Federal Court  Cour fédérale

Date: 20190524

Docket: T-563-19

Citation: 2019 FC 737

Ottawa, Ontario, May 24, 2019

PRESENT: Madam Justice Roussel

BETWEEN:

LESTER MARTELL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Introduction

[1] The Applicant, Mr. Lester Martell, is the holder of an Owner-Operator licence which authorizes him to fish lobster in Nova Scotia. He has held this licence since 1978 and has fished the licence personally, on a full-time basis, until a medical condition prevented him from doing so. Indeed, since 2009, Mr. Martell has received authorization to use a substitute operator given his inability to be on the fishing vessel full-time. On or around March 6, 2019, the Deputy

Minister of the Department of Fisheries and Oceans Canada [DFO] denied Mr. Martell's request for a further extension of his use of a medical substitute operator.

[2] On April 2, 2019, Mr. Martell filed a notice of application for judicial review in this Court wherein he seeks, *inter alia*, 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] As the lobster fishing season for Lobster Fishing Area 30 [LFA 30] was set to commence on May 18, 2019, Mr. Martell brought this motion, pursuant to section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7 and subsection 373(1) of the *Federal Courts Rules*, SOR/98-106. He seeks an order staying the Deputy Minister's decision and, in the alternative, a mandatory interlocutory injunction ordering the DFO to authorize the use of a medical substitute operator.

[4] Mr. Martell's motion proceeded before me in Halifax, Nova Scotia on May 9, 2019. After hearing the submissions of both parties, I reserved judgment on Mr. Martell's motion. On May 17, 2019, I granted Mr. Martell's motion with reasons to follow.

[5] These are my reasons for granting Mr. Martell's motion for interlocutory relief.

II. Background

A. *The DFO's Owner-Operator Policy*

[6] Beginning in the 1970s, the DFO introduced over a period of time the Owner-Operator policy in Eastern Canada. The policy was formally adopted in 1989 across the entire Eastern Canada inshore and its key elements were incorporated into subsections 11(6) to 11(8) of the *Commercial Fisheries Licensing Policy for Eastern Canada, 1996* [1996 Policy].

[7] The goal of the Owner-Operator 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.

[8] Subsection 23(2) of the *Fishery (General) Regulations*, SOR/93-53 creates an exception to the Owner-Operator policy where the licence holder is unable to engage in the activity authorized by the licence "because of circumstances beyond the control of the holder or operator." In such circumstances, a fishery officer or a DFO employee engaged in the issuance of licences may, on the request of the licence holder or the holder's agent, authorize another person to carry out the activity authorized under the licence.

[9] 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. In particular, subsection 11(11) of the 1996 Policy provides guidance in instances where the licence holder is ill:

(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 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.	(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 médicaux appropriés, à désigner un exploitant substitut pour la durée du permis. Cette désignation ne peut être supérieure à une période de cinq années.

[10] In 2008, the DFO introduced flexibility in the application of the five (5) year limit in order to respond to a global economic downturn, and in the hopes of enhancing economic support for the industry.

[11] By 2015, the DFO resumed strict compliance of the five (5) year limit following concerns expressed by licence holders and their representatives, including the Canadian Independent Fish Harvester’s Federation in the inshore fleet, that the DFO’s substitute operator designations were being abused by some licence holders.

B. *Mr. Martell's Request for Authorization to Use a Medical Substitute Operator*

[12] Mr. Martell is eighty-five (85) years old. He has been fishing since 1947. He owns an Owner-Operator licence to fish lobster in LFA 30, situated on the Northeast coast of Nova Scotia. He employs four (4) full-time seasonal employees – three (3) deckhands and one (1) captain – who crew his vessel and assist him to fish the licence. Since holding the licence, he has fished it personally on a full-time basis up until 2009.

[13] In or around 2009, Mr. Martell began experiencing problems with his knees which caused him excruciating pain and difficulty with balance. He underwent knee replacement surgery in 2009 which resulted in surgical complications. In 2012, he underwent a second replacement surgery for his other knee. He continues to experience difficulties with his balance.

[14] In 2009, as a result of his knee problems, Mr. Martell requested and received authorization to use a medical substitute operator. His requests have been granted on a yearly basis since 2009 by the DFO.

[15] In May 2015, Mr. Martell received notice from the DFO that the approval for his request for the 2015 season extended beyond the five (5) year period set out in the 1996 Policy and that further approval would be assessed on a case-by-case basis.

[16] On May 10, 2016, Mr. Martell was advised that his request for a medical substitute operator for the 2016 season was approved but that future requests would not be considered.

[17] Pursuant to sections 34 and 35 of the 1996 Policy, Mr. Martell appealed this decision to the Maritimes Region Licensing Appeal Committee [MRLAC], arguing that he should be granted credit for some fishing seasons where he did in fact conduct fishing activities and requesting an extension to the five (5) year limit based on extenuating circumstances, including his ongoing management of the fishing activity and a lack of alternative employment opportunities. The MRLAC agreed and recommended that the 2017 year would count as his fifth (5^{th}) year for the purposes of the application of the five (5) year limit in the 1996 Policy. On May 17, 2017, the MRLAC granted authorization to use a medical substitute operator until June 30, 2017, but did not recommend that further extensions be approved.

[18] Mr. Martell appealed the MRLAC's recommendation to the Atlantic Fisheries Licensing Appeal Board [AFLAB] seeking the authorization to use a medical substitute operator up to and including the year 2021. During the appeal, and prior to the AFLAB making a recommendation to the Deputy Minister of the DFO, Mr. Martell was granted the authorization to use a medical substitute operator for the 2018 fishing season.

[19] During the appeal before the AFLAB, counsel for Mr. Martell submitted that the five (5) year limit and the decision made pursuant to it were arbitrary, unjust and unconstitutional for violating his right to equality under section 15 of the *Charter*.

[20] By letter dated March 6, 2019, the Deputy Minister of the DFO denied Mr. Martell's request for continued use of a medical substitute operator authorization. The Deputy Minister determined that the circumstances raised by Mr. Martell before the AFLAB, namely financial

hardship and his succession plan, did not constitute extenuating circumstances that would warrant making an exception to the 1996 Policy.

[21] On April 2, 2019, Mr. Martell filed an application for judicial review seeking various orders, including, *inter alia*, setting aside the Deputy Minister's decision and having him reconsider Mr. Martell's constitutionally protected rights to be free from discrimination pursuant to subsection 15(1) of the *Charter*.

[22] As the upcoming lobster season was set to commence on May 18, 2019, Mr. Martell brought this motion asking the Court to stay the Deputy Minister's decision pending the determination of his application for judicial review and, in the alternative, to grant a mandatory interlocutory injunction ordering the DFO to authorize him to use a medical substitute operator pending the final resolution of the application for judicial review.

III. Analysis

A. *Preliminary Matter*

[23] In its written submissions in response to Mr. Martell's motion, the Respondent, the Attorney General of Canada [AGC], identified two (2) issues: (1) whether Mr. Martell should be granted injunctive relief in the nature of *mandamus*; and (2) whether Mr. Martell can seek a stay of the Deputy Minister's decision to refuse the authorization for a medical substitute operator up to and including the 2021 fishing season.

[24] As Mr. Martell did not seek the issuance of a writ of *mandamus* in his motion, I do not intend to address the issue of whether or not the remedy of *mandamus* was available to Mr. Martell except to mention that it has its own requirements which are different from those of a mandatory injunction (*Madeley v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 634 at para 29).

B. *Test for Interlocutory Injunctions*

[25] In order to succeed on a motion seeking interlocutory injunctive relief, the moving party must meet the requirements of the conjunctive tripartite test articulated by the Supreme Court of Canada [SCC] in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 348-349 [*RJR-MacDonald*] which requires the moving party demonstrate that: (1) there is a serious issue to be tried; (2) the moving party will suffer irreparable harm if the relief is not granted; and (3) the balance of convenience favours the granting of the order.

