CANADIAN COURT OF JUSTICE

(On appeal from the Federal Court of Appeal)

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

HUA CHENYU

Respondent

and

MARTIN BRODY

Intervenor

FACTUM OF THE APPELLANT

Counsel for the Appellant

SCHOOL NUMBER 17

PART I: STATEMENT OF FACTS AND JUDICIAL HISTORY

a) Facts

Legislative History

[1] Parliament enacted *The Shark Protection Act* (the "Act") in response to concerted, intense lobbying efforts by conservationists seeking to combat the slaughter of sharks for their fins.[1] Prior to the enactment of the *Act,* conservationists had targeted their lobbying efforts toward municipal governments. Shortly after municipal by-laws in Toronto prohibiting possession, sale, or consumption of shark fins were struck, conservationists turned their lobbying efforts toward seeking a national ban.[2]

[2] Controversially, conservationists sought a total ban on the sale of shark fin soup, and the importation and use of shark fins generally.[3] Private members' bills were introduced to ban finning and the importation of shark fins.[4] Concerns from various stakeholders prevented the private members' bills from moving beyond the first reading.

[3] Parliament passed the *Act* on June 12, 2018 in response to growing controversy and concerns raised by various stakeholders.[5] This case is the first time any court has been called upon to consider the *Act*.[6]

[4] Section 6 of the *Act* created the *Shark Protection Agency* (the "Agency"), a three member administrative body. The Agency was tasked with making rules "as expeditiously as possible" surrounding the "details of whether to ban finning and how to do so", and to enforce the rules "forthwith".[7] Sections 12 to 19 of the *Act* (the "Enabling Provisions") grant the Agency broad authority to enact rules.

[5] On August 14, 2018 the Governor in Council (the "GIC") made regulations pursuant to its authority under s. 24 of the *Act* (the "*Regulations*").[8] The *Regulations* provide a framework that clarifies the content of the Agency's rule-making functions and subsequent enforcement of its rules made pursuant to the *Act*'s Enabling Provisions.

The Agency's Composition

[6] On September 23, 2018 the GIC appointed three members to the Agency.[9]

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[1] *The Shark Protection Act,* 2018 *[Shark Protection Act]; Chenyu v Canada (Attorney General)*, 2019 FC at para 10 [*Federal Court Judgment*].
[2] *Federal Court Judgment, supra* note 1 at paras 10–11.
[3] *Ibid* at para 9.
[4] *Ibid* at para 12.
[5] *Ibid* at paras 8, 12–13.
[6] *Ibid,* at para 4.
[7] *Ibid*, at para 15.
[8] *Ibid* at para 13; *The Shark Protection Regulations*, 2018 [*Shark Protection Regulations*].
[9] *Federal Court Judgment, supra* note 1 at para 16.

[7] The Agency's members have diverse professional and lived experiences. Ms. Serena Walsh, the Chair, has a marketing background and has served on several environmental advisory panels for provincial governments.[10] Mr. Bill Shine has experience in sustainable development.[11] Mr. John Xu is the son of Chinese immigrants, and has been actively involved in organizing on matters related to Chinese communities in Toronto. Mr. Xu's marine biology background has created opportunities, past and present, for him to speak to conservationists about the importance of eliminating shark finning at national and international levels.[12]

[8] The one uniting feature of all three Agency members is that no member has any legal training.[13] During the proceedings relevant to this matter, the Agency only had access to part-time legal counsel and non-binding "observations" from the Privy Council Office (the "PCO").[14]

The Consultation Process

[9] The Agency held a 30 day public consultation to aid in crafting rules pursuant to its authority under the *Regulations.*[15] The consultation consisted of public hearings.[16]

[10] To facilitate a broad consultative process, the Agency sent out general notice regarding public hearings to various stakeholders who had previously expressed interest in receiving communications.[17] The Agency also made efforts to notify unknown stakeholders by posting and updating notices of public hearings on its website.[18] While several stakeholders provided input on the rules, there was no apparent reaction from cultural or culinary communities.[19]

[11] Shortly after the 30 day public consultation process ended, the Agency enacted *The Shark Protection Rules* (the "*Rules*") pursuant to its power under the Enabling Provisions of the *Act*.[20] The Agency issued a press release announcing the *Rules.*[21] The press release cited scientific statistics including an estimate that "millions of sharks are killed each year for their fins", and of the "dwindling number of sharks around the world", and the impact of this loss on the "ecosystem and biodiversity of the oceans".[22]

Enforcement of the Rules

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[10] *Ibid* at para 20.
[11] *Ibid* at para 19.
[12] *Ibid* at para 17.
[13] *Ibid* at para 21.
[14] *Ibid* at para 21.
[15] *Ibid* at paras 22–23.
[16] *Ibid* at para 22.
[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid* at para 23; *The Shark Protection Rules*, 2018 [*Shark Protection Rules*].
[21] *Federal Court Judgment, supra* note 1 at para 23.
[22] *Ibid*.

[12] On November 1, 2018, the Agency met to determine the manner in which to enforce its administrative functions.[23] During the meeting, Mr. Xu argued initially that Toronto was the best place to begin enforcing the *Rules*.[24] However, Ms. Walsh and Mr. Shine eventually convinced Mr. Xu that Winnipeg was a more appropriate city for the Agency's first round of enforcement efforts.[25]

[13] Soon after, the Agency's inspectors conducted a series of inspections on several restaurants in Winnipeg.[26]

The Respondent and Intervenor

[14] The Respondent, Mr. Hua Chenyu, operates a restaurant called 'Top Chinese Cuisine' located in Winnipeg.[27] Top Chinese Cuisine serves seafood soups, including shark fin soup.[28] The Respondent uses fins from a variety of sharks, including the Great White shark, Tiger shark, Bull shark, and Bala shark—which is not classified taxonomically as a shark, but rather as a Cyprinidae fish.[29] The Respondent purchases all of his shark fins from Mr. Martin Brody, the Intervenor.[30]

[15] The Intervenor sells shark fins and other shark meat to restaurants located in Canada and abroad.[31] His current clients include both Asian and non-Asian restaurants.[32] Additionally, the Intervenor operates his own restaurant in downtown Winnipeg, Amity's Seafood Restaurant, which serves shark fin soup.[33] The Intervenor buys some shark fins from importers who procure fins from foreign sources.[34]

[16] The Intervenor also raises and breeds sharks in pools located outside of Port Nelson at the mouth of the Nelson River. The pools draw water from the Nelson River, and discharge wastewater directly into the sea where the Nelson River meets the Hudson Bay.[35] Most of the Intervenor's stock is bred in the pools, but he imports animals "as necessary".[36]

[17] In his pools, the Intervenor "usually" ensures he kills the sharks before removing their fins.[37] He fins many of his sharks without using the entirety of the carcasses.[38] His

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[23] *Ibid* at para 47.
[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid* at para 48.
[27] *Ibid* at para 26.
[28] *Ibid.*
[29] *Ibid* at paras 26, 41.
[30] *Ibid* at para 26.
[31] *Ibid* at para 40.
[32] *Ibid* at para 43.
[33] *Ibid* at para 28.
[34] *Ibid* at para 29.
[35] *Ibid* at para 31.
[36] *Ibid* at para 40.
[37] *Ibid* at para 42.
[38] *Ibid.*

typical practice is to bury the unused shark carcasses, but he has disposed of an unknown number of shark carcasses in the Hudson Bay when they "slipped under" during finning.[39]

