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## Case Comment

### The Rule-of-Law Underpinnings of Endangered Species Protection: *Minister of Fisheries and Oceans v. David Suzuki Foundation*, 2012 FCA 40

Jocelyn Stacey\*

*Environmental organizations have experienced a string of recent courtroom successes enforcing the federal Species At Risk Act. This case comment examines one of these cases, Minister of Fisheries and Oceans v. David Suzuki Foundation<sup>1</sup> (“Killer Whales”), to expose the rule-of-law underpinnings of the Federal Court of Appeal’s decision. It argues that, while the decision is on its face an ostensible victory for endangered species protection, the conception of the rule of law on which the court relies is incapable of providing meaningful legal constraints for much environmental decision-making.*

*Des organisations environnementales ont eu gain de cause dans plusieurs affaires judiciaires, consolidant ainsi la Loi fédérale sur les espèces en péril. Le présent commentaire d’arrêt a pour but d’examiner une de ces affaires, Canada (Pêches et Océans) c. Fondation David Suzuki (l’« affaire des épaulards »), afin de mettre en lumière la règle de droit qui sous-tend la décision de la Cour d’appel fédérale. Dans cet article, l’auteur fait valoir que cette décision, bien qu’elle apparaisse comme une victoire éclatante en vue de la protection des espèces en péril, est fondée sur une conception de la règle de droit qui ne peut fournir un cadre légal significatif relativement à la plupart des litiges environnementaux soumis aux tribunaux.*

#### I. INTRODUCTION

In 2012 the Federal Court of Appeal held that the Minister of Fisheries and Oceans was in contravention of the *Species At Risk Act*<sup>2</sup> (SARA) when he issued a protection statement stating that killer whale critical habitat was sufficiently protected by existing discretionary provisions contained in the federal *Fisheries Act*.<sup>3</sup> The Federal Court held in the clearest possible terms that the Minister’s interpretation of SARA was not entitled to judicial deference and that Ministerial discretion does not constitute “legal protection” under the Act. While, on its face, this is a

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<sup>1</sup> 2012 FCA 40 [*Killer Whales*].

<sup>2</sup> S.C. 2002, c 29 [SARA].

<sup>3</sup> R.S.C. 1985, c. F-14 [*Fisheries Act*].

victory for endangered species protection, this case comment demonstrates that the decision is based on a formal conception of the rule of law, which rests on a strict understanding of the separation of powers. It argues that the formal conception, in the majority of environmental decisions, cannot meaningfully constrain environmental decision-making. The formal conception leads judges to strictly enforce clear legislative language, but this comes at the cost of creating legal black and grey holes where discretion is not subject to rule-of-law constraints. In contrast to recent environmental commentary, this article argues that environmental advocates should laud the Supreme Court of Canada's apparent overruling of *Killer Whales* and its rejection of the formalist line of authority that *Killer Whales* initiated because it clears the way for a competing understanding of the rule of law that is capable of both constituting and constraining the state's regulative authority over the environment. Relying on this competing conception of the rule of law, I demonstrate that the Federal Court of Appeal could have reached the same outcome — finding that the protection statement falls well short of *SARA*'s requirements — in a way that asserted a much more robust role for law in the environmental context.

The focus of this case comment is on *Killer Whales* because of the Federal Court of Appeal's particularly clear articulation of the appropriate role for judicial review of environmental decision-making. Although the Supreme Court of Canada has effectively overturned the decision, *SARA* continues to prove itself a lively site of judicial involvement in environmental protection,<sup>4</sup> where the courts continue to grapple with how to ensure basic enforcement of legislation in a complex decision-making context. And, as environmental and administrative law scholars and practitioners alike well know, the conversation about the standard of review never really ends. Moreover, the *Killer Whales* decision brings to the surface the need for a theoretically richer understanding of the relationship between the rule of law and environmental decision-making. As we will see, what initially appears an overwhelming environmental victory, in fact forecloses the opportunity to develop a more promising understanding of the rule of law.

## II. THE KILLER WHALES DECISION

### (a) The Federal Court of Appeal Decision

The facts of the decision are straight-forward. There are two resident killer whale populations off the coast of British Columbia both of which are listed species under *SARA*.<sup>5</sup> The northern population is designated as "threatened" and the southern population is designated as "endangered." The structure of *SARA* requires that, once a species is designated as threatened, extirpated or endangered, the responsible federal Minister must issue a recovery strategy, which identifies the species' critical habitat.<sup>6</sup> Within 180 days of publishing the recovery strategy, the Minister

<sup>4</sup> The most recent Federal Court decisions suggest that this litigation is becoming increasingly heated: *Western Canada Wilderness Committee v. Canada (Minister of Fisheries and Oceans)*, 2014 FC 148 and *Alberta Wilderness Assn. v. Canada (Attorney General)*, 2013 FCA 190.

<sup>5</sup> *Killer Whales*, *supra*, note 1 at para 28.

<sup>6</sup> *SARA*, *supra*, note 2, s. 37.

must issue either a protection order, which sets out how the critical habitat will be legally protected under an Act of Parliament; or the Minister may issue a protection statement which details how sufficient legal protections already exist.<sup>7</sup> The Minister of Fisheries and Oceans initially issued the latter, a protection statement pertaining to the killer whales' critical habitat, that listed existing legislative and regulatory provisions, including the Minister's discretionary licensing authority, and the Governor in Council's discretionary regulation-making authority under the *Fisheries Act*.<sup>8</sup> The Minister subsequently issued a protection order, which effectively revoked the statement.<sup>9</sup>

The David Suzuki Foundation challenged the Minister's protection statement, which proceeded in court on the grounds that it raised an important public issue about the requirements of a protection order that had not yet been before the courts.<sup>10</sup> It argued first, that the statement failed to respond to several important threats to the critical habitat, including acoustic degradation and diminished prey availability,<sup>11</sup> and second, that the Minister could not rely on "non-binding policy, prospective legislation or on ministerial discretion."<sup>12</sup> The Foundation was successful at the Federal Court, where the Court held that the issues were matters of statutory interpretation and thus reviewable on a standard of correctness.<sup>13</sup> The Court further held that the both the protection order and protection statement were legally deficient on a number of counts. In particular, the Federal Court held that "Ministerial discretion does not legally protect critical habitat within the meaning of section 58 of SARA, and it was unlawful for the Minister to have cited discretionary provisions of the *Fisheries Act* . . .".<sup>14</sup> The Minister appealed this declaration to the Federal Court of Appeal.

(i) *Standard of Review*

The first issue before the Federal Court of Appeal was the appropriate standard of review — the question of whether the Minister's interpretation of s. 58(5) was owed any deference by the Court. The Minister argued that both *SARA* and the *Fisheries Act* are the Minister's "home" statutes, meaning that he is a delegated decision-making authority under the Acts and thus has considerable expertise in administering their provisions.<sup>15</sup> The Minister relied on the Supreme Court of Canada's watershed decision in *Dunsmuir*,<sup>16</sup> where the Court held that administrative

<sup>7</sup> *Ibid.*, s 58.

<sup>8</sup> *Fisheries Act*, *supra*, note 3 at para 31.

<sup>9</sup> *Killer Whales*, *supra*, note 1 at paras 35–38.

<sup>10</sup> *Ibid.*, para 36, 63.

<sup>11</sup> *Ibid.*, para 32.

<sup>12</sup> *Ibid.*, para 34.

<sup>13</sup> *David Suzuki Foundation v. Canada*, (sub nom. *Georgia Strait Alliance v. Canada (Minister of Fisheries & Oceans)*) 2010 FC 1233; additional reasons 2011 CarswellNat 1510 (F.C.); reversed in part 2012 CarswellNat 262, 2012 CarswellNat 2973 (F.C.A.).

<sup>14</sup> *Ibid.*, at "Judgment 1d".

<sup>15</sup> *Killer Whales*, *supra*, note 1 at paras 66-67.

<sup>16</sup> *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 123 [*Dunsmuir*].

decision-makers should generally be entitled to deference on interpretations of their home statutes. Mainville J.A., writing for a unanimous court, rejected the Minister's argument. He held that *Dunsmuir* only applied to independent administrative tribunals, not Ministers of government exercising "administrative" functions.<sup>17</sup> In reaching this conclusion, Mainville J.A. was guided by the historical and constitutional foundations of judicial review and he stated in no uncertain terms his view that he would not defer to the Minister because to do so would "establish a new constitutional paradigm under which the Executive's interpretation of Parliament's laws would prevail insofar as such interpretation is not unreasonable."<sup>18</sup> He continued, "[t]his harks back to the time before the *Bill of Rights* of 1689 where the Crown reserved the right to interpret and apply Parliament's laws to suit its own policy objectives. It would take a very explicit grant of authority from Parliament in order for this Court to reach such a far-reaching conclusion."<sup>19</sup>

The Court thus concluded that a presumption of deference could not apply in this case and carried out a standard of review analysis to determine the appropriate level of deference. Finding no privative clause, mandatory statutory language, no special expertise in statutory interpretation and relying on the fact that the Minister was acting in an administrative rather than an adjudicative capacity, the Court found that correctness was the appropriate standard of review.<sup>20</sup> It is worth noting here that the Supreme Court has seemingly overturned this conclusion by confirming that a Minister is entitled to deference on questions of statutory interpretation<sup>21</sup> and the Federal Court has since applied the Supreme Court's decision in the environmental context.<sup>22</sup>

(ii) *Interpretation of "Legally Protected"*

The Minister argued that, although the requirement to protect critical habitat is mandatory, SARA nonetheless permits some flexibility in how to implement this protection. He argued that "not every instrument relied on in a protection statement need be a 'legal provision' which provides mandatory, enforceable protection against the destruction of critical habitat."<sup>23</sup> The Minister also submitted that he did not seek this flexibility to undermine the protection of critical habitat.<sup>24</sup> The Court disagreed and concluded that to accept the Minister's position would convert "the compulsory *non-discretionary critical habitat protection scheme* under the SARA

<sup>17</sup> *Killer Whales*, *supra*, note 1 at para 89.

<sup>18</sup> *Ibid.*, at para 98.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*, at paras 101–105.

<sup>21</sup> *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 [Agraira].

<sup>22</sup> *Greenpeace Canada v. Canada (Attorney General)*, 2014 FC 463 [Greenpeace]. See also *Western Canada Wilderness Committee v. British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, 2014 BCSC 808 at para 45 [Western Canada Wilderness].

<sup>23</sup> *Killer Whales*, *supra*, note 1 at para 107.

<sup>24</sup> *Ibid.*, at para 108.

[to] the *discretionary management scheme* of the *Fisheries Act*.”<sup>25</sup> Mainville J.A. stated that the language of SARA “leaves little ambiguity as to the intent of Parliament: critical habitat must be preserved through legally enforceable measures.”<sup>26</sup> He found that this intention applies to both protection orders and protection statements under s. 58(5) — a statement must contain protection equivalent to what would be required of a protection order.<sup>27</sup>

Mainville J.A. then turned to the individual discretionary provisions of the *Fisheries Act* on which the Minister sought to rely to determine if any could fulfill the requirements of s. 58(5) of SARA. The first provision that the Minister relied on was the “HADD” provision of the *Fisheries Act*, which prohibits any activity “that results in the harmful alteration, disruption or destruction of fish habitat,” unless that activity is authorized by the Minister or regulations made under the *Fisheries Act*.<sup>28</sup> The Court observed that the Minister possesses broad discretion to authorize “HADDs,” which effectively allows the Minister to waive the protection offered to fish habitat at any time. For this reason, Mainville J.A. held “the provision cannot ensure that the critical habitat of endangered or threatened aquatic species is ‘legally protected’.”<sup>29</sup> Mainville J.A. further stated that, although the Minister submitted that he would not use his discretion to undermine killer whale protection, “he does not explain how his intent can be legally enforced should he change his mind in the future for some presumably good reason . . . Intent not to use discretion is not legally enforceable.”<sup>30</sup>

Next, Mainville J.A. turned to the *Fisheries Act* prohibition on the deposit of deleterious substances into any place where they might enter water frequented by fish.<sup>31</sup> Here the *Fisheries Act* allows an exemption for substances authorized by regulations promulgated by the Governor in Council, and Minister relied upon the *Metal Mining Effluent Regulations*<sup>32</sup> and *Pulp and Paper Effluent Regulations*<sup>33</sup> which both permit deposits of deleterious substances so long as they remain below specified thresholds. Overturning the Federal Court, Mainville J.A. concluded that these regulations could constitute “legal protection” because they are legally enforceable and not subject to Ministerial discretion.<sup>34</sup> In the absence of an evidentiary record demonstrating that the regulations do in fact protect killer whale habitat, however, the Court declined to rule on whether the regulations fulfilled the s. 58(5) requirement of SARA.

<sup>25</sup> *Ibid.*, at para 109 (emphasis in original).

<sup>26</sup> *Ibid.*, at para 114. He also states: “A legal protection scheme is not a regulatory management scheme.” (at para 115).

<sup>27</sup> *Ibid.*, at para 117.

<sup>28</sup> *Supra*, note 3, s 35.

<sup>29</sup> *Killer Whales, supra*, note 1 at para 130.

<sup>30</sup> *Ibid.*, at para 131.

<sup>31</sup> *Supra*, note 3, s 36.

<sup>32</sup> SOR/2002-222.

<sup>33</sup> SOR/92-269.

<sup>34</sup> *Killer Whales, supra*, note 1 at para 138.

Finally, the Minister sought to rely on provisions of the *Fishery (General) Regulations*,<sup>35</sup> *Pacific Fisheries Regulations*,<sup>36</sup> and *British Columbia Sport Fishing Regulations*,<sup>37</sup> all of which delegate fisheries management responsibilities to the Minister, including the authority to specify fishing license conditions. The Court again disagreed with the Minister's position on the basis that these are all discretionary powers.<sup>38</sup> Mainville J.A. stated that "[t]he protection of critical habitat should not be confused with the management of critical habitat."<sup>39</sup> And, while salmon prey availability is essential for the killer whale's survival and recovery, the Minister "cannot use these management measures as a substitute for the mandatory protection of such prey within the critical habitat areas identified in the recovery strategy."<sup>40</sup>

In short, Mainville J.A.'s reasoning turned on a strict dichotomy between law and discretion. Wherever a legislative or regulatory provision permitted Ministerial discretion, he concluded that it could not count as "legal protection" under *SARA*.

#### **(b) The Formal Conception of the Rule of Law**

Mainville J.A. asserts a strong version of, what I describe here as, the formal conception of the rule of law. The formal conception of the rule of law equates law with rules enacted by the legislature and thus hinges on a rigid doctrine of the separation of powers. I follow David Dyzenhaus and others<sup>41</sup> by calling this the "formal conception of the rule of law" because it emphasizes the requirement of a formal allocation of distinct legal powers between institutions of government. The formal conception of the rule of law can be traced to Dicey whose understanding of the rule of law has had a lasting influence on Canadian constitutional and administrative law.<sup>42</sup>

Dicey distinguished between the dual roles of the legislature and the judiciary: on the one hand, the legislature possessed a monopoly over law making and, on the other, the judiciary a monopoly over law interpretation.<sup>43</sup> Dicey argued that this created a careful balance between the legislature and the judiciary, which assumed that judicial interpretation could temper the excesses of legislative supremacy. But Dicey was hostile to state intervention in the private sphere, and therefore saw no

<sup>35</sup> SOR/93-53.

<sup>36</sup> 1993, SOR/93-54.

<sup>37</sup> 1996, SOR/96-137.

<sup>38</sup> *Killer Whales*, *supra*, note 1 at para 148.

<sup>39</sup> *Ibid.*, at para 149.

<sup>40</sup> *Ibid.*, at para 151.

<sup>41</sup> David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v Canada*" (2001) 51 UTLJ 193 at 197-205 [Dyzenhaus & Fox-Decent]; Martin Loughlin, "Procedural Fairness: A study of the crisis in administrative law theory" (1978) UTLJ 215 [Loughlin].

<sup>42</sup> *Ibid.*

<sup>43</sup> Dyzenhaus and Fox-Decent, *supra*, note 40 at 198.

distinct role for the executive.<sup>44</sup> The continued influence of Dicey's conception has resulted in the complex and often convoluted development of administrative law doctrine as courts struggle to reconcile their acceptance of the legitimacy of the administrative state with an account of the rule of law that is inherently hostile to it.

Diceyan — or formalist — judges attempt to preserve the formal conception of the rule of law by reaching a practical, but unstable, compromise where they permit the executive “free rein within certain legal limits.”<sup>45</sup> This practical compromise seems to reconcile the legislature's competing intentions that the executive decision-maker, not the court, that has final decision-making authority with the logical inference that the legislature intends *some* restrictions on the statutorily-created decision-maker's power. Historically formalist judges have implemented this compromise by strictly enforcing the legal limits of “jurisdiction” and by categorizing decisions as “judicial” or “quasi-judicial” for the purpose of determining the applicability of the duty of procedural fairness.<sup>46</sup> The formal conception results in an all-or-nothing approach to judicial review, where some areas of executive action are policed vigorously by the courts whereas others — such as Ministerial discretion — are not internally governed by the rule of law. We will see in a later section that this can be helpfully described as creating a “legal black hole,” meaning that a formalist judge will supervise the boundaries of the black hole but will not impose any rule-of-law constraints on what happens inside those bounds.

As Mainville J.A. charts in *Killer Whales*, the trajectory of judicial review of adjudicatory decisions has clearly been away from the formal conception. Most prominently, in *Baker*,<sup>47</sup> the Supreme Court dismantled the boundary between law and discretion and subjected the Minister's exercise of discretion to review for reasonableness, and in doing so, clearly asserted a judicial supervisory function over what had previously been considered a legal black hole. The Supreme Court has been neither clear nor consistent in its articulation of a competing conception of the rule of law since *Baker*, to be sure,<sup>48</sup> but it continues to repeatedly reject the main tenets of the formal conception. Notably, in *Dunsmuir*, the Court reasserted the fact that courts do not always get the final say on questions of statutory interpretation, rather expert decision-makers interpreting their home statutes are entitled to deference.<sup>49</sup> Thus, judges must be willing to cede their traditional monopoly over law interpretation. And even more recently in *Alberta Teachers*,<sup>50</sup> a majority of the Supreme Court questioned whether jurisdictional questions even exist, suggesting that Canadian judges have departed significantly from their formalist origins.

<sup>44</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) at 188.

<sup>45</sup> Dyzenhaus and Fox-Decent, *supra*, note 41 at 204.

<sup>46</sup> Loughlin, *supra*, note 41 at 220; HW MacLauchlan, “How Much Formalism can We Reasonably Bear?” (1986) 36 UTLJ 343 at 343-44.

<sup>47</sup> *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 [*Baker*].

<sup>48</sup> See discussion below at footnote 104.

<sup>49</sup> *Dunsmuir*, *supra*, note 16.

<sup>50</sup> *Alberta (Information & Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para 34.

Yet, as *Killer Whales* demonstrates, the formal conception retains its appeal in the environmental context. Mainville J.A. rests his decision on a strong assertion of the separation of powers, which requires that the executive act only in a mechanical capacity by implementing law, not interpreting it. He casts the concept of deference as an “exception” to the formal conception, applicable only to independent tribunals, not the administrative state in general. Mainville J.A.’s application of the formal conception also results in a reliance on formal classification. He must make a distinction between “administrative” and “adjudicative” functions in order to make sense of *Dunsmuir* within the formal conception. This turn to formalist classification is reminiscent of the unstable categories of “jurisdictional questions” and “judicial” or “quasi-judicial” functions that have broken down over time. Mainville J.A. demonstrates the continued influence of Diceyan formalism: even as Canadian administrative law doctrine on the whole continues to break down formal barriers, judges will, at times, still seek to defend their traditional monopoly over statutory interpretation.

### (c) The Persistence of the Formal Conception in Environmental Law

The formal conception has a particular appeal in the environmental context which has led to its persistence in environmental law long past its decline in other areas of administrative decision-making. First, as we shall see, the formal conception is promoted by many environmental law scholars and advocates precisely because it promises to constrain executive discretion that can be exercised to undermine environmental protection. Second, environmental issues — to a greater and more obvious extent than many other kinds of administrative decisions — have complex, policy-laden dimensions which look, to formalist judges, like legislative issues requiring judicial abstinence.<sup>51</sup>

#### (i) *The Environmental Reform Position*

The “environmental reform position” captures the argument of the David Suzuki Foundation in *Killer Whales* as well as the assumptions of numerous Canadian environmental law scholars. The basic assumption of the environmental reform position is that discretion in environmental law is a pervasive problem that undermines both environmental protection and the rule of law.<sup>52</sup> From this perspective, the Minister’s attempt to rely on discretionary provisions in the *Fisheries Act* is problematic, not only because discretion is unlikely to yield strong protection for killer whale habitat, but also because executive discretion means that decisions with significant policy implications are not taken by the legislature, the institution of government with the greatest democratic legitimacy.

<sup>51</sup> See generally Genevieve Cartier, “Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?” (2003) 53 U Toronto LJ 217 [Cartier].

<sup>52</sup> Bruce Pardy, “In Search of the Holy Grail of Environmental Law: A Rule to Solve the Problem” (2005) 1 McGill Int’l J Sust Dev L & Pol’y 29; Lynda Collins, “Tort, Democracy and Environmental Governance: The Case of Non-Enforcement” (2007) 15 Tort L Rev 107 [Collins]; David Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) at 231 and 269 [Boyd].

The environmental reform position is understandable in light of Canada's poor track record on environmental protection.<sup>53</sup> It highlights the fact that discretion is systematically exercised in favour of short-term interests rather than long-term environmental protection.<sup>54</sup> The reasons for this are numerous and well known: the economic costs to industry are immediate and tangible and fall on a discrete group of firms who are motivated and capable of making their interests known in the regulatory process. In contrast, the benefits from environmental regulation are often intangible and typically dispersed across all members of the public, and sometimes will not be experienced until long into the future. Moreover, the regulator is often "[d]ependent on the regulated for information and legitimacy, both the regulator and the regulated ha[ve] no real option other than to strike a symbiotic balance in which each contribute[] to the political well being of the other."<sup>55</sup> The importance of Canada's natural resource industries in the Canadian economy has nurtured a cozy relationship between industry and government,<sup>56</sup> fuelling the deep distrust of executive discretion reflected in the environmental reform position.

The environmental reform position also asserts that the extent of discretion in Canadian environmental law is a threat to the rule of law itself. Bruce Pardy argues that environmental law "is one of the most extreme examples of legal disciplines in which the commitment to principles of predictability, abstraction, and separation of powers has been consistently abandoned . . ."<sup>57</sup> Pervasive executive discretion means that important environmental decisions are not made in the open legislature. Rather, "crucial decisions regarding trade-offs between short-term economic gain and long-term harm to health and the environment are . . . made behind closed doors generally without the knowledge of the electorate, and therefore without accountability."<sup>58</sup> Moreover, the courts have, in most cases, proved to be ineffective at constraining executive discretion to prevent environmental harm.<sup>59</sup> The environmental reform position is critical of judicial deference that permits executive decision-makers considerable leeway to undermine environmental protection objectives

<sup>53</sup> *Ibid.*, at 5–10.

<sup>54</sup> *Ibid.*, at 232, 237–38, 263. DL VanderZwaag, Maria Cecilla Engler-Palma & JA Hutchings, "Canada's Species at Risk Act and Atlantic Salmon: Cascade of Promises, Trickle of Protection, Sea of Challenges" (2011) 22 JELP 267 at 307 [VanderZwaag et al]. My previous work has assumed the environmental reform position for this reason: Shaun Fluker & Jocelyn Stacey, "The Basics of Species at Risk Legislation in Alberta" (2012) 50 Alta L Rev 95 [Fluker & Stacey]. See also the Commission for Environmental Cooperation where Canada is subject to numerous submissions that they are failing to enforce their existing environmental statutes online: <[http://www.cec.org/Page.asp?PageID=1226&ContentID=&SiteNodeID=546&BL\\_ExpandID=502](http://www.cec.org/Page.asp?PageID=1226&ContentID=&SiteNodeID=546&BL_ExpandID=502)>.

<sup>55</sup> D Paul Emond, "The Greening of Environmental Law" (1990) 36 McGill LJ 742 at 744–45.

<sup>56</sup> Stepan Wood, Georgia Tanner & Benjamin Richardson, "What Ever Happened to Canadian Environmental Law?" (2011) 37 Ecology LQ 981 at 1025.

<sup>57</sup> Bruce Pardy, "Environmental Assessment and Three Ways Not to Do Environmental Law" (2010) 21 JELP 139 at 149.

<sup>58</sup> Collins, *supra*, note 52 at 110–11.

<sup>59</sup> Boyd, *supra*, note 52 at 269.

when interpreting and implementing legislation. Where the executive has taken this approach, it is understandable that environmental reformers will seek judicial review on a standard of correctness in the hope that the court will reach a harder-line environmental decision than the executive.

(ii) *The Legislative Monopoly*

In addition to the environmental promotion of the formal conception, the inherent characteristics of environmental issues incline judges to revert to their formalistic tendencies. Environmental issues do not easily lend themselves to discrete party-party adjudication, rather they entail complex administrative contexts for determining how to best respond to and manage environmental issues. Ministers and other administrative decision-makers are delegated broad discretion by the legislature to issue regulations, licenses, orders and exceptions that have wide-ranging impacts beyond just the regulated party. Moreover, and as we will see in the next part, decision-makers must make these decisions under conditions of constant uncertainty. In short, these discretionary environmental decisions look and feel like lawmaking, in the sense that they involve the exercise of discretion over complex policy considerations.<sup>60</sup> Since the formal conception requires that judges not interfere with the legislature's traditional monopoly over lawmaking, formalist judges understand their role simply as policing the boundaries of the legislation and no more. The task of the formalist judge is statutory interpretation which does not engage the complex questions of the appropriate standard of review, nor the requirements of procedural fairness that arise in other administrative contexts.<sup>61</sup> Under the formal conception, deferring to Ministerial statutory interpretation would be judicial abdication; likewise overseeing the exercise of policy-laden discretionary decisions would be inappropriate judicial interference with the legislature's monopoly over lawmaking.

The persistence of the formal conception can be seen in the Supreme Court's post-*Dunsmuir* decision in *MiningWatch Canada v. Canada (Minister of Fisheries & Oceans)*,<sup>62</sup> which concerned the implementation of the *Canadian Environmental Assessment Act*.<sup>63</sup> The Minister of Fisheries and Oceans argued that he had discretion to determine the scope of a proposed project in a way that avoided the requirement to conduct a more fulsome environmental assessment under the *Comprehensive Study List Regulations*.<sup>64</sup> The appropriate standard of review was not an issue at the Supreme Court and the Court's reasons treated the matter as an ordinary question of statutory interpretation, proceeding on the implicit basis of correctness.<sup>65</sup> *MiningWatch* simply capped-off a long line of Federal Court authority that Ministers were not entitled to deference on questions of law arising from the implementation of the *Canadian Environmental Assessment Act*. The Supreme Court's

<sup>60</sup> Dyzenhaus and Fox-Decent, *supra*, note 41 at 207.

<sup>61</sup> Cartier, *supra*, note 51 at 237.

<sup>62</sup> 2010 SCC 2 [*MiningWatch*].

<sup>63</sup> S.C. 1992, c. 37 [Repealed].

<sup>64</sup> SOR/94-638.

<sup>65</sup> *MiningWatch*, *supra*, note 62 at paras 27-28.

failure to address the appropriate standard of review for administrative decision-making in the environmental context was disappointing,<sup>66</sup> but unsurprising given the coalescence of the inherent features of environmental issues, the environmental reform position, and the background rule-of-law assumptions of courts overseeing environmental decision-making.

### III. PROBLEMS WITH KILLER WHALES

The problem that we will now see is that the formal conception of the rule of law is incapable of providing the rule-of-law constraints sought by the environmental reform position in the vast majority of environmental cases. As I explain, environmental issues confront us as a kind of ongoing emergency, where decision-makers face profound epistemic constraints. This means that environmental regulation cannot always occur through clear, binding *ex ante* legal rules. Understanding environmental issues as an emergency means that discretion is inevitable. As we will see, the formal conception results in courts treating discretionary decisions as legal black holes — spaces not meaningfully constrained by the rule of law. In other words, the cost of Mainville J.A.’s strong stance on the language of *SARA* was to declare that the discretionary provisions of the *Fisheries Act* were “extra-legal”: legal black holes that are not governed by law.

#### (a) The Environmental Emergency

I have argued elsewhere that environmental issues confront us as an ongoing emergency because they possess the basic, constitutive features of an emergency.<sup>67</sup> Carl Schmitt, preeminent legal scholar on the state of emergency, argued that the emergency is the unforeseeable, existential threat to the state that reveals the necessity of unconstrained executive discretion.<sup>68</sup> In other words, the emergency contains two epistemic features: a lack of *ex ante* knowledge about the specific events that may produce an emergency, and a lack of *ex ante* knowledge about how to respond to such an unforeseen event. The emergency, according to Schmitt, is therefore incompatible with the rule of law since it cannot be anticipated through pre-existing positive legal norms. Schmitt’s theory of the emergency, though developed in the context of the Weimar Republic, has again risen to prominence in the post-9/11 national security literature.<sup>69</sup> Schmitt’s understanding of the emergency and the fundamental problem it poses for the rule of law seemed to offer some

<sup>66</sup> This point was originally made by Shaun Fluker, “*MiningWatch Canada v. Canada: Hoisted on One’s Own Petard?*” (2010) 20 JELP 151 at 157.

<sup>67</sup> Jocelyn Stacey, “The Environmental Emergency and the Legality of Discretion in Environmental Law” (2014) OHLJ (in review), copy on file with the author [Stacey].

<sup>68</sup> Carl Schmitt, *Political Theology* trans by G Schwab (Cambridge, Mass: MIT Press, 1985) at 6-7.

<sup>69</sup> David Dyzenhaus, “The Permanence of the Temporary — Can Emergency Powers Be Normalized?” RJ Daniels, P Macklem & K Roach, eds, *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 21, Oren Gross, “Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?” (2003) 112 Yale LJ 1011; Bruce Ackerman, “The Emergency Constitution” (2004) 113 Yale LJ 1029, Sanford Levinson, “Constitutional Norms in a State of Per-

theoretical support for, in particular, the American response to the 9/11 national security crisis where the executive acted through exceptional emergency powers to create the “legal black hole”<sup>70</sup> of Guantanamo Bay.

On their face, many environmental issues do not seem to possess sudden and dramatic features akin to a national security crisis. But the potential for an environmental catastrophe has always been a driver of environmental law, if implicitly.<sup>71</sup> Indeed, the concept of the environmental emergency has particular salience in the midst of global climate change because there is scientific consensus that, as a planet, we face an existential threat, and the effects of climate change are likely to affect us in unexpected ways.<sup>72</sup> While some aspects of climate change may be foreseeable, others such as extreme weather events, species migration and crop failures may not be, and all issues will require immediate and responsive action as our understanding of these events changes. Understanding environmental issues as an ongoing emergency reflects our position of epistemic frailty when making environmental decisions: it is difficult to know in advance which environmental issues have the potential to turn into catastrophes and which do not. And under these conditions, it is difficult to specify in advance what actions should be taken to respond to a yet-unknown crisis. In other words, environmental issues present the same fundamental problem for the rule of law as do emergencies: they require discretion to take swift action in response to early warning signs and potential threats.

The concept of the environmental emergency extends even to the recovery strategy for killer whales. The emergency features inherent in environmental issues arise from the complex, adaptive nature of ecological systems: killer whales are part of an intricate ecosystem where relationships are not direct, casual, and linear and therefore predictable. Rather, ecological systems are comprised of indeterminate relationships, that is, intricate networks of relationships that defy prediction.<sup>73</sup> The health and recovery of killer whale populations are dependent upon numerous relationships that often interact in unknown or unpredictable ways. For example, multiple contaminants can interact synergistically to produce a toxic effect in apex

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manent Emergency” (2005) 40 Ga L Rev 699, Eric A Posner & Adrian Vermeule, *Terror in the Balance* (New York: Oxford University Press, 2007).

<sup>70</sup> J Steyn, “Guantanamo Bay: The Legal Black Hole” (2004) 53 ICLQ 1.

<sup>71</sup> DP Emond, ““Are We There Yet?” Reflections on the Success of the Environmental Law Movement in Ontario” (2008) 46 Osgoode Hall LJ 219 at 223 (noting that full-scale environmental catastrophe and broader concerns of social justice “underpinned” early environmental law reform efforts in Canada).

<sup>72</sup> *Intergovernmental Panel on Climate Change, Climate Change 2014: Impacts, Adaption, and Vulnerability Summary for Policy Makers*. Indeed, it seems that the IPCC’s reports are less and less confident in the ability to predict the impacts of climate change: Fred Pearse, “UN Climate Report is Cautious on Making Specific Predictions” *Yale Environment* 360 (24 March 2014) online: Yale Environment 360 <[http://e360.yale.edu/feature/un\\_climate\\_report\\_is\\_cautious\\_on\\_making\\_specific\\_predictions/2750/](http://e360.yale.edu/feature/un_climate_report_is_cautious_on_making_specific_predictions/2750/)>.

<sup>73</sup> Brian Wynne, “Uncertainty and Environmental Learning” (1992) 2 *Global Environmental Change* 111 at 114; K Mickelson & WE Rees, “The Environment: Ecological and Ethical Dimensions” in EL Hughes, AR Lucas & WA Tilleman, eds, *Environmental Law and Policy* 3d ed (Toronto: Emond Montgomery Publications Ltd, 2003) 1 at 9.

predators, making it difficult to predict specific effects on a killer whale population.<sup>74</sup> Moreover, complex, adaptive systems often contain feedback loops and tipping points, where, for example, a population crosses a certain threshold from which it cannot recover. In fact, ecological relationships are so complex that they are incompressible, meaning that the “simplest model is the process itself [and t]he only way to determine the future of the system is to run it: there are no shortcuts.”<sup>75</sup> This means that environmental decisions are necessarily taken under conditions of uncertainty; it means that both our understanding of the problem and the problem itself are constantly evolving. Moreover, complex, adaptive systems contain the relatively high probability of extreme events, such as hurricanes, pest outbreaks or anthropogenic events such as oil spills.<sup>76</sup> This means that decision-makers cannot justifiably ignore the possibility of such an extreme event — they may be rare, but they are not improbable.<sup>77</sup> Our necessarily incomplete understanding of ecological systems means that surprises — sometimes catastrophic surprises — are unavoidable.

**(b) Discretion: Legal Black Hole?**

Schmitt’s argument was that the emergency could not be governed by a formal conception of the rule of law. It could not be anticipated through pre-existing rules and thus necessitated unconstrained executive discretion. But Schmitt argued that those who were committed to the formal conception would not be able to countenance the “extra-legal” nature of discretion, exposed by the emergency.<sup>78</sup> Rather, they would pretend that the emergency could be governed by law, by grounding emergency response actions in some pre-existing legal rule. But because the emergency is unforeseeable, this rule would have to be very broad. The American re-

<sup>74</sup> COSEWIC, *COSEWIC assessment and update status report on the Killer Whale *Orcinus orca*, Southern Resident population, Northern Resident population, West Coast Transient population, Offshore population and Northwest Atlantic/Eastern Arctic population, in Canada* (Ottawa: Committee on the Status of Endangered Wildlife in Canada, 2008) at 31-32 ([http://www.sararegistry.gc.ca/virtual\\_sara/files/cosewic/sr\\_killer\\_whale\\_0809\\_e.pdf](http://www.sararegistry.gc.ca/virtual_sara/files/cosewic/sr_killer_whale_0809_e.pdf)).

<sup>75</sup> Jean-Pierre Dupuy, “Complexity and Uncertainty A Prudential Approach to Nanotechnology” in Health and Consumer Protection Directorate General of the European Commission, *Nanotechnologies: A Preliminary Risk Analysis on the Basis of a Workshop Organized in Brussels on 1-2 March 2004* (European Commission, 2004) 71 at 81. On the complexity and therefore unknowability of effects on species in particular, see EO Wilson, *The Future of Life* (London: Little Brown, 2002) at 51.

<sup>76</sup> Daniel A Farber, “Probabilities Behaving Badly: Complexity Theory and Environmental Uncertainty” (2003) 37 UC Davis L Rev 145.

<sup>77</sup> See e.g. Douglas Kysar’s excellent analysis of the risk assessment for hurricane protection preceding Hurricane Katrina, which eliminated one of the most extreme hurricanes from the analysis as a statistical outlier: Douglas Kysar, *Regulating from Nowhere: Environmental Law and the Search for Objectivity* (New Haven, CT: Yale University Press, 2010) at 77.

<sup>78</sup> Dyzenhaus provides an excellent, succinct version of this argument in David Dyzenhaus, “Emergency, Liberalism, and the State” (2011) 9 Perspectives on Politics 69 at 71-72.

sponse to 9/11 provides a useful example of Schmitt's critique because the Authorization for Use of Military Force, a mere 60-word generic provision, has been relied on as authorization for a host of emergency response actions including indefinite detention and the use of military tribunals.<sup>79</sup> The role of judges, according to Schmitt, is a very minimal one where compliance with the rule of law simply means that the executive action is formally authorized by validly enacted legislation, even if the enabling legislation does not impose any substantive constraints on the exercise of discretion.

Put differently, Schmitt foresaw the creation of what Dyzenhaus, and others, have helpfully called "legal black and grey holes."<sup>80</sup> A legal black hole is created where the legislature attempts to exempt the executive from the requirements of the rule of law or preclude judicial review.<sup>81</sup> A legal grey hole is where "there are some constraints on executive action — it is not a lawless void — but the constraints are so insubstantial that they pretty well permit government to do as it pleases."<sup>82</sup> Grey holes are simply black holes in disguise because they only have the appearance of legal constraint, not the reality.<sup>83</sup> Both legal black holes and grey holes are direct products of the formal conception of the rule of law, which allows decision-makers virtually free rein wherever the legislature fails to impose substantive constraints on the exercise of discretion.

Schmitt's criticism of emergency powers should be familiar to environmental lawyers and law scholars. Environmental statutes are cast in the broadest of terms, delegating extensive discretion to executive decision-makers. Even SARA, which is more specific and prescriptive than many environmental statutes, still requires the exercise of extensive discretion.<sup>84</sup> As we have already seen, this is a source of much consternation for environmental advocates because discretion is systematically exercised to the detriment of the environment. The formal conception of the rule of law, however, is a direct contributor to this problem because it does not permit judges to impose substantive constraints on the executive discretion above and beyond what is set out in the legislation. The formal conception requires that, in the absence of specific legislative language, judges must simply certify legislative "blank cheques"<sup>85</sup> to the executive, which permit executive decision-makers to degrade the environment. The formalist judge's role is to patrol the boundaries of the statute, but where the statute itself is necessarily broad, judges are required to condone whatever action falls within those broad limits.

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<sup>79</sup> 115 Stat 224. See, in particular *Hamdi et al v Rumsfeld, Secretary of Defense et al*, 542 US 507 (2004).

<sup>80</sup> David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge Univ Press, 2006) at 3 [Dyzenhaus].

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*, at 42.

<sup>83</sup> *Ibid.*, at 3.

<sup>84</sup> Stewart Elgie, "Statutory Structure and Species Survival: How Constraints on Cabinet Discretion Affect Endangered Species Listing Outcomes" (2008) 19 *Journal of Environmental Law and Practice* 1 (on how Parliament sought to constrain discretion without limiting the range of substantive outcomes).

<sup>85</sup> Dyzenhaus, *supra*, note 80 at 50.

In the context of *Killer Whales*, then, the formal conception led Mainville J.A. to assert his judicial monopoly over statutory interpretation. But it also lead him to an interpretation of “legally protected” that conceded that the *Fisheries Act* is a series of legal black or grey holes where Ministerial discretion is essentially a law unto itself. These black or grey holes are legal voids, not subject to the oversight of the court and not governed by legal principles. That this is the case is evident from Mainville J.A.’s statement that the Minister did not “explain how his intent can be legally enforced should he change his mind in the future for some presumably good reason . . . Intent not to use discretion is not legally enforceable.”<sup>86</sup> In other words, the court is not entitled to scrutinize a discretionary Ministerial decision to authorize a HADD. So long as the decision is taken under a validly enacted provision of the *Fisheries Act*, the Minister’s decision has complied with the rule of law.

But Mainville J.A.’s discussion of the pollution prevention provision of the *Fisheries Act* reveals the instability of the formal conception. Here Mainville J.A. parts company with the trial judge by concluding that regulations under s. 36(5) that authorize the deposit of deleterious substances are not discretionary in nature and can therefore constitute “legal protection” under *SARA*. But, in reaching this conclusion, he dismisses two significant discretionary aspects of regulation-making: first, that the Governor in Council has the discretion to modify the substance of the existing regulations at any time, and second, that it has the discretion to issue new regulations permitting the deposit of additional harmful substances. Mainville J.A. tersely states that “[t]he fact a statutory provision or a regulatory provision may eventually be modified does not entail that it may not be relied upon by the Minister . . . Were it otherwise, the Minister could rely on no statutory or regulatory provision.”<sup>87</sup> But Mainville J.A.’s grouping of regulation and legislation is a problematic consequence of the formal conception’s attempt to protect the legislature’s monopoly over lawmaking. Since regulations are functionally equivalent to legislation, the formal conception requires judges not to interfere with the substance of regulations. Instead, they are only subject to review for their *vires*, and are virtually never struck down by the courts even when they openly degrade the environment,<sup>88</sup> or where their ability to achieve their statutory objective is dubious.<sup>89</sup> For this reason, regulation-making remains a very large legal black hole in environmental law.<sup>90</sup>

Yet Mainville J.A. suggests that s. 58(5) of *SARA* requires the courts to go beyond *vires* review and adjudicate on the substance of the regulations to determine whether they in fact provide substantive protection for critical habitat. This is a striking violation of the formal conception, since it requires judges to openly step outside their monopoly over statutory interpretation and engage in lawmaking. But if this is true, then there is no principled basis on which to maintain the line be-

<sup>86</sup> *Killer Whales*, *supra*, note 1 at para 131.

<sup>87</sup> *Ibid.*, at para 139.

<sup>88</sup> *Sandy Pond Alliance to Protect Canadian Waters Inc. v. Canada (Attorney General)*, 2013 FC 1112.

<sup>89</sup> *Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-Term Care)*, 2013 SCC 64 at para 28.

<sup>90</sup> Stacey, *supra*, note 67.

tween a discretionary Ministerial authorization and a discretionary regulation from the perspective of the rule of law. In other words, on Mainville J.A.'s logic, if s. 58(5) of SARA requires judicial supervision of the substance of "legally enforceable" regulations, then it can require judicial supervision of discretionary Ministerial decisions to authorize a HADD.

By probing the rule-of-law underpinnings of Mainville J.A.'s reasoning what becomes clear is that when he states, "[t]here is a fundamental difference between a non-discretionary and legally enforceable regulation and a discretionary ministerial licensing scheme,"<sup>91</sup> he means that there is a fundamental *practical* difference between the two. To be sure, there may be valid practical reasons to distinguish between *ad hoc* discretion and general regulations — for example, transparency or assurance of a more systematic or rigorous decision-making process in the sensitive context of endangered species protection.<sup>92</sup> But these are not the grounds on which Mainville J.A. relies. Rather, his analysis is based entirely on the distinction between the legality of discretionary and non-discretionary decisions. This is a pragmatic and unstable distinction resulting from the formal conception which cannot be sustained. Fortunately, it is one that we will now see is not the only or inevitable understanding of the rule of law.

#### IV. AN ALTERNATIVE BASIS FOR THE CONCLUSION IN KILLER WHALES

As we will now see, Mainville J.A. could have avoided conceding that the *Fisheries Act* is a series of legal black and grey holes, and in doing so, still held that the killer whale protection statement did not comply with SARA. In this section I outline a competing conception of the rule of law, one that Canadian courts have repeatedly, albeit inconsistently and imperfectly, endorsed but that has failed to penetrate the environmental context. This is a common law constitutional conception of the rule of law, where the "constraints of legality are the constraints of justification,"<sup>93</sup> and as we will see, it requires that government officials publicly justify their decisions on the basis of core constitutional principles. From the perspective of the common law constitutional conception of the rule of law, the *Fisheries Act* does not contain legal black and grey holes, since every decision must be justified on the basis of certain legal principles. It also means that courts need only defer to Ministerial decisions where they are so justified. As we will see in this section, the Minister's killer whale protection statement does not meet this test.

##### (a) The Requirement of Justification

Interestingly, Mainville J.A.'s conclusion that correctness was the appropriate standard of review deviated from the consistent judicial trend toward deferring to

<sup>91</sup> *Killer Whales*, *supra*, note 1 at para 139.

<sup>92</sup> Fluker & Stacey, *supra*, note 54 at 105, 113; VanderZwaag et al, *supra*, note 54 at 292-93.

<sup>93</sup> David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14 S Afr J on Hum Rts 11 at 30 ["Justification"].

Ministerial interpretations of their home statutes.<sup>94</sup> This trend reflects the Canadian courts' understanding of deference as respect, a recognition that administrative decision-makers "can make rational decisions about the law."<sup>95</sup> But what goes hand-in-hand with deference as respect is the elimination of legal black holes, or the idea that administrative decision-makers have "free rein within bounds."<sup>96</sup> So in areas that fall within the traditional judicial monopoly, such as statutory interpretation, judges must be willing to back off, but they also must be willing to take on a greater supervisory role in areas that would normally fall outside of their monopoly. Deference as respect is an expression of the courts' recognition of the legitimacy of the administrative state; that recognition requires that judges defer to reasonable interpretations, but also ensures that decision-makers comply with the standards that make them legitimate.

Deference as respect is one aspect of what David Dyzenhaus calls the "culture of justification."<sup>97</sup> For Dyzenhaus, the rule of law does not turn on maintaining a formal separation of powers between the branches of government; rather, it is about the realization of fundamental constitutional principles, a "rule-of-law project" in which all institutions of government are engaged.<sup>98</sup> Under Dyzenhaus' conception, all public officials are required to publicly justify their decisions on the basis of these principles — namely, fairness, reasonableness and equality.<sup>99</sup> This means that when interpretations are fair, reasonable and reflect substantive equality — in other words, are justified — the court must defer, but it also means that decisions that were conventionally seen as legal black holes must now live up to the requirement of public justification. In this way, when the legislature delegates discretionary decision-making authority to an executive decision-maker, that discretion is not a legal black hole. Instead, it is a decision that can be guided by common law constitutional principles, and indeed *must* reflect these principles if it is to count as law at all.

The earliest expression of this conception of the rule of law is found in Rand J.'s well-known reasons in *Roncarelli*, where a majority of the Supreme Court overturned the Quebec Liquor Commission's decision to permanently cancel the liquor license of a restaurateur in response to the Attorney General's opposition to the restaurateur's religious involvement.<sup>100</sup> While the authorizing statute gave the Commission seemingly unfettered licensing authority, Rand J.'s reasons were not based on solely on the express language of the statute, but the underlying principles of the rule of law:

In public regulation of this sort there is no such thing as absolute and untrammelled "discretion," that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an

<sup>94</sup> *Western Canada Wilderness*, *supra*, note 22 at para 42.

<sup>95</sup> Dyzenhaus, *supra*, note 80 at 127.

<sup>96</sup> *Ibid.*

<sup>97</sup> Justification, *supra*, note 93 at 11.

<sup>98</sup> Dyzenhaus, *supra*, note 80 at 5.

<sup>99</sup> *Ibid.*, at 13-14.

<sup>100</sup> *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.<sup>101</sup>

This understanding of the rule of law, one grounded in the core constitutional commitment that public power should not be exercised arbitrarily, is again articulated and expanded upon in the Supreme Court's important decision in *Baker*.<sup>102</sup> In *Baker*, the majority found that the Minister of Immigration and Citizenship was required to give reasons, and those reasons must demonstrate a reasonable justification for the outcome, when denying a deportation exemption on humanitarian and compassionate grounds. Again, the majority rejected the formal conception and found that the Minister's subjective discretion to issue the exemption "if satisfied" is governed not just by the permissive language of the statute, but also underlying legal principles. In other words, the Minister's "discretion must be exercised with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter."<sup>103</sup> And the Court's determination of whether the Minister has, in fact, exercised his or her discretion in this way arises from the Minister's obligation to publicly justify his or her decisions through reasons.

To be sure, the Court has retreated from this clear assertion of the common law constitutional conception of the rule of law, and it is not insignificant that this retreat began in the emergency context of a post-9/11 national security decision.<sup>104</sup> And, as discussed above, this understanding of judicial review has, as of yet, failed to permeate the environmental context. But the Supreme Court has nonetheless repeatedly affirmed the idea of deference as respect and has again articulated that its role "is concerned with justification, transparency and intelligibility within the decision-making process."<sup>105</sup> More recently, the Court has even held that the requirement of justification extends to highly discretionary and policy-laden municipal by-law making.<sup>106</sup> Despite the fact that a municipal by-law falls squarely within the legislature's traditional monopoly, the court nonetheless retains a supervisory jurisdiction over these decisions to ensure they comply with the requirements of legality.<sup>107</sup>

What this means is that, while Mainville J.A. can be read as rescuing *SARA*'s requirements from what he perceives as the legal black and grey holes of the *Fisheries Act*, there is nothing in principle that prevents him from adopting this compet-

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<sup>101</sup> *Ibid.*, at 140.

<sup>102</sup> *Baker*, *supra*, note 47.

<sup>103</sup> *Ibid.*, at para 56 *per* L'Heureux-Dubé J.

<sup>104</sup> *Suresh v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1 at para 41 (stating that the court's role is not to reweigh the relevant factors).

<sup>105</sup> *Dunsmuir*, *supra*, note 16 at para 47.

<sup>106</sup> *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2.

<sup>107</sup> *Ibid.*, at paras 11, 24.

ing conception of the rule of law. The requirement of public justification would impose additional demands, to be sure, on the executive to ensure its fisheries decisions are reasoned and transparent.<sup>108</sup> And while this suggests that this competing conception of the rule of law is aspirational, in the sense that its requirements likely depart significantly from the status quo in much environmental decision-making, the legal resources nonetheless already exist in Canadian administrative law that would have enabled *Mainville J.A.* to reason in this way.

**(b) Justifying Killer Whale Protection**

With this conception of the rule of law in mind, we can now see that the Minister’s killer whale protection statement would not meet the burden of public justification required by the common law constitutional conception of the rule of law. The protection statement issued by the Minister identified the aspects of killer whale habitat that required protection (e.g. fishing vessels that use gear that drag along the bottom), but then simply listed the existing instruments that allegedly provide sufficient protection. A portion of the statement reads as follows:

- Fishing vessels using gear that drags along the bottom
  - Protected through provisions of the Fisheries Act or regulations made thereunder, in particular s. 22(1) of the Fishery (General) Regulations. This protection is supported by processes under the Fisheries and Oceans Canada policy on Managing the Impacts of Fishing on Sensitive Benthic Areas.<sup>109</sup>

The legislative, regulatory and policy measures are listed in a generic fashion and the statement fails to explain how any of the existing measures respond to the habitat threat. Indeed, at the Federal Court of Appeal, the Minister’s only justifica-

<sup>108</sup> It may also impose demands on the legislature, for example, to create a review board that has the expertise to review fisheries permitting decisions. A key insight from the emergency context is that it may be the case that the task of ensuring that a decision is justified cannot be properly carried out by a court due to lack of expertise, or the secrecy requirements in national security contexts: Dyzenhaus, *supra*, note 80 at 163–65 (discussing the Special Immigration Appeals Tribunal for reviewing immigration decisions that engaged sensitive national security issues that could not be heard in open court nor by generalist judges) and 172–73 (on the need for “institutional imagination” and judges’ role in making this happen). Regional fisheries appeals boards currently exist as creations of the executive, but have a very limited mandate for reviewing licensing decisions offering non-binding recommendations to the Minister. See Department of Fisheries and Oceans, Guide to the Atlantic Fisheries License Appeal Board online: <<http://www.dfo-mpo.gc.ca/fm-gp/policies-politiques/licences-permis/aflap-pappa/index-eng.htm>> and Department of Fisheries and Oceans, Guide to the Pacific Region License Appeal Board <<http://www.pac.dfo-mpo.gc.ca/fm-gp/licence-permis/appeal-eng.html>>. Understanding the institutional requirements demanded by the requirement of public justification in the environmental context is the focus of the author’s ongoing doctoral work.

<sup>109</sup> Northern and Southern Resident Killer Whales (*Orcinus orca*) in Canada: Critical Habitat Protection Statement (2008) online: SARA Registry <[http://www.sararegistry.gc.ca/virtual\\_sara/files/ch\\_killer\\_Whale\\_0908\\_e.pdf](http://www.sararegistry.gc.ca/virtual_sara/files/ch_killer_Whale_0908_e.pdf)>.

tion for the reliance on discretionary provisions was that “Parliament intended that he be allowed some flexibility as to how to provide [SARA’s] compulsory protection.”<sup>110</sup> Neither the statement nor the submissions in Court revealed a reasonable basis for the reliance on these provisions. Put bluntly, the Minister did not justify his decision *at all*. In this case, there seemed to be no basis on which the Court could uphold the decision as a reasonable interpretation of *SARA*, and deciding on the case on this basis would not have had the effect of affirming that the *Fisheries Act* is a series of legal black and grey holes.

Though *Killer Whales* was initially an influential precedent particularly in the Federal Courts,<sup>111</sup> the Supreme Court has since held that, under the *Dunsmuir* standard of review analysis, Ministers are entitled to presumptive deference on interpretations of their home statutes.<sup>112</sup> The Federal Court of Appeal has affirmed that this decision effectively overturns *Killer Whales* and that Ministers interpreting their “home” environmental statutes are entitled to deference.<sup>113</sup> These developments have not been received well by all in the environmental law community. Martin Olszynski writes that the Supreme Court’s decision in *Agraira* poses “an emerging threat to the already weak separation of powers in Canada . . .” and it amounts to an abdication of the judiciary’s constitutional responsibility.<sup>114</sup> Olszynski is rightly concerned with the fact that the executive has consistently interpreted environmental legislation in a way that shirks environmental protection responsibilities. But, as I have already argued, the conception of the rule of law to which Olszynski subscribes cannot provide the rule-of-law constraints he seeks in the vast majority of environmental decisions. Since the very nature of environmental issues precludes clear and prescriptive legal rules, much environmental decision-making will be highly discretionary. It is therefore imperative that our understanding of the rule of law is capable of providing meaningful legal constraints in these necessarily discretionary contexts.

Moreover, the persistence of the formal conception in environmental law has precluded the development of core constitutional principles in the environmental context. Dyzenhaus’ principles of fairness, reasonableness, and equality would take on a different expression in the primarily administrative context of environmental decision-making, as opposed to the adjudicative contexts which have long shaped Canadian administrative law doctrine. They would be shaped by well-known environmental principles: prevention, polluter pays, precaution, and the like. But a partial explanation for the failure of these environmental principles to play a meaning-

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<sup>110</sup> *Killer Whales*, *supra*, note 1 at para 106.

<sup>111</sup> E.g. *Western Canada Wilderness Committee v. Manitoba*, 2013 MBCA 11; *Sheldon Inwentash & Lynn Factor Charitable Foundation v. R.*, 2012 FCA 136; *Bartlett v. Canada (Attorney General)*, 2012 FCA 230; *Prescient Foundation v. Minister of National Revenue*, 2013 FCA 120; leave to appeal refused 2013 CarswellNat 4462, 2013 CarswellNat 4463 (S.C.C.).

<sup>112</sup> *Agraira*, *supra*, note 21.

<sup>113</sup> *Greenpeace*, *supra*, note 21.

<sup>114</sup> Martin Olszynski, “Of Killer Whales, Sage-grouse and the Battle Against (Madisonian) Tyranny” (21 Aug 2013) online: ABLawg <<http://ablawg.ca/2013/08/21/of-killer-whales-sage-grouse-and-the-battle-against-madisonian-tyranny/>>.

ful role in Canadian environmental decision-making is the underlying formal conception of the rule of law which does not allow for an independent, and therefore meaningful, role for legal principles.<sup>115</sup> Rather, the formal conception understands law as rules, which leaves us with an environmental law that is punctured throughout with legal black and grey holes.

While developing what this competing conception of the rule of law would require in the environmental context is beyond the scope of this paper and part of a much broader project, it is worth mentioning that is not wholly inconceivable that the executive could rely on discretionary provisions to provide ample protection for critical habitat. The executive could take concerted action through policies and individual licensing restrictions that, though discretionary, take seriously killer whale protection. An executive so committed would use the flexibility of discretion, not to covertly cater to industry pressure, but rather to respond quickly and effectively to ratchet up habitat protection when it becomes clear that current measures are insufficient.<sup>116</sup> Indeed, the structure of *SARA* itself reflects the fact that the recovery of endangered species is nuanced and complex,<sup>117</sup> and does not easily lend itself to simple policy/law dichotomies. It is important, not only for theoretical coherence, but also for environmental protection to have a conception of the rule of law that enables this kind of environmental decision-making.

## V. CONCLUSION

On its face, *Killer Whales* is a clear environmental victory because it upholds a strict enforcement of *SARA* and it helps to clear some of the “legal mist” surrounding *SARA*’s recovery strategy requirements.<sup>118</sup> To reiterate, this article does not take issue with the court’s conclusion that the discretionary *Fisheries Act* provisions cannot fulfill *SARA*’s requirement in this case. Rather, the article has argued that the rule-of-law underpinnings of the Federal Court of Appeal’s reasoning had the undesirable effect of declaring that the discretionary *Fisheries Act* provisions

<sup>115</sup> A prominent example of this was the Supreme Court’s decision in *MiningWatch*, *supra*, 60 where the environmental intervenors argued that international environmental law principles should inform the interpretation and application of Canadian environmental assessment (Oral hearing Webcast (16 November 2009) online: Supreme Court of Canada <<http://scc-csc.gc.ca/insinc.com/en/clip.php?url=c/486/1938/200910160501wv150enr0513,001Content-Type:%20text/html;%20charset=ISO-8859-1>> at 151:00). While these principles are relevant — indeed, obvious — to anyone in the field of environmental law, a formalist judge cannot give them meaning when working within a formal conception of the rule of law, which understands law only in terms of legal rules. For the formalist judge, in other words, all that matters is the strict letter of the statute, and even where the statute incorporates environmental principles by reference, there nothing that requires the formalist judge to demand a robust or meaningful understanding of these principles.

<sup>116</sup> And it is important to flag that judicial review on its own may not be sufficient (or appropriate) to ensure that complex, scientific decisions, such as those in the fisheries context, are justified. Creative institutional design, such as specialized review tribunals may be necessary: Stacey, *supra*, note 67.

<sup>117</sup> VanderZwaag et al, *supra*, note 52 at 291.

<sup>118</sup> *Ibid.*, at 274, 286.

are legal black and grey holes — decisions that are only legally constrained in the minimal sense that they formally comply with the express requirements of the statute. Since environmental issues confront us as an ongoing emergency, statutory language will be necessarily broad and will often fail to provide specific, binding requirements on executive decision-makers.

I have argued that *Killer Whales* discloses the instability of the formal conception of the rule of law: it requires an all-or-nothing approach where formalist judges either substitute their own interpretation of legislation or give decision-makers free rein. In contrast, I have argued in favour of a common law constitutional conception of the rule of law, which understands the “constraints of legality as the constraints of justification.”<sup>119</sup> Admittedly, much work remains to develop what the constraints of public justification mean in the environmental context. But this conception of the rule of law has the potential to enable progressive and responsive environmental decision-making while providing the meaningful rule-of-law constraints that environmental advocates have long sought after.

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<sup>119</sup> *Supra*, note 92.

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