S.C.C. File No. 40195

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE ALBERTA COURT OF APPEAL)

IN THE MATTER of An Act to enact the *Impact Assessment Act* and the *Canadian Energy Regulator Act*, to amend the *Navigation Protection Act* and to make consequential amendments to other Acts, SC 2019, c 28 and the Physical Activities Regulations, SOR/2019-285

AND IN THE MATTER of a Reference by the Lieutenant Governor in Council to the Court of Appeal of Alberta under the *Judicature Act*, RSA 2000, c J-2, s 26

BETWEEN:

ATTORNEY GENERAL OF CANADA

APPELLANT

-and-

ATTORNEY GENERAL OF ALBERTA

RESPONDENT

-and-

(Title of Proceedings continued on next page)

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PART I – CONCISE OVERVIEW OF POSITION WITH RESPECT TO THE QUESTIONS ON WHICH THE INTERVENER HAS INTERVENED AND CONCISE STATEMENT OF FACTS

1. Oceans North Conservation Society ("Oceans North") is a non-profit society and registered charity with a strong work focus in *Inuit Nunangat*, the Inuit homeland in Canada, to conserve Arctic environments and promote ecological and cultural resilience in the region. Oceans North works to promote greater transparency and holistic environmental assessments, to ensure that assessments will adequately address and mitigate the interconnected, transboundary, and cumulative adverse impacts from major projects.

2. Oceans North takes the position that the *Impact Assessment Act* (the "*IAA*") is not only *intra vires* Parliament, but the powers under s. 91 of the *Constitution Act, 1867* would in fact support much stronger federal environmental assesement legislation.

3. In this appeal, Oceans North makes the following three arguments:

   a. The fisheries power under s. 91(12) of the *Constitution Act, 1867* is a broad power that encompasses the ability to regulate the aquatic environment to preserve fish and all animals that inhabit the sea. This power must be robust given the characteristics of marine ecosystems, and is not limited to what is regulated under the *Fisheries Act*.

   b. The national concern doctrine provides federal jurisdiction over not only s. 7(1)(b)(ii) and (iii) of the *IAA*, but the triggers in s. 7(1)(a) as well. Preventing and mitigating extraprovincial and international adverse effects, including marine pollution, are quintessential examples of matters which meet this test and should weigh heavily in the third step of the test in favour of federal jurisdiction.

   c. The constitutional logic behind a robust interpretation of the fisheries power and the prominence of the provincial inability test in the national concern doctrine is to address spillover effects or externalities inherent in major resource development projects. Federal environmental assessment legislation which regulates actual and potential adverse extraprovincial impacts from intraprovincial projects is essential to addressing such problems.

PART II - CONCISE OVERVIEW OF INTERVENER'S POSITION WITH RESPECT TO THE APPELLANT'S QUESTIONS ON WHICH INTERVENER HAS INTERVENED

4. The *IAA* and the *Physical Activities Regulations* (the "*Regulations*") are constitutional and *intra vires* the legislative authority of Parliament of Canada.

PART III - STATEMENT OF ARGUMENT

A. THE FISHERIES POWER IS NECESSARILY BROAD

5. Fisheries are a unique natural resource in that they are a "common property resource", and therefore the federal government not only has the power, but the duty to ensure the adequate conservation and sustainable development of that resource for the nation.[1] Further, from a division of powers perspective, fisheries are unique in that they are the one major exception to resources and "property" falling within provincial jurisdiction, given the "nature of the ocean and anadromous fisheries that transcend provincial boundaries."[2] As one author noted, "fish have no respect for the human fiction of juridical boundaries and cross them with impunity."[3]

6. Given the importance of marine ecosystems in our country and the interconnected and transboundary nature of such ecosystems, federal jurisdiction over fisheries must be broad and robust. It is not co-extensive with the ambit of the *Fisheries Act*, which the majority appears to suggest.[4] As Chief Justice Laskin in *Interprovincial Co-operatives* held, the fisheries power "is concerned with the protection and preservation of fisheries as a public resource".[5] Fisheries does not mean just fish, but means all animals which are part of the system which constitute the fisheries resource. Parliament has "authority to protect all those creatures which form a part of that system."[6] The Federal Court of Appeal has held that "Parliament may manage the fishery on social, economic

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[1] *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12 at para. 37
[2] Michael Howlett, "The Politics of Constitutional Change in a Federal System: Negotiating Section 92A of the Canadian Constitution Act (1982)" 21 (1991) Publius: The Journal of Federalism 121 at 124
[3] H. Scott Fairley, "Canadian Federalism, Fisheries and the Constitution: External Constraints on Internal Ordering" 12 Ottawa L Rev 257 [**Fairley, "Canadian Federalism"**] at 317
[4] *Reference re Impact Assessment Act*, 2022 ABCA 165 ("**Reasons**") at paras. 272-277, 385-388
[5] *Interprovincial Co-operatives Ltd. et al. v. R.*, [1976] 1 SCR 477 [***Interprovincial Co-operatives***] at 495, dissenting but not on this point
[6] *Northwest Falling Contractors v. The Queen*, [1980] 2 SCR 292 [***Northwest Falling***] at 300

or other grounds, either in conjunction with steps taken to conserve, protect, harvest the reserve or simply to carry out social, cultural or economic goals and policies.[7]

7. After canvassing the jurisprudence on the scope of the fisheries power, this Court in *Ward* put it "beyond doubt" that the fisheries power includes the protection, conservation and regulation of fish, and all the animals that inhabit the sea.[8]

8. The majority and the respondent rely heavily on *Fowler* to suggest that the *IAA* is constitutionally deficient because s. 7 of the *IAA* prohibits activities which may cause adverse impacts to fisheries.[9] However, *Fowler* should not be interpreted to mean that the fisheries power does not give Parliament authority to regulate activities which may cause adverse impacts to fisheries and marine environments. The provision in *Fowler* was struck down because it made "no attempt to link the proscribed conduct to actual or potential harm to fisheries."[10] Clearly, if there was a link to the potential harm to fisheries, the outcome in *Fowler* would have been different.

9. In this case, there is a link between the prohibition found in s. 7 and to potential harm to fisheries and marine environments. This link is found from reading the *IAA* in its entirety, and the evidence before this Court. [11] There is nothing from *Fowler* that requires the link to the potential harm to fisheries to be found in the language of the prohibition provision itself.

10. It is clear the types of projects listed in the *Regulations* and subject to s. 7 are the ones that are most likely to have the greatest adverse impacts on federal areas of jurisdiction – including fish and marine environments. The Project List specifically "targets those projects with the greatest potential for adverse environmental effects within federal responsibility".[12] Major projects like *in situ* oil and gas development will not only have many potential direct adverse impacts on fish and fish habitat, but by their nature will emit large quantities of greenhouse gases. [13] Such emissions

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[7] *Gulf Trollers Assn. v. Canada (Minister of Fisheries and Oceans)*, [1987] 2 F.C. 93 at 106
[8] *Ward v. Canada (Attorney General)*, 2002 SCC 17 at para. 41
[9] *Fowler v. The Queen*, [1980] 2 SCR 213 [***Fowler***]; Reasons at para. 233; Respondent's Factum at paras. 119-120
[10] *Fowler* at 226
[11] Reasons at paras. 607-608, 611
[12] Record of the Attorney General of Canada ("**CR**"), Part III, Affidavit of Corinne Kristensen, made December 12, 2019 ("**Kristensen Affidavit**"), Ex. P, p. 150
[13] CR, Part III, Kristensen Affidavit, Ex. P, p. 151

are not only transboundary air pollutants, but will have an adverse effect on fish and marine environments due to ocean acidification and changing weather patterns from climate change.[14]

11. Given the clear link between potential adverse impacts on fish and marine environments, and the types of projects subject to the *IAA*, this case is distinguishable from *Fowler*.

B. THE NATIONAL CONCERN TEST

12. The majority in the Court below found that the *IAA* does not meet the national concern test and it fails at the third step of the test,[15] in that the impact on provincial jurisdiction is unacceptable having regard to the impact on the interests that will be affected if Parliament is unable to constitutionally address the matter at a national level. The majority held that the cases on the national concern doctrine, such as from *Interprovincial Co-operatives* and *Crown Zellerbach*[16], are "readily distinguishable".[17].

13. However, *Interprovincial Co-operatives* and *Crown Zellerbach* provide a much broader interpretation of the national concern doctrine than the majority recognizes.

14. *Interprovincial Co-operatives* involved mercury pollution from Saskatchewan and Ontario chlor-alkali plants which harmed Manitoba fisheries. In such a scenario, there is little incentive for the jurisdictions benefitting from the manufacturing but not suffering from any of the externalities to regulate the manufacturing for the benefit of Manitoba fisheries. The issue was whether Manitoba had jurisdictional authority to regulate pollution in Saskatchewan and Ontario, and the Court ruled that it did not, and that interprovincial pollution was a matter falling under federal jurisdiction. Although not explicitly a national concern case, it has been since viewed as such.[18]

15. *Crown Zellerbach* meanwhile involved legislation "concerned with marine pollution and its effect on marine life, human health and the amenities of the marine environment [and] the effect

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[14] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [***GGPPA References***], para. 11; David Cassuto and Amy O'Brien, "You Don't Need Lungs to Suffer: Fish Suffering in the Age of Climate Change with a Call for Regulatory Reform" (2019) 5 Canadian Journal of Comparative and Contemporary Law 31 at 51-53
[15] Reasons at para. 285
[16] *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 [***Crown Zellerbach***]
[17] Reasons at para. 300
[18] *GGPPA References* at para. 99

of dumping on navigation and shipping and other legitimate uses of the sea."[19] The issue in *Crown Zellerbach* was whether the regulating of dumping of wood waste in provincial waters was *intra vires* Parliament under the national concern doctrine. Justice Le Dain, writing for the majority, found that it was.

16. *Crown Zellerbach* is also noteworthy because there was no evidence the wood waste at issue had any adverse impact on fish or navigation. The respondent made similar arguments to the respondent in this case – that by prohibiting the dumping of any substance – the legislation was *ultra vires*. However, the Court found that just because the substance may not have any adverse impact, does not alter the fact that the legislation was aimed at regulating marine pollution. Indeed, the Court went as far as saying that such a prohibition was perhaps the only "effective" regulatory model to prevent such pollution.[20]

> The chosen, and perhaps only effective, regulatory model makes it necessary, in order to prevent marine pollution, to prohibit the dumping of any substance without a permit. Its purpose is to require a permit so that the regulatory authority may determine before the proposed dumping has occurred whether it may be permitted upon certain terms and conditions, having regard to the factors or concerns specified in ss. 9 and 10 of the Act and Schedule III. The Act is concerned with the dumping of substances which may be shown or presumed to have an adverse effect on the marine environment. The Minister and not the person proposing to do the dumping must be the judge of this, acting in accordance with the criteria or factors indicated in ss. 9 and 10 and Schedule III of the Act. There is no suggestion that the Act purports to authorize the prohibition of dumping without regard to perceived adverse effect or the likelihood of such effect on the marine environment. The nature of the marine environment and its protection from adverse effect from dumping is a complex matter which must be left to expert judgment.[21]

17. The *IAA* is designed in much the same way. It prohibits certain actions which may have adverse impacts on matters falling under federal jurisdiction, and then leaves it up to expert judgment to determine what those adverse impacts may be, how they may be mitigated, and whether the project in question should be authorized. As in *Crown Zellerbach*, such a model does not change the constitutionality of the legislation or the ability of the federal government to impose such prohibitions pending a further fully-informed decision. It is simply effective environmental regulation.

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[19] *Crown Zellerbach* at 408
[20] *Crown Zellerbach* at para. 18
[21] *Crown Zellerbach* at para. 18

18. The Court in *Crown Zellerbach* also discussed *Fowler*, and ultimately resorted to the national concern doctrine as the fisheries power could not regulate the dumping of substances like wood waste where there was no link to potential adverse impact to fisheries.[22] Therefore, to the extent that there is no link in this case between projects subject to the *IAA* and potential impacts to fish and marine environments and the fisheries power does not apply, then it is clear the national concern doctrine would provide Parliament with the authority to regulate such projects in any event.

19. Indeed, the matters falling under the s. 7(1)(a) triggers regarding fish and fish habitat, aquatic species, and even migratory birds would fall under the national concern doctrine. These animals and the environments they depend on are clearly extraprovincial in nature and are subject to international agreements.[23] As Dale Gibson wrote, migratory wildlife poses "extraprovincial problems" that "cannot be dealt with effectively by any provincial legislature, and should therefore be regarded as coming within parliament's residual authority, by reason of the 'peace, order, and good government' clause."[24]

20. *Crown Zellerbach* and *Interprovincial Co-operatives* support the proposition that Parliament has constitutional authority over international and interprovincinal matters which may cause adverse effects to the environment because it is "simply beyond provincial competence".[25]

21. Provincial inability not only plays a prominent role in the application of the national concern test at the "singleness, distinctiveness, and indivisibility" stage,[26] it is also important to the third stage of the analysis. This is illustrated by this Court's analysis in the *GGPPA References*, where the majority held that the federal government can legislate "from the perspective of addressing the risk of grave extraprovincial and international harm associated with a purely intraprovincial approach" and that "the compelling federal interest is in doing precisely — and

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[22] *Crown Zellerbach*, para. 22
[23] See e.g. *Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean,* ratified by Order in Council, P.C. 2019-0426; Fairley, "Canadian Constitution" at 290-312
[24] Dale Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973) 23:1 U Toronto LJ 54 [**Gibson, "Constitutional Jurisdiction"**] at 65-66
[25] Gibson, "Constitutional Jurisdiction" at 84
[26] *GGPPA References* at paras. 145-146

only — what the provinces cannot do".[27] That meant that the intrusion into provincial jurisdiction to legislate in the area was "minimal".[28]

22. Just like in the case of the *GGPPA*, the *IAA* has minimal impacts on provincial jurisdiction to regulate development projects. The majority bases its finding on the national concern doctrine because it equates the triggers under s. 7(1)(b)(ii) – (iii) as regulation of GHG emissions generally. But as Justice Greckol noted, nothing in s. 7(1)(b) speaks to GHG emissions. Nothing in the *IAA* refers to the regulation of GHG emissions generally. The *IAA* does not regulate every project which emits GHG emissions.[29] Much like the *GGPPA References,* "the issue in this case is not the freedom of the provinces and territories to legislate in relation to GHG emissions generally."[30]

23. The *IAA* leaves plenty of room for provinces to legislate in relation to GHG emissions, and also to regulate intraprovincial projects generally. Provinces are free to design their own environmental impact assessment regimes, and regulate such projects from a provincial perspective. The *IAA* explicitly contemplates cooperative impact assessments with provincial counterparts.[31]

24. Nothing in the *IAA* prevents provinces from "regulating an intra-provincial activity located within its province" even if it has "incidental effect beyond its boundaries".[32] The *IAA*, and particularly s. 7(1)(b)(ii) – (iii), regulates only what the provinces simply cannot legislate. The *IAA* therefore has minimal impacts on a province's freedom to legislate and does not fail at the third step of the national concern test.

C. **BROAD** FEDERAL JURISDICTION IS NECESSARY TO ADDRESS INHERENT SPILLOVER EFFECTS FROM MAJOR DEVELOPMENT PROJECTS

25. Central to Oceans North's arguments on the scope and application of the fisheries power and the national concern doctrine is the fact that "one of the goals of federalism is to place matters of purely local import within local control and matters of wider import under federal control which

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[27] *GGPPA References* at para. 198
[28] *GGPPA References* at para. 199
[29] Reasons at para. 661
[30] *GGPPA References* at para. 199
[31] Reasons at paras. 723-730
[32] Reasons at para. 300

is, of itself, not entirely territorial."[33] This goal of federalism, and the realities of resource development and pollution, must animate not only the interpretation and application of both the fisheries power and the national concern doctrine, but also the interpretation and constitutionality of environmental impact assessment legislation generally.

26. Many adverse environmental impacts from projects are not confined to territorial provincial boundaries and will undoubtedly impact areas of federal jurisdiction:

> Many projects which, at first glance, would appear to be matters of a merely local or private nature within the confines of the province, in fact upon closer examination impact on areas of established federal jurisdiction such as "fisheries" and "navigation." Further, many local projects have impacts which cross provincial boundaries and are therefore inter-provincial or international in their effects, rendering the provinces incapable of dealing with these extraprovincial effects.[34]

27. Not only are impacts from such projects likely to be extraprovincial in nature, there is often a risk that those with least power and beyond the local vicinity of the project will bear the disproportionate burden of adverse effects, and receive little corollary benefits from the project. The risk is heightened where harms are to remote communities like those in the Arctic. For example, one author noted how the Churchill River diversion project in northern Manitoba would create widespread environmental damage. However, because the damage would only be in northern remote areas the provincial government raised no serious opposition to the proposal given the benefits to the population in the south of the province. This required federal government intervention to ameliorate the harms.[35]

28. This example illustrates the "spillover effects" or "externalities" that flow from major resource development projects. The fact is that there is a real risk of collective action problems as the benefits and costs of the development are not distributed evenly across jurisdictions because

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[33] Judith B. Hanebury, "Environmental Impact Assessment in the Canadian Federal System" (1991) 36 McGill LJ 962 at 984 [**Hanebury, "Environmental Impact Assessment"**]
[34] Hanebury, "Environmental Impact Assessment" at 965
[35] Hanebury, "Environmental Impact Assessment" at 985, citing D. Gibson, "Environmental Protection and Enhancement Under a New Canadian Constitution" in S.M. Beck & I. Bernier, eds, Canada and the New Constitution, vol. 2 (Montreal: Institute for Research on Public Policy, 1983) 115. The author gives another example of a proposed Alberta Pacific pulp mill in 1989 which would have discharged effluent into the Northwest Territories, see footnote 123

environmental impacts largely do not fall within jurisdictional lines. This has long been noted by environmental scholars to justify a broad role for the federal government in areas of environmental and pollution management. Daniel Esty, a leading environmental law scholar captured this point succinctly:

> [M]any environmental policy deficiencies arise from "structural failures" that occur when the scope of environmental effects does not match the jurisdiction of the regulating authority. Regulators tend to ignore extrajurisdictional harms (or benefits), which results in a skewed regulatory cost-benefit analysis.[36]

29. Judith Hanebury, writing specifically about the need for broad federal jurisdiction over environmental impact assessments, similarly noted:

> ...many initiatives will have a transboundary effect rendering them matters of not merely a "local and private" nature. To ensure the uniformity of environmental impact assessments across Canada and to safeguard the interests of those who will not benefit from the initiative but may suffer from its results, federal environmental impact assessments should apply to a broad range of proposals.[37]

30. As such, there can be no question that the federal government has some jurisdiction to regulate major intraprovincial development projects which by their nature will have transboundary effects. The scope of the federal constitutional authority must be sufficiently broad in order to address externalities and spillover effects inherent from such projects, and to ensure that decisions made about such projects examine in as holistic fashion as possible all potential impacts (and benefits) of a project. This must include the ability to assess at an early stage the potential for and degree of harm from such effects, in order to anticipate and prevent harm as required by the precautionary principle.[38]

31. While provinces are free to choose their own balance between resource development and environmental protection, if that development has risks of adverse impacts to environments or people outside of provincial jurisdiction, then our Constitution must enable the federal order of

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[36] Daniel C Esty, "Revitalizing Environmental Federalism" (1997) 95:3 Mich L Rev 570 at 573; see also Paul Emond, "The Case for a Greater Federal Role in the Environmental Protection Field: An Examination of the Pollution Problem and the Constitution" (1972) Osgoode Hall LJ 647 [**Emond, "The Case for a Greater Federal Role"**] at 649

[37] Hanebury, "Environmental Impact Assessment" at 987

[38] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 at paras. 31-32

government to respond to those risks and regulate intraprovincial projects, including not allowing such projects to proceed, if the impacts from the project are too great. As Paul Emond writes:

> ...most people would find it offensive that one group can, for purposes of maximizing their own enjoyment, substantially interfere with the enjoyment of another group.... Society demands involvement from a higher level of government to represent the interests of these affected people. Parliament has an interest in protecting the general well-being of all Canadians and if one group begins affecting the wellbeing of a large enough group of Canadians then it seems that Parliament not only has the power but the responsibility to intervene and regulate the problem.[39]

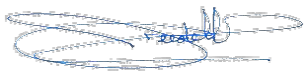
32. The effect of the decision below is to allow Alberta to maximize their resource development for their putative benefit, without concern for the interests of those adversely affected outside their jusidiction, including those in the North, and the environments they depend on. The environment is "too important" to be allocated exclusively to one level of government,[40] particularly at a time where we face an existential environmental and climate crisis.[41] Robust environmental assessment legislation from both levels of government is needed. Whether through the fisheries power or the national concern doctrine, Canada must have the constitutional authority to address transboundary effects, real or potential, from intraprovincial major resource development projects.

PART IV - ORDERS SOUGHT

33. Oceans North requests an order granting time for oral argument. It does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: 21 December 2022



For: David W.L. Wu
Counsel for the Intervener, Oceans North Conservation Society

[39] Emond, "The Case for a Greater Federal Role" at 652
[40] *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 at para. 52, aff'd 2020 SCC 1
[41] *GGPPA References* at para. 167

PART V - TABLE OF AUTHORITIES