Federal Court  Cour fédérale

Date: 20240503

Docket: T-252-24

Citation: 2024 FC 683

Ottawa, Ontario, May 3, 2024

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

CANADIAN COMMITTEE FOR A SUSTAINABLE EEL FISHERY INC., NOVAEEL INC., 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

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The harvesting of young eels, called elvers, is big business. In Canada, that business is concentrated in the Maritime Provinces. The elver fishery is regulated by the Minister of

Fisheries, Oceans and the Canadian Coast Guard [Minister], who seeks to balance several priorities in managing the fishery—profitability of the fishery, conservation of elver and eel populations, Indigenous reconciliation, compliance with fishery regulations, and others.

[2] An important regulatory measure in the management of the fishery is the establishment each year of the Total Allowable Catch [TAC], which limits the amount of elver harvested from rivers in any particular year. In January 2024, pursuant to her authority to make discretionary policy decisions as part of the general management and control of the fisheries under section 2.1 of the *Fisheries Act*, RSC 1985, c F-14, as well as her power to issue licenses under section 7 thereof, the Minister set the TAC for the elver fishery for the upcoming season at 9,960 kilograms, wet weight [2024 TAC Decision]. This decision was met with little enthusiasm from the applicants, elver fishery participants and stakeholders who have brought the underlying application for judicial review of that decision.

[3] In the present motion, the applicants request a series of interim relief measures to remain in place until this Court can make a decision on the merits of their underlying application. I should mention as well that there are also several other proceedings before this Court and the Federal Court of Appeal concerning the Minister's elver fishery decisions over the past few years.

[4] After the applicants filed the underlying application, the Minister announced the closure of fishery for this season. The respondent, Attorney General of Canada [Attorney General] therefore now also brings a motion under Rule 4 of the *Federal Courts Rules*, SOR/98-106

[Rules], and section 18.4 of the *Federal Courts Act*, RSC 1985, c F-7 [FCA], to strike the underlying application, arguing that the issues it seeks to raise are now moot. The Attorney General also argues that, although the 2024 TAC Decision is justiciable, the management of the elver fishery is not.

[5] For the reasons that follow, I am dismissing the applicants' motion, with the exception that I am ordering that the underlying application proceed as a specially managed proceeding under Rule 384. As for the Attorney General's motion, I am striking certain elements of the relief measures being sought by the applicants in their underlying application for judicial review, but not the application in its entirety.

II. Facts

[6] The American eel is found in the waters off the eastern coast of North America, stretching from Labrador to the Caribbean. Elvers are defined by section 35 of the *Maritime Provinces Fishery Regulations*, SOR/93-55, as eels less than 10 cm in length. Despite their presence offshore, elvers are harvested in rivers. The elver market is profitable and has grown considerably in recent years because of increasing demand for eels in Asia. Elvers are harvested here but sold to Asian markets, where they are allowed to mature in farms until they are ready for human consumption. The value of the elver fishery in Atlantic Canada increased from $19 million in 2017 to $45 million in 2022. In 2022 and 2023, the price for elvers was, respectively, $5,000 and $4,415 per kilogram.

[7] At the same time as demand for elvers has increased, there has been growing concern for the species' conservation. The American eel has been designated a threatened species by the Committee on the Status of Endangered Wildlife in Canada, and the Government of Canada is considering listing it in the *Species at Risk Act*, SC 2002, c 29. But that is not the only problem. Unauthorized harvesting has plagued the fishery for several years now. In April 2020, concerns over conservation and proper management of the fishery led to its closure by the Minister. The fishery was not closed in 2021 or 2022, but unauthorized fishing and violence were observed realities. In 2023, the Minister temporarily closed the fishery in April and renewed the closure in May, in both cases citing conservation and unauthorized harvesting. Some fishery stakeholders have sought judicial review before this Court of the April 2023 fishery closure; that matter is ongoing and is awaiting a hearing.

[8] In 2023, the TAC was 9,960 kilograms, wet weight. That amount has not changed since 2005, though the 2005 TAC represented a 10% reduction from prior levels and was motivated by conservation. In 2022 and 2023, the Minister set aside 13.7% of the TAC for licenses allocated to Indigenous communities in the Maritimes. This was done by reducing the individual quotas of existing licensees. Various fishery stakeholders sought judicial review of these quota reductions before this Court. The challenges to the 2022 individual quota reductions were dismissed by Justice Walker, then of this Court, in *Shelburne Elver Limited v Canada (Fisheries, Oceans and Coast Guard)*, 2023 FC 1166 [*Shelburne Elver*]; the appeal of that decision (A-253-23) has not yet been heard by the Federal Court of Appeal. The applications for judicial review of the 2023 individual quota reductions are still live before this Court—they too have not yet been heard.

[9] The TAC has for many years been the product of negotiating different priorities. Most relevant here, and in no particular order, are the profitability of the industry generally; Indigenous reconciliation and the availability and profitability of elver stocks for Indigenous harvesters; conservation of the American eel species; and preservation of the integrity and efficacy of fishery regulations. On January 10, 2024, the Regional Director, Fisheries Management for the Department of Fisheries and Oceans [DFO] recommended to the Minister that for the upcoming 2024 season, the TAC for elver remain at 9,960 kilograms, wet weight. The Regional Director General Maritime Region, the Minister's representative, accepted and adopted that recommendation the very same day; the 2024 TAC Decision was made.

[10] On February 9, 2024, the applicants sought judicial review of that decision. In the underlying application they seek the following:

1. That this Application be expedited and specially managed;
2. an Order quashing the Decision as unreasonable, incorrect, and/or procedurally unfair;
3. an Order referring the matter back to the DFO Minister for reconsideration and/or to take further steps to avoid a repeat in future years;
4. an Order requiring the Department and Minister, in the management of the elver fishery, to act in accordance with their duties of procedural fairness, specifically in a manner that is open minded and gives appropriate consideration to the points raised by Applicants and related stakeholders;
5. an Order requiring the DFO Minister to continue consultation and negotiations with respect to the 2024 glass eel fishery in accordance with directions provided by this Court;
6. Retaining the Court's jurisdiction and supervising the Respondent DFO to ensure its fulfilment of its responsibilities in a manner that is fair, reasonable and correct, and as dictated by the requested Order;

7. in the alternative to the above Order, a Declaration that the Decision was unreasonable and/or incorrect;

8. costs of this Application; and

9. such further and other relief as this Honourable Court deems to be just and appropriate.

[11] On March 11, 2024, the Minister decided not to issue any elver fishing licenses for 2024, and proceeded to close the fishery for the upcoming season. She communicated this decision through a statement posted to the DFO website. DFO also sent letters to licence holders, which explained the decision in more detail.

[12] Before me, the applicants now bring a motion under section 18.2 of the FCA seeking the following relief:

1. An Interim Order that the Department of Fisheries and Oceans provide the Minister with fair and balanced advice on the Applicant's [*sic*] concerns about the fairness, reasonableness and impacts of the 2024 Elver Fishery TAC Decision;

2. An Interim Order that the Department of Fisheries and Oceans advise the Minister in making final decisions about the 2024 elver fishery in a manner that is objective and gives due consideration to the Applicants' stated concerns about the Department's management approach in this matter;

3. An Interim Order directing the Minister and Department of Fisheries and Oceans immediate and concerted attention to the 2024 elver fishery management and enforcement plans, which will be necessary to reimpose order to the fishery and public faith in the government's ability and willingness to provide for its safety and protection;

4. An Interim Order that the DFO Minister genuinely consider, grapple with those concerns;

5. An Interim Order Enjoining the Minister and Department of Fisheries and Oceans, pursuant to Rule 373(1), from implementing its 2024 Elver Fishery TAC Decision unless and

until the Minister has complied with the Directions of this Court.

6. An Order that T-252-24 be heard on an expedited timetable under Rule 373(3);

7. An Order that T-252-24 continue as a specially managed proceeding pursuant to Rule 384 of the *Federal Courts Rules*; and

8. In the alternative, such order as this Court may find appropriate in the circumstances.

III. Analysis

A. *The Attorney General's motion to strike the underlying application for judicial review*

[13] The Attorney General cites paragraph 66 of the Federal Court of Appeal's decision in *JP Morgan Asset Management (Canada) Inc. v Canada (National Revenue)*, 2013 FCA 250 [*JP Morgan*], as outlining the fatal flaws warranting the striking out of a notice of application, as follows:

> (1) the notice of application fails to state a cognizable administrative law claim which can be brought in the Federal Court;
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> (2) the Federal Court is not able to deal with the administrative law claim by virtue of section 18.5 of the FCA or some other legal principle; or
>
> (3) the Federal Court cannot grant the relief sought.

[14] As for the threshold to be used, the Federal Court of Appeal in *Wenham v Canada (Attorney General)*, 2018 FCA 199 [Wenham], stated that the same threshold used for actions,

i.e., the plain and obvious test, is the test to be used for striking applications. As stated at paragraph 33:

> […] In motions to strike applications for judicial review, this Court uses the same threshold. It uses the "plain and obvious" threshold commonly used in motions to strike actions, sometimes also called the "doomed to fail" standard. Taking the facts pleaded as true, the Court examines whether the application:
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> > …is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, 1994 CanLII 3529 (FCA), [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; *cf. Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959.
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> [citing *JP Morgan* at para 47]

[15] As mentioned, the Attorney General does not deny that the 2024 TAC Decision is justiciable. With that issue out of the way, the issue of mootness falls within the category of preliminary objections which may lead to the striking of an application (*Wenham* at para 36). The Attorney General must show that it is plain and obvious that the underlying application suffers from such a flaw.

[16] The Attorney General takes no issue with the relief sought by the applicants listed as measures 1, 2, 3 and 7 of the underlying application. He does however take issue with listed measures 4, 5 and 6 on the basis that the applicants are seeking, essentially, an order of *mandamus* against the Minister, and thereby asking the Court to become involved in the management of the fishery, though it has no jurisdiction to supervise the Minister in the

fulfilment of her duties. As for the applicants' motion, the Attorney General argues that relief measures 1 to 4 again request an order of *mandamus*, similar to the underlying application for judicial review, which relief is equally unjustified. As regards measure 5, the Attorney General argues simply that the relief sought is no longer operative as the fishery is closed.

(1) Mootness

[17] The Attorney General points out that the Minister has closed the elver fishery since she made the 2024 TAC Decision, and stated her intention not to reopen it. In addition, and although difficult to say from the record before me, it may well be, as argues the Attorney General, the Minister did not rely on the 2024 TAC Decision in making her decision to close the fishery. Consequently, the Attorney General argues the 2024 TAC Decision is now inoperable and the underlying judicial review is moot, and that the Court should not exercise its discretion to hear the present application despite its mootness, as it would be a waste of judicial resources and plainly not in the interests of justice to allow the present matter to proceed—particularly given the various other challenges to elver fishery decisions presently before the Court, which raise similar issues as those raised in the underlying application for judicial review.

[18] For their part, the applicants disagree that the 2024 TAC Decision is moot, since it did not, they argue, depend on the fishery being open and, moreover, the reasons for which the fishery was ultimately closed are intimately linked to the 2024 TAC Decision. Although the closure of the fishery for this year is not the subject matter of the underlying application, the applicants assert that the DFO failed to adequately seek input from and negotiate with stakeholders, and that had this occurred, a better, more informed decision would have been made

by the Minister on both the TAC and the closure of the fishery; a more informed Minister making more informed decisions is not simply an issue for 2024, but will impact important fishery decisions in years to come. That said, the applicants underlined at the time of the hearing that what would be the peak of the 2024 season is not yet upon us, and that there is still time for the Minister to be properly informed through consultation with stakeholders before the end of the season. In addition, argue the applicants, there is precedent in this Court for hearing cases which arose during a preceding fishing season, even if mootness applies (*Area Twenty Three Snow Crab Fisher's Association v Canada (Attorney General)*, 2005 FC 1190 [*Snow Crab*]; *Campbell v Canada (Attorney General)*, 2006 FC 510 [*Campbell*]).

[19] The test for mootness is the two-step analysis set out in *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 [*Borowski*] at page 353:

> First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case.

[20] Put simply, the Court must first determine if the issues in the proceeding are moot. Then, it must decide if they should nonetheless be heard (*Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 at para 10).

[21] As stated, the applicants suggest that the season is not over yet. Yet, in my view, the Minister's decision suggests otherwise. In her statement on the DFO website, the Minister states that she "ha[s] made the difficult decision to not issue elver licences and <u>not open the Maritimes Region elver fishery in 2024</u>" [emphasis added]. In the letters to licence-holders explaining the

closure, DFO mentions suggestions made by licence-holders of “specific changes to the management of the fishery” which “could be made in time to enable the issuance of licences and the opening of the fishery in 2024”. DFO states that it “considered these suggestions carefully in its advice to the Minister”. However, for all of these proposals save one, it stated that they could not be implemented in time for a 2024 season. The remaining proposal was to delay opening, which DFO said was “likely to do little more than shift the timing of the problems, not to address them.” I take the applicants’ point that the Minister could, in her discretion, reopen the fishery this year; however, given her stated intention not to do so, I find reopening to be unlikely. In fact, I am satisfied that the Minister intends for the 2024 elver fishery to be closed for the entire season.

[22] The applicants suggest that the 2024 TAC Decision should be treated separately from the decision to close the fishery. I agree. Further considerations are undoubtedly required to set a TAC and limit what would otherwise be unfettered harvesting. Yet this does not overcome the fact that the TAC is only meaningful if the season is open. If there is no season, it does not matter what the TAC is, and the 2024 TAC Decision becomes “academic” and no longer a “tangible and concrete dispute”. The first element of the *Borowski* test is therefore met: the issue is moot.

[23] As for the second stage of the test, this Court’s decision in *Snow Crab* is particularly relevant here. In that case, the applicants sought relief from the Minister’s decision to reduce the TAC of snow crab in Eastern Nova Scotia by 10%. By the time the judicial review was heard on

the merits, the fishery had long since closed. Nevertheless, Justice Mosley decided to consider the merits of the Minister's decision for the following reasons (at paras 34–35):

> At paragraph 34 in *Borowski*, *supra*, Justice Sopinka noted that the concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it. I am sympathetic to the applicants' argument that the exigencies of the judicial review process mean that it would be practically impossible to hear an application respecting the crab fishery quota in any given year before the issue had become moot. The questions raised by the applicants might otherwise evade review if the Court was to decline to hear them.
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> Accordingly, I think it appropriate to consider, notwithstanding my conclusion that the application is moot, whether there are any grounds to declare that the decision to allocate the TAC reduction on a 39%/61% basis was made in error.
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> [Emphasis added.]

[24] In *Campbell*, Justice Tremblay-Lamer followed *Snow Crab*, holding as follows (at paras 16–17):

> For similar reasons, I have also concluded that the application before me is moot as there is clearly no live controversy affecting the rights of the applicants with respect to the 2005 Fishery. Nevertheless, as did my colleague Justice Mosley, I believe that it is in the public interest for the Court to exercise its discretion to hear the matter to determine whether the decision to deny the applicants access was made in error or not. I agree with the applicants that, unless a new policy is introduced, the Minister's decision is unlikely to change in future years and thus will affect the applicants' future access to the Fishery. Moreover, given the nature of the judicial review process, it would be practically impossible to hear an application respecting access to the Fishery in any given year before the issue becomes moot and therefore the question would always evade review by the Court: *Borowski*, above, at para. 36.
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> Accordingly, even though I have found the application to be moot, I still believe it necessary to consider whether the Minister's decision was made in error.

[Emphasis added.]

[25] I accept that the 2024 TAC Decision is separate from the decision to close the fishery, and would only be operative in the event the fishery remained open—in fact the memorandum prepared in support of the setting of the TAC for 2024 states clearly that recommendations on "whether to open in 2024, are forthcoming", and later recommends the setting of the TAC "for the 2024 season, if opened". In addition, as stated earlier, I also accept that the Minister may well have not relied on that decision when she decided to close the fishery. However, the circumstances of this matter fit neatly with those in *Snow Crab* and *Campbell*.

[26] In any year in which the Minister closes the elver fishery pre-emptively, and I would add even when she does not, it is highly unlikely that any judicial review of a TAC decision will still be a live issue at the time of the hearing, probably well after the particular season has come to an end. The applicants claim *inter alia* that the process leading to the 2024 TAC Decision was unreasonable. I am not adjudicating that question at this time, but if the applicants succeed, it would be important for future years that the Minister know why, especially considering that the TAC for any given year is established with the previous year in mind.

[27] Yet, the Attorney General points to several other matters before this Court and the Federal Court of Appeal as motivation for this Court not to exercise its discretion as it did in *Snow Crab* and *Campbell*. I have considered those matters, as courts may take judicial notice of their own records (*Araya v Canada (Attorney General)*, 2023 FC 1688 at para 58; *Petrelli v Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367 at paras 36–37; *R v Tysowski*, 2008 SKCA 88 at paras 18–19). However, none of them involve the judicial review of a TAC decision.

[28] One matter (T-1008-23) seeks review of the April 2023 45-day closure of the elver fishery, on the grounds that the Minister relied on irrelevant science in finding a threat to elver populations. The fishery was closed after the TAC was set, and the TAC is not at issue in that proceeding; the hearing before this Court is scheduled to be heard in June 2024.

[29] Another matter (T-891-23) challenges the Minister's 2023 decision to reduce individual elver quotas in order to accommodate Indigenous participation in the fishery, without compensation to those affected and contrary to the applicant's legitimate expectations. In that matter, the applicants argue that the TAC could have been increased in order to accommodate all stakeholders, and allege that the Minister initially offered and ultimately failed to compensate licence-holders for the financial loss resulting from their reduced quotas. Again, the TAC decision for that year was not the subject matter of the application for judicial review.

[30] Yet another matter (T-872-23) challenges the 2023 individual quota reductions, but the applicant is Shelburne Elver Ltd., not the applicants in this case. In any event, there seems to be an oblique reference to TAC, but it does not seem to be the main thrust of the application, which is that 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.

[31] Finally, there are the matters presently before the Federal Court of Appeal which concern the 2022 reduction of elver license-holders' individual quotas, the abandonment of the willing buyer approach to compensation for those affected by the reduction, and the reallocation of the reduction to Indigenous harvesters (*Shelburne Elver* at paras 24–25). I accept that in *Shelburne*

Elver, South Shore Trading Co, Ltd. [SST], an applicant in that case and in the matter before me, submitted that DFO did not adequately advise the Minister of the serious allegations of bias it had raised regarding a report that classified the American eel as threatened. SST argued in *Shelburne Elver*, similarly as they are doing in the underlying application, that DFO ignored the industry's concerns about that report and should have ensured that the Minister receive an objective eel stock assessment. In SST's view, DFO and the Minister acted arbitrarily in relying on that report and insisting that increased participation by First Nations in the elver fishery would be accommodated with no increase in TAC.

[32] At paragraph 67 of *Shelburne Elver*, Justice Walker, then of this Court, indicated that she was not persuaded by SST's arguments. In fact, Justice Walker noted that SST's March 3, 2022 response to the February 24, 2022 proposal sets out SST's bias allegations and concerns in full; in fact, the response was included as an attachment to the memorandum to the Minister, as was a DFO summary of all licence holder responses. As a result, the Minister was aware of SST's bias concerns and of its argument that TAC could viably be increased for the 2022 fishing season.

[33] Before me, the Attorney General says that the Minister is fully aware of the applicants' arguments, but simply does not agree with them; and such is her prerogative. Fair enough, however the issue with the report that was referred to in *Shelburne Elver* is part of the package of arguments amongst others being put forward by the applicants in the underlying application for judicial review. In addition, the reasonableness and procedural fairness of TAC decision in 2022 was not the focus of the debate, as it is here with the 2024 TAC Decision. In fact, in none of the other matters pointed to by the Attorney General was the reasonableness of a TAC decision itself

the focus of the judicial review. I appreciate the similarity in arguments, however I am not persuaded that the other matters presently before this Court and the Federal Court of Appeal are so similar to the underlying application as to alleviate any concerns that the issues put forward by the applicants will remain live and relevant to future TAC decisions. Here, there is no challenge to any specific quota or licence because the fishery was closed, with quotas or licences never having been issue for 2024.

[34] In the underlying application for judicial review, the applicants are challenging not only the 2024 TAC Decision by arguing that the process under which it was made is flawed because it relied on irrelevant and erroneous reasons—what would seem at first blush, rightly or wrongly, to be serious issues with that decision. I am not prepared to find that these arguments, to be advanced in the underlying application, are consumed in the arguments to be made and issues raised in the other matters before this Court relating to the elver fishery.

[35] There is also the issue of unlawful fishing, i.e., fishing beyond the allowable TAC on account of how lucrative the industry is: an on-going problem for the last several years and occasioned, at least according to the applicants, by the irrelevant and erroneous considerations informing TAC decisions by the Minister. According to the applicants, the sustainability of, and in particular indigenous access to, the elver fishery is not attained by the closure of the fishery, but would be if the Minister had proper insight and the relevant information. The Minister takes issue with these assertions by the applicants, and advises that the closure of the fishery had little if anything to do with the TAC and more to do with the lack of regulations, which exacerbates the problem of unlawful fishing. In any event, it seems to me that these issues, and the manner in

which they inform future TAC decisions, will continue to constitute a live controversy between the parties going forward, regardless of the fact that the fishery is closed this year.

[36] I also cannot agree with the Attorney General that any challenge to the basis upon which TAC decisions are made is premature given the impending regulations that the Minister is looking to pass. Whether and in what form the regulations sought by the Minister will be passed, which may inform setting the 2025 TAC, is a matter for future debate, as may well be the decision of the Minister to close the fishery this year in the event the applicants challenge that decision by way of judicial review. For now, I must deal with the lay of the land as I find it at this time. Accordingly, I am satisfied that the second stage of the *Borowski* test favours this Court hearing the underlying application on the merits. I will exercise my discretion accordingly.

(2) Justiciability of the management of the fishery

[37] As stated earlier, although the Attorney General accepts that TAC decisions are justiciable, she argues that management of the fishery is not, and what the applicants are seeking to do is to have the Court manage the elver fishery alongside the Minister, deputy ministers, operational civil servants, conservational officers and prosecutors; in effect, ordering DFO to manage the fishery as the applicants see fit, thus fettering the Minister's discretion in the management of the fishery.

[38] I agree. This Court should not get involved in the management and policing of the fisheries, and certainly not seek to manage the Minister in carrying out the statutory powers granted to her by Parliament (*Ahousaht First Nation v Canada (Fisheries, Oceans and Coast*

Guard), 2019 FC 1116 [*Ahousaht*] at para 128; *North of Smokey Fishermen's Assn v Canada (Attorney General)*, 2003 FCT 33 [*North of Smokey*] at para 27; *Cummins v Canada (Minister of Fisheries and Oceans)*, [1996] 3 FC 871 at 875. A similar request to have, in that case, the Court appoint the Minister of Transport to oversee a permitting process within the jurisdiction of the Port of Vancouver was made in *GCT Canada Limited Partnership v Vancouver Fraser Port Authority*, 2022 FC 1109. I did not find it appropriate in that case and I see no reason why the situation in this case is any different, even more so because the overseeing body that is requested here is the Court itself. In any event, not much of a challenge was made by the applicants on this issue, who say only that TAC decisions are justiciable. They are, as conceded by the Attorney General; but that is not the point.

[39] I will therefore strike relief measures 4, 5 and 6 of the underlying application for judicial review. I am not persuaded that the underlying application should be struck in its entirety; in fact, the Attorney General conceded that they take no issue with relief measures 1, 2, 3 and 7.

B. *The interim relief sought by the applicants*

[40] I now turn to the applicants' motion for interim relief.

[41] As stated, the Attorney General takes issue with the nature of the relief sought by the applicants, whether in the underlying application or the motion before me, which essentially calls for the issuance of an order of *mandamus* against the Minister, and having the Court become involved in the management of the fishery.

[42] The purpose of interim relief is to preserve or restore the *status quo*, not to provide an ultimate declaration of rights more appropriate to relief on judicial review: *Kellapatha v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 739 at para 20; *Wasylynuk v Canada (Royal Mounted Police)*, 2020 FC 962 at para 69.

C. *Relief measures (1) to (4)*

[43] Interim relief measures (1) to (4) sought by the applicants essentially amount to having the Court instruct the Minister on how to do her job. There is no reason to do so. Whether the Minister has in fact acted unreasonably in rendering the 2024 TAC Decision is the subject matter for judicial review, and ordering the Minister in the manner being requested by the applicants would in essence give the applicants what they are seeking in the underlying application. I am not convinced that the applicants have met the very high threshold needed for them to convince me that such relief is necessary.

[44] Relief measure (5) in the applicants' motion is for an interlocutory injunction barring the Minister from implementing the 2024 TAC Decision until certain conditions are met. This cannot be granted, for three reasons. First, the implementation of the 2024 TAC Decision is no longer an issue: with the closure of the elver fishery, the Minister herself has decided not to implement the 2024 TAC Decision. There are no quotas or licences, and the TAC for 2024 is effectively zero. While the applicants' claims against the 2024 TAC Decision themselves may be heard on judicial review, the applicants need no relief from a quota that has no effect.

[45] Second, ordering an injunction of this kind is not the place of this Court. As Justice Gascon stated in *Ahousaht* (at para 128):

> In this case, an interlocutory injunction would enjoin the Minister from carrying out his mandate and interfere with the exercise of the statutory powers granted to him by Parliament with respect to the allocation of fishing resources. This would go against and harm the public interest and it is not the function of the Court to manage and police the fisheries, to intervene in the management of the Canadian fisheries and to usurp the role of the Minister in that respect.
>
> See also: *North of Smokey* at para 27.

[46] Third, an injunction would be contrary to the purpose of interim relief, that being preserving the *status quo*. What the applicants are seeking is in essence an order in *mandamus* compelling the Minister to conduct the TAC process in a manner allegedly different from how she is conducting it at present. However, the applicants have not pointed to a legal obligation or duty which the Minister is neglecting. Simply stating that there is a public legal duty to act and that the Minister must undertake her functions in a fair and proper manner is insufficient; determining that question is the proper subject matter of the underlying application. In any event, even if they were asking me to maintain the *status quo*, it is not obvious what a *status quo* TAC would be if the current one were unreasonable, as the applicants allege. Moreover, they have not themselves proposed a number. This further underscores this Court's reluctance and inability, noted in *Ahousaht* above, to do the Minister's job for her.

[47] In addition, and given that there is some sense of urgency in this matter moving forward on an expedited basis, the applicants request that the matter proceed as a specially managed proceeding. I agree that the matter should be specially managed; however I leave the issue of

whether the underlying application proceed on an expedited basis to the case management judge. Consequently, the applicants' motion will be granted for the purpose only of ordering that the present matter continue as a specially managed proceeding pursuant to Rule 384. Otherwise, the applicants' motion is dismissed.

D. *Affidavits filed on this Motion*

[48] As a final note, the Attorney General has sought to strike certain portions of the affidavits filed in support of the applicants' motion, as they are "replete with personal and subjective views, containing various, sometimes colourful, allegations, assertions, and claims that are rooted in the Applicants' disagreement with DFO's past, current, and future management, or, as they say, 'mismanagement', of the elver fishery". Since there is no need in these circumstances to apply the more evidence-heavy assessment under *RJR-MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311, there is no need to decide the admissibility issue.

IV. Conclusion

[49] For the reasons above, I am granting the applicants' motion in part, solely to order that the matter continue as a specially managed proceeding. As for the Attorney General's motion, I am granting it as well in part, so as to strike the relief measures 4, 5 and 6 in the underlying application for judicial review.

[50] As for costs, the parties confirmed before me that they agree that $1,800 in costs should be awarded to whichever party is wholly successful, if any. In the event of mixed success, the

parties agree on $1,500 in costs. As the Attorney General was more successful than the applicants, I will order costs to the Attorney General in the amount of $1,500.

JUDGMENT in T-252-24

THIS COURT'S JUDGMENT is as follows:

1. Except as provided for below, the applicants' motion for interim relief is dismissed.

2. The Attorney General's motion to strike the underlying application for judicial review is granted in part, and relief measures 4, 5 and 6 of the underlying application for judicial review are struck.

3. This matter shall proceed as a specially managed proceeding and be referred to the Office of the Chief Justice for the appointment of a Case Management Judge.

4. Within 15 days of the appointment of a Case Management Judge, the parties shall provide mutually convenient dates for a case management conference to review the status of the proceeding and establish a timetable for the next steps in the proceeding.

5. Costs are to be paid by the applicants in the lump sum amount of $1,500 all inclusive.

"Peter G. Pamel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-252-24
STYLE OF CAUSE:	CANADIAN COMMITTEE FOR A SUSTAINABLE EEL FISHERY INC., NOVAEEL INC., SOUTH SHORE TRADING CO. LTD., and MITCHELL FEIGENBAUM v THE MINISTER OF FISHERIES, OCEANS AND THE CANADIAN COAST GUARD, and THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 18, 2024
JUDGMENT AND REASONS:	PAMEL J.
DATED:	MAY 3, 2024

APPEARANCES:

Michel C. Poirier	FOR THE APPLICANTS
Jessica Harris Melissa Grant	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Corporate Commercial Law Moncton, New Brunswick	FOR THE APPLICANTS
Attorney General of Canada Atlantic Regional Office	FOR THE RESPONDENTS