Federal Court Cour fédérale

Date: 20200525

Docket: T-343-19

Citation: 2020 FC 636

Ottawa, Ontario, May 25, 2020

PRESENT: Mr. Justice Gascon

BETWEEN:

CORPORAL RYAN THOMAS LETNES

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Corporal Ryan Thomas Letnes, is a serving member of the Royal Canadian Mounted Police [RCMP]. Following his most recent reassignment due to his visual limitations, Cpl. Letnes filed a complaint to the Canadian Human Rights Commission [Commission] under the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA], in which he alleged discrimination in the RCMP's promotion process based on a disability [Complaint].

Further to its investigation, the Commission referred the Complaint to the Canadian Human Rights Tribunal [CHRT], which initiated an inquiry in January 2018. The matter is still pending and no hearing date has yet been set by the CHRT.

[2] Since then, Cpl. Letnes has been designated medically unfit for any duty within the RCMP because of his medical condition. The designation meant that the RCMP could begin the internal administrative process to discharge Cpl. Letnes.

[3] Further to an application filed before this Court in February 2019 [Application], Cpl. Letnes seeks an interlocutory injunction, pursuant to section 44 of the *Federal Courts Act*, RSC 1985, c F-7 [FC Act] and subsection 7(a) of the CHRA, to prevent the RCMP from discharging him pending the resolution of his Complaint before the CHRT. He asks the Court to grant him relief in the nature of a *quia timet* order or, in the alternative, a prohibition order barring the RCMP from discharging him due to a mental or physical disability as defined in the CHRA or from subjecting him to the Employment Requirements [ER] process. This ER process is set out in the *Commissioner's Standing Orders (Employment Requirements)*, SOR/2014-292 [ER Order]. Cpl. Letnes seeks further relief in the form of an interlocutory injunction prohibiting the reliance, application and/or usage of subsection 6(a) of ER Order until such time that this subsection's constitutional validity is decided in two other files before the Court, namely *Kevin Douglas Picard v Attorney General of Canada et al.* (T-1803-18) [*Picard*] and *Christopher Williams v Attorney General of Canada et al.* (T-407-19).

[4] Cpl. Letnes submits that the Court has the jurisdiction to issue the requested injunction pursuant to section 44 of the FC Act and 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 interlocutory injunctions. He claims that: 1) a serious issue to be tried has been raised in his underlying Complaint; 2) he will suffer irreparable harm if the interlocutory injunction is not granted; and 3) the balance of convenience, which compares the harm he will suffer to the harm done to the RCMP, as well as the public interest, favours him.

[5] The Attorney General of Canada [AGC] responds that section 44 of the FC Act cannot serve to prohibit the RCMP from continuing its administrative discharge process and that, in any event, Cpl. Letnes has not met any of the three parts of the *RJR-MacDonald* test. The AGC submits that there is no serious issue to be tried and that Cpl. Letnes' alleged harm is entirely speculative in nature. The AGC adds that Cpl. Letnes' Application is not about preventing the carrying out of a decision made by the RCMP on Cpl. Letnes' discharge, but about prohibiting the RCMP from conducting its own discharge process altogether. The AGC pleads that seeking such an injunction at this time is premature.

[6] In this Application, the Court is not tasked with deciding the merits of Cpl. Letnes' Complaint before the CHRT, but with assessing whether Cpl. Letnes satisfies the requirements to be granted an interlocutory injunction preventing the continuation of the RCMP's discharge process. There are two issues to be determined: 1) whether section 44 of the FC Act can apply in

the circumstances; and, 2) whether Cpl. Letnes meets the well-established tripartite test to obtain injunctive relief.

[7] Further to my review of the parties' written and oral submissions and of the evidence, I am not satisfied that Cpl. Letnes has met the applicable conditions for the issuance of the interlocutory injunction he is seeking. Even if it is assumed that the Court has jurisdiction pursuant to section 44 of the FC Act and that there is a serious issue to be tried, Cpl. Letnes has failed to demonstrate that he will suffer irreparable harm if the injunction is not granted and if the RCMP continues the discharge process it has undertaken. Furthermore, the balance of convenience does not tilt in his favour. The Application is premature since the decision on Cpl. Letnes' discharge has yet to occur and, in the absence of exceptional circumstances, the Court should not interfere with the ongoing administrative process before the RCMP until this process has been completed. In the circumstances, I conclude that this is not an exceptional situation where it would be just and equitable for the Court to intervene. Cpl. Letnes' Application for an injunction will therefore be dismissed.

II. Background

A. *Factual context*

[8] Cpl. Letnes has been employed by the RCMP since October 2, 2000. Cpl. Letnes suffers from an irregular astigmatism, neurotrophic cornea, tear duct deficiency and forme frust keratoconus. He was diagnosed as having a 20/320 uncorrected vision. In February 2014, due to his uncorrected vision, his medical profile within the RCMP was changed from an operational

profile to a non-operational V4 vision medical profile. He was then placed in an undefined administrative role to accommodate his visual disabilities.

[9] In August 2016, Cpl. Letnes filed his Complaint against the RCMP, alleging discrimination based on his disability. He claims that he was denied promotional opportunities within the RCMP due to his inability to meet the minimal visual acuity standard. The RCMP responds that the minimal visual acuity standard is a *bona fide* occupational requirement of the job for RCMP members engaged in operational policing. Cpl. Letnes' Complaint is currently before the CHRT following the Commission's referral.

[10] In December 2018, Cpl. Letnes was assigned a "06" medical profile with no end date, which means that he is medically unfit for duty in any role within the RCMP. This designation further means that the RCMP can begin the process to discharge Cpl. Letnes on the basis of having a disability, as defined by the CHRA, that cannot be accommodated absent undue hardship. At the time of the hearing before this Court, no decision to discharge Cpl. Letnes had yet been made by the RCMP. Cpl. Letnes is currently on medical leave from his assignment with the RCMP.

[11] I pause to note that Cpl. Letnes has not filed any application for judicial review before the Court pursuant to section 18 of the FC Act, whether in respect of a decision to be rendered by the RCMP on his discharge or in respect of the Complaint to be determined by the CHRT. Cpl. Letnes' Application is what has been described as a "free-standing" application for an interlocutory injunction pursuant to section 44 of the FC Act.

B. *Relevant provisions*

[12] The Commissioner of the RCMP is responsible for human resources management within the RCMP. Pursuant to paragraph 20.2(1)(g) of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 [RCMP Act], the Commissioner or one of his delegates “may” notably discharge or demote any member, other than a Deputy Commissioner, “for reasons other than a contravention of any provision of the Code of Conduct”.

[13] The ER Order, which is one of the regulations adopted by the Governor in Council respecting the exercise of the Commissioner’s powers under paragraphs 20.2(1)(a) to (g) of the RCMP Act, provides at its paragraph 6(a) that reasons other than a contravention of any provision of the Code of Conduct include “having a disability”, as the term is defined in the CHRA.