The Penalty Assessed Against the Respondent

[18] The Agency's inspection determined the Respondent was not in compliance with the menu labelling requirement or the reporting requirement set out by ss. 4 and 5 of the *Rules* respectively.[40] The inspectors imposed an administrative penalty on the Respondent pursuant to s. 20 of the *Act*, fining him $10,000 on each violation of the *Rules*.[41] The Respondent did not contest to violating the *Rules*, but instead maintained that the *Rules* "simply cannot apply to him".[42] Some establishments in Winnipeg made serious efforts to comply with the *Rules*.[43]

The Respondent's Appeal to the Agency

[19] The Respondent appealed to the Agency, as provided for in s. 22 of the *Act*.[44] Section 6 of the *Regulations* empowers the Agency to hold hearings for the enforcement of its *Rules*, including appeals. However, after debating the merits of holding a hearing in this particular instance, the Agency decided to dismiss the Respondent's appeal summarily because he did not contest violating the *Rules*.[45]

b) Judicial History

[20] The Respondent applied to the Federal Court for judicial review of the Agency's decision to dismiss his appeal summarily. Mr. Brody was granted standing as an intervenor.[46]

[21] The parties based their application for judicial review on the following grounds:

1) The Act is *ultra vires* Parliament's constitutional jurisdiction;
2) The Agency's consultation process violated the rules of natural justice; and,
3) The Respondent was entitled to a hearing before the Agency.[47]

i) Federal Court

[22] The Federal Court (Pistris J.) dismissed the judicial review application with costs on the basis that the Respondent did not contest to violating the *Rules*.[48]

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[39] *Ibid.*
[40] *Ibid* at para 48.
[41] *Ibid* at para 49.
[42] *Ibid* at para 26.
[43] *Ibid* at para 48.
[44] *Ibid* at para 49.
[45] *Ibid* at para 50.
[46] *Ibid* at para 52.
[47] *Ibid* at paras 53–55.
[48] *Ibid* at paras 68–69.

[23] Pistris J. ruled that the *Act* was *intra vires* federal jurisdiction under both the s. 91(12) fisheries power and the s. 91(27) criminal law power.[49] Pistris J. also held that the evidence demonstrated "most sharks are an eminently endangered species and could become extinct if nothing is done in order to preserve them."[50]

[24] Pistris J. rejected the Respondent's argument that the Agency violated the rules of natural justice when it enacted the *Rules*.[51] On the issue of bias, Pistris J. held that Mr. Xu's statements did not meet the threshold at the rule-making stage.[52] Moreover, Pistris J. found that any statements made by Agency members that may have signaled some animus at the enforcement stage were purely incidental. Pistris J. also found that the lack of hearing on monetary penalties was not an issue.[53] In particular, Pistris J. expressed doubt that the Agency had jurisdiction to decide constitutional issues.

ii) Federal Court of Appeal

[25] The Federal Court of Appeal's decision was split, with Bruce and Chum J.J.A. writing concurring opinions, and Ancre J.A. writing for the dissent. The Federal Court of Appeal quashed the fines levied against the Respondent.[54]

[26] In determining the constitutionality of the provisions under which the Respondent was charged, Bruce and Chum J.J.A. concurred on the result, but departed significantly in their analysis. Bruce J.A. held that the *Act* was *ultra vires* federal jurisdiction.[55] In contrast, Chum J.A. held that the *Act* was *intra vires* under either the federal fisheries power, or trade and commerce powers —but that the *Rules* were invalid.[56] Chum J.A. found that ss. 4 and 5 of the *Rules* were *ultra vires* federal jurisdiction.[57] Additionally, Chum J.A. held the *Rules* as enacted exceeded the authority of the Agency under the Enabling Provisions.[58] Ancre J.A. would have upheld the *Act* as *intra vires* either the federal fisheries head of power, or the criminal law power.[59]

[27] Bruce J.A. ordered the Agency to add a provision to the *Rules* stating that "enforcement should be done in a culturally sensitive manner".[60] Further, Bruce J.A. overturned Pistris J.'s findings on the issues of bias, whether there was a *Charter* right to administrative consultation, and whether a lack of hearing violated the rules of natural

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[49] *Ibid* at paras 58–62.
[50] *Ibid* at para 65.
[51] *Ibid* at para 63.
[52] *Ibid*.
[53] *Ibid* at paras 64, 66.
[54] *Chenyu v Canada (Attorney General)*, 2019 FCA at para 13, Bruce JA [*Federal Court of Appeal Judgment*].
[55] *Ibid* at paras 3, 7–8, Bruce JA.
[56] *Ibid* at paras 15–16, Chum JA.
[57] *Ibid* at para 16, Chum JA.
[58] *Ibid* at para 17, Chum JA.
[59] *Ibid* at para 20, Ancre JA, dissenting.
[60] *Ibid* at para 11, Bruce JA.

justice.[61] Chum J.A. concurred with Bruce J.A. on the latter issue.[62] In a dissenting opinion, Ancre J.A. agreed with Pistris J. on the administrative law issues and on the order to dismiss the Respondent's judicial review application with costs.

PART II: OBJECTIONS BY APPELLANT TO JUDGMENT APPEALED FROM

[28] The *Act*, and delegated legislation, is *intra vires* federal constitutional jurisdiction.

[29] The Agency enacted the *Rules* within its delegated legislative authority.

[30] Under the common law threshold for procedural fairness, the Agency did not owe the Respondent any duty of fairness when it exercised its rule-making functions.

[31] *Charter* values did not attach to the Agency's consultation process for enacting the *Rules*.

[32] The Agency did not enact or enforce the *Rules* in a biased manner.

[33] Under the *Baker* factors, the Respondent's participatory rights on appeal to the Agency did not extend to a hearing, as he did not contest to violating the *Rules*.

[61] *Ibid* paras 11 and 12, Bruce JA.
[62] *Ibid* para 18, Chum JA.

PART III: ARGUMENTS

1. The *Act* is *Intra Vires* Parliament's Legislative Jurisdiction

[34] The presumption of constitutionality means the burden of demonstrating invalidity lies with those who challenge the legislation.[63] The Attorney General submits the Respondent has not met this onus, and that the *Act*, and its delegated legislation, are valid pursuant to either the s. 91(27) criminal law power, or the s. 91(12) fisheries power of the *Constitution Act, 1867*.

1.1 Pith and Substance of the *Act*

[35] Parliament's stated purpose of the *Act* is to "eliminate shark finning by regulating the practice comprehensively at both the national and international levels".[64] The pith and substance analysis confirms this is the dominant matter of the *Act*. The primary legal effects of the *Act* are to define shark finning, establish and delegate authority to the Agency, and to create penalties for violations of the delegated legislation. Looking past the "four corners of the legislation" itself, the legislative history and extrinsic evidence is consistent with the stated purpose.[65] Ultimately, the extrinsic evidence and context illustrates the *Act* was enacted consistently with the stated purpose, in response to public concern about the inhumane practice of shark finning, and the need to protect sharks as an endangered species. Pistris J. held the *Act* was enacted pursuant to persistent conservationist lobbying efforts, citing failed municipal by-laws, such as in *Eng v Toronto (City),* as the initial stages of these efforts.[66] The view that "shark finning is an inhumane

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[63] Peter W Hogg, *Constitutional Law of Canada*, 5th ed Supplemented (Toronto: Carswell, 2007) (loose-leaf updated 2018, release 1) ch 15 at 15–23.
[64] *Shark Protection Act, supra* note 1, s 5.
[65] *R v Morgentaler*, [1993] 2 SCR 463 at 497, 107 DLR (4th) 537.
[66] *Eng v Toronto (City),* 2012 ONSC 6818.

