Federal Court Cour fédérale

Date: 20200930

Docket: T-563-19

Citation: 2020 FC 943

Ottawa, Ontario, September 30, 2020

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

LESTER MARTELL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is the late Mr. Lester Martell [Mr. Martell], a fisherman who prior to his death held an owner-operator licence authorizing him to fish lobster in Nova Scotia. On April 2, 2019, he filed an application for judicial review of a decision issued on March 6, 2019 by the Deputy Minister [DM] of the Department of Fisheries and Oceans Canada [DFO], denying his

request for ongoing authorization to use a medical substitute operator [MSO] for his lobster fishing licence [the Decision].

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

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

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

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

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

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

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

[4] Mr. Martell passed away on May 4, 2020, before the hearing of this application. On June 4, 2020, his counsel filed a Notice of Transmission of Interest under Rule 117(1) of the *Federal Courts Rules,* SOR/98-106, advising that Mr. Martell's son and Executor, Mr. Blaire Martell, intended to carry on this proceeding on behalf of the Mr. Martell's Estate [the Estate], seeking the declaratory relief described in the Notice of Application.

[5] This application was argued on September 10, 2020, by video conference using the Zoom platform, together with an application in Court File No. T-562-19, in which another fisherman, Mr. Dana Robinson, raised essentially the same arguments in respect of a decision by the DM denying his request for ongoing authorization to use a MSO for his own lobster fishing licence [the Robinson Application]. The applicants in both matters are represented by the same counsel.

[6] The hearing on September 10, 2020, commenced with argument on a motion filed by the Respondent, the Attorney General of Canada, on August 20, 2020, seeking dismissal of Mr. Martell's application on the basis that the Estate does not have standing to pursue his rights under s 15(1) of the *Charter* and that the Estate cannot obtain declaratory relief on an application which has now become moot. I reserved my decision on that motion and counsel proceeded with

argument on the Robinson Application, followed by brief argument on the merits of Mr. Martell's application, in which counsel effectively adopted the submissions made in the Robinson Application.

[7] As explained in greater detail below, this application is dismissed, because I have concluded that the Estate does not have standing to pursue this application. This decision turns on the law governing the circumstances in which an estate can pursue remedies arising from the *Charter* rights of a deceased individual. Mr. Martell's family will no doubt be disappointed with this result, as his son has testified as to the importance to Mr. Martell of having his arguments adjudicated by the Court. However, I note that, in my decision in the Robinson Application (*Robinson v Canada (Attorney General)*, 2020 FC 942) [the Robinson Decision], released immediately before this decision, I have addressed on their merits the arguments advanced by Mr. Robinson through the counsel he shared with Mr. Martell, which arguments have met with some measure of success.

II. Background

A. Factual Context

[8] At the time he filed this application, Mr. Martell was 85 years old and had been a fisherman since 1947. The licence that is the subject of this application authorized him to fish lobster on the Northeast coast of Nova Scotia, in an area known as Lobster Fishing Area 30 [LFA 30]. Mr. Martell was first issued this licence in 1978 and fished it personally, on a full-time basis, until a medical condition prevented him from doing so.

[9] In or around 2009, Mr. Martell began having medical problems related to his knees, which made it impossible for him to stand for more than a few hours at a time without suffering pain and which compromised his balance. While he underwent medical treatment, his condition remained unresolved. Because of his condition, he was unable to meet the daily physical demands of being on his fishing vessel on a full-time basis, although he continued to fish as often as his condition allowed between 2010 and 2017. As a result of his condition, Mr. Martell requested and received an authorization to use a MSO from the DFO in 2009. The DFO thereafter continued to authorize a MSO until the events (explained below) giving rise to this application. The legitimacy of his medical condition, and the incapacity it represented, are not at issue in this application.

