Federal Court Cour fédérale

Date: 20200930

Docket: T-562-19

Citation: 2020 FC 942

Ottawa, Ontario, September 30, 2020

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

DANA ROBINSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Dana Robinson, is a fisherman who holds an owner-operator licence authorizing him to fish lobster in Nova Scotia. He is seeking judicial review of a decision issued on March 6, 2019 by the Deputy Minister [DM] of the Department of Fisheries and Oceans Canada [DFO], denying his request for ongoing authorization to use a medical substitute operator [MSO] for his lobster fishing licence [the Decision].

[2] The purpose of a MSO authorization is to allow another person to carry out the activities authorized under a fishing licence where the holder of the licence is affected by an illness preventing him or her from personally operating a fishing vessel. In the Decision, the DM denied Mr. Robinson's request, on the basis that it exceeded the five-year limitation to the use of a MSO set out in s 11(11) of the DFO's *Commercial Fisheries Licensing Policy for Eastern Canada, 1996* [the 1996 Policy]. The DM concluded that the circumstances raised by Mr. Robinson to support his request for an exception to this policy did not constitute extenuating circumstances that would warrant an exception.

[3] Mr. Robinson's Notice of Application, initiating this application for judicial review, sought several forms of relief, including:

A. an order quashing the Decision as incorrect or unreasonable;

B. a declaration that the Decision is discriminatory and contrary to s 15(1) of the *Canadian Charter of Rights and Freedoms* [the *Charter*], Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Constitution Act, 1982*];

C. a declaration that the Decision is discriminatory and contrary to the United Nations *Convention on the Rights of Persons with Disabilities* [the *Convention*];

D. a declaration that the five year limit in s 11(11) of the 1996 Policy infringes s 15(1) of the *Charter*; and

E. a declaration that any discretion delegated by the Minister of Fisheries and Oceans [the Minister] to the DM with respect to licensing is subject to s 15(1) of the *Charter*.

[4] This application was argued on September 10, 2020, by video conference using the Zoom platform, together with an application in Court File No. T-563-19, in which another applicant, the Estate of the late Mr. Lester Martell, raised essentially the same arguments in respect of a decision by the DM denying Mr. Martell's request for ongoing authorization to use a MSO for his own lobster fishing licence [the Martell Application]. The applicants in both matters are represented by the same counsel.

[5] As explained in greater detail below, this application is allowed, because I have concluded that, although the Decision engaged Mr. Robinson's s 15(1) *Charter* equality rights as a person with a physical disability, the DM did not take those rights into account in making the Decision. The Decision will therefore be set aside and returned to the decision-maker for re-determination in accordance with these Reasons. I have not granted Mr. Robinson's request for a declaration under s 52 of *Constitution Act, 1982*, that the five year limit in s 11(11) of the 1996 Policy infringes s 15(1) of the *Charter* and is of no force and effect. I have concluded that the 1996 Policy is not in the nature of law or legislation, the constitutionality of which can be challenged under s 52 of the *Constitution Act, 1982*.

II. **Background**

A. Factual Context

[6] Mr. Robinson is a fisherman and he has been a fisherman for all of his working life. He was 58-years-old when he filed this application. The licence that is the subject of this application authorizes him to fish lobster on the Southwest coast of Nova Scotia, in an area known as Lobster Fishing Area [LFA] 35 [the Licence]. He has held the Licence since 2007 and fished it personally, on a full-time basis, until a medical condition prevented him from doing so.

[7] In 2009, Mr. Robinson began having medical problems related to his legs. The medical reports indicate that Mr. Robinson suffers from venous insufficiency with leg pain when standing. His medical condition makes it impossible for him to stand for more than a few hours at a time without suffering from throbbing and swelling in his legs. While he has undergone medical treatment, his condition remains unresolved. Because of his condition, he is unable to meet the daily physical demands of being on his fishing vessel on a full-time basis.

[8] As a result, Mr. Robinson requested and received from the DFO an authorization to use a MSO. The DFO thereafter continued to authorize a MSO until the events (explained below) giving rise to this application. The legitimacy of his medical condition, and the incapacity it represents, are not in issue in this application.

[9] In his affidavit filed in this application, Mr. Robinson states that he maintains full control over his vessel's operations, manages the substitute operator and his other employees, and makes

most of the operational decisions related to his vessel, including negotiating the wharf price of the catch, arranging bait and fuel purchases, and managing the fishing operation's financial affairs. He employs three full-time seasonal crew members to assist him in fishing his Licence: two deck hands and a captain (i.e. the MSO) who operates his vessel.

[10] In October 2015, Mr. Robinson received a letter from the DFO informing him that his latest request for a MSO authorization had been approved to July 31, 2016 but that such approval extended beyond the five-year maximum period set out in s 11(11) of the 1996 Policy. This letter put him on notice that future requests for a MSO would no longer be approved.

[11] I note that the lobster fishing season in LFA 35 is a split season covering two periods, from October 15 to December 31 of one year and from March 1 to July 31 of the next. It is common ground between the parties that the applicable nomenclature is such that, for instance, the "2021 fishing season" represents October 15 to December 31, 2020 and March 1 to July 31, 2021.

[12] In October 2016, Mr. Robinson appealed the October 2015 decision to the Maritimes Region Licensing Appeal Committee [MRLAC]. In March 2017, he received a letter from MRLAC advising him that his request for an exception to the policy and for a MSO to fish for the current season (i.e., until July 31, 2017) had been approved. However, the letter advised Mr. Robinson that his request for an exception to the policy beyond the current season was denied.

[13] Mr. Robinson appealed the MRLAC's decision to the Atlantic Fisheries Licence Appeal Board [AFLAB], seeking to have continued use of a MSO authorization, with no end date. He invoked a number of grounds to challenge the DFO's refusal, including that the five-year limit in the 1996 Policy and the MRLAC's decision made pursuant to it were arbitrary, unjust and unconstitutional for violating his right to equality under s 15 of the Charter.

[14] On March 6, 2019, on the recommendation of the AFLAB and the DFO, the DM denied Mr. Robinson's appeal, in the Decision that is the subject of this application for judicial review. This Decision references s 23(2) *of the Fishery (General) Regulations*, SOR/93-53 [the Regulations], made under the *Fisheries Act*, RSC 1985, c F-14 [the Act], and s 11(11) of the 1996 Policy. In the Decision, the DM refers to Mr. Robinson raising financial hardship and his succession plan, as circumstances justifying an exception to the five-year maximum period in the 1996 Policy, and finds that these do not constitute extenuating circumstances warranting an exception. The Decision does not expressly reference Mr. Robinson's *Charter* arguments.

[15] I note that, throughout the ensuing legal proceedings, the DFO continued to authorize Mr. Robinson to use a MSO to fish his Licence, up to the fishing season ending on July 31, 2019. The DFO did not provide such authorization beyond that date, and Mr. Robinson sought interlocutory relief in this Court pending the outcome of his application for judicial review. On June 28, 2019, Justice Gascon issued an injunction requiring the DFO to authorize Mr. Robinson to use a MSO for the remaining fishing period in LFA 35 in the 2019 calendar year, i.e. from October 15 to December 31, 2019, unless this application was decided prior to the end of that period (see *Robinson v Canada (Attorney General)*, 2019 FC 876 [the Robinson Injunction]).

B. The DFO's Owner-Operator Policy and Fleet Separation Policy

[16] The requirement for Mr. Robinson to obtain authorization for a MSO stems from what the DFO refers to as its Owner-Operator Policy and, in a broad sense, its Fleet Separation Policy. In this application, the DFO filed an affidavit by Morley Knight, who was the Assistant Deputy Ministers of Fisheries Policy with the DFO prior to his December 2017 retirement. Mr. Knight explains these policies and the reasons they were developed.

[17] With respect to the Fleet Separation Policy, Mr. Knight explains that, due to increased participation in the Canadian fishery in the late 1970s, concern developed about control by fish processing companies of the inshore harvesting sector, which could lead to fewer independent licence holders and decreased benefit from the fisheries resource for local communities. To address this concern, the DFO introduced the Fleet Separation Policy, which separated the interests of the harvesting sector from those of the processing sector. The DFO stopped issuing new licences for fisheries in the inshore fleet to processing corporations in order to promote the control of fishing licences in the inshore fleet by those residing in and operating out of local coastal communities. These policy elements are incorporated in the 1996 Policy.

[18] The Owner-Operator Policy was implemented to purse similar objectives. In the Robinson Injunction, Justice Gascon describes the history and main features of this policy initiative. As I do not understand this policy background to be controversial between the parties, I borrow liberally from Justice Gascon's decision in my summary of the Owner-Operator Policy below.

[19] The Owner-Operator Policy was formally adopted in 1989 across the entire Eastern Canada inshore fleet, and its key elements were ultimately incorporated into the 1996 Policy. As stated in Mr. Knight's affidavit, its goal is to maintain an economically viable inshore fishery by keeping the control of licences in the hands of independent owner-operators in small coastal communities, and to allow them to make decisions about the licences issued to them. To achieve this, the Owner-Operator Policy requires licence holders to personally fish licences issued in their name. This means that the licence holder is required to be on board the vessel authorized to fish the licence.

[20] Subsection 23(2) of the Regulations creates an exception to this requirement. It provides that, where a licence holder or operator is unable to engage in the activity authorized by the licence due to "circumstances beyond the control of the holder or operator," a fishery officer or a DFO employee engaged in the issuance of licences can authorize another person (i.e., a substitute operator) to carry out those activities. The "circumstances beyond the control" of a licence holder or operator are not defined in the Regulations.

[21] Over time, the DFO developed policy guidance with respect to situations that may be considered circumstances that are beyond the control of the licence holder. Echoing the language used in the Regulations, s 11(10) of the 1996 Policy states:

(10) As provided under the *Fishery (General Regulations*, where, because of circumstances beyond his control, the holder of a licence or the operator named in a licence is unable to engage in the activity authorized by the	(10) Tel qu'énoncé dans le Règlement de pêche (dispositions générales), si, en raison de circonstances indépendantes de sa volonté, le titulaire d'un permis ou l'exploitant désigné dans le permis sont dans l'impossibilité

licence or is unable to use the vessel specified in the licence, a fishery officer or other authorized employee of the Department may, on the request of the licence holder or his agent, authorize in writing another person to carry out the activity under the licence or authorize the use of another vessel under the licence.	de se livrer à l'activité autorisée par le permis ou d'utiliser le bateau indiqué sur le permis, un agent des pêches ou tout autre employé autorisé du Ministère peut, à la demande du titulaire ou de son mandataire, autoriser par écrit une autre personne à pratiquer cette activité en vertu du permis ou autoriser l'emploi d'un autre bateau.

[22] Section 11 (11) of the 1996 Policy provides further guidance in instances where the licence holder invokes illness as a circumstance beyond his or her control. Pursuant to that provision, the 1996 Policy limits the designation of a substitute operator to a total period of five years where the circumstances beyond the control of the licence holder are of a medical nature. Section 11(11) reads as follows:

(11) Where the holder of a licence is affected by an illness which prevents him from operating a fishing vessel, upon request and upon provision of acceptable medical documentation to support his request, he may be permitted to designate a substitute operator for the term of the licence. Such designation may not exceed a total period of five years.	(11) Si le titulaire d'un permis est affecté d'une maladie qui l'empêche d'exploiter son bateau de pêche, il peut être autorisé, sur demande et présentation de documents médicaux appropriés, à désigner un exploitant substitut pour la durée du permis. Cette désignation ne peut être supérieure à une période de cinq années.

[23] In response to the global economic downturn in 2008, the DFO introduced flexibility in the application of the five-year limit set out in s 11(11) in the hopes of enhancing economic support for the industry. In 2015, the DFO resumed applying the five-year time limit, following

concerns expressed by certain licence holders and their representatives that the DFO's substitute operator designations were being abused by some licence holders, to the detriment of the objectives of the Owner-Operator Policy and Fleet Separation Policy. Licence holders who had reached or exceeded the five-year limit were notified that they had reached the policy time limit and that further extensions would only be approved on a case-by-case basis.

III. **Issues**

[24] The Applicant's Memorandum of Fact and Law filed in this application frames the issues to be determined by the Court as follows:

A. What is the applicable standard of review?

B. Was the Decision correct or reasonable (depending on the standard of review selected)?

C. Did the DM give sufficient reasons for the Decision?

D. Is the five-year limit in the 1996 Policy discriminatory and of no force and effect because it infringes the *Charter*?

E. Does the Decision and/or the 1996 Policy comply with the *Convention*?

[25] I would add to this list a preliminary issue raised by the Respondent, the Attorney General of Canada: whether this application is moot, because the injunction issued by Justice Gascon effectively afforded Mr. Robinson the remedy he is seeking in respect of the Decision.

IV. **Analysis**

A. Is this application for judicial review moot?

[26] The Attorney General submits that, because the Robinson Injunction granted Mr. Robinson use of a MSO until the end of 2019, he has already received the remedy sought in applying for judicial review of the Decision. This submission relies significantly on the nature of fishing licences and the statutory regime governing their issuance.

[27] Section 7 of the Act affords the Minister absolute discretion to issue fishing licences. Pursuant to s 10 of the Regulations, a "document" (which includes a licence) that is issued for a particular calendar or fiscal year expires at the conclusion of that year. Section 16 of the Regulations provides that a licence is the property of the Crown and is not transferable and that the issuance of a licence to any person does not confer any future right or privilege for the person to be issued a licence of the same type.

[28] Under the heading in the regulations, "Conditions of Licences," s 22 of the Regulations authorizes the Minister, for the proper management and control of fisheries and the conservation and protection of fish, to specify conditions in licences. Section 23(2) of the Regulations, which provides the regulatory authority for authorizing a MSO, falls under the same heading in the Regulations. I understand the Attorney General's submission to be, and I accept, that authorization to use a MSO represents a condition that is attached to a licence.

[29] However, in support of its position that Mr. Robinson's application for judicial review is now moot, the Attorney General also submits that, if the Court were to issue a decision touching on a period that extends beyond December 31, 2019 (i.e., beyond the duration of the Robinson Injunction), the Court would be fettering the Minister's discretion over whether to issue a licence (with conditions) to Mr. Robinson for such period.

[30] I disagree with this position. I do not accept either: (a) that the Robinson Injunction has afforded Mr. Robinson the relief he has sought in this application; or (b) that the Court is unable to afford him such relief without fettering the Minister's discretion.

[31] As explained in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at page 353, a proceeding is moot when a decision of the court would not have the effect of resolving some controversy which affects or may affect the rights of the parties. Then, subject to a residual discretion, the court will decline to decide the case.

[32] In the present case, the position Mr. Robinson advanced before AFLAB (and therefore before the DM) included the argument that the decision to impose a temporal limitation upon his use of a MSO was arbitrary and infringed his equality rights under s 15(1) of the *Charter*, as a person with a disability. This argument was not limited to a particular fishing season. I cannot conclude that Mr. Robinson received the relief he requested through the Robinson Injunction and that there is no longer a live controversy between the parties.

[33] In so deciding, I am conscious of the points raised by the Attorney General as to the nature of fishing licences and their limited duration. Indeed, the Attorney General raised these points in the Robinson Injunction before Justice Gascon, who took them into consideration in fashioning the particular injunctive relief he afforded (at paras 39 to 46). Justice Gascon agreed with the Attorney General that the Court could not impose a remedy relating to a MSO authorization, which would implicitly mean or require a renewal of Mr. Robinson's Licence beyond 2019. Granting an interlocutory injunction, which forced the issuance of a MSO authorization for a time period in which Mr. Robinson did not yet have a licence, would amount to a fettering of the Minister's discretion.

[34] However, Justice Gascon also noted that Mr. Robinson was not asking the Court to order the issuance or renewal of his Licence beyond calendar year 2019 or seeking any conclusion with respect to the Licence itself. The remedies sought concerned only the MSO authorization attached to the Licence (at para 44). In the result, Justice Gascon ordered the DFO to issue Mr. Robinson a MSO authorization to the end of calendar year 2019.

[35] Justice Gascon's reasons provide a helpful analysis of the application of the principles raised by the Attorney General to the interlocutory relief then sought from the Court. These arguments are potentially relevant to the merits of the application and will be further considered later in these Reasons. However, these arguments do not support a conclusion that there is no longer a live controversy between the parties, such as would render the application for judicial review moot.

B. What is the applicable standard of review?

[36] The parties disagree on the standard applicable to this Court's review of the Decision. The Attorney General takes the position that the reasonableness standard applies. The Attorney General relies on *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*], in which the Supreme Court of Canada drew a distinction between circumstances where a reviewing court is considering an administrative tribunal's determination of the constitutionality of a law, in which case the standard of review is correctness (at para 43), and circumstances where the court is considering whether a tribunal has taken sufficient account of *Charter* values in making a decision, in which case the standard of reasonableness applies (at paras 43 to 58).

[37] In circumstances of the latter sort, the decision-maker must conduct a proportionality exercise by considering how the *Charter* value at issue will best be protected in view of the statutory objectives, balancing the severity of the interference with the *Charter* protection against the statutory objectives. A reviewing court must in turn consider the reasonableness of this balancing (at paras 56 to 58).

[38] The Attorney General argues that Mr. Robinson's challenge of the Decision falls into the latter category, requiring a reasonableness review. It also notes that, in its recent and seminal decision on standard of review in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court expressly stated that it was not displacing the standard of review set out in *Doré* (*Vavilov* at para 57).

[39] In contrast, Mr. Robinson submits that the correctness standard applies to the Court's review of the Decision. He relies on the decision in *Canadian Broadcasting Corporation v Ferrier*, 2019 ONCA 1025 [*Ferrier*], in which the Court of Appeal for Ontario relied on *Doré* and *Vavilov* in concluding that, in a circumstance involving refusal or failure by an administrative decision-maker to consider an applicable *Charter* right, correctness applies (at paras 34 to 38):

> 34 If the *Charter* rights are considered by the administrative decision maker, the standard of reasonableness will ordinarily apply. In *Doré*, the Disciplinary Council of the Barreau du Québec considered and rejected the argument that the *Code of ethics of advocates* requirement that advocates conduct themselves with "objectivity, moderation and dignity" infringed the s. 2(b) *Charter* right to freedom of expression. Similarly, in *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry*, 2007 ONCA 20, 278 D.L.R. (4th) 550, the commissioner of inquiry considered the *Dagenais/Mentuck* test and rejected the argument that he should issue a publication ban regarding an alleged wrong-doer. In both cases, a reasonableness standard of review was applied when the decisions were challenged.
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> 35 On the other hand, the refusal or failure to consider an applicable *Charter* right should, in my opinion, attract a correctness standard of review. As the Supreme Court explained in *Dunsmuir*, at para. 60, citing *Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62: "where the question at issue is one of general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise' … uniform and consistent" answers are required. See also *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, at paras. 20-21. This is confirmed by *Vavilov*, at para. 17: "[T]he presumption of reasonableness review will be rebutted…where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies".

> 36 The s. 2(b) *Charter* right to freedom of expression and freedom of the press relied upon by the appellants is both a matter of central importance to the legal system and a constitutional question. As confirmed by *Vavilov*, at para. 53, the application of the correctness standard to "constitutional questions, general questions of law of central importance to the legal system as a whole…respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary".
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> 37 The issue before the decision maker was *whether* the *Dagenais/Mentuck* test had a bearing on the discretionary decision he had to make. That is not the same as the issue presented in *Doré* and *Episcopal* of *how* the s. 2(b) *Charter* right impacted or affected the discretionary decision he had to make. The decision maker did not reach the point of factoring the *Dagenais/Mentuck* test into his discretionary decision because he decided that it did not apply. A reasonableness standard assumes a range of possible outcomes all of which are defensible in law: see *Vavilov*, at para. 83. That standard is inappropriate here. The *Dagenais/Mentuck* test either applied or it did not.
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> 38 I refer here to a passage in *Episcopal* which, in my view, has a direct bearing on this issue. In that case, the inquiry commissioner applied the *Dagenais/Mentuck* test when declining to order an *in camera* hearing. This court held that his decision was reviewable on a reasonableness standard because he did consider the impact of the *Charter* right on the decision he had to make. However, we noted, at para. 36, that in *Dagenais* itself, the judge who made the challenged decision did not have available the new test enunciated when the case went to the Supreme Court. That meant that his "failure to arrive at a result that could be supported under the new test … amount[ed] to an error of law", reviewable on a standard of correctness. The same applies here. As I will explain, the decision maker did not have the benefit the decision of this court in *Langenfeld v. Toronto Police Services Board*, 2019 ONCA 716, 437 D.L.R. (4th) 614, an authority that bears directly upon the discretionary decision he was asked to make.

[40] As explained more fully elsewhere in *Ferrier* (at para 15), the *Dagenais/Mentuck* test is a test applicable to discretionary decisions limiting freedom of the press in relation to court proceedings. The issue before the Court of Appeal for Ontario in *Ferrier,* sitting in appeal of a

decision of the Divisional Court, was whether the Thunder Bay Police Services Board failed to respect the s 2(b) *Charter* right to freedom of expression by failing to require an open hearing in considering a complaint of police misconduct. Reviewing the issue on the correctness standard which it found to apply, the Court of Appeal concluded that the decision-maker did not err in finding that the *Dagenais/Mentuck* test was not applicable to the decision whether to hold an open hearing (at para 52). However, the Court nevertheless allowed the appeal and set aside the Board's decision, on the basis that it had failed to consider recent jurisprudence confirming that s 2(b) of the *Charter* protects the right of members of the public to attend meetings of police service boards (at paras 53 to 59).

[41] Mr. Robinson relies upon the standard of review analysis in *Ferrier*, because one of his principal submissions in challenging the Decision is that the DM entirely failed or declined to take into account his rights under s 15(1) of the *Charter*. He argues these circumstances attract correctness review. The Attorney General disputes this characterization of the Decision. The Attorney General argues that s 15(1) equality rights are not engaged by the Decision and, in the alternative, submits that the record evidences that the Decision implicitly took into account such rights and represented a proportionate balancing of those rights against statutory objectives as required by a reasonableness review under *Doré*.

[42] I will return shortly to the parties' disparate characterizations of the Decision and whether it implicitly took into account *Charter* values. On the subject of standard of review, I accept that *Ferrier* supports Mr. Robinson's position that the question of whether a *Charter* right has a bearing on an administrative decision is governed by the correctness standard. I would observe

that this principle arguably represents an evolution from *Doré*. However, I also note that, following its conclusion that s 2(b) of the *Charter* applied to the issue before the Board in that case, the Court in *Ferrier* added the following (at para 60):

> 60 While I reach that conclusion on a correctness standard, I add here that even if a reasonableness standard of review applies, I fail to see how a decision resulting from an unexplained refusal or failure to consider an applicable *Charter* right could be considered reasonable. This court's application of s. 2(b) in *Langenfeld* means that the decision ordering a closed hearing, through no fault of the decision maker, failed to consider an applicable right protected by the *Charter*. That decision cannot survive scrutiny under the *Vavilov* test for reasonableness. The reasonableness standard requires "an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker"; *Vavilov*, at para. 85. A decision that fails to consider an applicable *Charter* right cannot satisfy that standard or "the principle that the exercise of public power must be justified, intelligible and transparent": *Vavilov*, at para. 95.

[43] Taking into account this reasoning, with which I agree, the Decision will demonstrate reviewable error if the DM failed without explanation to consider an applicable *Charter* right, regardless of which standard of review applies. As previously noted, the parties dispute both (a) whether s 15(1) of the *Charter* applies in the context of the Decision; and (b) whether s 15(1) rights were indeed taken into account. I therefore turn to consideration of those questions, in the course of which I will return to the application of the standard of review.

C. Was the Decision correct or reasonable?

(1) Relevant Jurisprudence

[44] The parties are largely in agreement on the jurisprudential principles governing the application of the *Charter* to administrative decision-making. Referencing *Doré* and the

subsequent decisions of the Supreme Court in *Loyola High School v Québec (Attorney General)*, 2015 SCC 12 [*Loyola*], *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 [*LSBC*], and *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33, the Attorney General accepts that statutorily delegated authority must be exercised in light of constitutional guarantees and the values they reflect. As was stated in *LSBC*, the framework prescribed by *Doré* and *Loyola* for reviewing such decision-making is concerned with ensuring that *Charter* protections are upheld to the fullest extent possible given statutory objectives within a particular administrative context (at para 57).

[45] Put another way, *Charter* protections must be affected as little as reasonably possible in light of applicable statutory objectives. This does not mean that the administrative decision-maker must choose the option that limits the *Charter* protection least. However, if the decision-maker rejects a reasonably available option or avenue that would reduce the impact on the protected right, while still permitting sufficient furtherance of the relevant statutory objectives, such a decision would not fall within a range of reasonable outcomes on judicial review (see *LSBC* at paras 80-81).

[46] However, the Attorney General emphasizes that the proportionate balancing required by *Doré/Loyola* is triggered only if the *Charter* applies to the Decision. As explained in *LSBC*, there is a preliminary question as to whether the administrative decision engages the *Charter* by limiting *Charter* protections (at para 58). Mr. Robinson submits that the *Charter* is engaged in this case. To establish *Charter* engagement, he relies on the test for *prima facie* s 15(1) infringement as explained in *Quebec (Attorney General) v Alliance du personnel professionnel et*

technique de la santé et des services sociaux, 2018 SCC 17 [*Alliance*]. In that case, the Supreme Court considered whether particular legislative provisions were unconstitutional and described the s 15(1) test as proceeding in two stages: first, considering whether the impugned law, on its face or in its impact, creates a distinction based on an enumerated or analogous ground; and, if so, considering whether the law imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantages (at para 25).

[47] I note that the Attorney General referred the Court to *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, describing a list of contextual factors to be taken into account in performing this analysis. However, *Alliance* explained that it is not necessary or desirable to apply a step-by-step consideration of these factors and that recent jurisprudence has declined to do so. The focus is not on whether a discriminatory attitude exists or whether a distinction perpetuates negative attitudes about a disadvantaged group, but rather upon the discriminatory impact of the distinction (at para 28).

[48] I conclude that the *Alliance* test governs the preliminary question whether s 15 of the *Charter* applies to the Decision. Taking *Ferrier* into account, the standard of correctness applies to that question.

(2) Whether Section 15(1) of the *Charter* Applies to the Decision

[49] Mr. Robinson submits that the first stage of the *Alliance* test is clearly made out. He lives with and is limited by the physical disability created by his medical condition. The existence of that condition is not in dispute. He submits that the Decision, influenced by the five-year

limitation upon MSO authorizations in the 1996 Policy, imposes differential treatment on him in comparison to non-disabled fishers, creating a distinction based on the enumerated ground of physical disability. Mr. Robinson argues that licence holders who do not suffer from a medical condition, and are therefore able to personally fish their licences, are in a position to renew and fish their licences indefinitely as long as they abide by the licence terms and conditions. In contrast to that group, the requirement to obtain a MSO authorization and the Decision denying Mr. Robinson that authorization have the impact of depriving him of the ability to fish his Licence.

[50] In connection with the second stage of the *Alliance* test, Mr. Robinson submits that the Decision is discriminatory in that it denies him the ability to pursue the livelihood of his choice. He emphasizes that he owns and operates the relevant fishing enterprise but that, as a result of the Decision, he is required to give up his livelihood simply because he is physically unable to remain aboard his vessel for the extended periods of time often required to harvest a catch. Mr. Robinson submits that this perpetuates a serious disadvantage for fishers with physical disabilities.

[51] In response, the Attorney General relies significantly on the principles previously canvassed surrounding the nature of a fishing licence. It notes that s 15(1) of the *Charter* affords individuals the right to equal benefit of the law without discrimination and argues that, as Mr. Robinson is not seeking a benefit of the law, his claim does not engage s 15. The Attorney General submits that Mr. Robinson is seeking a benefit that is not afforded by law to anyone

else, as no licence holder has a legal right to fish indefinitely, to receive indefinite renewal of the licence, or to receive indefinite authorization to use a MSO.

[52] In support of its position, the Attorney General relies on *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78 [*Auton*], in which the petitioners brought an action against the province of British Columbia, alleging that its failure to fund specific treatments of their autistic children violated s 15(1) of the *Charter*. The Supreme Court found that the benefit claimed, i.e. funding for all medically required treatment, was not a benefit that the law provided to anyone (at para 47). The Court concluded that the impugned legislative scheme did not promise that any Canadian would receive such funding. It conferred only core funding for services provided by medical practitioners, with funding for non-core services left to the province's discretion (at para 35). The legislative scheme was a partial health plan. As such, the exclusion of particular non-core services could not, without more, be viewed as an adverse distinction based on an enumerated ground amounting to discrimination (at para 43).

[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.

(3) Whether the Decision Failed or Refused to Consider Mr. Robinson's *Charter* Rights

[58] I therefore turn to the Attorney General's argument that Mr. Robinson's s 15(1) rights were indeed taken into account by the DM in making the Decision. I do not understand the Attorney General to be arguing that either the DM, or the AFLAB or the DFO in making recommendations to the DM, expressly conducted a *Charter* analysis, either in relation to the preliminary question as contemplated by *Alliance* or in relation to the proportionate balancing required by *Doré*. Rather, the Attorney General relies on the explanation in *LSBC* that an administrative decision need not provide formal reasons explaining why it amounted to a proportionate balancing of the relevant *Charter* right and statutory objectives, provided the decision demonstrates that the decision-maker was alive to the requirement to perform such a

balancing (at para 55). In *LSBC*, the Supreme Court concluded from the record that the decision-maker was alive to this issue and therefore assessed whether it performed the required balancing reasonably (at para 56).

[59] Therefore, to address the Attorney General's argument, the next question I must consider is whether the record demonstrates that the DM was alive to the issue of the balance to be struck between Mr. Robinson's s 15 *Charter* rights and relevant statutory objectives. As this analysis is the means by which the Court can assess whether or not the DM failed to consider his *Charter* rights, this question must be answered on a standard of correctness (per *Ferrier*). Only if I conclude that the DM was alive to this issue will the analysis turn to an assessment of the proportionate balancing, which is to be performed on a reasonableness standard (per *Doré*).

[60] While I am not assessing the reasonableness of a balancing exercise at this stage of my Reasons, identifying what such balancing entails is important to assessing whether the Decision includes the components of such an exercise and therefore demonstrates that the DM was alive to the *Charter* issue. As articulated by the Attorney General in its written submissions, in the proportionate balancing stage of a *Charter* analysis, the decision-maker must consider the government objectives of the law under which it is acting, ask how the *Charter* value at issue can best be protected in light of the government objectives, and balance the severity of the interference with the *Charter* protection against statutory objectives (see *Doré* at paras 55 to 56).

[61] In support of its position that the Decision demonstrates the required *Charter* analysis, the Attorney General submits that the MSO provision is itself an accommodation and an

exception to the Owner-Operator Policy, which otherwise requires licence holders to personally fish licences issued in their name. The Attorney General argues that an authorization to use a MSO is designed to accommodate differences in ability, in order to ensure true substantive equality. Therefore, it submits that any consideration of whether an individual qualifies for use of a MSO, whether on an initial application or as an exception to the five-year limitation, necessarily considers the substance of the equality right in the weighing of competing considerations.

[62] The Attorney General further argues that the five-year limit on the use of a MSO is an important tool to advance the objectives of the DFO's policies. Namely, it aims to deter non-eligible licence holders from circumventing the policies and, in particular, the requirement that a licence holder fish his or her licence, all in support of the socio-economic objectives of preserving the independence of inshore licence holders and achieving socio-economic advantages for their coastal communities. The Attorney General submits that unlimited access to use of a MSO would undermine the policies aimed at achieving these objectives. It contends the five-year limitation minimally impairs a licence holder's *Charter* rights and is therefore proportionate to these objectives. The Attorney General argues that, in making the Decision, the DM was implicitly being attentive to the need for minimal impairment of Mr. Robinson's equality rights.

[63] In analysing these arguments, I will take into account both the Decision itself and the record before the DM, which includes the recommendations of the AFLAB and the DFO. The Decision was conveyed to Mr. Robinson in the form of a letter, signed by the DM, which

references s 23(2) of the Regulations and s 11(11) of the 1996 Policy, including the fact that, in some cases, extenuating circumstances may warrant making an exception thereto, and provides the following analysis:

> After careful review and consideration of all the relevant information pertaining to your licensing case, including the regional decision, the materials submitted to AFLAB, and AFLAB's recommendation, I am of the view that the circumstances raised before the AFLAB to support your request for a further exception to the policy, namely your claim of financial hardship and your succession plan, do not constitute extenuating circumstances that would warrant making an exception to the policy.

[64] The letter concludes by stating that the DM has decided that Mr. Robinson's request for a further exception to the policy is denied and that, accordingly, his request for a MSO will not be approved.

[65] As previously noted, this letter contains no express reference to Mr. Robinson's *Charter* rights or argument. The reasons set out therein are obviously quite brief. Mr. Robinson takes the position that the recommendations from the AFLAB and the DFO, that formed part of the material before the DM, do not form part of the reasons for the Decision. I disagree with this position. 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). I am therefore prepared to review the AFLAB and the DFO recommendations to assess whether, in combination with the Decision

itself, they support the Attorney General's position that the Decision took into account Mr. Robinson's *Charter* rights.

[66] The AFLAB recommendation is contained in a document entitled "Atlantic Fisheries Licence Appeal Board (Maritimes Region) - Case Summary and Recommendation" [the AFLAB Recommendation]. This document, in conjunction with Mr. Robinson's counsel's written submissions in support of his appeal, demonstrate that he advanced his *Charter* arguments, in relation to both the 1996 Policy and the Decision itself. The sections of the AFLAB Recommendation entitled "Deliberations" and "Recommendation and Rationale" demonstrate that, with respect to Mr. Robinson's allegation that the 1996 Policy violated his right to equality under s 15(1) of the *Charter*, the AFLAB concluded that evaluating that issue would be outside its mandate and therefore chose not to make a recommendation on that issue.

[67] The Attorney General submits that this aspect of the record demonstrates the AFLAB declining to engage with the issue of the constitutionality of the 1996 Policy, but that it does not indicate a lack of attention to Mr. Robinson's *Charter* rights in connection with the Decision itself. As the relevant paragraphs of the AFLAB Recommendation do refer expressly to the argument surrounding the 1996 Policy, I am prepared to accept this submission and assess whether the document otherwise evidences attention to *Charter* values.

[68] I note that the "Deliberations" section includes a reference to one member of AFLAB observing that five years is a reasonable amount of time to make alternate arrangements, as well as expression of a concern that the ability to use a MSO should not be open-ended, as otherwise

it could be abused. The "Recommendation and Rationale" section also includes reference to a determination by AFLAB that any further exception to the policy for Mr. Robinson would not meet the policy objective of supporting an independent owner-operator fleet, as well as a conclusion that five years is a reasonable time to make alternate arrangements if the licence holder is unable to personally operate the licence.

[69] The recommendation by the DFO to the DM is contained in a document entitled "Memorandum for the Deputy Minister" [the DFO Recommendation], which summarizes the background to the decision the DM is required to make, including the AFLAB's recommendations. It notes the AFLAB's conclusion that it was outside its mandate to make a recommendation on the allegation that the 1996 Policy violated Mr. Robinson's s 15(1) rights. Under the heading "Strategic Considerations," the DFO Recommendation refers to the DFO's stated intention to enshrine inshore policies in regulations and concurrent efforts to strengthen the application of the substitute operator provisions across regions. Based thereon, the DFO states that softening the application of the five-year maximum on MSOs is not recommended. The DFO recommendation concludes by expressing the view that the circumstances put forth by Mr. Robinson do not warrant a further exception to the 1996 Policy, that the AFLAB's recommendations should be followed, and that Mr. Robinson's request for a MSO should be denied.

[70] These recommendation documents demonstrate consideration of the policy objective of supporting an owner-operator fleet and concern that more liberal access to MSO authorizations could contribute to abuse that would conflict with that objective. These are among the sort of

policy considerations that the required *Charter* analysis should take into account. However, neither the recommendation documents nor the Decision demonstrates any consideration of the impact of those policy considerations upon Mr. Robinson's equality rights. The conclusion that five years was a reasonable time to make alternate arrangements (i.e. to exit the fishery), if a licence holder is unable to personally operate the licence, misses the thrust of Mr. Robinson's *Charter* argument, i.e. that, as a person with a disability, he should not be required to give up his chosen livelihood. There is no balancing of the severity of that result against the policy objectives or consideration of whether those objectives could reasonably be achieved in a manner that reduced the impact on Mr. Robinson's equality rights. I therefore disagree with the Respondent's contention that the Decision represents an implicit effort to conduct a balancing of *Charter* rights against statutory objectives. The Decision does not demonstrate that the DM was alive to the requirement to strike such a balance.

[71] Having taken into account the record that supports the Decision, I accept Mr. Robinson's submission that this is a situation of the sort referenced in *Ferrier*, involving a refusal or failure to consider an applicable *Charter* right. Informed by *Ferrier*, I have concluded, applying a correctness standard, that s 15(1) equality rights apply to the Decision and that these rights were not considered. Employing the alternative standard of review analysis articulated in *Ferrier*, even if a reasonableness standard of review applies, a decision resulting from a failure to consider Mr. Robinsons's *Charter* rights cannot be considered reasonable.

D. Did the DM give sufficient reasons for the Decision?

[72] Mr. Robinson has made no submissions specific to this particular issue. Inadequacy of reasons is not a standalone ground for judicial review (see *NLNU* at para 14). Regardless, having concluded above, based on a review of the Decision and the record supporting it, that the Decision is unreasonable, there is no need to give further consideration to this issue.

E. Is the five-year limit in the 1996 Policy discriminatory and of no force and effect because it infringes the Charter?

[73] Mr. Robinson argues that the five-year limitation imposed by s 11(11) of the 1996 Policy is discriminatory pursuant to s 15 of the *Charter*, cannot be justified by s 1 of the *Charter*, and is therefore of no force and effect pursuant to s 52 of the *Constitution Act, 1982*.

[74] The Attorney General's principal response to this argument is that the 1996 Policy is not in the nature of law or legislation, the constitutionality of which can be challenged under s 52 of the *Constitution Act, 1982*. Rather, the Attorney General argues that it represents non-binding policy guidelines of the sort that, in *Elson FC*, Justice Strickland (relying on *Maple Lodge Farms Ltd v Canada*, [1982] 2 SCR 2) described as subject to judicial review only in limited circumstances. Justice Strickland identified those circumstances as bad faith, nonconformity with the principles of natural justice where their application is required by statute, and reliance upon considerations that are irrelevant and extraneous to the statutory purpose (at para 50).

[75] Mr. Robinson's counsel confirmed at the hearing that he is not seeking to challenge the 1996 Policy other than under s 52 of the *Constitution Act, 1982*. In response to the Attorney General's argument that the Policy is not a law or legal instrument, Mr. Robinson relies on *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2009 SCC 31 [*Canadian Federation of Students*], where Justice Deschamps wrote (at para 64):

> 64 Where a policy is not administrative in nature it may be "law" provided that it meets certain requirements. In order to be legislative in nature, the policy must establish a norm or standard of general application that has been enacted by a government entity pursuant to a rule – making authority. A rule – making authority will exist if Parliament or a provincial legislature has delegated power to the government entity for the specific purpose of enacting binding rules of general application which establish the rights and obligations of the individuals to whom they apply (Denys C. Holland and John P. McGowan, *Delegated Legislation in Canada* (1989), at p. 103). For the purposes of s. 1 of the *Charter*, these rules need not take the form of statutory instruments. So long as the enabling legislation allows the entity to adopt binding rules, and so long as the rules establish rights and obligations of general rather than specific application and are sufficiently accessible and precise, they will qualify as "law" which prescribes a limit on a *Charter* right.

[76] Mr. Robinson submits that the 1996 Policy is binding, in that it is intended to have normative force and applies generally to all license holders, in the absence of a successful appeal. He also notes that the jurisprudence does not require that there be no possible exception to a rule in order for it to be binding. Mr. Robinson relies in particular on *The Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2018 ONSC 579 [*Christian Medical*], in which the applicants challenged the constitutional validity, including under s 15 of the *Charter*, of two policies adopted by the College of Physicians and Surgeons of Ontario related to the conduct of its members. He notes the Court observed that the policies did

not create "legally binding rules" (at para 64) but nevertheless concluded that their moral suasion was sufficient to engage the *Charter* (at para 110).

[77] I do not regard *Christian Medical* as departing from the principles of *Canadian Federation of Students* and in particular the principle that a policy must be of a binding nature in order for it to be treated as law and subject to being struck down under s 52 of the *Constitution Act, 1982*. As a starting point, I note that the application of the *Charter* to the policies under consideration in *Christian Medical*, and their status as sufficiently precise, accessible and binding to constitute laws within the meaning of s 52 does not appear to have been in dispute between the parties in that case (see paras 28 and 136). While the Court states the policies do not establish legally binding rules of professional conduct, this comment is made in the context of the policies not providing any penalty for noncompliance and the Court's observation that the policies set broad expectations of physician behaviour and are intended to have normative force (at para 64). Indeed, in concluding that the policies constitute laws, the Court relies on the requirements set out in *Canadian Federation of Students* that, for a government policy to be legislative in nature, it must be "…authorized by statute and sets out a general norm or standard that is meant to be binding …" (*Christian Medical* at para 137).

[78] Turning to the 1996 Policy, I note that Mr. Robinson has not identified, in the Act or the Regulations, any enabling legislative authority that allows the Minister or the DFO to adopt the policy as binding rules. Clearly ss 22 and 23 of the Regulations authorize the Minister to impose licence conditions, including authorizing a person other than the license holder to carry out the activity under the license where the holder is unable to engage in the activity because of

circumstances beyond the holder's control. However, these sections of the Regulations do not authorized the Minister to create binding policy rules governing the exercise of that authority.

[79] This is not to say that the Minister is without the authority to adopt policies such as the 1996 policy. As noted by the Federal Court of Appeal in *Elson FCA*, policy statements, used to guide administrative decision-making, play a useful and important role (at para 41). The Federal Court of Appeal relied on its earlier decision on *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 [*Stemijon*], which explained that such policies encourage the application of consistent principles and allow those subject to administrative decision-making to understand how discretions are likely to be exercised (at para 59). However, such policies are not law and indeed cannot be treated as such by the decision-maker. As *Stemijon* states at paragraph 60:

> 60 However, as explained in paragraphs 20-25 above, decision-makers who have a broad discretion under a law cannot fetter the exercise of their discretion by relying exclusively on an administrative policy: *Thamotharem*, *supra* at paragraph 24 above; *Maple Lodge Farms, supra* at page 6; *Dunsmuir, supra* (as explained in paragraph 24 above). An administrative policy is not law. It cannot cut down the discretion that the law gives to a decision-maker. It cannot amend the legislator's law. A policy can aid or guide the exercise of discretion under a law, but it cannot dictate in a binding way how that discretion is to be exercised.

[80] In my view, it is clear that s 11(11) of the 1996 Policy represents an administrative policy of this nature. Section 11(11) contemplates the DFO permitting the designation of a MSO for the term of the licence and states that such designation may not exceed a total period of five years. However, the five-year limitation is clearly not intended to be binding. If it was, it would conflict with s 23 of the Regulations, which contemplates no such limitation, and would represent an

unlawful fetter upon the Minister's discretion. Indeed, the facts of the present case a support this conclusion. Prior to the Decision under review, Mr. Robinson had sought and obtained MSO authorizations that extended beyond the five-year period, and the Decision itself involves a request for, and consideration of, such an extension.

