



Court File No. IMM 4173-15

FEDERAL COURT

**Seafarers' International Union of Canada,
Colin Neil, and Corwin Thorne**

Applicants

and

**The Minister of Citizenship and Immigration Canada and
The Minister of Public Safety and Emergency Preparedness Canada**

Respondents

APPLICATION FOR LEAVE and for JUDICIAL REVIEW

TO THE RESPONDENTS:

AN APPLICATION FOR LEAVE TO COMMENCE AN APPLICATION FOR JUDICIAL REVIEW has been commenced by the applicants under SUBSECTION 72(1) OF THE *IMMIGRATION AND REFUGEE PROTECTION ACT*.

UNLESS A JUDGE OTHERWISE DIRECTS, THIS APPLICATION FOR LEAVE will be disposed of without personal appearance by the parties, in accordance with paragraph 72(2)(d) of the *Immigration and Refugee Protection Act*.

IF YOU WISH TO OPPOSE THIS APPLICATION FOR LEAVE, you or a solicitor authorized to practice in Canada and acting for you must prepare a Notice of Appearance in Form IR-2 prescribed by the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, serve it on the tribunal and the applicant's solicitor or, if the applicant does not have a solicitor, serve it on the applicant, and file it, with proof after service, in the Registry, within 10 days after the day on which this application for leave is served.

IF YOU FAIL TO DO SO, the Court may nevertheless dispose of this application for leave and, if the leave is granted, of the subsequent application for judicial review without further notice to you.

Note: Copies of the relevant Rules of Court, information on the local office of the Court and other necessary information may be obtained from any local office of the Federal Court or the Registry in Ottawa, telephone: (613) 992-4238.

The applicants seek leave of the Court to commence an application for judicial review of:

The decision or decisions (the “Decision”) of an officer or officers of Canada Border Services Agency (“CBSA”) and/or Citizenship and Immigration Canada (“CIC”) (hereinafter, the Decision maker is referred to as the “Tribunal”) to allow Francisco Arcayos Castellano (“Castillano”) to enter Canada to work in Canada as unlicensed crew aboard the *New England*, a foreign ship under the flag of convenience of the Marshall Islands engaged in coasting trade (as defined in section 2 of the *Coasting Trade Act*, S.C. 1992, c. 31)(“Cabotage”), by issuing a work permit on or around August 29, 2015 without first requiring a Labour Market Impact Assessment (“LMIA”).

The Decision is part of a continuing course of conduct by the Tribunal since at least July 2013 to issue work permits to all unlicensed foreign crew working aboard the *New England* (the “Foreign Crew”) while it is engaged in Cabotage without first requiring an LMIA.

The Decision is also part of a broader continuing course of conduct by the Tribunal since at least 2013 to issue work permits to unlicensed foreign crew, who are neither Canadians nor permanent residents of Canada, on foreign ships engaged in Cabotage without first requiring an LMIA to be conducted, or a labour market opinion assessment (“LMO”), as the process was called prior to June 2014.

The applicant Seafarers’ International Union of Canada (“SIU”) became aware of the Decision on or about August 29, 2015. The individual applicants became aware of the Decision on or about September 14, 2015.

The Tribunal is composed of unknown officers at CBSA or CIC, which are as follows:

Canada Border Services Agency
191 Laurier Avenue West
Ottawa, ON K1A 0L8

Phone: 1-800-367-5693

Citizenship and Immigration Canada

365 Laurier Avenue West
Ottawa, ON K1A 1L1

Phone: 1-888-242-2100

The Tribunal's file number in relation to this Application for Leave and Judicial Review is not known.

If this Application for Leave is granted, the Applicants seek the following relief by way of a judicial review:

1. A declaration that the Tribunal erred in its Decision to issue a work permit to Castellano without first requiring an LMIA.
2. An order quashing the Decision and an Order remitting the matter back for redetermination in accordance with the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (the "IRPA"); the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations"); relevant policy directives, if any, including those of CIC and Employment and Social Development Canada ("ESDC"); and the directions of this honourable Court.
3. A declaration that the work permit issued to Castellano by the Tribunal pursuant to its Decision is invalid, as the Decision to issue such permit without an LMIA was based, *inter alia*, on improper and invalid considerations; misapprehension of the law and government policy; and/or misrepresentations.
4. Such further and other relief as counsel may advise and this Honourable Court may permit.

