Federal Court of Appeal | Cour d'appel fédérale

Date: 20200515

Docket: A-279-18

Citation: 2020 FCA 88

[ENGLISH TRANSLATION]

CORAM: **BOIVIN J.A.**
DE MONTIGNY J.A.
RIVOALEN J.A.

BETWEEN:

LE GROUPE MAISON CANDIAC INC.

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

CENTRE QUÉBÉCOIS DU DROIT DE L'ENVIRONNEMENT

Intervener

Heard at Montreal, Quebec, on February 26, 2020.

Judgment delivered at Ottawa, Ontario, on May 15, 2020.

REASONS FOR JUDGMENT: DE MONTIGNY J.A.

CONCURRED IN BY: BOIVIN J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] Le Groupe Maison Candiac Inc. (the appellant) is appealing from the decision by Justice LeBlanc of the Federal Court (as he then was) (Federal Court or LeBlanc J.) rendered on

June 22, 2018, dismissing its application for judicial review (2018 FC 643) (the Decision). After a detailed and exhaustive analysis, the Federal Court refused to invalidate the *Emergency Order for the Protection of the Western Chorus Frog (Great Lakes / St. Lawrence — Canadian Shield Population*), SOR/2016-211 (the Order), as the appellant requested. Rather, the Court held that the enabling provision, under which the Order was made, falls within the jurisdiction of Parliament over criminal law, and that there was neither a disguised nor *de facto* expropriation despite the absence of compensation.

[2] The appellant has challenged each of these conclusions before us. It essentially argued that the Federal Court made an error of law in concluding that the enabling statute suppresses an "evil" within the meaning of 91(27) of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), reproduced in *R.S.C., 1985, App II, No. 5* (*Constitution Act, 1867*) and does not encroach on provincial jurisdiction. It also argued that the Federal Court erred in considering that the concepts of disguised or *de facto* expropriation did not apply in this case.

[3] Having carefully weighed the arguments of the parties and considered the applicable law, I am of the view that this appeal should be dismissed.

I. Background

[4] LeBlanc J. set out the factual and legislative context of this case at length, and the parties did not disagree with his views. As a result, it will not be necessary for me to deal with it extensively in these reasons. I will therefore simply review the essential elements which form the backdrop upon which the constitutional questions before us must be resolved.

[5] The appellant is a real estate developer and builder who operates in the province of Quebec, mainly in the municipalities of Saint-Philippe, Candiac, La Prairie and on the South Shore of Montreal. As part of its operations, it acquired land for residential development. Because portions of this land contain wetlands, the appellant requested a certificate of authorization from Quebec's Ministry of Sustainable Development, Environment and the Fight against Climate Change. Section 22 of the *Environment Quality Act*, CQLR c. Q-2 (*Environment Quality Act*), provides that no person may undertake any construction, work or activity in wetlands or bodies of water without obtaining a certificate of authorization, in order to protect the environment and biodiversity.

[6] The appellant obtained its certificate of authorization on September 3, 2010, allowing it to begin its residential development (Appeal Book, vol. 2, tab H, pages 445–447 [AB]). This authorization required the appellant to establish conservation areas on its property and implement a three-year follow-up program. In June 2016, the appellant also obtained a certificate of authorization from the Municipality of Saint-Philippe to cut trees and perform backfill work (AB, vol. 2, tab H, pages 514–516).

[7] Informed of the appellant's development work in 2013, the Minister of the Environment initially decided not to recommend the adoption of an emergency order, being of the opinion that this work did not constitute an imminent threat within the meaning of section 80 of the *Species at Risk Act*, S.C. 2002, c. 29 (the Act) (the text of this provision is reproduced in the appendix to these reasons). According to that provision, to which I will return later, the Governor in Council may, on the recommendation of the competent minister (in this case, the Minister of the

Environment), make an emergency order to provide for the protection of a listed wildlife species. However, subsection 80(2), provides that the competent minister *must* make such a recommendation "if he or she is of the opinion that the species faces imminent threats to its survival or recovery."

[8] It should be mentioned at this point that the species in question is the Western Chorus Frog (the frog). This small amphibian, generally no more than 2.5 centimetres long as an adult, seldom moves more than 300 metres from its breeding place. The frogs prefer temporary and shallow wetlands. In Canada, they are only found in southern Ontario and southwestern Quebec (in the Outaouais and Montérégie). According to the Committee on the Status of Endangered Wildlife in Canada, the Montérégie group has lost about 90% of its former range. At this rate, experts estimate that all of the frog's habitats are likely to disappear from the area within 10 to 25 years. Given the decline of the frog's population in Quebec (approximately 37% per decade) and in Ontario (30% between 1995 and 2006), the frog was added to Canada's List of Wildlife Species at Risk in 2010 (*Order Amending Schedule 1 to the Species at Risk Act*, SOR/2010-32, section 5).

[9] The Minister's decision not to recommend the adoption of an emergency decree was challenged through an application for judicial review by two non-profit environmental protection organizations. The Federal Court, with Justice Martineau presiding, allowed this application on June 22, 2015, and ordered the Minister to reconsider his decision within six months of the date of his judgment: *Centre québécois du droit de l'environnement v. Canada (Environment)*, 2015 FC 773 (*Centre québécois du droit de l'environnement*). According to Martineau J., the

Minister had erred in adopting a restrictive interpretation of subsection 80(2) of the Act whereby the requirement to be met by the Minister was limited to cases where a species was exposed to imminent threats to its survival or recovery on a national basis.

[10] Pursuant to this decision, Environment and Climate Change Canada (ECCC) initiated a systematic process of collecting and analyzing information on the frog and its habitat, including the current state of the species, its habitat in La Prairie, current and planned development projects, and existing protective measures, as well as consultation with municipalities and provincial departments. ECCC completed a detailed scientific assessment of the frog, as well as a detailed protection assessment of the species, including a review of legal protection by the provinces and the compensation and mitigation measures planned by various developers (including the appellant). In a third assessment dealing with imminent threats, ECCC considered the measures taken to mitigate the impact of the residential project, but found that [TRANSLATION] "these measures will probably not ensure the long-term viability of the metapopulation affected by the project" (AB, pages 866 and 1474). Consequently, the study found that [TRANSLATION] "the viability of the La Prairie metapopulation is threatened in the short term. As a result, an immediate response is required" (AB, page 1478).

[11] Given these findings, the Minister ruled that there was an imminent threat to the frog's recovery in the area where the appellant was to build its housing development project. As she was required under the Act, she therefore recommended to the Governor in Council that an emergency order be made on December 4, 2015. Following this announcement, ECCC gathered information to establish the scope of the recommended Emergency Order and the prohibited

activities likely to be included in it, and held meetings with various stakeholders, including the appellant.

[12] On June 17, 2016, the Governor in Council adopted the *Emergency Order for the Protection of the Western Chorus Frog (Great Lakes / St. Lawrence — Canadian Shield Population)*, SI/2016-36, which was to come into force 30 days after it was registered. However, the day after a public information meeting was held on the Order (June 23, 2016), ECCC wildlife enforcement officers noted that activities likely to destroy the habitat identified in the Order were underway on the appellant's property. Consequently, the Governor in Council adopted a new Order on July 8, 2016, which came into force immediately to counter any activities that would not be compatible with it (the Order at issue in this case, above, at paragraph 1).

[13] The area covered by the Order consists of breeding ponds confirmed to be active and the area within a 300-metre radius of these ponds, from which unsuitable habitat features have been removed. The total area of the zone included in the area covered by the Order is 1.85 km². The area was defined based on general and historical information, scientific studies and public consultations. Some of the appellant's lots are included, in whole or in part, in the area covered by the Order. Indeed, the evidence shows that the area of the appellant's lots covered by the Order is approximately 0.098 km^2, or about 20% of the area of the appellant's remaining lots.

[14] Subsection 2(1) of the Order lists the prohibited activities in the areas set out in the Schedule:

Emergency Order for the Protection of the Western Chorus Frog (Great Lakes / St. Lawrence — Canadian Shield Population), SOR/2016-211

Décret d'urgence visant la protection de la rainette faux-grillon de l'Ouest (population des Grands Lacs / Saint-Laurent et du Bouclier canadien), DORS/2016-211

Prohibitions

Prohibited activities

2 **(1)** In the areas described in the schedule, it is prohibited to

(a) remove, compact or plow the soil;

(b) remove, prune, damage, destroy or introduce any vegetation, such as a tree, shrub or plant;

(c) drain or flood the ground;

(d) alter surface water in any manner, including by altering its flow rate, its volume or the direction of its flow;

(e) install or construct, or perform any maintenance work on, any infrastructure;

(f) operate a motor vehicle, an all-terrain vehicle or a snowmobile anywhere other than on a road or paved path;

(g) install or construct any structure or barrier that impedes the circulation, dispersal or

Interdictions

Activités interdites

2 **(1)** Les activités ci-après sont interdites dans les aires figurant à l’annexe :

a) retirer, tasser ou labourer la terre;

b) enlever, tailler, endommager, détruire ou introduire toute végétation, notamment les arbres, les arbustes ou les plantes;

c) drainer ou ennoyer le sol;

d) altérer de quelque façon que ce soit les eaux de surface, notamment modifier leur débit, leur volume ou le sens de leur écoulement;

e) installer ou construire une infrastructure ou procéder à toute forme d’entretien d’une infrastructure;

f) circuler avec un véhicule routier, un véhicule tout-terrain ou une motoneige ailleurs que sur la route ou les sentiers pavés;

g) installer ou construire des ouvrages ou des barrières qui font obstacle à la circulation, à la dispersion ou à la migration

migration of the Western Chorus Frog;	de la rainette faux-grillon de l'Ouest;
(h) deposit, discharge, dump or immerse any material or substance, including snow, gravel, sand, soil, construction material, greywater or swimming pool water; and	h) verser, rejeter, déposer ou immerger toute matière ou substance, notamment de la neige, du gravier, du sable, de la terre, des matériaux de construction, des eaux grises ou des eaux de piscine;
(i) use or apply a **pest control product** as defined in section 2 of the *Pest Control Products Act* or a **fertilizer** as defined in section 2 of the *Fertilizers Act*.	i) utiliser ou épandre tout **engrais** au sens de l'article 2 de la *Loi sur les engrais* ou tout **produit antiparasitaire** au sens de l'article 2 de la Loi sur les produits antiparasitaires.

[15] Finally, section 3 of the Order provides that any violation of these prohibitions is an offence for the purposes of section 97 of the Act, which provides that the offender is liable to (subsection 97(1.1)) a fine of not more than $1,000,000 in the case of a corporation, other than a non-profit corporation, and in the case of any other person, to a fine of not more than $250,000 or to imprisonment for a term of not more than five years.

[16] On August 5, 2016, the appellant filed a Notice of Application for judicial review to:

> [TRANSLATION]
>
> [Have the Court declare] the Order null, inoperative and non-opposable to [the applicant] on the basis that subparagraph 80(4)(c)(ii) of the Act (*Species at Risk Act* (S.C. 2002 c. 29)) under which it was adopted is unconstitutional because said Order is equivalent to an expropriation of the (applicant's) property without compensation.

[17] Following a two-day hearing, the Federal Court dismissed the application for judicial review on June 22, 2018 (the Decision at paragraph 5).

II. Impugned decision

[18] After having carefully described the context of this case and reviewed the history of the protection of species at risk in Canada, the Federal Court considered the constitutionality of the impugned legislative provision and whether the Emergency Order constituted a form of expropriation without compensation. The Court applied the standard of correctness when it considered both issues.

[19] Before summarizing the respective positions of the parties, the Federal Court first recalled the analytical framework and applicable principles for determining the constitutional validity of a statutory provision in relation to the division of powers, then described the legislative framework which contains the impugned provision. More specifically, the Federal Court then considered whether subparagraph 80(4)(c)(ii): 1) has a legitimate public purpose in criminal law; 2) colourably encroaches on areas of exclusive provincial legislative competence; and 3) the system of prohibitions it established resembles a criminal law system. It should be noted here that the appellant does not challenge the Act as a whole, only the above subparagraph. Groupe Candiac accepts that the Act first aims to protect wild species (aquatic species and protected migratory birds) and spaces (federal lands); hence, federal legislative jurisdiction is not in doubt.

[20] With respect to the purpose of subparagraph 80(4)(c)(ii), the Federal Court rejected the characterization made by the appellant, that its pith and substance was to allow the federal government to impose, for the sake of consistency and efficiency, standards of conduct for the protection of wildlife species, regardless of the species or where its population resides. Rather, it adopted the Attorney General's position that the purpose and legal effect of this provision would be to give the Governor in Council emergency intervention authority when a species at risk is about to suffer harm that would jeopardize its survival or recovery (the Decision at paragraphs 103–104). And in the Federal Court's view, this is clearly an "evil" that Parliament could seek to suppress through its criminal law power. Relying primarily on the Supreme Court's decision in *R v. Hydro-Québec*, [1997] 3 SCR 213, [1997] SCJ No. 76 (QL) [*Hydro-Québec*], the Court wrote:

> [110] For one thing, I believe that subparagraph 80(4)(c)(ii) is intended to suppress an "evil." I have difficulty in understanding how the release of toxic substances into the environment, caused by human activity, can properly constitute a source of legitimate criminal concern, but not an imminent threat, caused by human activity, to the survival or recovery of a species at risk, which, like all other species, is essential to maintaining life-sustaining systems of the biosphere, the depletion of which, by human activity, no longer needs to be demonstrated, nor does the impact of this depletion on the quality of the environment.

[21] In addition, the Federal Court did not accept the appellant's contention that subparagraph 80(4)(c)(ii), under the guise of the criminal law power, constitutes in fact a colourable attempt to encroach on the jurisdiction of the provinces (the Decision at paragraphs 96 and 105). Rather, it accepted the Attorney General's argument that the impugned provision rather authorizes emergency intervention when a species at risk is facing an imminent threat to its survival or recovery. The Court also noted that, unlike the case of an emergency order targeting an aquatic species, a migratory bird or any species on federal lands, the Order issued under subparagraph 80(4)(c)(ii) does not authorize the Governor in Council to impose protective

measures, and saw it as evidence that Parliament did not assume the power to protect species at risk for the sake of efficiency and consistency. According to the Federal Court, although the Emergency Order could affect the application of existing provincial legislation, it is not determinative of the fact that the pith and substance doctrine allows encroachments on the other level of government's jurisdiction (the Decision at paragraphs 129–130).

[22] Finally, the Federal Court rejected the appellant's argument that subparagraph 80(4)(c)(ii) did not have the ingredients of a criminal law system, where a prohibition is combined with a sanction. The appellant had argued that the system was purely regulatory in nature, insofar as it allowed the federal government to impose discretionary prohibitions in a designated area and make exemptions, the content of which was also left to the discretion of the federal government. Citing again *Hydro-Québec* and *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2001] 1 SCR 783, [*Reference re firearms*]; P.W. Hogg, *Constitutional Law of Canada*, 5th ed. suppl., Toronto; Carswell, 2007 (loose leaf 2016), section 15.5(i) (*Hogg*), the Court expressed the view that Parliament may delegate to the executive branch the power to define or specify conduct that could have criminal consequences, and thus authorize the establishment of detailed, precise and highly complex regulatory systems (the Decision at paragraph 143). Such a flexible approach is particularly appropriate in environmental matters, given the inherent complexity of these matters and the wide range of activities that may be involved. The Court made the following comment:

> [150] In *Hydro-Québec*, the majority stated that it was, "of course," within Parliament's criminal law power to carefully adapt, using regulatory authority, the prohibited activity based on the circumstances in which a toxic substance can be used or dealt with. I believe the same is true for the protection of species at risk

> facing an imminent threat to their survival or recovery. The measures deemed necessary in one case might not be necessary in another, with each species and each critical habitat having its own particularities. Giving the executive branch the power to carefully adapt the prohibited activity, as does subparagraph 80(4)(c)(ii), according to the particularities of the species and its habitat and the circumstances creating the imminent threat to its survival or recovery is, in my view, a valid exercise of Parliament's criminal law power.

[23] Given its ruling that subparagraph 80(4)(c)(ii) constitutes a valid exercise of Parliament's legislative power over criminal law, the Federal Court did not see fit to rule on whether it could also fall under the peace, order and good government clause, or to examine the ancillary powers doctrine (the Decision at paragraph 167). That said, the Court nevertheless expressed the view that this provision had a rational and functional connection with the Act as a whole, and that it would therefore have saved it as an ancillary measure to an otherwise valid legislative scheme even if it could not be considered, on its own, a true measure of criminal law (the Decision at paragraph 188).

[24] Finally, the Federal Court held that Parliament had expressly provided a mechanism to compensate for losses suffered following the application of an emergency order, which counters the arguments of disguised or *de facto* expropriation submitted by the appellant. Also, the Minister's decision not to grant compensation may be judicially reviewed and in any case has no impact on the validity of the power to make an emergency order. These are two different decision-making processes that meet different and independent factual and legislative dynamics (the Decision at paragraphs 209 and 213).

III. Issues

[25] The only issues before the Federal Court were whether subparagraph 80(4)(c)(ii) of the Act is constitutionally valid, and whether the Order is void on the grounds that it constitutes a form of expropriation without compensation. The Notice of Application filed pursuant to section 18 of the *Federal Courts Act*, R.S.C., 1985, c. F-7, the Notice of Appeal before this Court and the Notice of Constitutional Question all stated that the relief sought consisted in having the Court declare the Emergency Order null, inoperative and non-opposable to the appellant [TRANSLATION] "on the ground that subparagraph 80(4)(c)(ii) of the (Act) pursuant to which it was adopted is unconstitutional and because said Order amounts to an expropriation of the appellant's property without compensation."

[26] Before this Court, the appellant attempted to broaden the controversy somewhat by raising the reasonableness of the Order. However, the Federal Court (*Groupe Maison Candiac Inc. v. Canada (Attorney General)*, 2017 FC 430 affirmed by 2017 FCA 216) dismissed the appellant's motion to amend its notice of application for judicial review to allow it to challenge the appropriateness of making the Order. Therefore, in my view, the only issues that are appealable before us are as follows:

a) Did the Federal Court err in ruling that subparagraph 80 (4)(c)(ii) falls within Parliament's criminal law power?

b) Did the Federal Court err in ruling that the absence of compensation does not invalidate the Order?

IV. Analysis

[27] When this Court hears an appeal from a judicial review decision of the Federal Court, our role is to decide whether the appropriate standard of review was followed and whether it was applied correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559, at paragraph 45. In this case, LeBlanc J. applied the correctness standard to both issues, and I conclude that it was the appropriate standard.

[28] The Supreme Court did not change the standard of review to be applied when examining questions regarding the division of powers between Parliament and the provinces in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paragraph 55. In *Vavilov*, the Court reiterated that the standard of correctness must continue to be applied in reviewing such questions, as was the practice in the past (*Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 SCR 322; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

[29] As to whether the Order is valid despite the absence of compensation for those affected, in my view, this is rather a question of statutory interpretation. As the Supreme Court has stated on more than one occasion, regulations (to which the emergency order is akin) benefit from a presumption of validity. They can be struck down only if they are shown to be inconsistent with the objective of the enabling statute or the statutory mandate to the point of being "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose: *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] SCR 810, at paragraphs 24 and 28;

Syncrude Canada Ltd. v. Canada (Attorney General), 2016 FCA 160, at paragraph 27 [*Syncrude*].

A. *Did the Federal Court err in finding that subparagraph 80(4)(c)(ii) falls within Parliament's criminal law power?*

[30] It is well settled in Canadian law that laws adopted by both Parliament and the provincial legislatures are entitled to a presumption of constitutionality. Therefore, the party alleging the invalidity of a law is required to show that it is invalid: see, *inter alia*, *Nova Scotia Board of Censors v. McNeil*, [1978] 2 SCR 662; *Reference re firearms*, at paragraph 25.

[31] To determine whether an act or one of its provisions has been validly enacted, a two-stage analysis must be performed. The first step is to determine the "pith and substance" of the legislation or provision: this stage is called the classification of the law. This exercise involves an examination of the purpose and effects of the law in order to determine its "true meaning or essential character, its core". (*Reference re firearms*, at paragraph 16; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 SCR 693, at paragraphs 28–30 [*Long-Gun Registry*]; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 SCR 3, at paragraphs 25–26). The purpose can be discovered by reading the legislation itself. It can also be ascertained by reference to extrinsic materials such as Hansard and government publications. It can also be inferred from the problems which Parliament sought to remedy: see *Reference re firearms*, at paragraph 17; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837, at paragraph 64; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199, at pages 242–245 [*RJR-MacDonald Inc.*]; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010

SCC 39, [2010] 2 SCR 536, at paragraphs 17–18; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 SCR 146, at paragraph 53.

[32] Once this first stage has been completed, it must be determined whether the legislation so characterized falls under the head of power said to support it—the classification stage. This may require interpretation of the scope of the aforementioned power on the basis of the case law.

[33] It should be mentioned that the validity of an act must be examined, both at the qualification and classification stages, without taking into account the existence and terms of another related act which might have been adopted by the other level of government: *Hogg*, at page 16-3. If this is the case, it is because Canadian constitutional law has long recognized that a subject or matter can be approached from more than one angle. As a result, a federal law and a provincial law may govern an issue from different perspectives. This is the double aspect doctrine, which brings into play the principle of the paramountcy of federal law in the event of an operational conflict between federal and provincial legislation. The presence or absence of a provincial law on the same subject cannot therefore have any impact on the validity of a federal measure: *Long-Gun Registry*, at paragraphs 20 and 38; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457, at paragraph 68 (*Reference re assisted reproduction*).

[34] The Federal Court scrupulously followed this approach. After having presented both parties' arguments regarding the pith and substance of subparagraph 80(4)(c)(ii) of the Act and taking into account the more general context of the Act, the Court accepted the Attorney

General's argument and considered that this provision, by virtue of its purpose and legal and practical effects, was "to give the Governor in Council emergency intervention authority when a species at risk is about to suffer harm that will compromise its survival or recovery" (the Decision, at paragraph 104). The Court further stated that this provision allowed the Governor in Council to make an order without having to conduct consultations and comply with the formalities normally required to make prohibitions under sections 34 and 61 of the Act applicable in a province in order to prevent the "brutal and sudden" disappearance of a species at risk (*Centre québécois du droit de l'environnement*, at paragraph 104).

[35] In my view, this characterization of subparagraph 80(4)(c)(ii) is unassailable and perfectly consistent with the purpose and effects of this provision. The purpose of the Act is not at all to directly encroach on provincial jurisdiction or impose uniform national standards, as the appellant argued at trial and reiterated before us. On the contrary, I am of the view that subparagraph 80(4)(c)(ii) is really intended to permit an emergency response when a listed wildlife species is about to suffer harm that will jeopardize its survival or recovery.

[36] The very language of the Act confirms this objective. Section 6 of the Act, Purposes, states that "the purposes of this Act are to prevent wildlife species from being extirpated or becoming extinct, to provide for the recovery of wildlife 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."

[37] The preamble to the Act and the speeches delivered by the Minister when it was introduced in the House of Commons are consistent with its stated purpose, which refers, among other things, to the value of the environment, the role of the wildlife in the environment, the precautionary principle, and the various reasons, including moral reasons, for which we are duty-bound to prevent human activities from leading to the extinction of species (AB, pages 1551–1554). We must also take into account that the Act aims to implement the *United Nations Convention on Biological Diversity*, which Canada has ratified, thereby committing it to developing strategies and programs for conservation and the sustainable use of biological diversity.

[38] I also note that the prohibitory scheme set out in the Act contains several components. Sections 32 to 36 set out prohibitions on individuals of a species at risk, while sections 56 to 64 are intended to protect critical habitat of species at risk. It is interesting to note that these prohibitions do not apply in a province or territory (other than on federal lands, and except for aquatic species and migratory birds for the first series of prohibitions), unless an order to that effect has been adopted by the Governor in Council on the recommendation of the Minister (sections 34 and 61). The Minister may only make such a recommendation after consulting the appropriate provincial minister (paragraph 34(4)(a)) or if the provincial minister has requested that the recommendation be made (paragraph 61(3)(a). The Minister must also make this recommendation if the Minister is of the opinion that the laws of the province do not effectively protect the species or the residences of individuals of a wildlife species, or the designated portion of the species' critical habitat (at subsection 34(3) and paragraph 61(4)(b)).

[39] As previously mentioned, section 80 also authorizes the Governor in Council to make an emergency order to provide for the protection of a listed wildlife species. The Governor in Council can make this decision only upon the recommendation of the competent minister, who must make such a recommendation if he or she is of the opinion that the species faces "imminent threats to its survival or recovery" (at subsection 80(2)). The appellant does not object to such an order being made insofar as it applies to an aquatic species, a migratory bird protected under the *Migratory Birds Convention Act, 1994* (S.C. 1994, c. 22), or a federal land (paragraph (80)(4)(a), (b) and subparagraph (c), (i)). It only objects to subparagraph 80(4)(c)(ii), which makes it possible to adopt an emergency order covering listed wildlife species other than an aquatic species or a migratory bird species on provincial land.

[40] In my view, it is clear that this provision has a limited scope and is intended to address an emergency situation. It is clearly intended to prevent irreparable harm that would jeopardize the survival or recovery of a listed wildlife species. This is why such an order can be made by the Governor in Council without having to conduct consultations and comply with the formalities normally required under sections 34 and 61 of the Act, as noted by the Federal Court (the Decision, at paragraph 105). It is undoubtedly for the same reason that subparagraph 80(4)(c)(ii) does not authorize the Governor in Council to impose measures to protect the species and its designated habitat, as it can on federal lands. Under this provision, the Governor in Council may only enact provisions prohibiting activities likely to harm the species and this habitat. In my opinion, these are two indications of the narrow purpose pursued by Parliament and its desire to go no further than necessary to ensure the immediate survival of a species. This purpose is

perfectly consistent with the preamble of the Act and section 6 to which I referred above (at paragraph [36] of these reasons).

[41] The urgency to act to protect biodiversity, which underlies the Act as a whole and more particularly the orders authorized under section 80, not only reflects Canada's desire to comply with the international obligations that it has undertaken in ratifying the Convention, it also forms part of the backdrop of many scientific findings, each more alarming than the next. In a thorough expert report on the protection of species and their habitats filed by the respondent, Professor Blouin-Demers noted that [TRANSLATION] "[t]here is consensus within the scientific community that most biodiversity indicators show sharp declines worldwide and there is no sign that the rate of biodiversity loss is slowing" and that "we must work harder if we really want to slow biodiversity loss" (AB, page 2115). He also said amphibians are the group with the largest percentage of invertebrate species considered endangered. Finally, he pointed out that among the factors causing biodiversity loss, "[h]abitat loss is considered the main cause of biodiversity loss for terrestrial species worldwide " (AB, page 2117). It is clear that this scientific literature must be taken into account in order to identify the "evil referred to" by Parliament.

[42] An examination of how subparagraph 80(4)(c)(ii) is implemented and its practical effects did not reveal a colourable intent or a desire to do indirectly what would not be allowed to be done directly, i.e., to encroach on areas of provincial jurisdiction for purposes of uniformity across Canada. This provision only authorizes limited intervention insofar as habitat that is necessary for the survival or recovery of the species must be carefully defined, as well as activities that may adversely affect the species and that habitat. The Order at the centre of this

case provides a prime example: the area covered consists of breeding ponds confirmed to be active and the area within a 300-metre radius of these ponds, from which unsuitable habitat features have been removed. The total area is only 1.85 km² (which already included a conservation park covering almost 50% of the area), defined based on general and historical information, scientific studies and public consultations (AB, page 868). The Order contains a detailed list of prohibited activities, which all aim to prevent the loss or degradation of habitat that the frog needs in order to grow and reproduce. Indeed, the government's press release used these terms to announce the Emergency Order (AB, page 2136).

[43] A careful reading of the Summary of the regulatory impact study (AB, pages 2178 and following) confirms the purpose of the Order and the urgency to act. The Summary mentioned, *inter alia*, that the area of suitable habitat for the La Prairie metapopulation decreased by 57% between 1992 and 2013, and that the species would be unlikely to recover without an immediate response (AB, page 2178). After the costs and benefits of the planned response had been reviewed, it was found that the Order [TRANSLATION] "ensures the protection of the Western Chorus Frog (GLSLCS), La Prairie metapopulation, by protecting 90% of the species' suitable habitat from destruction." The Summary specified that this objective was achieved by prohibiting activities most harmful to the frog, which [TRANSLATION] "will help maintain the benefits that the species provides to the Canadian population and its potential future uses" (AB, page 2213). This impact analysis confirmed, assuming that was necessary, that the objective was to deal with an emergency situation and ensure the survival of the species by protecting its critical habitat.

[44] It is also important to mention another element that the parties did little to draw our attention to in this case. Under section 82 of the Act, the Minister of the Environment must make a recommendation to the Governor in Council that an emergency order be repealed if the Minister is of the opinion that the species to which the Order relates would no longer face imminent threats to its survival or recovery even if the Order were repealed. This provision clearly demonstrates once again that the objective is to deal with a precarious situation which requires an immediate response, and not to encroach on provincial powers and to seize powers for itself on a permanent basis.

[45] Finally, it has been shown that section 80 of the Act has been used sparingly since it came into force in June 2003. As the Federal Court noted at paragraph 124 of its reasons, only one other order has been issued to deal with imminent threats to the survival and recovery of a listed wildlife species, the Greater Sage-Grouse. The prohibitions provided for in that Order covered provincial and federal crown lands used by the petroleum industry and for animal husbandry. The respondent therefore did not abuse the power granted to him under subparagraph 80(4)(c)(ii), which again tends to confirm that this provision is not intended to be used for a colourable or hidden purpose.

[46] In short, for all of the foregoing reasons, I am of the view that the Federal Court did not err in concluding that the impugned provision does not constitute a subterfuge to allow the federal government to circumvent the authorizations granted to the appellant by the province and the municipality and impose its own rules of conduct. Rather, it is designed to allow the Governor in Council to respond immediately when a species at risk is about to suffer harm that

will jeopardize its survival or recovery. Given the presumption that legislation is constitutional, the courts are reluctant to declare that a law is colourable, which is why the party alleging a misuse of powers bears a heavy burden of proof. (*Long-Gun Registry*, at paragraph 31; *Syncrude*, at paragraph 53). That was not demonstrated in this case. The mere fact that an otherwise valid law could have incidental effects on legislative powers or measures adopted by another level of government is not in itself sufficient to conclude that this law was adopted for improper purposes. (*Reference re firearms*, at paragraph 49; *Long-Gun Registry*, at paragraph 32; *Hydro-Québec*, at paragraph 129).

[47] Having found that the pith and substance of subparagraph 80(4)(c)(ii) is to protect a listed wildlife species when its habitat is under an imminent threat that may adversely affect its survival or recovery, it remains to be determined whether Parliament has constitutional jurisdiction to intervene in this matter. As mentioned above, the Federal Court accepted the Attorney General's arguments in this regard and held that the impugned provision has all the attributes of a measure validly adopted by Parliament by virtue of the power conferred on it pursuant to subsection 91(27) of the *Constitution Act, 1867*. The appellant challenges this conclusion and argues that subparagraph 80(4)(c)(ii) does not have the normal ingredients of a criminal law where the prohibitions are not formulated in general terms and are intended to criminalize behaviour otherwise authorized under Quebec legislation.

[48] First, it should be noted that protection of the environment (which undoubtedly involves the protection and conservation of wildlife species and their habitat) is not a matter or subject of legislation with clearly defined wording likely to be wholly attributed to either of the two levels

of government. The doctrine of the Supreme Court is clear in this regard: the environment is not a head of jurisdiction per se. It should be addressed based on the various legislative powers vested in Parliament and the provincial legislatures under the *Constitution Act, 1867* (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3, [1992] SCJ No. 1, (QL) at paragraphs 63–67; *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401, [1988] SCJ No. 23 (QL), at pages 445-446; *Hydro-Québec*, at paragraph 112). The preamble to the Act also recognizes this reality insofar as one of its preambular recitals states that "responsibility for the conservation of wildlife in Canada is shared among the governments in this country and that it is important for them to work cooperatively to pursue the establishment of complementary legislation and programs for the protection and recovery of species at risk in Canada."

[49] The Attorney General invokes primarily the federal criminal law power to defend the constitutionality of the Act as a whole and the impugned provision in particular. As the Federal Court correctly noted, a law will fall under subsection 91(27) of the *Constitution Act, 1867* if it contains the following three components: (1) a prohibition, (2) accompanied by a penalty, and (3) a criminal law purpose: see inter alia *Hydro-Québec*, at paragraphs 34–36, 119; *Reference re assisted reproduction*, at paragraphs 35–36, 223; *RJR-MacDonald Inc.*, at paragraph 28.

[50] The criminal law power is obviously not frozen in time and cannot be limited to specific categories; in other words, there is no "area" of criminal law, as the Supreme Court has repeatedly said. Parliament's only limit on this power is its use to colourably invade areas of exclusively provincial legislative competence: *Scowby v. Glendinning*, [1986] 2 SCR 226, at page 237; *Hydro-Québec*, at paragraph 121. Chief Justice McLachlin provided a good summary

of the case law on this issue in the following passage of *Reference re Assisted Human Reproduction Act*:

> [43] . . . On the one hand, the jurisprudence properly recognizes that confining the criminal law power to precise categories is impossible. The criminal law must be able to respond to new and emerging matters of public concern that go to the health and security of Canadians and the fundamental values that underpin Canadian society. A crabbed, categorical approach to valid criminal law purposes is thus inappropriate. On the other hand, a limitless definition, combined with the doctrine of paramountcy, has the potential to upset the constitutional balance of federal-provincial powers. Both extremes must be rejected. To constitute a valid criminal law purpose, a law's purpose must address a public concern relating to peace, order, security, morality, health, or some similar purpose. At the same time, extensions that have the potential to undermine the constitutional division of powers should be rejected.

[51] I would add that the courts must be careful not to pass a value judgment on the purpose or means used by Parliament under the guise of a constitutional analysis: *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74, [2003] 3 SCR. 571, at paragraph 211; *R. v. Hinchey*, [1996] 3 SCR 1128, at paragraphs 34–36. The choice of means and ends is a matter for Parliament, as long as the measures adopted can rationally relate to a legitimate purpose of the criminal law. In this regard, Parliament must be given wide latitude, as recognized by LeBel and Deschamps JJ. (on behalf of two other colleagues) in *Reference re assisted reproduction*:

> [234] The formal component—establishing a prohibition and accompanying it with a penalty—supports a finding that a regulatory scheme, even one that takes the form of exemptions from a prohibitory scheme, falls within the field of criminal law. However, the substantive component, the justifiable criminal law purpose—the prohibition of a real or apprehended evil, and the concomitant protection of legitimate societal interests—must also be present. The substantive criterion assumes particular importance because of the liberal interpretation given to the formal component.
>
> [235] These components permit the federal government to deal with and make laws with regard to new realities, such as pollution, and genetic manipulations that are considered undesirable. Thus, Parliament retains flexibility in making

> decisions to prohibit conduct it considers reprehensible and to prevent the undesirable effects of such conduct.

[52] There is no longer any doubt that [the threatened interest of] environmental protection is one of the evils that Parliament can suppress through its criminal law power. This is a legitimate purpose, as the judges of the Supreme Court unanimously recognized in *Hydro-Québec*:

> [123] . . . But I entertain no doubt that the protection of a clean environment is a public purpose within Rand J.'s formulation in the *Margarine Reference*, cited *supra*, sufficient to support a criminal prohibition. It is surely an "interest threatened" which Parliament can legitimately "safeguard", or to put it another way, pollution is an "evil" that Parliament can legitimately seek to suppress. Indeed, as I indicated at the outset of these reasons, it is a public purpose of superordinate importance; it constitutes one of the major challenges of our time. It would be surprising indeed if Parliament could not exercise its plenary power over criminal law to protect this interest and to suppress the evils associated with it by appropriate penal prohibitions.
>
> See, similarly, the comments of the dissenting judges at paragraph 43.

[53] However, the evidence is clear that the protection of biodiversity is closely linked to environmental pollution control. One cannot go without the other, as the Federal Court aptly noted in its reasons:

> [110] . . . I have difficulty in understanding how the release of toxic substances into the environment, caused by human activity, can properly constitute a source of legitimate criminal concern, but not an imminent threat, caused by human activity, to the survival or recovery of a species at risk, which, like all other species, is essential to maintaining life-sustaining systems of the biosphere, the depletion of which, by human activity, no longer needs to be demonstrated, nor does the impact of this depletion on the quality of the environment.

[54] Once it is recognized, as the appellant seems to, that the apprehended disappearance of a listed wildlife species may constitute an “evil” to be suppressed, I find it hard to see how this case can be distinguished from *Hydro-Québec*. Subparagraph 80(4)(c)(ii), like section 35 of the *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (4th Suppl.), is closely linked to the prohibitory scheme introduced under the Act. In both cases, the Governor in Council (or the Minister, first, under section 35) is allowed to override the normal requirements and adopt an Emergency Order to deal with an emergency situation. I would even add, as did LaForest J. in *Hydro-Québec* (at paragraph 155), that section 35 reveals even more clearly a criminal purpose, and throws further light on the intention of sections 34 and 61 of the Act generally, insofar as it seeks to prevent the “brutal and sudden” disappearance of a species.

[55] In the light of the foregoing, I am, therefore, of the view that the Federal Court did not err in concluding that subparagraph 80(4)(c)(ii) seeks to suppress an “evil” as interpreted in the jurisprudence of the Supreme Court, and that there is no distinction to be made between the “evil” referred to in *Hydro-Québec* and the “evil” demonstrated in this case. The duty to prevent the extinction of wildlife species is a moral obligation as is the protection of the environment. The criminal law power must allow Parliament to intervene in these matters, particularly when the perceived harm is imminent.

[56] The appellant challenges this conclusion on the ground that the Order (as well as sections 34 and 61 and subparagraph 80(4)(c)(ii)) encroaches on provincial law and criminalizes actions permitted under Quebec’s *Environment Quality Act*. By nullifying the authorization that the appellant had received for its housing project and by imposing its own rules of conduct, the

Canadian government would thereby upset the balance of Canadian federalism. The appellant argues that performing work in accordance with a provincial authorization cannot constitute an offence.

[57] In my opinion, this argument cannot be accepted. As I mentioned above, there is no indication that the purpose or effect of the Act or subparagraph 80(4)(c)(ii) consisted in regulating all aspects of the protection of species at risk throughout Canada for purposes of efficiency and consistency. Once the Act as a whole or any of its provisions comes under federal jurisdiction, it cannot be declared invalid solely because its scope limits or overlaps with the scope of a provincial measure. The double aspect theory runs counter to this reasoning. This is why the doctrine of federal paramountcy has evolved to resolve real conflicts between federal and provincial laws: *Hogg*, sections 15.9(d) and 16.1.

[58] The appellant made this argument at trial, citing as it did before us certain passages in *Reference re assisted reproduction*. I fully endorse the reasoning of the Federal Court in this regard, at paragraphs 119 to 140 of its reasons, in particular with respect to the conclusions it referred to in *Hydro-Québec*. In that case, Hydro-Québec and the Attorney General had also argued that the impugned provisions of the *Canadian Environmental Protection Act* (CEPA) were so invasive of provincial powers that they could not be justified as valid measures of criminal law. Need we point out that section 35 of this Act went much further than subparagraph 80(4)(c)(ii) of the Act, in that it allowed toxic substances to be added (and regulated them at the same time) to the List of Toxic Substances in Schedule 1 providing the Ministers believed that immediate action was required? Unlike section 35 of CEPA,

subparagraph 80(4)(c)(ii) does not allow wildlife species to be added to the List of Wildlife Species at Risk. It only allows an emergency order to identify a specific habitat where activities likely to adversely affect the species and that habitat are to be prohibited. Sections 27 and 29 grant the Governor in Council this power, and the validity of these provisions is not at issue here.

[59] The Supreme Court nevertheless dismissed the fear expressed by Hydro-Québec and the Attorney General of Quebec, saying it was overstated under the circumstances. The majority emphasized that the federal criminal law power does not prevent the provinces from exercising the broad powers conferred on them by section 92 of the *Constitution Act, 1867* to regulate and limit pollution on their land, independently or in complementarity with federal measures. The same applies here. The scope of an emergency order is necessarily limited in space, and the evidence reveals, as I indicated earlier (at paragraph 60), that emergency orders have been used sparingly. Furthermore, the Act recognizes the importance of federal-provincial cooperation in the protection of listed wildlife species. Sections 34 and 61 even provide that provincial authorities must be consulted before an order can be made to protect a species or its habitat on lands that are not federal lands. Clearly, it is only because immediate action is needed that such a requirement is not imposed under subparagraph 80(4)(c)(ii). It is interesting to note that, although the appellant sent the Notice of Constitutional Question to all the Attorneys General, none of them appeared before the Federal Court or before this Court.

[60] The appellant argues that the *Reference re assisted reproduction* is an authority that supports its position. In my view, this argument is without foundation. On the one hand, as the Federal Court noted, three sets of reasons were presented in this decision. It is therefore

presumptuous, to say the least, to clearly identify its *ratio decidendi*. Furthermore, the issue had nothing to do with environmental protection, so its usefulness is limited to defining the scope of the criminal law power in this matter. Consequently, *Hydro-Québec* still seems authoritative to me and must continue to guide us in a case like the one before us.

[61] I would add that the disagreement between the two groups of four judges in this case had more to do with the characterization of the impugned provisions of the *Assisted Human Reproduction Act* than the scope of federal criminal law power. While the first group was of the view that the Act was essentially a series of prohibitions, followed by a set of subsidiary provisions for their administration, the second group considered that the main purpose of the impugned provisions was to regulate activities related to assisted human reproduction which were not declared inherently harmful or dangerous. It goes without saying that this characterization exercise, as well as the controversy which it gave rise to within the Court, is not very relevant for our purposes, insofar as the identification of the pith and substance of a law or provision depends on the purpose and effect of the language under consideration. Subparagraph 80(4)(c)(ii) is in no way related to the sections challenged in *Reference re assisted reproduction*, because neither its purpose nor effect is to regulate an otherwise harmless activity or, in the words of LeBel and Deschamps JJ., "to set up a national scheme to regulate the activities in question" (*Reference re assisted reproduction*, at paragraph 217).

[62] Indeed, LeBel and Deschamps JJ. seemed to want to raise the threshold for the severity of the evil in question so that Parliament could be empowered to legislate under the authority of subsection 91(27). In their view, if we want to avoid giving "the federal criminal law power an

unlimited and uncontrollable scope", there must be "a real evil and a reasonable apprehension of harm" (*Reference re assisted reproduction*, at paragraph 240). It is not for me to comment on the correctness of this requirement. At first glance, it may seem difficult to reconcile this requirement with traditional jurisprudence according to which Parliament must enjoy wide latitude in identifying the evils to be suppressed and the means to achieve this as long as the real purpose is not to regulate: *Reference re assisted reproduction*, at paragraph 76. Even assuming that the approach propounded by LeBel and Deschamps JJ. should be adopted, as the appellant argued, there is no doubt that the purpose pursued by Parliament in subparagraph 80(4)(c)(ii) meets the requirement of a real evil and a reasonable apprehension of harm. Both judges cited pollution prevention as a valid exercise of criminal law power as an example (*Reference re assisted reproduction*, at paragraph 237). The abundant scientific evidence, as well as Canada's international obligations, make it clear that the same must apply to the protection of biodiversity and endangered species.

[63] Finally, the appellant argues that the Order and the provision authorizing it do not have the fundamental ingredients of the criminal law in that it does not provide for a general prohibition. Instead, it lists a series of prohibitions targeting specific behaviours. According to the appellant, there was (contrary to the situation in *Hydro-Québec*) no need to set aside the general rule that criminal prohibitions must be drafted in general terms, apply throughout Canada (subject to possible exemptions), and be included in an Act rather than in a regulation. In my opinion, this argument cannot be accepted either.

[64] No doubt Parliament could have chosen, as some provincial legislatures have, to introduce general prohibitions that apply to the whole country, even if it meant adding more targeted regulatory exemptions to such a system. But the choice of the means used to combat an evil is not within the courts' jurisdiction, as long as the form chosen does not have the effect of transforming the measure into a prohibitory regulation rather than a prohibition: *Reference re assisted reproduction*, at paragraph 30.

[65] In its reasons, the Federal Court discussed at length the argument put forward by the appellant (at paragraphs 141-164), and I can do no better than to fully endorse them. It has long been recognized that Parliament may leave it to a minister or the Governor in Council to define a crime, define its scope and provide for exemptions. This is exactly what section 34 of the *Canadian Environmental Protection Act* did by providing the option to adopt regulations prescribing or imposing the quantity or concentration of a listed substance that may be released into the environment, where these substances may be released, the manufacturing or processing activities during which the substance may be released, the manner and conditions of release, and so on. Although extremely detailed, the regulations authorized under section 34 have nevertheless received the approval of the Supreme Court, in terms that also apply to subparagraph 80(4)(c)(ii) of the Act:

> What Parliament is doing in section 34 is making provision for carefully tailoring the prohibited action to specified substances used or dealt with in specific circumstances. This type of tailoring is obviously necessary in defining the scope of a criminal prohibition, and is, of course, within Parliament's power.
>
> *Hydro-Québec*, at paragraph 151.

[66] The Supreme Court has long recognized the need to be flexible in protecting the environment, given the breadth and complexity of the subject. In *Ontario v. Canadian Pacific Ltd.*, [1995] 2 SCR 1031, [1995] SCJ No. 62 (QL), Justice Gonthier wrote (at paragraph 43):

> What is clear from this brief review of Canadian pollution prohibitions is that our legislators have preferred to take a broad and general approach, and have avoided an exhaustive codification of every circumstance in which pollution is prohibited. Such an approach is hardly surprising in the field of environmental protection, given that the nature of the environment (its complexity, and the wide range of activities which might cause harm to it) is not conducive to precise codification. Environmental protection legislation has, as a result, been framed in a manner capable of responding to a wide variety of environmentally harmful scenarios, including ones which might not have been foreseen by the drafters of the legislation…
>
> See also *Hydro-Québec*, at paragraph 134, where the majority cited this passage with approval.

[67] What is true of environmental protection is also true of measures to preserve biodiversity, especially in a situation where the emergency requires immediate and well-targeted measures. In this matter, the precise identification of proscribed activities and the area where the habitat of a listed wildlife species must be protected to ensure the recovery or survival of the species is a virtue and is better than an unnecessarily broad measure which is likely to have a disproportionate impact on the exercise of provincial powers: *Hydro-Québec*, at paragraph 147. I can therefore, once again, only endorse the comments of LeBlanc J. of the Federal Court, when he wrote (at paragraph 150):

> In *Hydro-Québec*, the majority stated that it was, "of course," within Parliament's criminal law power to use its regulatory authority to carefully tailor the prohibited action based on the circumstances in which a toxic substance can be used or dealt with. I believe the same is true for the protection of species at risk facing an imminent threat to their survival or recovery. The measures deemed necessary in one case might not be necessary in another, with each species and each critical habitat having its own particularities. Giving the executive branch the power to

> carefully adapt the prohibited activity, as does subparagraph 80(4)(c)(ii), according to the particularities of the species and its habitat and the circumstances creating the imminent threat to its survival or recovery is, in my view, a valid exercise of Parliament's criminal law power.

[68] In short, for all the foregoing reasons, I am of the view that subparagraph 80(4)(c)(ii) constitutes a valid exercise of the power conferred on Parliament by subsection 91(27) of the *Constitution Act, 1867*, and the same necessarily applies to the Emergency Order adopted under its authority. In the light of this conclusion, I do not find it necessary to rule on whether the impugned provision could be saved under the ancillary powers doctrine or could have been validly adopted on the basis of Parliament's jurisdiction over peace, order and good government.

B. *Did the Federal Court err in ruling that the absence of compensation does not invalidate the Order?*

[69] The appellant reprised before us the arguments it had submitted before the Federal Court, namely that the Emergency Order should be set aside because the prohibitions it imposes are similar to a *de facto* expropriation, thus contrary to article 952 of the *Civil Code of Québec*, CQLR c. CCQ-1991 (C.C.Q.). According to that provision, no "owner may be compelled to transfer his ownership except by expropriation according to law for public utility and in return for a just and prior indemnity." The appellant submits that the Federal Court erred in concluding, on the basis of section 64 of the Act, that the concepts of disguised or *de facto* expropriation had been explicitly excluded by the compensation scheme set out in this provision.

[70] Although pleaded with skill and conviction, the argument does not persuade me, and I am of the opinion that the Federal Court correctly rejected it. Section 80 of the Act does not require

that the Governor in Council meet any compensation requirements when adopting an emergency order. Therefore, it cannot be argued that the Governor in Council exceeded the powers conferred on him by the Act and did not comply with the purpose sought by Parliament or the conditions prescribed in the exercise of the power delegated to him. On the contrary, section 80 does not give the Governor in Council any power to provide compensation. As a result, he could not exceed the powers conferred on him by the Act: *Attorney General of Canada v. Inuit Tapirisat et al.*, [1980] 2 SCR 735, [1980] SCJ No. 99 (QL), at page 752. Therefore, the Emergency Order cannot be invalidated on this basis.

[71] Pursuant to subsection 64(1) of the Act, the Minister may determine whether compensation must be provided for losses suffered as a result of the impact of the application of an emergency order. Subsection 64(2) provides that the Governor in Council "shall make regulations that the Governor in Council considers necessary for carrying out the purposes and provisions of subsection (1)."

[72] This provision defeats the appellant's argument based on *de facto* or disguised expropriation. We are not dealing here with a legislative gap that could be filled by section 952 of the C.C.Q. I have no doubt that this provision could apply to the federal Crown in a situation where federal law would be silent on the matter: *Interpretation Act*, R.S.C. 1985, c. I-21, section 8.1; *Canada (Attorney General) v. St Hilaire*, 2001 FCA 63, [2001] 4 FC 289; *Canada v. Raposo*, 2019 FCA 208. However, such is not the case here, given the compensation mechanism set out in section 64 of the Act. This case does not involve an expropriation carried out by indirect means. It involves a decision made pursuant to an Act that expressly authorizes the

expropriation and sets out a compensation scheme specifically tailored to the objectives sought by the Act. In my opinion, this is sufficient to preclude recourse to the general law in matters of disguised expropriation arising both from the common law and section 952 of the C.C.Q.

[73] The appellant retorts that in the absence of a regulation adopted by the Governor in Council providing (1) the procedure for claiming compensation, (2) the method for determining the right to compensation, the value of the loss suffered and the amount of compensation for this loss, as well as (3) the terms and conditions of this compensation, we find ourselves, as it were, in a legislative gap. If I understand this argument correctly, it would be necessary to use the provincial general law as suppletive law, as long as the regulation set out in subsection 64(2) of the Act has not been adopted.

[74] I find this argument to be without basis, and the Federal Court correctly rejected it. As the Supreme Court stated in *Irving Oil Ltd. et al. v. Provincial Secretary of New Brunswick*, [1980] 1 SCR 787, [1980] SCJ No. 23 (QL), (at page 795), a regulatory authority cannot nullify the application of a law and deprive the litigants of a benefit or remedy to which they would be entitled by refraining from adopting the regulation which conditions its existence. According to this logic, the Minister could not cling to the fact that no regulation was adopted pursuant to subsection 64(2) of the Act in order to deny a claim for compensation. To the extent that the Act is interpreted as creating a duty in this sense, failure to act could be interpreted as an abuse of power punishable under the rules of administrative law. I also note that the Federal Court dismissed an extra-contractual liability action brought against the Federal Crown for failing to provide compensation for losses suffered following the adoption of the Emergency Order (*9255-*

2504 Québec Inc. c. Canada, 2020 CF 161). In that case, the Court held that the Crown did not incur any extra-contractual civil liability because the Governor in Council had not adopted regulations implementing the compensation scheme created by section 64 of the Act, or because the Minister had decided not to provide compensation because of the absence of regulations. I do not consider it appropriate to discuss further this question, given the appeal against that decision lodged before this Court.

[75] On the other hand, the decision that the Minister could make (or had already made) not to compensate the appellant could be the subject of a separate challenge. As the Federal Court aptly pointed out, this is "a different decision-making process that meets a different and independent factual and legislative dynamic" (the Decision, at paragraph 213). The Minister is responsible by law for making this decision, not the Governor in Council, and this determination must be made after the Emergency Order comes into force. Therefore, it cannot have any impact on the validity of the Emergency Order as such. For this reason, it would not only be premature, but inappropriate to consider a possible claim for compensation that the appellant might make and any related issues that such a claim might raise.

V. Conclusion

[76] For all of the above reasons, I find that the appeal should be dismissed, with costs.

"Yves de Montigny"
J.A.

"I agree
Richard Boivin J.A."

"I agree
Marianne Rivoalen J.A."

Certified true translation
François Brunet, Revisor

APPENDIX

Species at Risk Act (S.C. 2002, c. 29)

Emergency order

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.

Obligation to make recommendation

(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.

Consultation

(3) Before making a recommendation, the competent minister must consult every other competent minister.

Contents

(4) The emergency order may

(a) in the case of an aquatic species,

(i) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and

(ii) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that

Loi sur les espèces en péril, L.C. 2002, ch. 29

Décrets d'urgence

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.

Recommandation obligatoire

(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.

Consultation

(3) Avant de faire la recommandation, il consulte tout autre ministre compétent.

Contenu du décret

(4) Le décret peut :

a) dans le cas d'une espèce aquatique :

(i) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,

(ii) imposer des mesures de protection de l'espèce et de cet habitat, et comporter des dispositions interdisant les

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

(B) imposer des mesures de protection de l'espèce, et comporter des dispositions interdisant les activités susceptibles de

species and that habitat; and

(c) with respect to any other species,

(i) on federal land, in the exclusive economic zone of Canada or on the continental shelf of 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

(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

(ii) on land other than land referred to in subparagraph (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

(B) include provisions prohibiting activities that may adversely affect the species and that habitat.

Exemption

nuire à l'espèce et à cet habitat;

c) dans le cas de toute autre espèce se trouvant :

(i) sur le territoire domanial, dans la zone économique exclusive ou sur le plateau continental du Canada :

(A) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,

(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) ailleurs que sur le territoire visé au sous-alinéa (i) :

(A) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret,

(B) comporter des dispositions interdisant les activités susceptibles de nuire à l'espèce et à cet habitat.

Exclusion

(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*.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-279-18
STYLE OF CAUSE:	LE GROUPE MAISON CANDIAC INC. v. ATTORNEY GENERAL OF CANADA AND CENTRE QUÉBÉCOIS DU DROIT DE L'ENVIRONNEMENT
PLACE OF HEARING:	MONTREAL, QUEBEC
DATE OF HEARING:	FEBRUARY 26, 2020
REASONS FOR JUDGMENT:	DE MONTIGNY J.A.
CONCURRED IN BY:	BOIVIN J.A. RIVOALEN J.A.
DATED:	MAY 15, 2020

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