Court of Appeal File No.:M43552
Divisional Court File No.: 341/13

COURT OF APPEAL FOR ONTARIO

BETWEEN:

PRINCE EDWARD COUNTY FIELD NATURALISTS

Appellant (Moving Party)

- 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 (Responding Party)

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FACTUM OF THE MOVING PARTY, PRINCE EDWARD COUNTY FIELD NATURALISTS

(Motion under Rule 61.03.1 of the *Rules of Civil Procedure* for leave to appeal)

April 11, 2014

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PART I - PROPOSED APPEAL

1. The Moving Party, the Prince Edward County Field Naturalists ("PECFN"), seeks leave to appeal from the decision of the Divisional Court dated February 20, 2014 (the "Court Decision"), which reversed the decision of the Environmental Review Tribunal ("Tribunal") dated July 3, 2013 (the "Tribunal Decision").

2. Exercising its authority under s. 145.2.1(4) of the *Environmental Protection Act*, R.S.O. 1990, c. E. 19 ("EPA"), the Tribunal revoked a Renewable Energy Approval ("REA") issued by the Director, Ministry of the Environment (the "Director") to Ostrander Point GP Inc., as general partner for and on behalf of Ostrander Point Wind Energy LP (the "Approval Holder") for nine wind turbines in Prince Edward County (the "Project").

3. The Tribunal held that PECFN had demonstrated, on a balance of probabilities, that engaging in the Project in accordance with the REA will cause serious and irreversible harm to a threatened animal species, namely the Blanding's turtle. The Director and the Approval Holder (the "Respondents") both appealed from the Tribunal Decision.

4. The Divisional Court allowed the Respondents' appeals and set aside the Tribunal Decision. It found that the latter had made six errors of law in arriving at its conclusion of serious and irreversible harm. In PECFN's respectful submission, the Tribunal's conclusion was correct in law and based on a full and systematic analysis of the extensive evidence led by all of the Parties.

5. Notwithstanding the reasonableness standard of review that was purportedly applied, the Divisional Court failed to afford any deference to the Tribunal concerning its determination on the Blanding's turtle. With its specialized expertise in environmental law and its privileges as trier of fact, the Tribunal should have been accorded great deference.

6. In addition, despite its limited jurisdiction to consider only questions of law, the Divisional Court entered into a fact-finding process. It made numerous findings of fact and/or substituted its own findings for those of the Tribunal and thereby acted *ultra vires*.

7. Furthermore, on its own initiative, the Court added a ground of appeal regarding "serious" v. "irreversible" harm and found the Tribunal to have erred in law with respect to that ground. Adding a ground of appeal not contained in the pleadings is an error of law.

8. Finally, the Divisional Court erroneously made a finding of breach of natural justice and procedural fairness regarding the remedy invoked by the Tribunal of revoking the REA. The Tribunal was entirely within its purview since no request had been made by the Parties to make submissions or bifurcate the hearing regarding the issue of remedy.

9. It is respectfully submitted that the Divisional Court then made numerous errors of law and its decision strongly warrants the attention of this Honourable Court. As outlined below, the issues raised on the proposed appeal are of broad public importance and the requirements for the granting of leave are clearly satisfied.

PART II - FACTS

1. Statutory Scheme of Renewable Energy Approvals

10. The REA legislative scheme was introduced by the *Green Energy Act*, S.O. 2009, c. 12 (the "GEA"). The GEA was intended to streamline the approval process for renewable energy projects so that "green" or environmentally sound energy sources could be developed promptly with limited hindrance.[1] The introduction of this Act led to amendments being made to existing legislation, particularly the EPA.

11. The EPA, as amended, prohibits an entity from commencing a renewable energy project without first obtaining a REA from the Ministry of the Environment ("MOE").

[1] Tribunal Decision, Motion Record of the Moving Party ["MR"], Tab 4, p. 55, at para. 12.

Under s. 47.5 of the EPA, the Director is empowered to issue or refuse to issue a REA if, in his/her opinion, it is in the public interest to do so.

12. Any person resident in Ontario may appeal the Director's decision to the Tribunal. A person may require a hearing *only if* engaging in the renewable energy project in accordance with the REA will cause (a) serious harm to human health, or (b) serious and irreversible harm to plant life, animal life or the natural environment.[2]

13. Section 59 of *Ontario Regulation* 359/09 of the EPA requires the Tribunal to render its decision on an appeal within six months of its commencement.

2. Appeal before the Tribunal

(a) PECFN's Appeal of the REA

14. On December 20, 2012, the Director issued the REA in question to the Approval Holder, authorizing it to construct, install, operate, use and retire nine wind turbines on 324 ha of provincial Crown land located along the south shore of Prince Edward County ("Ostrander Point Crown Land Block" or the "Project Site").[3]

15. On January 4, 2013, PECFN appealed pursuant to s. 142.1(3)(b) of the EPA on the basis that engaging in the Project in accordance with the REA will cause serious and irreversible harm to plant life, animal life or the natural environment.[4]

16. PECFN raised numerous grounds of appeal. In addition to Blanding's turtles, PECFN sought to establish serious and irreversible harm to birds, bats, Monarch butterflies and the alvar ecosystem (a globally imperilled and vulnerable habitat that supports the growth of rare vegetation communities).[5]

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[2] EPA, ss. 142.1(2) and (3).
[3] Tribunal Decision, MR, Tab 4, p. 53, at para. 1; Renewable Energy Approval No. 7681-8UAKR7, MR, Tab 8, pp. 209-234.
[4] Tribunal Decision, MR, Tab 4, pp. 54 and 57, at paras. 6, 9 and 22.
[5] Tribunal Decision, MR, Tab 4, pp. 57, 90, 94-95, 133, 139, 148 and 151-152, at paras. 23, 202, 227-234, 439, 476, 521 and 541-545; Notice of Appeal of PECFN to the Tribunal dated January 4, 2013, MR, Tab 9, pp. 235-242.

17. The delicate nature of the Project Site has never been in dispute. Indeed, Ostrander Point Crown Land Block is widely recognized as an ecologically sensitive area due to its function as a migratory corridor for many avian species, its provision of breeding, nesting, foraging and overwintering habitat for threatened species such as the Blanding's turtle and Whip-poor-will, and as a vulnerable alvar ecosystem. In addition, the Project Site is situated within a nationally and globally significant Important Bird Area, it encompasses provincially significant wetland, and is a candidate area of natural and scientific interest.[6]

18. From March to May 2013, the Tribunal heard over 24 days of evidence from nine experts called by PECFN, two called by the Director and 10 by the Approval Holder.[7] Dr. Frederic Beaudry, an expert in Blanding's turtles, and Ms. Kari Gunson, an expert on the impacts of roads on wildlife, were called on behalf of PECFN. Dr. Christopher Edge, an expert in Blanding's turtles, and Dr. Fraser Shilling, an expert in assessing the impacts of roads on wildlife and ecosystems, were called by the Approval Holder.[8]

19. On July 3, 2013, the Tribunal rendered a decision that was some 120 pages in length. Approximately 30 pages were dedicated to Blanding's turtles and the anticipated harm that would ensue to the species if the Project were to move forward as planned.[9]

(b) Blanding's Turtles

i. Conservation Status

20. Blanding's turtles are a threatened species under Ontario's *Endangered Species Act*, S.O. 2007, c. 6 (the "ESA") and the federal *Species at Risk Act*, S.C. 2002, c. 29. In Nova Scotia, the species has been listed as endangered. At the international level, the

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[6] Tribunal Decision, MR, Tab 4, pp. 56, 137-139, 148, 152, 163-164, at paras. 15, 463, 465, 472, 473, 524, 547, 607, 610 and 612.
[7] Tribunal Decision, MR, Tab 4, p. 59, at para. 32.
[8] Tribunal Decision, MR, Tab 4, pp. 93-94, at paras. 222-225.
[9] Tribunal Decision, MR, Tab 4, pp. 54, 115-119, at paras. 9 and 342-363.

