Federal Court Cour fédérale

Date: 20130521

Docket: IMM-11316-12

Citation: 2013 FC 512

Ottawa, Ontario, May 21, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

CONSTRUCTION AND SPECIALIZED WORKERS' UNION, LOCAL 1611; INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 115

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA; THE MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA; HD MINING INTERNATIONAL LTD.; CANADIAN DEHUA INTERNATIONAL MINES GROUP INC.; AND HUIYONG HOLDINGS (BC) LTD.

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants challenge a decision made under Canada's Temporary Foreign Worker Program [TFWP] which is administered by Human Resources and Skills Development Canada

[HRSDC] and Citizenship and Immigration Canada [CIC]. It appears that this is the first time a positive decision made under the TFWP has ever been challenged.

[2] The Applicants were granted public interest standing by the Court to bring this application for leave and judicial review. Specifically, they challenge the decision of Officer MacLean of HRSDC to issue positive Labour Market Opinions [LMOs] under section 203 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*], to HD Mining International Ltd. [HD Mining]. Officer MacLean issued these positive LMOs because he decided that offers of employment by HD Mining to 201 workers from China to do the work of extracting a bulk sample from HD Mining's coal properties near Tumbler Ridge, British Columbia [the Murray River Project], would likely result in "a neutral or positive effect on the labour market in Canada."

[3] The novelty of this application, the recent public interest in the TFWP and the significance of the issues to the Applicants, the corporate Respondents and the Ministers, made for a hard-fought application. All counsel are thanked for their comprehensive written and oral submissions. Five pre-hearing motions remained outstanding at the commencement of the hearing on the merits and were argued over a full day. Before the merits were heard, I issued oral rulings to be followed by formal Reasons and Orders for all but part of one motion which was reserved and is dealt with in these Reasons for Judgment.

BACKGROUND

The Parties

[4] The Applicants are trade unions who represent mining workers in British Columbia. They do not represent any workers of HD Mining at the Murray River Project. As previously noted, they were granted public interest standing by Order of Justice Campbell dated November 22, 2012, "because, realistically, no other means exist to engage judicial accountability with respect to the decision-making that has occurred within an important government strategy to maintain the economic health of Canada."

[5] HD Mining describes its principal business activity as "mine properties development, mines development, [and] coal mining." HD Mining applied for LMOs on March 2, 2012, and March 15, 2012, to bring 201 temporary foreign workers [TFWs] from China to Canada to fill 201 positions at the Murray River Project which were stated to be "necessary to work on the construction of the decline/shaft and complete bulk sample mining of coal" [the Bulk Sample Work]. Ten positive LMOs were issued by Officer MacLean of HRSDC on April 25, 2012, and, as is noted above, it is his decision to issue these positive LMOs that is under review.

[6] The Respondent Huiyong Holdings (BC) Ltd. is the controlling shareholder of HD Mining.

[7] Canadian Dehua International Mines Group Inc. [CDI] owns 40 per cent of the shares of HD Mining. The Murray River Project was previously to have been undertaken by CDI. In March 2011, CDI applied for LMOs for 92 foreign workers most of whom, according to Officer MacLean in his Bulk Request Assessment and Recommendation, a document described below, were underground coal miner and underground coal support and service workers. CDI received positive LMOs on April 15, 2011.

[8] Officer MacLean writes that he was advised by HD Mining that CDI "was not able to secure work permits" for these 92 foreign workers and HD Mining subsequently "assumed responsibility for the development and operation" of the Murray River Project and "essentially" HD Mining resubmitted the request for 84 of the 92 original foreign workers, together with LMOs for an additional 117 foreign workers, for a total of 201 foreign workers. More will be said of this later; however, the basis for the difference in the number of foreign workers requested between CDI and HD Mining was stated to be that CDI, unlike HD Mining, "did not include the construction of the mine shaft simultaneously with the construction of the decline." Officer MacLean, when assessing the HD Mining application, did consider information in the CDI LMO file. Again, more will be said of this later.

[9] The two Respondent Ministers, the Minister of HRSDC and the Minister of CIC each are responsible for a portion of the TFWP. HRSDC, through Service Canada, is responsible for issuing LMOs. CIC, based in part on the LMO, is responsible for issuing work permits to the foreign workers covered by the LMOs permitting them to enter and work in Canada.

The Temporary Foreign Worker Program

[10] The Ministers write in their memorandum that the TFWP is designed to "facilitate the entry of foreign workers from other countries to fill labour shortages." Workers under the TFWP require work permits issued by CIC pursuant to section 200 of the *Regulations* in order to enter Canada. Paragraph 200(1)(c)(iii) of the *Regulations* stipulates that a CIC officer "shall issue a work permit to

a foreign national if, among other things, the foreign national has been "offered employment, and an officer has made a positive determination under paragraphs 203(1)(a) to (e)."

[11] The positive determination required to be made by the CIC officer under paragraphs 203(1)(a) to (e) of the *Regulations* includes, in paragraph 203(1)(b), a determination by an officer "on the basis of an opinion provided" by HRSDC whether "the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada."

[12] The "opinion" provided by HRSDC is the LMO. Paragraphs 203(3) (a) to (f) of the *Regulations* stipulate the factors the officer is to consider when issuing an opinion as to whether "the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada:"

> (a) whether the employment of the foreign national 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 is likely to result in the creation 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 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 has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents; and
>
> (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.

HD Mining's LMO Applications and the Assessment Process

[13] On March 2, 2012, HD Mining submitted an application for 84 TFWs it required to construct the decline at the Murray River Project. On March 15, 2012, it submitted a further application for 117 TFWs it required for shaft construction. In total, HD Mining sought ten LMOs covering 201 TFWs in six job categories, as follows: 65 Underground Production and Development Miners, 16 Underground Conveyor Operators, 14 Underground Coal Ventilation Workers, 8 Underground Coal Dewater Workers (Mine Service and Support Workers), 14 Mechanics-Mining Machinery, 30 Underground Production and Development Miners, 16 Underground Conveyor Operators, 7 Underground Coal Ventilation Workers, 16 Underground Coal Mine Timbermen, and 15 Mechanics-Mining Machinery.

[14] On April 2, 2012, Officer MacLean of Service Canada was assigned to process these requests. He worked full-time on these applications between April 10, 2012, and April 25, 2012. In his affidavit, sworn March 19, 2013, Officer MacLean describes the process he followed in assessing these LMO applications. He conducted labour market information [LMI] research, identified the National Occupation Classification [NOC] codes that corresponded to the positions referenced in the applications, assessed the prevailing wage rates for the applicable NOCs, reviewed proof of recruitment and advertising, and conducted telephone interviews with representatives of HD Mining.

[15] In addition to independent research, as noted above Officer MacLean accessed Service Canada's file on the LMO application submitted the previous year by CDI. He attests that "I was

not the program officer who assessed and approved the 2011 CDI LMOs but I reviewed the file information and any LMI research conducted during the assessment of that file for background information." Officer MacLean was cross-examined on his access to and reliance on the CDI LMO file and, as discussed below, the fact that that entire file was not included in the Certified Tribunal Record [CTR] is a significant matter of dispute.

[16] Officer MacLean's assessment of the LMO applications is contained in "Assessment Notes" that he prepared and retained in the computer records of HRSDC. When his assessment was completed, he filled out an internal form entitled "Bulk Request Assessment and Recommendation" which briefly sets out a summary of the request, the wages and working conditions, recruitment efforts, and the officer's comments. He attests that HRSDC requires that this form be completed when an officer foresees "issuing a positive LMO involving more than 50 positions in a specific occupation." Officer MacLean transmitted his Bulk Request Assessment and Recommendation form by email of April 23, 2012, to a number of persons stating that "Any comments, guidance, objections, etc would be appreciated." No substantive feedback was received, and Officer MacLean issued ten positive LMOs to HD Mining covering the 201 TFWs.

PRE-HEARING MOTIONS

[17] As noted earlier, five outstanding motions were heard at the commencement of the hearing. Rulings and Orders have issued on all except the motion - Motion #2, which challenges the admissibility of affidavits sworn by Curtis Harold and Douglas Sweeney, which was taken under reserve.

Motion #2

[18] By motion filed March 28, 2013, CDI challenged the admissibility of the following:

a. Affidavit #1 of Curtis Harold, sworn March 8, 2013; and

b. Affidavit of Douglas Sweeney, sworn March 13, 2013.

[19] The Applicants' purpose in filing the affidavits of Mr. Harold and Mr. Sweeney was to support its submission that HD Mining misrepresented to HRSDC the nature of its mining operation at the Murray River Project. They submit that these affidavits show that HD Mining had represented to the BC Ministry of Natural Resource Operations, when it applied for a Bulk Sample Permit, that the mining technique it would use for that purpose was room and pillar and not long-wall mining. This is said to be contrary to the statement in the letter submitted with the LMO applications, that "HD Mining will be utilizing a long-wall mining construction method" which had not been used in Canada.

[20] In the submission of the Applicants, this evidence shows that HD Mining had obtained the LMOs through misrepresentation. Moreover, it was submitted, if the Court found that Officer MacLean erred in his decision, this evidence went to whether the Court ought to, as HD Mining requested, exercise its discretion and refuse to set the LMOs aside.

[21] At the close of argument, I held that it was premature to rule on the admissibility of these affidavits without having heard full submissions on the merits. Having now heard the parties' submissions on the merits and having considered the parties submissions on the motion, I find that these two affidavits are not admissible in the application. Moreover, as I discuss below, even if they

had been admitted, they would have been given no weight as they are unreliable and do not support the claim of the Applicants that HD Mining misrepresented anything to HRSDC.

Affidavit #1 of Curtis Harold, sworn March 8, 2013

[22] Mr. Harold is a business agent for one of the Applicant unions. He attended at the offices of the BC Ministry of Natural Resource Operations "where arrangements had been made to make available materials submitted by HD Mining for the Murray River Project." Mr. Harold met Diane Howe, the Deputy Chief Inspector of Mines, who had been informed that he would be coming to copy the application HD Mining had submitted for the Murray River Project.

