

FORM 301 – Rule 301

Court File No.

**FEDERAL COURT**

BETWEEN:

**CANADIAN COMMITTEE FOR A SUSTAINABLE EEL FISHERY INC.,  
NOVAEEL INC.,  
SOUTH SHORE TRADING CO. LTD.,  
and MITCHELL FEIGENBAUM**

Applicants

- and -

**THE MINISTER OF FISHERIES,  
OCEANS AND THE CANADIAN COAST GUARD,  
and THE 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  
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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 Department of Fisheries and Oceans and Canadian Coastguard (the “**DFO**”) communicated by Regional Director of Fishery Management, Jennifer Ford on January 11<sup>th</sup>, 2024, informing Elver Fishery Quota Holders in connection with the 2024 DFO Maritime Region Elver Fishery that:

DFO was rolling over the Total Allowable Catch (TAC) at 9,960 kg, and that its law enforcement agents would not be increasing its riverside enforcement efforts in 2024 due to a lack of prosecutorial support.

### **The Applicants make application for:**

1. That this Application be expedited and specially managed;
2. an Order quashing the Decision as unreasonable, incorrect, and/or procedurally unfair;
3. an Order referring the matter back to the DFO Minister for reconsideration and/or to take further steps to avoid a repeat in future years;
4. an Order requiring the Department and Minister, in the management of the elver fishery, to act in accordance with

their duties of procedural fairness, specifically in a manner that is open minded and gives appropriate consideration to the points raised by Applicants and related stakeholders;

5. an Order requiring the DFO Minister to continue consultation and negotiations with respect to the 2024 glass eel fishery in accordance with directions provided by this Court;
6. Retaining the Court's jurisdiction and supervising the Respondent DFO to ensure its fulfilment of its responsibilities in a manner that is fair, reasonable and correct, and as dictated by the requested Order;
7. in the alternative to the above Order, a Declaration that the Decision was unreasonable and/or incorrect;
8. costs of this Application; and
9. 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 CANADIAN COMMITTEE FOR A SUSTAINABLE EEL FISHERY, INC. (CCSEF)** is a non-profit corporation located at P.O. Box 34

Caledonia, NS Canada, B0T 1B0. (**CCSEF**), whose members began working with DFO in 1997 and was Incorporated in 2012 by 5 of the 8 commercial quota holders in the elver fishery. CCSEF's members are commercial quota holders Hamilton Eel Fishery, Atlantic Elver Fishery, Neptune Fishery, Shelburne Elver Limited, and South Shore Trading, Co.

2. The Applicant, **NOVAEEL INC.**, is a Nova Scotia company located at 2161 Armcrescent E Dr., Halifax, NS and founded in 2014 to research, develop and promote global scale eel aquaculture in Canada (**NovaEel**). NovaEel's shareholders include five Canadian quota holders and individuals who are members of a fifth quota holder (Shelburne Elver Limited, Welshtown, NS). NovaEel's Canadian Quota shareholders include Wine Harbor Fishery, Atlantic Elver, Neptune Fishery, South Shore Trading Co. Individual Nova shareholders that are members of Shelburne Fishery are Brian Grouix, Michael Townsend and Cecill Newell. .
3. The Applicant **SOUTH SHORE TRADING CO. LTD.** is a Nova Scotia company located at 36 John A. Trenholm Road in Port Elgin, New Brunswick, formed in 1984, and an elver fishery license holder. Its license is issued on an annual basis by the Department of Fisheries and Oceans (**DFO**).
4. The Applicant **MITCHELL FEIGENBAUM** is an individual residing at 8043 Highway 7, Musquodoboit Harbor, NS who has been involved in the eel business since 1978, age 15. He first became interested in the glass eel fishery when he

moved to Canada in 2000 as the General Manager and principal shareholder of South Shore Trading.

5. Feigenbaum is the majority shareholder and President of South Shore Trading. SST has been Canada's leading exporter of *adult* eels from 1984 to the present and has been a trader of glass eels (also referred to as "baby eels" or "elvers") since the inception of the commercial glass eel fishery.
6. Feigenbaum is a personal shareholder and the Chairman of the Board of NovaEel.
7. Feigenbaum is a member and director of the Canadian Committee for a Sustainable Eel Fishery.
8. Feigenbaum is also the founder and the President of Maine Eel Trade and Aquaculture (**META**), formed in 2014, and a shareholder of NovaEel. Feigenbaum is responsible for the worldwide sale of glass eels for both META and South Shore Trading, which has hovered at or above 50% of the North American market share for lawful eels since 2001 or 2002.
9. CCSEF plays a major role in eel science, including financial and logistical support to several eel population studies conducted by a third-party NGO (Coastal Action, Mahone Bay, NS), including the longest running survey of glass eel recruitment in North America on the East River in Chester, Nova Scotia.
10. On or about 2004, the DFO created the Canadian Eel Science Working Group ("CESWoG") to provide management advice for American eel. The Applicant

Mitchell Feigenbaum was a DFO-recognized industry observer and regular participant in CESWoG proceedings.

11. SST, NovaEel and most CCSEF members have substantial business and community interests that rely on the proper management of the elver fishery and policies that promote stable quota. DFO's January 11, 2024 Decision is part of a course of conduct by DFO which by design and/or effect has substantially undermined their interests.
12. NovaEel has enabled a unified bloc of quota holders to invest upwards of \$10 million in NovaEel to achieve the goal of domestic aquaculture of eels in Canada, with considerable funding by DFO.
13. The DFO Decision greatly impacts the Applicants' interests in seeing the ongoing future viability, stability and success of the fishery, and in the commercial eel and elver fishing industries and their eel aquaculture opportunity under development, with great impact on Canada's future economy.
14. Feigenbaum's interests have been greatly affected by the impact of DFO's January 11, 2024 Decision, and related conduct. The TAC Decision is of urgent importance to Feigenbaum, as it guides fundamental business decisions; impacts his personal financial interests in multiple business; complicates his retirement and Estate planning; and is part of a course of conduct that has had grave negative impacts on his professional aspirations, including the desire to make positive contribution to reconciliation between Canada and its First Nations people.

15. The Applicants interests have been greatly affected by the impact of the DFO Decision. The DFO Decision is of high importance to the Applicants as it directly impacts their revenue, business and economic interests, the livelihood of the Applicants, and that of their employees.
16. Each year the glass eel season usually commences the middle of March and is effectively over in early June.
17. DFO officials have informed the Applicants that the reason the TAC cannot be increased to accommodate new quota holders, or even considered it, is because a final decision on whether to list glass eels as threatened or endangered on the *Species at Risk Act* list is still pending. This non decision making, inaction, and arbitrary approach by the DFO been occurring since 2012. The government's obligation to make a SARA listing decision was triggered by the decision by COSEWIC to classify the American eel as "threatened" in COSEWIC 2012.
18. For years, influential elements within the DFO civil service have deliberately "ragged the puck" in making a SARA listing recommendation. This was admitted by a senior DFO official who has been identified to the Department and Attorney General. DFO's deliberate inaction allows it to cite the COSEWIC report to achieve management goals and justify a host of decisions without having to confront the essential flaws of that decision.

19. The COSEWIC 2012 Report which categorized the American eel as "threatened" was substantively flawed. This conclusion was in the interest of the Great lakes/Upper St. Lawrence American eel population, and it did not reflect how the biological area of occupancy of Maritime American eel population has been and remains stable.
20. Regional DFO officials in the Maritimes have informed the Applicants that they do not support listing the American eel on the SARA registry because it would not be effective in halting eel mortality in the Great lakes/Upper St. Lawrence region where the problems with the population are acute. In addition, a SARA listing would put an end to commercial fishing in the Maritimes, where eel recruitment has been on the rise over the past thirty years.
21. Multiple regional and national DFO officials have assured Applicants that a favorable resolution of the SARA issue would enable them to consider a TAC increase in the glass eel fishery, based on their own precedents, and stated policy of increasing glass eel fishing effort and harvests based on corresponding reduction of harvests of American eel at the adult stage ("**Conversion Policy**").
22. The DFO Minister and DFO rely on the substantively flawed COSEWIC II report and Departmental inaction on a *Species at Risk Act* listing recommendation as its sole or primary reason for the Department's refusal to increase quota and other management decisions of inaction on eel-related matter.
23. The past decade has further disproven the contention that eel populations are on the decline in Canada. DFO itself notes that glass eel recruitment to Canada has

risen over the past three decades and the overall eel population has been stable for over twenty years.

24. DFO officials are deliberately fettering the Minister's discretion by refusing to even include a TAC increase as a management option and failing to advise her properly on the questions about COSEWIC II and TAC, despite repeated and specific urging of the majority of commercial quota holders.
25. When viewed in the context of the Department's non-enforcement decision and its traceability decision, the TAC decision is part of its officials' intention to box the Minister into only their preferred course, essentially hijacking her discretion and thwarting her consideration of the points raised by key stakeholders.
26. Many DFO decisionmakers are aware of the illogic of COSEWIC II but refuse to grapple with the serious concerns raised by the majority of quota holders. The government does not refute the allegations relating to COSEWIC that have been raised by quota holders.
27. The Department's January 11, 2024 Decision to roll over the quota for the upcoming elver season, without consultation, discussion or engagement on quota holders' concerns about the substantive credibility of COSEWIC II, is part of its broader course of conduct designed to undermine quota holder rights.
28. Some Department actors have been motivated by hostility towards Applicants and other quota holders based on improper motives, such as resentment for their criticisms of COSEWIC II; their resort to political assistance to pursue their

reconciliation and value-add aquaculture goals; their outreach to the press in the defense of the fishery; false assumptions about their wealth, earnings and capital investments; retaliation for their resort to judicial intervention; and other improper motives to be determined.

29. DFO's Decision was not based upon objective or authoritative stock assessments for American eel elver population. DFO's Decision was unreasonable and/or incorrect in light of the ongoing reality and evidence of rising glass eel recruitment in the Maritimes and a stable eel population in Canada, the Conversion Policy, and other objective justification for an increase Total Allowable Catch. The DFO should have considered a TAC increase.
30. Another element of the Department's course of conduct designed to undermine the elver fishery has been its refusal to introduce or implement a software-based traceability system that has been requested by quota holders for years. DFO officials have intentionally dragged their feet on traceability, citing "jurisdictional complexity," while refusing to meaningfully engage other federal and provincial stakeholders with an interest in a traceability system.
31. By design or effect, DFO's failure to implement a traceability system promotes rampant illegal and unauthorized fishing that the Department has and will continue to rely on to justify its extraordinary measures, such as two fishery closure orders in the last four fishing seasons.

32. The dysfunction in the fishery that will occur without judicial intervention is not merely a possibility, but a near certainty that DFO proposes to accommodate in new rules.
33. Another element of DFO's course of conduct designed to undermine the elver fishery is its public statements that it will not increase its scant law enforcement efforts against unauthorized or illegal harvesters in 2024 but will instead focus on buyers and exporters.
34. The absurdity of the Non-Enforcement Decision is that DFO knows the identities of most buyers of illegal and unauthorized harvested elvers but refuses to act against them. Thus, there is inadequate DFO enforcement against the unauthorized harvester at the river or against the harvester's transfer of elvers to his or her buyer, who transports the product with ease.
35. DFO has stubbornly adhered to a policy of lax-enforcement of fishing rules at the river, and only focusing on buyers and exporters, despite being aware that once illegal elvers leave the river and are sold to an unlawful buyer, they enter a vast underground distribution system that is very difficult to detect.
36. Throughout its management of the elver fishery in recent years, Department officials have fettered the Minister's discretion, and caused widespread dysfunction, by refusing to even present, let alone have her consider or grapple with, the issues raised by the Applicants.

37. By making internal decisions on important issues of public policy prior to presenting her tailored recommendations and advice memoranda that evade the questions raised by quota holders, unelected DFO officials are usurping the Minister's discretion on matters of policy that are of profound interest to the stakeholders and public alike.
38. In making its 2024 TAC Decision and refusing to even address the possibility of additional quota in light of COSEWIC II's blatant defect, by foreclosing the willing buyer / willing seller approach for 2024 based on false and pretextual assumptions, in making its Non-Enforcement Decision, its failure to implement a traceability system before presenting its advice to the Minister on reducing commercial quotas for 2024, the Department precludes the Minister from giving thoughtful consideration to any of the questions raised by quota holders.
39. Both the process that led to the DFO Decision and the Decision itself was unreasonable and/or incorrect. The recommendations presented to the DFO Minister by Department officials are not supported by science or historical facts, nor do they reflect the profoundly serious impacts experienced by the commercial elver fishery in recent years.
40. The DFO's Decision was unreasonable and/or incorrect.
41. The DFO Minister's Decision was arbitrary, based on irrelevant or extraneous considerations, or made not made in good faith.

42. The DFO Minister violated the duty to exercise due care in ascertaining the scope of the DFO Minister's statutory authority.
43. The DFO Minister's choice of procedure was unfair, unreasonable and/or incorrect and an excessive measure.
44. The DFO Minister's breach of the Applicant's legitimate expectations constitutes a denial of procedural fairness.
45. Both the process that led to the DFO's Decision and the Decision itself was unreasonable and/or incorrect. The recommendations presented to the DFO Minister by DFO were unreasonable and not supported by reasons that could stand up to a somewhat probing examination.
46. The DFO's Decision is incorrect or unreasonable because it was made with without sufficient evidentiary basis and without a cogent chain of reasoning.
47. The DFO's Decision is incorrect or unreasonable based on other grounds which may appear in the Record.

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

- (a) This Notice of Application;
- (b) Affidavits along with exhibits;
- (c) The certified DFO Minister and DFO record;
- (d) Such further and other material as counsel may advise and this Honourable Court may allow.

48. The Applicant requests that DFO 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 DFO Minister and DFO to the Registry:

- (a) The certified record relied on by the DFO Minister and DFO in reaching the Decision; and
- (b) Any other materials or documents relied on by the DFO Minister and DFO in arriving at the Decision.

**DATED** at Moncton, Province of New Brunswick, this 9<sup>th</sup> day of February, 2024.



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