Bill C-68
An Act to amend the Fisheries Act and other Acts in consequence

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“The court is, however, entitled, and indeed required, to examine the interrelationship of federal and provincial legislation if it appears that Parliament has incorporated provincial enactments into its own legislation in an effort to “colour” (to adopt the language of the Privy Council) it so as to enter a field which, by our constitution, rests solely within the legislative competence of the provinces. In other words, Parliament cannot do indirectly, with provincial aid, what it could not have done directly.”

“As was stated by Taschereau J. in Attorney General of Nova Scotia v. Attorney General of Canada[11], at p. 40:

It is a well settled proposition of law that jurisdiction cannot be conferred by consent.

If the Parliament of Canada cannot find justification for its legislation in the British North America Act, consent or acquiescence in the adoption of a statute by Parliament, either individual consent or consent obtained through the operation of provincial legislation, cannot provide the missing jurisdiction and authority.”

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1 Dominion Stores Ltd. v. R., [1980] 1 S.C.R. 844
2 Dominion Stores Ltd. v. R., [1980] 1 S.C.R. 844
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I have always been of the opinion that Committees, Tribunals, Courts and the like are not for opinion but are to support the fundamental foundations of law and the constitution. Not being a lawyer, I do not present "legal opinions" nor do I express legal advice. I merely express research but there are some instances where a certain amount of emotion and opinion surface. This is one of those times.

For nearly a decade I have been the Director of Research for the Ontario Landowners Association, member of the Canadian Justice Review Board, etc. In that time, on a daily basis, we, in the OLA, have received call after call from people, throughout Ontario and even other provinces, looking for help because some government entity was taking their right to their land; their homes; their ability to make a living. These takings have all been done under the guise of the "public interest" or for purported "environmental protection."

We have people calling in tears that they are losing their homes because they built their homes in purported environmentally significant wetlands or a flood plain even though there are homes of either side of their property, same grade, same criteria of land. We have had people contact us because the Department of Fisheries is demanding permits from farmers to remove dead fish from their fields after a flood. This is what we, in the Ontario Landowners Association, deal with daily and this is wrong. In fact, it is so wrong on so many levels that now it has reached a point of systemic proportions. Some are told to get a lawyer and yet they can’t afford a lawyer. Or if they do obtain legal counsel the Courts fail to uphold justice by issuing orders – orders that contradict the very foundation of society and humanity as well as the fundamental rights of Canadians.

The people on these Committees, Tribunals, Courts and the like have little fear that they will ever be subjected to these egregious acts from enforcement because of the positions they maintain and that is why these entities are failing the people. Canada, at one time, based on court rulings and historical research, was a country that believed in justice, good law, and equity in the Courts. We cannot rely on that any longer because the law makers in this country seem to have lost sight of what made Canada such a great nation. And so, people, such as those in the Ontario Landowners Association, will continue to try and help the people because, it would seem, those we look to, as Canadians, are not.

"The rule is the public good is always paramount but never when it is at the expense of a private individual."3

3 Mr. Gisborn, Ontario Legislative Assembly, February 11, 1965 Volume 1, Page 478
Introduction

"The rule is the public good is always paramount but never when it is at the expense of a private individual."\(^4\)

In light of recent events perhaps it’s time government, of all levels, cease in their attempts to bull-doze over the fundamental principles of our Constitution. From reading Bill C-68 - *An Act to amend the Fisheries Act and other Acts in consequence*, it would seem the Federal government is attempting to (i) violate the constitution by artificially extending its jurisdiction in contradiction to its constitutional limits, and (ii) do indirectly what it cannot do directly.

In 2016 there was a document created entitled: "The Fisheries Act as an Environmental Protection Statute," in coordination with the Canadian Institute of Resources Law, Dalhousie University – Schulich School of Law, Dalhousie University – Marine & Environmental Law Institute and the Ministry of Environment and Climate Change Canada. This should be very concerning to all Canadians as it would seem the Department of Fisheries was not included in this document. It should also be concerning to Canadians, as yet again, the federal government seems to be going beyond the mandate established under its constitutional jurisdiction.

This raises a number of questions to be asked regarding Bill C-68 - *An Act to amend the Fisheries Act and other Acts in consequence*. Considering the *Fowler v. The Queen*, [1980] 2 SCR 213, 1980 CanLII 201 (SCC) case, etc.

1. Does the Federal government have the constitutional jurisdiction to implement this amendment?
2. Is this a violation of constitutionally protected private property rights?
3. Is this the federal government attempting to do “indirectly” what it cannot do “directly” by placing environmental requirements in an act which the intent of the act was merely to protect from the exploitation of fish stocks, specify the equipment that can be used in a fishery and not allow interference with navigation, and is the federal government attempting to artificially create and/or expand its jurisdiction?
4. What are some of the more systemic problems with Bill C-68?

It could be concluded that the Federal Government does not have constitutional jurisdiction to expand environmental protection through the *Fisheries Act* as this is in violation of provincial jurisdiction as well as a violation of private rights.

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\(^4\) Mr. Gisborn, Ontario Legislative Assembly, February 11, 1965 Volume 1, Page 478
established under common law, the *Constitution Act, 1867* (British North America Act, 1867) and the Letters Patent/Crown Grant.

Other issues with this amendment and why the previous government had amended it, to make it less repugnant, was the issue of flood victims having to obtain licences to remove fish from their property after a flood. This amendment would in all probability cause the same situations.

CNEWS - MAY 27, 2011
Flooded-out farmer needs permit to remove fish By QMI Agency
SABREVOIS, Que. - Bureaucrats have added insult to injury for a corn farmer south of Montreal whose fields have been damaged by near-record flooding.

Martin Reid says he's been forced to buy a fishing licence to remove carp that are swimming in a metre of water on his flooded-out fields. He says he bought the permit to avoid the problems he faced the last time he was forced to remove fish from his flooded farmland. In 1993, Reid was fined $1,000 for illegal fishing. "My father and I ... were charged by Fisheries and Oceans Canada," Reid recalled. "We were jointly responsible for having caused the death of fish for reasons other than sport fishing."

Reid says the fine will jump to $100,000 if he's cited a second time. He's under strict orders to safeguard the lives of the carp once he begins to expel them. "We have to collect all of them, and we have to fish both sexes, that's what (the permit) says," Reid explained. "I have to transport them so as not to damage them, by containers with water inside. If some of them die, I have to bury them."

What's more, his permit expires in two weeks even though floodwaters have yet to recede. A spokesman for the provincial natural resources department defended Ottawa's decision. "The idea is to help farmers," said Jean-Philippe Detolle. "The licence was issued to reassure them they won't be fined."

Quebec's wildlife minister, Serge Simard, also defended the decision to fine Reid and his father during the 1993 flood. "He was pumping water," said the minister. "The fish passed through the pumps and came out in pieces. The neighbours complained because it was contaminating the environment."

Reid, a third-generation farmer, says the government's demands are unacceptable, especially given the severe crop damage that he has yet to fully assess. "If we wanted to challenge it we would have to sue the federal government and pay lawyers," he said. "The legal process could drag on for five years."5

In finishing reading the amendment (Bill C-68) to the *Fisheries Act* one may come to the conclusion that the entire amendment is (i) the Federal government attempting to do indirectly what it cannot do directly, (ii) the Federal government is attempting to artificially extend its jurisdiction beyond its constitutional limits,

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5 http://canfirearms.ca/archives/text/v14n400-499/v14n473.txt
and (iii) the Federal government is attempting to place the subservient Minister above, the entity which created the Ministry in the first place, that being the Governor General, Canada’s Sovereign representative. This may place the Crown, Parliament, the Senate and the Judiciary in disrepute.
1. Does the Federal government have the constitutional jurisdiction to implement this amendment?

The Federal government, to some extent, must have jurisdiction but, and there is always a “but,” it cannot over-extrude its jurisdiction. There are a number of things which must be taken into consideration when establishing that jurisdiction and whether the Federal government is, perhaps, attempting to extend it too far.

Firstly, there needs to be specific definitions as to what water, land, and letters patent/Crown grants, environment, fee-simple, etc., actually are.

ENVIRONMENT – noun [Fr. environement, from environner, to surround.]
1. A surrounding or being surrounded. 2. Something that surrounds; surroundings. 3. All the conditions, circumstances, and influences surrounding, and affecting the development of, an organism or group of organisms; often contrasted with heredity.\(^6\)

HEREDITY - Definition of heredity in English: Noun - [mass noun] 1. The passing on of physical or mental characteristics genetically from one generation to another: the relative influence of heredity and environment. Oxford on line dictionary.\(^7\)

FEE SIMPLE –An interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs; esp., a fee simple absolute. – Often shortened to fee. “Fee simple. Originally this was an estate which endured for as long as the original tenant or any of his heirs survived. ‘Heirs’ comprised any blood relations, although originally ancestors were excluded; not until the Inheritance Act 1833 could a person be the heir of one of his descendants. Thus at first a fee simple would not terminate if the original tenant died without leaving any descendants or collateral blood relations (e.g. brothers or cousins), even if before his death the land had been conveyed to another tenant who was still alive. But by 1306 it was settled that where a tenant in fee simple alienated the land, the fee simple would continue as long as there were heirs of the new tenant and so on, irrespective of any failure of the original tenant’s heirs. Thenceforward a fee simple was virtually eternal.” Robert E. Megarry & M.P. Thompson, A Manual of the Law of Real Property 24-25 (6th ed. 1993).

FEE SIMPLE ABSOLUTE – An estate of indefinite or potentially infinite duration (e.g. Albert and his heirs"). – Often shortened to fee simple or fee. Also termed fee simple absolute in possession. “Although it is probably

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\(^7\) http://www.oxforddictionaries.com/definition/english/heritage
good practice to use the word ‘absolute’ whenever one is referring to an estate in fee simple that is free of special limitations, conditions subsequent, or executory limitation, lawyers frequently refer to such an estate as a ‘fee simple’ or even as a ‘fee’. Thomas F. Bergin & Paul G. Haskell. Preface to Estates in Land and Future Interests 24 (2d ed. 1984).

FREE SOCAGE – Socage in which the services were both certain and honorable. By the statute 12 Car. 2. ch. 24 (1660), all tenures by knight service were, with minor exceptions, converted into free socage. Also termed free and common socage; liberum socagium.

FREEHOLD – Such an interest in lands of frank-tenement as may endure not only during the owner’s life, but which is cast after his death upon the persons who successively represent him, ... Such persons are called heirs, and he whom they thus represent, the ancestor. When the interest extends beyond the ancestor’s life, it is a freehold of inheritance, and when it only endures for the ancestor’s life, it is a freehold not of inheritance. An estate to be a freehold, must possess these two qualities: 1. Immobility, that is, the property must be either land, or some interest issuing out of or annexed to land; and, 2. a sufficient legal indeterminate duration; for if the utmost period of time to which an estate can endure be fixed and determined , it cannot be a freehold.

FREEHOLD – Freehold is used in the common law to denote both the tenure by which an estate is held, and the estate itself. 1 Steph. Com. 197, note (e). Id. 217, note (/).

As a tenure, it was called free to distinguish it from villeinage Bract. fol. 207. It is equivalent to tenure in free socage, and is the opposite of copyhold in modern English law. 1 Steph. Com. 197. As an estate, it seems originally to have properly denoted an estate of inheritance; an estate for life being, according to Bracton, only a quasi freehold. Freehold is that which one holds to him and his heirs, in fee, and inheritance; or in fee only, to him and his heirs. Also as freehold, as for life only, or in the same way for an indeterminate period, without any fixed limitation of time. Bract. fol. 207.

FREEHOLD IN LAW, is where lands or tenements are descended to a man, and he may enter into them when he will; before his entry he has a freehold in law; after entry, he has a freehold in deed or fact.

“Freehold tenure is without any incidents or obligations for the benefit of the Crown. All lands granted by the Crown in fee simple are granted in free and common socage - freehold tenure.

A fee simple may be transferred without licence or fine and the new owner holds from the Crown in the same manner as the previous tenant held from the Crown.”

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LAND – 1. An immovable and indestructible three-dimensional area consisting of a portion of the earth’s surface, that space above and below the earth’s surface, and everything growing on or permanently affixed to it.

2. An estate or interest in real property.

“In its legal significance, ‘land’ is not restricted to the earth’s surface, but extends below and above the surface. Nor is it confined to solids, but may encompass within its bounds such things as gases and liquids. A definition of ‘land’ along the lines of ‘a mass of physical matter occupying space’ also is not sufficient, for an owner of land may remove part or all of that physical matter, as by digging up and carrying away the soil, but would nevertheless retain as part of his ‘land’ the space that remains. Ultimately, as a juristic concept, ‘land’ is simply an area of three-dimensional space, its position being identified by natural or imaginary points located by reference to the earth’s surface. ‘Land’ is not the fixed contents of that space, although, as we shall see, the owner of that space may well own those fixed contents. Land is immovable, as distinct from chattels, which are moveable; it is also, in its legal significance, indestructible. The contents of the space may be physically severed, destroyed or consumed, but the space itself, and so the ‘land’, remains immutable.”

LAND – In its restrained sense means soil, but in its legal acceptation it is a generic term, comprehending every species of ground or earth, as meadows, pastures, woods, moors, water, marshes, furze, and heath; it includes also messuages (i.e. dwelling houses, with some adjacent land assigned to the use of them, usually called curtilage), tofts (i.e. places where houses formerly stood), crofts (derived from the old English word creaf, meaning handy-craft, …they are small enclosures for pasture, &c., adjoining to dwelling houses), mills, castles, and other buildings, for with the conveyance of the land, the structures upon it pass also. And besides an indefinite extent upwards, it extends downwards to the globe’s centre, hence the maxim: - Cufus est solum ejus est suque ad caelum et ad inferos….

Water, by a solecism, is, in legal language, held to be a species of land; and yet it is to be observed, that a grant of a certain water will not convey soil, but only a right of fishing; but it is doubtful whether, by the grant of a several piscary, the soil passes or not, or, in other words, whether a person can have a several fishery without being owner of the soil…And in order to recover possession of a pool or rivulet of water, the action must be brought for the land, e.g., ten acres of land, covered with water, and not in the name of water only.

LETTERS PATENT: Guide to the Federal Real Property Act “writing of the sovereign, sealed with the Great Seal, whereby a person or company is

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entitled to do acts or enjoy privileges which could not be done or enjoyed without such authority.”

A letter or document from someone in authority (Crown or Nobility, etc.) use to record an agreement, contract, a command, endow a right, privilege, title, property, etc., granting a sole right [RIGHT – 1. That which is proper under law, morality, or ethics. 2. Something that is due to a person by just claim, legal guarantee, or moral principle. 3. A law <the right to dispose of one’s estate>. 4. A legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is a wrong. 5. The interest, claim, or ownership that one has in tangible or intangible property.]

**RIGHT** – [recht, Germ. and Tent., rito, Ital., rectus, Lat. The application of the same word to denote a straight line and moral rectitude of conduct, has obtained in every language I know. Dugald Stuwart], in its primitive sense, that which the law directs: in popular acceptation, that which is so directed for the protection and advantage of an individual, is said to be his right. 1 Stark. Evid. 1, n. (b). Dictionary of Jurisprudence, J.J.S. Wharton, Esq., 1847-48, pg. 593-594]to something. Also see Crown land patent: Private property patented land that is privately owned.

**LETTERS PATENT** - [L. Lat. Literes patentes; L. Fr. lettres overttes, open letters.] The modern form of royal grants in England; called patent, that is open, because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom, and are usually directed or addressed by the king to all his subjects at large; differing in this respect from letters close, which are directed to particular persons, and for particular purposes, and are therefore closed up and sealed on the out side. 2 Bl. Com. 346. See Hubback’s Evid. of Succession, 616, et seq.

**WATER** – A species of land. An action cannot be brought to recover possession of a pool or other piece of water by the name water only, but it must be brought for the land that lies at the bottom, as twenty acres of land covered in water.

The words “Crown Grant” and “Letters Patent,” in some instances, are interchangeable. And to understand the Letters Patent as it operates with the Prerogative – it is best explained by Chitty on the Prerogative. The general rule expressed by Joseph Chitty, Esq., on Prerogative, ch. 16, sec. 3, 393:

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17 http://www.duhaime.org/LegalDictionary/A/AbAbsurdo.aspx

18 New Law Dictionary: and Glossary: Containing Full Definition of The Principal Terms of the Common and Civil Law, ...Compiled on the basis of Spelman’s Glossary, By Alexander M. Burrill, Counsellor at Law, p. 672.

“In ordinary cases, between subject and subject, the principle is that the grant shall be construed, if the meaning be doubtful, most strongly against the grantor, who is presumed to use the most cautious words for his own advantage and security; but, in the case of the king, whose grants chiefly flow from his royal (781), grace and bounty, the rule is otherwise; and 440] crown grants have at all times *been construed most favorably for the king, where a fair doubt exists as to the real meaning of the instrument.

But there are limitations and exceptions even to this rule:

1st. No strained or extravagant construction is to be made in favor of the king; if the intention be obvious, royal grants are to receive a fair and liberal interpretation.

2nd. The construction and leaning shall be in favor of the subject, if the grant show that it was not made at the solicitation of the grantee; but ex speciali gratia certa scientia, et mero motu reigs. (10 Coke, 112; Comyn. Dig., Grant, C. 12.)

3rd. If the king’s grants are upon a valuable consideration, they shall be construed strictly for the patentee.”

In 1896 the Supreme Court of Canada, bound by the Robertson case,20/21/22 ruled, in Re Provincial Fisheries (1896) 26 SCR 444, on the following questions, of which the short concluding answers are included. The questions presented from the Reference are only those that pertain to the present situation.

1.—Did the beds of all lakes, rivers, public harbours, and other waters, or any and which of them, situate within the territorial limits of the several provinces and not granted before confederation, become under the British North America Act the property of the Dominion or the property of the province in which the same respectively are situate? And is there in that respect any and what distinction between the various classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes, such as Lakes Superior, Huron, Erie, &c., and other lakes, or the so-called great rivers, such as the St. Lawrence River, the Richelieu, the Ottawa, &c., and other rivers, or between waters directly and immediately connected with the sea-coast and waters not so connected, or between other waters and waters separating (and so far as they do separate) two or more provinces of the Dominion from one another, or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a foreign nation?

Answer: To the 1st Question: The beds of the waters referred to in this question did not become the property of the Dominion, but, "subject to any trusts existing in respect thereof, and to any interest other than that of the

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21 Supreme Court of Canada. The Queen v. Robertson (1882) 6 SCR 52.
22 In Re Provincial Fisheries, 26 SCR 444, 1896 CanLII 76 (SCC), Elson v. Canada (Attorney General), 2017 FC 459 (CanLII)
province in the same, and subject also to the regulations of the Parliament of Canada respecting "sea-coast and inland fisheries," "trade and commerce," and "shipping and navigation," remain the property of the province in which the same are situate, without any distinction between the various classes of waters, and without any exception whatever, save the exceptions contained in sections 108 and 117 of the British North America Act.

3.—If ..., in case the bed and banks of a lake or navigable river belong to a province, and the province makes a grant of land extending into the lake or river for the purpose of there being built thereon a wharf, warehouse or the like, has the grantee a right to build thereon accordingly, subject to the work not interfering with the navigation of the lake or river?

Answer: To the 3rd Question: Yes.

23 Property in Lands, Mines, etc.
109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same. British North America Act, 1867.

"56. All lands, mines, minerals and royalties vested in Her Majesty in the Provinces of Upper Canada, Lower Canada, Nova Scotia, New Brunswick and Prince Edward Island, for the use of such Provinces, shall belong to the Local Government of the territory in which the same are so situate; subject to any trusts that may exist in respect to any of such lands or to any interest of other persons in respect of the same." 1864 Quebec Conference, The Seventy-Two Resolutions, [authenticated October 29, 1864]

24 Transfer of Property in Schedule
108. The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada.

THE THIRD SCHEDULE
Provincial Public Works and Property to be the Property of Canada
1. Canals, with Lands and Water Power connected therewith.
2. Public Harbours.
3. Lighthouses and Piers, and Sable Island.
4. Steamboats, Dredges, and public Vessels.
5. Rivers and Lake Improvements.
6. Railways and Railway Stocks, Mortgages, and other Debts due by Railway Companies.
8. Custom Houses, Post Offices, and all other Public Buildings, except such as the Government of Canada appropriate for the Use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government, and known as Ordnance Property.
10. Armouries, Drill Sheds, Military Clothing, and Munitions of War, and Lands set apart for general Public Purposes.

25 Provincial Public Property
117. The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country.
4.—In case the bed of a public harbour, or any portion of the bed of a public harbour, at the time of confederation had not been granted by the Crown, has the province a like jurisdiction in regard to the making a grant as and for the purpose in preceding paragraph stated, subject to not thereby interfering with navigation, or other full use of the harbour as a harbour, and subject to any Dominion legislation within the competence of the Dominion Parliament?

Answer: To the 4th Question: No.

5.—Had riparian proprietors before confederation an exclusive right of fishing in non-navigable lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown?

Answer: To the 5th Question: Yes.

6.—Has the Dominion Parliament jurisdiction to authorize the giving by lease, license, or otherwise, to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

Answer: To the 6th Question: No.

7.—Has the Dominion Parliament exclusive jurisdiction to authorize the giving by lease, license, or otherwise, to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

Answer: To the 7th Question: Same answer. (No.)

8.—Has the Dominion Parliament such jurisdiction as regards navigable or non-navigable waters, the beds and banks of which are assigned to the provinces respectively under the British North America Act, if any such are so assigned?

Answer: To the 8th Question: Same answer. (No.)

9.—If the Dominion Parliament has such jurisdiction as mentioned in the preceding three questions, has a provincial legislature jurisdiction for the purpose of provincial revenue or otherwise to require the Dominion lessee, licensee or other grantee to take out a provincial license also?

Answer: To the 9th Question: The Dominion has no such jurisdiction, as already stated.
11.—Had the Dominion Parliament jurisdiction to pass …, so far as these respectively relate to fishing in waters, the beds of which do not belong to the Dominion and are not Indian lands?

Answer: To the 11th Question: Same answer. (No.)

12.—If not, has the Dominion Parliament any jurisdiction in respect of fisheries, except to pass general laws not derogating from the property in the lands constituting the beds of such waters as aforesaid, or from the rights incident to the ownership by the provinces and others, but (subject to such property and rights) providing in the interests of the owners and the public, for the regulation, protection, improvement and preservation of fisheries, as, for example, by forbidding fish to be taken at improper seasons, preventing the undue destruction of fish by taking them in an improper manner, or with improper engines, prohibiting obstructions in ascending rivers and the like?

Answer: To the 12th Question: The jurisdiction of the Dominion is limited to the passing of such general laws.

13.—Had the legislature of Ontario jurisdiction to enact the 47th\(^{26}\) section of the Revised Statutes of Ontario, chapter 24, intituled "An Act respecting the sale and management of Public Lands," and sections 5 to 13,\(^{27}\) both

\(^{26}\) 47. It has been heretofore, and it shall be hereafter lawful for the Lieutenant-Governor in Council to authorize sales or appropriations of land covered with water in the harbours, rivers and other navigable waters in Ontario, under such conditions as it has been, or it may be, deemed requisite to impose, but not so as to interfere with the use of any harbour as a harbour, or with the navigation of any harbour, river or other navigable water. R S. I), 1S77, c. 23 s. 47. ACTS, ORDERS AND REGULATIONS RESPECTING CROWN LANDS IN ONTARIO, 1888, p. 29.

\(^{27}\) 5. No tourist or summer visitor shall take or catch or kill in any Provincial water or carry away a greater number than one dozen bass caught or taken in such waters upon any one day.

6. Any summer tourist who shall take or catch in such waters bass of less than 10 inches in length, shall forthwith return the same to the water without unnecessary injury.

7. No person shall take or catch or kill in any Provincial waters or carry away a greater number than fifty speckled or brook trout on any one day, or more speckled or brook trout than in the aggregate weigh more than fifteen pounds, on any one day.

8. No person shall in such waters kill or retain or carry away any speckled or brook trout of less than five inches in length. But when any such trout of a length less than five inches shall be taken or caught, the same shall be forthwith returned to the water by the person taking or catching the same, without unnecessary injury.

9. No person shall at any time fish for, catch or kill speckled trout or brook trout, bass, pickerel (dore), maskinonge or muscallonge in such waters by other means than angling by hook and line in such waters.

10. No person shall take, catch or kill from or in such waters lake trout, salmon trout, whitefish, sturgeon or any other kind of fish which inhabit said waters, or attempt so to do, with any kind of net, seine or snare, rack, trap or weir, or night or set line, or fish in any such inland waters therewith for other kinds of fish without first having obtained a license, signed by the Commissioner of Crown Lands or by one of the Game and Fish Inspectors or by a fishery overseer duly authorized to grant such license, under a penalty for the first offence of not less...
inclusive, and sections 19\(^28\) and 21,\(^29\) both inclusive, of the Ontario Act of 1892, intituled "An Act for the protection of the Provincial Fisheries," or any and which of such several sections, or any and what parts thereof respectively?

Answer: To the 13th Question: Clause 47 of R. S. O. ch. 24 is *intra vires*; and likewise the sections referred to of the Ontario Fisheries Act of 1892, except with regard to public harbours and other Dominion property within sections 108\(^30\) and 117\(^31\) of the British North America Act, and also when inconsistent with Dominion regulations on "Inland Fisheries."

than $10 or more than $.50, and for a second or subsequent offence of not less than $20 or more than $100. But this section shall not apply to mullet or suckers or pike while they are running.

11. No person shall catch, kill or molest fish in such waters when passing or attempting to pass through any fishway or fish-pass, or when surmounting any obstacle or leaps, nor use any invention to catch, kill or molest fish in the mill-heads and watercourses appurtenant thereto.

12.—(1) No person shall use dynamite or any other explosive or any poison for the purpose of destroying or taking fish in or from said waters, under a penalty of $100 and two months' imprisonment in the county or district gaol for each offence.

(2) No person shall use lime or other injurious substance for the purpose of injuring, killing or taking fish in or from said waters, under a penalty of $50 and imprisonment not exceeding three months in the county or district gaol in default of payment.

13.—(1) No person shall fish for, catch, take or kill in such waters any kind or species of fish during the "close season," as by law or regulation the same is fixed or determined for or in respect of that particular kind or species of fish, or buy, sell or have in his possession at any time after the expiration of five days from the beginning of the close season in any year any of such kinds or species of fish caught in such waters under a penalty of not less than $10 nor more than $30, and a further penalty of $1 for each fish so caught or taken or found in possession after the expiration of such five days. Statutes of the Province of Ontario Passed in the Session Held in the Fifty-Fifth Year of the Reign of Her Majesty Queen Victoria, Being the 2nd Session of the Seventh Legislature of Ontario, 1892, p. 140-142.

\(^28\) 19. Whoever without permission of the proprietor fishes in that portion of a pond, stream or other waters in which fish are lawfully cultivated, owned and maintained by a private Owner, or lessee shall render himself liable to a fine of not less than $5 and not more than $20, and to a further penalty in each case of $1 for each fish so taken. Statutes of the Province of Ontario Passed in the Session Held in the Fifty-Fifth Year of the Reign of Her Majesty Queen Victoria, Being the 2nd Session of the Seventh Legislature of Ontario, 1892, p. 143.

\(^29\) 21. Any violations of the provisions of sections 5, 6, 7, 8, 9, 11 or 14 of this Act, or any other section ,to which no specific penalty is attached, shall subject the offender to a penalty of not less than $10 or more than $80, to be recovered upon summary conviction. Statutes of the Province of Ontario Passed in the Session Held in the Fifty-Fifth Year of the Reign of Her Majesty Queen Victoria, Being the 2nd Session of the Seventh Legislature of Ontario, 1892, p. 143.

\(^30\) Transfer of Property in Schedule

108. The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada.

THE THIRD SCHEDULE

Provincial Public Works and Property to be the Property of Canada

1. Canals, with Lands and Water Power connected therewith.

2. Public Harbours.

3. Lighthouses and Piers, and Sable Island.

4. Steamboats, Dredges, and public Vessels.

5. Rivers and Lake Improvements.

6. Railways and Railway Stocks, Mortgages, and other Debts due by Railway Companies.

14.—Had the legislature of Quebec jurisdiction to enact sections 1375 to 1378, inclusive, of the Revised Statutes of Quebec, or any and which of the said sections, or any and what parts thereof?

Answer: To the 14th Question: Yes, except when inconsistent with Dominion regulations on "Sea-coast and Inland Fisheries."

15.—Has a province jurisdiction to legislate in regard to providing fishways in dams, slides and other constructions, and otherwise to regulate and protect fisheries within the province, subject to, and so far as may consist with, any laws passed by the Dominion Parliament within its constitutional competence?

Answer: To the 15th Question: Yes.

16.—Has the Dominion Parliament power to declare what shall be deemed an interference with navigation and require its sanction to any work or erection in, or filling up of navigable waters?

Answer: To the 16th Question: Yes.

17.—Had riparian proprietors before confederation an exclusive right of fishing in navigable non-tidal lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown?

Answer: To the 17th Question: Yes.

As seen, there has already been a reference on the issue of the federal government’s jurisdiction pertaining to Sea Coast and Inland Fisheries, Navigation, Public Harbours, Lighthouses and Piers, and Sable Island. It would seem, like many other constitutional principles and restrictions, legislation is being produced attempting to expand levels of jurisdiction beyond the level granted. It would also seem the federal government is now attempting to use the Fisheries Act to expand its jurisdiction into a field which is not part of the intent of the Fisheries Act.

8. Custom Houses, Post Offices, and all other Public Buildings, except such as the Government of Canada appropriate for the Use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government, and known as Ordnance Property.
10. Armouries, Drill Sheds, Military Clothing, and Munitions of War, and Lands set apart for general Public Purposes.
31 Provincial Public Property
117. The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country.
In 2016 there was a document created entitled: “The Fisheries Act as an Environmental Protection Statute,” in coordination with the Canadian Institute of Resources Law, Dalhousie University – Schulich School of Law, Dalhousie University – Marine & Environmental Law Institute and the Ministry of Environment and Climate Change Canada. This should be very concerning to Canadians as it would seem the Department of Fisheries was not included in this document. It should also be concerning to Canadians, as yet again, the federal government seems to be going beyond the mandate established under its constitutional jurisdiction.

The federal government under the guise of the protection of “fish habitat” is actually looking to use the Fisheries Act as environmental legislation when the federal government has already protections established under the Canada Shipping Act and the Canadian Environmental Protection Act. Could this be the federal government creating legislation to interfere with provincial legislation as well as constitutionally protected private property rights? And is it extending into areas it shouldn’t considering Fowler v. The Queen, [1980] 2 SCR 213, 1980 CanLII 201, case?

Under the Canada Shipping Act is Part 8 – Pollution Prevention and Response – Department of Transport and Department of Fisheries and Oceans, therefore there is no need for the amendment to the Fisheries Act as pollution is already covered under the Canada Shipping Act and this part already pertains to the Department of Fisheries and Oceans. And there is, of course, the Environmental Protection Act which would cover other areas of federal properties.

As stated in Ontario (Attorney General) v. Rowntree Beach Assn., 1994 CanLII 7228 (ON S.C.):

“[122] As to the defendants’ counterclaim, the defendants are entitled to the following, that is to say:
[123] A declaration that … Her Majesty the Queen in right of Ontario has no right, title or interest in and to the lands described …”

With the Supreme Court of Canada having ruled in The Queen v. Robertson (1882) 6 SCR 52 that:

“That the Act of Parliament of Canada, 31 Vict., c. 60, recognizes the view, and, while it provides for the regulation and protection of the fisheries, it does not interfere with private rights, only authorizing the granting of leases in fresh water rivers, where such rights have not already accrued, and that any lease granted by the Minister of Marine and Fisheries to fish in fresh water rivers which are not the property of the Dominion or in which the soil is not in the Dominion is illegal;”32

32 The Queen v. Robertson (1882) 6 SCR 52, at 126.
It could be concluded that the Federal Government does not have constitutional jurisdiction to expand environmental protection through the *Fisheries Act* as this is in violation of provincial jurisdiction as well as a violation of private rights established under common law, the *Constitution Act, 1867* (British North America Act, 1867) and the Letters Patent/Crown Grant.
2. Is this a violation of constitutionally protected private property rights?

From the 1896 Reference:

3.—If …, in case the bed and banks of a lake or navigable river belong to a province, and the province makes a grant of land extending into the lake or river for the purpose of there being built thereon a wharf, warehouse or the like, has the grantee a right to build thereon accordingly, subject to the work not interfering with the navigation of the lake or river?

Answer: To the 3rd Question: Yes.

4.—In case the bed of a public harbour, or any portion of the bed of a public harbour, at the time of confederation had not been granted by the Crown, has the province a like jurisdiction in regard to the making a grant as and for the purpose in preceding paragraph stated, subject to not thereby interfering with navigation, or other full use of the harbour as a harbour, and subject to any Dominion legislation within the competence of the Dominion Parliament?

Answer: To the 4th Question: No.

5.—Had riparian proprietors before confederation an exclusive right of fishing in non-navigable lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown?

Answer: To the 5th Question: Yes.

6.—Has the Dominion Parliament jurisdiction to authorize the giving by lease, license, or otherwise, to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

Answer: To the 6th Question: No.

7.—Has the Dominion Parliament exclusive jurisdiction to authorize the giving by lease, license, or otherwise, to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

Answer: To the 7th Question: Same answer. (No.)
8.—Has the Dominion Parliament such jurisdiction as regards navigable or non-navigable waters, the beds and banks of which are assigned to the provinces respectively under the British North America Act, if any such are so assigned?

Answer: To the 8th Question: Same answer. (No.)

9.—If the Dominion Parliament has such jurisdiction as mentioned in the preceding three questions, has a provincial legislature jurisdiction for the purpose of provincial revenue or otherwise to require the Dominion lessee, licensee or other grantee to take out a provincial license also?

Answer: To the 9th Question: The Dominion has no such jurisdiction, as already stated.

11.—Had the Dominion Parliament jurisdiction to pass ..., so far as these respectively relate to fishing in waters, the beds of which do not belong to the Dominion and are not Indian lands?

Answer: To the 11th Question: Same answer. (No.)

12.—If not, has the Dominion Parliament any jurisdiction in respect of fisheries, except to pass general laws not derogating from the property in the lands constituting the beds of such waters as aforesaid, or from the rights incident to the ownership by the provinces and others, but (subject to such property and rights) providing in the interests of the owners and the public, for the regulation, protection, improvement and preservation of fisheries, as, for example, by forbidding fish to be taken at improper seasons, preventing the undue destruction of fish by taking them in an improper manner, or with improper engines, prohibiting obstructions in ascending rivers and the like?

Answer: To the 12th Question: The jurisdiction of the Dominion is limited to the passing of such general laws.

17.—Had riparian proprietors before confederation an exclusive right of fishing in navigable non-tidal lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown?

Answer: To the 17th Question: Yes.

There are some members of government who may feel that there are no constitutionally protected private property rights in Canada. These thoughts and/or statements could be considered fundamentally incorrect.
In Canada any person who qualifies to be a Senator may be appointed to the Senate. Under section 23 of the Constitution Act, 1867 (B.N.A.) it states to qualify to be a Senator one must be “legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in Free and Common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture”. That being said how can anyone actually qualify to be appointed to the Senate if a third party, including the public and/or the Crown, has the ability to interfere with one’s ability to qualify? And if a Senator allows a third party to interfere with his or her “own use and benefit of lands and tenements” they can be disqualified under section 31 (5) of the 1867 Act, can they not? So where would that leave the Senate?

In Ontario there is legislation which speaks to the Crown’s limitation period. This is established under section 3 of the Real Properties Limitations Act.

**Limitation where the Crown interested**

33 Section 23 (3) Constitution Act, 1867 Qualifications of Senator

23. The Qualifications of a Senator shall be as follows:

(3) He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in Free and Common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture, within the Province for which he is appointed, of the Value of Four thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same:

34 **FREEHOLD** – Such an interest in lands of frank-tenement as may endure not only during the owner’s life, but which is cast after his death upon the persons who successively represent him, ... Such persons are called heirs, and he whom they thus represent, the ancestor. When the interest extends beyond the ancestor’s life, it is a freehold of inheritance, and when it only endures for the ancestor’s life, it is a freehold not of inheritance. An estate to be a freehold, must possess these two qualities: 1. Immobility, that is, the property must be either land, or some interest issuing out of or annexed to land; and 2. a sufficient legal indeterminate duration; for if the utmost period of time to which an estate can endure be fixed and determined, it cannot be a freehold. Dictionary of Jurisprudence, J.J.S. Wharton, Esq., 1847-48, pg. 268.

FREEHOLD IN LAW, is where lands or tenements are descended to a man, and he may enter into them when he will; before his entry he has a freehold in law; after entry, he has a freehold in deed or fact. The New Law Dictionary and Institute of the Whole Law, Archibald Brown, Barrister-at-Law, M.A., Edin, and Oxon., and B.C.L. Oxon....1880, p. 521.

*Freehold tenure is without any incidents or obligations for the benefit of the Crown. All lands granted by the Crown in fee simple are granted in free and common socage - freehold tenure. A fee simple may be transferred without licence or fine and the new owner holds from the Crown in the same manner as the previous tenant held from the Crown.*

34 Ownership and Title to Real Property, http://lawstudies.wikidot.com/laws3112-lecture-3

35 Section 31(5) Constitution Act, 1867 Disqualification of Senators

31. The Place of a Senator shall become vacant in any of the following Cases:

(5) If he ceases to be qualified in respect of Property or of Residence; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of Canada while holding an Office under that Government requiring his Presence there.
3. (1) No entry, distress, or action shall be made or brought on behalf of Her Majesty against any person for the recovery of or respecting any land or rent, or of land or for or concerning any revenues, rents, issues or profits, but within sixty years next after the right to make such entry or distress or to bring such action has first accrued to Her Majesty. R.S.O. 1990, c. L.15, s. 3 (1).

This is based in the *Nullum Tempus Act, 1769*, long title being: “An Act to amend and render more effectual an Act made in the Twenty first Year of the Reign of King James the First, intituled, *An Act for the general quiet of the Subjects against all Pretences of Concealment whatsoever,*” and the sixty (60) year restriction on the Crown. As expressed, during debates on an amendment to this Act, in 1771 by Charles Fox:

“Mr. Speaker, it is under the law that every man holds his property, and enjoys his liberty in security and ease. But I firmly believe, as far as I am informed, that no man can have a better title to his estate, than the very title which the crown has vested in Sir James Lowther to the estate in question. If that title is to be taken away by act of Parliament, why not bring in an act to take away any other part of his estate? Why not of another man’s? For, if Bills are thus to pass for transferring the property of one man to another, there can be nothing sacred, nothing secure amongst us. I wish, therefore, Sir, that the gentlemen who brought in this Bill, would, for their honour’s sake, withdraw it. Sure I am, that my conscience would never suffer me to be at rest, were I to perpetrate the injustice intended by this Bill. As to myself, Sir, the same conviction, which dictates my present opposition, shall carry me on to oppose the Bill in every step, through every stage. But if it should succeed, here, it cannot succeed elsewhere. I do therefore again depurate the honour and justice of this House, that we may not suffer the scandal of passing this Bill to lie at our doors, and give the honour of rejecting it to the other House of Parliament.”

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“The Nullum Tempus Bill, or the act for quieting the possessions of the subject against all pretences of concealment whatsoever, which was first brought into the House of Commons, by Sir George Savile in 1768, and passed in the following year, owed its rise to a grant from the Treasury to Sir James Lowther, of a considerable estate and very extensive royalties, which had been granted by King William to the Portland family, and had been in their possession from that time. A clause had been inserted in that act, by which the grantees or lessees of the crown were allowed a year from its taking place, for the prosecution of their claims; and though that Bill had been brought in and supported by the Duke of Portland’s friends, and his particular case had been shewn the necessity and was the origin of it, no opposition was made to the clause in question. The general opinion, indeed, at that time seems to have been, that the matter in contest had been only thrown out to answer certain election purposes, which, being now over, it would no more be thought of; especially as the whole legislature. However plausible these opinions were, the consequence shewed they were ill-founded. A most expensive suit was not only commenced against the Duke of Portland, but the whole county of Cumberland was thrown into a state of the greatest terror and confusion: 400 ejectments were served in one day; and though a great many of the causes were afterwards withdrawn, it was notwithstanding said, some
Therefore, the statement from Ontario (Attorney General) v. Rowntree Beach Assn., 1994 CanLII 7228 (ON S.C.) of:

“[123] A declaration that ... Her Majesty the Queen in right of Ontario has no right, title or interest in and to the lands described ...”

is correct.

There are three words which must be defined to ensure the reader understands the significance of this ruling. Those words are: “right, title or interest.”

**RIGHT** – 1. That which is proper under law, morality, or ethics. 2. Something that is due to a person by just claim, legal guarantee, or moral principle. 3. A law <the right to dispose of one’s estate>. 4. A legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is a wrong. 5. The interest, claim, or ownership that one has in tangible or intangible property.37

**RIGHT** – [recht, Germ. and Tent., ritto, Ital., rectus, Lat. The application of the same word to denote a straight line and moral rectitude of conduct, has obtained in every language I know. Dugald Stuwart], in its primitive sense, that which the law directs: in popular acception, that which is so directed for the protection and advantage of an individual, is said to be his right. 1 Stark. Evid. 1, n. (b).38

**TITLE** – 1. The union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property; the legal link between a person who owns property and the property itself. 2. Legal evidence of a person’s ownership rights in property; an instrument (such as a deed) that constitutes such evidence.39

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38 Dictionary of Jurisprudence, J.J.S. Wharton, Esq., 1847-48, pg. 593-594
INTEREST – 1. The object of any human desire; especially advantage or profit of a financial nature. 2. A legal share in something; all or part of a legal or equitable claim to or right in property <right, title and interest>. Collectively, the word includes any aggregation of rights, privileges, powers and immunities, distributively, it refers to any one right, privilege, power or immunity.40

As "all power and honour flow from the Crown"41 and "In a constitutional monarchy such as Canada’s, power does not rest with any one person. Rather, power lies within an institution that functions to safeguard it on behalf of all its citizens. That institution is the Crown. ... A cornerstone of our system lies in the principle that governments use power but never possess it; power remains vested in the Crown and is only “entrusted” to governments to use on behalf of the people. In this way, power resides with a non-partisan institution that is above the political give and take inherent in the daily operations of government in every democracy."42

With the Crown having no “right, title or interest” in the lands described, by means of Letters Patent/Crown grants, and as the “soil” is not in the Dominion there is no jurisdiction, according to the Courts, for the federal government to implement this amendment or it may be interfering with a Canadian’s ability to qualify for a Senate position and could disqualify those in the Senate, creating a situation of placing the Crown, the Senate, the Courts and Parliament in disrepute.

Regarding riparian rights. One must seek out The Queen v. Robertson (1882) 6 SCR 52 and Re Provincial Fisheries (1896) 26 SCR 444, etc., to fully understand this meaning. That is not to say that riparian rights have diminished with time.

In 2016, Lynch v St. John's (City), 2016 NLCA 35 (CanLII), upheld by the Supreme Court of Canada43 in its summary:

"[63]...Having the property rights flowing from a Crown grant, with virtually unrestricted rights to build and to appropriate and use groundwater, transformed to merely a right to keep the land “unused in its natural state,” results in … all … incidents of ownership being taken away. All of the reasonable uses … were taken away and a …constructive expropriation, resulted….”

[56] To properly appreciate whether anything has been … acquired …, we have to consider the nature of groundwater. At common law,

41 https://www.canada.ca/content/dam/pch/documents/services/royal-symbols-titles/crnMpls-eng.pdf
42 https://www.canada.ca/content/dam/pch/documents/services/royal-symbols-titles/crnMpls-eng.pdf
groundwater was described as “water percolating through underground strata, ... has no certain course and no defined limit, but oozes through the soil in every direction in which the rain penetrates” ... Underground streams flowing in a definite channel also fall within the classification of groundwater ...

[57] The common law distinguishes between rights applying to groundwater and riparian rights applying to watercourses “in which water flows in a fairly regular manner in channels between banks that are more or less defined”: ... owners of lands abutting a watercourse to a right of access to water and the right to prevent flooding. ... Also, riparian owners are entitled to have water reach their lands substantially undiminished in quality.”44


“[17] In my view, the legal effect of the Act, from a simple reading of its language and the cases, is that in “the absence of an express grant” of the “bed of a navigable body of water or stream, a patent from the Province of land bordering on a navigable body of water or stream, is deemed not to pass the bed of such body of water. See the case of the Tadenac Club Ltd., supra, at p. 276 O.R. per Gale J. Such is not the case here; here, there is an express grant from the Crown of the “land and waters thereon lying”. In short, the Act [Beds of Navigable Waters Act]45 does not apply. It matters not whether the waterway is navigable since the fee is vested in the grantee.”46

All of these things must be taken into consideration before any legislation should be presented or passed regarding “fish,” “fisheries,” or “fish habitat.” The other issue of the Federal government moving forward with this amendment would undoubtedly place the Crown in disrepute. It may also place the Senate in a precarious position and could undermine the constitutional limits placed on the Federal government pertaining to fishing, fisheries, oceans, navigation and the like.

44 Lynch v St. John’s (City), 2016 NLCA 35 (CanLII)
45 My Note for clarity
46 Saker v. Middlesex Centre (Chief Building Official), 2001 CanLII 28088 (ON S.C.)
3. Is this the federal government attempting to do “indirectly” what it cannot do “directly” by placing environmental requirements in an act which the intent of the act was, merely, to protect from the exploitation of fish stocks, specify the equipment that can be used in a fishery and not allow interference with navigation and is the federal government attempting to artificially create and/or expand its jurisdiction?

It has been settled that the jurisdiction of the Federal government regarding the protection of fisheries from exploitation is established but only with the aid of the provincial governments when it involves Crown, public and private property that the “bed” or soil remains reserved to the Crown. There are also the issues of private properties which had been granted prior to Confederation, again unless reserved, is beyond federal and provincial jurisdiction as expressed in the Fisheries Reference.

The Federal government may be of the opinion that it can enter into agreements and/or transfer its authority to provincial governments to implement this egregious amendment and/or vice versa. As expressed by the Supreme Court of Canada the Federal Parliament cannot “colour” its legislation by incorporating it into provincial legislation nor can there be an avenue for the expansion of federal jurisdiction into provincial jurisdiction beyond what is allowed under the Constitution.

As expressed in Dominion Stores Ltd. v. R.,[1980] 1 S.C.R. 844:

“The court is, however, entitled, and indeed required, to examine the interrelationship of federal and provincial legislation if it appears that Parliament has incorporated provincial enactments into its own legislation in an effort to “colour” (to adopt the language of the Privy Council) it so as to enter a field which, by our constitution, rests solely within the legislative competence of the provinces. In other words, Parliament cannot do indirectly, with provincial aid, what it could not have done directly.”

“As was stated by Taschereau J. in Attorney General of Nova Scotia v. Attorney General of Canada[11], at p. 40:

47 Dominion Stores Ltd. v. R., [1980] 1 S.C.R. 844
It is a well settled proposition of law that jurisdiction cannot be conferred by consent.
If the Parliament of Canada cannot find justification for its legislation in the British North America Act, consent or acquiescence in the adoption of a statute by Parliament, either individual consent or consent obtained through the operation of provincial legislation, cannot provide the missing jurisdiction and authority.48

There have been, throughout the history of Canada, many court rulings in regards to federal v. provincial jurisdiction. The following pertains to the topic.

As with the Federal government not having specific jurisdiction, in 1913, Privy Council Appeal No. 41, the Attorney-General for the Province of British Columbia (Appellant) v. the Attorney-General for the Dominion of Canada (Respondent), and the Attorney-General for the Province of Ontario and others (Intervenants), regarding the Railway Belt:

“Their Lordships can see nothing in the judgment above referred to which casts the slightest doubt upon the conclusion to which they have come from a direct consideration of the terms of the grant itself, namely, that the entire beneficial interest in everything that was transferred passed from the Province to the Dominion. There is no reservation of anything to the Grantors. The whole solum of the belt lying between its extreme boundaries passed to the Dominion, and this must include beds of the rivers and lakes which lie within the belt. Nor can there be any doubt that every right springing from the ownership of the solum would also pass to the Grantee, and this would include such rights in or over the waters of the rivers and lakes as would legally flow from the ownership of the solum. This view is in harmony with what has been decided by the Board in another case in which the effect of the grant of the railway belt came into question, Burrard Power Company v. The King (1911 A. C. 87), where it was held that a grant of water rights on a lake and river within the belt made by the Government of the Province was void. The grounds of the decision of the Board in that case were, that the grant of the lands to the Dominion had passed the water rights incidental to the lands, and that these lands, so long as unsettled, were public property within the meaning of Section 91 of the British North America Act, and were, therefore, under the exclusive legislative authority of the Dominion, and could not be dealt with under a Water Clauses Act passed by the Provincial Government.

...They [the Board] are unable to see any ground for construing the grant of the railway belt as excluding such lands situated within it as are covered with water. The solum of a river bed is a property differing in no essential characteristic from other lands. Ownership of a portion of it usually accompanies riparian property and greatly adds to its value.

…In this present case, therefore, their Lordships entertain no doubt that the title of the *solum* and water rights in the Fraser and other rivers and the lakes, so far as within the belt are at present held by the Crown in right of the Dominion, and that this title extends to the exclusive management of the land and to the appropriation of its territorial revenues. It remains to consider the consequences as regards fishing rights. These are, in their Lordships’ opinion, the same as in the ordinary case of ownership of a lake or river bed. The general principle is that fisheries are in their nature mere profits of the soil over which the water flows, and that the title to a fishery arises from the right to the *solum*. A fishery may of course be severed from the *solum*, and it then becomes a *profit a prendre in alieno solo* and an incorporeal hereditament. The severance may be affected by grant or by prescription, but it cannot be brought about by custom, for the origin of such a custom would be an unlawful act. But apart from the existence of such severance by grant or prescription the fishing rights go with the property in the *solum*.

The authorities treat this broad principle as being of general application. They do not regard it as restricted to inland or non-tidal waters. They recognize it as giving to the owners of lands on the foreshores or within an estuary or elsewhere where the tide flows and reflows a title to fish in water over such lands, and this is equally the case whether the owner be the Crown or a private individual. But in the case of tidal waters (whether on the foreshore or in estuaries or tidal rivers) the exclusive character of the title is qualified by another and paramount title which is *prima facie* in the public. Lord Hale in his “De Jure Maris,” in a passage cited with approval by Lord Blackburn in his judgment in *Neill v. The Duke of Devonshire* (8 A. C. 177), states the law as follows: --

49 “Though custom may support a claim for an easement, nothing less than prescription can sustain a claim for a *profit a prendre in alieno solo*. Hill v. Lord, 48 Me. 98; Gateward’s Case, 6 Coke 60; Fowler v. Sanders, Cro. Jac. 446; Waters v. Lilley, 4 Pick. (Mass.) 148; Manning v. Wasdale, 5 A. & E. 758; 31 E. C.L.433. If one would prescribe for a *profit a prendre in alieno solo*, he must allege it in a que estate; in other words, if one would prescribe for such a right in another's soil, as authorizes the taking or having what is, by legal intendment, a profit therein, he must allege of land, owned by himself, and that he and all those, whose estate he has in the land, have from time immemorial exercised the right which he now claims. Littlefield v. Maxwell, 31 Me. 141, and other cases cited above. Again, this right is prescribed for in gross, and not as appurtenant to other lands. The right, if it exists, is a *profit a prendre*, and not a mere easement, and such rights must generally and perhaps universally be prescribed for not in gross, but as incident to other premises for the benefit of which and in connection with which the rights are to be exercised. Merwin v. Wheeler, 41 Conn. 25. A custom that all the inhabitants of a particular town, for the time being, have the right to the depasture of uninclosed woodlands of individual proprietors within the town, is not a mere easement like a right of way, or a right to flow water. It is a right to take a profit, and for such a right the commoner must prescribe in respect to some estate, and not in respect to mere inhabitancy. The custom is therefore void. Smith v. Floyd, 18 Barb. (N. Y.) 522.” THE American and English ENCYCLOPEDIA OF LAW COMPILED UNDER THE EDITORIAL SUPERVISION OF JOHN HOUSTON MERRILL, Late Editor of the American and English Railroad Cases and the American and English Corporation Cases, 1892, P. 262-263.
“The right of fishing in this sea” (i.e. the narrow seas adjoining the coasts) “and the creeks and arms thereof, is originally lodged in the Crown, as the right is depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river...But though the King is owner of this great waste, and as a consequence of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places, creeks, or navigable rivers where either the King or some particular subject hath gained a propriety exclusive of that common liberty.”

...Such, therefore, is undoubtedly the general law as to the public right of fishing in tidal waters. But it does not apply universally. To the general principle that the public have a “liberty of fishing in the sea or creeks or arms thereof,” Lord Hale makes the exception, “unless in such places, creeks, or navigable rivers where either the King or some particular subject hath gained a propriety exclusive of that common liberty.” This passage refers to certain special cases of which instances are to be found in well-known English decisions where separate and exclusive rights of fishing in tidal waters have been recognized as the property of the owner of the soil. ...It follows from these considerations that the position of the rights of fishing in the rivers, lakes, and tidal waters (whether in river and estuaries or on the foreshore) within the railway belt stand prima facie as follows: -- In the non-tidal waters they belong to the proprietor of the soil, i.e. the Dominion, unless and until they have been granted by it to some individual or corporation. In tidal waters, whether on the foreshore or in creeks, estuaries and tidal rivers, the public have the right to fish, and by reason of provisions of Magna Carta no restriction can be put upon that right of the public by an exercise of the prerogative in the form of a grant or otherwise. It will, of course, be understood that in speaking of this public right of fishing in tidal waters their Lordships do not refer in any way to fishing by kiddles, weirs, or other engines fixed to the soil. Such methods of fishing involve a use of the solum which, according to English law, cannot be vested in the public, but must belong either to the Crown or to some private owner. But we now come to the crux of the present case. The restriction above to relates on to Royal Grants, and what their Lordships here have to decide is whether the Provincial Legislature has the power to alter these public rights in the same way as a Sovereign Legislature such as that of the United Kingdom, could alter the law in these respects within its territory.

To answer this question one must examine the limitations to the powers of the Provincial Legislature which are relevant to the question under consideration. They arise partly from the provisions of Sections 91 and 92 of the British North America Act, 1867, and partly from the terms of Union of British Columbia with the Confederation with which we have already dealt. By Section 91 of the British North America Act, 1867, the exclusive
legislative authority of the Parliament of Canada extends to all matters coming within (amongst other things) “Sea Coast and Inland Fisheries.” The meaning of this provision was considered by this Board in the case of Attorney-General for the Dominion v. The Attorney-General for the Provinces (1898, A.C. 700), and it was held that it does not confer on the Dominion any rights of property, but that it does confer an exclusive right on the Dominion to make restrictions or limitations by which public rights of fishing are controlled, and on the exclusive right Provincial legislation cannot trench. It recognized that the Province retains a right to dispose of any fisheries to the property in which the Province has a legal title, so far as the mode of such disposal is consistent with the Dominion right of regulation, but it held that even in the case where proprietary rights remain with the Province, the subject matter may be of such a character that the exclusive power of the Dominion to legislate in regard to fisheries may restrict the free exercise of provincial rights. Accordingly it sustained the right of the Dominion to control the methods and season of fishing and to impose a tax in the nature of license duty as a condition of the right to fish, even in cases in which the property in the fishery originally was or still is in the Provincial Government.

The decision in the case just cited does not in their Lordships’ opinion affect the decision in the present case. Neither in 1867 nor at the date when British Columbia became a member of the Federation was fishing in tidal waters a matter of property. It was a right open equally to all the public, and therefore when by Section 91 sea coast and inland fisheries were placed under the exclusive legislative authority of the Dominion Parliament, there was in the case of the fishing in tidal waters nothing left within the domain of the Provincial Legislature. The right being a public one, all that could be done was to regulate its exercise and the exclusive power of regulation was place in the Dominion Parliament. Takin this in connection with the similar provision with regard to “Navigation and Shipping” their Lordships have no doubt that the object and the effect of these legislative provisions were to place the management and protection of the cognate public rights of navigation and fishing in the sea and tidal waters exclusively in the Dominion Parliament, and to leave to the Province no right of property or control in them. It was most natural that this should be done seeing that these rights are the rights of the public in general and in no way special to the inhabitants of the Province.

These considerations enabled their Lordships to answer the first question which reads as follows:— “Is it competent to the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, license or otherwise the exclusive right to fish in any or what part or parts of the water within the railway belt:— (a) As to such waters are tidal; (b) As to such waters which, though not tidal are navigable.”

… They now come to the second question, which is:— “Is it competent to the Legislature of British Columbia to authorize the Government of the Province to grant by way of lease, licence, or otherwise the exclusive right,
or any right, to fish below low-water mark in or in any or what part or parts of the open sea within a marine league of the coast of the Province?"

Their Lordships have already expressed their opinion that the right of fishing in the sea is a right of the public in general which does not depend on any proprietary title, and that the Dominion has the exclusive right of legislating with regard to it. They do not desire to pass any opinion on the question whether the subjects of the Province might, consistently with Section 91, be taxed in respect of its exercise for the reason pointed by out Lord Herschell at page 173 of 1898 A.C., but no such taxing could enable the Province to confer any exclusive or preferential right of fishing on individuals, or classes of individuals, because such exclusion or preference must import regulation and control of the general right of the public to fish, and this is beyond the competence of the Provincial Legislature.

…They desire, however, to point out that the three-mile limit is something very different from the “narrow seas” limit discussed by the older authorities, such as Selden and Hale, a principle which may safely be said to be now obsolete. The doctrine of the zone comprised in the former limit owes its origin to comparatively modern authorities on Public International Law. Its meaning is still in controversy. The questions raised thereby affect not only the Empire generally, but also the rights of foreign nations as against the Crown, and of the subjects of the Crown as against other nations in foreign territorial waters.

…Their Lordships therefore find themselves in agreement with the Supreme Court of Canada in answering the first and second questions in the negative.

The principles above enunciated suffice to answer the third question, which relates to the right of fishing in arms of the sea and the estuaries of rivers. The right to fish is in their Lordships opinion, a public right of the same character as that enjoyed by the public on the open seas. A right of this kind is not an incident of property, and is not confined to the subjects of the Crown who are under the jurisdiction of the Province. Interference with it, whether in the form of direct regulation, or by the grant of exclusive or partially exclusive rights to individuals or classes of individuals, cannot be within the power of the Province, which is excluded from general legislation with regard to sea coast and inland fisheries.

Their Lordships think that what they have now said affords a sufficient answer to the third question. It is in the negative…”

Supreme Court of Canada
Attorney-General For Canada v. Ritchie Contracting and Supply Co., (1915) 52 S.C.R. 78
Date: 1915-11-02

DAVIES J.—... I am quite unable to accede to this contention. I do not think the 108th section enacting that the public works and property of each province enumerated in the 3rd schedule to this Act shall be the property of Canada was ever intended to cover more or can fairly be construed as
covering more than public works and property existing at the time the Union took place. That section passed the property in these enumerated works from the provinces to Canada. It was a then present transfer of existing public works and property and had no relation to potential works or possibilities, such as harbours, which, in the future, settlement by population and expenditure of money might create.

[Page 95]
If subsequently to Confederation from any cause potential harbours became de facto harbours and it became necessary for the Dominion to acquire the rights or property on their foreshores either vested in the Crown in right of the province or in private individuals there were obvious methods by which the Dominion could acquire such property or rights.

… If, under its legislative power over navigation and shipping, the Dominion had created and defined any special place as a port or harbour of refuge it might well be that it would be entitled to prevent its destruction as such by the removal of one of its protecting arms by exercising its power of expropriation and awarding compensation to the owner of the foreshore, whoever he might be…. 

DUFF J.— In the litigation that is generally known as the Fisheries Case[48], the first question submitted by the Dominion and the provinces in relation to the beds of public waters and public harbours was in this form in part:

Did the beds of the lakes, rivers, public harbours * * * situate within the territorial limits of the several provinces not granted before Confederation become under the "British North America Act" the property of the Dominion? (See[49].)

The formal answer given by their Lordships to the first question is as follows:—

1. In answer to the first and fourth questions, that under the "British North America Act, 1867," the improvements only in lakes and rivers within the provinces became the property of the Dominion of Canada; that under the same Act, whatever is properly comprised in the term "public harbour" became the property of the Dominion of Canada; and the answer to the question, what is properly so comprised, must depend, to some extent, upon the circumstances of each particular harbour.

ANGLIN J.—… I strongly incline to the view that it does not apply to harbours which have only come into use as such after the Union. There are other means by which the Dominion can acquire jurisdiction over such harbours and title to the property in the land under and adjacent to them requisite for their proper control and administration, whether that title is
vested in the Crown in right of the province (Attorney-General for British Columbia v. Canadian Pacific Railway Co. [55], or in private individuals.

**Jurisdiction regarding pollution**

In regards to pollution of water this comes from riparian rights. As expressed in McKie v. The K.V.P. Company Limited (and four other actions), 1948 CanLII 93 (ON SC).


15th April 1948. MCRUER C.J.H.C.:-- The plaintiffs are all riparian proprietors on the Spanish River in the district of Sudbury, and all operate tourist camps of varying accommodation. The plaintiff James B. Vance, as well as being a riparian proprietor, owns a water lot over which the waters of the river flow and is a commercial fisherman holding a licence from the Province of Ontario. The plaintiff Russell Vance is a son of James B. Vance, and operates a tourist camp on the lands owned by his father. The defendant is the owner and operator of a "kraft" paper mill at the town of Espanola situated 35 miles upstream from the mouth of the river, which empties into the north channel of Lake Huron. The volume of water flowing in the river is considerable. It is said to be 200 yards wide at some places and as much as 80 feet deep. At others it is quite shallow, but it is not argued that at all relevant points the river is not navigable.

...While I have given this class of evidence every consideration, I find great wisdom in the following words of Sir G.J. Turner L.J. in Goldsmid v. The Tunbridge Wells Improvement Commissioners (1866), L.R. 1 Ch. 349 at 353:

"Speaking with all possible respect to the scientific gentlemen who have given their evidence, and as to whom it is but just to say that they have dealt with the case most ably and most impartially, I think that in cases of this nature much more weight is due to the facts which are proved than to conclusions drawn from scientific investigations. The conclusions to be drawn from scientific investigations are, no doubt, in such cases of great value in aid or in explanation and qualification of the facts which are proved, but in my judgment it is upon the facts which are proved, and not upon such conclusions, the Court ought in these cases mainly to rely. I think so the more strongly in this particular case, because it is obvious that the scientific examinations which have been made of the water of this brook must have depended much upon the state of circumstances which existed at the times when those investigations took place. They might well have been affected by the force of the stream at the times of investigation, and probably by the state of the weather, as tending or not tending to the diffusion or dispersion
of noxious smells. In my view of this case, therefore, the scientific evidence ought to be considered as secondary only to the evidence as to the facts." Many witnesses were called to testify as to conditions on the river. No useful purpose would be served by dealing with the evidence of each witness in detail. Where evidence conflicts with my findings it may be assumed that I have rejected it as unsatisfactory. The witnesses for the plaintiffs who gave evidence as to these conditions may be divided into two groups, officials who are employed by the Government of Ontario for the conservation of wild life, and those who live on the banks of the river.

...My findings are that following the closing of the Abitibi plant, and particularly following a flood of about fourteen years ago which washed out the bed of the river, the fish commenced to come back into the river, until in the years just prior to the year 1947 the river had become a good fishing ground, where game fish such as muskellunge, pickerel and bass, together with pike and other fish, were found in abundance. The result was that the area had developed into a desirable resort for fishermen, and the owners of the property on the river had every reason to expect that it would continue to develop if there was no interference with it....

Sitting as a jury on the case, the inference I draw is that the pollution of the river has substantially affected the fishing therein and that the pollution was responsible for killing fish found in the river in the spring of 1947. There is some evidence that the rice beds have disappeared, thus affecting the numbers of duck to be found in the area. This is not an element to be seriously considered in this case, either in fact or in law.

In applying the principles of law with which I have been dealing, it is convenient to consider first what rights the plaintiffs have to relief, founded on injury to the fishing. In considering this aspect of the case, the question whether or not the river is a navigable one is of importance. Otherwise, the rights of riparian proprietors are the same on navigable and non-navigable rivers: North Shore Railway Company v. Pion et al. (1889), 14 App. Cas. 612, C.R. [10] A.C. 63, 15 Q.L.R. 228, applied in Re Snow and City of Toronto, 1924 CanLII 393 (ON CA), 56 O.L.R. 100 at 106, [1924] 4 D.L.R. 1023.

The general principle is that rights of fishing are in their nature mere profits of the soil over which the water flows and the title thereto arises from the right to the solum: Attorney-General for British Columbia v. Attorney-General for Canada, 1913 CanLII 398 (UK JCPC), [1914] A.C. 153 at 167, 15 D.L.R. 308, 5 W.W.R. 878, 26 W.L.R. 347, 13 E.L.R. 536. The fishing in a river is the subject of property, and according to the English law must have an owner and cannot be vested in the public generally: see p. 173.
"... the title to fish follows the title to the solum, unless it has been severed and turned into an incorporeal hereditament of the nature of a profit a prendre in alieno solo": Attorney- General for Canada v. Attorney-General for Quebec, 1920 CanLII 381 (UK JCPC), [1921] 1 A.C. 413 at 421, 56 D.L.R. 358.

The rights of the plaintiff James B. Vance are on a very different footing. As owner of that part of the soil in the bed of the river covered by the grant to him of the water lot, he has property rights distinct from all the other plaintiffs. He is the proprietor of a fishery appendant or appurtenant to the ownership of the soil. He has the right to a free passage for fish in his fishery and he has the right to catch as many fish as by his industry and art he can: Hamilton v. Marquis of Donegal (1795), 3 Ridg, Parl. Rep. 267; Barker v. Faulkner (1898), 79 L.T. 24. But he must not in the exercise of his rights do anything to interfere with the rights of persons above or below him or riparian owners. The defendant, having, by the pollution of the river, interfered with this plaintiff's property rights, is liable in damages if he has suffered any, and to be restrained from further interference with those rights: Aldred's Case (1610), 9 Co. Rep. 57b, 59a, 77 E.R. 816.

The principles on which the Courts act in granting an injunction in cases of this sort are fully discussed in Shelfer v. City of London Electric Lighting Company; Meux's Brewery Company v. The Same, [1895] 1 Ch. 287. Lord Lindley at p. 314 quotes from the judgment of Lord Kingsdown in Imperial Gas Light and Coke Company v. Broadbent (1859), 7 H.L. Cas. 600, 11 E.R. 239, as follows:

"The rule I take to be clearly this: if a plaintiff applies for an injunction to restrain a violation of a common law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law; but when he has established his right at law, I apprehend that unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that violation."

And Lord Justice Smith says at p. 322:

"Many Judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance ..."

"In such cases, the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is prima facie entitled to an injunction."

The witness Heurter gave evidence that some kraft mills he had visited disposed of their effluent through settling basins. Before the defendant's plant started to operate, the plaintiff Dr. Downe interviewed the manager, Mr. Hunter, and suggested to him that the effluent be disposed of by being piped to a sand flats nearby. To this Mr. Hunter replied: "It is a matter of
economics.” The course of action that followed shows an indifference towards the rights of others which a Court should not hesitate to control by measures appropriate in the circumstances.

An injunction will go restraining the defendant from depositing foreign substances or matter in the Spanish River which alter the character or quality of the water flowing over the lands of the plaintiff James B. Vance, and washing the lands owned or occupied by the other plaintiffs.

… James B. Vance is in a different position from the other plaintiffs. As I have stated he is a commercial fisherman holding a licence from the Province of Ontario and owner of a water lot on the river. It was not argued that a licence to take fish from the river gave this plaintiff a particular right of action for damages for injury to the fishing that would not be vested in the other plaintiffs holding no such licence. No claim having been put forward on this footing, I do not deal with it. As owner of that part of the solum of the river vested in him he has a right to restrain the defendant from interfering with the fishing in the waters passing over his property. There is, however, no proof that he carried on his business as a commercial fisherman on this part of the river or that he actually suffered damage by reason of any interference with the fishing at this point. It therefore follows that the only damages that I can award must be based on the interference with his riparian rights and for the nuisance for which the defendant is responsible.

The operation of the injunction will be suspended for six months in order to give the defendant an opportunity to provide other means of disposal of its noxious effluent. This concession, however, is on condition that the defendant compensate the plaintiffs for damages suffered from the date of the trial of the action to the date when the injunction becomes effective. In so providing I am following the formal order in The City of Manchester v. Farnworth, supra. There will be a reference to an official referee to ascertain these damages. If the parties cannot agree on the referee, counsel may speak to me. As this reference is necessitated by an indulgence granted to the defendant, the costs of the reference will be paid by the defendant. The plaintiffs will have their costs of the action on the Supreme Court scale throughout.”

**Manitoba Fisheries Ltd. v. The Queen, [1979] 1 S.C.R. 101**

*Held:* The appeal should be allowed.

The legislation in question and the Corporation created thereunder had the effect of depriving the appellant of its goodwill as a going concern and consequently rendering its physical assets virtually useless and the goodwill so taken away constituted property of the appellant for the loss of which no compensation whatever had been paid. There is nothing in the Act providing for the taking of such property by the Government without compensation and as the Court found that there was such a taking, it followed that it was unauthorized having regard to the recognized rule that “unless the words of the statute clearly so demand, a statute is not to be
construed so as to take away the property of a subject without compensation” per Lord Atkinson in *Attorney-General v. De Keyser’s Royal Hotel*, [1920] A.C. 508.

To follow up, as this case was identified on the Federal government page: “Introduction and The Law of the Crown Prerogative,” with *Attorney-General v. De Keyser’s Royal Hotel*, [1920] A.C. 508.\(^50\)

**LORD ATKINSON** - “The late Master of the Rolls in the following pregnant passage of his judgment put a rather unanswerable question. He said:— "Those powers which the executive exercises without Parliamentary authority are comprised under the comprehensive term of the prerogative. Where, however, Parliament has intervened and has provided by statute for powers, previously within the prerogative, being exercised in a particular manner and subject to the limitations and provisions contained in the statute, they can only be so exercised. Otherwise, what use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative?"

“Neither the public safety nor the defence of the realm requires that the Crown should be relieved of a legal liability to pay for the property it takes from one of its subjects.”

“Again it appears to me to be almost inconceivable that the Crown should claim the right to do such things as prostrate fences, take possession of the great industrial works mentioned, or cause any buildings to be destroyed, without being bound at law to compensate the owners therefor…."

**LORD SUMNER** – “Royal Prerogatives are not named, but the powers of taking land are such as only the Crown by its proper officers and departments can exercise, and the restrictions on the exercise of the statutory powers, which the Act requires, must necessarily be restrictions upon the powers of the Crown.”

“According to the argument, under the prerogative the subject could claim no compensation for losing the use of his property; under the statute he could. Is it to be supposed that the Legislature intended merely to give the Executive, as advisers of the Crown, the power of discriminating between subject and subject, enriching one by electing to proceed under the statute and impoverishing another when it requisitions under the alleged prerogative? To presume such an intention seems to me contrary to the whole trend of our constitutional history for over two hundred years.”

\(^50\) Introduction and The Law of the Crown Prerogative as of February 26, 2019
LORD PARMOOR – “The Royal Prerogative connotes a discretionary authority or privilege, exercisable by the Crown, or the Executive, which is not derived from Parliament, and is not subject to statutory control. This authority or privilege is in itself a part of the common law, not to be exercised arbitrarily, but "per legem" and "sub modo legis." In the present appeal, it is not alleged that, if the Royal Prerogative did authorize the taking of possession of the premises of the respondents, for temporary use and occupation, without payment of rent or compensation, the authority was used improperly or in an arbitrary manner.”

“It is further noticeable that the prerogative right claimed is limited to an entry upon, or to taking temporary possession of, or to the temporary occupation and use of the land, of any subject without payment of compensation. It is not claimed that it can be extended to a case of disseisin. Since Magna Carta the estate of a subject in lands or buildings has been protected against the prerogative of the Crown. It is not easy to see what the distinction is between disseisin and an indefinite use and occupation, which may extend beyond the estate of any particular owner. The later statute law gives the same claim to compensation to the subject in either case. An analogy arises in the case of taxation. Money is of primary necessity for public defence during war, but it has long been established that in order to obtain the requisite supplies, the Executive must follow constitutional precedent, and obtain Parliamentary sanction. If, however, it could be established that there had been at one time such a prerogative right as is claimed by the appellant, I am unable to accept the further proposition that such right has not been abated, abridged, or curtailed by any … other statute.”

“The constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject. I think that the statutory provisions applicable to the interference by the Executive with the land and buildings of the respondents, bring the case within the above principle. It would be an untenable proposition to suggest that Courts of law could disregard the protective restrictions imposed by statute law where they are applicable. In this respect the sovereignty of Parliament is supreme. The principles of construction to be applied in deciding whether the Royal Prerogative has been taken away or abridged are well ascertained. It may be taken away or abridged by express words, by necessary implication, or, as stated in Bacon's Abridgement, where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong. Statutes which provide rent or compensation as a condition to the
right of the Executive to take over the temporary possession of lands or buildings on the occasion of public exigency come, in my opinion, within the category of statutes made for the advancement of justice and to prevent injury and wrong. This is in accord with the well-established principle that, unless no other interpretation is possible, justice requires that statutes should not be construed to enable the land of a particular individual to be confiscated without payment....”

The Fowler case involves purported “environmental protections” for “fish habitat” and brings into question a number of issues.

**Fowler v. The Queen, [1980] 2 SCR 213, 1980 CanLII 201 (SCC)**

Date: 1980-06-17

Other citations: 113 DLR (3d) 513; 32 NR 230; [1980] 5 WWR 511; 53 CCC (2d) 97; 9 CELR 115

Citation: Fowler v. The Queen, [1980] 2 SCR 213, 1980 CanLII 201 (SCC), retrieved on 2019-02-26

Cited by 48 documents

Supreme Court of Canada
Fowler v. The Queen, [1980] 2 S.C.R. 213
Date: 1980-06-17
Dan Fowler Appellant;

And

Her Majesty The Queen Respondent.

1979: December 4, 5; 1980: June 17.
Present: Martland, Ritchie, Pigeon, Dickson, Beetz, McIntyre and Chouinard JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Fisheries—Injury to fishing grounds and pollution of waters—Invalidity of s. 33(3) of Fisheries Act—Fisheries Act, R.S.C. 1970, c. F-14, s. 33, as amended by R.S.C. 1970 (1st Supp.), c. 17, s. 3 and 1976-77 (Can.), c. 35, s. 7—British North America Act, ss. 91(12), 92(13).

The appellant was carrying on a logging operation on the east shore of Humphrey Channel in the County of Vancouver. As part of the logging operation the logs were removed from the forest by dragging them with a caterpillar tractor and in the course of dragging these logs they were dragged across a small stream which was only a few feet wide. From this operation there was debris deposited in the stream bed. This stream flowed into Forbes Bay, which is salt water, part of the coastal water of British Columbia. The stream at some times contained fish, it being used for the
spawning and rearing of two species of salmon, but there was no evidence that the debris affected or injured the fish or the fry in any way. The appellant was charged with violating the provisions of s. 33 of the *Fisheries Act*, in that he did unlawfully put debris into water frequented by fish and that he did unlawfully knowingly permit to be put debris into water frequented by fish. The appellant was acquitted at trial, the trial judge finding that s. 33(3) of the *Fisheries Act* was ultra vires of the Parliament of Canada. The respondent appealed this decision and the County Court judge allowed the appeal. The appeal to the Court of Appeal by the appellant was dismissed, the Court of Appeal holding that s. 33(3) was within Parliament’s power to enact because it was “legislation clearly in relation to the matter of inland fisheries and particularly to the preservation of fish”. The sole issue to be determined in this appeal is that which is raised in the following constitutional question. “Is s. 33(3) of the *Fisheries Act* within the legislative competence of the Parliament of Canada?”

[Page 214]

*Held:* The appeal should be allowed.

“Fisheries”, as used in s. 91(12) of the *B.N.A. Act* and as interpreted by the courts, refers to the natural resource, and the right to exploit it, and the place where the resource is found and the right is exercised. The federal power in relation to fisheries is concerned with the protection and preservation of fisheries as a public resource. The legislation in question here does not deal directly with fisheries, as such, within that meaning. Rather, it seeks to control certain kinds of operations not strictly on the basis that they have deleterious effects on fish but, rather, on the basis that they might have such effects. *Prima facie* s. 33(3) regulates property and civil rights within a province: dealing with such rights and not dealing specifically with “fisheries”, in order to support the legislation it must be established that it provides for matters necessarily incidental to effective legislation on the subject-matter of sea coast and inland fisheries. It does not so provide, for s. 33(3) extends to cover not only water frequented by fish but also water that flows into such water, and it makes no attempt to link the proscribed conduct to actual or potential harm to fisheries. It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries. As such, s. 33(3) of the *Fisheries Act* is ultra vires of the federal Parliament.


APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from a judgment of the County Court[2], [Page 215] allowing an appeal by the respondent of a judgment of the Provincial Court[3].

Appeal allowed.

Duncan W. Shaw and Richard C. Gibbs, for the appellant.
T.B. Smith, Q.C., and H.J. Wruck, for the respondent.
E.R.A. Edwards, for the intervener, the Attorney General of British Columbia.
Alan Reid, for the intervener, the Attorney General of New Brunswick.

The judgment of the Court was delivered by

MARTLAND J.—The sole issue to be determined in this appeal is that which is raised in the constitutional question propounded in the order of the Chief Justice of this Court:
“Is Section 33(3) of the Fisheries Act, R.S.C. 1970, c. F-14, within the legislative competence of the Parliament of Canada?”

Section 33 of the Fisheries Act appears under the heading “Injury to Fishing Grounds and Pollution of Waters” and contains, inter alia, the following subsections:
33. (1) No one shall 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, or leave or deposit or cause to be thrown, left or deposited, upon the shore, beach or bank of any water or upon the beach between high and low water mark, remains or offal of fish, or of marine animals, or leave decayed or decaying fish in any net or other fishing apparatus; such remains or offal may be buried ashore, above high water mark.
(2) 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 such deleterious substance or any other deleterious substance that results from the deposit of such deleterious substance may enter any such water.
[Page 216]
(3) No person engaging in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.

(4) No person contravenes subsection (2) by depositing or permitting the deposit in any water or place

(a) of 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; or

(b) of a deleterious substance of a class, in a quantity or concentration and under conditions authorized by or pursuant to regulations applicable to that water or place or to any work or undertaking or class thereof, made by the Governor in Council under subsection (13).

(5) Any person who contravenes any provision of

(a) subsection (1) or (3) is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars for a first offence, and not exceeding ten thousand dollars for each subsequent offence; or

(b) subsection (2) is guilty of an offence and liable on summary conviction to a fine not exceeding fifty thousand dollars for a first offence, and not exceeding one hundred thousand dollars for each subsequent offence.

(6) Where an offence under subsection (5) is committed on more than one day or is continued for more than one day, it shall be deemed to be a separate offence for each day on which the offence is committed or continued.

... 

(11) For the purposes of this section and sections 33.1 and 33.2, “deleterious substance” means

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or

(b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, and without limiting the generality of the foregoing includes

(c) any substance or class of substances prescribed pursuant to paragraph (12)(a),

(d) any water that contains any substance or class of substances in a quantity or concentration that is equal to or in excess of a quantity or concentration prescribed in respect of that substance or class of substances pursuant to paragraph (12)(b), and
(e) any water that has been subjected to a treatment, process or change prescribed pursuant to paragraph (12)(c);
“deposit” means by discharging, spraying, releasing, spilling, leaking, seeping, pouring, emitting, emptying, throwing, dumping or placing;
“water frequented by fish” means Canadian fisheries waters.
(12) The Governor in Council may make regulations prescribing
(a) substances and classes of substances,
(b) quantities or concentrations of substances and classes of substances in
water, and
(c) treatments, processes and changes of water
for the purpose of paragraphs (c) to (e) of the definition “deleterious
substance” in subsection (11).

The respondent contends that subs. (3) of s. 33 is valid legislation
because of the legislative authority of Parliament in respect of “Sea Coast
and Inland Fisheries” under s, 91(12) of the British North America Act. The
appellant submits that subs. (3) falls within provincial legislative powers,
relying upon ss. 92(5), 92(10), 92(13) and 92(16) of the Act:
92(5) The Management and Sale of the Public Lands belonging to the
Province and of the Timber and Wood thereon.
92(10) Local Works and Undertakings ....
[Page 218]
92(13) Property and Civil Rights in the Province.
92(16) Generally all Matters of a merely local or private Nature in the
Province.

This case is concerned with the prosecution of the appellant on two counts,
as follows:
COUNT #1 that Dan Fowler, from April 27, 1975, to May 27, 1975, while
engaged in logging, did UNLAWFULLY put debris into water frequented by
fish, to wit: at or near Forbes Bay, in the County of Vancouver, Province of
British Columbia, CONTRARY TO THE PROVISIONS OF SECTION 33 OF
THE FISHERIES ACT, as amended;
COUNT #2 that Dan Fowler, from April 27, 1975, to May 27, 1975, while
engaged in logging, did UNLAWFULLY knowingly permit to be put, debris
into water frequented by fish, to wit: at or near Forbes Bay, in the County of
Vancouver, Province of British Columbia, CONTRARY TO THE
PROVISIONS OF SECTION 33 OF THE FISHERIES ACT, as amended.

The facts of the case are stated by the Provincial Court judge by whom the
case was tried, as follows:
The fact of the case are that the accused, Dan Fowler, was carrying on a
logging operation at a place known as Forbes Bay on the east shore of
Humphrey Channel in the County of Vancouver, Province of British
Columbia. Dan Fowler was subcontracting the removal of logs and timber
from this land for the purpose of the logs being towed away. The evidence
inferred that Dan Fowler was carrying on a normal and usual logging
operation. As part of the logging operation the logs were removed from the forest by dragging the logs with a caterpillar tractor and in the course of dragging these logs they were dragged across a small stream, which is so small that it has no name. There was no exact measurement of the width of the stream but a photograph would indicate it is a few feet wide. From this logging operation there

was debris deposited in the stream bed. From the photograph tendered as an exhibit and from the description given in evidence the debris consisted of limbs, branches or tops of trees.

This stream flowed into Forbes Bay which is salt water, part of the Coastal water of British Columbia. The stream at some times contained fish, the Fishery Officer said that the stream was used for the spawning of two species of salmon, Coho and pink, and for the rearing of the Coho fry. There was no evidence tendered by the Crown that the deposit of the debris affected or injured the fish or the fry in any way. On cross-examination the Fishery Officer said that this type of debris deposited in the stream could be a deleterious substance affecting the biological oxygen demand in the stream and that the fish eggs and the fry had a high oxygen demand. The Fishery Officer on cross-examination said that the debris could affect the number of fry by damaging the eggs in the gravel spawning ground. The Fishery Officer further said that every time something is done to the stream it may have a far reaching effect or little effect.

The appellant was acquitted at trial. The trial judge held as follows:

I find that Section 33(3) of the Fisheries Act is not certain and effective to exercise the power of Parliament under Section 91(12) of the B.N.A. Act and since it does interfere with the power of the provinces under Section 92(5) and 92(13), Section 33(3) is ultra vires Parliament.

The respondent appealed this decision and the County Court judge allowed the appeal. The appeal to the Court of Appeal by the appellant was dismissed. The appellant, with leave, has appealed to this Court.

The Court of Appeal held that subs. 33(3) was within Parliament’s power to enact because it was “legislation clearly in relation to the matter of inland fisheries and particularly to the preservation of fish”. The Court relied upon the first proposition of Lord Tomlin in Attorney-General for Canada v. Attorney-General for British Columbia and others[4], at p. 118. Lord Tomlin, in that case, stated four propositions, as follows:

Questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction have frequently come before their Lordships’ Board, and as the result of the decisions of the Board the following propositions may be stated:—

(1) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the
(2) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion: see *Attorney-General for Ontario v. Attorney-General for the Dominion* ([1896] A.C. 348).

(3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91: see *Attorney-General of Ontario v. Attorney-General for the Dominion* ([1894] A.C. 189); and *Attorney-General for Ontario v. Attorney-General for the Dominion* ([1896] A.C. 348).

(4) There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail: see *Grand Trunk Ry. of Canada v. Attorney-General of Canada* ([1907] A.C. 65).

Counsel for the appellant contends that in order to uphold the legislation in issue the respondent must establish that it falls within the third proposition enunciated by Lord Tomlin in that case. The earliest case in this Court in which the scope of the federal power to legislate in relation to [Page 221]

sea coast and inland fisheries is *R. v. Robertson*[5], which was concerned with the validity of an instrument called a lease of fishery whereby the Minister of Marine and Fisheries purported to lease for a term of nine years a portion of the Miramachi River in New Brunswick for the purpose of fly fishing for salmon. The lessee’s claim to the ownership of the fishing in that portion of the river was successfully resisted in the New Brunswick Courts by persons who owned a portion of the river. The lessee then filed a petition of right against the Crown in the Exchequer Court claiming compensation. In the course of his judgment, Ritchie C.J., at p. 120, said this:

… I am of opinion that the legislation in regard to ‘Inland and Sea Fisheries’ contemplated by the *British North America Act* was not in reference to ‘property and civil rights’—that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries, in other words,
all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; in other words, laws in relation to the fisheries, such as those which the local legislatures were, previously to and at the time of confederation, in the habit of enacting for their regulation, preservation and protection,…. At p. 123, he said further:

To all general laws passed by the Dominion of Canada regulating "sea coast and inland fisheries" all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large.

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The scope of federal power to legislate under s. 91(12) of the British North America Act was discussed by the Privy Council in the following two cases from which I quote:

Attorney General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia[6], at p. 712:

Their Lordships are of opinion that the 91st section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading, "Sea-Coast and Inland Fisheries" in s. 91. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively remained untouched by that enactment. Whatever grants might previously have been lawfully made by the province in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time, it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the time of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion Legislature.

Attorney-General for Canada v. Attorney-General for Quebec[7], at p. 432:

… There is everywhere a power of regulation in the Dominion Parliament, but this must be exercised so as not to deprive the Crown in right of the Province or private persons of proprietary rights where they possess them. Reference to the first quoted passage in the judgment of Ritchie C.J. in the Robertson case was made by Chief Justice Laskin in Interprovincial Co-Operatives Limited et al. v. The Queen[8], at p. 495, a case which dealt with provincial
legislation for the protection of provincial property rights in inland fisheries.
The Chief Justice, who delivered the judgment of himself and Judson and Spence JJ., which dissented in the result, made the following statement which was not the subject of disagreement by the majority:

... It is, in my view, untenable to fasten on words in a judgment, such as the words "tending to their regulation, protection and preservation", which appear in the reasons in The Queen v. Robertson, and read them as if they have literal constitutional significance. Federal power in relation to fisheries does not reach the protection of provincial or private property rights in fisheries through actions for damages or ancillary relief for injury to those rights. Rather, it is concerned with the protection and preservation of fisheries as a public resource, concerned to monitor or regulate undue or injurious exploitation, regardless of who the owner may be, and even in suppression of an owner’s right of utilization.

The meaning of the word “fishery” was considered by Newcombe J. in this Court in Reference as to the Constitutional Validity of Certain Sections of the Fisheries Act, 1914[9], at p. 472:

In Patterson on the Fishery Laws (1863) p. 1, the definition of a fishery is given as follows:

A Fishery is properly defined as the right of catching fish in the sea, or in a particular stream of water; and it is also frequently used to denote the locality where such right is exercised.

In Dr. Murray’s New English Dictionary, the leading definition is:
The business, occupation or industry of catching fish or of taking other products of the sea or rivers from the water.

The above definitions were quoted and followed by Chief Justice Davey in Mark Fishing v. United Fishermen & Allied Workers Union[10], at pp. 591 and 592. Chief Justice Davey at p. 592 added the words:
The point of Patterson’s definition is the natural resource, and the right to exploit it, and the place where the resource is found and the right is exercised.

The legislation in question here does not deal directly with fisheries, as such, within the meaning of those definitions. Rather, it seeks to control certain kinds of operations not strictly on the basis that they have deleterious effects on fish but, rather, on the basis that they might have such effects. Prima facie, subs. 33(3) regulates property and civil rights within a province. Dealing, as it does, with such rights and not dealing specifically with “fisheries”, in order to support the legislation it must be established that it provides for matters necessarily incidental to effective legislation on the subject-matter of sea coast and inland fisheries.

In Attorney-General for Canada v. Attorney-General for British Columbia and others, to which reference has already been made, the Attorney General for Canada sought to support provisions in the Fisheries Act, 1914, which required the obtaining of a federal licence in order to operate,
for commercial purposes, a fish cannery or, in British Columbia, a salmon cannery or curing establishment. It was in this case that Lord Tomlin stated his four propositions regarding conflicts between federal and provincial jurisdiction.

The federal argument was that the legislation in issue was valid under s. 91(12) as being directly or incidentally in relation to sea coast and inland fisheries. It was argued that the operation of canning and curing establishments was inseparably connected with the conduct of fisheries. The legislation was held to be *ultra vires* of Parliament. Lord Tomlin said at pp. 121-22:

It may be, though on this point their Lordships express no opinion, that effective fishery legislation requires that the Minister should have power for the purpose of enforcing regulations against the taking of unfit fish or against the taking of fish out of season, to inspect all fish canning or fish curing establishments and require them to make appropriate statistical returns. Even if this were so the necessity for applying to such establishments any such licensing system as is embodied in the sections in question does not follow. It is not obvious that any licensing system is necessarily incidental to effective fishery legislation, and no material has been placed before the Supreme Court or their Lordships’ Board establishing the necessary connection between the two subject matters. In their Lordships’ view, therefore, the appellant’s second contention is not well founded.

The impugned sections confer powers upon the Minister in relation to matters which in their Lordships’ judgment prima facie fall under the subject “property and civil rights in the province,” included in s. 92 of the British North America Act, 1867. As already indicated, these matters are not in their Lordships’ opinion covered directly or incidentally by any of the subjects enumerated in s. 91. Counsel for the respondent supports the legislation on the ground that it is preventive legislation intended to protect and preserve fish. He contends that its validity does not depend on showing that the operations to which it relates cause actual harm to a fishery.

The broad scope of the legislation in question is well illustrated in the following passages from the judgment of the Provincial Court judge at trial:

From evidence given in this case and also from judicial notice of the geography of the British Columbia coast and from that which is advanced in argument by both counsel, I have taken into consideration that on the coast of British Columbia where there are substantial logging operations there are innumerable streams, riverlets, and creeks flowing from the land to the various inlets and waters adjacent to the British Columbia coast which is the salt water and portion of the ocean frequented by fish and that the words of the section “into any water frequented by fish or that flows into such water” includes all these creeks, streams and riverlets of free flowing water that accumulate and ultimately flow into the ocean no matter how small and
whether or not at any particular part of the water is at that point frequented by fish.

The scope of this legislation covers the handling of any wood material by loggers and land clearers in respect to almost any water in Canada. This section would affect every log, piece of lumber or tree that is so placed or dumped into any river, lake, stream or ocean in Canada from which there is detached the wood. I cannot conceive that the booming operations, the log drives and similar type of logging enterprises could be carried out without depositing some debris into the waters used for that purpose. If section 33(3) does not require the additional proof that the deposit of the debris affects the preservation of fish then every such booming operation and log drive would be committing an offence against section 33(3).

The criteria for establishing liability under subs. 33(3) are indeed wide. Logging, lumbering, land clearing and other operations are covered. The substances which are proscribed are slash, stumps and other debris. The amount of the substance which is deposited is not relevant. The legislation extends to cover not only water frequented by fish but also water that flows into such water, ice over any such water and any place from which slash, stumps and other debris are likely to be carried into such water.

Subsection 33(3) makes no attempt to link the proscribed conduct to actual or potential harm to fisheries. It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries. Furthermore, there was no evidence before the Court to indicate that the full range of activities caught by the subsection do, in fact, cause harm to fisheries. In my opinion, the prohibition in its broad terms is not necessarily incidental to the federal power to legislate in respect of sea coast and inland fisheries and is ultra vires of the federal Parliament.

I would allow the appeal, set aside the judgment of the Court of Appeal and the County Court and restore the judgment at trial. The appellant is entitled to his costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: Davis & Company, Vancouver.
Solicitor for the respondent: R. Tassé, Ottawa.

Solicitor for the intervener, the Attorney General of British Columbia: R.H. Vogel, Victoria.
Solicitor for the intervener, the Attorney General of New Brunswick: G.F. Gregory, Fredericton.

Regina v. Lewis, 1993 CanLII 4522 (BC CA), retrieved on 2019-03-01

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE WALLACE
34) The principle that the *ad medium filum aquae* presumption for policy reasons, does not apply to navigable waters in British Columbia is best expressed by Anglin J. (as he then was) in *Keewatin Power Company v. Town of Kenora* (1906), 13 O.L.R. 237 at 263 (H.C):

. . . In our rivers which are navigable in fact, because the public rights in them are recognized to have always existed, *ex juris naturae*, the title to the alveus must be presumed to remain in the Crown unless expressly granted....

35) The Ontario Court of Appeal reversed Anglin J.’s decision on the basis that Ontario statute law required the English common law, without modification, to govern the decision. No such requirement is imposed upon the Western Provinces, the statutes of which generally provided for the introduction of the law of England only so far as it was not from local circumstances inapplicable. (See the *Law and Equity Act*, R.S.B.C., 1979, c.224, s.2). See also *Re Provincial Fisheries* (1895), 1896 CanLII 76 (SCC), 26 S.C.R. 444 at 528, where the Chief Justice held that where beds of navigable rivers have not been granted, ownership remains in the Crown, hence the right of fishing in such waters remains in the public. He referred to the "...invariable practice which has prevailed in Canada from the earliest time since the settlement of the country to treat the right of fishing in navigable waters above the flow of the tide as public, and in the injustice and impolicy of a contrary rule ..."

**Saker v. Middlesex Centre (Chief Building Official), 2001 CanLII 28088 (ON S.C.)**

HOCKIN J.:— “[17] In my view, the legal effect of the Act, from a simple reading of its language and the cases, is that in “the absence of an express grant” of the “bed of a navigable body of water or stream, a patent from the Province of land bordering on a navigable body of water or stream, is deemed not to pass the bed of such body of water. See the case of the Tadenac Club Ltd., supra, at p. 276 O.R. per Gale J. Such is not the case here; here, there is an express grant from the Crown of the “land and waters thereon lying”. In short, the Act [Beds of Navigable Waters Act] does not apply. It matters not whether the waterway is navigable since the fee is vested in the grantee. …”

**Lynch v St. John's (City), 2016 NLCA 35 (CanLII), upheld by the Supreme Court of Canada in its summary:**

"[63]...Having the property rights flowing from a Crown grant, with virtually unrestricted rights to build and to appropriate and use groundwater, transformed to merely a right to keep the land “unused in its natural state,” results in ... all ... incidents of ownership being taken away. All of the
reasonable uses … were taken away and a …constructive expropriation, resulted...."

[56] To properly appreciate whether anything has been … acquired …, we have to consider the nature of groundwater. At common law, groundwater was described as “water percolating through underground strata, … has no certain course and no defined limit, but oozes through the soil in every direction in which the rain penetrates” … Underground streams flowing in a definite channel also fall within the classification of groundwater ...

[57] The common law distinguishes between rights applying to groundwater and riparian rights applying to watercourses “in which water flows in a fairly regular manner in channels between banks that are more or less defined”: … owners of lands abutting a watercourse to a right of access to water and the right to prevent flooding. … Also, riparian owners are entitled to have water reach their lands substantially undiminished in quality.⁶⁵¹

We have seen, throughout these various court rulings, that there are a number of questions which need to be answered regarding the amendments proposed in Bill C-68.⁵² That being said it would seem that very little information has been brought forward from the Ministry of Natural Resources considering, in his mandate letter,⁵³ the Prime Minister expressed that the Minister of Fisheries, Oceans and the Canadian Coast Guard should seek information from this Ministry in the management of the fisheries as a natural resource.

⁵¹ Lynch v St. John’s (City), 2016 NLCA 35 (CanLII)
⁵² “The Fisheries Act as an Environmental Protection Statute,” in coordination with the Canadian Institute of Resources Law, Dalhousie University – Schulich School of Law, Dalhousie University – Marine & Environmental Law Institute and the Ministry of Environment and Climate Change Canada.
4. What are some of the more systemic problems with Bill C-68?

What could be considered as one of the most egregious sections in Bill C-68 is section 43.3 (2). This section purports to place the Minister’s regulations over those of the Governor General’s. As with any entity the “creator” of that entity has the right to remove that entity therefore as “all power and honour flow from the Crown” how is it that Parliament would express that the Minister’s regulation would prevail over those created by the Governor General (Sovereign representative), the very entity that created the Ministry and the Minister’s authority, through its own power? This section, it would seem, fails merely by placing the Minister over the Sovereign representative.

Some may feel this Bill makes a mockery of the Constitution and the rights of all Canadians. It brings forward section 35 of the 1982 Constitution for Indigenous rights and yet makes no statement in regards to section 25 and the rights established under the Royal Proclamation of 1763.

54 Inconsistency
43.3 (2) If there is an inconsistency between regulations made by the Minister under subsection (1) and any regulations made by the Governor in Council under this Act, any orders issued under any regulations made by the Governor in Council under this Act or any conditions of any lease or licence issued under this Act, the regulations made by the Minister prevail to the extent of the inconsistency.

55 https://www.canada.ca/content/dam/pch/documents/services/royal-symbols-titles/crnMpls-eng.pdf

56 Recognition of existing aboriginal and treaty rights
35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"
35. (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements
(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes
(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

57 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.
The Royal Proclamation of 1763 has been referred to as the *Magna Carta* for the Indigenous peoples. Combined with the omission of section 25 there are references to specific Treaties of which there would have been other treaties established long before in the history of British Columbia, etc. We must remember, prior to 1871, there would have been agreements in place. Are we not to assume a novation in regards to those agreements, upholding those constitutional documents?

Had the various governments merely upheld the obligations they, and the Crown, incurred, throughout the Dominion, under the Royal Proclamation of


59 13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.

To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies. British Columbia Terms of Union, (Order of Her Majesty in Council admitting British Columbia into the Union), At the Court at Windsor, the 16th day of May, 1871.

60 Métis win historic land dispute ruling in Supreme Court: Manitoba Métis Federation sought declaration of government's failure to implement 1870 land deal
https://www.cbc.ca/news/politics/m%C3%A9tis-celebrate-historic-supreme-court-land-ruling-1.1377827

CBC News, Posted: Mar 8, 2013 10:05 AM ET

The Supreme Court of Canada has ruled that the federal government failed in its obligations to the Métis people. A legal challenge by the Manitoba Métis Federation sought recognition for the treatment of its people after the 1870 government land deal that ended the Red River Rebellion. The 6-2 ruling in Canada's highest court declared that "the Federal Crown failed to implement the land grant provision set out in s.31 of the Manitoba Act, 1870 in accordance with the honour of the Crown." The federal government "acted with persistent inattention and failed to act diligently," the ruling explains, adding that it "could and should have done better." "This was not a matter of occasional negligence, but of repeated mistakes and inaction that persisted for more than a decade," it says. Writing the reasons for the majority decision, Chief Justice Beverley McLachlin and Justice Andromache Karakatsanis outlined lasting effects of the federal government's failure to honour obligations dating back 140 years. "So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the Charter and underlying s. 31 of the Manitoba Act, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied," they wrote. "The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import," the ruling says. Justices Marshall Rothstein and Michael Moldaver dissented from the majority view. Negotiations now likely The ruling ends three decades of legal challenges brought by the Métis against the federal government.

Friday's decision has not ordered any particular remedies, but it could open the door to land claim negotiations or talks toward other forms of compensation from the federal government. The Métis argued that Ottawa reneged on its promises under the Manitoba Act, which created the
1763, etc., there would be no need to exaggerate, through section 35, and create
division and discrimination under that section.

One of the biggest causes for concern in Bill C-68 is the amendment to the
definition of “fish habitat.” The existing definition is:

**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;⁶¹

The amendment defines ‘fish habitat” as:

**fish habitat** means water frequented by fish and any other areas on which
fish depend directly or indirectly to carry out their life processes, including
spawning grounds and nursery, rearing, food supply and migration areas;

This could mean anywhere as even a drainage ditch, farmers’ fields, etc., can be
“frequented by fish.” This would be in direct contradiction of one’s right to protect
one’s property from flooding as it would stop one from clearing their ditches of

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Bill C-68 An Act to Amend the Fisheries Act and etc., by OLA & ARR Ltd., © Mar. 2019
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debris to enable water to flow freely. This also interferes with one’s right to profit from their land and one’s riparian rights.

As “habitat” involves the “soil” it would seem if the “soil is not in the Dominion” regulating the “soil” is unlawful. If the Federal government is creating legislation pertaining to their own projects that is completely different but if they are attempting to legislation for others they could be considered as violating the constitution, including provincial jurisdiction and private property.

The next issue is the expansion of the definition of “fishery.” In the present act it is defined as:

**fishery** includes the area, locality, place or station in or on which a pound, seine, net, weir or other fishing appliance is used, set, placed or located, and the area, tract or stretch of water in or from which fish may be taken by the said pound, seine, net, weir or other fishing appliance, and also the pound, seine, net, weir, or other fishing appliance used in connection therewith.  

The amendment consists of expanding this to include:

(a) any of its species, populations, assemblages and stocks, whether the fish is fished or not,
(b) any place where fishing may be carried on,
(c) any period during which fishing may be carried on,
(d) any method of fishing used, and
(e) any type of fishing gear or equipment or fishing vessel used

This is not to be for the protection of fish that are “fished or not.” As for any place where fishing may be carried on as this could be an encroachment on private property and the right of an individual to fish their own fish for their own use. It would seem Parliament is intentionally making this section ambiguous to expand its area of jurisdiction.

In the amendment Parliament is removing section 2 (2) – Serious harm to fish. This section is needed to ensure that there must be death of fish or any permanent alteration to, or destruction of fish habitat. Without this section, again,

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62 “By legacy, we mean a carry-over, or “memory,” of past events and processes that influences today’s soil habitats (Vogt et al. 1997).” “How Soils Structure Communities in the Antarctic Dry Valleys” by ROSS A. VIRGINIA and DIANA H. WALL.
63 The Queen v. Robertson (1882) 6 SCR 52, at 126
65 2 (2) **Serious harm to fish**
(2) For the purposes of this Act, serious harm to fish is the death of fish or any permanent alteration to, or destruction of, fish habitat. R.S., 1985, c. F-14, s. 2; R.S., 1985, c. 35 (1st Supp.), ss. 1, 5; 1991, c. 1, s. 1; 2012, c. 19, s. 133, c. 31, s. 175. Fisheries Act, R.S.C., 1985, c. F-14, Current to January 30, 2019.
it would seem Parliament is opening up its field of jurisdiction in an indirect way to allow it to violate fundamental constitutional rights of land and property (proprietary rights).

Presently in the *Fisheries Act* section 2.1 had been repealed. The amendment to include “Purposes” goes far beyond Parliament’s jurisdiction and may place the Crown, Parliament, the Senate and the Judiciary in disrepute.

It allows for 2.1(b) the conservation and protection of fish and fish habitat, including by preventing pollution. There are presently various other statutes which include controls and prevention of pollution.

The amendment continues with 2.2 – Territorial Application. Not only is Parliament attempting to expand its national boundaries it has included statements of expanding beyond the limits of Canadian fisheries. This section is in direct conflict with Canada’s international agreements and covenants and could place Canada in jeopardy regarding its international obligations, considering the United Nations Convention on the Law of the Sea. Does

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66 The heading “Purposes” after section 2 of the English version of the Act is replaced by the following:

**Purpose**

3 The Act is amended by adding the following after the heading “Purposes” after section 2:

**Purpose of Act**

2.1 The purpose of this Act is to provide a framework for
(a) the proper management and control of fisheries; and
(b) the conservation and protection of fish and fish habitat, including by preventing pollution.

67 *fish habitat* means water frequented by fish and any other areas on which fish depend directly or indirectly to carry out their life processes, including spawning grounds and nursery, rearing, food supply and migration areas;

68 **Territorial Application**

**Application**

2.2 (1) This Act applies in Canada, and also to
(a) Canadian fisheries waters; and
(b) with respect to a sedentary species, any portion of the continental shelf of Canada that is beyond the limits of Canadian fisheries waters.

69 **Article 47**

**Archipelagic baselines**

1. An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.

2. The length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles.

3. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.

4. Such baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.
5. The system of such baselines shall not be applied by an archipelagic State in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another State.

6. If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected.

7. For the purpose of computing the ratio of water to land under paragraph 1, land areas may include waters lying within the fringing reefs of islands and atolls, including that part of a steep-sided oceanic plateau which is enclosed or nearly enclosed by a chain of limestone islands and drying reefs lying on the perimeter of the plateau.

8. The baselines drawn in accordance with this article shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, lists of geographical coordinates of points, specifying the geodetic datum, may be substituted.

9. The archipelagic State shall give due publicity to such charts or lists of geographical coordinates and shall deposit a copy of each such chart or list with the Secretary-General of the United Nations.

Article 48
Measurement of the breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf

The breadth of the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf shall be measured from archipelagic baselines drawn in accordance with article 47.

Article 49
Legal status of archipelagic waters, of the air space over archipelagic waters and of their bed and subsoil

1. The sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines drawn in accordance with article 47, described as archipelagic waters, regardless of their depth or distance from the coast.

2. This sovereignty extends to the air space over the archipelagic waters, as well as to their bed and subsoil, and the resources contained therein.

3. This sovereignty is exercised subject to this Part.

4. The regime of archipelagic sea lanes passage established in this Part shall not in other respects affect the status of the archipelagic waters, including the sea lanes, or the exercise by the archipelagic State of its sovereignty over such waters and their air space, bed and subsoil, and the resources contained therein.

Article 50
Delimitation of internal waters

Within its archipelagic waters, the archipelagic State may draw closing lines for the delimitation of internal waters, in accordance with articles 9, 10 and 11.

Article 51
Existing agreements, traditional fishing rights and existing submarine cables

1. Without prejudice to article 49, an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters. The terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them. Such rights shall not be transferred to or shared with third States or their nationals.

2. An archipelagic State shall respect existing submarine cables laid by other States and passing through its waters without making a landfall. An archipelagic State shall permit the maintenance and replacement of such cables upon receiving due notice of their location and the intention to repair or replace them.

PART V
EXCLUSIVE ECONOMIC ZONE
Canada want more international litigation brought to its doorstep? This may also place the Crown in disrepute for not honouring the Crown’s international obligations, does it not?

Section 2.2 (2) brings in “sedentary species”\textsuperscript{70} which includes “any organism” “that, at the harvestable stage, either is immobile on or under the seabed or is unable to move except by remaining in constant physical contact with the seabed or subsoil.” As this is part of section 2.2 – Territorial Application it would seem to

\textit{Article 55}

\textit{Specific legal regime of the exclusive economic zone}

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

\textit{Article 56}

\textit{Rights, jurisdiction and duties of the coastal State in the exclusive economic zone}

1. In the exclusive economic zone, the coastal State has:
   (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
   (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
      (i) the establishment and use of artificial islands, installations and structures;
      (ii) marine scientific research;
      (iii) the protection and preservation of the marine environment;
      (c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

\textit{Article 57}

\textit{Breadth of the exclusive economic zone}

The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

\textit{Article 59}

\textit{Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone}

In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole. \textit{United Nations Convention on the Law of the Sea}. Also see Article 68 and 77.

\textit{Definition of sedentary species}

2.2 (2) For the purpose of paragraph (1)(b), \textit{sedentary species} means any organism that, at the harvestable stage, either is immobile on or under the seabed or is unable to move except by remaining in constant physical contact with the seabed or subsoil.
be in direct violation of United Nations Convention on the Law of the Sea, and in particular articles 68 and 77 of that Convention. 71

In regards to the added section 2.5 – Considerations. 72 It states that the Minister may take into consideration the following when making a decision.

(a) the application of a precautionary approach73 and an ecosystem74 approach;

As seen with the Fowler v. The Queen, [1980] 2 SCR 213, 1980 CanLII 201 (SCC) case there is no criteria for a “precautionary approach.”

“The legislation extends to cover not only water frequented by fish but also water that flows into such water, ice over any such water and any place from which slash, stumps and other debris are likely to be carried into such water.

Subsection 33(3) makes no attempt to link the proscribed conduct to actual or potential harm to fisheries. It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the

71 Article 68 Sedentary species This Part does not apply to sedentary species as defined in article 77, paragraph 4.

72 Considerations for decision making

73 No interpretation/definition of "precautionary approach."

74 No interpretation/definition of "ecosystem".
elements of the offence so as to link the prohibition to any likely harm to fisheries. Furthermore, there was no evidence before the Court to indicate that the full range of activities caught by the subsection do, in fact, cause harm to fisheries. In my opinion, the prohibition in its broad terms is not necessarily incidental to the federal power to legislate in respect of sea coast and inland fisheries and is *ultra vires* of the federal Parliament.\(^{75}\)

Not to mention there is no definition or interpretation for “precautionary approach” in the Act or amendment to the Act. The same can be said for the term “ecosystem.” How is one to interpret an Act without comprehensible definitions to ensure what the legislation is attempting to say.

In subsections (c), (d) and (e)\(^{76}\) there seems to be a conflict. It states in section (c) the Minister may take “scientific information” into consideration and yet in subsection (d) and (e) the Minister may also take “traditional knowledge of the Indigenous peoples of Canada” and “community knowledge” into consideration. Which of these three subsections would prevail if there is a conflict? One is to be based in science – one is to be based on historical and community lore.

This could also be in reference to subsection (g)\(^{77}\) which includes “social, economic and cultural factors.” Canada, as Canadians have been told, is a very diverse culture. There are a number of social, economic and cultural factors that the Minister would have to take into consideration. These could include anything from shucking oysters during Quebec-style réveillon feast\(^{78}\) to La Vigilia part of the Italian culture at Christmas.\(^{79}\) So which of the multitude of ‘social’ and/or “cultural” factors is the Minister to take into consideration? To limit these cultures in favour of other cultures would be discriminatory and so would any exemptions allowed, wouldn’t it?

Is section 2.5 (h)\(^{80}\) meaning that there will be no future licences issued if it is for the “preservation and promotion of the independence of licence holders in commercial inshore fisheries”? And what exactly does this even mean in regards to the preservation or promotion of the independence of licence holders? When one speaks of “independence” the term independence is;

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\(^{75}\) *Fowler v. The Queen*, [1980] 2 SCR 213, 1980 CanLII 201 (SCC)

\(^{76}\) 2.5 (c) scientific information;

\(^{77}\) 2.5 (g) social, economic and cultural factors in the management of fisheries;

\(^{78}\) Chuck Hughes’ guide to hosting a Quebec-style réveillon feast

https://www.cbc.ca/life/holiday/chuck-hughes-guide-to-hosting-a-quebec-style-r%C3%A9veillon-feast-1.4934204

\(^{79}\) Celebrate The Holidays Like An Italian With These Traditional Dishes, What Italians eat for the holidays.  [https://www.huffingtonpost.ca/2016/12/12/italian-holiday-dishes_n_12964380.html](https://www.huffingtonpost.ca/2016/12/12/italian-holiday-dishes_n_12964380.html)

\(^{80}\) 2.5 (h) the preservation or promotion of the independence of licence holders in commercial inshore fisheries;...
INDEPENDENCE – The state or quality of being independent; esp., a country’s freedom to manage all its affairs, whether external or internal, without control by other countries.  

INDEPENDENT – 1. Not subject to the control or influence of another entity <an independent investigation>. 2. Not associated with another (often larger) entity <an independent subsidiary>. 3. Not dependent or contingent on something else <an independent person>.

Does this grant licence holders extensive right not to uphold the *Fisheries Act* and/or respect any other statutes or other person’s rights that the Minister should take into consideration? This is an ambiguous statement at the least and adds nothing to the determination of what the Minister may or may not take into consideration.

As for section 2.5 (i) “the intersection of sex and gender with other identity factors,” does this pertain to fish and perhaps a catch and release strategy or does this pertain to “persons”? If it does pertain to persons what does “sex and gender” identity have to do with any decision the Minister may or may not make under this Act? If by any chance the Minister, when making a decision, is some how discriminatory there is always section 15 of the Charter he or she may look to for guidance. This statement really has nothing to do with “fishing,” “fisheries,” or “licences” and adds nothing to the Act.

An addition is created in Bill C-68 of section 4.01 expressing that there is to be an “advisory panel” created. Is this merely another avenue for the Minister and government to create partisan appointments? Does the Ministry of *Fisheries*,

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83 2.5 (i) the intersection of sex and gender with other identity factors.
84 “Reid says the fine will jump to $100,000 if he’s cited a second time. He’s under strict orders to safeguard the lives of the carp once he begins to expel them. "We have to collect all of them, and we have to fish both sexes, that’s what (the permit) says," Reid explained. "I have to transport them so as not to damage them, by containers with water inside. If some of them die, I have to bury them." Flooded-out farmer needs permit to remove fish By QMI Agency. http://canfirearms.ca/archives/text/v14n400-499/v14n473.txt
85 Minister may establish advisory panels
4.01 (1) The Minister may, in order to carry out the purpose of this Act, establish advisory panels and provide for their membership, functions and operation.
Remuneration of members
(2) Members of an advisory panel established under subsection (1) are to be paid any amount that is fixed by the Governor in Council for each day that they attend any of the advisory panel’s meetings.
Expenses
(3) The members are also entitled to be reimbursed, in accordance with Treasury Board directives, for the travel, living and other expenses incurred in connection with their work for the panel while absent from their ordinary place of work, in the case of full-time members, or from their ordinary place of residence, in the case of part-time members.
2012, c. 19, s. 134
Oceans and the Canadian Coast Guard not have sufficient staff to advise the Minister or does the Minister not have faith in the information staff is providing? There is also the existing section 4.1\(^{86}\) whereby the Minister may facilitate enhanced communications between parties, including the exchange of scientific and other information and facilitate public consultation or enter into arrangements with third-party stakeholders. There is no need for an advisory panel to be created as there are sufficient avenues for the Minister to obtain the information needed to make decisions in regards to “fish,” “fisheries,” etc.

The addition to section 4.1 (1)\(^{87}\) seems to be the Minister extending federal jurisdiction over provincial jurisdiction by including “any Indigenous governing body and any body — including a co-management body — established under a land claims agreement.” One merely has to read the *St. Catharines Milling and Lumber Co. v. R*, 13 SCR 577 to realize that this goes beyond the Federal governments constitutional ability as it interferes with the provincial jurisdiction set out in section 92 (5), (13), (16) and section 109 of the *Constitution Act, 1867.*

Considering that the new section 4.1 (1) may be unconstitutional the new sections 4.1 (4) through (8)\(^{88}\) may not exist and therefore need no explanation.

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86 **Minister may enter into agreements**

4.1 (1) The Minister may enter into an agreement with a province to further the purposes of this Act, including an agreement with respect to one or more of the following:

(a) facilitating cooperation between the parties to the agreement, including facilitating joint action in areas of common interest, reducing overlap between their respective programs and otherwise harmonizing those programs;

(b) facilitating enhanced communication between the parties, including the exchange of scientific and other information; and

(c) facilitating public consultation or the entry into arrangements with third-party stakeholders.

87 **Minister may enter into agreements**

4.1 (1) The Minister may enter into an agreement with any government of a province, any Indigenous governing body and any body — including a co-management body — established under a land claims agreement, to further the purpose of this Act, including an agreement with respect to one or more of the following: 2012, c. 19, s. 134

(2) Paragraph 4.1(2)(h)\(^{87}\) of the Act is replaced by the following:

(h) the circumstances and manner in which the government of the province or the Indigenous governing body is to provide information on the administration and enforcement of a provision of the laws of the province or the Indigenous governing body that the agreement provides is equivalent in effect to a provision of the regulations. 2012, c. 19, s. 134

88 **Agreements to be published**

(4) Subject to subsections (5) to (8), the Minister shall publish an agreement in the manner that he or she considers appropriate.

**Publication of negotiated agreement**

(5) Before any agreement that is negotiated for the purposes of section 4.2 is entered into, the Minister shall publish the agreement, or give notice of its availability, in Part I of the *Canada Gazette* and in any other manner that he or she considers appropriate.

**Comments**

(6) Within 60 days after the publication of an agreement or the giving of notice of its availability, any person may file comments with the Minister.

**Publication by Minister of results**
Same can be said for the new sections 4.2\(^{689}\) dependent on the provincial jurisdiction.

Bill C-68 repeals section 6 of the *Fisheries Act* which states presently:

Factors To Be Taken into Account

**Factors**

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

(d) the public interest. R.S., 1985, c. F-14, s. 6; 1991, c. 1, s. 2; 2012, c. 19, s. 135.

\(^{(7)}\) After the end of the 60-day period, the Minister shall publish in Part I of the *Canada Gazette* and in any other manner that he or she considers appropriate a report that summarizes how any comments were dealt with or a notice of the availability of that report.

**Publication of final agreements**

\(^{(8)}\) The Minister shall publish any final agreement, or give notice of its availability, in Part I of the *Canada Gazette* and in any other manner that he or she considers appropriate. 2012, c. 19, s. 134

\(^{689}\) Declaration of equivalent provisions

4.2 (1) If an agreement entered into under section 4.1\(^{689}\) provides that there is in force a provision of the laws of the province or the Indigenous governing body that is equivalent in effect to a provision of the regulations, the Governor in Council may, by order, declare that certain provisions of this Act or of the regulations do not apply in the province or the territory governed by the Indigenous governing body, as the case may be, with respect to the subject matter of the provision of the laws of the province or the Indigenous governing body.

Non-application of provisions

(2) Except with respect to Her Majesty in right of Canada, the provisions of this Act or of the regulations that are set out in the order do not apply within the province or the territory governed by the Indigenous governing body, as the case may be, with respect to the subject matter of the provision of the laws of the province or the Indigenous governing body.

Revocation

(3) The Governor in Council may revoke the order if the Governor in Council is satisfied that the provision of the laws of the province or the Indigenous governing body, as the case may be, is no longer equivalent in effect to the provision of the regulations or is not being adequately administered or enforced.

Notice

(4) The Governor in Council may revoke the order only if the Minister has given notice of the proposed revocation to the government of the province or to the Indigenous governing body, as the case may be.
And replaces section 6.1 which presently states, in the Act, that the purpose of section 6 “is to provide for the sustainability and ongoing productivity of commercial, recreational and Aboriginal fisheries.” The repealing of section 6 and the amendment of section 6.1 seems to be removing the Governor in Council’s regulations and is turning all authority over to the Minister to make regulation regarding these issues and it brings into play “fish habitat” which is not part of the original section 6 requirement.

Under the Fisheries Act there are orders which can be created through regulation, etc. There is in Bill C-68 a suspension of the criteria regarding orders which pertain to the new section 9.1, etc. It states in section 9.7 the following:

Statutory Instruments Act
9.7 Orders made under section 9.1 are not statutory instruments for the purposes of the Statutory Instruments Act.

Factors — measures respecting fish stocks
6.1 In the management of fisheries, if the Minister is of the opinion that a fish stock that has declined to its limit reference point or that is below that point would be impacted, he or she shall take into account
(a) whether there are measures in place that are aimed at rebuilding the stock; and
(b) if he or she is of the opinion that the loss or degradation of that stock’s fish habitat has contributed to the stock’s decline, whether there are measures in place aimed at restoring that fish habitat.

Statutory Instruments Act
34.3 (6) Orders made under this section are not statutory instruments for the purposes of the Statutory Instruments Act.

Statutory Instruments Act
37. (6) Orders made under this section are not statutory instruments for the purposes of the Statutory Instruments Act. 2012, c. 19, s. 145(1).

Statutory Instruments Act
43.4 (2) The permissions referred to in section 4 and the leases and licences issued under this Act — including their terms and conditions — are not statutory instruments for the purposes of the Statutory Instruments Act.

Fisheries Management Orders
Powers of Minister
9.1 (1) The Minister may, if he or she is of the opinion that prompt measures are required to address a threat to the proper management and control of fisheries and the conservation and protection of fish, make a fisheries management order with respect to any aspect of fisheries in any area of Canadian fisheries waters specified in the order
(a) prohibiting fishing of one or more species, populations, assemblages or stocks of fish;
(b) prohibiting any type of fishing gear or equipment or fishing vessel from being used;
(c) limiting the fishing of any specified size, weight or quantity of any species, populations, assemblages or stocks of fish; and
(d) imposing any requirements with respect to fishing.

Conditions
(2) The Minister may impose any conditions that he or she considers appropriate in the order.

Application of order
(3) The fisheries management order may provide that it applies only to
(a) a particular class of persons, including
(i) persons who fish using a particular method or a particular type of gear or equipment, and
(ii) persons who use fishing vessels of a particular class; or
(b) holders of a particular class of licence.
The Statutory Instruments Act seems to be a “checks and balance” Act and under that Act a Statutory Instrument consists of:

**statutory instrument**
(a) means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established
(i) in the execution of a power conferred by or under an Act of Parliament, by or under which that instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which that instrument relates, or

93 **statutory instrument**
(a) means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established
(i) in the execution of a power conferred by or under an Act of Parliament, by or under which that instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which that instrument relates, or
(ii) by or under the authority of the Governor in Council, otherwise than in the execution of a power conferred by or under an Act of Parliament, but
(b) does not include
(i) any instrument referred to in paragraph (a) and issued, made or established by a corporation incorporated by or under an Act of Parliament unless
(A) the instrument is a regulation and the corporation by which it is made is one that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs, or
(B) the instrument is one for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,
(ii) any instrument referred to in paragraph (a) and issued, made or established by a judicial or quasi-judicial body, unless the instrument is a rule, order or regulation governing the practice or procedure in proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament,
(iii) any instrument referred to in paragraph (a) and in respect of which, or in respect of the production or other disclosure of which, any privilege exists by law or whose contents are limited to advice or information intended only for use or assistance in the making of a decision or the determination of policy, or in the ascertainment of any matter necessarily incidental thereto, or
(iv) a law made by the Legislature of Yukon, of the Northwest Territories or for Nunavut, a rule made by the Legislative Assembly of Yukon under section 16 of the Yukon Act, of the Northwest Territories under section 16 of the Northwest Territories Act or of Nunavut under section 21 of the Nunavut Act or any instrument issued, made or established under any such law or rule. (texte réglementaire)

**Determination of whether certain instruments are Regulations**
(2) In applying the definition regulation in subsection (1) for the purpose of determining whether an instrument described in subparagraph (b)(i) of the definition statutory instrument in that subsection is a regulation, that instrument shall be deemed to be a statutory instrument, and any instrument accordingly determined to be a regulation shall be deemed to be a regulation for all purposes of this Act. R.S., 1985, c. S-22, s. 2; 1993, c. 28, s. 78; 1998, c. 15, s. 38; 2002, c. 7, s. 236; 2014, c. 2, s. 27; 2015, c. 33, s. 3(F).
Determination of whether certain instruments are Regulations

(2) In applying the definition regulation in subsection (1) for the purpose of determining whether an instrument described in subparagraph (b)(i) of the definition statutory instrument in that subsection is a regulation, that instrument shall be deemed to be a statutory instrument, and any instrument accordingly determined to be a regulation shall be deemed to be a regulation for all purposes of this Act. R.S., 1985, c. S-22, s. 2; 1993, c. 28, s. 78; 1998, c. 15, s. 38; 2002, c. 7, s. 236; 2014, c. 2, s. 27; 2015, c. 33, s. 3(F).

It would seem the Minister and/or the Ministry is removing those checks and balances which seem to presently exist in the Fisheries Act and it seems curious that a Minister of the Crown would not want to have checks and balances included when dealing with fees, fines, licences, natural resources, provincial jurisdiction, etc., wouldn’t one think? There is also the issue that if the Minister’s “orders” are “not statutory instruments” for the purposes of the Statutory instrument.
"Instruments Act" what exactly are they and do they have force of law regarding the judicial process?

C-68 states that section 24\textsuperscript{95} is replace by section 23.1.\textsuperscript{96} 23.1 bans fishing for cetaceans (whales, dolphins, porpoises or any marine animal) to bring the animal

(a) means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(i) in the execution of a power conferred by or under an Act of Parliament, by or under which that instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to a matter to which that instrument relates, or

(ii) by or under the authority of the Governor in Council, otherwise than in the execution of a power conferred by or under an Act of Parliament, but

(b) does not include

(i) any instrument described in subparagraph (a) and issued, made or established by a corporation incorporated by or under an Act of Parliament unless

(A) the instrument is a regulation and the corporation by which it is made is one that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs, or

(B) the instrument is one for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

(ii) any instrument described in subparagraph (a) and issued, made or established by a judicial or quasi-judicial body, unless the instrument is a rule, order or regulation governing the practice or procedure in proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament,

(iii) any instrument described in subparagraph (a) and in respect of which, or in respect of the production or other disclosure of which, any privilege exists by law or whose contents are limited to advice or information intended only for use or assistance in the making of a decision or the determination of policy, or in the ascertainment of any matter necessarily incidental thereto, or

(iv) a law made by the Legislature of Yukon, of the Northwest Territories or for Nunavut, a rule made by the Legislative Assembly of Yukon under section 16 of the Yukon Act, of the Northwest Territories under section 16 of the Northwest Territories Act or of Nunavut under section 21 of the Nunavut Act or any instrument issued, made or established under any such law or rule. (texte réglementaire)

Determination of whether certain instruments are Regulations

(2) In applying the definition regulation in subsection (1) for the purpose of determining whether an instrument described in subparagraph (b)(i) of the definition statutory instrument in that subsection is a regulation, that instrument shall be deemed to be a statutory instrument, and any instrument accordingly determined to be a regulation shall be deemed to be a regulation for all purposes of this Act. R.S., 1985, c. S-22, s. 2; 1993, c. 28, s. 78; 1998, c. 15, s. 38; 2002, c. 7, s. 236; 2014, c. 2, s. 27; 2015, c. 33, s. 3(F).

\textsuperscript{95} Seines, nets, etc., not to obstruct navigation

24 Seines, nets or other fishing apparatus shall not be set or used in such manner or in such place as to obstruct the navigation of boats and vessels and no boats or vessels shall destroy or wantonly injure in any way seines, nets or other fishing apparatus lawfully set. R.S., c. F-14, s. 22.

\textsuperscript{96} Taking cetaceans into captivity

23.1 (1) Subject to subsection (2), no one shall fish for a cetacean with the intent to take it into captivity.

Exception

(2) The Minister may, subject to any conditions that he or she may specify, authorize a person to fish for a cetacean with the intent to take it into captivity if he or she is of the opinion that the
into captivity. There is a caveat that the Minister may, subject to conditions, allow a person to fish for a cetacean and bring in into captivity if the Minister is of the “opinion” that circumstance require it to be brought into captivity, including that the animal is injured or in need of care. This would be the end to marine zoos and could have potential impact on scientific research regarding these species.

Below and new section 23.1 and added back into Bill C-68 is section 24 which is merely a repeat of the original section 24 except it adds more unnecessary verbiage.

Again, it would seem the federal government is attempting to do indirectly what it cannot achieve directly. In the amendment of Section 29 (1) the amendment brings in exactly what had been disqualified in the Fowler case, that being “or any log, rock or material of any kind,” being added to the original section 29 (1). The amendment to section 29 (1) is repugnant and unconstitutional as expressed in that case. Same can be said for section 29 (2) to the amended of section 29 (2).

It would seem the Federal government continues to attempt to expand its jurisdiction under the guise of “fish” protection as it is amending the heading of section 34 from “Fisheries Protection and Pollution Prevention” to “Fish and Fish Habitat Protection and Pollution Prevention.” This is unfortunate as this will inevitably cost the tax-payers of Canada due to court challenges between the various provincial governments and the Federal government. It may also cost the individual when and if they are (i) charged and/or (ii) challenge this lack of constitutionality.

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97 Seines, nets, etc., not to obstruct navigation
24 Seines, nets or other fishing apparatus shall not be set or used in such a manner or in such a place that they or any equipment that is attached to any of them obstructs the navigation of boats and vessels and no boats or vessels shall destroy or wantonly injure in any way seines, nets or other fishing apparatus lawfully set or used or any equipment that is attached to any of them. 1991, c. 1, s. 6

98 Obstructing passage of fish or waters
29 (1) No person shall, for the purpose of fishing, place, erect, use or maintain any seine, net, weir or other fishing gear or apparatus, or any log, rock or material of any kind that

99 Obstructing passage of fish or waters
29 (1) No person shall erect, use or maintain any seine, net, weir or other fishing appliance that

100 Removal
29. (2) The Minister or a fishery officer may order the removal of or remove any seine, net, weir or other fishing appliance that, in the opinion of the Minister or fishery officer, results in an obstruction referred to in paragraph (1)(a) or (b).

101 Amendment - Removal
29. (2) The Minister or a fishery officer may order the removal of or remove any seine, net, weir or other fishing gear or apparatus, or any log, rock or material of any kind that, in the opinion of the Minister or fishery officer, results in an obstruction referred to in paragraph (1)(a) or (b).
As one continues through Bill C-68 one is affronted by the addition of certain definitions added to various sections. One of the most erroneous and perhaps most unconstitutional are the definitions added to section 34 (1) which include:

Subsection 34(1) of the Act is amended by adding the following in alphabetical order:

**designated project** means a project that is designated by regulations made under paragraph 43(1)(i.5)\(^{(102)}\) or that belongs to a class of projects that is designated by those regulations and that consists of works, undertakings or activities, including any works, undertakings or activities that the Minister designates to be associated with the project; \((\textit{projet \, désigné})\)

**ecologically significant area** means an area designated by regulations made under subsection 35.2(2);\(^{(103)}\)

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\(^{(102)}\) 43 (1) (i.5) for the purposes of the definition **designated project** in subsection 34(1), designating projects or classes of projects that may result in the death of fish or the harmful alteration, disruption or destruction of fish habitat;

\(^{(103)}\) Ecologically significant area

35.2 (1) No person shall carry on a work, undertaking or activity prescribed under paragraph (10)(a) or that belongs to a prescribed class under that paragraph, in an ecologically significant area except in accordance with an authorization issued under subsection (7).

Designation — ecologically significant area

(2) The Governor in Council may, on the recommendation of the Minister, make regulations designating ecologically significant areas.

Requirement to provide information

(3) Any person who proposes to carry on a work, undertaking or activity referred to in subsection (1) in an ecologically significant area shall provide the Minister with any document and other information that is required by regulation in respect of the prescribed work, undertaking or activity, or the water, place, fish or fish habitat that is likely to be affected by the prescribed work, undertaking or activity.

Request for additional information

(4) Regulations made for the purpose of subsection (3) do not prevent the Minister from requesting additional information that he or she considers necessary in the circumstances.

Compliance with request

(5) Every person who is required to provide any additional information must provide it within the time and in the manner that the Minister specifies.

Extension of time

(6) The Minister may, on request in writing from any person who is required to provide any additional information, extend the specified time.

Powers of Minister

(7) If the Minister is satisfied, after having reviewed any document and other information provided under subsection (3) or (4), that avoidance and mitigation measures may be implemented to achieve the prescribed objectives for the conservation and protection of fish and fish habitat, he or she may authorize, subject to the regulations made under subsection (10), the carrying on of the work, undertaking or activity referred to in subsection (1) in an ecologically significant area, on any conditions that he or she considers appropriate.

Amendment, suspension or cancellation — authorization

(8) The Minister may amend, suspend or cancel an authorization issued under subsection (7).

Fish habitat restoration plan

(9) The Minister shall, as soon as feasible, prepare a fish habitat restoration plan for an ecologically significant area, if he or she is of the opinion that fish habitat restoration in that
These amendments seem to be of the sort to “designate” without “dedication.” To understand this one must understand these two words because without dedication there can be no designation.

As expressed in the Midland Free Press, regarding *Ontario (Attorney General) v. Rowntree Beach Assn., 1994 CanLII 7228 (ON S.C.), “If you don’t own it, you cannot plan for it,”¹⁰⁴ as it is only the private property owner that has the authority to dedicate his property and it is only the private property owner that has the authority to designate his property for the use of the public¹⁰⁵ if he chooses.

This leads to what is termed “dedication” and who can “designate” private property. The only person (including corporations) that can designate private property is the owner of the property and that is through dedication to some other entity by grant.¹⁰⁶

This is what, it would seem, the Federal government is not revealing to the various government entities and what it is being demanded of the private

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ecologically significant area is required in order to meet any prescribed objectives for the conservation and protection of fish and fish habitat.

**Regulations**

**(10)** The Governor in Council may, on the Minister’s recommendation, make regulations

(a) prescribing works, undertakings or activities or classes of works, undertakings or activities, for the purposes of this section;

(b) respecting any document or other information that is required to be provided under subsection (3), including the manner in which and the time within which it is to be provided;

(c) respecting the objectives for the conservation and protection of fish and fish habitat in an ecologically significant area;

(d) prescribing works, undertakings or activities or classes of works, undertakings or activities that the Minister shall not authorize under paragraphs 34.4(2)(b) and 35(2)(b) to be carried on in an ecologically significant area;

(e) prescribing conditions under which and requirements subject to which the Minister may issue an authorization under subsection (7);

(f) respecting the manner and circumstances relating to the amendment, suspension or cancellation of an authorization referred to in subsection (7); and

(g) respecting the process by which a person may request an amendment, suspension or cancellation of an authorization under subsection (7).  2012, c. 19, s. 144(2)

¹⁰⁴ *Court rulings don’t support claim of open beaches*. Midland Free Press, May 19, 2000. (This article is a revised and updated version of TINY’S SHORELINE -- A LEGAL HISTORY, which appeared in Issue #14 (Spring 1999) of The Tiny Cottager) Midland Free Press, May 19, 2000. p.2.


¹⁰⁶ *City of Flagstaff, a Body Politic, Appellant, v. George Babbitt, Jr., Appellee.* Sup. Court. Aug. 6, 1968. The Court of Appeals, Stevens, J., held that actions of subdivider in testifying that he did not intend to dedicate land designated in subdivision plat as park to public, in failing to include park in dedicatory working on record plat, in establishing and grading streets and replatting lots in portion of area designated as park, and in executing easement for sewer line to city across park and paying taxes on such property were inconsistent with intent to dedicate park to public but rather were consistent with intent to retain property as private property of subdivider and they rebutted presumption of dedication arising from plat. Judgment affirmed.
property owner who is being forced, by legislation, to dedicate his property through unlawful designations.\textsuperscript{107} This is beyond the jurisdiction of the Federal government as they only have legislative territorial jurisdiction over what belongs\textsuperscript{108} to the Federal government. The Federal government, and other corporations, are implementing designations by demanding dedication by the private property owner and are doing indirectly what they legally cannot do directly.

The Queen v. Robertson (1882) 6 SCR 52, upheld by the Supreme Court of Canada on numerous occasions, that:

\textit{“That the Act of Parliament of Canada, 31 Vict., c. 60, recognizes the view, and, while it provides for the regulation and protection of the fisheries, it does not interfere with private rights, only authorizing the granting of leases in fresh water rivers, where such rights have not already accrued, and that any lease granted by the Minister of Marine and Fisheries to fish in fresh water rivers which are not the property of the Dominion or in which the soil is not in the Dominion is illegal;”}\textsuperscript{109}

As “habitat” involves the “soil”\textsuperscript{110} it would seem if the “soil is not in the Dominion”\textsuperscript{111} regulating the “soil” is unlawful. If the Federal government is creating legislation pertaining to their own projects – that is completely different but if they are attempting to legislation for others they could be considered as violating the constitution, including provincial jurisdiction and private property.

As follows, the majority of the amendment is in reference to “fish habitat” which involves the soil and this extends throughout the amendment and all mention of “fish habitat” should be removed if it has implications to provincial or private property. As expressed in Re Provincial Fisheries (1896) 26 SCR 444, the right of licencing and/or granting permits for Crown land is under provincial jurisdiction therefore the demands for permits from the Federal government for anything but interference with navigation is beyond Federal jurisdiction.

Then there are the exemptions allowed in this amendment. Section 43 has been replaced and in section 43 (5) is exemptions allowed.

\begin{flushright}
\parbox{\linewidth}{\textsuperscript{107} "3 Edw. I. – 1275 Statute of Westminster the First. Chap. XXVI. No King’s Officers shall commit extortion. No sheriff, nor other the king’s officer, shall take any reward to do his office, but shall be paid of that which they take of the king; and that so doeth shall yield twice as much, and shall be punished at the king’s pleasure. The Book of Rights: Or, Constitutional Acts and Parliamentary Proceedings Affecting Civil and Religious Liberty in England, from Magna Carta to the Present Time, Edgar Taylor, F.S.A., 1833, p. 57
\parbox{\linewidth}{\textsuperscript{108} BELONG (Black’s Law Dictionary, 9\textsuperscript{th} Edition, 2009, p. 175) – 1. To be the property of a person or thing. 2. To be connected with as a member.
\parbox{\linewidth}{\textsuperscript{109} The Queen v. Robertson (1882) 6 SCR 52, at 126.
\parbox{\linewidth}{\textsuperscript{110} “By legacy, we mean a carry-over, or “memory,” of past events and processes that influences today’s soil habitats (Vogt et al. 1997).” “How Soils Structure Communities in the Antarctic Dry Valleys” by ROSS A. VIRGINIA and DIANA H. WALL.
\parbox{\linewidth}{\textsuperscript{111} The Queen v. Robertson (1882) 6 SCR 52, at 126
\end{flushright}
Regulations exempting certain Canadian fisheries waters

43 (5) The Governor in Council may make regulations exempting any Canadian fisheries waters from the application of sections 34.3, 34.4 and 35 and subsections 38(4) and (4.1).

112 Studies, etc. — management or control of obstruction

34.3 (1) If the Minister considers that doing so is necessary to ensure the free passage of fish or the protection of fish or fish habitat, the owner or person who has the charge, management or control of an obstruction or any other thing that is detrimental to fish or fish habitat shall, on the Minister’s request and within the period specified by him or her, conduct studies, analyses, samplings and evaluations, and provide the Minister with any document and other information relating to them, to the obstruction or thing or to the fish or fish habitat that is or is likely to be affected by the obstruction or thing.

Minister’s order

(2) If the Minister considers that doing so is necessary to ensure the free passage of fish or the protection of fish or fish habitat, the owner or person who has the charge, management or control of an obstruction or any other thing that is detrimental to fish or fish habitat shall, on the Minister’s order, within the period specified by him or her and in accordance with any of his or her specifications,

(a) remove the obstruction or thing;
(b) construct a fishway;
(c) implement a system of catching fish before the obstruction or thing, transporting them beyond it and releasing them back into the water;
(d) install a fish stop or a diverter;
(e) install a fish guard, a screen, a covering, netting or any other device to prevent the passage of fish into any water intake, ditch, channel or canal;
(f) maintain the flow of water that the Minister considers sufficient to permit the free passage of fish; or
(g) permit the escape, into the water below the obstruction or thing, at all times of the quantity of water that the Minister considers sufficient, in accordance with the characteristics of the water and water flow as may be specified by him or her, for the conservation and protection of the fish and fish habitat, including
(i) the water temperature, and
(ii) the physical characteristics and chemical composition of the water.

Modification, repair and maintenance

(3) On the Minister’s order, the owner or person referred to in subsection (2) shall

(a) make any provision that the Minister considers necessary for the free passage of fish or the protection of fish or fish habitat during the carrying on of any activity mentioned in that subsection;
(b) operate and maintain anything referred to in that subsection in a good and effective condition and in accordance with any specifications of the Minister; and
(c) modify or repair it in accordance with any specifications of the Minister.

Obstruction of free passage of fish

(4) No person shall

(a) damage or obstruct any fishway constructed or used to enable fish to pass over or around any obstruction;
(b) damage or obstruct any fishway, fish stop or diverter constructed or installed on the Minister’s order;
(c) stop, impede or hinder fish from entering or passing through any fishway, or stop, impede or hinder fish from surmounting any obstruction or leap;
(d) damage, remove or authorize the removal of any fish guard, screen, covering, netting or other device installed on the Minister’s order; or
(e) fish in any manner within 23 m downstream from the lower entrance to any fishway, obstruction or leap.

Exception — removal for repairs
(5) Despite paragraph (4)(d), a person may remove or authorize the removal of any fish guard, screen, covering, netting or other device installed on the Minister’s order if the removal is required for modification, repair or maintenance.

**Statutory Instruments Act**

34.3 (6) Orders made under this section are not statutory instruments for the purposes of the **Statutory Instruments Act**.

113 **Death of fish**

34.4 (1) No person shall carry on any work, undertaking or activity, other than fishing, that results in the death of fish.

**Exception**

(2) A person may carry on a work, undertaking or activity without contravening subsection (1) if

(a) the work, undertaking or activity is a prescribed work, undertaking or activity or belongs to a prescribed class of works, undertakings or activities, as the case may be, 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;

(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 him or her;

(c) the carrying on of the work, undertaking or activity is authorized by a prescribed person or prescribed entity and the work, undertaking or activity is carried on in accordance with the conditions set out in the authorization;

(d) the death results from the doing of anything that is authorized, otherwise permitted or required under this Act;

(e) the work, undertaking or activity is carried on in accordance with the regulations;

(f) the work, undertaking or activity is carried on in accordance with a permit issued under subsection 35.1(2), in the case of a designated project; or

(g) the work, undertaking or activity is a prescribed work, undertaking or activity under paragraph 35.2(10)(a) or belongs to a prescribed class of works, undertakings or activities under that paragraph, as the case may be, and carried on in an ecologically significant area in accordance with an authorization issued under subsection 35.2(7).

113 **Other conditions**

(3) The prescribed person or prescribed entity referred to in paragraph (2)(c) may, in addition to the prescribed classes of conditions impose, subject to the regulations, any other conditions that they consider appropriate in the circumstances.

**Regulations**

(4) The Minister may, for the purposes of paragraph (2)(a) and subject to paragraph 43(1)(i.1), make regulations prescribing anything that is authorized to be prescribed.

**Amendment, suspension or cancellation — paragraph (2)(b)**

(5) The Minister may amend, suspend or cancel an authorization issued under paragraph (2)(b).

**Amendment, suspension or cancellation — paragraph (2)(c)**

(6) A prescribed person or prescribed entity referred to in paragraph (2)(c) may amend, suspend or cancel an authorization issued under that paragraph. 2012, c. 19, s. 142(2)

114 All legislation pertaining to the protection of fish and fish habitat.

**The portion of subsection 38(4)**

of the Act before paragraph (a) is replaced by the following:

**Duty to notify — serious harm to fish**

(4) Every person shall without delay notify an inspector, a fishery officer, a fishery guardian or an authority prescribed by the regulations of an occurrence that results in serious harm to fish that are part of a commercial, recreational or Indigenous fishery, or to fish that support such a fishery, that is not authorized under this Act, or of a serious and imminent danger of such an occurrence, if the person at any material time

(4) The portion of subsection 38(4)

of the Act before paragraph (a) is replaced by the following:

**Duty to notify — death of fish**
In other words, there is no protection in this Act, based on recent events, for fisheries waters or “fish habitat” as there are multiple avenues for, perhaps, political reasons to obtain exemptions from any of the purported protections described in this amendment. One merely has to look to the exemptions made for Montreal to dump eight-billion litres of sewage and yet in 2019 the City of Kawartha Lakes pays $75K to the Environmental Damages Fund for alleged violations under Fisheries Act to the Ministry of the Environment and not to the Ministry of Fisheries and Oceans. It would seem this is merely to fund the Ministry of the Environment and has nothing to do with the protection of the fisheries.

One, being Montreal with the approval of the Ministry of the Environment, was allowed to dump eight-billion litres of sewage into the St. Lawrence River. The other was in 2014, a city-hired contractor carried out maintenance work on the Washington Drain. The work resulted in a sediment release into the fish-bearing waterway. Environment and Climate Change Canada enforcement officers investigated the incident and determined that the sediment concentrations released during the work were deleterious to fish. It was also determined that the work was undertaken without taking adequate steps to mitigate the release of sediments into the waterway.

Question – according to the Fisheries Act “Minister means the Minister of Fisheries and Oceans or, in respect of any matter related to the Northern Pipeline referred to in the Northern Pipeline Act, the member of the Queen’s Privy Council for Canada designated as the Minister for the purposes of that Act.”

If this Act is to be administered by the Minister (Ministry) of Fisheries and Oceans why is the Ministry of the Environment enforcing and/or administering this Act

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(4) Every person shall without delay notify an inspector, a fishery officer, a fishery guardian or an authority prescribed by the regulations of the death of fish that is not authorized under this Act, or of a serious and imminent danger of such occurrence, if the person at any material time 2012, c. 19, ss. 145(1), (3) and 4(F)

Section 38 of the Act is amended by adding the following after subsection (4):

Duty to notify — harmful alteration, disruption or destruction of fish habitat

(4.1) Every person shall without delay notify an inspector, a fishery officer, a fishery guardian or an authority prescribed by the regulations of a harmful alteration, disruption or destruction of fish habitat that is not authorized under this Act, or of a serious and imminent danger of such an occurrence, if the person at any material time (a) owns or has the charge, management or control of the work, undertaking or activity that resulted in the occurrence or the danger of the occurrence; or (b) causes or contributes to the occurrence or the danger of the occurrence. 2012, c. 19, s. 145(1)

116 City begins massive sewage dump into St. Lawrence River

Residents are asked to do their part by not putting things like diapers, condoms, feminine hygiene products and syringes into the toilet. RENÉ BRUEMMER, MONTREAL GAZETTE.


supporting the statement that this is the Federal government attempting to do indirectly what it cannot do directly under the Ministry of the Environment in contradiction to the *Fisheries Act*, considering there is no mention of the Minister/Ministry of Environment in the Act?

Question – sediment\(^{118}\) would be sand, rocks and perhaps some gravel whereas sewage is hazardous\(^{119}\) – which is worse and why would one be granted approval to pollute while the other was merely doing maintenance needed? Absolutely no equity nor foundation in reason for either of these incidents.

Next question – if this pertains to the Ministry of Fisheries and Oceans, why is the Corporation of the City of Kawartha Lakes entering into a diversion agreement with the Public Prosecution Service of Canada after Environment and Climate Change Canada laid charges under the *Fisheries Act* and why is Kawartha Lakes paying $75,000 into the Environmental Damages Fund when this was purportedly an offence under the *Fisheries Act*? Seems this is the Federal government doing indirectly what it cannot do directly – having people and/or corporations paying fees and fines to one department while under funding the Ministry which is to be the over-seer of the Act.

The Ministry of the Environment seems to allow those entities with money to pollute and yet when something as simple as maintenance is applied with “sediment,” which could/would happen in the natural environment due to weather, they undermine necessary maintenance. Truly the Ministry of the Environment, at the Federal level, is an unnecessary Ministry, considering the provinces’ have their own.

In Ontario there are a number of various “water” protection pieces of legislation\(^{120}\) so it would seem the Federal Ministry is merely attempting to fund itself over and above what has been prescribed at and by the jurisdiction which has the authority. This could be considered unconstitutional as the Ministry of Environment, at the Federal level, seems to be interfering in jurisdiction it has no authority over.

It would seem, again, the Federal government is attempting to do indirectly what it cannot do directly. In Bill C-68 is the addition of section 42.01 to 42.04\(^{121}\) which

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\(^{118}\) SEDIMENT - sand, stones, etc. that slowly form a layer of rock:  *It is hoped that the oil slick will sink to the seabed where it would be covered within a few years by sediments and eventually decompose*.  https://dictionary.cambridge.org/dictionary/english/sediment

\(^{119}\) Environmental Protection Act, R.S.O. 1990, c. E.19

\(^{120}\) Ontario Water Resources Act, Clean Water Act, Environmental Protection Act, etc., etc., etc.

\(^{121}\) Definitions

42.01  The following definitions apply in this section and sections 42.02 to 42.04.  *conservation project* means a work, undertaking or activity that is carried on by a proponent for the purpose of creating, restoring or enhancing fish habitat within a service area in order to acquire habitat credits.  *projet de conservation*

**fish habitat bank** means an area of a fish habitat that has been created, restored or enhanced by the carrying on of one or more conservation projects within a service area and in respect of which area the Minister has certified any habitat credit under paragraph 42.02(1)(b). *(réserve d’habitats)*

**habitat credit** means a unit of measure that is agreed to between any proponent and the Minister under section 42.02 that quantifies the benefits of a conservation project. *(crédit d’habitat)*

**proponent** means a person who proposes the carrying on of a conservation project and any other work, undertaking or activity within a proposed service area. *(promoteur)*

**service area** means the geographical area that encompasses a fish habitat bank and one or more conservation projects and within which area a proponent carries on a work, undertaking or activity. *(zone de service)*

**Arrangements respecting fish habitat banks**

42.02  (1) For the purposes of sections 42.01 to 42.04, the Minister may

(a) establish a system for the creation, allocation and management of a proponent’s habitat credits in relation to a conservation project; and

(b) issue a certificate to the proponent respecting the validity of any habitat credit acquired from the carrying on of a conservation project.

**Arrangements**

(2) In exercising the powers referred to in subsection (1), the Minister may enter into arrangements with any proponent.

**Contents**

(3) An arrangement referred to in subsection (2) shall include, among other things,

(a) any document and other information that describes the proposed fish habitat bank, conservation project and service area;

(b) a written confirmation that the Department of Fisheries and Oceans and anyone authorized to act on the Department’s behalf is authorized to access the site of the conservation project for the term of the arrangement;

(c) a description of the administration, management and general operation of the arrangement by the parties, including

(i) a procedure for proposing a conservation project and an approval process,

(ii) a habitat credit certification process,

(iii) a process for habitat credit evaluation and any re-evaluation that may be required by the Minister,

(iv) habitat credit accounting procedures respecting the habitat credit ledger,

(v) progress reports on the conservation project, and

(vi) any other relevant matters respecting the administration of the arrangement;

(d) reports on the performance of the arrangement;

(e) the form and manner in which the arrangement may be amended;

(f) the date on which the arrangement comes into force; and

(g) the signatures of the parties.

**Use of habitat credit within service area**

42.03 A proponent may only use their certified habitat credits in respect of a fish habitat bank within a service area to offset the adverse effects on fish or fish habitat from the carrying on of a work, undertaking or activity authorized or permitted to be carried on in that service area.

**Regulations**

42.04 The Governor in Council may make regulations

(a) respecting the establishment of a system for the creation, allocation and management of habitat credits referred to in paragraph 42.02(1)(a);

(b) respecting the issuance of a certificate of validity of any habitat credit referred to in paragraph 42.02(1)(b); and

(c) respecting an arrangement with any proponent. 2012, c. 19, s. 148
and Conservation Reserves Act, 2006, S.O. 2006, c. 12, etc. therefore it would seem the Federal government is again attempting to artificially extend its jurisdiction into provincial matters.

In finishing reading the amendment to the Fisheries Act one may come to the conclusion that the entire amendment is (i) the Federal government attempting to do indirectly what it cannot do directly, (ii) the Federal government is attempting to artificially extend its jurisdiction beyond its constitutional limits, and (ii) the Federal government is attempting to place the subservient Minister above the entity which created the Ministry that being the Governor General, Canada’s Sovereign representative. This may place the Crown, Parliament, the Senate and the Judiciary in disrepute.
Conclusion

1. Does the Federal government have the constitutional jurisdiction to implement this amendment?
2. Is this a violation of constitutionally protected private property rights?
3. Is this the federal government attempting to do “indirectly” what it cannot do “directly” by placing environmental requirements in an act which the intent of the act was merely to protect from the exploitation of fish stocks, specifically the equipment that can be used in a fishery and not allow interference with navigation and is the federal government attempting to artificially create and/or expand its jurisdiction?

It could be concluded that the Federal Government does not have constitutional jurisdiction to expand environmental protection through the *Fisheries Act* as this is in violation of provincial jurisdiction as well as a violation of private rights established under common law, the *Constitution Act, 1867* (British North America Act, 1867) and the Letters Patent/Crown Grant.

4. What are some of the more systemic problems with Bill C-68?

In finishing reading the amendment (Bill C-68) to the *Fisheries Act* one may come to the conclusion that the entire amendment is (i) the Federal government attempting to do indirectly what it cannot do directly, (ii) the Federal government is attempting to artificially extend its jurisdiction beyond its constitutional limits, and (ii) the Federal government is attempting to place the subservient Minister above the entity which created the Ministry in the first place, that being the Governor General, Canada’s Sovereign representative. This may place the Crown, Parliament, the Senate and the Judiciary (Attorney General) in disrepute.
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