**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Northumberland Fisherman's Association v. Patriquin*, 2015 NSSC 30

**Date:** 2015-01-29

**Docket:** *Pictou*, No. 417571

**Registry:** Halifax

**Between:**

Northumberland Fisherman's Association

*Applicant*

v.

Robert Lloyd Patriquin

*Respondent*

**Judge:** The Honourable Justice Arthur LeBlanc

**Heard:** June 3, 2014, in Pictou, Nova Scotia

**Counsel:** John T. Rafferty, Q.C., Applicant
Bruce MacIntosh, Q.C., Respondent

**By the Court:**

## Introduction

[1] The Applicant Fisherman's Association (NFA) seeks an order against Robert Lloyd Patriquin, the respondent fisherman, granting a permanent injunction barring him from transferring any of his fishing licenses, as well as an order for specific performance compelling him to surrender his licenses and core enterprise status to the Department of Fisheries and Oceans (DFO). There is an existing interim and interlocutory injunction, whose validity the respondent has not challenged.

## Background and evidence

[2] In April 2011 NFA entered into a Contribution Agreement with DFO whereby DFO would advance funds to NFA to buy lobster licenses from fishermen, for the purpose of reducing the number of active licenses and thereby improve sustainability in the Atlantic lobster fishery. This was known as the Lobster License Buyout Program (the Buyout Program). Fishermen in the fishing area designated Lobster Fishing Area (LFA) 26A1—an administrative subdivision or management area of LFA 26A, which is located in the southern Northumberland Strait between the coasts of mainland Nova Scotia and eastern Prince Edward Island – would be invited to submit bids to NFA for sale of their lobster licenses. The Contribution Agreement between DFO and NFA included the following recitals:

> WHEREAS the Recipient [NFA] wishes to undertake a Project with the objective of sustainability – sustainability of both the lobster resource and the fishing industry in Lobster Fishing Area (LFA) 26 A-1 in Nova Scotia.
>
> WHEREAS DFO wishes to support the implementation of sustainability plans with all the Lobster Fishing Areas in the Atlantic Lobster fishery by providing financial assistance to supplement other sources of funding obtained by the Recipient … for this Project;
>
> AND WHEREAS DFO wishes to provide a contribution to the Recipient for the Project;
>
> THEREFORE, DFO and the Recipient agree to enter into this Contribution Agreement … to support the stated endeavours of the Recipient under the terms and conditions set out below.

[3] Annex A to the Contribution Agreement indicated – under the heading "Project Description" and the subheading "Restructuring and Rationalization" – that funding was required for two purposes: (a) to retire nine lobster licenses in LFA 26A1 in Nova Scotia; and (b) to "permanently remove 20 traps from each of the remaining 138 fish harvesters who fish in LFA 26A1 in Nova Scotia."

[4] In order to participate in the buyout program, NFA and its members had to contribute to the funding of the buyouts. At a meeting on January 3, 2011, the members passed a motion supporting NFA participation, a second motion requiring each fisherman to reduce their trap numbers by 20 in order to fund the NFA contribution, and a third motion requiring participants in the program to surrender their "core enterprise" status (also known colloquially as "core cards") after two years, along with any additional fishing licenses that had not been transferred at that time. (DFO's 2010 Commercial Fisheries Licensing Policy for the Gulf Region defines "core enterprise" as "a fishing unit composed of a fish harvester who is the head of the enterprise, registered vessel(s) and licences he holds, and which was designated as such by DFO in 1996.")

[5] The respondent, Mr. Patriquin fished out of Cape John, NS. He was not a member of NFA, and had thus not been notified of the January 2011 meeting at which participation in the program was voted on.

[6] NFA subsequently issued a Notice titled "Lobster License Buyout Program for LFA 26A1," inviting interested fishermen to bid to sell their lobster licenses, emphasizing that the amount requested was for "your lobster license only." The Notice was issued in two different versions, a first round with a deadline of January 31, 2011, and a second round with a deadline of April 13, 2011. The second-round notice stated that

> in order for your bid to be considered for the buyout program you must also agree to sign a civil agreement with the [NFA], that you will surrender your core card to DFO at the end of two years from the date you sell your lobster license. If you do not agree to sign the civil agreement when you accept the offer for your lobster license then the offer will be withdrawn. The remaining licenses attached to the core card can be sold prior to the two year deadline (upon such terms as you, in your sole discretion may determine) or surrendered with the core card in which case you will lose the remaining licenses. <u>The civil agreement form is not to be</u>

> sent back with your bid. It is signed at the lawyer's office if and when you receive the funds for your lobster license. [Emphasis in original]

[7] Substantively similar, though not identical, language had appeared in the first-round notice.

[8] On April 7, 2011, Mr. Patriquin filed a "Letter of Intent" in which he offered to sell his lobster license for $199,998.00. His evidence was that when he applied, he intended to stop fishing lobster temporarily because his wife was in poor health, and he could not fish and attend to her care at the same time. He said he understood that he could not apply for another lobster license for a year (apparently due to a DFO freeze), but he believed that he could use his other fishing licenses and, after a year, obtain another lobster license from another fisherman in LFA 26A. There is no evidence that he sought legal advice or consulted DFO, however.

[9] On April 18, 2011, Ian MacLean, a lawyer retained by NFA to deal with the Buyout Program, wrote to Mr. Patriquin as a follow-up to a telephone conversation, confirming that "[y]our offer to relinquish your lobster license upon payment of the sum of $199,998.00 is hereby accepted." He stated that the money was coming from DFO, and asked Mr. Patriquin sign several documents, including a "Receipt of Payment and License Relinquishment" in two versions, one specifying the price (to be sent to DFO in Moncton, NB) and one omitting the price (to be sent to DFO in Antigonish, NS). He was also asked to sign a contract, that being the Civil Agreement referred to in the notice and the letter of intent. Mr. MacLean wrote, "[t]he forms contemplate that the transfer will be to the Association. However, of course the end result is relinquishment of the license." After advising Mr. Patriquin to consult his tax advisor, Mr. MacLean concluded:

> You will have a period of two years from the date of relinquishment of your lobster license within which you can sell or transfer your remaining core licenses. At the end of the two-year period your core card will have to be relinquished to DFO. I suspect you know more about that system than do I, and in any event if you need advice in this regard you should contact DFO in Antigonish.

[10] The Civil Agreement between Mr. Patriquin and NFA stated, in its opening recitals:

> WHEREAS:

(a) The Fisherman holds certain licenses including a lobster license to fish in the territory known as LFA 26A1;

(b) [DFO] has allocated funds for the purpose of reducing the lobster fishing effort. Some lobster licenses will be purchased by DFO, and the remaining license holders will permanently give up twenty (20) traps each as part of this program.

(c) It is a condition of this arrangement that the Fisherman, upon completion of sale of his lobster license to DFO shall, within two years of the date of completion of that sale, transfer his remaining fishing licenses upon such terms as the Fisherman may deem to be satisfactory to him. At the end of the two (2) year period the Fisherman shall surrender his core card to DFO and at the same time he shall surrender, without compensation, any remaining licenses which he has not transferred.

(d) The Association is, for purposes of this Contract and related matters, the duly authorized representative of all core card holders in LFA 26A1, including but not limited to those holders who are members of the Association.

