Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

SEP 02 1997

97 245 093

T-1830-96
T-2481-96
T-2865-96
T-2866-96

Between:

COMMUNITY BEFORE CARS COALITION,

Applicant,

- and -

NATIONAL CAPITAL COMMISSION,

Respondent.

REASONS FOR ORDER

Muldoon, J.

This is an application for judicial review of four decisions made by the National Capital Commission (NCC) on September 3, 1996 and October 15, 1996. The subject of these decisions is a 70 year old 1142 meter long concrete and steel structure which spans the Ottawa River, commonly known as the Champlain bridge. The impugned decisions all relate to the NCC's proposed widening of the bridge from two to three lanes. In order to understand better what the four applications in T-1830-96, T-2481-96, T-2865-96 and T-2866-96 are all about, it is worth reciting the events which led to the proceedings before this Court in some detail.

The applicant is a coalition of community associations in western Ottawa who oppose the NCC's plan to widen the bridge

The respondent NCC is a federal Crown Corporation incorporated pursuant to the ***National Capital Act***, R.S.C. 1985, Chap. N-4. It owns and operates the Champlain bridge, which is the most western of the five bridges

spanning the Ottawa River as it runs through Ottawa and Aylmer-Hull. The Ottawa River, of course, forms the boundary between Quebec and Ontario. From the Quebec side, one approaches the bridge from Highway 148 and other arteries through the Lucerne/Brunet intersection. In Ontario, the approach is through the intersection of the Ottawa River Parkway and Island Park Drive. The NCC owns both of these roadways. Built between 1924 and 1928, the bridge's 12.5 meter width has two vehicle lanes and two sidewalks. Like many structures built after the collapse of the Roman empire, it has needed repair. The bridge has undergone two major rehabilitations: a deck replacement in 1969 and abutment repairs and expansion joint replacement in 1978 (respondent's record (RR), vol. I-A, tab 1: pp. 5 and 7; vol. 1-B, tab 1-G: p. 471).

The NCC retained Fenco Engineers Inc. (Fenco) to investigate the bridge. This was done between 1988 and 1989. Fenco found significant structural deterioration in a number of places, and made several recommendations: a seven year annual inspection and repair program, the replacement of the deck and major rehabilitation of the steel superstructure and substructure in 1997, and replacing the bridge altogether in 20 years. The bridge was restricted to use by cars, panel vans and small buses, and in 1992 a ten-tonne limit was imposed (RR, vol. I-A, tab 1: p. 13; tab 1-C: pp. 296-298; vol. II-A, tab 1-Q: pp. 997). The short term repair program started in 1991 and has been carried out to the annual cost of $250,000 per annum (RR, vol. I-A, tab. 1: p. 15). Full size public buses may not travel on the bridge, and use by snow removal and emergency vehicles is minimized (RR, vol. I-A, tab 1: p. 13; vol. II, tab 1-Q, p. 1001). The rationale for bridge rehabilitation is summarized in the ***Champlain Bridge Reconstruction Environmental Assessment Study***, "Rationale for the Project" at vol. I-B, tab 1-K, pp. 543 and 545 of the respondent's record, as follows:

> The structural condition of the Champlain Bridge is of great concern based on its current condition and the need to maintain and effectively operate the crossing without jeopardizing public safety.
>
> ***

> the current structural condition of the Champlain Bridge is such that remedial action is required as the useful service life of the deck has been reached and further deterioration would seriously endanger its safe operation.

In order to find a solution to the deteriorating bridge problem, the NCC studied various options on its own and as a member of a Joint Administrative Committee on Planning and Transportation (JACPAT), which was an intergovernmental committee with NCC, federal, provincial and municipal representation. The JACPAT conducted a two-phase study of the interprovincial bridge problem. Phase one was completed in 1989: phase two was completed in 1994. At the end of the first phase of the report, the JACPAT study found that if a new bridge were built at Britannia-Deschênes, there would be no need to widen the Champlain bridge. If a new bridge were not constructed, the JACPAT suggested that the Champlain bridge could be widened or twinned, *i.e.* another two-lane bridge beside the existing one. Only the twinning option was recommended for further study (RR, vol. I-A, tab 1: pp. 9, 11 and 13; applicant's record (AR), vol. I, tab 3: p. 34; tab 6: pp. 74-78; vol. II, tab 21, pp. 1098-99). In November 1994, the final report of the JACPAT found that if a new bridge is built, it should be at the Kettle Island Corridor and not at the Britannia-Deschênes or Champlain sites. The twinning option for the Champlain bridge was also rejected. In essence, the JACPAT posited that a new bridge at the Kettle Island Corridor should not be built until 2011 at the earliest. The "do nothing" option was also rejected by the JACPAT. With respect to the existing bridges, their use would be maximized and an effort would be made to promote car pooling (with special "high occupancy vehicle or HOV lanes), use of public transport, walking and cycling, to name but a few of the recommended actions (RR, vol. I-A, tab 1: p. 9 and 11; tab 1-B: pp. 265-66; 268-269).

Before the final JACPAT report was released, the NCC continued to explore rehabilitation options for the Champlain bridge. Two studies were conducted by the NCC, the ***Champlain Bridge Widening Traffic Analysis*** (completed in December, 1992) and the ***Champlain Bridge Widening Traffic***

Analysis Parkdale Alternative and a Balanced North-South Traffic Flow Scenario (March 1993). The 1992 study found that if the bridge were widened to three lanes, major modifications to the intersection at Island Park Drive/Ottawa River Parkway and possibly other modifications along both arteries would be necessary to accommodate any increase in traffic flow (AR, vol. III-A, tab 31: p. 1206; vol. III-A, tab 31: pp. 1211-12). The 1993 study examined the feasibility of modifying Parkdale Avenue to absorb increased traffic levels so as to keep the levels on Island Park Drive at or below then-existing levels, if the bridge were widened. (AR, vol.III-A, tab 32: pp. 1253, 1266-76).

In 1994, Fenco MacLaren Inc. was retained by the NCC to study the feasibility of the functional design requirements for retrofitting and widening the Champlain bridge. This study (the ***Champlain Bridge Functional Study***) examined two and three lanes options and determined that both are structurally feasible. Fenco recommended an environmental evaluation of a three-lane alternative (RR, vol. I-B, tab 1-D: pp. 401-02). The NCC staff prepared draft terms of reference for an environmental study for all reasonable rehabilitation/reconstruction options in November of 1994. At that time the NCC was the "initiating department" under the ***Environmental Assessment and Review Process Guidelines Order***, SOR/84-476 (the EARPGO). The study was to be made in accordance with the EARPGO and the ***Canadian Environmental Assessment Act***, R.S.C. 1985, Chap. C-15, (CEAA), which replaced the EARPGO in January, 1995. (RR, vol I-A, tab 1: p. 17, 23 and 25). Whether or not the NCC is subject to the CEAA is one of the collateral issues in this litigation. The draft terms of reference were circulated to various groups, including the applicant, and to different agencies and government officials (RR, vol. I-A, tab 1: p. 17; vol. I-B, tab 1-E: pp. 458-59).

The final terms of reference were finalized by the NCC staff after receiving comments on the draft terms in January, 1995 (RR, vol 1-A, tab 1: p.

17; vol. 1-B, tab 1-G: pp. 469-491). The objective of the study is found at vol. I-B, tab 1-G: p. 473 of the respondent's record:

> The study is being initiated to help determine the preferred option for the Champlain bridge that will ensure effective, safe, and efficient function. The study shall take into consideration traffic congestion and the deteriorating state of the Bridge.
>
> Federal environmental assessment guidelines and legislation require a comprehensive planning process that considers all reasonable options to the prospective rehabilitation and reconstruction of the Champlain Bridge according to economic, social, transportation, engineering, and environmental factors.

The preliminary list of options which the study was to canvass included partial or complete closure of the bridge, two-lane options to maintain the current level of traffic or to allow increased traffic flow and a three-lane option with a reversible lane which would accommodate HOVs and public transit buses (RR, vol. I-B, tab 1-G: p. 477). The terms of reference show that the study would examine a plethora of alternatives (RR, vol. I-B, tab 1-G: p. 475). Public consultation and participation were provided for in the terms of reference. A public advisory committee, cited hereafter by its endearing acronym PAC, was to be "established by the consultant to provide public opinion and advice to the consultants during the course of the study". It was to have "balanced representation from community, business, transportation, and environmental groups with a direct affiliation to the study area". The terms of reference emphasized that "Public participation and consultation is [*sic*] intended to be a leading component of this study." (RR, vol. I-B, tab 1-G: pp. 485 and 489). In sum, the study would fulfil the NCC's EARPGO requirements and assist the NCC in its quest for the preferred option.

McCormick Rankin and Associates Ltd was the consultant chosen by the NCC staff according to published criteria, and in April 1995 struck a contract with the NCC to do the assessment. Senior management, including the NCC chairman Mr. Marcel Beaudry, were not involved in the selection process

(RR, vol. I-A, tab 1: pp. 19, 21, and 23; vol. IV-A, tab 2: p. 2273; tab 3: p. 2439).

Mr. André Bonin, the vice-president for the environmental land management branch of the NCC, in his affidavit sworn January 17, 1996, asserts that "the NCC was not, nor is it currently, subject to CEAA" as it was to EARPGO. Now, that is potentially alarming for the future. Parliament's, or the government's, policy reasons for immunizing NCC from the salutary restraints and the environmental protection strictures of CEAA are not known to this Court, but would be apt for study by a joint committee of Parliament. For the present, however, Mr. Bonin swears, in paragraph 31, that despite such immunization, the NCC "in its terms of reference * * * directed that the Study was to have regard for the requirements of both regimes. * * * The NCC called for compliance with both regime because other federal bodies that would likely become involved in the process after January 1995 would be governed by CEAA." In that regard, one wonders why NCC is not so governed - permanently. (RR. vol. 1-A, tab 1, pp. 23 & 27 [out of sequence]).

The terms of reference show that the study was to proceed in two phases: "The first phase will define ***need and justification*** for the reconstruction in the context of interprovincial travel needs *** The second phase of this initiative will ***appraise alternative ways*** of resolving the needs and issues identified in Phase One and will ***recommend the preferred option****" [emphasis in original text] (AR, vol. I-B, tab 1-G: pp. 479 and 481).

Along with consulting existing studies (AR, vol. II-B, tab 1-Q: p. 999), one of the first steps the consultant took was to make a public consultation plan, which spawned the PAC. The plan makes it clear that public advisory participation was to be taken seriously. The following excerpt concerning the plan's objectives amply illustrates this (found at vol. I-B, tab 1-L: pp. 565 and 567):

It is critical for this study to document public concern and opinion on the future options for the Champlain Bridge, which can only be done through an effective consultation process. The study is also committed to effective public consultation as part of the NCC environmental assessment practice for most undertakings of this nature, recognizing that public consultation is a key element of environmental assessment. Upon these premises the following objectives are identified for the public consultation process.

- to encourage information exchange and dialogue, and to listen and report on the various community issues and concerns related to the Champlain Bridge.

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- to involve the public early into the study process, ultimately leading to a recommendation for the selection of a preferred option.

- to develop and establish a consultation and study evaluation process together with the public that is transparent and fairly and accurately represents the relevant interests of residents in the local Ontario and Quebec communities.

- to identify and recognize the relevant issues and legitimate interests of various community, business, recreation and environmental groups, and encourage a full and candid public discussion of the community issues related to the bridge.

- to create a forum which will encourage maximum public participation, and open discussion and feedback on the issues, concerns and options associated with the bridge.

- to organize a Public Advisory Committee (PAC), and in turn, provide an opportunity for the public to meaningfully participate in the consultation and discussion of future options and recommendations.

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All the above is good in a democratic society, but inevitably somewhat naïve, for one cannot assume that the public is monolithicly unanimous. There was no voting to resolve differences of view.

Six PAC meetings were held during the course of the study (twice the number contemplated in the terms of reference). Four public consultation sessions, the requisite number originally being 2, were also held (RR, vol. I-A, tab 1: pp. 35, 37 and 41, vol. I-B, tab 1-L: pp. 567-573; tab 1-G: pp. 485 and 487; vol. II-B, tab 1-Q: pp. 1004-1011; vol. IV-A, tab 3: p. 2441).

In addition to the PAC, the TAC (technical advisory committee) was conceived. Representatives of all levels of government and regulatory agencies were involved. The TAC was to provide technical guidance and advice.

The TAC was convened five times during the study (RR, vol. I-B, tab 1-G: p. 485; vol. II-B, tab 1-Q: p. 11-12).

In terms of bridge options, the consultant initially identified 19 rehabilitation/reconstruction options. After review by the PAC and TAC, the list was further pared down to eight, which were presented to the public at the first public consultation session in January, 1996 (RR, vol.I-A, tab 1: pp. 33 and 35; vol. II-B, tab 1-Q: pp. 1016-1020). What was presented to the public were variations on two-lane (maximum width 12.75 meters) and three-lane (maximum width 18.75 meters) bridge options. Some "sub-options" included 0.5 meter offsets for separating motorists from cyclists and pedestrians and modifications to the north and south approaches (AR, vol. I-B, tab 1-N: p. 619 and 631); vol. II-B, tab 1-Q: pp. 1022-1039).

Public feedback identified three major concerns: more than one lane should be maintained during construction, the service life of the bridge should be greater than 20 years, and that the bridge options should include both the initial cost or the capital cost of reconstructing the bridge and life-cycle costs, which include initial construction, maintenance and replacement costs at the end of the bridge's service life (RR, vol. I-A, tab 1: p. 39; vol. II-A, tab 1-O: p. 59; vol. IV-A, tab 2: p. 2273). The result was that the NCC instructed the consultant in March 1996 to reconsider reconstruction alternatives and identify other two and three-lane options which would address these concerns. Further, the NCC advised the consultant to estimate costs on a "life-cycle" basis (AR, vol. 1-A, tab. 1: p. 39; R.R., vol. II-A, tab 1-O: p. 659; vol. II-B, tab 1-Q: p. 1010).

With these instructions in mind, the consultant made a subsidiary study called the ***Champlain Bridge Reconstruction Option Reassessment*** (the "April report"), completed in April, 1996. It identified 11 options for further analysis. There were five two-lane and six three-lane options (RR, vol. II-A, tab 1-O: p. 659; vol II-B, tab 1-Q: pp. 1035 and 1063). The two-lane options were

12.75 meters wide and had no offsets. The three-lane options were between 16.25 and 18.75 meters wide. Some of the options had offsets, others did not, and the widest option had four offsets a half meter wide with a 2 meter sidewalk (RR, vol. I-A tab 1: p. 39; vol. I-B, tab 1-N: pp. 619, 621 and 631). Offsets and 2 meter wide sidewalks are recommended options under the Ontario Highway Bridge Design Code (RR, vol. II-B, tab 1-Q: p. 1022, 1054 and 1253; vol. III-A, tab 1-Y: pp. 1707-08). In addition to bridge reconstruction options, modification alternatives for the Island Park Drive intersection and for improving access to the Ottawa River Parkway were considered (RR, vol. I-A, tab 1: pp. 47 and 49; vol. II-B, tab 1-Q: pp. 1025-1035; pp. 1076-1077). All of these options were going to be the subject of further consideration by the consultant (RR, vol. II-B: pp. 1040-1070)

The determination of the factors which the study would utilize was "based on the technical understanding of the alternatives as well as on comments from the PAC, TAC and public" (RR, vol. II-B, tab 1-Q: p. 1040). The initial draft list of factors was "continually refined to reflect the comments of the various study participants as the understanding of the effects of the alternatives evolved during the course of the study" (RR, vol. II-B, tab 1-Q: p. 1012). This culminated in the list of factors used for the consultant's final report of June 21, 1996, the ***Champlain Bridge Reconstruction Environmental Study***. The four main factors were i) natural environment, ii) social environment, iii) transportation, and iv) cost. All of the bridge alternatives were assessed in accordance with these factors (RR, vol. II-B, tab 1-Q: pp. 1040-1070). Prior to the release of its final report, the consultant summarized its analysis in its ***Analysis of Alternatives*** which was given to the PAC (May 1, 1996) and TAC (the day following) for review and comment (AR, vol. I, tab 11; vol. II-A, tab 14: pp. 491-538); RR, vol. II- B, tab 1-Q: pp. 1171-1216; 1257-1260).

The method for analyzing the factors which was ultimately used was the comparison/elimination approach. It is a satisfactory method and operates

by identifying the best of each discrete type of option (two-lane, three-lane, approach consideration), and then ranking the options (RR, vol. I-A, tab 1: p. 43; vol IV-B, tab 53: pp. 1752-1755; vol. IV-B, tab 54: pp. 1899-1901). That much is clear. Whether a so-called "weighting" method was initially promised by the respondent will be determined below.

The consultant's preliminary findings were presented to the PAC and the TAC on May 21, 1996, and to the general public at a public consultation session on May 28-29, 1996. Public comments from this session are found in Appendix E, "Report on May 1996 Public Consultation Sessions" to the ***Champlain Bridge Reconstruction Environmental Study*** ("June report") given to the NCC staff on June 21, 1996 (RR, vol. II-B, tab 1-Q: pp. 987 and 1323).

The consultant's "preferred" two-lane options were "1.2.3." and "2.2". The 1.2.3 option included deck replacement with future strengthening and recoating of the existing superstructure. It would have a service life of 40 years. The 2.2 option had deck and concrete superstructure replacement. As well, a temporary bridge would be required during reconstruction to maintain 2 traffic lanes (at a six million dollar cost) and would have a service life of 80 years. The best three-lane option was "3.2.1.". It required deck and concrete structure replacement with pier widening. It would have a service life of 80 years (RR, vol. II-A, tab 1-O: pp. 659-700; vol. II-B, tab 1-Q: pp. 1064, 1066 and 1071). Offsets were not part of the consultant's recommendation.

With respect to intersection modification, the consultant found that no intersection modification should be made at the Island Park Drive intersection because intersection modification had an unacceptable social cost (RR, vol. II-B, tab 1-Q: pp. 1085-1090). With this in mind, all three options were examined without the sub-option of intersection modification. All three options would have 3.5 meter traffic lanes, a 1.5 meter sidewalk, 0.625 meter railing curbs and no offsets. The cost comparison was based on a 12.75 meter wide two-lane bridge

and a 16.25 meter-wide three-lane bridge and had a six percent discount rate (RR, vol. III-A, tab 1-Y: pp. 1695-1696).

When regard was had to the four assessment factors, the two-lane option was slightly preferred in terms of natural environment and in costs. The three-lane was preferred with respect to the transportation factor (not because more vehicles could cross the bridge but as it could allow offsets) (RR, vol. II-B, tab 1-Q: pp. 1064 and 1066).

The germane excerpts of the consultant's recommendation read thus (RR, vol. II-B, tab 1-Q: pp. 1105-06):

> Therefore, it is recommended that two lanes of traffic be operated on the Champlain Bridge with intersection improvements at Highway 148 and Lucerne Boulevard and with no intersection modification at Island Park Drive. In addition, the bridge should be reconstructed with a pedestrian sidewalk and two 1.5 m cycling lanes, one in each direction.
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> ***
>
> Beyond the actual limits of the Island Park Drive/Ottawa River Parkway intersection it is anticipated that minor improvements could be made by extending the free flow right turn from the Ottawa-River Parkway to the bridge to create a longer merge lane. This would allow vehicles to merge at a higher speed and help to alleviate the afternoon peak period queuing on both the Ottawa River Parkway and Island Park Drive.
>
> The analysis and evaluation of the various options which would provide additional roadway links to the Ottawa River Parkway resulted in the recommendation that a direct access to Tunney's Pasture be constructed.
>
> Throughout the analysis and evaluation of the various bridge construction methods, two two-lane construction methods were carried forward. The first option, 1.2.3 (i.e. deck replacement with future strengthening and recoating) had a lower capital and lifecycle cost associate with it but a higher potential for cost increases or early structure replacement. The second option 2.2 (i.e. concrete superstructure replacement) had a higher capital and lifecycle cost but a lower potential for cost increases or early structure replacement. The second option (2.2) has costs that are very similar to the three-lane bridge construction option preferred (3.2 1). The addition of a third lane in the future is estimated to cost $12 million (1996). Depending on the bridge construction method chosen, the bridge has a potential 80 year lifespan before requiring complete replacement. Therefore, consideration should be given to constructing the bridge structure wide enough at this point of reconstruction so that it would only require surface modifications to operate as three lanes in the future (two lanes of mixed flow traffic and one HOV lane) should there be changes in land use or the transportation network.

After receiving the consultant's recommendation flowing from the environmental assessment, the NCC prepared their own staff report. (RR, vol. I, tab 1: pp. 51 and 53). The staff 's recommendation (and reasons) is found at vol. III-A, tab 1-R: pp. 1588-89 of the respondent's record:

> 4.0 Conclusions
>
> Whereas the Champlain Bridge Reconstruction Environmental Study Report indicates a slight difference in ranking between the 2-lane and 3-lane options without modification to the Island Park Drive-Ottawa River Parkway intersection,
>
> Whereas the impacts of either the 2-lane or 3-lane options without modification to the Island Park Drive-Ottawa river Parkway intersection on the natural and social environments are insignificant and mitigable;
>
> Whereas the 2 lane bridge options 1.2.3., ie. deck replacement [*sic*] with future strengthening and recoating and the 2 lane Option 2.2, i.e. concrete superstcuture [*sic*] replacement with temporary bridge during construction, were ranked equal.
>
> Whereas the Champlain Bridge Reconstruction Environmental Study Report findings indicate very slight cost differences between the 2-lane (2.2) option and 3-lane (3.2.1.) option with no modification to the Island Park Drive-Ottawa River Parkway intersection ($0.3 million; [*sic*]
>
> Whereas the cost of adding a third lane in the future is substantial ($12.6 million) when compared with the cost of widening the Bridge now to accommodate three lanes ($0.3 million);
>
> Whereas the 3-lane option (3.2.1) without modification to the Island Park Drive-Ottawa River Parkway intersection would result in improved traffic level of service in the evening peak direction;
>
> Whereas the Champlain Bridge will continue to be the unique interprovincial link between Aylmer and Ottawa, for the foreseeable future;
>
> It is concluded by staff that reconstruction of the Champlain Bridge as a 3-lane facility now is workable, cost-effective, and fiscally responsible.
>
> 4.1 Recommendations
>
> It is recommended that the Commission retain as the proposal for reconstruction of the Champlain Bridge the following -
>
> 1. Replacement of the exsiting [*sic*] deck and superstructure as a three lane facility with a lane reserved for high occupancy vehicles (HOV) in the peak direction, a 2.0 m pedestrian sidewalk and two 1.5 m cycling lanes with a 0.5 m offset on both sides of the cycle lanes according to present OHBDC bridge code standards;
>
> 2. Modifications to Highway 148 and Lucerne-Brunet intersections, and no modifications to the Island Park Drive-Ottawa River Parkway intersection;
>
> 3. Provision of a new access to Tunney's Pasture from the Ottawa River Parkway to enhance

transit services and to reduce traffic along Island Park Drive and Parkdale Avenue.

4. Extension of the northbound access lane from the Ottawa River Parkway to the Bridge to facilitate merging of traffic and to reduce traffic congestion in the evening peak direction.

5. Considering the primary roles of the Champlain Bridge and Island Park Drive as vital links in the total parkway system, continued prohibition of commercial vehicles from the Champlain Bridge and Island Park Drive.

NEXT STEPS

Following is a summary of the next steps leading to a decision by the Commission according to the federal Environmental Assessment and Review Guidelines Order.

1. The proposal retained by the Commission would be made public with all supporting technical documentation consisting of the Commission Staff report and consultant reports;

2. The public would be provided sixty (60) days to review the proposal retained by the Commission and all supporting technical documentation;

3. Commission staff would consult with relevant federal departments to complete environmental assessment processes for the proposal retained by the Commission in accordance with requirements of the Environmental Assessment and Review Process Guidelines Order and the Canadian Environmental Assessment Act.

The above-quoted text reveals that the NCC staff adopted most of the consultant's recommendations. One point of disagreement which the NCC staff had with the consultant is found in the sixth conclusion reproduced above: "the 3-lane option (3.2.1) without modification to the Island Park Drive-Ottawa River Parkway intersection would result in improved traffic level of service in the evening peak direction". The reason for this is that the NCC staff concluded that the potential increased capacity afforded by a three-lane bridge could be realized in the evening with the peak of northbound traffic without any modification to the Island Park Drive intersection because the Lucerne/Brunet intersection could compensate as it has the capacity to accommodate more traffic (RR, vol. I-A, tab 1: p. 59; vol. III-A, tab 1-R: p. 1587). Further, the NCC staff surmised that the increased flexibility regarding HOV and reversible lanes which could exist if the three-lane

option was chosen was not adequately recognized by the consultant (RR, vol. I-A, tab 1: p. 61). The bridge recommended by the staff was 18.75 meters in width.

On June 28, 1996, the NCC commissioners met and discussed, among other things, the proposal. The minutes (at RR, vol. III-A, tab 1-U: pp. 1646-47) disclose that prior to the vote, the Chairperson Mr. Beaudry:

> indicated that he had informed Mr. Wilson, the Ethics Counsellor, of the facts that he has an interest in certain properties in the Outaouais, particularly in Hull and Aylmer. They are not, however, immediately adjacent to the Champlain Bridge.
>
> Mr. Wilson wrote back saying that he was of the opinion that the Chairperson did not have a conflict of interest. However, he agreed that many would consider this situation as an apparentconflict [*sic*] and that, under the circumstances, it would be preferable for Mr. Beaudry and the NCC that he not participate in the discussions and in the decision regarding the future of the Champlain bridge.
>
> The Chairperson then left the Boardroom.

By a six-four majority, the NCC commissioners adopted the staff recommendation as the NCC's "intent of decision" (RR, vol. III-A, tab 1-U: pp. 1651 and 1653). The intent of decision was released to the public on June 28, 1996, and the public was given 60 days to comment. The documents, including the staff report, were made available to the general public on July 8, 1996.

The completion of an environmental assessment of the proposal imposed on the NCC by subsection 10(1) of EARPGO was satisfied by the consultant's two reports and the June staff reports. Section 12 of the EARPGO was complied with by the NCC's July 18, 1996 ***Champlain Bridge Reconstruction Initial Environmental Evaluation*** (RR, vol. III-A, tab 1-W). The evaluation made a determination pursuant to subsection 12(*c*) of the EARPGO, that " ... the potentially adverse environmental effects that may be caused by the proposal are either insignificant or mitigable with known technology." (RR, vol. III-A, tab 1-w: p. 1668). The public was notified of this decision, in accordance with section 15 of the EARPGO, by press release on July 19, 1996. The public had until

September 17, 1996 to make written comments regarding the evaluation (RR, vol. III-A: tab 1-X: p. 1681).

On July 23, 1996, the applicant's solicitors wrote to the NCC to point out that the three-lane 18.75 meter wide bridge option which was the subject of the decision was not the 16.25 meter three-lane bridge costed by the consultant, that the costs and environmental impacts of the option were not made public. As well, it was pointed out that the cost of work on the bridge approaches was not made available, either (AA, vol. II-B, tab 21: pp. 1095-1096).

To remedy the problems noted by the applicant, the NCC instructed the consultant to make a supplementary report, the ***Champlain Bridge Reconstruction Environmental Study Supplementary Report.*** Without wading too far into the mind-numbing detail which the report evinces, the report did several things. First, the study confirmed that the bridge dimensions adopted in the NCC's June report were incorrect but insofar as cost comparisons were made in the consultant's report, a base width of 16.25 meters with no offsets had been assumed. As well, environmental effects of every option up to a 18.75 meter-wide bridge were analyzed by the consultant (RR, vol. III-A, tab 1-Y: pp. 1691-1696). The report then set out initial and life-cycle costs for options 1.2.3, 2.2 and 3.2. (all without offsets and with a 1.5 meter-wide sidewalk).

The report also compared the costs of widening options 2.2 and 3.2.1 to include two 0.5 meter offsets and 1.5 and 2 meter-wide offsets. Option 1.2.3 was excluded from this comparison because it was not structurally possible to satisfactorily widen that option. The consultant found that when offsets and a 2 meter-wide sidewalk were added to the options, the life-cycle cost for option 3.2.1 was only $130,000 more than option 2.2 (RR, vol. III-A, tab 1-Y: pp. 1695-1698). Finally, approach costs were also estimated (RR, vol. III-A, tab 1-Y: pp. 1693-94).

Upon reviewing the consultant's supplementary report, the NCC staff prepared another staff report. The recommended option was again a three lane bridge, but this time it was 17.75, not 18.75, meters, wide. This included three traffic lanes, with one reserved for HOVs, two cycling lanes, and two (instead of four) offsets (RR, vol. III-A, tab 1-Z: pp. 1725-26, 1731). An addendum was made to the July 18, 1996 environmental assessment, in which the NCC staff found that the 17.75 meter wide bridge would cause potentially insignificant or mitigable adverse environmental effects. This fulfilled the subsection 12(*c*) EARPGO requirements (RR, vol. III-A, tab 1-AA: p. 1745). On August 29, 1996, the consultant's supplementary report, the amended NCC staff report, the July 18, 1996 environmental evaluation and the draft addendum to the environmental evaluation were made available to the public.

On September 3, 1996, the NCC commissioners voted 7 to 5 in favour of adopting the recommendations in the amended staff report concerning the reconstruction and its addendum as an "intention of decision." In the same motion, the commissioners also voted in favour of adopting the staff's subsection 12(*c*) determination. Mr. Beaudry did not participate in the vote (RR, vol. III-A, tab 1-CC: p. 1795). The intention of decision was announced to the public that day. The public could make comments on the EARPGO determination, and on the proposal generally, up to October 7, 1996. The final decision was to be made on October 15, 1996 (RR, vol. I-A, tab 1: p. 89; vol. III-A, tab 1-DD: pp. 1807 and 1809). On that same day a decision would have to be made whether the project should be referred to a public review panel pursuant to section 13 of the EARPGO.

In order to inform the NCC Commissioners in their public panel referral decision, the NCC staff prepared a public concern analysis. The analysis, some 367 pages in length, recommended that the NCC Commissioners not decide to refer the project to a public review panel. Pertinent extracts from that report read as follows (RR, vol. III-B, tab 1-ff: p. 1831):

4.4 Potential That Panel Review will contribute new information for decision makers

NCC Staff is confident that sufficient information has been considered to assess the environmental implications of the Proposal and that the concerns raised related to the project can be addressed through design and proposed mitigation which would be implemented should the Proposal proceed

The general transportation policy concerns raised are beyond the authority of the NCC and the scope of a specific project.

The environmental assessment of the Champlain Bridge has been exhaustively reviewed internally and externally by NCC staff, consultants and technical advisory committee members. The responses received during the period commencing June 29th to the date of this report touch on the same issues in the EARPGO context as those that were made on in the public participation phase of the process detailed in chapter 2 of the ESR. The absence of evolution in the comments received supports the conclusion that it is unlikely that a public review of the assessment by a panel would provide significant new information about the Proposal or alternatives to it that are not currently available to decision-makers.

5. Recommendations

The issues raised throughout the process, both before and after the determination have not changed. In reviewing those concerns the NCC is satisfied that all issues raised related to the study have been addressed.

The public has been given numerous opportunities to express concerns and gain a better understanding of the project. Public input regarding the project was always a key component of the study for the NCC both before and after the determination under section 12.

Given:

- than an environmental assessment has been carried out on which basis it has been determined that the potentially adverse effects that may be caused by the Proposal are either insignificant or mitigable with known technology.

***

- that the public has had an adequate time to review all information available about the Proposal and the environment assessment and has had opportunities to comment in writing on the environmental assessment documentation and conclusions;

- that considering the public concerns raised, the public review of the assessment through a panel, is unlikely to result in new information about the Proposal and would not be of added value;

- that while opposition to the proposal has been vocal; there is also significant public support for the Proposal and all reasonable concerns have been taken into account or will be addressed through design and mitigation measures.

It is recommended that the Commission decide:

1.0 that pursuant to Section 13 of EARPGO a public review of the assessment by a Panel is not desirable;

***

On October 15, 1996, the NCC commissioners met and by a nine to four vote they made a final decision to reconstruct the bridge as a 17.75 meter-wide bridge "with a three-lane facility", with a lane reserved for HOV vehicles in the peak direction, two cycle lanes, two offsets, one sidewalk and two railing curbs,

> but that operates as a two-lane bridge until such time as the RMOC and the CUO can agree, along with the NCC, on a final operating design as a 2 or 3 lane bridge.
>
> If no agreement between the NCC and two municipal governments could be made by October 15, 1997, the issue will be reviewed and addressed by the NCC. [emphasis in minutes]

The NCC commissioners adopted the NCC staff's section 13 EARPGO recommendation that the project be not referred to a public review panel. Mr. Beaudry did not participate in the vote (RR, vol. III-B, tab 1-GG: p. 2259-60).

It is these facts from which the applications for judicial review have arisen. File T-1830-96 is in regard to the September 3, 1996 "intent of decision" made by the National Capital Commission and requests an order to quash it. Also requested are several orders of mandamus which are: (1) to conduct a full assessment of the alternatives to the project and to fully complete the environmental assessment in accordance with the terms of reference, (2) to provide a full set of selection criteria and associated weightings for public review comment and comment, and to provide a report to the public regarding the entire proposal in the manner the applicant submits it should be done, (3) a declaration that the public information disclosed by the NCC is incomplete or inaccurate and that the NCC failed to meet its statutory duty in this regard or a declaration that the NCC has no jurisdiction to make the three lane reconstruction decision. Finally, the applicants ask for prohibition to stop any construction on the project. File T-2481-96 requests similar relief with respect to the final decision of October 15, 1996 on the basis that there was no longer a complete proposal in existence by that time; the applicant also asks for an order of mandamus ordering the NCC to prepare a new environmental assessment.

File T-2865-96 requests an order quashing the September 3, 1996 decision which determined, pursuant to subsection 12(*c*) of the EARPGO, that the project would have insignificant or mitigable environmental effects and various orders of mandamus and prohibition to the same effect. File T-2866-96 asks for similar orders regarding the October 15, 1996, decision pursuant to section 13 of the EARPGO which decided not to refer the project to a public review panel.

The issues in these applications break down as follows.

1. Does the NCC have the jurisdiction to the add a third lane to the Champlain bridge?

2. (a) Are any of the decisions tainted by bias arising out of an alleged personal conflict of interest by the NCC chairman?

(b) Where the results of the EARPGO study biased because of an alleged predetermination of its results by the NCC staff?

3. Was the September 3, 1996 "intention of decision" made on inaccurate, non-objective and incomplete information?

4. Has the NCC complied with sections 12 and 13 of the EARPGO?

Jurisdiction

The consummate case on the jurisdiction of the NCC is ***Munro v. National Capital Commission***, [1966] S.C.R. 663. In that case the NCC appropriated some farm land for the purpose of establishing the green belt, which was part of the "master plan" (named the Gréber plan) that was implemented to develop the National Capital Region. The NCC was a constitutionally anomalous body because the power for its creation was not found in either section 91 or 92 of the ***Constitution Act, 1982***. The Supreme Court found that the federal parliament had the constitutional jurisdiction to create the NCC for the peace, order and good government of Canada. Two points are of particular interest to these applications. First, Mr. Justice Cartwright found that the NCC's powers, ***viz.***, the "making of zoning regulations and the imposition of controls of the use

of land situate in any province" (p. 667), are akin to those assigned to provincial legislatures by section 92 of the ***Constitution Act, 1867.***

Secondly, Cartwright J. wrote at p. 671 that he

> found it difficult to suggest a subject matter of legislation which more clearly goes beyond local or provincial interest and is the concern of Canada as a whole than the development, conservation and improvement of the National Capital Region in accordance with a coherent plan in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance.

It is on this last comment which applicant hinges the first prong of its attack. In a nutshell, the applicant's position is this. The "coherent plan" referred to by the Supreme Court in ***Munro*** under which the NCC currently operates is the 1988 Federal Land Use Plan (FLUP). The FLUP is a detailed document and a three lane bridge is not provided for in the FLUP or any amendments to the plan. Further, the Champlain Bridge is part of the parkway/driveway, which is defined as being a limited access scenic roadway commonly consisting of two lanes that runs through the National Capital Region. In particular, the applicant relies on this excerpt from the FLUP to downplay the transit role of the parkway/driveway: "The parkway/driveway system demonstrates a physical and functional distinction between a transportation system that satisfies the Capital's unique needs, and the regional roadway system." (RR, vol. IV-A, tab 7-A: p. 2821). Further, in both its written and oral submissions, the applicant emphasized documents which it submits show that even the NCC itself did not think it had jurisdiction to add a third lane to the bridge.

As a preliminary observation, this Court must emphasize that fact that even if the NCC's initial thought was that it lacked jurisdiction to undertake a three-lane project, that is just as irrelevant to this issue as the fact that it subsequently thought it did. The sole question before this Court is a question of law and that is whether the NCC has the jurisdiction to widen the bridge. The answer to this is found in the ***National Capital Act*** and the FLUP, not in the any contemplative musings by various members of the NCC staff.

There is little doubt that the NCC does have jurisdiction to rebuild the Champlain bridge as a three lane structure. The NCC's jurisdiction is rooted in section 10 and 11 of the ***National Capital Act***, cited above. The significant parts of those sections read:

> 10. (1) The objects and purposes of the Commission are to
>
> > (*a*) prepare plans for and assist in the development, conservation and improvement of the National Capital Region in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance
>
> ***
>
> (2) The Commission may, for the purposes of this Act,
>
> > (*a*) acquire, hold, administer or develop property;
>
> ***
>
> > (*c*) construct, maintain and operate parks, squares, highways, parkways, bridges, buildings and any other works;
>
> 11. The Commission shall, in accordance with general plans prepared under this Act, coordinate the development of public lands in the National Capital Region.

The FLUP, which stems from section 11 of the Act, states at vol. IV-B, tab 7-A: p. 2641 of the respondent's record that :

> The policy directions of this general Plan will be reflected and refined in a number of more detailed sector plans that focus on smaller geographical areas such as Gatineau Park, the Greenbelt and the urban sector of the Capital. These secondary plans will deal with smaller areas in greater depth in order to provide more specific and strategic policy guidance. Completion of these sector plans may necessitate amendments to this plan.

The Parkway/Driveway, of which the bridge is part, is defined at vol. IV-A, tab 7-A: p. 2827 of the respondent's record thus:

> This is limited access, scenic roadway that is designed, built controlled and maintained by the National Capital Commission on federal land. It runs through land of distinctive scenic quality and commonly consists of two lanes, with a minimum sixty-metre right-of-way reserved for landscaping and open space purposes.

There exist numerous references in the FLUP which could confer the appropriate powers to the NCC. At vol. IV-A, tab 7-A: p. 2815, the plan states "Certain interprovincial bridges have structural problems that will limit their life span. This highlights the need for comprehensive bridge planning." Under

the heading "Policy Direction", the NCC was to "(d) consider the development of additional bridge crossings over the Ottawa River, and the development of links with principal access roads, parkways and driveways to facilitate interprovincial access circulation [footnote omitted]." (RR, vol. IV-A, tab 7-A: p. 2819).

"Additional bridge crossings" was a subject conceived and aborted by the Joint Administrative Committee on Planning and Transportation (JACPAT), in its November, 1994, Study of the Interprovincial Bridges in the NC Region - Phase 2, "***Synthesis, Conclusions and Recommendations - Final Report***, a copy of which is exhibit B to Mr. Bonin's affidavit, sworn on January 17, 1997. It is found in the RR, vol. I-A, tab 1-B: pp. 183 to 271.

At page 236, para. 3.2.1 deals with the Britannia-Deschênes Corridor. It is too voluminous to recite here, especially since both sides are quite familiar with it. Selected passages are:

> This corridor is the most westerly of the corridors under review. It links the cities of Aylmer and Ottawa/Nepean from Highway 417 in Ottawa-Carleton to McConnell-Laramée Boulevard initially, and possibly to Pink Boulevard/Autoroute 550 subsequently, in the Outaouais. The Ontario approaches to the bridge would be located in the Ottawa River Parkway/OC Transpo South-West Transitway corridor, with the Québec approaches would be located in an existing right-of-way reserved for the future Deschênes Boulevard.
>
> *** *** ***
>
> The bridge portion of the corridor would be located immediately to the east of the existing RMOC water purification plant in Ottawa and on the southern tip of the Deschênes sector in Aylmer. This alignment was chosen in order to avoid the environmentally sensitive Mud Lake Area situation immediately to the west of the RMOC water purification plant and to take advantage of the existing right-of-way which was previously expropriated in the early 1970s by the Province of Québec in anticipation of the future Deschênes Boulevard and a possible Britannia-Deschênes Bridge. The bridge would be a limited access, urban highway-type facility. It would require approximately 14 bridge piers. The bridge would be a low-level facility since it does not cross a navigable channel.
>
> *** *** ***
>
> From a traffic perspective, the bridge corridor is expected to draw a moderate number of vehicles during the peak hour (approximately 2600 to 3400 vehicles per hour). At the high end of the traffic range, the bridge and its approaches are expected to operate with some reserve capacity at the 2011 horizon The corridor is not expected to attract a large number of commercial vehicles from the existing central area bridges.

This Court does not know how that last conclusion can be drawn unless one knows how much or how little residential land development will occur on lands

within a moderate distance from each end of that notional bridge. That surely is a lesson taught by the Champlain Bridge controversy. However at p. 268 of the JACPAT final report, the recommendation of significance is: "No further consideration be given to a new bridge in the Britannia-Deschênes and Champlain Corridors". (RR, vol. I-A, tab 1-B: pp. 236-37 and 268.)

Likewise the JACPAT final report considers a twinning of the Champlain Bridge, a Lemieux Island bridge, a Kettle Island bridge, and an OC Transit/STO bridge as well as a CP Rail commuter transit bridge. The best choice was identified as the Kettle Island bridge.

Appendix A to the FLUP, the "NCC Parkway Policy Review" reads:

> The roadways provide scenic, safe, and efficient access to Capital institutions and attractions *** The Parkway network has evolved since its inception at the turn of the century. Originally designed as a scenic driveway, many segments of the Network play other roles: they are used increasingly by commuters, and by regional public transit vehicles, for the journey-to-work (RR, vol. IV-A, tab 7-B: p. 2891).

The plan goes on to state:

> It is proposed that the National Capital Commission:
>
> (a) designate a parkway/driveway network (See Map 3) with the following primary functions:
>
> (i) to provide access to major scenic and recreational areas, Capital institutions and attractions,
>
> (ii) to accommodate Capital institutions and facilities in a manner compatible with the maintenance of the green, open space character of the parkway system,
>
> (iii) *to provide scenic access to the Capital's core area through connections with provincial highways at key intersections,*
>
> (iv) to accommodate recreational and cultural activities and events of international, national or regional significance,
>
> (v) to serve as occasional ceremonial routes, and,
>
> (vi) *to facilitate interprovincial access,*
>
> [emphasis not in original text]

The foregoing excerpts from the FLUP lead to the inescapable conclusion that the addition of a third lane to the Champlain bridge is within the

ambit of the NCC's decision-making powers. The FLUP is similar to the Gréber plan at issue in the ***Munro*** case. The Gréber plan was reproduced by Mr. Justice Gibson of the Exchequer Court at [1965] 2 Ex. C.R. 579. It described itself as being: "not final and rigid blueprints of immediate operation, but a comprehensive and flexible chart of co-ordinated development, subject to amendments and adaptations resulting from detailed studies and from unforeseen circumstances as they may evolve." (p. 611) The 1988 FLUP is no different.

The 1988 FLUP attempts to strike a balance between the scenic facets of the parkway and the practical aspects of it, specifically inter-provincial access. The only way in which the addition of a third lane will be outside the NCC's jurisdiction is if it will turn the parkway into a major regional artery and utterly disregard the other underlying rationales for the parkway's existence. Willy-nilly it has to accommodate rush-hour traffic, however. There is no evidence on the record which remotely suggests that the addition of a third lane, restricted to HOVs driving in one direction, would alter the character of the parkway to such an extent that the plan's balance between utility and aesthetics would be jeopardized. As well, the fact that the bridge could have three lanes is not inconsistent with the plan, which notes that the parkway ***commonly*** has two lanes. The FLUP does not restrict the parkway to two lanes. In fact, the Ottawa River Parkway and the Aviation Parkway have as many as four lanes, and the former accommodates public transit vehicles (RR, vol. IV-B, tab 7-B: pp. 2911 and 2917). It follows in law and in fact that the NCC has and exercises the jurisdiction to add a third lane to the Champlain bridge, if there be good reason to do so, consistent with the principles of judicial review of administrative acts.

Bias

The most obvious example of partiality, in literature, was Rhadamanthus, the cruel judge of hell, who punished before he heard (De Smith, Woolf and Jowell, ***Judicial Review of Administrative Action***, 5th ed. (London:

Sweet & Maxwell, 1995) p. 525). This case, however, involves a more sophisticated analysis. The applicant's first bias allegation is that the NCC chairman, Mr. Beaudry, was in a conflict of interest and that his conflict biased the NCC's decisions even though he did not participate in them. That is to say, Mr. Beaudry withdrew from the decision-making process allegedly too late in the day; he tainted the process. This arises out of his interest (latterly, since 1993, held through his wife) in about 1,000 acres of land approximately 3+ kilometres from the north end of the bridge (AR, vol. IV-B, tab 55: pp. 1908-1910) and the fact that after his withdrawal he continued in his capacity as chief executive officer of the NCC. The NCC chairperson, it must be remembered, has two roles under the ***National Capital Act***: chairman of the NCC board of commissioners and the chief executive officer of the NCC. Mr. Beaudry was sworn in as NCC chairman on September 2, 1992.

The first question to be determined is what the test for bias is in this case. Normally, evidence of a pecuniary interest results in the immediate disqualification of the decision maker because of an appearance of bias. As Mr. Justice Marceau wrote in ***Energy Probe v. Canada (Atomic Energy Control Board)***, [1985] 1 F.C. 563 at p. 579-580:

> It was soon "discovered", - it is taught in all the textbooks - that the common law, like the Roman law and the Canon law long before it, did not permit a judge to determine a matter in which he had a pecuniary or proprietary interest (see de Smith's Judicial Review of Administrative Action, (4th Ed. 1980) p. 248).

This, in fact, is the very root of the different types of bias now recognized by Canadian law. Marceau J. went on to describe the evolution of the law of bias at p. 580:

> From that early moment on, the law in that respect has evolved, as I understand it, on the strength of two ideas. One is that there are many interests other than pecuniary which may affect the impartiality of a decision-maker, emotional type interests one might say (see: Pépin and Ouellette, ***Principes de contentieux administratifs*** (2nd Ed.) p. 253), such as kinship, friendship, partisanship, particular professional or business relationship with one of the parties, animosity towards someone interested, predetermined mind as to the issue involved, etc. The other, which has since become a sort of legal axiom, is that it "is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done". The result of the evolution of the law on the basis of these two ideas

> is that a distinction is today well recognized and acknowledged between situations where the decision-maker has a pecuniary interest in the outcome of the decision, and situations where his interest is of another type. In the first case, since the maxim ***nemo judex in causa sua*** is readily applicable, the decision-maker is peremptorily disqualified from adjudicating regardless of the importance of the interest, provided however that it is an interest linked and tied to the decision itself and not too remote or too contingent to be devoid of any possible influence. In the second case, the decision-maker is disqualified from adjudicating if the interest is such that it would leave, in the mind of a reasonable man apprised of the facts, a reasonable apprehension of bias.

The Supreme Court of Canada, in ***Newfoundland Telephone v. Newfoundland (Public Utilities Board)***, [1992] 1 S.C.R. 623 and ***Old St. Boniface Residents Assn. v. Winnipeg (City)***, [1990] 3 S.C.R. 1170, has set out guidelines for formulating and applying the test for bias. In ***Newfoundland Telephone***, Mr. Justice Cory affirmed that the duty of fairness, which includes impartiality, applies to all administrative bodies, but that "the extent of that duty will depend upon the nature and the function of the particular tribunal" (p. 636). Cory J., after approving the Court's decision written by Mr. Justice Sopinka in the ***Old St. Boniface*** case, then went on to describe how the application of the bias test, should be applied at pp. 638-39:

> It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the Board should be such that there could be no reasonable apprehension of bias with regard to their decision At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a pre-judgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.
>
> ***
>
> Further, a member of a Board which performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing. This does not of course mean that there are no limits to the conduct of board members. It is simply a confirmation of the principle that the courts must take a flexible approach to the problem so that the standard which is applied varies with the role and function of the Board which is being considered In the end, however, commissioners must base their decision on the evidence which is before them. Although they may draw upon their relevant expertise and their background of knowledge and understanding, this must be applied to the evidence which has been adduced before the Board.

In sum, the test moves along a sliding scale, from the legislative (which attracts the most lenient application) to the adjudicative end (inevitably the most stringent). So the first step which the Court must take is to determine where the decision-making body falls on the scale.

Once the administrative body is positioned on the scale, the Court must apply the appropriate test. Where the decision maker is acting in an adjudicative function, such as a human rights tribunal, the standard is whether there is a reasonable apprehension of bias (***Newfoundland Telephone***, p. 638). In the legislative context, such as municipal planning conducted by popularly elected officials -- or, as Cory J. wrote in the text excerpted above, administrative boards which deal with policy matters -- the test to be applied is the one formulated by Sopinka J. at p. 1197 of the ***Old St. Boniface*** case:

> The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged.

That is to say, the decision maker has a closed mind.

Who determines whether a decision-maker has a so-called closed mind? Mr. Justice Sopinka put it this way: "the reasonably well-informed person" (***Old St. Boniface***, p. 1196 and 1198; from ***Committee for Justice v. National Energy Board***, [1978] 1 S.C.R. 369).

What, then, is the test for this case? The NCC falls on the policy-making end of the scale. Although its commissioners are appointed and not elected, the role of the NCC is very similar to that of municipal councils. This is not a startling revelation; the ***Munro*** case recognized it. Simply stated, the NCC develops policy, decides what course of action to take in terms of administering the national capital region, and then implements the decision. This

is analogous to a municipal council. For example, a municipal council might find as a matter of policy that the community's garbage should be picked up because garbage odours are intolerable and unsanitary. The council then determines that some scheme of garbage pick-up should be devised to address the issue. After this, the council decides that garbage pick-up will be only on Mondays and that a private company should be hired to so this. Tenders go out, and garbage is picked up. This is exactly how the NCC operates, with the exception, of course, that NCC commissioners do not run for office. This is exactly the sort of body contemplated by Justice Cory's words in the above cited passage in ***Newfoundland Telephone***: " Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature."

Before applying the tests, it is helpful to recall to whom they are directed. The impugned decisions were made by the NCC board of commissioners and the evidence is clear that Mr. Beaudry, acting on advice from Mr. Wilson, the Ethics Commissioner, withdrew from deliberations and decisions regarding the Champlain bridge. It must be recalled that the applicant's allegations are primarily levied against Mr. Beaudry, and only peripherally at the commissioners. At first blush, one might be tempted to reject the bias argument altogether because Mr. Beaudry was not a decision-maker. Such a solution would not be satisfactory in the face of the applicant's allegations because 1) when Mr. Beaudry was appointed on September 2, 1992, it was relatively early on in the process for making the reconstruction/rehabilitation decision, 2) after Mr. Beaudry withdrew he remained as head of the NCC staff, which recommended a three lane bridge, 3) it is uncontested that Mr. Beaudry supports a third lane, and 4) his withdrawal occurred almost four years after his appointment. Continuing the inquiry accords with the underlying principle that it is the integrity of the decision-making process which must be examined.

This complicates the analysis somewhat because the Court must first examine Mr. Beaudry's actions using a different test from that which will be used for the NCC commissioners because partiality by reason of pre-judgment is treated differently from partiality by reason of personal interest. In the ***Old St. Boniface*** case, Mr. Justice Sopinka made this distinction at p. 1196:

> I would distinguish between a case of partiality by reason of pre-judgment on the one hand and by reason of personal interest on the other. It is apparent from the facts of this case, for example, that some degree of pre-judgment is inherent in the role of a councillor. That is not the case in respect of interest. There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal or other interest. It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest. See ***Re Blustein and Borough of North York***, [1967] 1 O.R. 604 (H. Ct. of J.); ***Re Moll and Fisher*** (1979), 23 O.R. (2d) 609 (Div. Ct.); ***Committee for Justice, supra; and Valente v. The Queen***, [1985] 2 S.C.R. 673.

There is no evidence on the record which shows that Mr. Beaudry directly influenced the commissioners when each decision was made. In fact, the evidence shows the very opposite. In his affidavit, which was subject to cross-examination, Mr. Beaudry deposed thus:

> I have not at any time either before or after withdrawing from participation in the Commission's decision-making process with respect to the Proposal contacted any members of the Commission to lobby them to favour a three-lane option or otherwise attempted through indirect means to influence the outcome of the process (RR, vol. IV-B, tab 2: p. 2279).

Nor has the applicant pointed to sufficient evidence which would allow the Court to infer that Mr. Beaudry's presence as the NCC chairman for the previous four years had any impact on the commissioners when they made the two decisions. To find bias on the part of the commissioners, the Court must find that any conflict of interest related to Mr. Beaudry's property interests threaded its way

to the commissioners' decisions through his influence on the NCC staff. With this in mind, that redoubtable reasonably informed person begins the task at hand.

The main thrust of the applicant's submissions accords with Justice Sopinka's distinction between pre-judgment and personal interests. That is to say the applicant vigorously attacked Mr. Beaudry's property interests. The applicant's position is that Mr. Beaudry is in a classic conflict of interest. To this Court, the respondent's characterization of this submission is correct: "The real thrust of the allegation seems to be that the Chairman is biased in favour of a three-lane bridge by reason of personal interest and that, through his involvement in certain administrative aspects of the Bridge reconstruction project, his bias tainted the process that led to the decisions under review and therefore tainted the decisions themselves" (RR, vol. V, tab 8: p. 53). If born out by the facts, there is merit to this argument. Compliance with the conflict of interest guidelines only prevents any taint of the commissioners' decisions by reason of Mr. Beaudry's alleged direct influence on the commissioners. It cannot be curative of any influence which he may have already had on the staff unless there is some remedial effect in putting everybody on notice that the chairman had proprietary interest in some land. (It may be recalled that it was found above that there is no evidence of any influence on the commissioners.)

Sopinka J. suggested that the test (or, when observed as part of the whole bias argument, the sub-test) for determining whether there was a conflict of interest for a municipal counsellor, is to look at whether there was a personal interest under both statute and at common law. If there is, the effect will usually be that the individual is disqualified from participating any decisions related to the interest. For all intents and purposes this is the applicable test for Mr. Beaudry. Just as the NCC is akin to a municipal council, the position of a commissioner -- or, in Mr. Beaudry's case, the Chief commissioner, is similar to a municipal reeve or commissioner. The Court recognizes that, unlike most municipal councillors, NCC commissioners do not run on a platform, so there is no inherent

element of prejudgment in their policy postures. When it comes to conflict of interest, however, Sopinka J. has eliminated the "inherent prejudgment" element because it is not an inherent aspect of municipal office to have a personal interest in an issue.

It is worth emphasizing that Mr. Beaudry withdrew from the decisions. Obviously the Court cannot vitiate the decisions or remove his vote because the normal remedy, disqualification, has been pre-empted. If there be a conflict, however, it would be a significant factor to consider when the reasonable apprehension of bias test is applied to the board of commissioners.

As with all federally appointed public officials, Mr. Beaudry had to comply with the ***Conflict of Interest and Post-Employment Code for Public Office Holders***. According to his sworn affidavit, Mr. Beaudry has done so since his appointment (RR, vol. IV-A, tab 2: p. 2275). His property interests were transferred to his wife in December, 1993 (AR, vol. IV-B, tab 55: p. 1980). This, however, does not blow anyone away. This action did, however, conform with the Code. Further, Mr. Beaudry's compliance with the Code makes it very clear that the chairman had these interests. There was no attempt to conceal them. At no point was any outcry made about this. More importantly, because of the highly charged public debate surrounding the bridge proposals as the time for making the decisions was rapidly approaching, Mr. Beaudry took the extra step of consulting Mr. Howard Wilson, the Ethics Counsellor in June, 1996, and proposed that he withdraw from any discussion or decision regarding the bridge. Mr. Wilson replied that there was no real conflict, but to avoid any appearance of bias, advised the Mr. Beaudry to withdraw. On June 24, 1996, Mr. Wilson wrote (at RR, vol. IV-A, tab 2-D: 2399):

> Comme mentioné lors de notre réunion du 19 juin, je ne crois pas que vous soyiez dans une situation de conflit d'intérêts réel. Cependant, j'estime que plusieurs y verront là une situation apparente de conflit. C'est pourquoi, dans les circonstances actuelles, je crois qu'il serait préférable, et pour vous et pour la Commission, que vous ne participiez pas aux discussions et à la

> prise de décision touchant l'avenir du pont Champlain. Vous m'avez indiqué que vous aviez l'intention de demander à un autre membre de la Commission de présider aux discussions et de vous retirer de la salle durant le temps alloué pour discuter de cette question. Je suis donc entièrement d'accord avec les mesures que vous nous proposez de prendre à cet égard.

Based on these facts, the Court finds that Mr. Beaudry committed no wrong. What more could Mr. Beaudry have done, aside from resigning? The applicant suggests that a blind trust would have been appropriate. As the respondent submitted, this would not make any difference. Mr. Beaudry would still know he had an interest in the land. This is very different from a blind trust used for holding publicly traded securities, because the identity of land is very specific; shares much less so.

To summarize briefly, Mr. Beaudry disclosed all interests in accordance with the Code. This is sufficient to fulfil the first part of the conflict of interest test, *i.e.* compliance with statute. In this case, the Code is not even a statutory requirement. On the advice of the Ethics Counsellor, he withdrew from all deliberations and decisions concerning the bridge. The Ethics Counsellor found that Mr. Beaudry was not in a conflict of interest and that withdrawal was recommended to avoid any chance of an appearance of conflict.

The opinion of the Ethics Counsellor should not, of course, be rubber-stamped by this Court. The opinion is, however, helpful. This goes to the second element of conflict of interest: does a conflict exist at common law? The Federal Court of Appeal articulated the test for public office holders in ***Threader v. Canada (Treasury Board)***, [1987] 1 F.C. 41 at p. 56

> Whether an appearance of conflict of interest exists must be determined on an objective, rational and informed basis. While the Guidelines contained no definition of the term "appearance of conflict of interest", reference could be made to the concept of apprehension of judicial bias, where mere perception entails legal consequences, in determining the appropriate test. The question to be asked should be phrased as follows:
>
> > Would an informed person, viewing the matter realistically and practically and having thought the matter through, think it

> more likely than not that the public servant, whether consciously or unconsciously, will be influenced in the performance of his official duties by considerations having to do with his private interests?

This was confirmed by the Appeal Court in ***Canada (Treasury Board) v. Spinks*** (1987), 79 N.R. 375, and was cited by the Newfoundland Supreme Court Trial Division in ***Sparkes v. Enterprise Newfoundland & Labrador Corp*** (1994), 122 Nfld. & P.E.I.R. 25 as being the test for conflict of interest in the public service context. For this case, the test is this: would a reasonable, informed person think that Mr. Beaudry's property interest (now owned by his wife) consciously or unconsciously influenced his performance in his official duties?

The first point the reasonable person must consider is whether the NCC chairman had anything to gain from a three-lane bridge. The applicant asks the Court to find that as a fact, presumably by drawing an inference from allegedly increased easier access, that Mr. Beaudry's land value will increase. No evidence in support of this allegation was offered by the applicant. The uncontroverted evidence is that Mr. Beaudry believed that the land value would not increase as a result of the widening of the Champlain bridge. During cross-examination on his affidavit, the following exchange took place between Mr. Beaudry and the respondent's counsel during re-examination (AR, vol. IV-B, tab 55: 1917):

> Q. One last question, Mr. Beaudry. What effect on the value of your land holdings would you expect the widening of the Champlain Bridge to have?
>
> A. None, none whatsoever.

While instinct may dictate that enhanced, increased access will result in higher land values, this Court cannot take judicial notice of this, especially in face of unchallenged evidence of two things. The first is Mr. Beaudry's evidence that the value would not increase. The second is that the most direct route at this time

from the land in question to Ottawa is not by way of the Champlain bridge, but ***via*** the MacDonald-Cartier bridge (AR, vol. IV-B, tab 55: p. 1916). The inference which the applicant wishes the Court to draw is fatally weakened by these unchallenged facts. The only fact which the informed reasonable person is left with is that Mr. Beaudry had nothing to gain from a widening of the bridge. On the other hand, Mr. Beaudry himself thought that he ought to consult the Ethics Commissioner and that he ought to divest himself of apparent ownership by transferring the land to his wife, a person not thought to be at "arms length".

The second point which the reasonable person must consider is whether Mr. Beaudry "engineered" a reversal of NCC opinion, ***i.e.*** the applicant alleges that the staff previously favoured a two-lane option. After all, it is admitted that "it is no secret that the Chairman favours a three-lane bridge" (RR, vol. V: p. 55). One may speculate that the staff could have asked themselves: "what does the Chairman want?" As noted above, the record shows as an unrefuted fact however that Mr. Beaudry did not believe that any increase in his property interests would result from the widening of the bridge. This is something which the reasonable person cannot ignore, because the applicant adduced no expert or any evidence (speculative as it would have been) that Madame Beaudry's property values would rise as a result of easier river crossing on a three-lane bridge.

Leaving aside his alleged pecuniary interest altogether, there is no evidence whatsoever from which the Court can infer that Mr. Beaudry influenced the staff in such manner which resulted in a three-lane bridge being portrayed as far and away the preferable option. The issue is solely an evidentiary one. With what is the reasonable person informed? Mr. Beaudry's sworn evidence regarding his involvement with the proposal warrants full reproduction (RR, vol. IV-A, tab 2: pp.2269-74):

> 4. In discharging the duties of my position, I have been involved in certain administrative aspects of the proposal for the rehabilitation and reconstruction of the Champlain Bridge (the

"Proposal"). The reconstruction of the bridge is one of the NCC's most significant capital projects and will require major capital expenditures. Because of its magnitude, it is appropriate and necessary that the Chairperson be involved in the Proposal. It is the responsibility of the Chairperson to ensure that such major expenditures of public funds are based on sound business decisions made in accordance with best practices and applicable legislative and policy requirements. However, the ultimate decision-making authority in respect of the Proposal rests with the full National Capital Commission (the "Commission"), which is composed of 15 [*sic*] members appointed from across Canada.

5. Since my appointment as Chairperson, I have participated in a number of meetings and briefings relating to the Proposal, all of which were initiated by NCC staff. My first briefing on the subject of the Champlain Bridge took place in early December 1992. At the time of that first briefing, the two principal options for the reconstruction of the bridge, *i.e.* a two-lane or a three-lane bridge, had already been identified by the NCC. As early as 1968, the NCC had considered adding a third lane to the Champlain Bridge. In 1990, more than two years prior to my appointment as Chairperson, the NCC had commissioned the firm of Fenco MacLaren to perform an analysis of a three-lane option for the bridge. The study prepared for the Joint Administrative Committee on Planning and Transportation had even considered a four-lane bridge at the site of the Champlain Bridge, although this option was not pursued.

6. Most of the subsequent staff meetings and briefings on the subject of the Champlain Bridge in which I participated were for the purpose of providing me with status reports on the progress of the Proposal in order to keep me abreast of developments and enable me to fulfil my obligations as spokesperson for the NCC. I gave directions to NCC staff concerning the Proposal on only two occasions.

7. The first was on or about February 13, 1995 in the context of the selection process for a consultant to conduct an environment study of the various options for the reconstruction of the Champlain Bridge (the "Study"). Having been provided by NCC staff with the draft terms of reference for the Study, I directed that the detailed proposals submitted for the Study should be evaluated on the basis of a 70% - 30% ratio between the technical and price components of the overall evaluation, rather than a 80% - 20% ratio It was my opinion that, since there had already been an evaluation of technical competence in the expression of interest phase of the process, it was appropriate to give greater weight to the price component in the second phase of the process. This was consistent with my approach in other projects and not unique to the Proposal. My concern in all cases was to ensure that the NCC acted prudently in the expenditure of public funds.

8. The weighting of the evaluation criteria was disclosed to all proponents in the call for detailed proposals issued on February 22, 1995. It did not favour any of the firms submitting proposals.

9. I had no involvement in the evaluation of the expressions of interest or the detailed proposals. I gave no direction to NCC staff as to the choice of consultant to conduct the study, nor did I indicate any preference as to the choice of the consultant. In fact, I had no preference.

10 In February 1996, I became aware that the Study had been proceeding on the basis that the service life of the reconstructed Champlain Bridge would be only about twenty years and that, during reconstruction, only one lane of traffic flow would be maintained on the bridge Concerns about the short service life of the bridge and the restricted flow of traffic during reconstruction had been raised during public consultations. In response to these concerns, I considered it incumbent upon me to explore the possibility of extending the service life of the bridge beyond twenty years for reasons of efficiency and cost-

> effectiveness and to avoid the disruptions and divisiveness that would accompany a second reconstruction project in a mere twenty years. Therefore, on March 1, 1996, I met with senior NCC staff and directed them to request the Consultant performing the Study to examine reconstruction options that would have a longer service life, with marginal effect on the cost of the reconstruction, and that would maintain two lanes of traffic flow during the reconstruction.
>
> 11. I did not at any time direct, or exert pressure on, either the Consultant or NCC staff to prefer any particular reconstruction option. Rather, I supported the full consideration and evaluation of all reasonable reconstruction options, both two-lane and three-lane. My paramount concern throughout the Proposal has been to ensure that the Commission's decision would be an informed and fiscally responsible one and would be the result of a sound decision-making process.

This is corroborated by the affidavits of Mr. John Sutherns and Mr. André Bonin, the vice-president of capital planning for the NCC. Mr. Sutherns is the president of McCormick Rankin and deposed as follows (at RR, vol. IV-A, tab 3: p. 2441):

> 6. As is customary and consistent with sound professional practice, MR/BBL [the consultant] met regularly with the NCC's internal staff project team throughout the course of the Study. In that context, comments made by NCC staff where, in the objective professional opinion of MR/BBL, they were appropriate were included in the ESR. However, MR/BBL always acted in a professional fashion. At no time during the Study did NCC staff, Commissioners, or the Chairperson direct MR/BBL not to exercise its best objective and professional judgement in doing its work.

Mr. Bonin also swore that he had never been influenced by Mr. Beaudry (RR, vol. I-A, tab 1: p. 5):

> 3. In performing my duties as senior manager as set out above I have always exercised my best objective judgment. I have not been directed or coerced in discharging these duties by anyone, nor was the outcome pre-ordained.

These statements were not challenged by the applicant on cross-examination.

Mr. Beaudry was also subject to cross-examination on his affidavit. The applicant did not present any evidence on the cross-examination which impugns Mr. Beaudry's sworn statements. What the applicant has done is shown a number of unsworn documents to the Court which the applicant did not present to Mr. Beaudry or anyone else when cross-examined on his affidavit. It is from

these documents that the applicant asks the Court to infer that the chairman was instrumental, for whatever reason, in convincing the NCC staff that a three-lane bridge must be had at all costs. This must be rejected; there is no evidence that Mr. Beaudry had any influence one way or another on the NCC staff with respect to choosing and recommending bridge options.

For completeness, it may be added that the applicant's assertion, that the NCC staff was in favour of two-lane reconstruction prior to Mr. Beaudry's arrival, is not born out by the evidence either. The hard facts are these: (1) the NCC had considered a three-lane Champlain bridge as early as 1968 (RR, vol. IV-B, tab 2: p. 22672), (2) the December 1992 Fenco Maclaren report which was commissioned in 1990 considered three and four lanes (RR, vol. IV-A, tab 2: p. 2270-71), and (3) the 1989 results of the first phase of the JACPAT, of which the NCC was a participant, found that the Champlain bridge should be widened or twinned if a new bridge were not built at another location (RR, vol. I-A, tab 1: p. 9).

One interesting piece of evidence which corroborates Mr. Beaudry's affidavit is the January 21, 1994 memorandum from Mr. Bonin to Mr. Beaudry. The thrust of the memorandum is that the final results of the JACPAT study recommended that if a new bridge was to be built, it should be built at the Kettle Island corridor, and no earlier than 2011. There was, therefore, a need for maximizing the use of existing bridges. Mr. Bonin wrote that "Widening of the Champlain Bridge with reversible and HOV lanes would accordingly merit investigation *** Your concurrence is sought for the proposal for the Widening of the Champlain Bridge."(AR, vol. V-A, tab 57: pp. 2014-2015). This document strongly implies that Mr. Beaudry did indeed have a "hands-off" attitude to the conduct of the project. Thus the notionally reasonable, informed person conjured in the jurisprudence, would take into consideration that there is no evidence which shows that Mr. Beaudry engineered a reversal of staff opinion.

After considering the above, that reasonable person would conclude that there is no evidence which shows that Mr. Beaudry's property interest in certain land in Aylmer (now nominally owned by his wife) consciously or unconsciously influenced his performance in his official duties.

What does all of this mean? In the end, as Mr. Beaudry was not in a conflict of interest, there is no "malignant bias" which can be traced from his involvement as head of the NCC staff through to the NCC commissioners' non-unanimous decisions which would contribute to a reasonable apprehension of bias on the part of the commissioners. When the appropriate test for bias is applied, the reasonably well informed person would find that there is no reasonable apprehension that the NCC commissioners had preconceived, that a three lane bridge was the best option, to the extent that any representations which conflict with this view, which has been adopted, would be futile. There is no evidence to show that the NCC commissioners had their collective mind so fixed. Mr. Beaudry was not in a conflict of interest and had no influence on the consultant's and staff's recommendations. The commissioners had three reconstruction options before them, two two-lane and one three-lane. They knew that the consultant recommended a two-lane bridge and that the NCC staff recommended a three-lane bridge for reasons not considered by the consultant. On September 3, 1996, the commissioners voted seven to five in favour of a three-lane bridge. On October 15, 1996, the margin was nine to four. These numbers by themselves may very well be sufficient to prove no bias according to the test set out by the Supreme Court of Canada. Even so, the foregoing examination exonerates Mr. Beaudry and rejects the notion that any bias emanated from him. Mr. Beaudry did the best he could, short of resigning, in an unfortunate situation.

The second thrust of the applicant's allegation of bias purportedly focuses on the EARPGO environmental assessment process. The respondent aptly described it in its memorandum of argument (RR, vol. V, tab 8: p. 56): "The real thrust of its allegation is not that the results of the environmental assessment

process itself *** were predetermined, but, rather, that the outcome of the overall planning process (*i.e.* the staff recommendation to rebuild the Bridge as a three lane facility) was predetermined." This characterization is correct, for as the respondent's counsel remarked in oral argument, the applicant at no point attacks "the conclusion that the environmental effects of both a two-lane and a three-lane bridge are insignificant and mitigable" (Transcript, vol. IV: p. 826). Thus this attack is against the staff's recommendation for a three-lane bridge configuration (and p. 827).

The analysis of this issue will closely follow that made concerning Mr. Beaudry. For the reasons noted above, the test is again the closed mind test. There is no reason why the NCC staff are any less of a policy making body than the NCC commissioners, except, of course, that the commissioners have the ultimate authority. If anything, the staff are the instrument which hammers out potential policy suggestions and guidelines for approval, rejection or modification by the commissioners.

Both in its written submissions and oral argument, the applicant attempted to show that the staff was independently committed to a three-lane bridge. The respondent's counsel captured the essence of its attack during her oral submissions:

> They attack the consultant's evaluation methodology. They attack the description of bridge option 1.2.3. as high risk They attack the inclusion of offsets. They attack the failure to put the SNC Lavalin proposal before the commissioners. They attack the service life of the bridge as a covert means of justifying and advancing the three-lane option. They attack the costing information on the bridge options and suggest manipulation of that costing information. They attack the failure to refer to the TRANS study -- to refer to it in the NCC staff report. They even attack poor Arto Keklikian in stating that there is no rationale for a three-lane bridge, without modifications to the IPD/ORP intersection (Transcript, vol. IV: pp. 825-26)

The first and determinative observation the reasonably informed person would surely make is this. There is no predisposition toward a three-lane bridge; rather, it clearly traces the development of a policy. That is why the NCC and

the NCC staff are "in business". The NCC has to form some sort of opinion. The Court is not clairvoyant, but had the NCC staff recommended a two-lane option, it is reasonably foreseeable that the applicant would not be in court. None of the evidence which the applicant brought to court shows that either the NCC staff or the commissioners had a predetermination of the outcome of the study to any extent, much less that they had a closed mind. As noted above, Mr. Sutherns deposed that he was not at all influenced by the staff, and that the commissioners actually had more two-lane options before them than three-lane options. It is almost unnecessary to mention the numerical outcome of the votes. The applicant's understandable point of view is that a greater flow of traffic through its communities is undesirable. If the Court were established to take great account of and deference to parties' viewpoints, the Court would be a political, not a judicial, institution.

There would be little benefit in adding to these already compendious reasons a blow by blow account of every piece of evidence the applicant tendered and the Court has read. Some general remarks regarding the most significant points are in order. First of all, "proposal" as defined in section 2 of the EARPGO would include a two-lane reconstruction as well as a three lane. Both would be subject to an environmental assessment. It cannot be said that the only reason for the assessment was to advance a three-lane option.

The applicant suggests that the change in methodology from weighted approach to the comparison/elimination process was inappropriate. The change of the assessment's methodology was a decision made by the consultant, not the NCC. The decision to use the second method was completely within the purview of the consultant and did not in any way impinge on the statutory duty of the NCC. Further, there seems to be no dispute that the method which was finally used is satisfactory (RR, vol. I-A, tab 1: p. 43; tab IV-A, tab 3: P. 2439-41; AR, vol. IV-B, tab 53: pp. 1739-43; tab 54: pp. 1899-1901)

The reference to risk in the NCC staff's September report, "Option 1.2.3 was recognized among other things to be high risk", means that it is difficult to assess accurately what the future costs of an addition of a third lane would be. In cross-examination Mr. Sutherns stated that it was

> high risk in the context of the reliability of identifying the absolute costs associated with the construction. There is a risk associated with that because this type of construction has much more remediation rather than replacement. There is actual risk in terms of identifying the actual cost when you are remediating something rather than replacing it (AR, vol. IV-B, tab 54: p. 1894).

"High risk" can obviously not be taken to mean anything else. In fact, a transcription of a tape recording of the NCC's September 3, 1996 meeting was given to the Court and clarifies this point. The following exchange took place between Commissioner Joan O'Neill and Mr. Tony Wing, a representative of the consultants:

> ***Joan O'Neill:*** I guess I need to ask again because I know there was some ... I felt some confusion the last time when you had left and we got talking about this word "risk" and I heard someone say today, "Is this a safety risk, and some people say, well, "We want to throw out that 1.2.3 because it's risky". The consultant said it was risky, we don't want to do anything that's risky. You're not saying it's risky to rehabilitate a bridge."
>
> ***Tony Wing:*** We're saying there's higher risk associated with our cost estimating ...
>
> ***
>
> ***Tony Wing:*** It comes out cheaper than option 2.2 and 3.2.1 and I think it's fair to say of all the options considered, it's [*sic*] still remains to be the cheapest. Yes.
>
> ***Joan O'Neill:*** The cheapest and there's no safety risk to the public with rehabilitating this bridge.
>
> ***Tony Wing:*** That's correct.

This is all to say that the use of the term "high risk" did not mislead the commissioners. "Risk", an unfortunate choice of word, nevertheless refers to risk of inaccurate cost forecasting, not that the bridge will tumble down, according to the consultants.

Service life, as an issue, was not introduced as a means for insuring that a three-lane option would ultimately be chosen. As noted above, there was public concern that the service life of the bridge should be greater than 20 years (RR, vol. I-A, tab 1: p. 39; vol. II-A, tab 1-O: p. 59). This consideration was added in response to the public concern and, it may be added, so was the inclusion of life-cycle costs.

Cycling and walking were two modes of transportation mentioned in the terms of reference which were to be considered in the consultant's report (RR, vol. I-B, tab 1-G: p. 475). As the study progressed, both the PAC and the TAC identified pedestrian and cyclist concerns, especially safety, as a consideration (RR, vol. I-A, tab 1: pp. 57, 59, 79 and 81, vol. II-A, tab 1-O: p. 60; vol II-B, tab 1-Q: p. 1014, 1022, 1333, 1336, 1337, 1343 1054 and 1253; vol. III-A, tab 1-Y: pp. 1707-08; AR vol. IV-B, tab 54: pp. 1868-69). Offsets are a recommended option under the Ontario Highway Bridge Design Code (RR, vol. II-B, tab 1-Q: pp. 1022, 1054 and 1253; vol. III-A, tab 1-Y: p. 1076-1077). In the words of Mr. Sutherns,

> for the three-lane bridge, in rebuilding the deck, there is an opportunity in there to actually provide offsets between the travelled vehicle lanes and the cyclists, and between the cyclists and the pedestrians. While the offset is not something that is mandatory, I think it is certainly potentially preferable to have an offset as opposed to not having an offset if all other items are similar. (AR, vol. IV-B, tab 54: p. 1869)

The Court finds that the consultant's inclusion of offsets for some options was an invetiable, intelligent and entirely ***bona fide*** choice. In no way can it be said that offsets were intentionally included so as to put a slant which favoured three-lane options.

The applicant also argues that a proposal by Fenco-Maclaren Inc./SNC-Lavalin (Fenco), received in July, 1996 by the NCC staff should have been before the commissioners and that, as it was not, the staff was biased because the proposal allegedly shows that the cost difference between option 2.2 and 3.2.1 could be some $7.6 million (AR, vol. VI-B, tab 57: p. 2588). In

essence, if this was included in the report, it would not show the three-lane option in a good light.

Fenco was one of six pre-approved consultants to whom the NCC issued a request for design proposals for both two-lane and three-lane bridges. It may be recalled that Fenco did the 1989 investigation and the 1994 ***Champlain Bridge Functional Study***. Because of time constraints, the NCC wanted to select a design contractor prior to the NCC making a final decision. The terms of reference for proposals referred to Fenco's 1994 study with respect to volume of traffic. The Court notes that the specifications for volume of traffic for the design proposals are 1) ***a.m.***: 657 northbound, 1619 southbound, and 2) ***p.m.***: 1703 northhbound, 816 southbound. The bridge is ***currently*** operating at a.m.: 600 northbound, 1600 southbound, and p.m. 1520 northbound, 600 southbound: RR, vol. I-B, tab 1-D: p. 351; vol. II-B, tab 1-Q: p. 1001).

Fenco's proposal, while interesting, cannot be accorded much weight. First, it was brought to Mr. Suthern's attention, and then Mr. Bonin's, during cross-examination. It has not been tested. Second, as emphasized by the respondent's counsel, a brand new alternative is described in just two pages. It is far from complete. The study itself acknowledges this (AR, vol VI-B, tab 57: p. 2589):

> Of course, this engineering solution may have a fundamental influence on the whole Champlain Bridge Reconstruction project. The impact of this alternative on other components such as approach roadways, island peripheries, traffic management and environmental considerations will be identified and assessed during the conceptual phase.

Even though Fenco was familiar, through previous study, with the Champlain bridge, it did not have the benefit of the PAC, TAC and public consultation sessions. Instead of the long (about a year and a half) and intense process, where ideas were subject to professional and public scrutiny, Fenco made a proposal which amounts to little more than a couple of pages. No meat. The "alternative concept" (as Fenco calls the proposal which the applicant has viewed approvingly)

is sunk into an appendix. The aim of the document, though admirable, is not to assist the NCC in making a two or three-lane decision. It is to get the design contract. This is an entirely different context. The bottom line is this: the proposal, as an alternative to the options brought to the commissioners by the NCC staff, is too thin. It probably was not meant to be anything more. It follows that the NCC staff did not subvert the decision-making process by not including the Fenco proposal in their report.

With respect to the costing issue, there is not enough evidence before the Court to make a determination one way or another whether the option pricing was intentionally skewed or that it was incomplete. The applicant placed much reliance on the Fenco/SNC bridge design proposal, but, as noted above, this information should be given little weight. Apart from that, the applicant did not put its finger on anything which can convince the Court that the costs -- which factored in life-cycle costs --which were before the commissioners when the decisions were made were anything but accurate and complete. The costs in question were in the consultant's August supplementary report. All of the bridge options were priced. (AR, vol. III-A, tab 27: p. 1148). As the applicant points out, the only two lane option, 2.2, which could accommodate offsets was priced including the offsets (AR, vol. III-A, tab 27: 1149). In this Court's view, there is nothing on the record which demonstrates that there was no reasonable basis for making the decisions (***Martineau v. Canada*** (1989), 31 F.T.R. 161 at 165). It should not be forgotten that the consultant recommended a three-lane bridge and it was the consultant's figures which were used by the NCC staff and relied on by the commissioners.

Another part of the applicant's predetermination argument is that the NCC staff did not bring the TRANS study report (on traffic demand management measures), mentioned earlier, to the attention of the commissioners. The applicant submits that the staff rejected, and then misconstrued, the report. There is no substance to this allegation. First, the study was completed rather

"late in the day". The exact date it was completed is not readily discerned from the record, but the consultant did refer to it as "ongoing in its June report (RR, vol. II-B, tab 1-Q: p. 1000). The purpose of the TRANS study was to find promising transportation strategies. The study is truly, as the respondent's counsel put it, "a broad regional study", meant to explore potential solutions. One needs only to glance at the study's executive summary to ascertain this. Further, the study did not recommend for or against the addition of HOV lanes on bridges other than the Chaudière bridge. The study examined Ottawa/Outaouais area bridges as they existed at that time, and as no decision had been made regarding the number of lanes the Champlain bridge would have, the study could not contemplate any recommendation regarding HOV lanes for the bridge (AR, vol. VI-B, tab 57: p. 2454; vol. IV-B, tab 53: p. 1728). As Mr. Bonin indicated on cross-examination, the study did not consider HOV lanes for two-lane bridges because the impact of such a bridge on other bridges in the area would be unacceptable: AR, vol. IV-B, tab 53: p. 1729.

The applicant also brought to the Court's attention several documents containing comments which allegedly show that the NCC staff had already determined the outcome of their recommendation. These were all put into context, to this Court's satisfaction, by the respondent at vol. V, p. 58 of the respondent's record. The first was Mr. Keklikian's comment that there "no rationale to add third lane" (AR, vol. VI-B, tab 57: p. 2546). The rest of the sentence reads: "if IPD intersection is not modified". The second was an e-mail message which referred to "salvaging the third lane" (AR, vol. V-B: p. 2274). When the entire message is read, the meaning of the comment is clear:

> As you know, the original plan is that the bridge will be maintained for the next 20 years (2017) at which time it will be replaced entirely by a new bridge just west of the existing [bridge]. The problem is, that an investment of more than 13 million dollars for an additional lane for a period of only 20 years does not seem justifiable.
>
> It was questioned, that if implemented, is there any way that we could salvage the third lane. Given the situation and the current plan, it was concluded it was not possible. If we changed our planning strategy, however, it was found that there could be a possibility and the following objectives could be established if the 3-Lane option was implemented.

***

- demolish the existing two lane structure after 20+ years and replace with new while salvaging the third lane

The "salvaging" comment simply queried whether a third lane, if "stuck" on to the existing two-lane structure, could be salvaged. There is no evidence of pre-disposition here, only of broad, proper, canvassing of possibilities.

The applicant alleged that the nature of the project was changed and was not disclosed when the PAC meetings were "cancelled." The project did not change, and as noted in the recitation of this case's background, the PAC meetings were delayed into late April because of the need to carry out further analysis in response to public concern (RR, vol. I-A, tab 1: p. 39; vol. II-A, tab 1-O: p. 59; vol. IV-A, tab 2: p. 2273; AR vol. V-A, tab 57: p. 2303).

The last point which the Court is obligated to address, peripheral to the bias submission, is whether the applicant had a legitimate expectation that no preferred reconstruction option would emerge until the completion of the study. As noted previously, there was no "preferred option". Further, the doctrine of legitimate expectation would not give the applicant the relief it wants in any event because it wants substance relief. Legitimate expectation will only accord procedural relief (***Old St. Boniface, supra***; ***Reference Re Canada Assistance Plan (B.C.)***, [1991] 2 S.C.R. 525).

When the reasonable person takes these findings into account, it is inevitable that he or she would find that the NCC staff had their mind not set on a three-lane bridge at all, much less that any contrary representation would be futile. The Court finds no bias on the part of the staff, apprehended or otherwise.

Legality of the September 3, 1996 "intent of decision": was it made on objective, careful and complete information?

The "intent of decision" taken by the NCC commissioners on September 3, 1996, was only that, an intent of decision, a kind of device to alert everyone. The actual decision which the NCC will act upon was the final decision it made on October 15, 1996. In what amounts to a preliminary objection to review of the September 3, 1996 decision, the respondent submits that the decision is moot because it was subsumed by the October 15, 1996 decision. This is an attractive submission. The seminal case on mootness is ***Borowski v. Canada (Attorney General)***, [1989] 1 S.C.R. 342. Mr. Justice Sopinka wrote at pp. 353:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

Finding mootness therefore requires 1) an absence of a justiciable issue between the parties, and 2) no reason for the judge to exercise discretion to hear the case.

In this case, the concrete dispute between the parties has not disappeared nor have the issues become academic even if it can be said that the

September 3 decision was subsumed by the October 15 decision. The September 3 decision is not moot. The Court agrees with the applicant's submission regarding the importance of the September 3 decision. The September 3 decision was a "critical juncture" in the process. The decision is the locus where the process of assessment and information gathering come together. It evinces a "live controversy" which, as will be seen shortly, cannot be otherwise addressed. This conclusion is forced by the way the applicant framed its attack on the decisions. The applicant's position is that the decision was not made on complete and objective information. To find the decision moot would preclude the process leading up to the decision, in terms of gathering the material the NCC had in front of it when the two decisions were made, from scrutiny. The applicant did not attack the October 15 reconstruction decision on the ground that it was not made on objective, careful and complete information. If the September 3 decision was subsumed in its entirety, *i.e.* it was rolled up into the October 15 decision, which the respondents have argued, there seems to be no reason why the October 15 decision could not have been attacked on the those grounds: that it was made without complete and objective evidence before it. This is not to blame the applicant for proceeding in the manner it did. The applicant filed an originating notice of motion regarding the NCC's July 17, 1996 section 12 determination. The originating notice of motion was held in abeyance on consent of the parties until the applicant gave notice to the respondent that the motion would be continued. (This was part of a consent order issued by Mr. Justice MacKay.) After the September 3, 1996 decision, the applicants brought a motion to enjoin the NCC from taking any further steps in the process. This motion was denied but leave to amend the originating notice of motion was granted by Mr. Justice Cullen on October 7, 1996. The originating notice of motion was amended in T-1830-96 to impugn the September 3 decision. On December 10, 1996, Mr. Justice Dubé heard motions brought by both parties. One of the components of the respondent's motion was that T-1830-96 should be dismissed for being moot. This was denied by order of Mr. Justice Dubé on December 23, 1996. While this should not have been taken as a final adjudication on the mootness issue

(because the Court does not have the jurisdiction to strike out an originating notice of motion before the hearing unless the action has no possibility of success: ***David Bull Laboratories Inc. v. Pharmacia Inc.***, [1995] 1 F.C. 588), no reasons were given and this may have been the source of some confusion. Hindsight is always 20-20, and none of the originating notices was amended. To hold otherwise would immunize a number of public interest issues from judicial review because there was no originating notice of motion in respect of the October 15, 1996 decision regarding this ground.

This said, the applicant submits that there are specific flaws in the information upon which the NCC commissioners based their September 3, 1996 decision. The applicant challenges:

1) the lack of a study (or at a minimum, the lack of focus) on traffic demand management (TDM) for the two-lane option,

2) the staff's failure to reference the TRANS study.

3) the use of the term "high risk" in the September staff report; the applicant submits that it was highly misleading, and

4) the "ever changing nature of the justification for the proposed option", specifically

a) the inclusion of offsets,

b) the verity of the costing information,

c) the failure to consider the Fenco/SNC report,

d) that it was made possible because of an alleged change in the methodology used by the consultant.

There is no question that the information which the NCC had before it on September 3, 1996 had to be complete and objective, because it served as the basis for the "intent of decision ***and*** the subsection 12(*c*) EARPGO decision (which itself will be dealt with below). In ***Friends of the Oldman River v. Minister of Environment***, [1992] 1 S.C.R.3, the Supreme Court emphasized

that the decision maker must have objective information to make decisions under the EARPGO regime. As the applicant suggests, one can add "complete and careful" to this standard, as did Mr. Justice Mackay in ***Union of Nova Scotia Indian v. Canada (Minister of Fisheries and Oceans)***, [1997] 1 F.C. 325. The standard to which the NCC and its staff should be held to can be no less than scrupulous (***Canadian Wildlife Federation v. Minister of Environment***, (1989) 31 F.T.R. 1 at p. 15).

All of the above named points, except the first and last, were sufficiently dealt with under the second arm of the bias argument. While finding no bias will not always mean that material put together for a decision maker is careful, complete and objective, in this case it is. Therefore, the reasons for finding no bias can be transposed here; any difference is immaterial ***in this case***. None of these allegations is supported by sufficient evidence to show that the NCC staff material which the commissioners considered, consisted of material which was not complete, careful and objective.

With respect to the TDM allegation, the applicant alleges that the assessment did not completely address the issue of enhancement of TDM options for a two lane bridge design even though it was required by the terms of reference and it was demanded by some of the public participants during the assessment process. In the applicant's view, this is supported by a letter dated March 14, 1996 from the consultant to the NCC (AR, vol. V-B, tab 53: p. 2295) and by p. 96 of consultant's June report (AR, vol. II-A, tab 14: p. 420). The pertinent excerpt of the letter simply states that "The requirement for effective traffic management and the desire to maintain two lanes of traffic throughout the reconstruction has also been brought forward in the environmental process." The page in question in the consultant's report reads:

> In carrying out the evaluations of alternatives it was recognized that whichever scheme was identified as being preferred, there would be a need to pursue methods to increase vehicle occupancy rates and thereby potentially reduce the existing traffic volumes

> and the growth in volumes as population and employment levels increase on both sides of the River.

Neither of these pieces of evidence supports the applicant's contention. The terms of reference, in the definition of the scope of the proposal (RR, vol I-B, tab 1-G: p. 477), contemplate the examination of

> reasonable alternatives and options for evaluation by the study ***
>
> 2. A new two-lane deck that maintains existing capacity, travel modes, approach route configurations, and traffic control measures;
>
> 3. A new two-lane deck that combined with traffic control measures and corresponding approach route configurations that give priority to public transit and enhance the person capacity of the Bridge;
>
> 4. A new two-lane deck and corresponding approach route configuration dedicated specifically to high occupancy vehicles (HOV) combined with the application of congestion pricing (tolls or user fees) for single occupant vehicles (SOV) using the Bridge;
>
> ***

Nowhere do the terms of reference require a separate study of TDM enhancement for two-lane options. The terms of reference require only that the traffic effects of various two-lane (and three-lane) configurations be included in evaluation of the options.

The consultant's June report clearly shows that this was done. It is not necessary to reproduce every part of the report where TDM was dealt with. The following references represent some examples of how TDM for two-lane options were examined: AR, vol. II-A, tab 14: pp. 344, 345, 351, 353, 356, 375-384, 409-410, 413-415 and 418. Further, Mr. Bonin testified on cross-examination on his affidavit that (AR, vol. IV-B, tab 53: p. 1747)

> In the transportation demand management, there are other measures such as park and ride facilities. This, of course, was not directly related to the bridge, but the consultants were aware that the Société de transport de l'Outaouais and the Quebec Government were to go ahead with the construction of the park and ride facility on Aylmer Road at the intersection of Rivermead Road.

Mr. Sutherns, on cross-examination, testified that there were discussions with Ontario and Quebec representatives as to the potential HOV usage and designation of lanes on either side of the river. He also stated that there was discussion of tolls or user fees (congestion pricing) (AR, vol. IV-B, tab 54: pp. 1859-1860). This said, the terms of reference were complied with, and the fact that the consultant did not perform a separate study to consider enhancing options for a two-lane design does not show that the September 3, 1996 decision was made with a deficit of objective and complete information. The issues were fully considered.

One final submission, emphasized by the applicant in oral argument, is that there is a link between the methodology initially proposed by the consultant and that which was ultimately used. It was argued that this was the vehicle which allowed the alleged shifting justification for the project. In its written submission, the applicant puts it this way: "the ability to have this shifting justification stems directly from the removal of the weighting process during the initial EA" (AR, vol. VII: p. 2623). The applicant submits that the link manifests itself thus: the applicant had a legitimate expectation that the methodology used during the assessment process would be the weighting method, not the comparison/elimination method. As the evidence shows that there was no shifting justification, this point does not need to be addressed here. It will, however, be re-visited below under the analysis of the NCC's compliance with the EARPGO.

Has the NCC complied with sections 12 and 13 of the EARPGO?

The last issue before the Court is whether the NCC complied with the EARPGO requirements. The applicant is basically attacking the subsection 12(*c*) and section 13 EARPGO determinations, the conduct of the process, and the alleged "deferred decision" which if correct would undermine the whole process. For clarity, the analysis will be broken down this way:

(a) September 3, 1996 subsection 12(*c*) EARPGO decision

(ii) Did the public consultation process meet the necessary standard?

(ii) Was the project "split", *i.e.* were the cumulative effects considered?

(b) Was the October 15, 1996 section 13 EARPGO decision legal (referral to a public panel)?

(c) Was the October 15, 1996 "final" reconstruction decision legal because it allegedly "deferred" the actual decision?

It must be recalled that the consultant's June report was meant both to assist the NCC in choosing a reconstruction option and to fulfil the EARPGO requirements. Section 3 of the EARPGO defines the scope and purpose of the environmental assessment process. It reads:

> 3. The Process shall be self assessment process under which the initiating department shall, as early in the planning process as possible and before irrevocable decisions are taken ensure that the environmental implications for all proposals for which it is the decision making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel.

The potential effects which must be considered are set out in subsection 4(1):

> 4. (1) An initiating department shall include in its consideration of a proposal pursuant to section 3
>
> (*a*) the potential environmental effects of the proposal and the social effects directly related to those environmental effects, including any effects that are external to Canadian territory; and
>
> (*b*) the concerns of the public regarding the proposal and its potential environmental effects

Every proposal must undergo an initial environmental screening. This is mandated by section 10:

> 10. (1) Every initiating department shall ensure that each proposal for which it is the decision making authority shall be subject to an environmental screening or initial assessment to determine whether, and the extent to which, there may be any potentially adverse environmental effects from the proposal.
>
> (2) Any decisions to be made as a result of the environmental screening or initial assessment referred to in subsection (1) shall be made by the initiating department and not delegated to any other body.

After this determination of the potentially adverse effects is done, section 12 requires the initiating department to make a determination:

> 12. Every initiating department shall screen or assess each proposal for which it is the decision making authority to determine if
>
> ***
>
> (*c*) the potentially adverse environmental effects that may be caused by the proposal are insignificant or mitigable with known technology, in which case the proposal may proceed or proceed with the mitigation, as the case may be;
>
> (*d*) the potentially adverse environmental effects that may be caused by the proposal are unknown, in which case the proposal shall either require further study and subsequent rescreening or reassessment or be referred to the Minister for public review by a Panel;
>
> (*e*) the potentially adverse environmental effects that may be caused by the proposal are significant, as determined in accordance with criteria developed by the Office in cooperation with the initiating department, in which case the proposal shall be referred to the Minister for public review by a Panel; or
>
> (*f*) the potentially adverse environmental effects that may be caused by the proposal are unacceptable, in which case the proposal shall either be modified and subsequently rescreened or reassessed or be abandoned.

If there is sufficient public concern regarding the projects, the proposal must be referred to a public review panel. This requirement is found in section 13:

> 13. Notwithstanding the determination concerning a proposal made pursuant to section 12, if public concern about the proposal is such that a public review is desirable, the initiating department shall refer the proposal to the Minister for public review by a Panel

After a section 12 decision is made, subsection 15(*a*) requires that the initiating department

> (*a*) after a determination concerning a proposal has been made pursuant to section 12 or a referral concerning the proposal has been made pursuant to section 13,
>
> ***

> that the public have access to the information on and the opportunity to respond to the proposal in accordance with the spirit and principles of the ***Access to Information Act***.

The importance of the EARPGO process was emphasized by the Supreme Court in ***Friends of the Oldman River v. Canada***, [1992] 1 S.C.R. 3 at p. 71:

> Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. Its fundamental purpose is summarized by R. Cotton and D. P. Emond in "Environmental Impact Assessment", in J. Swaigen, ed., ***Environmental Rights in Canada*** (1981), 245, at p. 247:
>
> > The basic concepts behind environmental assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation.
>
> As a planning tool it has both an information-gathering and a decision-making component which provide the decision maker with an objective basis for granting or denying approval for a proposed development; see M. I. Jeffery, ***Environmental Approvals in Canada*** (1989), at p. 1.2, 1.4; D. P. Emond, ***Environmental Assessment Law in Canada*** (1978), at p. 5. In short, environmental impact assessment is simply descriptive of a process of decision-making.

The case presently before the Court is a paradigm example of the assessment having both information gathering and decision-making aspects. With this in mind, the discreet legal issues can now addressed.

It is appropriate to note that in reviewing the conduct of an environmental assessment, the role of the Court is akin to that in any other judicial review proceeding: generally speaking, as long as there was a reasonable basis for the impugned decision(s), irrelevant considerations are not taken into account and no legal error is committed, the Court will not intervene [***Canadian Wildlife Federation Inc. et al. v. Canada (Minister of the Environment) and***

Saskatchewan Water Corp (1989), 31 F.T.R. 1 at p. 14; affirmed by the Court of Appeal at [1991] 1 F.C. 641 (F.C.A.)].

Did the public consultation process meet the necessary standard?

Public consultation is part of the EARPGO assessment process by virtue of paragraph 4(1)(*b*), recited above, which states that public concern must be taken into account. Madam Justice Reed, in ***Friends of the Island v. Canada (Minister of Public Works)***, [1993] 2 F.C. 229 (T.D.) stated that the object of the EARPGO "is to allow for meaningful and comprehensive public discussion of potential environmental impacts." (p. 265) While this statement does not explicitly create a legal standard to assess public consultation, there is no sensible reason why "meaningful and comprehensive" should not be the standard. To hold otherwise would render paragraph 4(1)(*b*) nugatory. [The Court notes that the two cases to which the applicant referred, ***Re C.R.T.C. and London Cable TV Ltd*** (1976), 67 D.L.R. (3d) 267 (F.C.A.) and ***Quebec (A.G.) v. Canada (N.E.B.)***, [1994] 1 S.C.R. 159, as being illustrative of the legal standard to which public consultation processes should be held, are not applicable because those cases had hearings (C.R.T.C: a quasi-judicial body.) or public hearings (National Energy Board: public hearings mandated by statute).] As the applicant points out, there are two periods at issue: 1) the period prior to the September 3, 1996 decision, and 2) the period after September 5, 1996 with comes under the aegis of section 15 of the EARPGO. The first period will be dealt with first.

The public consultation was comprehensive. The respondent's memorandum of argument (RR, vol. V, tab 8) sets out the entire record of public consultation at pp. 71-72 and 77-78. The high points are as follows. Public

consultation and the establishment of the PAC were set out in the terms of reference (RR, vol. I-B, tab 1-G: p. 487). The applicant's submission, that the NCC was trying to "stack" the PAC in its favour because the "value of individual citizen membership is questionable" (AR, vol. V-B: p. 2227), is completely unfounded. The statement in question comes from a June 14, 1995 facsimile from Mr. Keklikian (NCC senior planner) to Mr. Gosselin (then head of the assessment for the consultant). When read in context, it is clear that Mr. Keklikian is only trying to get a balance of viewpoints on the PAC. As the respondent pointed out, such a balance was contemplated by the terms of reference.

Two public consultation sessions were held, in May and June of 1996 (these are described in appendices D, E and F to the consultant's June report, RR, vol. II-B, tab 1-Q: pp. 1109-1121 and 1297-1435). Six PAC meetings were held (June 26, August 1, November 8, December 6, 1995 and May 1 and May 21, 1996), three more than contemplated by the terms of reference. These were referred in the June report. The submissions which were made at the meetings and notes of the meetings were appended to the report. (RR, vol. II-B, tab 1-Q: pp. 1004-1007; pp. 1123-1220) After the June "intent of decision" (recall, the abortive one), there was a sixty day comment period. Notices were published in newspapers and the material was available at the respondent's offices and in public libraries. The response to this was 58 individual submissions and one petition. The NCC staff's public concerns analysis summarized and responded to the concerns (RR, vol. III-B, tab 1-EE: pp. 1818-1822 and 1835-1866).

The process was also meaningful. There are numerous examples in Mr. Bonin's affidavit which show the extent and impact of public concern which was identified through the consultative process: RR, vol. I-A, tab 1: pp. 27, 31, 33, 35-43, 61-63, 75-87, and 89-91. One example from these references is sufficient to make this point (p. 37): "As a result of comments received from

the January 1996 public meetings, as well as comments made by members of both PAC and TAC and in subsequent correspondence received by the NCC, an additional, previously unanticipated study was performed by the consultant titled 'Champlain Bridge Reconstruction Program Option Reassessment' ***. " The consultant's June report also notes this: RR, vol. II-B, tab 1-Q: pp. 1109-1121 and 1297-1435. Finally, it will be recalled that public concern identified bridge life span and lane viability during construction, and that public concern forced the consultant to make a supplementary report.

It should be added that any suggestion that the PAC participation was "summarily suspended" is completely without merit. There was a PAC meeting scheduled for February. As there was massive public response to the January public consultation study, the consultant needed more time to deal with the response. In fact, the consultant needed to increase its fees to deal with the public response. This is evidenced by the February 14, 1996 letter from the consultant to Mr. Keklikian (AR, vol. V-B, p. 2280):

> Studies of the nature of the Champlain Bridge Reconstruction Environment Study are very reactive to public input. In fact, it is the cornerstone on which the Environmental Assessment process is founded.
>
> ***
>
> The level of public involvement and political participation has far exceeded the expectations at the beginning of this study, consequently, considerable time has been spent responding to issues that were unanticipated.

The increase in cost was estimated to be $43,000 to $47,500. The deferral of the February meeting, therefore, was for the entirely innocent and appropriate reason of dealing with public concern.

A second issue, which is most appropriately discussed under the rubric of meaningful public consultation process, is whether there was a legitimate expectation that a particular methodology would be used and if so whether that legitimate expectation was breached. It is well established, by the authorities cited above, that the legitimate expectation doctrine applies only to

procedural, not substantive rights. The doctrine is invoked because the applicant argues that the change in methodology stifled public participation in the assessment process. As counsel for the applicant stated: "in terms of ensuring all of the alternatives were properly studied, the NCC became bound by its own rules, its own Terms of Reference, its own, if I may put it this way, contract with the community groups that were invited to participate in the public consultation process" (Transcript, vol. II: p. 364). This is a sophisticated argument, one which runs through the entire assessment process. Even though the evidence shows that all of the alternatives were properly studied ***with a method other than the weighting process***, that is to say, the comparison/elimination process, this is not sufficient to extinguish the applicant's legitimate expectation, if one exists, to participate in the "weighting" process. In this case, legitimate expectations have everything to do with fair process and nothing to do with the validity of the method actually used, which has been shown to be legitimate.

This argument stems from the decision of the Federal Court of Appeal in ***Pulp and Paper and Woodworkers of Canada, Local 8 et al. v. Canada (Minister of Agriculture) et al.*** (1994), 174 N.R. 37. In that case, the Minister of Agriculture undertook to include Health and Welfare Canada in the evaluation process for a pesticide. Before both the Trial Division and the Court of Appeal, the Pulp and Paper union successfully argued that a pamphlet entitled "Pesticides in perspective" issued by Agriculture Canada (1985), which was available to the general public, created a legitimate expectation that Agriculture Canada would consult with other government departments -- particularly Health and Welfare Canada -- before registering a pesticide. The relevant part of the pamphlet reads (pp. 45-45):

> The ***Pest Control Products Act*** governs the sale and use of all pesticides. It lets Agriculture Canada ensure their safety and effectiveness before they are made available to the public. Health and Welfare Canada, Environment Canada, Fisheries and Oceans Canada and their provincial counterparts all participate in the decision-making
>
> ***

> It may take up to 10 years' laboratory work and field evaluation before we consider a product sufficiently tested to be released on the commercial market.

Madam Justice Desjardins, for the Court of Appeal, found that this created a legitimate expectation for these reasons (pp. 47-49):

> The doctrine of legitimate expectations is essentially procedural. It was outlined by Hugessen, J.A., in ***Bendahmane v. Minister of Employment and Immigration***, [1989] 3 F.C. 16; 95 N.R. 385, at page 31, when he said:
>
> > The applicable principle is sometimes stated under the rubric of 'reasonable expectation' or 'legitimate expectation'. It has a respectable history in administrative law and was most forcefully stated by the Privy Council in the case of ***Attorney General of Hong Kong v. Ng Yuen Shiu,*** [1983] 2 A.C. 289 (P.C.). In that case, Ng was an illegal immigrant to Hong Kong from Macau, one of several thousands. The Government gave a public assurance that each illegal immigrant would be interviewed and each case treated on its merits. Notwithstanding this, Ng, whose illegal status was not in dispute, was ordered deported without being given the opportunity to explain why discretion should be exercised in his favour on humanitarian and other grounds. The Privy Council held that in so acting the authorities had denied Ng's reasonable expectations based upon the Government's own statements. Lord Fraser of Tullybelton put the matter thus (at page 638):
> >
> > '... when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly by any representations from

> interested parties and as a general rule that is correct.
>
> 'In the opinion of their lordships the principle that a public authority is bound by its undertakings as to the procedure it will follow, provided they do not conflict with its duty, is applicable to the undertaking given by the Government of Hong Kong to the applicant, along with other illegal immigrants from Macau, in the announcement outside the Government House on October 28, that each case would be considered on its merits.
>
> ***
>
> The Minister announced a consultative process by which he would come to that decision. The final decision is, however, by statute, his and his only to take, but he announced he would seek enlightenment from specialized government departments. No law prevented him from declaring the process he might choose to follow in order to arrive at his decision. When that process was announced, it could only have the effect of creating reasonable expectations in the public alerted to the use of pesticides, and particularly those more exposed to possible effects of the control product, that certain procedure would be followed so as to ensure public health and safety (" ... all participate ... It may take up to 10 years ...")
>
> In cases of an omission on the part of the Minister, this Court is entitled, as expressed by the Supreme Court of Canada in the Old St. Boniface Residents Assn. Inc. v. Winnipeg (City) case, to supply the omission where a party has been led to believe that his or her right to a safe environment would be affected if the proper consultation has not been followed.
>
> The Minister became bound by his own rules. The doctrine of legitimate expectations, being an element of procedural fairness, applies fully in this case. The trial judge so decided and I agree with him.

Boiled down, the requirements of a legitimate expectation arising from an undertaking made by a public authority hinge on the undertaking or promise. If a public authority has undertaken to do something, like an environmental assessment, a certain way in order to make a statutory decision, the public authority will be held to that undertaking.

During oral argument, counsel for the applicant went to great length to explain to the Court the difference between the weighting process and the comparison/elimination process (Transcript, vol. II: pp. 368-394). The

weighting method works this way: criteria are selected, *e.g.* travel time, air quality, resident considerations, and numerical values are given to each criteria. The numerical values are then tallied up. As the applicant's counsel emphasized, the value of criteria is in the eye of the evaluator. If community groups are participating in the weighting, the methodology allows an opportunity to reflect community interest. The comparison/elimination process was characterized by the applicant's counsel as being non-participatory. Various options are compared to each other using various criteria, and in the end only one is left. At this time the public can comment on the result. Mr. Sutherns described it this way during cross-examination: "Most commonly, I have heard it referred to as a ranking of the alternatives out of which a paired comparison can lead you to a choice of one over another" (AR, vol. IV-B, tab 54: p. 1899).

The terms of reference for the assessment left it to the consultant to choose either (or any other) method. What the legitimate expectation submission comes down to is whether the consultant undertook to use the weighting methodology or not. There is no question that the applicant wanted the consultant to use the weighting methodology. The September 3, 1995 letter to the consultant from some of the community groups which comprise the applicant is good evidence of this (AR, vol. V-B, tab 57: p. 2236):

> 4. The PAC must understand and be able to "advise" on these parameters since acceptable baseline values and rankings from an engineer may be quite different from levels acceptable to PAC. The PAC and the public must have the opportunity to rank and weight the factors independently of the technical group and the consultants ranking as was done in the Environmental Assessment of the South East Sector. (see attached example).

The assessment referenced in the letter had four different evaluators, one being a public advisory committee. The method used was the weighting method (AR, vol. V-B, tab 57: p. 2238). While what was wanted is clear, the existence of an undertaking or promise is somewhat murky.

A number of matters must be looked at. The first is the terms of reference. The relevant part of the terms reads (RR, vol. I-B, tab 1-G: p. 487):

> The consultants are expected to synthesize existing data to determine need and justification, identify any supplementary data requirements, determine appropriate evaluation criteria and appropriate environmental evaluation method, and conduct the environmental evaluation of alternative measures to recommend the preferred option. The consultants are expected to conduct all logistics, technical preparation, invitations, documentation, distribution and presentation associated with the conduct of the public consultation program for this study.

This does not direct the consultant to apply any particular sort of methodology. The choice is completely within the consultant's discretion. Public participation, however, is considered. The second phase requires "Documenting public concern and opinion with respect to the evaluation criteria, methodology and results, and preparing a report defining the consultation program and the way public concerns are incorporated in Phase two of the study" (RR, vol. I-B, tab 1-G: p. 485). The terms also allowed for the creation of the PAC and set out a schedule for public consultation. The terms of reference, therefore, stand for two things. The first is that the NCC did not promise a particular methodology for the assessment. The second is that the only relevant promise or undertaking was that there would be public consultation.

The second piece of evidence is the September 11, 1995 letter from Mr. Keklikian, to Mr. Gosselin. That letter was in response to the above-noted September 3, 1995 letter to the consultant from the community groups. The important part of the September 3 letter reads as follows (AR, vol. V-B, tab 57: p. 2242):

> the consultant team must clearly explain the evaluation methodology and process to members of the Public Advisory Committee. The consultant team must also ensure that members of the Public Advisory Committee will be given the opportunity to evaluate ad [*sic*] rate options and factors independently and in addition to TAC.

The response to this letter, which the consultant sent out to the community groups, is the third piece of evidence. The draft version appears at pp. 2243-45

of vol. V-B, tab 57 of the applicant's record. The important extracts warrant recitation:

> We generally agree with you that these meetings have not gone well and that we have been unable to progress into the study as we had planned.
>
> ***
>
> It is not the unanimous opinion of PAC members that we should not be examining the three lane option. We have noted, however, that you believe otherwise. It is our position that in order to carry out an environmental assessment study, reasonable alternatives must be identified. There are members of the public, members of the Public Advisory Committee as well as agencies within the National Capital Area that believe a three lane option should be examined, that fact alone dictates that it must be examined. If following the analysis and evaluation of the alternatives it is clear that the three lane option has more disadvantages and greater negative effect on the environment than the two lane option then it clearly will not be recommended. However, we cannot dismiss this option before the analysis associated with the EA study is completed.
>
> We have incorporated all of your comments that we believe are justified into the Public Consultation Plan. Those comments that have not been are now part of the public record and may be referenced at any time.
>
> ***
>
> *4) The PAC will be given the opportunity to advise and review the evaluation of the alternatives and comment on the weighting of the factors* [emphasis added]

These two letters, the applicant submits, contain a response to the applicant's demand. That was to promise that the weighting method would be used and that the PAC would be able to participate in the weighting.

The evidence shows that the consultant had to explain the methodology to the public and give the public an opportunity to comment and review the evaluation of the alternatives. The evidence also shows that various community groups in the PAC wanted the methodology to be the weighting method and wanted to participate in the weighting. The terms of reference allow the consultant, not anybody else, to determine what methodology would be used to identify alternatives. The evidence does not show that the consultant promised to use the weighting method. "The PAC will be given the opportunity to advise and review the evaluation of the alternatives and comment on the weighting of the factors" cannot be taken to mean this. What it does mean is that the PAC and

the general public would be able to consider the four major factors (natural environment, transportation, social environment and cost) which the consultant identified and weighed equally in the consultant's preliminary report of May 1 (RR, vol. II-A, tab I-P). The PAC had over seven weeks to comment on the evaluation. Many comments were made, and appear in an appendix to the consultant's June report (vol. II-B, tab 1-Q: pp. 1175-1216). Some of the comments which the applicant brought to the Court's attention indicate that several community groups were operating on the assumption that the evaluation method would indeed be the weighting approach (***e.g.*** letter from Westboro Beach Community Association, RR, vol. II-B, tab I-Q: p. 1182; letter from Mr. Michael Pellet, RR, vol. II-B, tab I-Q: p. 1186; letter from Hampton-Iona Community Group, RR, vol. II-B, tab I-Q: p. 1189; letter from Island Park Community Association, RR, vol. II-B, tab I-Q: p. 1198). That some groups mistakenly thought that the weighting method was going to be used is only evidence of confusion and wrongly placed belief. This is simply not relevant in the absence of any promise made by the NCC or its representative, the consultant.

Accordingly, there was no breach of legitimate expectation because neither the NCC nor the consultant promised that the weighting method would be used. No legitimate expectation was created. The only promise was of public participation by way of comment on the evaluation method, and the record is rife with that.

With respect to the second period, *post*-September 5, 1996, which ran from that date to October 7, 1996, the applicant relies on this submission: "much of the factual information for which [the applicant] believes fault should be found in the decision-making of the NCC commissioners applied equally to the public consultation process initiated by the NCC on September 5, 1996. The same written material was provided to the public for this purpose" (AR, vol. VII: p. 28). This Court has already found nothing wrong with the material which was

before the commissioners. ***Ergo*** this submission fails. Public concern for this period was addressed through meaningful and comprehensive public consultation.

Was the project "split"?

This prong of the applicant's attack arises from the NCC Commissioner's September 3, 1996 decision which determined that the environmental impacts of the three-lane proposal were insignificant or mitigable with known technologies, made in accordance with subsection 12(***c***) of the EARPGO. This fulfilled the Commission's obligation under section 12 of the EARPGO. The decision adopted the NCC staff's September 3, 1996 recommendation (RR, vol. III-A, tab 1-AA: p. 1745), which was in substance the same recommendation as the staff made on July 18, 1996 (RR, vol. III-A, tab 1-W). This comes as no surprise because, as the second recommendation notes, the change in costing information disclosed no new environmental impacts (RR, vol. III-A, tab 1-AA: p. 1745).

At the heart of a subsection 12(***c***) decision is the determination that environmental effects are insignificant or mitigable. This stems directly from the environmental assessment. The Federal Court of Appeal has recognized in a decision under the ***Canadian Environmental Assessment Act***, S.C. 1992 Chap. C-37 (CEAA: the statute which succeeded the EARPGO) that "No information about the probable future effects of a project can ever be complete or exclude all possible future outcomes *** Reasonable people can and do disagree about the adequacy and completeness of evidence which forecasts future results and about the significance of such results without thereby raising questions of law." (***Alberta Wilderness Assn. v. Express Pipelines Ltd.*** (A-494-96, A-586-96, 96-A-32) (July 24, 1996) at pp. 5-6). In ***Cantwell v. Canada (Minister of Environment)*** (1991), 41 F.T.R. 18, (upheld on appeal: (A-124-91), June 6,

1991), Mr. Justice MacKay wrote these words about the Court's role in reviewing such a determination at p. 31:

> It would be inappropriate for the Court to insist on a particular form, or to infer that a particular conclusion about potentially adverse effects that are discussed in a different manner from the discussion of others. The Assessment is not drafted by lawyers but by technical, scientific and managerial staff whose technical and scientific judgment is required. Unless there is some clear reason to question their qualifications and methodology, and these are not in issue here, their knowledge and understanding of the facts upon which their judgment is based must be relied upon.

Mindful of these comments, the Court turns to the case at bar.

The gravamen of the applicant's complaint is that the subsection 12(*c*) EARPGO decision did not consider potential modification to the Island Park Drive intersection (IPD intersection) which would allow it to accommodate extra traffic. The applicant submits that this shows that the environmental assessment and the decisions which flowed from it failed to consider the full impact, or cumulative effects, of the preferred three-lane option. Historically, the Coalition says, all studies which have considered the Champlain bridge show that the only way to make a three-lane option effective is to modify the IPD intersection. In the applicant's eyes the terms of reference contemplate that IPD intersection modifications were "part of the alternative for adding a third lane" (AR, vol. VII: p. 2624) and were eliminated in the consultant's June report. The applicant then asks the Court to infer that the NCC intends to modify the intersection at a later date ("The NCC is, in reality, already working to pave the way for intersection modification": AR, vol. VII: p. 2625) and thus would avoid having the project come under any environmental scrutiny. (The latter because it is the respondent's position that it is not bound by the new CEAA.)

In its barest form, the applicant's submission comes down to two points. The first is that the cumulative impacts of any modification of the IPD were ignored. The second is that modification of the IPD is inextricably linked to a third lane. The applicant relies on the words of Mr. Justice Iacobucci for the

Supreme Court of Canada in ***Quebec (A.G.) v. Canada (N.E.B.)***, [1994] 1 S.C.R. 159, where the Supreme Court considered whether construction of electrical production facilities was related to construction of export lines to the United States in the EARPGO context. Iacobucci J. stated at p. 192 that

> A better approach is simply to ask whether the construction of new facilities is required to serve, among other needs, the demands of the export contract. If this question is answered in the affirmative, then the environmental effects of the construction of such facilities are related to the export. In these circumstances, it becomes appropriate for the Board to consider the source of the electrical power to be exported, and the environmental costs that are associated with the generation of that power.

In essence, therefore, the applicant's second argument is this:

> every report on the expansion of the Champlain Bridge to date has stated that to make the third lane effective, the intersection at the Champlain Bridge-Ottawa River Parkway-Island Park Drive must be changed and the capacity increased. It is, therefore, a directly related work whose impacts must be taken into account. The impacts are generally known, and are generally seen as very significant (AR, vol. VII: p. 2626).

At this juncture it is vital to recall the facts surrounding what decision was ultimately taken. They resolve both questions. In its June environmental report the consultant recommended a two-lane reconstruction (RR, vol. II-B, tab 1-Q: pp. 1105). The consultants reviewed and considered all previous traffic studies regarding the expansion of the bridge. The studies are listed in the June report: "In carrying out the Environmental Assessment Study, extensive use was made of studies that have been carried out previously *** ***Champlain Bridge Investigation Report******Champlain Bridge One Directional Flow Impact assessment*** *** [*etc.*]" (RR, vol. II-B, tab 1-Q: pp. 999-1000). Three options analyzed by the consultant in its study included examining the closure of IPD at the Ottawa River Parkway and building a grade-separated left turn ramp. The consultant, and later the NCC staff, did not recommend any IPD intersection modification because it would have an unacceptable social cost (RR, vol. II-B, tab 1-Q: pp. 1085-1090). Mr. Bonin's unrebutted evidence is that

> The recommendation of the Consultant and the NCC staff was that no such changes occur. In such circumstances, no significant effects on traffic on the Ontario side occur. The only changes that occur are utilization of the remaining unused

> capacity in the IPD/ORP intersection owing to the improvements on the Québec side Bridge approaches, which are common to all options and variants. The Consultant quantified this effect as seven per cent increase in traffic on Island Park Drive. This increase is mitigated by the construction of the Tumney's Pasture connection which would result in a ten per cent reduction in traffic on Island Park Drive, therefore yielding a net reduction of three per cent (RR, vol. 1-A, tab 1: p. 57).

The consultant's figures in its June report corroborate this (RR, vol. II-B, tab 1-Q: pp. 1069-1070).

First, then, the evidence shows that the cumulative effects of a three lane bridge option which includes modifications to the IPD intersection were considered by the consultants. In fact, the consultant rejected modification of the IPD intersection because it would have an unacceptable social cost. Thus the first prong of the applicant's submission fails.

The second prong of attack is also stymied by the evidence. The NCC staff recommended that "the 3-lane option (3.2.1) without modification to the Island Park Drive-Ottawa River Parkway intersection would result in improved traffic level of service in the evening peak direction" (RR, vol. III-A, tab 1-R: p. 1588). The reason, as noted previously, was that the staff concluded that the potential increased capacity afforded by a three-lane bridge could be realized for northbound traffic in the evening without any modification to the Island Park Drive intersection because the Lucerne/Brunet intersection has the capacity to accommodate more traffic (RR, vol. I-A, tab 1: p. 59; vol. III-A, tab 1-R: p. 1587). Further, the NCC staff believed that any increased flexibility regarding HOV and reversible lanes which could exist if the three-lane option was chosen was not adequately recognized by the consultant (RR, vol. I-A, tab 1: p. 61). The NCC staff's subsection 12(*c*) recommendation, adopted by the Commissioners on September 3, 1996, was therefore premised on these grounds: a three lane bridge and ***no modification to the Island Park Drive intersection***. Nothing more, nothing less.

These facts erode the foundation of the applicant's second argument. The NCC staff decided that the additional capacity afforded by a third lane would not be wasted by not modifying the IPD intersection for the simple reason that the gain in the northbound evening traffic flow is worth the third lane. This is a valid reason and is not based on any irrelevant considerations. Nor does it ignore relevant ones (as identified immediately above). Further, the Court cannot infer that the NCC is paving the way for intersection modification so as to immunize future modification from environmental scrutiny. The reason for this is that in the absence of compelling circumstantial evidence, the Court will look only at the record. The only piece of evidence which was tendered to support the applicant's allegation is the terms of reference for the bridge design contract. The applicant points out that the terms of reference require traffic loads for the full flow of a mixed third lane to be" 2400 cars per hour" (AR, vol. VII: p. 2626; the pertinent part of the bridge contract design proposal document is at vol. VI-B, tab 57: p. 2596 , which refers to the ***Champlain Bridge Functional Study***). The ***Champlain Bridge Functional Study*** states the number per hour at precisely, thus: ***a.m.***: 657 northbound, 1619 southbound, and ***p.m.***: 1703 northbound, 816 southbound (RR, vol. I-B, tab 1-D: p. 351) As noted above, the bridge is currently operating at ***a.m.***: 600 northbound, 1600 southbound, and ***p.m.*** 1520 northbound, 600 southbound (RR, vol. II-B, tab 1-Q: p. 1001). The numbers speak for themselves. The Court is not clairvoyant and will not speculate as to the probability of IPD intersection modification in the face of insufficient evidence. In sum, modification of the IPD intersection is not inextricably linked to a third lane.

For these reasons, the NCC made no error when it decided, pursuant to subsection 12(c) EARPGO that the proposal would have insignificant or mitigable effects.

Was the October 15, 1996 section EARPGO decision legal?

On October 15, 1996, the NCC Commissioners decided not to refer the proposal to a public review panel. Section 13 of the EARPGO, quoted earlier, states that if public concern about the proposal is such that a public review is desirable, the initiating department shall refer the proposal to the Minister for public review by a Panel. It is a purely legal matter. The standard the Court employs when reviewing a decision not to refer a proposal to a public review panel was set out MacKay J. (affirmed by the Court of Appeal) in ***Cantwell, supra*** at p. 35:

> I agree with counsel for the applicants that the discretion vested in the Minister by section 13 is not absolute, [See, e.g., Lamer J. (as he then was) in ***Slaight Communications Inc. v. Davidson***, [1989] 1 S.C.R. 1038 at 1076; see, also cases cited note 38] that it must be exercised reasonably and in good faith taking into account relevant considerations, having regard to the purposes of the Guidelines Order. The concerns of the public regarding a proposal and its potential adverse environmental effects are important matters to be considered in assessing the proposal. Where the potentially adverse environmental effects of a proposal are significant then the proposal is to be referred to the Minister of the Environment for a public review by a panel. [The Guidelines Order, ss. 3, 4 and s-s. 12 (*e*)] The involvement of the public at various stages in the process is an integral part of the full consideration of potentially adverse environmental effects which the Guidelines call for, even at the stage of the Initial Assessment.
>
> On behalf of the applicants it is submitted that, in light of the purposes of the Guidelines Order, if there is sufficient public concern about a project a public review should be held. That is not what the Order, in section 13, says. I do agree that the level and extent of public concern ought to be an important factor considered by the Minister in his deliberations under section 13 to determine whether a public review by a panel "is desirable".
>
> ***
>
> The main argument of the applicants in relation to section 13 is that the Minister, in making his decision, appears to have taken into account considerations which are irrelevant to the purposes of the Guidelines Order, and thus irrelevant for his decision. If those were the only considerations before the Minister at the time of his decision, or if he clearly relied on irrelevant considerations, then the applicants are entitles to certiori [footnote omitted]

The language of the section indicates that it is a discretionary decision and the standard set out by MacKay J. conforms with how discretionary decisions are usually reviewed. As the applicant conceded in oral argument, the test sets a

high burden for the applicant to meet (transcript, vol. III: p. 586). Mr. Justice MacKay also suggested some examples of relevant considerations at p. 36:

> I would agree with counsel for the applicants that many of the factors suggested for consideration by the Minister were irrelevant to the issue to be decided. On the other hand, the following considerations were obviously before the Minister, and in my view these are relevant factors: the general conclusion of the Assessment which expressly referred to public concern and the necessity for a decision under section 13; the widespread public concern about the project and the evident interest of many in a public review, evident from the Assessment and other documents, including the memorandum from the Deputy Minister recommending that the Assessment's conclusion be accepted and that the matter not be referred for a public review by a Panel. Some other factors listed in the memoranda to the Minister might also be accepted as relevant: that referral to a public review would be seen by many in the public as a positive response to public concern; that a public review would at least provide opportunity for people to gain a better understanding of anticipated environmental effects and to alleviate suspicion of government.

It will be recalled that the NCC staff prepared a public concern analysis in order to assist the Commissioners in making the section 13 decision. The analysis, some 367 pages in length, recommended that the NCC Commissioners not refer the project to a public review panel. The Commissioners adopted the NCC staff's recommendation. In the eyes of the NCC staff, the purpose of the public concern analysis is this: "If the Commission decides that a panel review is not desirable, it must then decide whether the project should proceed or be amended and reassessed. The purpose of this report is to make recommendations to the Commission in this regard" (RR, vol. III-B, tab 1-EE: p. 1815). After a brief canter through the analysis, one is struck by the thoroughness of the document. Every comment from the PAC meetings and all correspondence were meticulously summarized, either individually or lumped together with similar comments or correspondence (*e.g.* form post-cards sent by Alymer residents which supported the three-lane bridge and those from Ottawa residents who were not in favour of it). It was on the basis of ***all*** of the public response the NCC received regarding the proposal that the staff made their recommendation. No concerns were discounted or ignored.

The following extract of the staff's analysis, cited previously, warrants reproduction because the staff articulates the precise grounds for why a referral was not recommended. It boils the exhaustive analysis of public concern down to its bare essentials and culminates in a recommendation against referring the proposal to a review panel (RR, vol. III-B, tab 1-ff: p. 1831).

> **4.4 Potential That Panel Review will contribute new information for decision makers**
>
> NCC Staff is confident that sufficient information has been considered to assess the environmental implications of the Proposal and that the concerns raised related to the project can be addressed through design and proposed mitigation which would be implemented should the Proposal proceed
>
> The general transportation policy concerns raised are beyond the authority of the NCC and the scope of a specific project.
>
> The environmental assessment of the Champlain Bridge has been exhaustively reviewed internally and externally by NCC staff, consultants and technical advisory committee members. The responses received during the period commencing June 29th to the date of this report touch on the same issues in the EARPGO context as those that were made on in the public participation phase of the process detailed in chapter 2 of the ESR. The absence of evolution in the comments received supports the conclusion that it is unlikely that a public review of the assessment by a panel would provide significant new information about the Proposal or alternatives to it that are not currently available to decision-makers.
>
> **5. Recommendations**
>
> The issues raised throughout the process, both before and after the determination have not changed. In reviewing those concerns the NCC is satisfied that all issues raised related to the study have been addressed.
>
> The public has been given numerous opportunities to express concerns and gain a better understanding of the project. Public input regarding the project was always a key component of the study for the NCC both before and after the determination under section 12.
>
> Given:
>
> • than an environmental assessment has been carried out on which basis it has been determined that the potentially adverse effects that may be caused by the Proposal are either insignificant or mitigable with known technology.
>
> ***
>
> • that the public has had an adequate time to review all information available about the Proposal and the environment assessment and has had opportunities to comment in writing on the environmental assessment documentation and conclusions;
>
> • that considering the public concerns raised, the public review of the assessment through a panel, is unlikely to result in new information about the Proposal and would not be of added value;

> • that while opposition to the proposal has been vocal; there is also significant public support for the Proposal and all reasonable concerns have been taken into account or will be addressed through design and mitigation measures.
>
> It is recommended that the Commission decide:
>
> 1.0 that pursuant to Section 13 of EARPGO a public review of the assessment by a Panel is not desirable;
>
> ***

As counsel for the respondent emphasized, this is far more than a measure of public opinion; public concern is what section 13 of the EARPGO deals with. The analysis correctly measured public concern. It has already been said that no concerns were discounted. What the NCC staff does say is that the public response did not raise any new issues which were not already considered by the consultant and the staff.

During his presentation to the NCC commissioners on October 15, 1996, Mr. Bonin relied on overhead transparencies for assistance. These appear at RR, vol. III-B, tab 1-FF. The applicant fingers some of the conclusions in those transparencies as being irrelevant considerations at vol. VII, p. 2633 of the application record. Most of them are clearly relevant and the applicant takes no issue with them. The conclusions addressed by the applicant's counsel in oral submissions which warrant comment will be examined. It must be emphasized that the overheads are nothing more than a visual aid. It is imperative to take them in context, *i.e.* the public concerns analysis as a whole. The first two read (AR, vol. VII: p. 2633): "ii) public provided numerous opportunities during the Environmental Study to gain an understanding of the projects and to express concerns *** iii) comments and concerns raised *** during the Environmental Study Process and those raised during the period of public review for the proposal are consistent." The applicant submits that the NCC is

> using the facts of their [the applicant's] participation to say, "We have heard it all before. We don't have to do an independent review. The proponent has heard it all before. They participated. We have heard them. We don't have to do it. We don't have to have any more outside voices review this."

> It is really using their participation against them on a critical issue. This is a process that says, if there is still public concern after going through the EA process that the proponent has initiated, the initial stages, you should look at the issue of the public panel (Transcript, vol. III: p. 593)

The Court rejects this submission. Accepting it would mean that as long as there exists a steadfast opposition to a proposal, a public review panel is the inevitable result. As the respondent's counsel remarked, this would eliminate the need for a self-assessment process. Further, realistically there will always be opposition to some proposals, particularly in cases such as this one where the public is so starkly polarized: home property value and quiet neighbourhoods ***versus*** access to work. The staff's conclusion is tied in with the bottom-line reason for not submitting the proposal for review: nothing new will be raised. The conclusion has to be a relevant factor. If the public had not been given adequate opportunity to express their concerns during an environmental process it would be very difficult to justify not sending a proposal for further public scrutiny. At the very least the question has to be asked. And answered.

The next conclusion with which the applicant takes issue is "iv) the proposal provides important benefits" (AR, vol. VII: p. 2633) because in its view this has nothing to do with public concern. This is a relevant consideration because the public concern from the point of view of Quebec residents is that increased access to Ottawa is an important benefit which is lost if a third lane is not adopted. Equally relevant is the conclusion that "Broader transportation policy concerns raised are beyond the authority of the NCC and the scope of the specific project" (AR, vol. VII: p. 2633). A glance at virtually any part of the analysis reveals that many of the concerns raised broader transportation issues. It would be entirely appropriate for the Commissioners to take this into consideration.

The next consideration which the applicant submits is irrelevant is this conclusion (AR, vol. VII: p. 2633): "environmental assessment process

indicates that potentially adverse effects that may be caused by the proposal are either insignificant or mitigable with known technology." This is a relevant consideration because most of the public concern raised against the proposed third lane was centred around perceived adverse effects which were addressed by the consultant when it examined mitigation measures. What would be the point of striking a review panel when the public concerns which would be heard were already considered to be mitigable? Considering this conclusion is not, as the applicant frames it, tautological. It will not always follow ***pro forma*** that if a determination is made pursuant to subsection 12(*c*) that no section 13 review will follow. Perhaps it would be far less relevant (and easier to comprehend) if the applicant contested the subsection 12(*c*) decision ***per se***, ***viz.*** that any adverse effects were insignificant or mitigable with known technology. The applicant did not do so. This same line of reasoning can be applied for the penultimate impugned consideration: "concerns raised regarding the proposal can be addressed through design and proposed mitigation that would be implemented should the proposal proceed." (AR, vol. VII: p. 2633)

Finally, the applicant attacks this conclusion: "it is unlikely the panel review would provide new information or alternatives regarding the proposed mitigation that would be implemented should the proposal proceed" (AR, vol. VII: p. 2633). This is a variation on the "if there is public opposition, a review must result" theme. The applicant asks the Court to find this irrelevant because "One doesn't know when new things are going to come up, new ideas, new solutions, especially when you move from the proponent to the independent stage. That is very presumptive" (Transcript, vol. III: p. 599). Correct, of course, insofar as no one can predict the future. But this cannot make it irrelevant. It is a relevant consideration, particularly when the contents of public concern analysis is examined. It is no secret that some members of the public are not in favour of the bridge. They do not like the idea of a third lane. They never will. The public concerns analysis makes this abundantly clear. It

also demonstrates that there was, at that point, no suggestion that anything new was raised *via* public concern (save for the SNC-Lavalin contract design sales pitch discussed earlier). Would it not be a relevant factor if the evidence revealed that public concern raised new points or identified areas which were not dealt with in the report? Of course it would.

The evidence shows that the public concerns analysis does not present irrelevant considerations. The Commissioners had the document in front of them and adopted the recommendation. Because of this, there are reasons for the decision (unlike the ***Cantwell*** case cited earlier). Again, they are essentially 1) that when considering the public concerns raised, the public review of the assessment through a panel, is unlikely to result in new information about the Proposal and would not be of added value, 2) that while opposition to the proposal has been vocal, there is also significant public support for the Proposal and ***all reasonable concerns have been taken into account or will be addressed through design and mitigation measures***. This reason corresponds with all of the evidence which has been exhaustively reviewed above.

The Court concludes, therefore, that there is no evidential or legal basis to show that the Commissioners did rely on irrelevant considerations.

Was the October 15, 1996 "final" reconstruction decision legal because it allegedly "deferred" the actual decision?

The final issue which needs to be addressed is one which the applicant characterizes as "decision splitting". On October 15, 1996, the Commissioners voted nine to four to reconstruct the bridge as a 17.75 meter-wide three-lane structure with a lane reserved for HOV vehicles in the peak direction, two cycle lanes, two offsets, one sidewalk and two railing curbs. It would

operate, however, as a two-lane bridge only until such time as the various municipal authorities and the NCC agree on a final operating design for a 2 or 3 lane bridge. If no agreement is made between the NCC and the municipal governments by October 15, 1997, the issue is to be reviewed and addressed by the NCC (RR, vol. III-B, tab 1-GG: p. 2259-60).

The applicant's position is that

> this type of decision splitting vitiates the continued existence of a specific proposal as required for a final determination of environmental impacts and public concern, and a subsequent ability to proceed with a project under EARPGO *** In the present case, the applicant submits that the assessment was a cross between a concept stage and more specific approaches. But never has a specific design for a 17.75 meter bridge been specifically put forward during the EA process. The Applicant submits that the splitting of the decision means that, at present, no specific proposal, even at a concept stage, exists (AR, vol. VII: p. 2631).

In support of this position the applicant relies on the fixed-link bridge case, ***Friends of the Island v. Canada (Minister of Public Works)***, 1993 2 F.C. 229 (T.D) p. 229. The applicant requests the Court to order a new section 12 EARPGO decision after a specific design is decided upon.

In ***Friends of the Island*** Madam Justice Reed made the following comments at p. 264:

> It is not disputed that it is preferable to identify potential environmental concerns relating to a project before private sector developers (or public sector developers for that matter) proceed to a final design. It is also desirable to use the process as a planing tool and to avoid duplication. I am not convinced however that it is useful to consider whether the Guidelines Order requires the assessment of proposal at the concept stage or at a more specific design stage. What is required may very well depend of the type of project being reviewed. What does seem clear is that the assessment is required to take place at a stage when the environmental implications can be fully considered (section 3) and when it can be determined whether there may be any potentially adverse environmental effects (subsection 10(1)). (emphasis in original, p. 229: approved Mr. Justice Iacobucci in ***Quebec (A,G,) v. Canada (N.E.B.),*** (at pp. 198-99) cited ***supra***).

The Court agrees with the respondent that Reed J. contemplated a flexible approach. The timing of the assessment cannot be subject to a hard and fast rule.

Few words need to be expended on this submission. First, the proposal is re-construction of an already existing structure, *i.e.* the bridge is already standing. Thus it is not so conceptual as the applicant makes it out to be. In fact, it is from the start, beyond the concept stage. It must also be recalled that the consultant's report achieved two objectives: it helped fulfil the EARPGO requirements and aided the Commission in choosing an option. In light of the foregoing, the Court finds that to require the NCC to wait until a final design is ready before the environmental assessment is conducted is unwarranted. Must every proposed undertaking be subject to a bifurcated process? Is it so wrong to "kill two birds with one stone" when it is certain that no more than two birds will be killed? The circumstances in which such would be improper come within the confines of Madam Justice Reed's words: it has to be done at the point where all of the effects can be considered.

Second, several two and three-lane configurations were studied for environmental effects. They included a three-lane 18.75-metre-wide option (RR, vol. III-A, tab 1-Y: pp. 1691-1696). If anything, the option chosen was "over-studied" by one metre. The applicant has not pointed to, and this Court cannot even begin to divine, what potentially adverse impacts could be found in a 17.75-metre-wide bridge (the chosen option) which would not be caused by a 18.75-metre-wide bridge. The evidence is that the 17.75-metre-wide three-lane bridge recommended by the NCC staff in its September report, adopted by the NCC Commissioners on October 15, 1996, is the same option which was recommended in the June staff report and initial environmental assessment. This of course includes no modification to the Island Park Drive intersection, as recommended by the consultant. (RR, vol. I-A, tab 1: pp. 49, 61, 85-86; vol. II-B, tab 1-Q: pp. 1105-06; vol. III-A, tab 1-Z: pp. 1725-27 and 1731; vol. III-A, tab 1-R: p. 1591; vol. III-A, tab 1-W: pp. 1674-75). This is all the evidence shows. Finally, the Court finds, on the basis of all of the evidence, that the assessment took place at a stage when the environmental impacts could be fully considered. This meets the concerns underscored by Reed J. ***supra***. In fact, the applicant

does not even seriously suggest that the environmental assessment was premature.

The Court rejects, therefore, the applicant's allegation that a section 12 determination should have to be done sometime in the future when a specific design is ready. As a result of this finding it is not necessary to inquire further into the issue of whether if the NCC would be required to do another section 12 EARPGO determination because of the repeal of the EARPGO and its replacement by the CEAA. The NCC will undoubtedly seek counsel and will comply with the law.

It is for all these foregoing reasons that this Court dismisses all four applications for judicial review. There will be no costs awarded.

The Court expresses a note of regret at having to dismiss the applications of a ***bona fide*** "grass roots" community organization. Its actions in assertion of the community's interests, as seen by membership, deserve praise in an era of the perceivable beginnings of urban social alienation, if not disintegration. It is a manifestation and expression of basic democracy. Unfortunately, the applicants do not have a democratically directly elected level of government whom they could hold responsible electorally for the actions which so displease them. That would be a proper forum in which to vent their democratic displeasure. This, or any, Court is a forum in which their right to vent their displeasure effectively is not guaranteed, because the Court must apply the law which is in place, and was so, long before the applicant coalition's cause arose, even although Parliament has recently modified it. EARPGO's repeal and the enactment of the CEAA are the unforeseen change.

Although the NCC's Chairman and Commissioner members are selected hopefully for their intelligence and sensitivity for their fellow citizens, still the ***National Capital Act*** evinces no in-built electoral responsibility to answer the coalition's anxiety for their property values and the quality of neighbourhood

life such as is suggested by its very name. Yet the Act and the environmental regulations are the law in place which the Court must apply without fear or favour to its best ability.

F.C. Muldoon

Judge

Ottawa, Ontario

August 7, 1997

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS ON THE RECORD

COURT FILE NO.:	T-1830-96, T-2481-96, T-2865-96 & T-2866-96
STYLE OF CAUSE:	Community Before Cars Coalition v. National Capital Commission
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	April 1, 2, 3, 8, 10, 1997

REASONS FOR ORDER OF THE HONOURABLE MR. JUSTICE MULDOON

DATED: August 7, 1997

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