Federal Court  Cour fédérale

Date: 20190628

Docket: T-562-19

Citation: 2019 FC 876

Ottawa, Ontario, June 28, 2019

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

DANA ROBINSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Overview

[1] The applicant, Mr. Dana Robinson, is a fisherman who holds an owner-operator licence authorizing him to fish lobster in Nova Scotia. He brings a motion, pursuant to section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7 [FC Act] and Rule 373(1) of the *Federal Courts Rules*, SOR/98-106 [Rules], to be granted two interlocutory reliefs. First, Mr. Robinson asks the Court to stay a decision issued in March 2019 by the Deputy Minister of the Department of Fisheries and Oceans Canada [DFO] denying his request for the "continued use of a medical substitute

operator authorization" for his lobster fishing licence [Decision]. Second, he seeks a mandatory interlocutory injunction ordering the DFO to authorize him to use a medical substitute operator [MSO]. Both reliefs are sought until the final determination of the application for judicial review Mr. Robinson has filed against the Decision on April 4, 2019.

[2] The purpose of a MSO authorization is to allow another person to carry out the activities authorized under a fishing licence where the holder of the licence is affected by an illness preventing him or her from personally operating a fishing vessel. In the Decision, the DFO denied Mr. Robinson's request on the basis that it exceeded the five-year limitation to the use of a MSO imposed by a DFO's policy, and that no extenuating circumstances warranted making an exception to this policy in the case of Mr. Robinson. In his underlying application for judicial review, Mr. Robinson challenges the Decision refusing his MSO authorization and seeks numerous remedies. These include an order setting aside the Deputy Minister's Decision on the basis that it is unreasonable because the Deputy Minister failed to acknowledge or consider his constitutionally protected right to be free from discrimination pursuant to subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[3] In this motion, the Court is not tasked with deciding the merits of Mr. Robinson's underlying application, but with assessing whether or not the requirements of the test governing the issuance of interlocutory injunctive reliefs have been met.

[4] Mr. Robinson submits that he satisfies each prong of the conjunctive three-part test set forth by the Supreme Court of Canada [SCC] in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*] for the issuance of stays and interlocutory injunctions. He claims that: 1) a serious issue to be tried has been raised in his underlying application; 2) he will suffer irreparable harm if the stay and mandatory interlocutory injunction are not granted; and 3) the balance of convenience, which examines the harm he will suffer compared to the harm done to the DFO, as well as the public interest, favours him.

[5] The Attorney General of Canada [AGC], acting for the DFO, responds that Mr. Robinson has not met any of the three parts of the *RJR-MacDonald* test. The AGC adds that a MSO authorization is a condition attached to a fishing licence, that Mr. Robinson has already been authorized to use a MSO from 2009 up to July 31, 2019, and that any further authorization would render the underlying judicial review moot and fetter the absolute ministerial discretion to issue a fishing licence under the *Fisheries Act*, RSC 1985, c F-14 [*Fisheries Act*], which occurs on a yearly basis.

[6] For the reasons that follow, Mr. Robinson's motion will be granted in part. Further to my review of the parties' submissions and of the evidence, I am satisfied that Mr. Robinson has met the applicable conditions for the issuance of the two interlocutory reliefs he is seeking. I acknowledge that, since Mr. Robinson will not need a further MSO authorization until the resumption of the applicable lobster fishing season on October 15, 2019, his motion may appear premature at this stage. However, I find no grounds to dismiss the motion for prematurity. I instead conclude that, when all the circumstances of this case are factored in, it is just and

equitable to order a stay of the Decision and the issuance of a temporary MSO authorization at this juncture, albeit only until the earliest of the determination of his underlying application for judicial review or the end of calendar year 2019. In parallel, Mr. Robinson shall nonetheless take the necessary steps to proceed with diligence on his application for judicial review.

[7] In reading these reasons, one must keep in mind that interlocutory reliefs are issued following a summary review of the issues, and on the basis of partial evidence. The stay and mandatory interlocutory injunction I am ordering today are not a definitive resolution to Mr. Robinson's dispute with the DFO. Nor are these reasons intended to provide answers to all of the questions raised by Mr. Robinson's application for judicial review.

II. Background

A. *Factual context*

[8] Mr. Robinson is a 58-year-old fisherman. He has been a fisherman all of his working life. He holds several fishing licences, including an owner-operator licence [Licence] which authorizes him to fish lobster on the Southwest coast of Nova Scotia, in an area known as Lobster Fishing Area [LFA] 35. He has held his Licence since 2007 and has fished it personally, on a full-time basis, until a medical condition prevented him from doing so.

[9] In 2009, Mr. Robinson began having medical problems related to his legs. The medical reports indicate that Mr. Robinson suffers from venous insufficiency with leg pain when standing. His medical condition makes it impossible for him to stand for more than a few hours at a time without suffering from throbbing and swelling in his legs. In 2011, Mr. Robinson

underwent surgery in an attempt to resolve his medical problems. While the surgery initially helped relieve some of the pain, the procedure has not cured his medical condition, and Mr. Robinson continues to experience pain after a few hours of standing. Because of his condition, he is unable to meet the daily physical demands of being on his fishing vessel, the "Sea Devil", on a full-time basis.

[10] Since he could not be present on his vessel due to his medical condition, Mr. Robinson requested and received from the DFO the authorization to use a MSO. Despite his physical inability to remain personally on-board his vessel, Mr. Robinson has however maintained full control over his vessel's operations. Even with a MSO, he indeed continues to make most of the operational decisions related to his fishing vessel, including negotiating the wharf price of the catch, arranging bait and fuel purchases, and managing the fishing operation's financial affairs. He employs three full-time seasonal crew members to assist him in fishing his Licence: two deck hands and a captain who operates his vessel.

[11] In October 2015, Mr. Robinson received a letter from the DFO informing him that his MSO authorization request for the fishing season ending on July 31, 2016 was extended beyond the five-year maximum period to accommodate a licence holder affected by an illness, as set out in the DFO's *Commercial fisheries licensing policy for Eastern Canada, 1996* [Policy]. While the DFO nonetheless granted Mr. Robinson a MSO authorization for the 2016 fishing season, the letter also put him on notice that future requests for a MSO exceeding the timeframe mentioned in the Policy would no longer be approved.

[12] In October 2016, Mr. Robinson appealed this DFO's decision to the Maritimes Region Licensing Appeal Committee [MRLAC]. In March 2017, Mr. Robinson received a letter from MRLAC advising him that his request for an exception to the Policy and for a MSO to fish for the current season (i.e., until July 31, 2017) had been approved. The letter however again advised Mr. Robinson that his request for an extension beyond the current season was denied.
Mr. Robinson subsequently appealed this MRLAC's decision to the Atlantic Fisheries Licensing Board [AFLAB], seeking to have the "continued use" of a MSO authorization, with no specific end date or fishing season. In his appeal, Mr. Robinson invoked a number of grounds to challenge the DFO's refusal, including that the five-year limit in the Policy and the MRLAC's decision made pursuant to it were arbitrary, unjust and unconstitutional for violating his right to equality under section 15 of the *Charter*.

[13] On March 6, 2019, on the recommendation of the AFLAB, the Deputy Minister of the DFO denied Mr. Robinson's appeal and his request for the "continued use" of a MSO authorization. This is the Decision that is the subject of Mr. Robinson's application for judicial review. The Decision was made pursuant to subsection 23(2) of the *Fishery (General) Regulations*, SOR/93-53 [Regulations] and subsection 11(11) of the Policy. In the Decision, the Deputy Minister mentioned that the financial hardship and succession plan invoked by Mr. Robinson were not extenuating circumstances justifying an exception to the five-year maximum period. The Decision did not expressly consider the *Charter* challenge, and the reasons made no mention of Mr. Robinson's medical condition, or his counsel's submissions to the AFLAB regarding the unconstitutionality of the Policy.

[14] More than two and a half years have now gone by since Mr. Robinson has filed his initial appeal in October 2016. However, throughout these proceedings before the DFO, Mr. Robinson has been permitted to continue to use a MSO to fish his Licence, and the DFO has thus effectively granted him successive MSO authorizations for every lobster fishing season since 2009, up to the current fishing season ending on July 31, 2019.

[15] I pause to observe that, contrary to most other LFAs, the lobster fishing season in LFA 35 is a split season covering two periods, from March 1 to July 31 and from October 15 to December 31 of each year. In his written submissions and in his affidavit, Mr. Robinson states that the "2019 fishing season" for LFA 35 first covers March 1 to July 31, 2019, with a second period starting on October 15, 2019 to end on December 31, 2019. As conceded by counsel for Mr. Robinson at the hearing before this Court, this statement is incorrect. The fishing season for LFA 35 indeed covers two periods, but over two different calendar years: the first period is in the fall of any given year while the second period takes place in the spring and summer of the following calendar year. Therefore, the "2019 fishing season" for LFA 35 extends from October 15 to December 31, 2018, and continues from March 1 to July 31, 2019. The upcoming October 15 to December 31, 2019 fishing period will thus be part of the 2020 fishing season in LFA 35.

[16] Another important contextual element needs to be mentioned. I heard Mr. Robinson's motion shortly after another judge of this Court issued a judgment in a very similar case, *Martell v Canada (Attorney General)*, 2019 FC 737 [*Martell*], where Mr. Martell – who was represented by the same counsel as Mr. Robinson – had also sought interlocutory reliefs against the DFO further to a refusal to issue a MSO authorization because of the five-year maximum period. In

Martell, Madam Justice Roussel granted the stay and mandatory interlocutory injunction sought by Mr. Martell for the 2019 lobster season, albeit in another LFA having different fishing periods. Needless to say, Mr. Robinson relied heavily on this precedent in his oral submissions before me and invited me to adopt the same analysis and reasoning in my decision.

