

IN THE SUPREME COURT OF CANADA
(On Appeal from the Saskatchewan Court of Appeal)

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*,
Bill C-74, Part V

AND IN THE MATTER A REFERENCE BY THE LIEUTENANT GOVERNOR IN
COUNCIL TO THE COURT OF APPEAL FOR SASKATCHEWAN UNDER THE
CONSTITUTIONAL QUESTIONS ACT, 2012, SS 2012, c C-29.01

BETWEEN:

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APPELLANT

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT

-and-

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ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF MANITOBA,
ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF ALBERTA,
ET AL.

INTERVENERS

FACTUM OF THE INTERVENER:
OCEANS NORTH CONSERVATION SOCIETY
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

(Continued on the next page)

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(On Appeal from the Ontario Court of Appeal)

IN THE MATTER OF *GREENHOUSE GAS PULLOUT PRICING ACT*,
SC 2018, c. 12, s. 186

AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN
COUNCIL TO THE COURT OF APPEAL FOR ONTARIO UNDER THE *COURTS OF
JUSTICE ACT*, RSO 1990, c. C.43, s.8

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TABLE OF CONTENTS

PART	PAGE
PART I: CONCISE OVERVIEW OF POSITION WITH RESPECT TO THE QUESTIONS ON WHICH THE INTERVENER HAS INTERVENED AND CONCISE STATEMENT OF FACTS	1
PART II: CONCISE OVERVIEW OF INTERVENER’S POSITION WITH RESPECT TO THE APPELLANT’S QUESTIONS ON WHICH INTERVENER HAS INTERVENED	4
PART III: STATEMENT OF ARGUMENT	4
A. THE MATTER IS ONE OF PARAMOUNT NATIONAL CONCERN WITH INTERNATIONAL CHARACTER AND INTERNATIONAL IMPLICATIONS	4
B. THE PROVINCIAL INABILITY TEST MUST EXAMINE THE UNEQUAL DISTRIBUTION OF COSTS VERSUS BENEFITS OF TRANSBOUNDARY POLLUTION	7
C. FEDERALISM REMAINS RESPECTED WHEN CONSIDERING THE IMPACTS ON THE ARCTIC AND THE OTHER OBJECTIVES OF FEDERALISM ...	9
PART IV: COSTS	10
PART V: TABLE OF AUTHORITIES	11

**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 that works primarily in *Inuit Nunangat*, the Inuit homeland in Canada, to conserve Arctic environments and promote ecological and cultural resilience in the region. Oceans North intervenes in this case to advance submissions on how the impacts of greenhouse gas (“**GHG**”) emissions and climate change on the Arctic is relevant and material to this Court’s application of the national concern doctrine. Specifically Oceans North makes the following three arguments:
 - a. The matter at issue is not just one of national concern, but of paramount concern with international character and implications, especially given the quality of GHG emissions as a form of marine pollution, its significant impacts on Arctic marine environments, and its impacts on related industries like fisheries and shipping.
 - b. The “provincial inability” test is central to the national concern doctrine. The rationale underlying the test is to prevent free-rider problems where the benefits and burdens of transboundary pollution are not distributed equally across jurisdictions. In this case, the Arctic and its people shoulder the most severe adverse consequences while at the same time being least responsible, and benefitting the least, from activities that generate GHG emissions.
 - c. The impacts of GHG emissions on the Canadian Arctic, which geographically comprises of a much larger area than any Canadian province and contains half of Canada’s coastline, is a significant and perhaps determining factor in the analysis. The constitutional balance underlying the principle of federalism remains respected when one considers these impacts and views federalism as not just simply about preventing federal overreach, but also about preserving national unity, cooperation, and survival.
2. Oceans North adopts Canada’s recitation of the facts.¹ In addition, Oceans North emphasizes the following facts:

¹ Factum of the Attorney General of Canada, dated December 3, 2019 (“**Canada’s Factum**”) at paras. 8-53

- a. While Canada as a whole has warmed twice as fast as the global average, the Canadian Arctic is warming three times as fast.² The Arctic is looking at a 12°C temperature increase by the end of the century.³
- b. Declining snow and sea ice cover, shorter seasons of ice cover on many lakes and rivers, widespread warming of permafrost and shrinkage of glaciers in the Arctic are already readily observable. A reduction in the spatial extent and mass of the Canadian cryosphere is evident, with melting ice from the Canadian Arctic contributing to an estimated 3.5 ± 2.4 cm to global sea level rise this century.⁴ The annual mean Arctic sea-ice extent has decreased 3.5 to 4.1% per decade between 1979 to 2012. Arctic sea-ice extent has decreased in every season and in every successive decade since 1979.⁵
- c. Climate change in the Arctic poses particular food and health challenges for Indigenous people and those living in the North. For example, changing timing of freeze and thaw events have made transportation and gathering food through hunting, trapping, fishing more dangerous.⁶
- d. The Arctic is expected to experience increased extreme water levels relative to other areas of Canada, as the loss of sea ice increases the risk of storm surge and coastal erosion.⁷
- e. Approximately 30% of anthropogenic CO₂ is directly absorbed by the ocean. When combined with H₂O, it increases the concentration of hydrogen ions resulting in an increase in acidity. The acidification of our oceans due to anthropogenic contributions is termed “ocean

² *Reference re Greenhouse Gas Pollution Pricing Act*, [2019 ONCA 544](#) at para. 10 (“**ONCA Reasons**”)

³ Record of the Attorney General of Ontario (“**OR**”), Part III, Tab 14 (Record of the Attorney General of Canada (“**CR**”), Vol. 1, Tab 1), Affidavit of John Moffet, made January 29, 2019 (“**Moffet Affidavit**”), Ex. F, p. 265

⁴ OR, Part III, Tab 18, (Record of the Attorney General of British Columbia (“**BCR**”), Tab 1) Affidavit of Tim Leisuk, made December 18, 2018 (“**Leisuk Affidavit**”), Ex. E, pp. 103-104; see also OR, Part III, Tab 14 (CR, Vol. 1, Tab 1), Moffet Affidavit, Ex. A, pp. 66-67

⁵ OR Part III, Tab 14 (CR, Vol. 1, Tab 1) Moffet Affidavit, Ex. C, p. 163; see also OR Part III, Tab 19 (Record of the Athabasca Chipewyan First Nation (“**ACFNR**”), Affidavit of Lisa Tsessaze, made December 17, 2018 (“**Tsessaze Affidavit**”), Ex. E, pp. 161-162

⁶ OR Part III, Tab 14 (CR, Vol. 1, Tab 1), Moffet Affidavit, Ex. G, p. 292; OR Part III, Tab 19 (ACFNR), Tsessaze Affidavit, Ex. E, pp. 173-174

⁷ OR Part III, Tab 18 (BCR, Tab 1) Leisuk Affidavit, Ex. E, p. 104; OR Part III, Tab 14 (CR, Vol. 1, Tab 1) Moffet Affidavit, Ex. G, p. 291

acidification”, and although no less insidious, is a distinct harm from global warming. Ocean acidification causes significant negative impacts on marine organisms and ecosystems.⁸ Ocean acidification is happening at greater rates in Arctic waters such as the Beaufort Sea.⁹

- f. The increased energy in the global climate system from anthropogenic climate change is almost all stored in the ocean, with the oceans storing more than 90% of the energy accumulated between 1971 and 2010. It is virtually certain that the upper ocean has warmed by 0.11°C per decade over 1971 to 2010.¹⁰
- g. The effects of climate change in the Arctic negatively impacts local wildlife and fish species. For example, increasing numbers of non-indigenous species, and changes in ice cover, water levels, water temperature, oxygen levels, and increasing contaminants from melting permafrost negatively affects the habitat and health of local wildlife.¹¹
- h. Climate change in the Arctic has also had an impact on industrial activities, especially fisheries and international shipping. The changing economic opportunities in the Arctic is fostering the need for greater international cooperation and has expanded the role of the Arctic Council.¹²
- i. The territories’ contribution to Canada’s GHG emissions, approximately 0.4% of Canada’s total emissions or 2.7 megatonnes of carbon dioxide equivalent (“**Mt CO₂ eq**”), is completely out of proportion to the adverse impacts that the region is experiencing.¹³

⁸ OR Part III, Tab 18 (BCR, Tab 1) Leisuk Affidavit, Ex. G, pp. 112-113; OR Part III, Tab 14 (CR, Vol. 1, Tab 1), Moffet Affidavit, Ex. A, p. 66, Ex. C at p. 172, Ex. D, pp. 202-203

⁹ OR, Part III, Tab 12 (Record of the Attorney General of Ontario, Vol. III, Tab 46), *2030 NWT Climate Change Strategic Framework* (1 June 2018) (“**NWT Framework**”), p. 1519

¹⁰ OR Part III, Tab 14 (CR, Vol. 1, Tab 1), Moffet Affidavit, Ex. C, p. 163

¹¹ OR, Part III, Tab 12 (Record of the Attorney General of Ontario, Vol. III, Tab 46), *NWT Framework*, p. 1519; OR Part III, Tab 19 (ACFNR), Tssessaze Affidavit, Ex. E, pp. 162, 167-168

¹² OR Part III, Tab 14 (CR, Vol. 1, Tab 1), Moffet Affidavit, Ex. F, p. 265; OR Part III, Tab 19 (ACFNR), Tssessaze Affidavit, Ex. E, pp. 162

¹³ ONCA Reasons at para. 19

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

3. The *Greenhouse Gas Pollution Pricing Act* (the “*Act*”) is constitutional under the national concern doctrine as an exercise of Parliament’s jurisdiction to legislate for peace, order, and good government of Canada under s. 91 of the *Constitution Act, 1867*.

PART III - STATEMENT OF ARGUMENT

A. THE MATTER IS ONE OF PARAMOUNT NATIONAL CONCERN WITH INTERNATIONAL CHARACTER AND INTERNATIONAL IMPLICATIONS

4. For a matter to fall under the national concern doctrine, it must be a matter that is beyond local or private in nature.¹⁴ Oceans North accepts Canada’s articulation of the matter: that the *Act* concerns establishing minimum national standards integral to reducing nationwide GHG emissions.¹⁵ This matter more than sufficiently transcends the requirement that the matter be beyond local or private in nature. One merely has to look at how GHG emissions impact the marine environment and cryosphere of the Canadian Arctic.

5. While GHG emissions are a form of air pollution,¹⁶ GHG emissions are also a form of marine pollution. When viewed as marine pollution, the matter at hand in this case is not so different from what was at issue in the seminal national concern case of *Crown Zellerbach*.¹⁷ *Crown Zellerbach* involved legislation “concerned with marine pollution and its effect on marine life, human health and the amenities of the marine environment [and] the effect of dumping on navigation and shipping and other legitimate uses of the sea.”¹⁸ The issue in *Crown Zellerbach* was whether the regulating of dumping of woodwaste in provincial waters, which did not have a pollutant effect in extra-provincial waters, was *intra vires* Parliament under the national concern doctrine.¹⁹ Justice Le Dain, writing for the majority, found that it was.

¹⁴ ONCA Reasons at paras. 104-106; *Reference re Greenhouse Gas Pollution Pricing Act*, [2019 SKCA 40](#) at para. 146

¹⁵ Canada’s Factum at paras. 56-64

¹⁶ Canada’s Factum at para. 88

¹⁷ *R. v. Crown Zellerbach Canada Ltd.*, [\[1988\] 1 SCR 401](#) [*Crown Zellerbach*]

¹⁸ *Crown Zellerbach* at 408

¹⁹ *Crown Zellerbach* at 409

6. In this case, not only are GHG emissions a direct form of marine pollution, in that they are absorbed directly by ocean water, but there is abundant evidence of its insidious and deleterious effects on marine environments. As summarized in the facts section above, more than 30% of GHG emissions are absorbed directly into the oceans, resulting in ocean acidification. Further, the other direct adverse result of the release of anthropogenic GHG emissions – increased energy (heat) in the Earth’s climate system – is primarily absorbed by the oceans (more than 90%), raising ocean temperatures. In Arctic waters, the melting of sea ice creates even greater adverse impacts, not only raising global sea levels but also, for example, making Arctic coastlines more vulnerable to extreme weather events.

7. These impacts on the Arctic marine environment have indisputable effects on marine life, human health and the amenities of the marine environment. These impacts, which are well documented in the evidentiary record before this Court, span the entire range of trophic levels: from the harms of ocean acidification on shellfish, to changing fish migration patterns, to the loss of sea ice for polar bears. The record also demonstrates how the food security and health of those who live in the Arctic, especially the Indigenous people whose hunting, gathering and fishing are more intimately tied with the Arctic environment, are adversely impacted by GHG emissions. The constitutionally entrenched rights of the Indigenous people of the North are imperilled as a result of GHG emissions.

