



FISHERIES

Judicial review of decision issued by Deputy Minister (DM) of Department of Fisheries and Oceans Canada (DFO), denying applicant's request for ongoing authorization to use medical substitute operator (MSO) for his lobster fishing licence — DM denying applicant's request on basis request exceeded five-year limitation to use of MSO set out in DFO's *Commercial Fisheries Licensing Policy for Eastern Canada, 1996* (1996 Policy), s. 11(11) — DM concluded that circumstances applicant raising to support request for exception to policy not constituting extenuating circumstances warranting exception — Applicant, fisherman who holds owner-operator licence authorizing him to fish lobster in Nova Scotia — Licence subject of this application authorizing applicant to fish lobster on southwest coast of Nova Scotia — Applicant holding licence since 2007; fished it personally on full-time basis until medical condition prevented him from doing so — Applicant having medical condition relating to legs; because of condition, unable to meet daily physical demands of operating fishing vessel on full-time basis — Thus, requested, received from DFO authorization to use MSO — Purpose of MSO authorization to allow another person to carry out activities authorized under fishing licence where holder of licence affected by illness preventing person from personally operating fishing vessel — In decision subject of judicial review, DM denying applicant's appeal on recommendations made by Atlantic Fisheries Licence Appeal Board (AFLAB), DFO — Decision at issue referencing *Fishery (General) Regulations*, SOR/93-53, s. 23(2) made under *Fisheries Act*, R.S.C., 1985, c. F-14, 1996 Policy, s. 11(11) — In decision, DM not expressly referencing applicant's *Canadian Charter of Rights and Freedoms* arguments — Nevertheless, throughout ensuing legal proceedings, DFO continued to authorize applicant to use MSO to fish his licence, up to fishing season ending on July 31, 2019 but not beyond that date — Applicant seeking, obtaining interlocutory relief from Federal Court pending outcome of judicial review — This relief authorizing applicant to use MSO for remaining fishing period in 2019 calendar year — Applicant seeking, in particular; order quashing DM decision as incorrect or unreasonable; declaration that decision discriminatory, contrary to Charter, s. 15(1); declaration that five year limit in 1996 Policy, s. 11(11) infringing Charter, s. 15(1); declaration that any discretion delegated by Minister of Fisheries and Oceans (Minister) to DM with respect to licensing is subject to Charter s, 15(1) — Main issues whether decision correct or reasonable; whether five-year limit in 1996 Policy discriminatory, of no force, effect because infringing Charter — Protections must be affected as little as reasonably possible in light of applicable statutory objectives — Not meaning that administrative decision maker must choose option that limits Charter protection least — However, if decision maker rejecting reasonably available option or avenue that would reduce impact on protected right, while still permitting sufficient furtherance of relevant statutory objectives, such decision would not fall within range of reasonable outcomes on judicial review, would not represent required proportionate balancing — Test set out in *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464 (*Alliance*), governing preliminary question of whether Charter, s. 15 applying to decision — Two-stage test stating: considering whether impugned law, on its face or in its impact, creating distinction based on enumerated or analogous ground; if so, considering whether law imposing burdens or denying benefit in manner that has effect of reinforcing, perpetuating, or exacerbating disadvantages — Both stages of *Alliance* test met — Minister's decision declining to grant applicant authorization to use MSO, which is only way applicant can fish his licence, necessarily engaging applicant's Charter, s. 15(1) rights as person with physical disability — Applicant advanced Charter arguments in relation to both 1996 Policy, decision itself — AFLAB concluded that evaluating Charter, s. 15(1) issue would be outside its mandate; therefore chose not to make recommendation on that issue — While recommendation documents involved demonstrating consideration of policy objective of supporting

owner-operator fleet, concern that more liberal access to MSO authorizations could contribute to abuse that would conflict with such objective, neither recommendation documents nor decision itself demonstrating any consideration of impact of those policy considerations upon applicant's equality rights — Conclusion that five years was reasonable time to make alternate arrangements (i.e. to exit fishery), if licence holder unable to personally operate licence, missed thrust of applicant's Charter argument, i.e. that, as a person with disability, applicant should not be required to give up chosen livelihood — No balancing of severity of that result against policy objectives or consideration of whether those objectives could reasonably be achieved in manner that reduced impact on applicant's equality rights — Decision not demonstrating that DM was alive to requirement to strike such balance — S. 15(1) equality rights applying to decision, such rights not considered — Although Regulations, ss. 22, 23 clearly authorizing Minister to impose licence conditions, including authorizing person other than license holder to carry out activity under license where holder unable to engage in activity because of circumstances beyond holder's control, these sections not authorizing Minister to create binding policy rules governing exercise of that authority — Policies such as 1996 Policy which Minister having authority to adopt not law, cannot be treated as such by decision maker — S. 11(11) contemplating DFO permitting designation of MSO for term of licence, stating that such designation may not exceed total period of five years — However, five-year limitation clearly not intended to be binding — If it was, would conflict with Regulations, s. 23, which contemplates no such limitation, would represent unlawful fetter upon Minister's discretion — Therefore, 1996 Policy, s. 11(11) not legislative in nature; not subject to challenge under *Constitution Act, 1982*, s. 52 — Decision set aside, returned to decision-maker for re-determination in accordance with reasons — Application allowed.

ROBINSON V. CANADA (ATTORNEY GENERAL) (T-562-19, 2020 FC 942, Southcott J., reasons for judgment dated September 30, 2020, 40 pp.)