Federal Court  Cour fédérale

Date: 20160613

Docket: T-1891-14

Citation: 2016 FC 655

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 13, 2016

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

LYNN TERESA NEALE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant, Lynn Teresa Neale, has worked for the Montréal Gateway Terminals Partnership (MGTP) company since 1991. She needs security clearance for her work as a transportation officer at the Port of Montréal. The applicant obtained her initial security clearance in 2007, and it was renewed in 2012 for a period of five (5) years.

[2] This is an application for judicial review of the reconsideration decision made by the Minister of Transport (Minister) to maintain the suspension of the applicant's security clearance. That decision was based on the Minister's opinion that because of the applicant's close association with an individual charged with importing narcotics for the purpose of trafficking through the Port of Montréal, there were reasonable grounds to suspect that the applicant was in a position in which there is a risk that she be suborned to commit an act that might constitute a risk to marine transportation security.

[3] The individual in question is the applicant's common-law spouse.

[4] For the reasons that follow, the application for judicial review is dismissed.

I. Background

A. *Seaport security*

[5] The Transport Canada Transportation Security Clearance Program (Program) has been in place for several years for the aviation industry. The aim of the Program is the prevention of unlawful acts of interference with civil aviation by requiring people with access to restricted areas to obtain security clearance. In the wake of the September 11, 2001 terrorist attacks on the World Trade Center, Transport Canada expanded the Program to include the marine sector (*Canada [Minister of Transport, Infrastructure and Communities] v Jagjit Singh Farwaha*, 2014 FCA 56, at paragraph 12 [*Farwaha*]). In 2006, the Program was integrated into the *Marine Transportation Security Regulations*, SOR/2004-144 (Regulations), enacted pursuant to the

Marine Transportation Security Act, S.C. 1994, c. 40. The Program aims to reduce the risk of threats to marine transportation in marine facilities, buildings and seaports and recognizes that port security may be compromised by internal threats (*Farwaha*, at paragraph 17).

[6] Section 380 of the Regulations stipulates that no person shall enter or remain in a restricted area unless they comply with certain conditions. Restricted areas are established by a security officer for the marine facility in the security plan for the marine facility. The plan is subject to the approval of the Minister, but is developed and implemented by the marine facility (Regulations, paragraphs 306(*b*) and 323(*c*) and section 380).

[7] When a person requires access to a "restricted area two," as defined in subsection 329(4) of the Regulations, for work-related purposes, that person shall be a holder of a security clearance pursuant to paragraph 503(*a*) of the Regulations. To obtain a security clearance, the person shall complete the form supplied by the Minister pursuant to section 507 of the Regulations and provide the information stipulated in section 506 of the Regulations. Notably, the person shall provide information used to confirm their identity, the addresses of all locations at which they resided during the five (5) years preceding the application, the names and street addresses of their employers and any post-secondary educational institutions attended during that same time period, details of any travel of more than ninety (90) days outside Canada or the United States, and the identity and address of residence of any current or former spouses and common-law partners.

[8] Once that information has been provided, Transport Canada conducts checks with government authorities. Based on those results, the Minister decides whether or not to grant security clearance. The decision is notably made based on the criteria stipulated in section 509 of the Regulations. Once clearance has been granted, the Minister may suspend or cancel a security clearance under section 515 of the Regulations after receiving information that could change the decision made pursuant to section 509 of the Regulations.

[9] An applicant or holder may request that the Minister reconsider a decision to refuse to grant or to cancel a security clearance, pursuant to section 517 of the Regulations. The Office of Reconsideration was created to reconsider security clearance decisions. Each application is given to an independent advisor who, after reviewing and evaluating the application, makes a recommendation to the Minister. The Minister then reviews the recommendation and the file, and reconsiders his initial decision.

B. *Review of applicant's security clearance*

[10] On or around June 14, 2013, the Director, Security Screening Programs (SSP) for Transport Canada received a Police Records Check (PRC) report on the applicant from the Royal Canadian Mounted Police (RCMP). The report indicated that the applicant [TRANSLATION] "closely associated and had interactions on a daily basis" with an individual who has no criminal record but is facing criminal charges notably including conspiracy to import, conspiracy to traffic, importing cannabis and possession for the purpose of trafficking.

[11] According to that same report, the charges were laid following an RCMP investigation that began in 2010, after the Canada Border Services Agency found drugs in cargo containers at the Ports of Montréal and Halifax. The international investigation uncovered a well-established criminal organization that stockpiled drugs mainly in Pakistan that were then hidden in containers and shipped by boat to Canada. The report indicated that the investigation resulted in the arrest of eight (8) people, including the individual in question. Furthermore, forty-three (43) tonnes of hashish, with an estimated Montréal market value of eight-hundred and sixty (860) million dollars, were seized during the investigation.

[12] Based on that information, the Director, SSP for Transport Canada informed the applicant in a letter dated June 19, 2013, that her marine security clearance was being reviewed. The wording used in the PRC report was quoted directly in the letter addressed to the applicant, and she was asked to provide additional information describing the circumstances of her association with the individual and any other relevant information or extenuating circumstances. The letter also indicated that the reasons stipulated in section 509 of the Regulations were the ones the Transportation Security Clearance Advisory Body (Advisory Body) used as a basis to recommend to the Minister to grant, refuse to grant or cancel a security clearance.

