ONTARIO COURT OF JUSTICE

Old City Hall – Toronto

BETWEEN:

LIAT PODOLSKY	)	**A. Koehl and J. Swaigen** **For the Prosecution**
— AND —	)	
CADILLAC FAIRVIEW CORP. LTD., YCC LTD. and CF/REALTY HOLDINGS INC.	)	**E. J. Babin and C. L. Spry** **For the Defendants**
	)	**Heard: April 3, 4, 10, 11, 12, 13, 16, 17 and 18, August 16 and 17, September 11 and 24, and October 2, 2012**

REASONS for JUDGEMENT

MELVYN GREEN, J.:

A. INTRODUCTION

[1] The case before me proceeded by way of a private prosecution. The defendant corporations are charged with a number of regulatory or public welfare offences related to the harming, injury or death of birds. The

offences at issue are set out in two provincial statutes (the *Ontario Society for the Prevention of Cruelty to Animals Act* and the *Environmental Protection Act*) and the federal *Species at Risk Act*. The nominal prosecutor, Liat Podolsky, is an employee of "Ecojustice", an environmental advocacy group that maintains carriage of the prosecution. The defendants are the owners and managers of the Yonge Corporate Centre ("YCC"), a complex of three office buildings in northern Toronto. The prosecution's case against the defendants rests substantially on evidence of avian collisions, or "bird strikes", with the highly reflective glass windows and spandrels of the YCC.

[2] The three charges describe what are generally characterized as "strict liability" offences. Although there is considerable disagreement as to the proper construction of the governing law, and even more disagreement as to the law's application to the evidence before me, it is generally acknowledged that the prosecution bears the burden of proving beyond reasonable doubt the essential physical elements, the *actus reus*, of each offence. If this onus is met, the burden then shifts to the defendants to establish, on a balance of probabilities, that they ought not to be held blameworthy as they exercised due diligence in meeting the appropriate standard of care. The defendants' position is that they cannot be found guilty of the offences charged because the impugned conduct or omissions fall outside the scope of any reasonable interpretation of the reach of the charging provisions. In the alternative, the defendants say that they, in any event, have exercised reasonable care and demonstrated such, and thus are not to be faulted for any harm caused to birds.

[3] As the language of the provisions and the charges is material to the resolution of this prosecution, I here set out the three offences as framed in

the two Informations before me. In each case, CF/Realty Holdings Inc., YCC Limited and The Cadillac Fairview Corporation Limited are charged that, at the Yonge Corporate Centre at 4100, 4110, and 4120 Yonge Street, in the City of Toronto, they:

- During the period beginning on or about September 3, 2010 and ending on or about November 7, 2010 … did commit the offence of causing animals to be in distress by having or using highly reflective glass, including windows, that caused the death or injury of birds, contrary to subs. 11.2(1) of the *Ontario Society for the Prevention of Cruelty to Animals Act*, RSO 1990, c. O.36, as amended;
- During the period beginning on or about March 15, 2010 and ending on or about November 7, 2010 … did commit the offence of discharging or causing or permitting the discharge of a contaminant, namely radiation (light), from reflective glass, including windows, that caused or was likely to cause an adverse effect, namely death or injury to birds, contrary to subs. 14(1) of the *Environmental Protection Act*, RSO 1990, c. E.19, as amended;
- Between the 15th day of March 2010 to 7th day of November 2010 … did commit the offence of killing, harming, or taking individuals of a wildlife species, namely Canada Warblers or Olive-sided flycatchers, that are listed as a "threatened" species, by having or using highly reflective glass, including windows, contrary to the *Species at Risk Act*, s. 32(1).

[4] This case is largely about the plight of migratory birds and, more particularly, those whose flight routes risk collision, often fatal, with buildings in Toronto. The reflective surfaces of a number of these buildings, the YCC among them, undoubtedly contributes to many thousands of otherwise avoidable bird deaths every year, including, it is alleged, members of some species that are legally classified as "threatened". The defendants have been aware of the challenges posed to migratory birds by the YCC complex for many years. They have also made some effort – too little and too late, in the prosecution's view – to pursue and implement solutions to this problem. While several complex

issues present, the questions, at bottom, are whether the prosecution has established to the requisite standard that the defendants' acts and omissions amount to the *actus reus* of the offences charged and, if so, whether the defendants have established that the steps they have taken to mitigate the risk of bird fatalities amount in all the circumstances to a duly diligent response to an acknowledged peril to migratory birds.

[5] There is no material differences between the potential liability of the various defendants and, in any event, none is advanced by the defence. Put otherwise, the fate of all three defendants rise or fall together. Accordingly, I refer to the defendants collectively as "Cadillac Fairview" or the YCC, depending on context.

[6] The prosecution called some thirteen witnesses, including three who were qualified as experts in their professional fields of endeavour. One witness, the general manager of the YCC complex, testified at the behest of the defence. This body of testimonial evidence was supplemented by a number of agreed statements of fact and a substantial volume of documentary material that was admitted on consent of all parties.

[7] My verdict and the reasons for it follow.

A. BACKGROUND

(a) Introduction

[8] An informed appreciation of the instant prosecution necessitates some understanding of the behaviour and faculties of migratory birds and their urban ecology. These considerations require, on the prosecution's theory, at least an introduction to the physics of light and radiation. More generally, they invite an overview of the setting, construction and certain

other features of the YCC. Finally, by way of essential context, some introductory mention need be made of the evolution of what, for want of a better phrase, I shall call "bird consciousness" in Toronto and, in particular, the genesis and history of the Fatal Light Awareness Program ("FLAP"), a Toronto-based bird advocacy organization.

(b) **The Plight of Migratory Birds**

[9] Most of the scientific evidence pertaining to the behaviour of birds was led through Dr. Daniel Klem Jr., an internationally recognized expert in ornithology, including bird window strikes and their prevention. Dr. Klem is also a self-acknowledged advocate for measures designed to preserve bird populations and, in particular, to reduce bird fatalities resulting from their collision with buildings. His pioneering effort have taken some years to gain traction among his peers.

[10] Birds play a vital role in the ecosystem through their contributions to pollination, seed dispersion and pest control. Yet, worldwide, they are routinely decimated by the expansion of human endeavour. Habitat destruction is the major cause of bird mortality, but collisions with automobiles, wind turbines and, in particular, buildings take a very heavy toll. In addition, the mortality attributable to the predatory conduct of primarily outdoor or feral cats has very recently been estimated as between 1.4 and 3.7 billion birds a year in the United States alone: S.R. Loss, T. Will and P.P. Marra, "The Impact of free-ranging domestic cats on wildlife of the United States" (Jan. 29, 2013), *Nature Communication* 4, Article No. 1396.

[11] According to Dr. Klem, at least one billion birds meet their death through collisions with buildings in the U.S. each year. These fatal collisions occur with office, commercial and residential buildings of varying heights,

although the first few stories are most dangerous for birds because of the risk of vegetative reflection. The density of the bird population is a significant factor in the incidence of these collisions. Although bird strikes occur throughout the year, the concentrating effect of migratory patterns can exacerbate the problem along genetically embedded fly routes. The natural wooded ravine setting of the YCC, for example, affords a particularly attractive resting spot for migratory birds. Although no completely reliable figure is possible, FLAP estimates that each year approximately a million birds meet their untimely demise through collisions with buildings in the GTA.

[12] Birds generally behave as though glass – whether clear or reflective – is invisible. Reflective glass, in particular, creates an illusion of a benign habitat, mirroring the safety of the wooded area from which bird may be flying. A bird can generate sufficient momentum in a few metres of flight to cause fatal head trauma upon impact. As a result, approximately half of such strikes result in the death of the colliding bird.

[13] Finding solutions to the problem of avian collisions has proven challenging. Conceptually, what is required is a something that signals the presence of the windows to birds and, thereby, eliminates the risk of mistake or confusion caused by the windows' transparency or reflectivity. Although various retrofit strategies have been devised, the most effective involves the application of visual patterns or markers to glass windows, a methodology that was experimentally recognized in the late-1970s but first published in the scientific literature in 1990. The application of almost any film to a window reduces the risk of collision by about 50% but, according to Dr. Klem's most recent research and publications, appropriate markings have an effective success rate of close to 100%.

Windows can be retrofit with such films or, alternatively, patterned ultra violet paint (visible to birds but not humans) can be applied. Other solutions, if less effective and aesthetically pleasing, include physical netting, the application of decals and the installation of predator-like decoys or silhouettes.

