Federal Court | Cour fédérale

Date: 20110504

Dockets: T-2189-09
T-2192-09

Citation: 2011 FC 515

Ottawa, Ontario, May 4, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

Docket: T-2189-09

THE CANADIAN TRANSIT COMPANY

Applicant

and

MINISTER OF TRANSPORT, MINISTER OF FISHERIES AND OCEANS, MINISTER OF THE ENVIRONMENT, WINDSOR PORT AUTHORITY, AND HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Respondents

Docket: T-2192-09

SIERRA CLUB OF CANADA

Applicant

and

THE ATTORNEY GENERAL OF CANADA and THE MINISTER OF FISHERIES AND OCEANS, THE MINISTER OF TRANSPORT, THE MINISTER OF THE ENVIRONMENT, WINDSOR PORT AUTHORITY, and HER MAJESTEY THE QUEEN IN RIGHT OF ONTARIO

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

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[1] These two applications for judicial review are to set aside an environmental assessment decision dated December 3, 2009, with respect to a proposed new bridge called the Detroit River International Crossing Project (the new bridge). The Canadian Minister of Transport, Minister of Fisheries and Oceans, and the Windsor Port Authority made the decision pursuant to section 20 of the *Canadian Environmental Assessment Act*, S.C. 1993, c.37 (the Act or CEAA).

[2] The decision is that the proposed new bridge crossing the Detroit River between Windsor, Ontario and Detroit, Michigan "would not cause significant adverse environmental effects". The effect of the decision is to provide Canadian Federal Government environmental assessment approval for the construction of the new bridge and accompanying infrastructure on conditions set out in the decision.

OVERVIEW OF THE COURT'S CONCLUSIONS

[3] The Court concludes, after four days of hearings and considering thousands of pages of evidence, that both applications are without any merit and must be dismissed. The applications have caused a delay in this project. The two applications relied upon the following five issues or bases:

First Issue – Allegation that Transport Canada was biased against allowing the Canadian Transit Company (CTC) to build a second span to the Ambassador Bridge

[4] The governments of the United States, Canada, Michigan, and Ontario created a Partnership, which decided that a new bridge crossing between Detroit and Windsor was necessary for the future. The evidence is that two of the partners, the Ontario Ministry of Transport and the Michigan Department of Transport, made the decision about the best alternative location for the proposed new bridge. While Transport Canada contended that the new bridge ought to be publicly

owned, the evidence clearly shows that this was not a factor, influence, or criteria for the decision to eliminate the alternative of the CTC building a second span for the Ambassador Bridge. Ontario decided that the new bridge should be at a different location than the Ambassador Bridge for the following four reasons (which the Court paraphrases):

1. The transportation needs of the Windsor-Detroit corridor represent a vital part of the economy for both Canada and the United States. It is prudent that a second bridge be constructed to relieve any congestion or obstruction which might arise on the existing Ambassador Bridge. For example, if a terrorist or some other event or mishap affected the Ambassador Bridge, the current $146 billion worth of trade which annually crosses this border area would be jeopardized. (The Court finds that it was reasonable that a second bridge at a different location than the Ambassador Bridge was necessary for this vital Windsor-Detroit transportation corridor);

2. Expansion of the existing Ambassador Bridge with a second span would require a much larger customs and inspection plaza. This would disrupt and displace the historic community of Sandwich, which is adjacent to Windsor. The Court finds it reasonable that a new bridge ought be located so that it minimizes the impact on existing communities.

3. Building a second span for the existing Ambassador Bridge would also require the expansion of the existing Windsor local roads leading to the Ambassador Bridge. These roads would need be converted into a dedicated freeway. This would have a serious impact on the community of Windsor since the existing roads leading to the Ambassador Bridge are essential for local Windsor traffic; and

4. If a second span were added to the Ambassador Bridge, the existing Windsor roadways leading to the Bridge would be under construction for a period of time which would disrupt international truck and auto traffic using this vital border crossing during construction.

These four reasons for eliminating the option of building a second span for the Ambassador Bridge did not relate to whether the new bridge was publicly or privately owned. Accordingly, an informed person viewing the matter realistically would not have a reasonable apprehension of bias regarding the decision of the Partnership against the option of building a second span for the Ambassador Bridge. This option was simply not reasonably open to the decision-makers from the Ontario perspective.

Second Issue – "Needs Analysis"

[5] The Sierra Club and CTC alleged that the Canadian federal authorities erred in relying upon the "Needs Analysis" for the new bridge undertaken by Ontario in 2005, and erred in not performing an updated "Needs Analysis" based upon the updated traffic volume statistics which show a significant decline in traffic crossing the Ambassador Bridge. This decline is due to the current recession, amongst other reasons. The Court finds that under CEAA, the federal Responsible Authorities are entitled to rely upon the "Needs Analysis" done by Ontario as part of its environmental assessment for this project, and that it was reasonably open for the federal Responsible Authorities to conclude that the decline in traffic does not affect the long-term traffic projections upon which the "need" for the second bridge was based. Moreover, a second bridge is needed as an alternative crossing in case the Ambassador Bridge becomes incapacitated.

Third Issue – $34 million land purchase before environmental assessment

[6] Transport Canada purchased land from the City of Windsor for $34 million in anticipation of the new bridge project but prior to the environmental assessment decision under CEAA. The CTC submits that this land purchase breached the Act, which requires an environmental assessment decision before a federal authority does any act that commits the federal authority to carrying out the project. The Court finds that the purchase of land does not commit the federal authority to carrying out the project. The land can always be sold if the project is not approved. A $34 million land purchase with respect to a multi-billion dollar project is not a commitment in breach of CEAA.

Fourth Issue – Mitigation Measures

[7] The Sierra Club alleges that the federal Responsible Authorities breached the "precautionary principle" under CEAA by failing to specify feasible means of mitigating adverse environmental effects during the construction of the new road upon the following three endangered species:

1. the Butler's Garter Snake;
2. the Carolina population of the Eastern Fox Snake;
3. the Colicroot plant.

After an extensive review of the evidence, the Court is satisfied that the federal Screening Report adequately specifies general mitigation measures for these endangered species and reasonably relies upon a Permit to be issued by the Ontario Ministry of Natural Resources under the *Ontario Endangered Species Act*. This Permit was issued by the time of the Court hearing, and consists of 46 pages plus 10 detailed Appendices which specify mitigation measures for the endangered species.

[8] The Sierra Club's questions about the reasonableness of this Permit are subject to review before the Ontario Divisional Court in May 2011. The Court finds as a matter of law that the federal Responsible Authorities are entitled under CEAA to rely upon provincial mitigation measures. Moreover, the jurisprudence under CEAA recognizes that the details of mitigation measures often have to be developed as the project unfolds after the Screening Report.

[9] The Sierra Club also criticizes the mitigation measures proposed for migratory birds, which are not an endangered species. The Court finds that the general mitigation measures in the

Screening Report for migratory birds were a reasonable basis upon which to conclude that there will not be any significant adverse environmental affects to migratory birds. The mitigation measures for migratory birds set out in the Screening Report are lights of specific colours, specific intensity, and specific wavelengths, which have been shown to effectively mitigate bird collisions. The specific location and colour of each light cannot be specified until the bridge design is finalized.

Fifth Issue – Expanded Footprint

[10] Sierra Club alleges that the federal Responsible Authorities erred in not further assessing the new bridge project after its footprint was expanded by an additional 100 metre buffer zone along the road being constructed by Ontario. This buffer zone was purchased by the Province of Ontario for homes on the route. This is a separate project undertaken by the Ontario Government after the decision under review. These lands were not required for the new bridge project and will only be acquired by Ontario from property owners who do not wish to remain in the vicinity of the new road leading to the bridge. Accordingly, this issue is not a basis for setting aside the decision under review.

FACTS

The parties

[11] The applicant Canadian Transit Company (CTC) is a private corporation that owns and operates the Canadian half of the Ambassador Bridge. CTC's parent U.S. company owns and operates the U.S. half of the Ambassador Bridge. The Ambassador Bridge is the existing bridge which spans the Detroit River between Windsor, Ontario and Detroit, Michigan. The Ambassador Bridge has been privately owned since it was built in 1929.

[12] The applicant Sierra Club of Canada is a federally incorporated non-profit, and has been active in environmental issues in Canada since 1963.

[13] The respondent Minister of Transport is named as representative of Transport Canada. As a co-proponent of the new bridge (see "Partnership," below), Transport Canada had a responsibility for ensuring that an environmental assessment was conducted.

[14] The respondent Minister of Fisheries and Oceans is named as representative of Fisheries and Oceans Canada. As the entity responsible for providing regulatory approval under the *Fisheries Act*, R.S.C. 1985, c. F-14, Fisheries and Oceans Canada had a responsibility for ensuring that an environmental assessment was conducted.

[15] The respondent Windsor Port Authority is a proponent of the new bridge, and a prescribed authority under the *Canada Port Authority Environmental Assessment Regulations*, SOR/99-318. The Windsor Port Authority also had a responsibility for ensuring that an environmental assessment was conducted pursuant sections 9 and 9.1 of the Act.

[16] Transport Canada, Fisheries and Oceans Canada, and the Windsor Port Authority are the "Responsible Authorities" under CEAA who made the decision that is the subject of these judicial review applications.

[17] The respondent Minister of Environment had responsibility for ensuring that the Responsible Authorities conducted a proper environmental assessment.

[18] The respondent Her Majesty the Queen in Right of Ontario is also a proponent of the new bridge, and has an interest in the outcome of these applications. Her Majesty the Queen in Right of Ontario had no responsibilities under the CEAA.

Sources of Evidence

[19] The evidence on which the decision relied was submitted in voluminous records by each of the active parties. Below, I describe the principal affidavits to which the evidence has been appended.

The CTC Affidavit: Paula Lombardi

[20] The evidence relied upon by the applicant CTC was submitted in 180 exhibits to the Affidavit of Paula Lombardi, sworn on September 24, 2010. Ms. Lombardi is vice-president and general counsel of the applicant CTC.

The Sierra Club Principal Affidavit: Dan McDermott

[21] Much of the evidence relied upon by the applicant Sierra Club was submitted in 250 exhibits to the Affidavit of Dan McDermott, sworn September 27, 2010. Mr. McDermott is Director of the Ontario Chapter of the Sierra Club of Canada.

[22] Sierra Club also submitted three additional affidavits which pertain to specific issues regarding species at risk. Those affidavits are described in more detail below.

The federal respondents' Affidavit: Kaarina Stiff

[23] In addition to relying upon the same documents filed by the applicants, the respondents filed the Affidavit of Kaarina Stiff with 28 exhibits. Ms. Stiff was the Environmental Assessment Project Manager in the Surface and Infrastructure Programs Directorate of the Programs Group at Transport Canada from May 2004 to June 2009. She worked on the new bridge project throughout her time as Environmental Assessment Project Manager.

[24] In addition to background information on the new bridge project Ms. Stiff deposes as to the discussions and negotiations that occurred among the respondents and other authorities throughout the process of developing the Screening Report for the new bridge project.

Creation of the Partnership

[25] On February 7, 2001, the Governments of Canada, the United States of America, the Province of Ontario and the State of Michigan established a partnership (the Partnership) for the purpose of improving the safe and efficient movement of people and goods across the Canada-U.S. border within the region of southeast Michigan and southwest Ontario. The government authorities in this partnership were the following four federal, provincial, and state departments:

1. Transport Canada (TC),
2. The Ministry of Transportation of Ontario (MTO),
3. The Federal Highway Administration of the U.S. Department of Transportation, and
4. The Michigan Department of Transportation.

[26] The Partnership was concerned with the transportation needs of the Windsor-Detroit corridor because it represents a vital part of the economy of both countries. Currently, $146 billion worth of trade passes across this border area annually, with a projected increase to approximately

$230 billion worth of surface trade by 2030. This represents approximately 25% of total trade in merchandise between the two countries. The objectives of the Partnership included a single environmental assessment process which met the requirements of all the partners:

> The purpose of the Partnership is to improve the movement of people and goods across the United States and Canadian border within the region of Southeast Michigan and Southwest Ontario. The overall objectives of the Partnership in support of this purpose are the following:
>
> ...
>
> d) To expedite the planning and environmental study process to ensure that future travel demands in this corridor can be accommodated in a timely manner;
>
> ...
>
> f) To use a single integrated planning and environmental study process, resulting in a single product, which will meet the requirements of all member of the Partnership;
>
> ...

First act of the Partnership:

The Planning/Needs Feasibility Study (the P/NF Study)

[27] In May 2001 the Partnership initiated the "Planning Needs and Feasibility Study" (the P/NF Study) by the consultants URS Canada Inc. and URS Inc. to assess the existing transportation network in the region and to develop a 30-year strategy to address its needs. Two years and eight months later, in January of 2004, URS released the P/NF Study Report recommending, *inter alia* the construction of a new or expanded international crossing of the Detroit River between Windsor and Detroit.

[28] The P/NF Study Report recommended that formal environmental assessment processes be initiated in all jurisdictions with respect to the different locations where the international crossing might be located.

The Partnership's Coordinated Environmental Assessment

[29] Three pieces of legislation governed the environmental assessment requirements that the members of the Partnership would have to meet:

1. The *Canadian Environmental Assessment Act*, S.C. 1993, c.37 (the Federal Act or CEAA),
2. The Ontario *Environmental Assessment Act*, R.S.O. 1990, c. E.18 (the Ontario Act), and
3. The U.S. *National Environmental Policy Act*, 42 U.S.C. § 4321 (1969) (the U.S. Act).

[30] The three acts have the same objective. As a result, the Partnership decided to conduct a coordinated environmental assessment process that would generate a single body of documentation to help each member of the Partnership meet the requirements of its own environmental legislation. In this way, each partner would remain responsible for meeting its legislative duties, but could reduce overlap and waste in production of the underlying documentation and studies required to conduct an environmental assessment.

[31] The Partnership's integrated environmental assessment process was coordinated by a Steering Committee, with representatives from each of the four partners in the Partnership. A working group reported to the Steering Committee. The working group was responsible for directing and coordinating the environmental assessments in each jurisdiction, and its members ensured that the coordinated assessment met the requirements of their jurisdictions.

[32] In the U.S., the Michigan Department of Transportation took the lead in conducting the environmental assessment required by the U.S. *National Environmental Policy Act*.

[33] In Canada, pursuant to section 9 of the *Canada-Ontario Agreement on Environmental Assessment Cooperation* and its associated informational guide, "Federal/Provincial Environmental Assessment Coordination in Ontario," the MTO was designated as the lead party for the Canadian coordinated assessment.

[34] Another reason for naming the MTO as the lead party stemmed from the differences between the Federal Act and the Ontario Act. In particular, the Ontario Act imposes a statutory duty upon proponents of an undertaking to identify and evaluate alternative means of achieving the purpose of the proposed undertaking. In contrast, the CEAA applies when a specific project has been identified. As a result, the respondent federal government departments initiated their environmental assessment once a preferred "alternative" has been selected by Ontario, and a general location had been identified in the Ontario assessment.

The Ontario Environmental Assessment before the formal launch of the Federal Environmental Assessment

[35] Pursuant to the Ontario Act, the MTO, as a proponent of a project, required "Terms of Reference" from the Ontario Ministry of the Environment for an environmental assessment of the project. The Ontario Terms of Reference recognized the coordinated Canadian assessment process and, at page 7, stated that the Ontario assessment would provide the necessary foundation for triggering the federal assessment:

> It is anticipated that work to be carried out during the EA/EIS will provide sufficient information to support a decision to trigger the federal EA process and to make a decision regarding likely significance of adverse environmental effects under CEAA. In recognition of federal interests and information requirements, concept design of the preferred practical alternative(s) will be

> undertaken during the OEA. This information will assist federal and provincial EA processes to move forward in an integrated manner.

[36] The Terms of Reference stated that Ontario would establish the purpose and need for the new or expanded bridge, identify and evaluate a range of alternatives, and select a recommended alternative. The Terms of Reference identified 35 criteria for evaluating practical alternatives for the new bridge.

[37] At the same time, the U.S. partners would conduct their environmental assessment. Like the Ontario Act, and unlike the Federal Act, the U.S. *National Environmental Policy Act* requires the identification and evaluation of possible alternatives for the proposed project. As a result, the Partnership determined that once the two sides had generated their lists of preferred alternatives they would select common recommended alternatives to "carry forward" for further study.

[38] In carrying out its task, the MTO engaged a consultant company, URS Canada Inc., to investigate and report on the need for a new crossing and the alternative means of responding to such need. At the hearing, I asked counsel about URS but they had no information. According to the worldwide web, URS Canada Inc. are consulting engineers and architects specializing in "transportation, municipal infrastructure, facilities and environment". This includes transportation and traffic planning, roadway engineering, bridge engineering, and environmental assessment.

September 29, 2005 URS Preliminary Report to the Working Group of the Partnership

[39] At a meeting of the working group of the Partnership on September 29, 2005, URS presented its evaluations of the alternatives for the new crossing.

[40] URS Canada informed the Partnership that it recommended three crossing options amongst the 15 alternatives. At the same time, the Partnership received the rankings of alternatives from the U.S. side. Each alternative crossing was marked with an "X" number. The X-12 Option was the alternative to build a second span of the existing Ambassador Bridge along with an expansion of the existing plaza at the foot of the Ambassador Bridge on the Canadian-side (the Twin Span Option). The U.S. side reported to the meeting that they had identified two options as the best performing: X-11 and X-12. The Canadian-side reported that alternative crossings X-9, X-10 and X-11 were the highest performing and that the X-12 Option (the Twin Span Option) did not perform well from the Canadian perspective. The meeting notes stated:

> . . . On the other hand, the plaza expansion at the foot of the Ambassador Bridge (CT-1) associated with twinning of the Ambassador Bridge, did not perform well. Len Kozachuk [the URS representative] summarized that, when paired with the Huron Church Road alignment, the second span of the Ambassador Bridge Crossing/CT-1 Plaza combination has a very low performance. Len then suggested the Canadian team would do additional research to determine whether Plaza CC-7 could be used with a secure roadway via Essex Terminal Rail right-of-way to serve the proposed second span of the Ambassador Bridge.

[41] The September 29, 2005, meeting notes therefore demonstrate that the X-12 Option was problematic because it performed very well on the U.S. side and very poorly on the Canadian-side. The partners would therefore need to reach some sort of compromise.

[42] In an email dated October 10, 2005, URS sent updated rankings to the MTO. MTO forwarded those rankings to TC in an email dated October 27, 2005. That email demonstrates that as of October 10, 2005, the X-12 Option was ranked ninth out of 11 feasible options. The parties agree that the October 10 rankings contained two numbers: first, the ranking produced by the URS consultants pursuant to their criteria, and, second, a "public ranking" determined on the basis of surveys distributed to the public by URS. In both, X-12 was ranked ninth on the Canadian-side.

Transport Canada Emails– October to November, 2005

[43] In a series of emails presented into evidence as exhibits to the Lombardi Affidavit, TC urged its U.S. partners to recognize that the low Canadian ranking would be a sufficient basis upon which to exclude X-12 such that the Partnership could generate a single list of agreed-upon alternatives. For example, an email from Mr. Sean O'Dell, Transport Canada's representative on the Partnership's Steering Committee, to his colleagues at TC, dated October 6, 2005, explains that the U.S. partners are uncomfortable eliminating the X-12 Option on the basis of the Canadian rankings, because they have a rigorous mathematical formula for evaluating alternatives and the Canadian ranking does not matter in that formula. As such, the U.S. authorities were concerned that they would be seen to be eliminating the X-12 Option on the basis of factors not acknowledged in the initial criteria. Mr. O'Dell also describes the reasons why the X-12 Option on the Canadian-side could not be modified to improve its performance and thereby bring it more closely in line with its U.S. ranking.

[44] Evidence in emails dated November 7 and 9, 2005, from Ms. Stiff reporting to her colleagues at Transport Canada, demonstrates that the U.S. partners ultimately determined that their

legislative duties did, in fact, enable them to rely on the Canadian analysis to make a decision under the U.S. environmental assessment law regarding which alternative to "carry forward." Therefore, as of November 8, 2005, the partners agreed on the same short list of practical alternatives. This list did not include the Twin Span Option.

Generation and Assessment of Illustrative Alternatives Report, dated November 2005

[45] In a report titled "Generation and Assessment of Illustrative Alternatives," dated November 2005, URS describes the results of its alternatives selection process. It describes the criteria that it used for evaluating options, which involved a list of seven evaluation factors and performance measures that incorporated the original 35 criteria established in the Ontario Terms of Reference but simplified them "to enable the public to more easily provide input to the Project Teams in terms of rating the importance of the factors." These included the ability of an alternative to provide "continuous/ongoing river crossing capacity" (i.e., "redundancy", or another bridge in case the existing crossings were blocked or congested), operational requirements for the customs and border security plaza, and impacts on communities that would be affected by the project.

[46] With regard to the X-12 Twin Span Option, URS stated, at section 3.5.5., the following reasons why this option was not feasible:

> ...
>
> However, expansion of the existing crossing and connections has a limited ability to provide continuous/ongoing river crossing capacity (i.e. redundancy), in comparison to providing a new crossing and connections.
>
> The Canadian Project Team also recognizes that expansion of the crossing and existing plaza creates high impacts to the historic Sandwich community around the existing bridge and plaza. This alternative would have high community impacts in terms of

> residential displacements and disruption, impacts to built heritage features, and community character and cohesion.
>
> The expansion of Huron Church/Talbot Road to a freeway also has high community impacts, particularly on the section north of E.C. Row Expressway. The constructability of this option is made additionally complex by the need to keep international truck and auto traffic moving efficiently at this important border crossing during construction.

[47] In other words, URS reported that the X-12 Option, both as initially considered and with the alternative plaza and roadway suggested at the September 29, 2005, meeting, had high community impacts and failed to achieve "desired redundancy". As a result, the X-12 Option performed poorly on Canadian-side rankings based upon the criteria established in the May 2004 Terms of Reference.

[48] The URS Report describes the difficulty faced by the Partnership in the face of the divergent rankings produced by the U.S. and Canadian-sides:

> In the evaluation of illustrative alternatives, the crossing X12 alternative was unique in that this alternative had relatively high negative impacts on the Canadian side in comparison to other Canadian alternatives, but relatively low negative impacts on the US side compared to other US alternatives. In terms of benefits provided to regional mobility, the alternative provides improved regional mobility for the border transportation network on both sides of the river, but was considered by the Canadian Team to have limited ability to provide continuous/ongoing capacity on the basis that this alternative would not provide a new crossing.
>
> In consideration of the high community impacts to the residential area impacted by the expansion of the Canadian bridge plaza and the expansion of Huron Church Road to a freeway facility on the Canadian side, and the potential for disruption to border traffic during construction of the plaza and freeway, on an end-to-end basis, the disadvantages of this alternative outweighed the advantages.
>
> **Crossing X12 was eliminated from further study. The expanded U.S. plaza of the Ambassador Bridge, with the improved**

> **connections to the interstate freeway system will be carried forward within the Area for Continued Analysis as a possible U.S. plaza site for a new crossing connecting to a new inspection plaza and connecting roadway on the Canadian side located downriver of the Ambassador Bridge.** [Emphasis in original]

The "Generation and Assessment of Illustrative Alternatives Report", dated November 2005 confirmed that the Partnership agreed that three bridge crossing options within a circumscribed geographic location should be carried forward for future study (identified as the "area of continued analysis").

[49] URS Canada's investigation provided the following three types of information:

1. Confirmation of the purpose and need for the undertaking in two documents, the "Travel Demands Forecast Working Paper" (September 2005), and the "Transportation Planning and Need Study Report" (November 2005).

2. Preparation of a list of illustrative alternative means of meeting the identified needs, in the "Generation and Assessment of Illustrative Alternatives Report" (November 2005). The list initially comprised 15 alternatives of potential bridges and tunnels over a large location ("crossing options") and 13 plazas and access road solutions.

3. Application of specific criteria (identified in the Ontario terms of reference) to whittle down the list of illustrative alternatives to identify an "area of continued analysis": "Generation and Assessment of Illustrative Alternatives Report" (November 2005), Ontario Environmental Assessment Report, W.O. 04-33-002, December 2008, sections 6.5 and 6.6.

Launch of the Federal Assessment

[50] A few months after the November 2005 URS reports above, in early 2006, draft guidelines for the federal assessment were circulated by Transport Canada to other potential federal authorities. These were based on the options or alternatives identified by URS on behalf of Ontario. On November 22, 2006, the federal Environmental Assessment Guidelines were published and opened

to public comment. The Guidelines were updated twice. At section 8.2, "Scope of Assessment," the Environmental Assessment Guidelines establish the scope of the project including a provision that the Screening Report will address the purpose of the project, the need for the project, and the benefits of the project:

> . . .
>
> The scope of the assessment for the DRIC Project shall include environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project, and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out. With the discretion allowed for in paragraph 16(1)(e) of the CEAA, the RA(s) will also consider the purpose of the project, the need for the project and the benefits of the project, as part of the coordinated EA process.
>
> ("RA" is responsible authority "EA" is environmental assessment.)

[51] Although the project description was therefore relatively well-defined, it still consisted of three bridge options, three alternative locations for border-inspection facilities, and five design options for an access road connecting the plaza to the provincial highway.

[52] Between March 2006 and June 2008, the Partnership's study team analyzed these "practical alternatives" for the final project. This analysis generated a series of reports, including, for example, the *Draft Practical Alternatives Evaluation Working Paper: Natural Heritage*, dated July 2007.

[53] In May of 2008 the Partnership announced the Windsor-Essex Parkway as the selected alternative for the access road portion of the project. In June of 2008 it announced the preferred location for the international bridge crossing and Canadian plaza. Together, these choices

constituted the "Technically and Environmental Preferred Alternative" that was to be assessed and further refined for the purposes of the Act.

[54] Once the "Technically and Environmental Preferred Alternative" had been selected, the Canadian environmental assessment focused on developing a detailed analysis of that choice and identifying appropriate mitigation measures for any adverse environmental effects that would be encountered.

Approval of the Ontario Environmental Assessment Report – August 21, 2009

[55] Based upon the studies conducted between March of 2006 and June of 2008, the Ontario "Draft Environmental Assessment Report Individual Environmental Assessment" was prepared and circulated for review and comment by the public, external agencies and all interested stakeholders.

[56] The study team revised the draft report in response to comments received.

[57] The Ontario Assessment Report was submitted to the Ontario Minister of the Environment on December 31, 2008, for review and approval. In accordance with the Act, the formal submission of the Ontario Assessment Report was followed by a seven-week comment period.

[58] Following the period of comment and review, the Ontario Minister of the Environment approved the new bridge project on August 21, 2009. The approval contained conditions requiring the proponents of the project to undertake certain measures to ensure continued compliance with the Ontario Act.

[59] The final Ontario Assessment Report consists of 11 chapters and four appendices, totalling 576 pages. In addition, the report references 63 supporting documents on which it relies. In total, the Ontario environmental assessment report consists of thousands of pages.

[60] There was no application for judicial review of the Ontario Minister of the Environment's decision to approve the new bridge project under the Ontario Act. However, the Ontario approval depended in part on the acquisition of permits from the Ontario Minister of Natural Resources, as required under the Ontario *Endangered Species Act, 2007*, S.O. 2007, c. 6 (Ontario ESA). As discussed below, these permits were granted but are the subject of litigation before the Ontario courts.

The Federal Environmental Assessment Report (the Screening Report)

[61] As the Ontario Ministry of the Environment review of the Ontario Assessment Report was ongoing, the Responsible Authorities prepared a draft Screening Report to be submitted in accordance under CEAA. The Screening Report was prepared by URS, the same consultants used by Ontario.

[62] The draft Screening Report was made available for comment by the public and other authorities on July 9, 2009. As with the Ontario assessment, comments received were considered and responded to by the Responsible Authorities.

[63] The Screening Report is based on the documentation generated and referred to in greater detail in the Ontario Assessment Report. The Screening Report itself is a summary document consisting of approximately 60 pages. It is organized into 12 chapters, which describe the background to the new bridge project, the coordination between Ontario and federal authorities in conducting the environmental assessment, the spatial and temporal scope of the environmental assessment that was conducted, the existing environment in the project area, the forecasted environmental effects of the new bridge project, and mitigation measures that should be taken to mitigate any negative environmental effects.

[64] The Screening Report details the consultations conducted by the Partnership in producing the Screening Report, including those undertaken pursuant to the Ontario Assessment Report, and discusses monitoring and follow-up programs and commitments to future work that form the basis for the Partnership's request that the new bridge be approved.

[65] The Screening Report has 11 appendices. The most relevant appendices to the Screening Report are as follows:

1. Appendix A: Response and Consideration of Public Input on the Draft Screening Report. This document contains responses from the Responsible Authorities to the CTC and other interested members of the public.

2. Appendix B: Disposition Tables of Responses to Comments Received from Federal Reviewers on Preliminary Draft CEAA Screening Reports. Together with Appendix C, this contains the Responsible Authorities responses to federal agencies, including Environment Canada.

3. Appendix C: Disposition Tables of Responses to Comments Received from Federal Reviewers on Provincial Technical Reports. Together with Appendix B, this contains the Responsible Authorities responses to federal agencies, including Environment Canada.

4. Appendix D: Cumulative Effects Assessment Report. This contains the Responsible Authorities assessment of the potential environmental effects of the new bridge project in combination with other projects ongoing within a determined spatial and temporal area. In total, 37 additional ongoing or reasonably foreseeable projects in the area were considered.

5. Appendix E: Supplementary Mitigation Approach for Species at Risk. This document provides mitigation strategies, references the permit approval processes required under the Ontario *Endangered Species Act* and the federal SARA, and commits Transport Canada to developing follow-up programs.

6. Appendix J: The Ontario Assessment Report.

[66] Of the documentation underpinning and incorporated into the Screening Report, the following studies and reports are most relevant to this application:

1. P/NF Study – January 2004

2. Travel Demands Forecast Working Paper - September 2005

3. Transportation Planning and Need Study Report - November 2005

4. Generation and Assessment of Illustrative Alternatives Report - November 2005

5. Natural Heritage Work Plan - February 2006.

[67] In addition, because certain features of the proposed new bridge project were relevant only to the federal authorities, the Screening Report incorporates studies not referenced in the Ontario report, appended in Appendices D to I. These include an investigation of the environmental effects that a bridge would have upon migratory birds, a report assessing the cumulative effects of the proposed project, and a supplementary report on mitigation approaches to take with regard to species at risk that would be impacted by the federal portion of the new bridge project.

Decision under review

[68] Each of the three Responsible Authorities – Transport Canada, Fisheries and Oceans Canada, and the Windsor Port Authority – had to approve the Screening Report. On December 3, 2009, the Responsible Authorities "posted" public notice of their decision.

[69] The Responsible Authorities decided that the new bridge, with the implementation of mitigation measures, was not likely to cause significant adverse environmental effects, and, therefore, could be approved:

> The authorities may exercise any power or perform any duty or function with respect to the project because, after taking into consideration the screening report and taking into account the implementation of appropriate mitigation measures and comments from the public, the authorities are of the opinion that the project is not likely to cause significant adverse environmental effects.

[70] The decision required that mitigation measures be implemented to address the following adverse environmental effects, and required that a follow-up program be implemented to verify the accuracy of the assessment and determine the effectiveness of any mitigation measures undertaken:

> birds and/or their habitat
> fauna at risk (as defined under the Species at Risk Act)
> fish and/or their habitat
> flora at risk (as defined under the Species at Risk Act)
> mammals and/or their habitat
> reptiles and/or their habitat
> air quality
> noise levels
> sedimentation
> soil quality
> surface and bedrock features
> vegetation
> water quality
> water quantity

The Canadian Transit Company's Project

[71] In July of 2004 (i.e., following the birth of the Partnership and the publication of the P/NF Study, but prior to the official launch of the coordinated environmental assessment), the owners of the Ambassador Bridge – the applicant CTC and its parent company in the U.S. – filed applications with both Canadian and U.S. regulators outlining plans to build a second span parallel to the existing Ambassador Bridge (the CTC Project).

[72] The Notice of Commencement of the environmental assessment for the CTC Project was posted on August 1, 2006. The Responsible Authorities were Transport Canada, as the authority responsible for determining whether the CTC Project would receive a permit under the *Navigable Waters Protection Act*, and the Windsor Port Authority, regarding provision of federal lands.

[73] Transport Canada's environmental assessment coordinator, Ms. Kaarina Stiff, was responsible for overseeing the CTC Project environmental assessment. This was the same person overseeing the environmental assessment for the new bridge project.

[74] After the Notice of Commencement, there was no action with regard to the CTC Project's Canadian environmental assessment. However, a second span to the Ambassador Bridge was one of the alternative options considered, and rejected, by the Partnership for the reasons stated herein.

Ontario ESA Permit approval documents and related evidence

[75] As discussed below, in addressing mitigation measures for species at risk in the area of the new bridge, the Screening Report references the provincial permit applications required under the Ontario ESA. Those permit applications and approvals rely upon expert reports regarding

anticipated dangers to species at risk posed by the new bridge. Of the reports generated in the permit application and approval process, the expert reports relevant to this application are the following:

1. Expert Report on Butler's Garter Snake by Ron Brooks, dated July 22, 2009;
2. Expert Report on Butler's Garter Snake by Mr. James Kamstra on behalf of AECOM Canada Ltd, dated July 2009;
3. Riverstone Environmental Solutions Inc. Report re: Eastern Fox Snake, dated July 22, 2009, authored by Rob Willson; and
4. Expert Report on the Possible Effects of the Windsor-Essex Parkway on Colicroot (Altris fairnosa), by John D. Ambrose, Gerry Waldron, and Brendon M.H. Larson, dated July 23, 2009.

The Applicants' additional evidence regarding threats to species at risk and migratory birds

[76] The applicants have submitted new evidence not before the decision-makers in this application regarding threat to species at risk and migratory birds. This evidence includes hundreds of pages of email correspondence and three reports, appended to three affidavits. Further details of this evidence are provided in my reasons on motion released with this Judgment.

[77] Of this evidence, the evidence most relevant to this application is the following:

1. Affidavit of Dr. Ron Brooks, sworn September 27, 2010;
2. Notes and minutes of meeting of August 28, 2009, between the Ontario Ministry of the Environment, Dr. Ron Brooks, and Mr. James Kamstra;
3. Expert report of Dr. Robert Murphy re: Eastern Fox Snake and Butler's Garter Snake, dated August 31, 2010; and
4. DRIC Project Bird Migration Radar Study – Spring & Fall 2009, dated March 2010.

The Applicant CTC's evidence regarding need for the new bridge project

[78] The applicant CTC has also submitted considerable additional evidence regarding the need for the project. This evidence consists of thousands of pages of emails, meeting minutes, speaking notes, and draft correspondences with the public, which detail correspondence between members of the Partnership regarding the need for the project. In addition, the applicants filed the following expert evidence, which was not before the decision-makers:

1. The Affidavit of Atif Kubursi, president of Econometric Research Limited, sworn September 28, 2010;

2. An Expert opinion by Econometric Research Limited on the Wilbur Smith & Associates Report, entitled "Comprehensive Traffic and Toll Revenue Study Windsor Gateway"; and

3. A report dated June of 2009 entitled "Ambassador Bridge – Traffic and Revenue Study," commissioned by the CTC from the Halcrow Group Limited.

Related judicial proceedings

[79] The Court requested that the applicant CTC and the federal government respondents compile a list of litigation related to the Ambassador Bridge and the proposed new bridge so that the Court could "see the forest for the trees", i.e. to appreciate the role that the applications at bar play in deciding whether the proposed new bridge project can legally proceed. For the reasons herein, the Court dismissed both applications. The respondents did not submit that these applications were intended to delay; however, that has been their effect.

[80] In addition to these two applications before the Federal Court, the following litigation has been undertaken or is ongoing:

1. Six (6) other Canadian legal proceedings, including four (4) in the Ontario Superior Court of Justice, one other in the Federal Court and one before the Ontario Municipal Board;

2. Seven (7) legal proceedings in the U.S., including five (5) in the U.S. Federal Court, and two (2) in Michigan State Courts; and

3. Two (2) challenges under the North American Free Trade Agreement, including (1) a claim that the Canadian planned road projects for the proposed new bridge discriminate against the owners of the Ambassador Bridge, and (2) a claim that the Canadian *International Bridges and Tunnels Act* interferes with vested rights possessed by the owners of the Ambassador Bridge.

It is to be seen if these legal proceedings have any merit. They may also delay the new bridge project.

ISSUES

[81] The applicant CTC submits the following issues:

1. Was the decision biased and pre-determined because Transport Canada opposed the option of building a twin or new span for the Ambassador Bridge based on "governance" concerns?;

2. Did the Responsible Authorities err in relying upon the "need" for the new bridge Project analysis undertaken by the Ontario Minister of Transport in 2005, and did the Responsible Authorities err in not performing another needs analysis based on updated traffic information showing a significant decline in traffic crossing the bridge since 2000?;

3. Did the Responsible Authorities breach the Federal Act by purchasing land for $34 million before the new bridge project was environmentally assessed under the Federal Act? Specifically, did the Responsible Authorities breach the following sections of the Act:

    i. Paragraph 5(1)(a) of the Federal Act by committing the federal authorities to carrying out the bridge project before the environmental assessment of the project was completed;

    ii. Subsection 11(1) of the Federal Act by making an irrevocable decision about the bridge project before the environmental assessment was completed; and

    iii. Paragraph 16(1)(a) of the Federal Act by failing to consider the cumulative environmental effects that are likely to result from the bridge project in combination with other projects or activities.

[82] In addition to supporting the submissions of the applicant CTC, the applicant Sierra Club of Canada submits the following issues:

4. Ought the decision be quashed on the basis of a breach of the precautionary principle, a failure to consider the best available information, errors on the record, or because it was unreasonable with regard to its findings regarding species at risk?; and

5. Are the Responsible Authorities required to further assess the DRIC after the Windsor-Essex Parkway footprint was expanded?

STANDARD OF REVIEW

[83] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, per Justice Binnie at paragraph 53.

[84] The issue of whether the facts of the case give rise to a reasonable apprehension of bias or "predetermination" is an element of the duty of fairness and rules of natural justice, to be determined on a standard of correctness: *Amis de la rivière Kipawa v. Canada (Attorney General)*, 2007 FC 1267, at paragraph 59; *Dunsmuir*, above at paras. 55 and 90; and *Khosa*, above at paragraph 43.

[85] However, questions of fact or mixed fact and law are to be reviewed on a standard of reasonableness: *Dunsmuir* at paragraphs 51, 59, and 147. Thus, the question of whether the Responsible Authorities made the decision under review on a reasonable factual basis that was complete and correct, properly considered the evidence regarding the cumulative environmental

effects, made a commitment to proceed with the project before the environmental assessment was completed, or made an irrevocable decision about the project before the environmental assessment was completed are questions to be determined on a standard of reasonableness. See *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, at paragraphs 37 to 40.

[86] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, at paragraph 47; *Khosa* at paragraph 59.

RELEVANT LEGISLATION

[87] Specific sections of the legislation relevant to this application are appended to this decision in Appendix 1. In brief, the following legislation is most relevant:

1. The *Canadian Environmental Assessment Act*, S.C. 1993, c.37 (the Act);
2. The Ontario *Endangered Species Act, 2007*, S.O. 2007, c. 6 (Ontario ESA); and
3. Environmental Assessment Cooperation, November 2004 (Canada-Ontario Agreement).

ANALYSIS

Federal statutory scheme for environmental assessments of federal projects

1. Subsection 4(1)(a) provides that one of the purposes of the *Canadian Environmental Assessment Act* is to ensure that projects are considered in a "careful and precautionary manner" before federal authorities take action to ensure that such projects do not cause significant adverse environmental effects.

2. Subsection 5(1)(a) provides that an environmental assessment of a project is required before a federal authority does any act or thing that commits the federal authority to carrying out the project.

3. Subsection 11(1) provides that an environmental assessment of a project is required "as early as is practicable in the planning stages of the project" and before irrevocable decisions are made.

4. Subsection 12(4) provides that where an environmental screening of a project is conducted and a provincial government also has responsibility to conduct an assessment of the environmental effects of the project, the federal responsible authorities may cooperate with the province respecting the environmental assessment of the project.

5. Subsection 16(1) provides that every screening of the environmental effects of the project may consider the "need for the project" and "alternatives to the project". These two factors are discretionary. In the cases before the Court, the federal screening did not consider "alternatives to the project"; however, "need" was a factor to be considered.

6. Subsection 17(1) provides that a federal Responsible Authority may delegate to another jurisdiction, such as a province, any part of the screening of the project.

7. Subsection 20(1)(a) provides that a federal Responsible Authority shall decide after the screening report whether the project is or is not likely to cause significant adverse environmental effects, after taking into account the implementation of any mitigation measures that the responsible authority considers appropriate.

8. Subsection 20(1.1) provides that mitigation measures which may be relied upon by a responsible authority include mitigation measures that will be implemented by another body (such as the Province of Ontario, in the case at bar).

CTC Issue No. 1: **Was the decision biased and pre-determined because Transport Canada opposed the option of building a twin or new span for the Ambassador Bridge based on "governance" concerns**

[88] The applicants submit that the Screening Report was fundamentally flawed because it was biased and predetermined from the outset.

[89] The applicants submit that the policy group at Transport Canada forced the elimination of the X-12 Twin Span Option during the Ontario environmental assessment process for biased

reasons. The applicants submit that the evidence demonstrates that Transport Canada did not want the owners of the Ambassador Bridge to govern, control, own or have a stake in the new bridge project. Thus, the applicants submit that the decision to eliminate the X-12 Twin Span Option was predetermined and biased because it was based on concerns with "governance", i.e. Transport Canada did not want the new crossing to be privately owned but this concern was not relevant to the environmental assessment.

The legal test for bias

[90] Allegations of bias are not to be taken or made lightly. They challenge the integrity of the decision-makers and, as such, must be supported by material evidence: see, for example, *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2003 FCA 53, at paragraph 89 and *Arthur c. Canada (Procureur general)*, [2001] F.C.J. No. 1091, 2001 FCT 223, at paragraph 8.

[91] The test for bias was clearly established by Justice de Grandpré in his dissenting reasons in *Committee for Justice and Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.), at page 394:

> … 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. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude …".

The email evidence upon which the allegation of bias is based

[92] The applicant CTC has referred the Court to a "stream" of emails starting August 11, 2004, showing that officials at Transport Canada insisted that the new bridge project be publicly owned

and publicly governed. Transport Canada called this the "governance principle". In a Transport Canada internal email dated December 13, 2004, about the "governance principle", the email stated:

> The principle implicitly precludes the Ambassador Bridge from owning/operating a new or expanded international crossing.

[93] However, this same email reported that the Ministry of Transportation for Ontario and the Michigan Department of Transport "expressed grave concern with the governance principle". The Court concludes from this email that while Transport Canada strongly believed in the governance principle, the other partners did not accept it as a relevant factor in the environmental assessment.

[94] It later becomes clear that the Ontario Ministry of Transportation, the Michigan Department of Transportation and the U.S. Federal Department of Highways did not accept the governance principle as a relevant factor, and were not influenced by it in their respective ultimate decision. For example, the Meeting Notes dated September 29, 2005, of the Partnership's working group, with 26 persons in attendance from all four partners, show that the U.S. analysis considered 37 crossing systems and that the X-12 Twin Span Option, with one other option, ranked the highest.

[95] At the same meeting, URS, the Canadian transportation consultants, reported that the Twin Span Option has a "very low performance" on the Canadian-side:

> … the second span of the Ambassador Bridge crossing/CT-1 Plaza combination has a very low performance.

[96] The Court concludes from the evidence that the Transport Canada concern about "governance" was not a relevant or deciding factor among the officials from Ontario, Michigan and the U.S., including the transportation consultants on both sides of the border. These officials did not

give any weight to the governance principle in the decision about which crossing alternative ought be selected.

[97] In a September 28, 2005, email, Transport Canada officials recognize that the Twin Span Option remains an alternative being considered for the new bridge project by the Partnership.

[98] In an October 10, 2005, email from URS to the Ontario Ministry of Transportation, the X-12 Option was ranked ninth of the different alternatives. This evidence shows that the twinning of the Ambassador Bridge option was still being considered regardless of the Transport Canada concern with the governance principle. At the same time, the twinning of the Ambassador Bridge option ranked very low from the Canadian-side analysis based on the relevant criteria (which did not include the governance principle).

[99] In an internal email between senior Transport Canada officials on October 27, 2005, from Mr. O'Dell, the Executive Director of this project for Transport Canada, he writes that he has received the "DRIC Evaluation of Illustrative Alternatives on the U.S. Side of the Border" which has three options on the short list, including the twinning of the Ambassador Bridge. Mr. O'Dell writes "as you know, we do not agree that X-12 should proceed". The next day, in an email dated October 26, 2005, Mr. O'Dell writes that he met with Ontario and URS and they are both "strongly of the opinion that X-12 could not (NOT) be ruled out at this point on the basis of the technical criteria used in the assessment of the alternatives".

[100] The emails demonstrate that TC urged its U.S. partners to recognize that the low Canadian ranking would be a sufficient basis upon which to exclude X-12 such that the Partnership could generate a single list of agreed-upon alternatives. For example, an email from Mr. O'Dell, who was also Transport Canada's representative on the Partnership's Steering Committee, to his colleagues at TC, dated October 6, 2005, states that the U.S. partners are uncomfortable eliminating the X-12 Option on the basis of the Canadian rankings, because they have a rigorous mathematical formula for evaluating alternatives and the Canadian ranking does not figure into that formula. As such, the U.S. authorities were concerned that they would be seen to be eliminating the X-12 Option on the basis of factors not in their criteria.

[101] Evidence contained in emails dated November 7 and 9, 2005, from Ms. Stiff reporting to her colleagues at Transport Canada demonstrate that the U.S. partners ultimately determined that their legislative duties did, in fact, enable them to rely on the Canadian analysis to make a decision under the U.S. environmental assessment law regarding which alternative to "carry forward." Therefore, as of November 8, 2005, all four partners agreed on the same short list of practical alternatives. This list would not include a twinned Ambassador Bridge.

URS Generation and Assessment of Illustrative Alternatives Report, dated November 2005

[102] As stated above, and I repeat for ease of reference, the URS report entitled "Generation and Assessment of Illustrative Alternatives," dated November of 2005, describes the results of its alternatives selection process. It describes the criteria used for evaluating options, which incorporated the original 35 criteria established in the Ontario Terms of Reference. The criteria included the ability of an alternative to provide "continuous/ongoing river crossing capacity" (i.e.,

redundancy), operational requirements for the customs and border security plaza, and impacts on communities affected by the project. The "governance principle", or private ownership criteria, was not a factor.

[103] With regard to the X-12 Twin Span Option, URS stated, at section 3.5.5., that the following negative impacts were found on the Canadian-side:

> ...
> (1) has a limited ability to provide continuous/ongoing river crossing capacity (i.e. redundancy), in comparison to providing a new crossing and connections.
> (2) expansion of the crossing at the Ambassador Bridge and existing plaza creates high impacts to the historic Sandwich community around the existing bridge and plaza (residential displacements and disruption, impacts to built heritage features, community character and cohesion).
> (3) expansion of Huron Church/Talbot Road to a freeway has high community impacts, particularly on the section north of E.C. Row Expressway.
> (4) the constructability of this option is made additionally complex by the need to keep international truck and auto traffic moving efficiently at this important border crossing during construction.

[104] In other words, URS was reporting that the X-12 Option, both as initially considered and with the alternative plaza and roadway suggested at the September 29, 2005, meeting, had high community impacts and failed to achieve desired redundancy. As a result, the X-12 Option performed poorly on Canadian-side rankings based upon the criteria established in the May 2004 Ontario Terms of Reference.

[105] The Generation and Assessment of Illustrative Alternatives Report concluded that three bridge crossing options within a relatively circumscribed geographic location should be carried forward for future study.

Conclusion of the Court with respect to allegation of bias

[106] The Court concludes that the emails demonstrate that Transport Canada had a strong policy view that the new bridge ought be publicly owned and controlled. Transport Canada called this the "governance principle". This policy meant that Transport Canada was against X-12 Option – the twinning of the existing Ambassador Bridge, if it were to be privately owned and controlled.

[107] However, extensive email evidence demonstrates that the Transport Canada policy position did not control, influence, subvert or taint the decision by the Partnership. The other three partners did not accept the governance principle as a relevant factor in either choosing the best alternative for the new bridge project or give it any weight in the ultimate decision agreed upon between the Ontario Ministry of Transport and the Michigan Department of Transport. These two partners were responsible for selecting the best practical alternative crossings. Ontario eliminated the twinning of the Ambassador Bridge option based on several relevant criteria. None of these related to the governance principle.

[108] Accordingly, an informed person viewing the matter realistically would not have a reasonable apprehension of bias regarding the Partnership's decision to eliminate the X-12 Option.

CTC Issue No. 2: **Did the Responsible Authorities err in relying upon the "need" for the new bridge project analysis undertaken by the Ontario Minister of Transport in 2005, and did the Responsible Authorities err in not performing another needs analysis based on updated traffic information showing a significant decline in traffic crossing the bridge since 2000?**

[109] The applicant CTC, supported by the Sierra Club, submits that the Responsible Authorities erred in the environmental assessment by not considering the "need for the project". Rather, the Responsible Authorities relied upon outdated traffic forecasts, and disregarded evidence that there had been a significant decline in traffic since 2000 at the Ambassador Bridge and at the other two crossings in the Detroit-Windsor area, so that a new bridge was not needed.

[110] Paragraph 16(1)(e) of the Federal Act gives the Responsible Authorities the discretion to consider "the need" in their environmental assessment of the project. The federal environmental assessment guidelines for this project stated that "the need" for the new bridge project would be assessed pursuant to the Federal Act. See the following references:

(a) Section 16(1)(e) of the Federal Act gives a Responsible Authority discretion to enquire of "any other matter relevant to the screening…such as the need for the project and alternatives to the project..."; and

(b) In the Federal Environmental Assessment Guidelines published on November 22, 2006, Transport Canada stated that needs and benefits of the new bridge project would be assessed by it and other Responsible Authorities pursuant to section 16(1)(e) of the Act:

> The scope of the assessment for the DRIC Project shall include environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project, and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out. With the discretion allowed for in paragraph 16(1)(e) of the CEAA, the RA(s) will also consider the purpose of the project, the need for the project and the benefits of the project,

> as part of the coordinated EA process. (Emphasis added.)

[111] The Canadian Environmental Assessment Act Screening Report dated November 2009 expressly assessed the need for the new bridge project. At sections 1.2 and 1.3, the Screening Report concludes that there is a need established for the new bridge by citing and relying upon the URS studies on "need" in the Ontario Environmental Assessment Report. The federal Screening Report was also prepared by URS so it makes sense that URS would not reinvent their original "needs analysis".

[112] The federal Screening Report states at page 2 as follows with respect to the need for the new bridge project:

> 1. **DIRC Study Process**
>
> ...
>
> The study process was led by the Ontario Ministry of Transportation, and followed an individual environmental assessment process under the Ontario *Environmental Assessment Act*. Key components of this process included defining the need for the project, the identification and analysis of alternatives, as well as opportunities for public consultation. ...
>
> 2. **Ontario Environmental Assessment Act**
>
> ...
>
> **Purpose, Need and Planning Alternatives**
>
> The Partnership has been studying border-crossing capacity in this region for several years. In 2001, the Partnership jointly commissioned a Planning/Need and Feasibility Study, which was completed in 2004. Among other things, the Planning/Need and Feasibility Study confirmed the long-term need for additional border crossing capacity in the Windsor-Detroit corridor.
>
> The Windsor-Detroit border crossing represents an important trade corridor between Canada and the United States. Based on 2006

> border crossing statistics, approximately 28% of Canada-United States surface trade passes through Windsor-Detroit. Based on studies undertaken by the Partnership, travel demand forecasts of passenger car and commercial vehicle volumes at the Detroit River crossings suggest that additional border crossing capacity will be required to accommodate traffic growth. The studies concluded that, unless steps are taken to expand infrastructure capacity, mounting congestion and delay would have considerable economic impacts by 2035.
>
> Drawing on the work of the Planning/Needs and Feasibility study, a draft Transportation Planning and Needs Report was completed in November 2005. The report identified several transportation planning alternatives, including improvements to border processing, transportation demand management, and various modal shifts, among others. The report concluded that the only transportation-planning alternative that could meet the identified needs was one that included the provision of new and/or improved roads with a new or improved crossing. This alternative was identified as the most effective at addressing the transportation network requirements, border processing requirements, and provided the highest overall level of support to long-term planning objectives.
>
> (underlining added)

[113] The applicants submit that the Responsible Authorities erred by relying upon these studies and failing to make their own independent determination of need.

Subsection 12(4) of the Federal Act provides for cooperation with other jurisdictions

[114] Subsection 12(4) of the Federal Act expressly provides that the Responsible Authority under the Federal Act may cooperate with another jurisdiction (such as Ontario) which has a responsibility or authority to conduct an assessment of the environmental effects of a project. Based on this subsection, Canada entered into an agreement with Ontario, the Canada-Ontario Agreement on Environmental Assessment Cooperation, to cooperate with respect to environmental assessments. Based on subsection 12(4) of the Federal Act and the Canada-Ontario Agreement, Canada relied

upon the environmental assessment work done by Ontario with respect to the need for the bridge and which alternative crossing of the Detroit River should be selected. Moreover, Canada used the same consultants as part of a coordinated environmental assessment process.

Evidence regarding need for the new bridge project

[115] The URS Transportation Planning and Needs Report dated November 2005 updated the URS P/NF Study to reflect "changes and traffic and network demands". At pages 22 and 23, the 2005 Report concluded that the Ambassador Bridge would reach capacity in 10 – 15 years. The Report stated at page 23:

> Even with improvements of these access facilities (the Huron Church Road and the Border Processing) the bridge crossing itself is expected to reach capacity within 10 – 15 years …The Ambassador Bridge and Detroit-Windsor Tunnel represent two of the busiest border crossings in North America. They carry over 16 million passenger vehicles and 3.7 million commercial vehicles annually and handle 23% of the total surface trade between Canada and the U.S. The delays and result in queuing at these crossings will have several negative effects associated with poor transportation network operations …

[116] The Report earlier stated at page 10 that the commercial vehicle volume at the Ambassador Bridge between 2000 and 2004 had decreased from 3.49 million to 3.37 million, a decline of 3.4%. The Report also showed that in the 10 years prior to 2000, commercial vehicle volume had doubled from 1.5 million to almost 3.5 million. The Report stated at page 12 that:

> The Detroit River frontier represents the busiest corridor for trade between Canada and the United States. … The governments of Canada, the United States, Ontario and Michigan each have a duty and responsibility to provide for and reduce the likelihood of disruption to the safe, continuous transport of people and goods across the Detroit River frontier.

[117] The 2005 URS "Generation and Assessment of Illustrative Alternatives Canada Side" report states at page 41:

> Total vehicle miles, vehicle hours of travel and travel distances will also be calculated on the border road network for the study horizon year of 2035. Also included will be an assessment of the ability of an alternative 1. to provide continuous/ongoing river crossing capacity (i.e. redundancy); and, 2. to meet the operational requirements for the plaza and crossing including considerations of security, accessibility and flexibility for expansion.

[118] In this language, URS reported that the alternative bridge was needed to provide an on-going crossing capacity if the Ambassador Bridge was rendered inoperable, and that the new bridge must have the space for the construction of a plaza large enough to handle border considerations including security, accessibility, and flexibility for expansion. It was with respect to the latter criteria that the URS Report stated at page 107 that the expansion of the existing plaza and connected roadway configuration at the Ambassador Bridge would have a high impact on the community. The expansion of the plaza combined with the building of a secure roadway approximately 1500 meters in length through Sandwich, an historic community bordering Windsor, would have a negative impact on that community.

New CTC traffic update evidence

[119] The applicant CTC further submits that if the Responsible Authorities had made their own determination regarding the need for the new bridge, they would have found that it was not necessary. In support of this submission, the applicants provided new evidence which is the subject of a motion to strike by the federal respondents. The evidence upon which CTC seeks to rely, which was not before the decision-makers, is as follows:

1. a report from Halcrow Group Limited dated June 2009 detailing traffic decline information (the "Ambassador Bridge – Traffic and Revenue Study");

2. a report from Wilbur Smith Associates dated September 2008 updating forecasts for the need of the new bridge (the "Windsor Gateway Study – Corridor Growth Comparison");

3. another report from Wilbur Smith Associates dated January 2009 updating traffic information and reporting on declines (the "Comprehensive Traffice and Toll Revenue Study");

4. another report from Wilbur Smith Associates dated February 2010 updating its traffic study;

5. an Affidavit from Mr. Atif Kubursi reporting on declines at the Ambassador Bridge (report entitled "Wilbur Smith Associates Report on Comprehensive Traffic and Toll Revenue Study – A Critical Evaluation"); and

6. a February 2010 Report from CBSA about the size of the Customs Plaza required by CBSA (the "Ambassador Bridge Plaza – Master Plan Study Report").

Updated traffic information before the decision-maker

[120] The Responsible Authorities did have updated traffic information in August 2009. Both the applicant CTC and the applicant Sierra Club wrote to the Responsible Authorities reporting that the actual traffic volumes had substantially declined since the P/NF study. In a letter from the CTC to Transport Canada dated August 7, 2009, CTC reported a 37% decline in vehicles using the Ambassador Bridge since 1999 and other declines at the other two crossings in the Windsor-Detroit area. In a letter to Transport Canada from the applicant Sierra Club, also dated August 7, 2009, the Sierra Club reported that the trans-border traffic growth anticipated in 2005 had failed to materialize and in fact had been negative, and suggested that Transport Canada ought to re-evaluate the traffic projections for the new bridge project.

[121] The applicant CTC submits that this evidence demonstrates that the traffic forecast upon which the new bridge project was based has proven to be incorrect and that there has been a decline in traffic which reflects permanent structural changes in traffic patterns. Accordingly, the applicant CTC argues that there is no need for a new bridge now or in the foreseeable future. As discussed, the federal respondents have filed a motion to strike all of the new evidence regarding traffic patterns generated after the date of the decision and/or which was not before the decision-maker.

The Stantec Report dated August 1, 2005 about the need for a large Plaza area

[122] The "Stantec Report" is a 45-page document from Stantec Consulting Services to URS, dated August 1, 2005, entitled "New CBSA Plaza Approximate Size and Specifications". The Report states its purpose is to "identify the initial land requirements for construction of a new Port of Entry in Canada and possible environmental effects for use in the development of the illustrative alternatives analysis". It relies upon a series of meetings with officials from CBSA and its U.S. counterpart, U.S. Customs and Border Protection; analysis and review of the sizes of other ports of entry, including the Ambassador Bridge and Blue Water crossings; review of the CBSA Statement of Requirements, a document produced by the CBSA that is used to determine facility needs at Canadian ports of entry; and review of "Site Land Border Facilities – Statement of Requirements Standards".

[123] This Report, commissioned by URS and relied upon by URS in its November 2005 Reports, stated at page 8 that the current plaza for the Ambassador Bridge is

> significantly undersized to accomplish the inspection requirement now in place at the border and to accommodate secondary inspection of commercial shipments on the plaza.

The Stantec Report stated that a plaza area of 80 acres would be required at the Ambassador Bridge, which is double the current size. The Report notes that the plaza on the U.S. side of the Ambassador Bridge is undergoing an expansion from 39 acres to 158 acres.

[124] The Stantec Report stated at page 9 that 25 to 30 acres are required strictly for CBSA activities, and the remainder of the 80 acres is required to

1. widen the highway approaches;
2. toll collection and toll house building;
3. broker parking and broker offices;
4. duty-free and currency exchange offices;
5. plaza and bridge operation and maintenance facilities;
6. snow storage;
7. storm water management; and
8. a buffer area to screen enforcement activities in the plaza.

The applicant CTC submits that the February 2010 Report from CBSA about its 30 acre requirement at the Canadian Plaza at the existing Ambassador Bridge is much lower than URS forecast of 80 acres, so that the premise upon which URS concluded that the expanded plaza would have a negative community impact is false. The federal respondents moved to strike this February 2010 Report from CBSA. The Court finds the 30 acres required for CBSA is part of the Stantec Report calculation that 80 acres would be needed in total for the Twin Span Option of the Ambassador Bridge.

The Court's findings with respect to the "needs analysis" issue

[125] The Court finds that the Environmental Assessment Guidelines did commit the federal authorities to determine the need "as part of the coordinated environmental assessment". Incorporating Ontario's assessment meets this requirement. This is the coordinated process

authorized under section 12(4) of the Federal Act and the Canada-Ontario Agreement. There was no reason to duplicate the work done for Ontario regarding the need for the new bridge project.

[126] The updated traffic information to 2009 not before the decision-maker is not admissible in order for the Court to substitute the decision under review with the Court's opinion. However, it is clear that Transport Canada had updated traffic information to 2009 from both applicants.

[127] The traffic information was updated by URS in 2005. The URS report contained a long term projection. The fact that the recession caused a significant decline in traffic across the Ambassador Bridge does not affect the long term projection of the surface transportation experts. Recessions cause temporary declines but do not affect long term growth. Appendix A to the Screening Report acknowledges the recent decline in traffic across the border but states:

> ... Assuming a modest economic recovery over the long-term, the existing crossing facilities will reach their practical capacity within the planning horizon.

This finding was reasonably open to the decision-makers so that the Court will not intervene. Moreover, the Court notes its finding above that the "need" for the project was based on many considerations, of which traffic projections formed only one part.

CTC Issue No. 3: **Did the Responsible Authorities breach the Federal Act by purchasing land for $34 million before the new bridge project was environmentally assessed under the Federal Act? Specifically, did the Responsible Authorities breach the following sections of the Act;**

i. Paragraph 5(1)(a) of the Federal Act by committing the federal authorities to carrying out the bridge project before the environmental assessment of the project was completed;

ii. **Subsection 11(1) of the Federal Act by making an irrevocable decision about the bridge project before the environmental assessment was completed; and**

iii. **Paragraph 16(1)(a) of the Federal Act by failing to consider the cumulative environmental effects that are likely to result from the bridge project in combination with other projects or activities.**

[128] In July of 2009, prior to issuing the decision, Transport Canada purchased land from the City of Windsor for $34 million, announcing "New Windsor-Detroit Crossing is One Step Closer as a Result of Land Purchase from City of Windsor." This land was for a new Customs Plaza.

[129] The applicant CTC submits that by making this purchase in anticipation of commencing the new bridge project but prior to the issuance of the decision under the Act, Transport Canada breached the Act. In particular, the applicant submits that the purchase breached the following sections of the Act for the reasons discussed below:

1. Sections 5(1) and 11(2)
2. Section 11(1)
3. Section 16(1)

1. Breach of Sections 5(1) and 11(2)

[130] Section 5 of the Act provides that a federal authority must conduct an environmental assessment before undertaking a function listed in section 5(1). With respect to projects requiring environmental assessment by consideration of a screening report, section 11(2) of the Act further requires that before a responsible authority can undertake any function mentioned in section 5, it must issue a decision under section 20(1)(a).

[131] The Federal Act contemplates environmental assessment as an integral part of the decision-making process. As the Supreme Court of Canada stated in *Mining Watch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, at paragraph 14, the Act "provides a process for integrating environmental considerations into planning and decision making".

[132] Transport Canada is a responsible authority under the Act. As such, Transport Canada was prohibited by section 11(2) of the Act from exercising any power or function referred to in section 5(1) of the Act before rendering its decision under section 20. The Responsible Authorities made the decision on December 3, 2009.

[133] The specific functions listed in section 5 that are relevant to this application are the following:

> 5.(1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority
>
> (a) is the proponent of the project and does any act or thing that commits the federal authority to carrying out the project in whole or in part;

[134] With regard to the breach of section 5(1)(a), the respondents submit that section was not breached because there was no commitment to carrying out the new bridge project. Whether the new bridge project proceeded was always understood to be contingent upon a positive decision under the Act. The Court accepts this submission.

[135] The Court finds that the purchase of land by Transport Canada does not constitute "an act or thing that commits the federal authority to carrying out the project in whole or in part" under section 5(1)(a) of the Federal Act. The land can always be sold if the project is not approved. A $34 million land purchase with respect to a multi-billion dollar project is not a commitment to carrying out the project. Therefore there was no breach of subsection 5(1)(a) of the Act.

2. Breach of Section 11(1)

[136] Section 11(1) of the Act provides that a federal authority referred to in section 5 "shall ensure that the environmental assessment is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made…."

[137] The applicant submits in its memorandum that Transport Canada breached section 11(1) by initiating the federal environmental assessment process in March of 2006 when the following facts make clear that the project was in the planning stages from at least 2000:

1. The P/NF Study confirms that the Partnership was planning an international crossing. It was conducted between 2001 and 2004.

2. The MTO commenced its environmental assessment process in September of 2004, approximately 1.5 years prior to the commencement of the federal assessment.

3. Transport Canada played a role in the MTO's assessment and in the Partnership's environmental assessment working group and Steering Committee.

4. The Twin Span Option was eliminated in 2005. The applicant submits that this was an "irrevocable decision" made on a basis unrelated to environmental considerations, and made prior to the initiation of the federal assessment.

[138] The applicant submits that there was no legitimate reason for delaying the commencement of the federal assessment. By 2005, only Transport Canada among the partners had failed to commence an environmental assessment. The applicant submits that Transport Canada's motive for delaying the federal assessment was to avoid consideration of the X-12 Twin Span Option in the federal assessment: by delaying the federal assessment, Transport Canada was able to encourage the elimination of the option during the Ontario assessment and avoid review of its own motives for providing a tainted needs assessment at the federal assessment stage.

[139] The respondents submit that the Responsible Authorities started the federal environmental assessment at the appropriate time. They submit that the word "project" used in the Act requires an identifiable physical work that can be practicably assessed. They submit that the 15 alternatives of potential bridges and tunnels over a large location and the 13 plazas and access road solutions considered at the outset of the Ontario and U.S. review processes (pursuant, as described above, to the legislative requirements of those jurisdictions that are not shared with the Federal Act) were not sufficiently identifiable to constitute a "project" in its planning phases. The respondents submit the following evidence in support of their interpretation of the definition of the word "project" in the Act:

1. The Act defines a "project" in section 2(1)(b) as "in relation to a physical work, any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work."

2. Section 16 of the Act makes the consideration of alternatives to a project a discretionary choice available to Responsible Authorities in a screening. The respondent submits that implies that alternative selection is not normally part of the "planning" referred to in the Act.

3. In non-binding guidelines it issues to help federal authorities exercise their responsibilities under the Act, the Canadian Environmental Assessment Agency states that in determining if the Act applies authorities should consider a "physical work" to be "something that has or will be constructed (human-made) and has a fixed location.

Examples include a bridge, building or pipeline, but do not include airplanes or ships at sea."

4. The *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*, SOR/97-181, state in section 5 that a federal authority that has determined that it is likely to require an environmental assessment of a project shall provide notice and a project description to other federal authorities. Section 1 defines a "project description" and includes, among other things, a requirement to provide information regarding the location of the project, and the areas potentially affected by the project.

5. Hansard from the House of Commons consideration of the Act, in fact demonstrates that the phrase "and before irrevocable decisions are taken" was understood to mean "no weaker in this respect than the EARP process." The EARP was the predecessor to the Act, and had been interpreted to require an environmental assessment only once the environmental implications of the project could be "fully considered." In *Friends of the Island Inc. v. Canada (Minister of Public Works)*, [1993] 2 F.C. 229, Justice Reed held that the environmental assessment ought to have occurred once it had been decided that the project under consideration involved a bridge connecting two known locations. She stated that it would have been premature to require an assessment in that case at the stage where both bridges and tunnels were being considered.

[140] The respondents further submit that there is no evidence or reason to believe that the selection of practical alternatives during that phase of the Ontario assessment was improper. The respondents submit that any concern that the applicants have with the Ontario assessment ought to have been brought in a judicial review of that decision and is improper on this application.

[141] The Court agrees with the respondents. The record of coordination efforts between the provincial and federal authorities conducting the coordinated environmental assessments demonstrate that even before formally initiating the federal assessment, federal authorities were involved in ensuring that the studies undertaken and reports generated in the Ontario assessment would meet their needs under the Act. The documentation produced during the Ontario assessment also speaks to the anticipated role of the federal authorities, and recognizes that they would formally launch their own assessment once the project description was clarified. For example, the terms of

reference for the Ontario assessment, quoted above, specify that the work done during the Ontario assessment should "provide sufficient information to support a decision to trigger the federal EA process" and that the concept design and selection of preferred practical alternatives undertaken during the Ontario assessment "will assist federal and provincial EA processes to move forward in an integrated manner."

[142] This interpretation is consistent with the general approach to coordinated environmental assessments described in the guide to coordinated federal/provincial assessments published by the Ontario Ministry of the Environment and the Canadian Environmental Assessment Agency, entitled "Federal/Provincial Environmental Assessment Coordination - A Guide For Proponents And The Public":

> Because the determination of whether CEAA applies (and therefore, federal agencies are fully engaged in an EA) depends on the level of detail known and is based on the project description, Figures 2.1 and 2.2 differ in showing when federal engagement may occur. Generally when a "traditional" individual EA (refer to Figure 2.1) is carried out, federal authorities will be involved when a preferred "alternative to" has been selected and a general study area has been identified.

[143] Accordingly, the Court finds no breach of subsection 11(1) of the Act.

3. Breach of Section 16(1)

[144] Section 16(1) of the Act provides in part that every screening shall consider "any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out".

[145] "Cumulative effects" were defined in *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, [2001] 2 F.C. 461, [2001] F.C.J. No. 18 (Fed. C.A.):

> ¶40. "Cumulative effects" are not defined in the Act. The Agency has defined cumulative environmental effects as "the effects on the environment, over a certain period of time and distance, resulting from effects of a project when combined with those of other past, existing, and imminent projects and activities."
>
> ¶41. Only likely cumulative environmental effects must be considered. Projects or activities which have been or will be carried out must be considered. However, only approved projects must be taken into account; uncertain or hypothetical projects or activities need not be considered. The Agency's Reference Guide on Cumulative Effects suggests, however, that "it would be prudent to consider projects or activities that are in a government approvals process as well."
>
> ¶42. In order to assess cumulative environmental effects, advice from and consultation with relevant individuals, organizations and government departments and agencies should be consulted.

[146] The applicants submit that the Partnership wrongly excluded the Blue Water Bridge from the boundaries of the study area considered during the federal environmental assessment. The applicants submit that this exclusion was arbitrary.

[147] The applicants note that the Blue Water Bridge was considered part of the relevant transportation corridor in the P/NF Study. In addition, the applicants state that the Responsible Authorities are also planning an expansion of the Blue Water Bridge to help address the "additional capacity" need identified in the P/NF Study. The applicants therefore submit that the exercise of discretion that resulted in the exclusion of the Blue Water Bridge was improper.

[148] The respondents submit that the spatial boundaries chosen by the Responsible Authorities for which projects to include in their cumulative effects analysis were sufficiently broad. The spatial boundaries included the Detroit River, the City of Windsor, and several neighbouring municipalities, and encompassed more than 40 related infrastructure, industrial, and other border-crossing projects. The results of the cumulative effects analysis are contained in the 44-page Cumulative Effects Assessment Report, attached to the Screening Report as Appendix D.

[149] The respondents submit that it was entirely appropriate to exclude the Blue Water Bridge from the consideration of cumulative effects. The Blue Water Bridge is 95 km away from the DRIC Project, and the environmental effects of the DRIC Project will not combine with any effects of enhancements of the Blue Water Bridge. The respondents further submit that the P/NF Study appropriately included the Blue Water Bridge within its scope of assessment because it was concerned with identifying transportation needs.

[150] Section 16(3) of the Act provides that the Responsible Authorities shall determine the scope of the section 16(1) factors to consider. In *Friends of the West Country Assn. v. Canada (Minister of Fisheries & Oceans)* (1999), 248 N.R. 25, [2000] 2 F.C. 263 (Fed. C.A.) at paragraphs 27 and 28, the Federal Court of Appeal confirmed the wide discretion conferred on Responsible Authorities in determining which additional projects to consider for the purposes of conducting a cumulative environmental effects analysis.

[151] The Blue Water Bridge is located in Sarnia, Ontario, 95 km away from the new bridge. The Responsible Authorities clearly turned their minds to the question of the scope of projects to include

in the cumulative effects analysis. In this case, the Court finds that the Responsible Authorities exercise of their discretion was reasonable and not in breach of subsection 16(1) of the Act. It was within their discretion to exclude consideration of any Blue Water Bridge expansion from the cumulative environmental effects analysis conducted for the new bridge project.

Sierra Club Issue No. 4: **Ought the decision be quashed on the basis of a breach of the precautionary principle, a failure to consider the best available information, errors on the record, or because it was unreasonable with regard to its findings regarding species at risk?**

[152] Section 4(2) of the Act enshrines the precautionary principle as an element of the Canadian environmental assessment regime. The Supreme Court of Canada defined the precautionary principle in *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville)*, 2001 SCC 40, [2001] 2 S.C.R. 241, at paragraph 31, quoting paragraph 7 of the *Bergen Ministerial Declaration on Sustainable Development* (1990):

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

[153] The applicant Sierra Club submits that there are three areas in which the Responsible Authorities failed to apply the precautionary principle:

1. By approving mitigation measures for plant and snake species that are not expected to work;

2. By failing to conduct sufficient field work to identify wildlife in the new bridge project's footprint; and

3. By failing to identify specific mitigation measures with respect to adverse effects on migratory birds.

1. Mitigation measures for plant and snake species

[154] Section 20 of the Act allows a responsible authority to consider "any mitigation measures that the responsible authority considers appropriate" when determining whether a project will cause significant adverse environmental effects. In accordance with section 16(1)(d) of the Act, "mitigation measures" are "measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project."

[155] The applicant submits that the Responsible Authorities improperly approved mitigation measures with regard to Butler's Garter Snake, the Carolinian population of the Eastern Fox Snake, and Colicroot.

[156] The Butler's Garter Snake is a species of garter snake that lives in prairie-like grasslands, fields, wet meadows and open marshes. At the time of the environmental assessment, Butler's Garter Snake was listed as threatened under both SARA and the Ontario ESA. At the time of the application, the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), established under section 14 of SARA, had elevated the status of Butler's Garter Snake from threatened to endangered, although that elevation had yet to be incorporated into law.

[157] The Eastern Fox Snake is Ontario's second-largest snake and lives in the Great Lakes region. While all Eastern Fox Snakes are listed as threatened, the Carolinian population of the

Eastern Fox Snake, which is the species that will be affected by the new bridge project, is listed as endangered under both SARA and the Ontario ESA.

[158] Colicroot is a low-growing perennial herb characteristic of open dry habitats associated with tall-grass prairies. The only place it can be found in Canada is in Southwestern Ontario, although it also can be found in the United States. Colicroot is listed as a threatened species under the Ontario ESA and SARA.

[159] Section 7 of the Screening Report, "Environmental Effects and Mitigation Measures", evaluates the effect of the new bridge project on the environment, including on plant and snake species at risk. The mitigation measures considered in Section 7 of the Screening Report are only those that respond to environmental effects that could not be fully avoided by techniques employed by the Partnership in the design of the project itself. As the Screening Report explains, environmental effects were to a large degree avoided, or minimized to the extent possible in the development of the project, as part of the identification and evaluation of alternatives and in the selection of the preferred alternative. In addition, many mitigation measures have been directly incorporated into the project design. Section 7 of the Screening Report summarizes the potential adverse environmental effects of the project and mitigation measures for effects that could not be fully avoided.

[160] Section 7.7 of the Screening Report, "Vegetation, Vegetation Communities, Wetlands and Species at Risk" enumerates the effects and general mitigation measures considered by the Responsible Authorities that relate, among other things, to Colicroot. It acknowledges that

vegetation and vegetation communities will be affected by the new bridge project, as a result of, for example, site preparation activities for construction that will result in their full or partial removal disturbance effects such as increased wind throw and drainage modification, winter maintenance activities like salting or sanding, and the introduction of exotic or invasive species. The Screening Report states that approximately 929 Colicroot will be affected by site preparation activities for the construction of the new bridge project. The Screening Report commits to 13 different measures designed to mitigate those negative effects.

[161] Section 7.8 of the Screening Report, "Wildlife, Wildlife Habitat and Migratory Birds" describes the effects and mitigation to be undertaken for wildlife species, including the two snake species at issue here. With regard to snakes, in addition to the measures identified to protect vegetation from disturbance during construction, the following general mitigation measures are provided:

- Wildlife rescue will be performed on-site prior to vegetation removal.
- Snakes will be captured and relocated prior to construction to prevent mortality.
- A snake barrier will be installed alongside portions of the construction area, to prevent snakes from entering the work zone, and to redirect snake movements to safer areas.

[162] In Section 7.0, Appendix E of the Screening Report, "Supplementary Mitigation Approach for Species at Risk", lists standard best management practices that will be employed in addition to mitigation, monitoring and follow-up for species at risk.

[163] In Section 5.0, "Landscape Plan", Appendix E describes the process by which 120 hectares of green space has been conceptualized to provide areas for ecological restoration or enhancement for species at risk that can be transplanted or relocated. Although a conceptual landscape plan for such areas has been developed, Appendix E explains that,

> Following the Species at Risk permitting process at the Provincial and Federal level, which will identify the specific mitigation measures required in association with the Windsor-Essex Parkway, Plaza and bridge portion of the Project, a detailed landscape plan will be developed in subsequent design stages that will include a detailed mitigation approach for each Species at Risk in the context of the overall Project.

[164] In addition to the general mitigation measures described in the Screening Report (and its Appendix E), the Screening Report states that more detailed and specific mitigation strategies will be developed as part of the permit approval process that is required before any activity can be undertaken that would affect the species at risk – including both the Colicroot and two snake species:

> Species-specific management plans will be prepared for each species-at-risk in consultation with regulatory agencies to demonstrate that the project will not jeopardize the survival or recovery of species –at risk. Permits and approvals under the *Species at Risk Act* and the *Ontario Endangered Species Act, 2007* will be secured prior to construction activities.

[165] Appendix E of the Screening Report elaborates upon the reliance on permit approval regimes for ensuring that no significant environmental effects are suffered by species at risk. In section 4.2, "Provincial Considerations", Appendix E explains the requirements of the provincial permit regime, and concludes as follows:

> Permits issued under section 17(2) (of the *Endangered Species Act*) may contain such conditions as the MNR considers appropriate.

[166] Finally, the Screening Report and its Appendix E both describe the "Species at Risk Coordination Committee" comprising "technical representatives from agencies including TC, MTO, EC, and MNR with support from additional expert technical advisors as required." Appendix E describes the objectives of the Coordination Committee which include:

> The goals and objectives, which will guide the committee will be:
>
> - Ensure the effective implementation of Species at Risk mitigation commitments for the Project as a whole.
>
> ...
>
> For the purposes of the Species at Risk Coordination Committee, adaptive management is intended to reflect a commitment to take actions based on monitoring and follow-up results that will ensure the effective implementation of mitigation throughout the life cycle of the Project and confirm the conclusions of the EA.

[167] The applicant submits that the mitigation measures in the Screening Report regarding Colicroot and the two snake species fail to meet the "technically and economically feasible" requirement of section 16 of the Act. First, the applicant submits that the general mitigation strategies enumerated in the Screening Report are not technically feasible means of mitigating the acknowledged environmental effects upon these species at risk. Second, the applicant submits that the Responsible Authorities reliance upon the permit approval process of the Ontario ESA to develop more specific mitigation procedures for species at risk that would be affected by the new bridge project was improper.

[168] The respondents submit that it was reasonable for the Responsible Authorities to find that the mitigation strategies enumerated in the Screening Report were technically and economically feasible. The respondents submit that these mitigation strategies were developed through a detailed study process by expert study teams and culminating in expert review by Environment Canada. The respondents submit that the Responsible Authorities had no obligation to seek additional evidence – the evidence before them was sufficient to support their conclusion and their reliance upon that evidence was reasonable.

[169] Furthermore, the respondents submit that the Responsible Authorities were entitled to rely upon the provincial permit approval process to develop more specific mitigation strategies for species at risk.

[170] The applicant did not contest the value of the general mitigation strategies provided in the Screening Report. Indeed, it is difficult to imagine how the applicant could fault the strategies of avoidance stressed therein. Nevertheless, the applicant submits that given that the general mitigation strategies are not expected to eliminate risk to the identified species at risk, the Responsible Authorities had a duty to evaluate the mitigation strategies proposed for the species at risk in the permit approvals, rather than merely relying upon those permits without reviewing the mitigation strategies developed therein.

[171] The applicant submits that the specific mitigation strategies proposed for the two snake species and Colicroot are not technically feasible. The mitigation strategies attacked by the applicant are the specific strategies developed pursuant to the Ontario ESA permit application process.

[172] The applicant disagrees with the mitigation required in the permit issued by the Ontario Ministry of Natural Resources under the Ontario ESA section 17(2)(d). This permit is detailed and subject to its conditions allows the Ministry of Transportation to engage in activities that would otherwise be prohibited by the ESA with respect to, among other species, the Butler's Garter Snake, Eastern Fox Snake, and Colicroot. The permit consists of 46 pages plus an additional 10 detailed appendices.

[173] To give a sense of the detail demanded by the permit, I reproduce here one of the 16 conditions imposed regarding the Butler's Garter Snake. I note that the same specificity and length is imposed regarding the Eastern Fox Snake and Colicroot:

> b. MTO shall develop a Butler's Gartersnake Management Plan, which must be approved by MNR, prior to undertaking any construction activity that will have an impact on Butler's Gartersnake individuals within the ESA Footprint. The approved Butler's Gartersnake Management Plan shall provide detailed information with respect to the goals, methods and techniques that MTO shall adopt for activities relating to Butler's Gartersnake and shall, at a minimum, address each of the following:
>
> i) Construction timing windows
> ii) Capture and release methodologies
> iii) Capture and release timing windows
> iv) Methodologies and timelines for the enhancement, restoration, and creation of habitat
> v) Key habitat feature creation protocols and designs
> vi) Adaptive management strategies

[174] The applicant has challenged the proposed mitigation plans for the following reasons. With regard to the two snake species, the applicant submits that the plan to create new snake habitat to replace habitat that will be destroyed by building the new bridge project is inadequate to address the

threat to the two snake species caused by destruction of their habitat. With regard to Colicroot, the applicant submits that the plan to transplant the species is inadequate because transplantation is unproven to be at all effective with regard to Colicroot.

[175] In support of its submission, that applicant has relied on reports generated in the course of the permit approval process initiated by the MTO under the Ontario ESA and on challenges to those reports. The parties agree that neither these reports nor the challenges to them were before the decision-makers, and they are not relied upon in the Screening Report. The applicant has submitted that the original reports ought to have been put before the decision makers but were not due to a misjudgment of the reports' contents.

[176] The Court finds that this evidence goes toward the mitigation measures being considered by the Province under the Ontario ESA and that their substance is properly weighed and considered by the scientific effort at the Ontario Ministry of Natural Resources in processing the applications for permits under the ESA. The question about whether the substance supports the Ontario Ministry's issuance of a permit is subject to review before the Ontario Divisional Court. The Responsible Authorities are entitled to rely upon Ontario's judicial system to ensure that the permit was properly issued. So, too, are they entitled to trust provincial authorities to carry out their responsibilities: see also *West Vancouver (District) v. British Columbia (Minister of Transportation),* 2005 FC 593 (WL Can) where Justice Lemieux held that federal Responsible Authorities properly relied upon the B.C. Ministry of Transportation to develop detailed mitigation measures once more details of the proposed project were determined:

> ¶102 I agree with counsel for Canada and B.C. there was ample evidence before the RAs to enable them to assess the

> environmental impact of windthrow in the affected area and to consider its significance measured against known mitigation techniques which cannot be implemented at the preliminary design stage but rather must be implemented when the design of the highway has taken shape.
>
> ...
>
> ¶104 In the circumstances, it was reasonable for the RAs to rely upon B.C.'s (MOT) commitment to mitigate through follow up studies when the timing to do such studies is appropriate.

[177] The Court finds that the Responsible Authorities' decision that there would be no significant adverse environmental effects caused by the new bridge project due to harm to at-risk species was reasonable based on the evidence before it, which did not include the reports submitted to the Ontario Minister of Natural Resources described above. The expert study team engaged by the Responsible Authorities conducted studies and arrived at recommendations which in turn were commented upon and to which adaptations were made.

[178] As noted above, Appendix E to the Screening Report states that the details of mitigation measures for species at risk will be developed beyond the general mitigation measures explicitly provided in the Screening Report as permit applications are obtained under the *Ontario Endangered Species Act, 2007*:

> 1.2 Purpose
> Given the preliminary design stage of the proposed Project, it is not presently feasible to outline highly specific mitigation measures for Species at Risk. In addition, the majority of proposed mitigation measures pertaining to Species at Risk will be subject to Final approval by either Environment Canada (EC) or the Ontario Ministry of Natural Resources (MNR) through the federal Species at Risk Act (SARA) and the Ontario Endangered Species Act (OESA) permitting processes. . .

[179] As discussed above, the Screening Report was part of a complex process of coordination among federal and provincial authorities as well as U.S. state and federal authorities. The process was designed to reduce overlap and waste. This is an important purpose of the Act, as stated in section 4 of the Act:

> 4. (1) The purposes of this Act are
>
> ...
>
> (b.1) to ensure that Responsible Authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process;
>
> (b.2) to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessment processes for projects;
>
> ...

[180] Moreover, this Court has recognized that CEAA does not require that all the details of mitigating measures be resolved before acceptance of the Screening Report. Madame Justice Tremblay-Lamer stated in *Pembina Institute for Appropriate Development v. Canada (Attorney General),* 2008 FC 302 (F.C.) at paragraphs 23 and 24:

> ¶23. The adequacy and completeness of the evidence must be evaluated in light of the preliminary nature of a review panel's assessment. In *Express Pipelines, supra,* at para. 14, Hugessen J.A. discussed the predictive and preliminary nature of the panel's role:
>
> > The panel's view that the evidence before it was adequate to allow it to complete that function "as early as is practicable in the planning stages ... and before irrevocable decisions are made" (see section 11(1)) is one with which we will not lightly interfere. By its nature the panel's exercise is predictive and it is not surprising that the statute specifically envisages the possibility of "follow up" programmes. Indeed, given the nature of the task we

> suspect that finality and certainty in environmental assessment can never be achieved.
>
> This view was echoed in *Inverhuron & District Ratepayers' Assn. v. Canada (Minister of the Environment)*, 2001 FCA 203, [2001] F.C.J. No. 1008 (Fed. C.A.), at para. 55, by Sexton J.A. Therefore, given the predictive function of an environmental assessment and the existence of follow-up mechanisms envisioned by the CEAA, the Panel's assessment of significance does not extend to the elimination of uncertainty surrounding project effects.
> ¶24. Similarly, it is evident that the assessment of environmental effects, including mitigation measures, is not to be conceptualized as a single, discrete event. Instructively, in *Union of Nova Scotia Indians v. Canada (Attorney General)* (1996), [1997] 1 F.C. 325, [1996] F.C.J. No. 1373 (Fed. T.D.), Mackay J. indicated, at para. 23 that he was not persuaded that the CEAA requires that all the details of mitigating measures be resolved before the acceptance of a screening report. He further asserted that the nature of the process of assessment was "ongoing and dynamic" with continuing dialogue between the proponent, the Responsible Authorities and interested community groups.

[181] Section 20(1.1) of the Act defines the extent of Responsible Authorities' authority to consider mitigation measures. It specifically provides in paragraph (b) that a responsible authority may take account of mitigation measures that are not within the legislative authority of Parliament but "that it is satisfied will be implemented by another person or body."

[182] In this case, the Screening Report specifically recognizes that mitigation measures will have to be developed as the new bridge project unfolds. The decision is contingent upon effective mitigation measures. The Screening Report specifies that such mitigation measures will be developed in the permit approvals process.

[183] It was reasonable for the decision-makers to rely upon the regime created by the Ontario ESA to mitigate potential harm to at-risk vegetation and snake species. Those specialized Acts are designed to protect at-risk species. They are mandatory and it was reasonable for the decision-makers to be satisfied that they would be properly applied. Of course, the applicants are free to challenge those decisions, as they have. For the purposes of this application, the question is the relatively circumscribed one of whether it is reasonable for a responsible authority under the Act to rely upon permit approval regimes as one element of its decision to ensure appropriate mitigation strategies for at-risk species. The Court finds that reliance to be reasonable and within the power of a responsible authority under the Act.

B. Field Work

[184] The applicant submits that the field work undertaken in order to discover potential wildlife and vegetation affected by the new bridge project was inadequate.

[185] The Screening Report references the provincial technical studies as the sources for the data that it presents. Appendix E to the Screening Report, "Supplementary Mitigation Approach for Species at Risk," summarizes what it describes as the study process at section 4.0:

> Based on the information collected from secondary sources and consultation with regulatory agencies, detailed, season-appropriate field investigations were carried out over several years to inventory natural heritage features and conduct Species at Risk surveys. Species at Risk investigations included detailed population and distribution surveys for vegetative species, molluscs, fish, reptiles, amphibians, birds and mammals. Investigations followed standardized protocols and included stem count surveys, point-count surveys, capture-mark-recapture surveys, radio-telemetry surveys, electrofishing surveys, visual encounter surveys and reconnaissance level mollusc surveys.

[186] At section 2.1, it also describes the method by which the field surveys were conducted:

> From the secondary source information gathered, a number of Federally and Provincially regulated species were identified within the greater Windsor-Essex County area. From this extensive list of species, repeated field surveys were undertaken between 2006 and 2009, specifically targeting vegetation, fish and wildlife species, as well as natural heritage areas. Based on this work, the following species were confirmed within the maximum footprint area of the combined practical alternatives and adjacent lands located within 120 meters of the right-of-way (Project Area) . . .

[187] The Screening Report therefore suggests that species investigations occurred over a number of years and with detailed studies. The applicant submits that the evidence does not support this characterization of the study process. To the contrary, the applicant submits that the evidence reveals that the only studies conducted to find species within the scope of the project were the following:

1. Field investigations for wildlife conducted by two biologists working together using no specialized equipment for a total of 36 days; 33 days over a period of 6 months in 2006 and 3 days in one month in 2007;

2. Field investigations for vegetation and vegetation communities conducted by two to four botanists working together for a total of 29 days over 6 months in 2006; and

3. Field investigations for further information on rare vascular plant species from June to October 2008, on unspecified dates.

[188] The respondents submit that it was reasonable for the Responsible Authorities to rely on the expert study teams' extensive work in the area of the new bridge and the findings regarding species at risk found in the project area. The respondents submit that 36 days of field work in 2006-2007 followed by species-specific field studies between 2007 and 2009 were sufficient.

[189] Moreover, the respondents submit that the decision recognizes that wildlife is mobile, and so has the contingency plan requirements and relies upon the permit approval processes.

[190] The Court finds that it was reasonable for the Responsible Authorities to rely on the expert study teams' field work. As recognized in *Inverhuron & District Ratepayers' Assn. v. Canada (Minister of the Environment)*, 2001 FCA 203:

> …[t]he environmental assessment process is already a long and arduous one, both for proponents and opponents of a project. To turn the reviewing Court into an "academy of science" … would be both inefficient and contrary to the scheme of the Act. [references omitted]

[191] This Court's role is to determine whether the Responsible Authorities followed the proper statutory process: *Bow Valley,* above, at paragraph 78.

[192] Based on the evidence before this Court, it does not appear that there were errors committed in the manner in which the expert study teams conducted their field surveys. While the applicants suggest that 29 or 36 days are insufficient, they have not provided evidence regarding the standard practice in this area. In the absence of this evidence, and absent any indication of bad faith, the Court is not willing to question the respondents' reliance upon the field work.

[193] In addition, the Court finds that the extensive comment and review process undertaken by the Responsible Authorities with members of the public and with federal expert agencies, including Environment Canada, supports the respondents' position that it was reasonable for the Responsible Authorities to rely on the field surveys. Any inadequacies in those processes could have been raised at any time during the comment and review process. Indeed, there are many examples of times

when expert authorities, especially Environment Canada, did criticize the methodology or findings of the expert teams, and where the Screening Report was modified as a result.

[194] The Court finds that the Responsible Authorities were reasonable in their reliance upon the field surveys undertaken by the expert study teams. Moreover, the Court recognizes that should at-risk species be discovered at any later phase, no activities will be able to continue until the required permits are obtained.

C. Migratory Birds

[195] The federal Environmental Assessment Guidelines state that the Screening Report will specify measures to mitigate bird collisions with the proposed bridge structure. In Table 2, "Scope of the Factors to be Assessed", under "Wildlife, Wildlife Habitat and Migratory Birds", the Environmental Assessment Guidelines list the following specific issues to be examined:

> • Description of migratory birds and wildlife species frequenting the project area and their habitats (notably any significant habitats potentially impacted by the project), consistent with the approach outlined in the Natural Heritage Work Plan including species that may only use the study area on a seasonal basis
>
> • Description of any wildlife habitats and other areas including urban environments (often migrating birds will use man-made structures as shelter) crossed by the project that are utilized as wildlife corridors providing linkages to significant habitats
>
> • Identification of predicated effects of the project, during construction and operations … discussion should address any additional risk of bird collisions due to the bridge structure (notably towers and cables), considering any lighting proposed for transportation/navigational safety and aesthetics

> • Description of proposed mitigation measures, including measures that will be put in place to ensure compliance with the Migratory Birds Convention Act, \species at Risk Act, and any regulations under these statutes; this should include any specific mitigation measures to mitigate bird collisions with the proposed bridge structure
>
> • Opinion on the significance of residual effects and ecological consequences

[196] The "Natural Heritage Work Plan" referenced in the Environmental Assessment Guidelines is the Draft Natural Heritage Work Plan, Version 2, dated March 2006 (the Natural Heritage Work Plan).

[197] Detailed data collection and analysis requirements in the Natural Heritage Work Plan with respect to migratory birds are provided in the description of the tasks to be carried out at Stage 4.

[198] Based upon the field work conducted, the 2008 Natural Heritage Impact Assessment report suggested that the Partnership consider undertaking a further analysis of the impact of the new bridge project on migratory birds:

> Consideration should be given to conducting a migratory bird survey at the location of the crossing to ascertain the species, population size and behaviour of birds migrating through and residing along the Detroit River. The investigations should include mobile radar studies in association with acoustical recordings and point count surveys during peak spring and fall migration periods. Further discussion will be undertaken with Canadian and U.S. wildlife authorities to determine the need and level of assessment required.

[199] In the spring of 2009, a radar study was, indeed, undertaken and was completed in July of 2009: the Detroit River International Crossing Project Bird Migration Radar Study – Preliminary Report, July 2009 (the July 2009 Preliminary Bird Migration Radar Study). No acoustic study was undertaken at that time.

[200] The July 2009 Preliminary Bird Migration Radar Study explains the importance of evaluating risks to migratory birds:

> 10.2 Risk to Migratory Birds
> . . . The cumulative impact of man-made structures on migratory bird populations is staggering. For example, an estimated 4 million to 50 million birds die each year as a result of striking communications towers, possibly as many as 174 million from collisions with power lines, and between 98 million and 980 million may die from striking buildings and windows (Erickson et al 20010). It is therefore important to minimize where possible the potential mortality associated with structure.

[201] The purpose of the July 2009 Preliminary Bird Migration Radar Study was to determine the number of birds flying in "risk zones" defined by the areas that would be occupied by two proposed bridge options – a "cable-stayed" and a "suspension" bridge – and to describe the flight patterns of the birds. The study stated that based upon its data, tens of thousands of migratory birds could be threatened by a new bridge:

> 9.0 DISCUSSION
> 9.1 Proportion of Birds Flying in Risk Zones
> The radar data provided the flight altitudes of nocturnal migrants, which were subsequently groups into 9 altitude bands corresponding to different vertical positions in relation to the proposed structures and the existing Ambassador Bridge. The Ambassador Bridge occupies the lowest three altitude bands, reaching a height of 111 m (to the top of the tower). The Ambassador Bridge would therefore present an obstacle to 26% (13, 606) of the targets recorded by the

> vertical radar. The Suspension Bridge design option occupies the lowest 4 altitude bands, reaching a height of 138 m. It would present an obstacle to 33% (17, 180) of the targets recorded by the vertical radar. The Cable Stayed Bridge design option would be nearly twice the height of the Suspension option reaching 250 m. This option would present an obstacle to 68% (35, 718) of the targets recorded by the vertical radar.

[202] The study concluded that both bridge design options pose risks to migratory birds, although the Suspension design would be less damaging:

> Based on the results of this study, a Cable-Stayed design option would pose a risk to roughly twice as many migrants as the Suspension design option and could pose a significant barrier to migration along the Detroit River since it "occupies" a substantial portion of the altitude range at which most migrants were flying. The Suspension Bridge design option has a lower profile and would pose less risk to migrants. Both bridge designs would present a risk to thousands of migrating birds each season, but available evidence suggests that only a small percentage would strike the structure.

[203] The July 2009 Preliminary Bird Migration Radar Study cautioned, however, that its conclusion was limited because of the limited period during which the study was conducted:

> These conclusions are based on a radar survey conducted over a one-month period during the latter part of the 2009 spring migration. As a result, these conclusions are considered preliminary. A second radar survey is proposed to be conducted from 1 September to 15 October 2009 to observe the fall migration. The results of the fall radar survey will be compared to the results of the spring radar study to identify inconsistencies or exceptions to these preliminary results. This report will be updated in fall 2009 to incorporate the results of the fall migration radar survey, to identify similarities and differences between the spring and fall migrations, and to determine if the preliminary conclusions drawn here remain valid.

[204] Although its purpose was to identify birds that would be affected by any new bridge, the July 2009 Preliminary Bird Migration Radar Study references mitigation options to prevent collisions of birds with any bridge structure ultimately chosen:

> 10.0 CONCLUSIONS
> 10.1 Mitigation
> Studies have shown that the type of lighting used on communication towers has affected the mortality rates of night-migrating birds. It is believed that birds can become more disoriented when subject to red lights due to the spectral sensitivity of the avian eye (Gauthreaux and Belser 2006). At least at times, migrating birds obtain compass information via magnetoreception, and this magnetoreception may be influenced by certain wavelengths of light (Gauthreaux and Belser 2006).
>
> A number of studies have shown that many more birds will congregate at towers that use red strobe lights and steady-burning red lights than white strobe lights (Gehring et al. 2009; Manvill 2005; Gauthreau and Belser 2006; Ogden 1996). To reduce the number of collisions of migrating birds with the Detroit River Crossing Bridge, white strobe lighting would be preferable. One source has suggested that for bridge pilot warning/obstruction lighting, low intensity blue lights may also be used (Manville 2005). For bridge suspension cables and bridge deck lighting, blue LED low energy consumption and directional lighting could be used (Manville 2005). In addition, recommendations have been made that flood-lighting that points upwards from the ground to illuminate bridges should not be used. If this form of lighting must be implemented, then a protocol must be initiated to ensure that the lighting can be turned off during migration seasons (Gauthreaux and Belser 2006).
>
> To minimize any potential mass mortality during migration, measures must be undertaken to ensure that proper lighting is used on the bridge. If possible, white strobe lighting should be implemented rather than steady burning or red strobe lights. Flood lighting directed towards the sky should not be used, at least during migration periods. If flood lighting must be used, light shielding should be implemented and a protocol should dictate that during peak migration times, or times of poor weather conditions, flood lighting should be turned off.

[205] The Screening Report adopts the general mitigation strategies referenced in the July 2009 Preliminary Bird Migration Radar Study, and states in section 7.8 that mitigation strategies will be developed based on additional studies:

> Potential collision effects on migratory birds from the presence of the bridge will be mitigated through the use of appropriate bridge lighting, such as the use of low-intensity, lower-wavelength blue, turquoise or green lights, and the avoidance of red and yellow lights to the extent possible. Given that the potential for effects on migratory birds would be linked to the design and height of the bridge, and that the bridge design has not yet been selected, specific mitigation measures will be incorporated during the final bridge design process. Additional studies will be undertaken in consultation with appropriate regulatory agencies.
>
> … It is concluded that, with the implementation of mitigation, significant adverse residual effects are not likely to occur. A follow-up program will also be developed to ensure that the effects are as predicted and that the mitigation is effective.

[206] The first additional study undertaken was the follow-up Bird Migration Radar Study that is recommended in the July 2009 Bird Migration Radar Study. The 2010 follow-up radar study was released in March of 2010 (the March 2010 Follow-Up Radar Study). The March 2010 Follow-Up Radar Study modified some of the findings of the July 2009 report, finding that more birds are involved in the migrations than found in the initial study.

[207] The applicant submits, first, that the Responsible Authorities failed to conduct the investigations that they committed to conducting in the Federal Environmental Assessment Guidelines. In particular, the applicant submits that the Responsible Authorities failed to adequately

1. describe the migratory birds frequenting the project area;

2. identify predicted effects of the project on migratory birds during construction and operations; and

3. describe proposed mitigation measures, especially "specific mitigation measures to mitigate bird collisions with the proposed bridge structure" as required in the Environmental Assessment Guidelines.

[208] Second, but closely related, the applicant submits that the Responsible Authorities had a legal duty, pursuant to the interpretation of the meaning of "technically and economically feasible mitigation measures" to identify specific mitigation measures prior to issuing the decision. The applicant submits that the Responsible Authorities erred by relying upon unspecified future actions as potential "mitigation measures".

[209] Finally, the applicant submits that the Responsible Authorities breached the precautionary principle by relying upon the promise of future studies regarding migratory birds in determining that there were no significant adverse environmental effects. If the Screening Report was unable to identify the adverse effects that the new bridge project would have on migratory birds, then it could not be said that the effects would not be significant. Moreover, even if that were sufficient, there is no evidence that any follow-up programs have been undertaken.

[210] The respondents submit that it was reasonable for the Responsible Authorities to conclude that there would be no significant adverse environmental effects caused as a result of collisions of migratory birds with the bridge crossing.

[211] At the time of the decision, the Responsible Authorities had the evidence regarding the potential effects of any bridge – both suspension and cable-stayed – upon migratory birds referred to above from the July 2009 Preliminary Bird Migration Radar Study.

[212] Section 20 of the Act required the Responsible Authorities to be satisfied that there would be no significant adverse environmental effects caused by the new bridge project, taking into account known technically and economically feasible mitigation measures.

[213] In this case, the Court does not agree with the applicant's contention that the Responsible Authorities approved the project on the basis of mitigation measures that have yet to be developed. To the contrary, the Court finds that the decision in fact was that the general mitigation strategies stated in the Screening Report (use of appropriate type and colour bridge lighting) satisfied the decision-makers of the absence of any significant adverse environmental effect. While the Screening Report undertakes to develop additional mitigation measures once a final bridge design* is chosen, the July 2009 Preliminary Bird Migration Radar Study makes clear that the predominant means of mitigating risks posed to migratory birds by the bridge will be by using appropriate lighting, and that risks posed to migratory birds by the proposed bridge designs will be effectively mitigated. (* The Partnership is planning a "private-public" entity to design, build and operate the new bridge.)

[214] The Court therefore finds that the Responsible Authorities properly carried out both their duties under the Act and the tasks that they had set out in the Environmental Assessment Guidelines. The jurisprudence establishes that a Screening Report and decisions under CEAA can

describe general mitigation measures which will be detailed and resolved in the future when the exact project design is determined. This is consistent with the preliminary and predictive nature of an environmental assessment: see *Pembina*, above at paragraphs 23 and 24.

[215] In this case, following the decision, the Responsible Authorities have to decide upon the design of the bridge. At this point, the studies have identified that the mitigation measures for migratory birds will be lights and will, as much as possible, be of three specific colours: low-intensity, lower-wavelength blue, turquoise or green lights. The Screening Report has also specified that two specific colours (red and yellow lights) will be avoided. The Court asked counsel for the applicant how mitigation measures could be made more specific beyond identifying the specific location and colour of each light. Of course, this cannot be done until the design is absolutely finalized. Accordingly, the mitigation measures cannot be more specific at this time.

[216] The Court finds that it was reasonable for the Responsible Authorities to conclude that they had sufficient evidence before them to determine that the risks posed by any bridge design would not constitute a "significant adverse environmental effect."

[217] With regard to follow-up programs, the Court finds that it was also reasonable for the Responsible Authorities to formulate follow-up programs after the bridge design is determined and the location and colour of each light identified.

Sierra Club Issue No. 5: Are the Responsible Authorities required to further assess the new bridge project since its footprint was expanded?

[218] The applicant submits that the DRIC Project as assessed has changed in two ways from the DRIC Project as it stood when it was assessed:

1. An additional 100m buffer has been added between the highway and homes on uncovered portions of the route; and

2. The funding agreement between Transport Canada and the MTO, pursuant to which MTO is to purchase the land required for the additional buffer zone, has yet to be concluded but may trigger section 5 of the Act.

Counsel for Sierra Club did not pursue this argument at the hearing but said she would rely upon her written argument in the factum.

[219] The applicant submits that the additional 100 metre buffer zone triggers section 24 of the Act, which states as follows:

> **24.** (1) Where a proponent proposes to carry out, in whole or in part, a project for which an environmental assessment was previously conducted and
> (*a*) the project did not proceed after the assessment was completed,
> (*b*) in the case of a project that is in relation to a physical work, the proponent proposes an undertaking in relation to that work different from that proposed when the assessment was conducted,
> (*c*) the manner in which the project is to be carried out has subsequently changed, or
> (*d*) the renewal of a licence, permit, approval or other action under a prescribed provision is sought,
> the responsible authority shall use that assessment and the report thereon to whatever extent is appropriate for the purpose of complying with section 18 or 21.
>
> (2) Where a responsible authority uses an environmental assessment and the report thereon pursuant to subsection (1), the responsible authority shall ensure that any adjustments are made to the report that are necessary to take into account any significant changes in the environment and in the circumstances of the project and any significant new information relating to the environmental effects of the project.

That is, while the Responsible Authorities are entitled to use the initial Screening Report to the extent that it is relevant, they must make the appropriate adjustments.

[220] With respect to funding the new bridge project, the applicant submits that once the funding agreement is concluded, that may trigger section 5(1) of the Act, which requires an assessment when a Responsible Authority is providing funding to a project.

[221] The respondents submit that the additional 100 metre buffer zone is an entirely separate project undertaken by the provincial government and is outside the scope of the decision. Moreover, it post-dates the decision under review. The respondents submit that the lands described will only be acquired by Ontario from property owners not wishing to remain in the vicinity of the new bridge project. These lands are not a required part of the new bridge project.

[222] The Court agrees with the respondents. The land being purchased will be from property owners who do not wish to be within 100 metres of the new parkway. The land is located entirely within provincial jurisdiction, and funding is being provided by the Province pursuant to an agreement with the City of Windsor. The additional 100 metres of space could not have been considered as part of a cumulative effects analysis since the issue arose after the decision. Accordingly, there is no requirement under CEAA to assess this land purchased by Ontario for a buffer zone.

[223] With regard to the possible trigger under section 5, the Court cannot entertain this question in the abstract. Should a funding agreement triggering the Act be concluded, that issue ought be canvassed at that time.

LEGAL COSTS

[224] Rule 400(1) of the *Federal Courts Rules* provides that the Court has full discretionary power over the amount of costs, the allocation of costs, and the determination of by whom the costs are to be paid.

[225] These two applications started at the same time and in conjunction with each other. The Sierra application supported and cross-referenced the CTC application. Both applications were set down to be heard together over a four day period.

[226] The Court invites submissions not exceeding four pages on or before May 16, 2011, from each party with respect to costs. Each party can then file a reply within three days.

JUDGMENT

THIS COURT'S JUDGMENT is that:

These applications for judicial review are dismissed with costs to be determined after receiving submissions from the parties.

"Michael A. Kelen"
Judge

APPENDIX 1: RELEVANT LEGISLATION

***Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (the Act)**

[227] Section 4 of the Act states the purposes of the Act and specifically incorporates the precautionary principle into Canadian law:

4. (1) The purposes of this Act are (a) to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects; (b) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy; (b.1) to ensure that responsible authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process; (b.2) to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessment processes for projects; (b.3) to promote communication and cooperation between responsible authorities and Aboriginal peoples with respect to environmental	4. (1) La présente loi a pour objet : a) de veiller à ce que les projets soient étudiés avec soin et prudence avant que les autorités fédérales prennent des mesures à leur égard, afin qu'ils n'entraînent pas d'effets environnementaux négatifs importants; b) d'inciter ces autorités à favoriser un développement durable propice à la salubrité de l'environnement et à la santé de l'économie; b.1) de faire en sorte que les autorités responsables s'acquittent de leurs obligations afin d'éviter tout double emploi dans le processus d'évaluation environnementale; b.2) de promouvoir la collaboration des gouvernements fédéral et provinciaux, et la coordination de leurs activités, dans le cadre du processus d'évaluation environnementale de projets; b.3) de promouvoir la communication et la collaboration entre les autorités responsables et les peuples autochtones en matière d'évaluation environnementale; c) de faire en sorte que les éventuels effets

assessment;
(c) to ensure that projects that are to be carried out in Canada or on federal lands do not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out; and
(d) to ensure that there be opportunities for timely and meaningful public participation throughout the environmental assessment process.

environnementaux négatifs importants des projets devant être réalisés dans les limites du Canada ou du territoire domanial ne débordent pas ces limites;
d) de veiller à ce que le public ait la possibilité de participer de façon significative et en temps opportun au processus de l'évaluation environnementale.

(2) In the administration of this Act, the Government of Canada, the Minister, the Agency and all bodies subject to the provisions of this Act, including federal authorities and responsible authorities, shall exercise their powers in a manner that protects the environment and human health and applies the precautionary principle.

(2) Pour l'application de la présente loi, le gouvernement du Canada, le ministre, l'Agence et les organismes assujettis aux dispositions de celle-ci, y compris les autorités fédérales et les autorités responsables, doivent exercer leurs pouvoirs de manière à protéger l'environnement et la santé humaine et à appliquer le principe de la prudence.

[228] Section 5(1) of the Act describes the situations that trigger a requirement for an environmental assessment:

5. (1) An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority
(a) is the proponent of the project and does any act or

5. (1) L'évaluation environnementale d'un projet est effectuée avant l'exercice d'une des attributions suivantes :
a) une autorité fédérale en est le promoteur et le met en oeuvre en tout ou en partie;
b) une autorité fédérale accorde à un promoteur en vue de l'aider à mettre en oeuvre le

thing that commits the federal authority to carrying out the project in whole or in part;
(b) makes or authorizes payments or provides a guarantee for a loan or any other form of financial assistance to the proponent for the purpose of enabling the project to be carried out in whole or in part, except where the financial assistance is in the form of any reduction, avoidance, deferral, removal, refund, remission or other form of relief from the payment of any tax, duty or impost imposed under any Act of Parliament, unless that financial assistance is provided for the purpose of enabling an individual project specifically named in the Act, regulation or order that provides the relief to be carried out;
(c) has the administration of federal lands and sells, leases or otherwise disposes of those lands or any interests in those lands, or transfers the administration and control of those lands or interests to Her Majesty in right of a province, for the purpose of enabling the project to be carried out in whole or in part; or
(d) under a provision prescribed pursuant to paragraph 59(f), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.

projet en tout ou en partie un financement, une garantie d'emprunt ou toute autre aide financière, sauf si l'aide financière est accordée sous forme d'allègement — notamment réduction, évitement, report, remboursement, annulation ou remise — d'une taxe ou d'un impôt qui est prévu sous le régime d'une loi fédérale, à moins que cette aide soit accordée en vue de permettre la mise en oeuvre d'un projet particulier spécifié nommément dans la loi, le règlement ou le décret prévoyant l'allègement;
c) une autorité fédérale administre le territoire domanial et en autorise la cession, notamment par vente ou cession à bail, ou celle de tout droit foncier relatif à celui-ci ou en transfère à Sa Majesté du chef d'une province l'administration et le contrôle, en vue de la mise en oeuvre du projet en tout ou en partie;
d) une autorité fédérale, aux termes d'une disposition prévue par règlement pris en vertu de l'alinéa 59f), délivre un permis ou une licence, donne toute autorisation ou prend toute mesure en vue de permettre la mise en oeuvre du projet en tout ou en partie.

[229] Section 11 of the Act provides that a responsible authority must ensure that an environmental assessment is conducted as early as practicable during project planning, and cannot exercise any function mentioned in section 5 until a "course of action" is taken under sections 20(1)(a) or 37(1)(a):

11. (1) Where an environmental assessment of a project is required, the federal authority referred to in section 5 in relation to the project shall ensure that the environmental assessment is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made, and shall be referred to in this Act as the responsible authority in relation to the project.	11. (1) Dans le cas où l'évaluation environnementale d'un projet est obligatoire, l'autorité fédérale visée à l'article 5 veille à ce que l'évaluation environnementale soit effectuée le plus tôt possible au stade de la planification du projet, avant la prise d'une décision irrévocable, et est appelée, dans la présente loi, l'autorité responsable de ce projet.
(2) A responsible authority shall not exercise any power or perform any duty or function referred to in section 5 in relation to a project unless it takes a course of action pursuant to paragraph 20(1)(a) or 37(1)(a).	(2) L'autorité responsable d'un projet ne peut exercer ses attributions à l'égard de celui-ci que si elle prend une décision aux termes des alinéas 20(1)a) ou 37(1)a).

[230] Section 16 of the Act states the factors that must be considered in any screening under the Act:

16. (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors: (a) the environmental effects of the project, including the	16. (1) L'examen préalable, l'étude approfondie, la médiation ou l'examen par une commission d'un projet portent notamment sur les éléments suivants : a) les effets environnementaux du projet, y compris ceux causés par les accidents ou

environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;

(b) the significance of the effects referred to in paragraph (a);

(c) comments from the public that are received in accordance with this Act and the regulations;

(d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and

(e) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.

(2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of

défaillances pouvant en résulter, et les effets cumulatifs que sa réalisation, combinée à l'existence d'autres ouvrages ou à la réalisation d'autres projets ou activités, est susceptible de causer à l'environnement;
b) l'importance des effets visés à l'alinéa a);
c) les observations du public à cet égard, reçues conformément à la présente loi et aux règlements;
d) les mesures d'atténuation réalisables, sur les plans technique et économique, des effets environnementaux importants du projet;
e) tout autre élément utile à l'examen préalable, à l'étude approfondie, à la médiation ou à l'examen par une commission, notamment la nécessité du projet et ses solutions de rechange, — dont l'autorité responsable ou, sauf dans le cas d'un examen préalable, le ministre, après consultation de celle-ci, peut exiger la prise en compte.

(2) L'étude approfondie d'un projet et l'évaluation environnementale qui fait l'objet d'une médiation ou d'un examen par une commission portent également sur les éléments suivants :

a) les raisons d'être du projet;
b) les solutions de rechange réalisables sur les plans technique et économique, et leurs effets environnementaux;
c) la nécessité d'un

the following factors:

(a) the purpose of the project;

(b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;

(c) the need for, and the requirements of, any follow-up program in respect of the project; and

(d) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

(3) The scope of the factors to be taken into consideration pursuant to paragraphs (1)(a), (b) and (d) and (2)(b), (c) and (d) shall be determined

(a) by the responsible authority; or

(b) where a project is referred to a mediator or a review panel, by the Minister, after consulting the responsible authority, when fixing the terms of reference of the mediation or review panel.

(4) An environmental assessment of a project is not required to include a consideration of the environmental effects that could result from carrying out

programme de suivi du projet, ainsi que ses modalités;
d) la capacité des ressources renouvelables, risquant d'être touchées de façon importante par le projet, de répondre aux besoins du présent et à ceux des générations futures.

(3) L'évaluation de la portée des éléments visés aux alinéas (1)a), b) et d) et (2)b), c) et d) incombe :

a) à l'autorité responsable;
b) au ministre, après consultation de l'autorité responsable, lors de la détermination du mandat du médiateur ou de la commission d'examen.

(4) L'évaluation environnementale d'un projet n'a pas à porter sur les effets environnementaux que sa réalisation peut entraîner en réaction à des situations de crise nationale pour lesquelles des mesures d'intervention sont prises aux termes de la *Loi sur les mesures d'urgence*.

the project in response to a national emergency for which special temporary measures are taken under the *Emergencies Act*.

[231] Section 17 of the Act provides that a responsible authority may delegate part of the screening for a project, but may not render a decision until satisfied that the delegated task has been carried out:

17. (1) A responsible authority may delegate to any person, body or jurisdiction within the meaning of subsection 12(5) any part of the screening or comprehensive study of a project or the preparation of the screening report or comprehensive study report, and may delegate any part of the design and implementation of a follow-up program, but shall not delegate the duty to take a course of action pursuant to subsection 20(1) or 37(1).	17. (1) L'autorité responsable d'un projet peut déléguer à un organisme, une personne ou une instance, au sens du paragraphe 12(5), l'exécution de l'examen préalable ou de l'étude approfondie, ainsi que les rapports correspondants, et la conception et la mise en oeuvre d'un programme de suivi, à l'exclusion de toute prise de décision aux termes du paragraphe 20(1) ou 37(1).
(2) For greater certainty, a responsible authority shall not take a course of action pursuant to subsection 20(1) or 37(1) unless it is satisfied that any duty or function delegated pursuant to subsection (1) has been carried out in accordance with this Act and the regulations.	(2) Il est entendu que l'autorité responsable qui a délégué l'exécution de l'examen ou de l'étude ainsi que l'établissement des rapports en vertu du paragraphe (1) ne peut prendre une décision aux termes du paragraphe 20(1) ou 37(1) que si elle est convaincue que les attributions déléguées ont été exercées conformément à la présente loi et à ses règlements.

[232] Section 20 of the Act determines the actions to be undertaken by a responsible authority following the completing of a Screening Report:

20. (1) The responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the screening report and any comments filed pursuant to subsection 18(3):	20. (1) L'autorité responsable prend l'une des mesures suivantes, après avoir pris en compte le rapport d'examen préalable et les observations reçues aux termes du paragraphe 18(3) :
(a) subject to subparagraph (c)(iii), where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is not likely to cause significant adverse environmental effects, the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part;	a) sous réserve du sous-alinéa c)(iii), si la réalisation du projet n'est pas susceptible, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, d'entraîner des effets environnementaux négatifs importants, exercer ses attributions afin de permettre la mise en œuvre totale ou partielle du projet;
(b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part; or	b) si, compte tenu de l'application des mesures d'atténuation qu'elle estime indiquées, la réalisation du projet est susceptible d'entraîner des effets environnementaux négatifs importants qui ne peuvent être justifiés dans les circonstances, ne pas exercer les attributions qui lui sont conférées sous le régime d'une loi fédérale et qui pourraient lui permettre la mise en oeuvre du projet en tout ou en partie;
(c) where	c) s'adresser au ministre pour une médiation ou un examen par une commission prévu à l'article 29 :
	(i) s'il n'est pas clair, compte

(i) it is uncertain whether the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects,

(ii) the project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, is likely to cause significant adverse environmental effects and paragraph (b) does not apply, or

(iii) public concerns warrant a reference to a mediator or a review panel,

the responsible authority shall refer the project to the Minister for a referral to a mediator or a review panel in accordance with section 29.

(1.1) Mitigation measures that may be taken into account under subsection (1) by a responsible authority are not limited to measures within the legislative authority of Parliament and include

(a) any mitigation measures whose implementation the responsible authority can ensure; and

(b) any other mitigation measures that it is satisfied will be implemented by another person or body.

tenu de l'application des mesures d'atténuation qu'elle estime indiquées, que la réalisation du projet soit susceptible d'entraîner des effets environnementaux négatifs importants,

(ii) si la réalisation du projet, compte tenu de l'application de mesures d'atténuation qu'elle estime indiquées, est susceptible d'entraîner des effets environnementaux négatifs importants et si l'alinéa b) ne s'applique pas,

(iii) si les préoccupations du public le justifient.

(1.1) Les mesures d'atténuation que l'autorité responsable peut prendre en compte dans le cadre du paragraphe (1) ne se limitent pas à celles qui relèvent de la compétence législative du Parlement; elles comprennent :

a) les mesures d'atténuation dont elle peut assurer l'application;

b) toute autre mesure d'atténuation dont elle est convaincue qu'elle sera appliquée par une autre personne ou un autre organisme.

(2) Si elle prend une décision dans le cadre de l'alinéa (1)a), l'autorité responsable veille à l'application des mesures

d'atténuation qu'elle a prises en compte et qui sont visées à l'alinéa (1.1)a) de la façon qu'elle estime nécessaire, même si aucune autre loi fédérale ne lui confère de tels pouvoirs d'application.

(2) When a responsible authority takes a course of action referred to in paragraph (1)(a), it shall, with respect to any mitigation measures it has taken into account and that are described in paragraph (1.1)(a), ensure their implementation in any manner that it considers necessary and, in doing so, it is not limited to its duties or powers under any other Act of Parliament.

(2.1) Il incombe à l'autorité fédérale qui convient avec l'autorité responsable de mesures d'atténuation d'appuyer celle-ci, sur demande, dans l'application de ces mesures.

(2.1) A federal authority shall provide any assistance requested by a responsible authority in ensuring the implementation of a mitigation measure on which the federal authority and the responsible authority have agreed.

(3) L'autorité responsable qui prend la décision visée à l'alinéa (1)b) à l'égard d'un projet est tenue de publier un avis de cette décision dans le registre, et aucune attribution conférée sous le régime de toute autre loi fédérale ou de ses règlements ne peut être exercée de façon à permettre la mise en œuvre, en tout ou en partie, du projet.

(3) Where the responsible authority takes a course of action pursuant to paragraph (1)(b) in relation to a project, the responsible authority shall publish a notice of that course of action in the Registry and, notwithstanding any other Act of Parliament, no power, duty or function conferred by or under that Act or any regulation made under it shall be exercised or performed that would permit that project to be carried out in whole or in part.

(4) L'autorité responsable ne peut prendre une décision dans le cadre du paragraphe (1) avant le quinzième jour suivant le versement au site Internet des documents suivants :

a) l'avis du début de l'évaluation environnementale;

b) la description de la portée du projet;

(4) A responsible authority

shall not take any course of action under subsection (1) before the 15th day after the inclusion on the Internet site of

(a) notice of the commencement of the environmental assessment;

(b) a description of the scope of the project; and

(c) where the responsible authority, in accordance with subsection 18(3), gives the public an opportunity to participate in the screening of a project, a description of the factors to be taken into consideration in the environmental assessment and of the scope of those factors or an indication of how such a description may be obtained.

c) dans le cas où l'autorité responsable donne, au titre du paragraphe 18(3), la possibilité au public de participer à l'examen préalable, la description des éléments à prendre en compte dans le cadre de l'évaluation environnementale et de la portée de ceux-ci ou une indication de la façon d'obtenir copie de cette description.

[233] Section 24 of the Act describes when changes to a project will trigger the need for a new environmental assessment:

24. (1) Where a proponent proposes to carry out, in whole or in part, a project for which an environmental assessment was previously conducted and
(a) the project did not proceed after the assessment was completed,
(b) in the case of a project that is in relation to a physical work, the proponent proposes an undertaking in relation to that work different from that proposed when the assessment was conducted,
(c) the manner in which the

24. (1) Si un promoteur se propose de mettre en oeuvre, en tout ou en partie, un projet ayant déjà fait l'objet d'une évaluation environnementale, l'autorité responsable doit utiliser l'évaluation et le rapport correspondant dans la mesure appropriée pour l'application des articles 18 ou 21 dans chacun des cas suivants :
a) le projet n'a pas été mis en oeuvre après l'achèvement de l'évaluation;
b) le projet est lié à un ouvrage

project is to be carried out has subsequently changed, or
(d) the renewal of a licence, permit, approval or other action under a prescribed provision is sought,
the responsible authority shall use that assessment and the report thereon to whatever extent is appropriate for the purpose of complying with section 18 or 21.

(2) Where a responsible authority uses an environmental assessment and the report thereon pursuant to subsection (1), the responsible authority shall ensure that any adjustments are made to the report that are necessary to take into account any significant changes in the environment and in the circumstances of the project and any significant new information relating to the environmental effects of the project.

à l'égard duquel le promoteur propose une réalisation différente de celle qui était proposée au moment de l'évaluation;
c) les modalités de mise en oeuvre du projet ont par la suite été modifiées;
d) il est demandé qu'un permis, une licence ou une autorisation soit renouvelé, ou qu'une autre mesure prévue par disposition réglementaire soit prise.

(2) Dans les cas visés au paragraphe (1), l'autorité responsable veille à ce que soient apportées au rapport les adaptations nécessaires à la prise en compte des changements importants de circonstances survenus depuis l'évaluation et de tous renseignements importants relatifs aux effets environnementaux du projet.

The Ontario *Endangered Species Act*, 2007, S.O. 2007, C. 6

[234] Section 9(1) of the Ontario Endangered Species Act prohibits causing harm to protected species:

9.(1) No person shall,

(a) kill, harm, harass, capture or take a living member of a species that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species;

(b) possess, transport, collect,

9.(1) Nul ne doit, selon le cas :

a) tuer, harceler, capturer ou prendre un membre vivant d'une espèce qui est inscrite sur la Liste des espèces en péril en Ontario comme espèce disparue de l'Ontario, en voie de disparition ou menacée, ni

buy, sell, lease, trade or offer to buy, sell, lease or trade,

(i) a living or dead member of a species that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species,

(ii) any part of a living or dead member of a species referred to in subclause (i),

(iii) anything derived from a living or dead member of a species referred to in subclause (i); or

(c) sell, lease, trade or offer to sell, lease or trade anything that the person represents to be a thing described in subclause (b) (i), (ii) or (iii).

lui nuire;

b) posséder, transporter, collectionner, acheter, vendre, louer ou échanger, ou offrir de vendre, d'acheter, de louer ou d'échanger, selon le cas :

(i) un membre, vivant ou mort, d'une espèce qui est inscrite sur la Liste des espèces en péril en Ontario comme espèce disparue de l'Ontario, en voie de disparition ou menacée,

(ii) toute partie d'un membre, vivant ou mort, d'une espèce visée au sous-alinéa (i),

(iii) quoi que ce soit qui est dérivé d'un membre, vivant ou mort, d'une espèce visée au sous-alinéa (i);

c) vendre, louer ou échanger, ou offrir de vendre, de louer ou d'échanger quoi que ce soit que la personne présente comme une chose mentionnée au sous-alinéa b) (i), (ii) ou (iii).

[235] Section 17 of the *Ontario Endangered Species Act* permits the Ontario Minister of Natural Resources to issue a permit to engage in an otherwise prohibited activity in certain circumstances:

17. (1) 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 an activity specified in the permit that

17. (1) Le ministre peut délivrer à une personne un permis qui, à l'égard d'une espèce qui y est précisée et qui est inscrite sur la Liste des espèces en péril en Ontario comme espèce disparue de l'Ontario, en voie de disparition ou menacée, l'autorise à exercer une

would otherwise be prohibited by section 9 or 10. 2007, c. 6, s. 17 (1).

(2) The Minister may issue a permit under this section only if,

(a) the Minister is of the opinion that the activity authorized by the permit is necessary for the protection of human health or safety;

(b) the Minister is of the opinion that the main purpose of the activity authorized by the permit is to assist, and that the activity will assist, in the protection or recovery of the species specified in the permit;

(c) 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 an overall benefit to the species will be achieved within a reasonable time through requirements imposed by conditions of the permit,

(ii) 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, and

(iii) the Minister is of the opinion that reasonable steps

activité qui y est précisée et qu'interdirait par ailleurs l'article 9 ou 10. 2007, chap. 6, par. 17 (1).

(2) Le ministre ne peut délivrer un permis en vertu du présent article que si, selon le cas :

a) il est d'avis que l'activité autorisée par le permis est nécessaire pour protéger la santé ou la sécurité des êtres humains;

b) il est d'avis que l'objet principal de l'activité autorisée par le permis est d'aider à la protection ou au rétablissement de l'espèce précisée dans celui-ci, et qu'elle y aidera;

c) il est d'avis que l'objet principal de l'activité autorisée par le permis n'est pas d'aider à la protection ou au rétablissement de l'espèce précisée dans celui-ci, mais que, selon lui, à la fois :

(i) les exigences qu'imposent les conditions du permis procureront dans un délai raisonnable un avantage plus que compensatoire pour l'espèce,

(ii) des solutions de rechange raisonnables ont été envisagées, y compris celles qui ne nuiraient pas à l'espèce, et la meilleure d'entre elles a été retenue,

(iii) les conditions du permis exigent la prise de mesures raisonnables pour réduire au

to minimize adverse effects on individual members of the species are required by conditions of the permit; or

(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

minimum les conséquences préjudiciables pour des membres de l'espèce;

d) il est d'avis que l'objet principal de l'activité autorisée par le permis n'est pas d'aider à la protection ou au rétablissement de l'espèce précisée dans celui-ci, mais les conditions suivantes sont réunies :

(i) il est d'avis que l'activité procurera un important avantage social ou économique à l'Ontario,

(ii) il a consulté une personne qu'il tient pour un expert sur les conséquences éventuelles de l'activité pour l'espèce et qu'il considère comme étant indépendante vis-à-vis de la personne que le permis autoriserait à exercer l'activité,

(iii) la personne qu'il a consultée en application du sous-alinéa (ii) lui a présenté un rapport écrit sur les conséquences éventuelles de l'activité pour l'espèce, y compris son avis sur la question de savoir si l'activité mettra en danger la survie ou le rétablissement de l'espèce en Ontario,

(iv) il est d'avis que l'activité ne mettra pas en danger la survie ou le rétablissement de l'espèce en Ontario,

(v) il est d'avis que des solutions de rechange raisonnables ont été envisagées, y compris celles

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.

qui ne nuiraient pas à l'espèce, et que la meilleure d'entre elles a été retenue,

(vi) il est d'avis que les conditions du permis exigent la prise de mesures raisonnables pour réduire au minimum les conséquences préjudiciables pour des membres de l'espèce,

(vii) le lieutenant-gouverneur en conseil a approuvé la délivrance du permis.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-2189-09 and T-2192-09
STYLE OF CAUSE:	T-2189-09, *The Canadian Transit Company v. Minister of Transport et al.* T-2192-09, *Sierra Club of Canada v. The Attorney General of Canada et al.*
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