

**Date: 20070921**

**Docket: T-78-07**

**Citation: 2007 FC 946**

**Ottawa, Ontario, September 21, 2007**

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

**BETWEEN:**

**STEPHEN MYERS**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] There are two applications for judicial review being heard by this Court one following the other pursuant to an Order of Madam Prothonotary Aronovitch, dated August 30, 2007. This application, Docket T-78-07, is the second being heard by the Court. It is for judicial review of a decision of the Department of Public Works and Government Services Canada (PWGSC) on December 14, 2006 denying the applicant reliability status. The first application, Docket T-529-07, was for judicial review of a decision of the Canada Revenue Agency (CRA) on August 3, 2006 revoking the applicant's "enhanced reliability status."

[2] In the first application, I found that Director of the CRA's Ottawa Technology Centre breached the rules of procedural fairness in failing to provide the applicant with an adequate opportunity to address the allegations against him before a final decision was rendered.

## **FACTS**

[3] The applicant worked on several short-term contracts for various government departments and agencies. The applicant obtained these contracts through employment agencies.

[4] To qualify for these contract positions, the applicant needed to be granted a reliability status by PWGSC. The applicant first obtained reliability status from PWGSC on June 27, 2003. The status was not due to expire until June 27, 2013. Since obtaining reliability status from PWGSC, the applicant has been employed by several government departments and agencies:

October to December 2003 – Public Health Agency of Canada  
January to June 2004 – Department of National Defence  
October to December 2004 – Treasury Board Secretariat  
July 2005 – Corrections Canada  
October to December 2005 – Public Health Agency of Canada  
January 2006 – Health Canada  
February to March 2006 – Canadian International Development Agency  
April to July 2006 – Canada Revenue Agency

[5] On April 3, 2006, the applicant commenced working for the CRA as a Tele Trace Agent at the Collections Call Centre in Ottawa, Ontario. The applicant was employed in this capacity for almost three months when he resigned on June 28, 2006. While at the CRA, the applicant was investigated for improperly using the CRA's electronic mail system. As a result of that investigation, the CRA revoked the applicant's CRA-granted "enhanced reliability status" on

August 3, 2006. The circumstances surrounding the revocation are discussed at length in the application respecting Docket T-529-07.

[6] After leaving the CRA, the applicant began working with another employment agency in an attempt to find employment. The agency found a contract for the applicant, but that contract required a Level II (Secret) security clearance. On October 27, 2006, the employment agency, on behalf of the applicant, requested a security clearance from PWGSC so that the applicant could undertake the contract.

[7] On October 31, 2006, in response to the aforementioned request, PWGSC provided the employment agency with a Level II (Secret) security clearance for the applicant. It is clear to the Court that this security clearance was provided because the applicant had received from PWGSC a reliability status on June 27, 2003, which was not due to expire until June 27, 2013. A few days later, the employment agency was informed by PWGSC in a telephone conversation that the security clearance had been issued in error, and PWGSC requested that the certificate be returned. The employment agency complied with this request.

### **Decision under review**

[8] After the certificate was returned, the applicant was asked by PWGSC to attend a “Resolution of Doubt” interview on November 15, 2006 to review and address new information respecting the applicant’s file that came to the attention of PWGSC. Specifically, the interview was to address the applicant’s adverse public service record with the CRA and the CRA’s subsequent

decision to revoke the applicant's "enhanced reliability status." At the "Resolution of Doubt" interview, eight factors regarding the applicant's reliability were identified as being "unsatisfactory," namely the applicant's employment history; personal contacts; finances; ability to cope with stress; personal issues; past criminal and civil proceedings; and the events at the CRA.

[9] The "Resolution of Doubt" Interview Report led to the creation of a "Denial recommendation." This document contained an Overview, which stated:

**Overview**

On October 30, 2006, a request to transfer a previously granted Secret clearance in favour of Stephen Jonathan Myers was initiated. We learned that Stephen Jonathan Myers had previous Adverse Public Services Record with the [CRA]; he resigned from a position within the Ottawa Technology Center on June 12, 2006 prior to disciplinary actions to revoke his security clearance for an irreparable breach of the [bond] of trust between himself and the Agency. A follow-up Resolution of Doubt ... interview was tasked to clarify issues that could have been detrimental in pursuing this request. It was learned that the subject would not acknowledge any wrongdoing while employed by the [CRA] and will not acknowledge receipt of the letter dated August 3, 2006 from the [CRA] revoking his Reliability status.