[13] On July 2, 2013, the applicant provided oral comments to an SSP employee. The applicant then sent an email to the Director, SSP on July 15, 2013, in which she pledged her loyalty to her employer and said that she had never been involved in or witnessed criminal activities, including those described in the June 19, 2013 letter. She also confirmed that she knew the individual in question. She explained that he was living with her in accordance with the

conditions of his bail, which he had been granted the year before, and that they had begun dating before his arrest. She added that she had known him for twenty (20) years and that his arrest was a shock to her. In the same email, she underscored that her job was her only source of income and that she had two (2) children, one (1) of whom had a disability. In closing, she encouraged the Minister to contact her should additional information be required.

[14] On August 27, 2013, the Advisory Body convened to review her file and formulate a recommendation for the Minister. They recommended suspending the applicant's security clearance until the criminal charges had been disposed of by the courts.

[15] On September 14, 2013, the Director General of Marine Safety & Security (DGMSS) endorsed the Advisory Body's recommendation. In a letter addressed to the applicant dated October 21, 2013, the DGMSS indicated that the information about her association with the individual raised concerns about her judgment and reliability. Citing the direct link between the still outstanding criminal charges against the individual and marine transportation security, as well as the applicant's affirmation that she has known him for twenty (20) years, that they began dating before his arrest and that they have been living together in accordance with his bail conditions, the DGMSS indicated that after reviewing the file, he was of the opinion that there were reasonable grounds to suspect that the applicant was in a position in which there is a risk that she be suborned to commit an act that might constitute a risk to marine transportation security.

[16] On October 22, 2013, the MGTP informed the applicant that she was suspended with pay because her marine security clearance had been suspended.

[17] On November 12, 2013, the applicant submitted an application to Transport Canada's Office of Reconsideration in which she included observations on the alleged risk of subornation.

[18] On November 25, 2013, the MGTP informed the applicant that she was now suspended without pay, retroactively to November 21, 2013.

[19] On December 12, 2013, the Office of Reconsideration Director informed the applicant that the outcome of her application for reconsideration depended on two (2) factors: firstly, whether she had provided sufficient clarification on her relationship with the individual in question, and secondly, whether there are reasonable grounds to suspect that the applicant may be in a position in which there is a risk that she be suborned to commit an act that that might constitute a risk to marine transportation security.

[20] On January 24, 2014, the applicant, her lawyer, the president of her union and the treasurer for the union in Montréal met with the independent advisor selected by the Minister to share her observations with him. The applicant stated, among other things, that: 1) the individual was still living with her; 2) he had not been found guilty; 3) the applicant's role in the Port of Montréal's security access process was rather inconsequential and insignificant to operational security, since she could not falsify documents in the way demonstrated during the preliminary

investigation into the case involving the applicant's spouse; and 4) she should not be affected financially by the fact that a loved one was charged with a criminal act in which she had no part.

[21] After that meeting, the independent advisor prepared a report with a summary of his conclusions, which was submitted to the Office of Reconsideration, along with the audio recording of the meeting.

[22] On June 23, 2014, the Office of Reconsideration Director prepared a three (3)-page briefing note for the Minister, which included his recommendation to maintain the decision to suspend the applicant's security clearance.

[23] On August 5, 2014, the Assistant Deputy Minister of Safety and Security for Transport Canada decided, on behalf of the Minister, to maintain the security clearance suspension. The applicant was informed of this on August 6, 2014. In her letter to the applicant, she indicated that she had reviewed all available and relevant information, including the Advisory Body's recommendation, the DGMSS's original decision, the report prepared by the independent advisor and the recommendation from the Office of Reconsideration. She also indicated that during her review she had noted the applicant's close association with the individual charged with indictable offences for importing forty-three (43) tonnes of hashish through the Port of Montréal. She underscored that there was sufficient information to conclude that paragraph 509(*c*) of the Regulations applied, namely that there were reasonable grounds to suspect that the applicant was in a position in which there was a risk that she 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. In

closing, the letter mentioned that the suspension would remain in effect until the criminal charges were disposed of by the courts and the Advisory Board reviewed her case.

II. Issue in dispute

[24] After analyzing the observations made by the parties, I consider that the only issue in dispute is determining whether the Minister's decision to maintain the security clearance suspension was reasonable.

III. Legislation

[25] The main provision of interest reads as follows:

509. The Minister may grant a transportation 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 en matière de transport 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	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

length of time between offences, the date of the last offence and the sentence or disposition;

condamnations, le temps écoulé entre les infractions, la date de la dernière infraction et la peine ou la décision;

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

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

(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,

(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) 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,

(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) is or has been a member of a criminal organization as defined in subsection 467.1(1) of the Criminal Code, or participates or has

(iii) est ou a été membre d'une organisation criminelle au sens du paragraphe 467.1(1) du Code criminel ou participe ou contribue,

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,

ou a participé ou a contribué, aux activités d'un tel groupe tel qu'il est mentionné au paragraphe 467.11(1) du *Code criminel*, compte tenu de la pertinence de ces facteurs par rapport à la sûreté du transport maritime,

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

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

(v) is or has been associated with an individual who is known to be involved in or to contribute to — or in respect of whom there are reasonable grounds to suspect involvement in or contribution to —

(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

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 the security of marine transportation;	contribution — à des activités visées au sous-alinéa (i), ou est membre d'un groupe ou d'une organisation visés à l'un des sous-alinéas (ii) à (iv), compte tenu de la pertinence de ces facteurs par rapport à la sûreté du transport maritime;
(c) whether there are reasonable grounds to suspect that the applicant is in a position in which there is a risk that they be suborned to commit an act or to assist or abet any person to commit an act that might constitute a risk to marine transportation security;	c) s'il y a des motifs raisonnables de soupçonner que le demandeur est dans une position où il risque d'être suborné afin de commettre un acte ou d'aider ou d'encourager toute personne à commettre un acte qui pourrait poser un risque pour la sûreté du transport maritime;
(d) whether the applicant has had a restricted area pass for a marine facility, port or aerodrome removed for cause; and	d) le demandeur s'est vu retirer pour motifs valables un laissez-passer de zone réglementée pour une installation maritime, un port ou un aérodrome;
(e) whether the applicant has filed fraudulent, false or misleading information relating to their application for a transportation security clearance.	e) le demandeur a présenté une demande comportant des renseignements frauduleux, faux ou trompeurs en vue d'obtenir une habilitation de sécurité en matière de transport.

