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[ENGLISH TRANSLATION]

Ottawa, Ontario, June 22, 2018

Present: The Honourable Mr. Justice LeBlanc

BETWEEN:

LE GROUPE MAISON CANDIAC INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

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I. Introduction

[1] The Groupe Maison Candiac Inc. [Groupe Candiac] is a company that works primarily in residential development. It buys large parcels of land, subdivides them, sometimes resells them, develops them and builds houses on them. Its activities are concentrated mainly on the South Shore of Montréal, primarily in the municipalities of La Prairie, Candiac and Saint-Philippe.

[2] On July 8, 2016, certain Groupe Candiac properties that were being developed were subject to an emergency order issued by the Governor in Council under the powers conferred by subparagraph 80(4)(c)(ii) of the *Species at Risk Act*, SC 2002, c. 29 [the Act]. The Governor in Council, on the recommendation of the Minister of Environment and Climate Change [the Minister], considers the order necessary to protect a small amphibian—the Western Chorus Frog—included on the List of Wildlife Species at Risk pursuant to the Act and whose population he considers to be facing imminent threats to its recovery.

[3] This order, entitled the *Emergency Order for the Protection of the Western Chorus Frog (Great Lakes / St. Lawrence — Canadian Shield Population)*, SOR/2016-211 [the Emergency Order], prohibits, for all practical purposes, on pain of sanctions, any activities involving drainage, excavation, deforestation and infrastructure construction in the area to which it applies. Groupe Candiac believes that the Emergency Order, for all practical purposes, paralyzes its development activities on the lands in question when it already had an authorization certificate from the Minister of Sustainable Development, Environment and the Fight against

Climate Change allowing it to proceed with this development, subject to the observance of a number of obligations aimed at protecting the Western Chorus Frog population in that area.

[4] Groupe Candiac is asking the Court pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c. F-7, to cancel the Emergency Order because it believes it was invalid considering that it was adopted under an enabling provision—subparagraph 80(4)(c)(ii) of the Act—which is ultra vires Parliament or, because it constitutes a form of expropriation without compensation.

[5] For the reasons that follow, I will not allow the conclusions sought by Groupe Candiac.

II. Background

A. *The protection of species at risk in Canada*

[6] The protection of species at risk in Canada is not a new concept. Already, in 1917, Parliament, in response to the *Convention for the Protection of Migratory Birds in the United States and Canada* entered into the previous year by the United States and the United Kingdom, adopted the *Migratory Birds Convention Act* (SC 1917, c. 18). This main purpose of this convention was to establish a uniform protection system to preserve the useful and harmless species of migratory birds.

[7] In 1975, Canada ratified the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* pursuant to which the Contracting States recognize:

a. that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come;

b. the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view;

c. that peoples and States are and should be the best protectors of their own wild fauna and flora;

d. that international cooperation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade; and

e. the urgency of taking appropriate measures to this end.

[8] This convention was implemented in domestic law in 1992 with the adoption of the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* (SC 1992, c. 52). This Act specifically targets the protection of animal and plant species threatened with extinction by trade. The Minister is empowered to enter into agreements with provincial governments to ensure the harmonious and effective application of the Act. These agreements must, in particular, aim to avoid conflicts or duplication between the regulations established by the federal and provincial governments.

[9] Meanwhile, Canada signs a certain number of international agreements and conventions to protect certain endangered species or natural environments, such as the polar bear, porcupine caribou, and wetlands of international importance, particularly those that provide a habitat for waterfowl.

[10] The Earth Summit, held in Rio de Janeiro, Brazil, in June 1992 under the auspices of the United Nations, led to the signing of an important international agreement, the *United Nations Convention on Biological Diversity* [the Convention on Biodiversity]. This convention, which was ratified by 196 countries, is founded on a certain consensus, with the Contracting Parties stating, in particular, that they are:

a. conscious of "the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity" and of "the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere";

b. concerned "that biological diversity is being significantly reduced by certain human activities"; and

c. convinced "that the conservation of biological diversity is a common concern of humankind."

[11] Each Contracting Party shall, as far as possible and as appropriate, "promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings," "rehabilitate and restore degraded ecosystems and promote the recovery

of threatened species, *inter alia*, through the development and implementation of plans or other management strategies" and "develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species and populations" (Article 8). Each Party shall, in accordance with its particular conditions and capabilities, "develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, *inter alia*, the measures set out in this Convention relevant to the Contracting Party concerned" (Article 6).

[12] In 1995, Canada revealed its strategy in response to the Convention on Biodiversity. This led to, in 1996, a federal-provincial Accord for the Protection of Species at Risk [the Accord], which provides that the ministers responsible for wildlife at both levels of government commit to a national approach for the protection of species at risk, the goal being to prevent them from becoming extinct as a result of human activity.

[13] The signing ministers recognized that species do not recognize jurisdictional boundaries, that cooperation is crucial to the conservation and protection of species at risk, and that lack of full scientific certainty must not be used as a reason to delay measures to avoid or minimize threats to species at risk. They agree to, among other things, coordinate their activities within a pan-national body—the Canadian Endangered Species Conservation Council—to resolve issues for the protection of species at risk in Canada as well as any disputes resulting from implementation of the Accord.

[14] They also agree to establish “complementary legislation and programs” that provide for “effective protection of species at risk throughout Canada.” According to the Accord, these programs and legislation will:

- address all native wild species;
- provide an independent process for assessing the status of species at risk;
- legally designate species as threatened or endangered;
- provide immediate legal protection for threatened or endangered species;
- provide protection for the habitat of threatened or endangered species;
- provide for the development of recovery plans within one year for endangered species and two years for threatened species that address the identified threats to the species and its habitat;
- ensure multi-jurisdictional cooperation for the protection of species that cross borders through the development and implementation of recovery plans;
- consider the needs of species at risk as part of environmental assessment processes;
- implement recovery plans in a timely fashion;
- monitor, assess and report regularly on the status of all wild species;
- emphasize preventive measures to keep species from becoming at risk;
- improve awareness of the needs of species at risk;
- encourage citizens to participate in conservation and protection actions;
- recognize, foster and support effective and long-term stewardship by resource users and managers, landowners, and other citizens; and
- provide for effective enforcement.

[15] The Act, which was adopted in 2002, followed the implementation of the Canadian government’s strategy in response to the Convention on Biodiversity and the Accord. Its stated purpose is 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." As Justice Martineau reminds us in *Centre Québécois du droit de l'environnement v. Canada (Environment)*, 2015 FC 773 [*Centre Québécois du droit de l'environnement*], a case I will get back to because it falls within the factual framework of this case, the Act is therefore intended to implement Canada's obligations under the Convention on Biodiversity (*Centre Québécois du droit de l'environnement* at paragraph 6).

[16] I will provide further details on the Act in my analysis.

[17] Quebec is doing well. In 1999, it adopted the *Act respecting threatened or vulnerable species*, CQLR c. E-12.01 [*Act respecting threatened or vulnerable species*]. This Act puts the Minister of Sustainable Development, Environment and Parks in charge of proposing to the Quebec government a policy of protection and management of designated threatened or vulnerable species or of species likely to be so designated. The *Act respecting the conservation and development of wildlife*, CQLR c. C-61.1, establishes various prohibitions that relate to the conservation of wildlife resources, including threatened or vulnerable species. The *Environment Quality Act*, CQLR c. Q-2, requires an authorization certificate for any person who wants to undertake any construction, work or activity in wetlands or bodies of water, in order to protect the environment and protect biodiversity. Municipalities also have authority under the *Act respecting land use planning and development* (CQLR c. A-19.1), to identify, in their zoning by-laws, zones dedicated to the conservation of fauna and flora.

[18] Since 2012, there has been an agreement between the governments of Quebec and Canada to protect and recover species at risk in Quebec. This agreement—the Cooperation Agreement for the Protection and Recovery of Species at Risk in Quebec—is founded on the recognition that cooperation between the two levels of government and the complementarity of their respective strategies is important to ensure, within the limits of their respective jurisdictions, more effective protection and recovery of species at risk. Essentially, this agreement establishes the principles and modes of cooperation between the two levels of government.

[19] According to the evidence in the record, there is a consensus among scientists about a steep decline in biodiversity indicators worldwide, with no sign of a slowdown. Moreover, we are currently experiencing the sixth period of mass extinction since life began on earth, but the first linked to human activity. In Canada, of the 976 species listed on November 1, 2016, by the Committee on the Status of Endangered Wildlife in Canada [COSEWIC], established under section 14 of the Act, 739, a proportion of 76%, are considered species at risk within the meaning of the Act (Scientific expert report on the protection of species and their habitats, Gabriel Blouin-Demers, PhD, Respondent's Record, Volume 4, page 1248).

B. *The Western Chorus Frog*

[20] The Western Chorus Frog is a small amphibian. In adulthood, it is generally no more than 2.5 cm in length and weighs about 1 gram. It prefers marshes and wooded wetland areas for breeding. Also for breeding, it requires seasonally dry temporary ponds devoid of predators,

particularly fish. It rarely moves more than 300 metres from its breeding ground throughout its life.

[21] In Canada, it is found mainly in southern Ontario and southwestern Quebec, mainly in the Outaouais and Montérégie regions. In Montérégie, where the lands targeted by the Emergency Order are located, this species occupies no more than 10% of its former range. Since the 1950s, its population in Quebec has declined an average of 37% every 10 years, which is a "catastrophic" trend, according to COSEWIC. One of the six metapopulations of Western Chorus Frog identified in Montérégie is in the La Prairie region, within the municipalities of Candiac and Saint-Philippe. This is the second largest metapopulation in Montérégie. A metapopulation consists of a set of local populations connected by connectivity areas allowing the movement of frogs from one population to the other (Affidavit of Mark Dionne, Respondent's Record, Volume 1, page 3).

[22] The biggest threat to the Western Chorus Frog is that its habitats are on lands deemed suitable for urban or agriculture development. The resulting draining and filling of the land have a fatal effect on many individuals and significantly change the quality of the species' habitat by causing the disappearance of temporary ponds essential for breeding, in particular.

[23] Since 2008, the Western Chorus Frog, Great Lakes / St. Lawrence – Canadian Shield population, has been listed as a "threatened species" under the Act. A "threatened species" is defined in section 2 of the Act as a "wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction." In

Quebec, since 2001, it has been listed under the *Act respecting threatened or vulnerable species* as a "vulnerable wildlife species." As a result, it was the subject of a recovery plan to halt the decline of its population. In 2008, a conservation plan that specifically addressed the Western Chorus Frog in the Montérégie region was adopted by the Quebec Minister of Natural Resources and Wildlife.

C. *The Emergency Order*

[24] The Emergency Order has its own story.

[25] According to subsection 80(1) of the Act, such an order can only be issued on the "recommendation of the competent minister." However, according to subsection 80(2) of the Act, when this minister is of the opinion that a species on the list of wildlife species in Schedule 1 of the Act [the List of Wildlife Species at Risk], "faces imminent threats to its survival or recovery," he or she must recommend to the Governor in Council that an emergency order be made.

[26] In this case, the Minister, who is the "competent minister" under section 80, initially refused to make such a recommendation. That was in March 2014. Specifically, the Minister rejected a request from Quebec environmentalist group Nature Québec, which, between May and October 2013, had asked the Minister to recommend the making of an emergency order. It claimed that there was an imminent threat to what may have remained of the Western Chorus Frog metapopulation in La Prairie, namely that of the "Bois de la Commune," as a result of the

deforestation and alteration of the wetlands surrounding the completion of a housing project called “Domaine de la Nature” (*Centre Québécois du droit de l’environnement* at paragraph 32).

[27] The Minister disagreed, considering that the scope of the project proposed in that sector did not threaten the possibility of the species’ presence elsewhere in Quebec and Ontario. The Minister therefore concluded that the Western Chorus Frog was not facing an imminent threat to its survival or recovery.

[28] This decision was set aside by Justice Martineau on June 22, 2015, in *Centre québécois du droit de l’environnement*. In particular, he rejected the Minister’s view that the mandatory requirement provided in subsection 80(2) of the Act is limited to cases where a species is exposed to imminent threats to its survival or recovery on a national basis. He deemed this view untenable and contrary to the Act:

> [77] The Court has already rejected the restrictive interpretation suggested by the respondents—whereby the mandatory requirement provided in subsection 80(2) is limited to cases where a species is exposed to imminent threats to its survival or recovery on a national basis—in *Adam*, above, at para 39. Not only did the Minister arbitrarily and capriciously ignore the scientific opinion of her own Department’s experts and the Chorus Frog recovery team, but the Minister’s logic leads to an absurd outcome, in contradiction of the Act: as long as individuals of the species are threatened by human activity locally, an imminent threat cannot exist since other individuals elsewhere in the country are not under threat nationally.
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> [78] Through the lens of its complex mechanics, the federal Act perceives critical habitat as a single unit, each part contributing to the species’ survival and recovery across Canada. The two major threats to the Western Chorus Frog are urbanization and agricultural development. These threats are present across Canada. According to the evidentiary record, these two threats are extreme, serious, continuous and ongoing, and jeopardize the survival and recovery of the Western Chorus Frog in Canada. If we rely on the

> information that was available at the time of the disputed decision, the work included in the Domaine de la nature project will destroy a portion of the species' critical habitat. The result is the brutal and sudden disappearance of the Bois de la Commune metapopulation in La Prairie—unless, of course, mitigation measures are taken to allow the species to recover in the area identified by the possible recovery program.
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> [Emphasis in original]

[29] Therefore, Justice Martineau ordered the Minister to reconsider her decision within six months following the judgment and to take account of the reasons for judgment and intervening developments.

[30] In July 2015, the Minister started the work leading to the reconsideration of her decision. Thus, she began a vast process of information gathering with a number of stakeholders from various backgrounds, governments, and so on. She also ordered three scientific evaluations from her department on, in particular, the imminent threats facing the Western Chorus Frog and the measures in place to protect it, including those imposed under Quebec legislation.

[31] On December 4, 2015, the Minister concluded that there was an imminent threat to the recovery of the Western Chorus Frog and recommended that the Governor in Council make an emergency order. She considered, among other things, that the measures taken to reduce the impact of the "Domaine de la Nature" housing project, renamed "Symbiocité," would likely not ensure the long-term viability of the Western Chorus Frog population affected by the project.

[32] Almost at the same time as that decision, the Minister included in the Public Registry established by the Act [the Registry], the recovery strategy for the Western Chorus Frog, Great

Lakes / St. Lawrence – Canadian Shield population, which sets out the measures required to halt or reverse the species' decline. One of the short-term objectives of this strategy is to maintain the areas of occupied suitable habitat as well as the breeding population level within each local population. Another is to maintain the level of connectivity between the local populations comprising a metapopulation.

[33] On June 17, 2016, the Emergency Order was made. The total area of the zone included in the area covered by the order is 1.85 km². It was supposed to take effect on July 17, 2016. However, on July 8, 2016, the Governor in Council made a second emergency order with the same purpose and the same scope as the emergency order of June 17, 2016, but that would take effect immediately to counter the fact that work with heavy machinery continued to be observed in the area covered by the order, even after the order had been issued.

[34] The impact study conducted in conjunction with the Emergency Order specified that this was one of the issues leading to its adoption:

> As the population of the Western Chorus Frog (GLSLCS) continues to decline, coupled with the threat to the connectivity and viability of existing metapopulations and the lack of adequate measures to protect its habitat, the Minister of the Environment concluded in December 2015 that, given the threat to the La Prairie metapopulation posed by the Symbiocité residential project, the recovery of the Western Chorus Frog (GLSLCS) is imminently threatened such that immediate intervention is required.
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> The Minister's conclusion was informed by a scientific assessment based on the best available information, which determined that the planned future phases of residential development in La Prairie, as currently proposed, would result in the loss of connectivity among remaining populations in the La Prairie metapopulation and the direct loss of habitat, including breeding ponds. The areas remaining after such development are therefore unlikely to sustain the viability of the La Prairie metapopulation in the long-term.

> Therefore, without immediate intervention, the objectives as set out in the Recovery Strategy of the Western Chorus Frog (GLSLCS) are unlikely to be met. As a result, pursuant to subsection 80(2) of SARA, the Minister recommended to the Governor in Council that an Emergency Order be put in place to address the imminent threat to the Western Chorus Frog (GLSLCS). The Governor in Council accepted the Minister's recommendation and the *Emergency Order for the Protection of the Western Chorus Frog (Great Lakes / St. Lawrence - Canadian Shield Population)* has been made.

[35] While precisely indicating its application area, the Emergency Order states 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 migration of the Western Chorus Frog;

h. deposit, discharge, dump or immerse any material or substance, including snow, gravel, sand, soil, construction material, greywater or swimming pool water; and

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*.

[36] It also states that any violation of these prohibitions constitutes an offence under section 97 of the Act, which stipulates that every person commits an offence who "contravenes a prescribed provision of a regulation or an emergency order."

[37] In a statement issued in conjunction with the issue of the Emergency Order, the Minister announced that the owners of properties located in the area covered by the order would not be compensated.

D. *Groupe Candiac's remedy*

[38] Groupe Candiac believes that the direct impact of the Emergency Order is that it prevents Groupe Candiac from carrying out its housing project as it was designed, costing the company around 20 million dollars.

[39] It brought this application on August 5, 2016. On March 24, 2017, Groupe Candiac filed a motion for leave to amend its notice of application for judicial review and to file a supplementary record and affidavits. With this amendment, it wants to be able to show that making the Emergency Order was unreasonable on the grounds that the population of chorus

frogs in the area covered by the Order, and therefore on the properties owned by Groupe Candiac and subject to the order, was not properly classified. They are not Western Chorus Frogs but rather Boreal Chorus Frogs, a species that is not at risk.

[40] The motion was dismissed by the Court, because the proposed amendment would radically change the nature of the issues and would unduly delay the legal debate started before the Court. Groupe Candiac tried to have this decision overturned, but its appeal was dismissed by the Federal Court of Appeal (*Groupe Maison Candiac Inc. v. Canada (Procureur général)*, 2017 CAF 216).

III. Issues and standard of review

[41] This case raises the following two issues:

a) Is subparagraph 80(4)(c)(ii) of the Act *ultra vires* Parliament, rendering the Emergency Order invalid?

b) Is the Emergency Order void on the grounds that it constitutes a form of expropriation without compensation?

[42] It has been well established that the standard of review applicable to the issues that challenge the constitutional validity of a statutory provision is that of correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 58).

[43] Regarding the second issue, neither party addressed the standard of review that applies in this case. In any event, in my opinion, this issue can be determined as a pure question of law in respect of which neither the Governor in Council nor the Minister has particular expertise. This

tends to favour the application of the standard of correctness (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at paragraphs 90-92). Moreover, this standard of review has generally been applied to issues challenging the *vires* of the exercise of regulatory power, and I see no reason to deviate from these earlier decisions, especially since this issue challenges, for all practical purposes, the applicability, in law, of the principles of *de facto* appropriation or disguised expropriation derived from private law to exercise the power of the Governor in Council under section 80 of the Act (*Saputo inc. v. Canada (Attorney General)*, 2011 FCA 69, at paragraph 10; *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2014 FC 776, at paragraph 104 [*Syncrude FC*]; *Canadian Generic Pharmaceutical Association v. Canada (Health)*, 2009 FC 725, at paragraph 43). This case does not challenge the reasonableness of the exercise of this power in the circumstances of this case, which, in my opinion, allows us to distinguish it from the case of *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, recently decided by the Supreme Court of Canada.

[44] The situation obviously would have been different if the Court had been called to decide on the legality of the Minister's decision not to offer any compensation to the owners affected by the Emergency Order. However, that is not the issue before the Court.

IV. Analysis

A. *Is subparagraph 80(4)(c)(ii) of the Act* ultra vires *Parliament?*

(1) The applicable framework for evaluating the constitutionality of subparagraph 80(4)(c)(ii)

[45] The applicable test for determining the constitutional validity of a statutory provision in relation to the division of powers is well known. We must first examine the pith and substance of the provision in question. This means defining its primary purpose, thrust or dominant characteristic. To do so, the analysis must consider the purpose of the provision, namely the concerns it aims to address and its impact (*R. v. Hydro-Québec*, [1997] 3 SCR 213, at paragraph 113 [*Hydro-Québec*]; *Reference re Firearms Act (Can.)*, 2000 SCC 31, at paragraphs 15-16, [2000] 1 SCR 783 [*Firearms Reference*]; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, at paragraphs 52-53 and 55, [2002] 2 SCR 146 [*Kitkatla*]; *Canadian Western Bank v. Alberta*, 2007 SCC 22, at paragraphs 26-27, [2007] 2 SCR 3 [*Canadian Western Bank*]; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, at paragraph 17, [2010] 2 SCR 536 [*COPA*]).

[46] This review is based on the text in this provision. It can also be based on extrinsic materials, such as parliamentary debates and government publications (*Firearms Reference*, at paragraph 17; *Canadian Western Bank*, at paragraph 27).

[47] Once this review is complete, we must consider if, based on its pith and substance, the provision in question falls under one of the legislative heads of power attributed by the *Constitution Act, 1867*[CA 1867] to the level of government that enacted it (*Re: Anti-Inflation Act*, [1976] 2 SCR 373, at page 450; *Firearms Reference*, at paragraph 25).

[48] If the provision falls within a jurisdiction attributed to this level of government, the provision is constitutionally valid and the analysis is complete. If that is not the case, the provision in question is not necessarily constitutionally invalid. In fact, it can still be saved by the ancillary powers doctrine if it has been sufficiently integrated in an otherwise valid legislative scheme (*Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, at paragraph 45, [2000] 1 SCR 494; *COPA*, at paragraph 16; *Kitkatla*, at paragraph 58; *Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, at paragraph 23, [2005] 3 SCR 302).

[49] It is useful, at this stage, to bear in mind an important principle of the pith and substance doctrine, namely, that it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government (*Canadian Western Bank*, at paragraph 29). In other words, this doctrine tolerates in many respects the overlap of federal and provincial laws, a law that falls under the jurisdiction of one level of government can impact the jurisdiction of the other level of government (*Friends of the Oldman River Society v. Canada (Minister of Transport*), [1992] 1 SCR 3, at pages 68-69 [*Oldman River*]; *Canadian Western Bank*, at paragraphs 24 and 28). It also recognizes that certain subjects can have both a provincial and federal dimension. Thus, the fact that a matter may for one purpose and in one aspect fall within one level of government does not mean that it cannot, for another purpose and in another aspect, fall within the competence of another level of government (*Canadian Western Bank*, at paragraph 30; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, at paragraphs 184-185, [2010] 3 SCR 457 [*Assisted Human Reproduction Reference*]).

[50] I also think it is useful, at this stage, to bear in mind that environmental protection, which, as the Supreme Court of Canada noted in *Oldman River*, has become "one of the major challenges of our time," is not in the list of legislative heads of power attributed to one of the levels of government by the Canadian Constitution (see also: *Hydro-Québec*, at paragraph 112). In this sense, it is an "abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty" (*Oldman River*, at pages 16 and 64). In this sense, the courts, when they are called on to define the extent to which each level of government can use its legislative powers in that regard, must bear in mind, while making sure to respect the fundamental balance of the division of powers by the CA 1867, that "the Constitution must be interpreted in a manner that is fully responsive to emerging realities and to the nature of the subject matter sought to be regulated" and that the "pervasive and diffuse nature of the environment" poses, in this sense, particular difficulties (*Hydro-Québec*, at paragraph 86).

[51] The Attorney General maintains that subparagraph 80(4)(c)(ii) of the Act constitutes a valid measure of criminal law. Alternatively, he claims that it was validly enacted pursuant to the introductory paragraph of section 91 of the CA 1867, which gives Parliament the power to make laws for the peace, order and good government of Canada. Alternatively, he argued that subparagraph 80(4)(c)(ii), if it must be deemed as falling outside of Parliament's jurisdiction, is sufficiently integrated in an otherwise valid vast legislative scheme to be constitutionally saved.

[52] However, it is up to Groupe Candiac to establish that subparagraph 80(4)(c)(ii) is *ultra vires* Parliament (*Firearms Reference*, at paragraph 39).

[53] Before getting to the heart of the matter, a brief description of the structure of the Act and its key provisions is necessary first to clearly identify the legislative scheme that section 80 and subparagraph 80(4)(c)(ii) fall under.

(2) The Act

[54] As I already stated, the Act aims to prevent the disappearance of wildlife species and permit the recovery of those that, as a result of human activity, have become "extirpated," "endangered" or "threatened." It also aims to help manage "species of special concern" to prevent them from becoming endangered or threatened.

[55] These species are all "species at risk" within the meaning of the Act. They are defined as follows:

a) "extirpated" species means a wildlife species that no longer exists in the wild in Canada, but exists elsewhere in the wild;

b) "endangered" species means a wildlife species that is facing imminent extirpation or extinction;

c) "threatened" species means a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction; and

d) species "of special concern" means a wildlife species that may become a "threatened" or an "endangered" species because of a combination of biological characteristics and identified threats.

[56] These four categories of species at risk are all “wildlife species,” meaning a species, subspecies, variety or geographically or genetically distinct population of animal, plant or other organism, other than a bacterium or virus, that is wild by nature and is native to Canada, or has extended its range into Canada without human intervention and has been present in Canada for at least 50 years.

[57] Essentially, the Act is comprised of three main elements: (i) adding wildlife species to the List of Wildlife Species at Risk; (ii) the development and implementation of recovery strategies and management plans for species listed as at risk; and (iii) the implementation of a system of prohibitions, with appropriate sanctions, and law enforcement activities under the Act.

a) *Wildlife species listing process*

[58] First, the Act established a process for listing wildlife species (sections 14 to 31). This process is guided by the COSEWIC, a committee of independent experts appointed by the Minister. These experts, as members of COSEWIC, are not part of the public service of Canada. COSEWIC’s main mission is to assess the status of each wildlife species it considers to be at risk and, as part of the assessment, identify existing and potential threats to the species. It is then responsible for classifying the species as extinct, extirpated, endangered, threatened or of special concern. It can conclude whether or not the species is at risk at the time of its assessment or it can indicate that it does not have sufficient information to render a decision. It is also responsible for periodically assessing the status of species at risk and, if appropriate, reclassifying or declassifying them (section 15).

[59] Once it has completed its assessment, COSEWIC must submit a copy of it to the Minister. The Minister must then indicate how the Minister intends to respond to the assessment and, to the extent possible, provide timelines for action (section 25). Then, the Governor in Council may, on the recommendation of the Minister, accept COSEWIC's assessment and add the species in question to the List of Wildlife Species at Risk, decide not to add the species to the List, or refer the matter back to COSEWIC for further information or consideration. However, if, within nine months after receiving COSEWIC's assessment, the Governor in Council still has not made a decision, the Minister shall, by order, amend the List of Wildlife Species at Risk in accordance with COSEWIC's assessment (section 27).

[60] A wildlife species can also be listed on the Species at Risk List on an emergency basis when the Minister, at the request of any person, is of the opinion that there is an imminent threat to the survival of the species in question (section 28). When the Minister reaches this conclusion, the Minister must make a recommendation to the Governor in Council that the List be amended to list the species as an "endangered species" (section 29). Within one year after the making of the order, COSEWIC, after having a status report on the wildlife species prepared, must confirm to the Minister the classification of the species, recommend to the Minister that the species be reclassified, or recommend to the Minister that the species be removed from the list (section 30). The Minister may then make a recommendation to the Governor in Council with respect to amending the List (section 31).

b) *Development and implementation of recovery strategies and management plans for any species listed as a "species at risk"*

[61] Second, the Act provides a mechanism for developing and implementing recovery strategies for any species on the Species at Risk List (sections 37 to 55) or management plans for any wildlife species listed as a species of special concern (sections 65 to 72). When possible, such strategies and plans are developed in collaboration with any provincial or territorial minister in the province or territory where the species in question is found or any federal minister responsible for the area where the species is found. This duty of cooperation also extends to any Aboriginal organization that the competent minister believes is directly affected by the strategy or management plan, or to the wildlife management board established under a land claims agreement when the species is in an area where such a board performs functions in respect of wildlife species. Such a strategy must also be prepared in consultation with the landowners and any other persons whom the competent minister considers to be directly affected by the strategy (sections 39 and 66).

[62] In developing a recovery strategy for a given species, the competent minister must determine whether the recovery is technically feasible. If the recovery is determined feasible, the competent minister must ensure that the strategy addresses threats to the survival of the species and its habitat, and includes, among other things, a broad strategy to be taken to address those threats (section 41).

[63] The competent minister first prepares a proposed recovery strategy and includes it in the Registry (section 42). Within 60 days after it is included in the Registry, any person may file comments with the competent minister regarding the proposed recovery strategy (section 43). The competent minister must report on the implementation of any recovery strategy every five

years (section 46). The same requirements apply to the development of a management plan for a wildlife species of special concern (sections 68 and 72).

[64] Moreover, any recovery strategy must be accompanied by one or more management plans developed by the competent minister based on the recovery strategy. The development of an action plan is subject to the same collaboration requirements as a recovery strategy (section 47). An action plan must include, with respect to the area to which the action plan relates, an identification of the species' critical habitat, a statement of the measures that are to be taken to implement the recovery strategy for the species' survival and the protection of its critical habitat, a statement of the methods to be used to monitor the recovery of the species and its long-term viability, and an evaluation of the socio-economic costs of the action plan and the benefits to be derived from it (section 49).

[65] Just as with the recovery strategy, any person may file written comments with the competent minister regarding any action plan included in the Registry by that minister.

[66] In implementing an action plan or management plan with respect to aquatic species, a migratory bird protected by the *Migratory Birds Convention Act, 1994*, SC 1994, c. 22 [Protected Migratory Bird], or any other wildlife species on "federal lands," the competent minister makes any regulations that are necessary in the opinion of the competent minister (sections 59 and 71). An "aquatic species," according to the definition given in the Act, means a wildlife species that is a fish, as defined in section 2 of the *Fisheries Act*, RSC 1985 c. F-14, or a marine plant, as defined in section 47 of that Act. "Federal land" is defined by the Act as three main categories of

federal land: (i) land that belongs to Her Majesty in right of Canada, or that Her Majesty in right of Canada has the power to dispose of, and all waters on and airspace above that land; (ii) the internal waters of Canada and the territorial sea of Canada; and (iii) reserves and any other lands that are set apart for the use and benefit of a band under the *Indian Act*, RSC 1985, c. I-5 (section 2).

[67] The competent minister must monitor the implementation of an action plan five years after the plan comes into effect. The follow-up report must discuss the progress toward meeting the objectives and the ecological and socio-economic impacts of its implementation (section 55).

c) *System of prohibitions and law enforcement activities*

[68] Finally, as the third main component, the Act establishes a prohibition system (sections 32 to 36 and 58 to 64), with sanctions (sections 97 to 119), the application of which is assured by law enforcement activities (sections 85 to 96).

[69] A first group of prohibitions concerns the individuals of a species at risk and its residence (sections 32 to 36). Thus, no person, on pain of sanction, shall kill, harm, harass, capture or take an individual of a wildlife species that is listed as an endangered or threatened species, nor shall any person possess, collect, buy or sell such an individual, or any part or derivative of such an individual (section 32). Also, no person shall damage or destroy the residence of an individual of a wildlife species that is listed as an extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada (section 33).

[70] These prohibitions, if they are not related to individuals of an aquatic species or species of Protected Migratory Birds, or their residence, do not apply in a province other than on federal lands unless it is stipulated in an order by the Governor in Council, adopted on the recommendation of the Minister. However, such a recommendation can be made only after the Minister has consulted the competent provincial minister. If, however, the Minister is of the opinion that the laws of the province do not effectively protect the species or the residences of its individuals, the Minister shall recommend that the Governor in Council make the order (section 34).

[71] This first group of prohibitions also protects the individuals of wildlife species that are not listed as species at risk under the Act but are classified as an endangered species or threatened species by a provincial or territorial minister. However, these prohibitions apply only to individuals and residences on federal land in the province or territory (section 36).

[72] A second group of prohibitions aims to protect the critical habitat of a species listed on the List of Wildlife Species at Risk (sections 58 to 64). Critical habitat means the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or in an action plan for the species (section 2). Thus, no person shall destroy any part of the critical habitat of such a species if the critical habitat is on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada, or if the species is an aquatic species or a species of Protected Migratory Birds (section 58).

[73] This prohibition also applies to any part of the critical habitat of a wildlife species classified by a provincial or territorial minister as an endangered species, that is on federal land and that the provincial or territorial minister has identified as essential to the survival or recovery of the species. However, the prohibition applies only to the portions of this habitat that the Governor in Council may, on the recommendation of the competent minister, by order, specify (section 60).

[74] Moreover, no person shall destroy any part of the habitat of an endangered or threatened species on the List of Wildlife Species at Risk, other than an aquatic species or species of Protected Migratory Birds that is in a province or territory and that is not a part of federal lands. Once again, the prohibition applies only to the portions of this habitat that the Governor in Council may, on the recommendation of the competent minister, by order, specify. This recommendation can be made when a provincial or territorial minister requests it. However, it must be made if, after consultation with the appropriate provincial or territorial minister, the competent minister is of the opinion that there are no provisions in, or other measures under, this or any other Act of Parliament that protect the particular portion of the critical habitat and the laws of the province or territory do not effectively protect the critical habitat (section 61). Such an order expires five years after the day on which it was made and can be extended.

[75] Moreover, 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 section 58, 60 or 61 (section 64). The regulations must prescribe the procedures to be followed in claiming compensation, 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 the terms and conditions for the provision of compensation.

[76] The offence and penalty regime associated with these two prohibition groups is set out in section 97 of the Act. Thus, every person commits an offence who contravenes subsection 32(1) or (2), section 33, or subsection 36(1), 58(1), 60(1) or 61(1). The severity of the penalty—a fine, imprisonment or both—varies depending on if there was a conviction on indictment or a summary conviction and on whether the offender is a corporation, a non-profit corporation or an individual. Moreover, section 108 allows alternative measures to be used to deal with a person who is alleged to have committed an offence, if certain conditions are met.

[77] However, this regime does not apply to a person who is engaging in activities "related to public safety, health or national security, that are authorized by or under any other Act of Parliament or activities under the *Health of Animals Act* and the *Plant Protection Act* for the health of animals and plants," or activities "authorized under section 73, 74 or 78 by an agreement, permit, licence, order or similar document" (section 83). Section 73 gives the competent minister the power to enter into an agreement with a person—or issue a permit to a person—authorizing the person to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals if (i) the activity is scientific research relating to the conservation of the species and conducted by qualified persons; (ii) the activity benefits the species or is required to enhance its chance of survival in the wild; or (iii) affecting the species is incidental to the carrying out of the activity. Section 74 allows, under the

conditions set out in section 73, an agreement, permit, licence, order or other similar document to be entered into, issued or made authorizing a person or organization to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals. According to section 78, the same is true for an agreement, permit, licence or order to be entered into, issued or made by a provincial or territorial minister under an Act of the legislature of a province or a territory.

[78] Lastly, the Minister, in implementing the system of prohibitions and offences established by the Act, has the powers vested in him or her under sections 85 to 96, which deal with law enforcement activities. Thus, the Minister has the authority to designate enforcement officers for the purposes of this Act, who are authorized, after obtaining a judicial warrant, to conduct inspections, searches and seizures at any location authorized by the warrant (sections 85 to 92). The Minister has the power to investigate any alleged offence under the Act. The Minister has the authority to investigate all matters that he or she considers necessary to determine the facts relating to the alleged offence (sections 93 and 94). The Minister may suspend or conclude the investigation if he or she is of the opinion that the alleged offence does not require further investigation or the investigation does not substantiate the alleged offence (section 95). At any stage of the investigation, the competent minister may send any documents or other evidence to the Attorney General for a consideration of whether an offence has been or is about to be committed, and for any action that the Attorney General may wish to take (section 95).

[79] Finally, this Act is binding on Her Majesty in right of Canada or a province (section 5). It is also based on the principle from the Convention on Biodiversity that if there are threats of

serious or irreversible damage to a wildlife species, cost-effective measures to prevent the reduction or loss of the species should not be postponed for a lack of full scientific certainty (Act, Preamble; also see: *Centre québécois du droit de l'environnement*, at paragraph 6).

(3) Section 80 of the Act

[80] Under section 80 of the Act, 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. The emergency order may identify any habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates. Before making a recommendation, the competent minister must consult "every other competent minister." This "other competent minister" will be the Minister responsible for the Parks Canada Agency, the Minister of Fisheries and Oceans or the Minister, as applicable.

[81] Moreover, under subsection 80(2), the Minister must recommend to the Governor in Council that an emergency order be made if he or she is of the opinion that a species "faces imminent threats to its survival or recovery."

[82] According to subsections 80(4)(a), (b) and (c)(i), this type of order may be made to protect an aquatic species, a species of Protected Migratory Bird or any other species on the List of Wildlife Species at Risk on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada.

[83] When an emergency order is made pursuant to one or more of these paragraphs or subparagraphs, it may provide for three things: (i) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates; (ii) include provisions requiring the doing of things that protect the species and that habitat; and (iii) include provisions prohibiting activities that may adversely affect the species and that habitat.

[84] Subparagraph 80(4)(c)(ii) allows the Governor in Council to make an emergency order to protect any species on the List of Wildlife Species at Risk, on land other than federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada. In other words, this provision allows the Governor in Council to make an emergency order to protect any species on the List of Wildlife Species at Risk, whether or not it is an aquatic or Protected Migratory Bird species and regardless of its range.

[85] Like an order made under subparagraphs 80(4)(a), (b) and (c)(i), an order made under subparagraph 80(4)(c)(ii) 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 prohibiting activities that may adversely affect the species and that habitat. However, it may not include provisions requiring the doing of things that protect the species and that habitat.

[86] Section 80, in its entirety, reads as follows:

Emergency order	**Décrets d’urgence**
80 (1) The Governor in Council may, on the recommendation of the competent minister, make an	**80 (1)** Sur recommandation du ministre compétent, le gouverneur en conseil peut prendre un décret d’urgence

emergency order to provide for the protection of a listed wildlife species.

visant la protection d’une espèce sauvage inscrite.

Obligation to make recommendation

Recommandation obligatoire

(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.

(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

Consultation

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

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

Contents

Contenu du décret

(4) The emergency order may

(4) Le décret peut :

(a) in the case of an aquatic species,

a) dans le cas d’une espèce aquatique :

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

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

(ii) 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;

(ii) imposer des mesures de protection de l’espèce et de cet habitat, et comporter des dispositions interdisant les 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 species and that habitat; and

(B) imposer des mesures de protection de l'espèce, et comporter des dispositions interdisant les activités susceptibles de nuire à l'espèce et à cet habitat;

(c) with respect to any other species,

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

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

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

(A) identify habitat that is necessary for the survival or recovery of the species in the

(A) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans

area to which the emergency order relates, and	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 prohibiting activities that may adversely affect the species and that habitat.	**(B)** comporter des dispositions interdisant les activités susceptibles de nuire à l’espèce et à cet habitat.
Exemption	**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.

[87] According to subparagraph 97(1)(b) of the Act, every person who contravenes a provision of an emergency order under section 80 and prescribed by this order commits an offence punishable in the same way as the offence committed in subsections 32(1) or (2), in section 33 or in subsections 36(1), 58(1), 60(1) or 61(1) of the Act. Under subsection 97(2), the emergency order may prescribe which of its provisions may give rise to an offence.

[88] The exception system set out in section 83 of the Act, that is, the same, as we saw, that applies to both groups of prohibitions established by the Act, also applies to the emergency orders made under section 80, including subparagraph 80(4)(c)(ii).

[89] Finally, the Act does not specify the duration of an emergency order made under its authority. However, it specifies in section 82 that the competent minister must make a recommendation to the Governor in Council that the emergency order be repealed if the competent 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."

(4) Groupe Candiac's position

[90] Groupe Candiac does not dispute the Act in its entirety. Apart from subparagraph 80(4)(c)(ii), it submits that the Act is perfectly in line with the division of powers in the CA 1867. That is because, according to the applicant, the Act first and foremost protects wildlife species—aquatic species and Protected Migratory Birds—and spaces—federal land—and there is no question about how it relates to the legislative authority of Parliament.

[91] Moreover, it goes on to say that the Act is based on the explicit recognition 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" (Act, Preamble). In other words, the Act reflects this recognition by playing, in the

protection and recovery of species at risk in Canada, a complementary role to the one played by the provinces, specifically a role limited to the species and areas under federal jurisdiction.

[92] Subparagraph 80(4)(c)(ii), according to Groupe Candiac, stands out by offering a "safety net" allowing emergency intervention when a species at risk and area not under federal jurisdiction is facing an imminent threat. By giving the Governor in Council the authority to act as the ultimate protector of species at risk in Canada, all species and all areas combined, it takes away, for all intents and purposes, the provinces' power to play their role with respect to species at risk that are neither aquatic species nor Protected Migratory Birds and are located in areas under their jurisdiction. As evidence of this, it points to the certificate obtained from the Minister of Sustainable Development, Environment and the Fight against Climate Change under the Quebec legislation on the environment, which authorized it to proceed with the development work on lands included in the area to which the Emergency Order relates, and which, according to the applicant, became invalid after the Order was made.

[93] The pith and substance of subparagraph 80(4)(c)(ii) is to allow the Government of Canada to impose, under certain circumstances deemed urgent, standards of conduct to ensure, on provincial territory, the protection of species at risk other than the species under its jurisdiction.

[94] However, Groupe Candiac contends that, in pith and substance, subparagraph 80(4)(c)(ii) does not fall under any of the heads of power attributed to Parliament by the CA 1867. In particular, it is of the view that this provision does not satisfy the jurisprudential markers of a

valid provision of criminal law, because it is purely regulatory in nature. In this way, it differs from the provisions in the *Canadian Environmental Protection Act* that were in issue in *Hydro-Québec* (RSC (1985) version, c. 16 (4th Supp.)) [CEPA], of which the Supreme Court of Canada confirmed the constitutional validity as valid measures of criminal law.

[95] This is the case because rather than making general prohibitions that apply to the whole country, accompanied by regulatory exemptions, Parliament chose to implement, with the combined effect of subparagraph 80(4)(c)(ii) and section 83, a system authorizing the executive branch to impose in a discretionary manner, in a designated area, prohibitions with sanctions from which exemptions based on agreements, permits, licences or orders are possible, the content of which is again left to the discretion of the executive branch. Moreover, the technique used puts the alleged offence in the superintending and reforming power of the courts from an administrative law standpoint, a situation that is in conflict with the rule that the legality of provisions creating criminal offences can be assessed only with respect to the CA 1867 or the *Canadian Charter of Rights and Freedoms* [the Charter].

[96] Groupe Candiac adds that subparagraph 80(4)(c)(ii) was not adopted to suppress an evil or counter a feared injury, as required by the validity flags of a measure of criminal law, but strictly in the interest of efficiency or consistency in the application of standards that the Government of Canada wishes to implement across the country to protect species at risk. Therefore, subparagraph 80(4)(c)(ii) has a "colourable purpose" under which Parliament wrongfully interferes in the provinces' jurisdiction.

[97] Moreover, according to Groupe Candiac, Parliament's jurisdiction over peace, order and good government does not justify the adoption of subparagraph 80(4)(c)(ii). Justified, according to the Attorney General, under the national dimensions doctrine, one of the two parts of this authority, its purpose—to ensure the protection, on an emergency basis, of a species at risk under the jurisdiction of the provinces, but facing imminent threats to its survival or recovery—does not, in the opinion of Groupe Candiac, have the indivisibility, singleness or particularity required to be clearly distinguishable from matters of provincial interest in this area. In this regard, Groupe Candiac notes that Parliament itself recognized that the conservation of wildlife species in Canada was, on the contrary, "shared among the governments in this country."

[98] Moreover, there were no gaps to be filled in the province's powers in that area, as shown by the various measures, legislation and so on adopted by Quebec to protect species at risk on its territory, including the Western Chorus Frog. Regardless, Groupe Candiac argues that if the national dimensions doctrine were to apply to the protection of species at risk, it would apply only to cross-border wildlife species, which is clearly not the case for the Western Chorus Frog, which never travels more than 300 metres on average from its breeding ground throughout its life.

(5) Subparagraph 80(4)(c)(ii) is a valid measure of criminal law

a) *The criminal law power*

[99] Parliament has jurisdiction over criminal law according to subsection 91(27) of the CA 1867. This power is exclusive and plenary, and its reach has always been broadly defined; it

is often said it is not “frozen in time” and that it “stands on its own” as federal jurisdiction. It is expressed not only in the *Criminal Code*, RSC 1985, c. C-46, but also in a number of acts, including the *Food and Drugs Act*, RSC 1985, c. F-27; the *Tobacco Act*, SC 1997, c. 13; the *Firearms Act*, SC 1995, c. 39; and the CEPA (*Firearms Reference*, at paragraphs 28-29; *Hydro-Québec*, at paragraphs 119-122).

[100] Thus, a law is considered to be under Parliament’s jurisdiction in this area when it stipulates a prohibition combined with a sanction and this prohibition is founded on a “legitimate public purpose,” associated with an “evil” that the legislature seeks to fight or suppress or with threatened interests that it seeks to safeguard (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199, at paragraph 28 [*RJR-MacDonald*]). Public peace, order, security, health and morality are considered legitimate public purposes of criminal law. However, this list is not exhaustive. Environmental protection was added in recent years (*Hydro-Québec*, at paragraph 123). Groupe Candiac is not arguing that.

[101] Parliament’s plenary criminal law power has only one reservation with regard to the division of powers: it cannot be employed colourably. In other words, it cannot be used to “colourably invade areas of exclusively provincial legislative competence” (*Hydro-Québec*, at paragraph 121, citing *Scowby v. Glendinning*, [1986] 2 SCR 226, at page 237).

[102] Consequently, in this case, we must first determine if, in pith and substance, subparagraph 80(4)(c)(ii) has a legitimate public purpose in criminal law and, therefore, a purpose associated with the suppression of an “evil.” In my opinion, there is no doubt. We must

then determine if it colourably invades areas of exclusively provincial legislative competence. In my view, it does not. Finally, we must determine whether the system of prohibitions established by subparagraph 80(4)(c)(ii) resembles a criminal law system. I am of the opinion that it does.

b) *Subparagraph 80(4)(c)(ii) has a legitimate public purpose of criminal law*

[103] As we have seen, the pith and substance of subparagraph 80(4)(c)(ii) is, according to Groupe Candiac, to allow the Government of Canada to impose, under certain circumstances deemed urgent, standards of conduct to ensure, on provincial territory, the protection of species at risk other than the species under its jurisdiction.

[104] According to the Attorney General, it is, by virtue of the purpose and the legal and practical effects of subparagraph 80(4)(c)(ii), 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. This is reflected in the Preamble of the Act and serves, as affirmed by the main protagonists of the Act before Parliament, as a “safety net” when the citizen, provincial or territorial measures already in place do not protect a species from an imminent threat to its survival. This emergency power has two parts, namely the identification of the habitat that is necessary for the survival or the recovery of the species and the prohibition, on pain of sanctions, of activities that expose this species to imminent threats against its survival or recovery. The purpose and ultimate legal and practical effect are to obtain immediate protection of the species to prevent, in the words of Justice Martineau in *Centre québécois du droit de l’environnement*, its “brutal and sudden” disappearance (*Centre québécois du droit de l’environnement*, at paragraph 78).

[105] I prefer this characterization. I would add the following. Given the necessity of acting quickly in the event of an imminent threat, subparagraph 80(4)(c)(ii) authorizes making an order without having to make consultations and sticking to the formalities necessary in cases where, under sections 34 and 61 of the Act, one of the two groups of prohibitions under the Act must be applied for a species other than an aquatic species or Protected Migratory Bird, and in an area other than on federal lands.

[106] Thus, like section 35 of the CEPA, which *Hydro-Québec* considered and which allowed an interim order to be made to deal with a significant danger to the environment, subparagraph 80(4)(c)(ii) is ancillary to the system of prohibitions established by the Act and, also like section 35, it makes it possible to circumvent the ordinary rules of this system when immediate action is required (*Hydro-Québec*, at paragraph 155).

[107] Now, does subparagraph 80(4)(c)(ii) intend to suppress an "evil" within the meaning of the criminal law? As the Supreme Court of Canada case law teaches, Parliament has discretion, in exercising its criminal law power, "to determine what evil it wishes by penal prohibition to suppress and what threatened interest it thereby wishes to safeguard" (*Hydro-Québec*, at paragraph 119).

[108] In this case, Groupe Candiac argues that there is no evil to suppress. It maintains that, as was the case for the provisions struck down in *Assisted Human Reproduction Reference*, subparagraph 80(4)(c)(ii) is motivated first and foremost by a concern for efficiency and consistency in the application of standards that the Government of Canada wishes to establish for

the protection of wildlife species in Canada, no matter what species it is or where its population resides in Canada. Thus, from the moment it deems that a particular wildlife species is not sufficiently protected by a province, this provision allows the Government of Canada to apply the Act to wildlife species under "provincial jurisdiction." However, Groupe Candiac argues that ensuring the desired efficiency and consistency, even for wildlife species under "provincial jurisdiction," by exercising the criminal law power, colourably invades the jurisdiction of the provinces.

[109] I disagree.

[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.

[111] This is, according to a very large consensus reached by nearly every nation on the planet in the very recent Convention on Biodiversity, a "common concern of humankind," a new paradigm, as it were, in how we think about the environment and its preservation for this generation of human beings and the next.

[112] I reiterate that, based on the evidence in the record, most of the biodiversity indicators, on a global scale, are showing a marked decline with no sign of a slowdown. This is primarily the result of human activity that, for the first time in human history, is the main cause of the period of mass extinction that we are currently experiencing, the sixth since the origin of life on Earth. Notably, the extinction rates of wildlife species are currently one thousand times higher than in the past. Canada is no exception. Of the 976 species listed by COSEWIC in the fall of 2016, 15 have become extinct, 23 are extirpated, 320 are endangered, 172 are threatened, and 209 are of special concern (Scientific expert report on the protection of species and their habitats, Gabriel Blouin-Demers, PhD, Respondent's Record, Volume 4, pages 1255-1256).

[113] Moreover, loss of habitat is generally considered the main cause of biodiversity loss for terrestrial species globally. It is the leading cause for amphibians (Scientific expert report on the protection of species and their habitats, Gabriel Blouin-Demers, PhD, Respondent's Record, Volume 4, page 1258). According to this report, the impact of biodiversity loss is as follows:

> [TRANSLATION]
>
> Biodiversity loss alters how ecosystems function and makes ecosystems less resilient to environmental changes, including climate change. Biodiversity acts as an independent factor that directly controls many important ecosystem functions, such as nutrient recycling, water filtration, oxygen production or carbon sequestration. Biodiversity loss diminishes ecosystem functions and thereby reduces the quality of the environment.
>
> (Scientific expert report on the protection of species and their habitats, Gabriel Blouin-Demers, PhD, Respondent's Record, Volume 4, page 1259).

[114] In my opinion, subparagraph 80(4)(c)(ii) follows the same logic of protection of the environment, which is a legitimate public purpose of criminal law, as the system for regulating

the release of toxic substances in the environment, determined in *Hydro-Québec*, as having been validly enacted under Parliament's criminal law power. In both cases, the intent was to suppress conduct likely to diminish the quality of the environment. As was the case in the system in question in *Hydro-Québec*, in this case, I believe, there is a real link between the harm feared and the evil to be suppressed, namely between the sudden and brutal disappearance of a species at risk contributing to the preservation of biodiversity and our ecosystems and the reduction of the quality of the environment caused by human activity, which is now a universal concern shared by nearly every nation on the planet.

[115] As noted by the majority in *Hydro-Québec*, it would be surprising if Parliament could not use its plenary criminal law powers to protect the environment and suppress the evils associated with it:

> [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.
>
> [124] This approach is entirely consistent with the recent pronouncement of this Court in *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, where Gonthier J., speaking for the majority, had this to say, at para. 55:
>
> > It is clear that over the past two decades, citizens have become acutely aware of the importance of environmental protection, and of the fact that penal consequences may flow from conduct which harms the environment. . . . Everyone is aware that

> individually and collectively, we are responsible for preserving the natural environment. I would agree with the Law Reform Commission of Canada, *Crimes Against the Environment*, *supra*, which concluded at p. 8 that:
>
> . . . a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the *right to a safe environment*.
>
> To some extent, this right and value appears to be new and emerging, but in part because it is an extension of existing and very traditional rights and values already protected by criminal law, its presence and shape even now are largely discernible. Among the new strands of this fundamental value are, it may be argued, those such as *quality of life*, and *stewardship* of the natural environment. At the same time, traditional values as well have simply expanded and evolved to include the environment now as an area and interest of direct and primary concern. Among these values fundamental to the purposes and protections of criminal law are the *sanctity of life*, the *inviolability and integrity of persons*, and the *protection of human life and health*. It is increasingly understood that certain forms and degrees of environmental pollution can directly or indirectly, sooner or later, seriously harm or endanger human life and human health.
>
> Not only has environmental protection emerged as a fundamental value in Canadian society, but this has also been recognized in legislative provisions such as s. 13(1)(a) EPA.

[125] It is worthy of note that following Working Paper 44 (1985), from which Gonthier J. cites, the Law Reform Commission of Canada in a subsequent report to Parliament (*Recodifying Criminal Law*, Report 31 (1987)), noted its view of the desirability of using the criminal law to underline the value of respect for the environment itself. . . .

[Italics in original; underlining added.]

[116] Moreover, these judges did not hesitate to make stewardship of the environment a fundamental societal value and recognize that the criminal law "must be able to keep pace with and protect our emerging values" (*Hydro-Québec*, at paragraph 127). This stewardship does not stop with regulating the release of toxic substances into the environment; it also extends to countering the biodiversity loss resulting from human activity, because it diminishes the quality of the environment.

[117] I also agree with the parallel drawn by Justice Martineau, in *Centre québécois du droit de l'environnement*, with regard to "philosophical and legal" considerations, between what underlies the criminalization of cruelty against animals and what underlies the protection of species at risk:

> [4] While this is not a case involving cruelty to animals, it must be understood that the protection of species at risk is premised on the same type of philosophical and legal considerations. The Honourable Antonio Lamer noted in 1978, as a Quebec Court of Appeal judge, that [TRANSLATION] "[w]ithin the hierarchy of our planet animals occupy a place which, if it does not give rights to animals, at least prompts us, as animals who claim to be rational beings, to impose on ourselves behaviour which will reflect in our relations with animals those virtues we seek to promote in our relations among humans. . . . Thus humans, by the rule of s. 402(1)(a) [of the *Criminal Code*], do not renounce the right given to them by their position as supreme creatures to put animals at their service to satisfy their needs, but impose on themselves a rule of civilization by which they renounce, condemn and repress all infliction of pain, suffering or injury on animals which, while taking place in the pursuit of a legitimate purpose, is not justified by the choice of the means employed" (*R v Ménard*, [1978] JQ No 187 (QC CA), at paras 19 and 21).
>
> [5] Cruelty to animals is inflicted by exceptionally ill‑intentioned individuals whose actions are severely punished by society, and is a crime. Its suppression is therefore within the power of Parliament under subsection 91(27) of the *Constitution Act, 1867*, 30 & 31 Victoria, c 3. But humans are also gregarious beings who themselves live in society in an environment inhabited

> by all kinds of animal and plant species. What happens when humans, as supreme creatures pursuing their civilizing mission, settle in places where, just yesterday, the American eastern cougar or the Prairie grizzly bear reigned supreme over vast areas of land with the wolverine feared by our forebears? And when human activity destroys in its wake the natural habitat of all these wildlife species—animals and varieties of plants—that cannot tolerate urban life or agriculture, to the point that their survival is threatened in the relatively short to medium term? Have we collectively imposed on ourselves a rule of civilization by which we must prevent the annihilation of individuals of a threatened wildlife species and the destruction of their natural habitat?
>
> [6] This does seem to be the case, for otherwise the *United Nations Convention on Biological Diversity*, June 5, 1992, 1760 UNTS 79 [CBD], which entered into force on December 29, 1993, would not have been ratified by 196 states parties, including Canada. The otherness between humans and animals, between owners and their property, between people and things without an owner, has given way to a universal legal concept whereby wildlife species and ecosystems are part of the world's heritage and it has become necessary to preserve the natural habitat of species at risk. The *Species at Risk Act*, SC 2002, c 29 [federal Act], which was assented to on December 12, 2002, is in fact intended to implement Canada's obligations under the CBD. . . .

[118] Once again, it is entirely up to Parliament "to determine what evil it wishes by penal prohibition to suppress and what threatened interest it thereby wishes to safeguard" (*Hydro-Québec*, at paragraph 119). In light of the foregoing, there is no doubt in my mind that subparagraph 80(4)(c)(ii) seeks to suppress an "evil" as interpreted in the Supreme Court of Canada case law on Parliament's criminal law power.

c) *Subparagraph 80(4)(c)(ii) does not colourably invade exclusively provincial heads of power*

[119] Nevertheless, Groupe Candiac is urging me to conclude that subparagraph 80(4)(c)(ii) constitutes a skilled but colourable attempt by Parliament to establish a national, uniform and

efficient system of protecting species at risk, no matter what they are or where they reside, without regard for the jurisdiction of the provinces in this matter. It is asking the Court to follow the teachings of the *Assisted Human Reproduction Reference*, which it says is more recent than the *Hydro-Québec* case.

[120] An initial comment must be made. The *Assisted Human Reproduction Reference* is the product of a deeply divided Court, as three sets of reasons were needed to break the impasse. Specifically, two groups of four judges confronted each other. Not only did they disagree on the result, but they also disagreed on how to reach it. The decisive reasons, which were relatively brief, were those of a single judge, Justice Cromwell, who, from the outset, said that he disagreed with his colleagues on both sides regarding the first step of the constitutional analysis, that of the pith and substance of the impugned provisions. There was then a disagreement on the outcome of the appeal, and Justice Cromwell took the middle ground, in a way, between the group that would have invalidated each and every impugned provision and the group of judges that would have upheld their validity.

[121] Thus, it is hard to get from this Supreme Court judgment a clear consensus on how to approach the division of powers questions involving subsection 91(27) of the CA 1867.

[122] Also, if the *Human Assisted Reproduction Reference* questioned the scope of Parliament's criminal law power, it did not do so in a context where the protection of the environment was the focus of concern, which also mitigates, in my opinion, and with all due respect, the usefulness of this judgment in a case such as ours. In my view, this judgment has not

superseded *Hydro-Québec* as the leading precedent in questions of validity, with regard to the division of powers, and to exercising jurisdiction over criminal law to protect the environment.

[123] In any case, I was not convinced that the immediate or ultimate purpose of subparagraph 80(4)(c)(ii) is to regulate on a national basis, the protection of species at risk with efficiency and consistency, and thereby colourably invade the jurisdiction of the provinces. Like section 35 of the CEPA, it authorizes emergency intervention when a species at risk is facing an imminent threat to its survival or recovery. An order made under subparagraph 80(4)(c)(ii) is not permanent, because the Minister is required to recommend its repeal when, as we have seen, the Minister is of the opinion that the species targeted by the order is no longer exposed to the threat that justified making the order.

[124] Moreover, the evidence in the record reveals that the powers conferred on the Governor in Council under subparagraph 80(4)(c)(ii) have been used very sparsely up until now. Indeed, since the Act came into force in June 2003, it has been used only once, to protect the Greater Sage-Grouse, a species of bird that lives mainly in western Canada, from an imminent threat related to farming and oil development.

[125] It is also important to note that subparagraph 80(4)(c)(ii), as I have already stated, does not authorize the Governor in Council, unlike an emergency order involving an aquatic species, a Protected Migratory Bird or any species on federal land, to impose protection measures. The power it confers is limited to imposing prohibitions in relation to activities likely to harm the

species in question and the habitat that is necessary for its survival or recovery, and the identification of this habitat in the area to which the emergency order relates.

[126] It is hard to see, in this context, how subparagraph 80(4)(c)(ii) could be used to regulate, on a national scale, the protection of species at risk in the interest of efficiency and consistency or for any other reason. Parliament simply did not assume this power, at least in the cases covered by this provision. The omission is not benign. It signals, in my view, a desire to remain faithful to the general structure of the Act, which, in many ways, but with a view to complementarity of government action, treats the aquatic species, the Protected Migratory Birds and the species on federal lands differently from other species.

[127] Moreover, there is no evidence in this case that Parliament, when it enacted subparagraph 80(4)(c)(ii), had an "ulterior motive" or "was attempting to intrude unjustifiably upon provincial powers" (*RJR-MacDonald*, at paragraph 33). That this provision, according to the extrinsic evidence in the record, was intended as a "safety net" when a species at risk is facing an imminent threat to its survival or recovery and, in an emergency situation, there is no measure in place to counter this threat, in my opinion, reflects no such intent.

[128] An emergency order could clearly affect application of the provincial legislation in place. In this case, the Emergency Order affects, at least for Groupe Candiac's lands in the area to which the Emergency Order relates, the scope of the authorization certificate issued to Groupe Candiac in 2010 by the Minister of Sustainable Development, Environment and the Fight against Climate Change pursuant to the *Environment Quality Act*, CQLR c. Q-2, which allows Groupe

Candiac to proceed with the housing project located in the area to which the Emergency Order relates, provided that certain conditions, specifically to minimize the impact of said project on the local Western Chorus Frog population, are met. The Emergency Order also affects the permits issued in June 2016 by the municipality of Saint-Philippe, which authorized Groupe Candiac to undertake deforestation and backfilling in the area to which the Emergency Order would apply.

[129] However, as we have seen, the pith and substance doctrine tolerates encroachment on the other level of government's jurisdiction. This defining feature of the pith and substance doctrine is particularly important with respect to protection of the environment, which, it should be noted, is not on the list of heads of legislative power assigned to any level of government by the Canadian Constitution. As stated by the Supreme Court of Canada in *Oldman River*, the protection of the environment is an "abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty" (*Oldman River*, at pages 17 and 64) [Emphasis added]. Thus, the majority stated in *Hydro-Québec*, "[t]he legitimate use of the criminal law . . . in no way constitutes an encroachment on provincial legislative power, though it may affect matters falling within the latter's ambit" (*Hydro-Québec*, at paragraph 129).

[130] The pith and substance doctrine even considers that a matter may fall within one level of government's jurisdiction for one purpose and in one aspect and fall within another level of government's jurisdiction for another purpose and in another aspect (*Canadian Western Bank*, at paragraph 30). It is the double aspect theory. Therefore, if there is an operational conflict

between two laws enacted on the same matter by each level of government, in the event that one allows a thing and the other does not, this theory engages the principle of federal paramountcy, which has federal law prevail over provincial law (*Canadian Western Bank*, at paragraph 69; *COPA*, at paragraph 62).

[131] While the existence of such a conflict was not identified in this case, this brief reminder of the conterminous properties of the pith and substance doctrine shows how provincial and federal legislation on the environment can coexist, despite the "considerable overlaps" likely to characterize this coexistence. In fact, use of the criminal law power "in no way precludes the provinces from exercising their extensive powers under s. 92 to regulate and control the pollution of the environment either independently or to supplement federal action" (*Hydro-Québec*, at paragraph 131).

[132] I note in passing that following the announcement, in December 2015, in response to the judgment in *Centre québécois du droit de l'environnement*, that the Minister would recommend to the Governor in Council that an emergency order be made concerning the Western Chorus Frog, the governments of Canada and Quebec were quick to establish a working group whose mandate was to identify possible solutions and implement procedures in the short and medium term [TRANSLATION] "to avoid situations that might require the use of orders under sections 34, 61 and 80 of the Act to protect terrestrial species in Quebec on non-federal lands" (Respondent's Record, Exhibit MD-11, Volume 2, page 652). The document outlining the working group's mandate stated the principle of shared responsibility of the two levels of government in protecting species at risk in Canada and their complementarity of action in this matter. It

underscored that making an order under sections 34, 61 and 80 of the Act was intended as a "last resort," but did not exclude exercising these powers. Rather, the working group's mandate was to find ways to limit its use as much as possible.

[133] The working group's creation, in the context of the announcement of the upcoming emergency order, signals, in my view, an acceptable mutual understanding of the role of each government and its respective legislation in the protection of species at risk and of the very clear and defined function of the power under subparagraph 80(4)(c)(ii), in particular. This may be why the government of Quebec did not intervene in this case even if it was served with a Notice of Constitutional Question, since Groupe Candiac is alone in claiming an unjustifiable encroachment of subparagraph 80(4)(c)(ii) on the jurisdiction of the provinces.

[134] Moreover, it must be understood, as this document reminds us and as I already mentioned, that the Act already authorizes making orders so that it applies to cases of species that are on non-federal land and are not aquatic species or species of Protected Migratory Birds. This is the case for the prohibitions under sections 32, 33 and 58, which, by order, can be applied to extend to those species. However, the provisions of the Act allowing such an extension—sections 34 and 61—are not being contested in this case. Their constitutional validity must then be presumed. Thus, if we must accept that such an extension is allowed by the Constitution, it becomes difficult, I think, to claim that the same thing cannot be done when a species at risk is facing an imminent threat to its survival or recovery and that exercising such a power unjustifiably encroaches on the jurisdiction of the provinces.

[135] This brings me back to the *Hydro-Québec* case, in which section 35 of the CEPA also allowed an interim order to be made when the ministers concerned were of the view that an immediate intervention was necessary with regard to a substance listed on the List of Toxic Substances established under this Act, because this substance was not regulated as it should be. Such an order could set limits on the quantity and concentration of emissions of the substance, controlling the areas where the substance may be released, controlling the commercial manufacturing or processing activity in the course of which the substance is released, stipulating the manner and conditions in which the substance may be advertised or offered for sale and regulating the packaging and labelling of the substance or of a material containing the substance (*Hydro-Québec*, at paragraph 105).

[136] Hydro-Québec and the Attorney General of Quebec maintained that it was impossible to justify such a provision under, *inter alia*, the criminal law power, because it was so invasive of provincial powers (*Hydro-Québec*, at paragraph 108). As we know, this claim did not prevail, the majority stating that the fear that section 35 (and its sister provision, section 34, which gives the Governor in Council broad regulatory power to regulate the quantity of substances considered dangerous to humans and the environment in general that may enter the environment and the conditions in which they may be released) would distort the federal-provincial balance seemed overstated (*Hydro-Québec*, at paragraph 131).

[137] I see no reason to find otherwise with regard to subparagraph 80(4)(c)(ii). Stating the opinion of the dissenting judges in *Hydro-Québec* is insufficient to convince me otherwise, considering that their point of view did not prevail. It is also not enough to submit the opinion of

authors criticizing the point of view retained by the majority, because that is the point of view binding on me.

[138] I also do not think that the principal of subsidiarity, which suggests that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity (*114957 Canada Ltée v. Hudson (Town)*, 2001 SCC 40, at paragraph 3, [2001] 2 SCR 241 [*Spraytech*]), can be used, as Groupe Candiac claims, to limit the otherwise plenary jurisdiction of Parliament over criminal law. This principle, like the notion of "co-operative federalism," a principle of the same nature, cannot be seen as imposing limits on the valid exercise of legislative authority (*Rogers Communications Inc. v. Chateauguay (City)*, 2016 SCC 23, at paragraph 39, [2016] 1 SCR 467). In this sense, it can neither override nor modify the division of powers. In other words, if it is used to understand what shaped Canadian federalism and what inspired the Fathers of Confederation to share as they did the legislative powers of the two levels of government, the principle of subsidiarity is not to remodel the parameters (*Canadian Western Bank*, at paragraph 45; Peter W. Hogg, *Constitutional Law in Canada*, 5th Ed. supplemented, Toronto (On), Thomson Reuters Canada, 2016 (loose-leaf updated to 2017-Rel.1), at pages 5-12 to 5-13).

[139] Finally, I give no weight to the argument that the authority under subparagraph 80(4)(c)(ii) is surplusage because of the system of prohibitions already in the Act. For one thing, I can clearly see the need for an emergency power such as the one in subparagraph 80(4)(c)(ii). The facts of this case, just as the presence of a provision such as

section 35 in the CEPA, provide us with a good illustration of that. Moreover, this kind of argument in a way challenges the wisdom of the choices made by Parliament or the efficiency of the measures it established. However, it is well established that this type of consideration is beyond the control of the courts when they question the validity of the laws with regard to the division of powers (*Firearms Reference*, at paragraph 57; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, at paragraph 3, [2015] 1 SCR 693).

[140] To succeed, Groupe Candiac had to show that subparagraph 80(4)(c)(ii), under criminal law, constitutes a colourable attempt by Parliament to encroach on the jurisdiction of the provinces. As the Federal Court of Appeal recently pointed out in *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2016 FCA 160 [*Syncrude*], this burden is significant (*Syncrude*, at paragraph 89). Groupe Candiac did not meet it.

d) *The system of prohibitions established by subparagraph 80(4)(c)(ii) resembles a criminal law system*

[141] A law, I will remind you, is considered to fall within Parliament's criminal law power when it stipulates a prohibition combined with a sanction and this prohibition is founded on a "legitimate public purpose", associated with an "evil" that Parliament seeks to fight or suppress. I have already determined that subparagraph 80(4)(c)(ii) was founded on such an objective and that this objective is associated with an "evil" to suppress within the meaning of the criminal law.

[142] Moreover, there is no doubt that subparagraph 80(4)(c)(ii) is intended, through its wording, to impose prohibitions and that these prohibitions, by the operation of section 97 of the Act, are combined with sanctions. However, Groupe Candiac argues that this system is purely regulatory in nature, because, rather than making general prohibitions that apply to the whole country and adding regulatory exemptions to this system of prohibitions, Parliament chose to implement, with the combined effect of subparagraph 80(4)(c)(ii) and section 83, a system authorizing the federal government to impose in a discretionary manner, in a designated area, prohibitions combined with sanctions and to make exemptions, based on agreements, permits, licences or orders, the content of which is again left to the discretion of the same government. However, it insists this is part of a regulatory regime and not a criminal law regime.

[143] Once again, I disagree. As the Attorney General pointed out, the Supreme Court of Canada has long recognized that Parliament may delegate to the executive branch the power to define or specify conduct that could have criminal consequences (*Hydro-Québec*, at paragraph 150; *Firearms Reference*, at paragraph 37; see also *Syncrude*, at paragraph 74). It also recognized that Parliament may also delegate the power to define the circumstances resulting in an exemption from the application of a criminal prohibition, as was done in the case of lotteries, which are prohibited by the *Criminal Code*, whereby the authority to order exemptions was delegated to the lieutenant governors of the provinces, who could then, with the issue of licences and permits, authorize holding lotteries in the province (*R. v. Furtney*, [1991] 3 SCR 89, at page 106 [*Furtney*]).

[144] In so doing, Parliament may authorize the establishment of detailed, precise and highly complex regulatory systems (*Firearms Reference*, at paragraph 37). Section 34 of the CEPA provides a good example by giving the Governor in Council broad regulatory power authorizing the Governor in Council to prescribe or impose requirements as varied as the quantity or concentration of a substance listed in the List of Toxic Substances that may be released into the environment, the places where such substances may be released, the manufacturing or processing activities in the course of which the substance may be released, the manner in which and conditions under which the substance or a product or material containing the substance may be stored, displayed, handled, transported or offered for transport, the packaging and labelling of the substance or a product or material containing the substance, the manner, conditions, places and method of disposal of the substance or a product or material containing the substance, including standards for the construction, maintenance and inspection of disposal sites, and the maintenance of books and records for the administration of any regulation made under this section.

[145] As the majority stated in *Hydro-Québec*, section 34 "precisely defines situations where the use of a substance in the List of Toxic Substances in Schedule I is prohibited, and these prohibitions are made subject to penal consequences" (*Hydro-Québec*, at paragraph 150). Thus, it is the executive branch and not Parliament that determines what is "criminal." In so doing, it may also, pursuant to subsection 34(2), make exemptions and it may do so on virtually any matter that can be defined as "criminal." It can even order that the regulations enacted under section 34 do not apply in a province that has equivalent provisions, thereby allowing asymmetrical application of the prohibitions in the regulations.

[146] Regarding the prohibitions enacted by interim order under section 35 of the CEPA, they are first ordered by the competent minister. In order to make it to the interim order expiry date, they must be approved by the Governor in Council. An order with the same effect as the interim order can then be made by the Governor in Council. It is valid for five years. Pursuant to paragraphs 35(1)(a) and (b), such an order can be made, I repeat, when the minister is of the opinion that a substance listed on the List of Toxic Substances established under this Act is not "adequately regulated" and that "immediate action is required to deal with a significant danger to the environment or to human life or health."

[147] Thus, the competent minister has the same powers as those given to the Governor in Council under subsections 34(1) and (2) of the CEPA. As we have seen, this power is very broad and includes that of making exemptions. Once again, the "crime," its conterminous properties and the cases in which it does not apply, are all defined by the executive branch, in this case, a minister.

[148] The Attorney General is correct in pointing out that in responding to environmental problems using the criminal law power, a flexible approach is desirable considering the scope and complexity of environmental protection and the wide range of activities that can result in degradation of the environment. Indeed, the Supreme Court of Canada agreed that Parliament can adopt a general approach in this matter, meaning an approach whereby an "exhaustive codification of every circumstance in which pollution is prohibited" is unnecessary, so that it is possible to respond "to a wide variety of environmentally harmful scenarios, including ones

which might not have been foreseen by the drafters of the legislation" (*Hydro-Québec*, at paragraph 134, citing *Ontario v. Canadian Pacific Ltd.*, [1995] 2 SCR 1031, at paragraph 43).

[149] Moreover, it is for this reason that the doctrine of vagueness established under section 7 of the Charter is not applied with the same intensity to the environmental protection legislation as to legislation on less complex matters, because to do otherwise "would be to frustrate the legislature in its attempt to protect the public against the dangers flowing from pollution" (*Hydro-Québec*, at paragraph 134).

[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.

[151] While they accepted that environmental protection was a legitimate public purpose of criminal law, the dissenting judges in *Hydro-Québec* concluded that the impugned provisions were more an attempt to regulate environmental pollution than to prohibit it. In particular, they were of the opinion that the prohibitions were ancillary to the regulatory scheme and not the

other way around. However, in this case, the Governor in Council's authority is limited, pursuant to subparagraph 80(4)(c)(ii), to imposing prohibitions while identifying, in the area to which the emergency order would apply, the habitat critical to the survival or recovery of the species at risk. As I said, contrary to the emergency orders under subparagraphs 80(4)(a), (b) and (c)(i), the Governor in Council does not have, under subparagraph 80(4)(c)(ii), the authority to impose protection measures, indicating a more limited intervention authority than the one that seemed to concern the dissenting judges in *Hydro-Québec*.

[152] Groupe Candiac placed considerable emphasis on the testimony of the professor of constitutional law, Dale Gibson, before the Standing Committee on Environment and Sustainable Development, which, in the spring of 2001, conducted the assessment, after the second reading, of the bill that would become the Act, and on the study it co-authored, in November 1999, with former Justice of the Supreme Court of Canada, Gérald V. La Forest [the 1999 Study], who notably wrote the reasons of the majority in *Hydro-Québec*, on the federal protection of species at risk and the criminal law power.

[153] During his testimony before this Committee, Professor Gibson essentially pointed out "two of the weaknesses that seem to [him] to be most obvious" about the bill. The first weakness was related to the fact that, according to Professor Gibson, Parliament did not "take a very strong position with respect to species that are on provincial or territorial lands unless they happen to be aquatic species or migratory birds." He considered this "an unnecessarily narrow view of federal constitutional powers." He believed that the situation was at least as concerning with regard to the protection of critical habitat "everywhere," because, according to him, the bill was "very

weak" in this regard (Groupe Candiac's book of authorities and doctrine, Schedule B, Book 1, Tab 13, page 2 of 17).

[154] This first big weakness, according to Professor Gibson, was in sections 34, 35, 58 and 61 of the bill, because these provisions made subject to a cabinet order the application of prohibitions enacted by the bill on land other than federal land. He believed that "the advice the government is receiving from some of its advisers says there is not sufficient constitutional jurisdiction to go further than the legislation goes" and that it was his duty, as a constitutional lawyer, to intervene to "say such concern is misplaced" (Groupe Candiac's book of authorities and doctrine, Schedule B, Book 1, Tab 13, page 3 of 17). Clearly, this does not help Groupe Candiac's case.

[155] Citing the 1999 Study, Mr. Gibson's second concern was related to the technique used to apply the prohibitions enacted by the Act to non-federal lands, namely the orders made and the asymmetrical geographical application of the prohibitions enacted by the bill that could result. Section 61 of the bill, regarding the application of prohibitions concerning the critical habitat of species at risk on non-federal land, seemed particularly problematic to him. However, he recognized that "somewhat similar examples of ministerial discretion were held to be constitutionally valid in the Hydro-Québec case—which was a Supreme Court of Canada decision on somewhat similar legislation," and that he was not prepared to say "that they are clearly outside the criminal law jurisdiction of the Parliament of Canada" (Groupe Candiac's book of authorities and doctrine, Schedule B, Book 1, Tab 13, page 3 of 17). In short, Professor

Gibson, in expressing this second concern, favoured the safest possible approach to avoid compromising what he saw as a bill that rests heavily on the powers of Parliament.

[156] The 1999 Study concluded as follows:

> 28 It is very clear that Parliament could, given its sole jurisdiction over criminal law, pass comprehensive legislation including prohibitions and providing a number of exemptions, dealing with the protection of *all* endangered and threatened species and their *habitat*. These exemptions resemble those found in the *Food and Drug Act*, the *Firearms Act* or the *Canadian Environmental Protection Act*, and criteria should be specified to limit the discretionary power for granting exemptions. Such legislation would respect all the necessary requirements for the valid exercise of the criminal law power, that is, a prohibition accompanied by a sanction for the purpose of protecting the environment, a valid criminal law purpose that is not colourable. However, if the legislation had to name prohibitions established by regulation, it would risk being perceived as more regulatory than criminal in nature. Therefore, it would be more cautious to include the prohibitions in the legislation itself.
>
> (Groupe Candiac's book of authorities and doctrine, Schedule B, Book 1, Tab 14, at paragraph 28)

[157] This study focused particularly on the risks associated with the fact that the Government of Canada proposed to include in the legislation [TRANSLATION] "a power to establish, by regulation, prohibitions against destroying habitat that would apply to some regions, such as those that do not already have efficient provincial or private protection," an approach that, according to the authors "might seem more 'regulatory' than the [*Canadian Environmental Protection Act*] and would more likely lead to an in-depth judicial review to determine whether it is, in fact, a valid measure of criminal law" (Groupe Candiac's book of authorities and doctrine, Schedule B, Book 1, Tab 14, at paragraph 20).

[158] Nevertheless, the authors recognized that while a general prohibition in the Act itself may suffice in protecting from destruction the habitat of a species at risk, a regulatory approach on a case by case basis could be necessary to "identify" the habitats. They also recognized that such an approach might be necessary "to address other types of problems with the legislation (and therefore might be justified under the criminal law power)", but specified that this issue went beyond the scope of their study (Groupe Candiac's book of authorities and doctrine, Schedule B, Book 1, Tab 14, at paragraph 19).

[159] I do not think that this second concern of Mr. Gibson, which was based on the 1999 Study, helps Groupe Candiac's case. Parliament ultimately chose, in sections 34, 35, 58 and 61 of the Act, the technique for which Professor Gibson expressed some reservations. However, once again, these provisions are not at issue, because Groupe Candiac is not challenging the Act in itself. Furthermore, there is no question, be it in Professor Gibson's testimony or in the 1999 Study, of section 80 of the bill, adopted as such by Parliament, which intends to give the executive branch the power of emergency intervention to counter an imminent threat to the survival or recovery of a species at risk.

[160] As the Supreme Court of Canada instructs us in the *Firearms Reference*, the legislature still must give the executive branch, to which it delegates the authority of defining the "crime", "undue" discretionary power (*Firearms Reference*, at paragraph 37). In this case, I believe that the power vested in the Governor in Council by means of subparagraph 80(4)(c)(ii), although it is poorly defined, is defined well enough to avoid the qualification of undue discretionary power. Thus, in a case such as ours, an emergency order can only be made if the species at risk "faces

imminent threats to its survival or recovery" and if the prohibited activities are likely to harm the species or habitat identified in the area to which the order would apply as necessary to the survival of the species or its recovery. The latitude given to the Governor in Council allows him or her to carefully adapt the prohibited activity based on the particularities of the species and its habitat and the circumstances of the imminent threat. This "case-by-case" approach, as we have just seen, is not in conflict with the criminal law power. In this case, I believe it is justified.

[161] Regarding Groupe Candiac's complaint about the asymmetrical geographical application of prohibitions imposed by an emergency order, recall that the Supreme Court invariably declared valid the criminal laws applied differently from one region to the other. One example of this, as we saw, was the provisions in the *Criminal Code* dealing with lotteries; this was also the case for provisions in the *Young Offenders Act*, SC 1980-81-82-83, c. 110, authorizing the provinces who make the choice, to substitute alternative measures under this Act with legal procedures otherwise applicable to the adolescent charged with an offence (*R v S (S)*, [1990] 2 SCR 254 [*R v S*]. In this last case, the Supreme Court, citing its former Chief Justice, the late Bora Laskin, in *R v. Burnshine*, [1975] 1 SCR 693, recalled that "there can be no doubt about Parliament's right to give its criminal or other enactments special applications, whether in terms of locality of operation or otherwise" (*R v. S*, at page 290). Once again, the need to carefully adapt the prohibited activity to the particularities of the species and its habitat and the circumstance of the imminent threat justified Parliament, in my view, with "special application" of the Act in these circumstances.

[162] Lastly, I cannot accept Groupe Candiac's argument that making an emergency order under subparagraph 80(4)(c)(ii) puts the resulting offence in the superintending and reforming power of the courts from an administrative law standpoint, a situation that is in conflict with the rule that the legality of provisions creating criminal offences can only be assessed with respect to the CA 1867 or the Charter. This argument, if it were accepted, would for all practical purposes spell the end of validly established regulatory schemes under the criminal law power. Moreover, Groupe Candiac provided no authority in support of their argument.

[163] Thus, in form, I have no hesitation in concluding that the prohibition regime established by combining subparagraph 80(4)(c)(ii) and section 83 meet the requirements of a criminal law prohibition regime.

[164] I therefore conclude that subparagraph 80(4)(c)(ii) of the Act has all the attributes of a measure validly enacted by Parliament under the authority vested in it under subsection 91(27) of the CA 1867.

[165] If I am wrong on this point, nevertheless, in my view, as we will see that the validity of subparagraph 80(4)(c)(ii) is saved because it is, in my view, sufficiently integrated in an otherwise valid legislative scheme.

(6) The peace, order and good government clause

[166] Having concluded that subparagraph 80(4)(c)(ii) has been validly enacted by Parliament under its criminal law power, it seems unnecessary to determine whether this provision would

also have been enacted under Parliament's power to legislate for peace, order and good government, on the basis that the protection of species at risk is a matter of national interest. I agree with the deference shown in this regard by the majority in *Hydro-Québec* for which the national concern doctrine, as a head of power, "raises profound issues respecting the federal structure of our Constitution which do not arise with anything like the same intensity in relation to the criminal law power" (*Hydro-Québec*, at paragraph 110).

[167] Giving Parliament general jurisdiction over environmental protection under the national concern doctrine, according to these judges, "could radically alter the division of legislative power in Canada" (*Hydro-Québec*, at paragraph 115). Since it is not strictly necessary to do so in this case, I won't delve into that.

> (7) Assuming subparagraph 80(4)(c)(ii) is *ultra vires* Parliament's legislative authority, it is nevertheless sufficiently integrated in a valid legislative scheme to be saved.

[168] Considering that, in my view, the enactment of subparagraph 80(4)(c)(ii) constitutes a valid exercise of Parliament's legislative power over criminal law, it is not necessary to examine the ancillary powers doctrine that all parties focused on. However, as I said, even if I concluded that Parliament did not have the authority required to enact this provision, I would still be of the view that it is saved by the ancillary powers doctrine.

[169] According to this doctrine, a potentially invalid legislative provision, in pith and substance, outside the competence of its enacting government, may be saved where it is an important part of a broader but otherwise valid legislative scheme enacted by this government

(*Quebec (Attorney General) v. Lacombe*, 2010 SCC 38, at paragraphs 35-36 and 38, [2010] 2 SCR 453 [*Lacombe*]).

[170] To assess its validity, the Court must decide whether such a provision has a rational and functional link to the legislative scheme to which it belongs. In other words, it must question whether the impugned provision actively allows the realization of objectives from that scheme, understanding that it is not enough to simply compensate for this scheme (*Lacombe*, at paragraph 45). In addition, the Court must be satisfied that the ancillary provision functionally completes the other provisions of the legislative scheme and make up for the weaknesses in said scheme, which, otherwise, would lead to an incoherent application of it or uncertainty (*Lacombe*, at paragraph 48). This exercise does not go so far as to require demonstration that without this ancillary provision, the scheme it is a part of is certain to fail (*Lacombe*, at paragraphs 42-43).

[171] In the decision he made in *Syncrude FC*, upheld on appeal (*Syncrude*), Justice Zinn applied the three following criteria to determine if, in the event that the provisions contested in this case exceeded Parliament's authority, the ancillary powers doctrine would allow it to be saved:

> 1. The scope of the heads of power in play and whether they are broad or narrow;
>
> 2. The nature of the impugned provision; and
>
> 3. The history of legislating on the matter in question.
>
> (*Syncrude FC*, at paragraph 90)

[172] The level of integration required to validate an otherwise *ultra vires* legislative provision, explained Justice Zinn, is based on the severity of the encroachment (*Syncrude FC*, at paragraph 90).

[173] The approach taken by Justice Zinn and the results of his analysis were endorsed without reserve by the Federal Court of Appeal (*Syncrude*, at paragraph 94).

[174] In this case, the applicant challenged the constitutional validity of a regulatory provision enacted under the CEPA, which required that diesel fuel produced in Canada contain at least 2% renewable fuel. Non-compliance with this regulatory provision constituted an offence under subsection 139(1) of the CEPA, which provides that "[n]o person shall produce, import or sell a fuel that does not meet the prescribed requirements" (*Syncrude FC*, at paragraphs 1 and 3).

[175] The applicant argued that, contrary to the government's claims, this regulatory provision did not, in pith and substance, constitute a legitimate use of federal power to legislate with respect to the criminal law. The applicant did not see it as a measure to combat atmospheric pollution but rather an attempt to regulate non-renewable resources and promote the economic benefits of protecting the environment by creating a demand for biofuels in the Canadian market. In particular, the applicant saw a specious encroachment in at least four areas of provincial jurisdiction, namely property and civil rights, local works and undertakings; matters of a merely local or private nature; and the development of non-renewable natural resources (*Syncrude FC*, at paragraphs 12 and 92).

[176] Justice Zinn concluded that the regulatory provision at issue, by assuming the powers of Parliament *ultra vires* was nevertheless valid under the ancillary powers doctrine. The application of the above three criteria to the circumstances of this case lead me to the same result.

[177] Before starting the analysis of these criteria, note that Groupe Candiac is not challenging the constitutionality of the Act in itself, which it deems to be consistent with the division of powers. In any event, subparagraph 80(4)(c)(ii) is part of a broader legislative scheme, the constitutionality of which I have no doubt. In fact, in its main points, the Act is based on the CEPA model: procedure for identifying species at risk, establishment of recovery measures for those species and prohibition regime accompanied by sanctions to protect these species and their habitat from human activities that could harm them, all with a view to offer broader protection of the environment and ecosystems, which determine quality and viability.

[178] In the eyes of Professor Gibson and Justice La Forest, it seemed "abundantly clear", as we saw, that Parliament, with the only jurisdiction over criminal law, could enact comprehensive legislation including prohibitions and exemptions to protect <u>all</u> species at risk and their habitat [Emphasis added]. In my view, the Act, in varying degrees, tends to do exactly that, even if, according to these two authors, it does not go far enough.

a) *The scope of the heads of power in play*

[179] This criterion considers the scope of heads of power in play and the fact that heads of powers with a broad scope are more prone to encroachment and overflow. Thus, when the

legislative scheme is enacted under a head of power with broad scope and the impugned ancillary provision encroaches on another head of power with broad scope, the encroachment is considered less serious and promotes the establishment of a rational and functional link between the provision and the legislative scheme at issue (*Syncrude FC*, at paragraph 91).

[180] For all practical purposes, the same heads of power at play in *Syncrude FC* are at play here: criminal law, on the one hand, and property and civil rights, land use planning (via jurisdiction of the provinces with regard to "municipal institutions") and matters of a purely local or private nature, on the other hand. Like Justice Zinn, I conclude that we are dealing with heads of power with broad scope on both sides, which means that there is less severe encroachment under subparagraph 80(4)(c)(ii) on the provincial heads of power in play.

b) *The nature of subparagraph 80(4)(c)(ii)*

[181] As we saw, subparagraph 80(4)(c)(ii) seeks to obtain immediate protection for a species at risk facing an imminent threat to its survival or recovery. It allows for emergency intervention when the measures already in place, whether they are private, provincial or territorial, are insufficient to counter the threat, thereby exposing the species to a sudden and brutal disappearance. In this sense, based on the extrinsic proof, subparagraph 80(4)(c)(ii) is a "safety net." In other words, in an emergency situation, it seeks to fill the deficits of the provincial and territorial schemes already in place.

[182] In *Syncrude FC*, the applicant argued that under the Alberta legislation already in place, it would be exempt from the requirement for renewable fuels that applies to those who produce,

import and sell fuel. Groupe Candiac made a similar case by pointing out that it has all the provincial and municipal authorizations required, which already contain measures to protect the Western Chorus Frog, to continue with the development of its lands in the area to which the Emergency Order applies.

[183] Justice Zinn noted that even if the general intent of the contested regulatory provision was to complete the provincial legislative measures in place, it would nevertheless prevail over those measures and, in so doing, encroach on certain elements of the provincial legislation on the matter. He concluded that it tended toward more serious encroachment on provincial jurisdictions (*Syncrude FC*, at paragraph 94).

[184] We can say the same of subparagraph 80(4)(c)(ii).

c) *History of legislating on the matter in question*

[185] Justice Zinn noted that Parliament had already invoked its power to legislate criminal law to validate regulatory schemes, particularly with respect to protection of the environment. He also noted that the provinces had also legislated regarding the use of renewable fuels. He concluded that this third factor was neutral (in the original version of the judgment: “In my view, this factor is therefore neutral”) (*Syncrude FC*, at paragraph 96).

[186] In this case, as we have seen, Quebec has also legislated to protect threatened or vulnerable species. Thus, it took an interest in the Western Chorus Frog, which it declared a “vulnerable wildlife species” and adopted a recovery plan to slow the decline of its population.

[187] Like Justice Zinn, I conclude that this third factor is neutral and adopt the general conclusion of his analysis of the ancillary powers doctrine, with the necessary modifications:

> [97] Overall, I conclude that had it been found that the [Impugned regulation], was ultra vires the federal government, the intrusion of the ancillary provisions into provincial powers would not be serious enough to warrant striking it down. The regulations are enacted under broad heads of power and only intrude on other broad heads of power. While they override some aspects of provincial legislation, in most respects, they seek to complement it. Finally, Parliament has a history of legislating to protect the environment and although the provinces have some history of legislating on the issue of renewable fuels, in my view, this is insufficient to demonstrate that the intrusion into provincial powers is serious.

[188] In summary, it is my opinion that subparagraph 80(4)(c)(ii) is constitutionally valid as a measure of criminal law. If I am wrong and in pith and substance, it turns out to be *ultra vires* Parliament, I think, in this case, it would be saved by the ancillary powers doctrine in that a rational and functional link connects it to a broader legislative scheme, the Act, which is otherwise valid.

[189] However, I would like to clarify that my conclusion on the constitutional validity of subparagraph 80(4)(c)(ii) is only true to the extent that the emergency order is made in a context in which, in the opinion of the competent minister, the species under the order, pursuant to subsection 80(2) of the Act, faces imminent threats to its survival or recovery.

[190] I am making this clarification because in *Adam v. Canada (Environment)*, 2011 FC 962 [*Adam*], the Chief Justice of this Court listed a number of general principles regarding the interpretation of section 80 of the Act. One of these principles is that the wording of

subsection 80(1) is sufficiently broad to permit the Governor in Council to make an emergency order on recommendation of the competent minister in situations other than those in subsection 80(2) (*Adam*, at paragraph 39) [Emphasis added].

[191] This case does not concern the constitutionality of subparagraph 80(4)(c)(ii) in an application context other than the one in subsection 80(2) of the Act. This broader question was not asked of me and I did not have to answer it to complete the determination of this case.

[192] Now all that remains is to determine whether the Emergency Order constitutes a form of disguised expropriation.

B. *Is the Emergency Order void on the grounds that it constitutes a form of expropriation without compensation?*

(1) Groupe Candiac's position

[193] Groupe Candiac argues that while the measure is constitutionally valid, the Emergency Order must nevertheless be invalidated because it has long been accepted that unless it is expressly authorized by the Act, a public authority cannot, without paying compensation, impose on a property owner restrictions amounting to confiscation of property. Otherwise, it said, this constitutes a form of disguised appropriation giving rise to a claim to nullify the expropriative measure.

[194] It argues that the prohibitions imposed by the Emergency Order are such that it cannot make reasonable use of its land in the Order's application area. Thus, it has been deprived of the

fundamental attributes of its property rights on this land. In concrete terms, Groupe Candiac stated that the Emergency Order will prevent the construction of about 353 of the 1,727 living units that it had reason to believe it could build on this land. It added that the Emergency Order will force it to incur substantial costs by requiring it to build a retention pond on the constructible part of its properties adjacent to the area to which the Order applies and to build a service lane the length of the existing highway.

[195] Groupe Candiac argues that section 952 of the *Civil Code of Québec* [CCQ], which stipulates that no owner may be compelled to transfer his ownership except by expropriation according to a law for public utility and in return for a just and prior indemnity, as well as the common law rule of *de facto* expropriation, which creates a rule of construction according to which the confiscation of property rights by the government necessarily includes the obligation to offer compensation unless the legislation at issue expressly indicates that no such compensation will be paid, arguing in favour of the nullity of the Emergency Order.

[196] It argues in this regard that paragraph 64(1)(b) of the Act, which gives the Minister the authority to provide fair and reasonable compensation for the losses suffered "as a result of any extraordinary impact of the application of . . . an emergency order" does not prevent section 952 of the CCQ or the common law rule of *de facto* expropriation from being applied because the Governor in Council has not always made it, as required in subsection 64(2) of the Act, the regulations supporting the exercise of power vested in the Minister pursuant to subsection 64(1).

[197] Subsection 64(2) of the Act reads as follows:

Regulations	**Règlements**
(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	(2) Le gouverneur en conseil doit, par règlement, prendre toute mesure qu'il juge nécessaire à l'application du paragraphe (1), notamment fixer :
(a) the procedures to be followed in claiming compensation;	a) la marche à suivre pour réclamer une indemnité;
(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	b) le mode de détermination du droit à indemnité, de la valeur de la perte subie et du montant de l'indemnité pour cette perte;
(c) the terms and conditions for the provision of compensation.	c) les modalités de l'indemnisation.

[198] Therefore, according to Groupe Candiac, without application regulations, the Minister has no authority to exercise its power to compensate. The result, it argued, is that the Act should be read as though it has no compensation plan for losses resulting from an emergency order, which opens the door to applying the aforementioned private law rules.

(2) Attorney General's position

[199] The Attorney General maintains that the Groupe Candiac's argument strays from the actual question at issue at this stage, which is whether the Emergency Order is *ultra vires* the enabling provision under which it was made, a question that must be resolved with a review of

the Order and section 80 of the Act. In his view, this review led to an inescapable result: the Governor in Council had all the authority needed to make the Emergency Order, even if it infringed on Groupe Candiac's property rights because the power to grant compensation under such circumstances does not rest with the Governor in Council, but rather with the Minister.

[200] Thus, according to the Attorney General, the fact that compensation was not paid has no bearing on the emergency order made under section 80and does not render it *ultra vires a posteriori*, because, based on the terms of the Act, it is the product of a decision made by another decision maker and this decision is necessarily made after the order.

[201] The Attorney General also claimed that the doctrine of de facto expropriation, which is merely an interpretive presumption, is without effect in this case because there is no silence to fill, the Act, in section 64, provides for the possibility of compensation for those affected by an emergency order. This type of presumption, he continued, must yield when there is a clear provision or, in the case of incompatibility with the intention of Parliament, which is not the case.

[202] Finally, the Attorney General argues that there is no disguised expropriation or de facto expropriation because Groupe Candiac has not demonstrated that the federal government has acquired a beneficial interest in the land subject to the Emergency Order or that all the reasonable uses of this land have been removed because the Emergency Order was made, the reasonable uses of land not being limited to profitable use.

[203] Moreover, he says that Groupe Candiac's submissions on the scope of harm it believes it has suffered in this case are not supported by the evidence on record. He argues that 20% of Groupe Candiac's remaining lands are in the area to which the Emergency Order applies and that a large part of it is wetlands, and therefore land more likely to be subject to protection measures.

(3) The concepts of the de facto expropriation or disguised expropriation have no impact on the validity of the Emergency Order.

[204] Like the Attorney General, I am of the view that de facto expropriation or disguised expropriation, which are part of common law and civil law, are of no hope to Groupe Candiac in this case. In other words, the question of the validity of the Emergency Order does not pass with these concepts because Parliament has already provided, in clear terms, a mechanism to compensate for losses suffered following the application of an emergency order and defines the scope of any "extraordinary impact" of such an order.

[205] This is not a regulation justifying the application of the rule of construction, which aims to protect a land owner from dispossession from his or her lands without compensation. There is no silence to fill in the Act in this regard, Parliament's intent has been clearly expressed in section 64 of the Act.

[206] But what about the absence of regulations pertaining to the Minister's power to pay compensation in relation to the application of an emergency order. Does it prevent the exercise of this power, as Groupe Candiac claims and, in so doing, the application of the concepts of de facto expropriation and disguised expropriation. I do not believe so.

[207] It is well established that an administrative decision-maker cannot invoke the absence of a regulation to not act when this inaction is equivalent to stripping a law or countering its application. We want to avoid creating a legal vacuum, thereby giving rise to an abuse of power by conferring to the regulatory authority [TRANSLATION] "a dimension that allows the Administration to indefinitely strip the legislature's express will" (Patrice Garant, *Droit Administratif*, 7th Ed., Montreal, Yvon Blais, 2017 [*Garant*], at pages 215-216). The principles only apply to the exercise of regulatory power, be it facultative or imperative, like in this case (*Garant*, at page 215). They are particularly useful in the absence of a regulation, if it was interpreted as having prevented the application of the legislation, or depriving the offender of a benefit conferred by it (*Irving Oil Ltd. et al. v. Provincial Secretary of New Brunswick*, [1980] 1 SCR 787, at page 795).

[208] This is what the Minister seems to have understood in this case, by releasing a statement to address the question of owners' rights to compensation for lands situated in the area to which the Emergency Order applies. I remember that it publicly stated no compensation would be paid. Although it did not address the situation of each owner affected, in my view, a decision was made pursuant to subsection 64(1) of the Act.

[209] However, this decision, which comes from a decision maker other than the Governor in Council, is in itself, judicially controllable, independent of the Emergency Order (*Habitations Îlot St-Jacques Inc. v. Canada (Attorney General)*, 2017 FC 535 [*Îlot St-Jacques*]). While it is necessarily related, the Minister's decision has no impact on the powers exercised by the

Governor in Council under section 80 of the Act. As stated by the Attorney General, this type of decision assumes that an emergency order was made previously.

[210] Note that the *Îlot St-Jacques* case involved another owner who had lands in the area to which the Emergency Order applied. That owner argued that the Emergency Order had to be invalidated because it was enacted without first consulting the owners who might be involved. He argued that the Emergency Order was made in violation of the rules of procedural fairness (*Îlot St-Jacques*, at paragraph 17).

[211] Once his judicial review began, this owner also wanted to tackle the fact that he had not been paid any compensation after the Emergency Order was made. Thus, he tried to amend his pleadings to force the Governor in Council to adopt the regulatory framework contemplated by subsection 64(2) of the Act. This application was denied by prothonotary Richard Morneau. This refusal was confirmed on appeal by Justice Yvan Roy for the reason that it "is less of an amendment and more of a different application for judicial review" (*Îlot St-Jacques*, at paragraph 15).

[212] In the opinion of Justice Roy, it seems indisputable that the amendment, if accepted, would allow in a single application for judicial review, [TRANSLATION] "the dispute of two different decision-making processes with different and independent factual and legislative dynamics" (*Îlot St-Jacques*, at paragraph 23). In particular, he saw no reason to intervene because prothonotary Morneau accepted the respondents' argument that the loss of value of a piece of land located in the area to which an emergency order applied is "completely irrelevant to

an application for judicial review to overturn an order to protect a species at risk" (*Îlot St-Jacques*, at paragraph 28).

[213] While it was first and foremost founded on procedural considerations, this case, the findings of which I fully support, in my view, strengthens the idea that when an emergency order is made under section 80 of the Act, any debate surrounding the lack of compensation is not relevant in determining the validity of the order, regardless of the basis for the alleged invalidity. Such a debate challenges, to paraphrase Justice Roy, a different decision-making process that meets a different and independent factual and legislative dynamic.

[214] This challenge was open to Groupe Candiac and perhaps still is. However, it has its own dynamic, which is distinct and independent from the dynamic associated with the challenge of the Emergency Order itself, the validity of which needs to be assessed considering the presence of section 64 of the Act, without having to address the matter of compensation and without having to look at the concepts of de facto expropriation and disguised appropriation.

[215] These concepts do not apply in this case and the second issue must therefore be answered in the negative.

[216] Having concluded that the Emergency Order will not be invalid for any of the reasons given by Groupe Candiac, this application f or judicial review will be dismissed. The Attorney General asks for his costs. Considering the outcome of the case, the Attorney General is entitled to them.

JUDGMENT IN T-1294-16

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs in favour of the respondent.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Alain Chevrier Adam Jeffrey Beauregard	FOR THE APPLICANT
Pierre Salois Michelle Kellam	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dunton Rainville Attorneys Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT