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More Justice for the Western Chorus Frog

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Case Commented On: *Groupe Maison Candiac Inc. v Canada (Attorney General)*, [2018 FC 643](#)

Groupe Candiac is another case of legal success for endangered species at the Federal Court, and the second victory for the endangered western chorus frog in Québec. Over the past decade or so, the Federal Court has consistently ruled in favour of applicants seeking to enforce provisions in the federal *Species At Risk Act*, [SC 2002 c 29](#) (*SARA*) and ABlawg has followed these judgments on matters such as the [designation of critical habitat](#), the [protection of critical habitat](#), and [recovery strategies](#). In *Groupe Candiac*, Justice LeBlanc rules the federal power to issue an emergency protection order in section 80 of *SARA* covering provincial lands does not offend the division of powers under the [Constitution Act 1867](#) and is otherwise lawful. *Groupe Candiac* is particularly relevant to Alberta, since the only other emergency protection order issued by the federal government under *SARA* since its enactment in 2002 protects the greater sage grouse located in southern Alberta. *Groupe Candiac* affirms the legality of this important power in *SARA* for the federal government to act swiftly to protect endangered species in the face of provincial inaction. Unfortunately for endangered species it is a hollow victory because federal officials are anything but swift when it comes to implementing the protective measures in *SARA*, and instead they regularly employ administrative discretion to undermine the effectiveness of the legislation.

The western chorus frog is a tiny amphibian located on wetland habitat in Ontario and Québec, and is listed as a threatened species under *SARA*. The largest remaining population of the species persists in a southern suburb of Montréal. The dispute which led to this case involves a housing development proposed by Groupe Candiac. The lands in question have previously been considered for conservation as a protected area (see [here](#)), but at some point several years ago it seems the municipal authority decided to proceed with a new subdivision and sold the lands to the developer Groupe Candiac. This decision was opposed by [Nature Québec](#) who turned to *SARA* for assistance in stopping the development.

In May 2013 Nature Québec requested that the federal Minister of the Environment recommend to the Governor in Council that it issue an emergency protection order for the La Prairie population of western chorus frog under section 80 of *SARA*. Where the Minister is of the opinion that a species faces an imminent threat to its survival, section 80(2) requires the Minister to recommend that the Governor in Council issue an emergency protection order. In response to this petition by Nature Québec, the Minister declined to make a recommendation for protection because, while the species would be harmed locally by the proposed housing development, in his opinion the species was not facing an imminent threat to its survival on a national basis.

The national-local dichotomy seems like it was a policy strategy for the Conservatives when they did not want to apply the emergency measures in *SARA*, as the same Minister also relied on the

status of national populations in his reasons for refusing to recommend an emergency protection order for the rapidly declining caribou populations in northern Alberta several years ago. In both instances of boreal caribou and western chorus frog, the Federal Court ruled this national-local dichotomy is an unreasonable basis for the Minister to refuse to recommend that the Governor in Council issue an emergency protection order under section 80 of *SARA*. Nigel Bankes wrote on the caribou ruling [here](#) I wrote on the western chorus frog ruling by the Federal Court in [Justice for the Western Chorus Frog?](#)

The Liberals took over Parliament in October 2015, and shortly thereafter the Minister had a change of opinion in relation to the western chorus frog by deciding that indeed the species did face an imminent threat to its survival. The Minister gave her recommendation to the Governor in Council, and the western chorus frog [Emergency Protection Order](#) (the ‘Order’) was issued in July 2016. Among its list prescriptions, the Order prohibits any removal of soil, alteration of surface water flows, draining of wetlands, or construction of infrastructure in portions of the La Prairie region that constitute habitat for the western chorus frog. Accordingly, the result of the Order is that a portion of the housing development cannot proceed and some modifications to ongoing development are required.

From a division of powers perspective, the controversial aspect of the Order is that it prohibits activities on provincial lands. This is also the case for the emergency order protecting the greater sage grouse in southern Alberta, and I commented on this exceptional federal power in [Curious Case of the Greater Sage Grouse in Alberta](#). For the most part, the prohibitions available under *SARA* are limited to either protecting species under federal authority (fish and migratory birds) or species located on federal lands (eg national parks). But section 80(4)(c) of *SARA* gives the federal government the authority to identify habitat on provincial lands necessary for the protection of an endangered species and prohibit activities from taking place on those lands. The intrusive character of this power is undoubtedly one reason why it has rarely been invoked by the federal government, despite the fact there are likely hundreds of species who would benefit from this emergency power because effective legal protection in provincial legislation is, in itself, an endangered species across the provinces. Alberta is emblematic of a woefully inadequate endangered species legal framework at the provincial level – see [Endangered species under Alberta's Wildlife Act: Effective legal protection?](#)

Groupe Candiac claims it has suffered a \$20 million loss because the housing development was halted and modified by the Order (*Groupe Candiac* at para 38), and accordingly Groupe Candiac sought judicial review to have the Order quashed by arguing (1) the Order is ultra vires Parliament because it does not fall within a federal head of power set out in the *Constitution Act 1867* and is a colourable attempt to regulate over matters assigned to the provinces or, in the alternative, (2) the Order is unlawful because it expropriates property rights without compensation.

The bulk of the reasoning in *Groupe Candiac* is focused on the division of powers argument, but I will start with a brief account of the argument on expropriation without compensation under *SARA*. On this issue Justice LeBlanc rules the validity of the Order does not rest on whether or not the federal government compensates for the losses suffered by Groupe Candiac (at paras 204 – 209). Justice LeBlanc relies on statutory construction for this finding, in that *SARA* explicitly

separates the issuance of an emergency order under section 80 from a decision under section 64 on whether to compensate for losses suffered as a result of the order. Notably there are two different decision-makers with discretionary authority here: The Governor in Council may issue the emergency order under section 80 and the Minister may decide to pay compensation. Justice LeBlanc rules the question of whether compensation is owed here is a matter concerning the interpretation and application of section 64 of *SARA* and is properly the subject of its own application (at para 214). The issue concerning expropriation and compensation under *SARA* remains to be addressed in a future case. An example in the jurisprudence of how this may play out down the road can be seen in *R v Tener*, [1985] 1 SCR 533, [1985 CanLII 76 \(SCC\)](#) where compensation was held to be owed as a result of a decision by the BC government to prohibit mineral development in Wells Gray Provincial Park. It is noteworthy that expropriation claims have been raised in response to both emergency protection orders issued to date by the federal government which apply on provincial lands (sage grouse and western chorus frog).

The target of Groupe Candiac's division of powers argument is section 80(4)(c)(ii). Groupe Candiac argued this provision offends the division of powers because it provides the federal government with discretion to regulate specific activities over provincial land and this is a colourable invasion of provincial legislative authority (at paras 90 – 98). Justice LeBlanc rejects this argument and finds that section 80(4)(c)(ii) is a valid exercise of the federal criminal law power set out in section 91(27) of the *Constitution Act 1867*. An application of the pith and substance doctrine requires that to be a valid exercise of criminal law power, a legislative provision must address a legitimate public purpose to suppress an 'evil' and be in the form of a prohibition backed by sanction (summarized at paras 99 – 102). Justice LeBlanc finds section 80(4)(c)(ii) meets each of these criteria. Briefly he finds:

- power to act quickly in order to protect a species from imminent risk is a legitimate public purpose (at paras 103 – 106);
- the widespread decline of wildlife species and destruction of their habitat by human activity is an 'evil' to be targeted by criminal law (at paras 110 – 118);
- the emergency order is in form a set of prohibitions backed by the threat of sanction (at paras 141-163);
- the section does not establish a regulatory regime whereby the federal government can regulate activities affecting endangered species and thereby colourably invade provincial authority. The record demonstrates the power has rarely been used (at para 124), and importantly the section does not authorize the federal government to require positive measures be taken on provincial lands (at paras 125 – 126) which might resemble regulation rather than penal sanctions.

On this basis Justice LeBlanc rules section 80(4)(c)(ii) to be *intra vires* Parliament, adding this provision to the growing list of federal environmental laws upheld under the federal criminal law power. This is a legacy of the former Chief Justice Gérard La Forest who championed the criminal law power as the basis for federal environmental law in Canada in a number of judgments culminating with *R v Hydro Québec*, [1997] 3 SCR 213, [1997 CanLII 318 \(SCC\)](#). Nonetheless, it will forever strike me as odd that federal environmental laws – which are most

comfortably understood as a form of regulation such as command and control, planning, or market-based – have to be contorted into some sort of penal sanction in order to survive a constitutional challenge.

Aside from these legal niceties, I was attracted to this decision because of what it represents on the ground: The habitat of a tiny amphibian in the northern fringes of its overall continental presence attracts the attention of the Minister and subsequently the frog is the beneficiary of one of the more powerful components of *SARA* and results in large economic loss for a housing developer. This is surely an outcome that species advocates envisioned back in the late 1990s when *SARA* was on the drafting table, but I also suspect the exercise of this emergency power was expected to occur on a more frequent basis than the mere 2 instances which it has thus far. Instead, threatened species have been left to disappear under the watchful gaze of *SARA* as their habitat is destroyed by the human hand.

One of my first engagements with *SARA* has stuck with me to this day and continues to serve as a reminder that there is a heavy dose of politics undermining the effectiveness of this legislation. During the early days of *SARA*, the [sakinaw sockeye salmon](#) could not even attract an endangered listing under *SARA* when it was widely known that only a handful of adult fish were returning to spawn, and eventually the wild population went extinct in 2009. Studies have now shown that threatened species which are subject to a commercial harvest are statistically less likely to be listed by federal officials under *SARA*. And there are countless listed threatened and endangered species which still await any meaningful protection and recovery action on the part of the federal government. Federal officials in the trenches grasp at any opportunity to undermine the effectiveness of the legislation when protection for endangered species will result in economic loss. The list of victories for endangered species at the Federal Court is a reminder that justice can be done, but *Groupe Candiac* and the other victories are also misleading in that they suggest justice is being done for endangered species under *SARA*. This is simply not the case, and the result here for the western chorus frog is truly an exceptional outcome.

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