CITATION: Sierra Club Canada v. Ontario (Natural Resources & Transportation), 2011 ONSC 4655
DIVISIONAL COURT FILE NO.: 412/10
DATE: 20110927

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

JENNINGS, WILSON & LEDERER JJ.

BETWEEN:	
SIERRA CLUB CANADA Applicant	*Paula Boutis*, for the Applicant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTATIVE OF NATURAL RESOURCES and THE MINISTRY OF TRANSPORTATION Respondent	*William J. Manuel* & *Lise Favreau*, for the Respondent
	HEARD: May 18, 2011

LEDERER J.:

INTRODUCTION

[1] It is proposed that a new bridge be built crossing the Detroit River. As part of the approval process, the Minister of Natural Resources of Ontario granted a Permit allowing for the disturbance of several species whose habitat would be affected by the construction. Sierra Club Canada does not believe the Permit should have been granted. It seeks a declaration that the issuance of the Permit was unlawful and invalid. The Permit was issued, pursuant to the *Endangered Species Act, 2007*, R.S.O. 2007, c. 6. ("*ESA*"). This application for judicial review is based on the argument that the applicable section of the *ESA* (s. 17) was not properly applied.

More broadly, the case concerns the role of the court when a judicial review extends into questions of public policy.

BACKGROUND

[2] The governments of the United States, Canada, Michigan and Ontario created a partnership. The partnership decided that a new bridge crossing the Detroit River, between Windsor and Detroit, was necessary. The project required approvals under both the *Canadian Environmental Assessment Act,* S.C. 1993, c. 37 and the Ontario *Environmental Assessment Act,* R.S.O. 1990, c. E. 18. These assessments were carried out at or about the same time.

[3] The federal assessment was approved on December 3, 2009. Two applications for judicial review were commenced in the Federal Court. Both sought to set aside the approval made with respect to the new bridge. The first was commenced by The Canadian Transit Company, the proponent of a competing proposal; and the second, by the applicant in this proceeding, Sierra Club Canada.

[4] The Federal Court concluded that both applications were without merit. They were dismissed.

[5] The provincial assessment was completed in December 2008 and was approved by the Minister in August 2009. It resulted in an approval of the proposed bridge and associated infrastructure, which included the Windsor-Essex Parkway ("Parkway"), a roadway which will connect Highway 401, in the Town of Tecumseh, to a new customs plaza located in the City of Windsor and to the new bridge.

[6] There was no application for judicial review of the decision of the Ontario Minister of Environment to approve the new bridge project under the Ontario *Environmental Assessment Act.* The Ontario approval depended, in part, on the acquisition of permits from the Ontario Minister of Natural Resources under the *ESA*. In its Notice of Application for Judicial Review in the Federal Court, Sierra Club Canada attempted to seek an order "quashing or setting aside any authorization(s), permit(s), and/or approval(s) that may be issued, prior to the hearing of this matter, by any of the Respondents under any statute including...the *Endangered Species Act* for the purpose of enabling the [Detroit River international crossing project] in whole or in part". In the end, Sierra Club Canada conceded that the Federal Court does not have jurisdiction over decisions made by the Minister of Natural Resources of Ontario to issue a permit under the *ESA*.

[7] A permit under the *ESA* was issued on February 9, 2010.

[8] On August 18, 2010, Sierra Club Canada commenced this application for judicial review seeking to set aside the Permit.

PRELIMINARY ISSUES

[9] Two preliminary issues were raised by the parties at the beginning of this hearing. The first concerned a motion to strike certain affidavits filed by the applicant after the Permit was issued.

[10] The Court ruled on the issue of what should be included in the record with written reasons to follow. It heard submissions and reserved on the question of delay.

[11] In the decision of the Court, delivered at the hearing with written reasons to follow, two affidavits and a substantial part of a third, filed by the applicant, were struck as inappropriate and irrelevant for the purpose of this application for judicial review. Our reasons were delivered by J. Wilson J., and released on June 29, 2011. No reference to the stricken material will be made in the reasons which follow.

[12] The second preliminary issue concerned the allegation of delay in the bringing of this application.

[13] In September 2010, the respondent brought a motion, returnable before Madam Justice Swinton, seeking to have this application dismissed on grounds of delay. She found that it was not appropriate to dismiss the application for delay in her capacity as a single judge of this Court, and adjourned the motion to be determined by the panel hearing the application.

[14] The respondent's position is that:

1. Sierra Club Canada had known for some time prior to the decision to issue the permit being made on February 9, 2010 that a permit might issue; and that

2. Although Sierra Club Canada became aware of the decision in April 2010, it waited until August 2010 to launch this application.

[15] From the record before us, it appears that, despite the efforts of Sierra Club Canada to obtain a copy of the documents that support the application, the Ministry of Transportation of Ontario did not assist and it was not until July 20, 2010 that Sierra Club Canada received the requested documentation. On July 30, 2010, Sierra Club Canada retained an expert for an opinion on the materials supporting the application. The opinion was completed on August 12, 2010 and this application was launched six days later.

[16] The factors we must consider on a motion to dismiss for delay are:

(a) the length of the delay;

(b) the explanation for the delay; and,

(c) prejudice.

[17] In an application such as this, which is not only novel, but engages a significant and considerable public interest, it is neither desirable nor appropriate to deny a hearing on the merits except in a clear case of procedural abuse. This is not such a case.

[18] The delay between April and August was not overly-long and was, in large part, due to the apparent refusal of the Ministry of Natural Resources to publicize the decision and the Ministry of Transportation to produce requested documentation.

[19] Having obtained the documentation, it was reasonable for Sierra Club Canada to consult an expert for an opinion on the merits of the application for Judicial Review.

[20] In circumstances where Michigan has not, as of yet, committed to the project, any delay will have caused minimal prejudice.

[21] In our opinion, the delay was, in the circumstances, not unreasonable and has been satisfactorily explained. There has been no prejudice to the applicant. The motion is dismissed.

FACTS

[22] The *ESA* prohibits anyone in Ontario from "killing, harming, harassing, capturing, taking, possessing, transporting, collecting and buying or selling any living member of any species that are listed on the Species at Risk in Ontario List as an endangered or threatened species" ("SAR") (see: *ESA,* s. 9). In respect of a limited number of designated species, the *ESA* also prohibits anyone, in Ontario, from damaging or destroying the habitat of SAR (see: *ESA*, s. 10). Despite these prohibitions, subject to certain limitations and requirements, the *ESA* allows the Minister of Natural Resources to issue permits authorizing activities otherwise prohibited under the *ESA* (see: *ESA*, s. 17).