International Union for Conservation of Nature (part of the United Nations Environment Program) has designated the Blanding's turtle as *globally* endangered under its Red List.[10]

ii. Biological Traits

21. The Blanding's turtle is a semi-aquatic turtle occurring only in North America. Its active season is generally between May and October when it moves overland to conduct foraging, mating and nesting activities. Adult turtles have been known to travel as much as 6 km to move between wetlands or to nest.[11]

22. Female Blanding's turtles reach sexual maturity at approximately 18-20 years. Their clutch size is 10-14 eggs, and females nest only once each season. Some may not even reproduce on an annual basis, with the average breeding interval being 1.5 years.[12]

23. Female turtles have shown a preference for laying their eggs on shoulders of roads where nests are exposed to direct sunlight - it is the sun that incubates the eggs rather than the turtles themselves.[13] The period during which emerging hatchlings make their way from the nest to a wetland is a vulnerable time due to predators such as coyotes and foxes. Indeed, nest success is variable but typically low due to predation.[14]

iii. Threats to the Species

24. The delayed sexual maturity of the Blanding's turtle means that to survive, the low annual reproductive output must be repeated over decades of breeding opportunities.[15] High adult survivorship, therefore, is critical to the turtles' continued existence. The two experts called to testify on behalf of PECFN, Dr. Beaudry and Ms. Gunson, both gave

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[10] Tribunal Decision, MR, Tab 4, pp. 95 and 109, at paras. 237, 239 and 312; Committee on the Status of Endangered Wildlife in Canada Assessment and Update Status Report 2005 ("COSEWIC Report"), MR, Tab 14, p. 343; Blanding's Turtle Habitat Assessment from Ostrander Point Wind Energy Park Natural Heritage Assessment by Stantec dated October 2009, MR, Tab 20, p. 430.

[11] Tribunal Decision, MR, Tab 4, pp. 96 and 104, at paras. 242 and 285; COSEWIC Report, MR, Tab 14, pp. 363 and 345.

[12] Tribunal Decision, MR, Tab 4, p. 96, at para. 245; COSEWIC Report, MR, Tab 14, pp. 345, 362 and 370.

[13] COSEWIC Report, MR, Tab 14, pp. 346, 360, 363, 369, 372 and 376.

[14] Tribunal Decision, MR, Tab 4, p. 96, at paras. 244-246; COSEWIC Report, MR, Tab 14, pp. 346 and 360.

[15] Tribunal Decision, MR, Tab 4, p. 97, at para. 247.

evidence that a 2% increase in adult mortality will result in a decline at the population level. Such a determination could be made, according to these two experts, *without* knowing the actual population size of the Blanding's turtles.[16] Indeed, the precise population of this species is simply not known by any experts and/or government authorities, none of whom have such data. This includes the Ministry of Natural Resources ("MNR"), which as discussed below, authorized the killing, harming and harassing of the species at the Project Site.[17]

25. A "crude" estimate of the population size was given in the 2005 Committee on the Status of Endangered Wildlife in Canada Assessment and Update Status Report ("COSEWIC Report"), which stated that there could be about 10,000 Blanding's in the Great Lakes/St. Lawrence region. However, the Report went on to state:

> ... Therefore, a maximum Great Lakes/St. Lawrence population estimate of 10,000 adults is not unreasonable. *This seems like a substantial number, but given the life history of the species, as described elsewhere throughout this report, these numbers may represent primarily older cohorts that are declining from increased mortality and very low recruitment.*[18]

26. It was the consensus among the experts at the Tribunal hearing that road mortality poses the greatest anthropogenic threat to the survival of Blanding's turtles. This is particularly so due to the proclivity of females to travel along roads in search for nesting sites and to nest on roadsides.[19] Poaching is another threat, stemming from the turtle's pleasant appearance and demeanour. Habitat loss and predation are also known threats.[20]

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[16] Tribunal Decision, MR, Tab 4, p. 116, at paras. 346-350; Transcript excerpts of Frederic Beaudry dated April 3, 2014, Tab 10, pp. 256-257; Transcript excerpts of Kari Gunson dated March 27, 2013, Tab 12, pp. 331-332.
[17] Tribunal Decision, MR, Tab 4, p. 96, at para. 240; Court Decision, MR, Tab 3, at p. 58, at para. 31.
[18] COSEWIC Report, MR, Tab 14, p. 368 (emphasis added).
[19] Tribunal Decision, MR, Tab 4, p. 97, at para. 251; COSEWIC Report, MR, Tab 14, pp. 343, 346, 354, 360-361, 363, 366, 368-369 and 372; Witness Statement of Kari Gunson dated January 2013, MR, Tab 23, pp. 458-459; Beaudry, F. *et al.* 2008. "Identifying Road Mortality Threats at Multiple Spacial Scales for Semi-Aquatic Turtles". *Biological Conservation* 141: 2550-2563, MR, Tab 24, p. 464.
[20] Tribunal Decision, MR, Tab 4, pp. 96, 96-99, 102, 105, 112-113 and 118-119, at paras. 220, 238, 246, 249, 251, 259, 261, 263, 276, 281, 291, 308-313, 327-328, 330, 358-359, 360 and 362-363; COSEWIC Report, MR, Tab 14, pp. 346-347, 359-360, 363-364, 368-369 and 372.

(c) Tribunal's Finding of Serious and Irreversible Harm

27. Upon weighing the extensive expert evidence led by the Parties, the Tribunal determined that PECFN had demonstrated, on a balance of probabilities, that engaging in the Project in accordance with the REA would cause serious and irreversible harm to the Blanding's turtle population. The Tribunal came to this conclusion *even though*:

- the precise number of Blanding's turtles at the Project Site is not known;
- current and expected traffic data post-construction had not been tendered as evidence; and
- the Approval Holder had been issued a permit to kill, harm and harass Blanding's turtles at the Project Site under the ESA (the "ESA Permit").[21]

28. It is important to note, with respect to the first and second conclusions, that the Tribunal received considerable expert opinion evidence regarding population size as well as the risk to Blanding's turtles brought on by increased traffic at the Project Site.[22] Consequently, its finding of serious and irreversible harm was corroborated by the evidence. This will now be reviewed in relation to each of the conclusions above.

i. Population Size

29. The Divisional Court held at paragraph 91(ii) of its decision that the Tribunal concluded that "serious and irreversible harm would be occasioned to Blanding's turtle *without any evidence* as to the population size affected." This is incorrect; the Tribunal received substantial evidence on this issue (or, quoting from the Tribunal at paragraph 358 of its decision, "an enormous amount of information"). The end result was simply a matter of the Tribunal preferring PECFN's expert evidence to that of the Respondents.

30. The Tribunal heard from Dr. Beaudry, a world renowned Blanding's turtle expert, that serious and irreversible harm to the species could be determined *without* knowing the

[21] Tribunal Decision, MR, Tab 4, p. 118, at paras. 304-363.
[22] Court Decision, MR, Tab 3, pp. 31-32, at paras. 40-49.

precise size of the population at the Project Site.[23] This is because the initial size of the population would only lead to a different end-time as to when the population will become extinct - the critical variable, therefore, is time rather than size. Dr. Beaudry further referred to modelling efforts carried out to project virtual population survival. If the estimated annual survivorship of Blanding's turtles is 96%, studies have shown that a 2% drop in adult survivorship will result in a fairly quick decline in the overall population.[24] Ms. Gunson provided a similar estimate. She testified that a 2-5% increase in adult mortality would lead to a decline at the population level.[25]

31. In its decision, the Tribunal noted the following from the COSEWIC Report:

> The [COSEWIC Report] notes that, due to its life-history strategy, with a delayed maturity and great longevity, [Blanding's turtles] are "highly vulnerable to any chronic increase in adult mortality rates, even when these increases are quite small (<5%)" … The same Report cites, at p. 20, the findings from a study by Browne (2003) in Point Pelee National Park, that *"if one extra (beyond natural mortality) adult female is killed by a vehicle every two years, and if nest mortality is >32% annually, the population would slowly decline to extinction"*.[26]

