Federal Court  Cour fédérale

Date: 20240724

Docket: T-511-24

Citation: 2024 FC 1163

Ottawa, Ontario, July 24, 2024

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

THE JEWISH COMMUNITY COUNCIL OF MONTREAL, KASHRUTH COUNCIL OF CANADA, RABBI ABRAHAM BANON, 4412532 CANADA INC. (D/B/A KOSHER MEHADRIN), and 1458935 ONTARIO LTD. (D/B/A SHEFA MEATS)

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicants, Jewish Community Council of Montreal [MK], Kashruth Council of Canada [COR], Rabbi Abraham Banon, 4412532 Canada Inc [Mehadrin] and 1458935 Ontario Ltd [Shefa], seek interlocutory injunctive relief from the application by the Canadian Food

Inspection Agency [CFIA] of a requirement imposed by the CFIA's *Guidelines for ritual slaughter of food animals without pre-slaughter stunning* [Guidelines] to licence holders of slaughterhouses [licence holders] in their production of kosher meat. The Guidelines require licence holders to confirm that a food animal is unconscious before the suspension of the animal and continuation of the process, by testing three (3) indicator signs to assess whether the animal is unconscious, which are: a) absence of rhythmic breathing (2 or more regular rib movements in and out); b) absence of palpebral reflex (after 3 consecutive negative results, 20 seconds apart); and c) absence of corneal reflex (after 3 consecutive negative results, 20 seconds apart) [three indicators of unconsciousness].

[2] The Applicants claim that the enforcement of the Guidelines have had a devastating impact on the supply of kosher meat in Canada and are depriving Canadian Jews of an important tenet of their faith. The Applicants claim that sections 143 and 144 of the *Safe Food for Canadians Regulations*, SOR/2018-108 [SFCR] and the Guidelines are unreasonable or *ultra vires*, and infringe their right to freedom or religion under subsection 2(a) of the *Canadian Charter of Rights and Freedoms* s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], and are discriminatory under section 15 of the *Charter*.

[3] The injunction will be granted. There are serious issues as to whether the CFIA's Guidelines are unreasonable and whether they encroach on the Applicants' rights to freedom of religion under subsection 2(a) and right to equality under section 15 of the *Charter*. The evidence, as presented, demonstrates a potential for irreparable harm that cannot be adequately

compensated with damages. Finally, in the circumstances, the balance of convenience favours the issuance of injunctive relief, given that compliance with section 143 of the SFCR and the necessity to ensure that food animals must be unconscious before suspension may be ensured without the use of the three indicators of unconsciousness now mandated by the Guidelines, by continuing the practice that has existed for many years before the adoption of the Guidelines.

II. Background Facts

[4] The Applicant MK is a not-for-profit organization created to facilitate the maintenance of Jewish traditional life in Montreal. Its activities include the supervision and certification of meat as kosher. Its “MK” symbol on product labels, including meat, signifies that the product is kosher.

[5] The Applicant COR is a not-for-profit, charitable organization that is responsible for the certification of kosher meat production and numerous other products. The “COR” symbol is found on the labels of many kosher food products.

[6] The Applicant Mehadrin is the largest kosher meat distributor in Canada. It also imports into Canada kosher meat from Mexico and Argentina to be sold to Canadian customers, and exports kosher meat produced in Canada to the United States of America.

[7] The Applicant Shefa is another significant kosher meat distributor in Canada.

[8] It is not disputed that together, Mehadrin and Shefa procure and distribute all of the kosher meat from Canadian licenced slaughterhouses, with Mehadrin having approximately 75% of the market for such distribution and Shefa having the remainder.

[9] The Applicant, Rabbi Abraham Banon, is a *shochet* and *bodek*, and an employee of MK who has received intensive practical training and religious certification on how to slaughter animals humanely according to the Jewish religious law, and how to determine whether a slaughtered animal may be certified for consumption as kosher. Because of the reduction in kosher meat production at the licenced slaughterhouses, demand for Rabbi Banon's services has been reduced. Rabbi Banon's (and other *shochetim*'s and *bodkim*'s) capacity to perform the religious act for which he dedicated many years of training and of practice, as well as his livelihood, is impacted by the Guidelines.

[10] The rules of *Kashrut*, in respect of religiously prescribed dietary laws, are the keystones of Jewish practice. These laws include restrictions on the species of animals that may be eaten and the manner of slaughter of the animals, and also mandate inspections of internal organs for certain anomalies before an animal is considered fit for consumption, and certified as kosher.

[11] In the Jewish faith, slaughter must be conducted through one continuous, fluid cut with a knife resulting in the rapid, simultaneous and complete severance of the animal's trachea, esophagus, carotid arteries, and jugular veins, leading to immediate massive blood loss. That slaughter process is known as *shechita*, which is a central element of Jewish religious practice. That process, which includes other steps such as the examination of the organs of the animal, is

required for the meat to be certified for consumption as kosher. *Shechita* is performed by highly trained professionals known as *shochetim* and *bodkim*.

[12] The manner of slaughter is impugned in this case.

[13] The *Safe Food for Canadians Act*, SC 2012, c 24 [SFCA] and, more precisely, the SFCR, regulate food animal slaughter in Canada. Section 128 of the SFCR requires licence holders to handle food animals in a manner that does not cause avoidable suffering, injury or death.

[14] Section 141 of the SFCR requires that, before bleeding a food animal and continuing the slaughter process, a licence holder must render the animal unconscious in a manner that prevents it from regaining consciousness before death or slaughter. A licence holder may do so by using a method listed in section 141, such as stunning by delivering a blow to the head of the food animal with a mechanical device called a "captive bolt" in a manner that causes immediate loss of consciousness, if the process is conducted appropriately. That process is known as the "conventional slaughter." *Shechita* is not one of the methods listed under section 141.

[15] Section 144 of the SFCR provides specific additional methods to those listed under section 141, in cases where a licence holder ritually slaughters the food animal to comply with Judaic or Islamic law. *Shechita* is therefore specifically permitted under section 144 of the SFCR. Section 144 requires that the slaughter through the process of *shechita* must cause the animal to bleed immediately, rapidly, and completely, to render it unconscious in a manner that prevents it from regaining consciousness before death.

[16] Section 143 of the SFCR prohibits the suspension of an animal on the slaughter line before it is rendered unconscious. Suspension of animals typically involves lifting and hanging an animal upside down by one leg to facilitate subsequent slaughter steps. The prohibition under section 143 of the SFCR to suspend an animal on the slaughter line before it is rendered unconscious applies both to conventional slaughter under section 141, and to ritual slaughter under section 144 of the SFCR.

[17] Once the animal has been rendered unconscious and suspended, the slaughter process comprises the following stages: bleeding, dressing (which entails removal of the skin, head, developed mammary glands and feet), evisceration, and splitting.

[18] Prior to 2019, the SFCR's predecessor, the *Meat Inspection Regulations*, 1990, SOR/90-288, contained requirements similar to the SFCR for the humane treatment of food animals and listed similar conditions in which ritual slaughter could be performed. As currently applicable under sections 143 and 144 of the SFCR, ritual slaughter was allowed under the former regulations, and a food animal could not be suspended prior to it being rendered unconscious (see sections 77 and 78 of the *Meat Inspection Regulations*; see also the Affidavit of Dr. Appelt, at paras 29–33, Respondent's Record, at pages 2201–2203.). *Shechita* was therefore allowed prior to the enactment of the SFCR, but the three indicators of unconsciousness now required under the Guidelines were not imposed to ensure that a food animal was unconscious before suspension.

[19] The issue in this case is that for the production of kosher meat, the food animals are not stunned by a forceful strike to the head from a captive bolt gun, prior to or after *shechita,* as is the case for conventional slaughter. The forceful strike to the head, in the case of conventional slaughter, renders the food animal unconscious when performed correctly, allowing the licence holders to suspend the animal almost immediately to continue the process.

[20] However, for kosher meat, the food animal is not stunned prior to *shechita*. As is the case for conventional slaughter, a licence holder must still ensure that a food animal is unconscious before it is suspended when conducting a ritual slaughter, as required under section 143 of the SFCR. In order to ensure that the food animal is unconscious prior to its suspension in the case of kosher slaughter, the Guidelines now require the licence holders to go through a series of measures, including applying the three indicators of unconsciousness.

[21] Prior to the adoption of the Guidelines, the three indicators of unconsciousness were not mandated, and licence holders were allowed to ensure that food animals were unconscious before suspension through the use of other indicators. The new measures mandated under the Guidelines are not required to the same extent for conventional slaughter, because the forceful strike to the head from a captive bolt gun renders the animal unconscious in most cases.

[22] The Guidelines are a result of a scientific literature review, performed by the CFIA following compliance issues in 2017 in the performance of ritual slaughter at a specific slaughterhouse [Establishment C]. During inspections, CFIA inspectors observed consistent signs of sensibility in animals following their suspension on the slaughter line, including

rhythmic breathing, righting reflex, stiff neck and curled tongue. This scientific literature review led to the adoption of the Guidelines (Affidavit of L-P Vaillancourt, at paras 68–74, Respondent's Record, at pages 15–16; Affidavit of Dr. Appelt, at paras 34–42, Respondent's Record, at pages 2203–2205).

[23] The SFCR also came into force on January 15, 2019. The SFCR have not changed the requirement now existing under section 143 of the SFCR that a food animal must be unconscious before suspension. That requirement existed before. However, the CFIA also published the Guidelines, setting out the norms to be followed by licence holders in their application of section 143 of the SFCR. Contrary to conventional slaughter, as stated, the Guidelines require from licence holders performing ritual slaughter to ensure that food animals are unconscious by verifying physical indicators, including the three indicators of unconsciousness that are: a) absence of rhythmic breathing (2 or more regular rib movements in and out); b) absence of palpebral reflex (requiring 3 consecutive negative results, 20 seconds apart); and c) absence of corneal reflex (requiring 3 consecutive negative results, 20 seconds apart). The Guidelines are not incorporated by reference in the SFCR or in any other regulations administered by the CFIA.

[24] The Applicants submit that the three indicators of unconsciousness test the presence of reflexes that are controlled by the brain stem and are present even in unconscious animals incapable of feeling pain. The Applicants therefore argue that the three indicators of unconsciousness are misplaced because they do not demonstrate that an animal is unconscious, as required under section 143 of the SCFR, but rather that the animal is dead.

[25] Between 2019 and 2023, the CFIA did not strictly implement the use of the three indicators of unconsciousness required under the Guidelines, and instead promoted their use as best practices, informing the licence holders that eventually, the Guidelines would become mandatory. In 2023, the CFIA announced to licence holders performing *shechita* that they would be required to conform with the Guidelines by the end of May 2023. Beginning in June 2023, the CFIA started to enforce the Guidelines at all the slaughterhouses that were then doing kosher slaughter.

[26] According to the Applicants, the new requirements mandated by the Guidelines represent a departure from prior practice resulting in a reduction in efficiency of the operation of kosher slaughter to the point that some licence holders have now ceased to produce kosher meat. The Guidelines have added a few minutes to the time needed to process every animal, slowing the production to the extent that licence holders prefer to put an end to *shechita* and the production of kosher meat.

[27] The Applicants argue that the number of slaughterhouses producing kosher meat in Canada has been reduced to three because of the closure of several plants, resulting in a reduction of the total volume of kosher beef produced by 55%, and the volume of kosher veal by 90% (Affidavit of S. Rosenfeld, at paras 31–33, 54, 77, Applicant's Record, at pages 5136, 5139, 5143). The restriction on access to kosher meat therefore prevents Canadian Jews from exercising the requirements of their faith, which unjustifiably violates their freedom of religion and their right to equality enshrined in the *Charter*.

[28] It also leaves specialized rabbis trained in *shechita* – the *shochetim* and *bodkim* – unable to fulfill their religious duties and practise their religion, and the other members of the community without local kosher meat.

[29] The issue is therefore whether the Guidelines requiring the application of the three indicators of unconsciousness to ensure that an animal is unconscious before suspension, as required under section 143 of the SFCR, are reasonable when applied to *shechita*, or whether they represent an encroachment on the Applicants' right to freedom of religion under subsection 2(a) of the *Charter*, or whether the requirement is discriminatory under section 15 of the *Charter*.

III. Analysis

A. *The test for injunctive relief*

[30] In *R v Canadian Broadcasting Corp*, 2018 SCC 5 at paragraph 12 [*CBC*], the Supreme Court of Canada [SCC] restated the applicable test in motions for injunctive relief, and re-affirmed the three-part test previously set out in *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110, 1987 CanLII 79 (SCC) [*Metropolitan Stores*] and *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334, 1994 CanLII 117 (SCC) [*RJR*]. The test requires an applicant to demonstrate a "serious question to be tried," in the sense that the application is neither frivolous nor vexatious; to convince the court that it will suffer irreparable harm if the relief is refused; and that on an assessment of the balance of

convenience, the applicant will suffer greater harm than the respondent from the granting or refusal of the injunction.

[31] These requirements are conjunctive and failure to demonstrate any of the three elements of the test is fatal to the motion (*Canada (Citizenship and Immigration) v Ishaq*, 2015 FCA 212 at para 15). However, the three prongs of the test are not watertight compartments. The three prongs are flexible and interrelated, should be considered together and inform the holistic approach of the Court's discretion in a particular case. Indeed, the *prima facie* strength of the case on the merits may affect the Court's consideration of irreparable harm and the balance of convenience at the other stages (*The Regents of University of California v I-Med Pharma Inc*, 2016 FC 606 at para 27, aff'd 2017 FCA 8; *Merck 7 Co Inc v Nu-Pharm Inc*, 4 CPR (4th) 464 at para 13, 2000 CanLII 14758 (FC); *Wasylynuk v Canada (Royal Mounted Police)*, 2020 FC 962 at para 135 [*Wasylynuk*]; *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195 at para 97, rev'd on other grounds 2021 FCA 84; *Indigenous Police Chiefs of Ontario v Canada (Public Safety)*, 2023 FC 916 at para 71 [*Indigenous Police Chiefs of Ontario*]; Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson Reuters, 2023) (loose-leaf release 2) §7:4 at 7-10, 7-12, 7-18, 7-19 [Roach, *Constitutional Remedies*]).

[32] The decision to grant an interlocutory injunction is discretionary (*CBC* at para 27). In the end, "[t]he fundamental question is whether the granting of [injunctive relief] is just and equitable in all of the circumstances of the case. This will necessarily be context-specific" (*Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 25 [*Google*]). In sum, *Google* instructs that, in exercising their discretion, "courts need to be mindful of overall considerations

of justice and equity, and that the *RJR-MacDonald* test cannot be simply boiled down to a box-ticking exercise of the three components of the test" (*Indigenous Police Chiefs of Ontario* at para 72).

[33] On the application of the three-part test set in *Metropolitan Stores*, the SCC has held that on the first branch of the test, whether there is a "serious question," "a preliminary and tentative assessment of the merits of the case" is a low threshold and only requires the court to determine that the issue is not frivolous or vexatious (*Metropolitan Stores* at 127–128; *RJR* at 337–338; *Perry v Cold Lake First Nations*, 2016 FC 1081 at para 9; *Bellegarde v Carry the Kettle First Nation*, 2023 FC 129 at para 21; *AC and JF v Alberta*, 2021 ABCA 24 at para 21 [*AC and JF*]). The Court should not engage in an extensive review of the merits, because of the relative complexity of constitutional adjudication, the limited and incomplete evidentiary record and legal submissions, and the short time allowed to the Court in determining whether injunctive relief ought to be granted. There are no specific requirements to be met in order to meet this low threshold; the judge must simply conclude that the issues raised are "neither frivolous nor vexatious" (*RJR* at 337–338; *AC and JF* at paras 21–22, 24; *Indigenous Police Chiefs of Ontario* at para 78; *Letnes v Canada (Attorney General)*, 2020 FC 636 at para 40 [*Letnes*]). The demonstration of a single serious issue suffices to meet the first part of the test (*Jamieson Laboratories Ltd v Reckitt Benckiser LLC*, 2015 FCA 104 at para 26; *Indigenous Police Chiefs of Ontario* at para 76).

[34] In the *Charter* context, a decision on injunctive relief is not indicative of eventual success after a full examination of the merits at trial or on an application, because the Court does not

have a full record on which to assess the claim. Many examples illustrate that decisions on interlocutory relief do not always coincide with the ultimate decision on the merits. For example, in *RJR*, the SCC initially refused interlocutory relief, but later found some of the impugned provisions to be a breach of freedom of expression in *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199, 1995 CanLII 64 (SCC). On the other hand, the SCC granted injunctive relief suspending the application of laws limiting third party spending during an election in *Harper v Canada (Attorney General)*, 2000 SCC 57 [*Harper*], but later lifted that relief because the limits constituted reasonable limits on freedom of expression in *Harper v Canada (Attorney General)*, 2004 SCC 33.

[35] The SCC also indicated that in the *Charter* context, a more lenient approach can be taken on the merits because any potential justification under section 1 of the *Charter* may be considered later under the third step of the test, in the assessment of the balance of convenience (*RJR* at 333–334; Roach, *Constitutional Remedies*, §7:4 at 7-10–7-12). Indeed, "the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim" (*RJR* at 337). A relatively weak *Charter* claim may still represent a serious question that is not frivolous or vexatious and therefore meet the first part of the test (*AC and JF* at para 30). The fact that the potential breach has not been conclusively established should not disqualify access to injunctive relief (Roach, *Constitutional Remedies*, §7:4 at 7-10–7-13).

[36] Although the test for a serious question is not onerous, given that constitutional issues are complex and the Court does not benefit from a complete evidentiary record nor of adequate time

to fully canvass the issues, the Court must still engage with the jurisprudence and be sensitive to case law that may undermine the applicant's *Charter* claim (Roach, *Constitutional Remedies*, §7:4, at 7-17). On the other hand, the presumption of constitutional validity of a government's impugned measure with *Charter* rights is not relevant for injunctive relief (*Metropolitan Stores* at 122; *AC and JF* at paras 20, 35; Roach, *Constitutional Remedies*, §7:7 at 7-23, 7-24, 7-44; Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 7th ed (Toronto: Irwin Law, 2021), ch 18 at 508 [Sharpe & Roach, *The Charter of Rights and Freedoms*]).

[37] On the second branch of the test, the only issue is whether a refusal to grant relief would adversely affect the Applicants' interests, and cause them to suffer any harm, in a manner that could not be compensated in damages if the decision on the merits vindicates their claims (*RJR* at 334, 341).

[38] Evidence of irreparable harm must be more than speculations or mere assertions, cannot be inferred, and if it occurs, cannot be compensated or remedied by damages (*Air Passengers Rights v Canada (Transportation Agency)*, 2020 FCA 92 at para 30, leave to appeal to SCC refused, 39266 (23 December 2020); *Canada (Attorney General) v Oshkosh Defense Canada Inc*, 2018 FCA 102 at paras 24–25; *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at paras 13–16; *Haché v Canada*, 2006 FCA 424 at para 11). It is the nature of the harm, not its magnitude, that is important. It 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" (*Metropolitan Stores* at 128; *RJR* at 341, 348; *Letnes* at para 49).

[39] To meet the test, the Applicants must provide a sound evidentiary basis for the Court to assess the alleged irreparable harm. The Applicants must adduce "evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted" (*Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31 [*Glooscap*]).

[40] The fact that the Applicants are alleging violations of constitutional rights does not modify this evidentiary requirement (*International Longshore and Warehouse Union, Canada v Canada (Attorney General)*, 2008 FCA 3 at paras 23, 26). However, in *Charter* cases, even a quantifiable financial loss may be considered irreparable harm given the difficulty of recovering damages at the merits in such cases (*Metropolitan Stores* at 128; *RJR* at 341–342). It may not be possible to conclude whether damages could properly compensate any *Charter* violation, and if it is possible, evaluate any *quantum* of damages necessary to fully repair the breach of intangible values protected by the *Charter*. The irreparable harm branch of the test is therefore often not onerous in *Charter* cases (Sharpe & Roach, *The Charter of Rights and Freedoms*, ch 18 at 508). As proposed by Roach in *Constitutional Remedies* at §7:8 at 7–25: "[f]or the purposes of constitutional remedies, irreparable harm should be related not to whether an injury can be compensated in damages per se, but rather to whether the interests and purposes of the Charter will be irreparably harmed." Indeed, in *143471 Canada Inc v Quebec (Attorney General)*, [1994] 2 SCR 339 at 380, 382, 1994 CanLII 89 (SCC) [*143471 Canada*], Justice Corry, also writing for Justices Sopinka and Iacobucci (with Lamer CJC concurring on other grounds without specifically addressing the issue), opined that the loss of privacy interest, contrary to section 8 of the *Charter*, "would, in itself, constitute irreparable harm" (at 380).

[41] Moreover, irreparable harm has been demonstrated in the context of an impact on minority language communities (and their culture) protected under section 23 of the *Charter* (*Commission Scolaire Francophone v Northwest Territories (Attorney General)*, 2008 NWTSC 53 [*Commission Scolaire Francophone*]; *Procureur général du Québec c Quebec English School Board Association*, 2020 QCCA 1171), and in the context of freedom of religion and equality rights under subsection 2(a) and section 15 of the *Charter* by the requirement to remove religious coverings to receive public services (*National Council of Canadian Muslims (NCCM) c Attorney General of Quebec*, 2017 QCCS 5459; *National Council of Canadian Muslims (NCCM) c Attorney General of Québe*c, 2018 QCCS 2766; Roach, *Constitutional Remedies*, §7:8 at 7-29, 7-30; but see also *Hak c Procureure générale du Québec*, 2019 QCCA 2145, leave to appeal to SCC refused, 39016 (9 April 2020), which is distinguishable because the injunction was denied on the basis of the balance of convenience branch of the test, and the application of section 33 of the *Charter* rendered the serious question to be tried in relation to freedom of religion inapplicable). In non-*Charter* claims, irreparable harm has been established when the alleged breach puts at risk an applicant and their community's culture, traditions and way of life (*Namgis First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2018 FC 334 at paras 93–94 [*Namgis*]).

[42] In the *Charter* context, the SCC has indicated that an applicant may normally be able to satisfy the first two steps of the test and establish that their *Charter* claim is not frivolous or vexatious, and that irreparable harm arises from a *Charter* violation. Injunctive relief will often fail at the third branch of the test, because the public interest will then be balanced against the applicant's claim and support the continued application of the government's measure. However,

the applicant may also be able to demonstrate that injunctive relief will equally serve the public interest or will at least not constitute or contribute to any harm (Roach, *Constitutional Remedies,* §7:2 at 7-7, 7-8, relying on *RJR* and *143471 Canada*).

[43] On the third branch of the test, the Court must determine which of the parties will suffer the greater harm from the granting or refusal of the interlocutory injunction, until a final decision is made on the merits (*RJR* at p 342). At this stage, the factors to be considered in assessing the balance of convenience are numerous and vary with each individual case (*RJR* at 342, 349).

[44] The interest of the public is an important factor to be taken into account at the stage of balance of convenience and "includes both the concerns of society generally and the particular interests of identifiable groups" (*RJR* at 344; *AC and JF* at para 23). When a public authority is involved, it is assumed that the public authority and the existing regulatory framework represents the public interest and the onus of demonstrating that the balance of convenience lies against the public interest rests with the private parties (*RJR* at 344; *Indigenous Police Chiefs of Ontario* at para 145-146; Roach, *Constitutional Remedies,* §7:12 at 7-42).

[45] In *Charter* matters, the evaluation of the competing risks between an applicant's *Charter* rights and the government's interest can be better assessed under the balance of convenience test. The required holistic assessment of the three-part test may allow the Court, at the third stage, to examine considerations of proportionality between the competing interests within their proper specific contexts, in determining whether injunctive relief is "just and equitable in all of the circumstances of the case" (*Google* at para 25).

[46] This onus will usually not be met if there is an indication that the action taken by the authority charged with the duty of promoting or protecting the public interest is undertaken pursuant to that responsibility (*Letnes* at para 83; *Power Workers Union v Canada (Attorney General)*, 2022 FC 73 at paras 112, 117). The Court should, in most cases, presume that an injunction restraining the public authority's actions will cause irreparable harm to the public interest. Validly enacted government measures must be presumed to serve the public interest as well as a legitimate purpose (*Harper* at para 9; *Ahousaht First Nation v Canada (Fisheries)*, 2019 FC 1116 at paras 126–128 [*Ahousaht*]).

[47] As stated, injunctive relief often fails at the third branch of the test, because the public interest supports the continued application of the government's measure. However, an applicant may succeed in demonstrating that the relief requested will equally serve the public interest or that it will not harm the public's interest (Roach, *Constitutional Remedies*, §7:2 at 7-7, 7-8, relying on *RJR* and *143471 Canada*; see also Roach, *Constitutional Remedies*, §7:12 at 7-46, 7-58.1–7-59). Moreover, the public interest includes both the interests of society at large, but also those of individuals and minority communities (see *Reference Re Secession of Québec*, [1998] 2 SCR 217 at paras 79–82, 1998 CanLII 793 (SCC)).

[48] In the end, the Court must assess the respective harms resulting from the granting or refusal of injunctive relief, and may apply, when possible, proportionality as a remedial principle and allow the least drastic remedy possible that both protects the applicant against irreparable harm, while at the same time preserving the public interest as much as possible.

B. *The Respondent's arguments that the Applicants' request is a mandatory injunction and that the relief sought has no practical utility*

[49] The Respondent argues that the Applicants are seeking a mandatory injunction and must therefore demonstrate more than a serious issue to be tried. Relying on *CBC* at paragraphs 13–15, the party seeking a mandatory injunction must show a "strong *prima facie* case." A mandatory injunction is an injunction that requires the respondent to do something, as opposed to an injunction that merely prohibits the respondent from doing something.

[50] The Respondent argues that the orders sought by the Applicants amount to a mandatory injunction since they would require the CFIA to take positive actions. In the Respondent's view, the injunction would require the CFIA to modify and publish a new version of the Guidelines, and remove the three indicators of unconsciousness. The CFIA would need to train its inspectors on the changes made to the Guidelines and to communicate with relevant licence holders to inform them of the modified Guidelines.

[51] The Respondent also argues that an injunction should not be issued, because the ultimate remedy sought by the Applicants has no practical utility and cannot be granted by the Court. Relying on *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at paragraphs 70–71, 85, the Respondent argues that because the Guidelines are not binding, a declaration of unconstitutionality would have no value as the source of unconstitutionality must reside in a statutory provision and not in non-binding manuals or guides.

[52] Moreover, in the Respondent's view, a declaration would not have any effect as it will not settle a "live controversy" between the parties (relying on *Shot Both Sides v Canada*, 2024 SCC 12 at paras 67–69; *Ewert v Canada*, 2018 SCC 30 at para 81; *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 11), because the slaughterhouses that have ceased production have made no commitment to resume, continue or increase their production of kosher beef or veal if the injunction is granted.

[53] I disagree.

[54] First, in my view, no "mandatory steps" are required by the CFIA under the remedy sought in this injunction. Rather, the remedy sought precludes the CFIA from strictly applying the Guidelines, essentially suspending its binding nature and application for ritual slaughter, and revert back to the situation applying before June 2023, only 13 months ago. Indeed, the Applicants seek to preserve the *status quo* existing prior to 2019 when the Guidelines were drafted, and the regulatory environment that existed prior to June 2023 when the CFIA was still not strictly enforcing the Guidelines. The Applicants therefore aim to prevent the Respondent from doing something, namely, to require licence holders to strictly abide by the Guidelines.

[55] Moreover, since the Guidelines are allegedly non-binding, and the licence holders may choose other effective methods, there is no requirement for CFIA to modify and publish a new version of the Guidelines, nor to train its inspectors, because licence holders are already allowed to use other methods that may not be within the existing expertise of inspectors. The evidence relied upon by the Respondent to allege that the CFIA would have to take positive action is also

unconvincing. Paragraphs 77–81 of the Affidavit of L-P Vaillancourt (Respondent's Record, at pages 17–18) simply mention that under its normal mandate, the CFIA actively communicates with licence holders to promote best practices and compliance with regulatory requirements. The injunction sought in this case would not have any specific "mandatory" impact, other than to have the CFIA simply continue to attend slaughterhouses, communicate and discharge its regulatory mandate under the SFCR. There is also no evidence of the necessity to publish a new version of the Guidelines, or what "training" would be required of the inspectors if the Guidelines were suspended. Indeed, the CFIA inspectors have applied section 143 of the SFCR for many years in the context of kosher slaughtering, and there is no extensive evidence of systemic non-conformity in relation to the suspension of conscious food animals (including in the Affidavit of L-P Vaillancourt, Exhibit LPV-7, Respondent's Record, at page 325 which does note some non-compliance in relation to sensitivity assessments, but except for Establishment C, was mostly not related to the actual suspension of a conscious food animal contrary to section 143 of the SFCR).

[56] In oral argument, the Respondent argued that an injunction in this case would be mandatory in nature because the CFIA would have to inform its inspectors, as well as the licence holders, that the Guidelines had been suspended. In my view, even if that element may represent a "mandatory aspect" of the order sought by the Applicants, this "mandatory aspect" is incidental to the order and not sufficiently important to require the Applicants to prove a "strong *prima facie* case" (*West Moberly First Nations v British Columbia*, 2018 BCSC 1835 at paras 226, 231–235).

[57] Finally, an injunction does not automatically become a "mandatory" one merely because it requires a respondent to *do something*, instead of *prohibiting* an act. In some cases, an injunction aims at maintaining the *status quo*, which requires the *continuation* of an *existing practice*. For example, in *AC and JF*, the applicants sought injunctive relief from the application of changes to the Alberta Support, Financial Assistance program, where the changes reduced admissibility to financial support up to the age of 22, when that admissibility was previously up to the age of 24. The applicants argued that the reduction in the availability of financial support was in breach of their rights under sections 7 and 12 of the *Charter*, and sought injunctive relief to preserve the *status quo*, requiring the continuation of prior practice by the government. The Alberta Court of Appeal (albeit ultimately dismissing the injunction) applied the criteria set out in *RJR* of a "serious question to be tried" (the lower threshold), and not the "strong *prima facie* case" for mandatory injunctions, even if the order required Alberta to take positive action and continue the financial support that existed previously (thereby preserving the *status quo* existing before the changes to the program were adopted) (*AC and JF* at paras 19–26, 30).

[58] It is also important to mention that in *AC and JF*, the Alberta Court of Appeal also opined that in *CBC*, the SCC applied a higher threshold of a "strong *prima facie* case" for a mandatory injunction in the non-*Charter* context. The Alberta Court of Appeal questioned the application of that threshold in the context of injunctive relief under the *Charter*, regardless of whether the nature of the relief was a mandatory injunction (*AC and JF* at paras 24–30; see also Roach, *Constitutional Remedies*, §7:4 at 7-13 to 7-16 where the author also opines that the *CBC* test for mandatory injunctions should not apply in the *Charter* context).

[59] In this case, I do not need to opine on the matter as I conclude that the relief sought does not amount to a "mandatory injunction," and that any "mandatory" action required of the CFIA is ancillary to the relief, and merely requires the CFIA to continue to implement its mandate.

[60] In any event, the injunctive relief in this case is seeking to maintain the *status quo* existing before June 2023 when the CFIA was not issuing non-compliance measures for the failure to apply the three indicators of unconsciousness, but rather implemented its regular mandate to enforce the SFCR, communicate and promote best practices. The injunctive relief therefore seeks a *prohibition* on the CFIA from applying the Guidelines, which it did not do prior to June 2023 despite its existence.

[61] To the extent that injunctive relief, and the *status quo*, requires the CFIA to continue its earlier practice in applying section 143 of the SFCR, the requirement to continue earlier practice does not constitute a "mandatory injunction" as understood in *CBC* or in case law requiring, for example, that the government incur additional expenditures of monies to provide modular classroom spaces to a minority school in order to protect the minority community from irreparable harm (*Commission Scolaire Francophone*).

[62] Second, regarding the Respondent's argument that any declaration in this case would have no practical utility, I am satisfied that there is sufficient evidence that licence holders do, in fact, consider the Guidelines as binding, and if they are informed that the CFIA will not strictly impose the use of the three indicators of unconsciousness, are prepared to resume the production

of kosher meat. Therefore, the Court is able to provide a remedy, by declaration, on the binding nature of the Guidelines and the validity of their use as a regulatory requirement by the CFIA.

[63] Contrary to what the Respondent asserts, the Guidelines, while not "binding" in the sense that it is incorporated by reference as a regulation, are clearly binding from a practical and pragmatic standpoint. The Guidelines are aimed at licence holders and CFIA inspectors, and indicate that the use of the three indicators of unconsciousness is necessary to determine the unconsciousness of a food animal before suspension (See Guidelines, Affidavit of Dr. Appelt, Exhibit MA-8, Respondent's Record, at page 2426). Moreover, a clarification to the Guidelines indicates that "in certain situations," only one of the three indicators can be sufficient, signalling again to inspectors that at least one of the three indicators is always required (Affidavit of Dr. Appelt, Exhibit MA-21, Respondent's Record, at page 2941). Finally, the cross-examination of L-P Vaillancourt demonstrates that the failure to use at least one of the indicators could lead to non-conformance and later the ultimate suspension of the licence (cross-examination of L-P Vaillancourt, Respondent's Record at pages 3841–3842, 3845–3846, 3853, 3897–3898). Licence holders are therefore required to apply at least one of the three indicators of unconsciousness, and the CFIA inspectors are required to enforce their use. While in oral argument the Respondent argued that the Guidelines were not binding and that the CFIA was not taking the position that they were, the evidence before this Court demonstrates the contrary and that inspectors are actually imposing the use of the three indicators of unconsciousness, failing which compliance measures and corrective action may be imposed.

[64] In the end, the only valid and enacted regulatory requirement is that food animals must be unconscious before suspension, as required pursuant to section 143 of the SFCR, and there is no legislated requirement mandating the use of a specific indicator of unconsciousness, or the application of a combination of indicators, to prove that a food animal is unconscious before suspension. The Guidelines may continue to be referred to as one way with which a licence holder may satisfy the CFIA that a food animal is unconscious, but the Applicants are seeking an injunction precluding the CFIA from requiring and enforcing the use of the three indicators of unconsciousness.

[65] In my view, such request does not constitute a "mandatory injunction," but rather a prohibition on CFIA to impose the use of the three indicators of unconsciousness as a regulatory requirement, failing which non-compliance and corrective measures may be imposed, up to suspension of the licence. Moreover, such relief would have practical utility, on the evidence presented in this case.

C. *The Applicants have met their onus for injunctive relief*

(1) Serious Issue

[66] The Applicants argue that there are three serious issues:

a) whether the Guidelines represent an unjustifiable encroachment on the Applicants' right to freedom of religion under subsection 2(a) of the *Charter*;

b) whether the Guidelines and their requirements are discriminatory under section 15 of the *Charter*; and

c) whether the Guidelines requiring the application of the three indicators of unconsciousness to ensure that an animal is unconscious before suspension are reasonable when applied to *shechita*, as those indicators are beyond the requirements of sections 143 and 144 of the SFCR.

[67] The Applicants submit that the Guidelines constitute a major departure from prior practice and are unduly protective as they essentially require that the animal be brain-dead before being suspended, when section 143 of the SFCR only requires that the animal be unconscious – the requirement for the animal to be dead only relates to invasive dressing procedures such as skinning and leg removal. The Guidelines therefore require an unreasonable application of the precautionary principle which does not measurably add to animal welfare (as required under sections 141 to 144 of the SFCR) while slowing down the operation of kosher slaughter to the point where licence holders prefer to cease production. As a result, the Guidelines restrict access to kosher meat and prevent Canadian Jews from exercising the requirements of their faith.

[68] The Guidelines are also discriminatory as they unfairly associate a religious practice of *shechita* to animal pain, and impose a challenge that does not apply to non-kosher meat production. The Guidelines therefore impose on Jews a burden and deny them benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating a disadvantage. Their *Charter* rights to freedom of religion and the right to equality enshrined in the *Charter* are therefore unjustifiably restricted.

[69] In order to establish an infringement to freedom of religion, the Applicants must demonstrate: a) that they sincerely believe in a practice or belief that has a nexus with religion, and b) that the impugned state conduct interferes, in a non-trivial or not insubstantial way, with their ability to act in accordance with that practice or belief (*Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 62; *Syndicat Northcrest v Amselem*, 2004 SCC 47 at paras 41, 44, 53, 75–77 [*Amselem*]).

[70] The Applicants argue that subsection 2(a) of the *Charter* protects "the individual and collective aspects of religious beliefs" and is "about religious beliefs, but also about religious relationships" and that freedom of religion must "account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions" (*Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 59–60 [*Loyola*]).

[71] The Applicants argue, first, that the consumption of kosher meat during celebrations has a special place as a part of the practice of the Jewish faith. Second, the interference with that practice by the Guidelines is substantial because the supply of kosher meat has been reduced by 55% for beef, and by 90% for veal. In the Applicants' view, preventing Jews from accessing food that complies with the requirements of their faith certainly qualifies as a "profound interference" with religious freedom (*Loyola* at paras 60–62, 67).

[72] For the perspective of *shochetim* and *bodkim*, they are deprived of their ability to practise their faith and profession, as they can no longer exercise their duties as religious leaders in the

community. As *shochetim* and *bodkim* represent a precious resource for the Canadian Jewish community, the loss of their expertise will encroach on the Canadian Jewish community's culture and collective aspect of religious beliefs. The interference is therefore substantial, both from an individual and collective point of view.

[73] As for section 15 of the *Charter*, to establish a breach of the right to equality, the Applicants must show that the impugned law or state action: a) creates a distinction based on enumerated or analogous grounds, on its face or in its effects; and b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage (*R v Sharma*, 2022 SCC 39 at paras 28–31).

[74] The Applicants argue that the Guidelines create a distinction based on religion, which is a prohibited ground of discrimination. They assert that the Guidelines directly cause disruption that threaten kosher operations, by imposing distinct requirements for *shechita*, which imposes a burden that is not required in conventional slaughter. On the second step of the section 15 criteria, the Applicants submit that the Guidelines have exacerbated stereotypes and prejudice against Jews, because it reinforces the notion that *shechita* is inhumane.

[75] Finally, the Applicants submit that the Guidelines as well as sections 143 and 144 of the SFCR are *ultra vires* or unreasonable, as there is no scientific data supporting the claim that the Guidelines' requirement of use of the three indicators of unconsciousness is necessary to ensure that the food animal is unconscious, to confirm that the slaughter of the food animal is not inhumane.

[76] The Respondent counters that sections 143 and 144 of the SFCR are clearly *intra vires* paragraph 51(1)(h) of the SFCA and are presumed valid (*Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17 at para 54). As for their reasonableness, the Respondent argues that the three indicators of unconsciousness are reasonable because they were selected on the basis of a rigorous review of the scientific literature on indicators of insensibility in bovines in the context of ritual slaughter, that they are non-binding, that the use of only one or two indicators may suffice, and that licence holders are free to choose other effective methods other than those suggested by the CFIA (see Affidavit of Dr. Appelt, at paras 17, 74, 123–124, Respondent's Record, at pages 2197, 2198, 2210, 2222–2223, 2235–2242, 2940–2943).

[77] On the issue of freedom of religion, the Respondent submits that the three indicators of unconsciousness do not unjustifiably infringe the Applicants' right to freedom of religion. The Respondent argues that the second part of the subsection 2(a) *Charter* test requires objective proof of the interference caused by government action on the claimants. The Applicants must demonstrate that their religious beliefs or conduct "might reasonably or actually be threatened" by the rules, events or acts that interfere with the exercise of the freedom. Evidence of a "state imposed cost or burden" does not suffice; there must be evidence that such a burden is capable of interfering with religious belief or practice (*Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 32 [*Hutterian Brethren*]). Moreover, freedom of religion does not indemnify practitioners against all costs incidental to the practice of religion (*Hutterian Brethren* at para 95). Legislative or administrative action may impose costs or burdens on a religious practitioner

in terms of money, tradition or inconvenience, but these costs may still leave the adherent with a meaningful choice concerning the religious practice at issue (*Hutterian Brethren* at paras 88, 94).

[78] The Respondent asserts that the Applicants have not met their evidentiary burden of showing non-trivial interference with their religious beliefs and practices. While some of the Applicants' witnesses indicate that consuming kosher meat is central to the Jewish faith, particularly during Shabbat meals and on important holidays, they have not demonstrated a sincere belief that they are required on religious grounds to consume a specific quantity of beef or veal. In any event, the Respondent argues that evidence demonstrates that kosher beef or veal is available in Canada.

[79] The Respondent also submits that the Applicants have also not established that consuming kosher beef and veal produced in Canada has any religious significance for them. While some witnesses state that having access to a "trustworthy source" of kosher meat is an integral part of the Jewish faith, "trustworthy sources" do not appear to be limited to Canadian kosher meat. The evidence shows that rabbis will travel from Canada to other jurisdictions to oversee the production of kosher meat by some of the Applicants, to be imported to Canada. Furthermore, kosher beef is imported by Mehadrin from Mexico and Argentina and is being purchased on the Canadian market, and has been for several years. While some of the Applicants' witnesses affirm that they prefer domestically raised kosher beef, this is a consumer preference rather than a belief grounded in religion. Moreover, the Applicant Mehadrin has made the choice to export 30% to 40% of its production of Canadian kosher meat to the United States of America, when it could instead have sold that meat on the Canadian market. While there is

evidence of a decrease in the supply of kosher beef and veal produced in Canada and an increase in prices, the Respondent argues that there is no evidence that the three slaughterhouses currently continuing to produce kosher meat intend to cease or diminish production.

[80] In relation to the Applicant Rabbi Banon, the Respondent submits that there is no indication that paid employment as a *shochet* and *bodek* – specifically for the slaughter of bovines and not other animals – is part of his religious beliefs. Moreover, subsection 2(a) of the *Charter* does not guarantee the ability to earn a livelihood or the right to do a particular job (*Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 at paras 186–187; *Kisilowsky v Manitoba*, 2018 MBCA 10 at paras 88–92; see also *Mussani v College of Physicians and Surgeons of Ontario*, 2004 CanLII 48653 at paras 39–43 (ONCA)). In any event, there is no evidence that Rabbi Banon is prevented from performing *shechita* or that the practice of *shechita* or the professions of *shochet* and *bodek* are threatened in Canada.

[81] On the argument that the Guidelines are discriminatory under section 15 of the *Charter*, the Respondent submits that only Rabbi Banon has standing to bring a claim under section 15 of the *Charter*, and not corporations such as the other Applicants (*Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 73). According to the Respondent, Rabbi Banon failed to establish that the Guidelines have a disproportionate impact on him as a person of Jewish faith as compared to others, and the Guidelines do not subject Jewish Canadians to differential treatment on the basis of religion. Instead, the same standards for the welfare of animals are applied to all types of slaughter methods, requiring that the food animal be unconscious before suspension. To

the extent that the choice of indicators and their application by licence holders may reduce line speed in kosher slaughter operations, this potential impact is based on animal physiology, not religion. Rabbi Banon has therefore not established that the differential treatment has caused him any harm, as *shechita* remains allowed and currently practised in compliance with the SFCR in Canada, and there is no evidence that slaughterhouses cannot comply with the Guidelines.

[82] In my view, the Applicants have met their burden and demonstrated serious questions, that are not frivolous nor vexatious.

[83] It is important to note that in the case of injunctive relief, the Court must not make any findings of fact, but rather assess whether there is a serious question, in the sense that the question is neither frivolous nor vexatious. In doing so, there is no specific requirement that needs to be satisfied with respect to the first branch of the test.

[84] Clearly, the issue of the Guidelines' impact on the Applicants' freedom of religion and right to equality are serious issues.

[85] First, in relation to the practice of the Jewish faith, the Applicants' affiants allege that eating kosher meat is a part of their sincere belief and practice of the Jewish faith, and that the reduction in the availability of veal by 90%, and of beef by 55%, represents more than a trivial impact on their sincere belief. Those on their own are serious questions that are not frivolous nor vexatious, and there is sufficient evidence adduced on this motion to meet that threshold. While as argued by the Respondent, the Applicant Mehadrin does export some Canadian beef and veal

(and also imports kosher beef into Canada), the evidence demonstrates a context explaining why some kosher beef is exported, and that explanation could be accepted by the trier of fact as a justification.

[86] For Rabi Banon, in his affidavit, he explains that he has a sincere belief that as a *shochet* and *bodek*, he is a religious leader and that every time he performs *shechita*, he is not merely practising a profession, but he is practising his religion including performing an instrumental role to the well-being of the Jewish community of Montreal and Canada, in ensuring that Canadian Jews can consume meat that is produced in accordance with the laws of *kashrut*. During oral arguments, the Respondent recognized that the performance of *shechita* by Rabbi Banon as *shochet*, was a religious practice. In terms of the impact of the Guidelines, Rabbi Banon stated that he has seen a reduction of more than half of his work, meaning that he cannot practise his religion and perform his religious role for the community to the same extent as before, and that he may lose his certifications as a result (see Affidavit of Rabbi Banon, at paras 6, 22, 35, 38, 59-62, 66-67, Applicant's Record, at pages 35, 37, 39, 43). Those issues, on the evidence adduced, also meet the threshold of serious issues that are not frivolous nor vexatious.

[87] While the Respondent argues that subsection 2(a) of the *Charter* does not guarantee the ability to earn a livelihood and that freedom of religion does not indemnify practitioners against all costs incidental to the practice of religion (*Hutterian Brethren* at para 95), the SCC has held in *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, 1986 CanLII 12 (SCC) that indirect or unintentional burdens are within the scope of subsection 2(a) of the *Charter* (at 759); and that

burdens resulting in a disadvantage and making it more expensive (or putting retailers in a competitive disadvantage) may encroach on freedom of religion (at 763–767).

[88] Consequently, the Applicants have demonstrated serious questions as to whether the impact and application of the Guidelines by the CFIA constitute a limit on the Applicants' and the Jewish community's sincere beliefs in a practice or beliefs that have a nexus with religion, and whether the limits are more than trivial. I am satisfied that on the low threshold applicable to the first branch of the test, the Applicants have demonstrated that the issue of an infringement to their rights to freedom of religion is not frivolous nor vexatious.

[89] Applying the low threshold, I am also satisfied that the Applicants have demonstrated a serious question in relation to their right to equality under section 15 of the *Charter*. The issue as to whether the Guidelines create a distinction based on enumerated grounds (religion), on its face or in its effects, and whether the Guidelines impose a burden or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage or prejudice, is not frivolous or vexatious. While some of the Applicants may not have standing to bring a claim under section 15, Rabbi Banon, as conceded, does, and his claim in relation to equality is sufficient to meet the first branch of the test for injunctive relief.

[90] Likewise, the Applicants' argument relating to the reasonableness or validity of the Guidelines is also a serious question. While the Guidelines may not be binding, the evidence demonstrates that the licence holders are compelled to apply at least one of the three indicators of unconsciousness, and that those indicators, while certainly demonstrating that a food animal is

unconscious, may be too strict to evaluate whether a food animal is unconscious before suspension, as required under section 143 of the SFCR. On that basis, it is arguable that the Guidelines require a higher threshold than required under section 143 of the SFCR, and that therefore the imposition of the three indicators of unconsciousness is unreasonable. At the very least, the argument is not frivolous nor vexatious, on the evidence adduced by the Applicants.

(2) Irreparable Harm

[91] The Applicants argue that kosher meat production has significantly declined due to the implementation of the Guidelines, because only three slaughterhouses continue to produce kosher meat (relying on the Affidavit of H. Herzog, Applicants' Record, at page 64, demonstrating the increase in prices, that imported meat is not of the same quality and that she has concerns on the manner that animals are raised and supervised in foreign countries). The Regulations also restrict Rabbi Banon's right to perform his religious duties, and threaten the existence of *shochetim* and *bodkim* resulting in the loss of rare and precious experts for the Jewish community.

[92] The Respondent argues that no irreparable harm has been established, that the Applicants provided no concrete evidence to support their allegations, and that their allegations are based on speculation and conjecture. The Respondent argues that the evidence demonstrates: a) that three licence holders continue to produce kosher meat and there is no evidence that those licence holders will cease production; b) there is no evidence that other producers will eventually resume production if the Guidelines are struck; c) kosher meat is currently available, either produced in Canada or imported; and d) the Applicant Mehadrin made a decision to export 30% to 40% of its

domestic meat to the United States of America and could therefore instead make that meat available to Canada.

[93] The Respondent therefore concludes that the Applicant Mehadrin's decision to export meat to the United States of America has an impact on the Canadian Jewish community, but that the impact is self-inflicted, and therefore cannot constitute irreparable harm (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 at para 24; *Glooscap* at para 39; *Wasylynuk* at paras 152–155, 162; *Arctic Cat Inc v Bombardier Recreational Products Inc*, 2020 FCA 116 at para 33). Moreover, kosher meat that is approved as kosher for consumption by one of the Applicants is imported and available in Canada; and the community's refusal to consume it is not an infringement of the freedom of religion, but a consumer choice made by individuals. Finally, the Respondent asserts that the Guidelines do not pose a threat to kosher slaughter or the *shochetim* or *bodkim*, because *shechita* is not limited to the production of beef and veal (but also poultry and lamb), and that Mehadrin hires *shochetim* or *bodkim* to oversee kosher slaughter in Mexico and Argentina. A reduction in hours, on its own, is not irreparable harm as it is compensable in damages (*Wasylynuk* at para 188).

[94] As stated above, under the irreparable harm branch of the test, the question is whether there is "evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted" (*Glooscap* at para 31). Irreparable harm will occur if "either [it] cannot be quantified in monetary terms or […] cannot be cured, usually because one party cannot collect damages from the other" (*Metropolitan Stores* at 128; *RJR* at 341, 348; *Letnes* at para 49).

[95] In the *Charter* context, however, even quantifiable financial loss may be considered irreparable harm given the difficulty of recovering damages at the merits in such cases (*RJR* at 348), and in some cases, a breach of a *Charter* right, on its own, may constitute irreparable harm (*143471 Canada* at 380). Finally, risks to a minority community's way of life, culture and traditions can also constitute irreparable harm (*Namgis* at paras 93–94).

[96] In this case, I am satisfied that the irreparable harm branch of the test has been met. The evidence, as presented, demonstrates that Rabbi Banon has experienced a reduction in his performance of a religious practice: *shechita*. Rabbi Banon therefore can no longer practise his religious beliefs to the same extent as before. In *Amselem*, an injunction was granted to allow the installation of "succahs" during the annual nine-day Jewish festival of Succot, as a prohibition to do so represented a breach of the applicants' freedom of religion. Likewise in this case, the reduction of the practice of religion by about two days per week, to the extent that it could later be held on the merits to constitute an unjustifiable limit to Rabbi Banon's freedom of religion or right to equality, could constitute an irreparable harm. From a religious or equality point of view (to be distinguished with his employment or income), the limit to the exercise of Rabbi Banon's religious beliefs or right to equality is not quantifiable and cannot adequately be compensated with damages.

[97] Likewise, the reduction of 55% in the availability of kosher beef and 90% of veal, to the extent that it would be found to constitute an unjustifiable limit to freedom of religion or equality on the merits, would not be adequately compensable in damages for the Jewish community, MK or COR. The evidence demonstrates that veal is almost impossible to obtain, and that beef, while

remaining available, is at a substantial cost. The result is that many Jews will not be able to access kosher beef and veal, either because it is simply not available, or the cost is prohibitive. During that time, they cannot eat a type of meat that has a special role in the Jewish tradition, especially on Jewish holidays (Affidavit of Rabbi Weiss, at paras 48, 50–51, Applicant's Record, at pages 51–52; Affidavit of H. Herzog, at paras 1–2, Applicant's Record, at page 64; Affidavit of S. Rosenfeld, at para 83, Applicant's Record, at page 5144; cross-examination of S. Rosenfeld, Respondent's Record, at pages 3779–3780). That situation is not quantifiable and not adequately compensable in damages, and constitutes irreparable harm.

[98] Moreover, even if, in a potential action, it would be possible to quantify the additional "cost" in pricing that resulted from the application of the Guidelines, many members of the Jewish community could still not be compensated for the simple reason that they were never able to procure meat, either because none was available, or because the increased price was inaccessible for them. Irreparable harm has therefore been established.

[99] To be clear, irreparable harm in this case occurs because of the impact on Rabbi Banon and the Jewish community's practice of their Jewish faith (and by implication, the Applicants MK and COR). The impact on Rabbi Banon's employment income (only, as opposed to his practice of *shechita* and associated certifications) may be compensated in damages and on its own, any impact on that aspect does not constitute irreparable harm. Likewise, there is insufficient evidence to demonstrate a ripple effect on Mehadrin's and Shefa's supply chain to constitute "irreparable harm" (*Long Lake Forest Products Inc v United Steelworkers Local 1-*

2693, 2006 CanLII 34442 at paras 41–43 (ONSC)). To the extent that economic damages have occurred, those damages are quantifiable and compensable.

[100] The Respondent argued that Mehadrin exports meat to the United States of America and therefore, the harm is self-inflicted. While it is true that Mehadrin does export 30% to 40% of its beef, Mr. Rosenfeld explained the context of that situation, which relates to the fact that in doing business, he must purchase the whole piece of beef, including parts that are not consumed by the community either for cultural or seasonal reasons (cross-examination of S. Rosenfeld, Respondent's Record, at pages 3751–3753). I therefore reject the Respondent's argument that the exportation of kosher beef by Mehadrin to the United States of America in this case constitutes sufficient evidence to demonstrate that kosher beef should otherwise be available and that its insufficiency is a result of Mehadrin's business decisions, or constitutes self-harm. There is also evidence that kosher beef is imported by Mehadrin, but that evidence also demonstrates that importation is subject to quotas (Affidavit of S. Rosenfeld, at para 57, Applicant's Record, at page 5140). Crucially, the evidence is unclear as to the amount of kosher beef that Mehadrin is able to import and how the importation of kosher meat offsets the 55% reduction in kosher meat produced in Canada (at paragraph 54 of his affidavit, Mr. Rosenfeld states that even with significant importation, sales of beef has dropped by 40%, indicating that the importation of kosher beef did not remedy the situation: Affidavit of S. Rosenfeld, at para 54, Applicant's Record, at page 5139). As for kosher veal, there is no evidence as to what proportion of veal is exported, and for what reason (cross-examination of S. Rosenfeld, Respondent's Record, at page 3753); and the evidence demonstrates that it is not imported in Canada (cross-examination of S. Rosenfeld, Respondent's Record, at pages 3772–3773). In my view, the evidence of availability

of kosher meat in Canada and its importation does not rebut the evidence of Ms. Herzog and Mr. Westberger, which I accept, that beef and veal are hard to find (Affidavit of H. Herzog, at paras 4–5, Applicant's Record, at page 65; Affidavit of A. Westberger, at paras 4–5, Applicant's Record, at page 61).

(3) Balance of Convenience

[101] At the balance of convenience stage, the harm suffered by the Applicants if the injunction is denied must be compared with the harm suffered by the Respondent if the injunction is granted, until a final decision is made on the merits (*RJR* at 342). The public interest must be taken into account at this stage in the context of this motion (*RJR* at 344; *AC and JF* at para 23). In this case, it is assumed that CFIA's enforcement of the three indicators of unconsciousness to protect animal welfare represents the public interest; and the onus of demonstrating that the balance of convenience lies against the CFIA rests with the Applicants (*RJR* at 350; *Indigenous Police Chiefs of Ontario* at paras 145–146; Roach, *Constitutional Remedies*, §7:12 at 7–42). The Court should presume that an injunction restraining the CFIA's actions will cause irreparable harm to the public interest (*Harper* at para 9; *Ahousaht* at paras 126–128), but the Applicants may succeed in demonstrating that the relief requested will not harm the public's interest (Roach, *Constitutional Remedies*, §7:2 at 7-7, 7-8, relying on *RJR* and *143471 Canada*; see also Roach, *Constitutional Remedies*, §7:12 at 7-46, 7-58.1–7-59).

[102] The Applicants submit that the limits to their freedom of religion and right to equality are evident and grave. The impact of the Guidelines' infringement is affecting not only the observant Jews' capacity to abide by the tenets of their faith, but also their way of living and the fabric of

their community. Moreover, the Jewish community risks losing a very precious expertise, because *shochetim* and *bodkim* risk losing their jobs and being unable to perform their religious duty.

[103] On the other hand, the Applicants argue that there would be no increased risk for animal welfare if licence holders continued to operate as they used to for decades prior to 2023, and use other indicators of unconsciousness as they were always able to, in compliance with section 143 of the SFCR.

[104] The Applicants also argue that even if science may evolve and governments may legitimately reassess long-standing policy, the Guidelines are based on literature that has existed for many years, sometimes decades. There is nothing in the literature that discussed new scientific evidence, or that requires urgent intervention to address a new and urgent problem. Moreover, evidence that animal welfare is not at stake in this case is demonstrated by the actions of the CFIA, which adopted the Guidelines in 2019 but did not enforce them until June 2023.

[105] The Respondent submits that the Applicants' position glosses over the significant risks to animal welfare that would materialize if the Guidelines were stayed. Scientific studies show that animals remain sensitive to pain and distress following the neck cut and before they become unconscious. Suspending a conscious animal exposes it to pain and distress and contravenes the regulatory requirements for the humane treatment of food animals. To ensure that conscious food animals are not suspended, it is important to have indicators that reliably and consistently confirm that the animal is unconscious before any procedure that could cause pain and suffering

is performed. The evidence shows that there is broad scientific consensus that loss of consciousness following ritual slaughter does not occur immediately after the neck cut. Peer-reviewed studies support the view that the three indicators of unconsciousness in the Guidelines are effective at evaluating whether a bovine is unconscious. Therefore, requiring the use of some of the three indicators of unconsciousness is in the public interest, and as demonstrated by the three remaining slaughterhouses that continue the production of kosher meat, the Guidelines are not an impediment to the production of kosher meat as required pursuant to the SFCR.

[106] The Respondent recognizes that the Guidelines are not incorporated by reference in the SFCR or any other regulations administered by the CFIA. However, the evidence demonstrates that the CFIA does impose at least the use of one of the three indicators of unconsciousness provided under the Guidelines on licence holders, so it is "binding" at an operational level (see Affidavit of Dr. Appelt, Exhibit MA-21 – Written Clarification of the Guidelines, Respondent's Record, at page 2941). Therefore, the use of only one or two of the three indicators of unconsciousness may suffice, and licence holders are free to choose other effective methods other than those suggested by the CFIA (relying on the Affidavit of Dr. Appelt, at paras 17, 74–124, Respondent's Record, at pages 2197, 2198, 2210, 2222–2223, 2235–2242, 2940–2943).

[107] In my view, the balance of convenience favours the Applicants.

[108] All parties recognize that animal slaughter must be conducted in a manner that does not cause avoidable suffering, injury or death, as required under section 128 of the SFCR, and respect the CFIA's mandate to ensure animal welfare.

[109] The issue in this case is whether the Guidelines, and the requirement for licence holders to use the three indicators of unconsciousness to prove that food animals are unconscious before suspension, as required under section 143 of the SFCR, are required to ensure animal welfare.

[110] Of material importance in this case is that section 143 of the SFCR, or an equivalent provision, has existed since well before 2019 and the adoption of the Guidelines. Kosher slaughter has therefore been conducted in Canada for many years, and have at all times been compliant with section 143 of the SFCR, and in cases of non-compliance which have occurred and are documented (for example, for Establishment C), the CFIA issued non-compliance orders and imposed corrective action which were adopted to ensure animal welfare and compliance with section 143 of the SFCR.

[111] Consequently, while the evidence demonstrates that the Guidelines and the three indicators of unconsciousness add a layer of precaution, they do not on their own constitute evidence that the failure to use them indicates that section 143 of the SFCR has historically been breached and that animal welfare has been compromised.

[112] The CFIA has therefore historically ensured animal welfare, and applied section 143 of the SFCR, without strictly requiring the application of the three indicators of unconsciousness (or even one of them). The Applicants do not question nor request the intervention of the Court to preclude the CFIA from implementing its mandate and continue its enforcement of section 143 of the SFCR. In their view, the public interest is therefore protected even if the Court grants injunctive relief. What the Applicants are seeking, is for the CFIA to continue prior practice,

which in their view was adequate to meet the standards established under section 143, and not apply the Guidelines and the three indicators of unconsciousness because of their impacts on the availability of kosher meat.

[113] In my view, and based on the evidence presented, the balance of convenience favours the Applicants. The public interest remains adequately protected and section 143 of the SFCR may continue to be enforced even if the Guidelines and the three indicators of unconsciousness are not applied. The suspension of the Guidelines would have a low impact on the public's interest and the CFIA's mandate, while the Court's refusal to grant injunctive relief would have a greater impact on the Applicants' *Charter* rights.

[114] The evidence demonstrates that the CFIA is able to enforce section 143 of the SFCR and ensure that food animals are not suspended while still conscious, even without the use of the three indicators of unconsciousness. The evidence demonstrates that the number of licence holders producing kosher meat is very limited (less than 10 in Canada), and that the CFIA is well aware of their procedures. Dr. Appelt, a CFIA Senior Director of Animal Health Programs, attended Establishment C in 2018 (the same establishment where compliance issues had been observed in 2017, and which led to the scientific literary review and later the adoption of the Guidelines). Dr. Appelt was present for the slaughter of 70 veal calves, and concluded that what he observed was an "expertly conducted slaughter process." Despite seeing signs of regular breathing and stiff or contracted neck, crucial signs of consciousness were absent and he did not believe that any animals were still conscious when suspended (Affidavit of Dr. Appelt, Exhibit MA-06, Respondent's Record, at pages 2399–2400). Dr. Appelt, in his cross-examination,

confirmed that he did not observe any non-compliance during his assessment (cross-examination of Dr. Appelt, at pp. 33-34, 93-112, filed with the Court on the day of the hearing). In other words, as of 2018, Establishment C, which was non-compliant in 2017 and was responsible for triggering the CFIA's literary review and later the adoption of the Guidelines, had already implemented corrective measures that were satisfactory to Dr. Appelt and the CFIA by 2018 to meet the requirement of section 143 of the SFCR, without applying the three indicators of unconsciousness now required under the Guidelines (which in 2018 had not yet been adopted).

[115] The evidence therefore demonstrates that an injunction in this case precluding the CFIA from strictly imposing the three indicators of unconsciousness will have a minimal impact on animal welfare and the public interest. The CFIA may use many other indicators, as it has done historically, to implement its mandate and enforce compliance with section 143 of the SFCR.

[116] The issuance of injunctive relief is not contrary to the public interest, given that compliance with section 143 of the SFCR and the necessity to ensure that food animals must be unconscious before suspension may be ensured without the use of the three indicators of unconsciousness now mandated by the Guidelines. The CFIA is able to continue its inspections of licence holders and protect animal welfare by properly enforcing section 143 of the SFCR, as it has done for many years before the adoption of the Guidelines.

[117] While the impact on the public interest is minimal, I am satisfied that the corresponding impact on Rabbi Banon and the Jewish community's *Charter* rights are significant. As stated, the public interest includes both the concerns of society at large, which I rule would not be severely

impacted, and the particular interests of identifiable groups, in this case the Jewish community. In my view, the public interest does not gravitate in favour of the enforcement of the Guidelines, when other measures exist to achieve the same result, as has been done historically, and which may also allow the Applicants to exercise their rights, pending the Court's decision on the merits.

IV. Conclusion

[118] For these reasons, I am satisfied that it is just and equitable for injunctive relief to be issued on the basis of the claims, evidence and legal arguments presented in this case (*Google* at para 25).

[119] The CFIA is enjoined from enforcing the use of any of the three indicators of unconsciousness under the Guidelines, and issuing non-compliance and require corrective action for the sole reason that a licence holder failed to apply any of them, until a final decision is rendered on the merits of the Application.

[120] The Guidelines, on their own, are not suspended and any licence holder is free to apply, or to continue to apply, the best practices noted in the Guidelines.

[121] The CFIA is entitled to continue to implement its mandate and ensure compliance with section 143 of the SFCR. As required under section 143 of the SFCR, and which existed before 2019, food animals may not be suspended while still conscious. In ensuring compliance, licence

holders and CFIA may rely on the other indicators noted in the Guidelines, or other indicators used before June 2023.

[122] The parties have agreed that no costs should be awarded on this motion.

ORDER in T-511-24

THIS COURT ORDERS that:

1. The motion for injunctive relief is granted.
2. The CFIA is enjoined from enforcing the use of any of the three indicators of unconsciousness under the Guidelines, issue non-compliance and require corrective action, for the sole reason that a licence holder has failed to apply any of the three indicators of unconsciousness, until a final decision is rendered on the merits of the Application.
3. The CFIA may enforce section 143 of the SFCR by using any other method historically used to assess compliance, and ensure animal welfare.
4. No costs are awarded on this motion.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	THE JEWISH COMMUNITY COUNCIL OF MONTREAL, ET AL. v ATTORNEY GENERAL OF CANADA
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DATED:	JULY 24, 2024

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