Federal Court  Cour fédérale

Date: 20240502

Docket: T-811-22

Citation: 2023 FC 1720

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 2, 2024

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

LE GROUPE MAISON CANDIAC INC

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

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I. Background

[1] The company Groupe Maison Candiac Inc. [GMC] operates mainly in residential development. Its main role is to acquire and subdivide large parcels of land on which it generally builds residential properties; any remaining lots are sold to other contractors.

[2] After the Ministère du Développement durable, de l'Environnement et des Parcs [Quebec Department of the Environment] issued a certificate of authorization under section 22 of the *Environment Quality Act*, CQLR c Q-2 [EQA] on September 3, 2010, GMC started developing a project called "Vallée de Provence", which was to be based within the territory of the municipalities of Candiac, Saint-Philippe-de-La Prairie [St-Philippe] and La Prairie.

[3] But on July 8, 2016, the Governor in Council [GIC] made an emergency order [Order] under the *Species at Risk Act*, SC 2002, c 29 [the Act], to protect the habitat of the Western Chorus Frog [WCF]. This put an end to GMC's plan and permanently prevented it from continuing with this residential development.

[4] Subsection 64(1) of the Act provides for "fair and reasonable" compensation for persons who suffer losses as a result of "any extraordinary impact" of an emergency order. Since the Order came into effect, GMC has therefore been seeking compensation for the losses it has suffered as a result of Vallée de Provence's coming to a complete halt. It estimates its losses to be over $20 million.

[5] On March 21, 2022, the Minister of Environment and Climate Change [the Minister] rejected GMC's compensation claim [Decision]. In the Decision, the Minister stated that he had considered the compensation policy adopted by his department [the Compensation Policy] and an assessment report (including a memorandum) prepared by his department. More specifically, he explained that, according to the file before him, GMC's losses had not been suffered as a result of any extraordinary impact of the Order, and there was therefore no reason to provide fair and reasonable compensation under subsection 64(1) of the Act.

[6] On judicial review, GMC contends that the Minister's conclusion that the Order did not cause any extraordinary impact and that its losses cannot be compensated is unreasonable. It alleges that this is not an acceptable or defensible outcome in light of the evidence and arguments it has submitted and that the Minister's conclusion reflects neither the letter nor the spirit of the Act.

[7] For the reasons that follow, the application for judicial review is allowed. The Minister's reasons are not transparent and do not explain how he weighed some of the relevant factors of the Compensation Policy. In his reasons, the Minister also failed to weigh some of GMC's central arguments and to consider the broad consequences of his interpretation for both GMC and the general public, which might find itself in a similar situation in the future. Finally, the Minister's decision does not explain how his interpretation of subsection 64(1) is in line with the purposes of the Act, which are to foster the preservation of species while encouraging and supporting Canadians in their conservation efforts, including by sharing costs in some circumstances.

[8] The same issues have arisen in a related case, T-1573-22, *9255-2504-Québec Inc et al v Attorney General of Canada* [*Grand Boisé*]. In that case, the Minister also denied a claim for compensation arising from the impact of the same Order, but on another project in the same area. Albeit distinct, both cases were heard together, and there is significant overlap in the parties' arguments. For example, at the hearing, following the Court's questions on the issues common to the two cases and counsel's replies, it was apparent that GMC has adopted the arguments made by the applicants in *Grand Boisé*, and vice versa. The Attorney General of Canada [AGC] also made a single oral argument for both cases, in which he addressed both parties' submissions, except for the questions of fact specific to each case, given that the judicial-review-related questions of law are the same in both cases. The reasons for the two decisions are therefore similar, apart from a few distinctions.

II. Facts

[9] GMC operates mainly in residential development. Its principal activities are acquiring and subdividing large parcels of land on which it generally builds residential properties; any remaining lots are sold to other contractors. It mainly operates on Montréal's South Shore.

[10] Among the projects it has carried out in recent years is Vallée de Provence, the initial phase of which was developed on the territory of the municipality of Candiac. Development was to continue on the territory of the municipalities of St-Philippe, mainly, and La Prairie (Applicant's Record [AR], Exhibit P-1, Assessment Report, appendices 50–53 at 1273–1330).

[11] GMC began acquiring the lots covered by the Order in 1986, long before the WCF was added to the list of species at risk, be it by the Government of Quebec, in 2001, or the Government of Canada, in 2010. However, in respect of one particular lot in the area covered by the Order, the land purchase only went through after the Quebec Department of the Environment allowed GMC to offset the loss of the wetlands on that lot by creating a conservation area on the northwestern portion of the lot and by building artificial ponds on a neighbouring lot in exchange for the development to go ahead. On August 25, 2009, some six months before the Canadian government added the WCF to the list of species at risk, GMC therefore entered into a promise-to-purchase agreement for this lot.

[12] The consultants hired by GMC prepared a conservation plan for the WCF, which the Quebec Department of the Environment approved on September 3, 2010, through a certificate of authorization under section 22 of the EQA, allowing GMC to start developing Vallée de Provence in Candiac, St-Philippe and La Prairie (AR, Exhibit P-1, Assessment Report, Appendix 28 at 1049). The certificate provided for the creation of WCF conservation areas.

[13] In 2010, GMC started construction on Phase 1 of Vallée de Provence in Candiac. In the course of the work, it oversized the municipal infrastructure in preparation for future phases of the project, to be developed on lots it owns on the territory of the municipalities of St-Philippe and La Prairie. It also created the conservation areas provided for in the certificate of authorization issued by the Quebec Department of the Environment (AR, Exhibit P-1, Assessment Report, Appendix 28 at 1049; AR, Exhibit P-1, Assessment Report, Appendix 30 at 1053).

[14] GMC submits that, had it not been for the certificate of authorization obtained from the Quebec Department of the Environment, it would not have acquired the lot in the area covered by the Order on August 25, 2009, and would not have started building Vallée de Provence. According to GMC, it had undertaken to create a conservation area and artificial ponds to offset the construction of the project, and the Department of the Environment had agreed to this. There was therefore no risk in developing the project and investing the huge sums required to do so.

A. *Order*

[15] On July 8, 2016, just as GMC had embarked on the second phase of the project, in St-Philippe and La Prairie, the GIC made an emergency order under section 80 of the Act, the *Emergency Order for the Protection of the Western Chorus Frog (Great Lakes / St. Lawrence — Canadian Shield Population)*, SOR/2016-211 [the Order].

[16] The Order affected the next phase of the Vallée de Provence residential development started on the territory of the municipalities of St-Philippe and La Prairie because the phase was now in the area covered by the Order.

[17] GMC has been seeking compensation for the losses it suffered as a result of being unable to complete its project ever since the Order was made. It relies on subsection 64(1) of the Act, under which the Minister may, in accordance with the regulations made for this purpose, provide "fair and reasonable compensation to any person for losses suffered as a result of any extraordinary impact" of an emergency order made under section 80 of the Act.

[18] In support of its claim, GMC has provided several documents establishing that the Order prevented it from completing part of its residential development on some of its lots, over a total area of 1,145,407 square feet. These lots can no longer be used for any useful purpose whatsoever (AR, Exhibit P-1, Assessment Report, Appendix 24 at 828; AR, Exhibit P-1, Assessment Report, Appendix 42 at 1190).

[19] More specifically, GMC submits that the Order is preventing it from building around 122 homes on the lots in question (AR, Exhibit P-1, Assessment Report, Appendix 24 at 845, 860, 861).

[20] GMC also alleges that the Order obliges it to incur additional expenses to build new access roads and municipal infrastructure on its land outside the perimeter of the area covered by the Order.

[21] Since the Order prohibits installing any infrastructure, changing any vegetation, altering surface water and draining the ground on these plots, it put an end to the project (see section 2(1) of the Order). Vallée de Provence has therefore never been completed.

B. *WCF*

[22] As described by Justice René LeBlanc in *GB FC* at paragraph 9, the WCF is a small wetland amphibian which, in adulthood, generally measures no more than 2.5 centimetres and weighs no more than a gram. During its lifetime, it will rarely move more than 300 metres from

its breeding site. The WCF is threatened by the fact that its habitat is found on land suitable for residential or agricultural development, which contributes to a large decline in its population.

[23] In 2001, the Government of Quebec designated the WCF as a "vulnerable wildlife species" under the *Act respecting threatened or vulnerable species*, CQLR c E-12.01 (*9255-2504 Québec Inc v Canada* [*GB FCA*], 2022 FCA 43 at para 7; *GB FC* at para 15). On February 23, 2010, the federal government designated the WCF (Great Lakes / St. Lawrence — Canadian Shield Population), by order of the GIC, a "threatened species" within the meaning of the Act (*GB FC* at para 12).

C. *Previous and related proceedings*

[24] This is not the only dispute of its kind. As mentioned previously, in the related *Grand Boisé*, other real estate developers are in an almost identical position and are also seeking compensation under section 64 of the Act. This is also not the first case GMC and the applicants in the related *Grand Boisé* find themselves in before this Court regarding the Order made by the Minister on July 8, 2016. This decision is therefore part of a series of related decisions.

(1) *Groupe Maison Candiac Inc v Canada (Attorney General)*, 2018 FC 643 (dated June 2, 2018) [*GMC FC*]

[25] In *GMC FC*, GMC sought to have the Order cancelled because it believed 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 constituted a form of expropriation without compensation.

[26] The Federal Court dismissed GMC's application. The Court held that the principles of disguised expropriation did not apply in this case because section 64 provides for a possibility of compensation.

[27] The Court further noted that the Minister could compensate GMC even though the GIC had not made regulations on the matter, as required by section 64 of the Act, because otherwise the regulation-making authority would be able to neutralize the Act simply by not exercising the discretion conferred on it by the Act. In other words, the Minister retained his discretion under the Act despite the GIC not having made regulations to govern it.

(2) *9255-2504 Québec Inc v Canada*, 2020 FC 161 (dated January 30, 2020) [*GB FC*]

[28] On April 3, 2017, the applicants in the related *Grand Boisé* instituted an action in civil liability against the Crown, seeking to be fully compensated for all the harm caused them as a result of the Order. The applicants submitted that the failure to enact a compensation mechanism under section 64 of the Act was a fault within the meaning of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 [CLPA], and, in the alternative, that the making of the Order without compensation amounted to disguised expropriation within the meaning of the common law and article 952 of the *Civil Code of Québec* [CCQ].

[29] The Federal Court dismissed the applicants' action, finding that the conditions of the CLPA had not been met. The fact that the GIC had not made regulations did not mean that the Crown or the Minister had committed a fault giving rise to damages.

[30] The Federal Court also concluded that, because the Act explicitly provides for a compensation scheme, the principles of disguised expropriation did not apply. In enacting section 64 of the Act, Parliament ruled out the general law remedy for disguised expropriation, arising from both the common law interpretative presumption and article 952 of the CCQ. The compensation provided for in section 64 of the Act must therefore not necessarily match the amount of the loss (*GB FC* at paras 226, 228).

(3) *Groupe Maison Candiac inc v Canada (Attorney General)*, 2020 FCA 88 (dated May 15, 2020) [*GMC FCA*]

[31] The Federal Court of Appeal dismissed GMC's appeal and affirmed the Federal Court's determination that, despite no regulations having been made under subsection 64(1) of the Act, the Minister retains the discretion to provide fair and reasonable compensation to any person for losses suffered as a result of any extraordinary impact of an emergency order.

[32] After the two decisions in *GMC*, the then minister indicated her change of heart and willingness to compensate GMC (and, in turn, the applicants in the related *Grand Boisé*) if a claim was made.

(4) *9255-2504 Québec Inc v Canada*, 2022 FCA 43 (dated March 9, 2022) [*GB FCA*]

[33] The applicants in the related *Grand Boisé* appealed the Federal Court's decision on their action in civil liability. The Federal Court of Appeal dismissed their appeal and affirmed the Federal Court's decision on the grounds that the applicants had failed to establish fault by a servant of the Crown and that the making of the emergency order was akin to a disguised

expropriation. According to the Court of Appeal, the principles of disguised expropriation did not apply because the decision had been made under a statute that provides for a statutory compensation plan specifically adapted to the objectives pursued by the Act. This ruled out the general law remedy for disguised expropriation arising from both the common law and article 952 of the CCQ (*GB FCA* at para 77).

[34] The Federal Court of Appeal did, however, address the business risk the applicants had taken in purchasing the land. It concluded at paragraph 35 that "[t]he risk that gave rise to the damage claimed by the appellants was not the making of the emergency order, but rather the risk that order would be made without the possibility of compensation on the advice of the Minister. This risk was hardly conceivable since it is so inconsistent with Canadian notions of 'fair dealing.'"

[35] The Federal Court of Appeal explained that if the law allowed the then minister to exercise her discretion and compensate the applicants in the absence of regulations, the failure to do so was not necessarily a fault that engages the Crown's extracontractual civil liability (*GB FCA* at para 69).

[36] On May 6, 2022, the applicants in *GB FCA* filed an application for leave to appeal from this judgment with the Supreme Court of Canada [SCC], but the application was dismissed on June 8, 2023 (*9255-2504 Québec inc, et al v His Majesty the King*, 2023 CanLII 49306 (SCC)).

D. *Compensation claim under subsection 64(1) and GMC's representations to Minister*

[37] On December 10, 2020, GMC submitted a compensation claim under subsection 64(1) of the Act to the Minister. In this claim, GMC alleges that the harm it suffered as a result of the application of the Order amounts to $20,796,306 (see AR, Exhibit P-1, Assessment Report, Appendix 22 at 796; AR, Exhibit P-1, Assessment Report, Appendix 24 at 830). To support its claim, GMC provided the Department of Environment and Climate Change Canada [ECCC] with several documents.

[38] In terms of losses, GMC identified $12,500,000 for the loss in value of the lots, $309,000 for sunk costs and assets that had become unproductive, $3,035,000 for compliance costs (road access and sanitary sewer hookup), and $4,952,306 for [TRANSLATION] “other losses”, including unrealized profits.

[39] ECCC had a number of written exchanges with GMC after this claim was submitted. On March 16, 2021, ECCC wrote to counsel for GMC to describe the method it intended to follow in processing the compensation claim and in determining whether GMC’s losses were suffered as a result of any extraordinary impact (AR, Exhibit P-1, Correspondence between GMC and ECCC, Letter to Alain Chevrier dated March 16, 2021, at 1727).

[40] In reply, GMC expressed its surprise that it was not obvious that such losses amounted to an “extraordinary impact” arising from the application of the Order (AR, Exhibit P-1, Correspondence between GMC and ECCC, Email sent to ECCC on March 16, 2021, at 1720).

[41] On May 21, 2021, ECCC wrote a letter to counsel for GMC setting out the criteria that could guide the Minister's decision. The letter covers a number of factors that, among other things, make up the Compensation Policy, but does not indicate that the latter is an official policy (AR, Exhibit P-1, Correspondence between GMC and ECCC, Letter to Alain Chevrier dated May 21, 2021, at 1748).

