Federal Court Cour fédérale

Date: 20240904

Docket: T-278-23

Citation No.: 2024 FC 1380

Ottawa, Ontario, September 4, 2024

PRESENT: Case Management Judge Benoit M. Duchesne

BETWEEN:

CHARLES SAINT-RÉMY

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Defendant

<u>ORDER AND REASONS</u>

[1] The Respondent Attorney General of Canada (the "AGC") has brought a motion to strike the Applicant's notice of application dated February 10, 2023 (the "Application"), on the basis that:

1) the Application is bereft of any possibility of success because it is premature;

2) the Applicant has yet to exhaust the remedy available to him under section 8 of the *Special Economic Measures (Haiti) Regulations* SOR/2022-226 (the *"*Haiti Regulations*"*) that once exhausted may determine the outcome of the Application,

or, at minimum, will inform the decision of this Court with respect to whatever issues may remain for judicial review; and,

3) there are no exceptional circumstances that justify allowing the premature Application to proceed.

[2] The Applicant responds that the only issue on this motion is whether his Application should be struck on the basis that the delisting application process set out in section 8 of the *Haiti Regulations* is an "adequate alternative remedy". He argues that the delisting application to be made to the Minister of Foreign Affairs in writing pursuant to section 8 of the of the *(Haiti) Regulations* (the "Section 8 Application") is not an adequate remedy and that his Application should proceed. He argues more particularly that the Section 8 Application is not adequate because:

1) in contrast to other regulations such as the *Special Economic Measures (Russia) Regulations*, SOR/2014-58, (the "*Russia Regulations*") there is no statutory deadline under the *Haiti Regulations* within which the Minister is required to have made a decision on a delisting application;

2) there is evidence suggesting that the Minister would not respond to a delisting application in any reasonable period of time; and,

3) the Section 8 Application is to be made to the same decision-maker who has made the initial decision, is tantamount to a reconsideration remedy, and as a result does not inspire confidence that the remedy might be effective.

[3] The Court finds that the Section 8 Application is an adequate alternative remedy to judicial review, and it must be pursued and exhausted prior to seeking judicial review in accordance with long standing principles of administrative law.

[4] The argument that the Minister would not respond to a Section 8 Application within a reasonable period of time is speculative given the absence of probative and relevant evidence on the issue in the record before the Court on the motion, and, in light of recent jurisprudence, is in any event unfounded.

[5] The text of the *Haiti Regulations* is clear that the first decision-maker pursuant to its provisions is the Governor in Council whereas a delisting application is determined by the Minister, not by the Governor in Council, notwithstanding that the Governor in Council has the ultimate discretion to delist an Applicant following the Minister's decision and recommendation to delist that would follow it. The Section 8 Application would in any way proceed on the basis of a different record than that which was before the Governor in Council at the time of its original decision because of the information that would be provided by the Applicant in his efforts to persuade the Minister that there are reasonable grounds to recommend that he should be removed from the Schedule to the regulation.

[6] The Respondent's motion is granted, and the Applicant's Application is struck without leave to amend for the reasons that follow.

I. The Law Applicable on a Motion to Strike

[7] The test applicable on a motion to strike an application for judicial review is set out in *Canada (National Revenue) v. JP Morgan Asset Management (Canada)*, 2013 FCA 250 *("JP Morgan").*

[8] The Court wrote in that decision at paragraph 47 that:

> "The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success" There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application."

[9] The Supreme Court of Canada has reiterated this test and confirmed its application in *Iris Technologies Inc. v Canada*, 2024 SCC 24:

> [26] There is no dispute on the proper test to be applied on a motion to strike in this context. A court seized of a motion to strike assumes the allegations of fact set forth in the application to be true and an application for judicial review will be struck where it is bereft of any possibility of success (*JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue),* 2013 FCA 250, [2014] 2 F.C.R. 557, at para. 47). It is understood to be a high threshold and will only be granted in the "clearest of cases" (*Ghazi v. Canada (National Revenue)*, 2019 FC 860, 70 Admin L.R. (6th) 216, at para. 10).

[10] In determining whether the threshold to strike is met by the moving party, the Court should consider that any of the following qualify as an obvious, fatal flaw warranting the striking out of a notice of application (*JP Morgan*, at para. 66; *Dakota Plains First Nation v. Smoke*, 2022 FC 911 (CanLII), at para. 6):

> a) If the notice of application fails to state a cognizable administrative law claim which can be brought in the Federal Court;
>
> b) If the Federal Court is not able to deal with the administrative law claim by virtue of the *Federal Courts Act* or some other legal principle; or
>
> c) If the Federal Court cannot grant the relief sought in the notice of application.

[11] The issue of prematurity on this motion falls within the scope of “some other legal principle” referred to above in paragraph b), immediately above, as an obvious and fatal flaw that is sufficient to strike a notice of application.