[23] He says that Ms. Howe "took me to a table with a number of binders of documents" which she described as "the application I had requested." He was also provided with "an electronic version of the application, which Ms. Howe copied." Mr. Harold says that he was later informed by counsel for the Applicants that he had been provided with "the wrong file."

[24] Consequently, Mr. Harold re-attended at the Ministry offices and was directed by Ms. Howe to a table of binders. He says that "I confirmed with Ms. Howe that these materials had been received from HD Mining and were in relation to the Murray River Project, and I inspected the documents and confirmed this was the case." Again, he was provided with an electronic version of the application file and was told to take the four large binders, rather than copy them, as they were copies of the original file. He says that he then sent both the electronic file and the paper file to the Applicants' lawyers.

[25] Although he swears that he was provided with both an electronic and paper copy of the Ministry's file, he attaches only a small part of it to his affidavit, which makes it impossible for the Court to make any assessment whether the entire contents of the application supports what he claims.

[26] Specifically, Mr. Harold attached to his affidavit three Exhibits, which he describes as follows:

> 10. I attach as Exhibit "A" to my affidavit a copy of the "Notice of Work Application: Murray River Coal Bulk Sample Project" dated June 30, 2011 which was included in both the electronic and paper versions of the materials I was provided by the Ministry of Natural Resource Operations on February 15, 2013, and including the support document "First Aid and Mine Rescue Emergency Response", but excluding the other support documents..
>
> 11. I attach as Exhibit "B": to my affidavit a copy of the Attachment "C" to the Notice of Work Application, titled "Murray River Bulk Sample Design" which I was also provided by the Ministry of Natural Resource Operations on February 15, 2013. This document was only included in the paper version of the file that I copied.
>
> 12. I attach as Exhibit "C" to my affidavit a copy of extracts of the "Supplement to Notice of Work Application – Murray River Project Bulk Coal Sample" dated January 18, 2012, including the covering letter, List of Documents, Updated Equipment List, and Safety Procedures for Bulk Sample Mining. I was also provided this document by the Ministry of Natural Resource Operations on February 15, 2013. This document was only included in the paper version of the file that I copied.
>
> 13. The supplement to Notice of Work Application was the most recent document included in the materials that I was provided by the staff at the Ministry of Natural Resource Operations. I did ask if they had any further documents that pertained to the Murray River Project and I was told that I had been provided with all of the documents they had in relation to the Murray River Project.

[27] CDI opposes the admissibility of this affidavit and these Exhibits, in part, based on a submission that the Applicants, in filing this material, are trying to do an end-run around an earlier pre-hearing Order of this Court. Before being granted leave in this application, the Applicants sought leave to file an affidavit in reply attaching thereto as exhibits the two documents attached as Exhibits A and B to Mr. Harold's affidavit. Leave was refused by Justice Manson, who wrote that those documents "are outdated and do not reflect the supplemental information in respect of HD Mining's operations provided to the Ministry of Energy, Mines and Natural Gas, in the period of January 2012 through January 2013, including the time the labour market opinions (LMOs) were applied for in March 2012."

[28] In finding that the Applicants' proposed information was outdated, Justice Manson relied on information contained in Affidavit 3 of Michael Xiao sworn February 22, 2013, which had been filed in response to the Applicants' motion. In it Mr. Xiao swears to filing plans and drawings up to January 2013. The reference by HD Mining to that affidavit in its memorandum was the subject of a motion and it was ruled that the reference to it was improper.

[29] CDI also objects to the admissibility of Mr. Harold's affidavit on the basis that it includes hearsay evidence and contains materials not before the decision-maker.

[30] Rule 10 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 [the *Immigration Rules*] speaks to an applicant filing "supporting affidavits verifying the facts relied on by the applicant in support of the application." Justice Manson noted that "this Court has granted some latitude in permitting documents to be provided beyond those before the decision maker;"

however, an affidavit filed in support must be confined to facts within the personal knowledge of the deponent. Hearsay is admissible provided necessity and reliability are established: *Zheng v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1152. The Applicants made no effort to establish that it was "necessary" that the affidavit with its attachments be sworn by someone other than the government official responsible for maintaining these official documents. I suspect no such argument was available because Ms. Howe, who would have been an appropriate affiant, was apparently very co-operative with and helpful to the Applicants.

[31] Further, I do not find that this evidence is reliable. Mr. Harold swears that he was provided with a paper and an electronic copy but some of the exhibited documents are found only in one source. In particular, the Supplement to Notice of Work Application – Murray River Project Bulk Coal Sample dated January 18, 2012, which was not before Justice Manson, was found only in the paper version of the file. This makes suspect the truth of the statement that Ms. Howe has provided a full paper and electronic copy of the application.

[32] More troubling is the hearsay statement from Mr. Harold that he was told, by some unnamed person, that he had been "provided with all the documents they had in relation to the Murray River Project" and that the most recent document was the Supplement to Notice of Work Application – Murray River Project Bulk Coal Sample dated January 18, 2012. It is troubling because no source of this information is stated by Mr. Harold and because Justice Manson references information provided to the Ministry "in the period January 2012 through January 2013" (emphasis added). In light of this Court's prior statement that there was information provided up to

January 2013, evidence to the contrary, to be reliable, had to be based on personal knowledge, not hearsay.

[33] As the affidavit does not meet the test for an exception to the admissibility of hearsay evidence in applications under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], it is not admissible.

Affidavit of Douglas Sweeney, sworn March 13, 2013

[34] Mr. Sweeney is a former Chief Inspector of Mines for British Columbia. He swears that he was "in touch" with Ms. Howe and had requested that she provide him with "a copy of the Bulk Sample Permit that was issued to HD Mining for the Murray River Project, as well as the Notice of Work Application." In Ms. Howe's email to him she writes:

> Attached is a copy of the Bulk Sample permit for the Murray River project. I just checked on the [Notice of Work] and it is an immense document and sorry but I will not be able to get a copy for your review, we just don't have the time or the folks that can help put it together in a timely way.

Mr. Sweeney goes on in his affidavit to attest that he "was, however, able to get a copy of the Notice of Work Application from the Steelworkers and from Mr. Gordon, as described above." What is "described above" is that Mr. Gordon, counsel for the Applicants provided him with a copy of:

> Affidavit #3 of Michael Xiao, as well as with the Notice of Work Application, Murray River Coal Bulk Sample Project dated June 30, 2011 and submitted by HD Mining, as well as portions of the Supplement to the Notice of Work Applications, Murray River Coal Bulk Sample Project dated January 12, 2012 [*sic*], which portions included a covering letter addressed to Diane Howe, the Deputy Chief Inspector of Mines Reclamation and Permitting, a List of

> Documents, Updated Equipment List, and Bulk Sample Related Safety Procedures.

[35] This evidence raises additional concerns. First, according to Curtis Harold, on February 15, 2013, Ms. Howe provided him with an electronic copy of the Ministry's file as well as a paper copy. That file material included the Notice of Work; however, very shortly thereafter Ms. Howe tells Mr. Sweeney that she can't get him a copy because "we just don't have the time or the folks that can help put it together in a timely way." How can that be if a paper and an electronic version had already been assembled and given to Mr. Harold?

[36] Second, the Bulk Sample Permit issued to HD Mining on March 15, 2012 which Ms. Howe sent to Mr. Sweeney was, one would assume, contained in the Ministry's file; however, this permit was not included in the allegedly complete materials she provided to Mr. Gordon on February 15, 2013 – eleven months after the permit was issued. We know that it was not included because Mr. Gordon says that the most recent document the Ministry had, a copy of which was given to him, was the Supplement to the Notice of Work Application which is dated January 18, 2012.

[37] These concerns offer further reason to question the completeness of the materials Mr. Harold was given and has produced. It also brings sharply into question the accuracy of the hearsay statement provided to Mr. Harold in his affidavit that the Supplement to the Notice of work dated January 18, 2012, was the most recent document in the Ministry files.

[38] In any event, Mr. Sweeney swears, based on his review of "portions of the Supplement to the Notice of Work Application dated January 12, 2012 [*sic*]", including the Updated Equipment

List and Bulk Sample Related Safety Procedures, that "there is no indication in these documents that long wall mining will be used" nor does the equipment "list any long wall mining machinery." I agree with CDI that Mr. Sweeney is offering an opinion based on these documents when he has not been qualified to provide one. Further, he is basing his opinion on documents that the Court has previously found to be "outdated."

[39] In addition to those opinions, Mr. Sweeney lastly offers his opinion in paragraph 7 of his affidavit that "under paragraph 2(d) of the Bulk Sample Permit" HD Mining would be prevented from changing the method of bulk sampling. However, there is no paragraph 2(d) of the Bulk Sample Permit. This may, as was submitted by the Applicants, have been in error and he may have meant to reference paragraph 2(c); nonetheless, it does little to support any view that he has offered reliable evidence, even if it was not objectionable as opinion evidence.

[40] For these reasons, I find that the affidavit of Mr. Sweeney is not admissible. In any event, had it been accepted, it would have been given no weight. It is simply not reliable evidence as it relies in large part on Mr. Harold's affidavit and its exhibits which I have found not to be reliable.

[41] Accordingly, I find that the Affidavit #1 of Curtis Harold, sworn March 8, 2013, and the Affidavit of Douglas Sweeney, sworn March 13, 2013, are inadmissible and are to be struck from the record.

ISSUES

[42] The parties raised a number of issues going to the merits of the application, which I summarize as the following:

1. Whether the Court has or should extend the time limit for seeking leave in this case;
2. Whether the decision-maker has provided a proper record under Rule 17 of the *Immigration Rules* and, if it has not, what is the remedy for that breach;
3. Whether portions of Officer MacLean's affidavit ought to be struck as an attempt to bolster the reasons for decision;
4. Whether HD Mining materially misrepresented the nature of the work in its LMO applications;
5. What is the appropriate standard of review of an officer's decision to grant a positive LMO; and
6. Whether Officer MacLean made a reviewable error in deciding to issue positive LMOs to HD Mining.

ANALYSIS

1. Extension of Time

[43] The decision under review that positive LMOs would issue was made and communicated to HD Mining by correspondence dated April 25, 2012. Paragraph 72(2)(b) of *IRPA* provides that when an application for leave and judicial review concerns a decision made in Canada, as this one was, the applicant is required to serve and file it "within 15 days … after the day on which the applicant is notified of or otherwise becomes aware of the matter." Paragraph 72(2)(c) provides that "a judge of the Court may, for special reasons, allow an extension of time for filing and serving the application."

[44] HD Mining says that it "strains credulity" to accept that the Applicants did not have knowledge of the LMO decisions at an earlier date given that one of the Applicant unions has members, and officials, and an office in Tumbler Ridge, and there was local media on this issue as early as Spring 2011. This is speculative. The best evidence as to when the Applicants first became aware of the positive LMOs having issued is found in the affidavit of Brian Cochrane, Business Manager of the International Union of Operating Engineers, Local 115 and Affidavit #2 of Mark Olsen, Business Manager of the Construction and Specialized Workers' Union, Local 1611, both of whom swear that they first became aware when the *Vancouver Sun* reported it on or about October 10, 2012. Both were cross-examined extensively but the evidence of neither was shaken. Accordingly, their evidence is accepted. By operation of paragraph 72(2)(b) of *IRPA*, the Applicants' time for serving and filing an application for leave and judicial review expired October 25, 2012.

[45] In their Application for Leave and Judicial Review, filed November 2, 2012, the Applicants specifically requested an extension of time as required by the *Immigration Rules*. HD Mining, the only Respondent that filed submissions, opposed both the leave and the extension of time request.

[46] Rule 6 of the *Immigration Rules* stipulates that "a request for an extension of time shall be made in the application for leave in accordance with form IR-1" and that "a request for an extension of time shall be determined at the same time, and on the same materials, as the application for leave" [emphasis added]. Justice Russell granted leave but did not specifically address the request for an extension of time in his Order.

[47] HD Mining submits that the question of leave remains a live issue and, relying on *Deng Estate v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 59 [*Deng Estate*] and *Khalife v Canada (Minister of Citizenship and Immigration)*, 2006 FC 221 [*Khalife*], submits that "where the order granting leave to submit the application for judicial review is silent on this preliminary issue (as it is in this case), it should not be presumed that an extension of time has been granted."

[48] In *Deng Estate*, the Court of Appeal expressly agreed with the following statement by Justice Tremblay-Lamer in *Canada (Minister of Human Resources Development) v Eason*, 2005 FC 1698, which, although it dealt with a decision of a member of the Pension Appeal Board, was stated by the Court of Appeal to be a "similar situation" to the immigration matter before it:

> However, as stated above, the member was silent on the issue of extension of time. The respondent suggests that as leave to appeal cannot be granted unless an extension of time is also granted, it can be inferred from the member's decision to grant leave that she also granted an extension of time. I disagree. While Mr. Eason did apply for the extension of time and for leave, it cannot automatically be inferred that the member turned her mind to the issue of extension of time simply because she granted leave. The granting of an extension of time must be explicitly considered by the decision maker. A member exceeds his jurisdiction, or fails to exercise his jurisdiction, if he grants leave to appeal without also granting an extension of time within which to appeal. [emphasis added]

[49] Absent the decision of the Court of Appeal in *Deng*, I would have thought that it would be proper to presume, in the absence of contrary evidence, that a leave judge considering an application that includes a request for an extension of time, properly applied the provisions of Rule 6 of the *Immigration Rules* and did not exceed his jurisdiction by granting leave when no extension of time

had been granted. Absent *Deng*, I would also have thought, given the express wording of Rule 6 that a request for an extension of time is to be heard "at the same time" as the leave application, that it is the leave judge alone and not the judge hearing the application that has jurisdiction to grant the extension of time. However, I feel that I am bound by the Court of Appeal's decision in *Deng Estate* and will thus determine whether to grant an extension of time because Justice Russell did not specifically address this request in his Order granting leave.

[50] The requested extension of time is granted. I am satisfied that the test summarized in *Patel v Canada (Minister of Citizenship and Immigration)*, 2011 FC 670 [*Patel*] is met. Under that test, an applicant must establish "a) a continuing intention to pursue the application; b) that the application has some merit; c) that no prejudice arises from the delay; and d) that a reasonable explanation for the delay exists." *Patel*, above, at para 12.

[51] The evidence filed establishes a continuing intention to pursue the application once the Applicants learned of the LMOs. Counsel was retained, including an expert in immigration law, efforts were made to gain access to the decisions at issue and research was conducted as to how to attack the impugned decisions. The application has some merit. Justice Russell, although he dismissed a motion for an injunction, found that a serious issue had been raised and found there to be an arguable issue when he granted leave. The fact that the parties argued the merits of the application for nearly three days itself points to there being an arguable case.

[52] Despite the best efforts of counsel for HD Mining, I am not convinced that it will suffer prejudice if the extension of time is granted. It argues that it has "spent tens of millions of dollars

preparing the project" and that it has relied on the LMOs "in good faith and has arranged all of its planning and contracting according to a complex work plan with many interrelated steps leading to completion of the bulk sample." Be that as it may, the prejudice that needs to be considered here is the prejudice, if any, that accrued between the deadline for bringing an application and the day the application was actually brought, not the entire period fifteen days after the day when the LMO decisions were communicated to HD Mining. The Applicants filed this application on November 2, 2012, meaning, based on my finding about the Applicants' state of knowledge, they were only just over a week late. HD Mining has not argued that any significant prejudice accrued to it during this short time. Granted, this situation is somewhat unique and potentially unfair to HD Mining since this application was brought by third parties, on a timeframe coinciding with their subjective knowledge. Accordingly, a broader conception of prejudice may be warranted. However, even if one applied a broader concept of prejudice, there is no proof that any part of these expended funds will be lost if this application proceeds, or will be lost even if the application is successful. HD Mining expended these funds and made these preparations based on its belief that the Murray River Project was a viable coal mine that will generate substantial profit for the company. That remains unchanged. It may be that HD Mining will have to adjust its operation if this application is successful; however, any possible prejudice to HD Mining that might result must be weighed against the public interest in having the LMO decision reviewed by a court.

[53] Lastly, a reasonable excuse for the delay has been established. As submitted by the Applicants, this is "first instance" litigation of a decision they did not have and is against parties the identity of which was uncertain. It is hardly surprising in such circumstances that the law firms retained would require some time to ascertain just how to attack the impugned decisions and on

what basis. Moreover, what is a reasonable excuse will depend on the length of the delay. As I noted above, the Applicants were just over a week late. That delay is relatively short in view of the complexities of this case. For these reasons, I grant the extension of time requested by the Applicants.

2. The Record

[54] The Applicants submit that the Ministers have not provided a proper record because the CTR is both under and over-inclusive.

[55] Rule 17 of the *Immigration Rules* provides as follows:

17. Upon receipt of an order under Rule 15, a tribunal shall, without delay, prepare a record containing the following, on consecutively numbered pages and in the following order:	17. Dès réception de l'ordonnance visée à la règle 15, le tribunal administratif constitue un dossier composé des pièces suivantes, disposées dans l'ordre suivant sur des pages numérotées consécutivement :
(a) the decision or order in respect of which the application for judicial review is made and the written reasons given therefor,	a) la décision, l'ordonnance ou la mesure visée par la demande de contrôle judiciaire, ainsi que les motifs écrits y afférents;
(b) all papers relevant to the matter that are in the possession or control of the tribunal,	b) tous les documents pertinents qui sont en la possession ou sous la garde du tribunal administratif,
(c) any affidavits, or other documents filed during any such hearing, and	c) les affidavits et autres documents déposés lors de l'audition,
(d) a transcript, if any, of any oral testimony given during the	d) la transcription, s'il y a lieu, de tout témoignage donné de

hearing, giving rise to the decision or order or other matter that is the subject of the application for judicial review, and shall send a copy, duly certified by an appropriate officer to be correct, to each of the parties and two copies to the Registry.	vive voix à l'audition qui a abouti à la décision, à l'ordonnance, à la mesure ou à la question visée par la demande de contrôle judiciaire, dont il envoie à chacune des parties une copie certifiée conforme par un fonctionnaire compétent et au greffe deux copies de ces documents.

[56] The Applicants submit that the 922 page CTR filed and served by the Minister of HRSDC pursuant to Rule 17 of the *Immigration Rules* is under-inclusive because it does not include all of the documents that Officer MacLean "looked at and consulted" when making his assessment of the HD Mining LMOs, namely, the entire file generated for the LMOs that were issued about a year earlier to CDI. They submit that the record is over-inclusive because the CTR includes documents that were admittedly copied from a file other than the HD Mining LMO file.

[57] I agree with the submission of the Applicants that because no one other than the Minister in an immigration related application is involved in the preparation of the tribunal record, a great deal of trust is reposed in him or her by the opposite party and by the Court to prepare a proper and complete record. I also agree with them that "an incomplete record alone could be grounds, in some circumstances, for setting aside a decision under review" [emphasis added]: *Parveen v Canada (Minister of Citizenship and Immigration)* (1999), 168 FTR 103 at para 9, per Reed J.; and see also *Machalikashvili v Canada (Minister of Citizenship and Immigration)*, 2006 FC 622; *Kong v Canada (Minister of Employment and Immigration)* (1994), 73 FTR 204, and *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 180.

[58] The Ministers submit that the jurisprudence cited above shows that setting aside a decision on the basis of an incomplete record should be done only when the omitted material is "clearly essential," "particularly material," or "critical" to an issue and was relied upon by the decision-maker. They submit that material alleged by the Applicants to have been omitted from the CTR does not meet this test, even if it is relevant and ought to have been included in the CTR.