[14] Over the years, Dr. Klem has advised the City of Toronto on a number of bird-friendly initiatives. He has also consulted, without fee, to the Convenience Group, a producer and distributor of bird-protective film technologies for window applications. Dr. Klem described the Convenience Group as "the only game in town" when it comes to providing risk-aversion window film – in Toronto and elsewhere in North America – and he has referred interested parties to the company and recommended its products. Patricia Poyntz was the general manager of the YCC during the periods critical to this prosecution. It was her understanding that the Convenience Group (with which Cadillac Fairview ultimately negotiated a substantial bird deterrent installation contract) and Michael Mesure (the executive director of FLAP, with whom she not infrequently communicated about the bird strike problem at the YCC) both routinely consulted with Dr. Klem.

(c) **Physics 101**

[15] The second count faced by the defendants alleges a violation of s. 14(1) of the *Environmental Protection Act*. In this regard, the prosecution called expert evidence from Dr. Pekka Sinervo pertaining to the physics of light and radiation and the meaning of "emit" and "emission" in the scientific community. As set out in count two, the defendants, it is said,

> … did commit the offence of discharging or causing or permitting the discharge of a contaminant, namely radiation (light), from reflective

> glass, including windows, that caused or was likely to cause an adverse effect, namely death or injury to birds …

Unsurprisingly, at least some of the averments in this count attracted challenge from the defence on the grounds that they are uncertain, ambiguous or, if construed in the manner urged by the prosecution, may lead to absurd results.

[16] Dr. Sinervo served as a professor in and then chair of the Physics Department and, later, as dean of Arts and Science at the University of Toronto. He has published more than 500 refereed papers. His qualification as an expert in the area of physics, including light radiation and electro-magnetic phenomenon, was properly conceded by the defendants.

[17] Dr. Sinervo explained that "radiation" includes all instances where energy travels through space. So long as it is not at absolute zero, every object emits radiation along an electro-magnetic spectrum. Visible light – including, for example, light reflecting from a window or mirror – is one form of radiation. Radio waves, X-rays and radioactivity are other examples. Physics aside, Dr. Sinervo disagreed with the suggestion that, in common parlance, "radiation" was associated with nuclear processes. For example, solar "radiation" by way of the emission of ultra violet rays from the sun is commonly understood as an explanation for the erosion of the ozone layer in the earth's atmosphere.

[18] The absorption, transmission and reflection of light are all variants of energy interacting with a surface and, as such, are all understood as "emissions" by physicists. While a non-scientist may speak of light reflecting off a window, it is more "accurate" to describe the phenomenon as light emitting from the window, if by way of reflection. Dr. Sinervo did allow that the meaning attributed to "emit" or "emission" may well

depend on both speaker and context. "Emission", he explained, is a "very generic term" that has to be contextualized, as in the interaction between light and a window, "to understand what is actually really happening".

(d) **The Yonge Corporate Centre**

[19] Two building developers merged in 1974 to form the Cadillac Fairview Corporation. The company owns and/or manages a large number of office and commercial properties. About 1983, Cadillac Fairview and an independent third party began construction of three office buildings north of York Mills Road on the west side of Yonge Street in the City of Toronto. The complex is known as the Yonge Corporate Centre or the YCC. The individual buildings' municipal addresses are 4100, 4110 and 4120 Yonge Street. They officially opened in 1986, 1988 and 1990 respectively. Cadillac Fairview transferred its 50% interest in the YCC to an affiliate, YCC Limited, in trust, in 1988. The third party partner transferred its 50% interest to CF/Realty Holdings Inc. (also an affiliate of Cadillac Fairview) in 2003. YCC Ltd. and CF/Realty Holdings maintain ownership of the complex while Cadillac Fairview continues to manage the buildings, including leasing and landlord functions, as agents for the owners.

[20] The YCC is a low-rise complex set in an eight-acre parkland or wooded setting. The buildings are surrounded by mature trees and a city-owned golf course. There is a ravine to the immediate west of the complex through which the Don River runs. The windows and spandrels of all three buildings are clad in highly reflective glass which contributes to the thermal efficiency of the complex. The YCC has won a number of "best building" awards, both local and national, for building and design excellence from an industry association, "BOMA" (the Building Owners

and Managers Association). Each of the buildings has also been awarded certificates for meeting certain BOMA-created environmental standards. Although bird-protection is not part of the BOMA award criteria, each of the buildings received a "Bird Friendly Building" certificate in 1996 and over the next several years. The certificates were issued by the Fatal Light Awareness Program, or FLAP, and the World Wildlife Fund in recognition of Cadillac Fairview's adoption of "the Bird-Friendly Building Program and [for] striving to make their building safe for birds". Although she was not employed there at the time, the current YCC general manager's "educated guess" was that these certificates were awarded in recognition of the YCC's efforts to control "light pollution" (the emission of light from building windows after dark) believed to entice birds and thereby induce fatal night-time collisions.

[21] The migratory patterns of a great many species of birds extend around the Great Lakes and through the Greater Toronto Area. The YCC's wooded ravine location is an especially attractive rest spot for such birds. Dr. Klem had visited the YCC twice, in 2004 and 2007. He described the buildings' natural setting as a classic example of a "reflective illusion" for birds. At the risk of being somewhat anthropomorphic, the birds misread the windows' reflection of the wooded surroundings as a continuation of the treed areas from which they are flying and, as a result, mistake the reflective surfaces for a safe natural habitat rather than unyielding obstacles with which they then collide. A similar risk is presented by transparent windows or planes of glass that frame a natural environment as birds often mistake them as clear or unobstructed flyways. As earlier noted, the consequences in either case are often fatal. According to Mark Peck, the manager of the Ornithology Collection at the Royal Ontario Museum, the ROM occasionally mounts displays of between 500 and

1,500 annual victims of GTA bird strikes. These specimens are collected by FLAP volunteers at GTA building sites and represent between 50 and 100 different species.

(e) **The Growth of Bird Risk Awareness in the GTA**

[22] Toronto public consciousness about the plight of migratory birds in urban environments closely parallels the history of the environmental advocacy group "FLAP" – the Fatal Light Awareness Program. The phenomenon of bird collisions first, if dimly, entered public awareness in the late-1980s. By 1993, Michael Mesure (now the executive director of FLAP), formed a group that began to monitor and document bird collisions with buildings in Toronto's downtown core. This group evolved into FLAP. By the mid-'90s it partnered with the World Wildlife Fund as proponents of bird preservation in urban settings. At the time, FLAP's focus was entirely on night-time collisions attributed to the bird-attractive light cast from the inside of high-rise buildings – thus explaining the origin of the organization's name and acronym. By 1996-97 there was a growing realization that avian collisions continued to occur after dawn in the downtown financial district, and that at some locations (the YCC, for example) there were more collisions in daylight than at night. The dynamics of the daytime problem were soon recognized, particularly at sites such as the YCC where a natural habitat, river and reflective buildings, all set in a migratory pathway, presented what Mesure characterized as a "lethal combination of features".

[23] Influenced in part by FLAP's advocacy, City Council adopted a motion regarding the "Prevention of Needless Deaths of Thousands of Migratory Birds in the City of Toronto" in April 2005. A "Lights Out Toronto!" ("LOT!") campaign began in 2006 in an effort to educate the public about

the concern and strategies to reduce avoidable bird deaths. A Migratory Bird Policy was adopted by Council in January 2006. It included Bird-Friendly Development Guidelines that addressed the problems presented by both transparent and reflective glass and those arising from night-time light pollution. Cadillac Fairview provided some of the funding for brochures related to the LOT! campaign and, along with FLAP and other environmental and property management groups, was one of the "participants" in developing the Guidelines. The Toronto Green Standard program, launched in 2010, requires the incorporation of bird-friendly elements in almost all new construction in Toronto. The program does not apply to existing buildings, but it placed Toronto in the forefront of North American cities as measured by civically endorsed bird-friendly policies. According to Dr. Klem, some other cities, such as New York, Calgary and San Francisco, have since adopted similar policies and programs.

[24] The City of Toronto has since begun to implement its Guidelines in some municipal construction and by retrofitting parts of City Hall through the application of a polka-dot patterned bird-deterrent film to windows on one of the facility's two towers. Bird fatalities are reported to have "disappeared" at the retrofitted tower and a similar application is planned for the windows of the companion tower.

[25] There are only a small number of kindred applications in the GTA. The Toronto Zoo affords one example. A large glass atrium area of the zoo's administrative building attracted flying birds confused by the reflection of pine trees about 60 feet distant. In the mid-1990s, approximately 20 to 35 bird deaths a year were attributed to the resulting collisions. Whitewashing the glass in 1999 eliminated bird collisions but its appearance, as described

by Tom Mason, the zoo's bird curator, was "ugly". FLAP helped the zoo source a proprietary bird deterrent film, "CollidEscape", in which FLAP then had a commercial interest. The film was applied in 2002 and 2003. According to Mason, the treatment has proven inexpensive, effective, durable and aesthetically pleasing. Other users are less pleased with its external appearance and the application's effect on see-out visibility, limiting its utility in most commercial applications.

[26] Markham offers another GTA example of a bird-friendly application. Working with FLAP, the Town of Markham retrofitted a portion of a municipally-owned, former Ontario Hydro building in April 2009 to test the bird deterrent efficacy of a film-on-glass treatment installed by the Convenience Group. Valerie Burke, a local counsellor and self-styled "champion" of the project, testified to a 90-95% reduction in bird strikes after the installation. The success of the experiment led Markham to commit to completing the installation at the former Hydro building and extending the retrofit program to a number of other civic buildings over time and as the town's budget permits. Inclusion of the film application in the maintenance budget for all town-owned buildings has been recommended, as has adoption of guidelines like those in Toronto. Burke characterized Markham's initiatives as the leading urban bird-friendly program in North America and perhaps the world.

B. THE MAJOR PLAYERS

(a) **Introduction**

[27] The three charges faced by the defendants refer to conduct alleged to have occurred during varying portions of 2010. Nonetheless, a full appreciation of the impugned activity and, in particular, the nature and extent of the

defendants' diligence in complying with the relevant statutory norms, commands a broader perspective so as to allow for an historical and contextual assessment.

[28] To the best of its ability, FLAP monitors bird strikes at many dozens of buildings in the GTA. It's activities are primarily focused on three regions: the downtown Toronto financial district, the Consilium Place complex in Scarborough and the ravine area around Yonge Street and York Mills Road, which includes the York Mills Centre and the YCC. The latter's wooded riverine setting, migratory route position and reflective cladding have, in combination, led to several thousand documented avian collisions and fatalities at that site. The YCC management is far from ignorant of this problem. Over the past 15 years it has permitted FLAP volunteers to conduct a bird surveillance and collection program on its property. It has also occasionally consulted with FLAP in exploring measures to minimize bird strikes at the building complex.

[29] The association between FLAP and the YCC has not been free of tension. The defendants take the position that they have moved with reasonable diligence and dispatch in endeavouring to mitigate bird deaths given a number of technological, financial and site-specific challenges. FLAP, on the other hand, has grown exasperated with the pace and substance of the YCC's response as bird fatalities attributable to the complex's reflective surfaces continue to mount. The history of the FLAP-YCC relationship both informs and frames the core issues in this prosecution.

[30] To be clear, FLAP is not a party to the proceedings before me. However, its frustration with what it sees as the YCC's slow progress in averting

needless bird deaths is mirrored if not amplified in the theory of the prosecution.

(b) **FLAP: Its Organization and Activities**

[31] FLAP is a relatively small non-profit organization. Its 2010 budget of $120,000 covered its two full-time employees (Michael Mesure and Susan Krajnc, FLAP's programme manager), rent and other expenses. Individual donors and foundation grants provided 80% of this budget; the rest came from a number of corporate sponsors. (FLAP was the recipient of a single, relatively modest direct donation from Cadillac Fairview a number of years earlier.) FLAP's energies are directed to bird protection and preservation, and data collection, public education and citizen advocacy in pursuit of these goals. Most of the ground-level work is performed by about 45 volunteers who monitor bird strikes at close to a hundred buildings in the GTA, usually by way of dawn patrols. These volunteers are trained to document avian collisions, collect and record the bird cadavers they collect, and rescue injured birds which are then delivered to the Toronto Wildlife Centre. The testimony of several of the FLAP volunteers spoke to the severe nature of the trauma suffered by dead and injured birds.

[32] Since 2005, the volunteers transfer the handwritten bird collision data they collect on-site onto spreadsheets that are submitted to Susan Krajnc and, in turn, to another volunteer, Erik Kremer, who collates the volunteers' data into seasonal or annual cumulative reports. These reports are posted to FLAP's website and submitted to, among others, affected property owners and managers, the City of Toronto's Planning Department and the Canadian Wildlife Service. The latter submission is a condition for issuance of FLAP's permits to collect and possess "accidentally killed"

and "injured, sick or orphaned" migratory birds. The cumulative spreadsheets record, among other information, the date, time and location of the documented bird collisions and the species of the bird involved in each incident. In 2010, close to 5,000 bird collisions (approximately two-thirds of which proved lethal) were recorded by FLAP volunteers throughout the GTA monitored sites, including at least 826 at the YCC alone. Among the dead birds collected at the YCC in 2010 was an Olive-sided Flycatcher and a number of Canada Warblers. Both species are listed as "threatened" by the federal *Species at Risk Act,* although the warbler was not added to the schedule until February 2010.

[33] The on-site volunteers store the dead birds in their personal freezers. They are later batch-transferred to the Ornithology Collection at the Royal Ontario Museum (ROM) which serves as FLAP's "bank" for bird cadavers. The ROM, in turn, selects birds from this collection for educational programming. As earlier noted, the ROM has occasionally mounted displays of victims of GTA bird strikes. The report of a wildlife pathologist who conducted a post-mortem examination of a collection of birds salvaged from the YCC by FLAP volunteers in 2010 concluded that,

> Death due to trauma was the final diagnosis in all cases which were suitable for examination. The injuries observed are compatible with the circumstances of collision with a building or other fixed object.

[34] Mark Peck, the manager of the ROM's Ornithology Collection, was qualified without challenge as an expert in the field of bird identification. He met with Michael Mesure in February 2011 to identify some of the birds collected by FLAP volunteers during the 2010 migrations. Peck positively identified a number of Canada Warblers (two of which had been personally recovered by Mesure) and one Olive-sided Flycatcher among the FLAP collection. Both species, Peck explained, are currently

designated as "threatened" by the Committee on the Status of Endangered Wildlife in Canada whose advice to the federal government is reflected in the scheduling to the *Species at Risk Act*.

[35] The evidence before me makes clear that there were occasions of on-site recording error or confusion. I recognize, as well, that some mistakes occurred through data transfer. Nonetheless I am more than satisfied of the chain of continuity of the vast majority of the recovered birds and the general integrity, accuracy and reliability of the 2010 bird strike data collected and collated by FLAP. More precisely, I have no doubt that many hundreds of birds lost their lives or were injured as a result of colliding with the reflective windows and spandrels at the YCC during the timesframes set out in the three counts and that, among the killed birds, were the one Olive-sided Flycatcher and three Canada Warblers whose field identification as such were positively confirmed by Peck during his examination of them at the ROM.

(c) **The YCC and Its Response to Bird Strikes**

[36] The YCC complex is one of several large commercial developments owned and/or managed by Cadillac Fairview. The YCC management recognized an avian collision problem relatively early in the evolution of Toronto bird consciousness. Inspired by FLAP's advocacy, the YCC responded to the problem of nocturnal bird collisions by reducing the illumination from its buildings after dark and by urging tenants to mitigate light pollution in the evening hours. Daytime bird strikes attributable to the buildings' reflective surfaces has proven a more intractable challenge. As explained by Patricia Poyntz (an employee of Cadillac Fairview since 1978 and the general manager of the YCC since 2006), a wide range of factors bear on management's response and, in particular, its

determination of an appropriate bird-deterrent window treatment. These latter concerns include: the cost and life-span of the product; interference with window cleaning; the "proven history" or reliability of the product; and the cost of installation. The last consideration incorporates the expense involved in renting a site-specific "swing stage" apparatus that requires two or three persons to operate. The overarching corporate concerns, however, are tenant satisfaction and maintaining commercial competitiveness.

[37] The YCC publicizes its natural setting in its promotional materials. It maintains nature trails and rest areas. The "green"-ness of the property is part of a tenant incentive package and seen by Cadillac Fairview as a capital advantage.

[38] The materials management distributed to its YCC tenants have included information about light pollution and related bird deaths; nothing, however, was said about daytime bird collisions attributable to the buildings' reflective glass cladding prior to the timeframes set out in the counts. Building security personnel, under Poyntz's direction, co-operated with FLAP volunteers in the conduct of their daily patrols. If security located a dead bird on other occasions, they would place it in a FLAP-supplied paper bag and store the cadaver until a FLAP volunteer could collect it. Protocols, sometimes refined, between the YCC management and FLAP defined the terms of this arrangement. No evidence was led of similar protocols at any other FLAP-monitored sites in the GTA.

[39] Soon after her appointment, Poyntz recognized that the YCC's wooded location and its reflective windows contributed to the routine bird deaths at the property. FLAP occasionally provided Poyntz with spreadsheet documentation of avian collisions with the YCC buildings and she was

aware of hundreds of bird deaths at the YCC every year. Drawing on her uncertain recall of the data collected through a documentation procedure the YCC itself initiated in August 2010, Poyntz estimated that about 50 to 65 birds were dying each week through that fall migration season. Cadillac Fairview occasionally hired professional consultants for advice respecting environmental issues, but none were ever retained to address the problem of avian fatalities at the YCC. Instead, Poyntz, as she repeatedly testified, relied on FLAP and, in particular, Michael Mesure.

[40] At Mesure's initiative, Poyntz had her first of several meetings with FLAP within six months of stepping into the role of general manager of the property. Pat Caplan, her predecessor at the YCC, had had similar meetings, but there was no record of any of them in "bird strike file" that Poyntz inherited. Poyntz characterized Mesure as "passionate" and "professional" and FLAP's executive viewed Poyntz as genuinely sympathetic and proactive. Nonetheless, from FLAP's perspective, there appeared to be very little forward momentum. Poyntz conceded that she never accompanied any FLAP volunteers, never visited any sites where bird collision deterrents had been installed, and never spoke directly to anyone connected to such sites. Neither she personally or Cadillac Fairview ever sought a legal opinion as to the YCC's compliance with environmental legislation in light of the bird strike problem.

[41] Prior to 2010, Poyntz had never seen a plan, list of options or cost-benefit analysis generated by Cadillac Fairview for dealing with the bird problem at the YCC. Although Cadillac Fairview was one of the "participants" in the creation of Toronto's 2007 "Bird Friendly Development Guidelines" (which includes a heavily illustrated chapter on mitigating the danger to birds caused by reflective glass), Poyntz had never read the "Guidelines"

or the related "Bird Friendly Development Rating System and Acknowledgement Program". She believed that Steven Sorensen, her immediate superior and the Vice President of Operations for Cadillac Fairview, had served as the corporation's representative on the City's Bird Friendly Development projects. No subsequent educational programs had been conducted for those, such as Poyntz, charged with management of the individual properties within the Cadillac Fairview portfolio. However, beginning around 2010, Sorensen had requested that all Cadillac Fairview property managers report on the occurrence of nocturnal bird collisions at their sites and their responses to them.

C. THE NARRATIVE THREAD

[42] A fine appreciation of the history of the YCC's response to the continuing problem of bird strikes on its property is essential to assessing the defendants' liability. I apologize in advance for the repetition of certain factual detail.

[43] FLAP first became aware of daytime bird collisions at the YCC about 1997. Discussions with Cadillac Fairview about the "daytime" problem began about the same time. As a result, the YCC installed custom built cables strung with birds of prey silhouettes in the spring of 1997 in an early effort to deter bird strikes. The ineffectiveness of this strategy soon became apparent. In the same timeframe, Cadillac Fairview, through Pat Caplan and in co-operation with FLAP, agreed to install mesh over the grating at the base of the YCC buildings' walls to facilitate the recovery of injured birds.

[44] By the late-'90s, Mesure realized that a thin film manufactured primarily for advertising and promotional purposes (such as that wrapped on some buses) could be applied to bird-deterrent effect on reflective and transparent windows. Mesure met with the owners of the local distributor regarding possible bird protective applications and, around 2002, an adaptation of this technology, styled "CollidEscape" was installed at the Toronto Zoo. As earlier noted, a functionally similar product (registered by the Convenience Group as "Feather Friendly" technology) was applied to part of the former Hydro building in Markham in 2009.

[45] The first window film application at the YCC was in 2007. Poyntz consulted Mesure in response to a tenant's complaint about a single bird's repetitive strikes. CollidEscape was installed at Mesure's recommendation; it was removed after the spring migration because the annoyance receded and the opaqueness of the product materially obscured the tenant's vision from inside her window. From Poyntz's perspective, CollidEscape was not a viable solution to the daytime bird strike problem at the YCC since it compromised tenant satisfaction. The daily patrols continued, as did both YCC measures to reduce nocturnal light pollution and occasional communications with both Mesure and Bob Alsip of the Convenience Group respecting new deterrent technologies. However, other than the single-tenant, temporary installation in 2007, no tangible initiatives were taken by the YCC to address the problem of daytime bird strikes from the time Poyntz assumed the role of general manager in September of 2006 until the spring of 2010. According to Poyntz, this inactivity reflected the absence of any satisfactory strategies rather than any indifference on her part or that of Cadillac Fairview.

[46] At FLAP's invitation, Mesure and Alsip met with Poyntz and several other Cadillac Fairview representatives on May 12, 2010. It was by now clear that the specific size, spacing and contrast of the visual markers or patterning on the film application was of critical importance to the deterrent efficacy of the technology. A new generation product incorporating improvements to these features and tested in Markham was introduced by Alsip. As recorded in Poyntz's notes of the meeting, Mesure urged the YCC to "step up and try something". FLAP identified the portions of that building in the YCC complex that suffered the greatest concentration of bird strikes and the Convenience Group was contracted to conduct a test installation of a modification of the bird deterrent film employed at Markham on a single pane in that area (the north face of 4120 Yonge) at the end of August 2010.

[47] The results of this experiment, as reported by FLAP and the Convenience Group, were disappointing, there being no material difference in the before/after incidence of bird collisions. This was attributed to the challenging features of the YCC setting. Although the film had been effective at other locations, it was apparent to the project stakeholders, including FLAP through Michael Mesure, that one size did not fit all and that some site-specific customization was required. Based on Alsip's and Mesure's assessment, the YCC's "next step", as Poyntz reported to Sorensen in October 2010, was for the "Convenience Group to develop a film with greater contrast" that would, hopefully, prove effective in the YCC's wooded setting.

[48] FLAP's participation in Cadillac Fairview's bird strike response extended beyond the YCC. A glass link-way at the downtown Toronto-Dominion Centre was a locus of particular concern and the company had installed

collision preventative measure at that site. In a November 16, 2010 communication to Steven Sorensen respecting the T-D Centre, Mesure conveyed his "delight and appreciation" with Cadillac Fairview's bird-friendly efforts. The corporation's "pinnacle moves", he continued, "not only have the potential to spare the lives of thousands of migrating birds, but will also set precedents for building owners and managers alike to follow". This sentiment, and other similar expressions to which I soon return, seem on their face to reflect either insincerity or inconsistency. I read Measure's comments differently, however. Mesure, indeed FLAP more generally, welcomed every step taken to abate the mounting toll of bird injuries and fatalities. His communication to Sorensen was an earnest effort to encourage further protective initiatives by Cadillac Fairview. On the other hand, Mesure could not help but be dismayed by the apparent failure to effectively address the avian collision problem at other sites such as the YCC, a frustration undoubtedly reinforced by his own dawn patrols and the daily body count reported by FLAP volunteers.

[49] Although not within the timeframes set out in the charges, there were a series of subsequent developments that arguably bear on the issue of due diligence on the part of the defendants.

[50] In late-March 2011, some five months after the failed test installation at the YCC, Alsip reported a material design improvement. Earlier that month, Cadillac Fairview had received a summons respecting the charges laid by the current prosecutor, Ecojustice, under the *Species at Risk Act*. On March 27, 2011, the company was served with summonses respecting the other charges currently before me. Until then, Poyntz knew nothing of a contemplated prosecution or that FLAP had recovered birds of "threatened" species at the YCC.

[51] According to Poyntz, the pending prosecution made no difference to Cadillac Fairview's determination to address the bird strike problem. FLAP volunteers continued their bird patrols at the YCC and Poyntz again met with Mesure and Convenience Group representatives to review the latest iteration of the company's window treatment. Mesure described this generation as "far superior" to earlier and competitive products. In short, as Mesure explained, it was more effective in deterring birds, more transparent to humans, and considerably less expensive. With a view to a much larger installation, a relatively small test application of this product proceeded in the late-spring of 2011.

[52] At the YCC's request, in June 2011 the Convenience Group provided a detailed proposal to cover all three buildings in a Feather Friendly technology. The all-in quote (including installation and warranty) was close to $1.2 million. Meantime, the YCC and the Convenience Group negotiated the terms of a first stage installation on the north face of the building at 4120 Yonge Street (the area that suffered the most bird strikes), and FLAP contributed a building assessment in aid of this project. Cadillac Fairview tendered a contract in mid-September 2011 that contemplated completion of the installation by the end of October at a cost of over $100,000. The Convenience Group warranted an 80% reduction in bird strikes in the area subject to Feather Friendly treatment.

[53] Just before the scheduled start date, the Convenience Group notified Poyntz that the installation would have to be delayed until the spring of 2012 in order to correct a recently discovered problem with the deterrent properties of the application. Sorensen signed off on a new contract in late-March 2012 and the installation of the remedied product finally began in April. Due to weather complications, the installation was not

completed until early August of that year. On August 9, 2012, Michael Mesure emailed Poyntz to "thank and congratulate" her for completing the installation of the "bird-safe window film" on the north wall of 4120 Yonge. (He also thanked her, in the same email, for installing a freezer at the YCC to house dead birds until they could be collected by FLAP volunteers.)

[54] The cost of the 2012 installation at 4120 Yonge was approximately $110,000, an expenditure that was approved in September 2011 by Sorensen and Cadillac Fairview's senior VP on an urgent basis given the then-imminent migration. Depending on its success, Cadillac Fairview plans to install similar film technology at the two other YCC buildings and have included the cost of these applications in the company's ten year capital plan budget. Cadillac Fairview's intention is to charge back the expense of bird deterrent treatments to the tenants through operating cost adjustments, as with the cost of utilities. The 4120 Yonge treatment, for example, worked out to approximately 17 cents a tenant square foot.

[55] Although in no way determinative of the issues before me, Mesure's assessment of the YCC's response to the bird strike problem is of some contextual relevance. As detailed in an earlier ruling in this same matter (*Podolsky v. Cadillac Fairview Corp. Ltd.* (2012), 112 O.R. (3d) 22), FLAP co-operated with Ecojustice as it prepared to lay charges by sharing the bird injury and fatality data its volunteers routinely collected at the YCC. Mesure knew that this information was to be used in aid of a prosecution of Cadillac Fairview and the YCC. He testified that he "personally" would not have supported the prosecution if he had known in 2010 about the YCC's plan to install a third generation film treatment in 2011, but he believed that deterrent technologies existed since the mid-1990s and that it

had taken "a long time to get to the stage where something is finally taking place, and it's a snail's pace and we can't afford to allow this to continue". In the end, as he put it, "we just want to stop these birds from dying and it's as simple as that".

[56] Mesure recognized that cost, aesthetics and efficacy were all factors that influenced the adoption of bird deterrent strategies by building owners. He acknowledged that "only a very small percentage" of GTA commercial property owners had taken any steps to reduce bird collisions and that Cadillac Fairview was among that small minority that had taken some remedial action, including the installation of test panels in 2010. In Mesure's words, Cadillac Fairview was "actively looking for a solution".

[57] FLAP and, to the best of Mesure's knowledge, Ecojustice had never applied for "an investigation of whether an alleged offence [under the *Species at Risk Act*] has been committed", as permitted by s. 93(1) of the Act. This provision does not prevent anyone from conducting their own investigation of a possible offence, nor do I read a s. 93(1) application as a precondition for a state-led or private prosecution.

D. ANALYSIS

(a) **Introduction**

[58] This case is close to unique. Private prosecutions in the environmental context are relatively rare although not an entirely unknown mode of procedure. (See, by way of recent examples begun as private prosecutions, *R. v. Kingston (City)* (2004), 240 D.L.R. (4th) 734 (Ont. C.A.) and *Reece v. Edmonton (City)*, 2011 ABCA 238.) Much more unusual is the gist of this prosecution – that is, the regulatory offence liability of a corporation for its

failure to respond in a timely and effective manner to injurious bird collisions with a building it owns and operates. The only precedent is a closely parallel private prosecution of the owners of a second office complex in the GTA for the same alleged provincial offences as those prosecuted before me. It was dismissed on November 14, 2012: *Schultz v. Menkes Consilium* unrepd., (Turtle, J.P., Ont. C.J.). With all due respect, His Worship's review of the evidentiary underpinnings to his judgement in the *Menkes* case is too brief and selective to permit the drawing of factual comparisons to the one before me. His legal analysis is equally concise. It is also unencumbered by any reference to the governing jurisprudence. Accordingly, I treat the matter before me as one of first impressions.

[59] There is no doubt that hundreds of birds were injured and killed as a result of flight collisions with the reflective glass that covered the external windows and walls of the YCC in the 2010 periods set out in the charges faced by the defendants. The critical questions are, first, whether these physical insults fall within the scope of the legislatively prohibited conduct and, second, whether, if so, the defendants' response amounts, as a matter of fact and law, to due diligence. The first order of business, then, is to set out my understanding of the nature of regulatory or public welfare offences and the legal framework – including the onus and standards of proof – that governs their prosecution and defence. I then turn to certain questions of statutory interpretation that arise by virtue of the language of the relevant legislation. And, finally, I consider the question of whether the prosecution and, if necessary, the defence have met their respective burdens.

(b) **Regulatory Offences and Their Manner of Proof**

[60] The offences here alleged are all regulatory or public welfare offences. The social purpose of such offences and the nature of the fault element that distinguishes them from what are sometimes called "true crimes" was explained by Cory J. in *R. v. Wholesale Travel Group*, [1991] 3 S.C.R. 154, at paras. 25-26:

> The objective of regulatory legislation is to protect the public or broad segments of the public … from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests. While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care.
>
> It follows that regulatory offences and crimes embody different concepts of fault. Since regulatory offences are directed primarily not to conduct itself but to the consequences of conduct, conviction of a regulatory offence may be thought to import a significantly lesser degree of culpability than conviction of a true crime. The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care.

[61] Regulatory offences are typically subclassified by the nature of the burden borne by the prosecution. Here, as in most such cases, the charged offences are properly characterized as "strict liability" offences. As summarized by Justice Cory in *Wholesale Travel, supra*, at para. 22, such offences are,

> a middle ground between full *mens rea* and absolute liability. Where the offence is one of strict liability, the Crown is required to prove neither *mens rea* nor negligence; conviction may follow merely upon proof beyond a reasonable doubt of the proscribed act. However, it is open to the defendant to avoid liability by proving on a balance of probabilities that all due care was taken. This is the hallmark of the strict liability offence: the defence of due diligence.

(For the seminal explication of the classification of regulatory offences and the doctrine of strict liability, see *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, esp. at para. 58-61, and the Supreme Court's re-affirmation of this approach in *Lévis (Ville) c. Tétreault*, [2006] 1 S.C.R. 420.)

(c) **The Charged Offences: An Introduction**

[62] Except for the charge pursuant to the *Ontario Society for the Prevention of Cruelty to Animals Act* or, hereafter, the "OSPCAA", the alleged offences form part of what may generally be described as environmental legislation. As said by the Supreme Court in *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 55, "Not only has environmental protection emerged as a fundamental value in Canadian society, but this has also been recognized in legislative provisions such as s. 13(1)(a) [now s. 14(1)] of the [Ontario] E[nvironmental P[rotection] A[ct]". (See, also, *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville)*, [2001] S.C.R. 241, at para. 1.) "Remedial public welfare" legislation of this genus, as said by the Court of Appeal in *Ontario (Ministry of Labour) v. Hamilton (City)* (2002), 58 O.R. (3d) 37, at para. 16, is to be "generously interpreted in keeping with the purposes and objectives of the legislative scheme".

[63] The expansive "purpose" of the *Environmental Protection Act* (hereafter, the EPA) "is to provide for the protection and conservation of the natural environment": s. 3(1). The "purposes" of the *Species at Risk Act* (hereafter, "SARA"), as set out in s. 6 of the Act, are, broadly stated, the preservation, recovery and management of wildlife species of special concern. SARA is preceded by a Preamble "recognizing that", *inter alia*:

- "wildlife, in all its forms, has value in and of itself and is valued by Canadians for aesthetic, cultural, spiritual, recreational, educational, historical, economic, medical, ecological and scientific reasons";

- "Canadian wildlife species and ecosystems are also part of the world's heritage"; and
- "the Government of Canada is committed to conserving biological diversity".

A generous reading of this statute is prescribed by s. 12 of the *Interpretation Act*, R.S.C. 1985, C. I-21, which reads: "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". This provision is a codification of the conventional purposive approach to statutory construction and is particularly apposite to the field of regulatory legislation, including those statutes directed to environmental protection. (See, generally, *Ontario v. Canadian Pacific, supra*.)

[64] The OSPCAA does not fit comfortably within the compass of what is commonly understood as environmental law. It is more accurately characterized as animal welfare legislation, consistent with the "humane societies" origins of such statutes. The OSPCAA's precursor, first enacted in 1917, incorporated and furthered the humanitarian and charitable aims of the Ontario Society for the Prevention of Cruelty to Animals. The "object" of the Society, as set in s. 3 of the OSPCAA, "is to facilitate and provide for the prevention of cruelty to animals and their protection and relief therefrom". A fair reading of the earlier legislation strongly suggests that it did not apply to wildlife. Amendments by way of legislation passed in 2008 (*Provincial Animal Welfare Act*, 2008, S.O. 2008, c. 16) enlarged the compass of animal protection and, as a result, potential liability. The word "animal" is no longer defined in the Act. However, its primary focus remains fixed on animal health and welfare and the prevention of exploitation and abuse by pet owners and those engaged in animal husbandry and the exhibition of animals. The Act also addresses certain

related duties of veterinarians. Significantly, prohibitory provisions in the Act distinguish between persons who own or care for animals and "persons" in general, a matter to which I soon return.

(d) **The Scope and Application of the Charged Offences**

(i) Introduction

[65] All three charges arise from the same impugned activity: the physical harm or death suffered by migrating birds as a result of their collision with the reflective glass cladding of the YCC buildings. However, the means by which the offence is said to have occurred and the trauma alleged to have been occasioned is differently particularized in each count – reflecting, of course, the different framework for liability set out in the relevant provision of each of three statutes. The OSPCAA count, for example, charges the defendants with "having or using" reflective glass that "caused" the birds to be in "distress". The charge under SARA is for "killing, harming or taking" birds of species scheduled as "threatened". And the EPA count speaks of "discharging or causing or emitting the discharge" of a "contaminant", particularized as "radiation (light) from reflective glass" that "caused or was likely to cause an adverse effect", namely the birds' death or injury.

[66] The same wrongdoing may, of course, be captured by a variety of offence provisions. And short of an abuse of process (and none is here suggested), the prosecution cannot be faulted for casting as wide a net as possible. What need be determined, however, is whether the facts distilled from the evidence fall within the proper radius of each or any of the offences charged. I begin with the EPA count.

(ii) Section 14(1) of the *Environmental Protection Act*

[67] The relevant portions of s. 14(1) of the EPA, the charging provision, read:

> [A] person shall not discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment if the discharge causes or may cause an adverse effect.

Section 1 of the Act defines the verb "discharge" to include "add, deposit, leak or *emit*" and, when used as a noun, includes "addition, deposit, *emission* or leak" (emphases added). "Contaminant" is defined as "any …gas … vibration, *radiation* or combination of any of any of them resulting directly or indirectly from human activities that causes or may cause an adverse effect" (emphasis added). "Adverse effect", in turn, includes "injury or damage to … plant or animal life". Count two in the Information closely tracks the language in s. 14(1) of the EPA while particularizing the alleged "contaminant" as "radiation (light) from reflective glass, including windows" and the "adverse effect" as "death or injury to birds". As set out in the EPA count, the defendants, it is said,

> … did commit the offence of discharging or causing or permitting the discharge of a contaminant, namely radiation (light), from reflective glass, including windows, that caused or was likely to cause an adverse effect, namely death or injury to birds …

[68] The controversy surrounding the meaning to be ascribed to the language employed in this count chiefly attaches to the words "emitting" and "radiation". In this regard, I have no difficulty here accepting the evidence of Dr. Sinervo as to the shared understanding of both these terms in the scientific community. Contrary to suggestions made at some points by the defence, "radiation" cannot be reduced to "radioactivity", nor is its meaning restricted to facets of the nuclear industry. Rather, like "add", "deposit" and "leak" (or their equivalent nouns), it is a term of deliberately expansive compass that is capable of capturing a broad range of natural phenomenon – including light reflecting from a window.

Similarly, that reflective mechanism is simply a variant, like absorption and transmission, of the process by which light is "emitted".

[69] A both generous and purposive approach to the construction of s. 14(1) is consistent with the governing jurisprudence. Although in reference to a case involving pollution, the Supreme Court's comments in *Canadian Pacific, supra*, at paras 51 and 52, are of general application to environmental legislation. Given their focus on the predecessor, if revised, provision to s. 14(1) of the EPA, they are also particularly apt here:

> The social importance of environmental protection is obvious, yet the nature of the environment does not lend itself to precise codification.
>
> …
>
> In the context of environmental protection legislation, a strict requirement of drafting precision might well undermine the ability of the legislature to provide for a comprehensive and flexible regime. As the Law Reform Commission suggests, then, generally framed pollution prohibitions are desirable from a public policy perspective. This explains why s. 13(1)(*a*) [now s. 14(1)] prohibits *any* emission of a contaminant which causes or *is likely to cause* impairment of the quality of the natural environment for any use that can be made of it. In my view, the generality of s. 13(1)(*a*) ensures flexibility in the law, so that the EPA may respond to a wide range of environmentally harmful scenarios which could not have been foreseen at the time of its enactment. [Emphasis in original.]

And in a summary statement of these principles, at para. 84:

> Environmental protection is a legitimate concern of government, and as I have already observed, it is a very broad subject matter which does not lend itself to precise codification. Where the legislature is pursuing the objective of environmental protection, it is justified in choosing equally broad legislative language in order to provide for a necessary degree of flexibility. Certainly, s. 13(1)(*a*) captures a broad range of polluting conduct. However, … the provision does not capture pollution with only a trivial or minimal impact on a use of the natural environment.

To be clear, I do not view the death and injury of hundreds if not thousands of migrating birds as a matter of merely "trivial or minimal" import, nor do I take the defendants to be suggesting such.

[70] The case before me illustrates of the wisdom of observing flexibility in the drafting of regulatory statutes, particularly in the field of environmental protection. The environmental insult presented by the instant fact pattern was not likely contemplated when s. 14(1) of the EPA was promulgated into law, yet the legislation is sufficiently broad and supple to encompass the alleged transgressions. Whether the prosecution has satisfied the essential elements of the offence is, of course, a very different matter. But one does not need to stretch or torture s. 14(1) to legally embrace the conduct at issue.

[71] Nor do I find that this construction is so expansionist as to lead to absurd consequences such, as suggested by the defendants, every homeowner having to fear prosecution for failing to bird-proof their residence against the possibility of isolated avian collisions. As the just-quoted passage from *Canadian Pacific* makes clear, s. 14(1) does not extend to conduct "with only a trivial or minimal impact" on the environment. As put more fully at para. 65 of the same authority:

> The absurdity, strict interpretation and *de minimis* principles … demonstrate that s. 13(1)(*a*) does not attach penal consequences to trivial or minimal impairments of the natural environment, nor to the impairment of a use of the natural environment which is merely conceivable or imaginable. *A degree of significance, consistent with the objective of environmental protection, must be found* in relation to both the impairment, and the use which is impaired. [Emphasis added.]

I appreciate that the legislative amendments reflected in what is now s. 14(1) alter the language that grounds some of textual components of this analysis. Nonetheless, in my view, the general principle obtains: minimal or trifling consequences inconsistent with a realistic appreciation of the goals of environmental protection are not captured by the penal reach of this provision.

(iii) Section 32(1) of the *Species at Risk Act*

[72] Section 32(1) of SARA reads:

> No person shall kill, harm, harass, capture or take an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species.

There are no reported cases dealing with s. 32(1). However, several other provisions in the Act offer some guidance as to the legal nature of the offence provision and the breadth of its application. Section 100, for example, expressly stipulates that "[d]ue diligence is a defence in a prosecution for an offence". More importantly, s. 102(b) instructs a sentencing court to consider, among any other relevant factors, "whether the offender was found to have committed the offence intentionally, recklessly or *inadvertently*" (emphasis added). This, in my view, makes patent Parliament's intention to include what might otherwise be described as even an accidental, careless or involuntary killing or harming of a member of, here, a "threatened" species within the scope of penal liability. There is no ambiguity in this provision and, accordingly, no room to apply the interpretive principle of manifest absurdity urged by the defendants. (See, in this regard, *R. v. Huggins* (2010), 326 D.L.R. (4th) 720 (Ont. C.A.).) Further, the express reference in s. 32(1) to "an *individual* of a [scheduled] wildlife species" (emphasis added) makes clear that a single death may fall within the scope of liability defined by this provision.

[73] The defendants also submit that the prosecution of the SARA offence is "statute-barred" as the proceedings, by way of the laying of an Information, did not commence until (if barely) more than six months after the death of the last specimen within the Act's schedule of "threatened" animals was recovered by a FLAP volunteer. The defendants' reliance on the six month limitation period prescribed by s.

786 of the Criminal Code to press this point is ill-founded. That provision applies to summary conviction offences set out in the Criminal Code. The provisions of the Code have no general application to federal statutes, including SARA. Nor, do I find, is s. 107 of SARA of any assistance to the defendants in this regard. I cannot claim to fully comprehend the meaning or applicability of this latter provision, but it appears to create a two year (not six months) limitation period commencing "the day on which the subject-matter of the proceedings became known to the competent minister". This suggests that state-initiated prosecutions must be brought within two years of the triggering event or the minister being advised of its occurrence. Section 107 says nothing about any temporal limitation on private prosecutions. In any event, if the defendants' position is that the SARA offence was "out of time", they ought to have moved to quash the separate Information containing this single count at the commencement rather than conclusion of the trial. I construe their continued participation throughout these lengthy proceedings as acquiescence by conduct, if not express consent, to the jurisdictional propriety of the SARA prosecution.

(iv) Section 11.2(1) of the *Ontario Society for the Prevention of Cruelty to Animals Act*

[74] Other than offences related to animal fighting and causing harm to animals that work with peace officers, the only offence provisions in the OSPCAA are those set out in sub-ss. 11.2(1) and (2):

> (1) No person shall cause an animal to be in distress.
>
> (2) No owner or custodian of an animal shall permit the animal to be in distress.

The defendants, not being owners or custodians of the birds at issue, are charged under sub.-s. (1).

[75] It is noteworthy, however, that the Act draws a clear distinction as to exposure to liability between persons who own or possess animals (typically, pet owners and those engaged in agricultural pursuits and the exhibition of animals) and all other persons. The former are at risk to prosecution only if they "cause" distress to an animal while those in the latter category are in penal jeopardy even if they merely "permit" such harm. While the word "cause" may, depending on context, encompass conduct consonant with the term "permit", the Legislature has clearly distinguished between the two concepts in s. 11 and circumscribed the compass of liability for those who do not own or have custody of animals. Indeed, there otherwise would be no need for s. 11.2(1).

[76] The former term, "cause", suggests some active role in the infliction of the prohibited harm while the latter, "permit", allows for a finding of culpability founded on mere passive participation. As a result, I have considerable doubt as to whether the defendants' passive ownership and management of buildings with which migratory birds collide properly falls within the scope of the offence here charged under sub-s. 11.2(1).

[77] I also have grave doubts as to whether the OSPCAA applies to wildlife, as is the nature of migratory birds, in its natural environment. I appreciate that the word "animal" is no longer defined in the OSPCAA. Nonetheless, the origins and history of the Act and the jurisprudence it has generated (most of which, admittedly, relates to earlier iterations of the legislation) pertain to domestic, farmed and captive animals. The exception carved out by sub-clause (6)(a) to the force of sub-ss. 11.2 (1) and (2) reinforces this view. That provision expressly excludes as offensive conduct "an activity permitted under the *Fish and Wildlife Conservation Act, 1997* in relation to wildlife in the wild". I take this

wording to mean that causing or permitting distress to wildlife in captivity – such as that maintained as pets or exhibited in zoos – falls within the scope of the offence provisions. This construction is consistent with what I take to be the Legislature's primary intendment in enacting the OSPCAA – the protection of pet, farm, display and performing animals (that is, domesticated and captive animals) and the maintenance of standards of care for their safety and well-being.

[78] For these reasons, and even accepting *in arguendo* a casual nexus between the defendants' acts or omissions and the distress suffered by the birds at issue, I do not believe their conduct is captured by the OSPCAA.

(e) **Establishing the *Actus Reus***

(i) Introduction

[79] As earlier noted, an assessment of the vitality of the charges before me depends on the application of a strict liability analysis. The first step, then, is to determine whether the prosecution has proven beyond reasonable doubt that the defendants committed the *actus reus* – or essential physical elements – of the offences charged. The count pursuant to the OSPCAA is no longer part of this undertaking in view of my conclusion as to its instant inapplicability or, put otherwise, that the impugned conduct does not fall within its purview.

[80] There are certain common and uncontentious elements to the two remaining offences charged. The defendants are the owners or managers of the YCC and, thus its directing minds and will. The alleged offences occurred at the three particularized buildings that compose the Yonge Corporate Centre. The immediate cause of a substantial number of the migrating birds' "death or injury" (as described in the EPA count) or "killing or harming" (as required under SARA) was their collision with

the YCC buildings. And these fatal and injurious events, I am satisfied, occurred during the timeframes set out in the two counts. If not undisputed, the evidence overwhelmingly satisfies me as to these conclusions.

[81] I turn, then, to more controversial facets of the offences charged under EPA and SARA.

(ii) Section 14(1) of the *Environmental Protection Act*

[82] The evidence, both expert and circumstantial, called at this trial persuades me to the requisite standard that, in at least most cases of bird strikes at the YCC, the collisions occurred as a result of the birds mistaking the reflections cast by the buildings as extensions of the safe wooded havens from which they were flying at the time of impact. YCC management was aware of the daytime bird strike problem as early as the late-1990s, and of the causal nexus between these collisions and the reflective surfaces of their buildings. Whether or not actual or deemed or constructive knowledge of the impugned harm is essential to establish the *actus reus* of a regulatory offence of this nature is of no moment in the present prosecution: the defendants, for at least a decade prior to the events at issue, knew that the reflective cladding of the YCC buildings caused or substantially contributed to the death and injury of migrating birds and foresaw the repetition of these events in the course of the 2010 migration.

[83] Although they may not have expressed the process in the terms employed by the EPA, the principals and agents of the defendant companies readily understood that reflected light (a "contaminant", sub-defined as "radiation") "emitted" (and thus "discharged") from the windows and spandrels of the YCC buildings into the "natural environment" and that these "emissions" caused "injury or damage", including death, "to …

animal life" (an "adverse effect"). Broken down to its essentials, this is not a case where, as put in *Canadian Pacific, supra*, at para. 53, "a citizen requires a chemistry degree to figure out whether an activity … trigger[s] a statutory prohibition".

[84] The language of the charging provision, s. 14(1) of the EPA, and the respective count in the provincial Information, sets out various modes by which the offence may be committed: by discharging or causing or permitting the discharge of a contaminant. In *Sault Ste. Marie, supra*, at para. 68 , Dickson J., on a behalf of a unanimous Supreme Court, explained the distinction between the various ways by which the *actus reus* of the same environmental offence (there, the discharge of refuse resulting in pollution, pursuant to s. 32(1) of the *Ontario Water Resources Act*) may be satisfied:

> The prohibited act would, in my opinion, be committed by those who undertake the collection and disposal of garbage, who are in a position to exercise continued control of this activity and prevent the pollution from occurring, but fail to do so. The "discharging" aspect of the offence centres on direct acts of pollution. The "causing" aspect centres on the defendant's active undertaking of something which it is in a position to control and which results in pollution. *The "permitting" aspect of the offence centres on the defendant's passive lack of interference or, in other words, its failure to prevent an occurrence which it ought to have foreseen.* The close interweaving of the meanings of these terms emphasizes again that [despite the differing modes of liability] s. 32(1) deals with only one generic offence. [Emphasis added.]

I am here more than amply persuaded by the evidence that, even if no greater degree of activity was involved, the defendants permitted the discharge or emission at issue in the sense described in *Sault Ste. Marie*. In the result, the *actus reus* of this offence is made out to the requisite standard of proof.

(iii) Section 32(1) of the *Species at Risk Act*

[85] I have earlier found that several individual birds belonging to species scheduled as "threatened" under SARA were among those "killed" between March 15 and November 7, 2010 as a result of collisions with the YCC buildings. These deaths were undoubtedly unintentional. However, as I have earlier endeavoured to explain, even inadvertent or accidental deaths of members of a scheduled species fall properly within the physical definition of an offence under s. 32(1) of SARA. Combined with those considerations I have just reviewed in respect to s. 14(1) of the EPA, I am similarly satisfied beyond reasonable doubt that the *actus reus* of the SARA offence has been committed.

(f) **The Defence of Due Diligence**

[86] Having found the *actus reus* for the EPA and SARA offences, the burden shifts to the defendants to establish their lack of fault. As put simply in *Sault Ste. Marie*, at para. 67: "Proof of the prohibited act *prima facie* imports the offence, but the accused may avoid liability by proving that he took reasonable care". Proof, in this context, is satisfied on the civil standard, a balance of probabilities. Failing same, the defendants will necessarily be found guilty of the two offences.

[87] A determination of whether a defendant has exercised due diligence involves, as said in *Lévis (Ville) c. Tétreault, supra,* at para. 15, the application of an "objective standard … under which the conduct of the accused is assessed against that of a reasonable person in similar circumstances". The exercise is largely fact-driven and depends, as many cases have repeated, on "an assessment of all the circumstances of the case". On conducting this analysis I am persuaded, for the reasons that follow, that the defendants have met their onus.

[88] I appreciate, in reaching this conclusion, that the YCC did not retain external consultants to address the problem of bird strikes. I appreciate, as well, that a corporate defendant, as here, cannot relieve itself of liability by effectively delegating or outsourcing its responsibility. (See, for example, *R. v. Canadian Tire Corp.*, [2004] O.J. No. 312 (Ont. S.C.), at para. 89.) The defendants, through Patricia Poyntz, relied on Michael Mesure and Bob Alsip, both of whom, she rightly assumed, were in contact with Dr. Klem. She reached no further in her search for expert assistance but, in the circumstances, I do not think her efforts unreasonable. Mesure was and remains the executive director of FLAP, Toronto's leading source of information and contacts respecting avian collisions and their remedy. Alsip headed the Convenience Group – the "only game in town", as was widely accepted, in the field of technological solutions to the problem. And Dr. Klem is generally acknowledged as the leading North American expert in the discipline pertaining to the causes of avian collisions and strategies for averting them. If there were other reputable sources of consulting expertise prior to the conclusion of the timeframe set out in the charges, their names or affiliations were not advanced by the prosecution during the course of this trial.

[89] It is also the case that Cadillac Fairview's investment in bird deterrent applications at the YCC appears to have accelerated in the period immediately following the company's first becoming aware that it faced prosecution for environmental and animal welfare offences. Some may read this as a reaction to the litigation and infer that the defendants could therefore have acted with greater dispatch. I do not see it that way. As I construe the evidentiary record, the defendants had committed themselves to moving forward on the bird strike problem before, as one might say, the

writ was dropped. The prior delays, on my assessment, were attributable to technological or logistic challenges presented by the YCC's physical setting and the development of a suitable product. The more salient question is whether the YCC ought earlier to have contracted to install an alternative application that, although inferior in efficacy, cost and tenant satisfaction, would at least have gone some way to mitigating the terrible harm caused to migrating birds. The difficult balancing of the factors germane to this question is the critical analysis that led me to my verdict and the one to which I now turn.

[90] One helpful and oft-cited catalogue of factors relevant to this determination is that devised by Hackett J. in *R. v. Commander Business Furniture Inc.*, [1992] O.J. No. 2904 (C.J.), at para. 95; affd. [1994] O.J. 313 (Ont. Ct. (G.D.):

1) the nature and gravity of the adverse effect;
2) the foreseeability of the effect including abnormal sensitivities;
3) the alternative solutions available;
4) legislative or regulatory compliance;
5) industry standards;
6) the character of the neighbourhood;
7) what efforts have been made to address the problem;
8) over what period of time and promptness of response;
9) matters beyond the control of the accused including technological limitations;
10) skill level expected of the accused;
11) the complexities involved;
12) preventative systems;
13) economic considerations; and
14) actions of officials.

(See, also, the inventory of considerations developed in *R. v. Gonder* (1981), 62 C.C.C. (2d) 326 (Y.T. Terr. Ct.), at 32 and adopted in *R. v.*

Imperial Oil Ltd., 2006 CarswellOnt 8983 (Ont. C.J.), at para. 36.) These factors are likely not exhaustive nor do they necessarily apply in every case. I have, however, considered each and they inform my decision.

[91] Cost considerations, while in no way dispositive, factor into many if not most assessments of due diligence. The following passage from *Commander Business*, at paras. 110-11, is of assistance to the task at hand:

> In my view, the degree of control that an accused can exercise over a problem must have an air of reality and therefore must include some consideration of cost. …
>
> Having said that, economic concerns must be properly balanced against other factors. For example, *phasing in an operational change which will both protect the environment and the economic viability of a company may be duly diligent in all the circumstances.* It is difficult to imagine that any industrial standards or reasonable person would support a non-phased-in approach which would destroy a company when a realistic phased-in timely approach would have reasonable success over a reasonable period of time and thereby accommodate both interests. *On the other hand, if a phased-in approach that complied with the industry standard would destroy the environment or cause or risk of serious harm, no cost would be too great.* The degree or level of harm or adverse effect must therefore be reasonably balanced with economic considerations and the other factors set out earlier for a due diligence defence. [Emphasis added.]

[92] I do not intend to here retrace the factual review that occupies much of this judgement or conduct a detailed factor-by-factor analysis. I do note that the YCC apparently complied with municipal building and industry standards, that only a handful, at most, of buildings in the GTA had adopted a more aggressive strategy in deterring bird strikes by 2010, that the YCC implemented and maintained a policy to respond to nocturnal light pollution, that it had co-operated with FLAP's bird retrieval, rescue and documentation efforts for more than a decade, and that it had endeavoured, if intermittently and without tangible success, to find solutions to the problem of daytime collisions since the late 1990s. The YCC, through Patricia Poyntz, had consulted with FLAP about the

problem of avian collisions and, on at least a few occasions, conducted test installations of window treatments that proved ineffective, unappealing to its tenants, or both.

[93] The presenting problems were complex and the necessarily site-specific solutions were constantly evolving. What worked elsewhere did not work at the YCC. As said Hill J. in *Canadian Tire, supra*, at para. 85,

> In assessing the efficacy of a due diligence defence, the court must guard against the correcting, but at times distorting, influences of hindsight. In considering the defendant's efforts, the court "does not look for perfection" (*R. v. Safety-Kleen Canada Ltd.* (1997), 114 C.C.C. (3d) 214 (Ont. C.A.) at 224) nor some "superhuman effort" on the defendant's part (*R. v. Courtaulds Fibres Canada* (1992), 76 C.C.C. (3d) 68 (Ont. Prov. Ct.) at 77). If the facts suggest a discoverable causative flaw "could readily" have been remedied, due diligence will fail: *R. v. Rio Algom Ltd.*, *supra* at 249, 252.

There were no quick-fix solutions to the problem of daytime bird strikes at the YCC and the measures that were proposed were expensive and, prior to 2011, of dubious efficacy. It must not be forgotten that the standard to be applied in assessing due diligence is that of the reasonable person in like circumstances, not one of immediate perfection upon recognition of an environmental problem.

[94] All that said, many hundreds of birds met their untimely deaths and many others were undoubtedly injured in the eight months bracketed by March and November of 2010. This single factor, particularly given its foreseeability, weighs heavily in the calculus of reasonable care. Balancing this against the other considerations (including, as I find, Poyntz's good faith effort to advance the bird file at the YCC), I conclude that the defendants did exercise due diligence in addressing the problem of avian collisions. Accordingly, acquittals must follow.

E. CONCLUSION

[95] For the reasons set out, I find that the prosecution has established the *actus reus* of two of the three offences charged but that the defendants have demonstrated that, in all the circumstances, they acted with due diligence and have thus discharged their burden. In the result, I find the defendants not guilty of all charges.

Judgment rendered on February 11, 2013

Revised copy filed on February 14, 2013

_____

Justice Melvyn Green