[42] On June 17, 2021, counsel for GMC sent ECCC its comments on the assessment criteria proposed by ECCC, that is, the criteria in the Compensation Policy (AR, Exhibit P-1, Assessment Report, Appendix 27 at 1042).

[43] On November 29, 2021, ECCC sent a second letter to counsel for GMC, describing its preliminary findings, and asked GMC to improve its case (AR, Exhibit P-1, Correspondence between GMC and ECCC, Letter to Alain Chevrier dated November 29, 2021, at 2017).

[44] On December 9, 2021, counsel for GMC replied to the letter of November 29, 2021. They asked ECCC for a copy of the Compensation Policy because, despite referring to it in its correspondence, ECCC had never informed GMC of the existence of an official compensation policy (AR, Exhibit P-1, Correspondence between GMC and ECCC, Letter from counsel for GMC dated December 9, 2021, at 2029; AR, Exhibit P-3, Letter from counsel for GMC dated December 9, 2021, at 3705).

[45] On January 5, 2022, ECCC officially sent GMC a copy of the Compensation Policy ECCC uses to process compensation claims made under section 64 of the Act (AR, Exhibit P-1, Correspondence between GMC and ECCC, Compensation Policy at 2064).

[46] The Compensation Policy as a whole reads as follows:

> [TRANSLATION]
> In exercising his discretion to provide compensation under paragraph 64(1)(b) of the *Species at Risk Act* (SARA), the Minister assesses the main elements of this provision: whether the person is eligible; whether the person has suffered losses as a result of any extraordinary impact of the application of an order made under section 80; and, if so, what compensation would be fair and reasonable in the circumstances.
>
> In exercising his discretion, the Minister may consider the following factors:
>
> **Applicant**: The applicant is generally an individual or a corporation owning land directly affected by the application of an emergency order made under section 80.
>
> **Extraordinary impact**: The extraordinary impact assessment may generally take into account the extent to which an order made under section 80 limits use of the land. This may include:
>
> - Changes in the historical use of the property;
> - Changes in the current, intended and potential uses of the property;
> - Other possible uses of the land that would not violate the emergency order made under section 80;
> - The proportion of land or of the intended use affected by the order;
> - The impact on the value of the land;
> - The length of time during which use of the land will be limited by the emergency order; and

- The existence of any regulatory restrictions already limiting use of the land.

Fair and reasonable compensation: Any compensation provided may be less than the eligible losses. Losses must be verifiable and directly attributable to any extraordinary impact resulting from the application of an order made under section 80. Eligible losses would not usually include future and speculative profits, but may include, but are not limited to the following:

- The loss in value of the property;
- Sunk costs and unproductive assets; and
- Compliance costs.

Moreover, considerations related to the business risk environment would also generally be taken into account to determine any compensation provided. These considerations may include but are not limited to the following:

- Awareness of the presence of species at risk and their habitat;
- Any mitigation measures taken and use of other available remedies; and
- The exceptional and temporary nature of an emergency order.

[Emphasis added.]

(AR, Exhibit P-1, Correspondence between GMC and ECCC, Compensation Policy at 2064.)

[47] On January 31, 2022, ECCC sent counsel for GMC a draft of the assessment report [Draft Report] it was writing regarding the compensation claim, to give GMC an opportunity to respond (AR, Exhibit P-1, Correspondence between GMC and ECCC, Draft Report at 2108–36).

[48] On February 18, 2022, counsel for GMC submitted their comments in reply to the Draft Report as well as some additional documents (AR, Exhibit P-1, Assessment Report, Appendix 47 at 1234). In these comments, GMC explained that it was disappointed that none of the arguments and observations it had made on June 17 and December 9, 2021, had been taken into account in the Draft Report.

E. *Reasons for Minister's decision*

[49] On March 17, 2022, ECCC sent the Minister a memorandum with the final assessment report regarding the GMC's compensation claim. This memorandum included all of the communications between GMC and ECCC, ECCC's recommendations and its weighing of the factors set out in the Compensation Policy in its assessment of the claim, and ECCC's conclusion that no compensation should be provided [Memorandum] (AR, Exhibit P-8, Memorandum dated March 18, 2022, at 4282–87). The final assessment report [Assessment Report], on which the Minister also based his decision, includes a comprehensive analysis of the compensation claim and information on the history and scope of GMC's development project as well as on the goals and purposes of the Order. The Assessment Report does not include ECCC's conclusions on its weighing of the factors set out in the Compensation Policy. These conclusions can be found in the Memorandum, however. The document and its appendices are over 3,600 pages long in total.

[50] On March 21, 2022, the Minister rejected GMC's compensation claim. Relying on all of the information and arguments submitted by GMC and in considering the wording, the object and the spirit of the Act, the Minister concluded that GMC's losses were not suffered as the

result of an impact that could be characterized as being extraordinary under subsection 64(1) of the Act. Accordingly, GMC could not be offered any compensation.

[51] The Minister explained that he made his decision on the basis of the Compensation Policy and the Assessment Report prepared by ECCC. More specifically, he writes that his decision was made on the basis of the three key factors provided for in subsection 64(1) of the Act: (i) whether the applicant was eligible; (ii) whether it suffered losses as a result of any extraordinary impact of the application of the Order; and, if so, (iii) what compensation could be considered to be fair and reasonable in light of the object and principles of the Act.

[52] The Minister's relevant reasons read as follows:

> [TRANSLATION]
> Any compensation claim must be assessed in light of not only the factors set out in section 64 of the *Species at Risk Act*, but also the object and spirit of the Act. The decline of biodiversity is recognized as one of today's most serious environmental challenges. Caused largely by habitat loss resulting from human activity, it is a significant threat to society. The *Species at Risk Act* is one of the federal government's main tools to protect and help species at risk recover. The Act recognizes not only that wild species are important to Canada's heritage, but also that responsibility for the conservation of wildlife is shared among the governments in Canada and its population. It confers on the federal government the powers required to act when a species and its habitat are not adequately protected and no cooperative solution can be found.
>
> The *Species at Risk Act* provides for a variety of protection measures, including the emergency order under section 80 to protect a species facing imminent threats to its survival or recovery. It was in response to the imminent threats to the recovery of the Western Chorus Frog caused by the residential development in La Prairie that the Governor in Council made an emergency order.
>
> …

My decision regarding your clients' compensation claim was therefore made on the basis of the three key elements in subsection 64(1) of the *Species at Risk Act*: are your clients eligible; have they suffered losses as a result of any extraordinary impact of the application of the emergency order; and, if so, what compensation would be fair and reasonable in light of the object and principles of the Act? In reviewing the claim, I also relied on this Department's Compensation Policy. This is therefore my decision and the reasons underlying it.

…

According to all of the information provided, the order did not significantly change the historical use of the land or the use at the time of its application.

I note first that there were a number of wetlands, some of which were home to the Western Chorus Frog, on part of the land. The presence of the Western Chorus Frog in this area has been known since at least 2002, following the publication of a first conservation plan for this species prepared by the Société de la faune et des parcs du Québec. Moreover, even though the available information reveals that the land to be used for the construction of subsequent phases of Vallée de Provence had long been identified as a suitable site for development, it had never been developed. So, when the order came into effect, construction had not yet begun. Consequently, only the land's potential use, including how your client intended to use it, has been affected by the emergency order.

Even though the order prevented part of the land from being developed, your client is still able to complete most of its project on the remaining part of its property. The order only applies to approximately 18% of the total developable area and reduced the number of housing units that could have been built by 12%. Of the 1,680 units that, according to your client, could have been built without the order, 1,481 can still be built. I also note that the land in question is only a portion of Vallée de Provence, the first phase of which has already been completed. In turn, Vallée de Provence is the final component of a much bigger development.

For the above reasons, it is my opinion that your client's losses were not suffered as a result of any impact that could be seen as extraordinary.

…

[Emphasis added.]

(AR, Exhibit P-1, Minister's Decision at 65–68.)

III. Issue

[53] This case raises a single issue: is the Minister's Decision reasonable?

IV. Analysis

A. *Reasonableness standard*

[54] The parties agree that an administrative decision maker's interpretation of a statute is evaluated against a standard of reasonableness (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*]; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 115 [*Vavilov*].

[55] In *Mason*, the Supreme Court, relying on *Vavilov*, instructs us that the reviewing court must take a "reasons first" approach that evaluates the administrative decision maker's justification for its decision. The SCC reiterates the need to "develop and strengthen a culture of justification" (*Mason* at paras 8, 58–60, 63; *Vavilov* at paras 14, 81, 84, 86).

[56] In *Mason*, the SCC explains how a reviewing court should conduct reasonableness review. A decision may be unreasonable if the reviewing court identifies a fundamental flaw, either a failure of rationality internal to the reasoning process or a failure of justification given the legal and factual constraints bearing on the decision (*Mason* at para 64).

[57] The SCC identified a series of legal and factual constraints that decision makers must examine and explain in light of the applicable context in order for their decisions to be appropriately *justified* in accordance with *Vavilov*. The burden of justification varies, but the decision maker must demonstrate that it was "alive" to the essential elements, and "sensitive to the matter before it", and "meaningfully grapple with key issues or central arguments raised by the parties" (*Mason* at paras 69, 74; *Vavilov* at paras 120, 128). Decision makers must consider the parties' central arguments and evidence and give reasons for how these arguments affect their decision (*Mason* at paras 73–74; *Vavilov* at paras 126–28).

[58] Among other things, decision makers must consider the principles of statutory interpretation; relevant statutory law, common law, and international law; the parties' evidence and central arguments; the past practices and decisions of the administrative body; the potential and potentially harsh impact of the decision on the affected individual or a large class of individuals; and the issues generally. The failure to consider any of these elements or to appropriately justify a decision can be a serious flaw that can cause a reviewing court to "lose confidence" in the decision maker's decision (*Mason* at paras 64, 66–76).

[59] When the decision maker communicates the rationale for its decision, it is not enough for the outcome of the decision to be *justifiable*; it must also be *justified* in reasons that demonstrate transparency and intelligibility (*Mason* at paras 59–60; *Vavilov* at paras 81, 84, 86). In examining the rationale for the decision and the outcome to which it led, the Court must determine whether the decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker (*Mason* at paras 8, 58–61; *Vavilov*,

at paras 12, 15, 24, 85–86). A decision is not reasonable when there is a failure of rationality in the reasoning process or the reviewing court is unable to trace the decision maker's reasoning without encountering "any fatal flaws in its overarching logic" (*Mason* at para 65, citing *Vavilov* at paras 102–03).

[60] However, the reviewing court should not create its own yardstick and then use it to measure what the administrator did (*Mason* at para 62; *Vavilov* at para 83). The Court's assessment is sensitive and respectful, but not a "rubber-stamping" process: judicial review is a robust exercise (*Mason* at paras 8, 63; *Vavilov* at para 12).

[61] Consequently, when performing a reasonableness review, the reviewing court must assess the reasons for the decision "holistically and contextually" in light of the history of the proceedings, the evidence submitted and the parties' central arguments (*Mason* at para 61; *Vavilov* at paras 91, 94, 97). The Court's role is not to reweigh the evidence presented to ECCC, question the exercise of ECCC's discretion or offer its own interpretation of the legislation. These are the decision maker's roles. As long as the decision maker's interpretation of the legislation is reasonable and the reasons for its decision are justifiable, precise and intelligible, the decision maker is owed deference by the Court (*Vavilov*, at paras 75, 83, 85–86, 115–24).

[62] Regardless of the approach chosen by the decision maker, the reviewing court must ensure that the interpretation of the statutory provision is consistent with the "modern principle" of statutory interpretation, which focuses on the entire context of the Act and the grammatical and ordinary sense of the language chosen by Parliament harmoniously with the scheme of the

Act, the object of the Act, the context and the intention of Parliament (*Mason* at paras 67, 69–70, 83; *Vavilov* at paras 110, 115–24; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 42; *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at paras 20, 36 [*Alexion*]; *Le-Vel Brands, LLC v Canada (Attorney General)*, 2023 FCA 66 at para 16; *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21; *BellExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26; Elmer Driedger, *Construction of Statutes*, 2nd ed, Toronto, Butterworths, 1983 at 87). An interpretation involving a "[r]esult-oriented analysis" that is expedient and not genuine is also unreasonable (*Alexion* at para 37, citing *Vavilov* at paras 120–21; *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at para 42 [*Entertainment Software FCA*]).

[63] In this case, it is up to the Minister, and not the Federal Court, to interpret the scope of his discretion under subsection 64(1) of the Act (*Safe Food Matters Inc v Canada (Attorney General)*, 2022 FCA 19 at para 37). There is no need for the Minister to mimic how courts go about it—the standard of perfection does not apply. There is also no need for the Minister to formulate reasons on all the arguments, statutory provisions or details raised by the parties (*Mason* at paras 61, 69–70; *Vavilov* at paras 119, 120). The length of the reasons as such is also not determinative of the reasonableness of a decision (*Vavilov* at paras 92, 292–93; *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at paras 16–19; *Patel v Canada (Citizenship and Immigration)*, 2020 FC 77 at para 17).

[64] However, the more severe the impact of a decision is on a party's rights and interests, the more the reasons provided must reflect the stakes and be enough for the parties, and the decision

maker must explain “why its decision best reflects the legislature’s intention” (*Mason* at para 76; *Vavilov* at paras 133–34; *Alexion* at para 21). Consequently, a decision can be unreasonable simply because, in its reasons, a decision maker has failed to consider or grapple with particularly harsh consequences for the parties (*Mason* at paras 69, 76; *Vavilov* at paras 134–35).

[65] Also, the reasons on key points do not always need to be explicit. They can be implicit or implied. As recognized by the Federal Court of Appeal in *Zeifmans LLP v Canada*, 2022 FCA 160, at paragraph 10 [*Zeifmans*], “[l]ooking at the entire record, the reviewing court must be sure, from explicit words in reasons or from implicit or implied things in the record or both, that the administrator was alive to the key issues, including issues of legislative interpretation, and reached a decision on them” (see also *Vavilov* at paras 94, 128).

[66] When the reviewing court looks at “the entire record” to determine whether the administrator was alive to the key issues and reached a decision on them, this record includes all the documents, evidence and arguments before the decision maker (*Zeifmans* at para 10; *Vavilov* at para 94). In this case, these documents included a memorandum and an assessment report ECCC sent to the Minister, which GMC had an opportunity to comment on. Even though the Assessment Report itself is not amenable to judicial review—given that it has no legal or practical effect—the decision-making authority must examine any deficiency submitted to it. Indeed, the decisions in *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at paragraph 201, and *Taseko Mines Limited v Canada (Environment)*, 2019 FCA 319 at paragraph 45, indicate that a materially deficient report supporting a decision can lead to the decision being set aside. Even though the reports in these decisions were required by the

statutory context (while no assessment reports are required in connection with subsection 64(1) of the Act), the teachings of the Federal Court of Appeal also apply here, in my opinion. To the extent that the Minister himself states in his reasons that his decision is partially based on the Assessment Report and this report contains material deficiencies that were brought to his attention in the parties' written representations in response to the report, these deficiencies can actually affect the reasonableness of the Minister's decision.

[67] But, although the reviewing court may look at "the entire record" in the absence of specific reasons on a key issue, it can only "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn" (*Vavilov* at para 97). The reviewing court should not deduce from the record or read into the decision maker's reasons an "implicit" justification in the abstract to justify an outcome the decision maker itself did not reach (*Mason* at paras 96–97, 101).

[68] Finally, the reviewing court must examine whether a decision is reasonable in light of the evidence and the submissions made by the parties before the decision maker. In this case, GMC argues that neither the Minister nor ECCC before him looked at the written representations filed during the compensation process. GMC alleges that, aside from a few very brief comments in the Memorandum and the Assessment Report, its arguments were neither considered nor weighed. Even though the reviewing court may hear new arguments that were not submitted to the decision maker, it must be cautious when doing so (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22–26). In order to determine whether the Minister's Decision was reasonable in light of the evidence and

arguments presented to him, the following reasons will therefore focus primarily on GMC's arguments before ECCC and the Minister.

B. *Application of reasonableness standard*

[69] In considering the reasons, the Court is mindful of the Supreme Court's guidance, as described above, that is, that the Minister is not held to a standard of perfection, and is not required to engage in a formalistic statutory interpretation or to address every argument of the parties. The Court should also not make its own yardstick and then use that yardstick to measure the Minister's work. However, the Minister's decision must be justified and demonstrate that the Minister was alive and sensitive to the matters before him, and meaningfully grappled with key issues or central arguments and the evidence submitted by the parties, as well as the consequences of the Decision for both the parties and a large class of individuals. Finally, the Minister's Decision must be consistent with the "modern principle" of statutory interpretation and must explain why it best reflects the legislature's intention (*Mason* at paras 69, 74, 76; *Vavilov* at paras 120, 128, 133–35).

[70] GMC criticizes the Minister (and before him ECCC, in the Assessment Report and the Memorandum) for failing to consider the guidance of this Court and the Federal Court of Appeal in *GMC* and *GB,* and its representations on critical factors, such as the amount of the loss itself (a major impact in its view), the duration of the Order (perpetual in its view), the fact that it retained no potential or reasonable use of the land in question and that, since it had obtained all the necessary authorizations, there was no longer any [TRANSLATION] "business risk".

[71] Above all, GMC criticizes the Minister for failing to give reasons for his decision and to explain how the major impact it suffered was not an extraordinary impact under section 64 of the Act and how denying it fair and reasonable compensation was in line with Parliament's intention, as expressed in the Act's preamble (*Mason* at paras 66, 73–74, 76). Since the stakes in this case are high for GMC, the Minister's decision should, in GMC's opinion, have contained reasons on each of GMC's central arguments. In other words, according to GMC, a $20 million loss deserves more than three and a half pages of reasons for rejecting a compensation claim.

[72] GMC finally submits that, if its losses do not qualify as an extraordinary impact of the application of an emergency order, it would be difficult for any future litigant to qualify. The standard imposed by the Minister is therefore too high, if not impossible, to meet.

(1) The Compensation Policy is reasonable and allows the Minister to determine, on a case-by-case basis, whether a loss has been "suffered as a result of any extraordinary impact" of an order under subsection 64(1) of the Act

[73] The Minister stated in his letter to GMC that he had considered [TRANSLATION] "some factors that seemed determinative" in deciding whether GMC's losses were suffered [TRANSLATION]"as a result of any impact that could be qualified as extraordinary". These factors could be found in the Compensation Policy prepared by ECCC and cited earlier, at paragraph 46 of my reasons.

[74] To begin with, I agree with the AGC that the criteria set out in the Compensation Policy are reasonable. As noted earlier, the Compensation Policy is based on three criteria: (1) the

"applicant" and the applicant's eligibility; (2) any "extraordinary impact"; and (3) "fair and reasonable compensation".

[75] The Compensation Policy explains each of these criteria and covers certain factors to consider. I note that some of the factors set out in the Compensation Policy are the same as those used in the test for constructive taking or disguised expropriation in *Annapolis Group Inc v Halifax Regional Municipality*, 2022 SCC 36 at para 45 [*Annapolis*], such as whether the measures restrict historical, current and potential uses of the land, and whether the duration of the restrictions is permanent or indefinite.

[76] In my opinion, the factors and criteria proposed by the Compensation Policy to determine whether a loss has been suffered as a result of any extraordinary impact of an order and, if it has, to establish fair and reasonable compensation under subsection 64(1) are appropriate. Considered together, these factors and criteria establish a benchmark that allows the Minister to assess, on a case-by-case basis, whether the impact in a particular situation is extraordinary and could lead to fair and reasonable compensation. Reviewing the factors and criteria set out in the Compensation Policy in the specific context of any future claims can lead to an outcome that is consistent with the wording of subsection 64(1), but also with the general purpose of the Act.

[77] It is important to note, however, that these criteria are neither mandatory nor exhaustive. The Minister is free to disregard some factors or to consider others, depending on the context of each particular case. Moreover, the Minister may not fetter his discretion by refusing to consider additional factors simply because they are not included in the Compensation Policy.

[78] Also, the parties agree that the factors set out in the Compensation Policy, whether they are listed under the extraordinary impact criterion or the fair and reasonable compensation criterion, are interchangeable and apply to both matters. For example, in his reasons, the Minister notes that there is no extraordinary impact in this case and that he therefore did not examine what compensation would have been fair and reasonable in the circumstances. However, his decision is partly based on [TRANSLATION] "[a]wareness" of the presence of the WCF on GMC's land even though [TRANSLATION] "awareness of the presence of species" appears under the fair and reasonable compensation criterion in the Compensation Policy and not under the criterion for determining whether there was any extraordinary impact. In other words, all the factors set out in the Compensation Policy are relevant, both to assess whether there was any extraordinary impact and to establish an amount of fair and reasonable compensation, regardless of under which criteria the factor appears in the Compensation Policy. I agree with this interpretation.

[79] Indeed, GMC did not challenge it after being disclosed the Compensation Policy or in response to ECCC's request for its representations on these factors and criteria. GMC has not submitted that any of the Compensation Policy factors or criteria were irrelevant in determining whether, in its specific situation, losses were suffered as a result of any extraordinary impact of the Order.

[80] The Minister's Decision must be carefully crafted and demonstrate a proper weighing of all the polycentric factors and criteria in accordance with the purposes of the Act. The decision as to whether the impact is extraordinary or not and which amount would constitute fair and reasonable compensation for the losses suffered must be justified, transparent and intelligible

(*Vavilov* at para 99) and in line with the purposes of the Act, which, as we will see, are to protect species, encourage and support the conservation efforts of individual Canadians and, in some cases, share the costs of protecting species.

[81] The real issue in this case concerns the application and weighing by the Minister of the factors and criteria set out in the Compensation Policy and, above all, whether the reasons reflect a reasonable application of the Policy allowing for an interpretation and application of subsection 64(1) that is consistent with the purposes and spirit of the Act. The Minister considered the following factors in his decision:

- the historical use of the land and the use of the land at the time of application of the emergency order;
- the potential or intended use of the property;
- the percentage of the project area affected by the emergency order; and
- the awareness since 2002 of the species' presence on the land covered by the emergency order and the fact that it was threatened.

[82] In my opinion, the Minister's reasons in this case do not demonstrate that the Compensation Policy factors and criteria were weighed in a manner that addresses the arguments and evidence submitted by GMC. Despite the exhaustive record submitted to the Minister, the reasons are not sufficient to support his conclusions.

(2) Justification deficiencies in Minister's reasons

[83] In my view, the Minister's reasons fail to explain why GMC's central arguments on elements of his own compensation policy were rejected in favour of other factors and criteria set out in that same policy. The Minister also failed to explain how he weighed these elements in his

conclusion that GMC's losses did not constitute extraordinary impact under subsection 64(1) of the Act.

[84] In failing to deal with these central arguments, concerning factors in his own compensation policy and on which ECCC sought GMC's representations, the Minister did not demonstrate that he was "alive" to the essential elements or " sensitive to the matter before [him]", and failed to "meaningfully grapple with key issues or central arguments raised by the parties" and give reasons for how these arguments affected his Decision (*Mason* at paras 61, 69, 73–74; *Vavilov* at paras 91, 94, 97, 120, 127, 128).

[85] I find that the Minister made certain errors, including the following:

a) he failed to consider both the decisions of this Court bearing on his interpretation of the purposes of the Act and the entire preamble of the Act, preferring to isolate certain excerpts;

b) his reasons do not demonstrate that he was alive to GMC's central arguments, including those regarding the historical, intended and potential uses, the proportion of the project area affected and the [TRANSLATION] "business risk";

c) he failed to explain his weighing of arguments on other relevant criteria included in the Compensation Policy, such as the duration of the Order, possible use by a corporate entity and the losses incurred; and

d) he failed to consider the significant impact of his Decision on GMC's rights as well as the broader impact of such a decision on a large class of persons who might find themselves in a similar situation.

a) *Failure to consider applicable precedents on purposes of Act as a whole*

[86] It should be said at the outset that the Minister mentioned the object and spirit of the Act in his reasons, stating that [TRANSLATION] "responsibility for the conservation of wildlife is shared among the governments in Canada and its population".

[87] However, even though the Minister took into account a number of statutory interpretation techniques and examined some of the arguments raised by the parties, he did not consider important legal constraints. He should have considered them in order to provide GMC with a clear, intelligible justification as to why the losses it was suffering as a result of the Order were not caused by any extraordinary impact under subsection 64(1) of the Act.

[88] As discussed above, the Supreme Court held in *Mason* and *Vavilov* that a reasonable interpretation must be consistent with the "modern principle" of statutory interpretation. For example, in *Mason*, the decision maker's interpretation was unreasonable because it failed to address points of statutory context and the broad consequences of its decision for the litigant. Among other things, the decision maker failed to address significant points of statutory context raised by the parties. This statutory context required the decision maker to examine other important statutory provisions, which imposed a significant legal constraint required to ensure a reasonable interpretation of the statute (*Mason* at paras 86, 91, 95).

[89] In this case, the Act has been carefully analyzed by Justice LeBlanc in the Federal Court's decisions in *GMC FC* and *GB FC*, which have been affirmed on appeal by the Federal Court of Appeal. Since the Minister is bound by these decisions of the Court, he needed to consider their guidance in interpreting the scope of his discretion (*Vavilov* at para 112; see also *Entertainment Software FCA* at paras 33, 35). Yet neither the Minister's reasons nor the Memorandum or Assessment Report prepared by ECCC meaningfully address the guidance of this Court regarding the Act, despite GMC's arguments drawing ECCC's attention to the decisions.

[90] As we will see, the Minister in this case did not rely on the guidance of this Court to interpret his discretion under subsection 64(1) and simply isolated certain parts of the preamble, but disregarded others, especially the entire context of the Act and Parliament's intention. As it appears, the proposed interpretation fails to consider GMC's central arguments as well as the broad consequences of the Decision not only for GMC, but also for any future claims. This is contrary to what previous decisions teach us.

(i) Entire context and purposes of Act, and Parliament's intention

[91] In *GMC FC* and *GB FC*, Justice LeBlanc described the purposes of the Act as being 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" (Act, s 6; *GMC FC* at para 15). The Court also noted that the preamble to the Act makes "the conservation of wildlife in Canada and the sharing, in certain cases, of costs

associated with this conservation effort everyone's business" [emphasis added] (*GB FC* at para 226). Together, these two references in the Act tie in with another reference in the preamble, which stipulates that "the conservation efforts of individual Canadians and communities should be encouraged and supported" (see the preamble to the Act).

[92] To some extent, these three purposes are consistent with what the Minister writes in his reasons, namely, [TRANSLATION] "responsibility for the conservation of wildlife is shared among the governments in Canada and its population" [emphasis added]. This threefold purpose therefore consists of protecting and preserving threatened species, supporting and encouraging collaboration in the conservation efforts of individual Canadians and, if required to achieve these objectives, sharing the cost in a fair and reasonable manner.

[93] The Act provides for various measures to preserve threatened species. The Court discussed these measures in *GMC FC* and *GB FC*, and they were discussed again on appeal. In parallel, the Act also provides for various measures to compensate litigants for their losses so as to share in the costs, as the case may be.

[94] First, sections 32 and 33 of the Act list some core prohibitions. Under section 32, no person shall kill, harm, harass, capture, take, possess, collect, buy, sell or trade an individual of an endangered, threatened or extirpated wildlife species, as set out in Schedule 1 to the Act. However, these prohibitions apply only on federal land, in other words, land that belongs to His Majesty, the internal waters of Canada and the territorial sea of Canada, and lands that are set apart for the use and benefit of the First Nations (*GMC FC* at para 69).

[95] Under section 33, no person shall damage or destroy the “residence” of a wildlife species that is listed as an endangered species or threatened species, or that is listed as an extirpated species if a recovery strategy has recommended the reintroduction of the species into the wild in Canada (*GMC FC* at para 69).

[96] Section 2 of the Act defines a residence as a dwelling-place, such as a den, nest or other similar area or place, that is occupied or habitually occupied by one or more individuals during all or part of their life cycles, including breeding, rearing, staging, wintering, feeding or hibernating.

[97] These prohibitions apply on federal land, but may also apply on provincial land if the GIC, on the recommendation of the Minister and following consultation with the appropriate provincial minister, adopts an order to that effect under section 34 of the Act (*GMC FC* at para 70). The Minister has to recommend the making of such an order if the Minister is of the opinion that the laws of the province do not effectively protect the species or the residences of its individuals.

[98] The purpose of sections 56 and following is to protect the critical “habitat” of species at risk by prohibiting the destruction of any part of the critical habitat. These prohibitions also apply on federal land, but, under section 61 (as with the prohibitions under sections 32 and 33), the Minister may recommend that the GIC prohibit by order the destruction of the critical habitat of a threatened or endangered species if he is of the opinion that (1) there are no provisions in, or other measures under, the Act or any other Act of Parliament that protect the critical habitat; and

(2) the laws of the province or territory do not effectively protect the critical habitat (*GMC FC* at paras 72–74). Such an order would make the prohibitions applicable on provincial land.

[99] An important distinction must be drawn. While the purpose of an order made under section 34 may be to protect a species and its residence, that of an order made under section 61 is to protect the species' habitat. Section 2 of the Act defines habitat as a broader area than a residence. It is defined as "the area or type of site where an individual or wildlife species naturally occurs or depends on directly or indirectly in order to carry out its life processes or formerly occurred and has the potential to be reintroduced".

(ii) Emergency orders under Act

[100] The provisions regarding emergency orders under section 80 of the Act provide for the protection of a listed wildlife species and prohibit activities that may adversely affect the species and its habitat or include provisions requiring the doing of things that protect the species. Under this provision, the GIC may, on the recommendation of the competent minister, make an emergency order to provide for the protection of a listed wildlife species. 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 (see subsection 80(2) of the Act; *GMC FC* at paras 80–84; *GB FC* at para 115).

[101] Subparagraph 80(4)(c)(ii) gives the government exceptional emergency intervention authority when a species at risk "is about to suffer harm that will compromise its survival or recovery" (*GMC FCA* at para 34). More specifically, this authority allows the GIC to make an

order "without having to conduct consultations and comply with the formalities normally required to make prohibitions under sections 34 and 61 of the Act applicable … in order to prevent the 'brutal and sudden' disappearance of a species at risk" (*GMC FCA* at para 34 citing *Centre québécois du droit de l'environnement v Canada (Environment)*, 2015 FC 773 at para 104). As explained by Justice LeBlanc, "this provision empowers the Governor in Council to make an emergency order, whether or not the designated species concerned is an aquatic species or a protected migratory bird species, within the meaning of the Act, or whether or not its range is on federal land, in the exclusive economic zone of Canada or on the continental shelf of Canada, once again, within the meaning of the Act" (*GMC FC* at paras 82–85; *GB FC* at para 116).

(iii) Compensation mechanism under subsection 64(1) of Act

[102] The matter at bar concerns section 64 of the Act. This provision allows for fair and reasonable compensation for losses suffered as a result of any extraordinary impact of certain orders made under the Act (*GMC FC* at para 75). Under this compensation framework, the Minister has broad discretion to determine whether compensation should be awarded or not under the Act. Section 64 reads as follows:

64 (1) The Minister may, in accordance with the regulations, provide fair and reasonable compensation to any person for losses suffered as a result of any extraordinary impact of the application of	**64 (1)** Le Ministre peut, en conformité avec les règlements, verser à toute personne une indemnité juste et raisonnable pour les pertes subies en raison des conséquences extraordinaires que pourrait avoir l'application :
(a) section 58, 60 or 61; or	**a)** des articles 58, 60 ou 61;

(b) an emergency order in respect of habitat identified in the emergency order that is necessary for the survival or recovery of a wildlife species.	**b)** d'un décret d'urgence en ce qui concerne l'habitat qui y est désigné comme nécessaire à la survie ou au rétablissement d'une espèce sauvage.
[Emphasis added.]	[Emphasis added.]

[103] Section 64 allows compensation claims following the making of various types of measures, namely, emergency orders under section 80 or orders under sections 58, 60 and 61. The purpose of such measures is to protect listed wildlife species by preventing the destruction of their critical habitats, by prohibiting activities that may adversely affect a species and its habitat or by allowing an extirpated species to recover in the wild (see sections 58, 60–61 of the Act). Listed wildlife species cover a wealth of species, including aquatic species and birds. They live in diverse habitats, such as private land, reserves and public land, be it federal or provincial (see subsection 58(7)).

[104] For the time being, the Minister may not award compensation for an order made under section 34 of the Act and applying to a species' residence. Furthermore, under section 62 of the Act, the Minister may enter into an agreement to acquire any lands or interests in land for the purpose of protecting the habitat of a species. We will come back to this later.

[105] The Minister also has full discretion to determine a fair and reasonable amount on the basis of the circumstances of a given case. According to the wording of subsection 64(1) of the Act, "the compensation to be paid under that section will not … match the loss suffered due to the extraordinary impact that may arise from applying an emergency order, although it is not

excluded that the particular circumstances of a given case might justify awarding compensation covering the entire loss suffered" (*GB FC* at para 228).

[106] From the wording of the provision, it is clear that Parliament restricted the Minister's authority so that he could provide compensation only when losses are suffered as a result of any extraordinary impact of the application of an emergency order. The Minister does not have the authority to provide compensation for losses suffered as a result of any other type of impact arising from the application of an emergency order (Respondent's Record [RR], Vol 8, AGC's Memorandum at para 60 at 3681–82). I agree with the AGC that the scope of what constitutes extraordinary impact should not be interpreted so as to unduly limit this constraint imposed by Parliament.

[107] Even though, contrary to the wording of subsection 64(2), the GIC has never made regulations with specific criteria for compensation under the Act, the Federal Court has recognized that this was an intentional choice to allow the government a period of experimentation (*GB FC* at para 166).

[108] Indeed, parliamentary debates reveal that there was much discussion among MPs about the appropriate compensation formula for awarding compensation to litigants under this provision. As explained by Justice LeBlanc in *GB FC* at paragraph 163, "[t]here is no doubt that the establishment of a compensation plan for the benefit, in particular, of landowners affected by the implementation of the [Canadian] Act was intended to be an important part of the bill. The government seemed anxious not to duplicate the American experience, where their law on

endangered species, adopted prior to the [Canadian] Act, did not provide for a compensation plan for those landowners (*House of Commons Debates, 37th Parl, 1st Sess, No 137 (February 19, 2001) at p 905* (Hon David Anderson) [*Debates*])" [emphasis added] (*GB FC* at para 163).

[109] MPs decided that it would take "several years of practical experience" to deal with this issue. Among other things, Parliament wanted to know "much more about 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 that loss", before deciding on a formula. According to the federal environment minister at the time, the Honourable David Anderson, Parliament wanted to "have a period of experimentation" to develop regulations after the first years of implementing the Act (see *GB FC* at paras 162–66, citing *Debates*, No 143 (February 18, 2002) at 8910 (Karen Redman, Parliamentary Secretary to the Minister of the Environment); Debates, No 143 (February 18, 2002) at 8907 (John Harvard); *Debates*, No 202 (June 10, 2002), Part A at 12375 (Hon David Anderson)).

[110] The "American experience", mentioned earlier, under which a coercive approach without any compensation measures was adopted, was the subject of several debates. The parliamentary debates reveal that MPs, especially opposition MPs, were concerned about the American experience, where landowners preferred to destroy species found on their land rather than report them and be forced to protect them for fear of suffering losses in the absence of a compensation program (see, for example, *Debates*, No 23 (February 28, 2001) at 1341–42 (Rick Casson); *Debates*, No 30 (March 16, 2001) at 1760–61 (Gerald Keddy and Rick Borotsik); Debates, No 143 (February 18, 2002) at 8903 (Rick Casson); *Debates*, No 143 (February 18, 2002) at

8929 (Garry Breitkreuz); *Debates*, No 145 (February 20, 2002) at 9048 (Gary Lunn); *Debates*, No 169 (April 16, 2002) at 10437 (Rob Anders); *Debates*, No 178 (April 29, 2002) at 10913 (Chuck Strahl); *Debates*, No 202 (June 10, 2002) at 12406 (Hélène Scherrer); *Debates*, No 202 (June 10, 2002) at 12421 (Rick Casson).

[111] The minister responsible for the Act, the Honourable David Anderson, explicitly rejected the American experience "that ha[d] been proposed so frequently by [opposition MPs]" in favour of a cooperative compensation program (*Debates*, No 203 (June 11, 2002) at 12498 (Hon David Anderson); see also *Debates*, No 203 (June 11, 2002) at 12519 (Karen Redman, Parliamentary Secretary to the Minister of the Environment). Even though parliamentary debates should be analyzed with caution, they can be helpful and relevant in identifying what the initiators of a bill had in mind at the time of its adoption; however, one should not attach too much importance to them (*GB FC* at para 162, citing *Fédération des francophones de la Colombie-Britannique v Canada (Employment and Social Development)*, 2018 FC 530 at para 223; see also *Reference re Impact Assessment Act*, 2023 SCC 23 at paras 62, 89).

[112] The context in which the compensation scheme provided for in section 64 of the Act was discussed and enacted was therefore conscious of the American experience, as noted by Justice LeBlanc. In enacting section 64, Canadian parliamentarians expressed that they did not wish to emulate this experience where, because of the absence of a compensation scheme, the protection of threatened species might be endangered because of landowners' preferring to destroy habitat rather than declaring and protecting it, and suffering significant losses without being compensated.

[113] Moreover, as indicated by Justice LeBlanc in *GB FC*, the compensation mechanism in section 64 has rarely been used since it was enacted. The judge notes that the GIC has used it only twice, and only once—here—in respect of private lands. In neither of those cases, the question of potential compensation had been considered yet (*GB FC* at para 169).

[114] It follows that it was Parliament's intention to provide for a compensation scheme that would be prescribed by regulations made by the GIC. This compensation scheme was intended to be "an important part of the bill" and to rectify the American experience, which had revealed a flaw that undermined the objective of protecting threatened species.

[115] The Minister's interpretation of his compensation authority under subsection 64(1) must therefore be in line with these purposes. The interpretation of his discretion cannot be so rigid as to circumvent this context and, in effect and in essence, "duplicate the American experience", which does not allow for compensation.

[116] However, as argued by the AGC—and I agree—the expression extraordinary impact must also be understood in a context where the possibility of a person making a claim under section 64 of the Act would arise in a situation that, as such, is already quite unusual. The interpretation of section 64 should therefore not be so flexible as to create an extraordinary situation upon an order being made, and any impact or loss arising from it must necessarily be assessed and compensated.

[117] I also accept the AGC's position that the emergency order is a tool of last resort available to the federal government to protect and recover species at risk, a safety net established only when no cooperative solution can be found (*GB FC* at para 168). The word "extraordinary" suggests that the impact must be such that it was not reasonably foreseeable in the litigant's normal course of business.

[118] Having said that, an interpretation that is too strict is also invalid. The term "extraordinary impact" should not be interpreted so narrowly that it becomes immune to any claim for compensation. While an extraordinary impact is required for a person to deserve compensation, an award of compensation should not be an exceptional outcome.

[119] As explained by Justice LeBlanc in *GB FC* at paragraph 226, subsection 64(1) of the Act must be implemented while taking into account the preamble and purposes of the Act, which make the conservation of wildlife in Canada and the sharing, in certain cases, of costs everyone's business. Having said that, Justice LeBlanc clarifies that the compensation amount must reflect the idea of sharing and this purpose, without necessarily being equivalent to the loss:

> [226] The specificity of this plan stems, in particular, from the very wording of section 64 of the Act which, while it speaks of the payment of "fair and reasonable" compensation, does so in relation to the occurrence of losses "suffered as a result of any extraordinary impact of the application [of an emergency order]". This wording also suggests that the loss and the compensation contemplated in article 64, although necessarily complementary, are two distinct concepts insofar as reference is made to the method of determining both "the amount of loss suffered" and "the amount of compensation in respect of any loss". In other words, section 64 of the Act suggests that the compensation paid may be, depending on the circumstances of each case, different from the amount of the loss. It may also be thought, as the defendant points out, that the determination of the amount of compensation to be

> paid could be made taking into account the preamble to the Act, which makes the conservation of wildlife in Canada and the sharing, in certain cases, of costs associated with this conservation effort everyone's business.
>
> …
>
> [228] Like the text of section 64 of the Act, the parliamentary debates seem to me to support the idea that the compensation to be paid under that section will not necessarily match the loss suffered due to the extraordinary impact that may arise from applying an emergency order, although it is not excluded that the particular circumstances of a given case might justify awarding compensation covering the entire loss suffered. …
>
> [Emphasis added.]

[120] As discussed earlier, there are a number of signs in the Act suggesting that obtaining compensation to share the costs of protecting wildlife species, as provided for in the preamble, should not be exceptional. This is similar to the context of disguised expropriations, which also have other types of public purposes, including environmental ones (*Dupras c Mascouche*, 2022 QCCA 350 [*Dupras*] at para 39; *Annapolis*; *The Queen in Right of the Province of British Columbia v Tener*, [1985] 1 SCR 533).

[121] Subsection 64(1), at issue here, is an example of this.

[122] Section 62 is another example. This provision allows the Minister to acquire lands or interests in land in order to protect the habitat of a species at risk, potentially for an amount equivalent to the fair market value (potentially more than mere compensation). The potential compensation under section 62 may therefore be greater than under subsection 64(1). Indeed, Justice LeBlanc's interpretation that the compensation provided for in subsection 64(1) may be

lower than the actual loss is supported by section 62. If section 62 allows acquisition (which would compensate the entire loss), the discretion to provide fair and reasonable compensation under subsection 64(1) must necessarily allow for a lower compensation amount than the actual loss. Otherwise, Parliament would have stipulated that, in the event of extraordinary impact, the Minister would have to fully compensate or acquire the land in question, as also provided for under the principles of constructive taking or disguised expropriation. Yet Parliament specifically provided for a distinct scheme in subsection 64(1) of the Act.

[123] Also, since there is no compensation scheme for orders made under section 34 of the Act, the AGC and GMC are in agreement that, in the absence of a compensation program similar to the one under section 64, the principles of disguised expropriation apply to orders made under section 34, leaving room for compensation that may potentially exceed any compensation that might be awarded under subsection 64(1), similar to the land acquisition provided for in section 62. Again, the distinction provided for in subsection 64(1) supports Justice LeBlanc's interpretation that the compensation can be less than the losses suffered.

[124] With this context in mind, it is up to the Minister to specify his own criteria for determining the circumstances that would enable him to conclude whether there is an extraordinary impact under section 64. The criteria and factors set out in the Compensation Policy enable the Minister to assess the impact on GMC and to determine whether, in this specific case, the impact of the Order was extraordinary, which would make GMC eligible for fair and reasonable compensation based on an assessment by the Minister.

[125] The Minister therefore had to examine the facts of the case and GMC's arguments and to explain how his refusal to characterize the impact on GMC as extraordinary and giving rise to fair and reasonable compensation was consistent with the purposes of the Act, which are to protect species and to encourage and support Canadians in their conservation efforts, and to explain that these purposes would be met in this case even if there were no need to share the costs associated with those efforts.

b) *Minister failed to give reasons for decision on GMC's central arguments and evidence*

[126] As discussed, a reasonable decision must show that the decision maker was alive to the arguments of the parties and considered them properly. In my opinion, the Minister failed to provide transparent and intelligible reasons for rejecting GMC's central arguments (*Mason* at paras 60, 74, 97; *Vavilov* at paras 127, 128, 136).

[127] The reasons for decision show that the Minister identified three main elements, all from the Compensation Policy, in concluding that GMC's losses were not the result of any extraordinary impact under subsection 64(1) of the Act. These three elements are (i) historical, intended and potential use; (ii) the proportion of the project area affected; and (iii) awareness of the presence of WCFs on the land.

(i) Minister's reasons regarding historical, intended and potential use of land neither transparent nor intelligible

[128] In the Decision, the Minister states that [TRANSLATION] "[a]ccording to all of the information provided, the order did not significantly change the historical use of the land or the use at the time of its application" (AR, Exhibit P-1, Minister's Decision at 67). In this regard, he notes that the land has never been developed and that, when the Order was made, construction had [TRANSLATION] "not yet begun" on that land. However, according to the Minister, [TRANSLATION] "only the land's potential use, including how [GMC] intended to use it, has been affected by the emergency order" [emphasis added] (AR, Exhibit P-1, Minister's Decision at 67).

[129] The Decision in this respect is based on the Memorandum and the Assessment Report. But GMC submitted representations to ECCC on the issue of the historical, intended and potential uses of the land well before the Draft Report. In the letters of June 17, 2021, and December 9, 2021 (AR, Exhibit P-1, Assessment Report, Appendix 27 at 1042; AR, Exhibit P-1, Correspondence between GMC and ECCC, Letter from Counsel for GMC dated December 9, 2021, at 2029; AR, Exhibit P-3, Letter from Counsel for GMC dated December 9, 2021, at 3705), GMC states that the plots of land are vacant, but that building on a residential project had begun, with the necessary authorizations from the municipalities and the Quebec Department of the Environment.

[130] GMC received the Draft Report and had an opportunity to respond before it was finalized and submitted to the Minister. GMC explains that, as a result of the Order, it is now unable to develop the rest of its property since over eight lots are either partially or completely included

inside the perimeter covered by the Order. These eight lots were supposed to be subdivided into 122 smaller lots for single-family homes, and GMC has therefore been deprived of its right to sell or develop these 122 future lots. Moreover, the residential development was neither hypothetical nor potential since GMC had secured the necessary building permits, the zoning bylaw already permitted this type of construction, and work had begun. The Minister should therefore have taken into account the intended use of these lots (RR, Vol 1, Correspondence between GMC and ECCC at 3489). GMC notes that the Minister has completely disregarded the fact that it is both a property developer and a construction company. It explains that when it acquires land, it keeps it in inventory. Residential development is its bread and butter, and the money it makes is business income. Saying that only the potential use is affected is an irrational argument because it is obvious that the lots were vacant when GMC acquired them given that they were intended for development (AR, Exhibit P-1, Assessment Report, Appendix 47 at 1234).

[131] GMC therefore submits that maintaining that the losses are not an extraordinary impact of the Order is clearly irrational in the circumstances and completely ignores the objective Parliament sought in enacting section 64 of the Act.

[132] The AGC states that the Minister can reasonably consider historical use as a determining factor in deciding whether the impact of an order is extraordinary. According to the AGC, emergency orders will not necessarily always relate to undeveloped land. Several examples were discussed at the hearing, and the AGC also included examples in his memorandum for the related *Grand Boisé*. An order could, for example, apply to developed land, campgrounds or farmland

and could be in force only during the breeding season of a species or only during certain seasons critical to the survival or recovery of the species. The AGC also submits that the Minister noted a change in intended and potential use, and GMC therefore asked the Court to reweigh the evidence, which is not the Court's role.

[133] I agree in principle with the AGC's argument. As discussed, the criterion itself is not problematic, and the Minister noted the impact on the intended and potential use of the land.

[134] In this case, however, the undisputed evidence shows that the Order has a relatively long-term impact not on future development but on planned development that is already under way. Moreover, although the issue was about constructive taking, the SCC stated in *Annapolis* at paragraph 45(b) that the prohibition of all *potential* reasonable uses may amount to a constructive taking, giving rise to compensation. We will come back to this later. In my opinion, this principle is also helpful in determining whether the impact on the potential use of the land may be an extraordinary impact under subsection 64(1) of the Act. The Compensation Policy includes a factor specifically for this.

[135] More importantly, the Minister fails to explain his analysis and weighing of the two factors, and why he gives the "change in historical use" factor more weight than another relevant factor under the Policy. The Minister fails to explain why the change in intended and potential use he acknowledged did not affect the weighing of the relevant elements in his conclusion that GMC's alleged losses of more than $20 million are not an extraordinary impact under

subsection 64(1) of the Act. The Minister did note that he had considered the change in intended and potential use; however, that is not sufficient in this case.

[136] To be clear, the Minister could have given more weight to historical use and less to intended and potential use. However, he had to show that he was alive to GMC's arguments on the issue and explain his weighing of these factors in the Policy while providing reasons for rejecting GMC's arguments. His reasons are therefore neither transparent nor intelligible, and they are inconsistent with a culture of justification (*Mason* at paras 60–63, 101; *Vavilov* at paras 2, 96, 136). Consequently, this aspect of the decision is unreasonable.

(ii) Failure of rationality internal to reasoning process in Minister's reasons regarding proportion of project area affected by Order

[137] The second criterion on which the Minister relies in his Decision concerns the percentage of GMC's project area affected by the Order. The Minister notes that [TRANSLATION] "[e]ven though the order prevented part of the land from being developed, [GMC] is still able to complete most of its project on the remaining part of its property" (AR, Exhibit P-1, Minister's Decision at 67). The Minister goes on to discuss the percentage of the project area covered by the Order:

> [TRANSLATION]
> The order applies only to approximately 18% of the total developable area and reduces the number of housing units that could have been built by 12%. Of the 1,680 units that, according to your client, could have been built without the order, 1,481 can still be built. I also note that the land in question is only a portion of Vallée de Provence, the first phase of which has already been completed. In turn, Vallée de Provence is the final component of a much bigger development.
>
> (AR, Exhibit P-1, Minister's Decision at 67.)

[138] The AGC submits that the reasons are reasonable because the Minister is merely repeating facts provided to him by GMC. The AGC states that GMC cannot criticize the Minister for considering information it deemed appropriate to provide.

[139] It is true that the Minister's conclusions are based on information submitted to ECCC by GMC in its compensation claim. Before the Court, GMC disputes the reasonableness of the basis for the decision. It submits that the reason involving the percentage of the project area affected by the Order is irrational and arbitrary. The Minister's reason does not take into consideration the extensive evidence and the arguments submitted to him because neither are mentioned in the Memorandum, in ECCC's Assessment Report or in the Decision.

[140] GMC submits that it presented its arguments before the Draft Report was shared with it for comments (and it repeated some of these arguments in reply to the Draft). In its letters of June 17, 2021, and December 9, 2021, GMC submitted that 100% of the 122 lots were affected by the Order, leading to losses of over $20 million (AR, Exhibit P-1, Assessment Report, Appendix 24 at 828; AR, Exhibit P-1, Assessment Report, Appendix 27 at 1043; AR, Exhibit P-1, Correspondence between GMC and ECCC, Letter dated December 9, 2021, at 2029; AR, Exhibit P-3, Letter dated December 9, 2021, at 3705). According to GMC, even if part of the project has been completed, the other parts of the land where development has been authorized in certificates of authorization are still affected. Even though the Order affects only 19% of the land, 199 of the 1,680 planned housing units cannot be built. From GMC's perspective, this is a similar impact to a car dealer losing 20% of its vehicle inventory because of an incident (AR, Exhibit P-1, Assessment Report, Appendix 27 at 1042; AR, Exhibit P-1,

Correspondence between GMC and ECCC, Letter from Counsel for GMC dated December 9, 2021, at 2029; AR, Exhibit P-3, Letter from Counsel for GMC dated December 9, 2021, at 3705). In its opinion, this is a significant impact.

[141] GMC further submits that the Minister seems to be of the opinion that, since it was able to generate revenue in the past thanks to the first phase of the Vallée de Province residential development in Candiac, it should not be entitled to compensation for the losses it suffered as a result of the Order. The right to compensation therefore depends on GMC's previous revenue or its current assets (AR, GMC's Memorandum at para 36 at 4331).

[142] GMC argues that such a stance is inconceivable in a democratic society such as Canada and points out that, in *Lorraine (Ville) v 2646-8926 Québec Inc*, 2018 SCC 35 at paragraph 1 [*Lorraine*], and *Annapolis* at paragraph 24, the SCC ruled on the importance of the right of private ownership (see also *Canadian Bill of Rights*, SC 1960, c 4, s 1(a); *Charter of human rights and freedoms*, CQLR, c C-12, s 6). Even though the Act limits this right, it does not stray from these fundamental principles thanks to the compensation mechanism. Indeed, in *GB FCA*, the Federal Court of Appeal revealed that it was referring to such principles, in speaking of "Canadian notions of 'fair dealing.'"

[143] GMC thereby submits that, in concluding that a property developer's permanently losing the use of over one million square feet of land was not an extraordinary impact of the application of the Order, the Minister made an unreasonable error that completely distorts Parliament's intention.

[144] I agree with GMC.

[145] Moreover, the factor of the proportion of land affected is itself ambiguous if analyzed in isolation, as is the case here. That 18% of an area is affected means nothing in itself. For instance, GMC gives the example of farmers and mining, petroleum and forestry operators whose profits could be wiped out by an order affecting only a small proportion of their land.

[146] Therefore, that the Order has an impact of only 18% in no way indicates that the impact is “minimal” or, on the contrary, “extraordinary”. The impact needs to be put into context. In this case, the Minister never discusses or weighs the fact that the proportion of the land represents an alleged loss of more than $20 million and, notwithstanding this major financial impact, never explains why the proportion of the land affected was not enough to be considered an extraordinary impact under subsection 64(1) of the Act.

[147] Moreover, I note that the Minister applied a variable test to this factor. In the related *Grand Boisé*, the Minister also accepted that the proportion of Grand Boisé’s affected land was about 17%, but, there, he included phases 1 to 4, which had already been completed, whereas, here, in the case of GMC, he did not include the first development phase in Candiac. In the related *Grand Boisé*, if the Minister had proceeded in the same way as here, the proportion of Grand Boisé land affected by the Order would have been 100% (since he would not have included the previously completed phases 1 to 4, as he has done in GMC’s case). In my reasons in *Grand Boisé*, I noted that the Minister’s approach was inconsistent. Even though the Minister’s approach seems to be more consistent here, he could have considered the Vallée de

Provence project as a whole, a method that would have been more in line with the one he used in the related *Grand Boisé*, and the proportion of GMC's project affected by the Order would have been even lower.

[148] Having said that, regardless of which method is chosen, the factor continues to be ambiguous if it is considered without context. In this case, GMC, like the applicants in *Grand Boisé*, suffered a loss, of around $20 million. Even if the Minister had considered the Vallée de Provence project as a whole, including the portion in Candiac, which had essentially been completed, and had concluded that about 10% of the land, for example, was affected, the loss remained at around $20 million. Consequently, GMC's loss is equivalent to the loss in the related *Grand Boisé*, aside from the fact that in that case, 17% of the land is affected.

[149] In both cases, the Minister should have explained why the factor of the proportion of land affected was important to him and why, in the specific context of the claims, including the alleged losses, the proportion of land affected by the Order was not, in his opinion, an extraordinary impact. But the Minister did not give reasons for his decision in this regard, nor did ECCC explain it before him, be it in the Memorandum or the Assessment Report.

[150] In short, the Court has before it two applications for judicial review relating to the same Order and the same Compensation Policy that have gone through the same process with ECCC. The Court is puzzled that the method used to calculate the proportion of land affected differs between the two cases, which were decided a few months apart. GMC goes further and submits that ECCC adjusted the factor and analyzed the evidence to achieve a specific, desired outcome

or to “reverse-engineer” a desired outcome, which is proscribed (*Vavilov* at para 121; AR, GMC’s Memorandum at para 18 at 4321). While I do not endorse this criticism, the Minister’s reasons fail to explain how the distinction noted is relevant; therefore, there is a failure of rationality in the reasoning process in his decision (*Mason* at para 65).

(iii) Minister’s reasons regarding business risk and awareness of WCFs on land fail to address GMC’s arguments

[151] One of the main reasons that no compensation was awarded appears to be that GMC was aware of the presence of the WCF on the land before it began its development (AR, Exhibit P-1, Minister’s Decision at 67; see also *GB FC* at para 49). Without referring to it directly, the Minister therefore also analyzes the business risk factor of the Compensation Policy.

[152] The factors of business risk and awareness of the presence of species at risk and their habitat are included in the Compensation Policy as factors under the fair and reasonable compensation criterion, and they are important in determining any compensation provided. These factors are not under the Policy’s criterion for determining whether losses were suffered as a result of any extraordinary impact of the Order.

[153] I noted above that it was not unreasonable to analyze all the criteria and factors in the Compensation Policy interchangeably to determine whether an impact is extraordinary and whether compensation is necessary in a given case to meet the purposes of the Act. The parties agree with this approach. In this case, it was therefore reasonable for the Minister to consider whether GMC knew before starting its development project that WCFs were present on the land.

In fact, acquiring land knowing that it contains threatened species may limit or even disqualify an individual from obtaining compensation if an emergency order is ultimately made. However, this is a question of fact.

[154] In examining the issue, the Minister therefore had to weigh GMC's evidence and arguments and explain why the arguments failed to persuade him that compensation was appropriate in GMC's specific case, despite its being aware of the presence of WCFs on the land.

[155] Business risk is referred to in a specific section of the Draft Report. This section concludes that [TRANSLATION] "the applicant must have known that there were risks involved in carrying out its development project" (RR, Vol 4, Draft Report at para 76 at 2175). In another section, the Report also mentions that GMC obtained an authorization from the Quebec Department of the Environment that approved the development project but required that GMC implement mitigation measures to protect the WCF (in particular, a conservation area and breeding ponds) (RR, Vol 4, Draft Report at 2159–60, 2169). However, neither the Memorandum nor the Assessment Report analyzes or discusses the impact of the government authorizations on the business risk that might remain when the project was carried out.

[156] In its response to the Draft Report, sent to the Minister on February 18, 2022, GMC explained that it had started acquiring lots in 1986 and that its lots were acquired before the Government of Canada added the WCF to the species at risk list in 2010. In respect of one particular lot, GMC had acted diligently by obtaining all the necessary authorizations from the competent authorities, including the Quebec Department of the Environment, before signing the

promise to purchase. It had also undertaken to create a conservation area and artificial ponds on a neighbouring lot in order to offset use of this lot. Once the development had been authorized by the Quebec Department of the Environment, no "business risk" existed (AR, Exhibit P-1, Assessment Report, Appendix 47 at 1237–40). GMC therefore submitted that it had properly weighed the business risks and that it could not have predicted that the federal government would be dissatisfied with the mitigation and protection measures imposed by the Quebec Department of the Environment, especially as it had not intervened in the first phase of the project in Candiac.

[157] In the Assessment Report submitted to the Minister, ECCC did not address GMC's argument regarding the fact that it had obtained authorizations from the Quebec Department of the Environment before buying one of the plots of land covered by the Order. The Memorandum also makes no substantive reference to these submissions. Furthermore, ECCC did not consider the argument that GMC had properly weighed its risks because, from that moment on, GMC could not have predicted the federal government's intervention. Nor did ECCC discuss the authorizations' impact on the project's business risk and the weight that the Minister should give to that fact (AR, Exhibit P-1, Assessment Report at 93).

[158] Moreover, the Minister's reasons fail to address this main argument of GMC's. The Minister does not refer to the authorizations or weigh their impact on business risk, that is, he does not state whether he agrees with GMC's argument that no business risk was foreseeable once the authorizations had been obtained and the first phase of Vallée de Provence had been completed and the second phase begun. Without stating it explicitly, the Minister appears to be

associating GMC's losses with a business risk like any other, without considering GMC's arguments suggesting that, in this case, the presence of WCFs on the land was no longer a source of business risk.

[159] Furthermore, right before the Minister made his decision, on March 11, 2022, GMC informed ECCC that the Federal Court of Appeal had handed down its decision in *GB FCA*. The Federal Court of Appeal rejected the AGC's argument regarding business risk, namely, that compensation was not warranted because the developers had carried out their housing project knowing that a species at risk was present on the property. The Federal Court of Appeal specified that developers must assess not the risk that an emergency order would be made but rather the risk that an emergency order would be made without compensation (AR, Exhibit P-1, Correspondence between GMC and ECCC, Email from Counsel for GMC dated March 11, 2022, at 3539; AR, Exhibit P-5, Email from Counsel for GMC dated March 11, 2022, at 3715). The Federal Court of Appeal concluded that this risk was hardly conceivable since it is highly inconsistent with the notions of fair dealing:

> [35] Before the Federal Court, the respondent argued that the losses suffered by the appellants were not compensable because they resulted from the business risk that the appellants had assumed in carrying out their project despite their knowledge of the existence and status of the frog. The Federal Court did not consider this issue given its finding on the issue of Crown civil liability: Decision, para. 215. This argument can be summarily dismissed. The risk that gave rise to the damage claimed by the appellants was not the making of the emergency order, but rather the risk that order would be made without the possibility of compensation on the advice of the Minister. This risk was hardly conceivable since it is so inconsistent with Canadian notions of "fair dealing."
>
> [Emphasis added.]
>
> (*GB FCA* at para 35.)

[160] GMC submits that, because of this, the Minister's Decision is unreasonable, since the Minister failed to justify why he was departing from the precedent set by the Federal Court of Appeal. It explains that this rule applies here *a fortiori* because counsel for the Minister made the business risk case before the Federal Court of Appeal.

[161] Indeed, nothing suggests that the Minister or ECCC considered the guidance of the Federal Court of Appeal in *GB FCA*. I would point out that the decisions of this Court and the Federal Court of Appeal in *GMC FC* and *GB FC* predate the Minister's decision on GMC's compensation claim. These decisions were a constraint that the Minister had to consider in interpreting subsection 64(1), especially since they had been brought to his attention.

[162] In his memorandum, the AGC argued that the Federal Court of Appeal's reasons did not apply because the Federal Court of Appeal was referring to specific faults alleged in a claim for damages and that the concept of fair dealing was specific to contractual discretionary powers, distinct from the administrative context (RR, Vol 8, Memorandum of the AGC at para 47 at 3678). In other words, because GMC was aware of the presence of the WCF, the Crown's refusal to compensate it on the basis of disguised expropriation was not a civil fault giving rise to a remedy.

[163] In my view, the reasons of the Federal Court of Appeal have a broader scope. The Court of Appeal referred directly to the AGC's argument that the presence of the WCF gave rise to a business risk and that the loss should therefore be borne entirely by the developers, notwithstanding the principles of civil liability and disguised expropriation (which Justice

LeBlanc discussed in *GB FC* and refused to decide (at paras 29, 238)); the Federal Court of Appeal rejected this argument because the risk that an emergency order would be made "without the possibility of compensation" was "hardly conceivable". The Federal Court of Appeal seems, at least implicitly, to be suggesting that the possibility of a business risk should not in itself bar compensation.

[164] However, the Minister rejected GMC's claim implicitly and in part on the grounds of business risk, which is the same argument used before the Court to dismiss the claim under the principles of civil liability and disguised expropriation. The parallel is relevant, since business risk is noted as a relevant factor in the Compensation Policy.

[165] I note that the Federal Court of Appeal's suggestion that a business risk does not automatically disqualify a compensation claim is consistent with the Compensation Policy, which includes business risk as one factor among many in determining the amount of fair and reasonable compensation, but not specifically in determining whether there is any extraordinary impact. Although these factors are interchangeable, as discussed above, there is nothing in the Compensation Policy to suggest that awareness of the presence of the species is to be given predominant weight. Moreover, if the Minister were of that opinion in the case of GMC, he would have had to explain it.

[166] That said, the Federal Court of Appeal's decision must also be interpreted in context. At that time, the Minister had not yet rejected the compensation claim. The Federal Court of Appeal's statement at paragraph 35 that the making of an emergency order "without the

possibility of compensation on the advice of the Minister" was "hardly conceivable" therefore does not have the conclusive scope that GMC is giving it. However, since GMC brought this significant argument specifically to the attention of the Minister (and ECCC), the Minister had to respond by at least considering the Federal Court of Appeal's decision, noting its potential effect and, if he wished to reject it, explaining why in his reasons.

[167] In any event, business risk is a factor in the Compensation Policy, and it is relevant in determining whether a loss has been suffered as a result of an extraordinary impact arising from the making of an order. In my opinion, it is above all a factor in justifying fair and reasonable compensation that could be lower than that being sought (or even in justifying the denial of compensation), as the Compensation Policy seems to suggest. However, like all other factors, its application depends on the context and the evidence of the parties.

[168] As discussed, *Mason* requires a culture of justification, and the decision maker must address the central arguments of the parties. In this case, GMC presented its arguments and, in good faith, took the necessary measures, including measures to preserve certain parts of the WCF's habitat, as required by the Quebec Department of the Environment. This was not a situation where a party was acting in a cavalier manner in the face of the law.

[169] Consequently, the Minister had to explain why, in weighing the evidence and in light of the parties' arguments, he rejected GMC's efforts, including obtaining all the required authorizations, and found that their actions were not enough to satisfy him that they had sufficiently mitigated the business risk, even though they had acted properly and in good faith.

He had to explain why, in his opinion, an emergency order in the circumstances was sufficiently foreseeable or likely, years before its making, for GMC's losses to be disqualified as an extraordinary impact and attributed instead to normal business risk. However, he did not.

c) *Minister failed to explain weighing of arguments on other relevant criteria in Compensation Policy, such as duration of Order, possible use by corporate entity and losses incurred*

[170] A number of relevant factors in the Compensation Policy are discussed in the Assessment Report but are not included in the Minister's decision. ECCC requested submissions from GMC on the elements in the Policy. GMC responded. However, the Minister failed to explain why, in the specific context before him, these elements of his own compensation policy were not relevant or sufficiently convincing to be weighed with the other elements he specifically considered in his reasons.

[171] The elements that were the subject of GMC's central arguments but that the Minister failed to address in his reasons include (i) the possible remaining use of the land; (ii) the duration of the Order; (iii) the Ecological Gifts Program; and (iv) the losses claimed.

(i) Other possible use by corporate entity

[172] Under the extraordinary impact criterion of the Compensation Policy, the Minister may consider whether there are other possible uses of the land that would not violate the Order.

[173] Even before the first draft of the Assessment Report under the Compensation Policy, GMC sent letters to ECCC on June 17, 2021, and December 9, 2021 (AR, Exhibit P-1, Assessment Report, Appendix 27 at 1043; AR, Exhibit P-1, Correspondence between GMC and ECCC, Letter from Counsel for GMC dated December 9, 2021, at 2029; AR, Exhibit P-3, Letter from Counsel for GMC dated December 9, 2021, at 3705) stating that, as a company, it can make no other effective use of the land because of the restrictions imposed by the Order and that the land has lost almost all of its intrinsic value.

[174] In its draft report, ECCC does not truly respond to GMC's assertion. In particular, the Report does not indicate whether the other possible uses of the land must be reasonable for the corporate owner's purposes, according to GMC's argument. The Draft Report merely states the following:

> [TRANSLATION]
> 56. Given its ecological value, the portion of the land located in the area to which the order applies could be used for recreational or conservation purposes as long as the activities do not violate the prohibitions in the order. The rest of the land could be used for any other purpose, including the planned residential development.
>
> (RR, Vol 1, Correspondence between GMC and ECCC at 2169.)

[175] In its response to the Draft Report, GMC states that it is unclear whether the lots could be used for recreational purposes as the Order extends to prohibiting damage to existing vegetation, which mere walking could do. It notes that, in its specific case, given that it is a corporate entity, recreational or conservation uses, as proposed by ECCC, are not valid since this would place a nominal value on the land, leading to significant financial losses (RR, Vol 6, Comments on Draft Report at paras 39–40 at 3494–95). In other words, in the case of a corporation (the same may

obviously not be true for an individual), there are no other possible uses of the land for it under the Order, and, in GMC's specific case, the impact is therefore extraordinary.

[176] The section is slightly amended in the Assessment Report, to respond to GMC's argument:

> [TRANSLATION]
> 55. The portion of the land located in the area to which the order applies could be used for conservation purposes given its ecological value as well as for recreational activities that are in line with the objective of the Order and that do not violate the prohibitions set out therein. The rest of the land could be used for any other purpose, including the planned residential development.
>
> (AR, Exhibit P-1, Assessment Report at 86).

[177] The Memorandum does not address or weigh this argument by GMC, either.

[178] ECCC did not consider GMC's representations regarding the financial loss it incurred given that land that can only be used for conservation purposes only has a nominal value. Nor do the Memorandum or the Assessment Report provide any indication of the weight that the Minister should give to this factor in the Compensation Policy. The Memorandum and the Assessment Report also fail to state how or why the elimination of any possible use other than for recreation or conservation purposes (resulting in the land value being nominal) should have no bearing on the Minister's decision as to whether this is an extraordinary impact that would give rise to fair and reasonable compensation.

[179] At the hearing (and in its memorandum), GMC compared the scope of the term extraordinary impact within the meaning of subsection 64(1) with the principles of disguised

expropriation in common law and under article 952 of the CCQ. It submitted that the SCC has dealt with the importance of the right to private property and the reasons why the right to expropriate is strictly regulated to ensure fair compensation for those affected by such expropriation. GMC further submitted that the right to enjoy one's property and the right not to have it taken away are fundamental rights in a democracy such as Canada and are deeply rooted in the legal tradition, as set out in paragraph 1(a) of the *Canadian Bill of Rights*, SC 1960, c 4, and section 6 of the *Charter of Human Rights and Freedoms*, CQLR c C-12 (AR, GMC's Memorandum at para 38 at 4332; see also *Annapolis* at para 24).

[180] It claimed that, for a factual situation to qualify under the principles of disguised expropriation, there must no longer be any reasonable use of the land for the owner. The impact on the right of ownership must be extreme, that is, extraordinary. By extension, GMC submits that, if a factual situation qualifies under the principles of disguised expropriation, prohibiting all reasonable use of a property must by definition also be an extraordinary impact under subsection 64(1) of the Act for an owner subject to such restrictions. Since the other possible uses of the land proposed by ECCC are not reasonable in the context of GMC, a corporate entity, there is no other possible use of the land for it, and the infringement of its right of ownership would qualify under the principles of disguised expropriation if those principles applied (*Dupras* at paras 27, 38; *Lorraine*; *Annapolis*). Consequently, it believes that its situation should also qualify as an extraordinary impact, since all reasonable uses of the land have been eliminated.

[181] In the wake of the SCC's decision in *Mason*, the Court invited the parties to make further written submissions on the effect of the new decision [Further Submissions Post-*Mason*]. At

paragraphs 11 to 13 of the AGC's Further Submissions Post-*Mason* in the related *Grand Boisé*, the AGC submitted that the Minister had not been unreasonable in failing to discuss the arguments about reasonable use of the property because these concepts are irrelevant to the compensation scheme under the Act and were rejected by Justice LeBlanc in *GB FC* at paragraphs 220 to 221 and 228. Therefore, the lack of reasons from the Minister (and from ECCC in the Memorandum and the Assessment Report) is justified and is not a failure to consider a legal constraint under *Mason*.

[182] In my opinion, Justice LeBlanc's conclusion on the application of the principles of expropriation must be put in the context of the issue that was before him. The developers in that case were seeking full compensation under the principles of civil liability and disguised expropriation. Justice LeBlanc stated in *GB FC* that the principles of disguised expropriation do not apply where there is a statutory provision providing for compensation, which displaces the principles arising from the common law and section 952 of the CCQ.

[183] However, Justice LeBlanc's decision in *GB FC does not rule out* the elimination of reasonable use as a relevant criterion for determining whether an impact is extraordinary under subsection 64(1) of the Act. On the contrary, at paragraphs 237 to 242, Justice LeBlanc puts the claim in context and notes that the compensation scheme set out in the Act remains to be interpreted. In so doing, Justice LeBlanc specifically declined to consider whether the impact of the Order on the lands in question in this case could be described as disguised expropriation, since he did not want his decision to influence the Minister's decisions on future claims under subsection 64(1):

[237] Having concluded that section 64 of the Act has the effect of ruling out the general law remedy for disguised expropriation arising both from the *common law* interpretative presumption and from article 952 of the CCQ, in favour of a statutory compensation plan specifically tailored to the objectives pursued by the Act, and that this plan is not unworkable, as the plaintiffs claim, given the position taken by the Minister following the *Groupe Maison Candiac* judgment, it is not necessary, in my view, to consider whether, in fact, there had otherwise been, in this case, disguised expropriation of the plaintiffs' land affected by the Order. Precedence must be given to the compensation plan established by the Act.

[238] I would add that it does not seem to me to be desirable either that this question be approached in such a way as to avoid that its outcome, whatever it may be, could influence the decision that would have to be taken by the federal Minister for the Environment in the event that the plaintiffs formally request that she exercise her powers under subsection 64(1) of the Act and thus provide her with a first opportunity, since the enacting of the Act, to make a decision under this provision and to, in doing so, develop the guidelines and principles that should guide this decision-making process. For the same reasons, it would not have been desirable for me to rule on the second issue at hand, that relating to business risk.

[239] In this unusual and novel context, it is better to leave the Minister all the latitude necessary to define these guidelines and to exercise, on this basis, the power vested in her under subsection 64(1) of the Act. The Court will be there, if requested, to review the legality of this exercise and the outcome thereof.

…

[242] … The defendant, moreover, would be wrong to interpret this judgment as if the case had been heard, in the sense that it has been settled and no longer requires any action; sooner rather than later, if she does not want to expose herself to other proceedings, she will have to find a way to achieve what Parliament wanted for the protection of species at risk in Canada, which included the effective establishment of a compensation plan for losses resulting from the extraordinary impact that may arise from an emergency order.

[Emphasis added.]

[184] Contrary to the AGC's argument, Justice LeBlanc did not entirely reject the principles of disguised expropriation at paragraphs 220 to 221 and 228 of his decision and their potential influence on the interpretation of subsection 64(1). Moreover, I note that the Compensation Policy itself repeats the criteria identified by the SCC in *Annapolis* at paragraph 45 as being relevant in determining whether there is constructive taking or disguised expropriation. Therefore, ECCC seems to consider at least some concepts to be compatible with the interpretation of subsection 64(1) of the Act. It was therefore important for the Minister to address GMC's argument and accept Justice LeBlanc's invitation to make his own decision and consider whether the "possible" or "reasonable" use of the land for a private owner was relevant.

[185] I also note that the Federal Court of Appeal, in *obiter* at paragraphs 99 to 100 and 102 of *GB FCA*, held that there had been no disguised expropriation in the related *Grand Boisé* (which also applies here) because the federal government had not taken or acquired anything. However, the fact that there has been no disguised expropriation does not in itself mean that the principles applicable to disguised expropriation are irrelevant to the interpretation of the scope of section 64, as seems to be demonstrated by the Compensation Policy, in which certain criteria overlap with constructive taking. In fact, it is for the Minister to decide. I also note that the Federal Court of Appeal did not have the benefit of the SCC's teachings in *Annapolis* at paragraphs 38 to 39, 41, 44 to 45c, 48, 58 and 64, which could have influenced its decision.

[186] In any event, in this case, the reasons are silent as to whether there is any other possible use for GMC that would render the Order's impact acceptable rather than extraordinary. However, GMC's submissions to the Minister were in response to the factor set out in the

Compensation Policy. The Minister does not explain how the other uses proposed by ECCC (recreation and conservation), in the context of GMC's right of ownership and the intended and potential use of the land, result in the Order's impact on GMC not being extraordinary under subsection 64(1) of the Act. ECCC's Memorandum and Assessment Report shed no further light on this major issue.

[187] The Minister therefore had to examine GMC's argument and explain why, in his opinion, the words [TRANSLATION] "other possible uses" in the Policy could not mean a reasonable use for an owner, either under the principles of disguised expropriation (which neither this Court nor the Federal Court of Appeal rejected in *GB FC* or *GB FCA* for the purposes of applying subsection 64(1)), or within the ordinary meaning of the words. He failed to explain why he gave more weight to other criteria in the Compensation Policy to the detriment of his conclusion on any possible use of the land by GMC.

[188] That said, at the hearing and in the AGC's principal memorandum in the related *Grand Boisé*, the AGC gives examples of the impact that may occur on land in specific contexts (for example, on campsites or farmland during the breeding season of a species). I agree in principle with the AGC's submissions. In some cases, an order will be of short duration or cover a small area. In these cases, a possible and reasonable use may always exist, the making of an Order notwithstanding (see e.g. *Wallot c Québec (Ville de)*, 2011 QCCA 1165). In other cases, even if no possible and reasonable use exists, the Order's duration (for example, during the weeks of a species' breeding period) may be so short that the impact on the owner is negligible.

[189] In either case, possible and reasonable uses of the land exist, either during the application of the Order itself or afterwards, where the Order is short-lived. An owner cannot qualify under the principles of disguised expropriation and obtain compensation in these situations because reasonable uses exist. In the same circumstances, a finding that no extraordinary impact exists as a basis for compensation under subsection 64(1) could also be reasonable. However, the Minister could also decide that the circumstances, although not qualifying under the principles of disguised expropriation, are nonetheless an extraordinary impact in his opinion and that compensation under subsection 64(1) is therefore still possible. The analysis is carried out case by case, in accordance with the purposes of the Act.

[190] The culture of justification requires that the decision maker address and respond to the central arguments of the parties. The Minister's failure to consider and provide reasons on the issue of whether there is any possible use of the land for GMC, despite its submissions that there is none, has sufficient impact on the transparency and intelligibility of the Decision for the Court to "lose confidence" in the outcome reached (*Mason* at para 66; *Vavilov* at para 106). The Minister had to explain why he thought that GMC's arguments did not merit any weight in his decision that, despite the possible uses he believed existed, the Order's impact was not an extraordinary impact in the specific context of GMC, namely, a corporate entity engaged in property development.

(ii) Duration of Order

[191] The [TRANSLATION] "length of time during which use of the land will be limited by the … order" is a factor under the extraordinary impact criterion of the Compensation Policy.

[192] In a letter sent on June 17, 2021, before the first draft assessment report under the Compensation Policy (AR, Exhibit P-1, Assessment Report, Appendix 27 at 1043), GMC stated that there was every reason to believe that the duration of the Order was perpetual since it would remain in effect as long as the species could be found on the site. The Order had been in existence for over five years, and there was no reasonable prospect of it being withdrawn.

[193] In the Draft Report, ECCC did not address GMC's contentions regarding the duration of the Order. Rather, the Draft Report states the following:

> [TRANSLATION]
> 57. The use of the applicant's land has been limited by the order for slightly more than five years. The order could be repealed by the Governor in Council if the Minister deems that there is no longer an imminent threat to the survival and recovery of the WCF in its absence (SARA, s 82).
>
> …
>
> 79. The emergency order to protect the WCF has been in force for slightly more than five years. The order could be repealed if equivalent prohibitions were introduced.
>
> (RR, Vol 4, Draft Report at para 57 at 2169 and at para 79 at 2176.)

[194] Therefore, ECCC itself notes in the Draft Report that the Order's duration is most likely perpetual. In particular, there is no evidence that the Order would ever be repealed and, according to the Report, if it were repealed, it would be because equivalent restrictions were being imposed. GMC's use of the land would therefore continue to be limited and it would continue to incur the same financial loss. (RR, Vol 6, Comments on Draft Report at 3495).

[195] In its response to the Draft Report, GMC again explained that the Order was perpetual and that there was nothing to suggest that it would be repealed one day given that the protection measures implemented have allowed the WCF to thrive on the site (AR, Exhibit P-1, Assessment Report, Appendix 47 at 1242). Taking these protection measures away would necessarily mean resumption of the development work and the almost certain extirpation of the WCF occurring there. The Order is therefore perpetual and its repeal is merely theoretical.

[196] The evidence shows that the WCF moves no more than 300 metres during its lifetime. Even if someday the WCF is revitalized on the site, it will not automatically be revitalized elsewhere in the country. It is therefore difficult to understand how the WCF could sufficiently recover to allow the Minister to repeal the Order someday, which would allow GMC to complete its project but destroy much of the WCF's habitat in the process.

[197] GMC made submissions in this regard, and the undisputed evidence is that the eventual lifting of the Order is not conceivable, at least in the foreseeable future.

[198] The Assessment Report (like the Memorandum) provided to the Minister fails to consider GMC's submissions. The paragraphs already in the Draft Report remain essentially unchanged (RR, Vol 1, Assessment Report at para 76 at 61; RR, Vol 4, Draft Report at para 79 at 2176).

[199] Nor do the Memorandum or the Assessment Report provide any indication of the weight that the Minister should give to this relevant factor in the Compensation Policy. The Memorandum and the Assessment Report also fail to state how or why the fact that the duration

of the Order is essentially perpetual should have no bearing on the Minister's decision as to whether the essentially perpetual duration of the Order is an extraordinary impact that would give rise to fair and reasonable compensation.

[200] At the hearing, GMC submitted that, in the context of disguised expropriation, the SCC ruled in *Annapolis* at paragraph 45(c) that restrictions or prohibitions *of indefinite duration* that have the effect of preventing any reasonable use of a property constitute a constructive taking, which justifies the payment of compensation. By analogy, GMC argued that the duration in this case was an extraordinary impact giving rise to compensation under subsection 64(1) of the Act.

[201] In the AGC's Further Submissions Post-*Mason* (submitted in response to those of GMC) at paragraph 15, the AGC explains that the Minister does not find that the Order will apply in perpetuity. He notes that the ECCC Assessment Report states that the Order could be repealed if equivalent prohibitions were introduced by the province, for example. At that point, GMC would be able to sue the province for compensation. The AGC also submits that the Order could be repealed if the area to which the Order applies were no longer necessary to help the WCF to recover; in that case, GMC would be able to develop a real estate project (AGC's Further Submissions Post-*Mason* at para 15 at 6).

[202] With respect, the Minister has provided no reasons regarding this issue. The Minister does not discuss the duration or impact of the Order in weighing the relevant factors. GMC's argument is clear: there are no current circumstances in which it is conceivable that the Order will be repealed someday, and if it is repealed, it will be because other equivalent restrictions

have been imposed. There is no evidence to the contrary and, if the Minister did consider that the Order could be repealed, he should have stated when and how it would be repealed, as well as the impact of its repeal and why, in the circumstances, despite the duration, the impact on GMC was not extraordinary under subsection 64(1). Lastly, there is no evidence that the province will intervene, knowing that it will likely be served with a claim for compensation.

[203] The Minister therefore had to explain why the duration of the Order, a criterion that he deemed relevant in his own compensation policy, was not relevant or deserving of any weight in this case. GMC made substantial submissions regarding the Order's impact and duration. The Minister had to be alive to these and provide an adequate explanation.

(iii) Ecological Gifts Program

[204] In the Draft Report, ECCC, for the first time, suggests a way for GMC to be compensated for the loss of its land. It suggests that GMC make an ecological gift to receive a tax credit in return (RR, Vol 4, Draft Report at para 78 at 2176).

[205] In its February 18, 2022, response to the Draft Report, GMC stated that it had looked at documents from the Canada Revenue Agency. It explained that, since the land is held in inventory, it cannot be converted into capital property. Since lots are part of its inventory, GMC makes business income, not a capital gain, when it sells a lot. It is therefore not eligible for tax credits under the Ecological Gifts Program because it does not make any capital gains. GMC made inquiries, and the tax rules governing the giving of property in inventory do not benefit it.

[206] ECCC does not respond to GMC's argument in the Assessment Report, other than by saying that GMC states that the program does not benefit it:

> [TRANSLATION]
> Any mitigation measures taken and use of other available remedies
>
> 75. The Ecological Gifts Program allows owners of land of ecological value to donate land to recipient organizations that will ensure that the land's biodiversity and environmental heritage are conserved (see Appendix 60). Under the program, landowners may be eligible for tax benefits in the form of tax credits. The applicant has indicated, however, that the tax rules governing gifts do not benefit it.
>
> (AR, Exhibit P-1, Assessment Report at 93 at para 75.)

[207] The question of the Ecological Gifts Program is not a fundamental aspect of this application for judicial review. The Minister's Decision is not unreasonable because it failed to consider this argument. As explained in *Mason* and *Vavilov*, decision makers do not have to respond to all the arguments raised, only the central arguments.

[208] However, neither the Assessment Report nor ECCC's Memorandum address GMC's argument. When GMC explained to ECCC that, from its understanding, the Ecological Gifts Program did not apply to it or did not benefit it, ECCC failed to consider and analyze the value of GMC's argument in helping the Minister in his deliberations.

[209] ECCC should have determined the legal validity of this argument. If GMC was wrong about its eligibility for the program, ECCC should have told the Minister so. Or if, on consideration, ECCC had found GMC's argument to be true, it should have told the Minister that the Ecological Gifts Program was not a reasonably acceptable remedy for GMC and explained to

him how this affected his weighing of whether the impact imposed by the Order was extraordinary or not. This too is a factor under the Compensation Policy, one of lesser importance maybe, but still a factor.

(iv) Losses claimed

[210] On December 10, 2020, GMC filed its claim for compensation under subsection 64(1) of the Act. GMC requested $20,730,586.06 in compensation in addition to fees and expert opinions.

[211] In its draft report, ECCC assesses the claim against the criteria set out in the Compensation Policy. In particular, ECCC assesses the losses claimed by GMC, including costs incurred for the project that are now sunk as a result of the Order. ECCC divided the claim into four categories: A. Loss of property value; B. Sunk costs and unproductive assets; C. Compliance costs; and D. Other losses (RR, Vol 4, Draft Report at 2174).

[212] However, the Draft Report does not state whether the losses claimed or certain categories of the losses claimed may have been [TRANSLATION] “suffered as a result of any extraordinary impact of the application of [the Order]” under subsection 64(1) of the Act. Rather, ECCC considered the claim as a whole. Since the compensation claim was complete and exhaustive and included a subsidiary claim for expenses incurred before the Order was made, it was the Minister’s responsibility to consider it from all angles, to determine whether any of the losses could qualify as losses suffered as a result of any extraordinary impact of the Order and to give reasons for his decision if appropriate.

[213] I noted above, at the request of the parties, all of whom agreed on this point, that the criteria and factors of the Compensation Policy, whether they fell under the extraordinary impact or the fair and reasonable compensation criterion of the Policy, are interchangeable and can be used in the analysis of either criterion. For example, the Minister used the factor of awareness of the presence of the species, analyzing it to determine that there was no extraordinary impact, even though this factor falls under the Policy's criterion of fair and reasonable compensation. I noted that this consideration was not in itself unreasonable.

[214] GMC has argued in this case that the loss of property value, sunk costs and unproductive assets and compliance costs, which are factors in the Compensation Policy, are in themselves extraordinary impacts under the Policy and the Act. These factors fall under the fair and reasonable compensation criterion of the Compensation Policy. However, these factors also had to be considered and analyzed by the Minister to determine whether the losses themselves were extraordinary impacts under his own compensation policy.

[215] For example, GMC stated in its compensation claim that it had suffered a loss of $12,500,000 as a result of the loss in value of its land and had incurred additional development costs for the oversizing of the municipal infrastructure. This last expense was incurred before the Order was made in July 2016, when the St-Philippe and La Prairie phases had been not only planned but also authorized by the Quebec Department of the Environment.

[216] The Minister therefore had to analyze GMC's losses individually. The Minister could have concluded that some losses qualified as extraordinary impacts but other types of losses did

not. Or he could have concluded that all or none of the losses qualified. The Minister had to explain why, for example, losses arising from costs actually incurred by GMC (some of which are now sunk), such as oversized infrastructure, the additional sums now required to bring the project into compliance with the Order or the purchase price of the land, are not extraordinary impacts. For example, he could have compared these sunk costs with the loss of future profits or the loss of land value appreciation. Those losses of income are not amounts already recognized as expenses, and there may be a distinction between the two. Past expenses (or future expenses to bring the part of the project already built into compliance with the Order) may be compensable, but not future profits. The Minister had to analyze this possibility. However, the Minister provided no reasons regarding these relevant factors under his own compensation policy.

[217] Furthermore, neither the Memorandum nor the Assessment Report enable the Court to determine the reasonableness of the Minister's analysis. In some cases, the file before the decision maker allows the reviewing court to understand the decision-making process; however, in this case, the Memorandum and the Assessment Report simply note the losses claimed, without examining why not all the losses are eligible. I acknowledge that the Memorandum and the Assessment Report explain that the development project [TRANSLATION] "carried risks" owing to the presence of the WCF, a ground that was accepted by the Minister (and is discussed above), but there is no weighing of GMC's arguments on this issue. For example, neither the Memorandum nor the Assessment Report weighs the fact that GMC had obtained all the necessary authorizations, had acted in good faith and was taking measures to mitigate the impact on the WCF (in particular creating a conservation area and breeding ponds), as required by the certificate issued by the Quebec Department of the Environment. These arguments could be used

to grant compensation for costs incurred and forfeited because of the Order, as distinct from future profits. This was for the Minister to determine, but there are no reasons in response to GMC's arguments in this case.

[218] Aside from stating that the presence of WCFs had been known since 2002, without linking that statement to a factor in the Compensation Policy or addressing GMC's arguments on the issue, the Minister's reasons fail to address the issue of GMC's losses in a transparent and intelligible manner, or to develop and strengthen the "culture of justification" needed in administrative decision making (*Mason* at paras 60, 63; *Vavilov* at paras 2, 136).

d) *Minister failed to take into account broad consequences for GMC and future litigants*

[219] In connection with the previous section, GMC submitted at the hearing (and in its memorandum: AR, GMC's Memorandum at paras 38–41 at 4332–35) that the proportion of the area affected and the value of its losses were, in themselves, extraordinary impacts under subsection 64(1) of the Act. It stated that, if the effects and losses arising from this Order were not extraordinary, no losses of future litigants could possibly qualify, which is inconsistent with the purposes of the Act. GMC specifically mentioned farmers and mine, petroleum and forestry operators, which would never qualify if GMC was unable to do so here.

[220] As GMC submitted at the hearing, the Decision has harsh consequences for it, and the broader the consequences for a party, especially where the party's livelihood is affected, the more the principle of justification requires sufficient reasons that are responsive to the issues and

concerns of the parties, in which the decision maker explains why its decision best reflects the legislature's intention (see AR, GMC's Memorandum at para 39 at 4333–34, citing *Vavilov* at paras 133–34; *Alexion* at para 21). GMC submits that three and a half pages of reasons are not enough in proportion to the consequences for it, namely a loss of more than $20 million.

[221] Moreover, GMC submits that the loss is so great that it is in essence asking the Court not to define what extraordinary impact under subsection 64(1) of the Act is, but simply to declare that the losses in question are of such magnitude that they must be an extraordinary impact. In other words, GMC is asking the Court to heed the words of the United States Supreme Court in *Jacobellis v Ohio*, 378 US 184 (1964) at 197, where Justice Stewart said of obscenity, while unable to clearly define the scope of the term: "But I know it when I see it …".

[222] Lastly, GMC criticizes the Minister for failing to take into account the broad consequences it has suffered and for failing to consider the broader context of future litigants (as required by *Mason* at para 69, citing *Vavilov* at paras 191–92) who could face the same dilemma already observed in the American experience that the parliamentarians wished to avoid: should litigants declare the presence of the species on their land and protect it, or remain silent for fear of incurring a significant loss that will not be compensated by the Minister?

[223] In response to these arguments, the AGC states at paragraphs 13 and 14 of its Further Submissions Post-*Mason* that the Minister had considered the impact of the decision on GMC because he had described the portions of the land that GMC could not develop and the lost profits this would mean for GMC. The AGC also submits that it is necessary to distinguish

particularly severe or harsh consequences, such as deportation in *Mason*, whereas here, GMC [TRANSLATION] "is not alleging that its company is in danger as a result of the emergency order". The AGC adds that, since the Minister saw one of the determinative factors as being the fact that the land has never been developed and that GMC was nonetheless able to complete most of its project outside the area covered by the Order, the Minister addressed the central arguments made by GMC, as required by *Mason* (AGC's Further Submissions Post-*Mason* at para 14 at 5–6).

[224] I agree with GMC.

[225] First, contrary to the AGC's arguments, the Minister did not explain in his reasons why the loss of numerous housing units and the financial losses did not represent an extraordinary impact under subsection 64(1) of the Act. He merely mentioned the loss of a number of units and a percentage of the developable area, and nothing more. He seems to justify his decision on the basis of profits made on other land that is not subject to the Order.

[226] Second, if the criterion imposed by the Minister requires bankruptcy or insolvency (or the equivalent of a severe threat to the life, liberty, dignity or livelihood of an individual) for an impact to be considered extraordinary, the Minister failed to express this in his reasons. ECCC also did not express this in either the Assessment Report or the Memorandum. More importantly, neither the Minister nor ECCC informed GMC of this. The Court also notes that this criterion may be too strict in light of the purposes of the Act discussed above; however, it is for the Minister to interpret the Act and to justify his interpretation.

[227] In this case, only the Compensation Policy was disclosed, and ECCC asked GMC to make submissions on the factors in the Policy. However, the viability of a company after an Order has been made is not a factor set out in the Compensation Policy. If ECCC knew that the financial impact on the company's viability was especially significant or even decisive, it was ECCC's duty to inform GMC and ask it what effect the losses would have on the company's solvency. The lack of evidence to this effect may have been caused by a failure to give GMC sufficient notice, which could have an impact on procedural fairness.

[228] In any event, in this case, it is not a question of rigidly determining the categories of losses incurred as a result of an extraordinary impact. Rather, the Minister must assess, case by case and on the basis of the context of each claim, whether the losses are suffered as a result of any extraordinary impact of the Order. I noted above that the criteria and factors set out in the Compensation Policy were designed to enable the Minister to determine, case by case, whether a loss incurred by a party was the result of such an extraordinary impact under subsection 64(1) of the Act.

[229] The fact that this is the first claim for compensation under subsection 64(1) of the Act also shows that this type of claim, like the making of an emergency order, is uncommon. Consequently, there is no reason to interpret extraordinary impact in subsection 64(1) of the Act in a needlessly narrow or strict manner.

[230] However, each claim must be analyzed on the facts of the case. Whether a loss has been suffered as a result of any extraordinary impact depends on the context. For example, a farmer

who cannot farm 1 million square feet of her 500-acre farm for two months because of a species' breeding season may not suffer a significant loss as a result of an extraordinary impact. However, the farmer's neighbour, who is also losing 1 million square feet of his farm over the same period, but whose farm is only 100 acres in size, may suffer significant losses that could lead to bankruptcy. That case is a comparative example where the Compensation Policy's factor of the proportion of land affected has a potentially predominant impact.

[231] The Minister could decide, on the basis of the facts, to consider the one farmer's loss to have been suffered as a result of an extraordinary impact (under subsection 64(1) of the Act) and compensate him for part of his loss, while, in the other case, the loss was not the result of an extraordinary impact because the farmer's loss was minimal and could be compensated by using another parcel of land on her farm. In each case, the Minister's decision would be reasonable and consistent with the purposes of the Act.

[232] In short, the context and facts are essential. The Minister's decision must also be consistent with the purposes of the Act, which are to protect species, to encourage and support Canadians in their conservation efforts, and in some cases, to share costs (as noted in the preamble to the Act and by Justice LeBlanc in *GB FC* at para 226). The Minister must therefore be satisfied that his decision reflects these purposes in each case.

[233] The Minister must therefore assess the extent of the loss for the litigant and assess the consequences of his decision for future claims, which he failed to do in this case. As was argued at the hearing, if GMC cannot qualify, it will be difficult, if not impossible, for any future litigant

to do so and obtain compensation (AR, GMC's Memorandum at paras 39–41 at 4333–35). If a refusal in one case has significant consequences for future cases, and if these consequences undermine the purposes of the Act, the Minister must be alive to this and provide reasons for his decision accordingly. In this case, the Minister did not consider the broad consequences of his decision either for GMC or for litigants who might be faced with the same dilemma (*Mason* at para 69; *Vavilov* at paras 191–92).

[234] That denying compensation may undermine the purpose of the Act, since it discourages Canadians in their conservation efforts—and foreshadows the consequences of the American experience that parliamentarians specifically sought to avoid—is an indication that the impact is extraordinary in the eyes of the litigant and that compensation is warranted.

[235] It is important to understand that the compensation does not necessarily have to cover the entire loss. The Minister's weighing must make it possible to share costs in a way that also reflects the purposes of the Act. In short, a flexible, case-by-case, context-based interpretation of "extraordinary impact" does not mean that fair and reasonable compensation will be substantial. The determination of the amount of compensation also involves weighing the facts on the basis of the context, in accordance with the purposes of the Act.

V. Costs

[236] GMC is seeking costs. Without making any substantive arguments, it is seeking [TRANSLATION] "costs in these proceedings to be awarded against the respondent".

[237] Under rule 400 of the *Federal Courts Rules*, SOR 98/106 [Rules], this Court has "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid". Having considered the factors set out in subrule 400(3) of the Rules and the other circumstances of this case, including the outcome of the proceedings and the size and complexity of the issues, which are unprecedented, I believe it is appropriate to award costs to GMC, assessed in accordance with the high end of column III of Tariff B (*Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc*, 2002 FCA 417 at para 9).

VI. Conclusion

[238] As the SCC wrote in *Mason* and *Vavilov*, the decision maker must be alive to and sensitive to the issues before it and meaningfully grapple with those issues while accounting for the central arguments and evidence presented by the parties (*Mason* at paras 69, 73–74; *Vavilov* at paras 120, 126–28). The decision maker must justify its decision, but the justificatory burden will depend on the context. The length of the reasons as such is not necessarily determinative of the reasonableness of a decision (*Vavilov* at paras 92, 292–93; *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at paras 16–19; *Patel v Canada (Citizenship and Immigration)*, 2020 FC 77 at para 17). However, the broader the consequences for a party, the more the principle of justification requires sufficient reasons that are responsive to the issues and concerns of the parties (*Vavilov* at paras 133–34; *Alexion* at para 21).

[239] On judicial review, the Court must show restraint, sensitivity and respect, but its evaluation is also a robust exercise (*Mason* at paras 8, 63; *Vavilov* at para 12).

[240] The Court has examined whether the Minister reasonably considered the constraints imposed by earlier decisions of this Court and the Federal Court of Appeal in *GMC FC*, *GMC FCA*, *GB FC* and *GB FCA*, the arguments of the parties before the Minister, the consequences of his interpretation for GMC and the broader issue of consequences for all other Canadians who might find themselves in the same situation (*Mason* at para 76; *Vavilov* at para 133).

[241] Moreover, as the SCC explained in *Mason* and *Vavilov*, in the absence of exhaustive reasons, as in this case, the Court may refer to the internal record (*Mason* at para 61). I reiterate that the length of the reasons as such is not determinative, but the reasons must demonstrate that the decision maker considered the central arguments and the evidence, and appropriately weighed the relevant factors. The AGC has asked the Court to evaluate the entire record, including the Memorandum and the Assessment Report, and to see in the Minister's reasons implicit justifications that are not noted in the Minister's reasons, the Memorandum or the Assessment Report. In this case, the Memorandum and the Assessment Report submitted to the Minister were a possible means of justifying the reasonableness of the Minister's decision.

[242] However, the Memorandum and the Assessment Report submitted to the Minister ignore several of GMC's submissions in response to the Draft Report and do not suggest how these should be weighed by the Minister. The Memorandum and the Assessment Report do not lead the Court to conclude that the Minister and his Department before him were alive to and sensitive to the issues before them and that they had meaningfully grappled with the central arguments raised by GMC. Therefore, the Court cannot agree to the AGC's request, which requires that the Court draw "implicit" justifications from the Minister's reasons and do more

than simply “connect the dots on the page” (*Mason* at paras 96–97, 101; *Vavilov* at para 97). Moreover, the deficiencies noted are sufficient for the Court to lose confidence in the process followed by the Minister (*Mason* at para 66; *Vavilov* at para 106). The Minister’s decision is, as a result, unreasonable.

[243] In this case, the Minister’s complete silence on some of GMC’s central arguments, on key factors of his own compensation policy and on his weighing of all these factors is a “fundamental gap” that “call[s] into question whether the decision maker was actually alert and sensitive to the matter before it” (*Vavilov* at paras 96, 100, 128).

[244] In deciding in this case that the Minister’s decision is unreasonable, the Court has not made its own yardstick and then used it to measure what the Minister did (*Vavilov* at para 83). Quite the opposite. The Court verified whether the Minister had applied his own yardstick, namely his own compensation policy, and examined, on the applicable standard of review, whether the Minister had reasonably applied and justified his analysis.

[245] The scope of the term “extraordinary impact” need not be defined in the abstract. The parties agree that what constitutes an extraordinary impact depends on the facts of each case. The Minister’s conclusion must be consistent with the purposes of the Act, which include (i) protecting threatened species; (ii) encouraging and supporting the participation of Canadians in their species conservation efforts; and (iii) in some cases, sharing costs.

[246] In this case, the Minister failed to consider or to justify in his reasons how his interpretation of subsection 64(1) and his decision to deny compensation for GMC's losses, because they were not the result of any extraordinary impact, were consistent with the purposes of the Act.

[247] The Minister's decision also fails to consider or at least explain how, in a broader context, his decision will support and encourage other Canadians to participate in conservation efforts in the future. The Minister must ask himself whether a refusal to compensate in a specific case may influence other Canadians to destroy the habitat of a species rather than protect it, for fear of incurring a significant loss without any real and reasonable hope of obtaining fair and reasonable compensation (as the American experience demonstrates). If so, it is an indication that the impact of the Order may be extraordinary under subsection 64(1) of the Act and in the eyes of the litigant.

[248] The same analysis must then be carried out by the Minister to determine the fair and reasonable amount of compensation to propose. Since the cost must be shared, the compensation does not necessarily have to fully offset the losses incurred. However, here again, the Minister must be guided by the same purposes of the Act. The compensation should enable costs to be shared between the public and the litigant, which will promote the protection of the species and encourage and support Canadians in their conservation efforts in the future. The weighing of these purposes might call for full compensation in one situation, while in another it might call for nominal or even zero compensation (despite the Minister's initial conclusion that the impact is

nonetheless extraordinary). In other cases, this weighing up could lead to fair and reasonable compensation that would split the litigant's loss 50-50 with the public.

[249] This determination is at the discretion of the Minister, who must comply with and weigh the purposes of the Act.

[250] Alternatively, the GIC can always intervene and make regulations under subsection 64(2) of the Act to set the terms of compensation, the method of determining entitlement to compensation, and the amount of compensation for losses.

[251] In closing, I would like to thank counsel for the parties for their substantial submissions, their cooperation and their exemplary professionalism.

JUDGMENT in T-811-22

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed.
2. The Decision of the Minister of Environment and Climate Change is set aside and referred back to the Minister for redetermination.
3. Costs are awarded to GMC in accordance with the high end of column III of Tariff B.

"Guy Régimbald"
Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-811-22
STYLE OF CAUSE:	LE GROUPE MAISON CANDIAC INC v THE ATTORNEY GENERAL OF CANADA
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JUDGMENT AND REASONS:	RÉGIMBALD J
DATED:	MAY 2, 2024

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