

Federal Court



Cour fédérale

Date: 20230328

Docket: T-1118-20

Citation: 2023 FC 428

Ottawa, Ontario, March 28, 2023

PRESENT: Madam Justice McDonald

BETWEEN:

LOUIS BOUDREAU

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Boudreau seeks judicial review of the August 24, 2020 decision of the Deputy Minister [DM] of Department of Fisheries and Oceans Canada [DFO] denying his request for an extension of a medical substitute operator [MSO] authorization for his lobster fishing licence [Decision]. Since 1988, Mr. Boudreau has been issued a lobster fishing licence each year. As of 2005, due to Mr. Boudreau's physical disability, DFO issued him an MSO for his lobster fishing licence. The MSO authorization allows someone else to operate Mr. Boudreau's fishing vessel.

[2] In denying the MSO extension in 2020, the DM held there were no extenuating circumstances that would warrant a further extension of the MSO authorization and noted there is no lifelong right to collect revenues from a fishing licence provided by the *Fisheries Act*, RSC 1985, c F-14.

[3] Mr. Boudreau claims the Decision is contrary to section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*], as it discriminates against him based upon a physical disability. He argues his case raises the same issues as those addressed in *Robinson v Canada (Attorney General)*, 2020 FC 942 [*Robinson FC*], affirmed in *Canada (Attorney General) v Robinson*, 2022 FCA 59 [*Robinson FCA*].

[4] For the reasons that follow, this judicial review is granted. I agree that, as in *Robinson FC*, the Decision of the DM does not respond to Mr. Boudreau's position that the decision to deny him a MSO fails to proportionately balance his right to be free from discrimination on the grounds of disability under section 15 of the *Charter*.

I. Background

[5] Mr. Boudreau is an 82-year-old fisherman who has held a lobster fishing licence since 1988. In 2005, after he became physically unable to be on his fishing vessel for lengthy periods of time, he applied for an MSO under DFO's *Commercial Fisheries Licensing Policy for Eastern Canada, 1996* [1996 Policy]. The 1996 Policy sets a five-year lifetime maximum for a licence holder to use a MSO.

[6] In 2005, Mr. Boudreau was granted an MSO with his son as the substitute operator. He was re-issued an MSO annually until 2016, when he was advised that further extensions of the MSO would not be granted.

[7] The explanation for the refusal was as follows. In 2008, following the economic downturn, DFO adopted a more flexible approach to MSOs and the five-year maximum. However, in 2015, following complaints from the Canadian Independent Fish Harvesters Federation, DFO returned to a strict application of the five-year limit because in some instances, the relaxed MSO policy allowed corporate entities to gain control over licences. Corporate control of the fishing licences breaches the purpose of the 1996 Policy, which is to promote the economic development of coastal inshore fishing communities through Owner-Operated licences.

[8] There is no suggestion that Mr. Boudreau engaged in this type of activity. Nor is there any allegation that there is corporate control of Mr. Boudreau's fishing operation. On the contrary, the evidence is that Mr. Boudreau himself maintains full operation and control of his fishing enterprise while using an MSO. He continues to make all operational decisions related to the fishing enterprise, including negotiating the wharf price of the catch, arranging bait and fuel purchases, and managing the fishing operation's financial affairs. Mr. Boudreau's only limitation with respect to his fishing operation is that he cannot physically be on his fishing vessel.

A. *Maritimes Regional Licensing Appeal Committee*

[9] After being advised in 2016 that no further extensions of his MSO authorization would be considered, in April 2017, Mr. Boudreau appealed to the Maritimes Regional Licensing Appeal Committee [MRLAC]. As a result of this appeal, the MSO authorization was extended to June 30, 2017.

[10] Mr. Boudreau filed a second appeal with MRLAC. On May 31, 2018, the MRLAC further extended the MSO authorization to June 30, 2018, but informed Mr. Boudreau that no further extensions would be considered.

B. *Atlantic Fisheries Licensing Appeal Board*

[11] Mr. Boudreau appealed the May 31, 2018 decision to the Atlantic Fisheries Licensing Appeal Board [AFLAB], who held a hearing on March 29, 2019.

