

Federal Court



Cour fédérale

Date: 20211012

Docket: T-147-21

Citation: 2021 FC 1062

Ottawa, Ontario, October 12, 2021

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

EVERETT RODGER STUCKLESS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to section 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision communicated on December 14, 2020 [the Decision] by Todd Cain,, in his capacity as Director General [DG], Controlled Substances and Cannabis Branch [CSCB], Health Canada, refusing to grant a security clearance to the Applicant under section 53 of the *Cannabis Regulations*, SOR/2018-144 [Regulations].

I. Preliminary Matters

[2] Before turning to the merits of the application, three preliminary matters need to be addressed.

[3] First, beyond requesting relief in the nature of *certiorari* to quash the Decision, the Applicant initially sought an order compelling Mr. Cain to comply with the duty to act fairly, and s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, by providing the Applicant the opportunity to have legal representation, as well as an independent and statutorily appointed decision maker. These heads of relief were abandoned at the start of the hearing.

[4] Second, the Respondent objected to the inclusion of Todd Cain as a respondent in the style of cause. As properly conceded by the Applicant, Mr. Cain is not a proper party to this proceeding in light of Rule 303(1) of the *Federal Courts Rules*, SOR/98-106. The style of cause shall accordingly be amended with immediate effect to remove Mr. Cain as a respondent.

[5] I should add, for the sake of clarity, that the Decision was actually rendered by Joanne Garrah, Acting Director General [ADG] of the CSCB, acting on behalf of the Minister of Health [Minister].

[6] The third matter relates to the admissibility of the Applicant's affidavit filed in support of the application. The Respondent submitted in his memorandum of fact and law that the affidavit

is improper because it reflects facts that were not before the ADG when she made the Decision. The affidavit also contains redundant paraphrasing of correspondence in the record.

[7] At the start of the hearing, the parties consented to an order striking out paragraphs 17, and 26 to 31 of the Applicant's affidavit. After hearing further submissions from counsel, I also struck paragraphs 6, 8, 9, 10, 12 and 13 of the affidavit on the ground that they contained new or superfluous evidence. The balance of the paragraphs were allowed to stand as they fell within the exception of general background information, material required to establish the lack of evidence before ADG, or evidence that could be relevant to the Applicant's procedural fairness allegations.

II. Cannabis Regulation Scheme

[8] In order to place this matter in proper context, it is useful to briefly outline the cannabis regulation scheme.

[9] The purpose of the *Cannabis Act*, SC 2018, c 16 is set out in section 7. It includes the protection of public health and public safety, provides for the licit production of cannabis to reduce illicit activities in relation to cannabis and deters illicit activities in relation to cannabis through appropriate sanctions and enforcement measures.

[10] Subsection 67(1) of the *Cannabis Act* also provides that, subject to the Regulations, the Minister "may" grant or refuse to grant a security clearance or suspend or cancel a security clearance.

[11] There are many requirements in order to receive a producer license under the *Cannabis Act*. One of these requirements exists under section 38 of the Regulations, which requires that a potential license holder retain a “head of security.” This leads to a subsequent requirement under paragraph 50(f) of the Regulations which requires the head of security to receive a security clearance, as well as paragraph 50(b) which requires the directors and officers of a corporation with a producer’s license to receive security clearance.

[12] According to section 52 of the Regulations, the Minister may conduct criminal record checks, and checks of relevant files of law enforcement agencies, including intelligence collected for law enforcement purposes.

[13] Before granting a security clearance, the Minister must 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. The Minister may also consider a series of factors to establish the level of risk posed by the applicant, as set out in subsection 53(2) of the Regulations.

[14] The refusal or cancellation of a security clearance in respect of a licence is ground for the Minister to refuse to issue, renew or amend a licence under paragraph 62(7)(f) of the *Cannabis Act*.

III. Background Facts

A. *Application for Security Clearance*

[15] The Applicant is the director and one of the shareholders of Nova Grow Ltd. [Nova Grow], a Canadian cannabis company.

[16] In an effort to become the head of security of Nova Grow, the Applicant submitted an application for an individual security clearance and a licence to produce cannabis to the Cannabis Legalization and Regulation Branch [CLRB] of Health Canada on October 7, 2016. The Applicant subsequently provided his fingerprints and a criminal background history.

[17] As time went on, the Applicant sent several emails inquiring about the status of his security clearance application, making his concerns known about the delay in processing his application.

[18] On January 1, 2019, the Applicant submitted a Security Clearance–Consent and Certification Form in connection to his initial application for a producer’s licence, and accompanying security clearance application.

[19] Based on the biographical information provided, the Security Intelligence Background Section [SIBS] of the Royal Canadian Mounted Police [RCMP] conducted a search of accessible law enforcement databases to determine if the Applicant had in the past engaged in criminal activities, or associated with individuals involved in such activities.

[20] On February 17, 2020, SIBS provided a Law Enforcement Record Check report [LERC] to the ADG. The LERC set out police information describing various incidents involving the Applicant from 2017 through 2018, as well as open source information.

B. *Review of Police Information and Recommendation to the DG*

[21] In the event that potential adverse information relevant to issuance of security clearance is discovered, the file must first be reviewed by the Interdepartmental Security Advisory Forum (ISAF) for Health Canada, who is tasked with formulating a recommendation to the DG.

[22] On or about April 7, 2020, the ISAF recommended that security clearance be refused to the Applicant based on the information available. This included the information contained in the LERC, which recounted recent and direct involvement by the Applicant in operating an illegal cannabis dispensary, a high number of break and enter incidents that took place at the dispensary, as well as perceived threats of violence.

