Federal Court  Cour fédérale

Date: 20190829

Docket: T-721-19

Citation: 2019 FC 1116

Ottawa, Ontario, August 29, 2019

PRESENT: Mr. Justice Gascon

BETWEEN:

THE AHOUSAHT FIRST NATION,
THE EHATTESAHT FIRST NATION,
THE HESQUIAHT FIRST NATION,
THE MOWACHAHT/MUCHALAHT FIRST NATION,
AND THE TLA-O-QUI-AHT FIRST NATION

Applicants

and

THE MINISTER OF FISHERIES AND OCEANS
AND CANADIAN COAST GUARD

Respondent

and

WEST COAST TROLLERS (AREA G) ASSOCIATION AND
SPORT FISHING INSTITUTE OF BRITISH COLUMBIA (SFI)

Intervenors

ORDER AND REASONS

I. Overview

[1] The Applicants, the Ahousaht, Ehattesaht, Hesquiaht, Mowachaht/Muchalaht and Tla-O-Qui-Aht First Nations [together, Five Nations or Applicants], are five of the 14 First Nations comprising the Nuu-chah-nulth cultural and linguistic group located on the West Coast of Vancouver Island [WCVI].

[2] On August 2, 2019, the Five Nations brought a motion, pursuant to section 18 of the *Federal Courts Act*, RSC 1985, c F-7 and Rule 373 of the *Federal Courts Rules*, SOR/98-106 , to be granted an interlocutory injunction against the Minister of Fisheries and Oceans and Canadian Coast Guard [Minister], as follows:

> a. An interim or interlocutory injunction enjoining the Minister from opening or continuing the opening of the commercial Area G salmon fishery and/or the recreational fishery for the harvest of WCVI Aggregate Abundance Based Management [AABM] chinook without allowing the Applicants to continue fishing commercially for AABM chinook pursuant to their established aboriginal right to do so as protected by subsection 35(1) of the *Constitution Act, 1982* for at least an additional 5,000 pieces of AABM chinook;
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> b. Costs; and
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> c. Such other relief as this Court deems just.

[3] The injunction motion stems from the Five Nations' application for judicial review of a decision [Decision] of the Minister dated March 31, 2019 approving and adopting the "Five Nations Multi-Species Fishery Management Plan, March 31, 2019-March 31, 2020" [Fishery

Management Plan]. In their underlying application for judicial review, the Five Nations seek the following remedies:

> a. A declaration that the Fishery Management Plan fails to offer the Applicants the opportunity to exercise their aboriginal rights [Aboriginal Rights], as established in proceedings before the British Columbia Supreme Court [BCSC], Vancouver Registry No. 8033335, in a manner that:
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> a. remedies the general and specific findings of unjustified infringement of the Aboriginal Rights [Unjustified Infringements] as found and declared by the BCSC pursuant to its Reasons for Judgment [2018 Reasons] and Order [2018 Order] dated April 19, 2018 [collectively, 2018 Judgment]; or
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> b. is otherwise consistent with the 2018 Judgment;
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> b. In the alternative, a declaration that portions of the Fishery Management Plan fail to offer the Applicants the opportunity to exercise their Aboriginal Rights in a manner that remedies some or all of the Unjustified Infringements or that is otherwise consistent with the 2018 Judgment;
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> c. An interim or interlocutory injunction enjoining the Minister from enforcing some or all of the Fishery Management Plan against the Applicants or their members;
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> d. An interim or interlocutory injunction enjoining the Minister from authorizing or opening other fisheries (recreational, general commercial or both) that are inconsistent with or given priority over the Applicants' Aboriginal Rights;
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> e. An order quashing the Decision and/or the Fishery Management Plan or portions thereof; and
>
> f. Costs.

[4] In this motion, the Court is not tasked with deciding the merits of the Five Nations' underlying application for judicial review, but with assessing whether or not the requirements of

the test governing the issuance of interlocutory injunctions have been met. This is the only issue to be determined.

[5] The Five Nations submit that they satisfy 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. They claim that: 1) a serious issue to be tried has been raised in their underlying application; 2) they will suffer irreparable harm if the interlocutory injunction is not granted; and 3) the balance of convenience, which compares the harm they will suffer to the harm done to the Minister and other interested parties, as well as the public interest, favours them.

[6] The Minister responds that the Five Nations have failed to meet the tripartite *RJR-MacDonald* test, that the remedy sought is an inappropriate order of *mandamus* and that, in the circumstances, it would not be just and equitable to issue the interlocutory injunction. In an order dated August 9, 2019, the Court granted leave to intervene to The West Coast Trollers (Area G) Association [Association] and to the Sport Fishing Institute of British Columbia [SFI], for the purpose of the motion. The Association and the SFI filed affidavit evidence and written submissions and made oral submissions at the hearing of the motion, in opposition to the Five Nations' motion.

[7] The injunction motion proceeded before me in Vancouver, British Columbia on August 13 and 14, 2019. After hearing the submissions of all parties, I reserved judgment on the motion.

On August 16, 2019, I dismissed the Five Nations' motion, with reasons to follow. These are my reasons for dismissing the motion.

[8] Further to my review of the parties' written and oral submissions and of the evidence, I am not satisfied that the Five Nations have met the applicable conditions for the issuance of the interlocutory injunction they are seeking. Even if it is assumed that their underlying application raises a serious issue to be tried, they failed to demonstrate that they will suffer irreparable harm if the injunction is not granted, and if the Minister is not enjoined from continuing the commercial fishery and/or the recreational fishery for the harvest of WCVI AABM chinook salmon, without allowing them to continue fishing commercially for at least an additional 5,000 pieces. In addition, the balance of convenience does not tilt in their favour. Furthermore, the remedy sought by the Five Nations amounts to an order of *mandamus* for which the conditions are not met. In the circumstances, I conclude that this is not an exceptional situation where it would be just and equitable for the Court to intervene before the Five Nations' application for judicial review is heard on the merits, with the benefit of a full record.

II. Background

[9] The backdrop to this injunction motion spans many years of negotiations and litigation between the Five Nations and the Department of Fisheries and Oceans [DFO] regarding the Five Nations' aboriginal rights to harvest and sell fish on the WCVI. It results from the Five Nations' disagreement with the allocation of one particular subset of one species of fish, namely AABM chinook salmon [AABM Chinook], provided to them by DFO in the Minister's Fishery

Management Plan. As such, it relates to one very specific and discrete issue in the overall dispute between the Five Nations and DFO.

[10] This backdrop is complex and has given rise to lengthy court proceedings opposing the Applicants to the Minister and DFO [together, Canada] and to extensive decisions by the BCSC and other courts. What follows is a summary of the main factual elements relevant to this injunction motion.

[11] In reading these reasons, one must keep in mind that interlocutory reliefs are considered following a summary review of the issues, and on the basis of partial evidence. The reasons I am issuing today are not a definitive resolution to the Five Nations' on-going dispute with the Minister and DFO. Nor are they intended to provide answers to all of the questions raised by the Five Nations' application for judicial review. Far from it.

A. *AABM Chinook*

[12] This injunction motion relates solely to AABM Chinook. AABM Chinook is one of five salmon species harvested on the WCVI and covered by the Fishery Management Plan, along with Sockeye, Pink, Chum, and Coho salmon. Salmon is one of several species of fish subject to the Plan. Apart from salmon, the Fishery Management Plan notably applies to many species of groundfish, crab and prawn.

[13] AABM Chinook are mixed stocks of Chinook salmon that pass by the WCVI on their way to natal rivers in Washington and Oregon states as well as rivers in British Columbia

(including the Fraser River). The term "WCVI AABM" is used in the Pacific Salmon Treaty between Canada and the United States (and by the Minister) to manage this mixed stock fishery taking place along the WCVI. AABM Chinook is described as a mixed stock fishery as it is comprised of the Five Nations' rights-based commercial fishery, the recreational fishery sector and the "Area G" commercial troll fishery. Area G is the term used by DFO to describe the fishing region off WCVI. AABM Chinook are also harvested by the Five Nations for food, social and ceremonial [FSC] needs and under the Maa-nulth treaty for "domestic" (i.e., food and Indigenous barter) purposes [Maa-nulth Treaty].

[14] It is not disputed that AABM Chinook along the WCVI provide an important fishery to the Five Nations.

[15] Because of the transboundary nature of the AABM Chinook populations and the number of different fisheries in which they can be caught, the total number of AABM Chinook that can be harvested in the WCVI in a given year is set by the Pacific Salmon Commission [Commission] under the terms of the Pacific Salmon Treaty. The Pacific Salmon Treaty's primary goal is to ensure the conservation of all species of Pacific salmon. The Commission thus develops an abundance index that it uses to set a "Total Allowable Catch" each year to ensure conservation of the AABM Chinook populations [Canadian TAC]. On April 1 2019, the Commission determined the Canadian TAC for 2019 to be 79,900 pieces of AABM Chinook.

B. *2009 judgment*

[16] In a judgment issued in November 2009 by Madam Justice Garson [Garson Judgment], the BCSC established that the Five Nations hold aboriginal rights, protected by subsection 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 , to harvest any species of fish from their individual court-defined fishing territories to an extent of nine nautical miles offshore, and to sell that fish into the commercial marketplace [Aboriginal Rights] (*Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2009 BCSC 1494 at paras 486-489, 909).

[17] Apart from the Five Nations, no other First Nations have proven such aboriginal commercial fishing rights except for the Heiltsuk commercial right to harvest herring spawn on kelp, recognized by the SCC in *R v Gladstone*, [1996] 2 SCR 723 [*Gladstone*].

