

**Date: 20090721**

**Docket: A-497-07**

**Citation: 2009 FCA 234**

**CORAM:** DÉCARY J.A.  
LINDEN J.A.  
EVANS J.A.

**IN THE MATTER of a reference by the Attorney General of Canada pursuant to subsections 18.3(2) and 28(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 as amended, of questions or issues of the constitutional validity, applicability or operability of an Act of Parliament or of Regulations made under an Act of Parliament that have arisen in proceedings before the Canadian Industrial Relations Board.**

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Applicant**

Heard at Vancouver, British Columbia, on June 15, 2009.

Judgment delivered at Ottawa, Ontario, on July 21, 2009.

**REASONS FOR JUDGMENT BY:**

**EVANS J.A.**

**CONCURRED IN BY:**

**DÉCARY J.A.  
LINDEN J.A.**

Federal Court  
of Appeal



CANADA

Cour d'appel  
fédérale

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**REASONS FOR JUDGMENT**

**EVANS J.A.**

**A. INTRODUCTION**

[1] This is a reference to the Court by the Attorney General of Canada pursuant to subsections 18.3(2) and 28(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for a determination of the constitutional validity of the *Marine Transportation Security Regulations*, SOR/2004-144 (“Regulations”).

[2] In brief, the Regulations create a scheme for screening workers employed in security-sensitive positions at ports in Canada. Employees must provide biographical and other information about themselves and their spouse or partner which is used to determine whether they represent a security threat to marine transportation emanating from terrorism or organized crime. If the Minister of Transport determines that there are reasonable grounds to suspect that an applicant poses such a risk, a security clearance may be refused. A refusal may reduce the applicant's opportunities for work.

[3] The principal question at issue in this reference is whether the Regulations breach the *Canadian Charter of Rights and Freedoms* as an unreasonable intrusion into the privacy of employees, as a result of which their employment may be jeopardized and their liberty compromised by the potential disclosure to a foreign government of the information collected about them. In my view, it has not been established that the Regulations violate the constitutional rights of the employees to whom they apply.

**B. BACKGROUND TO THE PROCEEDING**

[4] The respondents to the reference are the International Longshore and Warehouse Union of Canada and four of its Locals, 500, 502, 514, and 517 (collectively "ILWU"). ILWU members are employed in various roles in marine transportation in British Columbia, primarily in the Port of Metro Vancouver. Most of the approximately 4,600 employees who belong to these Locals are affected by the Regulations.

[5] The Vancouver Fraser Port Authority is also a respondent and, while taking no position on the merits of the issues, it has put before the Court factual information about the nature and scale of the business of the Port. It is concerned that a decision declaring the Regulations to be invalid, in whole or in part, would undermine potential users' confidence in the security of its ports, and thus have an adverse impact on business. The British Columbia Maritime Employers Association ("BCMEA") is also a respondent, but neither filed a memorandum of fact and law, nor made oral submissions.

[6] ILWU first mounted a legal challenge to the Regulations before a labour grievance arbitrator, alleging that the terminal operators were in breach of the collective agreement by, among other things, failing adequately to consult on the restricted areas and positions to be covered by the Regulations, and by requiring employees to apply for security clearance. ILWU argued also that the Regulations were invalid because they violated employees' Charter and other privacy rights. However, at the urging of the Attorney General and BCMEA, the arbitrator adjourned the proceeding, pending a determination of the validity of the Regulations by the Canada Industrial Relations Board ("Board") or a court: *British Columbia Maritime Employers Assn. v. International Longshore and Warehouse Union-Canada* (2007), 168 L.A.C. (4th) 418.

[7] Before the Board, BCMEA sought a declaration under section 91 of *the Canada Labour Code*, R.S.C. 1985, c. L-2, that the concerted refusal to apply for security clearances constituted an unlawful strike. The union replied that it did not and that, in any event, the Regulations were invalid. Before the hearing started, the Attorney General announced that he was referring to this Court the

issues concerning the constitutional validity of the Regulations. After determining that a reference by the Attorney General under subsection 18.3(2) of the *Federal Courts Act* removed the constitutional issues from its jurisdiction, the Board concluded that, leaving aside the validity of the Regulations, ILWU's instruction to its members not to apply for security clearances constituted an unlawful strike in breach of the Code: *British Columbia Maritime Employers Assn (Re)*, [2007] C.I.R.B. No. 397.

[8] The Court decided to proceed with the hearing, as the parties wished, after inviting submissions from counsel on the appropriateness of the reference, especially in light of the disputed factual questions which it appeared that the Court might have to determine, largely in the context of a section 1 inquiry, on the basis of a large record. While the Court has jurisdiction to determine a reference under subsection 18.3(2), even though it may require the Court to make findings of disputed fact (*Watt v. Liebelt*, [1999] 2 F.C. 455 at paras. 26-27 (C.A.)), it would have been preferable, in the view of the panel, if the Attorney General had permitted the matter to proceed before the Board, which could have made findings of fact on the basis of both documentary and, if required, *viva voce* evidence. We also agree with the submission of ILWU that the Board's labour relations expertise would have provided a useful context in which it could have considered if the Regulations violated the Charter.

[9] Because subsection 18.3(2) of the *Federal Courts Act* confines references by the Attorney General to the "constitutional validity, operability and applicability" of the Regulations, the Court determined that it would hear submissions only on the questions in the reference relating to the

Charter, and not the “*quasi-constitutional*” statutes relied on by ILWU in its memorandum, namely, the *Canadian Bill of Rights*, *Canadian Human Rights Act*, and *Privacy Act*.

[10] The Charter sections in issue in this reference are sections 2, 7, 8, and 15. If the union establishes a *prima facie* breach of any of these provisions, the government has the burden of satisfying the Court that the breach is justifiable under section 1. The questions referred to the Court by the Attorney General are set out in Appendix “B” to these reasons.

### **C. THE MARINE TRANSPORTATION SECURITY CLEARANCE PROGRAM**

#### **1. Statutory Scheme**

[11] The program is part of a security review process initiated by Transport Canada in 2002, partly in response to the attack on the World Trade Center in New York on September 11, 2001. The purposes of the program are to enable the Minister to gather sufficient information to establish the identities of workers employed in security-sensitive positions in ports and to ensure that they do not pose an unacceptable security risk to marine transportation. The scheme is intended to deter security risks from applying for clearance, and to screen out unacceptably high security risks who do apply.

[12] The full text of all the impugned sections of the Regulations and the relevant sections of the Charter are set out in Appendix “A” to these reasons. In this part of my reasons, I describe the principal elements of the statutory security clearance scheme, especially those on which ILWU has focussed its attack.

[13] Section 503 defines the positions for which a security clearance is required. A clearance is required for a security-sensitive location in a port designated as “a restricted area two”. At present, these are mainly in the cruise ship and container terminals, and areas containing central controls for security and surveillance equipment, and the central lighting system. However, ILWU fears that they may be extended in the future to other locations at ports.

[14] Section 503 provides that security clearances are necessary for, among others:

- (i) persons whose work requires them to have access to either a restricted area two, or to a cruise ship that interfaces with a restricted area two in order to provide services, supplies or equipment to the ship (paragraphs (a) and (f));
- (ii) persons who are involved with specified aspects of the security clearance process, or have other security responsibilities (paragraphs (d) and (e)); and
- (iii) persons who, as a result of being assigned to certain specified duties, could jeopardize security by causing a preventive measure to fail, delaying the response to a security incident, or affecting the recovery from such an incident (paragraph (g)).

