

FORM 301

FEDERAL COURT

BETWEEN:

SHELBURNE ELVER LIMITED

APPLICANT

– and –

ATTORNEY GENERAL OF CANADA

RESPONDENT

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.

April _____, 2023.

Issued by: _____
Registry Officer

Court File No. _____

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Address of local office:

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

TO: Attorney General of Canada

Atlantic Regional Office
Department of Justice Canada
Suite 1400, Duke Tower
5251 Duke Street
Halifax, Nova Scotia B3J 1P3

APPLICATION FOR JUDICIAL REVIEW

This is an application for judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 in respect of the decision of the Minister of Fisheries, Oceans and the Canadian Coast Guard (the “**Minister**”) dated March 28, 2023 to reduce the individual quota (“**IQ**”) allocated to the Applicant pursuant to the Applicant’s 2023 License # 312742 (the “**License**”) issued on March 27, 2023. On March 28, 2023, the Applicant was advised by the Department of Fisheries and Oceans (“**DFO**”), on behalf of the Minister, that the reduction in IQ would not be coupled with the provision of any financial arrangement (the “**Decision**”).

The Applicant seeks an order:

1. In the nature of *certiorari* quashing and setting aside the Decision to reduce, without financial compensation, the Applicant’s IQ in the amount of 13.7% under the License in comparison to the IQ allocated to the Applicant in the years 2005 to 2021;
2. In addition, in the nature of *mandamus* requiring the Minister to recommence the consultation and negotiation process under the voluntary relinquishment program or “willing buyer-willing seller” process in accordance with the principles of procedural fairness and natural justice;
3. Costs in favour of the Applicant; and
4. Such other relief as this Honourable Court may determine appropriate.

The grounds for the application are:

1. The Applicant, Shelburne Elver Limited (“**Shelburne Elver**”), is a corporation incorporated pursuant to the laws of the Province of Nova Scotia. Shelburne Elver operates as a cooperative comprised of 17 members who engage in fishing and related activities in the elver fishery pursuant to a license issued to it on an annual basis by the Minister.
2. In or about February 2021, the Minister launched an expression of interest process with commercial elver fishery license holders under a voluntary relinquishment program or “willing buyer-willing seller” process. Under the voluntary relinquishment program, DFO sought proposals on behalf of the Minister from commercial elver fishery license holders who wished to reduce their IQ, or exit from the elver fishery altogether, in exchange for financial payment from the Minister.

3. The proposed process under the voluntary relinquishment program would facilitate the increase in First Nations participation in the 2022 elver fishery, by providing the portion of IQ voluntarily relinquished by existing commercial elver license holders to create a moderate livelihood elver fishery for First Nations communities.
4. On or about April 6, 2021 in response to the expression of interest process launched by the Minister under the willing buyer-willing seller process, the Applicant submitted a proposal to sell all of its IQ issued to it under its commercial elver fishery license in exchange for financial compensation.
5. On or about August 31, 2021, DFO on behalf of the Minister received a market valuation report created by TriNav Fisheries Consultants Inc. to determine the value of the elver licences or IQ reduction as part of the willing buyer-willing seller process.
6. No counter offer was made by the Minister in response to the Applicant's proposal.
7. On or about February 24, 2022, DFO advised the Applicant that the financial submissions received by DFO were significantly in excess of the market value estimate obtained by DFO, and in view of the large divergence between the market valuation and the proposals submitted, the Minister would not proceed with a second expression of interest process under the voluntary relinquishment program. DFO further stated and that the Minister was considering reducing approximately 14% of elver license holder's IQ, including the Applicant's IQ, without financial compensation. The Minister invited written response to its proposed approach for the 2022 elver fishing season before March 4, 2022.
8. On or about March 3, 2022, the Applicant submitted a written response to DFO stating, among other things, that it did not agree with the Minister's proposed course of action, especially in light of the 2022 elver fishing season's scheduled opening in the coming weeks, and outlined other proposed methods which could increase First Nations' participation in the elver fishery while avoiding an involuntary reduction in IQ of existing elver license holders without financial compensation.
9. On or about March 30, 2022, the Applicant's allocated IQ pursuant to its license for the 2022 elver fishery was reduced by 13.7% in comparison to the IQ issued to it in previous years (2005 to 2021).

10. On or about April 6, 2022, the Minister advised the Applicant that it would allocate 13.7% less IQ for the 2022 season to commercial elver licence holders (not including We'koqma'q First Nation) as compared to the previous year, as an "interim measure" to support an increase in First Nations participation in the 2022 elver fishing season without financial payment to licence holders, including the Applicant.
11. On or about January 26, 2023, DFO advised elver licence holders during a meeting that DFO was considering as an "interim measure" to increase First Nation participation in the 2023 elver fishery to reduce IQ allocated to commercial elver licence holders by approximately 14% in comparison to the IQ allocated to licence holders in 2021. DFO also stated that the proposed reduction in IQ for the 2023 elver fishery would not be coupled with financial compensation.
12. On or about January 30, 2023, DFO sent a letter to the Applicant confirming the "interim approach" proposed for the 2023 elver fishery. Namely, that the Minister was considering a redistribution approach for the 2023 elver fishery that would be similar in concept and scale to the redistribution that was done for the 2022 elver fishery. DFO, on behalf of the Minister, invited written response to the Minister's "interim approach" for the 2023 season by February 8, 2023.
13. On or about February 8, 2023, the Applicant submitted a written response to DFO stating, among other things, that it did not agree with the Minister's proposed course of action for the 2023 elver fishery, especially in light of the Minister's continued commitment to the 'willing buyer-willing seller' process to increase First Nation participation in various fisheries.
14. On or about March 27, 2023, the Applicant's allocated IQ pursuant to its License was reduced by 13.7% for the 2023 elver fishing season in comparison to the IQ allocated to the Applicant in 2021.
15. On or about March 28, 2023, DFO advised the Applicant that the Minister has decided for the 2023 elver fishery to allocate existing commercial licence holders (not including We'koqma'q First Nation) 13.7 % less IQ as compared to the IQ issued in 2021, as an "interim measure" to support an increase in First Nations participation for the 2023 fishing season. DFO further stated that this decision was not coupled with the provision of any financial arrangement for commercial elver licence holders.

16. The Decision of the Minister or on her behalf should be quashed and set aside for the following reasons:
- (a) 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 IQ based on the representations made by the DFO to the Applicant, and that the approach taken by the Minister in the 2022 elver fishery was an “interim approach”, and would not occur again for the 2023 elver fishery;
 - (b) the Minister, without providing its market value assessment of the IQ and without an elver fishery conservation assessment, unreasonably terminated the expression of interest process and the voluntary relinquishment program;
 - (c) The Minister unreasonably reduced the IQ held by the Applicant under its License without financial compensation to the Applicant to create a moderate livelihood elver fishery for First Nations communities;
 - (d) The Applicant had legitimate expectations that the consultation process would result in an outcome that would be appropriate and fair to all elver license holders who may be impacted by the Minister’s Decision, including the Applicant;
 - (e) The Decision was unreasonable as it was a unilaterally imposed reduction in the IQ of the Applicant in the absence of a sincere and good faith willing buyer-willing seller process, such that the transactions under that process can be appropriate for everyone;
 - (f) The Decision represents a change in the position of the Minister with respect to the elver fishery which is prejudicial and unfair to the Applicant, and for these and other reasons, the arbitrary and capricious Decision failed to observe the principles of natural justice, procedural fairness or other procedure that the Minister was required by law to observe;
 - (g) The Minister unreasonably decided that the increase in First Nations participation in the elver fishery must occur without increasing the overall effort in the elver fishery;

- (h) The Decision is incorrect or unreasonable because it was made in a procedurally unfair manner;
- (i) The Decision is incorrect or unreasonable because it was made with no evidentiary basis and without a cogent chain of reasoning;
- (j) The Decision was unreasonably made in bad faith through consideration of factors irrelevant or extraneous to the statutory purpose; and
- (k) Such other grounds as may appear.

This Application will be supported by the following materials:

1. The within Notice of Application;
2. Affidavit of the Applicant and/or other affiant(s);
3. The certified tribunal record; and
4. Other material as counsel may advise and this Honourable Court may permit.

The Applicant requests, pursuant to Rule 317(1) of the *Federal Court Rules*, that the Minister send to the Applicant and to the Registry certified copies of:

1. all material in the Minister's possession, or in the possession of DFO, relating to the Decision including, without limiting the generality of the foregoing, all material surrounding the voluntary relinquishment program, copies of all notes, memoranda, analyses, correspondence, electronic communications or other records disclosing, containing or discussing the reasons for which the Minister made the Decision;
2. the market valuation assessment procured from TriNav Fisheries Consultants Inc. received by DFO in August 2021, and all materials, including directives, provided to TriNav Fisheries Consultants Inc. by DFO, or materials relied upon by TriNav Fisheries Consultants Inc., in support of the market valuation assessment; and

3. Any other materials or documents relied upon by the Minister or DFO in arriving at the Decision.

DATED at Halifax, Nova Scotia this 25th day of April, 2023.



Roderick (Rory) H. Rogers, K.C.

Manon A. M. Landry

Stewart McKelvey

Queen's Marque

600-1741 Lower Water Street

Halifax, NS B3J 2X2

Tel: 902.420.3200

Fax: 902.420.1417

**Solicitors for the Applicant, Shelburne Elver
Limited**