[14] The process to be followed to discharge or demote RCMP members is detailed in the ER Order. Paragraph 8(1)(b) of the ER Order notably provides that the decision maker must cause a notice to be served on a member if the decision maker intends to discharge or demote the member under paragraph 20.2(1)(e) or (g) of the RCMP Act. Once the decision maker has sufficient information, he or she must make one of the decisions listed in subsection 12(1) of the ER Order, which includes retaining the member, discharging the member under paragraph 20.2(1)(e), (g) or (k) of the RCMP Act, or demoting the member, subject to any conditions that the decision maker may impose. Finally, paragraph 20(2)(c) of the ER Order provides that a member aggrieved by a written decision under paragraph 20.2(1)(e) or (g) of the RCMP Act to

discharge or demote him or her may seek redress by means of an appeal of the decision in accordance with the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289 [Appeals Order].

III. Analysis

A. *Section 44 of the FC Act*

[15] Cpl. Letnes first submits that, pursuant to section 44 of the FC Act, the Court has jurisdiction to hear his Application and, more generally, to issue interim injunctive relief in matters arising from proceedings before the CHRT. Relying on the SCC decision in *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 [*Canadian Liberty Net*], Cpl. Letnes argues that Parliament entrusted the Court with a general supervisory role over CHRT proceedings. He claims that, in this context, the Court may grant an injunction "[i]n addition to any other relief" even in the event that the substance of the dispute remains to be determined by a different decision maker. As such, Cpl. Letnes argues that, through section 44 of the FC Act, Parliament intended to grant to the Court a general administrative jurisdiction over all federal boards and tribunals.

[16] The AGC responds that, in *Canadian Liberty Net* and other similar cases where section 44 of the FC Act was relied on, the Court was asked to supervise and oversee the CHRA process and proceedings before the CHRT. However, in the case at bar, Cpl. Letnes is relying on his Complaint against the RCMP not as a means to supervise the ongoing proceedings before the

CHRT, but as a means to supervise how the RCMP manages Cpl. Letnes' services within its own organization. The AGC further argues that, in *Canadian Liberty Net*, the Court was asked, through the recourse under section 44 of the FC Act, to prohibit individuals from engaging in the same defamatory conduct that was at issue before the CHRT. Here, says the AGC, the issues raised in Cpl. Letnes' Complaint to the CHRT and in the RCMP's discharge process are not identical.

[17] I agree with the AGC that the situation of Cpl. Letnes can be distinguished from the facts underlying *Canadian Liberty Net* and its progeny. In the present case, Cpl. Letnes is effectively trying to stop the RCMP from doing what it is enabled to do under its own legislation governing its relationships with its employees (i.e., conducting a discharge process), rather than trying to obtain an interlocutory injunction to restrain a conduct pending the disposition of an inquiry into that specific conduct by the CHRT. Stated otherwise, Cpl. Letnes is asking the Court to issue an injunction to prevent the RCMP from discharging him, while his complaint before the CHRT relates to denied promotion opportunities attributable to an alleged discrimination based on Cpl. Letnes' physical disability.

[18] However, I am not prepared to conclude that the Court could not have jurisdiction in this matter under section 44 of the FC Act and that Cpl. Letnes did not have the option of bringing his request for an injunction under that provision. True, section 44 of the FC Act can be and has been relied on to supervise and oversee the CHRA process. But, I am not persuaded that this constitutes the only type of situations where the Court can have jurisdiction to grant relief under that provision.

[19] Section 44 of the FC Act reads as follows.

Mandamus, injunction, specific performance or appointment of receiver	**Mandamus, injonction, exécution intégrale ou nomination d’un séquestre**
44 In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a *mandamus*, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just.	**44** Indépendamment de toute autre forme de réparation qu’elle peut accorder, la Cour d’appel fédérale ou la Cour fédérale peut, dans tous les cas où il lui paraît juste ou opportun de le faire, décerner un *mandamus*, une injonction ou une ordonnance d’exécution intégrale, ou nommer un séquestre, soit sans condition, soit selon les modalités qu’elle juge équitables.

[20] In *Canadian Liberty Net*, the SCC established that section 44 of the FC Act empowers the Court to issue free-standing interim injunctive relief even in situations where the merits of the underlying case, action or application will be heard by another decision maker who cannot issue injunctions (*Pier 1 Imports (U.S.), Inc. v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 963 [*Pier 1 Imports*] at para 48). Pursuant to the language of section 44, the Court can do so “in all cases in which it appears to [it] to be just or convenient”. In other words, the Court has residual jurisdiction to grant a free-standing injunction even if the final disposition of the dispute is left to an administrative decision maker and is not before the Court.

[21] In *Canadian Liberty Net*, the application under section 44 of the FC Act was made in the context of circumstances involving complaints made under the CHRA and proceedings before the Commission and the CHRT. In that matter, the Commission had received complaints from

the public regarding telephone messages of anti-Semitic nature made available by an organization advertising itself as Canadian Liberty Net. Callers to the Canadian Liberty Net phone number were offered a menu of telephone messages to choose from by subject area, including white supremacist and anti-Semitic messages. After investigating the content of the said messages, the Commission requested that the CHRT decide whether these messages constituted a discriminatory practice under subsection 13(1) of the CHRA. The Commission then applied to the Court for an injunction prohibiting Canadian Liberty Net from making any such messages available until the CHRT rendered a final order on its request.

[22] In the underlying first-instance decision (*Canadian Liberty Net v Canada (Human Rights Commission)*, [1992] 3 FC 155, 90 DLR (4th) 190, aff'd [1998] 1 SCR 626 [*Canadian Liberty Net FC*]), the Court granted the injunction after concluding that it had the jurisdiction to grant free-standing interlocutory injunctions to restrain the conduct of a party pending the disposition of an inquiry into that conduct by the CHRT (*Canadian Liberty Net FC* at pp. 14-15). The SCC confirmed that the Court had jurisdiction to issue an injunction in support of the prohibitions contained in the CHRA. The majority of the SCC concluded that, under section 44 of the FC Act, the Court may grant an injunction "[i]n addition to any other relief" even in the event that the dispute's substance is to be determined by another decision maker (*Canadian Liberty Net* at para 20). The SCC explained that the introductory words of section 44 do not constitute a clause of limitation, and that the general statement in section 3 of the FC Act describing the Court's status as "a superior court of record having civil and criminal jurisdiction", combined with the many powers of supervision, control, and enforcement of this and numerous other tribunals, indicates that section 44 is a power-conferring section (*Canadian Liberty Net* at paras 21, 24).

[23] Other decisions from the Court have applied the SCC's interpretation of section 44 of the FC Act and confirmed the Court's jurisdiction to issue a free-standing interlocutory injunction in certain circumstances involving a process before the Commission or the CHRT (*Toutsaint v Canada (Attorney General)*, 2019 FC 817 [*Toutsaint*] at para 65; *Colasimone v Canada (Attorney General)*, 2017 FC 953 [*Colasimone*] at para 7; *Drennan v Canada (Attorney General)*, 2008 FC 10 [*Drennan*] at para 23; *Canadian Human Rights Commission v Winnicki*, 2005 FC 1493 [*Winnicki*] at paras 17-22). In *Winnicki*, for instance, the Court granted an injunctive relief in the context of its supervisory role over the CHRT to prevent ongoing hate speech, a situation very similar to the facts in *Canadian Liberty Net*.