IV. Standard of review

[26] It is well established that the decision to cancel or suspend a security clearance is subject to the reasonableness standard of review, given the specialized and discretionary nature of the

decision (*Sidhu v Canada [Citizenship and Immigration]*, 2016 FC 34, at paragraph 11 [*Sidhu*]; *Singh Kailley v Canada [Transport]*, 2016 FC 52, at paragraph 17 [*Kailley*]; *Thep-Outhainthany v Canada [Attorney General]*, 2013 FC 59, at paragraph 11 [*Thep-Outhainthany*]; *Clue v Canada [Attorney General]*, 2011 FC 323, at paragraph 14). The Office of Reconsideration's decision to maintain or cancel the security clearance suspension is also subject to it (*Farwaha*, at paragraphs 84-86).

[27] In its reasonableness analysis, the Court's role consists of determining whether the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law," as per *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paragraph 47 [*Dunsmuir*]. As long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, the Court is not open to a reviewing court to substitute its own view of a preferable outcome (*Canada* [*Citizenship and Immigration] v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at paragraph 59).

V. Analysis

A. *Preliminary questions*

[28] In her Notice of Application and memorandum, the applicant is attempting to have not only the August 5, 2014 decision but also the initial October 21, 2013 decision made by the DGMSS set aside. It is well established that when the Court is required to review a reconsideration decision, it is not required to review the underlying decision of the reconsideration (*Canadian Airport Workers Union v Garda Security Screening Inc.*, 2013 FCA

106, at paragraph 3). This Court's review will therefore be limited to the reasonableness of the decision rendered on August 5, 2014.

[29] The respondent also presented a request to have some of the evidence provided by the applicant in support of her application for judicial review stricken from the record. The respondent argues that the Langevin, De Bastos and Doré affidavits, as well as Exhibit D-6 of the applicant's affidavit, are inadmissible and irrelevant.

[30] Before the documentation in question for the respondent's request is reviewed, it should be reiterated that although evidence may be admissible under certain circumstances, the general rule in this regard is that the evidentiary record for purposes of a judicial review application is restricted to that which was before the decision-maker. In *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, Mr. Justice Stratas of the Federal Court of Appeal explained the basis of the rule and provided guidelines on the admissibility of additional evidence that was not before the administrative decision-maker.

> [19] Because of this demarcation of roles between this Court and the Copyright Board, this Court cannot allow itself to become a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the Board. In other words, evidence that was not before the Board and that goes to the merits of the matter before the Board is not admissible in an application for judicial review in this Court. As was said by this Court in *Gitxsan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 at pages 144-45 (C.A.), "the essential purpose of judicial review is the review of decisions, not the determination, by trial de novo, of questions that were not adequately canvassed in evidence at the tribunal or trial court." See

also *Kallies v. Canada*, 2001 FCA 376, at paragraph 3; Bekker v. Canada, 2004 FCA 186, at paragraph 11.

[20] There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker (described in paragraphs 17-18, above). In fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker. Three such exceptions are as follows:

> (a) Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review: see, e.g., *Estate of Corinne Kelley v. Canada*, 2011 FC 1335, at paragraphs 26-27; *Armstrong v. Canada* (Attorney General), 2005 FC 1013, at paragraphs 39-40; *Chopra v. Canada (Treasury Board)* (1999), 168 FTR 273, at paragraph 9. Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider. In this case, the applicants invoke this exception for much of the Juliano affidavit.
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> (b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness: e.g., *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980) 29 O.R. (2d) 513 (C.A.). For example, if it were discovered that one of the parties was bribing an administrative decision-maker, evidence of the bribe could be placed before this Court in support of a bias argument.
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> (c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding: *Keeprite, supra*.

(a) Doré affidavit

[31] In a ten (10)-page affidavit, Mr. Doré confirmed that he had represented the applicant's spouse during his preliminary investigation for criminal charges related to importing narcotics for the purpose of trafficking. Mr. Doré attached one-hundred and forty-one (141) pages of transcript from an MGTP employee's testimony during that preliminary investigation.

[32] The respondent opposes admitting the affidavit and transcript on the basis that, other than an eleven (11)-page excerpt that was already in the Court record, the transcript was not before the decision-maker. He claims that these pieces of evidence are neither relevant nor admissible on judicial review.

[33] The applicant, however, claims that the full transcript is relevant for two (2) reasons. Firstly, the transcript provides a general understanding of the factual background of the case, because it explains the truck entry and exit procedure at the Port of Montréal. It also clarifies the factual background for an essential factor in Transport Canada's decision, namely the risk that she could be suborned to commit an act that might constitute a risk to marine transportation security. Secondly, she claimed that the excerpts contained beyond the eleventh (11th) page cannot be separated from the first (11) pages that were before the decision-maker.

[34] I must disagree with the applicant for the following reasons.