[59] Rule 17 of the *Immigration Rules* stipulates that in addition to the impugned decision, affidavits and documents filed during the hearing, and a transcript, if any, the CTR is to contain "all papers relevant to the matter that are in the possession or control of the tribunal" [emphasis added]. The Ministers submit that guidance as to the test of relevance is found in the Court of Appeal decision *Pathak v Canada (Canadian Human Rights Commission) (re Royal Bank of Canada)*, [1995] FCJ 555 [*Pathak*]. In *Pathak*, the decision under review was a decision of the Human Rights Commission dismissing Mr. Pathak's complaint. The CTR included everything that was before the Commission when it made that decision, including a report of a Commission investigator. However, in addition, the applicant sought to have included in the record all of the information that was before the investigator when he made his report.

[60] A judge of the Trial Division directed the Human Rights Commission to file certified copies of documents relied upon by the investigator in preparing his report pursuant to the *Federal Court Rules*, CRC 1978, c 663, which provided that a party to a judicial review application could request documents of the decision-maker. Rule 1612(4) further provided that such requested documents "must be relevant to the application for judicial review." Given the similarity of that language to

that of Rule 17 of the *Immigration Rules*, I agree with the Ministers that this authority offers guidance as to the test of relevance.

[61] The Court of Appeal in *Pathak* held that these additional documents were not relevant. It held that the investigator's report must be presumed to be a faithful and complete summary of the evidence before him and it further noted that there was no attack in the notice of application on his report. Accordingly, it held that the evidence before him was not relevant to the matter under review. At paragraph 10, the Court of Appeal describes relevant documents for judicial review purposes in the following manner:

> A document is relevant to an application for judicial review if it may affect the decision that the Court will make on the application. As the decision of the Court will deal only with the grounds of review invoked by the applicant, the relevance of the documents requested must necessarily be determined in relation to the grounds of review set forth in the originating notice of motion and the affidavit filed by the applicant.

[62] I pause to note that the Court of Appeal's assertion that relevance must of necessity be examined with an eye to the grounds of review set out in the application is a complete response to the suggestion of the Applicants that there was something improper or nefarious in the Ministers having prepared the tribunal record in light of and after having examined the grounds of review alleged by the Applicants.

[63] With that basic framework in mind, the two factual issues that require determination are whether the CTR improperly excludes relevant documents which should have been part of the certified record, and whether the CTR improperly includes documents which ought not be part of the certified record.

Under-inclusive Record

[64] In their Further Memorandum of Fact and Law, the Applicants submit that the CTR "omits critical documents on which the Officer admittedly relied" [emphasis added]. The Applicants' oral submission was more broadly stated; it was that "if Officer MacLean looked at and consulted the [CDI] file, we shouldn't be getting a portion of it, we should be getting the entire file." This is because, as I understand their submission, it is only if the Applicants get access to the entire CDI file that they are able to make the argument that the Officer "based [his] decision or order on an erroneous finding of fact that it made … without regard for the material before [him]," specifically the CDI file. Without the benefit of seeing the entire CDI file, of course, it is entirely speculative to argue that the Officer erred by failing to have regard to it; nevertheless, the Applicants are prevented from making that argument since they have no idea what else may be contained in the CDI file. Thus, assuming the entire CDI file was "before" Officer MacLean during his deliberations, this judicial review is somewhat frustrated and the decision cannot be fully held to account.

[65] The Ministers take a narrower view. Their position is that what must be included in the CTR is what the Officer considered and relied on in assessing the HD Mining LMO applications. They say all of the documents meeting this description were included in the CTR.

[66] With one exception, I agree that documents containing all of the information which the Officer expressly considered and relied upon were included in the CTR. This is based on my finding that, on the balance of probabilities, from his reasons and the cross-examination, as

excerpted below, Officer MacLean considered and relied upon the following from the CDI LMO file:

a. The notes of the officer who assessed the CDI application, which included LMI and information regarding the CDI LMO application.

> I did review the foreign worker system online notes that were prepared by the program officer who would assess that file. We would typically – I mean, in a case like this because they were linked would look at that previous application in the notes that were recorded, either was labour market information that was recorded on the foreign worker system as well, and I reviewed that.
>
> Cross-examination of Officer MacLean, March 25, 2013, page 11, lines 3–11.

b. The CDI LMO applications.

> It's my recollection that, yes, I think I reviewed the [CDI] applications.
>
> Cross-examination of Officer MacLean, March 25, 2013, page 11, lines 18-19.

c. The number of TFWs and the positions CDI requested.

> Q You considered the numbers and the positions that were being applied for by CDI and compared them to what HD Mining was applying for?
> A Yes.
>
> Cross-examination of Officer MacLean, March 25, 2013, page 11, lines 25-28.

d. The experience requirements of the requested CDI positions.

> Q You reviewed Dehua LMO applications, and indeed you even compared experience requirements between Canadian Dehua and HD Mining applications?

> A … I would have reviewed the experience requirements, or it would appear from this [being Exhibit A to his affidavit] that I compared the experience requirements under those positions.
>
> Cross-examination of Officer MacLean, March 25, 2013, page 12, lines 24-27, 35-38.

[67] Items a, c, and d above, the LMI, the number of TFWs and the positions CDI requested, and the experience requirements are contained in the notes of the officer who prepared the CDI files. These notes were produced in the CTR, at pages 834-922.

[68] Item b above, the CDI LMO applications, are not in the CTR. However, although Officer MacLean says that he reviewed them, the only information he states that he got from them was the number of TFWs, the positions CDI requested, and the experience requirements of the requested CDI positions. All of this information is also contained in the previous officer's notes at pages 834-922 of the CTR. While, technically, the LMO applications would have been the source of the previous officer's information and he only copied it in his notes; it would be an exceedingly technical objection that the CDI LMO applications were not produced. That is because there is simply no reason to believe the other officer copied this relatively straightforward information incorrectly.

[69] The one exception raised by the Applicants, and only in oral reply, was the documentary source for the information concerning the changing scope of the Murray River Project between the time CDI and HD Mining submitted their LMO applications. In particular, Officer MacLean accepted in his Assessment Notes that the new, higher number of positions requested by HD Mining (201 versus 91) was "genuine" partly because the descriptions of the project had changed – CDI's

project did not include "the construction of the mine shaft simultaneously with the construction of the decline." The source of this information is not clear; however, it may have, and apparently does emanate from a document in the CDI file which was not disclosed in the CTR.

[70] However, Officer MacLean's opinion that the number of positions was "genuine" relates to subsection 200(5) of the *Regulations*, and in his Assessment Notes he specifically distinguishes between his opinion under that provision and paragraph 203(1)(b), which requires an assessment of whether "the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada." The Applicants have framed their application as an attack on Officer MacLean's latter determination and opinion, not his determination and opinion that the offers of employment were "genuine" under subsection 200(5). Accordingly, in line with *Pathak*, above, the documents from the CDI file which would seemingly contain the narrower description of the Murray River Project and which go to the "genuineness" finding are not relevant and need not have been disclosed.

[71] Thus, the only real issue remaining is the proper test for relevance and the extent of the Minister's disclosure obligation. If, as the Ministers argue, consideration of and reliance on a document establishes relevance, then they have discharged their responsibility in compiling the CTR since each mention in the Officer's reasons and cross-examination of information from the CDI file is corroborated with a document disclosed in the CTR. If, on the other hand, the Applicants are correct and relevance and thus disclosure is triggered when the Officer decides to look at a document or it is otherwise placed "before" him, the CTR is not complete because the Officer had the CDI file before him but that entire file was not disclosed.

[72] There is no doubt that Officer MacLean did consider at least some of the CDI LMO file. In his affidavit he states that he "reviewed the [Foreign Worker System] notes to file" and further states that "I was not the program officer who assessed and approved the 2011 CDI LMOs but I reviewed the file information and any LMI research conducted during the assessment of that file for background information" [emphasis added].

[73] In my view, the decision-maker having reviewed the "file information," the file ought to have been included in the CTR. The Ministers' position that only documents considered and relied upon by Officer MacLean in assessing the HD Mining LMO applications are to be included in the CTR is too narrow. Reliance *per se* is not the determinative factor. What is determinative is what the decision-maker reviewed, or could have reviewed because it was put before him. Otherwise, paragraph 18.1(4)(d) of the *Federal Courts Act* is neutered: as the Applicants argue, how can an applicant in most cases successfully argue that a decision-maker based its decision on a finding of fact that it made "without regard to the material before it" if an applicant is not entitled to receive all of the material that was before it. However, mere access to a document is not sufficient; it must be "before" the decision-maker. Here, the CDI LMO file was undoubtedly "before" Officer McLean because he sought it out and to some extent reviewed it. It ought to have been disclosed in full by the Minister.

[74] However, for the reasons that follow, I am unable to conclude that the omission of the remainder of the CDI file from the CTR is such that this judicial review application ought to be allowed on this basis alone.

[75] Despite a vigorous cross-examination, there is no evidence that anything that may be missing from the CTR was or could have been material to the decision under review. Indeed, considering that CDI received positive LMOs, it is difficult to conceive what material information may have been in the CDI files that could significantly undermine Officer MacLean's decision such that it was unreasonable, which is the nature of the Applicants' challenge. At best, the Applicants only speculate that the CDI file might contain contradictory information regarding the Murray River Project's description. As noted above, however, that pertains to the opinion that the number of offers of employment was genuine under subsection 200(5) of the *Regulations*, which was not challenged in this application as framed by the Applicants. Other than that speculative possibility, the Applicants did not propose a single plausible example of the kind of information that might have been contained in the CDI file that would have shown the Officer's decision was unreasonable.

[76] Thus, although I strongly agree with the Applicants in general terms that it is highly problematic that "we don't know what we don't know," so to speak, and the Ministers cannot be condoned for taking such a narrow view of disclosure considering the trust that is reposed in them in preparing a complete and accurate CTR, in the particular circumstances of this case their failure is not material or significant and I will not grant the application on that basis alone.

[77] Moreover, I should also note that had I found that there was material evidence omitted or likely omitted from the CTR, it would have been appropriate, in my view, to weigh the materiality or likely materiality of the omission against the prejudice to be suffered by the corporate Respondents if the decision was quashed for that reason alone. In my view, such a consideration

would be appropriate because the corporate Respondents might suffer prejudice as a result of actions and decisions of the Ministers over which they have no control. As parties with no control over the CTR, their interests ought also to be weighed against the interests of these public-interest applicants.

Over-inclusive Record

[78] In his reasons, Officer MacLean did not refer to the source of the prevailing wage rates he used to arrive at his conclusion that those offered by HD Mining to the proposed TFWs would be comparable or better.

[79] The Applicants submit that the CTR is over-inclusive because on cross-examination Officer MacLean admitted that he could not find any document attached to the HD Mining files containing information on wage rates; however, he included in the CTR a document taken from another file – a print-out from the "Working in Canada" [WiC] website – since the information in this document "match[ed] the prevailing wage rates that were recorded in [his] assessment decisions for HD Mining." In his affidavit, Officer MacLean stated that his usual practice (and to his knowledge the practice of others) was to "use the wage information available on the [WiC] website," and, as a result, "to not bother citing in his assessment notes the source of prevailing wage rate inquiry."

[80] In my view, there is no merit to the Applicants' complaint that the record is over-inclusive or in some other way improper because it includes documents from other sources that the decision-maker referred to and used in coming to his decision. The record need not be a carbon copy of the administrative file kept by the decision-maker. Rather, Rule 17(b) of the *Immigration Rules*

describes that "all papers relevant to the matter that are in the possession or control of the tribunal must be produced" [emphasis added].

[81] Not only is there no suggestion the wage rates are not a perfect match between Officer MacLean's decision and the print-out taken from the different administrative file, Officer MacLean has sworn that it is his usual practice to use the wage rates from the WiC website (from which the print-out was made) in his assessment of temporary foreign workers files. There is no objective reason to doubt that the website (as reflected in the print-out) was the source of Officer MacLean's information, and there is every objective reason to believe it was. I am therefore satisfied that the website was, on a balance of probabilities, the source of Officer MacLean's information; the print-out was therefore "relevant to the matter" and in the tribunal's possession within the meaning of Rule 17(b), and is thus properly before this Court.

3. Officer MacLean's Affidavit

[82] The Applicants submit that portions of Officer MacLean's affidavit should be struck because they are an attempt to bolster his decision, and also because of the questionable reliability of his allegations due to the passage of time and the amount of files he reviews. In particular, they ask this Court to strike paragraphs 28, 42, 51 – 54, and 57 – 61 of the affidavit.

[83] There is no question that an attempt to bolster one or more of the bases for a decision by way of affidavit in a judicial review proceeding is impermissible, and "smacks of an after-the-fact attempt to bootstrap [a] decision." *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 41.

[84] Paragraph 28 of the affidavit states only "I did not deem it necessary to request or review the resumes ["from selected Canadian candidates and all resumes received for the project"]." I agree with the submission of the Applicants that this statement "is an attempt to bolster his failure to provide any rationale for not requesting those resumes." Accordingly, it is struck from the record.

[85] Paragraphs 42 and 51-54 concern the source of the information for the prevailing wage rates – the WiC website. These paragraphs do not add to the bases for the decision, but rather provide the necessary context to enable the Court to determine what *was* actually the basis for the decision. Given that there is no dispute that the wages are a perfect match between the decision and the WiC print-out, as noted previously, there is every reason to believe that the prevailing wage rates were in fact determined from the WiC website, as the Officer swears.

[86] Lastly, paragraph 57-61 contain, in the Applicants' submission, "attempts to provide further explanation for why [Officer MacLean] granted positive LMOs to HD Mining in light of his noted-concerns with their LMO application in the Bulk Request Assessment and Recommendation" and to "bolster his reasons pertaining to HD Mining's advertising efforts." In my view, Officer MacLean only explains the nature and intended audience of the Bulk Request Assessment and Recommendation form at paragraphs 57-59. At paragraph 60, he reiterates what is already contained in the reasons for his decision, namely, that he "was not aware of any TFWP policy imposing any requirement that specific languages must be spoken by foreign nationals." At paragraph 61, on the other hand, Officer MacLean does offer a supplement to his reasons by stating

that minor variances in job descriptions on advertisements are fairly normal. Accordingly, paragraph 61 is struck from the record.

4. Was the Nature of the Work Misrepresented?

[87] The Applicants submit that HD Mining misrepresented the nature of the work in its LMO applications, because in these it stated that it would be using long-wall mining when in the documents it filed with the British Columbia Ministry in relation to the Murray River Project it stated that it would be using the traditional room and pillar method. The Applicants submit that "it is a breach of natural justice to allow a decision to stand when the [decision-maker] acted upon false information provided by the applicant" and says that fundamental justice demands the Court's intervention.

[88] Paragraph 18.1(4)(e) of the *Federal Courts Act* specifically provides that the Court may grant relief if satisfied that a decision-maker "acted … by reason of fraud or perjured evidence." No such relief is requested in the Application for Leave and Judicial Review, nor is there any allegation in it that HD Mining was engaged in misrepresentation. The Applicants say this ground was not raised initially because they were unaware of the alleged misrepresentation until they obtained the documents from the BC government after this application was commenced, that they raised the issue as soon as possible, and that the Court should exercise its discretion to consider it. When asked why paragraph 18.1(4)(e) had not been pled or relied upon even at this late stage, counsel responded: "we are aware of the difference and chose to plead misrepresentation and not to plead fraud." I am hard-pressed to characterize the Applicants' allegation of the conduct of HD Mining as

one of either innocent or negligent misrepresentation, rather than fraudulent misrepresentation. Their allegation was put by counsel to be the following:

> [W]hat HD Mining is saying is, "Look, we're using this highly specialized equipment that we have to bring in from China, and this has never been done anywhere in Canada". And that's not, My Lord, what the documents clearly indicate. And these are HD Mining's documents. These are the documents that they submitted for the purpose of obtaining the permit that they needed from the provincial government to proceed with this project.

Given this characterization, the Applicants ought to have sought an amendment to their application to plead paragraph 18.1(4)(e) to have specifically put HD Mining on notice of its allegation, rather than stated it, as it did for the first time, in its Further Memorandum.

[89] In any event, as the affidavits of Curtis Harold and Douglas Sweeney have been ruled inadmissible, there is no evidence before the Court on which a finding could be made that HD Mining made any misrepresentation as to the type of mining that it would be doing at the Murray River Project.

[90] Further, even if these affidavits were in evidence, they would have been given very little weight for the reasons set out in ruling them inadmissible, namely their hearsay character, their incompleteness, and concerns regarding the accuracy of the information contained therein. Misrepresentation, like fraud, requires clear, cogent, and convincing evidence if it is to be found. The evidence tendered by the Applicants falls well short of that high standard.

5. Standard of Review

[91] The parties are in agreement that the standard of review of the officer's decision is reasonableness.

6. Is There a Reviewable Error?

[92] The Applicants submit that Officer MacLean's decision ought to be set aside on either of two broad bases.

[93] First, it is submitted that "the officer wasn't really making the decision, or at least his latitude of discretion was minimized to a significant extent." It is argued that Officer MacLean's discretion was so fettered because of the supervision and direction he received.

[94] Second, it is submitted that Officer MacLean made a number of unreasonable findings and reached unreasonable conclusions when conducting his assessment. In this respect the Applicants described a number of areas of concern without specifically organizing them with reference to the factors an officer is required to consider under subsection 203(3) of the *Regulations*. They were identified in oral submissions as "a variety of issues, including whether the officer reversed the onus of proof; that excessive requirements were imposed for the jobs; that the assessment of prevailing wage rates was made without proper foundation, and is unreasonable; the impact of the requirement to speak Mandarin; and a lack of a proper plan to transition to Canadians; deficient advertising to recruit Canadians; and the fact that there were qualified Canadians who applied but were not hired." As much as is possible, I propose to deal with these concerns with reference to the six specific factors the officer was required to consider under subsection 203(3) of the *Regulations* because ultimately the question that is to be addressed is the reasonableness of the officer's opinion under

paragraph 203(1)(b) of the *Regulations* that "the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada" based on these six factors.

(1) Did the Officer Fetter His Discretion?

[95] The Court of Appeal in *Stemijon*, above, at paragraph 24 wrote: "A decision that is the product of a fettered discretion must *per se* be unreasonable." The Applicants submit that Officer MacLean's decision is unreasonable because he fettered his discretion because he was "closely monitored and directed in his processing of the file" and because "absent approval of the managers, the Officer would not have given approval."

[96] Generally, when a decision-maker is given discretion by law, as Officer MacLean was, he or she cannot bind him or herself in the way that discretion will be exercised by internal policies or by obligation to others. However, this is not to say that such a decision-maker cannot have regard to internal policies as to how that discretion ought to be exercised, or seek input from others.

Fettering By Obligation to Others

[97] The Applicants, in their Further Memorandum, particularize their submission that Officer MacLean fettered his discretion by obligation to others as follows:

(i) "Officer MacLean was being closely monitored and directed in his processing of the file by numerous managers, including by the most senior manager of whom he was aware for the Western Territories Region, as well as by officials from Citizenship and Immigration Canada and by officials of the Province of British Columbia;"

(ii) He was asked to expedite the file and there was a "request that the Officer treat the recruitment done by Canadian Dehua for the same project a year earlier, as valid for HD Mining in its 2012 LMO applications," contrary to HRSDC policy; and

(iii) Officer MacLean prepared a Bulk Request Assessment and Recommendation form dated April 23, 2012, and sent it to "all 6 managers who were overseeing this file" and he agreed in cross-examination "that he would not approve the LMOs without approval of the managers, which is why the Bulk Request form was initially composed outside of the computer system normally used."