[24] In *Canadian Liberty Net*, the SCC also observed that "the decisions and operations of the [CHRT] are subject to the close scrutiny and control of the Federal Court" (*Canadian Liberty Net* at para 37). Therefore, what triggered the Court's jurisdiction under section 44 of the FC Act to issue a free-standing injunction in aid of the CHRT process was the Court's jurisdiction to review the CHRT's decisions and to supervise the CHRT (*Pier 1 Imports* at para 49). That jurisdiction flows from the fact that the CHRT is a "federal board, commission or other tribunal", as defined in section 2 of the FC Act.

[25] I further note that, in the context of an underlying complaint before the Commission or the CHRT, this Court has assumed that it had jurisdiction to issue an injunction under section 44 of the FC Act in matters where the injunction sought to prohibit or require certain conduct from another federal board or tribunal, namely the Correctional Service of Canada [CSC] (*Toutsaint* at para 65; *Colasimone* at para 7; *Drennan* at para 23). As such, according to the broad

interpretation of section 44 of the FC Act recognized in these cases involving CHRT proceedings, the Court considered that it had jurisdiction to consider a request for the issuance of a free-standing interlocutory injunction against another federal board or tribunal.

[26] I acknowledge that, normally, decisions of a federal board or tribunal will only be challenged by way of an application for judicial review. In the context of such judicial review, an applicant could bring a motion, pursuant to section 18 of the FC Act and Rule 373 of the *Federal Courts Rules*, SOR/98-106 [Rules], to be granted an interlocutory injunction. However, I am not persuaded that section 44 of the FC Act cannot also apply and cannot be used to seek a *mandamus*, an injunction or an order for specific performance against a federal board or tribunal in situations where the Court has a supervisory relationship vis-à-vis such federal board or tribunal that would be similar to the relationship between the Court and the CHRT described in *Canadian Liberty Net*.

[27] As stated above, I accept that the situation in the present case is significantly different from *Canadian Liberty Net*: the application for an interlocutory injunction is directed at the RCMP and its administrative process to discharge Cpl. Letnes, and it does not arise within the strict limits of the CHRT process as in *Canadian Liberty Net* or *Winnicki*. However, a parallel can be drawn between the present case and situations where, in the context of the Commission or CHRT proceedings, the Court saw no obvious impediment to assume jurisdiction over another federal board or tribunal further to an application made under section 44 of the FC Act. As acknowledged by the AGC, it is not disputed that the RCMP is a federal board within the meaning of section 2 of the FC Act.

[28] In fact, Cpl. Letnes' situation is reminiscent of the procedural context in *Toutsaint*, where the Court declined to issue an interlocutory injunction against the CSC pending the outcome of a CHRT proceeding. In that case, Mr. Toutsaint, an indigenous inmate, had been suffering from mental health illnesses and had a history of inflicting self-harm and suicide attempts. He was declared as a dangerous offender and sentenced to an indeterminate period of detention. Mr. Toutsaint had brought an application for a mandatory interlocutory injunction pursuant to section 44 of the FC Act, where he was asking the Court to intervene with the management of his incarceration by ordering the CSC to transfer him to a penitentiary that also served as a psychiatric centre, pending the outcome of his discrimination complaint filed with the Commission. The Court ultimately dismissed the application because Mr. Toutsaint had failed to meet the stringent requirements for the grant of an injunction.

[29] That being said, for the purpose of Cpl. Letnes' Application, I do not have to decide this issue of jurisdiction and to determine whether the Court has a supervisory relationship vis-à-vis the RCMP that would be similar to the relationship between the Court and the CHRT described in *Canadian Liberty Net*. Even if section 44 of the FC Act awards jurisdiction to the Court to grant certain *mandamus*, injunction or specific performance orders, it does not change the conditions for issuing a remedy authorized by that section, nor does it in any way deal with the procedural support required to bring a remedy application before the Court (*Habitations Ilot St-Jacques Inc. v Canada (Attorney General)*, 2017 FC 535 at para 45). In other words, the question of jurisdiction to grant an injunction under section 44 should not be conflated with the question of whether the conditions for granting such injunction and exercising such jurisdiction are met.

As rightly pointed out by the AGC, the mere existence of a CHRT proceeding cannot be the sole basis upon which this Court can issue an interlocutory injunction under section 44 of the FC Act.

[30] In the present case, as detailed in the reasons below, the failure of Cpl. Letnes to meet the conditions of the test for interlocutory injunctive relief suffices to dismiss his Application and is determinative. I pause to underline that, in my view, the AGC's arguments stating that section 44 of the FC Act does not apply to the RCMP essentially address the conditions for granting an injunction and exercising the Court's jurisdiction in this specific case, rather than the scope of the Court's jurisdiction under that section. I will therefore simply assume, without deciding the merits of the issue, that the Court has jurisdiction to consider Cpl. Letnes' request for an interim injunctive relief against the RCMP under section 44 of the FC Act.

B. *The tripartite injunction test*

[31] On the conjunctive three-part test to determine interlocutory injunctions, Cpl. Letnes submits that all prongs of the *RJR-MacDonald* test are satisfied. Cpl. Letnes first claims that there is a serious issue to be tried since it cannot be reasonably argued that his claim before the CHRT is frivolous or vexatious, as the Commission recognized the existence of a *prima facie* case. Secondly, Cpl. Letnes argues that there is foreseeable irreparable harm in the sense that, if the injunction is not granted, the RCMP will be able to discharge him, which will cause loss of his employment and career at the RCMP, loss of reputation, and exacerbation of his mental health illnesses. Thirdly, Cpl. Letnes maintains that the balance of convenience lies in his favour as he is a vulnerable employee whereas RCMP is a sophisticated organization which would not suffer any negative impact to its operation if the interlocutory injunction were to be granted. He

further asserts that public interest considerations also tilt the balance of convenience in his favour since all disabled members of the RCMP have a particular interest in the outcome of his Application (*RJR-MacDonald* at p 344).

[32] I do not agree. As the SCC noted in *Canadian Liberty Net*, the test for determining the existence of jurisdiction under section 44 of the FC Act must be distinguished from the appropriateness of exercising such jurisdiction in a particular case (*Canadian Liberty Net* at para 7). I am of the view that Cpl. Letnes' case is not a situation where it would be appropriate for the Court to exercise its discretion to grant the injunction. More specifically, for the reasons detailed below, I find that Cpl. Letnes has not established that his request for an interlocutory injunction satisfies the stringent requirements of the conjunctive three-part test in *RJR-MacDonald* for two reasons. First, Cpl. Letnes has not provided clear and non-speculative evidence that irreparable harm will follow if no injunction is granted, as he will remain an RCMP member on medical leave pending the RCMP administrative discharge process. Second, the balance of convenience does not favour restricting the RCMP's ability to manage its members and interfering in the RCMP's ongoing administrative process before it is completed.

(1) The test for granting an interlocutory injunction

[33] It is trite law that, in order to succeed on a motion seeking an interlocutory injunction, the moving party must satisfy the well-known tripartite test set out by the SCC in *RJR-MacDonald*. The moving 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). However, an elevated or

heightened threshold may apply in certain particular circumstances, such as when a mandatory interlocutory injunction is sought. Second, the moving party must show that it will suffer irreparable harm if the interlocutory 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; see also *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2019 FC 1116 [*Ahousaht*] at paras 48-53, *Robinson v Attorney General of Canada*, 2019 FC 876 [*Robinson*] at paras 56-82 and *Okojie v Canada (Citizenship and Immigration)*, 2019 FC 880 [*Okojie*] at paras 61-93).

