

Federal Court



Cour fédérale

**Date: 20160516**

**Docket: IMM-2500-15**

**Citation: 2016 FC 541**

**Ottawa, Ontario, May 16, 2016**

**PRESENT: The Honourable Mr. Justice O'Reilly**

**BETWEEN:**

**PATUREL INTERNATIONAL COMPANY**

**Applicant**

**and**

**MINISTER OF EMPLOYMENT AND  
SOCIAL DEVELOPMENT CANADA**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The applicant, Paturel International Company, operates a lobster processing plant in Deer Island, New Brunswick under the name East Coast Seafood. Paturel's application for judicial review challenges a decision of the Minister of Employment and Social Development Canada denying Paturel a Labour Market Impact Assessment [LMIA] which would have allowed it to renew the work permits of its employees under the Temporary Foreign Worker Program [TFWP]

under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (see Annex for all provisions cited). In 2015, an officer acting on behalf of the Minister denied the LMIA because Paturel failed to meet the requirement to pay the prevailing wage for shellfish workers in the region according to data relating to the median wage for that occupation.

[2] Paturel's position is that the prevailing wage has been set too high and the officer fettered his discretion by relying solely on data relating to median wages. Further, it submits that the decision was unreasonable because it relied on data that were not representative of the actual wages paid to employees in the region where it operates. Paturel asks me to quash the decision and order a reconsideration of its request for an LMIA.

[3] I agree with Paturel that the officer fettered his discretion, which resulted in an unreasonable decision. I will, therefore, allow this application for judicial review.

## II. Factual Background

[4] When deciding an LMIA application, an officer must consider whether the employment of the foreign national would have a neutral or positive effect on the Canadian labour market, including whether the wages offered are consistent with the prevailing wage rate for the occupation (s 203(1) of the Regulations).

[5] According to the Minister, the prevailing wage is determined with reference to the median wage published on-line by the Government of Canada's National Employment Service.

Wage data derives primarily from Statistics Canada's Labour Force Survey but other sources may also be considered, including Employment Insurance [EI] data.

[6] In 2013, the prevailing wage was based on provincial information. In 2014, regional EI figures were used instead, narrowing the geographical scope of the data. In the EI reports, fish processing workers (not just shellfish workers) stated that they earned between \$10.00 and \$57.00 per hour. Within this data set of 590 employees, the median wage was \$13.79, and the average was \$14.51. The Minister relied on the former as the prevailing wage for that occupation. This represented an increase of over 20% from the earlier provincial figures of \$11.25 per hour.

[7] Paturel is the largest employer of shellfish workers in the relevant region. None of its employees earns a wage as high as that established by the Minister as the median for that occupation. Other workers across Canada do earn higher wages than employees in New Brunswick (a median of \$12.00 per hour), but the statistics show that the median wage in the province is \$11.33 per hour. Job postings in the region offer between \$11.49 and \$12.43. Median wages in two regions adjacent to Paturel's location, where its competitors operate, are \$11.09 and \$11.20.

### III. Did the officer fetter his discretion?

[8] The Minister argues that it was not unreasonable for the officer to rely on median wage rates, calculated with reference to EI data, given that other sources of information were unavailable or unreliable at the time.

[9] While the officer has broad discretion to rely on the data that he considered to be most representative of the prevailing wage in the region, I find that the officer's sole reliance on EI data amounted to a fettering of his discretion. A conclusion reached by a decision-maker who has fettered his or her discretion is, *per se*, unreasonable (*Stemijon Investments Ltd v Canada*, 2011 FCA 299 at para 21-25).

[10] First, the Regulations do not specify how a prevailing wage should be calculated. This is a matter clearly within the Minister's discretion. However, the Regulations do not stipulate that a failure to meet the prevailing wage, alone, would be sufficient to defeat an employer's application. There are other factors that must also be considered to answer the broader question of whether employment of a foreign national would have a neutral or positive effect on the Canadian labour market (s 203(3)). The Minister considered these factors and determined that the majority of them had a positive effect, such that the employment:

- Will or is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;
- Is likely to fill a labour shortage;
- Is necessary, as demonstrated by the employer's unsuccessful efforts to recruit within Canada.

[11] Yet, in the end, the Minister's decision relies only on one factor, prevailing wage, without addressing how all the factors, together, impact the Canadian labour market.

[12] Second, while it was open to the Minister to consider EI data in the calculation of the prevailing wage, in the circumstances, it was unreasonable to rely solely on that data. Doing so amounted to a fettering of discretion. The difference between the 2013 median wage and the 2014 median wage, and the other available data, should have caused the officer to consider whether the EI data was a reliable indicator of the prevailing wage for the occupation.

[13] The gap between the 2013 wage (\$11.25 per hour) and the 2014 rate (\$13.79) on its face seems to be such a substantial increase that it should have cast doubt on the suitability of the EI data to represent the prevailing wage (an increase of over 20%). There are no circumstances offered by the Minister to justify the rise other than a change in way the rate was calculated. Therefore, it was improper, in my view, for the officer to deny Paturel's application solely on the basis that it had failed to meet an arbitrary standard that had not previously been applied, and seemed inconsistent with other available information. In sum, the officer did not have regard for the overall criteria for approval of the LMIA – he concentrated solely on the EI data, thereby fettering his discretion.

#### IV. Conclusion and Disposition

[14] The officer's reliance on EI data as the single source on which to base a calculation of the median wage in the industry, and to use that data as the sole basis to reject Paturel's application, amounted to a fettering of the officer's discretion. Therefore, the officer's decision was unreasonable. Accordingly, I will allow this application for judicial review and order another officer to reconsider Paturel's application. Neither party proposed a question of general importance for me to certify, and none is stated.

## **JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is allowed and the matter is referred back to the Board for a review by a different officer.
2. No question of general importance is stated.

"James W. O'Reilly"

---

Judge

Annex

*Immigration and Refugee  
Protection Regulations,  
SOR/2002-227*

*Règlement sur l'immigration et la  
protection des réfugiés, DORS/2002-  
227*

Assessment of employment  
offered

Appréciation de l'emploi offert

**203.** (1) On application under Division 2 for a work permit made by a foreign national other than a foreign national referred to in subparagraphs 200(1)(c)(i) to (ii.1), an officer must determine, on the basis of an assessment provided by the Department of Employment and Social Development, of any information provided on the officer's request by the employer making the offer and of any other relevant information, if

**203.** (1) Sur présentation d'une demande de permis de travail conformément à la section 2 par tout étranger, autre que celui visé à l'un des sous-alinéas 200(1)c)(i) à (ii.1), l'agent décide, en se fondant sur l'évaluation du ministère de l'Emploi et du Développement social, sur tout renseignement fourni, à la demande de l'agent, par l'employeur qui présente l'offre d'emploi et sur tout autre renseignement pertinent, si, à la fois :

(a) the job offer is genuine under subsection 200(5);

a) l'offre d'emploi est authentique conformément au paragraphe 200(5);

(b) the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada;

b) le travail de l'étranger est susceptible d'avoir des effets positifs ou neutres sur le marché du travail canadien;

(c) the issuance of a work permit would not be inconsistent with the terms of any federal-provincial agreement that apply to the employers of foreign nationals;

c) la délivrance du permis de travail respecte les conditions prévues dans l'accord fédéral-provincial applicable aux employeurs qui embauchent des travailleurs étrangers;

(d) in the case of a foreign national who seeks to enter Canada as a live-in caregiver,

d) s'agissant d'un étranger qui cherche à entrer au Canada à titre d'aide familial :

(i) the foreign national will reside in a private household in Canada and provide child care, senior home support care

(i) il habitera dans une résidence privée au Canada et y fournira sans supervision des soins à un enfant ou à une personne âgée ou

or care of a disabled person in that household without supervision,

(ii) the employer will provide the foreign national with adequate furnished and private accommodations in the household, and

(iii) the employer has sufficient financial resources to pay the foreign national the wages that are offered to the foreign national; and

(e) the employer

(i) during the period beginning six years before the day on which the request for an assessment under subsection (2) is received by the Department of Employment and Social Development and ending on the day on which the application for the work permit is received by the Department, provided each foreign national employed by the employer with employment in the same occupation as that set out in the foreign national's offer of employment and with wages and working conditions that were substantially the same as — but not less favourable than — those set out in that offer, or

(ii) is able to justify, under subsection (1.1), any failure to satisfy the criteria set out in subparagraph (i).

handicapée,

(ii) son employeur lui fournira, dans la résidence, un logement privé meublé qui est adéquat,

(iii) son employeur possède les ressources financières suffisantes pour lui verser le salaire offert;

e) l'employeur, selon le cas :

(i) au cours de la période commençant six ans avant la date de la réception, par le ministère de l'Emploi et du Développement social, de la demande d'évaluation visée au paragraphe (2) et se terminant à la date de réception de la demande de permis de travail par le ministère, a confié à tout étranger à son service un emploi dans la même profession que celle précisée dans l'offre d'emploi et lui a versé un salaire et ménagé des conditions de travail qui étaient essentiellement les mêmes — mais non moins avantageux — que ceux précisés dans l'offre,

(ii) peut justifier le non-respect des critères prévus au sous-alinéa (i) au titre du paragraphe (1.1).



...

[...]

#### Justification

#### Justification

(1.1) A failure to satisfy the criteria set out in subparagraph (1)(e)(i) is justified if it results from

(1.1) Le non-respect des critères prévus au sous-alinéa (1)e(i) est justifié s'il découle :

(a) a change in federal or provincial law;

a) d'une modification apportée aux lois fédérales ou provinciales;

(b) a change to the provisions of a collective agreement;

b) d'une modification apportée à une convention collective ;

(c) the implementation of measures by the employer in response to a dramatic change in economic conditions that directly affected the business of the employer, provided that the measures were not directed disproportionately at foreign nationals employed by the employer;

c) de la mise en oeuvre, par l'employeur, de mesures qui permettent de faire face à des changements économiques importants touchant directement son entreprise, et ce, sans que cela ne vise de façon disproportionnée tout étranger à son service;

(d) an error in interpretation made in good faith by the employer with respect to its obligations to a foreign national, if the employer subsequently provided compensation — or if it was not possible to provide compensation, made sufficient efforts to do so — to all foreign nationals who suffered a disadvantage as a result of the error;

d) d'une interprétation erronée de l'employeur, faite de bonne foi, quant à ses obligations envers l'étranger, s'il a indemnisé tout étranger qui s'est vu lésé par cette interprétation ou, s'il ne les a pas indemnisés, il a consenti des efforts suffisants pour le faire;

(e) an unintentional accounting or administrative error made by the employer, if the employer subsequently provided compensation — or if it was not possible to provide compensation, made sufficient efforts to do so — to all foreign

e) d'une erreur comptable ou administrative commise par l'employeur à la suite de laquelle celui-ci a indemnisé tout étranger lésé par cette erreur ou, s'il ne les a pas indemnisés, il a consenti des efforts suffisants pour le faire;

nationals who suffered a disadvantage as a result of the error;

(f) circumstances similar to those set out in paragraphs (a) to (e); or

(g) force majeure.

...

Factors — effect on labour market

(3) An assessment provided by the Department of Employment and Social Development with respect to the matters referred to in paragraph (1)(b) shall, unless the employment of the foreign national is unlikely to have a positive or neutral effect on the labour market in Canada as a result of the application of subsection (1.01), be based on the following factors:

(a) 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;

(b) 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;

(c) whether the employment of the foreign national is likely to fill a labour shortage;

(d) whether the wages offered to

f) de circonstances similaires à celles prévues aux alinéas a) à e);

g) d'un cas de force majeure.

[...]

Facteurs – effets sur le marché du travail

(3) Le ministère de l'Emploi et du Développement social fonde son évaluation relative aux éléments visés à l'alinéa (1)b) sur les facteurs ci-après, sauf dans les cas où le travail de l'étranger n'est pas susceptible d'avoir des effets positifs ou neutres sur le marché du travail canadien en raison de l'application du paragraphe (1.01):

a) le travail de l'étranger entraînera ou est susceptible d'entraîner la création directe ou le maintien d'emplois pour des citoyens canadiens ou des résidents permanents;

b) le travail de l'étranger entraînera ou est susceptible d'entraîner le développement ou le transfert de compétences ou de connaissances au profit des citoyens canadiens ou des résidents permanents;

c) le travail de l'étranger est susceptible de résorber une pénurie de main-d'oeuvre;

d) le salaire offert à l'étranger

the foreign national are consistent with the prevailing wage rate for the occupation and whether the working conditions meet generally accepted Canadian standards;

(e) 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;

(f) whether the employment of the foreign national is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute; and

(g) whether the employer has fulfilled or has made reasonable efforts to fulfill any commitments made, in the context of any assessment that was previously provided under subsection (2), with respect to the matters referred to in paragraphs (a), (b) and (e).

correspond aux taux de salaires courants pour cette profession et les conditions de travail qui lui sont offertes satisfont aux normes canadiennes généralement acceptées;

e) l'employeur embauchera ou formera des citoyens canadiens ou des résidents permanents, ou a fait ou accepté de faire des efforts raisonnables à cet effet;

f) le travail de l'étranger est susceptible de nuire au règlement d'un conflit de travail en cours ou à l'emploi de toute personne touchée par ce conflit;

g) l'employeur a respecté ou a fait des efforts raisonnables pour respecter tout engagement pris dans le cadre d'une évaluation précédemment fournie en application du paragraphe (2) relativement aux facteurs visés aux alinéas a), b) et e).

**FEDERAL COURT  
SOLICITORS OF RECORD**

**DOCKET:** IMM-2500-15

**STYLE OF CAUSE:** PATUREL INTERNATIONAL COMPANY v MINISTER  
OF EMPLOYMENT AND SOCIAL DEVELOPMENT  
CANADA

**PLACE OF HEARING:** FREDERICTON, NEW BRUNSWICK

**DATE OF HEARING:** NOVEMBER 9, 2015

**JUDGMENT AND REASONS:** O'REILLY J.

**DATED:** MAY 16, 2016

**APPEARANCES:**

Rodney J. Gillis FOR THE APPLICANT

Patricia MacPhee FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Gilbert McGloan Gillis FOR THE APPLICANT  
Barristers and Solicitors  
Saint John, New Brunswick

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of  
Canada  
Halifax, Nova Scotia