Federal Court Cour fédérale

Date: 20241223

Docket: T-263-23

Citation: 2024 FC 2092

Ottawa, Ontario, December 23, 2024

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

DANA ROBINSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In this application, the Applicant seeks judicial review of a decision made by the Deputy Minister [DM] of Fisheries and Oceans Canada [DFO], dated February 2, 2023 [the Decision]. In the Decision, the DM denied the Applicant's request for ongoing authorization to use a medical substitute operator in connection with an inshore lobster fishing licence. The Decision is a redetermination of an earlier decision by DFO, which was the subject of a successful application

for judicial review in *Robinson v Canada (Attorney General)*, 2020 FC 942 [*Robinson FC*], affirmed in *Canada (Attorney General) v Robinson*, 2022 FCA 59 [*Robinson FCA*].

[2] As explained in further detail below, this application will be allowed, because the DM erred by incorrectly concluding that the Applicant's equality rights under subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], as a person with a disability, were not engaged by the Decision. This error also lead to the DM conducting an unreasonable balancing of the Applicant's rights against relevant regulatory and policy objectives. The Decision will therefore be set aside and the matter remitted to the DM for redetermination. As it is therefore unnecessary for the Court to consider the Applicant's argument that a relevant regulatory provision underlying the Decision is constitutionally invalid, and as the Applicant did not raise that argument before the DM, the Court declines to address that argument.

II. Background

[3] The Applicant, Mr. Dana Robinson, is 63 years old and has been a fisherman almost all of his working life. Since 2007, the Applicant has been issued an inshore fishing licence (#111730) to fish lobster in Lobster Fishing Area 35 in Nova Scotia [the Licence].

[4] Subsection 19(2) of the *Atlantic Fishery Regulations*, 1985 SOR/86-21 [*Atlantic Regulations*], made under the *Fisheries Act*, RSC 1985, c F-14 [*Fisheries Act*], requires that the activities authorized under certain categories of inshore fishing licences be carried out either by the Applicant personally or by a person authorized in accordance with subsection 23(2) of the

Fishery (General) Regulations, SOR/93-53 [*General Regulations*]. This requirement applies to the Licence. While subsection 19(2) of the *Atlantic Regulations* came into force only on April 1, 2021, the general requirement that inshore fishing licences be personally fished by the licence holders has for a longer period been captured in subsection 11(7) of DFO's *Commercial Fisheries Licencing Policy for Eastern Canada* [the Policy].

[5] Subsection 23(2) of the *General Regulations* provides a possible exception to this requirement for licence holders who, due to circumstances beyond their control, are unable to fish their licence personally. Under subsection 23(2), DFO may authorize another person to carry out the activity under the licence, in which case the licence holder may designate a substitute operator to fish their licence on their behalf.

[6] Where the circumstance preventing the licence holder from fishing their licence personally is an illness that prevents the licence holder from operating a fishing vessel, the permission that DFO may provide under subsection 23(2) of the *General Regulations* is commonly referred to as an authorization for designation of a medical substitute operator [MSO]. Subsection 11(11) of the Policy states that the designation of an MSO may not exceed a total period of five years. However, this limit being a matter of policy rather than regulation, DFO has the discretion to depart from the limit and will do so in what it considers to represent extenuating circumstances.

[7] In *Robinson FC*, at paragraphs 17 to 19, this Court summarized the policy and history underlying these regulatory and policy provisions, which background I do not understand to be

the subject of any controversy between the parties. 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, DFO introduced what is termed the “fleet separation policy”, which separated the interests of the harvesting sector from those of the processing sector. 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 Policy.

[8] Similar objectives are pursued through what is termed the “owner-operator policy”. 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 Policy. Its goal is to maintain an economically viable inshore fleet 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.

[9] The Applicant fished the Licence personally, until a medical condition prevented him from doing so. The details of his medical condition and its effect upon his ability to fish the Licence personally are not at issue in this application.

[10] In 2009, the Applicant requested and received authorization to designate an MSO in relation to the Licence. In 2015, DFO informed the Applicant that he had reached the five-year limit on MSO use. He appealed to the Maritimes Region Licensing Appeal Committee, and on March 13, 2017, the Regional Director General, Maritimes Region [the Regional Director] granted him an exemption to the five-year limit on MSO use, but only until July 31, 2017.

[11] The Applicant appealed the decision of the Regional Director to the Atlantic Fisheries Licence Appeal Board [AFLAB], and on March 6, 2019, the Deputy Minister at the time rejected the Applicant's appeal. On April 5, 2019, the Applicant filed an application for judicial review of the Deputy Minister's decision in the Federal Court. On September 30, 2020, this Court issued its decision in *Robinson FC*, quashed the decision, and sent the matter back for redetermination taking into account the Court's reasons.

[12] In *Robinson FC*, this Court found, applying the correctness standard of review, that the impugned decision engaged the Applicant's subsection 15(1) equality rights in relation to physical disability under the *Charter* and that the decision-maker did not consider these rights. Alternatively, applying the reasonableness standard of review, the Court found that the failure to consider the Applicant's *Charter* rights also made the decision unreasonable (*Robinson FC* at paras 43, 71).

[13] On April 7, 2022, the Federal Court of Appeal [FCA] upheld *Robinson FC* in *Robinson FCA*, finding that, where a *Charter* protection is squarely raised by a party, the unexplained failure to address whether the *Charter* was engaged cannot survive reasonableness review (*Robinson FCA* at para 28).

[14] In the meantime, DFO has continued to permit the Applicant to use an MSO. In the context of his previous application for judicial review, the Federal Court granted the Applicant an interim injunction until December 31, 2019. DFO also adopted an interim policy during the COVID-19 pandemic, pursuant to which DFO authorized MSOs for additional years, notwithstanding the five-year limit. I understand from the Respondent's counsel's submissions at the hearing of this application that an MSO for the Applicant remains in place pending the outcome of this litigation.

[15] On May 27, 2022, the Applicant's counsel provided to DFO further submissions to be taken into account in the redetermination that had been ordered by the Court. Those submissions referenced the owner-operator policy and related regulations that are the subject of this litigation and their underlying goal of ensuring that economic benefits of fishing accrue to local communities and are not siphoned away by non-resident corporations or others. The Applicant expressed approval of that goal but argued that a decision that compromised or prevented local disabled fishers from enjoying economic benefits was inconsistent with the goal. He submitted that if a licence holder can demonstrate that they are actively engaged in the fishery, have care and control of the licence, are directing the fishing enterprise, and are physically unable to board the vessel, then a substitute operator should be authorized without an arbitrary five-year limit. The Applicant argued that, in that scenario, neither the substance of the owner-operator policy nor the *Charter* rights of the disabled licence holder would be infringed.

[16] While not expressly set out in the Applicant's counsel's letter, other documentation generated in the course of the various administrative processes leading to the Decision provides further detail related to the Applicant's reference to his active engagement in the fishery. In his

affidavit sworn in support of this application for judicial review [the Affidavit], the Applicant summarizes his role. The Applicant employs crew members to operate his vessel and states that he maintains full care and control of the Licence and his vessel, including managing the crewmembers and the MSO. He asserts that he makes the operational decisions regarding the vessel, including decisions relating to negotiating the wharf price of the catch, arranging bait and fuel purchase, and finances. The Applicant also asserts that a large portion of his total income is derived from the Licence and that he will lose his livelihood if unable to fish the Licence through an MSO. While the Affidavit was not itself before the DM when making the Decision, I do not understand the Respondent to dispute that such assertions were advanced before the decision-maker (and, indeed, before previous decision-makers in the administrative processes that preceded the Decision).

[17] On February 2, 2023, the DM made the Decision (summarized below) that is the subject of this application for judicial review. The Court heard this application on October 1, 2024, together with an application in Court File No. T-2356-22. In T-2356-22, the applicant, Mr. John Mombourquette, also challenges a decision to deny him an MSO authorization beyond the five-year limit set out in the Policy. The same counsel represents the applicants in both matters and advances largely identical arguments in the two proceedings.

III. Decision under Review

[18] In the February 2, 2023 letter conveying the Decision [the Decision Letter], the DM denied the Applicant’s request for a further exception to the five-year limit on MSOs. The DM referred to having arrived at this conclusion upon review of background material including the

recommendation of the AFLAB, the judgments in *Robinson FC* and *Robinson FCA*, and the Applicant's allegations of discrimination under subsection 15(1) of the *Charter*.

