Federal Court  Cour fédérale

Date: 20110623

Docket: T-1203-10

Citation: 2011 FC 764

Ottawa, Ontario, June 23, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

DAVE RUSSO

Applicant

and

THE MINISTER OF TRANSPORT, INFRASTRUCTURE AND COMMUNITIES

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the 24 June 2010 decision (Decision) of a delegate of the Minister of Transport, Infrastructure and Communities (Minister's Delegate) to follow the recommendation of the Transport Canada Advisory Body (Advisory Body) to refuse the Applicant's application for security clearance pursuant to section 509(c) of the *Marine Transportation Security Regulations*, SOR/2004-144 (Regulations).

BACKGROUND

[2] The Applicant has been employed as a longshoreman at the Port of Vancouver Fraser since 2000. At present, he reports on a daily basis to the dispatch hall of the British Columbia Maritime Employers Association (BCMEA), where he is dispatched, based on seniority and ratings, to the worksites of the BCMEA's member companies. It is not unusual for a longshoreman to be assigned to a different worksite each day, with the exception of those who have regular workforce positions (RWFs). Those with RWFs report directly to the same worksite each day for the duration of that discrete job.

[3] The Applicant worked in an RWF for 18 months, beginning in November 2007. His supervisors described him as a disciplined and "diligent" worker with a "very good" attitude. In May 2009, the Applicant was displaced from his RWF by a senior employee. He again began reporting to the dispatch hall. As the work assignments include work at cruise ship terminals, which can be accessed only by those with security clearance, and as the Applicant wished to be able to participate in all of the employment opportunities available to him at the Port of Vancouver Fraser, he applied for security clearance on 14 April 2009.

[4] The Applicant has a criminal record that includes convictions for dangerous operation of a motor vehicle, possession of property obtained by crime under $1000, obstructing a peace officer and producing a Schedule II substance (namely, marijuana). This has been a consistent impediment to the Applicant's request for security clearance.

[5] By letter dated 25 June 2009, the Director of Security Screening Programs at Transport Canada informed the Applicant that "adverse criminal information" had been made available that raised doubts as to his suitability to obtain security clearance. The letter listed the Applicant's above-noted convictions and advised him that his application would be reviewed by the Advisory Body, which would then make a recommendation to the Minister. The Applicant was "encouraged to provide a written statement, outlining the circumstances surrounding the … convictions, for consideration by the Advisory Body."

[6] On 8 July 2009 the Applicant, through counsel, sent a written statement to the Minister, outlining the circumstances of his criminal convictions. He stated that his convictions for dangerous operation of a motor vehicle, possession of property obtained by crime under $1000 and obstructing a peace officer all occurred in the early 1990s and were related to his choosing to drive without a licence and insurance. He stated that, following his conviction for producing marijuana, for which he was charged in 2004 and received a 20-month conditional sentence in 2008, he turned his life around, due in large part to the birth of his two children. The Applicant argued that his past convictions were unrelated to security matters.

[7] By letter dated 12 August 2009, the Director of Security Screening Programs at Transport Canada informed the Applicant that the Advisory Body had unanimously recommended that his application for security clearance be refused "based on the applicant's four (4) criminal convictions including one (1) recent drug-related conviction for Produce (*sic*) a Schedule II Substance." The letter further stated:

> The information was sufficient to determine that there is (*sic*) reasonable grounds to suspect that the applicant is in a position in

> which there is a risk that he may be suborned to commit an act or to assist or abet any person to commit an act that might constitute a risk to marine transportation security. His written explanation and supporting document did not provide sufficient information that would compel the Advisory Body to recommend issuing a clearance.

[8] By letter dated 16 September 2009 and by application dated 18 September 2009, the Applicant applied to Transport Canada's Office of Reconsideration for a reconsideration of the 12 August 2009 refusal. The Office of Reconsideration advised the Applicant by letter dated 22 September 2009 that it would assign his file to an independent security advisor.

[9] On 20 August, 16 October, 22 October and 30 October, all of 2009, Applicant's counsel asked various parties attached to Transport Canada to provide the documents and information that informed their assessment of the Applicant's security clearance application so that the Applicant might understand the basis of the refusal and respond to it. The Director of Security Screening Programs, among others, advised counsel to make a formal request under the *Privacy Act* to Transport Canada's Access to Information and Privacy Coordinator. Eventually, on 4 January 2010, the Applicant filed such a request; it was received by Transport Canada but the Applicant did not receive the requested documents until March 2011.

[10] Transport Canada tasked two independent security advisors (Advisors) to review the Applicant's file. On 9 November 2009, they met with the Applicant and his counsel. According to the transcript of that interview, the Advisors stated that the "decision [to refuse the Applicant security clearance] was based on the criminal record" and based "mostly on the last conviction,"

namely the 2008 conviction for producing a Schedule II substance. They also stated that their role was to evaluate how this conviction ties in with marine security and port security in Vancouver.

[11] During the interview, the Applicant explained the circumstances surrounding his convictions. Regarding the conviction for product of a Schedule II substance, he explained that he had started growing marijuana for his personal use and to sell it but that he did not make much profit from sales. He described it as a stupid decision but admitted that he still smokes about $100 worth of marijuana cigarettes each week. When reminded that one of the conditions of his sentence is to "keep the peace and be of good behaviour," the Applicant told the Advisors that, in his view, this did not prevent him from smoking marijuana or from buying it from suppliers in his neighbourhood.

[12] On 17 November 2009, the Advisors interviewed the Applicant's probation officer by telephone. The probation officer was aware of the Applicant's occasional use of marijuana but was unable to take action because the terms of the Applicant's sentence did not include a specific condition regarding drug use. The probation officer described the Applicant as having "a great deal of respect toward the criminal justice system," and he opined that the Applicant's risk of reoffending in the production of marijuana was low.

[13] On 9 December 2009 the Advisors submitted to the Office of Reconsideration a Refusal of Security Clearance Review Report (Report). In it, the Advisors state that the Applicant continues to participate in "the trafficking process by buying from suppliers in his neighbourhood and on the street." They also observe that the Applicant's interpretation of the term of his conditional sentence

to “keep [the] peace and be of good behaviour” does not include discontinuing the use and purchase of marijuana. They recommended that the Advisory Body’s initial decision to refuse the Applicant’s application for security clearance be maintained, having concluded that:

> This situation constitutes in our view reasonable grounds to suspect that the applicant is in a position in which there is a risk that they be suborned to commit an act or to assist or abet any person to commit an act that might constitute a risk to marine transportation security. We do not concur with the applicant’s probation officer’s statement that Mr. Russo shows a great deal of respect toward the criminal justice system. In doing so, we disagree with the applicant’s argument.