[98] The Ministers submit that the Applicants' "interpretation of the record presents an entirely unrealistic view of administrative operations with respect to labour market opinions in general" and is based on their speculation that there were "ulterior motives" behind every interaction between Officer MacLean and others.

[99] In my view, the record simply does not support that Officer MacLean fettered his discretion in any of the ways that have been alleged.

Closely Monitored and Directed

[100] I begin by observing that simply because one's work is being monitored does not necessarily lead to a conclusion that one's discretion is thereby fettered. Virtually everyone's work is monitored; some more closely than others.

[101] Officer MacLean acknowledged that the HD Mining LMO file was not a typical LMO file. As such, it is hardly surprising that his supervisor and superiors would be interested in how his assessment was progressing:

> Q Do you agree with me that this was a significant file for the Vancouver office?
>
> A I would agree with you in the sense that it was a sensitive – there was some sensitivity in – regarding the file. It was the numbers – there was a significant number of temporary foreign workers that were being requested at one time. The nature of the project itself meant that it was a complex file. So – and that's what I would have – I would agree to that statement.
>
> Cross-examination of Officer MacLean, March 27, 2013, page 39

[102] He also acknowledged that a number of employees of HRSDC were interested in the file and asked to be kept informed of its progress, and he did so. However, there is no evidence that any of those persons directed Officer MacLean do anything other than to devote his time exclusively to the application and to expedite it.

Directed to Use CDI Recruitment Information

[103] I find that there is no evidence that Officer MacLean was ever directed to use or rely on any of the materials relating to the former CDI LMO application. He was advised that he could use it, but in the end it was his decision alone whether he would and to what extent. This is evident from his diary note of April 11, 2012, in which he writes of his conversation with Dale Gill, the team leader who had assigned the file to him:

> Apr 11 spoke with Dale, she advised that received email? from Lisa Smith, advising that CIC were working on WP, requested that we expedite the file, Dale also mentioned possibly accepting old recruitment. Follow up on this and see if any other info

> communicated. Responded that will work exclusively on this file but not able to provide completion date at this time. [emphasis added]

In my view, this entry shows no direction to Officer MacLean regarding the CDI recruitment information, merely a suggestion that he consider accepting it. The record shows that he did consider the CDI file and found some discrepancies between the positions and duties stated therein and those requested by HD Mining. His diary entries also show that he decided that he could not and would not rely exclusively on CDI recruitment materials:

> Advised Lisa that was advised by Dale that could consider past recruitment conducted by previous ER but in light of additional #s being requested would need to consider recent recruitment in the decision. [emphasis added]

[104] In short, although a superior informed him that he "could" consider the CDI recruitment file, he was not directed to do so. Further, given that the first HD Mining application was largely a repeat of the former CDI application that had already been assessed, it may well be that he would have considered recruitment information in the CDI file in any event. I am satisfied that the record shows that Officer MacLean made his own decision as to what aspects of the CDI file he would consider, and his discretion was not fettered by his supervisors in this respect.

Required Managerial Approval

[105] Officer MacLean sent an email on April 19, 2012, to his team leader, Michael Au, the team leader in charge of the file, copied to Dale Gill, Kerry O'Neill and Lisa Smith, stating: "I will do my best to complete these recommendations by Friday and refer them thru my team leader for comment/guidance, etc." In fact, it was only on the following Monday that Officer MacLean finalized the assessments and by email dated April 23, 2012, he forwarded his completed Bulk

Request Assessment and Recommendation form "to summarize the ER request and officer assessment and concerns" to Michael Au, Janet Walsh and Howard Jones and continued saying that "any guidance, objections, etc. would be appreciated."

[106] Officer MacLean in his affidavit states that a Bulk Request Assessment and Recommendation form is sent to an officer's supervisor when the officer foresees issuing a positive LMO involving more than 50 positions in a specific occupation. He states that this form:

> … allows program officers to bring to the attention of the management/supervisory team any areas of concern, or any high-profile or sensitive cases. Based on these forms a supervisor may decide that a particular file merits the involvement of a business consultant or may identify concerns with the program officer's recommendation. Such concerns could trigger a discussion with the recommending program officer, and potential reconsideration. However, the program officer remains the final decision-maker even where a Bulk Request Assessment and Recommendation is completed." [emphasis added]

[107] In this case, the record shows that there were no comments at all regarding Officer MacLean's assessment or the concerns he raised. His team leader said in an email, "you have the go ahead from the two managers to approve these applications" which was, in fact, exactly what Officer MacLean indicated was his assessment – that they be approved. The LMOs were thus approved and issued by Officer MacLean. Given that there was no substantive feed-back from the supervisory personnel, it is shocking to suggest that the officer's discretion was fettered. The decisions were rendered exactly as he had written them.

Summary

[108] The position of the Applicants on the fettering of Officer MacLean's discretion by his superiors amounts to a submission that these superiors wanted positive LMOs to issue and were directing and controlling him to achieve that desired result. There is nothing in the record that establishes that. The Applicants' submissions are based on mere speculation and conjecture.

(2) Was the Officer's Assessment Unreasonable?

[109] An officer's opinion under paragraph 203(1)(b) of the *Regulations* that "the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada" shall, according to subsection 203(3), be based on the following six factors:

> (a) whether the employment of the foreign national 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 is likely to result in the creation 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 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 has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents; and
>
> (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.

As noted earlier, I will deal with the various issues raised by the Applicants within the context of these six factors, to the extent that this can be done in an orderly way.

203(3)(a) "whether the employment of the foreign national is likely to result in direct job creation or job retention for Canadian citizens or permanent residents"

[110] Officer MacLean makes an identical assessment on job creation for each of the LMO decisions, as follows:

> Information provided with the LMO refers to creation of 500 on site jobs and creation of 1000 indirect jobs offsite. ER has confirmed immediate onsite staffing needs of approximately 294 for completion of construction/bulk sampling phase. ER has offered employment to 30 Canadian workers, expects to hire additional 56 Canadians based on ongoing recruitment efforts. ER is requesting 201 FW. ER expects that the total onsite employment will increase to approximately 500 when mine reaches full production in 2-3 years. Thus approximately an additional 200 jobs will [be] created, the majority of those will be concentrated in miner and support service worker occupations.

[111] The Applicants do not raise any issues that directly go to this factor.

[112] The information in the officer's Assessment Notes is consistent with the cover letter sent to HRSDC with the LMO applications, and with telephone conversations between the officer and HD Mining on April 13 and 20, 2012. It is also consistent with his summary in the Bulk Request Assessment and Recommendation form. I agree with the submission of the Ministers that this is a factor favouring a positive LMO.

203(3)(b) "whether the employment of the foreign national is likely to result in the creation or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents"

[113] The Applicants submit that Officer MacLean presumed that this factor was met, or in other words favoured HD Mining, absent the breach of some policy or some other reason negating that

positive presumption. As a result, they say, Officer MacLean did not find that the factor truly favoured HD Mining in a substantive sense; only that there were no particular policies or reasons which disqualified it. At various points in their submissions, the Applicants referred to this error as the officer "reversing the onus of proof."

[114] The following excerpt from the Applicants' Memorandum of Fact and Law in support of Leave particularizes this submission:

> Thus, rather than require HD Mining to show, for instance, that having Mandarin as the predominant language in the mine would allow for the recruitment, training, or retention of Canadians, the Officer found instead that there was no policy which would allow for a refusal.

[115] The Applicants, in their oral submissions, also characterized this concern as the officer fettering his discretion:

> And in our submission the officer clearly had a discretion to refuse the LMOs on that basis. On the basis that the Mandarin in the work place would impede the transfer of work to Canadians and the hiring and retention of Canadians. And particularly given his concern, which is expressed immediately thereafter about there being little substantive information being provided about the training, and about concerns about the length of time the employer wished to take to transition to a Canadian workforce. But the officer clearly understands that he is unable to exercise that discretion because of an absence of any specific temporary foreign worker policy, which would allow for a refusal based on workplace language. And in our submissions that's a clear fettering of his discretion. He could refuse based on the discretion that he has. The officer seems to understand that he can't refuse unless there exists a specific policy allowing for a refusal.

[116] The concerns that Officer MacLean had regarding the Mandarin language requirement for the TFWs is found both in his Bulk Request Assessment and Recommendation form and in his Assessment Notes. In the former, he writes:

> Lack of requirement for English for FWs in underground mining occupations, raises some concerns regarding the employer's ability to attract/train and transition to Canadian workers. The employer has stated that English language training will be provided, that interpreters and English speaking foremen will facilitate on the job training and transfer of skills to Canadians. Still it is reasonable to question … how successful the employer will be in attracting, training or retaining Canadians, while the language of mine operation is predominantly Mandarin. However, I am unaware of any TWFP policy that would allow for a refusal based on workplace language. [emphasis added]

In his Assessment Notes for each LMO, he writes:

> Transfer of skills: concerns regarding the ability of the employer to deliver transfer of skills due to FW not being proficient in English. ER asserts that on the job training and skill/ knowledge/experience transfer will be facilitated by English speaking foreman and FW miners/support and service workers thru use of interpreters attached to the work units. … Transition to Canadian workforce: information attached to the LMO and confirmed by the employer ER, asserts change over will occur at 10% per year over the 1st 10 years a potentially 40 year mine life. Again no substantive information provided as how ER will meet this goal. Decision: LMO has met program requirements for genuineness under IRPA 200(5) and IRPA 203(3), wages, working conditions, recruitment, no labour dispute. Job creation and transfer of skills were also considered as benefits to Canada, notwithstanding officers comments recorded above. Bulk Request Assessment and Recommendation 23Apr forwarded bulk request assessment and recommendation to team leader and local manager(s), noting concerns, but recommending confirmation for all LMO's requested. A 2 year duration is appropriate as it will cover off the duration of the bulk sampling project, and allow for a subsequent review of the employers progress in hiring and training of Canadians. [emphasis added]

[117] Officer MacLean clearly had concerns that non-English speaking TFWs would have a negative impact on the creation or transfer of skills and knowledge to Canadians. HD Mining tried to overcome these concerns by pointing out that interpreters would be used and that foremen would be English and Mandarin speaking. They also provided some limited information about training at local educational institutions and had attached to their applications a long-term plan for the training of and transition to a one hundred percent Canadian workforce, which I also discuss further below in relation to the factor at paragraph 203(3)(e). These measures went some way to address the officer's concerns but, as he writes: "Still it is reasonable to question … how successful the employer will be in attracting, training or retaining Canadians, while the language of mine operation is predominantly Mandarin" [emphasis added]. It is relevant to note that at this point in his analysis, the officer has not concluded that the employer would have no success in attracting, training, and retraining Canadians; rather, he concludes that the degree of its success is open to question. This finding is made just before the statement the Applicants attack - "I am unaware of any TFWP policy that would allow for a refusal based on workplace language." The Applicants interpret this statement as meaning that since there is no such policy, Officer MacLean, who would otherwise disallow the application, feels that he must weigh this factor in favour of the applicant. I do not share that interpretation.