[23] Following the environmental assessment approval, made pursuant to the provincial process, it was understood that the construction of the Parkway could impact on a number of SAR. As part of the approval for the Parkway, the Ministry of Transportation applied for a permit under the *ESA.* The staff of the Ministry of Natural Resources concluded that the Parkway could affect eight (seven "threatened" and one "endangered") SAR. The Ministry of Natural Resources obtained reports from independent experts in respect of each of the eight species. The Ministry of Natural Resources held a "stakeholder meeting" in July 2009 and posted an "Information Notice" regarding the proposed permit on the electronic Environment Registry from September 8 to October 8, 2009. The Ministry of Natural Resources received a number of comments on the proposed permit, including two letters from the applicant, in which it outlined a number of concerns. As part of the decision-making process, the staff of the Ministry of Natural Resources compiled a record of relevant information for the Minister. This included the experts' reports on each of the SAR, a socio-economic review prepared by the staff of the Ministry, an analysis of all the submissions received from members of the public, including the applicant, and a document summarizing and analyzing the information obtained and to be considered by the Minister in relation to the application for the permit.

[24] On January 11, 2010, the Minister signed a decision in which she stated her opinion that the pre-conditions for seeking approval of the Lieutenant Governor in Council for the issuance of the permit, under the *ESA*, had been met.

ISSUES

[25] On this application for judicial review, Sierra Club Canada seeks to have the permit declared invalid on the basis that:

> (a) the Minister erred in law by failing to apply the "precautionary principle" or to meaningfully consider the Statement of Environmental Values of the Ministry of Natural Resources;
>
> (b) the Minister erred in law, in that the consultation with experts did not comply with the requirements of s. 17(2)(d)(ii) and (iii) of the *ESA;*
>
> (c) the Minister erred in law by failing to consider relevant information in deciding that the permit could be issued; and,
>
> (d) there was a reasonable apprehension that the Minister was biased.

LEGISLATION

[26] The authority for the Minister of Natural Resources to issue a permit and the limitations on that responsibility are found in s. 17 of the *ESA*.

[27] Section 17(1) states:

> The Minister may issue a permit to a person that, with respect to a species specified in the permit that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species, authorizes the person to engage in activity specified in the permit that would otherwise be prohibited by section 9 or 10.

[28] Section 17(2) outlines the limitations placed on the issuance of permits. The Permit that is the subject of this case was issued, pursuant to s. 17(2)(d) of the *ESA*. It states:

> (2) The Minister may issue a permit under this section only if,
>
> . . .
>
> (d) the Minister *is of the opinion that* the main purpose of the activity authorized by the permit is not to assist in the protection or recovery of the species specified in the permit, but,

(i) the Minister *is of the opinion that* the activity will result in a significant social or economic benefit to Ontario,

(ii) the Minister *has consulted with a person who is considered by the Minister to be an expert* on the possible effects of the activity on the species and *to be independent of the person who would be authorized by the permit to engage in the activity,*

(iii) the person consulted under subclause (ii) *has submitted a written report* to the Minister on the possible effects of the activity on the species, including *the person's opinion on* whether the activity will jeopardize the survival or recovery of the species in Ontario,

(iv) the Minister *is of the opinion that* the activity will not jeopardize the survival or recovery of the species in Ontario,

(v) the Minister *is of the opinion that* reasonable alternatives have been considered, including alternatives that would not adversely affect the species, and the best alternative has been adopted,

(vi) the Minister *is of the opinion that reasonable steps* to minimize adverse effects on individual members of the species are required by conditions of the permit and

(vii) the Lieutenant Governor in Council has approved the issuance of the permit.

[Emphasis added]

STANDARD OF REVIEW

[29] Apart from the issue of bias, raised by the applicant, we conclude that the standard of review is reasonableness.

[30] In this case, the Minister is the decision-maker. As such, to the extent that any interpretation of the *ESA* was required, she was interpreting her own statute, one closely-connected to her function, with which she is taken to have particular familiarity. The Minister is to be accorded deference. The reasonableness standard applies (see: *Dunsmuir v. New Brunswick* [2008] 1 S.C.R. 190, at para. 54, where reference is made to: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board),* [1995] 1 S.C.R. 157, at para. 48; and *Toronto (City) Board of Education v. O.S.S.T.F., District 15,* [1997] 1 S.C.R. 487, at para. 39).

[31] In assessing whether a decision is reasonable, the majority of the Supreme Court of Canada, in *Dunsmuir v. New Brunswick, supra*, described the task as follows:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> (*Dunsmuir v. New Brunswick, supra,* at para. 47)

[32] The measure of the deference is all the more significant when the decision is one that concerns a matter of public policy.

[33] The point is introduced in *Dunsmuir v. New Brunswick, supra*, where the following is said:

> Where the question is one of fact, discretion *or policy*, deference will usually apply automatically *(Mossop,* at pp. 599-600; *Dr. Q,* at para. 29; *Suresh,* at paras. 29-30).
>
> [Emphasis added]
>
> (*Dunsmuir v. New Brunswick, supra,* at para. 53)

[34] The Court of Appeal for Ontario refined the understanding when it held:

> …where … the decision-maker is a Minister of the Crown and the decision is one of public policy, the range of decisions that fall within the ambit of reasonableness is very broad.
>
> (*Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal),* [2008] O.J. 2150, at para. 22 (C.A.))

[35] The recognition that issues that concern public policy attract greater deference has been confirmed by this court:

> In making the June 2007 Order, the Minister was exercising a statutory power of the discretion granted to him under the *Occupational Health and Safety Act*. The Order is akin to a public policy decision as contemplated by the Court of Appeal in *Mills*. In *Dunsmuir*, the Supreme Court of Canada reaffirms that 'where the

> question is one of fact, discretion or policy, deference will usually apply automatically'.
>
> (*Elementary Teachers' Federation of Ontario v. Ontario (Minister of Labour)* [2009] O.J. No. 719, at para. 8)

[36] The one submission that stands apart is the claim that the Minister was biased. An allegation of bias runs to the core of the process and the decision. It challenges the integrity of the decision and the fairness of the process. Where the issue is procedural fairness, there is no standard of review. The process must be fair.

ANALYSIS

[37] The breadth of the deference to be offered to the Minister in this case is underscored by the words of s. 17(2)(d) of the *ESA*.

[38] Of the seven clauses that impose limitations on the authority of the Minister to issue a permit (see: s. 17(2)(d)(i) to (vii)):

- four require the Minister to form an opinion (see: s. 17(2)(d)(i), (iv), (v) and (vi));
- two require that the Minister consult with an independent expert who has submitted a written report, which includes that person's opinion on whether the activity will jeopardize the survival or recovery of the species in Ontario (see: s. 17(2)(d)(ii) and (iii)); and,
- one requires that the issuance of the permit be approved by the Lieutenant Governor in Council (see: s. 17(2)(d)(vii)).

