Federal Government: Constitutional Protector of Frogs

Symbiocité Development Blocked

Can the federal government prevent the construction of a residential development in a Montréal suburb to protect frogs? Yes, it can.[1]

On June 22, the federal government issued an emergency order under section 80 of its *Species at Risk Act*,[2] blocking the construction of Symbiocité, a development in the Montréal suburb of La Prairie.[3] This order protects the Western Chorus Frog, and covers two square kilometres of land on which 171 houses were to be constructed.[4]

Ironically, the municipality of La Prairie and Symbiocité advertised the neighbourhood for its closeness to nature;[5] an 88 hectare park had even been set aside as part of the project. When designing the neighbourhood and park, La Prairie had identified 35 breeding grounds for the frogs, and incorporated those into the protected park area.[6]

Reaction to the Order

Québec Ministère de l'Environnement David Heurtel was less than pleased with the emergency order: he considers the federal action a violation of that province's jurisdiction and a unilateral act that is out of step with the principle of cooperative federalism.[7] Cooperation and collaboration are the cornerstones of the modern approach to interjurisdictional conflict: the federal and provincial governments are generally expected to work together, legally and financially.[8]

Constitutionality of the Order

The *Constitution* does not grant a clear jurisdiction over *endangered* animals to either the federal or the provincial governments. Though the federal government does have a clear jurisdiction over aquatic animals,[9] migratory birds[10] and all animals in federal lands such as national parks, the provinces have a general jurisdiction over terrestrial animals within provincial boundaries.[11]

However, the federal government can claim jurisdiction over *endangered* animals, including the frogs in Québec, through the national concern doctrine. An issue qualifies as a "national concern" when it has a "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern."[12] One way in which this can be assessed is through the 'provincial inability' test. When one province alone would be unable to fully address a concern, the "aspect of the problem that is beyond provincial control" is deemed to be of national concern, and falls within federal jurisdiction.[13]

Endangered species generally do not confine themselves to a single province – the western

chorus frog for example can also be found in Ontario.[14] The destruction of a species' habitat in one province could have a significant effect on the species as a whole. It makes sense for the protection of endangered species to fall under the national concern doctrine and therefore within the federal government's regulatory powers: their endangerment as a species is an aspect of a problem beyond the control of any one province alone. Under this doctrine, section 80 of the *Species at Risk Act* – which authorizes the federal government to issue emergency protection orders concerning species at risk –falls within federal jurisdiction: meaning that the law and likely the federal government's actions under it, are constitutional.

Conclusion

Ministère David Heurtel is not wrong in saying the federal government intruded on a provincial power when it issued this emergency order: local animals usually do fall under provincial jurisdiction. However, *endangered* animals are a 'national concern', and the federal law that the protection order was issued under is thereby constitutional. Though it would certainly have been more diplomatic to have cooperated with the Ministère de l'Environnement, neither the federal legislation nor the constitutional division of powers appears to require it.

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[1] Daniel Leblanc, "Quebec Hopping Mad Over Federal Intervention to Protect Frog" *The Globe and Mail* (23 June 2016).

[2] *Species at Risk Act*, SC 2002, c 29 .

[3] Leblanc, *supra* note 1.

[4] *Ibid.*

[5] "Symbiocité La Prairie" *La Prairie* (accessed 23 June 2016), online: <http://www.ville.laprairie.qc.ca/setablir-a-laprairie.php?vivre-a-laprairie=166>.

[6] "Parc de Conservation du Marais" *La Prairie* (accessed 23 June 2016), online: <http://www.ville.laprairie.qc.ca/activites.php?activites=74>.

[7] Mike De Souza, "Tiny Frog Blocks 171 Homes. Quebec Environment Minister is Furious" *National Observer* (23 June 2016).

[8] Peter Hogg, *Constitutional Law of Canada,* 2007 Student Ed (Toronto: Thomson Carswell, 2007) 153-155.

[9] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(12), reprinted in RSC 1985, Appendix II, No 5 .

[10] *Ibid*, s 132.

[11] *Ibid*, s 92(13).

[12] *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, 49 DLR (4th) 161 at 184.

[13] *Ibid*, paras 34-35.

[14] Ontario Nature, "The Western Chorus Frog" online: <http://www.ontarionature.org/protect/species/reptiles_and_amphibians/western_chorus_frog.php>.