

Federal Court



Cour fédérale

**Date: 20201008**

**Docket: T-1973-19**

**Citation: 2020 FC 958**

**Ottawa, Ontario, October 8, 2020**

**PRESENT: The Honourable Mr. Justice Phelan**

**BETWEEN:**

**PETER WOJCIK**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] The Applicant was denied a security clearance under s 53(1) of the *Cannabis Regulations*, SOR/2018-144 [Regulations] by the Director General [Director], Controlled Substances and Cannabis Branch, Health Canada [the Decision]. The Applicant asks for judicial review on the grounds of (1) breach of procedural fairness and (2) unreasonableness of the Decision.

[2] The Respondent raises a preliminary objection to the affidavits that the Applicant and his wife filed in this judicial review. For reasons which follow later, the Respondent's objection is upheld and the affidavits are deemed inadmissible and will be struck and disregarded.

## II. Facts

[3] Under the *Cannabis Act*, SC 2018, c 16 [Act], the Minister may refuse to grant a security clearance. The grant of a security clearance is covered by the Regulations, the relevant provisions of which are:

### **Checks**

**52** The Minister may, at any time, conduct checks that are necessary to determine whether an applicant for, or the holder of, a security clearance poses a risk to public health or public safety, including the risk of cannabis being diverted to an illicit market or activity. Such checks include

**(a)** a check of the applicant's or holder's criminal record; and

**(b)** a check of the relevant files of law enforcement agencies that relate to the applicant or holder, including intelligence gathered for law enforcement purposes.

### **Vérifications**

**52** Le ministre peut, en tout temps, effectuer les vérifications nécessaires afin d'établir si le demandeur d'une habilitation de sécurité ou le titulaire d'une telle habilitation présente un risque pour la santé ou la sécurité publiques, notamment le risque que le cannabis soit détourné vers un marché ou pour une activité illicites; il peut notamment effectuer une vérification :

**a)** du casier judiciaire du demandeur ou du titulaire;

**b)** des dossiers pertinents — concernant le demandeur ou le titulaire — des organismes chargés d'assurer le respect des lois, notamment des renseignements recueillis

**pour assurer l'observation des lois.**

**Grant of security clearance**

**53 (1)** Before granting a security clearance, the Minister must, taking into account any licence conditions that he or she imposes under subsection 62(10) of the Act, determine that the applicant does not pose an unacceptable risk to public health or public safety, including the risk of cannabis being diverted to an illicit market or activity.

**Factors**

**(2) Factors that the Minister may consider to determine the level of risk posed by the applicant include**

**(a) the circumstances of any events or convictions that are relevant to the determination, the seriousness of those events or convictions, their number and frequency, the date of the most recent event or conviction and any sentence or other disposition;**

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

**Délivrance de l'habilitation**

**53 (1)** Avant de délivrer une habilitation de sécurité, le ministre doit établir, en tenant compte de toute condition dont il assortit la licence en vertu du paragraphe 62(10) de la Loi, que le demandeur ne présente pas de risque inacceptable pour la santé ou la sécurité publiques, notamment le risque que le cannabis soit détourné vers un marché ou pour une activité illicites.

**Facteurs**

**(2) Afin d'établir le niveau de risque que présente le demandeur, il peut notamment prendre en considération les facteurs suivants :**

**a) les circonstances, la gravité, le nombre et la fréquence de tout événement ou de toute condamnation pertinents, la date du dernier événement ou de la dernière condamnation, ainsi que toute peine et décision;**

**b) la question de savoir s'il est connu — ou s'il y a des motifs raisonnables de soupçonner — que le demandeur, selon le cas :**

**(i) is or has been involved in, or contributes or has contributed to, an activity that is prohibited by, or conducted in contravention of, any of the provisions of Division 1 of Part 1 of the Act — other than paragraphs 8(1)(a) to (e) — or Subdivision E of Division 2 of Part 1 of the Act,**

**(ii) is or has been involved in, or contributes or has contributed to, an activity that is prohibited by, or conducted in contravention of, any of the provisions of Part I of the *Controlled Drugs and Substances Act* — other than subsection 4(1) — or subsection 32(1) or (2) of that Act,**

**(iii) is or has been involved in, or contributes or has contributed to, an activity that is prohibited by, or conducted in contravention of, any provision of the *Criminal Code* relating to fraud, corruption of public officials, terrorism financing, counterfeiting or laundering the proceeds of crime,**