[14] On 12 April 2010, the Office of Reconsideration forwarded this Report to the Minister’s Delegate. By letter dated 24 June 2010, the Minister’s Delegate notified the Applicant that the Minister had decided to maintain the refusal of his security clearance. This is the Decision under review.

DECISION UNDER REVIEW

[15] The 24 June 2010 Decision refusing the Applicant’s application for reconsideration of the refusal to grant him security clearance is brief. The Minister’s Delegate states that the Minister received the Report of the independent security advisors and that, based on all of the available information, the Applicant’s request was refused. The Minister’s Delegate observed that there was “verifiable, reliable, and sufficient” information available to conclude that there were “reasonable grounds to suspect that the Applicant met the criterion of paragraph 509(c) of the Regulations,” namely that he was “in a position in which there is a risk that he would be suborned to commit an

act or to assist or abet any person to commit an act that might constitute a risk to marine transportation."

ISSUES

[16] The Applicant raises the following issues:

i. Whether the Decision was based on information that was irrelevant and that did not support a conclusion that the Applicant may be suborned to commit an act that might constitute a risk to marine transportation security; and

ii. Whether the Minister breached the principles of procedural fairness by failing to provide the Applicant with adequate notice of the case against him and adequate reasons for refusing his application for security clearance.

STATUTORY PROVISIONS

[17] The following provisions of the *Marine Transportation Security Act*, S.C. 1994, c. 40 (Act), are applicable in this application:

Regulations respecting security	**Règlements en matière de sûreté**
5. (1) The Governor in Council may make regulations respecting the security of marine transportation, including regulations	**5.** (1) Le gouverneur en conseil peut, par règlement, régir la sûreté du transport maritime et notamment :
(*a*) for preventing unlawful interference with marine transportation and ensuring that appropriate action is taken where	*a*) viser à prévenir les atteintes illicites au transport maritime et, lorsque de telles atteintes surviennent ou risquent de

that interference occurs or could occur;	survenir, faire en sorte que des mesures efficaces soient prises pour y parer;
(*b*) requiring or authorizing screening for the purpose of protecting persons, goods, vessels and marine facilities;	*b*) exiger ou autoriser un contrôle pour la sécurité des personnes, des biens, des bâtiments et des installations maritimes;
(*c*) respecting the establishment of restricted areas; …	*c*) régir l'établissement de zones réglementées; ….

[18] The following provisions of the Regulations are applicable in this application:

Checks and Verifications	**Vérifications**
508. On receipt of a fully completed application for a security clearance, the Minister shall conduct the following checks and verifications for the purpose of assessing whether an applicant poses a risk to the security of marine transportation:	**508.** Sur réception d'une demande d'habilitation de sécurité dûment remplie, le ministre effectue les vérifications ci-après pour établir si le demandeur ne pose pas de risque pour la sûreté du transport maritime :
(*a*) a criminal record check;	*a*) une vérification pour savoir s'il a un casier judiciaire;
(*b*) a check of the relevant files of law enforcement agencies, including intelligence gathered for law enforcement purposes;	*b*) une vérification des dossiers pertinents des organismes chargés de faire respecter la Loi, y compris les renseignements recueillis dans le cadre de l'application de la Loi;
(*c*) a Canadian Security Intelligence Service indices check and, if necessary, a Canadian Security Intelligence Service security assessment; and	*c*) une vérification des fichiers du Service canadien du renseignement de sécurité et, au besoin, une évaluation de sécurité effectuée par le Service;
(*d*) a check of the applicant's immigration and citizenship status.	*d*) une vérification de son statut d'immigrant et de citoyen.

Minister's Decision

509. The Minister may grant a security clearance if, in the opinion of the Minister, the information provided by the applicant and that resulting from the checks and verifications is verifiable and reliable and is sufficient for the Minister to determine, by an evaluation of the following factors, to what extent the applicant poses a risk to the security of marine transportation:

(*a*) the relevance of any criminal convictions to the security of marine transportation, including a consideration of the type, circumstances and seriousness of the offence, the number and frequency of convictions, the length of time between offences, the date of the last offence and the sentence or disposition;

(*b*) whether it is known or there are reasonable grounds to suspect that the applicant

(i) is or has been involved in, or contributes or has contributed to, activities directed toward or in support of the misuse of the transportation infrastructure to commit criminal offences or the use of acts of violence against persons or property, taking into account the relevance of those activities to the security of marine transportation,

(ii) is or has been a member of a terrorist group within the meaning

Décision du ministre

509. Le ministre peut accorder une habilitation de sécurité si, de l'avis du ministre, les renseignements fournis par le demandeur et ceux obtenus par les vérifications sont vérifiables et fiables et s'ils sont suffisants pour lui permettre d'établir, par une évaluation des facteurs ci-après, dans quelle mesure le demandeur pose un risque pour la sûreté du transport maritime :

a) la pertinence de toute condamnation criminelle du demandeur par rapport à la sûreté du transport maritime, y compris la prise en compte du type, de la gravité et des circonstances de l'infraction, le nombre et la fréquence des condamnations, le temps écoulé entre les infractions, la date de la dernière infraction et la peine ou la décision;

b) s'il est connu ou qu'il y a des motifs raisonnables de soupçonner que le demandeur :

(i) participe ou contribue, ou a participé ou a contribué, à des activités visant ou soutenant une utilisation malveillante de l'infrastructure de transport afin de commettre des crimes ou l'exécution d'actes de violence contre des personnes ou des biens et la pertinence de ces activités, compte tenu de la pertinence de ces facteurs par rapport à la sûreté du transport maritime,

(ii) est ou a été membre d'un groupe terroriste au sens du

of subsection 83.01(1) of the *Criminal Code*, or is or has been involved in, or contributes or has contributed to, the activities of such a group,

paragraphe 83.01(1) du *Code criminel*, ou participe ou contribue, ou a participé ou a contribué, à des activités d'un tel groupe,

(iii) is or has been a member of a criminal organization as defined in subsection 467.1(1) of the *Criminal Code*, or participates or has participated in, or contributes or has contributed to, the activities of such a group as referred to in subsection 467.11(1) of the *Criminal Code* taking into account the relevance of these factors to the security of marine transportation,