[18] In her judgment, Justice Garson also held that Canada had infringed the Applicants' Aboriginal Rights in its management of the Pacific fisheries. She, however, did not decide the question of justification, declaring instead that Canada had a duty to consult and negotiate with the Five Nations regarding how their newly-declared Aboriginal Rights could be accommodated and exercised. She set a period of time for consultation and negotiation and gave either party leave to return to the BCSC to have the question of whether Canada could justify its infringement determined. The Garson Judgment did not specifically impose limits on the scope and scale of the Five Nations' Aboriginal Rights, but did not define them precisely either.

[19] The Garson Judgment was upheld twice on appeal, with the exception of excluding one species, namely, geoduck clams, from the Aboriginal Rights.

C. *2018 judgment*

[20] Since negotiations were unsuccessful, the Five Nations turned to the BCSC to have the justification question decided. In a detailed judgment issued in April 2018 [Humphries Judgment],[1] Madam Justice Humphries released her decision on the justification proceeding, finding that some elements of how Canada managed the fisheries were justified, while others were not. The Humphries Judgment notably specified the scope and definition of the Five Nations' Aboriginal Rights and held that Canada had not justified its approach to allocating AABM Chinook to the Five Nations (*Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2018 BCSC 633 [*Ahousaht 2018*]).

[21] The Humphries Judgment clarified the interpretation to be given to the Five Nations' Aboriginal Rights (*Ahousaht 2018* at paras 414, 441). More specifically, the 2018 Order determined at paragraph 5 that the Aboriginal Rights are to be interpreted as follows:

> a. A non-exclusive, small-scale, artisanal, local, multi-species fishery, to be conducted in their court-defined area [CDA] for fishing, which extends nine nautical miles offshore, using small, low-cost boats with limited technology and restricted catching power, and aimed at wide community participation;
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> b. Providing predictable and long-term fishing opportunities; and

[1] The Humphries Judgment is what the Applicants defined as the 2018 Judgment in their application for judicial review.

> c. Allowing the sale of fish into the commercial marketplace with the opportunity, but not the guarantee, of sustainability and viability.

[22] Justice Humphries however held that it is not the court's role to design a fishery or to set allocations for each species of fish, and determined that "the task of allocating fishery resources belongs to the government" (*Ahousaht 2018* at paras 12, 836, citing *Gladstone* at pp 766-767).

[23] The Humphries Judgment also found that Canada could not justify its approach to allocating AABM Chinook to the Five Nations and its infringement of the Aboriginal Rights in that respect. Although Justice Humphries held that she could not make a determination of an exact allocation of AABM Chinook, she stated that a "generous approach" was required in the future for allocations of AABM Chinook and that DFO's method of allocation had to be revised (*Ahousaht 2018* at paras 1248-1249). The BCSC stated:

> […] a generous approach is required for allocations of AABM chinook, given the importance of that species to the plaintiffs, the lack of evidence of effects on the rest of the commercial fishery if the mitigation policy is not adhered to for this species, and the priority the plaintiffs have over the recreational fishery, despite the present Salmon Allocation Policy. While DFO makes a legitimate point that the mitigation policy is useful in terms of reconciliation, it may stand in the way of appropriate allocations if DFO chooses not to interfere with the recreational allocation for AABM chinook.
>
> The method of setting the present allocation for chinook, which has been based on the Salmon Allocation Policy and the mitigation policy, is not justified. It is up to the Minister to reassess DFO's approach to allocation of chinook with these principles in mind.

[24] The 2018 Order thus declared that it is an Unjustified Infringement of the Five Nations' Aboriginal Rights if DFO gives priority in allocation or in harvesting opportunities to the

recreational fishery over the Five Nations' exercise of their Aboriginal Rights to harvest and sell fish. The 2018 Order also declared, at paragraphs 8(g) and 9(a), that Canada's application of *An Allocation Policy for Pacific Salmon (October, 1999)* [Salmon Allocation Policy] which gave the recreational fishery priority over the Five Nations in allocation or in harvesting opportunities of fish in general and Chinook salmon in particular was an Unjustified Infringement. The Humphries Judgment stated that Canada was therefore required to reassess its approach to allocating AABM Chinook to the Five Nations.

[25] The 2018 Order otherwise declared that Canada's management of AABM Chinook fisheries was a justified infringement of the Applicants' Aboriginal Rights with regard to: (i) Canada's management of terminal Chinook salmon fisheries; (ii) Canada's decision to reject the Five Nations' request for 30% of the Canadian TAC for AABM Chinook on the WCVI; and (iii) Canada's decision to reject the Five Nations' request for an additional allocation of AABM Chinook for a winter fishery (2018 Order at paras 11(a), (b)).

[26] The 2018 Order further directed Canada to offer the Five Nations, by March 31, 2019, opportunities to exercise their Aboriginal Rights to harvest and sell salmon, groundfish, crab and prawn in their fishing territories in a manner that remedies the identified findings of Unjustified Infringements.

[27] On the issue of whether Canada had fulfilled its duty to consult, the BCSC held that there would be no purpose in deciding the question at that point, given that the duty was ongoing.

Justice Humphries stated that "DFO manages the fishery, but must consult on decisions and approaches of importance to the [Applicants]" (*Ahousaht 2018* at para 1221).

[28] The Five Nations appealed the Humphries Judgment and numerous elements of the 2018 Order made against them, and the BC Court of Appeal [BCCA] has not yet issued its decision.

D. *The Fishery Management Plan*

[29] Following the Humphries Judgment, DFO developed the Fishery Management Plan with the intention of complying with the terms of the 2018 Order and the findings contained in the Humphries Judgment.

[30] On November 30, 2018, the Minister provided the Five Nations with a draft Fishery Management Plan [Draft FMP]. In consultations that followed from November 2018 to March 2019, the Five Nations maintained that the entirety of the Draft FMP fell short of accommodating their established Aboriginal Rights in compliance with the terms of the Humphries Judgment. The Draft FMP notably included a formula based on a percentage of the Canadian TAC to determine the AABM Chinook allocations for the Five Nations. The Applicants considered that this formula would result in an allocation that would be inadequate and would not provide a viable fishery or a meaningful exercise of their rights. Throughout the consultations, they asked the Minister to explain how the AABM Chinook allocation formula had been arrived at and why the Minister considered the allocation to be appropriate to address the Five Nations' constitutionally-protected Aboriginal Rights. The Five Nations consider that

the Minister never provided a comprehensible explanation as to how DFO determined the AABM Chinook allocation or percentage.

[31] On March 31, 2019, the Minister delivered the finalized version of the Fishery Management Plan. For the 2018 and 2019 seasons, the allocation provided by the Minister to the Five Nations was calculated to be 12.17% of the Canadian TAC for AABM Chinook on the WCVI, after deduction of the Nuu-chah-nulth FSC needs and the Maa-nulth Treaty. This allocation to the Five Nations has priority over allocations to the recreational and the commercial Area G fisheries.

[32] The Minister is of the view that the Fishery Management Plan provides the Five Nations with opportunities to exercise their Aboriginal Rights to harvest and sell salmon (including AABM Chinook), groundfish, crab and prawn in a manner that remedies the Humphries Judgment's findings of Unjustified Infringements. The Five Nations disagree.

E. ***Allocations***

[33] Under the Fishery Management Plan, the allocation process works as follows for AABM Chinook. Once the Canadian TAC for AABM Chinook is determined by the Commission under the terms of the Pacific Salmon Treaty (i.e., 79,900 fish for the 2019 season), DFO is responsible for allocating the TAC among all fishers with either rights to, or interests in, harvesting AABM Chinook off the WCVI.

[34] DFO first allocates the number of AABM Chinook required to meet the Nuu-chah-nulth FSC needs on the WCVI, including for the Five Nations, and Canada's commitments for domestic fishing under the Maa-nulth Treaty. In 2019, DFO allocated 5,000 fish for FSC needs and 3,297 fish under the Maa-nulth Treaty. This left 71,603 AABM Chinook available for harvest by other fisheries.

[35] DFO then allocates what it estimates to be the AABM Chinook required to meet the needs of the Five Nations for the exercise of their constitutionally-protected Aboriginal Rights to harvest and sell fish commercially. For AABM Chinook, this estimate was established at 12.17% of the Canadian TAC after allocating for FSC needs and commitments under the Maa-nulth Treaty. In 2019, this equated to 8,714 fish. I observe that the Fishery Management Plan contains no explanation as to the reasons why DFO considers 12.17% of the Canadian TAC to be an appropriate allocation to address the Five Nations' Aboriginal Rights with respect to AABM Chinook. This meant that 62,889 AABM Chinook remained available for the recreational and commercial Area G fisheries in 2019.

[36] After allocating AABM Chinook for the Five Nations' rights-based fishery, DFO then allocates what is remaining of the Canadian TAC amongst recreational and commercial fishers. The Salmon Allocation Policy provides that recreational fishers receive priority in allocation for Chinook and Coho salmon, whereas commercial fishers get priority in allocation for Sockeye, Pink, and Chum salmon. As such, DFO next allocates AABM Chinook from the Canadian TAC to the recreational fishery based on its best estimate of what the recreational harvest will be that year. As long as the recreational fishery is expected to catch less than the remaining Canadian

TAC, there is no overall limit for the recreational fishery, though there is a daily limit of two AABM Chinook per day per recreational fisher on the WCVI. What eventually remains of the Canadian TAC, after the projected recreational harvest is deducted, is the quantity available for the general commercial Area G fishery and is referred to as the Commercial TAC.

[37] In 2019, DFO initially projected an expected recreational harvest of 50,000 AABM Chinook, which was the same expected catch for AABM Chinook as in previous years. This meant that the Commercial TAC was projected to be 12,889 AABM Chinook for 2019.

