

FORM 301 – Rule 301

FEDERAL COURT

BETWEEN:

JOHN MOMBOURQUETTE

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 Court 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:

The October 17, 2022 decision of the Deputy Minister of the Department of Fisheries and Oceans Canada (the “Deputy Minister”) denying the Applicant’s request for an exception to the policy for a medical substitute operator (the “Decision”). This Decision was made pursuant to section 23(2) of the *Fisheries (General) Regulations* (“FGR”) and section 11(11) of the *Commercial Fisheries Licensing Policy for Eastern Canada, 1996* (the “Policy”). The Deputy Minister issued the Decision in relation to Mr. Mombourquette’s appeal to the Atlantic Fisheries License Appeal Board (“AFLAB”) that was heard on September 29, 2020.

The Applicant makes application for:

1. an order quashing the Decision and allowing the Applicant’s request for an exception to the policy for a medical substitute operator, permitting him continued use of the medical substitute operator authorization;
2. in the alternative to the above order, an order quashing the Decision and referring the matter back to another departmental decision-maker for reconsideration;
3. an order declaring that the Deputy Minister’s decision is discriminatory and contrary to section 15(1) of the *Charter of Rights and Freedoms*;
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:

6. The Deputy Minister erred in law in deciding that subsection 15(1) of the *Canadian Charter of Rights and Freedoms* is not engaged in this Decision.
7. The Deputy Minister erred in law in deciding that the Decision was not based on a discriminatory distinction.
8. The Deputy Minister failed to outline any reasons in law or policy why the infringement of Mr. Mombourquette’s right to equality and freedom from discrimination was justified in these circumstances.
9. The Deputy Minister failed to balance the severity of the interference of the Decision with Mr. Mombourquette’s rights to equality and freedom from discrimination under section 15(1) of the *Charter*, with relevant statutory objectives, in a proportionate way;

10. The Deputy Minister asserted that the Applicant is seeking “retirement-like benefits in a licence to fish” but failed to explain how using an aid for physical disability while maintaining an active role in the fishing operation is akin to retirement;
11. The Decision is unreasonable and/or incorrect in its failure to properly consider Mr. Mombourquette’s personal and financial circumstances.

This application will be supported by the following material:

12. this Notice of Application;
13. the Affidavit of John Mombourquette along with exhibits;
14. the certified tribunal record;
15. such further and other material as counsel may advise and this Honourable Court may allow.

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 reaching the Decision,
- b) Any other materials or documents relied on by DFO in arriving at the Decision.

DATED at Halifax, Nova Scotia, this 10th day of November 2022.



Richard W. Norman, Counsel for the Applicant, John Mombourquette

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Halifax NS B3J 3N2
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Fisheries and Oceans
Canada

Pêches et Océans
Canada

Deputy Minister

Sous-ministre

Oct 17, 2022

Mr. John Mombourquette
RR 1
Lower L'Ardoise, NS
B0E 1W0

Mr. Mombourquette:

This letter pertains to your appeal of the April 17, 2020 decision of the Regional Director General of Fisheries and Oceans Canada (DFO), Maritimes Region, regarding your request for a medical substitute operator and heard by the Atlantic Fisheries Licensing Appeal Board (AFLAB) on September 29, 2020.

The inshore fishing licences you have been issued (herring 104562, mackerel 106162, and lobster 111129) are subject to DFO's Commercial Fisheries Licensing Policy for Eastern Canada (CFLP). Since April 2021, they are also subject to subsection 19(2) of the *Atlantic Fishery Regulations, 1985*. That regulatory provision, along with the CFLP, require that you personally carry out the activities authorized under the licences, except if a substitute operator authorization has been issued.

Subsection 23(2) of the *Fishery (General) Regulations* provides that, where a licence holder is unable to engage in the activities authorized by a licence due to circumstances that are beyond their control, DFO may authorize a substitute operator to carry out those activities. This is an exceptional provision intended to, among other things, accommodate fishers suffering from illness or other medical condition.

Section 11(11) of the CFLP guides the application of this exceptional provision where a licence holder is prevented from fishing due to illness or other medical condition. It provides an accommodation for licence holders by allowing for the designation of medical substitute operators to a total maximum period of five years during the holder's career. This five-year maximum period is an essential component of the existing rules aimed at ensuring that inshore fishers personally carry out the activities authorized under the inshore fishing licences they are issued.

After careful review and consideration of all the relevant information, including the regional decision, the materials submitted to AFLAB, AFLAB's recommendation, and your allegation of discrimination under subsection 15(1) of the *Canadian Charter of Rights and Freedoms* (the *Charter*), I regret to inform you that your request for a further exception to the policy for a medical substitute operator is denied.

I agree with AFLAB's conclusion that you were treated fairly and in accordance with departmental licensing policies, practices, and procedures. I am also of the view that the exit

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strategy, as presented to AFLAB, whereby your grandson will possibly become eligible to be issued an inshore licence at some point in the future, is not substantial enough to justify an exception to policy.

With respect to your allegation of discrimination, I have determined that subsection 15(1) of the *Charter* is not engaged in this decision. This is because:

1. There is no indication that you will ever be able to carry out commercial fishing activities personally. You are seeking to collect revenues from a licence to fish for an indefinite period of time without fishing. You are claiming retirement-like benefits in a licence to fish, which are not available by law under the *Fisheries Act*.
2. If it could be considered that my decision would be making a distinction based on your age or physical disability, it would not be a discriminatory distinction. It would merely reflect the reality that your advanced age and the natural physical effects of your aging are inconsistent with ongoing employment in commercial fishing.

Accordingly, your assertion that a refusal of your request would infringe your right to the equal benefit of the law without discrimination is without merit.

Furthermore, your request is inconsistent with DFO's underlying fisheries management policy objectives. Despite this refusal, you are further accommodated in that you may continue to seek renewal of the licences issued to you (herring 104562, mackerel 106162, and lobster 111129) on a yearly basis, so long as the fisheries are not closed for conservation purposes. Continuing to renew the licences will allow you to recommend to the Minister to issue a replacement licence to an eligible fisher, and to access a significant amount of capital via private commercial transaction while exiting the fishery. In my view, this is the best available option that is consistent with the fisheries management regime in place.

For additional information, please contact Sarah Chamberlain at 902-719-5684 or via email at sarah.chamberlain@dfo-mpo.gc.ca.

Yours sincerely,



Lawrence Hanson
Acting Deputy Minister

cc: Mr. Richard Norman, Partner, Cox & Palmer
Mr. Michel Samson, Counsel, Cox & Palmer