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FORM 301 – Rule 301

FEDERAL COURT

BETWEEN:

**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
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 a Decision of the Minister of the Department of Fisheries and Oceans and Canadian Coastguard (the “**DFO Minister**”) dated April 15, 2023 issuing a Fishery Management Order **FMO # 2023-01** closing the 2023 Glass Eel Fishery for a period of forty five (45) days (the “**Decision**”) and any amendments or extensions thereto. A copy of the Decision is attached at Schedule “A”.

The Applicant makes application for:

1. an Order quashing the Decision and Order as unreasonable and/or incorrect and reopening the 2023 glass eel fishery;
2. in the alternative to the above Order, an order quashing the Decision and Order as unreasonable and/or incorrect, and referring the matter back to the DFO Minister for reconsideration and/or to take further steps to avoid a repeat in future years;
3. in the alternative to the above Order, a Declaration that the Decision and Order was unreasonable and/or incorrect;
4. an order requiring the DFO Minister to continue consultation and negotiations with respect to the 2023 glass eel fishery closure in accordance with directions provided by this Court;

5. costs of this Application; and
6. such further and other relief as this Honourable Court deems to be just and appropriate.

The grounds for the application are:

1. The Applicant, South Shore Trading Co. Ltd. (**SST**) is a company incorporated pursuant to the laws of Nova Scotia. It is an elver fishery license holder. Its license is issued on an annual basis by the Department of Fisheries and Oceans (the “**DFO**”). SST is a major exporter of adult eels from 1984 to the present, and has been Canada’s top exporter of glass eels (juvenile elver eels) for the past two decades.
2. The Applicant Mitchell Feigenbaum is an individual residing at 8043 Highway 7, Musquodoboit Harbor, NS. Mr. Feigenbaum has been involved in the eel business since 1977 and a leader in the Glass Eel Fishery for over 20 years. The population status and threats to various eel species in North America, Europe and Asia have been scrutinized worldwide since the early/mid-2000's. Since that time, Mr. Feigenbaum has been immersed in the topic of eel fishery management as an invited or industry designated representative to dozens of DFO-sponsored forums.
3. In addition to his leadership of SST, Mr. Feigenbaum’s has interests in the proper management and sustainability of the American eel fishery due to his involvement with:

a) Nighthawk Fisheries, a joint venture between SST with First Nation interests to engage in glass eel trading in Canada.

c) Maine Eel Trade & Aquaculture (META), a glass eel trading company in Maine of which Mitchell Feigenbaum is founder and President.

d) Delaware Valley Fish Co. (DVF), an adult eel trader in Canada, which also provides management and services to META,

e) NovaEel, a company devoted to eel aquaculture in Canada, of which SST, META, DVF and Mitchell Feigenbaum personally are shareholders.

4. In addition, 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.
5. On or about April 15, 2023, the DFO Minister issued a Fishery Management Order closing the 2023 glass eel season for a period of forty five (45) days. The DFO Minister and her staff informed the Applicants and the general public that its action was based in part about conservation concerns, including DFO's belief that unauthorized glass eel harvests had pushed overall landing over the annual, Total Allowable Catch (TAC) for the glass eel fishery.
6. The Applicants interests have been greatly affected by the impact of the DFO Minister's Decision and Order. The DFO Minister's Decision and Order 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.

7. The glass eel season is effectively over in early June.
8. The DFO Minister's Decision and Order also greatly impacts the Applicant's interests in seeing the ongoing future viability, stability and success of the fishery, and in the commercial eel and elver fishing industries.
9. DFO officials have informed the Applicants that the reason the TAC cannot be increased to accommodate new quota holders 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 Minister 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.
10. The COSEWIC 2012 Report which categorized the American eel as "threatened" was 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.
11. 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 the eel population has been stable for several decades.