[35] The testimony in question was provided on April 23, 2013, during the preliminary investigation into the applicant's spouse. The applicant has been aware of the Minister's concerns since at least October 21, 2013, when the initial decision was made to suspend her marine security clearance. If, as the applicant claims, the entire transcript is relevant because it provides a general understanding of the factual background of the case and because it concerns an essential factor in Transport Canada's decision, I find, for the very same reasons, that this evidence should have been provided at the same time as the eleven (11) pages that were submitted to the independent advisor on January 24, 2014. The applicant decided to provide the first eleven (11) pages only. As for the alleged "inseparable" nature of the transcript excerpts that were not submitted previously, were that the case, the entire transcript should have been submitted, not only an excerpt.

[36] By submitting this new evidence, the applicant is attempting to improve her case before this Court, based on a factor that she considers to be essential to her case. Case law is clear, however. The purpose of judicial review is to verify the legality of the decision-maker's decision, and the Court can consider only the record that was before the decision-maker. The Doré affidavit and the attached transcript are therefore inadmissible.

(b) De Bastos affidavit

[37] In his affidavit, Mr. De Bastos confirmed that he is a Port of Montréal employee and works in the same room as the trucking office clerks, where the applicant worked. He recounted the checks conducted at the Port of Montréal entrance and exit as well as the procedure in place before and after the new integrated computer system was adopted in March 2014. Mr. De Bastos

also said that in his opinion, since that new system had been adopted, it was impossible to counterfeit a movement authorization because all the information and checks go through the new computer system.

[38] The respondent disagrees with the affidavit's being admissible on the grounds that the evidence about the new computer system was not before the decision-maker. The respondent also claims that Mr. De Basto's opinion about the possibility of outsmarting the entry and exit system is an inadmissible speculation that is being used to encourage the Court to re-evaluate the evidence.

[39] The applicant claims that the De Bastos affidavit is relevant because it also has some bearing on the risk that the applicant could be suborned to commit an act that may constitute a risk to marine transportation security. Paragraphs one (1) to six (6) and eight (8) of the affidavit are consistent with the contents of the eleven (11)-page transcript from Mr. Doré's interrogation. As for the other paragraphs in the De Bastos affidavit, the applicant claims that the procedure described therein was not in place when the applicant had the opportunity to present her observations to the independent advisor on January 24, 2014. She claims that these are new and critical facts that could not have been known before January 24, 2014, despite due diligence.

[40] This affidavit is inadmissible for two (2) reasons. Firstly, it contains an opinion on the risk of circumventing the entry and exit system that is purely speculative. Pursuant to Rule 81 of the *Federal Courts Rules*, SOR/98-106, affidavits shall be confined to facts within the deponent's personal knowledge. Furthermore, the Federal Court of Appeal reiterated in *Canada*

(Attorney General) v Quadrini, 2010 FCA 47, that the purpose of an affidavit is to adduce facts relevant to the dispute without gloss or explanation, and that it may be stricken where it contains opinion (at paragraph 18). An opinion is allowed only in an expert report prepared by a duly qualified expert. In this case, it was not shown that the affiant was an expert on the subject (Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4ed, Markham: LexisNexis Canada Inc., 2014 at pages 783-784; *R v Mohan*, [1994] 2 SCR 9, at pages 20-25 [*Mohan*]).

[41] Furthermore, that evidence was not before the Minister when the decision was made. Even though the new computer system was not operational at the time of the meeting with the independent advisor on January 24, 2014, the new procedure was implemented in March 2014, and the independent advisor's report was not signed until April 28, 2014. In addition, the decision to maintain the suspension was not made until June 23, 2014. If the applicant considered this information to be relevant to her case, she could have done what was necessary to send it to both the independent advisor and the Office of Reconsideration Director.

[42] I also do not share the view of the applicant that the information included in the affidavit falls under the exceptions to the general rule about submitting new documents for an application for judicial review. I would like to reiterate that the applicant cannot add to the record that was before the Minister through an application for judicial review. The Bastos affidavit is therefore inadmissible.

(c) Exhibit D-6 from the applicant's affidavit

[43] The applicant submitted a letter dated January 20, 2014, as Exhibit D-6 of her affidavit sworn on October 16, 2014. That letter, which was signed by the applicant's immediate supervisor, confirmed that the applicant has worked for MGTP for 23 years and that she has always done her work diligently and competently. The letter indicates that in addition to being punctual, the applicant is a team player and can always be counted on.

[44] The respondent objects on the grounds that the letter was not submitted as part of the review process and therefore was not before the Minister when the decision was made. The respondent does recognize, however, that its contents were discussed before the independent advisor.

[45] The applicant recognizes that the letter was not before the decision-maker. She maintains, however, that the letter was presented to the independent advisor during their meeting on January 24, 2014. The applicant claims that the letter is relevant, because it can provide additional clarification to the Court on the applicant's work and the risk that she commit an act that might constitute a risk to marine transportation security.

[46] Given that the letter was not included in the Certified Tribunal Record, it is not admissible. Nor do I regard it as falling under the exceptions to the general rule. The contents of the letter, however, are included in the tribunal record, since the applicant was recorded during her interview with the independent advisor.

(d) Langevin affidavit

[47] The Langevin affidavit contains seven (7) paragraphs and discusses Ms. Langevin's professional legal experience. She indicates that she has authored several publications on gender equality and marital equality. She claims to be recognized as an expert in the field. She says that she was instructed by the applicant's counsel to prepare an expert report on the prejudices and stereotypes underlying Transport Canada's decision to suspend the applicant's marine security clearance. Ms. Langevin also claims to have authored the expert report submitted in support of the applicant's application for judicial review. She indicates that she had the opportunity to consult the main documents used by Transport Canada in its reconsideration decision.

[48] The respondent is asking that her affidavit and the attached exhibits be stricken from the record. The respondent considers that the evidence the applicant is trying to submit through the affidavit and attached report: 1) is not necessary; 2) is beyond her area of expertise; 3) determines matters of fact and law that are within the exclusive jurisdiction of this Court; 4) lacks impartiality; and 5) was weakened by her testimony during interrogation.

[49] In response, the applicant claims that Ms. Langevin's expert report is extremely useful for the Court because it consists of a sociological review of how legislative standards and views concerning gender equality have changed for conjugality. Ms. Langevin's expert report is also relevant for the purposes of the constitutional ground that the applicant is invoking and that the Minister used to exercise his discretionary power in a manner contrary to the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B of the *Canada Act 1982*

(UK), 1982, c 11 [Charter] by applying prejudices and stereotypes to the applicant's marital status. The applicant claims that it was unreasonable to require her to produce an expert report for the Office of Reconsideration because it is the Minister's decision that she is contesting on a constitutional basis. This is therefore the first opportunity she has had to raise a constitutional ground and to produce an expert report in support of her claims.

[50] The applicant also maintains that the contested decision was made based on prejudices or stereotypes. The sociological approach of this expert opinion, in relation to both the social context and the definition of "prejudice" and "stereotype," stems from concepts outside the law that are beyond this Court's jurisdiction and expertise. The question of whether prejudices or stereotypes were at play is secondary to the question of discrimination, and Ms. Langevin's expert report did not suggest that she concluded that discrimination was experienced. Although these concepts are included in the legal test to establish whether the right to equality has been violated, it is useful and relevant to know how these concepts are defined in social sciences.

[51] The applicant says that the prejudicial effect that could result from admitting the expert report must be overborne by its probative value. She claims that the decisions involving the criteria to be taken into consideration for admitting expert evidence were made in a different context, and that a distinction should be made between them.

[52] The Supreme Court of Canada recently confirmed in *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23, at paragraphs 23 and 24 (*White Burgess*), that the analysis of whether expert evidence is admissible must be carried out in two steps. At the first

step, the expert evidence must meet the criteria stipulated in *Mohan* at pages 20 to 25: 1) relevance, 2) necessity in assisting the trier of fact, 3) absence of any exclusionary rule, and 4) a properly qualified expert. At the second step, the judge exercises his or her discretionary power by balancing the potential benefits and risks of admitting the expert evidence.

[53] The purpose of the criterion of necessity in assisting the trier of fact is to provide the judge with information, which "must likely be outside the experience and knowledge of a judge or jury" and that experts must not be permitted to usurp the functions of the trier of fact. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary (*Mohan*, at pages 23 and 24).

[54] The duty owed by an expert witness to the Court to be fair, objective and non-partisan falls under the "qualified expert" criterion (*White Burgess*, at paragraphs 46, 53).

[55] After carefully reviewing Ms. Langevin's report, I consider that it is not admissible because it does not meet the necessity criterion set out in *Mohan*. Although the first part of the report (pages 2 to 14) includes a historical and sociological analysis of the history of conjugality in Quebec, the analysis largely deals with the history of applicable legislation in Quebec from the 1866 *Civil Code of Lower Canada* to what is currently included in the *Civil Code of Québec*. It includes several references to legislative provisions and legal scholarly articles, and the legal aspect of the analysis cannot be differentiated from the more sociological aspects. That first portion of the report deals more with the Court's jurisdiction, and an expert report on applicable legislation does not meet the necessity criterion.

[56] In the second portion of her report, Ms. Langevin conducted an analysis of Transport Canada's decision. She considers that Transport Canada has an outdated and stereotypical view of conjugality that has no regard for spouses' independence, free thinking and judgment. She defines the concept of stereotype and analyzes Transport Canada's decision based on the characteristics of that concept to ultimately conclude that Transport Canada's decision was [TRANSLATION] "stereotyped and thus, wrong."

[57] I agree with the respondent's argument that the second portion of the report exceeds the scope of Ms. Langevin's expertise and that the analysis included therein is not necessary. Although I do not question her expertise in gender equality issues in conjugal relationships, the fact remains that Ms. Langevin is commenting on findings of fact and law that must be decided by this Court in this application for judicial review.

[58] In summary, the goal of the Langevin affidavit is to submit a report that includes an analysis that is more legal than sociological in nature, as well as an analysis of findings of fact and law that are within this Court's jurisdiction. The parts of the report that are more sociological in nature cannot be separated from the rest of the report.

[59] For these reasons, the affidavit and attached exhibits are deemed inadmissible because they do not meet the necessity criterion stipulated in *Mohan*. Analyzing the other criteria set out in *Mohan* is consequently unnecessary.

B. *Was the Minister's decision reasonable?*

[60] The applicant claims that the Minister made an unreasonable error in exercising his discretion in a way that is contrary to the Charter. She argues that the Minister's decision was based on prejudices and stereotypes about her marital situation. More specifically, she maintains that the Minister concluded that there was a risk that the applicant be suborned by her spouse without considering their relationship dynamic and assuming that when in a relationship, one is influenced by one's spouse, without any basis in fact. The applicant argues that the Minister's decision was rendered based on the fact that she is the accused individual's spouse. This is a discriminatory distinction based on an analogous ground in subsection 15(1) of the Charter, namely the applicant's marital status.

