Federal Court of Appeal | Cour d'appel fédérale

Date: 20140303

Docket: A-431-12

Citation: 2014 FCA 56

CORAM: **TRUDEL J.A.**
STRATAS J.A.
MAINVILLE J.A.

BETWEEN:

CANADA (MINISTER OF TRANSPORT, INFRASTRUCTURE AND COMMUNITIES)

Appellant

and

JAGJIT SINGH FARWAHA

Respondent

Heard at Vancouver, British Columbia, on May 13, 2013.

Judgment delivered at Ottawa, Ontario, on March 3, 2014.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: TRUDEL J.A.

CONCURRING REASONS BY: MAINVILLE J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The Minister appeals from the judgment dated September 6, 2012 of the Federal Court (*per* Justice Martineau) in file T-1383-11.

[2] The Federal Court quashed the Minister's decision to uphold the cancellation of a security clearance granted to Mr. Farwaha under the *Marine Transportation Security Regulations*,

SOR/2004-144 ("*Security Regulations*"). The Federal Court found the Minister's decision to be unreasonable.

[3] Broadly speaking, the Federal Court concluded that the evidence before the Minister was not strong enough to warrant the cancellation of the security clearance. The Federal Court's main justification for that conclusion was its interpretation of the provision that sets out the grounds upon which a security clearance can be cancelled, namely section 509 of the *Security Regulations*.

[4] The Federal Court also found that in making the decision the Minister failed to give to Mr. Farwaha certain procedures that he legitimately expected would be followed. It also found the Minister's reasons to be inadequate.

[5] I reach conclusions different from those of the Federal Court. Among other things, the Federal Court erred in its interpretation of section 509 of the *Security Regulations*. The Minister's decision fell within the ambit of the section, properly interpreted. Further, based on this record, the Minister's decision was reasonable. As well, the ground of legitimate expectations that Mr. Farwaha asserts does not arise in this case.

[6] Therefore, for the reasons that follow, I would allow the appeal with costs.

A. The basic facts

[7] Mr. Farwaha is a dock worker at the Port of Vancouver. Dock workers require a security clearance under the *Security Regulations* to work in certain areas of the Port of Vancouver and to perform certain tasks. Those without security clearance can still work elsewhere at the Port of Vancouver.

[8] As a practical matter, having a security clearance matters. Without a security clearance, the work opportunities are fewer. This can detrimentally affect the worker's seniority within the union, income and pension.

[9] The Minister granted Mr. Farwaha a security clearance. But twelve months later, the Minister cancelled Mr. Farwaha's security clearance, relying upon certain information from the RCMP.

[10] Given the detrimental effects upon him, Mr. Farwaha requested that the Minister reconsider the cancellation. On reconsideration, the Minister confirmed his earlier decision to cancel Mr. Farwaha's security clearance.

[11] In the Federal Court, Mr. Farwaha applied for judicial review of the Minister's reconsideration decision. He asked that the reconsideration decision be quashed and his security clearance restored. The Federal Court granted the application for judicial review.

B. The legislation and the detailed facts regarding how the legislation applied in this case

[12] The *Security Regulations* and similar regulations for airports are the product of a review of security following the attacks on the World Trade Center in New York on September 11, 2001.

[13] The *Security Regulations* establish the Marine Transportation Security Clearance Program. The Program addresses threats to the security of Canada's international marine ports. Terrorism and organized crime are among the potential security threats: *Reference re Marine Transportation Security Regulations*, 2009 FCA 234 at paragraph 64. Needless to say, these threats can cause catastrophic harm, both economic and human.

[14] In the *Reference re Marine Transportation Security Regulations*, *supra* at paragraph 66, Evans J.A. summarized the purposes behind the *Security Regulations* as follows:

> Canada's long coast line and many ports, its substantial economic dependence on international trade in goods transported by sea in and out of Canada and, to a lesser degree, on cruise line business, its ability to fund security measures, and its proximity to the United States, are all factors that provide a rational explanation of why Canada has instituted the present security clearance system.

[15] Broadly speaking, the *Security Regulations* offer "protection from threats to public safety and the economy from the activities of terrorist groups and organized crime": *Reference re Marine Transportation Security Regulations*, *supra* at paragraph 67.

[16] Marine ports play a large role in Canada's economy. A single breach of security could result in an incident shutting down Canada's international marine transportation system, resulting in losses of hundreds of millions of dollars a day, to say nothing of the ripple effect upon economic sectors that depend on the ports. Most of all, many could die or could be injured or maimed by the incident. See the Regulations' Regulatory Impact Analysis Statement, *Canada Gazette*, Part II, vol. 138, no. 11 at pages 920-926.

[17] For this reason, marine ports have in place physical security measures, such as fencing, lighting, patrols, and x-ray and radiation screening. But a single insider at a marine port can subvert these measures: *Reference re Marine Transportation Security Regulations*, *supra* at paragraph 23.

[18] The *Security Regulations* aim to reduce the risks individuals pose to marine ports. They achieve this by requiring those who work in security-sensitive areas to obtain a Marine Transportation Security Clearance from the Minister. The Minister grants a security clearance to those who do not pose an unacceptable risk to marine transportation. Those who "pose an unacceptable security risk to marine transportation" are screened out: *Reference re Marine Transportation Security Regulations*, *supra* at paragraph 11.

[19] As will be seen, to some extent the *Security Regulations* focus on criminal organizations and organized crime. The concern is that those with ties to criminal organizations and organized crime might be intimidated or coerced into performing illegal acts or subverting security measures at marine ports. There are links between terrorists and organized crime: *Reference re Marine Transportation Security Regulations*, *supra* at paragraph 64. Indeed, organizations involved in

organized crime may offer their services to terrorists by aiding them in, for example, smuggling weapons, explosives or operatives into Canada in containers: *Reference re Marine Transportation Security Regulations*, *supra* at paragraph 64.

[20] I turn now to the specific provisions in the *Security Regulations* that address the foregoing concerns. These provisions applied in Mr. Farwaha's case.

[21] An applicant for security clearance, such as Mr. Farwaha, must provide detailed information on a form supplied by the Minister: sections 506 and 507 of the *Security Regulations*. Owing to the concern associated with the security at marine ports, the information is most detailed.

[22] The applicant must provide identifying information such as names, date of birth, gender, height, weight, colours of eyes and hair, birth certificate (if born in Canada), place of birth, port and date of entry, citizenship or permanent residence or evidence of other immigration status (if born out of Canada), passport number (if any), fingerprints and facial image. Other required information includes addresses of all locations at which the applicant has lived in the previous five years, the names and addresses of employers and post-secondary educational institutions attended in the last five years, details of travel outside Canada and the United States of more than 90 days and identifying information and present addresses of the applicant's present and former spouses and common-law partners.

[23] Section 508 of the *Security Regulations* describes subsequent checks and verification of the information undertaken by the Minister in order to determine whether the applicant is a risk to the

security of marine transportation. These include: a criminal record check; a check of law enforcement files, including intelligence gathered for law enforcement purposes; a Canadian Security Intelligence Service (CSIS) indices check and, if necessary, a CSIS security assessment; and a check of the applicant's citizenship and immigration status.

[24] Under section 509 of the *Security Regulations*, the Minister determines whether the applicant's information and the information resulting from the checks and verifications is sufficient for a decision to be made regarding whether to grant a security clearance.

[25] Section 509 of the *Security Regulations* is the authority upon which Mr. Farwaha received his security clearance in 2008. (As we shall see, it also supplies the grounds upon which a security clearance can be later suspended or cancelled.) Under section 509, the Minister cannot grant a security clearance unless he is of the opinion that the information provided by the applicant and resulting from any checks and verifications is "sufficient," "verifiable" and "reliable."

[26] Section 509 reads as follows:

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:	**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*) 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 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,

(iii) is or has been a member of a criminal organization as defined in subsection 467.1(1) of the *Criminal*

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 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) est ou a été membre d'une organisation criminelle au sens du

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,

(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

(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 (ii) to (iv), taking into account the relevance of those factors to

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) 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) 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-

the security of marine transportation;

(*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;

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

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

alinéa (i), ou est membre d'un groupe ou d'une organisation visés à l'un des sous-alinéas (ii) à (iv), compte tenu de la pertinence de ces facteurs par rapport à la sûreté du transport maritime;

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

[27] On January 17, 2008, Mr. Farwaha applied for a security clearance. It was granted.