[34] At the outset, it is important to underline that an interlocutory injunction is an extraordinary and equitable relief. Moreover, a decision to grant or refuse an interlocutory injunction is a discretionary one (*CBC* at para 27). Given that an interlocutory injunction is an exceptional remedy, compelling circumstances are required to justify the intervention of the courts and the exercise of their discretion to grant the relief. The burden is on the moving party to demonstrate that the conditions of this exceptional remedy are met.

[35] 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 [*Ishaq*] at para 15; *Western Oilfield Equipment Rentals Ltd. v M-I L.L.C.*, 2020 FCA 3

[*Western Oilfield*] at para 7). That said, the three prongs of the test are not water-tight compartments, and they should not be assessed in total isolation from one another (*The Regents of 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).

[36] In *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 [*Google*], the SCC reminded that an overarching and fundamental objective animates the *RJR-MacDonald* test: the judge needs to be satisfied that, ultimately, granting the interlocutory injunctive relief is just and equitable, taking into consideration the particular circumstances of the case. The SCC in *Google* thus reinforces that, in exercising their discretion to grant 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. The Court must therefore assess whether, in the end, granting the interlocutory injunction sought by Cpl. Letnes in his Application would ultimately be "just and equitable in all of the circumstances of the case", which will "necessarily be context-specific" (*Google* at para 25).

[37] 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 (*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.

[38] An application for an interlocutory injunction like this one ultimately turns on its facts. When all the circumstances are considered, the Application materials and the evidence must convince the Court that, on a balance of probabilities, the three components of the test are met and that it is just and equitable to issue an injunction. 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). 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).

(2) Serious issue to be tried

[39] The first element of the tripartite test is whether the Application materials and the evidence before the Court are sufficient to satisfy the Court, on a balance of probabilities, that Cpl. Letnes has raised a serious issue to be tried. The demonstration of a single serious issue suffices to meet this part of the test (*Jamieson Laboratories Ltd v Reckitt Benckiser LLC*, 2015 FCA 104 at para 26).

[40] As I previously stated in *Okojie* and *Ahousaht*, the requirement of a serious issue to be tried can give rise to one of three different thresholds (*Okojie* at paras 69-87; *Ahousaht* at para

78). First, the usual and general threshold is a low one, in which case the Court should not engage in an extensive review of the merits. There are no specific requirements to be met in order to satisfy this threshold and the judge must simply conclude that the issues raised in the underlying application are neither frivolous nor vexatious (*RJR-MacDonald* at pp 338-339). Second, an elevated threshold however applies "when the result of the interlocutory motion will in effect amount to a final determination of the action" (*RJR-MacDonald* at p 338). These situations call for a more extensive review of the merits at the first stage of the analysis, and they have often been referred to as requiring a "likelihood of success" in the underlying application. Third, for mandatory interlocutory injunctions, the SCC established in *CBC* that a heightened threshold of a "strong *prima facie* case" applies, and it expressly stated that, in such cases, a "strong likelihood" of success needs to be demonstrated for assessing the strength of the applicant's case (*CBC* at paras 15, 17). I am satisfied that, in the present case, the usual and general low threshold of "neither frivolous nor vexatious" applies.

[41] Given my findings on the other two branches of the *RJR-MacDonald* test, I do not need to expand on the serious issue to be tried. Therefore, for the purpose of Cpl. Letnes' Application, I will simply assume that at least one serious issue exists. I underscore that the question here relates to a preliminary assessment of the strength of Cpl. Letnes' case in the proceeding underlying his Application (*CBC* at para 25), namely his Complaint to the Commission and the pending proceeding before the CHRT (*Toutsaint* at para 71; *Colasimone* at para 10).

[42] I must however pause to mention that, in the context of an application for a free-standing injunction under section 44 of the FC Act, this first prong of the *RJR-MacDonald* test takes a

somewhat different colour, as the merits of the underlying action or application will be heard by a decision maker other than the Court. In other words, the injunction sought will not relate to an underlying action or application for judicial review before the Court, as would usually be the case for an injunction motion brought under Rule 373. In addition, the injunctive relief itself may be sought against a person or an entity which is different from the decision maker involved in the underlying matter (as was the case with the CSC in *Toutsaint* or *Colasimone*, and as is the case here with the RCMP in Cpl. Letnes' Application).

[43] In his submissions, the AGC considers that the matter underlying Cpl. Letnes' Application for an injunction is not his Complaint and the ensuing CHRT proceeding, but the process before the RCMP. The AGC argues that, since the RCMP has not yet made the decision to discharge Cpl. Letnes, and since Cpl. Letnes has not filed an application for judicial review, there is no underlying application and therefore no question or serious issue for the Court to determine. According to the AGC, Cpl. Letnes' Application is therefore premature as there is no decision to be judicially reviewed by the Court, given that Cpl. Letnes has not yet been discharged from the RCMP and the administrative process before it is not completed. Moreover, the AGC notes that, if Cpl. Letnes were to be discharged at some future date, an appeal process within the RCMP would be available to him pursuant to the *Appeals Order*. Furthermore, if he were unsuccessful on his appeal, Cpl. Letnes would then have the right to apply to this Court for a judicial review of the final decision made by the appeal adjudicator.

[44] The AGC rightly points out that Cpl. Letnes challenges an ongoing administrative process in front of the RCMP, before the RCMP has even completed its analysis and at a time

where the RCMP has not yet decided whether Cpl. Letnes will be discharged or not. At this point in time, no action has been taken by the RCMP and no final decision has been made regarding Cpl. Letnes pursuant to the ER Order. In the AGC's view, Cpl. Letnes' Application amounts to an attempt to pre-empt the RCMP's jurisdiction to determine how cases proceed before it, contrary to its statutory mandate and to the provisions of the ER Order.

[45] I acknowledge that this question of the "prematurity" of the injunction recourse would typically be addressed in the assessment of the "serious issue" branch of the tripartite test. In *Newbould v Canada (Attorney General)*, 2017 FCA 106 [*Newbould*], the Federal Court of Appeal [FCA] observed that prematurity and extraordinary circumstances are "a feature of the law of judicial review, and not the law of injunction" (*Newbould* at para 22). As such, these issues are to be "considered under the heading of serious issue" where the question is whether their weight "is such that the underlying application can be considered frivolous or vexatious" (*Newbould* at para 24). I further note that, in previous cases such as *Abdi v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 202 [*Abdi*] or *Rogan v Canada (Citizenship and Immigration)*, 2010 FC 532 [*Rogan*], the Court indeed dealt with the issue of prematurity of an injunctive relief at the "serious issue to be tried" stage of the *RJR-MacDonald* test (*Abdi* at para 22; *Rogan* at para 12).

