IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF BATHURST

Citation: ***Robert Bruce Stewart, Alain Beaudin, Jason Hébert, Francis Cormier, Maurice Lanteigne & Réginald Paulin v. Opilio (U.P.M./M.F.U.) Inc. and L'union des Pêcheurs des Maritimes/Maritimes Fishermen's Union Inc.*** **2026 NBKB 020**

Court File No.: BM-4-2026

Between:

ROBERT BRUCE STEWART, ALAIN BEAUDIN, JASON HÉBERT, FRANCIS CORMIER, MAURICE LANTEIGNE & RÉGINALD PAULIN,

Applicants

- and -

OPILIO (U.P.M./M.F.U.) INC.

Respondent

- and -

L'UNION DES PÊCHEURS DES MARITIMES/MARITIMES FISHERMEN'S UNION INC.

Respondent

DECISION

Before:	**Justice Stephen J. Doucet**
Date of Hearing:	**February 3, 2026**
Date of Decision:	**February 9, 2026**
Appearances:	**Marc Cormier and Martin Brideau, for the Applicants**
	Sacha D. Morisset, K.C., for the Respondents
Summary:	**Mandatory/prohibitive injunction**

[TRANSLATION]

Doucet J.

I. OVERVIEW

[1] The applicants are all fishing boat captains and members in good standing of the respondent, the Maritime Fishermen's Union (the "MFU").

[2] The respondent, Opilio ("Opilio"), is a business corporation established by the MFU to manage the snow crab allocation assigned to it by the Department of Fisheries and Oceans.

[3] The MFU and Opilio hold an annual draw to determine which members of the local inshore fishermen's association can participate in the snow crab fishery. The fishermen must meet certain established criteria and submit their applications in order to be eligible for the draw, which determines the order of priority in which members are considered and selected to participate in the fishery, as part of the quota allocated to inshore fishermen who are members of the MFU.

[4] The applicants are all captains who either won the draw for 2025 or fished the allocation for the captain who won the draw, a practice accepted by the respondents.

[5] In order to fish the snow crab allocation, the applicants had to sign letters of agreement with the respondent Opilio on March 28, 2025.

[6] Once the season was over, the applicants each brought a separate lawsuit against Opilio on or about October 15, 2025, believing that Opilio had breached its contractual obligations.

[7] On January 15, 2025, the applicants received via email from the respondents notice of the draw for the 2026 community snow crab fishery, as well as the eligibility criteria for that draw.

[8] Criterion 12 of the [TRANSLATION] *ELIGIBILITY CRITERIA AND REQUIREMENTS FOR THE MFU'S COMMUNITY SNOW CRAB FISHERY 2026 SEASON* ("Criteria") provides as follows:

[TRANSLATION] "A member who is involved in or initiates active legal proceedings that could be detrimental to the MFU or one of its subsidiaries (Opilio, Homarus, etc.), or to a member, employee, director or any other person directly or indirectly connected to the MFU or one of its subsidiaries, is not eligible to participate in the draw or in the community snow crab fishery until further notice."

[9] The applicants argue that condition 12 of the eligibility criteria for the 2026 community snow crab fishing season expressly excludes them from the draw and from any participation in it until further notice due to the proceedings brought against Opilio on October 15, 2025.

[10] With respect to the pleadings, the applicants initially filed a Notice of Application on January 27, 2026, pursuant to Rule 69, seeking judicial review. Essentially, the applicants requested, among other things, that criterion 12 of the Criteria, disclosed on January 15, 2026, relating to the draw for the snow crab allocation, be set aside.

[11] At the same time, the applicants filed a Notice of Motion seeking a prohibitive interlocutory injunction, among other things.

[12] The applicants subsequently filed an amended Notice of Motion on January 30, 2026, seeking, in the alternative, an order suspending the application of criterion 12 until the hearing of the motion on the merits, pursuant to Rule 69.06(1)(a).

[13] One of the applicants' lawyers also filed an affidavit on February 3, 2026, along with a draft statement of claim that will form part of an original action by the applicants, who will become the Plaintiffs.

[14] The respondents filed affidavits on February 2, 2026.