12. The past decade has further disproven the contention that eel populations are on the decline in the Maritime Provinces. To the contrary, DFO itself notes that overall eel population had been stable in the Maritime Provinces for twenty years.
13. However, the DFO Minister and DFO relies on the *Species at Risk Act* pending listing decision as its sole or primary reason for the Department's inaction on eel-related initiatives.
14. The DFO Minister's Decision and the Fishery Management Order **FMO # 2023-01** closing the 2023 Glass Eel Fishery were not based upon objective or authoritative stock assessments for American eel elver population. The DFO Minister's Decision and the Order was unreasonable and/or incorrect in light of the ongoing reality and evidence of the growth of glass eel catches that have taken place for over a decade in Canada and the United States of America, reflecting a proven healthy glass eel population, and the objective justification for an increase in the Total Allowable Catch. The DFO Minister should have considered a TAC increase as an option for consideration, rather than complete Closure of the fishery.
15. The DFO Minister's Decision and Order was unreasonable and/or incorrect.
16. The DFO Minister's Decision and Order was arbitrary, based on irrelevant or extraneous considerations, or made not made in good faith.

17. The DFO Minister violated the duty to exercise due care in ascertaining the scope of the DFO Minister's statutory authority.
18. The DFO Minister's choice of procedure was unfair, unreasonable and/or incorrect and an excessive measure.
19. The DFO Minister's breach of the Applicant's legitimate expectations constitutes a denial of procedural fairness.
20. Both the process that led to the DFO Minister's Decision and Order and the Decision and Order 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.
21. The DFO Minister's Decision and Order is incorrect or unreasonable because it was made with without sufficient evidentiary basis and without a cogent chain of reasoning.
22. The DFO Minister's Decision and Order 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.

23. 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 making the Order; and
- (b) Any other materials or documents relied on by the DFO Minister and DFO in arriving at the Decision and making the Order.

DATED at Moncton, Province of New Brunswick, this 11th day of May, 2023.



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South Shore Trading Co. Ltd.
and Mitchell Feigenbaum

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FISHERIES ACT

Fisheries Management Order

FMO # 2023-01

**FISHERIES MANAGEMENT ORDER PROHIBITING FISHING FOR
EEL UNDER 10 CM IN LENGTH
(Section 9.1 of the *Fisheries Act*)**

Whereas a significant number of persons are fishing for eels under 10 centimeters (cm) in length (known as ‘elvers’) outside the authorized fishery, creating a situation where estimated elver removals are impacting conservation of the species both on rivers with established river catch limits and other areas where fishing is occurring, which represents a threat to the conservation and protection of the species;

Whereas to ensure the conservation of the species, it is imperative that fishing of elvers stop immediately in order for the Department of Fisheries and Oceans (DFO) to review the management and conservation measures for this fishery;

Whereas the rise in elver fishing activity results in increased concurrent fishing from commercial and non-commercial eels harvesters on the same rivers, which is causing disputes between harvesters, and these disputes have required DFO’s Conservation and Protection officials and local police to intervene;

Whereas conflict on the water between harvesters has escalated to threats of violence and the safety of harvesters is at risk, which constitutes a threat to the proper management and control of the fishery.

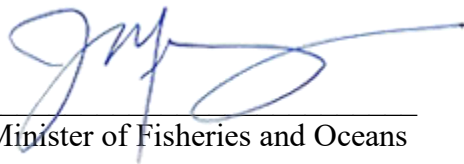
I hereby make this Fisheries Management Order and I hereby limit fishing as follows:

1. Subject to section 2, no person shall fish for eels that are less than 10 cm in length in the inland and tidal waters of the provinces of New Brunswick and Nova Scotia.
2. Section 1 does not apply to fishing for eels that are less than 10 cm in length that is authorized by a licence to fish for scientific purposes issued pursuant to section 52 of the *Fishery (General) Regulations*.
3. If eels that are less than 10 cm in length are caught in the waters described in section 1 under the authority of a licence to fish for scientific purposes issued pursuant to section 52 of the *Fishery (General) Regulations*, as soon as the scientific purposes have been fulfilled, the holder of the licence and the operator named in the licence must return the eels alive in the waters in which they were caught, in a manner that causes them the least harm, unless the licence to fish for scientific purposes issued pursuant to section 52 of the *Fishery (General) Regulations* authorizes the retention.

This Order prevails over any regulations made under the *Fisheries Act*, any orders issued under those regulations, and over any conditions of any lease or licence issued under that Act.

This Fisheries Management Order takes effect on the day on which it is signed and will remain in effect for a period of 45 days.

Ottawa, April 15, 2023



Minister of Fisheries and Oceans