File no. PL190022

LOCAL PLANNING APPEAL TRIBUNAL

B E T W E E N :

NICHOLYN FARMS INC., EDWARD KRAJCIR, and FRIENDS OF SIMCOE FORESTS INC.

Appellants

and

MINISTRY OF MUNICIPAL AFFAIRS AND HOUSING and THE COUNTY OF SIMCOE

Respondents

CASE SYNOPSIS OF FRIENDS OF SIMCOE FORESTS INC.

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CASE SYNOPSIS OF FRIENDS OF SIMCOE FORESTS INC.

OVERVIEW

1. The Friends of Simcoe Forests Inc. ("FSF") have appealed the MMAH's decision to approve the County of Simcoe's proposal to establish a large industrial site in the middle of the Freele County Forest. The forest is treasured by the community and falls within protected natural heritage areas identified in the *Growth Plan for the Greater Golden Horseshoe* ("*Growth Plan*") and is "significant woodlands" and "significant wildlife habitat" under the *Provincial Policy Statement, 2014* ("*PPS*").
2. At its core, Ontario's land use planning system is designed to ensure that the right development goes in the right place. Natural heritage protections in the *PPS*, *Growth Plan*, County of Simcoe Official Plan, and Township of Springwater Official Plan are all designed to protect natural heritage features for the long term. The County's proposal to establish the Environmental Resource Recovery Centre ("ERRC"), which will include a Waste Management Facility, an Organics

Processing Facility, a Materials Recovery Facility, a storm water management facility, a waste vehicle servicing facility, and an administrative facility, is inconsistent with those natural heritage protections. The interior of the highly functioning Freele County Forest is not the right place to site an intrusive industrial development.

3. The *Growth Plan* establishes strict protections for development outside of settlement areas. The Freele County Forest is not located in a settlement area, and the exception requiring authorization under the *Environmental Assessment Act* ("*EA Act*") does not apply since this project was exempted from the environmental assessment process.
4. The County has also not demonstrated that the proposed waste processing complex will result in "no negative impacts" on significant woodlands and significant wildlife habitat. Its Environmental Impact Study and Amended Environmental Impact Study undervalue the natural heritage and ecological functions of the Freele County Forest, and accordingly do not properly characterize the negative impacts of the development on the forest or consider sufficiently targeted and detailed mitigation measures.
5. MMAH's decision to approve the County's Official Plan Amendment 2 is not consistent with the *PPS*, fails to conform or conflicts with the *Growth Plan*, and fails to conform with the Official Plans of the County of Simcoe and the Township of Springwater. Accordingly, the Local Planning Appeal Tribunal should allow the appeal and return the matter to the County of Simcoe for a new decision.

PART I – STATEMENT OF FACTS

A. THE ENVIRONMENTAL RESOURCE RECOVERY CENTRE

6. The County's proposed ERRC is a large industrial development, including a Waste Management Facility, an Organics Processing Facility, a Materials Recovery Facility, a storm water management facility, a waste vehicle servicing facility, and an administrative building. The ERRC is proposed to be located at

2976 Horseshoe Valley Road West in the Freele County Forest in the Township of Springwater ("the subject property"). [1]

7. The subject property is owned by the County. The property is 84 hectares, all within the Freele County Forest, and is part of a larger contiguous woodland area. There are wetlands present on the northeast and southeast corners of the property.[2]

B. FRIENDS OF SIMCOE FORESTS INC.

8. FSF is an incorporated non-profit group.[3] It was established on June 9, 2016 with a mandate to protect and conserve the forests of Simcoe County and to preserve and extend parks and greenbelts.[4] FSF opposes the development of the ERRC in the Freele County Forest.[5]
9. FSF received the Canada 150 John Graves Simcoe Medal for Excellence for service and contributions to the community and Canada.[6]
10. FSF's executive consists of a president, a vice president, a secretary treasurer and a communications and outreach position.[7] It has 200 email subscribers and 780 social media followers.[8]
11. Mary Wagner is the president of FSF. She has lived at 2928 Horseshoe Valley Road West for nineteen years, and raised three children at the property. It is located deep in the forest and is within 300 metres of the proposed development.[9]

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[1] *Nicholyn Farms Inc., Edward Krajcir, and Friends of Simcoe Forests Inc. v Minister of Municipal Affairs and Housing, and County of Simcoe* [*Nicholyn Farms v MMAH*], Enhanced Municipal Record ("EMR"), Tab 8 Planning Report: County Adoption Report – 12 JUNE 2018, CCW 2018-320, *Request for Adoption - County of Simcoe Official Plan Amendment No. 2 for the Environmental Resource Recovery Centre (ERRC),* June 12, 2018 at 1.
[2] *Nicholyn Farms v MMAH,* Tab 5 of Appellant's Record of Friends of the Simcoe Forests Inc. [FSF Inc. Record]: Affidavit of Jennifer Lawrence to be affirmed March 27, 2019 at para 10 [Lawrence Affidavit]; EMR, Tab 2 Application: Copy of County Record, Studies, Siting Studies, *Part 2 – MMF – Long List Evaluation,* GHD at 17 [*Long List Evaluation]*.
[3] *Nicholyn Farms v MMAH,* FSF Inc. Record, Tab 4: Affidavit of Mary Teresa Wagner dated March 22, 2019, [Wagner Affidavit] and Exhibit A of Wagner Affidavit, *Articles of Incorporation.*
[4] Wagner Affidavit, *ibid* at para 10.
[5] Wagner Affidavit, *ibid* at para 15.
[6] Wagner Affidavit, *ibid* at para 13.
[7] Wagner Affidavit, *ibid* at para 12.
[8] Wagner Affidavit, *ibid* at para 11.
[9] Wagner Affidavit, *ibid* at para 1.

12. She is concerned about the safety of her family, animals, and livestock because there is only one access road to her property. ERRC facilities are prone to fires. Because of the proposed location of the ERRC in the interior of the forest, a fire at the facility could easily cause a forest fire.[10]
13. Ms. Wagner's family has a strong connection to the Freele County Forest. Her husband's family has owned their property for 52 years. Her husband and uncle used to hunt deer in the forest. Ms. Wagner uses the forest for recreational purposes nearly every day, either walking her dog or riding her horses on the logging roads and trails. Every week, Ms. Wagner watches for birds or signs of deer in the forest.[11]
14. It is important to Ms. Wagner that the Freele County Forest and wetlands are preserved for current and future generations. She hopes to take her three year old grandson this spring to see tadpoles and salamanders, which reside where the County is proposing to build an access road to its waste processing complex.[12]
15. Many residents of the community walk, hike and snowshoe in the Freele County Forest.[13]

C. THE COUNTY'S DECISION TO ESTABLISH THE ERRC WITHIN THE FREELE COUNTY FOREST

(a) The County's site selection was fundamentally flawed

16. Before filing its *Planning Act* application, the County administered a flawed site selection process.
17. The County considered 502 sites (302 County owned and 200 privately owned) for the ERRC. 82.5%, or 249 of the 302 County-owned sites, were County forests. Thus, almost half of the sites considered by the County for establishing the ERRC were County forests.[14]

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[10] Wagner Affidavit, *ibid* at para 9.
[11] Wagner Affidavit, *ibid* at para 4.
[12] Wagner Affidavit, *ibid* at para 6.
[13] Wagner Affidavit, *ibid* at para 6.0
[14] *Nicholyn Farms v MMAH*, FSF Inc. Record, Tab 5C: Planning Report by Jennifer Lawrence and Associates dated June 5, 2017 at 12 [Lawrence Report, June 5, 2017].

18. The siting process appeared to favour County-owned sites for economic reasons. In the Part 1 Siting Study, Conestoga-Rovers & Associates stressed the benefits of siting the ERRC on land the County already owned, for instance because it would avoid the costs of acquiring a property. Conestoga-Rovers & Associates also noted that it was "conceivable" no County-owned site would be available, so it expanded the search to privately owned properties despite their “unique challenges”.[15]
19. Against this backdrop, potential sites were evaluated against two sets of criteria: Screen 1 and Screen 2. The list of potential sites was first established under Screen 1. Despite assurances during the Screen 1 process that sites with significant natural heritage features and functions would be evaluated during Screen 2, the Screen 2 evaluation criteria did not analyze any natural heritage features or functions.[16]
20. Neither Screen 1 nor 2 properly considered natural heritage features. The site selection process resulted in the subject property, which is a forest located within key natural heritage features of the *Growth Plan*’s Natural Heritage System, and within significant woodland and significant wildlife habitat under the *PPS,* being selected for the ERRC.[17]

(b) The County’s planning approval process

21. The County of Simcoe commissioned several supporting studies for its *Planning Act* application, including a conceptual site plan, a planning justification report, a scoped Environmental Impact Study, an Agricultural Impact Assessment Report, and a Facility Characteristics Report, along with updates to several of these reports.[18]
22. With respect to natural heritage features, GHD Ltd. completed a Scoped Environmental Impact Study on November 17, 2016 (“EIS”). It updated its

[15] EMR, Tab 2 Application: Copy of County Record, Studies, Siting Studies, *Part 1 – MMF – Planning - Siting Methodology and Evaluation Criteria,* Conestoga-Rovers & Associates, s 4.3.1 at 33-34 [*Part 1 MMF Siting*].
[16] Lawrence Affidavit, *supra* note 2 at paras 19-21; *Long List Evaluation*, *supra* note 2, Figure 5 at 31 of PDF.
[17] Lawrence Affidavit, *supra* note 2 at para 21.
[18] EMR, Tab 2 Application: Copy of County Record, County of Simcoe, List of Public Information OPA 2, *List Describing the Information Available to the Public Prior to Adoption.*

analysis in an Amended Scoped Environmental Impact Study dated February 1, 2018 ("Amended EIS").[19]

23. The statutory public meeting was held on May 9, 2017.[20]
24. Ten members of the public made oral comments about the ERRC proposal. Nobody supported the proposal to site the ERRC in the Freele County Forest.[21]
25. Ms. Wagner highlighted that the members of FSF have a strong connection to the Freele County Forest. She recalled members of FSF venturing in the forest as children and spending hours playing with salamanders, frogs and snakes.[22]
26. The County also received 247 written comments. Again, nobody supported the proposal. Public comments raised concerns about wildlife and wildlife habitat, endangered species, such as the little brown bat, dangers to local residents due to fire risk, noise, light contamination, dust, odour, and traffic. The public questioned why County Forests were preferred during the site selection process and why an industrial site was not selected for siting an industrial facility.[23]
27. FSF members have been very active in raising concerns about the proposed ERRC during both the site selection and *Planning Act* process.[24] Ms. Wagner made several written submissions. For instance, on May 18, 2017, she emailed the Ministry of Natural Resources and Forestry ("MNRF") to point out that she had seen several salamander egg masses in locations not identified by the County's consultants. She expressed concern about the impact of the development on the wetlands on site.[25]

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[19] EMR, Tab 2 Application: Copy of County Record, Studies, *Scoped Environmental Impact Study_Simcoe Organics Facility*, GHD, 17 November 2016 [*EIS*]; EMR, Tab 2 Application: Copy of County Record, Studies, Addendums, *Amended Scoped Environmental Impact Study-Final*, GHD, 1 February 2018 [*Amended EIS*].
[20] EMR, Tab 2 Application: Copy of County Record, Notices, Notice of Public Meeting County OPA SC-OPA-1602 ERRC, *Notice of Statutory Public Meeting Concerning Proposed County Official Plan Amendment,* April 13, 2017; EMR, Tab 2 Application: Copy of County Record, Minutes, Public Transcript - ERRC Public Meeting June 9, 2017, *Transcription of the May 9, 2017 Public Meeting Official Plan Amendment File No. SC-OPA-1602* [*County Statutory Meeting Transcript*].
[21] EMR, Tab 2. Application, Copy of County Record, Minutes - ERRC Public Meeting June 9, 2017, Minutes, *Minutes - Corporation of the County of Simcoe Council – Public Meeting, Tuesday May 9, 2017* at 3; *County Statutory Meeting Transcript, ibid*.
[22] *County Statutory Meeting Transcript* at 14.
[23] EMR, Tab 2 Application: Copy of County Record, Comments Received – Public.
[24] Wagner Affidavit, *supra* note 3 at para 18.
[25] Wagner Affidavit, *supra* note 3 at para 17(g), and Exhibit H, *Email to Mr. Daly and Ms. Benner* (18 May 2017).

28. The FSF also submitted expert evidence in opposition to the planning proposal to the County of Simcoe, including reports by Jennifer Lawrence, a Registered Professional Planner, and James Dougan, Mary Anne Young, and Karl Konze from Dougan & Associates, Ecological Consulting Services ("D & A").[26]
29. Despite significant public opposition to the site and expert evidence highlighting serious concerns about the planning basis and natural heritage features on site, the County approved OP Amendment No. 2 in By-Law 6754 dated June 26, 2018.[27] The amendment renamed Schedule 5.6.1 to recognize new and expanded types of waste management facilities and provides for a site specific land use policy for the ERRC.[28]

D. THE MINISTRY OF MUNICIPAL AFFAIRS AND HOUSING'S DECISION

30. On November 30, 2018, Amendment No. 2 to the Official Plan for the County of Simcoe, as adopted by By-law 6754, was approved by MMAH. The decision made one modification to the County's decision by requiring that the ecological enhancement of the contiguous woodland feature be at a 2:1 ratio through a combination of reforestation and afforestation measures, rather than only through afforestation measures.[29]

E. THE PLANNING FRAMEWORK – PROTECTION FOR NATURAL HERITAGE FEATURES

(a) Planning Act

31. Section 1.1 of the *Planning Act,* RSO 1990, c P13 ("*Planning Act*") establishes its purposes:

> (a) to promote sustainable economic development in a healthy natural environment within the policy and by the means provided under this Act;

[26] Wagner Affidavit, *supra* note 3 at para 17(c); EMR, Tab 9-1 Comments Received by County: Written Comments – Public, Letter from Donnelly Law to Mr. Daly, County Clerk (1 August 2017) [Donnelly letter].
[27] EMR, Tab 2 Application: Copy of County Record, OPA 2, *Amendment No. 2 of the Official Plan for the County of Simcoe Environmental Resource Recovery Centre*, June 26, 2018.
[28] EMR, Tab 2 Application: Copy of County Record, Certified By-law No. 6754, *By-law No. 6754 of the Corporation of the County of Simcoe* at 6.
[29] EMR, Tab 3 Decision – Resolution – Adoption: Ministry of Municipal Affairs and Housing, 3-3 Copy of Notice of Decision, *Notice of Decision*, November 30, 2018 [*Notice of Decision*].

(b) to provide for a land use planning system led by provincial policy;
(c) to integrate matters of provincial interest in provincial and municipal planning decisions;
(d) to provide for planning processes that are fair by making them open, accessible, timely and efficient;
(e) to encourage co-operation and co-ordination among various interests;
(f) to recognize the decision-making authority and accountability of municipal councils in planning.[30]

32. The council of a municipality must have regard to matters of provincial interest, which includes the protection of ecological systems such as natural areas, features, and functions.[31]
33. The *PPS* was created under the authority of section 3 of the *Planning Act.* Subsection 3(5) provides that a Minister's decision shall be consistent with the *PPS*.[32]

(b) The Provincial Policy Statement, 2014

34. Policy 2 of the *PPS* outlines Ontario's goal to wisely manage natural resources:

> Ontario's long-term prosperity, environmental health, and social well-being depend on conserving biodiversity, protecting the health of the Great Lakes, and protecting natural heritage, water, agricultural, mineral and cultural heritage and archaeological resources for their economic, environmental and social benefits.[33]

35. The *PPS* natural heritage provisions stress that natural features and areas shall be protected for the long term, and the diversity and connectivity of natural features in an area should be maintained, restored or, where possible, improved.[34]
36. The proposed waste processing complex implicates several natural heritage policies:

- Policy 2.1.5 of the *PPS* allows development or site alteration in significant woodlands or significant wildlife habitat only if it has been

[30] *Planning Act*, RSO 1990, c P13, s 1.1 [*Planning Act*].
[31] *Ibid*, s 2(a).
[32] *Ibid*, ss 3(1), 3(5).
[33] *Provincial Policy Statement* (2014), s 2 [*PPS*].
[34] *PPS, supra* note 33, ss 2.1.1, 2.1.2.

demonstrated that there will be "no negative impacts on the natural features or their ecological functions".[35]

- Policy 2.1.7 only allows development or site alteration in the habitat of an endangered species and threatened species if it is in accordance with provincial and federal requirements.[36]

- Policy 2.1.8 provides that development and site alteration is not permitted on adjacent lands to the natural heritage features and areas identified in policy 2.1.5 unless the ecological function of the adjacent lands has been evaluated and it has been demonstrated that there will be no negative impacts on the natural feature or its ecological functions.[37]

37. "Negative impacts" are defined as "degradation that threatens the health and integrity of the natural features or ecological functions for which an area is identified due to single, multiple or successive development or site alteration activities".[38]

(c) Growth Plan for the Greater Golden Horseshoe

38. Policy 2.2.1.2(d) provides that development will be directed to settlement areas, except where the policies of the *Growth Plan* permit otherwise.[39]
39. Policy 4 – Protecting What is Valuable – applies to this application.[40]
40. Policy 4.2.2.2 requires municipalities to incorporate the Natural Heritage System as an overlay in official plans, and apply appropriate policies to maintain, restore or enhance the diversity and connectivity of the system and the long-term ecological functions of the features and areas.[41]
41. Policy 4.2.2.3(a)(i) of the *Growth Plan* requires that new development or site alteration within the Natural Heritage System demonstrate that:

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[35] *Ibid*, s 2.1.5.
[36] *Ibid*, s 2.1.7.
[37] *Ibid*, s 2.1.8.
[38] *Ibid* at 45.
[39] *Growth Plan for the Greater Golden Horseshoe, 2017*, OIC 1024/2017, *Places to Grow Act, 2005*, s 2.2.1.2(d) [*Growth Plan*].
[40] Lawrence Affidavit, *supra* note 2 at para 29.
[41] *Growth Plan*, *supra* note 39, s 4.2.2.2.

> i) there are no *negative impacts* on *key natural heritage features or key hydrologic features* or their functions.[42]

42. The term "*key natural heritage features*" is a defined in the *Growth Plan* and includes "habitat of endangered species and threatened species; wetlands; significant woodlands and significant wildlife habitat".[43]
43. Policy 4.2.3 prohibits development or site alteration in key natural heritage features outside of settlement areas, unless a specific exception applies:

> Outside of *settlement areas*, *development* or *site alteration* is not permitted in *key natural heritage features* that are part of the *Natural Heritage System* or in *key hydrologic features*, except for:
>
> c. activities that create or maintain *infrastructure* authorized under an environmental assessment process;[44]

44. The *Growth Plan* also includes restrictions for adjacent lands. Outside settlement areas, a proposal for a new development or site alteration within 120 metres of key natural heritage features will require a natural heritage evaluation that includes a vegetation protection zone.[45] Evaluations undertaken in accordance with policy 4.2.4.1 will identify any additional restrictions to be applied before, during and after development to protect the ecological functions of the feature.[46]

(d) County of Simcoe Official Plan

45. The County of Simcoe Official Plan ("County OP") was approved by Council on November 25, 2008, and updated on January 22, 2013. It was approved by the Ontario Municipal Board ("OMB") on December 29, 2016.
46. The site is within the Greenlands designation. Waste disposal sites are not a permitted use within the Greenlands designation, and an Official Plan Amendment is required.
47. GHD relied on section 3.3.6 of the County OP, which states:

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[42] *Ibid,* s 4.2.2.3(a)(i).
[43] *Ibid,* s 7.
[44] *Ibid,* s 4.2.3.1(c).
[45] *Ibid,* s 4.2.4(1).
[46] *Ibid,* s 4.2.4(2).

> Where feasible, and subject to *local municipal* policies and bylaws, *infrastructure* and passive recreational uses may be located in any designation of this *Plan*, subject to Sections 3.8, and 4.2 … and applicable *provincial* and federal policy and legislation. Where applicable, only such uses permitted in the Greenlands designation (see Section 3.8) are those which have successfully completed any required *provincial* and/or federal environmental assessment process or proceedings under the *Drainage Act*. Lot creation for *infrastructure* in the Agricultural designation is discouraged and should only be permitted where the use cannot be accommodated through an easement or right-of-way.[47]

48. Section 3.8 is the Greenlands designation. Its objectives are:

> **3.8.1** To protect and restore the natural character, form, function, and connectivity of the *natural heritage system* of the County of Simcoe, and to sustain the *natural heritage features and areas* and *ecological functions* of the Greenlands designation and local *natural heritage systems* for future generations.
>
> **3.8.2** To promote biodiversity and ecological integrity within the *County's natural heritage features and areas* and the Greenlands designation.
>
> **3.8.3** To improve the quality, connectivity and amount of *woodlands* and *wetlands* cover across the *County*.
>
> **3.8.4** To ensure that species and communities of conservation concern can continue to flourish and evolve throughout the *County*.
>
> **3.8.5** To contribute to the protection, improvement, and restoration of the quality and quantity of surface water and ground water and the function of *sensitive surface water features* and *sensitive ground water features* within the *County*.
>
> **3.8.6** To ensure that the Greenlands designation complements and supports the *natural heritage systems* established in *provincial* plans and is linked with the *natural heritage systems* of adjacent jurisdictions, and to require *local municipalities* to identify and protect natural features and *ecological functions* that in turn complement and support the Greenlands
>
> **3.8.7** To ensure that the location, scale, and form of *development* respect and support the protection of the *County's natural heritage system*.
>
> **3.8.8** To provide opportunities for natural heritage enjoyment and appreciation and for recreational and tourism uses in keeping with the

[47] Simcoe County Official Plan, s 3.3.6.

> Greenlands objectives, that foster healthy and liveable communities and enhance the sense of place and quality of life that characterize the *County*.[48]

49. Natural heritage in Simcoe County is to be protected by the Greenlands designation.[49] Section 3.8.10 establishes what is included in the Greenlands designation, including habitat of endangered species and threatened species, significant wetlands, significant woodlands, and significant wildlife habitat.[50]
50. Section 3.8.15 outlines permitted uses within the Greenlands designation. Infrastructure is not listed.[51]
51. However, section 3.8.19 provides that infrastructure authorized under an environmental assessment process may be permitted within the Greenlands designation or on adjacent lands.[52] If the infrastructure is not subject to an environmental assessment process, section 3.3.15 applies:

> **3.3.15** Despite anything else in this *Plan*, except Section 4.4 as it applies to *mineral aggregate operations* only, *development* and *site alteration* shall not be permitted*:*
>
> i. In *significant wetlands* and *significant coastal wetlands.*
>
> ii. In the following unless it has been demonstrated that there will be no *negative impacts* on the natural features or their *ecological functions*: *Significant woodlands*, s*ignificant valleylands*, *significant wildlife habitat*, *significant areas of natural and scientific interest (ANSIs),* and *coastal wetlands* (not covered by 3.3.15 i) above).
>
> …
>
> v. In *habitat of endangered species and threatened species*, except in accordance with *provincial and federal requirements.*
>
> vi. On *adjacent lands* to the *natural heritage features and areas* listed above, unless the *ecological function* of the *adjacent lands* has been evaluated and it has been demonstrated that there will be

[48] Simcoe County Official Plan, ss 3.8.1- 3.8.8.
[49] *Ibid*, s 3.8.9.
[50] *Ibid*, s 3.8.10.
[51] *Ibid*, s 3.8.15.
[52] *Ibid*, s. 3.8.19.

> no *negative impacts* on the natural features or on their *ecological functions. Adjacent lands* shall generally be considered to be:
>
> > a. within 120 metres of *habitat of endangered species and threatened species*, *significant wetlands, significant coastal wetlands, wetlands* 2.0 hectares or larger determined to be locally significant by an approved *EIS*, *significant woodlands*, *significant wildlife habitat*, *significant areas of natural and scientific interest* – life science, *significant valleylands*, and *fish habitat;*
> >
> > …
> >
> > c. A reduced *adjacent lands* from the above may be considered based on the nature of intervening land uses. The extent of the reduced area will be determined by the approval authority in consultation with the applicant prior to the submission of a *development* application, and supported by an *EIS,* demonstrating there will be no *negative impacts* beyond the proposed reduced *adjacent lands* area. [53]

52. Proposals to re-designate Greenlands require an "Environmental Impact Statement" to demonstrate to the satisfaction of the County that the Official Plan policies are met.[54]

(e) Township of Springwater Official Plan and Zoning By-Law Amendment

53. The Township of Springwater's planning documents are quite out of date. The Official Plan is dated October 6, 1997, and approved by the OMB on January 28, 1998. The zoning by-law amendment was approved by Council on August 5, 2003 and by the OMB on May 1, 2004. Both of these documents need to be updated to reflect the County of Simcoe's Official Plan and the *PPS*.
54. The site is designated as Rural and Agriculture on Schedule A-2 and Environment Protection Category 2 on Schedule B.[55]
55. Section 2.2.1 provides that the goal of the Official Plan is to ensure the maintenance, protection and enhancement of natural heritage features.[56]

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[53] Simcoe County Official Plan, s 3.3.15.
[54] *Ibid*, s 3.8.22.
[55] Township of Springwater Official Plan, Schedule A-2, Schedule B.
[56] *Ibid*, s 2.2.1.

56. Section 2.3.5.1 states that one of the township's goals should be to protect its natural resource base and natural heritage system, including significant woodlands, wildlife habitat, and endangered and threatened species.[57]
57. Section 2.20.4 provides that the establishment of a new waste disposal site requires an amendment to the OP.
58. Section 16 is the Natural Heritage (Environmental Protection) Policy. Its objectives are:

> 16.1.1. To conserve, maintain, and enhance the quality and integrity of the Natural Heritage features and ecological processes of the Township including air, water, land, and living resources for the benefit of future generations.
>
> …
>
> 16.1.3. To prevent the diminishment of ecosystem biodiversity and provide for the long term viability of the Natural Heritage System by approving only those land uses which are demonstrated to be environmentally sound and do not negatively impact natural features or environmental functions.
>
> 16.1.4. To encourage and promote the use of a variety of planning engineering and resource management approaches and techniques to realize the hydrological, biological, and socio-economic benefits derived from the long term protection of the Natural Heritage System.[58]

59. The Township Official Plan then creates two categories of natural heritage protection, reflective of the planning framework in the 1990s.[59] Category 1 includes significant portions of the habitat of threatened or endangered species. Category 2 includes unique and significant biologically sensitive wildlife habitat, and forests and woodlots.[60]
60. Section 16.2.1.4.2(b) relating to wildlife habitat and section 16.2.1.4.2(c) relating to woodlands are out of date.[61]

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[57] *Ibid*, s 2.3.5.1.
[58] *Ibid*, s 16.1.
[59] Exhibit C of Lawrence Affidavit, *supra* note 2; Lawrence Report, June 5, 2017, *supra* note 14 at 19.
[60] Township of Springwater Official Plan, s 16.2.1.1.
[61] Exhibit C of Lawrence Affidavit, *supra* note 2; Lawrence Report, June 5, 2017, *supra* note 14 at 19-20.

61. The property is zoned “A” agriculture in the Springwater By-law 5000. The Agricultural zone does not permit waste disposal sites, requiring a zoning by-law amendment as well.

PART II - THE NATURE OF THE APPEAL AND LIST OF ISSUES

62. County of Simcoe Official Plan Amendment No. 2 does not conform, or conflicts with, the *Growth Plan*, which prohibits development in key natural heritage features within the Natural Heritage System. The exception in policy 4.2.3.1(c) of the *Growth Plan* does not apply because the development has not been “authorized under an environmental assessment process.”
63. County of Simcoe Official Plan Amendment No. 2 is not consistent with the *PPS* and does not conform with the *Growth Plan* or the Official Plans of the County or Township. The County has not demonstrated that there will be no negative impacts from the construction or use of the ERRC on significant woodlands and significant wildlife habitat.

PART III - SUBMISSIONS

A. An exemption under the *EA Act* does not constitute an “authorization under an Environmental Assessment process” under the *Growth Plan*

64. The development does not conform, or conflicts with, the *Growth Plan.* The County and MMAH have erroneously equated an exemption from the *EA Act* with an authorization under the *EA Act,* circumventing the clear requirements of the *Growth Plan* to protect Natural Heritage Systems and direct development to settlement areas.
65. Equating an “exemption” with “authorization under the environmental assessment process” is an absurd interpretation of policy 4.2.3.1(c) of the *Growth Plan*. The *Growth Plan* protections for natural heritage features would be fundamentally undermined if the establishment of a waste disposal complex that has never undergone any EA process is permitted in areas identified in the Natural Heritage System. Such an interpretation defeats one of the *Growth Plan*’s key natural

heritage protections and one of its guiding principles to "protect and enhance natural heritage, hydrologic, and landform systems, features, and functions."[62]

a. Growth Plan protections for Natural Heritage System

66. The purpose of the *Growth Plan* is to balance growth and the protection of key natural heritage areas.[63] It establishes a Natural Heritage System which municipalities are required to overlay in official plans.[64] Municipalities are required to apply appropriate policies to maintain, restore or enhance the diversity and connectivity of the system and the long-term ecological or hydrologic functions of the features and areas in the *Growth Plan*.[65]
67. Policies 2.2.1.2(d) and 4.2.3.1 of the *Growth Plan* require that development is directed to settlement areas, except where the Plan permits otherwise. The subject property is located outside of the Settlement Area boundary and is entirely located within the Natural Heritage System of the *Growth Plan*.[66]
68. The only applicable exception is policy 4.2.3.1(c), which allows activities that create or maintain infrastructure outside of settlement areas if they have been "authorized under an environmental assessment process".[67] That exception has not been met.

b. This development was not authorized under the EA Act

69. The proposed ERRC was found to be exempt from the *EA Act* and Ontario Regulation 101/07 (Waste Management Projects).[68] The term "exemption" is defined as "not subject to."[69] The ERRC was never subject to any *EA Act* process.[70]

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[62] *Growth Plan*, *supra* note 39, ss 4.2.2(2), 4.2.3.1(c); see also Simcoe County Official Plan, s 3.8.19
[63] Lawrence Affidavit, *supra* note 2 at para 29; *Growth Plan*, *supra* note 39, s 1.2.1
[64] Lawrence Affidavit, *supra* note 2 at para 29; *Growth Plan*, *supra* note 39, s 4.2.2(1)
[65] Lawrence Affidavit, *supra* note 2 at para 29; *Growth Plan*, *supra* note 39, s 4.2.2(2).
[66] Lawrence Affidavit, *supra* note 2 at paras 11.
[67] *Growth Plan*, *supra* note 39, s 4.2.3.1(c)
[68] Lawrence Affidavit, *supra* note 2 at paras 38-40; Part *1 MMF Siting*, *supra* note 15 at 11.
[69] *Victoria Municipal Voters' List, Re*, 1908 CarswellBC 3, 7 W.L.R. 372 (BCSC, in Chambers) at para 3.
[70] Lawrence Affidavit, *supra* note 2 at para 40.

70. In contrast, “authorization” was defined by the Supreme Court in *CCH Canadian Ltd v Law Society of Upper Canada* as to “sanction, approve and countenance.”[71]
71. The modern principle of statutory interpretation requires that the words in a statute must be read harmoniously with the scheme and objects of the statute and the intention of the legislature.[72] The words in a statute should be given their plain, ordinary and literal meaning.[73]
72. FSF submits that the purpose of the exemption under policy 4.2.3.1(c) is clear and unambiguous. It is intended to limit development in key natural heritage features within the Natural Heritage System subject to certain limited exceptions. One of these exceptions is infrastructure that has already been subject to scrutiny under an *EA Act* process. The exception recognizes that a similar, duplicative process is not necessary under the *Planning Act* regime if an EA process has been successfully completed. That certainly does not apply to a situation where no such *EA Act* review occurred.

B. The evidence does not demonstrate that there will be no negative impacts on key natural heritage features

73. FSF’s ecological experts, D & A, fundamentally disagree with GHD’s conclusion in its original EIS and Amended EIS that the development will have no negative impacts on the Freele County Forest’s natural features and ecological functions. They found GHD’s conclusion of “no negative impacts” to be without foundation. It is not supported by the evidence in the original EIS or the Amended EIS, particularly given the inconsistencies, misinterpretation, and exclusions outlined below.[74]
74. D & A found the site to be more significant than portrayed in the EIS.[75] There is a tendency throughout the EIS to downplay the significance of the site and its natural heritage features.[76] The true extent of the negative impacts of the

[71] *CCH Canadian Ltd. v Law Society of Upper Canada,* [2004] 1 SCR 339 at para 37.
[72] *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27 at para 21.
[73] *Ontario v Canadian Pacific Ltd.,* [1995] 2 SCR 1031 at para 11.
[74] *Nicholyn Farms v MMAH,* FSF Inc. Record, Tab 6: Affidavit of Dougan & Associates dated March 22, 2019, [Dougan Affidavit] at paras 82-83.
[75] *Ibid* at para 84.
[76] *Ibid* at paras 81, 84.

development on the site's features are correspondingly misunderstood, and the proposed mitigation measures do not adequately address the nature and details of the site and impacts from the development.

75. Jennifer Lawrence, FSF's Professional Planner, stressed that policies 2.1.1 and 2.1.2 of the *PPS* cannot be overlooked, and the specific policies requiring that there be no negative impacts cannot be considered in isolation. Policy 2.1.1 states that it is the Province's intention to preserve natural features and areas for the long term, while policy 2.1.2 states that natural heritage systems should be maintained, restored, or, where possible, improved. These policies require a comprehensive consideration of natural heritage features and functions, which has not occurred in this case.[77]
76. Waste processing facilities are an industrial use. They would normally be sited on designated industrial land. Instead, the proposed site is the centre of a quality forested area, which will create conflicts with natural biodiversity, and which could be further exacerbated by operational management practices.[78] Jennifer Lawrence agrees that in her professional experience it is unusual for a municipality to propose to construct substantial infrastructure within a natural heritage feature.[79]

Significant Wildlife Habitat

77. Significant Wildlife Habitat ("SWH") is protected under the *PPS*. Policy 2.1.5 of the *PPS* allows development or site alteration in SWH only if it has been demonstrated that there will be "no negative impacts on the natural features or their ecological functions".[80] Based on D & A's knowledge of the site and the types of SWH, they conclude that the development will cause negative impacts and loss of SWH.[81]

[77] Exhibit C of Lawrence Affidavit, *supra* note 2; Lawrence Report, June 5, 2017, *supra* note 14 at 9.
[78] Dougan Affidavit, *supra* note 74 at para 85.
[79] Exhibit C of Lawrence Affidavit, *supra* note 2; Lawrence Report, June 5, 2017, *supra* note 14 at 29.
[80] *PPS*, *supra* note 33, s 2.1.5.
[81] Dougan Affidavit, *supra* note 74 at para 36.

78. GHD originally did not identify any SWH on site. D & A identified several SWH in its peer review. Subsequently, GHD acknowledged in the Amended EIS that four SWH types are on site, (1) Bat Maternity Colonies, (2) Amphibian Breeding Habitat (Woodland), (3) Woodland Area-Sensitive Bird Breeding Habitat, and (4) Species of Conservation Concern.[82] D & A also noted that Woodland Raptor Nesting Habitat may be present.[83]
79. GHD has not mapped or defined the limits of any of the SWH it identifies. It is therefore not possible for GHD to determine the scope of the impacts of the development on the SWH and whether the *PPS* standard is met.

"Bat Maternity Colonies" SWH

80. GHD found sufficient numbers of bats during an acoustic monitoring survey to confirm the likely presence of Bat Maternity Colonies. However, it does not define or map the limits of this SWH.[84] According to the Significant Wildlife Habitat Criteria Schedules ("SWHCS") for Ecoregion 6E, "the area of the habitat includes the entire woodland or a forest stand ELC Ecosite or an Ecoelement containing the maternity colonies".[85]

"Amphibian Breeding Habitat (Woodland)" SWH

81. GHD found spotted salamander eggs at two locations on site, triggering "Amphibian Breeding Habitat (Woodland)" SWH status. D & A confirmed those findings in 2017.[86]
82. The Amended EIS does not acknowledge or map the buffer around the Amphibian Breeding Habitat (Woodland) SWH as recommended by MNRF, or indicate how the proposed undertaking will negatively impact this SWH.[87] The SWHCS for Ecoregion 6E defines the SWH habitat as "the wetland area plus a 230 metre radius of woodland area". According to MNRF, naturalized plantation

[82] Dougan Affidavit, *supra* note 74 at para 28.
[83] Dougan Affidavit, *supra* note 74 at para 34.
[84] Dougan Affidavit, *supra* note 74 at para 30(a).
[85] Dougan Affidavit, *supra* note 74 at para 30(b).
[86] Dougan Affidavit, *supra* note 74 at para 31(a).
[87] Dougan Affidavit, *supra* note 74 at para 31(c).

is considered “woodland area” and should be included in the 230 metre wide buffer.[88] According to D & A’s calculation of the 230 metre buffer around the northern location where spotted salamander eggs were found, there is approximately an 11% overlap with the facility footprint. Likewise, the 230 metre buffer around the southern location would overlap with approximately 400 metres of the proposed new access road, including 53% of its length.

83. As well, GHD’s proposed mitigation measure for spotted salamanders is unsuitable. It recommends placing felled logs on the ground to provide cover and hibernation habitat, however spotted salamanders typically hibernate underground in small mammal burrows beneath the soil surface.[89]

“*Woodland Area-Sensitive Bird Breeding Habitat” SWH*

84. The proposed development, located roughly in the centre of the forest, would partially eliminate and negatively impact the “Woodland Area-Sensitive Bird Breeding Habitat” SWH.[90] GHD did not map or define the limits of this SWH type within the subject property. According to the SWHCS for Ecoregion 6E, “interior forest habitat is at least 200 m from forest edge habitat”, thus the majority of the site qualifies as SWH.[91]

“Special Concern and Rare Species” SWH

85. The Amended EIS acknowledged that two ‘Special Concern’ Species at Risk were found in the subject lands: Eastern Wood-Pewee and Wood Thrush. According to the SWHCS for Ecoregion 6E, “the area of the habitat to the finest ELC scale that protects the habitat form and function is the SWH, this must be delineated through detailed field studies. The habitat needs to be easily mapped and cover an important life stage component for a species e.g. specific nesting habitat or foraging habitat”. Since the Amended EIS did not map or provide detailed habitat information for these two bird species, it is not possible for GHD

[88] Dougan Affidavit, *supra* note 74 at para 31(b).
[89] Dougan Affidavit, *supra* note 74 at para 31(d).
[90] Dougan Affidavit, *supra* note 74 at para 32(c).
[91] Dougan Affidavit, *supra* note 74 at para 32(b).

to determine whether the proposed development will negatively impact the species or its habitat.[92]

86. The Western Chorus Frog was erroneously excluded from this list. The Amended EIS incorrectly lists the Western Chorus Frog's status as "S4: Apparently Secure", rather than its current status of "S3: Vulnerable".[93] The Amended EIS states that Western Chorus Frog were detected immediately north of Rainbow Valley Road, outside of the subject property, but does not discuss whether SWH for this species overlaps with the subject property or whether it will be negatively impacted by the proposed development.[94]

"Woodland Raptor Nesting Habitat" SWH

87. There is not enough information to support GHD's conclusion that Woodland Raptor Nesting Habitat SWH is absent from the site.[95]
88. GHD only conducted one stick nest survey. It does not document how it was conducted. In D & A's opinion, a thorough survey for nests on a 84 hectare property would likely take more than a single day, especially since GHD also conducted its Snag Density survey for bats on the same day.[96]
89. GHD did not acknowledge Barred Owl as one of the indicator species for SWH status and this species was apparently not targeted during the survey. It usually nests in cavities, which are more difficult to detect.[97]
90. A single active nest of any of the indicator species would trigger a SWH designation. Depending on the species, a 100 – 400 metre protective buffer around the nest would be required.[98]

[92] Dougan Affidavit, *supra* note 74 at paras 33(a), (b), (c).
[93] Dougan Affidavit, *supra* note 74 at para 33(a).
[94] Dougan Affidavit, *supra* note 74 at para 33(d).
[95] Dougan Affidavit, *supra* note 74 at para 34(c).
[96] Dougan affidavit, *supra* note 74 at para 34(c).
[97] Dougan Affidavit, *supra* note 74 at para 34(c).
[98] Dougan Affidavit, *supra* note 74 at para 34(d).

Significant Woodland

91. The *PPS* only allows development or site alteration in significant woodlands if it has been demonstrated that there will be "no negative impacts on the natural features or their ecological functions".[99] Although both GHD and D & A identify the site as Significant Woodland, GHD downplays the significance of that designation throughout its report. The Amended EIS continues to minimize the value of the forest without reference to its functional attributes, including the significant quality indicators and the four SWH now acknowledged by GHD.[100]
92. The proposed development will cause significant fragmentation of the forest. D & A estimates that approximately 18 hectares of forest interior will be eliminated.[101]
93. GHD mischaracterizes the forest function as temporary. The County has no plans to clear-cut the forest, and clear-cutting is not normal practice in the Simcoe County Forest Plan. The Forest Plan contemplates recreational activities and recommends High Conservation Value Forests be identified, mapped, maintained and enhanced.[102]
94. GHD also mischaracterizes the site as only including natural blocks of mature woodland in the northeast and southeast corners. The site is approximately 96% natural or naturalized.[103]

Species at Risk

95. GHD's Species at Risk findings are also insufficient.
96. D & A disagrees with GHD's conclusion that Eastern Whip-poor-will habitat is not present on site, based on a review of the literature and a site visit. Residents of the area also believe that Eastern Whip-poor-will have nested within the Freele County Forest in recent years. It is premature for GHD to conclude that the proposed development would not impact Eastern Whip-poor-will because nocturnal surveys have not been conducted.[104]

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[99] *PPS*, *supra* note 33, s 2.1.5.
[100] Dougan Affidavit, *supra* note 74 at paras 37-38.
[101] Dougan Affidavit, *supra* note 74 at para 43.
[102] Dougan Affidavit, *supra* note 74 at para 39.
[103] Dougan Affidavit, *supra* note 74 at para 40.
[104] Dougan Affidavit, *supra* note 74 at paras 45-46.

97. Because there are vernal pools on site and other related salamander species, it is possible that Jefferson Salamander are present. However, no surveys were conducted.[105]

Vegetation Classification

98. The vascular plant list is inadequate. There is insufficient information to assess the ecological diversity of each vegetation polygon as plants are not identified by Ecological Land Classification ("ELC") polygon. D & A observed several species on site not listed in Appendix B of the EIS, including Common Oak Fern, Common Mullein, and Plantain-leaved Sedge. These deficiencies are a concern given the EIS's conclusion that the vegetation is mostly low quality plantations.[106]
99. The ELC community descriptions understate the extent of naturalization that is occurring. Atypical of an actively managed plantation, D & A observed that the plantation communities exhibit relatively rich native understory regeneration and a low proportion of non-Native species.[107] The diversity of the habitat is also reflected in the bird diversity found on site.[108]
100. The Amended EIS notes native versus non-native species proportions, and general coefficients of conservatism values for the site as a whole. However, as species are not noted by vegetation community in the vascular plant list, the information cannot be broken down by community. Accordingly, the overall impacts of the development on species of higher conservation concern cannot adequately be assessed.[109]
101. Based on the 1998 ELC System, D & A proposed that the site be classified as FOD5-1, a Dry-Fresh Sugar Maple Deciduous Forest Type, rather than FODM5. In the Amended EIS, GHD's ELC classification is inconsistent throughout the report. It is FODM5 in the report text, but is FOD5-1 (as recommended by D & A) on Figure 4, Ecological Land Classification.[110]

[105] Dougan Affidavit, *supra* note 74 at para 47.
[106] Dougan Affidavit, *supra* note 74 at para 49.
[107] Dougan Affidavit, *supra* note 74 at para 50.
[108] Dougan Affidavit, *supra* note 74 at para 50.
[109] Dougan Affidavit, *supra* note 74 at para 51.
[110] Dougan Affidavit, *supra* note 74 at para 52.

102. GHD observed locally significant plant species during its field work which are located in ELC communities that will be disturbed by the development. However, GHD only provides locations and mitigation measures for False Sunflower. The regional significance of the other plant species are downplayed. To determine the extent of impacts to these populations, it is essential to understand their abundance and location.[111]

103. The impact description for vegetation communities identifies that vegetation will be lost and that permanent alteration of wetland habitat may occur. There is no information about the ecological impacts of creating a major opening with intensive development in the centre of what is currently a contiguous forest. There are no details about possible mitigation measures.[112]

Wetlands

104. Negative impacts to wetlands and ecological functions can be expected. GHD did not clearly delineate wetland boundaries. Although the EIS identifies two wetlands on site and a 120 metre offset for the assessment of impacts, the wetland in the southeast of the site is excluded from the offset area without explanation. The emergency access road is very close to the SWMM2-1 community and within the 230 metre buffer recommended by MNRF to protect salamanders.[113]

Invasive and Predatory Species

105. The ERRC includes an Organics Processing Facility. Pests will be introduced to the area, and can include mice and rats, non-native insects, and infectious organisms. Invasive plant and pest species can then invade the surrounding forest, which currently has a low proportion of non-native species (24% as calculated by GHD).[114]

[111] Dougan Affidavit, *supra* note 74 at para 54.
[112] Dougan Affidavit, *supra* note 74 at paras 55-56.
[113] Dougan Affidavit, *supra* note 74 at paras 57-58.
[114] Dougan Affidavit, *supra* note 74 at para 60.

106. There will likely be effects on local wildlife because of increases in populations of mice, rats, skunks, raccoons and coyotes, which can be predators for sensitive species such as ground-nesting area-sensitive forest birds.[115]
107. Resource recovery facilities generally address pests by using poison baits and live trapping. These techniques and their effects are not identified or discussed in the EIS, but would likely have an impact on woodland habitats and biota well beyond the site.[116]
108. The Amended EIS only addressed the potential introduction of invasive plants, and proposed fencing and containment. Invasive species may also enter the site from imported fill and topsoil, or from leakage and spillage of incoming waste.[117] The Amended EIS does not discuss other biohazards that could enter the waste stream and infest the forest, such as invasive insects or microbial pests.[118]

Adjacent Lands

109. In D & A's opinion, the facility will create negative changes to ecological functions on a large footprint, likely more than 200 metres from the limits of the site's natural heritage features. The proposed facility fragments the site. What used to be a large interior forest will instead be two much smaller fragments of interior forest, and those fragments are not connected to each other. The fragments are less ecologically viable than the existing block of forest.[119]
110. The original EIS and Amended EIS do not clearly discuss adjacent lands, which extend 120 metres from Significant Habitat of Endangered and Threatened Species, Significant Wetlands, Significant Woodlands, and SWH.[120]

Cumulative Effects

111. The footprint of the site will likely be expanded from 5.5 hectares to 20 hectares, according to the County's ONE SITE – ONE SOLUTION document. There should have been a discussion about the impacts of this likely expansion.[121]

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[115] Dougan Affidavit, *supra* note 74 at para 61.
[116] Dougan Affidavit, *supra* note 74 at para 62.
[117] Dougan Affidavit, *supra* note 74 at para 63.
[118] Dougan Affidavit, *supra* note 74 at para 63.
[119] Dougan Affidavit, *supra* note 74 at para 68.
[120] Dougan Affidavit, *supra* note 74 at paras 64-67; *PPS*, *supra* note 33, ss 4.7, 6; EIS, *supra* note 19, s 1.
[121] Dougan Affidavit, *supra* note 74 at paras 70-73.

GHD has not transparently addressed D & A's concerns

112. D & A conducted a peer review of the County's original EIS on June 16, 2017, which was submitted to the County on August 1, 2017.[122] As outlined above, D & A identified four, and possibly five, significant wildlife habitat in its peer review. Although GHD's original EIS analysis was significantly updated, including an acknowledgement of four significant wildlife habitat types, GHD did not acknowledge or transparently address D & A's peer review. As stated in D & A's affidavit, many of their core criticisms have yet to be addressed.[123]
113. FSF submits that the tribunal should be concerned about thed lack of transparency in GHD's analysis. The Local Planning Appeal Tribunal raised concerns and ultimately favoured the Conservation Authority and MNRF's witnesses in *LTM Land Corp* in part because the appellant community group's experts had not shared their opinions with the Conservation Authority or MNRF, or engaged with them to discuss any issues.[124] The same concern arises here. GHD has not acknowledged or transparently discussed D & A's findings, despite adopting some of the criticisms from the peer review in its Amended EIS.

Conclusion

114. The County's waste processing complex, a major industrial development, is proposed to be placed in the middle of the Freele County Forest. It is inconsistent with policies 2.1.5 and 2.1.8 of the *PPS*, policy 4.2.2.3(a)(i) of the *Growth Plan*, and section 3.3.15(ii) of the County's Official Plan. The County has not adequately demonstrated no negative impacts on the Significant Woodland and four types of Significant Wildlife Habitat found on site.

[122] *Nicholyn Farms v MMAH*, EMR Tab 9-1 Comments Received by County: Written Comments – Public, Donnelly Law Letter dated August 1, 2017; *Nicholyn Farms v MMAH*, FSF Inc. Record, Tab 6G: Dougan Peer Review by Dougan & Associates dated June 16, 2017 [Dougan Report].
[123] Dougan affidavit, *supra* note 74 at para 89.
[124] *LTM Land Corp. v Peterborough (City)*, 2019 CanLII 16477 (ON LPAT) at paras 79-80.

115. GHD did not adequately characterize the study area, provide appropriate interpretation of policy, or consider the impacts of the development or mitigation in sufficient detail. The Amended EIS did not address most of D & A's concerns.

116. The significance of the forest habitat was repeatedly understated. GHD acknowledged that the site meets significance targets under the Simcoe County's Official Plan Greenlands designation and the *PPS*, but still downplays the importance of this feature. GHD's rationale is not provided. D & A views the site as more significant than is portrayed in the original and Amended EIS.[125]

117. The proposed development is directed to the centre of the forest, which will have a negative impact on resident flora and fauna. Those negative impacts may worsen if the site expands, as is quite likely.[126]

118. Although the Amended EIS now recognizes four types of SWH, they are not adequately mapped or delineated. The *PPS* requires that these functions be protected, but the Amended EIS does not adequately address the development's impacts or their mitigation.[127]

119. There is no mitigation plan within the original or Amended EIS. The primary mitigation measure proposed is afforestation or reforestation at a 2:1 ratio, although presumably the ratio calculation will be based on GHD's recommendation that it be linked to the site's 5.5 hectare footprint. D & A calculates that approximately 18 hectares of the forest will be impacted.[128]

120. This mitigation measure gives no consideration to the quality of the woodlands being destroyed. In *SLWP Opposition Corp v Ontario*, the Environmental Review Tribunal allowed an appeal of a proposed wind turbine project in part because of serious and irreversible impacts to a forested area. The Tribunal observed that simply calculating the woodland to be removed does not fully capture the extent of the project's impacts.[129] The habitat proposed as compensation for the

[125] Dougan Affidavit, *supra* note 74 at para 84.
[126] Dougan Affidavit, *supra* note 74 at para 86.
[127] Dougan Affidavit, *supra* note 74 at para 90.
[128] Notice of Decision, *supra* note 29.
[129] *SLWP Opposition Corp. v Ontario (Ministry of the Environment and Climate Change)*, 2015 CanLII 83848 (ON ERT) at para 281.

removal of interior forest would also not be functioning for 30-40 years.[130] It is likewise insufficient in this case to suggest that any afforestation or reforestation, without any detailed plan, any detailed consideration of the quality of the interior forest being destroyed, or any timelines for re-planting, will meet the requirements of the *PPS*, *Growth Plan* and Official Plans.[131]

121. The Natural Heritage Manual points out that habitat fragmentation, for instance the loss of interior forest due to development, has affected many groups of species, notably area-sensitive birds and amphibians that breed in vernal forest pools.[132] This site will be fragmented. Once the appropriate buffer zones from SWH are mapped, two much smaller, non-contiguous patches of interior forest will remain, contrary to policies 2.1 and 2.2 of the *PPS*, policy 4.2.2.2 of the *Growth Plan*, and section 3.8.3 of the County's Official Plan.[133] The ecological characteristics of the forest function must be properly understood and mitigation measures must be designed to address those functions. The re-planting of trees anywhere at any time is simply insufficient to mitigate the impacts of what will be lost.

[130] *Ibid* at para 281.
[131] Exhibit C of Lawrence Affidavit, *supra* note 2; Lawrence Report, June 5, 2017, *supra* note 14 at 27.
[132] Natural Heritage Reference Manual, 2010 (2nd ed.) at 82.
[133] Dougan Affidavit, *supra* note 74 at para 68; *PPS, supra* note 33, ss 2.1.1, 2.1.2; *Growth Plan*, *supra* note 39, s 4.2.2.2; County of Simcoe's Official Plan, s 3.8.3

PART IV – ORDER SOUGHT

122. The Local Planning Appeal Tribunal should allow the appeal and return the matter to the County of Simcoe for a new decision.

123. In the event an oral hearing is ordered, FSF seeks 75 minutes for oral submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Dated at Toronto this 26th day of March, 2019.

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TABLE OF AUTHORITIES

Jurisprudence

RELEVANT STATUTORY AND POLICY PROVISIONS

Growth Plan for the Greater Golden Horseshoe, 2017

1.2.1 Guiding Principles

The successful realization of this vision for the GGH centres on effective collaboration amongst the Province, other levels of government, First Nations and Métis communities, residents, private and non-profit sectors across all industries, and other stakeholders. The policies of this Plan regarding how land is developed, resources are managed and protected, and public dollars are invested are based on the following principles:

- Support the achievement of complete communities that are designed to support healthy and active living and meet people's needs for daily living throughout an entire lifetime.
- Prioritize intensification and higher densities to make efficient use of land and infrastructure and support transit viability.
- Provide flexibility to capitalize on new economic and employment opportunities as they emerge, while providing certainty for traditional industries, including resource-based sectors.
- Support a range and mix of housing options, including second units and affordable housing, to serve all sizes, incomes, and ages of households.
- Improve the integration of land use planning with planning and investment in infrastructure and public service facilities, including integrated service delivery through community hubs, by all levels of government.
- Provide for different approaches to manage growth that recognize the diversity of communities in the GGH.
- Protect and enhance natural heritage, hydrologic, and landform systems, features, and functions.
- Support and enhance the long-term viability and productivity of agriculture by protecting prime agricultural areas and the agri-food network.
- Conserve and promote cultural heritage resources to support the social, economic, and cultural well-being of all communities, including First Nations and Métis communities.
- Integrate climate change considerations into planning and managing growth such as planning for more resilient communities and infrastructure – that are adaptive to the impacts of a changing climate – and moving towards low-carbon communities, with the long-term goal of net-zero communities, by incorporating approaches to reduce greenhouse gas emissions.

2.2 Policies for Where and How to Grow

2.2.1 Managing Growth

1. Population and employment forecasts contained in Schedule 3 will be used for planning and managing growth in the GGH to the horizon of this Plan in accordance with the policies in subsection 5.2.4.

2. Forecasted growth to the horizon of this Plan will be allocated based on the following:
   a) the vast majority of growth will be directed to settlement areas that:
      i. have a delineated built boundary;
      ii. have existing or planned municipal water and wastewater systems; and
      iii. can support the achievement of complete communities;
   b) growth will be limited in settlement areas that:
      i. are undelineated built-up areas;
      ii. are not serviced by existing or planned municipal water and wastewater systems; or
      iii. are in the Greenbelt Area;

c) within settlement areas, growth will be focused in:
   i. delineated built-up areas;
   ii. strategic growth areas;
   iii. locations with existing or planned transit, with a priority on higher order transit where it exists or is planned; and
   iv. areas with existing or planned public service facilities;
d) development will be directed to settlement areas, except where the policies of this Plan permit otherwise;
e) development will be generally directed away from hazardous lands; and
f) the establishment of new settlement areas is prohibited.

4.2.2 Natural Heritage System

1. The Province will map a Natural Heritage System for the GGH to support a comprehensive, integrated, and long-term approach to planning for the protection of the region's natural heritage and biodiversity. The Natural Heritage System mapping will exclude lands within settlement area boundaries that were approved and in effect as of July 1, 2017.

2. Municipalities will incorporate the Natural Heritage System as an overlay in official plans, and will apply appropriate policies to maintain, restore, or enhance the diversity and connectivity of the system and the longterm ecological or hydrologic functions of the features and areas as set out in the policies in this subsection and the policies in subsections 4.2.3 and 4.2.4.

3. Within the Natural Heritage System:

a) new development or site alteration will demonstrate that:

i. there are no negative impacts on key natural heritage features or key hydrologic features or their functions;

ii. connectivity along the system and between key natural heritage features and key hydrologic features located within 240 metres of each other will be maintained or, where possible, enhanced for the movement of native plants and animals across the landscape;

iii. the removal of other natural features not identified as key natural heritage features and key hydrologic features is avoided, where possible. Such features should be incorporated into the planning and design of the proposed use wherever possible;

iv. except for uses described in and governed by the policies in subsection 4.2.8, the disturbed area, including any buildings and structures, will not exceed 25 per cent of the total developable area, and the impervious surface will not exceed 10 per cent of the total developable area;

v. with respect to golf courses, the disturbed area will not exceed 40 per cent of the total developable area; and

vi. at least 30 per cent of the total developable area will remain or be returned to natural self-sustaining vegetation, except where specified in accordance with the policies in subsection 4.2.8; and

b) the full range of existing and new agricultural uses, agriculturerelated uses, on-farm diversified uses, and normal farm practices are permitted. However, new buildings or structures for agricultural uses,

agriculture-related uses, or on-farm diversified uses are not subject to policy 4.2.2.3 a), but are subject to the policies in subsections 4.2.3 and 4.2.4.

4. The natural heritage systems identified in official plans that are approved and in effect as of July 1, 2017 will continue to be protected in accordance with the relevant official plan until the Natural Heritage System has been issued.

5. In implementing the Natural Heritage System, upper- and single-tier municipalities may, through a municipal comprehensive review, refine provincial mapping with greater precision in a manner that is consistent with this Plan.

6. Beyond the Natural Heritage System, including within settlement areas, the municipality:

a) will continue to protect any other natural heritage features in a manner that is consistent with the PPS; and

b) may continue to protect any other natural heritage system or identify new systems in a manner that is consistent with the PPS.

7. If a settlement area is expanded into the Natural Heritage System in accordance with the policies in subsection 2.2.8, the portion that is within the revised settlement area boundary will:

a) be designated in official plans;

b) no longer be subject to policy 4.2.2.3; and

c) continue to be protected in a manner that ensures that the connectivity between, and diversity and functions of, the natural heritage features and areas will be maintained, restored, or enhanced.

4.2.3 Key Hydrologic Features, Key Hydrologic Areas and Key Natural Heritage Features

1. Outside of settlement areas, development or site alteration is not permitted in key natural heritage features that are part of the Natural Heritage System or in key hydrologic features, except for:

c) activities that create or maintain infrastructure authorized under an environmental assessment process;

4.2.4 Lands Adjacent to Key Hydrologic Features and Key Natural Heritage Features

1. Outside settlement areas, a proposal for new development or site alteration within 120 metres of a key natural heritage feature within the Natural Heritage System or a key hydrologic feature will require a natural heritage evaluation or hydrologic evaluation that identifies a vegetation protection zone, which:

a) is of sufficient width to protect the key natural heritage feature or key hydrologic feature and its functions from the impacts of the proposed change;

b) is established to achieve and be maintained as natural self-sustaining vegetation; and

c) for key hydrologic features, fish habitat, and significant woodlands, is no less than 30 metres measured from the outside boundary of the key natural heritage feature or key hydrologic feature.

2. Evaluations undertaken in accordance with policy 4.2.4.1 will identify any additional restrictions to be applied before, during, and after development to protect the hydrologic functions and ecological functions of the feature.

7. Definitions

Key Natural Heritage Features: Habitat of endangered species and threatened species; fish habitat; wetlands; life science areas of natural and scientific interest (ANSIs), significant valleylands, significant woodlands; significant wildlife habitat (including habitat of special concern species); sand barrens, savannahs, and tallgrass prairies; and alvars.

Greenbelt Plan, 2017

4.2.1 General Infrastructure Policies

For lands falling within the Protected Countryside, the following policies shall apply:

2. The location and construction of infrastructure and expansions, extensions, operations and maintenance of infrastructure in the Protected Countryside are subject to the following:

> h) New waste disposal sites and facilities, and organic soil conditioning sites are prohibited in *key natural heritage features*, *key hydrologic features* and their associated *vegetation protection zones*.

Planning Act, RSO 1990, c. P.13

Purposes

1.1 The purposes of this Act are,

> (a) to promote sustainable economic development in a healthy natural environment within the policy and by the means provided under this Act;
>
> (b) to provide for a land use planning system led by provincial policy;
>
> (c) to integrate matters of provincial interest in provincial and municipal planning decisions;
>
> (d) to provide for planning processes that are fair by making them open, accessible, timely and efficient;
>
> (e) to encourage co-operation and co-ordination among various interests;
>
> (f) to recognize the decision-making authority and accountability of municipal councils in planning. 1994, c. 23, s. 4.

Provincial Interest

2 The Minister, the council of a municipality, a local board, a planning board and the Tribunal, in carrying out their responsibilities under this Act, shall have regard to, among other matters, matters of provincial interest such as,

> (a) the protection of ecological systems, including natural areas, features and functions;
> (b) the protection of the agricultural resources of the Province;
> (c) the conservation and management of natural resources and the mineral resource base;
> (d) the conservation of features of significant architectural, cultural, historical, archaeological or scientific interest;
> (e) the supply, efficient use and conservation of energy and water;

(f) the adequate provision and efficient use of communication, transportation, sewage and water services and waste management systems;
(g) the minimization of waste;
(h) the orderly development of safe and healthy communities;
(h.1) the accessibility for persons with disabilities to all facilities, services and matters to which this Act applies;
(i) the adequate provision and distribution of educational, health, social, cultural and recreational facilities;
(j) the adequate provision of a full range of housing, including affordable housing;
(k) the adequate provision of employment opportunities;
(l) the protection of the financial and economic well-being of the Province and its municipalities;
(m) the co-ordination of planning activities of public bodies;
(n) the resolution of planning conflicts involving public and private interests;
(o) the protection of public health and safety;
(p) the appropriate location of growth and development;
(q) the promotion of development that is designed to be sustainable, to support public transit and to be oriented to pedestrians;
(r) the promotion of built form that,
(i) is well-designed,
(ii) encourages a sense of place, and
(iii) provides for public spaces that are of high quality, safe, accessible, attractive and vibrant;
(s) the mitigation of greenhouse gas emissions and adaptation to a changing climate. 1994, c. 23, s. 5; 1996, c. 4, s. 2; 2001, c. 32, s. 31 (1); 2006, c. 23, s. 3; 2011, c. 6, Sched. 2, s. 1; 2015, c. 26, s. 12; 2017, c. 10, Sched. 4, s. 11 (1); 2017, c. 23, Sched. 5, s. 80.

Policy statements
3 (1) The Minister, or the Minister together with any other minister of the Crown, may from time to time issue policy statements that have been approved by the Lieutenant Governor in Council on matters relating to municipal planning that in the opinion of the Minister are of provincial interest. R.S.O. 1990, c. P.13, s. 3 (1).

Policy statements and provincial plans
3 (5) A decision of the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the Tribunal, in respect of the exercise of any authority that affects a planning matter,

(a) shall be consistent with the policy statements issued under subsection (1) that are in effect on the date of the decision; and

(b) shall conform with the provincial plans that are in effect on that date, or shall not conflict with them, as the case may be. 2006, c. 23, s. 5; 2017, c. 23, Sched. 5, s. 80.

Same
3 (6) Comments, submissions or advice affecting a planning matter that are provided by the council of a municipality, a local board, a planning board, a minister or ministry, board, commission or agency of the government,

(a) shall be consistent with the policy statements issued under subsection (1) that are in effect on the date the comments, submissions or advice are provided; and

(b) shall conform with the provincial plans that are in effect on that date, or shall not conflict with them, as the case may be.

Ontario Provincial Policy Statement, 2014

2.0 Wise Use and Management of Resources

Ontario's long-term prosperity, environmental health, and social well-being depend on conserving biodiversity, protecting the health of the Great Lakes, and protecting natural heritage, water, agricultural, mineral and cultural heritage and archaeological resources for their economic, environmental and social benefits.

Accordingly:

2.1 Natural Heritage

2.1.1 Natural features and areas shall be protected for the long term.

2.1.2 The diversity and connectivity of natural features in an area, and the long-term ecological function and biodiversity of natural heritage systems, should be maintained, restored or, where possible, improved, recognizing linkages between and among natural heritage features and areas, surface water features and ground water features.

2.1.3 Natural heritage systems shall be identified in Ecoregions 6E & 7E, recognizing that natural heritage systems will vary in size and form in settlement areas, rural areas, and prime agricultural areas.

2.1.4 Development and site alteration shall not be permitted in:

a) significant wetlands in Ecoregions 5E, 6E and 7E; and
b) significant coastal wetlands.

2.1.5 Development and site alteration shall not be permitted in:

a) significant wetlands in the Canadian Shield north of Ecoregions 5E, 6E and 7E;
b) significant woodlands in Ecoregions 6E and 7E (excluding islands in Lake Huron and the St. Marys River);
c) significant valleylands in Ecoregions 6E and 7E (excluding islands in Lake Huron and the St. Marys River);
d) significant wildlife habitat;
e) significant areas of natural and scientific interest; and
f) coastal wetlands in Ecoregions 5E, 6E and 7E that are not subject to policy 2.1.4(b)

unless it has been demonstrated that there will be no negative impacts on the natural features or their ecological functions.

2.1.6 Development and site alteration shall not be permitted in fish habitat except in accordance with provincial and federal requirements.

2.1.7 Development and site alteration shall not be permitted in habitat of endangered species and threatened species, except in accordance with provincial and federal requirements.

2.1.8 Development and site alteration shall not be permitted on adjacent lands to the natural heritage features and areas identified in policies 2.1.4, 2.1.5, and 2.1.6 unless the ecological function of the adjacent lands has been evaluated and it has been demonstrated that there will be no negative impacts on the natural features or on their ecological functions.

2.3 Agriculture

2.3.1 Prime agricultural areas shall be protected for long-term use for agriculture. Prime agricultural areas are areas where prime agricultural lands predominate. Specialty crop areas shall be given the highest priority for protection, followed by Canada Land Inventory Class 1, 2, and 3 lands, and any associated Class 4 through 7 lands within the prime agricultural area, in this order of priority.

2.3.2 Planning authorities shall designate prime agricultural areas and specialty crop areas in accordance with guidelines developed by the Province, as amended from time to time.

2.3.3 Permitted Uses

2.3.3.1 In prime agricultural areas, permitted uses and activities are: agricultural uses, agriculture-related uses and on-farm diversified uses. Proposed agriculture-related uses and on-farm diversified uses shall be compatible with, and shall not hinder, surrounding agricultural operations. Criteria for these uses may be based on guidelines developed by the Province or municipal approaches, as set out in municipal planning documents, which achieve the same objectives.

2.3.3.2 In prime agricultural areas, all types, sizes and intensities of agricultural uses and normal farm practices shall be promoted and protected in accordance with provincial standards.

2.3.3.3 New land uses, including the creation of lots, and new or expanding livestock facilities shall comply with the minimum distance separation formulae.

2.3.4 Lot Creation and Lot Adjustments

2.3.4.1 Lot creation in prime agricultural areas is discouraged and may only be permitted for:

a) agricultural uses, provided that the lots are of a size appropriate for the type of agricultural use(s) common in the area and are sufficiently large to maintain flexibility for future changes in the type or size of agricultural operations;

b) agriculture-related uses, provided that any new lot will be limited to a minimum size needed to accommodate the use and appropriate sewage and water services;

c) a residence surplus to a farming operation as a result of farm consolidation, provided that:

1. the new lot will be limited to a minimum size needed to accommodate the use and appropriate sewage and water services; and

2. the planning authority ensures that new residential dwellings are

prohibited on any remnant parcel of farmland created by the severance. The approach used to ensure that no new residential dwellings are permitted on the remnant parcel may be recommended by the Province, or based on municipal approaches which achieve the same objective; and

d) infrastructure, where the facility or corridor cannot be accommodated through the use of easements or rights-of-way.

2.3.4.2 Lot adjustments in prime agricultural areas may be permitted for legal or technical reasons.

2.3.4.3 The creation of new residential lots in prime agricultural areas shall not be permitted, except in accordance with policy 2.3.4.1(c).

2.3.5 Removal of Land from Prime Agricultural Areas

2.3.5.1 Planning authorities may only exclude land from prime agricultural areas for expansions of or identification of settlement areas in accordance with policy 1.1.3.8.

2.3.6 Non-Agricultural Uses in Prime Agricultural Areas

2.3.6.1 Planning authorities may only permit non-agricultural uses in prime agricultural areas for:

a) extraction of minerals, petroleum resources and mineral aggregate resources, in accordance with policies 2.4 and 2.5; or

b) limited non-residential uses, provided that all of the following are demonstrated:

1. the land does not comprise a specialty crop area;

2. the proposed use complies with the minimum distance separation formulae;

3. there is an identified need within the planning horizon provided for in policy 1.1.2 for additional land to be designated to accommodate the proposed use; and

4. alternative locations have been evaluated, and

i. there are no reasonable alternative locations which avoid prime agricultural areas; and

ii. there are no reasonable alternative locations in prime agricultural areas with lower priority agricultural lands.

2.3.6.2 Impacts from any new or expanding non-agricultural uses on surrounding agricultural operations and lands are to be mitigated to the extent feasible.

4.5 - In implementing the Provincial Policy Statement, the Minister of Municipal Affairs and Housing may take into account other considerations when making decisions to support strong communities, a clean and healthy environment and the economic vitality of the Province.

4.7 - The official plan is the most important vehicle for implementation of this Provincial Policy Statement. Comprehensive, integrated and long-term planning is best achieved through official plans.

Official plans shall identify provincial interests and set out appropriate land use designations and policies. To determine the significance of some natural heritage features and other resources, evaluation may be required.

Official plans should also coordinate cross-boundary matters to complement the actions of other planning authorities and promote mutually beneficial solutions.

Official plans shall provide clear, reasonable and attainable policies to protect provincial interests and direct development to suitable areas. In order to protect provincial interests, planning authorities shall keep their official plans up-to-date with this Provincial Policy Statement. The policies of this Provincial Policy Statement continue to apply after adoption and approval of an official plan.

4.8 Zoning and development permit by-laws are important for implementation of this Provincial Policy Statement. Planning authorities shall keep their zoning and development permit by-laws up-to-date with their official plans and this Provincial Policy Statement.

6.0 Definitions

Adjacent lands: means

a) for the purposes of policy 1.6.8.3, those lands contiguous to existing or planned corridors and transportation facilities where development would have a negative impact on the corridor or facility. The extent of the adjacent lands may be recommended in guidelines developed by the Province or based on municipal approaches that achieve the same objectives;
b) for the purposes of policy 2.1.8, those lands contiguous to a specific natural heritage feature or area where it is likely that development or site alteration would have a negative impact on the feature or area. The extent of the adjacent lands may be recommended by the Province or based on municipal approaches which achieve the same objectives;
c) for the purposes of policies 2.4.2.2 and 2.5.2.5, those lands contiguous to lands on the surface of known petroleum resources, mineral deposits, or deposits of mineral aggregate resources where it is likely that development would constrain future access to the resources. The extent of the adjacent lands may be recommended by the Province; and
d) for the purposes of policy 2.6.3, those lands contiguous to a protected heritage property or as otherwise defined in the municipal official plan

Statement of Environmental Values, Ministry of Environment, Conservation and Parks

Statement of Environmental Values: Ministry of the Environment and Climate Change

1. INTRODUCTION

The Ontario Environmental Bill of Rights (EBR) was proclaimed in February 1994. The founding principles of the EBR are stated in its Preamble:

- The people of Ontario recognize the inherent value of the natural environment.
- The people of Ontario have a right to a healthful environment.
- The people of Ontario have as a common goal the protection, conservation and restoration of the natural environment for the benefit of present and future generations.

While the government has the primary responsibility for achieving this goal, Ontarians should have the means to ensure that it is achieved in an effective, timely, open and fair manner. The purposes of the Act are:

- To protect, conserve and where reasonable, restore the integrity of the environment;
- To provide sustainability of the environment by the means provided in the Act; and
- To protect the right to a healthful environment by the means provided in the Act.

These purposes include the following:

- The prevention, reduction and elimination of the use, generation and release of pollutants that are an unreasonable threat to the integrity of the environment.
- The protection and conservation of biological, ecological and genetic diversity.
- The protection and conservation of natural resources, including plant life, animal life and ecological systems.
- The encouragement of the wise management of our natural resources, including plant life, animal life and ecological systems.
- The identification, protection and conservation of ecologically sensitive areas or processes.

To assist in fulfilling these purposes, the Act provides:

- The means by which Ontarians may participate in the making of environmentally significant decisions by the Government of Ontario;
- Increased accountability of the Government of Ontario for its environmental decision-making;
- Increased access to the courts by residents of Ontario for the protection of the environment; and
- Enhanced protection for employees who take action in respect of environmental harm.

The EBR requires a Statement of Environmental Values from all designated ministries. The designated ministries are listed at: http://www.ebr.gov.on.ca/ERS-WEB-External/content/index2.jsp?f0=aboutTheRegistry.statement&f1=aboutTheRegistry.statement.value&menuIndex=0_3

Statements of Environmental Values (SEV) are a means for designated government ministries to record their commitment to the environment and be accountable for ensuring consideration of the environment in their decisions. A SEV explains:

- How the purposes of the EBR will be applied when decisions that might significantly affect the environment are made in the Ministry; and
- How consideration of the purposes of the EBR will be integrated with other considerations, including social, economic and scientific considerations, which are part of decision-making in the Ministry.

It is each Minister's responsibility to take every reasonable step to ensure that the SEV is considered whenever decisions that might significantly affect the environment are made in the Ministry.

The Ministry will examine the SEV on a periodic basis to ensure the Statements are current.

2. MINISTRY VISION, MANDATE AND BUSINESS

The Ministry of the Environment and Climate Change's vision is an Ontario with clean and safe air, land and water that contributes to healthy communities, ecological protection, and environmentally sustainable development for present and future generations.

The Ministry of the Environment and Climate Change develops and implements environmental legislation, regulations, standards, policies, guidelines and programs. The Ministry's research, monitoring, inspection, investigations and enforcement activities are integral to achieving Ontario's environmental goals.

Specific details on the responsibilities of the Ministry of the Environment and Climate Change can be found on the Ministry website www.ene.gov.on.ca.

3. APPLICATION OF THE SEV

The Ministry of the Environment and Climate Change is committed to applying the purposes of the EBR when decisions that might significantly affect the environment are made in the Ministry. As it develops Acts, regulations and policies, the Ministry will apply the following principles:

- The Ministry adopts an ecosystem approach to environmental protection and resource management. This approach views the ecosystem as composed of air, land, water and living organisms, including humans, and the interactions among them.
- The Ministry considers the cumulative effects on the environment; the interdependence of air, land, water and living organisms; and the relationships among the environment, the economy and society.
- The Ministry considers the effects of its decisions on current and future generations, consistent with sustainable development principles.
- The Ministry uses a precautionary, science-based approach in its decision-making to protect human health and the environment.
- The Ministry's environmental protection strategy will place priority on preventing pollution and minimizing the creation of pollutants that can adversely affect the environment.
- The Ministry endeavours to have the perpetrator of pollution pay for the cost of clean up and rehabilitation consistent with the polluter pays principle.
- In the event that significant environmental harm is caused, the Ministry will work to ensure that the environment is rehabilitated to the extent feasible.
- Planning and management for environmental protection should strive for continuous improvement and effectiveness through adaptive management.
- The Ministry supports and promotes a range of tools that encourage environmental protection and sustainability (e.g. stewardship, outreach, education).
- The Ministry will encourage increased transparency, timely reporting and enhanced ongoing engagement with the public as part of environmental decision making.

Decisions on proposed Acts, regulations and policies reflect the above principles. The ministry works to protect, restore and enhance the natural environment by:

- Developing policies, legislation, regulations and standards to protect the environment and human health,
- Using science and research to support policy development, environmental solutions and reporting,
- Ensuring that planning, which aims to identify and evaluate environmental benefits and risks, takes place at the earliest stages in the decision- making process;
- Undertaking compliance and enforcement actions to ensure consistency with environmental laws, and
- Environmental monitoring and reporting to track progress over time and inform the public on environmental quality.

In addition, the Ministry of the Environment and Climate Change uses a range of innovative programs and initiatives, including strong partnerships, public engagement, strategic knowledge management, and economic incentives and disincentives to carry out its responsibilities.

4. INTEGRATION WITH OTHER CONSIDERATIONS

The Ministry of the Environment and Climate Change will take into account social, economic and other considerations; these will be integrated with the purposes of the EBR when decisions that might significantly affect the environment need to be made. In making decisions, the Ministry will use the best science available. It will support scientific research, the development and application of technologies, processes and services.

The Ministry will encourage energy conservation in those sectors where it provides policy direction or programs.

5. MONITORING USE OF THE SEV

The Ministry of the Environment and Climate Change will document how the SEV was considered each time a decision on an Act, regulation or policy is posted on the Environmental Registry. The Ministry will ensure that staff involved in decisions that might significantly affect the environment is aware of the Ministry's Environmental Bill of Rights obligations.

The Ministry of the Environment and Climate Change monitors and assesses changes in the environment. The Ministry reviews and reports, both internally and to the Environmental Commissioner's Office, on its progress in implementing the SEV.

6. CONSULTATION

The Ministry of the Environment and Climate Change believes that public consultation is vital to sound environmental decision-making. The Ministry will provide opportunities for an open and consultative process when making decisions that might significantly affect the environment.

7. CONSIDERATION OF ABORIGINAL PEOPLES

The Ministry of the Environment and Climate Change recognizes the value that Aboriginal peoples place on the environment. When making decisions that might significantly affect the environment, the Ministry will provide opportunities for involvement of Aboriginal peoples whose interests may be affected by such decisions so that Aboriginal interests can be appropriately considered. This commitment is not intended to alter or detract from any constitutional obligation the province may have to consult with Aboriginal peoples.

8. GREENING INTERNAL OPERATIONS

The Ministry of the Environment and Climate Change believes in the wise use and conservation of natural resources. The Ministry will support Government of Ontario initiatives to conserve energy and water, and to wisely use our air, water and land resources in order to generate sustainable environmental, health and economic benefits for present and future generations.

The Ministry of the Environment and Climate Change is committed to reducing its environmental footprint by greening its internal operations, and supporting environmentally sustainable practices for its partners, stakeholders and suppliers. A range of activities is being undertaken to reduce the Ministry's air emissions, energy use, water consumption, and waste generation. These include: monitoring and reducing the Ministry's carbon footprint, promoting energy and water conservation in ministry outreach and educational activities, and supporting government-wide greening and sustainability initiatives.

County of Simcoe Official Plan

3.3.6 Where feasible, and subject to local municipal policies and bylaws, infrastructure and passive recreational uses may be located in any designation of this Plan, subject to Sections 3.8, and 4.2, and the requirements of the Niagara Escarpment Plan, Oak Ridges Moraine Conservation Plan, Greenbelt Plan and Lake Simcoe Protection Plan where applicable, and applicable provincial and federal policy and legislation. Where applicable, only such uses permitted in the Greenlands designation (see Section 3.8) are those which have successfully completed any required provincial and/or federal environmental assessment process or proceedings under the Drainage Act. Lot creation for infrastructure in the Agricultural designation is discouraged and should only be permitted where the use cannot be accommodated through an easement or right-of-way.

Natural Heritage

3.3.15 Despite anything else in this Plan, except Section 4.4 as it applies to mineral aggregate operations only, development and site alteration shall not be permitted:

i. In significant wetlands and significant coastal wetlands.

ii. In the following unless it has been demonstrated that there will be no negative impacts on the natural features or their ecological functions: Significant woodlands, significant valleylands, significant wildlife habitat, significant areas of natural and scientific interest (ANSIs), and coastal wetlands (not covered by 3.3.15 i) above).

iii. In the following regional and local features, where a local official plan has identified such features, unless is has been demonstrated that there will be no negative impacts on the natural heritage features or their ecological functions: wetlands 2.0 hectares or larger in area determined to be locally significant by an approved EIS, including but not limited to evaluated wetlands, and Regional areas of natural and scientific interest (ANSIs).

iv. In fish habitat except in accordance with provincial and federal requirements.

v. In habitat of endangered species and threatened species, except in accordance with provincial and federal requirements.

vi. On adjacent lands to the natural heritage features and areas listed above, unless the ecological function of the adjacent lands has been evaluated and it has been demonstrated that there will be no negative impacts on the natural features or on their ecological functions. Adjacent lands shall generally be considered to be:

a. within 120 metres of habitat of endangered species and threatened species, significant wetlands, significant coastal wetlands, wetlands 2.0 hectares or larger determined to be locally significant by an approved EIS, significant woodlands, significant wildlife habitat, significant areas of natural and scientific interest – life science, significant valleylands, and fish habitat;

b. within 50 metres of significant areas of natural and scientific interest – earth science;

c. A reduced adjacent lands from the above may be considered based on the nature of intervening land uses. The extent of the reduced area will be determined by the approval authority in consultation with the applicant prior to the submission of a development application, and supported by an EIS, demonstrating there will be no negative impacts beyond the proposed reduced adjacent lands area.

Nothing in the above policies is intended to limit the ability of agricultural uses to continue.

Despite anything else in Sections 3.3 and 3.8, in those portions of the Greenlands designation including Section 3.8.10 that are also designated in Provincial plans as listed in Section 3.8.10 (a) to (h), if the provisions of the Provincial plan are more restrictive than those of Section 3.8, then the Provincial plan prevails.

3.8 Greenlands

The rationale for the Greenlands Designation is found in the 1996 background report prepared for the County of Simcoe Official Plan titled "Development of a Natural Heritage System for the County of Simcoe". The Greenlands Designation is mapped on Schedule 5.1. This mapping is based on the findings of the 1996 report, revised in 2008 to reflect more accurate and complete information.

Objectives

3.8.1 To protect and restore the natural character, form, function, and connectivity of the natural heritage system of the County of Simcoe, and to sustain the natural heritage features and areas and ecological functions of the Greenlands designation and local natural heritage systems for future generations.

3.8.2 To promote biodiversity and ecological integrity within the County's natural heritage features and areas and the Greenlands designation.

3.8.3 To improve the quality, connectivity and amount of woodlands and wetlands cover across the County.

3.8.4 To ensure that species and communities of conservation concern can continue to flourish and evolve throughout the County.

3.8.5 To contribute to the protection, improvement, and restoration of the quality and quantity of surface water and ground water and the function of sensitive surface water features and sensitive ground water features within the County.

3.8.6 To ensure that the Greenlands designation complements and supports the natural heritage systems established in provincial plans and is linked with the natural heritage systems of adjacent jurisdictions, and to require local municipalities to identify and protect natural features and ecological functions that in turn complement and support the Greenlands.

3.8.7 To ensure that the location, scale, and form of development respect and support the protection of the County's natural heritage system.

3.8.8 To provide opportunities for natural heritage enjoyment and appreciation and for recreational and tourism uses in keeping with the Greenlands objectives, that foster healthy and liveable communities and enhance the sense of place and quality of life that characterize the County.

Natural Heritage Systems

3.8.9 Natural heritage in Simcoe County will be protected by:

a) The Greenlands designation, which is the natural heritage system of the County of Simcoe; and
b) The natural heritage systems of the 16 local municipalities which may identify local natural features and areas in addition to the County's Greenlands designation.

3.8.10 The County's natural heritage system primarily includes the following natural heritage features and areas, wherever they occur in the County:

a) Habitat of endangered species and threatened species;
b) Significant wetlands, significant coastal wetlands, other coastal wetlands, and all wetlands 2.0 ha or larger in area which have been determined to be locally significant, including but not limited to evaluated wetlands;
c) Significant woodlands;
d) Significant valleylands ;
e) Significant wildlife habitat;
f) Significant Areas of natural and scientific interest (ANSIs);
g) Regional Areas of natural and scientific interest (ANSIs);
h) Fish Habitat;
i) Linkage areas in accordance with Section 3.3.16; and,
j) Public lands as defined in the Public Lands Act.

The County's natural heritage system is generally identified as the Greenlands designation on Schedule 5.1.

3.8.11 The mapping of the Greenlands designation on Schedule 5.1 is approximate, and does not reflect certain features such as habitat of endangered species and threatened species, or new or more accurate information identifying natural heritage features and areas. Any minor adjustment to the Greenlands designation as determined through more detailed mapping, field surveys, the results of an EIS, information received from the Ministry of Natural Resources and Forestry or conservation authorities or local municipal official plans will not require an amendment to this Plan.

Despite anything else in Section 3.8, if any lands are demonstrated to be of a feature type listed in Section 3.8.10, even if they are not mapped in Schedules 5.1, those lands are to be protected in accordance with 3.3.15 and 3.3.16. With respect to settlement areas and expansions to settlement areas, the policies of 3.8.17 and 3.8.18 apply.

Development Control

3.8.15 Outside of settlement areas, and subject to Section 3.3.15 (other than for 3.8.15 vi. which is subject to policy 4.4.1), the following uses may be permitted in the Greenlands designation or on adjacent lands as described in Section 3.3.15:

i. Agricultural uses;
ii. Agriculture-related uses;
iii. On-farm diversified uses;
iv. Forestry on public lands or in County forests in accordance with an approved management plan and sustainable forest practices;
v. Forestry on private lands as permitted by the County's Forest Conservation Bylaw or by a local municipality's tree bylaw under the Municipal Act, 2001;
vi. Mineral aggregate operations, if approved through a local Official Plan amendment;
vii. Outdoor passive recreational uses; and
viii. Subject to demonstrating that the lands are not within a prime agricultural area, residential dwelling units on lots which were approved prior to the approval date of this policy (May 9, 2016).

3.8.19 Infrastructure authorized under an environmental assessment process may be permitted within the Greenlands designation or on adjacent lands. Infrastructure not subject to the environmental assessment process, may be permitted within the Greenlands designation or on adjacent lands in accordance with Section 3.3.15.

3.8.20 If it is determined by the County at the pre-consultation stage in the planning application process, that the subject property does not contain any natural heritage features and areas on the subject or adjacent lands which could be impacted by the proposed development and that the lands are not required as a connection, linkage or providing an ecological function to the natural heritage system, no EIS would be required to be submitted.

3.8.21 When considering planning applications in the Greenlands designation, more detailed mapping, field surveys, the results of an EIS, information received from the Ministry of Natural Resources and Forestry or conservation authorities or local municipal official plans may be used to determine more precise boundaries of the Greenlands designation or individual natural heritage features and areas.

Any minor adjustment to the Greenlands designation as determined by this information will not require an amendment to this Plan.

Where a refinement or adjustment to the Greenlands designation is facilitated without an amendment to this *Plan*, the land use designation abutting that portion of the Greenlands designation shall apply. A change to any other designation is subject to the policies of this Plan and shall require an amendment to this Plan if required by the applicable policies.

3.8.22 Proposals to re-designate lands in the Greenlands designation shall not be permitted unless an EIS is submitted to the satisfaction of the County demonstrating that the policies of Section 3.3.15, 3.3.16, 3.8.15, 3.8.16 or 4.4.1 as applicable, and the relevant policies of the local municipal official plan are satisfied. Policies 3.3.15 iii to vi) and 3.3.16 are not applicable to settlement area expansions.

3.8.23 Proposals to re-designate lands in the Greenlands designation are required to demonstrate if the lands are within a prime agricultural area. Re-designation proposals for lands within a prime agricultural area shall only be permitted to the Agricultural designation.

Implementation

3.8.24 The Greenlands designation does not imply that all lands within it are completely restricted from development and site alteration, or that a public agency must or will purchase any such land on which a planning application is refused or modified not to the applicant's satisfaction.

3.8.25 If natural heritage features and areas or ecological functions within the Greenlands Designation are damaged or destroyed after July 1, 2008 by causes not beyond the control of the landowner, the designation of the affected lands in this Plan or the local municipal official plan will not be changed as a result. Development will only be considered if it is a condition of approval that the damaged or destroyed features

4.5 Resource Conservation

Water is a crucial resource to almost every form of land use and economic sector. The resource traverses municipal boundaries and is subject to intensive use affecting its quality and available quantity. Water conservation, or the wise management of it as a resource, is essential; watershed-based planning is needed, including assessment of cumulative effects of water use. The County wishes to promote the gathering of information regarding water resources and watershed-based management of the resource.

Landform and soil conservation are also important for environmental, economic and social reasons. Landform features such as moraines must be managed wisely. Energy conservation and

alternative energy and renewable energy systems must also be wisely planned and managed for the overall benefit to the County and the environment.

Water

4.5.1 Land use planning and development within the County shall protect, improve or restore the quality and quantity of water and related resources and aquatic ecosystems on an integrated watershed management basis.

4.5.2 Water resource systems consisting of ground water features, hydrologic functions, natural heritage features and areas, and surface water features including shoreline areas which are necessary for the ecological and hydrological integrity of the watersheds within the County shall be identified in local municipal official plans, and include policies for their protection, improvement or restoration including maintaining linkages and related functions.

Development and site alteration shall be restricted in or near sensitive surface water features and sensitive ground water features such that these features and their related hydrologic functions will be protected, improved or restored. This will be demonstrated though a Risk Assessment Study for Ground and Surface Water where applicable.

Local municipal official plans shall provide that mitigative measures and/or alternative development approaches may be required in order to protect, improve, or restore sensitive surface water features, sensitive ground water features, and their hydrologic functions.

4.5.3 Proposals for major growth and major development shall be reviewed on a watershed management basis where applicable and appropriate to ensure the watershed is maintained in an environmentally sustainable fashion.

4.5.4 Development in the County shall occur in a manner that will protect human life and property from water related hazards such as flooding and erosion. Flood plain management shall occur on a watershed management basis giving due consideration to the upstream, downstream, and cumulative effects of development.

4.5.5 The County will work with local municipalities, Conservation Authorities, Source Protection Authorities, Parks Canada-Trent-Severn Waterway, and other Provincial agencies in the development of watershed and sub-watershed management plans. This may include the determination of cumulative flooding risks and impacts and the determination of a river system's capacity to assimilate effluent from point and non-point sources.

4.5.6 Aquifers, headwater areas, and recharge and discharge areas shall be identified and protected in the policies and maps of local municipal official plans and/or through the development and subdivision approval process. Development should generally be directed away from areas with a high water table and/or highly permeable soils. In settlement areas or other development centres where this is not possible, potential environmental impacts shall be mitigated using all reasonable methods.

4.5.7 Local municipalities shall ensure that stormwater management practices match pre development stormwater flow rates and where possible, minimize flow rates, minimize containment loads, and where feasible maintain or increase the extent of vegetative and pervious surfaces.

4.5.8 For those lands where York Region's wellhead protections areas extend into the County of Simcoe, the County recognizes that York Region comments must be obtained prior to approval being considered.

Flood Plains and Other Hazard Lands

4.5.9 Development shall generally be directed to areas outside of:

a) hazardous lands adjacent to the shorelines of the Great Lakes – St. Lawrence River System and large inland lakes which are impacted by flooding hazards, erosion hazards and/or dynamic beach hazards;

b) hazardous lands adjacent to river, stream and small inland lake systems which are impacted by flooding hazards and/or erosion hazards; and

c) hazardous sites.

4.5.10 Development and site alteration shall not be permitted within:

a) the dynamic beach hazards;

b) areas that would be rendered inaccessible to people and vehicles during times of flooding hazards, erosion hazards and/or dynamic beach hazards, unless it has been demonstrated that the site has safe access appropriate for the nature of the development and the natural hazard; and

c) a floodway regardless of whether the area of inundation contains high points of land not subject to flooding.

4.5.11 Notwithstanding 4.5.10, development and site alternation may be permitted in certain areas associated with the flooding hazard along river, stream and small inland lake systems within an approved Special Policy Area(s) according to their respective policies, or where the development is limited to uses which by their nature must locate within the floodway, including flood and/or erosion control works or minor additions or passive non-structural uses which do not affect flood flows. Any change or modification to the official plan policies, land use designations or boundaries applying to Special Policy Area lands, must be approved by the Ministers of Municipal Affairs and Housing and Natural Resources and Forestry prior to the approval authority approving such changes or modifications.

4.5.12 Development shall not be permitted to locate in hazardous lands and hazardous sites where the use is:

a) an institutional use including hospitals, long-term care homes, retirement homes, pre-schools, school nurseries, day cares and schools;

b) an essential emergency service such as that provided by fire, police and ambulance stations and electrical substations; and

c) uses associated with the disposal, manufacture, treatment or storage of hazardous substances.

4.5.13 Local municipalities shall consider the potential impacts of climate change that may increase the risk associated with natural hazards.

4.5.14 Where there is a Two Zone Concept applied, and except as prohibited in policy 4.5.10, development and site alteration may be permitted within the flood fringe of a river, stream, approval being considered.

Flood Plains and Other Hazard Lands

4.5.9 Development shall generally be directed to areas outside of:

a) hazardous lands adjacent to the shorelines of the Great Lakes – St. Lawrence River System and large inland lakes which are impacted by flooding hazards, erosion hazards and/or dynamic beach hazards;

b) hazardous lands adjacent to river, stream and small inland lake systems which are impacted by flooding hazards and/or erosion hazards; and

c) hazardous sites.

4.5.10 Development and site alteration shall not be permitted within:

a) the dynamic beach hazards;

b) areas that would be rendered inaccessible to people and vehicles during times of flooding hazards, erosion hazards and/or dynamic beach hazards, unless it has been demonstrated that the site has safe access appropriate for the nature of the development and the natural hazard; and

c) a floodway regardless of whether the area of inundation contains high points of land not subject to flooding.

4.5.11 Notwithstanding 4.5.10, development and site alternation may be permitted in certain areas associated with the flooding hazard along river, stream and small inland lake systems within an approved Special Policy Area(s) according to their respective policies, or where the development is limited to uses which by their nature must locate within the floodway, including flood and/or erosion control works or minor additions or passive non-structural uses which do not affect flood flows. Any change or modification to the official plan policies, land use designations or boundaries applying to Special Policy Area lands, must be approved by the Ministers of Municipal Affairs and Housing and Natural Resources and Forestry prior to the approval authority approving such changes or modifications.

4.5.12 Development shall not be permitted to locate in hazardous lands and hazardous sites where the use is:

a) an institutional use including hospitals, long-term care homes, retirement homes, pre-schools, school nurseries, day cares and schools;

b) an essential emergency service such as that provided by fire, police and ambulance stations and electrical substations; and

c) uses associated with the disposal, manufacture, treatment or storage of hazardous substances.

4.5.13 Local municipalities shall consider the potential impacts of climate change that may increase the risk associated with natural hazards.

4.5.14 Where there is a Two Zone Concept applied, and except as prohibited in policy 4.5.10, development and site alteration may be permitted within the flood fringe of a river, stream, professional, and the local municipality. The cost of preparing the study and professional review if required shall be borne by the applicant.

Steep Slopes

4.5.19 Development will be prohibited on slopes and ravines which could be subject to active erosion hazards or historic slope failure.

Minerals and Petroleum Resources

4.5.20 Minerals and petroleum resources shall be protected for long-term use.

4.5.21 Mineral mining operations and petroleum resource operations shall be identified and protected from development and activities that would preclude or hinder expansions or continued use.

4.5.22 Known mineral deposits, known petroleum resources, and significant areas of mineral potential shall be identified and development and activities in these resources or on adjacent lands which would preclude or hinder the establishment of new operations or access to the resources shall be identified and only be permitted if: a) resource use would not be feasible; or b) the proposed land use or development serves a greater long-term public interests; and c) issues of public health, public safety and environmental impacts are addressed.

Human-Made Hazards

4.5.23 Development on, abutting, or adjacent to contaminated sites, lands affected by mine hazards, oil, gas, and salt hazards, or former mineral mining operations, mineral aggregate operations, or petroleum resource operations may be permitted only if rehabilitation or other measures to address and mitigate known or suspected hazards are under way or have been completed.

Sites shall be remediated as necessary prior to any activity on the site associated with the proposed use such that there will be no adverse effects.

Conservation Authority Jurisdiction

4.5.24 For the portion of the County under the jurisdiction of a Conservation Authority, regulations made under the Conservation Authorities Act apply to development or site alteration activities unless the activity is exempt in accordance with the Conservation Authorities Act. Where appropriate, detailed delineation of the Conservation Authority regulated areas should be identified on schedules of local municipal plans.

For areas outside Conservation Authority jurisdiction, development applicants should consult local municipalities.

Watercourses, Shorelines, and Lake Management Plans

4.5.25 New development and redevelopment should be sufficiently set back from rivers, streams, and lakes within the County in order to develop vegetative corridors along shorelines and watercourses. The development setback distance shall be determined on-site in consultation with a qualified professional at the applicant's expense. The following factors shall be considered when establishing the setback distance, established through an EIS and slope stability report if necessary, with the intent of protecting significant natural heritage features and ecological functions, providing riparian habitat, and minimizing risk to public safety and property:

i. soil type;
ii. vegetation type and cover;
iii. slope of the land including existing drainage patterns;
iv. natural heritage features and ecological functions including fish habitat;
v. the nature of the development;
vi. defined portions of dynamic beaches; and
vii. flooding and erosion hazards.

4.5.26 Agricultural land users should have regard to the factors in 4.5.25 and farm management plans within their agricultural practice.

4.5.27 Where waterfront or shoreline development is proposed, the preservation of existing public accesses to publicly owned shorelines shall be maintained and the creation of new opportunities for public ownership of and access to shorelines in new developments may be obtained where appropriate. Open space corridors linking shorelines with upland areas should be provided where appropriate.

4.5.28 Development in shoreline areas must address, among other matters: the protection of water quality and quantity; the prevention of erosion resulting from surface water runoff and structural development or fill; the conservation of, and where appropriate the enhancement of linkages between the water bodies and upland areas; opportunities to naturalize the shoreline; and opportunities to conserve, and where appropriate to improve, public access to the shorelines. For the purposes of this policy, shoreline areas include the land that is physically and functionally connected to rivers, streams and lakes, and may be defined by prominent topographic and man-made features, the depth of the existing development oriented to the shoreline, and/or the presence of natural heritage features and areas and functions directly linked to the shoreline.

4.5.29 In shoreline areas, a Stormwater Management Report shall be prepared in accordance with Section 3.3.19 of this Plan, for developments identified in 3.3.19, to the satisfaction of the appropriate approval authorities.

4.5.30 Where individual on-site sewage services and individual on-site water services are provided to existing lots or new developments, local municipalities shall establish minimum lot

sizes sufficient to ensure sustainable development and no impact on water quality or water quantity.

4.5.31 Development proposed near lakes and water bodies with an established management plan shall be developed in accordance with the management plan. The County encourages the preparation of such plans, and will participate in their preparation.

4.5.32 New development proposed along the shoreline of Lake Huron/Georgian Bay, Lake Simcoe and other large inland lakes may require the preparation of a Coastal Engineering Study. The Coastal Engineering Study, prepared by a coastal engineer, must identify the coastal processes associated with the Lake or Bay. Where development is permitted, the Study must demonstrate the proposed mitigation measures to address the shoreline hazard. The Coastal Engineering Study must be prepared to the satisfaction of the municipality and local conservation authority or appropriate agency.

Fish Habitat

4.5.33 Development and site alteration are not permitted in fish habitat except in accordance with provincial and federal requirements.

Woodlands

4.5.34 Significant woodlands shall be subject to the policies of Section 3.3.15 and 3.8. Woodlands within the County of Simcoe shall continue to be protected in accordance with the County of Simcoe Forest Conservation Bylaw.