[10] In his affidavit filed in this application, Mr. Martell stated that he maintained care and control over the Licence and made all operational decisions related to his vessel, including matters such as storage and repairs to the vessel and gear. He negotiated the wharf price of the catch and arranged bait and fuel purchases. Mr. Martell and his wife managed the financial affairs of the fishing operation. He was also responsible for hiring and managing his vessel's crew and employed four full-time seasonal crew members: three deck hands and a captain (i.e. the MSO) who operated his vessel.

[11] In May 2015, Mr. Martell received a letter from the DFO informing him that his latest request for a MSO authorization had been approved to July 31, 2015, but that such approval extended beyond the five-year maximum period set out in the 1996 Policy. This letter advised

him that extensions beyond the five-year period were assessed on a case-by-case basis and recommended that he explore alternative arrangements prior to the 2016 fishing season.

[12] In May 2016, Mr. Martell was advised that his request for a MSO authorization for the 2016 season was approved, but that future requests would not be considered. Mr. Martell appealed this decision to the Maritimes Region Licensing Appeal Committee [MRLAC], arguing that he should be granted credit for some fishing seasons where he did in fact conduct fishing activities and requesting an extension to the five-year limit based on extenuating circumstances, including his ongoing management of the fishing activity and a lack of alternative employment opportunities. The MRLAC agreed and recommended that the 2017 year count as his fifth year for the purposes of the application of the five-year limit in the 1996 Policy, but it did not recommend that further extensions be approved.

[13] Mr. Martell appealed the MRLAC's recommendation to the Atlantic Fisheries Licence Appeal Board [AFLAB], seeking the authorization to use a MSO up to and including the year 2021. He invoked a number of grounds of appeal, including that the five-year limit in the 1996 Policy and the MRLAC's decision made pursuant to it were arbitrary, unjust and unconstitutional for violating his right to equality, as a person with a disability, under s 15 of the *Charter*. During the appeal, and prior to the AFLAB making a recommendation to the DM, Mr. Martell was granted the authorization to use a MSO for the 2018 fishing season.

[14] On March 6, 2019, on the recommendation of the AFLAB and the DFO, the DM denied Mr. Martell's appeal, in the Decision that is the subject of this application for judicial review.

This Decision references s 23(2) of the *Fishery (General) Regulations*, SOR/93-53 [the Regulations], made under the *Fisheries Act*, RSC 1985, c F-14, and s 11(11) of the 1996 Policy. In the Decision, the DM refers to Mr. Martell raising financial hardship and his succession plan, as circumstances justifying an exception to the five-year maximum period in the 1996 Policy, but finds that these do not constitute extenuating circumstances warranting an exception. The Decision does not expressly reference Mr. Martell's *Charter* arguments.

[15] On April 2, 2019, Mr. Martell filed this application for judicial review. As the upcoming lobster season was set to commence on May 18, 2019, he also brought a motion asking the Court to stay the Decision pending the determination of his application for judicial review, and to grant a mandatory interlocutory injunction ordering the DFO to authorize him to use a MSO pending the final resolution of the application.

[16] On May 24, 2019, Justice Roussel issued an injunction requiring the DFO to authorize Mr. Martell to use a MSO for the 2019 lobster fishing season in LFA 30, unless this application was decided prior to the end of the season (see *Martell v Canada (Attorney General)*, 2019 FC 737). Shortly thereafter, Justice Gascon issued a similar injunction in Court File No. T-562-19 (see *Robinson v Canada (Attorney General)*, 2019 FC 876 [the Robinson Injunction]).

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

[17] The requirement for Mr. Martell to obtain authorization for a MSO stems from what the DFO refers to as its Owner-Operator Policy and, in a broad sense, its Fleet Separation Policy. The DFO has filed an affidavit by Morley Knight, who was the Assistant Deputy Minister of

Fisheries Policy with the DFO until his retirement in December 2017. Mr. Knight explains these policies and the reasons they were developed.