[46] However, in the present case, the injunctive relief sought by Cpl. Letnes under section 44 of the FC Act is anchored in an underlying Complaint before the CHRT, not in an application before the Court. In addition, Cpl. Letnes' Application seeks to prohibit an administrative process undertaken by the RCMP which is different from the CHRT process. Therefore, the

prematurity concern raised by the AGC does not truly relate to the underlying Complaint and to the question of whether or not it raises a serious issue under the first prong of the *RJR-MacDonald* test. That said, the question of prematurity permeates the assessment of each component of the tripartite *RJR-MacDonald* test and essentially calls to mind the overarching exceptional and discretionary nature of interlocutory injunctive reliefs such as a stay or an injunction. Viewed under that lens, it could be considered under any of the three elements of the *RJR-MacDonald* test, as it in fact goes to the essence of the remedy sought and calls into question the exercise of the Court's discretion. Indeed, in *James v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 465 (FCTD) [*James*], the Court stated that, even though there was at least an arguable case to proceed to trial, no injunction should be issued as the "irreparable harm" and "balance of convenience" prongs of the *RJR-MacDonald* test were not met because the motion was premature (*James* at para 14).

[47] In the unusual circumstances of the present case where Cpl. Letnes seeks a free standing injunction under section 44 of the FC Act and where the underlying application relates to a process distinct from the process against which the injunctive relief is sought, I will therefore address the prematurity issue raised by the AGC under the "balance of convenience" branch of the tripartite test.

(3) Irreparable harm

[48] I now move to the second element of the *RJR-MacDonald* test, irreparable harm. Under this second prong of the test, the question is whether Cpl. Letnes has provided sufficiently clear, convincing and cogent evidence that, on a balance of probabilities, he will suffer irreparable

harm between now and the time the CHRT proceeding is completed, should the interlocutory injunction be denied.

(a) *Legal test*

[49] 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, usually because one party cannot collect damages from the other" (*RJR-MacDonald* at p 341).

[50] Irreparable harm is a strict test. First, irreparable harm must flow from clear, compelling 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). In addition, simply claiming that irreparable harm is possible is not enough. The jurisprudence of the FCA states that "[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 <u>will</u> 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). Further, irreparable harm is unavoidable harm that, by its quality, cannot be redressed by monetary compensation (*Canada (Attorney General) v Oshkosh Defense Canada Inc.*, 2018 FCA 102 [*Oshkosh*] at para 24; *Janssen* at para 24).

[51] The FCA has frequently insisted on the attributes and quality of the evidence needed to establish irreparable harm in the context of injunctive reliefs such as stays or interlocutory

injunctions. 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 "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 [*Stoney First Nation*] at para 48). In other words, to prove irreparable harm, "the moving party 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" (*Oshkosh* at para 25; *Janssen* at para 24).

[52] 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, Justice Stratas added that "it 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). This was recently reaffirmed by the FCA in *Western Oilfield* at paragraphs 11-12.

[53] I must add some remarks on the prospective nature of Cpl. Letnes' Application.

[54] 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. This is indeed how Cpl. Letnes himself labels the injunctive relief he is seeking from the Court.

[55] Applications for *quia timet* injunctions often require the 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 The Federation of Newfoundland Indians*, 2018 FC 497 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).

[56] In the context of interlocutory injunctions, the high probability that 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.

[57] 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. It all depends on the facts and the evidence. On this requirement to prove the imminence of harm, Justice Sharpe (writing extra judicially) 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, 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, as opposed to situations where the nature or the extent of the harm may change between the time of the decision and the moment where the harm would occur.

[58] In light of the foregoing, 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.

[59] The question for the Court is therefore whether the harm identified by Cpl. Letnes is clear, convincing and not speculative, and reaches the level of irreparable harm defined by the FCA, as opposed to being a simple inconvenience.

(b) *Grounds of irreparable harm*

[60] In his memorandum of fact and law, Cpl. Letnes alleges that he will suffer irreparable harm in a number of ways, and he has identified several headings of irreparable harm. Cpl. Letnes first submits that foreseeable irreparable harm exists in the sense that, absent an

injunction, the RCMP will be able to subject him to the ER process which is exclusively designed to discharge RCMP members. Cpl. Letnes further argues that this discharge would then result in the abrupt end of his career in the RCMP, loss of employment benefits and seniority within the RCMP, loss of time at the rank of Corporal and/or Sergeant, and loss of personal career development. Cpl. Letnes further claims that continuing the RCMP discharge process would subject him to an irreparable loss of reputation. Finally, Cpl. Letnes maintains that the discharge process would lead to the exacerbation of his numerous mental health disorders related to his duties as a RCMP member. At the hearing before this Court, Cpl. Letnes reiterated these arguments on his claims of irreparable harm.

[61] I make one preliminary remark on the claims of irreparable harm advanced by Cpl. Letnes. While Cpl. Letnes addresses his various allegations of irreparable harm in his memorandum of arguments, I note that, in his affidavit sworn on February 28, 2019, Cpl. Letnes does not recount any specific grounds of irreparable harm. His affidavit discusses the exchanges which occurred between him and the RCMP administration between August 2013, when he was first diagnosed regarding deficiencies in his vision, and January 2019, when he was informed of what would be the retirement benefits should he consent to a consensual medical discharge. However, the affidavit does not discuss Cpl. Letnes' claims of irreparable harm.

[62] When prejudice or injustice is not supported by facts on the record, it needs to be proven by affidavit evidence. In *Frame v Riddle*, 2018 FCA 204 [*Frame*], the FCA recently reminded that principle in very clear words: "[i]t is fundamental that, with very limited exceptions, a motion must be supported by evidence", which evidence must be provided in accordance with

Rule 363 (*Frame* at para 30; see also *Pfeiffer & Pfeiffer Inc v Lafontaine*, 2003 FCA 391 at para 5; *Laliberte v Canada*, 2004 FC 208 at paras 4-5). This is particularly true in the context of exceptional remedies like an injunction or a stay: "[s]omeone who wishes to benefit from an equitable remedy like a stay must at least establish the facts supporting the application" (*Trabelsi v Canada (Citizenship and Immigration)*, 2016 FC 585 at para 6). Simple assertions, unsupported by evidence, are insufficient to prove prejudice (*The Commissioner of Competition v HarperCollins Publishers LLC and HarperCollins Canada Limited*, 2017 Comp Trib 14 at paras 68, 97-98). As stated above, there needs to be evidence at a convincing level of particularity that shows a real probability that prejudice will result unless an injunctive remedy is granted. The prejudice must be more than arguable possibilities, speculations or hypotheticals. It needs to be demonstrated, with evidence. In applications like this one, this is typically done through an affidavit.

[63] It is a pre-requisite for any litigant seeking to benefit from an exceptional equitable remedy like an injunction to establish the facts supporting his or her request. More specifically, a litigant must attest to the harm or injustice claimed to be suffered. No matter how eloquent arguments may be, they cannot replace the need for a litigant to provide clear, convincing and non-speculative evidence supporting any allegations of harm or prejudice. The absence of proper affidavit evidence on this front is kryptonite to a party seeking an extraordinary and exceptional remedy like an injunction. In the circumstances of this case, the lack of an affidavit from Cpl. Letnes allowing me to find sufficient, reliable evidence in support of his allegations of harm is a major hurdle to his request.

[64] Turning to Cpl. Letnes' claims of irreparable harm, Cpl. Letnes first asserts that, without an injunction, he will be discharged by the RCMP and will suffer irreparable harm in terms of loss of employment and all benefits related to his status as a RCMP member. Cpl. Letnes argues that the RCMP's ER process is exclusively designed to discharge members, including members such as him on medical grounds. Cpl. Letnes appears to suggest that the RCMP's discharge process calls for a foregone conclusion and will inevitably and certainly lead to his dismissal. He notably relies on a policy document from the RCMP entitled "Discharge Options", which states that the administrative discharge process for persons having a "06" medical profile "is the most damaging of processes" and leaves RCMP members powerless to stop it.

[65] I do not agree and am not persuaded by Cpl. Letnes' arguments. On the contrary, when the ER Order is considered in its entirety, I do not find that it leads to the unavoidable spectre brandished by Cpl. Letnes. The process to be followed to discharge or demote a RCMP member is detailed in the ER Order. Once the decision maker has sufficient information, he or she must make one of the decisions listed in subsection 12(1) of the ER Order, which includes retaining the member, discharging the member under paragraph 20.2(1)(e), (g) or (k) of the RCMP Act, or demoting the member, subject to any conditions that the decision maker may impose. The discharge process to be undertaken by the RCMP is precisely to determine whether Cpl. Letnes will be discharged, demoted or maintained in employment. There is no definite outcome implying that Cpl. Letnes' employment will automatically be adversely affected simply by being subject to the RCMP's discharge process and having to go through such process.

[66] Being subject to the discharge process does not imply a given result. Therefore, Cpl. Letnes' claims that he will lose his employment benefits, his seniority and his career plans because of his participation in the discharge process is just speculative. There is no clear and convincing evidence allowing me to conclude, at this stage, that the discharge and loss of employment benefits that Cpl. Letnes fears will result from being subject to the discharge process is more likely than other conclusions such as being maintained in his employment. Indeed, as pointed out by the AGC, Cpl. Letnes will remain a RCMP member on medical leave during and until the completion of the discharge process, including any appeals pursuant to the Appeals Order.

[67] I do not dispute Cpl. Letnes' submission that work and a person's employment is one of the most fundamental aspects in a person's life, and that it is a determining factor of every person's identity (*Reference re Public Service Employee Relations Act*, [1987] 1 SCR 313 at p 368; *Canada (Attorney General) v Shakov*, 2017 FCA 250 at para 112). However, in this case, there is no evidence that, in the absence of the injunction he seeks, Cpl. Letnes will lose his employment or his work within the RCMP. This is what the RCMP discharge process will aim to determine, and there is no evidence of any discharge being imminent, nor evidence of any loss of employment, economic benefits or seniority.

[68] The problem with the irreparable harm put forward by Cpl. Letnes in relation to his employment with the RCMP is that, apart from his own self-serving impressions and concerns, there is no evidence on the various components of the chains of events he fears. The only link between being subject to the discharge process and a loss of employment benefits boils down to

Cpl. Letnes' own apprehensions. Even on a generous reading of his evidence, the risk of such harm is entirely speculative as Cpl. Letnes' assertions are unsupported, do not result from going through the RCMP discharge process and do not offer a sufficient degree of particularity. We are here in that landscape of "assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence," repeatedly found insufficient by the FCA to anchor a claim of irreparable harm and to justify an interlocutory injunctive relief (*Glooscap* at para 31; *Stoney First Nation* at paras 48-49). In other words, the situation that will exist when the harm claimed by Cpl. Letnes eventually occurs has not yet crystallized, and the nature or the extent of any harm may change between now and the moment where the harm would occur.

[69] I agree that the courts should not take a narrow view of what irreparable harm can encompass and I do not dispute that irreparable harm can be apprehended. What is determinative is the likelihood of the harm, not its futurity. But harm that is contingent on the outcome of future events which are not, or cannot be, known at this time, is speculative harm. And this cannot amount to irreparable harm under the *RJR-MacDonald* test. Injunctions cannot be obtained against a public authority like the RCMP on the simple basis of an applicant's fears that an adverse decision might come out of a process before such authority.

[70] Moreover, even if I were to accept these employment-related grounds of irreparable harm flagged by Cpl. Letnes, they could be remedied with a damage award. These claims of irreparable harm are quantifiable losses. It is well recognized that harm which is quantifiable and compensable in damages does not qualify as irreparable harm opening the door to interlocutory

injunctive relief (*RJR-MacDonald* at p 341; *Oshkosh* at para 24; *Shoan v Canada (Attorney General)*, 2016 FC 1031 [*Shoan*] at paras 42). This is the case here.

[71] Turning to the alleged loss of reputation to be suffered by Cpl. Letnes if he has to go through the RCMP discharge process, I also find it speculative. I agree that alleged irreparable harm to social interests such as reputation can be satisfied by inference from the surrounding circumstances (*Newbould* at para 29). But an alleged harm to reputation must nonetheless be demonstrated by supporting evidence. The harm that Cpl. Letnes alleges must not be simply inherent to the process in which he is engaged. If Cpl. Letnes claims to suffer irreparable harm in terms of loss to his reputation simply because he is subject to a discharge process before the RCMP, then it would mean that all employees being subject to a discharge process could claim loss to their reputation because of the process itself and argue that they would suffer irreparable harm because of it. I am not prepared to make such finding, and I do not find in Cpl. Letnes' materials the required evidence to establish that, in his particular case, the loss of reputation amounts to irreparable harm. As mentioned above, Cpl. Letnes' affidavit contains no references or statements on the harm he fears to suffer.

[72] In order to conclude that the alleged loss of reputation meets the threshold of irreparable harm, Cpl. Letnes had to demonstrate the existence of factors or elements in the surrounding circumstances of his case that made his discharge process different from the normal run of such proceedings. It was his burden to show the presence of such a factor, and he has failed to do so. There is no clear and convincing evidence permitting me to infer a likelihood of irreparable harm in terms of loss of reputation.

[73] In addition, this Court has determined that reputational harm is not irreparable as it can also be compensable in damages (*Shoan* at para 42; *Cadostin v Canada (Attorney General)*, 2019 FC 831 at para 15).

[74] Cpl. Letnes finally claims irreparable harm in terms of mental health concerns. Cpl. Letnes submits that this alleged harm is not speculative but foreseeable because he has submitted three affidavits from Marina Cumming, Christopher Williams and Susan Olson, who are other RCMP members claiming to have suffered exacerbation of psychological injury, loss of self-esteem and loss of career-defining benefits from being subjected to (or threatened with) the RCMP ER process.

[75] However, none of these affidavits are relevant to Cpl. Letnes' application for an injunction against the RCMP regarding his own discharge process. All three of these affiants give evidence that they were members of the RCMP who were themselves discharged from the RCMP, and who describe their own emotions and mental health issues after they were discharged. Their affidavits do not relate to Cpl. Letnes' situation, and I observe that Cpl. Letnes has not filed an affidavit of his own describing his own mental health symptoms and issues. It is well accepted that irreparable harm required to support an application for an injunction is harm to the person seeking such injunction, not to third parties even if they are in a similar or comparable situation. Again, there is no clear and convincing evidence permitting me to infer a likelihood of irreparable harm in terms of exacerbation of Cpl. Letnes' mental health disorders related to his duties as a RCMP member. In short, Cpl. Letnes' allegations on this front remain speculative.

(c) *Conclusion on irreparable harm*

[76] For all those reasons, having reviewed the totality of the evidence provided by Cpl. Letnes, I am not satisfied that, on a balance of probabilities, there is the required clear, compelling and non-speculative evidence to demonstrate irreparable harm. In essence, the various allegations of harm are not supported by detailed, particularized and specific evidence, and they remain in the universe of speculations and hypotheticals.

[77] More generally, all the apprehended grounds of irreparable harm raised by Cpl. Letnes are contingent upon a central event which remains uncertain, namely the outcome of the RCMP discharge process itself. This is the question that is not yet decided (and will only be after the discharge process actually takes place), and on which all of Cpt. Letnes' claims of harm depend. Such assertions cannot serve as valid grounds for granting an injunction, and I find them insufficient to establish a real probability that unavoidable irreparable harm will result if the injunction is denied and the RCMP discharge process is not interrupted.

[78] The second element of the *RJR-MacDonald* test is accordingly not met.

(4) Balance of convenience

[79] I finally 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 courts must determine which of the parties will suffer the greater harm from the granting or refusal of the

interlocutory injunction, pending a decision on the merits (*RJR-MacDonald* at p 342). At this stage, the interest of the public must also be taken into account (*RJR-MacDonald* at p 350).

[80] Given that Cpl. Letnes has not proffered the evidence needed to allow the Court to make a finding of irreparable harm, and having concluded that he has failed to satisfy that branch of the *RJR-MacDonald* test, it is not necessary for me to consider where the balance of convenience lies. He does not meet one element of the test and, according to the FCA case law, this is fatal (*Ishaq* at para 15). I will nonetheless review the issue as the balance of convenience is frequently viewed as an important factor in assessing whether interlocutory injunctions should be granted. Furthermore, extensive submissions were made by the parties on this dimension of the *RJR-MacDonald* test and, as mentioned above, the prematurity of Cpl. Letnes' Application is an additional factor that needs to be addressed at this stage of the analysis.

[81] In his submissions on the balance of convenience, Cpl. Letnes compares his salary and benefits to the overall budget of the RCMP. He claims that any intent for the RCMP to manage its workforce responsibly pales in comparison to his need to maintain his employment, his mental health and his eye/visual health, and to repair and enhance his professional reputation as well as personally and professionally develop. I disagree. As outlined above, if no injunction is granted and the RCMP's discharge process continues, Cpl. Letnes will not suffer the harm he claims. He will remain a member of the RCMP on medical leave pending the outcome of such process. If, at some point in time, he is discharged from the RCMP, he will then continue to have a right to appeal that decision pursuant to the Appeals Order and will then have the possibility of seeking a judicial review of any appeal decision before this Court.

[82] On this Application, the public interest and the prematurity of Cpl. Letnes' Application are two relevant factors to assess in the balancing of convenience, and they both favour the AGC. When I compare them to the harm expected to be suffered by Cpl. Letnes in the absence of an injunction, I conclude that, on a balance of probabilities, the balance tips in favour of the AGC and against the issuance of the injunctive relief sought by Cpl. Letnes and restricting the RCMP's ongoing ability to manage its members.

[83] Cpl. Letnes seeks an injunction against a decision maker, the RCMP, who is acting under provisions, regulations and processes which have not yet been determined to be invalid or inapplicable to the case at hand. Given that the injunction sought by Cpl. Letnes is against a public authority, there is a public interest dimension at stake. When a public authority is involved, the onus of demonstrating that the balance of convenience lies against the public interest rests with the private parties. This onus will usually not be met on proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned action (in this case, the RCMP's discharge process) is undertaken pursuant to that responsibility.

[84] The RCMP is presumed to act in the public interest, and significant weight should be given to these public interest considerations and to the statutory duties carried out by a federal board or tribunal. As a statutory authority responsible for the management of its human resources and the enforcement of its mandate, the RCMP benefits from a presumption that actions taken pursuant to its enabling legislation and regulations are *bona fide* and in the public interest. In other words, there is a public interest in allowing the RCMP to accomplish its role under the

RCMP Act and its regulations. In this case, the RCMP has the responsibility of ensuring that its members are medically fit to fulfill their duties to protect the public. The RCMP is a police force for Canada, and its members need to have the necessary physical qualities to be a member. No member has a right to remain in the RCMP if the individual no longer has the medical condition to do so, and no member has an entitlement to continue serving as a RCMP member. The discharge process exists in the context of the exercise of this responsibility given to the RCMP, and of its general mandate to protect the public and ensure that the RCMP members are properly qualified to do so.

[85] Contrary to what Cpl. Letnes argues, the injunction would not simply be a pause on the current state of affairs; it would be a halt on the exercise of the RCMP's authority set out in the RCMP Act and the ER Order. The public interest supports the maintenance of the statutory provisions, regulations and processes, and the efforts of those responsible for carrying them out. When it is established (as is the case here for the RCMP) that a public authority is charged with the duty of protecting the public interest, and that a proceeding or activity is carried and 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" (*RJR-MacDonald* at p 346). Put differently, when a public authority is prevented from exercising its statutory powers, it can be said that the public interest, of which the authority is the guardian, suffers irreparable harm.

[86] In this case, an interlocutory injunction would enjoin the RCMP from carrying out its mandate and interfere with the exercise of the statutory powers granted to him by Parliament

with respect to the management of its employees. I am satisfied that this would harm the public interest and it is not the function of the Court to manage and police the RCMP, to intervene in the management of RCMP employees and to usurp the role of the RCMP in that respect.

[87] Cpl. Letnes claims that his Application also raises public interest issues because it is brought in the context of similar challenges in related proceedings which invoke rights under 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]. Cpl. Letnes however admits that he is not specifically challenging the constitutional validity of subsection 6(a) of the ER Order in his Application, but he submits that the subject matter of his Application at least obliquely involves a Charter right. He claims that the RCMP is currently engaged in a campaign to rid from the workplace its disabled members and that it is utilizing subsection 6(a) of the ER Order to reach this objective. Cpl. Letnes submits that disabled members within the RCMP have a particular interest in the outcome of his Application and that these vulnerable members should be entitled to the interlocutory relief sought within this Application pending the outcome of the related constitutional challenges to the application of subsection 6(a) of the ER Order and the resolution of his CHRT proceedings.

[88] I do not dispute that the public authorities do not have a monopoly in framing the public interest, that private parties can also raise public interest arguments in the context of applications for injunctions, and that the public generally has an interest in the protection of Charter rights. However, no Charter rights are specifically at issue in this Application, and Cpl. Letnes has recognized that. Furthermore, Cpl. Letnes has the opportunity of raising his Charter-based

arguments within the RCMP discharge process. This is not an element that impacts the assessment of the balance of convenience to any significant degree in this case.

[89] The factors to be considered in assessing the balance of convenience are numerous and vary with each individual case (*RJR-MacDonald* at p 349). In this case, another crucial factor is the prematurity of the injunctive remedy sought by Cpl. Letnes against the RCMP, and the fact that it seeks to put a halt to an ongoing administrative process.

[90] The principle of judicial non-interference with ongoing administrative proceedings in the absence of "exceptional circumstances" is well established. In essence, it provides that administrative processes must be completed before an applicant can seek relief from the courts and ask a motion judge to stop such process in its tracks (*Okojie* at para 46). I can do no better than reproduce the passages from *CB Powell Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 [*CB Powell*] where the FCA aptly summarized the rationale for this principle in the context of judicial reviews, at paragraphs 30-33:

> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point […].
>
> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative

process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway […]. Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience […]. Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge […].

