

Federal Court



Cour fédérale

Date: 20140303

Docket: T-2252-12
Citation: 2014 FC 206

Ottawa, Ontario, March 3, 2014

PRESENT: The Honorable Madam Justice Kane

BETWEEN:

IRINA KOULATCHENKO

Applicant

and

**FINANCIAL TRANSACTIONS AND REPORTS
ANALYSIS CENTRE OF CANADA**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Irina Koulatchenko, the applicant, seeks judicial review pursuant to s. 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 of four related decisions made February 27, 2012 by the Director of the Financial Transactions and Reports Analysis Centre of Canada ("FINTRAC") which: refused to issue a Top Secret security clearance to her; revoked her Secret security clearance; revoked her Reliability Status; and, revoked her appointment to her position with FINTRAC.

[2] The applicant submits that she was denied procedural fairness because she was not provided with any notice of the concerns leading to the denial of her security status and was not provided with an opportunity to address those concerns before the Director made the final decisions. The applicant further submits that the decisions were not reasonable as they were so devoid of reasons that the Court could not be in a position to determine the reasonableness of the Director's decisions. The applicant submits that all four decisions, including the decision to terminate her employment, attract a duty of procedural fairness.

[3] The applicant seeks an order quashing all four decisions and remitting the decisions back to the Director of FINTRAC for a re-determination after providing her with notice of the nature of FINTRAC's security concerns and the opportunity to respond to those concerns. The applicant also seeks to be compensated in wages owed from the date of termination to the date of judgment on the basis that the termination decision was an administrative decision and, because of the breach of procedural fairness, it is void *ab initio*.

[4] The respondent submits there was no breach of the duty of procedural fairness in the circumstances and that the decisions of the Director were reasonable. The letters to the applicant from the Director coupled with a redacted Canadian Security Intelligence Service [CSIS] report provided to the applicant in these proceedings are sufficient for this Court to assess the reasonableness of the decisions (and to provide the applicant with reasons for the Director's decisions).

[5] For the reasons that follow, I find that the decisions denying and revoking the security clearances were administrative decisions. A duty of procedural fairness was owed to the applicant. Although, the scope of that duty in the circumstances was minimal, it was not met by the Director of FINTRAC. The decisions to deny the Top Secret status and revoke the Secret and Reliability Status must be quashed and sent back for re-determination by the Director.

[6] The decision to revoke the applicant's appointment as an employee of FINTRAC is governed by the law of contract. The duty of procedural fairness does not apply to this decision.

Background

[7] The applicant came to Canada from Russia via Cuba in 2000. She was granted status as a Convention Refugee in December 2001.

[8] On October 26, 2010, the applicant was appointed to a position as a policy analyst with the respondent, FINTRAC, on an indeterminate basis.

[9] FINTRAC, is an independent financial intelligence agency that reports directly to the Minister of Finance. It was established pursuant to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 (the "Act"). Its major objectives are to collect, analyse, assess and disclose information in order to assist in the detection, prevention and deterrence of money laundering and of the financing of terrorist activities, and to enhance public awareness and understanding of matters related to money laundering. FINTRAC provides financial intelligence to various agencies, including the Royal Canadian Mounted Police [RCMP] and CSIS.

[10] All employees at FINTRAC operate in a highly secure environment (for example, access to computers requires a fingerprint login). The applicant's position in the Terrorist Financing Unit of the Financial Analysis and Disclosures Directorate requires an even higher level of security than generally required by FINTRAC employees.

[11] The letter of offer of employment to the applicant stated that the position offered was conditional upon her obtaining a Secret security clearance before commencing her position and a Top Secret security clearance thereafter. The applicant obtained her Secret security clearance as required and was initially assigned to files that only required Secret security clearance. She submitted an application for Top Secret security clearance once she began her employment with FINTRAC.

[12] On February 26, 2010 FINTRAC requested that CSIS conduct a screening assessment of the applicant. The applicant was advised that her assessment for Top Secret security clearance would be conducted by CSIS and she provided her consent. As requested, she provided four references and her curriculum vitae. She was interviewed by a representative of CSIS on October 13, 2011.

[13] CSIS conducted the assessment of the applicant in accordance with its established process as required by the Policy on Government Security.

[14] Three letters were sent to the applicant on February 27, 2012 informing her of the decisions of the Director and advising her of the redress mechanisms for the denial and revocation of her

security status including the option of filing a complaint with the Security Intelligence Review Committee [“SIRC”] pursuant to s. 42 of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 (the “*CSIS Act*”).

[15] On March 26, 2012, the applicant filed a complaint with SIRC in an effort to have the decisions re-considered. SIRC dismissed the complaint for lack of jurisdiction. Section 42 of the *CSIS Act* refers to the decisions of “Deputy Heads” but this provision does not apply to all federal agencies. Section 29 of the *CSIS Act* designates who is a Deputy Head for the purposes of s 42 of the *CSIS Act*. At the relevant time the Director of FINTRAC was not designated. Accordingly, the security clearance decision of the Director did not fall within the jurisdiction of SIRC.

[16] The applicant then sought judicial review to this Court.

[17] The CSIS security assessment was disclosed to the applicant in a redacted form following her notice of application for judicial review. This Court directed that the redacted report be received pursuant to Rule 317 of the *Federal Courts Rules*, SOR 98/106 and that if the applicant wished to contest the redactions, she should make an application under subsection 37(3) within 10 days of the Court’s Directions. The applicant did not make an application contesting the redactions.

The CSIS Report

[18] The un-redacted portions of the CSIS assessment included, among other things, the following information:

- The applicant has dual Canadian and Russian citizenship;

- The applicant had several social interactions with a Russian diplomat who was friends with her ex-fiancé;
- The applicant had social interactions with another Russian diplomat who she met by chance at a Cirque du Soleil show and also attended one other social event with him at the Russian Embassy;
- The applicant discussed recent contact with another Russian diplomat who “she meets all the time” at various social events but has no contact with him outside such events;
- When asked what she would do if she was ever approached for information, the applicant responded that she would “mostly likely say no”, but then clarified that she might not say no immediately and instead might tell her supervisor in case she could be used as a double agent; and,
- The CSIS representative perceived the applicant to be guarded during the interview responding only with short answers.

[19] The assessment also noted that the Director “may wish” to provide the applicant with a security briefing on measures related to her position and that the Service could also offer the applicant an opportunity to undergo a polygraph test to further assess her loyalty to Canada, with the concurrence of the Director.

[20] The un-redacted portion of the assessment does not make recommendations with respect to a final decision on the security clearance; it states only that the final decision to grant, deny or revoke a clearance rests with the agency, i.e. the Director of FINTRAC.

The Decision under Review

[21] The Director of FINTRAC, Jeanne Fleming, communicated the four decisions to the applicant by way of three letters sent on February 27, 2012.