[12] In his submissions to the AFLAB, Mr. Boudreau argued that he continued to have full care and control of his licence and that he had met the conditions set out in the 2017 MRLAC appeal decision, namely providing medical documentation relating to his prognosis and/or an exit strategy from the fishery. Mr. Boudreau provided a letter from his doctor, which stated Mr. Boudreau could likely return to active fishing in the near future. Mr. Boudreau also confirmed his fishing operation is a family business, with his son acting as the substitute operator. Mr. Boudreau argued his *Charter* rights should be taken into account, as nothing in the 1996 Policy justified an infringement of his *Charter* rights.

[13] The AFLAB Case Summary and Recommendation notes Mr. Boudreau had been granted many exceptions to the MSO policy, and that it appeared unlikely he would ever return to active fishing, as he attended the hearing in a motorized scooter. The AFLAB determined the 14 years Mr. Boudreau held an MSO authorization had provided him ample time to recover from the medical condition that prevented him from fishing, if recovery was possible. The AFLAB also noted Mr. Boudreau appeared well positioned to exit the fishery.

[14] The AFLAB recommended upholding the 2018 MRLAC decision to not extend Mr. Boudreau's MSO authorization. The AFLAB's rationale was that Mr. Boudreau had been treated fairly, in accordance with DFO licensing policies, practices, and procedures, including notice of the change of policy and two additional one-year extensions, with sufficient time to plan his exit from the fishery. Further, the AFLAB concluded there were no extenuating circumstances that warranted a further extension, as DFO had addressed Mr. Boudreau's personal circumstances in good faith and he would not face undue financial hardship if the decision was upheld, as he could sell the licence.

[15] The AFLAB also concluded Mr. Boudreau's *Charter* arguments were outside its mandate and would not be considered.

II. DM's Decision Under Review

[16] The subject of this judicial review is the August 24, 2020 Decision of the DM of DFO which states:

After careful review and consideration of all the relevant information, including the regional decision, the materials submitted to AFLAB, AFLAB's recommendation, and your allegations of discrimination under section 15 of the *Canadian Charter of Rights and Freedoms*, I have decided to uphold the May 31, 2018 decision of the Regional Director General of DFO's Maritimes Region.

I am of the view that you were treated fairly and in accordance with departmental licensing policies, practices, and procedures. I am also of the view that the circumstances of this case do not constitute extenuating circumstances that would justify making another exception to the policy. The *Fisheries Act* does not provide for any lifelong right to collect revenues from a licence to fish. In addition, continuing to grant medical substitute operator authorizations to you in the existing circumstances would undermine the underlying objectives of DFO's Policies.

I regret to inform you that your request for a further exception to the policy for a medical substitute operator is denied.

[17] As noted in *Robinson* FC at paragraph 65:

... In a circumstance where the record before a decision-maker includes recommendations that provide analysis of the case and which are effectively adopted by the decision-maker, that documentation can be instructive in understanding the decision-maker's reasoning (see *Newfoundland and Labrador Nurses' Union v Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62 [NLNU] at para 15; *Elson* FCA at para 54).

[18] In this case, there are additional documents in the certified tribunal record that are relevant for consideration.

[19] The Acting Regional Director General, Maritimes Region prepared a Memorandum for the DM [Memorandum]. The DM signed this Memorandum, confirming he concurred with the recommendation. This Memorandum also attached a Departmental Analysis of Atlantic

Fisheries Licence Appeal Board Recommendations [Departmental Analysis] for the DM's review and consideration.

[20] The Departmental Analysis notes the objectives of the *Fisheries Act* and departmental policies, namely ensuring the benefits of inshore fishing remain in the coastal communities where licence holders reside. The Departmental Analysis also reviews the Owner-Operator policy and the MSO policy contained in the 1996 Policy. The Departmental Analysis considers the impacts on Mr. Boudreau and states:

Mr. Boudreau indicated during a meeting with the Maritimes Region Licensing Appeal Committee that he intended to have the licence re-issued to his son, but that his son required more time to be trained in the operation of the business. Over two years have now since passed and he has made no requests to the Department that the licence be re-issued to another eligible fisher. The Department considers the conclusion of the AFLAB reasonable. It is unlikely that Mr. Boudreau would be able to resume the fishing activity.

Nevertheless, Mr. Boudreau provided a letter at the AFLAB from his doctor dated March 26, 2019 indicating that he will probably be fit to return to fulltime fishing in 2020. Should this be the case, a further exception to the medical substitute operator policy is not required as he would be able to personally fish the licence issued to him.

There are alternate arrangements available to Mr. Boudreau should he not be able to personally fish the licence, such as requesting to the Department that the licence be re-issued as a replacement licence to another eligible fisher recommended by him. Mr. Boudreau could realize personally over \$600,000 as a result of this private transaction. Mr. Boudreau retains this option regardless of the outcome of this decision. Based namely on the fact that Mr. Boudreau retains the possibility of requesting the issuance of a replacement licence to an eligible fisher recommended by him, which would allow him to receive an amount of approximately \$600,000, the Department consider the impacts of a negative decision on Mr. Boudreau to be minimal.

[21] The Departmental Analysis notes an indefinite MSO authorization is inconsistent with licensing policy objectives, as it would circumvent the intention of the DFO to maintain an independent Owner-Operator regime. The Departmental Analysis confirmed:

... fishing licences are not assets of the holder and were never intended to serve as income generation mechanisms in retirement. There is no such a benefit guaranteed under the *Fisheries Act*. There is no legal right to a licence holder to receive any fishing licence year after year nor to receive it with the same fishing conditions as in the past. Therefore, the income security Mr. Boudreau is complaining of being deprived by not being granted an MSO is not a benefit guaranteed to any licence holder under the *Fisheries Act*.

[22] The Departmental Analysis concluded that any distinction created by the application of the MSO cap would flow from Mr. Boudreau's age and health, which are inconsistent with the physical demands of fishing, and recommended denying the MSO authorization extension.

[23] A Memorandum, dated July 30, 2020, which contains redactions, recommended denying the request to extend Mr. Boudreau's MSO authorization and states:

[REDACTED] the Department considers that Mr. Boudreau's *Charter* rights are not engaged. Even if they were engaged, the purpose of the *Fisheries Act* is to provide a framework for the proper management and control of fisheries. Key components to achieve that purpose include: conservation, sustainable use, self-reliance, shared stewardship, predictable and transparent access, to maintain an economically viable inshore fleet, and to ensure that the benefits flowing from the licences be distributed to the licence holders and to his/her coastal community. The Owner-Operator Policy is aimed at achieving that purpose.

Allowing MSOs indefinitely in circumstances similar to those of Mr. Boudreau would undermine the objectives of the fisheries management regime. It would also be inconsistent with the objectives of the MSO policy and the purpose of the Act, which are not to provide lifelong financial benefits or support to persons whose age, health and/or physical condition does not allow the

carrying out of fishing activities. As such, it is the Department's view that denying Mr. Boudreau's request is reasonable [REDACTED].

III. Relevant Legislation & Policies

[24] The following are the relevant legislative provisions.

[25] Subsection 15(1) of the *Charter* provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[26] Subsection 23(2) of the *Fishery (General) Regulations*, SOR/93-53 states:

Where the holder of a licence or the operator named in a licence is unable to engage in the activity authorized by the licence or use the vessel specified in the licence because of circumstances beyond the control of the holder or operator, a fishery officer who is employed by the Department or any employee of the Department engaged in the issuance of licences may, on the request

Si, en raison de circonstances indépendantes de leur volonté, le titulaire d'un permis ou l'exploitant désigné dans le permis sont dans l'impossibilité de se livrer à l'activité autorisée par le permis ou d'utiliser le bateau indiqué sur le permis, l'agent des pêches ou tout autre employé du ministère chargé de délivrer des permis peut, à la demande du titulaire ou de

of the holder or the holder's agent, authorize in writing son mandataire, autoriser par écrit :

(a) another person to carry out the activity under the licence; or a) soit une autre personne à pratiquer cette activité en vertu du permis;

(b) the use of another vessel under the licence. b) soit l'emploi d'un autre bateau aux termes du permis.

[27] Subsection 11(11) of the 1996 Policy provides:

Where the holder of a licence is affected by an illness which prevents him from operating a fishing vessel, upon request and upon provision of acceptable medical documentation to support his request, he may be permitted to designate **a substitute** operator for the term of the licence. Such designation may not exceed a total period of five years.

IV. Issues

[28] This application raises the following issues:

- A. *What is the applicable standard of review of the Decision on the Charter issue?*
- B. *Does the Decision engage the Charter?*
- C. *Did the Decision consider and balance Mr. Boudreau's section 15 Charter arguments?*
- D. *Is the Decision reasonable?*

V. Analysis

A. *What is the Applicable Standard of Review of the Decision on the Charter Issue?*

[29] Mr. Boudreau's legal counsel confirmed that he is not challenging the constitutionality of the 1996 Policy. However, Mr. Boudreau does maintain that the failure of the DM to substantively consider his *Charter* rights is an error of law and reviewable on the correctness standard.

[30] Mr. Boudreau relies upon *Canadian Broadcasting Corporation v Ferrier*, 2019 ONCA 1025 [*Ferrier*] in support of the argument that where a decision-maker fails to consider an individual's *Charter* right, it may constitute a question of law of central importance to the legal system, which would attract the correctness standard per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[31] Although *Ferrier* was applied by Justice Southcott in *Robinson FC*, the FCA held reasonableness was the appropriate standard of review, as the decision under review failed to respond to an argument raised by the applicant, whether his *Charter* rights were violated, and therefore the decision was not justified or transparent per *Vavilov (Robinson FCA at para 28)*.

[32] The Respondent argues the Decision is reviewable on the reasonableness standard (*Vavilov*) and pursuant to *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*], reasonableness applies to a decision-maker's balancing of *Charter* protections with other relevant considerations.

[33] In my view, the applicable standard of review is reasonableness. The decision in *Robinson FCA* held the appropriate standard was reasonableness, and the *Doré/Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 framework for judicial review of *Charter* issues supports a reasonableness review. If the DM failed to consider the *Charter* arguments raised by Mr. Boudreau, the Decision would be unreasonable for failing to address a key argument raised.

B. *Does the Decision Engage the Charter?*

[34] To prove a violation of subsection 15(1), a claimant must show the impugned law or state action: (1) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and (2) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage: *R v Sharma*, 2022 SCC 39 at para 28 [*Sharma*]; *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 27.

[35] Mr. Boudreau argues the refusal of an MSO authorization is a *prima facie* breach of his subsection 15(1) *Charter* rights, as the Decision clearly imposes differential treatment on him, compared to a non-disabled licence holder or licence holders issued other substitutions. Mr. Boudreau notes there are other categories of substitute operator authorization provided for under the Maritimes Region Commercial Licensing Policy, which operationalizes the 1996 Policy. Authorizations can be granted on “compassionate” and “association representative” grounds and these authorizations do not have a cumulative cap, unlike the MSO authorization. Mr. Boudreau argues this distinction perpetuates disadvantage for disabled people, who are forced out of their chosen profession due to their disability.

[36] The Respondent submits that the *Charter* is not engaged as Mr. Boudreau was seeking a benefit that is not available under the law. The Respondent has characterized Mr. Boudreau's MSO request as an age-related request and argues that, in effect, Mr. Boudreau is seeking a lifetime right to fish. It notes the *Fisheries Act* does not provide lifetime benefits to anyone. The Respondent also submits *Robinson FC* is distinguishable, given that Mr. Robinson was only 58 years old.

[37] The Respondent further submits that a distinction based on age does not necessarily engage the *Charter*. It relies on *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at paragraph 31. The Respondent also argues the *Charter* is not engaged because a distinction based upon actual capacities will rarely be discriminatory (*Sharma* at para 53).

[38] In my view, the Respondent's reliance on *Sharma* to argue that the *Charter* is not engaged on the facts of this case, is misplaced. The role of the Court on judicial review is not to conduct the section 15 analysis, but rather, to determine if the DM—within the *Doré* administrative decision-making framework—undertook the necessary analysis.

[39] I do not accept the Respondent's assertion that Mr. Boudreau was seeking a benefit that is not available under the *Fisheries Act*, namely a lifetime right to fish. Mr. Boudreau's submissions to the AFLAB, and those of his legal counsel at the hearing of this judicial review, are that he is still actively running his fishing operation, and seeks the ability to continue to do so using an MSO. Mr. Boudreau states that he does not seek a retirement benefit or a lifetime

income from his fishing licence; rather, he seeks the same benefit available to any other licence holder, that is, the right to fish the licence.

[40] The DFO took a similar position in *Robinson FC*, namely, that the applicant was seeking a benefit not available under the law. The Court in *Robinson FC* was satisfied the five-year maximum on MSOs creates a distinction based on physical disability that engages section 15 of the *Charter* and held:

[53] In analyzing these arguments, I have considered both the statutory regime under which the Canadian fishery is managed and the practices employed by the DFO in effecting such management. The Attorney General is correct that the holder of a fishing licence does not have a legal right to be issued a renewal of that licence at the conclusion of its term. As explained by Justice Strickland, in considering the 1996 Policy in *Elson v Canada (Attorney General)*, 2017 FC 459 [*Elson FC*] (aff'd 2019 FCA 27 [*Elson FCA*]) at paragraph 3:

3 Over the years, the DFO has established various policies pertaining to management of the fishery. One of these is the *Commercial Fisheries Licencing Policy for Eastern Canada, 1996* (“1996 Policy”) which has been revised over time but remains in effect. The 1996 Policy describes a fishing licence as an instrument by which the Minister, pursuant to his or her discretionary authority under the *Fisheries Act*, grants permission to a person to harvest certain species of fish, subject to the conditions attached to the licence. This is not a permanent permission and terminates upon expiry of the licence. The licence holder is essentially given a limited privilege, rather than any kind of absolute or permanent right or property. Generally speaking, all fishing licenses must be renewed, or “replaced”, annually.

[54] However, Mr. Robinson refers to the DFO’s practice, assuming a licence holder’s compliance with its terms and conditions, to reissue the licence to the licence holder each year, or to issue a “replacement” licence to another eligible person upon the licence holder’s request. Mr. Knight described this practice surrounding replacement in his affidavit. It is also captured in the 1996 Policy.

[55] In support of the practice of reissuing licences to a given licence holder year after year, Mr. Robinson notes the explanation of that practice in the chapter authored by David G Henley, “The Fishing Industry,” in Aldo Chricop et al, eds, *Canadian Maritime Law*, 2nd Ed (Toronto: Irwin Law, 2016) 1024 at 1041-1042. I do not understand the existence of this practice to be controversial between the parties. Indeed, in *Saulnier v Royal Bank of Canada*, 2008 SCC 58, the Supreme Court recognized that the stability of the fishing industry depends on the Minister’s predictable renewal of fishing licences year after year (at para 14).

[56] The question is whether, against that backdrop, the disparate treatment that Mr. Robinson argues engage his s 15(1) rights involves what can be characterized as a denial of equal benefit of the law. In my view, this is the correct characterization. Mr. Robinson has no more right to have his Licence renewed each year than does any other licence holder. While there is an established practice of doing so, the renewal (or, more accurately, the re-issuance) remains subject to the Minister’s absolute discretion under s 7 of the Act. However, if the Minister does re-issue his Licence, then Mr. Robinson’s ability to avail himself of the benefits afforded by that legal act differs from the ability of other licence holders who are not physically affected by a medical condition. Mr. Robinson cannot fish his licence without a particular licence condition, the authorization to use a MSO. Therefore, a decision which declines to grant him such authorization necessarily engages his s 15(1) rights as a person with a physical disability.

[57] I accept Mr. Robinson’s submissions regarding both stages of the *Alliance* test. This situation is distinct from that considered in *Auton*, where the petitioners were seeking a benefit that the law did not provide. The law provides benefits to fishers, once they are issued licences, and the administration of the benefits of licences must conform with *Charter* values.

[41] In light of the above, I accept the 1996 Policy creates a *prima facie* distinction based on disability and therefore, the Decision engages the *Charter*. I reject the Respondent’s assertion that *Robinson FC* is distinguishable, as the distinction created by the Decision is based on disability, not age.

C. *Did the Decision Consider and Balance Mr. Boudreau's Section 15 Charter Arguments?*

[42] Mr. Boudreau argues the Decision fails to consider his *Charter* arguments or accommodate his disability. He notes there is no mandatory retirement age or age-limiting criteria contained within the *Fisheries Act* or the relevant policies. He argues that the refusal to re-issue the MSO authorization was based solely on his physical disability. Mr. Boudreau states that he is not seeking a lifelong benefit or retirement income, as he is still actively operating and managing all aspects of his fishing operation from the shore. He argues the Decision forces him to give up his livelihood solely because of his disability.

[43] Mr. Boudreau also argues his circumstances are the same as in the *Robinson* case and therefore a similar finding should follow.

[44] The Respondent argues the age difference between Mr. Boudreau and Mr. Robinson makes Mr. Boudreau's circumstances entirely different. Mr. Robinson was 58 years old, whereas Mr. Boudreau was 79 at the time of the Decision.

[45] The Respondent argues the DM's treatment of the section 15 issue is reasonable because Mr. Boudreau, by his own admission, cannot physically go on his fishing vessel. This physical inability has been accommodated for many years beyond the maximum in the 1996 Policy. Mr. Boudreau was granted five additional extensions, from 2016 through 2020, based on extenuating circumstances (2016-2018) and then through his AFLAB appeal (2019-2020).

Therefore, he was granted the benefit (the ability to fish the licence despite his inability to be physically present on the vessel) available to all licence holders during his working years.

[46] In my view, the Respondent's submissions fail to address the issue raised on this judicial review, which is did the DM consider and balance the *Charter* submissions made by Mr. Boudreau?

[47] With respect to the *Charter* submissions, the Decision of the DM upholds the AFLAB recommendation, which specifically states the section 15 issue raised by Mr. Boudreau was "outside the Board's mandate". As the DM adopted the AFLAB recommendation, the DM also accepted the conclusion that the *Charter* was not considered because it was outside the mandate of the AFLAB.

[48] In his submissions to the AFLAB, Mr. Boudreau confirmed he maintains complete control of his fishing operation, notwithstanding his lack of presence on the fishing vessel itself. His MSO for all 16 fishing seasons was his son. He submitted a letter from a purchaser, Premium Seafoods Group, confirming Mr. Boudreau is still the shore captain, involved in pricing and sales. Mr. Boudreau also provided utility bills for his buildings associated with his fishing operation, all in his name. Mr. Boudreau's position before the AFLAB was that without the MSO, he could not fish the licence, and therefore could not continue to finance his fishing operation, which employed three community members directly and contributed to the economic viability of his coastal community.

[49] The DM does not engage with these submissions in the Decision. The Departmental Analysis, which the DM presumably relied upon, also does not engage with these submissions. There is no consideration or discussion as to *why* Mr. Boudreau must be physically present on the boat in order to ‘fish the licence personally’, despite this argument being explicitly raised before the AFLAB. In this respect, the Decision is the same as the decision in *Robinson FC*, where the DM failed to consider the thrust of the *Charter* arguments.

[50] The Respondent argues the Decision does reflect a proportionate balancing of the *Charter* protections. The Decision concludes that allowing Mr. Boudreau indefinite use of an MSO authorization would undermine the objectives of the fisheries management regime, which the Respondent submits is the balancing *Doré* requires.

[51] However, while the Decision notes fishing licences are not assets of the licence holder and are not intended to be used as income generating mechanism in retirement, it does not substantively respond to Mr. Boudreau’s arguments that, as a person with a disability, he should not be required to give up his chosen livelihood. It is this argument that needed to be balanced against the policy objectives. The DM needed to consider whether those policy objectives could reasonably be achieved in a manner that reduced the impact on Mr. Boudreau’s equality rights.

[52] The Decision fails to weigh the infringement of Mr. Boudreau’s rights against the statutory objectives. There is no reference to attempting to accommodate Mr. Boudreau’s disability. As in *Robinson FC*, the only option or alternative considered in the Decision, or the supporting materials, was Mr. Boudreau’s exit from the fishing industry. The Departmental

Analysis expressly concludes that because Mr. Boudreau can sell the licence, the impacts of denying him an MSO authorization are minimal.

[53] In light of *Robinson*, and considering the Decision and the underlying materials, I conclude the DM did not consider the core of Mr. Boudreau's submissions, that he complies with the policy goals by maintaining control of the fishing operation despite his inability to remain on the boat. Less infringing options may have been available, but no options beyond Mr. Boudreau's exit from the industry were considered. It is not enough for the DM to state that the section 15 arguments were considered, the Decision must demonstrate "a proportionate balancing of the *Charter* protections at play" (*Doré* at para 57).

[54] I conclude that the DM did not consider or respond to the section 15 *Charter* issue raised by Mr. Boudreau.

D. *Is the Decision Reasonable?*

[55] I note that the Decision references Mr. Boudreau's section 15 *Charter* arguments. However, the Decision and the underlying materials do not demonstrate that an analysis of the section 15 arguments on the basis of disability were considered. The DM Decision and the underlying materials focused on Mr. Boudreau's age and what was considered to be a request for a lifetime fishing licence. The issue of whether the application of the policies was discriminatory to Mr. Boudreau is not assessed.

[56] As noted in *Robinson* FCA:

[28] An administrative decision-maker does not have to address the Charter in every decision he or she makes (*Loyola* at para. 4). However, where, as in this case, a Charter protection is squarely raised by a party, the unexplained failure to address whether the Charter was engaged cannot survive reasonableness review. The reasons were not responsive to the question as framed in circumstances where it was called on to be answered (*Vavilov* at paras. 81 and 86) and the decision fails on both the transparency and justification metrics. As the Supreme Court said in *Vavilov*, reasons are the primary mechanism by which administrative decision-makers show that their decisions are reasonable (para. 81). For a decision to be justifiable where, as here, reasons are required, the decision must be justified by the reasons (paras. 86-87).

[57] The Decision fails to address the *Charter* issue. Further, the Decision also lacks transparency for failing to explain why, after 14 years of operating with an MSO, the renewal was denied. The DM (and the underlying materials before him) justifies the decision on the grounds of Mr. Boudreau's age and the fact the *Fisheries Act* does not create a lifelong right to fish. What the DM does not consider in any substantive manner is that the renewal of Mr. Boudreau's licence is in fact being denied because of his medical condition, and that engages his section 15 rights.

VI. Conclusion

[58] For the reasons above, this judicial review is granted. The Decision is unreasonable as it fails to engage with the core of Mr. Boudreau's *Charter* arguments. The Decision is quashed and the matter is remitted for redetermination in accordance with these reasons.

VII. Costs

[59] As the successful party, Mr. Boudreau is entitled to his costs. At the hearing, legal counsel for the parties agreed to costs in the amount of \$7,800.00, plus reasonable and provable disbursements, to the successful party.

JUDGMENT IN T-1118-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted and the matter is remitted for redetermination in accordance with these reasons.

2. Mr. Boudreau is awarded \$7,800.00 in costs, plus reasonable and provable disbursements.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1118-20

STYLE OF CAUSE: BOUDREAU v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: HALIFAX, NOVA SCOTIA

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DATED: MARCH 28, 2023

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