[23] The ISAF concluded that it is more likely than not that the Applicant posed an unacceptable risk to public health or public safety, including the risk of cannabis being diverted to an illicit market or activity.

C. *Notice of Intention to Refuse Security Clearance*

[24] On May 6, 2020, the ADG sent a notice of intention [Notice] to the Applicant expressing her intention to refuse to grant the security clearance. The Notice was prepared pursuant to

subsection 55 (1) of the Regulations, which specifies that the Minister must give notice of refusal in writing to an applicant when the Minister intends not to grant a security clearance.

[25] The Notice set out in detail the information revealed in the LERC. Although the information is lengthy, I think it is necessary that it be reproduced in full to understand the case the Applicant was required to meet:

Date	Offence	Disposition/Sentence
2018-11-30	Possession of a Scheduled Substance for the Purpose of Trafficking - Sec. 5(2) CDSA (2 charges) Traffic in a Scheduled Substance - Sec. 5(1) CDSA (2 charges)	Withdrawn

- On February 1, 2017, the Kelowna RCMP investigated a dispute over a loan of \$31,000 between you (loaner) and an ex-business partner (complainant - Subject A). The officer concluded the file as a civil matter.
- Between March and May 2017, the Codiac RCMP attended four calls of harassment and/ or civil matters involving you and your ex-business partner (Subject B) :
 - On March 8, 2017, you reported Subject B cheating you over money and rent for your common business “Nova Budds”. Subject B produced to police a year old business licence and said that you threatened him with violence and had claimed that you were friends with the Nova Scotia Hell’s Angels; and he stopped purchasing cannabis from you as you could not produce a licence to grow/sell. Furthermore, you told him to sell cannabis to anyone, regardless of a prescription provided or not.

RCMP could not confirm or deny a connection between you and the Nova Scotia Hell’s Angels, as stated by Subject B to police.

- On March 16, 2017, a harassment complaint by Subject B over the business about you.
- On April 28, 2017, a dispute over \$40,000 of cannabis and cannabis products from Canadian Vape. You reported you fronted the products to Subject B whom you thought was not living up to his end of the bargain.
- On May 5, 2017, a complaint of harassment over \$20,000 reported by you about Subject B.

Police determined that all four above incidents were civil matters.

- On May 22, 2017, Halifax Regional Police (HRP) responded to an alarm at Jazz Vape and Nova Budds in Halifax, NS and found a break and enter and damage to the alarm panel. Police noted inappropriate storage of medicinal cannabis and cannabis products, lack of security safeguards as well as your unwillingness to provide a security video of the incident.
- Between June and December 2017, the Codiac RCMP attended four break and enters at Nova Budds, a store owned by you, at 65 Mapleton Road, Moncton:
 - On June 19, 2017, \$200 worth of vaping merchandise was stolen.
 - On August 13, 2017, although entry was gained, nothing appeared stolen and police concluded the file due to a lack of investigative leads and your uncooperativeness.
 - On November 4, 2017, \$3,405 worth of various edible cannabis products were stolen.
 - On December 3, 2017, \$3,000 worth of cannabis items such as edibles, oils and other cannabis products were stolen.

The first three of the above investigations were concluded due to the lack of investigative leads and the last investigation was concluded because you were uncooperative.

- On October 31, 2017, Codiac RCMP Crime Reduction Unit began an investigation into local cannabis dispensaries, for offences of Trafficking and Possession for the Purpose of Trafficking cannabis. They hand-delivered a Notice of Police Enforcement to Nova Budds located at 65 Mapleton Road in Moncton, NB. Heath Canada had confirmed by letter to police that you, your now ex-business partner (Subject B) as well as 65 Mapleton Road in Moncton, NB had no current authorization under the Marihuana Medical Access Regulations or the Access to Cannabis for Medical Purposes Regulations (ACMPR).
- On December 4, 2017, HRP responded to a break and enter at Regal Confections/Canadian Vape warehouse, located at 311 Rocky Lake Road, Bedford, NS. This location is owned by you and your spouse. Between \$30,000 to \$50,000 worth of cannabis and vape products were stolen. Two weeks later, December 14, 2017, police responded to an uttering threats complaint in connection to the break and enter and the complainants told police that you threatened them as you believed they had broken into your warehouse. Police determined there was insufficient evidence to either charge you for threats or the complainants for the break and enter.
- On January 5, 2018, you contacted the HRP to report a break and enter at Regal Confections/Canadian Vape Inc. located at 311 Rocky Lake, Bedford, NS. When you called the police, you vented your frustrations and said that if police didn't do anything, you would. The call taker advised you that your statement can be perceived as a threat and you stated that "its all the police's fault this happened again". HRP responded and your spouse, co-owner of the business, explained to the officers that her husband's frustrations were as a

result of a series of break and enters at the location. Officers later concluded the file due to insufficient evidence to further the investigation.

