Federal Court  Cour fédérale

Date: 20200130

Docket: T-1073-18

Citation: 2020 FC 177

Ottawa, Ontario, January 30, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

CANADIAN MARITIME WORKERS COUNCIL

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant challenges the constitutional validity of sections 509 and 510 of the *Marine Transportation Security Regulations*, SOR/2004-144 [Security Regulations]. These provisions grant the Minister of Transport [Minister] the power to issue, deny, suspend, reinstate or cancel security clearances required to perform certain functions or to have access to certain

port areas. The Minister exercises this power by considering regulatory criteria that include, *inter alia*, the consideration of a port worker's associations with suspected or convicted criminals.

[2] The Applicant seeks a declaratory order to the effect that these provisions violate sections 2, 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter]. In essence, the Applicant argues that the Security Regulations allow the Minister to make arbitrary security clearance decisions that restrict a port worker's employment opportunities and have a chilling effect on otherwise innocent associations. The Respondent submits that the present application rehashes constitutional concerns that have already been addressed by the Federal Court of Appeal. Moreover, the Respondent argues that these constitutional concerns are best addressed in the context of the judicial review of individual decisions because the Security Regulations are neutral provisions that do not dictate particular outcomes.

[3] For the reasons that follow, I dismiss the application. The Applicant's sections 2 and 7 challenges to the Security Regulations are similar to those already addressed by the Federal Courts and thus have already been determined. The Applicant has not persuaded me that subsequent case law constitutes sufficient grounds to revisit the Courts' precedents.

[4] In addition, the section 7 challenge also fails because it is predicated upon a purely economic interest that is unconnected to a constitutionally protected liberty or security interest.

[5] I reject the Applicant's section 15 challenge because the Security Regulations themselves do not discriminate based on marital or family status. Rather, the Security Regulations make distinctions based on the "degree of proximity" between a port worker and his or her acquaintances (*entourage*). Degree of proximity is not a protected ground for the purposes of subsection 15(1) of the Charter.

[6] There is no need to address section 1 of the Charter.

II. Context

[7] In 2004, the Security Regulations were adopted pursuant to section 5 of the *Marine Transportation Security Act*, SC 1994, c 40 [Act]. Section 5 of the Act allows the Governor in Council to make regulations regarding the "security of marine transportation." The Security Regulations were adopted partly as a means for Canada to comply with its international obligations under the *Safety of Life at Sea Convention* and the *International Ship and Port Facility Security Code*. These instruments address the safety of merchant ships and ports. The Security Regulations form part of Canada's response to the increased desire for transportation security following the Air India Flight 182 bombing and the September 11, 2001 World Trade Center attacks (*Reference re Marine Transportation Security Regulations (CA)*, 2009 FCA 234 at para 11 [*Reference*]; *Canada (Minister of Transport, Infrastructure and Communities) v Jagjit Singh Farwaha*, 2014 FCA 56 at paras 12, 122 [*Farwaha*]).

[8] Part 5 of the Security Regulations implements the Marine Transportation Security Clearance Program [the Program], which introduces background checks and security

assessments of marine workers employed in security-sensitive positions at ports in Canada. These measures seek to protect Canadian ports from security threats that undermine Canada's economic interests and international trade (*Reference* at para 66; *Farwaha* at paras 12-19). In particular, these measures were designed to protect Canadian ports from "insider" security risks, such as corruption, insider subversion, and the psychological manipulation of port workers (*Reference* at paras 23-24, 36; *Farwaha* at paras 17-19, 69).

[9] Under the Program, affected port workers must provide identity information about themselves and their spouse or common-law partner (sections 506-507 of the Security Regulations). The information required by the Security Regulations is standard fare for a security clearance. The scope of family information is limited to current and recent spouses/common-law partners. Information is not sought in respect of former spouses or common-law partners where the relationship ended more than five years before the clearance application (section 506 of the Security Regulations). The Security Regulations also ask for basic identifying information: name, date of birth, gender, height, weight, colour of eyes and hair, birth certificate, place of birth, port and date of entry, citizenship or permanent residence or evidence of other immigration status (if born outside Canada), passport number, fingerprints and a facial image, addresses of all locations at which the applicant has lived in the previous five years, the names and addresses of employers and post-secondary educational institutions attended in the last five years, and details of travel outside Canada and the United States of more than 90 days (section 506 of the Security Regulations).