[15] Section 506 describes the information that an applicant for a security clearance must provide on a form supplied by the Minister pursuant to section 507. It includes the following.

- (i) **identity:** names, date of birth, gender, height, weight, colours of eyes and hair, birth certificate (if born in Canada), place of birth, port and date of entry, citizenship or permanent residence or evidence of other immigration status (if born out of Canada), passport number (if any), fingerprints and facial image (paragraphs (2)(a)-(e));

- (ii) **residence:** addresses of all locations at which the applicant has lived in the previous five years (paragraph (2)(g));
- (iii) **activities:** these include the names and addresses of employers and post-secondary educational institutions attended in the last five years (paragraph (2)(h));
- (iv) **travel:** details of travel outside Canada and the United States of more than 90 days (paragraph (2)(i));
- (v) **spouse or common-law partner (present and former):** identity information and present address (if known) (paragraph (2)(f) and subsection (3)).

[16] Section 508 describes subsequent checks and verification of the information undertaken by the Minister in order to determine whether the applicant is a risk to the security of marine transportation. These include: a criminal record check; a check of law enforcement files, including intelligence gathered for law enforcement purposes; a Canadian Security Intelligence Service (“CSIS”) indices check and, if necessary, a CSIS security assessment; and a check of the applicant’s citizenship and immigration status.

[17] In addition to disclosing an applicant’s information to domestic law enforcement and intelligence agencies, the Minister may share it, together with the results of the checks and verifications described above, with the government of a foreign state when the Minister is of the opinion that the public interest in such disclosure clearly outweighs the invasion of privacy resulting from the disclosure. Otherwise, the Minister is prohibited from disclosing the information to a foreign government without the written consent of the applicant. See subsection 506(5). The

application form supplied by the Minister contains a space where applicants can sign their consent to the release of personal information to foreign governments. The form warns that failure to sign may lead to the rejection of the application.

[18] Section 509 requires the Minister to determine whether the information supplied by the applicant, and that resulting from the checks and verifications, is sufficient for a decision to be made on the extent to which the applicant represents a security threat. If it is, the Minister will decide whether to issue a security clearance on the basis of an evaluation of the factors listed in section 509. These include:

- (i) the relevance of any criminal record to the security of marine transportation (paragraph (a));
- (ii) whether it is known or there are reasonable grounds to suspect that the applicant is or has been
  - (a) involved in or contributed to activities directed to the misuse of the transportation infrastructure to commit criminal offences or acts of violence against persons or property, taking into account the relevance of these factors to the security of marine transportation (subparagraph (b)(i));
  - (b) a member of or involved with a terrorist group or criminal organization within the meaning of sections 83.01 and 467.1 of the *Criminal Code*, or with a group that is reasonably suspected of being involved in or of contributing to acts of violence against persons or property, taking into account the relevance of these factors to the security of marine transportation (subparagraphs (b)(ii), (iii), and (iv)); or

- (c) associated with an individual who is known to come, or is reasonably suspected of coming, within any of the above descriptions ( subparagraph (b)(v));
- (iii) whether there are reasonable grounds to suspect that the applicant may be in a position to be suborned to commit an act that might endanger marine transportation security (paragraph (c)); and
- (iv) whether the applicant has had a restricted area pass for a port, marine facility or airport removed for cause, or has filed false or misleading information in connection with his or her security clearance application (paragraphs (d) and (e))

[19] Before refusing a clearance, the Minister is required by section 511 to notify an applicant of the basis of the Minister's doubt as to whether a security clearance should be issued, and to permit the applicant to respond.

[20] Section 515 authorizes the Minister to suspend a security clearance on the receipt of information that could change the Minister's decision under section 509. The individual must be told the basis of the suspension and given an opportunity to make written submissions. The Minister may then reinstate or cancel the security clearance after deciding whether the individual poses a threat to the security of marine transportation on the basis of the factors set out in section 509.

[21] Section 517 provides for reconsideration by the Minister of a refusal or a cancellation of a security clearance, after the applicant has had an opportunity to make representations.

## **2. Operation of the Scheme**

[22] ILWU emphasizes that, unlike airport workers, its members at the Vancouver Fraser Ports comprise a stable workforce. Some of these employees have expressed serious concern that, after many years of employment, they are now regarded as potential security risks, and are subject to extensive background checks which intrude on their privacy and, if the information is shared with foreign governments that have poor human rights records, may also expose them to grave personal danger.

[23] Apparently, only the United States and Australia have comparable background checking systems for port employees. These kinds of checks on employees are not required by either the International Labour Organization or the International Maritime Organization, which are responsible for setting international labour and maritime standards, or by the International Ship and Port Security Code. ILWU also points out that, as in other countries, ports in Canada already have physical security measures in place, such as fencing, lighting, patrols, and x-ray and radiation screening. However, the Attorney General notes that it is always possible for an “insider” to subvert these measures.

[24] Criminal record and law enforcement agency checks conducted on applicants include not only criminal convictions, but also criminal charges that did not lead to a conviction. The so-called indices checks by CSIS are more extensive. An applicant’s information is put through a computer program, which compares it with that in CSIS’s operational data banks by weighing the various fields according to their relative importance in identifying security risks. The indices of risk may be

found in, for example, associations, education, time spent outside Canada, and place of residence. A profile match will register as a “hit” and identify a security concern. “Hits” are examined by CSIS officials to determine if they are real threats. If they are, the applicant will be interviewed by CSIS. ILWU fears that information collected about its members who have applied for security clearance may be retained by CSIS in their operational data holdings and disclosed to foreign governments.

[25] Employees who are denied a security clearance will not necessarily lose their job. Rather, depending on their seniority and the particular work that they do, they may have fewer hours available to them in areas of the port for which a security clearance is not required. Failure to complete an application form in full may lead to the refusal of a security clearance, if the Minister cannot be satisfied that the person is not an unacceptable security risk on the basis of the information supplied. Thus, while a security clearance may not be a requirement of employment, the scheme cannot be described as voluntary either.

[26] According to information provided at the hearing by counsel for the Attorney General, most of the approximately 5,000 security clearance applications submitted have been processed. Ten applicants have been refused in Vancouver, of whom seven are longshoremen. Four others (not longshoremen) have been refused for incomplete information. All these negative decisions are subject to reconsideration.

#### **D. CHARTER ISSUES AND ANALYSIS**

[27] In his oral submissions, Mr Danay, counsel for the Attorney General, correctly emphasized three points that should frame an analysis of the allegations that the Regulations infringe the Charter rights of ILWU members.

[28] First, as the party alleging Charter violations, ILWU has the burden of proving a *prima facie* breach, even when the section of the Charter in question requires a contextual balancing of the right against competing interests, such as sections 7 (principles of fundamental justice) and 8 (unreasonable search). Second, when the issue is whether impugned state action has the effect of infringing a Charter right, ILWU, as the party alleging that it does, must adduce evidence to prove it, unless it is obvious. Third, it is important to distinguish an attack on the validity of the Regulations, such as that by ILWU, from an attack on an individual decision made under them. Regulations are not invalidated merely because they may be applied in an unconstitutional manner in individual cases. It is always open to an individual refused a security clearance to challenge the refusal as an unconstitutional exercise of the decision-making power delegated to the Minister by the Regulations: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120.

[29] To some extent, ILWU's Charter arguments overlap. Sometimes, its argument is focussed on particular provisions of the Regulations, while, at others, it is aimed at their cumulative effect. Moreover, in both its memorandum and oral submissions, ILWU adopts what is perhaps best described as a broad brush approach to an analysis of the Charter violations alleged. Nonetheless, I

shall endeavour to capture what I understand to be the essence of the arguments made under each section.

**Issue 1: Do the Regulations breach employees' freedom of religion, thought, belief, expression and association protected by section 2 of the Charter?**

[30] ILWU argues that the information that employees are required to give under section 506, and the checks and verifications subsequently made by law enforcement agencies (the Royal Canadian Mounted Police (“RCMP”) in particular) and CSIS, may enable an applicant’s religion or political opinions to be identified. Although applicants are not asked by the application form to disclose their religion or political opinions, they may be inferred from, for example, the educational institutions attended, time and activities out of Canada, or organizations to which an applicant has belonged. Counsel argues that, since the Minister may use this information to refuse a security clearance, and thus adversely affect an applicant’s employment, the Regulations will have a chilling effect on constitutionally guaranteed freedoms.

[31] In my view, it is not so obvious that the Regulations have a chilling effect on the rights relied on by ILWU that such an effect can be assumed as a matter of common sense. Neither the Regulations, nor the security clearance application form used by the Minister, require applicants to disclose their religious or political opinions. Whether they can be inferred from the information supplied by any given individual is a matter of speculation. ILWU has not adduced evidence to establish that the Regulations have a chilling effect on members’ practice of religion or the expression of their political views.

[32] An analogous scheme for screening airport workers has been in place in Canada since the Air India bombing in 1985 and no evidence has been adduced of complaints that it has had a chilling effect on the exercise of constitutional rights. This at least suggests that it cannot be assumed as a matter of “common sense” that the Regulations under consideration here will have this effect.

[33] ILWU relies on *R. v. Khawaja* (2006), 214 C.C.C. (3d) 399 (Ont. Sup. Ct.) (“*Khawaja*”) to support its attack on subparagraph 509(b)(ii). This provision makes the fact that an applicant is involved with a terrorist group, as defined by subsection 83.01(1) of the *Criminal Code*, a basis on which the Minister may form a reasonable ground to suspect that an applicant is a security threat and should not be granted a security clearance.

[34] In *Khawaja*, the Court invalidated the part of the definition of “terrorist activity” in subsection 83.01(1) which requires that the act be committed with a “political, religious or ideological purpose, objective or cause”. An irony of *Khawaja* is that the invalidation of the “motive clause” had the effect of broadening the definition of the activities included in the subsection.

[35] Be that as it may, *Khawaja* was not followed in two other cases decided in the Ontario Superior Court, where it was held that common sense alone did not support the view that the “motive clause” had a chilling effect on the exercise of section 2 freedoms. Evidence was required: see *R. v. Ahmad* (31 March, 2009); Toronto CRIMJ (F) 2025/07 (Ont Sup. Ct.) (subject to a publication ban) and *United States of America v. Nadarajah* [2009] O.J. No. 946 (QL). I agree with

the view expressed in *Ahmad* (at para. 133) that any chilling effect on religious freedom is more likely the result of public stereotyping of, and hostility towards certain religious and ethnic minorities, than of the “motive clause” in subsection 83.01(1).

[36] The argument respecting freedom of association is somewhat different, because of the factors to be considered by the Minister under section 509 when determining to what extent an applicant poses a threat to the security of marine transportation. These include several forms of association, such as terrorist groups and criminal organizations organized as defined by the *Criminal Code*, and organizations engaged in or supporting activities directed towards the use of violence. Admittedly, these definitions are broad. However, section 2 does not protect the freedom to associate in order to engage in or promote violent, terrorist or other criminal activities of the kind described in section 509: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at paras. 107-8.

[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.

[39] In these circumstances, it is not obvious as a matter of “common sense” that an applicant would be deterred from associating with others for lawful purposes, and ILWU has provided no evidence to support its allegation that the Regulations have a chilling effect on applicants’ freedom of association under paragraph 2(d) of the Charter.

[40] Finally, an applicant who is refused a security clearance by the Minister, and whose request for a reconsideration is unsuccessful, may apply to the Federal Court to review the decision on the ground that it was made in violation of the freedoms protected by section 2 of the Charter.

[41] In my opinion, the Regulations do not violate employees’ Charter rights under section 2.

**Issue 2:        Do the Regulations violate employees’ rights under section 7?**

[42] ILWU’s principal argument on section 7 is that the Regulations breach employees’ right not to be deprived of security of the person other than in accordance with the principles of fundamental

justice. It argues that section 7 is violated because subsection 506(5) authorizes the Minister to share information about an applicant with a foreign government when the public interest in such disclosure “clearly outweighs” the invasion of privacy. ILWU says that the provision enables the Minister to disclose to a foreign government with a poor human rights record who may use the information to inflict harm on the applicant.

[43] The Maher Arar affair is a salutary reminder that sharing intelligence with foreign governments can have very serious consequences for an individual, particularly, of course, if the information turns out to be false. Nonetheless, such instances appear to be sufficiently rare that the possibility that a decision by the Minister to disclose, in the limited circumstances permitted by subsection 506(5), will endanger the personal safety of an employee is too remote and speculative to constitute a breach of section 7. The marine transportation security clearance program is sufficiently new that there is little evidence about its operation. However, concerns about the potentially dangerous consequences of information sharing seem not to have arisen from the analogous and well established security clearance scheme at airports. The speculative nature of any harm to employees who are refused security clearance would also be applicable to a challenge based on paragraph 1(a) of the *Canadian Bill of Rights*.

[44] ILWU makes two other points on section 7. First, it argues that the extensive personal information that an applicant must disclose on the application form is an invasion of privacy, an interest protected by section 7. In my view, because section 8 deals specifically with the protection of privacy from unreasonable search and seizure, this concern is not appropriately considered under

section 7. Thus, in *R. v. Mills*, [1999] 3 S.C.R. 668 at para. 88, it was said that if a search and seizure is reasonable within the meaning of section 8, it is, by definition, “consistent with the principles of fundamental justice” for the purpose of section 7.

[45] Second, ILWU submits that the potential loss of employment by employees who do not obtain a security clearance attracts section 7 because loss of employment is a deprivation of liberty. I disagree.

[46] First, the consequences for an employee who is refused a security clearance are uncertain. ILWU stated that employees in this situation may lose hours of work, especially if they lack seniority. However, whether anyone would actually lose their job is speculative. The same consideration would apply to defeat an argument based on paragraph 1(a) of the *Canadian Bill of Rights*.

[47] Second, since section 7 does not protect property or other predominantly economic interests, it would not cover any potentially adverse impact that a refusal of security clearance might have on an employee’s employment: *Mussani v. College of Physicians and Surgeons of Ontario* (2004), 74 O.R. (3d) 1 at paras. 41-43 (C.A.) (right to practise a profession not protected by section 7).

**Issue 3: Do the Regulations breach employees’ right not to be subject to an unreasonable search and seizure contrary to section 8?**

[48] For the purpose of this reference, I shall assume that the Regulations constitute a search, in that employees are asked for personal information in a context where a refusal to provide it may

jeopardize their employment. I agree with ILWU that the fact that the security clearance form supplied by the Minister under subsection 507(1) contains a space for applicants to consent to verification and disclosure is of little legal significance, especially since a refusal to sign may lead the Minister to reject the application on the ground that there is insufficient information to conclude that the applicant is not a security threat.

[49] The question is whether the search authorized by the Regulations is unreasonable, an inquiry which requires the Court to balance employees' interest in privacy against the public interests served by the statutory scheme. This balancing must take into account the following considerations.

**(i) contextual factors**

[50] First, the Court must determine the strength of the privacy interests at stake. In my view, because they are part of a regulated workforce, members of the ILWU have a relatively low expectation of privacy with respect to personal information that is reasonably related to an assessment of the extent to which they pose a threat to the security of marine transportation: *Comité paritaire de l'industrie de la chemise v. Potash; Comité paritaire de l'industrie de la chemise v. Sélection Milton*, [1994] 2 S.C.R. 406 at 418-21 (“*Comité paritaire*”).

[51] Second, the manner of the search is relevant. Being required by the state to fill out a form is a lesser intrusion on privacy than, for example, a physical search of a person's home or business premises: compare *Baron v. Canada*, [1993] 1 S.C.R. 416 at 443.

[52] Third, administrative searches are generally regarded as less intrusive than those conducted in the course of a criminal investigation: *Thomson Newspapers Ltd. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 at 507-08.

[53] Fourth, a court must consider how pressing is the public interest served by the statutory scheme authorizing the search and to what extent the information sought is likely to further that purpose. In this case, national security is the relevant public interest, which is regarded as of grave concern: *R. v. Simmons*, [1988] 2 S.C.R. 495 at 528. In determining whether individual items of information are relevant to that interest, a court should be prepared to allow government a margin of appreciation.

[54] With these considerations in mind, I turn now to ILWU's arguments that the search authorized by the Regulations is unreasonable.

## **(ii) prior authorization and post-decision review**

[55] ILWU argues that the scheme is fatally flawed because it lacks any adequate checks to prevent the abuse of the power to obtain and use information about an employee. In particular, prior independent authorization is not required, and an employee who has been refused a security clearance has no right of review by an independent decision-maker. Hence, any "search" under the Regulations is unreasonable.

[56] Counsel relies on *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*, [1984] 2 S.C.R. 145 (“*Hunter*”), for the proposition that, even when undertaken as part of a regulatory scheme, a search will normally not be reasonable for the purpose of section 8 without prior authorization by an independent person capable of acting in a judicial manner.

[57] I disagree. In my opinion, *Hunter* cannot be applied to the scheme under consideration here. For one thing, to require prior authorization before an employee completes a security clearance application would serve no purpose because all employees complete the same form. The complaint in this case is not to abuses in the way that forms are administered to different employees, but to the form itself.

[58] Further, cases in which prior authorization has been required have invariably arisen in contexts where criminal and *quasi-criminal* offences are being investigated and where the expectation of privacy is highest. Here, in contrast, existing and future employees who wish to work in security-sensitive positions in marine transportation, a highly regulated activity giving rise to a much lower expectation of privacy, may be refused a security clearance, which may adversely affect their employment opportunities. See *Comité paritaire* at 419-20.

[59] To the extent that ILWU argues that authorization is required before the information provided by an employee is checked and verified by law enforcement and intelligence agencies, its argument is equally flawed. It would be impracticable to require prior authorization before the

information provided by thousands of port employees across the country could be processed. Nor is it clear to me what purpose would be served by such an exercise, since it will often not be possible to identify potential security risks until background checks have been conducted.

[60] As for the complaint that there is no independent body to hear appeals from refusals of security clearances, there is no constitutional right to such an appeal. Reconsiderations of negative decisions are undertaken by the Minister pursuant to section 517, on the basis of a fair and participatory process and with the advice of experts in security. After exhausting the administrative remedies, an applicant may challenge the refusal of a security clearance in an application for judicial review in the Federal Court.

**(iii) degree of intrusion into privacy and pressing nature of the public interest**

[61] Demands for personal information, a photograph and fingerprints are among the least intrusive forms of search: *R. v. Beare*, [1988] 2 S.C.R. 387 at 413. Nonetheless, ILWU says that the form that applicants must complete demands more information than is reasonably necessary given the objects of the statutory scheme. Its principal examples from the application form include: information about spouses and partners (past and present), the fact that applicants must supply information going back five years, and that the information sought about their encounters with criminal justice are not limited to the record of their convictions.

[62] The argument is supported by an affidavit by an ILWU expert witness, Professor Wesley Wark, to the effect that employees working at ports have never been responsible for terrorist

incidents and do not pose a security threat. However, on cross-examination, he conceded that home-grown terrorism is an issue in Canada, and one that it is difficult for intelligence services to stay on top of. In addition, Professor Wark does not have expertise in conducting risk assessments and claims no knowledge of the operation of maritime ports and their security.

[63] Moreover, Professor Wark's view was contradicted in an affidavit by one of the Attorney General's experts, Ms Margaret Purdy, whom Professor Wark recognized as a forthcoming and open-minded expert in national security issues. She said that home-grown terrorism poses security risks and noted, in particular, the existence of links between terrorists and organized crime. In her opinion, these risks warrant background screening of employees working in security-sensitive areas of ports. Another expert, Mr Ted Flanigan, who has extensive national security experience as a senior official with CSIS, supported Ms Purdy's opinion that the Regulations are properly responsive to potential threats to the security of Canada's ports.

[64] The fact that employees have not been the source of terrorist activities in the past is no guarantee that some may not be in the future. In this context, it is important to recall that the Regulations are also intended to protect against threats from organized crime which, for a price, may offer its services to terrorists by aiding them in, for example, smuggling weapons, explosives or operatives into Canada in containers.

[65] In my view, the evidence taken as a whole establishes that the Government is right to take seriously the possibility that port security could be endangered from the inside by employees acting

from ideological or mercenary motives. Nor is it implausible, as Professor Wark agreed, that an employee could be influenced by a spouse or partner, present or past, to engage in such activities.

[66] The fact that Canada may have the world's most rigorous system for conducting background checks on port employees does not in itself render it unreasonable. Canada's long coast line and many ports, its substantial economic dependence on international trade in goods transported by sea in and out of Canada and, to a lesser degree, on cruise line business, its ability to fund security measures, and its proximity to the United States, are all factors that provide a rational explanation of why Canada has instituted the present security clearance system.

[67] These considerations also indicate the substantial and pressing nature of the public interest that the Regulations are designed to advance: protection from threats to public safety and the economy from the activities of terrorist groups and organized crime.

[68] It is, of course, always possible that errors will occur and that an employee may become the object of suspicion on the basis of erroneous information used for background screening. For example, doubts have been expressed by the Auditor General about the reliability of information held by the RCMP in exempt data banks. However, an employee has an opportunity to correct an error in representations made to the Minister after being advised of the basis on which the Minister is considering refusing a security clearance. It would be open to an employee to apply for judicial review of a refusal of a security clearance for breach of the duty of fairness on the ground, for instance, of inadequate disclosure of the basis of the refusal.

[69] I am not persuaded that, in view of the potentially grave nature of the threats to the security of maritime transportation from terrorists and organized crime, the information required by the Regulations can be said to be overly intrusive and insufficiently tailored to the perceived risks. Accordingly, the search authorized by the Regulations is not unreasonable and does not violate section 8.

**Issue 4: Does the requirement that employees are required to provide information about their spouse or partner breach their right to equality under section 15?**

[70] ILWU says that an employee may not have access to all the personal information required about a former spouse or partner, who may be unwilling to provide it. As a result, an employee may be refused a security clearance for failing to provide sufficient information to enable the Minister to evaluate whether the employee is an unacceptable security risk. In addition, employees may be refused a security clearance because of the activities or associations of their spouse.

[71] The argument here is that, in view of the adverse consequences for an applicant's employment, the demand for information about spouses and partners constitutes discrimination on the ground of marital status, a ground analogous to those specifically mentioned in section 15. An employee who is not and has not been in a spousal relationship cannot be refused a security clearance for the above reasons.

[72] I do not agree. In order to establish a breach of section 15, a claimant must establish not only that the impugned law makes a distinction on a listed or analogous ground, but also that the distinction creates a disadvantage by perpetuating prejudice or negative stereotyping: *R. v. Kapp*,

2008 SCC 41, [2008] 2 S.C.R. 483, at para. 17. ILWU has adduced no evidence to prove that the Regulations perpetuate prejudice or stereotyping because they enable the Minister to consider whether a spouse or partner makes an employee a threat to the security of marine transportation.

**E. CONCLUSIONS**

[73] In view of the above conclusions, a section 1 analysis is not necessary.

[74] For all these reasons, I would answer the questions posed by the Attorney General on the constitutional validity of the *Marine Transportation Security Regulations* by finding that they do not breach the Charter rights of ILWU's members, and award the Attorney General his costs.

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“John M. Evans”

J.A.

“I agree  
Robert Décaray J.A.”

“I agree  
A.M. Linden J.A.”

## APPENDIX “A”

### ***Federal Courts Act, R.S.C. 1985, c. F-7***

Reference by Attorney General of Canada

**18.3** (2) The Attorney General of Canada may, at any stage of the proceedings of a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, refer any question or issue of the constitutional validity, applicability or operability of an Act of Parliament or of regulations made under an Act of Parliament to the Federal Court for hearing and determination.

Renvoi du procureur général

**18.3** (2) Le procureur général du Canada peut, à tout stade des procédures d'un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la *Loi sur la défense nationale*, renvoyer devant la Cour fédérale pour audition et jugement toute question portant sur la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, d'une loi fédérale ou de ses textes d'application.

### ***Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11***

**2.** Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- ...
- (d) freedom of association.

**7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

**8.** Everyone has the right to be secure against unreasonable search or seizure.

**2.** Chacun a les libertés fondamentales suivantes :

- a)* liberté de conscience et de religion;
- b)* liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

[...]

*d)* liberté d'association.

**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

**8.** Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

**Security Clearance**

**503.** Every person shall be a holder of a security clearance if they

- (a) require access to a restricted area two and cannot enter the area under any of paragraphs 380(1)(b) to (f) or subsection 380(2) or (3);
- (b) are a licensed ship's pilot;
- (c) are a harbour master or wharfinger appointed under subsection 69(1) of the *Canada Marine Act*;
- (d) have security responsibilities, including authorized screening and security guard functions;
- (e) take applications for security clearances and the applicants' fingerprints and facial images, which functions are performed on behalf of the Minister and for the purposes of this Part;
- (f) have access to a cruise ship that is interfacing with a restricted area two to provide services, supplies or equipment to the cruise ship or a member of the complement of the cruise ship;
- (g) could cause the failure of a preventive measure, delay the response to a security incident or adversely affect the recovery from a security incident as a result of being assigned or performing any of the following duties, responsibilities or functions:
  - (i) access to security information at the marine facility or port,
  - (ii) the supervision of marine facility operations,
  - (iii) the creation, alteration, control or maintenance of cargo documentation or crew or passenger lists by a person who

**Habilitation de sécurité**

**503.** Les personnes ci-après sont tenues d'être titulaires d'une habilitation de sécurité :

- a) celles qui ont besoin d'avoir accès à une zone réglementée deux et qui ne peuvent y entrer en vertu de l'un des alinéas 380(1)b) à f) ou des paragraphes 380(2) ou (3);
- b) celles qui sont des pilotes brevetés de navire;
- c) celles qui sont des directeurs de port ou des gardiens de quai nommés en vertu du paragraphe 69(1) de la *Loi maritime du Canada*;
- d) celles qui ont des responsabilités en matière de sûreté, y compris le contrôle et les fonctions d'agent de sécurité;
- e) celles qui reçoivent des demandes d'habilitation de sécurité et prennent les empreintes digitales et les images du visage des demandeurs, lesquelles fonctions sont exercées au nom du ministre et pour l'application de la présente partie;
- f) celles qui ont accès à un navire de croisière qui est en interface avec une zone réglementée deux pour fournir des services, des provisions ou de l'équipement à celui-ci ou à un membre de son effectif;
- g) celles qui pourraient entraîner l'échec d'une mesure préventive, retarder la réaction à un incident de sûreté ou nuire à tout rétablissement à la suite de cet incident, en raison des attributions ci-après qui leurs ont été confiées ou qu'elles exercent :
  - (i) l'accès à des renseignements de sûreté à l'installation maritime ou au port,
  - (ii) la supervision des opérations de l'installation maritime,
  - (iii) l'établissement, la tenue à jour, le contrôle ou la modification des documents relatifs aux cargaisons ou des listes de passagers ou de membres d'équipage par une

- personne qui, selon le cas :
- |   |  |
|---|--|
| <p>(A) is present at the marine facility or port, or</p> <p>(B) has advance access to the documentation or lists, or</p> <p>(iv) the planning or directing of the movement of cargo or containers at a container terminal, including their loading and unloading into and from vessels; or</p> <p>(h) are a seafarer who has submitted an application for a Seafarer's Identification Document.</p> | <p>(A) se trouve à l'installation maritime ou au port,</p> <p>(B) a accès au préalable à ces documents ou à ces listes,</p> <p>(iv) dans un terminal pour conteneurs, la planification ou la direction des mouvements des cargaisons ou des conteneurs ou leur acheminement, y compris leur chargement à bord de bâtiments et leur déchargement;</p> <p>h) celles qui sont des navigateurs qui ont présenté une demande visant à obtenir un Document d'identité des gens de mer.</p> |
|---|--|

#### Application Requirements

**506.** (1) In this section, "common-law partner" means any person who is cohabiting with the applicant in a relationship of a conjugal nature and has done so for a period of at least one year.

(2) An application for a security clearance shall include the following information and documentation, to be used only for the purposes of sections 508 and 509:

(a) the applicant's usual given name used, other given names, surname, all other names used and details of any name changes;

(b) the applicant's date of birth, gender, height, weight, and eye and hair colour;

(c) if the applicant was born in Canada, the number and province of issue of their birth certificate, as well as the original of that certificate;

(d) if the applicant was born outside Canada, their place of birth, the port and date of entry, and, in the case of a naturalized Canadian or permanent resident, the number and the original of the applicable certificate issued under the *Citizenship Act* or the *Immigration*

#### Exigences relatives à la demande

**506.** (1) Dans le présent article, « conjoint de fait » s'entend de toute personne qui vit avec le demandeur dans une union de type conjugal depuis au moins un an.

(2) La demande d'habilitation de sécurité comprend les renseignements et documents suivants à utiliser exclusivement pour l'application des articles 508 et 509 :

a) le prénom usuel, les autres prénoms, le nom de famille, les autres noms utilisés et le détail de tout changement de nom du demandeur;

b) la date de naissance, le sexe, la taille, le poids et la couleur des cheveux et des yeux du demandeur;

c) si le demandeur est né au Canada, le numéro et la province d'émission de son certificat de naissance, ainsi que l'original de ce certificat;

d) si le demandeur est né à l'extérieur du Canada, le lieu de naissance, le point d'entrée et la date d'arrivée au Canada et, dans le cas d'un citoyen naturalisé canadien ou d'un résident permanent, le numéro et l'original du certificat applicable délivré aux termes de la

*and Refugee Protection Act;*

(e) in the case of a foreign national, the original of any document that is evidence of their status;

(f) the applicant's passport number, including the country of issue and expiry date, or an indication that the applicant does not have a passport;

(g) the addresses of all locations at which the applicant resided during the five years preceding the application;

(h) an identification of the applicant's activities during the five years preceding the application, including the names and street addresses of the applicant's employers and any post-secondary educational institutions attended;

(i) the dates, destination and purpose of any travel of more than 90 days outside Canada or the United States, excluding travel for government business, during the five years preceding the application;

(j) the information referred to in subsection (3) respecting the applicant's spouse or common-law partner, any former spouses or common-law partners;

(k) the applicant's fingerprints, taken by or on behalf of the Minister;

(l) a facial image of the applicant for identification purposes, taken by or on behalf of the Minister;

(m) a statement signed by the marine facility operator or port administration certifying that the applicant requires or will require a security clearance and specifying the reasons for that requirement; and

(n) a statement signed by the person responsible for taking the fingerprints of the

*Loi sur la citoyenneté ou de la Loi sur l'immigration et la protection des réfugiés et sa date de délivrance;*

e) dans le cas d'un étranger, l'original de tout document attestant son statut;

f) le numéro du passeport du demandeur, y compris le pays de délivrance et la date d'expiration, ou une mention indiquant qu'il n'a pas de passeport;

g) les adresses des endroits où le demandeur demeuré au cours des cinq années précédant la date de la demande;

h) la mention des activités du demandeur durant les cinq années précédant la date de la demande, y compris le nom et l'adresse municipale de ses employeurs et des établissements d'enseignement post-secondaire fréquentés par le demandeur;

i) les dates, la destination et le but de tout voyage de plus de 90 jours à l'extérieur du Canada ou des États-Unis, à l'exclusion des voyages pour affaires officielles, durant les cinq années précédant la date de la demande;

j) les renseignements visés au paragraphe (3) en ce qui concerne l'époux ou le conjoint de fait du demandeur et, le cas échéant, les ex-époux ou les anciens conjoints de fait du demandeur;

k) les empreintes digitales du demandeur, prises par le ministre ou une personne agissant en son nom;

l) une image du visage du demandeur aux fins d'établissement de son identité, prise par le ministre ou une personne agissant en son nom;

m) une déclaration signée par l'exploitant de l'installation maritime ou l'organisme portuaire attestant que le demandeur est tenu ou sera tenu d'avoir une habilitation de sécurité et précisant les raisons à l'appui de cette exigence;

n) une déclaration signée par la personne chargée de prendre les empreintes digitales du

applicant certifying that they have confirmed the identity of the applicant in accordance with paragraph 384(3)(a) at the time of the taking of the fingerprints.

(3) The information required with respect to any of the persons referred to in paragraph (2)(j) shall be

(a) in the case of the spouse or common-law partner of the applicant, the following information:

(i) their gender, full given name, surname and, if applicable, maiden name,

(ii) their date and place of birth and, if applicable, date of death,

(iii) if born in Canada, the number and province of issue of their birth certificate,

(iv) if born outside Canada, their place of birth, their nationality and the port and date of entry into Canada, and

(v) their present address, if known; and

(b) in the case of former spouses and common-law partners with whom the relationship ended within the preceding five years, the information referred to in subparagraphs (a)(i), (ii) and (v).

(4) The application for a security clearance shall be valid only if signed by the applicant or, in the case of an applicant who is a minor under the laws of the province where they reside, by a parent or guardian or tutor.

(5) Personal information that is provided in the application for the security clearance and that resulting from the checks and verifications shall not, without the written consent of the individual to whom it relates, be disclosed by the Minister to the

demandeur attestant qu'elle a confirmé, conformément à l'alinéa 384(3)a), l'identité de ce dernier au moment de la prise.

(3) Les renseignements exigés à l'égard des personnes visées à l'alinéa (2)j) sont :

a) dans le cas de l'époux ou du conjoint de fait du demandeur, les renseignements suivants :

(i) le sexe, les prénoms au complet, le nom de famille et, le cas échéant, le nom de jeune fille,

(ii) la date et le lieu de naissance et, le cas échéant, la date du décès,

(iii) si la personne est née au Canada, le numéro et la province d'émission de son certificat de naissance,

(iv) si la personne est née à l'extérieur du Canada, le lieu de naissance, la nationalité et le point d'entrée et la date d'arrivée au Canada,

(v) son adresse actuelle, si elle est connue;

b) dans le cas des ex-époux et des conjoints de fait avec lesquels la relation a pris fin au cours des cinq dernières années, les renseignements visés aux sous-alinéas a)(i), (ii) et (v).

(4) La demande d'habilitation de sécurité n'est valide que si elle est signée par le demandeur ou, dans le cas d'un demandeur qui est mineur en vertu du droit de la province où il réside, par son père, sa mère ou son tuteur.

(5) Sauf avec le consentement écrit de l'individu qu'ils concernent, les renseignements personnels inclus dans une demande d'habilitation de sécurité et ceux recueillis lors des vérifications reliées au traitement d'une telle demande ne seront communiqués par le ministre au

government of a foreign state except

(a) where, in the opinion of the Minister, the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure; or

(b) for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information or for the purpose of complying with rules of court relating to the production of information.

#### Submission of Application

**507.** (1) Subject to subsection (2), every application for a security clearance shall be submitted on the form supplied by the Minister to the port administration at the port where the applicant works or is a candidate for work or to which the applicant otherwise requires access.

(2) If the port administration is not able to transmit the application in accordance with subsection (3), the application shall be submitted to an official of an office

(a) managed by or for an airport authority and that is responsible for the control of the airport's passes, where the airport authority is able to transmit the application in accordance with a document that evidences the understanding to that effect with the Minister; or

(b) operated by the Department of Transport.

(3) The port administration or official shall collect the applicant's information on behalf of the Minister and shall transmit it to the Minister in accordance with the document that evidences the understanding to that effect with the Minister.

#### Checks and Verifications

**508.** On receipt of a fully completed

gouvernement d'un État étranger :

a) d'une part, que si, de l'avis du ministre, des raisons d'intérêt public justifient nettement une éventuelle violation de la vie privée;

b) d'autre part, que si leur communication est exigée par subpoena, mandat ou ordonnance d'un tribunal, d'une personne ou d'un organisme ayant le pouvoir de contraindre à la production de renseignements ou exigée par des règles de procédure se rapportant à la production de renseignements.

#### Présentation d'une demande

**507.** (1) Sous réserve du paragraphe (2), la demande d'habilitation de sécurité est présentée sur le formulaire fourni par le ministre à l'organisme portuaire du port où le demandeur travaille ou a postulé un emploi, ou auquel il a besoin d'avoir accès pour une autre raison.

(2) Si l'organisme portuaire n'est pas en mesure de transmettre la demande conformément au paragraphe (3), la demande est présentée à un représentant d'un bureau qui, selon le cas :

a) est géré par ou pour une autorité aéroportuaire et responsable d'effectuer le contrôle des laissez-passer de l'aéroport, lorsque cette autorité aéroportuaire est en mesure de transmettre la demande conformément à tout document qui témoigne de l'arrangement à cet égard avec le ministre;

b) est exploité par le ministère des Transports.

(3) L'organisme portuaire ou le représentant recueille les renseignements concernant le demandeur au nom du ministre et les lui transmet conformément au document qui témoigne de l'arrangement à cet égard avec le ministre.

#### Vérifications

**508.** Sur réception d'une demande d'habilitation de sécurité dûment remplie, le

application for a security clearance, the Minister shall conduct the following checks and verifications for the purpose of assessing whether an applicant poses a risk to the security of marine transportation:

(a) a criminal record check;

(b) a check of the relevant files of law enforcement agencies, including intelligence gathered for law enforcement purposes;

(c) a Canadian Security Intelligence Service indices check and, if necessary, a Canadian Security Intelligence Service security assessment; and

(d) a check of the applicant's immigration and citizenship status.

#### Minister's Decision

**509.** The Minister may grant a 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:

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

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

(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

ministre effectue les vérifications ci-après pour établir si le demandeur ne pose pas de risque pour la sûreté du transport maritime :

a) une vérification pour savoir s'il a un casier judiciaire;

b) une vérification des dossiers pertinents des organismes chargés de faire respecter la Loi, y compris les renseignements recueillis dans le cadre de l'application de la Loi;

c) une vérification des fichiers du Service canadien du renseignement de sécurité et, au besoin, une évaluation de sécurité effectuée par le Service;

d) une vérification de son statut d'immigrant et de citoyen.

#### Décision du ministre

**509.** Le ministre peut accorder une habilitation de sécurité 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) 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 condamnations, le temps écoulé entre les infractions, la date de la dernière infraction et la peine ou la décision;

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

(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

violence against persons or property, taking into account the relevance of those activities to the security of marine transportation,

(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,

(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 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,

(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

(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 — 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;

(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;

activités, compte tenu de la pertinence de ces facteurs par rapport à la sûreté du transport maritime,

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

(e) whether the applicant has filed fraudulent, false or misleading information relating to their application for a security clearance.

**511.** (1) If the Minister intends to refuse to grant a security clearance, the Minister shall advise the applicant in writing to that effect.

(2) The notice shall set out the basis for the Minister's intention and fix a period of time for the applicant to make written representations to the Minister, which period of time shall start on the day on which the notice is served or sent and shall be not less than 20 days from that day.

(3) The Minister shall not refuse to grant a security clearance until the written representations have been received and considered or before the period of time fixed in the notice has expired, whichever comes first. The Minister shall advise the applicant in writing of any refusal.

**515.** (1) The Minister may suspend a security clearance on receipt of information that could change the Minister's determination made under section 509.

(2) Immediately after suspending a security clearance, the Minister shall advise the holder in writing of the suspension.

(3) The notice shall set out the basis for the suspension and shall fix a period of time for the holder to make written representations to the Minister, which period of time shall start on the day on which the notice is served or sent and shall be not less than 20 days from that day.

(4) The Minister may reinstate the security clearance if the Minister determines under section 509 that the holder does not pose a

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) le demandeur a présenté une demande comportant des renseignements frauduleux, faux ou trompeurs en vue d'obtenir une habilitation de sécurité.

**511.** (1) Le ministre avise par écrit le demandeur de son intention de refuser d'accorder l'habilitation de sécurité.

(2) L'avis indique les motifs de son intention et le délai dans lequel le demandeur peut présenter par écrit au ministre des observations, lequel délai commence le jour au cours duquel l'avis est signifié ou acheminé et ne peut être inférieur à 20 jours suivant ce jour.

(3) Le ministre ne peut refuser d'accorder l'habilitation de sécurité avant la réception et la prise en considération des observations écrites ou avant que ne soit écoulé le délai indiqué dans l'avis, selon la première de ces éventualités à survenir. Le ministre avise par écrit le demandeur dans le cas d'un refus.

**515.** (1) Le ministre peut suspendre une habilitation de sécurité lorsqu'il reçoit des renseignements qui pourraient modifier sa décision prise en application de l'article 509.

(2) Immédiatement après avoir suspendu l'habilitation de sécurité, le ministre en avise par écrit le titulaire.

(3) L'avis indique les motifs de la suspension et le délai dans lequel le titulaire peut présenter par écrit au ministre des observations, lequel délai commence le jour au cours duquel l'avis est signifié ou acheminé et ne peut être inférieur à 20 jours suivant ce jour.

(4) Le ministre peut rétablir l'habilitation de sécurité s'il établit, en application de l'article 509, que le titulaire de l'habilitation ne pose pas de risque pour la sûreté du transport

risk to marine transportation security.

(5) The Minister may cancel the security clearance if the Minister determines under section 509 that the holder may pose a risk to marine transportation security or that the security clearance is no longer required. The Minister shall advise the holder in writing of any cancellation.

(6) The Minister shall not cancel a security clearance until the written representations have been received and considered or before the time period fixed in the notice has expired, whichever comes first.

#### Reconsideration

**517.** (1) An applicant or a holder may request that the Minister reconsider a decision to refuse to grant or to cancel a security clearance within 30 days after the day of the service or sending of the notice advising them of the decision.

(2) The request shall be in writing and shall set out the following:

(a) the decision that is the subject of the request;

(b) the grounds for the request, including any new information that the applicant or holder wishes the Minister to consider; and

(c) the name, address, and telephone and facsimile numbers of the applicant or holder.

(3) On receipt of a request made in accordance with this section, the Minister, in order to determine the matter in a fair, informal and expeditious manner, shall give the applicant or holder

(a) where the situation warrants, the opportunity to make representations orally or in any other manner; and

(b) in any other case, a reasonable opportunity

maritime.

(5) Le ministre peut annuler l'habilitation de sécurité s'il établit, en application de l'article 509, que le titulaire de l'habilitation de sécurité peut poser un risque pour la sûreté du transport maritime ou que l'habilitation n'est plus exigée. Il avise par écrit le titulaire dans le cas d'une annulation.

(6) Le ministre ne peut annuler l'habilitation de sécurité avant la réception et la prise en considération des observations écrites ou avant que ne soit écoulé le délai indiqué dans l'avis, selon le premier de ces événements à survenir.

#### Réexamen

**517.** (1) Tout demandeur ou tout titulaire peut demander au ministre de réexaminer une décision de refuser ou d'annuler une habilitation de sécurité dans les 30 jours suivant le jour de la signification ou de l'envoi de l'avis l'informant de la décision.

(2) La demande est présentée par écrit et comprend ce qui suit :

a) la décision qui fait l'objet de la demande;

b) les motifs de la demande, y compris tout nouveau renseignement qu'il désire que le ministre examine;

c) le nom, l'adresse et les numéros de téléphone et de télécopieur du demandeur ou du titulaire.

(3) Sur réception de la demande présentée conformément au présent article, le ministre accorde au demandeur ou au titulaire, de manière à trancher les questions de façon équitable, informelle et rapide, la possibilité :

a) lorsque les circonstances le justifient, de présenter des observations oralement ou de toute autre manière;

b) dans tout autre cas, de lui présenter par

to make written representations.

(4) After representations have been made or a reasonable opportunity to do so has been provided, the Minister shall reconsider the decision in accordance with section 509 and shall subsequently confirm or change the decision.

(5) The Minister may engage the services of persons with appropriate expertise in security matters to advise the Minister.

(6) The Minister shall advise the applicant or holder in writing of the decision made following the reconsideration.

écrit des observations.

(4) Après que des observations ont été présentées ou que la possibilité de le faire a été accordée, le ministre réexamine la décision conformément à l'article 509 et, par la suite, confirme ou modifie la décision.

(5) Le ministre peut retenir les services de personnes qui possèdent la compétence pertinente en matière de sûreté pour le conseiller.

(6) Le ministre avise par écrit le demandeur ou le titulaire de sa décision à la suite du réexamen.

### ***Criminal Code, R.S.C. 1985, c. C-46***

#### Definitions

**83.01** (1) The following definitions apply in this Part.

"terrorist activity"  
« activité terroriste »

"terrorist activity" means

(b) an act or omission, in or outside Canada,

(i) that is committed

(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the

#### Définitions

**83.01** (1) Les définitions qui suivent s'appliquent à la présente partie.

[...]

« activité terroriste »  
"terrorist activity"

« activité terroriste »

[...]

b) soit un acte — action ou omission, commise au Canada ou à l'étranger :

(i) d'une part, commis à la fois :

(A) au nom — exclusivement ou non — d'un but, d'un objectif ou d'une cause de nature politique, religieuse ou idéologique,

(B) en vue — exclusivement ou non — d'intimider tout ou partie de la population quant à sa sécurité, entre autres sur le plan économique, ou de contraindre une personne, un gouvernement ou une organisation nationale ou internationale à accomplir un acte ou à s'en abstenir, que la personne, la

person, government or organization is inside or outside Canada, and

(ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

(B) endangers a person's life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

...

"terrorist group"  
« groupe terroriste »

population, le gouvernement ou l'organisation soit ou non au Canada,

(ii) d'autre part, qui intentionnellement, selon le cas :

(A) cause des blessures graves à une personne ou la mort de celle-ci, par l'usage de la violence,

(B) met en danger la vie d'une personne,

(C) compromet gravement la santé ou la sécurité de tout ou partie de la population,

(D) cause des dommages matériels considérables, que les biens visés soient publics ou privés, dans des circonstances telles qu'il est probable que l'une des situations mentionnées aux divisions (A) à (C) en résultera,

(E) perturbe gravement ou paralyse des services, installations ou systèmes essentiels, publics ou privés, sauf dans le cadre de revendications, de protestations ou de manifestations d'un désaccord ou d'un arrêt de travail qui n'ont pas pour but de provoquer l'une des situations mentionnées aux divisions (A) à (C).

Sont visés par la présente définition, relativement à un tel acte, le complot, la tentative, la menace, la complicité après le fait et l'encouragement à la perpétration; il est entendu que sont exclus de la présente définition l'acte — action ou omission — commis au cours d'un conflit armé et conforme, au moment et au lieu de la perpétration, au droit international coutumier ou au droit international conventionnel applicable au conflit ainsi que les activités menées par les forces armées d'un État dans l'exercice de leurs fonctions officielles, dans la mesure où ces activités sont régies par d'autres règles de droit international.

[...]

« groupe terroriste »  
"terrorist group"

"terrorist group" means

(a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or

(b) a listed entity,

and includes an association of such entities.

« groupe terroriste »

a) Soit une entité dont l'un des objets ou l'une des activités est de se livrer à des activités terroristes ou de les faciliter;

b) soit une entité inscrite.

Est assimilé à un groupe terroriste un groupe ou une association formé de groupes terroristes au sens de la présente définition

## **APPENDIX “B”**

### **Questions Referred by the Attorney General of Canada**

1. Are the rights of affected maritime port workers under any or all of sections 2(a), 2(b), 2(d), 7, 8, or 15 of the *Canadian Charter of Rights and Freedoms* (Charter) violated by sections 503, 506, 507, 508, 509, 515 or 517 of Part 5 of the *Marine Transportation Security Regulations* SOR/2004-144 (Regulations), enacted under section 5 of the *Marine transportation Security Act*, S.C. 1994, c. 40 (MTSA)?
  
2. If the answer to Question 1 is yes, are such violations saved by section 1 of the Charter?
  
3. If the answer to Question 2 is no, what is the effect of the violation(s) on the validity, applicability or operability of the affected section(s) of the Regulations?
  
4. Are the rights of affected maritime port workers under any or all of subsections 1(a), 1(b), or 1(e) of the *Canadian Bill of Rights*, 1969, c. 44 violated by sections 503, 506, 507, 508, 509, 515 or 517 of the Regulations?
  
5. If the answer to Question 4 is yes, what is the effect of the violation(s) on the validity, applicability or operability of the affected section(s) of the Regulations?

6. Are the rights of affected maritime port workers under sections 3 and/or 7 of the *Canadian Human Rights Act*, R.S. 1985, c. H-6 violated by sections 503, 506, 507, 508, 509, 515 or 517 of the Regulations?
7. If the answer to Question 6 is yes, what is the effect of the violation(s) on the validity, applicability or operability of the affected section(s) of the Regulations?
8. Are the rights of affected maritime port workers under section 4 of the *Privacy Act*, R.S.C. 1985, c. P-21 violated by sections 503, 506, 507, 508, 509, 515 or 517 of the Regulations?
9. If the answer to Question 8 is yes, what is the effect of the violation on the validity, applicability or operability of the affected section(s) of the Regulations?
10. Were the Regulations and/or the *MTSA* promulgated or enacted in violation of section 3 of the *Canadian Bill of Rights Examination Regulations*, C.R.C., c. 394?
11. If the answer to Question 10 is yes, what is the effect of such violation on the validity, applicability or operability of the Regulations or the *MTSA*?
12. Are sections 503, 506, 507, 508, 509, 515 or 517 of the Regulations *ultra vires* on the basis that section 5 of the *MTSA* does not authorize the promulgation of regulations that could cause a loss of employment or a change in work duties on the part of affected maritime port workers?

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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Linden J.A.

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