After providing a detailed summary of the applicant's security screening history, this "Denial recommendation" concluded:

**Recommendation**

Based on adverse information obtained with regards to the subject's past criminal convictions as well as the doubt on the subject's reliability continues to be present, it is recommended that this individual's request for Reliability Status be denied.

[10] On December 14, 2006, Albert Bissonnette, Acting Director for the Canadian & International Industrial Security Directorate, PWGSC, executed the recommendation, which thereby denied the applicant's request for reliability status.

## ISSUES

[11] Two issues were raised in this application:

- 1) Whether the Acting Director had the authority to deny reliability status to the applicant; and
- 2) Whether the Acting Director's decision was unreasonable on the facts set out in the "Resolution of Doubt" Interview Report.

## STANDARD OF REVIEW

[12] The applicant submits that the standard of review with respect to the December 14, 2006 decision is reasonableness. The respondent submits that the standard of review is patent unreasonableness. In *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, the Supreme Court of Canada affirmed the primacy of the pragmatic and functional approach when determining the appropriate standard of review to be applied to an administrative decision. In the application for judicial review respecting Docket T-529-07, I determined that decisions relating to whether an individual is reliable are highly factual in nature, within the expertise of the human resources management, and great deference should be afforded. This means the second issue is to be reviewed on a patently unreasonable standard.

[13] While my conclusions in that application dealt with the ability of a CRA official to revoke a CRA-issued "enhanced reliability status," they apply equally to this context where the decision to deny a reliability status is being made by an official of PWGSC.

[14] The first issue, with respect to the authority of the Acting Director, is a question of law to be reviewed on a correctness standard.

## **ANALYSIS**

[15] On the first issue, the applicant submits that since Mr. Bissonnette is not a deputy head, he did not have the authority to cancel a security clearance. The respondent submits that the Acting Director had the authority, as the December 14, 2006 decision was not for a security clearance, but rather was for reliability status, which is a necessary precondition to obtaining a security clearance. Moreover, the respondent states that the Security Intelligence Review Committee is the body empowered to decide issues relating to the denial of security clearances. At the hearing, I informed the parties that the Court does not need to decide this issue in order to decide this application.

[16] On the second issue, the Court heard the parties on the underlying facts with respect to the conclusions of the “Resolution of Doubt” officer on November 15, 2006 and the “Denial recommendation.” These conclusions formed the reasons for the decision to deny the applicant a reliability status. The Court is satisfied on the evidence that the respondent’s conclusions were not unreasonable or patently unreasonable.

[17] However, the Court must conclude that the CRA decision to revoke the applicant’s “enhanced reliability status” was the primary factor leading to a more intensive review of the applicant’s reliability credentials in the case at bar. Because of this, the Acting Director’s decision was materially affected by the CRA’s decision to revoke the applicant’s “enhanced reliability

status.” Since I have set aside the CRA decision in Docket T-529-07 for a breach of procedural fairness, and since I must conclude that that procedural error materially affected the respondent’s decision in the case at bar, the decision in the case at bar must also be set aside.

### **COSTS**

[18] On the first application, Docket T-529-07, regarding the breach of the duty to act fairly, the applicant is entitled to its costs. On the second application, the success is divided. The Court is not prepared to find that the decision was unreasonable on other factors except for the influence of the CRA decision. For that reason, no costs will be awarded.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

- 1) this application for judicial review is allowed;
- 2) the decision of PWGSC denying the applicant reliability status is set aside; and
- 3) the matter will be referred to another PWGSC officer to redetermine this decision after providing the applicant with another “Resolution of Doubt” interview without reference to the erroneous CRA decision dated August 3, 2006.

“Michael A. Kelen”

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Judge



**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-78-07

**STYLE OF CAUSE:** **STEPHEN MYERS and  
THE ATTORNEY GENERAL OF CANADA**

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** September 13, 2007

**REASONS FOR ORDER  
AND ORDER:** KELEN, J.

**DATED:** September 21, 2007

**APPEARANCES:**

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