[38] After DFO had finalized the Fishery Management Plan, the Five Nations requested that they be allowed to fish five Area G commercial troll licenses outside their rights-based fishery and to reduce the allocation of AABM Chinook available in their rights-based fishery accordingly. Maintaining those licenses in the general commercial Area G fishery, though depriving more of their members of the opportunity to fish, was viewed by the Five Nations as necessary to provide a more predictable and potentially viable commercial fishery for at least a few fishers. DFO acceded to this request, which resulted in an approximate reduction of 2.34% (or 1,675 pieces) off the 12.17% allocated to the Five Nations for their rights-based fishery. This brought the allocation to the Five Nations to 9.83% of the Canadian TAC for AABM Chinook, or 7,039 pieces.

[39] As it is a residual number determined at the end of the allocation process, the Commercial TAC was subsequently raised by a corresponding amount of 1,675 fish to 14,564 pieces.

[40] At the end of July 2019, based on in-season catch information, DFO revised the projected recreational harvest of 50,000 AABM Chinook and lowered it to 40,000 pieces. Therefore, pursuant to the method of allocation established by the Fishery Management Plan, the Commercial TAC available for the Area G commercial fishery was automatically increased to 24,564 pieces, reflecting the downward revision of the expected recreational harvest by 10,000 fish.

[41] Before the Humphries Judgment and the introduction of the Fishery Management Plan, the Five Nations' yearly allocation for AABM Chinook was determined as a share of the Commercial TAC. In other words, DFO gave the recreational fishery priority in the allocation of AABM Chinook over the Five Nations' rights-based fishery. That is no longer the case. The Five Nations' 12.17% share of the Canadian TAC under the Fishery Management Plan now has priority in allocation over both the recreational and the general commercial fisheries. It is therefore unaffected by any adjustments that DFO makes about allocating the remaining AABM Chinook between the recreational and commercial fisheries.

F. ***Court challenges***

[42] No court has yet determined whether the Fishery Management Plan complies with the Humphries Judgment and the 2018 Order, or whether it remedies the Unjustified Infringements. The Five Nations claim that it does not. More specifically, the Five Nations have consistently maintained that the allocations for AABM Chinook are insufficient to provide for a viable rights-based commercial fishery for their communities, comprising a registered population of more than

5,000 members for all Five Nations. In 2019, 165 members have registered to participate in the AABM Chinook fisheries but in past years, the number has been as high as 229 members.

[43] The Five Nations have commenced two legal proceedings challenging various aspects of the Fishery Management Plan, including the allocation of AABM Chinook. On April 30, 2019, the Five Nations filed their application for judicial review before this Court, in which they seek a finding, among many others, that the Fishery Management Plan is inadequate to remedy the findings of Unjustified Infringements in the 2018 Order. They brought this injunction motion within this proceeding. On May 13, 2019, the Five Nations also filed a Notice of Civil Claim against the Minister before the BCSC.

[44] Since the Fishery Management Plan was issued by DFO, the Five Nations have also sent several letters to DFO expressing their concerns with the Plan, but DFO did not answer them to the Five Nations' satisfaction. In those letters, the Five Nations specifically took issue with DFO's approach to allocating AABM Chinook, asking for "significantly greater" opportunity. More particularly, on May 16, 2019, the Five Nations wrote to DFO regarding the AABM Chinook allocation for the recreational fishery, signalling their understanding that the commercial Area G sector was lobbying for a reduction in the recreational catch and a re-allocation of that reduced amount to the commercial sector. At that time, the Five Nations expressly requested an additional 5,000 pieces of AABM Chinook for 2019.

[45] At the end of July 2019, DFO responded that the Five Nations' request for an additional quantity of AABM Chinook would not be granted. In that response, Mr. Thomson, Regional

Director of the Fisheries Management branch at DFO, indicated that no additional allocations of AABM Chinook were available to the Five Nations in advance of the "reconciliation agreement."

G. *Current status*

[46] On July 15, 2019, DFO opened the Five Nations' rights-based opportunity to harvest AABM Chinook. The offshore recreational fishery was permitted to fish AABM Chinook on the same date. Approximately two weeks later, on August 1, 2019, DFO opened the regular commercial Area G fishery for AABM Chinook on the WCVI.

[47] At the time of the hearing before this Court, Mr. Thomson estimated that the updated catch for the Five Nations rights-based fishery for AABM Chinook up to the end of August 5, 2019 was 6,144 out of their total allowable catch of 7,039 for the 2019 season. After the closure of the fishery on August 12, 2019, Ms. Gagne, the T'aaq-wiihak Fisheries Manager, estimated that only 477 pieces of AABM Chinook remained to be fished by the Five Nations. The commercial sector allowance of 20,000 AABM Chinook was achieved around August 8, 2019, with the remaining 4,564 pieces to be harvested in September.

III. Analysis

A. *The test for granting an interlocutory injunction*

[48] 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 *Robinson v Attorney General of Canada*, 2019 FC 876 [*Robinson*] at paras 56-82; *Okojie v Canada (Citizenship and Immigration)*, 2019 FC 880 [*Okojie*] at paras 61-93).

[49] 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.

[50] 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). 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). However, this does not mean that one of the three compartments can be completely empty and compensated by the other two being filled to a higher level. None of the elements of the test can be entirely left aside to be rescued by the other two.

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

[52] 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.

[53] A motion for an interlocutory injunction like this one ultimately turns on its facts. When all the circumstances are considered, the motion materials and the evidence must convince me that, on a balance of probabilities, the three components of the test are met 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).

B. *Preliminary remarks*

[54] Before turning to the requirements of the *RJR-MacDonald* test, the specific injunctive relief sought by the Five Nations in this case calls for two preliminary remarks. These observations do not fit squarely within one of the three components of the *RJR-MacDonald* test, and I consider that it is better to deal with them at the outset, before considering the test itself.

[55] The remedy sought by the Five Nations in this case is labelled as an "interim or interlocutory injunction." The injunction motion asks the Court for an order "enjoining the Minister from opening or continuing the opening" of the commercial and/or the recreational fisheries for AABM Chinook "without allowing" the Five Nations to continue fishing commercially for at least an additional 5,000 pieces. It is therefore a recourse having a dual dimension: a prohibitive injunction linked to a request mandating a specific course of action by the Minister. The conclusion seeking an additional allowance of 5,000 AABM Chinook is the key element of the recourse and the essence of what the Five Nations want to obtain. I note that no alternative conclusions or remedy have been mentioned in the injunction motion or voiced by the Five Nations in their submissions before this Court.

[56] As formulated, the Five Nations' injunction motion raises two fundamental problems which, in light of the overarching exceptional nature of interlocutory injunctive reliefs, are sufficient reasons to refrain from exercising my discretion in favour of the Five Nations and to dismiss the motion. First, the injunction motion goes beyond and differs from what is sought by the Five Nations in their underlying judicial review, in terms of the remedy itself and of the "established aboriginal right" invoked. Second, the main relief sought is a remedy in the nature of an order of *mandamus*, as opposed to an interlocutory injunctive relief.

(1) The scope of the injunction sought

[57] In their injunction motion, the Five Nations are asking for a remedy that goes beyond what they are actually seeking in their underlying application for judicial review. This is not what interlocutory injunctions are intended to accomplish.

[58] One should not lose sight of the fundamental nature of an injunction and its relation to a cause of action or an application. The right to obtain an interlocutory injunction is merely ancillary and incidental to a pre-existing cause of action or application. An injunction does not have an independent life of its own but is instead a remedy attached to an underlying action or application. As the SCC reminded in *CBC*, an injunction is generally "a remedy ancillary to a cause of action" [emphasis in original] (*CBC* at para 24, citing *Amchem Products Inc v British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897 at p 930). Mr. Justice Sharpe (writing extrajudicially) echoed this principle when he noted that "[i]nterlocutory injunctions are 'a prophylactic measure associated directly with the ongoing case' whereas 'permanent injunctions are of a different order and amount to a final adjudication of rights'" (Robert Sharpe J., *Injunctions and Specific Performance*, 4th ed (Toronto: Canada Law Book, 2012) [*Sharpe*] at paras 1.40 and 1.60). That is, an interlocutory injunction is a preservative and precautionary remedy intimately linked to an on-going matter, be it an action or an application.

[59] Given the accessory nature of interlocutory injunctions, and the direct connection they must have with an underlying action or application, the courts will be hesitant to use their discretion to grant such an exceptional relief when a moving party, by way of an interlocutory injunction, asks for more relief and remedy than what it is seeking in the underlying action or application. Put differently, it will hardly be just and equitable for a court to issue an interlocutory injunction if the moving party is in fact claiming more, as interlocutory relief, than what it is asking the court in its underlying action or application.

[60] This is what the Five Nations are attempting to obtain through this injunction motion. The main mandatory relief they are seeking (i.e., the allocation of 5,000 additional AABM Chinook) is not contemplated in their underlying judicial review. In addition, in support of such expanded relief, they are invoking a right which, in view of its terms, differs from and expands beyond the Aboriginal Rights referred to in their underlying application.

[61] The Five Nations do not have any mandatory conclusions in their underlying application of judicial review. They are not seeking conclusions compelling the Minister to allow them to continue fishing commercially for at least a certain additional amount of AABM Chinook, or in fact for any particular species of fish. Nor are they asking the Court to modify the Fishery Management Plan or to amend it in order to be granted specific allocations or quantities of fish. I further observe that the Five Nations are not seeking a judicial review of DFO's late July 2019 decision which refused their specific request for a new allocation of 5,000 AABM Chinook in the middle of the season.