practice" was undisputed in *Eng* as a purpose driving the legislation.[67] Pistris J. further held the evidence demonstrated "most sharks are an eminently endangered species, and could become extinct if nothing is done to preserve them."[68]

1.2 Pith and Substance of the Impugned Sections of the *Rules*

[35] Where the validity of a specific provision is challenged the court must first determine whether it intrudes on the other jurisdiction *on its face,* then the provision must be considered in its legislative context.[69] With respect, Chum J.A. erred in holding ss. 4 and 5 of the *Rules* were *ultra vires*. The fact that property interests may be engaged is not alone sufficient to show the provisions are in pith and substance a provincial matter.[70]

[36] While *on their face* these provisions may appear to intrude on provincial jurisdiction, when the sections are considered purposively in their legislative context it becomes clear the underlying pith and substance is consistent with the purpose of the *Act*. The legal effect of s. 4 of the *Rules* requires restaurants to affix a label to menus, stating that serving shark fin soup is unethical. Much like federal tobacco warning label requirements, which were upheld as a valid indirect means to discourage and reduce tobacco use, the practical effect of the s. 4 labelling requirement is to discourage consumption of shark fin soup as an indirect means of reducing demand for shark fins in furtherance of the *Act'*s purpose.[71] Section 5 of the *Rules* creates a compliance reporting requirement for restaurants serving seafood soup. The practical effect is to empower the

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[67] *Ibid* at paras 29, 68.
[68] *Federal Court Judgment, supra* note 1 at para 65.
[69] *Syncrude Canada Ltd. v Canada (Attorney General)*, 2016 FCA 160 at paras 34–35 [*Syncrude*].
[70] *Reference re Firearms Act (Canada)*, 2000 SCC 31 at para 50 [*Firearms Reference*].
[71] *Canada (Attorney General) v JTI-Macdonald Corp.,* 2007 SCC 30 at para 134 [*JTI*].

Agency with the mechanisms required to identify Canadian restaurants serving shark fins, allowing for meaningful application of the inspection and enforcement powers.

[37] Consideration of the effects of a law at this stage must not be confused with the law's efficacy. Absent the high standard of colourability, efficacy is irrelevant to the division of powers.[72] Bruce J.A. erred in his consideration of this factor.[73] Courts may not question the motive or wisdom of Parliament's policy decisions, only their legality.[74]

1.3 The *Act* is *Intra Vires* the Federal Criminal Law Power

[38] As held by Pistris J., confirmed in the dissenting reasons of Ancre J.A., the *Act* constitutes a valid exercise of the s. 91(27) criminal law power. The *Act*, and delegated legislation, create a prohibition backed by a penalty for a criminal law purpose directed at a legitimate public evil, thus fulfilling the form requirements of valid criminal law.[75]

[39] Parliament's purpose of eliminating shark finning lies squarely within the traditional scope of a valid criminal purpose on the basis of morality. The pith and substance reveals a driving purpose behind the *Act* is eliminating the inhumane treatment of sharks. Preventing animal cruelty is a valid criminal law purpose, as demonstrated by ss. 444-446 of the *Criminal Code*, which prohibit killing, causing injury, or causing unnecessary suffering to various animals.[76] Further, in *Ward v Canada (Attorney General)* an analogous purpose was considered in obiter, suggesting "[...] the federal criminal law powers could extend to prohibitions on the killing and manner of killing of animals like seals as a matter of public peace, order, security, health or morality."[77]

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[72] *Syncrude*, supra note 69 at paras 88–89.
[73] *Federal Court of Appeal Judgment, supra* note 54 at paras 4–5, Bruce JA.
[74] *Quebec (Attorney General) v Canada (Attorney General),* 2015 SCC 14 at paras 3, 38.
[75] *Firearms Reference, supra* note 70 at para 27; *Syncrude*, *supra* note 69 at paras 47–48.
[76] *Criminal Code*, RSC 1985, c C-46, ss.444–446.
[77] *Ward v Canada (Attorney General)*, 2002 SCC 17 at para 53 [*Ward*].

[40] The requirement of a prohibition is satisfied by ss. 1, 2, and 3 of the *Rules,* which prohibit the practice of shark finning, the importation to Canada of shark fins not attached to a shark carcass, and the serving of soup using shark fins not attached to a shark carcass immediately prior to soup preparation. Prohibitions contained in delegated legislation have been upheld as valid exercises of federal criminal law power.[78] Lastly, the prohibitions contained in the *Rules* are backed by penalties, detailed in s. 21 of the *Act,* which creates an indictable offence for a violation of the *Rules* subject to a maximum $100,000 fine and/or six months imprisonment for each violation.

[41] Section 4 of the *Rules* is a valid exercise of the criminal law power. The pith and substance analysis of the provision indicates it was enacted for the dominant purpose of eliminating shark finning. Labelling requirements akin to s. 4 have been upheld under federal criminal law power when, as in this case, they seek to effect the valid underlying criminal law purpose.[79]

[42] Alternatively, ss. 4 and 5 of the *Rules* are both valid pursuant to the ancillary powers doctrine. The suggested competing provincial heads of power, s. 92(13) property and civil rights and s. 92(16) matters of a local or private nature, are broad with federal intrusion therefore being less serious.[80] There is no evidence to indicate the provisions will override or intrude on existing provincial regulations, and further, Parliament has a history of invoking its criminal law power to uphold regulatory schemes.[81] Therefore, any

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[78] *R. v Hydro ‑Québec*, [1997] 3 SCR 213 at para 147, 151 DLR (4th) 32 [*Hydro*-Q*uébec]; Groupe Maison Candiac inc. c Canada (Procureur général),* 2018 FC 64 at paras 143–145.
[79] *RJR-MacDonald Inc. v Canada (Attorney General*), [1995] 3 SCR 199 at para 43, 127 DLR (4th) 1 [*RJR-MacDonald*].
[80] *General Motors of Canada Ltd. v City National Leasing,* [1989] 1 SCR 641 at 671–672, 58 DLR (4th) 255; *Reference re Assisted Human Reproduction Act,* 2010 SCC 61 at paras 129,134, McLachlin CJC [*AHRA*].
[81] *Hydro*-Q*uébec, supra* note 78; *Firearms Reference*, *supra* note 70.

ancillary incursion into provincial jurisdiction is minor and justified on a standard of rational and functional connection.[82] Sections 4 and 5 both have a clear rational and functional connection with the legislation. Section 4 discourages consumption of shark fin soup, to reduce demand for shark fins in furtherance of the purpose of the *Act*. The s. 5 compliance provision functions to facilitate the operation of the valid criminal prohibitions. Comparable regulatory mechanisms including registration, licencing, inspection, and enforcement regimes have consistently been upheld as constitutional ancillary to federal criminal law power.[83]

1.4 Alternatively, the *Act* is *Intra Vires* Federal Fisheries Power

[43] As held by Pistris J., Chum J.A., and the dissent of Ancre J.A., the *Act* is also *intra vires* the s. 91(12) fisheries head of power. Under the fisheries power Parliament may legislate for the preservation of fish, including both for preserving the numbers of fish and preserving the resource in a larger economic sense, regardless of who owns the fishing rights.[84] Provided a clear link exists between the legislation in question and the protection of fisheries, the regulation of non-fishing activity normally subject to provincial jurisdiction will be authorized under the fisheries head of power.[85] Therefore, while Pistris J. held correctly that pools such as Mr. Brody's could be considered inland fisheries, this determination is not necessary to establish the validity of the *Act* under the fisheries power.

[44] There is a clear link between the *Act*, its delegated legislation, and the preservation of sharks and other fish. Pistris J. held pursuant to the trial evidence that "most sharks are

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[82] *AHRA, supra* note 80 at paras 137–138; *Quebec (Attorney General) v Lacombe*, 2010 SCC 38 at paras 42–43, 45.
[83] *Firearms Reference*, supra note 70 at paras 36–39; *Hydro-Québec, supra* note 78; *AHRA, supra* note 80 at paras 291-292, Cromwell J.
[84] *Ward*, *supra* note 77 at paras 32-33; Hogg, *supra* note 63 at 30-16.
[85] *Northwest Falling Contractors v The Queen*, [1980] 2 SCR 292 at 301–302, 113 DLR (3d) 1 [*Northwest Falling Contractors*].

an eminently endangered species and could become extinct if nothing is done in order to preserve them."[86] A press release authored by the Agency upon the release of the *Rules* stated "millions of sharks are killed each year for their fins", and this "loss of sharks impacts the ecosystem and biodiversity of the oceans".[87] The elimination of shark finning is inextricably linked with preserving the number of sharks, and by extension the protection of other fish in the broader ecosystem, "fish habitat, and the use of fish by man".[88]

[45] Sections 4 and 5 of the *Rules* may also be upheld as valid pursuant to the fisheries power. While provisions which in pith and substance regulate the processing and marketing of the fisheries industry may fall within provincial jurisdiction, the pith and substance of ss. 4 and 5, as analyzed above, is the elimination of shark finning. Provisions which *on their face* regulate the marketing of fish or the provincial power over property and civil rights but were enacted as indirect means for the protection of fisheries have been upheld as valid exercises of the fisheries power.[89] We urge this Court to do the same.

2. <u>The *Rules* are *Intra Vires* the Authority of the Agency</u>

[46] Delegated legislation benefits from the presumption of validity with its enabling statute.[90] The onus is on the party challenging the legislation to establish its invalidity, not on the administrative agency to justify validity.[91] Further, the presumption "favours an interpretative approach that reconciles the regulation with its enabling statute so that, where possible, the regulation is construed in a manner which renders it *intra vires*".[92]

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[86] *Federal Court Judgment, supra* note 1 at para 65.
[87] *Federal Court Judgment, supra* note 1 at para 23.
[88] *Northwest Falling Contractors, supra* note 85 at 301.
[89] *Ward*, *supra* note 77 at para 49.
[90] John Mark Keyes, *Executive Legislation*, 2nd ed (Markham: LexisNexis, 2010) at 549.
[91] *Shoppers Drug Mart Inc. v Ontario (Minister of Health and Long-Term Care*), 2013 SCC 64 at para 25 [*Katz*].
[92] *Ibid.*

2.1 The *Vires* of the *Rules* with the Enabling Provisions of the *Act* Must be Assessed on a Contextualized Standard of Reasonableness

[47] The *vires* of the impugned sections of the *Rules* pursuant to the Enabling Provisions of the *Act* must be assessed on a contextualized standard of reasonableness. *West Fraser Mills Ltd. v British Columbia (Workers' Compensation Appeal Tribunal)*[93] characterizes the enactment of delegated legislation as an exercise of delegated administrative powers, governed by the judicial review principles from *Dunsmuir v New Brunswick*[94]. The *Dunsmuir* principles require a contextualized standard of reasonableness where an administrative body has been given broad discretion under its enabling statute to craft appropriate regulations to accomplish the statute's goals.[95]

[48] Under this standard "the question the court must answer is not one of *vires* in the traditional sense, but whether the regulation at issue represents a reasonable exercise of the delegated power, having regard to those goals."[96] Section 12 of the *Act* broadly empowers the Agency to "make rules related to the possession, importing, distribution, and selling of shark fins in Canada." Further, s. 16 of the *Act* grants discretion to the Agency to "[...] do all things that are necessary for or incidental to the exercise of its capacity and powers [...]". As held by Pistris J., it is clear Parliament made a policy decision not to prohibit shark finning in the *Act*, but to leave to the Agency "the details of whether to ban finning and how to do so".[97] Through the broad enabling provisions, Parliament is asking the Agency to exercise its good judgment of what rules are necessary or incidental to accomplish its purpose of eliminating shark finning. Applying this standard, any rule

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[93] *West Fraser Mills Ltd. v British Columbia (Workers' Compensation Appeal Tribunal),* 2018 SCC 22 at para 8, McLachlin CJC [*West Fraser Mills*].
[94] *Dunsmuir v New Brunswick*, 2008 SCC 9.
[95] *West Fraser Mills*, *supra* note 93 at para 9.
[96] *Ibid* at para 23.
[97] *Federal Court Judgment, supra* note 1 at para 15.

which represents a reasonable exercise of that judgment is valid, and the impugned *Rules* can only be set aside by the court as unreasonable if a rule "is one no reasonable body informed by [the relevant] factors could have [enacted]."[98]

2.2 The Enactment of *the Rules* was a Reasonable Exercise of the Agency's Delegated Authority

[49] With respect, Chum J.A, failed to apply a contextualized reasonableness standard of review in concluding ss. 1, 2 and 3 of the *Rules* were *ultra vires* the delegated legislative authority of the Agency. Delegated legislation will be unreasonable if it is "inconsistent with the objective of the enabling statute" to the point, for example, of being "'irrelevant', 'extraneous' or 'completely unrelated'".[99] The impugned *Rules* enacted by the Agency all prohibit shark finning, or use of shark fins in some capacity, and thus cannot be said to be 'irrelevant' or 'unrelated' to the purpose of the *Act.*

[50] Further, the Supreme Court of Canada has endorsed a "broad and purposive approach" for interpreting both the enabling provisions, and the challenged legislation on review of the *vires* of delegated authority.[100] On a purposive interpretation of the enabling provisions of the *Act*, the Agency reasonably interpreted its enabling provisions to conclude it had the authority to enact prohibitions in the *Rules* as it saw fit to further Parliament's purpose. A strict interpretative approach to enabling provisions, which may have required explicit use of the term "prohibit" in enabling provisions has largely been eclipsed by a broad, purposive interpretive approach favouring deference.[101] In this case, the enabling provisions delegate power through broad and general terms and the extrinsic evidence establishes Parliament clearly contemplated that the Agency would make

[98] *Green v Law Society of Manitoba*, 2017 SCC 20 at para 20.
[99] *Katz*, *supra* note 91 at paras 24, 28.
[100] *Ibid* at para 26.
[101] Keyes, *supra* note 90 at 312–313.

prohibitions, as they left "to the Agency the details of whether to ban finning and how to do so"[102]. Therefore, the Agency's interpretation was reasonable, because the legislative purpose would be frustrated by not interpreting the Enabling Provisions of the *Act* as granting the Agency the power to enact prohibitions.

3. The *Rules* do not Unconstitutionally Infringe *Charter* Rights

3.1 The *Rules* Are Valid Under s.7 of the *Charter*

[51] The Attorney General acknowledges that the *Rules* engage the right to liberty, given the possibility of imprisonment. However, s.7 of the *Charter* is not violated because the *Rules* are in accordance with the principles of fundamental justice (the "PFJs").

[52] While the Respondent may contend that the term 'seafood soup' in ss. 4 and 5 of the *Rules* is vague as it is not specifically defined in the legislation, the use of the term accords with the PFJs as it sufficiently delineates the "area of risk" created by the legislation.[103] With regard to the purpose and subject matter of the provisions, the scope of an "area of risk" relating to shark-*type* soups which include, or may be interpreted to include, shark can be discerned to provide the basis for coherent legal debate.[104] It may be further argued that the use of the term 'seafood soup' causes the *Rules* to be overbroad, as it has been applied to soup made with Bala shark, which is not taxonomically classified as a shark. However, for a law to be considered overbroad it must interfere with some conduct that has *no connection* to its objective.[105] Where, as in this case, Bala shark fins are used by restaurants in a like manner with fins from other varieties of sharks and may easily be perceived as a shark-*type* soup, there is a clear connection with the statutory objective.

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[102] *Federal Court Judgment, supra* note 1 at para 15.
[103] *Ontario v Canadian Pacific Ltd.,* [1995] 2 SCR 1031 at para 47, 125 DLR (4th) 385.
[104] *Ibid* at para 48.
[105] *Bedford v Canada (Attorney General), 2013 SCC 72* at para 101.

[53] The Respondent may further suggest that the *Rules* are overbroad as they apply to facilities such as the Intervenor's pools. However, eliminating shark finning, as defined in the *Act*, is Parliament's stated objective. Prohibiting shark finning, regardless of the facility engaging in the practice, is therefore directly connected to the statutory objective.

3.2 A *Prima Facie* Infringement of Section 15(1) Cannot be Established on the Evidence

[54] The *Rules* do not create a formal distinction based on a protected ground, and while Bruce J.A. notes "various groups contemplated by s. 15 of the *Charter*" may be affected by the *Rules*, evidence to support a *prima facie* infringement of s. 15(1) has not been established.[106] The burden lies with the claimant to inform the court of the historical, social and political context in a s. 15(1) claim.[107] Judicial notice may be taken that a facially neutral law creates a disparate impact on an enumerated group where the impact is "apparent and immediate", but the evidence must amount to more than intuition or a "web of instinct".[108] Even if judicial notice were taken accepting consumption of shark fin soup is of cultural or religious significance, which Bruce J.A. indicates may be the subject of disagreement, the evidence cannot establish a discriminatory adverse impact created by the *Rules*, particularly given the consumption of shark fin soup is not prohibited.[109]

3.3 Section 4 the *Rules* Does Not Unconstitutionally Infringe s. 2(b) of the *Charter*

[55] In some circumstances, silence may constitute expressive activity for the purpose of s. 2(b), however, as the Supreme Court of Canada has cautioned, "to hold that minor restrictions or requirements with respect to packaging [violate s. 2(b)] might be to trivialize

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[106] *Federal Court of Appeal Judgment, supra* note 54 at para 11, Bruce JA.
[107] *Law v Canada (Minister of Employment & Immigration)*, [1999] 1 SCR 497 at para 83, 170 DLR (4th) 1.
[108] *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 33–34.
[109] *Federal Court of Appeal Judgment, supra* note 54 at para 10, Bruce JA.

the guarantee."[110] While the Respondent might suggest that the labelling requirements in s. 4 constitutes more than a minor requirement, notably this requirement only affects restaurant menus where shark fin soup is sold. Commercial expression of this nature is "entitled to a lower degree of protection than other forms expression."[111]

[56] Should this Court find that the *Rules* do in fact limit *Charter* rights, the applicable analytical framework to assess the *Charter* compliance of the *Rules* remains unsettled. The Supreme Court of Canada continues to strongly affirm the *Doré* framework applies to review of administrative decisions that engage the *Charter*.[112] This reflects administrative decision makers' particular familiarity with the competing considerations at play in the context of their enabling legislation.[113] The Manitoba Court of Appeal recently suggested, citing the pre-*Doré Greater Vancouver Transportation Authority* decision, that a challenge to delegated legislation enacted by an administrative body should be analyzed using the *Oakes* framework as it involves analysis of a "government policy as opposed to a discretionary administrative decision".[114] However, this proposition is inconsistent with the subsequent *West Fraser Mills* decision, which characterizes the enactment of delegated legislation as a discretionary exercise of delegated administrative powers.[115] The case law ultimately suggests the *Doré* framework is applicable to assess the validity of the *Rules*, as it applies to review of substantive administrative decisions that engage *Charter* values.

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[110] *JTI*, *supra* note 71 at para 132.
[111] *RJR-MacDonald, supra* note 79 at para 175.
[112] *Doré v Barreau du Québec*, 2012 SCC 12 at para 55 [*Doré]*; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 35 [*Loyola*]; *Groia v Law Society of Upper Canada*, 2018 SCC 27 at para 111; *Trinity Western University v Law Society of Upper Canada,* 2018 SCC 33 at para 30 [*TWU Upper Canada*].
[113] *Doré, supra* note 112 at para *47.*
[114] *Kisilowsky v Her Majesty the Queen in Right of the Province of Manitoba*, 2018 MBCA 10 at paras 24–25.
[115] *West Fraser Mills*, *supra* note 93 at paras 8–9.

[57] It is the Attorney General's respectful view that any *Charter* limitation is reasonable. *Doré* requires the Court to ask whether the *Rules* give effect "as fully as possible to the *Charter* protections at stake given the particular statutory mandate."[116] The *Charter* right must be limited no more than is "reasonably necessary" to achieve the objective.[117] Section 4 is narrowly restricted in scope to achieve the statutory objective. Unlike the labelling provisions held to unconstitutionally infringe 2(b) in RJR-MacDonald, s. 4 of the *Rules* does not prohibit attribution of the label to the Agency, nor does it limit content on the remainder of the menu in any way.[118] Further, other options open to the Agency to sufficiently achieve the objective, such as prohibition on sale of shark fin soup, would be more impairing.[119] The negative impact on the *Charter* right is therefore relatively minimal, and is proportionate to the benefit gained toward the statutory mandate.

3.4 The *Rules* do not Unconstitutionally Infringe s. 2(a) of the *Charter*

[58] An individual advancing a s. 2(a) *Charter* challenge must demonstrate their sincere belief in a practice that has a nexus with religion.[120] However, s. 2(a) is only infringed where the provision "interferes with [the claimants] ability act in accordance with [their] religious beliefs in a manner that is more than trivial or insubstantial."[121] Sincerity of belief is assessed subjectively. However, demonstrating the belief is infringed by the provision requires objective proof of interference, otherwise individuals could simply "conclude themselves that their rights had been infringed".[122] This objective proof is not apparent on the evidence adduced. While Pistris J. held the Respondent "sincerely believes at the very

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[116] *Loyala*, *supra* note 112 at para 39.
[117] *Ibid* at para 114.
[118] *RJR-MacDonald*, *supra* note 79 at para 124, McLachlin J.
[119] *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 82.
[120] *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 59.
[121] *Ibid*.
[122] *S.L. v Commission scolaire des Chênes*, 2012 SCC 7 at para 24.

least in the profound human cultural significance of consuming shark fin soup", consumption of shark fin is not prohibited by the *Rules*.[123] Accordingly, the record does demonstrate how the Respondent's beliefs might "reasonably or actually be threatened"[124] by the requirement beyond the threshold of "trivial or insubstantial".[125]

[59] Further, even if s. 2(a) is engaged by s. 4 of the *Rules*, the provision reflects a proportionate balancing of the *Charter* right and statutory mandate.[126] Unintended limits on religious freedom "are often an unavoidable reality of a decision-maker's pursuit of its statutory mandate in a multicultural and democratic society".[127] The severity of any potential limits arising from the *Rules* are minor as only restaurants serving shark fin soup commercially are affected, and the *Rules* do not restrain the restaurant from attributing the label to the Agency, or including their own beliefs on the menu. The Agency's enactment of the *Rules* therefore reflect a proportionate balancing of the severity of a possible interference, with the benefits to the statutory objective of reducing shark fin consumption.

4. No Duty of Fairness Attaches to the Agency's Rule-Making Functions

[60] On the continuum of administrative power, the Agency's rule-making authority takes on a legislative, as opposed to adjudicative flavour. As L'Heureux-Dubé J. noted in *Knight v Indian Head School Division*,

> not all administrative bodies are under a duty to act fairly. Over the years, legislatures have transferred to administrative bodies some of the duties they have traditionally performed. Decisions of a legislative and general nature can be distinguished in this respect from acts of a more administrative and specific nature, which do not entail such a duty.[128]

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[123] *Federal Court Judgment, supra* note 1 at para 27.
[124] *R. v Edwards Books and Art Ltd*., [1986] 2 SCR 713 at 759, 35 DLR (4th) 1.
[125] *Hutterian Brethren of Wilson Colony v Alberta,* 2009 SCC 37 at para 34.
[126] *Loyola*, supra note 112 at para 32.
[127] *TWU Upper Canada*, supra note 112 at para 40.
[128] [1990] 1 SCR 653 at 670, 69 DLR (4th) 489.

Both *Knight* and *Inuit Tapirisat of Canada v Canada (Attorney General)* demonstrate that for a decision to be "legislative" in nature, the body making the decision does not have to be the legislature.[129] This principle has been upheld in subsequent decisions.[130] Here, Parliament has delegated its legislative authority to the Agency through the Enabling Provisions of the *Act*.

[61] Moreover, the *Rules* are a norm of general application because they affect a broad class of people.[131] The culinary community that purchases and sells shark fins for consumption is multifaceted and not limited to a subset of the Asian cultural community. In fact, the Intervener sells shark fins to both Asian and non-Asian restaurants.[132] In that respect, the facts in this matter can be distinguished from cases like *Homex Realty & Development Co v Wyoming (Village)*, where the Council passed a by-law that deregistered an individual complainant's plan to convey lots.[133] Instead, the *Rules* govern a broad class of restauranteurs, vendors, and members of the public involved with the "possession, importing, distribution, and selling of shark fins in Canada".[134] Even if this honourable Court does not accept that the *Rules* impact several constituencies beyond a narrow subset of the Asian cultural community, *Canadian Society of Immigration Consultants v Canada* illustrates that legislation aimed at one particular body does not constitute an individualized decision.[135]

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[129] *Ibid*; [1980] 2 SCR 735, 115 DLR (3d) 1.
[130] *Denby v Dairy Farmers of Ontario*, 182 ACWS (3d) 243, 2009 CarswellOnt 6924.
[131] Colleen Flood & Lorne Sossin, *Administrative Law in Context*, 3rd ed (Toronto: Emond Montgomery, 2018) at 327.
[132] *Federal Court Judgment*, *supra* note 1 at para 43.
[133] [1980] 2 SCR 1011, 116 DLR (3d) 1.
[134] *Shark Protection Act, supra* note 1, s 12.
[135] 2011 FC 1435 at para 113.

5. The Agency Nonetheless Met Its Duty of Fairness by Hosting Public Consultations

[62] No administrative process is unlimited in scope. Here, Parliament has empowered the Agency to balance stakeholder notice and consultation requirements with administrative discretion to make rules expeditiously. While it may be unfortunate that the Respondent did not take the opportunity to participate in the Agency's open and public consultations, it is the scheme and purpose of the *Act* that ought to frame this analysis.

5.1 The Combined Requirements of Sections 3 And 7 of The *Regulations* Preclude the Respondent from Arguing That Notice of Consultation Was Inadequate

[63] In analyzing the Agency's notice and consultation process, it is worth emphasizing that an administrative body "is the master of its own procedure" and is intimately familiar with the daily realities of decision-making.[136] Here, the Agency gave effect to s. 3 of the *Regulations* by holding public hearings over a 30 day period. It gave general notice of consultation to a known class of stakeholders that had lobbied the government in the past.[137] It also undertook efforts to capture unknown stakeholders by posting and updating notices of consultation on its website.[138]

[64] If s. 3 of the *Regulations* were read in isolation, members of the culinary community and the Asian cultural community might be seen as constituting affected stakeholders that have an interest in attending a hearing. However, in order to ascertain the appropriate scope and notice requirements for consultation, principles of statutory interpretation require this Court to read s. 3 in its "entire context and [its] grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the

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[136] *Knight*, *supra* note 128 at para 685.
[137] *Federal Court Judgment*, *supra* note 1 at paras 12 and 22.
[138] *Ibid* at para 22.

intention of Parliament."[139] The scheme of the *Act* includes s. 24, which allows the GIC to make regulations that add to the Agency's powers. Section 7 of the *Regulations* empowers the Agency to inject administrative efficiency into its calculus of what constitutes a "proper consultation" within the meaning of s. 3. Specifically, s. 7 of the *Regulations* provides that,

> Even where it is decided that notice to interested parties to a hearing or other proceedings is required, the Shark Protection Agency may, for reasons appearing to the Shark Protection Agency to be essential, make decisions or orders as if due notice had been given to all parties, and the decision or order is as valid and has effect in all respects as if due notice had been received.[140]

[65] The Attorney General submits that "other proceedings" encompasses rule-making because s. 7 is included under the "Rule-making" heading in the *Regulations*. The GIC could have placed s. 7 in a part of the *Regulations* unrelated to the Agency's rule-making power. Instead, however, it situated s. 7 in the schematic context of ss. 3 and 5. Similarly, "decisions" in s. 7 ought to include a decision to create rules even if a potential stakeholder was not given notice in the same manner as other stakeholders.

[66] Furthermore, the Agency's procedural obligations with respect to notice is informed by the purpose of the *Act*, which is to "eliminate shark finning by regulating the practice comprehensively at both the national and international levels."[141] Section 5 is not only a strong indicator that Parliament drafted the *Act* with a view to creating a legislative injunction over shark finning, but when read together with the Enabling Provisions it is an indication it has superimposed the *Act*'s purpose on the Agency's rule-making functions.

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[139] *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (Markham, ON: LexisNexis Canada, 2008) at 367.
[140] *Shark Protection Regulations*, *supra* note 8. Emphasis added.
[141] *Shark Protection Act, supra* note 1, s 5.

[67] We can also understand s. 7 in the broader context of PCO documents accompanying the *Regulations*. These documents indicate that the GIC had an interest in the Agency making rules "as expeditiously as possible", and to be enforced "forthwith".[142]

5.2 The Decision to Hold Public Hearings Over A 30 Day Period Was Procedurally Fair

[68] Parliament could have framed "proper consultation" under s. 3 of the *Regulations* by including in the *Act* comprehensive requirements for rule-making. Absent these requirements, this honourable Court should interpret the legislative silence on a rule-making process as a signal from Parliament to respect the Agency's chosen procedure.[143]

[69] Specifically, Parliament could have structured the *Act* like many other pieces of federal and provincial legislation that provide for robust notice and comment processes with respect to rule-making – for instance, the *CRTC Rules of Practice and Procedure*,[144] the *Ontario Energy Board Act*,[145] the *Ontario Securities Act*,[146] and the *Ontario Environmental Bill of Rights*.[147] Similarly, the GIC could have used its power under s. 24 of the *Act* to add a provision, like those found in the above-noted legislation, clarifying or limiting the meaning of "proper consultation" and "affected stakeholders".[148]

[70] Instead, Parliament granted the Agency the ability to choose its own procedures by letting it "act on its own initiative or motion and do all things that are necessary for or incidental to the exercise of its capacity and powers and the performance of its duties and functions".[149] This includes the Agency's rule-making power in the Enabling Provisions.

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[142] *Federal Court Judgment*, *supra* note 1 at para 15.
[143] *Baker v Canada (Minister of Citizenship & Immigration*), 1999 SCC 699 at para 27, [*Baker*].
[144] SOR/2010-277, ss 21 and 53.
[145] SO 1998, c 15, Sched B, s 45(2).
[146] RSO 1990, c S 5, ss 143.2 and 143.3.
[147] SO 1993, c 28, s 27.
[148] *Shark Protection Regulations, supra* note 112, s 3.
[149] *Baker*, *supra* note 143 at para 27; *Shark Protection Act, supra* note 1, s 16.

5.3 *Doré* Principles Cannot Inform the Constitutionality of the Rule-Making Procedure

[71] While jurisprudence indicates that the *Doré* framework is applicable to analyzing substantive administrative decisions, no such case law establishes that it is calibrated to address the constitutionality of a rule-making procedure itself.[150] Abella J. noted, "[w]hen *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts".[151] On these facts, it is impractical and unrealistic for the Agency to craft a consultation process that contemplates every possible *Charter* value that an unknown class of potential stakeholders may raise retroactively. This is true considering that the Agency consisted of three members with no legal training and limited access to part-time legal counsel during the consultation period. *Doré* concerned the Québec Bar Society's individualized decision to discipline a registrant. Unlike this matter, at the disciplinary stage, Mr. Doré had the opportunity to raise, before a legally-trained disciplinary council, the argument that art. 2.03 of the Code of Ethics violated s. 2(b) of the *Charter*.[152] The Council was aware of the *Charter* value at issue.

[72] It follows that Bruce J.A.'s comment that "regulatory agencies must reflect *Charter* values in their decisions" is misguided because it does not contemplate the impracticalities of overlaying the *Doré* analytical framework on a procedural decision that impacts a broad class of unknown claimants.[153] We cannot expect the Agency to extend its consultation processes for an indeterminate period and notify personally all potential stakeholders on the contingency that failure to do so will engage a *Charter* value that has not been brought before the Agency.

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[150] *Above* at para 56.
[151] *Doré*, *supra* note 112 at para 36.
[152] *Ibid* at paras 13–17.
[153] *Federal Court of Appeal Judgment*, *supra* note 54 at para 12, Bruce JA.

[73] In the alternative, if *Doré* principles attached to the rule-making process, the Agency nonetheless properly weighed the urgency of eliminating shark finning against the Respondent's interest in participating in public consultations. Given that the Respondent's *Charter* claims are not unconstitutionally infringed, these interests do not outweigh the impetus of setting statutorily-informed parameters on the scope of notice and consultation with respect to creating norms of general application.

6. The Agency Did Not Enact or Enforce the Rules in A Biased Manner

6.1 Mr. Xu's Comments Do Not Indicate a Closed Mind at The Rule-Making Stage

[74] The applicable standard to determine bias respecting the Agency's rule-making functions is whether the decision-maker is amenable to persuasion or whether their actions indicate "a mind so closed that any submissions would be futile".[154] This Court should analyze allegations of bias at the rule-making stage under the closed mind standard because the Agency's rule-making functions are policy-driven and investigative in nature.[155] *Newfoundland Telephone* stands for the proposition that a multifunctional administrative body may be subject to varying standards depending on the function being performed.[156]

[75] Mr. Xu's comments address the commercial, cultural, and environmental dimensions of shark finning.[157] They do not, however, indicate a closed mind to the degree that any submissions at the rule-making stage would be futile. If anything, Mr. Xu's heritage and involvement in matters related to Chinese communities shows that he has

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[154] *Newfoundland Telephone Co v Newfoundland (Public Utilities Board of Commissioners)*, [1992] 1 SCR 623 at para 642, 89 DLR (4th) 289 [*Newfoundland Telephone*]; *Old St. Boniface Residents Assn Inc v Winnipeg (City)*, [1990] 3 SCR 1170 at 1197, 75 DLR (4th) 385 [*Old St. Boniface*].
[155] *Newfoundland Telephone, ibid* at 637,639.
[156] *Newfoundland Telephone, supra* note 154.
[157] *Federal Court Judgment*, *supra* note 1 at para 17.

valuable lived experience in both conservation efforts and Chinese culture.[158] The substance of Mr. Xu's statements are distinguishable from matters where the closed mind standard was satisfied, such as *Save Richmond Farmland Society v Richmond (Township)*, where a councilor stated that it would take something "significant" to change his mind.[159]

[76] The choice to enforce the *Rules* in Winnipeg was also a policy decision. The fact that Ms. Walsh and Mr. Shine were able to convince Mr. Xu that Winnipeg was an appropriate location for enforcement illustrates that the Agency was amenable to persuasion at the investigation stage and not close minded.

6.2 The Agency's Comments Do Not Give Rise to A Reasonable Apprehension of Bias

[77] Viewed realistically and practically, it is evident that the Agency's decision to dismiss the Respondent's appeal summarily was motivated by the scope of its adjudicative power conferred under the *Act* and the undisputed fact that the Respondent violated the *Rules*. The distinction between taking action based on a negative animus towards a person or group of people and making a decision rooted in one's statutory mandate is relevant here. The Agency's decision to dismiss the Respondent's appeal summarily must be understood in the context of s. 5 of the *Act*, which speaks to Parliament's intention to eliminate shark finning and the Agency's understanding that giving effect to this purpose was urgent.[160] Furthermore, there was no question of fact for the Agency to adjudicate pursuant to s. 18(i) of the *Act* because the Respondent did not dispute violating the *Rules.*

[158] *Ibid*.
[159] [1990] 3 SCR 1213 at para 1219, 75 DLR (4th) 425.
[160] *Federal Court Judgment*, *supra* note 1 at para 50.

[78] The Agency members' statements may have been brash and distasteful.[161] However, the inquiry at this stage is whether a reasonable person, viewing the matter realistically and practically, and having obtained the necessary information, would have a reasonable apprehension of bias.[162] The high standard for bias is not met here.

7. The Respondent's Participatory Rights Do Not Include a Hearing on These Facts

[79] The Agency owed the Respondent a duty of procedural fairness at the appeal stage.[163] However, a contextual analysis of the Agency's statutory powers and a pragmatic understanding of the facts show that the content of this duty was minimal and did not extend to participatory rights in a hearing. While we cannot ignore the *audi alteram partem* principle, it is also noteworthy that at common law there is no *absolute* right to a hearing before an administrative decision maker.[164] Instead, as L'Heureux-Dubé J. noted,

> the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected… its content is to be decided in the specific context of each case. All of the circumstances must be considered in order to determine the content of the duty of procedural fairness.[165]

Here, because the Respondent both knew the case against him and made representations to the Agency that he did not contest violating the *Rules*, the Agency did not need to hear from the Respondent (either in writing or orally) to decide the matter fairly.