[15] On February 3, 2026, the applicants filed another Notice of Motion seeking to convert the application into an ordinary action in accordance with Rules 1.02.1, 1.03(2), 2.01, 2.02 and 2.03.

[16] The issues are as follows:

1. Does the motion to convert the application into an action lend itself well to the request for an abridgment of time? If so, can the application be converted into an ordinary action?
2. If the answer to the first question is no, does the motion lend itself well to the request for an abridgement of time to file a preliminary motion for an interlocutory injunction?
3. Is this an application for a mandatory or prohibitive injunction?
4. Is there a serious issue or a strong *prima facie* case that the applicants will succeed in their action?
5. Will the applicants suffer irreparable harm?
6. Whom does the balance of convenience favour?

II. FACTS

[17] The MFU was founded in 1977 and currently represents approximately 1,300 independent owner-operators in the provinces of New Brunswick and Nova Scotia. It has been a body corporate under the *Companies Act*, RSNB 1973, c. C-13, since 1991.

[18] The members of the MFU board of directors are all member fishermen elected by the entire membership, which is divided into seven local chapters.

[19] The MFU is the official representative of independent inshore fishermen (owner-operators) in New Brunswick and Nova Scotia. In New Brunswick, its status is recognized by the *Inshore Fisheries Representation Act*, RSNB 2011, c. 174, including fishers in Region 1 (from the Quebec border to Bartibog Bridge) and Region 2 (from Bartibog Bridge to the Nova Scotia border).

[20] As the official representative of inshore fishermen, the MFU has the authority to represent the interests of inshore fishermen on matters relating to the management and regulation of inshore fisheries.

[21] The MFU therefore essentially acts as the official representative in representing the interests of inshore fishermen. Its union status is supported by the statutory regime of the *Inshore Fisheries Representation Act*, which requires that a recognition vote be held every four years in order for the organization to be recognized as the fishermen's official representative, thereby allowing it to collect dues to ensure the representation of licence holders.

[22] However, the MFU does not have a regulatory role or any regulatory power. The regulation of commercial fishing falls primarily under the authority of Fisheries and Oceans Canada (“DFO”).

[23] Since 1995, the MFU has democratically established, through its members and governance, the Inshore Allocation management policy to be followed each year. This policy currently requires that only MFU member fishermen harvest crab for the organization, in accordance with a selection process that members must follow if they wish to be eligible for this fishing activity.

[24] The criteria and requirements (rules) that dictate this selection process, as well as the method of compensation for fishermen who will be fishing on behalf of the organization, are reviewed annually by the MFU's governance.

[25] Currently, Opilio holds a draw open to MFU members in good standing who meet certain conditions in order to select the member fishermen who will have the privilege of fishing for the organization. If the organization ever decides to allow other fleets and/or non-member fishermen to fish its Inshore Allocation in order to optimize profits for its members, it may do so.

[26] Opilio is a corporation incorporated under the *Business Corporations Act*, S.N.B. 1981, c. B-9.1.

[27] The Maritimes Fishermen's Union ("MFU") is Opilio's sole shareholder.

[28] As part of its management of the Inshore Allocation, Opilio, in collaboration with the MFU, develops an annual fishing plan for the Inshore Allocation, provided that DFO grants it to the MFU. This plan considers various factors, including the size of the Allocation, to determine the appropriate number of vessels required for its catch and the distribution of these vessels among the communities of interest.

[29] The recommended method for selecting fishermen to undertake the fishing effort has been by draw. However, Opilio, in collaboration with the MFU, also develops eligibility criteria for participation in the draw. Thus, only members in good standing of the MFU have been eligible to participate. Over the years, Opilio, in collaboration with the MFU, has added or changed various criteria that were deemed appropriate by their respective boards of directors.

[30] The requirement not to be engaged in litigation with the MFU or any of its subsidiaries has been in place since at least 2024. The criteria were established for the 2024, 2025 and 2026 fishing seasons.

[31] Once the draws are complete and the winners are confirmed, the winners must sign an agreement with Opilio, which governs the terms and conditions of the fishing to be carried out, including the price to be paid to the fisherman, etc.

[32] Opilio organizes the annual draw to select the fishermen who will fish the Inshore Allocation.

