Federal Court of Appeal Cour d'appel fédérale

Date: 20210226

Docket: A-264-20

Citation: 2021 FCA 39

Present: **RIVOALEN J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

DANA ROBINSON

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on February 26, 2021.

REASONS FOR ORDER BY: RIVOALEN J.A.

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REASONS FOR ORDER

RIVOALEN J.A.

I. Introduction

[1] The Attorney General of Canada moves pursuant to Rule 398 of the *Federal Courts Rules*, S.O.R./98-106 (the Rules), for a stay of the judgment of the Federal Court issued on September 30, 2020 (per Justice Southcott) (2020 FC 942) (the Judgment) until this Court determines the appeal and cross-appeal.

[2] The following background provides context to these reasons.

[3] The Minister of Fisheries and Oceans (the Minister) has authority over fisheries pursuant to the *Fisheries Act*, R.S.C 1985, c. F-14 (the Act). She is responsible for the proper management and control of fisheries and the conservation and protection of fish and fish habitat. These responsibilities include setting the annual total allowable catch, implementing conservation measures, determining access and allocation, and deciding who can fish through the issuance of licences. The Minister's authority and discretion to make these decisions enables her to achieve various objectives in properly managing fisheries.

[4] To achieve these objectives from its mandates, the Department of Fisheries and Oceans (the DFO) is guided by fishery policies, including the Owner-Operator Policy (the OOP) and the Commercial Fisheries Licensing Policy for Eastern Canada, 1996 (the 1996 Policy). The purpose of the OOP is to maintain an economically viable inshore fishery by keeping control of the licences in the hands of independent, owner-operator licence holders in small coastal communities. The independent, owner-operated licence holders are able to make individual decisions about the licence issued to them. As a result, they are not required to seek employment by a corporate entity.

[5] The OOP requires the licence holder himself to fish the licence issued in his name: that is, the licence holder is required to be present on the vessel. There is an exception to this requirement if the licence holder cannot engage in the fishing activity due to "circumstances beyond the control of the holder". In such circumstances, the licence holder may apply to obtain

permission to have someone else carry out the fishing activity. (See subsection 23(2) of the *Fishery (General) Regulation*s, S.O.R./93-53) (the Regulations)).

[6] In Eastern Canada, if a licence holder is unable to fish due to illness, the DFO may allow him the use of a Medical Substitute Operator (MSO) for up to the validity period of the licence, which is generally one year. The use of a MSO is limited to five years pursuant to subsection 11(11) of the 1996 Policy.

[7] The use of a MSO is intended to accommodate a licence holder unable to carry out his fishing activities due to illness. It provides the licence holder up to five years to recover from illness or to plan and finalize his exit strategy from the fishery. Should the licence holder no longer be able to carry out the fishing activities, he could recommend the re-issuance of the licence to another eligible person who could then become part of the inshore fishery. This would allow a new individual who meets the eligibility requirements the opportunity to obtain a licence for a year.

[8] Dana Robinson (Mr. Robinson or the respondent) is a commercial inshore fisherman who has held a licence to fish lobster in a designated area off the coast of Nova Scotia since 2007. He is a member of a lobster fishery and a fishery mandated by the DFO as a “limited entry fishery”. The DFO considers this fishery to be at full capacity and no other lobster licences will be issued to new entrants unless an existing licence holder has relinquished his licence and the new entrant meets the eligibility requirements. These measures safeguard the lobster fishing area by ensuring a healthy fish stock and by protecting the economic viability for the limited entry licence holders.

[9] In 2009, Mr. Robinson began experiencing problems with his legs. He was diagnosed as having venous insufficiency with leg pain when standing. His condition makes it difficult for him to stand for more than a few hours at a time without suffering from throbbing and swelling in his legs. Surgery has not alleviated his condition.

[10] Mr. Robinson has sought and obtained the use of a MSO from 2009 to 2015. In October 2015, the DFO advised him that he had exceeded the five-year limitation to the use of a MSO under the 1996 Policy.

[11] Mr. Robinson contested this decision. While the matter was winding its way through the various levels of administrative hearings, the DFO granted Mr. Robinson further uses of a MSO until July 31, 2019.

[12] On March 6, 2019, following two levels of appeal, the Minister's delegate, the Deputy Minister (DM) denied Mr. Robinson the further use of a MSO. On April 2, 2019, Mr. Robinson filed an application for judicial review of the DM's decision.