[12] In considering a motion to strike, the Court must read the notice of application under review holistically and practically with a view to understanding its real essence and essential character (*JP Morgan*, at paras. 49 and 50).

[13] The facts pleaded in the notice of application are to be taken as true while reading the notice of application broadly with a view to accommodating any inadequacies in the allegations. Accepting facts as pleaded in the notice of application as true for the purposes of the motion does not entail that characterisations of fact or speculations contained in the notice of application should be considered as true. It also does not require the Court to consider the legal arguments made in the application as being true.

II. Admissibility of Affidavit evidence

[14] As a general rule, affidavits are not admissible in support of a motion to strike applications for judicial review. The general rule against admissibility is justified by several considerations as articulated by the Federal Court of Appeal in *JP Morgan* at paragraph 52 as follows:

> [51] As a general rule, affidavits are not admissible in support of motions to strike applications for judicial review.
>
> [52] This general rule is justified by several considerations:
>
> > • Affidavits have the potential to trigger cross-examinations and refused questions and, thus, can delay applications for judicial review. This is contrary to Parliament's requirement that applications for judicial review proceed "without delay" and be heard "in a summary way."
> >
> > • A respondent bringing a motion to strike a notice of application does not need to file an affidavit. In its motion, it must identify an obvious and fatal flaw in the notice of application, i.e., one apparent on the face of it. A flaw that can be shown only with the assistance of an affidavit is not obvious. A respondent's inability to file evidence does not normally prejudice it. It can file evidence later on the merits of the review, subject to certain limitations, and often the merits can be heard within a few months. If an application has no merit, it will be dismissed soon enough. And if there is some need for faster determination of the merits, a respondent can always move for an order expediting the application.
> >
> > • As for an applicant responding to a motion to strike an application, the starting point is that in such a motion the facts alleged in the notice of application are taken to be true: Chrysler Canada Inc. v. Canada, 2008 FC 727 at paragraph 20, aff'd on appeal, 2008 FC 1049. This obviates the need for an affidavit supplying facts. Further, an applicant must state "complete" grounds in its notice of application. Both the Court and opposing parties are

> entitled to assume that the notice of application includes everything substantial that is required to grant the relief sought. An affidavit cannot be admitted to supplement or buttress the notice of application.

[15] Exceptions to the rule against admitting affidavits on motions to strike should be permitted only where the justifications for the general rule of inadmissibility are not undercut, and the exception is in the interests of justice.

[16] One such exception is where prematurity is raised as the basis to strike as the issue strikes at the Court's jurisdiction to hear the proceeding (*Picard v Canada (Attorney General*), 2019 CanLII 97266 (FC), at paras 17 and 18; *Tait v Canada (Royal Canadian Mounted Police),* 2024 FC 217, at para 27). In this sense the admissibility of affidavit evidence is grounded in considerations similar to those that permit affidavit evidence in actions where the Court's jurisdiction to hear a proceeding in is dispute (*Hodgson v. Ermineskin Indian Band No. 942*, 2000 CanLII 15066 (FC), at para. 9; affirmed, 2000 CanLII 16686 (FCA); *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54 (CanLII), at para 24). The affidavit evidence tendered must nevertheless be admissible from a procedural and from an evidentiary perspective and must be relevant to the issue on the motion.

[17] The Applicant has filed a single affidavit in support of his arguments. The affidavit's deponent is a legal assistant employed by one of the two law firms representing the Applicant. The deponent attests to having personal knowledge of the matters she deposes to because of her position as a legal assistant with one of the Applicant's legal representatives. There is no explicit indication in the affidavit that the legal assistant has actually worked on or has knowledge of any

of the facts that may be material to this proceeding or to this motion beyond her attaching various exhibits to her affidavit.

[18] Paragraphs 2 to 15 of the affidavit serve to produce the following documents as exhibits:

a) internet webpage printouts of Government of Canada websites that describe:

i) Canadian sanctions legislation;

ii) Canadian sanctions related to Russia;

iii) Canadian sanctions related to Haiti;

b) a Global Affairs Canada website printout describing the delisting application process;

c) a print-out from the Canada Border Services Agency's (CBSA) website entitled "Recourse Principles";

d) a print-out from the CBSA's website entitled "Service Standards";

e) a print-out from the CBSA's website entitled "Ensuring an Impartial Resolution Process";

f) a copy of the report entitled "Strengthening Canada's Autonomous Sanctions Architecture" released by the Canadian Senate's Standing Committee on Foreign

Affairs and International Trade on May 17, 2023 obtained from the Senate of Canada's website;

g) a copy of the response published by Global Affairs Canada to a question raised by the Canadian Senate's Standing Committee on Foreign Affairs and International Trade on October 26, 2022;

h) copies of notices of application for judicial review filed by other persons sanctioned by or as a result of regulations enacted pursuant to the *Special Economic Measures Act*, SC 1992, c 17;

i) a copy of the notice of application for judicial review filed by Laurent Lamothe on December 22, 2022, along with other documents including relating to Mr. Lamothe's proceeding including a stay Order and a printout of the court file history for the proceeding in Court file T-2697-22.

[19] Despite being *prima facie* admissible as exhibits attached to an affidavit tendered on a motion pursuant to Rule 80(3) of the *Federal Courts Rules*, none of these documents have been shown to be relevant to the actual issues before the Court on this motion as none of these documents concern the Applicant directly. None were referred to during the oral arguments made on this motion despite being referred to in the Applicant's written representations.

[20] Having reviewed the documents I conclude that they have little to no probative value for determining whether a Section 8 Application is an effective alternative remedy within the meaning of the jurisprudence on the issue of prematurity.

[21] The final document attached to the affidavit is copy of a letter dated February 20, 2023, sent by one of the Applicant's solicitors of record to Global Affairs Canada. The letter's date is ten (10) days after the February 10, 2023, issue of the Application that is now before the Court. In that letter, the Applicant informed Global Affairs Canada as follows:

> "Pursuant to subsection 8(1) of the Haiti Sanctions, a designated person may apply in writing to the Minister to have their name removed from the Schedule. It is our intention to file a delisting application as soon as possible; however, in order to do that, we request that Global Affairs Canada provide us with particulars of the Department's reasons for placing Mr. Saint-Remy on the Schedule and specifically the particular provision within section 2 of the Haiti Sanctions on which the Department has based its decision to list Mr. Saint-Remy on the Schedule.
>
> We look forward to your timely reply so that we may proceed to complete our application for delisting."

[22] This document is relevant to the issues on this motion.

[23] The Court understands from this document that the Applicant knew as early as 10 days after the commencement of this proceeding that he could file a Section 8 Application and perhaps be removed from the Schedule to the *Haiti Regulations* as a result. The Applicant went so far as to have his solicitors write to Global Affairs Canada to communicate his intention to seek the relief of delisting through a Section 8 Application. Nevertheless, the Applicant who once believed that a delisting application was a sufficiently appropriate remedy to communicate his intention of proceeding with a Section 8 Application ceased pursuing the remedy that was available to him outside of this proceeding and now says that it is inadequate and ineffective.

III. Prematurity and the requirement to exhaust adequate alternative remedies

[24] Judicial review is a discretionary remedy that the Court will consider when there is no adequate alternative remedy available to the aggrieved applicant (*Harelkin v University of*

Regina, 1979 CanLII 18 (SCC), [1979] 2 SCR 561, 26 NR 364). Conversely, the Court will not interfere with ongoing administrative proceedings by entertaining judicial review when administrative remedies are provided for by the administrative scheme in place (*Canada (Border Services Agency) v. C.B. Powell Limited,* 2010 FCA 61 (CanLII) at paragraphs 30 to 33).

[25] As the Federal Court of Appeal has held, the non-availability of judicial review as interlocutory relief while an administrative process has yet to run its course is next to absolute. A less stringent criterion would only encourage premature forays into courts (*Dugré v. Canada (Attorney General)*, 2021 FCA 8 (CanLII), at para 37 (*"Dugré"*)). An application for judicial review against what is an interlocutory administrative decision can be brought only in "exceptional circumstances." These circumstances are very rare and require that the consequences of an interlocutory decision be so "immediate and radical" that they call into question the rule of law (*Dugré*, at para 35; *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17, [2015] 4 F.C.R. 467, at paras. 31-33, set aside on a different point, 2016 SCC 29, [2016] 1 S.C.R. 770; *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139, 473 N.R. 283, at paras. 56-60).

[26] In *Strickland v. Canada (Attorney General),* 2015 SCC 37 (CanLII), the Supreme Court of Canada discussed the considerations identified by the jurisprudence in determining whether an alternative remedy or forum is adequate as to justify a discretionary refusal to hear a judicial review application on the basis of prematurity. Justice Cromwell, writing for the Court, wrote as follows at paras 42 to 45:

> [42] The cases identify a number of considerations relevant to deciding whether an alternative remedy or forum is adequate so as to justify a discretionary refusal to hear a judicial review application. These considerations include the convenience of the

alternative remedy; the nature of the error alleged; the nature of the other forum which could deal with the issue, including its remedial capacity; the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and cost: *Matsqui*, at para. 37; *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61, [2011] 2 F.C.R. 332, at para. 31; *Mullan*, at pp. 430-31; *Brown and Evans*, at topics 3:2110 and 3:2330; *Harelkin*, at p. 588. In order for an alternative forum or remedy to be adequate, neither the process nor the remedy need be identical to those available on judicial review. As Brown and Evans put it, "in each context the reviewing court applies the same basic test: is the alternative remedy adequate in all the circumstances to address the applicant's grievance?": topic 3:2100 (emphasis added).

[43] The categories of relevant factors are not closed, as it is for courts to identify and balance the relevant factors in the context of a particular case: *Matsqui*, at paras. 36-37, citing *Canada (Auditor General),* at p. 96. Assessing whether there is an adequate alternative remedy, therefore, is not a matter of following a checklist focused on the similarities and differences between the potentially available remedies. The inquiry is broader than that. The court should consider not only the available alternative, but also the suitability and appropriateness of judicial review in the circumstances. In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate. Ultimately, this calls for a type of balance of convenience analysis: *Khosa*, at para. 36; *TeleZone*, at para. 56. As Dickson C.J. put it on behalf of the Court: "Inquiring into the adequacy of the alternative remedy is at one and the same time an inquiry into whether discretion to grant the judicial review remedy should be exercised. It is for the courts to isolate and balance the factors which are relevant . . ." (*Canada (Auditor General)*, at p. 96).

[44] This balancing exercise should take account of the purposes and policy considerations underpinning the legislative scheme in issue: see, e.g., *Matsqui*, at paras. 41-46; *Harelkin*, at p. 595. David Mullan captured the breadth of the inquiry well:

> While discretionary reasons for denial of relief are many, what most have in common is a concern for balancing the rights of affected individuals against the imperatives of the process under review. In particular, the courts focus on the question of whether the application for relief is appropriately

> respectful of the statutory framework within which that application is taken and the normal processes provided by that framework and the common law for challenging administrative action. Where the application is unnecessarily disruptive of normal processes . . . the courts will generally deny relief. [Emphasis added; p. 447.]
>
> [45] The factors to be considered in exercising this discretion cannot be reduced to a checklist or a statement of general rules. All relevant factors, considered in the context of the particular case, should be taken into account.

[27] The Supreme Court of Canada also noted in *Strickland* that "the remedy available in an alternative forum need not be the claimant's preferred remedy or identical to that which the claimant seeks by way of judicial review. As the Court affirmed in *Matsqui*, at para. 37, and *Harelkin,* at p. 588, the remedial capacity of the alternative decision-maker is only one factor to consider in assessing adequacy". The existence of an adequate alternative remedy, although not the one an applicant may prefer, is sufficient to have the Court find that an application for judicial review is premature (*Fortin v. Canada (Attorney General)*, 2021 FC 1061 (CanLII), at para 59).

IV. The Facts and the Notice of Application

[28] There is no dispute between the parties about the facts underlying the motion.

[29] The Applicant was named in Part 2 of the Schedule to the *Haiti Regulations* following a regulatory amendment determined by the Governor in Council on January 12, 2023. Part 2 of the Schedule to the *Haiti Regulations* sets out the names of persons in respect of whom the Governor in Council, on the recommendation of the Minister of Foreign Affairs, is satisfied that there are reasonable grounds to believe meets the requirements of section 2 of the *Haiti Regulations.* The

title of Part 2 is “Individuals – Acts of Significant Corruption”. Section 2 of the *Haiti Regulations* does not explicitly refer to “acts of significant corruption” as a basis to name a person in the Schedule to the *Haiti Regulation.* Although it is not necessary to make any finding on this point to determine this motion, “acts of significant corruption” taken in their plain and ordinary meaning obviously fall within the ambit of the expression “activities that directly or indirectly undermine the peace, security and stability of Haiti” found at paragraph 2(a) of the regulation.

[30] The Governor in Council did not provide the Applicant with notice that he had been the subject of a recommendation by the Minister as contemplated by section 2 of the *Haiti Regulations*. The Applicant was not provided with an opportunity to make submissions to the Minister or to the Governor in Council prior to the January 12, 2023, decision being made in his regard. The Applicant was also not provided with reasons underpinning the Governor in Council’s decision to amend the *Haiti Regulations* to include him in its Schedule and to be affected by the prohibitions and limitations effected by the *Haiti Regulations* themselves. There is nothing included in the *Haiti Regulations* that suggests that the Applicant is entitled to notice, to make submissions, or be provided with the Governor in Council’s reasons to name him in the Schedule to the *Haiti Regulations.*

[31] There is no dispute that the Applicant has not made a Section 8 Application to the Minister that, if successful, could lead to his being delisted from the Schedule to the *Haiti Regulations*.

V. The Notice of Application

[32] Through his Application the Applicant seeks:

a. an order quashing the Decision to add the Applicant to the Schedule of the *Haiti Regulations*

b. an order directing the Governor in Council and the Minister to remove the Applicant's name from the Schedule of the Regulations;

c. a declaration that the Decision is deficient, unreasonable and does not comply with the principles of natural justice and procedural fairness;

d. in the alternative, an order:

   (a) setting aside the Decision and referring it back to the Governor in Council and the Minister for redetermination in accordance with such instructions as this Court deems appropriate and just;

   (b) compelling the Governor in Council and the Minister to disclose to the Applicant all documents and information considered by the Governor in Council and the Minister leading to and resulting in the Decision;

   (c) that the Applicant be given an opportunity to respond to the disclosures and productions ordered to be made pursuant to subparagraph (b) above;

(d) extending the time provided by Rule 306 of the *Federal Courts Rules*, affording the Applicant a period of 30 days following the release of the disclosures and productions ordered to be made pursuant to subparagraph (b) above within which to serve and file his supporting affidavits and documentary exhibits; and

(e) requiring the Governor in Council and the Minister to undertake a reconsideration of the Decision in light of the response provided by the Applicant pursuant to subparagraph (c) above;

e. an interim order under s. 18.2 of the *Federal Courts Act*, including staying the effect of the Decision pending final determination of this application.

[33] The Application includes allegations regarding:

a) the adoption of the *Special Economic Sanctions Act* and the *Haiti Regulations*;

b) an enumeration of the sanctions imposed on persons who are named in the Schedule to the *Haiti Regulations;*

c) the *Haiti Regulations* being amended on January 12, 2023, to name the Applicant in the Schedule to the regulation;

d) that a news release was issued on January 13, 2023, that publicly announced the regulatory amendment that included the Applicant's name to the Schedule of the *Haiti Regulation*;

e) blanket allegations against individuals contained in the January 13, 2023, news release;

f) the Applicant's inability to fairly appreciate the case against him from the content of the news release of from the *Haiti Regulation* itself;

g) the Applicant not being provided with information or reasons for his inclusion to the Schedule to the *Haiti Regulations*;

h) being denied procedural fairness by the process that led to the decision include him in the Schedule to the *Haiti Regulations*; and,

i) his argument that there is no reasonable basis for him to be added to the Schedule to the *Haiti Regulations*.

[34] Reading the Application holistically, it is clear that the Applicant seeks to be removed from the Schedule to the *Haiti Regulations* as the ultimate relief. He argues that his inclusion to the Schedule was made in breach of his rights of procedural fairness because he does not know the case against him and was not provided an opportunity to respond to show that he ought not to be a person named in the Schedule to the *Haiti Regulations*. He seeks to remedy the breaches he has alleged.

VI. Analysis

[35] The only issue on this motion is whether the delisting application process set out in section 8 of the *Haiti Regulations* is an "adequate alternative remedy" that should lead to this

Court to strike the Application on the basis that there exists an adequate alternative remedy within the prescribed administrative scheme set out in the *Haiti Regulations* that must be pursued and exhausted prior to seeking judicial review before this Court.

[36] The scheme of the *Haiti Regulations*, much like the scheme of the *Special Economic Measures (Russia) Regulations*, SOR/2014-58 (the *"Russia Regulations"*), is that the Governor in Council is the decision-maker with respect to whether a person is to be included in the Schedule to the regulation and be subject to the prohibitions and restrictions contained in the regulation and its empowering statute. This is clear from section 2 of the *Haiti Regulations* that reads as follows:

Listed person	**Personne dont le nom figure sur la liste**
2 A person whose name is listed in the schedule is a person who is in Haiti, or is or was a national of Haiti who does not ordinarily reside in Canada, and in respect of whom the Governor in Council, on the recommendation of the Minister, is satisfied that there are reasonable grounds to believe is	**2** Figure sur la liste établie à l'annexe le nom de toute personne qui se trouve en Haïti ou qui est ou était un de ses nationaux ne résidant pas habituellement au Canada à l'égard de laquelle le gouverneur en conseil est convaincu, sur recommandation du ministre, qu'il existe des motifs raisonnables de croire qu'il s'agit de l'une des personnes suivantes :
(a) a person engaged in activities that directly or indirectly undermine the peace, security and stability of Haiti;	a) une personne se livrant à des activités qui, même indirectement, compromettent la paix, la sécurité et la stabilité d'Haïti;
(a.1) a person who has participated in gross and	a.1) une personne ayant participé à des violations

systematic human rights violations in Haiti;	graves et systématiques des droits de la personne en Haïti;
(b) a current or former senior official of the Government of Haiti;	b) un haut fonctionnaire, ou un ancien haut fonctionnaire, du gouvernement d'Haïti;
(c) an associate of a person referred to in any of paragraphs (a) to (b);	c) un associé d'une personne visée à l'un des alinéas a) à b);
(d) a family member of a person referred to in any of paragraphs (a) to (c) and (g);	d) un membre de la famille d'une personne visée à l'un des alinéas a) à c) et g);
(e) an entity owned — or held or controlled, directly or indirectly — by a person referred to in any of paragraphs (a) to (d);	e) une entité appartenant à une personne visée à l'un des alinéas a) à d) ou détenue ou contrôlée, même indirectement, par elle;
(f) an entity owned — or held or controlled, directly or indirectly — by Haiti; or	f) une entité appartenant à Haïti ou détenue ou contrôlée, même indirectement, par lui;
(g) a senior official of an entity referred to in paragraph (e) or (f).	g) un cadre supérieur d'une entité visée aux alinéas e) ou f).

[37] As may be observed from the wording of the provision, the Governor in Council makes its decision to include a person in the Schedule by way of a regulation after it receives a recommendation from the Minister. The Minister is quite clearly not the decision-maker with respect to the inclusion of any person in the Schedule to the regulation.

[38] The availability of a Section 8 Application as a remedy to having been included in the Schedule to the regulation is provided at sections 8 and 9 of the *Haiti Regulations* as follows:

Removal from list	**Radiation**
8 (1) A listed person may apply to the Minister in	**8 (1)** La personne dont le nom figure sur la liste établie

writing to have their name removed from the schedule.	à l'annexe peut demander par écrit au ministre d'en radier son nom.
Reasonable grounds	**Motifs raisonnables**
(2) On receipt of an application, the Minister must decide whether there are reasonable grounds to recommend the removal to the Governor in Council.	**(2)** À la réception de la demande, le ministre décide s'il existe des motifs raisonnables de recommander la radiation au gouverneur en conseil.
New application	**Nouvelle demande**
9 If there has been a material change in circumstances since the last application was submitted, a listed person may submit another application under section 8.	**9** La personne dont le nom figure sur la liste peut, si la situation a évolué de manière importante depuis la présentation de sa dernière demande au titre de l'article 8, en présenter une nouvelle.

[39] Sections 8 and 9 provide that a person who is included in the Schedule may apply in writing to the Minister to have their name removed from the Schedule to the regulation. Upon receipt of that application, the Minister – not the Governor in Council – must decide whether there are reasonable grounds for a recommendation to be made to the Governor in Council to make a fresh decision to remove the person's name from the Schedule to the regulation.

VII, Applicant argument no. 1 – the absence of a statutory deadline for a Ministerial response

[40] The Applicant contrasts section 9 of the *Russia Regulations* with section 8 of the *Haiti Regulations* to argue that the Section 8 Application pursuant to the *Haiti Regulations* is not an adequate remedy as there is no statutory deadline under the *Haiti Regulations* within which the Minister is required to have made a decision on a delisting application.

[41] The Applicant is correct that subsection 9(3) of the *Russia Regulations* requires that the Minister “must make a decision on the application within 90 days after the day on which the application is received.” whereas subsection 8(2) of the *Haiti Regulations*’ language does not include the 90-day timeframe. As can be observed from subsection 8(2) of the *Haiti Regulations* reproduced above, the *Haiti Regulations* require the Minister to make a decision on a Section 8 Application “on receipt of an application”. The *Haiti Regulation* does not provide the Minister with 90-day timeframe which to make a decision on a delisting application. Instead, the Minister is required to act on receipt on an application, regulatory language that suggests that the Minister must act more expeditiously when she receives a delisting application pursuant to the *Haiti Regulations* than pursuant to the *Russia Regulation*.

[42] In any event I would comment as my colleague Associate Judge Cotter did in *Mobile Telesystems Public Joint Stock Company v. The Attorney General of Canada,* 2024 FC 1237 (*“Mobile Telesystems”*) at paragraph 29 that the Applicant can seek a *mandamus* order should the Minister not make a decision within the timeframe prescribed by the regulation.

[43] The Section 8 Application is not made an inadequate alternative remedy because of the absence of fixed timeframe fixed within which the Minister must decide whether there are reasonable grounds to recommend the Applicant’s removal from the Schedule to the regulation.

[44] The Applicant’s argument must therefore be rejected on a plan reading of the *Haiti Regulations*.

VIII Applicant argument no 2 - the Minister would not respond to a delisting application in any reasonable period of time.

[45] There is no direct evidence that the Minister would not respond in a timely manner to a Section 8 Application brought by the Applicant because the Applicant has not made a Section 8 Application. Following Justice McDonald's reasoning as set in *Fortin v Canada (Attorney General)*, 2021 FC 1061 at para 45, it is premature to assume that the Minister would not respond in a timely manner to a Section 8 Application brought by the Applicant when the Applicant has failed to take advantage of the remedy available to him. The argument advanced that the Minister would not respond in a timely manner is therefor entirely speculative.

[46] To address the speculative nature of his argument, the Applicant has introduced copies of notices of application filed by 8 different applicants pursuant to the *Russia Regulations* as Exhibits J to Q, inclusively, to the affidavit tendered on this motion. The allegations made in those notices of application are not assumed to be true for the purposes of this motion. As such, the Court is left to consider notices of application filed by other parties in other proceedings that may or may not contain provable allegations to fill the gap in the Applicant's evidence on this motion. I echo Associate Judge Cotter's observation in *Mobile Telesystems* at paragraph 13 that such evidence is irrelevant to the issues on this motion because they are not personal to the Applicant.

[47] The Court would not accept these notices of application as supporting the argument advanced by the Application even if the notices of application were to be considered probative. Take for instance the Applicant's reliance on the Notice of Application produced as Exhibit L. The Exhibit L document is the Notice of Application filed in Docket No.: T-846-23, in which the Applicant was Igor Viktorovich Makarov. The Minister responded to Mr. Makarov's delisting

application and recommended to the Governor in Council that Mr. Makarov be delisted from the Schedule to the *Russia Regulations,* as appears from paragraphs 31 to 45 of *Makarov v. Canada (Foreign Affairs)*, 2024 FC 1234 (CanLII) at paras 73 to 84, (*"Makarov"*). The Exhibit L evidence produced by the Applicant, if considered relevant, undercuts his argument.

[48] The same can be said for the documents produced as Exhibits J, N, Q and R which all reflect that the Minister or her delegates have responded to the applicants in those proceedings despite that decisions on their delisting applications were not made by the time they commenced their *mandamus* proceedings before this Court.

[49] The Applicant's second argument is based on speculation and must be rejected.

IX Applicant Argument no.3 – a Section 8 Application is to be made to the same decision maker as made the initial decision and is tantamount to a reconsideration

[50] The Applicant's argument that the Section 8 Application process is tantamount to the Governor in Council reconsidering its initial decision to include the Applicant in the Schedule to the *Haiti Regulations* does not resist scrutiny once the process that leads to decisions to include and to remove a person from the Schedule to the regulations are considered in their broad strokes.

[51] As was explained in *Makarov,* the Governor in Council decision to name the Applicant in the Schedule to an economic sanctions regulation such as the *Russia Regulations* is a discretionary decision that can be considered as executive in nature and must be given the widest margin of appreciation "because it involves public interest determinations based on a wide considerations of policy and public interest assessed on polycentric, subjective or indistinct

criteria and shaped by the administrative decision makers' view of economics, cultural considerations and the broader public interest" that are very much unconstrained.

[52] The *Russia Regulations* and the *Haiti Regulations* follow the same decision-making scheme and, absent evidence to suggest the contrary, should be interpreted in the same manner.

[53] The decision-making scheme in the *Haiti Regulations,* like as described in *Makarov* pursuant to the *Russia Regulation,* is as follows:

a) pursuant to section 2 of the regulation, upon a recommendation from the Minister, the Governor in Council lists a person in the Schedule to the regulation if it is satisfied that there are reasonable grounds to believe that a person has engaged in the conduct described at section 2 of the *Haiti Regulations*;

b) pursuant to section 8 of the regulation, the person named in the Schedule to the regulation may make a delisting application to the Minister;

c) pursuant to section 8 of the regulation, the Minister decides whether there are reasonable grounds to recommend to the Governor in Council that the applicant be removed from the Schedule to the regulation in light of the applicant's delisting application; and,

d) through section 8 of the regulation, the Governor in Council, upon a recommendation from the Minister following the delisting application and the Minister's decision that there are reasonable grounds to remove the person from

the Schedule to the regulation, decides whether a person who is named in the Schedule to the regulation should be removed from the Schedule to the regulation.

[54] Associate Judge Cotter determined in *Mobile Telesystems* at paragraph 32 that the decision-making scheme in the *Russia Regulations* reflects that a Section 8 Application is not the same as the typical administrative decision maker power to reconsider its own decision. Associate Judge Cotter reasoned as follows:

> [32] The applicant also argues that the power of an administrative decision maker to reconsider its own decision is, generally, not an adequate alternative remedy to judicial review. However, the typical power of an administrative decision maker to reconsider its own decision is different from the process available under section 8. As stated in one of the cases relied on by the applicant, the reconsideration power of the administrative tribunal, in that case the Canada Labour Relations Board, "is to be exercised with restraint, so that reconsideration is the exception rather than the norm" (*Buenaventura v Telecommunications Workers Union*, 2012 FCA 69, at paragraph 31). This is quite different from the process available under section 8 for the following reasons. First, under sections 8(2) and (3) the Minister "***must decide*** whether there are reasonable grounds to recommend to the Governor in Council that the applicant's name be removed" from the Sanctions List, and "***must make a decision*** on the application within 90 days" (emphasis added), and as a result, it is quite different from an option that is the exception that is to be exercised with restraint. Second, on an application under section 8(1) the applicant can submit whatever evidence, information and submissions it wishes. Third, the Minister is not reconsidering the original decision to place the person on the Sanctions List. Rather, having received the application and whatever information, evidence and submissions the person provides, the Minister is deciding "whether there are reasonable grounds" at that point to recommend that the person be removed from the Sanctions List. Fourth, the decision maker under section 8 is somewhat different. The initial decision under section 2 to add a person to the Sanctions List is made by the GIC on the recommendation of the Minister. Under section 8(2) it is the Minister that must make the decision, being "whether there are reasonable grounds to recommend to the Governor in Council that the applicant's name be removed from" the Sanctions List.

[55] I agree with Associate Judge Cotter.

[56] The listing or delisting decision to be made and the process by which the listing or delisting decision is to be made follow different processes, have different steps, and proceed on the basis of different submissions before different decision-makers. The decision-making scheme set out in the *Haiti Regulations* does not contemplate that the Governor in Council is reconsidering its initial decision to include a person in the Schedule to the regulation when it receives the Minister's recommendation following the Minister's decision that there are reasonable grounds to remove a person from the Schedule to the regulation. Rather, the Section 8 Application requires that two decisions be made by two distinct decision-makers on the basis of information that was not before either of them previously. Such a scheme is not consistent with a scheme that contemplates and implies a decision maker's power to reconsider their final decision (*Chandler v Alberta Association of Architects,* 1989 CanLII 41 (SCC), at page 860. In my view, the process does not contemplate a reconsideration at all. Rather, it contemplates different decisions-makers with different decisions to make on the basis of different information.

[57] The Applicant also argues that there is concern that the remedy offered by the Section 8 Application is not a true remedy because the Minister is a member of Cabinet and does not have sufficient separation from Cabinet and its decision-making. No evidence was led in respect to this argument. The Applicant's argument is based on conjecture and must therefore be rejected.

X The Section 8 Application as an adequate alternative remedy

[58] Notwithstanding the other arguments advanced by the Applicant, the question remains whether a Section 8 Application is an adequate alternative and effective remedy. In my view it is because in all of the circumstances it addresses the Applicant's grievances.

[59] The thrust of the Applicant's grievance as set out in his notice of application is that: a) he was not provided with information or reasons for his inclusion in the Schedule to the *Haiti Regulations;* and b) that he was denied procedural fairness by the process that led to the decision include him in the Schedule to the *Haiti Regulations.* These grievances can be addressed through a Section 8 Application as has been shown to be the case in *Makarov*. A Section 8 Application will allow the Applicant to obtain information from the Minister and to submit information to show that there are reasonable grounds for him not to be listed in the Schedule to the regulation.

[60] The result of a successful Section 8 Application may be that the Applicant is removed from the Schedule to the *Haiti Regulations*. Assuming such a result, then the crucial relief sought through this proceeding would have been obtained in the manner and by the means contemplated by Parliament.

[61] Considering the factors identified in *Strickland, CB Powell* and *Dugré*, the Court finds that a Section 8 Application is an adequate and effective remedy that is available to the Applicant now and later. The Applicant's procedural fairness concerns would be addressed by his engaging directly with the Minister, the Minister is a decision-maker of high expertise in connection with the subject matter of economic sanctions and whether reasonable grounds exist to list or delist a person from the economic sanctions regulations (*Makarov*, at paras 79 to 83), and there is no persuasive evidence led to suggest that the Minister would not make her decision expeditiously in light of all of the circumstances. The Minister would, assuming a favourable decision on the Section 8 Application, make a recommendation to the Governor in Council that the Applicant be removed from the Schedule to the regulation. Considering these factors and that the Ministerial decision to be made lies more within the expertise and experience of the executive rather than the

courts and that the widest deference is owed to the Minister and to the Governor in Council on the judicial review of a determination of who should or should not be sanctioned pursuant to economic sanction regulations (*Makarov*, at para 82), it seems clear that the remedial route Parliament intended the Applicant to follow and exhaust prior to engaging with the Court is an alternate adequate and effective remedy to be pursued and exhausted prior to engaging the Court in a judicial review proceeding. It may not be the Applicant's preferred remedy, but it is adequate, effective, and available to him as he has previously acknowledged in his correspondence to Global Affairs Canada.

[62] There was no argument that there are special circumstances at issue in this proceeding that call the rule of law into question.

[63] There is therefore no reason to make an exception to the principle of exhaustion in this case.

XI Conclusion

[64] For the reasons set out above, the Applicant's Notice of Application shall be struck as it is premature because the Applicant has not exhausted the remedies available to him pursuant to the *Haiti Regulations* before seeking judicial review. In the language of *JP Morgan*, the Applicant's refusal or failure to proceed with a Section 8 Application is an obvious, fatal flaw striking at the root of this Court's power to entertain the application on the basis of principles of administrative law.

[65] Considering the nature of the basis to strike the Applicant's Notice of Application, there is no basis to permit the Applicant to amend his Notice of Application to cure its defects.

[66] The parties informed the Court at the hearing of the motion that they had agreed that the successful party was entitled to its costs in the amount of $3,000. The Order will go accordingly.

THIS COURT ORDERS that:

1 The Applicant's Notice of Application dated February 10, 2023, is struck out, without leave to amend, and the Applicant's proceeding is dismissed pursuant to Rule 168.

2. The Applicant shall by the Respondent its costs of this motion which I hereby fix at $3,000, all-inclusive.

"Benoit M. Duchesne"

Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-278-23
STYLE OF CAUSE:	CHARLES SAINT-RÉMY v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 29, 2024
REASONS FOR JUDGMENT AND JUDGMENT:	ASSOCIATE JUDGE BENOIT M. DUCHESNE
DATED:	SEPTEMBER 4, 2024

APPEARANCES:

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