B. ***The DFO's owner-operator policy***

[17] The DFO's owner-operator policy which forms the background of Mr. Robinson's motion is aptly described by Madam Justice Roussel in *Martell*, at paragraphs 6 to 11. Its main features can be summarized as follows.

[18] The owner-operator policy was formally adopted in 1989 across the entire Eastern Canada inshore and its key elements were incorporated into the Policy. As stated in the affidavit of Mr. Morley Knight filed by the AGC, the goal of the Policy is to maintain an economically viable inshore fishery by keeping the control of licences in the hands of independent owner-operators in small coastal communities, and to allow them to make decisions about the licence issued to them. To achieve this, the owner-operator policy requires licence holders to personally fish the licences issued in their name. This means that the licence holder is required to be on board the vessel authorized to fish the licence.

[19] Subsection 23(2) of the Regulations creates an exception to the owner-operator policy. It provides that, where a licence holder or operator is unable to engage in the activity authorized by the licence due to "circumstances beyond the control of the holder or operator", a fishery officer or a DFO employee engaged in the issuance of licences can authorize another person (i.e., a

substitute operator) to carry out those activities. The “circumstances beyond the control” of a licence holder or operator are not defined in the Regulations.

[20] Over time, the DFO developed policy guidance with respect to situations that may be considered circumstances that are beyond the control of the licence holder. Echoing the language used in the Regulations, subsection 11(10) of the Policy restates that, “where, because of circumstances beyond his control, the holder of a licence or the operator named in a licence is unable to engage in the activity authorized by the licence or is unable to use the vessel specified in the licence, a fishery officer or other authorized employee of the Department may, on the request of the licence holder or his agent, authorize in writing another person to carry out the activity under the licence or authorize the use of another vessel under the licence”. At the hearing, counsel for the AGC mentioned that examples of circumstances beyond the control of a licence holder contemplated by this general provision include vacation time or the loss of a vessel further to a fire.

[21] Subsection 11 (11) provides further guidance in instances where the licence holder invokes illness as a circumstance beyond his or her control. Pursuant to that provision, the Policy limits the designation of a substitute operator to a total period of five years where the circumstances beyond the control of the licence holder are of a medical nature. Subsection 11(11) reads as follows:

(11) Where the holder of a licence is affected by an illness which prevents him from operating a fishing vessel, upon request and upon provision of acceptable	(11) Si le titulaire d'un permis est affecté d'une maladie qui l'empêche d'exploiter son bateau de pêche, il peut être autorisé, sur demande et présentation de documents

medical documentation to support his request, he may be permitted to designate **a substitute** operator for the term of the licence. Such designation may not exceed a total period of five years.	médicaux appropriés, à désigner un exploitant substitut pour la durée du permis. Cette désignation ne peut être supérieure à une période de cinq années.

[22] In 2008, the DFO introduced flexibility in the application of the five-year limit set out in subsection 11(11) in order to respond to the global economic downturn, and in the hopes of enhancing economic support for the industry. In 2015, the DFO resumed strict compliance of the five-year time limit following concerns expressed by certain licence holders and their representatives that the DFO's substitute operator designations were being abused by some licence holders. The DFO thus started sending letters to those who had reached or approached the five-year maximum period to advise them that they would no longer be authorized to use a MSO beyond that time limit. The October 2015 letter which is at the source of Mr. Robinson's application was sent to him in that context.

III. Analysis

A. *Preliminary matters*

[23] Several preliminary matters must be addressed before dealing with the main issue in dispute in Mr. Robinson's motion. They concern claims or submissions made by the AGC in relation to: 1) the availability of injunctions against the Crown; 2) the need for a notice of constitutional questions; 3) the nature of the remedies sought by Mr. Robinson; and 4) the possible fettering of discretion. Other brief remarks must also be made on the questions of judicial comity and judicial notice. Each will be dealt in turn.

(1) Injunctions against the Crown

[24] The AGC claims in his written submissions that section 22 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 [CLPA] prohibits injunctions against the Crown, and that Mr. Robinson's request for interlocutory injunctive remedies should be denied on that basis. The AGC points to this Court's decision in *Shubenacadie Indian Band v Canada (Attorney General)*, [2000] FCJ No 1445, 2000 CarswellNat 2075 [*Shubenacadie*], where it was determined that no interim injunctive relief was available against the Crown (*Shubenacadie* at paras 27, 78). The injunction sought in that case was to prevent the Minister of Fisheries and Oceans [Minister] from enforcing legislation related to lobster fishing (*Shubenacadie* at para 67).

[25] As I indicated at the hearing, the AGC's argument on this point cannot succeed. The FC Act expressly provides that the Court can make interim orders on an application for judicial review. The relevant portions of sections 18, 18.1 and 18.2 of the FC Act read as follows:

Extraordinary remedies, federal tribunals	**Recours extraordinaires : offices fédéraux**
18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	**18 (1)** Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and	**a)** décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;
[…]	[…]

Powers of Federal Court	**Pouvoirs de la Cour fédérale**
18.1 (3) On an application for judicial review, the Federal Court may	**18.1 (3)** Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	**a)** ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
[…]	[…]
Interim orders	**Mesures provisoires**
18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.	**18.2** La Cour fédérale peut, lorsqu'elle est saisie d'une demande de contrôle judiciaire, prendre les mesures provisoires qu'elle estime indiquées avant de rendre sa décision définitive.

[26] In *Attawapiskat First Nation v Canada*, 2012 FC 146, this Court in fact rejected an argument similar to what the AGC pleads here. In that decision, Mr. Justice Phelan concluded that section 22 of the CLPA does not apply where the proceeding is a proper FC Act section 18.1 application for judicial review. At paragraphs 39 and 44, he stated:

> [39] This Court has in several cases, including *Musqueam Indian Band v Canada (Governor in Council)*, 2004 FC 579, ordered injunctive relief in the context of s. 18.1 *Federal Courts Act* judicial review proceedings. The prohibition of injunctions against the Crown is a long held common law principle which predates the more specific language of the *Federal Courts Act*.
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> […]
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> [44] Therefore, the Court does have the jurisdiction under s. 18.1 and s. 18.2 of the *Federal Courts Act* to issue injunctive relief against the Respondent in the appropriate circumstances. This conclusion does not foreclose any of the Respondent's arguments

> regarding the appropriateness of a s. 18.1 proceeding being advanced at the judicial review hearing.

[27] Indeed, in *Shubenacadie*, the Court did not mention subsection 22(1) of the CLPA as a reason for denying the injunction.

[28] Furthermore, as pointed out by counsel for Mr. Robinson, there are exceptions to the Crown's immunity from injunctive relief, and one of these relates to claims for relief under the *Charter* (*Khadr v Canada*, 2005 FC 1076 at para 20).

[29] At the hearing, counsel for the AGC did not press the argument and ultimately agreed that interlocutory injunctions could be sought against the Crown. The AGC however contends that the requirements and preconditions for issuing one are simply not met in the case of Mr. Robinson. This will be addressed below in my decision.

(2) Notice of constitutional questions

[30] The AGC also contends, in his written submissions, that Mr. Robinson has not filed a notice of constitutional question, as required by section 57 of the FC Act. Section 57 provides that such notice must be served on the AGC and the attorney general of each province, at least ten days before the constitutional question is to be argued, when a party seeks to have an Act of Parliament or regulations made under such an Act "judged to be invalid, inapplicable or inoperable". In support of his position, the AGC relies on *Husband v Canadian Wheat Board*, 2006 FC 1390 at para 12, aff'd 2007 FCA 325, where the Court held that a notice of constitutional question was required before challenging on judicial review a federal board policy.

[31] At the hearing, counsel for the AGC however agreed that such notice was not needed in the context of Mr. Robinson's motion for interlocutory reliefs, as the objective of section 57 of the FC Act is to preclude a Court from making a finding that a statute or regulation is invalid, inapplicable or inoperable on constitutional grounds (including the *Charter*) without a prior notice of constitutional question. It is clear that no such conclusions are sought by Mr. Robinson on his motion for a stay and mandatory interlocutory injunction. It is axiomatic that there is no need for a section 57 notice of constitutional question in a case where the judicial remedy sought is something other than a judgment that a statute or regulation is invalid, inapplicable or inoperable on constitutional grounds (*Canada (Canadian Heritage) v Mikisew Cree First Nation*, 2004 FCA 66 at paras 76-79, rev'd on other grounds 2005 SCC 69).

[32] At the hearing, counsel for Mr. Robinson indicated that such notice of constitutional questions would however be given before the underlying application for judicial review itself will be heard and argued, in light of the declaratory remedies sought by Mr. Robinson in his application. The Court expects that, should such notice be given, the requirements of section 57 of the FC Act will be completed by Mr. Robinson and his counsel in a timely manner, so that no postponement or adjournment of the hearing on the merits of his judicial review will have to be contemplated by the Court on the ground that the provincial attorney generals would need more time to prepare their submissions on the constitutional questions at issue.

(3) Remedies sought by Mr. Robinson on the motion

[33] Two remarks need to be made on the nature of the remedies sought by Mr. Robinson on his motion.

[34] First, in his notice of motion and in his written submissions, Mr. Robinson presented his request for an interlocutory mandatory injunction ordering the DFO to authorize him to use a MSO in the interim period as an "alternative" relief. Counsel for Mr. Robinson recognized at the hearing that this was incorrect and that both the stay and the mandatory interlocutory injunction were main reliefs sought in his motion. Indeed, in *Martell* at paragraph 28, Madam Justice Roussel had also come to a similar conclusion.