(e) It is critical to the success of the program and to the future economic wellbeing of the remaining core card holders that the Fisherman comply with the terms of this Contract.

[11] The operative provisions of the Civil Agreement included the following:

IN CONSIDERATION of the premises, the sufficiency of which is hereby confirmed, the Fisherman hereby contracts and covenants with the Association (in its capacity as representative of all core card holders in LFA 26A1, that the Fisherman shall, within two (2) years of completion of the sale of his lobster license to DFO, transfer his remaining licenses and surrender his core card to DFO, permanently. If the Fisherman has not transferred his remaining licenses at the end of such two (2) year period, he shall surrender the same, permanently, to DFO without being compensated therefor.

The Fisherman acknowledges that the remaining core card holders will suffer irreparable harm if the Fisherman breaches the terms of this Contract.

The Fisherman acknowledges having had the opportunity to receive independent legal advice and other professional advice before signing this Contract. The Fisherman further confirms that he has read over and fully understands the terms and provisions of this Contract, and covenants that he will comply with such terms and provisions.

[12] Mr. Patriquin signed the Civil Agreement on April 20, 2011. He also signed a "Receipt of Payment and License Relinquishment" confirming that he was voluntarily relinquishing "all privileges associated with" his lobster license, and that he understood and agreed that "[t]he lobster license will be cancelled and, as such, I irrevocably and forever relinquish all claims and any interest in and any privileges associated with this fishing license" and that "[t]his decision is not reversible or appealable." In addition, he confirmed (by signing the receipt) that "I have received full payment of $199,998.00 for my lobster license and authorize [DFO] to confirm the cancellation of the above lobster license to [NFA]." This receipt was in two versions, as requested by Mr. MacLean.

[13] It was Mr. Patriquin's evidence that Mr. MacLean had acted for him on several occasions between 1983 and 2008. He stated in his affidavit that he regarded Mr. MacLean as his own lawyer. He added that the "personal and friendly nature" of the conversation caused him to believe that Mr. MacLean was acting for him as well as NFA, and that Mr. MacLean would protect his interests "despite the fact that he was being paid by NFA." He said his acknowledgement in the Civil Agreement that he had "the opportunity to receive independent legal advice" was false, as he was not aware that Mr. MacLean could not offer him independent advice. He also said Mr. MacLean did not inquire about his state of literacy – Mr. Patriquin said he is illiterate – and that if he had, he would have "disclosed my limitations without hesitation." Mr. Patriquin did not advise Mr. MacLean of his intention to leave the lobster fishery temporarily in order to care for his wife, then obtain another license and re-enter the fishery.

[14] On June 6, 2011, DFO informed Mr. MacLean that the license had been cancelled. (While Mr. Patriquin takes the position that this date, not April 20, should be treated as the effective date of relinquishment, the receipt of April 20 indicates that the voluntary relinquishment is "effective immediately.")

[15] I note that NFA led evidence that Mr. Patriquin told two acquaintances that he intended to take advantage of the lobster license buyout, and that unnamed "friends on PEI" would help him find a loophole so that he could return to the lobster fishery. According to Mr. Patriquin, any such comments, if they were said, were not meant seriously. I am not satisfied that this evidence is probative of any issue on this application.

[16] In April 2012 DFO implemented a freeze under the *Commercial Fisheries Licensing Policy for the Gulf Region*, imposing a "temporary freeze on the issuance of replacement Lobster licenses in LFA 26A" and indicating that replacement licenses "may only be issued to Aboriginal organizations, independent Core fish harvesters and qualified new entrants whose homeport is located within the applicable freeze area." The freeze areas were east of the line between the management areas LFA 26A-1 and 2, and west of that line as far as the LFA 25 line. (LFA 25 begins to the northwest, close to the New Brunswick line and the Confederation Bridge). The evidence indicates that this freeze was prompted in large part by representations or lobbying from NFA and other fishermen's organizations. It appears that NFA had requested a port-to-port freeze, which would have prevented license transfers between port. Under the less restrictive rules actually implemented by DFO, the policy "requires the two subject fisherment to have home ports in the same management area." In other words, a fisherman in management area LFA 26A-1 could only transfer a lobster license to another fisherman in LFA 26A-1, though they need not be in the same port.

[17] Mr. Patriquin's evidence was that in September 2012, with the 12-month restriction passed, he agreed to obtain a "core lobster license" by transfer from Robert R. Langille. He submitted a request to have the Langille license reissued to him on September 22, 2012. When he had not had a "straight answer" on the reissuance by December 12, he called Mr. macLean, who advised him that he could not advise him on the matter. According to Mr. Patriquin, the reason for this was that NFA was lobbying DFO in support of what he claims were exemptions from the license freeze for other fishermen.

[18] Mr. Langille's homeport was Wallace, in LFA 26A-3, while he was based in Cape John, in LFA 26A-1. According to Leroy MacEachern, Chief of Resource Management for DFO in Antigonish, NS, when the request to reissue the license came to his attention, he believed it was contrary to the freeze and sought advice from the Moncton DFO office. Mr. Patriquin alleges that the reissuance request led to "months of unexplained delay and undisclosed consultation with NFA" before he was informed that he "could not acquire the Langille lobster license because of the NFA-sponsored freeze." Ronald Heighton, the president of NFA, indicated in his evidence

that when he learned about the request, he "contacted various DFO officials and inquired about the transfer."

[19] Mr. Patriquin asserts that NFA intervened with DFO to assist other fishermen in obtaining waivers of the freeze. Both DFO and NFA deny this, stating that the only such reissuances during the relevant time period were within single ports and therefore did not offend the freeze.

[20] Just under two years after Mr. Patriquin signed the Civil Agreement, on April 9, 2013, Mr. MacLean wrote to inform him that the deadline to surrender his "core card" and any remaining fishing licenses to DFO was April 20, the two-year anniversary of the date he relinquished his lobster license. Mr. MacLean added:

> I confirm our telephone discussion of April 8, 2013… You indicated that you wish to purchase another lobster license and obtain a core card, and I explained that this is between you and DFO. However, you also indicated that you wish to keep your existing non-lobster licenses. I said that in my opinion the wording of the Contract is clear and that you cannot keep them. You can sell them or you can transfer them, failing which you must surrender them. The timeline in this regard is tight and it is absolute; in your case it is April 20, 2013.

[21] On April 12, 2013, shortly before the two-year deadline for transferring his remaining licenses and surrendering his core enterprise status was to expire on April 20, Mr. Patriquin requested that DFO transfer his licenses to Nickolis Bigney. The remaining licenses included licenses for groundfish, herring, mackerel, mussels, sea scallop, smelt, squid, swordfish, Bluefin tuna, alewives/gaspereau bait, and herring/mackerel bait. In for the licenses to be reissued to him, Mr. Bigney had to acquire "new entrant" status. His application was filed April 16. It had to be refiled due to errors, which was done on April 25.

[22] Mr. Patriquin's counsel (not his current lawyer) e-mailed Mr. MacLean to request a 30-day extension of the Civil Agreement deadline to allow the relinquishment and reissuance of the licenses. Mr. MacLean responded that it would be unfair to others in similar circumstances to grant the request. He also said such an extension would result in irreparable harm to NFA's credibility with its members.

[23] The request for reissuing the licenses was not processed by April 20, 2013. On May 1, Mr. MacLean wrote to DFO stating that Mr. Patriquin's two-year deadline had passed, and that NFA objected to DFO that the transfer was contrary to the Civil Agreement. He referenced his letter of April 29, 2013, in which he not only objected to the transfer on the basis that the deadline had passed, but also on the ground that Mr. Bigney was a new entrant; this, he said, would undermine the objective of "reducing the fishing effort in general." Barbara MacArthur of DFO subsequently informed Mr. Heighton that qualification as a new entrant was determined on the basis of DFO licensing policy and was totally separate from license reissuance. Mr. Patriquin points out that there was no reference to the ineligibility of new entrants under the Civil Agreement, by which the disposal of licenses (other than lobster) was within the fisherman's "sole discretion" (to use the phrase that appeared in the Notice and in the Letter of Intent).

[24] Mr. Bigney was approved for new entrant status in May 2013. On August 23, 2013, DFO wrote to Mr. Patriquin to inform him that there were no apparent "impediments to [Mr. Bigney] being reissued the Core Enterprise from Mr. Patriquin." DFO would, however, await an update on the case before dealing with the reissuance of licenses. By this time the interim injunction had been ordered.

**Issues**

[25] NFA seeks an injunction to prevent Mr. Patriquin from transferring his remaining licenses to a third party, and an order for specific performance requiring him to surrender his licenses and core enterprise status to DFO.

[26] In addition to the merits of the injunction itself, the respondent has raised certain objections to the validity and enforceability of the civil agreement. Mr. Patriquin says the civil agreement is void *ab initio* for want of consideration. If that is not the case, he says it is unenforceable by reason of unconscionability or *non est factum*. Failing that, he says, NFA has not proven that he breached the contract by failing to make the transfers within two years. If he did fail to meet the two-year requirement, he says this is mitigated by the Association's interference with DFO decision-making in respect of his proposed lobster license transfer.

**The availability of a permanent injunction**

[27] There is support for the proposition that a permanent injunction can be a remedy for breach of contract. In *Dalhousie University v. Aylward*, 2010 NSSC 65, [2010] N.S.J. No. 81, the plaintiff university and the defendant professor had negotiated a settlement of a human rights complaint arising from the professor's allegation of discrimination in not promoting her. The settlement agreement was confidential, but the defendant posted parts of it on the internet. Dalhousie commenced an action for breach of contract – specifically, breach of the confidentiality provisions of the settlement agreement – and requested a permanent injunction requiring the defendant to remove the confidential material from her web page. Kennedy C.J.S.C. granted summary judgment to the plaintiff. He granted a declaration that the defendant had "breached the settlement agreement and that the settlement agreement remains valid" (para. 114). He then considered the requested injunction:

> 117 Since the fusion of the jurisdictions of equity and law, either or both of damages and equitable relief are available in the same action in appropriate circumstances.
>
> 118 However, as Waddams (Waddams, *The Law of Contracts*, 5th ed. (Toronto: Ont., Canada Law Book) at p. 484, para. 665), notes:
>
> > The court has power to order contracts to be specifically performed and to grant injunctions restraining breaches of contract. In some systems of law specific enforcement is the primary remedy for breach of contract. In English law, however, and in the systems derived from it, these remedies have long been regarded as secondary. The primary remedy for breach of contract is said to be the award of monetary compensation, specific enforcement being available only when money compensation is inadequate.
>
> 119 Dalhousie has not engaged in any behaviour, such as *laches* or lack of clean hands that would disentitle it from seeking equitable relief from the Court.
>
> 120 Dalhousie is seeking an equitable remedy in the nature of specific performance because the substantial relief of damages is difficult to quantify and does nothing to protect Dalhousie's interest in enforcing the settlement agreement.
>
> 121 I determine that injunctive relief is available and that it can be accomplished herein to the benefit of Dalhousie without significant prejudice to Professor Aylward. It is the manifestly practical remedy in this instance.

> 122 I grant a permanent injunction requiring Professor Aylward to remove the terms of the settlement agreement from her Rebuttals filed in Complaint #2 and from her website.

[28] The Court of Appeal affirmed the Chief Justice's decision, without reference to the issue of remedy: 2011 NSCA 20.

[29] The applicant submits that the caselaw in Nova Scotia confirms that permanent injunctive relief is available, but that no specific test has been delineated. Accordingly, it relies on *Nalcor Energy v. NunatuKavut Community Council Inc.*, 2012 NLTD(G) 175, [2012] N.J. No. 398, where the Newfoundland and Labrador Supreme Court adopted the reasoning of the British Columbia Court of Appeal in *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396.

[30] *Nalcor* involved an application for an injunction restraining certain projects at a work site. Stack J. held (following *Cambie Surgeries*) that the well-known test for an interim injunction set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, did not govern an application for a permanent injunction. Rather, "[f]or a permanent injunction, there is a two prong test: first, has the applicant established its legal rights; and second, if so, is an injunction the appropriate remedy? (paras. 66-67). Stack J. described the first prong in the following terms:

> 68 As to the first prong of the test, at the permanent injunction stage we are no longer dealing with whether a serious issue to be tried has been established. That low threshold is sufficient to continue the inquiry where an interim injunction is sought. To make the injunction permanent, however, the applicant must prove its legal rights, usually following a trial, based upon a balance of probabilities -- the standard for establishing any civil entitlement in the courts. The permanence of the remedy sought requires a corresponding increased threshold of proof.

[31] As to the second prong of the analysis – whether a permanent injunction was an appropriate remedy – Stack J. noted that "the grant of a permanent injunction is an extraordinary discretionary remedy. It is, therefore, not a remedy that will be available to every party who has established a breach of legal rights" (para. 80). He discussed the relevant considerations:

> 83 … the first test of whether a permanent injunction is an appropriate remedy is whether there is an effective alternate remedy. Only where there

> is no effective alternate remedy will the evaluation of a permanent injunction as an appropriate remedy continue. Irreparable harm and the balance of convenience may then be evaluated because it is important that the extraordinary remedy of a permanent injunction not be disproportionate to the enjoined activity; in colloquial terms, the cure must not be worse than the disease. Both the degree of harm suffered by the applicant and the effects of the prohibition on each of the parties will assist in determining the issue of proportionality. There may be other factors that a court will want to consider in this regard in any given set of circumstances. But even in the absence of an effective alternate remedy, I would not think that the court would grant a permanent injunction without considering proportionality, and that it would be unlikely to do that without considering irreparable harm and the balance of convenience.
>
> 84 Following the applicant's establishment of legal rights there are, therefore, two steps to the exercise of the discretion to grant a permanent injunction. First: is an effective alternate remedy available? If one is, then the matter is at an end and the permanent injunction will not be granted. If, however, there is no effective alternative remedy, then the court must be satisfied that the remedy of a permanent injunction is proportionate to the behaviour being enjoined.

[32] Stack J. found that there was no alternative remedy available, and went on to consider proportionality, taking into account both irreparable harm and the balance of convenience.

## The injunction

### Is a legal right established?

[33] NFA submits that the elements of a contract – offer, acceptance, and consideration – are all present in its dealings with Mr. Patriquin. In response to a published invitation to treat, Mr. Patriquin delivered a letter of intent to NFA in which he offered to relinquish his lobster license and sign the Civil Agreement to surrender his "core card" (i.e. his core enterprise status) and remaining licenses after two years. In exchange, he received $199,998.00. His offer was accepted, and the contract (NFA says) was completed on April 20, 2011, subject to his core- and license-surrender obligations. He subsequently requested a transfer of his remaining licenses to Mr. Bigney on April 12, 2013, along with his core status. NFA maintains that the attempt to transfer his core status breached the contract.

#### *Consideration under the Civil Agreement*

[34] Mr. Patriquin argues that there were in fact two agreements, not one, and that there was no consideration flowing to him for entering into the Civil Agreement. He asserts that the $199,998.00 her received was a discounted value for his lobster license alone, and that there was no consideration for giving up his other licenses, or his core enterprise status.

[35] Mr. Patriquin denies that there was single contract between himself and NFA. Rather, he says, he executed one contract with DFO in two slightly differing versions (for the two offices concerned), plus the Civil Agreement with the NFA. He says the Civil Agreement had nothing to do with the contribution agreement between DFO and NFA, and that NFA provided no consideration for him entering into it. (I note that part of the arrangement between DFO and NFA involved the surrender of a number of traps by each fisherman in the area, thus furnishing part of the money which went to the fund that paid Mr. Patriquin for his lobster license.) The payment from DFO for surrendering the lobster license was (he says) "unrelated to the Civil Agreement." He refers to discovery evidence given by Ronald Heighton, the NFA president, to the effect that the contribution agreement with DFO was "restricted exclusively to lobster and did not address attempts to reduce fishing effort in other species." Mr. Heighton answered in the affirmative when asked whether the money received by Mr. Patriquin was for "the lobster license only…" He also agreed that Mr. Patriquin was "getting paid nothing" under the Civil Agreement.

[36] Mr. Patriquin relies on various pieces of evidence in support of his claim that he received no separate consideration for executing the Civil Agreement. There is no reference to the Civil Agreement in the Contribution Agreement between DFO and NFA. The Affidavit of Leroy MacEachern of DFO (December 13, 2013) indicates that funding was provided to organizations like NFA on the condition that they "match that funding and use the funds as set out in the Contribution Agreement." The notices of the buyout program did not invite the applicant "to include value for the surrender of core status or on the value of remaining licenses." The letter of intent stated simply that the fisherman was "willing to sell my lobster fishing license for the amount of $199,998." A similar statement appeared in Mr. MacLean's instructions accompanying the contract documents, and in the direct contract between Mr. Patriquin and DFO.

[37] Additionally, Mr. Patriquin points to evidence from Mr. Heighton indicating that the effect of the Civil Agreement was to bring about a financial benefit for members of the NFA (as well as other fishermen in the area). He notes that the NFA memorandum of association indicates that the organization's purpose is not financial gain for members; in addition, the terms of the DFO program under which the program originated referred to working with non-profit organizations.

[38] Despite NFA's non-profit status, Mr. Patriquin says, the practical effect of limiting his right to sell, assign or give away his remaining licenses to core status holders within his sub-zone was to "create a localized monopoly" for those licenses among NFA members who already held core status; this excluded Mr. Bigney. The result was that he had to transfer his licenses to one of that group, or be subject to a compelled surrender of the licenses, which would also benefit NFA members, by eliminating a competitor. This submission appears to be incorrect insofar as license transfer would not have been restricted to NFA members; he could transfer licenses to any fisherman who qualified under the relevant regulatory regime.

[39] Mr. Patriquin goes on to submit that the Civil Agreement was not collateral to the contract between himself and DFO by which he surrendered his lobster license. He says NFA was not a partner or agent of DFO, but only a local administrator of the DFO Lobster Buyout Program, with no authority to amend the main contract, or to impose conditions precedent to it. Nor was NFA a party to the contract between Mr. Patriquin and DFO.

[40] Accordingly, Mr. Patriquin takes the position that the Civil Agreement contradicted the terms of the Lobster Buyout Program, which had as its "sole objective … to support and sustain the lobster fishing industry, by means of license relinquishment." It was not (he submits) intended to force participating lobster fisherman "into compelled retirement without compensation" by requiring them to give up their other licenses as well as their core status.

[41] In summary, Mr. Patriquin says, there were two contracts, the lobster license buyout (to which the parties were himself and DFO) and the Civil Agreement (to which the parties were himself and NFA). His position is that there was no consideration for the Civil Agreement, and it is *void ab initio*.

[42] NFA says there was a single contract, to which DFO was not a party. None of the relevant documents – including the notices, the cover letter, the letter of intent form, and the Civil Agreement – suggested that the arrangement was with DFO. They were issued by NFA, under NFA letterhead.

[43] NFA submits that under the contribution agreement DFO was merely contributing funds to NFA's initiative. The recitals state, *inter alia*, that "the Recipient" (i.e. NFA) "wishes to undertake a Project with the objective of sustainability – sustainability of both the lobster resource and the fishing industry" in LFA 26A1. They go on to say that "DFO wishes to provide a contribution to the Recipient for the Project." NFA's position is that the Contribution Agreement left it "free to require other commitments from participants" in addition to retiring lobster licenses. It was clear from the evidence of Mr. MacEachern that DFO did not object to NFA's terms of the Civil Agreement.

[44] I conclude that NFA's position is correct. There was a single agreement, by which Mr. Patriquin was obliged to sign the DFO receipt and relinquishment form for his lobster license, surrender his core status after two years, and (also after two years) surrender any remaining non-lobster licenses. The latter two obligations were prerequisites to accessing the program. It is true that the DFO funding under the Contribution Agreement was targeted at reducing the number of lobster licenses. However, Mr. Patriquin has not pointed to any legal basis – such as some form of mistake – that would invalidate the overall agreement between himself and NFA. DFO took no position on the Civil Agreement, and nothing in that agreement is contrary to the contribution agreement between DFO and NFA. There was nothing to prevent NFA from imposing these additional requirements on willing participants in the lobster buyout program, and there was no concealment of these requirements from the fishermen who submitted bids or from those who ultimately had their lobster licenses bought out.

### *Unconscionability and inequality of bargaining power*

[45] Aside from the assertion that the Civil Agreement constituted a second agreement for which he received no consideration, Mr. Patriquin says the Civil Agreement is void for unconscionability.

[46] The law respecting unconscionability was considered by Hallett J. (as he then was) in *Stephenson v. Hilti (Canada) Ltd.* (1989), 93 N.S.R. (2d) 366 (S.C.T.D.). He cited the test described in *Harry v. Kreutziger* (1979), 95 D.L.R.(3d) 231 (B.C.C.A.), by which "the single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded" (*Stephenson* at para 11). Justice Hallett summarized the caselaw and stated, at para 12, that a transaction may be set aside as unconscionable when the evidence establishes the following:

> (1) That there is an inequality of bargaining position arising out of ignorance, need or distress of the weaker party;
>
> (2) The stronger party has unconscientiously used a position of power to achieve an advantage; and
>
> (3) The agreement reached is substantially unfair to the weaker party or, as expressed in the *Harry v. Kreutziger* case, it is sufficiently divergent from community standards of commercial morality that it should be set aside.

[47] Put more succinctly, Justice Hallett added, the question is whether the transaction is "so unconscionable that it requires the intervention of the court considering all the circumstances surrounding the making of the agreement" (para. 13). The Nova Scotia Court of Appeal has referred with approval to this analysis: see *Woods v. Hubley* (1995), 146 N.S.R.(2d) 97 (C.A.), at para. 25, per Chipman J.A. (dissenting in part, speaking for the majority on this issue); see also *Blackburn v. Eager*, 2002 NSCA 41, [2002] N.S.J. No. 147, at paras. 38-44.

[48] The Court of Appeal also considered unconscionability in *Atlas Supply Co. of Canada Ltd. v. Yarmouth Equipment Ltd.* (1991), 103 N.S.R.(2d) 1. In that case, Matthews J.A., for the majority, considered the issue of what constitutes unconscionable behaviour. He said:

> [65] The task of determining whether acts are unconscionable is at times difficult because the meaning of the word is far from precise. I suggest that it cannot be determined by recourse to a dictionary or precedents. Those can assist but they cannot precisely apply. The answer must be found within the particular facts of the case: the result will differ as do the facts.
>
> [66] As explained by Fridman in *The Law of Contract in Canada*, (2nd Ed. 1986), at p. 303, in a contractual setting there may be present features

> which encourage and entitle a court to apply equitable principles to intervene and grant rescission: those features are the ingredients of what might be termed "equitable fraud". It is not fraud in the classical, common-law sense, involving misrepresentations of the truth. Nor is there any improper application of pressure amounting to duress or its equitable analogue of undue influence. "Nonetheless, the conduct of one party in obtaining the assent of the other to a particular contract was of such a character that a court might well consider that to uphold the ensuing contract would be to perpetrate an injustice and produce an unfair result. A contract may be rescinded if the behaviour of one contracting party was unconscionable."
>
> [67] He continued at p. 304:
>
> > "Where a bargain is held to be unconscionable, it is not the consent of the victim that is impugned, but the reasonableness of the bargain, the conscientiousness of the other party, the equitable character of the transaction. In making such decisions, a court may be concerned with the internal state of mind of the party seeking rescission. But it is also concerned with external matters, the state of affairs surrounding the making of the contract, to the extent that such externalities operated on the mind of the party seeking rescission."
>
> [68] For our purposes his following comments (pp. 304-305) distinguishing unconscionability and undue influence are useful:
>
> > "Moreover a finding that there had not been undue influence does not preclude a decision in favour of a party who also alleges unconscionable conduct. In contrast with an attack upon consent, which is what is involved in a plea of undue influence, a plea that a bargain is unconscionable, or has been obtained by unconscionable means or methods, permits a court to invoke relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. Where such misuse of power is shown, it creates a presumption of fraud, in the equitable not common law sense. That presumption the stronger party must repel by proving that the bargain was fair, just and reasonable. The two doctrines are closely related. Indeed the latter is obviously an offshoot of the former. But they are distinct, even though their parentage is the same."

[49] Matthews J.A. went on to refer to a line of English and Canadian authorities, including *Lloyd's Bank v Bundy*, [1974] 3 All E.R. 757 (C.A.), where the following comments by Sachs L.J. appeared at 768:

> … It may in the particular circumstances entail that the person in whom confidence has been reposed should insist on independent advice being obtained or ensuring in one way or another that the person being asked to execute a document is not insufficiently informed of some factor which could affect his judgment. The duty has been well stated as being one to ensure that the person liable to be influenced has formed "an independent and *informed* judgment", or to use the phraseology of Lord Evershed MR in *Zamet v. Hyman*, "after full, free *and informed* thought"… [Emphasis in *Bundy*]

[50] Although *Bundy* was concerned with fiduciary relationships, Mathews J.A. considered this statement "applicable to a situation where there is an inequality of bargaining power due to one party not being informed of all of the relevant and pertinent information, keeping in mind all of the surrounding circumstances" (para. 74). He went on to cite the following passage from *Harry v. Kreutziger*, the case later cited by Hallett J. in *Hilti*:

> 15 From these authorities this rule emerges. Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When this has been shown a presumption of fraud is raised and the stronger must show, in order to preserve his bargain, that it was fair and reasonable.
>
> ….
>
> 19 … It is true … that appellant could have sought advice; he could have torn up the cheque; he could have refused to have any dealings with the respondent; but this will be true of almost any case where an unconscionable bargain is claimed. If the appellant had done these things, no problem would have arisen. The fact remains, however, he did not, and in my view of the evidence it was because he was overborne by the respondent because of the inequality in their positions and the principles of the cases cited apply.

[51] Mr. Patriquin says there were material misrepresentations by NFA, as well as abuse of its position as administrator of the Lobster Buyout Program. Broadly speaking, he asserts that NFA provided "no forewarning" that its proposal was "more than a Lobster License Buyout; that it was also going to include an undisclosed Civil Agreement that compelled retirement without compensation" (respondent's brief at para 61). He notes that non-members of NFA, like himself, were not permitted to attend the NFA meetings where the program was discussed. He points to Mr. Heighton's confirmation in his

discovery evidence that, although NFA was administering the program on behalf of DFO, the interests of non-members of NFA were not considered. One reason for this was that some of them, such as Mr. Patriquin, were members of the Maritime Fishermen's Union, a competing organization.

[52] Mr. Patriquin also submits that the early notices of the lobster license buyout gave "no forewarning of alleged 'dignified retirement' without compensation, or surrender of core cards or core concept or core enterprise." He adds that the Civil Agreement was not attached to the notices, leaving "the reasonable impression to a bidder that the Civil Agreement would be properly explained 'at the lawyer's office'."

[53] I cannot accept that Mr. Patriquin's allegations of non-disclosure and misrepresentation make out inequality of bargaining power or misuse of NFA's influence so as to render the bargain struck in April 2011 potentially unconscionable. As such, the question of substantial unfairness does not arise. The notices describing the buyout program, the application documents, and the documents Mr. Patriquin ultimately signed at Mr. MacLean's office all plainly disclose that the prerequisite to a buyout of the lobster license was the agreement to transfer or surrender his other licenses over the next two years, and to surrender his core status at the end of that time. Despite his inability to read the documents, there is no suggestion that Mr. Patriquin did not know what was in them. Moreover, he did not seek legal advice as to the effect of these conditions on his plan to remain in the fishery. His evidence was that his wife read documents to him (though he did not confirm that she had read every relevant passage to him). The claim that the ultimate result of the program was a form of forced retirement is a gloss placed on it by counsel; it would have been apparent, however, from the terms of the Civil Agreement that leaving the fishery at the end of two years was a potential outcome. This in itself does not render the agreement unconscionable.

***Lack of independent legal advice***

[54] As a further aspect of unconscionability, Mr. Patriquin argues that the lawyer designated by NFA to process his buyout, Ian MacLean, failed to act in accordance with the applicable practice standards respecting conflict of interest and provision of independent legal advice. He maintains that he was "entitled to expect that a not-for-profit society like NFA would be providing

free legal services to bidders like Patriquin, as part of the package NFA was administering on behalf of LFA 26A lobster fishers."

[55] The test for independent legal advice is found in *Gold v. Rosenberg*, [1997] 3 S.C.R. 767, where Sopinka J. said, for the majority, at para. 85:

> … Whether or not someone requires independent legal advice will depend on two principal concerns: whether they understand what is proposed to them and whether they are free to decide according to their own will. The first is a function of information and intellect, while the second will depend, among other things, on whether there is undue influence…

[56] The relationship of lack of independent legal advice and unconscionability was discussed in *Wilson v. BMO Nesbitt Burns Inc.*, 2011 NSSC 373, [2011] N.S.J. No. 549, where MacAdam J. said, "the mere lack of independent legal advice does not render a contract unconscionable. As noted by Oland J.A. [in *Bank of Montréal v. Courtney*, 2005 NSCA 153, at para. 37] it requires determining whether the person understood what was being proposed to them and whether they were free to decide according to their own will" (para. 42).

[57] The Alberta Court of Queen's Bench elaborated on this issue in *Cope v. Hill*, 2005 ABQB 625, [2005] A.J. No. 1413, affirmed at 2007 ABCA 32, application for leave to appeal dismissed at [2007] S.C.C.A. No. 138:

> 208 The function of independent legal advice is to remove a taint. A lack of independent legal advice does not in itself invalidate a transaction. In *Corbeil v. Bebris* (1993), 141 A.R. 215 at para. 13 (C.A.), the Court, *per* Kerans J.A., ruled:
>
> > [N]o rule in equity or contract invalidates an agreement simply on account of a lack of independent legal advice. The function of the advice, in that context, is to remove a [taint] that, left unremoved, might, according to contract or equity law, invalidate the contract. Judges cannot therefore simply say that an agreement is unenforceable for lack of independent legal advice. At the very least, they must first find a taint.
>
> 209 The nature and circumstances of a situation will dictate what constitutes adequate independent legal advice for purposes of that situation...
>
> 210 The case law identifies two types of independent legal advice:
>
> (a) advice as to understanding and voluntariness; and

> (b) advice as to the merits of a transaction.
>
> The two types may overlap such that advice as to understanding the nature and consequences of a transaction may well constitute, at least in part, advice as to the merits of the transaction.

[58] Mr. Patriquin asserts that Mr. MacLean did not provide him with sufficient information to allow him to exercise his free will. He was not informed that the Civil Agreement was "a separate creation of NFA that penalized him in ways that other fishers on the Northumberland Strait, under the same federal Program, were not penalized." More seriously, he says, Mr. MacLean failed to "explain the scope and consequences of the Civil Agreement itself…" In fact, he points out, Mr. MacLean's correspondence with him indicates that the lawyer himself did not understand the document that he had drafted. Thus, on April 21, 2011, Mr. MacLean himself sought advice from DFO respecting the administration of the Civil Agreement.

[59] The respondent's theory is that Mr. MacLean was his lawyer, and that Mr. MacLean disregarded the usual precautions respecting informed consent and conflict of interest. Mr. Patriquin says he relied on Mr. MacLean "to represent his interests fairly and simultaneously with NFA" and Mr. MacLean failed to do so. Mr. Patriquin's evidence is that he has a grade 3 education and is illiterate. As such, he says, he trusted Mr. MacLean, whom he viewed as his lawyer, to protect his interests and ensure that he understood what he was signing. Mr. MacLean, he submits, should have either insisted that he get independent advice, or explained each provision of the documents he was signing. He says NFA's failure to require Mr. MacLean to do so, given the non-profit nature of the organization "and its fiduciary obligations to its members and all bidders" is sufficient basis "to attract irreversible taint and unconscionability."

[60] Without endorsing every aspect of Mr. MacLean's handling of the matter, there is no indication that he held himself out as Mr. Patriquin's own lawyer, nor was it reasonable in the circumstances for Mr. Patriquin to assume that this was the case. While I acknowledge that Mr. MacLean had done work for him in the past, it is also the case that Mr. Patriquin knew that he was processing the program on behalf of NFA. I cannot accept that Mr. Patriquin's apparent passivity during this process gives rise to unconscionability; there is no suggestion that he was tricked by NFA or that his will was overborne by Mr. MacLean in respect of the content of the Civil

Agreement. Nor was there any evidence that Mr. Patriquin informed Mr. MacLean of his intention to re-enter the lobster fishery, or of his particular circumstances – that is, that he intended to leave the fishery temporarily during his wife's illness.

[61] There is no analysis provided in support of the bald assertion that NFA owed Mr. Patriquin a fiduciary duty, and I am satisfied that there was no such duty.

[62] There was a good deal of evidence of intervention by NFA into DFO's procedures, with resulting impacts upon Mr. Patriquin. For instance, it is clear that NFA – along with other fishermen's organizations – lobbied DFO for restrictions on lobster license transfers, with repercussions for Mr. Patriquin's attempt to obtain the Langille license. As for the intervention in respect of the attempted transfer to Mr. Bigney, this appears to have reminded DFO officials of regulatory restrictions and of Mr. Patriquin's obligations under the Civil Agreement. The question of the transfer of the lobster license is concluded. I am not satisfied that NFA's conduct resulted in any actual impropriety in respect of the failure to transfer Mr. Patriquin's remaining licenses. That said, I am less than impressed with NFA's conduct in relation to Mr. Patriquin's attempt to obtain the Langille license. There is, of course, no issue before me of any potential liability of NFA (or DFO, for that matter) arising out of what appears to have been a serious collective mishandling of the program. Arguably, while NFA was within its strict rights to lobby DFO as it did, this behaviour was contrary to the spirit of the arrangement as it would have been understood by Mr. Patriquin.

[63] Accordingly, I reject the claim that the agreement was unconscionable on the basis of lack of independent legal advice.

***Non est factum***

[64] In the alternative, Mr. Patriquin raises the doctrine of *non est factum*.

[65] In *Castle Building Centres Group Ltd. v. Da Ros* (1990), 95 N.S.R. (2d) 24 (S.C.T.D.), affirmed at 97 NSR (2d) 270 (S.C.A.D.), Glube C.J. (as she then was) outlined the three elements for the defence of *non est factum*, at para. 31:

> 1. The burden of proving *non est factum* rests with the party seeking to disown their signature. (*Saunders v. Anglia Building Society*, [1970] 3 All E.R. 961 (H.L.)). It is a heavy onus when the person is of full capacity.
>
> 2. The person who seeks to invoke the remedy must show that the document signed is radically or fundamentally different from what the person believed he was signing. (*Saunders v. Anglia, supra* and *Marvco Color Research Limited v. Harris and Harris* (1982), 45 N.R. 302; 141 D.L.R.(3d) 577 (S.C.C.))
>
> 3. Even if the person is successful in showing a radical or fundamental difference, the person raising the plea of *non est factum* must not be careless in taking reasonable measures to inform himself when signing the document as to the contents and effect of the document. (*Saunders, supra*, *Marvco, supra* and *Dwinell v. Custom Motors Limited* (1975), 12 N.S.R.(2d) 524; 6 A.P.R. 524 (C.A.))

[66] These elements were reaffirmed by the Court of Appeal in *Chender v. Lewaskewicz*, 2007 NSCA 108, [2007] NSJ No 463, at para 54.

[67] The defence of *non est factum* was historically available to individuals who were blind or illiterate because they were unable to personally read the disputed contract. However, in *Saunders v. Anglia Building Society*, [1970] A.C. 1004, 3 All ER 961 (H.L.), the House of Lords made this defence available to a larger class of people, but also indicated that it would rarely be available to a person of full capacity. This approach was followed by the Supreme Court of Canada in *Marvco Color Research Limited v. Harris*, [1982] 2 SCR 774, where the court adopted *Saunders* and held that it is necessary for the defendant to "be not guilty of carelessness in order to be entitled to raise the defence of *non est factum*" (782-786).

[68] Mr. Patriquin's defence of *non est factum* is bound up with his inability to read. Illiteracy may go to the first element of the *non est factum* defence, in particular in determining the person's capacity, which may ultimately alleviate the heavy onus. However, other factors may indicate that an illiterate individual is of full capacity. In *Coombs v. Canada (Attorney General)*, 2012 NLTD(G) 84, [2012] N.J. No. 175, the court held that functional illiteracy "does not necessarily mean a lack of capacity to enter into a contract or an inability to understand the terms of the contract" (para. 31). In that case, a widow of a fisherman, who agreed to retire his fishing license under a federal government program, sought unsuccessfully to have the contract set aside on the basis of *non est factum*. The court found no

evidence that the husband "lacked intelligence or the capacity to understand and enter into contracts" (para 31). Similarly, I find no evidence that Mr. Patriquin was not of full capacity when he agreed to the terms of the buyout program and signed the Civil Agreement.

[69] The second element from *Castle* requires the person who seeks to invoke the remedy to "show that the document signed is radically or fundamentally different from what the person believed he was signing". The language used by Glube C.J. is fairly broad and reflects the flexible test suggested by the decisions of the House of Lords and Supreme Court of Canada. The test requires an analysis of whether the contract was fundamentally, totally, or radically different "either as to content, character or otherwise from the document the signor intended to execute": *Marvco* at 784.

[70] NFA says this second element – and the defence of *non est factum* generally – does not apply to mistakes concerning legal consequences. It cites Fridman's *Law of Contract in Canada*, which references cases where mistakes did not go to the nature of the document, but to its contents or its legal consequences, neither of which were sufficient under the *Saunders* analysis. This suggests that *non est factum* only applies to mistakes concerning the nature of the document, not its contents or legal consequences. However, in *Marvco*, Estey J. rejected such a strict distinction, stating, at 784:

> … Prior to [*Saunders*] the plea of *non est factum* was available only if the mistake was as to the very nature or character of the transaction. It was not sufficient that there be a mistake as to the contents of the document... This distinction was rejected by the House of Lords in favour of a more flexible test. In the words of Lord Pearson (at p. 1039): "In my opinion, one has to use a more general phrase, such as 'fundamentally different" or 'radically different' or 'totally different'." Lord Wilberforce at pp. 1026-27 concluded that the principle would come into play on "rare occasions".

[71] As such, it appears that a mistake as to the document's contents may support a defence of *non est factum*. Further, the law before *Saunders* applied *non est factum* to misconceptions about the intended legal effect of the document. This view may not have been specifically overruled, but the courts have adopted a flexible test.

[72] In any event, the evidence does not satisfy me that the buyout program and the Civil Agreement were "radically or fundamentally different" from what Mr. Patriquin believed he was signing on to. His obligations under the Civil Agreement were clear on the face of the documents, and even if I accept that he was mistaken about certain legal implications of the arrangement, he did not seek legal advice, but merely assumed that what he intended to do could be done, even if it contradicted the language of the Civil Agreement.

[73] As to the third element of *Castle*, the Supreme Court of Canada held in *Marvco* that a party attempting to void a contract on the basis of *non est factum* must establish they were not negligent or careless. In that case, a rogue third party deceived the defendants into signing a contract with the plaintiff. The defendants did not read the contract and the plaintiff was not involved in the deception. The plaintiff attempted to enforce the contract. The court held that the defendants were unable to rely on *non est factum*, as they were careless in not reading the contract before signing it. The court was motivated by the plaintiff's innocence and the "recognition of the need for certainty and security in commerce" (*Marvco* at 786).

[74] An individual's illiteracy may be a factor in determining whether he was "careless in taking reasonable measures to inform himself when signing the document as to the contents and effect of the document" (*Castle* at para. 31). The authors of one textbook observe that one can "imagine cases where a person who cannot read or who does not understand English nevertheless requests an explanation of the document that he or she is being asked to sign. If the explanation is misleading and the document is 'fundamentally different' or 'radically different'… the document may be held to be void on the basis of *non est factum*": Angela Swan and Jakub Adamski, *Canadian Contract Law*, 3d edn. (Markham, Ont.: LexisNexis Canada Inc, 2012) at 800. By this reasoning, an illiterate individual who takes reasonable steps to understand the document, but is given misleading information, is not careless.

[75] In some cases, courts have rejected an illiterate individual's defence of *non est factum* when they failed to take reasonable steps to inform themselves about the contract. In *Canadian Bank of Commerce v. Dembeck*, [1929] 4 D.L.R. 220, [1929] S.J. No. 37 (Sask. C.A.), MacKenzie J.A. said, for the majority, at para. 33:

> … It was not enough for the defendant to prove, as the trial Judge finds, that he could not read English sufficiently to enable him to understand the guarantee, even though from this it be assumed that the trial Judge intended to find him illiterate; he should have gone farther, and shown that the manager in some way took advantage of his educational deficiency, in order to deceive or mislead him as to what he was signing…

[76] While this decision relied on older English authorities, it is consistent with the test in *Castle*. In *Coleman v. Bishop* (1991), 103 N.S.R. (2d) 265 (S.C.T.D.), Roscoe J. (as she then was) held that a functionally illiterate individual's *non est factum* claim could not succeed because he was "obviously negligent in failing to obtain legal counsel and in failing to have the final release explained fully before signing it" (para. 19). The individual had failed to meet the requirements of the third element of the *Castle* test.

[77] Mr. Patriquin suggests that the basis for his plea of *non est factum* is not limited to his inability to read. It seems that he is asserting that his inability to read the contract is relevant to the question of whether he was careless as to the contents and effect of the document. He asserts that NFA failed to inform him of the true purpose of the Civil Agreement and that Mr. MacLean neither encouraged nor invited him to ask about the content of the documents. I cannot accept this view; having found no lack of capacity, I see nothing else in the circumstances that would excuse him from the need to avoid carelessness. Hs assertion that the novel facts in the present case dissipate any duty of care on his part is not supported by any legal authority. He bears the burden of establishing *non est factum*, including proving that he was not careless.

[78] In the event that Mr. MacLean improperly "wore two hats", I am not satisfied that this excuses the respondent from any duty to ask questions if he did not understand the documents. I note that (as repeatedly pointed out by Mr. Patriquin's counsel), Mr. MacLean's own correspondence indicated that the lawyer himself said he did not fully understand the Civil Agreement.

[79] Accordingly, I find that Mr. Patriquin has not established a defence of *non est factum* in respect of the Civil Agreement.

***Is a legal right established?***

[80] The result of the rejections of Mr. Patriquin's various objections to the validity and enforceability of the Civil Agreement is that NFA has

established the existence of a legal right to the extent that Mr. Patriquin is bound by the Civil Agreement. It remains to be determined whether NFA has established that a permanent injunction is an appropriate remedy.

[81] The effect of such an injunction would be to prevent Mr. Patriquin from transferring his core status and his non-lobster licenses contrary to the Civil Agreement.

**Is a permanent injunction an appropriate remedy?**

**(1) Is there an effective alternative remedy?**

[82] In requesting a permanent injunction, NFA submits that there is no effective alternative remedy. It says there is no way to quantify damages, since "there is no way to quantify the monetary effect of Patriquin transferring his remaining licenses to Bigney and failing to relinquish his core status." Such a transfer, it is claimed, would affect long-term sustainability and conservation measures, as well as "the economic prosperity of the remaining fishermen contrary to the intention of the Atlantic Lobster Sustainability Measures program and the Lobster License Buyout Program as implemented in the Area." Further, NFA says, other participants in the buyout program have surrendered their core status in accordance with the Civil Agreement, and if Mr. Patriquin is permitted to transfer his to a new entrant, "the remaining fishermen in the area will have relinquished a substantial number of their traps without obtaining the modest benefit of a reduction in the number of active fish harvesters." Moreover, NFA would (it is alleged) suffer a loss of reputation, and Mr. Patriquin would receive a windfall.

[83] Mr. Patriquin says NFA never sought to negotiate a reasonable alternative remedy. Rather, he says, the Association focused on intervening with DFO in order to unfairly disadvantage him. He points to discovery evidence from Mr. Heighton indicating that the NFA leadership did not know, when it acted to prevent the transfer, whether he was actually required to surrender his core status. If that was the case, he says, it is not reasonable to claim that he should have understood this himself. Moreover, he says, Mr. Heighton agreed on discovery that he did not take legal advice as to whether NFA had discretion to abridge the two-year time period. Mr. Patriquin's request for an extension was thus rejected on the basis that "time was of the essence," which he says was untrue.

[84] In response to Mr. Patriquin's claim that it never sought an alternative remedy, NFA says, firstly, that damages – the typical alternative to an injunction – could not be calculated and would not be sufficient. Secondly, NFA says, there was urgency due to the possibility that DFO would allow the reissue of Mr. Patriquin's licenses to Mr. Bigney.

[85] I am satisfied that damages would not be an appropriate alternative remedy in this case. Further, Mr. Patriquin has not pointed to any plausible additional alternative remedies. I note that his own position is that the contract was void *ab initio*; the result of such a finding would be that the Civil Agreement would be unenforceable by either party (see, e.g., G.H.L. Fridman, *The Law of Contract in Canada*, 6th edn. (Toronto: Carswell, 2011), at 406-410. This would presumably mean that Mr. Patriquin could not retain the payment he received for his lobster license, and, to complicate matters. It was represented to the court by counsel for NFA that NFA was open to a resolution whereby Mr. Patriquin would return the money and have his lobster license restored; counsel for Mr. Patriquin objected to such a suggestion being raised in argument, and I am satisfied it is not a matter properly before the court in this proceeding. I see no method by which the court can direct that the license be reissued or otherwise reinstated. Such an action could only be taken by DFO, which is not a party to this proceeding. As such, I make no comment on the merits of any such arrangement. I also make no comment on any potential additional issues or causes of action that have not been raised.

[86] Accordingly, I conclude that there is no adequate alternative remedy available.

**(2) Is a permanent injunction appropriate in the circumstances?**

[87] NFA says a permanent injunction is appropriate. With respect to irreparable harm, NFA essentially relies on the same argument which underlies its claim that there is no effective alternative remedy. Permitting the transfer of Mr. Patriquin's core status to Mr. Bigney, it is alleged, would result in irreparable harm to local fishermen due to "an increase in the fishing effort in their Area beyond the amount contemplated by the terms of the contract, which will produce a financial effect on the remaining fishermen, an impact on fish stocks, and damage to the reputation of the Association and to future programs." While I am of the view that the alleged

irreparable harm is more nebulous than that described by NFA, I accept that irreparable harm to some degree would result if Mr. Patriquin is not held to the terms of the Civil Agreement. It should be noted, as well, that the Civil Agreement included an acknowledgement by Mr. Patriquin that "the remaining core card holders will suffer irreparable harm if the Fisherman breaches the terms of this Contract."

[88] NFA claims that the balance of convenience favours the granting of a permanent injunction. It says the injunction will not impose substantial hardship on Mr. Patriquin, but will only require him to comply with the terms of the buyout agreement. However, if the injunction is not granted, NFA and its members will not receive "a substantial part of the consideration" for which they contracted, and will suffer the harm discussed above. As with the claim of irreparable harm, I do not find this to be a particularly strong argument. I acknowledge, however, that denying Mr. Patriquin the ability to make the transfer would effectively do nothing more than bind him to the terms he agreed to.

[89] Mr. Patriquin says NFA lacks the "clean hands" required to claim an equitable remedy. The evidence shows that Mr. Heighton and NFA were lobbying DFO against his interests without his knowledge. I have not found that NFA's lobbying efforts led to actual impropriety. It should be noted that the regulatory decision-maker was DFO and nothing in the Civil Agreement suggests that the parties' obligations would not be subject to whatever regulatory regime was in place at the relevant time.

[90] The essence of the injunction is to prevent Mr. Patriquin from taking an action that would violate the terms of the Civil Agreement. In all the circumstances, I conclude that it would be appropriate for the court to exercise its discretion and order the injunction as requested, enjoining Mr. Patriquin from transferring his remaining licenses.

**Specific performance**

[91] In addition to a permanent injunction, NFA also seeks to amend its Notice pursuant to Rule 83.03 to include the remedy of specific performance. Mr. Patriquin does not oppose the amendment, and I hereby grant it.

[92] NFA maintains that the requirements for specific performance are similar to those for a permanent injunction: the existence of a contract between the parties, damages not being an appropriate remedy for the breach, and that the remedy will not cause undue hardship: see *Halsbury's Laws of Canada – Equitable Remedies* at §§HER 29 and 33. *Halsbury's* makes the following comment, at §HER 37:

> In general, an application for an injunction is the appropriate way to restrain a defendant from breaching a negative contractual covenant or interfering with the plaintiff's exercise of contractual rights. In contrast, specific performance is the appropriate way to compel a defendant to perform a positive obligation under a contract. A court may issue an injunction where specific performance of a covenant is not a proper remedy, such as a covenant for personal service. A court may also grant an interlocutory injunction in aid of specific performance; for example, to prevent removal of a contract's subject-matter from the jurisdiction pending trial.

[93] Applying the same considerations as I found relevant to the injunction, am satisfied that it is appropriate here to exercise the court's discretion and order specific performance, requiring Mr. Patriquin to perform his obligations under the Civil Agreement.

**Conclusion**

[94] Accordingly, for the foregoing reasons, the injunction and the order for specific performance are granted as requested by NFA.

[95] The parties may provide submissions on costs within one month of this decision.

LeBlanc J.