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Federal Court upholds nullification of Kearl oil sands authorization

By Shaun Fluker

Cases Considered:

Imperial Oil Resources Ventures Limited v. Pembina Institute for Appropriate Development et al., [2008 FC 598](#)

The Federal Court's decision in *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, is proving to have more significance than I anticipated in my initial blog (see [Just a Bump on the Road to Socio-Ecological Ruin](#)). In that judgment, Madame Justice Tremblay-Lamer held the Kearl joint panel erred in law by failing to comply with one of the duties imposed upon it by section 34 of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37. Shortly thereafter, the Federal Department of Fisheries and Oceans informed Imperial Oil that, as a consequence of the joint panel's error in law, the Kearl project authorization issued by the Minister pursuant to the *Fisheries Act*, R.S.C. 1985, c. F-14, was a nullity. In correspondence addressed to Imperial Oil, the Department of Fisheries and Oceans stated in part:

Please be advised that the Department of Fisheries and Oceans is of the view that, as a result of the Honourable Madam Justice Tremblay-Lamer's decision, the Authorization for Works or Undertakings Affecting Fish Habitat and the Authorization to Destroy Fish by any means other than Fishing (ED-03-2806) which was issued by the Minister of Fisheries and Oceans pursuant to subsection 35(2) of the *Fisheries Act* to Imperial Oil Resources Ventures Limited on February 12, 2008, is a nullity.

Without the section 35(2) authorization, the Kearl project cannot lawfully proceed.

On May 14, 2008, the Federal Court dismissed Imperial Oil's challenge to the Fisheries and Oceans position set out above. Noting the regulatory approval stages set out in the *Canadian Environmental Assessment Act*, Justice Douglas Campbell held the Minister's authorization was issued before the requisite environmental assessment approval of the Kearl project. Accordingly, Campbell J. held the Minister's authorization was issued without jurisdiction and was thus a nullity.

Of note, Campbell J. does not state the nullity occurred by 'operation of law', as the issue was framed by the parties. One is left to wonder whether the omission was intentional or presumed to be moot. In any case, it would appear Madame Justice Tremblay-Lamer's decision on the Kearl environmental assessment may indeed be more than just another bump in the road to socio-ecological ruin in the oil sands region of Alberta. And perhaps cause for celebration - at least by the fish and other aquatic species whose lives and habitat have been spared for now.