**(i) participe ou contribue, ou a participé ou contribué, à des activités qui sont interdites par la section 1 de la partie 1 de la Loi ou qui contreviennent à l'une de ses dispositions, à l'exclusion des alinéas 8(1)a) à e), ou qui sont interdites par la sous-section E de la section 2 de la partie 1 de la Loi ou qui contreviennent à l'une de ses dispositions,**

**(ii) participe ou contribue, ou a participé ou contribué, à des activités qui sont interdites par la partie I de la *Loi réglementant certaines drogues et autres substances* ou qui contreviennent à l'une de ses dispositions, à l'exclusion du paragraphe 4(1), ou qui sont interdites par les paragraphes 32(1) ou (2) de cette loi ou qui y contreviennent,**

**(iii) participe ou contribue, ou a participé ou contribué, à des activités qui sont interdites par les dispositions du *Code criminel* relatives à la fraude, à la corruption de fonctionnaires, au financement du terrorisme, à la contrefaçon ou au recyclage des produits de la criminalité ou qui y contreviennent,**

(iv) is or has been involved in, or contributes or has contributed to, an offence involving an act of violence or the threat of violence,

(iv) participe ou contribue, ou a participé ou contribué, à la perpétration d'une infraction impliquant des actes de violence ou des menaces de violence,

(v) is or has been a member of a *criminal organization* as defined in subsection 467.1(1) of the *Criminal Code*, or is or has been involved in, or contributes or has contributed to, the activities of such an organization,

(v) est ou a été membre d'une *organisation criminelle* au sens du paragraphe 467.1(1) du *Code criminel* ou participe ou contribue, ou a participé ou contribué, aux activités d'une telle organisation,

(vi) 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 its involvement in or contribution to — activities directed toward, or in support of, acts of violence or the threat of violence, or is or has been involved in, or contributes or has contributed to, the activities of such an organization,

(vi) est ou a été membre d'une organisation 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 des actes de violence ou des menaces de violence, ou participe ou contribue, ou a participé ou a contribué, aux activités d'une telle organisation,

**(vii) is or has been associated with an individual who**

**(vii) est ou a été associé à un individu qui, selon le cas :**

**(A) is known to be involved in or to contribute to — or in respect of whom there are reasonable grounds to suspect their**

**(A) est connu pour sa participation ou sa contribution, ou à l'égard duquel il y a des motifs raisonnables de soupçonner sa**

**involvement in or contribution to — activities referred to in subparagraphs (i) to (iii), or**

**participation ou sa contribution, à des activités visées aux sous-alinéas (i) à (iii),**

**(B)** is a member of an organization referred to in subparagraph (v) or (vi), or

**(B)** est membre d'une organisation visée aux sous-alinéas (v) ou (vi),

**(viii)** has conspired to commit

**(viii)** a comploté en vue de commettre :

**(A)** an offence under any of the provisions of the *Criminal Code* referred to in subparagraph (iii),

**(A)** une infraction à l'une des dispositions du *Code criminel* visées au sous-alinéa (iii),

**(B)** an offence referred to in subparagraph (iv), or

**(B)** une infraction visée au sous-alinéa (iv),

**(C)** an offence under any of sections 467.11 to 467.13 of the *Criminal Code*;

**(C)** une infraction prévue à l'un des articles 467.11 à 467.13 du *Code criminel*;

**(c) whether there are reasonable grounds to suspect that the applicant could be induced to commit an act — or to aid or abet any person to commit an act — that might constitute a risk to public health or public safety;**

**c) la question de savoir s'il y a des motifs raisonnables de soupçonner que le demandeur risque d'être incité à commettre un acte — ou à aider ou à encourager toute personne à commettre un acte — qui pourrait présenter un risque pour la santé ou la sécurité publiques;**

**(d)** whether there are reasonable grounds to believe that the applicant's activities, including their financial activities, pose a risk to the integrity of the control of the production

**d)** la question de savoir s'il y a des motifs raisonnables de croire que les activités du demandeur, notamment les activités financières, présentent un risque pour l'intégrité du contrôle de la

and distribution of cannabis under the Act;

production et de la distribution du cannabis sous le régime de la Loi;

(e) whether the applicant has had a security clearance suspended or cancelled;

e) la question de savoir si le demandeur a déjà été titulaire d'une habilitation de sécurité qui a été suspendue ou annulée;

(f) whether there are reasonable grounds to believe the applicant has, now or in the past, submitted false or misleading information, or false or falsified documents, to the Minister; and

f) la question de savoir s'il y a des motifs raisonnables de croire que le demandeur a fourni au ministre, à un moment quelconque, des renseignements faux ou trompeurs ou des documents faux ou falsifiés;

(g) whether an entity has refused to issue a security clearance to the applicant — or has suspended or cancelled one — and the reason for the refusal, suspension or cancellation.

g) la question de savoir si une entité a refusé de délivrer une habilitation de sécurité au demandeur ou a suspendu ou annulé son habilitation, ainsi que les motifs de la décision.

...

[...]

#### **Refusal to grant security clearance**

#### **Refus de délivrer l'habilitation**

**55 (1) If the Minister intends to refuse to grant a security clearance, the Minister must provide the applicant with a notice that sets out the reason for the proposed refusal and that specifies the period of time within which they may make written representations to the Minister. The period must start on the day on which the notice is provided and**

**55 (1) S'il a l'intention de refuser de délivrer l'habilitation de sécurité, le ministre en informe le demandeur par avis motivé qui indique le délai dans lequel ce dernier peut lui présenter par écrit ses observations. Le délai commence à courir à la date à laquelle l'avis est fourni et ne peut être inférieur à vingt jours.**

**must be not less than 20 days.**

**Notice of refusal**

**(2)** If the Minister refuses to grant the security clearance, the Minister must provide the applicant, and any affected holder of or applicant for a licence, with notice of the refusal in writing.

**Avis de refus**

**(2)** En cas de refus, le ministre en informe par avis écrit le demandeur ainsi que tout titulaire de licence ou demandeur de licence touché par cette décision.

[Bolded portions are the most relevant provisions for this judicial review]

[4] The Applicant is the Chief Executive Officer and Responsible Person in Charge of WFS Pharmagreen Inc [Pharmagreen]. For several years, he has held a Designated Person Production License authorizing him to be a licensed grower of medical marijuana for certain named individuals.

[5] Pharmagreen had applied to Health Canada for various licenses in relation to cannabis production and processing under the Act. As a result of those applications, the Applicant was required to apply for a security clearance.

[6] Eight months after the license application was filed and after changes in the regulatory scheme which had no material effect on this application, the Manager of Operations determined that it was more likely than not that the Applicant posed an unacceptable risk to public health and safety based on information contained in the RCMP's Law Enforcement Record Check [LERC]. The Manager recommended to the Director that the Applicant's security clearance request be denied.



[7] The Director wrote to the Applicant on February 19, 2019, advising of his intention to refuse to grant the security clearance on the basis of the LERC and providing 30 days' notice to submit written representations before a final decision was made.

[8] In this Notice of Intent letter (see s 55(1) of the Regulations), the Director having acknowledged that the Applicant had no criminal record, cited three occurrences against the Applicant:

- The Applicant, along with Subject A, was stopped in a vehicle by police in February 2011 and 1.5 lb of marijuana was found in the vehicle.
- In March 2011, the Applicant was stopped by police when driving a vehicle registered to Subject A. Subject A, sitting in the passenger seat, was not licensed to drive and said to police that he was residing at the Applicant's residence.
- On April 6, 2018, the RCMP intercepted a FedEx package sent by the Applicant to an individual in Alberta. The package contained 240 grams of marijuana.

[9] The LERC also disclosed that Subject A was reported to be a marijuana trafficker and an associate of the Outlaw Motorcycle Gang [OMG]. It also revealed that the addressee on the FedEx package was not a person for whom the Applicant was licensed to grow.

[10] The Applicant's response to the notice letter was to request the name of Subject A, and for detailed information that Subject A was a marijuana trafficker, that he was an associate to OMG members and that the Applicant knew about Subject A's background.

[11] This request was refused as this further information was not supplied to Health Canada by the RCMP due to the operation of the *Privacy Act*, RSC 1985, c P-21.

[12] On April 17, 2019, in response to the notice letter, the Applicant's counsel sent his submissions, included personal letters from the Applicant's friends/family, and made a further request for better information. This correspondence seemed to go astray and the Director advised that the security clearance was denied on the basis that no representations had been received.

[13] Upon re-submission of the representations, the Director undertook his review of the security clearance application.

[14] The matter went before the Interdepartmental Security Advisor Forum [ISAF] who recommended that the security clearance be denied because the Applicant posed an unacceptable risk to public health/safety including the risk of cannabis being diverted to an illicit market or activity. ISAF relied on the LERC information, particularly the Applicant's association with an individual reported to be a marijuana trafficker and an associate of an OMG member and that the Applicant had mailed 2.1 lbs of cannabis to an individual for whom he was not licensed to grow marijuana.

[15] The ISAF noted the Applicant did not contradict the above information but claimed that the mailing of cannabis was an innocent and honest mistake. The Applicant had also made the point that assuming Subject A was a Mr. Faulkner, he had never resided with the Applicant, nor was the Applicant aware of his criminal record or association with OMG members.

[16] The Applicant again requested further information that Health Canada reiterated it did not have.

[17] On October 28, 2019, the Director, on the basis that the Applicant posed an unacceptable risk to public health and safety, denied the security clearance request. The Director relied on the ISAF recommendations, the Applicant's submissions and the LERC. The reasons for decision cite the association with a reported marijuana trafficker, namely Subject A, and the mailing of cannabis to an individual for whom he was not licensed to grow.

[18] It is noteworthy that despite the attention focused by the Applicant in the judicial review on the matter of Subject A not living with him, this was not a grounds for refusal nor was the matter of Subject A's association with a member of the OMG.

[19] The issues in this judicial review were described in paragraph 1.

### III. Analysis

#### A. *Preliminary Issues*

[20] The parties have agreed that the style of cause should remove reference to Todd Cain.

[21] The more substantive preliminary issue is the admissibility of the affidavits of the Applicant and of his wife Leona Wojcik. The Applicant included them in his Record.

The Respondent objects on the grounds that they were not in the evidentiary record before the decision maker and that they do not fall into any of the recognized exceptions to the general rule that the evidentiary record on judicial review is restricted to that which was before the decision maker.

[22] As held in *Drew v Canada (Attorney General)*, 2018 FC 553 at para 14, the exceptions to the general rule in respect of judicial review include (1) where the evidence contains general background information that may help the Court understand the relevant issues; (2) when the information serves to demonstrate procedural defects that cannot be found in the decision maker's record; and (3) where the evidence reveals the complete absence of evidence available to the decision maker when it made its findings. (Declaration proceedings may require different considerations.)

[23] The affidavits contain materials that supplement the Record, go to the merits of the Decision and advance argument and submissions.

[24] The Applicant's affidavit raises the assertion that no one lived in the Applicant's house except his immediate family, that he never heard Mr. Faulkner tell the police that he lived in the Applicant's house and that the mailing of cannabis to Alberta was an innocent mistake and only a technical breach. The affidavit also makes legal argument, refers to the breach of s 7 of the *Canadian Charter of Rights and Freedoms* and seeks further and better disclosure.

[25] Leona Wojcik's affidavit provides *ex post facto* evidence as to the merits of the Decision.

[26] With the exception of documents submitted to the Director in the security clearance application (which form part of the Tribunal Record and are therefore redundant in the affidavit), the affidavits are improper. Both affidavits address the issue of Mr. Faulkner, a matter on which the Applicant made submissions to the Director. The explanation for the mailing of cannabis had likewise been put to the Director.

[27] The evidence included with the affidavits was or could have been put to the decision maker. The portions of the affidavit dealing with legal argument are improper content for an affidavit (Rule 81) and are the same as in the Applicant's response to the Notice of Intent.

[28] The two affidavits are improper, redundant and do not fall within the exception to the general rule on evidence in judicial review proceedings. Therefore, they are inadmissible and are struck from the Record. For purposes of this Decision, they have been disregarded.

#### B. *Standard of Review*

[29] It is now accepted that the standard of review in a judicial review application for issues of procedural fairness is correctness (see *Henri v Canada (Attorney General)*, 2016 FCA 38 at para 16).

[30] On the issue of the merits, as held in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, the presumptive standard is reasonableness. There is nothing in this case or the legislative scheme that rebuts this presumed standard. The decision must be justified in relation to the facts and law. Given the discretionary nature of the Decision, of the subject matter

itself, and the expertise in this area, the Court ought not to unduly interfere in the decision maker's function.

C. *Procedural Fairness*

[31] The Applicant argues that in respect of procedural fairness, he was not given sufficient details regarding the allegations supporting a conclusion that Subject A lived with the Applicant, that Subject A was a marijuana trafficker or that Subject A was associated with OMG. As a result, the Applicant did not have proper notice and opportunity to respond.

[32] The Applicant had been pressing for the name of Subject A but he later determined who Subject A was and that complaint of non-disclosure was withdrawn.

[33] The allegations in respect of Subject A were contained in the redacted version of the LERC. The LERC contains a curious disclaimer that "the RCMP and police agents involved in these occurrences cannot confirm the accuracy of the identity or information contained in these reports." That disclaimer could become relevant in other cases but not on the facts here.

[34] The Applicant objected to the redactions as being potentially relevant; however, those redactions were made by the RCMP and neither Health Canada nor the Director had any better information for the Decision than the redacted version. Whatever the deficiencies, that was part of the record before the Director.