[22] The first letter informed the applicant of the Director's decision to deny her Top Secret security clearance and to revoke her Secret security clearance. The letter stated the decision was "[a]s a result of the security concerns brought to my attention and in accordance with the requirements of Section 2.8 of the Standard on Personnel Security titled, 'Evaluating Security Assessment Information'", [...].

[23] The letter also referred to the Policy on Government Security and the Director's duty to inform the applicant of her right to seek redress or review of the decision in accordance with Section 6 of the Personnel Security Standard. More specifically, the letter advised the applicant she could:

- file a complaint with the Security Intelligence Review Committee;
- file a complaint to the Canadian Human Rights Commission if based on one or more of the prohibited grounds; and/or,
- raise the matter before the Federal Court.

[24] The second letter informed the applicant of the decision to revoke her Reliability Status. The letter noted that Section 2.8 of the Standard on Personnel Security titled "Evaluating Security Assessment Information" requires that where a "security clearance is denied or revoked on the grounds of loyalty or reliability as it relates to loyalty, the individual's reliability status must also be re-assessed." [My emphasis]. The Director indicated she had undertaken this reassessment and

reached her decision. The letter provided the applicant with the same information regarding possible review or redress of the decision.

[25] The Director's decision was based on the assessment report prepared by CSIS.

[26] The Policy on Government Security was attached to the letters along with a hyperlink to the relevant Treasury Board Policies.

[27] The third letter informed the Applicant of the revocation of her appointment to FINTRAC effective February 28, 2012. The letter noted that the applicant's offer of employment was conditional upon her obtaining Top Secret security clearance and, as a result of the denial of the security clearance, the applicant no longer meets that condition of employment.

[28] The relevant provisions of the Treasury Board Policies and the provisions of the Act are attached as an appendix to this decision.

Issues

[29] This application for judicial review raises three issues: the extent of the duty of procedural fairness on the Director of FINTRAC and whether she breached the duty of procedural fairness or the rules of natural justice in making any of the decisions; the reasonableness of the decisions; and, the appropriate remedy, in the event there was a breach of procedural fairness.

Standard of review

[30] There is no disagreement with respect to the standard of review. Whether the applicant was afforded procedural fairness will be reviewed on the standard of correctness. Decisions regarding the security clearance and reliability status are discretionary in nature and will be reviewed on the reasonableness standard.

[31] Where the standard of reasonableness applies, the role of the Court is to determine whether the decision “falls within ‘a range of possible, acceptable outcomes which are defensible in respect of the facts and law’ (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47 [*Dunsmuir*]). “There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.” (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59). The court should not interfere with these decisions unless this standard is not met.

Was the duty of procedural fairness breached?

The applicant's position

[32] The applicant submits that she was afforded no procedural fairness at all. She was not provided with notice of the concerns of the Director and she was not given an opportunity to respond; she received only the letters notifying her of the final decisions which did not provide any reasons.

[33] The applicant relies on *Myers v Canada (Attorney General)*, 2007 FC 947 at paras 38-39, [Myers], [2007] FCJ No 1246 in support of her argument that the decision respecting her security clearance attracts a greater than minimal degree of fairness. The Court in *Myers* considered procedural fairness in the context of a decision to revoke a reliability status.

[34] The applicant notes that with respect to decisions concerning security clearances, the duty of procedural fairness is met by most governmental departments through the SIRC process which includes a hearing. However, at the time of the applicant's complaint, FINTRAC did not fall under SIRC's jurisdiction. The applicant submits that in these circumstances, it was up to the Director of FINTRAC to fulfill the duty of procedural fairness and she did not do so. At a minimum, the Director was required to give her notice of the information upon which the decision was being made and the opportunity to respond before the final decision was rendered.

[35] The applicant also submits that the decision to revoke her appointment at FINTRAC attracted the duty of procedural fairness because she was not subject to a contract of employment, unlike the situation in *Dunsmuir*. She submits that the decisions to rescind her security clearance were administrative decisions attracting the duty of procedural fairness and the revocation of her appointment resulted from those administrative decisions and is, therefore, also an administrative decision.

[36] The applicant relies on *Nasrallah v Deputy Head (Department of Human Resources and Skills Development)*, 2012 PSLRB 12 at paras 232 and 234-236, [2012] CPSLRB No 13 [Nasrallah]

and *Gill v Treasury Board*, 2009 PSLRB 19 at paras 152 and 170, [2009] CP SLRB No 19 [*Gill*] to support her position that the revocation of her appointment is an exercise of administrative power.

The respondent's position

[37] The respondent submits that none of the decisions of the Director breached the duty of procedural fairness.

[38] The respondent notes that FINTRAC was specifically excluded from the jurisdiction of SIRC at the relevant time pursuant to section 29 of the *CSIS Act*. The respondent submits that this is indicative of Parliament's specific intention; that some agencies, including FINTRAC, would not be afforded the procedural safeguards of SIRC. FINTRAC was, therefore, not required to provide a comparable level of procedural protection as would be afforded through a SIRC hearing.

[39] The respondent acknowledges that a duty of procedural fairness was owed, but says that duty was met. Due to the overall context of the FINTRAC environment, the duty of procedural fairness does not require full disclosure of the case to be met in the context of security clearance decisions. The respondent notes that *Myers, supra*, relied on by the applicant, did not involve any national security interests.

[40] The respondent submits that in circumstances where issues of national security are involved, information helpful to an individual's ability to make full answer and defence may be withheld (*Harkat (Re)*, 2009 FC 1266 at para 26, [2009] FCJ No 1611 and *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38 at para 62, [2008] 2 SCR 326). If national security interests may

justify non-disclosure where liberty interests are at stake, then national security interests can justify non-disclosure of information where the interests at stake are lesser, including where the interests relate to an individual's employment.

[41] The Respondent notes that FINTRAC is statutorily prohibited pursuant to s. 19 of the *CSIS Act* from disclosing the assessment to the applicant without the permission of CSIS. The respondent submits, therefore, that the applicant could not have legitimately expected this disclosure.

[42] The respondent referred to the Supreme Court of Canada's decision in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39 [*Baker*] which established that the duty of procedural fairness varies depending on the context and that several factors must be considered to determine the scope of the duty owed. The respondent submits that many of the *Baker* factors favour a limited duty, including the statutory scheme, the nature of the decision, and, in particular, the respect for the choices of procedure made by the agency itself.

[43] Given that the *Baker* factors are not an exhaustive list, other factors may be considered in appropriate circumstances. The respondent submits that in this case the source of the information must be considered; the applicant provided the information to CSIS, and all the information disclosed to her in the redacted CSIS assessment resulted from that information, not from a third party.