32. Based on all the evidence that it had, the Tribunal determined that the exact size of the population was not necessary:

> An enormous amount of information on this species was brought forward in this appeal. *There is certainly enough information for the Tribunal to make findings on the conservation status of the species, its life history traits that make it vulnerable to harm from the Project, the precise type of harm that the Project will cause, and the significance of this type of harm (road mortality and poaching) on Blanding's turtle. The Tribunal finds that in such a case, knowledge of the exact size of the population that will be impacted by the Project, although helpful, is not required.*[27]

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[23] *Supra*, footnote 16.
[24] Tribunal Decision, MR, Tab 4, p. 116, at paras. 347-349; *supra*, footnote 16.
[25] Tribunal Decision, MR, Tab 4, p. 116, at para. 350; *supra*, footnote 16.
[26] Tribunal Decision, MR, Tab 4, p. 116, at para. 351 (emphasis added); COSEWIC Report, MR, Tab 14, pp. 362 and 368.
[27] Tribunal Decision, MR, Tab 4, p. 118, at para. 358 (emphasis added).

33. In its closing submissions to the Tribunal, the Approval Holder stated that any uncertainties, such as the size of the population, must work in favour of the Approval Holder because uncertainty cannot rise to the level of "will cause". The Tribunal disagreed:

> The approach suggested by the Approval Holder would require an "absolute" level of certainty with respect to the impacts of a Project. Such an approach is incompatible with the nature of biology, and our imperfect understanding of the impacts of human activity on plant life, animal life and the natural environment.[28]

34. In the end, the Tribunal weighed the evidence and found that serious and irreversible harm could be determined without knowledge of the exact size of the population. This was a factual finding that the Tribunal properly came to based on a full review of the large amount of expert evidence presented by the respective Parties.

ii. Traffic Studies

35. In a similar vein, the Divisional Court held at paragraph 91(iii) that the Tribunal concluded that "serious and irreversible harm would be occasioned to Blanding's turtle arising from road mortality *without any evidence* as to the current level of vehicular traffic on the Project Site or any evidences [*sic*] as to the degree of increase in vehicular traffic arising from the Project." Again, with respect, this conclusion is inaccurate.

36. The Tribunal was cognizant that no report on current or expected traffic had been tendered. However, such a report/study was not necessary for the Tribunal to find, on a balance of probabilities, that there would be serious and irreversible harm to Blanding's turtles since the Project Site, being Crown land, would remain open to the public.[29]

37. The Tribunal reasonably deduced, based on the all evidence that it had, that:

> With better and longer roads the Site will be more accessible, there will be more traffic than previously and more traffic than simply construction and maintenance vehicles. The Tribunal finds that on a balance of probabilities,

[28] Tribunal Decision, MR, Tab 4, p. 118, at paras. 356 and 357.
[29] Tribunal Decision, MR, Tab 4, pp. 118-119, at para. 360.

> turtle crossing signs are not effective, and will not reduce mortality enough to offset the increased risk of mortality and poaching caused by the introduction of new and better roads ...[30]

38. This conclusion reflects the opinion evidence advanced by Dr. Beaudry, who found the notion of *reducing* road mortality to be problematic for a declining species such as the Blanding's turtle, particularly in a natural/naturalized area such as Ostrander Point Crown Land Block. The Tribunal digested his evidence as follows:

> Populations can have natural fluctuations due to climate or an increase in predator populations; adding road mortality for this type of species is very dangerous. Dr. Beaudry's opinion, assuming a low traffic volume on the Project's roads, is that the only effective mitigation measure in this situation is not to build the roads [in currently undisturbed areas], in order to prevent serious and irreversible harm to this population of Blanding's turtle.[31]

39. Again, the Tribunal's conclusion regarding traffic at the Project Site was a factual finding and based on expert evidence which, as addressed below, cannot be disturbed by the Divisional Court in the absence of palpable and overriding error, which did not occur.

iii. The ESA Permit

40. On February 23, 2012, the MNR issued ESA Permit No. PT-C-003-12 to the Approval Holder pursuant to s. 17(2)(c) of the ESA.[32] A permit issued under this section authorizes the permit holder to kill, harm and harass an otherwise protected species so long as an overall benefit will in some way be achieved through the permit's requirements. An "overall benefit" is only achieved if the species *as a whole in Ontario* is made better off as a result of the permit being issued.[33] The permit also requires reasonable steps to be taken by the permit holder to minimize adverse effects on individual members of the species.

41. The ESA Permit here imposed the following mitigation measures on the Approval Holder to minimize possible adverse effects to Blanding's turtles at the Project Site:

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[30] Tribunal Decision, MR, Tab 4, p. 113, at para. 330.
[31] Tribunal Decision, MR, Tab 4, pp. 53, 98 and 112-113, at paras. 5, 259 and 329.
[32] ESA Permit No. PT-C-003-12 ("ESA Permit"), MR, Tab 15, pp. 389-407.
[33] Tribunal Decision, MR, Tab 4, p. 100, at para. 269.

- Develop an Impact Monitoring Plan ("IMP") prior to the commencement of construction activities;
- No construction at the Project Site from May 1 through October 15;
- If a Blanding's turtle or nest site is found on the Project Site during construction, cease construction until precautions are taken;
- Speed bumps to be installed and maintained;
- Training of staff and contractors with respect to Blanding's turtles;
- Educational signage at the Project Site regarding the possible presence of species at risk;
- Speed limits;
- Strategic creation of nesting habitat on the eastern side of the Project Site within 250 m of wetland habitat and at least 400 m away from the Project access roads, for the duration of the ESA Permit;
- Turtle crossing signs;
- 37.65 ha property, outside the Project Site, to be set aside to provide, restore and actively maintain habitat for Blanding's turtles, subject to a 20-year conservation easement (the "Compensation Property");
- The Compensation Property to be maintained in its current state until the MNR approved a Property Management Plan ("PMP");
- General monitoring for Blanding's turtles during construction; and
- Impact monitoring for Blanding's turtles during construction.[34]

42. Contrary to the Divisional Court's finding at paragraph 91(iv) of its decision, the Tribunal *did* give sufficient weight to the existence of the ESA Permit and the conditions attached thereto. This is evident from the Tribunal's thorough analysis of the opinion evidence that was advanced by the respective Parties. The Tribunal dedicated at least 14 pages and 70 paragraphs of its decision to an analysis of the ESA Permit in the context of the REA.[35] Again, what transpired was the Tribunal preferring the opinion evidence led by PECFN's experts. This, the Tribunal was clearly permitted to do.

43. Regarding the mitigation measures contained in the ESA Permit, the Tribunal held:

> It appears that the mitigation measures to be employed during the construction phase of the Project, i.e., no construction or maintenance from May 1 to October 15, would be effective to prevent serious and irreversible harm to Blanding's turtles from construction activities of the Project itself. *However, such measures do not prevent use of the roads in the post-construction phase. In addition, the Tribunal finds on a balance of probabilities that the fact that this Project is on Crown land and open to*

[34] Tribunal Decision, MR, Tab 4, pp. 100-101, at paras. 270 and 271; ESA Permit, MR, Tab 15, pp. 394-406.
[35] Tribunal Decision, MR, Tab 4, pp. 101-115, at paras. 272-343.