[39] The substantive requirements to be met are restricted to the Minister consulting experts and forming opinions. This serves to broaden the deference the court should provide to the decision to issue the Permit. There is nothing that requires that the Minister follow the opinions of the experts. The obligation is limited to the Minister undertaking the consultation and forming his or her own opinions. This reflects the fact that there are considerations other than the impact on SAR that must be accounted for in determining whether a project such as an international crossing should proceed. This is made clear by the reference, in s. 17(2)(d)(i) of the *ESA*, to the need for the Minister to be of the opinion that the activity will result in a significant social or economic benefit to Ontario. This demonstrates the public policy aspects of this determination and confirms the wide nature of the deference to be offered.

[40] In this case, there is evidence that these conditions were met. An extensive record was provided to the Court. It includes a document entitled, "Analysis of Type D Permit Requirements". It reviews the work done and analysis undertaken with respect to the Permit. The last page (page 23) contains the "Minister's Opinion". It is signed by the Minister and provides

each of the opinions required by s. 17(2)(d) of the *ESA*. This is the "decision" which she signed on January 11, 2010. The decision was informed by the work and analysis reported on in the preceding pages.

[41] The "Analysis of Type D Permit Requirements" refers to the eight SAR and identifies the experts consulted with respect to each of them. The reports were prepared and the opinions of the experts provided.

[42] The approval of the Lieutenant Governor in Council was obtained on January 18, 2010.

[43] On its face, the requirements of s. 17(2)(d) would seem to have been met. The applicant says this is not so.

(a) The "precautionary principle" and the Statement of Environmental Values ("SEV") of the Ministry of Natural Resources

[44] The applicant begins by referring to the "precautionary principle". This principle guards against the idea that where there is a risk of environmental harm, a party would be able to rely on ignorance or uncertainty as to the degree or nature of the risk as the basis on which to proceed. The enunciation of the "principle" can be found in different places, using different words.

[45] The applicant, in its factum, submitted that it is "enshrined in the preamble and purposes of the *ESA*". It says:

> The United Nations Convention on Biological Diversity takes note of the precautionary principle, which, as described in the Convention, states that, where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.

[46] As provided for in the *Environmental Bill Of Rights,* R.S.O. 1993, c. 28 ("*EBR*"), the Ministry of Natural Resources has issued a Statement of Environmental Values. As the applicant sees it, this, too, refers to the "precautionary principle". It states:

> The Ministry of Natural Resources is committed to applying the purposes of the EBR when decisions that might significantly affect the environment need to be made in the ministry as it develops Acts, regulations and policies, by the application of the following principles:
>
> . . .
>
> - As our understanding of the way the natural world works and how our actions affect it is often incomplete, MNR staff should exercise caution and special concern for natural values in the face of such uncertainty.

[47] In explaining the principle, the applicant also makes reference to a decision of the Environmental Review Tribunal:

> A precautionary approach presumes the existence of environmental risk in the absence of proof to the contrary. It places the onus of establishing the absence of environmental harm upon the source of risk. In situations where scientific uncertainty exists as to whether an activity could have an adverse effect, the precautionary principle requires that it should be considered to be as hazardous as it could be.
>
> (*Davidson v. Ontario (Director, Ministry of the Environment)* (2006), 24 C.E.L.R. (3d) 165 (O.E.R.T.), at para. 44)

[48] It is also said that s. 11(3) of the *ESA* contains another formulation of the principle, albeit one which applies to recovery strategies to be prepared for the recovery of SAR. It states:

> In preparing a strategy under subsection (1), the persons who are preparing the strategy shall consider the principle that, where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.

[49] The submissions, made on behalf of the applicant, suggested that the "precautionary principle" is an overarching consideration which must direct all aspects of the application for the permit. It is the position of the applicant that if the "precautionary principle" does not supersede all other factors, the issuance of the permit is unlawful and invalid.

[50] In support of this approach, reliance is placed on the case of *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* 2008 CanLII 30290 (Div. Ct.). In the factum, filed on behalf of the applicant, this case is cited as one where "the Divisional Court upheld the Environmental Review Tribunal's determination that the Director of the Ministry of the Environment (MOE) must have regard to the MOE's SEV when deciding whether to issue a Certificate of Approval" (see: Factum of the Applicant, at para. 118). This is not so.

[51] The decision of the Divisional Court dealt with an application for judicial review to quash a decision of the Environmental Review Tribunal which, in turn, had granted leave to appeal the decisions of two directors of the Ministry, each issuing a Certificate of Approval. In granting leave, the Tribunal was governed by s. 41 of the *EBR*. The applicable test included the requirement that there be "good reason to believe that no reasonable person, having regard to the relevant law and *to any government policies* developed to guide decisions of that kind, could have made the decision" [Emphasis added]. The Divisional Court found that: "Upon a consideration of ss. 7 and 11 of the EBR, *it is arguable and, therefore, reasonable* for the Tribunal to have regarded the SEV as relevant policy which should guide the decisions of the Directors". [Emphasis added] (see: *Lafarge Canada Inc. v. Ontario (Environmental Review*

Tribunal), supra, at para. 56). The Divisional Court made clear its view of the limits of its decision when it said:

> The decision of this Court on this application is not to be taken as deciding the merits of the appeal – for example, the application of the SEV. The merits are appropriately for the Tribunal to determine, on the basis of a full evidentiary record, although they are subject to further appeal to this court on a question of law (EPA, s. 145.6 (1)).
>
> (*Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal), supra*, at para. 82)

[52] Moreover, the proposition in the *Lafarge Canada* case was that the two directors, in coming to their decisions, had failed to consider the SEV. In the case this court is asked to decide, that is not the situation. The record includes a document entitled, "Ministry of Natural Resources, Environmental Bill Of Rights, Consideration of MNR's Statement of Environmental Values". It is an exhibit to an affidavit sworn by the Director of the Species at Risk Branch of the Ministry of Natural Resources. In the affidavit, he deposes:

> For the Windsor-Essex Parkway portion of the Detroit River International Crossing Project, the MNR's SEV was considered. This is documented in 'Consideration of MNR's Statement of Environmental Values' document which I approved and signed on October 28, 2009, a copy of which is attached and marked as exhibit 'B' to this my affidavit.

[53] The words in the various formulations of the principle to which reference has been made (see: paras. [45], [46], [47] and [48], above) serve to demonstrate that strict compliance with the precautionary principle is not intended to be a pre-condition to the granting of a permit. The fact that there is no consistent wording describing the principle would make it difficult to apply in this way. The precautionary principle is a guiding principle not a statutory or regulatory requirement.

[54] The description, found in the preamble to the *ESA* (see: para. [45], above), does nothing more than observe that the precautionary principle is taken note of by the United Nations Convention on Biological Diversity. Its presence in the preamble does not make it law. The preamble serves to introduce the ideas and concerns which inform the legislation that follows. It is worthwhile noting that, among the ideas found in the preamble, is the need to balance the concerns dealt with by the *ESA* with others. The preamble states:

> In Ontario, our native species are a vital component of our precious natural heritage. The people of Ontario wish to do their part in protecting species that are at risk, *with appropriate regard to social, economic and cultural considerations.* The present generation of Ontarians should protect species at risk for future generations.

[Emphasis added]

[55] The expression of the precautionary principle, as found in the Statement of Values of the Ministry of Natural Resources (see: para. [46], above), says only that the staff of the Ministry, in the face of uncertainty, should exercise caution and concern for natural values. This does not impose an overarching requirement that approval be granted only where the uncertainty is resolved.

[56] The reference to a "precautionary approach" in *Davidson v. Ontario (Director, Ministry of the Environment)*, *supra*, does nothing other than describe the view of the Environmental Review Tribunal as to what the precautionary principle requires (see: para. [47], above). It should go without saying that a statement, in the decision of a Board describing a principle, does not make it a statutory, regulatory or legal requirement.

[57] It is worthwhile to consider the context in which the statement was made. In the *Davidson* case, the Tribunal was considering an application for leave to appeal the renewal of a water taking permit. The water was taken, bottled and sold. There was evidence that, over time, there had been a significant reduction in the flow of the springs relied on to supply the water. Nonetheless, and despite the apparent policy that such permits should be limited to two years, the director had issued the permit for a ten-year period. The statement describing a "precautionary approach" was made in response to the stated rationale of the director for issuing a ten-year permit which "appears to be that the issue of the sustainability of the water taking… has been… 'studied to death' and still there is no scientific evidence of impact or potential impact to the environment" (see: *Davidson v. Ontario (Director, Ministry of the Environment)*, *supra*, at para. 44). In other words, the statement was made where there was an apparent departure from an established policy limiting the duration of such permits, in the face of empirical evidence demonstrating the depletion of an environmental asset and in response to the implicit, if not direct, assertion that nothing could be gained by more study. The paragraph in which these comments are found concludes by saying that this is not demonstrative of a precautionary approach (see: *Davidson v. Ontario (Director, Ministry of the Environment)*, *supra*, at para. 44). None of this suggests that it is the obligation of those involved in the issuance of permits to always be certain or to assume the worst.

[58] The reference to s. 11(3) of the *ESA* does not assist the applicant (see: para. [48], above). Whatever it may mean, its placement in s. 11 and its opening words ("In preparing a strategy"…) limits its application to "Recovery Strategies", as outlined in that section, and not to permits referred to in s. 17. If it was meant to apply to permits, it was open to the Legislature to include it within that section.

[59] The issue of whether the precautionary principle was properly accounted for in considering whether the Permit should be granted was raised by the applicants in submissions made to the Minister of Natural Resources. The staff of the Ministry responded:

> MNR is of the opinion that a precautionary approach has been taken in developing the permit and the conditions of the permit. Examples of this approach include consulting with species experts; requiring that trials be undertaken to test and identify the best approaches to mitigation (e.g. planting techniques) prior to impacting species; requirements for long-term monitoring; and the adoption of an adaptive management approach that may require additional mitigation steps to be undertaken where merited.
>
> (Summary of Stakeholder Comments and MNR Responses, at p. 11)

[60] There is nothing which supports the proposition that the precautionary principle must not only be considered, but adhered to before a permit can be issued. In this case, it was accounted for and considered. This complaint is not a basis for the granting of judicial review.

(b) The consultation with experts did not comply with the requirements of s. 17(2)(d)(ii) and (iii) of the ESA.

[61] The applicant does not question the quality of work, the consultation with experts, the mitigation imposed or the conclusions relied on in respect of five of the eight identified SARS. It raised concerns about the remaining three: Butler's Gartersnake, Eastern Foxsnake and Colicroot (a "low-growing perennial plant").

[62] The position of the applicant, in respect of the two species of snake, is summarized in a single paragraph found in the factum relied on by its counsel:

> The Applicant submits that there was no basis for the Minister's 'findings' made regarding jeopardy or survival or recovery of the species in Ontario of the two snake species. There is a significant lack of data underpinning the conclusion that there would not be jeopardy to the survival or recovery of those species. Moreover, what scientific peer-reviewed data did and does exist indicates that these mitigation strategies will fail. The Minister appears instead to rely on 'adaptive management' discussed more fully below. However, '[p]ossibilities of future research and development do not constitute mitigation measures'.
>
> (footnoted in respect of this paragraph: *Pembina Institute for Appropriate Development v. Canada (Attorney General),* 2008 FC 302 (T.D.) at para. 25)
>
> (Factum of the Applicant at para. 120)

[63] This statement, far from offering the breadth of deference required where a public policy decision is at issue, offers no deference at all. It would require the court to examine all the evidence for itself, analyze that evidence and come to its own conclusion as to how it should impact on whether or not a permit should be issued. As a general observation, we note that this is not appropriate. This is not a new hearing (a hearing "*de novo*") but, rather, an application for

judicial review guided by the standard of reasonableness with significant deference owed to the public policy decision of the Minister.

(i) Butler's Gartersnake

[64] A part of this application reflects the view of the applicant that the consultation undertaken by the Minister was not in compliance with s. 17(2)(ii) and (iii) of the *ESA*. Two experts were retained by the Minister to provide independent expert reports regarding the effect of the Parkway on the Butler's Gartersnake. One determined there would be no jeopardy to the survival or recovery of the species as a result of the Parkway. The applicant complained that this expert was not "independent", as required by s. 17(2)(d)(ii) of the *ESA*. This was said to be so because his employer was "vying for the contract to build the [Parkway] at the time he prepared his report for the Permit" (see: Factum of the Applicant at para. 121). "Independent", as referred to in the *ESA* s.17(2)(d)(ii), requires the expert to be independent of the person "who would be authorized by the permit to engage in the activity". This refers to the Ministry of Transportation. The expert provided a "Statement of Independence", in which he said:

> I hereby declare that I have no financial or working relationship with the Ontario Ministry of Transportation in connection with the Detroit River International Crossing study. I have however, worked on some projects for the Ontario Ministry of Transportation at other locations in Ontario. I also am completely independent from any connections to LGL Limited.

[65] The Minister found this satisfactory. Strictly speaking, it confirms the independence of the expert. He was not connected to the study and his employer (not LGL Limited), while bidding for work in respect of the project, had not yet been retained or shortlisted.