If the application for leave is granted, the application for judicial review is to be based on the following grounds:

The Applicants

1. The applicant, Seafarers' International Union of Canada ("SIU"), is an unincorporated trade union that represents the vast majority of unlicensed seafarers in the maritime field in Canada ("Canadian Crew").
2. The applicant, Colin Neil, is a Canadian seafarer residing in Burnt Islands, Newfoundland and Labrador and is qualified to work in an engine room rating position.
3. The applicant, Corwin Thorne, is a Canadian seafarer residing in Burnt Islands, Newfoundland and Labrador and is qualified to work as an ordinary seaman.

4. At all material times, the individual applicants, Colin Neil and Corwin Thorne (the “Individual Applicants”) were all unemployed members of SIU who were seeking work and who were available and qualified to work as crew on the *New England*.
5. The SIU and its members have a special interest in ensuring that Canadian laws are respected regarding the transportation of goods by water in Canada and the employment of Canadian Crew in connection with such transportation.
6. The SIU and its members have a special interest in ensuring that the maximum job opportunities in the maritime industry be made available to permanent residents and citizens of Canada, as well as ensuring that minimum standards regarding employment of Canadian Crew be respected.
7. There are currently, and for long periods of time have been, over 300 members of the SIU who are unemployed. SIU members are qualified and available to act as Canadian Crew on foreign ships engaged in Cabotage.
8. At all material times, the SIU had members who were unemployed and who were seeking work and who were available and qualified to work on the *New England* to fill the job positions of each member of the Foreign Crew.

The Respondents

9. The respondent, CBSA, is a federal agency charged with ensuring, *inter alia*, Canada's security and prosperity by managing the access of people and goods to and from Canada.
10. The respondent, CIC, is a federal agency that screens and processes, *inter alia*, temporary foreign worker applications for Canada. It does so in large part with the aid of the Temporary Foreign Worker program at ESDC.
11. The CBSA and CIC have a joint operational mandate to enforce the immigration laws and regulations of Canada with respect to issuing work permits to foreign workers including Foreign Crew, with CIC holding the primary policy mandate.

The New England

12. Dolphin Ship Management Inc. (“Dolphin”), is a ship management company incorporated in the Philippines.
13. The *New England* is an oil tanker registered in the Marshall Islands and sailing under the flag of convenience of the Marshall Islands.
14. The *New England* is a “foreign ship” within the meaning of the *Coasting Trade Act*.

15. Dolphin is the manager of the *New England* and, in that capacity, is the employer of all Foreign Crew on the *New England*.

Castillano

16. Castillano is a Philippine national. He was born on June 16, 1973.

17. At all relevant times, Castillano was employed as a pumpman by Dolphin as part of the Foreign Crew on the *New England*.

18. The Tribunal issued a work permit to Castillano on or around August 29, 2015 permitting Castillano to work in Canada as a Foreign Crew member onboard the *New England*.

19. Previously, the Tribunal had also issued a work permit to Castillano on or around July 29, 2015 permitting Castillano to work in Canada as a Foreign Crew member onboard the *New England* from July 29, 2015 to August 26, 2015.

20. Dolphin pays Castillano a fraction of the prevailing wages normally paid to Canadian Crew in the same or comparable job positions. Furthermore, the wages received by Castillano as a pumpman on the *New England* are far less than the minimum wage specified by s. 178 of the *Canada Labour Code*, R.S.C. 1985, c. L-2.

The Legislative Framework

21. Under s. 196 of the *Regulations*, a foreign national must not work in Canada unless authorized to do so by a work permit or the *Regulations*.

22. Under the *Coasting Trade Act*, the term “coasting trade” (i.e. – Cabotage as defined above) carries a wide definition that includes the carriage of goods or passengers by ship from one place in Canada to any other place in Canada, either directly or by way of a place outside Canada.

23. Pursuant to s. 3(1) of the *Coasting Trade Act*, foreign ships, such as the *New England*, may not engage in Cabotage.

24. Under s. 4(1) of the *Coasting Trade Act*, a person resident in Canada acting on behalf of a foreign ship may apply and be granted a license to engage in Cabotage (“CTA Waiver”).

25. Although s. 186(s) of the *Regulations* provides for an exemption for the requirement to hold a work permit for the foreign crew of vessels primarily engaged in international transportation, this provision does not apply to Cabotage situations, as the trade by definition, is not an “international” trade. Thus, all foreign crew of vessels engaged in Cabotage must hold a valid work permit.