[10] With that information, Transport Canada conducts checks with government authorities to assess whether the applicant poses a risk to marine transportation security. These include a criminal record check, a check of the files of law enforcement agencies, a Canadian Security Intelligence Service indices check and a check of the applicant's immigration and citizenship status (section 508 of the Security Regulations; *Reference* at para 24; *Forget v Canada (Transport)*, 2017 FC 620 at para 13 [*Forget*]; *Randhawa v Canada*, 2017 FC 556 at para 22 [*Randhawa*]; *Neale v Canada (Attorney General)*, 2016 FC 655 at para 8 [*Neale* (FC)], affirmed in *Neale v Canada (Attorney General)*, 2017 FCA 222).

[11] The Minister then uses this information to determine whether the port worker represents a security risk to marine transportation (sections 509-510 of the Security Regulations). The Minister may only grant a security clearance if the Minister is of the opinion that: (i) the information provided by the applicant and that resulting from the checks is verifiable and reliable; and (ii) there is sufficient verifiable and reliable information allowing the Minister to determine, based on the factors set out at section 509 of the Security Regulations, that the applicant does not pose a risk to the security of marine transportation (*Farwaha* at paras 67-69; *Singh Kailley v Canada (Transport)*, 2016 FC 52 at para 24 [*Kailley*]; *Forget* at para 14; *Randhawa* at para 23; *Neale* (FC) at para 8). After the security clearance is granted (e.g., for suspension decisions), the "verifiable and reliable" standard does not apply, and the Minister may make security decisions based on evidence from any source (subsection 515(1) of the Security Regulations; *Farwaha* at paras 70-71).

[12] At the second stage of the section 509 analysis, the Minister must consider the enumerated factors at section 509 of the Security Regulations. Most notably, the Minister is required to scrutinize the applicant's associations for potential security risks. Subparagraph 509(b)(v) of the Security Regulations provides that the Minister may consider the applicant's possible association with members of a terrorist group or criminal organization (*Reference* at paras 37-38; *Neale* (FC) at para 72). Paragraph 509(c) asks whether there are reasonable grounds to suspect that there is a risk that the applicant may 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 (*Forget* at para 14; *Neale* (FC) at para 73). The Minister's interest in a port worker's associations is grounded in the belief that that person's associations have the ability to influence the port worker and become a source of risk for port security (*Neale* (FC) at paras 69-70; *Reference* at paras 23-24). Indeed, employees with ties to criminal organizations and organized crime are more likely to be targeted to subvert port security measures (*Neale* (FC) at para 74; *Farwaha* at paras 13, 17, 19; *Reference* at paras 64-69).

[13] The second stage of the section 509 analysis requires the Minister to determine whether there are "reasonable grounds to suspect" an applicant poses a security risk (*Farwaha* at para 94). When reviewing the factors that affect the risk of subornation, the Minister is guided by the standard of whether there are "reasonable grounds to suspect" a risk, as stipulated in paragraph 509(c) of the Security Regulations (*Neale* (FC) at para 77; *Farwaha* at paras 95-97). The "reasonable grounds to suspect" standard is less stringent and more flexible than the "reasonable and probable grounds" standard and requires a judgmental standard based on identifying "possibilities," not finding "probabilities" (*Farwaha* at para 96). It has been

determined that the Minister must be certain that a person poses no risk to marine transportation security based on a "forward-looking and predictive" analysis of the application (*Farwaha* at paras 91, 94; *Randhawa* at para 30; *Neale* (FC) at para 91). This effectively places the onus on the security clearance applicant to show that he or she does not pose a risk to the security of marine transportation (*Kailley* at para 20).

[14] The section 509 analysis has been interpreted to confer broad power on the Minister to grant or cancel security certificates (*Reference* at para 36; *Kailley* at para 23; *Russo v Canada (Transport)*, 2011 FC 764 at para 31 [*Russo*]). As a result, reviewing courts have given the Minister a high level of deference on judicial review (*Farwaha* at paras 84-86; *Randhawa* at para 15; *Sidhu v Canada (Citizenship and Immigration)*, 2016 FC 34 at para 11 [*Sidhu*]; *Forget* at para 34). This level of deference is calibrated to the reality that the possession of a security clearance is a privilege, not a right (*Neale* (FC) at para 92).