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

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

[20] The Owner-Operator Policy was formally adopted in 1989 across the entire Eastern Canada inshore fleet, and its key elements were ultimately incorporated into the 1996 Policy. As stated in Mr. Knight's affidavit, its goal is to maintain an economically viable inshore fishery by keeping the control of licences in the hands of independent owner-operators in small coastal

communities, and to allow them to make decisions about the licences issued to them. To achieve this, the Owner-Operator Policy requires licence holders to personally fish licences issued in their name. This means that the licence holder is required to be on board the vessel authorized to fish the licence.

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

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

(10) As provided under the *Fishery (General Regulations*, where, because of circumstances beyond his control, the holder of a licence or the operator named in a licence is unable to engage in the activity authorized by the licence or is unable to use the vessel specified in the licence, a fishery officer or other authorized employee of the Department may, on the request of the licence holder or his agent, authorize in writing another person to carry out the	(10) Tel qu'énoncé dans le Règlement de pêche (dispositions générales), si, en raison de circonstances indépendantes de sa volonté, le titulaire d'un permis ou l'exploitant désigné dans le permis sont dans l'impossibilité de se livrer à l'activité autorisée par le permis ou d'utiliser le bateau indiqué sur le permis, un agent des pêches ou tout autre employé autorisé du Ministère peut, à la demande du titulaire ou de son mandataire, autoriser par écrit

activity under the licence or authorize the use of another vessel under the licence.	une autre personne à pratiquer cette activité en vertu du permis ou autoriser l'emploi d'un autre bateau.

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

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

[24] In response to the global economic downturn in 2008, the DFO introduced flexibility in the application of the five-year limit set out in s 11(11) in the hopes of enhancing economic support for the industry. In 2015, the DFO resumed applying the five-year time limit, following concerns expressed by certain licence holders and their representatives that the DFO's substitute operator designations were being abused by some licence holders, to the detriment of the objectives of the Owner-Operator Policy and the Fleet Separation Policy. The DFO notified

licence holders who had reached or exceeded the five-year limit that they had reached the policy time limit and that it would only approve further extensions on a case-by-case basis.

III. Issues

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

A. What is the applicable standard of review?

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

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

D. Is the five-year limit in the 1996 Policy discriminatory and of no force and effect because it infringes s 15 of the *Charter*?

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

[26] In the Memorandum of Fact and Law filed by the Estate in response to the Attorney General's motion to dismiss, the Estate describes the sole issue arising in the motion as whether, through public interest standing or some other recognized principle of law, the Estate can continue the application for judicial review and obtain a declaration pursuant to s 52 of the *Constitution Act, 1982*, to the effect that:

A. The Decision is discriminatory and contrary to s 15 of the *Charter;* and

B. Subsection 11(11) of the 1996 Policy, specifically the five-year limit contained therein respecting the amount of time a disabled or ill fisher may obtain a MSO, is discriminatory pursuant to s 15 of the *Charter* and, as the violation cannot be justified by s 1 of the *Charter*, is of no force and effect.

IV. Analysis

A. Relevant Jurisprudence

[27] In support of its motion, the Attorney General relies on authorities that have considered the extent to which estates are permitted to initiate or continue *Charter* claims. The leading authority on this issue is *Hislop v Canada (Attorney General)*, 2007 SCC 10 [*Hislop*], where the Supreme Court of Canada considered the entitlement of certain estates to pursue a class action challenging the constitutionality of provisions of the *Canada Pension Plan*, RSC 1985, c C-8 under s 15(1) of the *Charter*. The Supreme Court analysed this issue as follows (at paras 71 to 73):

> 71 The threshold issue is whether the estates of those survivors who died more than 12 months before the coming into force of the *MBOA* amendments to the *CPP* may have standing to claim a s. 15(1) *Charter* right on behalf of the deceased survivor. Only if they have such standing may the Court even entertain an argument that s. 60(2) should not apply to such estates. The Hislop class relies on *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at pp. 322-23. *Big M Drug Mart* dealt with s. 2 of the *Charter* which uses the term "[e]veryone". The term used in s. 15(1) is more precise and narrower, as it allows rights to "[e]very individual".
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> 72 The government submits, on the basis of the British Columbia Court of Appeal judgment in *Stinson Estate v. British Columbia* (1999), 70 B.C.L.R. (3d) 233, 1999 BCCA 761, that s. 15(1) rights cannot be enforced by an estate because those rights