26. Under s. 203(1)(b) of the *Regulations*, in order to issue a work permit:

- a. ESDC must provide an assessment of the impact of the employment of the foreign national on the labour market (i.e. – an LMIA) to CIC. CIC, in most situations, cannot issue a work permit without a LMIA; and
- b. an ESDC officer must make a determination, *inter alia*, that the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada.

27. Under s. 203 (1) and (3) of the *Regulations*, the LMIA provided by ESDC shall be based on, *inter alia*, the following factors:

- a. whether the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada;
- b. whether the employment of the foreign national will or is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;
- c. whether the employment of the foreign national will or is likely to result in the development or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;
- d. whether the employment of the foreign national is likely to fill a labour shortage;
- e. whether the wages offered to the foreign national are consistent with the prevailing wage rate for the occupation and whether the working conditions meet generally accepted Canadian standards; and
- f. whether the employer will hire or train Canadian citizens or permanent residents or has made, or has agreed to make, reasonable efforts to do so.

28. Under s. 205(a) of the *Regulations*, a work permit may be issued under s. 200 of the *Regulations* to a foreign national who “intends to perform work that... would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents” without ESDC first conducting or issuing an LMIA or providing an LMIA to CIC (a “C10 Exemption”).

29. Section 205(a) of the *Regulations* is intended to provide both CBSA and CIC officers with the flexibility and authority to respond in special and limited circumstances where the social, cultural or economic benefits to Canada of issuing the work permit are so clear and compelling that the importance of the LMIA can be overcome.

30. Prior to reviewing such requests, officers are encouraged to ensure that all practical efforts to obtain ESDC's assessment are made before a C10 Exemption is granted. Foreign nationals submitting an application for consideration under a C10 Exemption should be in a position to provide documentation supporting their claim of providing important or notable social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents.

Cabotage conducted by the New England and its Foreign Crew

31. In or around August 2015, PF Collins Customs Broker Ltd. ("PF Collins"), on behalf of Irving Oil Commercial GP ("Irving"), applied for a CTA Waiver in connection with the *New England* and a CTA Waiver was granted to Irving for the *New England* to transport approximately 265,000 – 530,000 barrels of petroleum products from Saint John, NB for discharge at St. John's, NL; Halifax, NS; Charlottetown, PEI; Quebec City, QC; Montreal, QC; Belledune, NB; Gaspé, QC; Matane, QC; Cartwright, NL; and Goose Bay, NL (the "Saint John Run") commencing on or about August 27, 2015 and ending on or about September 26, 2015.
32. Similarly, in July 2015, PF Collins, on behalf of Irving, applied for a CTA Waiver in connection with the *New England* and Irving was granted a CTA Waiver to use the *New England* for the exact or virtually the same Saint John Run for the period July 28, 2015 to August 26, 2015 (the "Past Saint John Run").
33. PF Collins also applied on behalf of Irving for a CTA Waiver for the *New England* and Irving was granted a CTA Waiver to use the *New England* to transport approximately 250,000 barrels of crude oil, in multiple voyages, from Point Tupper, NS to Saint John, NB for the period July 14, 2013 to August 24, 2013 (the "Point Tupper Run").

Granting of Work Permits without LMIA's

34. Dolphin is currently employing Foreign Crew on the *New England*, including Castillano, on the August 27, 2015 to September 26, 2015 Saint John Run.
35. The Tribunal granted work permits to the Foreign Crew of the *New England*, including Castillano, in connection with the Saint John Run without first requiring LMIA's by granting C10 Exemptions.
36. Dolphin employed Foreign Crew on the *New England* in connection with the Past Saint John Run, including Castillano.
37. The Tribunal granted work permits to the Foreign Crew of the *New England* in connection with the Past Saint John Run without first requiring LMIA's by granting C10 Exemptions.

38. Dolphin intends to employ Foreign Crew on the *New England* on future Saint John Runs.
39. Dolphin employed Foreign Crew on the *New England* on the Point Tupper Run.
40. The Tribunal granted work permits to the Foreign Crew of the *New England* without first requiring LMIA's by granting C10 Exemptions in connection with the Point Tupper Run.
41. Dolphin intends to employ Foreign Crew on the *New England* on future Point Tupper Runs.
42. At no time have any of the Respondents or any other persons approached SIU or inquired with the SIU or engaged in any other efforts to determine if there are Canadians or permanent residents who are qualified to work as Canadian Crew on the *New England*.
43. The Individual Applicants and many other members of SIU are qualified and available to work as Canadian Crew on the Saint John and Point Tupper Runs, and on any other runs being conducted by the *New England*.
44. The employment of the Foreign Crew, including Castellano, on the Saint John Runs and the Point Tupper Run has had and continues to have a negative effect on the labour market in Canada and will continue to have a negative effect in connection with future runs.
45. There was no legal basis for granting a C10 Exemption or any other exemption from an LMIA before issuing work permits to Castellano or the Foreign Crew as there is no indication or evidence that Castellano or the Foreign Crew intended to perform work that would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents, as required by the *IRPA* and its *Regulations* and the relevant governmental policy directives. The Decision to issue work permits to the Foreign Crew, including Castellano, is part of an ongoing course of conduct by the Tribunal to issue work permits to all Foreign Crew aboard the *New England* while it conducts the Saint John and Point Tupper Runs under CTA Waivers without first requiring a LMIA by improperly granting C10 Exemptions.
46. The SIU has alerted officials and Ministers in the Government of Canada and officials at PF Collins of the availability of qualified Canadian Crew available to crew the *New England* while it engages in Cabotage under CTA Waivers on the Saint John Runs; however, Canadian Crew have not been engaged to work on the *New England* and the Tribunal has ignored the SIU and continued unabated in its ongoing course of conduct of issuing work permits without first requiring an LMIA.

47. Dolphin pays the Foreign Crew working on the *New England*, including Castellano, a fraction of the prevailing wages normally paid to Canadian Crew. Furthermore, these wages are far less than the minimum wage specified by s. 178 of the *Canada Labour Code*, R.S.C. 1985, c. L-2.

Broader Course of Conduct

48. Since at least 2013, the Tribunal has routinely issued work permits to all foreign crews of foreign ships under CTA Waivers engaged in Cabotage without first requiring LMIA's by systematically granting C10 Exemptions to virtually all foreign crews (the "Course of Conduct").

49. Since at least 2013, this Course of Conduct involves issuing thousands of work permits to foreign crew in connection with approximately 140 foreign ships engaging in Cabotage under approximately 260 CTA Waivers without first requiring that LMIA's are conducted. This has been accomplished by routinely granting C10 Exemptions.

50. Since at least 2013, the SIU has alerted officials and Ministers in the Government of Canada of the availability of qualified Canadian Crew available to crew foreign ships engaging in Cabotage under CTA Waivers; however, the Tribunal has ignored the SIU and its members and has continued unabated in its Course of Conduct.

51. The foreign crew on foreign ships under CTA Waivers engaged in Cabotage are typically paid a fraction of the prevailing wages normally paid to Canadian Crew. Furthermore, these wages are less than the minimum wage specified by s. 178 of the *Canada Labour Code*, R.S.C. 1985, c. L-2.

52. The Course of Conduct creates an economic incentive for companies to contract with foreign ships under CTA Waivers with foreign crew instead of Canadian flagged ships with Canadian Crew. It furthermore creates an economic disincentive to employ Canadian Crew on foreign ships under CTA Waivers while they are engaged in Cabotage.

53. The applicants plead and rely on

- a. sections 8, 196, 200, 203, and 205 of the *Regulations*;
- b. section 72 of the *IRPA*;
- c. section 178 of the *Canada Labour Code*;
- d. sections 18 and 18.1 of the *Federal Courts Act*;
- e. the *Federal Courts Rules* and the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*; and

f. the principles of Administrative Law.

Conclusion

The Decision to issue a work permit to Castellano on the basis of a C10 Exemption was unlawfully made, given the clear existence of qualified and available Canadian Crew and the lack of the creation or maintenance of a significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents.

The applicants have **not** received written reasons from the Tribunal.

If the application for leave is granted, the applicants propose that the application for judicial review be heard at Vancouver, in the English language.

DATED AT VANCOUVER this 14th day of September, 2015.



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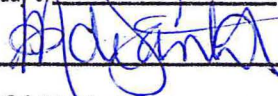
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The Minister of Public Safety and Emergency Preparedness Canada
269 Laurier Avenue West
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I HEREBY CERTIFY that the above document is a true copy of
the original issued out of / filed in the Court on the _____

day of SEP 14 2015 A.D. 20 _____

Dated this SEP 14 2015 day of _____ 20 _____



**SHEILA DE SANTOS
REGISTRY OFFICER
AGENT DU GREFFE**