[19] The DM agreed with the AFLAB's finding that the Applicant was treated fairly and in accordance with departmental licensing policies, practices, and procedures. The DM also found that the exit strategy presented by the Applicant to the AFLAB was not substantial enough to justify an exception to the Policy. That exit strategy was that either the Applicant's young grandchildren would potentially be issued an inshore licence in the future, or that the Applicant's daughters would potentially marry a fisherman. The DM found that the additional information presented by the Applicant on May 27, 2022, in the Applicant's counsel's submissions did not indicate a more developed exit strategy.

[20] With respect to the Applicant's *Charter* submissions, the DM found that subsection 15(1) of the *Charter* was not engaged by the Decision. The DM found no indication the Applicant would ever be able to carry out commercial fishing activities personally. As such, the DM found the Applicant was seeking to collect revenues from a licence to fish for an indefinite period of time without actively fishing, which the DM described as insurance or disability-like benefits that were not available at law to anyone under the *Fisheries Act*. Further, even if it could be considered that the Decision made a distinction based on the Applicant's age or physical disability, the DM concluded that this would not be a discriminatory distinction, as it would not reinforce, perpetuate, or exacerbate a disadvantage. Rather, the distinction would merely reflect the reality that the Applicant's permanent medical condition is inconsistent with ongoing demanding activity that is inherent in commercial fishing.

[21] The DM further found that, even if the Decision engaged the Applicant's *Charter* rights, his request for further MSO authorization was inconsistent with DFO's underlying policy objectives for fisheries management.

[22] The DM also stated that the current fisheries management regime accommodated the Applicant, in that he could continue to seek renewal of the licences issued to him on a yearly basis (subject to closures and all other eligibility requirements) and therefore could recommend to the Minister of Fisheries, Oceans and the Canadian Coast Guard [the Minister] an eligible fisher to which the Minister would issue a replacement licence. This would provide the Applicant with access to financial capital through a private commercial transaction.

[23] The parties disagree on whether an understanding of the reasons for the Decision may also be informed by a review of other documentation, generated by DFO in the course of the process leading to the Decision, as found in the Certified Tribunal Record [CTR] in this matter. These documents include a departmental "Memorandum for the Deputy Minister" dated January 27, 2023 [the Memorandum] and a supporting "Departmental Analysis and Rationale" [the Rationale]. I will reference these documents in more detail later in these Reasons when addressing the parties' dispute as to their relevance.

IV. Issues

[24] The parties' submissions in this application raise the following issues for the Court's determination:

A. What is the applicable standard of review?

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

C. Is subsection 19(2) of the *Atlantic Regulations* constitutionally invalid because it violates subsection 15(1) of the *Charter*?

D. If applicable, what remedies should the Court impose?

V. Analysis

A. *What is the applicable standard of review?*

(1) Introduction

[25] The parties disagree on the standard of review that the Court should apply in its consideration of the Decision. Relying on evolving jurisprudence on the standard of review applicable to administrative decision-making in the context of asserted *Charter* rights, the Applicant takes the position that the Decision is reviewable on the correctness standard, while the Respondent (the Attorney General of Canada) argues that the standard of reasonableness applies.

(2) Federal Courts jurisprudence

[26] Before turning to a broader review of applicable jurisprudence, I note that the standard of review was also the subject of disagreement between the parties in *Robinson FC*. The respondent in *Robinson FC* relied on *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*], in which the Supreme Court of Canada [SCC] 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 (*Doré* 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 (*Doré* at paras 43-58).

[27] 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 (*Doré* at paras 56-58). In *Robinson FC*, the respondent argued that the applicant's challenge of the decision then under review fell into this category, requiring a reasonableness review (*Robinson FC* at para 38). The respondent also noted that, in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], which confirmed the presumption in favour of the reasonableness standard when reviewing administrative decisions (*Vavilov* at para 16), the SCC expressly stated that reconsideration of the approach to the standard of review set out in *Doré* was not germane to the issues before it (*Vavilov* at para 57).

[28] In contrast, the applicant argued in *Robinson FC* that there was a role for the correctness standard in the Court's review of the administrative decision. He relied on *Canadian Broadcasting Corporation v Ferrier*, 2019 ONCA 1025 [*Ferrier*], in which the Court of Appeal for Ontario [ONCA] considered *Doré* and *Vavilov* in concluding that, in circumstances involving refusal or failure by an administrative decision-maker to consider an applicable *Charter* right, correctness applies. The ONCA contrasted such circumstances with those in which an administrative decision-maker considered applicable *Charter* rights and how those rights affected the required discretionary decision (as was the case in *Doré*), where the standard of reasonableness would ordinarily apply (*Ferrier* at paras 34-38).

[29] The issue in *Ferrier* was whether the Thunder Bay Police Services Board [the 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. The ONCA 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. Reviewing the issue on the correctness standard, the ONCA confirmed that this *Charter* right did apply (*Ferrier* at paras 53-59).

[30] In its elaboration upon *Doré* in *Loyola High School v Québec (Attorney General)*, 2015 SCC 12 [*Loyola*] at paragraph 49, the SCC explained that, before turning to the proportionate balancing exercise required by *Doré*, a preliminary question arises as to whether the administrative decision under review engages the *Charter* by limiting its protections (*Loyola* at para 39). In *Robinson FC* at paragraph 42, this Court accepted that *Ferrier* supported the

applicant's position that the answer to that preliminary question of whether a *Charter* right has bearing on an administrative decision is governed by the correctness standard. However, *Robinson FC* further explained at paragraphs 42 to 43 that, consistent with the analysis in *Ferrier* at paragraph 60, an administrative decision that fails without explanation to consider an applicable *Charter* right would also be unable to withstand reasonableness review.

[31] In the result, *Robinson FC* found, applying the correctness standard, that the decision under review in that matter engaged the applicant's subsection 15(1) rights of a person with a physical disability (at para 56). *Robinson FC* concluded, again applying the correctness standard, that the decision-maker did not consider those rights (at paras 70-71). Employing the alternative standard of review analysis articulated in *Ferrier*, this Court further concluded that, even if a reasonableness standard applied, the decision could not be considered reasonable because of its failure to consider applicable *Charter* rights (at paras 70-71).

[32] On appeal, the respondent argued that *Robinson FC* erred in relying on *Ferrier* in assessing against a correctness standard the question whether the administrative decision engaged subsection 15(1) protections. The respondent took the position that the presumptive standard of reasonableness should be applied to both the first question under the *Doré/Loyola* framework, determining whether a *Charter* protection was engaged, and the second question, the balancing of the *Charter* protection against the government's policy objectives (see *Robinson FCA* at paras 18, 24).

[33] The FCA concluded at paragraphs 27 to 28 that it was sufficient for purposes of the appeal to explain that it agreed with this Court that the Deputy Minister's decision ought to be set aside for failing to address the key question before him. Where, as in that case, a *Charter* protection was squarely raised by a party, the unexplained failure to address whether the *Charter* was engaged could not survive reasonableness review.

[34] As such, the FCA concluded that it was unnecessary to comment on this Court's application of the test under *Doré/Loyola.* Similarly, the FCA concluded that whether it ought to adopt the approach of the ONCA in *Ferrier*, holding that the first question under the *Doré/Loyola* analysis was to be determined on a correctness standard and the second question on a standard of reasonableness, should be decided when it must and with the benefit of full argument (*Robinson FCA* at para 29).

[35] Following *Robinson FCA*, the standard of review issue was again raised in the Federal Court in *Boudreau v Canada (Attorney General)*, 2023 FC 428 [*Boudreau*], in an application for judicial review of a DFO decision denying the applicant's request for an MSO authorization beyond the five-year policy limit. As in *Robinson FC* and the case at hand, the applicant in *Boudreau* argued that the decision infringed his rights as a disabled person under section 15 of the *Charter*. In connection with his assertion that DFO failed to consider those rights, the applicant relied on *Ferrier* in support of his position that the standard of correctness applied (see *Boudreau* at para 30).

[36] In *Boudreau*, Justice Ann Marie McDonald noted that *Ferrier* had been applied in *Robinson FC* but also that *Robinson FCA* had held that reasonableness was the appropriate standard of review, as the decision under review failed to respond to the applicant's argument that his *Charter* rights were violated (*Boudreau* at para 31). Referencing both *Robinson FCA* and *Doré*, Justice McDonald concluded that the applicable standard of review was reasonableness (*Boudreau* at para 33). Consistent with that conclusion, *Boudreau* commented that the role of the Court was not to conduct the section 15 analysis, including in relation to whether the *Charter* was engaged, but rather was to determine whether DFO had undertaken the necessary analysis (at paras 36-38).

[37] That said, *Boudreau* then considered the respondent's assertions that the *Charter* was not engaged, because the applicant was seeking a lifetime right to fish that was not available under the law, and relied on the analysis in *Robinson FC* (at paras 53-57) in concluding that DFO's policy created a *prima facie* distinction based on disability, such that the DFO decision under review did engage the *Charter* (*Boudreau* at para 36-41). The Court then moved to assessing whether the decision had considered the applicant's *Charter* arguments and balanced his *Charter* protections against DFO's policy objectives as required by *Doré*. The Court concluded that DFO had not done so and that the decision was therefore unreasonable (at paras 53-58). I note that *Boudreau* was appealed but that the appeal was subsequently discontinued.

[38] *Robinson FC* and *Ferrier* were also considered by my colleague Justice Christine Pallotta in *Toth v Canada (Mental Health and Addictions)*, 2023 FC 1283 [*Toth*], which addressed an application for judicial review of ministerial decisions refusing requests for an exemption under

the *Controlled Drugs and Substances Act*, SC 1996, c 19, to permit the applicants to possess and consume raw psilocybin mushrooms in the course of their own professional training for psilocybin-assisted psychotherapy. The applicants' arguments included an assertion that the decision did not address arguments as to the impact that refusing an exemption would have upon their and patients' rights under section 7 of the *Charter*.

[39] In relation to the standard of review applicable to the *Charter* arguments, the Court identified the two steps of the *Doré* framework, examining first whether an administrative decision engaged the *Charter* by limiting a *Charter* protection and, if it did, examining second whether the decision-maker properly balanced the relevant *Charter* protection with the statutory objectives (*Toth* at para 86). The applicants relied on *Robinson FC* and *Ferrier* in support of their position that correctness applied to the first step and reasonableness to the second step (at para 87). The respondent argued that the entire analysis should be performed under the reasonableness standard, noting that *Robinson FCA* declined to decide whether to adopt the *Robinson FC* and *Ferrier* approach for the first step under the *Doré* framework (at para 89).

[40] The Court agreed with the respondent's position, noting (at paras 94) that *Robinson FCA* was able to dispose of the appeal before it by applying the reasonableness standard (*Robinson FCA* at para 28). *Toth* expressed concern that the adoption of a correctness standard for the first step of the *Doré* analysis would lead to courts retrying administrative decisions involving factual findings that are entitled to deference under the reasonableness review applicable to the second step of the analysis (at para 96). The Court then conducted the first stage of the analysis, ultimately concluding that the decision did not engage section 7 *Charter* rights (at paras 97-103).

[41] At the hearing of the present application, the Respondent's counsel advised the Court that *Toth* is under appeal.

[42] Before leaving the recent jurisprudence of the Federal Courts, I note that, shortly following the release of *Boudreau*, the FCA considered the application of *Ferrier* in *Canadian Broadcasting Corporation v Canada (Parole Board)*, 2023 FCA 166 [*Parole Board*]. That decision addressed protections for freedom of the press under section 2(b) of the *Charter*, in the context of a decision by the Parole Board refusing to provide the Canadian Broadcasting Corporation [CBC] with a complete copy of the audio recordings of certain parole hearings.

[43] On appeal from the Federal Court's dismissal of CBC's application for judicial review of the Parole Board's decision, the FCA first considered the applicable standard of review. The FCA recognized at paragraph 30 the guidance in *Vavilov* that, while the presumptive standard of review of an administrative decision is reasonableness (*Vavilov* at para 10), the presumption may be rebutted in circumstances where the rule of law requires that the correctness standard be applied, such as when dealing with constitutional questions (*Vavilov* at para 17). The FCA further noted in paragraph 31 that not every constitutional question, including involving the *Charter*, required review on the correctness standard, and observed the direction in *Doré* (at para 36) that the application of *Charter* values to a particular set of facts in administrative decision-making should attract deference.

[44] However, the FCA identified (*Parole Board* at paras 32-33) that the first issue before the Parole Board was whether the open court principle, fortified by section 2(b) of the *Charter*,

applied to it, and relied on the following reasoning in *Ferrier* (at para 37) in concluding that the correctness standard applied to that question:

> 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.
>
> [Emphasis in original.]

[45] Following the resulting analysis, conducted on a correctness basis, as to whether the open court principle applied, the FCA agreed with the Parole Board and the Federal Court that it did not (*Parole Board* at para 56).

[46] The effect of *Robinson FC*, *Boudreau*, and *Toth* is that the jurisprudence of the Federal Court, on the standard of review applicable to the first step of the *Doré* analysis, remains unsettled. Arguably the FCA's endorsement of *Ferrier* in *Parole Board* assists in resolving this situation. However, as both *Ferrier* and *Parole Board* involved the same *Charter* issue, the application of the open court principle as informed by section 2(b), caution is warranted in concluding that the analysis applied in those cases, involving adoption of the correctness standard in considering whether *Charter* rights are engaged, applies more broadly to judicial review of *Charter*-infused administrative decision-making.

(3) Supreme Court of Canada jurisprudence

[47] I turn next to two recent decisions of the SCC that have addressed the standard of review in the administrative law context. In *Commission scolaire francophone des Territoires du Nord-Ouest v Northwest Territories (Education, Culture and Employment)*, 2023 SCC 31 [*Commission scolaire*], the SCC considered the application of the minority language educational rights protected by section 23 of the *Charter*. A group of parents not holding the right guaranteed by section 23 to have their children receive instruction in one of the two official languages, where it is the minority language, applied to the relevant minister for their children's admission to a French first language education program. The minister denied these applications, because they did not meet the conditions of an applicable ministerial directive that created categories of eligible non-rights holders.

[48] The parents applied for judicial review of these decisions, arguing that they did not reflect a proportionate balancing of section 23 protections. That argument succeeded before the Supreme Court of the Northwest Territories but was rejected by the Court of Appeal, the majority of which found that the Minister was not required to consider section 23 of the *Charter* because the parents were not rights holders under that provision.

[49] On appeal, the SCC confirmed (*Commission scolaire* at para 59) that it was through the lens of *Doré* that the ministerial decisions must be considered, involving first a determination whether the decisions engage the *Charter* by limiting *Charter* protections – both rights and values (at para 61). The Court further explained that, once the reviewing court has determined

that the impugned administrative decision infringes *Charter* rights or limits the values underlying them, the court must determine whether the decision is reasonable through an analysis of its proportionate balancing of *Charter* rights and values with the relevant statutory objectives (at paras 67, 73). The SCC ultimately found that the impugned ministerial decisions were required to take into account section 23 values (at para 83), that those decisions had the effect of limiting those values (at para 91), and that the decisions were unreasonable because they did not take those values into account (at para 92).

[50] On June 21, 2024, the SCC released its decision in *York Region District School Board v Elementary Teachers' Federation of Ontario*, 2024 SCC 22 [*York Region*], arising from a circumstance in which two teachers employed by an Ontario public school board were disciplined based on information obtained by the school principal through reviewing the teachers' private electronic communications. The teachers' union grieved the discipline, and a labour arbitrator dismissed the grievance.

[51] On judicial review, the Ontario Superior Court of Justice (Divisional Court) upheld the arbitrator's decision, with the majority applying a reasonableness standard of review and finding that an employee does not have a right under section 8 of the *Charter* to be secure against unreasonable search or seizure in a workplace environment. The ONCA allowed the union's appeal, conducting a correctness review of the arbitrator's decision and holding that the search was unreasonable under section 8.

[52] Writing for the majority in *York Region* in its standard of review analysis, Justice Rowe first explained that the correctness standard applies to the determination of whether the *Charter* applied to school boards pursuant to subsection 32(1) of the *Charter*, as this was a constitutional question that required a final and determinate answer by the courts, one that will apply generally and is not dependent on the particular circumstances of the case (at para 62).

[53] Referencing *Vavilov*, Justice Rowe then explained that the correctness standard also applied to review of the arbitrator's decision, as a result of which the decision would be quashed because the arbitrator erred in failing to appreciate that a *Charter* right arose from the facts before her. Justice Rowe held that the issue of constitutionality on judicial review – of whether a *Charter* right arises, the scope of its protection, and the appropriate framework of analysis – is a constitutional question that requires a final and determinate answer from the courts (at para 63). In the course of explaining that conclusion, Justice Rowe referenced (at para 66) a post-*Vavilov* developing line of jurisprudence supporting the application of correctness review in the constitutional context, including *Ferrier* and *Parole Board*.

[54] Applying the correctness standard, the majority held that Ontario public school teachers are protected from unreasonable search and seizure in their place of employment under section 8 of the *Charter* and that the arbitrator erred because she ought to have applied the *Charter* but failed to do so (at para 68).

