# ENVIRONMENTAL PROTECTION UNDER THE *FISHERIES ACT* AND BILL C-68: PROGRESS OR REGRESS?

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## Introduction

As Canadian politicians, academic commentators, and citizens generally look to the monumental challenge of addressing the rapid and frightening degradation of the natural environment, careful attention should be directed to current developments in the United States. The Trump Administration is rolling back a host of progressive environmental initiatives.[1] Given the size of the American economy, these regressive measures could have a serious, even catastrophic, impact on the world at large. But the moves of the Trump Administration also offer an important lesson on a general dysfunction in modern democratic governance that is strongly evident in Canadian legislation, and particularly in Canadian environmental legislation.

Current regressive measures in the United States are proceeding through executive order, even as many of the progressive initiatives of the prior Obama administration proceeded through executive order.[2] Such orders flow from what is arguably the dominant practice of modern legislatures: broad and often normless grants of law and policy-making power to executive decision-makers. Legislation itself all too often contains no clear policy choices, and in such circumstances, where legislatures have virtually written themselves out of the policy-making process, it becomes very easy for successive regimes to pursue drastically different agendas.

The Trump Administration was not elected with a strong mandate to dismantle environmental controls, any more than the Obama Administration was elected with a strong mandate to enact environmental controls. These same observations apply to Canada. The government of Stephen Harper was not elected with a strong environmental de-regulation mandate any more than the current government of Justin Trudeau was elected with a strong environmental protection mandate. Modern elections are rarely fought on a single issue. Personality figures as broadly as any package of policies, let alone any individual policy initiative. Legislatures, not general elections and resulting executive regulations, rules, and orders must remain

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[1] Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, "67 Environmental Rules on the Way Out Under Trump," *New York Times* (28 December 2018), online: <nytimes.com>; Michael Greshko et al, "A Running List of How Trump Is Changing the Environment," *National Geographic* (3 May 2019), online: <news.nationalgeographic.com>.

[2] *Ibid*.

the crucial site of policy making, for only legislatures can adequately focus public decision-making on a particular issue. Executive action under the authority of vaguely worded and capacious enabling clauses is the sign of an impoverished democracy. Formulating concerted responses to the crisis of environmental degradation must proceed with the legitimacy that can be forged only through broad public discussion culminating in detailed legislative initiatives.

In this paper, I consider the maximal room provided for executive law-making in two crucial environmental provisions of the Canadian *Fisheries Act*.[3] The *Fisheries Act* was substantially amended in 2012 under the Harper Government ("Harper Amendments"),[4] and is the subject of proposed amendments by the Trudeau government ("Bill C-68").[5] While the new amendments are allegedly intended to address regressive changes enacted in 2012,[6] in crucial respects the legislation will remain unchanged, even as it was essentially unchanged by the 2012 Harper Amendments themselves. The dominant strategy of governance under the *Fisheries Act* for many decades has been broad delegations of policy-making power to the executive. I argue that this delegated power is not adequately cabined by legislated norms, obscuring environmental decision-making behind layers of complex and interlocking enabling provisions that ultimately leave the executive with ample room to pursue any policy it desires. I submit that this legislative strategy leaves the success of any commitments to meet environmental goals highly uncertain. Even if the present Trudeau government pursues an aggressive environmental agenda (and there is admittedly little evidence of such a direction so far), future governments can change course as easily as the Trump Administration has gutted the protections set in place by the Obama administration.

My analysis proceeds as follows. In Section A, I argue that democratic government must proceed through legislated policy choices. In Section B, I consider sections 35 and 36 of the *Fisheries Act*, noting basic environmental prohibitions, but noting also the enormous qualifications in place that can undermine these prohibitions, qualifications that transfer broad policy-making power to the executive. In Section C, I consider a disturbing legislative strategy of obfuscation and avoidance introduced by the Harper Amendments of 2012 and continued in the proposed Bill C-68. Under this strategy, naked enabling provisions appear to be populated with normative content through complex and interlocking external sections of the legislation mandating a consideration of relevant "factors." Close examination of these new sections reveals little in the way of meaningful policy guidance. In Bill C-68, this strategy of obfuscation and avoidance potentially nullifies one of the few important advances made by the proposed amendments.

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[3] RSC 1985, c F-14 [*Fisheries Act*].

[4] *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19, Part 3, Division 5 [*Prosperity Act*]. This was a massive omnibus statute. The Harper Amendments were the last major revision to the *Fisheries Act*.

[5] Bill C-68, *An Act to amend the Fisheries Act and other Acts in consequence*, 1st Sess, 42nd Parl, 2018.

[6] *House of Commons Debates*, 42-1, No 263 (13 February 2018) at 1010–30 (Hon Dominic LeBlanc, Minister of Fisheries).

**A. The Democratic Character of Conflict Resolution in Legislatures**

Government through executive order, enabled by broad and normless legislation, reveals a fundamental breakdown of democracy. It should not be possible for successive regimes to pursue dramatically different policy agendas through the same piece of legislation. Legislative bodies must be the core of a system of meaningful self-government. This conclusion is supported by the Supreme Court of Canada's leading modern discussion of the democratic principle in *Reference re Secession of Quebec*:

> a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (*Saumur v City of Quebec*). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.[7]

This passage, which is consistent with other high-profile Supreme Court judgments,[8] equates democracy with institutionalized processes of public discussion and debate on divisive issues, and further provides that political conflict is the normal state of affairs in a democratic society composed of free individuals. In such a society, "[n]o one has a monopoly on truth," and there is a bustling "marketplace of ideas." Through a "continuous process of discussion," participants "build majorities" through "compromise, negotiation, and deliberation." Conflicts and disagreements are resolved, but only temporarily, as there always remain "dissenting voices."

In a "functioning democracy," it must be the case that citizens have the right to engage in the process of conflict resolution – to be part of the majority on a given question of law or policy, or, alternately, to be a "dissenting voice."[9] This right, central

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[7] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 68, 161 DLR (4th) 385 [*Secession Reference*], internal quotation cited to *Saumur v City of Quebec*, [1953] 2 SCR 299 at 330, [1953] 4 DLR 641 [*Saumur* cited to SCR]. Robin Elliot observes that the *Secession Reference* provides "the most comprehensive attempt yet undertaken by the Supreme Court of Canada to explain the precise nature of Canadian democracy, and hence to offer some insights into the normative implications flowing therefrom" (Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can Bar Rev 67 at 110).

[8] See *OPSEU v Ontario (Attorney General)*, [1987] 2 SCR 2 at para 151, 59 OR (2d) 671, Beetz J, writing for the majority of the Court [*OPSEU*]; *Switzman v Elbling*, [1957] SCR 285 at 306, 327, 7 DLR (2d) 337, Rand and Abbott JJ [*Switzman*]; *Saumur*, *supra* note 7 at 330, Rand J; and *Reference re Alberta Statutes*, [1938] SCR 100 at 133, 145–46, [1938] 2 DLR 81, Duff CJ and Cannon J [*Alberta Statutes*].

[9] Abbott J stresses this right in *Switzman*, *supra* note 8 at 327, as does Cannon J in *Alberta Statutes*, *supra* note 8 at 146.

to the democratic principle, has strong institutional corollaries. The Supreme Court hints at this in the above passage by noting that the "Constitution *mandates* government by democratic legislatures, and an executive *accountable* to them [emphasis added]." The subordination is clear here, but it must be taken to require more than simply the power of legislatures to delegate decision-making and overrule subsequent executive action if needed. Legislatures must be the formal site where the "marketplace of ideas" is focused and transmitted into law and policy decisions. As Hans Kelsen and MJC Vile have both observed, a legislature is a "collegial" institution facilitating open and public discussion and debate.[10] Legislatures are representative bodies specifically structured to harbour strong disagreements and conflicts within society at large. Jeremy Waldron, who argues that "disagreement is the most prominent feature of the politics of modern democracies," stresses that "[m]odern legislatures do not just respond to disagreement; they internalize it."[11] For Waldron, the rich processes and procedures of legislation are definitional to the "authority" of law itself – it is the "procedural virtues" of "legislative due process" that manage social disagreements and conflicts in an effective and legitimate manner.[12]

The "procedural virtues" of legislation are not evident where regimes pursue policy initiatives entirely through executive order. In contrast to the "collegial" structure of legislatures, executive bodies are "hierarchical," "autocratic," and "managerial" in nature.[13] Indeed, Kelsen observes that the "democratic principle" is generally confined to the "legislative process," and does not "penetrate" the executive.[14] The extended procedures and the public nature of legislative decision-making can often focus public attention on issues, forcing a society to thrash out its internal divisions and wrestle with conflicting views. The result can be decision-making reflecting a larger consensus and decision-making with greater permanence. Executive action pursuant to broad and normless enabling clauses, on the other hand, can often proceed with a minimum of public support and public awareness, and offer little coherence or direction in crucial matters affecting society (as the oscillation between the Obama and Trump Administration approaches to environmental regulation amply reveals). The structure of the executive branch is not conducive to law and policy-making with sufficient public input to render the results democratically consistent or coherent.[15]

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[10] Hans Kelsen, *The Essence and Value of Democracy*, ed by Nadia Urbinati & Carlo Invernizzi Accetti, translated by Brian Graf (Lanham, Maryland: Rowman & Littlefield, 2013) at 48, 80–81; MJC Vile, *Constitutionalism and the Separation of Powers*, 2nd ed (Indianapolis: Liberty Fund, 1998) at 370–72.

[11] Jeremy Waldron, *Law and Disagreement* (New York: Oxford UP, 1999) at 40, 106 [Waldron, *Law and Disagreement*].

[12] Jeremy Waldron, "Legislation and the Rule of Law" (2007) 1 Legisprudence 91 at 107; Waldron, *Law and Disagreement*, *supra* note 11 at 16, 40.

[13] Vile, *supra* note 10 at 370–72; Kelsen, *supra* note 10 at 48, 80–81; Jeremy Waldron, "Separation of Powers in Thought and Practice?" (2013) 54 Boston Coll L Rev 433 at 464 [Waldron, "Separation of Powers"].

[14] Kelsen, *supra* note 10 at 83–84.

[15] While some theorists have argued that it is possible to compensate for any democratic shortfall by introducing representative processes and procedures directly into executive law and policy-making, these arguments are presented in remarkably vague terms (see, for example, Jürgen Habermas, *Between Facts*

The above discussion suggests that legislation that functions by transferring broad swathes of law and policy-making power to the executive branch is suspect. While the Supreme Court of Canada has accepted the basic legality of such transfers in older case law,[16] the Court has not subjected these earlier precedents to a detailed reconsideration in light of more recent decisions such as the *Secession Reference*, in which unwritten principles, including democracy, are recognized as being definitional to the Canadian Constitution.[17] Furthermore, even accepting the sheer legality of uncabined delegations of law and policy-making power to executive decision-makers does not render such transfers necessarily appropriate in a society that defines itself as being democratic. Indeed, the proposition that law and policy-making is an activity that should be performed primarily by legislatures, and not the executive, is strongly supported by the guidelines and mandates of various Canadian legislative oversight bodies charged with reviewing regulations. The *Terms of Reference* of the Ontario Standing Committee on Regulations and Private Bills, for example, provides that, "Regulations should not contain provisions initiating new policy, but should be confined to details to give effect to the policy established by the statute."[18] In Manitoba, the Standing Committee on Statutory Regulations and Orders is guided by the principle that, "Regulations should not contain substantive legislation that should

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*and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge: MIT Press, 1996) at 440–41; and Genevieve Cartier, "Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?" (2003) 53 UTLJ 217 at 243, 260–61). Professor Waldron offers an appropriate rejoinder to such proposals:

[The executive's] shape is appropriately managerial rather than dialectical and, however much we believe in deliberative democracy, we should be wary of trying to transform it into a mode of discussion more appropriate for one of the other branches (Waldron, "Separation of Powers" *supra* note 13 at 464).

Attempts to democratize the executive (make it a "surrogate legislature") are also critiqued by Thomas Sargentich, "The Reform of the American Administrative Process: The Contemporary Debate" (1984) 1984 Wis L Rev 385 at 425–31, and see especially 429–30. It is likely that no amount of executive-based deliberation, dialogue, transparency, reason-giving, or public meetings can make up for the "legislative due process" that Waldron stresses is the formalized hallmark of legislation. The distinctive collegial properties of legislatures are definitional to the ability of democracy to resolve public conflicts.

[16] See *In Re George Edwin Gray*, [1918] SCR 150, 42 DLR 1 [*Gray* cited to SCR]; and *Reference as to the Validity of the Regulations in Relation to Chemicals*, [1943] SCR 1, [1943] 1 DLR 248 [*Chemicals Reference* cited to SCR].

[17] See especially *Secession Reference*, *supra* note 7 at paras 49–82. For other decisions recognizing the centrality of unwritten principles to the Canadian Constitution, see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3, 156 Nfld & PEIR 1 [*Judges Reference* cited to SCR]; *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319, 100 DLR (4th) 212; and *Reference re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1. Decisions such as *Gray* and the *Chemicals Reference* are predicated on the rule of parliamentary sovereignty. This rule, while still central to the Canadian Constitution, must now take its place alongside other rules emanating from the unwritten principles acknowledged by the Court. Parliamentary sovereignty, it must be stressed, does not exhaust the content of the democratic principle: see *OPSEU*, *supra* note 8 at para 151; *Judges Reference*, *supra* note 17 at paras 102–03, 108.

[18] Ontario, Legislative Assembly, Standing Committee on Regulations and Private Bills, Terms of Reference, Standing Order 108(i), online: <ola.org/en/legislative-business/standing-orders>.

be enacted by the Legislature, but should be confined to administrative matters."[19] The Parliamentary Standing Joint Committee for the Scrutiny of Regulations is required to consider:

> Whether any regulation or statutory instrument within its terms of reference, in the judgement of the Committee:
> […]
> amounts to the exercise of a substantive legislative power properly the subject of direct parliamentary enactment.[20]

These principles and guidelines are not legally enforceable, but they nevertheless affirm an allocation of institutional functions in which legislatures are the source of "new policy" and "substantive legislation."

Legislative oversight bodies have proved to be remarkably ineffective in fulfilling their mandates.[21] This failure is likely due in part to a dominant perception on the part of legislators, and commentators as well, that the overwhelming pressures on the modern administrative state necessitate broad delegations of law and policy-making power.[22] It may well be true that legislatures cannot cope with all of the details involved in coordinating millions of citizens in a peaceful social structure. However, legislatures rarely look to the delegation of legislative power as a tool to be used only when necessary. Instead, delegation is the default approach – it is the normal practice of government. Law and policy-making choices on a broad range of heavily conflicted matters are routinely shuffled off to the executive branch.

The normalization of the practice of delegation is strongly evident in environmental law, where there is often an assumption that the complex tasks of setting regulatory standards and responding to uncertain environmental threats require

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[19] Manitoba, Legislative Assembly, *Rules, Orders and Forms of Proceedings of the Legislative Assembly of Manitoba*, s 84(2)(a), online (pdf): <gov.mb.ca/legislature/business/rulebook_full.pdf>.

[20] Canada, Parliament, Standing Joint Committee for the Scrutiny of Regulations, "Mandate" at 12, online: <parl.ca/Committees/en/REGS/About>.

[21] See John Mark Keyes, *Executive Legislation* 2nd ed (Markham, Ontario: LexisNexis, 2010) at 501–25, and see especially 501–02, 509, 511–13, 518–19. The prevailing practice of legislative scrutiny by committee in the UK has also been characterized as "woefully inadequate" in "Shifting the Balance: Select Committees and the Executive" (London, 2000), Liaison Committee of the UK House of Commons at 24. See also Hermann Pünder, "Democratic Legitimation of Delegated Legislation: A Comparative View on the American, British and German Law" (2009) 58 ICLQ 353 at 365–66, 368–69; and Paul Craig, *Administrative Law*, 6th ed (London: Sweet & Maxwell, 2008) at 724–27.

[22] On the necessity argument for broad delegations of law-making power, see Roderick A Macdonald, "Understanding Regulation by Regulations," in Ivan Bernier & Andree Lajoie, eds, *Regulations, Crown Corporations and Administrative Tribunals* (Toronto: U of Toronto, 1985) 81 at 119; Alf Ross, "Delegation of Power" (1958) 7 Am J Comp L 1 at 4; John Willis, "Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional" (1935) 1 UTLJ 53 at 55; and JA Corry, "The Problem of Delegated Legislation" (1934) 11 Can Bar Rev 60 at 60–61. The necessity argument is summarized as follows in a leading decision of the United States Supreme Court: "our jurisprudence has been driven by a practical understanding that, in our increasingly complex society, replete with ever-changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives" (*Mistretta v United States*, 488 US 361 at 372 (1989)).

a maximum leeway for decision-makers who are situated closer to evolving scientific information and practical concerns than legislators.[23] Accepting that some flexibility in decision-making is required, however, should not operate to the exclusion of the need for legislated policy choices.[24] Establishing a normative framework for decision making is itself a very demanding task – it requires that legislators make hard choices, most pressingly between economic development and conservation. Where there is a culture of delegation in place, such choices are often never made. Environmental statutes frequently operate through blanket delegations of power rather than through carefully deliberated norms that provide a framework within which subordinate decision-making can meaningfully operate.[25]

Sections 35 and 36 of the *Fisheries Act* are a case in point. While there may be some need for a degree of delegation and flexibility under these provisions, there is little evidence of a measured or judicious approach here. Crucial policy-making tasks are largely surrendered, thereby removing conflict and disagreement over the prioritization of environmental and commercial goals altogether from the public arena of the legislature. This is undemocratic.

### B. Sections 35 and 36 of the *Fisheries Act*: Prohibitions and Qualifications

Canada has had fisheries legislation since the time of Confederation.[26] Historically, the primary focus of the *Fisheries Act* has been human activity that is directed at fish. This direct-impact activity is controlled largely through the regulation of the times, places, and manner of fish extraction, and especially through leasing and licensing provisions and prohibitions relating to fishing and the use of fishing gear.[27] There are other provisions in the statute, however, that regulate human activity that has an indirect impact on fish, and of these, sections 35 and 36 are two of the most important. These provisions bring the by-products and externalities of industrial, agricultural, and residential enterprises within the range of the legislation, and thus potentially have very important environmental applications. Yet as outlined under the following two

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[23] See Jocelyn Stacey, "The Environmental Emergency and the Legality of Discretion in Environmental Law" (2015) 52:3 Osgoode Hall LJ 985 at 992–97 and *passim*; Jamie Benidickson, *Environmental Law*, 3rd ed (Toronto: Irwin, 2009) at 131; and Michael N Schmidt, "Delegation and Discretion: Structuring Environmental Law to Protect the Environment" (2000) 16 Fla St UJ Land Use & Envtl Law 111 at 121.

[24] For a strong critique of the delegation and discretion approach to environmental regulation, see the work of Bruce Pardy, including *Ecolawgic: The Logic of Ecosystems and the Rule of Law* (Fifth Forum Press, 2015); "The Pardy-Ruhl Dialogue on Ecosystem Management, Part V: Discretion, Complex-Adaptive Problem Solving, and the Rule of Law" (2008) 25 Pace Envtl L Rev 341; and "In Search of the Holy Grail of Environmental Law: A Rule to Solve the Problem" (2005) 1 Intl J of Sustainable Development L and Policy 29. See also David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) at 231–33.

[25] See, for example, *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, ss 59, 108–09; *Environmental Assessment Act*, RSO 1990, c E.18, s 39(f); and *Environmental Protection Act*, RSO 1990, c E.19, ss 6, 9, 14, 20.2–20.6.

[26] See *Fisheries Act*, SC 1868, c 60, which consolidated pre-Confederation statutes.

[27] See, for example, *Fisheries Act*, *supra* note 3, ss 7–9, 18, 23–25, 28–29, 31, 33. Much of the regulation of human activity directly affecting fish has moved to regulations enabled under section 43(1).

headings, sections 35 and 36 are structured around a troubling legislative strategy: a strong prohibition followed by extensive qualifications. The qualifications are themselves unconstrained by normative considerations.

**Section 35**

Federal jurisdiction over "Sea Coast and Inland Fisheries" is grounded in section 91(12) of the *Constitution Act, 1867*.[28] In the 1970s, during the first major phase of environmental protection in Canada,[29] the *Fisheries Act* provided a crucial constitutional foothold for federal regulation of water quality, provided that such regulation was closely connected to protecting the fisheries and did not invade areas of provincial jurisdiction (for example, over local matters or property and civil rights).[30] In 1977, the following provision was introduced into the legislation:

> 31(1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.[31]

The "fish habitat" language enabled the government to provide an important environmental protection mechanism within the scope of the federal legislative power over fisheries.[32] Under the Harper Amendments of 2012, however, the "fish habitat" wording was removed:

> 35(1) No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.[33]

This provision, currently in force, may have a narrower environmental scope than its predecessor, for human activity (i.e. a "fishery") appears to provide the point of departure (a condition precedent) for considering whether harm to fish is prohibited. Under the earlier version, harm to fish, broadly understood through "habitat," was targeted.[34] Bill C-68 proposes to restore the "fish habitat" wording to the prohibition,[35]

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

[29] On the 1970s phase of environmental regulation, see Kathryn Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy* (Vancouver: UBC Press, 1996) at 55–114.

[30] See Benidickson, *supra* note 23 at 33, citing *Northwest Falling Contractors Ltd v The Queen*, [1980] 2 SCR 292, 113 DLR (3d) 1; and *Fowler v The Queen*, [1980] 2 SCR 213, 113 DLR (3d) 513.

[31] *Fisheries Act*, SC 1976–77, c 35, s 5 [*Fisheries Act*, SC 1976–77].

[32] For the environmental protection goal of the new provision, see *House of Commons Debates*, 30-2, Vol 6 (16 May 1977) at 5667–70 (Hon Romeo LeBlanc, Minister of Fisheries and the Environment).

[33] See *Prosperity Act*, *supra* note 4, s 142.

[34] For a discussion of the possible significance of the change in statutory wording, see Martin ZP Olszynski, "From 'Badly Wrong' to Worse: An Empirical Analysis of Canada's New Approach to Fish Habitat Protection Laws" (2015) 28:1 J Envtl L & Prac 1.

[35] Bill C-68, *supra* note 5, cl 22. The proposed definition under Bill C-68 reads as follows: "*fish habitat* means water frequented by fish and any other areas on which fish depend directly or indirectly to carry out

and from an environmental perspective, this restoration may be of considerable importance. However, qualifications to the prohibition will remain operative regardless, and these qualifications have been in place since 1977.

The following subsection qualified the section 35 prohibition between 1977 and 2012:

> 35 (2) No person contravenes subsection (1) by causing the alteration, disruption or destruction of fish habitat by any means or under any conditions authorized by the Minister or under regulations made by the Governor in Council under this Act.[36]

This sparse wording offers no legislative guidance whatsoever as to the basis on which Governor in Council regulations or Ministerial authorizations should proceed.

In 2012, the Harper Amendments expanded the qualification subsection considerably:

> 35 (2) A person may carry on a work, undertaking or activity without contravening subsection (1) if
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> (a) the work, undertaking or activity is a prescribed work, undertaking or activity, or is carried on in or around prescribed Canadian fisheries waters, and the work, undertaking or activity is carried on in accordance with the prescribed conditions;
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> (b) the carrying on of the work, undertaking or activity is authorized by the Minister and the work, undertaking or activity is carried on in accordance with the conditions established by the Minister;
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> (c) the carrying on of the work, undertaking or activity is authorized by a prescribed person or entity and the work, undertaking or activity is carried on in accordance with the prescribed conditions;
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> (d) the serious harm is produced as a result of doing anything that is authorized, otherwise permitted or required under this Act; or
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> (e) the work, undertaking or activity is carried on in accordance with the regulations.
>
> (3) The Minister may, for the purposes of paragraph (2)(a), make regulations prescribing anything that is authorized to be prescribed.

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their life processes, including spawning grounds and nursery, rearing, food supply and migration areas" (*ibid*, cl 1(5)).

This may be slightly broader than the current definition (which, as noted, does not apply to the section 35 prohibition): "*fish habitat* means spawning grounds and any other areas, including nursery, rearing, food supply and migration areas, on which fish depend directly or indirectly in order to carry out their life processes" (*Fisheries Act*, *supra* note 3, s 2(1); see also *Fisheries Act*, SC 1976–77, *supra* note 31, s 5(5)).

[36] *Ibid*, s 5(2).

Significantly, none of these 2012 details provides any normative restraint on the scope of executive decision-making, suggesting that clarity and precision are not necessarily synonymous with word count. Paragraphs (2)(a), (b), (d), and (e) of the current provision effectively restate the content of the earlier subsection 35(2). The only additions are paragraph (2)(c), which provides that authorizations can now proceed from "a prescribed person or entity" (and not just from the Minister), and subsection (3), which expands the regulation-making power from the Governor in Council to the Minister. Under the pre-2012 version, Ministerial exemptions were to take the form of authorizations, not regulations. It should also be noted that the expanded Ministerial power to make regulations in no way replaces the regulation-making power of the Governor in Council. The following paragraphs of the current statute's general regulation-making powers all directly address section 35 qualifications:

> 43 (1) The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations
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> […]
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> (i.1) for the purposes of paragraph 35(2)(a), prescribing anything that is authorized to be prescribed;
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> (i.2) respecting applications for the authorizations referred to in paragraph 35(2)(b) or (c);
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> (i.3) prescribing the conditions under which and requirements subject to which persons or entities referred to in paragraph 35(2)(c) may grant the authorization;
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> (i.4) respecting time limits for issuing authorizations referred to in paragraph 35(2)(b) or (c), or for refusing to do so.

These provisions are all normatively barren. One other general regulation-making power, likewise devoid of policy guidance, deserves special mention in connection with section 35:

> 43(5) The Governor in Council may make regulations exempting any Canadian fisheries waters from the application of sections 20, 21 and 35 and subsection 38(4).

Under this power, added under the Harper Amendments, the executive can completely efface the section 35 prohibition in a given area.

As noted above, Bill C-68 proposes to return the "fish habitat" wording to subsection 35(1). The "fish habitat" concept can potentially capture any defilement of water where fish live, regardless of the presence of human fishery interests. But Bill C-68 adds no clarifying language to subsection 35(2). Instead, with minor changes in wording, these qualifying provisions remain equally capacious and equally devoid of

policy guidance.[37]

Bill C-68 also proposes several new sections that announce prohibitions roughly analogous to section 35(1), prohibitions accompanied again by substantial qualifications. For example, under proposed section 34.4, the following prohibition will take effect: "(1) No person shall carry on any work, undertaking or activity, other than fishing, that results in the death of fish."[38] This language mirrors subsection 35(1), and there follows a series of subsections that directly mirror the qualifications under proposed subsection 35(2).[39] Again, there is no hint of legislative guidance in the wording. Additional proposed prohibitions relate to carrying out a "designated project" (section 35.1), and carrying out "a work, undertaking or activity . . . in an ecologically significant area" (section 35.2).[40] In both cases, ample normless carve-outs are available to executive decision-makers. A "designated project" is identified through Governor in Council regulations.[41] In the case of an "ecologically significant area," a complex series of subsections involving Governor in Council regulations and Ministerial permits apply.[42]

**Section 36**

The section 36 prohibition currently takes the following form:

> 36 (1) No one shall
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> (a) throw overboard ballast, coal ashes, stones or other prejudicial or deleterious substances in any river, harbour or roadstead, or in any water where fishing is carried on;
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> (b) leave or deposit or cause to be thrown, left or deposited, on the shore, beach or bank of any water or on the beach between high and low water mark, remains or offal of fish or of marine animals; or
>
> (c) leave decayed or decaying fish in any net or other fishing apparatus.
>
> (2) Remains or offal described in subsection (1) may be buried ashore, above high water mark.
>
> (3) Subject to subsection (4), no person shall deposit or permit the deposit of a deleterious substance of any type in water frequented by fish or in any place under any conditions where the deleterious substance or any other deleterious

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[37] See Bill C-68, *supra* 5, cl 22.

[38] This provision is similar to an earlier prohibition that was removed under the Harper Amendments:

32 (1) No person shall kill fish by any means other than fishing (RSC 1985, c F-14, s 32).

[39] Bill C-68, *supra* note 5, cl 21.

[40] *Ibid*, cl 23.

[41] *Ibid*, cl 31(6).

[42] *Ibid*, cl 23.

> substance that results from the deposit of the deleterious substance may enter any such water.

Unlike section 35, the wording of this prohibition was not changed under the Harper Amendments, and has remained largely unchanged since 1970, when subsection (3) was amended to add the opening caveat.[43] Prior to 1970, and indeed extending all the way back to an early consolidation of the legislation in 1914, the prohibition was unqualified.[44] The 1970 amendments introduced the crucial "Subject to subsection (4)" language into the prohibition, and in subsection (4), authorized exemptions from the prohibition on deposits of "deleterious substances" through Governor in Council regulations.[45] In subsequent years, the qualifications have been expanded and refined, most notably under the Harper Amendments, when Ministerial exemptions were added to the Governor in Council exemptions.[46] The current lengthy qualifications read as follows:

> (4) No person contravenes subsection (3) by depositing or permitting the deposit in any water or place of
>
> (a) waste or pollutant of a type, in a quantity and under conditions authorized by regulations applicable to that water or place made by the Governor in Council under any Act other than this Act;
>
> (b) a deleterious substance of a class and under conditions — which may include conditions with respect to quantity or concentration — authorized under regulations made under subsection (5) applicable to that water or place or to any work or undertaking or class of works or undertakings; or
>
> (c) a deleterious substance the deposit of which is authorized by regulations made under subsection (5.2) and that is deposited in accordance with those regulations.
>
> (5) The Governor in Council may make regulations for the purpose of paragraph (4)(b) prescribing
>
> (a) the deleterious substances or classes thereof authorized to be deposited notwithstanding subsection (3);
>
> (b) the waters or places or classes thereof where any deleterious substances or classes thereof referred to in paragraph (a) are authorized to be deposited;
>
> (c) the works or undertakings or classes thereof in the course or conduct of which any deleterious substances or classes thereof referred to in paragraph (a) are authorized to be deposited;

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[43] *An Act to Amend the Fisheries Act*, SC 1969–70, c 63, s 3(1) [*Fisheries Act*, SC 1969–70].

[44] *Fisheries Act, 1914*, SC 1914, c 8, s 44. For the prohibition as it read immediately prior to the 1970 amendments, see RSC 1952, c 119, s 33.

[45] *Fisheries Act*, SC 1969–70, *supra* note 43, s 3(2).

[46] *Prosperity Act*, *supra* note 4, s 143.

> (d) the quantities or concentrations of any deleterious substances or classes thereof referred to in paragraph (a) that are authorized to be deposited;
>
> (e) the conditions or circumstances under which and the requirements subject to which any deleterious substances or classes thereof referred to in paragraph (a) or any quantities or concentrations of those deleterious substances or classes thereof are authorized to be deposited in any waters or places or classes thereof referred to in paragraph (b) or in the course or conduct of any works or undertakings or classes thereof referred to in paragraph (c); and
>
> (f) the persons who may authorize the deposit of any deleterious substances or classes thereof in the absence of any other authority, and the conditions or circumstances under which and requirements subject to which those persons may grant the authorization.
>
> (5.1) The Governor in Council may make regulations establishing conditions for the exercise of the Minister's regulation-making power under subsection (5.2).
>
> (5.2) If regulations have been made under subsection (5.1), the Minister may make regulations
>
> (a) authorizing the deposit of deleterious substances specified in the regulations, or substances falling within a class of deleterious substances specified in the regulations;
>
> (b) authorizing the deposit of deleterious substances into waters or places falling within a class of waters or places;
>
> (c) authorizing the deposit of deleterious substances resulting from a work, undertaking or activity falling within a class of works, undertakings or activities;
>
> (d) establishing conditions, which may include conditions with respect to quantity or concentration, for the deposit of deleterious substances referred to in paragraphs (a) to (c); and
>
> (e) establishing, for the purposes of paragraphs (a) to (c), classes of
>
> (i) deleterious substances,
>
> (ii) waters and places, and
>
> (iii) works, undertakings and activities.

As is the case under the current section 35 qualifications, there is a great deal of detail here, but none of it amounts to any tangible normative restraint on the scope of executive decision-making. There is not a trace of legislative policy guidance, just a web of enabling provisions.

It should be noted that there are presently numerous regulations in force under the section 36 qualifications, regulations authorizing the deposit of some very toxic pollutants into Canadian waters.[47] The current government has made one repeal in this area,[48] but there are no amendments to section 36 itself in Bill C-68. The structure of the legislation has required, and will continue to require, executive initiative for any progressive (or regressive) change.

### C. Searching for Legislative Guidance: Obfuscation and Avoidance

In *Sandy Pond Alliance to Protect Canadian Waters Inc v Canada (Attorney General)*[49] the Federal Court rejected a challenge to the legality of regulations under section 36. Two aspects of this decision are of interest in the present inquiry. First, the claimants argued that the regulations, which authorize the deposit of toxic mining waste,[50] violate the conservationist purpose of the *Fisheries Act* recognized by the Supreme Court of Canada.[51] The Federal Court, however, found that the governing authorities recognize both conservation and fisheries management as central purposes of the legislation, and thus a claim based on an allegedly "paramount" conservationist statutory objective could not succeed.[52] This ruling suggests that vague statutory objectives alone cannot adequately control or direct exercises of executive power. Fisheries management is a very broad objective, particularly if it can be used to legitimize regulations permitting the deposit of toxic mining waste. Conservation is also a very broad objective. More concrete policy choices are required to control subordinate legislation – choices tailored to fit individual enabling provisions and individual prohibitions. The *Fisheries Act* does not currently have a statement of purposes, goals, or objectives, and has not had such a provision for most of its history.[53] Bill C-68 proposes a "Purpose" section that essentially codifies the

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[47] See *Petroleum Refinery Liquid Effluent Regulations*, CRC, c 828; *Potato Processing Plant Liquid Effluent Regulations*, CRC, c 829; *Meat and Poultry Products Plant Liquid Effluent Regulations*, CRC, c 818; *Fish Toxicant Regulations*, SOR/88-258; *Pulp and Paper Effluent Regulations*, SOR/92-269; *Metal and Diamond Mining Effluent Regulations,* SOR/2002-222; [*Metal Mining Regulations*]; and *Wastewater Systems Effluent Regulations*, SOR/2012-139.

[48] In 2018, the government repealed the *Chlor-Alkali Mercury Liquid Effluent Regulations*, CRC, c 811, which had been in place since the early 1970s, when the regulatory qualifications to the section 36 prohibitions were first enacted (see *Regulations Repealing the Chlor-Alkali Mercury Liquid Effluent Regulations*, SOR/2018-80). The "Regulatory Impact Analysis Statement" accompanying the repeal cites two reasons for the change: first, the industrial activity requiring this exemption from the section 36 prohibitions no longer deposits or releases mercury in the course of operations; and second, Canada has ratified an international convention prohibiting the use of mercury in certain industrial activities.

[49] 2013 FC 1112 [*Sandy Pond*].

[50] See *Metal Mining Regulations*, *supra* note 47.

[51] *Sandy Pond*, *supra* note 49 at paras 66–67.

[52] *Ibid* at paras 69–70. On the purposes of the *Fisheries Act*, see *Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12 at para 37, 142 DLR (4th) 193; and *Ward v Canada (Attorney General)*, [2002] 1 SCR 569 at para 38, 211 Nfld & PEIR 125.

[53] A "Purposes" section was introduced in 1985 and inexplicably repealed (effective 1987) in the same amending legislation: RSC 1985, c 35 (1st Supp), ss 2, 6, 9.

objectives recognized by the Supreme Court: "management and control of fisheries" and "conservation and protection of fish."[54]

The second aspect of *Sandy Pond* that is worth noting is the Federal Court's willingness to rely on a very literal reading of the enabling clauses without offering any further comment on the substance, or rather lack of substance, of those clauses. As far as the Court was concerned, the regulations fell within the plain wording of the section 36 qualifications, and thus nothing more could be said:

> The fact that regulations enacted pursuant to the [*Fisheries Act*] may have negative environmental consequences does not, *per se*, render those regulations invalid. Parliament legislated the provisions allowing the enactment of the Regulations in question here. There is no basis for judicial intervention. The will of the people, with respect to legislation, can be expressed at the ballot box.[55]

This statement is consistent with the very positivistic approach to the delegation of legislative power that is evident in the dated case law noted earlier.[56] As Chief Justice Duff observed in *Reference as to the Validity of the Regulations in Relation to Chemicals*, the "validity" of regulations depends solely on the pedigree linking the exercise of delegated (and even sub-delegated) law-making power to a foundational legislative enactment.[57] But the Federal Court's statement is also, with respect, facile. Democracy consists of more than a "ballot box." As discussed in Section A, democracy is an extended process of conflict resolution involving the discussion and debate of contentious public issues. This process depends, for its legitimacy, on activities that occur after elections, in the designated public forum of the legislature. A regulation under section 36 has had no benefit of discussion or debate; rather, public conflicts regarding the prioritization of resource extraction or environmental protection are avoided.

Absent a nondelegation argument grounded on unwritten constitutional principles such as democracy, the Federal Court in *Sandy Pond* may well have had no choice but to uphold the legality of the challenged regulations.[58] But the Court

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[54] Bill C-68, *supra* note 5, cl 3.

[55] *Sandy Pond*, *supra* note 49 at para 88, and see generally paras 73–88.

[56] See note 16 and surrounding text.

[57] *Chemicals Reference*, *supra* note 16 at 13. See also Duff J's discussion of the legalizing effect of an "antecedent legislative declaration" in *Gray*, *supra* note 16 at 170. On the importance of "pedigree" to legal positivism, see Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard UP, 1977) at 17–22, 39–45; and HLA Hart, *The Concept of Law*, 2nd ed (Oxford: Clarendon Press, 1994) at 263–68. Jules L Coleman maintains that "pedigree" provides a "noncontentful criterion of legality" (Jules L Coleman, "Negative and Positive Positivism" (1982) 11 J Lel Stud 139 at 140, n 1), which is precisely the approach to the legality of delegated legislative power endorsed by the Supreme Court in *Gray* and the *Chemicals Reference*.

[58] I do not argue in this paper that Canadian courts should have the power to overrule legislation on nondelegation grounds, but see (Alyn) James Johnson, "The Case for a Canadian Non-delegation Doctrine," forthcoming from the UBC Law Review. I should note that while a nondelegation argument may seem to be outside of the mainstream of Canadian legal doctrine and commentary, David Mullan, one of Canada's leading administrative law scholars, has suggested that there is "room for a re-evaluation of whether some

certainly had the authority to draw attention to the normative deficiencies of the naked enabling provisions in section 36, and to do so in strong terms, rather than simply accept the legislature's half-formed pronouncements without comment.[59] The section 36 enabling clauses (and the section 35 ones as well), are symptoms of a democratically impoverished practice of government that must be challenged by a broad array of voices – institutional and individual. Courts, legislators, media, and citizens must all participate in demanding change. The "ballot box" alone is not enough.

The Federal Court's response in *Sandy Pond* seems particularly deficient in light of the increasing tendency toward unnecessary complexity in legislative drafting, a complexity that likely renders statutes impenetrable to many observers. The Harper Amendments introduced difficult general provisions into the *Fisheries Act* offering the potential for normative guidance in the exercise of executive decision-making in certain circumstances. On careful reading, however, this guidance is less substantial than may at first appear. Bill C-68, if approved, will make the provisions in question more difficult, and arguably even convoluted.

The general normative guidance provisions in the Harper Amendments of 2012 assume the form of "Factors To Be Taken into Account":

> 6 Before recommending to the Governor in Council that a regulation be made in respect of section 35 or under paragraph 37(3)(c) or 43(1)(i.01) or subsection 43(5), and before exercising any power under subsection 20(2) or (3) or 21(1), paragraph 35(2)(b) or (c) or subsection 35(3), or under subsection 37(2) with regard to an offence under subsection 40(1) or with regard to harm to fish, the Minister shall consider the following factors:
>
> (a) the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries;
>
> (b) fisheries management objectives;
>
> (c) whether there are measures and standards to avoid, mitigate or offset serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or that support such a fishery; and

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features of the admittedly much criticized United States anti-delegation doctrine has any lessons for Canada," and Professor Mullan has further expressly endorsed nondelegation limits on "Henry VIII clauses," that is, clauses that grant executive decision-makers the power to overrule primary legislation: see David Mullan, "The Role of the Judiciary in the Review of Administrative Policy Decisions: Issues of Legality," in Mary Jane Mossman & Ghislaine Otis, eds, *The Judiciary as Third Branch of Government: Manifestations and Challenges to Legitimacy* (Montreal: Canadian Institute for the Administration of Justice, 1999) 313 at 368, n 207, 375.

[59] See the strong condemnation of the use of Henry VIII clauses in *Ontario Public School Boards' Assn v Ontario (Attorney General)* (1997), 151 DLR (4th) 346, 45 CRR (2d) 341 at paras 44–51 (Ont Ct J (Gen Div)), overruled on other grounds (1999), 175 DLR (4th) 609 (Ont CA), leave to appeal dismissed [1999] SCCA No 425. The Court of Justice's comments were made against legislation enacted by the Ontario government of Mike Harris, and were made expressly in the face of binding Supreme Court of Canada authority.

> (d) the public interest.
>
> 6.1 The purpose of section 6, and of the provisions set out in that section, is to provide for the sustainability and ongoing productivity of commercial, recreational and Aboriginal fisheries.

These provisions appear to offer legislated norms to guide the exercise of the copious executive powers conferred under the statute. Several very important observations must be made here. First, the legislature has not chosen to populate individual enabling provisions with tailored policy choices. Instead, these two external sections are introduced, and given a complex application to selected enabling provisions elsewhere in the statute. Sifting through the provisions listed in the opening part of section 6 reveals that section 36 is not included. The new policy considerations thus offer no guidance to executive decision-making under the crucial "deleterious substances" provisions. Section 35 is included, or at least appears to be included (along with several other provisions).[60] Section 6 places a mandatory "shall" requirement on Ministerial recommendations regarding Governor in Council regulations, Ministerial authorizations, and Ministerial regulations. Governor in Council decisions themselves have been left out of this wording. The following provision, as difficult as the new section 6 itself, offers some clarification for this omission:

> 43.1 Orders and regulations under subsections 4.2(1) and (3), 34(2), 36(5) and (5.1), 37(3) and 38(9) and section 43 are made on the recommendation of the Minister or, if they are made for the purposes of and in relation to the subject matters set out in an order made under section 43.2, on the recommendation of the minister designated under that section.

Laborious examination reveals that all of the Governor in Council regulation-making powers in respect of section 35 fall under the enumerated section 43. Thus, by extension, the mandatory "shall" requirement imposed by section 6 on Ministerial recommendations will in effect apply to a Governor in Council regulation under section 35. (Section 36 remains immune from section 6, even though it is included in section 43.1). But why draft provisions in such a difficult fashion? Courts and citizens must hunt through diverse parts of the statute to determine what applies and where. Situating all of the relevant information within section 35 – tailoring the policy guidance to the actual enabling provisions – would greatly assist in clarity. Indeed, if "Factors To Be Taken into Account" are to be introduced into the legislation, why would they not apply across the board to all exercises of executive power? A clearer mode of drafting would either make all decisions subject to a global policy guidance provision, or tailor policy guidance to individual sections. Sections 6 and 43.1 follow neither of these clear options, and instead introduce needless complexity into the legislation. It will be seen below that Bill C-68 increases this complexity substantially.

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[60] The other provisions cited in section 6 deal with obstructions to the passage of fish (section 20), devices to prevent fish escaping from breeding grounds (section 21), providing information to the Minister (section 37), certain offences (section 40), and regulations excluding fisheries from the ambit of various provisions, including section 35 (sections 43(1)(i.01) and 43(5)).

Keeping the focus on section 35 for now, can it be said that the combination of section 6 and section 43.1 places a leash on all relevant exercises of executive discretion? Perhaps not, for the following two paragraphs appear to remain untouched:

> 35 (2) A person may carry on a work, undertaking or activity without contravening subsection (1) if
>
> […]
>
> (d) the serious harm is produced as a result of doing anything that is authorized, otherwise permitted or required under this Act; or
>
> (e) the work, undertaking or activity is carried on in accordance with the regulations.

Provided that a work or undertaking can find its authorization outside of section 35 or is consistent with regulations made elsewhere, the "Factors To Be Taken into Account" under section 6 will make no difference.

Attention must also be directed to the scope of the "factors" themselves. In theory, making the consideration of certain relevant factors mandatory offers a normative structure for decision making. For theory to become practice, however, the factors themselves must be relatively concrete, and must do more than simply restate the basic competing policy considerations at work in a given area of decision making. To what extent are meaningful policy choices brought into the legislation and applied to keep executive discretion under section 35 in check? Arguably only two of the section 6 factors are concrete enough to apply:

> (a) the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries;
>
> (b) fisheries management objectives;
>
> (c) whether there are measures and standards to avoid, mitigate or offset serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or that support such a fishery; and
>
> (d) the public interest.

In many cases it will be possible to determine whether the fish in question contribute to a fishery or not (paragraph (a)), and whether there are "measures or standards" in place (paragraph (c)). On the other hand, factor (b), "fisheries management objectives," is extremely vague. Indeed, in *Sandy Pond* fisheries management was broad enough to encompass toxic mining regulations. Factor (d) is even more vague. The "public interest" is too elastic to constitute a meaningful policy choice by the legislature. The "public interest" could capture a new pipeline or pulp mill, or, conversely, protecting fish from such a venture. It is arguable that the section 6 factors do little more than state the obvious: any responsible decision under the *Fisheries Act* must balance commercial and conservation goals, and this balancing must be in the

public interest. In the absence of some prioritization of factors, there is no legislative choice, and no meaningful normative structure.

The mandatory requirements imposed on the Minister by section 6 essentially create a checklist, and a failure to check off each factor on some level will leave a resulting executive decision vulnerable to judicial review. On review, the deferential reasonableness standard will apply.[61] Thus, the end result of the new section 6 is to ensure that decisions under section 35 (but not section 36) take reasonable account of the four factors listed. None of the individual factors is determinative. They must be reasonably considered. A checklist, it must be said, is not a policy choice. It is a requirement for slightly constrained but nevertheless largely *ad hoc* decision-making. The courts have not yet clarified what effect sections 6 and 6.1 will have on executive policy making.[62]

This legislative approach (mandating a checklist) may be preferable to the policy void that existed prior to 2012, but nevertheless leaves much to be desired due to under-inclusiveness (no application to the crucial section 36), complexity, and the vagueness of the various listed factors. Under Bill C-68, the shortcomings of section 6 are not remedied. Here is the proposed revision of the section 6 "factors":

> 34.1 (1) Before recommending to the Governor in Council that a regulation be made in respect of section 34.4, 35 or 35.1 or under subsection 35.2(10), 36(5) or (5.1), paragraph 43(1)(b.2) or subsection 43(5) or before exercising any power under subsection 34.3(2) or (3), paragraph 34.4(2)(b) or (c), subsection 34.4(4), paragraph 35(2)(b) or (c) or subsection 35(4), 35.1(2), 35.2(7) or 36(5.2), or under subsection 37(2) with regard to an offence under subsection 40(1), the Minister, prescribed person or prescribed entity, as the case may be, shall consider the following factors:
>
> (a) the contribution to the productivity of relevant fisheries by the fish or fish habitat that is likely to be affected;
>
> (b) fisheries management objectives;
>
> (c) whether there are measures and standards
> (i) to avoid the death of fish or to mitigate the extent of their death or offset their death, or
>
> (ii) to avoid, mitigate or offset the harmful alteration, disruption or destruction of fish habitat;
>
> (d) the cumulative effects of the carrying on of the work, undertaking or activity referred to in a recommendation or an exercise of power, in combination with other works, undertakings or activities that have been or are being carried on, on fish and fish habitat;

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[61] *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51, 53.

[62] The one decision that briefly considers these provisions involves enforcement: *R c Ministère du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques (MDDELCC)*, 2018 QCCQ 5714.

> (e) any fish habitat banks, as defined in section 42.01, that may be affected;
>
> (f) whether any measures and standards to offset the harmful alteration, disruption or destruction of fish habitat give priority to the restoration of degraded fish habitat;
>
> (g) Indigenous knowledge of the Indigenous peoples of Canada that has been provided to the Minister; and
>
> (h) any other factor that the Minister considers relevant.[63]

The opening part of this new section is even more complicated than the predecessor section 6. The number of subject provisions has increased substantially, creating challenges for citizens, lawyers, courts, and executive officials alike. The question noted earlier must be asked again. What is the purpose of this level of complexity in legislative drafting? Why not introduce global requirements that apply across the board to all decision-makers, or introduce tailored normative considerations into individual sections? If the purpose of the provision is to introduce accountability and provide legislative control over executive decision-makers, why the cherry-picking?

The new list itself does contain several considerations that increase the emphasis on environmental protection. The insertion of "fish habitat" into the language at several points is significant, for as noted previously, "fish habitat" extends further into waters than the "fishery" focus of the Harper Amendments. Paragraph (d) also brings a more sustained environmental consideration into the factors by mandating a consideration of the "cumulative" impact of works and undertakings on fish and "fish habitat." Paragraph (g) may signal a policy choice, for the Minister is now required to consider information brought forward regarding relevant "traditional knowledge" of Indigenous peoples.[64] However, these new considerations, like the existing section 6 factors, are quite vague. Additionally, on the vagueness front, the elastic "fisheries management objectives" factor is unchanged (paragraph (b)), and there is also a new basket clause speaking to "any other factor that the Minister considers relevant" (paragraph (h)).

Bill C-68 ultimately offers an expanded but still unprioritized list. Commercial considerations ("productivity") are set beside conservation considerations ("harmful alteration, disruption or destruction of fish habitat"). Again, none of the factors is determinative. On judicial review, the Minister will be required, on a standard of reasonableness, to established that he or she considered the factors. There is still plenty of room for a Minister to consider all the factors and nevertheless make a decision that strongly favours industrial interests (say approving a pipeline),

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[63] Bill C-68, *supra* note 5, cl 21. The existing section 6 is repealed: *ibid*, cl 8.

[64] While Bill C-68 makes several attempts to recognize Indigenous peoples and interests (see, for example, cls 3, 5, 6), none of the new provisions appear to offer Indigenous peoples veto power over executive decision-making, or even a substantial voice in such decisions.

or strongly favours conservationist interests (say rejecting a pipeline). The legislature has not made a clear policy choice. That pressing task is still avoided.

One of the most important changes under the new "factors" provision is the inclusion of the crucial section 36. It will be remembered that under section 43.1 (which is unchanged under the proposed amendments), Governor in Council regulations under subsection 36(5) are made on the recommendation of the Minister. The opening language of the proposed subsection 34.1(1) thus makes Governor in Council regulations under section 36 reviewable (via the Ministerial recommendation) on the basis of the enumerated factors. Ministerial regulations will also be reviewable.

Despite the vagueness and ultimate indeterminacy of the new factors, adding any hint of normativity to the powerful section 36 qualifications can be seen as an improvement from the perspective of both environmental protection and legislative governance. Bill C-68 appears to offer the possibility for judicial review of regulations under section 36 that can extend beyond the slim legality inquiry provided by the Federal Court in *Sandy Pond*. However, the complex style of legislative drafting used in Bill C-68, as in the Harper Amendments, is tricky, and could frustrate judicial control of section 36 decision-making. The following qualification to subsection 34.1(1) may be of the utmost importance:

> 34.1(2) The obligation to consider the factors set out in subsection (1) applies only to the recommendations and powers that continue to be made or exercised by the Minister after an order is made under subsection 43.2(1) that sets out the powers, duties or functions that the designated minister may exercise or perform.[65]

Subsection 43.2(1) in the current legislation (not to be changed under Bill C-68) reads as follows:

> The Governor in Council may, on the recommendation of the Minister and any other federal minister, by order, designate that other minister as the minister responsible for the administration and enforcement of subsections 36(3) to (6) for the purposes and in relation to the subject-matters set out in the order.

Putting these provisions together leads to an alarming conclusion. The "Minister" under the *Fisheries Act* is the Minister of Fisheries and Oceans. Pursuant to proposed subsection 34.1(2), any powers involving the "administration and enforcement of subsections 36(3) to (6)" that are transferred to a "designated minister" under existing subsection 43.2(1) will be immune to subsection 34.1(1). Due to the convoluted drafting strategies of both the Harper Amendments and Bill C-68, in other words, it is not clear to what extent the crucial section 36 Ministerial powers can be sidestepped by a simple designation. There is currently a subsection 43.2(1) Order in force

[65] *Ibid*, cl 21.

transferring Ministerial powers under section 36 to the Minister of the Environment.[66] It remains to be seen whether Bill C-68's extension of mandatory "factors" to the section 36 Ministerial recommendation and regulation-making powers will survive future designations.

In addition to the section 34.1 revision of the existing section 6 factors, Bill C-68 contains two other provisions that offer the promise of general normative guidance to executive decision-making. Perhaps most significant is section 2.4:

> When making a decision under this Act, the Minister shall consider any adverse effects that the decision may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*.[67]

This directive essentially restates the procedural limitations on ministerial decision-making arising under the common law duty to consult.[68] However, a mandatory statutory expression of this duty is arguably quite important because, in adding a legislative imperative to the existing constitutional imperative, any failure by the Minister to take into account relevant Indigenous rights can be challenged on administrative as well as constitutional law grounds. In certain circumstances, an administrative law challenge may prove easier to make.[69] Having said that, the provision clearly does not go so far as to give Indigenous peoples any control over the substance of executive decision-making.

Finally, Section 2.5 of Bill C-68 offers, like proposed section 34.1, a set of general considerations to structure executive decision-making:

> Except as otherwise provided in this Act, when making a decision under this Act, the Minister may consider, among other things,
>
> (a) the application of a precautionary approach and an ecosystem approach;
>
> (b) the sustainability of fisheries;
>
> (c) scientific information;
>
> (d) Indigenous knowledge of the Indigenous peoples of Canada that has been provided to the Minister;
>
> (e) community knowledge;

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[66] "Order Designating the Minister of the Environment as the Minister Responsible for the Administration and Enforcement of Subsections 36(3) to (6) of the *Fisheries Act*," SI/2014-21.

[67] Bill C-68, *supra* note 5, cl 3.

[68] On the duty to consult, see *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.

[69] An administrative law challenge may be cheaper, faster, and less complex than a constitutional law challenge.

> (f) cooperation with any government of a province, any Indigenous governing body and any body — including a co-management body — established under a land claims agreement;
>
> (g) social, economic and cultural factors in the management of fisheries;
>
> (h) the preservation or promotion of the independence of licence holders in commercial inshore fisheries; and
>
> (i) the intersection of sex and gender with other identity factors.[70]

In some crucial respects, this provision is preferable to section 34.1. First, section 2.5 is global – it is simple to apply, unlike the convoluted language limiting the application of section 34.1. Second, it invokes two very important environmental concepts – the precautionary principle and ecosystems – and references scientific information and "community knowledge." Bringing these concepts and resources into executive decision-making under the *Fisheries Act* can be counted as a genuine improvement over the narrower focus of the Harper Amendments. However, there are three obvious drawbacks to section 2.5. Most important, the language is permissive ("may"), unlike the mandatory "shall" of section 34.1.[71] Thus any advance here, as far as both legislated choices and environmental protection are concerned, is heavily muted. A second problem with section 2.5 is that it does not touch Governor in Council decision-making. Finally, this remains an unprioritized list: the competing considerations evident in this complex area of public policy are ultimately stated, not organized. The policy choice is not made by the legislature – it is left for others.

Comparing section 2.5 with section 34.1 suggests a fundamental failure of legislated normative guidance in Bill C-68. Section 2.5 offered an opportunity to impose forceful environmental constraints on decision-making under the *Fisheries Act*. Yet the legislature proved unable to make this a determined policy choice, and opted instead to offer only loose guidance ("may"), leaving maximal room for executive discretion. Meanwhile, the mandatory directives ("shall") under section 34.1 are shrouded in convoluted language and lack precision. The ideal approach would be either a clearly worded and mandatory global directive, capturing all decision-making and specifying legislative choices, or, conversely, express choices built right into the provisions qualifying sections 35 and 36.

## Conclusion

Since the 1970s, the dominant strategy of the *Fisheries Act* (and particularly the crucial environmental protection provisions of sections 35 and 36) has been broad and normless delegations of power to executive decision-makers. This practice of government eviscerates democracy by denying citizens the opportunity to carefully

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[70] Bill C-68, *supra* note 5, cl 3.

[71] David Boyd observes, of Canadian environmental legislation generally, that the use of permissive instead of mandatory language can "transform potentially effective laws and regulations into paper tigers" (*supra* note 24 at 231).

discuss and debate detailed legislative initiatives in the public forum of the legislature. Instead of bringing citizens, through their representatives, into the decision-making process, the legislation has functioned through bureaucrats, experts, and Cabinet-level politicians operating out of sight. The costs of this form of legislation are enormous. In addition to weakening democracy, the details of environmental decision-making are kept away from the public. Citizens are not effectively educated about what goes on under the statute, and what could go on under the statute. How many Canadians are aware that toxic substances can be lawfully deposited into our waterways pursuant to regulations under the *Fisheries Act*? How many Canadians would support such laws if they were clearly stated in the legislation itself? Naked enabling provisions leave citizens out of the process of governance. This is undemocratic. It is also unstable. Regulatory initiatives can be easily changed, without the need for legislative amendments, when broad enabling provisions contain no normative guidance.

It is worth recalling the words of the Federal Court in *Sandy Pond*: "The will of the people, with respect to legislation, can be expressed at the ballot box." The "ballot box," however, is emptied of much of its promise when legislatures abdicate their law and policy-making responsibilities.