[28] However, the facts surrounding this approval form part of the backdrop against which the Minister's decision must be viewed.

[29] In early 2008, the *Security Regulations* were about to apply to the Port of Vancouver. The Port urged workers to apply for security clearances. It asked them to apply before February 20, 2008 so that their security clearances would be in place by the time the *Security Regulations* came into force.

[30] However, there was a complication. Certain longshore workers who were members of some chapters of the International Longshore and Warehouse Union protested the implementation of the security program set out in the *Security Regulations*. As part of the protest, they urged workers not to apply for security clearances.

[31] This posed a threat to the Port. If a sufficient number of workers did not possess a security clearance in time, the Port would not be able to function fully. Severe financial consequences would ensue.

[32] In response to the protest, the British Columbia Maritime Employers Association applied to the Canada Industrial Relations Board for a declaration that the workers were engaged in an unlawful strike. The Association succeeded. However, little time remained before the *Security Regulations* were in force. As a result, the applications were processed quickly.

[33] Mr. Farwaha's application for the security clearance was processed during this unsettled time. His application disclosed the existence of a criminal record, namely a 2002 conviction for attempted obstruction of justice. However, there was nothing in his application suggesting any

connection to organized crime, a ground of refusal under paragraph 509(*b*) of the *Security Regulations*.

[34] In this context, the Minister granted Mr. Farwaha's security clearance in June 2008. However, the Minister sought further information about Mr. Farwaha's criminal record and background.

[35] This information came in the form of a report from the Officer in charge of the RCMP's Federal Operation Criminal Intelligence Support Unit.

[36] That report disclosed new information regarding Mr. Farwaha's potential associations with the Hells Angels, as well as allegations of violent criminal activity. An excerpt appearing at pages 178-179 of the Appeal Book is as follows:

> On October 1, 1999 Surrey RCMP received a complaint that Mr. FARWAHA and two other individuals forced their way into the residence of the victims and stated they were part of the "Hells Angels". The suspects demanded all of the resident's money. FARWAHA and another suspect assaulted a resident to unconsciousness, which resulted in a concussion, facial lacerations, "cauliflower ears" and extensive bruising.
>
> During this assault, a suspect other that [*sic*] FARWAHA assaulted another resident, who was also threatened. This resident eventually agreed to give all her money ($30,000.00) to the 3 suspects.
>
> …
>
> According to Surrey RCMP, the suspect's association to the Hells Angels Motorcycle Club is credible. No further information available on that matter.

[37] Following this incident, Mr. Farwaha was charged with being in a dwelling house without lawful excuse, extortion, robbery, uttering threats to cause death or bodily harm, and assault causing bodily harm. However, these charges were stayed, apparently because (according to the report), "the victims did not cooperate with the judicial process."

[38] The Hells Angels are a well-known criminal organization: see, *e.g.*, *R. v. Lindsay*, 2009 ONCA 532, (2009), 97 O.R. (3d) 567 (C.A.). It is an organization that threatens and engages in acts of violence against persons or property. Reasonable grounds to believe that a person is a member of such an organization is a factor to be considered in denying a security clearance or cancelling one that has been granted.

[39] With the information in the RCMP's report in hand, the Minister began to consider whether Mr. Farwaha's security clearance should be cancelled under section 515 of the *Security Regulations*. Under section 515, the Minister can cancel a previously-granted security clearance based on the factors set out in section 509.

[40] Section 515 reads as follows:

515. **(1) The Minister may suspend a security clearance on receipt of information that could change the Minister's determination made under section 509.**	515. **(1) Le ministre peut suspendre une habilitation de sécurité lorsqu'il reçoit des renseignements qui pourraient modifier sa décision prise en application de l'article 509.**
(2) Immediately after suspending a security clearance, the Minister shall advise the holder in writing of the suspension.	**(2) Immédiatement après avoir suspendu l'habilitation de sécurité, le ministre en avise par écrit le titulaire.**

(3) The notice shall set out the basis for the suspension and shall fix a period of time for the holder 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.	**(3) L'avis indique les motifs de la suspension et le délai dans lequel le titulaire 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.**
(4) The Minister may reinstate the security clearance if the Minister determines under section 509 that the holder does not pose a risk to marine transportation security.	**(4) Le ministre peut rétablir l'habilitation de sécurité s'il établit, en application de l'article 509, que le titulaire de l'habilitation ne pose pas de risque pour la sûreté du transport maritime.**
(5) The Minister may cancel the security clearance if the Minister determines under section 509 that the holder may pose a risk to marine transportation security or that the security clearance is no longer required. The Minister shall advise the holder in writing of any cancellation.	**(5) Le ministre peut annuler l'habilitation de sécurité s'il établit, en application de l'article 509, que le titulaire de l'habilitation de sécurité peut poser un risque pour la sûreté du transport maritime ou que l'habilitation n'est plus exigée. Il avise par écrit le titulaire dans le cas d'une annulation.**
(6) The Minister shall not cancel a security clearance until the written representations have been received and considered or before the time period fixed in the notice has expired, whichever comes first.	**(6) Le ministre ne peut annuler 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 le premier de ces événements à survenir.**

[41] Owing to the importance of the security clearance to the worker, section 515 gives the worker certain procedural rights. After the worker exercises these procedural rights, the Minister considers all of the information before him and may, in his discretion, cancel the security clearance.

[42] Following section 515, by letter dated November 17, 2008 the Minister informed Mr. Farwaha that "[i]nformation has been made available that raises doubts about [his] suitability to retain a security clearance." The Minister specifically mentioned Mr. Farwaha's alleged association with the Hells Angels. He was invited to respond. Mr. Farwaha asked for and was granted an extension of time to respond.

[43] On March 18, 2009, Mr. Farwaha did respond, making submissions on the need for the Minister to act only on the basis of verifiable and reliable information, evidence and submissions on Mr. Farwaha's alleged association with the Hells Angels, and evidence and submissions on his previous criminal conviction for obstruction and his clear record thereafter. Mr. Farwaha also emphasized the importance to him of the security clearance.

[44] Thereafter, a body advising the Minister, known as the Advisory Body, studied the matter. It recommended to the Minister that Mr. Farwaha's security clearance be cancelled. In his decision letter of June 25, 2009, the Minister described the Advisory Body's recommendation as follows:

> The Advisory Body was unanimous in its recommendation to cancel the applicant's security clearance based on the credible information linking him to the Hell's [*sic*] Angels Motorcycle Club. The Advisory Body noted that the RCMP maintains the applicant's association to the Hell's [*sic*]Angels Motorcycle Club is credible. The Advisory Body was able to determine that there are 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 to abet any person to commit an act that might constitute a risk to marine transportation security. His written explanation and supporting documentation did not provide sufficient information that would compel the Advisory Body to recommend issuing a clearance.

[45] In his decision letter of June 25, 2009, the Minister accepted the Advisory Body's recommendation and cancelled Mr. Farwaha's security clearance "based on the information in [the] file." Mr. Farwaha's March 18, 2009 response was one of the documents in the Minister's file.

[46] Under section 517 of the *Security Regulations*, the worker can ask the Minister to reconsider a decision to cancel a security clearance. On August 4, 2009, Mr. Farwaha exercised that option and asked the Minister to reconsider the cancellation.

[47] The reconsideration provision, section 517, provides as follows:

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.**

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

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

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

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

(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

(*a*) where the situation warrants, the opportunity to make representations orally or in any other manner; and

(*b*) in any other case, a reasonable opportunity to make written representations.

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

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

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

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

(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*) lorsque les circonstances le justifient, de présenter des observations oralement ou de toute autre manière;**

***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.**

[48] The Minister has access to certain advisory bodies to assist him in making security determinations, including reconsiderations of cancellations. In this case, the Minister made use of certain advisory bodies during the reconsideration.

[49] As will be seen, in the Federal Court and in this Court, Mr. Farwaha submitted that he was led to expect that the Minister would follow a particular consultative process and not the one the Minister actually followed. The specific facts relating to this will be canvassed in more detail below in the context of the procedural fairness issues in this case.

[50] During the reconsideration process in this case, the Minister obtained further information concerning Mr. Farwaha's suitability for a security clearance. In particular, Mr. Farwaha was interviewed by the Office of Reconsideration, one of the bodies assisting the Minister. That interview did not assist Mr. Farwaha. The Office concluded that some of Mr. Farwaha's answers

concerning the home invasion incident, described above, were evasive. Further, Mr. Farwaha did not deny that he hung out with a "rough crowd," he had attended at the home in question, and an argument broke out at that time. He simply denied that he was involved in the argument, that there was any violence, or that he was involved with the Hells Angels.