[13] On June 28, 2019, the Federal Court granted an interlocutory injunction to Mr. Robinson requiring the DFO to allow him the use a MSO for the remaining period allowed in the 2019 calendar year, that being until December 31, 2019 (*Robinson v. Canada (Attorney General)*, 2019 FC 876 [*Robinson v. Canada*]).

[14] On September 30, 2020, the Federal Court allowed the respondent's judicial review application in part, set aside the DM's decision and ordered that the matter be returned to the Minister for re-determination in accordance with its reasons. The Federal Court determined that the DM's decision engaged the respondent's rights pursuant to subsection 15(1) of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter). However, the Federal Court found that the five-year limitation provision set out in the 1996 Policy was not in the nature of law or legislation and therefore could not be the subject of a challenge under section 52 of the *Constitution Act*, *1982*.

[15] On October 29, 2020, the appellant filed a Notice of Appeal of the Federal Court's Judgment. On November 4, 2020, the respondent filed a cross-appeal.

[16] The motion before this Court and the substantive appeals arise in the context of the Federal Court's Judgment granting the respondent's judicial review application of the DM's decision of March 6, 2019.

II. Analysis

[17] To stay the Federal Court's Judgment, the appellant must satisfy the tri-partite test outlined in *RJRMacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 at page 334 [*RJRMacDonald*]. The appellant must establish to this Court's satisfaction that there is a serious issue to be tried, that she will suffer irreparable harm if the stay is not granted, and that the balance of convenience favours granting the stay. All three questions must

be answered in the affirmative, and failure on any single question is fatal to the motion for the stay. The standard of proof is a balance of probabilities, and the burden of proof lies on the appellant throughout (*Novopharm Limited v. Janssen-Ortho Inc.*, 2006 FCA 406, 358 N.R. 155 at paras. 8, 11).

A. *Serious Issue to Be Tried*

[18] Turning to the first part of the test, the first question is whether there is a serious issue to be tried. The rule on a motion for a stay is that the Court conducts a preliminary investigation of the merits. The threshold for seriousness is “a low one”. The moving party needs only show that it is “neither vexatious nor frivolous” (*RJRMacDonald* at 337).

[19] The respondent agrees that there are serious issues to be tried.

[20] In the present case, I am satisfied that the application of the Charter to the use of the MSO presents a serious issue to be tried. The appellant has appealed the Federal Court’s determination that the DM’s decision with respect to a further use of a MSO engages the respondent’s Charter rights. The respondent has cross-appealed to challenge the Federal Court’s determination that the 1996 Policy was not legislative in nature and not subject to challenge under section 52 of the *Constitution Act*, *1982*. The nature of the constitutional questions put before this Court by both the appellant and the respondent meet the low threshold for seriousness.

[21] I find that there is a serious issue to be tried.

B. *Irreparable Harm*

[22] Turning to the second part of the test, I must determine whether the moving party will experience irreparable harm if the motion for the stay of the Federal Court's Judgment is denied.

[23] In *RJRMacDonald*, at page 341, the Supreme Court stated that "irreparable harm" refers to the nature of the harm suffered rather than its magnitude. 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.

[24] To establish irreparable harm, the appellant must adduce clear and non-speculative evidence that irreparable harm will follow if the motion for the stay is denied.

[25] The appellant submits that in cases involving constitutional questions the onus on the Government of demonstrating irreparable harm to the public interest is less than is required of a private applicant. As this Court stated in *Canada (Attorney General) v. Sfetkopoulos*, 2008 FCA 106, 377 N.R. 224 at paragraph 11, quoting from *RJRMacDonald*:

> The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

[26] The respondent argues that the Federal Court's Judgment here makes no declaration of unconstitutionality with respect to any impugned law or policy. He says it simply requires the DM to consider his section 15 Charter rights, and potentially the Charter rights of four other licence holders as their respective proceedings wind their way through the system. Relying on page 346 of *RJRMacDonald*, he submits that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case, and "[t]he reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law is suspended entirely." The respondent argues that this is the case here, where disabled applicants are seeking exemptions from what they say is a discriminatory policy.

[27] I have considered the evidence before me in the context of the Minister's duties and powers under the Act. It is well established and undisputed that the Minister has a wide discretion to manage fisheries in the public interest, including taking into account social and economic factors in managing and allocating a fishery resource under the Act. (*Elson v. Canada (Attorney General)*, 2017 FC 459 at para. 51, aff'd 2019 FCA 27, leave to appeal to SCC refused 38584 (July 25, 2019) [*Elson FC*]).