8. Further, GHG emissions will have significant impacts on navigation and shipping and other legitimate uses of Arctic waters, such as fisheries, which also have international ramifications. The recently ratified *Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean*,²⁰ is one such example of how GHG emissions and climate change are affecting areas of international concern in the Arctic. The preamble of the Agreement expressly recognizes that “that until recently ice has generally covered the high seas portion of the central Arctic Ocean on a year-round basis, which has made fishing in those waters impossible, but that ice coverage in that area has diminished in recent years” and acknowledges that “while the central Arctic Ocean ecosystems have been relatively unexposed to human activities, those ecosystems are changing due to climate change and other phenomena”. Thus the transformation of the Canadian Arctic concerns not just

²⁰ [*Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean*](#), ratified by Order in Council, [P.C. 2019-0426](#)

Canadian interests, it also has wide-ranging international implications. The Inuit have long foreseen the international implications of their changing environment, and were some of the first voices raising these concerns on the international stage.²¹ The increasingly rapid changes in the Arctic will only expand the mandate of the Arctic Council and other international organizations in the Arctic.

9. Ontario argues that for the national concern power to be validly invoked, there must be close links to other federal heads of power. Ontario says: “The regulation of marine pollution, a narrow and well-defined activity of ‘dumping [...] waste in waters, other than fresh waters, within a province,’ is closely tied to Parliament’s existing jurisdiction over offshore and international waters, navigation, and fisheries.”²² Oceans North does not agree that the jurisprudence requires that such a close connection is necessary, but even if it does, it would be undoubtedly met given the direct impacts to Arctic marine environments described above. Indeed, the territories are unique in that no provincial powers exist.²³ Power exercised by territorial governments or by local Indigenous communities through land claim agreements is ultimately devolved from the federal government. The impacts on the Arctic and its people are therefore ultimately the responsibility of the federal government.

10. Justice Le Dain’s conclusion in *Crown Zellerbach* that “[m]arine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole”²⁴ can be applied with even more force in this case. GHG emissions, when viewed as marine pollution, present the same extra-provincial and international character and implications as the forms of marine pollution listed as prohibited and restricted substances regulated by the *Ocean Dumping Control Act* in *Crown Zellerbach*. The threat to the Canadian Arctic, let alone the global oceans, is on a completely different scale than the impact of woodwaste deposited in provincial waters at issue in *Crown Zellerbach*. The matter in question in this case is one that far surpasses the requirement that the matter be beyond local or private in

²¹ [Utqiagvik Declaration](#), adopted by the Inuit Circumpolar Council on July 19, 2018

²² Factum of the Attorney General of Ontario, dated October 16, 2019 (“**Ontario Factum**”) at para. 50

²³ See s. 4 of the [British North America Act, 1871](#), 34-35 Vict., c. 28 (U.K.), reprinted in R.S.C. 1985, App. II

²⁴ *Crown Zellerbach* at para. 37

nature and it is more than adequate to invoke the national concern doctrine. The ability to establish minimum national standards integral to reducing nationwide GHG emissions is one of paramount national concern.

B. THE PROVINCIAL INABILITY TEST MUST EXAMINE THE UNEQUAL DISTRIBUTION OF COSTS VERSUS BENEFITS OF TRANSBOUNDARY POLLUTION

11. Oceans North agrees with Canada that the “provincial inability” test is critical in the analysis of national concern.²⁵ One of the fundamental rationales underlying the national concern doctrine – and why the provincial inability test is so central to the doctrine – is to prevent free-riding problems that can arise within a federal system when costs and benefits from transboundary forms of pollution are not evenly distributed.²⁶

12. This free-riding scenario is depicted in the case of *Interprovincial Co-operatives*,²⁷ in which Manitoba fisheries were harmed by mercury pollution from Saskatchewan and Ontario chlor-alkali plants. 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 the Manitoba fisheries.

13. The crux of the provincial inability test is not whether the jurisdiction in which the problem emanates from has the jurisdictional ability or apparent willingness to mitigate that problem intra-provincially, as the appellants contend.²⁸ For example, Saskatchewan and Ontario could have imposed legislation in *Interprovincial Co-operatives* to regulate its chlor-alkali plants in a manner to prevent the pollution from flowing into Manitoba waters. In *Crown Zellerbach*, British Columbia could have imposed regulations on the pollution of its provincial waters, which would have stemmed any pollutant effect into marine waters. However, these are not relevant considerations in the provincial inability test analysis because, as with the test applicable to the

²⁵ Canada’s Factum at para. 70

²⁶ See generally OR Part III, Tab 18 (BCR, Tab 1), Affidavit of June Parker made January 11, 2019, Ex. D, p. 365

²⁷ *Interprovincial Co-operatives Ltd. et al. v. R.*, [1976] 1 SCR 477 [*Interprovincial Co-operatives*]

²⁸ Factum of the Attorney General of Saskatchewan, dated October 19, 2019 (“**Saskatchewan Factum**”) at paras. 85-86; Ontario’s Factum at paras. 52-53, 71-75

general trade and commerce power,²⁹ it does not address the adverse national or international consequences when there is a lack of provincial cooperation.

14. Rather, the focus of the provincial inability test ought to be on the relative distribution of costs versus benefits of the polluting activity if the pollution crosses jurisdictions. Engaging in this analysis is critical in determining whether there is a realistic prospect of cooperation between jurisdictions. As Professor Hogg states, “the most important element of national concern” is where the national law “cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it adverse consequences for the residents of other provinces”.³⁰ Cooperative provincial action is not *realistic* when one jurisdiction is largely benefitting from an activity but the costs or externalities of that activity are borne largely or entirely by another jurisdiction.³¹ In such a scenario, these externalities must be addressed by the federal order of government.

15. The facts of this case demonstrate an extreme imbalance in the distribution of costs and benefits of activities which cause GHG emissions and resulting climate change. The disparity is most striking when comparing the Canadian North with the rest of the country. The territories are only responsible for 0.4% of Canada’s GHG emissions,³² but as canvassed in the facts above, are bearing the brunt of the adverse consequences. All three territories combined only produced 2.7 Mt CO₂ eq in 2016. This can be contrasted with Alberta’s 262.9 Mt CO₂ eq emitted in 2016. Further, provinces which have stood to benefit and profit from increasing oil and gas activities, like Alberta and Saskatchewan, have continued to increase their GHG emissions (14% and 11% respectively, from 2005 to 2016).³³

²⁹ *Reference re Securities Act*, [2011 SCC 66](#) at paras. 118-121

³⁰ ONCA Reasons at para. 98, quoting Peter Hogg, *Constitutional Law of Canada* at para. 17.3(b); see also *Crown Zellerbach* at 431

³¹ See Daniel Esty, “[Revitalizing Environmental Federalism](#)” (1996) 95 Michigan L Rev 570 at 591, 625-627

³² ONCA Reasons at para. 19

³³ OR Part III, Tab 14 (CR, Vol. 3, Tab 2), Affidavit of Dr. Dominique Blain (January 25, 2019), Ex. A, pp. 979-980

16. The territories are powerless to impose GHG regulations on the biggest polluters as they are outside of their territorial jurisdiction. The Arctic is the area of the country most impacted by GHG emissions, least responsible for it, and least able to address the problem.

17. Saskatchewan's submission that evidence of provincial inability in this case is based on conjecture does not stand up to scrutiny.³⁴ There is no realistic prospect of cooperation because of the inequity in the costs/benefits of climate change impacts and the inherent transboundary nature of the GHG emissions. These facts are undisputed. Any notion that there is a realistic prospect of interprovincial cooperation can be put to rest given the legislative history leading up to the enactment of the *Act*. Like the case of *Munro*,³⁵ the fact that the federal government has already attempted a cooperative solution is relevant to the analysis.³⁶ One of the underlying rationales of the national concern doctrine and the provincial inability test is to prevent individual jurisdictions from defeating a national solution by continuing to free-ride and thereby inflict adverse and irreversible consequences on other parts of the nation, such as the Arctic.

C. FEDERALISM REMAINS RESPECTED WHEN CONSIDERING THE IMPACTS ON THE ARCTIC AND THE OTHER OBJECTIVES OF FEDERALISM

18. The last step of the national concern test inquires into the scale of impact on provincial jurisdiction. The matter assigned to federal jurisdiction must not be so broad as to upset the constitutional balance between federal and provincial powers.³⁷ In *Oceans North's* submission, the principle of federalism is not undermined if the national concern doctrine facilitates federal jurisdiction to implement a national solution where the nation faces an urgent and unprecedented threat to the Arctic – an area of Canada that encompasses half of its coastline and a significant portion of its land area.

19. The appellants in this case make arguments along the themes of federal overreach and the fact that GHG emissions are pervasive in many aspects of provincial matters. However, when the matter is properly construed and the establishment of national minimum standards integral to decreasing national GHG emissions is viewed through the lens of solving a collective action or

³⁴ Saskatchewan Factum at para. 88

³⁵ *Munro v. National Capital Commission*, [1966] S.C.R. 633 at 667

³⁶ ONCA Reasons at paras. 107-108

³⁷ *Crown Zellerbach* at 432; ONCA Reasons at paras. 126-127

free-rider problem, then there is very little impact on provincial jurisdiction to regulate GHG emissions. The fact that the pollutant in this case is more pervasive and the consequences are much greater than other forms of pollution do not militate against the matter falling under the national concern power. Rather it supports the fact that a national solution is required and illustrates the “interrelatedness of the intra-provincial and extra-provincial aspects of the matter.”³⁸

20. The modern concept of federalism is not only about preventing federal overreach. Federalism exists also to “reconcile the legitimate diversity of regional experimentation with the need for national unity”.³⁹ It must facilitate, rather than undermine, cooperative federalism.⁴⁰ The principles of federalism cannot be used to stymie national solutions to problems of environmental free-riding, which continue to cause climate change impacts on the Arctic. Doing so is antithetical to the objective of fostering national unity and cooperative federalism.

21. Like any other part of our Constitution, the division of powers are subject to the “living tree” doctrine and the interpretation of the heads of power must “evolve and must be tailored to the changing political and cultural realities of Canadian society”.⁴¹ The reality facing Canadian society is that climate change presents an existential threat and it requires immediate national action. Nowhere is the threat more urgent and pressing than in the Canadian Arctic. The Arctic and its people are on the precipice of unprecedented and irreversible change unrivalled by any in Canadian history. Canada’s federal structure must be able to respond to prevent such irreparable harm – a harm that threatens the very survival of a significant portion of the nation.

PART IV - COSTS

22. Oceans North does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: January 27, 2020

A handwritten signature in blue ink, appearing to read "David W.L. Wu", with the word "agent" written in smaller cursive to the right. The signature is written over a horizontal line.

David W.L. Wu

Counsel for the Intervener, Oceans North

³⁸ *Crown Zellerbach* at para. 35

³⁹ *Canadian Western Bank v. Alberta*, 2007 SCC 22 [*CWB*] at para. 24 [emphasis added].

⁴⁰ *CWB* at para. 24

⁴¹ *CWB* at para. 23

PART V - TABLE OF AUTHORITIES

	Paragraph(s)
CASES	
<i>Canadian Western Bank v. Alberta</i> , 2007 SCC 22	20-21
<i>Interprovincial Daniel Esty, “Revitalizing Environmental Federalism”</i> (1996) 95 Michigan L Rev 570 <i>Co-operatives Ltd. et al. v. R.</i> , [1976] 1 SCR 477	12-13
<i>Munro v. National Capital Commission</i> , [1966] S.C.R. 633	17
<i>R. v. Crown Zellerbach Canada Ltd.</i> , [1988] 1 SCR 401	5,10,13,14, 18, 19
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<i>Reference re Greenhouse Gas Pollution Pricing Act</i> , 2019 SKCA 40	4
<i>Reference re Securities Act</i> , 2011 SCC 66	13
SECONDARY SOURCES	
Daniel Esty, “ Revitalizing Environmental Federalism ” (1996) 95 Michigan L Rev 570	14
Utqiagvik Declaration , adopted by the Inuit Circumpolar Council on July 19, 2018	8
STATUTORY PROVISIONS	
Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean , ratified by Order in Council, P.C. 2019-0426	8
British North America Act, 1871 , 34-35 Vict., c. 28 (U.K.), reprinted in R.S.C. 1985, App. II	9