- On February 14, 2018, police executed a search warrant at Nova Budds where two employees were arrested and charged. Police obtained information that you were the owner and were also the person responsible for acquisition, purchases and sales of products. Police seized: \$45,424 worth of edibles, paraphernalia, dried cannabis and oil pre-packaged for sale; \$649.00; computers, transaction slips, packaging material scales, invoices and ledgers. After ledgers' review, it was noted that between February 10 and 13, 2018, the dispensary sold \$20,427.08 of cannabis products. Records indicated a total of 2330 memberships; 202 with a proper doctor's prescription and 2128 without. Police determined that 8.6% of the memberships had the proper documentation to purchase cannabis under the ACMPR and that Nova Budds did not (sic) follow regulations in 91.4% of their sales. On April 3, 2018, you were arrested and charged with Possession for the Purpose of Trafficking and on November 30, 2018, the Crown withdrew the charges.
- On July 22, 2018, HRP responded to a break and enter at Jazz Vape/Nova Budds at 740 Bedford Hwy, Halifax, NS. The applicant provided police with video footage and police noted that vandalism was done to the building; however, no entry was gained and nothing was stolen.
- On November 23, 2018, HRP responded to a dispute between you and two of your employees regarding hold back pay and theft of items from Nova Budds. Both sides reported conflicting accounts of the events and you told police you were not the owner of Nova Budds and only the owner of the building. The departing employees told police that you were holding back their pay and you were the owner of the dispensary.

In order to provide additional information in regards to you, the RCMP has conducted some Open Source (OS) searches over the internet. The paragraphs below contain the findings that were uncovered by the RCMP.

- On February 13, 2018, Nova Scotia Utility and Review Board dismissed your application of appeal for a business permit for Jazz Vape and Nova Budds at 740 Bedford Highway, Halifax, NS. One of the Board's conclusions was: "The business model of Nova Budds as described by Mr. Stuckless is not lawful under the ACMPR".

<https://nsuarb.novascotia.ca/sites/default/files/m08245%20Decision.pdf>

- On June 20, 2019, a search of the Nova Scotia Registry of Joint Stock Companies shows you as Director, CEO & Recognized Agent of Nova Grow Ltd. (Registry 3301520) active since September 19, 2016.

[26] A typographical error was noted in the letter to the Applicant dated May 6, 2020. Bullet point 6 listed the date of the occurrence as December 4, 2017, however the date should have been December 3, 2017.

[27] The ADG stated in the Notice that she took into account the evidence in the Applicant's file and weighed the relevant material with the factors set out under subsection 53(2) of the Regulations. Based on all of the relevant information provided to her, the ADG was of the opinion that the Applicant posed an unacceptable risk to public health or public safety, including the risk of cannabis being diverted to an illicit market or activity.

[28] The most relevant factors considered by the ADG were subparagraphs 53(2)(b)(i) and (iv), clause 53(2)(b)(vii)(B) and paragraph 53(2)(d) of the Regulations, namely:

- whether it is known, or there are reasonable grounds to suspect, that the Applicant 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 Cannabis Act —other than paragraphs 8(1)(a) to (e) — or Subdivision E of Division 2 of Part 1 of the Cannabis Act;
- whether it is known, or there are reasonable grounds to suspect, that the Applicant is or has been involved in, or contributes or has contributed to, an offence involving an act of violence or the threat of violence;

- whether it is known, or there are reasonable grounds to suspect, that the Applicant is or has been associated with an individual who is a member of an organization referred to in subparagraph 53(2)(b)(v) of the Regulations; and
- whether there are reasonable grounds to believe that the Applicant's activities, including his financial activities, pose a risk to the integrity of the control of the production and distribution of cannabis under the *Cannabis Act*.

[29] The Notice concluded as follows:

In my view, given your recent and direct involvement operating an illegal cannabis dispensary, you are in a situation contemplated by subparagraph 53(2)(b)(i) and paragraph 53(2)(d) paragraph of the CR.

Further, given your perceived threats of violence against several individuals, you are in a situation contemplated by subparagraph 53(2)(b)(iv) of the CR.

Lastly, given that you claimed to be associated with the Nova Scotia Hell's Angels, you are in a situation contemplated by clause 53(2)(b)(vii)(B) of the CR.

Pursuant to subsection 55(1) of the CR, you are entitled to submit written representations in response to this notice of intent to refuse to grant you a security clearance. Written representations should be provided to Health Canada within thirty (30) days of the date of this letter. A final determination on your security clearance application will not be made until the written representations are received and considered or thirty (30) days after this letter, whichever comes first.

D. *Applicant's Response to the Notice*

[30] The Applicant responded to the Notice on May 15, 2020. He took issue with the allegation that he had operated an illegal cannabis dispensary, writing as follows:

I approached the RCMP at the Moncton, NB detachment and spoke with a Commanding Officer about purchasing a building that currently housed a Cannabis Dispensary [. . .] I was told it was up to me however as far as the RCMP was concerned there is no problem and none for the foreseeable future. I proceeded with the purchase of building and had no problems with RCMP or Municipal until February 14th 2018 [...] The place was raided, by the same (Moncton) RCMP detachment. I contacted the RCMP Moncton, NB to ask what I should do [...] I explained at the same time, that I was not an owner of the dispensary nor wish to be however I am in the process of purchasing the building 65 Mapleton Rd., and I wanted no trouble. [...] I showed up at the Moncton, NB Courthouse with the actual Pot Shop Owners and all charges were dropped against me, but three months later I received a second notice to appear which I did and after speaking with the Court the same Crown as the first time again dropped all charges. [...]

February 14th 2018, I am aware and certainly acknowledge that there was a raid on a dispensary located at 65 Mapleton Rd., however I was not the owner, nor was I present during that raid or anywhere near the dispensary, in fact I was not arrested for this until four or five months later, which was a shock and huge surprise to my Family and I [. . .] All charges were dropped because I showed up at the Court House with the actual dispensary owner.

As for the amounts and packing slips, etc that as (*sic*) zero to do with me, unless it was for Nova Budd's or Jazz Vape items which are not illegal and does not include Cannabis.

At that time I was in the process of purchasing 65 Mapleton Rd., and it should also be noted that I did forced (*sic*) the dispensary to close once I became the owner.

In fact, I forced the dispensary owner out eventually all together however it did take a few months because of his insistence that the lease allowed him access, my need to obtain legal advise (*sic*) and his insistence I that had no right to kick him out.

[31] The Applicant then proceeded to deny claims of harassment reported by the Kelowna RCMP against an individual who owed him money, and suggestions that he sold cannabis to the individual without a licence. He acknowledged that there were several break-ins in the building located at 65 Mapleton Road, but denied that anything illegal transpired in the smoke and vape shop he owned at that location.

[32] The Applicant disputed the allegation that the medical cannabis found at the Mapleton building was improperly stored. As far as the Applicant was aware “the Cannabis stolen was from the Manager and employees, they were 100% registered legal medical Cannabis patients [...]”

[33] As for the break-in and robbery on December 3, 2017 at Regal Confections/Canadian Vape warehouse (which the Applicant owned with his spouse), the Applicant confirmed that it occurred and that the amount stolen actually totalled \$80,000. The Applicant denied the allegation that he harassed the person who had broken in, who he described as a former employee of the warehouse.

[34] The Applicant acknowledged that break-ins took place between June and December 2017 at 65 Mapleton Road, but denied that illegal products were stolen. He confirmed the January 5, 2018 break-in and admitted stating to the police that he would do something about the recurrent break-ins if the police would not, but only out of frustration. The Applicant declared having little to no knowledge about the Hell’s Angels. The Applicant also denied having any criminal convictions, associations with criminal organizations, and illegal history.

E. *Request for Additional Information*

[35] In a letter dated May 27, 2020, the ISAF requested that a letter be sent to the Applicant in order to request additional information.

[36] The ADG subsequently sent a letter dated July 21, 2020 to the Applicant under section 67 of the *Cannabis Act* requesting that he provide additional information as follows:

A copy of the purchase agreement for 65 Mapleton Road, Moncton, NB, that clearly indicates the day the Applicant purchased the property;

Confirmation of what businesses operated at this address prior to purchase, whether the Applicant had any role in the businesses, and provide his understanding of what the businesses did;

Confirmation of the businesses that operated at 65 Mapleton Road after the Applicant purchased the property and describe his role in the businesses;

A copy of the judgment for the payment to which the Applicant referred in relation to a May 2017 occurrence and confirmation that the occurrence discussed in the paragraph referring to that judgment is the one dated March 8, 2017.

[37] On July 28, 2020, the Applicant replied to the ADG's request. The Applicant stated that he operated a vape shop at 65 Mapleton Road from November 2016 until May 2018. There was a medical marijuana shop located at this same address and it was operated by several different individuals at different times, between 2016 and 2018, until he and his spouse purchased the property. The Applicant insisted that he was not involved in its operation, and forced the closure of this shop once he gained control of the location. Since October 2018, there is a vape and smoke shop operating at this location. Attached to the Applicant's email was a certificate of

execution, and a copy of a default judgment order that was issued by the Small Claims Court of New Brunswick.

F. *Updated Recommendation and Further Inquiry by the ADG*

[38] On August 7, 2020, the ISAF provided an updated recommendation based on the information obtained from the LERC report, the May 17, 2020 written representations, and the July 28, 2020 representations provided by the Applicant. The ISAF recommended a refusal of security clearance to the Applicant for the following reasons:

The applicant's representation and response to the latest request for more information did not sufficiently: explain the role with respect to Nova Budds, nor did it provide evidence to counter the police information about the role he played at Nova Budds, and the cannabis-related activities with respect to Nova Budds.

The applicant did not provide a copy of the purchase agreement for 65 Mapleton Road, despite being asked to do so, and therefore the Forum is not able to conclude when the applicant became the owner of building.

Based on the information available, the Forum no longer believed there to be an association to organized crime.

[39] On October 14, 2020, the SIBS provided answers to questions posed by the ADG following receipt of ISAF's recommendation. The ADG inquired in particular whether there was a separate dispensary at 65 Mapleton Road and whether the activities were those of Nova Budds. The SIBS responded that the activities were those of Nova Budds and that there was no mention of another dispensary at the address.

[40] On October 15, 2020, the Applicant received an email from the CSCB asking him if the documents attached to his July 28, 2020 email were the documents he intended to submit. On the same day, the Applicant responded that he had reviewed the documents and had no reason to believe they should not be filed, or that they contained false information. He also suggested that he was willing to send further follow-up reference material.

[41] On October 16, 2020, the Applicant sent a second email stating that: “according to our Legal we need to take exception to questions that have no relevance to the issuance of a security clearance.” He also added that questions about the closing date or the purchase date of 65 Mapleton Road or what activities occurred there prior to his owning it were not relevant.

[42] On October 30, 2020, the RCMP provided a slightly revised version of the LERC in respect of the Applicant to Health Canada, removing the references to the percentage of “memberships with proper documentation to purchase marihuana” and that “Nova Budds did not follow regulations in 91.4% of their sales.”

[43] On December 14, 2020, the ADG sent a letter to the Applicant announcing the refusal to grant him a security clearance. That refusal is the Decision subject to judicial review.

IV. ADG’s Decision

[44] In the Decision, the ADG acknowledged receipt of the representations made by the Applicant and then set out the facts drawn from the security checks conducted.

[45] The ADG found that the Applicant posed an unacceptable risk to public health and public safety, including the risk of cannabis being diverted to an illicit market activity.

[46] Pertinent extracts of the Decision are set out below:

In your representation, regarding the statement that your former business partner made to police that you claimed to be friends with the Nova Scotia Hell's Angels, you stated that you have little to no knowledge of the Hell's Angels. I note that the RCMP could not confirm or deny a connection between you and the Nova Scotia Hell's Angels as stated by Subject B to police. I no longer consider that you are in a situation contemplated by clause 53(2)(b)(vii)(B) of the CR.

In your representation, you acknowledged multiple break and enters. During one occasion when you called the police after a break and enter (the January 5, 2018 occurrence), you would have said that if police didn't do anything, you would. In your representation you acknowledged making a call and stated that you were very frustrated and upset and informed the police that if they were not going to do anything about the situation that you would and informed them that you would call the Justice Minister that day. I also note that the March 8 and December 3, 2017 occurrences refer to complaints that you made threats. I note your representations disputing the statements made by Subject B. You also deny blackmailing or threatening an individual with physical harm in relation to the December 3, 2017 occurrence. I no longer consider that you are in a situation contemplated by subparagraph 53(2)(b)(iv) of the CR.

I have considered your representations in relation to the break in on December 3, 2017 at

Regal Confections/Canadian Vape warehouse at 311 Rocky Lake Rd. You acknowledge the break in and state that about \$80,000 worth of cannabis smoke products were stolen, but not cannabis. However, your claim that no cannabis was stolen contradicts the police information that marijuana was stolen. You did not provide sufficient evidence that the police report for the occurrence was erroneous and I find the information in the police report reliable.

I have considered your representations regarding your role with respect to Nova Budds and the occurrences relating to cannabis at 65 Mapleton Rd. You acknowledge that you were the owner of

Nova Budds. You represent that you operated a vape and smoke shop for 65 Mapleton Rd. from November 2016 until May 2018. You confirm that a dispensary was operated at that location during that period. However, you deny any involvement in the cannabis-related activities that took place at 65 Mapleton Rd. You state in your representation that the dispensary at 65 Mapleton Rd. was separate from Nova Budds and that the charges against you relating to the February 14, 2018 occurrence were dropped because you would have showed up at the Court House with the actual dispensary owner. However, you did not provide evidence in support of those statements and of your denial.

I have also considered your representations about the ownership of 65 Mapleton Rd., including a representation that you were not the owner of 65 Mapleton Rd. at the time of the February 14, 2018 occurrence but purchased it later that year. You provided a document in response to my request to provide the purchase agreement. The document that you provided does not seem to be a purchase agreement and does not refer to 65 Mapleton Rd. or to you or a business. It does not substantiate your claim that you were not the owner of 65 Mapleton Rd. on February 14, 2018. As mentioned above, the police had information that you were the owner of Nova Budds on February 14, 2018, when a search warrant was executed at Nova Budds. I have obtained confirmation from the RCMP that the February 14, 2018 occurrence took place at 65 Mapleton Rd., as indicated in your representation. Although the charges against you relating to the February 14, 2018 occurrence were withdrawn, it remains that according to the checks conducted in law enforcement records, the execution of the search warrant at Nova Budds revealed unauthorized cannabis-related activities. Although you represent that you did not own 65 Mapleton Rd. at the time of the occurrence, this claim is not substantiated and in any event this claim does not contradict the police information that you were the owner of Nova Budds and the information about the February 14, 2018, occurrence. You did not provide sufficient evidence that the police report for the occurrence was erroneous and I find the information in the police report reliable.

I have also considered your representation regarding the occurrences relating to Subject B, whom according to your representation would be a Patrick Jeannot. You referred to a judgment against the individual whom you believed to be Subject B and indicated that such judgment would not have been entered if the compensation sought had been for illegal cannabis and criminal activities. I asked you to provide a copy of that judgment and clarify if your representation related to the March 8, 2017

occurrence rather than the May 17, 2017 occurrence. Your response did not clarify to which occurrence you were referring and included a copy of a judgment by default that does not include any mention of the facts at issue. I find that your response does not substantiate your claim that you were not involved in a dispute relating to cannabis with Subject B. However, I am not relying, in my decision, on the information that your dispute with this individual related to cannabis.

In my view, given the information that the search warrant executed on February 14, 2018 at Nova Budds revealed unauthorized cannabis-related activities and the information that you were the owner of Nova Budds, as well as the fact that cannabis products were stolen from a warehouse owned by you, there are reasonable grounds to suspect that you are or have been involved in, or contribute or have contributed to, activities referred to in subparagraph 53(2)(b)(i) of the CR. The unauthorized sale and possession for sale of cannabis is illegal under the CA and was illegal under the Controlled Drugs and Substances Act. Furthermore, given that the police report identified you as the owner of Nova Budds, a dispensary which conducted unauthorized cannabis-related activities, I believe that you are in a situation contemplated by paragraph 53(2)(d) of the CR. Although the charges against you related to the February 14, 2018 incident were withdrawn, I note that your representations regarding the reason for the withdrawal are unsubstantiated and that they do not agree with the information in the police report about the ownership of the Nova Budds dispensary.

As explained above, the information revealed by the checks provide reasonable grounds to suspect that you engaged in or contributed to unauthorized cannabis-related activities. The relevant occurrences are recent. They are also serious, as they include involvement in or contribution to the activities of a cannabis dispensary—which poses a risk to the integrity of the legal framework for the distribution of cannabis. If granted a security clearance, I am concerned that you may engage in conduct similar to that revealed by the checks or in other conduct that would pose a risk to public health or public safety. Your representations have not alleviated my concerns and I believe that you pose an unacceptable risk to public health or public safety, including the risk of cannabis being diverted to an illicit market or activity. I refuse to grant you a security clearance.

V. Issues

[47] The arguments raised by the Applicant can neatly be broken down into two issues:

- A. Was the ADG decision procedurally fair?
- B. Was the ADG's decision reasonable?

VI. Standard of Review

[48] There is no dispute that the standard of review for questions of procedural fairness is correctness. On the issue of the merits, as was held in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov], 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.

[49] In this case, it should be borne in mind that pursuant to subsection 67(1) of the *Cannabis Act*, the Minister has a large discretion when it comes to the decision of granting or refusing a security clearance. Given the discretionary nature of the Decision, the subject matter itself, and the expertise of the decision maker in this area, the Court ought not unduly interfere in its function: *Wojcik v. Canada (Attorney General)*, 2020 FC 958 [Wojcik], at par. 30.

VII. Analysis

A. *Procedural Fairness*

(1) Content of the Duty of Fairness

[50] The Applicant submits that the ADG owed him a duty of care because the Decision to deny him a security clearance had a direct impact on Nova Budds' entitlement to sell cannabis, and therefore of his individual right, privilege and interest. I agree. In *Lum v. Canada (Attorney General)* 2020 FC 797 [*Lum*], Justice Cecily Strickland concluded that the Director General had a duty of procedural fairness towards applicants for a security clearance under the *Act* and Regulations. A similar finding was made by Justice Michael Phelan in *Wojcik*. I see no reason to depart from these previous holdings.

[51] The next step in the procedural fairness analysis is to determine the content of the duty of fairness owed to the Applicant. On this issue, the Applicant invokes the factors established in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] SCJ No. 39 [*Baker*], to assess the level of duty owed in the circumstances. These include: (a) the nature of the decision being made and the process followed in making it; (b) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (c) the importance of the decision to the individual(s) affected; (d) the legitimate expectations of the person challenging the decision; and (e) the choices of procedure made by the agency itself.

[52] The Applicant concedes that the findings in *Lum* and *Wojcik* suggest a low procedural fairness entitlement with respect to security clearance decisions by the Director General.

Notwithstanding, he submits that the context of this particular case yields a mid-to-high level of procedural entitlement because of the importance of the decision to him and the choices of procedures made by the ADG.

[53] The Applicant argues that he and his wife have invested more than \$2 million in Nova Grow and have been engaged in this process for approximately five (5) years. Therefore, the Decision has had a significant impact on every aspect of their lives. The Applicant seeks to draw a distinction with the facts in *Henri v Canada (Attorney General)*, 2014 FC 114 [*Henri*], noting that the importance of the Decision to the Applicant goes well beyond simply losing one's employment. On the one hand, given the substantial investments made in the business, the Decision will result in years of monetary loss to the Applicant. On the other hand, an individual who has lost an employment opportunity, as was the case in *Henri*, can always apply to work elsewhere.

[54] The Applicant further contends the fact that the *Cannabis Act* and Regulations do not allow appeals or requests invites a higher threshold of procedural fairness when combined with the importance of the decision. I disagree.

[55] First, there was no evidence before the ADG to support the Applicant's position. Second, the Applicant cites no case law in support of his position. In fact, the case law of this Court suggests otherwise.

[56] In *Lum*, the applicant's company had purchased a property for the purpose of carrying out cannabis production for \$2.9 million and that the company subsequently invested an additional \$1.1 million in the project. Justice Strickland nevertheless concluded, citing *Henri* with approval, that the duty of fairness was on the lower end of the spectrum and that the procedural safeguards related to the process that may lead to the cancellation of a security clearance are limited to the right to know the alleged facts and the right to make representations about those facts.

[57] While I acknowledge the serious impact of the Decision on the Applicant, it remains, as was stated by Justice Michael Phelan in *Wojcik*, at para 36: "a security clearance is a privilege not a right, and the impact of the refusal on an individual's investments or personal life does not trump national security concerns."

[58] The Applicant has failed to establish any reason to depart from or to revisit the findings in *Lum*, as well as in *Wojcik*, that the procedural requirements due to an applicant seeking a security clearance is low.

(2) Whether the Duty of Fairness was met

[59] The Applicant submits that one of the two bases upon which the ADG made the Decision not to grant the Applicant a security clearance was that the Applicant had unlawfully possessed cannabis stolen from the warehouse. According to the Applicant, it was not clear in the LERC or the Notice that this was being alleged against him.

[60] The Applicant points out that he maintained throughout his responses to the ADG that his businesses was solely focused on “smoke and vape” equipment and not cannabis itself. He claims that while he clarified that there was also no cannabis unlawfully possessed at the warehouse, further evidence or submissions could have been provided on this point had the issue been more clearly identified as one of the bases for refusal.

[61] The Applicant further submits that the ADG never mentioned that one of the grounds for refusal was the unlawful possession of cannabis – other than what he characterizes as “the falsely alleged operation of an illegal cannabis dispensary.” The Applicant claims that it was entirely unclear that he needed to provide evidence to rebut the claim of unlawful possession of cannabis for the December 3, 2017 incident.

[62] Moreover, according to the Applicant, this point was not addressed in the letter seeking additional information from him. The Applicant claims that the ADG failed to alert him to this particular ground that they were considering in refusing his security clearance.

[63] These arguments have no merit.

[64] In the Notice, the Applicant was provided with a lengthy and detailed list of incidents which were the basis of the intention to refuse. Further, an explanation was provided of the factors most relevant to the ADG’s opinion that the Applicant posed an unacceptable risk to public health or public safety, including the risk of cannabis being diverted to an illicit market or activity.

[65] The Applicant was plainly aware of the case against him in respect of the warehouse incident on December 3, 2017 and the significance of the allegation of “stolen cannabis products.” First, the incident was sufficiently described in the Notice. Second, the Applicant responded that “yes they stole about \$80,000 worth of Bongos, pipes, vape juice, vape devices, hemp products... but no cannabis just cannabis smoke products.” It is therefore clear from the Applicant’s response that he knew the theft of cannabis at the warehouse was among the ADG’s reasons for her intention to refuse.

[66] Moreover, among the preliminary conclusions of the ADG, as set out in the Notice, was that given the Applicant’s “recent and direct involvement operating an illegal cannabis dispensary, you are in a situation contemplated by subparagraph 53(2)(b)(i) and paragraph 53(2)(d) of the CR.”

[67] The Applicant now suggests that he could have provided more evidence or submissions to rebut the allegations. However, there is nothing on the record before me to establish that the Applicant had anything more to add. In any event, he was required to put his best foot forward in submitting his application. There was no obligation on the ADG to gather or seek additional evidence or to make further inquiries given his blanket denials.

[68] The Applicant further submits that the Decision is based on material facts that the Applicant was not provided the opportunity to rebut. He refers in particular to the answers provided by the SIBS to inquiries from the ADG that were not disclosed to him before the Decision was made.

[69] I fail to see how the follow-up questions and answers provided was in any way unfair to the Applicant. It appears that the ADG, by posing additional questions, was simply acting with due diligence and cross-checking the facts. It is somewhat ironic that the Applicant is complaining about this given his insistence that the ADG had a duty to probe and question the information.

[70] I agree with the Respondent that there was nothing new in the information provided by the SIBS. The Notice had informed the Applicant of multiple incidents from record checks regarding Nova Budds, “a store owned by you, at 65 Mapleton Road, Moncton.” The Applicant has already denied owning the store. The Applicant never asserted that there was another dispensary at 65 Mapleton and denied he owned it. The ADG was just dotting the i’s and crossing the t’s.

[71] The Applicant’s allegations about procedural fairness are also difficult to reconcile with the deflection he took, by refusing to send a copy of the requested purchase agreement for 65 Mapleton Road and later emailing to say that the additional information requested was not relevant.

(3) Duty to Investigate

[72] Finally, I agree with the Respondent that there was no duty to investigate the Applicant’s theory of why the charges against him were abandoned, or to perform various investigative tasks the Applicant alleges were the Director General’s responsibility.

[73] According to the Applicant, the ADG should have taken additional steps to acquire information and documentation on the inconsistencies found in the LERC reports, such as communicating with the Crown attorney, or reviewing decisions or transcripts of court proceedings to substantiate or eliminate the claim that the Applicant was operating the dispensary involved in the unlawful possession of cannabis.

[74] A similar argument was raised and rejected in *Lum*. Justice Strickland found that the Director General was entitled to rely on the LERC report and was not obliged to conduct independent research to test its content and the duty of procedural fairness did not require the Director to look behind the LERC report. This finding, which I adopt, mirrors the reasoning of the Federal Court in *Del Vecchio v. Canada (Attorney General)*, 2017 FC 696, at para 21:

[21] As part of this process, the Minister must rely on information provided from law enforcement agencies such as the RCMP (*Sidhu v Canada (Attorney General)*, 2016 FC 891 at para 19; *Henri v Canada (Attorney General)*, 2014 FC 1141 at para 40 [*Henri FC*], affirmed 2016 FCA 38). The Minister can rely on information provided by the RCMP without verifying or investigating the content of those reports. This information can be relied upon even though it is hearsay and not crosschecked (*Mangat* at para 54; *Henri FC* at para 40). The onus is on the person wishing to obtain security clearance to address the Minister's concerns.

[75] The decision was confirmed by the Federal Court of Appeal in *Del Vecchio v. Canada (Attorney General)*, 2018 FCA 168.

[76] For the above reasons, I conclude that the ADG not only met, but exceeded, the duty of procedural fairness owed to the Applicant.

B. *Reasonableness*

[77] The Applicant submits that the Decision is unreasonable as it was not justifiable on the evidence and the conclusions were irrational. According to the Applicant, there is no evidence to prove that the Applicant poses a security risk under subparagraph 53(2)(b)(i) and paragraph 53(2)(d) of the Regulations. These arguments miss the point entirely.

[78] There was no onus on the ADG to prove anything when processing the Applicant's application. To the contrary, the onus was on the Applicant, who wished to obtain security clearance, to address the Minister's concerns.

[79] In order to refuse security clearance, the Regulations only requires a finding that there are "reasonable grounds" to "suspect" or "believe" that the applicant was involved in or contributed to the subsection 53(2) factors. This standard is much lower than what is required for a finding of guilt of a criminal offence and lower even than the standard of reasonable grounds to charge for an offence. In *R v. Chehil*, 2013 SCC 49, the Supreme Court of Canada explained at para. 27 that reasonable grounds to suspect engages the "reasonable possibility, rather than probability of crime" and cautioned that when applying the reasonable suspicion standard, reviewing judges should not conflate it with the more demanding reasonable and probable grounds standard.

[80] With respect to the break-in and theft from the warehouse on December 3, 2017, the Decision explained that the Applicant had not provided sufficient evidence to support his assertion that no cannabis was stolen. The Applicant suggests that the reference to "cannabis and

vape products” in the LERC was capable of two interpretations. This could refer to “marihuana” and “vape products” as separate and distinct items, or alternatively, this could refer to “marihuana and vapes” as a descriptor of “products.” The Applicant submits that the latter interpretation is consistent with the Applicant’s explanation in his May 17, 2020 email that there was no cannabis in this warehouse, along with his consistent assertion that he only ever stored and sold cannabis-related products rather than cannabis itself

[81] It remains that it was reasonably open to the ADG to have read the report and conclude that cannabis, as opposed to only drug paraphernalia, had been stolen at the warehouse. The incident at the warehouse could not be divorced from other reports of thefts, unauthorized cannabis-related activities and seizure of cannabis pre-packaged for sale at the other location owned by the Applicant, where he was described as the person responsible for acquisitions, purchases and sales of products.

[82] The Decision explained that the Applicant had acknowledged being the owner of Nova Budds at 65 Mapleton Road and represented he operated a vape and smoke shop at that address from November 2016 until May 2018, and a dispensary operated at that location during that period. The Applicant had not provided evidence, other than a bald denial, to establish the dispensary was separate from Nova Budds.

[83] The Decision furthermore noted that the unauthorized sale and possession for sale of cannabis is illegal under the *Cannabis Act* and was illegal under the *Controlled Drugs and Substances Act*, SC 1996, c 19. The Decision explained that the occurrences were recent and

serious, given they included involvement in or contribution to the activities of a cannabis dispensary, which poses a risk to the integrity of the legal framework for the distribution of cannabis.

[84] The ADG was perfectly entitled to consider the totality of the circumstances and prefer the evidence gathered from the police to the Applicant's denials and explanations: *Lorenzen v Canada (Transport)*, 2014 FC 273 at para. 34. It was certainly not unreasonable for the ADG to suspect or believe that the Applicant had been involved in or contributed to a cannabis offence as the owner of Nova Budds given the number of serious incidents reported in the LERC and the Applicant's defensive and spotty explanations.

[85] The Decision explained that given the police report identified the Applicant as the owner of Nova Budds, a dispensary which conducted unauthorized cannabis-related activities, the ADG believed he was in a situation contemplated by paragraph 53(2)(d) of the Regulations. It was therefore reasonable on the evidence for the ADG to believe "that the [Applicant's] activities, including their financial activities, pose a risk to the integrity of the control of the production and distribution of cannabis under the Act."

[86] I agree with the Respondent that the fact the Applicant was not convicted of the trafficking charges was not dispositive. The ADG relied on the police information, which contained the background information that the Applicant and now ex-business partner had no authorization under the MMAR or ACMPR; that the Applicant was the owner and the person responsible at Nova Budds for acquisition, purchases and sales of products, and the seizure

included \$45,424 worth of edibles, paraphernalia, dried marihuana and oil pre-packaged for sale, as well as a review of ledgers that indicated on two prior days, the dispensary had sold \$20,427.08 of marihuana products. The ADG explained that she found the police report reliable and the Applicant had not provided sufficient evidence to show the information was erroneous.

[87] Moreover, the fact that the RCMP did not know why the charges were withdrawn is of no moment in this case. The Decision explained the ADG's concern that if granted a security clearance, the Applicant may engage in conduct similar to that revealed by the checks or in other conduct that would pose a risk to public health or public safety. The Decision explained that the Applicant's representations had not allayed the ADG's concerns and she believed the Applicant posed an unacceptable risk to public health or public safety, including the risk of cannabis being diverted to an illicit market or activity.

VIII. Conclusion

[88] The Decision provides a clear and intelligible rationale explaining how the facts came within the legislated factors and led the ADG to a conclusion that, pursuant to subsection 53(1) of the Regulations, the Applicant could not be granted a security clearance. When the reasons are viewed holistically and contextually, they bear the hallmarks of reasonableness: *Vavilov*, at paras 97, 99.

[89] For the above reasons, I conclude that the Applicant has failed to establish the Decision was unreasonable.

[90] At the conclusion of the hearing, the parties agreed that each should bear their own costs.

In the circumstances, the application shall be dismissed without costs.

JUDGMENT IN T-147-21

THIS COURT’S JUDGMENT is that:

1. The style of cause is amended with immediate effect by removing “Todd Cain in his capacity as Director General of the Controlled Substances and Cannabis Branch at Health Canada” as a respondent.
2. Paragraphs 6, 8, 9, 10, 12, 13, 17, and 26 to 31 of the Applicant’s affidavit are struck.
3. The application for judicial review is dismissed without costs.

“Roger R. Lafrenière”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-147-21

STYLE OF CAUSE: EVERETT RODGER STUCKLESS v ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: BY VIDEOCONFERENCE

DATE OF HEARING: AUGUST 23, 2021

JUDGMENT AND REASONS: LAFRENIÈRE J.

DATED: OCTOBER 12, 2021

APPEARANCES:

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