Court of Appeal File No.: C59008

ONTARIO
COURT OF APPEAL FOR ONTARIO

B E T W E E N:

PRINCE EDWARD COUNTY FIELD NATURALISTS

Appellant

- and-

OSTRANDER POINT GP INC., as general partner for and on behalf of OSTRANDER POINT WIND ENERGY LP and DIRECTOR, MINISTRY OF THE ENVIRONMENT

Respondents

FACTUM OF THE RESPONDENT DIRECTOR, MINISTRY OF THE ENVIRONMENT

MINISTRY OF THE ENVIRONMENT AND CLIMATE CHANGE
Legal Services Branch
135 St. Clair Ave. West, 10th Floor
Toronto, ON M4V 1P5
Fax: (416) 314-6579

Sylvia Davis (LSUC No. 38171H)
Tel.: (416) 314-6806
sylvia.davis@ontario.ca

Sarah Kromkamp (LSUC No. 61579R)
Tel.: (416) 314-6493
sarah.a.kromkamp@ontario.ca

Lawyers for the Respondent
Director, Ministry of the Environment

TO : **MCCARTHY TÉTRAULT LLP**
66 Wellington Street West, Suite 5300
TD Bank Tower
Toronto, ON M5K 1E6

Douglas Hamilton, LSUC No. 25812V
Tel: (416) 601-7642

Brandon Kain
Tel: (416) 601-7821

Neil Finkelstein
Tel: (416) 601-7611
Fax: (416) 868-0673

Lawyers for Ostrander Point GP Inc.,
as general partner for and on behalf of
Ostrander Point Wind Energy LP

AND TO: **ERIC K. GILLESPIE PROFESSIONAL CORPORATION**
10 King Street East, Suite 600
Toronto, ON M5C 1C3

Eric K. Gillespie (LSUC #37815P)
Tel: (416) 703-6362

Lawyers for Prince Edward County Field Naturalists
and Alliance to Protect Prince Edward County

AND TO: **PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**
155 Wellington Street West, 15th Floor
Toronto, ON M5V 3H1

Chris G. Paliare
Tel: 416-646-4318

Andrew Lokan
Tel: 416-646-4324
Fax: 416-646-4301

Lawyers for the Proposed Intervener,
Prince Edward County South Shore Conservancy

AND TO: **TORYS LLP**
79 Wellington St West #3000
Toronto, ON M5K 1N2

John Terry
Tel: 416-865-8245

Alex Smith
Tel: 416-865-8142
Fax: 416-865-7380

Lawyers for the Intervener,
Canadian Wind Energy Association

AND TO: **Stephen Hazell** (LSUC #23466Q)
Suite 300, 75 Albert Street
Ottawa, ON K1P 5E7

Tel: (613) 562-3447

Lawyer for the Intervener, Nature Canada

TABLE OF CONTENTS

PART I – OVERVIEW

1. This is an appeal by the Prince Edward County Field Naturalists ("PECFN") to reverse the decision of the Divisional Court dated February 20, 2014, which set aside a decision of the Environmental Review Tribunal (the "Tribunal" or "ERT") revoking a Renewable Energy Approval ("REA") issued under the *Environmental Protection Act* ("*EPA*") on the basis that the approved project would cause serious and irreversible harm to Blanding's turtles.

2. In a unanimous decision, the Divisional Court held that the ERT had made six separate errors of law which rendered the Tribunal's decision both unreasonable and a breach of natural justice. Contrary to the Appellant's assertion, the Divisional Court did not apply a *de facto* correctness standard, or engage in fact finding or policy making. It correctly applied well-established principles of law, including the reasonableness standard of review, in coming to its determination.

3. The Tribunal's decision was flawed in the face of findings of fact based on no evidence and reasons which fused and confounded the analysis of serious and irreversible harm. Furthermore, the Tribunal acted unreasonably in failing to give sufficient weight to a permit issued by the Minister of Natural Resources under the *Endangered Species Act* ("*ESA"*). Finally, the Tribunal failed to provide the Director and the Proponent with the opportunity to make submissions as to remedy, which resulted in a breach of natural justice. As such, it is respectfully submitted that this appeal should be dismissed.

4. Nature Canada and the Prince Edward South Shore Conservancy ("SSC") intervene in support of the Appellant. Their arguments largely echo those of the Appellant and are addressed in the paragraphs below.

PART II – THE FACTS

5. The respondent Director, Ministry of the Environment (the "Director") agrees with the facts as stated in paragraphs 11-20, 22-24, 28-30, 34-35, 37-38, 40, 42-45 and 50-53 of PECFN's factum. The Director disagrees with paragraphs 21, 25-27, 31-33, 36, 39, 41 and 46-49 of PECFN's factum. These paragraphs consist of an amalgam of facts and legal argument. The Director does not agree with PECFN's interpretation of the facts in these paragraphs. In general, the Director submits that the PECFN factum provides an incomplete picture of the appeal and decision and, therefore, offers the following additional facts.

Renewable Energy Approval Process

6. Renewable energy projects (such as arrays of solar panels or wind turbines) are subject to the renewable energy approval process set out under the *EPA*.[1] Under the *EPA*, any resident of Ontario may appeal a decision of the Director to issue a REA to the ERT.[2]

7. The *EPA* and the regulations promulgated thereunder require that the ERT render its decision on the appeal within six months of the commencement of the appeal, otherwise the decision of the Director is deemed confirmed. However, the Tribunal has the power to adjourn the six-month time period in exceptional circumstances.[3]

8. Section 145.2.1(2) of the *EPA* specifies that the Tribunal shall consider only whether engaging in the renewable energy project in accordance with the renewable energy approval will cause:

    a. serious harm to human health; or
    b. serious and irreversible harm to plant life, animal life or the natural environment.[4]

9. The *EPA* further stipulates that the person requiring the hearing has the onus of proof.[5]

---

[1] *Environmental Protection Act*, R.S.O. 1990, c. E-19 ss. 47.1 – 47.7 [*EPA*]; O. Reg. 359/09.
[2] *EPA, supra* note 1 at s. 142.1
[3] *Ibid* at s. 145.2.1(6); O. Reg. 359/09 at s. 59.
[4] *Ibid* at s. 145.2.1(2).

10. Should the Tribunal find that an appellant has met the test under s. 145.2.1(2), the Tribunal may:

    a. revoke the decision of the Director;

    b. by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with the *EPA* or its regulations; or

    c. alter the decision of the Director, and for that purpose substitute its opinion for that of the Director.[6]

11. A decision of the Tribunal may be appealed to the Divisional Court on a question of law.[7]

Renewable Energy Approval issued to Ostrander Point GP Inc.

12. On December 20, 2012, pursuant to s. 47.5 of the *EPA*, the Director issued a REA (the "Ostrander REA") to Ostrander Point GP Inc. (the "Proponent") for a nine-turbine wind project (the "Project") on 324 hectares (or 3.24 square kilometres) of Crown Land located on the south shore of Prince Edward County, known as the Ostrander Point Crown Land Block (the "Site"). The Site is leased to the Proponent for 25 years, with one extension for a further term of 15 years[8]

13. The Project was also the subject of a permit issued by the Minister of Natural Resources (the "Minister"), pursuant to s. 17(2)(c) of the *Endangered Species Act* (the "*ESA*").[9]

The *ESA*

14. The *ESA* provides statutory protection to threatened, endangered and extirpated species. Section 9 of the *ESA* prohibits killing, harming, harassing, capturing, possessing, buying, selling, trading, leasing or transporting species listed as threatened, endangered or

---

[5] *Ibid* at s. 145.2.1(3).
[6] *Ibid* at s. 145.2.1(4).
[7] *Ibid* at s. 145.6(1).
[8] *Alliance to Protect Prince Edward County v. Ontario (Ministry of the Environment)*, [2013] O.E.R.T.D. No. 40, ["ERT Decision"], Director's Compendium ("DC"), Tab 8 at paras. 1 and 3; Figure 1.0 from Natural Heritage Assessment (Exhibit 4 excerpt), Exhibit Book ("EB"), p. 593, DC, Tab 3, p. 12.
[9] *Endangered Species Act* Permit (ESA Permit), EB, pp. 995-1013, DC, Tab 6, pp. 19-37.

extirpated.[10] Section 17 of the *ESA* provides that the Minister may issue a permit to a person, with respect to a species listed as extirpated, endangered or threatened, which authorizes the person to engage in an activity specified in the permit that would otherwise be prohibited by section 9, if the conditions imposed by the permit are met.[11]

15. Section 17(2)(c) of the *ESA* allows for the issuance of a permit where the Minister is of the opinion that an overall benefit to the species will be achieved through the requirements imposed by the permit, and that the permit requires reasonable steps to minimize adverse effects on individual members of the species (an "overall benefit permit"). An overall benefit is only achieved if the species as a whole in Ontario is better off, as a result of the fulfillment of the permit's conditions, than it was prior to the permit being issued.[12]

16. The Minister has the authority to amend or revoke an overall benefit permit if the Minister is of the opinion the revocation or amendment is necessary to prevent jeopardizing the survival or recovery, in Ontario, of the species specified in the permit.[13] Under the *ESA*, there is no right of appeal to any administrative tribunal, including the ERT, from a decision by the Minister to grant, refuse, amend or revoke a permit under s. 17 of that Act.[14]

ESA Permit for Blanding's Turtle

17. On February 23, 2012, the Minister issued an overall benefit permit to the Proponent with respect to impacts on Blanding's turtles at the Site (the "ESA Permit"). The ESA Permit contains a number of requirements designed to minimize possible adverse effects to Blanding's turtles on the Site: including speed bumps, speed limits, education signage, training employees to avoid harming turtles, prohibiting construction and road maintenance

[10] *Endangered Species Act, 2007*, S.O. 2007, c. 6 at s. 9 [*ESA*].
[11] *Ibid* at s. 17.
[12] *Ibid*; ERT Decision, *supra* note 8 at para. 269.
[13] *ESA*, *supra* note 10 at s. 17(7)(b)(i)(A).
[14] *ESA*, *supra* note 10.

between May 1 and October 15, creating artificial nesting sites away from roads, as well as imposing monitoring and reporting requirements.[15]

Compensation Property and Property Management Plan

18. Additionally, in order to provide an overall benefit to the species, the Proponent is required to restore, enhance and actively maintain Blanding's turtle habitat on an adjacent 37.64 hectare property (seven times the size of the Project footprint) (the "Compensation Property"), for a minimum of twenty years. The Compensation Property has permanent wetlands suitable for Blanding's turtle overwintering, and a Blanding's turtle was seen on the property at the time of the hearing.[16] The ESA Permit effectively removes the Compensation Property from development, for any reason, for a minimum of 20 years.