[51] As well, the Minister obtained information from the RCMP's Security Intelligence Background Section. In a report dated December 1, 2010, the RCMP provided additional and specific details about the home invasion incident, Mr. Farwaha's conviction for obstruction of justice, and Mr. Farwaha's association with the Hells Angels. In particular, the December 1, 2010 report discloses that the Surrey RCMP "felt strongly enough about their information they had about [Mr. Farwaha's] association with the Hell's [*sic*] Angels that they requested that the Court consider it as an aggravating factor" in the home invasion charges against Mr. Farwaha.

[52] The December 1, 2010 report also disclosed a further troubling incident:

> On Jan. 3, 2002, while making patrols, police observed two individuals trying to break into a vehicle. Police determined that one individual owned the vehicle and was simply trying to gain access inside his car, as his door locks had been damaged. However, the owner of the vehicle was wearing a shirt which indicated his support for the "East End." The "East End" is known to be a chapter of the Hell's [*sic*] Angels. FARWAHA, the applicant was the second individual present with the owner of the vehicle.

[53] On December 24, 2010, Mr. Farwaha was advised about the report. He was told that a further body advising the Minister, the Program Review Board, would now review the matter. Mr Farwaha was invited to provide information and submissions. Mr. Farwaha responded on January

11, 2011, offering little in the way of new information and submitting that the Minister could not cancel Mr. Farwaha's security clearance without better information. He also raised questions about procedural matters. I shall deal with these below in the context of the procedural fairness issues in this case.

[54] Soon afterward, the RCMP delivered to the Minister's officials another report dated February 15, 2011. This report contained further information about Mr Farwaha's conviction for obstruction of justice and the incident to which it related.

[55] Mr. Farwaha was said to have handed a firearm to an individual who used it to shoot a person. That individual later pleaded guilty to manslaughter. He was a "significant drug trafficker" and had connections to the Hells Angels. The obstruction charge against Mr. Farwaha concerned the disposal of the firearm and Mr. Farwaha pleaded guilty to that charge.

[56] The February 15, 2011 report disclosed other matters of concern. Another person involved in the incident leading to Mr. Farwaha's conviction for obstruction was a member of the Hells Angels, and others involved had long criminal records including convictions for serious offences such as kidnapping, robbery, forcible confinement, theft, break and enter and assault. Information, said to be reliable but unconfirmed, suggested Mr. Farwaha had discussed selling drugs with one of the individuals, who was later convicted of trafficking in cocaine and heroin. Finally, the RCMP advised that in 2004 the "Vancouver police received reliable information that Mr. Farwaha was recruiting drug dealers to sell crack cocaine for him in the downtown area."

[57] On March 11, 2011, the Minister's officials forwarded the February 15, 2011 report to Mr. Farwaha for response. On March 30, 2011, Mr. Farwaha responded, providing writing submissions.

[58] It is fair to say that Mr. Farwaha's March 30, 2011 response was based on the view that the Minister could consider only verifiable and reliable evidence to cancel a security clearance. In Mr. Farwaha's view, the Minister had no such evidence. Mr. Farwaha's March 30, 2011 response provided very little new information, mainly resting upon a flat denial of many of the allegations in the February 15, 2011 report. In this sense, it was similar to his earlier January 11, 2011 response.

[59] By decision letter dated July 21, 2011, the Minister confirmed his earlier decision to cancel Mr. Farwaha's security clearance under subsection 517(4). This confirmatory decision was said to be "based on the information in [the] file." The contents of the file became known during the prosecution of Mr. Farwaha's application for judicial review by virtue of a Rule 317 request made by Mr. Farwaha. The Minister produced his file. Mr. Farwaha's March 30, 2011 response was in the file.

[60] In his decision letter of July 21, 2011, the Minister adopted the Program Review Board's recommendation that the cancellation of Mr. Farwaha's security clearance should be confirmed and adopted the Program Review Board's reasons in support of its recommendation. In its recommendation, the Program Review Board stated there were "reasonable grounds to suspect" that:

- "[Mr. Farwaha] is or has been involved in acts of violence against persons or property";

- might "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"; and

- "is or has been associated with an individual who is known to be involved in or is known to be a member of a criminal organization."

Collectively, these are grounds upon which the Minister may cancel a security clearance under paragraphs 509(*b*) and 509(*c*) of the *Security Regulations*.

C. The Federal Court's judgment

[61] As mentioned above, Mr. Farwaha applied for judicial review in the Federal Court. The Federal Court granted the application on two main grounds:

(1) *Substantive grounds*. The Minister improperly relied upon evidence that was unverified and unreliable. The Minister ignored evidence and explanations provided by Mr. Farwaha, in particular those contained in Mr. Farwaha's final submissions letter dated March 30, 2011. The Minister also did not give adequate reasons.

(2) *Procedural grounds*. In response to representations made, Mr. Farwaha had a legitimate expectation that a special office known as the Office of Reconsideration would be involved and would supply advice to the Minister that was independent of the Minister's own advisors.

[62] The Federal Court quashed the Minister's decision and remitted the matter to him for reconsideration. The Federal Court directed the Minister to reconsider the matter without relying upon unparticularized and unsupported allegations. The Federal Court also directed the Minister to consider the evidence and submissions made by Mr. Farwaha.

[63] The Minister appeals to this Court. He seeks the restoration of his decision confirming the cancellation of Mr. Farwaha's security clearance.

D. Analysis

(1) The substantive grounds: Mr. Farwaha's first submission

[64] On appeal to this Court, Mr. Farwaha first submits that the Minister, in declining to reinstate the security clearance, was specifically obligated under section 509 of the *Security Regulations*, to rely only upon verifiable and reliable evidence. He submits that the Court must review whether the Minister met that statutory obligation on the basis of correctness. The Minister failed to comply with that obligation and, thus, the decision must be quashed.

[65] This submission centrally affects the manner in which this Court should analyze this case. It is useful to deal with it first.

[66] I reject Mr. Farwaha's submission. In doing so, I shall address three matters.

– I –

[67] Section 509 of the *Security Regulations* provides that the Minister can only grant a security clearance if, among other things, "the information provided by the applicant and that resulting from checks and verifications" is "verifiable and reliable." This sort of information is provided during the process leading up to the granting of a security clearance.

[68] If that quality of information is not present, the Minister need not go any further. He need not consider the factors listed under paragraphs (*a*) to (*e*) in section 509.

[69] This makes sense. The thrust of section 509 is that a security clearance should only be granted to an individual when the Minister is sure, on the basis of reliable and verifiable information, that the individual poses no risk to marine security. Colloquially expressed, there must be no doubt on the matter. This high standard is necessary to prevent the grave consequences that might ensue if the individual commits injurious or destructive acts in sensitive port areas.

[70] Turning to suspensions of previously-granted security clearances, as a practical matter the situation is different. The information leading to suspension of previously-granted security

clearances can come from any source, not just from information supplied by the applicant or from checks and verifications. For example, CSIS might supply the Minister with information that creates a doubt concerning an individual's suitability to hold a security clearance. Nowhere do the *Security Regulations* say that the requirements of verifiability and reliability apply to this sort of evidence. Again, the requirements and verifiability and reliability apply only to the sort of evidence supplied during the initial granting process, *i.e.*, information supplied by the applicant or from checks and verifications.

[71] Subsection 515(1) allows the Minister to suspend a security clearance when there is any "information that could change the Minister's determination made under section 509." The reference to section 509 does not import all of that section. Specifically, it does not import the requirement that the information be reliable or verifiable. Subsection 515(1) only references the "determination" portion of section 509.

[72] Were it otherwise, the purposes of the *Security Regulations* would be undercut. Having received information from CSIS creating a doubt over the individual's suitability to hold a security clearance, the Minister would have to wait for better information, information that might never come. Meanwhile, the individual would continue to have unrestricted access to sensitive port areas while the Minister hopes to receive better quality information. This exposes sensitive port areas to unacceptable risk, the avoidance of which is the entire point of the *Security Regulations*.