[66] The expert was retained in late June, 2009. The Request for Qualifications to design, build, finance and maintain the Parkway was solicited at the end of June, 2009. The report of the expert was delivered during July, 2009. It was only at the end of October that the consortium, in which the employer was included, was short-listed to submit a proposal for the Parkway. Which is to say that, at the time the expert was retained, his employer may have been considering, preparing or perhaps had delivered its qualifications for the project. When the report, which included the "Statement of Independence", was delivered, the consortium had not yet been short-listed to provide a proposal.

[67] It is worthwhile remembering that it is the independence of the individual and not his employer that is the issue. This is important to the individual. The integrity of an expert rests, in large part, on the acceptance and recognition of his independence.

[68] While this is a situation which the Minister might have been better to avoid, we are not prepared to find that the expert involved lacked the independence required by s. 17(2)(d)(ii) of the *ESA*.

[69] The applicant observed that, on July 1, 2011, a new regulation under the *Environmental Protection Act*, R.S.O. 1990 c. E 19 ("*EPA*") was to come into force that would "deal with conflicts of interest in the context of consultants providing a risk assessment for property in which they hold a 'direct or indirect interest' " (see: *EPA*, O. Reg. 153/04, s. 6.1). The case was heard on May 18, 2011. The regulation was not in effect on that day and was not to come into effect until nearly 1.5 years after the permit had been issued (February 9, 2010). It can have no impact on this application. In any event, a simple reading of the regulation does not make clear that it would apply in the circumstances.

[70] This first expert concluded that, taking into account the mitigation measures proposed, the Parkway would not jeopardize the survival or recovery of the species in Ontario. In fact, he opined that the development of the Parkway "could actually contribute to the recovery of the species if the mitigation measures proposed… are carefully planned and implemented in the sights secured" (see: Expert Report on the Possible Effects of the Windsor-Essex Parkway on Butler's Gartersnake, AECOM Canada Ltd., July 2009 at s. 4.2).

[71] The Minister did retain and consider the report of a second expert. Both experts were retained at the same time (late June, 2009). Two experts were retained because little is known about the Butler's Gartersnake in Ontario (see: Analysis of Type D Permit Requirements, p. 8). In his report, the second expert expressed concern as to the impact on the species if the Parkway was constructed:

> If this population fails then will this failure jeopardize the species in Ontario? Given the small number of sites, the snakes [sic] small size, their isolation and their vulnerability, it is difficult to see how the loss of this population will not have a negative impact on the survival and recovery of the species overall. If it disappears then there is less reason to protect the remaining habitat even if some other species at risk occur there, plus it is a loss of another piece of the ecosystem. Each small population of Butler's is a part of the whole in terms of its genetics and its potential contribution in individuals and genetic material to a recovery if a recovery plan comes along. If one adds to this loss the apparent extirpation of perhaps 25% of locations in just the past 9 years since the species was designated threatened, then it is hard to dispute that the Butler's Gartersnake in Ontario is jeopardized in terms of both survival and recovery because of the proposed project and despite the recommended mitigation.
>
> (see: Expert Report on the possible effects of the Windsor-Essex Parkway on Butler's Gartersnake for the purposes of a potential permit issued under clause 17 (2)(d) of the *Endangered Species Act*, 2007, at p. 24)

[72] As has already been said, there is nothing in s. 17(2)(d) of the *ESA* which requires the Minister to accept the work or opinion of any expert. The requirement is that the Minister consult and obtain a written report with the opinion the section refers to. This is consistent with the broad extent of the deference the circumstances called for.

[73] Having said this, the delivery of the report was not the end of the involvement of the second expert. The record contains a "Note", entitled: "Refinements to Independent Species Expert Opinions on Butler's Gartersnake". It reveals that, on August 28, 2009, subsequent to the reports being written, a meeting was convened with both experts. The second expert attended by telephone. The "Note" observes that, at that time, the experts both endorsed a refined approach to Butler's Gartersnake. The record includes a summary of the meeting. This demonstrates that the consultation continued after the delivery of the report and an agreement reached as to mitigation that would allow both experts to recommend that the project could proceed.

[74] There is nothing wrong with this. To the contrary, it would seem to be an appropriate and substantive response to the concerns raised by the second expert.

[75] Unhappily, this is still not the end of involvement of the second expert. For the purposes of this application, the second expert swore two affidavits. He attempted to distance himself from his prior approval of the mitigation measures proposed. He was cross-examined on these affidavits. He disputed the accuracy of the "Note" insofar as it suggests he had "endorsed" enhanced mitigation measures. The difficulty is that both the affidavit he swore on September 17, 2010 and his cross-examination recognized that he was provided with a copy of both the "Note" and the summary of the meeting. Both documents were sent to him in early November, 2009. At that time, he did not voice the concern expressed in these affidavits. As part of the cross-examination, he acknowledged that, at the conclusion of the meeting, he was asked if the project could "move forward" and he said "yes". This application for judicial review was issued on August 18, 2010. The two affidavits were sworn after that date (September 27, 2010 and October 12, 2010). Accordingly, at the time the "Note" was prepared and advice provided to the Minister, it was an accurate description of the information communicated by the expert to the staff of the Ministry of Natural Resources. For the purposes of this application, no comment is made as to the credibility of the evidence found within these affidavits. On the other hand, experts cannot change the views they express after a decision has been made. In such circumstances, no decision would be final and no process reliable.

[76] Viewed from this perspective, there can be no criticism of the decision of the Minister insofar as her reliance on the opinions of these two experts is concerned.

(ii) Eastern Foxsnake

[77] The applicant also expressed concern in respect of the work done in relation to the second species of snake, the Eastern Foxsnake. An expert was retained. The report was prepared. The expert concluded that there would be no jeopardy to the survival or recovery of the species, in Ontario, as a result of the Parkway. Nonetheless, the applicant is not satisfied. The factum filed in support of its position observes that: "…this conclusion appears to be based on…" and proceeds to review other statements from the report which the applicant suggests should have pointed the reader to a different result (see: Factum of the Applicant at para. 61). This approach

would require the court to look behind the report to decide if the conclusion is sustainable and to determine that the Minister should not have relied on it. This goes well beyond what should be asked of the court on a judicial review and lacks the deference the Minister is owed.

[78] Principal among the complaints of the applicant is the concern that the report failed to distinguish between two geographically-distinct populations of Eastern Foxsnake: the Carolinian population (which includes the area contiguous to the Parkway) and the Georgian Bay population. At the time the report was prepared, the *ESA* regulations did not distinguish between the two populations. This is reflected in the terms of reference provided to the expert who was asked "will the activities associated with the construction of the Windsor-Essex Parkway, taking into account the proposed mitigation, jeopardize the survival or recovery of the Eastern Foxsnake…*in Ontario*?" [Emphasis added] (see: Expert Report on the possible effects of the Windsor-Essex Parkway on Eastern Foxsnake…. at 8th page (not numbered)).The report refers to the two populations (which it identifies as the Carolinian and Great Lakes/St. Lawrence) and that the assessment of the "area of occupancy" was for the entire population. The applicable regulation was amended in September, 2009 to distinguish between these two populations (see: O. Reg. 230/08). The Minister was made aware of the distinction between the two populations. It is referred to in a footnote of the analysis document which ends with her opinion, endorsed with her signature (see: Analysis of Type D Permit Requirements, at p. 3, footnote 1 and p. 23). What comes from this is that the Minister accounted for the presence of the two populations in coming to her opinion.

[79] While it is not directly the concern of the court, it may be helpful to point out that the factum of the respondent observes that the "Carolinian area is at least as big as the Georgian area, and that the Carolinian area is far greater than the footprint of the [Parkway]" – the implication being that the Parkway would not jeopardize the survival of the Eastern Foxsnake even if only the Carolinian population is considered (see: Factum of the Respondent at para. 40).

(iii) Colicroot

[80] The concerns expressed by the applicant in respect of Colicroot do not relate to the work of the experts that were retained or the report that was prepared. Rather, the applicant is concerned that the mitigation measures recommended by the experts were not respected and included as conditions to the Permit.

[81] With respect to Colicroot, the factum of the applicants suggests:

> Although the Permit required trials to be conducted to determine the best method of transplanting and growing the species from seed, the Permit did not prevent construction if none of the trials proved successful, and again, relied on 'adaptive management'. As a result, the construction of the [Parkway] could result in the total loss of 38% of the Colicroot population in Canada, with sites outside the Windsor area representing less than 200 known flowering individuals….

(Factum of the Applicant, at para. 127)

[82] This proposition proposes that the court look behind the Permit, look for inconsistencies with the report and make its own determination as to how the Minister should have responded to this work.

[83] The Minister retained three experts. They prepared the report working together. They concluded that the Parkway would not jeopardize the survival of Colicroot in Ontario as long as certain modifications were made to the project and mitigation strategies put in place. After the preparation of the report, there was further discussion between the experts and the Ministry of Transportation (see: Note: Requirements to Independent Species Expert Opinions on Colicroot, Summary: Meeting to Clarify Colicroot Concerns (August 26, 2009) and Summary: Meeting to Discuss Colicroot Mitigation (October 17, 2009)). This led to additional mitigation measures being added as conditions of the Permit, including, for example, the requirement of a retaining wall to protect the species. "These additional measures will help to ensure that survival and recovery of Colicroot is not jeopardized. With these modifications, the experts endorse the approach to Colicroot mitigation that is reflected in the proposed permit" (see: Analysis of Type D Permit Requirements at p.13). The conditions found in the Permit require five discreet trials related to the removal and transplantation of Colicroot, from the "Colicroot Impact Sites" to the "Colicroot Candidate Restoration Sites" (defined as: "any of the areas identified within Appendix E that have the potential to contain habitat suitable to support Colicroot") (see: Permit AY-D-001-09, Condition 12 (a) and (g)). The conditions require that:

> Prior to the commencement of any construction activities within the Impact Sites, MTO shall remove and transplant all Colicroot individuals within the ESA Footprint that will be impacted into a Final Restoration Site. MTO shall employ the technique(s) identified as a result of the trials conducted under Condition 12 (g) as the technique(s) providing for the highest survival rates for removed and transplanted Colicroot individuals.
>
> (Permit AY-001-09, Condition 12 (i))

[84] This does not satisfy the applicant.

[85] The discussions which took place on August 26, 2009 included the concerns expressed by the experts that any successful transplantation procedures would require a minimum of one year of survival of the transplanted Colicroot. The Minutes of the meeting of October 17, 2009 suggest a condition for the permit that Colicroot plants must have been established at any intended destination site and survived there from one growing season to the next.

[86] The Permit does not include this as a condition. Sierra Club Canada is concerned that, absent this condition, the Permit does not prevent construction of the Parkway if none of the trials have any level of success. Sierra Club Canada is concerned that without the requirement that there be plants that have survived for one year after they have been transplanted, the MTO

will be left free to rely on the principle of "adaptive management". It fears that this could lead to the destruction of the entire Colicroot population found in the area impacted by the construction.

[87] There is nothing that requires the Minister to accept every concern raised or every condition proposed. It is clear from the record of the two meetings that the appropriate treatment of Colicroot was reviewed and considered. The Minutes of both meetings refer to a permit having been issued under s. 17(2)(b) of the *ESA*. This is a permit where the activity authorized will assist in the "protection or recovery of the species specified in the permit". This permit was for work in the fall of 2009 that would include the testing, transplanting and propagation of Colicroot. The results were to feed into the transplanting and management plans required for a permit under s. 17(2)(d) of the *ESA*. The "Approaches for Moving Forward", found in the Minutes of October 17, 2009, refer to: "Complete several trials to assess the most successful transplanting methods."

[88] As we understand it, adaptive management would require those engaged in the construction of the Parkway to continue to monitor how best to protect this species and to adapt its management until the best answer is found. In their report, the experts commend the "adaptive management strategy outlined…" (see: Expert Report on the Possible Effects of the Windsor-Essex Parkway on Colicroot, at p. 9). This approach is underscored by comments prepared for the Minister where the staff of the MNR said: "MNR will continue to work closely with MTO throughout the life of the project to review and revise the mitigation plans to better protect the eight species at risk covered by the Permit" (see: Summary of Stakeholder Comments and MNR Responses, at p. 12).

[89] There is no basis to suggest, as the applicant does, that reliance on adaptive management constitutes an error of law as opposed to requiring a demonstration of one year of survival of the plant species said to be at risk.

[90] There is nothing in any of this which supports the proposition that the Minister has failed to consult with experts, as required by s. 17(2)(d)(ii) and (iii) of the *ESA*.

(c) The failure to consider relevant information in deciding that the permit could be issued

[91] The applicant submitted that the record before the Minister was defective on the basis that she was not provided with a full copy of the Permit application and because there was additional scientific information which should have been provided. Again, the position of the applicant requires the court to go behind the decision and examine the information provided to the Minister: in this case, to determine what else might have been of assistance. The applicant took the position that this alleged failure is an error of law.

(i) Further scientific information

[92] The applicant argued that the requirement to obtain independent expert reports does not end with the Ministry retaining experts and the Minister relying upon their opinions. The applicant argued that the Minister is obliged to go further, and to consider the best scientific information available, regarding the species, in making her own decisions. This includes consulting with experts at other governmental agencies, such as Environment Canada, and peer-reviewed scientific literature.

[93] We disagree.

[94] Section 17(2)(d) of the *ESA* stipulates what the Minister is to consider before issuing a permit. The only documents that the Minister is expressly required to consider are the written reports of the independent experts. The Minister has complied with the requirements of that section.

(ii) Other species

[95] The applicant expressed the concern that there may be other species, beyond the eight referred to in the Permit, that should have been considered and accounted for. The analysis document produced by the staff of the MNR for the Minister observed:

> MNR is of the opinion that the only species that may be implicated by the proposed undertaking are the eight identified in the permit. While MNR recognizes that other species at risk occur in the area, MNR has concluded that the activities authorized by the permit will not result in violations of the Act with respect to species that are not mentioned in the permit. Furthermore, MNR has notified the Ministry of Transportation in writing that in the event that additional species at risk are discovered, MTO is required to comply with the protection provisions of Act regarding the species, or alternatively, seek an additional permit prior to proceeding with the project.
>
> (Analysis of Type D Permit Requirements, at p. 7)

[96] This provides a complete answer. The species that may be "implicated" by the Parkway have been accounted for, pursuant to s. 17(2)(d) of the *ESA*. If more are found, the *ESA* will apply either in terms of protection or the requirement for an additional permit. To put it differently, it will remain an offence under the *ESA* for the MTO or anyone else to harm or kill SAR not covered by the Permit. In any event, as matters presently stand, this issue is not reviewable by way of judicial review. No statutory power of decision has been exercised. MTO did not apply for a permit in respect of other SAR. Accordingly, the Minister did not make any decision in respect of such an application.

(iii) Recovery strategies

[97] In addition, s. 17(3) of the *ESA* requires that, before issuing a permit, the Minister shall consider any "recovery strategy" published, pursuant to s. 11(8) of the *ESA*. The applicant notes

that, at the time the Permit was approved, "draft recovery strategies existed for all affected species". The applicant complains that the Minister failed to consider these draft strategies or to consult with the recovery teams. The applicant says this contributes to, and is itself, an error of law.

[98] There is nothing which requires the Minister to consider "*draft* recovery strategies" [Emphasis added] and nothing that directs her to consult with the "recovery teams". It should go without saying that draft strategies are not among those published, as required by s. 11(8) of the *ESA*.

(iv) Social or economic benefits

[99] Section 17(2)(d)(i) requires the Minister to be of the opinion that the activity, in this case the Parkway, will result in a significant social or economic benefit to Ontario. The applicant submitted that this opinion is not supported by the evidence and is, therefore, unreasonable. Again, the court is asked to look behind the opinion and evaluate the evidence. The applicant says that more recent studies indicate that travel demand would not justify a new bridge until, at the earliest, 2020 and possibly not until 2025 and beyond. Interestingly, the Permit has a time limit. It will expire on December 31, 2021. While it has not been said, it can certainly be inferred that this recognizes the length of time it can take for a project of this scope to be completed. It takes the project to the time which the projections, referred to by the applicant, propose the bridge could be needed to accommodate traffic demand. The fact is that the Minister, in coming to her opinion, was aware that, in recent years, there has been a reduction in the use of the available Detroit River crossings:

> As of 2004, the Detroit-Windsor crossings were operating at 66% of capacity. Total traffic flow at the border peaked in 1999. Since that time, there has been a 45% decrease in passenger car traffic, and a 20% reduction in truck traffic (the latter was stable until 2006). These decreases likely reflect a number of factors, including economic restructuring, increased border security, and fluctuations in foreign exchange rates and the price of oil. Traffic flow at this border is anticipated to increase significantly in the future.
>
> (Analysis of Type D Permit Requirements, at p. 4)

The analysis goes on:

> MTO anticipates a significant increase in traffic demand for the period 2005-2035 as a result of exports-led growth and Canadian population growth. This increase in travel demand is based on a projected annual growth in Canada's GDP of 1.9% and a projected annual increase in volume of traffic across the Windsor-court order of 1.8%, similar to that seen in the late 1990s.
>
> (Analysis of Type D Permit Requirements, at p. 4)

What this demonstrates is that projects of this kind cannot be planned in the short-term. It is entirely reasonable for the Minister to proceed on this basis.

[100] Moreover, responding to traffic demand is not the only social or economic benefit on which the Minister relied in coming to her opinion. In its consideration of the application, the staff of the MNR undertook the analysis of the socio-economic benefits associated with the project. A broad range of Ministries were consulted (for example: Ministry of Economic Development and Trade, Ministry of Energy and Infrastructure, Ministry of Tourism and Recreation, Ministry of Finance and Ministry of Municipal Affairs and Housing). The benefits referred to can be summarized as improved conditions for Ontario's trade and investment, short-term economic stimulus for the region and the ability to meet long-term border infrastructure needs (see: MNR Staff Socio-Economic Review of Permit Application, August 21, 2009).

(v) The "no-build" alternative

[101] Section 17(2)(d)(v) of the *ESA* obligates the Minister to be of the opinion that reasonable alternatives have been considered. There is nothing that requires the Minister to consider all alternatives or even every reasonable alternative. Nonetheless, the applicant complains that the Minister has failed to consider an alternative in which the Detroit River International Crossing would be set aside and not constructed. In environmental planning, this is generally referred to as the "do-nothing" or the "no build" alternative. Typically, this is an option considered within an environmental assessment. In respect of this point, the applicant seeks to have the court go further. We are encouraged to look behind the environmental assessment approval which has been obtained. It is suggested that the Ontario environmental assessment process was premised on the fact that the bridge would be built and "did not seriously consider alternatives such as 'Do Nothing' or non-road-based alternatives" (see: Factum of the Applicant, at para. 150). This is beyond what the court can properly do. In any case, this argument runs contrary to the legislative scheme. With the environmental assessment having approved the project and the Minister being of the opinion that the project will yield significant social or economic benefits (see: s. 17(2)(d)(i) of the *ESA*), the consideration of alternatives is focused on alternative ways of completing the project not, as suggested by the applicant, the alternative of leaving things as they are.

(vi) Expanded foot print of the Parkway

[102] Finally, in respect of available information the applicant says the court should take into account, there is the suggestion that, since the approval of the Permit, the footprint of the Parkway has changed. Obviously, this is not information that would have been available to the Minister at the time the Permit was approved. Nonetheless, the applicant seeks an order that the court declare: "the Decision is nullified and invalid due to substantial changes made to the project after the Permit was issued". This proposes to take the court even further. Now, it is asked not only to look behind what was done by the Minister at the time the Permit was issued, but to account for what has happened since. This is not proper or relevant to this judicial review. What is under review is the decision to issue the Permit that was made in February, 2010. What

is relevant to that issue is the information that was before the Minister at the time of the decision. Any expansion to the Parkway footprint that may affect SAR would require the MTO to apply for a new permit or to amend the existing Permit.

(c) There was a reasonable apprehension that the Minister was biased

[103] This submission is based on the well-known test for bias. There does not have to be a demonstration of actual bias, but there must be a reasonable apprehension of bias:

> …the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information…[T]hat test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly'.
>
> (*Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.), at p. 394 as quoted in: *Baker v. Canada (Minister of Citizenship and Immigration),*[1999] 2 S.C.R. 817, at para. 46 and as endorsed by the Supreme Court of Canada in *R. v. S. (R.D.),* [1997] 3 S.C.R. 484 (S.C.C.) at para. 11, *per* Major J.; at para. 31 *per* L'Heureux-Dubé and McLachlin JJ.; and at para 111, *per* Cory J.)

[104] In the context of this case, it is important to acknowledge that the standard for reasonable apprehension of bias may vary depending on the context and the type of function performed by the decision-maker involved (see: *Baker v. Canada (Minister of Citizenship and Immigration), supra*, at para. 47 referring to: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (S.C.C.); and *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City),* [1990] 3 S.C.R. 1170, at p. 1192)).

[105] In this case, the question is whether the test of a reasonable apprehension of bias applies at all.

[106] The allegation of bias arises from the fact that the Minister who, as Minister of Natural Resources made the decision to issue the Permit, had been the Minister of Transportation and, in that capacity, had "led the proponent" of the project for "almost a year and a half" (see: Factum of the Applicant, at para. 139). The applicant says that this creates a reasonable apprehension of bias.

[107] In making this submission, the applicant referred to *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1970] 1 S.C.R. 369. In relying on this case, the applicant has failed to recognize the difference in the function being performed by the decision-maker. In that case, the Chair of the National Energy Board was a member of a panel hearing an application for

approval of a pipeline in the Mackenzie River Valley. Before becoming a member of the Board, the Chair had been president of the Canada Development Corporation and its representative in a Study Group of companies that were exploring the possibility of building a natural gas pipeline in the area. The case arose in connection with the organization of hearings by the National Energy Board to consider competing applications for the pipeline. One of the applications was filed by Canadian Arctic Gas Pipeline Limited. The Supreme Court of Canada found that the participation of the Chair in the discussions and decisions which led to that application "... cannot but give rise to a reasonable apprehension, which reasonably well-informed persons could properly have, of a biased appraisal and judgment of the issues to be determined..." on the application (see: *Committee for Justice and Liberty v. Canada (National Energy Board)*, *supra*, at para. 29).

[108] As a member of the panel considering the application, the Chair would carry out a quasi-judicial function. The role of the Minister is different. The Minister is a government official who is required to carry out political and legislative duties. This was the subject of the decision in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170. In that case, a municipal councillor made submissions to a committee of Council in support of a development project. There was an election. The councillor was re-elected. He voted, at council, in support of the project. The decision allowing for the development to proceed was challenged on the basis that the councillor was biased. The court understood that, in the course of processing development applications, members of council can, and often do, take a stand either for or against the proposal. It acknowledged that: "This degree of prejudgment would run afoul of the ordinary rule which disqualifies a decision-maker on the basis of a reasonable apprehension of bias. Accordingly, it could not have been intended by the Legislature that this rule apply to members of council with the same force as in the case of other tribunals whose character and functions more closely resemble those of the court" (see: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), supra*, at para. 45). The court considered and distinguished *Committee for Justice and Liberty v. Canada (National Energy Board)*, *supra* (see: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), supra*, at paras. 53-55). It determined that the applicable test was one which considered whether the mind of the decision-maker was closed, that is to say, he or she was no longer capable of being persuaded to a different view:

> In my opinion, the test that is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor is one which requires that the objectors or supporters be heard by members of Council who are capable of being persuaded. The Legislature could not have intended to have a hearing before a body who has already made a decision which is irreversible. The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged....

(*Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), supra*, at para. 57)

(see also: *Pelletier v. Canada (Attorney General),* [2008] FCA 1, [2008] F.C.J. No. 4, at para 57; and, *Pushpanathan v. Canada (Minister of Citizenship and Immigration),* [1999] F.C.J. No. 941, at para. 41 (F.C.))

[109] There is no evidence to show that the Minister had pre-judged the matter to the point where any representations at variance with her view would have been futile. There is evidence to show that the Minister did consider issues raised by the applicant in submissions it made (see: Analysis of Type D Permit Requirements, at pp. 6-7).

CONCLUSION

[110] The Minister was asked to make a decision concerning, on the one hand, social and economic benefit, and, on the other, the possible impact on SAR. There is an obvious tension between these values. The decision she has been required to make is, at its core, a matter of government policy. The requirement that she form opinions (as opposed to making a quasi-judicial decision) confirms this understanding. Ultimately, applying and weighing the values at stake is for the Minister and not the court. In this case, the applicant has consistently sought to have the court enter considerations leading to an analysis that would take the court outside the applicable law and its appropriate role. This approach, if followed, would have required the court to ignore the breadth of the deference owed, particularly to the degree owed to the Minister in circumstances such as this. The final demonstration of this lies in the submission of the applicant that the Minister erred in law by failing to account for "the uncertain status of the [Detroit River International Crossing] Project in Michigan…" The project has, apparently, not received the approvals, from the Michigan Legislature, necessary to proceed. It is the position of the applicant that the Minister erred in not accounting for the possibility that the approvals would not be forthcoming and that the result would be a "road to nowhere". To accommodate this submission, the Minister would have to explain and the court would have to understand the obligations of the four governments to the partnership they formed, the status of any negotiations and the expectations for the political process in Michigan. This would deny the Minister the broad deference the law provides and take the court into the field of international relations where it has little, if any, business.

[111] For the reasons reviewed herein, the application is dismissed.

COSTS

[112] If the parties are unable to agree as to costs, the court will consider written submissions made as follows:

1. On behalf of the respondent, no later than fifteen days after the release of these reasons, such submissions to be no longer than four pages, double-spaced, excluding any Bill of Costs or Cost Outline that is provided and any case law that is relied on;

2. On behalf of the applicant, no later than ten days thereafter, such submissions to be no longer than four pages, double-spaced, excluding any Bill of Costs or Cost Outline that is provided and any case law that is relied on; and,

3. In Reply, on behalf of the respondent, no later than five days thereafter, such submissions to be no longer than two pages, double-spaced.

LEDERER J.

JENNINGS J.

WILSON J.

Released: 20110927

CITATION: Sierra Club Canada v. Ontario (Natural Resources & Transportation), 2011 ONSC 4655
DIVISIONAL COURT FILE NO.: 412/10
DATE: 20110927

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

JENNINGS, WILSON & LEDERER JJ.

BETWEEN:

SIERRA CLUB CANADA

Applicant

– and –

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTATIVE OF NATURAL RESOURCES and THE MINISTRY OF TRANSPORTATION

Respondent

REASONS FOR JUDGMENT

LEDERER J.

Released: 20110927