4.5.35 The County shall continue to acquire County Forest Lands in accordance with the County Forest Acquisition Principles.

4.5.36 The County encourages forestry management practices that sustain the viability of both the woodlot and the harvest of woodland products.

4.5.37 The County encourages measures, in accordance with the policies of this Plan, including but not limited to Section 3.8, which will result in an increase in the overall forest cover within the County.

4.5.38 Where the policies of this Plan require, or an EIS recommends, any development setback or area of environmental constraint on the shoreline of any water body, the County will, where appropriate, encourage re-vegetation or forest restoration with native species within the required setback.

Landform Conservation

4.5.39 Local municipalities should prohibit the disruption and destruction of regionally significant landform features by mass grading and other extensive land alteration unless an acceptable assessment has demonstrated no negative impacts on the landform features, with the exception of mineral aggregate operations.

4.5.40 The County supports the Niagara Escarpment Plan and the Oak Ridges Moraine Conservation Plan and will assist in ensuring development takes place in accordance with those plans and according to Sections 3.10 and 3.11 of this Plan respectively.
Soil Conservation

4.5.41 The County encourages local municipalities to pass bylaws to restrict the removal and movement of topsoil before appropriate development agreements are in place. The removal of topsoil or vegetation, or other disturbances of land, associated with a proposed land use change, should not proceed until approvals have been granted under the Planning Act. Where such activities take place to foster a development application prior to its consideration and approval, such activities will not be considered a basis for supporting the land use change.

Air Quality

4.5.42 This Plan promotes improved air quality through land use development patterns that promote compact and mixed use development, transit usage where appropriate, alternative transportation and active transportation systems, and forest management and reforestation efforts as a means of fostering maintenance and improvement of air quality. The County will work in co-operation with the appropriate agencies to assist in the maintenance and improvement of air quality in the County.

Energy Conservation and Renewable Energy
4.5.43 The County will promote energy conservation through land use development patterns that:
a) promote compact, mixed use development;
b) promote active transportation and the use of transit;
c) maximize, where appropriate, the use and production of alternative energy systems or renewable energy systems, such as solar, wind, biomass or geothermal energy; and
d) maximize the use of existing natural areas and newly planted vegetation to reduce the urban heat island effect.

4.5.44 Renewable energy systems and alternative energy systems should be promoted, where feasible, in accordance with provincial and federal requirements.

4.5.45 Development of renewable energy systems shall be in accordance with the Green Energy and Green Economy Act. Renewable energy undertakings are exempted from Planning Act approvals as per Schedule K of the Green Energy and Green Economy Act.

4.9.8 Notwithstanding any policies herein, w*aste disposal sites* will be established in accordance with the *Environmental Assessment Act* and the *Planning Act* and will be operated in accordance with the *Environmental Protection Act* and the Environmental Compliance Approval for the *waste disposal site.*

Township of Springwater Official Plan

2.2. Goals
2.2.1. To ensure the maintenance, protection and enhancement of natural heritage features.

2.3.5.1. That of a rural municipality focusing on protection of its natural resource base and natural heritage systems as follows:

a) lands of good agricultural potential;
b) Provincially and locally significant wetlands and significant regional and local groundwater aquifer areas;
c) Significant woodlands;
d) Valley lands;
e) Fish and wildlife habitat and endangered and threatened species
f) ANSI's
g) Aggregate Resources
h) Surface and groundwater resources
i) Streams, rivers and lakes

16.1. Objectives

16.1.1. To conserve, maintain, and enhance the quality and integrity of the Natural Heritage features and ecological processes of the Township including air, water, land, and living resources for the benefit of future generations.

16.1.2. To preserve and protect all Internationally, Provincially and Locally significant Wetlands and Areas of Natural and Scientific Interest (A.N.S.I.'s) situated within the Township.

16.1.3. To prevent the diminishment of ecosystem biodiversity and provide for the long term viability of the Natural Heritage System by approving only those land uses which are demonstrated to be environmentally sound and do not negatively impact natural features or environmental functions.

16.1.4. To encourage and promote the use of a variety of planning engineering and resource management approaches and techniques to realize the hydrological, biological, and socio-economic benefits derived from the long term protection of the Natural Heritage System.

16.1.5. To ensure the wise use and conservation of the ground and surface water resources of the Township and to maintain and protect the function of sensitive ground water recharge/discharge, aquifer and headwaters areas on a watershed and subwatershed basis.

16.1.6. To prevent loss of life, minimize property damage and social disruption through the proper management and regulation of flood plain lands or lands possessing steep slopes, areas of soil or bedrock instability, high water tables, or other constraints or natural hazards.

16.2.1.1. Definitions.

Natural Heritage (Environmental Protection) - Category 1 Lands may primarily be characterized as undeveloped natural areas of high environmental quality and significance and/or sensitivity. These areas typically will be both publicly and privately owned.

Natural Heritage (Environmental Protection) - Category 2 Lands may be characterized as areas of lesser environmental significance and/or sensitivity, although areas of high environmental quality may also be present. Category 2 Lands also presently contain lands/or waters previously altered or impacted (i.e.

former agricultural or aggregate extractive areas) and developed areas which exhibit a variety and mix of existing uses.

i. Natural Heritage (Environmental Protection) Category I Lands
Lands designated as Natural Heritage (Environmental Protection) Category 1 Lands on Schedule "A" include environmentally significant lands and/or waters of inherent ecological sensitivity, such as those areas containing the following natural features:

- Internationally, provincially, and locally significant wetlands (Classes 1 – 7),
- Provincially significant Areas of Natural and Scientific Interest (A.N.S.l."s) or other combinations of habitat or landform which could be essential for scientific research or conservation education;
- Significant portions of the habitat of threatened and endangered species; and
- Significant natural watercourses and ravines.

Notwithstanding that all significant natural watercourses and ravines within the Township may not be shown as Natural Heritage (Environmental Protection) - Category I Lands on Schedule "A", policies are contained within this section which apply specifically to these areas

ii. Natural Heritage (Environmental Protection) - Category 2 Lands
Lands delineated as Natural Heritage (Environmental Protection) - Category 2 Lands on Schedule "B" include, but are not limited to, those environmentally significant lands and/or waters of ecological sensitivity, such as those areas containing the following natural features:

- Lands situated adjacent to provincially and locally significant wetlands and other Natural Heritage (Environmental Protection) - Category I Lands;
- Unique and significant biologically sensitive wildlife habitat; Forests and Wood lots;
- Natural connections through valley corridors or other linkages between core areas of the Natural Heritage System;
- Groundwater recharge and discharge, aquifer, and shoreline areas; and
- Natural Fish Habitat.

The above noted components of the Natural Heritage System are for the most part shown in the areas delineated as Natural Heritage (Environmental Protection) Category 2 Lands on Schedule "B". Policies contained within this section apply specifically to these areas, however, additional policies are contained in this section which pertain to areas such as aquifer recharge/discharge and headwater areas which have yet to be delineated.

16.2.1.2. Permitted Uses
ii. Natural Heritage (Environmental Protection – Category 2 Lands

a) Permitted uses on lands delineated on Schedule "B" as Natural Heritage (Environmental Protection) - Category 2 Lands are those uses which are permitted by the underlying land use designation provided that such uses conform to the policies of this Plan.

b) Existing uses at the date of formal approval of this Plan may be recognized in the Zoning By-Law. The extent of any such existing use will be limited in the By-law to an area sufficient to the siting of such uses.

c) It is the intention of this plan to direct development primarily to established settlement areas. Development in lands delineated Natural Heritage (Environmental Protection) - Category 2 Lands however may be permitted if it can be demonstrated, to the satisfaction of the municipality in consultation with the applicable commenting agencies and approving authorities, that negative impacts on the ecological features or functions of the components of the Natural Heritage System of the Township will not occur. The anticipated impact of development may be demonstrated by a proponent of development through the completion of an E.I.A. (Environmental Impact Assessment). The study requirements for an E.I.A. are contained in section 16.2.4 of this Plan.

16.2.1.3. General Policies

iii. The re-designation of Natural Heritage (Environmental Protection) Category 2 Lands of the Township for development may require an E.I.A. (Environmental impact Assessment) to be completed by a professional qualified in the field of environmental sciences to the satisfaction of the Township and other approval agencies.

vii. In the absence of more detailed mapping, Natural Heritage System boundaries shall be used as guides for the implementation of the policies contained within this Plan. The municipality should amend the Schedules of the Official Plan and Comprehensive Zoning By-law to incorporate more detailed mapping of components of the Natural Heritage System when such mapping becomes available.

16.2.1.4.1. Natural Heritage (Environmental Protection) – Category 1 Lands

16.2.1.4. Policies

16.2.1.4.1. Natural Heritage (Environmental Protection) – Category 1 Lands

a) Wetlands

i. The Township contains parts or all of 15 different Wetlands and Wetland Complexes. The following policies shall apply to protect all Wetlands (Classes 1- 7) and unclassified Wetlands in the Township.

ii. Development shall not be permitted in Wetlands which are designated Natural Heritage (Environmental Protection) -Category I Lands on Schedule "A" to this Plan. Development shall also not be permitted in any unclassified Wetlands not shown on Schedule "A" to this Plan.

iii. No development shall be permitted within 30 metres (98 feet) of a provincially significant Class 1 - 3 Wetland or 15 metres (49 feet) of a locally significant Class 4 - 7 Wetland. Where the boundary of a Wetland is undefined or unclear, it will need to be defined in consultation with the applicable commenting and approval agencies.

iv. The municipality may assist stakeholders and others with implementing the recommended actions of the Minesing Swamp Management Plan (1995) or its successor.

v. The Township shall encourage the development of Management Plans for other Wetlands or Wetland Complexes in consultation with the applicable approving and commenting agencies.

vi. Wetlands shall be placed in a Zone in the implementing Zoning Bylaw which protects them in accordance with these policies.

c) Significant Habitat of Endangered and Threatened Species

i. For the purposes of this section endangered species means any native species, as listed in the Regulations under the Endangered Species Act. Threatened species means any native species at risk of becoming endangered through all or a portion of its Ontario range if the limiting factors are not reversed.

ii. Natural areas within the Township not yet identified or recognized may be inhabited by endangered or threatened species for all or part of their life cycle. It is the policy of this Plan to prohibit development in areas of habitat of endangered or threatened species.

iii. Where a development proposal may have the potential to cause negative impacts to significant habitat of endangered and threatened species and where a recovery/management plan has been prepared, the Township shall implement, as conditions of approval, the relevant habitat protection sections in the area to which the development proposal applies.

iv. Where a development proposal may have the potential to cause negative impacts to significant habitat of endangered and threatened species and where a recovery/management plan has not been prepared, the Township shall follow the protocol for the identification of the significant portions of the habitat of Endangered and Threatened Species and may require the applicant to identify and confirm through the completion of an E.l.A., the location, size, amount, configuration, and quality of the habitat requiring protection.

v. As conditions change or new information becomes known in regard to areas of habitat of endangered species, these lands/or waters may be designated Natural Heritage (Environmental Protection) Category I Lands on Schedule "A" of this Plan.

vi. Areas of Significant Habitat of Endangered and Threatened Species shall be placed in the appropriate Zoning category to ensure no development or site alteration.

16.2.1.4.2. Natural Heritage (Environmental Protection) - Category 2 Lands

a) Lands Adjacent to Category 1 Lands

i. Development proposals for lands situated within 120 metres (394 feet) of Wetlands may be permitted by the Township subject to the completion of an Environmental Impact Assessment (E.l.A.) to the satisfaction of the Township and applicable commenting agencies. Notwithstanding the above, no development shall be permitted within 30 metres (98 feet) of a provincially significant Class 1-3 Wetland or 15 metres (49 feet) of a locally significant Class 4-7 Wetland in accordance with Section 16.2.1.4.1 (a)

(iii) of this Plan. The study shall demonstrate that the proposal will not result in any of the following:

a) loss of Wetland functions;

b) loss of contiguous Wetland;

c) the potential for the proposal to introduce subsequent development pressure which will lead to a future loss of Wetland areas or functions; and

d) conflict with local Wetland management practices or an approved Management Plan.

ii. Development proposals for lands situated within 65 metres (213 feet) of A.N.S.I. Areas and/or the habitat of threatened or endangered species may be permitted by the Township of Springwater subject to the completion of an Environmental Impact Assessment (E.l.A.) to the satisfaction of the Township and applicable commenting agencies. Notwithstanding the above, no development shall be permitted within 30 metres (98 feet) of an Area of Natural and Scientific Interest (ANSI) in accordance with Section 16.2.1.4.1 b) (iii) of this Plan. The study shall demonstrate that the proposal will not negatively impact the viability of the habitat or the natural features or ecological functions for which the area is identified.

b) Significant Biologically Sensitive Wildlife Habitat

i. The Township possesses extensive areas containing terrestrial and aquatic flora and fauna typical of the Great Lakes mixed forest region. It is the policy of this Plan to maintain the biodiversity and integrity of the Natural Heritage System through the protection and management of significant biologically sensitive wildlife habitat. For the purposes of this section significant biologically sensitive wildlife habitat may include those areas where species concentrate at a vulnerable point in their annual or life cycle, areas which are important to migratory or non-migratory species, rare or specialized habitats, and habitats of species of conservation concern excluding endangered or threatened species.

ii. In the Township significant biologically sensitive wildlife habitat refers specifically to deer wintering yards, fish spawning and nursery areas, and waterfowl production and staging areas. These land/or water areas have been identified by the Ministry of Natural Resources and are situated within the Natural Heritage System as defined by Schedule “B” of this Plan. Specific areas are delineated in Figure 6 of the Background Report to this document.

iii. Development may be permitted within 50 metres (164 feet) of and in significant biologically sensitive wildlife habitat subject to the completion of an Environmental Impact Assessment (E.l.A.) to the satisfaction of the Township and applicable approval and commenting agencies. The study shall demonstrate that the proposal will not negatively impact the viability of the habitat or the ecological value and functions for which the area is identified. The study shall contain the following information:

a) a biological assessment of the extent and characteristics of the habitat area that may be affected;

b) an analysis of the potential impact of the proposal on the biological viability of the habitat area;

c) a strategy whereby the design, construction and operation of the proposal will maintain the environmental quality of the habitat and preserve the biological viability of the affected habitat area; and

d) a method for the replacement or compensation for any used or converted portions of the significant biologically sensitive wildlife habitat which will, generally be equal to the ecological functions of the areas converted from the former natural habitat use.

iv. The Township, where reliable information on habitat use is lacking, may encourage and co-operate with wildlife conservation groups, non-governmental organizations, or interested agencies to promote the undertaking of inventories, habitat assessments, and other information gathering activities.

v. It is the policy of this Plan to promote and encourage the continuation of study of the biological aspects of the Natural Heritage System of the Township over the duration of the planning period. The purpose of the additional studies would be to ensure the adequate protection of the biodiversity and viability of the Natural Heritage System through the further evaluation and identification of the attributes of the specific system components. Study topics may include, but are not limited to, the following issues and matters:

a) The identification of species of regional and local conservation concern and their corresponding habitat areas; and

b) The delineation of regionally or locally rare or specialized habitats for wildlife with specialized needs; and

c) The examination of the local context of larger scale (i.e. North American flyways) animal movement linkages and of the regional and local animal movement corridors between the core areas of the Natural Heritage System features of the Township; and

d) The determination of the present and historical ecological significance of habitat areas associated with seasonal concentrations of animals.

vi. As additional information is submitted and found to be acceptable to the Ministry of Natural Resources and the Township in regard to the location of areas of Significant Biologically Sensitive Wildlife Habitat, these lands/or waters may be designated Natural Heritage (Environmental Protection) - Category 2 Lands on Schedule “B” of this Plan.

vii. Areas of Significant Biologically Sensitive Wildlife Habitat may be placed in a Zone in the implementing Zoning By-law which protects them in accordance with these policies.

c) Forests and Woodlots

i. Forests

a) For the purposes of this Plan, Forests mean treed areas that vary in their level of significance and provide a variety of diverse environmental and economic benefits such as erosion prevention, water retention, a sustainable harvest of wood and other forest products, provision of habitat, public recreational opportunities where permitted, and aesthetic enjoyment. It is the policy of this Plan to generally maintain the present forest coverage of approximately 30 % of the Township.

b) The Township shall encourage best forestry management practices and Management Plans prepared for forest areas in the Township shall generally endeavour to achieve the following basic objectives:

i. To allow the continuous and sustainable production and harvesting of the optimal volume of wood and other forest products; and

ii. The conservation and/or preservation of forest habitat of threatened and/or endangered species or other significant wildlife populations; and

iii. To permit passive and other non-intensive uses where permitted that are compatible with the above.

c) It is the policy of this Plan to encourage the continuation of the study and inventory of the Forest areas of the Township. Studies may be conducted in co-operation with nongovernmental organizations and/or interested groups with the purpose of the studies being the evaluation of the significance of the individual forest areas of the Township. This would permit their rating and prioritization of importance by the municipality for both protection and production purposes.

d) Significant forests may be determined by the Township according to the combination of various factors such as species composition, age and maturity, contiguous size, terrain characteristics, Natural Heritage System linkages and connections, aesthetic and historical values, and productive capacity.

e) Development may be permitted within 50 metres (164 feet) of and in significant forests subject to the completion of an Environmental Impact Assessment (E.I.A.) to the satisfaction of the Township and applicable approval and commenting agencies. The E.I.A. shall demonstrate that the proposal will not negatively impact the forest area and the values for which it is identified.

f) Areas of Significant Forests may be placed in a Zone in the implementing Zoning By-law which protects them in accordance with these policies.

16.2.4.1. Definitions

It is the intention of this Plan that Environmental Impact Assessments generally should only be as complex as they need to be and that the process of environmental review be adaptable and flexible in order to take into account the size, scale, and complexity of the proposal being assessed. The two basic levels of Environmental Impact Assessment include:

i. Comprehensive E.l.A.: A Comprehensive E.I.A. may be required to assess impacts over large and extensive geographical areas. A Comprehensive E.I.A. is typically broad in scope and would provide sufficient analysis to formulate land use designations and policies. A Comprehensive E.I.A. may require detailed objectives outlined in a Terms of Reference and input from an Advisory or Technical Review Committee.

ii. Site E.l.A.: A Site Environmental Impact Assessment is intended to assess the potential impact of a specific development proposal on the natural features and/or functions of a particular site. Depending upon the complexity and scale of a proposal, a Full Site or a Scoped Site E.I.A. may be required by

the municipality to adequately assess the anticipated environmental impact/s. An Issues/Summary Report (l.S.R.) may also be required by the Township as a preliminary step in order to more closely define the basis of study for a required Site E.I.A. The following is a brief definition and description of an I.S.R., Full Site, and Scoped Site E.I.A.:

a) Issues/Summary Review: An I.S.R. would identify key natural features and functions and briefly outline and summarize fundamental issues relating to potential impacts. An I.S.R. would also recommend the scale and type of Site E.I.A. necessary for a proponent to undertake in order to satisfactorily assess anticipated impacts.

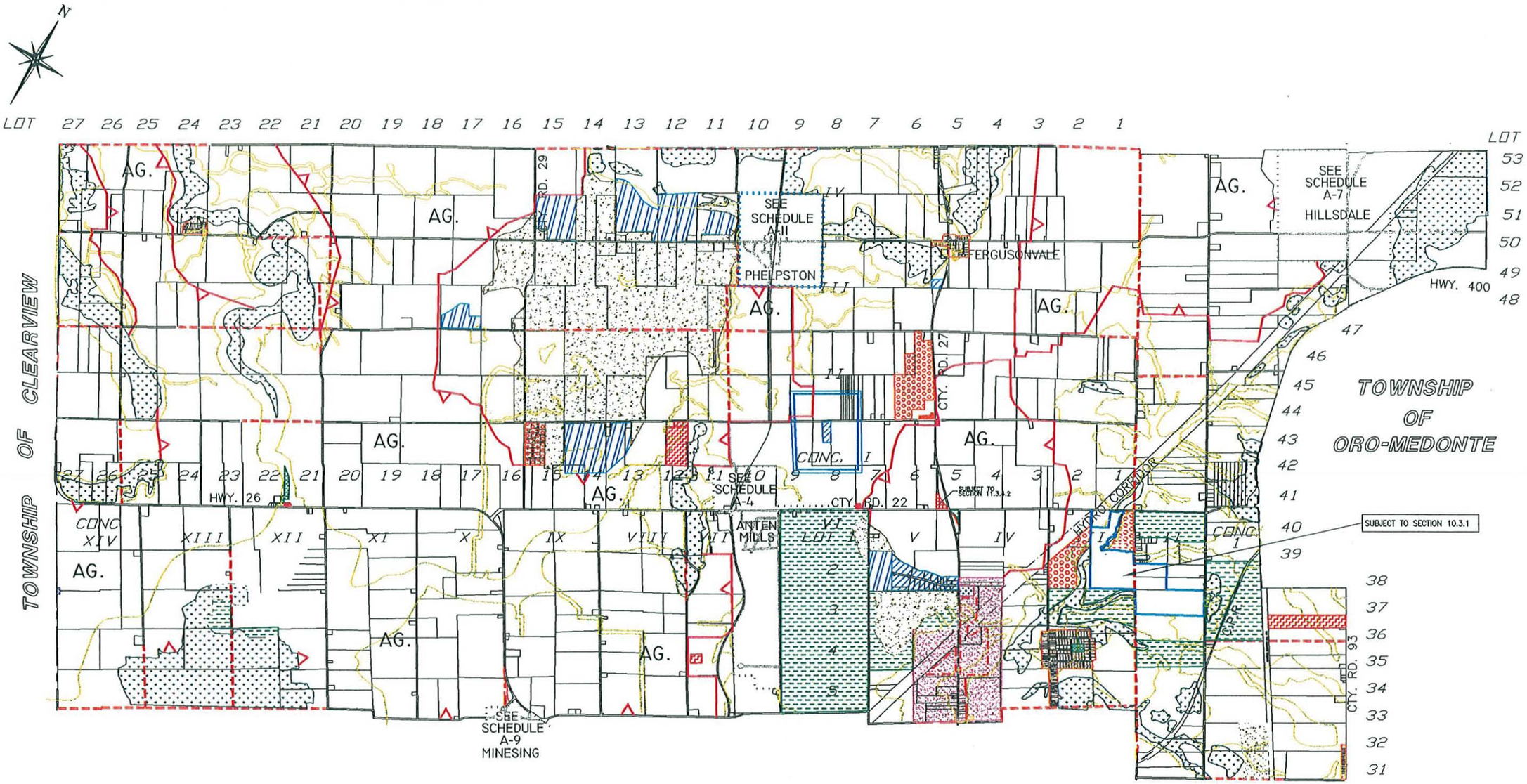
The two basic levels of Site E.I.A.s include:

b) Full Site E.l.A.: A full site E.I.A. may contain a number of detailed assessments of various potential impacts and may be required by the Township to assess large scale development where impacts are unknown and when appropriate mitigative measures may not be readily available.

c) Scoped Site E.l.A.: A scoped site E.I.A. consists of a focused review which assesses small scale development where environmental impacts can reasonably be expected to result in minimal disruption and change and/or where the expected impacts can be easily mitigated.

Section 20 – Waste Disposal Policies
20.2. Policies

20.2.4. The establishment of new waste disposal sites within the Township or the expansion of existing sites shall require an amendment to this Official Plan. Any such amendments will have to comply with the policies of this Official Plan.



OFFICE CONSOLIDATION:
Updated December 2001, OPA # 8

Note: All lakes, rivers and creeks, whether set out or not on this schedule, are subject to the policies of Section 3 and Section 16 of this Plan.

TOWNSHIP OF SPRINGWATER

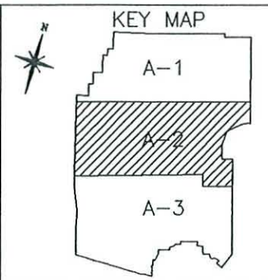
SCALE: 1:35 000
0 200 500 1000 2000m

NOTE: N.T.S. WHEN REDUCED TO 11X17

LEGEND

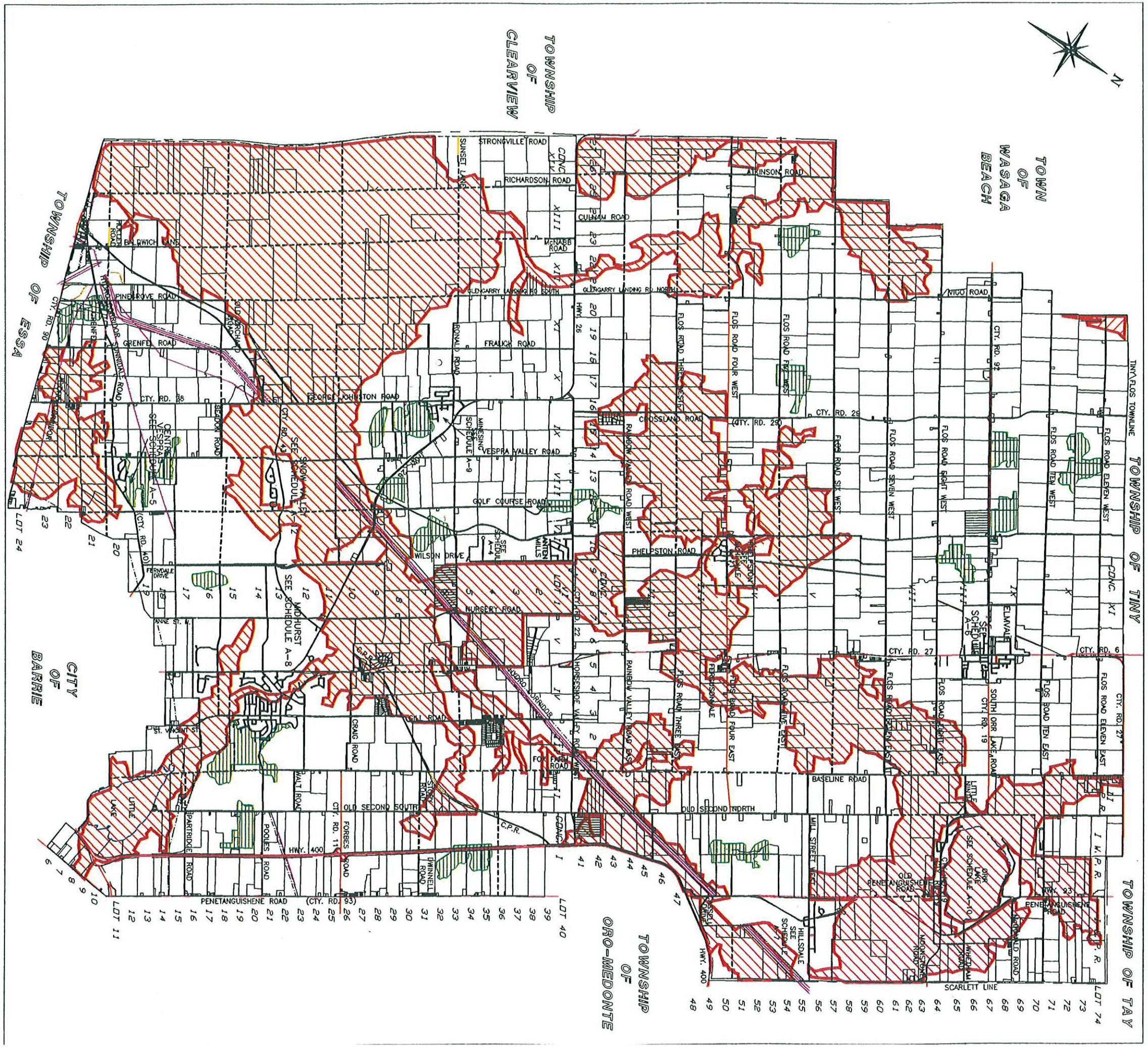
- RURAL
- RURAL RESIDENTIAL
- ESTATE RESIDENTIAL
- OPEN SPACE
- NATURAL HERITAGE (ENVIRONMENTAL PROTECTION) CATEGORY 1 LANDS
- AG AGRICULTURAL (DELINEATION)
- CONSTRAINT AND HAZARD LANDS
- INSTITUTIONAL
- GENERAL COMMERCIAL
- HIGHWAY COMMERCIAL
- TOURIST / RECREATIONAL COMMERCIAL
- RESTRICTED RURAL (SECTION 24)
- HIGH AGGREGATE POTENTIAL
- WASTE DISPOSAL SITE
- GREEN BELT
- INDUSTRIAL
- BUSINESS INDUSTRIAL
- AGGREGATE EXTRACTIVE
- WASTE DISPOSAL ASSESMENT 500m SETBACK
- HIGHWAY SPECIAL POLICY AREA
- HYDRO EASEMENT
- DETAILED SCHEDULE
- MUNICIPAL BOUNDARY

KEY MAP



Schedule 'A-2'
LAND USE PLAN
OFFICIAL PLAN FOR THE TOWNSHIP OF SPRINGWATER

Date of Original : 1997
Base Map Source : Ontario Base Maps (1995)



SCHEDULE 'B'

OFFICIAL PLAN

NATURAL HERITAGE
(ENVIRONMENTAL PROTECTION)
CATEGORY 2 LANDS

TOWNSHIP OF SPRINGWATER

LEGEND

- TOWNSHIP OF SPRINGWATER BOUNDARY
- PROVINCIAL & COUNTY ROADS
- POWER LINES
- RAIL LINES
- PIPE LINE
- DETAILED SCHEDULE
- NATURAL HERITAGE (ENVIRONMENTAL PROTECTION) CATEGORY 2 LANDS
- WOODLOTS (OVER 30ha IN SIZE)

REINDERS

NOTE :
This map may not include all revisions. Contact township office for the most up-to-date information.
Base Map Source : O.B.M. data taken from 1986 MNR Air Photos.
Soil Classification Source : Canada Land Inventory
All lakes, rivers and creeks, whether set out or not on this schedule, are subject to the policies of Section 3 and Section 16 of this Plan.

1:100 000
0 2500 5000m
NOTE: DRAWING NOT TO SCALE IF PLOTTED ANY SIZE BUT 11" x 17".

SECTION 33 - AGRICULTURAL (A) ZONE

33.1 Within an Agricultural (A) Zone, no person shall use any land; erect, alter, enlarge, use or maintain any building or structure for any use other than as permitted in this section and also such use, building or structure shall be in accordance with the regulations contained or referred to in this section.

33.2 PERMITTED USES

33.2.1 Residential Uses:

a) single detached dwelling in accordance with Sections 33.3.14.1, 33.3.14.2 and 33.3.14.3.
b) single detached dwelling which is accessory to the permitted uses of Section 33.2.2 b) in accordance with Section 33.3.14.4.

33.2.2 Non-Residential Uses:

a) agricultural use in accordance with the General Provisions Section.
b) hobby kennel in accordance with subsection 3.6(c) of the Kennel (K) Zone.
c) conservation and wildlife sanctuary, including a forestry use.
d) veterinary clinic
e) equestrian facility
f) market garden or farm produce sales outlet
g) home occupation in accordance with General Provisions Section
h) home industry in accordance with General Provisions Section and 33.3.13
i) bed & breakfast establishment
j) radio, television, telephone or other communications tower or transmission facility.
k) passive outdoor recreation use
l) public use in accordance with the General Provisions Section

33.3 ZONE PROVISIONS

33.3.1 Refer to Section 3 - General Provisions

33.3.2	Lot area (minimum)	35 ha (86.48 acres)
33.3.3	Lot Frontage (minimum)	150 m (492.13 ft.)
33.3.4	Front Yard Depth (minimum) or the MDS II requirement whichever is the greater	30 m (98.43 ft.)
33.3.5	Rear Yard Depth (minimum) or the MDS II requirement whichever is the greater	30 m (98.43 ft.)
33.3.6	Interior Side Yard Width (minimum) or the MDS II requirement whichever is the greater	30 m (98.43 ft.)
33.3.7	Exterior Side Yard Width (minimum) or the MDS II requirement whichever is the greater	30 m (98.43 ft.)
33.3.8	Maximum Building Height for all non-agricultural buildings	11 m (36.09 ft.)
33.3.9	Maximum Building Height for all agriculturally related buildings	N/A
33.3.10	Dwelling units per lot (maximum)	1

33.3.11 Accessory buildings refer to the General Provisions Section

a) In addition to the above and notwithstanding the General Provisions Section, the following shall apply in regard to buildings accessory to an agricultural use;

i)	minimum front yard for an accessory building	15m (49.22 ft.)
ii)	minimum interior side yard for an accessory building	8m (26.25 ft.)
iii)	minimum exterior side yard for an accessory building	15m (49.22 ft.)
iv)	minimum rear yard for an accessory building	8m (26.25 ft.)

33.3.12 Off Street Parking in accordance with the General Provisions Section.

33.3.13 Special Lot Area Requirement:

a) No minimum lot area is required in the case of a radio, television, telephone or other communications tower.
b) The minimum lot area for a lot to be used for a market garden shall be 4 hectares (9.88 acres) and the use shall comply with the regulations of Section 26.3. In addition to the above the minimum front yard setback for a market garden outlet shall be 90 metres (295.28 ft.).
c) The minimum lot area for a lot to be used for a home industry shall be 0.8 hectares (1.98 acres) and the minimum frontage shall be 60 metres (196.85 ft.). In addition to the above the provisions of Section 33.3.14.1 shall apply.

33.3.14 Single Detached Dwelling Unit Provisions

33.3.14.1 In the case of a lot used or intended to be used for a residential purpose or a lot created by consent subsequent to the passing of this Bylaw, the following zone provisions shall apply:

a)	Minimum Frontage	30 m (98.43 ft.)
b)	Minimum Area	1855 m^2 (19967.71 $ft.^2$)
c)	Minimum Yards	
	Front	9.0 m (29.53 ft.)
	Rear	7.5 m (24.61 ft.)
	Interior Side	3.0 m (9.84 ft.)
	Exterior Side	9.0 m (29.53 ft.)
d)	Maximum Lot Coverage	20%
e)	Dwelling Unit Area (Min. Ground Floor Area)	100 m^2 (1076.43 $ft.^2$)
	i) In the case of a 1½ storey or 2 storey dwelling, the minimum ground floor area may be reduced to 80 percent of the minimum ground floor area required.	
f)	Maximum Building Height	11.0 m (36.09 ft.)
g)	Dwelling Units per Lot (maximum)	1
h)	Accessory Buildings	

In addition to the General Provisions Section, the maximum total area of accessory buildings or structures shall be 115 m^2 (1238 $ft.^2$) in total.

Minimum Yards

Front	9.0 m (29.53 ft.)
Rear	3.0 m (9.84 ft.)
Interior Side	3.0 m (9.84 ft.)
Exterior Side	9.0 m (29.53 ft.)

i) Parking
   i) Refer to the General Provisions Section for additional parking requirements;
   ii) No part of the required front yard of any lot, or the required exterior side yard of a corner lot, shall be used for the parking or storage of the whole or any part of a boat trailer, boat, truck, bus, coach or streetcar.
   iii) Not more than 50 percent of the area of a side yard or rear yard of any lot shall be occupied by parking area.

33.3.14.2 In the case of a single detached dwelling unit which is used in conjunction with an agricultural or equestrian facility use, the following zone provisions shall apply.

a) Minimum Frontage — 150.0 m (492.13 ft.)

b) Minimum Area — 35.0 ha (86.48 acres)

c) Minimum Yards

Front	9.0 m (29.53 ft.)
Rear	7.5 m (24.61 ft.)
Interior Side	3.0 m (9.84 ft.)
Exterior Side	9.0 m (29.53 ft.)

d) Maximum Lot Coverage — 20%

e) Dwelling Unit Area (Min. Ground Floor Area) — 100 m^2 (1076.43 $ft.^2$)
   i) In the case of a 1½ storey or 2 storey dwelling, the minimum ground floor area may be reduced to 80 percent of the minimum ground floor area required.

f) Maximum Building Height — 11.0 m (36.09 ft.)

g) Dwelling Units per Lot (maximum) — 1

h) Accessory Buildings
In addition to the General Provisions Section, the maximum total area of accessory buildings or structures shall be 115 m^2 (1238 $ft.^2$) in total.

Minimum Yards

Front	9.0 m (29.53 ft.)
Rear	3.0 m (9.84 ft.)
Interior Side	3.0 m (9.84 ft.)
Exterior Side	9.0 m (29.53 ft.)

i) Parking

i) Refer to the General Provisions Section for additional parking requirements;
ii) No part of the required front yard of any lot, or the required exterior side yard of a corner lot, shall be used for the parking or storage of the whole or any part of a boat trailer, boat, truck, bus, coach or streetcar.
iii) Not more than 50 percent of the area of a side yard or rear yard of any lot shall be occupied by parking area.

33.3.14.3 In the case of a veterinary clinic or where a single detached dwelling unit is used in conjunction with a veterinary clinic, the following zone provisions shall apply:

a)	Minimum Frontage	30.0 m (98.43 ft.)
b)	Minimum Area	1.0 ha (2.47 acres)
c)	Minimum Yards for Veterinary Clinic	
	Front	9.0 m (29.53 ft.)
	Rear	7.5 m (24.61 ft.)
	Interior Side	7.5 m (24.61 ft.)
	Exterior Side	9.0 m (29.53 ft.)
d)	Minimum Yards for a Single Detached Dwelling	Refer to Section 33.3.14.1
e)	Dwelling Unit Area (Min. Ground Floor Area)	100 m^2 (1076.43 $ft.^2$)
	i) In the case of a 1½ storey or 2 storey dwelling, the minimum ground floor area may be reduced to 80 percent of the minimum ground floor area required.	
f)	Maximum Building Height	11.0 m (36.09 ft.)
g)	Dwelling Units per Lot (maximum)	1
h)	Accessory Buildings In addition to the General Provisions Section, the maximum total area of accessory buildings or structures shall be 115 m^2 (1238 $ft.^2$) in total.	
	Minimum Yards	
	Front	9.0 m (29.53 ft.)
	Rear	3.0 m (9.84 ft.)
	Interior Side	3.0 m (9.84 ft.)
	Exterior Side	9.0 m (29.53 ft.)

i) Parking
i) Refer to the General Provisions Section for additional parking requirements;
ii) No part of the required front yard of any lot, or the required exterior side yard of a corner lot, shall be used for the parking or storage of the whole or any part of a boat trailer, boat, truck, bus, coach or streetcar.
iii) Not more than 50 percent of the area of a side yard or rear yard of any lot shall be occupied by parking area.

33.3.14.4 Hobby Kennel - Refer to the Kennel (K) Zone

33.4 ZONE EXCEPTIONS

33.4.1 A-1, Lot 18, Concession VI (Vespra)
560 Anne Street North, Roll No. 43 41 010 004 089 00 0000 & 43 41 010 004 088 01 0000
Vespra ZBA. 84-8 Schedule 'D' as amended by ZBA. 98-102

An airfield, driving range and nine hole putting and chipping course are permitted. For the purpose of this By-law an airfield means any land, lot or building used for the purpose of landing, storing, taxiing, or taking off of private or commercial aircraft, pursuant to the regulations of the Department of Transport. Accessory uses to such a facility including business offices, flight training school, restaurants, maintenance and repair facilities, associated storage and similar uses are permitted.

33.4.2 A-2, Lot 18, Concession IV (Vespra)
651 Bayfield Street North, Roll No. 43 41 010 004 029 00 0000
Vespra Zoning By-law Amendment No. 90-3

The required lot frontage (minimum) shall be 5.24 metres.

33.4.3 A-3, Lot 22, Concession X (Vespra)
3734 George Johnston Road, Roll No. 43 41 010 006 181 00 0000
Vespra Zoning By-law Amendment No. 91-23

The processing of fine grade hardwoods within a wholly enclosed structure is permitted. In addition the following provision shall apply; lot frontage (minimum) is 30 metres, lot area (minimum) is 4000 square metres, maximum lot coverage is 10%, building height (maximum) is 11 metres, gross floor area (maximum) is 124.86 square metres, front yard depth (minimum) is 55m, rear yard depth (minimum) is 1m, interior side yard width (minimum) is 12 metres and the exterior side yard width (minimum) is 12 metres. No outside storage shall be permitted. No off-street parking shall be permitted within any area of the front yard as defined by the front yard building line; parking is also prohibited within any exterior side and/or rear yard setback area. No detached accessory buildings, uses or structures will be permitted. A loading space area is not permitted beyond the front building line or within any required yard. No outside display area shall be permitted. An area of landscaped open space consisting of existing mature trees shall be maintained around the proposed building as shown in the site plan agreement and plans. The location, size and style of signage shall be facilitated within the site plan agreement.

33.4.4 A-4, Lot 32, Concession II (Vespra), Part 1 of Reference Plan 51R-16305
1700 Old Second South, Part of Roll No. 43 41 010 001 261 01 0000
Vespra Zoning By-law Amendment No. 91-38

The following provisions shall apply; lot frontage (minimum) is 21 metres, front yard depth (minimum) is 9 metres, rear yard depth (minimum) is 15 metres, interior side yard width (minimum) is 3 metres. The existing playground equipment located within the minimum side yard is considered a legal conforming use. The zone boundary between the E.P. and A-4 Zones is the existing tree line along the top of the valley.

33.4.5 A-5, Lot 18, Concession XI (Vespra)
3165 Pinegrove Road, Roll No. 43 41 010 006 221 00 0000
Vespra Zoning By-law Amendment No. 91-48

The following provisions shall apply; lot frontage (minimum) is 121.92 metres, lot area (minimum) is 14864 square metres and the interior side yard width (minimum) for the southern boundary shall be 45 metres.

33.4.6 A-6, Lot 3, Concession IV (Vespra)
1318 Gill Road, Part of Roll No. 43 41 010 002 120 02 0000
Vespra Zoning By-law Amendment No. 92-26

The lot frontage (minimum) required shall be 12.2 metres.

33.4.7 A-7, Lot 5, Concession VII (Vespra)
1690 Hendrie Road, Roll No. 43 41 010 002 242 02 0000
Vespra Zoning By-law Amendment No. 93-37

The lot frontage (minimum) required shall be 7.62 metres.

33.4.8 A-8, Lot 5, Concession X (Vespra),
2466 Ronald Road, Part of Roll No. 43 41 010 005 156 00 0000
Zoning By-law Amendment No. 94-149 (Giffen)

The lot area (minimum) required shall be 37.0 hectares.

33.4.9 A-9, Lot 31, Concession II (Vespra)
572 Storey Road, Roll No. 43 41 010 001 257 10 0000
Zoning By-law Amendment No. 95-035 - Bowey

The permitted uses within this zone are restricted to a single detached dwelling, an agricultural use and a home occupation. The lot area (minimum) shall be 9.7 hectares. Furthermore, the permitted single detached dwelling shall not be located on the area affected by this By-law within 300m of any livestock building or structure on any surrounding property.

33.4.10 A-10, Lot 16, Concession VIII (Vespra)
2935 Barrie Hill Road, Part of Roll No. 43 41 010 006 024 00 0000
Zoning By-law Amendment No. 95-040 - Barrie Hill Farms / Gervais

A temporary seasonal residence in the form of a converted bunkhouse for migrant farm labourers is permitted. For the purpose of this section, a converted bunk-house shall mean a building that is used or intended to be used for short term or seasonal occupancy.

33.4.11 A-11, Lots 32 and 33, Concession I W.P.R. (Vespra)
1633 Old Second South, Part of 43 41 010 001 190 00 0000
1655 Old Second South, Part of 43 41 010 001 192 00 0000
Zoning By-law Amendment No. 97-037 as amended by Zoning By-law Amendment No. 2000-077 - Farrington Moto-cross

A motorcycle motorcross track is permitted.

33.4.12 A-12, Lot 18, Concession VI (Vespra),
600 Anne Street North, Roll No. 43 41 010 004 088 00 0000
Zoning By-law Amendment No. 97-064 - P & R Investments - St. Onge Golf

The lot area (minimum) required shall be 20 hectares.

33.4.13 A-13, Lot 10, Concession VII, Part I, Plan 51R-11887, (Vespra)
1665 Highway 26, Roll No. 43 41 010 003 332 02 0000

An accessory building consisting of 157.94 square metres (1700 $ft^{2)}$ shall be permitted.

33.4.14 A-14, Lot 5, Concession IX (Flos)
81 Yonge Street North, Roll No. 43 41 030 002 389 00 000

A duplex dwelling is permitted.

33.4.15 A-15, Lot 8, Concession IX (Flos)
220 Queen Street West, Part of Roll No. 43 41 030 006 104 00 0000
Zoning By-law Amendment 97-023 (Elliott / Country Connection)

A retail store for the display and sale of environmentally friendly products and furniture including assembly; sale and service of swimming pools; sale and service repair shop for small engines; outside storage in the rear yard for RV's (recreational vehicles), licensed vehicles, house trailers, boats and mini-storage units and associated professional offices are permitted. A single detached dwelling and accessory uses thereto is also permitted.

33.4.16 A-16, Lot 5, Concession XI (Flos)
15695 County Road 27, Part of Roll No. 43 41 030 002 418 00 0000

No building may be erected or used for the purpose of keeping or housing any livestock or other animals within 84 metres of the front lot line.

33.4.17 A-17, Lot 17, Concession VIII (Flos)
2446 Flos Road 8 West, Roll No. 43 41 030 007 053 00 0000

A maximum of 2 dwellings may be erected provided the minimum lot size is 30 hectares and the use of the lot is agricultural.

33.4.18 A-18, Lot 21, Concession II (Flos)
2894 Rainbow Valley Road West, Roll No. 43 41 030 008 037 00 0000

A converted dwelling is permitted. The combined minimum overall floor area of the dwelling units is 186 square metres.

33.4.19 A-19, Lot 10, Concession VIII (Flos)
3211 Ushers Road, Roll No. 43 41 030 006 085 00 0000
Flos By-law P88-02 as included in Flos Zoning By-law P88-05

A maximum of two dwelling units may be permitted on these lands.

33.4.20 A-20, Lot 6, Concession II (Flos)
1041 Flos Road 3 West, Part of Roll No. 43 41 030 003 042 00 0000
Flos ZBA No. 90-38 & 5000-022, Huronia Equestrian Estates

No livestock use shall be made of the lands zoned A-20.

33.4.21 A-21, Lots 18 and 19, Concession III (Flos)
2586 Flos Road 3 W., Roll No. 43 41 030 005 019 00 0000
Flos Zoning By-law Amendment No. 92-33 (Moreau)

No building or structure shall be used to house livestock within 173 metres of any commercial zone. Furthermore the interior side yard width (minimum) for any building or structure along the eastern boundary of the Rural Commercial (CR) Zone shall be 9 metres.

33.4.22 A-22, Lot 21, Concession VIII (Flos)
3274 Vigo Road, Roll No. 43 41 030 007 065 00 0000
Zoning By-law Amendment No. 94-63 - Langman

A second residential dwelling unit is permitted on the subject parcel of land being some 20 hectares more or less in size, however the creation of a separate lot for residential purposes shall not be permitted in regard to this lot.

33.4.23 A-23, Lot 6, Concession IV (Flos)
1094 Flos Road Four West, Part of Roll No. 43 41 030 003 134 01 0000
Zoning By-law Amendment No. 94-150 - Craddock / Schutt

A motor vehicle repair garage and a farm implement dealer is permitted. Furthermore the lot frontage (minimum) is 52 metre, the lot area (minimum) is 0.85 hectares and the interior side yard width (minimum) for the eastern side yard is 3 metres. A dwelling is not a permitted use. The existing barn is limited to non-livestock uses.

33.4.24 A-24, Lot 7, Concession I, (Flos)
1147 Rainbow Valley Road West, Roll No. 43 41 030 003 002 20 0000

A rear yard depth (minimum) of 7.01 metres (23 ft.) shall be required.

33.4.25 A-25, Lot 7, Concession X, (Flos)
1175 Flos Road Eleven West, Roll No. 43 41 030 006 138 00 0000
Zoning By-law Amendment No. 2000-098 - Morris

The interior side yard width (minimum) to the north and east of the existing accessory building shall be 1.5 metres and the rear yard depth (minimum) to the south of the existing accessory building shall be 1.2 metres.

33.4.26 A-26, Lot 17, Concession IV, (Vespra)
734 St. Vincent Street, Roll No. 43 41 010 004 025 00 0000

An accessory building, no larger than 84 square metres (900 sq. ft.) and which is used only for the storage of personal possessions may be permitted.

33.4.27 A-27, Lot 13, Concession VIII, (Vespra)
2038 Snow Valley Road, Roll No. 43 41 010 006 003 03 0000
Zoning By-law Amendment No. 98-061 (Patterson)

An accessory building, not larger than 90.2 square metres in area and having a horizontal distance of not more than 13.5 metres may be permitted.

33.4.28 A-28, Lot 31, Concession I, W.P.R. (Vespra)
1777 Old Second South, Part of Roll No. 43 41 010 001 186 00 0000
Zoning By-law Amendment No. 2000-077 - Hillway Vespra Pit

In addition to the permitted uses of this section a weigh scale, scale house and maintenance building shall also be permitted as related to a licensed gravel pit located on the same lot.

33.4.29 A-29, Lot 51, Concession I, (Medonte)
4191 Penetanguishene Road, Part of Roll No. 43 41 020 001 031 00 0000

A contractor's yard is permitted.

33.4.30 A-30, Lot 50, Concession I, (Medonte)
4121 Penetanguishene Road, Roll No. 43 41 020 001 028 01 0000

A machine shop and welding shop are permitted.

33.4.31 A-31, Pt. Lot 65, Concession I E.P.R., (Medonte)
5435 Penetanguishene Road, Roll No. 43 41 020 009 006 00 0000
Zoning By-law Amendment No. 95-101 (Seed)

An accessory building may be erected prior to the main building on the lot.

33.4.32 A-32, Lot 55, Concession I E.P.R.,(Medonte)
31 Martin Street, Roll No. 43 41 020 081 082 01 0000
Zoning By-law No. 98-010 (Borchuk / Martin)

The minimum lot frontage shall be 9.1 metres and the minimum lot area shall be 8.3 hectares.

33.4.33 A-33, Part of Lots 12 & 13, Concession IX (Flos)
1922 County Road 92, Roll No. 43 41 030 006 127 00 0000
Zoning By-law Amendment No. 2002-099 - Rounds Farm & Zoning By-law Amendment 5000-067

In addition to the permitted uses under Section 33.2, agriculturally-related uses such as petting zoos, wagon rides, farm tours, group functions, education, corporate training as well as an accessory concession stand for on-site patrons shall be permitted.

33.4.34 A-34, Part of Lots 8 & 9, Concession IX (Vespra)
1972 Vespra Valley Road, Part of Roll No. 43 41 010 005 135 01 0000
Zoning By-law Amendment No. 2002-090 - Chalmers

The minimum lot area is 15.4 hectares (38.05 acres) and the minimum lot frontage is 98.9 (324.47 feet) metres.

33.4.35 A-35, Part of South Half of Lot 10, Concession IX (Flos)
1586 County Road 92, Roll No. 43 41 030 006 121 00 0000 - Weatherill

An existing attached second dwelling unit is a permitted use.

33.4.36 A-36, Part of Lot 6, Concession IX (Vespra)
2309 Ronald Road, Part of Roll No. 4341 010 005 125 00 0000
Zoning By-law Amendment No. 2001-158 - Minesing Meadow Subdivision

Permitted uses are limited to existing uses at date of by-law. No buildings or structures are allowed, save and except those associated with public uses in accordance with the provisions of Section 3.29.

33.4.37 A-37, Part of Lot 3, Concession IV, Part 5, Plan 51R-10489
Roll No. 43 41 010 002 12000 0000
Zoning By-law Amendment no. 2002-104 - Richardson

Permitted uses are limited to a single detached dwelling and related accessory uses.

33.4.38 A-38, Part of the West Half of Lot 2, Concession IV, Vespra
Parts 3, 4, 5 & 6 on RP 51R-31676 subject to right-of-way, 12595 County Road 27 Roll No. 43 41 010 002 118 84 0000; Zoning By-law Amendment No. 2002-146 - Barnden (McKay)

The minimum lot frontage shall be 15.2 metres.

33.4.39 A-39, Fergusonvale Area of Natural and Scientific Interest (ANSI), Flos
1819 Old Second South, Property Roll No. 4341 010 001 18002 00000 added by ZBA 5000-057 Stillinger

The permitted uses of Section 33.2.1 “Residential Uses” and Section 33.2.2 “Non-Residential” Uses shall apply with the exception of forestry uses and equestrian facilities.

33.4.40 A-40, Lot 5, Concession VII, Vespra
1586 Wilson Drive, Part of 43 41 010 002 240 00 0000
Pinehurst Estates Subdivision ZBA 2003-008

The minimum lot area shall be 29.01 hectares.

33.4.41 A-41, part of North Half of Lots 3 & 4, Con. 10, Flos,
1163 Flos Road Eleven East, Roll No. 4341 030 002 401 00 0000
Dyer / Griedanus Farm Consolidation ZBA 5000-032

The permitted uses of Section 33.2.1 "Residential Uses" and Section 33.2.2 "Non-residential Uses" shall apply, with the exception of 33.2.2(b), (d) and (e) and notwithstanding the definition of Agricultural Uses in Section 28.5, no land or structures shall be used for the keeping, feeding or raising of livestock, including, but not limited to, dairying, and exclusive of two horses which may be kept for the personal use of the household. And further that, notwithstanding the provisions of Section 33.3.14.1, the maximum total lot coverage for accessory buildings shall be 1850 square metres and the maximum horizontal dimension for an accessory building shall be 50 metres. In the event that any or all of the accessory buildings are destroyed or removed, they cannot be replaced unless destroyed by fire or other insured perils, except for in compliance with the provisions of Section 3.7.4.

33.4.42 A-42, Schedule “A”, Part of East Halves of Lots 4 and 5, Con. 9, former Township of Vespra,
1456 Vespra Valley Road, Roll No. 4341 010 005 054 00 0000
Priest ZBA 5000-052

The permitted uses under this zone are limited to Section 33.2.1 “Residential Uses” and the keeping of up to two horses for the personal use of the household. And further that, notwithstanding the provisions of Section 33.3.14.1, the maximum total lot coverage for accessory buildings shall be 415 square metres. In the event that any or all of the accessory buildings are destroyed or removed, they shall not be replaced unless destroyed by fire or other insured perils, except for in compliance with the provisions of Section 3.7.4.

33.4.43 A-43, Pt Lot 6, Con. 7 & Pt of Rd All between Lots 5 & 6, Con. 7 & Pt 2, RP 51R-32183
1012 Flos Road Seven East, Property Roll No. 4341 030 006 040 01 0000
Slavish ZBA 5000-053

Notwithstanding the provisions of Section 3.34, (c), the maximum above grade floor area of any accessory building devoted to the home industry shall not exceed 280 square metres (3014 square feet).

33.4.44 A-44, N Pt Lot 18, Con. 2, Flos,
2665A Flos Road Three West – Property Roll No. 4341 030 005 003000000
(VanLaarhoven ZBA – By-law No. 5000-065)

That the use of the existing buildings located in the north-eastern corner of the property shall be limited to the storage of farm equipment and other farm related materials.

33.4.45 A-45,Part Lot 7, Concession VIII, Vespra
Part 1, Plan 51R-35288, 1826 Golf Course Road, Part of 4341 010 005 021 00 0000
Ramolla ZBA No. 5000-081

Permitted uses shall include the keeping of two horses for personal use. The minimum side yard setback for an accessory building shall be 6.2 metres.

33.4.46 A-46 South Half Lot 17, Concession 6, Flos
2422 Flos Rd Six W, Property Roll No. 4341 030 007 00600 0000
Zoning By-law Amendment No. 5000-096 , Langman & Langcrest Farms B02/08

Notwithstanding the provisions of Section 3.7 regarding lot coverage, accessory buildings existing at the date of this By-law shall be permitted.

33.4.46 A1-46, North Half Lot 56 plus North & South Half Lot 57, Concession 1, (Medonte) – Heritage Village Subdivision (SP-0504) By-law No. 5000-099

33.4.46.1 PERMITTED USES

Public uses as per Section 3.29, which include, but are not limited to, stormwater management facilities including ponds and conveyance structures, wastewater treatment facilities including structures, and sub-surface appurtenances.

33.4.47 A-47, Part Lot 6, Con. 5 (Flos)
1102 Flos Rd Five W, Roll No. 4341 030 003 187 00 0000
Moreau Farm Consolidation ZBA 5000-092

The permitted uses of Section 33.2.1 “Residential Uses” and Section 33.2.2 “Non-residential Uses” shall apply, with the exception of 33.2.2(b), (d) and (e) and notwithstanding the definition of Agricultural Uses in Section 28.5, no land or structures shall be used for the keeping, feeding or raising of livestock, including, but not limited to, dairying, and exclusive of two livestock units which may be kept for the personal use of the household. And further that, notwithstanding the provisions of Section 33.3.14.1, the maximum total lot coverage for accessory buildings and the maximum horizontal dimension for an accessory building shall be limited the maximum dimensions of the existing accessory buildings. In the event that any or all of the accessory buildings are destroyed or removed, they cannot be replaced unless destroyed by fire or other insured perils, except for in compliance with the provisions of Section 3.7.4.

33.4.48 A-48, West Half Lot 3, Concession 11 (Vespra)
1153 Glengarry Landing South, 4341 010 005 201 00 0000
Downey Consent ZBA No.5000-097, Consent B27/07

The construction of a house and/or other buildings on the subject lands is prohibited.

33.4.49 A-49, Part Lot 2, Concession XIII, Vespra
1185 Richardson Rd., Roll No. 4341 010 007 02400 0000,
Zoning By-law Amendment No. 5000-106, Schaer

Pt Lot 3, Concession 11, (Vespra)
1366 Fralick Road, Roll 434101000520200
By-law 5000-148, ZB-2011-004 Degasparro

Notwithstanding the provisions of Section 33.3.14.1, the maximum total lot coverage for accessory buildings and the maximum horizontal dimension for an accessory building shall be limited to the dimensions of the existing accessory buildings. In the event that any or all of the accessory buildings are destroyed or removed, they shall not be replaced unless destroyed by fire or other insured perils, except for in compliance with the provisions of Section 3.7.4.

33.4.50 A-50, Part Lot 58, Concession 1 (Flos)
2449 Old Second Road North, Roll No. 4341 030 002 009 01 0000
Matveev Beekeeping, ZBA No. 5000-115

The required lot area shall be 2.7 hectares (6.58 acres) and the minimum interior side yard setback for an accessory building to an agricultural use shall be 8 metres (26 ft.). An accessory structure to a maximum of 325 square metres (3,500 sq. ft.) is permitted.

33.4.51 A-51 Part Lot 15, Concession 1 (Vespra); Parts 1, 4 and 5, Plan 51R-25081
748 Penetanguishene Rd., Roll No. 434101000109200
Eisses ZBA 5000-119

That the minimum rear yard setback for the severed lands to the metal clad shed shall be 4.70 metres (15.42 ft.)."

33.4.52 South Half of Lot 6, Concession 8, former Township of Flos
96 Yonge St. S., Roll No.434103000606700
By-law No. 5000-125, Hummelink

Lot 6, Con. 11, Pt. 1 on RP 51R-36951, Flos
1112 Flos Road Eleven West,Roll No. 4341 030 006 16902 0000
ZBA 5000-170 – ZB-2012-012 McLean

Notwithstanding the provisions of Section 3.7 regarding lot coverage, accessory buildings existing at the date of this By-law shall be permitted, however the keeping of livestock therein is prohibited.

33.4.53 A-53, Part of Lot 11, Concession 3, Vespra
2276 Russell Road, Roll No. 434101000300900
ZBA 5000-132, Rudy Clinic

A day spa, business or professional office and a clinic shall also be permitted uses within the existing residential dwelling.

33.4.54 A-54

3314 George Johnston Rd., Roll No. 434101000617200 East Part Lots 18 & 19, Con. 10 (Vespra) By-law 5000-131 (ZB-2010-007 Scott)

2319 County Rd. 92, Roll No. 434103000705000 Pt Lot 16, Con. 8 (Flos) By-law 5000-134 (ZB-2010-010 Springvalley Farms)

710 Penetanguishene Road, Roll No. 434101000108903 By-law 5000-153 (ZB-2011-010) Drury

4340 Horseshoe Valley Road W., Roll No. 434103000303000 Part Lot 13, Con. 1 (Flos) By-law 5000-155, ZB-2011-14 Kapteyn

2571 Flos Road Ten W, Roll No. 4341030004011000000 Part Lot 18, Con. 9, By-law 5000-163 (ZB-2012-006) Minty

1866 George Johnston Road, Roll No. 4341010005189000000 Lot 7, Con. 10, Vespra, By-law 5000-164 (ZB-2012-008) Dobson/Giroux

1792 Flos Rd Seven West, No. 4341030006056000000, Roll Part of Lot 12, Concession 7, (Flos), By-law 5000-171 (ZB-2013-003) Spence Farms

1586 Scarlett Line, 4341020009192000000 Part of Lots 73 & 74, Con. 1, Medonte, By-law 5000-175 (ZB-2013-014) DeLarge

2563 Old Second North, Roll No. 4341030002013000000, Lot 59, Con. 1, Flos, By-law 5000-176 (ZB-2013-015) Langman Meadow Farms Ltd.
2544 Old Second North, Roll No. 4341030002298000000, Lot 59, Con. 2, Flos, By-law 5000-177 (ZB-2013-016) Langnic Farms Ltd.

2184 Flos Road Eleven West, Roll No. 4341030006181000000, Lot 15, Con. 11, Flos, By-law 5000-182 (ZB-2013-020) Springvalley Farms (Elmvale) Ltd.

15695 County Rd 27, Roll No. 4341030002418000000, E Half Lots 4 & 5, Con. 11, Flos, By-law 5000-185 (ZB-2013-021) G. Archer

1880 Flos Rd Ten West – Roll 4341 030 006 15300 0000, Pt of Lots 12 & 13, Con. 10, Flos By-law 5000-188 (ZB-2014-01) Beacock

1352 Vespra Valley Rd., 4341010005051000000, E1/2 Lot 3, Concession 9, Vespra By-law 5000-189 (ZB-2014-002) Vespra Valley Farms

4295 Horseshoe Valley Rd., 4341010005001010000,W. Part E1/2 Lot 1, Con. 8, Vespra By-law 5000-190 (ZB-2014-003) Clarke

1787 & 1887 Flos Road Eleven W., 4341030006151000000, N ½ Lot 12, Con. 10, Flos By-law 5000-193 (ZB-2013-023) A Spence Estate

2026 Old Second North, Roll 4341030001040000000, Lot 53, Con. 2, Flos, By-law 5000-194 (ZB-2014-004) Langcrest Farms Ltd.,

Existing accessory buildings are permitted. The keeping of livestock in the existing accessory structure is prohibited.

33.4.55 A-55, Part Lot 63, Concession 1, EPR, Medonte
1733 Moonstone Road, Roll No. 434102000921202
ZB-2010-009 Nicholls ZBA

In addition to the uses permitted within the Agricultural Zone the following provisions will apply. Detached accessory buildings are not to exceed a total ground floor area of 211 square metres (2,271 square feet) and are to be used for storage or uses that are accessory to the residential use of the property.

33.4.56 A-56, Pt. Lot 14, Con. 1, Vespra
708 Penetanguishene Road, Roll 434101000108900
By-law 5000-153, Drury

The minimum lot frontage shall be 98 metres (322 ft.) and the minimum lot area shall be 18.6 hectares. (46 acres).

33.4.57 A-57a – Part Lots 14 & 15, Con. 3, Vespra
1391 Pooles Road, Roll 4341010003023000000
By-law 5000-156A Midves Court Extension (ZB-2012-001)

Provisions:

i)	Minimum Lot Area	1.5 acres
ii)	Minimum developable lot area	0.8 acres
iii)	Minimum Lot Frontage	45 metres
iv)	Minimum front yard setback	15 metres
v)	Minimum rear yard setback	15 metres
vi)	Minimum interior sideyard setback	7.5 metres
vii)	Minimum exterior sideyard setback	15 metres
viii)	Maximum lot coverage	10% of total lot area
viii)	Minimum Gross Floor Area for two storey	278m^2
ix)	Minimum Gross Floor Area for one storey	250$m^{2.}$

Permitted uses for the lands zoned A57(H) be limited to the following:

Residential Uses:
Single detached dwelling.

33.4.57 A-57b, S. Pt Lot 10, Con. 1, 51R-21677 Pts 3, 4 & 5 Flos
Roll Number 4341030003018000000
ZB-2012-004 Coughlin, ZBA 5000-158

The minimum frontage required shall be 70 metres (229.7 ft.) and the minimum lot area shall be 31.1 hectares (76.9 acres).

33.4.58 A-58 Part of Lots 18 & 19, Con. 3, Flos
2586 Flos Road Three West, Roll No. 434103000501900000
ZB-2012-003 VanLaarhoven, 5000-159

No building or structure shall be used to house livestock within 173 metres of any commercial zone. Furthermore, the interior side yard width (minimum) for any building or structure along the eastern boundary of the Rural Commercial (CR) Zone shall be 9 metres. Existing accessory buildings are permitted. The keeping of livestock in the existing accessory structure is prohibited."

33.4.59 A-59 Lot 14, Con. 4 Flos
2108 Flos Road Four West, Roll No. 434103000318300000
By-law 5000-184, ZB-2011-009 Willmart Grain Ltd., as approved by OMB.

No dwelling unit shall be permitted.

33.4.60 A-60 Part of Lot 10, Concession 3 (Flos)
1582 Flos Rd Three W., Roll No. 4341 030 003 11400 0000
Camack (Loftus Properties (Flos) Inc. ZBA 5000-167

The maximum GFA for detached accessory buildings shall be 120 square metres (1,291.66 ft²) and the minimum lot frontage shall be 10 metres.

33.4.61 (A-61) Part of Lot 10, Concession 3 (Flos)
1582 Flos Rd Three W., Roll No. 4341 030 003 11400 0000
Camack (Loftus Properties (Flos) Inc. ZBA 5000-167

The minimum lot frontage shall be 27.6 metres.

33.4.62 A-62, N Pt Lot 6, Con. 9; Flos, Pt 1, 51R-17219
120 Yonge St. N, 43410300061011100000
ZBA 5000-186, B. Roberts / Oggie Investments Ltd.

Outdoor storage in conjunction with a contractor's yard is a permitted use.

33.4.63 A-63, Pt. Lot 13, Con. 1, Flos, Pt 1 on RP 51R-38330
4340 Horseshoe Valley Road W., 4341030003030020000
ZB-2013-022, By-law 5000-187, Lampriere

The maximum lot coverage of all accessory buildings shall be 244 square metres.

33.4.64 A-64 - Part Lot 31, Concession 2 Vespra
1704 Story Road; 4341010001257010000
ZB-2014-008 G. D'Aoust

A 148.6 square metre (1,600 ft^2) detached garage with a maximum height of 5.13 metre (16.83 ft.) is permitted.

Law Society of Upper Canada *Appellant/Respondent on cross-appeal*

v.

CCH Canadian Limited *Respondent/Appellant on cross-appeal*

and between

Law Society of Upper Canada *Appellant/Respondent on cross-appeal*

v.

Thomson Canada Limited c.o.b. as Carswell Thomson Professional Publishing *Respondent/Appellant on cross-appeal*

and between

Law Society of Upper Canada *Appellant/Respondent on cross-appeal*

v.

Canada Law Book Inc. *Respondent/Appellant on cross-appeal*

and

Federation of Law Societies of Canada, Canadian Publishers' Council and Association of Canadian Publishers, Société québécoise de gestion collective des droits de reproduction (COPIBEC) and Canadian Copyright Licensing Agency (Access Copyright) *Interveners*

Barreau du Haut-Canada *Appelant/Intimé au pourvoi incident*

c.

CCH Canadienne Limitée *Intimée/Appelante au pourvoi incident*

et entre

Barreau du Haut-Canada *Appelant/Intimé au pourvoi incident*

c.

Thomson Canada Limitée, faisant affaire sous la raison sociale Carswell Thomson Professional Publishing *Intimée/Appelante au pourvoi incident*

et entre

Barreau du Haut-Canada *Appelant/Intimé au pourvoi incident*

c.

Canada Law Book Inc. *Intimée/Appelante au pourvoi incident*

et

Fédération des ordres professionnels de juristes du Canada, Canadian Publishers' Council et Association des éditeurs canadiens, Société québécoise de gestion collective des droits de reproduction (COPIBEC) et Canadian Copyright Licensing Agency (Access Copyright) *Intervenants*

INDEXED AS: CCH CANADIAN LTD. *v.* LAW SOCIETY OF UPPER CANADA

Neutral citation: 2004 SCC 13.

RÉPERTORIÉ : CCH CANADIENNE LTÉE *c.* BARREAU DU HAUT-CANADA

Référence neutre : 2004 CSC 13.

File No.: 29320.

2003: November 10; 2004: March 4.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Copyright — Infringement — Photocopying — Fax transmissions — Law Society providing custom photocopy service and maintaining self-service photocopiers in library for use by patrons — Legal publishers bringing copyright infringement actions against Law Society — Whether publishers' headnotes, case summary, topical index and compilation of reported judicial decisions "original" works covered by copyright — If so, whether Law Society breached publishers' copyright — Whether Law Society's fax transmissions of publishers' works constitute communications "to the public" — Copyright Act, R.S.C. 1985, c. C-42, s. 3(1)(f).

Copyright — Infringement — Exception — Fair dealings — Law Society providing custom photocopy service and maintaining self-service photocopiers in library for use by patrons — Legal publishers bringing copyright infringement actions against Law Society — Whether Law Society's dealings with publishers' works "fair dealings" — Copyright Act, R.S.C. 1985, c. C-42, s. 29.

Copyright — Works in which copyright may subsist — Meaning of "original" work — Whether headnotes, case summary, topical index and compilation of reported judicial decisions "original" works covered by copyright — Copyright Act, R.S.C. 1985, c. C-42, s. 2 "every original literary, dramatic, musical and artistic work".

The appellant Law Society maintains and operates the Great Library at Osgoode Hall in Toronto, a reference and research library with one of the largest collections of legal materials in Canada. The Great Library provides a request-based photocopy service for Law Society members, the judiciary and other authorized researchers. Under this "custom photocopy service", legal materials are reproduced by Great Library staff and delivered in person, by mail or by facsimile transmission to

N^{o} du greffe : 29320.

2003 : 10 novembre; 2004 : 4 mars.

Présents : La juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps et Fish.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit d'auteur — Violation du droit d'auteur — Photocopie — Transmissions par télécopieur — Barreau offrant un service de photocopie et mettant des photocopieuses libre-service à la disposition des usagers de sa bibliothèque — Éditeurs juridiques poursuivant le Barreau pour violation de leur droit d'auteur — Les sommaires, le résumé jurisprudentiel, l'index analytique et la compilation de décisions judiciaires publiées sont-ils des œuvres « originales » protégées par le droit d'auteur? — Dans l'affirmative, le Barreau a-t-il violé le droit d'auteur des éditeurs? — La transmission par télécopieur, par le Barreau, des œuvres des éditeurs constituait-elle une communication des œuvres « au public »? — Loi sur le droit d'auteur, L.R.C. 1985, ch. C-42, art. 3(1)f).

Droit d'auteur — Violation du droit d'auteur — Exception — Utilisation équitable — Barreau offrant un service de photocopie et mettant des photocopieuses libre-service à la disposition des usagers de sa bibliothèque — Éditeurs juridiques poursuivant le Barreau pour violation de leur droit d'auteur — L'utilisation par le Barreau des œuvres des éditeurs constituait-elle une « utilisation équitable »? — Loi sur le droit d'auteur, L.R.C. 1985, ch. C-42, art. 29.

Droit d'auteur — Œuvres protégées par le droit d'auteur — Sens du terme œuvre « originale » — Les sommaires, le résumé jurisprudentiel, l'index analytique et la compilation de décisions judiciaires publiées sont-ils des œuvres « originales » protégées par le droit d'auteur? — Loi sur le droit d'auteur, L.R.C. 1985, ch. C-42, art. 2 « toute œuvre littéraire, dramatique, musicale ou artistique originale ».

Le Barreau appelant assure le fonctionnement de la Grande bibliothèque d'Osgoode Hall, à Toronto, une bibliothèque de consultation et de recherche dotée d'une des plus vastes collections d'ouvrages juridiques au Canada. La Grande bibliothèque offre un service de photocopie sur demande aux membres du Barreau et de la magistrature, et aux autres chercheurs autorisés. Dans le cadre de ce service de photocopie, les membres du personnel de la Grande bibliothèque préparent et remettent

requesters. The Law Society also maintains self-service photocopiers in the Great Library for use by its patrons. In 1993, the respondent publishers commenced copyright infringement actions against the Law Society, seeking a declaration of subsistence and ownership of copyright in specific works and a declaration that the Law Society had infringed copyright when the Great Library reproduced a copy of each of the works. The publishers also sought a permanent injunction prohibiting the Law Society from reproducing these works as well as any other works that they published. The Law Society denied liability and counterclaimed for a declaration that copyright is not infringed when a single copy of a reported decision, case summary, statute, regulation or a limited selection of text from a treatise is made by the Great Library staff, or one of its patrons on a self-service copier, for the purpose of research. The Federal Court, Trial Division allowed the publishers' action in part, finding that the Law Society had infringed copyright in certain works; it dismissed the Law Society's counterclaim. The Federal Court of Appeal allowed the publishers' appeal in part, holding that all of the works were original and therefore covered by copyright. It dismissed the Law Society's cross-appeal.

Held: The appeal should be allowed and the cross-appeal dismissed. The Law Society does not infringe copyright when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise is made by the Great Library in accordance with its access policy. Moreover, the Law Society does not authorize copyright infringement by maintaining a photocopier in the Great Library and posting a notice warning that it will not be responsible for any copies made in infringement of copyright.

The headnotes, case summary, topical index and compilation of reported judicial decisions are all original works in which copyright subsists. An "original" work under the *Copyright Act* is one that originates from an author and is not copied from another work. In addition, an original work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. While creative works will by definition be "original" and covered by copyright, creativity is not required to make a work "original". This conclusion is supported by the plain meaning of "original", the history

sur place ou transmettent par la poste ou par télécopieur des copies d'ouvrages juridiques aux personnes qui en font la demande. Le Barreau met aussi des photocopieuses libre-service à la disposition des usagers de la Grande bibliothèque. En 1993, les éditeurs intimés ont intenté des actions contre le Barreau pour violation du droit d'auteur afin d'obtenir un jugement confirmant l'existence et la propriété du droit d'auteur sur des œuvres précises et déclarant que le Barreau avait violé le droit d'auteur lorsque la Grande bibliothèque avait produit une copie de chacune de ces œuvres. Les éditeurs ont en outre demandé une injonction permanente interdisant au Barreau de reproduire ces œuvres ou toute autre œuvre qu'ils publient. Le Barreau a nié toute responsabilité et demandé à son tour un jugement déclarant qu'il n'y a pas de violation du droit d'auteur lorsqu'une seule copie d'une décision publiée, d'un résumé jurisprudentiel, d'une loi, d'un règlement ou d'un extrait limité d'un traité est imprimée par un membre du personnel de la Grande bibliothèque ou par un usager au moyen d'une photocopieuse libre-service, aux fins de recherche. La Section de première instance de la Cour fédérale a accueilli en partie l'action des éditeurs, concluant que le Barreau avait violé le droit d'auteur sur certaines œuvres; elle a rejeté la demande reconventionnelle du Barreau. La Cour d'appel fédérale a accueilli en partie l'appel des éditeurs, statuant que les œuvres en cause étaient toutes originales et protégées par le doit d'auteur. Elle a rejeté l'appel incident du Barreau.

Arrêt : Le pourvoi est accueilli et le pourvoi incident est rejeté. Le Barreau ne viole pas le droit d'auteur lorsque la Grande bibliothèque fournit une seule copie d'une décision publiée, d'un résumé jurisprudentiel, d'une loi, d'un règlement ou d'une partie restreinte d'un texte provenant d'un traité conformément à sa politique d'accès. Par ailleurs, le Barreau n'autorise pas la violation du droit d'auteur en plaçant une photocopieuse dans la Grande bibliothèque et en affichant un avis où il décline toute responsabilité relativement aux copies produites en violation du droit d'auteur.

Les sommaires, le résumé jurisprudentiel, l'index analytique et la compilation de décisions judiciaires publiées sont tous des œuvres « originales » conférant un droit d'auteur. Une œuvre « originale » au sens de la *Loi sur le droit d'auteur* est une œuvre qui émane d'un auteur et qui n'est pas une copie d'une autre œuvre. Elle doit en outre être le produit de l'exercice du talent et du jugement d'un auteur. Cet exercice ne doit pas être négligeable au point qu'on puisse le qualifier d'entreprise purement mécanique. Bien qu'une œuvre créative soit par définition « originale » et protégée par le droit d'auteur, la créativité n'est pas essentielle à l'originalité. Cette conclusion s'appuie sur le sens ordinaire du mot

of copyright law, recent jurisprudence, the purpose of the *Copyright Act* and the fact that this constitutes a workable yet fair standard. While the reported judicial decisions, when properly understood as a compilation of the headnote and the accompanying edited judicial reasons, are "original" works covered by copyright, the judicial reasons in and of themselves, without the headnotes, are not original works in which the publishers could claim copyright.

Under s. 29 of the *Copyright Act*, fair dealing for the purpose of research or private study does not infringe copyright. "Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained, and is not limited to non-commercial or private contexts. Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29. The following factors help determine whether a dealing is fair: the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing, and the effect of the dealing on the work. Here, the Law Society's dealings with the publishers' works through its custom photocopy service were research-based and fair. The access policy places appropriate limits on the type of copying that the Law Society will do. If a request does not appear to be for the purpose of research, criticism, review or private study, the copy will not be made. If a question arises as to whether the stated purpose is legitimate, the reference librarian will review the matter. The access policy limits the amount of work that will be copied, and the reference librarian reviews requests that exceed what might typically be considered reasonable and has the right to refuse to fulfill a request.

The Law Society did not authorize copyright infringement by providing self-service photocopiers for use by its patrons in the Great Library. While authorization can be inferred from acts that are less than direct and positive, a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law. This presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement. Here, there was no evidence that the copiers had been used in a manner that was not consistent with copyright law. Moreover, the Law Society's posting of a notice warning that it will not be responsible for any copies made in infringement of copyright does not constitute an

« originale », l'historique du droit d'auteur, la jurisprudence récente, l'objet de la *Loi sur le droit d'auteur* et le caractère à la fois fonctionnel et équitable de ce critère. Bien que les décisions judiciaires publiées, considérées à juste titre comme une compilation du sommaire et des motifs judiciaires révisés qui l'accompagnent, soient des œuvres « originales » protégées par le droit d'auteur, les motifs de la décision en eux-mêmes, sans les sommaires, ne constituent pas des œuvres originales sur lesquelles les éditeurs peuvent revendiquer un droit d'auteur.

L'article 29 de la *Loi sur le droit d'auteur* prévoit que l'utilisation équitable d'une œuvre aux fins de recherche ou d'étude privée ne viole pas le droit d'auteur. Il faut interpréter le mot « recherche » de manière large afin que les droits des utilisateurs ne soient pas indûment restreints, et la recherche ne se limite pas à celle effectuée dans un contexte non commercial ou privé. L'avocat qui exerce le droit dans un but lucratif effectue de la recherche au sens de l'art. 29. Les facteurs suivants aident à déterminer si une utilisation est équitable : le but de l'utilisation, la nature de l'utilisation, l'ampleur de l'utilisation, la nature de l'œuvre, les solutions de rechange à l'utilisation et l'effet de l'utilisation sur l'œuvre. En l'espèce, l'utilisation des œuvres des éditeurs par le Barreau, dans le cadre du service de photocopie, était axée sur la recherche et équitable. La politique d'accès circonscrit adéquatement les copies que le Barreau effectuera. Lorsque la fin poursuivie ne semblera pas être la recherche, la critique, le compte rendu ou l'étude privée, la demande de photocopie sera refusée. En cas de doute quant à la légitimité de la fin poursuivie, il appartiendra aux bibliothécaires de référence de trancher. La politique d'accès limite l'ampleur de l'extrait pouvant être reproduit, et les bibliothécaires de référence ont le droit de refuser une demande dont la portée excède ce qui est habituellement jugé raisonnable.

Le Barreau n'autorise pas la violation du droit d'auteur en mettant des photocopieuses à la disposition des usagers de la Grande bibliothèque. Bien que l'autorisation puisse s'inférer d'agissements qui ne sont pas des actes directs et positifs, ce n'est pas autoriser la violation du droit d'auteur que de permettre la simple utilisation d'un appareil susceptible d'être utilisé à cette fin. Les tribunaux doivent présumer que celui qui autorise une activité ne l'autorise que dans les limites de la légalité. Cette présomption peut être réfutée par la preuve qu'il existait une certaine relation ou un certain degré de contrôle entre l'auteur allégué de l'autorisation et les personnes qui ont violé le droit d'auteur. En l'espèce, aucune preuve n'établissait que les photocopieuses avaient été utilisées d'une manière incompatible avec les dispositions sur le droit d'auteur. De plus, le Barreau, en affichant un avis où il décline toute responsabilité relativement aux copies

express acknowledgement that the copiers will be used in an illegal manner. Finally, even if there were evidence of the copiers having been used to infringe copyright, the Law Society lacks sufficient control over the Great Library's patrons to permit the conclusion that it sanctioned, approved or countenanced the infringement.

There was no secondary infringement by the Law Society. The Law Society's fax transmissions of copies of the respondent publishers' works to lawyers in Ontario were not communications to the public. While a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright, there was no evidence of this type of transmission having occurred in this case. Nor did the Law Society infringe copyright by selling copies of the publishers' works. Absent primary infringement, there can be no secondary infringement. Finally, while it is not necessary to decide the point, the Great Library qualifies for the library exemption.

Cases Cited

Applied: *Muzak Corp. v. Composers, Authors and Publishers Association of Canada, Ltd.*, [1953] 2 S.C.R. 182; *De Tervagne v. Belœil (Town)*, [1993] 3 F.C. 227; **not followed:** *Moorhouse v. University of New South Wales*, [1976] R.P.C. 151; **referred to:** *Moreau v. St. Vincent*, [1950] Ex. C.R. 198; *Goldner v. Canadian Broadcasting Corp.* (1972), 7 C.P.R. (2d) 158; *Grignon v. Roussel* (1991), 38 C.P.R. (3d) 4; *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34; *Bishop v. Stevens*, [1990] 2 S.C.R. 467; *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42; *University of London Press, Ltd. v. University Tutorial Press, Ltd.*, [1916] 2 Ch. 601; *U & R Tax Services Ltd. v. H & R Block Canada Inc.* (1995), 62 C.P.R. (3d) 257; *Feist Publications Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991); *Tele-Direct (Publications) Inc. v. American Business Information, Inc.*, [1998] 2 F.C. 22; *Édutile Inc. v. Automobile Protection Assn.*, [2000] 4 F.C. 195; *Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co.* (1984), 3 C.P.R. (3d) 81; *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465; *Composers, Authors and Publishers Association of Canada Ltd. v. CTV Television Network Ltd.*, [1968] S.C.R. 676; *CBS Inc. v. Ames Records & Tapes Ltd.*, [1981] 2 All E.R. 812; *Hubbard v. Vosper*, [1972] 1 All E.R. 1023; *Associated Newspapers Group plc v. News Group Newspapers Ltd.*, [1986] R.P.C. 515;

produites en violation du droit d'auteur, n'a pas reconnu expressément que les photocopieuses seraient utilisées de façon illicite. Enfin, même si la preuve établissait que les photocopieuses ont été utilisées pour violer le droit d'auteur, le Barreau n'a pas un contrôle suffisant sur les usagers de la Grande bibliothèque pour que l'on puisse conclure qu'il a sanctionné, appuyé ou soutenu la violation du droit d'auteur.

Il n'y a pas eu violation du droit d'auteur à une étape ultérieure de la part du Barreau. En transmettant des copies des œuvres des éditeurs à des avocats de l'Ontario, le Barreau ne les a pas communiquées au public. La transmission répétée d'une copie d'une même œuvre à de nombreux destinataires pourrait constituer une communication au public et violer le droit d'auteur, mais aucune preuve n'a établi que ce genre de transmission aurait eu lieu en l'espèce. Le Barreau n'a pas non plus violé le droit d'auteur en vendant des copies des œuvres des éditeurs. En l'absence de violation initiale du droit d'auteur, il ne peut y avoir de violation à une étape ultérieure. Enfin, bien qu'il ne soit pas nécessaire de trancher cette question, la Grande bibliothèque est visée par l'exception prévue pour les bibliothèques.

Jurisprudence

Arrêts appliqués : *Muzak Corp. c. Composers, Authors and Publishers Association of Canada, Ltd.*, [1953] 2 R.C.S. 182; *De Tervagne c. Belœil (Ville)*, [1993] 3 C.F. 227; **arrêt non suivi :** *Moorhouse c. University of New South Wales*, [1976] R.P.C. 151; **arrêts mentionnés :** *Moreau c. St. Vincent*, [1950] R.C. de l'É. 198; *Goldner c. Société Radio-Canada* (1972), 7 C.P.R. (2d) 158; *Grignon c. Roussel* (1991), 38 C.P.R. (3d) 4; *Théberge c. Galerie d'Art du Petit Champlain inc.*, [2002] 2 R.C.S. 336, 2002 CSC 34; *Bishop c. Stevens*, [1990] 2 R.C.S. 467; *Compo Co. c. Blue Crest Music Inc.*, [1980] 1 R.C.S. 357; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42; *University of London Press, Ltd. c. University Tutorial Press, Ltd.*, [1916] 2 Ch. 601; *U & R Tax Services Ltd. c. H & R Block Canada Inc.* (1995), 62 C.P.R. (3d) 257; *Feist Publications Inc. c. Rural Telephone Service Co.*, 499 U.S. 340 (1991); *Télé-Direct (Publications) Inc. c. American Business Information, Inc.*, [1998] 2 C.F. 22; *Édutile Inc. c. Assoc. pour la protection des automobilistes*, [2000] 4 C.F. 195; *Slumber-Magic Adjustable Bed Co. c. Sleep-King Adjustable Bed Co.* (1984), 3 C.P.R. (3d) 81; *Ladbroke (Football) Ltd. c. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465; *Composers, Authors and Publishers Association of Canada Ltd. c. CTV Television Network Ltd.*, [1968] R.C.S. 676; *CBS Inc. c. Ames Records & Tapes Ltd.*, [1981] 2 All E.R. 812; *Hubbard c. Vosper*, [1972] 1 All E.R. 1023; *Associated Newspapers Group*

Sillitoe v. McGraw-Hill Book Co. (U.K.), [1983] F.S.R. 545; *Beloff v. Pressdram Ltd.*, [1973] 1 All E.R. 241; *Pro Sieben Media AG v. Carlton UK Television Ltd.*, [1999] F.S.R. 610.

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Hitchcock, P. D. « Home Copying and Authorization » (1983), 67 C.P.R. (2d) 17.

Kierans, Patrick E., and Rowena Borenstein. « Injunctions — Interlocutory and Permanent ». In Ronald E. Dimock, ed., *Intellectual Property Disputes : Resolutions & Remedies*, vol. 2. Toronto : Thomson/Carswell, 2002, 15-1.

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APPEAL and CROSS-APPEAL from a judgment of the Federal Court of Appeal, [2002] 4 F.C. 213, 212 D.L.R. (4th) 385, 289 N.R. 1, 18 C.P.R. (4th) 161, [2002] F.C.J. No. 690 (QL), 2002 FCA 187, reversing in part a judgment of the Trial Division, [2000] 2 F.C. 451, 169 F.T.R. 1, 179 D.L.R. (4th) 609, 2 C.P.R. (4th) 129, 72 C.R.R. (2d) 139, [1999] F.C.J. No. 1647 (QL). Appeal allowed and cross-appeal dismissed.

R. Scott Joliffe, *L. A. Kelly Gill* and *Kevin J. Sartorio*, for the appellant/respondent on cross-appeal.

Roger T. Hughes, *Q.C.*, and *Glen A. Bloom*, for the respondents/appellants on cross-appeal.

Kevin L. LaRoche, for the intervener the Federation of Law Societies of Canada.

Thomas G. Heintzman, *Q.C.*, and *Barry B. Sookman*, for the interveners the Canadian Publishers' Council and the Association of Canadian Publishers.

Claude Brunet, *Benoît Clermont* and *Madeleine Lamothe-Samson*, for the interveners Société québécoise de gestion collective des droits de reproduction (COPIBEC) and the Canadian Copyright Licensing Agency (Access Copyright).

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction — The Issues To Be Determined

The appellant, the Law Society of Upper Canada, is a statutory non-profit corporation that has regulated the legal profession in Ontario since 1822. Since 1845, the Law Society has maintained and operated the Great Library at Osgoode Hall in

Ricketson, Sam. *The Berne Convention for the Protection of Literary and Artistic Works : 1886-1986*. London : Kluwer, 1987.
Vaver, David. *Copyright Law*. Toronto : Irwin Law, 2000.

POURVOI PRINCIPAL et POURVOI INCIDENT contre un arrêt de la Cour d'appel fédérale, [2002] 4 C.F. 213, 212 D.L.R. (4th) 385, 289 N.R. 1, 18 C.P.R. (4th) 161, [2002] A.C.F. nº 690 (QL), 2002 CAF 187, qui a infirmé en partie un jugement de la Section de première instance, [2000] 2 C.F. 451, 169 F.T.R. 1, 179 D.L.R. (4th) 609, 2 C.P.R. (4th) 129, 72 C.R.R. (2d) 139, [1999] A.C.F. nº 1647 (QL). Pourvoi principal accueilli et pourvoi incident rejeté.

R. Scott Joliffe, *L. A. Kelly Gill* et *Kevin J. Sartorio*, pour l'appelant/intimé au pourvoi incident.

Roger T. Hughes, *c.r.*, et *Glen A. Bloom*, pour les intimées/appelantes au pourvoi incident.

Kevin L. LaRoche, pour l'intervenante la Fédération des ordres professionnels de juristes du Canada.

Thomas G. Heintzman, *c.r.*, et *Barry B. Sookman*, pour les intervenants Canadian Publishers' Council et l'Association des éditeurs canadiens.

Claude Brunet, *Benoît Clermont* et *Madeleine Lamothe-Samson*, pour les intervenantes la Société québécoise de gestion collective des droits de reproduction (COPIBEC) et Canadian Copyright Licensing Agency (Access Copyright).

Version française du jugement de la Cour rendu par

LA JUGE EN CHEF —

I. Introduction — Les questions en litige

1 L'appelant, le Barreau du Haut-Canada, est une société sans but lucratif constituée par une loi qui régit l'exercice du droit en Ontario depuis 1822. Le Barreau assure, depuis 1845, le fonctionnement de la Grande bibliothèque d'Osgoode Hall, à Toronto,

Toronto, a reference and research library with one of the largest collections of legal materials in Canada. The Great Library provides a request-based photocopy service (the "custom photocopy service") for Law Society members, the judiciary and other authorized researchers. Under the custom photocopy service, legal materials are reproduced by Great Library staff and delivered in person, by mail or by facsimile transmission to requesters. The Law Society also maintains self-service photocopiers in the Great Library for use by its patrons.

2 The respondents, CCH Canadian Ltd., Thomson Canada Ltd. and Canada Law Book Inc., publish law reports and other legal materials. In 1993, the respondent publishers commenced copyright infringement actions against the Law Society, seeking a declaration of subsistence and ownership of copyright in eleven specific works and a declaration that the Law Society had infringed copyright when the Great Library reproduced a copy of each of the works. The publishers also sought a permanent injunction prohibiting the Law Society from reproducing these eleven works as well as any other works that they published.

3 The Law Society denied liability and counterclaimed for a declaration that copyright is not infringed when a single copy of a reported decision, case summary, statute, regulation or a limited selection of text from a treatise is made by the Great Library staff or one of its patrons on a self-service photocopier for the purpose of research.

4 The key question that must be answered in this appeal is whether the Law Society has breached copyright by either (1) providing the custom photocopy service in which single copies of the publishers' works are reproduced and sent to patrons upon their request or by (2) maintaining self-service photocopiers and copies of the publishers' works in the Great Library for use by its patrons. To answer this question, the Court must address the following subissues:

une bibliothèque de consultation et de recherche dotée d'une des plus vastes collections d'ouvrages juridiques au Canada. La Grande bibliothèque offre un service de photocopie sur demande aux membres du Barreau et de la magistrature, et aux autres chercheurs autorisés. Les membres de son personnel remettent sur place ou transmettent par la poste ou par télécopieur des copies d'ouvrages juridiques aux personnes qui en font la demande. La Grande bibliothèque met également des photocopieuses libre-service à la disposition des usagers.

Les intimées, CCH Canadienne Limitée, Thomson Canada Limitée et Canada Law Book Inc., publient des recueils de jurisprudence et d'autres ouvrages juridiques. En 1993, les éditeurs intimés ont intenté des actions contre le Barreau pour violation du droit d'auteur. Ils ont demandé un jugement confirmant l'existence et la propriété du droit d'auteur sur onze œuvres précises et déclarant que le Barreau avait violé le droit d'auteur lorsque la Grande bibliothèque avait produit une copie de chacune de ces œuvres. Les éditeurs ont en outre demandé une injonction permanente interdisant au Barreau de reproduire ces onze œuvres ou toute autre œuvre qu'ils publient.

Le Barreau a nié toute responsabilité et demandé à son tour un jugement déclarant qu'il n'y a pas de violation du droit d'auteur lorsqu'une seule copie d'une décision publiée, d'un résumé jurisprudentiel, d'une loi, d'un règlement ou d'un extrait limité d'un traité est imprimée par un membre du personnel de la Grande bibliothèque ou par un usager au moyen d'une photocopieuse libre-service, aux fins de recherche.

La principale question qui doit être tranchée dans le cadre du présent pourvoi est de savoir si le Barreau a violé le droit d'auteur (1) en offrant le service de photocopie grâce auquel une seule copie d'un ouvrage des éditeurs est réalisée et transmise à un client sur demande ou (2) en mettant à la disposition des usagers de la Grande bibliothèque des photocopieuses libre-service et des exemplaires des ouvrages des éditeurs. Pour répondre à cette question, notre Cour doit examiner les sous-questions suivantes :

(1) Are the publishers' materials "original works" protected by copyright?

(2) Did the Great Library authorize copyright infringement by maintaining self-service photocopiers and copies of the publishers' works for its patrons' use?

(3) Were the Law Society's dealings with the publishers' works "fair dealing[s]" under s. 29 of the *Copyright Act*, R.S.C. 1985, c. C-42, as amended?

(4) Did Canada Law Book consent to have its works reproduced by the Great Library?

The publishers have filed a cross-appeal in which they submit that, in addition to infringing copyright by reproducing copies of their works, the Law Society infringed copyright both by faxing and by selling copies of the publishers' copyrighted works through its custom photocopy service. The publishers also contend that the Great Library does not qualify for the library exemption under the *Copyright Act* and, finally, that they are entitled to an injunction to the extent that the Law Society has been found to infringe any one or more of their copyrighted works. The four sub-issues that the Court must address on this cross-appeal are:

(1) Did the Law Society's fax transmissions of the publishers' works constitute communications "to the public" within s. 3(1)(*f*) of the *Copyright Act* so as to constitute copyright infringement?

(2) Did the Law Society infringe copyright by selling copies of the publishers' works contrary to s. 27(2) of the *Copyright Act*?

(3) Does the Law Society qualify for an exemption as a "library, archive or museum" under ss. 2 and 30.2(1) of the *Copyright Act*?

(1) Les ouvrages des éditeurs constituent-ils des « œuvres originales » protégées par le droit d'auteur?

(2) La Grande bibliothèque a-t-elle autorisé la violation du droit d'auteur en mettant à la disposition des usagers des photocopieuses individuelles et des exemplaires des ouvrages des éditeurs?

(3) L'utilisation des ouvrages des éditeurs par le Barreau constituait-elle une « utilisation équitable » au sens de l'art. 29 de la *Loi sur le droit d'auteur*, L.R.C. 1985, ch. C-42, modifiée?

(4) Canada Law Book a-t-elle consenti à ce que ses œuvres soient reproduites par la Grande bibliothèque?

5 Les éditeurs ont formé un pourvoi incident dans lequel ils font valoir que le Barreau a violé le droit d'auteur non seulement en réalisant des copies de leurs œuvres, mais également en télécopiant et en vendant des copies de leurs œuvres protégées dans le cadre de son service de photocopie. Ils prétendent en outre que la Grande bibliothèque ne peut bénéficier de l'exception que prévoit la *Loi sur le droit d'auteur* pour les bibliothèques et, enfin, qu'ils ont droit à une injonction dans la mesure où il a été établi que le Barreau a violé le droit d'auteur sur une ou plusieurs de leurs œuvres. Voici les quatre sous-questions que notre Cour doit examiner dans le cadre de ce pourvoi incident :

(1) La transmission par télécopieur des œuvres des éditeurs par le Barreau constituait-elle une communication « au public » au sens de l'al. 3(1)*f*) de la *Loi sur le droit d'auteur*, de sorte qu'elle constituait une violation du droit d'auteur?

(2) Le Barreau a-t-il violé le droit d'auteur en vendant des copies des œuvres des éditeurs contrairement au par. 27(2) de la *Loi sur le droit d'auteur*?

(3) Le Barreau bénéficie-t-il d'une exception à titre de « bibliothèque, musée ou service d'archives » suivant l'art. 2 et le par. 30.2(1) de la *Loi sur le droit d'auteur*?

(4) To the extent that the Law Society has been found to infringe any one or more of the publishers' copyrighted works, are the publishers entitled to a permanent injunction under s. 34(1) of the *Copyright Act*?

6 With respect to the main appeal, I conclude that the Law Society did not infringe copyright by providing single copies of the respondent publishers' works to its members through the custom photocopy service. Although the works in question were "original" and thus covered by copyright, the Law Society's dealings with the works were for the purpose of research and were fair dealings within s. 29 of the *Copyright Act*. I also find that the Law Society did not authorize infringement by maintaining self-service photocopiers in the Great Library for use by its patrons. I would therefore allow the appeal.

7 On the cross-appeal, I conclude that there was no secondary infringement by the Law Society; the fax transmissions were not communications to the public and the Law Society did not sell copies of the publishers' works. In light of my finding on appeal that the Law Society's dealings with the publishers' works were fair, it is not necessary to decide whether the Great Library qualifies for the library exemption. This said, I would conclude that the Great Library does indeed qualify for this exemption. Finally, in light of my conclusion that there has been no copyright infringement, it is not necessary to issue an injunction in this case. I would dismiss the cross-appeal.

II. Analysis on Appeal

8 Copyright law in Canada protects a wide range of works including every original literary, dramatic, musical and artistic work, computer programs, translations and compilations of works: see ss. 5, 2 and 2.1 of the *Copyright Act*. Copyright law protects the expression of ideas in these works; it does not protect ideas in and of themselves. Thorson P. explained it thus in *Moreau v. St. Vincent*, [1950] Ex. C.R. 198, at p. 203:

(4) S'il est établi que le Barreau a violé le droit d'auteur sur une ou plusieurs des œuvres des éditeurs, ces derniers ont-ils droit à une injonction permanente en application du par. 34(1) de la *Loi sur le droit d'auteur*?

En ce qui concerne le pourvoi principal, j'arrive à la conclusion que le Barreau n'a pas violé le droit d'auteur en fournissant à ses membres une seule copie des œuvres des éditeurs intimés dans le cadre de son service de photocopie. Même si les œuvres en question étaient « originales » et, par conséquent, protégées par le droit d'auteur, le Barreau les a utilisées aux fins de recherche et cette utilisation était équitable au sens de l'art. 29 de la *Loi sur le droit d'auteur*. Je conclus également que le Barreau n'a pas autorisé la violation du droit d'auteur en mettant des photocopieuses libre-service à la disposition des usagers de la Grande bibliothèque. Je suis donc d'avis d'accueillir le pourvoi.

Pour ce qui est du pourvoi incident, j'estime qu'il n'y a pas eu de violation à une étape ultérieure de la part du Barreau; les transmissions par télécopieur ne constituaient pas des communications au public, et le Barreau n'a pas vendu les copies des œuvres des éditeurs. Ayant conclu dans le pourvoi principal que l'utilisation des œuvres des éditeurs par le Barreau était équitable, je n'estime pas nécessaire de décider si la Grande bibliothèque bénéficie de l'exception susmentionnée. Je suis néanmoins d'avis qu'elle pourrait s'en prévaloir. Enfin, comme je juge qu'il n'y a pas eu de violation du droit d'auteur, il est inutile de décerner une injonction en l'espèce. Je suis d'avis de rejeter le pourvoi incident.

II. Analyse du pourvoi

Le droit d'auteur au Canada protège une vaste gamme d'œuvres originales, notamment les œuvres littéraires, dramatiques, musicales ou artistiques, les programmes d'ordinateur, les traductions et les compilations d'œuvres : voir les art. 5, 2 et 2.1 de la *Loi sur le droit d'auteur*. Il protège l'expression des idées dans ces œuvres, et non les idées comme telles. Le président Thorson l'a expliqué de la manière suivante dans *Moreau c. St. Vincent*, [1950] R.C. de l'É. 198, p. 203 :

It is, I think, an elementary principle of copyright law that an author has no copyright in ideas but only in his expression of them. The law of copyright does not give him any monopoly in the use of the ideas with which he deals or any property in them, even if they are original. His copyright is confined to the literary work in which he has expressed them. The ideas are public property, the literary work is his own.

It flows from the fact that copyright only protects the expression of ideas that a work must also be in a fixed material form to attract copyright protection: see s. 2 definitions of "dramatic work" and "computer program" and, more generally, *Goldner v. Canadian Broadcasting Corp.* (1972), 7 C.P.R. (2d) 158 (F.C.T.D.), at p. 162; *Grignon v. Roussel* (1991), 38 C.P.R. (3d) 4 (F.C.T.D.), at p. 7.

In Canada, copyright is a creature of statute and the rights and remedies provided by the *Copyright Act* are exhaustive: see *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34, at para. 5; *Bishop v. Stevens*, [1990] 2 S.C.R. 467, at p. 477; *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 S.C.R. 357, at p. 373. In interpreting the scope of the *Copyright Act*'s rights and remedies, courts should apply the modern approach to statutory interpretation whereby "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26, citing E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.

Binnie J. recently explained in *Théberge*, *supra*, at paras. 30-31, that the *Copyright Act* has dual objectives:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator . . . .

The proper balance among these and other public policy objectives lies not only in recognizing the

[TRADUCTION] Je crois qu'un principe fondamental du droit d'auteur veut que l'auteur n'ait pas un droit sur une idée, mais seulement sur son expression. Le droit d'auteur ne lui accorde aucun monopole sur l'utilisation de l'idée en cause ni aucun droit de propriété sur elle, même si elle est originale. Le droit d'auteur ne vise que l'œuvre littéraire dans laquelle elle s'est incarnée. L'idée appartient à tout le monde, l'œuvre littéraire à l'auteur.

Puisque le droit d'auteur ne protège que l'expression des idées, l'œuvre doit être fixée sous une forme matérielle pour bénéficier de cette protection : voir les définitions d'« œuvre dramatique » et de « programme d'ordinateur » à l'art. 2 et, de manière plus générale, *Goldner c. Société Radio-Canada* (1972), 7 C.P.R. (2d) 158 (C.F. 1re inst.), p. 162; *Grignon c. Roussel* (1991), 38 C.P.R. (3d) 4 (C.F. 1re inst.), p. 7.

9 Au Canada, le droit d'auteur tire son origine de la loi, et les droits et recours que prévoit la *Loi sur le droit d'auteur* sont exhaustifs : voir *Théberge c. Galerie d'Art du Petit Champlain inc.*, [2002] 2 R.C.S. 336, 2002 CSC 34, par. 5; *Bishop c. Stevens*, [1990] 2 R.C.S. 467, p. 477; *Compo Co. c. Blue Crest Music Inc.*, [1980] 1 R.C.S. 357, p. 373. Pour définir les droits et recours conférés par la *Loi sur le droit d'auteur*, les tribunaux doivent recourir à l'approche moderne en matière d'interprétation législative selon laquelle « il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur » : *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 26, où notre Cour cite E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87.

10 Récemment, dans *Théberge*, précité, par. 30 et 31, le juge Binnie a expliqué que la *Loi sur le droit d'auteur* a deux objectifs :

La Loi est généralement présentée comme établissant un équilibre entre, d'une part, la promotion, dans l'intérêt du public, de la création et de la diffusion des œuvres artistiques et intellectuelles et, d'autre part, l'obtention d'une juste récompense pour le créateur . . .

On atteint le juste équilibre entre les objectifs de politique générale, dont ceux qui précèdent, non seulement

creator's rights but in giving due weight to their limited nature.

In interpreting the *Copyright Act*, courts should strive to maintain an appropriate balance between these two goals.

11 Canada's *Copyright Act* sets out the rights and obligations of both copyright owners and users. Part I of the Act specifies the scope of a creator's copyright and moral rights in works. For example, s. 3 of the Act specifies that only copyright owners have the right to copy or to authorize the copying of their works:

> **3.** (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof . . . .
>
> . . .
>
> and to authorize any such acts.

12 Part III of the *Copyright Act* deals with the infringement of copyright and exceptions to infringement. Section 27(1) states generally that "[i]t is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do." More specific examples of how copyright is infringed are set out in s. 27(2) of the Act. The exceptions to copyright infringement, perhaps more properly understood as users' rights, are set out in ss. 29 and 30 of the Act. The fair dealing exceptions to copyright are set out in ss. 29 to 29.2. In general terms, those who deal fairly with a work for the purpose of research, private study, criticism, review or news reporting, do not infringe copyright. Educational institutions, libraries, archives and museums are specifically exempted from copyright infringement in certain circumstances: see ss. 29.4 to 30 (educational institutions), and ss. 30.1 to 30.5. Part IV of the *Copyright Act* specifies the remedies that may be awarded in cases where

en reconnaissant les droits du créateur, mais aussi en accordant l'importance qu'il convient à la nature limitée de ces droits.

Lorsqu'ils sont appelés à interpréter la *Loi sur le droit d'auteur*, les tribunaux doivent s'efforcer de maintenir un juste équilibre entre ces deux objectifs.

La *Loi sur le droit d'auteur* établit les droits et les obligations des titulaires du droit d'auteur et des utilisateurs. La partie I de la Loi précise l'étendue du droit d'auteur et des droits moraux du créateur sur une œuvre. Par exemple, l'art. 3 dispose que seul le titulaire du droit d'auteur a le droit de reproduire son œuvre :

> **3.** (1) Le droit d'auteur sur l'œuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'œuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'œuvre n'est pas publiée, d'en publier la totalité ou une partie importante . . .
>
> . . .
>
> Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.

La partie III de la *Loi sur le droit d'auteur* porte sur la violation du droit d'auteur et prévoit des exceptions. Le paragraphe 27(1) prévoit généralement que « [c]onstitue une violation du droit d'auteur l'accomplissement, sans le consentement du titulaire de ce droit, d'un acte qu'en vertu de la présente loi seul ce titulaire a la faculté d'accomplir. » Des exemples précis de violation du droit d'auteur sont donnés au par. 27(2) de la Loi. Les exceptions, perçues plus justement comme des droits d'utilisation, sont prévues aux art. 29 et 30 de la Loi. Celles liées à l'utilisation équitable sont énumérées aux art. 29 à 29.2. De manière générale, la personne qui fait une utilisation équitable d'une œuvre aux fins d'étude privée, de recherche, de critique, de compte rendu ou de communication de nouvelles ne viole pas le droit d'auteur. Les établissements d'enseignement, les bibliothèques, les services d'archives et les musées bénéficient expressément d'une exception dans certaines circonstances : voir les art. 29.4 à 30 (établissements d'enseignement) et les art. 30.1

copyright has been infringed. Copyright owners may be entitled to any number of different remedies such as damages and injunctions, among others.

This case requires this Court to interpret the scope of both owners' and users' rights under the *Copyright Act*, including what qualifies for copyright protection, what is required to find that the copyright has been infringed through authorization and the fair dealing exceptions under the Act.

(1) *Are the Publishers' Materials "Original Works" Covered by Copyright?*

(a) The Law

Section 5 of the *Copyright Act* states that, in Canada, copyright shall subsist "in every original literary, dramatic, musical and artistic work" (emphasis added). Although originality sets the boundaries of copyright law, it is not defined in the *Copyright Act*. Section 2 of the *Copyright Act* defines "every original literary . . . work" as including "every original production in the literary . . . domain, whatever may be the mode or form of its expression". Since copyright protects only the expression or form of ideas, "the originality requirement must apply to the expressive element of the work and not the idea": S. Handa, *Copyright Law in Canada* (2002), at p. 209.

There are competing views on the meaning of "original" in copyright law. Some courts have found that a work that originates from an author and is more than a mere copy of a work is sufficient to ground copyright. See, for example, *University of London Press, Ltd. v. University Tutorial Press, Ltd.*, [1916] 2 Ch. 601; *U & R Tax Services Ltd. v. H & R Block Canada Inc.* (1995), 62 C.P.R. (3d) 257 (F.C.T.D.). This approach is consistent with the "sweat of the brow" or "industriousness" standard of originality, which is premised on a natural rights

à 30.5. La partie IV de la *Loi sur le droit d'auteur* précise les réparations qui peuvent être accordées en cas de violation du droit d'auteur. Le titulaire du droit peut obtenir une ou plusieurs réparations différentes, notamment des dommages-intérêts et une injonction.

13 Notre Cour est appelée dans la présente affaire à déterminer l'étendue des droits que la *Loi sur le droit d'auteur* reconnaît aux titulaires du droit d'auteur et aux utilisateurs. Elle doit notamment examiner l'objet de la protection du droit d'auteur, les éléments constitutifs de la violation du droit d'auteur par voie d'autorisation et les exceptions relatives à l'utilisation équitable.

(1) *Les ouvrages des éditeurs constituent-ils des « œuvres originales » protégées par le droit d'auteur?*

a) Le droit

14 L'article 5 de la *Loi sur le droit d'auteur* dispose que le droit d'auteur, au Canada, existe « sur toute œuvre littéraire, dramatique, musicale ou artistique originale » (je souligne). Bien que l'originalité délimite la portée du droit d'auteur, elle n'est pas définie par la *Loi sur le droit d'auteur*. Suivant l'art. 2, « toute œuvre littéraire [. . .] originale » s'entend de « toute production originale du domaine littéraire [. . .] quels qu'en soient le mode ou la forme d'expression ». Comme le droit d'auteur ne protège que l'expression des idées ou leur mise en forme, [TRADUCTION] « le critère de l'originalité doit s'appliquer à l'élément expressif de l'œuvre, et non à l'idée » : S. Handa, *Copyright Law in Canada* (2002), p. 209.

15 La jurisprudence est contradictoire sur le sens du terme « originale » en matière de droit d'auteur. Pour certains tribunaux, le fait qu'une œuvre émane d'un auteur et soit davantage qu'une simple copie d'une autre œuvre suffit à faire naître le droit d'auteur. Voir, par exemple, *University of London Press, Ltd. c. University Tutorial Press, Ltd.*, [1916] 2 Ch. 601; *U & R Tax Services Ltd. c. H & R Block Canada Inc.* (1995), 62 C.P.R. (3d) 257 (C.F. 1re inst.). Cette interprétation associe le critère d'originalité à l'idée d'effort ou de labeur, conception qui s'appuie sur

or Lockean theory of "just desserts", namely that an author deserves to have his or her efforts in producing a work rewarded. Other courts have required that a work must be creative to be "original" and thus protected by copyright. See, for example, *Feist Publications Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991); *Tele-Direct (Publications) Inc. v. American Business Information, Inc.*, [1998] 2 F.C. 22 (C.A.). This approach is also consistent with a natural rights theory of property law; however it is less absolute in that only those works that are the product of creativity will be rewarded with copyright protection. It has been suggested that the "creativity" approach to originality helps ensure that copyright protection only extends to the expression of ideas as opposed to the underlying ideas or facts. See *Feist*, *supra*, at p. 353.

16 I conclude that the correct position falls between these extremes. For a work to be "original" within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an "original" work.

17 In reaching this conclusion, I have had regard to: (1) the plain meaning of "original"; (2) the history

une théorie des droits naturels ou lockienne voulant que « chacun obtienne ce qu'il mérite », c'est-à-dire que l'auteur qui crée une œuvre a le droit de voir ses efforts récompensés. Pour d'autres tribunaux, une œuvre doit être créative pour être « originale » et, de ce fait, protégée par le droit d'auteur. Voir, par exemple, *Feist Publications Inc. c. Rural Telephone Service Co.*, 499 U.S. 340 (1991); *Télé-Direct (Publications) Inc. c. American Business Information, Inc.*, [1998] 2 C.F. 22 (C.A.). Cette analyse est aussi conforme à une théorie du droit de propriété considéré comme un droit naturel, mais elle est moins radicale, du fait que seule l'œuvre issue d'une activité créative bénéficie de la protection du droit d'auteur. L'on a avancé que cette conception de l'originalité contribuait à faire en sorte que le droit d'auteur ne protège que l'expression des idées, par opposition aux idées ou aux éléments sous-jacents. Voir *Feist*, précité, p. 353.

J'arrive à la conclusion que la juste interprétation se situe entre ces deux extrêmes. Pour être « originale » au sens de la *Loi sur le droit d'auteur*, une œuvre doit être davantage qu'une copie d'une autre œuvre. Point n'est besoin toutefois qu'elle soit créative, c'est-à-dire novatrice ou unique. L'élément essentiel à la protection de l'expression d'une idée par le droit d'auteur est l'exercice du talent et du jugement. J'entends par talent le recours aux connaissances personnelles, à une aptitude acquise ou à une compétence issue de l'expérience pour produire l'œuvre. J'entends par jugement la faculté de discernement ou la capacité de se faire une opinion ou de procéder à une évaluation en comparant différentes options possibles pour produire l'œuvre. Cet exercice du talent et du jugement implique nécessairement un effort intellectuel. L'exercice du talent et du jugement que requiert la production de l'œuvre ne doit pas être négligeable au point de pouvoir être assimilé à une entreprise purement mécanique. Par exemple, tout talent ou jugement que pourrait requérir la seule modification de la police de caractères d'une œuvre pour en créer une « autre » serait trop négligeable pour justifier la protection que le droit d'auteur accorde à une œuvre « originale ».

Je tire cette conclusion en tenant compte : (1) du sens ordinaire du mot « originale »; (2) de

of copyright law; (3) recent jurisprudence; (4) the purpose of the *Copyright Act*; and (5) that this constitutes a workable yet fair standard.

(i) *The Plain Meaning of "Original"*

The plain meaning of the word "original" suggests at least some intellectual effort, as is necessarily involved in the exercise of skill and judgment. The *Concise Oxford Dictionary* (7th ed. 1982), at p. 720, defines "original" as follows:

> **1.** *a.* existing from the first, primitive, innate, initial, earliest; . . . **2.** that has served as pattern, of which copy or translation has been made, not derivative or dependant, first-hand, not imitative, novel in character or style, inventive, creative, thinking or acting for oneself.

"Original"'s plain meaning implies not just that something is not a copy. It includes, if not creativity *per se*, at least some sort of intellectual effort. As Professor Gervais has noted, "[w]hen used to mean simply that the work must originate from the author, originality is eviscerated of its core meaning. It becomes a synonym of 'originated,' and fails to reflect the ordinary sense of the word": D. J. Gervais, "*Feist* Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law" (2002), 49 *J. Copyright Soc'y U.S.A.* 949, at p. 961.

(ii) *History of Copyright*

The idea of "intellectual creation" was implicit in the notion of literary or artistic work under the *Berne Convention for the Protection of Literary and Artistic Works* (1886), to which Canada adhered in 1923, and which served as the precursor to Canada's first *Copyright Act*, adopted in 1924. See S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (1987), at p. 900. Professor Ricketson has indicated that in adopting a sweat of the brow or industriousness approach to deciding what is original, common law countries such as England have "depart[ed] from the spirit, if not the letter, of the [Berne] Convention" since works that have taken time, labour or money to produce but are not truly artistic or literary

l'historique du droit d'auteur; (3) de la jurisprudence récente; (4) de l'objet de la *Loi sur le droit d'auteur* et (5) du caractère à la fois fonctionnel et équitable de ce critère.

(i) *Le sens ordinaire du mot « original »*

18 Le sens ordinaire du mot « original » suppose au moins un certain effort intellectuel, comme l'exige nécessairement l'exercice du talent et du jugement. Le *Nouveau Petit Robert* (2003), p. 1801, définit comme suit l'adjectif « original » :

> **1.** Primitif. [. . .] **2.** Qui [. . .] est l'origine et la source première des reproductions. [. . .] **3.** Qui paraît ne dériver de rien d'antérieur, ne ressemble à rien d'autre, est unique, hors du commun.

Suivant le sens ordinaire du mot, une œuvre n'est pas « originale » uniquement parce qu'elle n'est pas une simple copie, mais aussi parce qu'elle a nécessité un certain effort intellectuel, si ce n'est de la créativité comme telle. Comme le professeur Gervais l'a signalé, [TRADUCTION] « [e]mployé pour indiquer simplement que l'œuvre doit émaner de l'auteur, le terme "original" est dépouillé de son sens principal. Il devient synonyme du mot "originaire" et n'a plus son sens ordinaire » : D. J. Gervais, « *Feist* Goes Global : A Comparative Analysis of the Notion of Originality in Copyright Law » (2002), 49 *J. Copyright Soc'y U.S.A.* 949, p. 961.

(ii) *Historique du droit d'auteur*

19 Dans la *Convention de Berne pour la protection des œuvres littéraires et artistiques* (1886), à laquelle le Canada a adhéré en 1923, et qui a pavé la voie à l'adoption de la première loi canadienne sur le droit d'auteur en 1924, l'idée de « création intellectuelle » était implicite dans la notion d'œuvre littéraire ou artistique. Voir S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works : 1886-1986* (1987), p. 900. Le professeur Ricketson a indiqué que les pays de common law comme l'Angleterre ont, en retenant le critère de l'effort et du labeur pour décider de l'originalité, [TRADUCTION] « rompu avec l'esprit, voire la lettre de la Convention [de Berne] », étant donné qu'une œuvre dont la production a nécessité du

intellectual creations are accorded copyright protection: Ricketson, *supra*, at p. 901.

20 In the international context, France and other continental civilian jurisdictions require more than mere industriousness to find that a work is original. "Under the French law, originality means both the intellectual contribution of the author and the novel nature of the work as compared with existing works": Handa, *supra*, at p. 211. This understanding of originality is reinforced by the expression "*le droit d'auteur*" — literally the "author's right" — the term used in the French title of the *Copyright Act*. The author must contribute something intellectual to the work, namely skill and judgment, if it is to be considered original.

(iii) *Recent Jurisprudence*

21 Although many Canadian courts have adopted a rather low standard of originality, i.e., that of industriousness, more recently, some courts have begun to question whether this standard is appropriate. For example, the Federal Court of Appeal in *Tele-Direct*, *supra*, held, at para. 29, that those cases which had adopted the sweat of the brow approach to originality should not be interpreted as concluding that labour, in and of itself, could ground a finding of originality. As Décary J.A. explained: "If they did, I suggest that their approach was wrong and is irreconcilable with the standards of intellect and creativity that were expressly set out in NAFTA and endorsed in the 1993 amendments to the *Copyright Act* and that were already recognized in Anglo-Canadian law." See also *Édutile Inc. v. Automobile Protection Assn.*, [2000] 4 F.C. 195 (C.A.), at para. 8, adopting this passage.

22 The United States Supreme Court explicitly rejected the "sweat of the brow" approach to originality in *Feist*, *supra*. In so doing, O'Connor J. explained at p. 353 that, in her view, the "sweat of the brow" approach was not consistent with the underlying tenets of copyright law:

> The "sweat of the brow" doctrine had numerous flaws, the most glaring being that it extended copyright

temps, du travail ou de l'argent, mais qui n'est pas vraiment une création intellectuelle artistique ou littéraire bénéficie de la protection du droit d'auteur : Ricketson, *op. cit.*, p. 901.

À l'échelle internationale, la France et d'autres pays européens de tradition civiliste exigent davantage que le seul labeur pour conclure à l'originalité. [TRADUCTION] « En droit français, l'originalité découle à la fois de l'apport intellectuel de l'auteur et de la nouveauté de l'œuvre au regard des œuvres existantes » : Handa, *op. cit.*, p. 211. C'est d'ailleurs cette notion d'originalité qui est évoquée implicitement par l'utilisation du mot « auteur » dans l'expression « droit d'auteur ». L'auteur doit faire un apport intellectuel à l'œuvre, à savoir exercer son talent et son jugement, s'il veut qu'elle soit originale.

(iii) *Jurisprudence récente*

Même si de nombreux tribunaux canadiens ont appliqué un critère d'originalité peu rigoureux, soit celui du labeur, certains se sont récemment demandé s'il s'agissait d'un critère approprié. Par exemple, dans *Télé-Direct*, précité, la Cour d'appel fédérale a statué, au par. 29, que les décisions fondées sur le critère de l'effort ne devaient pas être interprétées comme affirmant que le travail permet à lui seul de conclure à l'originalité. Le juge Décary a expliqué : « Si elles l'ont fait, j'estime qu'elles sont erronées et que leur approche est incompatible avec les normes d'apport intellectuel et créatif expressément prévues par l'ALENA, puis confirmées par les modifications apportées à la *Loi sur le droit d'auteur* en 1993, et déjà reconnues par le droit anglo-canadien. » Voir également *Édutile Inc. c. Assoc. pour la protection des automobilistes*, [2000] 4 C.F. 195 (C.A.), par. 8, qui reprend cet extrait.

Dans *Feist*, précité, la Cour suprême des États-Unis a expressément rejeté l'effort comme critère d'originalité. La juge O'Connor a ainsi expliqué à la p. 353 que, selon elle, ce critère était incompatible avec les préceptes qui constituent l'assise du droit d'auteur :

> [TRADUCTION] La doctrine de l'effort comportait de nombreuses failles, la plus évidente étant qu'elle

protection in a compilation beyond selection and arrangement — the compiler's original contributions — to the facts themselves. Under the doctrine, the only defense to infringement was independent creation. A subsequent compiler was "not entitled to take one word of information previously published," but rather had to "independently wor(k) out the matter for himself, so as to arrive at the same result from the same common sources of information." . . . "Sweat of the brow" courts thereby eschewed the most fundamental axiom of copyright law — that no one may copyright facts or ideas.

accordait la protection du droit d'auteur à une compilation non seulement en ce qui concerne le choix et l'agencement — l'apport original de l'auteur — mais aussi les données elles-mêmes. Suivant cette doctrine, le seul moyen de défense à une action pour violation du droit d'auteur résidait dans la création indépendante. L'auteur d'une compilation subséquente « ne pouvait reprendre un mot d'une information déjà publiée »; il devait plutôt « travailler indépendamment et arriver au même résultat à partir des mêmes sources d'information ». [. . .] Les tribunaux favorables à la doctrine de l'effort ont donc fait fi de l'axiome le plus fondamental du droit d'auteur : nul ne peut détenir un droit d'auteur sur un fait ou une idée.

As this Court recognized in *Compo*, *supra*, at p. 367, U.S. copyright cases may not be easily transferable to Canada given the key differences in the copyright concepts in Canadian and American copyright legislation. This said, in Canada, as in the United States, copyright protection does not extend to facts or ideas but is limited to the expression of ideas. As such, O'Connor J.'s concerns about the "sweat of the brow" doctrine's improper extension of copyright over facts also resonate in Canada. I would not, however, go as far as O'Connor J. in requiring that a work possess a minimal degree of creativity to be considered original. See *Feist*, *supra*, at pp. 345 and 358.

Comme notre Cour l'a reconnu dans *Compo*, précité, p. 367, les tribunaux canadiens ne peuvent s'inspirer d'emblée des décisions américaines sur le droit d'auteur à cause des conceptions du droit d'auteur fondamentalement différentes qui animent les lois applicables de part et d'autre de la frontière. Néanmoins, au Canada comme aux États-Unis, la protection du droit d'auteur ne s'étend pas aux données ou aux idées, mais se limite à l'expression des idées. C'est pourquoi l'inquiétude exprimée par la juge O'Connor concernant la protection que la doctrine de l'effort étend indûment aux faits trouve écho au Canada. Contrairement à la juge O'Connor, toutefois, je n'irais pas jusqu'à exiger d'une œuvre un degré minimal de créativité pour la juger originale. Voir *Feist*, précité, p. 345 et 358.

(iv) *Purpose of the Copyright Act*

(iv) *Objet de la Loi sur le droit d'auteur*

23 As mentioned, in *Théberge*, *supra*, this Court stated that the purpose of copyright law was to balance the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator. When courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply show industriousness to ground copyright in a work, they tip the scale in favour of the author's or creator's rights, at the loss of society's interest in maintaining a robust public domain that could help foster future creative innovation. See J. Litman, "The Public Domain" (1990), 39 *Emory L.J.* 965, at p. 969, and C. J. Craig, "Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law" (2002), 28

Tel qu'il est mentionné précédemment, dans *Théberge*, précité, notre Cour a dit que l'objet de la *Loi sur le droit d'auteur* était d'établir un juste équilibre entre la promotion, dans l'intérêt public, de la création et de la diffusion des œuvres artistiques et intellectuelles, d'une part, et l'obtention d'une juste récompense pour le créateur, d'autre part. Lorsque le tribunal retient un critère d'originalité qui exige seulement que l'œuvre soit davantage qu'une simple copie ou qu'elle résulte d'un labeur pour bénéficier de la protection du droit d'auteur, il favorise les droits de l'auteur ou du créateur au détriment de l'intérêt qu'a la société à conserver un domaine public solide susceptible de favoriser l'innovation créative à l'avenir. Voir J. Litman, « The Public Domain » (1990), 39 *Emory*

Queen's L.J. 1. By way of contrast, when an author must exercise skill and judgment to ground originality in a work, there is a safeguard against the author being overcompensated for his or her work. This helps ensure that there is room for the public domain to flourish as others are able to produce new works by building on the ideas and information contained in the works of others.

(v) *Workable, Yet Fair Standard*

24 Requiring that an original work be the product of an exercise of skill and judgment is a workable yet fair standard. The "sweat of the brow" approach to originality is too low a standard. It shifts the balance of copyright protection too far in favour of the owner's rights, and fails to allow copyright to protect the public's interest in maximizing the production and dissemination of intellectual works. On the other hand, the creativity standard of originality is too high. A creativity standard implies that something must be novel or non-obvious — concepts more properly associated with patent law than copyright law. By way of contrast, a standard requiring the exercise of skill and judgment in the production of a work avoids these difficulties and provides a workable and appropriate standard for copyright protection that is consistent with the policy objectives of the *Copyright Act*.

(vi) *Conclusion*

25 For these reasons, I conclude that an "original" work under the *Copyright Act* is one that originates from an author and is not copied from another work. That alone, however, is not sufficient to find that something is original. In addition, an original work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. While creative works will by definition be "original" and covered by copyright, creativity is not required to make a work "original".

L.J. 965, p. 969, et C. J. Craig, « Locke, Labour and Limiting the Author's Right : A Warning against a Lockean Approach to Copyright Law » (2002), 28 *Queen's L.J.* 1. À l'opposé, un critère d'originalité fondé sur l'exercice du talent et du jugement garantit que l'auteur ne touchera pas une rétribution excessive pour son œuvre. Ce critère est en outre propice à l'épanouissement du domaine public, d'autres personnes étant alors en mesure de créer de nouvelles œuvres à partir des idées et de l'information contenues dans les œuvres existantes.

(v) *Critère à la fois fonctionnel et équitable*

Le critère selon lequel une œuvre originale doit résulter de l'exercice du talent et du jugement est à la fois fonctionnel et équitable. Le critère fondé sur « l'effort » n'est pas assez strict. Il favorise indûment les droits du titulaire et ne protège pas l'intérêt du public dans la production et la diffusion optimales des œuvres intellectuelles. Par contre, le critère d'originalité fondé sur la créativité est trop rigoureux. La créativité implique qu'une chose doit être nouvelle et non évidente — des notions que l'on associe à plus juste titre au brevet qu'au droit d'auteur. En comparaison, la norme exigeant l'exercice du talent et du jugement dans la production d'une œuvre contourne ces difficultés et offre, pour l'octroi de la protection du droit d'auteur, un critère fonctionnel et approprié qui est compatible avec les objectifs de politique générale de la *Loi sur le droit d'auteur*.

(vi) *Conclusion*

Pour ces motifs, j'arrive à la conclusion qu'une œuvre « originale » au sens de la *Loi sur le droit d'auteur* est une œuvre qui émane d'un auteur et qui n'est pas une copie d'une autre œuvre. Toutefois, cela ne suffit pas à rendre une œuvre originale. Elle doit en outre être le produit de l'exercice du talent et du jugement d'un auteur. Cet exercice ne doit pas être négligeable au point qu'on puisse le qualifier d'entreprise purement mécanique. Bien qu'une œuvre créative soit par définition « originale » et protégée par le droit d'auteur, la créativité n'est pas essentielle à l'originalité.

(b) Application of the Law to These Facts

At trial, the respondent publishers claimed copyright in eleven works: three reported judicial decisions; the three headnotes preceding these decisions; the annotated *Martin's Ontario Criminal Practice 1999*; a case summary; a topical index; the textbook *Economic Negligence* (1989); and the monograph "Dental Evidence", being chapter 13 in *Forensic Evidence in Canada* (1991). Gibson J. held that the publishers' works should be judged against a standard of intellect and creativity in order to determine if they were original. Based on this standard of originality, the trial judge found that the publishers only had copyright in the annotated *Criminal Practice*, the textbook and the monograph. He concluded that the remaining eight works were not original and, therefore, were not covered by copyright ([2000] 2 F.C. 451).

On appeal, the Law Society did not challenge the trial judge's findings with respect to the three works in which he found copyright did exist, with the exception of questioning whether the monograph constituted a "work" within the meaning of the *Copyright Act*. The Federal Court of Appeal adopted the "sweat of the brow" approach to originality and found that if a work was more than a mere copy, it would be original. On this basis, Linden J.A., writing for the majority, held that all of the remaining works were original and therefore covered by copyright ([2002] 4 F.C. 213). The Law Society appeals, contending that the headnotes, case summary, topical index and reported judicial decisions are not "original" within the meaning of the *Copyright Act* and, therefore, are not covered by copyright.

As stated, in order to be original, a work must have originated from the author, not be copied, and must be the product of the exercise of skill and judgment that is more than trivial. Applying this test, all of the works in question are original and therefore covered by copyright.

b) Application du droit aux faits de l'espèce

26 En première instance, les éditeurs intimés ont revendiqué le droit d'auteur sur onze œuvres : trois décisions judiciaires publiées, les trois sommaires qui les précèdent, l'ouvrage annoté *Martin's Ontario Criminal Practice 1999*, un résumé jurisprudentiel, un index analytique, le manuel *Economic Negligence* (1989) et une monographie, « Dental Evidence », figurant au chapitre 13 de l'ouvrage *Forensic Evidence in Canada* (1991). Le juge Gibson a statué qu'il convenait d'évaluer le caractère intellectuel et créateur des œuvres des éditeurs pour décider de leur originalité. Sur le fondement de ce critère, il a conclu que les éditeurs n'avaient un droit d'auteur que sur l'ouvrage annoté *Criminal Practice*, le manuel et la monographie. À son avis, les huit autres œuvres n'étaient pas originales et n'étaient donc pas protégées par le droit d'auteur ([2000] 2 C.F. 451).

27 En appel, le Barreau n'a pas contesté les conclusions du juge de première instance concernant les trois œuvres qui, selon lui, étaient protégées par le droit d'auteur, mais il a soulevé la question de savoir si la monographie constituait une « œuvre » au sens de la *Loi sur le droit d'auteur*. La Cour d'appel fédérale a fait sien le critère d'originalité fondé sur l'effort et a conclu que l'œuvre qui n'est pas une simple copie est originale. S'exprimant au nom de la majorité, le juge Linden a estimé que les autres œuvres étaient toutes originales et, de ce fait, protégées par le droit d'auteur ([2002] 4 C.F. 213). Le Barreau interjette appel en faisant valoir que les sommaires, le résumé jurisprudentiel, l'index analytique et les décisions judiciaires publiées ne sont pas des œuvres « originales » au sens de la *Loi sur le droit d'auteur* et, par conséquent, ne bénéficient pas de la protection du droit d'auteur.

28 Je le répète, l'œuvre originale est celle qui émane de l'auteur, ne constitue pas une copie et résulte de l'exercice non négligeable du talent et du jugement. Suivant ce critère, toutes les œuvres en cause sont originales et, donc, protégées par le droit d'auteur.

(i) *Headnotes*

29 The Federal Court of Appeal held that "headnotes", defined as including the summary of the case, catchlines, statement of the case, case title and case information, are more than mere copies and hence "original" works in which copyright subsists. It found that the headnotes are more than simply an abridged version of the reasons; they consist of independently composed features. As Linden J.A. explained, at para. 73, the authors of the headnotes could have chosen to make the summaries "long or short, technical or simple, dull or dramatic, well written or confusing; the organization and presentation might have varied greatly".

30 Although headnotes are inspired in large part by the judgment which they summarize and refer to, they are clearly not an identical copy of the reasons. The authors must select specific elements of the decision and can arrange them in numerous different ways. Making these decisions requires the exercise of skill and judgment. The authors must use their knowledge about the law and developed ability to determine legal *ratios* to produce the headnotes. They must also use their capacity for discernment to decide which parts of the judgment warrant inclusion in the headnotes. This process is more than just a mechanical exercise. Thus the headnotes constitute "original" works in which copyright subsists.

(ii) *Case Summary*

31 For substantially the same reasons as given for headnotes, the case summary is also covered by copyright. A summary of judicial reasons is not simply a copy of the original reasons. Even if the summary often contains the same language as the judicial reasons, the act of choosing which portions to extract and how to arrange them in the summary requires an exercise of skill and judgment.

(i) *Sommaires*

La Cour d'appel fédérale a statué que les « sommaires », y compris le résumé de l'affaire, les mots clés, l'exposé de l'affaire, l'intitulé répertorié et les autres renseignements relatifs aux motifs du jugement, n'étaient pas que de simples copies et constituaient donc des œuvres « originales » conférant un droit d'auteur. Elle a estimé que les sommaires étaient davantage qu'une version abrégée des motifs, qu'ils comportaient des caractéristiques composées de façon indépendante. Comme le juge Linden l'a expliqué, au par. 73, les auteurs des sommaires auraient pu choisir de rédiger des résumés « longs ou courts, techniques ou simples, ternes ou remarquables, bien écrits ou confus; leur arrangement et leur présentation auraient pu varier grandement ».

Même si un sommaire s'inspire en grande partie du jugement qu'il résume et auquel il renvoie, il ne s'agit manifestement pas d'une copie identique des motifs. L'auteur doit choisir des éléments précis de la décision et il peut les présenter de nombreuses façons différentes. Ces choix supposent l'exercice du talent et du jugement. Le rédacteur doit faire appel à ses connaissances juridiques et à l'aptitude qu'il a acquise pour cerner la *ratio decidendi* de la décision. Il doit également faire appel à sa faculté de discernement pour décider quelles parties du jugement doivent figurer dans le sommaire. Il ne s'agit pas d'une entreprise purement mécanique. Un sommaire constitue donc une œuvre « originale » conférant le droit d'auteur.

(ii) *Résumé jurisprudentiel*

Essentiellement pour les mêmes motifs que ceux exprimés concernant les sommaires, le résumé jurisprudentiel est également protégé par le droit d'auteur. Le résumé des motifs d'un jugement n'est pas que la copie des motifs originaux. Même si le résumé reprend souvent les mêmes termes que les motifs du jugement, le choix des extraits et leur agencement requièrent l'exercice du talent et du jugement.

(iii) *Topical Index*

The topical index is part of the book *Canada GST Cases* (1997). It provides a listing of cases with short headings to indicate the main topics covered by the decision and very brief summaries of the decisions. The Federal Court of Appeal held that the index was original in that it required skill and effort to compile. I agree. The author of the index had to make an initial decision as to which cases were authorities on GST. This alone is a decision that would require the exercise of skill and judgment. The author also had to decide which headings to include and which cases should fall under which headings. He or she had to distill the essence of the decisions down to a succinct one-phrase summary. All of these tasks require skill and judgment that are sufficient to conclude that the topical index is an "original" work in which copyright subsists.

(iii) *Index analytique*

32 L'index analytique fait partie de l'ouvrage *Canada GST Cases* (1997). Il fournit une liste de décisions accompagnées de courtes rubriques indiquant les principaux sujets abordés et d'un très bref résumé. La Cour d'appel fédérale a statué qu'il était original en ce que sa compilation exigeait habilité et effort. C'est également mon avis. L'auteur de l'index a dû faire un tri initial pour repérer les affaires décisives en matière de TPS. À lui seul, ce tri appelle l'exercice du talent et du jugement. L'auteur a dû également décider des rubriques et choisir les décisions qui figureraient sous chacune d'elles. Il lui a fallu dégager l'essence de chacune des décisions et l'exprimer dans une phrase succincte. Toutes ces opérations nécessitent un talent et un jugement suffisamment importants pour qu'on puisse conclure que l'index analytique est une œuvre « originale » conférant le droit d'auteur.

(iv) *Reported Judicial Decisions*

The reported judicial decisions, when properly understood as a compilation of the headnote and the accompanying edited judicial reasons, are "original" works covered by copyright. Copyright protects originality of form or expression. A compilation takes existing material and casts it in a different form. The arranger does not have copyright in the individual components. However, the arranger may have copyright in the form represented by the compilation. "It is not the several components that are the subject of the copyright, but the over-all arrangement of them which the plaintiff through his industry has produced": *Slumber-Magic Adjustable Bed Co. v. Sleep-King Adjustable Bed Co.* (1984), 3 C.P.R. (3d) 81 (B.C.S.C.), at p. 84; see also *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465 (H.L.), at p. 469.

(iv) *Décisions judiciaires publiées*

33 Les décisions judiciaires publiées, considérées à juste titre comme une compilation du sommaire et des motifs judiciaires révisés qui l'accompagnent, sont des œuvres « originales » protégées par le droit d'auteur. Celui-ci protège l'originalité de la forme ou de l'expression. Une compilation consiste dans la présentation, sous une forme différente, d'éléments existants. Celui qui l'effectue n'a aucun droit d'auteur sur les composantes individuelles. Cependant, il peut détenir un droit d'auteur sur la forme que prend la compilation. [TRADUCTION] « Ce ne sont pas les divers éléments qui sont visés par le droit d'auteur, mais bien leur agencement global qui est le fruit du travail du demandeur » : *Slumber-Magic Adjustable Bed Co. c. Sleep-King Adjustable Bed Co.* (1984), 3 C.P.R. (3d) 81 (C.S.C.-B.), p. 84; voir également *Ladbroke (Football) Ltd. c. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465 (H.L.), p. 469.

The reported judicial decisions here at issue meet the test for originality. The authors have arranged the case summary, catchlines, case title, case information (the headnotes) and the judicial reasons in a specific manner. The arrangement of these different

34 Les décisions judiciaires publiées qui sont visées en l'espèce satisfont au critère d'originalité. Les auteurs ont agencé de façon particulière le résumé jurisprudentiel, les mots clés, l'intitulé répertorié, les renseignements relatifs aux motifs

components requires the exercise of skill and judgment. The compilation, viewed globally, attracts copyright protection.

35 This said, the judicial reasons in and of themselves, without the headnotes, are not original works in which the publishers could claim copyright. The changes made to judicial reasons are relatively trivial; the publishers add only basic factual information about the date of the judgment, the court and the panel hearing the case, counsel for each party, lists of cases, statutes and parallel citations. The publishers also correct minor grammatical errors and spelling mistakes. Any skill and judgment that might be involved in making these minor changes and additions to the judicial reasons are too trivial to warrant copyright protection. The changes and additions are more properly characterized as a mere mechanical exercise. As such, the reported reasons, when disentangled from the rest of the compilation — namely the headnote — are not covered by copyright. It would not be copyright infringement for someone to reproduce only the judicial reasons.

36 In summary, the headnotes, case summary, topical index and compilation of reported judicial decisions are all works that have originated from their authors and are not mere copies. They are the product of the exercise of skill and judgment that is not trivial. As such, they are all "original" works in which copyright subsists. The appeal of these findings should be dismissed.

(2) *Authorization: The Self-Service Photocopiers*

(a) The Law

37 Under s. 27(1) of the *Copyright Act*, it is an infringement of copyright for anyone to do anything that the Act only allows owners to do, including authorizing the exercise of his or her own rights. It does not infringe copyright to authorize a person

du jugement (les sommaires) et les motifs de la décision. L'agencement de ces différents éléments nécessite l'exercice du talent et du jugement. Considérée globalement, la compilation confère un droit d'auteur.

Cela dit, les motifs de la décision en eux-mêmes, sans les sommaires, ne constituent pas des œuvres originales sur lesquelles les éditeurs peuvent revendiquer un droit d'auteur. Les modifications apportées aux motifs de la décision sont relativement mineures; les éditeurs ne font qu'ajouter des données factuelles de base comme la date du jugement, le nom de la Cour et du ou des juges qui ont entendu l'affaire, le nom des avocats des parties, les décisions, lois, règlements et règles cités, ainsi que les références parallèles. Les éditeurs corrigent également les erreurs grammaticales mineures et les fautes d'orthographe. Le talent et le jugement susceptibles d'être mis à contribution pour apporter ces modifications et ces ajouts mineurs sont trop banals pour justifier la protection du droit d'auteur. Il est plus juste d'y voir une simple opération mécanique. Les motifs publiés, une fois dissociés du reste de la compilation — savoir le sommaire — ne sont donc pas visés par le droit d'auteur. La seule reproduction des motifs de la décision ne viole pas le droit d'auteur.

Pour résumer, les sommaires, le résumé jurisprudentiel, l'index analytique et la compilation de décisions judiciaires publiées sont tous des œuvres émanant de leur auteur et ne sont pas de simples copies. Ils sont le produit de l'exercice non négligeable du talent et du jugement. De ce fait, il s'agit d'œuvres « originales » conférant un droit d'auteur. Le pourvoi formé relativement à ces conclusions doit être rejeté.

(2) *Autorisation : Les photocopieuses libre-service*

a) Le droit

Suivant le par. 27(1) de la *Loi sur le droit d'auteur*, constitue une violation du droit d'auteur l'accomplissement d'un acte que seul le titulaire du droit d'auteur a, en vertu de la Loi, la faculté d'accomplir, y compris autoriser l'exercice de

to do something that would not constitute copyright infringement. See *Composers, Authors and Publishers Association of Canada Ltd. v. CTV Television Network Ltd.*, [1968] S.C.R. 676, at p. 680. The publishers argue that the Law Society is liable for breach of copyright under this section because it implicitly authorized patrons of the Great Library to copy works in breach of the *Copyright Act.*

"Authorize" means to "sanction, approve and countenance": *Muzak Corp. v. Composers, Authors and Publishers Association of Canada, Ltd*., [1953] 2 S.C.R. 182, at p. 193; *De Tervagne v. Belœil (Town)*, [1993] 3 F.C. 227 (T.D.). Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, "[g]ive approval to; sanction, permit; favour, encourage": see *The New Shorter Oxford English Dictionary* (1993), vol. 1, at p. 526. Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference: *CBS Inc. v. Ames Records & Tapes Ltd.*, [1981] 2 All E.R. 812 (Ch. D.), at pp. 823-24. However, a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law: *Muzak*, *supra*. This presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement: *Muzak*, *supra*; *De Tervagne*, *supra*; see also J. S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs* (4th ed. (loose-leaf)), at p. 21-104, and P. D. Hitchcock, "Home Copying and Authorization" (1983), 67 C.P.R. (2d) 17, at pp. 29-33.

ses propres droits. Autoriser une personne à faire une chose qui ne constitue pas une contrefaçon ne viole pas le droit d'auteur. Voir *Composers, Authors and Publishers Association of Canada Ltd. c. CTV Television Network Ltd.*, [1968] R.C.S. 676, p. 680. Les éditeurs font valoir que le Barreau est responsable, en vertu de cette disposition, du non-respect du droit d'auteur pour avoir autorisé tacitement les usagers de la Grande bibliothèque à copier des œuvres en contravention de la *Loi sur le droit d'auteur*.

38 « Autoriser » signifie « sanctionner, appuyer ou soutenir » (« *sanction, approve and countenance* ») : *Muzak Corp. c. Composers, Authors and Publishers Association of Canada, Ltd.*, [1953] 2 R.C.S. 182, p. 193; *De Tervagne c. Belœil (Ville)*, [1993] 3 C.F. 227 (1re inst.). Lorsqu'il s'agit de déterminer si une violation du droit d'auteur a été autorisée, il faut attribuer au terme « *countenance* » son sens le plus fort mentionné dans le dictionnaire, soit [TRADUCTION] « approuver, sanctionner, permettre, favoriser, encourager » : voir *The New Shorter Oxford English Dictionary* (1993), vol. 1, p. 526. L'autorisation est néanmoins une question de fait qui dépend de la situation propre à chaque espèce et peut s'inférer d'agissements qui ne sont pas des actes directs et positifs, et notamment d'un degré suffisamment élevé d'indifférence : *CBS Inc. c. Ames Records & Tapes Ltd.*, [1981] 2 All E.R. 812 (Ch. D.), p. 823-824. Toutefois, ce n'est pas autoriser la violation du droit d'auteur que de permettre la simple utilisation d'un appareil susceptible d'être utilisé à cette fin. Les tribunaux doivent présumer que celui qui autorise une activité ne l'autorise que dans les limites de la légalité : *Muzak*, précité. Cette présomption peut être réfutée par la preuve qu'il existait une certaine relation ou un certain degré de contrôle entre l'auteur allégué de l'autorisation et les personnes qui ont violé le droit d'auteur : *Muzak*, précité; *De Tervagne*, précité. Voir également J. S. McKeown, *Fox Canadian Law of Copyright and Industrial Designs* (4e éd. (feuilles mobiles)), p. 21-104, et P. D. Hitchcock, « Home Copying and Authorization » (1983), 67 C.P.R. (2d) 17, p. 29-33.

(b) Application of the Law to These Facts

39 For several decades, the Law Society has maintained self-service photocopiers for the use of its patrons in the Great Library. The patrons' use of the machines is not monitored directly. Since the mid-1980s, the Law Society has posted the following notice above each machine:

> The copyright law of Canada governs the making of photocopies or other reproductions of copyright material. Certain copying may be an infringement of the copyright law. This library is not responsible for infringing copies made by the users of these machines.

At trial, the Law Society applied for a declaration that it did not authorize copyright infringement by providing self-service photocopiers for patrons of the Great Library. No evidence was tendered that the photocopiers had been used in an infringing manner.

40 The trial judge declined to deal with this issue, in part because of the limited nature of the evidence on this question. The Federal Court of Appeal, relying in part on the Australian High Court decision in *Moorhouse v. University of New South Wales*, [1976] R.P.C. 151, concluded that the Law Society implicitly sanctioned, approved or countenanced copyright infringement of the publishers' works by failing to control copying and instead merely posting a notice indicating that the Law Society was not responsible for infringing copies made by the machine's users.

41 With respect, I do not agree that this amounted to authorizing breach of copyright. *Moorhouse*, *supra*, is inconsistent with previous Canadian and British approaches to this issue. See D. Vaver, *Copyright Law* (2000), at p. 27, and McKeown, *supra*, at p. 21-108. In my view, the *Moorhouse* approach to authorization shifts the balance in copyright too far in favour of the owner's rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole.

b) Application du droit aux faits

Depuis plusieurs décennies, le Barreau met des photocopieuses libre-service à la disposition des usagers de la Grande bibliothèque. L'utilisation de ces appareils par les usagers ne fait pas l'objet d'une surveillance directe. Depuis le milieu des années 80, l'avis suivant est apposé au-dessus de chaque appareil :

> [TRADUCTION] La législation sur le droit d'auteur au Canada s'applique aux photocopies et autres reproductions qui sont faites de documents protégés. Certaines reproductions peuvent constituer une violation du droit d'auteur. La bibliothèque n'assume aucune responsabilité en cas de violations susceptibles d'être commises par les utilisateurs des photocopieuses.

En première instance, le Barreau a demandé un jugement déclaratoire portant qu'il n'avait pas autorisé la violation du droit d'auteur en mettant des photocopieuses libre-service à la disposition des usagers de la Grande bibliothèque. Aucun élément de preuve n'a été présenté pour établir que les appareils avaient été utilisés de manière illicite.

Le juge de première instance a refusé de se prononcer sur la question, en partie à cause du caractère ténu de la preuve y afférente. La Cour d'appel fédérale, s'appuyant entre autres sur la décision *Moorhouse c. University of New South Wales*, [1976] R.P.C. 151, de la Haute Cour d'Australie, a conclu que le Barreau avait tacitement sanctionné, appuyé ou soutenu la violation du droit d'auteur sur les œuvres des éditeurs en omettant de surveiller la réalisation des copies et en se contentant d'afficher un avis dans lequel il déclinait toute responsabilité en cas de violation du droit d'auteur.

En toute déférence, je ne crois pas que cela équivalait à autoriser la violation du droit d'auteur. La décision *Moorhouse*, précitée, est incompatible avec la jurisprudence canadienne et britannique antérieure en la matière. Voir D. Vaver, *Copyright Law* (2000), p. 27, et McKeown, *op. cit.*, p. 21-108. À mon sens, l'interprétation retenue dans *Moorhouse* penche trop en faveur des droits du titulaire et entrave inutilement l'utilisation appropriée des œuvres protégées pour le bien de l'ensemble de la société.

Applying the criteria from *Muzak*, *supra*, and *De Tervagne*, *supra*, I conclude that the Law Society's mere provision of photocopiers for the use of its patrons did not constitute authorization to use the photocopiers to breach copyright law.

42 À partir des critères dégagés dans *Muzak* et *De Tervagne*, précités, je conclus que le Barreau, en mettant des photocopieuses à la disposition des usagers, ne les a pas autorisés à se servir des appareils pour contrevenir à la législation sur le droit d'auteur.

First, there was no evidence that the photocopiers had been used in a manner that was not consistent with copyright law. As noted, a person does not authorize copyright infringement by authorizing the mere use of equipment (such as photocopiers) that could be used to infringe copyright. In fact, courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law. Although the Court of Appeal assumed that the photocopiers were being used to infringe copyright, I think it is equally plausible that the patrons using the machines were doing so in a lawful manner.

43 Premièrement, aucune preuve n'établit que les photocopieuses ont été utilisées d'une manière incompatible avec les dispositions sur le droit d'auteur. Rappelons que ce n'est pas autoriser la violation du droit d'auteur que de permettre la simple utilisation d'un appareil (comme une photocopieuse) susceptible d'être utilisé à cette fin. Les tribunaux doivent présumer que celui qui autorise une activité ne l'autorise que dans les limites de la légalité. Même si la Cour d'appel a tenu pour acquis que les photocopieuses étaient utilisées pour violer le droit d'auteur, je crois qu'il est également plausible que les usagers de la bibliothèque aient utilisé les appareils de manière licite.

Second, the Court of Appeal erred in finding that the Law Society's posting of the notice constitutes an express acknowledgement that the photocopiers will be used in an illegal manner. The Law Society's posting of the notice over the photocopiers does not rebut the presumption that a person authorizes an activity only so far as it is in accordance with the law. Given that the Law Society is responsible for regulating the legal profession in Ontario, it is more logical to conclude that the notice was posted for the purpose of reminding the Great Library's patrons that copyright law governs the making of photocopies in the library.

44 Deuxièmement, la Cour d'appel a eu tort de conclure que le Barreau, en affichant l'avis, reconnaissait expressément que les photocopieuses seraient utilisées de façon illicite. La présence de l'avis ne réfute pas la présomption voulant qu'une personne n'autorise une activité que dans les limites de la légalité. Étant donné que le Barreau réglemente l'exercice du droit en Ontario, il est plus logique de conclure que l'avis a été affiché pour rappeler aux usagers de la Grande bibliothèque que la photocopie de documents de la bibliothèque est assujettie au régime du droit d'auteur.

Finally, even if there were evidence of the photocopiers having been used to infringe copyright, the Law Society lacks sufficient control over the Great Library's patrons to permit the conclusion that it sanctioned, approved or countenanced the infringement. The Law Society and Great Library patrons are not in a master-servant or employer-employee relationship such that the Law Society can be said to exercise control over the patrons who might commit infringement: see, for example, *De Tervagne*, *supra*. Nor does the Law Society exercise control over which works the patrons

45 Enfin, même si la preuve établissait que les photocopieuses ont été utilisées pour violer le droit d'auteur, le Barreau n'a pas un contrôle suffisant sur les usagers de la Grande bibliothèque pour que l'on puisse conclure qu'il a sanctionné, appuyé ou soutenu la violation du droit d'auteur. Il n'existe pas entre le Barreau et les usagers de la bibliothèque une relation employeur-employé permettant de conclure que le Barreau exerce un contrôle sur les usagers susceptibles de violer le droit d'auteur : voir par exemple *De Tervagne*, précité. Le Barreau n'exerce

choose to copy, the patron's purposes for copying or the photocopiers themselves.

46 In summary, I conclude that evidence does not establish that the Law Society authorized copyright infringement by providing self-service photocopiers and copies of the respondent publishers' works for use by its patrons in the Great Library. I would allow this ground of appeal.

(3) *The Law Society and Fair Dealing*

47 The Great Library provides a custom photocopy service. Upon receiving a request from a lawyer, law student, member of the judiciary or authorized researcher, the Great Library staff photocopies extracts from legal material within its collection and sends it to the requester. The question is whether this service falls within the fair dealing defence under s. 29 of the *Copyright Act* which provides: "Fair dealing for the purpose of research or private study does not infringe copyright."

(a) The Law

48 Before reviewing the scope of the fair dealing exception under the *Copyright Act*, it is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver, *supra*, has explained, at p. 171: "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair

pas non plus de contrôle sur les œuvres que les usagers décident de copier, sur les fins auxquelles ils les copient, ni sur les photocopieuses elles-mêmes.

En résumé, j'estime que la preuve ne révèle pas que le Barreau a autorisé la violation du droit d'auteur en mettant des photocopieuses libre-service ainsi que des exemplaires des œuvres des éditeurs intimés à la disposition des usagers de la Grande bibliothèque. Je ferais droit à ce moyen d'appel.

(3) *Le Barreau et l'utilisation équitable*

La Grande bibliothèque offre un service de photocopie. À la demande d'avocats, d'étudiants en droit, de membres de la magistrature ou de chercheurs autorisés, son personnel prépare des photocopies d'extraits d'ouvrages juridiques faisant partie de sa collection et les leur transmet. La question est de savoir si ce service bénéficie de l'exception prévue à l'art. 29 de la *Loi sur le droit d'auteur*, qui dispose que « [l]'utilisation équitable d'une œuvre ou de tout autre objet du droit d'auteur aux fins d'étude privée ou de recherche ne constitue pas une violation du droit d'auteur. »

a) Le droit

Avant d'examiner la portée de l'exception au titre de l'utilisation équitable que prévoit la *Loi sur le droit d'auteur*, il importe de clarifier certaines considérations générales relatives aux exceptions à la violation du droit d'auteur. Sur le plan procédural, le défendeur doit prouver que son utilisation de l'œuvre était équitable; cependant, il est peut-être plus juste de considérer cette exception comme une partie intégrante de la *Loi sur le droit d'auteur* plutôt que comme un simple moyen de défense. Un acte visé par l'exception relative à l'utilisation équitable ne viole pas le droit d'auteur. À l'instar des autres exceptions que prévoit la *Loi sur le droit d'auteur*, cette exception correspond à un droit des utilisateurs. Pour maintenir un juste équilibre entre les droits des titulaires du droit d'auteur et les intérêts des utilisateurs, il ne faut pas l'interpréter restrictivement. Comme le professeur Vaver,

and balanced reading that befits remedial legislation."

op. cit., l'a expliqué, à la p. 171, [TRADUCTION] « [l]es droits des utilisateurs ne sont pas de simples échappatoires. Les droits du titulaire et ceux de l'utilisateur doivent donc recevoir l'interprétation juste et équilibrée que commande une mesure législative visant à remédier à un état de fait. »

As an integral part of the scheme of copyright law, the s. 29 fair dealing exception is always available. Simply put, a library can always attempt to prove that its dealings with a copyrighted work are fair under s. 29 of the *Copyright Act*. It is only if a library were unable to make out the fair dealing exception under s. 29 that it would need to turn to s. 30.2 of the *Copyright Act* to prove that it qualified for the library exemption.

49 À titre de partie intégrante du régime de droit d'auteur, l'exception relative à l'utilisation équitable créée par l'art. 29 peut toujours être invoquée. Ainsi, une bibliothèque peut toujours tenter d'établir que son utilisation d'une œuvre protégée est équitable suivant l'art. 29 de la *Loi sur le droit d'auteur*. C'est seulement dans le cas où elle n'est pas en mesure de prouver l'application de cette exception qu'il lui faut s'en remettre à celle que prévoit l'art. 30.2 au bénéfice des bibliothèques.

In order to show that a dealing was fair under s. 29 of the *Copyright Act*, a defendant must prove: (1) that the dealing was for the purpose of either research or private study and (2) that it was fair.

50 Pour établir qu'une utilisation était équitable au sens de l'art. 29 de la *Loi sur le droit d'auteur*, le défendeur doit prouver (1) qu'il s'agit d'une utilisation aux fins d'étude privée ou de recherche et (2) qu'elle était équitable.

The fair dealing exception under s. 29 is open to those who can show that their dealings with a copyrighted work were for the purpose of research or private study. "Research" must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained. I agree with the Court of Appeal that research is not limited to non-commercial or private contexts. The Court of Appeal correctly noted, at para. 128, that "[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research." Lawyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the *Copyright Act*.

51 Toute personne qui est en mesure de prouver qu'elle a utilisé l'œuvre protégée par le droit d'auteur aux fins de recherche ou d'étude privée peut se prévaloir de l'exception créée par l'art. 29. Il faut interpréter le mot « recherche » de manière large afin que les droits des utilisateurs ne soient pas indûment restreints. J'estime, comme la Cour d'appel, que la recherche ne se limite pas à celle effectuée dans un contexte non commercial ou privé. La Cour d'appel a signalé à juste titre, au par. 128, que « [l]a recherche visant à conseiller des clients, donner des avis, plaider des causes et préparer des mémoires et des factums reste de la recherche. » L'avocat qui exerce le droit dans un but lucratif effectue de la recherche au sens de l'art. 29 de la *Loi sur le droit d'auteur*.

The *Copyright Act* does not define what will be "fair"; whether something is fair is a question of fact and depends on the facts of each case. See McKeown, *supra*, at p. 23-6. Lord Denning explained this eloquently in *Hubbard v. Vosper*, [1972] 1 All E.R. 1023 (C.A.), at p. 1027:

52 La *Loi sur le droit d'auteur* ne précise pas ce qu'il faut entendre par « équitable »; il s'agit d'une question de fait qui doit être tranchée à partir des circonstances de l'espèce. Voir McKeown, *op. cit.*, p. 23-6. Lord Denning l'a expliqué avec éloquence dans *Hubbard c. Vosper*, [1972] 1 All E.R. 1023 (C.A.), p. 1027 :

It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal of fact must decide.

[TRADUCTION] Il est impossible de définir l'« utilisation équitable ». C'est une question de degré. Tout d'abord, il faut tenir compte du nombre et de l'importance des citations et des extraits. Considérés globalement, sont-ils trop nombreux et trop longs pour être équitables? Il faut ensuite se pencher sur l'usage qui en est fait. S'ils sont utilisés aux fins de commentaire, de critique ou de compte rendu, il peut s'agir d'une utilisation équitable. S'ils sont employés pour transmettre la même information que l'auteur, dans un but concurrent, l'utilisation peut être inéquitable. Il faut ensuite considérer les proportions. Utiliser un long extrait et l'accompagner d'un bref commentaire peut être inéquitable. Cependant, un court extrait et un long commentaire peuvent constituer une utilisation équitable. D'autres considérations peuvent également être pertinentes. Mais, en définitive, c'est une question d'impression. L'on peut établir un parallèle entre le commentaire loyal et honnête en matière de diffamation et l'utilisation équitable en matière de droit d'auteur. Il appartient au juge des faits de trancher.

53 At the Court of Appeal, Linden J.A. acknowledged that there was no set test for fairness, but outlined a series of factors that could be considered to help assess whether a dealing is fair. Drawing on the decision in *Hubbard*, *supra*, as well as the doctrine of fair use in the United States, he proposed that the following factors be considered in assessing whether a dealing was fair: (1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. Although these considerations will not all arise in every case of fair dealing, this list of factors provides a useful analytical framework to govern determinations of fairness in future cases.

Le juge Linden, de la Cour d'appel, a reconnu l'absence d'un critère établi permettant de dire qu'une utilisation est équitable ou non, mais il a énuméré des facteurs pouvant être pris en compte pour en décider. S'inspirant de *Hubbard*, précité, ainsi que de la doctrine américaine de l'utilisation équitable, il a énuméré les facteurs suivants : (1) le but de l'utilisation; (2) la nature de l'utilisation; (3) l'ampleur de l'utilisation; (4) les solutions de rechange à l'utilisation; (5) la nature de l'œuvre; (6) l'effet de l'utilisation sur l'œuvre. Bien que ces facteurs ne soient pas pertinents dans tous les cas, ils offrent un cadre d'analyse utile pour statuer sur le caractère équitable d'une utilisation dans des affaires ultérieures.

(i) *The Purpose of the Dealing*

(i) *Le but de l'utilisation*

54 In Canada, the purpose of the dealing will be fair if it is for one of the allowable purposes under the *Copyright Act*, namely research, private study, criticism, review or news reporting: see ss. 29, 29.1 and 29.2 of the *Copyright Act*. As discussed, these allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users' rights. This said, courts should attempt to make an objective assessment of the user/defendant's real purpose or motive in using the copyrighted work. See McKeown, *supra*, at p. 23-6.

Au Canada, l'utilisation ne sera manifestement pas équitable si la fin poursuivie n'est pas de celles que prévoit la *Loi sur le droit d'auteur*, savoir la recherche, l'étude privée, la critique, le compte rendu ou la communication de nouvelles : voir les art. 29, 29.1 et 29.2 de la *Loi sur le droit d'auteur*. Je le répète, il ne faut pas interpréter ces fins restrictivement, sinon les droits des utilisateurs pourraient être indûment restreints. Cela dit, les tribunaux doivent s'efforcer d'évaluer objectivement le but ou le motif réel de l'utilisation de l'œuvre protégée.

See also *Associated Newspapers Group plc v. News Group Newspapers Ltd.*, [1986] R.P.C. 515 (Ch. D.). Moreover, as the Court of Appeal explained, some dealings, even if for an allowable purpose, may be more or less fair than others; research done for commercial purposes may not be as fair as research done for charitable purposes.

(ii) *The Character of the Dealing*

In assessing the character of a dealing, courts must examine how the works were dealt with. If multiple copies of works are being widely distributed, this will tend to be unfair. If, however, a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing. If the copy of the work is destroyed after it is used for its specific intended purpose, this may also favour a finding of fairness. It may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair. For example, in *Sillitoe v. McGraw-Hill Book Co. (U.K.)*, [1983] F.S.R. 545 (Ch. D.), the importers and distributors of "study notes" that incorporated large passages from published works attempted to claim that the copies were fair dealings because they were for the purpose of criticism. The court reviewed the ways in which copied works were customarily dealt with in literary criticism textbooks to help it conclude that the study notes were not fair dealings for the purpose of criticism.

(iii) *The Amount of the Dealing*

Both the amount of the dealing and importance of the work allegedly infringed should be considered in assessing fairness. If the amount taken from a work is trivial, the fair dealing analysis need not be undertaken at all because the court will have concluded that there was no copyright infringement. As the passage from *Hubbard* indicates, the quantity of the work taken will not be determinative of fairness, but it can help in the determination. It may be possible to deal fairly with a whole work. As Vaver points out, there might be no other way to criticize or

Voir McKeown, *op. cit.*, p. 23-6. Voir également *Associated Newspapers Group plc c. News Group Newspapers Ltd.*, [1986] R.P.C. 515 (Ch. D.). De plus, comme la Cour d'appel l'a expliqué, certaines utilisations, même à l'une des fins énumérées, peuvent être plus ou moins équitables que d'autres; la recherche effectuée à des fins commerciales peut ne pas être aussi équitable que celle effectuée à des fins de bienfaisance.

(ii) *La nature de l'utilisation*

55 Pour déterminer la nature d'une utilisation, le tribunal doit examiner la manière dont l'œuvre a été utilisée. Lorsque de multiples copies sont diffusées largement, l'utilisation tend à être inéquitable. Toutefois, lorsqu'une seule copie est utilisée à une fin légitime en particulier, on peut conclure plus aisément que l'utilisation était équitable. Si la copie de l'œuvre est détruite après avoir été utilisée comme prévu, cela porte également à croire qu'il s'agissait d'une utilisation équitable. L'on peut également tenir compte de l'usage ou de la pratique dans un secteur d'activité donné pour décider si la nature de l'utilisation est équitable. Par exemple, dans *Sillitoe c. McGraw-Hill Book Co. (U.K.)*, [1983] F.S.R. 545 (Ch. D.), les importateurs et les distributeurs de « notes d'étude » comportant de larges extraits d'œuvres publiées ont soutenu que leur utilisation était équitable parce que la fin poursuivie était la critique. Le tribunal a examiné les pratiques courantes en la matière dans les ouvrages de critique littéraire avant de conclure que les notes d'étude ne constituaient pas une utilisation équitable aux fins de critique.

(iii) *L'ampleur de l'utilisation*

56 Tant l'ampleur de l'utilisation que l'importance de l'œuvre qui aurait fait l'objet d'une reproduction illicite doivent être prises en considération pour décider du caractère équitable. Lorsqu'une infime partie de l'œuvre est utilisée, il n'est pas du tout nécessaire d'entreprendre l'analyse relative au caractère équitable, car le tribunal aura conclu à l'absence de violation du droit d'auteur. Comme l'indique la citation de *Hubbard*, l'ampleur de l'extrait tiré de l'œuvre n'est pas décisive en la matière, mais elle peut présenter une certaine utilité. Il est possible

review certain types of works such as photographs: see Vaver, *supra*, at p. 191. The amount taken may also be more or less fair depending on the purpose. For example, for the purpose of research or private study, it may be essential to copy an entire academic article or an entire judicial decision. However, if a work of literature is copied for the purpose of criticism, it will not likely be fair to include a full copy of the work in the critique.

(iv) *Alternatives to the Dealing*

57 Alternatives to dealing with the infringed work may affect the determination of fairness. If there is a non-copyrighted equivalent of the work that could have been used instead of the copyrighted work, this should be considered by the court. I agree with the Court of Appeal that it will also be useful for courts to attempt to determine whether the dealing was reasonably necessary to achieve the ultimate purpose. For example, if a criticism would be equally effective if it did not actually reproduce the copyrighted work it was criticizing, this may weigh against a finding of fairness.

(v) *The Nature of the Work*

58 The nature of the work in question should also be considered by courts assessing whether a dealing is fair. Although certainly not determinative, if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to a wider public dissemination of the work — one of the goals of copyright law. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair. See *Beloff v. Pressdram Ltd.*, [1973] 1 All E.R. 241 (Ch. D.), at p. 264.

(vi) *Effect of the Dealing on the Work*

59 Finally, the effect of the dealing on the work is another factor warranting consideration when courts are determining whether a dealing is fair. If

d'utiliser équitablement une œuvre entière. Comme le signale Vaver, *op. cit.*, p. 191, il peut n'y avoir aucune autre manière de critiquer certains types d'œuvre (p. ex. une photographie) ou d'en faire le compte rendu. L'ampleur de l'extrait peut aussi être plus ou moins équitable selon la fin poursuivie. Par exemple, aux fins de recherche ou d'étude privée, il peut être essentiel de reproduire en entier un exposé universitaire ou une décision de justice. Cependant, lorsqu'une œuvre littéraire est reproduite aux fins de critique, il ne sera vraisemblablement pas équitable de la copier intégralement.

(iv) *Solutions de rechange à l'utilisation*

L'existence de solutions de rechange à l'utilisation d'une œuvre protégée par le droit d'auteur peut avoir une incidence sur le caractère équitable ou inéquitable de l'utilisation. Lorsqu'un équivalent non protégé aurait pu être utilisé à la place de l'œuvre, le tribunal devra en tenir compte. Je pense, comme la Cour d'appel, qu'il sera également utile de tenter de déterminer si l'utilisation était raisonnablement nécessaire eu égard à la fin visée. À titre d'exemple, le fait qu'une critique aurait été tout aussi efficace sans la reproduction de l'œuvre protégée pourra militer contre le caractère équitable de l'utilisation.

(v) *La nature de l'œuvre*

Le tribunal doit également tenir compte de la nature de l'œuvre pour décider du caractère équitable de son utilisation. Bien qu'il ne s'agisse certainement pas d'un facteur décisif, l'utilisation d'une œuvre non publiée sera davantage susceptible d'être équitable du fait que sa reproduction accompagnée d'une indication de la source pourra mener à une diffusion plus large de l'œuvre en question, ce qui est l'un des objectifs du régime de droit d'auteur. Par contre, si l'œuvre en question était confidentielle, la balance pourra pencher en faveur du caractère inéquitable de l'utilisation. Voir *Beloff c. Pressdram Ltd.*, [1973] 1 All E.R. 241 (Ch. D.), p. 264.

(vi) *L'effet de l'utilisation sur l'œuvre*

Enfin, l'effet sur l'œuvre est un autre facteur à prendre en considération pour décider si l'utilisation est équitable. La concurrence que la reproduction

the reproduced work is likely to compete with the market of the original work, this may suggest that the dealing is not fair. Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair. See, for example, *Pro Sieben Media AG v. Carlton UK Television Ltd.*, [1999] F.S.R. 610 (C.A.), *per* Robert Walker L.J.

To conclude, the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing and the effect of the dealing on the work are all factors that could help determine whether or not a dealing is fair. These factors may be more or less relevant to assessing the fairness of a dealing depending on the factual context of the allegedly infringing dealing. In some contexts, there may be factors other than those listed here that may help a court decide whether the dealing was fair.

(b) Application of the Law to These Facts

In 1996, the Law Society implemented an "Access to the Law Policy" ("Access Policy") which governs the Great Library's custom photocopy service and sets limits on the types of requests that will be honoured:

Access to the Law Policy

The Law Society of Upper Canada, with the assistance of the resources of the Great Library, supports the administration of justice and the rule of law in the Province of Ontario. The Great Library's comprehensive catalogue of primary and secondary legal sources, in print and electronic media, is open to lawyers, articling students, the judiciary and other authorized researchers. Single copies of library materials, required for the purposes of research, review, private study and criticism, as well as use in court, tribunal and government proceedings, may be provided to users of the Great Library.

This service supports users of the Great Library who require access to legal materials while respecting the copyright of the publishers of such materials, in keeping with the fair dealing provisions in Section 27 of the Canadian Copyright Act.

est susceptible d'exercer sur le marché de l'œuvre originale peut laisser croire que l'utilisation n'est pas équitable. Même si l'effet de l'utilisation sur le marché est un facteur important, ce n'est ni le seul ni le plus important. Voir par exemple *Pro Sieben Media AG c. Carlton UK Television Ltd.*, [1999] F.S.R. 610 (C.A.), le lord juge Robert Walker.

60 En conclusion, le but de l'utilisation, la nature de l'utilisation, l'ampleur de l'utilisation, la nature de l'œuvre, les solutions de rechange à l'utilisation et l'effet de l'utilisation sur l'œuvre sont tous des facteurs qui peuvent contribuer à la détermination du caractère équitable ou inéquitable de l'utilisation. Ces facteurs peuvent être plus ou moins pertinents selon le contexte factuel de la violation alléguée du droit d'auteur. Dans certains cas, d'autres facteurs que ceux énumérés peuvent aider le tribunal à statuer sur le caractère équitable de l'utilisation.

b) L'application du droit aux faits de l'espèce

61 En 1996, le Barreau a mis en œuvre une « Politique d'accès à l'information juridique » (la « Politique d'accès ») régissant le service de photocopie de la Grande bibliothèque et précisant quelles sortes de demandes seraient acceptées :

Politique d'accès à l'information juridique

Le Barreau du Haut-Canada et la Grande bibliothèque sont au service de l'administration de la justice et de la primauté du droit en Ontario. Les membres du Barreau et de la magistrature, les stagiaires en droit et autres personnes autorisées qui font de la recherche peuvent se servir du vaste catalogue de sources d'information juridique primaires et secondaires, sur support papier ou électronique, constitué par la Grande bibliothèque. Les usagers de la Grande bibliothèque peuvent obtenir une seule copie des documents faisant partie de sa collection à des fins de compte rendu, d'étude privée, de recherche ou de critique ou aux fins d'une instance judiciaire ou d'une audience devant un organisme gouvernemental.

Le service d'accès à l'information juridique respecte le droit d'auteur des éditeurs des divers documents faisant partie de la collection de la Grande bibliothèque, conformément aux principes d'utilisation équitable énoncés à l'article 27 de la Loi sur le droit d'auteur du Canada.

Guidelines to Access

1. The Access to the Law service provides single copies for specific purposes, identified in advance to library staff.

2. The specific purposes are research, review, private study and criticism, as well as use in court, tribunal and government proceedings. Any doubt concerning the legitimacy of the request for these purposes will be referred to the Reference Librarian.

3. The individual must identify him/herself and the purpose at the time of making the request. A request form will be completed by library staff, based on information provided by the requesting party.

4. As to the amount of copying, discretion must be used. No copies will be made for any purpose other than that specifically set out on the request form. Ordinarily, requests for a copy of one case, one article or one statutory reference will be satisfied as a matter of routine. Requests for substantial copying from secondary sources (e.g. in excess of 5% of the volume or more than two citations from one volume) will be referred to the Reference Librarian and may ultimately be refused.

5. This service is provided on a not for profit basis. The fee charged for this service is intended to cover the costs of the Law Society.

When the Access Policy was introduced, the Law Society specified that it reflected the policy that the Great Library had been following in the past; it did not change the Law Society's approach to its custom photocopy service.

62 At trial, the Law Society claimed that its custom photocopy service does not infringe copyright because it is a fair dealing within the meaning of s. 29 of the *Copyright Act*. The trial judge held that the fair dealing exception should be strictly construed. He concluded that copying for the custom photocopy service was not for the purpose of either research or study and therefore was not within the ambit of fair dealing. The Court of Appeal rejected the argument that the fair dealing exception should be interpreted restrictively. The majority held that

Lignes directrices du service d'accès

1. Le service d'accès à l'information juridique fournit une seule copie des documents demandés à des fins précises, à condition que celles-ci soient communiquées d'avance au personnel de la Grande bibliothèque.

2. Les fins visées sont la recherche, le compte-rendu, l'étude privée ou la critique, de même que l'utilisation lors d'une instance judiciaire ou d'une audience devant un organisme gouvernemental. En cas de doute, les bibliothécaires de référence décideront si la demande est légitime.

3. Quiconque présente une demande doit faire connaître son identité et préciser à quelles fins la copie est destinée. Le personnel de la Grande bibliothèque transcrit alors ces renseignements sur un formulaire de demande.

4. Le nombre de documents que le service d'accès à l'information juridique acceptera de photocopier varie. Aucune copie ne sera faite à des fins autres que celles énoncées sur le formulaire de demande. En général, le personnel accepte de photocopier une décision, un article ou un court extrait de la loi. Par contre, les demandes portant sur un large extrait d'une source secondaire (plus de 5 pour 100 d'un volume par exemple ou plus de deux citations ou extraits d'un même volume) seront soumises aux bibliothécaires de référence, qui sont en droit de les refuser.

5. Ce service est à but non lucratif. Les frais facturés correspondent uniquement aux coûts encourus par le Barreau.

Le Barreau avait indiqué, au moment de son adoption, que sa Politique d'accès était dans le droit fil de celle appliquée jusqu'alors par la Grande bibliothèque et que sa conception du service de photocopie demeurait inchangée.

En première instance, le Barreau a fait valoir que son service de photocopie ne viole pas le droit d'auteur parce qu'il s'agit d'une utilisation équitable au sens de l'art. 29 de la *Loi sur le droit d'auteur*. Le juge de première instance a dit que l'exception au titre de l'utilisation équitable devait être interprétée strictement. Il a conclu que les copies n'étaient pas réalisées aux fins de recherche ou d'étude et qu'il ne s'agissait donc pas d'une utilisation équitable. La Cour d'appel a rejeté l'argument que l'exception au titre de l'utilisation équitable devait être interprétée

the Law Society could rely on the purposes of its patrons to prove that its dealings were fair. The Court of Appeal concluded, however, that there was not sufficient evidence to determine whether or not the dealings were fair and, consequently, that the fair dealing exception had not been proven.

This raises a preliminary question: is it incumbent on the Law Society to adduce evidence that every patron uses the material provided for in a fair dealing manner or can the Law Society rely on its general practice to establish fair dealing? I conclude that the latter suffices. Section 29 of the *Copyright Act* states that "[f]air dealing for the purpose of research or private study does not infringe copyright." The language is general. "Dealing" connotes not individual acts, but a practice or system. This comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works. Persons or institutions relying on the s. 29 fair dealing exception need only prove that their own dealings with copyrighted works were for the purpose of research or private study and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or by showing that all individual dealings with the materials were in fact research-based and fair.

The Law Society's custom photocopying service is provided for the purpose of research, review and private study. The Law Society's Access Policy states that "[s]ingle copies of library materials, required for the purposes of research, review, private study and criticism . . . may be provided to users of the Great Library." When the Great Library staff make copies of the requested cases, statutes, excerpts from legal texts and legal commentary, they do so for the purpose of research. Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary

strictement. Les juges majoritaires ont statué que le Barreau pouvait se fonder sur les fins poursuivies par les usagers pour établir que son utilisation des œuvres était équitable. La Cour d'appel a cependant conclu que la preuve ne permettait pas de décider si l'utilisation était équitable ou non et, par conséquent, que l'application de l'exception en cause n'avait pas été établie.

63 Cela soulève une question préliminaire : le Barreau est-il tenu de prouver que chacun des usagers utilise de manière équitable les ouvrages mis à sa disposition, ou peut-il s'appuyer sur sa pratique générale pour établir le caractère équitable de l'utilisation? Je conclus que ce dernier élément suffit. L'article 29 de la *Loi sur le droit d'auteur* dispose que « [l]'utilisation équitable d'une œuvre ou de tout autre objet du droit d'auteur aux fins d'étude privée ou de recherche ne constitue pas une violation du droit d'auteur. » Les termes employés sont généraux. « Utilisation » ne renvoie pas à un acte individuel, mais bien à une pratique ou à un système. Cela est compatible avec l'objet de l'exception au titre de l'utilisation équitable, qui est de faire en sorte que la faculté des utilisateurs d'utiliser et de diffuser des œuvres protégées ne soit pas indûment limitée. La personne ou l'établissement qui invoque l'exception prévue à l'art. 29 doit seulement prouver qu'il a utilisé l'œuvre protégée aux fins de recherche ou d'étude privée et que cette utilisation était équitable. Il peut le faire en établissant soit que ses propres pratiques et politiques étaient axées sur la recherche et équitables, soit que toutes les utilisations individuelles des ouvrages étaient de fait axées sur la recherche et équitables.

64 Le service de photocopie du Barreau est offert aux fins de recherche, de compte rendu et d'étude privée. La Politique d'accès du Barreau dispose que « [l]es usagers de la Grande bibliothèque peuvent obtenir une seule copie des documents faisant partie de sa collection à des fins de compte rendu, d'étude privée, de recherche ou de critique ou aux fins d'une instance judiciaire ou d'une audience devant un organisme gouvernemental. » C'est aux fins de recherche que les membres du personnel de la Grande bibliothèque photocopient sur demande décisions, lois, extraits de textes juridiques ou

conditions of research and thus part of the research process. The reproduction of legal works is for the purpose of research in that it is an essential element of the legal research process. There is no other purpose for the copying; the Law Society does not profit from this service. Put simply, its custom photocopy service helps to ensure that legal professionals in Ontario can access the materials necessary to conduct the research required to carry on the practice of law. In sum, the Law Society's custom photocopy service is an integral part of the legal research process, an allowable purpose under s. 29 of the *Copyright Act*.

65 The evidence also establishes that the dealings were fair, having regard to the factors discussed earlier.

(i) *Purpose of the Dealing*

66 The Access Policy and its safeguards weigh in favour of finding that the dealings were fair. It specifies that individuals requesting copies must identify the purpose of the request for these requests to be honoured, and provides that concerns that a request is not for one of the legitimate purposes under the fair dealing exceptions in the *Copyright Act* are referred to the Reference Librarian. This policy provides reasonable safeguards that the materials are being used for the purpose of research and private study.

(ii) *Character of the Dealing*

67 The character of the Law Society's dealings with the publishers' works also supports a finding of fairness. Under the Access Policy, the Law Society provides single copies of works for the specific purposes allowed under the *Copyright Act*. There is no evidence that the Law Society was disseminating multiple copies of works to multiple members of the legal profession. Copying a work for the purpose of research on a specific legal topic is generally a fair dealing.

articles de doctrine. Même si la recherche documentaire et la photocopie d'ouvrages juridiques ne constituent pas de la recherche comme telle, elles sont nécessaires au processus de recherche et en font donc partie. La reproduction d'ouvrages juridiques est effectuée aux fins de recherche en ce qu'il s'agit d'un élément essentiel du processus de recherche juridique. La photocopie n'a aucune autre fin; le Barreau ne tire aucun bénéfice de ce service. Le service de photocopie du Barreau contribue simplement à faire en sorte que les juristes de l'Ontario aient accès aux ouvrages nécessaires à la recherche que demande l'exercice du droit. En somme, ce service fait partie intégrante du processus de recherche juridique, et la fin qui le sous-tend est conforme à l'art. 29 de la *Loi sur le droit d'auteur.*

La preuve révèle également que l'utilisation était équitable au regard des facteurs mentionnés précédemment.

(i) *Le but de l'utilisation*

La Politique d'accès et ses garanties incitent à conclure que l'utilisation était équitable. La personne qui demande une copie doit préciser à quelle fin elle la destine, et lorsque la légitimité de cette fin soulève un doute, il appartient aux bibliothécaires de référence de décider de l'application de l'exception au titre de l'utilisation équitable que prévoit la *Loi sur le droit d'auteur*. Cette politique garantit raisonnablement que les ouvrages seront utilisés aux fins de recherche et d'étude privée.

(ii) *La nature de l'utilisation*

La nature de l'utilisation des ouvrages des éditeurs par le Barreau permet également de conclure à son caractère équitable. Suivant la Politique d'accès, le Barreau fournit une seule copie des documents aux fins expressément autorisées par la *Loi sur le droit d'auteur*. Aucune preuve n'établit que le Barreau a distribué de multiples copies d'ouvrages à de multiples membres de la profession juridique. Copier une œuvre aux fins d'une recherche juridique portant sur un sujet en particulier constitue généralement une utilisation équitable.

(iii) *Amount of the Dealing*

The Access Policy indicates that the Great Library will exercise its discretion to ensure that the amount of the dealing with copyrighted works will be reasonable. The Access Policy states that the Great Library will typically honour requests for a copy of one case, one article or one statutory reference. It further stipulates that the Reference Librarian will review requests for a copy of more than five percent of a secondary source and that, ultimately, such requests may be refused. This suggests that the Law Society's dealings with the publishers' works are fair. Although the dealings might not be fair if a specific patron of the Great Library submitted numerous requests for multiple reported judicial decisions from the same reported series over a short period of time, there is no evidence that this has occurred.

(iv) *Alternatives to the Dealing*

It is not apparent that there are alternatives to the custom photocopy service employed by the Great Library. As the Court of Appeal points out, the patrons of the custom photocopying service cannot reasonably be expected to always conduct their research on-site at the Great Library. Twenty percent of the requesters live outside the Toronto area; it would be burdensome to expect them to travel to the city each time they wanted to track down a specific legal source. Moreover, because of the heavy demand for the legal collection at the Great Library, researchers are not allowed to borrow materials from the library. If researchers could not request copies of the work or make copies of the works themselves, they would be required to do all of their research and note-taking in the Great Library, something which does not seem reasonable given the volume of research that can often be required on complex legal matters.

The availability of a licence is not relevant to deciding whether a dealing has been fair. As discussed, fair dealing is an integral part of the scheme of copyright law in Canada. Any act falling within the fair dealing exception will not infringe copyright. If a copyright owner were allowed to license people to use its work and then point to a person's

(iii) *L'ampleur de l'utilisation*

68 La Politique d'accès précise que la Grande bibliothèque veille à ce que l'ampleur de l'utilisation des œuvres protégées par le droit d'auteur demeure raisonnable. Elle ajoute que le personnel accepte généralement de photocopier une décision, un article ou un court extrait d'une loi. De plus, une demande portant sur plus de cinq pour cent d'une source secondaire sera soumise à l'approbation d'un bibliothécaire de référence qui, en fin de compte, pourra la refuser. Cela porte à croire que l'utilisation des œuvres des éditeurs par le Barreau est équitable. L'utilisation peut être inéquitable lorsque, dans un court laps de temps, un usager de la Grande bibliothèque présente de nombreuses demandes visant de multiples décisions judiciaires publiées dans les mêmes recueils, mais aucun élément n'établit que cela s'est produit.

(iv) *Solutions de rechange à l'utilisation*

69 Il ne semble pas y avoir de solutions de rechange au service de photocopie offert par la Grande bibliothèque. Comme la Cour d'appel le signale, l'on ne peut raisonnablement s'attendre à ce que les usagers effectuent toujours leurs recherches sur place. Vingt pour cent des demandeurs n'habitent pas la région de Toronto; il serait excessif de les obliger à s'y rendre chaque fois qu'ils veulent mettre la main sur une source juridique en particulier. De plus, comme la collection juridique de la Grande bibliothèque fait l'objet d'une forte demande, les chercheurs ne sont pas autorisés à emprunter des ouvrages. Si les chercheurs ne pouvaient obtenir de photocopies des ouvrages ou les photocopier eux-mêmes, ils seraient contraints d'effectuer la totalité de leurs recherches à la Grande bibliothèque et d'y prendre des notes, ce qui ne paraît pas raisonnable compte tenu de l'ampleur de la recherche que requièrent souvent les sujets juridiques complexes.

70 La possibilité d'obtenir une licence n'est pas pertinente pour décider du caractère équitable d'une utilisation. Tel qu'il est mentionné précédemment, l'utilisation équitable fait partie intégrante du régime de droit d'auteur au Canada. Un acte visé par l'exception au titre de l'utilisation équitable ne violera pas le droit d'auteur. Si, comme preuve du

decision not to obtain a licence as proof that his or her dealings were not fair, this would extend the scope of the owner's monopoly over the use of his or her work in a manner that would not be consistent with the *Copyright Act*'s balance between owner's rights and user's interests.

(v) *Nature of the Work*

71 I agree with the Court of Appeal that the nature of the works in question — judicial decisions and other works essential to legal research — suggests that the Law Society's dealings were fair. As Linden J.A. explained, at para. 159: "It is generally in the public interest that access to judicial decisions and other legal resources not be unjustifiably restrained." Moreover, the Access Policy puts reasonable limits on the Great Library's photocopy service. It does not allow all legal works to be copied regardless of the purpose to which they will be put. Requests for copies will be honoured only if the user intends to use the works for the purpose of research, private study, criticism, review or use in legal proceedings. This further supports a finding that the dealings were fair.

(vi) *Effect of the Dealing on the Work*

72 Another consideration is that no evidence was tendered to show that the market for the publishers' works had decreased as a result of these copies having been made. Although the burden of proving fair dealing lies with the Law Society, it lacked access to evidence about the effect of the dealing on the publishers' markets. If there had been evidence that the publishers' markets had been negatively affected by the Law Society's custom photocopying service, it would have been in the publishers' interest to tender it at trial. They did not do so. The only evidence of market impact is that the publishers have continued to produce new reporter series and legal publications during the period of the custom photocopy service's operation.

caractère inéquitable de l'utilisation, le titulaire du droit d'auteur ayant la faculté d'octroyer une licence pour l'utilisation de son œuvre pouvait invoquer la décision d'une personne de ne pas obtenir une telle licence, il en résulterait un accroissement de son monopole sur l'œuvre qui serait incompatible avec l'équilibre qu'établit la *Loi sur le droit d'auteur* entre les droits du titulaire et les intérêts de l'utilisateur.

(v) *La nature de l'œuvre*

Je suis d'accord avec la Cour d'appel pour dire que la nature des œuvres en cause — les décisions judiciaires et d'autres œuvres essentielles à la recherche juridique — porte à croire que leur utilisation par le Barreau était équitable. Comme l'a expliqué le juge Linden, au par. 159, « [i]l est généralement dans l'intérêt du public que l'accès aux décisions judiciaires et autres ressources juridiques ne soit pas limité sans justification. » En outre, la Politique d'accès circonscrit convenablement le service de photocopie de la Grande bibliothèque. Elle ne permet pas que tout ouvrage juridique soit photocopié à n'importe quelle fin. Une demande ne sera acceptée que si l'usager compte utiliser l'œuvre aux fins de recherche, d'étude privée, de critique ou de compte rendu, ou encore pour les besoins d'une instance judiciaire. Voilà qui étaye davantage la thèse de l'utilisation équitable.

(vi) *L'effet de l'utilisation sur l'œuvre*

Par ailleurs, aucun élément de preuve n'a été présenté pour établir que les copies produites ont fait fléchir le marché des œuvres des éditeurs. Même s'il lui incombe de prouver que l'utilisation était équitable, le Barreau n'avait pas accès aux données sur l'effet de l'utilisation sur ce marché. S'il avait existé une preuve que le service de photocopie du Barreau avait eu une incidence néfaste sur ce marché, il aurait été dans l'intérêt des éditeurs de la présenter au procès. Ils ne l'ont pas fait. La seule preuve relative à l'effet sur le marché est que les éditeurs ont continué à produire de nouveaux recueils et de nouvelles publications juridiques pendant que le service de photocopie était offert.

(vii) *Conclusion*

The factors discussed, considered together, suggest that the Law Society's dealings with the publishers' works through its custom photocopy service were research-based and fair. The Access Policy places appropriate limits on the type of copying that the Law Society will do. It states that not all requests will be honoured. If a request does not appear to be for the purpose of research, criticism, review or private study, the copy will not be made. If a question arises as to whether the stated purpose is legitimate, the Reference Librarian will review the matter. The Access Policy limits the amount of work that will be copied, and the Reference Librarian reviews requests that exceed what might typically be considered reasonable and has the right to refuse to fulfill a request. On these facts, I conclude that the Law Society's dealings with the publishers' works satisfy the fair dealing defence and that the Law Society does not infringe copyright.

(4) *Canada Law Book's Consent*

Under s. 27(1) of the *Copyright Act*, a person infringes copyright if he or she does something that only the owner of the copyright has the right to do without the owner's consent. On appeal to this Court, the Law Society submits that six of the items that the respondent publishers have claimed were copied in infringement of copyright were copied at the request of Jean Cummings, a lawyer who had been asked by Canada Law Book's Vice-President to obtain copies of these works from the Law Society. As such, the Law Society contends that the copies were made with the consent of Canada Law Book and therefore were not an infringement of copyright.

This issue was not really addressed in the courts below. In light of my findings on the issue of fair dealing, it is not necessary to answer this question to dispose of this appeal, and I decline to do so.

(5) *Conclusion on Main Appeal*

I would allow the appeal and issue a declaration that the Law Society does not infringe copyright

(vii) *Conclusion*

73 Considérés globalement, les facteurs susmentionnés incitent à conclure que l'utilisation des œuvres des éditeurs par le Barreau, dans le cadre de son service de photocopie, était axée sur la recherche et équitable. La Politique d'accès circonscrit adéquatement le service de photocopie offert. Elle précise que toutes les demandes ne seront pas acceptées. Lorsque la fin poursuivie ne semblera pas être la recherche, la critique, le compte rendu ou l'étude privée, la demande sera refusée. En cas de doute quant à la légitimité de la fin poursuivie, il appartiendra aux bibliothécaires de référence de trancher. La Politique d'accès limite l'ampleur de l'extrait pouvant être reproduit, et les bibliothécaires de référence décideront d'accepter ou non une demande dont la portée excède ce qui est habituellement jugé raisonnable. Ces faits m'amènent donc à conclure que l'utilisation des œuvres des éditeurs par le Barreau bénéficie de l'exception relative à l'utilisation équitable et que le Barreau ne viole pas le droit d'auteur.

(4) *Consentement de Canada Law Book*

74 Suivant le par. 27(1) de la *Loi sur le droit d'auteur*, une personne viole le droit d'auteur lorsqu'elle accomplit, sans le consentement du titulaire de ce droit, un acte que seul ce dernier a la faculté d'accomplir. Devant notre Cour, le Barreau fait valoir que c'est à la demande du vice-président de Canada Law Book, par l'intermédiaire de l'avocat Jean Cummings, qu'il a photocopié six des œuvres dont des copies violant censément le droit d'auteur ont été produites. Il prétend donc avoir obtenu le consentement de Canada Law Book et ne pas avoir violé le droit d'auteur.

75 Les tribunaux inférieurs n'ont pas vraiment étudié cette question. Compte tenu de mes conclusions sur l'utilisation équitable, il n'est pas nécessaire de la trancher pour statuer sur le présent pourvoi et je refuse de le faire.

(5) *Conclusion relative au pourvoi principal*

76 Je suis d'avis d'accueillir le pourvoi et de rendre un jugement déclaratoire portant que le Barreau ne

when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise is made by the Great Library in accordance with its Access Policy. I would also issue a declaration that the Law Society does not authorize copyright infringement by maintaining a photocopier in the Great Library and posting a notice warning that it will not be responsible for any copies made in infringement of copyright.

III. Analysis on Cross-Appeal

(1) *Are the Law Society's Fax Transmissions Communications to the Public?*

77 At trial, the publishers argued that the Law Society's fax transmissions of copies of their works to lawyers in Ontario were communications "to the public by telecommunication" and hence infringed s. 3(1)(*f*) of the *Copyright Act*. The trial judge found that the fax transmissions were not telecommunications to the public because they "emanated from a single point and were each intended to be received at a single point" (para. 167). The Court of Appeal agreed, although it allowed that a series of sequential transmissions might constitute an infringement of an owner's right to communicate to the public.

78 I agree with these conclusions. The fax transmission of a single copy to a single individual is not a communication to the public. This said, a series of repeated fax transmissions of the same work to numerous different recipients might constitute communication to the public in infringement of copyright. However, there was no evidence of this type of transmission having occurred in this case.

79 On the evidence in this case, the fax transmissions were not communications to the public. I would dismiss this ground of cross-appeal.

viole pas le droit d'auteur lorsque la Grande bibliothèque fournit, sur demande, une seule copie d'une décision publiée, d'un résumé jurisprudentiel, d'une loi, d'un règlement ou d'une partie restreinte d'un texte provenant d'un traité conformément à sa Politique d'accès. Je rendrais également un jugement déclaratoire portant que le Barreau n'autorise pas la violation du droit d'auteur en mettant une photocopieuse à la disposition des usagers de la Grande bibliothèque et en affichant un avis où il décline toute responsabilité relativement aux copies produites en violation du droit d'auteur.

III. Analyse du pourvoi incident

(1) *En transmettant des copies par télécopieur, le Barreau communique-t-il une œuvre au public?*

En première instance, les éditeurs ont soutenu qu'en transmettant des copies de leurs œuvres à des avocats de l'Ontario, le Barreau les communiquait « au public, par télécommunication » et violait donc l'al. 3(1)*f*) de la *Loi sur le droit d'auteur*. Le juge de première instance a conclu que les transmissions par télécopieur en cause n'équivalaient pas à une communication au public par télécommunication parce qu'elles « provenaient d'un seul point et étaient destinées à n'atteindre qu'un seul point » (par. 167). La Cour d'appel partageait cette opinion, même si elle a reconnu qu'une série de transmissions séquentielles pouvait violer le droit du titulaire de communiquer une œuvre au public.

Je souscris à ces conclusions. Transmettre une seule copie à une seule personne par télécopieur n'équivaut pas à communiquer l'œuvre au public. Cela dit, la transmission répétée d'une copie d'une même œuvre à de nombreux destinataires pourrait constituer une communication au public et violer le droit d'auteur. Toutefois, aucune preuve n'a établi que ce genre de transmission aurait eu lieu en l'espèce.

Compte tenu de la preuve, les transmissions par télécopieur ne constituaient pas des communications au public. Je suis d'avis de rejeter ce moyen d'appel incident.

(2) *Did the Law Society Infringe Copyright in the Publishers' Works by Selling Copies to Section 27(2) of the Copyright Act?*

Under s. 27(2)(*a*) of the *Copyright Act*, it is an infringement of copyright to sell a copy of a work that the person knows or should have known infringes copyright, a practice known as secondary infringement. The majority at the Court of Appeal rejected the allegation of secondary infringement on the ground that it was not established that the Law Society knew or should have known it was dealing with infringing copies of the publishers' works. The publishers appeal this finding on cross-appeal.

At the Court of Appeal, Rothstein J.A., in his concurring judgment, properly outlined the three elements that must be proven to ground a claim for secondary infringement: (1) the copy must be the product of primary infringement; (2) the secondary infringer must have known or should have known that he or she is dealing with a product of infringement; and (3) the secondary dealing must be established; that is, there must have been a sale.

In the main appeal, I have concluded that the Law Society did not infringe copyright in reproducing the publishers' works in response to requests under its custom photocopy service. Absent primary infringement, there can be no secondary infringement. I would dismiss this ground of cross-appeal.

(3) *Does the Law Society's Great Library Qualify for an Exemption as a "Library, Archive or Museum" Under Sections 2 and 30.2(1) of the Copyright Act?*

In 1999, amendments to the *Copyright Act* came into force allowing libraries, archives and museums to qualify for exemptions against copyright infringement: S.C. 1997, c. 24. Under s. 30.2(1), a library or persons acting under its authority may do anything on behalf of any person that the person may do personally under the fair dealing exceptions to copyright infringement. Section 2 of the *Copyright*

(2) *Le Barreau a-t-il violé le droit d'auteur sur les œuvres des éditeurs en vendant des copies contrairement au par. 27(2) de la Loi sur le droit d'auteur?*

80 Suivant l'al. 27(2)*a*) de la *Loi sur le droit d'auteur*, constitue une violation du droit d'auteur (appelée violation à une étape ultérieure) la vente d'une copie d'une œuvre par une personne qui sait ou qui aurait dû savoir qu'elle viole le droit d'auteur. Les juges majoritaires de la Cour d'appel ont rejeté l'allégation de violation à une étape ultérieure au motif qu'il n'avait pas été établi que le Barreau savait ou aurait dû savoir qu'il fournissait des copies illicites des œuvres des éditeurs. Ces derniers contestent cette conclusion dans le cadre du pourvoi incident.

81 Dans ses motifs concourants, le juge Rothstein, de la Cour d'appel, a correctement énoncé les trois éléments requis pour prouver la violation à une étape ultérieure : (1) l'œuvre est le produit d'une violation initiale du droit d'auteur; (2) l'auteur de la violation à une étape ultérieure savait ou aurait dû savoir qu'il utilisait le produit d'une violation initiale du droit d'auteur; (3) l'utilisation à une étape ultérieure est établie, c'est-à-dire qu'une vente a eu lieu.

82 Dans le cadre du pourvoi principal, j'ai conclu que le Barreau n'avait pas violé le droit d'auteur en photocopiant sur demande les œuvres des éditeurs dans le cadre du service de photocopie. Vu l'absence de violation initiale, il ne peut y avoir de violation à une étape ultérieure. Je suis d'avis de rejeter ce moyen d'appel incident.

(3) *La Grande bibliothèque du Barreau bénéficie-t-elle de l'exception prévue pour les « bibliothèque, musée ou service d'archives » à l'art. 2 et au par. 30.2(1) de la Loi sur le droit d'auteur?*

83 En 1999, des modifications apportées à la *Loi sur le droit d'auteur* sont entrées en vigueur, et les bibliothèques, services d'archives et musées ont dès lors bénéficié d'une exception à la violation du droit d'auteur : L.C. 1997, ch. 24. Suivant le par. 30.2(1), une bibliothèque ou une personne agissant sous son autorité peut accomplir un acte pour une personne qui peut elle-même l'accomplir sur le fondement

Act defines "library, archive or museum". In order to qualify as a library, the Great Library: (1) must not be established or conducted for profit; (2) must not be administered or controlled by a body that is established or conducted for profit; and (3) must hold and maintain a collection of documents and other materials that is open to the public or to researchers. The Court of Appeal found that the Great Library qualified for the library exemption. The publishers appeal this finding on the ground that the Law Society, which controls the library, is indirectly controlled by the body of lawyers authorized to practise law in Ontario who conduct the business of law for profit.

de l'exception au titre de l'utilisation équitable. L'article 2 de la *Loi sur le droit d'auteur* définit « bibliothèque, musée ou service d'archives ». Pour être considérée comme une bibliothèque, la Grande bibliothèque : (1) ne doit pas être constituée ni administrée pour réaliser des profits, (2) ne doit pas être administrée ni contrôlée directement ou indirectement par un organisme constitué ou administré pour réaliser des profits, et (3) doit rassembler et gérer des collections de documents ou d'objets qui sont accessibles au public ou aux chercheurs. La Cour d'appel a conclu que la Grande bibliothèque bénéficiait de l'exception en cause. Les éditeurs contestent cette conclusion au motif que le Barreau, qui contrôle la bibliothèque, est contrôlé indirectement par l'ensemble des avocats autorisés à exercer le droit en Ontario, qui l'exercent pour réaliser des profits.

84 I concluded in the main appeal that the Law Society's dealings with the publishers' works were fair. Thus, the Law Society need not rely on the library exemption. However, were it necessary, it would be entitled to do so. The Great Library is not established or conducted for profit. It is administered and controlled by the Benchers of the Law Society. Although some of the Benchers, when acting in other capacities, practise law for profit, when they are acting as administrators of the Great Library, the Benchers are not acting as a body established or conducted for profit. The Court of Appeal was correct in its conclusion on this point. I would dismiss this ground of cross-appeal.

Dans le cadre du pourvoi principal, j'ai conclu au caractère équitable de l'utilisation des œuvres des éditeurs par le Barreau. Celui-ci n'a donc pas à invoquer l'exception prévue pour les bibliothèques, mais il pourrait l'invoquer au besoin. La Grande bibliothèque n'est ni constituée ni administrée pour réaliser des profits. Elle est administrée et contrôlée par les conseillers du Barreau. Bien que certains des conseillers exercent par ailleurs le droit dans un but lucratif, ils ne peuvent, lorsqu'ils agissent à titre d'administrateurs de la Grande bibliothèque, être assimilés à un organisme constitué ou administré pour réaliser des profits. La Cour d'appel a tiré une conclusion juste à cet égard. Je suis d'avis de rejeter ce moyen d'appel incident.

(4) *Are the Publishers Entitled to a Permanent Injunction Under Section 34(1) of the Copyright Act?*

(4) *Les éditeurs ont-ils droit à une injonction permanente en vertu du par. 34(1) de la Loi sur le droit d'auteur?*

85 Under s. 34(1) of the *Copyright Act*, the copyright owner is entitled to all remedies, including an injunction, for the infringement of copyright in his or her work. An injunction is, in principle, an equitable remedy and, thus, it is within the Court's discretion to decide whether or not to grant an injunction. See P. E. Kierans and R. Borenstein, "Injunctions — Interlocutory and Permanent", in R. E. Dimock, ed., *Intellectual Property Disputes:*

Le paragraphe 34(1) de la *Loi sur le droit d'auteur* dispose que le titulaire est admis à exercer tous les recours, en cas de violation du droit d'auteur, notamment pour obtenir une injonction. Une injonction est une réparation fondée en principe sur l'equity, de sorte que le tribunal a le pouvoir discrétionnaire de l'accorder ou de la refuser. Voir P. E. Kierans et R. Borenstein, « Injunctions — Interlocutory and Permanent », dans R. E. Dimock,

Resolutions & Remedies (2002), vol. 2, 15-1, at p. 15-4.

Given my finding on the main appeal that the Law Society did not infringe copyright in the publishers' works, it is unnecessary to consider whether the Court of Appeal erred in choosing not to issue an injunction in this case. I would dismiss this ground of appeal.

(5) *Conclusion on Cross-Appeal*

In the result, I would dismiss the cross-appeal.

IV. Conclusion

On the main appeal, I conclude that the Law Society did not infringe copyright through its custom photocopy service when it provided single copies of the publishers' works to its members. The publishers' headnotes, case summary, topical index and compilation of reported judicial decisions are all "original" works covered by copyright. They originated from their authors, are not mere copies and are the product of the exercise of skill and judgment that is not trivial. That said, the Great Library's dealings with the works were for the purpose of research and were fair dealings within the meaning of s. 29 of the *Copyright Act* and thus did not constitute copyright infringement. I also conclude that the Law Society did not authorize copyright infringement by maintaining self-service photocopiers in the Great Library for use by its patrons. I would therefore allow the appeal.

My conclusions on the cross-appeal follow from those on the main appeal. No secondary infringement of copyright by the Law Society is established. The Law Society's fax transmissions did not constitute communications to the public and it did not sell copies of the publishers' works. Were it necessary, I would conclude that the Great Library qualifies for a library exemption under the *Copyright Act*. Finally, in light of my finding that there has been no copyright infringement in this case, an injunction should

dir., *Intellectual Property Disputes : Resolutions & Remedies* (2002), vol. 2, 15-1, p. 15-4.

86 Ayant conclu dans le pourvoi principal que le Barreau n'a pas violé le droit d'auteur sur les œuvres des éditeurs, point n'est besoin de décider si la Cour d'appel a eu tort de ne pas décerner une injonction en l'espèce. Je suis d'avis de rejeter ce moyen d'appel incident.

(5) *Conclusion relative au pourvoi incident*

87 En conséquence, je suis d'avis de rejeter le pourvoi incident.

IV. Conclusion

88 Pour ce qui est du pourvoi principal, je conclus que le Barreau n'a pas violé le droit d'auteur en fournissant à ses membres une seule copie des œuvres des éditeurs dans le cadre de son service de photocopie. Les sommaires, le résumé jurisprudentiel, l'index analytique et la compilation de décisions judiciaires publiées constituent tous des œuvres « originales » des éditeurs et sont protégés par le droit d'auteur. Ils émanent de leurs auteurs, ne sont pas de simples copies et résultent d'un exercice non négligeable du talent et du jugement. Cela dit, la Grande bibliothèque a utilisé les œuvres aux fins de recherche et cette utilisation était équitable au sens de l'art. 29 de la *Loi sur le droit d'auteur*; cette utilisation ne violait donc pas le droit d'auteur. J'estime également que le Barreau n'a pas autorisé la violation du droit d'auteur en mettant des photocopieuses libre-service à la disposition des usagers de la Grande bibliothèque. Je suis donc d'avis d'accueillir le pourvoi.

89 Mes conclusions relatives au pourvoi incident découlent de celles tirées dans le pourvoi principal. Il n'a pas été prouvé que le Barreau a violé le droit d'auteur à une étape ultérieure. L'envoi de copies par télécopieur ne constituait pas une communication au public, et le Barreau n'a pas vendu de reproductions des œuvres des éditeurs. Si cette conclusion était nécessaire, je statuerais que la Grande bibliothèque bénéficie de l'exception que prévoit la *Loi sur le droit d'auteur* pour les bibliothèques.

not be issued in this case. I would dismiss the cross-appeal.

90 In the result, the appeal is allowed and the cross-appeal dismissed. I would issue a declaration that the Law Society does not infringe copyright when a single copy of a reported decision, case summary, statute, regulation or limited selection of text from a treatise is made by the Great Library in accordance with its "Access to the Law Policy". I would also issue a declaration that the Law Society does not authorize copyright infringement by maintaining a photocopier in the Great Library and posting a notice warning that it will not be responsible for any copies made in infringement of copyright. Given the appellant's success on the appeal and cross-appeal, it is entitled to costs throughout.

APPENDIX

Legislative Provisions

Copyright Act, R.S.C. 1985, c. C-42

2. . . .

"every original literary, dramatic, musical and artistic work" includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science;

. . .

"library, archive or museum" means

(*a*) an institution, whether or not incorporated, that is not established or conducted for profit or that does not form a part of, or is not administered or directly or indirectly controlled by, a body that is established or conducted for profit, in which is held and maintained a collection of documents and other materials that is open to the public or to researchers, or

Enfin, vu ma conclusion qu'il n'y a pas eu de violation du droit d'auteur en l'espèce, une injonction ne saurait être décernée. Je suis d'avis de rejeter le pourvoi incident.

En conséquence, le pourvoi principal est accueilli et le pourvoi incident rejeté. Je rendrais un jugement déclaratoire portant que le Barreau ne viole pas le droit d'auteur lorsque la Grande bibliothèque effectue une seule copie d'une décision publiée, d'un résumé jurisprudentiel, d'une loi, d'un règlement ou d'un extrait limité d'un texte provenant d'un traité conformément à sa « Politique d'accès à l'information juridique ». Je rendrais également un jugement déclaratoire confirmant que le Barreau n'autorise pas la violation du droit d'auteur en mettant une photocopieuse à la disposition des usagers de la Grande bibliothèque et en affichant un avis de non-responsabilité relativement aux copies produites en violation du droit d'auteur. L'appelant ayant gain de cause dans le cadre du pourvoi principal et du pourvoi incident, les dépens lui sont adjugés devant toutes les cours.

ANNEXE

Dispositions législatives

Loi sur le droit d'auteur, L.R.C. 1985, ch. C-42

2. . . .

« bibliothèque, musée ou service d'archives » S'entend :

a) d'un établissement doté ou non de la personnalité morale qui :

(i) d'une part, n'est pas constitué ou administré pour réaliser des profits, ni ne fait partie d'un organisme constitué ou administré pour réaliser des profits, ni n'est administré ou contrôlé directement ou indirectement par un tel organisme,

(ii) d'autre part, rassemble et gère des collections de documents ou d'objets qui sont accessibles au public ou aux chercheurs;

b) de tout autre établissement à but non lucratif visé par règlement.

. . .

« toute œuvre littéraire, dramatique, musicale ou artistique originale » S'entend de toute production

(*b*) any other non-profit institution prescribed by regulation;

3. (1) For the purposes of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

(*a*) to produce, reproduce, perform or publish any translation of the work,

(*b*) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,

(*c*) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,

(*d*) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

(*e*) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,

(*f*) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

(*g*) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,

(*h*) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program, and

(*i*) in the case of a musical work, to rent out a sound recording in which the work is embodied,

originale du domaine littéraire, scientifique ou artistique quels qu'en soient le mode ou la forme d'expression, tels les compilations, livres, brochures et autres écrits, les conférences, les œuvres dramatiques ou dramatico-musicales, les œuvres musicales, les traductions, les illustrations, les croquis et les ouvrages plastiques relatifs à la géographie, à la topographie, à l'architecture ou aux sciences.

3. (1) Le droit d'auteur sur l'œuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'œuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'œuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :

a) de produire, reproduire, représenter ou publier une traduction de l'œuvre;

b) s'il s'agit d'une œuvre dramatique, de la transformer en un roman ou en une autre œuvre non dramatique;

c) s'il s'agit d'un roman ou d'une autre œuvre non dramatique, ou d'une œuvre artistique, de transformer cette œuvre en une œuvre dramatique, par voie de représentation publique ou autrement;

d) s'il s'agit d'une œuvre littéraire, dramatique ou musicale, d'en faire un enregistrement sonore, film cinématographique ou autre support, à l'aide desquels l'œuvre peut être reproduite, représentée ou exécutée mécaniquement;

e) s'il s'agit d'une œuvre littéraire, dramatique, musicale ou artistique, de reproduire, d'adapter et de présenter publiquement l'œuvre en tant qu'œuvre cinématographique;

f) de communiquer au public, par télécommunication, une œuvre littéraire, dramatique, musicale ou artistique;

g) de présenter au public lors d'une exposition, à des fins autres que la vente ou la location, une œuvre artistique — autre qu'une carte géographique ou marine, un plan ou un graphique — créée après le 7 juin 1988;

h) de louer un programme d'ordinateur qui peut être reproduit dans le cadre normal de son utilisation, sauf la reproduction effectuée pendant son exécution avec un ordinateur ou autre machine ou appareil;

i) s'il s'agit d'une œuvre musicale, d'en louer tout enregistrement sonore.

and to authorize any such acts.

5. (1) Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met: . . .

27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

(2) It is an infringement of copyright for any person to

(*a*) sell or rent out,

(*b*) distribute to such an extent as to affect prejudicially the owner of the copyright,

(*c*) by way of trade distribute, expose or offer for sale or rental, or exhibit in public,

(*d*) possess for the purpose of doing anything referred to in paragraphs (*a*) to (*c*), or

(*e*) import into Canada for the purpose of doing anything referred to in paragraphs (*a*) to (*c*),

a copy of a work, sound recording or fixation of a performer's performance or of a communication signal that the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it.

29. Fair dealing for the purpose of research or private study does not infringe copyright.

29.1 Fair dealing for the purpose of criticism or review does not infringe copyright if the following are mentioned:

(*a*) the source; and

(*b*) if given in the source, the name of the

(i) author, in the case of a work,

(ii) performer, in the case of a performer's performance,

(iii) maker, in the case of a sound recording, or

Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.

5. (1) Sous réserve des autres dispositions de la présente loi, le droit d'auteur existe au Canada, pendant la durée mentionnée ci-après, sur toute œuvre littéraire, dramatique, musicale ou artistique originale si l'une des conditions suivantes est réalisée : . . .

27. (1) Constitue une violation du droit d'auteur l'accomplissement, sans le consentement du titulaire de ce droit, d'un acte qu'en vertu de la présente loi seul ce titulaire a la faculté d'accomplir.

(2) Constitue une violation du droit d'auteur l'accomplissement de tout acte ci-après en ce qui a trait à l'exemplaire d'une œuvre, d'une fixation d'une prestation, d'un enregistrement sonore ou d'une fixation d'un signal de communication alors que la personne qui accomplit l'acte sait ou devrait savoir que la production de l'exemplaire constitue une violation de ce droit, ou en constituerait une si l'exemplaire avait été produit au Canada par la personne qui l'a produit :

a) la vente ou la location;

b) la mise en circulation de façon à porter préjudice au titulaire du droit d'auteur;

c) la mise en circulation, la mise ou l'offre en vente ou en location, ou l'exposition en public, dans un but commercial;

d) la possession en vue de l'un ou l'autre des actes visés aux alinéas *a*) à *c*);

e) l'importation au Canada en vue de l'un ou l'autre des actes visés aux alinéas *a*) à *c*).

29. L'utilisation équitable d'une œuvre ou de tout autre objet du droit d'auteur aux fins d'étude privée ou de recherche ne constitue pas une violation du droit d'auteur.

29.1 L'utilisation équitable d'une œuvre ou de tout autre objet du droit d'auteur aux fins de critique ou de compte rendu ne constitue pas une violation du droit d'auteur à la condition que soient mentionnés :

a) d'une part, la source;

b) d'autre part, si ces renseignements figurent dans la source :

(i) dans le cas d'une œuvre, le nom de l'auteur,

(ii) dans le cas d'une prestation, le nom de l'artiste-interprète,

(iii) dans le cas d'un enregistrement sonore, le nom du producteur,

(iv) broadcaster, in the case of a communication signal.

29.2 Fair dealing for the purpose of news reporting does not infringe copyright if the following are mentioned:

(*a*) the source; and

(*b*) if given in the source, the name of the

(i) author, in the case of a work,

(ii) performer, in the case of a performer's performance,

(iii) maker, in the case of a sound recording, or

(iv) broadcaster, in the case of a communication signal.

30.2 (1) It is not an infringement of copyright for a library, archive or museum or a person acting under its authority to do anything on behalf of any person that the person may do personally under section 29 or 29.1.

34. (1) Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

Appeal allowed with costs and cross-appeal dismissed with costs.

Solicitors for the appellant/respondent on cross-appeal: Gowling Lafleur Henderson, Toronto.

Solicitors for the respondents/appellants on cross-appeal: Sim Hughes Ashton & McKay, Toronto.

Solicitors for the intervener the Federation of Law Societies of Canada: Borden Ladner Gervais, Ottawa.

Solicitors for the interveners the Canadian Publishers' Council and the Association of Canadian Publishers: McCarthy Tétrault, Toronto.

(iv) dans le cas d'un signal de communication, le nom du radiodiffuseur.

29.2 L'utilisation équitable d'une œuvre ou de tout autre objet du droit d'auteur pour la communication des nouvelles ne constitue pas une violation du droit d'auteur à la condition que soient mentionnés :

a) d'une part, la source;

b) d'autre part, si ces renseignements figurent dans la source :

(i) dans le cas d'une œuvre, le nom de l'auteur,

(ii) dans le cas d'une prestation, le nom de l'artiste-interprète,

(iii) dans le cas d'un enregistrement sonore, le nom du producteur,

(iv) dans le cas d'un signal de communication, le nom du radiodiffuseur.

30.2 (1) Ne constituent pas des violations du droit d'auteur les actes accomplis par une bibliothèque, un musée ou un service d'archives ou une personne agissant sous l'autorité de ceux-ci pour une personne qui peut elle-même les accomplir dans le cadre des articles 29 et 29.1.

34. (1) En cas de violation d'un droit d'auteur, le titulaire du droit est admis, sous réserve des autres dispositions de la présente loi, à exercer tous les recours — en vue notamment d'une injonction, de dommages-intérêts, d'une reddition de compte ou d'une remise — que la loi accorde ou peut accorder pour la violation d'un droit.

Pourvoi principal accueilli avec dépens et pourvoi incident rejeté avec dépens.

Procureurs de l'appelant/intimé au pourvoi incident : Gowling Lafleur Henderson, Toronto.

Procureurs des intimées/appelantes au pourvoi incident : Sim Hughes Ashton & McKay, Toronto.

Procureurs de l'intervenante la Fédération des ordres professionnels de juristes du Canada : Borden Ladner Gervais, Ottawa.

Procureurs des intervenants Canadian Publishers' Council et l'Association des éditeurs canadiens : McCarthy Tétrault, Toronto.

Solicitors for the interveners Société québécoise de gestion collective des droits de reproduction (COPIBEC) and the Canadian Copyright Licensing Agency (Access Copyright): Ogilvy Renault, Montréal.

Procureurs des intervenantes la Société québécoise de gestion collective des droits de reproduction (COPIBEC) et Canadian Copyright Licensing Agency (Access Copyright) : Ogilvy Renault, Montréal.

Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement local

ISSUE DATE: February 25, 2019 **CASE NO.:** PL160463

The Ontario Municipal Board (the "OMB") is continued under the name Local Planning Appeal Tribunal (the "Tribunal"), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

PROCEEDING COMMENCED UNDER subsection 22(7) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	LTM Land Corp.
Subject:	Request to amend the Official Plan - Failure of the City of Peterborough to adopt the requested amendment
Existing Designation:	Low Density Residential and Major Open Space
Proposed Designation:	Low and Medium Density Residential, Major Open Space
Purpose:	To permit a residential plan of subdivision and realign a planned collector street.
Property Address/Description:	1225, 1261 and 1289 Parkhill Road West
Municipality:	City of Peterborough
Approval Authority File No.:	O1403
OMB Case No.:	PL160463
OMB File No.:	PL160463
OMB Case Name:	LTM Land Corp. v. Peterborough (City)

PROCEEDING COMMENCED UNDER subsection 34(11) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	LTM Land Corp.
Subject:	Application to amend Zoning By-law No. 97-123- Refusal or neglect of the City of Peterborough to make a decision
Existing Zoning:	D.2 and SP.238
Proposed Zoning:	R.1,8z-162-"H"; R.1,8z,10e-162-"H"; R.31,3x,5f-"H"; SP.273,10e,16h-302-"H"; OS.1; and OS.2
Purpose:	To permit a residential plan of subdivision.

Property Address/Description:	1225, 1261 and 1289 Parkhill Road West
Municipality:	City of Peterborough
Municipal File No.:	Z1410sb
OMB Case No.:	PL160463
OMB File No.:	PL160464

PROCEEDING COMMENCED UNDER subsection 51(34) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Applicant and Appellant:	LTM Land Corp.
Subject:	Proposed Plan of Subdivision - Failure of the City of Peterborough to make a decision
Purpose:	To permit a residential plan of subdivision and realign a planned collector street.
Property Address/Description:	1225, 1261 and 1289 Parkhill Road West
Municipality:	City of Peterborough
Municipal File No.:	15T-14501
OMB Case No.:	PL160463
OMB File No.:	PL160465

Heard: September 13, 14, 15, 18, 19, and 20, 2017 in Peterborough, Ontario

APPEARANCES:

Parties	**Counsel/Representative***
LTM Land Corp. (“Applicant”)	John Ewart
City of Peterborough (“City”)	Alan Barber
Roger White and William White (the “Whites”)	Kelly Gravelle
Paul Frost and Marguerite Xenopoulos (the “Objectors”)	J. Douglas Mann (as to part of the proceedings) Paul Frost * (on behalf of both Objectors)

DECISION DELIVERED BY DAVID L. LANTHIER AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] The Applicant, supported by the Whites who have partnered with the Applicants

on the proposed Subdivision, applied to the City for an amendment to the City's Official Plan, a Zoning By-law amendment and approval of a draft Plan of Subdivision for the purposes of facilitating a residential subdivision on the south side of Parkhill Road West near the Loggerhead Marsh in the City of Peterborough.

[2] Council for the City failed to make a decision on all three applications, as a result of a tie vote on the proposal as it was presented for approval, and accordingly the Applicant filed the Appeals before the Ontario Municipal Board, as it then was, pursuant to subsections 22(7), 34(11) and 51(34) of the *Planning Act*. Since that time, as of the date of the hearing, the City is supportive of the Subdivision Applications as a result of additional amendments that have been made to the proposed Subdivision and Plan of Subdivision, subject to some qualifications and minor disagreement as to the Conditions.

PROCEDURAL MATTERS, PARTIES, PARTICIPANTS, WITNESSES

[3] The appeals were procedurally managed through two Pre-hearing conferences which eventually resulted in the approval of a Procedural Order issued on May 4, 2017. The Objectors (jointly) and the Whites (also jointly) were added as parties to the appeals and the following seven Participants were granted status

1. Kim Fleming;
2. Peterborough Field Naturalists represented by Martin Parker;
3. Elizabeth Healey;
4. Joanne McKee;
5. Sean Heuchert;
6. Don MacPherson; and
7. Shawn Wilson.

[4] The Appeals and the hearing were governed by the terms of the Procedural Order which contained a detailed Issues List and an outline of the Order of Evidence that governed the conduct of the hearing that extended over a period of six hearing

days.

[5] Mr. Mann appeared on the first day of the hearing, on behalf of the Objectors, to address the Panel but advised that he would be withdrawing after his initial comments and that Dr. Frost would undertake the examination and cross-examination of witnesses, with the possibility that Mr. Mann might re-attend later in the hearing on their behalf.

[6] No witnesses were called by the Whites, though their counsel was in attendance and elected to cross-examine witnesses in some instances.

[7] The following witnesses appeared at the hearing and where applicable, were qualified by the Panel in their respective areas of expertise, as indicated. With the exception of Mary Ann Perron, there were no objections raised with respect to requests to be qualified by any of the experts in their areas of expertise and the Panel was satisfied as to the qualifications of each expert to provide opinion evidence in their areas of specialty. The matter of the ruling relating to the qualifications of Ms. Perron is addressed below.

[8] In addition to the seven Participants, the witnesses were as follows:

a. **Brad Appleby**, Planner for the City of Peterborough (Land Use Planning);

b. **Murray Davenport** for the Applicant (Vice-President of LTM Land Corp.)

c. **Ron Davidson** for the Applicant (Land Use Planning);

d. **Chris Ellingwood** for the Applicant (Ecology);

e. **Michael Davenport** for the Applicant (Stormwater Management Design and Function);

f. **Jennifer Clinesmith**, under summons by the Applicant (Planner with the Otonabee Region Conservation Authority ("ORCA"));

g. **Cara Hernould**, under summons by the Applicant (District Planner, Ministry of Natural Resources and Forestry);

h. **Mary Ann Perron** for the Objectors (Wetland Ecology);

i. **Thomas Whillans** for the Objectors (Wetlands and Wetland Ecology);

j. **Stephen Fahner** for the Objectors (Land Use Planning); and

k. **Dennis Murray** for the Objectors (Ecology).

[9] In regards to the request to qualify Ms. Perron as an expert, the Panel received a challenge from the Applicant, and received submissions as to the qualifications of Ms. Perron to provide expert evidence in the areas of both "urban water quality" and matters relating to water chemistry and "wetland ecology".

[10] The Tribunal ruled that Ms. Perron would be qualified to provide expert opinion evidence only in the area of wetland ecology and not in the area of water quality in the Loggerhead Marsh and provided oral reasons.

[11] In considering the nature of Ms. Perron's qualifications, taking into account such things as her level of expertise, education, skill, professional certification and experience in the subject fields, the Panel concluded that, as a doctoral student instructor, there was insufficient evidence that Ms. Perron possessed the requisite practical experience and demonstrated expertise in matters relating to water quality, stormwater management, outfalls, or water chemistry or analysis.

[12] The Tribunal concluded that Ms. Perron did have sufficient qualifications that would allow her to provide expert opinions in matters of wetland ecology. Any

expressed concerns relating to her levels of experience and training, and lack of prior qualification by a tribunal or court, will go to matters of weight of such opinions on wetland ecology that might be provided.

[13] The Panel noted that because, in some cases, it might be difficult to separate the topic of water quality from wetland ecology, the Panel would be able to sufficiently parse out any evidence that might relate to water quality, stormwater management plans or water quantity.

TRANSITION AND SHORT FORMS

[14] For the purposes of transition, the hearing of these Appeals was conducted by the Ontario Municipal Board ("Board"). On April 3, 2018 the *Local Planning Appeal Tribunal Act, 2017* ("LPATA") was proclaimed in force, which provides that the Board will be continued as the Local Planning Appeal Tribunal (the "Tribunal"). This Decision is issued subsequent to the proclamation of LPATA, and accordingly the Appeals are continued and determined under the jurisdiction of the Tribunal. Any reference to the Tribunal in this Decision is therefore deemed to also be a reference to the Board as it then presided over the initial aspects and hearing of the Appeals prior to proclamation

[15] For the purposes of this Decision, in addition to references to any other short form usage which may be provided form, short form references to relevant planning legislation, existing and proposed planning instruments, planning terminology and governmental agencies and stakeholders are hereafter as follows:

- *Planning Act* (the "Act");
- *Endangered Species Act* ("ESA");
- *Provincial Policy Statement, 2014* ("PPS");
- *Growth Plan for the Greater Golden Horseshoe (2017)* ("Growth Plan");
- Peterborough Official Plan (the "OP" or the "City's OP");

- Jackson Creek Secondary Plan (the “Jackson Creek SP”);
- City of Peterborough Comprehensive Zoning By-law No. 97-1213 (the “ZBL”);
- Loggerhead Marsh Management Plan (“Loggerhead MMP”);
- The proposed Official Plan Amendment (the “OPA”);
- The proposed Zoning By-law Amendment (the “ZBLA”);
- The proposed Draft Plan of Subdivision (the “PoS”);
- The proposed Joint Conditions of Draft Plan of Subdivision Approval (the “Draft Conditions”);
- Environmental Impact Study conducted by Niblett Environmental Associates on behalf of the Applicant (the “EIS”);
- Ministry of Natural Resources and Forestry (“MNRF”);
- Ministry of the Environment, Conservation and Parks (“MECP”);
- Otonabee Region Conservation Authority (“ORCA”);
- Provincially Significant Wetland (“PSW”)’ and
- Loggerhead Marsh (alternatively the “Marsh”).

THE APPLICATIONS AND PROPOSED PLANNING INSTRUMENTS

[16] The nature of the Applications and the proposed planning instruments that would permit the Subdivision are relatively straightforward.

1. Plan of Subdivision – The Draft PoS lays out the proposed Subdivision and the details are set out below. Issues relating to the Draft Conditions relating to the Subdivision are addressed in this Decision.

2. Official Plan Amendment – Although it was suggested by the Applicant’s

Planner that the OP might not require an amendment to change the location of the street, the OPA will amend the provisions of the OP and the Jackson Creek SP to "shift" one of the streets (the Nornabell Avenue extension) slightly to the west of the proposed Subdivision and outside the Subject Lands. It is also required to include the Subject Lands in the areas where Medium Density residential development is permitted as identified in Schedule "E" to the OP and in Schedule "G" of the Jackson Creek SP. Although residential development is permitted on the Subject Lands, Medium Density is limited to identified portions of the City.

3. Zoning By-Law Amendment – The ZBLA would rezone the majority of the Subject Lands to "R.1 – Residential District" and those identified blocks for parkland, open space and stormwater management as "OS.1 – Open Space District". The ZBLA would also provide for some altered performance standards relating to side lot and street setbacks.

THE ISSUES

[17] The Issues List contained within the Procedural Order is comprehensive in identifying a wide range of planning issues, but as the evidence unfolded the three central issues of the Appeals have emerged:

1. Natural Heritage and Environmental – Stormwater Management

   Much of the evidence related to concerns relating to the impact of the Subdivision on the ecological and natural habitat features, and specifically the PSW Loggerhead Marsh, including impact upon the Marsh as a habitat for the Least Bittern.

   The adequacy and sufficiency of the stormwater management plan, given the proximity to the PSW, is an issue and is interrelated with the Natural Heritage and Environmental Issues.

2. General Planning Considerations – There are a number of specific points of conflict that have emerged in the planning evidence, but generally the Tribunal must determine whether the Subdivision is consistent with the PPS and provincial policies, conforms to the Growth Plan, conforms to the City's OP and related planning policies and guidelines, and represents good planning, in the public interest.

3. Conditions of Subdivision – It will be necessary to determine the conditions that should be imposed with respect to the PoS.

[18] To drill down further within the issues arising in this hearing, the central point of contention, and subject of discussion, is the adequacy of the depth of the buffer (now provided for at 30 metres ("m") from the boundary of the PSW) as it relates to the applicable provincial and municipal policies relating to "no negative impact" and other requirements under provincial and municipal natural heritage/environmental/stormwater management policies.

THE PROPOSED SUBDIVISION

[19] The proposed subdivision development (the "Subdivision") which is the subject matter of this Appeal, is located on a 19.8 hectare composite of three parcels of land within Lot 8, Concession 13 in the former Township of Monaghan (the "Subject Lands") located on the south side of Parkhill Road West ("Parkhill"). The municipal addresses of the three parcels are 1225, 1289 and 1261 Parkhill Road West.

[20] The Subdivision, in its most recent iteration as of September 2017 (Exhibit 10), as now presented to the Tribunal for approval, would contain 163 detached dwellings on lots, as well as ten additional blocks of land that would contain 40 townhouses.

[21] The proposed internal street layout would have two points of entry from the north off of Parkhill (Chandler Crescent and Davenport Road) and have three west-east streets extending to the west and east boundaries of the Subdivision with the potential

for linking to future residential developments to the west and east.

[22] In addition to the total 203 residential dwelling units, there are blocks of land identified for parkland and stormwater management ponds. As will be discussed in further detail later, the PoS proposes two stormwater management ponds near the south west and south east areas of the Subdivision. Blocks of Parkland are proposed along the entire western and southern boundaries of the Subdivision, including segments between the south boundaries of each of the two ponds and the south boundary of the Subject Lands.

[23] As the PoS has been presented, there will be a 30 m buffer from the most recently established wetland boundary. However, the actual distance from the wetland boundary to the rear fences of the residential lots themselves, will be greater than 30 m. There are three parkland blocks (Blocks 175, 177 and 179) the North East Forest Parkland Block 176 and the two Stormwater Management Pond (Blocks 180 and 181). Mr. Ellingwood confirmed that the distances between the wetland boundary and the south limits of the residential lots shown in Exhibit 10 range from 37 m at the shortest distance to the west, up to 59 m at its greatest depth.

THE PHYSICAL CONTEXT OF THE PROPOSED SUBDIVISION

[24] As the City's residential developments have expanded in this area, subdivisions have been developed in the southern portions of Lots 7, 8 and 9 of Concession 13. Ireland Drive angles from the southwest off of Brealey Drive to the northeast, merging with Ravenwood Drive which then extends northeast and then north to connect to Parkhill. The Loggerhead Marsh more-or-less follows the same southwest to north east angle, north of Ireland Drive and Ravenwood Drive.

[25] There has been some residential development on the north side of Ireland Drive and south of the Loggerhead Marsh and watercourse but for the most part the lands north of the Loggerhead Marsh, south of Parkhill and east of Brealey Drive, within which the Subject Lands are located, have remained largely undeveloped with some

agricultural use with a few residential dwellings. Other subdivision developments extend to the southwest, south and south east of the Subject Lands occupying the area of the City east of Brealey Drive, north of Sherbrooke Street and west of Wallis Drive.

[26] The Loggerhead Marsh and wetlands features are located in irregular patterns along the entire south of the Subject Lands. The Loggerhead Marsh has been designated as a PSW, and was previously designated as a locally significant wetland.

[27] A recognized natural woodland is also located in proximity to the proposed Subdivision. The “North East Forest” is located north of the wetland boundary, and although it is not a Provincially Significant woodland, it is recognized within the Jackson Creek SP as a feature of significant that should be maintained for the benefit of the community.

[28] On the north side of Parkhill, to the north of the Site, there has been some residential and mixed use development. The entrance to a residential subdivision on the north side is accessed from Chandler Crescent and the PoS anticipates that Chandler Crescent and Parkhill Road would be a primary intersection with access to the two residential subdivisions, to the north and south.

[29] Relevant, to some extent, to the issues in this hearing, is the fact that the topography of the Subject Lands and the surrounding area, that gives rise to the Loggerhead Marsh and its related watercourses, results in the Subject Lands and adjacent areas generally sloping to the south and the southwest, away from Parkhill.

THE PLANNING CONTEXT

[30] The Subject Lands are within the Designated Greenfield Area identified in section 2.2.7 of the Growth Plan.

[31] Under the City’s OP the Subject Lands are designated as Residential and Major Open Space in the Land Use designations and as Designated Greenfield Area under

the OP's City Structure.

[32] The Subject Lands are also within the areas covered by the Jackson Creek SP which, as explained further in the evidence, followed the results of the Loggerhead MMP (which had identified the stormwater management strategy for the Jackson Creek West Secondary Planning Area). In addition to the identification/classification of Nornabell Avenue, the Jackson Creek SP identifies the Subject Lands as "Low Density Residential" and "Other Open Space".

[33] Two of the three parcels forming the Subject Lands are currently zoned "D.2 Development District" (1225 and 1289 Parkhill) which allows for a limited range of rural and agricultural uses and the third is zoned "SP.238 Residential District" (1261 Parkhill) which allows for the use of private well and septic services for the existing single dwelling that is there.

DISCUSSION, ANALYSIS AND FINDINGS – ENVIRONMENTAL, STORMWATER MANAGEMENT, ECOLOGY AND SPECIES AT RISK

[34] As indicated it is the presence of the Loggerhead Marsh and its related natural features to the south of the proposed Subdivision, and its presence as a protected natural feature, and recently a designated PSW, that has underscored much of the evidence and the issues of contention.

[35] ORCA's responsibilities and roles (or the "four hats" worn by ORCA, as described by Ms. Clinesmith) in relation to the Loggerhead Marsh are of relevance since ORCA is the governing authority in matters relating to Policies 2.1 and 2.2 of the PPS, and the City relies upon ORCA's advisory and technical review expertise in matters relating to the Marsh and its hydrological function, in part informed by the Loggerhead MMP.

[36] So too is the MNRF's responsibility and role in relation to the Marsh of relevance as the MNRF assumes responsibility for matters relating to the ESA, the review of

Environmental Impact Assessments/Studies undertaken for developments such as the Applicants' Subdivision, as well as applications for permits under the ESA in relation to any activities that might relate to species at risk. The MNRF has assumed the task, in these areas of expertise, of reviewing and commenting on the EIS to address matters relating to the PSW as a habitat for wildlife including species at risk, which in this case, is focused on the Least Bittern.

Background As To the Loggerhead Marsh and ORCA

[37] The evidence in the hearing, from the various witnesses, including Mr. Appleby, Dr. Whillans, Mr. Murray Davenport, and Ms. Clinesmith, provided some helpful historical background as to the development of the Loggerhead MMP. Through the organized efforts of the City and various developers in 2001, the City retained consultants to complete a comprehensive study, and management plan, for the Loggerhead Marsh allowing for development in the watershed area of the Marsh, while protecting and preserving it. The Loggerhead MMP when it was completed, was adopted by the City as a result of the Study, and through this, the boundaries of the Loggerhead Marsh were determined, and specifically three Cells within the Marsh. From the Loggerhead MMP, an advisory group was established, stormwater management ponds were constructed, an independent monitoring program for the Loggerhead Marsh was initiated with ORCA, and those lands identified in the Plan as the marsh, the floodplain and the wetland setback, were transferred to the City of Peterborough.

[38] The executive summary in the Loggerhead MMP (Exhibit 2b, Tab 20) Report explains how the Plan was intended to identify potential impacts upon the Loggerhead Marsh from residential development that was expected to occur in the watershed of the Marsh, minimize those impacts and "maintain and enhance the health and quality of the Loggerhead Marsh and its ecosystem". The Summary states that the completed Plan, from that Study, was to:

> …provide guidance to local and regional authorities in planning

> stormwater management for existing and future land use development while ensuring the protection, restoration and/or enhancement of the natural features in the sub-watershed – including Loggerhead Marsh. The Plan will also be useful for the review and regulation of stormwater management issues related to individual development proposals.

[39] As Mr. Appleby and Mr. Murray Davenport testified, the Loggerhead MMP then led to the adoption of the Jackson Creek SP as the stormwater management strategy for development in the Jackson Creek West SP Area (Exhibit 1, Tab 7, page 83 (Schedule G)). It is the view of the Tribunal that it was this well-supported planning process, undertaken with the foresight of the City, the Developers, concerned residents and members of the scientific community, that wisely anticipated the need for a careful balancing of the need for preservation of the Loggerhead Marsh and the reality that the City's growth would lead to developments such as this Subdivision, and those that have come before it, within the Loggerhead Marsh sub-watershed.

[40] As the evidence has been provided in this Hearing, this underlying planning and natural heritage preservation plan is of some significance when weighing the evidence before the Tribunal.

[41] The Loggerhead MMP expected that there would be two gravity sanitary sewer lines to service development in the watershed areas surrounding the Marsh, one running along Ireland Drive to the south of the Marsh and the other along the north side of the Marsh. This was, however, dependent upon acquiring control and ownership of the areas necessary for both lines. In this case, access to the necessary easements to allow for the linkage in the anticipated area on the north side of the Marsh from third party owners has not been forthcoming. Mr. Michael Davenport has explained how the Applicant has looked to other workable alternatives that ultimately have resulted in less disturbance of the lands closest to the north boundary of the Marsh.

[42] As confirmed by Ms. Hernould the boundaries of the Loggerhead Marsh were again reviewed and adjusted in consultation with MNRF and ORCA in 2016/2017 (Exhibit 1, Tab 4, pp. 47 and 48). The wetland boundary as confirmed through MNRF has since been utilized by the Applicant in the preparation of the PoS as it has shown

the north demarcation of the wetland at the south boundary of the Subject Lands (Exhibit 10) which has been used for the purposes of laying out the 30 m buffer.

[43] Ms. Clinesmith appeared on behalf of ORCA under summons and confirmed that she was the File Lead and Planner since the later summer/early fall of 2014 and familiar with the Subdivision Applications.

[44] Ms. Clinesmith confirmed ORCA's multi-faceted responsibilities as: the delegated representative of the Province in identified matters; the service-provider of technical reviews and planning advice to municipalities such as the City of Peterborough in relation to matters covered under Policies 2.1 and 2.2 of the PPS; the designated Regulatory Body under O.Reg 167/06 (The Otonabee Region Conservation Authority: Regulation Of Development, Interference With Wetlands And Alterations To Shorelines And Watercourses) enacted under the *Conservation Authorities Act*; and the entity providing risk management services.

[45] Ms. Clinesmith confirmed that at the point in time of the hearing, ORCA's role had progressed to the point of providing the earlier formal response dated February 25, 2016 (Exhibit 2b, Tab 19) and the most recent updated response on September 6, 2017 (Tab 18).

[46] ORCA's position, with respect to the Applications before the Tribunal, was summarized by Ms. Clinesmith as follows:

(a) Based upon the revised PoS, produced as Exhibit 10 to the Hearing, ORCA's technical staff considers that a 30 m buffer from the wetland boundary to any development is sufficient and serves to protect the hydrological function of the wetland;

(b) ORCA has no concerns regarding the limited extension of the east side of the southwestern stormwater management pond into the Woodlot block;

(c) ORCA will require the inclusion of the Draft Conditions as set out in the response of February 25, 2016 with minor revisions to reflect the changes (ie. updated references to 30 m buffers and block identifications, removal of reference to the seep in Condition 7, etc.). The provision of ORCA's Draft Conditions operates in tandem with Policy 3.3.7 of the OP which provides that any recommendations from ORCA, through consultation, will be implemented as conditions for approval of the proposed development;

(d) ORCA's engineering technologists had no concerns regarding nutrient loading or water quality in relation to the proposed stormwater management plan but would fully re-examine the final design at that phase of development;

(e) ORCA would, if the City directed a monitoring plan and requested assistance in that regard, also provide services with respect to onsite monitoring. This is in addition to ORCA's ongoing monitoring of the Loggerhead Marsh that would be forwarded to the City and the five-year post-construction review to determine and assess long term effects of the Subdivision (and other developments);

(f) ORCA considers that the PoS, with the included and recommended conditions, would be consistent with Policies 2.1 and 2.2 of the PPS.

The Loggerhead Marsh as a PSW - Natural Heritage Feature and Wildlife Habitat

[47] Upon the whole of the evidence, including that of the Objectors, there are very few differences, if any, in relation to the quality and status of the Loggerhead Marsh as a natural feature, wildlife habitat and PSW.

[48] The Marsh is a PSW having been formally designated as such by MNRF in August of 2016 (Exhibit 1, Tab 4, p. 45) as the proposed Subdivision was under review and discussion with the City. One of the reasons its designation was upgraded to a

PSW at that time was the identification of the area as a habitat for the Least Bittern, a species at risk that is listed as "threatened" and limited sighting of the Least Bittern in the Marsh. Under the *Endangered Species Act*, the Least Bittern, and its habitat, are accordingly protected.

[49] There have been no sightings of the Least Bittern for approximately 8 years, the last sighting being in 2009. The uncontradicted evidence of Mr. Ellingwood, who performed surveys in 2017 following accepted protocols, was that no sighting occurred. Ms. Hernould from the MNRF confirms, and there is no disagreement, that the absence of sightings is however not considered as evidence of the absence of the species. Her communication to the City of July 18, 2017, and that of Mr. Andy Baxter of the MNRF, dated February 16, 2017, (Exhibit 3, pages 70-78) confirms that MNRF considers the entire Loggerhead Marsh to be Least Bittern Habitat.

[50] Ms. Hernould's correspondence of July 18, 2017, as supplemented by her direct testimony, and Mr. Baxter's comments on behalf of MNRF, regarding Potential Endangered Species Act Requirements in his correspondence, succinctly summarizes the outstanding concern relating to potential impact of the Subdivision upon endangered species and the requirement of an Overall Benefit Permit under section 17(2)(c) of the ESA (in addition to any further modifications required for the Subdivision). As this was referred to in the evidence, the communication to Mr. Appleby of July 18, 2017 indicated as follows:

> The proposed building lot envelopes appear to come to within 37 metres of Loggerhead Marsh PSW boundaries. The close proximity and the associated increase in human activity to Least Bittern habitat is likely to have a negative impact on the Least Bittern individuals due to factors such as road mortality, pet predation/harassment, loss of movement corridors and the Bittern's general behavior of human/development avoidance. Section 9(1) of the ESA protects species listed as threatened or endangered from being killed, harmed or harassed.

[51] Ms. Hernould in her evidence confirmed that section 10 of the ESA was of relevance with respect to the Least Bittern's habitat. The lots that are referred to by Ms. Hernould in her correspondence, which are closest to the PSW boundary (at 37 m) are

Lots 76 to 79. The additional lots from 63 to 75, which are on the south side of “Street A”, with the other four lots, are the next closest lots to the PSW. As indicated on the Plan at Exhibit 10, the other parkland blocks and stormwater ponds add additional distance between the PSW and the point of closest residential occupancy (ie. the south boundaries of all residential lots).

[52] Mr. Ellingwood’s evidence as to the Least Bittern was forthright as he acknowledged that notwithstanding the absence of further sightings, and his doubt as to the continued presence of the Least Bittern in the PSW, the PSW was nevertheless considered as a protected Least Bittern Habitat under the instructive guidelines and protocols. There is agreement that the Least Bittern is an elusive and shy species that is not readily detected in surveys for various reasons.

[53] Despite pointing to complete absence of any siting of the Least Bittern in the surveys undertaken by Mr. Ellingwood’s team, following accepted protocols, the Applicant does not submit to the Tribunal anything other than the importance of protecting the Loggerhead Marsh, for the included purpose of compliance with the ESA, the PPS, the OP and the Jackson Creek SP, to the extent that the PSW is a habitat for the Least Bittern.

[54] Accordingly, for the purposes of the issues in this hearing, the Tribunal accepts, and finds that the Loggerhead Marsh is a PSW, which serves, in conjunction with its natural elements, a number of recognized ecological functions. As such, the Marsh is clearly a valuable natural heritage feature that has the benefit of protection and preservation through the policies in the PPS, as well as the City’s OP and the Loggerhead MMP. The Tribunal also finds that the PSW is currently recognized as a habitat for the Least Bittern, which is listed as an endangered species. Accordingly the Marsh and PSW must thus be recognized as a habitat that is protected under section 10 of the ESA from any damage or destruction. The boundaries of the Marsh have been determined with precision. The underlying fundamental value of the Loggerhead Marsh, as an important natural heritage feature on the edge of the Subdivision, is a basic

contextual premise that informs the analysis of the evidence.

[55] The Tribunal has no difficulty making these findings on the evidence provided by Mr. Ellingwood, Ms. Clinesmith on behalf of ORCA, Ms. Hernould on behalf of the MMNRF and Ms. Perron, Dr. Whillans and Mr. Murray on behalf of the Objectors.

[56] With this evidentiary basis, these contextual bases and those findings, the Tribunal must review the evidence, make the necessary determinations of consistency with the PPS policies, and conformity with the Growth Plan, the OP and the Jackson Creek SP, which relatedly requires compliance with sections 9 and 10 of the ESA, and decide the core issues outlined above.

[57] There is no dispute amongst the expert witnesses or the Parties in their submissions, that one of the primary determinations that must be made is whether the Subdivision, as it will be adjacent lands to the Loggerhead Marsh PSW will have “no negative impacts” upon the Loggerhead Marsh, and no damage or destruction to habitat under the ESA, and otherwise comply with the natural heritage, natural features and environmental policies identified in the evidence for the Tribunal.

Applicable Policies of the PPS

[58] The policies of the PPS include policies relating to the protection of natural heritage features. These policies are recognized as being important to the Province’s long-term prosperity, environmental health, and social well-being. Section 2.2.1 provides that “Natural features and areas shall be protected for the long term.” As indicated, the Loggerhead Marsh immediately to the south, and contiguous to the Subject Lands, has been identified as a PSW.

[59] Accordingly, the Subject Lands are “Adjacent Lands”, given their location, which is relevant to the Tribunal’s consideration of the PPS and the issues raised by the Objectors, and the planning issue of whether the Subdivision is consistent with the PPS. “Adjacent Lands” is defined in the PPS as follows:

Adjacent lands: means

a) *(omitted)*

b) for the purposes of policy 2.1.8, those lands contiguous to a specific natural heritage feature or area where it is likely that *development* or site alteration would have a negative impact on the feature or area. The extent of the *adjacent lands* may be recommended by the Province or based on municipal approaches which achieve the same objectives;

c) *(omitted)*; and

d) for the purposes of policy 2.6.3, those lands contiguous to a *protected heritage property* or as otherwise defined in the municipal official plan.

[60] The policy sections of the PPS that are particularly relevant to this hearing are as follows:

2.1 Natural Heritage

2.1.1 Natural features and areas shall be protected for the long term.

…

2.1.4 Development and site alteration shall not be permitted in:

a) significant wetlands in Ecoregions 5E, 6E and 7E1; and

b) significant coastal wetlands.

2.1.5 Development and site alteration shall not be permitted in:

….

d) significant wildlife habitat;

….

unless it has been demonstrated that there will be no negative impacts on the natural features or their ecological functions.

….

2.1.7 Development and site alteration shall not be permitted in habitat of endangered species and threatened species, except in accordance with provincial and federal requirements.

2.1.8 Development and site alteration shall not be permitted on adjacent lands to the natural heritage features and areas identified in policies 2.1.4, 2.1.5, and 2.1.6 unless the ecological function of the adjacent lands has been evaluated and it has been demonstrated that there will be no negative impacts on the natural features or on their ecological functions.

[61] Based on the evidence presented the Tribunal concludes that the Subdivision, and any site alteration that may occur, will not occur within the PSW, as it is a wildlife habitat, and the Tribunal finds that the Subdivision is accordingly consistent with those

policies.

[62] The Subdivision development however is obviously on adjacent lands to a PSW. The policy basis of the requirement for “no negative impact” is set out above. “Ecological functions” are defined as the natural processes, products or services that living and non-living environments provide or perform within or between species, ecosystems and landscapes and may include biological, physical and socio-economic interactions. Negative impacts is defined in the PPS as follows:

> **Negative impacts:** means
>
> ….
>
> b) in regard to Policy 2.2 degradation to the quality and quantity of water, sensitive surface water features and sensitive ground water features, and their related hydrologic functions, due to single, multiple or successive development or site alteration activities
>
> c) in regard to fish habitat, any permanent alteration to, or destruction of fish habitat, except where, in conjunction with the appropriate authorities, it has been authorized under the Fisheries Act; and
>
> d) in regard to other natural heritage features and areas, degradation that threatens the health and integrity of the natural features or ecological functions for which an area is identified due to single, multiple or successive development or site alteration activities.

[63] The Province provides its Natural Heritage Reference Manual which assists in the application of the PPS policies. A portion of the Manual was reviewed in the evidence (Exhibit 3, page 34 to 53) which describes the process of: sufficiently identifying and describing the natural heritage features and areas; identifying and analyzing the natural features and ecological functions on the site and the adjacent properties that may be affected by the development; identifying the mitigation or avoidance measures necessary to address the effect of the development on the functions; and then demonstrate that the identified mitigation or avoidance measures will ensure that no negative impacts will occur on the identified natural features or on the ecological functions.

[64] The City’s OP and Jackson Creek SP also contain policies relating to the

Loggerhead Marsh and the Natural Features which also address the development criteria and objectives which are consistent in requiring “no negative impacts on the natural features or their ecological functions.”

[65] Again, sections 9 and 10 of the ESA are also of significance as they relate to the protection of SAR and their habitat:

> ***Prohibition on killing, etc.***
>
> 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;
>
> ….
>
> ***Prohibition on damage to habitat, etc.***
>
> 10. (1) No person shall damage or destroy the habitat of,
>
> a) a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species; or
>
> b) a species that is listed on the Species at Risk in Ontario List as an extirpated species, if the species is prescribed by the regulations for the purpose of this clause.

The City Of Peterborough Official Plan (and Jackson Creek Secondary Plan)

[66] Mr. Appleby, Mr. Davidson and Mr. Fahner directed the Tribunal’s attention to the various provisions of the OP which address environmental and natural features, including specific reference to the Loggerhead Marsh. The Tribunal was provided with a copy of the City’s OP. It includes, as one of its Goals and Objectives, item 2.1.4:

> 2.1.4 Maximum effort should be made to preserve, protect and enhance both the natural and the urbanized landscape by providing careful attention to the integration of development with natural features in the urban environment. Such measures may include preservation and protection of historical properties, regulation of building construction, access to properties, regulation of signs, consideration of natural areas and environmentally sensitive lands. An assessment shall be made of the visual impact of each proposed development in relation to existing structures, land uses, street scape, natural areas and features.

[67] Policy 2.4.10 relating to Natural Heritage is familiar as it is consistent with the PPS polices:

> 2.4.10 **NATURAL HERITAGE**
>
> 2.4.10.1 Significant Natural features and areas shall be protected for the long term. Development and site alteration shall not be permitted in: a) significant habitat of endangered species and threatened species; b) significant wetlands.
>
> Development and site alteration shall not be permitted in:
>
> a) significant woodlands
>
> b) significant valley lands
>
> c) significant wildlife habitat; and
>
> d) significant areas of natural and scientific interest unless it has been demonstrated that there will be no negative impacts on the natural features or their ecological functions.
>
> 2.4.10.2 Development and site alteration shall not be permitted in fish habitat except in accordance with provincial and federal requirements.
>
> 2.4.10.3 Development and site alteration shall not be permitted on adjacent lands to the natural heritage features and areas identified in policies 2.4.10.1 unless the ecological function of the adjacent lands has been evaluated and it has been demonstrated that there will be no negative impacts on the natural features or their ecological functions.

[68] Policy 4.2.4.7 includes the following as one of the factors to be reviewed for any application for residential development:

> viii) The proximity of the site to, or presence of significant natural/environmental features and how the development is sensitive to these features.

[69] The general land use provisions of the OP includes section 3.3 which provides for Natural Areas which includes such features as woodlands, wetlands, watercourses or endangered or threatened species habitat. The Loggerhead Marsh PSW qualifies in all those respects. The stated purpose of the Natural areas is provided in the OP as follows:

PURPOSE

Natural Areas contain ecological features worth preserving as a part of a system of open space within the urban environment. Such areas may also include lands which buffer or physically link the Natural Areas as a part of a system of open space in order to:

1) support and protect the ecological functions of a natural area from the impact of development;

2) provide access to natural areas;

3) promote and integrate nature based recreation opportunities within parks and along walking trails and bicycle routes;

4) extend the connection between Natural Areas and the established trail system including the Rotary Greenway Trail, Jackson Park Trail and the Trans-Canada Trail System:

5) identify areas which may pose adverse conditions or physical constraints for development;

6) promote diversity in the approach to urban development by appropriate integration of natural areas to improve the quality of the urban environment.

[70] The OP then provides policies in Policy 3.3.5 relating to methods of protecting natural areas. Consistent with the PPS, the OP policies prohibit development or site alteration within a PSW. The policies in 3.3.6 govern all development applications, and the latter part of those, reinforce the same protection policies related to “adjacent lands” and no negative impact on the natural feature or its ecological functions.

3.3.5 **METHODS OF PROTECTION**

Development and site alteration is not permitted within provincially significant wetlands and significant portions of the habitat of endangered and threatened species as per the Provincial Policy Statement 1997 as may be amended from time to time.

The City of Peterborough may assist in the protection of identified Natural Areas through the following actions:

1) designating and zoning lands to permit land use that would be compatible with natural areas;

2) entering into agreements with land owners as a condition of development approvals involving rezoning, subdivision, variances or site plan approval. Such agreements may require the placement of siltation barriers, and fencing around the drip line of treed areas or other natural features during construction, and specific planting required to buffer or enhance natural features within a development plan. Adequate performance security to guarantee compliance with measures specified in the agreement will be required.

3) working in co-operation with the Conservation Authority or interested parties in entering into agreements involving the voluntary stewardship of natural areas or conservation easements;

4) retaining or acquiring ownership or partial rights to preserve and rehabilitate all or strategically significant portions of identified areas; and,

5) regulating the destruction or removal of trees from properties through the requirement of a permit.

6) permitting the alteration of sites and grades on the basis of approved plans for development or explicit permission.

Where development or redevelopment is proposed on lands that abut Natural Areas, the lands identified as natural areas may not necessarily be accepted as a part of the dedication for parkland or required under the Planning Act. The identification of Natural Areas under private ownership shall not imply that such areas are accessible to the public or that they will be purchased by the municipality or other public agency.

No adjustment of boundaries or removal of the identification of Natural Areas City of Peterborough Official Plan Consolidated December 31, 2017 will be considered by Council if the environmental features on the property identified in the Natural Areas Strategy are willfully altered, damaged or destroyed as determined by Council. Where such acts occur, Council may require the replacement or rehabilitation of such features as part of the approval for development involving the property.

3.3.6 **DEVELOPMENT APPLICATIONS**

The purpose of identifying Natural Areas is to avoid incompatible development in areas subject to physical or environmental constraints or that would interfere with the primary purpose or function of the natural area such as erosion control, a recharge area for ground water, or fish and wildlife habitat. The boundaries of the Natural Areas shown on Schedule C are general therefore revisions can be made as more detailed information is provided through an Environmental Study described under policy 3.3.7.

In the case of Provincially Significant Natural Areas, the boundaries include adjacent lands* set out as follows:

- ❑ 120 metres from Provincially significant wetlands;
- ❑ 50 metres from Provincially significant woodlands and valleylands, Areas of Scientific Interest, Wildlife habitat and the habitat of endangered or threatened species.
- ❑ 30 metres from the high water mark in the case of fish habitat*.

Development and site alteration may be permitted within the “adjacent lands” and in fish habitat, provincially significant woodlands, valleylands, wildlife habitat and areas of natural and scientific interest if it can be demonstrated that there will be no negative impacts on the natural feature or the ecological functions for which the area is identified. Development including plans for the alteration of grades and storm water management

affecting natural areas will be designed in accordance to the principles listed under policy 6.5.5.

[71] As the Tribunal has noted before, the Jackson Creek SP, as it emerged as a product of the Loggerhead MMP, within the City's OP, has specificity of application to the Subject Lands. The Objectives of the Jackson Creek SP set out in section 10.5.2, and the specific development policy relating to the Loggerhead Marsh in that SP, and the necessity of a minimum open space buffer are relevant:

10.5.2	**OBJECTIVES OF THE PLAN**
	Council adopts the following objectives for the Jackson Creek Secondary Plan:
10.5.2.1	To establish a residential community including those uses which are Integral to and supporting of a residential environment for the undeveloped lands south of Parkhill Road and east of Brealey Drive.
10.5.2.2	To recognize the Planning Area as a substantial new development and identify the need to anticipate development impacts on the surrounding neighbourhood and take reasonable actions to mitigate adverse impacts.
10.5.2.3	To provide for the protection and maintenance of the Loggerhead Marsh area by ensuring that development proposals proceed in accordance with the recommendations of the Loggerhead Marsh Management Plan.
10.5.2.4	To establish a transportation system that connects the community with the surrounding neighbourhood and is sensitive to alternative transportation modes, in particular, pedestrians and bicycles.
10.5.2.5	To establish a community open space system which preserves significant environmentally sensitive features within the Planning Area, with particular attention paid to Loggerhead Marsh and the two woodlots, and provides for diverse outdoor recreation opportunities and has the potential to connect to other open space systems outside of the Planning Area.
10.5.2.6	To establish a servicing strategy to link services in the Secondary Plan Area with services in the city in a cost-effective manner and ensure adequate standards are maintained for all services.
10.5.3	**DEVELOPMENT POLICIES**
	Development of the Planning Area shall take place in conformity with detailed regulations for all properties within the Planning Area established in the Zoning By-law and in accordance with the following policies:

….

10.5.3.6	When reviewing development proposals, the City will have regard for the existing natural features of the Secondary Planning Area, particularly Loggerhead Marsh and its outlet channel. Development proposals adjacent to the Loggerhead Marsh shall provide a minimum open space buffer as recommended in the Loggerhead Marsh Management Plan. This buffer is represented by the Management Boundary illustrated on Schedule 'G'.

[72] These planning policies have been considered by the Tribunal in the analysis, and examination of the evidence, which follows.

The Evidence, Analysis and Findings – Stormwater Management

[73] With respect to the matter of the Stormwater Management Plan, the Tribunal has considered all of the evidence before it, including the apprehensions expressed by the witnesses for the Objectors as to this sufficiency of the Stormwater Management Plan, and general concerns about water quality.

[74] On all of the evidence the Tribunal is satisfied that there are no genuine concerns or issues with respect to the Proposed Stormwater Management plan in relation to the Subdivision or the hydrology of the Loggerhead Marsh such that the Tribunal would conclude that there will be a negative impact upon the Loggerhead Marsh PSW from the adjacent Subdivision.

[75] In reaching this conclusion the Tribunal relies upon the following accepted evidence and conclusions, and makes the following findings, in regards to the Stormwater Management Plan and concerns relating to the hydrology of the Wetland:

a) Michael Davenport's evidence with respect to the engineering and design of a Stormwater Management Plan was considered together with the Stormwater Quality and Quantity Control Report and Functional Servicing Study, related design documentation prepared by his firm, and the

Hydrogeological Assessment Report prepared by Geo-Logic. All of this evidence was uncontradicted in the hearing.

b) There were some generalized concerns, without empirical data or assessed reports, expressed by the MNRF at one point based upon the comments in the EIS, but Mr. Ellingwood's testimony and his written Addendum of August 4, and Mr. Davenport's evidence and the above reports, indicate that the peak flow rates exiting the Subdivision from the westerly dry pond into Cell C of the Marsh will be reduced to levels at or below pre-development conditions but surface water flows from the westerly portion of the subdivision will continue to outlet into Cell C of the Marsh. No changes to the hydrology of the wetland, and in particular Cell C are anticipated and therefore no negative impacts from water-level fluctuations are expected from the Subdivision, post-construction, in terms of vegetation types and plant species composition.

c) The evidence presented in relation to the water budget and ground water analysis indicates that the post-development water balance calculations will result in an infiltration loss of 6.1% and a runoff increase of 7.4% and thus the post-development infiltration at the Site is expected to have minimal impact to the shallow water regime and deeper aquifer complexes.

d) Mr. Davenport's testimony indicates that the preliminary design and planned engineering infiltration processes planned for the Subdivision will substantially exceed the standards and provide the quality and quantity control requirements of the MECP which address all matters relating to bacteria, nitrates, hydro-carbons and phosphorous. This supports Mr. Davenport's opinion that he is "confident that there will be no negative impacts from relating to stormwater management and the hydrology of the Loggerhead Marsh".

e) The Objectors have provided no expert evidence to contradict Mr. Davenport's overview and opinions as to the specifics of the proposed stormwater design or the effects the proposed design will have on the hydrology of the wetland which have been relied upon by Mr. Ellingwood in his EIS as it relates to the hydrology of the PSW. The Tribunal has considered carefully the cross-examination of Mr. Davenport by Dr. Frost and finds that the strength and veracity of Mr. Davenport's opinions were not shaken or weakened.

f) Mr. Davenport has indicated that the general plan, as provided for, and the Site Plan, have been amended to address a number of concerns expressed by the City, and other agencies providing input, including ORCA. Despite the general issues raised by the Objectors as to the lack of sufficient information and detail, and concerns with respect to the information relating to the PSW, the Tribunal accepts Mr. Davenport's testimony that the specifics and details about all such matters relating to stormwater management and Subdivision design have been, and are, at this point adequate and fully informed. The information now obtained with respect to the Loggerhead Marsh, including its location and status as a PSW are known and there have been no uncertainties as to the relationship of the proposed Subdivision to the boundaries of the PSW (as a result of the redefined boundaries provided by MNRF in October of 2016).

g) Mr. Davenport's evidence indicates that there is nothing unusual, or out of the ordinary, with respect to this proposed Subdivision development in relation to the design of the Stormwater Management systems, and like the other developments within the sub-watershed of the Loggerhead Marsh the final design, construction and monitoring of the stormwater management plan and systems would be subject to review and assessment including the MECP.

h) In response to the suggestions as to a lack of detail, and questions in cross-examination, including those relating to the appropriateness of the dry pond, Mr. Davenport has stated that they have a solution that can, and will, meet all of the requirements that the City, ORCA, the MECP will determine to be necessary. In the permitting process to be undertaken in the final design phases of the Subdivision, if those requirements are not satisfied, then there will simply be "no construction taking place".

i) Pointedly, if the City's position and design requirements should be altered to allow for a wet pond to be used, Mr. Davenport has testified that it can be placed in the same location as is now shown for the southwesterly pond (which is in a number of location in the Exhibits, including the very last page of Tab 9, Exhibit 1)

j) Mr. Davenport specifically indicates that the Draft Conditions that relate to the stormwater management, that are already included in Exhibit 12, are commonly found in the standard form of subdivision agreements and will ensure that all aspects of the sanitary sewers, the streets, and the stormwater management plan will comply with Ministry and provincial standards, failing which the MECP will withhold the necessary permits to bring the systems online.

k) Mr. Davenport is of the opinion that the Stormwater Management Plan is adequately designed and planned, at this point in the process, to ensure that there will be no increase in runoff Peak flows in accordance with MECP guidelines and he is confident that the two stormwater ponds are more than adequate to handle a 100-year storm event. In Mr. Davenport's opinion the blocks allocated in the plan to stormwater management, and the drainage/infiltration systems, represent good engineering science for quality and quantity control. Again this evidence is uncontroverted expert evidence.

l) The Tribunal has also considered the context in which this Subdivision development is occurring within the Jackson Creek SP and the Loggerhead MMP that has been in place for some time and which expressly recognizes the Loggerhead Marsh watershed as a system around which development in this portion of the City has been, and will be, carefully regulated and controlled.

m) The Tribunal is mindful of the fact that the definition of "negative Impacts" relate to "…single, multiple or successive development or site alteration activities" and that the analysis of the issue of "no negative impact" must consider this development as the latest in a number of successive subdivision developments within the watershed of the Loggerhead Marsh and the Jackson Creek SP. In the Tribunal's mind however there is nothing, on the evidence, to suggest that the stormwater management plan for this Development in the Watershed does not follow the processes that have been continuing since 2001 under the Loggerhead MMP and the Jackson Creek SP which created the framework for development in this area as it relates to stormwater management. More importantly, there is no evidence to suggest that this Subdivision will, itself, substantially alter the condition of the hydrology of the Loggerhead Marsh.

n) The Tribunal has considered the evidence of Ms. Clinesmith on behalf of ORCA. Ms. Clinesmith's opinion is that the 30 m buffer in place and the reconfiguration of the southwestern stormwater pond of the subdivision will serve to protect the hydrological functions of the wetland, and in her view there will be no negative impact upon the PSW from the Subdivision and its Stormwater Management Ponds on the land adjacent to the PSW. Ms. Clinesmith states that the technical staff at ORCA have had the opportunity to consider the revised 30 m buffer and are satisfied that this is sufficient, and in her view is consistent with the policy requirements of

the PPS that there be no negative impact of the activities on the adjacent lands to the PSW.

o) On cross-examination Ms. Clinesmith confirmed that in the exercise of its ordinary responsibilities ORCA has provided advice to the City on matters relating to the Loggerhead Marsh and in this case, there is no requirement for further third-party peer review. She indicates that ORCA has relied upon, and followed, the usual protocols and the assessments undertaken by their on-staff watershed biologists to reach their conclusions. This included a consideration by their engineering technologist, of nutrient loading from the additional development in the Watershed from the subdivision.

p) In answer to Dr. Frost's inquiries, Ms. Clinesmith confirmed in cross-examination that ongoing monitoring of the Loggerhead Marsh will continue and will consider the cumulative effects of development in the Loggerhead Marsh watershed, as anticipated by the Loggerhead MMP and the mandate of ORCA. Ms. Clinesmith has also confirmed as well, that with the Conditions in place for the Subdivision ORCA's consultation and involvement would continue and that they will review, as necessary, the further stormwater management design and construction processes that will be monitored by the City and the MECP as the Subdivision progresses to that phase of development.

[76] Upon all of this evidence, the Tribunal finds that the Stormwater Management Plan, as it will permit the Subdivision, and importantly, as it will be subject to the remaining review and approval processes through the MECP, the City and ORCA, will not result in any negative impact upon the Loggerhead Marsh PSW, or its hydrology or ecological functions as a wetland and is thus consistent with the policies of the PPS, and conforms to the policies of the OP and the SP.

The Evidence, Analysis and Findings – Environmental, Ecology and ESA

[77] The Tribunal has considered the evidence of Mr. Ellingwood supported by the documentary evidence including his EIS and his addendums, and the evidence of Ms. Hernould who appeared on behalf of the MNRF. The Tribunal has also considered the opposing evidence from Dr. Whillans, and Dr. Murray, who are fellow scientists and professors, and Ms. Perron, a PhD student, in areas of Biology, as well as those Participants, who have voiced their concerns and objections regarding the Subdivision.

[78] Mr. Ellingwood's testimony, in conjunction with his EIS reports and subsequent communications were detailed and comprehensive. Some aspects of his evidence, and the findings, regarding the status of the Loggerhead Marsh PSW have already been addressed.

[79] The Objectors, relying upon the evidence of Dr. Whillans, Dr. Murray and Ms. Perron, have advanced a number of concerns and apprehensions regarding the adequacy and reliability of the EIS processes that have been completed by Mr. Ellingwood. The evidence that has been put before the Tribunal represents critical analyses of the EIS process and the conclusions reached. These experts are of course providing opinion evidence, but these opinions are not supported by alternative studies or assessments or other data undertaken or obtained by them.

[80] Neither Dr. Murray, Dr. Whillans, or Ms. Perron ever contacted ORCA or the MNRF in regards to their concerns and to discuss issues relating to the positions being taken by ORCA and MNRF. Their concern was noted that the EIS had not been subjected to other peer review, beyond the consultation and review by ORCA and MNRF. Although he did not exactly know about the expertise of the staff at ORCA, Dr. Murray was nevertheless critical of the expertise that exists with ORCA indicating that he did not think they had anyone there "at a PhD level", did not view them as impartial and independent and valued their assessment on the issues less than the MNRF.

[81] On the whole of the evidence presented, the Tribunal did not find that there was

any basis for the critical assessment of the reliability of opinions of, and positions taken by, ORCA and the MNRF as independent bodies acting under their respective mandates as directed by the Province. The Tribunal has also considered the rather entrenched views of Dr. Murray, Dr. Whillans and Ms. Perron that there was no value to engaging in any type of dialogue with ORCA or the MNRF in regards to their concerns as academics in the fields of biology and wetlands.

[82] Neither Dr. Murray nor Ms. Perron have ever completed an EIS, though Dr. Murray indicates that he teaches others how to do them. Dr. Whillans testified that he had reviewed the earlier EIS, but not the whole thing, and he looked only at "those portions that were of interest to him". Dr. Murray admitted that although he was aware of new documentation provided by the Applicant in relation to the environmental and stormwater and hydrology issues, he "didn't see it necessary" to have considered these addendums to the EIS.

[83] The Tribunal has considered the expert evidence and opinions cumulatively placed before the Tribunal in this hearing by Mr. Ellingwood, and by the representatives of ORCA and the MNRF. For the various reasons provided herein, overall, prefers the evidence of Mr. Ellingwood, Mr. Davenport and that of Ms. Hernould and Ms. Clinesmith over the apprehensions and critical desktop analysis undertaken by the Objectors' witnesses. While the Objectors' evidence has raised a number of reasonable concerns with respect to the EIS processes, and voiced various concerns as to some of the conclusions reached, the Tribunal does not find that the nature of this evidence is sufficient to alter the findings of the Tribunal. The Tribunal accepts the evidence that with the modifications presented, and the additional permitting, review, and vetting processes that will follow in the ordinary processes of developing this Subdivision, the Subdivision will not result in any negative impact upon the Loggerhead Marsh, or its ecological functions (assuming all permits are issued).

[84] The Tribunal also finds that the whole of the evidence submitted by the Objectors does not alter the Tribunal's findings that, with respect to policies and matters relating to

the environmental concerns, natural heritage features, the PSW, and the habitat of species at risk, the Subdivision is consistent with the PPS and conforms to the OP and the Jackson Creek SP.

[85] The findings set out in the paragraphs above are however subject to the important qualification and exception relating to the matter of impact of the Subdivision upon the habitat of the Least Bittern (or the Western Chorus Frog or boreal chorus frog if they are present within the PSW).

[86] In respect of the concerns expressed by Dr. Murray, Dr. Whillans, and Ms. Perron, and Mr. Parker on behalf of the Peterborough Field Naturalists, relating to the Least Bittern and the sufficiency of the buffer separation between the wetland boundary of the PSW and the southern-most limit of Lots 76-79 and Lots 63 to 75, the Tribunal accepts their evidence, which is consistent with the opinions and position taken by the MNRF with respect to the presence of human occupation in proximity to the PSW habitat for the Least Bittern. These are the same concerns expressed by the MNRF, and which were communicated in the correspondence of July 18, 2017 (and other correspondence).

[87] Ms. Hernould was summonsed to appear before the Tribunal by the Applicant. In her evidence Ms. Hernould indicated that the width of the buffer around the PSW was not a concern of MNRF with respect to matters relating to water quality, and that this required input from ORCA. In her testimony Ms. Hernould confirmed that there had been earlier concerns as to the sufficiency of the surveys conducted on certain species. However, based upon a further review of the EIS, and the subsequent addendums, Ms. Hernould stated that the MNRF did not have any remaining concerns regarding the Subdivision as it might adversely affect the list of the species investigated including: the Blanding's Turtle, the Eastern Meadowlark and Bobolink, the Eastern Whip-poor-will, Barn Swallows, Chimney Swifts, Spotted Turtles, various Bat Species and the Butternut.

[88] Ms. Hernould testified that the moderate intrusion of the southwestern stormwater management pond easterly into the southwest portion of the subdivision into

the woodlot was likely not a concern to the MNRF given the modifications that had been made from the prior design. Ms. Hernould did indicate that the newest design had not yet been reviewed by staff, but would again be reviewed in the context of the Permit application.

[89] Essentially, Ms. Hernould's evidence with respect to the Least Bittern was that the MNRF remained non-supportive on the important issue of whether the subdivision, as it was amended just prior to the hearing, would result in no negative impact upon the Least Bittern habitat. This was because the MNRF had not, unfortunately, had the opportunity to review Exhibit 10, which had increased the buffer to 30 m from the PSW. Ms. Hernould confirmed that the MNRF does not provide comments on the consistency of a proposed development to the PPS, and instead is concerned with issues relating to sections 9 and 10 of the ESA.

[90] The impact of the subdivision on the Least Bittern habitat remains as the real concern of the MNRF with respect to the Subdivision which will require further final review based upon the increased buffer of 30 m. In Ms. Hernould's view, the concern remains that the proposed subdivision might impact the Loggerhead Marsh PSW such that, under Section 10 of the ESA, there could be damage or destruction to the habitat of the Least Bittern.

[91] Ms. Hernould was, however, quite clear in her evidence that it was certainly possible for the Subdivision to move forward, if approved by the Tribunal, with the remaining issue to be addressed through the subsequent ESA permitting system as had been indicated in her correspondence of July 18, 2017. Ms. Hernould indicated that if a condition was included with the subdivision to ensure that no development would occur until such time as MNRF had processed an application for an Overall Benefit Permit under the ESA, and the Applicant then addressed such matters as were necessary to eliminate the concerns relating to sections 9 and 10 of the ESA, then this would satisfy the requirements of the ESA and the concerns relating to the Least Bittern.

[92] This opinion, to the extent that there remained the unresolved determination that

the Subdivision would not result in an impact upon the Least Bittern habitat, and thus result in a negative impact from adjacent lands contrary to the PPS policy, was shared by Dr. Murray, Dr. Whillans and Ms. Perron, and addressed in the Objectors' closing submissions at length.

[93] Ms. Hernould also indicated that given the results of the EIS that had been completed, which had failed to indicate the presence of the Least Bittern within the PSW at the time that the surveys were conducted, that further surveys could be undertaken over a three-year period and the issue re-examined by the MNRF. It was the view of the MNRF biologists that three consecutive years of monitoring would be necessary to determined conclusively whether the PSW was, or was not, habitat for the Least Bittern, as suspected by Mr. Ellingwood. Until those consecutive years are study are completed the MNRF remains firmly of the view that the Loggerhead Marsh is to be considered a habitat for an endangered species. This, as indicated, has led to the finding of the Tribunal that the Loggerhead Marsh is considered a Least Bittern habitat.

[94] On cross-examination Ms. Hernould also confirm that in the event such monitoring revealed the presence of other bird species or wildlife which were on the species at risk ("SAR") list, then this too would be examined by the MNRF under the permitting process of the ESA. Ms. Hernould indicated that the Western Chorus Frog was not included in the SAR list.

[95] Ms. Hernould confirmed in examination-in-chief, cross-examination and again in re-examination, that the MNRF's concerns as to the effect of the Subdivision, which were now limited to impact on the Least Bittern habitat, could be resolved in one of two ways: either consecutive years of monitoring could be undertaken to provide satisfactory confirmation that the Least Bittern was no longer using the Loggerhead Marsh as a habitat; or alternatively the Applicant could obtain an Overall Benefit Permit, and comply with directives and requirements of the MNRF to allow for the activities related to the installation of the subdivision to proceed on such terms. This was consistent with the written communications to the Applicant.

[96] It is clear to the Tribunal that those terms and requirements that could be imposed as necessary before the ESA permit was issued, could include further redesign of the Subdivision, and any number of recommendations. Based upon the evidence before the Tribunal, since the southernmost row of residential lots (Lots 63 to 79) appear to be quite relevant to the voiced concern of the MNRF (and the Objectors, who submit that the buffer distance should be a minimum of 120 m) the permit process could conceivably result in the continued presence of these southern-most lots in the PoS being raised as a concern in relation to the permit application.

[97] In any event, whatever further directives and requirements, or whatever required changes to the PoS, might be imposed by MNRF to allow the Applicant to gain access to the Permit necessary to eliminate the non-compliance with sections 9 and 10 of the ESA, and satisfy the condition, will have to be addressed by the Applicant. Clearly in the absence of compliance with the terms of the permit issued under Section 17(2)(c) of the ESA, the condition will not be waived and the Applicant cannot, and will not, proceed with the Subdivision plan as approved by the Tribunal. This was confirmed clearly by the Applicant in the closing submissions to the Tribunal.

[98] The Tribunal also finds on a point raised in the evidence that the Objectors, and Mr. Fahner, are incorrect on the sequencing order in which the events will occur and agrees with the evidence of Mr. Ellingwood, Ms. Hernould and the submissions of the Applicant. Based on the procedural requirements under the ESA, the MNRF will not process an application for an Overall Benefits Permit under s. 17(2)(c) of the ESA until such time as the Subdivision Agreement is in place and the activity which would be the subject matter of the permit application, is approved to proceed.

[99] The Tribunal has carefully considered the evidence provided by the Objectors and although there have been expressed concerns from the witnesses as to the sufficiency of the investigations undertaken to determine biological and ecological impacts upon the PSW, and concerns as to whether there has been adequate examination of the impact of the Subdivision on the ecological functions of the PSW,

the Tribunal prefers the evidence of Mr. Ellingwood and cannot conclude that there will otherwise be negative impact on Loggerhead Marsh or that the Subdivision will otherwise fail to conform with the requirements of the City's OP or the Jackson Creek SP as they relate to development in proximity to the Loggerhead Marsh.

[100] The Tribunal finds that the remaining concern relating to the Least Bittern, can, and will be fully addressed through the Permit application process under s. 17(2)(c) of the ESA. If the issues relating to Least Bittern Habitat, as communicated by Ms. Hernould in the evidence, cannot be addressed, the Subdivision will not move forward in its approved form. If modifications to the PoS (in the form of removal of some lots) and such other requirements under the Permit are satisfied, the Tribunal finds that there has been, and will be, proper regard for the existing natural features, and in particular the Loggerhead Marsh, under policy 10.5.3.6 of the Jackson Creek SP, the objectives of the SP, the protections afforded to the PSW as a protected Natural Area under policy 4.9.1 of the OP, and the policies relating to Natural Areas in section 3.3. of the OP.

[101] The Tribunal finds upon all of the evidence, including the entirety of the extended Environmental Impact Assessment undertaken by Mr. Ellingwood, on behalf of the Applicant, that, save and except for the negative impact that still exists with respect to the habitat of the Least Bittern (and any other SAR which the MNRF may wish to address), which can be further addressed through the ESA Permitting process, the Subdivision will be consistent with Policy 2.1 of the PPS. The Tribunal is satisfied that there will otherwise be no negative impact upon the Loggerhead Marsh as a PSW as a result of the Subdivision activity on the adjacent lands.

[102] With such additional directives, recommendations, measures, redesign and changes to the Subdivision that may be directed by the MNRF to allow for the issuance of the Overall Benefit Permit to be applied for by the Applicant pursuant to section 17(2)(c) of the ESA, and full compliance with such other additional directive and measures, the remaining negative impacts will be resolved. If they cannot be resolved, or if the Applicant is not prepared to comply, as the Condition is to be worded, then the

Subdivision will not be constructed, (just as it will not proceed if the MECP permits are not secured by the Applicant).

[103] Accordingly, the Tribunal is satisfied upon all of the evidence, and taking into account the operation of the ESA permit application processes, that the approval of the Subdivision with the necessary conditions in place, will be consistent with the PPS and conform to the environmental and protection policies in place in the City's OP and the Jackson Creek SP.

[104] The Condition relating to this aspect of the proposed Subdivision must ensure that the MNRF is afforded the full opportunity to respond to the Applicant's permit application, and through the City's review, be assured that the concerns relating to the Least Bittern, as an endangered species (and any other SAR), are fully addressed. As indicated, what form the directives, additional measures, or requested changes to the design of the Subdivision may take are unknown. It is unnecessary for the Tribunal to make that determination at this time as the Condition, as part of the planning approval process, will address this remaining concern.

[105] To summarize, upon the evidence that was presented, it is the proximity of lots 63 to 79, of the PoS, given their closest location to the boundary of the wetlands as established by the MNRF in October of 2016, and the sufficiency of the now-expanded setback, that poses one of the remaining concerns or impediments to adequately addressing sections 9 and 10 of the ESA. Whatever further measures or redesign may occur, to the satisfaction of the MNRF, will allow for the issuance of the permit and, in the Tribunal's view allows for the finding of consistency and conformity and good planning.

The Condition relating to the Least Bittern and SAR Habitat

[106] The Tribunal has considered the submissions of the Parties as to the form of the Condition necessary to ensure that there are no impacts upon the Least Bittern and any other species at risk, based upon the evidence in the hearing. Condition 34 in the

Conditions shall be replaced with the following imposed condition:

34. Notwithstanding the approvals given by the Tribunal, the Owner shall comply with the requirements of the *Endangered Species Act* and prior to any development, site alteration, or tree and vegetation clearing on the Site, and prior to final approval, the Owner shall, to the satisfaction of the MNRF, have undertaken such avoidance or mitigation measures, and requirements including site, timing or design revisions to the draft Plan of Subdivision, as are required by the MNRF to secure an Overall Benefit Permit related to any endangered and threatened species under clause 17(2)(c) of the *Endangered Species Act* and ensure, to the satisfaction of MNRF that there will be no negative impact arising from the Subdivision on the Least Bittern or other species at risk identified by MNRF, and it's, or their, habitat in the Loggerhead Marsh.

    For the purposes of this Condition, MNRF shall provide a clearance letter, together with a copy of the Permit, to the City which shall include a summary of the avoidance or mitigation measures and requirements (including site, timing or design revisions to the draft Plan of Subdivision) that were required by the MNRF in order to secure the required Overall Benefit Permit and a statement detailing how each of such measures or requirements, so imposed by MNRF, have been satisfied.

[107] This Condition shall form part of the amendments to the Draft Conditions as provided for below.

PLANNING

[108] The Tribunal has carefully reviewed and considered the planning evidence provided in this hearing from Mr. Applebey, on behalf of the City, Mr. Davidson on behalf of the Applicant, and Mr. Fahner, on behalf of the Objectors. Aside from the planning opinions from the planning experts in relation to consistency and conformity

with the PPS and the municipal planning instruments' policies relating to natural heritage and the environment, the opinions of the planners did not differ substantially.

Non-Environmental Planning Issues

[109] Leaving aside for the moment policies relating to natural heritage in the environment, the Tribunal has considered the evidence relating to consistency with the PPS and conformity with the growth plan. Mr. Applebee and Mr. Davidson are in agreement that the Subdivision, and the OPA and ZBLA that would facilitate the Subdivision, as presented at the hearing are consistent with the PPS policies dealing with efficient use of land and infrastructure, housing, intensification and transportation and Transit. They are also of the opinion, in reviewing relevant provisions of the Growth Plan that the Subdivision also conforms to policies relating to development in Designated Greenfield Areas, the promotion of "complete communities", policies relating to intensification and densities, as well as transportation and transit.

[110] Mr. Fahner provides no planning opinions on these matters in contradiction to those expressed by Mr. Davidson and Mr. Applebee.

[111] Again, leaving aside matters relating to environment, natural heritage features, stormwater management, and species at risk, there are really few, if any, contentious planning issues emerging from the evidence in relation to the City's OP and the Jackson Creek SP.

[112] Mr. Appleby and Mr. Davidson both provided a very comprehensive overview of the policies in the City's OP, and the Jackson Creek SP on behalf of the City, and their opinions with respect to conformity, as the OP would be amended by the OPA. Mr. Applebee indicates that as the PoS has been revised through consultations with the City planning staff, the unit configuration and densities have been adjusted and, as the development would contribute to density within the City, it would conform to the density policies of the OP and conform to the overall objectives of the Jackson Creek SP.

[113] Mr. Appleby and Mr. Davidson also agree that the realignment and shifting of Nornabell Avenue, the final Street pattern with internal streets connecting to the West and East, traffic management plans, and the framework of the Subdivision in relation to other development and the City's planning, would comply with all of the policies of the OP relating to existing use of infrastructure and services, traffic flow, efficient and compatible land uses, municipal services and the development criteria as provided for in the OP and the SP.

[114] Again, Mr. Fahuner's opinion evidence, as it relates to planning matters arising from the OP and the Jackson Creek SP that are not related to the protection of Natural Areas, environmental matters, water quality, ecology and environmental impact, does not challenge the planning opinions provided by Mr. Applebee and Mr. Davidson. Mr. Fahner's planning opinions have been almost entirely focused on issues of good planning, non-consistency and non-conformity in relation to the environmental matters.

[115] Accordingly the Tribunal finds, upon the planning evidence presented that save and except for the other environmental matters addressed briefly below (and dealt with in the analysis above) the Subdivision, and the OPA and the ZBLA are consistent with the PPS, conform to the Growth Plan, are in compliance with the provisions of the Act including all of the criteria set out in section 51(24), conform to the policies set out in the City's OP and the Jackson Creek SP, and represent good planning evidence in the public interest.

Environmental Planning Evidence - PSW, Natural Features, Natural Heritage, Ecological Functions, Water Quality and Stormwater Management

[116] The Tribunal's findings with respect to matters relating to environmental issues, ecology, endangered species and stormwater management have been fully addressed above.

[117] Upon a consideration of all of the evidence and the findings made, the Tribunal has made its findings regarding the singular outstanding matter of the potential negative

impact that might exist until such time as the Condition is satisfied. Upon those findings, with respect to all other matters relating to the PSW, Natural Heritage features, concerns relating to ecological functions of the Loggerhead Marsh, Natural Features as provided for in the City's OP, water quality, ecology and impacts arising from stormwater management, the Tribunal is satisfied that the Subdivision, and the OPA and the ZBLA are consistent with the PPS, conform to the Growth Plan, are in compliance with the provisions of the Act (including s. 51(24), conform to the policies set out in the City's OP and the Jackson Creek SP, and represent good planning evidence in the public interest.

[118] Specifically, having made its finding that there remains this existing concern of a potential negative impact upon the habitat of the Least Bittern, (and any other SAR that may also be found to be present by the MNRF as a result of any further and final investigations and assessment required by MNRF) that, in and of itself, might ordinarily lead the Tribunal to conclude that the Subdivision and the requested planning instruments should not be approved and would not represent good planning. However, for the reasons indicated, and upon the evidence provided, the Tribunal is satisfied that if Condition 34, as set out in paragraph 106, is included in the Conditions to the Subdivision agreement, and if the MNRF provides the necessary clearance that whatever other modifications or measures have been completed and taken, then upon the issuance of an Overall Benefit Permit by the MNRF pursuant to subsection 17(2)(c) of the ESA, there would, and will, be: consistency with the PPS; conformity with the OP and the Jackson Creek SP; regard for the criteria in s. 51(24) of the Act; and thus the Subdivision would, and will, represent good planning in the public interest.

Subdivision Conditions

[119] The Tribunal has considered and reviewed the Draft Conditions as they were originally set out in Exhibit 12, and then revised in final form, as a joint submission by the Applicant, the Whites and the City in the closing submissions.

[120] The primary condition of contention, Condition 34, has been addressed by the

Tribunal as set out above.

[121] The Tribunal has made some additional modifications to those Conditions based upon the evidence provided, and the submissions of counsel. These are attached as the facing page to the Conditions now approved by the Tribunal as set out in Attachment 3.

ORDERS

Official Plan Amendment – Appeal pursuant to section 22(7) of the *Planning Act*

[122] The Tribunal orders that the Appeal is allowed and the Official Plan for the City of Peterborough is amended as set out in **Attachment 1** to this Order. In the event any amendments to Attachment 1 are required as a result of revisions to the Plan of Subdivision arising from the satisfaction of the Conditions, including Condition 34, as provided for in paragraph 124 below, the Tribunal may be spoken to.

Zoning By-law Amendment – Appeal pursuant to section 34(11) of the *Planning Act*

[123] The Tribunal orders that the Appeal against By-law No. 97-123 of the City of Peterborough is allowed in part and By-law No. 97-123 is amended as set out in **Attachment 2** to this Order. In the event any amendments to Attachment 2 are required as a result of revisions to the Plan of Subdivision arising from the satisfaction of the Conditions, including Condition 34, as provided for in paragraph 124 below, the Tribunal may be spoken to.

Subdivision – Appeal pursuant to section 51(34) of the *Planning Act*

[124] Subject to the fulfillment of the Draft Conditions referred to below and any revision to the Plan of Subdivision that might arise from the satisfaction of the Conditions, including Condition 34, the Tribunal orders that the appeal is allowed in part

and the Draft Plan for the “Batten/White Subdivision” prepared by M.J. Davenport & Associates Limited dated November, 2016 (marked as Exhibit 10 in this Hearing and attached as **Attachment 4**) comprised of part of Lot 8, Concession 13, formerly in the Township of North Monaghan, being Part 1 of Plan 45R-8069 and Part 1 of Plan 45R-11202, in the City of Peterborough, is hereby approved.

[125] The approval is subject to the fulfillment of the Draft Conditions set out in **Attachment 3** to this Order which are based upon Exhibit 12 in the Hearing and filed in revised form as Appendix A to the closing submissions of the City.

[126] The Tribunal orders that pursuant to subsection 51(56.1) of the *Planning Act*, the City of Peterborough shall have the authority to clear the conditions of draft plan approval and to administer final approval of the plan of subdivision for the purposes of subsection 51(58) of the *Planning Act*. In the event there are any difficulties implementing any of the conditions of draft plan approval, or if any changes are required to be made to the draft plan, the Tribunal may be spoken to.

“David L. Lanthier”

DAVID L. LANTHIER
MEMBER

Canadian Pacific Limited *Appellant*

v.

Her Majesty The Queen in Right of Ontario *Respondent*

and

The Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General for Saskatchewan and Canadian Environmental Law Association *Interveners*

INDEXED AS: ONTARIO *v.* CANADIAN PACIFIC LTD.

File No.: 23721.

1995: January 24; 1995: July 20.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Fundamental justice — Vagueness — Use of reasonable hypotheticals — Overbreadth — Environmental protection law drafted in very broad terms — Whether or not law capable of interpretation so as to allow for legal debate — Environmental Protection Act, R.S.O. 1980, c. 141, ss. 1(1)(c), (k), 13(1)(a) — Canadian Charter of Rights and Freedoms, s. 7.

During controlled burns along the appellant's railway right-of-way, dense smoke escaped onto adjacent properties. This led to complaints about injuries to health and property, and the appellant was charged under s. 13(1)(*a*) of Ontario's *Environmental Protection Act* (EPA). This provision constitutes a broad and general prohibition of the pollution "of the natural environment for any use that can be made of it". CP's acquittal in the Provincial Offences Court of Ontario was overturned on appeal to the Ontario Court of Justice, Provincial Division and a further appeal to the Court of Appeal was dismissed. The constitutional issues that were raised in that court were appealed here. The first, that the Ontario EPA was not constitutionally applicable to CP, a federal undertaking, was dismissed here as *Canadian*

Canadien Pacifique Limitée *Appelante*

c.

Sa Majesté la Reine du chef de l'Ontario *Intimée*

et

Le procureur général du Québec, Le procureur général du Manitoba, Le procureur général de la Saskatchewan et L'Association canadienne du droit de l'environnement *Intervenants*

RÉPERTORIÉ: ONTARIO *c.* CANADIEN PACIFIQUE LTÉE

N° du greffe: 23721.

1995: 24 janvier; 1995: 20 juillet.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Justice fondamentale — Imprécision — Utilisation d'hypothèses raisonnables — Portée excessive — Loi sur la protection de l'environnement rédigée en termes très généraux — La loi peut-elle être interprétée de manière à donner lieu à un débat judiciaire? — Loi sur la protection de l'environnement, L.R.O. 1980, ch. 141, art. 1(1)c), k), 13(1)a) — Charte canadienne des droits et libertés, art. 7.

Le brûlage contrôlé effectué par l'appelante sur son emprise ferroviaire a rejeté une fumée épaisse sur les propriétés adjacentes. Des citoyens ont porté plainte en invoquant qu'ils avaient subi des conséquences préjudiciables pour leur santé et leurs biens, et des accusations ont été portées contre l'appelante en vertu de l'al. 13(1)*a*) de la *Loi sur la protection de l'environnement* de l'Ontario (LPE). Cette disposition constitue une interdiction générale de pollution «de l'environnement naturel relativement à tout usage qui peut en être fait». L'acquittement de CP par la Cour des infractions provinciales de l'Ontario a été infirmé lors de l'appel interjeté devant la Division provinciale de la Cour de justice de l'Ontario, et un autre appel interjeté devant la Cour d'appel a été rejeté. Les questions constitutionnelles qui

Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours, [1899] A.C. 367, was determinative of the issue. The second, that s. 13(1)(*a*), and in particular the words "for any use that can be made of [the natural environment]", was unconstitutionally vague, overbroad, and therefore in violation of s. 7 of the *Canadian Charter of Rights and Freedoms*, remained.

Held: The appeal should be dismissed.

Per La Forest, L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci and Major JJ.: Section 13 (1)(*a*) EPA was neither unconstitutionally vague nor overbroad, and clearly covered the pollution activity at issue.

A law will be found unconstitutionally vague if it is so lacking in precision as not to give sufficient guidance for legal debate. Legislative precision is required because of (1) the need to provide fair notice to citizens of prohibited conduct and, (2) the need to proscribe enforcement discretion. Vagueness must be considered within the larger context and not *in abstracto*. A court can only determine whether an impugned provision affords sufficient guidance for legal debate after its interpretative role has been exhausted.

Using broad and general terms in legislation may well be justified. Section 7 of the *Charter* does not preclude the legislature from relying on the judiciary to determine whether those terms apply in particular fact situations. The standard of legal precision required by s. 7 will vary depending on the nature and subject matter of a particular legislative provision. A deferential approach should be taken in relation to legislation with legitimate social policy objectives.

The purpose of the EPA is to provide for the protection and conservation of the natural environment. Environmental protection has an obvious social importance and yet the nature of the environment does not lend itself to precise codification. In the context of environmental protection legislation, a generally framed pollution prohibition may be desirable from a public policy perspective. The generality of s. 13(1)(*a*) ensures flexi-

avaient été soulevées devant cette cour font l'objet du présent pourvoi. La première question, savoir qu'à titre d'établissement fédéral, CP ne pouvait, en vertu de la constitution, être assujettie à l'application de la LPE, a été rejetée parce que l'arrêt *Canadian Pacific Railway Co. c. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367, a réglé cette question. Il restait à statuer sur la seconde question, savoir que l'al. 13(1)*a*) et, en particulier, les termes «relativement à tout usage qui peut en être fait [de l'environnement naturel]» sont d'une imprécision inconstitutionnelle et d'une portée excessive et, par conséquent, violent l'art. 7 de la *Charte canadienne des droits et libertés*.

Arrêt: Le pourvoi est rejeté.

Les juges La Forest, L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci et Major: L'alinéa 13(1)*a*) LPE n'est pas d'une imprécision inconstitutionnelle ni d'une portée excessive, et il vise manifestement l'activité polluante en cause.

Une loi sera jugée d'une imprécision inconstitutionnelle si elle manque de précision au point de ne pas constituer un guide suffisant pour un débat judiciaire. Cette précision législative est requise en raison (1) de la nécessité de donner aux citoyens un avertissement raisonnable au sujet d'une conduite interdite et (2) de la nécessité d'interdire que la loi soit appliquée de façon discrétionnaire. La question de l'imprécision doit être appréciée dans un contexte interprétatif plus large et non dans l'abstrait. C'est uniquement après s'être acquitté intégralement de son rôle d'interprétation qu'un tribunal est en mesure de déterminer si la disposition attaquée fournit un guide suffisant pour un débat judiciaire.

Le recours à des dispositions législatives générales peut fort bien se justifier. L'article 7 de la *Charte* n'empêche pas le législateur de se fonder sur le pouvoir judiciaire pour déterminer si ces dispositions sont applicables à des situations factuelles particulières. La norme de précision législative exigée par l'art. 7 varie selon la nature et le contenu de chaque disposition législative particulière. Il faudrait faire preuve de retenue à l'égard des dispositions législatives qui cherchent à atteindre des objectifs de politique sociale légitimes.

La LPE a pour objet d'assurer la protection et la conservation de l'environnement naturel. L'importance de la protection de l'environnement pour la société est évidente mais, de par sa nature, l'environnement ne se prête pas à une codification précise. Dans le contexte des lois sur la protection de l'environnement, il est préférable d'un point de vue de politique d'intérêt public de formuler les dispositions prohibant la pollution en

bility in the law, so that the EPA may respond to a wide range of environmentally harmful scenarios which could not have been foreseen at the time of its enactment.

The fair notice element of vagueness analysis has procedural and substantive aspects. Procedural notice, which involves the mere fact of bringing the text of a law to the attention of citizens who are presumed to know the law is not a central concern of vagueness analysis. Instead, the focus of the analysis is the substantive aspect — an understanding that some conduct comes under the law. Whether citizens appreciate that the particular conduct is subject to legislative sanction is inextricably linked to societal values.

The purpose and subject matter of s. 13(1)(*a*) EPA, the societal values underlying it, and its nature as a regulatory offence, all have some bearing on the analysis of the s. 7 vagueness claim. Because environmental protection is an important societal value, legislators must have considerable room to manoeuvre in regulating pollution. Section 7 must not be employed to hinder flexible and ambitious legislative approaches to environmental protection.

To secure a conviction under s. 13(1)(*a*) EPA, the Crown must prove: (1) that the accused has emitted a contaminant; (2) that the contaminant was emitted into the natural environment; and (3) that the contaminant caused or was likely to cause the impairment of the quality of the natural environment for any use that can be made of it. The statutory definitions of "contaminant" and "natural environment" provide the basis for legal debate as to what constitutes a "contaminant" and the "natural environment". The term "impairment" has been the subject of legal debate in other contexts and provides the basis for legal debate. Judicial interpretation of what constitutes a "use" of the natural environment is easily accomplished through various interpretive techniques. The word must be considered in its context, should be interpreted in a manner which avoids *de minimis* applications and absurd results, and may be considered in contexts other than environmental law. These principles demonstrate that s. 13(1)(*a*) does not attach penal consequences to trivial or minimal impairments of the natural environment, nor to the impairment of a use of the natural environment which is merely con-

termes généraux. La généralité de l'al. 13(1)*a*) assure la souplesse de la loi, de sorte que la LPE puisse répondre à une vaste gamme d'hypothèses d'atteintes à l'environnement qui ne pouvaient être envisagées au moment de son adoption.

Dans l'analyse relative à l'imprécision, l'exigence d'un avertissement raisonnable comporte deux volets, l'un touchant la forme et l'autre, le fond. L'aspect de l'avertissement qui touche la forme, et qui se limite au seul fait d'attirer l'attention des citoyens sur le texte de la loi, dont la connaissance est présumée, n'est pas une question centrale dans une analyse relative à l'imprécision. L'analyse doit plutôt se concentrer sur le fond de l'avertissement raisonnable — la conscience qu'une conduite est répréhensible en droit. Le fait que les citoyens soient conscients ou non qu'une conduite particulière entraîne sanction de la loi est inextricablement lié aux valeurs de la société.

L'objectif et le contenu de l'al. 13(1)*a*) LPE, les valeurs sociétales qui le sous-tendent, de même que la nature réglementaire de l'infraction qu'il prévoit ont tous une incidence sur l'analyse de l'imprécision alléguée au regard de l'art. 7. La protection de l'environnement étant une valeur sociétale importante, les législateurs doivent disposer d'une grande marge de manœuvre en matière de réglementation de la pollution. L'article 7 ne doit pas nuire aux démarches législatives souples et d'envergure en matière de protection de l'environnement.

Pour obtenir une déclaration de culpabilité sous le régime de l'al. 13(1)*a*) LPE, le ministère public doit prouver: (1) que l'accusé a rejeté un contaminant; (2) que le contaminant a été rejeté dans l'environnement naturel, et (3) que le rejet du contaminant a causé ou risquait de causer la dégradation de la qualité de l'environnement naturel relativement à tout usage qui peut en être fait. Les définitions législatives fournissent matière à débat judiciaire sur ce qui constitue un «contaminant» et l'«environnement naturel». Le terme «dégradation» («*impairment*») a été l'objet de débats judiciaires dans d'autres contextes et il fournit le fondement d'un tel débat. L'interprétation judiciaire de ce qui constitue un «usage» de l'environnement naturel est facile à faire grâce à diverses techniques d'interprétation. Ce terme doit être examiné dans son contexte, il doit être interprété d'une manière qui empêche des applications *de minimis* et des absurdités, et il peut être examiné dans d'autres contextes que celui du droit de l'environnement. Ces principes établissent que l'al. 13(1)*a*) ne rattache pas de sanctions pénales aux dégradations négligeables ou minimes de l'environnement naturel, ni à la

ceivable or imaginable. A degree of significance, consistent with the objective of environmental protection, must be found in relation to both the impairment, and the use which is impaired.

After taking these interpretive principles and aids into account, the scope of s. 13(1)(*a*) is reasonably delineated, and legal debate can occur as to its application to a specific fact situation. This is all that s. 7 of the *Charter* requires.

Although its conduct fell within the "core" of polluting activity prohibited by s. 13(1)(*a*), CP is challenging the provision by relying on hypothetical fact situations which fall at the "periphery". Peripheral vagueness arises where a statute applies without question to a core of conduct but applies with uncertainty to other activities. Peripheral vagueness is the basis for the argument that the expression "for any use that can be made of [the natural environment]" is vague because it is not qualified as to time, degree, space or user, and thus fails to delineate clearly an "area of risk" for citizens.

Reasonable hypotheticals, however, have no place in the vagueness analysis under s. 7. There is no need to consider hypothetical fact situations, since it is clear after an analysis of the provision and its context that the law either provides or does not provide the basis for legal debate, thereby either satisfying or infringing the requirements of s. 7 of the *Charter*.

Unlike the analysis for overbreadth, where reasonable hypotheticals may be advanced, proportionality plays no role in vagueness analysis. When considering a vagueness claim, a court is required to perform its interpretive function in order to determine if an impugned provision provides the basis for legal debate. The comparative nature of proportionality is, therefore, not an element of vagueness analysis.

Section 13(1)(*a*) is not overbroad. Environmental protection is a legitimate concern of government and a very broad subject matter which does not lend itself to precise codification. The legislature, when pursuing the objective of environmental protection, is justified in choosing equally broad legislative language in order to provide for a necessary degree of flexibility. Section

dégradation d'un usage de l'environnement naturel qui n'est que concevable ou imaginable. Tant la dégradation que l'usage qui est affecté doivent avoir une certaine importance, compatible avec l'objectif de la protection de l'environnement.

Une fois que l'on a tenu compte de ces principes et moyens d'interprétation, la portée de l'al. 13(1)*a*) est raisonnablement délimitée et il peut y avoir un débat judiciaire sur son application à une situation factuelle particulière. C'est là tout ce qu'exige l'art. 7 de la *Charte*.

Bien que sa conduite fasse partie du «noyau» de l'activité polluante interdite par l'al. 13(1)*a*), CP conteste cette disposition en se fondant sur des situations de fait hypothétiques qui se trouvent en «périphérie». L'imprécision périphérique se produit lorsqu'une loi s'applique incontestablement au noyau d'une conduite, mais aussi, de façon incertaine, à d'autres activités. L'imprécision périphérique est le fondement de l'argument suivant lequel l'expression «relativement à tout usage qui peut en être fait [de l'environnement naturel]» est imprécise parce qu'elle n'est pas définie pour ce qui est du temps, du degré, de l'espace ou de l'utilisateur et que, partant, elle ne délimite pas clairement une «sphère de risque» pour les citoyens.

Les hypothèses raisonnables n'ont toutefois pas leur place dans une analyse de l'imprécision au regard de l'art. 7. Il n'est pas nécessaire d'examiner des situations factuelles hypothétiques puisqu'il appert clairement, après une analyse de la disposition et de son contexte, que la loi fournit ou non un fondement pour un débat judiciaire et, par conséquent, satisfait ou contrevient aux exigences de l'art. 7 de la *Charte*.

Contrairement à l'analyse de la portée excessive où il est possible d'avancer des hypothèses raisonnables, le facteur de la proportionnalité n'a aucun rôle à jouer dans l'analyse de l'imprécision. Le tribunal qui examine une prétention d'imprécision doit s'acquitter de sa fonction d'interprétation afin de déterminer si la disposition attaquée fournit un fondement pour un débat judiciaire. La nature comparative du facteur de proportionnalité ne constitue donc pas un élément de l'analyse de l'imprécision.

L'alinéa 13(1)*a*) n'a pas une portée excessive. La protection de l'environnement constitue une préoccupation légitime du gouvernement et il s'agit d'un sujet très vaste qui ne se prête pas aisément à une codification précise. Lorsque le législateur poursuit l'objectif de la protection de l'environnement, il a le droit de choisir un langage législatif tout aussi général afin de permettre un

13(1)(*a*), while it captures a broad range of polluting conduct, does not apply to pollution with only a trivial or minimal impact on a use of the natural environment. Moreover, the "use" condition limits the application of s. 13(1)(*a*) by requiring the Crown to establish not only that a polluting substance has been released, but also that an actual or likely use of the environment, which itself has some significance, has been impaired by the release. Speculative or purely imaginary uses of the environment are not captured by the provision. These limits on the application of s. 13(1)(*a*) prevent it from being deployed in situations where the objective of environmental protection is not implicated.

It was not necessary to decide whether the independent principle of overbreadth, as outlined in *R. v. Heywood*, is available to the appellant in the circumstances of this case. Section 13(1)(*a*) is simply not overbroad.

Per Lamer C.J. and Sopinka and Cory JJ.: Section 13(1)(*a*) of the Ontario EPA meets the test for vagueness under s. 7 in that it provides sufficient guidance for legal debate. The claim that the section is unconstitutionally overbroad also fails.

The availability of a defence can be relevant to s. 7 vagueness analysis if the fact that the defence exists sheds light on the meaning to be ascribed to an otherwise vague provision. The availability of the defence of due diligence, however, has no bearing on the question of whether s. 13(1)(*a*) EPA is unconstitutionally vague. This defence does not protect an accused from the consequences of his or her erroneous interpretation of a vague statutory provision and does nothing to impose standards on how such a provision is applied. Its availability is thus of no relevance to the s. 7 vagueness analysis.

Arguments based on hypothetical examples generally have little or no bearing on the s. 7 vagueness analysis since the task of a court conducting the analysis is to determine whether the law at issue provides "sufficient guidance for legal debate", as distinct from actually interpreting it. This conclusion, however, is not based on any doctrine of standing similar to that found in U.S. case law (such as *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982)). As this Court has

degré de souplesse nécessaire. Bien qu'il englobe une vaste gamme de conduites polluantes, l'al. 13(1)*a*) n'inclut pas la pollution qui n'a qu'une incidence négligeable ou minime sur l'usage de l'environnement naturel. Par ailleurs, l'exigence d'un «usage» limite l'application de l'al. 13(1)*a*) en imposant au ministère public qu'il établisse non seulement qu'une substance polluante a été rejetée, mais aussi qu'un usage réel ou vraisemblable de l'environnement, ce qui en soi a une certaine importance, a été détérioré par le rejet. La disposition n'englobe pas les usages hypothétiques ou purement imaginaires de l'environnement. Ces restrictions empêchent le recours à l'al. 13(1)*a*) dans des situations où l'objectif de la protection de l'environnement n'est pas en jeu.

Il n'est pas nécessaire de déterminer si l'appelante peut, dans les circonstances de l'espèce, invoquer le critère autonome de portée excessive, esquissé dans l'arrêt *R. c. Heywood*. L'alinéa 13(1)*a*) n'a tout simplement aucune portée excessive.

Le juge en chef Lamer et les juges Sopinka et Cory: L'alinéa 13(1)*a*) LPE satisfait au critère relatif à l'imprécision au regard de l'art. 7 en ce qu'il constitue un guide suffisant pour permettre un débat judiciaire. La prétention suivant laquelle cet article est inconstitutionnel pour cause de portée excessive ne peut non plus être retenue.

La possibilité d'invoquer un moyen de défense peut être pertinente dans le cas d'une analyse de l'imprécision au regard de l'art. 7 si l'existence de ce moyen de défense éclaire le sens à donner à une disposition par ailleurs imprécise. Toutefois, l'existence de la défense de diligence raisonnable n'a aucun rapport avec la question de savoir si l'al. 13(1)*a*) LPE est d'une imprécision inconstitutionnelle. Ce moyen de défense ne protège pas la personne accusée contre l'interprétation erronée qu'elle peut faire d'un libellé législatif imprécis et n'a pas pour effet d'imposer des normes quant à la façon d'appliquer cette disposition. Par conséquent, l'existence de ce moyen de défense n'est pas pertinent pour l'analyse de l'imprécision au regard de l'art. 7.

Les arguments fondés sur des situations factuelles hypothétiques ont généralement peu de rapport, sinon aucun, avec l'analyse de l'imprécision au regard de l'art. 7 étant donné que la tâche du tribunal appelé à procéder à cette analyse consiste à déterminer si la loi en cause fournit «un guide suffisant pour un débat judiciaire» plutôt que de procéder effectivement à son interprétation. Toutefois, cette conclusion n'est pas fondée sur quelque théorie de la qualité pour agir apparentée aux

held on many occasions, a person charged with an offence in Canada need not show that the law at issue directly infringes his or her constitutional rights in order to have standing to raise a constitutional challenge. However, the fact that an accused's conduct clearly falls within the ambit of the impugned provision may still be relevant to the s. 7 vagueness analysis since the fact that an identifiable "core" of prohibited activity can be identified will often be a strong indicator that the terms of the law provide sufficient guidance for legal debate. It should also be noted that s. 7 vagueness claims will often be raised in conjunction with other arguments that do call for a consideration of hypothetical examples.

As this Court held in *R. v. Heywood*, s. 7 overbreadth analysis requires a comparison of the state's objectives underlying a statutory provision with the means it has chosen to achieve these objectives. In order to make such a comparison, it is necessary to interpret the statutory provision in question so as to determine what the means at issue are. The key to the interpretation of s. 13(1)(*a*) EPA is the expression "impairment of the quality of the natural environment for any use that can be made of it". Interpreting this expression requires that meaning be ascribed to two distinct phrases: the phrases "impairment of the quality" and "for any use that can be made [of the natural environment]".

Ordinarily, it can be presumed that a statute's literal meaning, as construed in the context of the statute as a whole, best reflects the intention of the legislature. In some cases, however, this presumption can be countered by the competing presumption that the legislature does not intend to violate the constitution. If the words in a statutory provision reasonably bear an interpretation other than a literal reading, the presumption of constitutionality can sometimes justify rejecting the literal interpretation in favour of the non-literal reading, when the former interpretation would render the legislation unconstitutional and the latter would not. If, however, the terms of the legislation are so unequivocal that no real alternative interpretation exists, respect for legislative intent requires that the court adopt the plain meaning, even if the legislation must then be struck down as unconstitutional.

principes retenus dans des affaires américaines (comme *Hoffman Estates c. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982)). Comme l'a statué notre Cour à de nombreuses reprises, la personne accusée d'une infraction au Canada n'est pas tenue de démontrer que la loi en cause viole directement ses droits constitutionnels pour qu'on lui reconnaisse la qualité pour soulever une contestation constitutionnelle. Toutefois, le fait que la conduite de l'accusé relève clairement de la disposition attaquée peut être pertinent pour l'analyse de l'imprécision au regard de l'art. 7 étant donné que le fait que l'on puisse déterminer un «noyau» identifiable d'activité prohibée sera souvent un bon indice pour conclure que la loi constitue un guide suffisant pour un débat judiciaire. Il faut également noter qu'il arrive souvent que les prétentions d'imprécision au regard de l'art. 7 soient associées à d'autres arguments qui eux exigent un examen de situations hypothétiques.

Comme notre Cour l'a statué dans l'arrêt *R. c. Heywood*, pour procéder à l'analyse de la portée excessive au regard de l'art. 7, il faut comparer les objectifs qui sous-tendent une disposition législative et les moyens choisis par l'État pour les atteindre. Pour effectuer une telle comparaison, il est nécessaire d'interpréter la disposition législative en cause pour déterminer la nature des moyens. La clé de l'interprétation de l'al. 13(1)*a*) LPE est l'expression «dégradation de la qualité de l'environnement naturel relativement à tout usage qui peut en être fait». L'interprétation de cette expression nécessite l'attribution d'un sens à deux propositions distinctes: «dégradation de la qualité» et «relativement à tout usage qui peut en être fait [de l'environnement naturel]».

Normalement, on peut présumer que le sens littéral d'une loi interprétée dans son contexte global reflète le mieux l'intention du législateur. Dans certains cas, toutefois, cette présomption peut être réfutée par l'autre présomption selon laquelle le législateur ne souhaite pas violer la constitution. Si les mots figurant dans une disposition législative peuvent raisonnablement recevoir une interprétation différente du sens littéral, la présomption de constitutionnalité permet parfois de rejeter l'interprétation littérale en faveur de celle qui ne l'est pas, lorsque la première interprétation, mais non la dernière, aurait pour effet de rendre la loi inconstitutionnelle. Toutefois, si les termes de la loi sont à ce point non équivoques qu'il n'existe aucune autre interprétation possible, c'est le sens ordinaire que le tribunal doit adopter par respect pour l'intention du législateur, même si la loi doit être annulée parce qu'elle est inconstitutionnelle.

The expression "for any use that can be made of [the natural environment]" has an identifiable literal or "plain" meaning when viewed in the context of the EPA as a whole, particularly the other paragraphs of s. 13(1). When the terms of the other paragraphs are taken into account, it can be concluded that the literal meaning of the expression "for any use that can be made of [the natural environment]" is "any use that can conceivably be made of the natural environment by any person or other living creature". In ordinary circumstances, once the "plain meaning" of the words in a statute have been identified there is no need for further interpretation. Different considerations can apply, however, in cases where a statute would be unconstitutional if interpreted literally. This is one of those exceptional cases, in that a literal interpretation of s. 13(1)(*a*) would fail to meet the test for overbreadth established in *Heywood*.

The state objective underlying s. 13(1)(*a*) EPA is, as s. 2 of the Act declares, "the protection and conservation of the natural environment". This legislative purpose, while broad, is not without limits. In particular, the legislative interest in safeguarding the environment for "uses" requires only that it be preserved for those "uses" that are normal and typical, or that are likely to become normal or typical in the future. Interpreted literally, s. 13(1)(*a*) would capture a wide range of activities that fall outside the scope of the legislative purpose underlying it, and would fail to meet s. 7 overbreadth scrutiny. There is, however, an alternative interpretation of s. 13(1)(*a*) that renders it constitutional. Section 13(1)(*a*) can be read as expressing the general intention of s. 13(1) as a whole, and paras. 13(1)(*b*) through (*h*) can be treated as setting out specific examples of "impairment[s] of the quality of the natural environment for any use that can be made of it". When viewed in this way, the restrictions place on the word "use" in paras. (*b*) through (*h*) can be seen as imported into (*a*) through a variant of the *ejusdem generis* principle. Interpreted in this manner, s. 13(1)(*a*) is no longer unconstitutionally overbroad, since the types of harms captured by paras. (*b*) through (*h*) fall squarely within the legislative intent underlying the section. In light of the presumption that the legislature intended to act in accordance with the constitution, it is appropriate to adopt this interpretation of s. 13(1)(*a*). Thus, the subsection should be understood as covering the situations captured by paras.

L'expression «relativement à tout usage qui peut en être fait [de l'environnement naturel]» a un sens littéral ou «ordinaire» identifiable lorsqu'elle est considérée dans le contexte global de la LPE, particulièrement dans celui des autres alinéas du par. 13(1). Lorsque l'on tient compte des termes utilisés dans les autres alinéas, on peut conclure que le sens littéral de l'expression «relativement à tout usage qui peut en être fait [de l'environnement naturel]» est «tout usage concevable qui peut être fait de l'environnement naturel par toute personne ou autre créature vivante». Dans des circonstances normales, dès que le «sens ordinaire» des mots employés dans une loi a été circonscrit, point n'est besoin de pousser plus loin l'exercice d'interprétation. Toutefois, diverses considérations peuvent s'appliquer dans des affaires où l'interprétation littérale d'une loi rendrait celle-ci inconstitutionnelle. La présente espèce appartient à ces affaires exceptionnelles en ce sens que s'il devait recevoir une interprétation littérale, l'al. 13(1)*a*) ne satisferait pas au critère relatif à la portée excessive établi dans l'arrêt *Heywood*.

L'objectif de l'État qui sous-tend l'al. 13(1)*a*) LPE est, selon le libellé de l'art. 2 de la Loi, «la protection et la conservation de l'environnement naturel». Bien que la portée des intentions du législateur soit générale, elle n'est pas illimitée. En particulier, l'intérêt du législateur dans la protection de l'environnement pour certains «usages» exige seulement qu'il soit préservé pour les «usages» qui sont normaux et typiques, ou qui sont susceptibles de le devenir un jour. Interprété littéralement, l'al. 13(1)*a*) engloberait une vaste gamme d'activités qui débordent la portée de son objectif législatif sous-jacent, et ne satisferait pas à l'examen de la portée excessive au regard de l'art. 7. L'alinéa 13(1)*a*) peut toutefois recevoir une autre interprétation qui le rend constitutionnel. Il est possible d'interpréter l'al. 13(1)*a*) comme l'expression de l'objet général du paragraphe dans son ensemble et de voir en chacun des al. 13(1)*b*) à *h*) l'énonciation d'exemples spécifiques de «dégradation de la qualité de l'environnement naturel relativement à tout usage qui peut en être fait». Vues de cette façon, les restrictions apportées au mot «usage» aux al. *b*) à *h*) peuvent être perçues comme incluses dans l'al. *a*) par une variante de la règle *ejusdem generis*. Interprété de cette manière, l'al. 13(1)*a*) cesse d'être inconstitutionnel en raison d'une portée excessive, puisque les types de maux englobés par les al. *b*) à *h*) sont clairement visés par l'intention législative sous-jacente à la disposition. Compte tenu de la présomption selon laquelle le législateur a voulu agir dans le respect de la constitution, il y a lieu d'interpréter l'al. 13(1)*a*) de cette façon. Par conséquent, l'alinéa devrait être compris comme incluant les

13(1)(*b*) through (*h*), and any analogous situations that might arise.

The term "impairment" supports two alternative interpretations: it can be seen as covering even slight departures from the norm or, alternatively, as requiring a more marked departure. When interpreting a term that on its face bears two equally plausible meanings, it is appropriate to consider the consequences that would result from applying either interpretation to the statutory provision at issue, and to ask whether these consequences can plausibly be seen as having been intended by the legislature. If the term "impairment" in s. 13(1)(*a*) were interpreted as capturing all slight departures from the norm, virtually everyone in Ontario would regularly be in contravention of the section, and thus subject to fines or imprisonment. While the legislature has a legitimate interest in controlling pollution that results from multiple sources, each one insignificant in itself (such as air pollution resulting from automobile emissions) the legislature clearly did not consider the threat of imprisonment to be an appropriate means of addressing problems of this nature (for example, the legislature clearly did not contemplate the imprisonment of all Ontario drivers). Rather, the legislature intended to reserve the threat of imprisonment as a deterrent aimed at persons whose activities contribute significantly to an environmental problem. When the term "impairment" in s. 13(1)(*a*) is interpreted in this manner, the impugned provision is not overbroad in relation to the underlying legislative purpose.

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By Gonthier J.

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situations visées par les al. 13(1)*b*) à *h*) et les situations analogues qui pourraient se présenter.

Le terme «dégradation» permet deux interprétations: on peut considérer qu'il vise même un faible écart par rapport à la norme ou, subsidiairement, qu'il exige un écart plus marqué. Lorsqu'il faut interpréter un terme qui, à première vue, peut permettre deux sens également plausibles, il y a lieu d'examiner les conséquences qui pourraient découler de l'une ou l'autre interprétation de la disposition législative en cause et de se demander si ces conséquences peuvent d'une manière plausible avoir été voulues par le législateur. Si on devait interpréter le mot «dégradation» de l'al. 13(1)*a*) comme incluant tous les faibles écarts par rapport à la norme, pratiquement tous les Ontariens contreviendraient régulièrement à cet disposition et seraient donc passibles d'amendes et de peines d'emprisonnement. Même si le législateur a un intérêt légitime à assurer l'élimination de la pollution découlant de nombreuses sources qui, prises individuellement, n'ont qu'un effet négligeable (comme la pollution de l'air découlant des émissions dégagées par les automobiles), il est évident qu'il n'a pas pensé que la menace d'emprisonnement soit un moyen approprié pour résoudre les problèmes de cette nature (par exemple, le législateur n'a manifestement pas envisagé l'emprisonnement de tous les conducteurs en Ontario). Le législateur entend plutôt réserver la menace d'emprisonnement comme moyen de dissuasion pour les personnes dont les activités contribuent de façon importante à un problème d'environnement. Lorsque le mot «dégradation» figurant à l'al. 13(1)*a*) est interprété de cette manière, la disposition attaquée n'a pas une portée excessive eu égard à l'objectif législatif sous-jacent.

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Citée par le juge Gonthier

Arrêt suivi: *Canadian Pacific Railway Co. c. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367; **arrêt appliqué:** *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606; **arrêt examiné:** *R. c. Commander Business Furniture Inc.* (1992), 9 C.E.L.R. (N.S.) 185; **arrêts non suivis:** *Hoffman Estates c. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); *Parker c. Levy*, 417 U.S. 733 (1974); **arrêts mentionnés**: *R. c. Morgentaler* (1985), 52 O.R. (2d) 353; *R. c. Lopes* (1988), 3 C.E.L.R. (N.S.) 78; *R. c. Royal Pacific Seafarms Ltd.* (1989), 7 W.C.B. (2d) 355; *Québec (P.G.) c. Noranda Inc. (Mines Noranda Ltée)* (1989), 4 C.E.L.R. (N.S.) 158; *R. c. Algoma Steel Corp.* (1991), 14 W.C.B. (2d) 264; *R. c. Satellite Construction Ltd.* (1992), 8 C.E.L.R. (N.S.) 215; *R. c. Wholesale*

Group Inc., [1991] 3 S.C.R. 154; *R. v. Stellato* (1993), 78 C.C.C. (3d) 380, aff'd [1994] 2 S.C.R. 478; *R. v. McKenzie* (1955), 111 C.C.C. 317; *R. v. Smith* (1992), 73 C.C.C. (3d) 285; *R. v. Winlaw* (1988), 13 M.V.R. (2d) 112; *R. v. Bruhjell*, [1986] B.C.J. No. 746 (QL); *R. v. Campbell* (1991), 87 Nfld. & P.E.I.R. 269; *The "Reward"* (1818), 2 Dods. 265, 165 E.R. 1482; *Qualico Developments Ltd. v. M.N.R.* (1984), 51 N.R. 387; *Galt Art Metal Co. v. Pedlar People Ltd.*, [1935] O.R. 126; *Elias v. Insurance Corp. of British Columbia* (1992), 95 D.L.R. (4th) 303; *Watts v. Centennial Insurance Co.* (1967), 62 W.W.R. 175; *Rockert v. The Queen*, [1978] 2 S.C.R. 704; *Stevenson v. R.* (1980), 19 C.R. (3d) 74; *Conlin v. Prowse* (1993), 109 D.L.R. (4th) 243; *Pickering Twp. v. Godfrey*, [1958] O.R. 429; *R. v. Zundel* (1987), 58 O.R. (2d) 129; *R. v. LeBeau* (1988), 41 C.C.C. (3d) 163; *Thornhill v. Alabama*, 310 U.S. 88 (1940); *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Goltz*, [1991] 3 S.C.R. 485; *R. v. Heywood*, [1994] 3 S.C.R. 761.

By Lamer C.J.

Applied: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; **considered**: *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *R. v. Creighton*, [1993] 3 S.C.R. 3; **not followed**: *Parker v. Levy*, 417 U.S. 733 (1974); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); **referred to**: *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299; *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *R. v. Heywood*, [1994] 3 S.C.R. 761; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. DeSousa*, [1992] 2 S.C.R. 944; *Smithers v. The Queen*, [1978] 1 S.C.R. 506; *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Hibbert*, [1995] 2 S.C.R. 973.

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Citée par le juge en chef Lamer

Arrêt appliqué: *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606; **arrêts examinés:** *Comité pour la République du Canada c. Canada*, [1991] 1 R.C.S. 139; *R. c. Creighton*, [1993] 3 R.C.S. 3; **arrêts non suivis:** *Parker c. Levy*, 417 U.S. 733 (1974); *Hoffman Estates c. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); **arrêts mentionnés:** *R. c. Keegstra*, [1990] 3 R.C.S. 697; *R. c. Ville de Sault Ste-Marie*, [1978] 2 R.C.S. 1299; *Broadrick c. Oklahoma*, 413 U.S. 601 (1973); *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *R. c. Morgentaler*, [1988] 1 R.C.S. 30; *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 154; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *Schachter c. Canada*, [1992] 2 R.C.S. 679; *R. c. Heywood*, [1994] 3 R.C.S. 761; *R. c. McIntosh*, [1995] 1 R.C.S. 686; *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *R. c. DeSousa*, [1992] 2 R.C.S. 944; *Smithers c. La Reine*, [1978] 1 R.C.S. 506; *R. c. Smith*, [1987] 1 R.C.S. 1045; *R. c. Hibbert*, [1995] 2 R.C.S. 973.

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Dobbs Ferry, N.Y.: Transnational Publishers, Inc., 1992.

APPEAL from a judgment of the Ontario Court of Appeal (1993), 13 O.R. (3d) 389, 63 O.A.C. 222, 103 D.L.R. (4th) 255, 10 C.E.L.R. (N.S.) 169, 81 C.C.C. (3d) 498, 22 C.R. (4th) 238, 15 C.R.R. (2d) 278, allowing an appeal from a judgment of Fraser Prov. Div. J. (1992), 9 C.E.L.R. (N.S.) 26 allowing an appeal from acquittal by the Provincial Offences Court of Ontario. Appeal dismissed.

H. C. Wendlandt and *G. Despars*, for the appellant.

David Lepofsky and *Pat Moran*, for the respondent.

Jean Bouchard, for the intervener the Attorney General of Quebec.

Kenneth J. Tyler and *Stewart J. Pierce*, for the intervener the Attorney General of Manitoba.

Graeme G. Mitchell, for the intervener the Attorney General for Saskatchewan.

Richard D. Lindgren, for the intervener Canadian Environmental Law Association (written submission only).

The reasons of Lamer C.J. and Sopinka and Cory JJ. were delivered by

LAMER C.J. — I have read the reasons of my colleague Justice Gonthier, and find myself in substantial agreement with his analysis of the appellant's claim that s. 13(1)(*a*) of the Ontario *Environmental Protection Act*, R.S.O. 1980, c. 141 ("EPA"), is unconstitutionally vague, subject to certain additional comments that I will set out below. In particular, I agree with my colleague's conclusion that the section provides sufficient guidance for legal debate, and therefore meets the test for vagueness set out by this Court in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606. On the question of the actual interpretation

Law: Basic Instruments and References. Dobbs Ferry, N.Y.: Transnational Publishers, Inc., 1992.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1993), 13 O.R. (3d) 389, 63 O.A.C. 222, 103 D.L.R. (4th) 255, 10 C.E.L.R. (N.S.) 169, 81 C.C.C. (3d) 498, 22 C.R. (4th) 238, 15 C.R.R. (2d) 278, qui a accueilli l'appel contre un jugement du juge Fraser de la Cour de l'Ontario, Division provinciale (1992), 9 C.E.L.R. (N.S.) 26, qui avait accueilli l'appel contre l'acquittement prononcé par la Cour des infractions provinciales de l'Ontario. Pourvoi rejeté.

H. C. Wendlandt et *G. Despars*, pour l'appelante.

David Lepofsky et *Pat Moran*, pour l'intimée.

Jean Bouchard, pour l'intervenant le procureur général du Québec.

Kenneth J. Tyler et *Stewart J. Pierce*, pour l'intervenant le procureur général du Manitoba.

Graeme G. Mitchell, pour l'intervenant le procureur général de la Saskatchewan.

Richard D. Lindgren, pour l'intervenante l'Association canadienne du droit de l'environnement (arguments écrits seulement).

Version française des motifs du juge en chef Lamer et des juges Sopinka et Cory rendus par

LE JUGE EN CHEF LAMER — J'ai lu les motifs de mon collègue le juge Gonthier et, sous réserve de certains commentaires additionnels que je ferai plus loin, je souscris essentiellement à l'analyse qu'il a faite de la prétention de l'appelante selon laquelle l'al. 13(1)*a*) de la *Loi sur la protection de l'environnement* de l'Ontario, L.R.O. 1980, ch. 141, («LPE») serait d'une imprécision inconstitutionnelle. En particulier, je souscris à sa conclusion que la disposition fournit un guide suffisant pour permettre un débat judiciaire et qu'elle satisfait donc au critère relatif à l'imprécision énoncé par notre Cour dans *R. c. Nova Scotia Pharmaceu-*

that should be given to s. 13(1)(*a*), however, I find that although my colleague and I adopt substantially similar interpretations of the section, we reach our conclusions on the basis of different principles of construction. Therefore, while I agree with Gonthier J. that the appellant's alternative claim that the section is unconstitutionally overbroad also fails, and that the appeal should accordingly be dismissed, I arrive at this conclusion by a somewhat different route from that taken by my colleague.

I. The Section 7 Vagueness Claim

2 In *Nova Scotia Pharmaceutical Society*, the Court (*per* Gonthier J.) established the test for assessing "void for vagueness" claims under s. 7 of the *Canadian Charter of Rights and Freedoms*, declaring (at p. 643) that "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate". As my colleague observes in his reasons, vague laws have the potential to violate the requirements of the principles of fundamental justice that citizens be provided with fair notice of prohibited conduct, and that there be adequate safeguards against selective and arbitrary law enforcement. As I noted above, on the issue of vagueness I am in substantial agreement with Gonthier J.'s s. 7 analysis, and with his conclusion that s. 13(1)(*a*) EPA is not unconstitutionally vague. I wish, however, to make a few brief comments in connection with two points: the relevance of the existence of a defence of due diligence to the issue of vagueness under s. 7, and the role of "reasonable hypotheticals" in the s. 7 vagueness analysis.

A. *The Relevance of the Defence of Due Diligence to Section 7 Vagueness Analysis*

tical Society, [1992] 2 R.C.S. 606. Toutefois, pour ce qui est de l'interprétation à donner à l'al. 13(1)(*a*), j'estime que, même si nous adoptons des interprétations essentiellement semblables, mon collègue et moi fondons nos conclusions sur des principes d'interprétation différents. Par conséquent, quoique je convienne avec le juge Gonthier que ne peut être retenue la prétention subsidiaire de l'appelante voulant que cette disposition soit inconstitutionnelle pour cause de portée excessive et que le pourvoi doit donc être rejeté, j'arrive à cette conclusion par une voie quelque peu différente de la sienne.

I. La prétention d'imprécision au regard de l'art.7

Dans l'arrêt *Nova Scotia Pharmaceutical Society*, notre Cour (le juge Gonthier) a établi le critère d'appréciation des prétentions de «nullité pour cause d'imprécision» au regard de l'art. 7 de la *Charte canadienne des droits et libertés* en déclarant (à la p. 643) qu'«une loi sera jugée d'une imprécision inconstitutionnelle si elle manque de précision au point de ne pas constituer un guide suffisant pour un débat judiciaire». Comme le note mon collègue dans ses motifs, les lois imprécises risquent de violer les principes de justice fondamentale selon lesquels les citoyens doivent recevoir un avertissement raisonnable au sujet d'une conduite interdite et disposer de garanties adéquates contre l'application sélective et arbitraire de la loi. Comme je l'ai dit plus haut, en ce qui concerne la question de l'imprécision, je suis essentiellement d'accord avec l'analyse au regard de l'art. 7 qu'a faite le juge Gonthier et avec sa conclusion que l'al. 13(1)*a*) LPE n'est pas d'une imprécision inconstitutionnelle. Je voudrais toutefois faire quelques brefs commentaires sur deux points: la pertinence, relativement à l'imprécision, de l'existence d'un moyen de défense fondé sur la diligence raisonnable, et le rôle des «hypothèses raisonnables» dans l'analyse de l'imprécision au regard de l'art. 7.

A. *La pertinence de la défense de diligence raisonnable dans l'analyse de l'imprécision au regard de l'art. 7*

In its submissions, the respondent argued that the fact that persons charged with violations of s. 13(1)(*a*) can raise a defence of "due diligence" was relevant to the issue of whether the subsection fails s. 7 vagueness analysis. With respect, I do not agree that the availability of the defence of due diligence has any bearing on the question of whether the impugned provision in the present case is unconstitutionally vague. In my view, while the fact that a defence exists will often shed light on the meaning that is to be ascribed to an otherwise vague provision, and thus be relevant to s. 7 vagueness analysis, this is not the case with every defence. What is important is the relation between the defence and the terms of the statute that are said to be unconstitutionally imprecise. In *R. v. Keegstra*, [1990] 3 S.C.R. 697, for instance, the defences established in s. 319(3) of the *Criminal Code*, R.S.C., 1985, c. C-46, to prosecutions for "wilfully promoting hatred" under s. 319(2) provided considerable assistance in interpreting the ambit of the offence in s. 319(2). As Dickson C.J. observed (at p. 779, in the context of considering vagueness under s. 1 of the *Charter*):

[The s. 319(3)] defences are . . . intended to aid in making the scope of the wilful promotion of hatred more explicit; individuals engaging in the type of expression described [in s. 319(3)] are thus given a strong signal that their activity will not be swept into the ambit of the offence. The result is that what danger exists that s. 319(2) is overbroad or unduly vague, or will be perceived as such, is significantly reduced.

In contrast, the fact that the defence of due diligence is available does not help provide a basis for interpreting the term "use" in s. 13(1)(*a*) of the Ontario EPA. As Dickson J. (as he then was) noted in *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, at p. 1326:

[The defence of due diligence] involves consideration of what a reasonable man would have done in the circum-

Dans son argumentation, l'intimée a soutenu que le fait que les personnes accusées d'avoir enfreint l'al. 13(1)*a*) puissent invoquer la «diligence raisonnable» comme moyen de défense était pertinent quant à la question de savoir si l'alinéa échoue à l'analyse de l'imprécision au regard de l'art. 7. Avec égards, je ne puis conclure que l'existence de la défense de diligence raisonnable ait quelque rapport avec la question de savoir si la disposition attaquée en l'espèce est d'une imprécision inconstitutionnelle. À mon avis, même s'il arrive souvent que l'existence d'un moyen de défense éclaire le sens à donner à une disposition par ailleurs imprécise et, partant, soit pertinente relativement à l'analyse de l'imprécision au regard de l'art. 7, cela n'est pas le cas pour tous les moyens de défense. L'important, c'est le lien entre le moyen de défense et les termes de la loi censés être d'une imprécision inconstitutionnelle. Dans l'arrêt *R. c. Keegstra*, [1990] 3 R.C.S. 697, par exemple, les moyens de défense établis au par. 319(3) du *Code criminel*, L.R.C. (1985), ch. C-46, contre des accusations d'avoir «foment[é] volontairement la haine», au sens du par. 319(2), ont beaucoup aidé à interpréter la portée de l'infraction prévue à ce paragraphe. Comme le dit le juge en chef Dickson (à la p. 779, dans le cadre d'un examen de l'imprécision au regard de l'article premier de la *Charte*): 3

Ces moyens de défense [prévus au par. 319(3)] servent [. . .] à aider à préciser de façon plus explicite la portée de la fomentation volontaire de la haine; ils indiquent clairement aux personnes se livrant au genre d'expression ainsi décrite [au par. 319(3)] que cette activité échappe à la portée de l'infraction. Il en résulte une diminution appréciable du danger, s'il en est, que le par. 319(2) soit de portée trop large ou démesurément vague, ou qu'il soit ainsi perçu.

Par contre, le fait qu'on puisse invoquer la diligence raisonnable comme moyen de défense n'aide pas à l'établissement d'une base pour l'interprétation du mot «usage» figurant à l'al. 13(1)*a*) LPE. Comme l'a dit le juge Dickson (plus tard Juge en chef) dans l'arrêt *R. c. Ville de Sault Ste-Marie*, [1978] 2 R.C.S. 1299, à la p. 1326: 4

[La défense de diligence raisonnable] comporte l'examen de ce qu'une personne raisonnable aurait fait dans

stances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

The defence does not, however, protect an accused from his or her erroneous interpretation of the terms of a statute, since this is an error of law rather than of fact. This sort of error is, of course, the type most likely to arise as a consequence of vague language having been used in a statute. Although the defence of due diligence prevents some actors from being found liable under s. 13(1)(*a*), it does nothing to impose standards on the application of the section in other cases. In my view, since the availability of the defence does nothing to address the problems that might potentially arise as a result of the imprecise language employed by the drafters of s. 13(1)(*a*), it is of no relevance to the s. 7 vagueness analysis.

B. *The Role of Reasonable Hypotheticals in Section 7 Vagueness Analysis*

I agree with Gonthier J.'s conclusion that arguments based on hypothetical fact situations will generally have little or no bearing on the analysis that is required when assessing s. 7 vagueness claims. I wish to emphasize, however, that this results from the nature of the s. 7 vagueness analysis itself, as set out in *Nova Scotia Pharmaceutical Society*, *supra*, rather than as a consequence of any limitations on standing akin to those found in American case law. As *Nova Scotia Pharmaceutical Society* indicates, the task of a court conducting s. 7 vagueness analysis is to determine whether the law at issue provides "sufficient guidance for legal debate". Put another way, the court must determine whether the words chosen by the legislature provide an adequate foundation upon which to anchor an interpretation of the law that provides adequate notice of prohibited conduct and guards against "standardless sweeps". Determining whether a law can be interpreted in this manner is, however, a distinct process from actually interpreting the law.

les circonstances. La défense sera recevable si l'accusé croyait pour des motifs raisonnables à un état de faits inexistant qui, s'il avait existé, aurait rendu l'acte ou l'omission innocent, ou si l'accusé a pris toutes les précautions raisonnables pour éviter l'événement en question.

Ce moyen de défense ne protège toutefois pas la personne accusée contre l'interprétation erronée qu'elle peut faire du libellé de la loi puisqu'il s'agit d'une erreur de droit plutôt que de fait. Ce type d'erreur est, bien sûr, celui qui risque le plus de se produire par suite de l'emploi d'un libellé législatif imprécis. Même si elle permet à certains d'éviter d'être jugés responsables sous le régime de l'al. 13(1)*a*), la défense de diligence raisonnable n'a pas pour effet d'imposer des normes quant à l'application de cette disposition à d'autres affaires. À mon avis, puisque l'existence de ce moyen de défense ne contribue aucunement à résoudre les problèmes qui pourraient survenir en raison de l'utilisation d'un libellé imprécis par les rédacteurs de l'al. 13(1)*a*), elle n'est pas pertinente pour l'analyse de l'imprécision au regard de l'art. 7.

B. *Le rôle des hypothèses raisonnables dans l'analyse de l'imprécision au regard de l'art. 7*

Je suis d'accord avec la conclusion du juge Gonthier qu'en général les arguments fondés sur des situations factuelles hypothétiques ont peu de rapport, sinon aucun, avec l'analyse que requiert l'examen des prétentions d'imprécision au regard de l'art. 7. Je voudrais toutefois souligner que cela découle, à mon avis, de la nature même de l'analyse de l'imprécision au regard de l'art. 7, telle qu'elle a été établie dans l'arrêt *Nova Scotia Pharmaceutical Society*, précité, plutôt que de l'imposition de quelque limite à la qualité pour agir, comme celles que l'on retrouve dans la jurisprudence américaine. Comme l'indique l'arrêt *Nova Scotia Pharmaceutical Society*, la tâche du tribunal appelé à procéder à une analyse de l'imprécision au regard de l'art. 7 consiste à déterminer si la loi en cause fournit «un guide suffisant pour un débat judiciaire». En d'autres termes, le tribunal doit déterminer si les mots choisis par le législateur fournissent un fondement adéquat pour ancrer une interprétation de la loi qui donne un avis adéquat

While a court that actually interprets a law also demonstrates in the process that the law is capable of interpretation, the converse is not true — it is possible to establish that a law is capable of being interpreted while leaving for another day the actual problem of interpreting it. When called on actually to interpret a law, a court will usually be required to draw lines separating prohibited from non-prohibited conduct. In so doing, considering how the law would apply to hypothetical fact situations will often be a useful analytical tool. In contrast, when analysing whether a law is capable of being interpreted, recourse to such hypotheticals will often be unnecessary, since all that is required is that it be established that the law provides sufficient guidance to direct the interpretive exercise.

du comportement prohibé et qui ne laisse pas une «large place à l'arbitraire». C'est une chose de déterminer si une loi peut être interprétée de cette façon, et une tout autre chose de procéder effectivement à l'interprétation de la loi. S'il est vrai que le tribunal qui interprète une loi se trouve, par le fait même, à démontrer que la loi peut faire l'objet d'une interprétation, la réciproque ne l'est pas — il est possible d'établir qu'une loi peut faire l'objet d'une interprétation tout en reportant à plus tard la tâche de procéder à son interprétation. Lorsqu'il est effectivement appelé à interpréter une loi, le tribunal doit habituellement tracer des lignes de démarcation entre la conduite interdite et celle qui ne l'est pas. Dans ce processus, le recours à des situations factuelles hypothétiques pour déterminer comment la loi pourrait s'y appliquer constitue souvent un outil analytique utile. Par contre, lorsqu'il s'agit de déterminer si une loi peut faire l'objet d'une interprétation, il est souvent inutile de recourir à de telles situations hypothétiques puisqu'il suffit simplement d'établir que la loi constitue un guide suffisant pour orienter le processus d'interprétation.

Although hypothetical examples are thus of limited utility when conducting s. 7 vagueness analysis of legislation, I wish to emphasize that this conclusion has nothing whatsoever to do with the question of who has standing to challenge the legislation's constitutionality. More specifically, this conclusion is not based on any doctrine of standing similar to that found in American cases such as *Parker v. Levy*, 417 U.S. 733 (1974), and *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), cases that were relied on by the trial judge and the Court of Appeal in the present case. In *Parker*, the U.S. Supreme Court held, at p. 756, that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness". This position was subsequently reaffirmed in *Hoffman Estates*, *supra*, where the court stated, at p. 495:

6 Même si je conclus que les exemples hypothétiques sont ainsi d'une utilité limitée lorsqu'il s'agit de procéder à une analyse de l'imprécision de la loi au regard de l'art. 7, je voudrais souligner que cela n'a absolument rien à voir avec la question de savoir qui a qualité pour contester la constitutionnalité de la loi. De façon plus précise, cette conclusion n'est pas fondée sur quelque théorie de la qualité pour agir apparentée aux principes retenus dans des affaires américaines comme *Parker c. Levy*, 417 U.S. 733 (1974), et *Hoffman Estates c. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), décisions sur lesquelles se sont fondés le juge du procès et la Cour d'appel en l'espèce. Dans *Parker*, la Cour suprême des États-Unis a conclu (à la p. 756) que [TRADUCTION] «[c]elui dont la conduite est clairement visée par une loi ne peut l'attaquer avec succès pour cause d'imprécision». Cette position fut réaffirmée dans la décision *Hoffman Estates*, précitée, où la cour a dit (à la p. 495):

A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law

[TRADUCTION] Le demandeur qui s'engage dans une conduite qui est clairement prohibée ne peut se plaindre

as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

This approach accords with the general American doctrine on standing to challenge legislation's constitutionality, which was described by the U.S. Supreme Court in the following terms in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), *per* White J., at pp. 610-11 :

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court . . . . [This principle reflects] the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws.

7 This Court, however, has adopted a different approach to the question of standing in Canada, in recognition of the Canadian constitution's distinct structure — in particular, the existence of s. 52 of the *Constitution Act, 1982*, which declares that laws that are inconsistent with the provisions of the Constitution are "to the extent of the inconsistency, of no force or effect". As Dickson J. observed in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at pp. 313-14:

> Section 52 [of the *Constitution Act, 1982*] sets out the fundamental principle of constitutional law that the Constitution is supreme. The undoubted corollary to be drawn from this principle is that no one can be convicted of an offence under an unconstitutional law. The respondent [Big M] did not come to court voluntarily as an interested citizen asking for a prerogative declaration that a statute is unconstitutional. If it had been engaged in such "public interest litigation" it would have had to fulfill the status requirements laid down by this Court in the trilogy of "standing" cases . . . but that was not the reason for its appearance in Court.

Any accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid. Big M is urging that the law under which it has been

de l'imprécision de la loi telle qu'elle s'applique à la conduite d'autrui. Le tribunal doit par conséquent examiner la conduite du plaignant avant d'analyser d'autres applications hypothétiques de la loi.

Ce point de vue correspond à la théorie américaine généralement acceptée en matière de qualité pour attaquer la constitutionnalité de dispositions législatives, laquelle a été décrite en ces termes dans l'affaire *Broadrick c. Oklahoma*, 413 U.S. 601 (1973), le juge White, aux pp. 610 et 611:

> [TRADUCTION] Au rang des règles traditionnelles régissant les décisions en matière constitutionnelle se trouve le principe selon lequel la personne à qui une loi peut constitutionnellement s'appliquer n'est pas habilitée à attaquer cette loi au seul motif qu'elle pourrait théoriquement s'appliquer inconstitutionnellement à d'autres, dans d'autres situations que celles dont la Cour est saisie. [. . .] [Ce principe reflète] la conviction que, dans notre système constitutionnel, les tribunaux ne sont pas des commissions itinérantes chargées de se prononcer sur la validité des lois de la nation.

Notre Cour a toutefois adopté un point de vue différent à l'égard de la question de la qualité pour agir au Canada, reconnaissant ainsi la structure constitutionnelle distincte du pays — en particulier l'existence de l'art. 52 de la *Loi constitutionnelle de 1982*, qui déclare que la Constitution «rend inopérantes les dispositions incompatibles de toute autre règle de droit». Comme l'a dit le juge Dickson dans l'arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, aux pp. 313 et 314:

> L'article 52 [de la *Loi constitutionnelle de 1982*] énonce le principe fondamental du droit constitutionnel, savoir la suprématie de la Constitution. De ce principe il découle indubitablement que nul ne peut être déclaré coupable d'une infraction à une loi inconstitutionnelle. Ce n'est pas volontairement, à titre de citoyen intéressé qui demande qu'une loi soit déclarée inconstitutionnelle, que l'intimée [Big M] se trouve devant les tribunaux. S'il s'était agi de ce genre de «litige d'intérêt public», elle aurait eu à satisfaire aux exigences relatives à la qualité pour agir que cette Cour a établies dans les trois arrêts suivants [. . .] Toutefois, ce n'est pas la raison pour laquelle elle s'est présentée en Cour.

Tout accusé, que ce soit une personne morale ou une personne physique, peut contester une accusation criminelle en faisant valoir que la loi en vertu de laquelle l'accusation est portée est inconstitutionnelle. Big M

charged is inconsistent with s. 2(*a*) of the *Charter* and by reason of s. 52 of the *Constitution Act, 1982*, it is of no force or effect.

This principle has been reconfirmed by this Court on many subsequent occasions. For instance, in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Dr. Morgentaler was allowed to argue that the law under which he was charged violated s. 7 as a consequence of its impact on some women, and his acquittal was restored. Similarly, in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, the Court confirmed that a corporation was entitled to challenge the constitutionality of the law under which it was charged, notwithstanding the fact that the constitutional challenge was based on s. 7, which does not grant rights to corporations (see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927). In my view, this principle applies equally to s. 7 vagueness challenges. That is, a person charged with an offence need not demonstrate that the law at issue directly infringes his or her constitutional rights in order to obtain standing to raise a constitutional challenge. That is not to say, however, that the fact that an accused's conduct clearly falls within the ambit of the law is irrelevant to the question of whether the law is unconstitutionally vague — rather, the fact that there is some identifiable "core" of activity prohibited by the law will often be a strong indicator that the terms of the law provide sufficient guidance for legal debate. Furthermore, the fact that an accused has standing to challenge a law does not inevitably mean that he or she will benefit from a finding that the law is unconstitutional, since there is always the possibility that a court might be able to sever or read down the offending provision so as to maintain its applicability to the accused's particular case (whether this is possible will, of course, depend on how the principles I set out in *Schachter v. Canada*, [1992] 2 S.C.R. 679, at pp. 705ff, apply to the particular piece of legislation at issue). Depending on the circumstances, the fact that the impugned law is directed at an identifiable "core" of conduct may be a factor to consider in deciding whether either of these remedial alternatives are appropriate. Of course, if it proves necessary to strike the offending law down in its entirety, this

soutient que la loi en vertu de laquelle elle est accusée est incompatible avec l'al. 2*a*) de la *Charte* et qu'elle est inopérante en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*.

Ce principe a souvent été confirmé par notre Cour. Dans l'affaire *R. c. Morgentaler*, [1988] 1 R.C.S. 30, par exemple, le Dr Morgentaler a pu faire valoir que la loi en vertu de laquelle il était accusé violait l'art. 7 par suite de son incidence sur certaines femmes, et obtenir ainsi le rétablissement de son acquittement. De même, dans l'arrêt *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 154, notre Cour a confirmé qu'une personne morale avait le droit de contester la constitutionnalité de la loi en vertu de laquelle elle était accusée, nonobstant le fait que la contestation constitutionnelle était fondée sur l'art. 7, qui n'accorde aucun droit aux personnes morales (voir *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927). À mon avis, ce principe s'applique également aux contestations fondées sur l'imprécision au regard de l'art. 7. Ainsi, la personne accusée d'une infraction n'est pas tenue de démontrer que la loi en cause viole directement ses droits constitutionnels pour qu'on lui reconnaisse la qualité pour soulever une contestation constitutionnelle. Toutefois, cela ne signifie pas pour autant que le fait que la conduite de l'accusé relève clairement de la loi soit sans rapport avec la question de savoir si la loi est d'une imprécision inconstitutionnelle, mais plutôt que le fait qu'il existe quelque «noyau» identifiable d'activité prohibée par la loi sera souvent un bon indice pour conclure que la loi constitue un guide suffisant pour un débat judiciaire. En outre, le fait que la personne accusée a qualité pour contester une loi n'implique pas inévitablement qu'elle bénéficiera d'une décision prononçant l'inconstitutionnalité de la loi, puisqu'il y a toujours la possibilité qu'un tribunal retranche ou atténue la disposition fautive de façon à en maintenir l'applicabilité à la situation particulière de l'accusé (possibilité qui dépend, bien sûr, de la façon dont les principes que j'ai énoncés dans l'arrêt *Schachter c. Canada*, [1992] 2 R.C.S. 679, aux pp. 705 et suivantes, s'appliquent à la disposition législative en cause). Selon les circonstances, le fait que la loi attaquée vise un «noyau» de conduite identifiable peut être un facteur à considérer lorsqu'il s'agit de

invalidation will apply to the prosecution of the accused's case: see *Wholesale Travel*, *supra*, at pp. 179ff.

8 It should be noted that although s. 7 vagueness analysis itself requires courts only to establish whether or not a given law is capable of being interpreted, and does not demand that courts take the next step and actually provide an interpretation, vagueness claims will often be raised in conjunction with other arguments that do require courts actually to engage in the interpretive process. Once it has been established that a given law provides sufficient guidance for legal debate, many accused persons will attempt to argue that the law, when properly understood, does not prohibit their conduct. Alternatively, they may argue that while the law does apply to them on its face, the law itself is unconstitutionally overbroad (see *R. v. Heywood*, [1994] 3 S.C.R. 761) and thus violates s. 7. In order to resolve these claims, it will generally be necessary for a court actually to interpret the law and identify the boundary between prohibited and non-prohibited conduct. When conducting this analysis, it will often prove necessary to consider hypotheticals, even when this is not required at the s. 7 vagueness analysis stage.

II. The Section 7 Overbreadth Claim

9 The alternative constitutional argument open to the appellant in this case is based on the protection s. 7 of the *Charter* provides against overbroad laws. The principles governing s. 7 overbreadth analysis were set out by Cory J. (writing for the majority) in *Heywood*, *supra*, at pp. 792-93:

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a

décider si l'une ou l'autre de ces réparations est appropriée. Bien sûr, s'il s'avère nécessaire d'invalider totalement la loi fautive, cette invalidation s'appliquera à la poursuite engagée contre l'accusé: voir *Wholesale Travel*, précité, aux pp. 179 et suivantes.

Il faut se rappeler que même si, en soi, l'analyse de l'imprécision au regard de l'art. 7 n'oblige les tribunaux qu'à déterminer si une loi particulière peut faire l'objet d'une interprétation, sans exiger d'eux qu'ils passent à l'étape suivante et procèdent effectivement à une interprétation, il arrive souvent que les prétentions d'imprécision soient associées à d'autres arguments qui eux exigent que les tribunaux s'engagent effectivement dans le processus d'interprétation. Une fois établie la conclusion qu'une loi particulière constitue un guide suffisant pour un débat judiciaire, beaucoup d'accusés tenteront de faire valoir que, lorsqu'elle est bien comprise, cette loi n'interdit pas leur conduite. Ils peuvent également prétendre que même si, à première vue, elle s'applique à eux, la loi elle-même est inconstitutionnelle en raison de sa portée excessive (voir l'arrêt *R. c. Heywood*, [1994] 3 R.C.S. 761) et viole ainsi l'art. 7. Pour pouvoir résoudre ces prétentions, le tribunal devra généralement interpréter la loi et tracer la ligne de démarcation entre la conduite prohibée et celle qui ne l'est pas. Pour procéder à cette analyse, il lui sera souvent nécessaire d'examiner des situations hypothétiques, même si cela ne s'impose pas à l'étape de l'analyse de l'imprécision au regard de l'art. 7.

II. La prétention de portée excessive au regard de l'art. 7

L'autre argument constitutionnel qui s'offre à l'appelante en l'espèce est fondé sur la protection qu'assure l'art. 7 de la *Charte* contre les lois d'une portée excessive. Les principes régissant l'analyse de la portée excessive au regard de l'art. 7 ont été énoncés par le juge Cory (au nom de la majorité) dans *Heywood*, précité, aux pp. 792 et 793:

> L'analyse de la portée excessive porte sur les moyens choisis par l'État par rapport à l'objet qu'il vise. Lorsqu'il examine si une disposition législative a une portée excessive, le tribunal doit se poser la question suivante: ces moyens sont-ils nécessaires pour atteindre l'objectif

legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

He continued by observing that "[r]eviewing legislation for overbreadth as a principle of fundamental justice is simply an example of balancing of the State interest against that of the individual". Furthermore, he stated at p. 793:

> In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that legislation conforms with the *Charter*, legislatures must have the power to make policy choices. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator.

Before the state's means can be compared to its objectives, it is necessary to determine what exactly those means are — that is, the statutory provision that is at issue must be interpreted, in order that its true scope be identified. The key to the interpretation of s. 13(1)(*a*) of the Ontario EPA is the expression "impairment of the quality of the natural environment for any use that can be made of it", a phrase which both defines the scope of s. 13(1)(*a*) and specifies what is and what is not a "contaminant", as defined in s. 1(1)(*c*) of the Act. As Gonthier J.'s reasons indicate, interpreting this expression requires that meaning be ascribed to two distinct phrases: the phrases "impairment of the quality" and "for any use that can be made [of the natural environment]".

The starting point of the interpretive process is the plain meaning of the statute's terms. As I noted in *R. v. McIntosh*, [1995] 1 S.C.R. 686, at p. 697, "[w]here the language of the statute is plain and admits of only one meaning, the task of interpretation does not arise". Of course, isolated words in a statute will, bereft of their context, tend to support

de l'État? Si, dans un but légitime, l'État utilise des moyens excessifs pour atteindre cet objectif, il y aura violation des principes de justice fondamentale parce que les droits de la personne auront été restreints sans motif. Lorsqu'une loi a une portée excessive, il s'ensuit qu'elle est arbitraire ou disproportionnée dans certaines de ses applications.

Le juge Cory poursuit en observant que «[l]'examen d'une loi pour déterminer si elle a une portée excessive, en tant que principe de justice fondamentale, est simplement un exemple de l'évaluation des intérêts de l'État par rapport à ceux du particulier.» Puis il ajoute, à la p. 793:

> Lorsqu'on analyse une disposition législative pour déterminer si elle a une portée excessive, il y a lieu de faire preuve de retenue à l'égard des moyens choisis par le législateur. Bien que les tribunaux aient l'obligation constitutionnelle de veiller à ce qu'une loi soit compatible avec la *Charte*, le législateur doit avoir le pouvoir de faire des choix de principe. Un tribunal ne devrait pas intervenir simplement parce que le juge aurait peut-être choisi des moyens différents d'atteindre l'objectif s'il avait été législateur.

Avant de pouvoir comparer les moyens aux objectifs de l'État, il est nécessaire de déterminer quels sont exactement ces moyens — c'est-à-dire qu'il faut interpréter la disposition législative attaquée, afin d'en préciser la véritable portée. La clé de l'interprétation de l'al. 13(1)*a*) LPE est l'expression [TRADUCTION] «dégradation de la qualité de l'environnement naturel relativement à tout usage qui peut en être fait», qui tout à la fois définit la portée de l'al. 13(1)*a*) et précise ce qui est et ce qui n'est pas un «contaminant» au sens de l'al. 1(1)*c*) de la Loi. Comme l'indiquent les motifs du juge Gonthier, l'interprétation de cette expression nécessite l'attribution d'un sens à deux propositions distinctes: «dégradation de la qualité» et «relativement à tout usage qui peut en être fait [de l'environnement naturel]». 10

Le point de départ du processus d'interprétation est le sens ordinaire des termes de la loi. Comme je l'ai mentionné dans *R. c. McIntosh*, [1995] 1 R.C.S. 686, à la p. 697, «[s]i le libellé de la loi est clair et n'appelle qu'un seul sens, il n'y a pas lieu de procéder à un exercice d'interprétation». Bien sûr, des mots isolés d'une disposition législative, 11

more than one meaning. As Driedger notes (*Construction of Statutes* (2nd ed. 1983)) at p. 39:

> Words, and particularly general words, when taken by themselves, can almost always be said to have two meanings (and in a law suit it is so urged), a broad one and a restricted one, and the task is to determine what the meaning is in the particular context. If the context determines the meaning, then the words are clear and unambiguous and effect must be given to them whatever the consequences.

Similarly, as Côté observes (*The Interpretation of Legislation in Canada* (2nd ed. 1991)) at p. 242:

> It should not be forgotten that research in semantics has shown that words only take on their real meaning when placed in context. The meaning of words and sentences is crystallized by the context, and in particular by the purpose of the message.

Thus, the first task of a court construing a statutory provision is to consider the meaning of its words in the context of the statute as a whole. If the meaning of the words when they are considered in this context is clear, there is no need for further interpretation. The basis for this general rule is that when such a plain meaning can be identified this meaning can ordinarily be said to reflect the legislature's intention. As Driedger observes at p. 106, "[t]he 'intention of Parliament' can only be an agreement by the majority that the words in the bill express what is to be known as the intention of Parliament." Côté makes a similar point, noting at p. 248 that "[i]t is only reasonable to assume that apparent intention leads to the true intention: lacking extra-sensory perception, we have no other choice". Thus, the best way for the courts to complete the task of giving effect to legislative intention is usually to assume that the legislature means what is says, when this can be clearly ascertained.

12 The presumption that a statute's literal meaning, as construed in the context of the statute as a

privés de leur contexte, peuvent donner lieu à plus d'un sens. Comme le dit Driedger (*Construction of Statutes* (2e éd. 1983)), à la p. 39:

> [TRADUCTION] On peut presque toujours dire que les mots, et en particulier les mots généraux, lorsqu'ils sont pris individuellement, ont deux sens (et c'est ce que l'on fait valoir dans les poursuites judiciaires), un sens large et un sens strict, et il s'agit de déterminer quel sens s'impose dans le contexte particulier. Si le contexte détermine le sens à donner, alors les mots sont clairs et non ambigus, et il faut leur donner effet peu importe les conséquences.

De même, Côté écrit (*Interprétation des lois* (2e éd. 1990)), à la p. 270:

> Rappelons simplement que les études dans le domaine de la sémantique démontrent que les mots du langage n'acquièrent leur sens véritable que lorsqu'ils sont insérés dans un contexte. C'est le contexte (ce qui comprend particulièrement l'objectif de la communication) qui précise le sens des mots et des phrases.

Ainsi, la première tâche du tribunal appelé à interpréter une disposition législative consiste à examiner le sens de ses mots dans le contexte global de la loi. Si le sens des mots examinés dans ce contexte est clair, il n'est pas nécessaire de poursuivre l'interprétation. Le fondement de cette règle générale est que lorsqu'il est ainsi possible d'identifier un sens clair, on peut généralement présumer que ce sens reflète l'intention du législateur. Comme le note Driedger à la p. 106, [TRADUCTION] «[l]'«intention du législateur» ne peut être qu'une reconnaissance par la majorité que les mots employés dans le projet de loi expriment ce qui doit être reconnu comme l'intention du législateur». Côté fait une remarque semblable lorsqu'il souligne (à la p. 277) qu'«[i]l faut en effet faire l'hypothèse que l'intention apparente mène à l'intention véritable: à défaut de perception extra-sensorielle, il n'y a pas d'autre possibilité». Ainsi, la meilleure façon pour les tribunaux de mener à terme la tâche de donner effet à l'intention du législateur consiste habituellement à présumer que le législateur entend dire ce qu'il dit, lorsque cela peut être clairement établi.

La présomption que le sens littéral d'une loi interprétée dans son contexte global reflète le

whole, best reflects legislative intention is valid in ordinary circumstances. However, the presumption is not irrebuttable. In cases where special circumstances exist, these circumstances can lead a court to conclude that a statutory provision's apparent literal meaning does not, in fact, provide an accurate reflection of the legislature's intentions, and that an alternative understanding of the words in the statute would be more appropriate, provided that the words of the statute reasonably bear such an alternative interpretation. One situation where such special circumstances can occur is in cases where a statutory provision would be unconstitutional if it were to be interpreted literally. In such cases, the presumption that the legislature intended that effect to be given to the plain meaning of its enactments can be countered by the competing presumption that the legislature ordinarily does not intend to violate the constitution. If the words in the statutory provision at issue reasonably bear an interpretation other than a literal reading, this second presumption will justify rejecting the literal interpretation in favour of the non-literal reading, when the former (but not the latter) interpretation would render the legislation unconstitutional. As I stated in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078, (writing for the Court on this point):

> Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect.

In *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, I applied this approach to statutory construction in the course of interpreting s. 7 of the *Government Airport Concession Operations Regulations*, SOR/79-373, which stated that "no person shall . . . advertise or solicit at an airport on his own behalf or on behalf of any person" without prior ministerial approval. I held (Sopinka and La Forest JJ. concurring on this point) that, as a matter of construction, this section did not apply to political speech. I based this conclusion in part "on the interpretative presumption

mieux l'intention du législateur est valide dans les circonstances ordinaires. Cette présomption n'est toutefois pas irréfutable. Lorsqu'il existe des circonstances spéciales, celles-ci peuvent amener le tribunal à conclure que, dans les faits, le sens littéral apparent d'une disposition législative ne reflète pas exactement les intentions du législateur, et qu'une autre signification des mots employés dans la loi serait plus appropriée, pourvu que ces mots puissent raisonnablement recevoir cette autre interprétation. Il peut y avoir de telles circonstances spéciales notamment dans les cas où une disposition législative serait inconstitutionnelle si elle était interprétée littéralement. En pareil cas, la présomption selon laquelle le législateur voulait que l'on donne effet au sens ordinaire de ses dispositions législatives peut être réfutée par l'autre présomption selon laquelle le législateur ne souhaite habituellement pas violer la constitution. Si les mots figurant dans la disposition législative en cause peuvent raisonnablement recevoir une interprétation différente du sens littéral, cette seconde présomption permet de rejeter l'interprétation littérale en faveur de celle qui ne l'est pas, lorsque la première (mais non la dernière) aurait pour effet de rendre la loi inconstitutionnelle. Comme je l'ai écrit dans *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, à la p. 1078 (dans les motifs que j'ai rédigés pour la Cour sur ce point):

> Or, quoique cette Cour ne doive pas ajouter ou retrancher un élément à une disposition législative de façon à la rendre conforme à la *Charte*, elle ne doit pas par ailleurs interpréter une disposition législative, susceptible de plus d'une interprétation, de façon à la rendre incompatible avec la *Charte* et, de ce fait, inopérante.

Dans l'arrêt *Comité pour la République du Canada c. Canada*, [1991] 1 R.C.S. 139, j'ai appliqué cette méthode d'interprétation des lois à l'examen de l'art. 7 du *Règlement sur l'exploitation de concessions aux aéroports du gouvernement*, DORS/79-373, qui portait que «nul ne peut [. . .] faire, à un aéroport, de la publicité ou de la sollicitation pour son propre compte ou pour celui d'autrui» à moins d'avoir obtenu au préalable une autorisation écrite du ministre. J'ai conclu (avec l'appui des juges Sopinka et La Forest sur ce point) que, sur le plan de l'interprétation, cette dis-

that legislation is constitutional" (p. 163). Although a majority of the Court adopted a different interpretation of s. 7 of the Regulations, I do not understand the majority as rejecting the existence of the presumption of constitutionality, but rather as differing as to its application on the particular facts of the case. Indeed, McLachlin J. expressly referred to the presumption (at p. 244), but took the position that it did not apply in that case, since even if s. 7 of the Regulations were held to apply (which would violate s. 2(*b*) of the *Charter*) the section might still be upheld under s. 1 and thus be constitutional.

position ne s'appliquait pas à un discours politique. J'ai fondé cette conclusion en partie «sur la présomption de constitutionnalité des lois» (p. 163). Même si une majorité des juges de notre Cour a adopté une interprétation différente de l'art. 7 du Règlement, je ne crois pas que la majorité ait rejeté l'existence de la présomption de constitutionnalité, mais plutôt qu'elle avait une opinion différente quant à son application aux faits particuliers de l'espèce. En fait, le juge McLachlin a expressément mentionné la présomption (à la p. 244), mais elle était d'avis qu'elle ne s'appliquait pas au cas en question, puisque même si l'art. 7 du Règlement devait être déclaré applicable (ce qui violerait l'al. 2*b*) de la *Charte*), cette disposition pourrait être maintenue en vertu de l'article premier et, partant, être constitutionnelle.

14 Similarly, in *R. v. Creighton*, [1993] 3 S.C.R. 3, I took the position that the term "unlawful act" in s. 222(5)(*a*) of the *Criminal Code*, R.S.C., 1985, c. C-46, should be interpreted to include a requirement that there be objective foreseeability of death. After concluding that s. 7 of the *Charter* required no less, I stated at p. 23 that "it remains to consider whether s. 222(5)(*a*) is open to an interpretation that would render it constitutional in this regard". I held that it was, stating at pp. 24-25 that:

> . . . in light of the constitutional imperative, the wording of the section, and the reasoning employed by this Court in [*R. v. DeSousa*, [1992] 2 S.C.R. 944] and the Ontario Court of Appeal in *R. v. L. (S.R.)* [(1992), 11 O.R. (3d) 271], I have no hesitation in concluding that the section is open to an interpretation that would render it constitutional.

De même, dans l'arrêt *R. c. Creighton*, [1993] 3 R.C.S. 3, j'étais d'avis que l'expression «acte illégal» figurant à l'al. 222(5)*a*) du *Code criminel*, L.R.C. (1985), ch. C-46, devrait être interprétée comme incluant l'obligation d'une prévisibilité objective de la mort. Après avoir conclu que l'art. 7 de la *Charte* n'exigeait rien de moins que cela, j'ai dit, à la p. 23, qu'«il reste à examiner si l'al. 222(5)*a*) admet une interprétation qui lui conférerait un caractère de constitutionnalité à cet égard». J'ai conclu qu'il en était ainsi, lorsque j'ai écrit, aux pp. 24 et 25:

> Compte tenu [. . .] de l'impératif constitutionnel, du libellé de l'alinéa et du raisonnement de notre Cour dans l'arrêt [*R. c. DeSousa*, [1992] 2 R.C.S. 944] et de la Cour d'appel de l'Ontario dans l'arrêt *R. c. L. (S.R.)* [(1992), 11 O.R. (3d) 271], je conclus sans hésitation que l'alinéa en question peut être interprété d'une façon qui le rendrait constitutionnel.

Although I was writing in dissent on this issue, the source of my disagreement with the majority was over the issue of whether or not s. 7 required objective foreseeability of death rather than on the application of the presumption of constitutionality if it did. While the majority (*per* McLachlin J.) interpreted the section differently, no suggestion was made that my interpretive approach was incorrect in light of my premise that the alternative interpretation was unconstitutional — rather, the majority did not accept this premise. Indeed, the

Même si j'ai rédigé des motifs de dissidence sur ce point, mon désaccord avec la majorité portait sur la question de savoir si l'art. 7 exigeait la prévisibilité objective de la mort, plutôt que sur l'application de la présomption de constitutionnalité le cas échéant. Bien que la majorité (motifs rédigés par le juge McLachlin) ait interprété cette disposition différemment, elle n'a d'aucune manière laissé entendre que ma façon d'interpréter n'était pas fondée compte tenu de ma prémisse selon laquelle l'autre interprétation était inconstitutionnelle — en fait, la

majority interpreted "unlawful act" as requiring objective foreseeability of bodily harm, as had the Court in *R. v. DeSousa*, [1992] 2 S.C.R. 944, when interpreting these as used in s. 269 of the *Code* — an interpretation that itself clearly departs from the "plain meaning" of the word "unlawful act", standing alone. In *DeSousa*, it should be noted, the Court rejected the literal meaning of this phrase (which had been suggested in *Smithers v. The Queen*, [1978] 1 S.C.R. 506), in part on the grounds that "*Smithers* was not argued under the *Charter*" (p. 960, *per* Sopinka J.).

In my view, therefore, the presumption of constitutionality can sometimes serve to rebut the presumption that the legislature intended that effect be given to the "plain meaning" of its enactments. It is important to note, however, that the process of invoking the presumption of constitutionality so as to arrive at an interpretation different from that that would ordinarily result from applying the rules of statutory construction leads to essentially the same result as would be reached by adopting the ordinary interpretation, holding that the legislation is unconstitutional, and "reading it down" as a remedy under s. 52 of the *Constitution Act, 1982*. In light of this essential similarity between the two processes, it is clear that courts relying on the presumption of constitutionality to interpret legislation must take into account the principles I identified in *Schachter*, *supra*, in the context of "reading down" as a constitutional remedy. As I stated in that case (at p. 715), "respect for the role of the legislature and the purposes of the *Charter* are the twin guiding principles" when crafting a remedy under s. 52; in my view, they also provide guidance when interpreting legislation in light of the presumption of constitutionality. In this latter context, the former principle imposes a requirement that any alternative interpretation adopted in preference to the "plain meaning" must itself be one

majorité n'a pas accepté cette prémisse. En effet, elle a interprété l'expression «acte illégal» comme exigeant la prévisibilité objective de lésions corporelles, comme l'avait fait notre Cour dans l'arrêt *R. c. DeSousa*, [1992] 2 R.C.S. 944, pour l'interprétation de ces mots qui figuraient à l'art. 269 du *Code* — interprétation qui, en soi, s'éloigne clairement du «sens ordinaire» de l'expression «acte illégal», considérée seule. Il me faut souligner que dans l'arrêt *DeSousa*, notre Cour a rejeté le sens littéral de cette expression (qui avait été suggéré dans l'arrêt *Smithers c. La Reine*, [1978] 1 R.C.S. 506), en partie parce que «la *Charte* n'était pas en vigueur quand l'affaire *Smithers* a été débattue» (p. 960, le juge Sopinka).

À mon avis, la présomption de constitutionnalité peut donc parfois servir à réfuter la présomption selon laquelle le législateur voulait que l'on donne effet au «sens ordinaire» de ses lois. Il importe toutefois de noter que le processus par lequel on recourt à la présomption de constitutionnalité pour parvenir à une interprétation différente de celle qui aurait normalement découlé de l'application des règles d'interprétation des lois conduit essentiellement au même résultat que celui qui découlerait de l'adoption de l'interprétation ordinaire, par laquelle on conclut que la disposition législative est inconstitutionnelle, avant de la soumettre à une «interprétation atténuée» en guise de réparation sous le régime de l'art. 52 de la *Loi constitutionnelle de 1982*. Eu égard à la similitude essentielle entre les deux processus, il est clair que les tribunaux qui se fondent sur la présomption de constitutionnalité pour interpréter une loi doivent tenir compte des principes que j'ai énoncés dans l'arrêt *Schachter*, précité, dans le contexte de l'«interprétation atténuée» en tant que réparation constitutionnelle. Comme je l'ai dit dans cet arrêt (à la p. 715), «le respect du rôle du législateur et des objets de la *Charte* [sont] les deux principes directeurs» lorsqu'il s'agit de concevoir une réparation sous le régime de l'art. 52; à mon avis, ils servent également de guide à l'interprétation des lois eu égard à la présomption de constitutionnalité. Dans ce dernier contexte, le premier principe pose l'exigence que toute autre interprétation que le «sens ordinaire» soit elle-même raisonnablement appuyée

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that is reasonably supported by the terms of the legislation. As I observed in *Schachter* at pp. 708-9:

> Where the choice of means is unequivocal, to further the objective of the legislative scheme through different means would constitute an unwarranted intrusion into the legislative domain.

Thus, merely invoking the presumption of constitutionality does not give a court complete freedom to depart from the terms of a statute employed by the legislature. Rather, the presumption is simply a factor that on some occasions tips the scales in favour of one interpretation over another construction that, in the absence of this consideration, would appear to be the most strongly supported by the rules of statutory construction. If the terms of the legislation are so unequivocal that no real alternative interpretation exists, respect for legislative intent requires that the court adopt this meaning, even if this means that the legislation will be struck down as unconstitutional.

A. *"For Any Use That Can Be Made of It"*

16 In order to apply this approach in the present case, it is first necessary to determine whether the terms of s. 13(1)(*a*) have a "plain meaning" when viewed in the context of the statute as a whole. I begin by considering the expression "for any use that can be made of [the natural environment]". Although the word "use" is somewhat ambiguous when considered on its own, the expression "for any use that can be made of [the natural environment]" has, in my view, an identifiable literal or "plain" meaning when viewed in the context of the EPA as a whole, particularly the other subsections of s. 13(1). Section 13(1) contains eight subsections ((*a*) through (*h*)). If each of these subsections is seen as having been intended by the legislature to address a distinct problem (which, in my view, is the most natural construction when the presumption of constitutionality is left out of the picture), differences in the manner in which the term "use" is employed in the different subsections become significant. In s. 13(1)(*a*), for instance, the word "use" is qualified by the addition of the word any,

par les termes de la loi. Comme je l'ai fait remarquer dans l'arrêt *Schachter*, à la p. 709:

> Lorsque le choix du moyen est évident, favoriser l'atteinte de l'objectif du régime législatif par d'autres moyens constituerait un empiétement injustifié sur le domaine législatif.

Par conséquent, le simple fait de recourir à la présomption de constitutionnalité ne donne pas au tribunal l'entière liberté de s'éloigner des termes employés par le législateur dans la loi. La présomption est plutôt tout simplement un facteur qui, à l'occasion, fait pencher la balance en faveur d'une interprétation autre que celle qui, sans cette considération, semblerait être la plus conforme aux règles d'interprétation des lois. Si les termes de la loi sont à ce point non équivoques qu'il n'existe aucune autre interprétation possible, c'est ce sens que le tribunal doit adopter par respect pour l'intention du législateur, même si cela signifie que la loi sera annulée parce qu'elle est inconstitutionnelle.

A. *«Relativement à tout usage qui peut en être fait»*

Pour appliquer cette démarche à la présente espèce, il faut d'abord déterminer si les mots de l'al. 13(1)*a*) ont un «sens ordinaire» lorsqu'on les examine dans le contexte global de la loi. Je commence par l'expression «relativement à tout usage qui peut en être fait [de l'environnement naturel]». Même si le mot «usage» est quelque peu ambigu lorsqu'il est examiné seul, l'expression «relativement à tout usage qui peut en être fait [de l'environnement naturel]» a, à mon avis, un sens littéral ou «ordinaire» identifiable lorsqu'il est considéré dans le contexte global de la LPE, particulièrement dans celui des autres alinéas du par. 13(1). Ce paragraphe comporte huit alinéas (de *a*) à *h*)). Si l'on considère qu'en adoptant chacun de ces alinéas le législateur avait l'intention de s'attaquer à un problème distinct (ce qui, à mon avis, est l'interprétation la plus naturelle lorsque la présomption de constitutionnalité n'entre pas en ligne de compte), les différences dans la façon dont le mot «usage» est employé dans les divers alinéas deviennent significatives. À l'alinéa 13(1)*a*) par

which suggests that "use" is to be interpreted broadly. This stands in marked contrast to s. 13(1)(*g*), where the meaning of the word "use" is restricted by the further qualifier that it be "normal". The fact that s. 13(1)(*f*) employs the term "for use by man" (emphasis added) is also significant, since the absence of such qualification in s. 13(1)(*a*) suggests an intention on the part of the drafters that the section apply to "uses" of the environment by non-humans as well as by humans. Finally, the use of the phrase "can be made of it" (emphasis added) suggests that the subsection is not restricted to actual existing uses, but applies instead to any conceivable use. When these factors are taken into account, it can, I believe, be concluded that the literal meaning of the expression "for any use that can be made of [the natural environment]" is "any use that can conceivably be made of the natural environment by any person or other living creature".

exemple, le mot «usage» est qualifié par l'ajout du mot tout, ce qui donne à entendre que le mot «usage» doit recevoir une interprétation large. Cela tranche vivement avec l'al. 13(1)*g*), où le sens du mot «usage» est restreint par le qualificatif [TRADUCTION] «normal». Le fait que l'al. 13(1)*f*) emploie l'expression [TRADUCTION] «à l'usage des êtres humains» (je souligne) est lui aussi significatif puisque l'absence d'un tel qualificatif à l'al. 13(1)*a*) suppose de la part des rédacteurs l'intention que l'article s'applique aux «usages» de l'environnement autant par des non-humains que par des êtres humains. Enfin, l'emploi de la proposition «qui peut en être fait» (je souligne) suppose que la disposition n'est pas restreinte aux seuls usages actuels, mais qu'elle s'applique plutôt à tout usage concevable. Lorsque ces facteur sont pris en considération, il me semble possible de conclure que le sens littéral de l'expression «relativement à tout usage qui peut en être fait [de l'environnement naturel]» est «tout usage concevable qui peut être fait de l'environnement naturel par toute personne ou autre créature vivante».

In ordinary circumstances, once the "plain meaning" of the words in a statute have been identified, there is no need for further interpretation. In particular, as I indicated in *McIntosh*, *supra*, at p. 704, even when the literal interpretation of a statute results in absurd or undesirable consequences, this "is not . . . sufficient to declare it ambiguous and then embark upon a broad-ranging interpretive analysis". As I have explained, however, different considerations can apply in cases where interpreting a statute in a literal manner would not merely lead to undesirable results, but would also render the statute unconstitutional. This, I believe, is one of those exceptional cases — in my view, if interpreted literally, s. 13(1)(*a*) would fail to meet the test for overbreadth established by this Court in *Heywood*, *supra*.

17 Dans des circonstances normales, dès que le «sens ordinaire» des mots employés dans une loi a été circonscrit, point n'est besoin de pousser plus loin l'exercice d'interprétation. En particulier, comme je l'ai indiqué dans *McIntosh*, précité, à la p. 704, même lorsque l'interprétation littérale d'une loi aboutit à des résultats absurdes ou indésirables, cela «n'est pas [. . .] suffisant pour affirmer qu'elle est ambiguë et procéder ensuite à une analyse d'interprétation globale». Toutefois, comme je l'ai expliqué, diverses considérations peuvent s'appliquer dans des affaires où l'interprétation littérale d'une loi non seulement entraînerait des résultats indésirables, mais aussi rendrait la loi inconstitutionnelle. Selon moi, la présente espèce appartient à ces affaires exceptionnelles — à mon avis, s'il devait recevoir une interprétation littérale, l'al. 13(1)*a*) ne satisferait pas au critère relatif à la portée excessive établi par notre Cour dans *Heywood*, précité.

As Cory J.'s reasons in *Heywood*, *supra*, establish, in order to conduct overbreadth analysis under s. 7 it is first necessary to identify the state

18 Ainsi que l'énonce le juge Cory dans ses motifs de l'arrêt *Heywood*, précité, pour procéder à l'analyse de la portée excessive au regard de l'art. 7, il

objective underlying the law, which is then to be compared with the means the legislature has chosen to achieve it. In the case of s. 13(1)(*a*) EPA, the state objective is, as s. 2 of the Act declares, "the protection and conservation of the natural environment." Among other things, the objectives of the Act thus seem to encompass the preservation of the natural environment for some range of use by humans and animals. I agree with my colleague Gonthier J.'s observations that environmental protection is a very broad subject matter. I do not believe, however, that the scope of the Ontario legislature's intentions underlying the enactment of s. 13(1)(*a*) is unlimited. In particular, I do not believe that the legislature intended to prohibit absolutely all human activity that has the effect of reducing to any degree the suitability of a particular portion of the environment for any conceivable use. In my view, the legislative interest in safeguarding the environment for "uses" extends only so far as to require that it be preserved for those "uses" that are normal and typical of the place in question, or that are likely to become normal or typical in the future.

19 As I have explained, however, when interpreted literally, s. 13(1)(*a*) captures considerable activity outside this range, since on a literal reading, the expression "any use that can be made of [the natural environment]" includes all activities that could go on at a given locale, not merely those that normally or even sometimes take place there, or are likely to take place there in the future. Thus, for example, under a "plain meaning" interpretation of s. 13(1)(*a*) all Ontario residents who in winter-time place sand on the icy sidewalks in front of their houses to lessen the risk of passers-by injuring themselves by slipping and falling would seemingly be subject to prosecution and imprisonment: city sidewalks are clearly part of the "natural environment" as defined in s. 1(1)(*k*) EPA, and the spreading of sand can render them less suitable for use as cross-country ski trails (making sand a "contaminant", and triggering the operation of s. 13(1)(*a*)). It would be no defence for the accused

faut d'abord cerner l'objectif qui sous-tend la loi, puis le comparer aux moyens choisis par le législateur pour l'atteindre. Dans le cas de l'al. 13(1)*a*) LPE, l'objectif de l'État est, selon le libellé de l'art. 2, [TRADUCTION] «la protection et la conservation de l'environnement naturel». Entre autres choses, les objectifs de la LPE semblent donc englober la préservation de l'environnement naturel pour une certaine gamme d'usages par les êtres humains et les animaux. Je suis d'accord avec les observations de mon collègue le juge Gonthier sur le fait que la protection de l'environnement est une question très générale. Je ne crois toutefois pas que la portée des intentions du législateur ontarien sous-jacentes à l'adoption de l'al. 13(1)*a*) soit illimitée. Tout particulièrement, je ne crois pas que le législateur ait eu l'intention de prohiber absolument toute activité humaine qui aurait pour effet de réduire à quelque degré que ce soit la convenance d'une portion particulière de l'environnement pour quelque usage concevable que ce soit. À mon avis, l'intérêt du législateur dans la protection de l'environnement pour certains «usages» ne s'étend qu'à concurrence de ce qui est nécessaire afin de le préserver pour les «usages» qui sont normaux et typiques pour l'endroit en question, ou qui sont susceptibles de le devenir un jour.

Toutefois, comme je l'ai expliqué, s'il reçoit une interprétation littérale, l'al. 13(1)*a*) embrasse beaucoup d'activités qui débordent cette portée, puisque, au sens littéral, l'expression «tout usage qui peut en être fait [de l'environnement naturel]» comprend toutes les activités qui pourraient avoir lieu à un endroit donné, et non pas seulement celles qui s'y déroulent normalement, voire parfois, ou qui sont susceptibles de s'y dérouler à l'avenir. À titre d'exemple, selon une interprétation fondée sur le «sens ordinaire» de l'al. 13(1)*a*), tous les citoyens ontariens qui, l'hiver venu, épandent du sable sur le trottoir glacé devant leur maison pour réduire le risque que des piétons tombent et se blessent seraient vraisemblablement passibles de poursuite et d'emprisonnement: les trottoirs municipaux font clairement partie de l'«environnement naturel» au sens de l'al. 1(1)*k*) LPE, et l'épandage de sable peut les rendre moins appropriés à des usages comme le maintien d'une piste de ski de

to establish that no-one wanted to ski on the sidewalk, since as long as it was clear that it was physically possible to "use" sidewalks in this manner (so that this "use" was thus conceivable), it would fall within the scope of the section. While my colleague Gonthier J. is no doubt correct in his assertion, in para. 56, that "the average citizen in Ontario would have known that pollution was statutorily prohibited", I believe it is also fair to say that the average person in Ontario would have been very surprised to learn that placing sand on sidewalks, and countless other similar activities, were prohibited and subject to criminal sanction even when they did not interfere with any actual current or probable future "use" of the environment. Although the fact that police and provincial prosecutors rarely, if ever, lay charges against persons whose activities interfere with purely hypothetical "uses" of the environment cannot, in my view, be invoked to sustain the legislation if it were found to be unconstitutionally overbroad (in my opinion, my reasoning in *R. v. Smith*, [1987] 1 S.C.R. 1045, applies equally to the present context), this fact does suggest that the legislature did not seriously intend that all such activity was to be prohibited and punished. In my view, the fact that s. 13(1)(*a*), when interpreted literally, captures a wide range of activities that fall outside the scope of the legislative purpose underlying the section indicates that the provision would, if given this interpretation, fail to meet s. 7 scrutiny. Imprisoning a person whose activities do not affect any actual or apprehended "use" of the environment and which do not have any other negative effect would, in my view, constitute a deprivation of liberty that is not in accordance with the principles of fundamental justice — imposing penal sanctions in such cases would indeed "[go] beyond what is needed to accomplish the governmental objective": *Heywood, supra*, at p. 794.

The question that must be addressed in the present case is thus the following: given the presump-

fond (transformant le sable en un «contaminant» et déclenchant l'application de l'al. 13(1)*a*)). Il ne servirait à rien d'invoquer en défense que personne ne veut faire du ski sur le trottoir puisque, tant qu'il appert clairement qu'il est matériellement possible de faire un tel «usage» des trottoirs («usage» ainsi rendu concevable), cet «usage» est visé par la disposition. Si mon collègue le juge Gonthier a sans doute raison de dire, au par. 56, que «l'Ontarien moyen devait savoir que la pollution était interdite par la loi», je crois toutefois qu'on peut tout aussi bien dire que l'Ontarien moyen aurait été très surpris d'apprendre que l'épandage de sable sur les trottoirs et bon nombre d'autres activités semblables sont prohibés et le rendent passible de sanctions pénales même si ces activités ne nuisent à aucun «usage» actuel ou éventuel de l'environnement. Même si, pour justifier la loi qui serait jugée inconstitutionnelle en raison de sa portée excessive, on ne peut, selon moi, invoquer le fait que la police et les poursuivants provinciaux engagent rarement, voire jamais, de poursuites pénales contre les personnes dont les activités nuisent à des «usages» purement hypothétiques de l'environnement (et j'estime que le raisonnement que j'ai suivi dans l'arrêt *R. c. Smith*, [1987] 1 R.C.S. 1045, est également applicable au présent contexte), ce fait laisse néanmoins entendre que le législateur ne prévoyait pas sérieusement interdire et sanctionner toutes les activités de cette nature. À mon avis, le fait que l'al. 13(1)*a*), lorsqu'il est interprété littéralement, englobe une vaste gamme d'activités qui débordent la portée de son objectif législatif sous-jacent indique que cette disposition, lorsqu'elle est ainsi interprétée, ne satisfait pas à l'examen au regard de l'art. 7. Emprisonner une personne dont les activités ne nuisent à aucun «usage» réel ou éventuel de l'environnement et n'ont aucun autre effet négatif constituerait, selon moi, une privation de liberté qui ne respecterait pas les principes de justice fondamentale — imposer des sanctions pénales en pareil cas serait effectivement «all[er] au-delà de ce qui est nécessaire pour atteindre l'objectif gouvernemental»: *Heywood*, précité, à la p. 794.

La question à examiner en l'espèce se présente donc comme suit: étant donnée la présomption que 20

tion that the legislature intended to legislate in accordance with the constitution, is s. 13(1)(*a*) open to an alternative construction that would render it constitutional? In my view, such an alternative interpretation does indeed exist. As I noted earlier, the most natural manner of viewing s. 13 is to view all of the various subsections as directed at different (albeit overlapping) evils. However, it is also possible to interpret s. 13(1)(*a*) as expressing the general intention of the section as a whole, and to treat paras. 13(1)(*b*) through (*h*) as setting out specific examples of "impairment[s] . . . of the natural environment for any use that can be made of it". That is, s. 13(1)(*a*) can be read as if it were part of the main body of the section, with words to the effect of "and, without limiting the generality of the foregoing, that" interposed between it and the other subsections. When viewed in this way, the fact that the word "use" in paras. (*b*) through (*h*) is qualified and narrowed in several respects has a very different effect than it does if para. (*a*) is seen as standing independently (as was discussed above) — now, the restrictions on the term in the other subsections can be seen as being imported into para. (*a*) (through a variant of the *ejusdem generis* principle), rather than as suggesting that the term as used in para. (*a*) is to be interpreted more broadly than in the other subsections.

21 In my view, s. 13(1) is open to construction in this manner. Furthermore, when provisions in paras. 13(1)(*b*) through (*h*) are taken as specifying the sense to be ascribed to the term "use" in para. (*a*), I am of the view that the section is no longer unconstitutionally overbroad, since the types of harms captured by paras. (*b*) through (*h*) fall squarely within the legislative intent underlying the section and the Act as a whole. In light of the presumption that the legislature intended to act in accordance with the constitution, I believe it is appropriate to interpret s. 13(1)(*a*) in this manner, as providing the best reflection of the intentions of Ontario's legislature. That is, the term "for any use that can be made of [the natural environment]" in s. 13(1)(*a*) should be understood as covering situa-

le législateur entendait légiférer dans le respect de la constitution, l'al. 13(1)*a*) peut-il recevoir une autre interprétation qui le rendrait constitutionnel? À mon avis, il existe effectivement une autre interprétation. Comme je l'ai déjà noté, la façon la plus naturelle de considérer l'art. 13 consiste à voir chacun des divers alinéas comme visant des maux différents (qui peuvent toutefois se chevaucher). Cependant, il est aussi possible d'interpréter l'al. 13(1)*a*) comme l'expression de l'objet général du paragraphe dans son ensemble, et de voir en chacun des al. 13(1)*b*) à *h*) l'énonciation d'exemples spécifiques de «dégradation [. . .] de l'environnement naturel relativement à tout usage qui peut en être faire». En d'autres termes, l'al. 13(1)*a*) peut être considéré comme s'il faisait partie du corps principal de l'article et qu'il était suivi d'expressions comme «notamment» ou «sans que soit limité la généralité de ce qui précède», puis des autres alinéas. Vu de cette façon, le fait que le mot «usage» dans les al. *b*) à *h*) est qualifié et restreint à plusieurs égards entraîne un effet très différent de celui qu'il aurait si l'al. *a*) était considéré comme un élément indépendant (comme nous l'avons déjà vu) — dès lors, les restrictions apportées à ce mot dans les autres alinéas peuvent être perçues comme incluses dans l'al. *a*) (par une variante de la règle *ejusdem generis*), plutôt que comme des indications que le mot employé à l'al. *a*) doit être interprété de manière plus générale que dans les autres alinéas.

À mon avis, le par. 13(1) se prête à une telle interprétation. En outre, lorsque les dispositions des al. 13(1)*b*) à *h*) sont prises comme précisant le sens à donner au mot «usage» employé à l'al. *a*), j'estime que la disposition cesse d'être inconstitutionnelle en raison d'une portée excessive, puisque les types de maux englobés par les al. *b*) à *h*) sont clairement visés par l'intention législative sous-jacente à la disposition particulière et à la Loi dans son ensemble. Compte tenu de la présomption selon laquelle le législateur a voulu agir dans le respect de la constitution, je crois qu'il y a lieu d'interpréter l'al. 13(1)*a*) de cette façon, parce que cela reflète le mieux les intentions du législateur ontarien. En d'autres termes, l'expression «relativement à tout usage qui peut en être fait [de l'envi-

tions captured by s. 13(1)(*b*) through (*h*) and analogous situations, if any indeed exist. For the purposes of the present case, I believe it suffices to resolve the interpretive problem only to this level of detail, since it is clear that any interpretation based on the framework of construction I have outlined above will not be unconstitutionally overbroad. That is, it is unnecessary in the present case to determine whether there exist any situations analogous to those in paras. 13(1)(*b*) through (*h*) that would not be captured by those subsections but would be covered by (*a*), since it is clear that in the case at bar the appellant's conduct contravened, at minimum, s. 13(1)(*b*), (*c*), (*d*) and (*g*). This is sufficient to bring the appellant squarely within the ambit of para. (*a*), under any interpretation where the content of para. (*a*) is informed by the terms of s. 13(1)'s other paragraphs.

ronnement naturel]» qui figure à l'al. 13(1)*a*) devrait être comprise comme incluant les situations visées par les al. 13(1)*b*) à *h*) et les situations analogues, s'il en existe. Pour les fins du présent pourvoi, je crois qu'il suffit de résoudre le problème d'interprétation jusqu'à ce niveau de détail seulement, puisqu'il appert clairement que toute disposition interprétée selon la grille d'interprétation susmentionnée ne sera pas inconstitutionnelle pour cause de portée excessive. Autrement dit, il n'est pas nécessaire en l'espèce de déterminer s'il existe des situations analogues à celles visées par les al. 13(1)*b*) à *h*) qui ne seraient pas englobées par ces alinéas mais qui seraient visées par l'al. *a*), puisqu'il est clair que, en l'espèce, la conduite de l'appelante a contrevenu à tout le moins aux al. 13(1)*b*), *c*), *d*) et *g*). Cela suffit pour que l'appelante soit directement visée par l'al. *a*), selon toute interprétation où le contenu de l'al. *a*) est qualifié par les termes des autres alinéas du par. 13(1).

B. *"Impairment"*

What remains to be considered is the interpretation to be given to the word "impairment" as it appears in s. 13(1)(*a*). As Gonthier J. points out, the meaning of the related term "impaired" has been the subject of considerable debate in the context of the "impaired driving" provision of the *Criminal Code* (s. 253(*a*)), where courts have reached differing conclusions over whether or not the term covers even a slight departure from the norm, or whether instead some more marked departure from the norm is required. It is clear from this debate that the term "impair" equally supports either of these two senses standing alone, and that the task of interpretation thus arises. I find it unnecessary, however, to invoke the presumption of constitutionality here, since I am of the view that an interpretation can be generated by the ordinary rules of construction that is not overbroad.

When interpreting a term that on its face bears two equally plausible meanings, it is appropriate to consider the consequences that would result from applying either interpretation to the statutory provision at issue, and to ask whether these consequences can plausibly be seen as intended by the

B. *«Dégradation»*

Il reste à interpréter le mot «dégradation» (en anglais «*impairment*»), qui figure à l'al. 13(1)*a*). Comme le souligne le juge Gonthier, le sens du terme connexe «*impaired*» («affaibli») a fait l'objet d'un débat considérable dans le contexte de la disposition du *Code criminel* portant sur la «conduite d'un véhicule avec capacité affaiblie» (al. 253*a*)), où les tribunaux sont parvenus à des conclusions divergentes sur la question de savoir si ce mot vise même un faible écart par rapport à la norme ou s'il faut un écart plus marqué. Il ressort clairement de ce débat que le mot «*impair*» peut tout aussi bien recevoir l'un ou l'autre de ces deux sens et qu'il nécessite donc un exercice d'interprétation. J'estime toutefois qu'il n'est pas nécessaire d'invoquer ici la présomption de constitutionnalité puisque je suis d'avis que les règles d'interprétation ordinaires permettent d'interpréter la disposition comme n'étant pas de portée excessive. 22

Lorsqu'il faut interpréter un terme qui, à première vue, peut permettre deux sens également plausibles, il y a lieu d'examiner les conséquences qui pourraient découler de l'une ou l'autre interprétation de la disposition législative en cause et de se demander si ces conséquences peuvent d'une 23

legislature (see my reasons in *R. v. Hibbert*, [1995] 2 S.C.R. 973.) In the context of s. 13(1)(*a*), interpreting the term "impairment" as including all slight departures from the norm would mean that virtually everyone in Ontario would regularly be in contravention of the section, and thus liable to fines and imprisonment. Although the Ontario legislature is undoubtedly concerned about the significant impairments of environmental quality that can result from the aggregate of a large number of sources of pollution, each having an insignificant effect standing alone, I do not believe that the legislature considered the threat of imprisonment an appropriate means of addressing problems of this nature. For example, it is well established that emissions from automobiles are a major contributor to smog in urban areas, which is clearly an environmental problem of the sort the legislature was concerned with. While no one automobile can be said to "impair" environmental quality significantly, the combination of many thousands of automobiles results in a significant source of discomfort and hazard to health. Yet, while the legislature no doubt has a legitimate interest in controlling such pollution, it clearly did not contemplate the imprisonment of all drivers in Ontario. Rather, I believe the legislature intended to reserve the threat of imprisonment as a deterrent aimed at persons whose activities contribute significantly to an identifiable environmental problem. It is self-evident, I believe, that when the term "impairment" is interpreted in this manner it does not render the impugned provision overbroad in relation to the legislative purpose.

III. Conclusion

24 Subject to the above remarks, I would dismiss the appeal in accordance with the reasons of Gonthier J.

manière plausible avoir été voulues par le législateur (voir mes motifs dans l'arrêt *R. c. Hibbert*, [1995] 2 R.C.S. 973). Dans le contexte de l'al. 13(1)*a*), le fait d'interpréter le mot «dégradation» comme incluant même les faibles écarts par rapport à la norme signifierait que pratiquement tous les Ontariens contreviendraient régulièrement à cette disposition et seraient donc passibles d'amendes et de peines d'emprisonnement. Même si le législateur ontarien se préoccupe sans aucun doute des dégradations importantes de la qualité de l'environnement qui peuvent découler de l'effet cumulatif de nombreuses sources de pollution qui, prises individuellement, n'ont qu'un effet négligeable, je ne crois pas que le législateur ait pensé que la menace d'emprisonnement soit un moyen approprié pour résoudre les problèmes de cette nature. Par exemple, il est bien établi que les émissions dégagées par les automobiles contribuent pour une large part à la formation du smog dans les zones urbaines, lequel est clairement un problème environnemental de la nature de ceux qui préoccupent le législateur. Même si l'on ne peut dire qu'une automobile en particulier «dégrade» de façon importante la qualité de l'environnement, la combinaison de plusieurs milliers d'automobiles a pour effet de constituer une source importante d'inconfort et de danger pour la santé. Pourtant, même si le législateur a sans aucun doute un intérêt légitime à assurer l'élimination d'une telle pollution, il n'a manifestement pas envisagé l'emprisonnement de tous les conducteurs en Ontario. Je crois plutôt que le législateur entend réserver la menace d'emprisonnement comme moyen de dissuasion pour les personnes dont les activités contribuent de façon importante à un problème d'environnement identifiable. Il va de soi, selon moi, que lorsque le mot «dégradation» est interprété de cette manière, il ne donne pas à la disposition attaquée une portée excessive eu égard à l'objectif législatif.

III. Conclusion

Sous réserve des remarques qui précèdent, je suis d'avis de rejeter le pourvoi conformément aux motifs du juge Gonthier.

The judgment of La Forest, L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci and Major JJ. was delivered by

GONTHIER J. —

I. Issues

The issues in this appeal are encompassed in the three following constitutional questions:

1. Does s. 13(1)(*a*) of the *Environmental Protection Act*, R.S.O. 1980, c. 141 (now s. 14(1) of the *Environmental Protection Act*, R.S.O. 1990, c. E.19), constitutionally apply to the appellant when maintaining its right-of-way?

2. Is s. 13(1)(*a*) of the *Environmental Protection Act* so vague as to infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

3. If the answer to question 2 is in the affirmative, is s. 13(1)(*a*) nevertheless justified by s. 1 of the *Charter*?

The first question was answered in the affirmative in reasons delivered orally at the conclusion of the hearing of the appeal and the decision as to questions 2 and 3 was reserved. These reasons respond to the second and third questions. The issue as argued is more fully stated as whether s. 13(1)(*a*) of Ontario's *Environmental Protection Act*, R.S.O. 1980, c. 141 (as amended) ("EPA") contravenes s. 7 of the *Canadian Charter of Rights and Freedoms* because it is unconstitutionally vague and/or overbroad.

II. Factual Background

On April 6 and 11, 1988, Canadian Pacific Limited ("CP") conducted controlled burns of the dry grass and weeds on its railway right-of-way in the town of Kenora, Ontario. The purpose of the controlled burns was to clear the right-of-way of combustible material which posed a potential fire hazard. Both burns discharged a significant amount of thick, dark smoke, which adversely affected the health and property of nearby residents. One resident suffered an asthma attack in his driveway after being exposed to the smoke. The smoke filled

Version française du jugement des juges La Forest, L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci et Major rendu par

LE JUGE GONTHIER —

I. Les points en litige

Le présent pourvoi porte sur les trois questions constitutionnelles suivantes: 25

1. L'alinéa 13(1)*a*) de la *Loi sur la protection de l'environnement*, L.R.O. 1980, ch. 141 (maintenant le par. 14(1) de la *Loi sur la protection de l'environnement*, L.R.O. 1990, ch. E.19), s'applique-t-il constitutionnellement à l'appelante lorsqu'elle procède à l'entretien de son emprise?

2. L'alinéa 13(1)*a*) de la *Loi sur la protection de l'environnement* est-il vague au point de contrevenir à l'art. 7 de la *Charte canadienne des droits et libertés*?

3. Si la réponse à la deuxième question est affirmative, l'al. 13(1)*a*) est-il néanmoins justifié par l'article premier de la *Charte*?

La première question a reçu une réponse affirmative dans les motifs rendus oralement à la fin de l'audition du pourvoi et les deuxième et troisième questions ont été prises en délibéré. Les présents motifs répondent à ces dernières. Il s'agit plus précisément de déterminer si l'al. 13(1)*a*) de la *Loi sur la protection de l'environnement* de l'Ontario, L.R.O. 1980, ch. 141 (modifiée) («LPE»), viole l'art. 7 de la *Charte canadienne droits et libertés* pour cause d'imprécision inconstitutionnelle ou de portée excessive. 26

II. Les faits

Les 6 et 11 avril 1988, Canadien Pacifique Limitée («CP») a procédé à un brûlage contrôlé des herbes sèches et des broussailles sur son emprise ferroviaire dans la ville de Kenora (Ontario). Elle visait ainsi à libérer l'emprise des matières combustibles qui pouvaient constituer un risque d'incendie. Les deux opérations de brûlage ont rejeté une quantité importante de fumée épaisse et opaque, qui a entraîné des conséquences préjudiciables pour la santé et les biens des personnes résidant à proximité. L'une d'entre elles a 27

the home of another man, with the result that he had to clean the interior walls and furniture thoroughly. Another resident discovered that the shrubs, grass and trees in her backyard had been damaged by the fire and smoke.

28 The smoke from the April 11, 1988 controlled burn was not only injurious to the health and property of several Kenora residents, but also hampered visibility on a 200-foot stretch of an adjacent road. One driver was forced to engage his vehicle lights and brakes because the smoke was so heavy that he was unable to see the other side of the road.

29 Following complaints from residents of the town, CP was charged with unlawfully discharging or permitting the discharge of a contaminant, namely smoke, into the natural environment that was likely to cause an adverse effect, contrary to s. 13(1)(*a*) of the Ontario EPA.

30 On October 22, 1991, CP was acquitted by Daub J.P. of the Provincial Offences Court of Ontario, who concluded that, although the respondent had established the essential elements of the offence under s. 13(1)(*a*) EPA, the appellant's defence of due diligence raised a reasonable doubt. On June 22, 1992, the respondent's appeal to the Ontario Court of Justice, Provincial Division, was allowed, and CP's acquittal was overturned.

31 CP appealed to the Ontario Court of Appeal, raising two constitutional issues. First, CP advanced an interjurisdictional immunity claim, arguing that, because it is a federal undertaking, s. 13(1)(*a*) of the Ontario EPA is not constitutionally applicable to emissions from controlled burns on its railroad right-of-way. Second, CP alleged that s. 13(1)(*a*) was unconstitutionally vague, and therefore in violation of s. 7 of the *Charter*. On May 19, 1993, the Court of Appeal dismissed CP's appeal.

fait une crise d'asthme dans son entrée après avoir été exposée à la fumée. La fumée a envahi la résidence d'un autre voisin, qui a dû par la suite procéder à un nettoyage en profondeur des murs intérieurs et du mobilier. Une autre personne a constaté que les arbustes, le gazon et les arbres de sa cour arrière avaient été endommagés par le feu et la fumée.

Non seulement la fumée de l'opération de brûlage du 11 avril 1988 a entraîné des conséquences préjudiciables pour la santé et les biens de plusieurs citoyens de Kenora, mais elle a aussi réduit la visibilité sur un tronçon de deux cents pieds d'une route adjacente. Un conducteur a dû allumer les phares de son véhicule et mettre les freins parce que la fumée était tellement dense qu'elle l'empêchait de voir l'autre côté de la route.

À la suite de plaintes portées par des citoyens de cette ville, CP a été accusée d'avoir illégalement occasionné ou permis le rejet d'un contaminant, à savoir de la fumée, dans l'environnement naturel ce qui pouvait entraîner une conséquence préjudiciable, en violation de l'al. 13(1)*a*) LPE.

Le 22 octobre 1991, CP a été acquittée par le juge Daub de la Cour des infractions provinciales de l'Ontario, qui a conclu que, même si l'intimée avait établi les éléments essentiels de l'infraction visée à l'al. 13(1)*a*) LPE, le moyen de défense fondé sur la diligence raisonnable invoqué par l'appelante suscitait un doute raisonnable. Le 22 juin 1992, la Division provinciale de la Cour de justice de l'Ontario a accueilli l'appel interjeté par l'intimée et infirmé l'acquittement de CP.

CP a interjeté appel de cette décision devant la Cour d'appel de l'Ontario en soulevant deux questions constitutionnelles. Elle a d'abord invoqué l'exclusivité des compétences en faisant valoir qu'à titre d'établissement fédéral, elle ne pouvait en vertu de la constitution être assujettie à l'application de l'al. 13(1)*a*) LPE à l'égard des rejets entraînés par le brûlage sur son emprise ferroviaire. Elle a aussi prétendu que l'al. 13(1)*a*) était d'une imprécision inconstitutionnelle et que, par conséquent, il violait l'art. 7 de la *Charte*. Le 19 mai 1993, la Cour d'appel a rejeté l'appel de CP.

CP then appealed both constitutional issues to this Court. In reasons delivered from the bench on January 24, 1995, this Court dismissed the interjurisdictional immunity claim, finding that the Privy Council decision in *Canadian Pacific Railway Co. v. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367, was determinative that s. 13(1)(*a*) was constitutionally applicable to CP in the circumstances of this case. Judgment on the s. 7 claim was reserved.

III. Relevant Statutory Provisions

Environmental Protection Act, R.S.O. 1980, c. 141, as amended S.O. 1983, c. 52: —

1. — (1) In this Act,

. . .

(*c*) "contaminant" means any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from the activities of man that may,

(i) impair the quality of the natural environment for any use that can be made of it,

(ii) cause injury or damage to property or to plant or animal life,

(iii) cause harm or material discomfort to any person,

(iv) adversely affect the health or impair the safety of any person,

(v) render any property or plant or animal life unfit for use by man;

(vi) cause loss of enjoyment of normal use of property, or

(vii) interfere with the normal conduct of business.

(*k*) "natural environment" means the air, land and water, or any combination or part thereof, of the Province of Ontario . . . .

13. — (1) Notwithstanding any other provision of this Act or the regulations, no person shall deposit, add, emit or discharge a contaminant or cause or permit the

CP a alors saisi notre Cour des deux questions constitutionnelles. Dans les motifs prononcés à l'audience le 24 janvier 1995, notre Cour a rejeté la demande fondée sur l'exclusivité des compétences en concluant que l'arrêt du Conseil privé *Canadian Pacific Railway Co. c. Corporation of the Parish of Notre Dame de Bonsecours*, [1899] A.C. 367, établissait qu'est constitutionnelle l'application de l'al. 13(1)*a*) à CP dans les circonstances de l'espèce. Elle a pris en délibéré la question de la demande sous le régime de l'art. 7. 32

III. Les dispositions législatives pertinentes

La *Loi sur la protection de l'environnement*, L.R.O. 1980, ch. 141, modifiée par S.O. 1983, ch. 52: —

[TRADUCTION]

1. (1) Les définitions qui suivent s'appliquent à la présente loi.

. . .

c) «contaminant» Solide, liquide, gaz, odeur, chaleur, son, vibration, radiation ou une combinaison de ces éléments qui proviennent, directement ou indirectement, des activités humaines et qui peuvent

(i) causer la dégradation de la qualité de l'environnement naturel relativement à tout usage qui peut en être fait,

(ii) causer du tort ou des dommages à des biens, des végétaux ou des animaux,

(iii) causer de la nuisance ou des malaises sensibles à quiconque,

(iv) causer l'altération de la santé de quiconque ou l'atteinte à sa sécurité;

(v) rendre des biens, des végétaux ou des animaux impropres à l'usage des êtres humains;

(vi) causer la perte de jouissance de l'usage normal d'un bien,

(vii) entraver la marche normale des affaires.

k) «environnement naturel» Air, terrain et eau ou toute combinaison ou partie de ces éléments qui sont compris dans la province de l'Ontario . . .

13. (1) Malgré toute autre disposition de la présente loi et des règlements, nul ne doit déposer, ajouter, émettre ou rejeter un contaminant, ou causer ou permettre le

deposit, addition, emission or discharge of a contaminant into the natural environment that,

(*a*) causes or is likely to cause impairment of the quality of the natural environment for any use that can be made of it;

(*b*) causes or is likely to cause injury or damage to property or to plant or animal life;

(*c*) causes or is likely to cause harm or material discomfort to any person;

(*d*) adversely affects or is likely to adversely affect the health of any person;

(*e*) impairs or is likely to impair the safety of any person;

(*f*) renders or is likely to render any property or plant or animal life unfit for use by man;

(*g*) causes or is likely to cause loss of enjoyment of normal use of property; or

(*h*) interferes or is likely to interfere with the normal conduct of business.

(2) Clause (1)(*a*) does not apply to animal wastes disposed of in accordance with normal farming practices.

IV. Decisions Below

(1) *Daub J.P.*

33 Daub J.P. agreed that s. 13(1)(*a*) EPA could apply to an almost limitless number of possible circumstances, but did not think that the provision was indefinite or uncertain. He observed that it would be impossible for the legislature to codify each circumstance in which the provision might apply, and that it would be the task of the courts to interpret and apply the provision in each case.

34 Moreover, Daub J.P. relied on the decision of the United States Supreme Court in *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), as adopted by the Ontario Court of Appeal in *R. v. Morgentaler* (1985), 52 O.R. (2d) 353, for the proposition that a party may not allege vagueness where that party's conduct is clearly proscribed by the challenged legislative enactment. In Daub J.P.'s view, CP's conduct in Kenora on April 6 and 11, 1988 was prohibited by s. 13(1)(*a*)

dépôt, l'ajout, l'émission ou le rejet dans l'environnement naturel d'un contaminant qui

a) cause ou risque de causer la dégradation de la qualité de l'environnement naturel relativement à tout usage qui peut en être fait,

b) cause ou risque de causer du tort ou des dommages à des biens, des végétaux ou des animaux,

c) cause ou risque de causer de la nuisance ou des malaises sensibles à quiconque,

d) cause ou risque de causer l'altération de la santé de quiconque;

e) cause ou risque de causer l'atteinte à la sécurité de quiconque;

f) rend ou risque de rendre des biens, des végétaux ou des animaux impropres à l'usage des êtres humains,

g) cause ou risque de causer la perte de jouissance de l'usage normal d'un bien,

h) entrave ou risque d'entraver la marche normale des affaires.

(2) L'alinéa (1)*a*) ne s'applique pas aux déchets animaux qui sont éliminés conformément aux pratiques normales en usage dans les exploitations agricoles.

IV. Les tribunaux d'instance inférieure

(1) *Le juge Daub*

Tout en reconnaissant que l'al. 13(1)*a*) LPE pouvait s'appliquer à un nombre presque illimité de situations possibles, le juge Daub a conclu qu'il ne s'agissait pas d'une disposition indéfinie ou incertaine. Il a fait remarquer qu'il serait impossible pour le législateur de codifier chaque circonstance susceptible d'être visée par cette disposition et qu'il appartient aux tribunaux d'en assurer l'interprétation et l'application dans chaque cas.

Le juge Daub s'est aussi fondé sur l'arrêt de la Cour suprême des États-Unis *Hoffman Estates c. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), adopté par la Cour d'appel de l'Ontario dans l'arrêt *R. c. Morgentaler* (1985), 52 O.R. (2d) 353, pour dire qu'une partie ne peut invoquer la théorie de l'imprécision lorsque sa conduite est clairement prohibée par la disposition législative attaquée. Selon le juge Daub, la conduite de CP à Kenora les 6 et 11 avril 1988 était interdite par l'al.

EPA, and CP could not therefore raise a vagueness claim against the provision.

(2) *Fraser Prov. Div. J., Ontario Court (Provincial Division)* (1992), 9 C.E.L.R. (N.S.) 26

Fraser Prov. Div. J. agreed with the conclusion reached by Daub J.P. He stated at p. 31 that "Section 13 does make it clear to any person of average intelligence what conduct is being prohibited".

(3) *The Ontario Court of Appeal* (1993), 13 O.R. (3d) 389

The Ontario Court of Appeal unanimously rejected CP's vagueness claim. Relying on the decision of this Court in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, the court sought to determine whether s. 13(1)(*a*) EPA provided sufficient guidance for legal debate. The court also determined that a deferential approach should be employed in light of the important social objectives of the EPA.

Like Daub J.P., the court relied upon the decision of the United States Supreme Court in *Hoffman Estates*, *supra*, and concluded that CP could not rely on hypothetical examples in support of its vagueness claim. It framed the issue as whether, "in the light of the circumstances of this case" (p. 400), s. 13(1)(*a*) is unconstitutionally vague.

The court then observed that there are three essential elements which must be proved by the Crown under s. 13(1)(*a*): (1) the Crown must prove that the defendant discharged or permitted the discharge of a contaminant; (2) the Crown must prove that the contaminant was discharged into the natural environment; and (3) the Crown must prove that the discharge of the contaminant was likely to cause impairment of the quality of the natural environment. The court concluded that the terms "discharge", "contaminant", "natural environment" and "impairment" provided sufficient guidance for legal debate, and that the test developed by this Court in *Nova Scotia Pharmaceutical Society*, *supra*, was satisfied.

13(1)*a*) LPE, de sorte que l'appelante ne pouvait soulever la question de l'imprécision à l'égard de cette disposition.

(2) *Le juge Fraser de la Cour de l'Ontario (Division provinciale)* (1992), 9 C.E.L.R. (N.S.) 26

35 Le juge Fraser a souscrit à la conclusion tirée par le juge Daub. Il a dit à la p. 31 que [TRADUCTION] «L'article 13 indique clairement à toute personne d'intelligence moyenne quelle conduite est interdite».

(3) *La Cour d'appel de l'Ontario* (1993), 13 O.R. (3d) 389

36 La Cour d'appel de l'Ontario a rejeté à l'unanimité le moyen de l'imprécision invoqué par CP. En se fondant sur l'arrêt de notre Cour *R. c. Nova Scotia Pharmaceutical Society*, [1992] 2 R.C.S. 606, la cour a cherché à déterminer si l'al. 13(1)*a*) LPE constituait un guide suffisant pour permettre un débat judiciaire. La cour a aussi déterminé qu'il y avait lieu de faire preuve de retenue eu égard aux objectifs sociaux importants visés par la LPE.

37 À l'instar du juge Daub, la cour s'est fondée sur l'arrêt *Hoffman Estates*, précité, de la Cour suprême des États-Unis et elle a conclu que CP ne pouvait invoquer des cas hypothétiques pour étayer sa prétention d'imprécision. Selon elle, il s'agissait de déterminer si, [TRADUCTION] «compte tenu des circonstances de l'espèce» (p. 400), l'al. 13(1)*a*) est d'une imprécision inconstitutionnelle.

38 La cour a ensuite fait remarquer que le ministère public doit prouver trois éléments essentiels sous le régime de l'al. 13(1)*a*): (1) que la défenderesse a rejeté un contaminant, ou permis que cela se fasse; (2) que le contaminant a été rejeté dans l'environnement naturel; (3) que le rejet du contaminant risquait de causer la dégradation de la qualité de l'environnement naturel. La cour a conclu que les expressions «rejet», «contaminant», «environnement naturel» et «dégradation» constituaient un guide suffisant pour permettre un débat judiciaire, et que le critère élaboré par notre Cour dans l'arrêt *Nova Scotia Pharmaceutical Society*, précité, était respecté.

V. Analysis

(1) *Introduction*

39 CP alleges that s. 13(1)(*a*) EPA is unconstitutionally vague and overbroad, and thereby infringes s. 7 of the *Charter*. Section 13(1)(*a*) states:

> **13.** — (1) Notwithstanding any other provision of this Act or the regulations, no person shall deposit, add, emit or discharge a contaminant or cause or permit the deposit, addition, emission or discharge of a contaminant into the natural environment that,
>
> (*a*) causes or is likely to cause impairment of the quality of the natural environment for any use that can be made of it . . . .

In the courts below, CP's vagueness claim involved a general challenge to s. 13(1)(*a*) in its entirety. In this Court, however, CP's claim specifically challenges the expression "for any use that can be made of [the natural environment]". CP submits that this element of s. 13(1)(*a*) is so vague and broad that it fails to provide an intelligible standard that would enable citizens to regulate their conduct.

40 I would note that s. 13(1)(*a*) EPA was amended in 1988 (S.O. 1988, c. 54, s. 10) and later renumbered as s. 14(1) (R.S.O. 1990, c. E.19). That provision states:

> **14.** — (1) Despite any other provision of this Act or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect.

"Adverse effect" is defined in s. 1(1) of the 1988 Act, and includes "impairment of the quality of the natural environment for any use that can be made of it" (s. 1(1)(*a*)). Therefore, the issue raised by CP in relation to the old s. 13(1)(*a*) EPA is directly relevant to ss. 14(1) and 1(1)(*a*) of the revised Act.

41 Section 13(1)(*a*) constitutes a broad and general pollution prohibition. In this respect, it is not unusual, as the EPA contains several broadly worded

V. Analyse

(1) *Introduction*

CP prétend que l'al. 13(1)*a*) LPE est d'une imprécision inconstitutionnelle et a une portée excessive, et qu'il viole ainsi l'art. 7 de la *Charte*. L'alinéa 13(1)*a*) dispose:

> [TRADUCTION] **13.** (1) Malgré toute autre disposition de la présente loi et des règlements, nul ne doit déposer, ajouter, émettre ou rejeter un contaminant, ou causer ou permettre le dépôt, l'ajout, l'émission ou le rejet dans l'environnement naturel d'un contaminant qui
>
> *a*) cause ou risque de causer la dégradation de la qualité de l'environnement naturel relativement à tout usage qui peut en être fait. . .

Devant les tribunaux d'instance inférieure, la prétention d'imprécision de CP visait en général tout l'al. 13(1)*a*). Devant notre Cour toutefois, CP attaque particulièrement l'expression «relativement à tout usage qui peut en être fait [de l'environnement naturel]». Elle fait valoir que cet élément de l'al. 13(1)*a*) est a ce point imprécis et général qu'il ne peut offrir de norme intelligible qui permette aux citoyens de régler leur conduite en conséquence.

Je voudrais d'abord souligner que l'al. 13(1)*a*) LPE a été modifié en 1988 (L.O. 1988, ch. 54, art. 10), avant de devenir le nouveau par. 14(1) (L.R.O. 1990, ch. E.19). Cette disposition porte:

> **14.** (1) Malgré toute autre disposition de la présente loi et des règlements, nul ne doit rejeter un contaminant dans l'environnement naturel ou permettre ou faire en sorte que cela se fasse lorsqu'un tel acte cause ou causera vraisemblablement une conséquence préjudiciable.

L'expression «conséquence préjudiciable» définie au par. 1(1) de la Loi de 1988 comprend notamment: «la dégradation de la qualité de l'environnement naturel relativement à tout usage qui peut en être fait» (al. 1(1)*a*)). Par conséquent, la question soulevée par CP relativement à l'ancien al. 13(1)*a*) LPE est directement pertinente à l'égard du par. 14(1) et de l'al. 1(1)*a*) de la loi révisée.

L'alinéa 13(1)*a*) constitue une interdiction générale de pollution, ce qui n'est pas inhabituel puisque la LPE comporte plusieurs interdictions for-

prohibitions. For example, Part VIII of the EPA prohibits "littering", and "litter" is broadly defined in s. 73 to include,

> . . . any material left or abandoned in a place other than a receptacle or place intended or approved for receiving such material and "littering" has a corresponding meaning. [Emphasis added.]

Another example is found in s. 23(2) EPA, which prohibits the discharge or deposit of "any waste" upon or over the ice over any water. "Waste" is defined in s. 23(1)(*c*) as "human excrement or any refuse" (emphasis added).

Environmental protection laws in other provinces contain similarly broad pollution prohibitions. Nova Scotia's *Environmental Protection Act*, R.S.N.S. 1989, c. 150, prohibits "pollution" generally (s. 23(1)), and "pollution" is defined in part as a "detrimental variation or alteration" (s. 3(n)) "that causes or is likely to cause impairment of the quality of the environment for any use that can be made of it . . . " (s. 3(f)(i)(A)). Quebec's *Environment Quality Act*, R.S.Q. 1977, c. Q-2, contains the following prohibition:

> **20.** No one may emit, deposit, issue or discharge or allow the emission, deposit issuance or discharge into the environment of a contaminant in a greater quantity or concentration than that provided for by regulation of the Gouvernement.
>
> The same prohibition applies to the emission, deposit, issuance or discharge of any contaminant the presence of which in the environment is prohibited by regulation of the Gouvernement or is likely to affect the life, health, safety, welfare or comfort of human beings, or to cause damage to or otherwise impair the quality of the soil, vegetation, wild life or property. [Emphasis added.]

Saskatchewan's *The Environmental Management and Protection Act*, S.S. 1983-84, c. E-10.2, as am. by S.S. 1992, c. 49, s. 5, is more succinct: "no person shall pollute or cause any pollution" (s. 34.1),

mulées en termes généraux. Ainsi, la Partie VIII de la LPE interdit de «répandre des détritus», et définit à l'art. 73 le terme «détritus» de façon générale:

> [TRADUCTION] . . . «détritus» s'entend notamment de toute matière laissée ou abandonnée dans un endroit autre qu'un récipient ou un endroit destiné ou autorisé à recevoir cette matière et l'expression «répandre des détritus» a une signification correspondante. [Je souligne.]

On peut en outre citer à titre d'exemple supplémentaire le par. 23(2) LPE qui interdit de rejeter ou de déposer «des déchets» sur de la glace formée à la surface des eaux. Le terme «déchets» défini à l'al. 23(1)*c*) comprend les [TRADUCTION] «excréments humains ou détritus» (je souligne).

Les lois sur la protection de l'environnement 42
dans d'autres provinces comportent des interdictions de pollution semblables formulées aussi en termes généraux. L'*Environmental Protection Act* de la Nouvelle-Écosse, R.S.N.S. 1989, ch. 150, interdit la «pollution» en général (par. 23(1)), laquelle est définie en partie comme une [TRADUCTION] «modification ou altération nuisible» (al. 3n)) [TRADUCTION] «qui cause ou risque de causer une dégradation de la qualité de l'environnement pour tout usage qui peut en être fait» (disp. 3f)(i)(A)). La *Loi sur la qualité de l'environnement* du Québec, L.R.Q. 1977, ch. Q-2, prévoit l'interdiction suivante:

> **20.** Nul ne doit émettre, déposer, dégager ou rejeter ni permettre l'émission, le dépôt, le dégagement ou le rejet dans l'environnement d'un contaminant au-delà de la quantité ou de la concentration prévue par règlement du gouvernement.
>
> La même prohibition s'applique à l'émission, au dépôt, au dégagement ou au rejet de tout contaminant, dont la présence dans l'environnement est prohibée par règlement du gouvernement ou est susceptible de porter atteinte à la vie, à la santé, à la sécurité, au bien-être ou au confort de l'être humain, de causer du dommage ou de porter autrement préjudice à la qualité du sol, à la végétation, à la faune ou aux biens. [Je souligne.]

L'*Environmental Management and Protection Act* de la Saskatchewan, S.S. 1983-84, ch. E-10.2, mod. par S.S. 1992, ch. 49, art. 5, est plus concise: [TRADUCTION] «Nul ne peut polluer ou causer

with "pollution" defined very broadly in s. 2(*v*). Examples of similarly broad pollution prohibitions can be found in s. 8 of the *Waters Protection Act*, R.S.N. 1990, c. W-5; s. 20 of the *Environmental Protection Act*, R.S.P.E.I. 1988, c. E-9; s. 5.3 of the *Clean Environment Act*, R.S.N.B. 1973, c. C-6, ad. by S.N.B. 1989, c. 52, s. 6 and am. by S.N.B. 1993, c. 13, s. 5; and s. 98 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3. Moreover, the *Canadian Environmental Protection Act*, R.S.C., 1985, c. 16 (4th Supp.), contains a very broad prohibition against ocean dumping, which makes it a crime to dump "any substance" from "any ship, aircraft, platform or other anthropogenic structure" in "any area of the sea" over which Canada exercises jurisdiction (s. 67).

43 What is clear from this brief review of Canadian pollution prohibitions is that our legislators have preferred to take a broad and general approach, and have avoided an exhaustive codification of every circumstance in which pollution is prohibited. Such an approach is hardly surprising in the field of environmental protection, given that the nature of the environment (its complexity, and the wide range of activities which might cause harm to it) is not conducive to precise codification. Environmental protection legislation has, as a result, been framed in a manner capable of responding to a wide variety of environmentally harmful scenarios, including ones which might not have been foreseen by the drafters of the legislation. This has left such legislation open to allegations of unconstitutional vagueness: *R. v. Lopes* (1988), 3 C.E.L.R. (N.S.) 78 (Ont. Dist. Ct.); *R. v. Royal Pacific Seafarms Ltd.* (1989), 7 W.C.B. (2d) 355 (B.C. Co. Ct.); *Québec (P.G.) v. Noranda Inc. (Mines Noranda Ltée)* (1989), 4 C.E.L.R. (N.S.) 158 (Que. Ct. (crim. div.)); *R. v. Algoma Steel Corp.* (1991), 14 W.C.B. (2d) 264 (Ont. Ct. (Prov. Div.)); *R. v. Satellite Construction Ltd.* (1992), 8 C.E.L.R. (N.S.) 215 (N.S. Prov. Ct.), and *R. v. Commander Business Furniture Inc.* (1992), 9 C.E.L.R. (N.S.) 185 (Ont. Ct. (Prov. Div.)). In

quelque pollution» (art. 34.1), le terme «pollution» étant défini en termes très généraux à l'al. 2*v*). On peut trouver des exemples d'interdictions de polluer aussi générales à l'art. 8 de la *Waters Protection Act*, R.S.N. 1990, ch. W-5, à l'art. 20 de l'*Environmental Protection Act*, R.S.P.E.I. 1988, ch. E-9, à l'art. 5.3 de la *Loi sur l'assainissement de l'environnement*, L.R.N.-B. 1973, ch. C-6, aj. par L.N.-B. 1989, ch. 52, art. 6, et mod. par L.N.-B. 1993, ch. 13, art. 5, et à l'art. 98 de l'*Environmental Protection and Enhancement Act*, S.A. 1992, ch. E-13.3. En outre, la *Loi canadienne sur la protection de l'environnement*, L.R.C. (1985), ch. 16 (4e suppl.) comprend une interdiction très générale de procéder à toute immersion de déchets en mer, rendant passible d'une infraction quiconque procède à l'immersion «de substances» à partir «de navires, aéronefs, plates-formes ou autres ouvrages» dans «toute zone de mer» relevant de la souveraineté du Canada (art. 67).

Il ressort clairement de cette brève revue des interdictions relatives à la pollution au Canada que nos législateurs ont préféré adopter une démarche générale, évitant ainsi une codification exhaustive de chaque situation entraînant l'interdiction de polluer. Une telle démarche dans le domaine de la protection de l'environnement ne surprend pas, étant donné que la nature de l'environnement (sa complexité et la vaste gamme des activités qui peuvent en causer la dégradation) ne se prête pas à une codification précise. Les lois sur la protection de l'environnement ont donc été rédigées d'une façon qui permette de répondre à une vaste gamme d'atteintes environnementales, y compris celles qui n'ont peut-être même pas été envisagées par leurs rédacteurs. Les lois de cette nature prêtent ainsi le flanc à des allégations d'imprécision inconstitutionnelle: *R. c. Lopes* (1988), 3 C.E.L.R. (N.S.) 78 (C. dist. Ont.); *R. c. Royal Pacific Seafarms Ltd.* (1989), 7 W.C.B. (2d) 355 (C. cté. C.-B.); *Québec (P.G.) c. Noranda Inc. (Mines Noranda Ltée)* (1989), 4 C.E.L.R. (N.S.) 158 (C. Qué. (ch. crim.)); *R. c. Algoma Steel Corp.* (1991), 14 W.C.B. (2d) 264 (C. Ont. (Div. prov.)); *R. c. Satellite Construction Ltd.* (1992), 8 C.E.L.R. (N.S.) 215 (C. prov. N.-É.), et *R. c. Commander Business Furniture Inc.* (1992), 9 C.E.L.R. (N.S.) 185

none of these cases, however, has the s. 7 vagueness claim succeeded.

CP's vagueness and overbreadth claims in relation to s. 13(1)(*a*) of the Ontario EPA could, in my view, be raised against any of the provincial and federal pollution prohibitions which I have mentioned above. Thus, a finding in CP's favour in the instant case would place these prohibitions, and potentially many others, in constitutional jeopardy. Such a finding would obviously impede the ability of the legislature to provide for environmental protection, and would constitute a significant social policy setback. However, for the reasons developed below, I find that CP's constitutional challenge must fail. The terms of s. 13(1)(*a*) EPA are not vague, but in fact apply quite clearly to pollution activity which is appropriately the subject of legislative prohibition. Moreover, while s. 13(1)(*a*) applies broadly, the objective of environmental protection is ambitious in scope. The legislature is justified in choosing equally ambitious means for achieving this objective.

In the discussion below, I will consider in detail the vagueness aspect of CP's constitutional challenge. I will then turn briefly to the overbreadth claim.

(2) *The Applicable Legal Principles for a Section 7 Vagueness Claim*

In *Nova Scotia Pharmaceutical Society*, *supra*, I enunciated the appropriate interpretive approach to a s. 7 vagueness claim. As I observed there, the principles of fundamental justice in s. 7 require that laws provide the basis for coherent judicial interpretation, and sufficiently delineate an "area of risk". Thus, "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate" (p. 643). This requirement of legal precision is founded on two rationales: the need to provide fair notice to citi-

(C. Ont. (Div. prov.)). Les allégations d'imprécision fondées sur l'art. 7 n'ont toutefois été retenues dans aucune de ces affaires.

Les allégations d'imprécision et de portée excessive avancées par CP à l'égard de l'al. 13(1)*a*) LPE pourraient, à mon avis, être soulevées à l'égard de n'importe quelle des interdictions de polluer provinciales et fédérales susmentionnées. Par conséquent, toute décision en faveur de CP en l'espèce mettrait en péril la constitutionnalité de ces interdictions et peut-être de nombreuses autres. Une telle décision nuirait manifestement au pouvoir du législateur d'assurer la protection de l'environnement et constituerait un important recul en matière de politique sociale. Toutefois, pour les motifs qui suivent, je conclus que l'attaque constitutionnelle présentée par CP doit être rejetée. Les termes de l'al. 13(1)*a*) LPE ne sont pas imprécis; au contraire, ils s'appliquent en fait très clairement à l'activité polluante qui est à juste titre visée par l'interdiction législative. En outre, autant l'al. 13(1)*a*) LPE s'applique de manière générale, autant l'objectif de la protection environnementale a une portée ambitieuse. Le législateur est fondé à choisir des moyens tout aussi ambitieux pour atteindre cet objectif. 44

Dans l'analyse qui suit, j'examinerai en détail le volet imprécision de la contestation constitutionnelle de CP. J'aborderai ensuite brièvement le volet portée excessive. 45

(2) *Les principes juridiques applicables à une prétention d'imprécision fondée sur l'art. 7*

Dans l'arrêt *Nova Scotia Pharmaceutical Society*, précité, j'ai énoncé la démarche interprétative qu'il convient d'adopter à l'égard d'une prétention d'imprécision fondée sur l'art. 7. Comme je l'ai dit alors, selon les principes de justice fondamentale de l'art. 7, les lois doivent fournir le fondement d'une interprétation judiciaire cohérente et délimiter suffisamment une «sphère de risque». Par conséquent, «une loi sera jugée d'une imprécision inconstitutionnelle si elle manque de précision au point de ne pas constituer un guide suffisant pour un débat judiciaire» (p. 643). Cette exigence de précision de la loi est fondée sur deux 46

zens of prohibited conduct, and the need to proscribe enforcement discretion.

47 In undertaking vagueness analysis, a court must first develop the full interpretive context surrounding an impugned provision. This is because the issue facing a court is whether the provision provides a sufficient basis for distinguishing between permissible and impermissible conduct, or for ascertaining an "area of risk". This does not necessitate an exercise in strict judicial line-drawing because, as noted above, the question to be resolved is whether the law provides sufficient guidance for legal debate as to the scope of prohibited conduct. In determining whether legal debate is possible, a court must first engage in the interpretive process which is inherent to the "mediating role" of the judiciary (*Nova Scotia Pharmaceutical Society*, *supra*, at p. 641). Vagueness must not be considered *in abstracto*, but instead must be assessed within a larger interpretive context developed through an analysis of considerations such as the purpose, subject matter and nature of the impugned provision, societal values, related legislative provisions, and prior judicial interpretations of the provision. Only after exhausting its interpretive role will a court then be in a position to determine whether an impugned provision affords sufficient guidance for legal debate.

48 The mediating role of the judiciary is of particular importance in those situations where practical difficulties prevent legislators from framing legislation in precise terms. On this point, I find helpful the comments of Andrew S. Butler, "A Presumption of Statutory Conformity with the *Charter*" (1993), 19 *Queen's L.J.* 209, at pp. 225-27:

> Let us consider the practical difficulties facing legislators in giving statutory expression to their intentions. One difficulty faced in the drafting of statutes is meeting the demand that laws operate prospectively. Legislatures

principes: la nécessité de donner aux citoyens un avertissement raisonnable au sujet d'une conduite interdite et la nécessité d'interdire que la loi soit appliquée de façon discrétionnaire.

Lorsqu'un tribunal est appelé à analyser une prétention d'imprécision, il doit d'abord circonscrire tout le contexte interprétatif entourant la disposition attaquée. Il doit procéder ainsi parce qu'il lui faut déterminer si la disposition fournit un fondement suffisant pour établir une distinction entre une conduite permise et une conduite prohibée, ou pour délimiter une «sphère de risque». Il n'est pas nécessaire de procéder à une délimitation judiciaire stricte puisque, comme je l'ai déjà mentionné, il s'agit de déterminer si la loi fournit un guide suffisant pour un débat judiciaire en ce qui a trait à l'étendue de la conduite prohibée. Pour pouvoir dire s'il y a possibilité d'un débat judiciaire, le tribunal doit d'abord entreprendre le processus d'interprétation qui est inhérent au «rôle de médiateur» du pouvoir judiciaire (*Nova Scotia Pharmaceutical Society*, précité, à la p. 641). La question de l'imprécision ne doit pas être examinée dans l'abstrait, mais plutôt être appréciée dans un contexte interprétatif plus large élaboré dans le cadre d'une analyse de certains aspects tels que l'objectif, le contenu et la nature de la disposition attaquée, les valeurs sociales en jeu, les dispositions législatives connexes et les interprétations judiciaires antérieures de la disposition. C'est uniquement après s'être acquitté intégralement de son rôle d'interprétation qu'un tribunal est en mesure de déterminer si la disposition attaquée fournit un guide suffisant pour un débat judiciaire.

Le rôle de médiateur du pouvoir judiciaire revêt une importance particulière dans les cas où des difficultés pratiques empêchent le législateur de formuler des lois en termes précis. Sur ce point, je trouve utiles les commentaires d'Andrew S. Butler, «A Presumption of Statutory Conformity with the *Charter*» (1993), 19 *Queen's L.J.* 209, aux pp. 225 à 227:

> [TRADUCTION] Examinons les difficultés pratiques auxquelles doivent faire face les législateurs lorsqu'ils expriment leurs intentions dans une loi. L'une des difficultés de la rédaction législative a trait à la nécessité

cannot as a rule set down *ex post facto* provisions, which identify types of fact situations intended to be caught by a particular enactment, distinguished from others. Accordingly, legislators face a dilemma: they must pay particular attention to and identify the core commonalities of the fact situations they *do* wish to legislate against (which become embodied within statutes), while at the same time not neglecting to anticipate and provide for variations on those fact situations, which may occur in the future .... The usual solution to this dilemma is to fall back on general language, which is adequate to cover the particular situations envisaged, and which holds out the possibility of catching unforeseen variations. This strategy can often lead to broadly expressed statutory language, with the danger that it may apply to too much activity — the problem of overbreadth — or that it will not be expressed in concrete enough terms — the problem of vagueness. In such instances, however, the expectation of legislators will invariably be that the courts will flesh-out the generality of the provisions through interpretation based upon experience. [Emphasis added; italics in original text.]

d'assurer une application prospective des lois. En règle générale, les législateurs ne peuvent établir des dispositions après le fait qui identifient des sortes de situations factuelles qu'ils entendent viser par une disposition particulière, en les distinguant des autres. Les législateurs sont donc pris dans un dilemme: il leur faut d'une part déterminer et identifier avec soin les constantes fondamentales des situations factuelles qu'ils *souhaitent* interdire par voie législative (en les énonçant dans les lois), et d'autre part ne pas négliger de prévoir les variations de ces situations factuelles qui risquent de se produire à l'avenir [. . .] La solution habituellement retenue pour sortir de ce dilemme consiste à recourir à une formulation générale, qui est adéquate pour couvrir les situations particulières prévues, et qui devrait permettre d'englober les variations non prévues. Cette stratégie donne souvent lieu à un libellé législatif exprimé en termes généraux, qui risque d'être applicable à un cercle d'activités trop grand — le problème de la portée excessive — ou qui n'est pas exprimé en des termes suffisamment concrets — le problème de l'imprécision. En pareil cas, cependant, les législateurs s'attendent invariablement à ce que les tribunaux étoffent les dispositions générales par une interprétation fondée sur l'expérience. [Je souligne; en italique dans l'original.]

The use of broad and general terms in legislation may well be justified, and s. 7 does not prevent the legislature from placing primary reliance on the mediating role of the judiciary to determine whether those terms apply in particular fact situations. I would stress, however, that the standard of legal precision required by s. 7 will vary depending on the nature and subject matter of a particular legislative provision. As I stated in *Nova Scotia Pharmaceutical Society*, *supra*, at p. 627:

Factors to be considered in determining whether a law is too vague include (a) the need for flexibility and the interpretive role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist ....

In particular, a deferential approach should be taken in relation to legislative enactments with legitimate social policy objectives, in order to avoid impeding the state's ability to pursue and promote those objectives (at p. 642). The s. 7 doc-

Le recours à des dispositions législatives générales peut fort bien se justifier, et l'art. 7 n'empêche pas le législateur de se fonder principalement sur le rôle de médiateur du pouvoir judiciaire pour déterminer si ces dispositions sont applicables à des situations factuelles particulières. Je voudrais toutefois souligner que la norme de précision législative exigée par l'art. 7 varie selon la nature et le contenu de chaque disposition législative particulière. Comme je l'ai dit dans *Nova Scotia Pharmaceutical Society*, précité, à la p. 627: 49

Les facteurs dont il faut tenir compte pour déterminer si une loi est trop imprécise comprennent: a) la nécessité de la souplesse et le rôle des tribunaux en matière d'interprétation; b) l'impossibilité de la précision absolue, une norme d'intelligibilité étant préférable; c) la possibilité qu'une disposition donnée soit susceptible de nombreuses interprétations qui peuvent même coexister. . .

Il faudrait en particulier faire preuve de retenue à l'égard des dispositions législatives qui cherchent à atteindre des objectifs de politique sociale légitimes, afin de ne pas nuire à la capacité de l'État de viser et de promouvoir ces objectifs (à la p. 642).

trine of vagueness must not be used to straightjacket the state in social policy fields.

(3) *Application of the Vagueness Principles in the Instant Case*

50 CP alleges that s. 13(1)(*a*) is so open-ended that it constitutes a "standardless sweep". The issue to be resolved is whether s. 13(1)(*a*) provides the basis for coherent legal debate as to what constitutes a "contaminant", an "impairment" and a "use" of the "natural environment". In other words, can the scope of s. 13(1)(*a*) be reasonably interpreted, in order for an "area of risk" to be discerned?

51 In developing the interpretive context for a s. 7 vagueness analysis, it is first necessary to have regard to the purpose and subject matter of the impugned legislative provision. The purpose of the EPA, as stated in s. 2, "is to provide for the protection and conservation of the natural environment". The social importance of environmental protection is obvious, yet the nature of the environment does not lend itself to precise codification. On this point, the comments of the Law Reform Commission of Canada, *Crimes Against the Environment* (1985), Working Paper 44, are apposite. There, the Commission proposed the formulation of a *Criminal Code* prohibition against environmental pollution, and at p. 46 recommended that the prohibition should be framed in "general terms":

> To be as effective as possible, a *Criminal Code* prohibition against environmental pollution should be formulated in general terms as regards the substances, contaminants, and range of activities which could fall within its scope. The advantage thereby gained is that the offence could be as all-inclusive as possible, not excluding as a potential focus of criminal liability a specific form of conduct, a particular element of the environment, or a specific substance or contaminant only because they were not expressly referred to in the *Code* offence. If each substance, emission standard or type of activity had to be expressly listed in a *Criminal Code* offence, it would have to be revised each time a new pollutant, hazard or activity not originally foreseen

La théorie de l'imprécision au regard de l'art. 7 ne doit pas servir à imposer une camisole de force à l'État dans les domaines de la politique sociale.

(3) *Application des principes de l'imprécision à la présente espèce*

CP prétend que l'al. 13(1)*a*) a une portée tellement illimitée qu'il laisse une «large place à l'arbitraire». Il s'agit de déterminer si l'al. 13(1)*a*) fournit le fondement d'un débat judiciaire cohérent sur ce qui constitue un «contaminant», une «dégradation» et un «usage» de «l'environnement naturel». En d'autres termes, la portée de l'al. 13(1)*a*) peut-elle recevoir une interprétation raisonnable qui permette de délimiter une «sphère de risque»?

Dans l'élaboration du contexte interprétatif pour une analyse de l'imprécision au regard de l'art. 7, il est nécessaire d'examiner en premier lieu l'objectif et le contenu de la disposition législative attaquée. La LPE a pour objet, ainsi que l'énonce l'art. 2, [TRADUCTION] «d'assurer la protection et la conservation de l'environnement naturel». L'importance de la protection de l'environnement pour la société est évidente, mais de par sa nature, l'environnement ne se prête pas à une codification précise. À cet égard, les commentaires de la Commission de réforme du droit du Canada dans *Les crimes contre l'environnement* (1985), Document de travail 44, sont pertinents. La Commission y propose la formulation d'une interdiction de pollution de l'environnement dans le *Code criminel* et recommande, aux pp. 53 et 54, le recours à un libellé en «termes généraux»:

> Par souci d'efficacité, les dispositions du *Code criminel* prohibant la pollution de l'environnement devraient être formulées en termes généraux pour ce qui est des substances, des contaminants et des types d'activités visés. Une formulation générale présenterait l'avantage de donner à l'infraction une portée compréhensive, de façon à ne pas exclure d'emblée de la responsabilité pénale un type de conduite particulier, un élément particulier de l'environnement ou encore une substance ou un contaminant particuliers seulement parce qu'ils n'ont pas été énumérés dans le texte d'incrimination. En effet, s'il fallait énumérer dans le *Code criminel* chaque substance, norme d'émission ou type d'activité, il faudrait modifier le *Code* chaque fois qu'un nouveau polluant,

came into existence, and each time a new emission standard was formulated, or an existing one revised . . . .

To be as effective as possible, a *Code* prohibition of pollution should accommodate a wide range of activities. The environment and consequently human life and health, can after all, be harmed or endangered either by direct acts or in the course of many kinds of activity. The primary harm and danger points as regards a wide variety of potentially hazardous goods, wastes and contaminants are their manufacture, their transportation, their use, their storage and their disposal. In the interests of both comprehension and specificity, all these activities and stages which could in some circumstances, attract criminal liability, should be expressly included in the formulation of the *Code* offence.

In the context of environmental protection legislation, a strict requirement of drafting precision might well undermine the ability of the legislature to provide for a comprehensive and flexible regime. As the Law Reform Commission suggests, then, generally framed pollution prohibitions are desirable from a public policy perspective. This explains why s. 13(1)(*a*) prohibits any emission of a contaminant which causes or is likely to cause impairment of the quality of the natural environment for any use that can be made of it. In my view, the generality of s. 13(1)(*a*) ensures flexibility in the law, so that the EPA may respond to a wide range of environmentally harmful scenarios which could not have been foreseen at the time of its enactment.

Moreover, the precise codification of environmental hazards in environmental protection legislation may hinder, rather than promote, public understanding of what conduct is prohibited, and may fuel uncertainty about the "area of risk" created by the legislation. This is a point raised in *Nova Scotia Pharmaceutical Society*, *supra*, at p. 642. In the area of environmental protection, legislators have two choices. They may enact detailed provisions which prohibit the release of particular quantities of enumerated substances into the natural environment. Alternatively, they may

danger ou activité non prévu initialement se fait jour, chaque fois qu'une nouvelle norme d'émission est formulée ou qu'une norme existante est révisée. . .

Pour être efficaces, les dispositions du *Code* interdisant la pollution devraient pouvoir embrasser un vaste éventail d'activités. Après tout, l'environnement et, partant, la vie et la santé humaines, peuvent être endommagés ou mis en danger soit par des actes directs, soit au cours de nombreuses activités. Les principaux dommages et dangers que peuvent causer une grande variété de produits, de déchets et de contaminants dangereux peuvent survenir au cours de leur fabrication, de leur transport, de leur utilisation, de leur stockage et de leur élimination. Par souci d'exhaustivité autant que de précision, toutes ces activités qui peuvent, dans certaines conditions, engager la responsabilité pénale, devraient être visées par la formulation du texte d'incrimination.

52 Dans le contexte des lois sur la protection de l'environnement, toute exigence stricte de précision dans la formulation pourrait avoir pour effet de limiter la capacité du législateur à établir un régime complet et souple. Comme le dit la Commission de réforme du droit, il est préférable d'un point de vue de politique d'intérêt public de formuler les dispositions prohibant la pollution en termes généraux. Voilà pourquoi l'al. 13(1)*a*) interdit toute émission d'un contaminant qui cause ou risque de causer la dégradation de la qualité de l'environnement naturel relativement à tout usage qui peut en être fait. À mon avis, la généralité de l'al. 13(1)*a*) se trouve à assurer la souplesse de la loi, de sorte que la LPE puisse répondre à une vaste gamme d'hypothèses d'atteintes à l'environnement qui ne pouvaient être envisagées au moment de son adoption.

53 De plus, la codification précise des risques environnementaux dans les lois sur la protection de l'environnement peut avoir pour effet de gêner plutôt que de favoriser la compréhension par le public des conduites qui sont prohibées et d'alimenter l'incertitude quant à la «sphère de risque» créée par la loi. Ce point a été soulevé dans *Nova Scotia Pharmaceutical Society*, précité, à la p. 642. En matière de protection de l'environnement, les législateurs ont le choix entre deux possibilités. D'une part, ils peuvent adopter des dispositions détaillées qui interdisent le rejet dans l'environne-

choose a more general prohibition of "pollution", and rely on the courts to determine whether, in a particular case, the release of a substance into the natural environment is of sufficient magnitude to attract legislative sanction. The latter option is, of course, more flexible and better able to accommodate developments in our knowledge about environmental protection. However, a general enactment may be challenged (as in the instant case) for failing to provide adequate notice to citizens of prohibited conduct. Is a very detailed enactment preferable? In my view, in the field of environmental protection, detail is not necessarily the best means of notifying citizens of prohibited conduct. If a citizen requires a chemistry degree to figure out whether an activity releases a particular contaminant in sufficient quantities to trigger a statutory prohibition, then that prohibition provides no better fair notice than a more general enactment. The notice aspect of the vagueness analysis must be approached from an objective point of view: would the average citizen, with an average understanding of the subject matter of the prohibition, receive adequate notice of prohibited conduct? If specialized knowledge is required to understand a legislative provision, then citizens may be baffled.

54 Of course, the question remains as to whether sufficient notice is provided to meet the standard demanded by s. 7. On this point, in *Nova Scotia Pharmaceutical Society*, *supra*, I observed that there are two aspects to the fair notice requirement: procedural and substantive. Procedural notice involves the mere fact of bringing the text of a law to the attention of citizens. As I noted at p. 633, the idea of giving fair notice to citizens would be rather empty if procedural notice were sufficient, particularly since citizens are presumed to know the law. Therefore, whether or not citizens are familiar with the text of a law is not a central con-

ment naturel de quantités particulières de substances énumérées. D'autre part, ils peuvent opter pour une interdiction plus générale de «pollution», et se fier sur les tribunaux pour déterminer si, dans un cas particulier, le rejet d'une substance dans l'environnement naturel est suffisamment important pour en rendre l'auteur passible de sanction légale. Cette seconde option est bien sûr plus souple et plus susceptible de s'adapter à l'évolution de nos connaissances en matière de protection de l'environnement. Toutefois, une disposition générale peut être attaquée (comme en l'espèce) parce qu'elle ne fournirait pas aux citoyens un avertissement adéquat de la conduite prohibée. Une disposition législative très précise serait-elle préférable? À mon avis, en matière de protection de l'environnement, l'énumération détaillée n'est pas nécessairement la meilleure façon d'avertir les citoyens des conduites qui sont prohibées. Si une interdiction législative exige du citoyen qu'il ait une formation poussée en chimie pour être en mesure de déterminer qu'une activité donnée libère un contaminant particulier en quantité suffisante pour entraîner son application, cette interdiction ne donne guère un meilleur avertissement qu'une loi plus générale. Le volet avertissement de l'analyse de l'imprécision doit être abordé d'un point de vue objectif: est-ce que le citoyen moyen possédant une connaissance moyenne de la matière visée par l'interdiction en tirerait un avertissement adéquat de la conduite prohibée? Les citoyens peuvent être déroutés s'il leur faut posséder des connaissances spécialisées pour être en mesure de comprendre une disposition législative.

Bien sûr, la question demeure toujours de savoir si la disposition donne un avertissement suffisant pour satisfaire à la norme de l'art. 7. À cet égard, dans *Nova Scotia Pharmaceutical Society*, précité, j'ai fait remarquer que l'exigence d'un avertissement raisonnable comporte deux volets: l'un touchant la forme et l'autre, le fond. L'aspect de l'avertissement qui touche la forme se limite au seul fait d'attirer l'attention des citoyens sur le texte de la loi. Comme je l'ai dit à la p. 633, l'idée de donner un avertissement raisonnable aux citoyens serait plutôt dénuée de sens s'il suffisait simplement de donner un avertissement sur la

cern of vagueness analysis. Instead, the focus of the analysis is the substantive aspect of fair notice, which I described at pp. 633-34 as "an understanding that some conduct comes under the law".

Whether citizens appreciate that particular conduct is subject to legislative sanction is inextricably linked to societal values. As I stated in *Nova Scotia Pharmaceutical Society*, *supra*, at p. 634:

> The substantive aspect of fair notice is therefore a subjective understanding that the law touches upon some conduct, based on the substratum of values underlying the legal enactment and on the role that the legal enactment plays in the life of the society.

Societal values are highly relevant in assessing whether a general pollution prohibition, such as s. 13(1)(*a*) EPA, provides fair notice to citizens of prohibited conduct. It is clear that over the past two decades, citizens have become acutely aware of the importance of environmental protection, and of the fact that penal consequences may flow from conduct which harms the environment. Recent environmental disasters, such as the Love Canal, the Mississauga train derailment, the chemical spill at Bhopal, the Chernobyl nuclear accident, and the *Exxon Valdez* oil spill, have served as lightning rods for public attention and concern. Acid rain, ozone depletion, global warming and air quality have been highly publicized as more general environmental issues. Aside from high-profile environmental issues with a national or international scope, local environmental issues have been raised and debated widely in Canada. Everyone is aware that individually and collectively, we are responsible for preserving the natural environment. I would agree with the Law Reform Commission of

forme, surtout puisque la connaissance de la loi est présumée. Par conséquent, la question de savoir si les citoyens connaissent bien le texte d'une loi n'est pas une question centrale dans une analyse relative à l'imprécision. L'analyse doit plutôt se concentrer sur le fond de l'avertissement raisonnable, que j'ai décrit à la p. 633 comme «la conscience qu'une conduite est répréhensible en droit».

Le fait que les citoyens soient conscients ou non qu'une conduite particulière entraîne sanction de la loi est inextricablement lié aux valeurs de la société. Comme je l'ai dit dans *Nova Scotia Pharmaceutical Society*, précité, à la p. 634: 55

> Du point de vue du fond, l'avertissement raisonnable réside donc dans la conscience subjective de l'illégalité d'une conduite, fondée sur les valeurs qui forment le substrat du texte d'incrimination et sur le rôle que joue le texte d'incrimination dans la vie de la société.

Les valeurs de la société sont des plus pertinentes lorsqu'il s'agit de déterminer si une interdiction générale de pollution, comme celle qui est prévue à l'al. 13(1)*a*) LPE, donne aux citoyens un avertissement raisonnable de la conduite prohibée. Il est clair qu'au cours des deux dernières décennies, les citoyens se sont fortement sensibilisés à l'importance d'assurer la protection de l'environnement et au fait que des conséquences pénales peuvent découler d'une conduite qui nuit à l'environnement. Des désastres environnementaux récents, comme l'état du Love Canal, le déraillement ferroviaire à Mississauga, la fuite de produits chimiques à Bhopal, l'accident nucléaire de Tchernobyl et le déversement de pétrole de l'*Exxon Valdez*, ont canalisé l'attention et l'inquiétude du public. Les pluies acides, l'amincissement de la couche d'ozone, le réchauffement global de la terre et la qualité de l'air sont des sujets environnementaux plus généraux qui ont fait la manchette. Outre les questions environnementales marquantes à l'échelle nationale ou internationale, il est des questions d'environnement locales qui sont soulevées et débattues un peu partout au Canada. Nous savons tous que, individuellement et collectivement, nous sommes responsables de la préservation de l'environnement naturel. J'abonde dans le sens de la Commission de réforme du droit du

Canada, *Crimes Against the Environment*, *supra*, which concluded at p. 8 that:

> . . . a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the *right to a safe environment.*
>
> To some extent, this right and value appears to be new and emerging, but in part because it is an extension of existing and very traditional rights and values already protected by criminal law, its presence and shape even now are largely discernible. Among the new strands of this fundamental value are, it may be argued, those such as *quality of life*, and *stewardship* of the natural environment. At the same time, traditional values as well have simply expanded and evolved to include the environment now as an area and interest of direct and primary concern. Among these values fundamental to the purposes and protections of criminal law are the *sanctity of life*, the *inviolability and integrity of persons*, and the *protection of human life and health.* It is increasingly understood that certain forms and degrees of environmental pollution can directly or indirectly, sooner or later, seriously harm or endanger human life and human health. [Emphasis in original text.]

Canada qui, dans son document *Les crimes contre l'environnement*, *op. cit.*, a conclu, à la p. 10:

> . . . certains faits de pollution représentent effectivement la violation d'une valeur fondamentale et largement reconnue, valeur que nous appellerons le *droit à un environnement sûr.*
>
> Cette valeur paraît relativement nouvelle, encore que dans la mesure où elle s'inscrit dans le prolongement d'un ensemble traditionnel et bien établi de droits et de valeurs déjà protégés par le droit pénal, son existence et ses modalités soient facilement perceptibles. Parmi les nouvelles composantes de cette valeur fondamentale, on peut sans doute compter la *qualité de la vie* et la *responsabilité* de l'être humain envers l'environnement naturel. D'autre part, les valeurs plus traditionnelles ont simplement évolué et pris une certaine ampleur pour embrasser l'environnement à titre de sujet d'intérêt et de préoccupation en soi. Font partie des valeurs fondamentales qui sous-tendent les objets et les mécanismes de protection du droit pénal, *le caractère sacré de la vie, l'inviolabilité et l'intégrité de la personne* et la *protection de la vie et de la santé humaines.* L'on s'entend de plus en plus pour dire que la pollution de l'environnement, sous certaines formes et à certains degrés, peut, directement ou indirectement, à court ou à long terme, être gravement dommageable ou dangereuse pour la vie et la santé humaines. [En italique dans l'original.]

Not only has environmental protection emerged as a fundamental value in Canadian society, but this has also been recognized in legislative provisions such as s. 13(1)(*a*) EPA.

Non seulement la protection de l'environnement est-elle devenue une valeur fondamentale au sein de la société canadienne, mais ce fait est maintenant reconnu dans des dispositions législatives telles que l'al. 13(1)*a*) LPE.

56 In 1988, when the pollution in the instant case took place, few citizens would have been aware of the actual terms of s. 13(1)(*a*) EPA. However, the average citizen in Ontario would have known that pollution was statutorily prohibited. It therefore would not have come as a surprise to citizens that the EPA prohibited the emission of contaminants into the environment that were likely to impair a use of the natural environment. In my view, the purpose and terms of s. 13(1)(*a*) are so closely related to the societal value of environmental protection that substantive notice of the prohibition in s. 13(1)(*a*) is easy to demonstrate.

En 1988, au moment où est survenue la pollution visée par la présente affaire, peu de citoyens connaissaient la formulation exacte de l'al. 13(1)*a*) LPE. Toutefois, l'Ontarien moyen devait savoir que la pollution était interdite par la loi. Les citoyens n'auraient donc pas été surpris de savoir que la LPE interdisait l'émission dans l'environnement de contaminants susceptibles de détériorer un usage de l'environnement naturel. À mon avis, l'objet et les termes de l'al. 13(1)*a*) sont si intimement liés à la valeur que représente la protection de l'environnement pour la société qu'il est facile de démontrer l'existence de l'avertissement quant au fond de la prohibition prévue à l'al. 13(1)*a*).

In addition to the purpose and subject matter of s. 13(1)(*a*) EPA, and the societal values underlying the provision, the interpretive context in the instant case is further coloured by the regulatory nature of the offence contained in s. 13(1)(*a*). In *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, Cory J. held at p. 227 that, "the contextual approach requires that regulatory and criminal offences be treated differently for the purposes of *Charter* review", with the result that regulatory offences are subject to a lower standard of *Charter* scrutiny. He offered two justifications for differential treatment. The first, the licensing justification, is not implicated in the instant case. However, the second, the vulnerability justification, is highly relevant. As Cory J. explained, at p. 233:

> The realities and complexities of a modern industrial society coupled with the very real need to protect all of society and particularly its vulnerable members, emphasize the critical importance of regulatory offences in Canada today. Our country simply could not function without extensive regulatory legislation. The protection provided by such measures constitutes a second justification for the differential treatment, for *Charter* purposes, of regulatory and criminal offences.

Cory J. emphasized the principle that the *Charter* should not be used as an instrument to roll back legislative protections enacted on behalf of the disadvantaged, vulnerable and comparatively powerless members of society. He then reached the following conclusion, at p. 234:

> Regulatory legislation is essential to the operation of our complex industrial society; it plays a legitimate and vital role in protecting those who are most vulnerable and least able to protect themselves. The extent and importance of that role has increased continuously since the onset of the Industrial Revolution. Before effective workplace legislation was enacted, labourers — including children — worked unconscionably long hours in dangerous and unhealthy surroundings that evoke visions of Dante's *Inferno*. It was regulatory legislation with its enforcement provisions which brought to an end the shameful situation that existed in mines, factories and workshops in the nineteenth century. The differen-

57 À l'objet et au contenu de l'al. 13(1)*a*) LPE de même qu'aux valeurs de la société qui sous-tendent cette disposition vient s'ajouter, comme élément du contexte interprétatif, la nature réglementaire de l'infraction prévue à l'al. 13(1)*a*). Dans *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 154, le juge Cory a écrit, à la p. 227, que «la méthode contextuelle exige que les infractions réglementaires et les infractions criminelles soient traitées différemment aux fins de l'examen fondé sur la *Charte*», de sorte que les infractions réglementaires sont assujetties à une norme moins sévère d'examen fondé sur la *Charte*. Il a avancé deux raisons pour justifier un traitement différent. La première, qui a trait à l'acceptation d'un régime réglementaire, ne s'applique pas ici. En revanche, la seconde, qui a trait à la vulnérabilité, est très pertinente. Comme l'explique le juge Cory, à la p. 233:

> Les réalités et les complexités d'une société industrielle moderne associées au besoin réel de protéger tous les membres de la société et, en particulier, ceux qui sont vulnérables font ressortir l'importance cruciale des infractions réglementaires au Canada aujourd'hui. Notre pays ne pourrait tout simplement pas fonctionner sans réglementation très étendue. La protection fournie par de telles mesures est une seconde justification du traitement différent des infractions réglementaires et des infractions criminelles aux fins de la *Charte*.

Le juge Cory a souligné le principe selon lequel la *Charte* ne devrait pas servir à réduire les protections législatives adoptées à l'intention des membres de la société qui sont désavantagés, vulnérables et relativement démunis. Il est arrivé à la conclusion suivante, à la p. 234:

> Les lois de nature réglementaire sont essentielles au fonctionnement de notre société industrielle complexe; elles jouent un rôle crucial et légitime dans la protection des citoyens qui sont les plus vulnérables et qui sont les moins capables de se protéger eux-mêmes. Ce rôle a constamment pris de l'ampleur depuis le début de la révolution industrielle. Avant l'adoption de lois efficaces sur les conditions et les lieux de travail, on imposait aux travailleurs, y compris aux enfants, des horaires de travail déraisonnablement longs dans des endroits dangereux et malsains qui évoquent des visions de l'*Enfer* de Dante. Ce sont les lois de réglementation et leurs dispositions d'application qui ont mis fin à la situation

tial treatment of regulatory offences is justified by their common goal of protecting the vulnerable.

58 In the environmental context, each one of us is vulnerable to the health and property damage caused by pollution. Where the legislature provides protection through regulatory statutes such as the EPA, it is appropriate for courts to take a more deferential approach to the *Charter* review of the offences contained in such statutes.

59 I therefore conclude that the purpose and subject matter of s. 13(1)(*a*) EPA, the societal values underlying it, and its nature as a regulatory offence, all inform the analysis of CP's s. 7 vagueness claim. Legislators must have considerable room to manoeuvre in the field of environmental regulation, and s. 7 must not be employed to hinder flexible and ambitious legislative approaches to environmental protection.

60 Keeping this in mind, it is now necessary to consider the actual terms of s. 13(1)(*a*). In order to secure a conviction under s. 13(1)(*a*), the Crown must prove three elements: (1) that the accused has emitted, or caused or permitted the emission of a contaminant; (2) that the contaminant was emitted into the natural environment; and (3) that the contaminant caused or was likely to cause the impairment of the quality of the natural environment for any use that can be made of it.

61 The term "contaminant" is defined in s. 1(1)(*c*) EPA as:

(*c*) . . . any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or indirectly from the activities of man that may,

(i) impair the quality of the natural environment for any use that can be made of it,

scandaleuse qui existait dans les mines, dans les usines et dans les ateliers au XIX^e siècle. Le traitement différent des infractions réglementaires se justifie par leur objectif commun qui est de protéger ceux qui sont vulnérables.

Dans le contexte environnemental, chacun d'entre nous est menacé par la dégradation de la santé et des biens que cause la pollution. Lorsque le législateur prévoit des mesures de protection au moyen de lois de nature réglementaire comme la LPE, il convient que les tribunaux fassent preuve d'une plus grande retenue quand ils examinent les infractions prévues dans ces lois au regard de la *Charte*.

Je conclus donc que l'objectif et le contenu de l'al. 13(1)*a*) LPE, les valeurs de la société qui le sous-tendent, de même que la nature réglementaire de l'infraction qu'il prévoit ont tous une incidence sur l'analyse de l'imprécision au regard de l'art. 7 alléguée par CP. Les législateurs doivent disposer d'une grande marge de manœuvre en matière de réglementation environnementale, et l'art. 7 ne doit pas nuire aux démarches législatives souples et d'envergure en matière de protection de l'environnement.

Cela dit, il est maintenant nécessaire d'examiner les termes mêmes de l'al. 13(1)*a*). Pour obtenir une déclaration de culpabilité sous le régime de l'al. 13(1)*a*), le ministère public doit prouver trois éléments: (1) que l'accusée a rejeté un contaminant, ou permis que cela se fasse; (2) que le contaminant a été rejeté dans l'environnement naturel, et (3) que le rejet du contaminant a causé ou risquait de causer la dégradation de la qualité de l'environnement naturel relativement à tout usage qui peut en être fait.

Le mot «contaminant» est ainsi défini à l'al. 1(1)*c*) LPE:

c) Solide, liquide, gaz, odeur, chaleur, son, vibration, radiation ou une combinaison de ces éléments qui proviennent, directement ou indirectement, des activités humaines et qui peuvent

(i) causer la dégradation de la qualité de l'environnement naturel relativement à tout usage qui peut en être fait,

(ii) cause injury or damage to property or to plant or animal life,

(iii) cause harm or material discomfort to any person,

(iv) adversely affect the health or impair the safety of any person,

(v) render any property or plant or animal life unfit for use by man;

(vi) cause loss of enjoyment of normal use of property, or

(vii) interfere with the normal conduct of business.

(ii) causer du tort ou des dommages à des biens, des végétaux ou des animaux,

(iii) causer de la nuisance ou des malaises sensibles à quiconque,

(iv) causer l'altération de la santé de quiconque ou l'atteinte à sa sécurité;

(v) rendre des biens, des végétaux ou des animaux impropres à l'usage des êtres humains;

(vi) causer la perte de jouissance de l'usage normal d'un bien,

(vii) entraver la marche normale des affaires.

The term "natural environment" is defined in s. 1(1)(*k*) as "the air, land and water, or any combination or part thereof, of the Province of Ontario". Subject to my comments below, which are relevant to the interpretation of s. 1(1)(*c*)(i), I have no trouble concluding that these statutory definitions provide the basis for legal debate as to what constitutes a "contaminant" and the "natural environment".

L'expression «environnement naturel» est ainsi définie à l'al. 1(1)*k*): [TRADUCTION] «Air, terrain et eau ou toute combinaison ou partie de ces éléments qui sont compris dans la province de l'Ontario.» Sous réserve de mes remarques ci-après, qui sont pertinentes à l'interprétation du sous-al. 1(1)*c*)(i), je n'ai aucune difficulté à conclure que ces définitions législatives fournissent matière à débat judiciaire sur ce qui constitue un «contaminant» et l'«environnement naturel».

The term "impairment" is not defined in the EPA. However, I agree with Galligan J.A. in the court below, who found it significant that the concept of "impairment" has been the subject of legal debate in the context of drinking and driving for decades. In the recent decision of the Ontario Court of Appeal in *R. v. Stellato*(1993), 78 C.C.C. (3d) 380, aff'd, [1994] 2 S.C.R. 478, that court had the opportunity to review the legal debate surrounding the interpretation of "impaired", as the term is used in s. 253(*a*) of the *Criminal Code* (operation of a motor vehicle while impaired). Labrosse J.A., writing for the court at p. 382, observed that some courts have adopted an interpretation of "impaired" which requires a "marked departure from what is usually considered as the normal" (*R. v. McKenzie* (1955), 111 C.C.C. 317 (Alta. Dist. Ct.); *R. v. Smith* (1992), 73 C.C.C. (3d) 285 (Alta. C.A.)), whereas other courts have concluded that the term "impaired" covers even a slight departure from the norm (*R. v. Winlaw* (1988), 13 M.V.R. (2d) 112 (Ont. Dist. Ct.); *R. v. Bruhjell*, [1986] B.C.J. No. 746 (C.A.); *R. v. Campbell* (1991), 87 Nfld. & P.E.I.R. 269

62 Le terme «dégradation» (en anglais «*impairment*») n'est pas défini dans la LPE. Toutefois, je suis d'accord avec le juge Galligan, de la Cour d'appel, qui a jugé intéressant le fait que la notion d'«*impairment*» a été pendant des décennies l'objet de débats judiciaires dans le contexte d'infractions d'alcool au volant. Dans l'arrêt récent *R. c. Stellato* (1993), 78 C.C.C. (3d) 380, conf. par [1994] 2 R.C.S. 478, la Cour d'appel de l'Ontario a eu l'occasion d'examiner le débat judiciaire entourant l'interprétation de l'expression «*impaired*» («affaiblie») employée à l'al. 253*a*) du *Code criminel* (conduite d'un véhicule automobile avec capacité affaiblie). Le juge Labrosse, au nom de la cour, a fait observer, à la p. 382, que certains tribunaux ont adopté une interprétation du terme «affaibli» qui exige un [TRADUCTION] «écart marqué par rapport à ce qui est habituellement considéré comme normal» (*R. c. McKenzie* (1955), 111 C.C.C. 317 (C. dist. Alb.); *R. c. Smith* (1992), 73 C.C.C. (3d) 285 (C.A. Alb.)), tandis que d'autres ont conclu que ce terme comprend même un faible écart par rapport à la norme (*R. c. Winlaw* (1988), 13 M.V.R. (2d) 112 (C. dist. Ont.); *R. c. Bruhjell*,

(P.E.I.C.A.)). Labrosse J.A. himself favoured the latter interpretation, at p. 384:

> If the evidence of impairment is so frail as to leave the trial judge with a reasonable doubt as to impairment, the accused must be acquitted. If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence has been made out.

In my view, the decision in *Stellato* demonstrates conclusively that the term "impairment" provides the basis for legal debate.

63 I next turn to the "use" requirement in s. 13(1)(*a*), which is the focus of CP's s. 7 challenge. It is notable that the existence of the "use" condition actually narrows the scope of s. 13(1)(*a*), and that CP is therefore alleging vagueness in relation to an element of s. 13(1)(*a*) which operates to limit CP's liability. If the "use" element were not present, then s. 13(1)(*a*) would cover a much broader range of pollution activity. However, the "use" condition requires the Crown to establish not only that a polluting substance has been released, but also that the release of the substance has actually impeded, or is likely to impair, someone's or something's "use" of the environment. The instant case illustrates this point. If CP had employed controlled fires on its right-of-way in a remote and unpopulated region of Northern Ontario, and wind conditions had caused the smoke to spread beyond the confines of CP's property, then CP could argue that it did not infringe s. 13(1)(*a*) because no discernible "use" of the environment had been, or was likely to have been, impaired. However, the smoke in Kenora filled residential homes, and diminished visibility on nearby roads. Thus, identifiable human "uses" were affected by the smoke, resulting in CP's liability under s. 13(1)(*a*).

64 The term "use" is not defined in the EPA. Nevertheless, I am of the view that judicial interpretation of what constitutes a "use" of the natural envi-

[1986] B.C.J. No. 746 (C.A.); *R. c. Campbell* (1991), 87 Nfld. & P.E.I.R. 269 (C.A.Î.-P.-É.)). Le juge Labrosse penchait pour cette dernière interprétation (à la p. 384):

> [TRADUCTION] Si la preuve de la capacité affaiblie est mince au point de susciter à ce sujet un doute raisonnable chez le juge du procès, l'accusé doit être acquitté. Si la preuve de la capacité affaiblie établit un degré quelconque d'affaiblissement pouvant aller de léger à élevé, il y a infraction.

À mon avis, l'arrêt *Stellato* démontre de façon concluante que le terme «*impairment*» fournit le fondement d'un débat judiciaire.

J'aborde maintenant la question de l'«usage» qu'il faut établir en vertu de l'al. 13(1)*a*), soit le point central attaqué par CP au regard de l'art. 7. Il est intéressant de noter que l'existence de la condition d'«usage» se trouve effectivement à réduire la portée de l'al. 13(1)*a*) et que CP invoque donc la théorie de l'imprécision à l'égard d'un élément de l'al. 13(1)*a*) qui a pour effet de limiter sa responsabilité. Si le terme «usage» n'y figurait pas, l'al. 13(1)*a*) engloberait une gamme beaucoup plus vaste d'activités polluantes. La condition de l'«usage» force par contre le ministère public à prouver non seulement qu'une substance polluante a été déposée, mais aussi que le dépôt de cette substance a effectivement détérioré, ou est susceptible de détériorer l'«usage» de l'environnement par quelqu'un ou quelque chose. La présente espèce en est l'illustration. Si CP avait procédé à des brûlages contrôlés sur son emprise dans une région éloignée et inhabitée du Nord de l'Ontario et que le vent avait poussé la fumée au-delà des limites de sa propriété, elle pourrait prétendre ne pas avoir enfreint l'al. 13(1)*a*) parce qu'aucun «usage» apparent de l'environnement n'aurait été détérioré ou n'aurait été susceptible de l'être. Par contre, à Kenora, la fumée a envahi des résidences et réduit la visibilité sur des routes adjacentes. Par conséquent, des «usages» humains identifiables ont été gênés par la fumée, d'où la responsabilité de CP sous le régime de l'al. 13(1)*a*).

Le terme «usage» n'est pas défini dans la LPE. J'estime toutefois que l'interprétation judiciaire de ce qui constitue un «usage» de l'environnement

ronment is easily accomplished. Various interpretive techniques are of assistance. First, as I observed in *Nova Scotia Pharmaceutical Society*, *supra*, at pp. 647-48, legislative provisions must not be considered in a vacuum. The content of a provision "is enriched by the rest of the section in which it is found and by the mode of inquiry adopted by courts as they have ruled under it". Thus, it is significant that the expression challenged by CP as being vague (i.e., "for any use that can be made of [the natural environment]") appears in s. 13(1)(*a*) alongside various other environmental impacts which attract liability. It is apparent from these other enumerated impacts that the release of a contaminant which poses only a trivial or minimal threat to the environment is not prohibited by s. 13(1). Instead, the potential impact of a contaminant must have some significance in order for s. 13(1) to be breached. The contaminant must have the potential to cause injury or damage to property or to plant or animal life (s. 13(1)(*b*)), cause harm or material discomfort (s. 13(1)(*c*)), adversely affect health (s. 13(1)(*d*)), impair safety (s. 13(1)(*e*)), render property or plant or animal life unfit for use by man (s. 13(1)(*f*)), cause loss of enjoyment of normal use of property (s. 13(1)(*g*)), or interfere with the normal conduct of business (s. 13(1)(*h*)). The choice of terms in s. 13(1) leads me to conclude that polluting conduct is only prohibited if it has the potential to impair a use of the natural environment in a manner which is more than trivial. Therefore, a citizen may not be convicted under s. 13(1)(*a*) EPA for releasing a contaminant which could have only a minimal impact on a "use" of the natural environment.

Second, interpreting the concept of "use" in s. 13(1)(*a*) in a restrictive manner is supported not only by its place in the legislative scheme, but also by the principle that a statute should be interpreted to avoid absurd results. Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed.

naturel est facile à faire. Diverses techniques d'interprétation entrent en jeu. En premier lieu, comme je l'ai dit dans *Nova Scotia Pharmaceutical Society*, précité, aux pp. 647 et 648, il ne faut pas étudier les dispositions législatives dans l'absolu. Le contenu d'une disposition «est enrichi par le reste de l'article dans lequel il est situé et par le mode d'examen retenu par les tribunaux qui l'ont interprété et appliqué». Par conséquent, il est significatif que l'expression qualifiée d'imprécise par CP (à savoir «relativement à tout usage qui peut en être fait [de l'environnement naturel]») figure à l'al. 13(1)*a*) avec diverses autres atteintes à l'environnement entraînant la responsabilité de leurs auteurs. Il ressort de ces autres atteintes énumérées que le rejet d'un contaminant qui ne crée qu'une menace négligeable ou minime pour l'environnement n'est pas prohibé par le par. 13(1). Au contraire, la répercussion potentielle d'un contaminant doit avoir une certaine importance pour qu'il y ait violation du par. 13(1). Le contaminant doit être susceptible de causer du tort ou des dommages à des biens, des végétaux ou des animaux (al. 13(1)*b*)), de causer de la nuisance ou des malaises sensibles (al. 13(1)*c*)), de causer l'altération de la santé (al. 13(1)*d*)), de causer une atteinte à la sécurité (al. 13(1)*e*)), de rendre des biens, des végétaux ou des animaux impropres à l'usage des êtres humains (al. 13(1)*f*)), de causer la perte de jouissance de l'usage normal d'un bien (al. 13(1)*g*)) ou d'entraver la marche normale des affaires (al. 13(1)*h*)). Le choix des termes figurant au par. 13(1) me porte à conclure que la conduite polluante n'est prohibée que lorsqu'elle est susceptible de détériorer l'usage de l'environnement naturel d'une façon qui est plus que négligeable. Par conséquent, un citoyen peut ne pas être reconnu coupable d'infraction sous le régime de l'al. 13(1)*a*) LPE s'il a rejeté un contaminant qui ne pourrait avoir qu'un effet minime sur un «usage» de l'environnement naturel.

65 En deuxième lieu, l'interprétation restrictive de la notion d'«usage» figurant à l'al. 13(1)*a*) trouve confirmation non seulement dans son contexte au sein du régime législatif, mais aussi dans le principe selon lequel une loi doit recevoir une interprétation qui évite des résultats absurdes. Dans son

1991), observes at pp. 383-84 that consideration of the consequences of competing interpretations will assist the courts in determining the actual meaning intended by the legislature. Since it may be presumed that the legislature does not intend unjust or inequitable results to flow from its enactments, judicial interpretations should be adopted which avoid such results. One method of avoiding absurdity is through the strict interpretation of general words (at p. 330). *Driedger on the Construction of Statutes* (3rd ed. 1994) states the relationship between the absurdity principle and strict interpretation as follows, at p. 94: "Absurdity is often relied on to justify giving a restricted application to a provision". Where a provision is open to two or more interpretations, the absurdity principle may be employed to reject interpretations which lead to negative consequences, as such consequences are presumed to have been unintended by the legislature. In particular, because the legislature is presumed not to have intended to attach penal consequences to trivial or minimal violations of a provision, the absurdity principle allows for the narrowing of the scope of the provision. In this respect, the absurdity principle is closely related to the maxim, *de minimis non curat lex* (the law does not concern itself with trifles). The rationale of this doctrine was explained by Sir William Scott in the case of *The "Reward"* (1818), 2 Dods. 265, 165 E.R. 1482, at pp. 269-70 and p. 1484:

> The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim *De minimis non curat lex*. — Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked.

The absurdity, strict interpretation and *de minimis* principles assist in narrowing the scope of the expression "for any use that can be made of [the natural environment]", and determining the area of risk created by s. 13(1)(*a*) EPA. Where an accused has released a substance into the natural environ-

ouvrage *Interprétation des lois* (2e éd. 1990), Pierre-André Côté souligne aux pp. 436 et 437 que l'examen des conséquences d'interprétations contraires aide les tribunaux à déterminer la signification réelle recherchée par le législateur. Comme l'on peut présumer que le législateur ne cherche pas à créer par ses lois des résultats injustes ou inéquitables, il faut adopter les interprétations judiciaires qui permettent d'éviter de tels résultats. L'une des méthodes employées pour éviter l'absurdité consiste à donner une interprétation restrictive aux termes généraux (à la p. 374). Dans *Driedger on the Construction of Statutes* (3e éd. 1994), on présente ainsi la relation entre le principe de l'absurdité et l'interprétation restrictive, à la p. 94: [TRADUCTION] «On a souvent recours au principe de l'absurdité pour justifier l'application restrictive d'une disposition.» Lorsqu'une disposition se prête à plus d'une interprétation, le principe de l'absurdité peut permettre de rejeter les interprétations qui entraînent des conséquences négatives, puisqu'on peut présumer que le législateur ne visait pas de telles conséquences. De façon plus précise, comme on peut présumer que le législateur ne voulait pas attacher de conséquences pénales à des violations négligeables ou minimes d'une disposition, le principe de l'absurdité permet d'en réduire la portée. À cet égard, le principe de l'absurdité est très proche de l'adage *de minimis non curat lex* (la loi ne se soucie pas des bagatelles). Le fondement de ce principe a été exposé par sir William Scott dans l'affaire *The «Reward»*(1818), 2 Dods. 265, 165 E.R. 1482, aux pp. 269 et 270, et à la p. 1484:

> [TRADUCTION] La cour n'est pas tenue à une sévérité à la fois dure et pédantesque dans l'application des lois. La loi permet la qualification qui est implicite dans l'ancien adage *De minimis non curat lex*. — En présence d'irrégularités entraînant de très légères conséquences, elle ne vise pas à infliger des peines inéluctablement sévères. Si l'écart est une vétille qui, advenant qu'elle se poursuive, n'aurait que peu ou pas d'incidence sur l'intérêt public, on pourrait légitimement l'ignorer.

Les principes de l'absurdité, de l'interprétation restrictive et de la règle *de minimis* aident à réduire la portée de l'expression «relativement à tout usage qui peut en être fait [de l'environnement naturel]» et à déterminer la sphère de risque créée par l'al. 13(1)*a*) LPE. Lorsqu'un accusé a rejeté une sub-

ment, the legal debate must focus on whether an actual or likely "use" of the "natural environment" has been "impaired" by the release of a "contaminant". This legal debate is clearly facilitated by the application of generally accepted interpretive principles. In particular, these principles demonstrate that s. 13(1)(*a*) does not attach penal consequences to trivial or minimal impairments of the natural environment, nor to the impairment of a use of the natural environment which is merely conceivable or imaginable. A degree of significance, consistent with the objective of environmental protection, must be found in relation to both the impairment, and the use which is impaired.

Third, reference may be made to judicial consideration of the term "use" in contexts other than environmental law. On this point, it is worth observing that the "use" concept has been judicially considered and interpreted in a variety of different contexts, examples of which include: "use" of property under the *Income Tax Act* (*Qualico Developments Ltd. v. M.N.R.* (1984), 51 N.R. 387 (F.C.A.)); "use" of a patent (*Galt Art Metal Co. v. Pedlar People Ltd.*, [1935] O.R. 126 (H.C.)); "use" of a motor vehicle (*Elias v. Insurance Corp. of British Columbia* (1992), 95 D.L.R. (4th) 303 (B.C.S.C.), *Watts v. Centennial Insurance Co.* (1967), 62 W.W.R. 175 (B.C.S.C.)); "use" of a place as a common gaming house (*Rockert v. The Queen*, [1978] 2 S.C.R. 704); "use" of writing purporting to be an affidavit (*Stevenson v. R.* (1980), 19 C.R. (3d) 74 (Ont. C.A.)); "use" for human habitation (*Conlin v. Prowse* (1993), 109 D.L.R. (4th) 243 (Ont. Ct. (Gen. Div.))).

A review of these cases indicates that courts have generally looked to dictionary definitions of the word "use" as a starting point in the interpretive process. However, the proper legal interpretation of "use" is context- and fact-specific, and this may require a refinement of the definition in a particular circumstance. For example, in *Pickering Twp. v. Godfrey*, [1958] O.R. 429, the Ontario

stance dans l'environnement naturel, le débat judiciaire doit porter sur la question de savoir si un «usage» réel ou vraisemblable de «l'environnement naturel» a été «détérioré» par le rejet d'un «contaminant». Le débat judiciaire est clairement facilité par l'application de principes d'interprétation généralement reconnus. Plus particulièrement, ces principes établissent que l'al. 13(1)*a*) ne rattache pas de sanctions pénales aux dégradations négligeables ou minimes de l'environnement naturel, ni à la dégradation d'un usage de l'environnement naturel qui n'est que concevable ou imaginable. Tant la dégradation que l'usage qui est affecté doivent avoir une certaine importance, compatible avec l'objectif de la protection de l'environnement.

66 En troisième lieu, le tribunal peut se référer à l'examen judiciaire du terme «usage» dans d'autres contextes que celui du droit de l'environnement. À cet égard, il est utile de noter que le concept de l'«usage» a été examiné et interprété judiciairement dans de multiples contextes, notamment ceux de l'«usage» de biens sous le régime de la *Loi de l'impôt sur le revenu* (*Qualico Developments Ltd. c. M.N.R.* (1984), 51 N.R. 387 (C.A.F.)), de l'«usage» d'un brevet (*Galt Art Metal Co. c. Pedlar People Ltd.*, [1935] O.R. 126 (H.C.)), de l'«usage» d'un véhicule automobile (*Elias c. Insurance Corp. of British Columbia* (1992), 95 D.L.R. (4th) 303 (C.S.C.-B.), *Watts c. Centennial Insurance Co.* (1967), 62 W.W.R. 175 (C.S.C.-B.)), de l'«usage» d'un local tenu comme maison de jeu (*Rockert c. La Reine*, [1978] 2 R.C.S. 704); de l'«usage» d'un écrit censé constituer un affidavit (*Stevenson c. R.* (1980), 19 C.R. (3d) 74 (C.A. Ont.)), et de l'«usage» comme lieu d'habitation (*Conlin c. Prowse* (1993), 109 D.L.R. (4th) 243 (C. Ont. (Div. gén.))).

67 Un examen de ces décisions montre que les tribunaux se servent généralement des définitions données au mot «usage» dans les dictionnaires comme point de départ du processus d'interprétation. Toutefois, l'interprétation proprement judiciaire du mot «usage» dépend du contexte et des faits, ce qui peut exiger de qualifier davantage la définition dans un cas particulier. Dans l'affaire

Court of Appeal was faced with the issue of whether the digging of a gravel pit, for the purpose of selling gravel, was a "use of land" that could be regulated or prohibited by municipal by-law. The answer depended on the interpretation of the word "use" in s. 390 of *The Municipal Act*, R.S.O. 1950, c. 243. Morden J.A., writing for the court, held as follows at p. 437:

> Counsel did not refer to any decisions interpreting the words "use of land" as they appear in s. 390 and I could find none. The dictionary definitions of "use" are numerous and diverse. An examination of them and some authorities, to which I will refer, has led me to the opinion that the word when used in conjunction with such commodities as food and water connotes the idea of consumption, but when applied to more durable forms of property means the employment of the property for enjoyment, revenue or profit without in any way otherwise diminishing or impairing the property itself.

Morden J.A. went on to find that the grant of power under s. 390 to regulate the "use of land" could not be interpreted to allow municipalities to prohibit an owner from selling his land or any part of it. Therefore, a by-law passed under s. 390 could not prevent a land owner from digging and removing gravel or other substances from his land.

68 A similar contextual and fact-sensitive analysis is required in interpreting the expression "for any use that can be made of [the natural environment]". The kinds of environmental "uses" that can be made of a particular area, and the question of whether the release of a contaminant has impaired these "uses" in a manner which is more than trivial or minimal, will involve certain factual inquiries. The character of the neighbourhood in which the contaminant has been released, the nature of the released contaminant, and the amount released, will all be important factors. The decision of Hackett Prov. Div. J. in *Commander Business*

Pickering Twp. c. Godfrey, [1958] O.R. 429, par exemple, la Cour d'appel de l'Ontario était saisie de la question de savoir si le creusage d'une carrière de gravier, à des fins de vente de gravier, était un [TRADUCTION] «usage de la terre» qui pouvait être réglementé ou interdit par voie de règlement municipal. La réponse dépendait de l'interprétation du mot «usage» à l'art. 390 de *The Municipal Act*, R.S.O. 1950, ch. 243. Dans les motifs qu'il a rédigés au nom de la cour, le juge Morden a conclu de la façon suivante, à la p. 437:

> [TRADUCTION] Les avocats n'ont cité aucune décision interprétant les mots «usage de la terre» qui figurent à l'art. 390 et je n'ai pu en trouver aucune. Les définitions que les dictionnaires donnent du mot «usage» sont nombreuses et diverses. Après m'y être référé, de même qu'à certains auteurs que je mentionnerai, j'en suis venu à la conclusion que, lorsqu'il est utilisé relativement à des denrées comme de la nourriture et de l'eau, le mot connote l'idée de consommation, tandis que dans son application à des formes plus durables de biens, il signifie l'emploi du bien pour en jouir, en tirer un revenu ou un profit sans qu'il n'y ait de quelque façon diminution ou dégradation du bien lui-même.

Et le juge Morden de conclure que l'attribution du pouvoir, en vertu de l'art. 390, de réglementer l'«usage de la terre» ne pouvait être interprétée comme si elle habilitait les municipalités à interdire à un propriétaire de vendre la totalité ou une partie de sa terre. Par conséquent, un règlement adopté sous le régime de l'art. 390 ne pouvait empêcher un propriétaire foncier de creuser sa terre et d'en retirer du gravier ou quelque autre substance.

Il faut recourir à une analyse contextuelle et factuelle semblable pour interpréter l'expression «relativement à tout usage qui peut en être fait [de l'environnement naturel]». Les sortes d'«usages» environnementaux que l'on peut faire d'une région particulière, et la question de savoir si le rejet d'un contaminant a détérioré ces «usages» d'une façon qui est plus que négligeable ou minime obligent à procéder à certains examens des faits. Le caractère du voisinage touché par le rejet du contaminant, la nature de ce contaminant et la quantité rejetée constituent tous des facteurs importants. La décision du juge Hackett dans l'affaire *Commander*

Furniture Inc., supra, illustrates this kind of factual inquiry. In that case, the defendant company was charged under s. 13(1) EPA (as amended, S.O. 1988, c. 54, s. 10; now s. 14(1), R.S.O. 1990, c. E.19) with emitting "volatile organic compound" emissions which caused a recurrent odour problem in a nearby residential neighbourhood. Hackett Prov. Div. J. heard testimony from six residents concerning the odours. As well, a scientific survey was admitted into evidence, which confirmed the nature and extent of the problem. Hackett Prov. Div. J. considered this evidence, along with the character of the neighbourhood, and reached the following conclusion, at p. 207:

> The residential area in question is adjacent to a commercial/industrial strip in which Commander is located. I find that "normal use of property" in this residential area must include the full use of yards and community parks. As set forth earlier, it is clear that these six residents lost the full use of their own yards and community parks. When the odour occurred, many of them described having to go inside or stay indoors. In my view, these are not trivial or inconsequential effects, as argued by the defence. On all of the evidence, including the frequency, nature and duration of these experiences, I conclude that the Crown has proved beyond a reasonable doubt that these residents significantly lost the normal use of property which would be reasonable in such a mixed-use neighbourhood at the relevant time.

Hackett Prov. Div. J. thus determined that a human "use" of property had been impaired, and that this impairment was neither trivial nor inconsequential. Such a factual and legal inquiry is precisely the kind in which courts engage on a daily basis.

Extrinsic materials provide additional assistance in interpreting the term "use" in the environmental context. In particular, I have in mind the 1986 Report of the Experts Group on Environmental Law of the World Commission on Environment and Development (WCED), entitled *Legal Principles for Environmental Protection and Sustainable Development* (U.N. Doc. WCED/86/23/Add. 1 (1986), A/42/427, Annex I). This Report was pre-

Business Furniture Inc., précitée, illustre ce genre d'examen des faits. Dans cette affaire, la société défenderesse était accusée sous le régime du par. 13(1) LPE (modifiée par L.O. 1988, ch. 54, art. 10; maintenant le par. 14(1), L.R.O. 1990, ch. E.19) d'avoir rejeté des [TRADUCTION] «composés organiques volatils» qui ont causé un problème récurrent d'odeur dans une zone résidentielle voisine. Le juge Hackett a entendu les témoignages de six voisins au sujet des odeurs. Une analyse scientifique, qui est venue confirmer la nature et l'étendue du problème, a aussi été admise en preuve. Après avoir examiné la preuve et le caractère du voisinage, le juge Hackett a tiré la conclusion suivante, à la p. 207:

> [TRADUCTION] La zone résidentielle en cause est adjacente à une bande commerciale et industrielle où se trouve Commander. Je conclus que l'«usage normal du bien» dans cette zone résidentielle doit comprendre le plein usage des cours et des parcs publics. Il appert, comme cela a déjà été établi, que ces six voisins ont perdu le plein usage de leurs propres cours et des parcs publics. Lorsque les odeurs se sont produites, bon nombre d'entre eux ont dit avoir dû entrer chez eux ou demeurer à l'intérieur. À mon avis, il ne s'agit pas d'effets négligeables ou sans importance, comme le prétend la défenderesse. À la lumière de toute la preuve, notamment en ce qui a trait à la fréquence, à la nature et à la durée de ces expériences, je conclus que le ministère public a prouvé hors de tout doute raisonnable que ces résidents ont perdu à un degré important, à l'époque pertinente, l'usage qu'ils pourraient raisonnablement avoir de leurs biens dans un tel voisinage mixte.

Le juge Hackett a ainsi déterminé qu'il y avait eu dégradation de l'«usage» humain des biens, et que cette dégradation n'était ni négligeable, ni sans importance. C'est précisément à cette sorte d'examen factuel et juridique que les tribunaux procèdent quotidiennement.

69 Des sources externes peuvent aussi aider à interpréter le terme «usage» dans le contexte environnemental. J'ai en particulier à l'esprit le Rapport de 1986 du groupe d'experts du droit de l'environnement de la Commission mondiale pour l'environnement et le développement (CMED) intitulé *Principes juridiques proposés pour la protection de l'environnement et un développement durable* (N.U. Doc. CMED/86/23/Add. 1 (1986),

pared by 13 legal experts, who were appointed by the United Nations-mandated WCED. In it, the Experts Group formulated 22 legal principles, which were intended to serve as a guide for the development of domestic environmental protection legislation. For the purposes of the instant case, the most significant principle is Art. 4, which requires states to take measures "aimed at preventing or abating interferences with natural resources or the environment". In the "Use of Terms" section of their Report, the Experts Group provided the following definition of "environmental interference":

(f) "environmental interference" means any impairment of human health, living resources, ecosystems, material property, amenities or other legitimate uses of a natural resource or the environment caused, directly or indirectly, by man through polluting substances, ionizing radiation, noise, explosions, vibration or other forms of energy, plants, animals, diseases, flooding, sand-drift or other similar means; [Emphasis added.]

The Experts Group also adopted the following definition of the expression, "use of a natural resource":

(a) "use of a natural resource" means any human conduct, which, directly or indirectly, takes advantage of the benefits of a natural resource in the form of preservation, exploitation, consumption or otherwise of the natural resource, in so far as it does not result in an environmental interference as defined in Paragraph (f);

In my view, it is significant that 13 experts in environmental law, working under a United Nations mandate, adopted the "use" concept as a legal principle for domestic environmental law, and proceeded to define it in their Report. This is evidence that the term "for any use that can be made of the [natural environment]" is capable of forming the basis for legal debate. Moreover, where a court is considering the application of s. 13(1)(*a*) EPA in a particular fact situation, it would be entitled to have recourse to the definition of "use" adopted by

A/42/427, annexe I). Ce rapport a été préparé par 13 experts nommés par la CMED pour le compte des Nations Unies. Le groupe d'experts y a formulé 22 principes juridiques, destinés à servir de guide à l'élaboration de lois internes sur la protection de l'environnement. Pour les fins de la présente espèce, le principe le plus important se trouve à l'art. 4, lequel invite les États à prendre des mesures [TRADUCTION] «visant à prévenir ou à réduire les atteintes aux ressources naturelles ou à l'environnement». Dans la section intitulée [TRADUCTION] «Termes utilisés», le groupe d'experts a donné la définition suivante de [TRADUCTION] «atteinte à l'environnement»:

[TRADUCTION]

f) «atteinte à l'environnement» Toute dégradation de la santé humaine, des ressources vivantes, des écosystèmes, des biens matériels, des équipements collectifs ou des autres usages légitimes d'une ressource naturelle ou de l'environnement causée, directement ou indirectement, par l'homme au moyen de substances polluantes, de radiations ionisantes, de bruits, d'explosions, de vibrations ou de toute autre forme d'énergie, de plantes, d'animaux, de maladies, d'inondations, d'ensablements ou d'autres moyens semblables; [Je souligne.]

Le groupe d'experts a aussi adopté la définition suivante de l'expression [TRADUCTION] «usage d'une ressource naturelle»:

[TRADUCTION]

a) «usage d'une ressource naturelle» Toute conduite humaine qui, directement ou indirectement, tire profit des avantages d'une ressource naturelle par la préservation, l'exploitation ou la consommation de cette ressource naturelle ou autrement, pourvu que cela n'entraîne pas une atteinte à l'environnement au sens de l'alinéa f);

À mon avis, il est intéressant que 13 experts en droit de l'environnement, travaillant dans le cadre d'un mandat des Nations Unies, aient adopté la notion d'«usage» comme principe juridique pour le droit interne de l'environnement et aient entrepris de le définir dans leur rapport. Cela prouve que l'expression «relativement à tout usage qui peut en être fait [de l'environnement naturel]» peut constituer un fondement pour un débat judiciaire. En outre, lorsqu'un tribunal est chargé d'établir si l'al. 13(1)*a*) LPE est applicable à une situation factuelle

the Experts Group, since this definition has important persuasive value.

Thus, after taking into account interpretive principles and aids which narrow and define the scope of the term "use" in the environmental context, I see no reason to believe that the "use" concept in s. 13(1)(*a*) poses any greater interpretive challenge to the judiciary than it does in other contexts. Therefore, I conclude that the scope of s. 13(1)(*a*) EPA is reasonably delineated, and that legal debate can occur as to the application of the provision in a specific fact situation. This is all that s. 7 of the *Charter* requires.

(4) *The Role of "Reasonable Hypotheticals" in Section 7 Vagueness Analysis*

In the instant case, Daub J.P., Fraser J. and the Ontario Court of Appeal all concluded that CP could not rely on hypotheticals involving third parties to demonstrate the vagueness of s. 13(1)(*a*) EPA. In reaching this conclusion, the lower courts relied on the ruling of the United States Supreme Court in *Hoffman Estates*, *supra*, in which the court held, at p. 495, that "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." Prior to the instant case, this position had been adopted by the Ontario Court of Appeal in *Morgentaler*, *supra*, *R. v. Zundel* (1987), 58 O.R. (2d) 129, and *R. v. LeBeau* (1988), 41 C.C.C. (3d) 163.

Like the lower courts, I have no difficulty in concluding that CP's conduct in Kenora on April 6 and 11, 1988 fell squarely within the pollution prohibition contained in s. 13(1)(*a*) EPA. CP emitted noxious smoke which contaminated the natural environment, and which interfered with its use by several home owners and drivers in a manner which was more than trivial or minimal. In fact, I do not understand CP's argument to be that s.

particulière, il peut recourir à la définition du terme «usage» adoptée par le groupe d'experts puisque cette définition a une importante valeur de persuasion.

70 Par conséquent, après avoir tenu compte des principes et des moyens d'interprétation qui limitent et définissent la portée du terme «usage» dans le contexte de l'environnement, je ne puis voir pourquoi la notion d'«usage» exprimée à l'al. 13(1)*a*) poserait aux juges un problème d'interprétation plus grand que dans d'autres contextes. Je conclus donc que la portée de l'al. 13(1)*a*) LPE est raisonnablement délimitée et qu'il peut y avoir un débat judiciaire sur l'application de cette disposition à une situation factuelle particulière. C'est là tout ce qu'exige l'art. 7 de la *Charte*.

(4) *Le rôle des «hypothèses raisonnables» dans une analyse de l'imprécision au regard de l'art. 7*

71 En l'espèce, le juge Daub, le juge Fraser et les juges de la Cour d'appel de l'Ontario ont tous conclu que CP ne pouvait se fonder sur des hypothèses mettant en jeu des tiers pour démontrer l'imprécision de l'al. 13(1)*a*) LPE. Pour arriver à cette conclusion, les tribunaux d'instance inférieure se sont fondés sur l'arrêt de la Cour suprême des États-Unis *Hoffman Estates*, précité, où la cour a conclu, à la p. 495, que [TRADUCTION] «[l]e demandeur qui s'engage dans une conduite qui est clairement prohibée ne peut se plaindre de l'imprécision de la loi telle qu'elle s'applique à la conduite d'autrui». Avant la présente affaire, cette position avait été adoptée par la Cour d'appel de l'Ontario dans les arrêts *Morgentaler*, précité, *R. c. Zundel* (1987), 58 O.R. (2d) 129, et *R. c. LeBeau* (1988), 41 C.C.C. (3d) 163.

72 À l'instar des tribunaux d'instance inférieure, je n'ai aucune difficulté à conclure que la conduite de CP à Kenora, les 6 et 11 avril 1988, était clairement visée par l'interdiction de polluer prévue à l'al. 13(1)*a*) LPE. CP a rejeté de la fumée nocive qui a contaminé l'environnement naturel et qui a nui à son usage par plusieurs propriétaires et conducteurs d'une façon qui était plus que négligeable ou minime. En fait, selon moi, l'argument de CP

13(1)(*a*) is vague in relation to the conduct which gave rise to the charges in the instant case. CP argues instead that the expression "for any use that can be made of [the natural environment]" is vague because it is not qualified as to time, degree, space or user, and thus fails to delineate clearly an "area of risk" for citizens generally.

73 CP is advancing an argument based on peripheral vagueness, which arises where a statute applies without question to a core of conduct, but applies with uncertainty to other activities. CP's conduct fell within the core of polluting activity prohibited by s. 13(1)(*a*), yet CP is relying on hypothetical fact situations which fall at the "periphery" of s. 13(1)(*a*), and to which it is uncertain whether liability attaches. I would note that the core-periphery problem is encountered in relation to virtually every legislative provision, and is an inevitable result of the imprecision of human language. This point was raised in *Nova Scotia Pharmaceutical Society*, *supra*, at p. 639:

> Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made.

The role of the courts, then, is to interpret and clarify the language of an enactment, and thereby determine the area of risk.

74 The question then becomes whether CP's s. 7 challenge must necessarily fail because its polluting activity in Kenora on April 6 and 11, 1988 fell within the "core" of conduct prohibited by s. 13(1)(*a*) EPA. If I were to agree with the position of the United States Supreme Court in *Hoffman*

ne fait pas valoir que l'al. 13(1)*a*) est imprécis à l'égard de la conduite qui a donné lieu aux accusations en l'espèce. CP prétend plutôt que l'expression «relativement à tout usage qui peut en être fait [de l'environnement naturel]» est imprécise parce qu'elle n'est pas définie pour ce qui est du temps, du degré, de l'espace et de l'utilisateur et que, partant, elle ne délimite pas clairement une «sphère de risque» pour les citoyens en général.

CP présente un argument fondé sur l'imprécision périphérique, qui se produit lorsqu'une loi s'applique incontestablement au noyau d'une conduite, mais aussi, de façon incertaine, à d'autres activités. La conduite de CP faisait partie du noyau de l'activité polluante interdite par l'al. 13(1)*a*), et pourtant CP se fonde sur des situations de fait hypothétiques qui se trouvent en «périphérie» de l'al. 13(1)*a*) où il n'est pas certain qu'elles entraînent une quelconque responsabilité. Je tiens à signaler que le problème du discernement entre le noyau et la périphérie se pose à l'égard de pratiquement toute disposition législative et qu'il est le résultat inévitable de l'imprécision du langage humain. Ce point a été mentionné dans l'arrêt *Nova Scotia Pharmaceutical Society*, précité, à la p. 639:

> Le langage n'est pas l'instrument exact que d'aucuns pensent qu'il est. On ne peut pas soutenir qu'un texte de loi peut et doit fournir suffisamment d'indications pour qu'il soit possible de prédire les conséquences juridiques d'une conduite donnée. Tout ce qu'il peut faire, c'est énoncer certaines limites, qui tracent le contour d'une sphère de risque. Mais c'est une caractéristique inhérente de notre système juridique que certains actes seront aux limites de la ligne de démarcation de la sphère de risque; il est alors impossible de prédire avec certitude.

Les tribunaux ont donc pour rôle d'interpréter et de clarifier le langage d'une disposition législative et, partant, de déterminer la sphère de risque.

Il s'agit alors de déterminer si la contestation engagée par CP sous le régime de l'art. 7 doit nécessairement être rejetée parce que l'activité polluante de cette dernière à Kenora, les 6 et 11 avril 1988, se situait dans le «noyau» de la conduite prohibée par l'al. 13(1)*a*) LPE. Si j'étais d'accord

Estates, *supra*, as adopted by the Ontario Court of Appeal, then I would reject CP's attempt to stray beyond its own fact situation in the instant case.

It may be trite, but nevertheless worth repeating, that while American rights jurisprudence can be of assistance in interpreting provisions of the *Charter*, Canadian courts should not simply import American constitutional principles into our law. What may be appropriate in the American constitutional setting may be unacceptable, or even unworkable, in the unique Canadian milieu. For this reason, the *Hoffman Estates* principle must be approached with considerable caution.

A review of American constitutional jurisprudence on the subject of the use of reasonable hypotheticals indicates that the issue has been approached as one of standing. Christina L. Jadach, "Pre-enforcement Constitutional Challenges to Legislation after *Hoffman Estates*: Limiting the Vagueness and Overbreadth Doctrines" (1983), 20 *Harv. J. on Legis.* 617, explained the standing rationale, at p. 620:

> Generally courts evaluate a statute by considering whether the provision impairs the rights of the complaining party in light of the attending circumstances. This traditional standing rule prohibits petitioners from invoking rights of third parties in individual claims.

In the predecessor case to *Hoffman Estates*, *Parker v. Levy*, 417 U.S. 733 (1974), the United States Supreme Court confirmed that an appellant who is alleging unconstitutional vagueness cannot rely on hypothetical fact situations, and at pp. 755-56, supported this conclusion by reference to the traditional American approach to standing in constitutional claims. In fact, resort to hypothetical fact situations is only possible in the area of overbreadth claims under the First Amendment. This narrow exception is justified because of the historical pre-eminence of free speech in American constitutional law, and particularly because of the con-

avec la position de la Cour suprême des États-Unis dans l'arrêt *Hoffman Estates*, précité, telle qu'elle a été adoptée par la Cour d'appel de l'Ontario, je rejetterais la tentative de CP de s'écarter de sa propre situation factuelle en l'espèce.

Bien que ce soit un lieu commun, il importe néanmoins de répéter que même si la jurisprudence américaine en matière de droits peut parfois aider à interpréter des dispositions de la *Charte*, les tribunaux canadiens ne devraient pas importer tout simplement les principes constitutionnels américains dans notre droit. Ce qui est approprié dans le cadre constitutionnel américain peut fort bien être inacceptable, voire impraticable, dans le milieu unique propre au Canada. Voilà pourquoi le principe énoncé dans l'arrêt *Hoffman Estates* doit être abordé avec beaucoup de prudence. 75

Une revue de la jurisprudence constitutionnelle américaine sur le sujet du recours à des hypothèses raisonnables montre que cette question relève de la qualité pour agir. Dans son article intitulé «Pre-enforcement Constitutional Challenges to Legislation after *Hoffman Estates*: Limiting the Vagueness and Overbreadth Doctrines» (1983), 20 *Harv. J. on Legis.* 617, Christina L. Jadach explique comment se justifie cette attitude à l'égard de la qualité pour agir, à la p. 620: 76

> [TRADUCTION] En général, les tribunaux évaluent une loi en se demandant si la disposition porte atteinte aux droits de la partie plaignante eu égard aux circonstances de l'espèce. Cette règle traditionnelle de la qualité pour agir empêche les requérants d'invoquer les droits de tiers dans des réclamations personnelles.

Dans un arrêt antérieur à l'arrêt *Hoffman Estates*, savoir *Parker c. Levy*, 417 U.S. 733 (1974), la Cour suprême des États-Unis avait confirmé qu'un appelant qui invoque l'imprécision inconstitutionnelle ne peut se fonder sur des situations factuelles hypothétiques et avait appuyé cette conclusion, aux pp. 755 et 756, en se référant au point de vue américain traditionnel à l'égard de la qualité pour agir dans des affaires constitutionnelles. En fait, les situations factuelles hypothétiques ne peuvent être invoquées que dans des affaires fondées sur une portée excessive au regard du Premier amendement. Cette exception restreinte s'explique par la

cern that an overly broad limitation on speech will result in the "chilling" of legitimate and valuable expression: *Thornhill v. Alabama*, 310 U.S. 88 (1940).

77 The traditional hostility of the American courts to the use of hypothetical fact scenarios in constitutional adjudication has not been shared by this Court. In *R. v. Smith*, [1987] 1 S.C.R. 1045, and *R. v. Goltz*, [1991] 3 S.C.R. 485, this Court approved the use of reasonable hypotheses in assessing legislation under s. 12 of the *Charter*. Moreover, in *R. v. Heywood*, [1994] 3 S.C.R. 761, Cory J. held that a court could have resort to reasonable fact scenarios other than that of the particular appellant where overbreadth is alleged under s. 7.

78 In light of the different approach taken by this Court in relation to constitutional standing (a matter elaborated upon by Chief Justice Lamer in his concurring reasons), I cannot adopt the rationale underlying the *Hoffman Estates* principle. Nevertheless, I take the view that reasonable hypotheticals have no place in the vagueness analysis under s. 7.

79 Where a court is faced with a vagueness challenge under s. 7, the focus of the analysis is on the terms of the impugned law. The court must determine whether the law provides the basis for legal debate and coherent judicial interpretation. As I stated above, the first task of the court is to develop the full interpretive context surrounding the law, since vagueness should only be assessed after the court has exhausted its interpretive function. If judicial interpretation is possible, then an impugned law is not vague. A law should only be declared unconstitutionally vague where a court has embarked upon the interpretive process, but has concluded that interpretation is not possible. In a situation, such as the instant case, where a court has interpreted a legislative provision, and then has determined that the challenging party's own fact

prééminence de la liberté de parole en droit constitutionnel américain, tout particulièrement par la crainte qu'une restriction trop générale de la liberté d'expression ne «refroidisse» l'expression légitime et valable: *Thornhill c. Alabama*, 310 U.S. 88 (1940).

L'hostilité traditionnelle des tribunaux américains à l'endroit du recours à des situations factuelles hypothétiques dans les affaires constitutionnelles n'est pas partagée par notre Cour. Dans *R. c. Smith*, [1987] 1 R.C.S. 1045, et *R. c. Goltz*, [1991] 3 R.C.S. 485, notre Cour a approuvé le recours à des hypothèses raisonnables pour permettre l'examen de dispositions législatives au regard de l'art. 12 de la *Charte*. En outre, dans *R. c. Heywood*, [1994] 3 R.C.S. 761, le juge Cory a conclu qu'un tribunal pouvait recourir à des situations factuelles raisonnables autres que celle qui est propre à l'appelant dans des affaires où l'on invoque la portée excessive au regard de l'art. 7.

Compte tenu de la démarche différente adoptée par notre Cour à l'égard du pouvoir d'agir en matière constitutionnelle (question examinée en détail par le juge en chef Lamer dans ses motifs concordants), je ne puis adopter la justification à la base du principe énoncé dans *Hoffman Estates*. Je conclus toutefois que les hypothèses raisonnables n'ont pas leur place dans une analyse de l'imprécision au regard de l'art. 7.

Lorsqu'un tribunal est saisi d'une prétention d'imprécision fondée sur l'art. 7, l'analyse doit porter sur les termes de la loi attaquée. Le tribunal doit déterminer si la loi fournit un fondement pour un débat judiciaire et une interprétation judiciaire cohérente. Comme je l'ai déjà dit, le tribunal a pour premier rôle de déterminer le contexte interprétatif intégral qui entoure la loi, puisque l'imprécision ne peut être établie qu'une fois que le tribunal épuise les possibilités se rattachant à sa fonction d'interprétation. S'il est possible de procéder à une interprétation judiciaire, alors la loi attaquée n'est pas imprécise. Une loi ne peut être déclarée d'une imprécision inconstitutionnelle que lorsque le tribunal, après avoir épuisé le processus, conclut qu'il est impossible d'en dégager une interprétation. Dans un cas comme la présente

situation falls squarely within the scope of the provision, then that provision is obviously not vague. There is no need to consider hypothetical fact situations, since it is clear that the law provides the basis for legal debate and thereby satisfies the requirements of s. 7 of the *Charter*.

espèce, où un tribunal a interprété une disposition législative, puis déterminé que la situation factuelle propre à la partie opposante tombe précisément sous le coup de cette disposition, celle-ci n'est manifestement pas imprécise. Il n'est pas nécessaire d'examiner des situations factuelles hypothétiques puisqu'il appert clairement que la loi fournit un fondement pour un débat judiciaire et satisfait ainsi aux exigences de l'art. 7 de la *Charte*.

The analysis of overbreadth under s. 7, and of cruel and unusual treatment or punishment under s. 12, are quite different from vagueness analysis. Where a party alleges that a law is overbroad, or that punishment is cruel and unusual, a court must engage in proportionality analysis. In *Goltz*, *supra*, for example, I discussed the test for determining violations of s. 12 of the *Charter*, and stated, at p. 498, "that a sentence which is grossly or excessively disproportionate to the wrongdoing would infringe s. 12". Cory J. asserted a similar proportionality test in *Heywood*, *supra*, at p. 793: "The effect of overbreadth is that in some applications the law is arbitrary or disproportionate". 80

L'analyse de la portée excessive au regard de l'art. 7 et celle des traitements ou peines cruels et inusités au regard de l'art. 12 sont très différentes de l'analyse de l'imprécision. Lorsqu'une partie prétend qu'une loi a une portée excessive ou qu'une peine est cruelle et inusitée, le tribunal doit procéder à une analyse de la proportionnalité. Dans *Goltz*, précité, par exemple, j'ai examiné le critère permettant d'établir les violations de l'art. 12 de la *Charte* et dit, à la p. 498, qu'«une peine qui est exagérément ou excessivement disproportionnée à l'infraction va à l'encontre de l'art. 12». Le juge Cory a énoncé un critère de proportionnalité semblable dans *Heywood*, précité, à la p. 793: «Lorsqu'une loi a une portée excessive, il s'ensuit qu'elle est arbitraire ou disproportionnée dans certaines de ses applications.»

Proportionality analysis involves an assessment of whether a law, the terms of which are not vague, applies in a proportionate manner to a particular fact situation. Inevitably, courts will be required to compare the law with the facts. In that situation, the use of reasonable hypotheticals will be of assistance, and may be unavoidable (*Goltz*, *supra*, at p. 515). 81

L'analyse de la proportionnalité suppose un examen qui permette de déterminer si une loi, dont les termes ne sont pas imprécis, s'applique de façon proportionnée à une situation factuelle donnée. Les tribunaux seront inévitablement obligés de comparer le droit et les faits. En pareil cas, non seulement le recours à des hypothèses raisonnables sera utile, mais il pourrait même être inévitable (*Goltz*, précité, à la p. 515).

In the context of vagueness, proportionality plays no role in the analysis. There is no need to compare the purpose of the law with its effects (as in overbreadth), or to compare the punishment with the wrongdoing (as with cruel and unusual punishment). A court is required to perform its interpretive function, in order to determine whether an impugned provision provides the basis for legal debate. Given this, I see no role for the 82

Dans le contexte de l'imprécision, le facteur de la proportionnalité n'a aucun rôle à jouer dans l'analyse. Il n'est pas nécessaire de comparer l'objet de la loi à ses effets (comme ce serait le cas pour la portée excessive), ni de comparer la peine au méfait (comme dans le cas d'une peine cruelle et inusitée). Le tribunal doit s'acquitter de sa fonction d'interprétation afin de déterminer si la disposition attaquée fournit un fondement pour un débat

consideration of reasonable hypotheticals in vagueness analysis.

(5) *The Overbreadth Claim*

83 Having dispensed with CP's vagueness claim, it is now necessary to turn to the issue of overbreadth. In its submissions, CP argued in part that s. 13(1)(*a*) EPA is vague because it is overbroad. In light of my reasons above, however, I think that this submission must fail.

84 Environmental protection is a legitimate concern of government, and as I have already observed, it is a very broad subject matter which does not lend itself to precise codification. Where the legislature is pursuing the objective of environmental protection, it is justified in choosing equally broad legislative language in order to provide for a necessary degree of flexibility. Certainly, s. 13(1)(*a*) captures a broad range of polluting conduct. However, my reasons in relation to the vagueness claim illustrate that the provision does not capture pollution with only a trivial or minimal impact on a use of the natural environment. Moreover, the "use" condition limits the application of s. 13(1)(*a*) by requiring the Crown to establish not only that a polluting substance has been released, but also that an actual or likely use of the environment, which itself has some significance, has been impaired by the release. Speculative or purely imaginary uses of the environment are not captured by the provision. These limits on the application of s. 13(1)(*a*) prevent it from being deployed in situations where the objective of environmental protection is not implicated. In my view, then, the breadth of s. 13(1)(*a*) matches the breadth of the objective of environmental protection. There is no overbreadth.

85 In his concurring reasons, Lamer C.J. has concluded that the literal interpretation of s. 13(1)(*a*) results in overbreadth, since the provision applies on its face to "any conceivable use" of the environment. He then applies the presumption of constitu-

judiciaire. Je ne vois par conséquent aucun rôle pour l'examen d'hypothèses raisonnables dans une analyse de l'imprécision.

(5) *La prétention de portée excessive*

Après le rejet de la prétention d'imprécision de CP, il faut maintenant aborder la question de la portée excessive. Dans ses prétentions, CP a fait valoir en partie que l'al. 13(1)*a*) LPE est imprécis parce qu'il a une portée excessive. Cependant, compte tenu des motifs qui précèdent, je suis d'avis que ce moyen doit échouer.

La protection de l'environnement constitue une préoccupation légitime du gouvernement et, comme je l'ai déjà mentionné, il s'agit d'un sujet très vaste qui ne se prête pas aisément à une codification précise. Lorsque le législateur poursuit l'objectif de la protection de l'environnement, il a le droit de choisir un langage législatif tout aussi général afin de permettre un degré de souplesse nécessaire. L'alinéa 13(1)*a*) englobe certainement une vaste gamme de conduites polluantes. Cependant, comme mes motifs relativement à la prétention d'imprécision l'illustrent, cette disposition n'inclut pas la pollution qui n'a qu'une incidence négligeable ou minime sur l'usage de l'environnement naturel. Par ailleurs, l'exigence d'un «usage» limite l'application de l'al. 13(1)*a*) en imposant au ministère public qu'il établisse non seulement qu'une substance polluante a été rejetée, mais aussi qu'un usage réel ou vraisemblable de l'environnement, ce qui en soi a une certaine importance, a été détérioré par ce rejet. La disposition n'englobe pas les usages hypothétiques ou purement imaginaires de l'environnement. Ces restrictions empêchent le recours à l'al. 13(1)*a*) dans des situations où l'objectif de la protection de l'environnement n'est pas en jeu. Par conséquent, l'ampleur de l'al. 13(1)*a*) correspond, selon moi, à celle de l'objectif de la protection de l'environnement. Il n'y a pas de portée excessive.

Dans ses motifs concordants, le juge en chef Lamer a conclu que l'al. 13(1)*a*), interprété littéralement, a une portée excessive puisque cette disposition s'applique à première vue à «tout usage concevable» de l'environnement. Il applique ensuite la

tionality for the purpose of limiting the scope of s. 13(1)(*a*). With respect, I cannot agree that the term "use" has a plain and literal meaning in the context of environmental protection. The term is open to interpretation, and I prefer a construction which avoids the kinds of absurd applications of s. 13(1)(*a*) which are identified by Lamer C.J. In my view, the first step in the overbreadth analysis requires a court to exhaust its interpretive function. Only then can overbreadth be assessed. In the instant case, having interpreted s. 13(1)(*a*) (and in particular, the terms "use" and "impairment"), I have concluded that the appellant's overbreadth claim must fail.

Before concluding, I wish to add a caveat to my overbreadth analysis. My reasons should not be taken to endorse the view that the independent principle of overbreadth, as outlined in *Heywood*, *supra*, is available to the appellant in the circumstances of this case. My point is simply that s. 13(1)(*a*) is clearly not overbroad. Since neither CP nor the respondent were aware of this Court's decision in *Heywood*, the matter was not argued. I therefore prefer to defer consideration of the *Heywood* principle to a future case, where it is actually necessary to the result.

VI — Conclusion

I agree with the courts below that s. 13(1)(*a*) EPA, and specifically the expression "for any use that can be made of [the natural environment]", are not unconstitutionally vague or overbroad. Section 13(1)(*a*) is sufficiently precise to provide for a meaningful legal debate, when the provision is considered in light of the purpose and subject matter of the EPA, the nature of the provision as a regulatory offence, the societal value of environmental protection, related provisions of the EPA, and general interpretive principles. Section 13(1)(*a*) is also proportionate and not overbroad. The objective of environmental protection is itself broad, and

présomption de constitutionnalité dans le but de restreindre la portée de l'al. 13(1)*a*). Avec égards, je ne suis pas d'accord pour dire que le terme «usage» a un sens ordinaire et littéral dans le contexte de la protection de l'environnement. Ce terme peut être interprété et je préfère une interprétation qui évite les types d'applications absurdes de l'al. 13(1)*a*) dont parle le juge en chef Lamer. À mon avis, la première étape d'une analyse de la portée excessive exige qu'un tribunal épuise les possibilités se rattachant à sa fonction d'interprétation. Ce n'est que par la suite que la portée excessive peut être évaluée. En l'espèce, me fondant sur mon interprétation de l'al. 13(1)*a*) (tout particulièrement des termes «usage» et «dégradation»), j'ai conclu que l'appelante ne peut avoir gain de cause relativement à son argument invoquant la portée excessive.

Avant de conclure, je tiens à ajouter une mise en garde à mon analyse de la portée excessive. Je ne voudrais pas que l'on interprète mes motifs comme reconnaissant que l'appelante peut, dans les circonstances de l'espèce, invoquer le critère autonome de portée excessive, esquissé dans l'arrêt *Heywood*, précité. J'estime tout simplement que l'al. 13(1)*a*) n'a de toute évidence aucune portée excessive. Puisque ni CP ni l'intimée n'étaient au courant de la décision de notre Cour dans *Heywood*, la question n'a pas été débattue. En conséquence, je préfère reporter l'examen du principe formulé dans l'arrêt *Heywood* lorsque la solution d'un litige l'exigera. 86

VI. Conclusion

Je suis d'accord avec les tribunaux d'instance inférieure pour conclure que l'al. 13(1)*a*) LPE et tout particulièrement l'expression «relativement à tout usage qui peut en être fait [de l'environnement naturel]» ne sont pas au sens constitutionnel imprécis ni de portée excessive. L'alinéa 13(1)*a*) est suffisamment précis pour permettre un débat judiciaire significatif lorsque cette disposition est examinée en fonction de l'objectif et du contenu de la LPE, de la nature réglementaire de l'infraction prévue par cette disposition, de la valeur sociale de la protection de l'environnement, des dispositions connexes de la LPE et des principes généraux d'in- 87

the legislature is justified in choosing broad, flexible language to give effect to this objective. I would therefore dismiss the appeal and answer the second and third constitutional questions as follows:

2. Is s. 13(1)(*a*) of the *Environmental Protection Act* so vague as to infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

A. No.

3. If the answer to Question 2 is in the affirmative, is s. 13(1)(*a*) nevertheless justified by s. 1 of the *Charter*?

A. This question does not arise.

Appeal dismissed.

Solicitor for the appellant: Canadian Pacific Legal Services, Montreal.

Solicitors for the respondent: The Ministry of the Attorney General and the Ministry of Environment and Energy, Toronto.

Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy.

Solicitor for the intervener the Attorney General of Manitoba: The Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General for Saskatchewan: W. Brent Cotter, Regina.

Solicitor for the intervener Canadian Environmental Law Association: Canadian Environmental Law Association, Toronto.

terprétation. En outre, l'al. 13(1)*a*) est proportionnel et il n'a pas une portée excessive. L'objectif de la protection de l'environnement est lui-même vaste, et le législateur est fondé à choisir une formulation générale et souple pour assurer la réalisation de cet objectif. Je suis donc d'avis de rejeter le pourvoi et de donner les réponses suivantes aux deuxième et troisième questions constitutionnelles:

2. L'alinéa 13(1)*a*) de la *Loi sur la protection de l'environnement* est-il vague au point de contrevenir à l'art. 7 de la *Charte canadienne des droits et libertés*?

R. Non.

3. Si la réponse à la deuxième question est affirmative, l'al. 13(1)*a*) est-il néanmoins justifié par l'article premier de la *Charte*?

R. La question ne se pose pas.

Pourvoi rejeté.

Procureur de l'appelante: Services juridiques du Canadien Pacifique, Montréal.

Procureurs de l'intimée: Le ministère du Procureur général et le ministère de l'Environnement et de l'Énergie, Toronto.

Procureur de l'intervenant le procureur général du Québec: Le procureur général du Québec, Ste-Foy.

Procureur de l'intervenant le procureur général du Manitoba: Le procureur général du Manitoba, Winnipeg.

Procureur de l'intervenant le procureur général de la Saskatchewan: W. Brent Cotter, Regina.

Procureur de l'intervenante l'Association canadienne du droit de l'environnement: L'Association canadienne du droit de l'environnement, Toronto.

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("*ESA*") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appelants*

c.

Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

Nº du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «*LNE*») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40*a* of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40*a* to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40*a* de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. Il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40*a* sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur

trarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40*a* are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Cases Cited

Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

Le recours à l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l'*Employment Standards Amendment Act, 1981*, étaient exemptés de l'obligation de verser des indemnités de cessation d'emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l'obligation de verser une indemnité de cessation d'emploi. Si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur.

Lorsque les mots exprès employés aux art. 40 et 40*a* sont examinés dans leur contexte global, les termes «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inéquitable. Une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. La cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. Il était inutile d'examiner la question de l'applicabilité du par. 7(5) de la *LNE*.

Jurisprudence

Distinction d'avec les arrêts: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343; **arrêts mentionnés:** *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. c. Hydro-Québec*,

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. v. Vasil*, [1981] 1 S.C.R. 469; *Paul v. The Queen*, [1982] 1 S.C.R. 621; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025.

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Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40*a*(1) [rep. & sub. *ibid*., s. 5(1)].
Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).
Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

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Loi d'interprétation, L.R.O. 1980, ch. 219 [maintenant L.R.O. 1990, ch. I-11], art. 10, 17.
Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi, L.O. 1995, ch. 1, art. 74(1), 75(1).
Loi sur la faillite, L.R.C. (1985), ch. B-3 [maintenant la *Loi sur la faillite et l'insolvabilité*], art. 121(1).
Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5) [abr. & rempl. 1986, ch. 51, art. 2], 40(1) [abr. & rempl. 1987, ch. 30, art. 4(1)], (7), 40*a*(1) [abr. & rempl. *ibid*., art. 5(1)].

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APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and *Kathleen Martin*, for the appellants.

Raymond M. Slattery, for the respondent.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

The judgment of the Court was delivered by

IACOBUCCI J. — This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. nº 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett et *Kathleen Martin*, pour les appelants.

Raymond M. Slattery, pour l'intimée.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur. 1

1. Les faits

Avant sa faillite, la société Rizzo & Rizzo Shoes Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la 2

order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

chaîne de magasins. Le lendemain, une ordonnance de séquestre a été rendue sur consentement à l'égard des biens de Rizzo. Au prononcé de l'ordonnance, les employés de Rizzo ont perdu leur emploi.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

Conformément à l'ordonnance de séquestre, l'intimée, Zittrer, Siblin & Associates, Inc. (le «syndic») a été nommée syndic de faillite de l'actif de Rizzo. La Banque de Nouvelle-Écosse a nommé Peat Marwick Limitée («PML») comme administrateur séquestre. Dès la fin de juillet 1989, PML avait liquidé les biens de Rizzo et fermé les magasins. PML a versé tous les salaires, les traitements, toutes les commissions et les paies de vacances qui avaient été gagnés par les employés de Rizzo jusqu'à la date à laquelle l'ordonnance de séquestre a été rendue.

4 In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

En novembre 1989, le ministère du Travail de la province d'Ontario, Direction des normes d'emploi (le «ministère») a vérifié les dossiers de Rizzo afin de déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi*, L.R.O. 1980, ch. 137 et ses modifications (la «*LNE*»). Le 23 août 1990, au nom des anciens employés de Rizzo, le ministère a remis au syndic intimé une preuve de réclamation pour des indemnités de licenciement et des paies de vacances (environ 2,6 millions de dollars) et pour des indemnités de cessation d'emploi (14 215 $). Le syndic a rejeté les réclamations et a donné avis du rejet le 28 janvier 1991. Aux fins du présent pourvoi, les réclamations ont été rejetées parce que le syndic était d'avis que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave

Le ministère a interjeté appel de la décision du syndic devant la Cour de l'Ontario (Division générale) laquelle a infirmé la décision du syndic et a admis les réclamations en tant que réclamations non garanties prouvables en matière de faillite. En appel, la Cour d'appel de l'Ontario a cassé le jugement de la cour de première instance et rétabli la

to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. —

(5) Every contract of employment shall be deemed to include the following provision:

> All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act.*

40. — (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

décision du syndic. Le ministère a demandé l'autorisation d'en appeler de l'arrêt de la Cour d'appel, mais il s'est désisté le 30 août 1993. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. L'ordonnance de notre Cour faisant droit à ces demandes a été rendue le 5 décembre 1996.

2. Les dispositions législatives pertinentes

Aux fins du présent pourvoi, les versions pertinentes de la *Loi sur la faillite* (maintenant la *Loi sur la faillite et l'insolvabilité*) et de la *Loi sur les normes d'emploi* sont respectivement les suivantes: L.R.C. (1985), ch. B-3 (la *«LF»*) et L.R.O. 1980, ch. 137 et ses modifications au 14 avril 1989 (la *«LNE»*). 6

Loi sur les normes d'emploi, L.R.O. 1980, ch. 137 et ses modifications:

7 . . .

(5) Tout contrat de travail est réputé comprendre la disposition suivante:

> L'indemnité de cessation d'emploi et l'indemnité de licenciement deviennent exigibles et sont payées par l'employeur à l'employé en deux versements hebdomadaires à compter de la première semaine complète suivant la cessation d'emploi, et sont réparties sur ces semaines en conséquence. La présente disposition ne s'applique pas à l'indemnité de cessation d'emploi si l'employé a choisi de maintenir son droit d'être rappelé, comme le prévoit le paragraphe 40a (7) de la *Loi sur les normes d'emploi.*

40 (1) Aucun employeur ne doit licencier un employé qui travaille pour lui depuis trois mois ou plus à moins de lui donner:

a) un préavis écrit d'une semaine si sa période d'emploi est inférieure à un an;

b) un préavis écrit de deux semaines si sa période d'emploi est d'un an ou plus mais de moins de trois ans;

(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40*a* . . .

(1a) Where**,**

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

c) un préavis écrit de trois semaines si sa période d'emploi est de trois ans ou plus mais de moins de quatre ans;

d) un préavis écrit de quatre semaines si sa période d'emploi est de quatre ans ou plus mais de moins de cinq ans;

e) un préavis écrit de cinq semaines si sa période d'emploi est de cinq ans ou plus mais de moins de six ans;

f) un préavis écrit de six semaines si sa période d'emploi est de six ans ou plus mais de moins de sept ans;

g) un préavis écrit de sept semaines si sa période d'emploi est de sept ans ou plus mais de moins de huit ans;

h) un préavis écrit de huit semaines si sa période d'emploi est de huit ans ou plus,

et avant le terme de la période de ce préavis.

. . .

(7) Si un employé est licencié contrairement au présent article:

a) l'employeur lui verse une indemnité de licenciement égale au salaire que l'employé aurait eu le droit de recevoir à son taux normal pour une semaine normale de travail sans heures supplémentaires pendant la période de préavis fixée par le paragraphe (1) ou (2), de même que tout salaire auquel il a droit;

. . .

40*a* . . .

[TRADUCTION] (1a) L'employeur verse une indemnité de cessation d'emploi à chaque employé licencié qui a travaillé pour lui pendant cinq ans ou plus si, selon le cas:

a) l'employeur licencie cinquante employés ou plus au cours d'une période de six mois ou moins et que les licenciements résultent de l'interruption permanente de l'ensemble ou d'une partie des activités de l'employeur à un établissement;

b) l'employeur dont la masse salariale est de 2,5 millions de dollars ou plus licencie un ou plusieurs employés.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2. — (1) Part XII of the said Act is amended by adding thereto the following section:

. . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C., 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. *Ontario Court (General Division)* (1991), 6 O.R. (3d) 441

Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22

[TRADUCTION]

2. (1) La partie XII de la loi est modifiée par adjonction de l'article suivant:

. . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

Loi sur la faillite, L.R.C. (1985), ch. B-3

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date de la faillite, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à la date de la faillite, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Loi d'interprétation, L.R.O. 1990, ch. I.11

10 Les lois sont réputées apporter une solution de droit, qu'elles aient pour objet immédiat d'ordonner l'accomplissement d'un acte que la Législature estime être dans l'intérêt public ou d'empêcher ou de punir l'accomplissement d'un acte qui lui paraît contraire à l'intérêt public. Elles doivent par conséquent s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables.

. . .

17 L'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit.

3. L'historique judiciaire

A. *La Cour de l'Ontario (Division générale)* (1991), 6 O.R. (3d) 441

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

Après avoir tranché plusieurs points non soulevés dans le présent pourvoi, le juge Farley est passé à la question de savoir si l'indemnité de licenciement et l'indemnité de cessation d'emploi sont des réclamations prouvables en application de la *LF*. S'appuyant sur la décision *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (C.S. Ont. en matière de faillite), il a conclu que manifestement, l'indemnité de licenciement et l'indemnité de cessation d'emploi sont prouvables en matière de faillite lorsque l'obligation légale d'effectuer ces versements a pris naissance avant la faillite. Par conséquent, il a estimé que le point essentiel à résoudre en l'espèce était de savoir si la faillite était assimilable au licenciement et entraînait l'application des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* de manière que l'obligation de verser ces indemnités prenne naissance également au moment de la faillite.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

Le juge Farley a abordé cette question en faisant remarquer que l'objet et l'intention de la *LNE* étaient d'établir des normes minimales d'emploi et de favoriser et protéger les intérêts des employés. Il a donc conclu que la *LNE* visait à apporter une solution de droit et devait dès lors être interprétée de manière équitable et large afin de garantir la réalisation de son objet selon ses sens, intention et esprit véritables.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

Le juge Farley a ensuite décidé que priver les employés en l'espèce du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi aurait pour conséquence injuste et arbitraire que l'employé licencié juste avant la faillite aurait droit à une indemnité de licenciement et à une indemnité de cessation d'emploi, alors que celui qui a perdu son emploi en raison de la faillite elle-même n'y aurait pas droit. Ce résultat, a-t-il dit, irait à l'encontre du but visé par la loi.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in

Le juge Farley ne voyait pas pourquoi les réclamations des employés en l'espèce ne seraient pas généralement considérées comme des réclamations concernant les salaires ou comme d'autres réclamations présentées en application de la *LF*. Il a souligné que les anciens employés en l'espèce

the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

n'avaient pas soutenu que les indemnités de licenciement et de cessation d'emploi devaient être prioritaires dans la distribution de l'actif, mais tout simplement qu'elles étaient des réclamations prouvables en matière de faillite (non garanties et non privilégiées). Pour ce motif, il a conclu qu'il ne convenait pas d'invoquer la jurisprudence et la doctrine portant sur l'interprétation des dispositions relatives à la priorité de la *LF*.

Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

11 Même si la faillite ne met pas fin à la relation entre l'employeur et l'employé de façon à faire jouer les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNF*, le juge Farley était d'avis que les employés en l'espèce avaient néanmoins droit à ces indemnités, car il s'agissait d'engagements contractés avant la date de la faillite conformément au par. 7(5) de la *LNE*. Il a conclu d'une part qu'aux termes du par. 7(5), tout contrat de travail est réputé comprendre une disposition prévoyant le versement d'une indemnité de licenciement et d'une indemnité de cessation d'emploi au moment de la cessation d'emploi et d'autre part que l'employeur en faillite est assujetti à l'obligation conditionnelle de verser ces indemnités depuis le début de la relation entre l'employeur et l'employé, soit bien avant la faillite.

Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

12 Le juge Farley a également examiné le par. 2(3) de l'*Employment Standards Amendment Act, 1981*, L.O. 1981, ch. 22 («l'*ESAA*»), qui est une disposition transitoire exemptant certains employeurs en faillite des nouvelles obligations relatives au paiement de l'indemnité de cessation d'emploi jusqu'à ce que les modifications aient reçu la sanction royale. Il était d'avis que cette disposition n'aurait pas été nécessaire si le législateur n'avait pas voulu que les obligations auxquelles sont tenus les employeurs au moment d'un licenciement s'appliquent aux employeurs en faillite en vertu de la *LNE*. Le juge Farley a conclu que la réclamation présentée par les anciens employés de Rizzo en vue d'obtenir des indemnités de licenciement et de cessation d'emploi pouvait être traitée comme une créance non garantie et non privilégiée dans une faillite. Par conséquent, il a accueilli l'appel formé contre la décision du syndic.

B. *Ontario Court of Appeal* (1995), 22 O.R. (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or who proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a peti-

B. *La Cour d'appel de l'Ontario* (1995), 22 O.R. (3d) 385

Au nom d'une cour unanime, le juge Austin a commencé son analyse de la question principale du présent pourvoi en s'arrêtant sur le libellé des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE*. Il a noté, à la p. 390, que les dispositions relatives à l'indemnité de licenciement utilisent des expressions comme «[a]ucun employeur ne doit licencier un employé» (par. 40(1)), «le préavis qu'un employeur donne pour licencier» (par. 40(2)) et les «employés qu'un employeur a licenciés ou se propose de licencier» (par. 40(5)). Passant à l'indemnité de cessation d'emploi, il a cité l'al. 40*a*(1)*a*), à la p. 391, lequel contient l'expression «l'employeur licencie cinquante employés». Le juge Austin a conclu que ce libellé limite l'obligation d'accorder une indemnité de licenciement et une indemnité de cessation d'emploi aux cas où l'employeur licencie des employés. Selon lui, la cessation d'emploi résultant de l'effet de la loi, notamment de la faillite, n'entraîne pas l'application de la *LNE*.

À l'appui de sa conclusion, le juge Austin a examiné les arrêts de principe dans ce domaine du droit. Il a cité *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (C.S. en matière de faillite), dans lequel le juge Houlden (maintenant juge de la Cour d'appel) a statué que les dispositions relatives à l'indemnité de licenciement de la *LNE* n'étaient pas conçues pour s'appliquer à l'employeur en faillite. Il a également invoqué *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (C.S. Ont. en matière de faillite), à l'appui de la proposition selon laquelle la faillite d'une compagnie à la demande d'un créancier ne constitue pas un congédiement. Il a conclu ainsi, à la p. 395:

> [TRADUCTION] Le libellé clair des art. 40 et 40*a* ne crée une obligation de verser une indemnité de licenciement ou une indemnité de cessation d'emploi que si l'employeur licencie l'employé. En l'espèce, la cessation d'emploi n'est pas le fait de l'employeur, elle résulte d'une ordonnance de séquestre rendue à l'encontre de Rizzo le 14 avril 1989, à la suite d'une pétition présentée par l'un de ses créanciers. Le droit à une indemnité

tion by one of its creditors. No entitlement to either termination or severance pay ever arose.

Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40*a*(1a) begins with

de licenciement ou à une indemnité de cessation d'emploi n'a jamais pris naissance.

15 En ce qui concerne le par. 7(5) de la *LNE*, le juge Austin a rejeté l'interprétation du juge de première instance et a estimé que cette disposition ne créait pas d'engagement. Selon lui, elle ne faisait que préciser quand l'engagement contracté par ailleurs devait être acquitté et ne se rapportait donc pas à la question dont la cour était saisie. Le juge Austin n'a pas accepté non plus l'opinion exprimée par le tribunal inférieur au sujet du par. 2(3), la disposition transitoire de l'*ESAA*. Il a jugé que cette disposition n'avait aucun effet quant à l'intention du législateur, comme l'attestait la terminologie employée aux art. 40 et 40*a*.

16 Le juge Austin a conclu que, comme la cessation d'emploi subie par les anciens employés de Rizzo résultait d'une ordonnance de faillite et n'était pas le fait de l'employeur, il n'existait aucun engagement en ce qui concerne l'indemnité de licenciement, l'indemnité de cessation d'emploi ni la paie de vacances. L'ordonnance du juge de première instance a été annulée et la décision du syndic de rejeter les réclamations a été rétablie.

4. Les questions en litige

17 Le présent pourvoi soulève une question: la cessation d'emploi résultant de la faillite de l'employeur donne-t-elle naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*?

5. Analyse

18 L'obligation légale faite aux employeurs de verser une indemnité de licenciement ainsi qu'une indemnité de cessation d'emploi est régie respectivement par les art. 40 et 40*a* de la *LNE*. La Cour d'appel a fait observer que le libellé clair de ces dispositions donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé. Par exemple, le par. 40(1) commence par les mots suivants: «Aucun employeur ne doit

the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legisla-*

licencier un employé . . .» Le paragraphe 40*a*(1a) contient également les mots: «si [. . .] l'employeur licencie cinquante employés ou plus . . .» Par conséquent, la question dans le présent pourvoi est de savoir si l'on peut dire que l'employeur qui fait faillite a licencié ses employés.

La Cour d'appel a répondu à cette question par la négative, statuant que, lorsqu'un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l'employeur mais par l'effet de la loi. La Cour d'appel a donc estimé que, dans les circonstances de l'espèce, les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNE* n'étaient pas applicables et qu'aucune obligation n'avait pris naissance. Les appelants répliquent que les mots «l'employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d'emploi volontaire et la cessation d'emploi forcée. Ils soutiennent que ce libellé visait à dégager l'employeur de son obligation de verser des indemnités de licenciement et de cessation d'emploi lorsque l'employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d'emploi forcée résultant de la faillite de l'employeur est assimilable au licenciement effectué par l'employeur pour l'exercice du droit à une indemnité de licenciement et à une indemnité de cessation d'emploi prévu par la *LNE*.

Une question d'interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d'appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

Bien que l'interprétation législative ait fait couler beaucoup d'encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2e éd.

tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "... the interests of employees by requiring employers to comply with

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l'approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

22 Je m'appuie également sur l'art. 10 de la *Loi d'interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

23 Bien que la Cour d'appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n'a pas accordé suffisamment d'attention à l'économie de la *LNE*, à son objet ni à l'intention du législateur; le contexte des mots en cause n'a pas non plus été pris en compte adéquatement. Je passe maintenant à l'analyse de ces questions.

24 Dans l'arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l'importance que notre société accorde à l'emploi et le rôle fondamental qu'il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C'est dans ce contexte que les juges majoritaires dans l'arrêt *Machtinger* ont défini, à la p. 1003, l'objet de la *LNE* comme étant la protection «. . . [d]es intérêts des employés en exigeant que

certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

les employeurs respectent certaines normes minimales, notamment en ce qui concerne les périodes minimales de préavis de licenciement». Par conséquent, les juges majoritaires ont conclu, à la p. 1003, qu'«. . . une interprétation de la Loi qui encouragerait les employeurs à se conformer aux exigences minimales de celle-ci et qui ferait ainsi bénéficier de sa protection le plus grand nombre d'employés possible est à préférer à une interprétation qui n'a pas un tel effet».

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.)

L'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. L'article 40 de la *LNE* oblige les employeurs à donner à leurs employés un préavis de licenciement raisonnable en fonction des années de service. L'une des fins principales de ce préavis est de donner aux employés la possibilité de se préparer en cherchant un autre emploi. Il s'ensuit que l'al. 40(7)a), qui prévoit une indemnité de licenciement tenant lieu de préavis lorsqu'un employeur n'a pas donné le préavis requis par la loi, vise à protéger les employés des effets néfastes du bouleversement économique que l'absence d'une possibilité de chercher un autre emploi peut entraîner. (Innis Christie, Geoffrey England et Brent Cotter, *Employment Law in Canada* (2e éd. 1993), aux pp. 572 à 581.)

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

De même, l'art. 40*a*, qui prévoit l'indemnité de cessation d'emploi, vient indemniser les employés ayant beaucoup d'années de service pour ces années investies dans l'entreprise de l'employeur et pour les pertes spéciales qu'ils subissent lorsqu'ils sont licenciés. Dans l'arrêt *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, le juge Robins a cité en les approuvant, aux pp. 556 et 557, les propos tenus par D. D. Carter dans le cadre d'une décision rendue en matière de normes d'emploi dans *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), à la p. 19, où il a décrit ainsi le rôle de l'indemnité de cessation d'emploi:

Severance pay recognizes that an employee does make an investment in his employer's business — the extent of this investment being directly related to the length of

[TRADUCTION] L'indemnité de cessation d'emploi reconnaît qu'un employé fait un investissement dans l'entreprise de son employeur — l'importance de cet investis-

the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

sement étant liée directement à la durée du service de l'employé. Cet investissement est l'ancienneté que l'employé acquiert durant ses années de service [. . .] À la fin de la relation entre l'employeur et l'employé, cet investissement est perdu et l'employé doit recommencer à acquérir de l'ancienneté dans un autre lieu de travail. L'indemnité de cessation d'emploi, fondée sur les années de service, compense en quelque sorte cet investissement perdu.

In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88). 27

À mon avis, les conséquences ou effets qui résultent de l'interprétation que la Cour d'appel a donnée des art. 40 et 40*a* de la *LNE* ne sont compatibles ni avec l'objet de la Loi ni avec l'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes. Selon un principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes. D'après Côté, *op. cit.*, on qualifiera d'absurde une interprétation qui mène à des conséquences ridicules ou futiles, si elle est extrêmement déraisonnable ou inéquitable, si elle est illogique ou incohérente, ou si elle est incompatible avec d'autres dispositions ou avec l'objet du texte législatif (aux pp. 430 à 432). Sullivan partage cet avis en faisant remarquer qu'on peut qualifier d'absurdes les interprétations qui vont à l'encontre de la fin d'une loi ou en rendent un aspect inutile ou futile (Sullivan, *Construction of Statutes*, *op. cit.*, à la p. 88).

The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up 28

Le juge de première instance a noté à juste titre que, si les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* ne s'appliquent pas en cas de faillite, les employés qui auraient eu la «chance» d'être congédiés la veille de la faillite auraient droit à ces indemnités, alors que ceux qui perdraient leur emploi le jour où la faillite devient définitive n'y auraient pas droit. À mon avis, l'absurdité de cette conséquence est particulièrement évidente dans les milieux syndiqués où les mises à pied se font selon l'ancienneté. Plus un employé a de l'ancienneté, plus il a investi dans l'entreprise de l'employeur et plus son droit à une indemnité de licenciement et à une indemnité de cessation d'emploi est fondé. Pourtant, c'est le personnel ayant le plus d'ancienneté qui risque de travailler

until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *ESAA* introduced s. 40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

2. . . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional

jusqu'au moment de la faillite et de perdre ainsi le droit d'obtenir ces indemnités.

Si l'interprétation que la Cour d'appel a donnée des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi est correcte, il serait acceptable d'établir une distinction entre les employés en se fondant simplement sur la date de leur congédiement. Il me semble qu'un tel résultat priverait arbitrairement certains employés d'un moyen de faire face au bouleversement économique causé par le chômage. De cette façon, les protections de la *LNE* seraient limitées plutôt que d'être étendues, ce qui irait à l'encontre de l'objectif que voulait atteindre le législateur. À mon avis, c'est un résultat déraisonnable.

En plus des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi, tant les appelants que l'intimée ont invoqué divers autres articles de la *LNE* pour appuyer les arguments avancés au sujet de l'intention du législateur. Selon moi, bien que la plupart de ces dispositions ne soient d'aucune utilité en ce qui concerne l'interprétation, il est une disposition transitoire particulièrement révélatrice. En 1981, le par. 2(1) de l'*ESAA* a introduit l'art. 40*a*, la disposition relative à l'indemnité de cessation d'emploi. En application du par. 2(2), cette disposition entrait en vigueur le 1er janvier 1981. Le paragraphe 2(3), la disposition transitoire en question, était ainsi conçue:

[TRADUCTION]

2. . . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

La Cour d'appel a conclu qu'il n'était ni nécessaire ni approprié de déterminer l'intention qu'avait le législateur en adoptant ce paragraphe

subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469, at p. 487; *Paul v. The Queen*, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

provisoire. Néanmoins, la cour a estimé que l'intention du législateur, telle qu'elle ressort des premiers mots des art. 40 et 40*a*, était claire, à savoir que la cessation d'emploi résultant de la faillite ne fera pas naître l'obligation de verser l'indemnité de cessation d'emploi et l'indemnité de licenciement qui est prévue par la *LNE*. La cour a jugé que cette intention restait inchangée à la suite de l'adoption de la disposition transitoire. Je ne puis souscrire ni à l'une ni à l'autre de ces conclusions. En premier lieu, à mon avis, l'examen de l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié et notre Cour y a eu souvent recours (voir, par ex., *R. c. Vasil*, [1981] 1 R.C.S. 469, à la p. 487; *Paul c. La Reine*, [1982] 1 R.C.S. 621, aux pp. 635, 653 et 660). En second lieu, je crois que la disposition transitoire indique que le législateur voulait que l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi prenne naissance lorsque l'employeur fait faillite.

In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

32 À mon avis, en raison de l'exemption accordée au par. 2(3) aux employeurs qui ont fait faillite et ont perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale, il faut nécessairement que les employeurs faisant faillite soient de fait assujettis à l'obligation de verser une indemnité de cessation d'emploi. Selon moi, si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin.

I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows (at p. 89):

33 Je m'appuie sur la décision rendue par le juge Saunders dans l'affaire *Royal Dressed Meats Inc.*, précitée. Après avoir examiné le par. 2(3) de l'*ESAA*, il fait l'observation suivante (à la p. 89):

> . . . any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the E.S.A. . . . it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

> [TRADUCTION] . . . tout doute au sujet de l'intention du législateur ontarien est dissipé, à mon avis, par la disposition transitoire qui introduit les indemnités de cessation d'emploi dans la L.N.E. [. . .] Il me semble qu'il faut conclure que le législateur voulait que l'obligation de verser des indemnités de cessation d'emploi prenne naissance au moment de la faillite. Selon moi, cette intention s'étend aux indemnités de licenciement qui sont de nature analogue.

This interpretation is also consistent with statements made by the Minister of Labour at the time

34 Cette interprétation est également compatible avec les déclarations faites par le ministre du

he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . .
>
> . . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

> . . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legisla-

Travail au moment de l'introduction des modifications apportées à la *LNE* en 1981. Au sujet de la nouvelle disposition relative à l'indemnité de cessation d'emploi, il a dit ce qui suit:

> [TRADUCTION] Les circonstances entourant une fermeture régissent l'applicabilité de la législation en matière d'indemnité de cessation d'emploi dans certains cas précis. Par exemple, une société insolvable ou en faillite sera encore tenue de verser l'indemnité de cessation d'emploi aux employés dans la mesure où il y a des biens pour acquitter leurs réclamations.
>
> . . .
>
> . . . les mesures proposées en matière d'indemnité de cessation d'emploi seront, comme je l'ai mentionné précédemment, rétroactives au 1er janvier de cette année. Cette disposition rétroactive, toutefois, ne s'appliquera pas en matière de faillite et d'insolvabilité dans les cas où les biens ont déjà été distribués ou lorsqu'une entente est déjà intervenue au sujet de la proposition des créanciers.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 4 juin 1981, aux pp. 1236 et 1237.)

De plus, au cours des débats parlementaires sur les modifications proposées, le ministre a déclaré:

> [TRADUCTION] En ce qui a trait à la rétroactivité, l'indemnité de cessation d'emploi ne s'appliquera pas aux faillites régies par la Loi sur la faillite lorsque les biens ont été distribués. Cependant, lorsque la présente loi aura reçu la sanction royale, les employés visés par des fermetures entraînées par des faillites seront visés par les dispositions relatives à l'indemnité de cessation d'emploi.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 16 juin 1981, à la p. 1699.)

Malgré les nombreuses lacunes de la preuve des débats parlementaires, notre Cour a reconnu qu'elle peut jouer un rôle limité en matière d'interprétation législative. S'exprimant au nom de la Cour dans l'arrêt *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 484, le juge Sopinka a dit:

> . . . jusqu'à récemment, les tribunaux ont hésité à admettre la preuve des débats et des discours devant le corps législatif. [. . .] La principale critique dont a été l'objet ce type de preuve a été qu'elle ne saurait représenter «l'intention» de la législature, personne morale, mais

tive history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

c'est aussi vrai pour d'autres formes de contexte d'adoption d'une loi. À la condition que le tribunal n'oublie pas que la fiabilité et le poids des débats parlementaires sont limités, il devrait les admettre comme étant pertinents quant au contexte et quant à l'objet du texte législatif.

Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

36 Enfin, en ce qui concerne l'économie de la loi, puisque la *LNE* constitue un mécanisme prévoyant des normes et des avantages minimaux pour protéger les intérêts des employés, on peut la qualifier de loi conférant des avantages. À ce titre, conformément à plusieurs arrêts de notre Cour, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur (voir, par ex., *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2, à la p. 10; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, à la p. 537). Il me semble que, en limitant cette analyse au sens ordinaire des art. 40 et 40*a* de la *LNE*, la Cour d'appel a adopté une méthode trop restrictive qui n'est pas compatible avec l'économie de la Loi.

The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

37 La Cour d'appel s'est fortement appuyée sur la décision rendue dans *Malone Lynch*, précité. Dans cette affaire, le juge Houlden a conclu que l'art. 13, la disposition relative aux mesures de licenciement collectif de l'ancienne *ESA*, R.S.O. 1970, ch. 147, qui a été remplacée par l'art. 40 en cause dans le présent pourvoi, n'était pas applicable lorsque la cessation d'emploi résultait de la faillite de l'employeur. Le paragraphe 13(2) de l'*ESA* alors en vigueur prévoyait que, si un employeur voulait licencier 50 employés ou plus, il devait donner un préavis de licenciement dont la durée était prévue par règlement [TRADUCTION] «et les licenciements ne prenaient effet qu'à l'expiration de ce délai». Le juge Houlden a conclu que la cessation d'emploi résultant de la faillite ne pouvait entraîner l'application de la disposition relative à l'indemnité de licenciement car les employés placés dans cette situation n'avaient pas reçu le préavis écrit requis par la loi et ne pouvaient donc pas être considérés comme ayant été licenciés conformément à la Loi.

Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were

38 Deux ans après que la décision *Malone Lynch* eut été prononcée, les dispositions relatives à l'in-

amended by *The Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

demnité de licenciement de l'*ESA* de 1970 ont été modifiées par *The Employment Standards Act, 1974*, S.O. 1974, ch. 112. Dans la version modifiée du par. 40(7) de l'*ESA* de 1974, il n'était plus nécessaire qu'un préavis soit donné avant que le licenciement puisse produire ses effets. Cette disposition vient préciser que l'indemnité de licenciement doit être versée lorsqu'un employeur omet de donner un préavis de licenciement et qu'il y a cessation d'emploi, indépendamment du fait qu'un préavis régulier ait été donné ou non. Il ne fait aucun doute selon moi que la décision *Malone Lynch* portait sur des dispositions législatives très différentes de celles qui sont applicables en l'espèce. Il me semble que la décision du juge Houlden a une portée limitée, soit que les dispositions de l'*ESA* de 1970 ne s'appliquent pas à un employeur en faillite. Pour cette raison, je ne reconnais à la décision *Malone Lynch* aucune valeur persuasive qui puisse étayer les conclusions de la Cour d'appel. Je souligne que les tribunaux dans *Royal Dressed Meats*, précité, et *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (C.S.C.-B.), ont refusé de se fonder sur *Malone Lynch* en invoquant des raisons similaires.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in *Malone Lynch*, *supra*, with approval.

La Cour d'appel a également invoqué *Re Kemp Products Ltd.*, précité, à l'appui de la proposition selon laquelle, bien que la relation entre l'employeur et l'employé se termine à la faillite de l'employeur, cela ne constitue pas un «congédiement». Je note que ce litige n'est pas fondé sur les dispositions de la *LNE*. Il portait plutôt sur l'interprétation du terme «congédiement» dans le cadre de ce que le plaignant alléguait être un contrat de travail. J'estime donc que cette décision ne fait pas autorité dans les circonstances de l'espèce. Pour les raisons exposées ci-dessus, je ne puis accepter non plus que la Cour d'appel se fonde sur l'arrêt *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), qui citait la décision *Malone Lynch*, précitée, et l'approuvait.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the con-

Selon moi, l'examen des termes exprès des art. 40 et 40*a* de la *LNE*, replacés dans leur contexte global, permet largement de conclure que les

clusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESAA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

mots «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Adoptant l'interprétation libérale et généreuse qui convient aux lois conférant des avantages, j'estime que ces mots peuvent raisonnablement recevoir cette interprétation (voir *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025). Je note également que l'intention du législateur, qui ressort du par. 2(3) de l'*ESAA*, favorise clairement cette interprétation. Au surplus, à mon avis, priver des employés du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi en application de la *LNE* lorsque la cessation d'emploi résulte de la faillite de leur employeur serait aller à l'encontre des fins visées par les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi et minerait l'objet de la *LNE*, à savoir protéger les intérêts du plus grand nombre d'employés possible.

In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

41 À mon avis, les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui ont été licenciés pour quelque autre raison serait arbitraire et inéquitable. De plus, je pense qu'une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. Je conclus donc que la cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. En raison de cette conclusion, j'estime inutile d'examiner l'autre conclusion tirée par le juge de première instance quant à l'applicabilité du par. 7(5) de la *LNE*.

I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections

42 Je fais remarquer qu'après la faillite de Rizzo, les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la

74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law". As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

LNE ont été modifiées à nouveau. Les paragraphes 74(1) et 75(1) de la *Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi*, L.O. 1995, ch. 1, ont apporté des modifications à ces dispositions qui prévoient maintenant expressément que, lorsque la cessation d'emploi résulte de l'effet de la loi à la suite de la faillite de l'employeur, ce dernier est réputé avoir licencié ses employés. Cependant, comme l'art. 17 de la *Loi d'interprétation* dispose que «[l]'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit», je précise que la modification apportée subséquemment à la loi n'a eu aucune incidence sur la solution apportée au présent pourvoi.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

6. Dispositif et dépens

Je suis d'avis d'accueillir le pourvoi et d'annuler le premier paragraphe de l'ordonnance de la Cour d'appel. Je suis d'avis d'y substituer une ordonnance déclarant que les anciens employés de Rizzo ont le droit de présenter des demandes d'indemnité de licenciement (y compris la paie de vacances due) et d'indemnité de cessation d'emploi en tant que créanciers ordinaires. Quant aux dépens, le ministère du Travail n'ayant produit aucun élément de preuve concernant les efforts qu'il a faits pour informer les employés de Rizzo ou obtenir leur consentement avant de se désister de sa demande d'autorisation de pourvoi auprès de notre Cour en leur nom, je suis d'avis d'ordonner que les dépens devant notre Cour soient payés aux appelants par le ministère sur la base des frais entre parties. Je suis d'avis de ne pas modifier les ordonnances des juridictions inférieures à l'égard des dépens.

Appeal allowed with costs.

Pourvoi accueilli avec dépens.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto.

Procureurs des appelants: Sack, Goldblatt, Mitchell, Toronto.

Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto.

Procureurs de l'intimée: Minden, Gross, Grafstein & Greenstein, Toronto.

Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

Procureur du ministère du Travail de la province d'Ontario, Direction des normes d'emploi: Le procureur général de l'Ontario, Toronto.

Environmental Review Tribunal
Tribunal de l'environnement

ISSUE DATE: December 7, 2015 **CASE NO.:** 15-037

PROCEEDING COMMENCED UNDER section 142.1(2) of the *Environmental Protection Act,* R.S.O. 1990, c. E.19, as amended

Appellant:	SLWP Opposition Corp.
Approval Holder:	Settlers Landing Nominee Ltd.
Respondent:	Director, Ministry of the Environment and Climate Change
Subject of appeal:	Renewable Energy Approval for Settlers Landing Wind Park
Reference No.:	8992-9TVSKD
Property Address/Description:	510 Telecom Road Part of Lots 7-9, Concession 3
Municipality:	City of Kawartha Lakes
ERT Case No.:	15-037
ERT Case Name:	SLWP Opposition Corp. v. Ontario (Environment and Climate Change)
Heard:	September 9, 10, 11 and October 22, 2015 in Pontypool, Ontario, November 9, 2015 by telephone conference call, and in writing.

APPEARANCES:

Parties	**Counsel/Representative[+]**
SLWP Opposition Corp.	Graham Andrews
Director, Ministry of the Environment and Climate Change	Nadine Harris and Katie Clements
Settlers Landing Nominee Ltd.	Grant Worden, John Terry and Dennis Mahony

Participants

City of Kawartha Lakes	Robyn Carlson
Save the Oak Ridges Moraine Coalition	Cindy Sutch[+]

Presenters

Jane Zednik	Self-represented
Monica McCarthy	Self-represented

ORDER DELIVERED BY JUSTIN DUNCAN AND HEATHER GIBBS

REASONS

Background

[1] On May 7, 2015, Mohsen Keyvani, Director, Ministry of the Environment and Climate Change ("MOECC") issued Renewable Energy Approval No. 8992-9TVSKD (the "REA") to Settlers Landing Nominee Ltd. (the "Approval Holder"), granting approval for the construction, installation, operation, use and retiring of a Class 4 wind facility with a total name plate capacity of 10 megawatts (the "Project"). The Project is to be located at 510 Telecom Road in the City of Kawartha Lakes, Ontario (the "Site"). The Site is within the Oak Ridges Moraine Conservation Plan ("ORMCP") area, within the "Countryside Area" designation.

[2] On May 22, 2015, SLWP Opposition Corp. (the "Appellant") appealed the REA to the Environmental Review Tribunal (the "Tribunal") on the grounds that the Project will cause serious harm to human health ("Health Test") and serious and irreversible harm to plant life, animal life or the natural environment ("Environment Test").

[3] Evidence was heard on the appeal in Pontypool, Ontario on September 9, 10 and 11, 2015, with closing submissions heard on October 22, 2015. Additionally, a motion to introduce new evidence under Rule 234 of the Tribunal's *Rules of Practice* relating to woodland and grassland habitat compensation was heard on October 22, 2015. The motion was granted by the Tribunal, and the Appellant was given the opportunity to file responding evidence in writing. Responding evidence by the Appellant, along with additional evidence by the Approval Holder, was filed on November 9, 2015. Additional closing submissions in relation to woodland and grassland habitat compensation were also filed by the parties on November 9, 2015 and the Tribunal held a telephone conference call ("TCC") that day to hear submissions on those remaining matters.

[4] On November 19, 2015 the Tribunal issued an order finding that the Appellant has failed to meet the onus under the Health Test but has met the onus under the Environment Test, specifically in relation to the removal of portions of a significant woodland and impact to woodland habitat in the Project area. The Tribunal's order, as well as the hearing of evidence and submissions regarding several issues, has taken place in the context of the expedited procedure and unique test required by the *Environmental Protection Act* ("*EPA*"). These are the reasons for the Tribunal's order of November 19, 2015.

Relevant Legislation

[5] The following provisions of the *EPA* set out the jurisdiction of the Tribunal on this appeal, the onus of proof of the Appellant and the powers of the Tribunal where the Appellant has met their evidentiary onus:

> **What Tribunal must consider**
>
> 145.2.1 (2) The Tribunal shall review the decision of the Director and shall consider only whether engaging in the renewable energy project in accordance with the renewable energy approval will cause,
>
> (a) serious harm to human health; or

(b) serious and irreversible harm to plant life, animal life or the natural environment.

Onus of proof

(3) The person who required the hearing has the onus of proving that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a) or (b).

Powers of Tribunal

(4) If the Tribunal determines that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a) or (b), the Tribunal may,

(a) revoke the decision of the Director;
(b) by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations; or
(c) alter the decision of the Director, and, for that purpose, the Tribunal may substitute its opinion for that of the Director.

(6) The decision of the Director shall be deemed to be confirmed by the Tribunal if the Tribunal has not disposed of the hearing in respect of the decision within the period of time prescribed by the regulations.

Issues

[6] The three issues to be determined on this appeal are as follows:

1. Whether engaging in the Project in accordance with the REA will cause serious harm to human health.

2. Whether engaging in the Project in accordance with the REA will cause serious harm to human health, or serious and irreversible harm to the natural environment, specifically through hydrological or hydrogeological impacts.

3. Whether engaging in the Project in accordance with the REA will cause serious and irreversible harm to plant life, animal life or the natural environment, specifically through impacts to grassland bird habitat and to woodlands/woodland habitat.

[7] The Tribunal heard evidence from a total of 17 witnesses on this appeal. The Appellant tendered evidence from Doug McRae, David Bridges, Stuart Williams and Heather Stauble. Additionally, the Appellant summonsed David Kerr, an employee of the City of Kawartha Lakes (the "City"), to testify.

[8] Also in support of the appeal, the Tribunal heard evidence from Ron Taylor of the participant City, and Cindy Sutch on behalf of the participant Save the Oak Ridges Moraine Coalition ("STORM") and from the two presenters, Jane Zednik and Monica McCarthy.

[9] On behalf of the Director, the Tribunal heard evidence from Shawn Kinney and Mahdi Zangeneh.

[10] On behalf of the Approval Holder, the Tribunal heard evidence from David Eva, Dr. Robert McCunney, Grant Whitehead, David Charlton, Dr. Paul Kerlinger and Shant Dokouzian.

[11] The Tribunal has considered all the evidence of the parties, participants and presenters, and the various submissions in detail. In these reasons, the Tribunal has only included a summary of the evidence and submissions received.

Issue No. 1: Whether engaging in the Project in accordance with the REA will cause serious harm to human health.

Evidence

a. Appellant

[12] To begin, Mr. Bridges testified on behalf of the Appellant. He testified, among other things, that as the Project is located at the highest point of the Oak Ridges Moraine ("ORM"), the Project will appear to dominate the countryside. He expressed his view that the Project will undermine and conflicts with the purpose of the *Oak Ridges Moraine Conservation Act, 2001* (the "*ORMCA*") which is to protect the ORM in perpetuity. Mr. Bridges also explained that there was an original proposal for 30 turbines that have now been split into five different projects which, in his view, was intended to reduce the setbacks necessary for turbines from 750 metres ("m") to 550 m.

[13] Ms. Stauble is the City Councillor for the area in which the Project will be located. She testified about the character of the ORM and provided an overview of her concerns relating to the Project and the process leading to its approval. In particular, she testified that the MOECC had committed to conduct a cumulative effects study to assess the impacts of the Project in conjunction with the nearby Snowy Ridge and Sumac Ridge Projects, but that such an assessment has not yet occurred. Ms. Stauble expressed the view that noise receptors located between the Project and other adjacent projects should have a specific noise assessment done based on the cumulative noise from both projects.

[14] Ms. Stauble also expressed concerns about health impacts from the Project to residents in the area, including loss of sleep and increased annoyance and stress levels that may result from the Project.

b. Presenters

[15] Ms. McCarthy testified about her concerns relating to impact to children and other vulnerable individuals, such as those using pacemakers, resulting from the Project, including from potential noise impacts.

c. Director

[16] Mr. Zangeneh was qualified by the Tribunal as a mechanical engineer with special expertise in noise and the application of the MOECC's 2008 Noise Guidelines (the "MOECC Guidelines") for wind turbines. He explained that the closest Project turbine to a non-participating receptor is 635 m and as a result, the Project meets the regulated setback of 550 m.

[17] With regards to assessing cumulative noise impacts, Mr. Zangeneh explained that under the MOECC Guidelines one must first identify a receptor within 1,500 m of a turbine, and then use all turbines within 5,000 m of that receptor to assess noise impacts. He explained that this was undertaken for the Project. He stated that all five wind turbines from the Sumac Ridge Wind project were used in the noise modeling, but that none of the turbines from the Snowy Ridge project are captured within the 5,000 m radius and were not modeled. Mr. Zangeneh also explained how the conditions in the REA are intended to monitor and verify noise levels for the Project, including noise from the turbines and the transformer substation.

[18] In cross-examination, Mr. Zangeneh acknowledged that the Snowy Ridge project is close to the 5,000 m limit stipulated for assessment under the MOECC Guidelines. However, he testified that the contribution of turbines over 5,000 m away to noise would be a fraction of a decibel ("dBA"). In other words, the contribution to noise would not be noticeable. He also testified that in preparing for the hearing that he had included the Snowy Ridge project turbines and verified that their added contribution to noise was is in the range of only 0.03 – 0.04 dBA when combined with the noise from the Project.

d. Approval Holder

[19] Dr. McCunney was qualified by the Tribunal as a medical doctor specializing in occupational and environmental medicine with particular expertise in health implications

of noise exposure. In summary, his evidence was that in his various reviews and syntheses of expert literature, he found no association between exposure to wind turbine noise and health effects, nor has any been generally recognized. More specifically, he considered the various concerns of the Appellant's witnesses in relation to susceptibility of children and shadow flicker allegedly causing epilepsy, among other health issues, and opined no such causation has been shown. It was his opinion that the Project will not pose a serious risk to human health.

[20] In cross-examination, Dr. McCunney acknowledged that theoretically, infrasound (sound below human audibility) could have a health effect, but he testified that it has not yet been demonstrated in any of the studies he has reviewed. Dr. McCunney also defined serious harm from a medical perspective to be a situation where a person's life is impacted by the diagnosis of disease and that it interferes with their ability to work, they need to take medication, or the disease markedly impairs their ability to engage in activities of daily life.

[21] Mr. Dokouzian was qualified by the Tribunal as an engineer with expertise in wind turbine impact assessment, including noise and shadow flicker, risk and public safety assessment, and post-construction monitoring. He explained how the MOECC Guidelines apply to the Project and the steps taken to comply with the Guidelines. Mr. Dokouzian opined that the noise assessment performed for the Project was conservative and he verified that all Sumac Ridge turbines were considered in conjunction with the Project as part of a cumulative assessment conducted for noise. He also explained that the Snowy Ridge project turbines were excluded from the assessment as they were beyond 5,000 m from any turbine of the Project.

[22] Mr. Dokouzian also opined that the turbines to be used for the Project are modern top-tier models with a very low risk of fire. Additionally, as the Approval Holder is adding a fire suppression system, he opined that the risk of fire was further reduced.

[23] In relation to shadow flicker, Mr. Dokouzian explained that modeling undertaken for the Project considered worst case scenarios and the highest amount of shadow flicker possible for any observer yearly is a total of 14 hours, 59 minutes. It was his opinion that this is a low total annual amount, and that it is likely that reality will result in much less flicker being experienced by anyone.

Submissions

[24] The Appellant submits that the Project will cause serious harm to human health through noise and infrasound impacts and visual impacts if the construction and operation of the Project as approved is permitted to proceed.

[25] The Appellant submits that the Project, being located in the middle of a heavily populated rural area, will expose thousands of residents to noise and infrasound that will have a serious adverse impact on a non-trivial percentage of them. The Appellant requests that the appeal be allowed and the REA revoked.

[26] The Director submits that the evidence adduced by the Appellant fails to meet the Health Test. The Director submits that the Appellant did not call any medical experts to support its allegation of harm to human health and relied solely on the testimony of one lay witnesses and a presenter. At its highest, it is argued, this evidence establishes that individuals have concerns about the Project and it does not establish that the Project will cause harm to human health. In opposition, the Director submits, the respondents called the superior evidence of two noise engineers and a medical doctor whose evidence addressed the concerns raised by these two witnesses.

[27] The Director requests that the Tribunal dismiss the appeal and confirm the decision of the Director to approve the REA.

[28] The Approval Holder also submits that the Appellant has failed to meet its onus under the Health Test. The Approval Holder submits that similar to previous appeals based on similar evidentiary foundations, the Appellant has failed to meet their evidentiary onus. More specifically, the Approval Holder submits that the relevant scientific studies do not support a finding that wind turbines generally cause serious harm to human health. The Approval Holder further submits that the expressions of concern from pre-turbine witnesses, (i.e., those who have not yet experienced living near operating turbines), as to the potential impact of wind turbines on their health are speculative and fall far short of the level of proof required to demonstrate that the operation of the Project in accordance with its REA will cause serious harm to human health.

[29] Overall, the Approval Holder requests that the appeal be dismissed.

Discussion, Analysis and Findings on Issue No. 1

[30] Pursuant to s. 145.2.1(2)(a) of the *EPA*, the test that the Tribunal must apply is limited to considering whether engaging in the Project in accordance with the REA will cause serious harm to human health.

[31] In order to meet the Health Test, the Appellant must prove on a balance of probabilities that harm will occur, rather than that it may occur. While the Appellant need not establish the precise mechanism whereby harm is caused, the Appellant must prove that the alleged harm is caused by the Project operating in accordance with the REA. Evidence that only raises the potential for harm does not meet the onus of proof.

[32] In considering the totality of the evidence in relation to health impacts of the Project, the Tribunal finds that the Appellant has not established, on a balance of probabilities, that the Project, operating in accordance with the REA, will cause serious harm to human health.

[33] The evidence tendered by the Appellant, participants and presenters only raised concerns about the potential for harm to human health. For example, Ms. Stauble's evidence relating to annoyance, loss of sleep and stress did not rise to the level of showing that harm to human health will result from the Project and certainly did not show that such harm will be serious in nature.

[34] The Tribunal accepts the uncontradicted expert evidence of Dr. McCunney that research to date has not established that wind turbines cause specific health effects at the distances and sound levels involved in this Project.

[35] The Appellant asserts that proof of annoyance should be sufficient to meet the Health Test. That cannot be the case. Annoyance due to noise or other aspects of the Project, without additional evidence of the scope, character and seriousness of health impacts resulting from such annoyance, does not answer the question of whether the Project will cause serious harm to human health.

[36] Additionally, on balance, the Tribunal finds that the evidence relating to risk from fires, shadow flicker and noise does not rise to the level of serious harm. To the contrary, Mr. Eva's evidence explaining the safety features of the Project turbines and Mr. Dokouzian's evidence has satisfied the Tribunal that the risk of fire from the Project is very low. Additionally, Mr. Dokouzian's evidence has satisfied the Tribunal that potential shadow flicker impacts will be low.

Issue No. 2: Whether engaging in the Project in accordance with the REA will cause serious harm to human health, or serious and irreversible harm to the natural environment, through hydrological or hydrogeological impacts.

Evidence

a. Appellant

[37] Ms. Stauble provided testimony expressing her concerns about the potential for impact to the ORM from the Project. In particular, she expressed concerns relating to impacts to groundwater flows and water quality due to spills, and impacts to agricultural lands and woodlands. She stressed that the Project is proposed in a vulnerable aquifer area of the ORM and any spills resulting from the Project will result in potential contamination to groundwater. Furthermore, Ms. Stauble testified that the Project and other adjacent projects are located in the most heavily forested areas of the ORM. She testified that the ORM received legislative protection in order to protect the area from incremental and cumulative development across the moraine. It was her view that the scientific reasons for the protection of the ORM must prevail.

[38] Mr. Kerr, currently the manager of environmental services for the City and appearing under summons, was qualified by the Tribunal as a professional geoscientist with expertise in hydrogeology. Mr. Kerr's testimony focused on the risk of spills and contamination of ORM groundwater. He testified that the ORM is highly susceptible to contamination because sediments in the ground are very permeable. He also explained that contamination is very difficult to detect and remediate as groundwater flows in the ORM are very complex.

[39] Mr. Kerr explained that there are a number of private wells in the Project area and the water table is very high in many areas. Mr. Kerr was of the view that the Approval Holder's consultants had failed to evaluate the water table during seasonally high water flow and he had communicated with the Approval Holder to explain what details the City wanted to see as part of a fulsome groundwater analysis.

[40] On cross-examination, Mr. Kerr was taken through the witness statement of Mr. Whitehead. Upon review of that witness statement and the updated report appended to it, entitled Settlers Landing Wind Park Hydrogeological Assessment, dated September 2, 2015, Mr. Kerr acknowledged that the updated report had addressed the concerns he had raised previously. However, he testified that he remained unsatisfied that the highest water table had been considered and that he remained concerned that groundwater contamination would result from a spill.

b. Participants

[41] Mr. Taylor, Chief Administrative Officer with the City, testified that the ORMCP is reflected in the City's Official Plan and that wind turbines are not a permitted use in either document. He acknowledged, however, that many of the City's concerns with the Project have been addressed and that the only remaining items relate to sedimentation and erosion control which have not been addressed by the conditions of the REA.

[42] Ms. Sutch, on behalf of STORM, testified that her organization's major concern is cumulative impacts of various developments on the ORM. It was her view that the ORM is an environmentally significant landscape and simply cannot accommodate industrial-scale development. She testified that the *ORMCA* and its associated plan have improved the hydrological and ecological conditions on the ORM. She provided testimony relating to the importance and vulnerability of the aquifers of the ORM, including the supply of drinking water to a multitude of communities. It was Ms. Sutch's view that cumulative impacts on the ORM should be fully considered before any further industrial wind projects are permitted on the moraine.

c. Director

[43] Mr. Kinney was qualified as a professional geoscientist with experience in hydrogeology. Mr. Kinney explained that the electrical insulating oil and the lubricants

to be used in the turbines and transformer are not the type of hydrocarbons that can contaminate ground water. He explained that these substances are hydrophobic meaning that they do not enter groundwater, but rather will be absorbed by soils which can then be readily cleaned up and backfilled with clean soil. He explained that, as a result of the characteristics of these hydrocarbons, Ontario does not even have Drinking Water Standards for them.

d. Approval Holder

[44] Mr. Eva is the Vice-President at Capstone Power Development for Settlers Landing Nominee Ltd., the Approval Holder. He explained that the Project consists of five turbines with a hub-height of 100 m. He explained the safety features of the turbines, including the fire resistant materials used and fire suppression features. He explained that the turbines contain lubricants but that the turbines are designed not to leak in the first place, and to contain lubricants inside the structure in the unlikely event that a leak should occur. He explained that the REA contains terms intended to address any spills from the turbines or the transformer substation. It was his evidence that redundancies exist in the Project to reduce the likelihood of spills.

[45] Mr. Whitehead was qualified as a professional geoscientist with expertise in hydrogeology. He is a senior hydrogeologist with Stantec. Mr. Whitehead testified that two hydrogeological studies were conducted for this Project; the first was a desk-top evaluation dated July 11, 2014, and the second was a field-based study dated September 2, 2015. The latter study was not submitted as part of the REA application, but was conducted to respond to concerns raised by Mr. Kerr and the City of Kawartha Lakes.

[46] Mr. Whitehead reviewed the conclusions of the field study, and testified that he is confident this Project will not detrimentally impact the form or function of the ORM. For example, he explained he was very confident that there is no high water table (water

close to the surface) where Project components will be placed (at geographical high points). With respect to the Appellant's concern that the field study was not conducted during the spring freshet, Mr. Whitehead testified that water levels are typically highest during the spring freshet but since April and May were untypically dry in 2015, followed by a very wet June, the highest water table was experienced in June of 2015. He testified that this peak high water level was considered when determining whether high water tables existed near the Project.

Submissions

[47] The Appellant submits that the Project will cause serious harm to human health through groundwater contamination and that impacts to the ORM groundwater from the Project will result in serious and irreversible harm to the natural environment.

[48] The Appellant submits that the ORM is one of the most significant and sensitive natural formations in south-central Ontario, and one of only four areas in Ontario protected by a Provincial Plan. The portion of the moraine affected is an area of high aquifer vulnerability where contamination is more likely to occur as a result of surface contamination caused by accidental spills. The Appellant also submits that the Project is located near sensitive watersheds and water features including a spring and a water table almost at surface level.

[49] The Appellant also submits that Project infrastructure will negatively affect water infiltration and flow. The Appellant submits that the permeability of the largely sandy Moraine soils makes the ORM highly vulnerable to erosion. The Appellant relies on Mr. Kerr's description of the ORMCP area:

> Water falling on most areas of the Moraine is absorbed rapidly into the sandy soils. The water filters through silt, sand and gravel until it reaches a less permeable layer. It eventually travels out of the moraine, forming headwaters, seeps, and springs. The outflows are often under pressure, as shown by shallow artesian wells and springs in the Project area. Moraine water in the area flows into creeks and rivers. The internal

> pathways and connections between surface and ground waters within this part of the Moraine are unknown.

[50] The Appellant stresses that the flow patterns and links between water entering the Moraine and water emerging from it, or the permeable pathways within it, are not fully known or understood.

[51] The Appellant relies on Mr. Kerr's testimony, that in his experience equipment leakage is a common source of spills, and that the "risk of spills also exists during refueling, mechanical breakdowns, storage, transfer or accidents such as fires." Mr. Kerr stated that "it is not a question of if it will happen but rather when it will happen."

[52] The Appellant submits that the Approval Holder did not do sufficient hydrogeological studies to understand the impact of a spill on this area of high aquifer vulnerability, and that the test wells drilled after the REA was issued did not capture the annual high water condition. The Appellant submits that the hydrogeological assessment for the Project's REA application is not reliable because it was a desktop study, which relied upon a previous geotechnical report by the Approval Holder's consultant LVM (the "LVM Report"). The Appellant submits that the LVM Report is unreliable due to its failure to identify the Pontypool municipal well as the closest well to the Project, and its failure to mention the fact that the Project is within the ORMCP area and in a high aquifer vulnerability zone. The Appellant maintains that only the borehole records may be relied upon, and asserts that these records show wet conditions at all the turbine sites that were accessible for study; i.e., Turbines 1, 2, 4 and 5.

[53] The Appellant submits that the turbines in the Project will require regular maintenance, presenting a risk of spill since maintenance includes regular exchange of hundreds of litres of oils and other hazardous materials stored within the nacelle of the turbines. The Appellant also relies on the evidence of the Director's witness Mr. Kinney who testified that any spill will be rapidly absorbed into soil, such that response time will not be fast enough to prevent harm.

[54] The Appellant submits that Mr. Whitehead, the expert called by the Approval Holder, could not speak to the local water or hydrogeology situation with any authority and was not aware of local shallow wells relied on by numerous residents for their water supply, or the spring in the Project area.

[55] The City submits that policy 1.6.6.7(c) of the 2014 Provincial Policy Statement (the "PPS") requires the City to conduct a review of any proposal in the City to ensure there is no increase in risk to health. Here the City reviewed the REA and submits that it is unable to determine if sedimentation and erosion issues have been properly addressed to the extent that it can carry out its responsibilities under the PPS. The City argues that there was not sufficient documentation filed in support of the REA to indicate that there will not be an increase in harm to human health and that as a result, the appeal should be allowed and conditions included in the REA requiring that a development agreement be concluded with the City to address outstanding sedimentation and erosion issues.

[56] The Director submits that the witnesses called by the Appellant, the participants and the presenters expressed concerns and opinions about potential harm to the ORM, development and visual pollution on the moraine and potential impacts to groundwater are speculative and not supported by the evidence. To the contrary, the Director argues, the evidence of the respondents establishes that the Project, operating in accordance with the REA, will not cause harm.

[57] Regarding groundwater contamination, the Director submits that the Appellant has failed to establish that the Project infrastructure will contain any groundwater contaminants, that a spill at the Project site is likely, or that if a spill did occur, it will cause serious and irreversible harm to groundwater or the aquifer.

[58] The Director also submits that the Appellant has failed to lead any evidence that construction and excavation activities would result in any serious or irreversible harm to groundwater.

[59] The Director submits that there is very low risk of any contaminant being spilled from the Project. In this regard the Director points to REA conditions: requiring that the transformer substation be designed with an approved oil spill containment facility; prohibiting the proponent from refueling vehicles or storing or using bulk chemicals on Project lands; requiring regular inspection and maintenance; and monitoring the Project components on a continuous basis. The REA provides that no hazardous waste or liquid industrial waste may be generated or stored on the ORM.

[60] The Director submits that the Tribunal should afford Mr. Kerr's assertion that the question is not "if" there will be a spill, but "when", no weight. In this regard, the Director refers to the Divisional Court decision in *Ostrander Point GP and another v. Prince Edward County Field Naturalists and another*, [2014] O.N.S.C. No. 974 ("*Ostrander*"), para. 127, where the Court reiterated that it is up to the Tribunal to determine what weight to give to expert evidence and "an expert's conclusion which is not appropriately explained and supported may properly be given no weight at all". The Director submits that the test pit data demonstrate that the geology of the Project site is not variable or complex.

[61] The Director submits that if there is a spill, it will not cause serious or irreversible harm to the groundwater or aquifers. In this regard, the Director relies on Mr. Kinney's evidence that transformer oil and other material contained in the turbines are not groundwater contaminants. Rather, the Director submits that these types of hydrocarbons have extremely low solubility in water and are inherently biodegradable.

[62] The Director notes that the MOECC requires hydrogeological studies for proposed activities which can be expected to either remove significant amounts of

groundwater from or emit potential contaminants to an aquifer. The Director argues that such studies are not required in this case, because the Project is not designed to take significant amounts of groundwater from an aquifer, nor release any substances to an aquifer which might contaminate groundwater. Nonetheless, the MOECC had a subject matter expert review the application prior to the issuance of the REA and provide an opinion as to potential impacts of the Project on groundwater quantity and/or quality. The Director submits that this expert concluded that the Project did not constitute a potentially contaminating activity in respect of groundwater, that potential groundwater impacts were negligible, and that further hydrogeological study of the site was not warranted. Mr. Kinney concurred with this assessment.

[63] With respect to the Appellant's request that a complete hydrogeological study be undertaken, the Director submits that it is unproductive and an inefficient use of resources to require in-depth studies where study is not justified on the basis of scientific necessity and not commensurate with the potential groundwater risk. The Director observes that, nonetheless, the Approval Holder had its consultant prepare a study consistent with the parameters stipulated by Mr. Kerr in preparation for the hearing.

[64] The Approval Holder submits that despite the Appellant's assertion that the legislature never intended the ORM for the kind of development that is at issue in this proceeding, it is clear the legislature specifically considered the matter and concluded that wind development is compatible with the ORM. That is why, it is submitted, s. 62.0.2 of the *Planning Act* exempts wind projects from the ORMCP.

[65] The Approval Holder submits that the evidence establishes that the Project will not have a serious impact on the hydrogeological form and function of the ORM, that a spill of hazardous material at the Project is unlikely, and that even if a spill occurred, the small volume and the nature of the material would be such that it would be very unlikely to cause serious harm, let-alone serious and irreversible harm.

[66] The Approval Holder agrees with the Director, that the expert opinion evidence from both Mr. Whitehead and Mr. Kinney is that the likelihood of a spill is small, and even in the very unlikely event that a spill occurred, it would be unlikely to pose a contaminant threat to the groundwater in the Project Area or the Oak Ridges Moraine.

[67] Furthermore, the Approval Holder submits that Stantec, on behalf of the Approval Holder, carried out a comprehensive field-based hydrogeological assessment of the Project Area in 2015 (the "2015 Hydrogeological Report"), and that Mr. Kerr acknowledged on cross-examination that this was the field-based assessment he had requested be conducted.

[68] The evidence that a spill is unlikely includes Mr. Whitehead's testimony that the enclosed turbine gearbox is located in the enclosed turbine nacelle, and only uses a small volume of oil. The Approval Holder submits that, even in the event of a spill first from the gearbox and then from the nacelle, it is unlikely that a significant quantity of oil would reach the ground 100 m below, before being identified and addressed. Mr. Eva described the safety features of the MM92 turbines that are designed to prevent and contain spills, such as the leak-proof design of components, and that any leaks would be enclosed within the turbine structure itself.

[69] As for the transformer substation, the Approval Holder points out that Condition K1 of the REA provides that the transformer substation must be equipped with an "integrated spill containment structure" approved by a professional engineer, capable of containing the volume of transformer oil and lubricants used at the substation. Mr. Whitehead explained the leak-proof design of the transformer substation that is designed to prevent any leaked material from reaching groundwater.

[70] The Approval Holder also notes that the Design and Operations Report submitted as part of the application for the REA and which now forms part of the REA

requirements, includes a requirement that no refueling of vehicles take place and no storage or use of bulk chemical or fuels occur on the Project site. The Approval Holder emphasizes that Mr. Taylor, the Chief Administrative Officer of the City, testified that the City has reviewed the REA and related documents, and is satisfied with respect to the provisions relating to hazardous materials.

[71] The Approval Holder submits that the likelihood of a spill will also be reduced through regular inspection and maintenance, and monitoring of oil levels in each turbine and in the substation "24/7" using a "supervisory control and data acquisition" ("SCADA") system, which notifies Project personnel in the event of a fire or if fluid levels have dropped to a point suggestive of a leak.

[72] The Approval Holder also submits that, contrary to Mr. Kerr's assertion, the hydrogeology of the Project site is well understood. Two assessments have taken place: the 2014 desktop-level hydrogeological impact assessment which was submitted with the REA application, and Stantec's 2015 Hydrogeological Report, based on field-based hydrogeological work. The scope of the requested work for the 2015 Report was set out in an email from Mr. Kerr to Mr. Whitehead dated May 6, 2015.

[73] The Approval Holder submits that the 2015 Hydrogeological Report is also consistent with the Tribunal's recommendation in the *Cham Shan Temple v. Ontario (Ministry of Environment)* (2015), 94 C.E.L.R (3d) 175 at para. 363, as follows:

> A hydrogeological report should be prepared which investigates the interactions of surface water and groundwater, where any REA project is proposed on high vulnerability aquifer locations.

[74] The Approval Holder also submits that in the unlikely event that a spill occurs, it is unlikely to pose a threat to the groundwater in the area. First, Mr. Whitehead described the emergency spill response procedures set out in Appendix H of the 2015 Hydrogeological Report, that would mitigate a spill before infiltrating to the regional aquifer system. Second, the oil used at the Project has "extremely low water solubility"

and, if spilled, would be absorbed by shallow soil and immobilized in the immediate vicinity of the spill. The Approval Holder submits that any such spill therefore poses a low environmental risk and would be easy to excavate for disposal. Third, the site-specific tests show it would take days for a spill of oil to reach the shallow groundwater system due to the very slow infiltration rate in the Project area.

[75] With respect to impacts to the groundwater recharge functions of the ORM, the Approval Holder points to Mr. Whitehead's testimony that the Project will create an approximately 0.013% increase in imperviousness on the section of the ORM that is located within the Kawartha-Haliburton Source Protection Area, which it submits is a very minor increase. The Approval Holder submits that, in addition, the precipitation which will occur post-construction will flow around the turbine foundations and into native soil and continue to recharge the underlying aquifer systems.

[76] The Approval Holder submits that the Project is not expected to cause any impacts to private well water supplies because the groundwater table in the Project Area is deeper than the depth of the turbine foundations and other underground infrastructure, as confirmed by Mr. Whitehead. Further, contrary to the concerns expressed by Mr. Kerr, the Approval Holder submits that the evidence establishes that Stantec's on-site monitoring program captured spring freshet conditions.

Discussion, Analysis and Findings on Issue No. 2

[77] The Tribunal finds that the Appellant has not established that the Project will cause serious harm to human health or serious and irreversible harm to the natural environment through hydrological or hydrogeological impacts, for the following reasons.

[78] Mr. Kerr's concerns relating to contamination of the aquifer and negative impacts to infiltration were not substantiated through evidence. To the contrary, the evidence of Mr. Eva and Mr. Kinney satisfied the Tribunal that: (1) there is little risk of a spill, and (2)

if a spill occurs there is little risk of groundwater contamination due to the spill-proof design of the infrastructure, which is mandated partly by conditions in the REA, and to the characteristics of the lubricants and oils involved, which are unlikely to enter groundwater.

[79] The Tribunal acknowledges the effort made by the Approval Holder to respond to water-related concerns of the City through conducting field-based research and producing the 2015 Hydrogeological Report. Specifically, Mr. Kerr on behalf of the City of Kawartha Lakes asked the Approval Holder to undertake the following work in correspondence with the Approval Holder:

> a. install multi-level wells to assess shallow groundwater conditions and potential surface water-groundwater interactions at each proposed turbine location and at the proposed substation location;
>
> b. install shallow well points (*i.e.*, drive-point piezometers) immediately adjacent to identified surface water features located in the vicinity of the Project to assess shallow groundwater conditions;
>
> c. evaluate vertical hydraulic gradients established over the course of seasonal fluctuations in the groundwater table (spring-summer);
>
> d. prepare cross-sections showing the location of proposed construction features in relation to the shallow groundwater table; and
>
> e. provide conclusions regarding the potential impacts of proposed construction activities on groundwater/surface water flow regime and outline mitigation measures to be employed to reduce any such potential impacts.

[80] Mr. Kerr agreed in cross-examination that the 2015 Hydrogeological Report appeared to meet those requirements. The Report concludes at pages 6.1 and 6.2 that:

> a. a shallow groundwater flow system is not present beneath the Project lands and that any infiltration occurring across these lands likely recharges a deeper aquifer system;
>
> b. the construction of Project components are expected to create 1.3 ha of impervious surfaces, however the residual effect to the infiltration function of the ORM is expected to be negligible;

c. the installation of this infrastructure will occur above the groundwater table and construction dewatering will not be required, such that construction of the Project components is not expected to cause a negative effect on existing groundwater flow regimes and,

d. subsequently, to yields of nearby private wells; and

e. the permeability of the soils and solubility of the oils used is such that it would take days for an accidental spill to reach the groundwater system.

[81] Both Mr. Whitehead and Mr. Kinney agree with those conclusions. The Tribunal heard no evidence to contradict those opinions.

[82] The Tribunal further acknowledges that the recommendation made in *Cham Shan*, cited above, relating to understanding the hydrogeological characteristics of the area where a project is proposed in the ORM, have been met in this case.

[83] Turning to the Appellant's concern regarding increased impermeable surfaces, the Tribunal finds that the evidence does not establish that the turbine bases and Project infrastructure will have any impact on infiltration rates in any measurable way. Mr. Kerr's concerns in this regard were not supported with evidence. On the other hand, Mr. Whitehead provided opinion evidence that water will simply flow over or around the turbine bases and infiltrate into adjacent land into groundwater. The Tribunal accepts Mr. Whitehead's evidence on this issue.

[84] With respect to the potential issue of erosion and sedimentation raised by the City, the Tribunal finds this amounted to a statement of the City's concern based on the City's view that the information provided by the Approval Holder is insufficient. However, no direct evidence of an anticipated increase in sedimentation or erosion and resultant health impacts was adduced to support this view.

[85] In conclusion, the Tribunal finds that the Appellant has not established that engaging in the Project in accordance with the REA will cause serious harm to human

health, or serious and irreversible harm to the natural environment, through hydrological or hydrogeological impacts.

Issue No. 3: Whether engaging in the Project in accordance with the REA will cause serious and irreversible harm to plant life, animal life or the natural environment, specifically through impacts to grassland bird habitat and to woodlands/woodland habitat.

[86] The Project involves five turbines. Turbines 1, 2 and 4 are located in agricultural fields. Turbines 3 and 5, and access roads for turbines 2, 3 and 5, are located within a significant woodland identified as woodland number 11 ("SW-11"), and require vegetation clearing, including removal of portions grassland areas and the forested portions of SW-11.

Evidence

a. Appellant

[87] Mr. Williams testified describing the type of vegetation and bird species found in the Project area. Although Mr. Williams readily admitted he is not trained as a professional ornithologist, he has studied birds and bird habitat for 57 years as a field ornithologist and has focused on the ORM since 1981. Mr. Williams has contributed to the 5 year bird census of 2001 to 2005 for the Ontario Breeding Bird Atlas. Mr. Williams has also lived in the Project area for over 18 years and stated that during that time, he has monitored birds inhabiting the woodlands and grassland areas of the Project site.

[88] Mr. Williams explained that the Project site provides a variety of habitat for breeding birds including grassland, mature deciduous forest, mixed coniferous/ deciduous forest, young re-growth where selective logging has taken place, and

bramble and thicket in logged openings. He explained that all of the woodlands on the site are classified by the province as “significant woodlands” as part of the ORM.

[89] Mr. Williams provided a photographic tour of the Project area showing the woodlands, grasslands, other areas and the relative locations of proposed turbines and other Project infrastructure. He testified that 134 species of birds have been identified near the Project site, with 104 species identified during breeding season, of which 48 are confirmed breeders.

[90] He explained that the grassland habitat is utilized by Bobolink, Eastern Meadowlark and Grasshopper Sparrow among other bird species. He testified that it is known that there are 2-3 breeding pairs of Bobolink nesting in the Project area.

[91] Mr. Williams testified that there have been Eastern Wood-Pewee (currently listed as special concern under the *Endangered Species Act, 2007* (“*ESA*”)) identified yearly in the woodlands in the Project area, including in SW-11. Mr. Williams testified that numerous other species of birds use SW-11, the grasslands, and especially the woodland edges as habitat.

[92] Mr. Williams also explained that the woodland area SW-11 is not a fragmented minimal value woodland predominated by Scots pine plantation, as depicted by the Approval Holder. Rather, Mr. Williams testified that the Scots pine plantation located in a portion of SW-11 was planted decades ago, the Scots pine are dying off as they have reached the end of their lifecycle, and they are being replaced by native hardwood species. He testified that it will take a lifetime for any compensation habitat to replace the woodlands to be removed for the Project.

[93] Mr. McRae was qualified by the Tribunal to provide expert evidence as a field naturalist with expertise in birds and their habitat. He has 45 years of experience studying birds and their habitat. On June 12 and 13, 2015, Mr. McRae conducted a

two-day daytime field survey with Mr. Williams of the Project area and identified over 50 species of birds in the immediate vicinity of the Project that were considered breeding or probable breeders. His opinion was that finding 50 species of breeding birds in just two overcast days indicates the Project area is a very diverse site. He testified that with more time, and with the inclusion of nighttime surveys, many more species would be identified in the Project area. Mr. McRae explained that when bird surveys focus solely on the interior of woodlands, species are often missed as birds often rely upon edge habitats – the transition between woodland and grassland in this instance for example. He also testified that many of the species present in the edge habitat areas are either scarce or in decline.

[94] Mr. McRae acknowledged that turbines are not killing many birds in most cases but that it is more of a concern here that access roads and turbines will remove 18% of SW-11 (as set out in the Approval Holder's application for the REA) and Project-related activities will disturb bird species. He explained that some species of bird are tolerant of disturbance but many are not. He expressed his opinion that SW-11 is high value habitat for birds. He stated that this habitat is not fragmented, explaining that this is indicated by the presence of birds that do not breed in fragmented woodlands, including Black-throated Blue Warbler which he identified as probably breeding due to displayed behaviour. He also explained that SW-11 appears to function as a distinct woodland block as birds are not flying between woodland blocks in the Project area.

[95] Mr. McRae also explained that the Project area, and especially SW-11, is functioning as a mosaic of habitats. With respect to its quality as habitat, he stated:

> Most of the existing forest blocks are comprised of native trees of many species and with different age structure – the preferred elements to promote and sustain a high level of biodiversity. While it is true some of the forest is comprised of Red and Scots Pine plantations, the understory will regenerate with primarily native species, and the plantations still serve an important function for connectivity. If left standing, these forests will only become more significant to wildlife and birds as they mature and will help increase block size and the forest interior value.

[96] Mr. McRae testified that the Scots pine in SW-11 are approximately 50 years old and it will only be another 15-20 years before they are completely replaced by the growth of native trees. Mr. McRae acknowledged that some forest compensation can be beneficial to species but that it was the size and quality of compensation that matters. It was his view that habitat has to be of similar quality and of a comparable size to be adequately compensatory.

[97] In response to Dr. Kerlinger's approach of analyzing serious and irreversible harm based on species-specific status across a species' entire range, Mr. McRae testified that there are only a few bird species in Ontario that are listed under the *ESA* where losing individuals will result in serious and irreversible harm to the species. His view was that, at the point where loss of individual birds of a species matters statistically, it is usually too late for the species to survive. He opined that collective impacts are what matter. It was his view that the focus here should be on the local impacts from the Project.

[98] On cross-examination, Mr. McRae acknowledged that the main contributor to loss of Bobolink is the early harvesting of hay fields which destroys nests and the young they contain before the birds are able to fledge.

b. Presenters

[99] Ms. Zednik stressed that the *ORMCA* is intended to prevent the removal of woodlands, with narrow exceptions and even then, only where there are no reasonable alternatives. It was her view that the Project will result in damage to SW-11 that will be permanent through woodland removal, fragmentation and degradation. She testified that "multiple varied ecosystems will be eliminated when the interior core" of SW-11 is removed. She observed that the Approval Holder has not provided information on the number or age of trees to be removed, and cited statistics from the Ontario Woodlot Association that the average number of mature trees found per hectare ("ha") in a

woodland ranges between 600 and 1000. She explained that although compensation habitat is intended to be provided for lost woodland and grassland, no permanent protection is afforded to these new areas in the REA. She also testified that compensation woodland will take over 30 years to grow to the same extent as the existing woodland areas to be removed, and that there is no plan to compensate for lost ground plants in the cleared woodland areas which form part of the functioning woodland ecosystem. She also testified that, if the area to be turned into woodland habitat as compensation is already habitat for other species, it will involve losing current habitat to create the replacement habitat resulting, on balance, in a loss of habitat to accommodate the Project. Overall, it was Ms. Zednik's view that SW-11 will be divided in half by the Project's access roads, and that no compensation can fully account for this.

c. Approval Holder

[100] Mr. Eva explained that the natural heritage assessment/environmental impact assessment ("NHA/EIS") prepared for the Project was approved by the Ministry of Natural Resources and Forestry ("MNRF") as part of the REA approval process. He also explained that Condition I1 of the REA captures the requirement for the Woodland Rehabilitation Protocol, and that Condition J recognizes the requirement to comply with the *ESA*, which in turn requires that grassland bird habitat compensation be provided.

[101] On cross-examination, Mr. Eva acknowledged that it is not yet known what will happen with habitat compensation areas upon Project decommissioning.

[102] Mr. Charlton was qualified by the Tribunal as an ecologist with expertise in the assessment and mitigation of environmental impacts including at wind farms with regards to vegetation and animals, including birds. Mr. Charlton, an employee of Stantec, provided an overview of the NHA/EIS, which was prepared by the consulting

company M. K. Ince. He testified that, having reviewed the report, he agrees that there will be no significant environmental impact from the Project as approved by the REA.

[103] Mr. Charlton considers SW-11 to be a significant woodland, having been so deemed under MNRF Guidelines, and stated his witness statement is not intended to imply otherwise. He testified, however, that the question for him is the sensitivity of the woodland to additional disturbance.

[104] Mr. Charlton visited SW-11 on two occasions, and described it as a doughnut shape with an agricultural clearing in the middle, half of which was planted in soybean crops and the other half being old pasture. He confirmed that much of the 44 ha woodland is made up of plantations that are 40-50 years old. He testified that the Scots pine plantation in SW-11 has started to naturalize, now including maple, cherry, and oak, and that Scots pine is no longer utilized as a solution to replace removed forests and to stabilize soils. He testified SW-11 has lots of diversity, but there is "no significant interior habitat to speak of", and that "there is lots of this type of woodland on the moraine."

[105] Mr. Charlton testified that Stantec calculated that 2.5 ha of the 44 ha of SW-11 would be removed, which is higher than the M.K. Ince calculation of 1.8 ha. However, his team also calculated that this represents 6% of the woodland being removed, rather than 18% as calculated by M.K. Ince in the NHA/EIS, which he testified was an error. It was Mr. Charlton's view that this removal will not significantly add to the existing fragmentation of SW-11.

[106] With respect to the 10-year monitoring period required as part of the woodland restoration plan, Mr. Charlton testified that a functioning woodland cannot be created in 10 years, but that it is good to monitor over that period of time, to get the woodland "off to a better start". While Mr. Charlton acknowledged there would be changes to bird

habitat caused by removal of the woodland, he opined it would not be significant enough to be considered serious harm.

[107] Mr. Charlton acknowledged that construction of turbine 5 will require the removal of native species and "higher quality trees" but testified that, in his opinion, it is a "reasonable tradeoff" due to the benefit of clean energy sources.

[108] In cross-examination, Mr. Charlton acknowledged that it will take at least 30-40 years before the "whips" (3 m tall saplings) to be planted as compensation will mature to a similar size as mature native hardwoods that have already grown and partially replaced Scots pine. He also acknowledged that SW-11 is "relatively intact", as opposed to "fragmented". He testified that an opening of 20 m or less is not considered a "break" in the forest according to NHA/EIS guidance unless such breaks are maintained as public roads.

[109] Mr. Charlton acknowledged that 7 to 8 of the birds sighted by Mr. McRae in the Project site could be viewed as interior woodland species: the Red-bellied Woodpecker, Eastern Wood-Pewee, Red-eyed Vireo, Ovenbird, Brewster's Warbler, American Redstart, Black-throated Blue Warbler, and perhaps the Indigo Bunting. However, he noted that some that were observed may have been migrating when observed in June by Mr. McRae.

[110] With respect to grassland bird habitat, Mr. Charlton testified that Stantec undertook an independent analysis and concluded that the Project would impact 2.9 ha of Bobolink and Eastern Meadowlark habitat. He explained that Ontario Regulation ("O. Reg.") 242/08 of the *ESA* provides, among other things, that an equal or greater amount of habitat must be replaced. He testified that the key protective measure for grassland bird species is ensuring there will be no mowing of fields during the period before birds fledge.

[111] Dr. Kerlinger was qualified by the Tribunal as an expert on birds and the impacts of wind energy projects on birds. He testified that a "biologist's definition" of "serious harm" would be a significant impact resulting in a material decline in a population, or acceleration of a decline in a population. Similarly he testified that a "biologist's definition" of "irreversible harm" would be a decline that cannot be reversed and would lead to the extinction of a species. Prior to preparing his witness statement Dr. Kerlinger reviewed the Approval Holder's reports regarding this Project, and concluded that this Project will not cause that type of harm. He stated that he visited the Site shortly before his appearance at the hearing of this appeal.

[112] Dr. Kerlinger testified that SW-11 is not an "ideal shape" for interior bird habitat given that it has irregular edges, nor does it contain high quality interior bird habitat as it is "highly fragmented". Dr. Kerlinger acknowledged that there are several locations where interior habitat (i.e., at least 100 m from an edge) is present in SW-11; however, he testified there is little of it. Dr. Kerlinger testified that once turbines 3 and 5 are constructed there will no longer be any interior habitat. While he did not dispute Mr. McRae's observation of interior obligate bird species on the Project site such as Eastern Wood-Pewee, Black-throated Blue Warbler, American Redstart, Ovenbird and Wood Thrush, his view was nonetheless that SW-11 does not currently contain "suitable" habitat for those species because they prefer large forests, and he questioned whether interior species were successfully nesting in SW-11.

[113] Dr. Kerlinger testified that wind turbines have a small displacement effect on grassland species, and that grassland compensation habitat is effective simply as a result of the prevention of mowing during the breeding season. In his opinion, 4.4 ha of grassland compensation habitat is sufficient to offset the Project impacts on grassland habitat.

[114] In cross-examination, Dr. Kerlinger stated that he was not aware of the time period required for woodland compensation habitat to grow. His view was that 10 years

of monitoring is sufficient for grassland habitat compensation, however. With respect to bird collision mortality, Dr. Kerlinger testified that carcass searches are more difficult in forests because searcher efficiency is poor due to scavenging. Dr. Kerlinger also acknowledged that as a biologist, he has only been called upon to interpret "serious harm" or "irreversible harm" in the context of REA appeals in Ontario. The terminology most often used in the United States, he testified, is "undue adverse impact".

[115] Based on the evidence and the manner in which the parties have organized their submissions, the Tribunal has organized its consideration of birds and animal habitat into two broad categories: grassland bird habitat and woodlands/woodland habitat. The Tribunal also heard evidence that some bird species prefer edge habitat; i.e., the transition areas between woodland and grassland areas. However, it was not alleged that bird species which prefer edge habitat would be uniquely impacted by the Project.

i. Grassland Bird Habitat

Submissions on Bird Habitat Generally and Grassland Bird Habitat Specifically

[116] Broadly, the Appellant submits that the Project will cause serious and irreversible harm to birds and bird habitat and reduce the number and variety of birds present and breeding in the Project area. The Appellant alleges this will occur due to removal and degradation of both woodland habitat and grassland habitat. The Appellant argues that the compensation properties are not sufficient to prevent serious and irreversible harm to habitat or the natural environment.

[117] The Appellant relies on the opinion of Mr. McRae in submitting that the Project will harm breeding bird populations, reduce foraging sites and impact the amount of food that is available to adult birds feeding their young. The Appellant argues that removal of a significant amount of habitat available for nine species at risk bird species will also cause serious and irreversible harm to animal life and the environment.

[118] The Appellant submits that of the two bird experts, Mr. McRae's evidence should be preferred because he is familiar with local birds and works closely with the ORMCP area. Dr. Kerlinger, on the other hand, stated he was "somewhat familiar" with the area, and relied on models using a *global* scale of analysis to predict the potential impacts of wind turbines on avian populations. The Appellant argues that Dr. Kerlinger is not as familiar with the ORM; his experience is related to bird habitats in more southerly portions of North America, where habitats may differ for the same species found in the ORM area; he did not consider all the species observed in the woodlands; he did not consider cumulative impacts; and he improperly focused on a broad population analysis.

[119] The Appellant stresses that Mr. McRae documented 52 species during his June 2015 surveys, and Mr. Williams and other birders have identified 134 species over the last five years in the area, of which 81 species are confirmed or probably breeding on the site. On the other hand, Dr. Kerlinger's opinion did not acknowledge this variety of species.

[120] The Appellant notes that the Approval Holder's consultants found the following birds, designated as "threatened" under the *ESA*, on the Project site: Bobolink, Bank Swallow, Barn Swallow, Eastern Meadowlark, Common Nighthawk, Golden-winged Warbler and Eastern Whip-poor-will.

[121] The Appellant submits that the Tribunal should assess the local bird population which encompasses the ORM in determining impact on populations, as suggested by Mr. McRae, rather than relying on the presumed resiliency of a species across its global range. To do otherwise, submits the Appellant, would render any conservation moot until a species is so imperiled that there were only a few individuals remaining. In this regard the Appellant refers to the Tribunal's analysis in *Fata v. Ontario (Ministry of the Environment)* (2014), 90 C.E.L.R. (3d) 37 at para. 247-248 ("*Fata*").

[122] The Appellant argues that both forest and grassland bird habitat lost through this Project is irreparably lost.

[123] In reply submissions, the Appellant argues that, contrary to the Approval Holder's submissions, Grasshopper Sparrows have been seen recently on the Project site. The Appellant argues that Mr. Williams and Mr. McRae found at least three Grasshopper Sparrows, one of which was carrying food and presumed to be nesting as a result, in the grassland within the upland centre of the doughnut and also in the fields to the north-east of turbine 5 during their site visits in June 2015.

[124] The Appellant argues that the REA condition requiring grassland compensation, will allow removal of woodland to become grassland. The condition requiring woodland compensation, will allow grassland to become woodland. One way or the other, argues the Appellant, there will be a net loss of habitat due to this Project. The Appellant notes that the REA conditions do not require the compensation property to be either within the Project area, or even within the ORMCP area.

[125] The Appellant submits that reforesting a portion of the grassland "doughnut" in the centre of SW-11, which was admitted as new evidence by the Tribunal, should neither be condoned nor permitted because it effectively removes grassland habitat in order to recreate woodland habitat, and that in any event will not be useful as woodland habitat for many years to come. The Appellant submits that the grassland in the "doughnut hole" includes a valley and a higher area which is used as nesting and foraging area for several pair of Grasshopper Sparrows, the presence of which was noted by Mr. McRae. The Appellant submits this proposed conversion is contrary to the intention of both the *EPA* and the ORMCP. The Appellant submits that any new woodland habitat should be adjacent to SW-11 and should be placed in an area of active cultivation so as not to destroy habitat of Grasshopper Sparrows, Eastern Meadowlarks, or Bobolinks, all of which are *ESA* listed species.

[126] The Director submits that, under the *ESA* regime, the Approval Holder is required to create a compensation habitat for Bobolink and Eastern Meadowlark, which in this case involves creation of 4.4 ha of grassland compensation habitat. The Director submits this represents an area 1.5 times greater than the impacted and potentially impacted area, and greater than the area required by the *ESA*.

[127] The Director submits that the Tribunal should give considerable weight to the Approval Holder's expert evidence because Mr. Charlton and Dr. Kerlinger remained within their area of expertise and provided detailed pathways for their conclusions including references, assumptions and analyses.

[128] The Approval Holder submits that the Tribunal should rely on the opinions of Dr. Kerlinger and Mr. Charlton, that the grassland compensation habitat requirements will result in a net gain of habitat for grassland birds.

[129] The Approval Holder submits that the following species, mentioned by the Appellant's submissions, should not be considered by the Tribunal for the reasons cited:

a. Bank Swallow; there is no evidence on this species in this proceeding;
b. Grasshopper Sparrow; none seen since cultivation of the grassland began "years ago"
c. Common Nighthawk; not seen in the last ten years
d. Eastern Whip-poor-will; not seen in the last ten years
e. Golden-winged Warbler; seen in 2014 but not 2015

[130] The Approval Holder submits that the Tribunal should not rely on Mr. Williams' evidence as anything other than an expression of concern, as he is not a recognized bird expert.

[131] The Approval Holder submits that the three rounds of breeding bird surveys conducted in 2011 and 2012 by its consultants showed the only species at risk in the

Project Area to be grassland birds, namely Bobolink, Eastern Meadowlark and Barn Swallow.

[132] The Approval Holder submits that removal of 6% of SW-11 will not impact the three species of concern in the Project area, as they are all grassland species.

[133] With respect to Bobolink and Eastern Meadowlark, the Approval Holder submits that there is no scientific evidence supporting an assertion that there will be displacement impacts for these species. Rather, reliance is placed on Dr. Kerlinger's opinion that these two species "will land and nest within close proximity to the turbines," that displacement risk is low for Bobolink and Eastern Meadowlark at the Project site, and the breeding success of the species is not expected to be affected.

[134] The Approval Holder relies on Mr. Charlton's opinion that the construction and use of access roads and wind turbines do not fragment the habitat, or materially affect the density, of breeding Bobolinks or Eastern Meadowlarks.

[135] The Approval Holder submits that the experts are unanimous that agricultural fields are low quality habitat for Bobolink and Eastern Meadowlark because they have been previously disturbed and are subject to crop rotation. Further, the REA conditions A1 and J required that construction activities be restricted during the breeding season, which will reduce disturbance risk.

[136] With respect to Barn Swallow, the Approval Holder submits that no habitat will be impacted because no habitat (typically barns or other open buildings) was found within the Project area. Dr. Kerlinger testified that the removal of a small amount of Barn Swallow foraging area as a result of the Project will result in no serious harm to the species, as they are habitat generalists and will use other areas for foraging.

[137] The Approval Holder submits that Condition K of the REA requires grassland compensation habitat, under the *ESA*, to be in place prior to commencement of construction, and that all the experts agreed that the grassland compensation habitat will provide a benefit.

[138] The Approval Holder also points to the testimony of Mr. Charlton and Dr. Kerlinger that mortality risk from strikes of birds with operating wind turbines is low for Eastern Meadowlark and Bobolink.

Discussion, Analysis and Findings – Grassland

[139] Two experts on birds were called as witnesses in this hearing: Mr. McRae by the Appellant and Dr. Kerlinger by the Approval Holder. Relevant testimony to the Tribunal's consideration was also provided by Mr. Williams for the Appellant, Mr. Charlton for the Approval Holder and by the presenter Ms. Zednik. These witnesses testified to the presence of a variety of birds and bird habitat in both the grassland and woodland areas of the Project site.

[140] The parties take opposing positions on the weight that should be afforded to the testimony of witnesses testifying about birds and their habitat and the impacts of the Project. The parties' submissions and the Tribunal's findings in relation to the expertise of these witnesses and the weight to be afforded to their testimony applies equally to both grassland and woodland birds and their habitat.

[141] The Tribunal begins by making the overall observation that opinion evidence may only be relied upon where the witness has been recognized as having expertise in the subject area of the opinion being provided. This does not mean, however, that lay witnesses may only give "expressions of concern". Non-expert witness may have any number of factual and technical observations upon which the Tribunal may properly rely,

and which may be preferred over or may supplement other evidence before the Tribunal.

[142] The Approval Holder and Director asked that the Tribunal consider virtually all of the evidence brought by non-expert witnesses as "expressions of concern". In this case, the Tribunal finds that evidence of Mr. Williams and some of the evidence of Mr. McRae that the Approval Holder and Director submitted was outside his area of expertise, was based on extensive observational and field experience, indicating that their technical observations can be considered reliable. It would be improper for the Tribunal to afford little or no weight to such evidence out of hand. Rather, the Tribunal, as evidenced in these reasons, has weighed these technical observations, based on their practical experience, along with the expert opinion adduced in this proceeding.

[143] The Tribunal further finds that Mr. McRae and Mr. Williams' evidence, and indeed their local knowledge regarding bird species and bird habitat in the ORM generally, and the Project site in particular, is relevant to the issues to be addressed in this proceeding. The Tribunal accepts their evidence regarding the number and variety of birds on the Project site, and finds that Mr. McRae and Mr. Williams' two-day survey of the Project site most likely underestimated the number of species using the site. In this regard the Tribunal notes that none of the experts disagreed with the list Mr. McRae generated during his observations. What is disputed is Mr. McRae's assessment of whether SW-11 represents quality habitat for certain species. This is discussed below in the Tribunal's analysis of the woodland habitat impacts.

[144] The Tribunal also wishes to stress that local knowledge is particularly important, given the Tribunal's finding in previous REA appeals that it is appropriate in the analysis of impact on animal life to assess local impacts as a starting point. The Tribunal endorses its findings regarding scale in REA appeals that was described in *Fata, supra*, at paras. 247-248, as follows:

> There may be reasons why a particular species requires a smaller scale consideration (e.g., a species of plant or animal dependent on a wetland which is found in one small part of a large project area), or a larger scale consideration (e.g., a migratory bird species which only use the airspace above a project, or has a significant habitat directly adjacent to a project), or an area that straddles the project boundary. Indeed, the NHA guidance documents for proponents specifically recognize circumstances where the proponent must look for habitat, for instance, outside the project area.
>
> If a project were to have a lethal impact on every member of a species within the project area, yet not be found to have a discernible impact on the overall regional or continental population of a species, the "population viability" approach would lead to the absurd result of a finding of no serious harm to animal life.

[145] In a similar vein, the Tribunal rejects the approach of Dr. Kerlinger to assessing the legal definition of "serious harm" to animal life. The Tribunal finds that s. 145.2.1(2)(b) of the *EPA* cannot be read such that a species-wide viability analysis is the appropriate scale for the assessment of serious harm. Dr. Kerlinger's analysis would render the Environment Test almost meaningless at the scale of local impacts by requiring the Appellant to prove that the Project has an impact that results in a material change to the population of a species overall, before any modification to it could be ordered. This is clearly not the intention of the *EPA*, which includes the purpose at s. 3 of "the protection and conservation of the natural environment", and at s. 47.2 (the Renewable Energy section of the *Act*) "to provide for the protection and conservation of the environment."

[146] In addition, O. Reg. 359/09 sets out reporting requirements for renewable energy project proponents, and mandates that studies analyze the anticipated impacts of the undertaking in the project area. The Tribunal, consistent with its findings in previous REA appeals including *Fata* (paras. 247-250), *Lewis v. Ontario (Ministry of the Environment)* (2013), 82 C.E.L.R. (3d) 28 (paras. 42-49) and *APPEC v. Ontario (Ministry of the Environment)* (2013), 76 C.E.L.R. (3d) 171 (paras. 355 and 359), rejects the notion that the Environment Test should be restricted to a global population viability analysis in relation to impacts to specific animals under s. 145.2.1(2)(b) of the *EPA*.

[147] The Tribunal finds that the scale that is most appropriate and relevant to its consideration of serious and irreversible harm to grassland birds and their habitat in this instance, and to woodland habitat below, therefore, is the local Project scale.

[148] There is no dispute that habitat of grassland birds, including Bobolink and Eastern Meadowlark, will be affected by the Project operated in accordance with the REA, although there is disagreement as to the amount of displacement and habitat disturbance that will occur. Portions of grassland habitat will be removed for infrastructure, and there will be some displacement and disturbance. Bobolink and Eastern Meadowlark in particular are species listed as threatened under the *ESA*.

[149] The REA requires the Approval Holder to obtain an *ESA* permit (or allows an exemption on certain conditions) to harm, harass or kill endangered species. The *ESA* exemption in this case, contained at s. 23.6 of O. Reg. 242/08 enacted under the *ESA*, for Eastern Meadowlark and Bobolink requires the Approval Holder to provide an area of compensation habitat greater than the area of habitat to be removed. Here the Approval Holder has entered into a lease agreement with a nearby land owner to create and protect 4.4 ha of grassland compensation habitat, an area approximately 1.5 times the area that is calculated to be impacted by the Project.

[150] The Tribunal finds that the grassland compensation requirements in the REA will, more likely than not, offset any impacts of the Project to grassland bird habitat, for the following reasons.

[151] First, all experts agreed that Bobolink and Eastern Meadowlark habitat would be better protected through the conditions in the REA, if met, in the short-term. In particular, the greatest threat to Bobolink and Eastern Meadowlark is loss of breeding habitat due to farm practices where hay is mowed before fledglings leave their nests, located on the ground, resulting in their death. The terms of the REA and the

agreement entered into ensure that a greater amount of compensation habitat will be created in the vicinity of the Project which will be managed to ensure that mowing does not occur during breeding season.

[152] Secondly, based on the evidence of Dr. Kerlinger, the Tribunal finds that, following construction, at least some of the disturbed grassland habitat will, in the range of several years, once again become usable by grassland species as habitat and additionally, birds will likely recover partially from any disturbance from the period of construction and operations of the Project commencing.

[153] The Appellant asserts that the area in the "doughnut" that will be used for woodland compensation is a field that is not currently cultivated and therefore habitat for grassland bird species. The Appellant relies on Mr. McRae in this regard, who suggested that the proposed woodland compensation causes additional loss to grassland habitat, that itself requires compensation.

[154] In Mr. Charlton's supplementary witness statement of October 29, 2015, he stated that the open field of the "doughnut" is not suitable habitat for SAR-listed grassland birds. He lists the reasons for his conclusion as follows:

a. M.K. Ince did not observe any Bobolink, Eastern Meadowlark, Grasshopper Sparrow, Field Sparrow or Eastern Towhee in the area in 2011, nor did Stantec in May, 2015;

b. the Stantec biologist who conducted the site visit in 2015 "judged the habitat at this location to be unsuitable for grassland birds as it consisted of active agriculture row crops in the south part of the opening, and over-mature meadow in the north part";

c. He visited the area twice in 2015, and noticed that the northern meadow "included small shrubs and areas of dense forbs", which make the meadow unsuitable for most grassland birds except Field Sparrow, a relatively common species with abundant habitat; and

d. The dimensions of the open meadow are too small to be suitable habitat for Bobolink and Eastern Meadowlark.

[155] In consideration of the evidence of Mr. McRae and Mr. Charlton, the Tribunal finds that the variety of grassland species identified in other areas do not use the "doughnut" hole, and more specifically, this area is not habitat for Bobolink or Eastern Meadowlark.

[156] The Tribunal finds, based on the evidence before it, that grassland habitat disturbed due to construction of the Project site will likely become useable once again in the short-term under the terms of the REA, and that displacement effects caused by presence of the infrastructure will be addressed through the REA conditions requiring the creation of 4.4 ha of superior grassland habitat.

[157] Overall therefore, the Tribunal finds that the Appellant has not established that engaging in the Project in accordance with the REA will cause serious and irreversible harm to grassland bird species or their habitat in the Project area.

ii. Woodlands and Woodland Habitat

Submissions

[158] The submissions of the parties in relation to the weight to be afforded to expert and non-expert evidence is set out above under the grassland habitat section.

Similarly, the overview of the parties' submissions in relation to bird habitat generally throughout the Project area and the Environment Test are set out above.

[159] In relation to woodland impacts, the Appellant submits that significant habitat once removed cannot be replicated, and that it is a restoration myth that an ecosystem can be restored or recreated as a copy of the original.

[160] The Appellant further submits that the Approval Holder should have considered the full intent of the ORMCP provisions, as directed by s. 9.3 of the *Technical Guide to Renewable Energy Approvals*, MOECC, 2011 ("*Technical Guide*"), but did not do so.

[161] The Appellant highlighted the relevant objectives for the ORMCP, established through section 4 of the *ORMCA*, which include protecting the ecological integrity of the ORM area, and ensuring that only land and resource uses that maintain, improve or restore the ecological functions are permitted.

[162] The Appellant notes that the Project is located within the Countryside Area of the ORM. In relation to planning applications on the Moraine, the Appellant references ORM Technical Paper 3 - *Supporting Connectivity* which states (at pages 2 and 5) that, in order to "ensure the movement of plants and animals across the ORM and to natural areas north and/or south of the ORM" the requirement is for "all wooded areas outside key natural features and hydrologically sensitive features and their associated vegetation protection zones (including hedgerows) [to be] maintained or enhanced".

[163] The Appellant submits that the Project will cause habitat fragmentation in SW-11 due to the construction of a gravel access road to turbines 2, 3 and 5, with the result that the southern section of SW-11 will be separated from the northern section of the woodland. The Appellant submits that areas in the southern section will be further fragmented into smaller wooded fragments to enable the construction and installation of the bases for turbines 3 and 5.

[164] The Appellant submits that the environmental damage to SW-11 will be permanent because all but the top metre of the "800 tonne concrete bases" will remain in the ground and prohibit natural tree and woodland regeneration, and will alter rainfall infiltration patterns and ground and surface water flow. The Appellant notes that the Approval Holder will not remove the gravel access road if the landowner wishes to keep it, and emphasizes that there is no long-term requirement in the REA to maintain the woodland compensation habitat.

[165] The Appellant submits that SW-11 has been defined as "significant" according to the ORM Technical Paper 7, and that the significant woodland plays an important role in the ecosystem of the ORM in ways other than acting as habitat:

> Woodlands generally play an important role in the complex hydraulic cycle of evaporation, transpiration, and rainfall that support natural features such as streams, rivers, geological features and the water table. Trees reduce runoff by breaking rainfall. Woodlands leaf and twig ground litter hold back melt water and storm water runoff and increase the rates of groundwater recharge. Trees act like a sponge that filters water naturally and uses it to recharge groundwater supplies. Root systems of trees provide erosion controls. Their root channels created during growth improve water infiltration into the soil.
>
> Significant Woodland 11 is located within a significant hydrologic area of the Oak Ridges Moraine designated 'high vulnerability' as well as a 'significant recharge' zone and is part of the larger Fleetwood Creek Forest complex.

[166] The Appellant submits that 24 species of trees will be removed in the construction phase, and trees will also be lost in the decommissioning phase as well.

[167] The Appellant also submits that the Approval holder has not been correct in its description of the amount of woodland to be removed. While the NHA/EIS states in three separate locations that 18% of the significant woodland will be removed, Mr. Charlton testified orally that this was a "typo". The Appellant submits it could not be a "typo" made three times.

[168] The Appellant submits that no clear information has been given to the MOECC (or the Tribunal) regarding the amount of significant woodland that will actually be removed. The EIS and EEMP reports indicate that 1.8 ha of woodland will be removed. However, the Appellant notes that Mr. Charlton stated that, based on GoogleEarth imagery, closer to 2.5 ha would be removed.

[169] In addition, the Appellant submits that Mr. Charlton's testimony regarding the significance of the woodlands should be given significantly less weight than the locally-informed testimony of both Mr. Williams and Mr. McRae, for reasons including errors in identifying the woodland in photos to the Tribunal and contradictory testimony.

[170] The Appellant submits that s. 22(2) of the ORMCP prohibits removal of any part of a woodland classified as significant, unless the Approval Holder can demonstrate the need for the Project and that there is no reasonable alternative, which the Approval Holder has never done. The Appellant submits that the Approval Holder has never produced documentation that there is no reasonable alternative to constructing this industrial project wholly on the ORM.

[171] The Appellant also submits that the Project violates s. 38 of O. Reg. 359/09, which prohibits activity within a significant woodland or within 50 m of a significant woodland.

[172] The Appellant submits that the cumulative impact of tree removal for this Project must be considered along with "the thousands of trees that will also be removed in order to accommodate the adjacent wind energy project, Sumac Ridge, which is also located on the Oak Ridges Moraine thus further fragmenting the Fleetwood Creek Forest."

[173] The Appellant notes that Dr. Kerlinger confirmed there are three distinct bird habitat communities within SW-11; grassland, edge habitat and interior woodland

habitat. Interior bird species, according to both Dr. Kerlinger and Mr. Charlton, require a forest with an interior at least 100 m from an edge.

[174] The Appellant argues that the Tribunal should not rely on the opinions of Mr. Charlton and Dr. Kerlinger regarding the quality of habitat within SW-11, because they both focused their comments exclusively on the mature Scots pine plantation. The Appellant submits they did not fully evaluate the benefits of the existing habitat in the four other environmental land classification components identified in the NHA, including the mixed white birch deciduous forest, the sugar maple forest, the other coniferous woodland as well as another mixed sugar maple dominated deciduous woodland.

[175] The Appellant disagrees with the Approval Holder's assertions regarding Eastern Wood-Pewee habitat, stating that at least six Eastern Wood-Pewees were found by Mr. McRae and Mr. Williams in several areas of SW-11 on both days of their site visit, indicating that SW-11 is important habitat for the species.

[176] The Appellant submits that bird habitat is important to protect from cumulative impacts, as follows:

> It cannot be assumed that species affected by the Project will simply "adapt" to the removal of habitat. Habitat removal erodes populations. Breeding habitat removal is the major cause of population decline in Southern Ontario. If habitat continues to be eroded, at some future point in time critical turning points will occur when some species' concentrations are sufficiently reduced that they cannot recover. As was pointed out, bobolinks cannot move north – they need the climate of Southern Ontario for part of their life cycle otherwise they will disappear from this area.

[177] Finally, the Appellant submits that construction of the Project in the significant woodland will also negatively impact snake and bat habitat. The Site map (forming part of the NHA/EIS) denotes two potential bat maternity colonies (one in each of significant woodland SW-10 and SW-11) and two candidate significant snake hibernacula (both in SW-11) within 60 m of areas to be cleared for the Project.

[178] The Director's submissions on this issue largely focus on the fact that Mr. Charlton was qualified as an expert and, as the Appellant did not call a witness with specific expertise on woodlands, that Mr. Charlton's evidence should be preferred. The Director submits that the Appellant only tendered the evidence of Ms. Zednik and Ms. Stauble which should only be considered expressions of concern. The Director submits that the Appellant adduced no expert evidence that the removal of a portion of the significant woodlands will have a negative impact on any bird species. The Director relies on the conditions of the REA and Mr. Charlton's opinion, that the potential impact of the removal of a small portion of SW-11 is mitigated by conditions A1 and I of the REA which require the implementation of the Environmental Effects Monitoring Plan including the Woodland Rehabilitation Protocol.

[179] The Director made no submissions on the issue of removing portions of a "significant woodland" within the ORMCP area specifically, nor how the Tribunal should apply the Environment Test in this context.

[180] The Approval Holder submits that the principal thrust of the Appellant's environmental case centers on the impact of "the removal of 6% of a single woodlot … which the Appellant argues must remain undisturbed because of the habitat it allegedly provides for protected species." The Approval Holder argues that the only evidence before the Tribunal from an expert qualified to opine on the health and viability of woodlands and their constituent trees and plants is Mr. Charlton, whose evidence is that SW-11 "is not comprised of high value native species but instead is comprised largely of non-native species that are highly fragmented, and are without any significant amount of interior habitat." The Approval Holder submits that the compensation agreement reached with an owner of part of SW-11 satisfies the requirement of Woodland Protocol in the REA. The Approval Holder submits that the removal of a small percentage of SW-11 will not cause serious and irreversible harm to any bird species either directly or indirectly.

[181] The Approval Holder submits that the figure of 18% woodland removal, which appears in the NHA/EIS, is a "typo" or a "mathematical error". The Approval Holder relies on Mr. Charlton's calculation, which is that the total area of SW-11 is 44 ha, of which 2.5 ha will be impacted by the project construction, or 6% of the total area (i.e., 2.5/44 = 0.0568 or 6% after rounding up).

[182] The Approval Holder submits that the woodland removal is not serious as there is no significant habitat that is negatively impacted, and the woodland itself is "highly fragmented", including an agricultural field in the middle and roads for farm equipment and logging access. Further, it is submitted that the woodland areas to be removed are comprised of low-desirability non-native species such as Scots pine. The Approval Holder submits that the woodland was designated significant on the basis of its size, without regard to its quality.

[183] The Approval Holder further submits that the woodland removal is not irreversible as the compensation woodland, as outlined in the Woodland Compensation Protocol contained in the Environmental Effects Monitoring Plan will be a better mix of native trees. The compensation woodland is to be 2.7 ha in size, and is currently made up of "agricultural fields" in the centre of SW-11. Additionally, the Approval Holder relies upon the fact that the lease agreement concluded for woodland compensation habitat is for a period of 20 years, while the REA only requires monitoring for 10 years.

[184] With regards to woodland bird habitat, the Approval Holder submits that the Tribunal should rely on the opinions of Dr. Kerlinger and Mr. Charlton that the removal of 6% of SW-11 will not cause serious and irreversible harm to any bird species. The Approval Holder points to Dr. Kerlinger's opinion that the "poor quality of the woodlands is such that it is not important for nesting, wintering or migrating birds, either for species at risk or other birds," and Mr. Charlton's opinion agreeing that SW-11 "does not provide

high-quality wildlife habitat." Further, according to the Approval Holder no species at risk that require forest for nesting or foraging were encountered during the bird surveys.

[185] Regarding the Eastern Wood-Pewee, a species listed as "special concern" under the *ESA*, and observed in SW-11 by Mr. McRae, the Approval Holder relies on Dr. Kerlinger's testimony that this species requires woodlands larger in size than SW-11, with more sizeable trees for nesting.

[186] The Approval Holder submits that the Appellant's bird expert, Mr. McRae, did not support a finding of serious and irreversible harm to birds as he testified only that "it is difficult to speculate precisely what will be the biological impact on birds, wildlife and habitat", and that "it is completely unclear what impact the on-going operation of the turbines will have" on species at risk.

Discussion, Analysis and Findings – Woodland

[187] There are two aspects to the Project's impact on woodlands; harm to SW-11 itself as an ecosystem including removal of trees, and harm to the woodland as habitat for a variety of species, including (but not limited to) birds, bats, snakes and mammals.

[188] As a general comment relating to opinion evidence given by experts as compared to the technical evidence provided by various witnesses, the Tribunal's reasons above in the "grassland" section apply equally here. That is, technical evidence may be reliably received from lay witnesses, as from experts in relation to the size and species of trees observed and the variety of bird species present and utilizing SW-11. For example, the woodland photographic survey provided by Mr. Williams and his explanation of the various photographs revealed the maturity and variety of tree species in SW-11. His evidence, along with the information contained in the NHA/EIS made it clear that SW-11 cannot merely be considered a low quality Scots pine plantation. This evidence was the best evidence and most useful to the Tribunal in

regard to those matters, even though Mr. Williams is not an expert. The Tribunal elaborates upon this further below.

[189] At the outset, the Tribunal recognizes that there was significant evidence and submissions dedicated to the issue of the creation of compensation woodland areas. The Tribunal is satisfied that the compensation agreement reached by the Approval Holder to create woodland in the centre of SW-11 likely satisfies the requirement of the Woodland Protocol in the REA. The question for the Tribunal remains however, whether engaging in the Project in accordance with the REA will result in serious and irreversible harm despite the compensation to be provided for.

[190] In summary, the Tribunal finds that the Project will cause serious and irreversible harm to SW-11 and to the habitat it represents, for the reasons below.

[191] The Tribunal considers whether harm is "serious" and whether it is "irreversible" separately, given that different evidentiary matters relate to these two considerations in this context. The Tribunal wishes to stress that these considerations, in other contexts, may also be considered in tandem.

Serious harm

[192] The Tribunal has found that the harm to SW-11 will be serious in consideration of the following factors:

- Designation of SW-11 as "significant woodland";
- Prohibition of development in significant woodlands in statute, regulation and policy as an aid to interpreting "serious harm";
- Negative impacts are to the features and functions for which the woodland is designated "significant";

- Harm to the features and functions of the woodland despite mitigation measures, including
    - Loss of trees - age and type,
    - Forest fragmentation,
    - Invasive species and edge effects,
    - Impact on animal habitat including birds,
    - Loss of woodland interior and presence of woodland interior bird species which have been identified at risk under the *ESA*; and
- Possible cumulative impacts on the ORM.

SW-11 is a "significant woodland"

[193] There is no dispute that SW-11 is designated "significant woodland" by operation of law. That designation remains despite the establishment of the renewable energy approval system through the *Green Energy and Green Economy Act*. SW-11 is described in the Approval Holder's Natural Heritage Evaluation of Significance Report at p. 11 as follows:

> [SW-11] … is a significant woodland under the Natural Heritage Assessment Guide for woodland native diversity dominant. Additionally, WO11 is significant under the criteria of the ORMCP Technical Paper 7 based upon tree cover and area which is both > 4 ha in Countryside Area of the ORMCP and intersecting a key natural heritage feature.

[194] The evaluation process required in applying for a renewable energy project approval includes development of an "Evaluation of Significance" report, followed by an "Environmental Impact Study" ("EIS") report for the natural features that were identified as "significant". The EIS is intended to address negative impacts through the identification of mitigation measures.

[195] In this case, the Evaluation of Significance Report (M.K. Ince, October 26, 2012) explains that SW-11 qualifies as a significant woodland under two evaluation tools: MNRF's *Natural Heritage Assessment Guide*, and ORMCP Technical Paper 7.

i. MNRF's Natural Heritage Assessment Guide

[196] MNRF's *Natural Heritage Assessment Guide* is a document that dictates how a NHA/EIS is to be prepared in support of an application for a renewable energy approval.

[197] The Approval Holder's NHA indicates that SW-11 qualifies as significant as a "woodland composed of native tree species", also referred to as "woodland native diversity dominant." While SW-11 is made up of a number of environmental land classification ("ELC") ecosites, it is the portion of the woodland designated as FOCM6-3 that qualifies as significant under this criterion. Turbine 3 and access roads are planned inside FOCM6-3. Below is an excerpt from the Table in the Evaluation of Significance Report appendix, which comprises part of the NHA/EIS, and summarizes the significance of SW-11:

Ecosite	Ecosite size	woodland interior	woodland native diversity dominant
FOCM6-3	20.72 ha	0.34 ha	**20.72 ha**

[198] While "woodland interior" is not a characteristic that led to its designation of significance, it is also of note that FOCM6-3 is the only ecosite in SW-11 that contains what is considered woodland "interior". Interior habitat is a notable quality due to its relative rarity, and for species of animals that rely on such habitat, amongst other reasons.

ii. Oak Ridges Moraine Conservation Plan Technical Paper 7

[199] SW-11 is also considered significant under the criteria of the ORMCP Technical Paper 7, "based upon tree cover and area which is both > 4 ha in Countryside Area of

the ORMCP and intersecting a key natural heritage feature." Specifically, SW-11 was found to have:

a. at least 60% tree cover;
b. its area (44 ha) is greater than 4 ha in the Countryside Area of the ORMCP; and
c. it intersects a key natural heritage feature (significant wildlife habitat - snake hibernacula: SH07 and SH13).

[200] With regard to the third criterion (significant wildlife habitat), page 14 of the Evaluation of Significance Report states:

> In accordance with OMNR guidance, including the *Natural Heritage Assessment Guide* (OMNR, 2011) and consultation with the district office, rock piles more than 30 m and less than 120 m from the Project Location were treated as significant snake hibernacula and exempt from further studies (see the *Settlers Landing Site Investigation Report* for complete details) and carried to the *Environmental Impact Study*. SH01, SH06, SH07 and SH13 were between 30 m and 120 m from the Project Location, and will be treated as significant snake hibernacula and carried forward to the *Environmental Impact Study*.

[201] The EIS then reports that Snake Hibernaculum SH07 "is located 46 m from underground electrical cabling; 48 m to Project Road to T5; 117 m to T5 bladeswept area." Snake Hibernaculum SH13 is located "95 m and 120 m to T2 bladeswept area; 101 m to Project Road to T2; 107 m to underground electrical cabling."

[202] Mr. Charlton did not comment on the influence of the snake hibernacula on SW-11's designation as significant.

Provincial Statute, Regulation and Policy as Aids in Determining Whether Harm is Serious

[203] There are various Ontario statutes under which natural features are designated as significant in some way. The designation of significance may come in the form of

protection of species and the habitat upon which they rely through the *ESA*, protective legislation relating to development in a specially designated landform (e.g., Niagara Escarpment or the ORM), or a designation as "significant wildlife habitat", "significant wetland" or "significant woodland" by way of statutory definition – through the PPS under the *Planning Act* or through the ORMCP under the *ORMCA* for example. A basic principle of statutory interpretation presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter (see for example *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867 at para. 52 and *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*, 2014 ONSC 974 at para. 59).

[204] Here, the Tribunal finds that a consideration of other statutory schemes is relevant to its consideration of what should be considered serious harm in this context in applying the Environment Test under s. 145.2.1(2)(b) of the *EPA*. The Tribunal finds the ORMCP and the *ESA* to be of such assistance. Specifically, the Tribunal finds that not only does SW-11 represent habitat for species at risk listed under the *ESA*, as discussed below, but it has also been afforded special status under provincial statute and policy as a significant woodland for which there is a presumption of protection.

[205] Both the ORMCP and the *EPA* contain provisions protecting significant woodlands. The ORMCP defines and then prohibits development within a significant woodland. The *EPA* only exceptionally allows renewable energy development within significant woodlands where a natural heritage investigation has demonstrated that the impact can be "addressed". The Tribunal now turns to the relevant provisions of these legislative and policy schemes.

i. O. Reg. 359/09 of the Environmental Protection Act

[206] As a result of the *Green Energy and Green Economy Act*, which amended the *Planning Act* by adding s. 62.0.2(1)2, the ORMCP does not operate to prohibit projects approved under a renewable energy approval from being developed in a significant

woodland. However, the incorporation of a strong deference to the ORMCP in O. Reg. 359/09 and in the MOECC's ORM Technical Guide indicates that there is a very strong preference that significant woodlands be preserved where possible as intended by the ORMCP.

[207] Section 38 of O. Reg. 350/09, which applies throughout the province including the ORMCP area, provides that a renewable energy project is prohibited in a significant woodland or within 120 m of a significant woodland unless an exception in s. 38(2) applies. That is, an environmental impact study is prepared and the negative effects identified are "addressed". The section reads:

> 38(2) Subsection (1) does not apply if, as part of the application for the issue of a renewable energy approval in respect of the renewable energy project, the applicant submits,
>
> (a) an environmental impact study report prepared in accordance with the Natural Heritage Assessment Guide, that,
> (i) identifies and assesses any negative environmental effects of the project on a natural feature, provincial park or conservation reserve referred to in the Table to subsection (1),
> (ii) identifies mitigation measures in respect of any negative environmental effects mentioned in subclause (i),
> (iii) describes how the environmental effects monitoring plan set out in paragraph 4 of item 4 of Table 1 addresses any negative environmental effects mentioned in subclause (i), and
> (iv) describes how the construction plan report prepared in accordance with Table 1 addresses any negative environmental effects mentioned in subclause (i);
> (b) written confirmation from the Ministry of Natural Resources that the report mentioned in clause (a) has been prepared in accordance with the Natural Heritage Assessment Guide; and
> (c) any written comments provided by the Ministry of Natural Resources to the applicant in respect of the project.

[208] Additionally, section 9.3 of the MOECC's *Technical Guide to Renewable Energy Approvals*, provides that the "full intent" of the ORMCP is to be considered by project proponents:

> Renewable energy projects at project locations that are located entirely or partly on land subject to the Oak Ridges Moraine Conservation Plan have special provisions that must be considered in an application for an

> REA. These provisions are located in sections 42 – 46 of O. Reg. 359/09. The provisions were incorporated in the regulation to maintain protection of the Oak Ridges Moraine in respect of renewable energy projects since these are now exempt from the Planning Act. While O. Reg. 359/09 describes the minimum legal requirements that pertain to projects in the Oak Ridges Moraine, applicants are expected to consider the full intent of the Oak Ridges Moraine Conservation Plan when evaluating negative environmental effects that will or are likely to occur as a result of the proposed project.

[209] With this strong deference to the full intent of the ORMCP in mind, the Tribunal now turns to that policy document.

ii. Oak Ridges Moraine Conservation Plan

[210] The ORMCP is Ontario Regulation 140/02 made under the *ORMCA*. The objectives of the ORMCP are set out in s. 4 of the *ORMCA* which provides:

> 4. The objectives of the Oak Ridges Moraine Conservation Plan are,
>
> (a) protecting the ecological and hydrological integrity of the Oak Ridges Moraine Area;
> (b) ensuring that only land and resource uses that maintain, improve or restore the ecological and hydrological functions of the Oak Ridges Moraine Area are permitted;
> (c) maintaining, improving or restoring all the elements that contribute to the ecological and hydrological functions of the Oak Ridges Moraine Area, including the quality and quantity of its water and its other resources;
> (d) ensuring that the Oak Ridges Moraine Area is maintained as a continuous natural landform and environment for the benefit of present and future generations;
> (e) providing for land and resource uses and development that are compatible with the other objectives of the Plan;
> (f) providing for continued development within existing urban settlement areas and recognizing existing rural settlements;
> (g) providing for a continuous recreational trail through the Oak Ridges Moraine Area that is accessible to all including persons with disabilities;
> (h) providing for other public recreational access to the Oak Ridges Moraine Area; and
> (i) any other prescribed objectives.

[211] The ORMCP considers significant woodlands to be "key natural heritage features", which are afforded special protection from development. Specifically, development within these features is prohibited, unless an exception applies. The relevant sections read:

> 22. (1) The following are key natural heritage features:
>
> …6. Significant woodlands.
>
> (2) All development and site alteration with respect to land within a key natural heritage feature or the related minimum vegetation protection zone is prohibited, except the following:
> …
> 3. Transportation, infrastructure and utilities as described in section 41, but only if the need for the project has been demonstrated and there is no reasonable alternative.

[212] The s. 41 exception referred to in s. 22(2)3 requires a demonstration of need, and of no reasonable alternative. It reads as follows:

> 41. (1) Transportation, infrastructure and utilities uses include,
>
> (a) public highways;
> (b) transit lines, railways and related facilities;
> (c) gas and oil pipelines;
> (d) sewage and water service systems and lines and stormwater management facilities;
> (e) power transmission lines;
> (f) telecommunications lines and facilities, including broadcasting towers;
> (g) bridges, interchanges, stations and other structures, above and below ground, that are required for the construction, operation or use of the facilities listed in clauses (a) to (f); and
> (h) rights of way required for the facilities listed in clauses (a) to (g).

[213] STORM made the point that s. 41 applies to linear development of transportation, infrastructure and utilities such as transmission lines and pipelines that *cross through* the ORM area. The generation of electrical power, however, does not explicitly appear on the list. If power generation is not included as a s. 41 exception, then wind turbine

development would be prohibited entirely within significant woodlands in the ORMCP area.

[214] Thus a reading of these provisions demonstrates that under the *ORMCA*, all development and site alteration is prohibited in significant woodlands in the ORMCP area, with narrow exceptions and even then only when "need" has been shown. The Tribunal finds that this is a strong indication that removal of portions of the significant woodlands in this area should be considered "serious" harm by operation of legal standards set in the ORMCP adopted through O. Reg. 359/09, and as explained by the MOECC's ORM Technical Guide. This does not mean that such removals are prohibited (given s. 62.0.2(1)2 of the *Planning Act*), but rather that harm is acknowledged under the *EPA* where woodlands are to be removed.

[215] Wooded areas are also recognized in the ORMCP as important in serving a key connectivity function for wildlife and plants to the north and south of the ORMCP area. ORM Technical Paper 3 - *Supporting Connectivity* requires that "all wooded areas outside key natural features and hydrologically sensitive features and their associated vegetation protection zones (including hedgerows) [be] maintained or enhanced".

iii. Planning Act and Provincial Policy Statement

[216] Although the PPS is not applicable to the Project directly by virtue of amendments to the *Planning Act* made through the *Green Energy and Green Economy Act*, the PPS also provides some interpretative assistance in assessing the importance of significant woodlands provincially.

[217] The PPS places restrictions on development and site alteration in significant woodlands. The PPS defines "woodland" and "significant" for woodlands at part 6 (definitions) as follows:

> **Significant**: means
> …
> b) in regard to *woodlands*, an area which is ecologically important in terms of features such as species composition, age of trees and stand history; functionally important due to its contribution to the broader landscape because of its location, size or due to the amount of forest cover in the planning area; or economically important due to site quality, species composition, or past management history. These are to be identified using criteria established by the Ontario Ministry of Natural Resources…
>
> **Woodlands**: means treed areas that provide environmental and economic benefits to both the private landowner and the general public, such as erosion prevention, hydrological and nutrient cycling, provision of clean air and the long-term storage of carbon, provision of wildlife habitat, outdoor recreational opportunities, and the sustainable harvest of a wide range of woodland products. *Woodlands* include treed areas, woodlots or forested areas and vary in their level of significance at the local, regional and provincial levels. *Woodlands* may be delineated according to the *Forestry Act* definition or the Province's Ecological Land Classification system definition for "forest."

[218] Section 2.1.5(b) of the PPS then goes on to state:

> 2.1.5 *Development* and *site alteration* shall not be permitted in:
> …
> b) *significant woodlands* in Ecoregions 6E and 7E (excluding islands in Lake Huron and the St. Marys River);
> …
> unless it has been demonstrated that there will be no *negative impacts* on the natural features or their *ecological functions*.

[219] The Project area at issue in this appeal is within the area of Ecoregions 6E and 7E identified in the PPS. Similar to provincial law and policy above, the PPS also stresses the importance of significant woodlands in the province.

[220] To summarize, designation of a woodland as "significant" by a provincial authority is instructive in the Tribunal's consideration of whether harm to it should be considered "serious" under s. 145.2.1(2)(b) of the *EPA*. In addition, the fact that SW-11 is within the ORMCP, an area that the province has determined warrants additional ecological protection, is an added indicator of the harm that the province considers would be occasioned through development or site alteration within it.

iv. Endangered Species Act

[221] The final legislative scheme that the Tribunal views as relevant to its interpretation of the Environment Test is the *ESA*. As set out below, the Tribunal has found that SW-11, more likely than not, represents habitat for nesting species of birds that are listed under the *ESA*, including Eastern Wood-Pewee and possibly Wood Thrush and Golden-winged Warbler, all of which are listed under the *ESA* as species of special concern.

[222] Under the *ESA*, the habitat of species listed as special concern does not receive specific protection similar to that of species listed as either threatened or endangered, but the criteria set out in the *Act* for listing a species as special concern includes consideration that the species may become threatened or endangered as a result of threats to it:

> 5. (1) For the purposes of this Act, COSSARO shall classify species in accordance with the following rules:
> …
> 5. A species shall be classified as a special concern species if it lives in the wild in Ontario, is not endangered or threatened, but may become threatened or endangered because of a combination of biological characteristics and identified threats.

[223] Additionally, s.12 of the *ESA* mandates that a management plan be prepared for each species listed under the *Act* as special concern:

> 12. (1) The Minister shall ensure that a management plan is prepared for each species that is listed on the Species at Risk in Ontario List as a special concern species.

[224] Therefore in assessing "serious harm" the Tribunal is cognizant that species listed as special concern under the *ESA* are in need of some form of protection beyond what is provided for through usual planning processes, in order to prevent further decline of the species.

[225] Overall therefore, the Tribunal finds that SW-11's significance is recognized by operation of provincial statute, regulation and policy. The Tribunal further finds that this significance is relevant to the Tribunal's application of the Environment Test in the context of this appeal and particularly in determining whether any harm to SW-11 rises to the level of serious. With this in mind, the Tribunal now turns to a consideration of the impacts to SW-11; those anticipated in the Approval Holder's reports, as well as those alleged by the Appellants.

Impacts to SW-11

[226] The EIS includes a summary in table form (Table 4-1) of the anticipated impacts to SW-11, and proposed mitigation measures which the Tribunal has replicated and attached to these reasons as Appendix 1.

[227] As noted in the table, direct effects identified by M.K. Ince that will be caused by construction and decommissioning of the Project road, construction of turbines 2 ("T2"), 3 ("T3") and 5 ("T5") and underground electrical cabling include:

a. Encroachment onto feature due to placement of two turbines (T3 and T5) including the foundation (306 square metres ("m^2")), permanent project roads (3,180 m^2), underground electrical cabling (1,187 m^2), temporary turning radii (1,043 m^2) and rotor assembly area and crane pad (13,225 m^2).
b. Potential for small edge effect (colonization on feature borders, pollution, erosion, loss of habitat) given minor encroachment onto feature.
c. Impacts to wildlife habitat will be minimal.
d. Improper storage or disposal of oils, gasoline, grease or other materials used in construction vehicles, turbines or maintenance vehicles may result in spills or leaks, contaminating soils or water.
e. Potential for erosion and/or sedimentation but these impacts will be short term and highly localized.

f. Changes in soil moisture and structure (compaction), however should be highly localized and previously compacted from prior road construction – negligible effect.

[228] The Approval Holder's application reports state that 1.8 ha of woodland and hedgerow, or 18% of SW-11, will be cleared and kept clear for the life of the Project for operational purposes. Mr. Charlton's calculations increased the area to be cleared to 2.5 ha, although he estimates this amounts to 6% of SW-11. The Tribunal finds that the area to be cleared is 2.5 ha, a number that has not been disputed. Based on the total area of SW-11 of 44 ha, a size that has also not been disputed, the Tribunal finds that 6% of the woodland will be cleared for the Project (2.5 ha of cleared area of 44 ha of total woodland represents 6% of the woodland if one rounds up to the nearest whole number).

[229] The Approval Holder's documents indicate that clearing within SW-11 will occur within a number of Environmental Land Classification types:

a. FODM3-2 (Dry-fresh White Birch Deciduous Forest)
b. FODM5-1 (Dry-fresh Sugar Maple Deciduous Forest)
c. FOCM6-3 (Dry-fresh Scots Pine Naturalized Coniferous Plantation)
d. WOCM1 (Dry-fresh Coniferous Woodland)
e. WODM4-3 (Dry-fresh Sugar Maple Deciduous Woodland)

[230] The Natural Heritage Site Investigation Report includes a map at Appendix D that shows at p.28 the exact ELC classifications within SW-11. The figure at p. 28 shows that turbine 3 is located in FOCM6-3, described as "Dry-Fresh Scots Pine Naturalized Coniferous Plantation Type", and turbine 5 is located in WOCM1, described as "Dry-Fresh Coniferous Woodland Ecosite". Appendix D to the Natural Heritage Site Investigation Report lists the range of tree species to be removed in these areas:

> *FOCM6-3*: Beech, Balsam fir, basswood, black cherry, red oak, dotted hawthorn, mountain ash, read pine, Scots pine, sugar maple, white birch, white cedar, white spruce, white ash and scarlet hawthorn.
>
> *WOCM1*: red oak, red pine, scarlet hawthorn, Scots pine, basswood, mountain ash, ironwood, sugar maple, trembling aspen, white ash, white birch, white spruce, red maple, red oak, and red spruce.

Characterization of SW-11

[231] The characterization of SW-11 by the Approval Holder's witnesses was markedly different from that of the Appellant's witnesses and the participants and presenters.

[232] The Appellant provided photographs of SW-11, which indicate very tall trees on the sites identified as the locations for turbines 3 and 5. The evidence was that there is one access trail for farm equipment to enter the agricultural fields at the centre of the "doughnut" from the south, and that a new access road will be constructed specifically for the Project which enters the woodland from the east.

[233] Mr. Charlton's witness statement characterizes the woodland as a "Scots pine plantation", and states that "the woodland possesses all of the characteristics of a highly disturbed, low quality site and virtually none of the indicators of higher quality sites outside of the Project area". In oral testimony, however, Mr. Charlton stated that he does consider SW-11 to be significant, that there is "no question it is significant", and that he did not intend to denigrate its importance.

[234] The Tribunal finds that Mr. Charlton substantially minimized the importance of SW-11 in his witness statement. Both Mr. Charlton's witness statement and the Approval Holder's submissions refer to the ecosite impacted by the Project as TAGM1 ("Coniferous Plantation"), while in fact turbine 3 is located in WOCM1 ("Dry-Fresh Coniferous Woodland Ecosite"). They correctly identified turbine 5 as located in FOCM6-3 ("Dry-Fresh Scots Pine Naturalized Coniferous Plantation"). The Approval Holder's reports show that the very ecosite in which turbine 3 and access roads will be

built, is the one that qualifies SW-11 as significant under MNRF's *Natural Heritage Assessment Guide* due to "woodland native diversity dominant". Mr. Charlton acknowledges in his witness statement that the woodland around turbine 3 has "naturalized". Mr. Charlton also acknowledged on cross-examination that mature, native species of trees, which he termed "higher quality trees", will be removed for the construction of turbine 5.

[235] The Tribunal also finds that Mr. Charlton was applying planning considerations in coming to his opinion regarding impacts to SW-11, when such planning considerations are not particularly relevant to the Tribunal's application of the Environment Test. He testified, for example, that the removal of 2.5 ha of SW-11 is a "good tradeoff" when "balanced" with the goal of clean energy. O. Reg. 359/09 has removed planning considerations from the test applied by the Tribunal. Indeed, were the usual planning considerations before the Tribunal the woodland removal proposed would appear to be prohibited by the ORMCP.

[236] Further, Mr. Charlton testified that a factor in his opinion that construction in SW-11 will not cause serious harm was that the mosaic of habitat it represents, with small amounts of interior habitat, is of a "lower level of rarity on the Moraine" compared with bigger, intact woodlands such as Fleetwood Creek Forest. The "more and better elsewhere" analysis is not helpful in determining, at the Project scale, whether the Project operated in accordance with the REA will cause serious and irreversible harm to plant life, animal life or the natural environment. Indeed, the fact that the province has earmarked significant woodlands such as SW-11 for protection generally in most other contexts, is indicative of the rarity of SW-11. The fact that there are woodlands considered even more rare than SW-11 does not lead to the conclusion that SW-11 should not be afforded consideration as significant in this context in the application of the Environment Test.

[237] For all of these reasons, the Tribunal finds Mr. Charlton's opinion unpersuasive regarding "serious" harm to SW-11 as interpreted under s. 145.2.1(2)(b) of the *EPA*.

[238] Dr. Kerlinger was qualified as an expert on birds and the impacts of wind energy projects on birds, and not specifically on assessing woodlands. Nonetheless he provided opinions relating to the suitability of SW-11 as bird habitat. The Tribunal notes in this regard that he based his comments on the mistaken understanding that SW-11 was a "Scots pine plantation", which he stated was "worthless for wildlife." As a result, the Tribunal finds his opinion unpersuasive regarding "serious" harm to SW-11 under s. 145.2.1(2)(b) of the *EPA*.

[239] Mr. McRae disagrees with Mr. Charlton's opinion that SW-11 is "low quality", fragmented or degraded. Rather, he states at p. 3 of his witness statement that:

> (t)hese forests appear to support healthy populations of Pileated Woodpecker, Eastern Wood-Pewee, Great Crested Flycatcher, at least one pair (possibly two) of Broad-winged Hawk, … as well as forest interior species such as Ovenbird. This species mix demonstrates that, even though there has been some disturbance between the woodlots, they are still interconnected and function as a whole. It is clear that this area within the Subject lands and those immediately adjacent still support diverse and important bird communities.

[240] Mr. McRae acknowledged that "the woodlots are somewhat fractured now", but testified SW-11 still functions as a connected unit, and that it is a rich area that has not been degraded as habitat as revealed by his observation of bird species in the woodland. He testified that the Black-throated Blue Warbler, for example, which he sighted in the Project area, does not nest in small, isolated woodlots. Rather, it is typically a forest interior species. He also testified that "the planned cutting will result in the removal of a large proportion of the remaining woods, including some high quality habitat."

[241] Ms. Zednik made a number of relevant observations as to information that was not included in the Approval Holder's analysis of SW-11. For example, she noted that

"the Approval Holder did not conduct a plot grid calculation to determine the trees per square metre, has not revealed the number of trees to be removed, or the total numbers within various tree species." She stated that "the approval holder has not indicated the age of the trees to be removed", while observing that residents have indicated there are old-growth stands within SW-11. She emphasized that the Approval Holder's consultants noted the presence of red spruce in WOCM1, which is rare in southern Ontario. Ms. Zednik pointed out that no ground layer plants were included in the botanical inventory conducted by the Approval Holder in 2013, and that there is no mitigation strategy to replace ground layer plants.

[242] Mr. McRae testified that Scots pine were largely planted in the 1930s to 1950s. He testified that plantations of Scots pine generally create a "biological desert", but the trees nonetheless reduce erosion on sandy soils and "act as shade to allow forest tree seedlings to grow." He testified that in this case, the woodland has naturalized and the Scots pine will die out in the next 15 to 20 years, leaving native species in the forest. This was consistent with Mr. Charlton's evidence on the life span of Scots pine.

[243] Based on the above evidence and findings, the Tribunal finds that SW-11, in its current naturalized state, is an important and functioning woodland, and woodland habitat, in the ORMCP area.

[244] The Tribunal finds that the significance of SW-11, and its significance as habitat, is not reduced by the fact that portions of it are a mature Scots pine plantation. To the contrary, being mature Scots pine indicates, as shown by the evidence, that native tree species will soon fully replace the remaining Scots pine. Although all the experts agreed that Scots pine plantations are undesirable, nonetheless the evidence is that the plantations within SW-11 are old enough that the area has naturalized to a large extent and become valuable as habitat, including a diversity of native species of mature trees.

[245] The Tribunal agrees with the Appellant's submission that the Approval Holder's consultants did not fully evaluate the benefits of the existing habitat in the mixed white birch deciduous forest, the sugar maple forest, the other coniferous woodland as well as another mixed sugar maple dominated deciduous woodland in SW-11.

[246] The Tribunal therefore finds that, in addition to its deemed significance by operation of statute and policy, SW-11 has significance due to its value as a diverse functioning woodland within the ORMCP area which provides connectivity and habitat to a variety of species. The woodland cannot simply be considered low quality Scots pine plantation devoid of species diversity broadly across its area or even at the specific locations where trees will be removed for the Project.

Loss of Trees

[247] The Design and Operations Report considers the value of timber harvested from the woodland. However, the Tribunal also recognizes that trees have inherent value and provide benefits including the filtering of pollutants from air and water, absorbing and storing carbon, reducing soil erosion, and providing habitat for plants, wildlife and pollinators. They assist in fighting climate change, which is the same goal of the renewable energy production that is proposed to replace them.

[248] Trees are beneficial for water filtering and reducing soil erosion; both important in the "high vulnerability aquifer area" designation under the ORMCP, where SW-11 is situated. The Approval Holder's botanical inventory classifies the soils within SW-11 as "fine textured silty sand", which are vulnerable to erosion. Ms. Stauble testified to the improvement in area over the past 50 years, including reversal of soil erosion and desertification, as a result of the tree planting activities that have taken place.

[249] One of the mitigation measures listed in the EIS is implementation of a woodland rehabilitation plan. Appendix D to the EIS is the Woodland Rehabilitation Protocol. It states that, following Project construction,

> Approximately 1.8 ha of [SW-11] are planned for clearing during the project construction phase. Within one year of construction, a total of 2.7 ha of open agricultural land or open meadow will undergo regeneration efforts. This reflects a 3:2 ratio of habitat regenerated to land cleared.
>
> Ideally, woodland regeneration will take place on the impacted property, with a location adjacent to woodland [SW-11] strongly preferred. If this is not possible on the impacted property, woodland rehabilitation will occur within the same township as the project, and will be added to a woodland that is 40 ha or greater in size.

[250] The Woodland Rehabilitation Protocol states that for regeneration, the following measures will be taken:

> Native saplings or seedlings will be planted in the same ratio/composition as the adjacent ELC polygon, or similar pending consultation with Trees Ontario. Saplings/seedlings will be obtained from an organization that maintains seed banks from local sources. Trees will be planted at a density of approximately 1000 stems/hectare.
>
> For the first two years following planting, monitoring will occur once monthly between the months of May and September to collect complete inventories of vascular plants within the regeneration areas, to remove non-native woody species, and to remove native woody species in the vicinity of planted seedlings/saplings that are not associated with the adjacent ELC polygon type. Photographs will be taken of the regeneration area at each visit.
>
> Following the two year intensive monitoring period, the same measures will be implemented each growing season once between April and June and once between July and September until the tenth year after construction, or until an agreement is reached between the proponent and the OMNR that regeneration efforts have been sufficient.
>
> An analysis of biodiversity comparing the regeneration area and the adjacent ELC polygon will be performed once annually, and a summary report will be submitted to the OMNR. Discussions to modify, extend, or to halt the process above will be ongoing with monitoring.

[251] The Woodland Compensation Protocol provides for woodland replacement of 2.7 ha of open meadow. There is no disagreement among the experts that compensation

plantings could take upwards of 40 years to mature to the same extent of some of the areas of the existing woodland that are to be removed.

[252] Mr. Charlton testified that woodland restoration is a "tried and proven method of compensating for forest removal." He suggested that "specific factors that suggest the proposed forest regeneration for this project will result in an enhancement forest cover on the Oak Ridges Moraine" include:

a. There is no difficulty obtaining native seeds;
b. The woodland to be removed is "dominated by a Scots pine plantation"…; and
c. Scots Pine is being actively removed because it is invasive.

[253] The Tribunal has found on the basis of the evidence before it that SW-11 is not dominated by a Scots pine plantation, but is considered "native species dominant", and the specific area where turbine 3 is located is "naturalized plantation", and turbine 5 is "coniferous woodland". The Tribunal finds that the key factor in considering mitigation of tree removal in a significant woodland through planting seedlings and whips, is the 30 to 40 year time lag involved. The Appellant's witnesses testified that it would take "a lifetime" for the trees to mature, Mr. Charlton acknowledged that it would take at least 30 to 40 years for the planted whips to grow to the size of some of the trees to be removed in the area of turbine 5, and testified that "you cannot create a functioning woodland in ten years", which is the time requirement for monitoring under the Protocol (although the compensation agreement is for 21 years).

[254] Given that removal of mature trees is "irreversible harm", as discussed below, the Tribunal finds that forest replanting in this case cannot be considered fully mitigable harm. Rather, it is appropriately considered as partial "compensation" for the serious harm to be occasioned.

Forest Fragmentation

[255] The Appellant submits that, while removal of 2.5 ha is already serious and irreversible harm, much more of SW-11 will be negatively impacted due to fragmentation. Ms. Zednik's evidence was that the woodland will be effectively divided into two; north and south. She notes that the Protocol only takes into account areas cleared, and submits that 2.7 ha of compensation does not compensate for dividing the significant woodland into two.

[256] Mr. Charlton, on the other hand, testified that SW-11 is already fragmented, and the additional cleared areas will not change the functions of the feature. He testified the woodland does not have "high quality" functioning interior habitat. On cross-examination, he nonetheless characterized the woodland as "relatively intact."

[257] Simply calculating the woodland to be removed for the construction of Project infrastructure does not fully capture the extent of the Project's impacts to SW-11. Although the NHA/EIS considered impacts within 120 m of Project infrastructure, those documents do not fully account for fragmentation impacts and removal of remaining interior habitat from SW-11.

[258] The Tribunal finds that it is not only relevant that 6% of the woodland will be cleared, it is an important consideration that the woodland to be removed will result in fragmentation effects beyond Project infrastructure boundaries.

[259] Fragmentation of woodlands is a very serious problem in southern Ontario. MNRF's Report on *The State of Ontario's Forests*, 2011, for example, at p. 2 (cited in Ms. Zednik's materials) states:

> The level of fragmentation of a forest (e.g., how broken up or dispersed forests are on the landscape) affects ecological processes and wildlife habitat. Fragmentation levels also affect the capacity of the forest landscape to retain species and processes usually found in those

> habitats. Forest fragments may be too small to maintain viable breeding populations of certain species.

[260] Fragmented forests are characterized as isolated and with more edge and less forest interior, leading to loss of biodiversity, increases in invasive plants, pests, and pathogens, and reduction in water quality (see Ecosystem Fragmentation, November 1, 2000, Environmental Commissioner of Ontario).

[261] Forest fragmentation is also damaging because it allows invasion into forest interior by predators and non-native plants, leading to reduced biodiversity.

[262] In this case, Dr. Kerlinger acknowledged that if one could consider any of SW-11 interior habitat from a technical perspective, the Project would all but eliminate these remaining areas.

[263] All the experts agreed that there will be an increase in "edge" habitat, at the expense of interior habitat, as a result of this Project.

[264] It is possible that beyond the life of the Project operated in accordance with the REA, the woodland compensation, if maintained, could lead to reduced fragmentation of SW-11 overall. However, while this may occur in the long-term (although there is no guarantee), the Tribunal is not satisfied that fragmentation impacts will be reduced during the life of the Project operated in accordance with the REA. To the contrary, the Tribunal finds that the Project will increase forest fragmentation of SW-11, leading to a decrease in the quality of the SW-11 that will remain after construction. This impact is in addition to and compounds the impacts of 2.5 ha of woodland removal.

Impact on Animal Habitat Including Birds

[265] The Design and Operations Report summarizes impacts on bird habitat at p. 59 as:

> Some habitat loss will occur as a result of this project, although a woodland rehabilitation plan will be implemented to offset this loss. No net effects on bird populations due to impacts of habitat loss are anticipated.

[266] Mr. Charlton testified that the Project will not eliminate any one type of habitat, but that there will be "some change" to the habitat in that some areas will be reduced and some increased. Dr. Kerlinger acknowledged that the Project would largely eliminate the remaining interior forest (i.e., 100 m from a forest edge) in SW-11, although he did not agree it was successful interior-obligate bird habitat.

[267] There is no disagreement that SW-11 supports a variety of bird habitat, although the parties disagree on whether the mix of birds should be considered a "large variety", or just a "normal number in the ORM".

[268] With respect to species listed under the *ESA*, all the parties accept that Eastern Wood-Pewees (listed as special concern under the *ESA*) have been identified in SW-11. Dr. Kerlinger testified that the woodland should not be considered habitat for the species because they "prefer" more mature and larger woodlands, and he speculated that perhaps the birds sighted in the area are not breeding "successfully". Dr. Kerlinger testified that the literature states Eastern Wood-Pewee is found in large interior forests, but acknowledged that more recently the species has been observed in smaller forests. Mr. McRae testified that, despite conventional knowledge about Eastern Wood-Pewee habitat, "the birds are telling us another story" given that he has viewed them present in the Project area annually.

[269] Given Mr. McRae's uncontested observation of Eastern Wood-Pewee in the area displaying behaviour that suggests probable breeding and the fact that the species has been observed in the woodlands in the Project area annually, the Tribunal finds that the woodland is most likely nesting habitat for Eastern Wood-Pewee. Additionally, given Dr. Kerlinger's evidence that the species prefers the interior of woodlands, the Tribunal

finds that it is likely that the elimination of remaining interior habitat could have the impact of eliminating Eastern Wood-Pewee from SW-11.

[270] The Tribunal finds, based on the evidence before it, that SW-11 is habitat for a significant number and variety of birds, including some interior obligate species such as the Eastern Wood-Pewee. Dr. Kerlinger's research relating to displacement of birds due to wind turbines relates to grassland species, and collision mortality has not been raised as an issue in this hearing. It is clear that removal of woodland habitat for any type of development will cause harm to a bird species that relies upon that woodland habitat.

[271] The NHA/EIS documents also identify potential bat and snake habitat in the Project Area, including within SW-11. Although mitigation is proposed in those documents to minimize impacts to such areas, what is clear is that there are a variety of species using the Project area and SW-11.

[272] The Tribunal finds that, whether or not the Approval Holder's experts deem the habitat provided by SW-11 to be of "high quality", SW-11 nonetheless provides habitat for a wide variety of species, including interior obligate birds.

Cumulative Impacts

[273] Mr. Williams, Ms. Stauble, Ms. Zednik and STORM all expressed the concern that permitting this Project will set a precedent, and send a signal that is directly opposite to the efforts that have been underway for many years in the ORMCP area. For example, Ms. Zednik stated in her witness statement that:

> Municipalities, conservation authorities, provincial agencies and ministries as well as individuals have been actively promoting and seeking ways to connect and restore fragmented sections of Fleetwood Creek Forest. The Approval Holder is actively seeking to undermine this incentive by further fragmenting woodland cover in the area, setting the

> stage for other developers and individuals to follow suit and also destroy and further fragment Fleetwood Creek Forest.

[274] The Tribunal agrees that, to the extent future renewable energy projects are proposed in significant woodlands on the ORM, there could be cumulative fragmentation impacts for the ORMCP area and its forest cover, resulting in the potential for cumulative effects. Although the Appellant raised the issue of woodland removal at other locations of the ORM, the Tribunal did not receive any direct evidence of other renewable energy projects proposed in significant woodlands on the ORM, or evidence of how that woodland removal may result in harm in combination with what is proposed here. As a result, the Tribunal is unable to make any additional findings on this particular issue.

[275] To conclude this section, the Tribunal finds that serious harm will be occasioned by the removal of portions of SW-11, despite the mitigation measures provided. The proposed woodland compensation will be considered further under the "irreversible harm" part of the Tribunal's analysis.

Irreversible Harm

Submissions

[276] The Appellant submits that the removal of a 100 m radius of trees around turbines 3 and 5 will cause irreversible harm to that woodland. First, the Appellant argues the woodland habitat currently in existence will be lost. The trees being planted are not of the same size, and would take many years to support the number and breadth of species currently in SW-11. The Appellant cited Mr. McRae's testimony in submitting that the species will not simply "move next door", but will likely not survive to the next breeding season. The Appellant also submits that the current mixture of species found in SW-11 is a function of its habitat mixture, and the various stages of development of its components. A regenerated habitat, it submits, would be something

different and would not comprise the same species. In addition, the Appellant submits that the decades of time required for woodland regeneration means the harm is irreversible for generations of species inhabiting the woodland, meaning the species would not be able to remain in the area.

[277] The Director submits that the test for "serious" harm is the extent of impact on the biological function of the woodland, which has not been established here. The Director submits that the test for irreversible harm cannot be simply that the replaced trees are not of the same age as those removed, and submits that a woodland can be regenerated, "with the caveat of time". The Director submits that the underlying theory is that the woodland regeneration plan ensures that any harm is not irreversible. In this regard, one must address whether the regeneration planned is proximate, and makes sense. The Director submits that the only expert who gave an opinion on the impact of removing 6% of SW-11 is Mr. Charlton. On birds, the Director submits, Mr. McRae on behalf of the Appellant only expressed concerns regarding loss of habitat and displacement, while Dr. Kerlinger and Mr. Charlton opined there would not be serious and irreversible harm to birds.

[278] The Approval Holder agrees with the Director, that requiring woodland regeneration to be exactly the same as the portion removed is not reasonable. The Approval Holder submits that the plan here is to improve the 6% of the woodland that is impacted, through the Woodland Protocol. The Director submits the Protocol includes specific direction as to species that must be planted, to provide the highest quality woodland habitat. The Approval Holder submits there is no evidence that SW-11 is habitat for any species at risk. The Approval Holder submits simply that the 6% of removed woodland will be "reversed" by the compensation woodlands.

Discussion, Analysis and Findings

[279] The Decommissioning Plan report states that further tree removal will be required to decommission the Project, although details have not been provided. Section 2.1 states that "Vegetation and trees on rights-of-way or at turbine sites may need to be cleared. As vegetation patterns on the site may change during the lifetime of the project, specific locations cannot be described at this point."

[280] The NHA/EIS recognizes that the Project will have "residual impacts" on the two main significant woodlands in the vicinity of the Project, but concludes that those impacts will no longer exist after decommissioning:

> It is anticipated that implementation of the mitigation and monitoring measures … in addition to those included in the *Construction Plan Report* (MKI, 2012) and the *Environmental Effects Monitoring Plan* within the *Design and Operations Report* (MKI, 2012), will minimize the environmental impacts on the natural environment. Minimal residual impacts are anticipated as a result of the construction, operation or decommissioning of the Settlers Landing Wind Park. [SW-10] and [SW-11] may experience some residual impacts. However, following the decommissioning of Settlers Landing Wind Park, these residual impacts are no longer anticipated.

[281] Construction of turbines 3 and 5 will remove "woodland interior" in SW-11, that is contained in the FOCM6-3 portions of SW-11, thereby removing any habitat for interior obligate species. Interior habitat, being at least 100 m from any forest edge, will not again exist until either (i) the Project is decommissioned and the woodland regenerates in the footprint of the Project infrastructure, or (ii) property adjacent to SW-11 actually becomes part of the woodland, and matures to a sufficient size and quality as the existing woodland portion to be removed. As acknowledged by Mr. Charlton, the compensation habitat will not be functioning similar to the areas of SW-11 that will be removed for the Project for approximately 30-40 years.

[282] As shown by the evidence, SW-11 is a complex functioning ecosystem consisting of a variety interactions between its trees, other plant life, birds and animals. SW-11

has taken many decades to develop and regenerate after being cleared many decades ago and planted with Scots pine to prevent further erosion of the ORM. The Tribunal has already found that the removal of portions of SW-11 constitutes serious harm.

[283] Although it remains unclear based on the evidence heard whether woodland functionality lost through woodland removal can even be replicated, assuming it even can be, any attempt to do so in this instance through mitigation or compensation under the REA will extend decades beyond the life of the Project. The question posed by s. 145.2.1 is whether the harm is "irreversible" as a result.

[284] The Tribunal finds that the answer to this question is in the affirmative: the harm that will be caused by Project operated in accordance with the REA will indeed be irreversible in consideration of both mitigation and compensation measures incorporated into the REA. The Tribunal considers these measures below.

Mitigation of Woodland Impacts

[285] The REA includes conditions to minimize impact to animal life and to the woodland during construction, operation and decommissioning of the Project. The only mitigation measures (as opposed to "compensation", dealt with below) that address the serious harm that will be occasioned to SW-11 during construction and operation are "limitation" of clearing, and erosion control measures. These mitigation measures do not prevent the vegetation clearing that the Tribunal has found creates the harm. With respect to decommissioning, some portions of the infrastructure will remain permanently within SW-11. According to the Decommissioning Plan Report, the turbine bases are to be left in the ground permanently below 1 m, and access roads could remain permanently if the landowner wishes it. These portions of the Project that may remain after decommissioning will interfere permanently with woodland regeneration.

[286] Vegetation removed for construction of the Project will remain cleared until the Project is decommissioned, which will not occur at least until the feed-in-tariff contract ("FIT Contract") for the Project expires in 20 years, or for an unknown extended period of time since the contract may be renewed from time to time. The Decommissioning Plan report, part of the REA Application documents, states:

> The FIT contract awarded to the Settlers Landing Wind Park has a term of 20 years. At the conclusion of this term, a decision will be made whether to continue operating the facility – conducting maintenance and upgrades as necessary – or to decommission the wind farm entirely.

[287] The Decommissioning Plan contemplates seeding the cleared non-agricultural areas with native grasses which could eventually, one would assume, be replaced by trees over time through natural succession. Even if trees were specifically replanted in the cleared areas within SW-11, they will take 30-40 years to grow to replace the existing woodland, after being planted at the end of the original 20 year term. It could reasonably be 50-60 years before trees grow to a replacement size in those areas as a result, or 70-80 years if the Project is extended for an additional 20 years.

[288] The word "irreversible", as it is applied in the Environment Test, has temporal components to it in this context. Dr. Kerlinger indicates in his witness statement that birds using the Project area live approximately 1 to 4 years. For many of the birds currently using SW-11 therefore, decommissioning will not even start for many generations. The Tribunal therefore finds that removal of portions of SW-11 for the Project is also irreversible in the sense that mitigation cannot address the fact that many of the species that rely upon those areas of woodland have life spans much shorter than the time that areas of SW-11 will be lost for the Project and as a result, portions of their habitat will be lost for multiple generations of the species.

[289] The Tribunal is aware of the fact that there is little judicial consideration of "irreversible harm". The Parties in this case were asked for submissions on the meaning of "irreversible harm" in the context of a significant woodland, and made no

reference to case law. The Tribunal is aware that courts have considered "irreparable harm", *inter alia* in determining interlocutory injunctions. The MNRF itself recognizes in its NHA Guide for renewable energy projects that fragmentation of forests should be avoided as a mitigation measure. This is consistent with the Court's reasoning in *Algonquin Wildlands League v. Northern Bruce Peninsula (Municipality)* (2000) 39 C.E.L.R. (N.S.) 53 (Ont. S.C.J.) ("*Algonquin Wildlands League*") where the Court recognized that permanent harm could be occasioned by the removal of established trees in the context of a party seeking an interlocutory injunction.

[290] Although the test for an interlocutory injunction is not directly on par with the Environment Test that the Tribunal must apply in this instance, and the Tribunal recognizes that the scope of harm a Court may consider in that context is of a shorter duration, the Tribunal finds Court precedent in the injunction context to be of some assistance. Courts have found that the removal of trees and the length of time it would take to replace them as meeting the irreparable component of the four-part injunction test established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311. For example, in *Algonquin Wildlands League*, *supra,* at para. 2, Lamek, J. found the "irreparable harm" part of the injunction test "easy" to meet in the context of tree removal given the length of time it takes for trees to regrow:

> Irreparable harm is easy. Absent an injunction, the clearing of the road will proceed and the trees will have gone, if not forever, at least for decades. The balance of convenience, too, favours the Applicants — as the British Columbia Court of Appeal observed in *MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C. C.A.)] (a case quite similar to the one before me) if the application for an injunction should eventually fail, the trees will still be there to be harvested.

[291] The Tribunal therefore finds that the mitigation measures in the REA are insufficient to prevent irreversible harm to SW-11. The Tribunal will now consider the impact of the compensation property outside SW-11.

Woodland Compensation

[292] As noted above, the Tribunal considers “mitigation measures”, which are designed to prevent harm, as being different from “compensation”, which is designed to compensate for harm that has been occasioned. Nonetheless, the Woodland Compensation Protocol forms part of the REA and must be considered by the Tribunal. The fact that the compensation property that has been found by the Approval Holder is adjacent to SW-11 also makes it more clearly relevant to an evaluation of serious and irreversible harm to the woodland in this particular case.

[293] The Protocol provides that 2.7 ha of compensation woodland be planted, preferably adjacent to SW-11 but if that is not possible, it should be adjacent to another significant woodland.

[294] Under these requirements, the Approval Holder could have complied with the Protocol by finding compensation land outside of the ORMCP area entirely; or could have found 2.7 ha of land in another Ecoregion. In both of those examples, the Project operated in accordance with the REA would have caused harm through the loss of woodland to the ORMCP area, or to the Ecoregion, respectively.

[295] As it stands, however, the Approval Holder found compensation property within the ORMCP area and adjacent to SW-11, and has signed a 21-year lease agreement. The 2.7 ha site is in fact surrounded on three sides by SW-11, which would appear to be an ideal location for compensation for SW-11, in the long-term.

[296] Mr. McRae acknowledged that the “general idea” of enlarging SW-11 is a good one. However, he raised some concerns regarding future biodiversity in the area slated for tree planting, due to its poor soil quality and hilly terrain, and suggested alternate locations adjacent to SW-11 that he believed would be more successful. Mr. McRae

also had concerns that the replanting would in fact remove current habitat of grassland bird species. All of Mr. McRae's concerns were contested by the Approval Holder.

[297] Mr. Charlton also testified that the whips and seedlings planted in the compensation forest will take 30 to 40 years, or "probably longer", to grow to the size of those removed for turbine 5.

[298] The undisputed evidence at the hearing was that trees planted in the compensation area, assuming they grow successfully, will take approximately 30-40 years to establish to the degree that the larger ones to be removed currently exist. In considering the Project operated in accordance with the REA under s. 145.2.1, the Tribunal finds there to be a disconnect between the timelines of Project approval and the compensation to be provided and that the lag time for compensatory woodlands results in irreversible harm.

[299] In the context of this appeal, the Tribunal, again, notes that neither mitigation, nor compensation in the lifetime of the Project operated in accordance with the REA will address the harm occasioned by the removal of parts of SW-11. The Tribunal therefore finds that the serious harm is irreversible. Further submissions on mitigation and compensation can be considered in the next phase of this proceeding, insofar as they are relevant to a remedy under s. 145.2.1(4) of the *EPA*.

[300] To conclude, the Tribunal finds that the harm to SW-11 is both serious and irreversible and the Tribunal finds that the appeal should be allowed in part.

[301] As outlined in the Tribunal's order of December 4, 2015, the deadline for the Tribunal's disposition of this appeal is now January 15, 2016. A TCC is scheduled for December 14, 2015 to discuss procedural steps for the parties to make submissions in relation to the appropriate remedy under s. 145.2.1(4) of the *EPA*.

ORDER

[302] The Tribunal orders that the appeal is allowed in part.

Appeal Allowed in Part

"Justin Duncan"

JUSTIN DUNCAN
MEMBER

"Heather I. Gibbs"

HEATHER I. GIBBS
MEMBER

Appendix 1 - Summary of the Anticipated Impacts to SW-11

Appendix 1

Summary of the Anticipated Impacts to SW-11
Excerpt from Environmental Impact Study, Table 4-1, pages 27-29:

WO11 Woodland	Native diversity dominance	0 m from Project Road to T2, T3 and	**Construction & Decommissioning** of project road, T2, T3 and T5 and		Woodland areas cleared for road construction will be limited to and demarcated with siltation fencing 5m either side of the centre line of the road as depicted in **Figure 1-3**.	Ensure no changes to function on	Some vegetative cover will

Feature and ID	Characteristics and Function	Distance to Nearest Project Component (< 120 m)	Potential Negative Effects to Feature		Mitigation Measures	Performance Objectives	Expected Residual Effects
			Direct	Indirect			
	Tree cover > 4 ha in Country-side Areas of ORMCP Contains BMR02(c)	T5; 0 m, 0 m and 0 m to T3 and T5 turbine, laydown and blades wept area, respectively; 60 m, 35 m and 14 m to T2 turbine, laydown and blades wept area, respectively; 0 m to underground electrical cabling (**Figure 1-3**)	underground electrical cabling Encroachment onto feature due to placement of two turbines (T3 and T5) including the foundation (306 m^2), permanent project roads (3180 m^2), underground electrical cabling (1187 m^2), temporary turning radii (1043 m^2) and rotor assembly area and crane pad (13225 m^2). Potential for small edge effect (colonization on feature borders, pollution, erosion, loss of habitat) given minor encroachment onto feature. Impacts to wildlife habitat will be minimal. Improper storage or disposal of oils, gasoline, grease or other materials used in construction vehicles, turbines or maintenance vehicles may result in spills or leaks, contaminating soils or water. Potential for erosion and/or sedimentation but these impacts	Indirect effects from construction (e.g., noise, vehicle movement) could temporarily disturb wildlife this habitat; however any disturbance is anticipated to be short-term. Dust generation will be short-term and highly localized.	Woodland areas cleared for turbine construction (turbine pad and laydown area) will be limited to and demarcated with siltation fencing, directly adjacent to the areas cleared as described above in **Table 2-1** Description of Construction Activities and Approximate Timing and depicted in **Figure 1-3**. Clearing of woodland will be kept to a minimum. As 1.8 ha of woodland will be removed, a woodland rehabilitation plan will be implemented within one year of construction, where the proponent will plant a total of 2.7 ha of open agricultural land adjacent to WO10 (see **Appendix D** for more information). All workers will be notified of woodland significance. Daily visual monitoring of work area to ensure compliance (construction only occurring within demarcated area). Revegetation of temporarily cleared areas (turning radius) with native plants and reseeding as soon as possible in growing season. Use of erosion and sedimentation control measures such as silt fences or erosion control blankets will be applied. Erosion and sediment control measures will be inspected daily to ensure they are functioning and are maintained as required. If erosion and sediment control measures are not functioning properly, alternative measures will be implemented and prioritized above other construction activities. Implement dust suppression when needed such as wetting gravel or topsoil piles, and limiting vehicle speeds on gravel or dirt roads.	woodland. Ensure proper handling, storage of potential contaminants to soils and water. Ensure minimal residual disturbance to wildlife using habitat.	be lost. Potential disturbance effect to wildlife.

Feature and ID	Characteristics and Function	Distance to Nearest Project Component (< 120 m)	Potential Negative Effects to Feature		Mitigation Measures	Performance Objectives	Expected Residual Effects
			Direct	Indirect			
			will be short term and highly localized. Changes in soil moisture and structure (compaction), however should be highly localized and previously compacted from prior road construction – negligible effect.		Ensure all equipment used on site is in good working order. Ensure safe storage of petroleum, oils and lubricants. Storage and disposal of petroleum, oil and lubricants (POL), and equipment fuelling is not allowed within 120m of any significant natural feature, watercourse or water body. Where possible, vehicle maintenance will be performed off site, at a nearby commercial fuelling station, in order to minimize the amount of lubricants and oils stored on site. Maintain an emergency spill kit on site during all maintenance activities. Remediate spill areas as needed.		
			Operation – use of project road, operation of T2, T3 and T5 No direct impacts from operation.	Indirect effects from operation (i.e. noise, vehicle movement) could disturb wildlife living in this habitat (noise levels will be monitored for longevity of project to ensure noise does not exceed limits).	None required if noise levels do not exceed limits. Use of project road will be restricted for maintenance access only when required.		

1908 CarswellBC 3
British Columbia Chambers

Victoria Municipal Voters' Lists, Re

1908 CarswellBC 3, 7 W.L.R. 372

Re Victoria Municipal Voters' Lists

Clement, J.

Judgment: January 14, 1908.

Counsel: *Higgins*, for the applicants.
W.J. Taylor, K.C., for the voters attacked.

Subject: Public
Headnote
Elections --- Voters — Right to vote — In municipal elections — Proprietors and taxpayers
Municipal Elections — Voters' Lists — Qualification of Voters — "Householders" — Construction of Statute — Payment of Taxes — "Exempt" — Road Tax — Man over 50 — Civil Servant — Pensioner — Payment of Water Rates.

Applications to strike from the voters' lists for the city of Victoria the names of 5 persons.

***Clement, J.*:**

1 Applications to strike from the voters' list for the city of Victoria the names of 5 persons, and the question as to all is: Are they duly qualified voters under the statute, 1902, ch. 20, sec. 2?

2 As to all but M. the question is within a still narrower compass: Are they "householders" within the statute, 1906, ch. 18, sec. 2? That section defines a householder thus: "Householder shall mean and include any person of the full age of 21 years who occupies a dwelling, tenement, hotel, or boarding house, and who shall, unless exempt by statute or municipal by-law, have paid directly to the municipality rates, taxes, or fees of not less than $2 for the current year."

3 Admittedly all 4 (leaving M. to one side for the moment) fall within the first branch of this definition; but it is also admitted that none of them has paid during 1907 any rate, tax, or fee of any description to the city. It is, however, contended on their behalf that they fall within the phrase "exempt by statute or municipal by-law," and so are entitled to vote, notwithstanding the fact that they have contributed nothing to the civic treasury. I should add that the question in all these cases has reference to the "road tax" which by the Municipal Clauses Act, 1906, sec. 50, sub-sec. 117, the council of the city is empowered to impose (and has by by-law imposed) on all residents of the city between the ages of 21 and 50.

1. W. B. is a man over 50, and claims to be "exempt by statute." Counsel for the applicants contend that the word "exempt" can apply only to a person on whom a tax or impost is first or prima facie laid, and then by a clause of exception removed or remitted; and that, as under sub-sec. 117 no by-law can be passed imposing what I may call an initial or prima facie liability on a man over 50, his position is not that of an "exempt" strictly speaking. This strikes me as a piece of over-refined pedantry. "Exempt from," in the ordinary idiomatic English of to-day, means "not subject to," and, as the exemption in this case is statutory, I think W. B. entitled to remain on the list of voters.

2. E. A.'s position is the same as W. B.'s, and his name too must remain on the list.

3. J. G. B. is an official of the Dominion government. That does not make him "exempt by statute," and no municipal by-law is set up as exempting him. If he be exempt from municipal taxation, imposed under authority of a provincial

Act, it is not by virtue of any statutory provision, but as a matter of public policy under our federal system: see Leprohon v. Ottawa, 2 A. R. 522, an authority very much weakened but not entirely overruled by Webb v. Outram, 76 L. J. P. C. 25. See also Fillimore v. Colburn, 28 N. S. R. 292. J. G. B.'s name therefore must be struck off.

4. J. W. M. is a pensioner of the Imperial or Dominion government. As I was not referred to, nor do I know of, any statute or by-law under which, for that or any other reason, he is exempt, his name must be struck off.

5. F. G. M. is in a class by himself. He has paid water rates to the extent of $2 or more, but has not paid his road tax. It is contended that in order to qualify as a voter under the statute, 1902, ch. 20, sec. 2, he should have paid all taxes, other than land taxes, due by him to the city. It is admitted that the Chief Justice of this Court about this time last year decided in favour of the right to vote in cases such as this, and I do not think I should do otherwise than follow that decision, in favorem vitæ. F. G. M.'s name will therefore remain on the list.

LPAT File No. PL190022

NICHOLYN FARMS INC., EDWARD KRAJCIR, and FRIENDS OF SIMCOE FORESTS INC. Appellants	**and**	**MINISTRY OF MUNICIPAL AFFAIRS AND HOUSING and THE COUNTY OF SIMCOE** Respondents

LOCAL PLANNING APPEAL TRIBUNAL

PROCEEDING COMMENCED AT TORONTO

CASE SYNOPSIS

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