

FORM 301 – Rule 301

FEDERAL COURT

BETWEEN:

**SOUTH SHORE TRADING CO. LTD.**

Applicant

- and -

**ATTORNEY GENERAL OF CANADA**

Respondent

APPLICATION UNDER section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7 and Rule 301 of the *Federal Courts Rules*, 1998.

**NOTICE OF APPLICATION**

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Halifax, Nova Scotia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor, or where the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court, and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Issued the: \_\_\_\_\_

Issued by: \_\_\_\_\_

Address of local office:

1801 Hollis Street, 17th Floor  
Suite 1720  
Halifax, Nova Scotia  
B3J 3N4

TO: Attorney General for Canada  
Department of Justice  
Suite 1400, Duke Tower  
5251 Duke St.  
Halifax, NS B3J 1P3

## APPLICATION

This is an application for judicial review in respect of a decision of the Minister of the Department of Fisheries and Oceans and Canadian Coastguard (the “**Minister**”) dated March 28, 2023 which reduced the Applicant’s elver quota without providing financial compensation (the “**Decision**”). A copy of the Decision is attached at Schedule “A”.

### **The Applicant makes application for:**

1. an order quashing the Decision as unreasonable and/or incorrect and reinstating the quota amount from the previous year;
2. in the alternative to the above order, an order quashing the Decision as unreasonable and/or incorrect, and referring the matter back to a departmental decision-maker for reconsideration;
3. an order requiring the Minister to continue consultation and negotiations with respect to the relinquishment of elver quota in accordance with directions provided by this Court;
4. costs of this application;
5. such further and other relief as this Honourable Court deems to be just and appropriate.

### **The grounds for the application are:**

1. The Applicant is a company incorporated pursuant to the laws of Nova Scotia. It is an elver fishery license holder. Its license is issued on an annual basis by the Fisheries and Oceans Canada (“**DFO**”).
2. Shortly before the commencement of the 2021 elver fishing season, which normally begins in the spring of each year, DFO expressed interest in establishing a voluntarily relinquishment program by which license holders would agree to relinquish a portion of the quota associated with their license in exchange for financial compensation paid by DFO.
3. Between the Spring of 2021 and Winter of 2022, the Applicant participated with DFO attempts to value the quotas for the purpose of compensating the Applicant for relinquishing a portion of its quota.
4. On or about February 24, 2022, DFO advised the Applicant that DFO would not be proceeding with a second expression of interest under the voluntarily relinquishment program. The Applicant was advised that DFO was considering an approximately 14% reduction of the Applicant’s elver quota with no financial compensation provided. DFO invited written submissions with respect to its proposal. Very little time was provided to prepare written submissions.

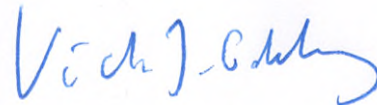
5. The Minister announced a 13.7% reduction of Applicant's quota on April 6, 2022. At that time, DFO officials promised that they would engage in thorough consultation with the Applicant during the following year, hopefully to avoid the various negative outcomes that have arisen in the fishery over the past several seasons.
6. Despite those promises, from April through December of 2022, DFO promised and scheduled several meetings with quota holders, only to cancel them or unsuccessfully attempting to pass the buck to another colleague. No DFO official ever met with the quota holders or communicated with them in writing except regarding the scheduling and cancellation of meetings.
7. The Applicant informed DFO about flaws in the 2012 COSEWIC decision, which were at the core of the Department's advice to the Minister and have a profound impact on the management of this fishery. This issue is a root cause of the various negative outcomes in the fishery over the past several years, which include fishery closures in 2020 and 2023, the compromise of vital science efforts, and lawlessness in the fishery caused primarily by poachers.
8. DFO's representatives have attempted to defend the 2012 COSEWIC decision on grounds that are demonstrably untrue, particularly the erroneous claim that any alleged biases in the 2012 COSEWIC decision were smoothed out by peer review.
9. On or about March 28, 2023, the Applicant received a written decision from the Minister, which indicated its quota would be reduced by 13.7% as compared to its 2021 quota.
10. In advising the Minister leading up to her March 28, 2023 Decision, DFO representatives repeated their misleading description of the species stock status from the year before and refused to advise her on the concerns raised by the Applicant and others for a second year in a row.
11. The Decision is incorrect or unreasonable because the Applicant had a legitimate expectation that it would receive some form of financial compensation in exchange for relinquishing its quota based on the representations made by DFO.
12. The Decision is incorrect or unreasonable because it is arbitrary and unilaterally imposed the quota reduction in a bad faith manner. It completely contradicts the March 2021 ministerial statement that the Government of Canada was committed to ensuring First Nations access to the fishery through a "willing buyer-willing seller approach".
13. The Decision is incorrect or unreasonable because it was made in a procedurally unfair manner.
14. The Decision is incorrect or unreasonable because it was made with no evidentiary basis and without a cogent chain of reasoning.

15. The Decision is incorrect or unreasonable based on other grounds which may appear in the Record.

**This application will be supported by the following material:**

16. This Notice of Application;
17. The record in the matter of South Shore Trading v. Attorney General of Canada (T-1804-22) and the related cases of Shelburne Elver Limited v. Attorney General of Canada (T-866-22); and Wine Harbour v. Attorney General of Canada (T-923-22);
18. affidavits together with exhibits;
19. the certified tribunal record;
20. such further and other material as counsel may advise and this Honourable Court may allow.
21. The Applicant requests that DFO send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of DFO to the Registry:
  - (a) The certified record relied on by DFO in arriving at the Decision,
  - (b) Any other materials or documents relied on by DFO in arriving at the Decision.

**DATED** at Halifax, Nova Scotia, this 27<sup>th</sup> day of April, 2023.



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Victor J. Goldberg, K.C.  
Counsel for the Applicant, South Shore  
Trading Co. Ltd.

Cox & Palmer  
Nova Centre – South Tower  
1500-1625 Grafton Street  
Halifax, NS B3J 0E8  
Tel: (902) 491-4119  
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## SCHEDULE "A"



Fisheries and Oceans Pêches et Océans  
Canada Canada

PO Box 1006  
Dartmouth, NS  
B2Y 4A2

March 28, 2023

South Shore Trading Co., Ltd  
Mitchell Feigenbaum  
PO Box 1545  
Port Elgin, New Brunswick  
E4M 3Y9

Dear Mr. Feigenbaum:

**RE: 2023 Elver Fishery Allocation**

This is further to a meeting held with Fisheries and Oceans Canada (DFO; the Department) representatives on January 26, 2023, a letter from the Department dated January 30, 2023, and your response on February 8, 2023.

The Minister has considered your representations on the proposed approach set out in the meeting on January 26, 2023, and the letter from DFO on January 30, 2023. As communicated, the Minister supports an increase in First Nations participation in the commercial elver fishery, without increasing the overall effort in this fishery.

The Minister has decided for the 2023 season to allocate existing commercial licence holders (not including We'koqma'q First Nation) 13.7 per cent less quota this year as compared to individual allocations issued in 2021, as an interim measure to support an increase in First Nations participation for the 2023 fishing season. For the 2023 season, this decision is not coupled with the provision of any financial arrangement for licence holders. This year's individual quota allocation is reflected in 2023 conditions of licence (2023 quota allocation of 1035.6 kg) with no other adjustments to access being made, such as changes or reduction of the river fishing locations for the 2023 season. This approach is consistent with the interim management measures taken in the 2022 season.

For 2023, the Minister has set the overall total allowable catch (TAC) for elver at 9,960 kg, which is the same as the 2022 season. DFO will monitor removals in relation to the TAC, enforce the license conditions, and take measures to deter unauthorized fishing, including enforcement action, to support conservation of the American eel and proper management of the fishery.

As part of the interim approach, DFO is authorizing six Wolastoqey communities and four Kespukwitk communities to fish elver in 2023. The licences include a specific amount of quota, specific rivers as fishing locations with corresponding river catch

limits, reporting and monitoring requirements, and other conditions essential to uphold the precautionary management approach. These management measures are intended to support an orderly and sustainable fishery in keeping with the Integrated Fisheries Management Plan for elver.

Over the course of 2023, and consistent with the Government of Canada's reconciliation agenda to increase First Nation participation in fisheries, DFO will conduct a review of the elver fishery with a primary objective being the sharing of benefits through enhanced Indigenous participation in the fishery over the longer term. DFO has initiated planning for this review, which will take into account the views of current commercial licence holders.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'J. Ford', is written over the typed name.

Jennifer Ford  
Director  
Resource Management and Licensing  
Maritimes Region