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FORM 301 - Rule 301

FEDERAL COURT

BETWEEN:

GRAND MANAN FISHERMENS ASSOCIATION, INC.

Applicant

- and -

**ATTORNEY GENERAL OF CANADA and FUNDY NORTH
FISHERMEN'S ASSOCIATION INC.**

Respondents

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 RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant.
The relief claimed by the applicant appears below.

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 Fredericton, New Brunswick.

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 file a notice of appearance in Form 305 prescribed by
the *Federal Courts Rules* and serve it on the applicant's solicitor or, if 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.

Date Issued: _____

Issued by: _____

Address of local office:

82 Westmorland Street
Suite 100
Fredericton, NB
E3B 3L3

TO: ATTORNEY GENERAL FOR CANADA
Department of Justice
Suite 1400, Duke Tower
5251 Duke St.
Halifax, NS B3J 1P3

AND TO: FUNDY NORTH FISHERMEN'S ASSOCIATION INC.
3 Prince of Wales Street
St. Andrews NB E5B 3W9

Application

This is an application for judicial review in respect of a decision of the Minister of Fisheries, Oceans and the Canadian Coast Guard (the “Minister”) dated October 4, 2022, which purported to change the coordinates for the Lobster Fishing Area 37 (LFA 37) on an interim basis, without any change to the LFA 37 coordinates specified by the Atlantic Fishery Regulations, 1985, SOR/86-21 (the “**Decision**”).

The Applicant makes application for:

1. An order quashing the Decision as unreasonable or incorrect;
2. An order requiring the Minister to adhere to the legislated process for changes to the Atlantic Fishery Regulations;
3. Costs of this application;
4. Such further and other relief as this Honourable Court deems to be just and appropriate.

The grounds for the application are:

1. The Applicant (“the GMFA”) is a company incorporated pursuant to the laws of New Brunswick. It represents the interests of 82 Lobster Fishing Area 38 (“LFA 38”) license holders, who are issued LFA 38 commercial licenses by the Department of Fisheries and Oceans (“DFO”) on an annual basis. The GMFA also represents 136 crew members, and 7 indigenous license designated operator captains. The majority of LFA 38 license holders are represented by the GMFA.
2. The Respondent Fundy North Fishermen's Association Inc. (the “FNFA”) represents the interests of Lobster Fishing Area 36 (“LFA 36”) license holders. The GMFA and FNFA have been recognized by DFO as “stakeholder groups”.
3. Lobster Fishing Area 37 (LFA 37) is a fishing area located in the Bay of Fundy, to the north and northeast of Grand Manan, and southwest of Saint John. It is roughly the shape of a trapezoid, and is bordered on the south by LFA 38 and by LFA 36 to the north, east, and west. The area of LFA 37 is defined in Schedule XIII, Part V of the Atlantic Fishery Regulations, 1985 (“AFR”) by reference to four points defined as geographic coordinates. The defined area of LFA 37 has remained unchanged since the AFR were enacted in January 1986.

4. DFO has historically referred to LFA 37 as a shared fishing area, and all LFA 36 and LFA 38 license holders are eligible to fish in LFA 37 in accordance with license conditions issued for their respective areas. No commercial or communal-commercial licenses are issued for LFA 37 specifically.
5. For many years, DFO has expressed a desire to eliminate LFA 37 and re-allocate the existing area to LFA 36 and LFA 38, to create two neighbouring but fully independent lobster fishing areas. To this end, DFO has engaged in consultations with GMFA and FNFA over a period of decades, with efforts to achieve a resolution intensifying in recent years. These efforts have not been successful.
6. Following the failed efforts by a third-party facilitator in 2021 to achieve a consensus from GMFA and FNFA for an option to divide LFA 37, DFO commissioned a report to outline a decision-making framework for the division of the currently shared LFA 37 and subsequent re-allocation to LFA 36 and 38, to be used in preparing a recommendation for consideration by the Minister.
7. A 40-page consultant's report dated June 17, 2022 ("the Report") was subsequently prepared. The Report considered demarcations of LFA 37 that had been proposed by GMFA and FNFA but considered the proposals untenable in terms of an equitable distribution based on relative productive capacity. Instead, the report proposed a demarcation line to be established at Latitude 44°53, which would divide the existing area of LFA 37 in two. The northerly portion would be fished under LFA 36 licenses, and the southerly portion would be fished under LFA 38 licenses.
8. On October 4, 2022, the Applicant's representative, Melanie Sonnenberg, received an e-mail from the Minister's Regional Advisor, Liam MacKinnon, informing the GMFA that the Minister had made an interim change to the commercial access to LFA 37, prior to the opening of the fall lobster season, based on the Report's recommendation. The e-mail noted that consultation with indigenous communities were ongoing, so there would be no changes to communal commercial licenses for the 2022-23 season while consultations continued.
9. The e-mail also noted that the Minister allowed for further input from the association (the GMFA) and harvesters, but that it was the Minister's intent to start the regulatory process to make the LFA 37 change permanent at the conclusion of Indigenous consultations. The e-mail estimated that the regulatory process change was anticipated to take a couple of years.

10. Although Ms. Sonnenberg inquired whether a formal letter from the Minister would be forthcoming, the Decision was only communicated in the form of the e-mail from Mr. MacKinnon.
11. DFO subsequently issued license conditions to LFA 38 license holders that define LFA as “a Lobster Fishing Area as defined in Schedule XIII of the Atlantic Fishery Regulations, 1985 SOR/86-21” but restrict license holders’ fishing area authorization to a limited portion of LFA 37 based on the new dividing line.
12. In accordance with the AFR, the LFA 38 fall fishing season is scheduled to commence on November 8, 2022 at 7:00AM.
13. The Decision is incorrect or unreasonable because the Minister is not entitled to create a new demarcation line dividing a lobster fishing area defined by the AFR to the exclusion of existing license holders without following the requirements of the regulatory process, in accordance with the *Statutory Instruments Act*, RSC, 1985, c. S-22.
14. The Decision is unreasonable and in bad faith because (a) the Minister communicated the Decision just five weeks from the opening of the fishing season, (b) the Minister informed the GMFA that the interim decision allowed for further input from the association and its harvesters, but did not give the GMFA an opportunity to review the report or give feedback on the consultant’s recommendation prior to deciding that the change would be implemented for the fall season, (c) the Minister has indicated consultation with indigenous communities is incomplete, and (d) the Minister has failed to provide meaningful reasons for the Decision. The GMFA is also of the view that there are serious deficiencies with the report on which the Decision is based.
15. Counsel for the GMFA wrote to the Minister on October 21, 2022 to express concern and to request that the Minister retract her decision, as it appeared to conflict with the provisions of the *Fisheries Act*, AFR, and FGR. Counsel for the GMFA informed the Minister that if there was no change to the interim decision, the GMFA intended to proceed with a federal court judicial review on the basis, in part, of jurisdictional error.
16. On or around October 20, 2022, the Minister proceeded to issue license conditions that reflected a new boundary line limiting the rights of LFA 37 license holders to fish in a portion of LFA 37. For LFA 38 license holders, the area of LFA 37 in which they are authorized to fish has been reduced by 57%. This will have significant economic ramifications for license holders.

17. On October 28, 2022, the Minister sent a letter to counsel for the GMFA indicating that the letter of October 21, 2022 would “receive due consideration” and “a response may be forthcoming”. Counsel has not received any further correspondence from the Minister as of the date of filing.
18. The Decision is incorrect or unreasonable because it is *ultra vires* the scope of the Minister’s authority as provided by the *Fisheries Act* and regulations.
19. The Decision is incorrect or unreasonable because the Applicant had a legitimate expectation that it would have an opportunity to provide comment on any proposed division prior to implementation of any recommendations by the Minister.
20. The Decision is incorrect or unreasonable because it unilaterally imposes the division in a bad faith manner. It contradicts the Department’s longstanding recognition of LFA 37 as a “shared area” and the premise on which LFA 37 was first established.
21. The Decision is incorrect or unreasonable because it was made in a procedurally unfair manner.
22. The Decision is incorrect or unreasonable because it was made with a deficient evidentiary foundation and without a cogent chain of reasoning.
23. 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:

24. this Notice of Application;
25. Affidavits along with exhibits;
26. The certified tribunal record;
27. Such further and other materials as counsel may advise and this Honourable Court may allow.
28. The Applicant requests that the Minister and DFO send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the Minister and DFO to the applicant and to the Registry:

- a. The certified record relied on by the Minister in reaching the Decision,
- b. Any other materials or documents relied on by the Minister in arriving at the Decision.

DATED at Yarmouth, Nova Scotia, this 15th day of November, 2022.



Sarah A. Shiels

Counsel for the Applicant, Grand Manan
Fishermen's Association, Inc.

CLIFFORD SHIELDS LEGAL
242 Main Street
Yarmouth, NS B5A 1C9
Tel: (902) 881-2810
Fax: (902) 881-2660
E-mail: sarah@cslegal.ca