[61] The respondent claims that the decision does not invoke section 15 of the Charter. The respondent argues that there is no distinction based on an enumerated or analogous ground, and no historical disadvantage or stereotyping.

[62] The applicable analytical framework to decide whether a Minister exercised his or her discretionary power as per the relevant provisions of the Charter was established by the Supreme Court of Canada in *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*]. Before the analysis stipulated in *Doré* is conducted, as a preliminary measure it should be determined whether the decision invokes the Charter (*Loyola High School v Quebec [Attorney General]*, 2015 SCC 12, [2015] 1 SCR 613, at paragraph 39).

[63] To determine whether the decision invokes subsection 15(1) of the Charter, it must be determined whether there is a distinction based on an enumerated or analogous ground. The purpose of this initial step is to limit judicial reviews only to distinctions that the Charter is designed to prohibit. If it is concluded that the applicant was treated differently because of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity, it is necessary to proceed to the second step to determine whether the distinction has a discriminatory effect. At that step, the case is reviewed to determine whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping. It is only when the two (2) steps receive an affirmative response that it is concluded that the decision invokes subsection 15(1) of the Charter and that the analysis from *Doré* is conducted (*Withler v Canada [Attorney General*], 2011 SCC 12, at paragraphs 30, 33 and 34, [2011] 1 SCR 396).

[64] For the following reasons, I find that the applicant has not shown that a distinction was made based on her marital status, a personal characteristic recognized by case law as an analogous ground under subsection 15(1) of the Charter.

[65] The Regulations grant the Minister significant discretionary authority over granting, refusing, suspending or cancelling a security clearance. A conjugal relationship alone, however, cannot justify the conclusion that there is a risk that a person be suborned by his or her spouse. The same can be said for any innocent association.

[66] In my opinion, the Minister's risk assessment must instead be based on factual elements that show that the person's personal circumstances or behaviour make him or her vulnerable to

pressure from an undue influence. It is also important to be able to establish a link with the security being protected.

[67] One of the main factors considered in assessing the risk that a person be suborned is the personality traits of the person applying for a security clearance. The more easily manipulated a person is, the more that he or she is at risk of being suborned. It is also important to consider the person's lifestyle. A person with a drug, alcohol or other harmful substance addiction who does not have the means to support that addiction may be at a greater risk of being persuaded to commit an illegal act or participate in one for financial or other compensation. The same can be said of someone with significant financial problems.

[68] Depending on the circumstances, it may also be appropriate to take account of the person's personal convictions. People with deep-rooted personal convictions that promote radical or criminal ideologies could be more easily persuaded to commit or participate in an act that puts the security the Minister is trying to protect at risk. Similarly, a person's criminal history may be considered if that person has been found guilty of an offence that represents one of the risks the Minister is trying to eliminate.

[69] A person's associations also have the ability to negatively influence the assessment of the risk that he or she be suborned. Associations can be based on friendships, bonds of fraternity, kinship, business relationships or physical proximity. If a member of the applicant's family is associated with a criminal group, the risk of subornation depends on how close their relationship is. If, for example, the security clearance applicant has had no contact with that family member

for a long time, the risk of subornation may be lower than if the applicant is in daily contact with that person.

[70] This Court has repeatedly recognized that it is reasonable to conclude that there is a risk to transport security because of a person's associations (*Russo v Canada [Minister of Transport, Infrastructure and Communities]*, 2011 FC 764. at paragraph 84; *Farwaha*, at paragraph 97; *Sidhu*, at paragraph 20; *Brown v Canada [Attorney General]*, 2014 FC 1081, at paragraph 74; *Fontaine v Canada [Transport Canada Safety and Security]*, 2007 FC 1160, at paragraph 7).

[71] In all such cases, the risk of subornation must be assessed while taking account of the particular facts of the relationship.

[72] For marine security, subparagraph 509(*b*)(v) of the Regulations stipulates that the Minister may consider associations the applicant has with members of a terrorist group or criminal organization as defined in subsection 467.1(1) of the *Criminal Code*, RSC, 1985, c. C-46, or organizations that are involved in acts of violence or support such activities. In *Reference re Marine Transportation Security Regulations* (CA), 2009 FCA 234 (*Reference re Regulations*), the Federal Court of Appeal ruled on the association criterion in paragraph 37 and 38:

> [37] Nonetheless, a particular problem is created by subparagraph 509(*b*)(v), which provides that the Minister may consider an applicant's association with a person who is involved with any of the groups considered in the previous paragraph. As counsel for ILWU pointed out, an applicant's association with such a person may be entirely innocent, whether or not the applicant was aware of the person's criminal or terrorist activities.
>
> [38] In this context, it is important to recall that none of the associations described in the previous paragraph will necessarily jeopardize an applicant, although they may create sufficient

> suspicion as to warrant an interview, at which an applicant could provide an explanation. The association must be relevant to threats to the security of marine transportation from terrorists and criminal organizations, when considered together with all the factors listed in section 509. Innocent associations will not normally warrant the denial of a security clearance, as when, for example, an applicant was unaware that some members of an essentially peaceful political group had engaged in violent activities, or that a friend or family member was involved with a criminal organization or terrorist group.

[73] In my opinion, that is how paragraph 509(*c*) of the Regulations should be interpreted when the risk of a person's being suborned stems from his or her association with another person. The association in question should have some relation to the threats to the security of marine transportation.