[35] Granting only a stay of the Decision would not be sufficient to reinstate Mr. Robinson's MSO and would not be very helpful to Mr. Robinson as it would simply suspend the Decision denying his request for the continued use of a MSO authorization. A stay of the Decision alone would not grant Mr. Robinson the authorization he requires in order to use a MSO after July 31, 2019. In fact, the mandatory interlocutory injunction remedy, which compels action on the part of the DFO, captures the essence of the relief sought by Mr. Robinson in his motion. Consequently, Mr. Robinson agreed that the mandatory interlocutory injunction should not be considered as an alternative relief, but as one of two main interlocutory reliefs he seeks on his motion. This is how I treated it in my decision.

[36] Second, throughout his submissions, the AGC repeatedly argues that granting a mandatory interlocutory injunction in this case will grant Mr. Robinson the relief he is seeking in his underlying application for judicial review, being the authorization to the continued use of a substitute operator. And that this would therefore render his underlying judicial review moot. I do not agree.

[37] I do not dispute that there is a limited overlap between the mandatory interlocutory injunction sought by Mr. Robinson in his motion and one of the remedial orders he seeks in his underlying application for judicial review, as the application includes a request for an order quashing the Decision and replacing it with a decision allowing Mr. Robinson's request for the continued use of a MSO authorization. However, in addition to seeking an order setting aside the Decision, Mr. Robinson also asks the Court to order numerous other declaratory remedies in his application for judicial review, including orders declaring that subsection 11(11) of the Policy, and specifically the five-year limit for designating a substitute operator, discriminates against fishermen with disabilities and is contrary to subsection 15(1) of the *Charter*. It is useful to reproduce the first six orders sought by Mr. Robinson in his underlying application. They read as follows:

> 1. an order quashing the Decision as unreasonable and/or incorrect, and replacing it with a decision allowing the appeal and Mr. Robinson's continued use of the medical substitute operator authorization;
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> 2. in the alternative to the above order, an order quashing the Decision as unreasonable and/or incorrect, and referring the matter back to the Deputy Minister for reconsideration and directing the Deputy Minister to consider the Applicant's constitutionally protected rights in arriving at any decision;
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> 3. an order declaring that the Deputy Minister's decision is discriminatory and contrary to section 15(1) of the *Charter*;
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> 4. an order declaring that the Deputy Minister's decision is discriminatory and contrary to the United Nations *Convention on the Rights of Persons with Disabilities*;
>
> 5. an order declaring that section 11(11) of the Policy, and specifically the limit contained herein on the amount of time a disabled or ill license-holder can obtain a medical substitute operator authorization, discriminates against disabled fishers and/or fishers with medical conditions and is contrary to section 15(1) of the *Charter*;

> 6. an order declaring that any discretion delegated by the Minister of the Department of Fisheries and Oceans to the Deputy Minister with respect to licensing matters is subject to section 15(1) of the *Charter*.

[38] As a result, I am satisfied that by ordering the DFO, through its authorized representative, to allow Mr. Robinson to use a MSO for the balance of this calendar year (as will be discussed below in this decision), such mandatory interlocutory relief will not effectively amount to a final determination of the underlying judicial review. Far from it. The remedies sought in the underlying application are different and far more expansive, and several other declaratory remedies will remain to be decided. Even on the issue of the "continued use" of a MSO authorization, given the terms of the Order I am issuing in this decision, Mr. Robinson will have to proceed with his application for judicial review failing which he will be required to seek a new exemption to the application of the Policy for the balance of the 2020 fishing season falling in calendar year 2020, as well as for subsequent fishing seasons.

(4) Limit due to fettering of discretion

[39] This brings me to the issue of the fettering of discretion raised by the AGC. On this front, the AGC argues that granting Mr. Robinson's motion (and more particularly his request for the "continued use" of a MSO) would fetter the Minister's statutory discretion to issue a licence under section 7 of the *Fisheries Act*, which grants him the authority to issue licences for fisheries and fishing. The AGC submits that, according to the Regulations, licences are only valid for a specific period of time and that no vested rights exist beyond that period. Even though licences are routinely renewed, this is not automatic, and no one can claim a "right" to a licence. The fact that licences are renewed as a matter of course does not give any entitlement to a licence holder.

[40] The AGC further explains that the authorization to use a MSO is a condition attached to a licence that is issued annually, and that such conditions are discretionary decisions. According to the evidence before me, MSO authorizations are indeed granted on a yearly basis only, are temporary, and are not approved for more than one year. I note that, on Mr. Robinson's Licences for calendar year 2019 authorizing a MSO for various parts of the 2019 fishing season, it is specifically mentioned that this permission "is granted as a temporary privilege only", valid for the duration of the authorized substitute period indicated on the document.

[41] The AGC also submits that, in the case of LFA 35, the 2019 fishing season ends on July 31, 2019, and that the October 15 to December 31, 2019 period falls under the 2020 fishing season, for which no licence has yet been issued to or sought by Mr. Robinson. The AGC thus contends that the Court could not order the mandatory injunctive remedy sought by Mr. Robinson as it would require the DFO to authorize a MSO for which no fishing licence would have been issued. As indicated above, in his motion and in his appeals which led to the DFO's Decision, Mr. Robinson is seeking what appears to be an open-ended "continued use" of a MSO authorization, as opposed to a MSO authorization limited to a specific fishing period.

[42] I partly agree with the AGC on this issue of a possible fettering of discretion.

[43] I accept that the decision to issue fishing licences is discretionary and belongs to the Minister (*Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12 at para 36; *Anglehart v Canada*, 2018 FCA 115 at paras 26, 28; *Malcolm v Canada (Fisheries and Oceans)*, 2014 FCA 130 [*Malcolm*] at paras 40-42). Pursuant to section 10 of the

Regulations, fishing licences are issued by the Minister for a calendar year and typically expire on December 31 of the year for which they are issued unless otherwise specified. Subsection 11(2) of the Policy further provides that licence renewal and payment of fees is mandatory on a yearly basis in order to retain the privilege to be issued a licence.

[44] I underscore that, in his application for judicial review and in his motion, Mr. Robinson is not asking the Court to order the issuance or renewal of his Licence beyond the end of calendar year 2019, nor is he seeking any conclusion with respect to the Licence itself. The remedies sought strictly concern the MSO authorization attached to the Licence.

[45] In the case of Mr. Robinson, the difficulty flows from the discrepancy between the period covered by his Licence, and the period of the fishing season in LFA 35: while fishing licences are issued for calendar years, the fishing season in LFA 35 covers time periods spreading over two different calendar years. It is true that Mr. Robinson has not sought a licence for calendar year 2020 or for the 2020 lobster fishing season in LFA 35 – which encompasses the fall of 2019 –, and that the Minister has not made a decision in respect of such licence. However, it is not disputed that Mr. Robinson's Licence is currently valid for calendar year 2019, and that it expires on December 31, 2019. It therefore covers the fall of 2019, when the 2020 fishing season in LFA 35 begins.

[46] I agree with the AGC that, under the current regulatory regime and on the facts of this case, the Court could not impose a remedy relating to a MSO authorization which would implicitly mean or require a renewal and extension of Mr. Robinson's Licence into 2020. Stated

otherwise, the Court could not allow a MSO authorization that would go beyond the duration of the underlying licence for which the MSO would become a condition. A situation where the Court would grant an interlocutory injunction and force the issuance of a MSO authorization for a time period where Mr. Robinson does not yet have a licence would amount to a fettering of the Minister's discretion. In addition, as I observed above, Mr. Robinson's motion contains no conclusion or request regarding his Licence. Conversely, since Mr. Robinson's current Licence only expires on December 31, 2019, there would be no fettering of discretion if the Court were to order the issuance of a MSO authorization for the October 15 to December 31, 2019 period, as such MSO would become a condition attached to the 2019 Licence already issued to Mr. Robinson. Counsel for the AGC indeed acknowledged at the hearing that, since Mr. Robinson's Licence expires on December 31, 2019, granting a MSO authorization for the period of October 15 to December 31, 2019 would not entail a fettering of discretion, even though the period technically falls in the 2020 lobster season for LFA 35.

(5) Judicial comity

[47] The current case has a particular flavour because of the *Martell* decision involving similar issues, similar evidence, and the same counsel. While this precedent is not binding upon me, it certainly raises issues of judicial comity. As was described by Mr. Justice Martineau in *Alyafi v Canada (Citizenship and Immigration)*, 2014 FC 952 [*Alyafi*], the principle of judicial comity aims to prevent the creation of conflicting lines of jurisprudence within the same court and to encourage certainty in the law (*Alyafi* at para 45; see also *Eclectic Edge Inc v Gildan Apparel (Canada) LP*, 2015 FC 1332 [*Gildan*] at para 29). In essence, under the principle of

judicial comity, decisions on substantially similar issues rendered by a judge of this Court should be followed by other judges in the interest of advancing certainty in the law.

[48] In *Apotex Inc v Allergan Inc*, 2012 FCA 308, the Federal Court of Appeal [FCA] discussed the doctrine of judicial comity in the context of patent law and made it clear, at paragraphs 43-44, that the principle however only relates to determinations of law:

> [43] […] This doctrine is sometimes described as a modified form of *stare decisis*, *i.e.* horizontal rather than vertical (*House of Sga'nisim v. Canada (Attorney General)*, 2011 BCSC 1394, para. 74). *Stare decisis* requires judges to follow binding legal precedents from higher courts. Although not binding in the same way, the doctrine of comity seeks to prevent the same legal issue from being decided differently by members of the same Court, thereby promoting certainty in the law (*Glaxo Group Ltd. v. Canada (Minister of Health and Welfare)*, [1995] F.C.J. No. 1430, 64 C.P.R. (3d) 65, pp. 67 and 68 (T.D.)).
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> [44] As a manifestation of the principle of *stare decisis*, the principle of judicial comity only applies to determinations of law. It has no application to factual findings. As was stated by the Ontario Court of Appeal in *Delta Acceptance Corporation Ltd. v. Redman*, [1966] 2 O.R. 37, paragraph 5 at page 785 (C.A.):
>
> > The only thing in a [j]udge's decision binding as an authority upon a subsequent [j]udge is the principle upon which the case was decided.
>
> [emphasis added]

[49] The conclusions of law of a judge of this Court will therefore not be departed from by another judge unless he or she is convinced that the departure is necessary and can articulate cogent reasons for doing so. But the doctrine of judicial comity cannot be invoked to trump the judge's role in assessing the evidence as it unveils before him or her. The existence of a different factual matrix or evidentiary basis between two cases, or situations where different issues are to be decided, can lead to different outcomes (*Gildan* at para 31).

[50] Counsel for both parties acknowledged at the hearing that the principle of judicial comity applies here as far as the *Martell* decision is concerned. Counsel for the AGC further agreed that there are no reasons why I should depart from the determinations of law made by Madam Justice Roussel in *Martell*. However, the AGC submits that the *Martell* case can be distinguished on its facts. I agree with the AGC that the doctrine of judicial comity cannot lead me to blindly follow and adopt all of the Court's conclusions in *Martell*, as the current matter involves slightly different issues, based on a different set of facts. In my decision, I will of course be mindful of the various findings made in *Martell*, as there is material overlap with the case of Mr. Robinson, but I will assess the situation of Mr. Robinson based on the evidentiary record and arguments before me.

(6) Judicial notice of the Policy

[51] The last preliminary matter I need to address is the Policy.

[52] As I observed at the hearing, despite the fact that the Policy is at the very heart of Mr. Robinson's motion and application, neither party has filed it as part of their evidence on this motion, as it was not attached to any of the affidavits filed. In *Leahy v Canada (Citizenship and Immigration)*, 2012 FCA 227 [*Leahy*], the FCA established that courts cannot "normally" take judicial notice of policies or instructional documents (*Leahy* at para 143). If such policies, documents or administrative guidelines are relevant, they need to be treated similarly to other facts and will normally have to be identified and appended to a supporting affidavit in order for the court to consider them. Since the Policy is only an administrative guideline, as opposed to a law or a regulation, I asked counsel whether I could take judicial notice of the document in this

case. At the hearing, counsel for both parties indicated that they did not object and that I could take judicial notice of the Policy even though it was not part of the evidence before me.

[53] It is well-recognized that a court may take judicial notice of facts that are either "(1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy" (*R v Le*, 2019 SCC 34 at para 84, citing *R v Find*, 2001 SCC 32 at para 48). These two criteria are often referred to as the "Morgan" criteria. The approach will, however, be more nuanced and more flexible when the facts at issue do not play an important role in the disposition of a given case or are not disputed by the parties. For example, in *Canadian Broadcasting League v Canada (Canadian Radio-Television and Telecommunications Commission)*, [1983] 1 FC 182, 1982 CanLII 2945 (FCA) [*Canadian Broadcasting League*], aff'd [1985] 1 SCR 174, the FCA took judicial notice of a policy of the Canadian Radio-television and Telecommunications Commission that was not disputed by the parties (*Canadian Broadcasting League* at para 17).

[54] Considering this precedent, the fact that the Policy itself is not contested and that its actual contents are not the subject of debate between the parties, and the agreement expressed by both counsel, I am satisfied that I can take judicial notice of the Policy in this case. On that basis, I did take it into account in my decision.

B. ***Merits of the motion***

[55] I now turn to the merits of the motion for interlocutory reliefs brought by Mr. Robinson.

(1) General test for stays and interlocutory injunctions

[56] It is trite law that, in order to succeed on a motion seeking a stay or an interlocutory injunction, the moving party must satisfy the well-known tripartite test set out by the SCC in *RJR-MacDonald*. The party must first establish, on a preliminary assessment of the merits of its case, that there is a serious issue to be tried; this generally means that the underlying action or application is neither frivolous nor vexatious (*RJR-MacDonald* at pp 334-335, 348). Second, the party is required to show that it will suffer irreparable harm if the stay or injunction is not granted. Third, the onus is on the moving party to establish that the balance of convenience, which contemplates an assessment of which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits, favours the granting of the interlocutory relief (*R v Canadian Broadcasting Corp*, 2018 SCC 5 [*CBC*] at para 12).

[57] At the outset, it is important to underline that a stay of proceedings or an interlocutory injunction is an extraordinary, discretionary equitable relief. It is an exceptional remedy, and compelling circumstances are required to justify the intervention of the Court and the exercise of the Court's discretion to grant a stay or issue an interlocutory injunction. The burden is on the moving party to demonstrate that the conditions of this exceptional remedy are met. The *RJR-MacDonald* test is conjunctive and all three elements of the test must be satisfied in order to grant relief. None of the branches can be seen as an "optional extra" (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 [*Janssen*] at para 19), and a "failure of any of the three elements of the test is fatal" (*Canada (Citizenship and Immigration) v Ishaq*, 2015 FCA 212 at para 15). That said, I acknowledge that the three prongs of the test are not water-tight compartments, that they are somewhat interrelated and that they should not be assessed in total isolation from one another

(*The Regents University of California v I-Med Pharma Inc*, 2016 FC 606 at para 27, aff'd 2017 FCA 8; *Merck & Co Inc v Nu-Pharm Inc* (2000), 4 CPR (4th) 464 (FC) at para 13). However, this does not mean that one of the three compartments can be completely empty and compensated by the other two being filled to a higher level. There still needs to be something in each of the three compartments and none of the elements of the test can be entirely left aside and rescued by the other two.

[58] A motion for a stay or interlocutory injunction like this one ultimately turns on its facts. When all the circumstances are considered, the motion materials and the evidence must convince me that, on a balance of probabilities, the three components of the test are met. I underline that, as the SCC stated in *FH v McDougall*, 2008 SCC 53 [*McDougall*], there is only one standard of proof in civil cases in Canada, and that is proof on a balance of probabilities (*McDougall* at para 49). In that decision, Mr. Justice Rothstein, for a unanimous court, said that "it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case" and that the only legal rule in all cases is that "evidence must be scrutinized with care by the trial judge" to determine whether it is more likely than not that an alleged event occurred or is likely to occur (*McDougall* at para 45). Evidence "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall* at para 46). The requirement is no different for interlocutory injunctive orders.

[59] I add that the courts have repeatedly considered that the applicable test for interlocutory injunctions is the same as the test governing the granting of stays of proceedings or of appeals (*Manitoba (AG) v Metropolitan Stores Ltd*, [1987] 1 SCR 110 at para 30; *Toronto Real Estate*

Board v Commissioner of Competition, 2016 FCA 204 at para 11; *Janssen* at paras 12-17; *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 [*Glooscap*] at para 4; *International Charity Association Network v Canada (National Revenue)*, 2008 FCA 114 at para 5). No distinction therefore needs to be made between the principles developed for interlocutory stays or for interlocutory injunctions, and they are equally applicable in both contexts.

(2) Test for mandatory interlocutory injunctions

[60] In *CBC*, the SCC examined in more detail the framework applicable for granting a mandatory interlocutory injunction – an injunction that directs the defendant to do something, as opposed to an injunction that prohibits the defendant from doing something. The SCC held that, in such a case, the appropriate criterion for assessing the first factor of the *RJR-MacDonald* test is a heightened and more stringent threshold, in that the moving party must establish a "strong *prima facie* case" (*CBC* at para 15) as opposed to simply one that is neither frivolous nor vexatious. This is so because a mandatory injunction "directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise 'put the situation back to what it should be', which is often costly or burdensome for the defendant and which equity has long been reluctant to compel" (*CBC* at para 15).

[61] Establishing a strong *prima facie* case requires more than an arguable case; it implies that the moving party has a high chance of success on the merits. It requires the moving party to show "a case of such merit that it is very likely to succeed at trial" (*CBC* at para 17). Therefore, the SCC described as follows the modified *RJR-MacDonald* test applicable for mandatory interlocutory injunctions (*CBC* at para 18):

> (1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will ultimately be successful in proving the allegations set out in the originating notice;
>
> (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
>
> (3) The applicant must show that the balance of convenience favours granting the injunction.

[62] Distinguishing a prohibitive from a mandatory injunction may sometimes be difficult, given that even prohibitive language may require a party to take positive action (*CBC* at para 16). However, in the present case, I am satisfied that the DFO would have to take positive actions should Mr. Robinson succeed in his motion, and that a mandatory injunction is definitely what is being contemplated in his request for an order forcing the DFO to authorize him to use a MSO pending the determination of his application for judicial review. Therefore, to be successful, Mr. Robinson must demonstrate that he meets, at the first stage of the *RJR-MacDonald* test, the heightened threshold of a strong *prima facie* case that he will succeed on his underlying application.