[73] Turning to lifting suspensions or cancelling security clearances, the Minister has these powers under subsection 515(5). A suspension can be lifted when the Minister "determines under

section 509 that the holder does not pose a risk to marine transportation security." Cancellation can happen when he "determines under section 509 that the holder may pose a risk to marine transportation security." Just like the suspension provision, only the "determination" portion of section 509 – the portion that comes after the quality of the evidence needed to justify the grant of a security clearance – is to be considered.

[74] How is that determination under section 509 conducted? Under section 509, the Minister is "to determine by [conducting] an evaluation of the…factors" under paragraphs (*a*) through (*e*).

[75] In the case of factors (*b*) and (*c*), the factors relevant here, the Minister's determination under section 509 must include a consideration of whether there are "reasonable grounds to suspect" the factor is present. As we shall see at paragraphs 95-97 below, "reasonable grounds to suspect" is a concept known to our law in a number of areas. Cases show that a reasonable suspicion need not be formed on the basis of verifiable evidence. Instead, all that is required is the lesser standard of "objectively discernable facts": *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 at paragraph 43.

[76] After the Minister cancels a security clearance, the affected individual may ask for the Minister to reconsider the cancellation under section 517 in the hopes of getting the security clearance re-granted. The individual may offer submissions and "any new information that the applicant or holder wishes the Minister to consider": paragraph 517(2)(*b*) of the *Security Regulations*.

[77] Under subsection 517(4), the Minister decides the reconsideration "in accordance with [all of] section 509." This is broader than the cancellation decision, where the Minister "determines under section 509." The broader wording in the case of reconsideration decisions is to accommodate the fact that the applicant may offer new information in the reconsideration process in the hope of having the clearance re-granted – any new information must be "reliable and verifiable" in order for the Minister to rely on it. This is consistent with the philosophy mentioned above – a security clearance should only be re-granted to an individual when the Minister is sure, on the basis of reliable and verifiable information, that the individual poses no risk to marine security.

[78] This interpretation of the plain wording of the *Security Regulations* is supported by the purposes underlying section 509 and the overall purposes of the *Security Regulations* identified by this Court in the *Reference re Marine Transportation Security Regulations*. When the Minister receives information that creates a doubt about the individual's continued suitability, he should be able to suspend the individual's security clearance right away. And where there are "reasonable grounds to suspect" – *i.e.*, a doubt based on discernable facts, not just hunches or speculations – that an individual holding a security clearance should not continue to access sensitive port areas under paragraphs 509(*b*) and (*c*), the Minister should be able to keep the suspension in place, cancel the security clearance, refuse to reconsider a cancellation, or any of these things. The Minister should not be in a position of doubting the person's suitability on the basis of facts good enough to ground a "reason to suspect," but restrained from doing anything about it because the information received is not "verifiable." The importance of Canada's sensitive port areas demands no less.

[79] This is not to say that the Minister can act on the basis of fanciful musings, speculations or hunches. As I shall explain below, "reasonable grounds to suspect" does provide a meaningful standard against arbitrary cancellation of a security certificate. But "reliable and verifiable information" of the sort Mr. Farwaha says the Minister should have had is simply not required by the *Security Regulations*.

– II –

[80] Turning to the determination of the standard of review, Mr. Farwaha has parsed the Minister's decision into two components. First, the Minister was to satisfy himself that the evidence was reliable and verifiable. Second, overall, the Minister was to decide whether Mr. Farwaha should receive his security clearance back. The former part of the decision, says Mr. Farwaha, must be reviewed on the basis of correctness. The Federal Court agreed with Mr. Farwaha.

[81] In my view, this is an artificial and unacceptable parsing of the Minister's task in this case. Overall, the Minister was to decide whether Mr. Farwaha's security clearance should be cancelled. That is how the Minister approached his decision. The standards applied by the Minister to the matter before him – including the Minister's assessments of the quality and weight to be given to the evidence – are part and parcel of the overall decision he made. For the purposes of assessing the standard of review, the Minister's decision should be assessed in its totality.

[82] I am supported in this approach by the Supreme Court's decision in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36. There, the Supreme Court was

concerned with a visa officer's decision. In making the decision, the visa officer – like the Minister in this case – applied legislative standards to the facts of the case. The Supreme Court did not parse the visa officer's decision into two sub-decisions, one concerning legislative interpretation and the other concerning the application of the legislation to the facts of the case. Instead, the Supreme Court reviewed the visa officer's decision in its totality. It applied the well-known considerations in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 and concluded that the decision, based largely on factual appreciation, should be reviewed on the basis of reasonableness.

[83] Accordingly, in this case, we must review the Minister's reconsideration decision in its totality, not in the manner urged upon us by Mr. Farwaha.

– III –

[84] In my view, the Minister's reconsideration decision involves the application of legal standards to the evidence in this case. This involves fact-finding and determining issues of mixed fact and law where the facts play a dominant role in the decision.

[85] Security policy may also play an important role and so it is appropriate that the Minister be given a margin of appreciation in assessing the facts and determining whether those facts disclose a security risk: *Reference re Marine Transportation Security Regulations, supra* at paragraph 53.

[86] Therefore, in these circumstances, the Minister's decision must be reviewed on the basis of reasonableness, not correctness.

[87] It follows from the foregoing that the Federal Court erred. The standard of review is reasonableness, not correctness for part of the decision.

(2) The substantive grounds: conducting reasonableness review

[88] It is now well-accepted that a reasonable decision falls within a range of acceptability and defensibility on the facts and the law: *Dunsmuir, supra*. It is also now well-accepted that the range of acceptable and defensible options takes its colour from the context, widening or narrowing depending on the nature of the question and other circumstances: see *Canada (Attorney General) v. Abraham*, 2012 FCA 266 at paragraphs 37-50, *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75 at paragraphs 13-14 and *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436 at paragraph 22; and see, to the same effect, most recently, *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at paragraphs 37-41.

[89] In short, as the Supreme Court said in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at paragraphs 17-18 and 23 and *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364 at paragraph 44, the range of acceptable and rational solutions depends on "all relevant factors" surrounding the decision-making.

[90] Part of the context that affects the breadth of the range of reasonableness are two principles lying at the heart of the Court's jurisdiction to review administrative decisions, namely

parliamentary supremacy and the rule of law,: see *Dunsmuir, supra* at paragraphs 27-31 and on the specific content of the rule of law see *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 and *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873.

[91] Some of the cases in paragraph 88, above, give us guidance on the breadth of the ranges in a particular case. In some cases, Parliament has given a decision-maker a broad discretion or a policy mandate – all things being equal, this broadens the range of options the decision-maker legitimately has. In other cases, Parliament may have constrained the decision-maker's discretion by specifying a recipe of factors to be considered – all things being equal, this narrows the range of options the decision-maker legitimately has. In still other cases, the nature of the matter and the importance of the matter for affected individuals may more centrally implicate the courts' duty to vindicate the rule of law, narrowing the range of options available to the decision-maker.

[92] In considering the breadth of the range of reasonableness available to the Minister in this case, I have considered the following:

- The Minister's decision is a matter of great importance to Mr. Farwaha, affecting the nature of his work, his finances, and his prospects for advancement.

- The decision concerns security matters. Wrong decisions can lead to grave consequences.

- Security assessments involve some policy appreciation and sensitive weighings of facts.

- The Minister's decision in this case requires assessments of risk based on whether reasonable grounds for suspicion exist.

I wish to further address this last factor.

[93] On one view of the matter, the specification of a standard in the legislation – assessments of risk and "whether reasonable grounds for suspicion exist" – constrains the range of options available to the Minister. The Minister can confirm the cancellation of a security clearance only when those standards are met, not whenever the Minister "thinks it appropriate": see, *e.g.*, the statutory recipe and its narrowing effect on the ranges discussed in *Almon Equipment Limited v. Canada (Attorney General)*, 2012 FCA 193.

[94] However, assessments of risk and whether reasonable grounds for suspicion exist are standards that involve the sensitive consideration of facts and careful fact-finding, tasks that normally entail a broad range of acceptable and defensible decision-making. Assessments of risk are forward-looking and predictive. By nature, these are matters not of exactitude and scientific calculation but rather matters of nuance and judgment.

[95] As for "reasonable grounds to suspect," I note that this is a concept that is well-known in law and jurisprudence. Concepts understood in law and jurisprudence can affect the breadth of the

ranges of acceptability and defensibility, though care must be taken not to import uncritically concepts developed in different contexts: *Canadian Human Rights Commission*, *supra*. In *Canadian Human Rights Commission*, a tribunal's range of options concerning a human rights discrimination complaint was constrained by existing court jurisprudence on anti-discrimination law.

[96] Law and jurisprudence show that "reasonable grounds to suspect" is not "reasonable and probable grounds," a higher standard that is well-defined and concrete in our law. It is a lesser, looser, judgmental standard based identifying "possibilities," not finding "probabilities." Examples in law and jurisprudence include when roadside breath samples should be provided (see subsection 254(2) of the *Criminal Code*, R.S.C. 1985, c. C-46), inspections under paragraph 99(1)(*f*) of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.) (see *R. v. Jacques*, [1996] 3 S.C.R. 312), and investigative detentions (see *Mann*, *supra*).

[97] While fanciful musings, speculations or hunches do not meet the standard of "reasonable grounds to suspect," the "totality of the circumstances" and inferences drawn therefrom, including information supplied by others, apparent circumstances and associations among individuals can. To satisfy the "reasonable grounds to suspect" standard, verifiable and reliable proof connecting an individual to an incident – proof of the sort required to secure a conviction or even a search warrant – is not necessary. See *e.g. Mann*, *supra*; *R. v. Kang Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. Monney*, [1999] 1 S.C.R. 652. Instead, "objectively discernable facts" will suffice: *Mann*, at paragraph 43.

[98] This law and jurisprudence on "reasonable grounds to suspect" allows the Minister to consider and base his decision on a much wider range of information than one could consider under a "reasonable and probable grounds" standard.

[99] On balance, I conclude that a fairly broad range of acceptable and defensible options was available to the Minister. Further, in my view, the facts set out in paragraphs 33, 36-38, 44, 50-52 and 54-56, above, were capable of supporting the Minister's conclusion that there were reasonable grounds to suspect that Mr. Farwaha had engaged in the conduct described in paragraphs 509(*b*) and 509(*c*) and, thus, that Mr. Farwaha posed a risk to the security of marine transportation.

[100] One way of assessing whether a decision is reasonable – a "badge of reasonableness," so to speak – is to assess whether it is consistent with the purposes of the provision authorizing the decision and the purposes of the overall legislation: see *Montreal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427 at paragraphs 42 and 47. I canvassed the purposes of the *Security Regulations* at paragraphs 12-19, above.

[101] The Minister's decision is consistent with these purposes. There is a basis for the Minister holding a reasonable suspicion that Mr. Farwaha has been associating with the Hells Angels and others who are involved in criminal activities and that he has been involved in other criminal incidents, including incidents where there has been violence and threats of violence. There is a basis for the Minister holding a reasonable suspicion that Mr. Farwaha might be suborned into acts that would threaten the security of the Port. These matters are covered by paragraphs 509(*b*) and 509(*c*) and raise the very sorts of security concerns the Act is meant to address.

[102] The tenor of the Federal Court's decision was to second-guess the Minister on matters of fact-finding, requiring him to insist on standards of evidence much higher than that required by the section. To similar effect was the tenor of Mr. Farwaha's submissions. This does not apply a sufficiently deferential approach to the Minister's decision under the legislative standards governing that decision.

[103] The Federal Court and Mr. Farwaha also found fault with the Minister for not taking into account all of the material before him and, in particular, Mr. Farwaha's final submissions dated March 30, 2011. Closely related to this is the adequacy of the Minister's reasons for decision.

[104] In my view, the Minister's reasons were adequate. The reasons for decision include the decision letter and the record upon which the Minister made his decision. When the record of this case is reviewed – and much of it is set out above – the grounds for the Minister's decision are apparent. It is also trite that the Minister's reasons need not explicitly deal with every argument and submission made. Above, I have noted that all of Mr. Farwaha's letters containing evidence and submissions were in the Minister's file and the Minister stated that he considered the materials in the file: see paragraph 59, above. I would add that Mr. Farwaha's March 30, 2011 submission, said to have been ignored by the Minister, added nothing new to the previous information Mr. Farwaha supplied: see paragraph 58, above.

[105] Overall, the Minister's decision exhibits transparency, intelligibility and justification and is supportable on the basis of the record placed before it. See *Dunsmuir*, *supra* at paragraph 48 and see

Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] 3 S.C.R. 708.

[106] For the foregoing reasons, I conclude that the Minister's decision was reasonable.

(3) The procedural grounds

[107] The Federal Court held that Mr. Farwaha had a legitimate expectation that a special office known as the Office of Reconsideration would be involved and would supply advice to the Minister that was independent of the Minister's own advisors. As this was not done, Mr. Farwaha was not afforded procedural fairness.

[108] In support of that conclusion, the Federal Court relied upon information set out on a website regarding how the Minister's reconsideration process works. On that website, the Office of Reconsideration was described as an "interim, short-term solution for the reconsideration process."

[109] In my view, this may not qualify as the sort of "clear, unambiguous and unqualified" promise that is necessary for the procedural doctrine of legitimate expectations to apply: *Canada (Attorney General) v. Mavi*, [2011] 2 S.C.R. 504 at paragraph 68; *Agraira, supra*. The website made it clear that the process, relatively new, was in flux. The Office was "interim" and "short-term." There were no guarantees.

[110] However, the *Security Regulations* were accompanied by a lengthy and detailed Regulatory Impact Analysis Statement: *Canada Gazette Part II,* Vol. 140, No. 23 at pages 1742-1757. The Regulatory Impact Analysis Statement dealt specifically and extensively with the Office of Reconsideration, describing its role and function. It was to be "completely independent," would be assisted by "independent advisors," and, after "review[ing] [any] applications for reconsideration," would give "a recommendation to the Minister to either confirm or reconsider the original decision on the file" (at page 1754).

[111] These words must be interpreted against the context leading up to the enactment of the *Security Regulations*. As noted in *Reference Re Marine Transportation Security Regulations*, *supra*, the introduction of security clearances in Canadian ports had been the subject of much controversy and had been hotly debated and challenged by many labour organizations representing affected employees, leading to labour unrest and judicial challenges. Seen in this context, the words of the Regulatory Impact Analysis Statement must be seen as a "clear, unambiguous and unqualified" promise within the meaning of the above authorities, triggering the doctrine of legitimate expectations. In these circumstances, the Minister must keep his promise.

[112] That being said, in my view I do not find a breach of procedural fairness warranting the quashing of the Minister's decision. I offer two reasons.

[113] First, it is true that Mr. Farwaha was given an assurance at one point that the Office of Reconsideration would be involved: see note to file dated July 20, 2009 (Appeal Book, page 157). However, in later correspondence, the Minister's officials clarified the matter. By letter dated

December 24, 2010, the Minister advised Mr. Farwaha that the Program Review Board – not the Office of Reconsideration – would conduct a review. In his January 11, 2011 response, Mr. Farwaha queried the jurisdiction of the Program Review Board's involvement. By letter dated March 11, 2011, the Minister's officials clarified the roles of the Program Review Board and the Office of Reconsideration. From the March 11, 2011 letter, Mr. Farwaha should have understood that the Office was not going to be involved in the manner he was told earlier or in the manner contemplated by the Regulatory Impact Analysis Statement. In the circumstances, the March 11, 2011 letter called for response. But there was no response: in his final submissions letter of March 30, 2011, Mr. Farwaha did not raise the issue again. It must be taken from this that at least from March 30, 2011, Mr. Farwaha no longer had a concern about how the Office of Reconsideration was being involved in the matter. To the extent that the lack of involvement of the Office of Reconsideration was a procedural defect, Mr. Farwaha waived that defect and could not raise it on judicial review: see, *e.g.*, *Telus Communications Inc. v. Telecommunications Workers Union*, 2005 FCA 262, (2005), 257 D.L.R. (4th) 19 at paragraphs 43-49; *Geza v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124 at paragraph 66.

[114] Second, the Office of Reconsideration was, in fact, involved as an independent body at one point in the process and the Minister had the benefit of the Office's views when making his final decision. This is shown by the sequence of events that took place. On August 4, 2009, Mr. Farwaha submitted his application for reconsideration of the Minister's cancellation. The Office of Reconsideration (in the words of the Regulatory Impact Analysis Statement) "review[ed] the application for reconsideration" and decided whether to make "a recommendation to the Minister to either confirm or reconsider the original decision on the file." It prepared a report

recommending that the Minister reconsider his cancellation of Mr. Farwaha's security clearance. In the Office's view, the RCMP information supplied to the Minister was not "verifiable and reliable" because it was not "corroborated or supported in any way." With the assistance of the Office's report, the Minister then embarked on his own consideration of the matter.