[28] Consequently, the Minister and her delegates at DFO manage, conserve and develop fisheries on behalf of all Canadians and for the public interest. Fisheries in Canada are a common property resource belonging to all Canadians. Licencing and authorizations to fish are tools in the arsenal of powers available to the Minister and DFO to manage fisheries. It is the duty of the

Minister and DFO to exercise these powers and use these tools to manage fisheries on behalf of all Canadians and in the public interest to achieve the objectives in the Act.

[29] For the purpose of this motion, I accept the evidence on which the appellant relies that the 1996 Policy was instituted by the Minister and the DFO to advance the Act’s objectives to protect the public interest by properly managing and controlling fisheries in order to guard socio-economic interests in small coastal areas in Eastern Canada. The impugned five-year limitation provision limiting the use of medical substitute operators is integral to the objectives of the 1996 Policy.

[30] In addition, from the evidence adduced before this Court, I note there are four other licence holders in the coastal areas in Eastern Canada who are at various stages of appeals or applications for judicial review, challenging the DM’s refusal to grant further uses of a MSO. They all hold the position that subsection 11(11) of the 1996 Policy contravenes their rights to equality under subsection 15(1) of the Charter. They are represented by the same counsel representing Mr. Robinson and are advancing arguments on the same substantive bases as those presented by Mr. Robinson.

[31] I am satisfied that the re-determination of the DM’s decision exposes the Minister to a multiplicity of proceedings and risk of differing findings. To safeguard the public interest, it is important to obtain a final determination on the constitutional issues before this Court in a meaningful way. The risk of multiple proceedings represents a genuine harm to the public interest.

[32] I find that the appellant has met the onus to establish some risk of irreparable harm if the stay of the Federal Court's Judgment is denied.

[33] I must therefore turn to the third part of the test.

C. *The Balance of Convenience*

[34] When considering the balance of convenience, the appellant relies on evidence putting forward the purpose of the 1996 Policy. As mentioned earlier in these reasons, I accept that the 1996 Policy was developed as an integral part of a number of federal government initiatives to restructure the commercial fisheries and lay foundation for a fishery that is sustainable and economically viable. Its objectives were to reduce the harvesting capacity of each licence holder, improve the economic viability for participants to the fishery and prevent future growth of capacity in the commercial fishery.

[35] The public interest, as an aspect of irreparable harm, will be considered both in the second and third stage of the analysis under the *RJRMacDonald* test. Harm to Mr. Robinson must be balanced with harm to the appellant, including any harm to the public interest (see *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2007 BCCA 221, 282 D.L.R. (4th) 170 at para. 10).

[36] The appellant argues that DFO's approach to licensing favours limiting access to the fishery to safeguard viable and profitable operations for the participants. The 1996 Policy serves to protect individual licence holders in the inshore fishery of Eastern Canada. Also, it was

implemented to ensure that vital socio-economic goals continued to advance in the small coastal areas of that region and for the benefit of those communities.

[37] The appellant argues that the provision limiting the use of an MSO to five years provides another protection to inshore fishermen and their communities by ensuring the licence holders fished the licences issued in their name personally. The five-year limitation serves as a deterrent to corporate entities from gaining control over fishing licences through the use of a MSO due to the significant financial investment required to participate in the inshore fishery.

[38] The appellant submits that for these reasons, the balance of convenience in this case favours the public interest and the granting of a stay of the Federal Court's Judgment.

[39] In response, the respondent advances two arguments with respect to the question of irreparable harm he will suffer, affecting both the second and third part of the test. First, he relies on the reasoning of the Federal Court when it granted an interlocutory injunction in the proceeding before it (*Robinson v. Canada*). He submits that the test for injunctive relief is the same as that where a party seeks a stay of a decision pending appeal. He argues that, as was found by the Federal Court at paragraph 113 of its decision, Mr. Robinson's continued use of an MSO was "perfectly in line with the objectives and underlying rationale of the 1996 Policy" and that the public interest defended by the DFO would only be "affected marginally, if at all, by the interlocutory reliefs being sought".

[40] Second, the respondent submits that if the Judgment is stayed, the Minister could look past his Charter rights and make a decision without any consideration of the impact such a decision would have on his rights. The respondent argues that a stay of the Judgment will likely bar him from fishing his lobster licence, forcing him to withdraw from his chosen livelihood. In addition, a stay will deprive him and other disabled fishermen from the benefits of the Judgment regarding their section 15 Charter rights.

[41] In the alternative, the respondent submits that the matters before this Court on this motion are *res judicata*, because of the stay granted in *Robinson v. Canada*.