19. Enhancement of the Compensation Property shall be done in accordance with a Property Management Plan ("PMP") which must be approved by the Ministry of Natural Resources and Forestry ("MNRF"). The Proponent is required to monitor and report on the effectiveness of the PMP to MNRF.[17]

20. The ESA Permit specifies that the PMP must include the following elements: reporting on the status, effectiveness and functionality of all habitat restoration, enhancement or creation efforts, successful techniques and methods to restore damaged habitat and monitoring of suitable habitat assessments for Blanding's turtles.[18]

21. A wide range of monitoring and reporting is required on the Site, similar to that required for the Compensation Property. In addition, the ESA Permit requires the Proponent to prepare an Impact Monitoring Plan ("IMP"), to ensure that the Site restoration and mitigation

[15] ESA Permit, *supra* note 9; ERT Decision, *supra* note 8 at para. 270.
[16] *Ibid* at paras. 270, 338 and 340.
[17] *Ibid* at para. 270; ESA Permit, *supra* note 9, Conditions 4.3, 4.4, 4.5, & Appendix C, Part A.
[18] *Ibid*, Appendix C, Part A.

measures are installed, maintained and function as intended, thereby applying the principle of "adaptive management". The ESA Permit outlines minimum requirements for the IMP, and the full IMP must be prepared and approved by the MNRF prior to commencement of construction. The ESA Permit specifies that the IMP must also require an annual report identifying Blanding's turtle high frequency intersects with the proposed road, to be followed by implementation of site- specific mitigation measures.[19]

PECFN's Appeal of Ostrander REA

22. On January 4, 2013, PECFN appealed the Ostrander REA on the grounds that the Project would cause serious and irreversible harm to some thirty-three different animal and plant species, including the Blanding's turtle.[20] At the hearing, evidence was adduced regarding potential impacts to the following species and their habitats:

> Blanding's turtle, Mergansers, Whip-Poor-Will, Henslow's Sparrow, Long-Tailed Duck, Greater Scaup, White-Winged Scoter, raptors (general), eagles (general), Bald Eagles, Golden Eagles, Peregrine Falcons, Vultures, Grouse, Tree Swallows, Chimney Swifts, Common Nighthawks, Purple Martins, Kirkland Warbler, Loggerhead Shrike, American Woodcock, Common Snipe, Short Eared Owl, alvar vegetation, various types of bats including: Big Brown Bat, Hoary Bat, Silver Haired Bat, Eastern Pipistrelle, Red Bat, Little Brown Bat, Northern Long Eared Bat and Small Footed Bat and the Monarch Butterfly.[21]

Uncontested Evidence at the Hearing

(a) The Site

23. The following uncontested evidence regarding the Site was provided at the hearing:

    a. The Site was used by the Department of National Defence ("DND") in the 1950s for air-to-ground rocket and gunnery strafing, as a practice bombing range and for tank manoeuvres. [22]

[19] *Ibid*, provision 11, Appendix C, Parts B & C; ERT Decision, *supra* note 8 at paras. 270 and 334.
[20] PECFN Notice of Appeal to ERT, dated January 4, 2013, DC Tab 7, at paras. 5, 6, 7, 13, 16 and 18.
[21] ERT Decision, *supra* note 8 at paras. 220, 371, 373, 377, 380, 392, 404, 412, 413, 426, 430, 439, 445, 446, 447, 477, 521 and 546.
[22] *Ibid* at para. 552.

b. Since the DND ceased operations, the Site has remained open to the public as Crown land, although it is not a provincial park. It is used by the public in a variety of ways, including for bird watching, driving all-terrain vehicles, occasional unlicensed camping and campfires on the beach.[23]

c. Currently, the Site contains several kilometres of tertiary road which is only passable with four-wheel-drive and all-terrain vehicles. The Project requires that 5.4 km of gravel roads be constructed.[24]

(b) <u>The Blanding's Turtle</u>

24. It was agreed that Blanding's turtles inhabit the Site.[25] In addition to the facts noted by PECFN in its factum, the following evidence regarding Blanding's turtles was uncontested at the hearing:

a. Blanding's turtles are genetically uniform across their range. They have not evolved into separate genetic subspecies. Blanding's turtles in Ontario are part of the Great Lakes St. Lawrence population, which includes southern Ontario, parts of Quebec and the United States.[26]

b. The 2005 Report by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) on the Blanding's turtle estimates this population to include approximately 10,000 individuals.[27]

c. The population of Blanding's turtles on the Site is unknown, as is the population of Blanding's turtles in Prince Edward County.[28] Prince Edward County appears to support numerous populations of Blanding's turtles.[29]

d. The Site includes both permanent and temporary wetlands, as well as areas suitable for turtle nesting.[30] In that respect, the Site is similar to the lands surrounding it. The area of the southern shore of Prince Edward County was described as a homogeneous matrix of various wetland types, both permanent and temporary, so that the whole shore is suitable habitat for Blanding's turtles.[31] Blanding's turtles likely move off and on the Site on a regular basis.[32]

---

[23] *Ibid* at paras. 16, 323 and 551.
[24] *Ibid* at para. 250.
[25] *Ibid* at para. 240.
[26] *Ibid* at paras. 242 and 274.
[27] Report by the Committee on the Status of Endangered Wildlife in Canada, ("COSEWIC Report"), EB, p. 2510 , DC, Tab 2, p. 11.
[28] ERT Decision, *supra* note 8 at paras. 240, 256 and 356.
[29] *Ibid* at para. 256.
[30] *Ibid* at paras. 253-255.
[31] *Ibid* at para. 257.
[32] *Ibid* at para. 258.

25. At the hearing, the Tribunal heard from two experts on Blanding's turtles -- Dr. Christopher Edge (for the Proponent) and Dr. Frederic Beaudry (for PECFN).[33] As between the two Blanding's Turtle experts, the Tribunal preferred the evidence of Dr. Beaudry, regarding road mortality, to that of Dr. Edge.[34] Dr. Beaudry's key evidence is summarized below:

    a. In Dr. Beaudry's opinion, the mitigation measures proposed to reduce turtle mortality caused by the project roads would be ineffective, in that all mortalities resulting from the additional Project roads would not be prevented. The only mitigation measure that would prevent serious and irreversible harm would be to not build any additional roads on the Site.[35]

    b. Dr. Beaudry did not know the number of turtles on the Site or in the area, but gave evidence on the concept of "population groups", which he described as a group of intermingling individuals that could potentially breed with each other. In his opinion, there were likely a small number of Blanding's turtles at the Site itself because of its small size. These turtles would belong to a population group which extended off the Site to adjacent areas, although he could not say by how far.[36]

    c. Dr. Beaudry did not provide any evidence as to the estimated number or estimated increase in the number of turtles that would be killed or poached in the area, by the addition of the Project roads. He testified that the estimated annual survivorship of Blanding's turtle is 96%. A 2% increase in mortality - i.e. a drop to 94% adult survivorship - would result in a fairly quickly declining population. Slower declines may occur with mortality increases in the range of 1% -2%.[37]

    d. Dr. Beaudry admitted that the size of the population on the Site would affect how long it would take for a decline to lead to extirpation on the Site, but indicated that he viewed this as an unimportant variable.[38] Dr. Beaudry admitted that he did not distinguish between "serious" and "irreversible".[39]

26. A second expert for PECFN, Kari Gunson, also testified that, in her opinion, the Project would cause serious and irreversible harm to Blanding's turtles through habitat loss and increased road mortality. Ms. Gunson also did not provide specific evidence as to the estimated number of turtles at or near the Site, or the projected increase in mortality due to

[33] *Ibid* at paras. 221-226.
[34] *Ibid* at para. 325.
[35] *Ibid* at paras. 276-280.
[36] *Ibid* at para. 274.
[37] *Ibid* at para. 347.
[38] *Ibid* at para. 349.
[39] *Ibid* at para. 346.

the additional roads. Ms. Gunson testified that an acute or sudden increase in adult mortality would likely result in a population decline. Ms. Gunson testified that research on the Blanding's turtle indicates that a population could sustain a 2 to 5 per cent mortality. She added that recovery of turtle populations from an increase in adult mortality was slow.[40]

Tribunal's Findings

27. On July 3, 2013, after forty hearing days, 185 exhibits and 31 expert witnesses, the Tribunal rendered its decision. The Tribunal held that PECFN had failed on all grounds of its appeal except one – that concerning the Blanding's turtle. In the case of the Blanding's turtle the Tribunal found that:

> … mortality due to roads, brought by increased vehicle traffic, poachers and predators, directly in the habitat of Blanding's turtle, a species that is globally endangered and threatened in Ontario, is serious and **irreversible harm** to Blanding's turtles at Ostrander Pont Crown Land Block that will not be effectively mitigated by conditions in the REA.[41] [emphasis added]

28. The Tribunal next considered its authority under the *EPA* to either alter the decision, order the Director to take action or revoke the decision.[42] The Tribunal stated that whether or not the Site should be closed to public access "is a value judgment that is not within the purview of the Tribunal to make". The Tribunal, therefore, held that it was not in the position to alter the decision of the Director, or to substitute its opinion for that of the Director. The Tribunal revoked the decision of the Director without first asking for submissions on the foregoing jurisdictional issue or on alternative remedies to revocation.

Appeals to Divisional Court

29. The Director and Proponent both appealed the ERT's decision to the Divisional Court. The Divisional Court held that the standard of review for all issues except a breach of natural

[40] *Ibid* at paras. 262-264 and 350.
[41] *Ibid* at paras. 7, 630 and 635.
[42] *EPA, supra* note 1 at s. 145.2.1(4); ERT Decision, *supra* note 8 at paras. 636, 640 and 641.

justice was reasonableness. The Court held that there was no standard of review for a breach of natural justice.[43]

30. The Divisional Court set aside the decision of the Tribunal on the grounds that it was both unreasonable and constituted a breach of natural justice. The Divisional Court found the Tribunal committed six errors of law.[44] The Court concluded that the Tribunal's decision on serious and irreversible harm was unreasonable. Indeed, the four errors on that point were both individually and collectively fatal to the Tribunal's conclusion.[45]

First Error – Failing to separately analyse irreversible harm from serious harm

31. The Court acknowledged that the evidence before the Tribunal indicated a "risk of serious harm to the Blanding's turtle from the Project".[46] However, the evidence on irreversibility was less clear. The Tribunal failed to provide clear reasons on how the test of irreversible harm had been met and instead blended its analysis of serious and irreversible harm. This resulted in an error of law because:

    a. Serious and Irreversible are two factors which address very different issues. This was acknowledged by the Tribunal, which differentiated between the test for "serious" harm (in section 145.2.1(2)(a)) and "serious and irreversible" harm (in section 145.2.1(2)(b)).[47]

    b. However, the Tribunal, through its blended analysis of whether there would be serious *and* irreversible harm to Blanding's turtles appeared to follow the approach of Dr. Beaudry, who admitted that he did not differentiate between "serious" and "irreversible".[48]

    c. The lack of a clear analysis prevented the Court from understanding why the Tribunal made its decision. As such, the Court could not determine whether the conclusion was within the range of acceptable outcomes.[49]

---

[43] *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*, [2014] O.J. No. 772 ("Div Ct Decision"), DC, Tab 11 at paras. 27 and 28.
[44] *Ibid* at para. 92.
[45] *Ibid* at para. 74.
[46] *Ibid* at para. 35.
[47] ERT Decision, *supra* note 8 at para. 186, first bullet point.
[48] Div Ct Decision, *supra* note 43 at para. 39.
[49] *Ibid* at paras. 38 and 39.

Second and Third Errors – Finding of Irreversible Harm in the face of no evidence on population size or present or future vehicular traffic

32. The Court found the Tribunal's conclusion, that the Blanding's turtle would experience irreversible harm, to be unreasonable, in light of the following:

    a. The Tribunal acknowledged that the analysis of serious and irreversible harm is closely linked to the size of the population considered.[50] Dr. Beaudry went further and allowed that the size of the population on the Site would affect how long it would take for a decline to lead to extirpation on the Site.[51]

    b. The Tribunal admitted that it had no evidence on the population size of the Blanding's turtle on the Site, or in Prince Edward County as a whole. However, it decided this information was unnecessary to determine whether the Project would cause serious and irreversible harm.[52]

    c. As outlined above at paragraphs 25 & 26, expert witnesses linked irreversible harm to a specific percentage increase in adult mortality occurring through an increase in vehicular traffic. However no evidence was provided regarding current vehicular traffic or its projected increase should the Project go forward.[53]

33. As noted by the Court, it is not possible to determine the magnitude of an increase in mortality, and therefore its irreversibility, without knowing the size of the population. There is an obvious difference between the effects of five additional deaths a year to a population of 5,000 as opposed to a population of 100.[54] By the same token it is not possible to determine if the increase in road mortality will reach the critical 2 to 5 percent identified by Gunson & Beaudry without data on present and projected road traffic.[55]

34. The Court found that the Tribunal's decision, in the face of no evidence on either population or traffic data, makes sense only if one assumes that <u>any</u> increase in the mortality rate is both significant and amounts to irreversible harm. However, as noted by the Court, the Tribunal

[50] ERT Decision, *supra* note 8 at para. 344; Div Ct Decision, *supra* note 43 at para. 73.
[51] ERT Decision, *supra* note 8 at para. 349.
[52] *Ibid* at paras. 356-358.
[53] Div Ct Decision, *supra* note 43 at para. 49.
[54] *Ibid* at para. 44.
[55] *Ibid* at para. 49.

specifically considered and rejected this approach earlier in its decision.[56] PECFN had submitted that the "serious and irreversible harm" test will be met, if it can be shown that a project will cause measurable declines of a species that is already deemed at risk. The Tribunal found this "declining species" interpretation of the phrase "serious and irreversible harm" to be so broad and easily satisfied as to render the test meaningless.[57] This was consistent with prior Tribunal decisions.[58]

35. The Court clarified that it was not requiring "scientific certainty" or mathematical precision regarding population size, however there had to be "some level of data respecting population to allow at least an order of magnitude to be calculated before a proper finding could be made on the issue of irreversible harm."[59]

Fourth Error – Failing to give sufficient weight to the existence of the ESA Permit

36. The Court found that there is nothing in the EPA or the ESA that limits the Tribunal's mandate on matters that are subject to the ESA[60]. However, the Tribunal could not ignore the ESA permit or "push it to the side". The Tribunal was obliged to apply its statutory mandate in manner that would avoid any conflict between the two statutory regimes if possible.[61] It did not do so. The ESA Permit gives permission for the harming of Blanding's turtles in the context of the Project so long as mitigation and overall benefit measures are complied with. The Tribunal's decision prohibits the Project on the grounds that it will harm Blanding's turtles at the Site and surrounding area.[62]

[56] *Ibid* at para. 46.
[57] ERT Decision, *supra* note 8 at paras. 187 and 203.
[58] *Ibid* at para. 201.
[59] Div Ct Decision, *supra* note 43 at para. 47.
[60] *Ibid* at para. 58.
[61] *Ibid* at para. 59.
[62] *Ibid* at paras. 60 and 57.

37. The Court found the Tribunal's two reasons for giving little or no weight to the ESA Permit were flawed.

    a. The Tribunal stated that it could not evaluate the effectiveness of ESA Permit because the PMP and IMP were not finalized at the time of the hearing. This ignored the role of MNR in monitoring the ESA Permit and policing compliance. By doing so, the Tribunal appears to be sitting on appeal from the decision of the MNR to issue the ESA Permit and assuming jurisdiction it does not have. It also sets itself up for conflict with the ESA process and thus fails to adopt an interpretation of the statues that leads to their harmonious and consistent application.[63]

    b. The Tribunal stated that the ESA Permit was of limited relevance because the ESA Permit considered the population "as a whole in Ontario" whereas the Tribunal limited its consideration to the population on the Project site and "surrounding landscape" (hereinafter the "Population Location").[64] The Court correctly found this to be unreasonable because there was no evidence before the Tribunal that the Blanding's turtles within the Population Location were in any way different or genetically unique to the population within Ontario as a whole.[65]

38. As well, it should be noted that the Compensation Property falls within the Population Location, as it is located adjacent to the Site.[66] It therefore provides an overall benefit to both the turtles within the Population Location, as a protected habitat, as well as to turtles in the rest of the province.

Fifth and Six Errors: Breach of Natural Justice and Jurisdictional Error

39. Finally, the Court found that the Tribunal's decision on the appropriate remedy was reached following a breach of the rules of natural justice as it had failed to provide procedural fairness to the parties. Additionally, the Tribunal erred in failing to exercise its jurisdiction,

---

[63] *Ibid* at paras. 64-67.

[64] ERT Decision, *supra* note 8, at paras. 342 and 343. The only expert to provide any evidence on what constituted the "surrounding landscape" for the purposes of the Population Location was Dr. Edge, who opined that the population extended along the entire length of the south shore of Prince Edward County as well as north five or six kilometers inland (see para. 345 of ERT Decision, *supra* note 8). As such, the Site is a small percentage of the vaguely defined Population location – see Figure 1.0, *supra* note 8.

[65] Div Ct Decision, *supra* note 43, at para. 73; As well, there was no evidence that the Site had a denser population of Blanding's turtles than any other portion of the south shore of Prince Edward County or that the Blanding's turtle habitat at the Site was rare or unique. In fact, Dr. Edge, in uncontested evidence, described the Site as similar to the lands surrounding it – see ERT Decision, *supra* note 8 at para. 257.

[66] ERT Decision, *supra* note 8 at paras. 338-340; Evidence of C. Edge in Appellant`s Transcript Volume 6, p. 39, L. 3-13, p. 40, L. 5-14, p. 50, L. 3-25, p. 51, L. 1-3, and p. 74, L. 13-23, DC, Tab 1 at pp.1-5; Figure 2.1 of the Design and Operations Report, EB, p. 272, DC, Tab 4, p. 13.

by determining that it was not in a position to alter the decision of the Director. Consequently, neither the Tribunal's decision on the merits, nor its decision regarding remedy could stand. The appeal, therefore, was allowed and the decision of the Tribunal set aside.[67]

PART III – ISSUES AND THE LAW

Issue No. 1 - The Divisional Court did not apply the correctness standard

40. The Divisional Court did not apply a "*de facto* correctness standard", as submitted by PECFN. The Court stated from the outset that the standard of review for all issues except for breaches of procedural fairness was the standard of reasonableness.[68]

41. The Supreme Court of Canada has stated on a number of occasions that trial judges are presumed to know the law with which they work and, where a standard of proof is expressly stated, it will be assumed to have been applied.[69] It is axiomatic that the same principle applies to an appellate court. It should, therefore, be assumed that the Divisional Court understood its task in conducting a reasonableness review and did not stray from it.

42. A court conducting a review for reasonableness enquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to the outcomes.[70]

43. In the present case, the Divisional Court scrupulously followed the reasonableness review as outlined in *Dunsmuir* and provided all appropriate deference to the Tribunal. The Court

---

[67] Div Ct Decision, *supra* note 43 at paras. 79-90 and 92.
[68] *Ibid* at para. 28.
[69] *F.H. v. McDougall*, [2008] S.C.J. No. 54, Director's Book of Authorities ("DBA"), Tab 1 at para. 54. See also *R. v. Burns*, [1994] 1 S.C.R. 656, DBA, Tab 2 at para. 18.
[70] *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, Appellant's Book of Authorities ("ABA"), Tab 18 at para. 47.

looked first at the transparency and intelligibility of the Tribunal's reasons.[71] It was only upon finding the Tribunal's reasons to be insufficiently transparent and intelligible that the Court considered whether the Tribunal's decision fell within a range of possible acceptable outcomes which are defensible in respect of the facts and law.

44. The Divisional Court's deference to the Tribunal is apparent throughout the Court's reasons. The Court did not challenge the Tribunal's interpretation of the serious and irreversible harm test set out under s. 145.2.1(2) of the *EPA*. Rather, the Court found this interpretation to be reasonable, most notably the distinction between serious harm and irreversible harm.[72]

45. The Court also agreed with the Tribunal that the test must be interpreted on a case-by-case basis, and the test cannot be interpreted in a manner such that it can never be met or always be met.[73] In particular, the Court agreed with the Tribunal's rejection of the "declining species" interpretation of the phrase "serious and irreversible harm" – i.e. that the death of one individual of a species at risk automatically fulfills the requirements of the serious and irreversible harm test - because such an approach would result in the test always being met.[74]

46. The Court also accepted and did not challenge the Tribunal's weighing of expert evidence and the Tribunal's preference for the evidence of PECFN's experts over those of the Director or the Proponent.[75]

47. The Court deferred to the Tribunal's interpretation of the evidence before it. In particular, the Court found that "it seems unquestionable" from the evidence before the Tribunal that

[71] Div Ct Decision, *supra* note 43 at paras. 38-39.
[72] *Ibid* at para. 36.
[73] *Ibid* at paras. 37-38.
[74] *Ibid* at para. 72.
[75] *Ibid* at para. 39.

the Blanding's turtle faced a risk of serious harm from the Project. Indeed, the Court noted that: "Given the fragile status of the Blanding's turtle as a species, it would be difficult to characterize any increase in mortality arising from the Project as anything other than serious."[76]

48. However, although the evidence established serious harm, the Court found that the real issue was whether the harm would also be irreversible.[77] The Tribunal is required to provide reasons, which allow the reviewing court to understand why the Tribunal made its decision, in order to determine whether the Tribunal's conclusion fell within the range of reasonable outcomes.[78] The Tribunal failed to do this.

49. The Tribunal fused and confounded its analysis of serious harm and irreversible harm, notwithstanding that, as admitted by the Tribunal, the two elements of the legal test, address very different issues.[79] Dr. Beaudry, the expert whose evidence was preferred by the Tribunal, testified that he did not distinguish between "serious" and "irreversible". The lack of reasons in the Tribunal's decision with regards to irreversibility makes it appear that the Tribunal did the same.[80]

50. Following the approach taken by Dr. Beaudry was not an option open to the Tribunal. Dr. Beaudry was providing scientific evidence in his capacity as an expert witness. As such, he was free to interpret the words "serious" and "irreversible" as he felt appropriate, from the point of view of his scientific expertise. However, the Tribunal's duty was to take the evidence and apply it to the elements of the legal test set out in s. 145.2.1(2) of the *EPA*.

---

[76] *Ibid* at para. 35.
[77] *Ibid*.
[78] *Ibid* at para. 38, citing *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, ABA, Tab 19 at para. 16 [*Newfoundland Nurses*].
[79] ERT Decision, *supra* note 8 at para. 186.
[80] Div Ct Decision, *supra* note 43 at para. 39.

51. The SSC factum misstates the statutory test as "*likely to cause* serious and irreversible harm".[81] The wording under s. 145.2.1(2) of the *EPA* is far more stringent as it requires proof that the project *will* cause harm. This error is significant. The stricter the test, the narrower the range of reasonable outcomes, thereby increasing the need for clear and transparent reasons.

(a) Tribunal's decision unreasonable in finding irreversible harm in the face of no evidence

52. The Court did not conflate "no data" with "no evidence" as alleged by PECFN. The missing "data" in question was essential "evidence" necessary to support PECFN's argument that the Project would cause irreversible harm.

53. The primary theory on harm, put forward by PECFN's experts, was that a 2 to 5% increase in adult mortality would result in an adverse impact to the population, sufficient to constitute "serious and irreversible harm". To evaluate whether these percentage increases in mortality would be reached or exceeded at the Site requires data on population and traffic in order to determine whether a 2 to 5% adult mortality increase would indeed occur as a result of the Project.[82] The Tribunal had no such essential evidence before it. As noted by the Supreme Court of Canada: "before any weight at all can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist".[83]

54. The Court found that the Tribunal's conclusion, that general evidence on the vulnerability of the species was sufficient to determine irreversible harm, can only be correct if one assumes that **any** increase whatsoever in the mortality rate, results in both serious **and** irreversible harm. However, the Tribunal specifically rejected this approach, earlier in its reasons, on

[81] SSC Factum at para. 7.
[82] Div Ct Decision, *supra* note 43 at paras. 48-49.
[83] *R. v. J.J.*, [2000] 2 S.C.R. 600, DBA, Tab 3 at para. 59; see also *R. v. Charlebois*, [2000] 2 S.C.R. 674, DBA, Tab 4 at para. 22 and *R. v. K.W.*, [2002] B.C.J. No. 348 (C.A.), DBA, Tab 5 at para. 53.

the ground that it resulted in the test "always being met".[84] Accordingly, the Court was correct in finding that this result was unreasonable.

55. In the present case, the evidence of Dr. Beaudry regarding the level of harm that could be tolerated by Blanding's turtles was based on the theory that a 2% increase in adult mortality would result in a "fairly quickly declining population"[85] leading to serious and **irreversible** harm. Ms. Gunson provided evidence regarding a 2 to 5% mortality increase.[86] PECFN chose to make this very specific calculation the centrepiece of its case. The reliance of both PECFN experts on this formula necessitated evidence on population numbers, current traffic, increased traffic due to the Project and increased mortality due to increased traffic. As such, it was for PECFN to provide the evidence necessary to complete the equation.

56. The SSC submits at paragraph 38 of its factum that population size and traffic data are irrelevant for determining serious and irreversible harm, because they only indicate the rate of decline.[87] That reasoning is fallacious. A critical component to determining if a decline is irreversible is the speed with which the decline is likely to lead to extinction. This is particularly so in the case of a temporary project, such as the case here, where the roads must be removed at the end of the project life.[88]

57. Contrary to PECFN's assertions at paragraph 36 of its factum, the Tribunal did not make the conservative assumption that the new roads would **not** increase road traffic. As noted at paragraph 34 of PECFN's factum, the Tribunal specifically found that the new roads **will**

---

[84] *Ibid* at paras. 44-46.
[85] ERT Decision, *supra* note 8 at para. 347.
[86] *Ibid* at para. 350.
[87] *Ibid* at para. 349.
[88] *Ibid* at para. 3 (lease of Crown land limited to maximum of 40 years); Decommissioning Plan Report, EB, p. 507, DC, Tab 5, p. 16 – all access roads to be removed at end of project and site returned to similar condition prior to project commencement

result in more traffic and would, therefore, increase mortality.[89] This finding however begs the question as to whether the new roads will actually cause the 2 to 5% increase in adult mortality specified by Ms. Gunson and Dr. Beaudry as leading to a significant decline.

58. If this Honourable Court reverses the Divisional Court on this point, the implication of such a finding would be that the serious and irreversible harm test **will** be met, so long as the Project creates a risk of **even one additional death** to a Blanding's turtle. As noted by both the Tribunal and the Divisional Court, such a finding would render the test meaningless.

(b) <u>Reconciling the ESA Permit and s. 145.2.1(2) of the *EPA*</u>

59. The Divisional Court's decision does not interfere with the Tribunal's mandate or undermine its independence. The Divisional Court's findings on the issue of the weight to be given to the ESA Permit in the interpretation of s. 145.2.1(2) of the *EPA* were in accordance with the following established principles of statutory interpretation and related legislation:

    a. The legislature is presumed to know its own statute book and to draft each new provision with regard to the structures, conventions and habits of expression as well as the substantive law embodied in existing legislation;[90]

    b. Statutes enacted by a legislature that deal with the same subject are presumed to be drafted with one another in mind, so as to offer a coherent and consistent treatment of the subject;[91]

    c. Statutes that deal with the same subject are presumed to operate together harmoniously;[92] and

    d. Statutes that are analogous to one another are presumed to reflect an intention to deal with the matters in question in an analogous fashion.[93]

---

[89] See also ERT Decision, *supra* note 8 at para. 363.
[90] *R. v. Ulybel Enterprises Ltd.*, [2001] S.C.J. No. 55, DBA, Tab 6 at paras. 30, 50-51 [*Ulybel Enterprises*].
[91] *Nova, an Alberta Corp. v. Amoco Canada Petroleum Co.*, [1981] S.C.J. No. 92, DBA, Tab 7 at 9.
[92] *Ulybel Enterprises, supra* note 90.
[93] *Law Society of Upper Canada v. Ontario (A.G.)* [1995] O.J. No 9 (Ct. J. (Gen. Div.)), DBA, Tab 8 at paras. 23 and 24, See also R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (LexisNexis: Markham, 2008), DBA, Tab 32 at 411, 412 and 416.

60. The Court emphatically rejected the argument that the Tribunal had no jurisdiction to consider the issue of Blanding's turtle mortality in light of the ESA Permit. The Court stated unequivocally that nothing in the *EPA* or the *ESA* shows an intention to carve out of the Tribunal's mandate matters that are subject to the *ESA*.[94] The Court found, however, that under the well-established rules of statutory interpretation, statutes should be interpreted in a fashion that results in their harmonious operation. The Tribunal, therefore, was obliged to apply its statutory mandate in a manner that would, if possible, avoid any conflict between the *EPA* and the *ESA*. It failed to do so.[95]

61. The Court's approach is in accordance with the Supreme Court of Canada's guidance in *Levis*, that "[t]he starting point in any analysis of legislative conflict is that legislative coherence is presumed and an interpretation which results in conflict should be eschewed unless it is unavoidable."[96]

62. The Divisional Court did not find that there was an operational conflict between the Tribunal's decision and the ESA permit, nor does the Director assert that such a conflict exists. The Supreme Court of Canada in *B.C. Telephone Co. v. Shaw Cable Systems (C.B.) Limited*, defined operational conflict as two decisions creating a conflict which makes it impossible for a claimant to fulfil simultaneously its legal obligations, as defined by the respective administrative boards. That is not the case here. [97] Moreover, there is no conflict between the actual sections of the *EPA* and the *ESA*, such that s. 179(1) of the *EPA* would apply. However that does not end the matter.

---

[94] Div Ct Decision, *supra* note 43 at para. 58.
[95] *Ibid* at para. 59, citing and quoting with approval, *Ulybel Enterprises, supra* note 90 at para. 52.
[96] *Levis (City) v. Fraternite des policiers de Levis Inc.*, [2007] 1 S.C.R. 591, ABA, Tab 9 at para. 47.
[97] [1995] 2 S.C.R. 739 [*Shaw*], DBA, Tab 27 at paras. 47 and 78.

63. While the situation facing the Tribunal does not fall neatly within the categories of statutory or operational conflict, this does not mean that the Tribunal was free to ignore the rules of statutory interpretation in determining the weight to be given to the ESA Permit. Besides the established principles of statutory interpretation listed at paragraph 59 of this factum, there is also the recognized principle of conflict of purpose. Conflict of purpose arises where applying the provision of one statute would frustrate the purpose intended by Parliament in another.[98] It is submitted that this is what has occurred in the present case: the Tribunal's decision had the effect of thwarting the purpose of the *ESA*.

64. By finding that the Project would cause serious and irreversible harm to the Blanding's turtle since the Project increased the risk of the death of one or more turtles, the Tribunal arrived at a conclusion directly at odds with the Minister's decision under the *ESA*. In issuing the overall benefit permit, the Minister determined that killing, harming or harassing Blanding's turtles at the Site, during the course of the Project, was acceptable, provided that the conditions of the ESA Permit, including the provision of an overall benefit, were fulfilled.[99]

65. It cannot be said that a decision revoking the REA has no effect on the legitimacy of the ESA Permit (as alleged at paragraph 82 of PECFN's factum). The purpose of the ESA Permit was to allow the wind project to proceed, in a way that was acceptable under the legislation. With the revocation of the REA, the ESA Permit would be moot.

66. The ESA Permit was issued on the condition that the overall benefit provided through the permit would result in the species being better off as a result of the project than it was prior

[98] *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, [2012] 3 S.C.R. 489, DBA, Tab 28 at para. 44.
[99] Div Ct Decision, *supra* note 43 at paras. 58-60.

to the permit being issued. [100] This was in keeping with two of the primary purposes of the ESA: (1) protect species at risk and their habitats; and (2) promote the recovery of these species.[101] The Tribunal's decision has frustrated both of these purposes.

67. The Court held that the Tribunal ought to have explained how its determination of serious and irreversible harm was harmonious with the MNRF's decision that operating the Project, in accordance with the ESA Permit, would lead to an overall benefit for the species. Reasons on this point were especially necessary since the evidence showed that the turtle population in Prince Edward County was not genetically unique.[102]

68. The Tribunal's reasons failed to indicate why this ostensible conflict was unavoidable or what, if any, evidence could explain how the species as a whole could be benefitted in Ontario, but irreversibly harmed in Prince Edward County. The Court concluded that without such an explanation, the implication of this finding is that **any** increase in mortality to a species at risk **must** result in both serious and irreversible harm. However, the Tribunal had expressly rejected that interpretation of the test. [103]

69. The Court did not endorse the position that serious and irreversible harm should *always* be determined at the provincial level, as alleged by PECFN.[104] The Court in fact agreed with the Tribunal that the test of serious and irreversible harm must be interpreted on a case by case basis. However the Court also said that none of the foregoing excuses the Tribunal from explaining how, in any given case, the test is either met or not met.[105]

---

[100] ERT Decision, *supra* note 8 at para. 269.
[101] *ESA*, *supra* note 10 at s.1.
[102] Div Ct Decision, *supra* note 43 at paras. 70-71.
[103] *Ibid* at para. 72.
[104] Appellant's Factum at para. 77.
[105] Div Ct Decision, *supra* note 43 at paras. 37 and 38.

70. The Court stated that the Tribunal should not have given less weight to the ESA Permit because details of some of the permit's conditions would be finalized over the course of implementation. The Tribunal ought to have assumed that the MNRF would properly and adequately monitor compliance with the ESA Permit and would take steps to ensure that any non-compliance issues were addressed. To do otherwise would be to appear to be sitting on appeal from the decision of the Minister to issue the ESA Permit, thereby assuming jurisdiction that the Tribunal does not have.[106]

71. In making the foregoing determination, the Court was **not** limiting the Tribunal's ability to make factual findings on the "effectiveness" of mitigation measures, as suggested in paragraph 79 of PECFN's factum. The Tribunal's mistake was in failing to accept the ESA Permit at face value, which means accepting that the requirements of the permit including the PMP and IMP would be put in place as contemplated by the permit and would be properly and adequately monitored by the MNRF.[107]

72. As noted by the Court, the ESA Permit is an ongoing, iterative process. Should monitoring results indicate to the MNRF that the mitigation measures or overall benefit are somehow inadequate, the MNRF has the authority to amend or even revoke the ESA Permit. The MNRF can do so, if the Minister is of the opinion revocation or amendment is necessary to prevent jeopardizing the survival or recovery of the species.[108]

73. Furthermore, by discounting the effectiveness and, therefore, relevance of the IMP and PMP because they had not yet been finalized, the Tribunal effectively reversed the burden of

[106] *Ibid* at paras. 64-68. See also *Sierra Club Canada v. Ontario (MNR)*, [2011] O.J. No. 4374 (Sup. Ct.), DBA, Tab 29 at paras. 29-39 - a decision by the Minister under s. 17 of the ESA is entitled to significant deference.
[107] Div Ct Decision, *supra* note 43 at para. 68.
[108] *Ibid* at para. 56.

proof from PECFN to Ostrander and the Director, contrary to s. 145.2.1(3) of the EPA. As noted in a recent ERT decision, lack of information supplied by the approval holder does not shift the burden of proof from the appellant.[109]

74. The Tribunal also erred in law by finding the Compensation Property did not provide an overall benefit because there was no evidence the property could be improved as a turtle habitat.[110] This finding again reversed the burden of proof from PECFN to the Respondents.

75. The Tribunal erred in law by stating that the province-wide scale of the overall benefit made it irrelevant, in light of the Tribunal's decision to focus on a smaller population. The ESA Permit provides a direct benefit to the Blanding's turtle population with which the Tribunal was concerned, since the Compensation Property is situated **within** the Population Location and adjacent to the Site. As such, the Tribunal's justification for rejecting the permit is founded on an erroneous premise.

Issue No. 2: The Divisional Court did not make findings of fact

76. Contrary to PECFN's submissions, the Divisional Court did not exceed its jurisdiction by making findings of fact. Rather, the Court determined that the Tribunal erred by making legal findings without a factual foundation. It is well established that to make a finding in the absence of any evidence amounts to an error of law.[111]

---

[109] *Bovaird v. Ontario (Ministry of the Environment)*, [2013] O.E.R.T.D. No. 87, DBA, Tab 9 at para. 271.

[110] ERT Decision, *supra* note 8 at para. 340.

[111] See S. Blake, *Administrative Law In Canada*, 5th ed, (Markham: LexisNexis, 2011), DBA, Tab 33 at 172-173; *Metropolitan Entertainment Group v. Nova Scotia (Workers Compensation Appeals Tribunal)* [2007] N.S.J. No. 88 (C.A), DBA, Tab 10 at para. 15; *P.S.S. Professional Salon Services Inc. v. Saskatchewan (Human Rights Commission)*, [2007] S.J. No. 675 (C.A.), leave to appeal refused [2008] S.C.C.A. No. 69, DBA, Tab 11 at paras. 60-63; *R v. Schuldt*, [1985] 2 S.C.R. 592, DBA, Tab 12 at para. 28; *R. v. J.M.H.*, [2011] 3 S.C.R. 197, DBA, Tab 13 at para. 25; *R. v. Gilchrist*, [2013] S.J. No. 756 (C.A.), DBA, Tab 14 at para. 7; *R. v. Skogman*, [1984] 2 S.C.R. 93, DBA, Tab 15 at 9; *Murphy v. Saskatchewan Government Insurance*, [2008] S.J. No. 268 (C.A.), DBA, Tab 16 at para. 5; *R. v. Fogazzi*, [1993] O.J. No. 884 (C.A.), DBA, Tab 17 at 4; *R. v. Whittle*, [1992] O.J. No. 2752 (C.A.), DBA, Tab 18 at 13.

77. As noted at paragraph 61 of PECFN's factum, at no time did the Divisional Court make a finding of "palpable and overriding error of fact". This is because the Divisional Court deferred to all factual findings by the Tribunal. What the Divisional Court disagreed with was the Tribunal's conclusion that the legal test under s. 145.2.1(2) of the EPA could be met in this instance without **any** evidence on population or traffic.

Issue No. 3: The Divisional Court did not add a ground of appeal

78. The Divisional Court did not add a new ground of appeal, as alleged by PECFN. The Director's notice of appeal to the Divisional Court raised the issue of whether the evidence of harm to the Blanding's turtle was not only serious, **but also** irreversible.[112]

79. Paragraphs 81 through 87 of the Director's Divisional Court factum expanded on this ground by setting out the requirements for proving not just serious but also irreversible harm. Specifically, paragraph 86 of the Director's Divisional Court factum stated:

> Section 145.2.1(2) limits the Tribunal to considering whether the project, if operated in accordance with its approval, **will** cause serious and **irreversible** harm. Taken at its highest, the evidence provided to the Tribunal indicated that there exists a risk of serious harm. However, there was no evidence before the ERT that such a decline would be so immediate as to cause irreversible harm… [Emphasis in original][113]

80. As noted by the Supreme Court of Canada in the recent decision of *R. v. Mian*, genuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties and cannot reasonably be said to stem from the issues as framed by the parties.[114] In the present case, the Divisional Court did not add a new ground but acted appropriately by, responding to an issue raised by the Director in his notice of appeal and factum, and by reviewing the Tribunal's reasons for transparency and intelligibility in this regard.

---

[112] Director's Notice of Appeal, Ground 3, DC, Tab 9, p. 148.
[113] Factum of the Appellant Director, Ministry of the Environment (Divisional Court) dated November 15, 2013; DC, Tab 10, pp. 181-182.
[114] *R. v. Mian*, [2014] S.C.J. No. 54, DBA, Tab 30 at para. 30.

81. PECFN has cited paragraphs 39 and 91 of the Divisional Court decision as evidence of the addition of this "new ground". However, an examination of the decision, especially paragraph 38, shows that, far from adding a new ground, the Divisional Court was simply reviewing the Tribunal's reasons for transparency and intelligibility. The law is well established that a review on the reasonableness standard consists, in part, of considering the reasons of the Tribunal to see whether they are "justified, transparent and intelligible".[115]

82. At paragraph 38 of the Divisional Court's decision, the Court expresses dissatisfaction with the Tribunal's reasons. Paragraph 39 then explains how the Tribunal's decision fails to provide transparent and intelligible reasons for its finding that harm caused by the Project would be both serious **and** irreversible. Although the Court had no quarrel with the Tribunal's finding of serious harm, it found the Tribunal's conclusion that the harm was also irreversible was not supported by any analysis or evidence as to the turtle population or traffic on the Site. Indeed, the Court found that the Tribunal "blended" its analysis in considering whether the "serious and irreversible" test had been met, an approach which the Court considered problematic given that the two factors address very different issues.[116]

83. This flawed analysis could not have been saved by "supplementing" the reasons as suggested by PECFN at paragraph 97 of its factum (relying on *Newfoundland Nurses*), since the Tribunal provided no reasons at all for its finding on irreversibility. Instead, the Court was left "guessing" as to the analysis on this key issue. As noted by the Federal Court, Trial Division, *Newfoundland Nurses* is not "an open invitation to the Court to provide reasons

[115] *Taub v. Investment Dealers Association of Canada et al.* (2009), 98 O.R. (3d) 169 (C.A.), DBA, Tab 19 at para. 35.
[116] Div Ct Decision, s*upra* note 43 at para. 39.

that were not given, nor is it a licence to guess what findings might have been made or to speculate as to what the tribunal was thinking."[117]

84. Given the fact that the Director clearly raised this issue, in both his Notice of Appeal and his Factum, PECFN had ample notice that it would need to address it in its factum and at the hearing. Moreover as acknowledged by PECFN in its factum, the Court brought this issue to the attention of all parties at the hearing and heard responses from both PECFN and Ostrander.[118]

85. The caselaw relied on by PECFN on this ground is distinguishable on its facts. In two of the decisions cited by PECFN, each court raised an issue after argument was completed and sought written submissions on the issue.[119] In the present case, the issue was raised both in the Director's notice of appeal, the Director's factum and by the Divisional Court at the hearing.

86. In the alternative, even if this Honourable Court finds that this was a new issue raised by the Divisional Court, it is acceptable for an appellate court to raise a new issue, where it is strictly an issue of law and the parties are given a chance to fully respond, [120] as happened in this instance.

---

[117] *Komolafe v. Canada (Minister of Citizenship and Immigration)*, [2013] F.C.J. No. 449, DBA, Tab 20 at para 11.
[118] Appellant's Factum at para. 92.
[119] *Jones v. Niklaus*, [2008] O.J. No. 2500 (C.A.), ABA, Tab 14 at para. 25 ; *Claude Resources Inc. v. Thompson*, [2005] S.J. No. 647 (Sask. Q.B.), ABA, Tab 16 at para. 29.
[120] *Mian, supra* note 114 at paras. 53-59; *Peters v. University Hospital Board*, [1983] S.J. No. 401 (C.A.), ABA, Tab 17 at para. 51; *Three Rivers Rentals Ltd. v. Luff*, [2008] A.J. No. 146 (C.A.), ABA, Tab 15 at para. 4.

Issue No. 4: The Divisional Court was correct in finding a breach of natural justice and procedural fairness

87. PECFN objects to the Divisional Court's findings on natural justice and procedural fairness on two grounds: (a) the law does not require the Tribunal to consider alternatives to revocation; and (b) none of the parties requested the opportunity to make submissions on remedies prior to the final decision being issued.

88. It is well established law that a failure to allow submissions on remedy or penalty can amount to a breach of procedural fairness.[121] It is also accepted that, in certain proceedings, submissions on remedy or penalty should only occur after determinations on the merits of the hearing have been made.[122]

89. The Court found that the duty of fairness required the Tribunal to provide the Director and the Proponent with an opportunity to make submissions on remedy, once the Tribunal had rendered its decision on serious and irreversible harm. The Court held that the Tribunal failed in this duty, notwithstanding the fact that neither responding party had requested a bifurcation of the hearing in this manner.[123]

90. As the Court noted, the ERT was faced with a wide range of allegations of serious and irreversible harm to numerous animal and plant species, as well as allegations of harm to human health. Accordingly, the Tribunal could have found that PECFN had discharged

---

[121] *Sussman Mortgage Funding Inc. v. Ontario (Superintendent of Financial Services),* [2004] O.J. No. 4551 (Div. Ct.), ABA, Tab 22 at para. 9; *Sussman Mortgage Funding Inc. v. Ontario (Superintendent of Financial Services),* [2005] O.J. No. 4806 (C.A.), DBA, Tab 21 at para. 1; *Igbinosun v. Law Society of Upper Canada,* [2009] OJ No 2465 (C.A.), DBA, Tab 22 at paras. 53-57; *Doman v. British Columbia (Superintendent of Brokers),* [1998] B.C.J. No. 2378 (C.A.), DBA, Tab 23 at para. 49; *Tsimidis v. Certified General Accountants of Ontario,* [2014] O.J. No. 3376, DBA, Tab 24, at paras. 38, 43 and 49-51.

[122] *Mackenzie Illes Watson v. British Columbia Securities Commission,* [1999] B.C.J. No. 2500 (C.A.), DBA, Tab 25 at para. 10; *Pacific Newspaper Group Inc., a division of Canwest Mediaworks Publications Inc. v. Communications, Energy And Paperworkers Union of Canada, Local 2000,* [2011] B.C.J. No. 1717 (CA), DBA, Tab 26 at para. 46.

[123] Div Ct Decision, *supra* note 43 at para. 81.

their burden of proof on any number or combination of grounds. The nature of the remedy flows directly from the nature of the harm identified. Given the range of allegations, and the Tribunal's broad remedial powers under s. 145.2.1(4) of the *EPA*, the range of potential remedies was extremely broad. The Court found it was impractical, if not impossible, to make submissions on remedy at the same time as submissions on harm.[124]

91. PECFN's suggestion that the Divisional Court's ruling on the new evidence motion somehow contradicts its finding with regards to procedural fairness is not warranted. The new evidence motion was concerned with whether evidence not before the Tribunal at the hearing should be allowed before the Court. That is a different issue, requiring a different determination than the question of whether a breach of natural justice occurred. As noted by the Divisional Court in its decision on the merits of the motion:

> It is a fair, if not irresistible, inference from the state of the record that Ostrander was not anticipating the result that the Tribunal reached on the issue of serious and irreversible harm to Blanding's turtle.[125]

92. In this context, and in light of the numerous other issues raised, procedural fairness required that the Tribunal provide a separate opportunity to make submissions on remedy, once the finding of harm to Blanding's turtles was reached.

93. The Court found that the fact that the parties did not request a two-step process, whereby the Tribunal addressed the harm issue first, with a return to the Tribunal to address remedy if necessary, was not determinative. This did not change the obligations on the Tribunal to discharge its duty to ensure procedural fairness. The Tribunal was aware of the wide range of challenges and possible remedies facing the parties. It should have been evident to the Tribunal that natural justice and procedural fairness required a bifurcated process. If the

[124] *Ibid* at para. 79.
[125] *Ibid* at para. 13.

Tribunal was pressed for more time, it could have availed itself of the adjournment provisions set out under s. 145.2.1(6) of the EPA and s. 59 of Regulation 359/09.[126]

94. Moreover, the Tribunal's conclusion that it did not have the authority to alter the decision of the Director or substitute its opinion for that of the Director, contradicted the express wording of s. 145.2.1(4)(c) of the *EPA* and was plainly wrong.[127] While the Tribunal was not required by law to order something other than revocation, the fact that it ruled that it did not have the jurisdiction to grant any relief other than a revocation of the approval was a clear error of law.[128]

PART IV – ADDITIONAL ISSUES

95. The Director does not raise any additional issues. The Director takes no position on the costs issue raised by PECFN.

PART V – ORDER SOUGHT

96. In conclusion, the Divisional Court was correct in finding that the Tribunal's decision was both unreasonable and a breach of procedural fairness and natural justice. The Director respectfully requests, therefore, that this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: November 5, 2014

Sylvia Davis & Sarah Kromkamp
Counsel for the Respondent,
Director, Ministry of the Environment

[126] *Ibid* at paras. 80-85.
[127] *Ibid* at paras. 86-90.
[128] As well, in *Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board*, [2009] O.J. No. 1050, DBA, Tab 31, at paras. 39-40 the Ontario Court of Appeal ruled that imposing the harshest penalty without first considering the other, less stringent options available to a tribunal was an error in principle, rendering the Tribunal's decision unreasonable.

Court of Appeal File No.: C59008

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

PRINCE EDWARD COUNTY FIELD NATURALISTS

Appellant

- and-

OSTRANDER POINT GP INC., as general partner for and on behalf of OSTRANDER POINT WIND ENERGY LP and DIRECTOR, MINISTRY OF THE ENVIRONMENT

Respondents

CERTIFICATE OF RESPONDENT'S COUNSEL

I, Sylvia Davis, counsel for the appellant, the Director, Ministry of the Environment, certify that:

1. an order under subrule 61.09(2) in respect of the original record and exhibits was not required; and

2. the estimated time that the appellant will require for oral argument, not including reply, is one hour and fifty minutes.

Date: November 5, 2014

Sylvia Davis

Sylvia Davis
Lawyer for the Appellant,
Director, Ministry of the Environment

SCHEDULE "A"

LIST OF AUTHORITIES

CASE LAW

Erickson v. Ontario (Ministry of the Environment), [2011] O.E.R.T.D. No. 29 (QL)

Alliance to Protect Prince Edward County v. Ontario (Ministry of the Environment), [2013] O.E.R.T.D. No. 40 (QL)

Ostrander Point GP Inc. v. Prince Edward County Field Naturalists, [2014] O.J. No. 1619 (Ont. Div. Ct.) (QL)

F.H. v. MaDougall, [2008] S.C.J. No. 54 (QL)

R. v. Burns, [1994] 1 S.C.R. 656 (QL)

Dunsmuir v New Brunswick, [2008] S.C.J. No. 9 (QL)

Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), [2011] 3 S.C.R. 708 (QL)

R. v. J.J., [2000] 2 S.C.R. 600 (QL)

R. v. Charlebois, [2000] 2 S.C.R. 674 (QL)

R. v. K.W., [2002] C.C.J. No 348 (C.A.) (QL)

R. v. Ulybel Enterprises Ltd., [2001] S.C.J. No. 55 (QL)

Nova, an Alberta Corp. v. Amoco Canada Petroleum Co., [1981] S.C.J. No 92 (QL)

Law Society of Upper Canada v. Ontario (A.G.), [1995] O.J. No. 9 (Ct. J. (Gen. Div.) (QL)

Levis (City) v. Fraternite des policiers de Levis Inc., [2007] 1 S.C.R. 591 (QL)

Metropolitan Entertainment Group v. Nova Scotia (Workers Compensation Appeals Tribunal) [2007] N.S.J. No. 88 (C.A.) (QL)

P.S.S. Professional Salon Services Inc. v. Saskatchewan (Human Rights Commission), [2007] S.J. No. 675 (C.A.) (QL)

R v. Schuldt, [1985] 2 S.C.R. 592 (QL)

R. v. J.M.H., [2011] 3 S.C.R. 197 (QL)

R. v. Gilchrist, [2013] S.J. No. 756 (C.A.) (QL)

R. v. Skogman, [1984] 2 S.C.R. 93 (QL)

Murphy v. Saskatchewan Government Insurance, [2008] S.J. No. 268 (C.A.) (QL)

R. v. Fogazzi, [1993] O.J. No. 884 (C.A.) (QL)

R. v. Whittle, [1992] O.J. No. 2752 (C.A.) (QL)

Taub v. Investment Dealers Association of Canada et al. (2009), 98 O.R. (3d) 169 (C.A.) (QL)

Komolafe v. Canada (Minister of Citizenship and Immigration), [2013] F.C.J. No. 449 (QL)

Jones v. Niklaus, [2008] O.J. No. 2500 (C.A.) (QL)

Claude Resources Inc. v. Thompson, [2005] S.J. No. 647 (Q.B.) (QL)

Peters v. University Hospital Board, [1983] S.J. No. 401 (C.A.) (QL)

Three Rivers Rentals Ltd. v. Luff, [2008] A.J. No 146 (C.A.) (QL)

Sussman Mortgage Funding Inc. v. Ontario (Superintendent of Financial Services), [2004] O.J. No. 4551 (Div. Ct.) (QL)

Sussman Mortgage Funding Inc. v. Ontario (Superintendent of Financial Services), [2005] O.J. No. 4806 (C.A.) (QL)

Igbinosun v. Law Society of Upper Canada, [2009] O.J. No. 2465 (C.A.) (QL)

Doman v. British Columbia (Superintendent of Brokers), [1998] B.C.J. No. 2378 (C.A.) (QL)

Tsimidis v. Certified General Accountants of Ontario, [2014] O.J. No. 3376 (QL)

Mackenzie Illes Watson v. British Columbia Securities Commission, [1999] B.C.J. No. 2500 (C.A.) (QL)

Pacific Newspaper Group Inc., a division of CanwestMediaworks Publications Inc. v. Communications, Energy And Paperworkers Union of Canada, Local 2000, [2011] B.C.J. No. 1717 (C.A.) (QL)

Bovaird v. Ontario (Ministry of the Environment), [2013] O.E.R.T.D. No. 87 (QL)

British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd., [1995] 2 S.C.R. 739 (QL)

Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, [2012] 3 S.C.R. 489

Sierra Club Canada v. Ontario (Ministry of Natural Resources), [2011] O.J. No. 4374 (Sup. Ct.) (QL)

R. v. Mian, [2014] S.C.J. No. 54 (QL)

Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board, [2009] O.J. No. 1050 (C.A.) (QL)

OTHER AUTHORITIES

SECONDARY SOURCES

R. Sullivan, *Sullivan on the Construction of Statutes,* 5th ed (Markham: LexisNexis, 2008) at 411, 412, 416

S. Blake, *Administrative Law In Canada*, 5th ed (Markham: LexisNexis, 2011) at 172-173

SCHEDULE "B"
LIST OF RELEVANT STATUTES, REGULATIONS & BY-LAWS NOT INCLUDED IN SCHEDULE "B" OF THE PECFN'S FACTUM

Endangered Species Act, 2007, S.O. 2007, CHAPTER 6

PROTECTION AND RECOVERY OF SPECIES

Purposes

1. The purposes of this Act are:

1. To identify species at risk based on the best available scientific information, including information obtained from community knowledge and aboriginal traditional knowledge.

2. To protect species that are at risk and their habitats, and to promote the recovery of species that are at risk.

3. To promote stewardship activities to assist in the protection and recovery of species that are at risk. 2007, c. 6, s. 1.

Prohibition on killing, etc.

9. (1) No person shall,

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

(b) possess, transport, collect, buy, sell, lease, trade or offer to buy, sell, lease or trade,

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

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

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

(c) sell, lease, trade or offer to sell, lease or trade anything that the person represents to be a thing described in subclause (b) (i), (ii) or (iii). 2007, c. 6, s. 9 (1).

Possession, etc., of species originating outside Ontario

(2) Clause (1) (b) does not apply to a member of a species that originated outside Ontario if it was lawfully killed, captured or taken in the jurisdiction from which it originated. 2007, c. 6, s. 9 (2).

Specified geographic area

(3) If the Species at Risk in Ontario List specifies a geographic area that a classification of a species applies to, subsection (1) only applies to that species in that area. 2007, c. 6, s. 9 (3).

Possession by Crown

(4) Clause (1) (b) does not apply to possession by the Crown. 2007, c. 6, s. 9 (4).

Transfer for certain purposes

(5) If the Crown is in possession of anything referred to in clause (1) (b), the Minister may transfer it to another person or body and authorize the person or body to possess it, despite clause (1) (b), for,

(a) scientific or educational purposes; or

(b) traditional cultural, religious or ceremonial purposes. 2007, c. 6, s. 9 (5).

Interpretation

(6) A reference in this section to a member of a species,

(a) includes a reference to a member of the species at any stage of its development;

(b) includes a reference to a gamete or asexual propagule of the species; and

(c) includes a reference to the member of the species, whether or not it originated in Ontario. 2007, c. 6, s. 9 (6).

. . .

Permits

17. (1) The Minister may issue a permit to a person that, with respect to a species specified in the permit that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species, authorizes the person to engage in an activity specified in the permit that would otherwise be prohibited by section 9 or 10. 2007, c. 6, s. 17 (1).

Limitation

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

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

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

(c) the Minister is of the opinion that the main purpose of the activity authorized by the permit is not to assist in the protection or recovery of the species specified in the permit, but,

(i) the Minister is of the opinion that an overall benefit to the species will be achieved within a reasonable time through requirements imposed by conditions of the permit,

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

(iii) the Minister is of the opinion that reasonable steps to minimize adverse effects on individual members of the species are required by conditions of the permit; or

(d) the Minister is of the opinion that the main purpose of the activity authorized by the permit is not to assist in the protection or recovery of the species specified in the permit, but,

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

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

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

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

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

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

(vii) the Lieutenant Governor in Council has approved the issuance of the permit. 2007, c. 6, s. 17 (2).

Response to recovery strategy

(3) Before issuing a permit under this section, the Minister shall consider any statement that has been published under subsection 11 (8) with respect to a recovery strategy for the species specified in the permit. 2007, c. 6, s. 17 (3).

Conditions

(4) A permit issued under this section may contain such conditions as the Minister considers appropriate. 2007, c. 6, s. 17 (4).

Same

(5) Without limiting the generality of subsection (4), conditions in a permit may,

(a) limit the time during which the permit applies;

(b) limit the circumstances in which the permit applies;

(c) require the holder of the permit to take steps specified in the permit, and require that steps be taken before engaging in the activity authorized by the permit;

(d) require the holder of the permit to furnish security in an amount sufficient to ensure compliance with the permit;

(e) require the holder of the permit to ensure that the activity authorized by the permit, and the effects of the activity, are monitored in accordance with the permit;

(f) require the holder of the permit to rehabilitate habitat damaged or destroyed by the activity authorized by the permit, or to enhance another area so that it could become habitat suitable for the species specified in the permit; or

(g) require the holder of the permit to submit reports to the Minister. 2007, c. 6, s. 17 (5).

Compliance

(6) An authorization described in subsection (1) does not apply unless the holder of the permit complies with any requirements imposed by the permit. 2007, c. 6, s. 17 (6).

Amendment or revocation

(7) The Minister may,

(a) with the consent of the holder of a permit issued under this section,

(i) amend the permit, if the permit was issued under clause (2) (a), (b) or (c) and the Minister is of the opinion that he or she would be authorized under the same clause to issue the permit in its amended form,

(ii) amend the permit, if,

(A) the permit was issued under clause (2) (d),

(B) the Minister has consulted with a person who is considered by the Minister to be an expert on the possible effects of the amendment on the species specified in the permit and to be independent of the person who would be authorized by the permit in its amended form to engage in an activity,

(C) the Lieutenant Governor in Council has approved the amendment, and

(D) the Minister is of the opinion that he or she would be authorized under clause (2) (d) to issue the permit in its amended form, or

(iii) revoke the permit; or

(b) without the consent of the holder of the permit issued under this section, but subject to section 20, amend or revoke the permit, if,

(i) the Minister is of the opinion that the revocation or amendment,

(A) is necessary to prevent jeopardizing the survival or recovery, in Ontario, of the species specified in the permit, or

(B) is necessary for the protection of human health or safety, and

(ii) the Lieutenant Governor in Council has approved the revocation or amendment, in the case of a permit that was issued with the approval of the Lieutenant Governor in Council. 2007, c. 6, s. 17 (7).

Delegation

(8) In addition to any authority under any Act to delegate powers to persons employed in the Ministry, the Minister may, in the circumstances prescribed by the regulations, delegate his or her powers under this section to a person or body prescribed by the regulations, subject to any limitations prescribed by the regulations. 2007, c. 6, s. 17 (8).

Environmental Protection Act, R.S.O. 1990, CHAPTER E.19

PART V.0.1
RENEWABLE ENERGY

Definition

47.1 In this Part,

"environment" has the same meaning as in the *Environmental Assessment Act*. 2009, c. 12, Sched. G, s. 4 (1).

Purpose

47.2 (1) The purpose of this Part is to provide for the protection and conservation of the environment. 2009, c. 12, Sched. G, s. 4 (1).

Application of s. 3 (1)

(2) Subsection 3 (1) does not apply to this Part. 2009, c. 12, Sched. G, s. 4 (1).

Requirement for renewable energy approval

47.3 (1) A person shall not engage in a renewable energy project except under the authority of and in accordance with a renewable energy approval issued by the Director if engaging in the project involves engaging in any of the following activities:

1. An activity for which, in the absence of subsection (2), subsection 9 (1) of this Act would require an environmental compliance approval.
2. An activity for which, in the absence of subsection (2), subsection 27 (1) of this Act would require an environmental compliance approval.
3. An activity for which, in the absence of subsection (2), subsection 34 (3) of the *Ontario Water Resources Act* would require a permit.

Note: On the later of the day subsection 4 (1) of Schedule G to the *Green Energy and Green Economy Act, 2009* comes into force and the day subsection 1 (8) of the *Safeguarding and Sustaining Ontario's Water Act, 2007* comes into force, paragraph 3 is repealed and the following substituted:

3. An activity for which, in the absence of subsection (2), subsection 34 (1) of the *Ontario Water Resources Act* would require a permit, if the activity would not involve a transfer as defined in subsection 34.5 (1) of that Act.

See: 2009, c. 12, Sched. G, ss. 4 (2), 26 (2).

4. An activity for which, in the absence of subsection (2), section 36 of the *Ontario Water Resources Act* would require a well construction permit.

5. An activity for which, in the absence of subsection (2), subsection 53 (1) of the *Ontario Water Resources Act* would require an environmental compliance approval.

6. An activity for which, in the absence of subsection (2), a provision prescribed by the regulations would require an approval, permit or other instrument.

7. Any other activity prescribed by the regulations. 2009, c. 12, Sched. G, s. 4 (1); 2010, c. 16, Sched. 7, s. 2 (39-41).

Exemptions

(2) The following provisions do not apply to a person who is engaging in a renewable energy project:

1. Subsection 9 (1) of this Act.

2. Subsection 27 (1) of this Act.

3. Subsection 34 (3) of the *Ontario Water Resources Act*.

Note: On the later of the day subsection 4 (1) of Schedule G to the *Green Energy and Green Economy Act, 2009* comes into force and the day subsection 1 (8) of the *Safeguarding and Sustaining Ontario's Water Act, 2007* comes into force, paragraph 3 is repealed and the following substituted:

3. Subsection 34 (1) of the *Ontario Water Resources Act*, if the person engaging in the renewable energy project is not engaged in a taking of water that involves a transfer as defined in subsection 34.5 (1) of that Act.

See: 2009, c. 12, Sched. G, ss. 4 (3), 26 (2).

4. Section 36 of the *Ontario Water Resources Act*.

5. Section 53 of the *Ontario Water Resources Act*.

6. A provision prescribed by the regulations for the purpose of paragraph 6 of subsection (1). 2009, c. 12, Sched. G, s. 4 (1); 2010, c. 16, Sched. 7, s. 2 (42).

Application

47.4 (1) An application for the issue or renewal of a renewable energy approval shall be prepared in accordance with the regulations and submitted to the Director. 2009, c. 12, Sched. G, s. 4 (1).

Director may require information

(2) The Director may require an applicant under subsection (1) to submit any plans, specifications, engineers' reports or other information and to carry out and report on any tests or experiments relating to the renewable energy project. 2009, c. 12, Sched. G, s. 4 (1).

Director's powers

47.5 (1) After considering an application for the issue or renewal of a renewable energy approval, the Director may, if in his or her opinion it is in the public interest to do so,

(a) issue or renew a renewable energy approval; or

(b) refuse to issue or renew a renewable energy approval. 2009, c. 12, Sched. G, s. 4 (1).

Terms and conditions

(2) In issuing or renewing a renewable energy approval, the Director may impose terms and conditions if in his or her opinion it is in the public interest to do so. 2009, c. 12, Sched. G, s. 4 (1).

Other powers

(3) On application or on his or her own initiative, the Director may, if in his or her opinion it is in the public interest to do so,

(a) alter the terms and conditions of a renewable energy approval after it is issued;

(b) impose new terms and conditions on a renewable energy approval; or

(c) suspend or revoke a renewable energy approval. 2009, c. 12, Sched. G, s. 4 (1).

Same

(4) A renewable energy approval is subject to any terms and conditions prescribed by the regulations. 2009, c. 12, Sched. G, s. 4 (1).

Water transfers: Great Lakes-St. Lawrence River, Nelson and Hudson Bay Basins

47.6 A renewable energy approval shall not authorize a person to take water contrary to subsection 34.3 (2) of the *Ontario Water Resources Act*. 2009, c. 12, Sched. G, s. 4 (1).

Policies, renewable energy approvals

47.7 (1) The Minister may, in writing, issue, amend or revoke policies in respect of renewable energy approvals. 2009, c. 12, Sched. G, s. 4 (1).

Same

(2) A policy or the amendment or revocation of a policy takes effect on the later of the following days:

1. The day that notice of the policy, amendment or revocation, as the case may be, is given in the environmental registry established under the *Environmental Bill of Rights, 1993*.

2. The effective day specified in the policy, amendment or revocation, as the case may be. 2009, c. 12, Sched. G, s. 4 (1).

Same

(3) Subject to section 145.2.2, decisions made under this Act in respect of renewable energy approvals shall be consistent with any policies issued under subsection (1) that are in effect on the date of the decision. 2009, c. 12, Sched. G, s. 4 (1).

. . .

Hearing re renewable energy approval

142.1 (1) This section applies to a person resident in Ontario who is not entitled under section 139 to require a hearing by the Tribunal in respect of a decision made by the Director under section 47.5. 2009, c. 12, Sched. G, s. 9.

Same

(2) A person mentioned in subsection (1) may, by written notice served upon the Director and the Tribunal within 15 days after a day prescribed by the regulations, require

a hearing by the Tribunal in respect of a decision made by the Director under clause 47.5 (1) (a) or subsection 47.5 (2) or (3). 2009, c. 12, Sched. G, s. 9.

Grounds for hearing

(3) A person may require a hearing under subsection (2) only on the grounds that engaging in the renewable energy project in accordance with the renewable energy approval will cause,

(a) serious harm to human health; or

(b) serious and irreversible harm to plant life, animal life or the natural environment. 2009, c. 12, Sched. G, s. 9.

. . .

Hearing required under s. 142.1

145.2.1 (1) This section applies to a hearing required under section 142.1. 2009, c. 12, Sched. G, s. 13.

What Tribunal must consider

(2) The Tribunal shall review the decision of the Director and shall consider only whether engaging in the renewable energy project in accordance with the renewable energy approval will cause,

(a) serious harm to human health; or

(b) serious and irreversible harm to plant life, animal life or the natural environment. 2009, c. 12, Sched. G, s. 13.

Onus of proof

(3) The person who required the hearing has the onus of proving that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a) or (b). 2009, c. 12, Sched. G, s. 13.

Powers of Tribunal

(4) If the Tribunal determines that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a) or (b), the Tribunal may,

(a) revoke the decision of the Director;

(b) by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations; or

(c) alter the decision of the Director, and, for that purpose, the Tribunal may substitute its opinion for that of the Director. 2009, c. 12, Sched. G, s. 13.

Same

(5) The Tribunal shall confirm the decision of the Director if the Tribunal determines that engaging in the renewable energy project in accordance with the renewable energy approval will not cause harm described in clause (2) (a) or (b). 2009, c. 12, Sched. G, s. 13.

Deemed confirmation of decision

(6) The decision of the Director shall be deemed to be confirmed by the Tribunal if the Tribunal has not disposed of the hearing in respect of the decision within the period of time prescribed by the regulations. 2009, c. 12, Sched. G, s. 13.

. . .

Appeals from Tribunal

145.6 (1) Any party to a hearing before the Tribunal under this Part may appeal from its decision or order on a question of law to the Divisional Court in accordance with the rules of court. 2005, c. 12, s. 1 (28).

. . .

Conflict with other legislation

179. (1) Where a conflict appears between any provision of this Act or the regulations and any other Act or regulation in a matter related to the natural environment or a matter specifically dealt with in this Act or the regulations, the provision of this Act or the regulations shall prevail.

Idem

(2) Subsection (1) does not apply in respect of section 178 and the enactment of section 178 or a by-law pursuant to section 178 does not affect the validity of an Act that was in force immediately before the 8th day of October, 1975. R.S.O. 1990, c. E.19, s. 179.

Environmental Protection Act O.Reg. 359/09

RENEWABLE ENERGY APPROVALS UNDER PART V.0.1 OF THE ACT

Date of deemed confirmation

59. (1) Subject to subsections (2) and (3), the prescribed period of time for the purposes of subsection 145.2.1 (6) of the Act is six months from the day that the notice is served upon the Tribunal under subsection 142.1 (2) of the Act. O. Reg. 359/09, s. 59 (1); O. Reg. 333/12, s. 19 (1).

(2) For the purposes of calculating the time period mentioned in subsection (1), any of the following periods of time shall be excluded from the calculation of time:

1. Any period of time occurring during an adjournment of the proceeding if,

   i. the adjournment is granted by the Tribunal on the consent of the parties, or

   ii. the adjournment is,

      A. on the initiative of the Tribunal or granted by the Tribunal on the motion of one of the parties,

B. not being sought for the purpose of adjourning the proceeding pending the resolution of an application for judicial review, and

C. necessary, in the opinion of the Tribunal, to secure a fair and just determination of the proceeding on its merits.

2. If an application for judicial review under the *Judicial Review Procedure Act* has been commenced with respect to the proceeding, the period of time from the day that the application is commenced until the day that the application is disposed of, if a stay of the proceeding before the Tribunal is granted by the Divisional Court. O. Reg. 359/09, s. 59 (2); O. Reg. 333/12, s. 19 (2, 3).

(3) For the purposes of calculating the time period mentioned in subsection (1), if an adjournment of the proceeding pending the resolution of an application for judicial review under the *Judicial Review Procedure Act* was granted by the Tribunal before the day Ontario Regulation 333/12 made under the Act comes into force, the following periods of time shall be excluded from the calculation of time:

1. The period of time from the day the application was commenced until the day the application was disposed of, if the application was disposed of before the day Ontario Regulation 333/12 made under the Act comes into force.

2. The period of time from the day the application was commenced until the day Ontario Regulation 333/12 comes into force, if the application has not been disposed of before the day Ontario Regulation 333/12 comes into force. O. Reg. 333/12, s. 19 (4).

. . .

PRINCE EDWARD COUNTY FIELD NATURALISTS
Appellant

- and -

DIRECTOR, MINISTRY OF THE ENVIRONMENT ET AL
Respondent

Court File No.: C59008

ONTARIO
COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

FACTUM OF THE DIRECTOR

MINISTRY OF THE ENVIRONMENT AND CLIMATE CHANGE
Legal Services Branch
135 St. Clair Avenue West, 10th Floor
Toronto, ON M4V 1P5

Sylvia Davis (LSUC No.: 38171H)
Tel: (416) 314-6806

Sarah Kromkamp (LSUC No.: 61579R)
Tel: (416) 314-6493

Crown Counsel for the Director,
Ministry of the Environment