[33] This year's draw is scheduled for February 12, 2026. This date was chosen at the request of the members, as the snow crab fishery has started earlier than usual for the past three to four years.

[34] Opilio was incorporated in 1995 to manage and administer the community snow crab allocation (the “Inshore Allocation”) it had received from Fisheries and Oceans Canada (“DFO”).

[35] The members of Opilio's board of directors are all member fishermen elected by the entire membership of the MFU, which is divided into seven local chapters.

III. ANALYSIS

1. Does the motion to convert the application into an action lend itself well to the request for an abridgment of time? If so, can the application be converted into an ordinary action?

[36] The applicants argue that the abridgment of time is entirely appropriate in the circumstances, considering that this is, first and foremost, a discretionary power of the Court. Rule 3.02(1) of the *Rules of Court* of New Brunswick is quite clear with the use of the word “may.”

[37] Second, the draw that is the subject of the motion for an injunction is central to this dispute. The deadline for the applicants to submit their applications is February 6, 2026, and the date of the draw is February 12, 2026. Therefore, once the draw date has passed, it will be too late for the applicants and their motion will become null and void.

[38] In my view, on a claim for abridgment, the basic issues before the Court are: is it necessary for justice to be done; is it an urgent issue; were there unforeseeable circumstances; and are there any limitation dates or deadlines. I am speaking only from my own practice; other judges may deal with such claims differently. (See *671617 N.B. Ltd. v. Certas Home and Auto Insurance Co. (operating as Desjardins Insurance)* [2024] N.B.J. No. 278 (NBKB), at paragraph 3)

[39] Due to the deadline, I exercised my discretion to grant the abridgement of time.

[40] The Court acknowledges the provisions of Rules 2.01, 2.02 and 2.03, which were raised by the applicants. In specific circumstances, there are certain constraints on the Court's ability, either in terms of jurisdiction or in terms of exercising its discretion, to allow amendments to pleadings.

[41] Here, we are dealing with a special case where an application for judicial review under Rule 69 has been filed.

[42] In short, I do not have jurisdiction to convert such an application into an ordinary action.

[43] I rely on the case of *New Brunswick (Minister of Education and Early Childhood Development) v. Henrie*, [2017] N.B.J. No. 9 (NBCA), in which an application for judicial review under Rule 69 had been filed. In that decision, one

party had requested that the application be converted into an action. The issue was whether the trial court had jurisdiction to issue such an order, and this was decided by the Court of Appeal, which answered in the negative.

[44] Under Rule 16, applications may be converted into actions. There is a specific rule regarding this, namely Rule 38.09(c). This rule applies only to applications filed under Rule 16. An application filed under Rule 69 is discrete and specific and governed by Rule 69 itself. The Court of Appeal notes in *Henrie* that Rule 69 is a codification of former remedies under administrative law, and the rule states that those remedies may be exercised only by way of application filed under this rule. Therefore, Rule 38.09(c), which allows for the conversion of an application into an action, applies only to other applications and not to applications for review.

[45] The Court of Appeal does not say in *Henrie* that the trial court should or should not have exercised its discretion; it says that the judge hearing the application did not have jurisdiction to convert the application into an action. Therefore, this is a jurisdictional issue; the trial court does not have the power to convert an application filed under Rule 69 into an ordinary action.

[46] I dismiss the request to convert the application filed under Rule 69 into an ordinary action on jurisdictional grounds.

2. If the answer to the first question is no, does the motion lend itself well to the request for an abridgement of time to file a preliminary motion for an interlocutory injunction?

[47] As the request to convert the application filed under Rule 69 to an ordinary action failed, the applicants requested that the amended Notice of Motion be changed to a Notice of Preliminary Motion, with the Notice of Action to be filed within a time granted by the Court.

[48] The Court has discretion to allow amendments to pleadings even at the hearing stage. In such a case, the Court must determine what is just, equitable and efficient, and the prejudice it would cause to the other party. (See *Ouellet v. Béchard*, [1999] N.B.J. No. 145 (NBCA), at paragraphs 3, 4 and 5; *Sewell v. ING Insurance Company of Canada*, [2007] N.B.J. No. 219 (NBCA), at paragraph 29; *McLaughlin v. Levesque*, 2008 NBQB 329, at paragraph 32)

[49] Rule 40.01 provides that a request for an injunction may be made before the commencement of proceedings, by preliminary motion. The rule also provides that the request may be granted only on terms providing for commencement of proceedings without delay. The rule specifically uses the words, “only on terms providing for […]”

[50] Rule 40.05 states that “[a]n injunction […] may be made under this rule […] upon terms and conditions as may be just.” Therefore, the rule confers broad discretion upon the Court.

