Federal Court Cour fédérale

**Date: 20200130**

**Docket: T-495-17**

**Citation: 2020 FC 161**

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

**Ottawa, Ontario, January 30, 2020**

**PRESENT: The Honourable Mr. Justice LeBlanc**

**BETWEEN:**

**9255-2504 QUÉBEC INC.**
**AND**
**142550 CANADA INC.**
**AND**
**GRAND BOISÉ DE LA PRAIRIE INC.**

**Plaintiffs**

**and**

**HER MAJESTY THE QUEEN**

**Defendant**

**JUDGMENT AND REASONS**

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## I. INTRODUCTION

[1] The plaintiffs, which are related companies, work in the field of real estate development. Their activities are mainly concentrated on the South Shore of Montréal, particularly in the town of La Prairie, where in 2013 they undertook a real estate development project known as "Projet Symbiocité" (also identified in the evidence at times as the "projet du Domaine de la nature" or "projet du secteur du Bois de la commune") [Symbiocité Project]. This project had six phases and was scheduled for completion in 2019.

[2] On June 17, 2016, when the first four phases of the Symbiocité Project were for all intents and purposes completed, the Governor in Council, pursuant to its powers under subparagraph 80(4)(c)(ii) of the *Species at Risk Act*, SC 2002, c 29 [the Act], made an emergency order to protect the Western Chorus Frog, a threatened species under the Act. This order, which was to come into effect on July 17, 2016, was followed by a second order (*Emergency Order for the protection of the Western Chorus Frog (Great Lakes / St Lawrence*

*and Canadian Shield population)*, SOR/2016-211 [Order], Exhibit P-1), made on July 8, 2016, but with immediate effect, since heavy machinery work, not attributed to the plaintiffs, continued to be observed in the area subject to the first order. Except for the effective date, the Order was identical in all respects to the order dated June 17, 2016.

[3] The Governor in Council considered this intervention necessary, being convinced that this species present in Quebec, especially in the Montérégie region, and whose population has declined significantly over the past 50 years in this region, which includes the territory of the town of La Prairie, faces imminent threats to its recovery.

[4] The scope of the Order extended to the land on which phases 5 and 6 of the Symbiocité Project were to be built, and the prohibitions that the Order put in place slowed down the development of said phases since the plaintiffs were therefore no longer permitted, under threat of severe penalties, to carry out the work necessary to complete the last two phases of their project.

[5] As with at least two of their competitors, Groupe Maison Candiac Inc. and Habitations Îlot St-Jacques Inc., whose lands were also affected by the Order, the plaintiffs considered themselves to have been harmed by its coming into force. However, unlike those two competitors, they did not contest the validity of the Order, which has been confirmed by two decisions of this Court (currently before the Federal Court of Appeal) in *Groupe Maison Candiac Inc. v Canada (Attorney General)*, 2018 FC 643 [*Groupe Maison Candiac*] and *Habitations Îlot St-Jacques Inc. v Canada (Attorney General)*, 2019 FC 315 [*Îlot St-Jacques*].

[6] Assuming, therefore, for the purposes of this action that the Order is valid, the plaintiffs submit that the defendant has engaged her civil liability by failing to compensate them for the losses they consider to have suffered because the completion of phases 5 and 6 of the Symbiocité Project is now, for all intents and purposes, irreparably compromised by the Order. According to them, this fault allegedly results from the failure of the defendant, herein represented by the Governor in Council and the Minister of the Environment and Climate Change, to implement the compensation plan established by the Act, which authorizes providing fair and reasonable compensation, in accordance with the regulations made for this purpose, to any person for losses suffered as a result of any extraordinary impact that the application of an emergency order made under the Act may have, and from the failure to fully apply the plan in the present case.

[7] Alternatively, the plaintiffs claim that the Order, because it was not preceded—or followed—by the implementation of said compensation plan, effected a disguised expropriation of the land included in the area subject to the Order, an expropriation for which, they argue, they are entitled to obtain full compensation.

[8] The defendant disputes both grounds of the plaintiffs' claim but admits, after coming to an agreement with them a few days before the start of the trial, that the loss suffered by the plaintiffs as a result of the adoption of the Order is $22,292,473, excluding expert fees and extrajudicial fees paid to their counsel. The details of this agreement are set out in Exhibit P-106 filed, by consent, at trial.

## II. GENERAL BACKGROUND

[9] The Western Chorus Frog is a small wetland amphibian which, in adulthood, generally does not measure more than 2.5 centimetres long or weigh more than a gram. During its lifetime, it will rarely move more than 300 metres from its breeding site.

[10] In Canada, it is now found mainly in southern Ontario and southwestern Quebec, chiefly in the Montérégie and Outaouais regions. In Montérégie, more particularly, it is said that this species occupies only 10% of the range it once occupied 50 years ago. One of the six metapopulations of Western Chorus Frogs listed in Montérégie is located in the La Prairie area, at the limits of the municipalities of Candiac and Saint-Philippe. It is the second-largest metapopulation in the region.

[11] According to the evidence on the record, the greatest threat to this species comes from the fact that its habitat is often found on land considered to be of interest for urban or agricultural development. The resulting draining and backfilling of the land do indeed prove fatal for many individuals, in addition to significantly changing the quality of the species' critical habitat (Exhibit D-1).

[12] On February 23, 2010, the Western Chorus Frog Great Lakes/St. Lawrence–Canadian Shield population was designated, by order of the Governor in Council, a "threatened species" within the meaning of the Act, meaning a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction (*Order Amending Schedule 1 to the Species at Risk Act*, SOR/2010-32, Exhibit D-3).

[13] As I mentioned in *Groupe Maison Candiac*, the designation of a species as a threatened species generally results from an assessment conducted by a committee of independent experts, the Committee on the Status of Endangered Wildlife in Canada [COSEWIC], constituted under the Act, whose mission is, among other things, to assess the status of each wildlife species it considers to be at risk and, as part of the assessment, to report to the responsible minister—in this case the Minister of the Environment and Climate Change (or the federal Minister of the Environment)—existing and potential threats to the species (*Groupe Maison Candiac* at paras 58–60).

[14] In this case, in a report dated April 2008 (Exhibit D-1), COSEWIC noted that in Quebec, particularly due to suburban expansion, the habitat and breeding sites of the Western Chorus Frog were suffering continuous losses, resulting in population losses and the isolation of the remaining patches of habitat. It concluded that the species was threatened. This was followed by a recommendation from the federal Minister of the Environment that the Western Chorus Frog Great Lakes/St. Lawrence–Canadian Shield population be added to the list of "threatened species", as defined in the Act, and that the abovementioned designation order be made (Exhibit D-3).

[15] Since 2001, the Western Chorus Frog has also been classified as a "vulnerable wildlife species" under Quebec legislation on threatened or vulnerable species (*Act respecting threatened or vulnerable species*, CQLR c E-12.01) and since that time has been the subject of a conservation plan (Exhibit D-89) prepared under the aegis of this legislation and intended to halt

the decline of the population of the species. This plan was updated in 2008 based on a review of conservation principles conducted the previous year (Exhibit D-64).

[16] In May 2008, the town of La Prairie, further to a request it had made in December 2005, obtained from the Quebec government of a certificate of authorization issued under section 22 of Quebec's environmental quality legislation (*Environment Quality Act*, CQLR c Q-2; Exhibit P-26). This certificate authorized backfilling of wetlands (swamps and marshes) on the land where what would become the Symbiocité Project was planned to be built. In return, it was accompanied by a number of measures aimed at mitigating the environmental impacts of these activities. The evidence reveals that the plaintiffs were involved in the process of obtaining this certificate, but since the town of La Prairie was, at the time, owner of more than half of the land in the area where the development of the future Symbiocité Project was being considered, the certificate was issued under its name.

[17] On July 11, 2012, the plaintiffs signed a memorandum of understanding with the town of La Prairie (Exhibit P-2) for the development of the Symbiocité Project. As a result of this memorandum, the plaintiffs and the town exchanged land. More specifically, the plaintiffs bought from the town most of the land on which phases 5 and 6 of the Symbiocité Project were to be built. This transaction was signed before a notary on June 6, 2013 (Exhibit P-23).

[18] A few weeks before this transaction was finalized, in mid-May 2013, an environmental group, Nature Québec, formally asked the federal Minister of the Environment at the time, Peter Kent, to make an emergency order under section 80 of the Act to protect the habitat of the

Western Chorus Frog metapopulation in the area where the Symbiocité Project was planned to be built. Nature Québec believed that this project threatened what remained of the metapopulation in this area and alerted the Minister to the existence of an opinion published by the provincial recovery team for this species in 2010, which [TRANSLATION] "reiterates the weakness of legal tools in place in Quebec to protect wildlife habitats on private land", noted in a first opinion made public in 2007 (Exhibit D-7).

[19] On March 27, 2014, Minister Kent's successor to the Environment portfolio, Minister Leona Aglukkaq, refused to recommend to the Governor in Council the adoption of the emergency order sought, saying that even though the decline of the Western Chorus Frog in all of southern Quebec and Ontario could be described as serious from a biological point of view, the scope of the work planned on the site referred to in Nature Québec's formal demand did not threaten the possibility of the species' presence elsewhere in Ontario and Quebec (Exhibit P-119).

[20] Nature Québec did not stop there. It challenged Minister Aglukkaq's decision before this Court. It joined forces with another environmental defence group, the Centre québécois du droit de l'environnement.

[21] On June 22, 2015, Justice Luc Martineau, even though he refused to order the Minister to recommend to the Governor in Council that an emergency order be issued, set aside the decision to not make such a recommendation, which he considered to be unreasonable, and referred the matter back to the Minister to reconsider said decision within six months (*Centre québécois du*

*droit de l'environnement v Canada (Environment)*, 2015 FC 773 [*Centre québécois du droit de l'environment*]). Essentially, Justice Martineau criticized the Minister for having "arbitrarily and capriciously ignore[d] the scientific opinion of her own Department's experts" and for having adopted an unduly restrictive interpretation of section 80 of the Act to limit its application to cases where a species is exposed to imminent threats to its survival or recovery on a national basis (*Centre québécois du droit de l'Environnement* at paras 77–78).

[22] On December 5, 2015, the new Minister of the Environment and Climate Change Canada, Catherine McKenna [Minister], following the judgment of Justice Martineau, announced that she intended to recommend to the Governor in Council the adoption of an emergency order, being of the opinion that the Symbiocité Project, in particular, threatened the short-term viability of the metapopulation of the Western Chorus Frog in the La Prairie area, that this metapopulation was necessary for the restoration of the species in Canada and, therefore, that there was an imminent threat to this recovery (Exhibit D-14).

[23] The Minister presented three options to the Governor in Council:

a. make an emergency order which would protect part of the suitable habitat for the metapopulation of the area concerned and which would include the land of phases 5 and 6 of the Symbiocité Project, but not that of phases 1 to 4, already developed;

b. make an emergency order which would protect all suitable habitats for the metapopulation of the area concerned and which would include all the land associated with the Symbiocité Project; or

c. do not issue an emergency order;

[24] It was ultimately the first option that was chosen by the Governor in Council. The impact study done in relation to the Order specified the following as the issues that led to its adoption:

> While there is a continuous decline in the Western Chorus Frog (GLSLCS) population, threats to the connectivity and viability of existing metapopulations and the lack of adequate measures to protect its habitat, the Minister of the Environment concluded in December 2015 that the Western Chorus Frog (GLSLCS) was exposed to an imminent threat to its recovery due to the threat posed by the Symbiocité residential project to the metapopulation of La Prairie and, therefore, that immediate intervention was required.
>
> The Minister's conclusion was based on a scientific assessment that took into account the best information available. The study concluded that the planned phases of the La Prairie residential development project, as we currently understand them, would cause the loss of connectivity between the remaining populations of the Prairie metapopulation and the direct loss of habitat, including breeding ponds. The areas remaining after such development were therefore unlikely to sustain the viability of the La Prairie metapopulation in the long-term. As such, the objectives set out in the recovery strategy for the Western Chorus Frog (GLSLCS) were unlikely to be achieved without immediate intervention. Therefore, under subsection 80(2) of the [Act], the Minister recommended that the Governor in Council make an emergency order to address the imminent threat to the Western Chorus Frog (GLSLCS). The Governor in Council accepted the Minister's recommendation and made the *Emergency Order for the protection of the Western Chorus Frog (Great Lakes / St Lawrence and Canadian Shield population).*

[25] The Order gives a precise description of the area to which it applies and states that it is prohibited to

a. remove, compact or plow the soil;

b. remove, prune, damage, destroy or introduce any vegetation, such as a tree, shrub or plant;

c. drain or flood the ground;

d. alter surface water in any manner, including by altering its flow rate, its volume or the direction of its flow;

e. install or construct, or perform any maintenance work on, any infrastructure;

f. operate a motor vehicle, an all-terrain vehicle or a snowmobile anywhere other than on a road or paved path;

g. install or construct any structure or barrier that impedes the circulation, dispersal or migration of the Western Chorus Frog;

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

i. use or apply a *pest control product* as defined in section 2 of the *Pest Control Products Act* or a *fertilizer* as defined in the *Fertilizers Act*.

[26] The Order also provides that any contravention of these prohibitions is an offence for the purposes of section 97 of the Act, which states that every person commits an offence who, among other things, “contravenes a prescribed provision of a regulation or an emergency order”.

[27] On July 13, 2016, the plaintiffs sent a formal demand to the Attorney General of Canada in connection with the adoption of the Order, which in their view had the effect of preventing the completion of phases 5 and 6 of the Symbiocité Project. More specifically, they asked the Attorney General to confirm in writing, within 10 days, that it was the Government of Canada's intention to compensate them for the losses resulting from the Order, which provided no form of compensation (Exhibit P-17).

[28] Essentially, this formal demand fell on deaf ears, such that on April 3, 2017, the plaintiffs instituted these proceedings. As I indicated at the outset, they do not contest the validity of the Order. Rather, they focus on its effects for which they seek compensation. They consider that by failing to ensure the implementation of the compensation plan established in section 64 of the Act, in particular by failing to adopt the regulations required for this purpose, the defendant committed an omission which incurred her civil liability. Alternatively, they consider that making the Order, without paying compensation for the losses resulting from it, amounts to a disguised expropriation of the land intended for the construction of phases 5 and 6 of the Symbiocité Project.

[29] As I have also had occasion to say, the defendant disputes the plaintiffs' action. In particular, she submits that the failure to make a regulation—or to make a decision—under section 64 of the Act does not constitute a fault and, at best, gives rise to a remedy on judicial review. She argues that, in any event, there is no possibility of a remedy in civil liability in the circumstances of the present case since the plaintiffs must be considered as having, with full knowledge of the facts, assumed a business risk in planning a real estate development in an area

at the heart of the habitat of a species at risk. According to her, the plaintiffs knew—or should have known—that it was possible that a government authority could intervene to protect this species and thus thwart, in whole or in part, the achievement of this development. The realization of this risk must be entirely borne by the plaintiffs, she concludes.