6.3 The Nature of Agency's Decision to Dismiss the Appeal Without a Hearing Is Informed by Its Polycentric Function

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[161] *Ibid* at para 47.
[162] *R v S (RD)*, [1997] 3 SCR 484 at para 31, 151 DLR (4th) 193; *Roberts v R*, 2003 SCC 45 at para 74.
[163] *Cardinal v Kent*, [1985] 2 SCR 643 at 653, 24 DLR (4th) 44; *Nicholson v Haldimand-Norfolk (Regional Municipality) Commissioners of Police*, [1979] 1 SCR 311, 88 DLR (3d) 671.
[164] P.P. Craig, *Administrative Law*, 7th ed (London: Sweet & Maxwell, 2012) at 367.
[165] *Baker*, *supra* note 143 at paras 21 and 22; *Dunsmuir v New Brunswick*, *supra* note 94 at para 79.

[80] Because the Agency's adjudicative functions are secondary to its primary purpose of creating and enforcing rules of general application, any procedural protections that attach to its decisions are minimal.[166] While s. 6 of the *Regulations* creates an express mechanism through which the Agency can exercise its adjudicative functions, these are focused on hearing and determining questions of fact and making orders based on such determinations.[167] Moreover, the Agency is not "bound in the conduct of its hearings by the rules of law concerning evidence that are applicable to judicial proceedings".[168] None of its members have legal training, despite having access to part-time counsel not employed by the Agency.[169] The Agency may use "observations" from the PCO; however, these are non-binding and the Agency is not compelled to consider them.[170]

[81] Undoubtedly, there can be instances where the Agency's duty of fairness extends to participatory rights that include a hearing. However, because the Respondent did not contest the allegation that he violated the *Rules*, there was no need for the inspector who imposed the penalty to establish the violation under s. 22 of the *Act*. Absent a *bona fide* issue of fact for the Agency to decide, and in light of the Agency's ancillary adjudicative functions, the duty of fairness does not include a hearing on these facts.

6.4 The Impact of the Decision to Dismiss the Respondent's Claim Was Minimal

[82] The Agency's decision to dismiss the Respondent's claim summarily is proportionate to the importance of the decision to the Respondent and the nature of its impacts on him.[171] A $10,000 fine on each violation is significant, but it does not trigger

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[166] *Baker*, *supra* note 143 at para 23.
[167] *Shark Protection Act, supra* note 1, ss 14, 18(i).
[168] *Shark Protection Regulations, supra* note 8, s 4.
[169] *Federal Court Judgment*, *supra* note 1 at para 21.
[170] *Ibid*.
[171] *Baker*, supra note 143 at para 25.

the "high standard of justice that is required when the right to continue in one's profession or employment is at stake".[172] No facts indicate that the Respondent was unable to operate his restaurant as a result of the fines. If he complies with the *Rules*, he can continue selling sea food soup, including shark fin soup, without penalty.

[83] Even if the Respondent's s. 7 *Charter* rights are *engaged* (though not violated), there is no need to resort automatically to the PFJs for procedural protections because the common law provides for adequate procedure on these facts.[173] Specifically, because the duty of fairness is context-driven, with no question of fact to decide – and certainly no issues of credibility at play – the Agency was able to make a procedurally fair decision without hearing any further representations from the Respondent.[174]

[84] Furthermore, resorting to the *Charter* should be reserved for matters where statutory interpretation cannot provide an adequate remedy. *Singh* states, "[i]f, as a matter of statutory interpretation, the procedural fairness sought by the appellants is not excluded by the scheme of the Act, there is, of course, no basis for resort to the *Charter*".[175] Unlike *Singh*, there is nothing in the statutory scheme that ousts the common law by precluding the Agency from conducting a hearing.[176] As noted above, s. 6 of the *Regulations* creates an express mechanism through which the Agency can exercise its adjudicative functions.

6.5 <u>The Agency Has Discretion in Determining Its Own Hearing Procedures</u>

[85] The Agency's choice of procedure in dismissing the Respondent's appeal accorded with its broad statutory authority to "do all things that are necessary" to exercise its

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[172] *Kane v University of British Columbia*, [1980] 1 SCR 1105 at para 1113, 110 DLR (3d) 311.
[173] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 138.
[174] *Suresh v Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1 at para 114.
[175] *Singh v Canada (Minister of Employment & Immigration)*, [1985] 1 SCR 177 at 188, 17 DLR (4th) 422 [*Singh*].
[176] *Ibid*.

functions.[177] We ask this Court to show deference to the Agency's decision to dismiss the Respondent's claim without holding a hearing because of the latitude that Parliament has granted to the Agency to decide its own procedures by way of s. 16 of the *Act*. As noted in *Baker*, "important weight must be given to the choice of procedures made by the agency itself and its institutional constraints".[178]

7. The Agency Did Not Have Jurisdiction to Decide the *Act's* Constitutionality

[86] Absent a question of fact to decide, the Agency had no reason to grant the Respondent's request for a hearing on questions of law respecting the *Act*'s constitutionality. Nothing in the *Act* or *Regulations* grant the Agency explicit jurisdiction to decide questions of law.[179]Additionally, implied jurisdiction is discerned by looking at the statute as a whole.[180] The following factors weigh against the Agency having implied jurisdiction to determine the *Act*'s constitutionality. First, s. 18(i) of the *Act* is a strong indicator that Parliament intended for the Agency's adjudicative power to be focused on questions of fact, not law. Second, no members of the Agency received legal training. It is unclear whether the Agency would have access to legal counsel while adjudicating any hypothetical constitutional claims. It is also unclear what value PCO "observations" would serve at this stage. Third, the Agency's primary functions are policy-driven and investigative in nature. The Agency's adjudicative functions are ancillary to its core purpose of creating and enforcing the *Rules*. Finally, the *Act* does not provide for a statutory right of appeal on questions of law. The existence of such a provision would suggest that an administrative tribunal may deal initially with questions of law.

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[177] *Shark Protection Act, supra* note 1 at s 16.
[178] *Baker*, *supra* note 143 at para 27.
[179] *Martin v Nova Scotia (Workers' Compensation Board),* 2003 SCC 54 at para 48; *R v Conway*, SCC 2010 22 at para 68.
[180] *Martin*, supra note 179 at para 48.

PART IV: ORDER SOUGHT AND NAMES OF COUNSEL

[87] The Appellant requests that the Canadian Court of Justice:

ALLOW the appeal of the Appellants;
OVERTURN the Order of the Federal Court of Appeal to add new provisions to the *Rules*.
WITH COSTS throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of January, 2019.

Katie Glowach	Jeremy Ryant
Counsel #1 for the Appellant	Counsel #2 for the Appellant

APPENDIX A: LIST OF AUTHORITIES

LEGISLATION

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.
Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.
Criminal Code, RSC 1985, c C-46.
CRTC Rules of Practice and Procedure, SOR/2010-277.
Ontario Energy Board Act, SO 1998, c 15, Sched B.
Ontario Environmental Bill of Rights, SO 1993, c 28.
Ontario Securities Act, RSO 1990, c S 5.

JURISPRUDENCE

Baker v Canada (Minister of Citizenship & Immigration), 1999 SCC 699.
Bedford v Canada (Attorney General), 2013 SCC 72.
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