[15] This level of discretion and the scope of disclosed information have made the Security Regulations a controversial law. Union-led legal challenges to the Security Regulations culminated in a reference to the Federal Court of Appeal regarding their constitutionality. In *Reference*, the Federal Court of Appeal concluded that there was insufficient evidence to conclude that the Security Regulations infringed upon the port workers' Charter rights to freedom of religion, thought, belief, expression and association (section 2), and Charter-protected liberty interest under section 7 (*Reference* at paras 30-47). Furthermore, the Court concluded that the Security Regulations did not infringe upon the port workers' Charter right to privacy under section 8 or discriminate based on marital status under section 15

(*Reference* at paras 48-72). As a result, the Federal Court of Appeal found that the Security Regulations do not breach the Charter rights of the union members (*Reference* at para 74). Due to the nature of the proceeding, *Reference* addressed the law itself, rather than a particular decision authorized by the Security Regulations.

[16] Following *Reference,* many marine workers received decisions regarding their security clearance. These decisions have a direct effect on a port worker's work opportunities: port workers who are denied a security clearance are not permitted to work in security-sensitive areas and may have fewer work hours (*Reference* at para 25).

[17] To avoid the effects of a refused or revoked security clearance, several port workers contested their security clearance decisions before the federal courts (*Russo*; *Farwaha*; *Sidhu*; *Kailley*; *Neale* (FC); *Forget*; *Randhawa*; *Dhesi v Canada (Attorney General)*, 2018 FC 519 [*Dhesi*]). None of these cases, however, dealt with Charter challenges to the Security Regulations themselves. Rather, these post-*Reference* cases involved administrative law challenges to individual security clearance decisions.

[18] The post-*Reference* case law demonstrates that *Reference* failed to defuse the controversy surrounding the Security Regulations and constrain the discretion they provide. According to the Applicant, the post-*Reference* cases illustrate that the scope of what can cross the threshold of reasonable suspicion is diverse, broad, and vague. Critics of the Program maintain that it infringes upon the private lives of port workers, grants the Minister too much discretion, and

infringes upon the Charter rights of those subjected to the Program (*Reference* at paras 4-9; *Farwaha* at para 111). The latter critique is the focus of the case before me.

III. Issues

[19] This application raises a series of constitutional challenges to sections 509 and 510 of the Security Regulations. This application does not attack these provisions on the basis of particular factual circumstances or an individual decision made under them. The constitutional issues are as follows:

(1) Do the Security Regulations infringe upon the right to freedom of association as guaranteed by paragraph 2(d) of the Charter?

(2) Do the Security Regulations infringe upon the right to life, liberty, and security of the person as guaranteed by section 7 of the Charter?

(3) Do the Security Regulations infringe upon the equality rights guaranteed by section 15 of the Charter?

[20] As the party alleging Charter violations, the applicant has the burden of proving a Charter breach. Once a Charter violation is made out, this Court will determine whether section 1 of the Charter saves the provision from a declaration of unconstitutionality.

[21] In his written submissions and the early portion of his oral pleadings, the Respondent raised concerns about the Applicant's standing. The Applicant is a coalition of trade unions representing 6,820 port workers affected by the Security Regulations. The Applicant grounded the present application on its economic and public interest standing (citing *Thorson v Attorney General of Canada*, [1975] 1 SCR 138, 1974 CanLII 6 (SCC); *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR

524; *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623 at para 43) and is best positioned to mount a Charter challenge to the Security Regulations.

[22] The Respondent argued that the Applicant lacked standing because it lacked a specific mandate from the union members and is not directly affected by the operation of the Security Regulations. There is no evidence of infringement of Charter rights, and thus I am being asked to consider the constitutional validity of these provisions in a factual vacuum. However, during the hearing, counsel for the Respondent withdrew his challenge to the Applicant's standing and expressed a desire for this Court to address the merits of the constitutional issues regardless of the standing issue. On the basis of the withdrawal of this argument, I will not address the parties' submissions regarding the Applicant's standing.

