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F I L E D	FEDERAL COURT COUR FÉDÉRALE	D É P O S É
	February 09, 2023 09 février 2023	
	Michael Kowalchuk	
	HFX	1

# FORM 301 – Rule 301

Court File No

## FEDERAL COURT

BETWEEN:

**DANA ROBINSON**

Applicant

- and -

**ATTORNEY GENERAL OF CANADA**

Respondent

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

### 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:

1. The February 2, 2023 decision of the Deputy Minister of the Department of Fisheries and Oceans Canada 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* (the “Policy”) denying the Applicant, Dana Robinson, his request for continued use of a medical substitute operator authorization (the “Decision”).
2. The Deputy Minister issued the Decision in relation to Mr. Robinson’s appeal of the March 13, 2017 decision of Morley Knight, former Regional Director General of Fisheries and Oceans Canada (DFO), Maritimes Region, on behalf of the Maritimes Region Licensing Appeal Committee (the “Committee Decision”), denying Mr. Robinson’s request for continued use of a medical substitute operator authorization (the “Appeal”). The Appeal was heard by the Atlantic Fisheries License Appeal Board (“AFLAB”) on June 7, 2018.
3. Mr. Robinson brought the Appeal on the basis that section 11(11) of the Policy, and the Committee Decision made pursuant to it, were unconstitutional as being in violation of his right to equality pursuant to section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (the “Charter”).
4. On March 6, 2019, the former Deputy Minister made a decision with respect to Mr. Robinson’s Appeal, denying him a continued use of a medical substitute operator authorization. Mr. Robinson sought judicial review. His application for judicial review was heard by this Court on September 10, 2020. In reasons released on September 30, 2020, the Honourable Justice Richard Southcott granted his application and directed the Deputy Minister to re-determine the matter in accordance with the Court’s reasons. The Court concluded that Mr. Robinson’s *Charter* rights were engaged by the decision and the decision-maker was obliged to consider those rights. The Court’s reasons were reported as *Robinson v. Canada (Attorney General)*, 2020 FC 942.
5. The Respondent appealed Justice Southcott’s decision. The appeal was dismissed by the Federal Court of Appeal with reasons reported at 2022 FCA 59.
6. The Decision is the redetermination ordered by the Court in September 2020. The Decision ignores or disobeys the Court’s clear directions to the Deputy Minister. In spite of the Court’s findings, the Deputy Minister maintains that Mr. Robinson’s *Charter* rights are not engaged in the decision-making process.

**The Applicant makes application for:**

1. an urgent stay of the Decision and/or a mandatory interim or interlocutory injunction, if necessary, to permit Mr. Robinson continued use of a medical substitute authorization pending the determination of this judicial review for reasons similar to those expressed by this Court in *Robinson v. Canada (Attorney General)*, 2019 FC 876;
2. an order quashing the Decision as unreasonable and/or incorrect, and replacing it with a decision allowing the appeal and Mr. Robinson's continued use of the medical substitute operator authorization as it appears that the Deputy Minister is not prepared to follow this Court's directions with respect to re-determination;
3. in the alternative to the above order, an order quashing the Decision as unreasonable and/or incorrect, and referring the matter back to the Deputy Minister for reconsideration and for a second time directing the Deputy Minister to consider the Applicant's constitutionally protected rights in arriving at any decision;
4. an order declaring that s. 19(2) of the *Atlantic Fishery Regulations, 1985* discriminates against disabled fishers and/or fishers with medical conditions and is contrary to section 15(1) of the *Charter* and is therefore of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*;
5. costs of this application on a solicitor-client basis;
6. such further and other relief as this Honourable Court deems to be just and appropriate.

**The grounds for the application are:**

1. The Decision constitutes an error in law, is unreasonable, and otherwise amounts to a reviewable error in the following ways;
  - (a) the Deputy Minister failed to follow or obey the Court's directions contained in the reasons reported as 2020 FC 942;
  - (b) the Deputy Minister failed to properly acknowledge or consider Mr. Robinson's constitutionally protected right to be free from discrimination pursuant to s. 15 of the *Charter*;
  - (c) the Deputy Minister failed to properly balance the severity of the interference of the Decision with Mr. Robinson's rights to equality and freedom from discrimination under section 15(1) of the *Charter*, with DFO's regulatory objectives, in a proportionate way;
  - (d) the Deputy Minister erred by relying on considerations that were irrelevant or extraneous in reaching the Decision;

- (e) the Deputy Minister's decision was unreasonable and/or incorrect in its failure to properly consider Mr. Robinson's circumstances as described at the AFLAB hearing and other materials.

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

1. this Notice of Application;
2. the Affidavit of Dana Robinson along with exhibits;
3. the certified tribunal record;
4. such further and other material as counsel may advise and this Honourable Court may allow.

The Applicant requests the Atlantic Fisheries Licensing Appeal Board and the Department of Fisheries and Oceans to send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the Atlantic Fisheries Licensing Appeal Board and the Department of Fisheries and Oceans to the Applicant and to the Registry:

- a) The certified tribunal record of AFLAB submitted to, and relied on by Deputy Minister Sargent in reaching the Decision,
- b) Any other materials or documents relied on by the Deputy Minister in arriving at his decision, including (but not limited to) any memorandum or policies delegating any Ministerial discretion (pursuant to s. 7 of the *Fisheries Act*) to the Deputy Minister, and any memorandum or policies indicating how the Deputy Minister is to determine whether extenuating circumstances exist for an exemption to the Policy.

**DATED** at Halifax, Nova Scotia, this 9th day of February, 2023.



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Richard W. Norman, Counsel for the  
Applicant, Dana Robinson

Cox & Palmer  
Nova Centre – South Tower  
1500-1625 Grafton Street  
Halifax, NS B3J 0E8  
Tel: (902) 491-4128  
Fax: (902) 421-3130



February 2, 2023

Mr. Dana Robinson  
RR 3  
Granville Ferry, Nova Scotia  
B0S 1K0

Mr. Robinson:

As ordered by the Federal Court on September 30, 2020, I have reconsidered your request for a further exception to the policy for a medical substitute operator (MSO). Supplementary submissions sent by your legal counsel on May 27, 2022 have also been taken into account in making this decision.

Despite my predecessor's decision on March 6, 2019, you have received since then many MSO authorizations as exceptions to Fisheries and Oceans Canada (DFO) policy. You have received authorizations pending the final resolution of the matter before the Federal Court of Appeal and another one recently until December 31, 2022 (the first period of the Lobster Fishing Area 35 fishing season) pending this decision. Since you have received exceptional MSO authorizations until December 31, 2022, re-deciding the matter for any previous seasons would serve no practical purpose. Therefore, I shall decide the matter for the second fishing period of the 2022-23 lobster fishing season that is set to held from February 2023 to July 31, 2023.

The inshore fishing licences you have been issued (lobster 111730, herring 104566, and swordfish 109011) are subject to DFO 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 activity 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.

Subsection 11(11) of the CFLP guides the application of this exceptional provision. It provides an accommodation for licence holders by allowing for the designation of MSO to a

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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 the Atlantic Fisheries Licensing Appeal Board (AFLAB), AFLAB's recommendation, your allegation of discrimination contrary to subsection 15(1) of the *Canadian Charter of Rights and Freedoms* (the *Charter*), the court judgments of September 30, 2020 and of April 7, 2022, and your further submissions of May 27, 2022, I regret to inform you that your request for a further exception to the policy for a MSO 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 strategy, as presented to AFLAB, whereby you hope your infant and preschool-aged grandsons would possibly become eligible to be issued an inshore licence at some point in the future, or that your daughters could possibly marry a fisherman, is not substantial enough to justify an exception to policy. Your legal counsel presented additional information to DFO on May 27, 2022, and no information was provided to suggest you have developed a more substantial exit strategy. You have not shown any extenuating circumstances that would warrant an exception of the policy.

With respect to your allegation of discrimination, I am of the view 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 based on the medical information received from your doctor. You are seeking to collect revenues from a licence to fish for an indefinite period of time without actively fishing. The benefits you are claiming are insurance or disability-like benefits related to a licence to fish. Those types of benefits sought are not available by law to anyone 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. The distinction would not reinforce, perpetuate, or exacerbate a disadvantage. It would merely reflect the reality that your permanent medical condition is inconsistent with ongoing demanding activity that is inherent to commercial fishing.

Accordingly, your assertion that a refusal of your request would infringe subsection 15(1) of the *Charter* is without merit. Even if it could be considered that this decision engaged that right under subsection 15(1) of the *Charter*, what you are seeking would be inconsistent with DFO's underlying fisheries management policy objectives.

I stress that despite this refusal, you are further accommodated in a way where you may continue to seek renewal of the inshore licenses issued to you (lobster 111730, herring 104566, and swordfish 109011) on a yearly basis, so long as the fisheries are not closed for conservation purposes and you continue to meet all other eligibility requirements. Continuing to renew the licenses will allow you to recommend to the Minister of Fisheries, Oceans and the Canadian Coast Guard 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. Finally, I note that the scallop licences issued to you are not subject to the owner-operator policy and you may continue to exploit those without MSO authorizations.

For additional information, please contact Ryan Curwin at 902-456-4068 or via email at [ryan.curwin@dfo-mpo.gc.ca](mailto:ryan.curwin@dfo-mpo.gc.ca).

Sincerely,

A handwritten signature in blue ink, appearing to read 'Annette Gibbons', with a stylized, cursive script.

Annette Gibbons

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