[81] Finally, I note that this issue has previously been considered by the Supreme Court of Nova Scotia in *Robinson v Canada (Attorney General)*, 2018 NSSC 37 [*Robinson NSSC*]. Mr. Robinson previously applied for a declaration from that Court that s 11(11) of the 1996 Policy is of no force and effect under s 52 of the *Constitution Act, 1982.* The Attorney General brought a motion for summary judgement, arguing that the provincial Superior Court was without jurisdiction to consider this request for relief, as it was a matter within the exclusive jurisdiction of the Federal Court. In responding to that motion, Mr. Robinson argued that provincial Superior Courts have jurisdiction over *Charter* challenges to legislation and that the 1996 Policy should be regarded as akin to legislation.

[82] In granting the Attorney General's motion, the Court considered but rejected Mr. Robinson's arguments under *Canadian Federation of Students.* Justice Boudreau noted that she had been provided with no precedent where a provincial Superior Court had decided it was empowered to review a federal government policy because it was binding and therefore legislative in nature (at para 29). Justice Boudreau also held that the fact the five-year limit on issuance of a MSO had previously been waived for Mr. Robinson, due to his special circumstances, established that the policy was not binding (at paras 31-32).

[83] I accept Mr. Robinson's submissions, in relation to *Robinson NSSC*, that this decision was issued in the context of a motion, perhaps without the benefit of the evidentiary record that is before the Federal Court in the present application. It was also decided in the context of a jurisdictional question. I therefore do not treat *Robinson NSSC* as determinative of the issue. However, I note that Justice Boudreau's reasons on this issue are consistent with my own.

[84] In conclusion on this issue, I find that s 11(11) of the 1996 Policy is not legislative in nature and is therefore not subject to challenge under s 52 of the *Constitution Act, 1982*.

F. Does the Decision and/or the 1996 Policy comply with the Convention?

[85] Mr. Robinson submits that both the Decision and the 1996 Policy must comply with the United Nations *Convention on the Rights of Persons with Disabilities*, Article 1 of which outlines the purpose of the *Convention* as follows:

> The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

[86] While Mr. Robinson frames this issue as consideration of whether both the Decision and the 1996 Policy are inconsistent with the *Convention*, his brief submissions on this issue focus principally upon the 1996 Policy. He refers to the explanation in *R v Hape*, 2007 SCC 26 of the principle of statutory interpretation that courts will strive to avoid constructions of domestic law, pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result (at para 53). However, as I have previously

concluded, the 1996 Policy is not legislative in nature. Therefore, I need not give further consideration to this point.

[87] Mr. Robinson also submits that, if the Court determines that the Decision should be quashed, it should return the matter to the decision-maker with instructions to consider the matter with regard to the purpose of the Convention. Mr. Robinson refers the Court to *Pushpanathan v Canada (Minister of Employment & Immigration)*, [1998] 1 SCR 982 [*Pushpanathan*], in which the Supreme Court ordered that a refugee protection matter be returned to what was then called the Convention Refugee Determination Division for re-determination in a manner consistent with the Court's reasons (at para 77). Those reasons took into account the United Nations *Convention Relating to the Status of Refugees* in interpreting Canada's immigration legislation.

[88] In my view, these arguments contribute little to the way forward in the present matter. *Pushpanathan* involved a situation in which a provision of the relevant international convention had been expressly incorporated into Canada's domestic immigration legislation. The present case does not involve comparable circumstances. Moreover, Mr. Robinson's minimal submissions on this issue provide no elaboration on how he would propose that the provisions of the *Convention* should influence re-determination of the Decision in a context in which the *Charter* is engaged. I have found that that the Decision engages Mr. Robinson's s 15(1) *Charter* equality rights. Canadian jurisprudence provides guidance as to the framework for *Charter*-based administrative decision-making, and these Reasons provide guidance, to the extent appropriate in keeping with the judicial function, for the application of that framework to the present case.

V. **Remedy**

[89] Mr. Robinson's Memorandum of Fact and Law refines the relief claimed in his Notice of Application to request that the Court quash the Decision of the DM; declare s 11(11) of the 1996 Policy unconstitutional; grant such other relief as the Court deems just; and award costs to Mr. Robinson. The issue of costs will be addressed below. Otherwise, as I have rejected the argument that s 11(11) is unconstitutional, the remaining relief that is available to Mr. Robinson is to have the Decision set aside and returned to the decision-maker for re-determination in accordance with these Reasons. In the hope it will assist in guiding that re-determination, I offer the following summary of key principles, identified more fully above in these Reasons, to be taken into account by the decision-maker.

[90] I have concluded that the Decision engaged Mr. Robinson's s 15(1) *Charter* equality rights as a person with a physical disability. This obliges the decision-maker to conduct the proportionate balancing stage of the *Charter* analysis, considering the relevant government objectives and asking how the *Charter* value at issue can best be protected in light of those government objectives. The decision-maker must consider how to balance the severity of the interference with the *Charter* protection (in the present case, Mr. Robinson being required to give up his chosen livelihood) against those objectives.

[91] *Charter* protections must be affected as little as reasonably possible in light of the applicable statutory objectives. This does not mean that the administrative decision maker must choose the option that limits the *Charter* protection least. However, if the decision-maker rejects

a reasonably available option or avenue that would reduce the impact on the protected right, while still permitting sufficient furtherance of the relevant statutory objectives, such a decision would not represent the required proportionate balancing.

VI. **Costs**

[92] At the hearing of this matter, the parties agreed to consult with each other and subsequently advise the Court, prior to issuance of a decision, whether they were able to reach agreement on a costs figure that would be payable by the unsuccessful party. The Attorney General has proposed that costs of the application be set at $7,800.00 (a figure calculated based on Tariff B, Column IV) plus reasonable and provable disbursements. Mr. Robinson has indicated his agreement with the Attorney General's proposal.

[93] I adopt this proposed disposition of costs. My Judgment will so reflect, including that the parties shall endeavor to reach agreement on the amount of the disbursements, failing which that amount shall be assessed.

JUDGMENT in T-562-19

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is allowed, the Decision of the Deputy Minister is set aside, and the matter is returned for re-determination in accordance with the Court's Reasons.

2. The Applicant is awarded costs of this application, set at $7800.00 plus reasonable and provable disbursements. The parties shall endeavor to reach agreement on the amount of the disbursements, failing which that amount shall be assessed.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-562-19
STYLE OF CAUSE:	DANA ROBINSON v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE VIA HALIFAX, NOVA SCOTIA
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APPEARANCES :

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