[115] As part of that process, the Minister's officials followed up with police authorities to secure additional information. Though this additional information was sent to Mr. Farwaha for review and comment, it was not submitted to the Office of Reconsideration: see Appeal Book, pages 73 and 123. Rather, it was sent for assessment and recommendation to an internal departmental committee known as the Program Review Board. The Minister was entitled to seek advice from it: subsection 517(5) of the *Security Regulations*. The Program Review Board recommended the cancellation of Mr. Farwaha's security clearance. The Minister accepted that recommendation. In doing so, the Minister did consider the Office's report, albeit a report that did not examine the additional information. The report was in the Minister's file that was produced in response to the Rule 317 request: see Appeal Book, pages 97-100 and see paragraph 59, above.

[116] Mr. Farwaha also complains that his final submissions letter dated March 30, 2011 was not before the Minister when he decided to confirm the cancellation of his security clearance. As I have explained in paragraph 59, above, this letter appears to have been in the file that was placed before the Minister. In any event, as I noted at paragraph 58, above, this letter did not add any materially new evidence and submissions to the Minister's existing file. Mr. Farwaha also complains that two letters of reference submitted to the Minister did not appear in the material produced in response to the Rule 317 request and, thus, were not considered by the Minister. However, these letters only

confirm that he was a good worker with no discipline record. Finally, Mr. Farwaha complains that a briefing note prepared by the Program Review Board for the Minister mistakenly stated that Mr. Farwaha did not respond to additional RCMP materials in late 2010 and 2011, when in fact he did: see Appeal Book, page 65. However, that response offered little information other than flat denials of the sort made in previous submissions. It was also included in the material produced in response to the Rule 317 request so it was in fact before the Minister.

[117] To the extent there was any procedural defect caused by these matters, it is not of the material sort that would justify a quashing of the Minister's decision and remittal back to him: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202. In these circumstances, remittal back to the Minister would be futile.

[118] At all stages of the process, the Minister provided Mr. Farwaha an opportunity to make his case. Although the Minister was subject to an obligation to preserve the confidentiality of some aspects of the sensitive materials in his hands, he gave Mr. Farwaha sufficient access to information to know the case against him and to make a meaningful response to it. Overall, the process was fair.

(4) Other issues

[119] In his memorandum of fact and law, Mr. Farwaha submitted that the Federal Court should have considered his submission that the Minister's decision failed to comply with sections 7 and 11 of the *Canadian Charter of Rights and Freedoms*. The short response is that the Federal Court did

not need to consider Mr. Farwaha's Charter submissions as it granted his application on other grounds.

[120] Mr. Farwaha's submission in the Federal Court was that the Minister infringed the principle in sections 7 and 11(d) of the Charter that all persons are presumed innocent until proven guilty by relying on stayed or withdrawn criminal charges to support cancelling Mr. Farwaha's security clearance. Further, he submitted that the right to security of the person in section 7 of the Charter protects against "serious state-induced psychological stress."

[121] In no way does the Minister's decision offend the principle that all persons are presumed innocent until proven guilty. The Minister did not form the view that Mr. Farwaha was guilty of the conduct alleged in the criminal charges. Rather, the Minister relied on facts concerning the incident that led to the charges, and also relied on other facts, in assessing whether there were "reasonable grounds to suspect" that Mr. Farwaha posed a threat to the security of the Port. A finding that Mr. Farwaha should not hold a security clearance at the Port in no way finds Mr. Farwaha guilty of a criminal offence.

[122] Finally, the evidentiary record in this case does not establish the high level of psychological stress necessary to establish a deprivation of the right to security of the person in section 7: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 3. Even if the evidentiary record established a deprivation of the right to security of the person, that deprivation would have been in accordance with the principles of fundamental justice. The principles of fundamental justice embody a balancing between the interests of the state and individuals:

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519; *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571. Here, in a case such as this, the need to protect against security threats to the Port must outweigh the psychological interests of any one individual worker at the Port.

E. Disposition

[123] For the foregoing reasons, I would allow the appeal and set aside the judgment of the Federal Court. Giving the judgment the Federal Court should have given, I would dismiss the application for judicial review. On the issue of costs, Mr. Farwaha asks that there be no award of costs in light of the novelty and importance of the issues in this appeal and the Minister's ability to bear the costs. In my view, the issues in this appeal are similar to those in other appeals where costs have followed the event. Therefore, I would award the Minister his costs here and below.

"David Stratas"

J.A.

"I agree
Johanne Trudel J.A."

MAINVILLE J.A. (Concurring Reasons)

[124] I have recently been provided, in draft form, with the reasons of Stratas J.A. Though I agree with his proposed disposition of this appeal, I have concerns with respect his reasons in regard to two fundamental issues.

[125] The first issue of concern is the interpretation my colleague gives to section 509 and subsections 515(5) and 517(4) of the *Marine Transportation Security Regulations*, SOR/2004-144 ("*Security Regulations*"). Under my colleague's interpretation, the threshold of "verifiable and reliable information" set out in section 509 would only apply to the granting of a security clearance, while a lower threshold would apply both to the cancellation of a security clearance under subsection 515(5) and to the reconsideration, under subsection 517(4), of a cancellation or of a refusal to grant a security clearance. As a result, in my colleague's view, the Minister could cancel a security clearance granted under section 509 of the *Security Regulations* and refuse to reconsider that cancellation without having to base either decision on verifiable and reliable information.

[126] In my view, such an interpretation is not consistent with the language and object of the *Security Regulations*. Nor is this interpretation justified having regard to the record before this Court in this appeal. Nor is it consistent with the Minister's own interpretation of the *Security Regulations* and the Minister's submissions in this appeal. In my view, both subsections 515(5) and 517(4)

specifically and unambiguously require the Minister to rely on information which is verifiable and reliable when cancelling a security clearance and when reconsidering that decision.

[127] The second issue of concern relates to the respondent's legitimate expectation that the independent Office of Reconsideration would be involved throughout the reconsideration process set out under section 517 of the *Security Regulations* that leads to the Minister confirming or changing a prior decision to refuse to grant or to cancel a security clearance.

[128] When adopting the current version of Part 5 of the *Security Regulations* dealing with security clearance, the Governor-in-Council made a clear, unambiguous and binding commitment that the "completely independent" Office of Reconsideration "will make a recommendation to the Minister to either confirm or reconsider the original decision on the file": *Canada Gazette Part II,* Vol. 140, No. 23 (November 15, 2006) at page 1754. In my view, that formal commitment of the Government of Canada was not waived by the respondent, and Transport Canada had no authority to set aside that commitment by avoiding the involvement of the independent Office of Reconsideration, in this case, in favour of an internal Program Review Board.

[129] I will address each of these two issues in turn.

First Issue: The scope of subsections 515(5) and 517(4) of the *Security Regulations*

[130] It is important to clearly identify the ministerial decision which is at issue here. The respondent, Mr. Farwaha, was granted a security clearance under section 509 of the *Security Regulations*. That clearance was subsequently cancelled by the Minister under subsection 515(5).

Mr. Farwaha sought reconsideration of this cancellation under subsection 517(4). The Minister refused to reconsider the cancellation following a recommendation from an internal Program Review Board. This is the decision which was the subject of the judicial review application which was allowed by Martineau J.

[131] The pertinent legislative provisions are set out in Part 5 of the *Security Regulations* comprising sections 501 to 519. The aspects of Part 5 which are relevant to this appeal may be summarily described as follows.

[132] After receiving an application for security clearance containing the information required under section 506 of the *Security Regulations*, the Minister must conduct under section 508 checks and verifications for the purpose of assessing whether an applicant poses a risk to the security of marine transportation. These include a criminal record check, a check of relevant files of law enforcement agencies, a Canadian Security Intelligence Service indices check and, if necessary, a security check by that Service, and a check of the applicant's immigration and citizenship status.

[133] Section 509 of the *Security Regulations* specifically sets out that both the information supplied by the applicant and that resulting from the checks and verifications required under section 508 must be "verifiable and reliable" and "sufficient" to allow the Minister to determine, by an evaluation of certain factors, the extent to which the applicant poses a security risk. I reproduce here the introductory paragraph of section 509:

509. **The Minister may grant a security clearance if, in the opinion of the Minister, the information provided by the applicant and that**	509. **Le ministre peut accorder une habilitation de sécurité si, de l'avis du ministre, les renseignements fournis par le**

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:	**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 :**
…	**[…]**
[Emphasis added]	**(Je souligne)**

[134] The factors relevant to this appeal which the Minister must take into account under section 509 of the *Security Regulations* notably include:

A. the relevance of any criminal conviction to the security of marine transportation (509(*a*));

B. whether there are reasonable grounds to suspect that the applicant has been involved in activities directed to the misuse of transportation infrastructure to commit criminal offences or has been associated with an individual known to be involved in such activities (509(*b*)(i) and (v)), or has been a member of a criminal organization or a violent group or contributed to the activities of such a group (509(*b*)(iii) and (iv));

C. whether there are reasonable grounds to suspect that the applicant is in a position in which there is a risk that he be suborned to commit an act that might constitute a risk to marine transportation security (509(*c*)).

[135] Subsection 515(1) of the *Security Regulations* authorizes the Minister to suspend a security clearance simply on receiving information that could change the Minister's prior determination. Under subsection 515(4), the suspended security clearance may be reinstated if the Minister determines "under section 509" that the holder does not pose a risk to marine transportation security. Subsections 515(1) and (4) read as follows:

515. **(1) The Minister may suspend a security clearance on receipt of information that could change the Minister's determination**	515. **(1) Le ministre peut suspendre une habilitation de sécurité lorsqu'il reçoit des renseignements qui pourraient**

made under section 509.	**modifier sa décision prise en application de l'article 509.**
…	**[…]**
(4) The Minister may reinstate the security clearance if the Minister determines under section 509 that the holder does not pose a risk to marine transportation security.	**(4) Le ministre peut rétablir l'habilitation de sécurité s'il établit, en application de l'article 509, que le titulaire de l'habilitation ne pose pas de risque pour la sûreté du transport maritime.**
[Emphasis added]	**(Je souligne)**

[136] Moreover, under subsection 515(5) of the *Security Regulations*, the Minister may cancel a security clearance if he determines "under section 509" that the holder may pose a risk to marine transportation security. That subsection reads as follows:

515. **(5) The Minister may cancel the security clearance if the Minister determines under section 509 that the holder may pose a risk to marine transportation security or that the security clearance is no longer required. The Minister shall advise the holder in writing of any cancellation.**	515. **(5) Le ministre peut annuler l'habilitation de sécurité s'il établit, en application de l'article 509, que le titulaire de l'habilitation de sécurité peut poser un risque pour la sûreté du transport maritime ou que l'habilitation n'est plus exigée. Il avise par écrit le titulaire dans le cas d'une annulation.**
[Emphasis added]	**(Je souligne)**

[137] Finally, under section 517 of the *Security Regulations*, an applicant for a security clearance, or the holder of such a clearance, may request the Minister to reconsider a decision to refuse to grant or to cancel a security clearance, and may make representations to the Minister for this purpose. The Minister must then reconsider the decision "in accordance with section 509". Subsection 517(4) is particularly relevant for the purposes of this appeal:

517. **(4) After representations have been made or a reasonable opportunity to do so has been**	517. **(4) Après que des observations ont été présentées ou que la possibilité de le faire a été**

provided, the Minister shall reconsider the decision in accordance with section 509 and shall subsequently confirm or change the decision. **[Emphasis added]**	**accordée, le ministre réexamine la décision conformément à l'article 509 et, par la suite, confirme ou modifie la décision.** **(Je souligne)**

[138] It is abundantly clear from these provisions that the decision to grant or to refuse a security clearance, the decision to cancel a security clearance, and any reconsideration of such decisions, must be made under or in accordance with section 509 of the *Security Regulations*.

[139] Section 509 clearly sets out the requirements that the information on which the Minister's determination is made must be "verifiable and reliable and … sufficient". These requirements must extend to any determination to cancel a security clearance under subsections 515(5) or to a reconsideration under subsection 517(4) of the *Security Regulations*, since these subsections specifically and unambiguously require that the Minister's determination be made "under section 509" or "in accordance with section 509". The language of the subsections requires no less.

[140] There is no doubt that one of the main purposes of the *Security Regulations* is to deter persons who are security risks from applying for security clearance in the first place, and to screen out those applicants who pose unacceptably high security risks and who apply regardless. However, this purpose is best served when the determination of the security risk is based on verifiable and reliable information, thus ensuring the Canadian public and the affected individuals that security risk determinations are not made on the basis of unreliable information or through a fanciful, discriminatory or otherwise improper process. As noted in the Regulatory Impact Statement accompanying the amendments to the *Security Regulations* dealing with security clearance, "[t]he

Minister must have verifiable information in order to conduct appropriate background checks": *Canada Gazette Part II*, Vol. 140, No. 23 at page 1755.

[141] Requiring that the information relied upon to make security determinations is verifiable and reliable facilitates the social and political acceptability of the security measures for the employees targeted by the regulations, their labour associations and the Canadian public generally. In addition, these requirements also assist in ensuring that the *Security Regulations* themselves conform to Canada's Constitution, fundamental civil liberties, and the rule of law. Indeed, the validity of the security clearance system implemented by the *Security Regulations* may well rest on the requirement of basing the Minister's decisions on reliable information and providing mechanisms to ensure that reliability: *Reference Re Marine Transportation Security Regulations*, 2009 FCA 234, 395 N.R. 1 at paragraph 68.

[142] I add that any concern with respect to the security of Canadian ports resulting from the requirement of basing security clearance determinations on verifiable and reliable information is misplaced. I note in particular that under subsection 515(1) of the *Security Regulations*, the Minister may suspend at any time the security clearance of an individual simply "on receipt of information that could change the Minister's determination". In such instances, the information need not meet the requirements of verifiability and reliability.

[143] It is notable that, in this appeal, the appellant Minister never submitted or argued that the Minister's decisions under subsections 515(5) and 517(4) were not subject to the "verifiable and reliable" information requirements of section 509. On the contrary, the Minister acknowledged that

the information used to make determinations under these subsections must be "verifiable and reliable". This appears to be a long-standing ministerial position: *Russo v. Canada (Minister of Transport, Infrastructure and Communities)*, 2011 FC 764, 406 F.T.R. 49 at paragraph 15. As a result, the debate in this Court rather focused on (a) the extent of the Minister's discretion to determine what type of information is "verifiable and reliable", and (b) the standard under which the Minister's determination with respect to the verifiability and reliability of the information should be reviewed.

[144] In this respect, I substantially agree with the Minister's submissions that (a) he must consider the verifiability and reliability of the information before him, but (b) in so doing he has a large discretion to assess whether that information meets those requirements, and (c) that the Minister's exercise of that discretion is reviewed judicially under a standard of reasonableness. I also agree with the Minister that the judge below erred when he implied that the information provided must be proven in order to be verifiable and reliable.

Second Issue: Legitimate expectation that the independent Office of Reconsideration would be involved throughout the reconsideration process

[145] As noted in *Reference Re Marine Transportation Security Regulations*, cited above, the introduction of security clearances in Canadian ports has been the subject of much controversy and has been hotly debated and challenged by many labour organizations representing affected employees, leading to labour unrest and to judicial challenges.

[146] When the current version of Part 5 of the *Security Regulations* dealing with security clearance was adopted by the Governor-in-Council under SOR/2006-269 dated November 2, 2006,

it was published in the *Canada Gazette* with a Regulatory Impact Analysis Statement (RIAS). The RIAS dealt specifically and extensively with the Office of Reconsideration. In the RIAS, the Canadian government made clear commitments with respect to the role of this Office. It is appropriate to reproduce here in full the provisions of the RIAS dealing with this matter as set out in the *Canada Gazette Part II*, Vol. 140, No. 23 at page 1754:

The Reconsideration Mechanism and the Office of Reconsideration (OOR)	**Le mécanisme de réexamen et le Bureau de réexamen (BRE)**
With respect to a reconsideration mechanism, it was requested that individuals who have a security clearance refused or cancelled be given the right to appeal to the TATC [the Transportation Appeal Tribunal of Canada], or alternatively, to an organization or entity wholly independent from Transport Canada. In order for the TATC to perform the reconsideration function, amendments to several acts of Parliament would be required. This can be a lengthy process, and this option will be explored in the future. In any case, the TATC does not have the legislated authority to overturn a Minister's decision, nor to recommend that the Minister reconsider a decision. Likewise, any outside organization or agency also lacks the legislated authority to overturn a Minister's decision, or to recommend that the Minister reconsider a decision. However, the applicant still has the option of filing an appeal with the Federal Court.	**En ce qui a trait au mécanisme de réexamen, on a demandé que les particuliers dont l'habilitation de sécurité serait refusée ou annulée aient le droit d'en appeler au TATC [le Tribunal d'appel des transports du Canada] ou à un organisme ou une entité entièrement indépendants de Transports Canada. Pour que le TATC puisse exercer cette fonction de réexamen, des modifications à plusieurs lois adoptées par le Parlement seraient requises. Ce processus pourrait prendre beaucoup de temps et pourrait être envisagé à l'avenir. Le TATC n'a pas le pouvoir législatif de renverser la décision d'un ministre ou de recommander que le ministre réexamine sa décision. De plus, aucun autre organisme ou aucune agence externe ne possède le pouvoir législatif de renverser la décision d'un ministre ou de recommander que le ministre réexamine sa décision. Le candidat conserve l'option d'interjeter appel en Cour fédérale.**
In order to provide an expedited review of any negative decision, the Office of Reconsideration was	**Afin de fournir une revue expéditive de toute décision négative, le Bureau de réexamen a été mis sur pied.**

developed. Transport Canada is currently establishing the OOR in Ottawa, and it will operate under the Assistant Deputy Minister of Corporate Services. It is, therefore, completely independent from the Safety and Security ADM, and the original decision-maker. The OOR will be administered by a Director who will hire, on a contractual basis, independent advisors to review the applications for reconsideration. When review of the application is complete, the OOR will make a recommendation to the Minister to either confirm or reconsider the original decision on the file. The Office of Reconsideration is a review process, not an appeal process.

Transports Canada établit présentement le BRE à Ottawa sous la direction du sous-ministre adjoint des Services généraux. Il est donc entièrement indépendant du SMA, Sécurité et Sûreté et du décideur original. Le BRE sera administré par un directeur qui embauchera à contrat des conseillers indépendants chargés d'étudier les demandes de réexamen. Lorsque l'examen de la demande sera terminé, le BRE soumettra une recommandation au ministre, afin de confirmer ou de réexaminer la décision originale au dossier. Le Bureau de réexamen est un processus de revue et non un processus d'appel.

Extensive information was requested on the Office of Reconsideration, the independent review mechanism to which individuals may apply for reconsideration within thirty days of having a security clearance refused or cancelled. Specifically, stakeholders questioned if the OOR will have a quasi-judicial process that includes hearings, appeals, stays, witnesses, affidavits, evidence, standards of proof, regional offices, etc. The OOR is intended to provide an expedited and inexpensive process. The timely nature of the process was a key consideration throughout the regulatory development.

On a demandé beaucoup de renseignements au sujet du Bureau de réexamen, du mécanisme de revue indépendant auxquels les particuliers peuvent faire appel en vue d'un réexamen dans les trente jours du refus ou de l'annulation d'une habilitation de sécurité. Plus particulièrement, les intervenants ont demandé si le BRE disposera d'un processus quasi judiciaire comprenant des audiences, appels, arrêtés, témoins, affidavits, preuves, normes de preuve, bureaux régionaux, etc. Le BRE vise à fournir un processus expéditif et économique. La nature ponctuelle du processus a été la clé de la formule envisagée tout au long de l'élaboration.

Information requests on how to apply to the OOR: The OOR will soon have a website and an operational 1-800-number to provide complete

Demandes de renseignements au sujet du processus de présentation d'une demande au BRE : Le BRE aura bientôt un numéro d'appel 1-

information to the public. As well, the OOR will supply information pamphlets at the enrolment sites where they can be readily available to individuals when applying for a security clearance. **[Emphasis added]**	**800 et un site Web fournissant des renseignements détaillés au public. De plus, le BRE rendra disponibles, sur les sites de présentation des demandes, des brochures d'information à la disposition des personnes qui présentent une habilitation de sécurité.** **(Je souligne)**

[147] I have no hesitation concluding that this commitment, made at the highest level of government, qualifies as a clear, unambiguous and unqualified promise that triggers the application of the doctrine of legitimate expectations: *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504 at paragraphs 68 to 70; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paragraphs 93 to 98. As noted by Binnie J. in *Canada (Attorney General) v. Mavi*, *supra* at paragraphs 68 and 69:

> [68] Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty. Proof of reliance is not a requisite. See *Mount Sinai Hospital Center*, at paras. 29-30; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 78; and *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 131. It will be a breach of the duty of fairness for the decision maker to fail in a substantial way to live up to its undertaking: Brown and Evans, at pp. 7-25 and 7-26.
>
> [69] […] Generally speaking, government representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement.

[148] In this case, the Office of Reconsideration found that the Minister's decision was based on information that had not been corroborated or supported. As a result, the recommendation from the Office of Reconsideration to the Minister, dated October 21, 2010, was that the Minister's decision should be reconsidered on the ground that the information on which it was based could not be considered verifiable and reliable.

[149] Following this recommendation, officials at Transport Canada followed up with police authorities to secure additional information concerning the verifiability and reliability of the original information. Though this additional information was sent to the respondent for review and comment, it was not submitted to the Office of Reconsideration. Rather, it was sent for assessment and recommendation to an internal departmental committee known as the Program Review Board. That Board is not independent.

[150] The respondent in this case, through his counsel, wrote to Transport Canada on January 11, 2011 to specifically question the involvement of the Program Review Board in the reconsideration process. The Director of the Security Screening Program at Transport Canada responded on March 11, 2011 by informing the respondent's counsel that the Office of Reconsideration would not be involved in the review of the new information, and that the Program Review Board would rather be the body providing the Minister with a final recommendation based on that new information. In light of this response, the respondent had no choice but to exhaust the available administrative process before challenging, as he eventually did, the exclusion of the Office of Reconsideration: *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332 at paragraphs 30 to 33 and 39 to 45.

[151] In my view, the clear commitment made by the Governor-in-Council in the RIAS was that the process leading to a reconsideration of the cancellation of a security clearance under subsection 517(4) of the *Security Regulations* would be subject to a review of the relevant information by the independent Office of Reconsideration, staffed with independent advisors, leading to a recommendation by that office to the Minister. The role of that Office is not trivial. It serves to ensure the accuracy of the information on which the Minister makes the decision, and it gives the Minister an independent second opinion to consider: *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 S.C.R. 385 at paragraph 25.

[152] Unfortunately, that process was not followed in this case.

[153] As a result, the additional information which formed the basis of the Minister's determination under subsection 517(4) of the *Security Regulations* was not submitted to the Office for Reconsideration so as to allow it to proceed to an assessment so as to provide the Minister with a new recommendation in light of that new information. This constituted a clear breach of the Government of Canada's commitment with respect to the involvement of the independent Office of Reconsideration in determinations made under the reconsideration mechanism set out in subsection 517(4).

[154] Though I have reached the conclusion that the exclusion of the Office of Reconsideration from the final reconsideration process was improper, nevertheless, I would not return the matter to the Minister for a new determination. The additional information provided to the Minister is such

that it would be useless to expect that the Office of Reconsideration would recommend anew to the Minister that he reconsider his decision to cancel the security clearance of the respondent. That additional information is aptly summarized in the reasons of my colleague Stratas J.A. and need not be repeated here. In light of this new information, it would be futile in this case to return the matter for a new determination: *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at pages 228-229.

[155] That being said, it is nevertheless important for this Court to clearly uphold the commitment of the Government of Canada with respect to the involvement of the independent Office of Reconsideration so as to ensure that procedural fairness is maintained in future determinations under subsection 517(4) of the *Security Regulations*. There should be no ambiguity about this as a result of this Court's decision in this case.

[156] I would therefore dispose of the appeal in the manner suggested by Stratas J.A., but for different reasons than those offered by him.

"Robert M. Mainville"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-431-12

APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE MARTINEAU DATED SEPTEMBER 6, 2012, DOCKET NO. T-1383-11

STYLE OF CAUSE:	Canada (Minister of Transport, Infrastructure and Communities) v. Jagjit Singh Farwaha
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 13, 2013
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	TRUDEL J.A.
CONCURRING REASONS BY:	MAINVILLE J.A.
DATED:	MARCH 3, 2014

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