[55] In concurring reasons written by Justices Karakatsanis and Martin, they explained their agreement with the majority that the issue of whether the *Charter* applies to Ontario school

boards is one that must be determined on a standard of correctness. However, they disagreed with how the majority reviewed the arbitrator's decision and concluded instead that the arbitrator's reasons clearly demonstrated that she appreciated that the section 8 privacy framework applied and constrained her decision. As such, the issue for the Court's determination was whether the arbitrator used that framework reasonably in the circumstances of the case (at paras 108-09).

[56] Speaking to the applicable standard of review, the minority disagreed with the majority's broad statement of the constitutional questions exception to the presumption of reasonableness review identified in *Vavilov*. Although agreeing that whether or not teachers had a privacy right in their workplace was an issue that required a correctness determination and that the arbitrator's analysis had to be consistent with the *Charter* framework, the minority concluded that the arbitrator's reasons demonstrated that she was reviewing the challenged conduct using the section 8 *Charter* framework as a touchstone. The minority held that focusing on whether the arbitrator asked the right question and therefore reviewing the arbitrator's decision on the correctness standard overshot the *Vavilov* exception. Rather, the issue before the arbitrator was whether the teachers' privacy rights had been breached, an assessment which depended heavily on the specific factual and statutory context to which the presumption of reasonableness review therefore applied (at paras 111-12).

[57] Following further explanation of their conclusion that the arbitrator had recognized that section 8 of the *Charter* constrained her decision (at paras 113-18), the minority elaborated upon their conclusion that there was no basis to depart from the presumption of reasonableness review

where determining the engagement and scope of *Charter* rights entailed a highly context-specific exercise (at paras 121-23). The minority expressed their view that the cases cited by the majority at paragraph 66 (including *Ferrier* and *Parole Board*) were distinguishable from the circumstances of the present appeal and did not support correctness review for how administrators should assess a *Charter* right in a particular factual context (at para 124).

[58] In relation to *Ferrier* in particular, the minority noted that that case was not considered by the SCC on an appeal, expressed no comments on its conclusions, and expressed their view that the principle requiring correctness for constitutional matters did not govern review of whether the privacy right was infringed in the circumstances of the case before it (at para 126). Nor did the minority accept that the cases referenced by the majority qualified as a line of developing authority requiring correctness review for whether a *Charter* right arose on the facts or for questions about the scope of a *Charter* right (at para 127).

[59] Employing the reasonableness standard to assess the arbitrator's decision, the minority nevertheless agreed with the majority that the arbitrator had erred. The minority concluded that the decision was unreasonable and that the arbitrator's reasons were inconsistent with the approach required by the applicable section 8 framework (at para 129).

(4) Analysis

[60] Relying on the recent jurisprudential backdrop provided by the SCC, the Applicant in the case at hand argues that *York Region* supports his position that, in the first stage of the *Doré* analysis, which considers whether a *Charter* right or value is engaged, the standard of

correctness applies. Indeed, he takes the position that, depending upon the particular administrative decision-maker's level of expertise in analysing *Charter* considerations, *York Region* also potentially supports application of the correctness standard to the second stage *Doré* review of the decision's proportionate balancing.

[61] In contrast, the Respondent relies on *Commission scolaire* in support of the position that the entire *Doré* analysis is to be conducted under the standard of reasonableness. The Respondent argues that the correctness review required by *York Region* applies only in circumstances where a decision-maker has failed to turn its mind to whether a *Charter* right is engaged. In that respect, the Respondent draws a distinction between the decision that was under review in *Robinson FC*, in which DFO had failed to consider the applicant's *Charter* arguments, and the decision now under review in which those arguments were considered but rejected.

[62] I disagree with the Respondent's position that *York Region* can be interpreted and distinguished in that manner. In concluding that the arbitrator erred in law by failing to apply the section 8 *Charter* right as she was required to do, the majority observed not only that the arbitrator's reasons failed to indicate that she was considering that right but also that she failed to appreciate that the *Charter* right was at stake (at para 94). To accept the Respondent's submission would be to conclude that, if the arbitrator had thought about the *Charter* right but concluded that it did not apply, the majority in *York Region* would have examined that conclusion through the standard of reasonableness. I do not read the majority's analysis as capable of supporting that interpretation.

[63] I appreciate that the performance of a court's task in considering whether *Charter* rights or values are engaged in a particular case may differ depending on whether the administrative decision-maker has itself considered whether such rights or values are engaged. If the decision-maker has conducted such an analysis, then the court has the benefit of that reasoning that may inform its own analysis. However, I do not consider the existence of reasons from the decision-maker on *Charter* engagement to translate into a requirement that the court's review of those reasons must be conducted on the standard of reasonableness. Nor can I identify a principled reason why, as the Respondent would advocate, the standard of review applicable to the engagement question should differ depending on whether or not the administrative decision-maker has itself considered and analysed the question.

[64] I also appreciate the point raised by the minority in *York Region* (and advanced by the Respondent in argument in the case at hand), that determining the engagement and scope of *Charter* rights can be a context-specific exercise. Indeed, in *Toth*, Justice Pallotta expressed similar concern about the courts retrying fact-specific administrative decisions. However, while *Toth* noted that in *Robinson FCA* the FCA had declined to decide whether it should adopt the standard of review approach set out in *Ferrier*, the FCA has subsequently applied that approach in *Parole Board*. Moreover, the majority in *York Region* expressly approved of what it described as a developing body of jurisprudence, including *Ferrier* and *Parole Board*. The majority in *York Region* also expressly stated that the question of whether a *Charter* right arises and the scope of its protection is subject to the correctness standard of review.

[65] As such, while the jurisprudential tension displayed in the Federal Courts' decisions remains evident in the divergence between the majority and minority decisions in *York Region*, the guidance of the majority must be regarded as determinative. I also note that I do not regard that guidance as diverging from that provided in *Commission scolaire*. While *Commission scolaire* speaks expressly only of reasonableness review, it does so in the context of the *Doré* proportionate balancing exercise. At paragraph 73, *Commission scolaire* articulates the required analysis as follows:

> It follows from the foregoing that, under the *Doré* approach, a reviewing court must first determine whether the discretionary decision limits *Charter* protections. If this is the case, the reviewing court must then examine the decision maker's reasoning process to assess whether, given the relevant factual and legal constraints, the decision reflects a proportionate balancing of *Charter* rights or the values underlying them. If not, the decision is unreasonable.

[66] This explanation references the required reasonableness review in the context of the proportionate balancing of *Charter* rights or values, *i.e.*, the second stage of the *Doré* analysis. In relation to the first stage, it refers to the reviewing court determining whether the administrative decision limits *Charter* protections. That language reads as a correctness review.

[67] Indeed, if one returns to *Doré* itself, the SCC's focus on reasonableness review is expressed in the context of the balancing of *Charter* values with statutory objectives (at para 58), and the ensuing reasonableness analysis assesses that balancing, not whether the particular *Charter* value is engaged.

[68] Similarly, in the elaboration upon *Doré* found in *Loyola*, the SCC described the reasonableness of the ministerial decision then under review as depending on whether it reflected a proportionate balancing between the relevant statutory mandate and the religious freedoms under consideration (at para 32). The Court explained that, in contexts where *Charter* rights are engaged, reasonableness requires proportionality (at para 38).

[69] In other words, I do not read the principles surrounding standard of review expressed in either *Doré* or *Loyola* to be inconsistent with the approach to be derived from *York Region*, whereby the question whether *Charter* rights or values are engaged is assessed on a correctness standard and, if answered in the affirmative, the necessary balancing of those rights or values with statutory objectives is assessed on the standard of reasonableness.

[70] Before concluding on standard of review, I also note that I find no jurisprudential support for the Applicant's argument that, depending upon an administrative decision-maker's particular expertise, a court's assessment of the proportionate balancing might in some circumstances warrant a correctness review. That position is inconsistent with *Doré* and the cases that have followed it and, in my view, is not supported by *York Region*. While *York Region* is framed entirely in terms of correctness review, that framing results from the majority's conclusion that the administrative decision-maker failed to recognize and apply the *Charter* right that was engaged in that case. In other words, with the benefit of that conclusion, the majority was not required to move to the second stage of the analysis that involved reasonableness review.

[71] In conclusion, in reviewing the Decision, I will conduct the first stage of the *Doré* analysis employing the correctness standard and will conduct the second stage employing the standard of reasonableness.

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

(1) Whether the Decision engages subsection 15(1) of the *Charter*

[72] The above standard of review analysis necessarily drew upon explanations of the jurisprudential principles governing the application of the *Charter* to administrative decision-making. I will not repeat those explanations but will expand upon them in my review of the Decision.

[73] First, in considering under the correctness standard whether the Decision engaged subsection 15(1) *Charter* rights or values, I will be guided by jurisprudence that explains the required analysis in a subsection 15(1) context. The Respondent relies on the relatively recent decision in *R v Sharma*, 2022 SCC 39 [*Sharma*], in which the majority of the SCC described the applicable test as follows (at para 28):

> The two-step test for assessing a s. 15(1) claim is not at issue in this case. It requires the claimant to demonstrate that the impugned law or state action:
>
> (a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and
>
> (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*R. v. C.P.*, 2021 SCC 19, at paras. 56 and 141; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at para. 27; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548, at paras. 19-20).

[74] The majority further elaborated upon the steps as follows (at para 31):

> The first step examines whether the impugned law created or contributed to a *disproportionate impact* on the claimant group based on a protected ground. This necessarily entails drawing a *comparison* between the claimant group and other groups or the general population (*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 164). The second step, in turn, asks whether that impact imposes burdens or denies benefits in a manner that *has the effect of reinforcing, perpetuating, or exacerbating a disadvantage*. The conclusion that an impugned law has a disproportionate impact on a protected group (step one) does not lead automatically to a finding that the distinction is discriminatory (step two).
>
> [Emphasis in original.]

[75] In arguing that the *Charter* is not engaged by the Decision in the case at hand, the Respondent faces the significant challenge that this issue was addressed in *Robinson FC*, in which this Court applied the same test (although as enunciated in the pre-*Sharma* decision in *Quebec (Attorney General) v Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 [*Alliance*]) and held that the test was met (*Robinson FC* at paras 49-57). The Court subsequently reached the same conclusion in *Boudreau* (at para 41).

[76] The Applicant submitted at the hearing of this application that the issue of *Charter* engagement is therefore *res judicata*. I appreciate the Applicant's point, that this issue was previously decided in a final decision of the Court, involving the same two parties and an administrative decision that similarly denied him a further authorization to use an MSO. However, the Decision currently under review, while addressing exactly the same MSO authorization request and indeed representing a redetermination of the decision that was set aside in *Robinson FC*, is nevertheless a distinct decision. More importantly, the Applicant raised the

argument, that the principle of *res judicata* applied, for the first time in oral argument, and neither the Applicant nor the Respondent provided any meaningful submissions on the application of the principle. In the circumstances, I decline to address this issue on the basis of a *res judicata* analysis.

[77] Rather, I rely jurisprudentially both on *Robinson FC* and on *Boudreau*, in which Justice McDonald followed *Robinson FC* and concluded that the *Charter* was engaged by the decision of DFO denying the request by the applicant in that case for an extension of an MSO authorization for his lobster fishing licence beyond the five-year policy limit (*Boudreau* at paras 34-41).

[78] The Respondent's jurisprudential position is that both *Robinson FC* and *Boudreau* were wrongly decided, as they failed to conduct the full analysis required under *Sharma*. In particular, the Respondent argues that these authorities failed to conduct an analysis under the second step of the *Sharma* test, considering whether the impugned decision imposed a burden or denied a benefit in a manner that had the effect of reinforcing, perpetuating, or exacerbating a disadvantage.

[79] I do not find this argument compelling. In *Robinson FC*, the applicant advanced submissions under both stages of the *Alliance* test. Under the first stage, he submitted that he lives with and is limited by the physical disability created by his medical condition and that the decision under review, influenced by the five-year policy limitation upon MSO authorizations, imposed differential treatment on him in comparison to non-disabled fishers, creating a

distinction based on the enumerated ground of physical disability. He argued 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 licences indefinitely as long as they abide by the licence terms and conditions. In contrast to that group, the requirement to obtain an MSO authorization and the decision denying him that authorization had the impact of depriving him of the ability to fish his licence (at para 49).

[80] In connection with the second stage of the test, the applicant argued that the decision under review was discriminatory in that it denied him the ability to pursue the livelihood of his choice. He emphasized that he owned and operated the relevant fishing enterprise but that, as a result of the decision, he was required to give up his livelihood simply because he was physically unable to remain on board his vessel for the extended period of time often required to harvest its catch. The applicant submitted that these circumstances perpetuated a serious disadvantage for a fisher with a physical disability (at para 50).

[81] In response, the respondent in *Robinson FC* relied significantly on principles surrounding the nature of a fishing licence. That is, section 7 of the *Fisheries Act* affords the Minister absolute discretion to issue fishing licences. Pursuant to section 10 of the *General Regulations*, a "document" (which, according to section 2 of the *General Regulations*, includes a licence) that is issued for a particular calendar or fiscal year expires at the conclusion of that year. Section 16 of the *General 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.

[82] The respondent noted that subsection 15(1) of the *Charter* afforded individuals the right to equal benefit of the law without discrimination and argued that, as the applicant was not seeking a benefit of the law, his claim did not engage section 15. The respondent submitted that the applicant was seeking a benefit that was not afforded by law to anyone else, as no licence holder had a legal right to fish indefinitely, to receive indefinite renewal of a licence, or to receive indefinite authorization to use an MSO (at para 51).

[83] In support of its position in *Robinson FC*, the respondent relied 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 treatment of their autistic children violated subsection 15(1) of the *Charter*. The SCC found that the benefit claimed, *i.e.*, funding for all medically required treatment, was not a benefit that the law provided to anyone.

[84] This Court in *Robinson FC* analysed the respondent's arguments as follows (at paras 53-57):

> 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.

[85] As demonstrated by this analysis, culminating with the conclusion in the final paragraph thereof, *Robinson FC* considered and rejected the respondent's arguments in connection with the test for *Charter* engagement and expressly accepted the applicant's submissions as to how both stages of the test were met.

[86] Turning to *Boudreau*, the Court's engagement analysis concludes with paragraph 41, stating that the Court accepted that DFO's policy created a *prima facie* distinction based on disability and, therefore, the decision under review engaged the *Charter*. I appreciate that this statement references only the first, and not the second, stage of the *Sharma* test. However, the Court's preceding analysis quoted and relied upon the above paragraphs from *Robinson FC*, which expressly considered both elements of the test, and paragraph 41 concluded with the rejection of the respondent's assertion that *Robinson FC* was distinguishable.

[87] In the absence of any compelling basis to distinguish the present facts from those in *Robinson FC* and in *Boudreau*, those decisions afford little scope for a conclusion other than that they are determinative jurisprudentially and that, as in those cases, the Decision in the case at hand engaged the Applicant's subsection 15(1) *Charter* rights.

[88] However, in keeping with the point expressed earlier in these Reasons, that in circumstances where an administrative decision-maker has expressly considered (and, in this case, rejected) *Charter* engagement, that analysis may inform a court's conduct of the correctness review, I have also considered the Decision's analysis of that issue.

[89] At this stage in the Court's analysis, it is necessary to consider the dispute between the parties, that became evident during the hearing of this matter, as to which documents in the record before the Court should inform its understanding of the DM's reasons for the Decision. As previously noted, while the Decision was conveyed in the Decision Letter, the CTR also includes the Memorandum and the Rationale prepared by DFO, which documents the Respondent argues form part of the Decision. The Applicant disagrees, arguing that, where an administrative decision-maker has authored a substantive decision (in this case, the Decision Letter), that document alone represents the decision. The Applicant submits that there is no basis to conclude that analytical elements, which are found in the Memorandum or the Rationale but not in the Decision Letter, form part of the DM's reasoning.

[90] In *Robinson FC* at paragraph 65, this Court analysed a similar issue, in which the applicant took a similar position, arguing that recommendations from the AFLAB and DFO, that formed part of the material before the Deputy Minister, did not form part of the reasons for the decision. The Court rejected that position, noting that 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 at para 15; *Elson v Canada (Attorney General)*, 2019 FCA 27 at para 54, leave to appeal to SCC refused, 38584 (25 July 2019)).

[91] Adopting that analytical framework in the case at hand, I will consider the contents of the Memorandum and the Rationale, in conjunction with the Decision Letter, to assess whether the Decision Letter should be read as adopting elements of the analyses found in the supporting documents.

[92] The Decision Letter set out the following *Charter* engagement analysis:

> With respect to your allegation of discrimination, I am of the view that subsection 15(1) of the *Charter* is not engaged in this decision. This is because:
>
> 1. There is no indication that you will ever be able to carry out commercial fishing activities personally based on the medical information received from your doctor. You are seeking to collect revenues from a licence to fish for an indefinite period of time without actively fishing. The benefits you are claiming are insurance or disability-like benefits related to a licence to fish. Those types of benefits sought are not available by law to anyone under the *Fisheries Act*;
>
> 2. If it could be considered that my decision would be making a distinction based on your age or physical disability, it would not be a discriminatory decision. The distinction would not reinforce, perpetuate, or exacerbate a disadvantage. It would merely reflect the reality that your permanent medical condition is inconsistent with ongoing demanding activity that is inherent to commercial fishing.
>
> Accordingly, your assertion that a refusal of your request would infringe subsection 15(1) of the *Charter* is without merit. …

[93] The Memorandum contains a similar but somewhat lengthier analysis, that reads as follows:

> Mr. Robinson's complaint is aimed at the duration of the MSO accommodation that is provided under policy, as he wishes to be accommodated indefinitely. Mr. Robinson asserted that failure to issue him further MSO authorizations would infringe upon his equality rights guaranteed by subsection 15(1) of the *Charter* (protection against discrimination based on age and/or physical disability). [Redaction subject to solicitor-client privilege] DFO disagrees with that assertion. DFO considers that Mr. Robinson's right to the equal benefit of the law without discrimination is not engaged by the decision you have to make. That is because:
>
> - there is no indication that Mr. Robinson intends to or will ever be able to personally carry out fishing activities authorized by the licences issued to him. He has obtained a MSO now for 13 years with no evidence of improvement of his condition. He has no viable plan to exit the fishery and his goal is to retain the licences as an income-generating mechanism for an indefinite duration. The *Fisheries Act* does not confer on anyone the legal right to a licence to fish, and no holder can claim a right to receive any fishing licence (or other fishing authorizations) year-after-year nor to receive it for an extended or indefinite period in the future. This type of long-term disability like income generating benefit is not one afforded to anyone by law under the *Fisheries Act*; and,
>
> - even if the court determines that what Mr. Robinson is seeking is a "benefit of the law," a decision to deny Mr. Robinson the further use of a MSO is not discriminatory, and therefore subsection 15(1) of the *Charter* is not engaged. Mr. Robinson's medical condition is seemingly a permanent impediment to carrying out the physically demanding activities associated with commercial fishing. Any distinction made in this context does not reflect negative views and does not reinforce, perpetuate, or exacerbate a disadvantage. It simply reflects the fact that Mr. Robinson is being impacted by a permanent medical condition with no reasonable prospect of recovering in the near future, one that renders him incapable of carrying out the inherent physical nature of the bona fide occupational requirements of an inshore commercial licence holder.

[94] That excerpt from the Memorandum is in turn a summary of a lengthier analysis in the Rationale document. I will not reproduce that analysis, as it appears to be accurately summarized in the Memorandum, and the Respondent has not identified any particular element of the Rationale (or indeed the Memorandum) on which it relies to supplement the reasons in the Decision Letter. However, in relation to this aspect of the Decision (analysing the issue of *Charter* engagement), I agree with the Respondent's position that it is appropriate to read the Decision Letter as adopting the portions of the analyses canvassed above. As such, the Court can have recourse to the Memorandum and the Rationale in developing an understanding of the reasons for the Decision.

[95] However, I do not consider the reasons identified through this review to particularly assist the Respondent in distinguishing this matter from *Robinson FC* or *Boudreau* or to otherwise support a conclusion that this aspect of the Decision is correct. Rather, the DM's analysis appears comparable to the arguments that the Court rejected in those authorities.

[96] As explained above, the respondent argued in *Robinson FC* that the applicant was 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 a fishing licence, or to receive indefinite authorization to use an MSO. In conducting the first stage of the *Sharma* analysis, the Decision similarly reasons that the *Fisheries Act* does not confer rights of this nature and characterizes the Applicant as seeking a long-term disability-like income generating benefit that is not afforded to anyone under the law. In its written submissions in this application, the Respondent again relies

on *Auton* (as it did in *Robinson FC*) to support an argument that the benefit sought by the Applicant is not one that is available at law.

[97] As explained in more detail in the paragraphs of *Robinson FC* quoted earlier in these Reasons, the Applicant has benefits under the law if the Minister reissues the Licence to him, but the Applicant's ability to avail himself of those benefits differs from the ability of other licence holders who are not physically affected by a medical condition. The Applicant cannot fish his licence without a particular licence condition, the authorization to use an MSO. Therefore, the Decision which declined to grant him such authorization necessarily engaged his subsection 15(1) *Charter* rights as a person with a physical disability. The situation is distinct from *Auton*, which involved a benefit that the law did not provide.

[98] The Respondent also relies on *Publicover v Canada (Attorney General)*, 2023 FC 659 [*Publicover*] at paragraph 47, in which this Court held that it was reasonable for the Minister to have made a discretionary decision declining to confer additional benefits upon a fishing licence holder that were not supported by DFO policy. However, *Publicover* does not assist the Respondent. That decision is factually distinct, in that it involved a decision declining to authorize a transfer of a category of fishing licences that were not transferable under DFO policy. More importantly, while *Publicover* refers to *Robinson FC* and *Boudreau* in the context of a particular argument raised by the applicant in that case, the applicant was not advancing an argument that the decision declining to allow transfer of his licence was not *Charter*-compliant. As the Respondent acknowledges in its written submissions, the Court's comments about benefits at paragraph 47 of *Publicover* were not made in the context of a *Doré* analysis.

[99] In conducting the second stage of the *Sharma* analysis, the Decision states that, even if what the Applicant was seeking did represent a benefit of the law, the *Charter* was still not engaged, as a decision to deny him the further use of an MSO was not discriminatory. The Decision references physically demanding activities associated with commercial fishing and reasons that the distinction to which the Applicant is subject simply reflects the fact that he has a permanent medical condition that renders him incapable of carrying out the inherent physical nature of the *bona fide* occupational requirements of an inshore commercial licence holder.

[100] In support of this aspect of the DM's analysis, the Respondent relies on jurisprudence identifying that distinctions based on actual capacities will rarely be discriminatory (see, e.g., *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 174-75, 1989 CanLII 2 (SCC); *Sharma* at para 53). The Respondent argues that this principle is particularly applicable in the employment context, where distinctions in treatment frequently reflect actual capacities and needs. For example, the SCC has held that limits on how long an employee may be absent from work for health reasons or disability are not discriminatory (*McGill University Health Centre (Montréal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 [*McGill*]). An employer is entitled to establish *bona fide* occupational requirements such as measures to ensure the regular attendance of the workforce upon which it relies (*McGill* at para 18).

[101] While this principle is jurisprudentially sound, I do not find it applicable to the matter at hand. As the Applicant argues, the *bona fide* occupational requirements analysis advanced by the Respondent (and in the Decision) is a poor fit for the circumstances currently before the Court.

The whole point of the Applicant's request is that he has actively and successfully prosecuted the fishery authorized by the Licence for many years. While his disability prevents him from being physically present on the vessel during its fishing activities, it does not prevent him from getting the job done. The requirement to be physically present, or in the alternative obtain authorization to employ an MSO, is strictly a function of policy considerations underlying the applicable regulatory and policy regime.

[102] Whether the relevant policy objectives should prevail over the Applicant's interest in pursuing his livelihood in the commercial fishery is a determination to be made through the proportionate balancing exercise under the second part of the *Doré* analysis. However, I do not regard a policy-based requirement as akin to an occupational requirement of the sort addressed in *McGill.* As the Applicant submits, and as this Court accepted in *Robinson FC*, the effect of the Decision is discriminatory, in that it denies him the ability to pursue the livelihood of his choice, thereby perpetuating a serious disadvantage experienced by fishing industry participants with physical disabilities. The Decision's *Charter* engagement analysis fails to recognize this effect upon the Applicant.

[103] Applying the standard of correctness, I find that the DM erred in both stages of the *Sharma* analysis and in thereby concluding that subsection 15(1) of the *Charter* was not engaged by the Decision. Before leaving this stage of the analysis, I note that, in the circumstances of this case in which the Court had the benefit of reasons for the decision-maker's conclusion that the *Charter* was not engaged, it is a straightforward exercise to also analyse this aspect of the

Decision under the standard of reasonableness. Given the unsettled state of the law on standard of review canvassed earlier in these Reasons, I consider it beneficial to do so.

[104] In this case, review under the reasonableness standard generates the same result as did the correctness standard. Reasonableness review requires a respectful attention to the reasons given by the administrative decision-maker by way of justification for the decision, warrants deference to such reasons, and acknowledges the possibility of a range of acceptable outcomes (*Vavilov* at paras 83-86). However, for the reasons articulated in the course of my correctness review, the justification offered by the DM does not withstand review even on the reasonableness standard. The Decision's reasoning, that the Decision does not affect a benefit available at law and that it does not discriminate against the Applicant by perpetuating a disadvantage arising from his physical disability, are not conclusions available under the relevant legal and factual constraints that are capable of withstanding review even on the more deferential standard.

(2) Whether the Decision proportionately balanced *Charter* rights against statutory and policy objectives

[105] Given that the Decision engaged the *Charter*, the DM was obliged to proportionately balance the Applicant's *Charter* rights against the underlying statutory and policy objectives informing the Decision. As previously explained, the reasonableness standard applies to the Court's review of this balancing exercise under the second stage of the *Doré* analysis.

[106] The Applicant argues that, as the DM failed to recognize that the *Charter* was engaged, the Decision necessarily demonstrates a reviewable error and must be set aside, without need for

the Court to move to the second stage of the *Doré* analysis. I note that the Applicant takes the position that the Decision Letter does not set out a proportionate balancing analysis. However, the Applicant also submits that, even if the Court were to conclude based on the Memorandum and the Rationale that the Decision does include a balancing analysis, such analysis cannot be reasonable as it was performed in a context in which no *Charter* engagement was actually acknowledged.

[107] The Applicant's argument raises an interesting question as to whether it is possible for an administrative decision-maker to conduct a reasonable proportionate balancing analysis, after finding that the *Charter* right or value to be balanced is not engaged. In the absence of more comprehensive submissions on this question, I decline to address that question as a matter of law as, in my view as explained below, the answer to that question in this particular matter can be derived from a review of the reasons for the Decision.

[108] As with the first stage of the *Doré* analysis, it is necessary to consider which documents in the record before the Court inform an understanding of the reasons for the Decision. After expressing the conclusion (as quoted above) that a refusal of the Applicant's MSO authorization request would not infringe subsection 15(1) of the *Charter*, the Decision Letter sets out the following analysis:

> … Even if it could be considered that this decision engaged that right under subsection 15 of the *Charter*, what you are seeking would be inconsistent with DFO's underlying fisheries management policy objectives.
>
> I stress that despite this refusal, you are further accommodated in a way where you may continue to seek renewal of the inshore licences issued to you (lobster 111730, herring 104566, and swordfish 109011) on a yearly basis, so long as the fisheries are

> not closed for conservation purposes and you continue to meet all other eligibility requirements. Continuing to renew the licences will allow you to recommend to the Minister of Fisheries, Oceans and the Canadian Coast Guard to issue a replacement licence to an eligible fisher and to access a significant amount of capital via private commercial transaction while exiting the fishery. In my view, this is the best available option that is consistent with the fisheries management regime in place. Finally, I note that the scallop licences issued to you are not subject to the owner-operator policy and you may continue to exploit those without MSO authorizations.

[109] Turning to the other documentation in the record, the Memorandum submits two options for the DM's consideration: (a) granting the Applicant's appeal and authorizing a further MSO; and (b) denying the appeal and refusing a further MSO. The Memorandum recommends the latter option and expresses the opinion that authorizing a further MSO would be contrary to the underlying objective of subsection 19(2) of the *Atlantic Regulations* and DFO policy to ensure that independent owner-operators are personally participating in and benefiting from commercial fishing in the inshore sector.

[110] Immediately before setting out these options and the resulting recommendation, the Memorandum states that these two options had been identified and comprehensively analysed by DFO (in the Rationale) and that, despite DFO's view that the Applicant's asserted *Charter*-protected right is not engaged, DFO's analysis included the proportionate balancing that would have been required if that protected right had been engaged. Consistent with that description, the Rationale states that, despite the views of DFO that a decision to deny the further use of an MSO likely would not engage the Applicant's subsection 15(1) right, as a matter of precaution DFO will conduct the *Charter* balancing. That exercise then ensues in a section entitled "The proportionate balancing".

[111] I read these portions of the Rationale and the Memorandum documents as having led to the DM's conclusion, as set out in the Decision Letter, that the appropriate result was to choose the recommended option refusing to provide the Applicant with a further MSO authorization. As such, I am satisfied that such content forms part of the reasons for the Decision.

[112] The substance of the balancing exercise is found in the Rationale, which commences with the following statement of relevant principles:

> A decision in this case, assuming that the *Charter* right raised is engaged, should be considered reasonable if the decision reflects a proportionate balancing of the *Charter* equality right with the underlying objectives of the applicable fisheries management regime. This requires decision makers to determine the impacts of the decision on Mr. Robinson's alleged *Charter* protected rights, and attempt to balance those impacts or minimize them in regards to the objectives sought to be achieved under the fisheries management regime at issue. If there is an option available that would have less impact on the *Charter* protected right of Mr. Robinson and that would not undermine the underlying objectives of the regime, that option will be the reasonable decision to make.

[113] I find no flaw in this statement of principles that should guide the proportionate balancing.

[114] After referencing the Applicant's submissions in his counsel's May 27, 2022 letter, the Rationale then sets out the following analysis:

> In other words, Mr. Robinson wishes to retain the licence as an income or revenue-generating asset or disability-like benefit and argues that he should be accommodated for an indefinite amount of time. This is clearly at odds with the very nature of privileges that flow out of fishing licences and authorizations under the *Fisheries Act* and regulations. Further, this is inconsistent with the management of this fishery and undermines the objectives of DFO in managing inshore fisheries in Atlantic Canada. The objectives to

be achieved by requiring that licence holders personally fish the licences issued to them apply to everyone holding those types of licences, regardless of the reasons why they cannot fish them. Granting Mr. Robinson a further MSO (or not limiting the time period for an MSO) would result in an infinite use of an MSO and would circumvent the existing fishery management regime. It would also give him better benefits than those afforded to everyone else: under *the Fisheries Act*, regulations, or policies, no one is entitled to a life-long fishing authorization, and no one can claim a right to be issued a licence to fish or fishing authorization for an indefinite period of time.

Mr. Robinson's contention that he is still controlling his enterprise from shore and is not undermining DFO policies, objectives and operations is ill-founded. Allowing Mr. Robinson to operate the licence in such a manner would be no different that [sic] allowing fish processors and third parties to control inshore licences. Further, Mr. Robinson overlooks that once a substitute operator authorization is granted, many rights, privileges and responsibilities related to commercial fishing activities during the authorized substitute operator are passed to the substitute operator. Through MSOs, the registered licence holder may escape responsibility of non-compliance with licence conditions, forgo his responsibility of being steward of the resource and to follow sustainable harvesting and best fishing practices at sea.

While the May 27, 2022 letter from Mr. Robinson's counsel alleges that "There is no reasonable accommodation open to DFO which would allow for the five year limit to be enforced while minimally impairing Mr. Robinson's rights", Mr. Robinson and his counsel have not raised any facts or impacts pertaining to Mr. Robinson's alleged rights other than a deprivation of a financial benefit. They have not provided evidence or arguments that Mr. Robinson is subject to a distinction that has the effect of reinforcing, perpetuating, or exacerbating a disadvantage. Further, Mr. Robinson has option available to him: he can exit the lobster, swordfish and herring fisheries and realize substantial amounts of money out of a private commercial transaction with a new entrant by requesting a licence re-issuance. He can also maintain and operate his scallop licences without an MSO authorization. Under the *Fisheries Act* and regulations, there is no rights to a fishing licence, there is no right to draw a long-term or retirement like-benefits from a fishing licence, and there is no right to licence holder to maintain a fishing licence as a mere income generating commercial or personal asset. This applies to everyone.

[115] The Rationale then considers options available to the DM and concludes with the recommended option of denying the Applicant's appeal and refusing further MSO authorization.

[116] While the above analysis in the Rationale canvases objectives underlying the DFO's regulatory and policy regime, in an effort to balance them against *Charter* rights, the difficulty is that the analysis is significantly tainted by the errors (explained earlier in these Reasons) that were made in determining whether the *Charter* was engaged.

[117] As with the Decision's engagement analysis, the above balancing analysis describes the Applicant's request for an MSO authorization as an effort to obtain a lifetime right to fish. As explained earlier in these Reasons, this sort of description repeats the Decision's flawed analysis of the Applicant's position, which seeks only the ability to fish if the Minister makes the annual discretionary decision to renew the Licence. The above balancing analysis also describes the Applicant's interests as seeking an income or revenue-generating asset or disability-like benefit and positions the required balancing as related to financial benefits. It fails to recognize that the effect of the Decision is discriminatory in that it denies him the ability to pursue the livelihood of his choice.

[118] Consistent with the Applicant's submission in this application, the Decision's proportionate balancing analysis, while on its face is described as an alternative analysis premised on the *Charter* being engaged, is unreasonable because the balancing was not performed against the *Charter*-protected interests that are at issue in this matter.

C. *Is subsection 19(2) of the Atlantic Regulations constitutionally invalid because it violates subsection 15(1) of the Charter?*

[119] The Applicant argues that subsection 19(2) of the *Atlantic Regulations* are constitutionally invalid because it violates subsection 15(1) of the *Charter*. Indeed, in his Notice of Application, and in a Notice of Constitutional Question served on the federal and provincial attorneys general and filed on April 23, 2024, which attaches the Notice of Application, the Applicant seeks an order from the Court declaring that subsection 19(2) is of no force and effect.

[120] Subsection 19(2) of the *Atlantic Regulations* provides as follows:

19 (2) In the case of a licence referred to in paragraph 18(a), (b), (d) or (g), the activities authorized under the licence must be carried out personally by the licence holder, the operator named in the licence or a person authorized in accordance with subsection 23(2) of the *Fishery (General) Regulations*.	**19 (2)** Dans le cas d'un permis visé aux alinéas 18a), b), d) ou g), les activités autorisées par le permis doivent être exercées personnellement soit par le titulaire de permis, soit par l'exploitant désigné dans le permis, soit par une personne qui a reçu une autorisation conformément au paragraphe 23(2) du *Règlement de pêche (dispositions générales)*.

[121] However, the Applicant did not raise the constitutionality of subsection 19(2) before the DM. This raises concerns that, pursuant to the principles explained by the FCA in *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 [*Forest Ethics*], this issue is not properly before the Court. Where an administrative decision-maker can hear and decide a constitutional issue, that jurisdiction should not be bypassed by raising the constitutional issue for the first time on judicial review (*Forest Ethics* at para 46).

[122] The Applicant argues that this principle should not be an impediment to raising the invalidity argument in this application, because the DM was not empowered to make a declaration of constitutional invalidity. Only the Court is so empowered. The Applicant also argues that, based on the DM's response to the arguments as to how the Decision engaged the *Charter*, it would have been a waste of time to raise the invalidity argument before the DM.

[123] The latter argument has no merit. The *Forest Ethics* principle is based at least in part on the need to respect the legislature's grant of jurisdiction to administrative decision-makers (at para 46) and the value in the court being provided with a record that includes insights derived from the analysis by the administrative decision-maker (at paras 42-45). Regardless of whether the decision-maker analysis favours the Applicant, such an analysis forms an important component of the process of administrative decision-making and judicial oversight thereof.

[124] In relation to the Applicant's argument as to the DM's authority, I note that *Forest Ethics* considered but rejected similar arguments advanced by the applicant in that matter that they should be allowed to raise their *Charter* issue for the first time on judicial review because the relevant administrative decision-maker (the National Energy Board) could not declare the challenged provision of no force or effect. The FCA noted at paragraph 50 that the SCC had addressed this argument in *Okwuobi v Lester B. Pearson School Board; Casimir v Quebec (Attorney General); Zorrilla v Quebec (Attorney General)*, 2005 SCC 16 at paragraph 45:

> That said, a claimant can nevertheless bring a case involving a challenge to the constitutionality of a provision before the [Tribunal]. If the [Tribunal] finds a breach of the *Canadian Charter* and concludes that the provision in question is not saved under s. 1 it may disregard the provision on constitutional grounds and rule on the claim as if the impugned provision were not in

> force (*Martin*, at para. 33). Such a ruling would, however, be subject to judicial review on a correctness standard, meaning that the Superior Court could fully review any error in interpretation and application of the *Canadian Charter*. In addition, the remedy of a formal declaration of invalidity could be sought by the claimant at this stage of the proceedings.

[125] The Respondent submits that the *Forest Ethics* principle applies in the case at hand and that the Court should therefore decline to consider the Applicant's arguments surrounding constitutional invalidity of subsection 19(2) of the *Atlantic Regulations*. I agree. Moreover, as I have found that the DM committed a reviewable error in arriving at the Decision, this application for judicial review will be allowed, and it is unnecessary for the Court to consider the invalidity argument. Absent exceptional circumstances, judicial restraint favours declining to address constitutional issues that are not necessary for the resolution of the parties' dispute (*Commission scolaire* at para 108). The Applicant has not identified what I would consider to be any such exceptional circumstances in this case.

D. *If applicable, what remedies should the Court impose?*

[126] The Applicant seeks an order quashing the Decision and replacing it with a decision allowing him to have continued use of an MSO. The Respondent argues that, in the event the Court finds the DM to have erred, the appropriate remedy is to remit the matter back to the DM for redetermination, not to direct the DM to grant the Applicant's MSO request.

[127] As the Respondent correctly submits, the usual remedy in an application for judicial review is for the court to issue an order quashing the administrative decision and remitting it to the decision-maker for redetermination on the merits (*Sharif v Canada (Attorney General)*, 2018

FCA 205 at para 53). An order directing an administrative decision-maker to reach a particular conclusion is only available in exceptional circumstances.

[128] The Applicant argues that such circumstances exist in this case, because his request for an extension of his MSO authorization has been litigated before, this Court determined in *Robinson FC* that the *Charter* was engaged, quashed the decision and sent it back for redetermination in accordance with the Court's reasons, and yet the DM redetermined the matter in a manner that was not in accordance with those reasons. The Applicant submits that, given what he argues represents the DM's blatant disregard for the Court's direction, it is appropriate that the Court decide the matter on its merits.

[129] I will return to the Applicant's arguments in the context of costs, as he advances similar submissions in support of a position that the Court should award him solicitor-client costs. However, on the subject of remedies, I am not satisfied that these circumstances presently represent a basis for the Court to depart from the usual practice of remitting the matter back for redetermination in accordance with the Court's reasons. *Vavilov* recognizes that this practice cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations, and identifies circumstances in which it may be appropriate for a court to depart from the usual practice (at para 142). However, this is not a matter where such departure is warranted by a conclusion that a particular outcome is inevitable, such that remitting the case would serve no useful purpose. Given the Court's understanding that at present the Applicant retains the benefit of an MSO authorization, concerns such as delay, fairness, or urgency also do not warrant such a result at this stage.

VI. Costs

[130] As noted above, the Applicant is seeking solicitor-client costs on the basis that he has already litigated the present issues in *Robinson FC* and, more particularly, on the basis that the Decision declined to follow the Court's conclusion in that matter on the issue of *Charter* engagement. The Applicant recognizes that solicitor-client costs are awarded only on very rare occasions, for example when a party has displayed reprehensible, scandalous, or outrageous conduct (*Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, 2002 SCC 13 at para 86). However, he submits that this is such an occasion.

[131] While an award of solicitor-client costs in an application for judicial review is rare, the Applicant's request in the case at hand is far from frivolous, as I agree that, in finding that the *Charter* was not engaged in this matter, the DM disregarded the conclusions in *Robinson FC*. However, I am conscious of the Respondent's argument, advanced in oral submissions, that if the standard of reasonableness applied to the issue of *Charter* engagement (*i.e.*, to the conduct of the *Sharma* analysis under the first step of the *Doré* framework), then the potential for a range of possible outcomes associated with reasonableness review afforded scope for the DM to analyse the engagement issue differently than *Robinson FC*.

[132] The Court has rejected the Respondent's position on the standard of review applicable to the first step of the *Doré* framework. However, as I explained earlier in these Reasons, this is an area of law that has been unsettled, at least in the jurisprudence of the Federal Courts. While the Respondent did not prevail on that issue, I consider it to have advanced an arguable position and

therefore am not prepared to conclude that the DM displayed reprehensible, scandalous, or outrageous conduct in disregarding *Robinson FC*.

[133] Rather, I find that the Applicant, having prevailed in this application, should be awarded costs on a party-and-party basis. The parties consulted in an effort to agree on a party-and-party figure to be awarded to whichever was the successful litigant (in the event that the Court decided that a party-and-party costs award was appropriate), and they agreed upon the figure of $8000.00 inclusive of disbursements. This figure is comparable to the amount awarded in both *Robinson FC* and *Boudreau*. I agree that this is an appropriate result, and my Judgment will so provide.

JUDGMENT IN T-263-23

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is allowed, the Decision of the DM is set aside, and the matter is returned for redetermination in accordance with the Court's Reasons.

2. The Applicant is awarded costs of this application, set at $8000.00 inclusive of disbursements.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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