[26] In *R v Canadian Broadcasting Corp*, 2018 SCC 5 [*CBC*], the SCC examined the framework applicable for granting mandatory interlocutory injunctions and held that the appropriate criterion for assessing the first factor of the *RJR-MacDonald* test is *not* whether there is a serious issue to be tried, but rather whether the moving party has shown a strong *prima facie* case (*CBC* at para 15). 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 a situation back to what it should be" (*CBC* at para 15). In some cases, it is also equivalent to the relief that would be requested at trial or, in this case, the underlying application for judicial review.

[27] Establishing a strong *prima facie* case entails showing a *strong likelihood* on the law and the evidence presented that, at trial or the underlying application, the moving party will be ultimately successful in proving the allegations set out in the originating notice (*CBC* at para 18).

[28] In the case before me, Mr. Martell has improperly characterized the mandatory interlocutory injunction as an alternative relief. He is essentially seeking an interlocutory order that will allow him to continue earning a livelihood pending the determination of his application for judicial review. A stay of the Deputy Minister's decision alone will not grant him the authorization he requires to use a medical substitute operator for the 2019 fishing season. However, the mandatory interlocutory injunction remedy, which compels action on the part of the DFO, can capture the relief Mr. Martell is seeking in his motion. Consequently, the mandatory interlocutory injunction will not be considered as an alternative relief. Hence, to be successful, Mr. Martell must demonstrate that he meets the elevated standard of a strong *prima facie* case that he will succeed on the underlying judicial review.

[29] Relying on the recent case of *Calin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 731 [*Calin*], Mr. Martell's counsel submits that the Court should not impose the elevated standard of mandatory injunctions set out in *CBC* and that he should only be required to demonstrate a likelihood or probability of success on the underlying application.

[30] In *Calin*, the Court considered whether it was appropriate to impose the exception to the serious issue test when applied to a mandatory interlocutory injunction for the release of a person held in detention pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27. The

Court held that the test in such circumstance should be at the level of a likelihood or probability of success of 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". It also noted that the individual's release from detention did not entail any "potential severe consequences" for the respondent besides concerns relating to the public interest, which were to be considered in the context of the balance of convenience factor (*Calin* at para 14).

[31] Mr. Martell argues that, similarly in his case, the steps to restore the status quo or otherwise put the situation back to what it should be are neither costly nor burdensome and require very little positive action on the part of the Deputy Minister.

[32] It is not necessary for me to determine whether a mitigated standard should apply in the circumstances of this case as I am of the view that the elevated standard articulated in *CBC* has been met.

(1) A strong *prima facie* case

[33] Mr. Martell submits the matter underlying the 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.

[34] Mr. Martell argues that he is limited by his medical condition/physical disability and that the decision of the Deputy Minister and by extension, the decision of the AFLAB, imposes differential treatment upon him in comparison to other licence holders. 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. According to Mr. Martell, it is widely recognized that the DFO's practice is to reissue to a given licence holder, each year, the licence held the previous year. The 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, he and others like him with a similar medical condition and physical disability must apply year after year for the authorization to use a medical substitute operator and are subjected to the five (5) year limitation found in the 1996 Policy. Like him, they face the risk of being forced to give up their licence in the event of a refusal as a way to mitigate their losses.

[35] Mr. Martell argues that the Deputy Minister's decision has the effect of denying 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. 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 Deputy Minister gives no effect to Mr. Martell's right to equal benefit of the law without

discrimination. Moreover, in the absence of some acknowledgment and accommodation of his disability, the decision is unreasonable and does not fall within the range of possible, acceptable outcomes.

[36] Based on the material before me, I am satisfied that the first criterion for obtaining a mandatory interlocutory injunction has been met. I reach this conclusion for a number of reasons.

[37] To begin with, the AGC fails to respond in its submissions to Mr. Martell's argument of discrimination, which therefore remains undisputed.

[38] Furthermore, there is nothing in the motion materials demonstrating that the Deputy Minister or the AFLAB considered Mr. Martell's discrimination argument or that a proper proportionality analysis was conducted under the *Doré/Loyola* framework balancing Mr. Martell's *Charter* protections and the objectives of the 1996 Policy. To the extent that this argument was raised by Mr. Martell on appeal to the AFLAB and that the issue was not considered by the Deputy Minister, there is a strong likelihood that the decision could be set aside on this basis alone.

[39] I have nevertheless considered the submissions of the AGC regarding the goals of the 1996 Policy in reaching my determination. I note from the affidavit filed by the AGC that one of the goals of the 1996 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, one of the purposes of creating policies to

achieve this goal was 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 1996 Policy, I note from Mr. Martell's affidavit that he continues to make all operational decisions related to the 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 of being on the fishing vessel full-time because of his medical condition or disability, his operations appear to be in line with the principles of the 1996 Policy.

[40] I have also considered that granting a mandatory interlocutory injunction in this case will in part grant Mr. Martell the relief he is seeking in the underlying application for judicial review, being the authorization to use a substitute operator for the 2019 lobster fishing season. However, upon review of the relief sought in the notice of application for judicial review filed by Mr. Martell, I note that in addition to seeking an order setting aside the decision of the Deputy Minister, he is also seeking an order declaring that subsection 11(11) of the 1996 Policy, and specifically the five (5) year limit for designating a substitute operator, discriminates against fishermen with disabilities and is contrary to subsection 15(1) of the *Charter*. I also note from the affidavit filed by the AGC that in his appeal to the AFLAB, Mr. Martell sought authorization to use a medical substitute operator up to and including the year 2021. As a result, I am satisfied that by ordering the DFO, through its authorized representative, to allow Mr. Martell to use a medical substitute operator, the interlocutory relief will not be determining the outcome of the underlying judicial review. Mr. Martell 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 2020 fishing season as well as for the subsequent seasons.

(2) Irreparable harm

[41] Under this second stage of the test, Mr. Martell submits that if the interlocutory relief he seeks is not granted, he will experience a substantial interference with his ability to earn a livelihood. Mr. Martell affirms in his affidavit that the income he receives from fishing this licence is a large portion of his total income. If he is unable to fish the licence by way of a substitute operator, he will not only forfeit the proceeds of the 2019 season which he estimates to be in the neighbourhood of $600,000.00 based on the value of the total catch for previous years, but also those for future seasons since he will have to transfer or sell his licence in order to mitigate his losses.

[42] Mr. Martell adds that if he is forced to transfer or sell his licence, it will be virtually impossible for him to re-acquire the licence or a similar licence. It is his understanding that the LFA 30 fleet is comprised of twenty (20) licence holders and that no LFA 30 licences have been sold in over ten (10) years. The loss of the licence may also result in the loss of his Core enterprise status designation, attached to his licence. This designation allows him to operate an enterprise with several licences on a vessel. Without the Core enterprise status designation, the market of purchasers is very limited.

[43] Finally, Mr. Martell indicates in his affidavit that he wishes to keep the licence in his family. His grandchildren are currently attending university and wish to enter the fisheries when

they have finished their education. He intends to transfer the licence to one of his grandchildren when they reach a suitable age and meet the necessary criteria set by the DFO to hold the licence. If forced to transfer the licence, he will be unable to carry out his succession plan for the benefit of his family.

[44] In response, the AGC submits that to establish irreparable harm, Mr. Martell must lead clear and non-speculative evidence which goes beyond mere assertions and that the threshold is not lessened by the allegation that the Deputy Minister's decision is discriminatory. I agree. General assertions cannot establish irreparable harm. Moreover, irreparable harm refers to the *nature* of the harm rather than its *magnitude*. Additionally, irreparable harm is harm that cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other (*RJR-MacDonald* at 341; *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at paras 15-16).

[45] The AGC also submits that Mr. Martell has not established that he will suffer irreparable harm given that the nature of the harm he complains of, namely his livelihood, can be quantified in monetary terms.

[46] Relying on the SCC decision in *Canada (Attorney General) v Hislop*, 2007 SCC 10 at paragraphs 102 and 103 [*Hislop*], Mr. Martell opposes this argument by contending that if he is successful on the 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, it is a general rule of public law that "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).

[47] While I agree that Mr. Martell's economic loss for the 2019 fishing season can be quantified on the basis of the value of previous years, Mr. Martell's evidence is undisputed that if he is not authorized to use a substitute operator for the 2019 fishing season, the amount of the loss will be significant and he will have to either transfer or sell his licence. It is also undisputed that the number of licence holders in the LFA 30 fleet is comprised of twenty (20) licence holders and no LFA 30 fleet licences have been sold in over ten (10) years. I am satisfied that the sale or transfer of Mr. Martell's licence will constitute irreparable harm to Mr. Martell who has been fishing the licence since 1978 and who, in all likelihood will be limited in pursuing other employment opportunities and deprived of future income.

[48] Moreover, I consider the inability to carry out one's succession plan to constitute irreparable harm that can support an application for a mandatory interlocutory injunction, providing the other criteria are met.

[49] For these reasons, I am satisfied that Mr. Martell will suffer irreparable harm if the interlocutory relief is not granted.

(3) Balance of convenience

[50] Under the third part of the test, Mr. Martell argues that the balance of convenience favours awarding the relief as substantially greater harm will be done to him than to the DFO or the public interest if the requested relief is not granted. Granting him the medical substitute operator authorization would not impose any additional financial or administrative burdens on the DFO staff or the Deputy Minister. Further, there is little to no public interest in allowing the Deputy Minister's decision to stand pending the judicial review.

[51] In response, the AGC submits that the balance of convenience must favour the DFO. In support of its argument, the AGC contends that it is within Parliament's authority to manage the fishery on social, economic or other grounds, in conjunction with steps to conserve, protect, and harvest the reserve. The 1996 Policy was adopted pursuant to that broad authority which provides broad discretion to the Minister of the DFO to manage fisheries in the public interest, and in this case, 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. To do so, licence holders must personally fish the licence issued in their name. The 1996 Policy applies to any and all licence holders for the sake of protecting all affected stakeholders, not only those conducting fishing activities in LFA 30. In this case, Mr. Martell has been able to use a medical substitute operator designation since 2009.

[52] I find that in the circumstances of this case, the balance of convenience favours Mr. Martell. 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. Martell has been fishing under this licence since 1978 and that he has been authorized to use a medical substitute operator since 2009. Throughout his appeals, he has been granted authorization to continue using a medical substitute operator. In my view, the granting of interlocutory relief allowing him to continue to do so will be maintaining the status quo. It has not been demonstrated that granting the requested interlocutory relief will have any additional or undue impact on the DFO and the lobster fishery industry.

[53] The same cannot be said for rejecting Mr. Martell's motion.

[54] If Mr. Martell is successful on his underlying application for judicial review, the immediate and continuing irreparable harm that arises from the inability to fish the 2019 season outweighs the inconvenience suffered by the DFO.

IV. Conclusion

[55] For these reasons, I am satisfied that Mr. Martell 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 the application for judicial review. Mr. Martell has also met the elevated threshold of establishing a strong *prima facie* case, as elaborated in *CBC*, justifying the grant of a mandatory interlocutory injunction which effectively authorizes Mr. Martell to use a medical substitute operator for the upcoming 2019 lobster season in LFA 30.

ORDER in T-563-19

THIS COURT ORDERS that:

1. The Applicant's motion is granted;
2. The decision of the Deputy Minister of the Department of Fisheries and Oceans Canada made on or around 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 application for judicial review has been made;
3. The Department of Fisheries and Oceans Canada, through its authorized representative, shall authorize the Applicant to use a medical substitute operator for the upcoming 2019 lobster season in Lobster Fishing Area 30 until a final determination of the application for judicial review has been made;
4. Costs shall be payable to the Applicant and they shall be assessed in accordance with Column III, Tariff B of the *Federal Courts Rules*, SOR/98 106.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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