[42] I do not accept any of the respondent's arguments.

[43] Starting with the alternative argument on the question of the effect of *Robinson v. Canada* on this Court, it is clear that the doctrine of *res judicata* has no application. The interlocutory injunction does not apply to or constrain this Court. The interlocutory injunction by its very nature was time-limited and was granted solely for the 2019 licencing year. Further, the facts and issues before this Court are somewhat different from the facts and issues presented to the Federal Court in *Robinson v. Canada*.

[44] On the question of the harm Mr. Robinson might suffer if the motion for the stay is granted, I do not accept his submissions that he will suffer irreparable harm. The evidence he provided on this point was unsatisfactory, as I will describe in more detail at paragraph 54 of these reasons.

[45] In my view, permission granted by the Minister under a fishing licence in her discretion is not permanent and terminates upon expiry of the licence. Accordingly, fishing licences must be renewed or replaced yearly, but this renewal is not automatic. The licence holder is given a limited privilege, rather than any kind of absolute or permanent right or property. (See *Elson FC* at para. 3.)

[46] Here, the DM's decision dated March 6, 2019, affects a single fishing year. Nothing prevents Mr. Robinson from applying for a renewal or replacement of the licence for 2021 or following years. As I have already observed, I am not satisfied on this record that any harm that might be suffered by Mr. Robinson if he is successful in his cross-appeal (and in defending the appeal) before this Court could not be quantified in monetary terms. Certainly, his evidence is less than clear and convincing on this point.

[47] The impact of this motion on other licence holders personally is also unconvincing. Other licence holders wishing to obtain a further use of a MSO beyond the five-year limitation can, and I understand, do obtain a determination from the DM on a case-by-case basis (Judgment at para. 23).

[48] I agree with the submissions of the appellant on the third part of the test.

[49] On its motion record, the appellant has adduced evidence that the Minister and her delegates at the DFO are charged with the duty of protecting the public interest. To discharge that duty, subsection 11(11) of the 1996 Policy sets out a five-year time limit of the use of a

MSO to promote DFO's mandate in the public interest. This evidence is sufficient to meet the requirements to assume that irreparable harm will result.

[50] I find that, on the record before me, the granting of a stay is necessary to safeguard the public interest on the basis that the five-year limitation to the MSO plays a role in the socio-economic goals at play for the inshore fishery in Eastern Canada. The balance of convenience favours the public interest.

[51] Further, I am satisfied that a stay of the Judgment will not affect Mr. Robinson's future requests for a MSO, cannot affect the other licence holder's requests for the use of a MSO and is not subject to the doctrine of *res judicata.* In addition, on this record I am not satisfied that Mr. Robinson will suffer irreparable harm if the stay of the Federal Court Judgment is granted.

III. Decision

[52] On the record before me and in light of the constitutional issues that are at the very heart of the appeal and cross-appeal before this Court, I am satisfied that the appellant has established irreparable harm and that the balance of convenience favours the appellant.

[53] The tri-partite test for granting of a stay is met in this case. There are (1) serious constitutional issues to be determined, (2) compliance with the Judgment will cause irreparable harm to the public interest, and (3) the balance of convenience, taking into account the public interest, favours retaining the status quo until this Court has disposed of the legal issues.

[54] A note on the evidence proffered by the respondent. The affidavit of counsel for the respondent was the sole affidavit relied upon as part of respondent's motion record. In that affidavit, counsel swore to facts contested by the appellant. Further, appended improperly to counsel's affidavit are the affidavits from Mr. Robinson's prior motion for the interim interlocutory injunction. These "exhibits" do not comply with Rule 81 and are subject to the hearsay rule (*Pfizer Canada Inc. v. Apotex Inc.*, 2007 FC 971, 61 C.P.R. (4th) 305 at para. 112). Rule 81 sets out the proper content of affidavits. Rule 82 states that a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit, except with leave of the Court. There is no doubt that better evidence was available through Mr. Robinson himself, and not his counsel. Counsel in this case has contravened both of these rules.

IV. Conclusion

[55] For these reasons, the motion for a stay of the Judgment of the Federal Court issued on September 30, 2020 (2020 FC 942) is granted. The appellant did not seek costs in its motion, and accordingly, no costs will be awarded.

[56] The Court is prepared to assist the parties in expediting the hearing of the appeal and cross-appeal.

"Marianne Rivoalen"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-264-20
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MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR JUDGMENT BY:	RIVOALEN J.A.
DATED:	FEBRUARY 26, 2021

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