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The Cost of Justice for the Western Chorus Frog

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Case Commented On: *9255-2504 Québec Inc. v Canada*, [2020 FC 161 \(CanLII\)](#)

This decision is a bit dated as it was issued back in January, but an English translation was only recently published and it caught my attention because I have been following the saga of the western chorus frog under the *Species at Risk Act*, [SC 2002, c 29](#) (SARA) for several years (see [Justice for the Western Chorus Frog?](#) and [More Justice for the Western Chorus Frog](#)). In many ways, the case of the western chorus frog encapsulates the SARA story since it was enacted back in 2003: politics over science; missed statutory deadlines; and inadequate funding. SARA has certainly systematized efforts to develop recovery frameworks for threatened species and provided some additional transparency. However, the legislation has done very little to actually protect critical habitat beyond what would already be available under protected area or wildlife legislation. *9255-2504 Québec Inc. v Canada* offers a glimpse into the question of who pays the cost of protecting critical habitat for a threatened species. The judgment also includes an unusual amount of detailed testimony from federal officials on how SARA has been applied in this case. Accordingly, this is an important decision not just for the western chorus frog but for all SARA-listed species and those interested in following the application of SARA generally.

The western chorus frog is a tiny amphibian species that resides in southeastern Ontario and southwestern Québec. The geographic range for individual frogs is very limited, and suitable habitat includes both wetland and terrestrial features in close proximity. Populations of this species are in rapid decline because their habitat is often located in regions where urbanization and agriculture are expanding and filling in wetlands. Upwards of 90% of the species' historical range has already been rendered unsuitable by these developments.

The western chorus frog was designated as a threatened species by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) in 2008 and subsequently [listed](#) as a threatened species under SARA in 2010 but, since most populations are located on provincial or private lands, the federal legislation offers little habitat protection absent an order issued by the Governor in Council under sections 61 or 80 of SARA to apply the legislation on non-federal lands. Provincially in Québec, the western chorus frog is listed as a vulnerable species under the *Act respecting threatened or vulnerable species*, [CQLR c E-12.01](#), and has a designated recovery team, but the provincial legislation implements a 'manage and mitigate' approach for addressing threats to critical habitat. An illustration of this approach and its shortcomings as a means to protect critical habitat is aptly demonstrated in a longstanding conflict between the western chorus frog and a residential development in La Prairie, a suburb of Montréal. The conflict is described in the testimony of officials summarized by Mr. Justice René LeBlanc in this judgment (see paras 39 – 114).

In 2008, the municipality received provincial approvals to clear lands for residential development in a region containing wetlands. The area was known as habitat for one of the last remaining metapopulations of the western chorus frog. In response to this, the development approval included conditions to manage and mitigate the impact on the threatened species. These conditions included avoiding construction activity during the breeding season, expanding an existing conservation area in the region, and creating several new wetlands to replace habitat lost to the development. This exemplifies the ‘business as usual’ approach implemented just about everywhere to address impacts to a threatened species. ‘Business as usual’ in the sense that impacts to a threatened species are considered in the regulatory process for a project approval, but the effectiveness of measures imposed on the project to address these impacts is untested or the measures explicitly fall short of actually protecting habitat from destruction.

In the normal course, the listing of the western chorus frog as a threatened species under SARA in 2010 would have done little to alter this ‘business as usual’ trajectory for the residential development in La Prairie. Sections 41 and 42 of SARA require the federal Minister to prepare a recovery strategy within 2 years of listing for a threatened species that identifies, among other things, the biological needs of the species, threats, and known critical habitat, but the recovery strategy itself offers no legal protection for critical habitat. As noted above, SARA does not afford legal protection for critical habitat on provincial or private lands, absent a Governor in Council order. And moreover, federal officials have demonstrated an inability or unwillingness to meet the timeframes stipulated by SARA for the development of a recovery framework (see *Western Canada Wilderness Committee v Canada (Fisheries and Oceans)*, [2014 FC 148 \(CanLII\)](#)). In the case of the western chorus frog, by 2013 when environmental groups petitioned the federal Minister of the Environment to actually do something to protect this SARA-listed species, three years had passed since the listing decision and thus the recovery strategy was already one year overdue. The [recovery strategy](#) was finalized in December 2015.

The listing of the western chorus frog under SARA in 2010 did nonetheless provide a new arrow in the quiver of environmentalists who oppose further development at this location in La Prairie: it opened the window to the issuance of an emergency habitat protection order under section 80 of SARA. An emergency protection order is unique in that section 80 provides that an order may prohibit development activity on any lands, including federal, provincial or privately-owned. The hurdle for a threatened species is to convince the Governor in Council to exercise its discretion to issue an emergency protection order – a decision that is made on the basis of a recommendation from the Minister that the species in question faces an imminent threat to its survival or recovery. Only two emergency protection orders have ever been issued under SARA, including the order in this case. The other section 80 order applies to the Greater Sage Grouse in southeastern Alberta (see [The Curious Case of the Greater Sage Grouse in Alberta](#) for some commentary).

The path towards a section 80 order for the western chorus frog began in May 2013 when Nature Québec petitioned the federal Minister of the Environment to recommend that the Governor in Council issue an emergency protection order for the La Prairie population of western chorus frog. Initially, the Minister declined to make the recommendation because, while the species would be harmed locally by the residential development, in the Minister’s opinion the species was not facing an imminent threat on a national basis. Nature Québec was successful in having this decision by the Minister quashed in judicial review in *Centre Québécois du droit de*

l'environnement v Canada (Environment), [2015 FC 773 \(CanLII\)](#). This decision is the subject of my earlier ABlawg post in [Justice for the Western Chorus Frog?](#)

In the meantime, a change in government took place in Parliament during the Fall of 2015, and shortly thereafter the new Minister commissioned an [imminent threat assessment](#), which concluded specifically that the housing development at La Prairie was a threat to western chorus frog:

In the Montérégie region, more than 90% of the Western Chorus Frog (GLSLCS) historical range had been lost by 2009. In 2009, there were at total of nine metapopulations and some isolated populations. Recent information indicated that, by 2014, of these nine metapopulations, only six remained biologically functional, and threats to those metapopulations continue to persist on the landscape.

Within Montérégie, the greatest loss of habitat is occurring in the La Prairie metapopulation. The extent of suitable habitat in the La Prairie metapopulation decreased by 57.3% (4.16 km²) between 1992 and 2013, and further losses have been documented since 2013. As a result of habitat destruction, breeding ponds were also destroyed during that period. Most of the habitat and pond destruction has been due to residential development, despite the implementation of mitigation measures as part of the development. The most recent residential development is taking place at the core of the La Prairie metapopulation. Future phases of this development, should they proceed as currently understood, would adversely affect a large proportion of the remaining ponds through direct destruction of habitat, through proximity drainage, and/or by isolating local populations, threatening the viability of the metapopulation (i.e., making it more susceptible to extirpation). Breeding ponds outside of the proposed residential project are facing ongoing risks of additional development, which is compromising their viability. Some are already isolated and could not, by themselves, sustain the viability of the La Prairie metapopulation.

Although a conservation park is being established by the residential developer in La Prairie, it is unlikely to provide for the long-term viability of the metapopulation, due to the small area of the park's intact habitat, the small number of active breeding ponds within the park, and the planned construction of a recreational path system within the park. Other measures taken by the Municipality of La Prairie and the developer to mitigate the impact of the residential development – such as creating artificial ponds, installing fences along developed areas and undertaking works outside of the breeding period – do not currently provide sufficient mitigation of the development's impacts such that the long-term viability of the La Prairie metapopulation is provided for. These measures would not avoid the direct destruction of habitat and the resulting loss of connectivity among local populations, and would not offset those impacts such that there would be no increased risk to the long-term viability of the metapopulation. (at page 7)

What is perhaps most striking about this imminent threat assessment is how it completely debunks the ‘manage and mitigate’ approach implemented several years earlier in the provincial approval process for the residential development. Unlike the earlier federal and provincial considerations, this assessment concluded that, without further intervention, the proposed residential development would have a significant adverse impact on the La Prairie metapopulation and constitutes an imminent threat to the recovery of the species.

On the basis of this assessment, the Minister recommended that the Governor in Council issue an emergency protection order for the La Prairie population. The section 80 [emergency protection order](#) was subsequently issued in July 2016. Among its list of 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. Justice for the western chorus frog and a bitter pill to swallow for the residential developers in this region of La Prairie who have lost millions because of the halted construction.

While it would be nice to think this emergency protection order was issued solely on the basis of the science explained by the imminent threat assessment, this hardly seems likely given the context of this case and that of SARA more generally. The La Prairie population was categorized as threatened by COSEWIC way back in 2008, and at that point the population had already incurred significant habitat loss. Nonetheless, it still took federal officials 8 years to produce a recovery strategy for the species and actual habitat protection only came about after the petition for an emergency order by Nature Québec in May 2013. Moreover, it is unlikely to be a coincidence that the recovery strategy was only proposed after litigation was commenced in relation to this petition. The recovery strategy wasn’t finalized for another 18 months (well past the 3 month deadline prescribed by section 43 of SARA) and concurrently with the imminent threat assessment done in late 2015 after the change in government. My speculation is that the issuance of the emergency protection order in July 2016 was as much a political statement as it was an implementation of science on the western chorus frog. The emergency protection order was an opportunity for the new (at the time) federal government to demonstrate a commitment to its election campaign promise for stronger environmental protection in Canada.

The emergency protection order has, thus far, withstood a challenge in judicial review by several developers. Other developers have asserted the order is *ultra vires* Parliament, as a colourable invasion of provincial legislative authority. Justice LeBlanc also heard this earlier challenge in *Groupe Maison Candiac Inc. v Canada (Attorney General)*, [2018 FC 643 \(CanLII\)](#), and he disagreed, ruling the issuance of the order is a valid exercise of the federal criminal law power; reasoning that protecting a threatened species is a legitimate public purpose (*Groupe Maison* at paras 103 – 106) and that the Order addresses an “evil” in the form of habitat destruction which is properly the subject of criminal law (*Groupe Maison* at paras 110 – 118). As a set of prohibitions backed by the threat of sanction, the Court held the Order does not purport to regulate activities subject to provincial legislative jurisdiction (*Groupe Maison* at paras 141-163). This decision is the subject of my earlier ABlawg post in [More Justice for the Western Chorus Frog](#). The Federal Court of Appeal recently affirmed Justice LeBlanc’s ruling in *Le Groupe Maison Candiac Inc. c Canada (Procureur général)*, [2020 CAF 88 \(CanLII\)](#).

However, I suggest this constitutional squabble is not the main event here. The real issue in this dispute is who pays in the rare instance of development being halted in order to protect a threatened species. The applicant in this case has suffered \$22 million in losses because the residential development cannot be completed under the terms of the emergency order (at para 8), but the federal government has thus far refused to pay any compensation for these losses. In his earlier ruling, Justice LeBlanc held the validity of the order itself does not rest on whether or not the federal government compensates for lost development (*Groupe Maison* at paras 204 – 209).

Section 64 of SARA contemplates the enactment of regulations to govern compensation for losses incurred because of SARA protection orders, but the federal government has yet to enact any such rules. Section 64 provides as follows:

Compensation

64 (1) The Minister may, in accordance with the regulations, provide fair and reasonable compensation to any person for losses suffered as a result of any extraordinary impact of the application of

(a) section 58, 60 or 61; or

(b) an emergency order in respect of habitat identified in the emergency order that is necessary for the survival or recovery of a wildlife species.

Regulations

(2) The Governor in Council shall make regulations that the Governor in Council considers necessary for carrying out the purposes and provisions of subsection (1), including regulations prescribing

(a) the procedures to be followed in claiming compensation;

(b) the methods to be used in determining the eligibility of a person for compensation, the amount of loss suffered by a person and the amount of compensation in respect of any loss; and

(c) the terms and conditions for the provision of compensation.

The absence of regulations is the basis for the applicant's position that the federal Crown should be liable for civil damages pursuant the *Crown Liability and Proceedings Act*, [RSC 1985, c C-50](#). The applicant's argument is that the failure to enact regulations under section 64 has deprived them of any possibility of compensation and is thus inconsistent with the scheme of SARA, particularly in regard to where a habitat protection order has an economic impact on property rights (at para 133).

The applicant sought compensation right from the outset of the emergency protection order (at para 136), however the Minister's initial position was that she was unable to pay compensation

because there was no regulatory scheme. The Minister apparently changed this view later on (at para 154). In any event, it is clear from section 64 that Parliament contemplated scenarios such as this one and provided authority for the Governor in Council to devise a compensation scheme. Presumably these regulations would reflect a policy choice on how to allocate the economic cost of critical habitat protection for threatened species.

Justice LeBlanc summarizes the general principles applicable to the Crown's civil liability, including the need for a causal relation between the alleged unlawful act and the damage suffered, as well as the immunity granted to the Crown for decisions based on policy considerations that are not otherwise made in bad faith (at paras 139 – 149). The applicant's position here is essentially that the failure by the Governor in Council to enact regulations on a compensation scheme is in bad faith given the intentions of Parliament that a compensation scheme be enacted as well as the mandatory language used in section 64(2) (at paras 150, 151).

Justice LeBlanc dismisses this argument, ruling that the failure to enact regulations under section 64 of SARA is immune from civil liability: “. . . the exercise of the power to legislate enjoys Crown immunity since it involves taking discretionary decisions known as “policy” decisions. This, with the exercise of the royal prerogative . . ., is a classic example where the principles of Crown immunity apply. Courts have so far recognized that this immunity even extends to decisions not to legislate, including decisions not to make regulations . . .” (at para 157).

Justice LeBlanc also throws cold water on suggestion that the failure to legislate here is in bad faith, referencing debate in Parliament that indicates the Governor in Council was expected to take some time and make a considered policy choice in this regard (at paras 161 – 169). The fact that the clock on these regulations is now at 17 years and counting is not lost on Justice LeBlanc. However, the doctrine of privilege over cabinet deliberations is one reason why the Court must be satisfied without much of an explanation for such a lengthy delay (at para 170). Justice LeBlanc goes on to conclude:

Many factors may explain this delay in taking action, but the fact that it can be linked to the sparse and exceptional use of the power to issue an emergency order—a measure of last resort—and to the fact that they clearly wanted to use the first years of experience in implementing the Act to define a compensation plan acceptable to all in an area where there were no real precedents, does not, in my view, violate the norm of conduct applicable to the Governor in Council in the exercise of its legislative powers, as this standard must be understood in light of the long-standing relative immunity enjoyed by it in this regard. (at para 171)

Respectfully, I think Justice LeBlanc extends too much latitude to federal officials on this point. As I have explained above, the missing compensation scheme is no surprise here. Federal officials have missed plenty of statutory deadlines under SARA, and also seem reluctant to take ‘big steps’ until pushed in litigation commenced by environmental groups. Litigation has resulted in numerous decisions by the Federal Court favourable to the plight of threatened species in this country, but these judicial rulings are no substitute for proper administrative implementation of SARA. Surely Parliament did not intend or expect the Federal Court would have to be the champion of SARA! But that is where we are at.

There is real irony in the fact that federal tardiness on SARA actually assists the Crown in defending against civil liability. Provincial and territorial legislation generally does not afford adequate legal protection for critical habitat of threatened species (for a summary on this point see [here](#)), and because of this gap in legal protection, section 80 orders should not be considered measures of ‘last resort’, as described by Justice LeBlanc. In order for SARA to fulfill its intentions on the recovery and protection of threatened species in Canada, there should be hundreds of section 80 emergency orders in place by now. Federalism is certainly one reason for why only two of these orders have been issued since SARA was enacted in 2003, but this is a red herring in my view. The primary reason for why so little critical habitat is protected under SARA (or under any other endangered species legislation in the country for that matter) is precisely because of what has arisen in the case of the western chorus frog. There is an economic cost associated with protecting habitat which government officials are reluctant or unwilling to address. Rather than face this challenge by protecting critical habitat when science calls for it and implementing an explicit policy to allocate the economic cost of this habitat protection, federal officials seem more content to duck the matter altogether by making excruciatingly slow progress on implementing SARA.

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