IV. Analysis

[23] The Applicant's overarching argument is that the Security Regulations grant too much discretion to the Minister and lead to arbitrary security clearance decisions. Before addressing the Applicant's specific constitutional concerns, I will first note the safeguards embedded in the Security Regulations and explain the role of judicial review in this context.

A. *Safeguards Embedded in Part 5 of the Security Regulations*

[24] Part 5 of the Security Regulations contains several limits on the Minister's substantive determinations and the manner in which the Minister makes these determinations.

[25] The first such limit is regulatory criteria for ministerial decision-making. In particular, the Minister's decision-making must be concentrated on risks to marine transportation security. No other considerations are relevant. This is made clear by the text of section 509 of the Security Regulations that provides that the Minister may only grant a security clearance if "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" whether "the applicant poses a risk to the security of marine transportation." Sections 509 and 510 enumerate factors that further refine the Minister's attention to marine transportation risks, namely the enumerated factors at paragraphs 509(a) to (e) and the consideration of criminal charges at section 510. The Minister may not substitute or neglect the enumerated factors, nor can the Minister base a decision on considerations that are unrelated to marine transportation security. These considerations apply to security clearance applications, suspensions, cancellations, and reinstatements as well as to determinations on the length of security clearances (sections 512 and 515 of the Security Regulations; *Reference* at para 20; *Farwaha* at paras 24-26).

[26] Section 509 further constrains ministerial discretion in requiring the Minister to base his or her application decisions on evidence that is "verifiable and reliable." For reasons of transportation security, the Minister may not grant a security clearance if the evidence provided is anything less than verifiable and reliable (*Farwaha* at paras 67-69).

[27] In his or her evaluation of risks to marine transportation security, the Minister should apply the "reasonable grounds to suspect" standard. This standard derives from the text of the Security Regulations at paragraphs 509(b) and 509(c). As Mister Justice Stratas explains in

Farwaha at paragraph 78, the "reasonable grounds to suspect" standard must be grounded in "discernable facts, not just hunches or speculations – that an individual holding a security clearance should not continue to access sensitive port areas under paragraphs 509(b) and (c)." The "reasonable grounds to suspect" standard is not an arbitrary standard; it "constrains the range of options available to the Minister" to those that met the regulation criteria, thereby excluding determinations that are based on mere personal opinion or insufficient factual evidence (*Farwaha* at paras 93, 97).

[28] The Security Regulations also provide a reconsideration mechanism that allows applicants and holders to challenge a security clearance decision. Under the section 517 mechanism, the worker will first submit a reconsideration request (subsection 517(1)) that includes "any new information that the applicant or holder wishes the Minister to consider" (paragraph 517(2)(b)). After receiving the reconsideration request, the Minister must give the requester the opportunity to make representations (subsection 517(3)). The Minister will either confirm or change the initial decision based on these representations and the section 509 criteria (subsection 517(4); *Farwaha* at para 77). The Minister must send written notice of the reconsideration decision (subsection 517(6)).

[29] The Security Regulations also provide procedural guarantees that ensure that port workers are informed of ministerial decisions and are given an opportunity to respond. Applicants may be interviewed if the Minister has concerns or if the intelligence screening process yields a concerning result (*Reference* at paras 24, 38; *Farwaha* at para 50). According to section 511, the Minister must provide written notice of his or her intention to refuse a security

clearance along with reasons that justify that intention. The applicant may then make written representations to the Minister. If the applicant makes written representations before the indicated deadline, the Minister may not refuse the security clearance until the Minister has considered these representations (subsection 511(3)). If, after reading the representations, the Minister denies the security clearance, the Minister must advise the applicant of the refusal (subsection 511(3)). The Minister must also provide written notice with reasons if the Minister decides to suspend or cancel a security clearance (subsections 515(2), (5)). Port workers with suspended or cancelled security clearances are then provided with an opportunity to make written representations (subsections 515(3), (5), (6)). A port worker may apply for a new security clearance if there is a change in the circumstances that led to the refusal or cancellation (paragraph 516(b)). Overall, this process affords the port worker an opportunity to respond to concerns raised by the Minister (*Farwaha* at para 118).