[74] It is recognized that organized crime, and more specifically illegal drug trafficking activities, poses a serious threat to the security of marine transportation. To carry out these kinds of activities, criminal organizations often need assistance from employees with access to restricted areas. Employees with ties to criminal organizations and organized crime are more likely to be targeted and influenced or forced to circumvent security measures (*Farwaha*, at paragraphs 13, 17 and 19; *Reference re Regulations*, at paragraphs 64 to 69). Thus the importance of reviewing a person's associations when he or she works in a restricted area.

[75] These associations may also include associations based on a conjugal relationship. In *Thep-Outhainthany*, above, this Court had the opportunity to rule on a case where the association at issue was a conjugal relationship. In that case, the applicant's spouse was involved in an on-call drug dealing network and used the automobile for which she was the main driver. The

automobile had a secret compartment in which a variety of controlled substances and a firearm were found. The applicant, who worked at an airport, denied any involvement. The Court, however, underscored that the applicant's access to a restricted area of an airport was likely to attract the attention of her spouse or his associates (*Thep-Outhainthany*, at paragraphs 26 and 27).

[76] I also find that the relevance of the conjugal relationship was considered in the risk assessment for security clearance, because applicants are required to provide information about their current and previous spouses or common-law spouses when they complete the application form required by the Minister. If the spousal relationship was not relevant in the risk assessment, the Minister would not be justified in collecting that information.

[77] When reviewing the factors that affect the risk of subornation, the Minister is guided by the standard of whether there are "reasonable grounds to suspect" a risk, as stipulated in paragraph 509(*c*) of the Regulations. In *Farwaha*, above, the Federal Court of Appeal indicated that the Court must use judgment and nuance when ruling on whether there are "reasonable grounds to believe" there is a risk:

> [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.

[78] The "reasonable grounds to suspect" standard is less stringent and more flexible than the "reasonable and probable grounds" standard and requires a judgmental standard based on identifying "possibilities," not finding "probabilities" (*Farwaha*, at paragraph 96).

[79] In light of the above, and upon reviewing the record in this case, I must disagree with the applicant's argument that the Minister's decision was based on prejudices and stereotypes, as well as the assumption that when in a relationship, one is influenced by one's spouse. Rather, I am of the opinion that the Minister's decision was based on the connection between the criminal charges laid against the applicant's spouse, the location where she works, and marine transportation security, as well as the fact that the applicant and her spouse have a non-arm's length relationship.

[80] In her letter to the applicant dated August 6, 2014, informing her of the decision to maintain the suspension, the Assistant Deputy Minister explicitly referred to the applicant's close association with an "individual" who is accused of conspiracy to import, conspiracy to traffic, importation of cannabis and possession for the purpose of trafficking for his alleged involvement in facilitating the movement of forty-three (43) tonnes of hashish through the Port of Montréal. She did not name the individual in question and made no reference to their conjugal relationship. The same can be said for the letters dated June 19, 2013, and October 21, 2013.

[81] The significance of their non-arm's length relationship is also included in the report prepared by the independent advisor as part of the reconsideration process. In the "analysis" section of his report, the independent advisor initially described the applicant's relationship with

her spouse. He indicated that she had begun a relationship with "the accused" in 2009 and that she had known him for about twenty (20) years. They lived with each other intermittently until "the accused" moved in with her in 2012, and that is where he was living when he was arrested. He also indicated that although there was no indication that the applicant was aware of the conspiracy going on at the Port of Montréal, she had already been in a [TRANSLATION] "close relationship with the accused" since 2010.

[82] The independent advisor then indicated that the fact that the Port of Montréal security process was short-circuited when the crime was committed demonstrates that anyone involved in the process could have been suborned. He added that based on the evidence, it appears that the guard at the barrier let the truck driver in without the required paperwork. He rejected the argument put forward by the applicant's counsel suggesting that the transport officer played an insignificant role in the security process and that the applicant could not be suborned because of the changes made to the identification process introduced for the admission of trucks. He indicated that he had conducted additional checks with the applicant's employer to determine whether the role of "trucking clerk" described in the testimony provided during the criminal investigation of her spouse was identical to that of the applicant as a transport officer. Based on the information obtained, it was the same position, and one of the associated tasks involves preparing and issuing an "interchange" document that authorizes the entry and exit of containers at the Port of Montréal. That document told the barrier guard that the truck had been granted access and then told the inspector which container was involved in the transaction.

[83] In the conclusion of the report, reference was also made to the connection between the charges laid against the applicant's spouse and where she works. The independent advisor concluded that the explanations provided for the reconsideration decision only confirmed the facts provided in the record that the applicant did indeed have an association with an "individual" who lives with her and is [TRANSLATION] "accused of several counts of conspiracy for crimes committed at the Port of Montréal, where he also worked at the time." He added that despite the conviction the applicant expressed about his innocence, so long as a court has not established his innocence, he continues to be accused of criminal acts and to maintain a close relationship with the applicant. The independent advisor found that the applicant's personal situation clearly included aspects considered a concern in section 509 of the Regulations and recommended that the suspension of her security clearance be maintained until the Minister is satisfied that, pursuant to subsection 515(4) of the Regulations, there is no risk to marine transportation security.

[84] The applicant's personal situation under consideration in the report refers not only to her "association" with someone accused of conspiracy for offences connected to her workplace, but also to the significant role this person plays in the applicant's disabled son's life. When asked by her counsel to describe the relationship during her meeting with the independent advisor, the applicant stated:

> [TRANSLATION] Well, he takes care of my son, he's attached to him, it's been like that since 2009. So it's . . . my child is his child, normally. So if he wasn't with us, I would have trouble . . . taking care of him (applicant's file, page 554).

[85] The applicant claimed that there was no indication in the record that the Minister took that information into consideration. Even if this information was not mentioned in the decision, it is trite law that the decision-maker is not required to mention every piece of evidence in his or her reasons and that it is assumed that all evidence was taken into consideration. In this case, the Assistant Deputy Minister confirmed that she had consulted all the relevant information available to come to her conclusion. The applicant has not put forward any information to the contrary. (*Florea v Canada [Minister of Employment and Immigration]*, [1993] FCJ No. 598 (FCA); *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador [Treasury Board]*, 2011 SCC 62, at paragraphs 14 to 16, [2011] 3 SCR 708 [*Newfoundland Nurses*]).

[86] Furthermore, in *Newfoundland Nurses*, at paragraphs 15 and 16, the Supreme Court of Canada stated that when a court is assessing whether a decision is reasonable in light of the outcome and the reasons, the court must respect the decision-making process of the adjudicative body and may not substitute their own reasons. The Court may, however, if it finds it necessary, look to the record for the purpose of assessing the reasonableness of the outcome. The Supreme Court also added that reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. If the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[87] The applicant criticized the Minister for not considering the relationship dynamic between her and her spouse. That allegation is unfounded. The audio recording of the applicant's interview with the independent advisor clearly shows that he tried several times to encourage the applicant to clarify her relationship dynamic, but to no avail. Instead, the applicant decided to assert, through her counsel: 1) that her finances should not be affected by the fact that a loved one is accused of a criminal act that she had no part in; 2) that her spouse has not been found guilty and had submitted a motion for *certiorari* to have the criminal charges dropped; and 3) that the applicant's role in the security access process at the Port of Montréal was rather inconsequential for operational security. This Court recognized that it is the responsibility of the applicants for a security clearance, not the Minister, to show that they are not a risk to marine transportation security (*Kailley*, at paragraph 20). It is therefore the applicant's responsibility to dispel the Minister's doubts. She did not do so to his satisfaction.

[88] The evidence on record simply does not show that the applicant was treated differently because of her marital status or the identify of her spouse in a way that would invoke subsection 15(1) of the Charter. The Minister's decision is based not on her marital status, but on the following: 1) her close relationship with an individual facing criminal charges directly related to marine transportation security; 2) those criminal charges are directly connected to where the applicant works; 3) the applicant depends on her spouse to provide moral and physical support for her child who has a disability. These three (3) factors make the applicant more vulnerable and therefore put her at a higher risk of being suborned than another Port of Montréal employee. The decision is therefore not based on an analogous ground stipulated in subsection 15(1) of the

Charter. If the individual in question had not been her spouse, but a parent, roommate or friend, that close relationship would have raised the same concerns.

[89] The applicant also claims that the Minister disregarded the presumption of innocence guaranteed in paragraph 11(*d*) of the Charter. More specifically, she claims that given the way he interpreted the Regulations, the Minister [TRANSLATION] "completely ignored the applicant's right to be presumed innocent. Indeed, the Minister is making the applicant guilty by association because she is in a conjugal relationship with [the accused]."

[90] This argument is without merit. The Federal Court of Appeal stated in *Farwaha* that the Minister's decision to deny security clearance accords with the presumption of innocence because the decision can in no way be equated with a conviction, even if the person himself or herself is accused of a criminal act (at paragraph 121). In this case, the applicant is not facing criminal charges or proceedings that could result in a true penal consequence, as stipulated by the Supreme Court of Canada in *R. v Wigglesworth*, [1987] 2 SCR 541, at paragraphs 21 and 23. The Minister's reconsideration decision therefore does not invoke paragraph 11(*d*) of the Charter.

[91] Given that suspending the applicant's security clearance means that she loses her job, she suggests that the Minister must be convinced that there is a "strong possibility" that the applicant will be suborned. I find this argument to be in no way founded in law. In *Farwaha*, the Federal Court of Appeal indicated pursuant to the wording of sections 509 and 515, the Minister must be certain that a person poses no risk to marine transportation security. To quote Stratas J., there

must be no doubt on the matter. When there is doubt, the Minister may cancel or suspend a security clearance.

[92] The applicant also claimed that the Minister rendered a disproportionate decision because she would no longer be able to work at the Port of Montréal once her security clearance is suspended. She claims that the decision is disproportionate to the case against her. In my opinion, the case law that she cited does not apply in the circumstances of this case because a requirement of the applicant's job is that she have security clearance. A security clearance is not a right, it is a privilege (*Lorenzen v. Canada [Transport]*, 2014 FC 273, at paragraph 31; *Thep-Outhainthany*, at paragraph 17). Seeing as the applicant did not dispel all the Minister's doubts, the Minister was justified in suspending her security clearance. Given that the criminal charges had not yet been disposed of by the courts, the Minister suspended her security clearance, rather than cancelling it definitively.

VI. Conclusion

[93] Given the close relationship between the severity of the charges against the applicant's spouse that are directly related to threats authorities are trying to eliminate at the Port of Montréal, the applicant's workplace (which is a "restricted area two"), and the fact that the applicant depends on her spouse to help her with her disabled son, I conclude that it was entirely reasonable for the Minister to suspect that the applicant was in a position in which there is a risk that she be suborned pursuant to paragraph 509(*c*) of the Regulations.

[94] Under these circumstances, the Minister's decision is justified, transparent and intelligible and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, at paragraph 47).

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs.

"Sylvie E. Roussel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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