[63] Relying on the recent case of *Calin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 731 [*Calin*], Mr. Robinson submits that I should not impose the heightened threshold set out in *CBC* and that he should only be required to demonstrate a less demanding "likelihood or probability of success" in his underlying application. In *Calin*, the Court considered whether it was appropriate to impose the *CBC* exception to the serious issue test when applied to a mandatory interlocutory injunction for the release of a person held in detention in an immigration context. The Court held that the test in such circumstances should be

at the lower level of likelihood or probability of success in the underlying application given that the respondent did not have to take "steps to restore the *status quo*" or to otherwise "put the situation back to what it should be" (*Calin* at para 14). Furthermore, the Court noted that an individual's release from detention did not entail "potentially severe consequences" for the respondent besides general concerns relating to the public interest, which were to be considered in the context of the balance of convenience factor (*Calin* at para 14). Mr. Robinson argues that, similarly in his case, the steps to restore the *status quo* or otherwise put the situation back to what it should be (namely, the issuance of a MSO authorization) are neither costly nor burdensome and require very little positive action on the part of the DFO.

[64] I do not agree with Mr. Robinson. I instead consider that, as argued by the AGC, the approach mandated by the SCC for mandatory interlocutory injunctions in *CBC* should be fully applied here, and that the more calibrated approach espoused by the Court in *Calin* should not be followed in this case. Given the positive actions that the DFO would need to undertake to authorize the continued use of a MSO and to restore the situation that existed prior to 2015, I see no reason why I should depart from the recent and clear directions that the SCC has specifically established for mandatory interlocutory injunctions in *CBC* (*CBC* at para 13). In the case of Mr. Robinson, the heightened "strong *prima facie* case" threshold does apply and a strong likelihood of success needs to be established.

(3) "Just and equitable" requirement

[65] I make one final remark on the applicable test.

[66] None of the parties has referred, in its written or oral submissions, to the pronouncement made by the SCC on the *RJR-MacDonald* test in *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 [*Google*]. In that decision, Madam Justice Abella, speaking for a majority of the SCC, described the *RJR-MacDonald* test as follows:

> [25] *RJR—MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, sets out a three-part test for determining whether a court should exercise its discretion to grant an interlocutory injunction: is there a serious issue to be tried; would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and is the balance of convenience in favour of granting the interlocutory injunction or denying it. The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific.
>
> [emphasis added]

[67] In that decision, the SCC thus reminded that an overarching objective animates the *RJR-MacDonald* test: the courts need to be satisfied that, ultimately, granting the interlocutory injunctive relief is just and equitable, taking into consideration the particular circumstances of any given case. In *CBC*, the SCC has not modified nor commented on this particular observation previously made in *Google*. I am not suggesting that the SCC decision in *Google* has changed the well-accepted three-prong test developed in *RJR-MacDonald* and expanded in *CBC* for mandatory injunctions, or that it has superimposed an additional consideration over it. But the SCC decision in *Google* reinforces that, in exercising their discretion to grant a stay or an interlocutory injunction, the courts need to be mindful of overall considerations of justice and equity, and that the *RJR-MacDonald* test cannot be simply boiled down to a box-ticking exercise of the three components of the test.

[68] I must therefore assess whether, in the end, granting the stay and mandatory interlocutory injunction sought by Mr. Robinson in his motion would ultimately be "just and equitable in all of the circumstances of the case", which will "necessarily be context-specific" (*Google* at para 25).

(4) Serious issue

[69] I now turn to the first element of the tripartite test: whether the motion materials and the evidence before the Court is sufficient to satisfy me that, on a balance of probabilities, Mr. Robinson has a strong *prima facie* case that he will succeed, on at least one issue, on the merits of his application. I underline that the question here relates to the strong likelihood of success on his underlying application for judicial review, namely the likelihood of finding the DFO's Decision unreasonable and/or incorrect and of returning it to the decision-maker for reconsideration (*CBC* at para 25).

[70] Mr. Robinson submits that the matter underlying his application for judicial review meets the higher threshold of a "strong likelihood" of success because the impugned Decision is arbitrary, unjust and unconstitutional as it severely circumscribes the protection afforded by subsection 15(1) of the *Charter* to be free from discrimination based on physical disability, including chronic medical conditions. Mr. Robinson argues that he is limited by his medical condition and that the Decision of the Deputy Minister made on the recommendation of the AFLAB and, by extension, the preceding decision of the MRLAC, imposes differential treatment upon him in comparison to other fishing licence holders. He claims that licence holders who do not suffer from a medical condition preventing them from being on board the vessel are essentially able to renew their licences indefinitely, so long as they abide by their terms and

conditions. Mr. Robinson claims that the DFO's practice is to renew and reissue to a given licence holder, each year, the licence held the previous year, and that a licence holder can reasonably expect his or her licence to be renewed from year to year, thus providing the holder with a measure of financial stability and certainty. Alternatively, the licence holder can request that the DFO reissue the licence to another person, as a replacement for their own, thus enabling the licence holder to sell his licence or pass it on to a family member. However, Mr. Robinson and others like him suffering from a medical condition or physical disability must apply year after year for the authorization to use a MSO and are subjected to the five-year limitation found in the Policy.

[71] Mr. Robinson further argued in his appeals before the DFO that the successive decisions denying him the continued use of a MSO authorization have the effect of negating him all of the privileges and entitlements of other licence holders, simply because he is physically unable to remain on board his fishing vessel for the extended periods of time often required to harvest a catch. Mr. Robinson contends that, instead of reflecting a proportionate balancing of the *Charter* protections and statutory objectives at play as prescribed by the SCC in *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*] and *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 [*Loyola*], the Decision gives no effect to his right to equal benefit of the law without discrimination.

[72] In his submissions, the AGC does not respond to these arguments of discrimination raised by Mr. Robinson.

[73] Based on the materials and the evidence before me, I am satisfied that Mr. Robinson has met the first criterion for obtaining an interlocutory mandatory injunction and the heightened threshold of a strong likelihood of success in his judicial review application.

[74] First, I observe that there is nothing in the motion materials demonstrating that the Deputy Minister or the AFLAB considered Mr. Robinson's discrimination argument or that a proper proportionality analysis was conducted under the *Doré/Loyola* framework balancing Mr. Robinson's *Charter* protections and the objectives of the Policy. The Decision contains no acknowledgment and accommodation of Mr. Robinson's disability and no discussion of his discrimination argument. As was the case in *Martell*, to the extent that this argument was raised by Mr. Robinson on appeal to the AFLAB and that the issue was not considered by the Deputy Minister in the Decision, there is a strong likelihood that the Decision will be found unreasonable and outside the range of possible, acceptable outcomes, and set aside on this basis alone (*Martell* at para 38). This is the main conclusion sought by Mr. Robinson in his underlying application.

[75] Furthermore, I note that subsection 11(10) of the Policy summarizes the general conditions for a substitute operator due to circumstances beyond the control of a licence holder or operator. And, contrary to subsection 11(11) which imposes a five-year limitation on the issuance of MSO authorizations linked to a medical condition, the more general subsection 11(10) does not impose any maximum period. Therefore, subsection 23(2) of the Regulations establishes the possibility of authorizing another person to carry out the activities authorized under a licence where the holder is unable to engage in the activity "because of circumstances beyond [his or her] control", but the Policy provides that only the licence holders suffering from

an illness or medical condition are subject to a different treatment and to the time limit outlined in subsection 11(11). According to the Regulations, the Policy, and to the submissions by counsel for the AGC, the "circumstances beyond the control" of a licence holder or operator can be numerous; however, the five-year limitation is restricted to licence holders invoking their medical condition. For other circumstances beyond the control of a licence holder or operator, there is no similar time limit constraining the option of resorting to a surrogate person to carry out the fishing activities under their licence. That is, the argument to the effect that the Decision and the Policy impose a differential treatment upon Mr. Robinson in comparison to other licence holders not suffering from a medical condition also has a strong likelihood of success.

[76] I therefore conclude that the first element of the *RJR-MacDonald* test is met.

(5) Irreparable harm

[77] Under the second prong of the *RJR-MacDonald* test, the question is whether Mr. Robinson has provided sufficiently clear, convincing and cogent evidence that, on a balance of probabilities, he will suffer irreparable harm between now and the time his underlying application for judicial review is disposed of, should the interlocutory reliefs be denied.

(a) *Legal test*

[78] Irreparable harm refers to the nature of the harm suffered rather than its magnitude. The irreparability of the harm is not measured by the pound. It is harm which "either cannot be quantified in monetary terms or which cannot be cured" (*RJR-MacDonald* at p 341).

[79] As rightly pointed out by the AGC, irreparable harm is a very strict test. The FCA has frequently insisted on the attributes and quality of the evidence needed to establish irreparable harm in the context of injunctive relief. Irreparable harm must flow from clear and non-speculative evidence (*United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 [*US Steel*] at para 7; *AstraZeneca Canada Inc v Apotex Inc*, 2011 FC 505 at para 56, aff'd 2011 FCA 211; *Aventis Pharma SA v Novopharm Ltd*, 2005 FC 815 at paras 59-61, aff'd 2005 FCA 390). Simply claiming that irreparable harm is possible is not enough: "[i]t is not sufficient to demonstrate that irreparable harm is 'likely' to be suffered" (*US Steel* at para 7). There must be evidence that the moving party will suffer irreparable harm if the injunction or the stay is denied (*US Steel* at para 7; *Centre Ice Ltd v National Hockey League* (1994), 53 CPR (3d) 34 (FCA) at p 52).

[80] In addition, the evidence must be more than a series of possibilities, speculations, or hypothetical or general assertions (*Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 [*Gateway City Church*] at paras 15-16). Assumptions, hypotheticals and arguable assertions unsupported by evidence carry no weight (*Glooscap* at para 31). There needs to "be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted" (*Gateway City Church* at para 16, citing *Glooscap* at para 31). It is not enough "for those seeking a stay […] to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable" (*Stoney First Nation v Shotclose*, 2011 FCA 232 at para 48).