B. *The Role of Judicial Review*

[30] Judicial review is available to correct unreasonable decisions and procedural defects. If the Minister makes a determination that is unsupported by the evidence, the affected party may apply for judicial review of that determination. Substantive judicial review of this type has been granted twice before this Court. In the first case, the Federal Court determined that there was a lack of discernible facts to support the decision to cancel a security clearance (*Forget* at paras 67-71). In the other case, judicial review was granted because the Minister's delegate failed to give weight to a piece of evidence that undermined the security clearance decision (*Dhesi* at paras 23-26). Parties may also seek to correct procedural defects or irregularities through judicial review (*Reference* at para 68). Indeed, many parties have attempted to do so before the Federal

Courts (*Russo* at paras 48-71; *Farwaha* at paras 107-118; *Sidhu* at paras 12-14; *Kailley* at paras 43-48). Moreover, parties may raise constitutional challenges concerning individual ministerial decisions (*Reference* at para 60; see e.g., *Farwaha* at paras 119-122; *Neale* (FC) at paras 60-90; *Forget* at paras 6-8, 35-40).

[31] Judicial review of individual decisions is particularly appropriate because courts may then evaluate the Minister's (highly factual) determinations in light of a factual matrix. The contestation of individual decisions allows courts to scrutinize ministerial determinations on a case-by-case basis, just like the Minister when he or she makes security clearance decisions based on a considerable amount of evidence about a particular port worker's situation. Without the benefit of such evidence, it can be difficult to evaluate the constitutional issues related to the Security Regulations because the Security Regulations are neutral provisions that do not dictate a particular outcome. Because of their neutral nature, these provisions should be read in a way that maintains their constitutionality, leaving the door open to constitutional challenges of individual decisions (*Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120 at paras 70-73, 77, 8; *2747-3174 Québec Inc v Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919, 1996 CanLII 153 (SCC) at para 71; *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 1989 CanLII 92 (SCC) at pp 1077-1080; *Bilodeau-Massé v Canada (Attorney General)*, 2017 FC 604, [2018] 1 FCR 386 at paras 177-178).

[32] That said, I will now turn to specific constitutional issues related to the Security Regulations.

C. *The Constitutional Challenges at Issue*

(1) The paragraph 2(d) challenge to sections 509 and 510 of the Security Regulations

[33] The Applicant submits that the Security Regulations restrict a port worker's ability to maintain associations with other people for hobbies, church-related activities, social activities and community-related activities. In the context of sections 509 and 510, every port worker is expected to know the background of every person who belongs to the same organization as him or her. In effect, a port worker who is associated with a convicted or suspected criminal, even in the most innocent setting, is at risk of seeing his or her clearance revoked, regardless of the port worker's actual relationship with the person, his or her vulnerability to influences or the probable risk he or she might pose to maritime transportation security. This state of affairs, according to the Applicant, runs contrary to the Supreme Court's purposive approach to the freedom of association, as embodied in post-"Labour Trilogy" cases such as *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, [2015] 1 SCR 3; *R v Advance Cutting & Coring Ltd*, 2001 SCC 70, [2001] 3 SCR 209; and *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, 1997 CanLII 326 (SCC).

[34] The Respondent submits that this Court is bound to reject this paragraph 2(d) argument based on the precedent established by the Federal Court of Appeal in *Reference*. According to the Respondent, the Applicant has failed to distinguish its paragraph 2(d) argument from the one that was rejected in *Reference*. Furthermore, the Applicant has not provided sufficient evidence or demonstrated an unforeseen legal development that is sufficient to relitigate the *Reference* precedent. The Applicant instead advises this Court to maintain the constitutionality of the

Security Regulations because the provisions merely create a neutral process. Instead, the Applicant should seek to invalidate particular decisions for their impact on freedom of association—should the need arise.

[35] The principle of *stare decisis* holds that a lower court must apply the decisions of higher courts to the facts before it (*R v Comeau*, 2018 SCC 15, [2018] 1 SCR 342 at para 26 [*Comeau*]). As exceptions to this principle, lower courts may "reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate'" (*Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 at para 44 [*Carter*]; *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 at para 42 [*Bedford*]). The evidence exception to the principle of vertical *stare decisis* is narrow and must have the effect of fundamentally shifting "how jurists understand the legal question at issue" (*Comeau* at para 34; *Bedford* at paras 44, 48-49; *Carter* at paras 44, 47). As a further exception to *stare decisis*, a lower court is not "bound to follow a precedent if a distinction can be drawn between the facts or the legal context of the matter before it and those that gave rise to the precedent" (*Céré v Canada (Attorney General)*, 2019 FC 221 at para 38).

[36] In *Reference* at paragraphs 36-40, the Federal Court of Appeal considered and dismissed the paragraph 2(d) argument made by the International Longshore and Warehouse Union [ILWU]. In essence, the ILWU argued that section 509 of the Security Regulations is overly broad and allowed the Minister to refuse a security clearance because of an applicant's innocent associations (*Reference* at paras 36-37). The Federal Court of Appeal rejected this argument. The

Federal Court of Appeal reasoned that innocent associations would "not normally warrant the denial of a security clearance" because security clearance applicants may be interviewed to assuage the Minister's concerns (*Reference* at para 38). Furthermore, the Federal Court of Appeal concluded that the ILWU provided no evidence that the Security Regulations would "have a chilling effect" on a port worker's freedom of association (*Reference* at para 39).

[37] This analysis is applicable to the case at bar because the ILWU's argument in *Reference* is synonymous to the one raised in the case at bar. The Federal Court of Appeal's reasoning regarding security clearance applications is applicable to security clearance revocations and cancellations because these decisions, like the security clearance application process, engage with the factors enumerated at sections 509 and 510 of the Security Regulations (sections 512 and 515 of the Security Regulations; *Reference* at para 20; *Farwaha* at paras 24-26). As a result, I find that the Applicant's freedom of association argument does not raise a new legal issue.

[38] Nor has the Applicant convinced me that I should upset the *Reference* precedent on the basis of "a change in the circumstances or evidence". The Federal Court of Appeal does not reference *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989, 1999 CanLII 649 (SCC), or any other overruled case on the freedom of association issue. That Court's sole citation in its freedom of association analysis is to *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3, a case that remains good law (*Reference* at para 36). Rather, the Federal Court of Appeal concluded that there was insufficient evidence as to the chilling effect of the Security Regulations.

[39] The Applicant is asking that I revisit *Reference* in light of how the process has developed since then. The argument from the Applicant is that the union has noted a general arbitrary and unjust application of the law, which is precisely the concern that was addressed by the Federal Court of Appeal in *Reference*.

[40] However, much like in the Federal Court of Appeal in *Reference* (at para 39), the record before me does not support the Applicant's claim that the Security Regulations have a widespread chilling effect on the port workers' ability to associate freely. Expert evidence that merely describes the security clearance process rather than its potential chilling effect does little to advance the Applicant's claim. Similarly, the cited cases involving judicial review of individual security clearance decisions (from *Russo* to *Dhesi*) do not provide evidence of the actual chilling effect of ministerial determinations. Rather, these cases are illustrative evidence of the Minister's decision-making process. It is therefore speculative to infer a widespread chilling effect based on the evidence before me.

(2) The section 7 challenge to sections 509 and 510 of the Security Regulations

[41] The Applicant argues that, by their very operation, the Security Regulations infringe upon the security and liberty interests of port workers. Concerning the security interest, the Applicant submits that the security clearance process causes psychological distress when it results in port workers losing work, being ostracized by their colleagues, and living through financial stress.

[42] This is not a novel argument. In *Farwaha* (a post-*Reference* decision), the Federal Court of Appeal found that there was insufficient evidence that the Security Regulations established a

"high level of psychological stress necessary to establish a deprivation of the right to security of the person in section 7" (*Farwaha* at para 122). The Federal Court of Appeal also wrote that even if there was evidence of psychological stress, that deprivation would be in accordance with the principles of fundamental justice and would be outweighed by Canada's security interests (*Farwaha* at para 122). While the *Farwaha* case dealt with an individual ministerial decision to cancel a security clearance, I find that analysis is equally applicable to the provisions of the security clearance process because there is a lack of evidence that the Security Regulations cause sufficient psychological stress to activate section 7 protection (*British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3, 1999 CanLII 652 (SCC) at para 60; *Farah v Canada (Attorney General)*, 2016 FC 935 at paras 45-46).

[43] As a second argument, the Applicant claims that the Security Regulations infringe upon the liberty interests of port workers by giving Transport Canada the right to refuse security clearances to otherwise deserving employees based on mere suspicion.

[44] This too is not a novel argument. In *Reference*, the ILWU argued that the employees would suffer from a deprivation of liberty if they were to lose their employment as a result of failing to obtain a security clearance (*Reference* at para 45). The Federal Court of Appeal rejected the ILWU's section 7 argument because the possibility of job loss (as a consequence of a clearance rejection) was too "speculative" and section 7 "would not cover any potentially adverse impact that a refusal of security clearance might have on an employee's employment" (*Reference* at paras 46-47).

[45] Since both of these arguments reiterate arguments already rejected by the Federal Court of Appeal, this Court is bound to reject both arguments, absent some consideration that displaces the doctrine of vertical *stare decisis* (*Forget* at paras 38-39). As a result of these precedents, this Court is bound to conclude that the Security Regulations do not infringe upon the security and liberty interests of port workers. Since the Applicant is unable to "hang his hat" on one of the enumerated grounds, it appears as if the Security Regulations may infringe upon an interest (perhaps an economic one) that lies outside of section 7 of the Charter (*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 at para 47; *Reference re ss 193 and 195.1(1)(C) of the criminal code (Man)*, [1990] 1 SCR 1123, 1990 CanLII 105 (SCC) at p 1179; *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 at para 201).

[46] Recognizing that *Reference* already addressed a similar liberty interest argument, the Applicant argues that the many cases before the Federal Court show that port workers have indeed lost hours, lost seniority, lost their employment, or received administrative suspensions. These cases, according to the Applicant, show the erroneous nature of the Federal Court of Appeal's section 7 analysis and present new factual circumstances that should provoke a re-examination of this issue. Moreover, the Applicant claims that the Federal Court of Appeal committed an error in law when it concluded that the right to practise a profession is not protected by section 7. In support of this proposition, the Court of Appeal cited *Mussani v College of Physicians and Surgeons of Ontario* (2004), 74 OR (3d) 1, 2004 CanLII 48653 (ON CA) at paras 41-43.

[47] These considerations do not displace the doctrine of *stare decisis*.

[48] As I stated above, the doctrine of *stare decisis* applies unless the application raises a new or distinguishable legal issue or there is a fundamental shift in how jurists understand a legal issue.

[49] In *Reference*, the Federal Court of Appeal provided two reasons to reject the ILWU's liberty interest argument: the IWLU's argument was too speculative and relied on an incorrect interpretation of section 7 (*Reference* at paras 46-47). Both of these reasons are sufficient, standalone grounds to reject the argument. In the present case, the post-*Reference* case law (that mostly confirms the reasonableness of the Minister's decisions) and certain quibbles as to the proper interpretation of section 7 do not "fundamentally shift" the terms of the legal debate (*Comeau* at para 34; *Bedford* at para 42; *Carter* at para 44).

[50] The role of the Federal Court is not to second-guess the decision of its appellate court. Rather, the role of the Federal Court, as in the present case, is to apply the law and settled legal precedents. The principle of vertical *stare decisis* requires no less of this Court.

[51] There is no evidence before me that a union member's right to liberty and security has been infringed. Since the Applicant has not established that the Security Regulations infringe upon a section 7 right, it is unnecessary to conduct a fundamental freedoms analysis.

(3) The section 15 challenge to sections 509 and 510 of the Security Regulations

[52] The Applicant argues that, in certain situations, the application of the Security Regulations may lead to an infringement of section 15. Sections 509 and 510 create a disadvantage for port workers who have blood relatives convicted or suspected of a crime and port workers whose spouse or partner is convicted or suspected of a crime. In particular, the *Forget*, *Neale* (FC), and *Randhawa* cases purportedly show that security clearance applicants have the burden to prove that family members and acquaintances do not influence them. Moreover, the refusal of a security clearance due to associations with suspected or convicted criminals perpetuates the stereotype that families, spouses, or friends of convicts are more likely to commit a crime. According to the Applicant, these effects show how the criteria of the Security Regulations lead to discrimination.

[53] The Respondent presents three arguments with respect to section 15 of the Charter. First, the Respondent argues that the Federal Court of Appeal (in *Reference*) has already addressed a similar section 15 claim. Second, the Respondent argues that the Applicant failed to establish that the Security Regulations create a distinction on the basis of an enumerated or analogous ground because the Security Regulations merely consider the degree of proximity between a port worker and certain individuals. Third, the Respondent argues that the Security Regulations do not have discriminatory effects, or perpetuate prejudice or negative stereotypes.

[54] The Respondent is right to point out that this is not the first time a party has challenged the Security Regulations under section 15 of the Charter. In *Reference*, the Federal Court of

Appeal rejected the ILWU's section 15 argument because of a lack of evidence "to prove that the [Security Regulations] perpetuate prejudice or stereotyping" (*Reference* at para 72). The Federal Court of Appeal's concise rejection of the section 15 argument is predicated on there being no evidence of prejudice or stereotyping. Moreover, *Reference* directed its section 15 analysis to the potential for a distinction on the basis of marital status and did not evaluate whether the Security Regulations create unconstitutional distinctions based on a person's family.

[55] I should note that the Applicant's claim also fails at the first stage of the subsection 15(1) analysis, which is consistent with the Federal Court of Appeal's decision. The first stage of the subsection 15(1) analysis is to determine whether the law in question creates a distinction on the basis of an enumerated or analogous ground (*R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 17; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 1999 CanLII 675 (SCC); *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 at para 61; *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 at para 185; see also *Miceli-Riggins v Canada (Attorney General)*, 2013 FCA 158 at para 43).

[56] However, neither the text nor the effect of the Security Regulations creates distinctions on the enumerated or analogous section 15 grounds. Sections 509 and 510 of the Security Regulations set out a series of factors to be considered before making a decision on a given security clearance. One of these factors pertains to information relating to a port worker's associations with individuals who are members of a terrorist group or criminal organization, or individuals who have been—or are suspected of being—involved in criminal activities relating to

the security of marine transportation (section 509 of the Security Regulations). The text of the provisions do not mention a person's civil status, marital status or family status.

[57] The lack of evidence regarding the alleged discrimination is due to the fact that the ministerial analysis pursuant to the Security Regulations is concerned with the degree of proximity between a port worker and certain individuals. The Security Regulations do not operate on the basis of a person's civil status, marital status or family status. Rather, it is the degree of proximity between a security clearance applicant or holder and one of the groups or individuals identified in sections 509 and 510 of the Security Regulations that can negatively influence his or her chances of being granted a security clearance. A clear example of this operation of the Security Regulations may be found in *Neale* (FC) at paragraph 88, wherein the Court held that "[i]f the individual in question had not been her spouse, but a parent, roommate or friend, that close relationship would have raised the same concerns." I, therefore, reject the subsection 15(1) challenge because "degree of proximity" is not a protected ground for the purposes of subsection 15(1) of the Charter.

V. Conclusion

[58] The Applicant has argued that the manner in which the Security Regulations have been applied since *Reference* confirms the validity of the concerns that the Federal Court of Appeal found to be speculative in that case and at that time. It seems to me, however, that if there were individual failings in the manner in which the Security Regulations impacted individual workers, it would be in the implementation of the Security Regulations and not in the legislation itself.

[59] In view of the above considerations, I dismiss the Applicant's application and conclude that the section 1 analysis is not necessary. That said, this does not shut the door to appropriate challenges of individual ministerial decisions in the future.

JUDGMENT in T-1073-18

THIS COURT'S JUDGMENT is that:

1. The present Application is dismissed.

2. The Applicant shall pay to the Respondent costs in the amount of $4,950 lump sum.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1073-18
STYLE OF CAUSE:	CANADIAN MARITIME WORKERS COUNCIL v CANADA (ATTORNEY GENERAL)
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APPEARANCES:

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