> *public use will reduce the effectiveness of road mortality mitigation measures, including educational signage and reduced speed limits, to the point they will no longer be effective in reducing mortality to a level that would prevent serious and irreversible harm to Blanding's turtle …*[36]

44. The Tribunal also expressly held, again based on the expert evidence, that the "mitigation measures do nothing to reduce increased nest predation or poaching."[37]

45. As for the requirement to develop an IMP and a PMP, the Tribunal held that since neither had been finalized nor presented to the Tribunal (as was in fact done at the hearing with a draft Alvar Management Plan), it could not evaluate their effectiveness. On this basis, the Tribunal held that the REA "lacks important detail for some mitigation plans."[38]

46. With respect to the Compensation Property, aimed at achieving an overall benefit to the species as a whole in Ontario, the Tribunal came to the following conclusion:

> However, the area north of Helmer Road is already considered Blanding's turtle habitat … *The Compensation Property therefore does not add to Blanding's turtle habitat, and any habitat lost on the Project Site will amount to a net loss of Blanding's turtle habitat in Prince Edward County.* There was no evidence to the effect that the habitat on the compensation site would benefit from improvements.
>
> The Compensation Property is also on the north side of Helmer Road, west of Babylon Road, which are county roads that separate the Compensation Property from the permanent wetlands which Stantec identified as "critical habitat", to the south. Therefore, in order to reach the Compensation Property, the turtles using the southern wetlands must cross a County Road, with its associated [road mortality] risks.[39]

47. As for the Project Site itself, the Tribunal concluded that the *whole site* is "critical" Blanding's turtle habitat due to the fact that it provides "habitat needed to fulfill the [turtle's] life cycle without reducing its fitness, without reducing reproductive output or increasing mortality or decreasing survivorship". On this definition of critical habitat, the Tribunal noted that a development setback should apply to the *entire* Project Site:

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[36] Tribunal Decision, MR, Tab 4, pp. 118-119, at para. 360 (emphasis added).
[37] Tribunal Decision, MR, Tab 4, p. 102, at para. 276.
[38] Tribunal Decision, MR, Tab 4, p. 114, at para. 335.
[39] Tribunal Decision, MR, Tab 4, p. 115, at paras. 340 and 341 (emphasis added).

> Given the expertise of Drs. Beaudry and Edge, the Tribunal prefers their interpretation of critical habitat over the approach taken by Stantec, of labelling only permanent wetlands (overwintering and nursery habitat), as "critical habitat". Under such a definition, *the whole of Ostrander Point Crown Land Block should benefit from a development setback.*[40]

48. The Tribunal's finding of serious and irreversible harm was, therefore, based on a detailed analysis of the ESA Permit and its conditions. This is clear from the following:

> The issue before the Tribunal is not whether the Approval Holder will operate the Project in compliance with the REA conditions. *Rather, the issue is whether the mitigation measures themselves, contained in the conditions [which include the ESA Permit], will be effective in preventing serious and irreversible harm.*[41]

49. The Tribunal, specifically and comprehensively, reviewed the expert evidence as to whether engaging in this Project in accordance with the REA, *incorporating the ESA Permit*, would cause serious and irreversible harm to Blanding's turtles. It concluded affirmatively, finding that neither the mitigation measures nor the Approval Holder's attempts to achieve an "overall benefit" to the species at the provincial scale would protect the Blanding's turtle population in question against serious and irreversible harm.[42]

(d) First Successful REA Appeal

50. There have been more than 20 appeals of REAs since the new legislative scheme came into effect in 2009. All but the PECFN appeal resulted in dismissals. In allowing PECFN's appeal, the Tribunal rendered a landmark and precedent-setting decision.

51. In considering appeals under the second branch of the test - serious and irreversible harm to plant life etc. - the Tribunal has been mindful of avoiding an interpretation of the test that can either always be met or never be met.[43] The Tribunal had this to say about the test on an earlier occasion: "interpretations that automatically result either in screening out

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[40] Tribunal Decision, MR, Tab 4, p. 109, at para. 313 (emphasis added).
[41] Tribunal Decision, MR, Tab 4, p. 107, at para. 304 (emphasis added).
[42] Tribunal Decision, MR, Tab 4, pp. 107-119, at paras. 304-363.
[43] Tribunal Decision, MR, Tab 4, pp. 86-87 and 90, at paras. 186 and 203.

no appeals, or screening out all appeals, do not accord with the Legislature's intention".[44]

If PECFN's appeal was to now fail it would mean *no* REA appeal has *ever* succeeded.

3. Tribunal Decision Reversed by the Divisional Court

52. On February 20, 2014, in a 40-page decision that disposed of two appeals, a cross-appeal and motion for new evidence, the Divisional Court reversed the Tribunal's decision.

53. The Divisional Court concluded that the Tribunal committed six errors of law in arriving at its conclusion of serious and irreversible harm to Blanding's turtles:

(i) The Tribunal failed to separately identify and explain its reasons for concluding that, if serious harm would result from the Project, that serious harm was irreversible;

(ii) The Tribunal concluded that serious and irreversible harm would be occasioned to Blanding's turtle without any evidence as to the population size affected;

(iii) The Tribunal concluded that serious and irreversible harm would be occasioned to Blanding's turtle arising from road mortality without any evidence as to the current level of vehicular traffic on the Project Site or any evidence as to the degree of increase in vehicular traffic from the Project;

(iv) The Tribunal failed to give sufficient weight to the existence of the ESA permit, the conditions attached to that permit, the obligation of the MNR to monitor and enforce the permit and the fact that the [REA] expressly required Ostrander to comply with the ESA permit;

(v) The Tribunal failed to give a proper opportunity to the parties to address the issue of the appropriate remedy and thereby violated the principles of natural justice and procedural fairness; and

(vi) The Tribunal erred in finding that it was not in a position to alter the decision of the Director, or to substitute its opinion of that of the Director.[45]

4. Stay Motion Granted by the Court of Appeal

54. In setting aside the Tribunal Decision, the Divisional Court reinstated the REA. When the Approval Holder threatened to commence construction, PECFN brought a

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[44] *Monture v. Ontario (Ministry of the Environment)*, [2012] O.E.R.T.D. No. 50 (QL), Brief of Authorities of the Moving Party ["BoA"], Tab 1, at paras. 71 and 75.

[45] Court Decision, MR, Tab 3, p. 42, at para. 91.

motion for a stay. Blair J.A. heard that motion on March 21, 2014. In his endorsement of March 25, 2014, he stated that he had "no hesitation in granting the stay."[46]

55. **Serious issue to be tried:** Blair J.A. held there were sufficiently serious arguments raised with respect to the Divisional Court having failed to afford the required deference to the Tribunal, a tribunal of particular specialized expertise in the field in question.[47]

56. More importantly, as discussed below, Blair J.A. also held that the issues raised on the proposed appeal were of *broad public implication* in the field of environmental law.[48]

57. **Irreparable harm:** According to Blair J.A., the irreparable harm criterion was satisfied on the basis that "[o]nce a habitat is destroyed, it is destroyed - for at least short-term purposes, in any event - and the species sought to be protected here is a vulnerable and endangered species." Further, he stated that since the Approval Holder "has refused to disclose anything about the proposed scope of the contemplated work, or its start date", he could not rely on its assertion that little if any construction could be completed between now and May 1, 2014 when the ESA Permit comes into force.[49]

58. **Balance of Convenience:** Finally, Blair J.A. held that the balance of convenience favoured a stay, whatever the extent of the work contemplated, given the irreparable harm outlined above. He again emphasized: "the issues raised on the proposed appeal are issues of *broad public implication* in the field of environmental law."[50]

PART III - QUESTIONS

59. The Moving Party seeks the following questions to be answered by this Honourable Court if leave to appeal is granted:

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[46] Stay Decision, BoA, Tab 2, at para. 7.
[47] Stay Decision, BoA, Tab 2, at paras. 13 and 14.
[48] Stay Decision, BoA, Tab 2, at para. 15.
[49] Stay Decision, BoA, Tab 2, at paras. 17 and 23.
[50] Stay Decision, BoA, Tab 2, at paras. 25-27 (emphasis added).

(i) Did the Divisional Court err in law by applying the wrong standard of review?
(ii) Did the Divisional Court err in law by making findings of fact notwithstanding its limited jurisdiction to consider only questions of law?
(iii) Did the Divisional Court add a ground of appeal and therefore err in law?
(iv) Did the Divisional Court err in law by making a finding of breach of natural justice and procedural fairness in relation to the Tribunal's disposition on remedy?