[33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high […]. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted […]. [T]he presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

[Emphasis added; citations omitted.]

[91] This principle of judicial restraint in the context of an ongoing or pending administrative proceeding has been regularly recognized by the courts. When legislation sets out an administrative process consisting of a series of decisions and remedies, it must be followed to the end, barring exceptional circumstances, before the courts may be asked to intervene. The parties must exhaust all adequate remedial recourses when Parliament has given administrative decision makers the authority to make decisions rather than courts of law: ". . . absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted" (*CB Powell* at para 31). Therefore, Cpl. Letnes cannot bypass the process established by the RCMP by making an application for an injunction (*Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para 51; *Public Service Alliance of Canada v Canada (Treasury Board)*, 205 FTR 270, 2001 FCT 568 (CanLII) at para 65, aff'd 2002 FCA 239). The public has an interest in non-interference with the decision-making process of administrative decision makers, and the public interest favours the expeditious resolution of administrative proceedings.

[92] I acknowledge that the doctrine of exhaustion of administrative remedies contemplates certain exceptions. However, the range of situations that allow for the general rule to be set aside are narrow and the threshold for exceptionality is high (*CB Powell* at para 33). Exceptional circumstances may emerge in very rare decisions where a court grants a writ of prohibition or an injunction against administrative decision makers before or after the administrative process has begun. Conversely, the fact that an important legal issue is at stake or that concerns about procedural fairness arise do not allow the Court to expand the exception to the rule against the judicial review of interlocutory administrative decisions (*CB Powell* at para 33; *Singh v Canada*

(Public Safety and Emergency Preparedness), 2017 FC 683 at para 35). In addition, the presence of challenges raising jurisdictional grounds does not open the door to early recourses to the courts (*CB Powell* at paras 39-40).

[93] In the case of Cpl. Letnes, the decision to be issued by the RCMP in his discharge has yet to occur. In this administrative process, Parliament has assigned decision-making authority to the RCMP and various administrative officials, not to the courts. Absent extraordinary circumstances, which are not present here, parties must exhaust their rights and remedies under this administrative process before pursuing a recourse to the courts. In this case, Cpl. Letnes should follow the discharge process and the internal appeal mechanism available to him. For all those reasons, Cpl. Letnes' Application for an injunction is premature as the ordinary administrative process ought to be followed, rather than this Court pre-empting the RCMP's jurisdiction (*CB Powell* at paras 32-33). The existence of this administrative process again tips the balance of convenience in favour of the AGC and against the issuance of an injunction at this premature stage.

[94] I pause to observe that, in a similar matter referred to by Cpl. Letnes, namely *Picard*, the Court recently granted the AGC's motion to strike the application for judicial review. The Court noted that, as of the date of hearing the motion to strike Mr. Picard's application, the discharge appeal process before the RCMP was yet to be concluded as the appeal adjudicator had not rendered a final decision. The Court agreed that Mr. Picard's application was premature as Mr. Picard had failed to exhaust the adequate remedies available to him under the RCMP's internal administrative process, that Mr. Picard had an adequate and effective alternative remedy, and

that there were no exceptional circumstances warranting a departure from the principle of judicial non-interference with ongoing administrative process and the doctrine of exhaustion. I should point out that, in that case, Mr. Picard was at a much farther stage of the RCMP discharge process than Cpl. Letnes, as Mr. Picard had filed an appeal of the discharge issued against him.

[95] In the end, the protection of the integrity of the process contemplated in the RCMP Act and the ER Order, the public interest and the prematurity of Cpl. Letnes' recourse tilt the balance of convenience in favour of the AGC, not Cpl. Letnes. This is especially true in a context where, conversely, Cpl. Letnes' alleged harm resulting from a denial of the injunction is not supported by sufficiently convincing evidence and is speculative. In those circumstances, when the harm expected to be suffered by Cpl. Letnes in the absence of the injunction is compared to the harm expected to be caused to the AGC, the RCMP and the public interest by the injunction, there is no doubt in my view that the balance of convenience lies with the AGC and does not favour granting the interlocutory injunction sought by Cpl. Letnes.

[96] The third element of the *RJR-MacDonald* test is accordingly not satisfied either.

C. *The just and equitable requirement*

[97] The last element that I need to cover is the just and equitable requirement as, on a request for an interlocutory injunction, the ultimate focus of the Court must always be on the justice and equity of the result in light of the particular context of each case (*Google* at para 25; *Unilin Beheer BV et al v Triforest Inc*, 2017 FC 76 at para 12).

[98] In the circumstances of this case, I have no hesitation to conclude that it would not be just and equitable to issue the injunction sought by Cpl. Letnes, and this is not an appropriate case to exercise my discretion in his favour. The elements that support this conclusion are: the fact that Cpl. Letnes is seeking in this injunction application a relief different from his underlying recourse before the CHRT; the absence of a demonstrated irreparable harm; and the various factors, including the RCMP's public interest mandate and the prematurity of Cpl. Letnes' Application, that tilt the balance of convenience in favour of the AGC.

[99] The issues raised by Cpl. Letnes in this injunction application are clearly better left for the RCMP to decide in its own process. On an interlocutory application, a court has neither a full record of the evidence to be heard nor sufficient time to properly weigh that evidence. The legal and factual issues raised by Cpl. Letnes are complex and there is not enough legal merit to his injunction application to justify the extraordinary intervention of this Court in making the order sought at the interlocutory stage, without a hearing on the merits. This Court should not, on an application for an interlocutory injunction, supplant the statutorily-mandated decision of the RCMP and prevent it from exercising its authority. What is just and equitable in the circumstances of this case is to leave the issue in the RCMP's hands, bearing in mind that its decisions will remain subject to the scrutiny of the courts.

IV. <u>Conclusion</u>

[100] For all the above-mentioned reasons, I find that Cpl. Letnes has not met the conjunctive tripartite test articulated in *RJR-MacDonald* to justify the granting of the interlocutory injunction he is seeking. On the basis of the evidence before me, I find that he has not provided clear,

compelling and non-speculative evidence of irreparable harm, and that the balance of convenience does not favour granting the injunctive relief he is seeking. Having considered the evidence, the nature and attributes of the relief sought, the absence of non-speculative irreparable harm, the broader public interest considerations regarding the RCMP's mandate and authority, and the prematurity of the Application, I conclude that it would not be just and equitable, in the circumstances of this case, to grant the injunctive relief sought by Cpl. Letnes. There are no exceptional circumstances justifying the exercise of my discretion in his favour.

[101] In the circumstances of this case, the AGC is entitled to costs, which I will fix to a lump-sum amount of $500, all inclusive.

JUDGMENT in T-343-19

THIS COURT'S JUDGMENT is that:

1. The application for an interlocutory injunction is dismissed.

2. Costs in the all-inclusive, lump-sum amount of $500 are awarded to the Attorney General of Canada.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-343-19
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APPEARANCES:

Ryan Thomas Letnes	FOR THE APPLICANT (ON HIS OWN BEHALF)
Sarah Eustace	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT