

# FEDERAL COURT

BETWEEN:

**FISH, FOOD AND ALLIED WORKERS-UNIFOR AND GLEN WINSLOW**

Applicants

and

**ATTORNEY GENERAL OF CANADA**

Respondent

APPLICATION UNDER sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

## NOTICE OF APPLICATION FOR JUDICIAL REVIEW

### TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicants. The relief claimed by the Applicants appears on the following pages.

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, this place of hearing will be as requested by the Applicants. The Applicants request that this application be heard at St. John's, Newfoundland.

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 file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicants' solicitor 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.

July 25, 2024

Issued By: \_\_\_\_\_

(Registry Officer)

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**COPY TO:**

The Honourable Diane Lebouthillier  
Minister of Fisheries, Oceans and the Canadian Coast Guard  
200 Kent St  
Station 15N100  
Ottawa, ON K1A 0E6

## APPLICATION

1. This is an application for judicial review in respect of the Minister of Fisheries, Oceans and the Canadian Coast Guard's decision on June 26, 2024 to end the Northern Cod Moratorium off the north and east coasts of Newfoundland and Labrador allowing for a significant portion the Total Allowable Catch (TAC) of 2J3KL cod allocation to be given to offshore and international companies (the "Decision"). The Minister announced the Decision at a press conference but has not otherwise, to the Applicants' knowledge, released documentation outlining the reasons for such a decision. The Minister's failure to provide detailed reasons for its June 26, 2024 decision shows a lack of consideration for the unquantifiable and irreparable harm that greater capacity vessels and their ability to target pre-spawning aggregations may have on the population of 2J3KL cod or the financial harm this decision would have on outport fishing communities in Newfoundland and Labrador.

2. The Minister's Decision was made without the release of reasons as required under the Act and was made without considering the ecological, economic, and social impacts that the Decision will have on the people of Newfoundland and Labrador, including the Applicants. As a result of the Minister exercising her discretion in a manner inconsistent with the *Fisheries Act* and department guidelines, the Decision is unreasonable and should be quashed.

### Relief Sought

3. The Applicants make application for:
- a. An order quashing the Minister's decision to 'end' the Northern Cod Moratorium off the north and east coast of Newfoundland and Labrador by allocating a significant portion of 2J3KL cod to offshore fishing vessels over 100 feet;
  - b. A permanent injunction on the implementation of the Decision and a return to the 2023 TAC allocation;
  - c. Disclosure with respect to all information relied on in forming the Decision to end the Cod Moratorium off the north and east coasts of Newfoundland and Labrador, pursuant to Rule 317 of the *Federal Courts Rules*;

- d. the costs of this application;
- e. such injunctive or interlocutory relief as may be sought by the Applicants, until such time as this application can be determined on its merits; and
- f. such further and other relief as counsel may request and this Honourable Court may permit.

**The grounds for the application are:**

***(a) The Parties***

4. **The Fish, Food and Allied Workers-UNIFOR (FFAW)**, the Applicant, is a union representing local fishermen of Newfoundland and Labrador. The Union and its predecessor organizations have represented the interests of ‘inshore’ fishers in Newfoundland and Labrador for more than 100 years. Pursuant to the *Fishing Industry Collective Bargaining Act* and a certification order from the Newfoundland and Labrador Labour Relations Board, the FFAW is the sole bargaining agent for all fish harvesters who land fish for processing on the island of Newfoundland and in Labrador communities south of Makkovik. There are approximately 10,000 such fishers. In addition to its role in collective bargaining with seafood processors, the FFAW lobbies the Provincial and Federal Governments in relation to fisheries-related issues, including environmental sustainability.

5. **Glen Winslow**, the second Applicant, is a FFAW union member and local fisherman residing within Newfoundland and Labrador. He is 62 years old, and has been fishing for 44 years. He has owned a fishing enterprise since 1990. He holds a cod license, and has fished cod every year that he was legally permitted to, employing 6 crew members. In May of 1992, he purchased a new fishing vessel, which was rigged for the commercial cod fishery. In June of 1992, the Cod Moratorium was declared. Mr. Winslow wishes to pass his cod license and enterprise to his son, John Winslow, so he can continue the family enterprise.

6. **The Honourable Diane Lebouthillier, Minister of Fisheries and Oceans** is responsible for issuing the June 26, 2024 decision to end the Cod Moratorium and allocate a significant of the

2J3KL cod TAC to offshore and international companies. Pursuant to Rule 303, the **Attorney General of Canada** is the appropriate respondent.

***(b) The Decision & Background***

7. On June 26, 2024, Fisheries and Oceans Canada held a news conference accompanied by a simultaneous news release on its website announcing the ‘end’ of the Northern Cod Moratorium off the north and east coasts of Newfoundland and Labrador: <https://www.canada.ca/en/fisheries-oceans/news/2024/06/the-government-of-canada-announces-the-historic-return-of-the-commercial-northern-cod-fishery-in-newfoundland-and-labrador.html>

8. The specific changes to the 2J3KL Northern Cod Fishery management approach were then posted on its website, without reasons, at the following link: <https://www.dfo-mpo.gc.ca/fisheries-peches/decisions/fm-2024-gp/atl-30-eng.html>

9. The Northern cod stock (NAFO divisions 2J3KL) is perhaps the most iconic fishery in Canada. Historically, the Northern cod fishery was both the economic and cultural heart of Newfoundland and Labrador. Throughout the 1980s, the TAC hovered around 250,000 tonnes.

10. On July 2, 1992, the Federal government announced what was supposed to be a two-year moratorium on the fishery as a result of poor stock health. Inshore fish harvesters were ringing the alarm bells far earlier, however. In 1986, the Newfoundland Inshore Fisheries Association commissioned a report to examine DFO’s estimate of Northern cod stock status, observing that inshore catch rates were declining despite DFO’s claim that the stock was healthy and not subject to overfishing. The moratorium resulted in leaving more than 20,000 people unemployed, the largest single-day layoff in Canadian history.

11. In 1995, the FFAW, in partnership with Fisheries and Oceans Canada, began the cod sentinel survey, a survey conducted by inshore fish harvesters to track catch rates and biological information of the stock. This survey is ongoing today and is an important component of the current assessment model used to determine the health of the stock. In 2006, Fisheries and Oceans Canada announced the re-opening of a small-scale, inshore commercial fishery, or the Stewardship Fishery. Under the stewardship fishery, commercial harvesters were allowed to catch a small amount of cod each week over a designated period using gill nets and long lines. The stewardship

fishery has been ongoing since 2006, with a progressive increase in the maximum authorized harvest as determined by stock health. The maximum authorized harvest in 2023 was 12,999 tonnes.

12. The decision to end the moratorium and reopen the commercial fishery flies in the face of fisheries science and DFO's mandate to promote the sustainability of major fish stocks. Based on estimates provided by Fisheries and Oceans Canada, the risk of stock decline from 2024-2027 is between 62 to 76 percent, and the risk of the stock declining below the limit reference point—the point at which the stock may suffer severe, irreparable harm—is between 42 to 52 percent depending on the TAC. These projections do not take into account the seasonality or location of offshore catch, which could have severe impacts on future stock productivity well beyond just the removal of biomass.

13. At the current stock size, this decision also ignores decades of best practice when considering stock uncertainty. One of the key factors in a management decision is “management cost,” or the potential cost to stock health of a management decision. All estimates of maximum sustainable yield, the amount of biomass that can be removed while preserving stock productivity, have relative uncertainty. A completely unbiased model will produce an estimate of maximum sustainable yield that has a 50% likelihood of being too high and a 50% likelihood of being too low. The cost of exceeding the maximum sustainable yield can be extremely severe for the stock. DFO has not released the maximum sustainable yield for the Northern cod stock or any quantified uncertainty, so it is unclear where the TAC is relative to that value; however, ending the moratorium clearly increases the likelihood of overfishing.

14. One of the key tenets of fisheries management today is that harvesters with a stake in the future viability of the stock will be more likely to promote and protect it. Economic and conservation objectives, i.e., the long-term health of the stock, are inherently linked for fish harvesters, motivating them to act as stewards and create more sustainable fisheries. Inshore harvesters know this intimately, as harvesters, plant workers, and their communities are still recovering from the impacts of the moratorium.

15. To date, the Minister of Fisheries and Oceans has not disclosed documentation or reasons for the Decision as it is required to do under s. 6.1 of the *Fisheries Act*.

16. Historically, since the commencement of the Cod Moratorium in 1992, the Federal Government has made numerous promises that once the Cod Moratorium was ended, the first 115,000 tonnes of TAC would be allocated to local fishermen and Indigenous groups within the province of Newfoundland and Labrador.

***(c) Errors with the Minister's Decision***

17. The Minister failed to exercise her discretion in a manner consistent with the *Fisheries Act* and department guidelines.

18. The Minister has failed to provide reasons as required under 6.1 of the *Fisheries Act*.

19. The Minister failed to consider ecological, environmental, and biological factors in making the Decision.

20. The Minister further failed to consider cultural factors and adverse socio-economic impacts of the Decision.

21. The Minister failed to properly consider the factors in s. 2.5 of the *Fisheries Act* or considered irrelevant factors. Section 2.5 provides:

Except as otherwise provided in this Act, when making a decision under this Act, the Minister may consider, among other things,

- (a) the application of a precautionary approach and an ecosystem approach;
- (b) the sustainability of fisheries;
- (c) scientific information;
- (d) Indigenous knowledge of the Indigenous peoples of Canada that has been provided to the Minister;
- (e) community knowledge;
- (f) cooperation with any government of a province, any Indigenous governing body and any body — including a co-management body — established under a land claims agreement;
- (g) social, economic and cultural factors in the management of fisheries;
- (h) the preservation or promotion of the independence of licence holders in commercial inshore fisheries; and
- (i) the intersection of sex and gender with other identity factors.

22. The Decision is unreasonable, arbitrary and unsupported by the evidence.

23. Pursuant to DFO's own guidelines, the decision-making exercise under s. 2.5 of the *Fisheries Act* requires substantial reasoning before deciding to change a management plan for a fishery in any way. When such a fundamental change is made to a fishery, as is the case for 2024 2J3KL Northern cod, the decision-making process must be robust and transparent and show careful consideration of all relevant factors.

24. In the present case, there has been no reasoning provided whatsoever. Considering the context in which it was rendered, the Decision fails to reveal a rational chain of analysis. Furthermore, a failure to provide reasons is tantamount to providing inadequate reasons.

25. Following this application, the Minister may publish the reasons for the Decision. However, the fishery in area 2J has already opened, and the cod fishery in area 3KL is set to commence on July 28, 2024. While the Applicants, as part of this judicial review, intend to challenge the reasoning of the Decision if and when published, the fact that the Decision itself was rendered a mere month before the fishery opened without written reasons being available is indicative of a determination rooted in political convenience and not scientific analysis.

26. In fact, the Decision flies in the face of the technical report that the Minister received prior to making the Decision. That report, which to date is the only scientific data that the Minister has referenced, indicates that there is a 62 to 76 percent chance that stock decline will occur between 2024-2027. The Applicants submit that there is no way that the Minister can reconcile the Decision with that report.

27. The Act and the guidelines acknowledge that they create "legally binding obligations on DFO" to, among other things "manage prescribed major fish stocks at levels necessary to promote sustainability". To accomplish this, DFO implemented its 2009 'Precautionary Approach' to major fish stocks, including Northern cod. One requirement of the Precautionary Approach is to "ensure a low risk of serious or irreversible harm to the stock". The Applicants submit that allocating more than 1000 tonnes of cod to offshore trawlers does not ensure against such a risk.

28. The Applicants had a legitimate expectation to be part of and consulted with respect to any decisions ending the Northern Cod Moratorium off the north and east coasts of Newfoundland and

Labrador. The Minister breached the Applicants' right and expectation of procedural fairness by not properly consulting the Applicants, not properly allowing them to be heard, not informing them of the decision-making process, and not providing reasons for the Decision.

29. The FFAW will provide affidavit and expert evidence in support of its application seeking judicial review, as well as the companion application for an interlocutory injunction seeking to prevent the implementation of the Decision until the judicial review application can be determined.

***(d) Legislation, regulations, and enactments***

30. The Applicants rely on the following legislation, regulations, documents and enactments:
- a. Sections 18(1) and 18.1(1) of the *Federal Courts Act*;
  - b. News release from Jeremy Collard, Press Secretary of the office of the Minister of Fisheries, Oceans, and the Canadian Coast Guard, dated June 26, 2024;
  - c. Sections 2.5 and 6.1 of the *Fisheries Act*;
  - d. Guidelines for Implementing the Fish Stocks Provisions in the *Fisheries Act* (published by DFO) <https://www.dfo-mpo.gc.ca/reports-rapports/regs/sff-cpd/guidelines-lignes-directrices-eng.htm>; and
  - e. Such further and other authorities and legislation as counsel may advise and this Honourable Court may accept.

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

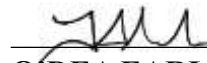
- 1. The Affidavit of Glen Winslow, to be served;
- 2. The Affidavit of Greg Pretty, President of the FFAW, to be served;
- 3. the Affidavit of George Rose, fisheries scientist, to be served;
- 4. the Affidavit of Courtney Glode, FFAW researcher, to be served; and

5. Such further and other evidence as counsel may advise and this Honourable Court may permit.

**Request for material from the decision-maker:**

Pursuant to Rule 317 of the *Federal Courts Rules*, the Applicants request from the Attorney General of Canada and the Minister of Fisheries, Oceans and the Canadian Coast Guard to send a certified copy of the record that was before the Minister of Fisheries, Oceans and the Canadian Coast Guard when she made her decision of June 26, 2024 to end the Northern Cod Moratorium off the north and east coasts of Newfoundland and Labrador to the Applicants and the Registry.

July 25, 2024

  
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