Federal Court  Cour fédérale

Date: 20150622

Docket: T-996-14

Citation: 2015 FC 773

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 22, 2015

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

CENTRE QUÉBÉCOIS DU DROIT DE L'ENVIRONNEMENT
and
NATURE QUÉBEC

Applicants

and

THE MINISTER OF THE ENVIRONMENT
and
THE ATTORNEY GENERAL OF CANADA

Respondents

and

THE CITY OF LA PRAIRIE

Intervener

JUDGMENT AND REASONS

[1] The applicants, the Centre québécois du droit de l'environnement and Nature Québec, are two non-profit organizations working in the field of protection of the environment and of species at risk. They are challenging the legality of a decision dated March 27, 2014, by which the Minister of the Environment refused to recommend to the Governor in Council that an emergency order be made under section 80 of the *Species at Risk Act*, SC 2002, c 29 [federal Act], to provide for the protection of the Western Chorus Frog (*Pseudacris triseriata*), a threatened wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction.

[2] For the reasons that follow, this application for judicial review should be allowed.

I LEGAL ENVIRONMENT

[3] To understand the real issues in this case and the nature of the specific questions that arise, it seems necessary to situate the Minister's refusal within the legal environment—international and domestic—for the protection of species at risk.

[4] While this is not a case involving cruelty to animals, it must be understood that the protection of species at risk is premised on the same type of philosophical and legal considerations. The Honourable Antonio Lamer noted in 1978, as a Quebec Court of Appeal judge, that [TRANSLATION] "[w]ithin the hierarchy of our planet animals occupy a place which, if it does not give rights to animals, at least prompts us, as animals who claim to be rational beings, to impose on ourselves behaviour which will reflect in our relations with animals those virtues we seek to promote in our relations among humans. . . . Thus humans, by the rule of s. 402(1)(*a*)

[of the *Criminal Code*], do not renounce the right given to them by their position as supreme creatures to put animals at their service to satisfy their needs, but impose on themselves a rule of civilization by which they renounce, condemn and repress all infliction of pain, suffering or injury on animals which, while taking place in the pursuit of a legitimate purpose, is not justified by the choice of the means employed" (*R v Ménard*, [1978] JQ No 187 (QC CA), at paras 19 and 21).

[5] Cruelty to animals is inflicted by exceptionally ill-intentioned individuals whose actions are severely punished by society, and is a crime. Its suppression is therefore within the power of Parliament under subsection 91(27) of the *Constitution Act, 1867*, 30 & 31 Victoria, c 3. But humans are also gregarious beings who themselves live in society in an environment inhabited by all kinds of animal and plant species. What happens when humans, as supreme creatures pursuing their civilizing mission, settle in places where, just yesterday, the American eastern cougar or the Prairie grizzly bear reigned supreme over vast areas of land with the wolverine feared by our forebears? And when human activity destroys in its wake the natural habitat of all these wildlife species—animals and varieties of plants—that cannot tolerate urban life or agriculture, to the point that their survival is threatened in the relatively short to medium term? Have we collectively imposed on ourselves a rule of civilization by which we must prevent the annihilation of individuals of a threatened wildlife species and the destruction of their natural habitat?

[6] This does seem to be the case, for otherwise the *United Nations Convention on Biological Diversity*, June 5, 1992, 1760 UNTS 79 [CBD], which entered into force on December 29, 1993,

would not have been ratified by 196 states parties, including Canada. The otherness between humans and animals, between owners and their property, between people and things without an owner, has given way to a universal legal concept whereby wildlife species and ecosystems are part of the world's heritage and it has become necessary to preserve the natural habitat of species at risk. The *Species at Risk Act*, SC 2002, c 29 [federal Act], which was assented to on December 12, 2002, is in fact intended to implement Canada's obligations under the CBD. This is reflected in the fact that, in the preamble to the federal Act, the Government of Canada formally sets out its commitment to conserving biological diversity and to the principle that, if there are threats of serious or irreversible damage to a wildlife species, cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty [precautionary principle].

[7] The federal Act is binding not only on Her Majesty in right of Canada but also on Her Majesty in right of a province (section 5). Moreover, the Supreme Court of Canada noted in *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, that the precautionary principle may now be a norm of customary international law (at para 32), which justifies a dynamic and liberal interpretation of the provisions of the federal Act, the purposes of which are, on the one hand, to prevent species from being extirpated or becoming extinct and, on the other, to provide for the recovery of species that are extirpated, endangered or threatened as a result of human activity and to manage species of special concern to prevent them from becoming endangered or threatened (section 6 of the federal Act).

[8] Any sustainable development requires the adoption of government policies based on the precautionary principle, especially since administrative *laissez-faire* contributes, along with uncontrolled—and irresponsible—human activity, to the destruction of natural habitats and the loss of wildlife species. It is a panacea to think that the enactment of legislation or regulations eliminates the threats: without a specific action plan, without concrete action on the ground, the survival and recovery of species at risk are irreparably compromised. From this perspective, the CBD therefore provides for general measures that must be taken by the states parties for conservation and sustainable use. Implementation of the measures specified in the CBD implies that the conservation of wildlife species in Canada is a responsibility shared by the country's governments and that cooperation among them is an important priority in order to establish laws and complementary programs that can ensure the protection and recovery of species at risk in Canada.

[9] In addition to the federal Act, account should be taken of the *Act respecting threatened or vulnerable species*, CQLR, c E-12.01 [Quebec Act], and the *Endangered Species Act, 2007*, SO 2007, c 6 [Ontario Act]. These two statutes in turn incorporate the CBD's general principles in the provincial sphere and supplement the federal scheme for the protection and recovery of species at risk from a sustainable development perspective. The Quebec Act (1999) makes the Minister of Sustainable Development, Environment and Parks responsible for proposing to the province's government a policy of protection and management of designated threatened or vulnerable species or of species likely to be so designated, while the *Act respecting the conservation and development of wildlife*, CQLR, c C-61.1, establishes various prohibitions that relate to the conservation of wildlife resources. The Ontario Act, which is more recent (2007), is

a complete code dealing with extinct, extirpated, endangered, threatened and special concern species. Indeed, the following is noted in the preamble to the Ontario Act: "Biological diversity is among the great treasures of our planet. It has ecological, social, economic, cultural and intrinsic value. Biological diversity makes many essential contributions to human life, including foods, clothing and medicines, and is an important part of sustainable social and economic development. Unfortunately, throughout the world, species of animals, plants and other organisms are being lost forever at an alarming rate. The loss of these species is most often due to human activities, especially activities that damage the habitats of these species. Global action is required. . . . In Ontario, our native species are a vital component of our precious natural heritage. . . ."

[10] Parliament and the provincial or territorial legislatures are gambling that the governments and people concerned will step up before the decline of a species in Canada becomes irreversible, which is why it is important that the departments and ministries concerned adopt recovery strategies and action plans as soon as possible. That being said, before going any further, it is important not to confuse the residence of an individual with the critical habitat of a species. Under the federal Act, the concept of "residence" refers to "a dwelling-place, such as a den, nest or other similar area or place, that is occupied or habitually occupied by one or more individuals during all or part of their life cycles, including breeding, rearing, staging, wintering, feeding or hibernating" (section 2 of the federal Act). By contrast, the concept of "critical habitat" is much broader: it refers to "the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or in an action plan" (section 2 of the federal Act). While establishing the Canadian

Endangered Species Conservation Council [CESCC] and the Committee on the Status of Endangered Wildlife in Canada [COSEWIC] as independent expert bodies, the federal Act contains both prohibitive provisions—reinforced by a penal component—and regulatory provisions that are designed to ensure the survival and recovery of any threatened wildlife species listed on the List of Wildlife Species at Risk set out in Schedule 1 to the federal Act [federal List] and that can ensure the protection of their critical habitat.

[11] With regard to the general prohibitions, subsection 32(1) of the federal Act provides that "[n]o person shall kill, harm, harass, capture or take an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species", while section 33 of the federal Act provides that "[n]o person shall damage or destroy the residence of one or more individuals of a wildlife species that is listed as an endangered species or a threatened species, or that is listed as an extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada". A contravention of subsection 32(1) or section 33 of the federal Act constitutes an indictable offence or a summary conviction offence subject to heavy fines (subsections 97(1) and (1.1) of the federal Act).

[12] In this case, sections 32 and 33 of the federal Act currently apply only to Western Chorus Frog populations living on federal land (section 2). This is because, with respect to individuals of a wildlife species listed on the federal List that is not an aquatic species or a species of birds that are migratory birds protected by the *Migratory Birds Convention Act, 1994*, SC 1994, c 22, sections 32 and 33 of the federal Act do not apply in lands in a province (or a territory) <u>that are not federal lands</u> unless an order is made expressly providing that they apply (subsections 34(1)

and 35(1) of the federal Act). However, such an order will be made by the Governor in Council only on the recommendation of the Minister of the Environment, who, after consultation with the appropriate provincial or territorial minister (section 2), must be satisfied that the laws of the province (or the laws of the territory) do not effectively protect the species or the residences of its individuals (subsections 34(3) and 35(3) of the federal Act). In this case, no order has been made under subsection 34(1) or 35(1) of the federal Act to make sections 32 and 33 applicable in relation to the Western Chorus Frog.

[13] With regard to regulations, where a species is identified as endangered, threatened or extirpated, the federal Act requires the competent minister (section 2) to publish a proposed recovery strategy within a short period of time—here, within two years after the species is listed on the federal List, since the Western Chorus Frog is a threatened species (subsection 42(1) of the federal Act). The publication of the proposed strategy enables any person to make useful representations. The Minister must then quickly publish the finalized version of the recovery strategy (see the short time limits in section 43 of the federal Act). In the meantime, the recovery strategy must be prepared in cooperation with the minister of the province (or territory) where the species is found and in consultation with any landowners affected by the strategy (paragraph 39(1)(*a*) and subsection 39(3) of the federal Act).

[14] The precautionary principle expressly applies to any recovery strategy (section 38 of the federal Act). In this case, if the competent minister is of the opinion that the recovery of the species is feasible, the provisions in section 41 are mandatory and the competent minister must identify the species' critical habitat based on the best available information, including the

information provided by COSEWIC, while the recovery strategy must include examples of activities that are likely to result in its destruction. See paragraph 41(1)(*c*) of the federal Act; *Environmental Defence Canada v Canada (Fisheries and Oceans)*, 2009 FC 878, at para 40; and *Alberta Wilderness Association v Canada (Environment)*, 2009 FC 710, at para 25. In addition, based on the time lines included in the recovery strategy (paragraph 41(1)(*g*) of the federal Act), the competent minister must prepare one or more action plans containing measures to protect the critical habitat and to implement the recovery strategy (sections 47 and 49 of the federal Act). The competent minister must monitor the implementation of an action plan and the progress towards meeting its objectives five years after the plan comes into effect. A copy of the minister's report must be included in the federal Public Registry (section 55 of the federal Act).

[15] With regard to the protection of critical habitat itself, sections 56 *et seq*. of the federal Act adopt a general framework that also resembles sections 32 *et seq*. discussed above. If the critical habitat of the listed endangered species or the listed threatened species is on federal lands, the purpose of section 58 of the federal Act is to ensure that, within 180 days after the recovery strategy or action plan that identified the critical habitat is included in the federal Public Registry, all of the critical habitat is protected (section 57 and subsection 58(1) of the federal Act). But once again, the federal Act brings into play a series of external considerations—the wishes of provincial or territorial authorities—with regard to the applicability in a province or territory of the prohibition against destroying any part of the critical habitat that is not part of federal lands. See sections 50 to 61 of the federal Act. However, the Minister of the Environment must recommend that an order be made to apply the prohibition if he or she is of the opinion that the particular portion of the critical habitat is not protected by the federal Act and that the laws of

the province or territory do not adequately protect the critical habitat (subsection 61(4) of the federal Act). Clearly, the mechanisms for implementing the federal Act are very cumbersome and depend exclusively on the discretion of the various levels of government, which means that, after a wildlife species is listed on the federal List, several more years may pass before concrete measures are taken in a province or territory to protect populations, the residence of individuals and the species' critical habitat.

[16] That being said, in the province of Quebec, the Western Chorus Frog was officially designated a "vulnerable species" under the Quebec Act in 2001, whereas it was formerly considered a common species. At the same time, the *Act respecting the conservation and development of wildlife* prohibits the capture, sale or keeping in captivity of individuals of a designated species, and section 26 of that Act provides that "[n]o person may disturb, destroy or damage a beaver dam or the eggs, nest or den of an animal".

[17] In the province of Ontario, sections 9 and 10 of the Ontario Act contain prohibitions similar to the ones in the federal Act, while sections 11 *et seq*. of the Ontario Act deal with recovery strategies and management plans for special concern species. However, the practical problem—and it is a major one in this case—is that the Ontario Act does not apply directly to the Western Chorus Frog, which means that the portion of the species' critical habitat in Ontario has no protection outside federal lands. However, the Northern Cricket Frog (*Acris crepitans*), a different species than the Western Chorus Frog (*Pseudacris triseriata*), has been listed in Schedule 1 to the Ontario Act as a "threatened species".

[18] This will be discussed below when considering the facts, but the applicants would like the Governor in Council to make an emergency order to protect the Western Chorus Frog in the City of La Prairie, Quebec. In this regard, when a wildlife species on the federal List faces "imminent threats" to its survival or recovery, the Government of Canada may, on its own initiative, make an order [emergency order] to protect the species. Section 80 of the federal Act provides:

80. (1) The Governor in Council may, on the recommendation of the competent minister, make an emergency order to provide for the protection of a listed wildlife species.	80. (1) Sur recommandation du ministre compétent, le gouverneur en conseil peut prendre un décret d'urgence visant la protection d'une espèce sauvage inscrite.
(2) The competent minister must make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery.	(2) Le ministre compétent est tenu de faire la recommandation s'il estime que l'espèce est exposée à des menaces imminentes pour sa survie ou son rétablissement.
(3) Before making a recommendation, the competent minister must consult every other competent minister.	(3) Avant de faire la recommandation, il consulte tout autre ministre compétent.
(4) The emergency order may (a) in the case of an aquatic species,	(4) Le décret peut : a) dans le cas d'une espèce aquatique :
(i) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and	(i) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,
(ii) include provisions requiring the doing of things that protect the species and that habitat and provisions	(ii) imposer des mesures de protection de l'espèce et de cet habitat, et comporter des dispositions interdisant les

prohibiting activities that may adversely affect the species and that habitat;	activités susceptibles de leur nuire;
(b) in the case of a species that is a species of migratory birds protected by the Migratory Birds Convention Act, 1994,	b) dans le cas d'une espèce d'oiseau migrateur protégée par la Loi de 1994 sur la convention concernant les oiseaux migrateurs se trouvant :
(i) on federal land or in the exclusive economic zone of Canada,	(i) sur le territoire domanial ou dans la zone économique exclusive du Canada :
(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and	(A) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,
(B) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat, and	(B) imposer des mesures de protection de l'espèce et de cet habitat, et comporter des dispositions interdisant les activités susceptibles de leur nuire,
(ii) on land other than land referred to in subparagraph (i),	(ii) ailleurs que sur le territoire visé au sous-alinéa (i) :
(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and	(A) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,
(B) include provisions requiring the doing of things that protect the species and provisions prohibiting activities that may adversely affect the species and that habitat; and	(B) imposer des mesures de protection de l'espèce, et comporter des dispositions interdisant les activités susceptibles de nuire à l'espèce et à cet habitat;

(c) with respect to any other species,	c) dans le cas de toute autre espèce se trouvant :
(i) on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada,	(i) sur le territoire domanial, dans la zone économique exclusive ou sur le plateau continental du Canada :
(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and	(A) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,
(B) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat, and	(B) imposer des mesures de protection de l'espèce et de cet habitat, et comporter des dispositions interdisant les activités susceptibles de leur nuire,
(ii) on land other than land referred to in subparagraph (i),	(ii) ailleurs que sur le territoire visé au sous-alinéa (i) :
(A) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and	(A) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,
(B) include provisions prohibiting activities that may adversely affect the species and that habitat.	(B) comporter des dispositions interdisant les activités susceptibles de nuire à l'espèce et à cet habitat.
(5) An emergency order is exempt from the application of section 3 of the *Statutory Instruments Act*.	(5) Les décrets d'urgence sont soustraits à l'application de l'article 3 de la *Loi sur les textes réglementaires*.
[Emphasis added]	[soulignements ajoutés]

[19] In *Adam v Canada (Environment)*, 2011 FC 962 at paras 38 and 39 [*Adam*], Chief Justice Crampton identified a number of general principles pertaining to the interpretation of section 80 of the federal Act:

> With respect to the specific language in subsection 80(2), the Applicants requested the Court to endorse the following propositions:
>
> i. Subsection 80(2) imposes a mandatory duty;
>
> ii. subsection 80(2) is triggered by threats to recovery or survival, or both;
>
> iii. a key purpose of section 80 is to protect habitat while awaiting a recovery strategy;
>
> iv. subsection 80(2) requires an objective inquiry based on the best available scientific information;
>
> v. inaction is not permitted due to a lack of full scientific certainty;
>
> vi. section 80 orders can be made for only part of the range of the species;
>
> vii. imminent threats need not be guaranteed to materialize;
>
> viii. the impact of threats must be considered over a biologically appropriate timescale; and
>
> ix. timely decision-making is required.
>
> Generally speaking, these propositions are supported either by the plain meaning of the language in the statute, including the preamble thereto, or the legislative history of the SARA (see, for example, *House of Commons Debates*, 37th Parl, 1st Sess, No 149 (26 February 2002) at 1150 (Hon Karen Redman); Standing Committee on Environment and Sustainable Development, *Minutes/Evidence* , March 22, 2001, at 09:35–09:40). That said, in my view, the following is equally clear:
>
> i. The mandatory duty contemplated in subsection 80(2) is only triggered when the

Minister reaches the "opinion" referred to in that provision.

ii. The language in subsection 80(1) is sufficiently broad to permit the Governor in Council to make an emergency order on recommendation of the competent minister in situations other than those contemplated by subsection 80(2), however, the competent minister would not have any statutory duty to make a recommendation in such other situations.

iii. In reaching an opinion under subsection 80(2), the Minister is not confined to considering the best available scientific information—for example, the Minister may also consider legal advice with respect to the meaning of the language in subsection 80(2).

iv. Keeping in mind the "emergency" nature of the power contemplated in section 80, it may nevertheless be legitimate for the Minister to take a short period of time, following a request such as was made by the Applicants to: (a) obtain information necessary to make an informed opinion under subsection 80(2); or (b) obtain receipt of scientific or other information that is in the process of being prepared.

v. The fact that an Order may be made (under paragraph 80(4)(*c*)) for only part of the range of a listed species, and the fact that the term "wildlife species" is defined in subsection 2(1) to include a "subspecies, variety or geographically or genetically distinct population", do not imply that an Order must always be made whenever the listed species faces threats to its survival or recovery in only a part of its habitat. The Minister's decision will properly depend on the nature of the scientific information, legal advice and other information that he receives and that is relevant to the determination to be made under subsection 80(2), including with respect to the

> biologically appropriate timescale within which to assess a particular threat.
>
> vi. Conversely, I agree with the Applicants' submission that there is nothing in the plain language of subsection 80(2) which limits the mandatory duty imposed on the Minister to situations in which a species faces imminent threats to its survival or recovery on a national basis.
>
> vii. The less likely the threats are, the less weight that they may merit in the Minister's assessment of the imminency of the threats.
>
> [Emphasis in original]

[20] It is clear from the case law that section 80 of the federal Act must be given a liberal interpretation. The primary objective of that provision is to protect the critical habitat of a listed species while awaiting a recovery strategy. An emergency order will therefore contain protective measures that would normally be found in an action plan (federal, provincial or territorial) in the absence of an urgent need for action. In addition to designating the habitat required for the survival or recovery of a species, an emergency order may include provisions prohibiting activities that may adversely affect the species or that habitat (subparagraphs 80(4)(*c*)(i) and (ii) of the federal Act). Section 80 must therefore be read in conjunction with paragraph 97(1)(*b*) and subsection 97(2), which provide that contravention of any prescribed provision of a regulation or an emergency order constitutes an offence under the federal Act.

[21] An emergency order may apply to any critical habitat as well as to only a part thereof. It is not limited to federal lands. Moreover, each group of species is different and its protection requires appropriately tailored measures. The specific nature of the threat needs to be taken into

account. The environment is also important. The determination contemplated at subsection 80(2) of the federal Act entails a careful review of all of the relevant circumstances, including severity and frequency, as well as any other relevant factors. For example, endangered species living in urban or agricultural areas are at risk of disappearing more quickly than species found only in remote and wild areas. That said, section 80 does not provide a precise definition of what is meant by "imminent threat". However, in 2009 the Department of the Environment published on its site a draft document entitled "Species at Risk Act Policies: Protection" [the Draft Policy]. It indicates that the minister will consider recommending an emergency order in cases where protection under other provisions of the federal Act will not be put in place in a sufficiently timely manner to ensure the survival or recovery of a species.

[22] The Draft Policy further provides that, to determine whether or not there is an imminent threat to the survival or recovery of a species, the competent minister will consider whether

> - A serious, sudden decline in the species' population and/or habitat that jeopardizes the survival or recovery of the species is in progress and is anticipated to continue unless immediate protective actions are taken; or
>
> - There is a strong indication of impending danger or harm to the species or its habitat, with inadequate or no mitigation measures in place to address the threat, such that the survival or recovery of the species is at risk; or
>
> - One or more gaps have been identified in the existing suite of protection measures for the species that will jeopardize its survival or recovery, and it is not possible to achieve protection by other means in a timely fashion.

[23] Lastly, it is important not to confuse the "survival" of a species with its "recovery", as they are two separate concepts. The concept of "recovery" goes well beyond that of the

"survival" of a species. Although there is no statutory definition of the term "recovery", Environment Canada adopted a definition in the amended *Recovery Strategy for the Roseate Tern (Sterna dougallii)*, which indicates that "recovery is the process by which the decline of an endangered, threatened, or extirpated species is arrested or reversed and threats are removed or reduced to improve the likelihood of the species' persistence in the wild". Under that definition, the recovery of a species therefore includes a halt to or reversal of the decline of its population.

[24] Let us now consider the factual context that led to the Minister of the Environment's refusal to recommend the making of an emergency order to protect the Western Chorus Frog.

II FACTUAL CONTEXT

[25] The Western Chorus Frog is a small amphibian (a category that includes frogs, toads and bullfrogs) approximately 2.5 centimetres in length that lives and breeds in wetlands. Because it is a species that does not move around much, its home range lies within a small radius (approximately 250 metres) of its breeding habitat. The wetland (pool of water, swamp or flooded woodland clearing) initially serves as a breeding habitat and must be close to open land (field, clearing or woodland). The breeding season takes place during the spring. The majority of adults generally breed only once, and in most cases their life span is no more than one year, although it sometimes reaches two or three years.

[26] The Western Chorus Frog's range extends from south-western to north-eastern North America. Approximately nine percent of the Western Chorus Frog's global range is in Canada, where it occupies the lowlands of southern Ontario and Quebec. Suburban sprawl and

changes in farming practices are contributing to the ongoing destruction of Western Chorus Frog habitats and are thereby threatening the species' survival in Canada and elsewhere in the world. Populations and metapopulations (composed of separate population groups that interact to some degree) found along the Great Lakes/St. Lawrence and Canadian Shield are particularly exposed to the human threat, which makes them highly vulnerable.

[27] In Quebec, the Western Chorus Frog was historically present in the south of the province, from the Ottawa Valley to the foothills of the Appalachians and west of the Richelieu River. Today it is thought to occupy only 10% of this historical range. In Montérégie, the species has been reduced to just over 800 highly fragmented sites over a narrow 20-kilometre strip between the municipalities of Beauharnois to the south and Contrecœur to the north. Its presence has also been confirmed in just over 220 sites in the Outaouais region on a strip approximately 10 kilometres wide that extends over a distance of approximately 100 kilometres from east to west along the Ottawa River between the city of Gatineau and Île-du-Grand-Calumet. In 2010, scientists estimated that the species occupied at least 102 square kilometres of habitat: 60 square kilometres in Montérégie and 42 square kilometres in the Outaouais. It is estimated that the Western Chorus Frog has already lost close to 90% of its historic range in Montérégie, and it can now be found only on Île Perrot and on Montréal's South Shore between Saint-Stanislas-de-Kostka and Varennes, along a small strip of land approximately 20 kilometres wide. Within this area only nine metapopulations and seven small isolated populations survive, occupying a total area of approximately 50 square kilometres.

[28] In Ontario, the Western Chorus Frog is distributed over a much larger area, from the United States border up to Georgian Bay, to the south of Algonquin Park, in the Frontenac Axis, and along the Ottawa Valley up to Eaganville. No systematic survey specific to the species and its habitat has been carried out in that province. Therefore, no estimate of the number of sites occupied is available. However, there are studies that show a decline in the number of sites at which the species was historically present in eastern Ontario (-30% near Ottawa; -95% near Cornwall). These two studies were carried out in a peri-urban environment and represent good examples of the trend whereby habitat is lost to housing development in this type of context. However, they do not take into account the fact that some adjacent breeding environments have been colonized since then.

[29] Since March 17, 2010, the Great Lakes/St. Lawrence–Canadian Shield population of the Western Chorus Frog (*Pseudacris triseriata*) has been listed on the federal List as a "threatened species": *Order Amending Schedule 1 to the Species at Risk Act*, SOR/2010-32 [Designation Order]. It was placed on the list following an assessment of the species by COSEWIC. The summary of the regulatory impact analysis that was published in the *Canada Gazette Part II*, SOR/2010-32 [the impact analysis], indicates that, in addition to direct economic benefits, the protection of species at risk can provide many benefits to Canadians, such as the protection of essential ecosystems, while the unique features and the evolving history of numerous species at risk, such as the Western Chorus Frog, arouse special interest on the part of the scientific community.

[30] Although a proposed recovery strategy for the Western Chorus Frog targeted to the Great Lakes/St. Lawrence–Canadian Shield population [target population] was published in 2014 in the Species at Risk Public Registry [federal Public Registry] (http://www.registrelep-sararegistry.gc.ca), no definitive version has yet been published in the federal Public Registry. In fact, according to the proposed recovery strategy for the species, urbanization and intensification of agriculture are two serious threats that raise strong concerns about the recovery of the species (Quebec and Ontario). From a biological point of view, these are two real threats that occur on an ongoing and frequent basis. The severity of these two threats is high, while the available evidence establishes a strong causal connection between the human threats identified and the viability of the target population.

[31] That said, the current proposed recovery plan does not contain any timelines or a general overview of the recovery measures contemplated by Environment Canada, the Parks Canada Agency and other jurisdictions and/or organizations participating in conservation of the species and protection of the critical habitat of the target population. It goes without saying that the implementation of recovery measures is subject to the appropriations, priorities and budgetary constraints of the participating jurisdictions and organizations, with the result that the critical habitat—and any part thereof—of this threatened species is not currently receiving any specific protection outside of federal lands. It is nonetheless anticipated that one or more action plans will be posted in the federal Public Registry before the end of 2019.

[32] The foregoing is a general factual overview. I now come to the specific facts on which this case is based. On May 15, 2013, the applicant Nature Québec served a letter on the then

Environment Minister, the Honourable Peter Kent, asking him to recommend the making of an emergency order under section 80 of the federal Act and invoking an "imminent threat" to what may have remained of the Western Chorus Frog metapopulation in La Prairie, namely that of the "Bois de la Commune", as a result of the deforestation and alteration of the wetlands surrounding the completion of a housing project called "Domaine de la nature".

[33] Nature Québec indicates that this metapopulation has already undergone losses of more than 50% since the early 1990s and that the species' recovery is compromised. Nature Québec alleges that it recently obtained a copy of the minutes (dated February 20, 2013, final version April 2, 2013) of a meeting of the species recovery team in Quebec, composed of experts including an Environment Canada representative. It is expressly acknowledged that the current protection and compensation measures planned for what remains of the Bois de la Commune metapopulation do not offer the necessary safeguards to ensure the survival of the species and jeopardize its recovery. Protection of the Bois de la Commune metapopulation had already been identified as a critical habitat in the provincial recovery plan.

[34] Nature Québec therefore submitted a formal request to the Minister of the Environment asking that he exercise his power to make a recommendation under section 80 of the federal Act and to [TRANSLATION] "quickly prepare an order to be adopted on an emergency basis by the Governor in Council and to provide for designation of the habitat necessary to the survival or recovery of the species in the area targeted by the order, i.e. La Prairie, and to include in this order provisions prohibiting activities that may adversely affect the species and its habitat"

[emphasis added]. No immediate action was taken by the Minister of the Environment, who was slow to reply to the letter of May 15, 2013.

[35] On October 16, 2013, Nature Québec's counsel sent to the Honourable Peter Kent's successor, the Honourable Leona Aglukkaq [the Minister of the Environment], a formal demand that reiterated the arguments made in their previous letter. On November 14, 2013, the Director General of the Canadian Wildlife Service at Environment Canada responded, indicating that the Department was seeking additional information from the other jurisdictions on the situation of the Western Chorus Frog and on the measures taken to ensure the conservation of this species, in order to ensure that the Minister would be able to make a fully informed decision.

[36] On December 13, 2013, Environment Canada's Canadian Wildlife Service an internal scientific report looking at the issue of whether there were imminent threats: "Threat and protection assessment of the Western Chorus Frog (Great Lakes / St. Lawrence – Canadian Shield Protection) following petitions for an emergency order to protect the species in Bois de la Commune, La Prairie, Quebec" [the internal expert report]. The purpose of the internal expert report was to provide the Minister of the Environment with a science-based, credible and objective assessment in order to help her make an informed decision.

[37] The internal expert report noted that 260 habitats of the threatened species in Canada had been identified as critical habitats in Quebec and 211 in Ontario. Over the previous 10 years there had been a 37% decline in the species in Quebec and a 42.6 % decline in Ontario, while over the previous 60 years the Chorus Frog had disappeared from 90% of the area it had

historically occupied in Montérégie. The species' critical habitat included habitats for breeding, feeding and overwintering that had been inhabited by populations at least twice during the previous 20 years, including at least once during the previous 10 years. The Bois de la Commune metapopulation was part of the nine Montérégie metapopulations whose habitats had to be protected. According to the internal expert report, however, the problem was that there were no appropriate protective measures under Quebec law at that point, while the conservation area proposed by the municipality of La Prairie was not sufficient to ensure the survival of the Bois de la Commune metapopulation. Although the survival of the species in Canada was not directly compromised, the housing project represented an imminent threat to the recovery of the species in Canada. According to the detailed analysis carried out by the scientists, all of the factors previously identified in the Draft Policy for the making of an emergency order had been met in this case.

[38] On February 5, 2014, the Western Chorus Frog recovery team sent to the competent authorities an additional scientific opinion concluding that the Bois de la Commune housing project constituted an imminent threat to the recovery of the species and that the location of the conservation area identified in the agreement with the municipality of La Prairie should be amended to bring it more in line with the zone recommended in the provincial conservation plan.

III MINISTER'S REFUSAL

[39] On March 27, 2014, the Minister of the Environment decided not to recommend the adoption of an emergency order because, in her opinion, the Western Chorus Frog was not facing an imminent threat to its survival or recovery. The letter of refusal signed by Mr. Beale,

Assistant Deputy Minister of the Environmental Stewardship Branch at Environment Canada [the Minister's delegate], provided the following explanation:

> [TRANSLATION]
> Environment Canada representatives have considered your request. The threat the species is currently experiencing is related to habitat destruction in the species' range in Quebec and Ontario owing to suburban sprawl and changes in farming practices. Although the decline in the Western Chorus Frog throughout southern Quebec and Ontario can be described as serious from a biological point of view, Environment Canada considers that the scope of the project proposed for the La Prairie site does not threaten the possibility of the species' presence elsewhere in Ontario and Quebec. Accordingly, the Western Chorus Frog is not facing an imminent threat with regard to its survival or its recovery.

[40] The only relevant documents that were before the Minister or her delegate were those identified by the delegate in the file transmission notice, filed on June 9, 2014, under rule 318 of the *Federal Courts Rules,* SOR/98-106 [Rules]. The internal expert report of December 13, 2013, was not submitted to the decision-maker. However, some of the information it contained is summarized in a draft memorandum to the Minister (MIN-175318) attached to the correspondence dated February 9, 2014, from the Director General of the Wildlife Service to the delegate (point 6b). A draft of a proposed species recovery strategy (2013) was also brought to the attention of the Minister or her delegate (point 4a).

[41] According to the documentation filed under rule 318, the officials considered a number of recommendation scenarios (positive or negative). Even with regard to the possible reasons for refusal, it seems that not all of them were adopted. For the purposes of assessing the legality of the Minister's refusal, the respondents agree that the drafts not adopted for decision-making purposes were not part of the general reasoning of the Minister or her delegate.

IV PARTIES' SUBMISSIONS

[42] First, the applicants submit that the Minister failed in her duty to gather and consider the best available, relevant and determinative scientific information. As indicated by the Court in *Adam*, above, section 80 of the federal Act requires that the precautionary principle be implemented and that an inquiry "based on the best available scientific information" be carried out (at paras 38-39). The Minister or her delegate first had to consider the relevant scientific information, which obviously included any scientific reports prepared internally by the Wildlife Service.

[43] The applicants argue that the scientific staff in the Quebec region (although it seems that the internal expert report was a collective work, throughout the proceedings the applicants referred to the Branchaud report, Branchaud's name appearing on the internal expert report) carried out a methodical, objective and comprehensive inquiry in order to determine whether the Domaine de la nature project constituted an imminent threat to the Western Chorus Frog's recovery. Yet only a portion of the relevant information and of the detailed analysis found in the 15-page internal expert report was summarized by the officials who prepared the briefing notes for the Minister of the Environment. The memorandum that contains the officials' general arguments leaves out a number of pieces of important technical and scientific information. In fact, the survival of the species and its recovery are two separate matters. There is no mention of the fact that the Chorus Frog metapopulations in La Prairie are not isolated. This determinative analytical error vitiates the Minister's reasoning, because not only is conservation of the Bois de la Commune metapopulation in La Prairie an important target in terms of an overall species recovery strategy, but the latter could disappear completely, and on an imminent

basis, because of the Domaine de la nature project. Consequently, the best scientific information, namely the scientific report, was arbitrarily disregarded by the Minister or her delegate.

[44] At the same time, the applicants argue that the reasons found in the delegate's letter do not provide any logical or rational basis that could justify the Minister's refusal. According to those reasons, [TRANSLATION] "Environment Canada considers that the scope of the project proposed for the La Prairie site does not threaten the possibility of the species' presence elsewhere in Ontario and Quebec. Accordingly, the Western Chorus Frog is not facing an imminent threat with regard to its survival or its recovery". While it is true that the Minister's logic is consistent with the absence of an imminent threat to the survival of the entire species in Canada, the reasons do not explain in any way how the residential developer's project does not present an imminent threat to the species' recovery in Canada.

[45] The applicants also argue that the brutal and sudden disappearance of the entire Bois de la Commune population will prevent the authorities from establishing an action plan for the recovery of the species in Montérégie, which, along with the Outaouais region, is one of the only two regions in which there are still Western Chorus Frog populations. The reasons for the refusal do not take into account the relevant criteria referred to in the draft departmental policy and do not explain how the negative impact of the Domaine de la nature project would be negligible or would be compensated by the survival or increase in the population of other populations of the species in Canada. There are no adequate protective measures offering protection on private lands in either Quebec or Ontario.

[46] The applicants would like the Court to set aside the decision under review and issue a writ of *mandamus* or grant declaratory relief in order to force the Minister to recommend that an order be made. In the alternative, the applicants are asking the Court to set aside the decision under review and to refer the matter for a fresh determination by the Minister, with specific instructions with respect to their right of participation and the timeframe within which the redetermination will need to be made: *Alberta Wilderness Association v Canada (Environment)*, 2009 FC 882 [*Alberta Wilderness Association*].

[47] For their part, the respondents are asking the Court to dismiss this application for judicial review. The Minister had no duty in this case to recommend that an order be made under section 80 of the federal Act. The Court must simply consider whether the general reasoning found in the reasons for the Minister's refusal is logical and is based on the evidence on the record (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-16 [*Newfoundland Nurses*]; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 53 and 63).

[48] The defendants note that the reasons forwarded by the delegate clarify the Minister's reasoning with regard to the determination that there are no "imminent threats". The Minister or her delegate were not required to analyze the material or scientific evidence or to confine themselves to the parameters whereby, under Environment Canada's draft Guidelines, a particular situation would be considered an "imminent threat" to the survival or recovery of a threatened species. The general reasoning found in the letter of refusal accurately represents the Department's current position: in order to be imminent, the threat must apply to all of Canada,

which is not the case here. Accordingly, the Minister did not act unreasonably in disregarding the positive recommendation contained in the officials' first memorandum, which was based on the internal report and the criteria in the draft Guidelines.

[49] Moreover, the defendants contend that the outcome is not unreasonable. In fact, the imminent destruction of the Bois de la Commune metapopulation will not jeopardize the survival or the recovery of the species elsewhere in Canada, as the threat is local, confined to the municipality of La Prairie. Given that there are no other known housing projects that could lead to the destruction of the other metapopulations in Quebec and Ontario, we cannot refer to "imminent threats" (see *Adam*, above, at paras 45-47). Although the words "in Canada" are not found in section 80 of the federal Act, that statutory provision refers only to "the species" and not to populations and metapopulations.

[50] Furthermore, the respondents claim that the Minister is under no obligation in respect of the precautionary principle to prevent the destruction of the Bois de la Commune metapopulation, especially since provincial authorities approved the residential development project in question. Moreover, the Western Chorus Frog has been listed on the federal Public Registry only since 2010. Even if the Bois de la Commune metapopulation is completely eradicated, the recovery program will protect the species in future. There was no need for an urgent response.

[51] Without conceding that the Minister committed a reviewable error herein, the respondents additionally submit that it would be inappropriate for the Court to issue a

mandamus, render a declaratory judgment on rights or prescribe specific instructions. It need simply set aside the disputed decision and return the case to the Minster for a fresh determination. Any interested individual or organization may then present evidence and make submissions to the Minister for the Minister's consideration. If the applicants wish to have more extensive rights than other interested individuals and organizations, the Minister is responsible for making the relevant assessment and decision. In this regard, the scope of the evidence likely to be submitted to the Minister cannot be anticipated, and necessarily affects the time involved in reaching a decision. *Alberta Wilderness Association* does not apply herein because, in that case, the Minister had omitted to fulfil his legal duty to describe the critical habitat in the recovery program. The present case is more akin to the decision in *Adam*, in which Chief Justice Crampton referred the matter to the Minister for a fresh determination, but did not specify a time-frame.

[52] On March 10, 2015, the city of La Prairie was granted intervener status and leave to submit a written memorandum. The intervener—acting alone in this case—argued that the latest scientific data showed that the metapopulation affected by work in progress in the municipality was not the Western Chorus Frog (*Pseudacris triseriata*), but rather the Boreal Chorus Frog (*Pseudacris maculata*), which is not a species listed as threatened under Schedule 1 to the federal Act. For example, the following excerpt appears in the document entitled "Proposed Recovery Strategy for the Western Chorus Frog (*Pseudacris tristeriata*), Great Lakes / St. Lawrence – Canadian Shield Population, Canada", which was before the Minister:

> A high degree of morphological resemblance, along with recent genetic analyses of mitochondrial DNA, indicates that individuals of the [Great Lakes/St. Lawrence – Canadian Shield Population] are actually Boreal Chorus Frogs (*Pseudacris maculata*) rather

> than Western Chorus Frogs (ConservAction ACGT Inc. 2011; Tessier et al. in prep.). Whatever the outcome, the status of Chorus Frog populations remains uncertain in southern Ontario and Quebec.

[53] The intervener also noted that the June 2008 conservation plan appended to the affidavit of the Executive Director of Nature Québec, Christian Simard, had previously reported this issue. Additionally, if the Court decides to allow this application for judicial review, the intervener would also like permission to intervene before the Minister and argue that certain highly relevant scientific information concerning the identification of Chorus Frog metapopulations in the Montérégie region should be taken into account.

[54] During the hearing before this Court, the applicants and respondents objected to the admission of any evidence that had not been presented to the Minister of the Environment or her delegate. In passing, the applicants noted that if the intervener wished to challenge the existing taxonomy, it would have to attack the legality of the Designation Order. Indeed, COSEWIC, the organization having jurisdiction, has already determined that the Designation Order applies to the Chorus Frog population of south-western Quebec, which includes the Montérégie. The respondents consider the Minister of the Environment to have jurisdiction over this Chorus Frog metapopulation until a declaration is made to the contrary; however, they do not necessarily believe that attacking the legality of the Designation Order in Court is the appropriate solution.

[55] In response, the applicants argue that the respondents cannot re-write the impugned decision or raise additional grounds not mentioned in the delegate's letter of refusal. The fact that a recovery program was published in proposal form is irrelevant, and cannot be used as

a posteriori justification. Furthermore, no concrete action plan has yet been developed. Additionally, Nature Québec has never alleged that the "survival" of the entire species was in jeopardy. The applicants reiterate that according to the precautionary principle, a measure of scientific uncertainty is no excuse for delaying action. The dispute concerned and still concerns the possibility that the residential development project in La Prairie poses an imminent threat to the "recovery" of the species. The Montérégie region is a priority habitat and critical habitat for the recovery of the species, and includes Bois de la Commune.

[56] To conclude, the applicants reiterated that the Minister's refusal to recommend issuing an order to protect the Bois de la Commune metapopulation in La Prairie is arbitrary and capricious. Furthermore, Nature Québec originally requested an emergency order in May 2013. The residential development project had already started and was scheduled for completion in the summer of 2015. The circumstances are urgent. It is therefore appropriate to order the Minister to reach a new decision within 20 days of this Court's judgment, and to allow the applicants a period of 10 days from the date of the judgment to forward any pertinent information to the Minister. Lastly, the intervener and other parties should not be granted any right to participate, as this would slow the decision-making process.

V ANALYSIS

[57] The applicants herein are required to show that a reviewable error was made or that other grounds for intervention exist under subsection 18.1(4) of the *Federal Courts Act*, RSC 1985, c F-7. Briefly, the applicants charge that the Minister or her delegate omitted to consider the best available, relevant and determinative scientific information, or to have otherwise arbitrarily set

aside, without reasonable cause, uncontroverted evidence showing that the Western Chorus Frog faces imminent threats to its recovery in Canada. The concise reasons given for the refusal pertain to outside considerations, while the Minister's arguments are unreasonable and inconsistent with the federal Act and its objectives.

[58] The respondents refute these allegations, and insist on the legality of the Minister's refusal and its reasonableness. The city of La Prairie, which was granted intervener status, alleges that the Minister had no authority to recommend making an order under section 80 of the federal Act, which the applicants and respondents dispute.

[59] Before determining the merits of the allegations submitted by the parties before the Court, it first seems advisable to address the potential mootness, in whole or in part, of this application for judicial review. Although neither the applicants nor the respondents raised this issue, the Court cannot ignore the matter: *Canada (Fisheries and Oceans) v David Suzuki Foundation et al*, 2012 FCA 40 at paragraph 56 [*David Suzuki Foundation*]. For that reason, the counsel were asked to address the issue after the hearing.

[60] Since the applicants would like the Governor-in-Council to issue an emergency order as soon as possible to prohibit the destruction of the residences of individuals and the critical habitat of the species in the area covered by the emergency order, namely, exclusively in La Prairie, it may be asked whether it might not be too late to protect the Bois de la Commune metapopulation, particularly since the developer has been issued all of the authorizations required to complete the work planned in Bois de la Commune by provincial or municipal

authorities. No safeguard order was issued in this case to maintain the *status quo* until the Federal Court made its final disposition, and no application was made for a permanent injunction to halt the work in progress.

[61] In fact, a certain amount of work had already started in Bois de la Commune by the fall of 2012, and work to extend the water supply, waste water, storm drain and sewer systems was able to commence on July 1, 2014. This work inevitably destroyed several historic ponds and breeding sites of individuals of the species, which the applicants, respondents and intervener do not dispute. Nevertheless, the Bois de la Commune metapopulation was not completely eradicated.

[62] Based on the affidavit by Philippe Blais, who participated in the annual spring inventory in La Prairie in April 2015, most of the breeding ponds historically located in the area described as Phase 1 of the residential development were destroyed when the work started in July 2014. However, new ponds have appeared in proximity to and around the periphery of the same area, in woodland islands and at the edges of areas not yet destroyed (approximately 15% to 25% of Phase I, without prejudice).

[63] Mr. Blais states that the potential exists to preserve and even improve the breeding ponds inside Phase I if destruction of the area is halted. Furthermore, with Phase 2 still as yet unharmed, all of the ponds it contains remain active breeding sites, not to mention that it contains 13 new breeding sites. However, the possible development of Phase 2, in addition to directly

destroying high-density and high-quality breeding ponds, could have a significantly detrimental impact on breeding ponds in the adjoining conservation park.

[64] The respondents showed that at least five biologists working on behalf of various organizations confirmed the presence of the Western Chorus Frog in the Bois de la Commune in the spring of 2015, and that habitat required for the species' survival or recovery in the Bois de la Commune remains. Moreover, the proposed recovery plan for the species, which includes the Bois de la Commune as a proposed critical habitat, contains no action plan but states that [TRANSLATION] "one or more action plans for the Western Chorus Frog (GLSLCS) will be entered in the Species at Risk Public Registry before the end of 2019".

[65] Therefore, the applicants and respondents submit that the application for a judicial review is not moot. The Court must determine whether the Minister's refusal—based on a finding that the work planned in La Prairie does not pose an imminent threat to the survival and recovery of the species elsewhere in Canada—is or is not unreasonable in the case at hand.

[66] The intervener contends that the application for judicial review is moot and should therefore be dismissed. While challenging the qualifications of affiant Blais as an expert and disputing his impartiality, the intervener also submits that [TRANSLATION] ". . . based on the information currently available to the Court, no tangible action has yet been taken by authorities at the federal, provincial or municipal levels, or by the applicants herein, to halt the work in progress at Bois de la Commune" (Court's direction dated May 22, 2015).

[67] The intervener notes the applicant's admission that [TRANSLATION] ". . . the vast majority of the territory inhabited by the Chorus Frog in Canada primarily falls under provincial jurisdiction" (applicants' submissions dated June 1, 2015). In this regard, the intervener argues, based on the affidavit of Jean Bergeron, that a plan of action for the species' recovery in Montérégie does indeed exist and includes the many measures taken by the intervener as a mandatory condition for obtaining the certificate of authorization issued by the Quebec Minister of Sustainable Development, Environment, Wildlife and Parks on February 10, 2014.

[68] I have decided to rule on the merits of this application for judicial review. In essence, I accept the arguments brought forward by the applicants and the respondents. The intervener's general submissions merely strengthen this Court's opinion that before an emergency order is recommended, the Minister must demonstrate transparency and establish a consultation process that takes account of all relevant viewpoints. I am satisfied that the issues raised by the parties in their submissions are not moot, and that a dispute persists among the parties concerning the potential impact of the work in progress in Bois de la Commune since 2012 on the species' recovery in Canada.

[69] At the hearing, counsel for the applicants stated that the issue was not to determine whether any violation of procedural fairness had taken place. The standard of reasonableness generally applies when reviewing the reasons for the Minister's refusal. The issue of whether the Minister committed a reviewable error in failing or refusing to recommend an emergency order under subsection 80(2) of the federal Act—by failing to consider relevant factors, or otherwise dismissing or ignoring relevant evidence—raises an issue of mixed fact and law that is

reviewable on a standard of reasonableness: *Adam*, above, at para 28; *Alberta Wildlife Association v Canada (Attorney General)*, 2013 FCA 190 at para 49; *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*].

[70] Contrary to the intervener's claims, the issue of determining which particular species of Chorus Frog is present in La Prairie is not a matter of jurisdiction—based on a correct interpretation of section 80 of the federal Act—but rather a simple determination of fact which the Minister has the authority to make and for which Environment Canada already has recognized institutional expertise. Lastly, the reasons for the Minister's refusal are not grounded in any specific interpretation of the wording used in section 80 of the federal Act (except perhaps implicitly). However, we note that the Federal Court of Appeal decided in 2012 that interpretations by the authorized Minister of the applicable provisions of the federal Act (or the *Fisheries Act*, RSC 1985, c F-14) are not owed judicial deference: *David Suzuki Foundation*, paras 65-105.

[71] Moreover, there is no reason to deviate from the general rule whereby an evaluation of the reasonableness of a decision is based exclusively on the evidentiary record that was before the decision-maker at the time it made the disputed decision (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20). In the matter at bar, Environment Canada scientists were satisfied that the Montérégie area metapopulations were of the threatened species' variety (*Pseudacris triseriata*). I also consider it unnecessary to decide today on the administrative or legal recourse available to

the intervener to have the Montérégie metapopulations declared part of or excluded from the scope of the Designation Order.

[72] This has been an oft-repeated refrain of the courts since *Dunsmuir*: the review of a decision on a reasonableness standard concerns the outcome of the decision as well as its transparency and intelligibility (*Dunsmuir*, at paragraph 47). Referring to this new general principle, the Supreme Court took pains to explain in *Newfoundland Nurses*, above, at paragraph 16, that "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met".

[73] There is cause to intervene herein. The arguments submitted by the applicants in favour of setting aside the disputed decision seem valid. In the case at hand, if one refers to the review of the documents submitted to the Court by the federal office under rule 318, the Minister seems to have "put the cart before the horse", to coin a popular 16th-century saying, as her reasoning in the letter dated March 27, 2014 seems to have been shaped by the specific outcome sought. Otherwise, I fail to understand why the logic and the analytical checklist specified in the Draft Policy discussed earlier at paragraphs 21 and 22 were ignored. Granted, the Minister is not bound by departmental policy. However, the specific reasons for deviating from such policies should be made clear.

[74] The Minister's succinct reasons for the refusal are stated in the delegate's letter. They are stated plainly enough. They come down to the fact that despite the biological severity of the

threats currently confronting the Western Chorus Frog, [TRANSLATION] "the scope of the project proposed for the La Prairie site does not threaten the possibility of the species' presence elsewhere in Ontario and Quebec". However, the problem is that the evidence in the certified file compiled under rule 318 does not logically support the Minister's finding that [TRANSLATION] "[a]ccordingly, the Western Chorus Frog is not facing an imminent threat with regard to its survival or its recovery" [emphasis added]. The species' "survival" and "recovery" are two quite distinct notions (see paragraph 23, above). In terms of "recovery", the Minister's logic is seriously flawed.

[75] The internal procedure by which the Minister's decision was made was by no means transparent. This opacity is evident in the documentation that the applicants were able to obtain under rule 318. The respective roles of the various interveners on issues of scientific, political and legal interest remain unknowable to the Court. However, what is clear is a reversal in the public servants' position. Their final position, however, is not based on any scientific analysis. In the matter at bar, I do not believe that the Minister's refusal constitutes an acceptable outcome based on the evidentiary record and the applicable law. Therefore, the Minister's refusal is unreasonable.

[76] The Minister is required to act in accordance with the federal Act. The precautionary principle applies to material determinations made under the federal Act. This principle stands in contrast to administrative or ministerial *laissez-faire*. Where no provincial measure exists to sufficiently protect a wild species registered on the federal List, an imminent threat to the survival or recovery of the species can obviously be expected in the relatively short term. The

reasoning applied must conform to the spirit and intent of the federal Act, as well as any rational, objective criteria previously used within the Department to judge the imminence of a threat.

[77] The Court has already rejected the restrictive interpretation suggested by the respondents—whereby the mandatory requirement provided in subsection 80(2) is limited to cases where a species is exposed to imminent threats to its survival or recovery on a national basis—in *Adam*, above, at para 39. Not only did the Minister arbitrarily and capriciously ignore the scientific opinion of her own Department's experts and the Chorus Frog recovery team, but the Minister's logic leads to an absurd outcome, in contradiction of the Act: as long as individuals of the species are threatened by human activity locally, an imminent threat cannot exist since other individuals elsewhere in the country are not under threat nationally.

[78] Through the lens of its complex mechanics, the federal Act perceives critical habitat as a single unit, each part contributing to the species' survival and recovery across Canada. The two major threats to the Western Chorus Frog are urbanization and agricultural development. These threats are present across Canada. According to the evidentiary record, these two threats are extreme, serious, continuous and ongoing, and jeopardize the survival and recovery of the Western Chorus Frog in Canada. If we rely on the information that was available at the time of the disputed decision, the work included in the Domaine de la nature project will destroy a portion of the species' critical habitat. The result is the brutal and sudden disappearance of the Bois de la Commune metapopulation in La Prairie—unless, of course, mitigation measures are taken to allow the species to recover in the area identified by the possible recovery program.

[79] The Minister's reasoning ignores that the species' recovery in Canada is currently in danger, based on the evidentiary record. A decimated metapopulation cannot recover after its critical habitat is destroyed. The delegate offers no explanation in the disputed decision of how the absence of an imminent threat to other populations might offset the disappearance or decline of a metapopulation facing an imminent threat. Ample and uncontroverted evidence shows that the species has experienced a severe and irreversible decline in Canada over the past few years, while experts investigating the issue have identified various shortfalls arising from inadequate protection in Ontario and Quebec to counter urbanization and intensified farming. Based on the internal report of December 2013, the prohibition against destroying the residences of individuals and the critical habitat of the species seems to be the only effective means of preventing the early demise of the metapopulations identified in the Montérégie area.

[80] According to Environment Canada's definition of the term "recovery", which means halting or reversing the decline of a species, the disappearance of a metapopulation obviously threatens the species' recovery, in the absence of offsetting measures targeting other populations of the species. The fact that other populations are not directly under threat is not sufficient to show that the recovery is not threatened, particularly when documents on record prove that protection of the metapopulation in question is an important strategic objective in the recovery plan proposed for the species.

[81] During the hearing, the respondents explained that the Western Chorus Frog recovery plan would be implemented in future years. However, at the risk of repeating myself, this recovery plan is not currently in force and nothing in the record indicates that tangible protection

measures to assist the recovery of the species in the Montérégie area were in place at the time of the disputed decision, hence the importance for the Minister to determine whether an emergency order should have been made to protect metapopulations whose survival or recovery were under imminent threat.

VI CONCLUSION AND REMEDIES

[82] The applicants are asking the Court to set aside the disputed decision and issue a *mandamus* or a declaratory judgment compelling the Minister to recommend that an order be made. In the alternative, the applicants are asking the Court to set aside the disputed decision and return the case for a new review by the Minister, with specific instructions concerning their right of participation and the time-frame in which the new decision is to be made.

[83] In light of all of the evidence and submissions presented by the parties, from the time this matter was taken under deliberation, the Court considers it inappropriate to issue a *mandamus* compelling the Minister to recommend an emergency order. It is similarly inappropriate to reach a declaratory judgment of law. It is sufficient to set aside the disputed decision, which in my view is unreasonable, and to ask the Minister to examine the matter again, with the stipulation that the reasons for judgment and any intervening developments shall be taken into account.

[84] Further, although the Court decided to allow this application for judicial review while limiting its review of the reasonableness of the Minister's refusal to items directly brought to the final decision-maker's attention in March 2014, it is plainly evident that we are dealing with an ongoing situation. The practical problem in this case is that we cannot turn back the clock. The

department must study the request for a recommendation again in light of any new, ensuing developments of relevance. In this regard, the upcoming publication of a final version of the recovery program, and compliance or non-compliance with the protective measures imposed by provincial or municipal authorities—as conditions for issuing work permits to the developer—are some of the new factors that the Minister must consider when she decides for a second time on the appropriateness of recommending that the Governor General issue an emergency order under section 80 of the federal Act.

[85] It is also clear that the Minister's fresh determination must include a consultative component that in my humble opinion should not be limited to consideration of the applicants' evidence and submissions. However, rather than give the Minister specific instructions in the Court's judgment, it seems advisable that the existing shortfalls in the current decision-making process be corrected by the Department internally, to account for the opinions of scientists, provincial and municipal authorities, public stakeholders such as the applicants herein and any other interested party.

[86] Considering the lengthy delays already encountered, it is also appropriate to determine the time-frame in which a new decision shall be made by the Minister or her delegate. A period of six months following this judgment seems reasonable in the circumstances.

[87] For these reasons, the application for judicial review is allowed. The decision given on March 27, 2014, is set aside and the case is referred back to the Minister of the Environment for redetermination to be made within six months following this Court's judgment. The Minister

shall consider the reasons for the judgment and any intervening developments. The Minister shall allow the applicants and any other interested individuals or organizations, including the intervener, to submit evidence and make representations before a new decision is reached in this case. Given the outcome, the applicants are awarded costs against the respondents. The intervener is not awarded costs.

JUDGMENT

THIS COURT'S JUDGMENT IS that the application for judicial review is allowed. The decision of March 27, 2014, is set aside, and the matter is referred back to the Minister of the Environment for redetermination within six months following the judgment of this Court. The Minister shall take account of the reasons for judgment and intervening developments. The Minister shall allow the applicants and any other interested individual or organization, including the intervener, to present evidence and make submissions prior to deciding the matter anew. Applicants' costs are awarded against the respondents. The intervener is not awarded costs.

"Luc Martineau"

Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-996-14
STYLE OF CAUSE:	CENTRE QUÉBÉCOIS DU DROIT DE L'ENVIRONNEMENT and NATURE QUÉBEC v. MINISTER OF THE ENVIRONMENT and ATTORNEY GENERAL OF CANADA and CITY OF LA PRAIRIE
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	APRIL 28, 2015
REASONS FOR JUDGMENT AND JUDGMENT BY:	MARTINEAU J.
DATED:	JUNE 22, 2015

APPEARANCES:

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Robert Daigneault	FOR THE INTERVENER

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