[62] Pursuant to their judicial review application, the Five Nations are only asking the Court to declare that the Fishery Management Plan or portions of it fail to offer them the opportunity to exercise their Aboriginal Rights in a manner that remedies some or all of the Unjustified Infringements or that is otherwise consistent with the Humphries Judgment. They are also asking for an injunction enjoining the Minister from enforcing some or all of the Fishery Management Plan against them or from authorizing or opening other fisheries (recreational, general commercial or both) that are inconsistent with or given priority over the Five Nations'

Aboriginal Rights. But nowhere are they asking the Court to compel the Minister to do what they are seeking to obtain at an interlocutory stage.

[63] In the same vein, the injunction motion relates to one specific species of fish, namely, AABM Chinook, and rely on an alleged "established aboriginal right" to continue fishing commercially for a certain minimum quantity of that specific species. Again, this alleged aboriginal right differs from the Aboriginal Rights described in the underlying application for judicial review. The Aboriginal Rights expressly referred to in support of the application for judicial review are the Aboriginal Rights as they are defined and described in the Humphries Judgment. As indicated at paragraph 5 of the 2018 Order, these are rights to fish and sell fish commercially in the context of a non-exclusive, small-scale, artisanal, local, multi-species fishery. These rights, as currently defined, are not attached to a specific species or quantity of fish, or sliced up by species. All the remedies sought by the Five Nations in their judicial review application are in relation to their Aboriginal Rights as defined in the Humphries Judgment.

[64] In other words, the Aboriginal Rights being claimed by the Five Nations appear to have morphed between the application for judicial review and the injunction motion. The constitutionally protected Aboriginal Rights are not for a specific species of fish in a specific numerical quantity.

[65] In my view, it would defeat the purpose and objective of interlocutory injunctive relief if a moving party seeking an interlocutory injunction could invoke rights that are different and go further than the rights forming the basis of the underlying application or cause of action.

(2) The *mandamus* dimension

[66] The second fundamental problem with the Five Nations' injunction motion is the remedy itself. I agree with the Minister that what the Five Nations are in fact seeking, through their conclusions asking the Court to compel the Minister to give them an additional allocation of 5,000 AABM Chinook, is an order of *mandamus*, namely a judicial remedy in the form of an order forcing the Minister to perform a public duty. It is not an injunctive relief.

[67] A *mandamus* is not to be confused with a mandatory injunction. And once again, the difference goes back to the fundamental nature of injunctive reliefs.

[68] An interlocutory injunctive relief is a preservative remedy essentially aimed at maintaining the *status quo* pending the hearing of an action or application on the merits. No matter whether the interlocutory injunction sought is prohibitive or mandatory, this defining feature of interlocutory injunctive relief remains. Mr. Justice Sharpe underlined the restorative nature of injunctions while speaking of mandatory injunctions: "[a] mandatory injunction may be given to remedy past wrongs and require the defendant to undo some wrong he or she has committed. Such orders are restorative in nature, requiring the defendant to take whatever steps are necessary to repair the situation in a manner consistent with the plaintiff's rights" [emphasis added] (*Sharpe* at para 1.10).

[69] As the SCC said in *CBC*, while a mandatory interlocutory injunction requires a defendant to do something as opposed to simply refrain from doing something, it nonetheless remains a

corrective, restorative measure: "[a] mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise 'put the situation back to what it should be,' which is often costly or burdensome for the defendant and which equity has long been reluctant to compel" [emphasis added] (*CBC* at para 15, citing *Sharpe* at para 2.640).

[70] The SCC refers to such mandatory interlocutory injunctions as providing "restorative relief." True, a mandatory interlocutory injunction requires a defendant to take a positive action, but these are restorative positive actions.

[71] In this case, this is not what the Five Nations are asking the Court to do in their injunction motion. They are not asking for a restorative, mandatory injunctive relief. They are instead asking for an order compelling the Minister to do something he has not yet done, and to adopt a new course of conduct. This is not an interlocutory injunctive relief. This is the very essence of an order of *mandamus*.

[72] Just as is the case for interlocutory injunctions, a *mandamus* is an extraordinary remedy having its own set of requirements. As correctly stated by the Minister, the basic principal requirements for the issuance of a writ of *mandamus* are well settled and have been outlined by the Federal Court of Appeal [FCA] in *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 [*Apotex*] at para 45, aff'd [1994] 3 SCR 110. These conditions are cumulative and they must all be satisfied before a court can consider issuing a writ of *mandamus* (*Rocky Mountain Ecosystem*

Coalition v Canada (National Energy Board) (1999), 174 FTR 17 at para 30 (FCTD)). These conditions were described as follows in *Apotex*, at pages 766-769:

1. There must be a public legal duty to act.

2. The duty must be owed to the applicant.

3. There is a clear right to the performance of that duty, in particular:

   (a) the applicant has satisfied all conditions precedent giving rise to the duty;

   (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay;

4. Where the duty sought to be enforced is discretionary, the following rules apply:

   (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";

   (b) *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";

   (c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;

   (d) *mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

   (e) *mandamus* is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.

5. No other adequate remedy is available to the applicant.

6. The order sought will be of some practical value or effect.

7. The Court in the exercise of its discretion finds no equitable bar to the relief sought;

> 8. On a "balance of convenience" an order in the nature of *mandamus* should (or should not) issue.
>
> [citations omitted]
>
> (see also *Canada (Health) v The Winning Combination Inc*, 2017 FCA 101 at para 60; *Lukacs v Canada (Transportation Agency)*, 2016 FCA 202 at para 29; *Complexe Enviro Progressive Ltée v Canada (Transport)*, 2018 FC 1299 at paras 68-70)

[73] An order for *mandamus* can compel the performance of a clear affirmative legal duty by a public authority such as the Minister, but only when all the conditions set out in *Apotex* are met. Conversely, an order for *mandamus* cannot compel the exercise of a discretion in a particular way, and cannot dictate the result to be reached (*Canada (Chief Electoral Officer) v Callaghan*, 2011 FCA 74 at para 126).

[74] In light of the foregoing, I agree with the Minister that the well-recognized conditions for the issuance of a *mandamus* are not met in this case and have not been established by the Five Nations. The underlying authority of the Minister to allocate fish is discretionary under the *Fisheries Act*, RSC 1985, c F-14 [*Fisheries Act*], and the Court cannot dictate the result of the exercise of the Minister's discretion. Furthermore, the Five Nations do not have a vested right in the performance of the positive duty they are seeking to compel the Minister to undertake, namely to allocate them an additional quantity of 5,000 AABM Chinook. I observe that, in their written and oral submissions, the Five Nations have not responded or challenged the Minister's submissions on this issue of *mandamus*.

[75] For all those reasons, this is not a situation where the key remedy sought by the Five Nations in this case is available and could be granted by the Court.

[76] I will briefly come back to these two points when I discuss whether granting the injunction sought by the Five Nations is just and equitable in the circumstances of this case. But they both militate against exercising my discretion in favour of the Five Nations to issue the exceptional interlocutory injunctive relief they are seeking. While these findings would arguably be sufficient to dismiss the Five Nations' injunction motion, I will nonetheless review the *RJR-MacDonald* requirements as the motion also fails under that test.

C. *The RJR-MacDonald requirements*

(1) Serious issue to be tried

[77] The first element of the tripartite test is whether the motion materials and the evidence before the Court are sufficient to satisfy me, on a balance of probabilities, that the Five Nations have raised a serious issue to be tried. I underline that the question here relates to a preliminary assessment of the strength of the Five Nations' case in their underlying application for judicial review (*CBC* at para 25), namely their various requests for declaratory and prohibitive injunctive reliefs in relation to the Fishery Management Plan. 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).

[78] As I have stated in *Okojie*, I am of the view that the serious issue to be tried can give rise to one of three different thresholds (*Okojie* at paras 69-87). The usual and general threshold is a low one, in which case the court should not engage in an extensive review of the merits, once the motion judge is satisfied that the underlying application is neither frivolous nor vexatious (*RJR-*

MacDonald at pp 338-339). 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. For mandatory interlocutory injunctions, the SCC has established in *CBC* that a heightened threshold of a "strong *prima facie* case" applies, and has 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).

[79] The Five Nations submit they meet whatever threshold would apply to their injunction motion. They claim that there is a serious issue to be tried, notably with respect to the following questions raised in their underlying application: 1) whether the AABM Chinook allocation under the Fishery Management Plan complies with the 2018 Order and remedies the Unjustified Infringements of their established Aboriginal Rights, considering the fact that, with the Minister's new methodology, there has been no material change to the Five Nations' effective allocation of AABM Chinook, in actual numbers; 2) the failure of the Minister to explain his methodology to establish the allocations of AABM Chinook to the Five Nations; 3) whether the approach taken by the Minister constitutes a "generous approach" as directed in the Humphries Judgment; and 4) whether the Minister has demonstrated that it consulted with the Applicants with respect to the proposed measures, that it has accorded priority to the Five Nations' Aboriginal Rights and that it has minimally impaired these rights.

[80] In his written submissions, the Minister did not challenge that there is a serious issue to be tried in the underlying judicial review application, notably in light of the questions raised in relation to the regulation of the fisheries, the Crown's duty to consult and the issues of accommodation of the Five Nations and the infringement of their rights.

[81] As the detailed submissions of the parties illustrate with eloquence, the issues in the underlying application for judicial review raise complex questions of interpretation with respect to the Humphries Judgment and detailed factual assessments in relation to the terms and conditions of the Fishery Management Plan and its implementation. Given my findings on the other two branches of the *RJR-MacDonald* test, I do not need to expand further on the serious issue to be tried and, for the purpose of this injunction motion, I will simply assume that at least one serious issue exists.

(2) Irreparable harm

[82] 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 the Five Nations have provided sufficiently clear, convincing and cogent evidence that, on a balance of probabilities, they will suffer irreparable harm between now and the time their underlying application for judicial review is disposed of, should the interlocutory injunction be denied.