[30] Finally, the defendant argues that the conditions for applying the rules of disguised expropriation, assuming that they were not ruled out by the compensation plan established by the Act, were not satisfied in the present case. She argues, in this regard, that the Order did not result in the appropriation by the Crown of an interest in the plaintiffs' property subject to the Order, or even in the abolition of all uses of said property, which could still be put to reasonable uses despite the prohibitions provided for in the Order.

[31] I note that the plaintiffs, after having read the judgment in *Groupe Maison Candiac*, filed an application for judicial review aimed at forcing the Governor in Council to adopt the regulations provided for in subsection 64(2) of the Act and the Minister to exercise the powers vested in her under subsection 64(1) of the Act (*Grand Boisé de La Prairie et al. v Her Majesty the Queen et al.*, T-1374-18 [*Grand Boisé II*]). They say they instituted these proceedings to protect their rights. After filing these proceedings, they requested that they be stayed until judgment is rendered in the present case.

[32] In response to this alternative proceeding, the Attorney General requested that it be rejected, by means of a motion to strike. He argued that said judicial review proceeding was incompatible with the rules and principles governing judicial reviews before this Court in that, in

particular, it related to two separate decision-making processes under the jurisdiction of two separate federal boards, commissions or other tribunals, did not specify grounds in support of the conclusions sought, compelled the Court to identify for itself the decision to be reviewed so that it could exercise its jurisdiction and, moreover, constituted an abuse of right to the extent that, *inter alia*, an application for judicial review cannot serve as an insurance policy, so to speak, in case it turns out to be useful later on.

[33] The Attorney General's motion was still under reserve before Prothonotary Alexandra Steele when this case was being tried. Since then, on November 29, 2019, Prothonotary Steele granted the said motion and, therefore, struck the plaintiffs' alternative remedy, finding it, essentially on the grounds relied on by the Attorney General, inconsistent with the rules and principles governing judicial review before this Court.

[34] As permitted by rule 51 of the *Federal Court Rules*, SOR/98-106 [Rules], Prothonotary Steele's order was appealed to a judge of this Court. However, on December 18, 2019, Prothonotary Tabib, at the request of the plaintiffs and with the consent of the defendant, suspended that appeal until the delivery of this judgment.

## III. EVIDENCE ADDUCED AT TRIAL

[35] The present case was heard between September 11 and October 3, 2019, in Montréal.

[36] The plaintiffs called only one witness, Theodore Quint, their principal shareholder and director. For her part, the defendant called six witnesses, namely Mark Dionne and Marie-Josée

Couture, both officials at Environment and Climate Change Canada (or Environment Canada); Alain Branchaud, formerly of that same department; Alain Guitard and Dominic Boula, both officials at the federal Department of Fisheries and Oceans; and Lyne Bouthillier, an official representing Quebec's department of forests, wildlife and parks, the Ministère des Forêts, de la Faune et des Parcs.

[37] These testimonies were used, in particular, to file a total of 160 exhibits, some of which were the subject of objections, all of which were either settled or decided during the trial.

[38] It should be noted that a confidentiality order that was issued was not challenged by the plaintiffs in this case. The purpose of this order was to guarantee the confidentiality of personal information (names, mailing addresses, telephone numbers and email addresses) concerning natural persons who are not parties to this dispute, contained in exhibits D-46 and D-54 produced by the defendant at trial. No such information appears in these reasons for judgment, so there is no reason to also issue a confidential version.

A. *Mr. Quint's testimony*

[39] Mr. Quint, personally or through companies he controls, has worked in the field of construction and real estate development since the late 1960s. To avoid making this summary of the testimony unnecessarily heavy to read, I will refer to Mr. Quint, although most of the time he acted through one or more of the companies of which he is the chief officer.

[40] Mr. Quint's activities, therefore, are concentrated on the South Shore of Montréal. At the time, he built residences as well as commercial and industrial buildings. In particular, he began building houses on the territory of the town of La Prairie in the mid-1970s.

[41] In the 1980s, he abandoned construction to focus on his real estate developer activities, which became more demanding due to new requirements imposed by the municipalities. As such, he stated that he had developed [TRANSLATION] "almost all residential areas" in La Prairie (Transcripts, September 11, 2019, at p 46). For example, it is Mr. Quint who developed the Grand Boisé Project, located on the northern edge of the Symbiocité Project.

[42] His real estate developer activities, he continued, consist of finding and acquiring [TRANSLATION] "developable" land, ensuring the bearing capacity of such land effectively allows building what is planned to be built there, decontaminating that land, if necessary, discussing and negotiating with the municipal authorities the agreements necessary for carrying out the proposed real estate development, obtaining the environmental permits required from the government authorities concerned, carrying out the necessary infrastructure work (streets, water and sewer services, public utility services, etc.) and then selling the serviced land to builders, as subdivided.

[43] Mr. Quint stated that he had acquired land that would eventually be used for the development of the Symbiocité Project in 1987. Some of the land was subsequently transferred to the town of La Prairie, which wished to develop an industrial park there. However, citizen

opposition put a stop to the project. This sector therefore became a residential area with a school, a daycare centre and an arena, explained Mr. Quint.

[44] The planning of the Symbiocité Project took its more or less final form, continued the witness, in July 2012, when he signed, on behalf of the plaintiffs, the memorandum of understanding, which I have already mentioned, with the town of La Prairie (Exhibit P-2). This memorandum was the culmination of two years of negotiations, he stated, during which the project underwent modifications, mainly in terms of its residential density. This document also provides for the exchanges and transfers of land between the plaintiffs and the town, necessary for the implementation of all phases of the project. These exchanges and transfers, recalled Mr. Quint, were signed before a notary in June 2013 and set the stage for beginning work on the project as scheduled for fall of that same year.

[45] Although the memorandum does not mention it, this work included, explained Mr. Quint, carrying out the compensation measures stipulated in the certificate of authorization issued to the town in May 2008 under the terms of Quebec's environmental quality legislation (Exhibit P-26), and in the complementary measures issued during 2014 and relating, in particular, to the five-year waterworks and sewer plan related to the project (exhibits P-38, P -39 and P-41). These measures, at the expense of the plaintiffs, specified Mr. Quint, included expanding the existing conservation park by 5 million square feet, bypassing a stream crossing the Symbiocité Project area and developing four breeding ponds for the Western Chorus Frog. All of these measures had been taken, continued Mr. Quint, with the exception of the development of the two breeding ponds to border phases 5 and 6 of the Symbiocité Project, which the Order made obsolete.

[46] The certificates of authorization issued in relation to the Symbiocité Project also oblige the plaintiffs not to carry out any work during the reproduction period of the Western Chorus Frog, that is, between March and July.

[47] The memorandum of understanding also dictates, the witness continued, the pace that the development of the six phases of the Symbiocité Project has to follow. Mr. Quint emphasized, in this regard, that this agreement obliges him to build 125 units per year or face monetary penalties. It also obliges him to do business, at least for the first four phases of the project, with a minimum of six contractors. As for phases 5 and 6, this number is reduced to two, since they were intended to accommodate only one type of housing, that is, single-family houses. The contractors were chosen in 2015, and negotiations for the completion of these phases began with them in the fall of the same year and continued to the spring of 2016. Mr. Quint specified that the game plan was to proceed with the sale of the serviced land to these two contractors in time for construction of the homes to begin in the summer of 2018. This was admitted by the defendant (Exhibit P-105).

[48] When asked about the business risk associated with the Symbiocité Project, Mr. Quint specified that from the moment he had, from an environmental standpoint, all the required authorizations from the town and the province to undertake the project, it no longer posed a risk, at least in this regard. For a promoter, he stated, having a certificate under section 22 of the Quebec's environmental quality legislation, [TRANSLATION] "is the green light to go ahead with a project" (Transcripts, September 11, 2019, at p 110). Besides, he noted, if carrying out the project still presented a risk, he would not have invested 15 million dollars in the construction of

infrastructure, of which 2.5 million dollars was devoted to the over-sizing of the infrastructure of phases 1 to 4, which is necessary for carrying out phases 5 and 6.

[49] He added that, to his knowledge, there was no citizen opposition to this project, at least no significant opposition. As for the presence of the Western Chorus Frog in the Symbiocité Project area, he stated he was obviously aware of it since it was discussed with the municipal and Quebec authorities for the purpose of issuing the certificates and authorizations required to launch the project and was also referenced in the certificates obtained under Quebec's environmental quality legislation, which imposed compensation measures to limit the impact of the project's development on the species.

[50] As for the steps taken in the spring of 2013 by Nature Québec to force the federal Minister of the Environment to recommend the issuance of an emergency order under the Act, Mr. Quint stated he did not know anything about it until notice of provisional and interlocutory injunction proceedings (Exhibit P-8) was served on him by Nature Québec and the Centre québécois du droit de l'environnement in the summer of 2015, in the wake of Justice Martineau's judgment. The objective behind these proceedings was to preserve the useful effects of that judgment while Minister Aglukkaq reconsidered her decision not to recommend the making of such an order to the Governor in Council, and to stop, for this purpose, the work being done on the Symbiocité Project.

[51] At the same time, stated Mr. Quint, the authorities of Environment and Climate Change Canada, through a letter signed by Marie-Josée Couture, one of the defendant's witnesses in the

present case, contacted him (Exhibit P-7). They were looking for information on the situation of the Western Chorus Frog and on the activities that could have an impact on it, in this case the Symbiocité Project. Mr. Quint noted that the letter he received from Ms. Couture made no reference to Justice Martineau's judgment.

[52] On October 14, 2015, Mr. Quint, through his counsel, wrote to Minister Aglukkaq (Exhibit P-10) to persuade her to maintain her decision not to recommend the issuance of an emergency order while reminding her of the potentially disastrous effect that the adoption of such an order would have on the plaintiffs and the Symbiocité Project. Following the election of Justin Trudeau's government in the fall of 2015, the same letter was sent to the Minister.

[53] Mr. Quint then described the discussions he and his counsel had with Environment Canada authorities following the Minister's decision in early December 2015 to recommend to the Governor in Council that an emergency order be made in the Symbiocité Project area. He specified that this department was especially interested, this time, in the potential socio-economic effects of making an emergency order and required information of this type from him. Mr. Quint then commissioned a study by the firm KPMG on the economic losses that would result from making such an order (Exhibit P-15). This study was submitted to department authorities on April 5, 2016.

[54] This particular request led him to believe that compensation would be paid to him by the government if an emergency order were to be adopted. Moreover, during meetings held in January and March 2016, in relation to the work carried out by the Minister with a view to

finalizing her recommendation to the Governor in Council, Mr. Quint inquired about the compensatory measures expected in the event that such an order were made. Ultimately, he stated, he was told that for the most part, in the absence of regulations under subsection 64(2) of the Act, the Minister had no authority to pay compensation.

[55] Mr. Quint stated that the land in phases 5 and 6 of the Symbiocité Project was now worthless and it was folly to believe that it could be used for other reasonable purposes than that for which it was intended. He also stated that he was ready to cede the land to the federal government if he received full compensation for the damage suffered as a result of the Order.

[56] The plaintiffs' representative concluded his testimony by asserting that, as a good citizen, he did not oppose the protection of species at risk, as evidenced by the investments he had made to mitigate the impacts of the Symbiocité Project on the Western Chorus Frog. However, it is baffling why the Order, which had the effect of devaluing the land in phases 5 and 6 of his project almost to nothing, was not accompanied by compensatory measures, especially since the Act provided that this could be done.

[57] Questioned on the reasons that motivated him to bring this action rather than attack, on judicial review, the Governor in Council's inaction on putting in place regulations implementing the compensation plan provided for in section 64 of the Act or the Minister's decision to consider herself without authority, in the absence of regulations, to exercise her power of compensation, Mr. Quint stated that, at the age of 74, time was running out for him and that the quickest way to be compensated, in the circumstances, was to institute this action in damages.

B. *Mr. Dionne's testimony*

[58] This witness, the first called by the defendant, has worked for the Canadian Wildlife Service since 2004. The Canadian Wildlife Service is a branch of Environment and Climate Change Canada. The witness is a biologist by training. He was called upon to contribute to the work which would eventually lead, following Justice Martineau's judgment, to the Minister's decision and the subsequent adoption of the Order.

[59] After briefly explaining the procedure leading to a "threatened species" designation under the Act and the mission of the Species at Risk Public Registry as a tool for publicizing certain actions (recommendations, decisions, reports) taken under the Act, Mr. Dionne described the obligations that must be imposed following such a designation, namely the identification of the species' critical habitat, the preparation of a proposal for a recovery plan for the species for consultation purposes, the adoption of the recovery plan and the implementation of an action plan.

[60] In the case of the Western Chorus Frog, recalled Mr. Dionne, the proposal for the recovery program or plan (Exhibit D-44) was published, for consultation, in July 2014. He stated, using a postcard referring to this proposal to support his claim (Exhibit D-45), that among the people and organizations consulted were the land owners whose properties are home to the species' critical habitat, and that among those owners, two of the three plaintiffs, Grand Boisé de La Prairie Inc. and 142550 Canada Inc., were on the mailing list for said postcards filed in

support (Exhibit D-46). As for the final version of the recovery program or plan (Exhibit D-6), according to the witness, it was published on December 1, 2015.

[61] Returning to his involvement in the follow-up to Justice Martineau's judgment, Mr. Dionne stated that he was involved on a number of levels. He worked first, he said, to collect the information necessary for the reconsideration process imposed by that judgment. This was to update the knowledge that Environment and Climate Change Canada had on the Western Chorus Frog and what threatened it. He also participated in the activities of the various committees responsible for producing evaluation reports to be used to reconsider the decision not to recommend the issuance of an emergency order.

[62] Mr. Dionne explained that three reports were necessary for this purpose: a first on the situation of the species (Exhibit D-5), a second on the protection to which it was subject (Exhibit D-12) and a third on the threat it faced (Exhibit D-13). A number of studies and reports from a variety of federal/provincial government and non-government sources were considered for the purposes of this exercise. The witness listed a few, including the 2008 COSEWIC status report, which was used to designate the Western Chorus Frog as a threatened species (Exhibit D-1); the recovery report for the species for the period from 1999 to 2009, prepared by Quebec's department of natural resources and wildlife, the Ministère des Ressources naturelles et de la Faune, and made public in April 2010 (Exhibit D-4); the conservation plan submitted to the town of La Prairie in June 2008 by the Western Chorus Frog provincial recovery team set up by the Ministère des Ressources naturelles et de la Faune (Exhibit D-64); and the report released by

Ciel et Terre on the situation of the Western Chorus Frog in the La Prairie area, in particular, this time for the period from 2004 to 2014 (Exhibit D-48).

[63] These reports, the witness pointed out, conclude, among other things, that since 1992, in the La Prairie area, the Western Chorus Frog had suffered habitat losses of around 60%, and that these were the largest losses observed in Montérégie. It also concluded, again according to the witness, that there are significant shortcomings in Quebec in terms of protecting the critical habitat of this species, in particular because the relevant legislation does not apply to private land in most cases, whereas the majority of habitats are located on such land.

[64] His involvement, continued Mr. Dionne, did not stop there since once the decision to recommend the adoption of an emergency order was made in December 2015, he was called upon to participate in land inventories for the purpose of delimiting what the application area of a possible order could include, as well as in information meetings organized by his department for the people likely to be affected by such an order.

[65] His only other involvement in a file concerning the area where the Symbiocité Project would be developed or its surroundings dates back to the mid-2000s. At that time, he was asked to give an expert opinion on a feared loss of wetlands in connection with a real estate development project whose name he could not recall.

[66] His department, which manages the federal environmental assessment procedure established under the *Canadian Environmental Assessment Act*, SC 1992, c 37, was then called

upon by Fisheries and Oceans Canada to follow up on complaints received by the department in relation to that project. The assessment related, explained Mr. Dionne, to the impact that the anticipated loss of wetlands could have on migratory birds that use those habitats. It was Smitter's Marsh, which is located in the application area of the Order, that was the focus of their concerns at the time.

[67] In preparing his expert opinion, he stated he was provided with a copy of a report from the firm Genivar, dated November 2005 (Exhibit P-10E) and prepared at the request of the town of La Prairie in support of the request it was submitting to the Quebec authorities for the purpose of obtaining the certificate of authorization which would be issued in May 2008 under section 22 of the Quebec's environmental quality legislation (Exhibit P -26).

[68] Although the Western Chorus Frog was one of the concerns discussed in that report, the federal government's interest in the assessment undertaken at the request of Fisheries and Oceans was limited to fish habitat and migratory birds since, as explained by Mr. Dionne, the Western Chorus Frog did not, at the time, benefit from any designation under the Act.

[69] On cross-examination, Mr. Dionne acknowledged that the position of his department at the time the plaintiffs enquired, during information sessions held in relation to the Minister's decision to recommend the issuance of an emergency order, about the payment of compensation in the event of the adoption of such an order, was to the effect that such compensation was not possible in the absence of regulations. He also acknowledged that, apart from the Order, none of documents entered in the Species at Risk Public Registry concerning the Western Chorus Frog

were binding. He finally recognized that before Nature Québec protested in spring 2013 by sending a formal demand to Minister Kent, the Western Chorus Frog was not yet considered by his department to be facing an imminent threat to its survival or recovery. However, he pointed out that the assessments allowing such a judgment to be made had not yet been carried out.

C. *Ms. Couture's testimony*

[70] Ms. Couture has been a federal public servant since September 1997. In 2015, she was the head of the Canadian Wildlife Service for the Quebec region. It was essentially in this capacity that she testified at trial.

[71] Like Mr. Dionne before her, she stated that it was the Service, acting on behalf of Minister Aglukkaq, that was primarily responsible for following up on Justice Martineau's judgment. Accordingly, it was she who signed the request for information sent to the plaintiffs in July 2015 (Exhibit P-7). The Service also filed, as part of the information gathering made necessary by Justice Martineau's judgment, an access to information request concerning the Symbiocité Project, made to the Quebec authorities concerned (Exhibit D-8). The town of La Prairie was also approached, she continued, as they were essentially trying to determine what protective measures were put in place to protect the Western Chorus Frog from the threat posed by the Symbiocité Project.

[72] Ms. Couture pointed out that 58 individuals and organizations were contacted as part of this information-gathering process and specified that 23 responses were received by the Service,

including the letter from counsel for the plaintiffs dated October 14, 2015 (Exhibit P-10), to which I have already referred.

[73] On November 26, 2015, continued the witness, the Minister was informed of the Service's recommendation regarding the follow-up on Justice Martineau's judgment. All the information collected by the Service as part of the information-gathering process was sent to the Minister. That collection of information, according to Ms. Couture, was over 3,000 pages long (Exhibit D-54, excluding the first 13 pages). The Service concluded that even though the species was not facing an imminent threat to its survival, the same could not be said for its recovery, given the likely impact of the Symbiocité Project on its habitat.

[74] Ms. Couture remained involved in the file after the Minister's decision to recommend to the Governor in Council that an emergency order be made. She now had to coordinate the collection of socio-economic information relating to the impact of creating an emergency order, information that had to be included in what was to be sent to the Governor in Council for its own decision-making purposes. She had to also organize information sessions for those who were likely to be affected by the issuance of such an order.

[75] An initial meeting took place on December 15, 2015. Mr. Quint was there, stated Ms. Couture. The question of compensation in the event of an emergency order was raised by Mr. Quint. He was informed that although compensation was possible under the Act, the question was premature at this stage since the adoption of such an order remained hypothetical.

Mr. Quint was also informed that, for the moment, there were no regulations allowing compensation to be paid (Exhibit D-17).

[76] Also in December 2015, continued Ms. Couture, they received a list of questions , prepared by Environment Canada's economists, aimed at helping people likely to be affected by an emergency order to provide the sought-after socio-economic information. An English version of the questions was sent, on request, to Mr. Quint on December 22, 2015 (Exhibit D-56J). On the same day, counsel for Mr. Quint reminded Ms. Couture of their client's interest in holding a meeting on the socio-economic impacts that the emergency order would have (Exhibit D-56K).

[77] Ms. Couture clarified that a map showing the possible application area of such an order as well as a non-exhaustive list of activities that could be prohibited in this area were also sent to people potentially affected by an emergency order (Exhibit D-18).

[78] A meeting with the town and representatives of Mr. Quint, including one of his lawyers, was held on January 14, 2016. Once again, the question of compensation was raised. Environment Canada officials present at the meeting were asked whether the Minister intended to also recommend to the Governor in Council the adoption of regulations governing compensation. They said that she did not, specifying that the Minister [TRANSLATION] "will abide by her obligations under the [Act]" (Exhibit D-19). Ms. Couture and her team then recommended that participants who were interested in this issue could raise the point right in the socio-economic information they were given the opportunity to submit (Exhibit D-19).

[79] On January 22, 2016, counsel for Mr. Quint requested an extension of time to produce the socio-economic information requested (Exhibit P-14). Five days later, an amended map of the possible application area of a potential order and a new series of socio-economic questions were sent to the persons concerned (Exhibit D-56O).

[80] On February 4, 2016, continued Ms. Couture, she received from the Quebec government the information that was the subject of the access to information request filed in July 2015 (Exhibit D-72).

[81] Three new information meetings were held on March 9, 22 and 31, 2016. The question of compensation was also addressed at these meetings. Ms. Couture then reiterated to participants that the Act makes it possible to pay compensation, but that in the absence of regulations, the Minister has no authority to consider such a request. Ms. Couture specified, however, that since the decision of this Court in *Groupe Maison Candiac*, the Minister's position has been that she does have this authority, despite the absence of regulations. However, she was unable to say whether such requests had been made to the Minister since this change of position.

[82] On April 5, 2016, Ms. Couture received from Mr. Quint's counsel, in the form of the KPMG report to which I have already referred (Exhibit P-15), the socio-economic information requested from people likely to be affected by the issuance of an emergency order. Ms. Couture stated that a summary of all the information received was prepared and sent to the people concerned for comment. No comments, she stated, were received.

[83] On May 4, 2016, according to the evidence on the record, Mr. Quint met with representatives of the Minister's office to explain his concerns regarding the prospect of an emergency order which would have the effect of paralyzing the Symbiocité Project (Exhibit D-56X).

[84] Following the adoption of the Order, Ms. Couture remained involved in the case insofar as her team was responsible for informing the persons affected by the adoption of the Order of its content. A meeting to this effect, attended by Mr. Quint and representatives of the town of La Prairie, was held on June 22, 2016 (Exhibit D-56AA).

[85] At the end of her testimony in chief, Ms. Couture stated that certain activities could be carried out in the application area of the Order upon obtaining a permit. She indicated that 15 such requests had been received since the Order was made and that permits had been issued in some cases. She gave as an example the two permits issued to Hydro-Québec, which has facilities in the area subject to the Order, and one granted to the town of La Prairie allowing it to maintain the cross-country ski trails and the ice rink located in the application area of the Order. On cross-examination, she was asked if her department had received a permit request from a private owner. She replied that it had, stating that this request, which concerned the development of a parking lot, had been abandoned for reasons unknown to her. However, she acknowledged that such activity would have been difficult to reconcile with the prohibitions set out in the Order.

[86] On cross-examination, she was also made aware of a series of internal notes from her department (exhibits P-110 to P-117) setting out the Minister's position that no compensation could be offered to the persons affected by Order, given the absence of regulations to that effect. She was also confronted with the possibility that the type of tree frog present in the application area of the Order may not be the Western Chorus Frog. She responded that this issue had been resolved by the clarification statement issued by COSEWIC on November 26, 2015 (Exhibit D-53), that is, before the Minister made her decision to recommend that an emergency order be made.

D. *Mr. Branchaud's testimony*

[87] This witness was employed by Environment and Climate Change Canada from 2003 to 2015. He is a biologist by training. He began his career at the department as a biologist working on the recovery of species at risk and was a member of COSEWIC between 2007 and 2010. He therefore sat on this committee when it examined the Western Chorus Frog and recommended, in 2008, its designation as a threatened species under the Act. The witness described COSEWIC's discussions on the problem related to the type of tree frog found in La Prairie.

[88] He was the one who signed the scientific opinion (Exhibit D-82) given to Minister Aglukkaq in connection with Nature Québec's petition in May 2013, and the decision she had to make regarding the appropriateness of recommending that an emergency order be issued. He underlined the key elements, namely that the Symbiocité Project posed a real threat to the recovery of the Western Chorus Frog, and that an emergency order was the only tool available to counter that threat.

[89] The main part of Mr. Branchaud's testimony, however, consisted of a review of the media coverage related to the plight of the Western Chorus Frog because of real estate development in La Prairie. He first identified two articles from the newspaper *Le Devoir* published in 2004 in connection with the intervention by Fisheries and Oceans Canada, an intervention which I have already mentioned ("Ottawa bloque un projet de développement domiciliaire dans un marais à La Prairie", Exhibit D-33; "Un plan global de protection est nécessaire pour mettre fin au saccage des boisés et des milieux humides", Exhibit D-34). The witness clarified that these articles do not discuss the Western Chorus Frog, but added that they do nevertheless speak of the destruction of wetlands where this species lives.

[90] Mr. Branchaud then discussed the media coverage following the first opinion of the provincial recovery team for the Western Chorus Frog, made public in February 2007, which mainly highlighted the absence, at the provincial level, of legal tools to protect the habitats of this so-called "vulnerable" species under provincial legislation on threatened or vulnerable species (Exhibit D-64). This was how *Le Devoir*, noted the witness, took an interest in this opinion and published, in its December 21, 2007 edition, a report entitled "La rainette devient moins politique" (Exhibit D-36).

[91] *Le Devoir* was also interested, noted the witness, in the second opinion of the provincial recovery team for the Western Chorus Frog, this one published in 2010, which echoed the finding of the 2007 opinion, noting that the ineffectiveness of the legal tools available constituted [TRANSLATION] "the crux of the problem of protecting the habitats of the Western Chorus Frog" (Exhibit D-90). This article, entitled "Entendez-vous le cri de la rainette faux-grillon", was

published on June 18, 2010 (Exhibit D-40). The daily newspaper *La Presse* also took interest in the second opinion of the provincial recovery team for the Western Chorus Frog and published, a few weeks earlier, on April 20, 2010, an article which reported on it, entitled "Une minuscule grenouille disparaîtra du Québec" (Exhibit D-37).

[92] Mr. Branchaud then went on to address the media coverage following Nature Québec's formal demand in the spring of 2013. *La Presse* reported on this on May 16, 2013, in an article entitled "Espèce menacée à La Prairie : Nature Québec demande à Ottawa d'intervenir" (Exhibit D-38). It discussed it again on June 11, 2013, in an article entitled "Milieux humides : Nature Québec craint le scénario « Laval » à La Prairie", in which *La Presse* took another look at the steps taken by Nature Québec (Exhibit D-39).

[93] On February 26, 2014, continued the witness, *La Presse* published an article entitled "Milieux humides : des écologistes pressent Québec d'agir" (Exhibit D-41), in which some stakeholders denounced the decision of Quebec's department of the environment authorizing the Symbiocité Project. On April 1, 2014, *La Presse* reported on the decision of Minister Aglukkaq not to intervene in the Symbiocité Project file in an article entitled "Espèce menacée : Ottawa n'interviendra pas à La Prairie" (Exhibit D-42). On June 12 of the same year, this same newspaper reported Nature Québec's decision to go to court to contest Minister Aglukkaq's decision not to intervene. That article was entitled "Minuit moins une pour une espèce menacée en Montérégie" (Exhibit D-43).

[94] The witness noted that in February 2015, *La Presse* published an update to an article originally published on November 18, 2014, which reported on the results of Western Chorus Frog recovery efforts for the period from 2004 to 2014 (Exhibit D-48), to which I have already referred and which was written on behalf of the organization Ciel et Terre by Isabelle Picard, a biologist specializing in aquatic wildlife who is interested in the fate of this species in Montérégie. This assessment, specified Mr. Branchaud, was an update of a first assessment made in 2004 by this same specialist in the context of a citizen movement for the protection of the Western Chorus Frog. This follow-up article was entitled "Le déclin s'accélère pour la rainette faux-grillon" (Exhibit D-49).

[95] Finally, Mr. Branchaud referred to articles published in 2013 and 2014 in the local publications *Roussillon Express* or *Tout Express*. These articles reported the concerns of some local defenders of the Western Chorus Frog (Exhibit D-76).

[96] Mr. Branchaud also testified as a resident of La Prairie. He has lived there, he said, since the fall of 2003, and his residence is located in Grand Boisé, an area developed by Mr. Quint neighbouring the Symbiocité Project. He claimed that the presence of the Western Chorus Frog has not gone unnoticed in his residential area. No one here, however, disputes that this species is present in the area of the Symbiocité Project.

[97] On cross-examination, the witness was confronted with a scientific article which he co-wrote in 2015 and which revisits the question of the true identity of the tree frog present in the La Prairie area ("A 'Trilling' Case of Mistaken Identity: Call Playbacks and Mitochondrial DNA

Identify Chorus Frogs in Southern Quebec (Canada) as *Pseudacris maculata* and Not *P. triseriata*", Exhibit P-121). Asked whether the conclusions of this article were indeed to the effect that the tree frog present in this area is the Northern Tree Frog, and not the Western Chorus Frog, the witness asserted that the question should be qualified according to whether the species was being discussed in legal or biological terms, and that the conclusions of the article do not change the correctness of the tree frog's designation in the Order. He noted in this regard that COSEWIC had been asked twice to clarify this issue. The second, dated November 26, 2015, gave rise to the issuance of a statement by this organization, namely, the "Clarification statement on the taxonomic issues relevant to the status of chorus frogs in Canada" to which I have already referred (Exhibit D-53).

[98] Moving on, Mr. Branchaud, still under cross-examination, was asked to specify how many versions of the federal recovery program proposal for the Western Chorus Frog preceded the final version issued in December 2015, and how many versions of the scientific opinion related to Nature Québec's formal demand had been produced before he signed it and sent it to Minister Aglukkaq. After checking, he stated that there were 76 and 31, respectively.

[99] He was also asked to explain a discrepancy between the text of an earlier version of that scientific opinion, dated December 11, 2013 (Exhibit D-100), and the text of the final version, dated December 13, 2013 (Exhibit D-82), regarding what the province was prepared to do to address the concerns raised in the notice. Stressing that this kind of document passes through many hands before being finalized, he explained that the final version reflected his understanding

of the Quebec government's position as to its desire not to intervene to modify the authorizations previously issued for the Symbiocité Project.

E. *Witnesses from Fisheries and Oceans Canada*

[100] These two witnesses, Mr. Guitard and Mr. Boula, both discussed the intervention of Fisheries and Oceans Canada in relation to citizen complaints received by this department in the mid-2000s regarding a real estate development project expected to bring harm to Smitter's Marsh, in particular, located in the area where the Symbiocité Project would eventually be carried out. One, Mr. Boula, took over this file from the other, Mr. Guitard.

[101] The plaintiffs objected to these two testimonies, considering them irrelevant. Although they are at the limit of what is useful to know in order to resolve the present case, I allowed these testimonies insofar as they contribute, in my opinion, to understanding the general context of this dispute.

[102] I note that after receiving these complaints, the town of La Prairie, identified as the proponent of the project in question, was informed, in the summer of 2004, that Fisheries and Oceans Canada considered the *Fisheries Act*, RSC 1985, c F-14, applicable to this project, that an authorization under this law would be necessary to allow the completion of the planned work to the extent that it could affect fish habitat, and that an environmental assessment, conducted under the *Canadian Environmental Assessment Act*, could therefore be required.

[103] Although some complaints mention the Western Chorus Frog as one of the concerns raised, it was not up to Fisheries and Oceans Canada to look closer at it. Mr. Guitard mentioned that he did not remember whether his department informed Environment Canada of the existence of such complaints, although he did remember having seen a complaint to that department concerning this species.

[104] Mr. Boula took over from Mr. Guitard in January 2006. He was asked to analyze the impact of the planned work on fish and their habitat. To do this, he read over the Genivar report, dated November 2005, which was previously discussed (Exhibit P-10E). Discussions then took place with representatives of that firm. Mr. Boula stated that, ultimately, the town of La Prairie was notified by Fisheries and Oceans Canada that the work planned in a specific area— the Casimir-Dufresne area—would not be authorized due to the richness and rare nature of the fish habitat there.

[105] As for the other areas included in the planned real estate development, they did not present any major challenges in relation to fish habitat, continued Mr. Boula, although they required further analysis to properly guide the decision-making process (Letter from Fisheries and Oceans Canada to the town of La Prairie dated September 20, 2006, Exhibit D-29D). For these areas, stated Mr. Boula, protective measures were required, but no formal authorization was needed (Letter from Fisheries and Oceans Canada to the town of La Prairie dated October 27, 2006, Exhibit D-29E). The witness clarified that since no authorization was required under the *Fisheries Act*, there was no longer a [TRANSLATION] "trigger" justifying the continuation of the environmental assessment undertaken by Environment Canada.

[106] On cross-examination, Mr. Boula was unable to describe the exact nature of the work that Fisheries and Oceans Canada did not authorize in the Casimir-Dufresne area.

F. *Ms. Bouthillier's testimony*

[107] The last witness presented by the defendant has been employed by the Quebec government for 30 years. She is currently an official working for the Ministère des Forêts, de la Faune et des Parcs. One of her biggest files, she stated, was the recovery of the Western Chorus Frog. Her testimony essentially consisted of listing the studies, reviews, programs, action plans and follow-ups undertaken and decisions made by her department in connection with the recovery of this species.

[108] Ms. Bouthillier recalled that the Western Chorus Frog has been designated in Quebec as a "vulnerable species" under Quebec legislation on threatened or vulnerable species since 2001. The provincial recovery team for this species already exists. Established in 1998, this team is responsible for collecting all the information available on the Western Chorus Frog in Quebec to determine whether this species qualifies as a species likely to be designated as threatened or vulnerable. Once the species was designated, the mandate of the recovery team expanded; it now had to advise the Minister of Wildlife on the strategies to adopt and the programs to be put in place to ensure the recovery of the species.

[109] A first recovery plan was prepared in 2001, approved by the ministerial authorities and published. It identified, in particular, the breeding sites of the Western Chorus Frog in La Prairie. In addition to this recovery plan, a conservation plan for the Western Chorus Frog in La Prairie,

of which the witness is a co-author, was prepared the following year (Exhibit D-89) and presented to the authorities of the town of La Prairie. This plan proposed a conservation perimeter which aimed to stop the fragmentation of the species' habitat and to protect a significant portion of it.

[110] Discussions ensued with various stakeholders, including the town of La Prairie. A memorandum of understanding involving the town, the Société des Parcs et de la Faune, which then reported to the Minister of Natural Resources and Wildlife, the Quebec department of the environment and a property developer not related to Mr. Quint, Arrondissement de La Prairie Inc., emerged from those discussions (Exhibit P-10C). The memorandum was dated December 17, 2003. The objective of this agreement, from the point of view of the Société des Parcs et de la Faune, was to ensure the creation of a conservation park benefitting, in particular, the Western Chorus Frog in the area concerned.

[111] Ms. Bouthillier went on to discuss the involvement of her department in examining requests for certificates of authorization filed under section 22 of Quebec's environmental quality legislation. This involvement is sought, specified the witness, when the provincial department of the environment judges that a wildlife component is affected by the project in question. In such a case, her department prepares a wildlife opinion for the provincial environment department. Her role, however, is not to recommend the issuance of the certificate. She stated that she had worked on preparing a wildlife opinion as part of the certificate the town of La Prairie applied for in 2005 in relation to the Bois de la Commune development project, renamed, as we have seen, as the Symbiocité Project.

[112] This opinion, she specified, was drawn up on the basis of the available data and the information in the Genivar report ordered by the town in support of its certificate application (Exhibit P-10E). The opinion recommended modifications to the proposed development plan in order to, in particular, improve the conservation balance of the breeding ponds of the Western Chorus Frog and wetlands in general. The witness then described the commitments made by the town of La Prairie in relation to the upcoming issuance of the certificate of authorization (Exhibit P-26) in a letter sent to the Quebec government in March 2008 (Exhibit P-10D.1).

[113] Ms. Bouthillier went on to describe the Western Chorus Frog Conservation Plan prepared by the provincial recovery team for the species and made public in June 2008 (Exhibit D-64). This plan, recalled the witness, was based on a review of conservation principles carried out the previous year. The witness then returned to the three opinions issued by the recovery team in 2007 (Exhibit D-64), 2010 (Exhibit D-90) and 2014 (Exhibit P-120) on the situation of the Western Chorus Frog. She clarified that these three opinions were disseminated to various the stakeholders and departments concerned, with the exception of the 2014 opinion, which was only sent to the deputy minister of the Quebec wildlife department.

[114] On cross-examination, Ms. Bouthillier acknowledged that her department did not oppose the issuance, to the town of La Prairie, of the 2008 certificate of authorization (Exhibit P-26) and that the developable territory subject to the 2003 memorandum of understanding (Exhibit P-10C) was located within the perimeter of the conservation park proposed in 2002 (Exhibit D-89). Asked about the specific requests from her department for the protection of the Western Chorus Frog in the wildlife opinion filed along with the application that would result in the granting of

the 2008 certificate of authorization, she admitted that all her department's requests had been met by the plaintiffs or by the town and that the conservation park had been enlarged by more than 20 hectares.

## IV. SECTIONS 80 AND 64 OF THE ACT

[115] Section 80 of the Act gives the Governor in Council, on the competent minister's recommendation, the power to make an emergency order for the protection of a species designated as threatened, particularly where the Minister is satisfied that the species concerned faces imminent threats to its survival or recovery. Such an order may identify any habitat that is necessary for the survival or recovery of the species in question in the area to which the order relates and prohibit any activity that exposes the species to these imminent threats.

[116] More specifically, subparagraph 80(4)(c)(ii), under which the Order was made, empowers the Governor in Council to make an emergency order for the protection of any species so designated, whatever it is and whatever its range. In other words, 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.

[117] For convenience, the text of section 80 of the Act is reproduced in full as an appendix to this judgment.

[118] For its part, section 64 of the Act confers on the competent minister the power, in accordance with the regulations adopted for this purpose, to "provide fair and reasonable compensation to any person for losses suffered as a result of any extraordinary impact of the application of . . . an emergency order", in particular.

[119] These regulations, which still do not exist, as we have seen, may, in particular, set the procedure to be followed to claim compensation as well as the method of determining the right to compensation, the amount of loss suffered and the amount of the compensation in respect of any loss.

[120] Section 64 of the Act provides as follows:

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| **Compensation** | **Indemnification** |
| 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. |
| **Regulations** | **Règlements** |
| (2) The Governor in Council shall make regulations that the Governor in Council considers | (2) Le gouverneur en conseil doit, par règlement, prendre toute mesure qu'il juge |

| | |
|---|---|
| necessary for carrying out the purposes and provisions of subsection (1), including regulations prescribing | nécessaire à l'application du paragraphe (1), notamment fixer: |
| (a) the procedures to be followed in claiming compensation; | a) la marche à suivre pour réclamer une indemnité; |
| (b) the methods to be used in determining the eligibility of a person for compensation, the amount of loss suffered by a person and the amount of compensation in respect of any loss; and | b) le mode de détermination du droit à indemnité, de la valeur de la perte subie et du montant de l'indemnité pour cette perte; |
| (c) the terms and conditions for the provision of compensation. | c) les modalités de l'indemnisation. |

## V. DEFENDANTS' DESIGNATION

[121] This action was directed, jointly and severally, against Her Majesty the Queen, the Attorney General of Canada and the Minister of the Environment and Climate Change. The Attorney General maintains that this designation is problematic, being of the opinion that, according to the combined effect of subsection 48(1) of the *Federal Courts Act*, RSC 1985, c F-7, and the schedule to that Act, only Her Majesty the Queen may be named as the defendant in the case. His objection, he continues, also finds support in doctrine (Michael H. Morris and Jan Brongers, *The 2019 Annotated Crown Liability and Proceedings Act*, Toronto, Carswell, 2019, at p 173; Bernard Letarte et al., *Recours et procédure devant les Cours fédérales*, Montréal, LexisNexis, 2013, at p 163 [*Recours et procédure*]).

[122] The plaintiffs argue that this objection is moot and not based on any provision of the *Federal Courts Act* or the Rules, that the authorities that support it do not have the scope that the Attorney General attributes to them and that, in any event, there is good reason here to also designate the Attorney General and the Minister as defendants.

[123] I disagree.

[124] To begin with, I would like to point out that the Court has the power to change the designation of the parties, if it considers that it is incorrect, right in the conclusions of the judgment it is called upon to render (see, for example: *Magy v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 722; *Okonkwo v Canada (Citizenship and Immigration)*, 2019 FC 1330 at para 1). Although neither the *Federal Courts Act* nor the Rules provide for a specific procedural vehicle for dealing with this type of issues, the Court frequently deals with motions or requests of this nature (see, for example: *Bergeron v Canada (Correctional Service)*, 2016 FC 235 at paras 3–8). This is undoubtedly, in my view, part of its inherent or implied power to enforce the procedure governing the proceedings brought before it (*Recours et procédure*, at pp 12–13).

[125] It is true that the wording of section 48 of the *Federal Courts Act*, which provides that the document instituting proceedings against the Crown "may be in the form set out in the schedule", which schedule identifies "Her Majesty the Queen" as defendant, is permissive, not imperative. However, the jurisprudence is clear, in my view, that if, in a proceeding instituted, as here, against the federal Crown under section 17 of the *Federal Courts Act*, no relief is claimed, in an

individual capacity, from the Attorney General, a minister or other Crown servant, it is not appropriate to designate the Attorney General, that minister or that other servant as a defendant in the action (*Rodriguez v Canada*, 2018 FC 1125 at para 5; *Kealey v The Queen*, [1992] 1 FC 195 at para 64; *Federal Courts Practice 2020*, Toronto, Carswell, 2019, at p 301 [*Federal Courts Practice*]).

[126] This approach is more consistent, in my opinion, with the law governing the extracontractual civil liability of the federal Crown, according to which, as we will see, this statutory liability can be engaged, in a case like ours, only for the fault of public servants. In such a context, designating both Her Majesty and her servants as defendants when the latter are not being sued in their personal capacity, as is the case here, appears contrary to the reality proper to this right.

[127] The designation of public servants as defendants is, of course, still possible if they are sued personally, but in such a case, if they are summoned to appear in Federal Court, the jurisdiction of the Court to deal with these claims is not a given (*Peter G. White Management Ltd v Canada (Minister of Canadian Heritage)*, 2006 FCA 190; *Apotex Inc v Ambrose*, 2017 FC 487; *Federal Courts Practice*, at p 84).

[128] The style of cause in this case will therefore be changed so that only Her Majesty the Queen appears as defendant. This change in no way weakens, of course, the rights that the plaintiffs would have to demand—and obtain—full execution of a judgment rendered in their favour.

## VI. ISSUES

[129] The present case, in my view, raises the following three issues:

a. Because the Governor in Council had not made regulations under subsection 64(2) of the Act at the time or following the issuance of the Order and because the Minister believed that she was justified in not exercising the discretionary power of compensation vested in her under subsection 64(1) of the Act, in either case or in both cases, is it a fault engaging the civil liability of the defendant?

b. Assuming this to be the case, should the plaintiffs, in planning to carry out a real estate project in an area known to harbour a species at risk, be considered to have taken a business risk for which they alone must assume the consequences, including those forming the basis of their claim based on Crown liability? In other words, if the plaintiffs are to be considered as having taken a business risk in this case in relation to the presence of the Western Chorus Frog in the area planned for the completion of phases 5 and 6 of the Symbiocité Project, does this constitute a bar or a complete defence, as the defendant claims, against their claim based on Crown liability?

c. Alternatively, did making the Order effect a disguised expropriation of the plaintiffs' property included in the Order's application area?