[81] Again, the requirement of having evidence convincing and cogent enough to satisfy the balance of probabilities test, set out in *McDougall*, of course applies to the clear and non-speculative evidence needed for irreparable harm. In *Janssen*, the FCA stated that a party seeking a suspension relief must demonstrate in a detailed and concrete way that it will suffer "real, definite, unavoidable harm – not hypothetical and speculative harm – that cannot be repaired later" (*Janssen* at para 24). In that decision, Mr. Justice Stratas added that "[i]t would be strange if a litigant complaining of harm it caused itself, harm it could have avoided or repaired, or harm it still can avoid or repair could get such serious relief […] [or] if vague assumptions and bald assertions, rather than detailed and specific evidence, could support the granting of such serious relief" (*Janssen* at para 24).

[82] The question for the Court is therefore whether the harm identified by Mr. Robinson reaches the level of irreparable harm defined by the FCA, as opposed to being a simple inconvenience.

(b) *Prematurity of Mr. Robinson's motion*

[83] At the hearing, counsel for the AGC argued that the harm claimed by Mr. Robinson is not imminent and is speculative since it will not materialize until October 15, 2019, when the fall fishing period begins in LFA 35. On that basis, the AGC claims that the interlocutory reliefs sought by Mr. Robinson should be denied for prematurity. The AGC pleads that the better recourse would be for Mr. Robinson to seek leave for an expedited hearing on his application for judicial review, so that the matter could be decided by the Court rapidly, perhaps even before next October.

[84] Counsel for Mr. Robinson responds that the motion is not submitted prematurely, since waiting until the last minute to plan the fishing season is stressful and difficult for Mr. Robinson. He further submits that, even if Mr. Robinson's harm is anticipated and prospective, it will begin to be suffered before the next fishing season actually starts in mid-October 2019. That said, Mr. Robinson does not dispute that, under the *RJR-MacDonald* test, irreparable harm is harm to be suffered in the interim period, between now and the decision on his application for judicial review.

[85] I acknowledge that the AGC raises a valid concern about the timing of Mr. Robinson's motion. At first glance, the motion appears to be premature as there is no immediate urgency that it be treated now or that the interlocutory reliefs sought be issued by the Court at this point in time. Mr. Robinson has his MSO authorization until the end of July 2019, and he will not need a new MSO authorization until mid-October 2019, when the fall portion of the 2020 lobster fishing season in LFA 35 starts. I indeed raised questions about the timing of Mr. Robinson's motion at the hearing. However, for the following reasons, I am not persuaded that, in the circumstances of this case, Mr. Robinson's motion should be dismissed for prematurity.

[86] I note at the outset that, for interim injunctions, the moving party must demonstrate a situation of urgency in addition to the three well-known components of the *RJR-MacDonald* test (*Arysta Lifescience North America, LLC v Agracity Crop & Nutrition Ltd*, 2019 FC 530 at para 17). But this is specific to interim injunctions, and this criterion has not been retained and adopted for interlocutory injunctions.

[87] All injunctions are future-looking in the sense that they all intend to prevent or avoid harm rather than compensate for injury already suffered (Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 1992) (loose-leaf updated 2018, release 23) [*Sharpe*] at para 1.660). One type of injunction that is frequently considered and issued by the courts is the *quia timet* ("because he or she fears") injunction, where injunctive remedies are sought before any harm has actually been suffered and where the harm is only apprehended and expected to occur at some future point. To a certain extent, and given its timing, the mandatory interlocutory injunction sought by Mr. Robinson is akin to such a *quia timet* injunction.

[88] Applications for this type of injunction are not necessarily dismissed by the courts even though they often require the motion judge to assess the propriety of injunctive relief without the advantage of actual evidence regarding the nature and extent of the alleged harm. To assess prospective harm for *quia timet* injunctions, the courts have adopted a cautious approach generally requiring two elements: a high probability that the alleged harm will occur; and the presence of harm that is about to occur imminently or in the near future, thus adding a temporal dimension to the feared harm (*Merck & Co, Inc v Apotex Inc*, [2000] FCJ No 1033, 2000 CarswellNat 1291 (FCA) at para 8; *Doucette v Canada (Attorney General)*, 2018 FC 697 at para 23; *Gilead Sciences, Inc v Teva Canada Limited*, 2016 FC 336 [*Gilead*] at paras 5, 10; *Amnesty International Canada v Canadian Forces*, 2008 FC 162 [*Amnesty*] at para 70; see also *Sharpe* at para 1.690).

[89] In the context of interlocutory injunctions, the first element (i.e., the high probability that the harm will occur) has often been expressed by the Court in terms of clear and non-speculative

evidence that irreparable harm will ensue if the interlocutory relief is not granted (*Amnesty* at paras 69, 123), thus mirroring the general test for irreparable harm. On the imminence of harm, the case law developed by this Court offers no clear definition or timeline of what is "imminent", but rather suggests that it will depend on the facts of each case. For example, harm distant from as much as 18 months has been found to be imminent (*Gilead* at paras 5-6). In fact, in *Gilead*, the Court reframed the imminence criterion as a factor to be considered in determining the likelihood of future harm (*Gilead* at para 11):

> [11] At the same time the requirement of imminence in the temporal sense may be relevant in the determination of the likelihood of a future event. A potential event that is more distant in time may be an event that is less likely to occur. Furthermore temporal imminence appears to be a subordinate consideration in a case where the likelihood of future harm appears high: see *Canadian Civil Liberties Assn v Toronto Police Service*, above, at para 88.

[90] In other words, the determinative element is the likelihood of harm, not its futurity (*Horii v Canada (CA)*, [1992] 1 FC 142 (FCA) at para 13). The fact that the harm sought to be avoided is in the future does not necessarily make it speculative. On this requirement to prove the imminence of harm, Justice Sharpe (writing extrajudicially) suggests that the temporal imminence of harm may not be the best way to analyze the issue, and that the courts should rather look at whether the factors relevant in the granting of injunctive reliefs have "crystallized" (*Sharpe* at para 1.750). According to this approach to the imminence criterion, prematurity only arises in situations where, for example, the nature or the extent of the harm may change between the time of the decision and the moment where the harm would occur. In other words, a *quia timet* injunction should not be granted by the courts unless the situation that will exist when the alleged harm eventually occurs is already crystallized.

[91] In light of the foregoing, I am of the view that the test applicable for apprehended harm is whether there is clear, convincing and non-speculative evidence allowing the Court to find or infer that irreparable harm will result if the relief is not granted, using the cautious approach prescribed for *quia timet* injunctions. Stated differently, to meet its burden in an application where the harm is apprehended and more distant, the moving party must establish, on a balance of probabilities, that there is clear, convincing and non-speculative evidence demonstrating that such harm has crystallized, so that any findings or inferences made about the harm can be found to reasonably and logically flow from the evidence.

[92] I am satisfied that, in the circumstances of this case, the situation is crystallized enough and sufficiently imminent to be able to assess whether the harm alleged by Mr. Robinson meets the "irreparable" requirement. Although the harm that Mr. Robinson seeks to avoid will only fully materialize in about three months (i.e., mid-October 2019), there is evidence showing how the alleged harm will exist at that time. It is not harm that is speculative or contingent on the outcome of future events which are not, or cannot be, known at this time. The alleged harm is already crystallized and can as such be considered imminent. The grounds of irreparable harm that Mr. Robinson alleges he will suffer if he is unable to fish his Licence by way of a substitute operator in October 2019, that is the monetary loss, the loss of employment for his crew and the loss of his fishing Licence, do not depend on factors that will substantially vary between now and mid-October.

[93] Although I just examined the issue of prematurity under the "irreparable harm" part of the *RJR-MacDonald* test, since it is typically the part most likely to be apprehended, I point out

that the factors affecting the three parts of the test must all be crystallized at the time of the motion. For example, prematurity issues would also arise when the definition of the right and the degree of remedial protection are not static and may change between the time of decision and the moment where the harm would occur (*Sharpe* at para 1.760). Suffice it to say that, in this case, the right asserted by Mr. Robinson to use a MSO and to be protected against discrimination will not change between now and next October, and that the costs allegedly imposed on the DFO if the mandatory interlocutory injunction is granted are also already known.

[94] In the circumstances of this case, I am therefore not persuaded that there is a reason to dismiss Mr. Robinson's motion on grounds of prematurity.

[95] I would add that it would also not be in the interests of the administration of justice nor an efficient and appropriate use of judicial resources and of the parties' resources to dismiss Mr. Robinson's motion for prematurity: the Court and counsel for the parties have spent considerable time and resources preparing for and hearing this motion, and the evidence and issues before the Court would not materially change if Mr. Robinson's motion had to be refiled and reheard in 2 or 3 months from now. Courts should always exercise their discretion against the wasteful and inefficient use of judicial resources. To refuse to consider Mr. Robinson's injunctive reliefs now and simply invite the parties to redo at later date the debate that has just taken place in this Court would not, in my view, be an efficient and proper use of resources. In reaching this decision, I am also guided by Rule 3 of the Rules, which provides that the Rules shall be interpreted and applied so as to secure "the just, most expeditious and least expensive determination of every proceeding on its merits".

(c) *Grounds of irreparable harm*

[96] In this case, Mr. Robinson has identified three grounds of irreparable harm in his affidavit, essentially resulting from a refusal to be granted the continued use of a MSO authorization and being able to fish his Licence. They are: 1) the monetary losses from his inability to fish the Licence and to earn a livelihood; 2) the loss of employment for his crew; and 3) the loss of his fishing Licence. I note that, while Mr. Robinson omits to mention the impact on his succession plan in his affidavit, the evidence on the record shows that this factor was identified by the MRLAC as one element of Mr. Robinson's submissions before the Deputy Minister and the DFO.

[97] As a first ground of irreparable harm, Mr. Robinson submits that, if the interlocutory reliefs he seeks are not granted, he will experience a substantial interference with his ability to earn a livelihood. Mr. Robinson affirms in his affidavit that the income he receives from fishing his Licence accounts for a large portion of his total income, approximately 60%. He claims that, if he is unable to fish the "remainder of the 2019 season" in LFA 35 (which corresponds, in his mind, to the period extending from October 15 to December 31, 2019) with a substitute operator, he will lose all income associated with what usually is the most lucrative part of the lobster season. He estimates the total value of the catch for the equivalent fall period in 2018 to be about $562,000.

[98] As a second head of irreparable harm, Mr. Robinson submits that his crew (composed of two deck hands and a captain who operates his vessel) will be unable to secure employment in LFA 35 on another fishing vessel this late prior to the fall fishing season commencing.

[99] Finally, as a third ground of irreparable harm, Mr. Robinson affirms that, if he cannot fish the Licence, he will have to transfer or sell it in order to mitigate his losses. Should he be forced to transfer or sell his Licence, he submits that it will be very difficult to re-acquire it or a similar licence, given the limited number of LFA 35 licences available and the very high demand for them.

[100] It is well established, and the AGC agrees, that the existence of one ground meeting the required attributes of irreparable harm is sufficient to meet the second prong of the *RJR-MacDonald* test (*Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA) at p 5).

[101] The AGC's response to Mr. Robinson's allegations of harm is fairly succinct and generic. The AGC submits that Mr. Robinson has not established that he will suffer irreparable harm given that the nature of the harm he complains of can be quantified in monetary terms. The AGC also claims that the evidence provided by Mr. Robinson is general, limited and speculative, and does not meet the high requirements set by the FCA. I note that the AGC's arguments focus on the first ground of irreparable harm advanced by Mr. Robinson but remain virtually silent on the two other grounds raised.

[102] Relying on the SCC decision in *Canada (Attorney General) v Hislop*, 2007 SCC 10 [*Hislop*] at paragraphs 102 and 103, Mr. Robinson opposes the AGC's argument on the monetary losses by contending that, even if he is successful on his underlying judicial review, he will likely have no recourse to recover his lost income or licence if the DFO pleads the doctrine of

qualified immunity to avoid liability. According to this doctrine, "absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional" (*Hislop* at para 102). Therefore, the monetary losses would not be compensable in damages. I observe that, in his submissions, the AGC did not address this argument made by Mr. Robinson.

[103] I do not have to determine whether the claims of monetary losses made by Mr. Robinson amount to harm which "cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other" (*RJR-MacDonald* at p 341), as I am of the view that the requirements of irreparable harm are met with his claim regarding the transfer and sale of his Licence.

[104] I of course agree with the AGC that Mr. Robinson must lead clear, convincing and non-speculative evidence which goes beyond mere general assertions. I also acknowledge that the evidence of irreparable harm provided by Mr. Robinson could arguably have been more elaborated and more detailed. However, I note that the statements made by Mr. Robinson on the consequences of having to sell or transfer his Licence leave no doubt on the irreparable harm to be suffered. In his affidavit, Mr. Robinson affirms that, without a further MSO authorization, he will have to transfer or sell his Licence, and that it will be impossible to re-acquire it. The AGC has not cross-examined Mr. Robinson on his affidavit and his evidence remains undisputed.

[105] The AGC argues that, pursuant to the Regulations, licences are not transferable, and that Mr. Robinson will be able to hold his Licence even if he does not obtain a MSO authorization. I have two comments on this submission. First, I note that Mr. Robinson's evidence on being forced to sell or transfer his Licence in the absence of a MSO authorization has not been contradicted. Furthermore, in the February 2017 case summary recommendation of the MRLAC that led to the DFO's Decision, it is specifically mentioned that granting a MSO authorization to Mr. Robinson for the remainder of the 2017 fishing season "will allow Mr. Robinson adequate time to seek legal and financial advice on transferring the licence in a tax efficient and PIIFCAF compliant manner" [emphasis added]. The MRLAC thus implies that, without a MSO authorization for subsequent years, a transfer of licence looks inevitable for Mr. Robinson. In other words, there is clear, convincing and non-speculative evidence on the transfer of Mr. Robinson's Licence without a MSO authorization. Second, the evidence showing that, once sold, lost or transferred, it is virtually impossible to re-acquire a lobster fishing licence has also not been contradicted.

[106] In the circumstances, I find that the apprehended loss of Mr. Robinson's Licence has the attributes of "irreparable harm", as these were developed and established by the FCA. I am satisfied that the sale or transfer of Mr. Robinson's Licence is harm which would not be curable, and is therefore irreparable harm to Mr. Robinson who has been fishing his Licence since 2007, who would be faced with a virtual impossibility to re-acquire the Licence or a similar licence, and who would be limited in pursuing other employment opportunities as he has been a fisherman all of his working life.

[107] For these reasons, I conclude that Mr. Robinson has demonstrated to my satisfaction that he will suffer irreparable harm if the interlocutory reliefs are not granted. The second element of the *RJR-MacDonald* test is therefore met.

(6) Balance of convenience

[108] I now turn to the last part of the *RJR-MacDonald* test, the balance of convenience (or inconvenience, as some prefer to state it). Under this third part of the test, the Court must determine which of the parties will suffer the greater harm from the granting or refusal of the stay or interlocutory injunction, pending a decision on the merits (*RJR-MacDonald* at p 342). Important to these proceedings, the SCC expressly stated in *RJR-MacDonald* that the role of public authorities in protecting the public interest is an important factor in assessing the balance of convenience.

[109] Mr. Robinson argues that the balance of convenience favours awarding the interlocutory reliefs as substantially greater harm will be done to him than to the DFO or the public interest if the requested reliefs are not granted. He says that granting him the MSO authorization would not impose any additional financial or administrative burdens on the DFO staff or the Deputy Minister. Further, he claims that there is little to no impact on the public interest in allowing the Decision to stand pending the application for judicial review.

[110] In response, the AGC submits that the balance of convenience must favour the DFO. The AGC contends that it is within Parliament’s authority to manage the Canadian fisheries on social, economic or other grounds, in conjunction with steps to conserve, protect, and harvest the

reserve. The Policy was adopted pursuant to that authority which provides broad discretion to the Minister to manage fisheries in the public interest. The AGC refers more particularly to DFO's mandate to carry out the socio-economic objective to maintain an economically viable inshore fishery by keeping the control of licences in the hands of independent owner-operators, who must personally fish the licence issued in their name. The Policy, argues the AGC, applies to any and all licence holders for the sake of protecting all affected stakeholders, not only to Mr. Robinson or those conducting fishing activities in LFA 35.

[111] I do not dispute that, in this case, the public interest and the impact of a stay or mandatory interlocutory injunction on the exercise of the Minister's mandate are an important factor to consider in determining whether the balance of convenience tilts in Mr. Robinson's favour. I note though that, in *RJR-MacDonald*, the SCC made its comments to that effect in the context of a situation where the moving party was in effect requesting the complete suspension of a regulation *erga omnes* while awaiting a final decision on its constitutional validity. The regulation in question would have been entirely inoperative for the duration of the suspension. In this case, only Mr. Robinson's situation is at stake. Mr. Robinson is not seeking a suspension of subsection 11(11) of the Policy at the interlocutory stage. His situation is more similar to motions for stay of removal of a person from Canada – which are often brought before this Court –, where the public authority's general interest in enforcing the law must often yield when, in an individual case, the applicant has presented a solid case on the merits, and demonstrated irreparable harm.

[112] I recognize that, when it is established (as is the case here for the DFO) that a public authority is charged with the duty of promoting or protecting the public interest and that a proceeding or activity was undertaken pursuant to that responsibility, "the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action" [emphasis added] (*RJR-MacDonald* at p 346). I also accept that there is public interest in allowing the Minister and the DFO to accomplish their roles under the *Fisheries Act*, and that the Minister is indeed charged with the promotion of the public interest in this area. The *Fisheries Act* grants the Minister a wide and unfettered discretion to manage, conserve and develop the Canadian fisheries on behalf of Canadians, taking into account the public interest (*Malcolm* at para 40).

[113] However, the issue of the public interest at the balance of convenience stage cannot be considered and analyzed in a vacuum, divorced from the specific facts at play and the record before the Court. In this case, I find that the materials and the evidence provided by the AGC on how the stay or mandatory interlocutory injunction would adversely harm the public interest are not convincing. In fact, when considered in their totality, the motion materials and the evidence before me instead suggest that the reasons why Mr. Robinson has been granted MSO authorizations so far are perfectly in line with the objectives and underlying rationale of the Policy, and that the public interest defended by the DFO would only be affected marginally, if at all, by the interlocutory reliefs sought.

[114] I note from the affidavit of Mr. Knight filed by the AGC that one of the goals of the Policy is to maintain an economically viable inshore fishery by keeping the control of licences in

the hands of independent owner-operators in small coastal communities. Furthermore, according to the AGC's submissions, another purpose of the Policy is to prevent large corporations from gaining access to the licences by way of agreement. To the extent that these are the goals behind the implementation of the Policy, the evidence provided in Mr. Robinson's affidavit reveals that his behaviour closely follows the objectives and underlying rationale of the Policy. Since he has benefited from a MSO authorization, Mr. Robinson continues to make all operational decisions related to his fishing vessel, including matters such as storage and repairs to the vessel and gear. He also negotiates the wharf price of the catch, arranges bait and fuel purchase and is responsible for hiring and managing the crew and the fishing operation's financial affairs. Despite his inability to be on the fishing vessel full-time because of his medical condition, his operations espouse and incorporate the principles animating the Policy. It is therefore difficult to see how granting him the interlocutory reliefs he seeks can be found to be harmful to the public interest defended by the Minister and the DFO.

[115] I also observe that, since the DFO has renewed Mr. Robinson's MSO authorization throughout these proceedings, a situation where Mr. Robinson continues to hold a MSO authorization is the effective *status quo*. The mandatory interlocutory injunction sought by Mr. Robinson would just serve to maintain and prolong the current situation for additional fishing periods.

[116] The AGC claims that there is evidence in the Knight affidavit referring to the economic objectives of the Policy and to DFO's efforts to prevent the circumvention of the MSO regime. This affidavit also refers to the socio-economic interests at stake, to complaints of abuse received

from certain licence holders, and to the strict application of the five-year maximum period adopted by the DFO since 2015. I am not persuaded by that evidence. I rather find that, in the circumstances of this case, the balance of convenience favours Mr. Robinson. While I recognize the importance of the Minister's discretion to manage the fisheries and the presumption of the public interest in enforcing policies, the fact remains that Mr. Robinson has been authorized to use a MSO for several years, and that he has followed the requirements and objectives of the MSO authorizations he has received. Throughout his appeals, he has been granted authorization by the DFO to continue using a MSO until July 31, 2019. In my view, the granting of an mandatory interlocutory relief allowing him to continue to do so up to the end of calendar year 2019, while his Licence is still in effect, will have little or no adverse impact on the public interest defended by the Minister.

[117] Conversely, if Mr. Robinson's motion is rejected, he will suffer irreparable harm.

[118] For all those reasons, I am satisfied, on a balance of probabilities, that the irreparable harm that will arise from Mr. Robinson's inability to fish the balance of calendar year 2019 in LFA 35 outweighs any inconvenience to be suffered by the DFO. Therefore, the third and last element of the *RJR-MacDonald* test is met.

C. *The terms of the Order*

[119] Under the *RJR-MacDonald* test, Mr. Robinson had the obligation to satisfy the Court that he met all elements of the tripartite conjunctive test in order to be successful on his motion. On the basis of the evidence before me, I find that he has.

[120] In addition, having considered the evidence presented by Mr. Robinson, the specific factual context of this case, and the broader public interest considerations regarding the DFO's mandate and authority, I also conclude that, in the particular circumstances of this case, it is just and equitable to grant the stay and the mandatory interlocutory injunction sought by Mr. Robinson, subject to the limits mentioned below. The issues raised by Mr. Robinson in his application for judicial review are significant matters, and he has demonstrated the strength of his case. His evidence of irreparable harm is clear and convincing and granting the interlocutory reliefs he is seeking will allow him to continue, in the interim period, the fisherman activities he has done all of his working life. Furthermore, it is not a situation where granting the interlocutory reliefs will do any material harm to the public interest defended by the DFO.

[121] A decision to grant or refuse a stay or an interlocutory injunction is a discretionary one (*CBC* at para 27). The Court must consider what constitutes a just and equitable result in the context of each specific case. Here, the effective preservation of the *status quo,* the irreparable harm and the various interests at stake all favour Mr. Robinson. I am satisfied that, in this case, there are exceptional circumstances justifying the exercise of my discretion to grant the reliefs sought by Mr. Robinson.

[122] Now, regarding the terms of the Order, a limit must however be imposed on the duration of the mandatory relief sought by Mr. Robinson. As explained above, Mr. Robinson is not seeking any conclusions with respect to his Licence, and this Licence expires on December 31, 2019. Moreover, I am satisfied that it would amount to a fettering of the Minister's discretion to impose a MSO authorization for a licence that does not exist. For those reasons, the mandatory

injunctive remedy cannot, at this stage, exceed December 31, 2019. If the final determination of Mr. Robinson's application for judicial review has not been made by then, he will be required to seek a new exemption to the application of the Policy for subsequent calendar years and fishing seasons.

[123] That said, the AGC is right to point out that, given the time lag between now and October 15, 2019, when the MSO authorization would kick in, Mr. Robinson has an optional or parallel recourse available to him: to take the appropriate measures to proceed diligently with his application for judicial review and to seek leave for an expedited hearing of his application. If his application proceeds expeditiously and the matter is heard and decided rapidly by the Court, it could perhaps make the interlocutory reliefs no longer necessary at some point in time.

[124] As I noted at the hearing, Mr. Robinson's application for judicial review has moved at a slow pace so far. The application was filed in early April and the certified tribunal record required pursuant to Rule 317 was quickly transmitted by the DFO and received by April 16, 2019. However, Mr. Robinson's affidavits have not yet been filed and served, and Mr. Robinson is already several weeks late on this front. If an applicant proceeds quickly and follows the Rules, without even abridging the delays provided in the Rules, a requisition for a hearing can be made about four months after an application for judicial review has been filed before the Court.

[125] Section 18.4 of the FC Act must be kept in mind. It provides that judicial review applications "shall be heard and determined without delay and in a summary way". It directs both the parties and the Court to move judicial review applications along to hearing stage as

quickly as possible. The timeframes provided in the Rules to govern such applications are designed to give the parties adequate time to prepare their case so that the Court can properly decide the matter while respecting the objective of deciding without delay. I would add that this requirement is magnified in situations where, as is the case here for Mr. Robinson, an applicant is asking for the Court's assistance in granting interlocutory reliefs pending his application for judicial review. In such circumstances, it goes without saying that the applicant has to move expeditiously and diligently with his underlying application.

[126] It is therefore my opinion that Mr. Robinson's underlying application for judicial review should proceed as expeditiously as possible. The parties, and in particular Mr. Robinson, should take immediate steps to follow the timeframes set out in the Rules and to seek orders or directions from a case management judge to fix a timetable for completing the steps leading to an expedited hearing of the application. In my view, in a context where interlocutory reliefs are being sought and granted, Mr. Robinson's application for judicial review should continue as a specially managed proceeding under Rule 384. If Mr. Robinson and the AGC move efficiently under the timeframes provided for in the Rules and a request for an expedited hearing is made, this matter could likely be heard by the Court in the fall of 2019.

[127] I mentioned above, when discussing the issue of prematurity, what is in the interests of justice and an efficient and proper use of judicial resources in this case. I also considered the question of justice and equity in agreeing to the interlocutory reliefs sought by Mr. Robinson. What is also in the interests of the administration of justice in this case, and what is also just and equitable in the circumstances, is for Mr. Robinson to take all necessary steps to expedite his

application for judicial review. Not only through an eventual request for an expedited hearing but at all steps of the application process. Those who come knocking on the Court's door to obtain an exceptional remedy like a stay or an interlocutory injunction should themselves expedite and treat their underlying application with similar exception.

[128] It is therefore up to Mr. Robinson to move his application at an eventful pace. So far, it appears that this has not always happened, as Mr. Robinson has not accomplished the steps over which he has full control in a timely manner. The ball is in Mr. Robinson's hands for the next procedural steps, and the Court expects that Mr. Robinson will take notice of this and will act accordingly. The just and equitable resolution of his motion also requires that Mr. Robinson uses all the options at his disposal to ensure that this matter proceeds in a fair, expeditious and efficient manner.

[129] Should the need for a further temporary injunctive remedy resurface at a later point in these proceedings (as nothing in this Order prevents any party from bringing another motion for an interlocutory injunctive remedy should it be needed), how each of the parties will have dealt with the underlying application for judicial review will undoubtedly be among the factors then considered by the Court in the exercise of its discretion.

IV. Conclusion

[130] For the above-mentioned reasons, I am satisfied that Mr. Robinson has met the conjunctive tripartite test articulated in *RJR-MacDonald* to justify the granting of a stay of the Deputy Minister's Decision pending the final resolution of his application for judicial review.

Mr. Robinson has also met the heightened threshold of establishing a strong *prima facie* case, as elaborated in *CBC*, justifying the grant of a mandatory interlocutory injunction which effectively authorizes Mr. Robinson to use a MSO up to December 31, 2019 or until the final resolution of his application for judicial review, whichever comes earlier. In parallel, Mr. Robinson shall take the necessary steps to proceed with diligence on his underlying application.

[131] In light of the divided result on the remedies being issued by the Court, I consider that this is not a case for a costs award against the AGC.

ORDER in T-562-19

THIS COURT ORDERS that:

1. The Applicant's motion is granted in part.

2. The decision of the Deputy Minister of the Department of Fisheries and Oceans Canada dated March 6, 2019 denying the Applicant's request for the continued use of a medical substitute operator is stayed until a final determination of the underlying application for judicial review.

3. The Department of Fisheries and Oceans Canada, through its authorized representative, shall authorize the Applicant to use a medical substitute operator for the remaining 2019 fishing period in Lobster Fishing Area 35, namely from October 15 to December 31, 2019, until the earliest of 1) the final determination of the underlying application for judicial review or 2) December 31, 2019.

4. The Applicant's application for judicial review shall continue as a specially managed proceeding and is referred to the office of the Chief Justice for the appointment of a Case Management Judge.

5. Within ten (10) days of being appointed, the Case Management Judge shall convene a case management conference and, after speaking with the parties, establish the schedule and procedure for an expedited hearing of the application on the merits.

6. No costs are awarded.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-562-19
STYLE OF CAUSE:	DANA ROBINSON v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	JUNE 13, 2019
ORDER AND REASONS:	GASCON J.
DATED:	JUNE 28, 2019

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