PART IV - ISSUES AND LAW

Issue #1: Broad Public Importance of the Legal Issues

60. As a precondition for leave, a moving party should demonstrate that the legal issues raised on the proposed appeal are of broad public importance. That is to say, the onus rests with the prospective appellant to show that the questions would "settle for the future [questions] of general interest to the public or a broad segment of the public".[51]

61. As the *first ever* REA appeal decision to reach the Divisional Court, and in turn this Honourable Court, this case is completely a matter of first impression. The issues raised, which address the appropriate standard of review, the proper interpretation and evidentiary standard to be applied to the "serious and irreversible harm" test, the proper interpretation and application of the test in the context of related statutory regimes (here, the ESA), and the appropriate remedy upon a finding of serious and irreversible harm, all involve questions of very significant public interest and importance. These matters will directly impact the development of jurisprudence in the context of environmental and administrative law in Ontario.

[51] *Re Sault Dock Co. v. Sault Ste. Marie (City)*, [1972] O.J. No. 2069 (Ont. C.A.) (QL), BoA, Tab 3. See also Sopinka, J. and Gelowitz, M., *The Conduct of an Appeal*, 3rd ed. (Markham: LexisNexis Canada Inc., 2012), BoA, Tab 19, p. 50.

62. As the first ever REA appeal to succeed, the Divisional Court's decision, if allowed to stand, also raises the bar even higher for appellants seeking to successfully challenge REAs. Consequently, this case's implications for future REA appeals are also far-reaching.

63. Furthermore, as noted above, Blair J.A. in rendering his decision on the stay motion stated unequivocally that PECFN's proposed appeal raises issues of broad public implication in the field of environmental law.[52]

64. Similarly, the Divisional Court, in its costs endorsement of April 4, 2014, accepted that the case involved matters of public interest. Therefore, it reduced the costs sought against PECFN by 66% to reflect the large measure of public interest in the litigation.[53]

65. In light of the above, PECFN respectfully submits that the requisite public importance for granting of leave to appeal to this Honourable Court is clearly present.

Issue #2: The Divisional Court Applied the Wrong Standard of Review

66. The Divisional Court noted that the appropriate standard of review of the Tribunal's decision is reasonableness, both with respect to the Tribunal's interpretation of "serious and irreversible harm" and its interpretation of the ESA as it relates to the EPA.[54]

67. In practice, however, with respect, it appears the Divisional Court applied a *de facto* correctness standard in that it failed to defer at all to the Tribunal's expertise or the Tribunal's reliance on large amounts of expert evidence.

68. First, particularly on an appeal limited only to questions of law (as is the case here), the Divisional Court plainly ought to have deferred to the Tribunal's factual findings. In *Housen v. Nikolaisen*, three general objectives to justify appellate deference to findings of fact were identified as: (i) limiting the number, length and cost of appeals; (ii) promoting

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[52] Stay Decision, BoA, Tab 2, at paras. 15 and 27.
[53] *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*, 2014 ONSC 2127 (CanLII), BoA, Tab 4, at paras. 3 and 8.
[54] Court Decision, MR, Tab 3, p. 29, at paras. 27 and 28.

the autonomy and integrity of trial proceedings; and (iii) recognizing the expertise of the trial judge and his or her advantageous position with respect to matters of fact.[55] Similarly, Donald Brown, in *Civil Appeals*, provides:

> Deference by appellate courts to fact-finding by the initial decision-maker is justified by virtue of the advantage gained through hearing and seeing witnesses, and through expertise in fact-finding acquired through experience in dealing with evidence. As well, deference is warranted in order to minimize duplication of judicial effort and to support the autonomy of trial proceedings.[56]

69. The Supreme Court of Canada in *Schwartz v. Canada* also emphasized the concept of a "heightened" degree of deference with respect to findings of fact:

> It has long been settled that appellate courts must treat a trial judge's findings of fact with great deference. The rule is principally based on the assumption that the trier of fact is in a privileged position to assess the credibility of witnesses' testimony at trial ... Others have also pointed out additional judicial policy concerns to justify the rule. Unlimited intervention by appellate courts would greatly increase the number and length of appeals generally. Substantial resources are allocated to trial courts to go through the process of assessing facts. The autonomy and integrity of the trial process must be preserved by exercising deference towards the trial courts' findings of fact.[57]

70. Second, in the case of a specialized tribunal such as the one here, an important question to consider is: "who has more expertise on the question at issue; the tribunal or the court?" According to the author Sara Blake, "the tribunal must have more expertise than the court to be accorded deference." She goes on to state:

> The rationale behind this factor is the recognition that tribunal decisions are often influenced by the tribunal's knowledge and experience in the field it regulates. Each time a court interferes with a decision of the tribunal, confidence and respect for its work may be lost. Routine interference in tribunal decisions by the courts would give victory to the parties better able to afford delay and fund litigation. Deference gives expert tribunals the respect they deserve, while maintaining a salutary degree of court supervision.[58]

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[55] *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (QL), BoA, Tab 5, at paras. 16-18.
[56] Brown, D., *Civil Appeals* (Toronto: Canvasback Publishing Inc., 2012), BoA, Tab 20, pp. 1-15 and 1-16.
[57] *Schwartz v. Canada*, [1996] 1 S.C.R. 254 (QL), BoA, Tab 6, at para. 32.
[58] Blake, S., *Administrative Law in Canada*, 5th ed. (Markham: LexisNexis Canada Inc., 2011), BoA, Tab 21, p. 216.

71. Blake also states that more deference is shown to tribunals with broad powers. In addition, a tribunal that has developed a body of jurisprudence to guide its decision-making is presumed to have greater expertise.[59] Here, with its broad remedial powers under s. 145.2.1(4) of the EPA and the significant body of jurisprudence it has already developed after several years of disposing of REA appeals, the Tribunal ought to have been shown great deference by the Divisional Court.

72. When the appropriate standard of review is reasonableness, appellate intervention is justified only if the court or tribunal below makes a "palpable and overriding error of fact", an error that is "plainly seen" or "so obvious that it can easily be seen or known".[60]

73. As seen from these submissions, the Divisional Court discernibly failed to defer to the Tribunal on the issue of Blanding's turtles. The Divisional Court disturbed many of the factual findings of the Tribunal, and it did so without itself making a single finding of palpable and overriding error of fact. In reality, the Court assumed the role of trier of fact; it became the "academy of science"[61] despite its lack of expertise in the matters at hand, the extensive expert evidence that the Tribunal chose to prefer on these issues, and its limited jurisdiction to consider only questions of law.

(a) Serious and Irreversible Harm to Blanding's Turtles

74. As was highlighted above, the Tribunal properly relied on the opinion evidence of Dr. Beaudry and Ms. Gunson in concluding that the exact size of the Blanding's turtle population was not necessary to come to a finding of serious and irreversible harm. Indeed, it was pointed out that such data simply does not exist; experts the world over do not have this information. Scientific modelling efforts have, however, found that a 2% increase in

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[59] Blake, S., *Administrative Law in Canada*, 5th ed. (Markham: LexisNexis Canada Inc., 2011), BoA, Tab 21, p. 217.
[60] *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (QL), BoA, Tab 5, at paras. 5-6.
[61] *Inverhuron & District Ratepayers' Assn. v. Canada (Minister of the Environment)*, [2001] F.C.J. No. 1008 (QL), BoA, Tab 7, at paras. 36, 40 and 48.

adult mortality will have a detrimental impact on the population as a whole. It appears that the Divisional Court overlooked/dismissed the value of this vital expert evidence, instead coming to its own conclusion on the facts:

> *It is difficult to see how one could make a determination whether an increase in the mortality rate at the Project site, and surrounding landscape, would or would not be significant in terms of irreversibility without knowing the size of the population impacted. Without knowing the magnitude of the mortality rate, it would seem difficult to make a determination that the harm is irreversible* … It would also appear to be important in considering this issue to know the size of the population in the surrounding area and in Prince Edward County and in Ontario as a whole before reaching a conclusion as to whether the harm is irreversible …[62]

75. Whether or not it was difficult for the *Divisional Court* to see how one could make such a determination, there was sufficient expert evidence before the *Tribunal* for it to come to the conclusion that it did. By virtue of the advantage gained through hearing and seeing the expert testimony, and through its expertise in fact-finding acquired from its function as a specialized tribunal, the Tribunal was justified in finding serious and irreversible harm. For all of the same reasons, the Divisional Court was *not* justified in interfering with the Tribunal's factual findings, that is, in the absence of palpable and overriding errors, of which it expressly found none.

76. Similarly, the Divisional Court disregarded the Tribunal's considerations regarding traffic at the Site, which, in view of *all* the evidence, the Tribunal determined that a report/study on current and predicted traffic was not necessary.[63] Again, the Divisional Court did not find palpable and overriding error but instead simply noted its own view that it was "difficult to see how the Tribunal could make [such] a determination":

> Second, the Tribunal also did not have any evidence regarding the current vehicular traffic on the site nor did it have any evidence regarding the increase in vehicular traffic that would result from the Project. While it placed great emphasis on the issue of road mortality and the effect of the

[62] Court Decision, MR, Tab 3, p. 32, at para. 44 (emphasis added).
[63] Tribunal Decision, MR, Tab 4, p. 118, at paras. 356-358.

> Project on road mortality, *it is difficult to see how the Tribunal could make a determination that the Project would cause irreversible harm without any data as to the existing or projected traffic on the site.* There was no dispute that there was harm currently being caused to Blanding's turtles on the site that would, presumably, continue with or without the Project. What was important for the mandate of the Tribunal was to determine the increase in that harm that would arise from the Project …[64]

77. The Divisional Court, either through omission or misapprehension of the evidence, came to the conclusion that the Tribunal's finding of serious and irreversible harm to Blanding's turtle was based on *no evidence*, either with respect to population size or traffic data. As has been set out in paragraphs24-25 and 29 to 39 *supra*, this is clearly a flawed understanding of what was a thorough review by the Tribunal of extensive expert evidence.

78. As also noted by the Tribunal, in coming to the conclusion of serious and irreversible harm, its detailed considerations included, but were not limited to: the conservation status of the species; the species' habitat on the Project Site and in the area; the vulnerability of the population; type and harm caused by the Project; vulnerability of the species to this type of harm and extent of harm due to its life history traits; mitigation measures in the REA; and demonstrated lack of effectiveness of the mitigation measures.[65]

79. The Tribunal provided its rationale as to why it did not require precise population and traffic data in finding serious and irreversible harm.[66] This is *far* from showing that the Tribunal's conclusions were based on "no evidence" as to these matters.

80. In essence, the Divisional Court simply did not wish to accept the Tribunal's factual findings. It then effectively reweighed, discounted or overlooked evidence that informed the Tribunal's decision. In so doing, not only did it exceed its jurisdiction, it failed to defer to the Tribunal's specialized expertise and the expert evidence.

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[64] Court Decision, MR, Tab 3, p. 32-33, at para. 48 (emphasis added).
[65] Tribunal Decision, MR, Tab 4, p. 118-119, at paras. 358 and 362.
[66] Tribunal Decision, MR, Tab 4, p. 118, at para. 358.

81. Regarding this approach, it is of note that, while the Divisional Court afforded no deference to the Tribunal on the issue of Blanding's turtles and the expert evidence that was ultimately preferred by the Tribunal, it did defer to the Tribunal and experts with respect to its findings on birds and the alvar ecosystem. For example, concerning serious and irreversible harm to birds, the Divisional Court held: "[w]hat PECFN's complaint boils down to is that the Tribunal did not adopt the scale that PECFN contended that is should. That, however, was a matter for the Tribunal to decide and its conclusion on that point, given the expert evidence, cannot be shown to be unreasonable."[67] This shows deference.

82. Similarly, with respect to serious and irreversible harm to the alvar, the Divisional Court upheld the Tribunal's finding as being reasonable "given the evidence that the Tribunal had". The Court also noted that "[i]n reaching its conclusion on this issue, the Tribunal also correctly considered the mitigation requirements contained in the [REA]".[68]

83. It is submitted that there is a great dichotomy in the Divisional Court's treatment of the issues addressed by the Tribunal; deference was applied, except regarding turtles.

(b) Reconciling the ESA Permit and the Legal Test under the EPA

84. At paragraph 53 of its decision, the Divisional Court also found that the Tribunal did not give "any real consideration to the effect of the ESA Permit in terms of the Tribunal's overall analysis". As has already been demonstrated above at paragraphs 40 to 49, such a statement in fairness is not accurate; the Tribunal gave the ESA Permit more than due consideration in the context of the legal test it applied.

85. In addition, according to the Divisional Court, "the Tribunal ought to have accepted the ESA Permit at face value." That is to say, the Tribunal "ought to have accepted the requirements of the permit including the [PMP] and the [IMP] would be put in place as

[67] Court Decision, MR, Tab 3, p. 44, at para. 106.
[68] Court Decision, MR, Tab 3, p. 46, at para. 114.

contemplated by the permit and that those plans and the conditions of the permit would be properly and adequately monitored by the MNR." The Divisional Court came to this conclusion even though it stated that the "Tribunal was not required to take the presence of the ESA Permit as determinative of its task under s. 145.2.1(2) of the EPA".[69]

86. The requirement to take the ESA Permit "at face value" does not accord with the Tribunal's legislative mandate, which is to consider how engaging in the specific Project in question, in accordance with the REA being appealed, will cause serious and irreversible harm, in this case to Blanding's turtles at the Project Site and the surrounding landscape. An important consideration for the Tribunal in distinguishing the ESA Permit for its purposes was the difference in scale:

> However, as noted by Mr. Baxter, the ESA Permit is issued by the MNR after a determination that the species **as a whole in Ontario** will have an overall benefit. The Tribunal is considering the status of the Blanding's turtle population that occupies this Project Site and the surrounding landscape. Due to the difference in scale, the MNR's determination of "overall benefit" for the species will therefore not be determinative of the second branch of the test with respect to Blanding's turtles.[70]

87. In *Lewis v. Director, Ministry of the Environment*, the Tribunal explained "why, within the specific confines of the EPA's unique test, [it] does not simply defer to what government agencies may have determined with respect to species covered under other policies and legislation". There, the Tribunal stated:

> Unlike the turtle species at issue in *APPEC*, the bald eagle is not subject to the ESA's permit regime (as it is a special concern species rather than endangered or threatened), but the general principle applies such that *the Tribunal will not simply defer to MNR management decisions on species at risk under other regimes, which are not subject to appeal to an independent tribunal, in carrying out its role in applying the serious and irreversible harm test under the EPA. The Tribunal's own independent analysis of serious and irreversible harm at the relevant scale and the effectiveness of any mitigation measures (see, for example, APPEC at paras. 304 and 323) is especially*

[69] Court Decision, MR, Tab 3, pp. 37-38, at paras. 68 and 70.
[70] Tribunal Decision, MR, Tab 4, p. 115, at para. 343 (original emphasis).

> *important given that the Tribunal is asked to apply a unique statutory test that is not found in other relevant regimes.*[71]

88. The foregoing is why, according to the Tribunal in *Lewis*, "the likely effectiveness of any proposed measure (whether contained in the [REA] or some other document)" will be considered within the specific context of the "Tribunal carrying out the mandate stipulated by the Legislature". As to its finding of serious and irreversible harm in the PECFN appeal (also referred to as "*APPEC*"), the Tribunal in *Lewis* noted that "in *APPEC*, the Tribunal reached its own independent conclusion on future harm to a threatened species of turtle under the EPA test, while having regard to how that species was being addressed under the ESA permit system."[72]

89. In *Lewis*, the Tribunal clarified that its role is not to revisit the Director's considerations of significant wildlife habitat at the REA approval application review phase, which is a separate and additional process:

> That process may generate information and documents that may be relevant to the matters raised in a REA appeal but that process is also not determinative of the unique statutory test found in the EPA. *By drafting the EPA the way it did, the Legislature created a unique test that is not to be answered by simply reconsidering what was done at the REA approval stage or by deferring to other regimes such as the ESA.*[73]

90. Also in *Lewis*, the Tribunal elaborated as to why the provincial scale, which has now effectively being endorsed by the Divisional Court, is not appropriate for the purposes of the Tribunal's function under the EPA:

> ... the Tribunal notes that an automatic provincial scale for harm to animal life would likely lead to the absurd result that the test would be impossible to meet in virtually any case, despite an extensive loss of animal life in the vicinity of a project ... *In many cases, where habitat loss is a key factor, it will be the loss of numerous local populations that, over time and space, accumulate to the point that a species declines, or in a worst case scenario, is*

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[71] *Lewis v. Ontario (Ministry of the Environment)*, [2013] O.E.R.T.D. No. 70 (QL) ("*Lewis*"), BoA, Tab 8, at para. 30 (emphasis added).
[72] *Lewis*, BoA, Tab 8, at paras. 25 and 37.
[73] *Lewis*, BoA, Tab 8, at paras. 29 and 31 (emphasis added).

> *lost forever. If each project that contributed to the loss of a species is only assessed for its impacts at a provincial scale, then little would be done to prevent serious and irreversible harm.* By looking at the situation at all relevant scales, including a local level in appropriate circumstances, declines can be prevented in the first place. *If a provincial scale is the only one that could be used, then the "death by a thousand cuts" scenario that has affected many species would remain unaddressed and the statutory test would be rendered virtually meaningless.*[74]

91. Finally, the Tribunal reflected on the scale that was applied in PECFN's appeal:

> This Tribunal panel adopts the finding in *APPEC* that *assessing serious and irreversible harm involves a multi-factor case by case analysis in which the extent of harm, in the sense of a factor such as the scale of population being affected where appropriate, is just one factor among many.* Mortality to another species at risk, the Blanding's turtle, assessed at the local population level, was a key factor in the Tribunal's finding of serious and irreversible harm in *APPEC* at paras. 355, 359 and 363 (where the local Crown land block/site and surrounding landscape scale was used).[75]

92. In the case at bar, by stipulating that the Tribunal should have taken the ESA Permit "at face value", the Divisional Court has greatly undermined the independence of the Tribunal, not only with respect to its ability to determine the appropriate scale against which the EPA test should be considered but also with respect to the Tribunal's ability to question the effectiveness of the conditions contained in the ESA Permit for the Tribunal's specific purpose of determining whether the EPA test has been satisfied.

93. Future REA appeals with an ESA Permit have, as a result of the Court Decision, been pre-empted as it must now be accepted that the Permit will achieve an overall benefit to at-risk species. As noted, an ESA permit does not protect against serious and irreversible harm at the more local level. The Legislature mandated the Tribunal to decide this. Unless this error is addressed, the purpose of the REA appeal process will be defeated.

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[74] *Lewis*, BoA, Tab 8, at paras. 37 and 40 (emphasis added).
[75] *Lewis*, BoA, Tab 8, at paras. 44 and 47 (emphasis added).

Issue #3: Divisional Court Made Findings of Fact notwithstanding its Limited Jurisdiction to Consider *Only* Questions of Law

94. Under s. 145.6(1) of the EPA, any party may appeal from the Tribunal's decision *on a question of law* to the Divisional Court. On any other matter, an appeal from the Tribunal's decision may be made to the Minister of the Environment pursuant to s. 145.6(2). Consequently, the Divisional Court did not have jurisdiction to challenge the Tribunal's findings of fact. Nevertheless, as has been identified above, the Divisional Court engaged in an evaluation of the evidence, came to its own conclusions, and overlooked crucial evidence that the Tribunal was better equipped to assess. As also noted, it did so without making any finding(s) of palpable and overriding error of fact.

95. The Divisional Court was fully aware of the limited role it enjoyed on the appeal. This is evident from its decision on the motion brought by the Approval Holder to admit new evidence. With respect to that motion, the Court held that it could not entertain new evidence since its jurisdiction was circumscribed by statute: "There is nothing to be gained by receiving fresh evidence that addresses an issue that the appeal court cannot consider. In this case, this court can only consider questions of law."[76]

96. While the Divisional Court states that the Tribunal's conclusion on serious and irreversible harm was based on *no evidence* of either population or traffic data - and no evidence amounts to an error of law[77] - it has already been demonstrated above that the Tribunal had ample expert evidence before it to adequately allow it to come to the conclusion that it did. It is clear that the Divisional Court misconstrued/misapprehended the Tribunal's reasons and ultimately the amalgamation of evidence that the Tribunal relied on to properly come to a finding of serious and irreversible harm.

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[76] Court Decision, MR, Tab 3, p. 27, at para. 16.
[77] Brown, D., *Civil Appeals* (Toronto: Canvasback Publishing Inc., 2012), BoA, Tab 20, p. 3-10.

Issue #4: The Divisional Court Added a Ground of Appeal

97. The Divisional Court held that the Tribunal erred in law because it did not separate out, in the course of its determination on whether the legal test was met in relation to Blanding's turtles, its analysis of the "serious" factor from its analysis of the "irreversible" factor.[78] This, however, was not a ground of appeal raised by any of the Parties.[79] The Divisional Court merely raised this issue at the hearing and, on its own initiative, found that the Tribunal erred in law with respect to this ground.

98. Where an adjudicator decides on a ground that was not put before it or included in the pleadings, the parties are deprived of a decision that is responsive to their proofs and argument. As per Doherty J.A., "it is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings."[80]

99. On the basis that this is a decision-making error, a finding based on a ground that has not been pleaded is reviewable on the correctness standard.[81]

100. Insofar as this ground was not raised by either of the Respondents and there had been no opportunity for the Parties to make written submissions, this portion of the Court Decision should be set aside.

101. Moreover, even if the Divisional Court was correct in adding this ground of appeal on its own initiative, it was wrong to conclude that the Tribunal erred in law by not differentiating between "serious" and "irreversible" harm. Indeed, while the Tribunal may have not have *explicitly* distinguished between serious and irreversible harm with respect

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[78] Court Decision, MR, Tab 3, pp. 31 and 42, at paras. 39 and 91.
[79] Notices of Appeal of the Director and Approval Holder dated August 1, 2013, MR, Tabs 4 and 5, pp. 190-201.
[80] *Antonacci v. Great Atlantic & Pacific Co. of Canada*, [2000] O.J. No. 40 (Ont. C.A.) (QL), BoA, Tab 9, at para. 32; see also *Lion's Gate Homes Ltd. v. Clarke*, [2008] A.J. No. 1372 (Alta. C.A.) (QL), BoA, Tab 10, at para. 11; *Rodaro v. Royal Bank of Canada*, [2002] O.J. No. 1365 (Ont. C.A.) (QL), BoA, Tab 11, paras. 60 and 61; *1030553 Ontario Ltd. v. Pieckenhagen*, [2000] O.J. No. 4016 (Ont. C.A.) (QL), BoA, Tab 12.
[81] *Brown v. Silvera*, [2011] A.J. No. 367 (Alta. C.A.) (QL), BoA, Tab 13, at para. 15.

to the Blanding's turtle, its reasons were nonetheless justified, transparent, and intelligible.[82] Read as a whole, the Tribunal Decision supports the conclusion reached.

102. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* ("*Newfoundland*"), the Supreme Court's reference to an excerpt of Professor Dyzenhaus' article, "The Politics of Deference: Judicial Review and Democracy", is apt here:

> "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, *the court must first seek to supplement them before it seeks to subvert them.* For it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc., then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective.[83]

103. The Supreme Court in *Newfoundland* found that simply because reasons do not contain "all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred", this "does not impugn the validity of either the reasons or the result under a reasonableness analysis". That is to say, a "decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion".[84]

104. In PECFN's respectful submission, the Tribunal's reasons are justified, transparent and intelligible. The Tribunal analyzed a considerable amount of evidence and found that there would be serious *and* irreversible harm to Blanding's turtles. Its reasons in this regard address many factors including, but not limited to, the species' population, traffic at the Project Site, and the ESA Permit. A separate analysis was not required in law or practice.

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[82] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, BoA, Tab 14, at para. 47.
[83] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708 (QL) ("*Newfoundland*"), BoA, Tab 15, at para. 12 (original emphasis).
[84] *Newfoundland*, BoA, Tab 15, at para. 16.

Issue #5: Alleged Breach of Natural Justice and Procedural Fairness Regarding Remedy though Bifurcation was not Requested

105. According to the Divisional Court, the Tribunal also failed to give a proper opportunity to the Parties to address the issue of the appropriate remedy and thereby violated the principles of natural justice and procedural fairness. The Court further held that the Tribunal erred in finding that it was not in a position to alter the decision of the Director, or to substitute its opinion for that of the Director. In PECFN's respectful submission, the Court also erred in coming to these conclusions.

106. The Tribunal has limited discretion. Under s. 145.2.1(4) it may only:

> (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.

107. While the Tribunal is bound by the principle of procedural fairness and natural justice, it is within the discretion of the Tribunal to revoke the decision of the Director without first considering whether to alter the Director's decision or order the Director to take a specific course of action. There is no stipulation in the EPA that the Tribunal must first consider s. 145.2.1(4)(b) and/or (c) before revoking a REA under s. 145.2.1(4)(a).

108. It is important to note that neither the Director nor the Approval Holder sought to make submissions on the appropriate remedy, despite having had many opportunities to do so. As noted at the beginning of these submissions, the Tribunal heard evidence from the Parties from March to May 2013. There had also been three preliminary hearings in February 2013.[85] Written submissions were provided to the Tribunal on June 13, 2013 and final oral submissions were made in person on June 21, 2013. The Tribunal was required to

[85] Tribunal Decision, MR, Tab 4, pp. 58-59, at paras. 29-34 .

release its decision by no later than July 10, 2013, pursuant to a statutory timeline. The Parties were provided with ample "opportunity to present their case fully and fairly".[86]

109. Here, what the Divisional Court is endorsing is for a tribunal to consider an approach never requested of it. A similar situation arose in *McLellan v. Law Society of Upper Canada*, where the appellant, referring to *Sussman Mortgage Funding Inc. v. Ontario*, maintained that the hearing panel erred in failing to consider a permission to resign rather than revocation of a license, a remedy not requested. There, the court found that since the hearing panel properly articulated the applicable test and carefully reviewed the evidence, its conclusion that revocation was the appropriate remedy was reasonable.[87]

110. In this case, the Respondents failed to make submissions on alternative remedies and failed to bring any motions requesting leave to introduce evidence regarding remedy. The Tribunal thoroughly reviewed the evidence that it had received, clearly articulated the test under s. 145.2.1(4) and properly found revocation of the REA to be appropriate.[88]

PART V - RELIEF SOUGHT

111. For the foregoing reasons, the Moving Party respectfully requests leave be granted to appeal from the Divisional Court decision, with costs reserved to the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of April 2014.

Eric K. Gillespie/Natalie Y. Smith
Of Counsel for the Moving Party

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[86] Court Decision, MR, Tab 3, p. 40, at para. 82; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (QL), BoA, Tab 16, at paras. 23-26.
[87] *McLellan v. Law Society of Upper Canada*, [2012] O.J. No. 1493, BoA, Tab 17, at paras. 7-10; *Sussman Mortgage Funding Inc. v. Ontario*, [2004] O.J. No. 4551, BoA, Tab 18.
[88] Tribunal Decision, MR, Tab 4, p. 168-169, at paras. 635-641.

SCHEDULE "A"
LIST OF AUTHORITIES

Cases

1030553 Ontario Ltd. v. Piechenhagen, [2000] O.J. No. 4016 (Ont. C.A.) (QL)

Antonacci v. Great Atlantic & Pacific Co. of Canada, [2000] O.J. No. 40 (Ont. C.A.) (QL)

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 (QL)

Brown v. Silvera, [2011] A.J. No. 367 (Alta. C.A.) (QL)

Dunsmuir v. New Brunswick, [2008 1 S.C.R. 190 (QL)

Housen v. Nikolaisen, [2002] 2 S.C.R. 235 (QL)

Inverhuron & District Ratepayers' Assn. v. Canada (Minister of the Environment), [2001] F.C.J. No. 1008 (QL)

Lewis v. Ontario (Ministry of the Environment), [2013] O.E.R.T.D. No. 70 (QL)

Lion's Gate Homes Ltd. v. Clarke, [2008] A.J. No. 1372 (Alta. C.A.) (QL)

McLellan v. Law Society of Upper Canada, [2012] O.J. No. 1493 (Div. Ct.)

Monture v. Ontario (Ministry of the Environment), [2012] O.E.R.T.D. No. 50 (QL)

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

Ostrander Point GP Inc. v. Prince Edward County Field Naturalists, [2014] O.J. No. 1349 (Ont. C.A.) (QL)

Ostrander Point GP Inc. v. Prince Edward County Field Naturalists, 2014 ONSC 2127 (CanLII)

Re Sault Dock Co. v. Sault Ste. Marie (City), [1972] O.J. No. 2069 (Ont. C.A.) (QL)

Rodaro v. Royal Bank of Canada, [2002] O.J. No. 1365 (Ont. C.A.) (QL)

Schwartz v. Canada, [1996] 1 S.C.R. 235 (QL)

Sussman Mortgage Funding Inc. v. Ontario, [2004] O.J. No. 4551 (Ont. Div. Ct.)

Treatises

Blake, S., *Administrative Law in Canada*, 5th ed. (Markham: LexisNexis Canada Inc., 2011)

Brown, D., *Civil Appeals* (Toronto: Canvasback Publishing Inc., 2012)

Sopinka, J. and Gelowitz, M., *The Conduct of an Appeal*, 3rd ed. (Markham: LexisNexis Canada Inc., 2012)

SCHEDULE "B"
RELEVANT PROVSIONS AND STATUTES

Green Energy and Green Economy Act, S.O. 2009, c. 12

Preamble
The Government of Ontario is committed to fostering the growth of renewable energy projects, which use cleaner sources of energy, and to removing barriers to and promoting opportunities for renewable energy projects and to promoting a green economy.

Environmental Protection Act, R.S.O. c. E. 19

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).

...

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.

...

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).

Appeal to Minister
(2) A party to a hearing before the Tribunal under this Part may, within 30 days after receipt of the decision of the Tribunal or within 30 days after final disposition of an appeal, if any, under subsection (1), appeal in writing to the Minister on any matter other than a question of law and the Minister shall confirm, alter or revoke the decision of the Tribunal as to the matter in appeal as the Minister considers in the public interest. 2005, c. 12, s. 1 (28).

Ontario Regulation 359/09
made under the *Environmental Protection Act*

59 (1) Subject to subsection (2), 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.

Endangered Species Act, S.O. 2007, c. 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).

PRINCE EDWARD COUNTY FIELD NATURALISTS	- and -	**OSTRANDER POINT GP INC., as general partner for and on behalf of OSTRANDER POINT WIND ENERGY LP and the DIRECTOR, MINISTRY OF THE ENVIRONMENT**	**Court of Appeal Nos. M43552 and M43553 Divisional Court Nos. 341/13 and 342/13**
Appellant/Moving Party		Responding Parties	

COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at Toronto

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