(iii) est ou a été membre d'une organisation criminelle au sens du paragraphe 467.1(1) du *Code criminel* ou participe ou contribue, ou a participé ou a contribué, aux activités d'un tel groupe tel qu'il est mentionné au paragraphe 467.11(1) du *Code criminel*, compte tenu de la pertinence de ces facteurs par rapport à la sûreté du transport maritime,

(iv) is or has been a member of an organization that is known to be involved in or to contribute to — or in respect of which there are reasonable grounds to suspect involvement in or contribution to — activities directed toward or in support of the threat of or the use of, acts of violence against persons or property, or is or has been involved in, or is contributing to or has contributed to, the activities of such a group, taking into account the relevance of those factors to the security of marine transportation, or

(iv) est ou a été un membre d'une organisation qui est connue pour sa participation ou sa contribution — ou à l'égard de laquelle il y a des motifs raisonnables de soupçonner sa participation ou sa contribution — à des activités qui visent ou favorisent la menace ou l'exécution d'actes de violence contre des personnes ou des biens, ou participe ou contribue, ou a participé ou a contribué, aux activités d'une telle organisation, compte tenu de la pertinence de ces facteurs par rapport à la sûreté du transport maritime,

(v) is or has been associated with an individual who is known to be involved in or to contribute to — or in respect of whom there are reasonable grounds to suspect involvement in or contribution to — activities referred to in subparagraph (i), or is a member of an organization or group referred to in any of subparagraphs

(v) est ou a été associé à un individu qui est connu pour sa participation ou sa contribution — ou à l'égard duquel il y a des motifs raisonnables de soupçonner sa participation ou sa contribution — à des activités visées au sous-alinéa (i), ou est membre d'un groupe ou d'une organisation visés à l'un des sous-alinéas (ii) à (iv),

(ii) to (iv), taking into account the relevance of those factors to the security of marine transportation;

compte tenu de la pertinence de ces facteurs par rapport à la sûreté du transport maritime;

(*c*) whether there are reasonable grounds to suspect that the applicant is in a position in which there is a risk that they be suborned to commit an act or to assist or abet any person to commit an act that might constitute a risk to marine transportation security;

c) s'il y a des motifs raisonnables de soupçonner que le demandeur est dans une position où il risque d'être suborné afin de commettre un acte ou d'aider ou d'encourager toute personne à commettre un acte qui pourrait poser un risque pour la sûreté du transport maritime;

(*d*) whether the applicant has had a restricted area pass for a marine facility, port or aerodrome removed for cause; and

d) le demandeur s'est vu retirer pour motifs valables un laissez-passer de zone réglementée pour une installation maritime, un port ou un aérodrome;

(*e*) whether the applicant has filed fraudulent, false or misleading information relating to their application for a security clearance.

e) le demandeur a présenté une demande comportant des renseignements frauduleux, faux ou trompeurs en vue d'obtenir une habilitation de sécurité.

[…]

[…]

511. (1) If the Minister intends to refuse to grant a security clearance, the Minister shall advise the applicant in writing to that effect.

511. (1) Le ministre avise par écrit le demandeur de son intention de refuser d'accorder l'habilitation de sécurité.

(2) The notice shall set out the basis for the Minister's intention and fix a period of time for the applicant to make written representations to the Minister, which period of time shall start on the day on which the notice is served or sent and shall be not less than 20 days from that day.

(2) L'avis indique les motifs de son intention et le délai dans lequel le demandeur peut présenter par écrit au ministre des observations, lequel délai commence le jour au cours duquel l'avis est signifié ou acheminé et ne peut être inférieur à 20 jours suivant ce jour.

(3) The Minister shall not refuse

(3) Le ministre ne peut refuser

to grant a security clearance until the written representations have been received and considered or before the period of time fixed in the notice has expired, whichever comes first. The Minister shall advise the applicant in writing of any refusal.

d'accorder l'habilitation de sécurité avant la réception et la prise en considération des observations écrites ou avant que ne soit écoulé le délai indiqué dans l'avis, selon la première de ces éventualités à survenir. Le ministre avise par écrit le demandeur dans le cas d'un refus.

[…]

[…]

Reconsideration

Réexamen

517. (1) An applicant or a holder may request that the Minister reconsider a decision to refuse to grant or to cancel a security clearance within 30 days after the day of the service or sending of the notice advising them of the decision.

517. (1) Tout demandeur ou tout titulaire peut demander au ministre de réexaminer une décision de refuser ou d'annuler une habilitation de sécurité dans les 30 jours suivant le jour de la signification ou de l'envoi de l'avis l'informant de la décision.

(2) The request shall be in writing and shall set out the following:

(2) La demande est présentée par écrit et comprend ce qui suit :

(*a*) the decision that is the subject of the request;

a) la décision qui fait l'objet de la demande;

(*b*) the grounds for the request, including any new information that the applicant or holder wishes the Minister to consider; and

b) les motifs de la demande, y compris tout nouveau renseignement qu'il désire que le ministre examine;

(*c*) the name, address, and telephone and facsimile numbers of the applicant or holder.

c) le nom, l'adresse et les numéros de téléphone et de télécopieur du demandeur ou du titulaire.

(3) On receipt of a request made in accordance with this section, the Minister, in order to determine the matter in a fair, informal and expeditious manner, shall give the applicant or holder

(3) Sur réception de la demande présentée conformément au présent article, le ministre accorde au demandeur ou au titulaire, de manière à trancher les questions de façon équitable, informelle et rapide, la possibilité :

(*a*) where the situation warrants,

the opportunity to make representations orally or in any other manner; and	*a*) lorsque les circonstances le justifient, de présenter des observations oralement ou de toute autre manière;
(*b*) in any other case, a reasonable opportunity to make written representations.	*b*) dans tout autre cas, de lui présenter par écrit des observations.
(4) After representations have been made or a reasonable opportunity to do so has been provided, the Minister shall reconsider the decision in accordance with section 509 and shall subsequently confirm or change the decision.	(4) Après que des observations ont été présentées ou que la possibilité de le faire a été accordée, le ministre réexamine la décision conformément à l'article 509 et, par la suite, confirme ou modifie la décision.
(5) The Minister may engage the services of persons with appropriate expertise in security matters to advise the Minister.	(5) Le ministre peut retenir les services de personnes qui possèdent la compétence pertinente en matière de sûreté pour le conseiller.
(6) The Minister shall advise the applicant or holder in writing of the decision made following the reconsideration.	(6) Le ministre avise par écrit le demandeur ou le titulaire de sa décision à la suite du réexamen.

STANDARD OF REVIEW

[19] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[20] The first issue concerns the Minister's assessment of the evidence. This is within the Minister's area of expertise and, therefore, attracts the reasonableness standard. See *Dunsmuir*, above, at paragraphs 51 and 53; and *Rivet v Canada (Attorney General)*, 2007 FC 1175 at paragraph 16.

[21] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See Dunsmuir, *above*, at paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[22] The second issue concerns the adequacy both of the notice provided by the Minister with respect to the case that the Applicant had to meet and of the Minister's reasons for refusing the Applicant's application for security clearance. Adequacy of notice and adequacy of reasons are procedural fairness issues, which attract the correctness standard. See *Khosa*, above, at paragraph 43; and *Rivet*, above, at paragraph 16.

ARGUMENTS

The Applicant

The Decision Was Based on Irrelevant Considerations

[23] The Minister's decision to grant or refuse an application for security clearance must be based on the factors stated in s. 509 of the Regulations, including: the relevance of any criminal record to the security of marine transportation, pursuant to s. 509(a); and the existence of reasonable grounds to suspect that the applicant may be in a position to be suborned to commit an act that might endanger marine transportation security, pursuant to s. 509(c).

[24] The Applicant submits that information relevant to an assessment of these factors was ignored. The Minister did not consider the Applicant's ten-year employment history, which includes clean disciplinary and workplace safety records and positive references from his supervisors. The Minister also ignored the opinion of the Applicant's probation officer that the Applicant was at low risk to re-offend and that he abided by the conditions of his sentence and accepted responsibility for his wrongdoing. (The Applicant says this even though the record shows that the Advisors considered the opinion and explicitly said that they disagreed with it.)

[25] Instead, the Applicant argues, the Minister based his Decision on an irrelevant consideration—namely, the Applicant's current habit of using marijuana—which overwhelmed all other considerations. The Regulations do not direct the Minister to investigate applicants based on their habits. In so substituting his own view of what was an appropriate consideration, the Minister

unreasonably exercised his discretion, contrary to the finding of the Supreme Court of Canada in *Chamberlain v Surrey School District No. 36*, 2002 SCC 86, at paragraphs 56-71.

[26] According to s. 509(c) of the Regulations, refusal of an application for security clearance is justified where there are "reasonable grounds" to suspect that an applicant may be suborned to commit an act that may constitute a risk to marine transportation security. The Applicant argues that there are no reasonable grounds to suspect that he may be suborned. The standard of proof required to establish reasonable grounds is "a bona fide belief in a serious possibility based on credible evidence." See *Sicuro v Canada (Minister of Citizenship and Immigration)*, 2004 FC 461, at paragraphs 36-37. In the Decision under review, the supposed connection between the Applicant's criminal record and/or his current marijuana use and such a risk is never explained. It is unjustified.

Content of the Duty of Fairness

[27] The Applicant submits that the content of the duty of fairness is contextual and dependent on: (a) the nature of the decision being made and the process followed in making it; (b) the nature of the statutory schemes and the terms of the statute pursuant to which the body operates; (c) the importance of the decision to the individual affected; (d) the legitimate expectations of the person challenging the decision; and (e) the choices of procedure made by the agency itself. See *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39 (QL), at paragraphs 21-27. The Supreme Court of Canada has held that "a high standard of justice is required when the right to continue in one's profession or employment is at stake." See *Kane v*

Board of Governors of the University of British Columbia, [1980] 1 SCR 1105, [1980] SCJ No 32 (QL), at page 7 (QL).

[28] Under s. 511 of the Regulations, an applicant who has been refused security clearance is entitled to notice, including notice of "the basis for the Minister's intention" and the opportunity to make written representations. The Applicant argues that security clearance applicants are also entitled to know the case they have to meet; to be told the facts alleged against them; to make representations on those facts; and to be provided with reasons, especially where the decision is important or is the final step in the application process. See *DiMartino v Canada (Minister of Transport)*, 2005 FC 635 at paragraph 36; *Rivet*, above, at paragraph 25; *Baker*, above, at paragraphs 24 and 43; and *Clifford v Ontario Municipal Employees Retirement System*, 2009 ONCA 670, at paragraph 21. The Applicant argues that, because this Decision affects his ability to participate fully in his employment opportunities and to support his family, he is entitled to all of these procedural protections.

The Applicant Did Not Have Notice of the Case to Be Met

[29] The Applicant submits that disclosure of relevant evidence is a "basic element of natural justice … and, in the administrative context, procedural fairness generally requires disclosure unless some competing interest prevails." See *1657575 Ontario Inc. v Hamilton (City)*, 2008 ONCA 570, at paragraph 25. This Court has held in the context of airport security clearance that a refusal of the advisory body to disclose documents to the applicant prevented him from responding to accusations

in a meaningful way. See *Xavier v Canada (Attorney General and Minister of Transport, Infrastructure and Communities)*, 2010 FC 147 at paragraphs 12-15.

[30] The Applicant notes that, from August to October of 2009, he requested four times that various parties attached to Transport Canada provide him with copies of the documents upon which they were relying to refuse his security clearance application. All parties advised him to make a formal request under the *Privacy Act* to Transport Canada's Access to Information and Privacy Coordinator. The Applicant contends that, as the information related to his own application, this advice was inappropriate and constitutes a breach of procedural fairness. The Applicant argues that the Minister's persistent failure to disclose these documents deprived him of the opportunity to respond to the refusal of his application in a meaningful way. See *Confederation Broadcasting (Ottawa) Ltd. v Canadian Radio-Television Commission*, [1971] SCR 906, [1971] SCJ No 72 (QL) at pages 13-14 (QL).

[31] The 25 June 2009 letter from the Director of Security Screening Programs at Transport Canada also was deficient with respect to notice. Although it informed the Applicant that "adverse criminal information" was made available that raised doubts as to his suitability to obtain security clearance, it made no reference to s. 509(c) of the Regulations, which apparently was the regulatory provision at issue. And while the letter did encourage the Applicant to provide a written statement outlining the circumstances of his convictions, it did not explain how these convictions might be relevant to marine transportation security. It also did not specify the information that Transport Canada would require to overcome its concerns about the Applicant's convictions and to grant the Applicant's request for security clearance.

[32] The 12 August 2009 letter informing the Applicant that the Advisory Body had unanimously recommended refusing his application for security clearance was similarly deficient. It did not explain why Transport Canada believed the Applicant to be at risk of being suborned or why the application for security clearance had been refused under s. 509(c) instead of s. 509(a). This letter was the first communication from Transport Canada to identify the Applicant's drug conviction as being of particular significance to his security clearance application. It did not indicate that the Applicant's current drug use would adversely impact his application for security clearance; in failing to do so, it deprived him of the opportunity to stop using marijuana so as to increase his chances of obtaining a clearance.

[33] In their 9 November 2009 interview with the Applicant, the Advisors failed to address with him the concerns and conclusions eventually published in their 9 December 2009 Report. They did not explain to the Applicant how, as a convicted marijuana producer and/or a current recreational user of marijuana, he constituted a risk to the security of marine transportation. They did not provide him with a meaningful opportunity to make submissions, as required by the Regulations, in answer to their concerns that he was addicted to marijuana and was a security risk. Further, they did not identify specific information that the Applicant could supply to Transport Canada to alleviate these concerns and thereby obtain his security clearance.

[34] Because he has been refused security clearance, the Applicant cannot be dispatched to all of the areas where he could potentially work. This limits his work opportunities and results in a loss of income. The Applicant is concerned that his lack of security clearance will have a material impact on his ability to support his family.

The Reasons Were Inadequate

[35] The Applicant submits that, in giving reasons, a decision maker cannot simply cite a conclusion without explaining why the conclusion was reached. See *Johal v Canada (Revenue Agency)*, 2009 FCA 276 at paragraph 43. Reasons must be sufficiently clear, precise and intelligible to enable an individual to know why the decision maker decided as it did. The Ontario Court of Appeal in *Clifford*, above, makes clear that reasons must let the individual affected by a decision know why the decision was made; the basis of the decision must be explained and the explanation must be logically linked to the decision. The path the decision maker takes in reaching the decision must be clear.

[36] In the instant case, the Minister never explained why the Applicant's current marijuana use was considered at all or why it led the Ministry to conclude that there were reasonable grounds to suspect that the Applicant is at a risk of being suborned. It is not enough that, in the Decision, the Minister states that the Applicant's security clearance is denied because there was "enough information available" to conclude that there were "reasonable grounds to suspect" that he did not meet the criteria under s. 509(c). Adequate reasons would explain what the "sufficient information" was, what the "reasonable grounds" were and how it all related to threats against marine security. The supposed connection between the Applicant's current marijuana use and the risk that he is in a position to be suborned is not explained. There is no explanation of a connection between either his current use of marijuana or his criminal record and marine transportation security.

The Respondent

The Decision Was Reasonable

[37] The Respondent contends that the Decision was reasonable under the circumstances, taking into account the objectives of the legislation. With respect to security clearance, the objective of the legislation is to reduce the risk of security threats by preventing unlawful interference with marine transportation. The Ministry does this by conducting background checks on marine workers who perform certain duties or who have access to restricted areas and by granting clearance only to those who meet the standards set out in the Act and Regulations.

[38] The Applicant's criminal record of marijuana production and his continued association with criminals through the purchasing of marijuana from criminals are linked to a risk that he could be suborned to commit an act that is a risk to marine security. In *Rivet*, above, the applicant argued that the revocation of his security clearance was unreasonable because his fraud conviction was unrelated to violent crime, terrorism and the objectives of the legislation. Justice Yvon Pinard rejected this argument, noting that a law is arbitrary only where it bears no relation to, or is inconsistent with, the objectives at the root of it, namely protection of the interests of society as a whole and not just those of the applicant.

[39] In the case at bar, the link between the Applicant's criminal record and his risk to marine security is explained in the Advisors' Report:

> … [the Applicant] still participates today in the trafficking process by buying from suppliers in his neighbourhood and on the street. His interpretation of this important condition of his conditional sentence [to keep the peace and be of good behaviour] does not include

> quitting the use of marihuana and stop buying from suppliers. He admitted that he did not care where or toward what cause the money he paid went to.
>
> This situation constitutes in our view reasonable grounds to suspect that the applicant is in a position in which there is a risk that they be suborned to commit an act or to assist or abet any person to commit an act that might constitute a risk to marine transportation security.

[40] This demonstrates that there is a link between the Applicant's criminal record (which includes marijuana cultivation and association with criminals) and the risk that he could be suborned by criminals to commit an act that might constitute a risk to marine security. In this case, the reasons provided by the Minister for denying the Applicant's security clearance application were certainly sufficient, considering the purpose of the legislation.

The Minister's Duty of Fairness Was Minimal

[41] The Respondent argues that the Minister's duty of fairness was minimal in the instant case for two reasons. First, the matter does not concern a revocation of security clearance already obtained but rather a refusal to grant clearance in the first place. In *Kahin v Canada (Minister of Transport, Infrastructure and Communities)*, 2010 FC 247 at paragraphs 11-16, Justice Roger Hughes of this Court observed that, in *Motta v Canada (Attorney General)* (2000), 180 FTR 292, [2000] FCJ No 27 (QL) Justice Pinard commented that a refusal to grant security clearance does not involve the withdrawal of a person's rights and that, therefore, that person can have no legitimate expectation that he will be granted clearance. Justice Hughes went on to distinguish *Motta* from *DiMartino* and *Xavier*, above, the latter two being cases in which the applicants' security clearance

was revoked, thus requiring that the applicants be afforded an opportunity to see the evidence relating to third-party allegations made against them and to make submissions.

[42] The "security clearance revocation cases" (*Rivet*, *DiMartino* and *Xavier*) are relied on by the Applicant but are distinguishable for the reasons outlined above. The Respondent argues that the instant matter, a "security clearance refusal case," is more similar to *Kahin*, above. Applying the reasoning in *Kahin*, the Respondent contends that the duty of procedural fairness in the instant case is minimal. It requires only that there be an opportunity to be heard and a basis for the Minister's Decision. The Respondent argues that this duty was met.

[43] Second, the Applicant did not lose his job as a result of the refusal. The Applicant may continue to report to the dispatch hall; the denial of security clearance does not prevent him from working in any area of the port other than a restricted area. The Applicant has cited *Kane*, above, which involved a disciplinary suspension, and *DiMartino*, *Xavier* and *Rivet*, all of which involved loss of the applicants' employment following revocation of their security clearance. The duty of procedural fairness owed to those applicants was greater than that owed to the Applicant in the instant case, where only his income has been affected and by an indeterminate degree.

The Minister's Duty of Fairness Was Met; the Reasons Were Adequate

[44] The Respondent further argues that the Minister fulfilled the duty of fairness as set down in the Regulations. Subsection 511(2) requires the Minister to provide an applicant with the basis of the decision to refuse the security clearance application. By letter dated 25 June 2009, the Director

of Security Screening enumerated the Applicant's four convictions and stated that "during the verification process adverse criminal information was made available that raises doubts as to your suitability to obtain a clearance." On 8 July 2009 the Applicant, through counsel, submitted a written statement, outlining the circumstances of his criminal convictions.

[45] Following the 12 August 2009 refusal, the Minister agreed to reconsider the Applicant's application. The Applicant, with counsel, was subsequently interviewed by two independent security advisors and again had an opportunity to make submissions, both written and oral. The Minister's duty, pursuant to s. 517(6) of the Regulations, was to advise the Applicant of the Decisions made on reconsideration. The Minister did so on 24 June 2010. That letter indicated that there were reasonable grounds to suspect that the Applicant met the criteria set out in s. 509(c) of the Regulations and, therefore, the application was refused. The Respondent submits that these reasons were certainly adequate under the circumstances.

Document Disclosure Is Irrelevant

[46] The Respondent submits that, contrary the Applicant's arguments, this case is not about document disclosure. The Applicant was informed repeatedly that the only document that was important to the initial decision was the Applicant's criminal record. Unlike the situation in *DiMartino* and *Xavier*, above, the Applicant had access to this document all along. Moreover, the Regulations require only that the Applicant be provided with the basis for the Decision; full document disclosure is not required.

[47] In the reconsideration process, the Report to Crown Counsel regarding the Applicant's marijuana offence and the related conditions of his sentence were also important. Both were provided by the Applicant. Therefore, the Applicant had access at all times to the only important documents referred to in his case.

ANALYSIS

Adequate Notice of Case Against Him

[48] The Applicant asserts that he was not provided with the information that was considered in the initial denial of his application and that he was not told what the "reasonable grounds" were to suspect that he is at risk of being suborned. He says, therefore, that he had no meaningful opportunity to meet the case against him.

[49] The procedural fairness issues raised by the Applicant need to be considered in the full context of his application for security clearance. This is because, as the Supreme Court of Canada made clear in *Baker*, above, the extent of the duty of procedural fairness that is owed in particular cases is variable and context specific and all relevant circumstances must be considered. Factors to be considered include: (a) the nature of the decision being made and the process followed in making it; (b) the nature of the statutory schemes and the terms of the statute to which the body operates; (c) the importance of the decision to the individual affected; (d) the legitimate expectations of the person challenging the decision; and (e) the choices of procedure made by the agency itself.

[50] The Applicant was informed of the basis of the Minister's intention by letter dated 25 June 2009 from the Director of Security Screening Programs, which stated that "during the verification process adverse criminal information was made available that raises doubts as to your suitability to obtain a clearance," and the Applicant's four convictions were specifically cited.

[51] Following that, the Applicant submitted written representations on 8 July 2009 to the Director of Security Screening. These representations were considered by the Minister prior to rendering the decision to refuse the security clearance.

[52] The Applicant was informed in the letter dated 12 August 2009 that his four convictions, including the recent drug-related convictions, were sufficient to determine that there were reasonable grounds to suspect that he was in a position in which there was a risk that he may be suborned to commit an act or assist or abet any person to commit an act that might constitute a risk to marine transportation security. He was also informed that his written explanation and supporting documents did not provide sufficient information that would compel the Advisory Body to recommend issuing a clearance.

[53] On reconsideration, the Applicant was represented by counsel and was able to make further written submissions. He was also provided with an opportunity to make oral representations to the independent Advisors to the Office of Reconsideration and to respond to any concerns that they raised.

[54] Following that, the Applicant was advised of the reconsideration decision.

[55] The Applicant was also provided with the basis for denying his security clearance by letter dated 24 June 2010 from the Deputy Minister that indicated that there was enough information available to conclude that there were reasonable grounds to suspect that the Applicant met the criteria of paragraph 509(c) of the Regulations.

[56] In my view, the record shows that the Applicant was made fully aware that his criminal record raised concerns regarding whether he was a security risk. He was given every opportunity to explain why this record should not be considered as a threat to marine security. There was no failure to disclose documentation because the only documents relied upon by the decision maker were those related to the Applicant's criminal record, of which he was fully aware. The Applicant appears to be suggesting that he should have been pre-warned of concerns that arose as part of the investigative process so that he could have been in a position to refute conclusions that were drawn only after the investigation took place and all of the information was assessed. This is not a procedural fairness issue in my view. The Applicant was fully aware of what a security check involved, and he was even told at the interview with the Security Advisors what the purpose of the process was and that there were concerns related to his criminal record. The Applicant gave a full and forthright account on the issue of his conviction for producing a Schedule II substance and his continued involvement with marijuana use.

[57] As the Respondent points out, this Court has assessed the content of the duty of procedural fairness in the specific context of applications for security clearances on a number of occasions. These decisions demonstrate that the level of procedural fairness required with respect to the denial of an initial application for a clearance, as opposed to a revocation, is minimal.

[58] In *Kahin*, above, a recent decision of this Court involving the denial of an application for a security clearance in an airport, Justice Hughes considered a number of relevant cases and noted as follows:

> 11 There are a surprising number of cases dealing with persons employed at airport facilities and security clearance issues. I suspect that is because letters refusing clearance conclude, as the letter here of June 11, 2009 does, with an invitation to seek judicial review in the Court. Those cases, as referred to me by counsel, are:
>
> > *Irani v. Canada (Attorney General)*, 2006FC 816
> > *Singh v. Canada (Attorney General)*, 2006 FC 812
> > *Motta v. Canada (Attorney General)* (2000), 180 F.T.R. 292
> > *DiMartino v. Canada (Minister of Transport)*, 2006 FC 635
> > *Xavier v. Canada (Attorney General)*, 2010 FC 147
>
> 12 Counsel for the parties before me agreed that since the issue is procedural fairness, the appropriate standard of review is correctness.
>
> 13 The present case is similar to that of *Motta*. The Applicant here has only been employed, indeed only in Canada, for a few months and has not yet received any security clearance that would enable him to continue his employment at the airport. Justice Pinard in *Motta* at paragraph 13 described the procedural fairness to be afforded in such circumstances as minimal:
>
> > [13] In the case at bar, we are dealing with a simple application for clearance or a permit made by a person who has no existing right to that clearance or permit and is not accused of anything. As the Minister's refusal to grant access clearance does not involve the withdrawal of any of the plaintiff's rights, the latter can have no legitimate expectation that he will be granted clearance (see *Peter G. White Management Ltd. v. Canada (Minister of Canadian Heritage) et al.* 1997 CanLII 5142 (F.C.), (1997), 132 F.T.R. 89, and *Cardinal v. Alberta (Minister of Forestry, Lands and Wildlife)*, December 23, 1988, Edmonton 8303-04015, Alta. Q.B.) In the circumstances, therefore, I consider that the requirements imposed by the duty to act fairly are minimal and that, after allowing the plaintiff to

> submit his application in writing as he did, the Minister only had to render a decision that was not based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before him. As no evidence was submitted that the decision duly made by the Minister pursuant to the powers conferred on him by the Act and Regulations was without basis, this Court's intervention is not warranted.
>
> 14 A similar finding of minimal requirements was made in *Irani* (para. 21) and *Singh* (para. 20).
>
> 15 *DiMartino* and *Xavier* present a different set of circumstances. In those cases a security clearance was revoked on the basis of police reports of criminal activity. In those cases the Court required that the individual be afforded an opportunity to see the case against him and make submissions because the allegations as to impropriety came from third persons.
>
> 16 In the present case, the decision was based on information and documents submitted by the Applicant. The Applicant had not yet been given security clearance and had been working at the airport only a few months. I find this case to be similar to the *Motta* group of cases. Only minimal procedural fairness needs to be extended. I find the letter of June 18, 2008, to be sufficient in that regard.

[59] Although the Applicant attempts to suggest otherwise, it is my view that in this case the Applicant's security clearance was not revoked but was denied in the first instance as in the "*Motta* group of cases." It is true that, in the present case, the Applicant has been employed as a longshoremen since 2000, but the security clearance process is of fairly recent origin and the Applicant, like anyone else who wants to work on cruise ships, was obliged to apply for a clearance. No one could have a legitimate expectation that security clearance would be granted merely as a consequence of past work at the Port of Vancouver. Consequently, the level of procedural fairness owed to the Applicant was minimal under the circumstances and required only that the Applicant, like everyone else who wanted clearance, be given an opportunity to be heard and that there be a

basis for the Minister's decision. It is my view that this level of procedural fairness was met in the instant case. The Applicant says that the present case involves the revocation of his right to work on cruise ships and the various benefits associated with that right. In my view, this is not an accurate characterization of what occurred. The new regulatory scheme for security clearance required everyone who wanted to work on cruise ships to apply for and obtain the requisite security clearance. I have not been asked to review the decision to implement the new scheme in this application. It was that decision, if any, that removed any right of any longshoreman to work on cruise ships without security clearance. The new regulations left the Applicant in the same position as anyone else who wanted security clearance: he had to apply for it.

[60] In my view, the Applicant's case is distinguishable from *DiMartino* and *Xavier*, which involved a revocation of the applicants' clearance and allegations against the applicants in the form of third-party information, which was relied upon by the decision maker and which the applicants were not provided an opportunity to challenge. In the present case, the Applicant was provided with an opportunity to make submissions regarding the information relied upon by the decision maker prior to a decision being rendered. This information was his criminal record and recent drug-related conviction, and the risk that he could pose to marine security.

[61] In *Rivet*, above, Justice Pinard found that the fact that the applicant had received notice of the Advisory Board's investigation and that he was invited to make representations before the decision was made meant that he knew both the case that he had to meet and the scope of the investigation. Justine Pinard found that procedural fairness had been met in that case.

[62] Similarly, the Applicant in the present case was provided with information that his four criminal convictions raised doubts as to his suitability to obtain a clearance. On reconsideration, the Applicant was permitted to make submissions after being informed that those convictions, including his recent drug-related conviction, were sufficient to determine that there were reasonable grounds to suspect that the Applicant may be suborned to commit an act, or to assist any person to commit an act, that might constitute a risk to marine transportation security. He was also informed that his written explanation and supporting document did not provide sufficient information that would compel the Advisory Body to recommend issuing a clearance.

[63] Consequently, it is my view that the Applicant knew the case he had to meet and that the procedural fairness requirements were satisfied in this case.

[64] The Applicant also complains about insufficient document disclosure. The document important to the Decision of the Minister to deny the application for a clearance was the Applicant's criminal record. The Applicant had access to this documentation all along. The Applicant was informed repeatedly that the issue of concern was his criminal record. The Applicant knows his own criminal record.

[65] In post-hearing written submissions based upon additional documentation that the Applicant acquired through the *Privacy Act* application, the Applicant argues that the documents make no mention of potential subornment and focus exclusively on his criminal convictions. In addition, he says that the Decision was "made on the basis of a moral judgment about the proximity of Mr. Russo's activities to his wife's pregnancy" and that this is "unreasonable and outside of the statutory

mandate of the Regulations." He also argues that the "documents also enforce Mr. Russo's view that the issue of subornment was never considered by Transport Canada."

[66] I do not find these arguments convincing. For reasons already given, it is my view that the Applicant was made fully aware of the basis for the risk his criminal activities posed to security, was given every opportunity to present whatever materials and arguments he wanted to show that he did not pose such a risk, and was considered a security risk because of the reasons in the letter from the Minister dated 12 August 2009 which was based upon the Advisory Body Record of Recommendation dated 22 July 2009, which was item 9 in the Rule 318 certificate that was disclosed to the Applicant. Quite apart from admissibility issues concerning the new documentation, it is my view that there is nothing in the documents that makes any difference to the issues raised by the Applicant in this judicial review.

[67] Unlike the situation in *DiMartino* and *Xavier*, the Decision in this case was not based upon third-party information regarding criminal activity that the applicant had not been given a chance to challenge prior to a decision to revoke his clearance. It was based upon various convictions, including a recent one, and the Applicant had already had a chance to challenge his criminal charges prior to his convictions. In the present case, the Applicant simply disagrees that his criminal convictions should give rise to a security concern. He professes not to see the connection between his criminal activities involving marijuana and marine security. However, it is clear to me from the record that the Applicant was well aware that this was a concern. In fact, at the interview, the Applicant's marijuana activities were raised with him and he had every opportunity to provide his views as to why his criminal activities involving marijuana should not give rise to a security

concern. Just because the Applicant's views, and those of his probation officer, were not accepted does not mean that the Decision was unreasonable or that a breach of procedural fairness occurred.

[68] The Report to Crown Counsel in relation to the Applicant's drug-related offence and the conditions attached to his conditional sentence in relation to that conviction were the two additional documents that were important to the Advisor's Report and the Minister's Decision. Both were provided to counsel for the Applicant at the time of his interview. Consequently, the Applicant had access at all times to the only important documents referred to in his case.

[69] The procedural fairness requirements in respect of the Applicant were also low because he did not lose his job as a result of the refusal of his clearance.

[70] As the Respondent points out, the Applicant's materials indicate that he worked from 2000 to 2007 out of the dispatch hall and then had a regular workforce position from November 2007 to May 2009. He did not try to obtain a clearance under the new regulatory scheme until 14 April 2009. Only since May 2009 has he had to report to the dispatch hall again as a result of someone with greater seniority taking his regular workforce position.

[71] The Applicant may continue to report to the dispatch hall. The denial of his clearance does not prevent him from working in any area of the port other than a restricted area. This is not a situation that requires a high level of procedural fairness. The Applicant has not lost his employment, even though he feels that he has less chance of promotion as a result of being denied security clearance.

Adequate Reasons

[72] The Applicant's complaint concerning inadequate reasons also has to be viewed in the full context of what occurred in this particular case.

[73] On 12 August 2009, the Applicant was advised in the letter from Transport Canada that the Minister had refused to grant his security clearance based on the Advisory Board's recommendation. That letter reads as follows:

> The Advisory Board was unanimous in its recommendation to refuse to grant the applicant a security clearance based on the applicant's four (4) criminal convictions including one (1) recent drug-related conviction for Produce [*sic*] a Schedule II Substance. The information was sufficient to determine that there is reasonable grounds [*sic*] to suspect that the applicant is in a position in which there is a risk that he may be suborned to commit an act or to assist or abet any person to commit an act that might constitute a risk to marine transportation security.

[74] So the Applicant was told the nature of the problem and the reasons why he could not be granted security clearance: he had four criminal convictions (and the recent Schedule II substance conviction was singled out), which were identified as the basis for reasonable grounds to suspect that there was a risk that he could be suborned to commit an act or to assist or abet someone else, so that he may constitute a risk to marine transportation security.

[75] The Applicant may argue that this connection between his criminal activities and marine security is unreasonable, but I do not think he can say that he was not given adequate reasons as to why he was denied a security certificate.

[76] As was his right, the Applicant requested a reconsideration of this Decision. He went through the interview and the investigative process, during which the security risks of his Schedule II substance conviction and his continued acquisition and use of marijuana were investigated, and the Applicant was allowed to make submissions.

[77] The final Decision was rendered by the Minister by letter dated 24 June 2010 which read as follows:

> In response to your application to the Office of Reconsideration dated September 17, 2009, we would like to inform you that the independent advisors who were assigned to review your file submitted their report to the Minister of Transport, Infrastructure and Communities.
>
> After reviewing all the information made available, the Minister decided to maintain the refusal of your security clearance. In the course of this review, there was enough information available which was considered verifiable, reliable and sufficient to conclude there are reasonable grounds to suspect that you do meet the criterion under Paragraph 509(c) of the Marine Transportation Security Regulations, which states:
>
> > Paragraph 509(c) – whether there are reasonable grounds to suspect that the applicant is in a position in which there is a risk that they be suborned to commit and act or to assist or abet any person to commit an act that might constitute a risk to marine transportation.
>
> You have a right to seek a judicial review of this decision through the Federal Court of Canada within thirty (30) days of receipt of this notice, as noted by the *Canada Gazette* publications related to the *Marine Transportation Security Act*. For further information, please visit: http://cas-ncr-nter03.cas-satj.gc.ca/fct-cf/index.html.

[78] As this letter points out, the Decision is simply to “maintain” the earlier refusal of 12 August 2009, and the reasonable grounds to fear subornment are reiterated. The Minister’s obligations on reconsideration under the Marine Transportation Security Regulations are found in Regulation 517.

[79] Under subsection 517(4), the Minister is obliged to consider the decision “in accordance with section 509 and shall subsequently confirm or change the decision.” The Minister is then obliged, under ss. 517(6), to advise the applicant of the decision.

[80] This is precisely what occurred in the present case. The Minister followed the Regulations and applied them. The Applicant says that this was not enough because he was not provided with sufficient reasons. In my view, this is not the case.

[81] The Minister explains that he is confirming or maintaining the decision of 12 August 2009 for which the Applicant has already been given reasons, and the reason the Minister has decided to maintain that decision is given in the letter of 24 June 2010, i.e., there is a subornation concern.

[82] If we step back and look at the whole process, there is no doubt or confusion as to why the Applicant was refused security clearance: his criminal convictions and, in particular, his continuing involvement with marijuana, are used as reasonable grounds to suspect that there is a risk that he might be suborned. Once again, the Applicant can argue that his involvement with marijuana is not a reasonable basis for such a conclusion, but I do not think he can say that he was not made fully aware of the reasons why he was refused security clearance. This is particularly the case when the procedural fairness obligation in this case is on the low side.

[83] In my view, what the Applicant means by “inadequate reasons” is that he disagrees with the reasons. He does not feel that his criminal involvement with marijuana provides reasonable grounds for a conclusion that he poses a security risk. This is a reasonableness issue.

Reasonableness

[84] Also, in my view, the reconsideration decision was reasonable under the circumstances given the purpose of the legislation, the Applicant’s criminal record of drug cultivation and his continued association with criminals through his purchasing of drugs from them. There is a clear link. The Applicant wishes to work on cruise ships that travel across international borders. He admits to purchasing and using marijuana even after his Schedule II substance conviction. I do not think the connection to a possible risk of subornment that may impact marine transport security is difficult to understand or unreasonable.

[85] This does not mean that I personally would have concluded that such a risk exists. However, I cannot say that conclusions reached by the Minister in this case, after a full investigation, fall outside of the range of possible, acceptable outcomes which are defensible in respect of the facts and law. The Applicant’s professional opportunities may have been curtailed somewhat by the Decision, but public safety is also at stake and the Minister must be left to make these decisions. As has been said so many times in this Court, the Court cannot substitute its own opinion of the case for the opinion of either the Minister or those who are delegated with the authority to assess security and clearance applications unless the Court can find some breach of natural justice or procedural fairness or unless the decision is unreasonable and falls outside the range posited by *Dunsmuir*.

Although the denial of security clearance to the Applicant is inconvenient to him in terms of his career objectives, I can find no such reviewable error in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed with costs to the Respondent.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1203-10
STYLE OF CAUSE:	**DAVE RUSSO** **and** **THE MINISTER OF TRANSPORT, INFRASTRUCTURE AND COMMUNITIES**
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 9, 2011
REASONS FOR JUDGMENT AND JUDGMENT	**Russell J.**
DATED:	June 23, 2011

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