[44] With respect to the decision to terminate the applicant's employment, the respondent submits that no duty of procedural fairness was owed because the employment relationship was

contractual. The offer of employment was expressly conditional upon the applicant obtaining Top Secret security clearance and that condition was not met.

[45] The respondent further submits that the applicant's reliance on *Gill* and *Nesrallah* in support of the argument that the decision to terminate was an administrative decision is not sound and, moreover, these decisions are not binding.

[46] In response to the applicant's argument that a contractual relationship was found to exist in *Dunsmuir* due to the specific provisions of the New Brunswick *Civil Service Act*, the respondent submits that, despite the fact that there is no analogous statutory provision in this case, contract law still governs. The law of contract applies unless superseded by statute or agreement (*Wells v Newfoundland*, [1999] 3 SCR 199 at paras 30 and 33, [1999] SCJ No 50). The respondent also distinguishes the present case from *Dunsmuir* on the basis that the applicant was an employee and not a public office holder.

[47] The respondent acknowledges that the Supreme Court of Canada in *Dunsmuir* commented that a duty of procedural fairness could apply to a termination decision despite a contractual relationship. However, the Court envisioned two possible situations where the duty might arise. First, the Court noted that a duty of procedural fairness could arise for public office holders or Ministers of the State who hold office at pleasure and are really subject to the will of the Crown. Second, the duty might flow by necessary implication from a specific statutory power governing the employment relationship. Neither is applicable to the facts of this case.

[48] The applicant's letter of offer coupled with the appendices which set out the terms and conditions constitutes her contract, which she signed and accepted. The applicant's position was created by the Director; it is not a statutory position. The Director of FINTRAC has the power to terminate as set out in s 49 of the Act, *infra*, as does the Governor in Council on the basis of security clearances, as set out in s 13 of the *Financial Administration Act*, RSC 1985, c F-11, *infra*, and no duty of procedural fairness is applicable.

The employment relationship is contractual

[49] Before assessing the scope of the duty of procedural fairness and whether it was breached, it is important to identify the decisions to which such a duty applies.

[50] There is no disagreement that the decisions to deny and revoke the security clearances were administrative decisions and that a duty of procedural fairness applies.

[51] With respect to the decision to revoke the applicant's appointment to her position at FINTRAC, I do not agree with the applicant's position that this is an administrative decision. I appreciate that such a finding is essential to the remedy the applicant seeks, given the applicant's reliance on the comments in *Dunsmuir* that if the termination decision was made without procedural fairness it is void *ab initio*.

[52] However, the Court in *Dunsmuir* remarked that most public employees are employed on a contractual basis. There is nothing on the facts of this case to suggest the applicant's relationship with FINTRAC is not contractual.

[53] Moreover, the applicant's reliance on passages from *Dunsmuir* in support of the remedy she seeks must be put in context. The Court was addressing the issue of whether reinstatement was a remedy; it noted that reinstatement was not a remedy for either breach of contract or for breach of procedural fairness (at para 108). In considering whether other remedies would apply, the Court referred to decisions made in breach of procedural fairness as void *ab initio*. The Court was not pronouncing that all decisions to terminate public employment attract the duty of procedural fairness; only that in cases where such a duty is owed, the breach would have this result. As noted by the respondent, the Court had identified two situations where a duty of procedural fairness could apply despite a contract of employment. Neither of those situations apply to the present case.

[54] The applicant was in a contractual employment relationship. Although the letter of offer used the word "appointment", this does not signal that the applicant was appointed to a public office. The applicant was appointed to a position with FINTRAC as an employee. The exclusive authority of the Director as set out in s 49 of the Act includes the authority to appoint, lay off or terminate the "employment of employees" and to set the terms and conditions of "employment for employees".

[55] The applicant's contract of employment was her letter of offer coupled with the appendices that set out the terms and conditions, which she accepted and signed.

[56] The applicant relied on *Nasrallah, supra* at para 235-236 for the position that a dismissal which flows from the revocation of reliability status or security clearance is not merely a matter of contract and that the decision must comply with the duty of procedural fairness:

235 In my view, unless it can be sustained that the determination that the employee no longer met the condition of his employment due to his loss of reliability status is tainted by procedural unfairness or bad faith, an adjudicator's jurisdiction ends once cause has been properly established.

236 Based on the jurisprudence cited above, I believe that since the decision to revoke the reliability status is clearly an element that lead to the determination that the grievor no longer met the requirement of his position and ultimately to his termination of employment, I must consider all the process that led to the termination of employment. In other words, I must consider whether procedural fairness and good faith were present in the context surrounding the revocation of the reliability status.

[Emphasis added].

[57] Although the applicant suggests that the adjudicator was prepared to consider the procedural fairness of the termination, the clear wording conveys that the Board was speaking of the need to consider the procedural fairness of the administrative decisions which were the context for the decision to revoke the security clearance.

[58] In *Nesrallah*, the Board found that Mr Nesrallah ought to have known the information upon which his security clearance was revoked and his termination was based. Accordingly, there was no breach of procedural fairness.

[59] In *Gill, supra* the Board found that the investigator did not provide procedural fairness to Mr Gill in revoking his enhanced reliability status and in terminating his employment as a result. The Board noted at para 152:

I conclude that terminating the grievor's employment was an administrative action and that it was done for non-disciplinary reasons. To retain jurisdiction, I would have to be convinced that the employer acted in bad faith or breached the grievor's right to procedural fairness.

[60] In *Gill*, the comments that the termination decision was an administrative act were made in the context of the adjudicator's determination of his own jurisdiction. To the extent that the Board's decision goes beyond a jurisdictional analysis, it is not binding on this Court and I would decline to follow its finding that the termination was an administrative decision.

[61] The decision to deny or revoke a security clearance is an administrative decision which attracts a duty of procedural fairness. Whether revocation or denial of a security status is the cause for dismissal or whether the dismissal is due to the employee's failure to meet an essential condition of the contract of employment, the issue is whether the dismissal is wrongful. The remedy lies in contract law.

[62] No duty of procedural fairness was owed with respect to the decision to revoke the applicant's appointment as an employee of FINTRAC.

The Director did not meet the duty of procedural fairness with respect to the security clearance decisions

The scope of the duty owed

[63] The duty of procedural fairness applies to the Director's decisions to deny the applicant her Top Secret status and to revoke both her Secret security clearance and Reliability status.

[64] FINTRAC was not subject to the SIRC review process at the relevant time. However, due to recent amendments to the *Canadian Security Intelligence Service Act Deputy Heads of the Public Service of Canada Order, SI/93-81*, which designates who is a Deputy Head pursuant to s. 29(e) of the *CSIS Act*, the security clearance decisions of the Director of FINTRAC are now subject to SIRC. If the same decisions were made today, an individual would have the opportunity to seek review or redress through that process.