(a) *Legal test*

[83] 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).

[84] 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 will suffer irreparable harm if the injunction or the stay is denied (*US Steel* at para 7; *Centre Ice Ltd v National Hockey League* (1994), 53 CPR (3d) 34 (FCA) at p 52). 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).

[85] 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).

[86] The requirement for proof of non-speculative harm applies even where an applicant contends that the impugned conduct is based on allegations of unconstitutionality (*International Longshore and Warehouse Union, Canada v Canada (Attorney General)*, 2008 FCA 3 at para 26; *Ahousaht First Nation v Canada (Fisheries and Oceans*), 2015 FC 253 [*Ahousaht 2015*] at para 23).

[87] I pause to note that, in their written submissions, the Five Nations argued that clear proof of irreparable harm is not required and that courts have cautioned against requiring claimants to prove to a high degree of certainty of harm or that harm is highly likely to occur, relying on a precedent of this Court citing *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2017

BCCA 395 [*Vancouver*]. In that case, the BCCA overturned an interlocutory injunction which had been issued in the context of the respondent's copyright and breach of contract claims.

[88] In my view, the *Vancouver* decision is not contrary to the principles established by the FCA and which I have summarized above and in *Robinson* and *Okojie*. In fact, the BCCA effectively followed the FCA's interpretation of irreparable harm to overturn the chambers judge's grant of interlocutory injunction. While it referred to some cautionary remarks of Canadian appellate courts on imposing a too stringent proof of irreparable harm, it ultimately espoused the FCA's interpretation in its application of the test. The BCCA specifically noted that the FCA interpreted that "the evidentiary foundation required to establish irreparable harm must be clear and non-speculative evidence that irreparable harm will occur if the injunction is not granted" (*Vancouver* at para 58). After referring to the caution expressed by certain Canadian appellate courts against holding the claimants to a too stringent test of certainty that irreparable harm will result, the BCCA stressed, in the immediately following paragraph, that "there surely must be a foundation, beyond mere speculation, that irreparable harm will result" and the need for a "sound evidentiary foundation" to support an interlocutory injunctive relief pending the trial of the issues [emphasis added] (*Vancouver* at para 60).

[89] The question for the Court is therefore whether the harm identified by the Five Nations is clear, convincing and not speculative, and reaches the level of irreparable harm defined by the FCA, as opposed to being a simple inconvenience. For the following reasons, the Five Nations' motion ultimately fails for want of adequate proof of such irreparable harm.

(b) *Claims of irreparable harm*

[90] The Five Nations submit that they will suffer irreparable harm in a number of ways, should the injunction be denied and they are not allowed to fish an additional amount of 5,000 AABM Chinook.

[91] In their Notice of Motion, the Five Nations state that, without access to the additional quantities of AABM Chinook they are seeking, they will be wrongfully precluded from exercising their constitutionally-protected right to fish and to sell fish, which is based on a practice that helps define who they are as aboriginal peoples. As such, they say that the inability to exercise this right impairs the very core of their culture and way of life, causing irreparable harm. They also argue that significant harm is caused to the objective of reconciliation and the honour of the Crown, due to the conduct of the Minister and his failure to respond to the Five Nations' concern about the inadequacy of the AABM Chinook allocation or engage with them in any meaningful way on this important concern. In their written submissions, the Five Nations express this as the loss of opportunity to be consulted and accommodated. The Five Nations further allege that the Minister's approach for the allocation of AABM Chinook causes an adverse impact on the actual exercise of their constitutionally-protected right to harvest AABM Chinook commercially.

[92] I pause to note that the constitutional context of their "established aboriginal right" is at the center of the Five Nations' claims of irreparable harm, and indeed permeates all the arguments advanced by the Five Nations on this front. Their evidence of irreparable harm is

contained in the affidavits of Ms. Gagne, Mr. Martin, Mr. Jackson and Mr. Webster filed in support of the injunction motion, and in the documents attached to them.

[93] Further to my review of the evidence, I am not satisfied that the Five Nations' evidence is sufficiently clear and compelling to support any claims of irreparable harm. At the outset, it is important to underline that the evidence must establish that the irreparable harm is linked to what is sought to be prohibited or mandated by the injunctive relief. So, in this case, it is the harm generated by continuing the opening of the recreational and commercial fisheries without granting the Five Nations the right to fish an additional 5,000 pieces of AABM Chinook. In other words, the harm has to be linked to the inability to access this incremental quantity of fish. This is what the Five Nations have failed to demonstrate.

(i) Affidavit evidence

[94] I acknowledge that the affidavits filed by the Five Nations contain numerous statements regarding how the fishing culture is central to who they are as aboriginal peoples and for their fishers to be able to earn a reasonable living from the fishery. The affidavits also emphasize the importance of the AABM Chinook troll fishery to the Applicants.

[95] In his affidavit, Mr. Jackson, a Tla-o-qui-aht member and fisheries manager for that First Nation, states that the AABM Chinook troll fishery "currently remains the best opportunity for our members to participate in the commercial fishery," and that the Five Nations "depend on it very heavily as a primary means for their members to participate in the commercial fishery and to exercise our aboriginal rights." Mr. Jackson also affirms that "the allocations of AABM

Chinook and other fishing opportunities that DFO has provided" to the Five Nations "are not nearly enough to support the meaningful and viable exercise of our aboriginal rights to fish commercially." He qualifies the "commercial fishing opportunities" provided to the Five Nations through the implementation of the Humphries Judgment as being "crucial" to the members of the Five Nations. He adds that he has consistently heard from Tla-o-qui-aht fishermen and fishermen from the other Applicants that the AABM Chinook allocation "is far too small and provides a far too limited economic opportunity for the fishermen," insufficient to allow for an economically "viable" fishery.

[96] I also note that, in numerous letters they have sent to DFO since the adoption of the Fishery Management Plan, the Five Nations repeatedly affirm that DFO's actions preclude them from exercising their constitutionally-protected right in a meaningful way and that they do not view the Fishery Management Plan as an acceptable implementation of their Aboriginal Rights as these were affirmed in the Humphries Judgment.

[97] I am not contesting that this type of evidence will be of relevance in the Five Nations' application for judicial review and will likely be part of the considerations that the Court will need to assess in order to determine the merits of the Five Nations' application. However, in the context of this injunction motion seeking a specific injunctive remedy regarding an additional allocation of AABM Chinook, this evidence bears severe shortcomings as far as allegations of irreparable harm are concerned.

[98] I will mention three. First, the evidence proffered in the affidavits often refers indistinctively to a mix of fisheries and to the Aboriginal Rights that the Five Nations have with respect to various fisheries, making it impossible to determine whether the allegations relate to all species of fish or solely to AABM Chinook. Second, even when the statements more specifically refer to AABM Chinook, they do not address the effect of being denied access to the incremental 5,000 pieces sought by the Five Nations in their injunctive relief, and on how this specific denial will lead to irreparable harm for the Applicants. In other words, the evidence does not demonstrate how not having access to the 5,000 additional AABM Chinook causes them irreparable harm. In fact, none of the affidavits filed by the Five Nations qualifies the difficulties claimed to be suffered as "irreparable" harm. Third, the statements contained in the affidavits speak in general terms and fail to provide evidence that goes beyond vague and general assertions of harm devoid of any level 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).

(ii) Commercial loss

[99] Furthermore, the more specific allegations contained in Mr. Jackson's affidavit express the harm in terms of lost additional income for the Five Nations' fishers. Mr. Jackson states that "[t]he chinook and other fisheries bring in small amounts of money for our fishermen," that the members of the Five Nations "very much need and depend upon any income they can get from the fishery," and that even "these small bits of income are very important" to the members of the Five Nations, though not sufficient for them to make a living from it.

[100] In fact, the estimated economic loss linked to the denial of access to an additional amount of 5,000 AABM Chinook has been quantified by Ms. Gagne in an email attached to the affidavit of Mr. Webster, where it is stated that the estimated revenue for the additional 5,000 pieces of AABM Chinook would be approximately $300,000. So, this is a quantifiable loss.

[101] 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). This is the case here. I pause to remind that the asserted Aboriginal Rights at stake in this injunction, and in the underlying application for judicial review, are rights to harvest and sell fish commercially. These are, at their core, economic and commercial rights, and they can be measured, quantified and compensated in damages. As such, any harm which may befall the Applicants by refusing the injunctive relief they are seeking, to the extent it can be related to the denial of access to the additional 5,000 AABM Chinook, would be compensable in damages and thus, by definition, not irreparable.

(iii) Economic viability

[102] The Five Nations also submit that they have repeatedly and consistently maintained, in their discussions with DFO, that the allocations established for all species of fish in the Fishery Management Plan are generally inadequate to allow them to exercise their Aboriginal Rights in a "viable" manner and that they do not allow for an "economically viable" fishery. The affidavit of Mr. Martin also contains a more particularized statement to the effect that the formula for the allocation of AABM Chinook "would result in an allocation that would not provide for a viable

fishery or the meaningful exercise" of the Five Nations' right, and that the "allocations do not provide for an economically viable fishery" for that subset of fish species.

[103] However, there is no evidence nor any particulars or data to support any of these claims about a lack of economic viability. The Five Nations have offered no evidence demonstrating that the existing opportunity to harvest AABM Chinook provided under the Fishery Management Plan is not "viable," or would remain so without an access to the incremental quantity of 5,000 AABM Chinook. There is also no evidence of a lack of viability on a general level, for all fisheries covered by the Fishery Management Plan. In fact, in the Humphries Judgment, Justice Humphries had stated that there was no evidence on the size of the fishery contemplated by the Five Nations and a lack of evidence regarding "what constitutes a viable fishery, whether viability means for the community as a whole or for each individual fisher who choose to participate" (*Ahousaht 2018* at para 982). The record before me contains numerous references to exchanges between the parties on this issue, and to the absence of evidence supporting the Five Nations' claims of lack of viability.

[104] This is clearly insufficient to meet the stringent requirements of irreparable harm established by the FCA.

(iv) Culture, way of life and traditions

[105] Similarly, no evidence has been provided on the impact of a denial of access to the incremental 5,000 AABM Chinook on the Five Nations' culture, way of life and traditions. I accept that the risk to the First Nations' way of life, culture and traditions may constitute

compelling evidence of irreparable harm (*Namgis First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2018 FC 334 [*Namgis*] at para 94). However, once again, this has to be demonstrated in relation to what is sought to be prevented or corrected by the injunctive relief. Here, these allegations of irreparable harm have to be in relation to the additional 5,000 AABM Chinook sought, and I find no clear and compelling evidence demonstrating how the failure to be granted access to this additional quantity of a specific species of salmon amounts to harm to the Five Nations' culture, way of life and other non-monetary interests. This was especially important in light of the fact that the Aboriginal Rights at the source of their claims were recognized and affirmed in relation to a multi-species fishery.

[106] In order to obtain the injunctive relief they are seeking, the Five Nations had to draw a link between the prevention of access to this additional quantity of a specific species, AABM Chinook, and their claim of irreparable harm to their way of life and culture. They have not done so with the evidence provided.

(v) Consultation and accommodation

[107] On the issue of the duty to consult and accommodate, the Five Nations claim that the Minister and DFO breached their duty since they have not explained, despite numerous requests to that effect by the Five Nations, how the 12.17% allocation for AABM Chinook was calculated. They also contend that the Minister has refused to engage in meaningful discussions since the adoption of the Fishery Management Plan and has not responded to numerous letters requesting the additional allocation of 5,000 pieces of AABM Chinook. They complain about the lack of response to seven letters written between April and June 2019, until the July 26, 2019

response from Mr. Thomson rejecting their request for the additional amount of AABM Chinook.

[108] Again, I acknowledge that these concerns with respect to the Crown's duty to consult and accommodate in the context of the Fishery Management Plan are elements that the Court will be called to consider in its review of the merits of the Five Nations' application for judicial review, based on a full record. What I have to determine here, though, is whether, in light of the evidence before me, the failures to consult alleged by the Five Nations can support a finding of irreparable harm in the specific context of this injunctive relief. I am not persuaded that this is the case.

[109] On the contrary, I am satisfied that the evidence provided by Mr. Thomson demonstrates that there has been extensive and meaningful consultations with the Five Nations on the Fishery Management Plan between November 2018 and March 2019. There was dialogue on the concerns expressed by the Five Nations and there is also evidence that the Minister is well aware that the Five Nations want more AABM Chinook. Indeed, in his affidavit, Mr. Jackson expressly states that "DFO is very aware of our view on the inadequacy of our chinook allocations." The fact that the Five Nations have not received a satisfactory, positive answer to their requests for an incremental quantity of AABM Chinook does not mean that no meaningful consultations have taken place and are taking place, or that a unique opportunity to consult and accommodate will be lost. This latest numerical request cannot be divorced from the context of the overall Fishery Management Plan and of the Aboriginal Rights at stake, and there is evidence of on-going consultations and discussions between the Minister's representatives and the Applicants. According to the evidence before me, the consultations are an interactive and iterative process,

they are continuing, and they will continue in the post-season review and planning for next year's fishery.

[110] On July 26, 2019 Mr. Thomson responded to Ms. Gagne that there was no additional allocation of AABM Chinook available at that time, "in advance of the reconciliation agreement." This, in my view, indicates that there are still discussions and exchanges between the parties through this reconciliation agreement process which, according to Mr. Thomson is not completed yet and is still in progress. I understand that the Five Nations take exception to the comment made by Mr. Thomson to the effect that additional allocations, provided through the reconciliation agreement process, "will eventually add" to the existing allocation to the Five Nations. But, as far as the issue of consultation is concerned, it indicates that the process is on-going. I agree with the Minister that a separate and distinct duty to consult and to accommodate cannot be triggered or measured with every letter sent or email exchanged.

[111] I acknowledge that a breach of the duty to consult or the loss of a unique opportunity to be consulted and accommodated may result in irreparable harm (*Wahgoshig First Nation v Ontario*, 2011 ONSC 7708 at paras 49, 53; *Haida Nation v British Columbia*, 2018 BCSC 1117 [*Haida*] at paras 71, 74; *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2014 FC 197 [*Ahousaht 2014*] at para 27). However, such a finding is intimately related to the underlying facts of each case (*Canada (Public Works and Government Services) v Musqueam First Nation*, 2008 FCA 214 at para 52). And, in my view, the present situation can be distinguished from the precedents relied upon by the Five Nations and where irreparable harm has been found in the context of injunctive reliefs sought by the First Nations.

[112] For example, in *Ahousaht 2014*, the issue at the core of the dispute and of the injunction request was the conservation of the roe herring fishery, not allocation. The evidence showed that the absence of an injunction would directly impact the conservation of the fishery, would irremediably affect the First Nations, and would take away an opportunity to participate in negotiations. This is not what the denial of an additional quantity of AABM Chinook will do here. I further observe that, in the present case, there is arguably no "established rights legal framework" for the specific quantity of a specific species of fish that the Five Nations seek to see allowed. In *Haida*, the cutting activity and the granting of permits authorizing the logging of cedar trees were the subject matter of the litigation, and the Court found harm to the reconciliation process in the context of the irreversible impact of such cutting. In *Namgis*, despite the fact that the salmon fishery at issue was of fundamental importance to the asserted aboriginal rights of the applicant, and that there was evidence of potential risk to the wild salmon populations, the Minister had refused to consult with respect to the policy at issue and to the transfer of licences that could adversely affect the asserted aboriginal rights. In those circumstances, the Court found that there was a complete lack of consultation, and that the Minister had not afforded a meaningful opportunity for consultation, causing irreparable harm (*Namgis* at paras 93-94). I do not find that there was a lack or an insufficiency of consultations in the present case.

[113] I pause to note that the recent decision of the FCA in *Squamish First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 216 [*Squamish*], mentioned by the Five Nations in their oral submissions, also arises in a fairly different factual context. It was issued further to a full application for judicial review where the Court reviewed the consultation process in detail in the

context of an asserted right to fisheries resources for FSC purposes, and concluded that consultations had been "generic," insufficient and inadequate. Whether the consultations that have taken place around the Fishery Management Plan meet the bar set by the FCA in *Squamish* is an issue to be determined on the merits of the Five Nations' application for judicial review, with the benefit of a full record.

(c) *The Aboriginal Rights at issue*

[114] I underline once again that, in assessing the Five Nations' claims of irreparable harm, the specific injunctive relief sought has to be put in context and cannot be looked at in isolation. The Aboriginal Rights recognized in the Humphries Judgment are defined as a right to harvest and to sell fish commercially. They are multi-species commercial rights, they are not divided by species of fish , and they do not contemplate particular allocations or quantities. As stated in the Humphries Judgment, it is the "totality of the fishery that is relevant, not one particular allocation of a species," and the "overall allocation is what counts" (*Ahousaht 2018* at paras 414(4), 977, 981). These Aboriginal Rights have been established and defined in the Humphries Judgment in relation to a group of species of fish, not to certain specific species such as salmon, or to one subset of one species such as AABM Chinook. Indeed, in paragraph 5 c) of the 2018 Order, the questions of viability and sustainability of the commercial fishing activity are measured against all species of fish covered. As they are currently defined in the Humphries Judgment, the Aboriginal Rights of the Five Nations do not grant rights to specific allocations of fish for any species of fish, including AABM Chinook in particular. There is no vested or constitutionally-protected right regarding a specific quantity or allocation of AABM Chinook, or of any species of fish.

[115] Here, however, what underlies the injunction motion is a numerical amount of one among many species that the Five Nations are entitled to harvest in the exercise of their Aboriginal Rights. When considered as a portion of the totality of the Applicants' multi-species fishery, I am not persuaded that the denial of the additional allocation of 5,000 AABM Chinook does amount to irreparable harm.

[116] Moreover, the evidence demonstrates that, far from suffering from irreparable harm, the Five Nations are exercising their rights to harvest and fish AABM Chinook, that they are not prevented from exercising these rights, and that they have other opportunities to fish called Individual Stock-Based Management [ISBM] Chinook salmon. In his second affidavit, Mr. Thomson indicates that, in addition to their rights-based commercial fishery to harvest 8,714 AABM Chinook in 2019, the Five Nations have two other distinct opportunities to harvest a combined total 4,589 Chinook salmon in ISBM fisheries under the Fishery Management Plan. I am not suggesting that this calls for any particular conclusion regarding the issues raised by the Five Nations in their application for judicial review. But this evidence certainly contributes to demonstrate that, on a balance of probabilities, the Five Nations have not established with clear and compelling evidence that they will suffer irreparable harm if they are denied access to an additional quantity of 5,000 AABM Chinook.

[117] The evidence provided by Mr. Thomson also shows that the method used by the Minister to determine the allocation of AABM Chinook has indeed changed since the Humphries Judgment, and that the recreational fishery no longer has priority over the Five Nations' rights-based fishery. The evidence of Mr. Thomson indicates that this change in the method of

allocation has led, for 2019, to doubling the share of the fishery for the Five Nations compared to what they would have obtained under the previous method. Using the 2019 Canadian TAC for AABM Chinook on the WCVI, the evidence shows that DFO's current approach provides the Five Nations with almost twice as many fish as DFO's previous approach would have provided them if it had been applied in 2019. This old approach is the method of allocation that was found to be an Unjustified Infringement in the Humphries Judgment. I acknowledge that, even though the method of allocation has changed and the share of the AABM Chinook fishery that the Five Nations receive relatively to other fishers has increased, the absolute number of fish allocated to the Five Nations has only fluctuated slightly. Whether this complies with the Humphries Judgment or not is not for me to decide on this injunction motion and will again be an issue of debate in the application for judicial review.

[118] In essence, the Five Nations disagree with the allocation granted to them by the Minister. At the heart of the disagreement is the Five Nations' preference that their AABM Chinook allocations be increased to a level that is higher than what DFO has identified as the level that allows for sustainable and appropriate rights-based fishing opportunities, based on DFO's interpretation and understanding of the Garson Judgment, the Humphries Judgment and the 2108 Order. I am not persuaded that such a disagreement on a specific allocation for a specific species, when viewed in context, amounts to irreparable harm. The fact that there is a disagreement about management decisions concerning the AABM Chinook fishery is no basis for a finding of irreparable harm (*Ahousaht 2015* at para 24).

[119] Having reviewed the totality of the evidence provided by the Five Nations, I am therefore 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. This, as the FCA frequently reminded, falls well short of the mark to meet the high threshold of irreparable harm established by *RJR-MacDonald* and its progeny. Such assertions cannot serve as valid grounds for granting an interlocutory injunction and I find them insufficient to establish a real probability that unavoidable irreparable harm will result if the injunction is denied.

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

(3) Balance of convenience

[121] 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).

[122] Given that the Five Nations have not proffered the evidence needed to allow the Court to make a finding of irreparable harm, and having concluded that they have failed to satisfy that branch of the *RJR-MacDonald* test, it is not necessary for me to consider where the balance of convenience lies. They do not meet one element of the test and, according to the FCA case law,

this is fatal (*Ishaq* at para 15). I will nonetheless address 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, including by the two Intervenors.

[123] The factors to be considered in assessing the balance of convenience are numerous and vary in each individual case (*RJR-MacDonald* at p 349). On this motion, the facts concerning the public interest and the role of the Minister, the *status quo*, the impact on the recreational and commercial fisheries, and the compliance concerns raised by the Five Nations' use of their Aboriginal Rights are relevant and favour the Minister. When I compare them to the harm expected to be suffered by the Five Nations in the absence of an injunction, I conclude that, on a balance of probabilities, the balance tips in favour of the Minister and against the issuance of the injunctive relief sought by the Applicants.

(a) *Public interest*

[124] Relying on *RJR-MacDonald*, the Minister submits that, 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 decision on the allocation of AABM Chinook under the Fishery Management Plan) is undertaken pursuant to that responsibility.

[125] I agree with the Minister.

[126] The Minister 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 the Minister. As a statutory authority responsible for the administration and enforcement of the *Fisheries Act*, the Minister benefits from a presumption that actions taken pursuant to the legislation are *bona fide* and in the public interest. In other words, there is a public interest in allowing the Minister and DFO to accomplish their roles under the *Fisheries Act*. The *Fisheries Act* grants the Minister a wide discretion to manage, conserve and develop the Canadian fisheries on behalf and for the benefit of all Canadians, taking into account the public interest (*Malcolm v Canada (Fisheries and Oceans)*, 2014 FCA 130 at para 40; *Doug Kimoto v Canada (Attorney General)*, 2011 FCA 291 at para 13). The Minister's fisheries power necessitates the balancing of conservation and protection of various competing rights and interests, including the First Nations, commercial and economic interests, and the public interest in sport and recreational activities. Canada's fisheries are a common property resource belonging to all Canadians (*Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12 at para 37).

[127] When it is established (as is the case here for the Minister) that a public authority is charged with the duty of promoting or protecting the public interest, and that a proceeding or activity is 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.

[128] In this case, an interlocutory injunction would enjoin the Minister from carrying out his mandate and interfere with the exercise of the statutory powers granted to him by Parliament with respect to the allocation of fishing resources. This would go against and harm the public interest and it is not the function of the Court to manage and police the fisheries, to intervene in the management of the Canadian fisheries and to usurp the role of the Minister in that respect.

(b) *Status quo*

[129] The main objective of an interlocutory injunction is to preserve the *status quo*. Typically, interlocutory injunctions seek to ensure that the subject matter of the litigation will be preserved so that effective relief will be available when the case is ultimately heard on the merits. This is true whether the injunction sought is prohibitive or mandatory. Courts have, rightly in my view, proceeded cautiously where an injunction requires a respondent to take positive steps, to incur additional expenses or to act in ways that would modify an existing state of affairs.

[130] Here, the Five Nations' injunction motion seeks to compel the Minister to embark upon a fresh course of conduct, as opposed to reverting back to a course of conduct pursued before the occurrence of the acts or omissions that provoked the litigation. In essence, it seeks to modify the *status quo*. There is no doubt that the preservation of the *status quo* favours the Minister and does not militate in favour of issuing the injunctive relief sought.

(c) *Adverse impact on recreational and commercial fisheries*

[131] Given that the Five Nations' Aboriginal Rights are not exclusive and are commercial, their rights must be balanced with the interests of other participants in the AABM Chinook fishery. AABM Chinook is a mixed stock fishery and the Canadian TAC is distributed between the Five Nations' rights-based commercial fishery, the recreational fishery and the general commercial fishery. The allocation to the commercial fishers is a residual amount of fish within the public fishery, remaining after all rights-based fisheries have received their allocations and the estimate of the total recreational catch has been determined by the Minister.

[132] As pointed out by the Association, a commercial aboriginal right is a right with no internal limitations. The priority afforded to such an aboriginal commercial fishery does not form the basis of an exclusive fishery for the First Nations claiming it (contrary to, for example, aboriginal fishing rights for FSC purposes). In such a case, the First Nations' priority is not a priority of allocation but a priority of consideration in the allocation process (*Gladstone* at pp 766-771). On their part, commercial fishers also have a right and a legitimate interest to participate in Canada's fishery (*Gladstone* at pp 770-771).

[133] In this case, DFO and the two Intervenors have provided clear and compelling evidence of financial harm if the injunctive relief is granted and if the Minister is enjoined from opening or continuing the commercial Area G fishery and the recreational fishery without allowing for the additional amount of AABM Chinook sought by the Five Nations. The injunction would

prevent the Intervenors from exercising their fishing rights, and their harm would not be compensable in damages.

[134] The evidence provided by the Association shows that the regular commercial Area G fishery is conducted by commercially licensed trollers with commercial gear configurations that fish across an area much larger than the CDA, further offshore. According to the affidavit of Ms. Scarfo, a director of the Association, an Area G license carries an entitlement to troll for salmon for commercial purposes only in that specific area and only for the specific AABM Chinook species. The Association represents the interests of 108 commercial troll fishing license holders in Area G, and these fishers rely solely on AABM Chinook for their livelihood. They have no other fishery opportunities to turn to if the AABM Chinook fishery closes or if their allocation is diminished. Their fishing rights are not multi-species.

[135] The evidence filed by the SFI also refers to the harm that would be caused to the recreational fishery by the conditional closing of the fishery sought by the Five Nations. The SFI is a not-for-profit society regrouping contributors and members involved in recreational fishing, including fishing lodges, resorts, certified tidal angling guides, hotels, charter operators, manufacturers, distributors, tackle shops, dealers, boat marine manufacturers, regional airlines, individual anglers and industry organizations. The affidavit of Mr. Bird, Executive Director of the SFI, states that British Columbia's sport fishing industry is a vital element in the success of the WCVI regional economy, and provides data on its significant impact in terms of revenues for guides, lodges and accommodations, and in terms of jobs.

[136] Mr. Bird affirms that Chinook salmon is the driver in recreational fishing. He states that a visiting angler will often spend approximately $1,000 per day for the fishing activity. He adds that bookings of fishing trips and related services (hotels, airlines, etc.) are made several months or even a year in advance, and that the money lost by the recreational sector due to an injunction closing the fishery cannot be compensated through a recourse in damages.

[137] In the circumstances of this case, the adverse impact of an interlocutory injunction on the commercial and recreational sectors favours the Minister and a denial of the relief sought by the Five Nations.

(d) *Compliance concerns*

[138] There is also evidence, in the affidavits of Mr. Thomson and of Ms. Scarfo, of compliance concerns in the way the Five Nations have been using their Aboriginal Rights with respect to AABM Chinook. This evidence has not been contradicted. It indicates that the Five Nations have likely not complied with several terms of the Humphries Judgment and of the Fishery Management Plan regarding the scope and attributes of their Aboriginal Rights.

[139] Aerial surveillance conducted by DFO showed that several of the Five Nations' fishing vessels designated to harvest AABM Chinook under the Fishery Management Plan were outside of the CDA in an area where the regular commercial Area G troll fishery can occur. In addition, these vessels are large industrial-scale commercial salmon trollers using high production technology, as opposed to the small, low-cost boats that the 2018 Order and the Humphries Judgment found to be the focus of the Five Nations' multi-species rights-based fishery. DFO

estimates that, between July 15 and July 29, 2019, the Five Nations' designated vessels that are equipped with regular commercial salmon troll gear configurations harvested over 90% of the Five Nations' total catch of AABM Chinook under the Fisheries Management Plan. In other words, the focus of the rights-based fishery on low-cost boats to ensure wide community participation (as contemplated in the Humphries Judgment) is what did not occur this season in the AABM Chinook fishery (*Ahousaht 2018* at para 1221).

[140] By allowing vessels equipped with regular commercial salmon troll gear to harvest the vast majority of their AABM Chinook allocation over a short period of time, the Five Nations have effectively limited the allocation available to provide an opportunity for those fishers participating in the rights-based fishery using smaller vessels that have lower catching power. The concentration of fishing efforts in a small number of large industrial participants who have caught the majority of the allocation does not appear to be in compliance with the constitutionally-protected Aboriginal Rights invoked by the Five Nations, as these were defined in the Humphries Judgment.

[141] A party knocking on the Court's door to obtain the issuance of an extraordinary, exceptional injunctive remedy based on an asserted right must not be seen as acting in a manner that is contrary to the right they are asking the Court to allow and implement (and in this case, expand). I agree with the Minister and SFI that this evidence works against the notion of a rights-based fishery providing an opportunity for wide community participation by fishers using smaller vessels to harvest more fish over a longer fishing season, and this does not tilt the

balance in favour of granting an injunctive relief seeking an increase in the allocation of AABM Chinook.

(e) *Balancing assessment*

[142] In my view, these various elements outweigh the risk of harm to the Five Nations and their Aboriginal Rights in the absence of an injunction.

[143] As stated above, the Five Nations have not demonstrated that they will suffer irreparable harm if the injunctive relief they are seeking is denied. I am mindful that the Five Nations' ancestors were fishing peoples who depended on fisheries resources to sustain themselves, and that the regular trade of significant quantities of the diverse fisheries resource in their territories was a prominent feature of their society and integral to their distinctive culture (*Ahousaht 2009* at paras 281-2, 439-40, 485). The Aboriginal Rights granted to the Five Nations recognized this right to harvest and sell various species of fish commercially. But this constitutionally-protected right is in relation to a multi-species fishery, not to specific allocations of AABM Chinook. It is not a right to harvest and sell specific quantities of AABM Chinook.

[144] To reiterate, a fundamental problem with the Five Nations' injunction motion is that the constitutionally-protected Aboriginal Rights they are invoking in support of their application for judicial review do not, as defined in the Humphries Judgment, extend to the more dissected right that they are seeking to exercise through the interlocutory injunctive relief they ask from the Court.

[145] It is true that the Five Nations have an allocation priority for AABM Chinook, and the evidence indeed shows that this has been specifically recognized by the Minister in the new method of allocation put in place with the Fishery Management Plan. Contrary to what the Five Nations submit and argue, the Minister did not modify this method of allocation for AABM Chinook in July 2019. No new quantities of fish became "available" at that point in time, and the Minister did not grant a request for more AABM Chinook to the commercial Area G sector. The fluctuation that occurred in the relative quantities given to the recreational and commercial fishers is simply a reflection of the new method of allocation at work.

[146] The Five Nations raise the issue of the public interest in reconciliation, and I agree that the reconciliation of the rights and culture of Indigenous peoples with the interests of and sovereignty of Canada is of fundamental importance to all Canadians. There is significant public interest in reconciliation and in giving recognition to the SCC's emphasis on consultation and accommodation (*Ahousaht 2014* at paras 30-32). It is very much in the public interest that Canada upholds its duty to consult and accommodate the Five Nations' Aboriginal Rights in managing the fisheries, and this certainly needs to be taken into account in assessing the balance of convenience.

[147] However, the Aboriginal Rights we are talking about are a right to commercial fishing, and it is a multi-species right. There is no evidence allowing me to conclude that the Minister's decision to decline an additional allocation of 5,000 AABM Chinook is acting contrary to Canada's fiduciary obligations with respect to the Five Nations. As indicated above, the process of consultation and accommodation is complex, and I am satisfied that it has been a meaningful

one so far and that it is continuing. I am also not convinced that the "minimal impairment" argument put forward by the Five Nations modifies the balance of convenience in this case. The Aboriginal Rights of the Five Nations are economic, commercial rights, and there can be allocations provided by DFO to other users that do not infringe these rights.

[148] In the end, the protection of the integrity of the process contemplated in the *Fisheries Act*, the public interest, the preservation of the *status quo*, the other interests affected and the conduct of the Five Nations in the exercise of their Aboriginal Rights tilt the balance of convenience in favour of the Minister, not the Five Nations. This is especially true in a context where, conversely, the Five Nations' 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 the Five Nations in the absence of the injunction is compared to the harm expected to be caused to the Minister, the public interest and other interested parties by the injunction, there is no doubt in my view that the balance of convenience does not favour granting the interlocutory injunction sought by the Five Nations. The third element of the *RJR-MacDonald* test is accordingly not satisfied either.

[149] Given that I find that the balance of convenience favours the Minister in not granting the interlocutory relief, I need not consider the issue of an undertaking as to damages.

D. *The just and equitable requirement*

[150] 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 (*Equustek* at para 25; *Unilin Beheer BV et al v Triforest Inc*, 2017 FC 76 at para 12).

[151] 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 the Five Nations, and that this is not an appropriate case to exercise my discretion in their favour. The elements that support this conclusion are: the fact that the Five Nations are seeking more relief in this injunction motion than in their underlying application for judicial review; their reliance on an "established aboriginal right" that goes beyond the Aboriginal Rights as defined in their judicial review application; the fact that the main relief they are seeking is an order of *mandamus* for which the requirements are not met; the absence of a demonstrated irreparable harm; and the various factors, including the Minister's public interest mandate, that tilt the balance of convenience in favour of the Minister.

[152] Another important element needs to be underlined in this assessment of justice and equity. As was discussed at the hearing before the Court, the Five Nations are essentially asking me to do, on an interlocutory injunction motion, what the BCSC has declined to do after months of hearing and a decision nearing 1,800 paragraphs, namely, to determine and allow specific allocations of fish attached to the Five Nations' Aboriginal Rights. Justice Humphries repeatedly said in her judgment that allocations are not for the court to decide, that the overall absolute count of fish is not for the court to determine or to set, and that the court "does not have the evidence or expertise necessary to set allocations while balancing the needs of all sectors of the fishery" (*Ahousaht 2018* at paras 668-669, 836, 981-984). If it was not appropriate for Justice

Humphries to insert herself into such a complex management process for which the Minister and DFO have the expertise, even with the benefit of months of evidence and submissions before her, it would certainly not be just and equitable for me to do so in the context of an interlocutory injunction, with limited evidence and mid-way through an on-going process.

[153] The issues raised by the Five Nations in this injunction motion are clearly better left for the hearing of the application for judicial review on its merits. 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 issues raised by the Five Nations are complex and there is not enough legal merit to their injunction motion to justify the extraordinary intervention of this Court in making the order sought at the interlocutory stage, without a hearing on the merits.

[154] Parliament has given the Minister the decision-making authority to manage the fishery and the Minister has exercised his discretion to do so in determining the allocations of AABM Chinook, as he is entitled to do. The Minister and DFO's approach to fisheries management deserves to be afforded considerable deference (*Ahousaht 2015* at para 32). This Court should not, on an interlocutory injunction motion, supplant the statutorily-mandated decision of the Minister and substitute either its own views on AABM Chinook management or the views of the Five Nations. As Justice Humphries pointed out in her decision, "the factors that go into allocations are subject to a wide variety of considerations within the knowledge of the Minister at any particular time" (*Ahousaht 2018* at para 836). What is just and equitable in the circumstances of this case is to leave that in the Minister's hands, bearing in mind that his decisions remain subject to the scrutiny of the courts.

IV. Conclusion

[155] For all the above-mentioned reasons, I find that the Five Nations have not met the conjunctive tripartite test articulated in *RJR-MacDonald* to justify the granting of the interlocutory injunction they are seeking. On the basis of the evidence before me, I find that they have not provided clear, compelling and non-speculative evidence of irreparable harm, and that the balance of convenience does not favour granting the injunctive relief they are seeking. In addition, the key remedy they want to obtain is an order of *mandamus*, for which they do not meet the well-established requirements.

[156] 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 Minister's mandate and authority, the various competing interests at stake and the complexities of the allocations setting process in dispute, I also conclude that it would not be just and equitable, in the circumstances of this case, to grant the injunctive relief sought by the Five Nations. There are no exceptional circumstances justifying the exercise of my discretion in the Applicants' favour.

[157] The Minister is entitled to his costs.

ORDER in T-721-19

THIS COURT ORDERS that:

1. The Applicants' motion is dismissed, with costs to the Respondent.

2. No costs are awarded for or against the Intervenors.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-721-19
STYLE OF CAUSE:	THE AHOUSAHT FIRST NATION, THE EHATTESAHT FIRST NATION, THE HESQUIAHT FIRST NATION, THE MOWACHAHT/MUCHALAHT FIRST NATION, AND THE TLA-O-QUI-AHT FIRST NATION v THE MINISTER OF FISHERIES AND OCEANS AND CANADIAN COAST GUARD AND AL.
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	AUGUST 13-14, 2019
ORDER AND REASONS:	GASCON J.
DATED:	AUGUST 29, 2019

APPEARANCES:

F. Matthew Kirchner Lisa C. Glowacki	FOR THE APPLICANTS
Craig Cameron Susan Dawson Andrew Crawford	FOR THE RESPONDENT
Ian Knapp	FOR THE INTERVENOR, WEST COAST TROLLERS ASSOCIATION (AREA G)
W. Gary Wharton Pamela Germann	FOR THE INTERVENOR, SPORT FISHING INSTITUTE OF BRITISH COLUMBIA (SFI)

SOLICITORS OF RECORD:

Ratcliff and Company LLP North Vancouver, British Columbia	FOR THE APPLICANTS
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT

Mackenzie Fujisawa LLP Vancouver, British Columbia	FOR THE INTERVENOR, WEST COAST TROLLERS ASSOCIATION (AREA G)
Bernard LLP Vancouver, British Columbia	FOR THE INTERVENOR, SPORT FISHING INSTITUTE OF BRITISH COLUMBIA (SFI)