Federal Court  Cour fédérale

Date: 20250128

Docket: T-1008-23

Citation: 2025 FC 174

Ottawa, Ontario, January 28, 2025

PRESENT: The Honourable Madam Justice Tsimberis

BETWEEN:

SOUTH SHORE TRADING CO. LTD. AND MITCHELL FEIGENBAUM

Applicants

and

THE MINISTER OF FISHERIES, AND THE CANADIAN COAST GUARD, AND THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] South Shore Trading Co. Ltd. [SST] and Mr. Mitchell Feigenbaum [Feigenbaum], [collectively, the Applicants], make this application to judicially review the April 15, 2023 decision of the Minister of Fisheries, Oceans and the Canadian Coast Guard [Minister], to issue a Fisheries Management Order #2023-01 [FMO] prohibiting the harvest of eels under 10 cm in

length (elver), for a period of 45 days [Decision], pursuant to section 9.1 of the *Fisheries Act*, RSC 1985, c F-14 [Act]. This Decision caused the closure of the elver fishery in the inland and tidal waters of New Brunswick and Nova Scotia for the remainder of the 2023 season. The FMO was issued in response to significant levels of unauthorized fishing and associated safety, enforcement, conservation of the American eel and compliance concerns.

[2] The Applicants seek to quash the FMO as unreasonable, incorrect, and procedurally unfair, alleging that the Minister and officials within the Department of Fisheries and Oceans [DFO] have acted in bad faith by relying on biased and inaccurate scientific data.

[3] For the reasons that follow, this application for judicial review is dismissed, because the Decision is a discretionary policy decision and, having considered the parties' arguments in the context of the principles governing judicial review of such decisions, I find that the Decision is reasonable.

II. Facts

[4] For reasons that will become obvious later, I will separate the facts of this case into those materials that were before the Minister when making the Decision that are supported by the Certified Tribunal Record [CTR], and the alleged facts asserted by the Applicants that are not supported by the CTR.

A. *Facts Supported by the Certified Tribunal Record*

[5] Elvers, also known as glass eels, are the juvenile form of American eel, measuring less than 10 cm in length. The American eel is a migratory species that inhabits all fresh water and coastal marine waters connected to the Atlantic Ocean in Canada. The elver population in New Brunswick and Nova Scotia supports a lucrative fishery with elver being the most valuable fish sold in Canada at over $5,000 per kg.

[6] In Canada, the elver fishery is managed and regulated by the Minister and the DFO. Licences to harvest elver are issued pursuant to the *Maritime Provinces Fisheries Regulations*, SOR/93-55 [*MPFR*] and the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332 [*ACFLRs*]. Generally, the Minister sets an annual Total Allowable Catch [TAC] for the elver fishery expressed in kilograms, and determines the quota allocation for all licence holders not to exceed the TAC. A licence issued pursuant to the *Fisheries Act* is required to harvest elvers legally.

[7] Unauthorized elver fishing has steadily increased in recent years due to the relative ease and low cost of harvest and its high commercial value. Unauthorized fishing complicates DFO's conservation efforts, endangers fish populations, and leads to tensions between authorized and unauthorized harvesters. Due to the elver fishery's large geographic harvesting area, the ease of harvest requiring minimal resources and equipment, and the harvesting being usually conducted at night in the darkness, the fishery causes significant enforcement issues for DFO's Conservation and Protection [C&P] officers, who do not have the required capacity to monitor all areas in which elvers are present.

[8] In recent years, threats to the conservancy of American eel and the proper management and control of the elver fishery from unauthorized harvesting have caused the Minister to issue another FMO in April 2020 closing the elver fishery for most of the 2020 fishing season, and to leave 600 kg of elver quota unallocated in 2022.

[9] For the 2023 fishing season, licences were issued to eight licence holders under the *MPFR* and three communal commercial licences under the *ACFLRs*, the latter of which included two interim licences issued to advance reconciliation with First Nations. For the 2023 season, despite the new licences issued, the TAC was maintained at 9,960 kg, which was the same TAC as in 2021 and 2022.

[10] The Applicant SST is one of those commercial elver licence holders with an allocation of 1,035.6 kg of elver quota for the 2023-fishing season.

[11] In early March 2023, elvers began appearing in Nova Scotia river systems. From March 13, 2023 to April 11, 2023, C&P reported approximately 1550 individual occurrences of harvesters engaged in unauthorized elver fishing across the Maritimes region. As part of the continual increase in fishing activity as the elver run progresses through the season and across the region, C&P assessed that in addition to observed or reported unauthorized activity, there is a high likelihood that significant unauthorized activity is occurring without being observed or reported.

[12] The authorized elver fishery opened on March 28, 2023. As of April 13, 2023, the total elver landings reported from the licenced fishery was approximately 3500 kg, with an additional 36 kg of unauthorized elver removals having been seized by C&P officers. As part of ongoing compliance, monitoring and enforcement, there were significant yet unknown levels of removals of the elver by the many unauthorized harvesters, both observed and reported. C&P indicated that it was reasonable to estimate the unauthorized removals are equal to or greater than the authorized catch at April 13, 2023. Accounting for both the licenced and unauthorized removals, DFO estimated that over half of the TAC had already been landed in the elver fishery as of April 13, 2023.

[13] With the water temperatures continuing to rise and rivers becoming more productive, both the numbers of unauthorized harvesters and catch per unit effort of all harvesters was expected to continue to increase. This was expected to lead to a significant rise in the scale of unauthorized removals, which indicated that *total removals* (those accounted for through licenced and unauthorized removals) *were on track to exceed the TAC by mid-April* as the peak of the elver run approached. In view of the level and trajectory of total removals, a clear threat to the conservancy and protection of the American eel population was reported to the Minister.

[14] Add to this, the nature of the elver fishery that makes it challenging to enforce. Fishery officers have difficulty locating and accessing the fishing sites and assessing the harvesters, until they are on site. C&P had received numerous complaints of unauthorized harvesters interfering with and threatening other harvesters, in addition to threats made against fishery officers working to interrupt unauthorized fishing and to settle disputes. As of April 13, 2023, there were threats

uttered and references to firearms, acts of violence, impersonation of a fishery officer in an attempt to gain access to a harvesting location, and an incident where fishery officers and commercial harvesters were temporarily detained following efforts to resolve a fishing gear dispute. There were heightened safety risks associated with unauthorized harvesters purposefully working in large groups making it difficult for fishery officers to monitor for compliance and take enforcement action, and with Indigenous harvesters who are poised to defend what they view to be a treaty right to participate in the elver fishery.

[15] As of April 13, 2023, C&P had a number of ongoing investigations related to unauthorized elver harvesting. As the water temperatures were anticipated to continue to rise over the coming weeks and rivers become more productive, the numbers of unauthorized harvesters was expected to continue to rise. This was expected to lead to a significant rise in the scale of unauthorized removals and a corresponding increased risk of violent encounters and safety concerns for harvesters and fishery officers. *Without the authorized elver fishery, the opportunity to disguise or launder unauthorized elver product is severely limited*.

[16] Given these conservation and safety concerns related to the 2023 elver fishing season, on April 14, 2023, DFO officials drafted and submitted a 7-page Memorandum for the Minister Addressing Conservation and Safety Concerns Relating to 2023 Elver Fishing Activity (FOR DECISION) [Memo] that detailed all the points summarized above (from paragraphs 5 through 15) and more. The Memorandum's Summary is reproduced below:

Summary

> The purpose of this note is to ask you to issue a Fisheries Management Order (FMO) to prohibit fishing of elver in the inland and tidal waters of the provinces of New Brunswick (N.B.) and Nova Scotia (N.S.).
>
> DFO views the current situation and trajectory of the unauthorized fishing of elver as both a threat to the conservation of American eel, and a threat to the proper control and management of the elver fishery. Through inspections, observations and reports to Conservation & Protection (C&P) there are significant quantities of elver being fished illegally, with removals estimated to be as high, and likely higher than that being harvested legally, jeopardizing the conservation objectives for American eel in Canada and a threat to the conservation and protection of the single American eel population.
>
> The fishery has become the focus of harassment, threats and violence between fishers and toward fishery officers, with a number of confrontations and incidents of violence in the recent weeks creating an immediate threat to the proper management and control of the elver fishery. Current control, management and enforcement tools and resources are not able to control the situation and urgent action is needed.
>
> The impact of a fishery closure will be most significant to the three communal commercial licence holders and eight commercial licence holders who most likely will not be able to fully realize their individual quota allocations this season. However, by closing the licenced fishery, you will ease pressure on the species by reducing overall removals and support a focus on unauthorized fishing and the interdiction of illegal elvers entering the marketplace.
>
> For these reasons, we recommend that you make the attached order (Tab 1) under section 9.1 of the Fisheries Act. The order will prohibit fishing for elvers in the inland and tidal waters of the provinces of N.B. and N.S for 45 days. Such an order can be extended an additional 45 days if circumstances warrant.

[17] The facts supported by the CTR, and notably the Memo and its attachments, highlight a detailed account of several critical facts concerning the regulation and management of the elver

fishery. It confirms the significant issue of unauthorized elver fishing, which had posed considerable threats to conservation efforts and had escalated tensions and incidents of violence amongst harvesters. This unauthorized activity is documented as the primary reason for the Minister of Fisheries and Oceans issuing the FMO on April 15, 2023, which closed the 2023 elver fishing season for 45 days. The FMO was intended to address urgent conservation needs and ensure the safety of authorized harvesters and the public.

[18] The CTR, and notably the Memo, also highlight the negative impact of the closure on commercial licence holders, including the Applicant SST, noting the significant disruptions to their revenue and business operations. Additionally, the CTR provides context for the reallocation of quotas to Indigenous communities in 2022 and 2023, reflecting efforts by the DFO to increase First Nations' participation in the elver fishery while maintaining the TAC at the same level as 2021/2022. This reallocation was part of broader management strategies aimed at addressing conservation concerns while promoting equitable access to fishing resources.

B. *Alleged Facts Unsupported by the Certified Tribunal Record*

[19] The Applicant Feigenbaum is SST’s President and controlling shareholder.

[20] The Affidavit of the Applicant Feigenbaum [Feigenbaum Affidavit] provides argumentation, hearsay, and other facts irrelevant to this judicial review across 1265 pages, with 507 paragraphs and 111 exhibits. Among other things, Feigenbaum argues in his affidavit that the Decision was not based on objective or authoritative stock assessments, and offers his own evidence and his opinions on said evidence to contend that not only is the elver population

healthy, but that an increase in the TAC should have been considered instead of a fishery closure. The affidavit asserts a lack of meaningful consultation with non-Indigenous quota holders.

[21] Feigenbaum also provides a historical perspective on alleged mismanagement by the DFO, including delays in making a *Species at Risk Act*, SC 2002, c 29 [*SARA*] recommendation and failures to adequately address First Nations treaty rights. Feigenbaum describes instances of what he perceives as bad faith and misconduct by DFO officials, motivated by hostility and prejudice towards non-Indigenous quota holders. Additionally, the affidavit alleges that DFO broke promises to engage with stakeholders and was inconsistent in following up on consultations, which have supposedly contributed to the current challenges faced by commercial licence holders.

[22] Several facts asserted by Feigenbaum are not supported by the CTR. Feigenbaum claims that specific options for increasing the TAC were proposed and ignored by DFO, but there is no explicit evidence in the CTR or the affidavit to support that these specific options were formally considered, and were only offered as feedback to DFO. Throughout the affidavit, Feigenbaum also alleges widespread misconduct and intentional malfeasance by DFO officials, asserting that these actions were motivated by hostility and prejudice. While these claims are detailed in the affidavit, they are not corroborated by specific evidence in the CTR, which focuses primarily on the conservation and management aspects of the Decision. Furthermore, Feigenbaum uses his affidavit to challenge the validity of a 2012 report from the Committee on the Status of Endangered Wildlife in Canada [COSEWIC], which had assessed that the American eel was recommended for the “threatened” status under *SARA*, asserting that it was not formally peer-

reviewed and was biased. However, these allegations lack explicit support in either the CTR or the affidavit, as there is no detailed evidence provided to substantiate the claims about the peer review process or the alleged bias in the 2012 COSEWIC report.

III. Statutory Scheme

[23] As I understand it, this application is the first time that a decision taken pursuant to section 9.1 of the Act is being judicially reviewed, and involves the interplay between the Minister making the Decision through section 9.1 and the purpose of the Act as set out in section 2.1. For ease of reference, I shall reproduce section 9.1 in its entirety below:

> **Fisheries Management Orders**
>
> **Powers of Minister**
>
> **9.1 (1)** The Minister may, if he or she is of the opinion that prompt measures are required to address a threat to the proper management and control of fisheries and the conservation and protection of fish, make a fisheries management order with respect to any aspect of fisheries in any area of Canadian fisheries waters specified in the order
>
> > **(a)** prohibiting fishing of one or more species, populations, assemblages or stocks of fish;
> >
> > **(b)** prohibiting any type of fishing gear or equipment or fishing vessel from being used;
> >
> > **(c)** limiting the fishing of any specified size, weight or quantity of any species, populations, assemblages or stocks of fish; and
> >
> > **(d)** imposing any requirements with respect to fishing.
>
> **Conditions**
>
> **(2)** The Minister may impose any conditions that he or she considers appropriate in the order.

> **Application of order**
>
> **(3)** The fisheries management order may provide that it applies only to
>
> > **(a)** a particular class of persons, including
> >
> > > **(i)** persons who fish using a particular method or a particular type of gear or equipment, and
> >
> > > **(ii)** persons who use fishing vessels of a particular class; or
> >
> > **(b)** holders of a particular class of licence.

[24] Section 9.1 was created as a result of *An Act to amend the Fisheries Act and other Acts in consequence*, SC 2019, c 14, which received royal assent on June 21, 2019 and came into force shortly thereafter. However, I understand similar aims could previously be achieved through what are called "variation orders" pursuant, not to the Act, but to section 6 of the *Fishery (General) Regulations*, SOR/93-53 [Regulations].

[25] I also note that the exercise of the Minister's discretion pursuant to section 9.1 of the Act must serve the statutory purpose of the Act, which is set out in section 2.1:

> **Purpose of Act**
>
> **2.1** The purpose of this Act is to provide a framework for
>
> > **(a)** the proper management and control of fisheries; and
> >
> > **(b)** the conservation and protection of fish and fish habitat, including by preventing pollution.

[26] Finally, section 9.6 of the Act provides that if there is an inconsistency between a fisheries management order and any regulation made under the Act, other orders issued under

those regulations, or the conditions of any lease or licence issued under the Act, the fisheries management order prevails to the extent of the inconsistency. Parliament's intention was that a fisheries management order would take precedence over other established regulations, orders, leases or licences of a fishery for a short period to rapidly mitigate threats to the Minister's control of fisheries and the conservation of fish and fish habitat.

IV. Decision under Review

> 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.
>
> […]

[27] The FMO itself outlines that the Minister's concern was the significant number of persons fishing for 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. The FMO also lays out that the rise in concurrent fishing from commercial and non-commercial eel harvesters on the same rivers has caused disputes between harvesters, which has required the intervention of DFO's C&P officials and local police. The Minister states that conflict on the water between harvesters has escalated to threats of violence and that the safety of harvesters is at risk, which constitutes a threat to the proper management and control of the fishery.

[28] To respond to these concerns, the Minister issued the Decision on the morning of April 15, 2023 closing the 2023 elver fishing season for 45 days, specifically targeting the tidal and inland waters of New Brunswick and Nova Scotia. The Decision aimed to address the urgent conservation concerns and ensure the proper management and control of the elver fishery. The FMO was also intended to mitigate the public safety risks associated with unauthorized fishing activities and the limited capacity of C&P officers to effectively monitor and enforce regulations across the large geographic area where elvers are harvested.

[29] While the Decision is dated April 15, 2023, its reasons were prepared as of April 14, 2023. At the hearing, the Respondent clarified and the Applicants did not contest that the Decision was actually made on April 14, 2023, but was not issued until the morning of April 15, 2023. The reason for this is that the elver fishery is primarily a nocturnal fishery and the Minister did not want to complicate the matter further by closing the fishery partway through their work schedule. As such, the Decision was timed to come into force after the night of April 14, 2023 had concluded.

[30] The Respondent has stated, and I agree, that the April 14, 2023 Memo referred to in the Facts section above, which was signed on April 14, 2023 by both the Deputy Minister of DFO and the Minister, constitutes the reasons for the Decision. The Memo illustrates that, since elvers began appearing in Nova Scotian river systems in early March 2023, DFO's C&P officers had reported approximately 1550 individual occurrences of harvesters engaged in unauthorized fishing of elvers, and C&P does not have the capacity to monitor all areas where elvers are present to allow for effective compliance monitoring of the fishery. This established a high likelihood that significant unauthorized activity was occurring without being observed or reported. As of the date of the Memo, the authorized catch was approximately 3500 kg of a TAC of 9960 kg and DFO indicated that "it is reasonable to estimate that unauthorized removals [of elvers] are equal to or greater than the authorized catch at this point in the season." Based on this assessment, the Memo states that "[a]ccounting for both the licenced and unauthorized removals, DFO estimates that over half of the TAC has already been landed in the elver fishery" as of April 13, 2023, and that "total removals (i.e., licenced and unauthorized together) are on track to exceed the TAC by mid-April as the peak of the elver run approaches".

[31] The Memo also relays that C&P had “received numerous complaints of unauthorized harvesters interfering with and threatening other harvesters, in addition to threats against fishery officers working to interrupt unauthorized fishing and settle disputes. To date, there have been threats uttered and references to firearms, acts of violence, impersonation of a fishery officer in an attempt to gain access to a harvesting location, and most recently an incident where fishery officers and commercial harvesters were temporarily detained following efforts to resolve a fishing gear dispute.” These tensions were compounded by instances where harvesters would even have conflicts with commercial fishing operations from other fisheries.

[32] In advance of the fishery beginning, DFO had discussed the possible need to consider additional fisheries management measures, up to and including a closure, with all commercial licence holders (which included SST), should the levels of unauthorized removals become a conservation concern. In particular, these discussions took place with DFO officials in the Maritimes Region during meetings held on January 26, 2023, March 12, 2023 and again on March 27, 2023. There had been ongoing dialogue with licence holders, but DFO noted that some licence holders had stopped reporting unauthorized fishing out of concerns that the fishery will be closed.

[33] The Memo also discusses DFO’s consultations in preparation for the 2023 season with representatives of indigenous licence holders from the Kwilmu’kw Maw-klusuaqn Negotiation Office and the Wolastoqey Nations of New Brunswick. Both groups expressed their opposition to any measure that precludes them from fishing their individual quotas, which had been considered as part of the deliberations informing DFO’s recommendation that a closure of the

fishery is required to address the threat to conservation and to the orderly management of the fishery. DFO reasoned that keeping the fishery selectively open for indigenous licence holders would undermine the purpose behind the closure because it would (i) contribute to excessive harvest pressure on elver, (ii) maintain the difficulty of discerning lawful from unlawful harvesting during fishery officer patrols and other reports; and (iii) maintain a lawful supply of elver, frustrating the ability to respond to the possession, transport, and sale of unlawfully harvested elver.

V. Issues

[34] The Applicants pose four issues in their Memorandum of Fact and Law:

1. Did the Minister and DFO deliberately fail to consider a credible allegation of the Applicant that a material element of the Record is tainted by Bias?

2. Did the DFO officials and Minister's inappropriate reliance on the *SARA* to refuse consideration of a TAC Increase make the decision incorrect and/or unreasonable?

3. Did the failure to base the Ministerial Decision on current and best available science that the Glass Eel Population is healthy making the decision unreasonable?

4. In arriving at the Minister's 2023 Decision, were certain DFO officials acting in bad faith, by conveying inaccurate assumptions about the Applicant and other quota holders that are motivated by hostility and disregard for the interests of non-indigenous quota holders?

[35] To be clear, the Decision is limited in scope to the Minister's exercise of discretion to issue an FMO closing the elver fishery for 2023 due to concerns that rampant unauthorized fishing threatened the conservancy of the American eel and the proper control and management of the elver fishery. I find at the outset that neither the Decision nor CTR have any mention or consideration of *SARA* and whether the American eel population is, in fact, healthier than the

CTR suggests and, instead of closing the fishery over conservation concerns, the overall TAC should be increased. The Applicants' issue 2, as outlined at paragraph 34 above, is entirely beyond the scope of the Decision and will not be assessed.

[36] In contrast, the Respondent frames four different issues:

1. What is the standard of review?
2. Was the issuance of the FMO reasonable?
3. Was the issuance of the FMO fair?
4. If the issuance of the FMO was unreasonable and/or unfair, what is the appropriate remedy?

[37] I find the true issues lay somewhere between the parties' respective elaborated issues. This is reinforced by the emergence of a preliminary issue that arose at the hearing, being the contents of the Feigenbaum Affidavit. As such, I find the true issues and sub-issues in this application are as follows:

A. Preliminary issues –What contents, if any, of the Feigenbaum Affidavit are admissible?

B. What is the applicable standard of review?

   i. What is the nature of the Decision?
   ii. What is the applicable standard of review?
   iii. Is there a procedural fairness issue?

C. Did the Minister and DFO deliberately fail to consider a credible allegation of the Applicant that a material element of the Record is tainted by Bias?
   i. Did the Minister and DFO rely on biased extrinsic evidence not contained in the CTR and, if so, is the Decision itself tainted by the extrinsic evidence's bias?

   ii. Did the Minister base the Decision on reasons or evidence other than those provided in the CTR?

D. Is the Decision reasonable?

i. Did the Minister act in bad faith in making the Decision?

ii. Did the Minister not adhere to statutorily mandated natural justice?

iii. Did the Minister consider factors that were irrelevant or extraneous to the statutory purpose?

VI. Analysis

A. *Preliminary issue – Feigenbaum Affidavit*

[38] At the hearing, the Respondent pointed out two fatal flaws with the Feigenbaum Affidavit:

A. Some of the contents of the Feigenbaum Affidavit are not in compliance with Rule 81(1) of the *Federal Courts Rules*, SOR/98-106 [Rules] as they are not confined to the facts within Feigenbaum's personal knowledge, but instead include hearsay, opinions, and legal argumentation; and,

B. While the balance of the contents of the Feigenbaum Affidavit are confined to facts and exhibits, most of these are not admissible under any of the exceptions to the general rule against this Court receiving new evidence in an application for judicial review as outlined at paragraph 20 of *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*].

[39] Regarding the first flaw, upon review, it is correct that some of the contents of the following paragraphs of the Feigenbaum Affidavit are not in compliance with Rule 81(1) of the Rules because they contain hearsay, opinions, and legal argumentation: 3, 7, 11, 13-15, 125-130,

132-135, 137-140, 142, 147-156, 297-324, 338-344, 346-360, 363, 366-393, 453, 455-467, and 485-506. As such, I shall not consider them.

[40] Regarding the second flaw, I note that, in the normal course, materials that were not before the decision maker are not admissible on judicial review (*Access Copyright* at para 19). There are three *Access Copyright* exceptions to admit new evidence in an application for judicial review. New material can be admitted if it:

1. Assists the court to understand the general background circumstances of the judicial review;
2. Is relevant to an issue of procedural fairness or natural justice; or,
3. Highlights a complete absence of evidence before the decision maker;

(*Access Copyright* at para 20).

[41] Dealing with the third exception first, the CTR is rather healthy and provides sufficient evidence that was before the Minister in rendering her Decision. Since there was not a complete absence of evidence before the Minister, the third exception cannot apply. Likewise, the CTR provides a thorough and sufficient walkthrough of the general background circumstances for the Decision, and so the contents of the Feigenbaum Affidavit that are proffered as general background information shall not be admitted. Finally, as will be discussed below, the Applicants have not substantiated in law a duty of procedural fairness that they were owed and which may have been breached, and so the second exception cannot apply. For these reasons, all the exhibits save Exhibits 1 and 2 attached to the Feigenbaum Affidavit and the following paragraphs of the Feigenbaum Affidavit shall not be considered: 12, 16-124, 131, 136, 141, 143-146, 157-295, 325-336, 361, 362, 364, 365, 394-452, and 468-484.

[42] This leaves the following paragraphs of the Feigenbaum Affidavit intact and up for consideration: 1-2, 4-6, 8-10, 296, 337, 345, 454, and 507.

B. *Applicable standard of review*

(1) Decision's nature is that of policy/legislative

[43] The Applicants did not make any specific submissions on the nature of the Decision, instead choosing to argue that they were owed some degree of procedural fairness irrespective of the nature of the Decision on the basis that they were drastically affected when the FMO came into force. In contrast, the Respondent submits the Decision was a legislative decision, and the judicial review will necessarily be constrained by the context of the Decision and limited to narrow avenues of review.

[44] A policy or legislative decision, being interchangeable terms throughout the jurisprudence, is a decision in which there is the "creation and promulgation of a general rule of conduct without reference to particular cases" (*De Smith Judicial Review of Administrative Action* (S.A. De Smith & J.M. Evans, 4th ed. (London, England: Stevens, 1980)) [*De Smith*] at 71, as cited in *Ecology Action Centre Society v Canada (Attorney General)*, 2004 FC 1087 [*Ecology Action*] at para 50). In contrast, an administrative decision "cannot be exactly defined, but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice" (*De Smith* at 71, as cited in *Ecology Action* at para 50).

[45] In *Barry Group v Canada (Fisheries, Oceans and Coast Guard)*, 2017 FC 1144 [*Barry Group*], Justice Southcott held that a decision by the Minister to close the 2016 Atlantic mackerel fishery by way of variation order was legislative or policy, not administrative, in nature (*Barry Group* at para 28, as cited in *Munroe v Canada (Attorney General)*, 2021 FC 727 [*Munroe*] at para 36). While the method may have been slightly different, the nature of a "variation order is a legislative act, authorized by the *Regulations* and adopted pursuant to the *Act*" (*Spinney v Canada (Attorney General)*, 2000 CanLII 15007 [*Spinney*] at para 60, as cited in *Ecology Action* at para 51). Similar to the variation orders interpreted in *Spinney*, *Ecology Action*, *Barry Group*, and *Munroe*, the FMO is expressly authorized by and adopted pursuant to section 9.1 of the Act.

[46] Here, the Decision to close the elver fishery was "a general rule of conduct without reference to particular cases" (*De Smith* at 71) characteristic of a legislative or policy decision in that it applies to the entire class of elver fishers and treats them equally (*Shelburne Elver Limited v Canada (Fisheries, Oceans and Coast Guard)*, 2023 FC 1166 [*Shelburne FC*] at paras 39 and 43, upheld on appeal in *Shelburne Elver Limited v. Canada (Fisheries, Oceans and Coast Guard*), 2024 FCA 190 [*Shelburne FCA*] at para 4).

[47] At a factual level, I am prepared to agree with the Applicants that the Decision closing the elver fishery early before they had the chance to harvest all of their TAC affected their revenue, business and economic interests in 2023 (para 8 of Feigenbaum Affidavit). However, it is unclear whether the Applicants were affected in a manner different from the other commercial licence holders holding similar TACs. And in any event, I agree with the conclusion of Justice

Southcott in *Barry Seafoods NB Inc. v Canada (Fisheries, Oceans and Coast Guard)*, 2021 FC 725 [*Barry Seafoods*] at para 32, citing *Barry Group* at para 28, that the fact that a fisheries management measure of general application has a particular effect upon a particular participant in the fishery, or affects some participants more than others, does not in itself change the nature of that decision such that it can be characterized as an administrative act.

[48] I, therefore, agree with the Respondent that the Decision is of a policy nature, not administrative, taken by the Minister in the exercise of her broad discretionary powers to manage Canadian fisheries under the Act and related regulations. As such, in making the Decision, the Minister was subject to fewer procedural and substantive constraints than a decision-maker would otherwise be in making an administrative decision (*Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 (CanLII), [2021] 1 FCR 374 [*Entertainment Software*] at paras 24-36; *Barry Seafoods* at paras 32-33).

(2) Standard of review is reasonableness

[49] A policy or legislative decision is reviewable on the reasonableness standard as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], meaning a reasonable decision is one that is justified, intelligible, and transparent (*Barry Seafoods* at paras 34-36, citing *Malcolm v Canada (Minister of Fisheries and Oceans)*, 2014 FCA 130 [*Malcolm*] at para 35; *Vavilov* at para 100). With that said, *Barry Seafoods* rightly points out that, while reasonableness post-*Vavilov* remains a single standard, “what is reasonable in a given situation will be a contextual determination that takes into account the constraints imposed by the legal and factual context of the particular decision under review” (*Barry Seafoods* at para 35, citing

Vavilov at paras 88-90). This Court's review will necessarily be constrained by the context of the legislative or policy decision under review.

[50] *Barry Seafoods* relied on the Supreme Court of Canada in *Maple Lodge Farms v Government of Canada*, 1982 CanLII 24 (SCC), [1982] 2 SCR 2 [*Maple Lodge Farms*] and succinctly identified that the legal and factual context of a policy or legislative decision is restrained to the circumstances upon which a policy or legislative act may be found unreasonable:

1. Bad faith;
2. Non-adherence to statutorily mandated natural justice; and,
3. Consideration of factors irrelevant or extraneous to the statutory purpose;

(*Maple Lodge Farms* at 7-8, as cited in *Barry Seafoods* at paras 34-36, 57-61).

[51] Absent any of these errors and narrow areas of review, the Courts should not interfere with the legislative or policy decision (*Maple Lodge Farms* at 7-8).

(3) No procedural fairness issue here

[52] As the Decision is of a policy nature, it is subject to review for non-adherence to statutorily mandated natural justice requirements (*Barry Seafoods* at para 61, citing *Maple Lodge Farms* at 7-8). Just like what occurred in *Barry Seafoods*, it seems the Applicants advanced submissions surrounding natural justice or procedural fairness principally on the assumption that the Decision was administrative in nature. Again, as like *Barry Seafoods*, the Applicants here have failed to identify any natural justice requirements statutorily mandated by the Act or any other applicable legislation or regulation. Having failed to identify any natural justice

requirements statutorily mandated by the Act or any other applicable legislation or regulation, the Applicants have not substantiated any duty of procedural fairness or principle of natural justice they were owed by the Minister that could have been breached in making the Decision.

[53] The Applicants allege in their Notice of Application that the Minister acted unfairly in deciding to issue its FMO, breaching their legitimate expectations that constituted a denial of procedural fairness. I must agree with the Respondent that the Minister did not violate any procedural fairness rights because the Applicants are not entitled to them. Legislative or policy decisions do not attract duties of procedural fairness, as explained in *Canadian Assn. of Regulated Importers v. Canada (Attorney General)* (C.A.), 1994 CanLII 3460 (FCA), [1994] 2 FC 247 at 258-259:

> Generally, the rules of natural justice are not applicable to legislative or policy decisions. As has been clearly stated by Sopinka J. in *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at page 558:
>
> > **[T]he rules governing procedural fairness do not apply to a body exercising purely legislative functions**.
>
> A similar statement was made by Dickson J. (as he then was) in *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at page 628:
>
> > **A purely ministerial decision, on broad grounds of public policy, will typically afford the individual no procedural protection, and any attack upon such a decision will have to be founded upon abuse of discretion.** Similarly, public bodies exercising legislative functions may not be amenable to judicial supervision.
>
> (See also Estey J. in *Attorney General of Canada v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735, at page 758; *Bates v Lord Hailsham of St Marylebone,* [1972] 3 All E.R. 1019 (Ch.D.).)
>
> More particularly, **it has been held that the principles of natural justice are not applicable to the setting of a *quota policy*** although they may be to *individual decisions* respecting grants of

> quotas. In *Re Bedesky et al. and Farm Products Marketing Board of Ontario et al.* (1975), 8 O.R. (2d) 516 (Div. Ct.); affirmed (1975), 10 O.R. (2d) 105 (C.A.); leave to appeal refused (1975), 10 O.R. (2d) 105 note, Mr. Justice Morden stated at page 539:
>
> > No authority was cited to us for the proposition that the principles of natural justice respecting the right to notice and the right to be heard are applicable to govern a body such as the Chicken Board with respect to the devising and adopting of a quota policy. In fact, the law would appear to be to the contrary.
>
> I can see no reason to differentiate the situation where, as here, it is a Minister rather than a board that is establishing the quota. Some may be damaged while others may gain by such a quota, but the exercise is essentially a legislative or policy matter, with which Courts do not normally interfere. Any remedy that may be available would be political, not legal. **It might have been a considerate thing for the Minister to give the respondents notice and an opportunity to be heard, but he was not required to do so**.
>
> **In essence, what the respondents are seeking here is to impose a public consultation process on the Minister when no such thing has been contemplated by the legislation.** There are statutes in which regulations or policies cannot be promulgated without notifying and consulting the public. (See, for example, *Grain Futures Act*, R.S.C., 1985, c. G-ll, subsection 5(2); *Aeronautics Act*, R.S.C., 1985, c. A-2, section 5 [as am. by R.S.C., 1985 (lst Supp.), c. 33, s. 1; (3rd Supp.), c. 28, s. 359] and section 6 [as am. by R.S.C., 1985 (lst Supp.), c. 33, s. 1]; *Transportation of Dangerous Goods Act*, R.S.C., 1985, c. T-l9, subsection 22(1); and *Broadcasting Act*, S.C. 1991, c. 11, subsection 11(5). **No such legislative provision appears in the** *Export and Import Permits* ***Act,*** **something that Parliament could have inserted if it wanted notice to be given and consultation with the public to be held**.
>
> [Emphasis in original, emphasis added]

[54] Similarly, there is no legislative provision appearing in the Act, including section 9.1, and its regulations suggesting that the Applicants were owed a duty of procedural fairness or had a right to be consulted (*Spinney* at para 58) or to be heard prior to the Minister making its Decision to issue the FMO. In line with prior decisions for the Federal Court and the Federal Court of

Appeal that have set out that no duty of procedural fairness is owed to licence holders in the setting of quota policy or the alteration of quotas that are legislative or policy in nature, it is reasonable that the same be said of the Minister's decision to issue a closure of the elver fishery for 45 days under section 9.1 of the Act.

C. *Bias or ulterior reasoning*

(1) Extrinsic evidence does not make the decision-maker biased by association

[55] The Applicants hedge their argument of bias on the existence of the 2012 COSEWIC report designating American eel as 'threatened', which they allege is biased. They argue that, since the 2012 COSEWIC report was biased, and the Minister was concerned about conservation efforts for the American eel and American eel elvers in making the Decision, the Minister must have relied on the 2012 COSEWIC report and therefore the Decision is biased because the Minister relied on biased evidence.

[56] The basis of the Applicants' allegation that the 2012 COSEWIC report is biased appears to be that the Applicants either doubt the credibility or legitimacy of the science underlying the 2012 COSEWIC report, or that the report's author was not impartial in writing the report. As the Applicants believe this establishes that the report is biased, they go on to submit that the 2012 COSEWIC report's bias has inherently or unwittingly biased the Minister in making the Decision without any legal authority to support this argument of, in essence, "second-hand bias". They further allege without any evidentiary basis that DFO "gave 'significant' weight to the COSEWIC 2012 decision in advising the Minister", and baldly assert that "many DFO officials

(…) have conveyed to Feigenbaum that the COSEWIC 2012 finding has been the *sole reason* that a TAC increase would not be considered" [emphasis in original].

[57] With respect, this line of attack must fail. First, even considering I have determined I will not consider the exhibits in the Feigenbaum Affidavit, I note that the Decision under judicial review *is not* the 2012 COSEWIC report and, as such, whether the 2012 COSEWIC report is somehow biased is immaterial. Second, the Applicants have provided no authority that suggests this Court can somehow impute second-hand bias on the Minister's part. Third, the Decision only concerns the closure of the 2023 elver fishery, and not the determination of the TAC, despite the Applicants sheer insistence that their feedback to DFO to increase the TAC instead of closing the fishery was so clearly a better alternative to closing the fishery that it renders the Decision unreasonable. This Court cannot delve into the underlying facts before the Minister and, more specifically, previous decisions (determination of the TAC) not subject of judicial review before this Court. Fourth and finally, the Applicants have failed to provide any evidence, including the excluded evidence, that establishes that the 2012 COSEWIC report was considered by the Minister in any capacity when making the Decision, let alone that it was the sole basis for the Decision.

[58] The Respondent submits that the Applicants' argument that the Minister's decision to issue an FMO was unreasonable because it was not based on the scientific data the Applicants deem to be "the best available science" illustrate two fundamental flaws. The first flaw relates to the Applicants' reliance on scientific analysis conducted in 2012 to help support its view that conservation efforts for elvers can be relaxed. The second flaw is the Applicants' attempt to

attack the reasonableness of the FMO by questioning the quality of the evidence that was relied upon by the Minister, which the Respondent argues is improper, as it would invite the Court to usurp the role of the Minister and to become an "academy of science". The Respondent submits, and I agree, that the Court's role is to review the Minister's exercise of statutory authority to determine whether it was reasonably discharged based on the information before it, which included the threat to the conservation status of eels, and not to arbitrate conflicting scientific predictions relying on *West Vancouver v British Columbia,* 2005 FC 593 at para 55 reproduced below:

> [55] Another principle related to the notion of deference is referred to by Justice Sexton in the Federal Court of Appeal's judgment in *Inverhuron & District Ratepayers' Assn. v. Canada (Minister of the Environment),* 2001 FCA 203 (Fed. C.A.). He wrote the following at paragraphs 47 and 48:
>
> > 48 In my opinion, it is not for this Court to delve into the scientific complexities associated with determining the validity of the appellant's factual assertions. To do so would be contrary to the long-accepted principle discussed by my colleague Strayer J. in Vancouver Island Peace Society:
> >
> > > <u>It is not the role of the Court in these proceedings to become an academy of science to arbitrate conflicting scientific predictions...</u> Whether society would be well served by the Court performing either of these roles, which I gravely doubt, they are not the roles conferred upon it in the exercise of judicial review under section18 of the Federal Court Act.
> > >
> > > For the sole purpose of the following analysis, however, I will proceed on the assumption that the alleged facts have been established. As will be seen, the validity of the alleged facts has no impact upon my conclusions. [*emphasis mine*]
> > >
> > > [Emphasis in original]

(2) No evidence that the Decision is based on any reasons other than those given

[59] The Applicants rely on facts in the Feigenbaum Affidavit (which I shall not consider, but will summarize to relay their argument) to argue that, because some DFO officials resisted granting government funding as premature to NovaEel, Inc. [NovaEel], another company founded by the Applicants, saying that the Minister had not finalized a *SARA* recommendation on the American eel and this funding would unfairly signal to range-state colleagues that Canada did not intend to put American eel on the *SARA* list, to ask this Court to infer that the *real* reason the Minister closed the fishery was their unstated intention to make a recommendation on whether to put the American eel on the *SARA* list.

[60] Notwithstanding the Applicants' inconsistency in asserting that both the 2012 COSEWIC report and the Minister's unstated intention to make a recommendation on whether to put the American eel on the *SARA* list are somehow simultaneously the sole reasons for the Decision, this line of attack also must fail. The Applicants have offered no evidence, including the excluded evidence, that establishes that the Minister has such an intention and, further, that said intention is the true animus for closing the fishery, which is in despite of the Minister's reasoned justification from the Memo and the FMO that conservation concerns from unauthorized fishing and safety concerns from threats and conflicts between harvesters were the motivations behind the Decision. What they did offer, and which I excluded, was a series of communications between DFO and the Applicants and their other associated organizations (including NovaEel), where the Applicants would continuously inquire as to whether the Minister would recommend the American eel be put on the *SARA* list, and DFO would continuously respond that they have not finished developing the listing advice they will provide to the Minister. The Applicants have

nothing more than their own bald assertion that the Minister was actively considering such an action, let alone that they have not offered anything to connect this active consideration to the Decision.

(3) Conclusion on bias or ulterior reasoning

[61] For these reasons, the Applicants have failed to establish that the Decision is unreasonable due to an alleged bias or ulterior motive of the Minister.

D. *Decision is reasonable*

(1) No bad faith by Respondent

[62] In *Munroe* at para 65, Justice Strickland explained that "[a] decision made in bad faith is a decision made for the purpose not authorized by statute. It has also been equated to acting "dishonestly, maliciously, fraudulently or with mala fides" or manifesting serious misconduct bordering on the corrupt, while in other instances the term seems to have been given a meaning akin to arbitrariness" [citation omitted].

[63] The Applicants allege that "certain DFO officials have acted in bad faith, based on false assurances, with inadequate consultation, guided by inaccurate assumptions and motivated by hostility and disregard for the interests of non-indigenous quota holders." They appear to have three prongs to this assertion. First, that the Minister has "a deliberately hidden agenda to illegally take [the] Applicant's quota without compensation." Second, that DFO has acted in bad faith through hostile interactions with the Applicants specifically and with commercial quota

holders generally. Third, that DFO has acted in bad faith by not adopting the Applicants' feedback and disregarding the impact the Decision would have on the Applicants' economic and property interests.

[64] The first of these prongs fails both in fact and in law. In fact, the Applicants have failed to establish the alleged fact of the existence of any hidden agenda by the Minister, nor have they established the subsequent alleged fact that the Decision either is based on or is in furtherance of this allegedly hidden agenda. In law, even if the Minister had such an agenda, the Applicants' argument is predicated on the assumption that they hold some property right in their quota, the taking of which must be compensated. This was succinctly dealt with by Justice Southcott in *Barry Seafoods*, citing *Anglehart v Canada*, 2018 FCA 115 (CanLII), [2019] 1 FCR 504 [*Anglehart*], to paraphrase that "[fishing] quotas do not confer property rights. While they may be viewed as valuable assets capable of being the subject of commercial transactions, ultimately their value depends on discretionary ministerial decisions" (*Barry Seafoods* at para 59, citing *Anglehart* at paras 35-36). If the Applicants have no property right in their quota, there can be no right to compensation arising purely from the fact of loss of their quota (*Canada (Attorney General) v Arsenault*, 2009 FCA 300 (CanLII) at para 57, cited by *Malcolm* at para 43). The Applicants cannot therefore legally claim that the Minister has "illegally taken [the] Applicant's quota without compensation."

[65] The second of these prongs fails on logic. The Applicants allege that the Minister and DFO dealt with the Applicants throughout the course of their interactions in a hostile manner, which they claim evidences the Minister's "true motives" as previously discussed. This argument

fails on logic because it is predicated on the assumption that the Applicants have already established the Minister has a hidden agenda and the Decision is actually based on or is in furtherance of this allegedly hidden agenda. As the Applicants have failed to establish this allegedly hidden agenda, so too must they fail to establish that the manner of their interactions with the Minister and DFO evidence the same. The Minister's comment to one elver licence holder that she "must have done very well" for herself and comment that the elver fishery had increased in recent years are remarks that do not rise to the level of bad faith in *Munroe* (at para 65). I agree with the Respondent that the Applicants are disproportionally focusing on these comments to give them more importance than they warrant in the circumstances of this judicial review.

[66] The third and final of these prongs fails on facts. The Applicants allege, in essence, two fundamental issues that underpin this argument of bad faith. First, that the Minister ignored the Applicants' suggestion through feedback that the fishery should not be closed and instead the TAC should be increased. Second, that the Minister disregarded the impact the Decision would have on the Applicants' economic and property interests.

[67] The Applicants' first allegation in this respect is misguided and irrelevant. While it seems true that the Applicants did submit to the Minister a series of unsolicited and external scientific information and a suggestion that the TAC should be increased in light of their external scientific information, the Applicants have not indicated any authority for the proposition that the Decision should be found unreasonable simply because the Minister did not elect to adopt the Applicants' proposition. Indeed, their allegation seems to be premised on the incorrect foundation that they

believe their suggestion to increase the TAC is *more* reasonable than the Decision, and therefore the Decision is unreasonable *by comparison*. Even if I were to accept that the Applicants' suggestion was *more reasonable* than the Decision, which I do not, the role of this Court on judicial review is to determine whether the Decision "falls within a range of reasonable outcomes, having regard for both the context in which the decision was made and the fact that the decision itself involves policy matters in which a reviewing court should not interfere by substituting its own opinion to that of the Minister's" (*Malcolm* at para 35). The simple fact that the Applicants insist their suggestion may be *more* reasonable than the Decision, even if it were true, does not in and of itself render the Decision unreasonable.

[68] The Applicants' second allegation in this respect fails flatly on the fact that the Memo at pages 4-5 expressly discusses and considers the impact of a closure on authorized licence holders, but weighed that this impact "must be balanced against the need to curtail the excessively high harvest pressure of total removals, and the safety risks associated with losing control and management of the fishery." Clearly, the Minister turned their mind to how the Decision would impact the Applicants' economic interests. As discussed above, the Applicants have no property right in their quota, and so there were no property interests for the Minister to consider.

[69] The Applicants have failed to establish any act of bad faith by the Minister in making the Decision.

(2) No non-adherence to statutorily mandated natural justice

[70] As highlighted in paragraphs 53 and 54 above, the Applicants have not identified any principles of statutorily mandated natural justice in the Act to which the Minister may not have adhered. As such, the Applicants have failed to establish this *Maple Lodge* factor.

(3) No consideration of factors irrelevant or extraneous to the statutory purpose

[71] The only allegation made by the Applicants which could suggest the Minister considered factors irrelevant or extraneous to the statutory purpose of the FMO was that the Decision was either based on or is in furtherance of an allegedly hidden agenda or ulterior motive. I have previously found the Applicants failed to establish any hidden agenda or ulterior motive on the Minister's part in making the Decision.

[72] The dual purposes of the Act as set out in section 2.1 are: (a) the proper management and control of fisheries; and, (b) the conservation and protection of fish and fish habitat, including by preventing pollution. The Minister relied on both the FMO and the Memo when it stated that the Decision had two principal motivations: elver conservation concerns arising from high rates of unauthorized fishing, and re-establishing the proper management and control of the elver fishery following safety concerns.

[73] With the Applicants' shortcomings in mind, I have great difficulty in finding the Minister considered any factors that were irrelevant or extraneous to the statutory purpose. Indeed, I find the only factors the Minister *did* consider were those factors that were explicitly and exclusively the statutory purpose of the underlying Act itself.

[74] For these reasons, the Applicants have failed to establish the Minister considered factors irrelevant or extraneous to the statutory purpose.

(4) Conclusion

[75] The Applicants have failed to establish that the FMO was issued arbitrarily, in bad faith, or on the basis of considerations extraneous or irrelevant to the purpose of the Act. The Minister exercised her discretion to make a legislative or policy decision pursuant to section 9.1 of the Act, which had application to the entire class of elver fishers and was a general decision made in the management of the fishery. It is clear from the record before the Minister that the volume of unauthorized harvesting was substantial, the total removals of elver were on track to exceed the TAC by mid-April, and the tensions between unauthorized harvesters, authorized harvesters, and C&P officers had resulted in threats and violence and was escalating. It is also clear that the Minister was presented with information demonstrating a threat to the proper management and control of the fishery and the conservation and protection of American eel, and that prompt action was required to address them.

[76] Once those preconditions were met, the Minister had a wide, unfettered discretion to draft a fisheries management order pursuant to section 9.1 of the Act prohibiting elver fishing. The Minister's Decision to close the elver fishery on April 15, 2023 was reasonable on the facts before her and balanced both conservation and protection concerns, the safety of fishers and C&P officers, and the economic interests of elver fishers. The Court must afford considerable deference to the Minister's Decision as the Federal Court of Appeal held in *Entertainment Software* at para 28:

> Public interest determinations based on wide considerations of policy and public interest, assessed on polycentric, subjective or indistinct criteria and shaped by the administrative decision makers' view of economics, cultural considerations and the broader public interest—decisions that are sometimes characterized as quintessentially executive in nature—are very much unconstrained: (…) [citations omitted].

VII. Costs

[77] As the Respondent is ultimately successful on this application, they are entitled to costs. Both parties sought costs on this matter, but failed to provide any submissions of the same. If the parties cannot submit a draft award of costs on consent, the parties shall have thirty days from the issuance of this judgment to make submissions on what award of costs is appropriate.

VIII. Conclusion

[78] The Decision, being of a policy or legislative nature, is reasonable. The Applicants have failed to establish any duty of procedural fairness or principle of natural justice the Minister may have breached. The Applicants have likewise failed to establish the Decision was made in bad faith, that the Minister did not adhere to statutorily mandated natural justice, or that the Minister considered factors irrelevant or extraneous to the statutory purpose. For these reasons, this application for judicial review is dismissed with costs payable to the Respondent.

JUDGMENT in T-1008-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;
2. The Respondent is entitled to costs; and,
3. The parties shall have thirty days from the issuance of this judgment to submit for consideration either a draft award of costs to the Respondent on consent, or submissions on what award of costs to the Respondent is appropriate.

"Ekaterina Tsimberis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1008-23
STYLE OF CAUSE:	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:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	JUNE 11 AND 12, 2024
JUDGMENT AND REASONS:	TSIMBERIS J.
DATED:	JANUARY 28, 2025

APPEARANCES:

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