[35] Justice Strickland in *Lum v Canada (Attorney General)*, 2020 FC 797 [*Lum*] – the only decision to date on security clearance in respect of cannabis licensees - performed a thorough analysis of the scheme for regulating these clearances which I adopt here. *Lum* confirmed that security clearance is a privilege, not a right. This conclusion impacts the nature and level of procedural fairness owed.

[36] As held in *Henri v Canada (Attorney General)*, 2014 FC 1141 [*Henri FC*], the impact of denial of a security clearance on an individual's employment or personal life does not trump the need for national security. The level of fairness owed is held to be minimal (*Varn v Canada (Attorney General)*, 2017 FC 1132; *Singh-Kailey v Canada (Minister of Transport)*, 2016 FC 52). Section 67(1) of the Act provides significant discretion in the granting of a security clearance that buttresses the conclusion that in these cases the level of procedural fairness is low.

[37] The Act and Regulations set out the risk factors to be considered, and the process to be followed in respect of the refusal of a clearance. Section 55(1) of the Regulations requires that an applicant be afforded notice of reasons for the proposed refusal and offered an opportunity to provide a written response.

[38] I conclude that the Applicant received that to which he was entitled. He had notice of the intention to refuse clearance; he was informed of the concerns upon which the refusal would be based; he had time to prepare extensive responses including legal argument; he submitted them; and they were considered before a final decision was rendered.

[39] While the Applicant argues that the Decision was unreasonable, that principle does not impact the issue of procedural fairness. He had the same information that Health Canada had (even if allegedly insufficient) and had an opportunity to address the concerns.

[40] I can find no breach of procedural fairness in these circumstances. Cases relied on by the Applicant involving the National Parole Board are distinguishable, particularly on the issue of the level of procedural fairness, as those are decisions which affect personal physical freedom.

D. *Reasonableness*

[41] This case can be distilled to the question of whether the basis for the Director's decision was reasonable. The issue of Subject A's residency did not form a basis for the Decision. The Decision was based on the Applicant's actions in shipping marijuana to Alberta and his association with a person who was reported to be both a marijuana trafficker and associated with a motorcycle gang.

[42] The question is whether that was a reasonable basis for the Director to believe, on a balance of probabilities, that the Applicant may pose an unacceptable risk to public health or safety, including the risk of cannabis being diverted to an illicit market or activity.

[43] There was evidence to support this conclusion. Without making a finding on Subject A's actual drug trafficking, the Director noted that the reported trafficking contained in the LERC raised a reasonable suspicion.



[44] Pursuant to s 53(2) of the Regulations, the Director only has to conclude that there are reasonable grounds to suspect that the Applicant was associated with an individual about whom there are grounds to suspect involvement in legally prohibited activities.

[45] The Director's reliance on a LERC, whatever its disclaimer, is supported as a legitimate source of information upon which to rely (see *Lum, Henri FC*).

[46] The LERC formed a reasonable basis for the type of decision that the Director was called upon to make. The LERC also provided evidence regarding the cannabis shipment to the Alberta address which was at the very minimum a regulatory breach. While the Applicant claimed it was an honest mistake, this shipment alongside the other occurrences mentioned in the LERC formed a rational, transparent basis for a decision that a refusal was within the reasonable alternatives available to the Director.

[47] The Applicant's reliance on *Britz v Canada (Attorney General)*, 2016 FC 1286 [*Britz*], is misplaced. In *Britz*, highly relevant evidence was ignored and otherwise not dealt with. In the present case, there is no boilerplate language, and there was a factual basis and a rational analysis, albeit brief.

[48] The determination which had to be made was forward-looking and risk-based, which involved considering whether the Applicant may be prone to commit or assist third parties in committing breaches of the Act and Regulations.

[49] Given the nature of the Decision, the Court must give the Director reasonable latitude in his acceptance or rejection of risk.

[50] In these circumstances, I conclude that the Decision is reasonable.

IV. Conclusion

[51] This judicial review will be dismissed with costs.

**JUDGMENT in T-1973-19**

**THIS COURT'S JUDGMENT is that:**

1. the application for judicial review is dismissed with costs; and
2. the style of cause is amended to delete the name Todd Cain.

"Michael L. Phelan"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1973-19

**STYLE OF CAUSE:** PETER WOJCIK v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE AT VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** SEPTEMBER 23, 2020

**JUDGMENT AND REASONS:** PHELAN J.

**DATED:** OCTOBER 8, 2020

**APPEARANCES:**

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