[118] I firstly note that notwithstanding the extensive cross-examination of Officer MacLean by the Applicants, I cannot find that he was specifically asked what he meant by the impugned comment. In any event, as I see it, in the above-questioned passage, Officer MacLean expresses that he has concerns that the transfer of skills and work to Canadians will be limited by the Mandarin language of the workplace, but accepts that there will be some skills transfer. As such,

this factor weighs in the applicant's favour, even if only slightly, and Officer MacLean notes that there is no policy that would dictate that he say that it does not weigh in its favour (and reject the application). That is not a reversal of onus as alleged; it is a statement of fact.

[119] Indeed, Officer MacLean, quite responsibly in my view, notes his concerns in this regard so that another officer considering a subsequent LMO application from HD Mining will inquire into and assess the success it has had in skills transfer to Canadians notwithstanding the initial Mandarin language of the workplace:

> Q. But what persisted as a concern was the impact that a predominantly Mandarin workplace language would have on the ability of HD Mining to recruit and train Canadian workers; correct?
>
> A. Well, I would say that that was a concern, and I would say that this is in regards to, you know, my style of note-taking, my style in terms of writing the decision. Some of it in terms of the concern was that any subsequent labour market opinions it was more of a going-forward period. They had met the program requirements. I was confirming those applications. I had concerns in regards to transitioning because of language and that language may present some barriers. The employer had provided what steps they had taken to address that.
>
> Those concerns, Mr. Clements, were there in the sense that as going forward if I am – and as is my practice when I'm confirming an application, if I have some concerns that would not cause a refusal of an application, then I'll note them, and that the next officer that may assess an application from that company can review those notes to say this previous officer had some concerns regarding language. So that may form part of the questions that they would ask the employer in terms of a subsequent application. So how is it working in terms of transitioning? How is it working in regards to workplace language? That's how I would categorize. When I tend to write concerns, they would mostly be going forward. In other words, that somebody in subsequent dealings with the company may review that and bring those back up.
>
> Cross-examination of Officer MacLean, March 25, 2013, pages 32-33.

[120] On the whole, therefore, I do not find that Officer MacLean's assessment of this factor is unreasonable. He found this factor weighed in HD Mining's favour, if only slightly, based on their transition plan, the discussions they had had with a local training institution, and the use of English-speaking foremen, but nevertheless had some concerns about this plan and about how the use of Mandarin would affect HD Mining's ability to attract and train Canadians. This finding is intelligible and falls within the range of possible acceptable outcomes based on the material that was before the officer. Moreover, as I noted above, Officer MacLean expressing his concerns in his reasons was meant to be a useful tool for the next officer to review an LMO application from HD Mining, which was to occur within roughly two years. In my view, this Court would be sending the wrong message and it would arguably have a chilling effect on administrative reasons to hold, in effect, that an officer cannot express his or her concerns but nevertheless make a positive determination if, on balance, that is warranted.

203(3)(c) "whether the employment of the foreign national is likely to fill a labour shortage"

[121] Officer MacLean makes an identical assessment on the issue of a labour shortage for each of the LMO decisions, as follows:

> Available LMI reviewed, speaks to challenges in finding workers in this industry due to growth of industry and aging workforce. Mining Industry Human Resources Council (MiHR) report on Labour Market Demand Projects dated Jun 2008, details the expected mining labour force shortage for British Columbia over period 2008-2017 and refers to labour shortages in this industry across Canada. See also LMI research completed by another officer for related employer SF 7752445 which supports ongoing labour shortages in industry and specifically underground coal mining [i.e. the CDI application].

[122] The Applicants acknowledge that there is a shortage of some skilled underground mine workers in Canada but say that not all of the TFW positions are skilled and face shortages. However, they take no issue with Officer MacLean's reliance on the documentary evidence, which he understood as establishing a shortage across all mining positions, or point to any part of it as supporting their assertion. Rather, the only issue they raise that is arguably relevant to the finding of a labour shortage is that of the "excessive" job requirements for the lower skilled positions. In particular, they submit that HD Mining sought excessive qualifications for these positions from Canadian applicants and that this artificially depressed the number of qualified Canadians who could apply and were qualified, which gives the impression that there was a labour shortage for the lower skilled positions, when in fact this *may* not be the case. The Applicants' submission that the requirements were "excessive" is based on their interpretation of NOC 8411. They submit that rather than requiring HD Mining to establish that its requirements were reasonable, the officer placed the onus on the Minister to show that they were not:

> Level of experience required may vary depending on type of mining and specific job being performed. Insufficient information to support a refusal based on job requirements being excessive. [emphasis added]

[123] Taken in isolation it may appear that Officer MacLean is placing the burden on the Minister to establish that the job requirements are excessive; however, when read in context, this is not the case. The entire passage from which the Applicants have extracted the impugned sentence is as follows:

> Job offer/requirements; duties and requirements, minimum 3 years underground coal mining experience are related to the specific worker job title. ER rationale for job requirements, performance of these jobs requires this level of experience, ensure safety of workers, initial construction phase of mine requires experienced workers.

> Unable to locate any standardized job description for any of these job offers. Based on information reviewed in assessment of file would appear that experience, knowledge, can be specific to type of mining, underground versus open pit, hard rock versus soft rock, etc. and not necessarily any natural mobility between open pit and underground mining. Level of experience required may vary depending on type of mining and specific job being performed. Insufficient information to support as refusal based on job requirements being excessive.

[124] In my view, in this passage Officer MacLean is simply noting that his research has shown that job requirements vary in mining between underground and open pit mining, and hard rock and soft rock mining; that the employer has provided an explanation for the requirements it placed on these jobs, which is that experienced workers during the construction phase of the project will help ensure the safety of workers; and that, in light of this, he has no reason to find that the requirements HD Mining is requiring of its workers are excessive. He is not, in my view, doing anything more than saying that although they are higher than the NOC standard, explanations have been offered and he has no reason to find otherwise. This is not a reversal of onus. Moreover, this is consistent with his evidence on cross-examination where he states that the NOC requirements are used by program officers as a guide and they do not require that an applicant provides a mirror image of the NOC classification: See Cross-examination of Officer MacLean, March 25, 2013, pages 26-27.

[125] More importantly, the Applicants have not accurately focused on what is contained in NOC 8411. NOC 8411 is a Skill Level C classification. The Applicants note that the NOC guide provides that a job will be at Skill Level C if the education and training is either "completion of secondary school and some short-duration courses or training specific to the occupation *or* some secondary school education, with up to two years of on-the-job training, training courses or specific work experience." HD Mining's requirements for the NOC 8411 classified positions were a

secondary school diploma and three years related underground mining experience. Thus, they argue, HD Mining's requirements were far too high.

[126] However, what the Applicants fail to address is that Skill Level C covers a variety of unskilled and low skilled positions. NOC 8411, which is specific to "Underground mine service and support workers," lists the following under employment requirements:

- "Completion of secondary school is usually required.
- "Previous formal training of up to six weeks followed by periods of on-the-job training as a helper or in support occupations is usually required.
- "Previous experience as a mine labourer is usually required.
- "May be certified in the basic common core program in Ontario.
- "Company licensing or certification is often required for occupations in this unit group."

[127] When the requirements sought by HD Mining are compared to these more specific education and training requirements contained specifically in NOC 8411 (and not merely the guidelines for Skill Level C positions generally), one sees no real deviation at all: HD Mining required a secondary school diploma and previous, related experience, as is "usually required" according to NOC 8411. The officer's assessment and approach did not therefore unreasonably support the conclusion, corroborated by the available labour market research compiled by him and the previous officer, that there was a labour shortage for these positions. There is simply no merit to the Applicants' argument that the job requirements for the lower skilled positions were "excessive."

> ***203(3)(d) "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"***

[128] The Applicants make two submissions. First, that Officer MacLean in his reasons "offers no source or any other basis for his determination of prevailing wage rates" and second, if it is accepted that he looked to the WiC website run by the Government of Canada, he failed to follow HRSDC policy by not looking at various sources.

[129] HRSDC's Temporary Foreign Worker Program Manual, section 3.5.3.4, provides that officers are to "review the wages that an employer offers and compare them to wages paid to Canadians and permanent residents in the same occupation and geographical area based on objective LMI from StatisCan, HRSDC/Service Canada, provincial ministries, and other reliable sources."

[130] Officer MacLean looked only at the WiC website for information. At paragraph 46 of his affidavit, he attests that "It is my usual practice – and as far as I am aware, that of all program officers – to use the same process for assessing wage information: namely, they use the wage information available on the WiC website." In his cross-examination on March 25, 2013, he stated (page 114): "My understanding of the program requirements were that prevailing wage was defined as the average wage in a geographic region and that we were at that time using Working in Canada as a single source of prevailing wage rate inquiry. … That's how I conducted my wage assessment."

[131] I have dealt above with the evidence of the WiC website print-out and found that the source of Officer MacLean's prevailing wage rate information was the WiC website. Although he fails to state this in the Assessment Notes, it does not follow that he had no source for this information. As also noted previously, LMO decisions are administrative decisions and the duty to give reasons is at

the low end of the scale. Accordingly, his failure to state the source, given the evidence before the Court, is not a reason to set aside his decision.

[132] The alternative submission of the Applicants is that the officer erred in failing to follow the HRSDC policy quoted above and consider multiple sources of wage information. In particular, collective agreements in place at two mines close to the Murray River Project show, so argue the Applicants, that the wage information on the WiC site is not accurate, and Officer MacLean should have looked at them.

[133] Paragraph 18.1(4)(d) of the *Federal Courts Act* provides that the Court may grant relief in this judicial review if it is satisfied that the officer "based [his] decision or order on an erroneous finding of fact that [he] made in a perverse or capricious manner or without regard for the material before [him]."

[134] Based on the information that was "before [him]," the WiC website information, there can be no dispute that his decision on the prevailing wage rate was reasonable – the wages offered by HD Mining exceeded the prevailing wage rate indicated on that website. That satisfies the second clause in paragraph 18.1(4)(d). Thus, the issue raised by the Applicants about the wages paid at the two unionized mines in close proximity to the Murray River Project must go to whether Officer MacLean made his finding "in a perverse or capricious manner."

[135] While it is true that Officer MacLean was aware of these two mining operations that were in close proximity to the Murray River Project, I am unable to agree with the Applicants that he ought

to have sought wage information from them and that his failure to do so meant his wage rate finding was made in either a perverse or capricious manner. First, Officer MacLean testified that he took "prevailing wage rate" to mean the average wages for the occupation, which is not an unreasonable interpretation. As such he would have been aware that there were some who paid higher and some who paid lower wages than shown on the WiC website. Even if he had seen the wages paid at the two nearby mines, the fact that these two unionized operations paid higher is thus not necessarily significant to the "prevailing" rate. On the contrary, choosing data *ad hoc* and anecdotally might very well have resulted in a less reliable finding. Officer MacLean had no reason to question the accuracy of the WiC website, which, as the Respondent Ministers point out, is a government website compiled from various objective sources. Accordingly, although I admitted as evidence in this application the wage rate information taken from these collective agreements despite the fact that they were not in the record before Officer MacLean, they do not demonstrate that he made his wage rate finding in a perverse or capricious manner. In short, the Applicants have raised no reviewable error in Officer MacLean's wage rate determination.

203(3)(e) "whether the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents"

[136] The Applicants submit that the advertising for these 201 employees was not properly done. They submit that the raised qualifications would have prevented some Canadians from being qualified. I have already addressed, above, the qualifications and found them to be reasonable and in keeping with what would be expected in the industry, based on NOC 8411.

[137] The Applicants further submit that HD Mining's failure to advertise all positions within the 3 month window as required by HRSDC policy also prevented Canadians from applying. Again, I

have previously dealt with the decision of the officer not to require reposting and his reliance on CDI's recruitment efforts as well as his experience and knowledge. The officer is entitled to use his discretion when examining the advertising an applicant has made both in terms of its timing and accuracy. Officer MacLean did so and, as he stated, was looking at whether he felt that "any different outcome would arise" if the recruitment was done differently. There is nothing on the record that establishes that he was wrong in his assessment that sufficient efforts had been made to recruit Canadians, either when he made that assessment or in hindsight. As a result, in the circumstances of this case and to invoke a concept otherwise readily invoked by the Applicants, it might very well have been a "fettering of discretion" to strictly follow HRSDC recruitment policies, i.e. if the information otherwise indicated that HD Mining's recruitment efforts were "reasonable."

[138] In my view, the Applicants have examined the rather meticulous analysis of Officer MacLean regarding the deficiencies in the advertising done by HD Mining, and argue that the decisions he made were unreasonable only because a contrary view could have been taken. I don't doubt that another officer may have taken the view that HD Mining had to re-advertise for those few positions where the job title was slightly misstated, or where the advertising was slightly stale-dated, but that does not make this officer's decision to the contrary unreasonable. As the Supreme Court said regarding the reasonableness standard of review in *Khosa v Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12 at para 59: "There might be more than one reasonable outcome ... as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome."

[139] The Applicants also point to a comment made in the Bulk Request Assessment and Recommendation form by Officer MacLean as evidence that his determination under this factor was unreasonable:

> Transition to a Canadian workforce: employer estimates that the transition to a Canadian workforce will occur at 10% per year, but has provided little substantive details how this goal will be achieved."

[140] The transition plan in the LMO application at page 289 of the CTR reveals that the transition to a Canadian workforce involves a "multi-year training process during which local Canadian workers would be trained in the skills required for this method of mining [i.e. long-wall mining]." It illustrates that proposed transition by a chart which shows that the 10% per year transition to Canadians will begin only after the second year of the mine's full operation. It does not happen at all during the sampling phase that was at issue for this officer. Given that his positive LMO will expire before there is to be any transition to a Canadian workforce, it was reasonable for the officer, in my view, not to require more of HD Mining in terms of specifics. In order to continue with their TFW workforce, if the mine goes into full production, HD Mining will have to establish to the satisfaction of another officer that they do have a workable and reasonable transition plan. Accordingly, I am unable to agree with the Applicants that Officer MacLean's issuance of the positive LMOs in light of his concerns about a transition plan was unreasonable.

[141] The Applicants also submit that Officer MacLean ought to have been suspicious of the recruitment efforts in Canada given the few Canadians hired or interviewed, despite HD Mining having received many resumes. The officer did not have the resumes but could have requested

them. The Applicants' own analysis shows, they say, that a number of these resumes were from Canadians who were "*prima facie* qualified" to be hired by HD Mining.

[142] The program officer is not a human resources specialist or a recruitment officer. I would be very surprised if a review of the resumes would have been any more meaningful to the officer than to the Court. Frankly, an employer must be given some latitude in its hiring even within the TFWP. The real question is whether there was anything before the officer from which he should reasonably have concluded that the applicant had failed to make reasonable efforts to hire Canadians. In approaching that question, one must keep in mind that there was a labour shortage in the mining industry, that CDI's application had been approved only 12 months earlier for the same project, and that CDI and HD Mining both did recruitment. The Applicants submission is that the few persons interviewed from those who applied ought to have raised the officer's suspicion that the recruitment was not genuine. I find nothing to support that view given the background described and particularly given that the decision was being made by an experienced program officer. Further, despite the submissions made by counsel, I do not share the view that the low number of interviews alone would have reasonably raised a concern that the recruitment process was not genuine or sincere.

203(3)(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"

[143] There is no labour dispute at the Murray River Project. This factor is irrelevant.

Summary

[144] The officer did not fetter his discretion when assessing the LMO application from HD Mining, or make any unreasonable assessment when considering the factors set out in subsection 203(3) of the *Regulations*. Further, as counsel for the Applicants conceded, it is not necessary that an applicant meet every one of the six factors listed in subsection 203(3), the decision-maker must examine and assess each and then perform a weighing exercise to decide whether the LMO will issue. This is exactly what Officer MacLean did. As he notes in the Bulk Request Assessment and Recommendation form, even if the job creation and skill transfer factors did not weigh in favour of a positive opinion, all of the others did and the LMO would still issue.

[145] For these reasons, the application will be dismissed.

CERTIFIED QUESTIONS

[146] The parties were given an opportunity to propose a question of general importance for certification; only HD Mining responded. It proposed the following questions:

> 1. Does the Federal Court of Canada [*sic*], as a statutory court, have the authority to grant an Applicant who is not directly affected by the Tribunal's decision public interest standing on judicial review under section 18.1(1) of the *Federal Courts Act*, which limits applications for judicial review to the Attorney General and persons "directly affected."
>
> 2. If a Tribunal's Certified Tribunal Record (CTR) is found to have any omissions, is the ability of the court to quash the underlying decision any different in cases where the applicant is one to whom the decision relates as opposed to cases where the applicant is challenging approvals issued to a third party?
>
> 3. Can the Federal Court of Canada [*sic*] on judicial review quash work visas or authorizations under the *Immigration and Refugee Protection Act* on the basis of an impugned labour market opinion in circumstances where the holders of such work visas or authorizations have not been made Respondents or otherwise been

> provided notice of and an opportunity to participate in the judicial review?
>
> 4. Can the Federal Court rely on evidence that is not in the Certified Tribunal Record to assess the reasonableness of a statutory decision maker's decision?
>
> 5. Is a public interest applicant subject to a different test on the extension of time for seeking leave for judicial review than a person directly affected?
>
> 6. Is the fact an applicant is seeking litigation funding from non-parties a "reasonable explanation" for the delay in filing a party's application for leave for judicial review and a proper basis for a court to grant an extension of time?
>
> 7. In the case of a corporate entity, can an extension of time for filing an application for leave for judicial review be granted upon the applicants asserted lack of early knowledge of the decision in circumstances where the only evidence before the court is that a single official of the corporate entity was personally unaware of the decision?

[147] CDI expressed "substantial agreement" with the positions expressed by HD Mining. The Applicant's filed written submissions in opposition to the proposed questions.

[148] No question will be certified. The jurisdiction of the Federal Court to grant public interest standing under the *Federal Courts Act* has been determined: *Harris v Canada (Minister of National Revenue)*, [2000] 4 FC 37 (CA). Given the findings and the disposition of this application for judicial review, none of the other proposed questions, even if of a general nature, would be determinative of an appeal and thus are not proper questions to certify: *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] F.C.J. No. 1637.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. Paragraphs 28 and 61 of the affidavit of Officer MacLean, and the affidavits of Curtis Harold and Douglas Sweeney, are struck from the record;

2. The application is dismissed; and

3. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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