[65] It appears that the Director thought that the SIRC process did apply to provide a review mechanism for the applicant, since her letter to the applicant advised her of redress mechanisms including SIRC. Had the SIRC process been available, the applicant would have had an opportunity to make submissions, presumably based on the disclosure of the redacted CSIS assessment report. However, the ultimate decision would rest with the Director.

[66] Both the applicant and respondent agree that because the SIRC process did not apply, the duty of procedural fairness owed by the Director did not have to mirror that of SIRC, but they differ on the extent of the duty owed.

[67] The applicant relied on *Myers* to support her position that the degree of procedural fairness owed is more than minimal and that the Policy on Government Security requires procedural fairness.

[68] In *Myers*, Justice Kelen found that a Director at the Canada Revenue Agency had breached the duty of procedural fairness in revoking a reliability status, and noted:

[35] The fact that the Director's decision is administrative in nature and one that affects the "rights, privileges or interests" of the applicant is enough to give rise to a duty of procedural fairness: see *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 and *Baker v. Canada*, [1999] 2 S.C.R. 817. The presence of a duty of fairness also appears to be encapsulated within the *Government Security Policy* itself, where article 10.9 states that government departments must "[t]reat individuals in a fair and unbiased manner, and give them an opportunity to explain adverse information before a decision is reached."

[69] The applicant submits that article 10.9 referred to by Justice Kelen is now article 6.1.6. However, I note that the wording of article 6.1.6 has changed. That provision falls within the section of the Treasury Board Policy on Government Security that addresses the duties of the Deputy Head (i.e. the Director). It provides that Deputy Heads of all departments are responsible for:

6.1.6 Ensuring that all individuals that will have access to government information and assets, including those who work in or for offices of Ministers and Ministers of State, are security screened at the appropriate level before the commencement of their duties and are treated in a fair and unbiased manner.

[70] The current provision does not refer to giving individuals an opportunity to explain adverse information before a decision is reached. However, such wording is included in article 2.7 of the Personnel Security Standard which applies to the revocation of reliability status and provides:

2.7 Individuals must be given an opportunity to explain adverse information before a decision is reached. Unless the information is exemptible under the Privacy Act, individuals must be given the reasons why they have been denied reliability status.

[71] Similar wording does not appear in the provisions regarding the Secret and Top Secret security clearance. The policy now provides more generally that:

2.10 If the required level is denied, Section 42 of the *CSIS Act* requires that the individual be advised in writing within 10 days of the decision and also be informed of his or her right to complain to the Security Intelligence Review Committee (SIRC). See Section 6 for additional information.

[72] The policy distinguishes decisions regarding reliability status from those regarding Top Secret and Secret security clearance, and appears to rely on SIRC as the review mechanism for the latter. As noted above, FINTRAC was not subject to the SIRC process at the relevant time.

[73] Regardless, the issue is not whether a duty of procedural fairness is required, but the extent of that duty in the circumstances.

[74] In *Myers*, Justice Kelen went on to note:

[36] In situations where such a duty arises, the extent of the duty is dependent on the circumstances of each individual case. In *Baker*, above, the Supreme Court outlined a number of factors that are to be weighed in determining the appropriate level of procedural fairness to be afforded: the nature of the decision and the procedure followed in making it; the nature of the statutory scheme and provisions within it; the importance of the decision to the individual affected; the legitimate expectations of the person challenging the decision; and the agency's choice of procedure in making the decision.

[75] Justice Kelen applied the *Baker* factors noting that there was no other appeal procedure other than judicial review to this Court, which pointed to “the need for procedural safeguards above the minimal level”. In addition, the decision to deny or revoke the reliability status was of profound impact to the applicant as his employment depended on it signalling “a degree of fairness that is greater than the minimum level”. Justice Kelen went on to find that the applicant was entitled to know the information upon which the decision was made and to explain the adverse information before the decision was made.

[76] Although the applicant relies on *Myers* as an analogous case, it can be distinguished as there were no national security concerns at play and the decision revoked a reliability status for disciplinary reasons. However, the approach taken by Justice Kelen in relying on the *Baker* factors to first determine the content or level of the duty provides guidance for the present case.

The Baker Factor Analysis

[77] In *Baker*, Justice L’Hureux Dube provided a list factors affecting the duty of procedural fairness emphasizing that the content of the duty must be determined in the specific context of each case; the duty of fairness is flexible and variable, and depends on the context of the particular statute and the rights affected. The Court noted that the factors were not exhaustive and reiterated that procedural fairness is based on the principle that individuals affected by decisions should have the opportunity to present their case and to have decisions affecting their rights and interests made in a fair and impartial and open process “appropriate to the statutory, institutional, and social context of the decision” (*Baker, supra* at para 28).

[78] The *Baker* factors inform the scope of the duty owed in the circumstances.

The nature of the decision:

[79] The level of procedural fairness owed by a decision-maker may be affected by the nature of the decision being made and the process followed in making it. The more the process resembles judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness [*Baker* at para 23].

[80] The process followed by FINTRAC in making the decisions did not resemble judicial decision making at all; rather it was a decision entrusted exclusively to the Director without any apparent internal review process prior to the final decision. The CSIS process was typical and followed the CSIS customary screening assessment approach; the applicant consented to the screening, provided her personal information and was interviewed.

The nature of the statutory scheme:

[81] Greater procedural protections will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted [*Baker* at para 24].

[82] In the present case, the statutory scheme (the Act) did not provide for any review or appeal mechanism within FINTRAC. The Government Policy on Security includes a general provision (6.1) that, “Departments should establish an internal screening review process to review all relevant information and negative recommendations before reliability status or a security clearance is denied

or revoked,” but no such process was put in place by FINTRAC. The only review mechanism available for FINTRAC security clearance decisions was the judicial review to this Court, which does not provide an alternative to procedural fairness in the decision making process, only correction for decisions that breach procedural fairness.

The importance of the decision to the individual affected:

[83] The more important the decision and the greater the impact on the persons affected, the more stringent the procedural protections mandated. The importance of a decision to the individuals affected constitutes a significant factor affecting the content of the duty of procedural fairness [Baker at para 25].

[84] There is no doubt that the decision to deny and revoke her security clearance was of significant importance to the applicant. Not only did it end her employment with FINTRAC, but it would likely make her unemployable across the federal government.

Legitimate Expectations:

[85] The legitimate expectations of the person challenging the decision may determine what procedures the duty of fairness requires in given circumstances; if the person has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness [Baker at para 26].

[86] There is no evidence on the record of the applicant’s legitimate expectations of the process to be followed with respect to the denial and revocation of her security clearance. She was aware

that a Top Secret security clearance was required, that CSIS would conduct the assessment, that she would be interviewed and that the Director would make the decision. The Act establishing FINTRAC constituted notice that the Director had exclusive authority in human resource management and other issues. The Treasury Board Policies on Government Security and the Personnel Security Standard are easily accessible and would have informed the applicant of the nature of the screening and the possible consequences of denial of the Top Secret clearance.

[87] The respondent submits that the applicant would not have any legitimate expectations of disclosure of the security concerns because FINTRAC was precluded from providing this information. However, once she received the letter from the Director, she likely expected the SIRC process to be available given that the letter referred her to this as a redress mechanism and given that she launched a complaint to SIRC.

[88] This Court has found that the duty of procedural fairness may vary depending on whether a security clearance is denied or whether an existing security clearance is revoked. Although these cases did not deal with national security concerns, the distinction may be relevant to the legitimate expectations of the applicant. In addition, the distinction is an additional consideration given the caution in *Baker* that the factors are non-exhaustive.

[89] In *Xavier v Canada (Attorney General)*, 2010 FC 147, [2010] FCJ No 175, the applicant's airport security clearance was revoked as a result of criminal charges that were ultimately withdrawn. Although the applicant was permitted to make submissions to the Board following the investigation, several relevant pieces of information, including a report from the airport intelligence

unit, were not disclosed leading to the result that he was not able to provide a meaningful response. Justice O'Reilly rejected the respondent's argument that the duty owed was relatively low noting, among other reasons that the cases relied on by the respondent dealt with a denial of a security clearance rather than revocation.

[13] The Minister suggests that the degree of fairness owed to Mr. Xavier is relatively slight, according to the factors outlined in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Further, he suggests that this Court found this to be so in *Irani v. Canada (Attorney General)*, 2006 FC 816 and *Motta v. Canada (Attorney General)* (2000), 180 F.T.R. 292. I note that the latter cases dealt specifically with the granting of a TSC, not the cancellation of one. Further, there were no allegations of misconduct against the applicants and no risk that they would lose their jobs. Here, Mr. Xavier has been accused of serious offences, and was fired. The duty of fairness owed to him was greater than in the cases cited by the Minister. That duty must include, at least, the disclosure to him of information to be put before the Advisory Body and an opportunity to respond to it.

[90] Similar distinctions were noted in *Kahin v Canada (Minister of Transport)*, 2010 FC 247, [2010] FCJ No 288 and *Russo v Canada (Minister of Transport, Infrastructure and Communities)*, 2011 FC 764, [2011] FCJ No 957 [*Russo*], and *Motta v Canada (Attorney General)* (2000), 180 FTR 292, [2000] FCJ No 27.

[91] In *Russo*, Justice Russell noted that decision to deny a clearance attracted only a minimal duty of procedural fairness.

[57] As the Respondent points out, this Court has assessed the content of the duty of procedural fairness in the specific context of applications for security clearances on a number of occasions. These decisions demonstrate that the level of procedural fairness required with respect to the denial of an initial application for a clearance, as opposed to a revocation, is minimal.

[92] In the present case, two of the decisions at issue revoke an existing status, which could call for a higher level of procedural fairness because an existing status or privilege is being taken away. I acknowledge that the revocation was a consequence of the denial and that the Director was required to reassess the Secret and Reliability Status upon denial of the Top Secret status. Nevertheless, the decisions were made to revoke the existing status without any review process.

Choice of Procedure:

[93] The choice of procedure made by the agency itself should be taken into account and respected; particularly when the statute leaves the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances [*Baker* at para 27].

[94] The procedures followed by FINTRAC reflected the statutory mandate of the Director and the application of most, but not all, of the relevant TB policies. The Director had the discretion, based on her review of the CSIS report, to decide without any further process. The Director, as Deputy Head, had the full responsibility to determine the security clearance level of employees, and although the CSIS assessment provided essential information, the Director had the final authority. However, although the Personnel Security Standard (6.1) suggests that all Departments should have a process for review of security assessments before a clearance is denied or revoked, no such process existed at FINTRAC.

[95] In summary, at least two of the five *Baker* factors favour greater procedural protections for the applicant than were provided; the importance of the decision to the applicant and the absence of any review mechanism other than the judicial review to this Court.

[96] The other factors, which attract significant weight, suggest that more minimal procedural protections would be sufficient. The applicant was aware that the Top Secret status was a condition of employment and as such she had notice that the CSIS interview would be conducted and would be the basis for the decision regarding her security status. She was aware of the FINTRAC mandate and the secure environment needed and of the high levels of security required by employees.

[97] The applicant consented to the screening and should have been aware of the Treasury Board policies that describe the nature of the assessment and what is being assessed. The criteria for Top Secret security clearance refer to loyalty to Canada and reliability as it relates to loyalty. The applicant should have been aware of what CSIS would be assessing and how the information she provided would be considered in relation to this criteria. The information disclosed in the security assessment was based on information provided by the applicant.

[98] This leads to the conclusion that the duty owed in these circumstances was at the lower end of the spectrum or was minimal. But even the most minimal duty of procedural fairness requires that the person whose rights or interests are affected know the case they have to meet and have some opportunity to respond before the final decision is made.

[99] As stated in *Baker*:

[28] [...] The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

The duty was breached

[100] Although the Director of FINTRAC was not at liberty to disclose the specific security concerns to the applicant, the Director made the final decision without disclosing that she had concerns at all and without providing any opportunity for the applicant to make additional submissions or provide additional information.

[101] As noted in *Thomson v Canada (Deputy Minister of Agriculture)*, [1992] 1 SCR 385 at p 485, [1992] SCJ No 13 at para 31 [*Thomson*]:

This Court has repeatedly recognized the general common law principle that there is "a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual" (see *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653). It follows that the Deputy Minister was under a duty to comply with the principles of procedural fairness in the context of security clearance decision-making. Generally speaking, fairness requires that a party must have an adequate opportunity of knowing the case that must be met, of answering it and putting forward the party's own position. When all the surrounding circumstances are taken into account it is clear that the Deputy Minister fully satisfied these requirements.

[Emphasis added].

[102] Although the applicant had notice of the CSIS assessment process and its purpose, had access to all the Treasury Board policies regarding security, and provided the information to CSIS

that CSIS relied on for the assessment, the applicant was not made aware of the concerns of the Director before the Director made her final decision. The Director had the authority to grant or deny the security clearance regardless of the CSIS assessment. The Director rendered her decision based on the security concerns she had without alerting the applicant to the nature of the concerns or providing the applicant with any opportunity to provide submissions in response to those concerns. As such, the applicant could not provide any further information which may have had a bearing on the Director's decision.

[103] The Director was statutorily prohibited from disclosing the CSIS assessment to the applicant without the consent of CSIS. However, some information could possibly have been provided regarding the Director's more general concerns without disclosing protected information. For example, the Director could have flagged her concerns about loyalty in a general way, as she did in the letters revoking the Secret security clearance and Reliability status. In addition, the Director could have advised the applicant that some aspects of the CSIS report led her to have concerns. She could then have provided the applicant an opportunity to respond based on what the applicant had told CSIS at the interview.

[104] The Treasury Board Policy contemplates that SIRC is usually available as a redress mechanism. For decisions regarding reliability status, there is an express provision that the individual have an opportunity to respond. There is no similar provision for decisions regarding the Secret or Top Secret security clearance because the SIRC process is referred to as the review mechanism.

[105] In addition, Government agencies are generally required to have some internal review mechanism for such decisions. It appears that FINTRAC had none at the applicable time and was exempt from the SIRC process. The Director's decisions were, therefore, immune from review except for judicial review to this Court.

[106] The provision of the redacted report after the decision was made does not address a breach of procedural fairness in the decision making process. It only provides the applicant with reasons for the purpose of determining her next steps (i.e. whether to pursue the judicial review) and the court with the record to determine if the reasons were adequate and the decision reasonable.

[107] The duty of procedural fairness owed in the circumstances was minimal; but even the minimal duty of procedural fairness requires that the person whose rights or interests are affected know the case they have to meet and be given some opportunity to respond before the final decision is made. Although the applicant should have known the nature of the security concerns, she was not provided with any opportunity to respond, even in a general way, to the Director who was the final decision-maker.

[108] I find the Director breached the duty of procedural fairness with respect to the first three decisions under review.

Were the decisions of the Director reasonable?

[109] If I had found that the Director had not breached the minimal duty of procedural fairness owed in the circumstances, I would have also found that the decisions of the Director were reasonable and the reasons provided for the decisions were adequate.

[110] The applicant acknowledges that *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 established that the reasons need not specifically address every issue raised:

[16] 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. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, 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.

[111] I do not agree with the applicant's submission that the reasons fall far below this standard. The Director's reasons do allow this Court to understand why the Director made the decisions and to determine whether the *Dunsmuir* criteria were met.

[112] The letters regarding the security clearances referred to "security concerns brought to my attention" and also referred to the applicable Treasury Board policies on Government and Personnel Security. Notably, the letter which informed the applicant of the revocation of her Reliability Status indicated, in accordance with the Standard on Personnel Security "that where a security clearance is

denied or revoked on the grounds of loyalty or reliability as it relates to loyalty, the individual's reliability status must also be re-assessed." Therefore the applicant would have been made aware that the reasons were due to security concerns regarding her loyalty.

[113] The CSIS report also forms part of the reasons given the Director's reliance on it. As noted above, the CSIS assessment report indicated, among other information that: the applicant had social contact with Russian Diplomats; the applicant responded oddly to questions regarding how she would react if she was asked for information obtained through her employment with FINTRAC; and the applicant appeared guarded during the interview.

[114] As noted by the Supreme Court of Canada in *Thomson* at para 33 and 34, the Deputy Minister (or Deputy Head) has the responsibility for ensuring government security and as a result, the authority to make the ultimate decisions on security clearances. The Deputy is not bound to follow a recommendation of SIRC and the Court should only interfere if there is no evidence to support the decision. The same would apply in the absence of a SIRC process. As Justice Cory noted:

33 The word "recommendations" in the context of s. 52(2) should receive its plain and ordinary meaning. It should not be taken to mean a final or binding decision. Consequently, s. 52(2) does not detract from the Deputy Minister's authority to make the ultimate decision regarding security clearance. This conclusion flows from the wording of s. 52(2). It is supported by the compelling policy reasons for ensuring government security, a duty which is the responsibility of each Deputy Head.

34 Further, the Deputy Minister clearly had evidence upon which he could base his conclusion that security clearance should not be granted. In those circumstances, a court should not interfere with that decision.

[115] Although the Court does not have access to the redacted portions of the CSIS assessment, the information disclosed is sufficient to ground the Director's concerns about her loyalty and her reliability as it relates to loyalty, particularly given the nature of FINTRAC's mandate and the work that the applicant would be responsible for within FINTRAC. The Director bears the responsibility for security within the organisation and is best placed to assess whether to grant, deny or revoke a security clearance on the basis of the assessment done by CSIS. If the Director had provided an opportunity for the applicant to make some submissions to her prior to making the final decision, and the Director then reached the same conclusion, the decisions would fall within the range of possible acceptable outcomes.

[116] Deference would be owed to the Director. She had the onerous responsibility for ensuring security at FINTRAC, an agency that must ensure the highest levels of security in its operations and from its people. As Director she had the expertise and experience in making the difficult decisions to ensure security and to manage human resources.

The remedy

[117] As I have found that there was a breach of the minimal duty of procedural fairness owed, the decisions regarding the security clearance are quashed and must be remitted to the current Director of FINTRAC for re-determination with some opportunity for the applicant to respond to the information that has been disclosed, whether in writing or orally. It is possible that the Director may reach the same result following re-determination, but the applicant must have some opportunity to address the security concerns disclosed.

[118] As I noted earlier in these reasons, the decision to revoke the applicant's appointment as an employee of FINTRAC is not an administrative decision and is governed by the law of contract. Contrary to the applicant's argument, the decision is not void *ab initio*. Any compensation to be sought by the applicant must be done through an action rather than an application for judicial review.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed with respect to the three decisions regarding the Top Secret and Secret security clearance and the Reliability status.
2. Costs are awarded to the applicant.

“Catherine M. Kane”

Judge

Appendix A: Relevant Statutory Provisions

Proceeds of Crime (Money Laundering) and Terrorist Finance Act, RSC 2000, c 17

Loi sur le recyclage des produits de la criminalité et le financement des activités terroristes, LRC 2000, ch 17

3. The object of this Act is

(a) to implement specific measures to detect and deter money laundering and the financing of terrorist activities and to facilitate the investigation and prosecution of money laundering offences and terrorist activity financing offences, including

(i) establishing record keeping and client identification requirements for financial services providers and other persons or entities that engage in businesses, professions or activities that are susceptible to being used for money laundering or the financing of terrorist activities,

(ii) requiring the reporting of suspicious financial transactions and of cross-border movements of currency and monetary instruments, and

(iii) establishing an agency that is responsible for dealing with reported and other information;

(b) to respond to the threat posed by organized crime by providing law enforcement officials with the information they need to deprive criminals of the proceeds of their criminal activities, while ensuring that appropriate safeguards are put in place to protect the privacy of persons with respect to personal information about themselves; and

3. La présente loi a pour objet:

(a) de mettre en oeuvre des mesures visant à détecter et décourager le recyclage des produits de la criminalité et le financement des activités terroristes et à faciliter les enquêtes et les poursuites relatives aux infractions de recyclage des produits de la criminalité et aux infractions de financement des activités terroristes, notamment :

(i) imposer des obligations de tenue de documents et d'identification des clients aux fournisseurs de services financiers et autres personnes ou entités qui se livrent à l'exploitation d'une entreprise ou à l'exercice d'une profession ou d'activités susceptibles d'être utilisées pour le recyclage des produits de la criminalité ou pour le financement des activités terroristes,

(ii) établir un régime de déclaration obligatoire des opérations financières douteuses et des mouvements transfrontaliers d'espèces et d'effets,

(iii) constituer un organisme chargé de l'examen de renseignements, notamment ceux portés à son attention en application du sous-alinéa (ii);

(b) de combattre le crime organisé en fournissant aux responsables de l'application de la loi les renseignements leur permettant de priver les criminels du produit de leurs activités illicites, tout en assurant la mise en place des garanties nécessaires à la protection de la vie privée des personnes à l'égard des renseignements personnels les concernant;

(c) to assist in fulfilling Canada's international commitments to participate in the fight against transnational crime, particularly money laundering, and the fight against terrorist activity.

(c) d'aider le Canada à remplir ses engagements internationaux dans la lutte contre le crime transnational, particulièrement le recyclage des produits de la criminalité, et la lutte contre les activités terroristes.

[...]

[...]

40. The object of this Part is to establish an independent agency that

40. La présente partie a pour objet de constituer un organisme qui :

(a) acts at arm's length from law enforcement agencies and other entities to which it is authorized to disclose information;

(a) est autonome et indépendant de tout organisme chargé de l'application de la loi et des autres entités à qui il est autorisé à communiquer des renseignements;

(b) collects, analyses, assesses and discloses information in order to assist in the detection, prevention and deterrence of money laundering and of the financing of terrorist activities;

(b) recueille, analyse, évalue et communique des renseignements utiles pour la détection, la prévention et la dissuasion en matière de recyclage des produits de la criminalité ou de financement des activités terroristes;

(c) ensures that personal information under its control is protected from unauthorized disclosure;

(c) assure la protection nécessaire aux renseignements personnels qui relèvent de lui;

(d) operates to enhance public awareness and understanding of matters related to money laundering; and

(d) sensibilise le public aux questions liées au recyclage des produits de la criminalité;

(e) ensures compliance with Part 1.

(e) procède à des contrôles d'application de la partie 1.

41. (1) There is hereby established the Financial Transactions and Reports Analysis Centre of Canada.

41. (1) Est constitué le Centre d'analyse des opérations et déclarations financières du Canada.

(2) The Centre may exercise powers only as an agent of Her Majesty in right of Canada.

(2) Le Centre ne peut exercer ses pouvoirs qu'à titre de mandataire de Sa Majesté du chef du Canada.

[...]

[...]

49. (1) The Director has exclusive authority to

49. (1) Le directeur a le pouvoir exclusif:

(a) appoint, lay off or terminate the employment of the employees of the Centre; and

(a) de nommer, mettre en disponibilité ou licencier les employés du Centre;

(b) establish standards, procedures and processes governing staffing, including the appointment, lay-off or termination of the employment of employees otherwise than for cause.

(b) d'élaborer des normes et méthodes régissant la dotation en personnel, notamment la nomination, la mise en disponibilité ou le licenciement — à l'exclusion du licenciement motivé.

(2) Nothing in the *Public Service Labour Relations Act* shall be construed so as to affect the right or authority of the Director to deal with the matters referred to in paragraph (1)(b).

(2) La *Loi sur les relations de travail dans la fonction publique* n'a pas pour effet de porter atteinte au droit ou au pouvoir du directeur de régir les questions visées à l'alinéa (1)b).

(3) Subsections 11.1(1) and 12(2) of the *Financial Administration Act* do not apply to the Centre, and the Director may

(3) Les paragraphes 11.1(1) et 12(2) de la *Loi sur la gestion des finances publiques* ne s'appliquent pas au Centre; le directeur peut :

(a) determine the organization of and classify the positions in the Centre;

(a) déterminer l'organisation du Centre et la classification des postes au sein de celui-ci;

(b) set the terms and conditions of employment for employees, including termination of employment for cause, and assign to them their duties;

(b) fixer les conditions d'emploi — notamment en ce qui concerne le licenciement motivé — des employés et leur assigner des tâches;

(c) notwithstanding section 112 of the *Public Service Labour Relations Act*, in accordance with the mandate approved by the Treasury Board, fix the remuneration of the employees of the Centre; and

(c) malgré l'article 112 de la *Loi sur les relations de travail dans la fonction publique*, conformément au mandat approuvé par le Conseil du Trésor, fixer la rémunération des employés du Centre;

(d) provide for any other matters that the Director considers necessary for effective human resources management in the Centre.

(d) régler toute autre question dans la mesure où il l'estime nécessaire pour la bonne gestion des ressources humaines du Centre.

Appendix B: Relevant Government Policies

Treasury Board of Canada Secretariat: Policy on Government Security

[...]

2.1 This policy applies to:

- All departments within the meaning of Schedules I, I.1, II, IV and V of the *Financial Administration Act* (FAA), unless excluded by specific acts, regulations or Orders in Council.

[...]

3.6 Deputy heads are accountable for the effective implementation and governance of security and identity management within their departments and share responsibility for the security of government as a whole. This comprises the security of departmental personnel, including those working in or for offices of Ministers or Ministers of State, and departmental information, facilities and other assets.

[...]

Requirements

6.1 Deputy heads of all departments are responsible for:

6.1.1 Establishing a security program for the coordination and management of departmental security activities that:

- a. Has a governance structure with clear accountabilities
- b. Has defined objectives that are aligned with departmental and government-wide policies, priorities and plans; and
- c. Is monitored, assessed and reported on to measure management efforts, resources and success toward achieving its expected results;

[...]

6.1.6 Ensuring that all individuals who will have access to government information and assets, including those who work in or for offices of Ministers and Ministers of State, are security screened at the appropriate level before the commencement of their duties and are treated in a fair and unbiased manner;

6.1.7 Ensuring that their authority to deny, revoke or suspend security clearances is not delegated;

Treasury Board of Canada Secretariat: Personnel Security Standard

[...]

2.7 Evaluating results of reliability checks

In arriving at a reliability screening decision, officials are expected to provide a fair and objective assessment that respects the rights of the individual. *Individuals must be given an opportunity to explain adverse information before a decision is reached. Unless the information is exemptible under the Privacy Act, individuals must be given the reasons why they have been denied reliability status.*

The authorizing manager will need to determine whether a person can be considered trustworthy, taking into account the assessments in articles 2.7.1 to 2.7.5 below.

[...]

2.8 Evaluating security assessment information

The decision to grant or deny a security clearance is based primarily on the investigative body's recommendation concerning the person's loyalty to Canada, as well as their reliability as it relates to such loyalty.

Depending upon the security clearance level requested and the position or contract for which the individual is being considered, consideration is given to some or all of the following factors:

- Character (honesty, stability, etc.).
- Criminal record (if any).
- Financial situation.
- Citizenship.
- Personal beliefs and associations.
- Statements made during the subject interview.
- CSIS indices check.

A decision to grant or deny a security clearance must be based upon adequate information. Where such information does not exist, or cannot be obtained, a security clearance cannot be given.

Normally, an adequate quantity and quality of information covers:

- For site access, the last five continuous years or to age 16 years, whichever comes first.
- For Levels I, II and III, the last 10 continuous years or to age 16 years, whichever comes first.

Adverse information concerning an individual is assessed with respect to its nature and seriousness, surrounding circumstances, frequency, the willingness of participation, the individual's age at the time of the incident(s) and the degree of rehabilitation.

Individuals are denied a security clearance if there are reasonable grounds to believe that the following conditions apply:

- As it relates to loyalty, the individual is engaged, or may engage, in activities that constitute a threat to the security of Canada within the meaning of the *CSIS Act*.
- Reliability as it relates to loyalty, because of personal beliefs, features of character, association with persons or groups considered a security threat, or family or other close ties to persons living in oppressive or hostile countries, the individual may act or may be induced to act in a way that constitutes a "threat to the security of Canada"; or they may disclose, may be induced to disclose, or may cause to be disclosed in an unauthorized way, classified information.

Classified CSIS information must not be discussed with an individual without the prior agreement of CSIS.

[Emphasis added].

CSIS need only be informed of cases in which a department:

- Grants a level of clearance other than that which has been requested.
- Grants a clearance where a negative assessment recommendation is involved.
- Denies, suspends or revokes a clearance.

If as part of a security clearance assessment, adverse information as defined in paragraph 3 to Appendix B "Guidance on Use of Information for Reliability Checks" is received, it may be used to re-assess the individual's previously granted reliability status. In such cases, departments must conduct their own internal investigation to determine if a revocation of reliability status is warranted.

In cases where the individual's security clearance is being denied or revoked on the grounds of loyalty or reliability as it relates to loyalty, departments must also re-assess the individual's reliability status.

In all cases that result in a denial or revocation of either a security clearance or reliability status, departments must follow those procedures outlined within Sections 5 and 6 of this Standard.

[Emphasis added]

[...]

2.10 Granting or denying a security clearance

Departments must assign authority at an appropriate level to grant security clearances. The authority to deny, revoke or suspend clearances may not be delegated below the level of deputy head.

The decision to grant a security clearance is recorded on the *Security Screening Certificate and Briefing Form*. The requesting office is then advised so that the proposed appointment or contract may proceed.

All records pertaining to security clearances are to be retained in standard information bank PSE 909, except where an alternate bank is identified in *Info Source*.

If the required level is denied, Section 42 of the *CSIS Act* requires that the individual be advised in writing within 10 days of the decision and also be informed of his or her right to complain to the Security Intelligence Review Committee (SIRC). See Section 6 for additional information.

Pursuant to making a complaint, individuals will be provided with a statement of circumstance by SIRC.

[...]

5. Revocation

As a result of an update or a review based on new adverse information concerning an individual, his or her enhanced reliability status or security clearance may be revoked. The authority of the deputy head to revoke a security clearance may not be delegated.

In the event of a revocation, individuals must be informed of their rights of review or redress and prohibited from access to sensitive information and assets.

If as the result of a denial or revocation of a security clearance or reliability status, the individual no longer meets the condition of employment, departmental Labour Relations must be consulted.

If the individual concerned is on contract, the contract must be terminated. Where the individual is an employee of a firm, the person must be replaced by another employee of the contracting firm, otherwise the contract is to be terminated.

In cases involving security clearance denials, revocations or suspensions, except for members of the Canadian Forces, deputy heads must consult with the Privy Council Office before recommending to the Governor in Council the dismissal of any individual in the interests of national security. If the individual is an employee as defined in the Public Service Staff Relations Act, deputy heads must also consult with the Human Resources Policy Branch of the Treasury Board Secretariat.

When a member of the Canadian Forces is released in the interests of national security pursuant to the provisions of the Queen's Regulations and Orders (Chapter 15-Release), the deputy head must inform the Privy Council Office.

6. Review and redress

6.1 General

Departments should establish an internal screening review process to review all relevant information and negative recommendations before reliability status or a security clearance is denied or revoked.

Individuals must be informed in writing of their rights of access to review or redress mechanisms where a decision to deny or revoke reliability status or a security clearance has been reached. The authorized officer denying reliability status should consult the security office regarding the redress mechanisms available in each case in order to fully inform the individual concerned.

6.2 Reliability status

Employees who wish to challenge a negative decision based on the results of a reliability check may do so through current grievance procedures in accordance with Sections 91 and 92 of the *Public Service Staff Relations Act*. Departments, other than the Canadian Forces component of the Department of National Defence, must ensure that reliability check grievances proceed directly to the final level of the grievance procedure.

Individuals from outside the Public Service, such as applicants and contractors, may complain to the Canadian Human Rights Commission, the Public Service Commission's Investigations Directorate or the Federal Court, Trial Division, according to the specifics of each case.

6.3 Security clearance

The Canadian Security Intelligence Service Act establishes the Security Intelligence Review Committee (SIRC) as the formal review body in cases concerning denial of a security clearance. Pursuant to *Section 42 of the CSIS Act*, this right of review is available to outside candidates, employees and those contracting directly with the government who are denied a security clearance by a deputy head.

Deputy Heads who disagree with a security clearance recommendation made by SIRC must consult with the Privy Council Office (PCO) in reviewing the issue. Deputy Heads must also inform the Chairperson of SIRC of their final decision in writing. Consultation with PCO must take place prior to any action to release, demote or dismiss an individual, notwithstanding the fact that the authority to deny a security clearance remains with the Deputy Head. This requirement is intended to ensure the thorough review of the initial reasons for denying, revoking or suspending a security clearance in those cases where the SIRC recommends granting or reinstating the clearance.

Any individual denied a security clearance may also file a complaint with the Canadian Human Rights Commission. If a minister advises the Commission that the basis of the denial relates to the security of Canada, the Commission may either dismiss the complaint or refer the matter to SIRC for investigation before proceeding. As well, individuals may appeal to the Federal Court following the denial of a security clearance.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2252-12

STYLE OF CAUSE: IRINA KOULATCHENKO v
FINANCIAL TRANSACTIONS AND REPORTS
ANALYSIS CENTRE OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: JANUARY 27, 2014

**REASONS FOR JUDGMENT
AND JUDGMENT:** KANEJ.

DATED: MARCH 3, 2014

APPEARANCES:

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