

Justice for the Western Chorus Frog?

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Case Commented On: *Centre Québécois du droit de l'environnement v Canada (Environment)*, [2015 FC 773 \(CanLII\)](#), *TransCanada PipeLines Limited King's North Connection Pipeline Project* (July 2015), [GHW-001-2014](#) (National Energy Board)

These two decisions were issued about a week apart in late June, and have nothing in common except for the fact that both concern the threatened Western Chorus Frog species in Canada. *Québécois du droit de l'environnement v. Canada (Environment)* is a Federal Court judgment issued by Justice Martineau ordering the federal Minister of the Environment to reconsider her refusal to issue an emergency protection order for the Western Chorus Frog under section 80 of the *Species at Risk Act*, [SC 2002, c 29](#). The *King's North Connection Pipeline Project* decision issued by the National Energy Board under section 58 of the *National Energy Board Act* [RSC 1985, c N-7](#) exempts TransCanada from having to obtain a certificate under section 31 and thus effectively approves the construction of an 11 kilometre gas pipeline thru known habitat for the Western Chorus Frog in southern Ontario. I consider these posts together as a means for another comment on the intersection between species at risk protection and development in Canada. These decisions also demonstrate that species at risk issues can arise in congested urban areas, not just in the far away wilds.

The Western Chorus Frog is only about 2.5 cm long and lives in and around wetland habitat. Like many threatened species in Canada, the population of the Western Chorus Frog represents the northern fringe of its larger continental numbers in the United States. The Canadian populations are in rapid decline due mainly to urbanization and agriculture destroying its habitat in southern Ontario and southern Quebec. The frog needs both aquatic and terrestrial habitat in close proximity for breeding and hibernating. The sharp decline in population numbers and loss of habitat for the Western Chorus Frog resulted in its listing as a threatened species under the *Species at Risk Act* in 2010. A [proposed recovery strategy](#) is on the public registry administered under the Act. The Western Chorus Frog is not a fish and its habitat lies on provincial lands, and so accordingly the strongest protections under federal *Species at Risk Act* – namely no take and no destruction of critical habitat – do not apply to the species absent an order by the Governor in Council.

The largest remaining population of Western Chorus Frog in Quebec is located in and around the town of La Prairie – a suburb of Montreal. The dispute in *Québécois du droit de l'environnement v. Canada (Environment)* concerns the impact of a controversial housing development in the frog's habitat in La Prairie. Apparently the lands upon which the development is occurring were previously to be included in a conservation area (See [here](#)). In May 2013 Nature Quebec requested that the federal Minister of the Environment recommend that the Governor in Council issue an emergency protection order for the La Prairie population of Western Chorus Frog under section 80 of the *Species at Risk Act*. After some delay the Minister refused to make the recommendation, stating that the species does not face an imminent threat to its survival or recovery.

Nature Quebec commenced a judicial review application in Federal Court seeking mandamus to order the Minister to make the recommendation to the Governor in Council. Justice Martineau does set aside the Minister's refusal as an unreasonable decision, but he does not grant mandamus and instead orders the Minister to reconsider her decision in light of this judgment. In this regard, the result in *Québécois du droit de l'environnement v. Canada (Environment)* is very similar to that in the previous Federal Court decision in *Adam v Canada (Environment)*, [2011 FC 962](#) concerning the refusal of the Minister to recommend the issuance of a section 80 emergency protection order for the Boreal population of Woodland Caribou. For discussion of this earlier decision and the mechanics of section 80 see Nigel Bankes' comment [here](#).

The decision to issue an emergency protection order under section 80 of the *Species at Risk Act* is within the complete discretion of the Governor in Council, although section 80(2) requires the Minister to recommend that the order be issued if she forms the opinion the species in question faces an imminent threat to its survival or recovery. Accordingly litigation on emergency orders has focused thus far on the alleged duty of the Minister to form such opinion. The discretionary nature of the order itself ensures very few will be issued under section 80, and indeed the only emergency order thus far under the legislation remains the Greater Sage Grouse order issued in early 2014 (See [Curious Case of the Greater Sage Grouse in Alberta](#) for some commentary).

The scientific evidence on the demise of the Western Chorus Frog in Quebec is like that of the Sage Grouse in that it conclusively states the frog will disappear unless corrective action is taken soon to halt and reverse its current trajectory. Indeed the evidence in this case included a report from the Canadian Wildlife Service and a report from the Western Chorus Frog recovery team that both conclude the housing development in La Prairie constitutes an imminent threat to the recovery of the species (at paras 36 – 38). The Minister's failure to address these reports leads Justice Martineau to find her refusal to be unreasonable (at paras 74-81). The Minister now has 6 months to revisit the matter (at para 87). Of course even if the Minister decides to recommend an emergency protection order it is still up to the Governor in Council to issue the order itself. Nonetheless it is a partial victory for the Western Chorus Frog and the overall tone of Justice Martineau's reasoning is very much favourable to the plight of endangered species in Canada. He cautions against what he calls *laissez-faire* administrative action (at para 8) and reiterates the import of the precautionary principle and science into decision-making under the *Species at Risk Act* – all of which bodes well for threatened species in Canada.

The National Energy Board approval for the Limited King's North Connection Pipeline Project provides a very different outcome for the Western Chorus Frog. The new buried pipeline will transport natural gas in the busy Greater Toronto Area, and accordingly the new line passes thru a host of environments including highways, a railyard, commercial districts, residential areas, and habitat for the Western Chorus Frog. This congestion ensured a relatively lengthy number of interveners for such a short length of pipeline. Yet it appears from the Board's decision that considerations on the Western Chorus Frog came about largely from TransCanada's environmental studies prepared as part of its regulatory application and a submission from Environment Canada (at para 9.4).

The regulatory approach on species at risk issues is 'manage and mitigate'. The National Energy Board expects applicants to employ both standard and issue-specific mitigation measures to

address the adverse environmental impacts of a project. The Board also requires applicants to file a plan to implement these measures. In cases where the project will impact a listed species, but that species is not a fish and does not reside on federal lands, effective legal protection for threatened or endangered species is not offered by the *Species at Risk Act* and we are left with the same ‘manage and mitigate’ approach that produced the species at risk problem in the first place since provincial laws generally do not offer effective protection.

The Board’s decision addresses the impacts this pipeline will have on the Western Chorus Frog at paragraph 9.5.4.2. The trenched construction of the new line will destroy habitat for the frog and restoration of the temporal wetlands to their current state is uncertain. The Board’s conditions to address this impact fall well short of real protection, requiring TransCanada to tailor its construction activity outside of breeding and hibernation times and to conduct post-construction monitoring of the population.

The cynic in me is tempted to describe the National Energy Board’s decision here as the sort of *laissez-faire* administrative action that Justice Martineau lambasts in his ruling. But that would seemingly overlook the conditions imposed by the Board on TransCanada to mitigate the impacts on the Western Chorus Frog. On the other hand, the Board’s conditions will do nothing to prevent the destruction of habitat which is the single greatest threat to the species. And then there are also the questions over who will ensure these conditions are met or are effective at mitigating damage.

I think Justice Martineau gets it right when he opens his judgment interpreting the *Species at Risk Act* as an enactment that reflects our true desire to take steps to prevent the decimation of biodiversity and an acknowledgment that ‘manage and mitigate’ will not get us there. As it stands presently there is a growing divide between Federal Court jurisprudence that interprets the *Species at Risk Act* to require effective legal protection for species at risk and administrative decision-making in the natural resources sector that implements the manage and mitigate approach. No doubt the limited reach of the federal *Species at Risk Act* – both on its terms and due to the reluctance by federal officials to actually implement its provisions - has a lot to do with this divide, but I also think there is a very different perception of the problem at work here.

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