[51] Furthermore, Rule 40.05 confers upon the Court the discretion to impose such terms and conditions as it considers just. Therefore, in the event that the applicant’s affidavit does not clearly state that an originating process will be filed, but that the Court determines that the facts give rise to potential proceedings, the Court has the discretion to impose conditions that an originating process be filed within a certain time period, otherwise the injunction will be set aside.

[52] At this stage, bear in mind that I am ruling on the merits of this motion only, and not on the merits of the action.

[53] In this case, if I dismiss the applicants' application to amend, they could simply file a preliminary motion today with a draft statement of claim and seek an abridgment of time for a hearing on the notice of preliminary motion. I believe I would grant the abridgment of time for this preliminary motion for the same reasons

already outlined. However, I asked the respondents if they would have preferred an adjournment. The respondents replied that they would have preferred more time to prepare, but they were ready to proceed. I therefore determined that the prejudice suffered by the respondents could be remedied with costs.

3. Is this a request for a mandatory or prohibitive injunction?

[54] The statutory authority to issue interim injunctions is provided at section 33 of the *Judicature Act*, R.S.N.B. 1973, c. J-2, as well as in Rule 40.01(a) of the *Rules of Court* of New Brunswick (N.B. Reg. 82-73 under the *Judicature Act*).

[55] The principles that determine whether an injunction should be issued in the present circumstances are set out in the seminal case of *RJR–MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17 (S.C.C.), at paragraph 43.

[56] The Supreme Court's three-stage test is as follows:

a) There is a serious issue to be tried;

b) The applicant will suffer irreparable harm or harm not compensable by an award of damages if the injunction is not granted; and

c) The balance of convenience favours the plaintiff, in the sense that the harm to the plaintiff if the injunction is not granted must exceed the harm to the defendant if the injunction is granted.

[57] The applicants only have to establish a strong *prima facie* case. It is sufficient to satisfy the Court that the claim is not frivolous or vexatious, or, in other words, that there is a serious issue to be tried. (See *RJR-MacDonald*, at paragraph 43.)

[58] Once satisfied that the request is neither vexatious nor frivolous, the motion judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged consideration of the

merits is generally neither necessary nor desirable. (See *RJR-MacDonald*, at paragraph 50)

[59] It should be noted, however, that the analytical framework set down in *RJR-MacDonald* is one of general application and that, in certain circumstances, the Court must undertake a more extensive review of the merits of the case and apply a stricter test to the first part of the analysis. This is particularly the case when the applicant seeks a mandatory injunction.

[60] In this case, the respondents argue that the injunction sought by the applicants is mandatory in nature. The applicants, however, characterize the relief sought as a prohibitive injunction, as they are asking the respondents to refrain from applying eligibility criterion 12.

[61] The respondents maintain that the actual effect of the order sought is to compel the respondents to take specific positive action, that is, to ensure the applicants are registered for the draw, thereby rendering the injunction mandatory.

[62] The case law acknowledges that distinguishing between mandatory and prohibitive injunctions can be difficult, since an injunction that is framed in prohibitive language may, in practice, force the defendant to take positive action. It is therefore imperative to look past the form of the application in order to determine the practical consequences of the injunction sought. (See *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, at paragraph 16)

[63] In this case, the argument is that the injunction sought by the applicants, although presented as a prohibitive injunction, is in fact a mandatory injunction, as it would compel the respondents to take positive action, that is, to register the applicants for the draw and the community snow crab fishery for 2026.

[64] According to the respondents, since the injunction sought is in fact a mandatory injunction, the applicants are required to meet a modified *RJR-MacDonald* test with respect to the first stage of the analysis. They must meet a higher threshold in light of the potentially serious consequences of the order sought.

[65] In this modified version of the test, the applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice. (See *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, at paragraph 18)

[66] So, when a mandatory injunction is sought, the assessment of the evidence at the first stage of the *RJR-MacDonald* test does not hinge on the existence of a serious issue to be tried but rather requires the applicant to establish a "strong *prima facie* case" that the applicant will prevail at trial.

[67] The phrase "strong *prima facie* case" imposes on the applicant the burden of presenting evidence showing that it is very likely the applicant will succeed at trial. Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning that, upon a preliminary review of the case, the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice. (See *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, at paragraph 17)

[68] There is a specific purpose underlying the imposition of this onerous burden, namely to account for the potentially serious consequences for the other party should the requested measure be granted. The appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR-MacDonald* test is not whether there is a serious issue to be tried, but rather

whether the applicant has shown a strong *prima facie* case. The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR-MacDonald* as "extensive review of the merits" at the interlocutory stage. (See *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, at paragraph 15)

[69] I considered the tests set out in *RJR-MacDonald* and *Canadian Broadcasting Corp.* to determine whether this was, in fact, a matter of a mandatory or prohibitive injunction.

[70] If I grant the applicants' injunction application, what I would be doing is ordering the respondents to refrain from applying criterion 12; I would not be compelling the respondents to take specific positive action, that is, to ensure the applicants' registration for the draw. I am relying on criterion 9 of the Criteria, which states that [TRANSLATION] "A member must confirm his participation in the draw by calling (506) 395-6366 for ZPH23 and (506) 532-2485 for ZPH25." This means that the fishermen are responsible for their own registration, and not the respondents. This point is reinforced by criterion 10, which reads: [TRANSLATION] "Ineligible members who have put their names in the draw anyway and been selected will receive written notice of their disqualification within a reasonable time."

[71] In light of criteria 9 and 10, I am satisfied that if the injunction sought by the applicants is granted, the respondents will not be compelled to take any specific positive action—that is, to ensure the applicants are registered for the draw—as the criteria stipulate that the members themselves are required to confirm their participation in the draw. Once members confirm their participation in the draw, it is automatic, and they will only be excluded if their names are drawn and they are ineligible under criterion 10.

[72] Based on my foregoing analysis, I find that the injunction actually sought in this matter is prohibitive rather than mandatory.

[73] I will now turn to the first stage of *RJR-MacDonald*.

3. Is there is a serious issue to be tried?

[74] When dealing with an application for a prohibitive injunction, the first test is not very onerous. It is sufficient, based on a preliminary review of the merits of the case, to determine whether there is a serious issue to be tried.

[75] There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one.

[76] The court hearing the motion must make a preliminary assessment of the merits of the case, relying on common sense and an extremely limited review of the case on the merits.

[77] The applicant for interlocutory relief must demonstrate a serious question in the sense that it is neither frivolous nor vexatious. By necessity this test requires a limited review of the merits of the case.

[78] To reiterate, this Court has often made it clear that the requirements for granting an interlocutory injunction should be considered in a comprehensive and discretionary manner, as the first two stages are not strict conditions that must be met before assessing the other criteria. The first two stages are not prerequisites.

[79] The applicants claim that the MFU and Opilio themselves have fiduciary duties to their members and *de facto* to the applicants, or, in the alternative, that they are subject to fiduciary duties arising from the circumstances. The applicants

expressly invoke all the principles applicable to fiduciary duties, as they arise from the common law and/or equity.

[80] The applicants argue that the MFU and Opilio had a duty of loyalty, an obligation to act in the best interests of their members, to avoid any conflict of interest and not to take advantage of their position as fiduciaries.

[81] The applicants claim that the MFU and Opilio breached their fiduciary duties.

[82] In my view, the issue of the respondents' fiduciary duty to the applicants is not a serious issue to be tried in this matter. I confirm that my duty at this stage is not to determine the merits of the case between the applicants and the respondents but only whether the applicants have raised a serious issue to be tried.

[83] My decision is supported by *Gauvin v. Association coopérative des pêcheurs de l'île limitée* 2009 NBQB 158 ("*Gauvin*"). In *Gauvin*, the plaintiff argued that the board of directors of a fishing co-operative had a fiduciary duty to the co-operative's members. In addition, the plaintiff in *Gauvin* alleged that the co-operative had breached its fiduciary duty to its members and that the board of directors had placed itself in a conflict of interest with the plaintiff by furthering the interests of board members to the detriment of its members. However, *Gauvin* was not a class action suit; the suit was brought solely by the plaintiffs. In this instance, there are five separate cases; this is not a joint application.

[84] In my view, a board of directors has a primary duty to the corporation, not a primary duty or obligation to its members or shareholders, and certainly not to a specific member or shareholder. (See *Gauvin v. Association coopérative des*

pêcheurs de l'île limitée 2009 NBQB 158, at paragraph 81; *BCE Inc. v. 1976 Debentureholders,* [2008] 3 S.C.R. 560, at paragraphs 37, 66, 81 and 87)

[85] I find, based on the case law, that boards of directors have a duty to act in the best interests of the company, corporation, co-operative association, or whatever the specific nature of that entity may be. However, the entity in question, whether it is a corporation, a company or a co-operative association, is steered by a board of directors that is accountable to that entity and not to its members in a fiduciary capacity.

[86] Obviously, boards of directors have certain obligations to members, just as a board of directors would have obligations to shareholders in a corporation. However, the board of directors is not a fiduciary to the shareholders, any more than the MFU is a fiduciary to its members or co-operatives are fiduciaries to their members. Therefore, the theory that the respondents are a special entity subject to the highest obligations recognized by law is one that has not been proven by the applicants.

[87] If this were a case for a mandatory injunction, there would not be a strong *prima facie* case because a board of directors has no fiduciary duty in such a situation. As for the serious issue to be tried test, which is a much less onerous test, none of the evidence submitted or case law relied upon by the applicants discloses a serious issue to be tried, as the issue raised by the applicants is not supported by the evidence in their affidavit or in law by the case law.

[88] For the above reasons, I find that there is no serious issue to be tried in this case.

5. Will the applicants suffer irreparable harm?

[89] The purpose of this second stage of the test is to determine whether the applicant would suffer irreparable harm if the requested injunction were denied. The phrase “irreparable harm” has a specific meaning: it is harm that cannot be quantified in monetary terms or for which no adequate remedy could be provided.

[90] Irreparable harm is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision; where one party will suffer permanent market loss or irrevocable damage to its business reputation; or where a permanent loss of natural resources will be the result. (See *RJR-MacDonald*, at paragraph 59)

[91] In this case, the harm invoked by the applicants relates to their ineligibility to participate in the draw and, potentially, in the community snow crab fishery for 2026. In this regard, the respondents argue that this harm is purely speculative and, in any event, quantifiable in monetary terms.

[92] The mechanism used to select the fishermen who will undertake the fishing effort is based on a random draw. To be eligible for this draw, applicants must meet various eligibility criteria, including eligibility requirement 12. However, even when these criteria are met and the member is duly admitted to the draw, this eligibility in no way confers a vested right or a guarantee of being selected.

[93] In addition, the applicants argue that criterion 12 also has collateral consequences, as the applicants are all captains and therefore own vessels and have crews. Their employees will be similarly unable to benefit from the fishery and earn an income from it, for example as deckhands.

[94] The evidence shows that the applicants are all captains and own their own boats. In addition, there is no evidence that the applicants rely solely on this crab fishery for their livelihoods. I can therefore confidently infer that the applicants have other income sources as fishermen and do not rely solely on this fishery, which is the subject of this injunction.

[95] The applicants maintain that the draw is the only way for them to obtain an allocation, which represents a sum of money, with the number of pounds to be harvested and the price per pound being set each year. In 2025, for example, the allocation was 77,000 pounds at $1.50 per pound, although that amount is in dispute. According to the applicants, the harm suffered by the fishermen includes their exclusion from the draw, the loss of income from community fishing and the inability to subsequently seek damages as a result of this exclusion.

[96] In the end, even the applicants admit at paragraph 44 of their brief that the ultimate issue is not the allocation but a matter of income and specifically the loss of income derived from the fishery.

[97] The applicants contend that this exclusion from the draw makes it impossible to subsequently pursue a claim for damages. I am of the view that the potential loss of income can be calculated with sufficient accuracy by looking at past years as an option. The case law confirms that if the parties provide no evidence that would allow the Court to make the foregoing damage assessment, nor any evidence of their efforts at mitigation, the Court may ultimately make the determination. However, the law authorizes trial judges to go ahead with the determination of damages. (See *Burns v. Lynch* 2019 NBQB 173, at paragraph 61)

[98] In addition, with respect to the applicants' argument that it will be impossible to pursue a claim for damages at a later date, I rely on the decision in *Dugas v. Gaudet* [2015] N.B.J. No. 82 (NBCA), at paragraph 7. That case involved a fishing

licence transfer contested by Mr. Dugas. The Court of Appeal stated that Mr. Dugas had not put forth any facts in support of his bold assertion he would be ruined and put out of business if he could not fish the 2015 season. In these circumstances, the Court did not accept his unsupported assertions to that effect. In addition, the Court was not convinced the respondents would not be able to compensate Mr. Dugas for any consequent losses. Mr. Dugas had the onus of establishing any irreparable harm to himself that might result from execution of the trial judgment, and the Court determined that the evidence fell short of the mark.

[99] In my view, the harm allegedly suffered by the applicants does not meet the requirement of “irreparable harm,” as it is hypothetical, uncertain and speculative in nature. Furthermore, the alleged harm resulting from the refusal of the injunction sought would be strictly pecuniary and quantifiable. It would be limited to the profits the applicants would have earned had they been selected in the draw and participated in the fishery. Since the harm invoked by the applicants can be quantified in monetary terms, it does not satisfy the second part of the test and therefore does not constitute irreparable harm.

[100] The applicants further contend that the irreparable harm may be the retaliation clause in criterion 12. In other words, if the applicants do not withdraw their lawsuits, they will not be able to participate in the draw for the fishery. More specifically, the draft lawsuit states, and I am paraphrasing here, that the respondents abused their fiduciary position by devising a criterion intended to exert coercion and undue pressure, pursuing an ulterior motive contrary to public policy and constituting an oppressive and arbitrary act of intimidation.

[101] The case law acknowledges that so-called “retaliation” clauses, which allow a public authority to exclude from a bidding process a bidder involved in litigation against it, are recognized under Canadian law. Such clauses are accepted as

legal, valid and consistent with the principles governing public procurement, provided they are clearly stated and applied in a non-arbitrary manner.

[102] The Supreme Court of British Columbia has confirmed that a municipality may legitimately refuse to award a contract to a bidder with whom it is engaged in ongoing litigation. The Court found that such a clause does not deprive the bidder of the right of access to the courts but rather establishes the terms under which the municipality agrees to enter into a contract. It is an eligibility criterion within the contracting authority's discretion, not a punitive or illegitimate measure. (See *J. Cote & Son Excavating Ltd. v City of Burnaby,* 2018 BCSC 1491), at paragraph 84; fully affirmed on appeal *J. Cote & Son Excavating Ltd. v. Burnaby (City)*, 2019 BCCA 168)

[103] The principle upheld in the *J. Cote & Son Excavating Ltd.* cases is that the municipality's objective—namely, managing the legal, administrative and relational risks associated with the performance of a contract during a legal dispute—is a legitimate consideration in public procurement. The fact that such a clause may deter certain suppliers from bidding during the course of litigation is not sufficient to make it unreasonable or contrary to public policy.

[104] Similarly, the respondents, which are not public or government bodies, are free to establish eligibility criteria for the draw they use to select the fishermen with whom an agreement will be entered into for the harvest of the MFU's Inshore Allocation. Criterion 12, which the applicants contest, is a legitimate contractual choice falling within the contracting authority's freedom to define the terms and conditions for participation in its draw.

[105] It is therefore reasonable for a municipality to conclude that the coexistence of active litigation and an ongoing contractual relationship may hinder the proper performance of the work and the mutual trust required in the performance of a government contract. The same applies to the respondents.

[106] I should also mention that the requirement not to be engaged in litigation with the MFU or any of its subsidiaries has been in place since at least 2024. The criteria were established for the 2024, 2025 and 2026 fishing seasons. Prior to the draw in 2024 and 2025, the applicants never challenged the policies underlying criterion 12 and therefore never raised with the respondents that they considered this criterion to be an unreasonable clause of a retaliatory nature.

[107] I find that criterion 12 is therefore a legitimate risk management mechanism, based on the case law, and not a sanction or retaliatory measure in the constitutional or quasi-constitutional sense. The respondents are free to adopt policies aimed at preserving the integrity, effectiveness and stability of their contractual relationships.

[108] I am satisfied that criterion 12 does not deprive the applicants of their right to sue the respondents; instead, it requires them to bear the commercial consequences of that choice, which is consistent with the general principles of public contract law and therefore does not constitute irreparable harm.

6. Whom does the balance of convenience favour?

[109] The third test to be applied in an injunction application is a determination of which of the parties will suffer the greater harm from the granting or refusal of the injunction, pending a decision on the merits. This analysis requires taking into account all of the relevant circumstances, including the public interest, where applicable.

[110] With respect to the balance of convenience, the applicants argue that they are affected by three inconveniences. They are being denied access to the draw due to the lawsuit filed against Opilio, finding themselves unable to obtain an allocation for the 2026 snow crab fishery and *de facto* unable to collect the

revenues derived from this fishery or to file a lawsuit for the revenues derived from this fishery.

[111] In addition, the applicants argue that they do not fully understand how the breach-of-contract lawsuits would prevent them from harvesting crab. They maintain that they are the only ones suffering any harm in the circumstances and that the balance of convenience favours them.

[112] Conversely, the respondents urge the Court to bear in mind that they have an internal governance structure, and that internal governance structure entails members electing from among themselves who will sit on their board of directors. In other words, who will make the big decisions in the interests of the association. External interference in the internal governance decisions made by members, and democratically no less, can only undermine the members' confidence in their internal governance system.

[113] I agree that it is important at this stage to assess the potential impact of the injunction on each party. The Court must consider the potential consequences of the injunction on each party. Apart from the risks of monetary loss and gain, what will be the relative impact upon the parties of granting or withholding the injunction? Which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits? (See *Brideau c. Barrera-Brideau*, 2025 NBBR 162, at paragraphs 40 and 41; *Greenlaw v. Lanteigne, 2013 NBQB 207*, at paragraph 10)

[114] It is my view that no inconvenience or difficulty raised by the applicants is irreparable, as any loss of opportunity to participate in the snow crab fishery in 2026 will, at most, lead to a quantifiable loss of profit and is therefore fully compensable through the award of damages. With respect to the respondents, I find that an order compelling the registration of the applicants for the draw undermines the autonomy of the respondents' governance systems, in addition to

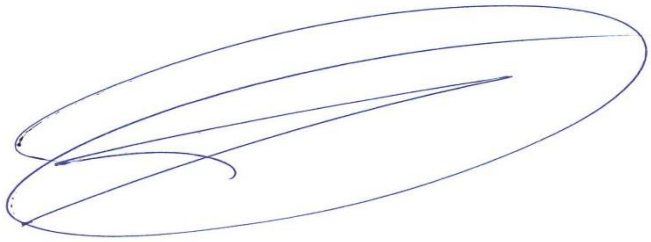
altering the relative chances of other participants who meet all the eligibility requirements established by these governing bodies democratically elected by the membership. For the reasons outlined in the previous section, the balance of convenience favours denying the requested injunction.

IV. Disposition

[115] Following a comprehensive review of the three tests set out in *RJR-MacDonald*, and based on the totality of the evidence, the applicants' application for an interlocutory injunction is dismissed with costs.

[116] On the issue of costs, the applicants are ordered to pay $1,500 in costs to each respondent in connection with the dismissal of the conversion motion, for a total of $3,000. In addition, the applicants are ordered to pay $1,500 in costs to each respondent in connection with the dismissal of the injunction motion, which also includes the prejudice suffered by the respondents due to the abridgement of time for the preliminary motion, for a total of $3,000. In total, the applicants are to pay $6,000 in costs to the respondents, inclusive of HST and disbursements.

DATED at Miramichi, New Brunswick, this 9th day of February 2026.



Justice Stephen J. Doucet
Judge of the Court of King's Bench
of New Brunswick