[130] For the reasons that follow, I find that the first and third questions should be answered in the negative and that it is therefore neither necessary nor desirable to answer the second question.

## VII. ANALYSIS

### A. *Is the federal Crown's extracontractual civil liability engaged in this case?*

#### (1) Plaintiffs' position

[131] The plaintiffs essentially argue that the defendant, first by the Governor in Council's actions and subsequently by the Minister's, failed to meet her obligations under section 64 of the Act. They maintain, however, that these obligations were unambiguous, insofar as the Governor in Council was required, by the wording of subsection 64(2), to adopt regulations implementing the compensation plan instituted by this provision, which it has not yet done to date, while the Minister could not rely on the absence of such regulations to refuse to consider paying compensation in relation to the Order.

[132] These omissions, both on the part of the Governor in Council and of the Minister, constitute, according to the plaintiffs, by their cumulative effect, a civil fault engaging the liability of the federal Crown. In particular, the plaintiffs argue that the Governor in Council, in making an emergency order in relation to private property for the first time since the adoption of the Act, therefore placed itself at odds with the Act, even though the Act made the adoption of regulations under subsection 64(2) a mandatory obligation.

[133] The plaintiffs submit that this failure to act has, in a way, neutralized the power granted to the Minister to compensate them, the Minister having felt justified in not acting in turn for lack of regulations. This situation persisted, they add, despite the clear pronouncements of the

Court in *Groupe Maison Candiac* and *Îlot St-Jacques* that the absence of such regulations could not have the effect of carrying out such a neutralization. This situation, according to the plaintiffs, is not only contrary to the letter of the Act, but also to its underlying principles and to the intention clearly expressed by Parliament in the debates which preceded its enactment.

[134] This is therefore an abuse of right, according to the plaintiffs, the government being unable, by its own turpitude, to deny a right or a benefit specifically conferred by the Act.

[135] In response to the defendant's argument that a remedy for damages is not the appropriate remedy in the circumstances of this case, the plaintiffs argue that it must be rejected for three reasons.

[136] First, it is with full knowledge of the facts, they say, that the Governor in Council and the Minister acted in this way since the question of compensation was raised at the first meeting that followed, in December 2015, the Minister's decision to recommend the adoption of an emergency order. However, there are still no regulations or a ministerial decision, three years after the Order was made and more than a year after the decision of this Court in *Groupe Maison Candiac*. In this context, the plaintiffs conclude, it would be unreasonable to require them to start from scratch, as it were, by seeking judicial review of the Governor in Council's failure to adopt the regulations under subsection 64(2) of the Act and the Minister's failure to exercise her powers under subsection 64(1) of the Act when they have now had every opportunity to rectify the situation.

[137] Second, the plaintiffs, borrowing from the law applicable to disguised expropriation, maintain that two remedies are available to them, as the Supreme Court of Canada recently recalled in *Lorraine (Ville) v 2646-8926 Quebec Inc.*, 2018 SCC 35 at para 2 [*City of Lorraine*]. Alternatively, they rely on another Supreme Court decision, *Irving Oil Ltd. et al. v Provincial Secretary of New Brunswick*, [1980] 1 SCR 787 [*Irving Oil*], to invite the Court to exercise, in the Minister's place, the power set out in subsection 64(1) of the Act, which they maintain is sufficiently delineated by its wording to allow such an approach.

[138] Finally, they note having instituted, in the few weeks following the judgment rendered in *Groupe Maison Candiac*, a proceeding for judicial review—*Grand Boisé II*— against the failure of the Governor in Council to act and the Minister's decision not to exercise her powers under subsection 64(1) due to the absence of regulations. They find it difficult to explain why they are now being criticized by the defendant for having pursued the wrong remedy when the defendant is seeking, at the same time, to strike out their application for judicial review. In their view, there is an irreconcilable paradox in the defendant's position on this question.

(2) Applicable general principles

[139] As the Supreme Court of Canada recently noted in *Hinse v Canada (Attorney General)*, 2015 SCC 35 [*Hinse*], the extracontractual civil liability of the federal Crown is rooted in the *Crown Liability Act*, SC 1952-53, c 30, enacted in 1953. Until the advent of this law, which became the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 [CLPA], the Crown, at common law, was in principle sheltered from any extracontractual civil liability since it was considered that, being the source and fountain of justice, it could not act contrary to law. Over

time, however, it had become technically possible to take legal action against the Crown in a case of extracontractual civil liability, but this could only happen if the alleged fault was attributable to one of its employees and if it gave its consent to filing the proceedings (*Swanson v Canada*, [1992] 1 FC 408 at pp 418–19; Peter W. Hogg, Patrick J. Monahan and Wade K. Wright, *Liability of the Crown,* 4th ed, Toronto Carswell, 2011, at p 9 [*Liability of the Crown*]; Jean-Louis Baudouin and Patrice Deslauriers, *La responsabilité civile,* vol 1, 8th ed, Cowansville, Yvon Blais, 2014, at p 108 [*La responsabilité civil*]).

[140] Under the regime established by the CLPA, the federal Crown [or the federal State] is henceforth considered, in matters of extracontractual civil liability, a natural person of full age. In Quebec, according to paragraph 3(a) of the CLPA, the Crown is liable for the damage caused by a servant of the Crown, or the damage resulting from the act of a thing in the custody of or owned by the Crown, as if the Crown were such a person. In the first case, the one which governs the present issue in dispute, the liability of the Crown is said to be indirect ("vicarious") (*Liability of the Crown* at p 159). In other words, in such a scenario, the Crown engages extracontractual civil liability not on its own account, but solely for the fault of its servants (*Hinse* at para 58; *La responsabilité civil*e at p 115).

[141] It is now established that a government minister will generally be considered to be a "servant" within the meaning of the CLPA (*Hinse* at para 58). There has yet to be a court ruling to the same effect with respect to the Governor in Council, the collegiate body at the top of the executive branch of the government which some believe cannot be a "servant" within the meaning of the CLPA because it represents the Crown itself (*Pacific Shower Doors (1995) Ltd. v*

*Osler, Hoskin & Harcourt, L.L.P.*, 2011 BCSC 1370 at para 111). However, in view of the conclusions I have reached elsewhere, it will not be necessary to decide this question.

[142] Also, according to the CLPA, the extracontractual civil liability of the federal Crown is governed by the law of the jurisdiction where the alleged harmful acts were committed. Thus, in Quebec, "the federal Crown is generally subject to the rules of civil liability set out in art[icle] 1457 [of the *Civil Code of Québec*, CQLR, c CCQ-1991]" (*Hinse* at para 21). This provision, however, must be read together with article 1376 of the same Code, which article, while making the Code's liability regime applicable to "the State", does so "subject to any other rules of law which may be applicable to them".

[143] This means, as the Supreme Court recalled in the *Hinse* case, that "general principles or rules of public law may either prevent the general rules of civil liability from applying or substantially alter how they are applied"(*Hinse* at paras 22–23; see *Finney v Québec Bar*, 2004 SCC 36 at para 27 [*Finney*].

[144] There are many principles relating to Crown immunity. It is now well established that so-called "policy" decisions, that is, those which are generally based on considerations of public interest, such as economic, social or political factors, enjoy relative immunity in the sense that they are cannot engage the Crown's extracontractual liability, provided they are neither irrational nor taken in bad faith (*Hinse* at para 23; see also: *Kosoian v Société de transport de Montréal*, 2019 SCC 59 at para 107 [*Kosoian*]; *R v Imperial Tobacco Canada ltée*, 2011 SCC 42 at

para 90; *Just v British Columbia*, [1989] 2 SCR 1228 at pp 1239–40; *Laurentide Motels Ltd v Beauport (Ville)*, [1989] 1 SCR 705 [*Laurentide Motels*]).

[145] This standard is, of course, higher than the standard of simple fault (*Hinse* at para 52) and encompasses "acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith"; we are thus talking about "recklessness", a "breakdown of the orderly exercise of authority" and an act "inexplicable and incomprehensible, to the point that it can be considered as an actual abuse of power, having regard to the purposes for which it is meant to be exercised" (*Sibeca Enterprises Inc. v Frelighsburg (Municipality)*, 2004 SCC 61 at paras 25–26 [*Frelighsburg*]). This is a heavy burden.

[146] It is also generally recognized that the exercise of legislative power, even delegated or subordinate power, falls into this category of so-called policy decisions to which the principles relating to Crown immunity apply (*Frelighsburg* at paras 19–23; *Kosoian* at para 107; see also *Canada (Attorney General) v Hijos*, 2007 FCA 20 at paras 58–61; *Welbridge Holdings Ltd. v Greater Winnipeg*, [1971] SCR 957 at pp 967–68 [*Welbridge*]; *AO Farms Inc. v Canada*, 2000 CanLII 17045 (FC) at para 6 [*AO Farms*]; *RNE Realty Ltd. c Dorval (City of)*, 2012 QCCA 367 at para 32; *La responsabilité civile* at p 122; *Bernèche c Canada (Procureur général)*, 2007 QCCS 2945 at para 108 [*Bernèche*]).

[147] In the *Frelighsburg* case, the Supreme Court, in the context of the exercise of a municipality's regulatory power, described the foundations of this particular aspect of Crown immunity in the following terms:

> [24] . . . Municipalities perform functions that require them to take multiple and sometimes conflicting interests into consideration. To ensure that political disputes are resolved democratically to the extent possible, elected public bodies must have considerable latitude. Where no constitutional issues are in play, it would be inconceivable for the courts to interfere in this process and set themselves up as arbitrators to dictate that any particular interest be taken into consideration. They may intervene only if there is evidence of bad faith. The onerous and complex nature of the functions that are inherent in the exercise of a regulatory power justify incorporating a form of protection both in civil law and at common law. Such protection was recognized under the *Civil Code of Lower Canada*, as evidenced in *Laurentide Motels*, *supra*, although the process followed to recognize it was different. The considerations behind the formulation of the public law immunity recognized by the civil law, as governed by the *Civil Code of Lower Canada*, remain applicable after the coming into force of the *Civil Code of Quebec* . . . .

[148] Furthermore, again according to the principles and rules of public law, the failure of a government official to fulfill a legal obligation does not necessarily amount to negligence within the meaning of the law of extracontractual civil liability. Even if a discretionary decision of a decision maker has been declared invalid or unlawful, that in itself does not create a cause of action in tort or in civil liability (*Canada (Attorney General) v TeleZone Inc.*, 2010 SCC 62 at para 29 [*TeleZone*]; see also: *Holland v Saskatchewan*, 2008 SCC 42 at paras 8–9 [*Holland*]; *R. v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at p 225 [*Saskatchewan Wheat Pool*]; *Welbridge* at p 969; René Dussault and Louis Borgeat, *Traite de droit administrative*, volume III, 2nd ed, Québec, Presses de l'Université Laval, 1989 at p 934 [*Traité de droit administratif*]). Not all

financial losses resulting from an act or omission of the government will lay the basis for a private cause of action (*TeleZone* at para 25).

[149] Finally, as in private law, the alleged damage must have been the logical, direct and immediate consequence of the fault (*Hinse* at para 132).

(3) Absence of regulations implementing compensation plan established by Act not engaging, in this case, Crown's extracontractual civil liability

[150] The plaintiffs, I note, argue that the inaction of the Governor in Council, which has been going on for more than 15 years, even though a mandatory obligation to regulate is imposed under subsection 64(2) of the Act, amounts to an abuse of power punishable not only according to the rules of administrative law, but also according to those of Crown liability. In other words, they argue, this is a gross violation of the obligations prescribed by Parliament, as Justice George R. Locke (now of the Federal Court of Appeal) suggested, in their view, in *Îlot St-Jacques* (*Îlot St-Jacques* at para 49).

[151] Such conduct, the plaintiffs point out, cannot be protected by the principles of Crown immunity since, even assuming that there is no intention to harm on the part of the Governor in Council, its conduct is so inconsistent with the relevant legislative context that one cannot reasonably conclude that it acted in good faith. This, in their view, very clearly amounts to circumstantial evidence of bad faith (*Frelighsburg* at para 26).

[152] I have two important reservations regarding this argument. The first—the main one—relates to what I decided in *Groupe Maison Candiac*. I recall that the applicant in that case sought a declaration of invalidity of the Order. It argued that the Order was not only unconstitutional, but also invalid on the basis of the concept of disguised expropriation. In this latter regard, I found that this concept was of no assistance to the plaintiff because of the presence of the compensation plan instituted by section 64 of the Act and the fact that the Minister could not invoke the lack of regulations to legitimize her refusal to exercise the discretion conferred on her under subsection 64(1) of the Act. I expressed myself in these terms:

> [204] Like the Attorney General, I am of the view that de facto expropriation or disguised expropriation, which is part of common law and civil law, are of no hope to Groupe Candiac in this case. In other words, the question of the validity of the Emergency Order does not pass with these concepts because Parliament has already provided, in clear terms, a mechanism to compensate for losses suffered following the application of an emergency order and defines the scope of any "extraordinary impact" of such an order.
>
> [205] This is not a regulation justifying the application of the rule of construction, which aims to protect a land owner from dispossession from his or her lands without compensation. There is no silence to fill in the Act in this regard, Parliament's intent has been clearly expressed in section 64 of the Act.
>
> [206] But what about the absence of regulations pertaining to the Minister's power to pay compensation in relation to the application of an emergency order. Does it prevent the exercise of this power, as Groupe Candiac claims and, in so doing, the application of the concepts of de facto expropriation and disguised expropriation. I do not believe so.
>
> [207] It is well established that an administrative decision maker cannot invoke the absence of a regulation to not act when this inaction is equivalent to stripping a law or countering its application. We want to avoid creating a legal vacuum, thereby giving rise to an abuse of power by conferring to the regulatory authority [TRANSLATION] "a dimension that allows the Administration to indefinitely strip the legislature's express will" (Patrice Garant, Droit Administratif, 7th Ed., Montréal, Yvon Blais, 2017 [Garant], at pages 215-216). The principles only apply

> to the exercise of regulatory power, be it facultative or imperative, like in this case (*Garant*, at page 215). They are particularly useful in the absence of a regulation, if it was interpreted as having prevented the application of the legislation, or depriving the offender of a benefit conferred by it (*Irving Oil Ltd. et al. v. Provincial Secretary of New Brunswick*, [1980] 1 SCR 787, at page 795).
>
> [208] This is what the Minister seems to have understood in this case, by releasing a statement to address the question of owners' rights to compensation for lands situated in the area to which the Emergency Order applies. I remember that it publicly stated no compensation would be paid. Although it did not address the situation of each owner affected, in my view, a decision was made pursuant to subsection 64(1) of the Act.
>
> [209] However, this decision, which comes from a decision maker other than the Governor in Council, is in itself, judicially controllable, independent of the Emergency Order (*Habitations Îlot St-Jacques Inc. v. Canada (Attorney General)*, 2017 FC 535 [*Îlot St-Jacques*]). While it is necessarily related, the Minister's decision has no impact on the powers exercised by the Governor in Council under section 80 of the Act. As stated by the Attorney General, this type of decision assumes that an emergency order was made previously.

[153] Justice Locke, in *Îlot St-Jacques*, essentially agreed with this reasoning (*Îlot St-Jacques* at para 53).

[154] We now know from the evidence adduced in this proceeding that the Minister's decision was based on her understanding that, in the absence of regulations, she had no authority to consider the payment of compensation under the subsection 64(1) of the Act. We also now know, and I will come back to this, that since the judgment in *Groupe Maison Candiac*, this is no longer her position.

[155] But even assuming that the Governor in Council engaged the liability of the federal Crown by failing to adopt the regulations described in subsection 64(2) of the Act, there can be no causal link between this "fault" and the damage that the plaintiffs believe they have suffered, since this state of affairs could not serve as a justification for neutralizing the compensation plan established by the Act.

[156] I would point out that the damage had to be the logical, direct and immediate consequence of the fault. Here, it is not. Rather, it is the Minister's decision not to consider the payment of compensation due to the lack of regulations, if that even constitutes a civil fault which is, in my opinion, the direct and immediate cause of said damage, and not the fact that there are still, to date, no regulations articulating the implementation of the compensation plan provided by the Act.

[157] My second reservation, assuming that I was wrong to conclude as I did in *Groupe Maison Candiac*, concerns the idea that extracontractual civil liability of the Crown may be engaged, in the circumstances of this case, by the failure of the Governor in Council to legislate. As we have seen, the exercise of the power to legislate enjoys Crown immunity since it involves taking discretionary decisions known as "policy" decisions. This, with the exercise of the royal prerogative (*Hinse* at para 4), is a classic example where the principles of Crown immunity apply. Courts have so far recognized that this immunity even extends to decisions not to legislate, including decisions not to make regulations (*Mahoney v Canada*, [1986] FCJ No 438 at p 6; *A.O. Farms* at para 8; *Kwong Estate v Alberta*, [1978] AJ No 594 (QL), cited in *Kwong v The Queen in Right of the Province of Alberta*, [1979] 2 SCR 1010). This is the understanding

that Justice Richard Wagner, now Chief Justice of Canada, seemed to have in *Bernèche*, a case involving the federal government's extracontractual civil liability in a Quebec context, when he wrote that [TRANSLATION] "[t]he State cannot engage civil liability for having adopted laws or regulations, whether or not they are declared *ultra vires*", just as it cannot be automatically found liable for a [TRANSLATION] "failure to adopt certain rules" (*Bernèche* at para 108).

[158] The plaintiffs note that in those decisions, where Crown immunity with regard to the exercise of the power to regulate was found to include the decision to regulate or not, the power in question was discretionary in nature. In other words, and contrary to subsection 64(2) of the Act, Parliament did not make it a duty to act in those cases.

[159] In this regard, the plaintiffs have repeatedly emphasized the words of Justice Locke in *Îlot St-Jacques*, according to which the absence of regulations under the provision concerned [TRANSLATION] "appear[ed] to be in contravention of the [Act]" (*Îlot St-Jacques* at para 49). However, it should be recalled that Justice Locke was careful not to say that he was making a definitive ruling on the question (*Îlot St-Jacques* at paras 49 and 52).

[160] Admittedly, I agree with Justice Locke that this failure—the absence of regulations—should be rectified (*Îlot St-Jacques* at para 52), but the fact that it has not yet been done in this case does not, in my opinion, constitute a fault.

[161] We have to go back to the parliamentary debates that preceded the adoption of the Act, as well as to the very specific context of the implementation of its section 80, to understand why.

[162] Parliamentary debates, I would note, insofar as they are relevant and reliable and not too much importance is attached to them, can be helpful in identifying what the initiators of a bill had in mind at the time of its adoption (*Fédération des francophones de la Colombie-Britannique v Canada* (*Employment and Social Development)*, 2018 FC 530 at para 223). Here, in my opinion, they are helpful, and the parties have not shied away from relying on them by bringing to my attention numerous passages in which the question of the compensation plan which was then proposed to be set up was discussed.

[163] There is no doubt that the establishment of a compensation plan for the benefit, in particular, of landowners affected by the implementation of the 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 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*]). On the opposition side, there was concern that the details of how the proposed compensation plan would work were not included in the bill and that it would be left to the discretion of the Governor in Council, both in terms of content and implementation deadlines (see in particular: *Debates*, No 185 (May 8, 2002) at p 11412 (Bob Mills); *Debates*, No 202 (June 10, 2002), Part A at p 12404 (Werner Schmidt); *Debates*, No 202 (June 10, 2002), Part A at p 12425 (Jim Abbott)).

[164] What emerged from the discussions, however, was that precedents in this area were scarce, if not non-existent, which required that the question of compensation be studied in depth in order to design a plan “that works for everyone” (*Debates*, No 143 (February 18, 2002) at

p 8910 (Karen Redman, Parliamentary Secretary to the Minister of the Environment)). It was anticipated that it would take "several years of practical experience" to deal with this issue, among others (*Debates*, No 143 (February 18, 2002) at p 8910 (Karen Redman, Parliamentary Secretary to the Minister of the Environment), and to establish "more comprehensive guidelines . . . [and] provisions . . . dealing with questions of compensation"; it was hoped that the government would then 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" (*Debates*, No 143 (February 18, 2002) at p 8907 (John Harvard)).

[165] On April 22, 2002, during debate in the House, the then federal Minister of the Environment, the Honourable David Anderson, who sponsored the bill, stated essentially the same thing:

> That said, the difficulty we face with compensation, of which the member is well aware, is that we had a number of studies done. They were put to some of the stakeholder groups and it was not possible, despite very constructive discussion on all parts, to come up with a compensation system which was, we should say, completely acceptable. Therefore we intend in the first months and years of the bill on the basis of experience with providing compensation in an ex-gratia way, to develop regulations . . . .

[166] In other words, the government decided to "have a period of experimentation" (*Debates*, No 202 (June 10, 2002), Part A at p 12375 (Hon David Anderson)).

[167] It is true that it has been suggested that, at the very least, a general framework allowing any claims that could be submitted to the government to be dealt with on a case-by-case basis would be put in place as soon as the bill was enacted. This was not done.

[168] Is this inaction, like the inaction related to the absence of detailed regulations, wrongful in terms of the extracontractual civil liability of the Crown? I do not think so, since, in my opinion, it is also necessary to take into account the very specific context of the implementation of the Act and, more specifically, of its section 80. As I had the opportunity to say in *Groupe Maison Candiac*, the emergency order procedure has always been presented as a measure of "last resort" and a "safety net" to be used when the citizen, provincial or territorial measures already in place do not protect a species from an imminent threat to its survival or recovery (*Groupe Maison Candiac* at paras 104-5, 127, 132 and 181).

[169] However, it is important to remember that since the adoption of the Act, this power has been used sparingly. Indeed, as the evidence reveals, the Governor in Council has used it only twice, and only once—and that was in this case—in respect of private lands. There is also no evidence on the record that compensation was paid or that the question of paying compensation arose when this power was first exercised. There is also no evidence on the record that this question arose in the context of the application of section 58, 60 or 61 of the Act, in respect of which compensation may also be considered under section 64 of the Act, or that compensation was actually paid in these other contexts where section 64 of the Act applies.

[170] As Cabinet deliberations are privileged under section 39 of the *Canada Evidence Act*, RSC 1985, c C-5, (see: *Babcock v Canada (Attorney General)*, 2002 SCC 57), there is no evidence on the record to explain precisely why, even today, there is still no general framework or detailed regulatory framework related the implementation of section 64 of the Act. However, this particular context, which does not reveal any intention to harm, prevents me from saying that this delay in taking action is so inconsistent with the relevant legislative context that a court could not reasonably conclude that the Governor in Council acted in the good faith (*Frelighsburg* at para 26).

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

[172] The plaintiffs also take offence at the fact that, three years after the Order was made and several months after judgment was rendered in *Groupe Maison Candiac* (June 2018) and *Îlot St-Jacques* (March 2019), the Governor in Council had still not adopted a regulatory framework for the purposes of implementing the compensation plan established by law. It now has no more excuses for its inaction, they insist, since it knows, ever since the Minister made the

decision to recommend the adoption of an emergency order, that the question of compensation is being asked.

[173] Some might argue that the Order was not even six weeks old before it was being challenged on all fronts, including in respect of the very authority of Parliament to give the Governor in Council the power to make emergency orders when it comes to private land, a debate likely to go to the highest court in the country, and that this, at least for the moment, is not worth the investment of resources necessary for the development of a regulatory framework which promises to be very complex, considering all the issues at stake.

[174] In any event, and as the Supreme Court recalled in *Frelighsburg*, "[t]he onerous and complex nature of the functions that are inherent in the exercise of a regulatory power justify incorporating a form of protection both in civil law and at common law" (*Frelighsburg* at para 24). If this is true for a municipality, it is equally if not more so for the Governor in Council. Is it delaying making the regulations to implement the compensation plan instituted by section 64 of the Act to the point where traditional remedies under public law are possible? Maybe. But even assuming that to be the case, this does not constitute, in the specific circumstances of the present case and for the reasons which I have already mentioned, a fault within the meaning of the law on the Crown's extracontractual civil liability.

[175] This coexistence, in this case, of a remedy under public law and a remedy based on the CLPA poses, in my view, an additional difficulty, namely that of the choice of proceedings brought by the plaintiffs. They certainly had a choice of proceedings, as they claim. However,

this does not guarantee the success of the proceedings chosen, especially given the still pending attack on the validity of the Order, an aspect of the context which cannot, in my view, be ignored.

[176] *Paradis Honey Ltd. v Canada*, 2015 FCA 89 [*Paradis Honey*], is, in my opinion, enlightening on this subject. That case, which also involved the federal government's extracontractual liability, comes from a common law province, but its lessons, based on principles of public law, are in my opinion just as useful for the purposes of the case at hand even if it does come from Quebec.

[177] In that case, a group of commercial beekeepers tried to bring a class action against the federal Crown, which they accused of having, from 2006, prohibited the importation of bees from the United States, a matter hitherto regulated under the *Health of Animals Act*, SC 1990, c 21, by means of ministerial orders, and therefore, according to them, without legal foundation. The appellants claimed that by doing so, the government had incurred civil liability. The appellants' action was dismissed by a judge of this Court on the motion to strike submitted by the government, which argued that the action could not establish liability since it is settled law that a breach of statutory duty is not, in and of itself, negligence (*Paradis Honey* at para 17).

[178] This decision was overturned by a majority judgment of the Federal Court of Appeal. Justice Denis Pelletier upheld the judgment of the motions judge, except on the issue of costs, but his two colleagues, justices David Stratas and Marc Nadon, decided otherwise, finding that it

was not plain and obvious that the facts alleged by the appellants were not capable of serving as the basis for an action based on negligence and bad faith.

[179] Although not required to decide the issue in this case, Justice Stratas, on the basis that he and his two colleagues "all [seem] to agree that the allegations in the claim, taken as true, could trigger an award of administrative law remedies, or more generally public law remedies", thought it useful, "[f]or the benefit of future causes", to examine whether a monetary award based on principles of public law could constitute one of those remedies (*Paradis Honey* at para 112).

[180] As part of his analysis, in which Justice Nadon concurred, Justice Stratas felt that the time had come, in a way, to think about the law on the liability of public authorities in a different way, that is, through the prism of public law and not, as it always has been, through that of private law. For Justice Stratas, the approach followed to date was "something that makes no sense" since public authorities "are different from private parties in so many ways":

> [127] At the root of the existing approach is something that makes no sense. In cases involving public authorities, we have been using an analytical framework built for private parties, not public authorities. We have been using private law tools to solve public law problems. So to speak, we have been using a screwdriver to turn a bolt.
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> [128] Public authorities are different from private parties in so many ways. Among other things, they carry out mandatory obligations imposed by statutes, invariably advantaging some while disadvantaging others. As for the duty of care, does it make sense to speak of public authorities having to consider their "neighbours"– the animating principle of *Donoghue v. Stevenson* – when they regularly affect thousands, tens of thousands or even millions at a time? As for the standard of care, how can one discern an "industry practice" that would inform a standard of care given public authorities' wide variation in mandates, resources and

> circumstances? Even if these questions are satisfactorily answered, others remain. For example, the defence of consent – a defence that keeps the liability of many private parties in check – is often impractical or impossible for public authorities. And, unlike private parties, many other less drastic tools exist to redress public authorities' misbehaviour, including *certiorari* and *mandamus*.
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> [129] As well, the current law of liability for public authorities – the provenance and essence of which is private law – sits as an anomaly within the common law. By and large, our common law recognizes the differences between private and public spheres and applies different rules to them. Private matters are governed by private law and are addressed by private law remedies; public matters are governed by public law and are addressed by public law remedies. This has become a fundamental organizing principle: *Dunsmuir*, above; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504; *Air Canada v. Toronto Port Authority*, 2011 FCA 347; [2013] 3 FC 605.

[181] This "anomaly", concluded Justice Stratas, should now end, since the law of liability for public authorities should be governed by principles on the public law side of the divide, not the private law side, which provides an appropriate framework—the unacceptability or indefensibility in the administrative law sense of the public authority's conduct and the court's exercise of remedial discretion—for determining whether monetary relief based on public law is justified in a given case (*Paradis Honey* at paras 130 and 139).

[182] In terms of the CLPA, Justice Stratas found that a public authority against whom monetary relief is awarded on public law principles "must be regarded as having committed a 'fault' (in Quebec) or a 'tort' (in the rest of Canada) within the meaning of paragraphs 3(a)(i) and 3(b)(i) of the [CLPA]". There is moreover no reason, according to him, to interpret the word "tort" as if it only included named torts in private law, as opposed to, as is the case in Quebec, "any legally-recognized fault". Interpreting it differently, continued Justice Stratas, would run

counter to the objective pursued by Parliament when it amended the CLPA in 2001, through the *Federal Law-Civil Law Harmonization Act, No. 1*, SC 2001, c 4, which was to prevent different liability rules applying to the federal Crown depending on whether the dispute arose in Quebec or elsewhere in Canada (*Paradis Honey* at para 140).

[183] More specifically, with regard to the discretionary power to grant monetary relief under public law, Justice Stratas recalled that this type of compensation "has never been automatic upon a finding that governmental action is invalid" and that "additional circumstances" are therefore necessary to support this (*Paradis Honey* at para 142). In this regard, Justice Stratas opined that one must keep in mind "the compensatory objective of monetary relief" such that in certain cases such a penalty will be neither necessary nor appropriate:

> [143] The compensatory objective of monetary relief must be kept front of mind. So, in some cases, the quashing of a decision or the enjoining or prohibition of conduct will suffice and monetary relief will neither be necessary nor appropriate. In other cases, quashing, prohibiting or enjoining can prevent future harm and go some way to redress past harm, reducing or eliminating the need for monetary relief. In still others, such as cases like *McGillivray* and *Roncarelli*, both above, only monetary relief can accomplish the compensatory objective.
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> [144] As well, the quality of the public authority's conduct must be considered. This is because orders for monetary relief are mandatory orders against public authorities requiring them to compensate plaintiffs. And in public law, mandatory orders can be made against public authorities only to fulfil a clear duty, redress significant maladministration, or vindicate public law values: see, *e.g. Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55, 444 NR 93 at paragraph 14; *D'Errico*, above at paragraphs 15-21.

[184] That judgment, which does not, in my view, widen or narrow the field of the Crown's extracontractual civil liability, but which invites us to think of this area of law differently, is

binding on me. Thus, insofar as it paves the way "for the benefit of future cases", the last passage from the reasons of Justice Stratas appears to me to be particularly important for the purposes of this case since it highlights the fact that monetary relief may, in some cases, be neither necessary nor appropriate. I believe this to be the case here, given the very specific context in which the plaintiffs' claim arises.

[185] First, as we have seen, others before them contested the validity of the Order, the original source of the alleged damage. This is, I repeat, a contextual element which cannot be ignored insofar as we are dealing with concurrent remedies in public law and in the law of Crown extracontractual civil liability based on the same foundation, that is, the making of the Order. If it were eventually to be found *ultra vires*, quashing it could undoubtedly help to correct the damage that the plaintiffs believe they have suffered, by allowing the Symbiocité Project to resume, thus eliminating the need for monetary relief. According to the evidence (Exhibit P-106), this damage is mainly related to the loss of land value, the loss of profits resulting from the non-completion of phases 5 and 6 of said project, the development costs already incurred for the purposes of carrying out these phases, and revenue losses, in terms of phases 1 to 4 of the project, resulting from the non-completion of the last two phases of the project. Would any of this damage still exist if the Order invalidated?

[186] Second, I am of the opinion that public law remedies, the outcome of which could be to force the Governor in Council or the federal Minister of the Environment to exercise powers—or reconsider the exercise of powers—vested in them under section 64 of the Act, are better suited to the present situation since they would, if they succeed, ensure the implementation of the

compensation plan instituted by the Act, an implementation indirectly sought by the plaintiffs by means of the present action in Crown extracontractual civil liability.

[187] It is better, it seems to me, to force the application of the compensation rules contemplated by Parliament in the quite specific context of the Act, its object and its guiding principles, rather than to settle the question by relying on rules borrowed from private law.

[188] The case at hand shows, in my view, the limits of private law in allowing an appropriate solution in the present case since the full realization of the damage suffered by the plaintiffs depends in a way on a condition precedent, namely, the confirmation of the validity of the Order, a situation which does not seem to have an equivalent in private law. As long as this confirmation is not acquired, there is, in my opinion, a risk of unjust enrichment since if the Order were eventually invalidated after they were compensated at the end of this proceeding, nothing, theoretically, would stop the plaintiffs from restarting the development of phases 5 and 6 of the Symbiocité Project, thus revitalizing the value of the properties concerned and the prospect of profits linked to the resumption of said development. This prospect, it seems to me, is ill-suited to the reality of the liability of public authorities in a context like ours.

[189] The plaintiffs themselves raised this spectre—that of enrichment or double compensation—in the notes of argument they produced at trial. To cover this risk, they offer to transfer ownership of the land included in the application area of the Order to the defendant so that, in the event of the repeal of the Order, the defendant will own [TRANSLATION] “land[s] having regained market value for development purposes” (Notes of Argument at para 193).

[190] Finally, I see nothing irreconcilable in the fact that the defendant opposed the judicial review proceeding undertaken by the plaintiffs in *Grand Boisé II*. The defendant is not arguing that judicial review would not be an appropriate remedy in the present case. Rather, the defendant objects to how the application for judicial review was worded and presented, considering it to be, as I have already noted, contrary to the rules and principles governing judicial review before this Court and abusive, in particular because, in the defendant's view, the plaintiffs are contesting two decisions resulting from two separate decision-making processes, do not specify the reasons in support of the conclusions sought, place the onus of identifying the decision to be reviewed on the Court itself, and seek, by that proceeding, to give themselves a kind of insurance policy in the event this action is dismissed.

[191] This question, decided in favour of the defendant by Prothonotary Steele, remains in dispute since it is currently under appeal before a judge of this Court. For the time being, however, I do not believe, in light of the grounds on which the Attorney General's motion to strike is based, that it constitutes a bar against finding, in the particular circumstances of this case, that monetary relief, supported by a proceeding based on the CLPA, is necessary or even appropriate.

[192] I also do not see how the age of Mr. Quint, which seems, as I have already mentioned, to have been an important factor in the plaintiffs' choice of a remedy, is of any relevance here and thus able to thwart the application of the principles established in *Paradis Honey*. Mr. Quint is certainly a litigant in a hurry, but that does not justify a departure from the applicable law.

[193] In sum, I find that the defendant's extracontractual civil liability is not engaged because the Governor in Council has still not adopted the regulations implementing the compensation plan established by section 64 of the Act. Indeed, even assuming that this defect results from faulty conduct, the damage alleged by the plaintiffs was not the direct, logical and immediate cause, given the role and responsibilities of the Minister in the implementation of said plan.

[194] In the alternative, I find that the absence of regulations, when considered in light of all the evidence, and in particular the parliamentary debates preceding the adoption of the Act and the context in which section 80 was implemented, does not disclose any evidence of bad faith, whether direct or indirect, in the conduct of the Governor in Council. In other words, while this conduct can theoretically give rise to recourse and remedies under public law, it is not such as to justify compensation under the CLPA.

[195] Further in the alternative, I am also of the opinion that all the circumstances of this case, in particular the existence of concurrent remedies under public law and the risk of unjust enrichment, when analyzed in the light of the teachings of *Paradis Honey*, do not favour monetary relief in the present case, quite the contrary, because other types of remedies arising from public law could help to correct the damage claimed by the plaintiffs and do so to the degree intended and desired by Parliament.

[196] But what about the Minister? Did she commit a fault in refusing to consider the payment of compensation on the grounds that the regulations implementing the compensation plan

instituted by section 64 of the Act had still not been adopted? For the reasons below, I find that she did not.

(4) Minister's decision not to pay compensation in absence of regulations also not engaging extracontractual civil liability of federal Crown

[197] Even though the plaintiffs' efforts focused mainly on the conduct of the Governor in Council, who, by failing to adopt the regulations implementing the compensation plan established by the Act, allegedly sterilized the Minister's own power under subsection 64(1) of the Act, they also maintain that the Minister's inaction constitutes a fault, for two reasons.

[198] First, they say, this inaction was found to be contrary to her obligations under the Act since, following the judgment of this Court in *Groupe Maison Candiac*, she could not use the absence of such regulations to refuse to exercise her powers under subsection 64(1) of the Act. Second, they further argue, there is no explanation for her inaction since that judgment was rendered, which in itself also constitutes fault.

[199] I would note that even when the private law applicable to a case involving extracontractual civil liability of the federal Crown is that of Quebec, a breach of the Act does not necessarily amount or equate to a fault (*TeleZone* at para 29). It is also necessary to find, in the conduct that is said to be prejudicial, the elements constituting a fault within the meaning of the law of civil liability (*Saskatchewan Wheat Pool*; *Welbridge* at p 969; *Traité de droit administratif* at p 934). Not all financial losses resulting from an act or omission of the government will lay the basis for a private cause of action (*TeleZone* at para 25).

[200] This is the case here insofar as the Minister, according to *Groupe Maison Candiac*, erred in law by taking the position that the absence of regulations deprived her of the power to exercise her discretion under subsection 64(1) of the Act. In my opinion, only proof of bad faith can engage the liability of the federal Crown in connection with this error. However, this proof has not been made.

[201] Indeed, in the wake of her December 2015 decision to recommend to the Governor in Council the issuance of an emergency order, and under pressure from the plaintiffs to, in particular, shed some light on the issue of compensation, the Minister was then called upon to determine if she could take charge of this matter in the absence of regulations, which if so would have led her to define for herself, that is, in the Governor in Council's place, the formal and, above all, substantive parameters which should guide the exercise of her discretion, a specific function to making so-called policy decisions. In this unusual context, she did not, in my opinion, act as a mere public servant working in an administrative or operational capacity (*Hinse* at para 35); she was in the antechamber, so to speak, of the policy decision, being called in to decide whether she, on her own, could assume this responsibility, which is moreover protected by Crown immunity.

[202] I cannot bring myself to think that an error of law committed in good faith, in such a context, departs from a standard of conduct under the law of extracontractual civil liability and amounts to a fault. As the Supreme Court of Canada noted in *Welbridge*, "[i]nvalidity is not the test of fault and it should not be the test of liability" (*Welbridge* at p 969; see also *TeleZone* at para 29; *Finney* at para 31). In addition, an error in interpreting a law or regulation, when it is

committed in good faith, does not, in itself, constitute fault (*Saint-Laurent (Ville) v Marien*, [1962] SCR 580, at pp 2 and 4; cited in *Carrières TPR ltée v St-Bruno de Montarville (Ville)*, [1983] QJ No 342 (leave to appeal refused, [1984] SCCA No 353), and *Canada v Rousseau Metal inc*., [1987] FCJ No 40 (leave to appeal refused, [1987] SCCA No 252)).

[203] In my opinion, the Minister's situation is easily distinguished from the one in *Bellechasse (Municipalité régionale de comté) c Québec (Procureure générale)*, 2014 QCCS 6026 [*MRC Bellechasse*], relied on by the plaintiffs in support of their claims as to the faulty nature of the position taken by the Minister on the issue of compensation when the Order was made.

[204] In that case, the Regional County Municipality of Bellechasse [MRC] sued the Quebec government to recover the cost of the expenses it had to incur to correct a situation of environmental non-compliance noted by the Quebec department of sustainable development, environment and parks linked to the operation of its landfill site and, more specifically, to the use of a new covering material on said site from which noxious odours were being emitted. It criticized the officials of this department for having previously approved, through the issuance of a certificate of conformity, the use of this new material without having made the analyses required by the applicable environmental laws and regulations, which would have enabled them to identify the risks associated with this use due to similar problems experienced in another landfill where the department had nevertheless been found liable (*MRC Bellechasse* at paras 32 and 40).

[205] Recalling that the officials of this department could not, during the examination of an application for a certificate of conformity, [TRANSLATION] "be content to examine the file submitted, limiting themselves to only those assertions contained in the application for the certificate and relying on [their] power to intervene once the measures were put in place after the certificate had been obtained", the Superior Court of Quebec held that the work carried out by the officials examining the application for the certificate of conformity filed by the MRC in connection with the use of this new material had been, in a way, bungled given what they knew or should have known of the problems caused by the use of this material (*MRC Bellechasse* at paras 78 and 93–101).

[206] The Court concluded that these officials had not [TRANSLATION] "engaged in the behaviour expected of a government official who is responsible for ensuring that the law and regulations are observed, in particular to avoid undermining human life, health, well-being and comfort" (*MRC Bellechasse* at para 105).

[207] There is no doubt, in my opinion, that the conduct alleged against the officials of the Quebec department of sustainable development, environment and parks in this case was clearly part of the exercise of so-called administrative or operational functions, supervised by exhaustive regulations and to which Crown immunity does not apply (*Kosoian* at para 108; *Laurentide Motels* at p 722). It is quite different in the present case, where the Minister was asked, I repeat, in an unusual context, I also repeat, to determine if she herself could set the parameters that should guide the examination of claims that may be made under section 64 of the Act, and then

dispose of such claims at her discretion under subsection 64(1) of the Act, an exercise that necessarily involved balancing economic, social or political considerations.

[208] As I had the opportunity to say in *Groupe Maison Candiac*, there was certainly a remedy based on administrative law against the Minister's position insofar as it meant that no compensation would be paid in relation to making the Order. However, for the reasons I have just mentioned, this position did not also justify, in the absence of evidence of bad faith on the part of the Minister, a remedy based on the Crown's extracontractual civil liability.

[209] Now what about what appears to be a change of heart on the part of the Minister, in the wake of the judgment rendered in *Groupe Maison Candiac* in the summer of 2018? I recall that Ms. Couture, who heads the Canadian Wildlife Service for the Quebec region, testified that her department's position, since that judgment, has been that the Minister had the necessary authority, even in the absence of regulations, to consider a claim for compensation made under section 64 of the Act.

[210] The plaintiffs criticize the Minister for not having reached out to them following this change of heart. They complain, based on *Holland*, that the Minister thus failed to implement a judicial decree, which would fall outside the protection afforded by the principles of Crown immunity (*Holland* at para 14).

[211] I cannot support this argument. First of all, and unlike the *Holland* case, the judgment rendered in *Groupe Maison Candiac* is not a judicial decision which the Minister was bound to

enforce. That judgment, rendered barely 15 months before the trial was held in the present case, dismissed an application for judicial review relating to the validity of the Order; it contained no conclusions, in its disposition, creating any obligation whatsoever on the Minister. *Holland* does not apply here.

[212] Furthermore, if we rely on the testimony of Ms. Couture, who occupies a high position in the hierarchy of the federal environment department, the door is now open for consideration of a claim for compensation. That the Minister expressed the opinion, after having read the judgment in *Groupe Maison Candiac*, that she may, in the absence of regulations, exercise the power conferred on her by subsection 64(1) of the Act, in my opinion, does not constitute a fault. Here again, this stems from the interpretation made in good faith of the powers conferred on her by the Act, an interpretation obtained from a judicial pronouncement that she was not, strictly speaking, compelled to follow, but that she nevertheless decided to adopt.

[213] I do not see any reason, either, for me to take the place of the Minister (or her successor), as I am urged to do by the plaintiffs on the basis of *Irving Oil*, and to exercise, in her stead, the power provided under subsection 64(1) of the Act, by ordering payment of the amount of the loss related to the making of the Order. *Irving Oil*, it is important to note, was decided in the context of judicial review. The Supreme Court considered it appropriate to render a directed verdict, a possible but exceptional remedy, in this area (*Canada (Attorney General) v Allard*, 2018 FCA 85 at para 44, citing *Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31 at para 14; *Hughes v Canada (Attorney General)*, 2019 FC 1026 at para 96). Having received an action based on the CLPA and having concluded that there was no fault on the part of the

Minister, I simply do not have the power to pronounce against the defendant the judgment the plaintiffs are seeking for the faults attributed to Minister.

[214] I am therefore satisfied that the plaintiffs have not established that the conduct of the Minister, on the basis of the facts for which she is criticized, engaged the Crown's extracontractual civil liability. I am also satisfied that the combined criticisms against the Governor in Council and the Minister do not engage the Crown's extracontractual civil liability either. Indeed, taken individually, neither of these complaints has been established. Taking them together, in the unusual context of this case, cannot lead to a conclusion favourable to the plaintiffs either, since these criticisms do not stem, in my opinion, from any conduct tinged with bad faith, whether direct or indirect.

[215] In view of my conclusion as to the absence of faulty conduct in this case, it is not necessary, in my view, to decide the second question in issue and, therefore, to determine whether the plaintiffs, in planning a real estate development in an area known to be home to a species at risk, have taken a business risk of which they alone must bear the consequences.

B. *Alternatively, was there a disguised expropriation?*

[216] The plaintiffs plead, I recall, that the making of the Order amounts in one way or another to a disguised expropriation of land intended for the construction of phases 5 and 6 of the Symbiocité Project. They argue that because of this, they are now unable to use these lands for the purposes for which they were intended, while no form of compensation to wipe out the losses associated with this state of affairs was paid or even offered to them.

[217] They note, in this regard, the interpretative presumption from the common law that the law cannot have the effect of dispossessing a person of their property without fair compensation, unless the legislature has, in clear terms, decided otherwise. There is a constructive taking under common law principles, they go on, when the expropriating authority acquires a beneficial interest in the property in question and the expropriating measure results in the suppression of all reasonable uses of that property. They point out that a beneficial interest in the property concerned can take the form of a general interest for the public.

[218] However, in Quebec, plead the plaintiffs, where the right to the peaceful enjoyment and free disposition of their property is enshrined in section 6 of the *Charter of Human Rights and Freedoms*, CQLR c C-12 [Quebec Charter], and where protection against expropriation without indemnity is codified in article 952 of the *Civil Code of Québec* [CCQ], the rules differ in that it is sufficient to demonstrate, to establish that there is disguised expropriation, that the measure taken by the public authority in question entails the suppression of the reasonable uses of the property targeted by said measure. They conclude that there is therefore no need, in civil law, to demonstrate that a beneficial interest in said property has been acquired as a result of the measure in question.

[219] Thus, the plaintiffs argue that to the extent that the Order resulted in the suppression of the reasonable uses of the land to which it applies and the Act contains no clear and explicit provision setting aside the obligation to compensate in such a case, there is a disguised expropriation of this land for which they are entitled to receive full compensation under the general law. The possibility that the Order could be repealed one day, if the imminent threats

raising fears for the recovery of the Western Chorus Frog in the area of the Symbiocité Project were to be contained, could not constitute, they claim, a bar to applying the rules of disguised expropriation.

[220] Having stated that, they recognize, however, that section 64 of the Act [TRANSLATION] "embodies a clear manifestation of Parliament's unequivocal will that fair and reasonable compensation be paid to take into account the consequences of such an order" (Notes of Argument at para 209). They even go so far as to assert that the compensation plan instituted by this provision goes further than the civil law and common law regimes for disguised expropriation, by [TRANSLATION] "grant[ing] in fact a right to much broader compensation than those regimes" (Notes of Argument at paras 229–32).

[221] However, it is precisely the existence of section 64 of the Act that led me to conclude, in *Groupe Maison Candiac*, that the concepts of disguised expropriation, whether they originate from civil law or common law, were of no assistance to the plaintiff in that case since Parliament had already provided, in clear terms, a mechanism to compensate for losses suffered following the issuance of an emergency order (*Groupe Maison Candiac* at paras 204–5).

[222] It is in fact conceptually difficult, in my opinion, to speak of disguised expropriation, that is to say, an expropriation carried out outside the framework of the laws on expropriation "for an ulterior motive, such as to avoid paying an indemnity" (*City of Lorraine* at para 2), whereas the alleged expropriating act was performed under the terms of a law that enacts a system allowing the payment of compensation in connection with the loss resulting from that act.

[223] I note that section 6 of the Quebec Charter guarantees everyone the right to the peaceful enjoyment and free disposition of their property, except, however, to the extent provided by law [emphasis added]. It is well established that Parliament can derogate from the civil law when it legislates on a subject that falls within its jurisdiction (*Canada (Attorney General) v St-Hilaire*, 2001 FCA 63 at para 30). Similarly, it is open to the Quebec legislature to restrict or even set aside the principle established in article 952 of the CCQ, as long as it does so in express terms (*Traité de droit administratif* at p 771).

[224] It seems important to me to underline here, when it comes to the limits to the right guaranteed by section 6 of the Quebec Charter, the comments of the Quebec Court of Appeal in *Abitibi (Municipalité régionale de comté) c Ibitiba Ltée*, [1993] RJQ 1061:

> [TRANSLATION]
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> 32 Environmental protection and adherence to national policies are, at the end of this century, more than a simple question of private initiatives, however laudable they may be. It is now a matter of public order. Consequently, it is normal that in this regard, the legislature, protector of the entire community, present and future, limits, sometimes even severely, the absolute nature of individual ownership (citation omitted). The right of ownership is now increasingly subject to collective imperatives. This is an inevitable trend since, in Quebec as in many other countries, the protection of the environment and the preservation of nature have too long been abandoned to individual selfishness (citation omitted). As the Supreme Court wrote in *Bayshore Shipping Center v Nepean*, [1972] SCR 756, concerning the right of ownership:
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> > . . . by-laws restrictive of that right should be strictly construed. Yet it has been said that modern zoning provisions have been enacted to protect the whole community and should be construed liberally having in certain the public interest . . . .

[225] I agree with the defendant when she asserts that in adopting section 64 of the Act, Parliament ended up ruling out the general law remedy for disguised expropriation, arising from both the common law interpretative presumption and article 952 of the CCQ, [TRANSLATION] "in favour of a statutory compensation plan specifically adapted to the objectives pursued by the [Act]" (Notes of Argument at para 89).

[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.

[227] According to the defendant, and contrary to what the plaintiffs claim, Parliament thus rejected the idea that the plan established under section 64 of the Act allows compensation to be calculated according to the compensation principles applicable to a disguised expropriation,

which aim to compensate the expropriated party for all the economic consequences that may arise from the property's expropriation. This plan would therefore have a more limited scope.

[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. As the then federal Minister of the Environment, David Anderson, stated on June 10, 2002, in a debate in the House, "there is no question of expropriation [in section 64 of the Act]", which explains why the terms "fair and reasonable" and not "fair market value" were used in reference to compensation, "fair market value" being, he noted, a concept associated with expropriation (Debates, No 202 (June 10, 2002), Part A at p 12378 (Hon David Anderson)). I understand that there was a desire not to use terms that would equate the compensation plan that they proposed to set up with the general law regimes dealing with protection against disguised expropriation.

[229] The plaintiffs argue, however, that section 64 of the Act cannot deprive them of the right to turn to the Court for a remedy on the basis of the principles of disguised expropriation since, as Justice Locke pointed out in *Îlot St-Jacques*, "[i]t is difficult to understand how a plan that does not exist can have this effect" (*Îlot St-Jacques* at para 49).

[230] Relying on *Manitoba Fisheries Ltd. v The Queen*, [1979] 1 SCR 101 [*Manitoba Fisheries*], the plaintiffs note that the Supreme Court of Canada has already allowed a remedy

based on the principles of disguised expropriation despite the presence, as in this case, of a specific compensation plan.

[231] In that case, the plaintiff, a Manitoba company, purchased fish from fishers in the province and then processed them and sold them to customers in other Canadian provinces and in the United States. In business for some 40 years, it had to cease operations when Parliament enacted the *Freshwater Fish Marketing Act*, RSC 1970, c F-15, which created a freshwater fish marketing board with the exclusive right to export fish caught for commercial purposes from Manitoba to participating provinces. Adopted at the request of several provinces, this law authorized the federal minister responsible for its application to conclude agreements with the participating provinces under which the provinces could pay compensation to the owners of establishments affected by the coming into force of the law, which Manitoba had refused to do for the plaintiff (*Manitoba Fisheries* at pp 103–4).

[232] The Supreme Court held that such a compensation plan, created under agreements between governments to which the owners of businesses affected by the creation of the marketing board were not parties, gave them no legal rights and, therefore, was no bar to a remedy based on the principles of disguised expropriation against the federal Crown, whose law had led to the cessation of their commercial operations (*Manitoba Fisheries* at p 117).

[233] Clearly, the plan created under the Act is not of this nature: it is established by the very legislation which authorizes the issuance of emergency orders, and it cannot be said that it does not give any legal rights to those who suffer a loss due to the extraordinary impact that may arise

from applying such orders. There is no doubt that the establishment of a compensation plan for the benefit, in particular, of landowners affected by the implementation of the Act, was intended to be an important part of what Parliament was proposing to do. Again, this plan is enshrined in law, not in political agreements between governments that risk leaving these owners "entrapped in policy differences between two levels of government" (*Manitoba Fisheries* at p 117).

[234] I reiterate here, based on *Paradis Honey*, that public law remedies, the outcome of which could be to force the Governor in Council and/or the federal Minister of the Environment to exercise powers—or reconsider the exercise of powers—which are vested in them under section 64 of the Act, are better suited to the present situation since they would, if successful, ensure the implementation of the compensation plan as intended by Parliament, rather than settle the question by borrowing rules from general law.

[235] Be that as it may, this debate is somewhat moot in the particular circumstances of this case since, as I have had occasion to say, following the judgment in *Groupe Maison Candiac*, the Minister stated that she was ready to exercise her powers under subsection 64(1) of the Act even if the regulations implementing the compensation plan had not yet been put in place. This change of heart, first announced, I repeat, during the trial of this case, was probably not known to Justice Locke when he delivered his judgment in *Îlot St-Jacques* in March 2019, well before this trial.

[236] In theory, therefore, the door is open to a claim for compensation from the plaintiffs and to the remedies that may follow. All is not lost for them.

[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.

[240] The plaintiffs' action will therefore be dismissed. The defendant is seeking costs. Awards of costs are entirely within the discretion of the Court, as long as such discretion is, of course, exercised judicially (*Consorzio del Prosciutto di Parma v Maple Leaf Meats Inc.*, 2002 FCA 417 at para 9; *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 1119 at para 6).

[241] Subsection 400(3) of the Rules sets out factors the Court may consider in exercising its discretion. Obviously, the outcome of the proceeding is one of these factors, but it is not the only one.

[242] Here, owing to the very particular circumstances of this case, I find that the plaintiffs need not bear the defendant's costs, including fees for her experts, who ultimately rallied to the figures of the plaintiffs' experts as to the value of the loss. Even if it did not end as desired by the plaintiffs, this action raised important, even unprecedented, questions in relation to the rules of Crown extracontractual civil liability in a context which, some might say, invited it. 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.

[243] An order to pay costs therefore does not seem to me to be appropriate in the circumstances.

[244] In closing, I would be remiss in not highlighting the professionalism, thoroughness and civility shown by counsel for both parties throughout the trial.

**JUDGMENT in T-495-17**

**THIS COURT'S JUDGMENT** is as follows**:**

1. The action is dismissed, without costs.

2. The style of cause is amended so that only Her Majesty the Queen appears as defendant.

"René LeBlanc"
Judge

Certified true translation
This 3rd day of June 2020.

Michael Palles, Reviser

## APPENDIX

*Species at Risk Act*, SC 2002, c 29

| | |
|---|---|
| Emergency order<br>80 (1) The Governor in Council may, on the recommendation of the competent minister, make an emergency order to provide for the protection of a listed wildlife species. | Décrets d'urgence<br>80 (1) Sur recommandation du ministre compétent, le gouverneur en conseil peut prendre un décret d'urgence visant la protection d'une espèce sauvage inscrite. |
| (2) The competent minister must make the recommendation if he or she is of the opinion that the species faces imminent threats to its survival or recovery. | (2) Le ministre compétent est tenu de faire la recommandation s'il estime que l'espèce est exposée à des menaces imminentes pour sa survie ou son rétablissement. |
| (3) Before making a recommendation, the competent minister must consult every other competent minister. | (3) Avant de faire la recommandation, il consulte tout autre ministre compétent. |
| (4) The emergency order may | (4) Le décret peut: |
| (a) in the case of an aquatic species, | a) dans le cas d'une espèce aquatique: |
| (i) identify habitat that is necessary for the survival or recovery of the species in the area to which the emergency order relates, and | (i) désigner l'habitat qui est nécessaire à la survie ou au rétablissement de l'espèce dans l'aire visée par le décret, |
| (ii) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat; | (ii) imposer des mesures de protection de l'espèce et de cet habitat, et comporter des dispositions interdisant les activités susceptibles de leur nuire; |
| (b) in the case of a species that is a species of migratory birds | b) dans le cas d'une espèce d'oiseau migrateur protégée |

protected by the *Migratory Birds Convention Act*, 1994,

par la *Loi de 1994 sur la convention concernant les oiseaux migrateurs* se trouvant:

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

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

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

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

(B) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat, and

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

(ii) on land other than land referred to in subparagraph (i),

(ii) ailleurs que sur le territoire visé au sous-alinéa (i):

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

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

(B) include provisions requiring the doing of things that protect the species and provisions prohibiting activities that may adversely affect the species and that habitat; and

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

(c) with respect to any other species,

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

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

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

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

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

(B) include provisions requiring the doing of things that protect the species and that habitat and provisions prohibiting activities that may adversely affect the species and that habitat, and

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

(ii) on land other than land referred to in subparagraph (i),

(ii) ailleurs que sur le territoire visé au sous-alinéa (i):

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

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

(B) include provisions prohibiting activities that may adversely affect the species and that habitat.

(B) comporter des dispositions interdisant les activités susceptibles de nuire à l’espèce et à cet habitat.

(5) An emergency order is exempt from the application of section 3 of the *Statutory Instruments Act.*

(5) Les décrets d’urgence sont soustraits à l’application de l’article 3 de la *Loi sur les textes réglementaires.*

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-495-17 |
| **STYLE OF CAUSE:** | 9255-2504 QUÉBEC INC., AND, 142550 CANADA INC., AND, GRAND BOISÉ DE LA PRAIRIE INC. v HER MAJESTY THE QUEEN |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | SEPTEMBER 11, 12, 16, 17 AND 18 AND OCTOBER 2 AND 3, 2019 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | LEBLANC J. |
| **DATED:** | JANUARY 30, 2020 |

**APPEARANCES:**

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|---|---|
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| David Lucas<br>Michelle Kellam<br>Geneviève Bourbonnais<br>Jessica Pizzoli | FOR THE DEFENDANT |

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