> are personal and terminate with the death of the affected individual. The government also submits that estates are not individuals but artificial entities incapable of having their human dignity infringed. In addition, the government relies on the Special Joint Committee on the Constitution (see *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada* (1980-81), Issue No. 43, January 22, 1981, at pp. 43:39-43:44; see also Issue No. 44, January 23, 1981, at pp. 44:6-44:10; Issue No. 47, January 28, 1981, at p. 47:88; and Issue No. 48, January 29, 1981, at pp. 48:4-48:49), which substituted the words "every individual" for "everyone" in s. 15(1) in response to the Minister of Justice's desire "to make it clear that this right would apply to natural persons only" (p. 43:41). The government further argues that this Court has held that s. 15(1) rights could not be claimed by other entities such as corporations (see *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1382, *per* La Forest J.).
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> 73 In our opinion, the government's submissions have merit. In the context in which the claim is made here, an estate is just a collection of assets and liabilities of a person who has died. It is not an individual and it has no dignity that may be infringed. The use of the term "individual" in s. 15(1) was intentional. For these reasons, we conclude that estates do not have standing to commence s. 15(1) *Charter* claims. In this sense, it may be said that s. 15 rights die with the individual.

[28] In *Giacomelli Estate v Canada (Attorney General)*, 2008 ONCA 346 [*Giacomelli*], in considering a claim for a variety of declarations and compensation arising from wrongful detention during World War II, the Court of Appeal for Ontario followed *Hislop* in concluding that an estate may not pursue *Charter* claims under s 15(1) on behalf of a deceased person. *Giacomelli* also referred to two exceptions to this principle that were identified in *Hislop*, summarizing those exceptions as follows (at para 17):

> 17 The Supreme Court identified two exceptions to this principle. First, an appeal from a judgement raising s. 15(1) issues "must be allowed to survive the party's death pending the appeal": para. 76. Second, where an individual dies after the conclusion of argument

> but before judgment is entered, judgment shall be entered as the person's estate is not to be prejudiced by the time required for a court to render judgment: para. 77.

[29] In responding to the motion, the Estate argues that it falls within the second of these two exceptions. It notes that *Hislop* describes this exception as follows (at para 77):

> 77 Although the preceding comments are sufficient to dispose of the issue in relation to Mr. Hislop himself, because this is a class action, it is appropriate to clarify with more precision the time at which s. 15(1) rights crystallize. Merger, as we have explained, occurs when judgment is entered. Nevertheless, it is a long-standing principle of law that a litigant should not be prejudiced by an act of the court (*actus curiae neminem gravabit*): *Turner v. London and South-Western Railway Co.* (1874), L.R. 17 Eq. 561. Based on this principle, in cases where a plaintiff has died after the conclusion of argument but before judgment was entered, courts have entered judgment *nunc pro tunc* as of the date that argument concluded: see *Gunn v. Harper* (1902), 3 O.L.R. 693 (C.A.); *Hubert v. DeCamillis* (1963), 41 D.L.R. (2d) 495 (B.C.S.C.); *Monahan v. Nelson* (2000), 186 D.L.R. (4th) 193, 2000 BCCA 297. We affirm the correctness of this approach and conclude that the estate of any class member who was alive on the date that argument concluded in the Ontario Superior Court, and who otherwise met the requirements under the *CPP*, is entitled to the benefit of this judgment.
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> [Applicant's emphasis]

[30] Relying on the sequence of events leading to the hearing of this application, the Estate submits that it benefits from the principle that a litigant should not be prejudiced by an act of the court. The Estate notes that the hearing was originally scheduled for April 7, 2020. However, on March 17, 2020, in response to the global outbreak of COVID-19, Chief Justice Crampton issued a Practice Direction and Order, adjourning *sine die* all matters scheduled between that date and

April 17, 2020. Consequently, this application was not heard until September 10, 2020, by which time Mr. Martell had passed away.

[31] In my view, the applicable exception does not assist the Estate. As explained in *Giacomelli*, the exception is intended to avoid prejudice resulting from the time required by the court to render judgment after arguments have concluded. The time required to render judgement can vary based on a number of factors, including the present workload of the particular judge involved. This is a circumstance specific to the particular piece of litigation. In contrast, Chief Justice Crampton's Order dated March 17, 2020 was of general application in response to the circumstances of the COVID-19 global pandemic. This is not the sort of "act of the court" to which the principle identified in *Hislop* and *Giacomelli* has been applied. As argument in this application did not conclude until the hearing on September 10, 2020, the exception identified in those cases is not applicable.

[32] The Estate also submits that the Attorney General's interpretation of *Hislop* and *Giacomelli* is overly expansive and fails to consider recent jurisprudence where estates have been granted public interest standing to bring *Charter* claims. The Estate concedes that s 24(1) of the *Charter* (which permits anyone whose *Charter* rights have been infringed to apply to a court for remedies) has been interpreted in these cases, and in subsequent decisions, to provide remedies only to individuals whose "own" rights have been infringed and not to third parties. However, the Estate submits that this principle does not necessarily extend to circumstances where an estate, which is seeking relief in the form of a declaration under s 52(1) of the *Constitution Act, 1982,* is found to have public interest standing to pursue a *Charter* claim.

[33] I agree with the Estate that post-*Hislop* jurisprudence supports a conclusion that there are circumstances where a claim based on s 15(1) of the *Charter* can be pursued, notwithstanding the death of the individual whose *Charter* rights are engaged. Indeed, the Attorney General acknowledges that, at paragraph 73 of *Hislop,* the Supreme Court expresses its conclusion as being "[i]n the context in which the claim is made here…" In *Grant v Winnipeg Regional Health Authority et al*, 2015 MBCA 44 [*Grant*], the Manitoba Court of Appeal identified the significance of this language, concluding that *Hislop* had not endorsed the broad proposition that redress for a violation of a *Charter* right ends on death regardless of the context (at paras 65-66). *Grant* made similar comments regarding *Giacomelli* (at paras 72-76),

[34] Ultimately, the Court distinguished the facts of *Grant* from *Hislop* and *Giacomelli* based on the context of the *Charter* claim. In *Grant*, the estate alleged that breach of the deceased's *Charter* rights, in the context of the provision of care in an emergency waiting room, contributed to his death. The earlier authorities did not involve a situation where there was a nexus between the individual's death and the alleged violation of *Charter* rights (at para 77). The Court held that the estate should be granted public interest standing to clarify the serious issue of whether redress for a *Charter* violation ends on death, when the alleged breach contributed to the death (at para 97).

[35] The Estate also draws the Court's attention to *Lawen Estate v Nova Scotia (Attorney General)*, 2018 NSSC 188 [*Lawen No.1*], in which the Supreme Court of Nova Scotia granted public interest standing to an estate seeking a declaration under s 52 of the *Constitution Act, 1982,* that particular sections of the *Testators' Family Maintenance Act*, RSNS 1989, c 465,

violated the *Charter*. Justice Wood (as he then was) referenced *Grant* as turning significantly on the allegation in that case that the *Charter*-infringing conduct contributed to the death of the individual in question, but also noted that *Hislop* and *Giacomelli* were not determinative. Justice Wood held that the constitutional issue raised by the estate was a sufficiently serious question to justify granting it public interest standing.

[36] In the subsequent decision on the merits, the Court granted the applicants certain declarations under s 52 (see *Lawen Estate v Nova Scotia (Attorney General)*, 2019 NSSC 162 [*Lawen No.2*]). The applicants also sought remedies under s 24(1) of the *Charter*. However, noting that s 24(1) provides remedies to individuals whose "own" *Charter* rights have been infringed and not for infringements of the rights of third parties, the Court concluded that the applicants did not meet the requirements for standing to bring a s 24 claim (at para 129).

[37] I accept the Estate's proposition that an estate can pursue a declaration under s 52 of the *Constitution Act, 1982* that a law is constitutionally invalid, notwithstanding the death of the individual whose *Charter* rights were allegedly violated, where the requirements of public interest standing are met.

B. Public Interest Standing

[38] There is no dispute between the parties as to the test for granting public interest standing. The governing authority is *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside*], in which the Supreme

Court explained that, in exercising the discretion to grant public interest standing, a court must consider three factors:

A. whether there is a serious justiciable issue raised;

B. whether the plaintiff has a real stake or genuine interest in it; and

C. whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts.

The court must apply these factors purposively and flexibly. All other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred (para 37).

[39] As previously noted, the Estate submits it should be permitted to continue the application for judicial review and obtain a declaration pursuant to s 52 of the *Constitution Act, 1982*, that: (a) the Decision was discriminatory and contrary to s 15 of the *Charter*; and (b) s 11(11) of the 1996 Policy, and specifically the five-year limit contained therein, is discriminatory pursuant to s 15 of the *Charter* and is of no force and effect.

[40] I have difficulty concluding that the Estate has a case for public interest standing in seeking a declaration that the Decision infringes s 15 of the *Charter*. The Estate states in its Memorandum of Fact and Law that it is seeking a declaration under s 52 of the *Constitution Act, 1982*. Subsection 52(1) empowers a court of competent jurisdiction to declare any law that is inconsistent with any provision of the *Constitution Act, 1982*, including the *Charter*, to be of no force and effect. However, it is trite law that s 52(1) is directed at laws, not actions of

government. In contrast, s 24(1) provides that anyone whose *Charter* rights have been infringed may apply to a court of competent jurisdiction for an appropriate remedy. It is under this section that a party can seek personal remedies, including a declaration or damages, for government actions that violate the *Charter* (see *R v Ferguson*, 2008 SCC 6 at paras 58-61).

[41] As noted above, the Estate concedes that the applicable jurisprudence interprets s 24(1) to provide remedies only to individuals whose "own" rights have been infringed and not to third parties (see, e.g., *Lawen No.*2 at para 129). *Grant* represents an exception to this principle, where the alleged *Charter* breach contributed to the individual's death, but that exception is not applicable in the present case.

[42] At the hearing of the Attorney General's motion to strike this application, the Estate's counsel raised the possibility that its request for a declaration, that the Decision infringes s 15, engages neither s 24 of the *Charter* nor s 52 of the *Constitution Act, 1982*. Rather, the Estate submits the Court is empowered to grant such relief (presumably under s 18(1) of the *Federal Courts Act*, RSC 1985, c F-7), as a function of its role sitting in judicial review of federal government decision-making. However, the Estate identified no authority to support its position that characterizing the relief sought in this manner avoids application of the jurisprudence restricting the availability of remedies (other than under s 52) for *Charter* infringements to individuals whose own rights had been infringed.

[43] A request for declaratory relief related to a particular government decision engages consideration of the effects of that decision upon the rights of a particular individual. This differs

from a request for a declaration under s 52, which engages consideration of legislation of general application and is therefore potentially well-suited to granting public interest standing. The Estate's Memorandum of Fact and Law, responding to the Attorney General's motion, advances arguments in support of its request for public interest standing that relate entirely to its s 52 challenge to the constitutional validity of s 11(11) of the 1996 Policy. The Estate's submissions do not establish a basis for it to be granted public interest standing to challenge the Decision itself.

[44] I therefore turn to consideration of the Estate's request for public interest standing to argue that s 11(11) of the 1996 Policy, and specifically the five-year limit upon the issuance of a MSO, should be declared of no force and effect, because it is contrary to s 15(1) of the *Charter*.

[45] In arguing in this motion that the question, whether the five-year limitation imposed by s. 11(11) of the 1996 Policy is unconstitutional, raises a serious justiciable issue, the Estate submits that where a policy is legislative in nature, it may be considered "law" and subject to *Charter* scrutiny and a declaration of invalidity under s 52 of the *Constitution Act, 1982*. As a statement of general principle, this submission is sound (see *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2009 SCC 31). Counsel confirmed at the hearing of the Robinson Application and the within application that the Applicants are not seeking to challenge the 1996 Policy other than under s 52. Therefore, whether the Estate has raised a serious justiciable issue turns significantly on the question whether the 1996 Policy is legislative in nature.

[46] I am conscious of the direction in *Downtown Eastside* that, in considering whether a serious issue is raised, a court should not examine the merits of the case other than in a preliminary manner (at para 42). However, in the present case, the Court is in the unique circumstance of having just analysed and decided this particular issue on the merits, and on the basis of the same arguments, in the Robinson Decision. While my full analysis is set out in the Robinson Decision, my conclusion on this issue was that s 11(11) of the 1996 Policy is not legislative in nature and is therefore not subject to challenge under s 52 of the *Constitution Act, 1982*. I therefore dismissed that particular ground of judicial review.

[47] The three factors prescribed by *Downtown Eastside* for consideration of a request for public interest standing are not to be viewed as items on a checklist or as technical requirements, and they should be weighed cumulatively (see para 36). However, in a circumstance where there is a definitive conclusion that the request for public interest standing does not raise a serious justiciable issue on the merits, there is little value in considering the other factors.

[48] I therefore conclude that the circumstances of this application do not support a grant of public interest standing to the Estate. In the absence of success on that issue, this application for judicial review must be dismissed. It is therefore unnecessary for me to consider the Attorney General's argument that this application is now moot, or the issues raised by the parties on the merits of the application.

V. Costs

[49] At the hearing of this matter, the parties agreed to consult with each other and subsequently advise the Court, prior to issuance of a decision, whether they were able to reach agreement on a costs figure that would be payable by the unsuccessful party. The Attorney General has proposed that costs of the motion to dismiss Mr. Martell's application be set at $1,500.00 (a figure calculated based on Tariff B, Column III) and costs of the application itself be set at $7,800.00 (a figure calculated based on Tariff B, Column IV) plus reasonable and provable disbursements. Mr. Martell has indicated his agreement with the Attorney General's proposal but has also pointed out that, on the injunction motion in this matter, Justice Roussel ordered costs payable to him in accordance with Tariff B, Column III. He proposes that costs of that motion be set at $1,500.00 payable to the Estate.

[50] I agree with these proposals related to costs of the relevant motions. The Attorney General has prevailed on the motion to dismiss, for which a costs award of $1,500.00 all-inclusive is appropriate, to be off-set against the costs award for Mr. Martell's successful injunction motion, which I also set at $1,500.00 all-inclusive. My Judgment will so reflect. As the Attorney General succeeded on the motion to dismiss, the Court did not adjudicate the application on its merits. I therefore award no costs on the application itself.

JUDGMENT in T-563-19

THIS COURT'S JUDGMENT is that:

1. The Applicant's application is dismissed.

2. The Respondent is awarded costs of the motion to dismiss, set at $1,500.00 all-inclusive. This award is off-set against the Applicant's costs on the successful injunction motion, which are also set at $1,500.00 all-inclusive.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-563-19
STYLE OF CAUSE:	LESTER MARTELL v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE VIA HALIFAX, NOVA SCOTIA
DATE OF HEARING:	SEPTEMBER 10, 2020
ORDER AND REASONS:	SOUTHCOTT J.
DATED:	SETEMBER 30, 2020

APPEARANCES:

Richard W. Norman Michel P. Samson Sian G. Laing	FOR THE APPLICANT
Catherine M.G. McIntyre	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Cox & Palmer Halifax, Nova Scotia	FOR THE APPLICANT
Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT