

Nicholas Wright Barrister & Solicitor

September 26, 2012

VIA EMAIL to gwildgen@humanesociety.org

Humane Society International/Canada
Attn: Gabriel Wildgen
506-460 Ste Catherine O/W
Montreal, Quebec
H3B 1A7

Dear Mr. Wildgen:

RE: British Columbia's Jurisdiction to Ban Shark Fin Products

Below is the opinion that you requested regarding the authority of British Columbia to ban the sale, trade and distribution of shark fin products.

It is our opinion that British Columbia has the authority to ban the sale, trade and distribution of shark fins through their powers to legislate with respect to "Property and Civil Rights in the Province" and "Generally all Matters of a merely local or private Nature in the Province" pursuant to sections 92(13) and 92(16) of the *Constitution Act, 1867* respectively.¹

I. Background

Shark finning refers to the practice of capturing a shark, removing its fins, and discarding the shark back into the ocean. Left without their fins, sharks either suffocate to death or are consumed by predators.

The practice of shark finning raises numerous concerns, including: concerns about the welfare of sharks due to the inherent cruelty involved in this practice; environmental concerns stemming from the effect that shark finning has on declining shark populations; as well as concerns over public health and safety, supported by evidence which suggests that shark fin food products may pose health risks due to their high level of mercury and other toxins.²

¹ *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3.

² Multiple studies indicate that mercury and other contaminants are present in shark fin products, and that these contaminants are a public health concern. See e.g. *Mercury, A Major Public Health Concern*. World Health Organization, online: <www.who.int/phe/news/Mercury-flyer.pdf>; *Final Report: Contaminants and health risk*

II. Shark Fin Bans and the Division of Powers

1. Division of Powers Generally

To be validly enacted, a provincial law banning the sale, trade and distribution of shark fin products must flow from one or more provincial heads of power under section 92 of the *Constitution Act, 1867*.³

In addition to grounding the provincial laws' authority under section 92, the enacted law must also not be a colourable attempt to encroach on heads of power granted exclusively to Parliament under section 91. A definition of colourable will be outlined below.

Furthermore, any validly enacted provincial regulation of shark fin products must not be in express conflict with, or frustrate the purpose of, any validly enacted federal laws. If the purpose of the federal law is frustrated, or if an express conflict exists between validly enacted but overlapping provincial and federal legislation, then the doctrine of federal legislative paramountcy is engaged and the "provincial legislation is inoperative to the extent of the inconsistency."⁴ Professor Peter Hogg notes however, that courts have allowed "provincial laws to survive so long as they do not "expressly contradict" federal law."⁵

2. Enacted Law's Subject Matter or "Pith and Substance"

The legal test to determine the constitutional validity of a law enacted by either the provincial or federal government is to determine the law's "pith and substance". To determine the pith and substance of a law, the Supreme Court of Canada ("SCC") has provided a two part test:

1. What is the essential character of the law, considering its purpose and effect?
2. Does the character related to an enumerated head of power granted to the legislature in question by *Constitution Act, 1867*?⁶

a. The Essential Character of the Law

assessment of shark fins available in markets in five cities in China, Croucher Institute for Environmental Sciences & Hong Kong Baptist University, 2007, submitted to WildAid.

³ *The Constitution Act*, *supra* note 1.

⁴ *Rothmans Benson & Hedges Inc v Saskatchewan*, 2005 SCC13, [2005] 1 SCR 188 at 11-12.

⁵ Peter Hogg, *Constitutional Law of Canada*, 5th Edition Supp, Vol 1 (2011) at 16-4 [Hogg].

⁶ See e.g. *Reference re Firearms Act (Can)*, 2000 SCC 31, [2000] 1 SCR 783; *Ward v Canada (Attorney General)*, 2002 SCC 17, [2002] 1 SCR 569 [Ward]; *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3; *British Columbia v Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 SCR 473.

i. Purpose

In determining the purpose of a law, the SCC has stated that, “the purpose refers to what the legislature wanted to accomplish.”⁷ This is an inquiry into the “dominant purpose” of the legislation, as “legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may, at least to a certain extent, affect matters beyond the legislature’s jurisdiction without necessarily being unconstitutional.”⁸ Incidental effects, or “effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature... are proper and to be expected.”⁹

ii. Legal effect of the law

In determining the legal effects of the law, the SCC has stated that this part of the analysis:

refers to how the law will affect rights and liabilities, and is also helpful in illuminating the core meaning of the law....The effects can also reveal whether the law is “colourable”, i.e. does the law in form appear to address something within the legislature’s jurisdiction, but in substance deal with a matter outside that jurisdiction?¹⁰

b. Does the essential character of the law relate to an enumerated head of power granted to the legislature in question by *Constitution Act, 1867*?

At this stage of the analysis, the law is categorized under one or more head of power under the *Constitution Act, 1867*. In categorizing the law, there are two principles of interpretation that must be followed:

1. The Constitution must be interpreted flexibly over time to meet new social, political, and historical realities.
2. The principle of federalism must be respected. Power is shared by two orders of government, each autonomous in developing policies and laws within their own jurisdiction subject to the courts which “control the limits of the respective sovereignties”. Classes of subjects should be construed in relation to one another. In cases where federal and provincial classes of subjects contemplate overlapping concepts, meaning may be given to both through the process of “mutual modification”. Classes of subjects should not be construed so broadly as to expand jurisdiction indefinitely [References omitted].¹¹

⁷ *Ward, ibid* at para 17.

⁸ *Canadian Western Bank v Alberta, supra* note 6 at para 28.

⁹ *Ibid.*

¹⁰ *Ward, supra* note 6 at para 17.

¹¹ *Ward, supra* note 6 at para 30.

An example of how this test was applied in a similar circumstance to this issue at hand, can be seen in *Ward*.¹² In *Ward*, the SCC determined whether or not a federal law, prohibiting the sale of baby seals, was constitutional.¹³ In making their determination, the SCC accepted that the purpose of the law was indirectly to limit the killing of baby seals, by prohibiting their sale. The Court concluded that the pith and substance of the law was management and control of the fisheries and therefore fell into federal authority under section 91(12) over “sea coast and inland fisheries”.

The SCC also found that the regulation was not directed at controlling commerce or property. A law that was essentially directed at regulating business or property within the province, would fall under exclusive provincial jurisdiction under section 92(13) “property and civil rights of the province”.¹⁴ Here the law was classified as a measure to protect a resource and therefore did not infringe upon section 92(13) power.

In undergoing the pith and substance analysis the SCC differentiates between the purpose of the regulation and the means chosen to achieve this purpose.

Reviewing *Ward*, in the context of judicial scrutiny over the efficacy of a law, Peter Hogg observed:

The Court accepted the evidence of the Government of Canada that the purpose of the ban on sale was not to regulate the marketing of baby seals but to limit the killing of baby seals by removing the commercial incentive to harvest them. This invited the question of why the Government did not directly prohibit the killing of the animals if that was indeed its purpose.¹⁵

The *Ward* case is a good illustration of how the courts will interpret the division of powers sections 91 and 92 flexibly, as well as how they will respect parliamentary supremacy and not look into the means in which a legislature has chosen to address a particular mischief, so long as the broader purpose is otherwise under their respective jurisdiction.

The subject matter in *Ward*, namely seals, may be differentiated from the sharks that will be the subject matter of the proposed ban, because here we are dealing with the regulation of a product

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ward, ibid* at para 49.

¹⁵ Hogg, *supra* note 5 at 15-19.

that is harvested mainly outside of the territorial jurisdiction of Canada. Furthermore, there are several components, such as environment and morality, which have double aspects and do not fall exclusively under one specific head of power. This line of argument will be further articulated below.

III. Federal Jurisdiction

1. Section 91(12) - Sea Coast and Inland Fisheries

Currently the Department of Fisheries and Ocean (“DFO”) regulates the practice of shark finning within Canada’s Exclusive Economic Zone (“EEZ”), i.e. up to 200 nautical miles seaward from the low watermark. Specifically, shark finning is regulated by ministerial imposed conditions on commercial fishing licenses, authorized under section 22 of the *Fisheries Act, Fishery (General) Regulations*.¹⁶ Each fishery also has an Integrated Fisheries Management Plan (“IFMP”), which guides marine resource management and corresponding licensing restrictions, addressing practices involving sharks caught both as target species and as by-catch.¹⁷

Despite the DFO’s current attempts to curtail the practice of shark finning through licensing conditions and IFMPs, including the *Canadian Atlantic Shark – 2002-2007 IFMP*,¹⁸ there remain widespread concerns about the continued mortality of sharks. In regards to shark finning practices beyond the Canadian EEZ, the DFO states that “[m]ortality levels due to finning may continue to be significant by foreign vessels in international waters, especially for species that do not have good market value for the meat, such as the blue shark.”¹⁹

Shark fin products imported and sold in British Columbia come from a variety of regions, most of which are outside the territorial jurisdiction of Canada. Accordingly, these animals do not fall under federal jurisdiction over “Sea Coast and Inland Fisheries” under section 91(12) of the *Constitution Act, 1867*.

2. Section 91(2) - Regulation of Trade and Commerce

¹⁶ *Fishery (General) Regulations*, SOR/93-53, s 22.

¹⁷ Fisheries and Oceans Canada, “Integrated Fisheries Management Plans”, online: DFO <<http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/ifmp-gmp/index-eng.htm>>.

¹⁸ Fisheries and Oceans Canada, “Canadian Atlantic Pelagic Shark – 2002-2007”, online: DFO <<http://www.dfo-mpo.gc.ca/fm-gp/peches-fisheries/ifmp-gmp/shark-requin/shark-requin2002-eng.htm>>.

¹⁹ *Ibid.*

Although broadly stated, federal power over trade and commerce has been narrowed by judicial interpretation. Particularly, the courts have taken a conservative approach to interpretation, allowing room for both federal and provincial levels of government to regulated trade, under sections 91(2) and 92(13) respectively. Furthermore, the doctrine of mutual modification has been applied so that when reading provisions that give rise to an apparent conflict, the sections are read in a way that the language and interpretation of one section is modified by the other.²⁰

In *Parsons*, the Privy Council clarified that the federal power to regulate trade and commerce should be read as not including “the power to regulate by legislation the contracts of a particular business or trade...in a single province”.²¹

Since *Parsons* it has been accepted that intraprovincial trade and commerce falls under provincial power under “property and civil rights in the province” and federal power is confined to interprovincial or international trade and commerce and “general” trade and commerce, affecting the whole dominion.²² Furthermore, section 91(2) “cannot be applied to the regulation of a single trade, even though it be on a national basis.”²³

As previously stated, either head of power can have incidental effects on another head of power, so long as the law has a valid federal or provincial purpose. However regulation of contracts within the province falls exclusively under provincial jurisdiction, and regulation of the flow of extra provincial trade, falls to the federal government.

IV. Provincial Jurisdiction

1. Provincial Sale of Shark Fin Products

In regards to banning the sale, trade and distribution of shark fin products in BC, the two most applicable heads of power are sections 92(13) and 92(16) which read:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

(13) Property and Civil Rights in the Province.

(16) Generally all Matters of a merely local or private Nature in the Province.

²⁰ *Citizens' Insurance Co v Parsons*, (1881) 7 App Cas 96.

²¹ *Parsons*, *ibid* at 113.

²² Hogg, *supra* note 5 at 20-2.

²³ *Labatt Breweries of Canada Ltd. v Attorney General of Canada*, [1980] 1 SCR 914, at 915.

The scope of section 92(16), referred to as the provincial “residual power”, has not been clearly defined by the courts. However, it is often used by provincial governments as an alternative or in addition to evoking section 92(13). On this matter, Professor Peter Hogg has stated that “[j]urisdiction over local trade is also undoubtedly provincial, and the power has usually been attributed to s 92(13), but it has been suggested that s 92(16) is the more appropriate attribution.”²⁴

For example, the SCC has recognized the authority for provincial regulation of the sale and consumption of alcohol within the province, under both sections 92(13) and 92(16).²⁵

Accordingly, it may be advantageous for the province of BC to rely on both heads of power when enacting legislation to ban the sale, trade and distribution of shark fins.

In contemplating such a ban, the provincial legislation will have to be mindful of the interactions between section 92(13) and federal jurisdiction under sections 91(12) and 91(2), explored above.

As stated by the SCC in *Ward*, there is no bright line between federal jurisdiction under section 91(12) and provincial jurisdiction under section 92(13).

Measures that in pith and substance go to the maintenance and preservation of fisheries fall under federal power. By contrast, measures that in pith and substance relate to trade and industry within the province have been held to be outside the federal fisheries power and within the provincial power over property and civil rights.²⁶

It is the pith and substance of the legislation that will be of utmost importance in determining whether the legislation is validly enacted or not. On this point, the SCC in *Ward* stated that:

If the activity is in pith and substance a matter of trade and industry within the province, it will not fall under the federal fisheries power merely because some aspects of the activity touch upon the fishery. Conversely, measures that are in pith and substance directed to the fishery fall within the federal fisheries power even though they possess aspects relating to property and civil rights.²⁷

²⁴ Hogg, *supra* note 5 at 21-5.

²⁵ *Rio Hotel Ltd v New Brunswick (Liquor Licensing Board)*, [1987] 2 SCR 59, at 2.

²⁶ *Ward*, *supra* note 6 at 43

²⁷ *Ibid* at para 47.

It is well established that the Federal government may enact legislation regarding the preservation of fish under section 91(12), however the power to regulate fish is not unlimited.²⁸ As per *Fish Canneries Reference*, federal authority over fisheries does not extend to the processing and marketing of fish.²⁹ In this case the SCC held that federal power to regulate fisheries does not extend to licensing of fish canneries or regulation of trade processes, once the fish were caught, i.e. extracted and turned into a commodity.³⁰ At this point the commodity will fall into the jurisdiction of the province over property and civil rights.

Accordingly, the province of BC is arguably authorized under section 92(13) to enact legislation that prohibits the sale, trade and distribution of shark fin products within the territorial boundaries of BC. As long as the pith and substance of the law is found to fall within a field of provincial legislative competence, any “[i]ncidental or ancillary extra-provincial aspects of such legislation are irrelevant to its validity.”³¹

2. Environment

It is well established that the practice of shark finning has a seriously negative impact on the declining global shark populations. The effect these declining populations have on biodiversity is only of the many negative effects that shark finning has on the environment.

Addressing the authority of various levels of government to regulate on environmental matters, the SCC states:

It must be recognized that the environment is not an independent matter of legislation under the *Constitution Act, 1867* and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty.³²

In *Friends of the Oldman River Society*, the SCC was careful to ensure that the environment was not given exclusively to either the provincial or the federal government. Instead, the Court recognized that a regulatory instrument dealing with the environment had to be connected to another head of power under the competence of the enacting legislature.

²⁸ *Ward v Canada*, paras 32-33.

²⁹ *Reference re: Fisheries Act, 1914 (Canada)*, [1928] SCR 457 [*Fish Canneries Reference*].

³⁰ *Ibid.*

³¹ *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, [2005] 2 SCR 473, at 28.

³² *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3.

The sentiment that the environment is not just the concern of one level of government was reiterated by the SCC in *Hydro-Québec* and later in *Spraytech*.³³ The SCC stated that: “the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels.”³⁴

Accordingly, it is arguable that a validly enacted provincial ban on the sale, trade and distribution of shark fin products may have an ancillary purpose of protecting the environment, especially considering that it is the sale of unregulated shark fins that is perpetuating the continued environmental degradation.

3. Animal Welfare and Morality

There is ongoing public concern with the inherent cruelty involved with shark finning. This concern is evidenced by the multiple municipal bans of shark fin products in both Ontario and BC.³⁵

Provincial governments have been granted broad authority to regulate animals within their territorial jurisdiction. The regulation of animals outside the territory of BC may however be upheld as lawful, if it is found to be incidental to the regulation of an intra-provincial business.

There are also moral concerns with the practice of shark finning. Morality, like the environment, is not exclusive to either provincial or federal heads of power, despite federal jurisdiction over criminal law under section 91(27) *Constitution Act, 1867*. In *Rio Hotel v NB* the SCC upheld New Brunswick’s Liquor Control Act, requiring that liquor license holders also hold licenses in regards to entertainment, enabling the licensing board to regulate nudity where alcohol was served.³⁶

In exploring the double aspects doctrine, the SCC stated that:

subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91.

³³ *R v Hydro-Quebec*, [1997] 3 SCR 213; 114957 *Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241 [*Spraytech*].

³⁴ *Hydro-Quebec*, *ibid* at 127.

³⁵ See e.g. The Corporation of the Town of Oakville By-law 2011-141; The Corporation of the City of Mississauga Shark Fin By-law 268-11; Shark Fin By-law PH-17

³⁶ *Rio Hotel Ltd v New Brunswick*, *supra* note 25.

...when a particular legislative subject matter can be said to have a "double aspect", so that viewed in one light the subject falls within the legislative competence of Parliament and, viewed in another light, within the legislative competence of a provincial legislature, federal legislation will only be paramount when there is a direct conflict with the relevant provincial legislation. Mere duplication does not constitute a "direct conflict".

The double aspect doctrine will apply whenever the contrast between the relative importance of the federal and provincial characteristics of a particular subject matter is not sharp.³⁷

Accordingly, it is arguable that provincial regulation of shark fin products may regulate morality in a sense that may overlap with criminal law, so long as the provincial law is anchored in a provincial purpose, such as the regulation of provincial business matters.

4. Health and Safety

Lastly, there the consumption of shark fin products raises significant health and safety concerns. Unless regulated in a criminal context, health is deemed to fall under the competence of the provinces.³⁸ Accordingly, a provincial ban on the sale, trade and distribution of shark fin products could have a valid provincial purpose in protecting the health of BC residents.

V. Conclusion

Given the multi-aspects that a provincial ban on the sale, trade and distribution of shark fin products would have, it is our opinion that BC has the authority to enact such a ban through their powers to legislate with respect to "Property and Civil Rights in the Province" and "Generally all Matters of a merely local or private Nature in the Province" pursuant to sections 92(13) and 92(16) of the *Constitution Act, 1867* respectively. Valid provincial purposes can be found in provincial competence over local sales and trade, the environment, morality and health and safety.

Yours sincerely,

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³⁷ *Rio Hotel*, *supra* note 25 at paras 4-5.

³⁸ See e.g. *Canada (Attorney General) v PHS Community Services*, 2011 SCC 44, [2011] 3 SCR 134.