Federal Court of Appeal | Cour d'appel fédérale

Date: 20210212

Docket: A-152-19

Citation: 2021 FCA 27

[ENGLISH TRANSLATION]

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

BETWEEN:

HABITATIONS ÎLOT ST-JACQUES

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard by videoconference organized by the registry on February 11, 2021.

Judgment delivered at Ottawa, Ontario, on February 12, 2021.

REASONS FOR JUDGMENT OF THE COURT BY: THE COURT

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REASONS FOR JUDGMENT OF THE COURT

[1] Habitations Îlot St-Jacques Inc. is appealing the Federal Court decision (2019 FC 315) dismissing its application for judicial review of the Governor General in Council's decision to issue the *Emergency Order for the Protection of the Western Chorus Frog (Great Lakes / St. Lawrence — Canadian Shield Population)*, SOR/2016-211 (the Order) pursuant to the *Species at Risk Act*, S.C. 2002, c. 29 (the Act).

[2] This is not the first time this Court has been called upon to consider the legality of the Order: *Groupe Maison Candiac Inc. v. Canada (Attorney General)*, 2020 FCA 88, leave to appeal to the SCC denied, 39272 (December 10, 2020) (*Candiac*). The decision in *Candiac* was rendered after the memorandums were filed in this appeal, and the Court asked the parties to be prepared to discuss its impact on the issues before us.

[3] In *Candiac*, this Court affirmed that whether the Order is valid is a question of statutory interpretation because it is akin to a regulation and benefits from a presumption of validity. The Order's legality must be considered in light of the tests established by the Supreme Court of Canada in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810 at paragraphs 24 and 28 (*Candiac* at para. 29, and *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 111). That is the approach that this Court took to determine whether the establishment of a compensation program (see section 64 of the Act) was a precondition for the Order to be made. This Court found that it was not.

[4] The appellant attempted to convince us that the Order at issue here is more in the nature of a specific decision that applies to only certain property owners, rather than an instrument of a legislative nature that is general in scope, and that this issue was not really debated in *Candiac*. We cannot agree with that argument. It is clear that we are not dealing with a decision that is adjudicative in nature whereby a general standard is applied to a specific situation; the Order must instead be likened to a regulation that sets out a standard that is general in scope, as we decided in *Candiac*. The appellant has failed to convince us that there were exceptional circumstances in this case that would warrant overturning this Court's decision in *Candiac*

(*Miller v. Canada (Attorney General)*, 2002 FCA 370). The applicable principles for determining whether an order is legislative in nature were established over 15 years ago (*Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212, pages 224–225). There is little doubt as to their application in this case. The Order sets out a rule of conduct, has the force of law and applies to an undetermined number of persons. We do not consider *Candiac* to be manifestly wrong on the grounds that this Court failed to consider the applicable legislation or a precedent that it should have followed.

[5] The only issue that remains is whether the Court must set aside or declare unenforceable the portion of the Order concerning lot 53, which belongs to the appellant (Appellant's Memorandum, page 31).

[6] To invalidate the Order, the appellant had to convince this Court that it is inconsistent with the scope of the statutory mandate (*Katz* at para. 24). The appellant submits that the Governor General in Council's mandate is limited to acting solely to neutralize an imminent threat and that there was no such threat on its lot. However, nothing in the Act supports that narrow interpretation of the Governor General in Council's mandate.

[7] The Minister's mandate under subsection 80(2) of the Act is to determine whether the species faces "imminent threats to its survival or recovery"; that is the trigger. However, the Governor General in Council's mandate is broader than that. An order under clauses 80(4)(c)(i)(A) and (B) of the Act may "identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates" and "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". In no way does the Act restrict these measures to those that are only necessary to address the imminent threat.

[8] In this case, the Act did not require the text, which is legislative in nature, to contain reasons (*Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at paras. 29–30). Although the two summaries of the regulatory impact analysis of the original order and of the *Order* (AB, volume 5, page 2394) do not expressly refer to the appellant's lot, they explain that the habitat necessary for the recovery of the species is identified in the recovery strategy (AB, volume 1, pages 133–134).

[9] The habitat necessary for the recovery of the species includes its suitable habitat (see the Recovery Strategy for the Western Chorus Frog, 2015, section 7). To determine the suitable habitat for the species, the Minister considered the connectivity between the remaining populations of the La Prairie metapopulation and the support for that metapopulation. Most of the appellant's lot is within the geographic area specified in the *Order* because it is within the suitable habitat established in the published scientific studies. The scientific method used to make that determination is described in those studies. Clearly, the Order is not based on considerations that are "irrelevant", and it is neither "extraneous" nor "completely unrelated" to the statutory purpose (*Katz* at para. 28).

[10] Notwithstanding the able and passionate arguments of counsel for the appellant and although the Court is sensitive to the frustration expressed by the appellant, it must apply the well-established principles in this case.

[11] The appeal must therefore be dismissed with costs.

"Johanne Gauthier"
J.A.

"Yves de Montigny"
J.A.

"Marianne Rivoalen"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE LOCKE DATED MARCH 14, 2019, DOCKET NO. T-1190-16

DOCKET:	A-152-19
STYLE OF CAUSE:	HABITATIONS ÎLOT ST-JACQUES INC. v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 11, 2021
REASONS FOR JUDGMENT OF THE COURT BY:	GAUTHIER J.A. DE MONTIGNY J.A. RIVOALEN J.A.
DATED:	FEBRUARY 12, 2021

APPEARANCES:

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