**CITATION:** Ostrander Point GP Inc. and another v. Prince Edward County Field Naturalists and another 2014 ONSC #974
**DIVISIONAL COURT FILE NOs.:** 341/13, 342/13, 357/13
**DATE:** 20140220



**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**NORDHEIMER, LINHARES de SOUSA & WHITAKER JJ.**

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| **BETWEEN:** | ) | |
| | ) | |
| OSTRANDER POINT GP INC. as general partner for and on behalf of OSTANDER POINT WIND ENERGY LP and | ) | *D. Hamilton & C. Wayland*, for the appellant, Ostrander Point GP Inc. |
| DIRECTOR, MINISTRY OF THE ENVIRONMENT | ) | *S. Davis, S. Kromkamp & F. Rotter*, for the appellant, Director, Ministry of the Environment |
| Appellants | ) | |
| | ) | |
| **– and –** | ) | |
| | ) | |
| PRINCE EDWARD COUNTY FIELD NATURALISTS | ) | *E. Gillespie & N. Smith*, for the respondent |
| Respondent | ) | |
| **- and -** | ) | |
| | ) | |
| CANADIAN WIND ENERGY ASSOCIATION and PRINCE EDWARD COUNTY SOUTH SHORE CONSERVANCY | ) | *J. Terry & A. Smith*, for the intervener, Canadian Wind Energy Association |
| | ) | *C. Paliare & A. Lokan*, for the intervener, Prince Edward County South Shore Conservancy |
| Interveners | ) | |
| | ) | |
| **AND BETWEEN:** | ) | |
| | ) | |
| PRINCE EDWARD COUNTY FIELD NATURALISTS | ) | *E. Gillespie & N. Smith*, for the appellant |
| Appellant | ) | |
| | ) | |
| **– and –** | ) | |
| | ) | |

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| OSTRANDER POINT GP INC. as general partner for and on behalf of OSTANDER POINT WIND ENERGY LP and | ) | *D. Hamilton & C. Wayland*, for the respondent, Ostrander Point GP Inc. |
| DIRECTOR, MINISTRY OF THE ENVIRONMENT | ) | *S. Davis, S. Kromkamp & F. Rotter*, for the respondent, Director, Ministry of the Environment |
| Respondents | ) | |
| **AND BETWEEN:** | ) | |
| ALLIANCE TO PROTECT PRINCE EDWARD COUNTY | ) | *E. Gillespie & N. Smith*, for the appellant |
| Appellant | ) | |
| **– and –** | ) | |
| OSTRANDER POINT GP INC. as general partner for and on behalf of OSTANDER POINT WIND ENERGY LP and | ) | *D. Cruz & E. Pellegrino*, for the respondent, Ostrander Point GP Inc. |
| DIRECTOR, MINISTRY OF THE ENVIRONMENT | ) | *S. Davis, S. Kromkamp & F. Rotter*, for the respondent, Director, Ministry of the Environment |
| Respondents | ) | |
| **- and -** | ) | |
| CANADIAN WIND ENERGY ASSOCIATION and PRINCE EDWARD COUNTY SOUTH SHORE CONSERVANCY | ) | *J. Terry & A. Smith*, for the intervener, Canadian Wind Energy Association |
| | ) | *C. Paliare & A. Lokan*, for the intervener, Prince Edward County South Shore Conservancy |
| Interveners | ) | |
| | ) | **HEARD at Toronto:** January 21, 22 & 23, 2014 |



**NORDHEIMER J.**:

[1] These reasons deal with three appeals from a decision of the Environmental Review Tribunal dated July 3, 2013. In that decision, the Tribunal allowed an appeal by the Prince Edward County Field Naturalists ("PECFN") respecting a Renewable Energy Approval issued by the Ministry of the Environment that authorized Ostrander Point GP Inc. to construct and

operate nine wind turbines (the "Project") on a site known as Ostrander Point, a 324 hectare parcel of Crown land located in Prince Edward County about fifteen kilometres south of Picton. In the same decision, the Tribunal dismissed the appeal of PECFN as it related to a separate challenge to the Renewable Energy Approval and it also dismissed an appeal by the Alliance to Protect Prince Edward County ("APPEC") respecting the Renewable Energy Approval.

[2] The Tribunal heard evidence from thirty-one expert witnesses along with a number of fact witnesses over the course of a forty day hearing between March and June, 2013. The Tribunal's decision, comprising some one hundred and twenty pages, was released on July 3, 2013. In the end result, the Tribunal revoked the Director's decision granting the Renewable Energy Approval as it found that the Project would cause serious and irreversible harm to an animal species, namely, Blanding's turtle – one of a number of grounds advanced by PECFN. The Tribunal rejected the appeal by PECFN in relation to other animal species and to plant life and it also rejected the appeal by APPEC that asserted that the Project would cause serious harm to human health.

[3] The first appeal is by Ostrander Point GP Inc. and the Director, Ministry of Environment from the decision of the Tribunal to revoke the Renewable Energy Approval on the basis that the Tribunal found that there was serious and irreversible harm to animal life, namely, Blanding's turtle. The second appeal is by PECFN from the dismissal of their appeal by the Tribunal regarding the harm to birds and alvar. The third appeal is by APPEC from the dismissal of their appeal regarding the harm to human health.

[4] At the outset of the hearing of the appeals, the court considered an application by Ostrander to submit fresh evidence on the first appeal. At the conclusion of the submissions on that application, the court advised the parties that the application to admit fresh evidence was dismissed. The parties were further advised that reasons for that decision would be provided as part of the court's reasons on the three appeals. Consequently, I begin by providing the reasons for the dismissal of that application.

Application to admit fresh evidence

[5] The proposed fresh evidence dealt with steps that Ostrander had taken, after the decision of the Tribunal, to lease certain property within the Project site from the Ministry of Natural Resources ("MNR") that was to be used for the purpose of installing access roads to the wind turbines. The purpose behind the lease was to allow Ostrander to obtain control over this property so that it could prohibit access to these roads by members of the public. As will be seen, the issue of the use of the access roads was a concern that was central to the Tribunal's decision to revoke the Renewal Energy Approval.

[6] The decision of the Tribunal revoking the Renewal Energy Approval was based on its conclusion that the wind turbine project would seriously and irreversibly harm a species of animals, namely Blanding's turtle. It is evident from any fair reading of the reasons of the Tribunal that the finding of serious and irreversible harm arose principally, if not entirely, from the Tribunal's conclusion that public use of the access roads would greatly increase the mortality rate of Blanding's turtles. Blanding's turtles would, of necessity, have to traverse the access roads as part of their annual life cycle and thus would be exposed to a greater risk of death because of the increased traffic on the roads.

[7] By way of example, the Tribunal said in its reasons at para. 635:

> As noted above, the Tribunal finds 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 turtle at Ostrander Point Crown Land Block that will not be effectively mitigated by the conditions in the REA.

[8] There are two principle authorities on the test to be applied when deciding whether fresh evidence should be admitted on an appeal. One is the decision in *R. v. Palmer*, [1980] 1 S.C.R. 759 and the other is the decision in *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (C.A.). While those two tests differ in their terms, especially regarding the degree of impact that the fresh evidence must have regarding the decision under appeal, both tests begin with one identical criteria – that the evidence "could not have been obtained by the exercise of reasonable diligence" prior to the hearing at first instance.

[9] In my view, Ostrander has failed to establish that the information contained in the fresh evidence could not, with reasonable diligence, have been put before the Tribunal. It is clear from the record that the issue of harm to Blanding's turtle was one of the issues with which the Tribunal was going to have to contend. While it was not the only issue that the Tribunal had to grapple with, it was one of those issues. Ostrander knew that it was an issue and it knew that the issue of harm to Blanding's turtle arising from the access roads would be part of the concern.

[10] I reach that conclusion for two principal reasons. One is that Ostrander was engaged in discussions about the access roads prior to even obtaining the Renewable Energy Approval. There is email correspondence between Ostrander and the MNR going back to 2010 in which the issue of fencing or gating the access point to the Project site is discussed. There is also correspondence dating back to early 2011, again with the MNR, in which public use of the access roads is discussed. As will be seen when I come to deal with appeal #1, the MNR is of importance to this matter because of its role under the *Endangered Species Act, 2007*, S.O. 2007, c. 6, particularly its authority to issue permits that allow a person to engage in activities that would otherwise be prohibited under the *ESA*.

[11] The other reason relates to the state of Ostrander's knowledge regarding the access roads and their possible impact on Blanding's turtle. On the record before us, it is difficult to accept that Ostrander did not know that possible harm to Blanding's turtle was an issue prior to the Tribunal hearing. However, even if it did not, Ostrander certainly knew that it was an issue by the time of the hearing because both its experts and the respondent's experts were prepared to, and did, address that issue during the course of the lengthy hearing before the Tribunal.

[12] In my view, it is not open to Ostrander to suggest, as it now does, that it was caught by surprise by this issue and, consequently, there was no reason for Ostrander to believe that it ought to take steps to address that issue prior to, or during the course of, the hearing. While the conclusion that the Tribunal reached on this issue may have not been what Ostrander was expecting, that is a very much different thing than asserting that the issue was not a live one before the Tribunal.

[13] 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. As a result of the Tribunal's adverse conclusion, Ostrander has now taken steps to obtain control over the property on which the access roads will be built so that they can prohibit public access to those roads and thereby eliminate the increased risk found by the Tribunal. There is nothing in the record before us that would establish that the efforts that the applicant undertook with the MNR after the Tribunal's decision could not have been undertaken before the Tribunal's decision and then put before the Tribunal for its consideration as a proposed mitigation measure.



[14] Apart from the due diligence issue, there is another basis for refusing the admission of the fresh evidence. This second basis involves a novel issue in this case that arises from the nature of the appeal to this court. Once the Tribunal has reached a decision, there are essentially two appeal routes set out in s. 145.6 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19. The section provides that a party to the hearing may appeal to this court "on a question of law". The section also provides that a party to the hearing may appeal to the Minister of the Environment "on any matter other than a question of law".

[15] The jurisdiction of this court to receive fresh evidence is governed by s. 134(4)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. That section reads:

> Unless otherwise provided, a court to which an appeal is taken may, in a proper case,
>
> …
>
> (b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs;

[16] An appeal court can only receive fresh evidence that is relevant to an issue over which the appeal court has jurisdiction. 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. We have no jurisdiction to consider questions of fact or questions of mixed fact and law unless they amount to an error of law: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 27.

[17] Ostrander seeks to overcome this apparent obstacle by asserting that a palpable and overriding error of fact amounts to a question of law. In my view, none of the authorities relied upon by Ostrander sustain that assertion. In the normal instance, all that a palpable and overriding error of fact does is to eliminate the deference that appellate courts accord to factual findings of trial courts. It does not change the nature of the question that is at issue. It is still a question of fact.

[18] However, even if Ostrander's core assertion was correct, it would not apply to the circumstances of this case. What the applicant has essentially done here is to take a factual concern upon which the Tribunal relied to reach its conclusion, entered into arrangements to change the underlying facts after the Tribunal's decision is known and then submit that the factual finding for the Tribunal's conclusion is in error. Indeed, the applicant goes further than that because it submits that the Tribunal made not just a simple error but a palpable and overriding error. To make that submission on a set of facts that the applicant has changed after the fact is neither fair nor reasonable.

[19] When asked whether there was any existing authority where an appellate court had received fresh evidence in a situation where the appellate court's jurisdiction was confined to a question of law, Ostrander could point to only two cases. One is *R. v. Budai,* 2001 BCCA 349.[1] In that case, the British Columbia Court of Appeal, on a Crown appeal, received fresh evidence that established that a juror had engaged in improper conduct giving rise to a reasonable apprehension of bias on the juror's part. In doing so, the court considered whether the issue of possible bias constituted a question of law since the Crown was restricted to appeals on questions of law alone. The court concluded that the issue was a question of law because the issue of bias went directly to the issue of jurisdiction.

[20] In my view, the situation in *Budai* is not in any way comparable to the situation here. I do not doubt the conclusion, reached in *Budai,* that the requirement of a fair and impartial trier of fact is a question of law. There is no equivalent issue here, however. Rather, here the issue is whether the Tribunal reached a factual finding that was open to it. Ostrander essentially seeks to

[1] leave to appeal to S.C.C. refused

attack that finding of fact by adding to the evidentiary record. That is not something that Ostrander should be permitted to do.

[21] The other case is *R. v. B.E.A.*, 2013 ABCA 191. That decision involved a single judge of the Alberta Court of Queen's Bench deciding on the test for seeking leave to appeal on a summary conviction appeal. It does not assist at all in the issue that is before this court.

[22] I conclude that this court cannot receive evidence regarding a material change of fact given the appellate jurisdiction of this court is confined to a question of law. The fresh evidence does not address whether the Tribunal made an error in law in reaching the conclusions that it did. Rather, it is an attempt to undermine the factual conclusions reached by the Tribunal or to show that the facts have sufficiently changed that the Tribunal's conclusions are now unreliable.

[23] However one wishes to characterize the effect of the proposed fresh evidence, it is clear that it is directed to matters of fact and those matters are not within the jurisdiction of this court on this appeal. Rather, that jurisdiction, by way of appeal, rests solely with the Minister. It may be open to Ostrander to rely on these changed facts in any appeal to the Minister to reverse the conclusion of the Tribunal. It is not open to Ostrander to rely on them for the purposes of this appeal.

[24] For these reasons, the application for the admission of fresh evidence was dismissed.

Appeal #1 – serious and irreversible harm to Blanding's turtle

[25] Turning then to the first appeal, the Tribunal's jurisdiction to review a Renewable Energy Approval is found in s. 145.2.1(2) of the *EPA*, which reads:

> 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.

On this appeal, it is subsection s. 145.2.1(2)(b) that is applicable, namely, serious and irreversible harm to animal life.

[26] Section 145.2.1 goes on, in subsection 3, to provide:

> 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).

[27] Before turning to the first issue in this appeal, I should address the appropriate standard of review. There is agreement between the parties that the standard of review regarding the Tribunal's interpretation of the test under s. 145.2.1(2) is that of reasonableness. The parties differ, however, over the standard of review for the Tribunal's interpretation of the *ESA* as it relates to the *EPA*. The appellants submit that the standard of review is correctness and the respondent submits that the standard of review is reasonableness. In terms of the aspect of the appeal regarding the remedy that was ordered, there is no standard of review applicable to an alleged breach of the rules of natural justice: see *London (City) v. Ayerswood Development Corp.*, [2002] O.J. No. 4859 (C.A.), at para. 10.

[28] On the one issue where the parties disagree, it is my view that the appropriate standard of review is correctness. I do not agree with the submission of the appellants that the *ESA* is not a statute closely connected to the Tribunal's function under the *EPA*: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 54. Indeed, as will become apparent in the course of my reasons on this appeal, the interrelationship between the Tribunal's function under the *EPA* and the impact of the *ESA* is of considerable importance to the analysis that the Tribunal was required to undertake and the decision that it was mandated to address.

A. The finding of serious and irreversible harm

[29] The Tribunal concluded that PECFN had demonstrated that the Project would cause serious and irreversible harm to animal life, namely, Blanding's turtle. It is therefore relevant to set out some background information regarding Blanding's turtles.[2]

[30] Blanding's turtles are a medium-sized freshwater turtle largely confined to the Great Lakes Basin. Approximately 20% of the Blanding turtle's global range is contained within Canada, particularly, Ontario. In its Canadian range, the Great Lakes/St. Lawrence population of the Blanding's turtle is located throughout southern and south-central Ontario as far northwest as the Chippewa River in Algoma West and continuing eastward across Ontario into extreme south-western Quebec. There is also a population of Blanding's turtles in Quebec around Gatineau Park and there is a small population in Nova Scotia. Populations of Blanding's turtles can also be found in the United States. They are located in the northern states from Nebraska east to Ohio and from Michigan south to Missouri. There are also small populations in New York, Massachusetts, New Hampshire and Maine.

[31] It is clear from the evidence that was placed before the Tribunal that no one knows the exact size of the various populations of Blanding's turtles. In its report, the Committee on the Status of Endangered Wildlife in Canada offered a "crude guess" that the population of Blanding's turtles in Ontario was about 10,000. The principal predators of Blanding's turtles are raccoons, skunks, foxes and coyotes that attack the turtles' nests. Adult turtles have few predators because of the strength of their shell and their overall size. As may become apparent, it is of some importance, for the purposes of this appeal, to know that female turtles are attracted to the gravel shoulders of roadways for suitable nesting habitat. This increases the risk of mortality to nesting females and their hatchlings as they are often struck and killed by vehicles using the roadways. The Project involves the construction of new roadways within the Project's site.

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[2] Much of this background information is drawn from Assessment and Update Status Reports on the Blanding's Turtle prepared by the Committee on the Status of Endangered Wildlife in Canada that were marked as exhibit #36 at the hearing.

[32] In addition to these threats, Blanding's turtles are also susceptible to poaching by humans because they are one of the more colourful and pleasant species of turtles. Consequently, humans desire them as pets. Because of their desirability, a Blanding's turtle can attract a relatively high price and, consequently, the "return" for poachers is even more appealing.

[33] Blanding's turtle has been listed as threatened in Ontario since 2004. The population in Nova Scotia was designated as endangered in 2000. The population in Quebec is also designated as threatened. The International Union for Conservation of Nature (part of the United Nations Environment Project) changed the status of Blanding's turtle to endangered in 2011.

[34] There were a number of different "threats" to the Blanding's turtles identified by PECFN that it contends arise from the Project. These included vehicular mortality, poaching and predators. It is apparent from a fair reading of the reasons of the Tribunal that road impacts collectively were the main, if not only, threat that lead to its conclusion that the Project would cause serious and irreversible harm to the Blanding's turtle.

[35] It seems unquestionable from the evidence that was placed before the Tribunal that there was a risk of serious harm to Blanding's turtle from the Project. Given the fragile status of 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. The real issue is whether that harm was also irreversible.

[36] The Tribunal set out the legal test governing its jurisdiction over this issue at the outset of its reasons. It correctly stated that PECFN bore the onus of proving that engaging in the Project in accordance with the Renewable Energy Approval will cause serious and irreversible harm to plant life, animal life or the natural environment. The test can be broken down into a number of different requirements that must be met before an overall conclusion of serious and irreversible harm can be reached. Those requirements are:

(i) the person seeking the review, in this case PECFN, bears the onus of proof;
(ii) the onus of proof is on a balance of probabilities;

(iii) in considering the effect of engaging in the Project, it must be assumed that the Project will be carried out in accordance with the Renewable Energy Approval including all of its terms and conditions;
(iv) the Project must result in serious harm, and;
(v) the serious harm must be irreversible.

[37] The Tribunal noted, at para. 186 of its reasons, that the test of "serious and irreversible harm" had not been considered in depth by previous decisions of the Tribunal. To the degree that the test had been considered in previous decisions, it had been found, and the Tribunal in this case agreed, that the issue of "serious and irreversible harm" must be interpreted on a case by case basis. The Tribunal also found that the test cannot be interpreted in a manner that would allow it to either always be met or never be met.

[38] I do not quarrel with any of those observations of the Tribunal. Obviously the facts in each case will determine if the test is met. It is equally obvious that a test cannot be interpreted in a manner where it can never be met or where it is always met. Either of those results would have the test be no test at all. None of this, however, excuses the Tribunal from explaining how, in any given case, the test is either met or not met. The reasons must "allow the reviewing court to understand why the Tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* [2011] 3 S.C.R. 708, at para. 16.

[39] One of the first problems relating to the Tribunal's reasons on this issue is that the Tribunal did not separate out, in the course of its determination of whether the test was met in relation to Blanding's turtle, its analysis of the serious harm factor from its analysis of the irreversible harm factor. Rather, the Tribunal blended its analysis when considering whether the test was met. This approach would be problematic in and of itself since the two factors address very different issues but it becomes even more so when one considers that the Tribunal noted, in reference to one of PECFN's experts whose evidence the Tribunal appeared to prefer, that the expert "does not distinguish between 'serious' and "irreversible'". While that approach may have been open to the expert, it was not one open to the Tribunal. The combination of these two matters leads to the concern that the Tribunal simply followed the approach of this expert and, in doing so, failed to make a distinction between the two elements of the test. Whether that is what

happened or not, what is clear is that the Tribunal's reasons do not reveal a separate and intelligible analysis on the issue of irreversible harm that this court can review. As a result, this court is essentially left guessing as to what the analysis was on this issue.

[40] That concern then leads to another. Part of establishing that any harm is irreversible will generally require a determination of the population of the species at risk. That determination will, in turn, require a determination of the geographic area that is relevant to that population. On this latter point, the Tribunal said, at para. 203 of its reasons:

> In this case, the Tribunal finds PECFN's "declining species" interpretation of the phrase "serious and irreversible harm" is too broad, and the "population viability" interpretation of the Director and the Approval Holder, when used for all species, is too restrictive.

The Tribunal went on to decide that the scale of the population used by Stantec in the preparation of its Blanding's Turtle Report was the appropriate scale to be used.[3] Stantec's scale was the population within the study area (i.e. the Project site) and surrounding landscape. The Tribunal noted that this population appeared to accord with the population referenced by the experts for both Ostrander and PECFN.

[41] The Tribunal repeated that the issue must be assessed on a case by case basis. The Tribunal added its view that when dealing with plant life, animal life or a feature of the natural environment that has been identified as being at risk, "a decline in the population or habitat of the species" will generally be a factor with considerable weight in deciding whether serious and irreversible harm will occur. This observation begs the question of the proper population to consider.

[42] While these considerations may all be perfectly fine when stated in general terms, it is in the application of these considerations in the individual case where difficulties will arise. It then becomes even more important that the analysis of the Tribunal be set out in clear and unambiguous terms so that the thought processes of the Tribunal can be followed. Unfortunately, I do not find the reasons in this case rise to that standard for a number of reasons.

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[3] This refers to a report prepared by Stantec Consulting Ltd. in 2009 for the Ministry of Natural Resources entitled Blanding's Turtle Habitat Assessment Ostrander Point Wind Energy Park.

[43] First, the Tribunal said that it would consider only the local population resident on the site of the Project and on the "surrounding landscape" in considering whether irreversible harm will occur. It then observed that there was no evidence before the Tribunal as to the size of the population of Blanding's turtles at the Project site or otherwise within Ontario. Specifically, the Tribunal said, at para. 356:

> No data was available on the size of the Blanding's turtle population, whether on site, in the surrounding area, or in Prince Edward County as a whole.

[44] 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. If, for example, the affected population at the Project site is 5,000 and the increased mortality from the Project amounts to five additional deaths a year that would seem to give rise to a much different evaluation as to whether the population decline is irreversible over the life of the Project as opposed to a situation where the population is 100 and the additional loss per year is five. 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. The Tribunal implicitly seems to acknowledge this point because it noted in passing, at para. 354 of its reasons:

> Dr. Shilling agreed that, if there were three Blanding's Turtles at the site and one of them got killed, that would be serious and irreversible harm.

[45] In response to this issue, the Tribunal said, at para. 358:

> 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 the 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.

[46] With respect, that conclusion can only be correct if one assumes that any increase in the mortality rate is both significant and amounts to irreversible harm – a conclusion that would run afoul of "the test is always met" interpretation that was expressly eschewed by the Tribunal. Otherwise, one needs to know the size of the population not only on the site but on the surrounding landscape in order to properly evaluate the significance of the harm (i.e. the increase in the mortality rate) and thus whether it is truly irreversible. The Tribunal did not have that data.

[47] PECFN's response to this issue is to contend that requiring such data would, in effect, require PECFN to produce evidence amounting to a "scientific certainty" in order to establish irreversible harm. I do not agree. I am not suggesting that mathematical precision was necessary regarding the population size of Blanding's turtle within the appropriate geographic area. What I am saying is that there had to be some level of data respecting the population being affected by the Project in order to allow at least an order of magnitude to be calculated before a proper finding could be made on the issue of irreversible harm.

[48] 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 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. In this regard, two pieces of evidence are worth mentioning, both of which are found in the Tribunal's reasons.

[49] One is the finding by the Tribunal, at para. 360 of its reasons, that the mitigation measures to be employed during construction "would be effective to prevent serious and irreversible harm" during that phase. It distinguished that phase from the post-construction phase again without any information regarding what degree of increase there might be in the use of the roads post-construction. The other is that the Tribunal noted that PECFN's own expert on

road mortality gave evidence that "research on Blanding's turtle indicates that a population could sustain a 2 to 5 per cent mortality". Without any data on the extent of road mortality currently experienced on the site (that would again require data on the size of the population) and without any data on the increased traffic, and therefore without the ability to project any increase in the mortality percentage, it would not seem possible to determine whether the resulting mortality percentage falls inside or outside that range.



[50] Third, as part of the Project, Ostrander was required to, and did, obtain a permit under the *ESA*. The ESA permit expressly permits Ostrander to "kill, harm, harass, capture, possess and transport Blanding's Turtle" subject to the conditions of the permit. Those conditions require Ostrander to:

(a) set aside 37.65 hectares of property, outside of the Project site, to provide, restore and actively maintain habitat for Blanding's turtle subject to a 20 year conservation easement;
(b) prepare and implement a Property Management Plan for the site;
(c) report all injured or dead Blanding's turtles;
(d) cease construction or maintenance activities within 30 metres of any found Blanding's turtle;
(e) establish a 5 metre buffer zone around any nest site found and report to the MNR;
(f) strategically create a nesting habitat for Blanding's Turtle during or immediately after the construction of access roads on site;
(g) twice yearly, report all observances of Blanding's turtles;
(h) develop an Impact Monitoring Plan to ensure, among other things, that the required restoration and mitigation measures are undertaken and maintained;
(i) not conduct any construction activities, vegetation clearing or road maintenance between May 1 and October 15 of any year;
(j) install and maintain speed limits and speed bumps on the access roads; and
(k) install Educational signage and Turtle crossing signs.

[51] While the Tribunal makes reference to the ESA permit in the course of its reasons, the Tribunal appears to have been dismissive of its relevance. For example, at para. 316 of its reasons, in relation to the ESA permit, the Tribunal said:

> This mitigation measure is echoed in the *ESA* Permit, which is a separate instrument from the REA. Although the Approval Holder is bound by the *ESA* Permit, a contravention of which may lead to prosecution under the *ESA*, for the Tribunal's purposes in this analysis it is simply evidence relevant to conditions to the REA, which must be assessed as would any other condition. The panel notes

> that neither of the MNR witnesses who testified with respect to the *ESA* Permit are Blanding's turtle experts. [emphasis added]

[52] It is not clear to me what the Tribunal was intending to convey from the last observation. The witnesses from the MNR came to explain the permit process. They were not being offered as experts on Blanding's turtles although one of the witnesses was qualified as an expert on reviewing the impacts of proposed projects on at risk species. If the Tribunal was intending to suggest that the lack of specific expertise of these two individuals in some fashion undermined the importance of the ESA permit, then, with respect, that is an unfair attack on the permit process. The permit process did not involve just these two witnesses. The evidence was that the permit process involved a number of people within the MNR, including Blanding's turtle experts.

[53] In any event, having said that the ESA permit was evidence relevant to conditions in the Renewable Energy Approval, it is not then apparent that the Tribunal gave any real consideration to the effect of the ESA permit in terms of the Tribunal's overall analysis. Indeed, it is noteworthy that in the penultimate paragraph of its reasons, the Tribunal set out the elements that it considered were important in determining whether engaging in the Project in accordance with the Renewable Energy Approval "will cause serious and irreversible harm". The ESA permit does not appear among the seven elements that the Tribunal identified.

[54] Some background to the ESA permit process will be helpful in assessing the importance of the permit to the issue that was before the Tribunal. Section 9 of the *ESA* prohibits any person from harming a species at risk. There is an exception to that prohibition, however. Section 17 of the *ESA* authorizes the Minister of Natural Resources to grant a permit to a person to engage in an activity that would harm a species at risk. However, before issuing a permit under s. 17, the Minister must be satisfied of a number of things, as set out in s. 17(2), including:

> (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 …

[55] As earlier noted, witnesses from the MNR gave evidence before the Tribunal about the permit process. In terms of "overall benefit", the evidence was that for there to be an overall benefit, the species "has to be better off than before the project started". The permit therefore requires not only that steps be taken to minimize the permitted harm but also to ensure that actions are taken that will result in an overall benefit to the species. It is also important to note that in looking at the question of overall benefit, one is not restricted to the site where the harm is permitted to occur. Rather, one may look at all locations in Ontario to determine the benefit achieved. Also, overall benefit is not simply a question of looking at maintaining or increasing the population of the species directly. An overall benefit may be achieved through the commissioning of studies that would otherwise not occur that may, in turn, increase the protection and recovery of the species.

[56] It should also be understood that the goal of overall benefit is not one that can be achieved at the outset of the Project. To the contrary, the process of providing an overall benefit is an ongoing one. That is why the ESA permit requires a monitoring plan as one of its conditions. Problems that were not evident at the time of the commencement of the Project may be identified later and steps then taken to ensure an overall benefit. Further, the ESA permit is not permanent. It is subject to being amended or revoked if the Minister determines that it is necessary to do so to prevent jeopardizing the survival or recovery of the species named in the permit. Section 17(7) of the *ESA* reads, in part:

> The Minister may,
> …
> (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 …

[57] It must be kept in mind that the ESA permit is directed at permitting a person to cause harm to a listed species such as Blanding's turtle of the very type that the Tribunal was duty bound to consider in terms of its statutory mandate. The fact that Ostrander obtained permission from the MNR to undertake that harm was, consequently, a matter that the Tribunal should have carefully evaluated in terms of its impact on the issue of serious and irreversible harm to the species.

[58] I pause at this juncture to address one submission made by Ostrander. Ostrander submits that the Tribunal had no jurisdiction to consider the issue of Blanding's turtle mortality given that it had obtained an ESA permit. I do not accept that submission. I have already outlined the Tribunal's statutory mandate under the *EPA*. There is nothing either in the *EPA* or in the *ESA* that shows any intention to carve out of the Tribunal's mandate matters that are subject to the *ESA*. Had the Legislature intended that result, it could easily have said so.

[59] Nevertheless, the Tribunal could not ignore the ESA permit nor could it push it to the side in terms of its role in deciding whether there would be serious and irreversible harm from the Project. The ESA permit was relevant and significant evidence relating directly to the issue that the Tribunal had to decide. In addition to that reality, the Tribunal was also required to consider how its decision might impact on other steps that the Government had taken to address problems arising from the Project. To the degree that there is overlap between the role of the Tribunal under the *EPA* and that of the *ESA*, and there clearly is, the Tribunal was obliged to consider any possibility for conflict between the two statutory regimes in terms of the manner in which they addressed the same subject matter. The Tribunal was obliged to apply its statutory mandate in a manner that would avoid any such conflict, if possible. This need arises, not only from the application of a common sense approach to decision making, but also from the general rule of statutory interpretation that statutes should be interpreted in a fashion that results in their harmonious operation. Albeit in a difference context, Iacobucci J. reiterated this principle in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867 where he said, at para. 52:

> As between the *Fisheries Act* and the grant of admiralty jurisdiction in the *Federal Court Act*, such a result does not comply with the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter.

[60] It should therefore have been a matter of pause for the Tribunal when it found itself heading towards a conclusion that appeared to be directly at odds with the conclusion reached by another arm of government on the same issue. While such a result might be required in certain circumstances if the evidence demands it, it is a result that the Tribunal should have striven to avoid and one that it should only have reached if no other viable alternative existed. It does not appear that the Tribunal subjected their analysis of the issue to that degree of critical review.

[61] This is especially problematic given that the Renewable Energy Approval expressly required Ostrander to obtain all necessary authorizations under the *ESA*. Given the statutory mandate that the Tribunal had to apply was to evaluate the Project on the assumption that it would be undertaken "in accordance with the renewable energy approval", the Tribunal was duty bound to consider that the Renewable Energy Approval would be operating under the conditions established by the ESA permit. The ESA permit was, therefore, a significant piece of evidence for the Tribunal to consider.

[62] I will pause again, this time to address one submission made by the intervener, Prince Edward County South Shore Conservancy. It asserts that the ESA permit is simply a non-prosecution permit, that is, it shields the holder of the permit from prosecution for undertaking acts that would otherwise be prohibited by the *ESA*. From a very narrow perspective, that is true but this submission fails to give proper consideration to the role that the ESA permit has in the overall scheme of the Renewable Energy Approval. Given the important link between the two, the ESA permit, in a case like the one here, takes on a much greater significance than just protecting against prosecution. Not only do the conditions attached to the ESA permit expressly address matters going to the manner in which the permit holder is authorized to commit the harm, and the concurrent obligations that arise from that authorization, the fact that the Renewable Energy Approval ties its performance to the obligations imposed by the ESA permit means that the ESA permit directly affects the performance required under the Renewable Energy Approval. As a consequence, an Approval Holder such as Ostrander cannot comply with

the Renewable Energy Approval without also complying with the conditions of the ESA permit. The effect of that compliance must therefore be of importance in evaluating the magnitude of harm that will result from the Project. The magnitude of harm, in turn, goes directly to the issue of whether the harm is irreversible.

[63] The dismissive attitude of the Tribunal to the ESA permit appears to have arisen for two main reasons. One was that certain required parts of the ESA permit were not before the Tribunal and the other was the distinction in the scale of the populations considered.

[64] In terms of the first reason, the Tribunal said that it could not evaluate the effectiveness of either the Property Management Plan or the Impact Monitoring Plan called for in the permit because neither of those plans had been placed before the Tribunal. This appears to have been the result of the fact that neither plan had been finalized.

[65] It was fair for the Tribunal to observe that it could not evaluate plans that it did not have. However, that observation did not preclude the Tribunal from considering the information that the Tribunal did have with respect to the ESA permit especially given the important interrelationship between the role of the Tribunal and the role of the *ESA*.

[66] The Tribunal did note that the Impact Monitoring Plan had certain minimum elements that it had to contain. These minimum elements are set out at para. 334 of the Tribunal's reasons. The Tribunal was therefore in a position at least to evaluate how those minimum elements would impact on the issue of serious and irreversible harm. Indeed, the Tribunal was critical about some of those elements at paras. 336-337 of its reasons.

[67] In offering that criticism, though, the Tribunal did not consider the role of the MNR in policing compliance with the conditions of the ESA permit. In my view, the Tribunal ought to have assumed that the MNR would properly and adequately monitor compliance with the ESA permit and would take steps to ensure that any failings in compliance were addressed. If the Tribunal does not approach the ESA permit in this fashion, two problems arise. One is that the Tribunal then appears to be sitting on appeal from the decision of the MNR to issue the ESA permit and is thus assuming a jurisdiction that is not given to it, either under the *EPA* or under

the *ESA*. The other, which follows from the first, is that the Tribunal then sets itself up for conflict with the *ESA* process and thus fails to adopt an interpretation of the statutes that leads to their harmonious and consistent application.

[68] Put another way, the Tribunal ought to have accepted the ESA permit at face value. It ought to have accepted that the requirements of the permit including the Property Management Plan and the Impact Monitoring Plan would be put in place as contemplated by the permit and that those plans and the conditions of the permit would be properly and adequately monitored by the MNR. With those assumptions in place, the Tribunal should then have considered the impact of the ESA permit on the issue of irreversible harm. This the Tribunal failed to do.

[69] In terms of the second reason, the Tribunal attempted to distance its decision from the result of the ESA permit process on the basis that the *ESA* requires a consideration of the population "as a whole in Ontario" whereas for its purposes the Tribunal was only considering the population on the Project site and the surrounding landscape. Indeed, this distinction lead the Tribunal to say, at para. 343:

> 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 turtle.

The issue then becomes whether this distinction is a substantive one or merely a theoretical one.

[70] As I have already said, 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*. The Tribunal had to reach its own conclusion regarding its statutory mandate. However, in these circumstances, the Tribunal was obliged to explain how the fact that the MNR had concluded under the *ESA* that the Project would lead to an overall benefit to Blanding's turtle (notwithstanding the harm that would arise from the Project) could mesh with its conclusion that the Project would cause irreversible harm to the same species. This is especially so given that the evidence that was before the Tribunal demonstrated that the Great Lakes/St. Lawrence population of Blanding's turtle, located throughout southern and south-central Ontario, is genetically homogeneous. No witness suggested that the local population in Prince Edward County was a distinct or separate genetic

subspecies. Further, when Blanding's turtle was classified as threatened by the Committee on the Status of Species at Risk in Ontario, it was so classified as a single species without distinction based on geographic location.

[71] By issuing the ESA permit, the MNR had determined that the Project, operated in accordance with the conditions contained in the permit, would result in an overall benefit to Blanding's turtle in Ontario. The Tribunal determined that the Project, operating within the same strictures (since the ESA permit is part of the Renewable Energy Approval), would give rise to serious and irreversible harm to Blanding's turtle at the Project site and the surrounding landscape. The apparent conflict between those two results is obvious. Yet no explanation is given by the Tribunal as to how that conflict was unavoidable nor is there any clear identification of the evidence that would necessitate such conflicting results.

[72] This problem arises, at least in part, because the statutory test under s. 145.2.1(2) of the *EPA* does not stipulate the geographic boundaries to be considered in applying the test. That absence may be necessary because the geographic boundaries will vary from case to case. Nonetheless, it does immediately set up the prospect for conflict between the *EPA* and the *ESA*. If the Tribunal had pointed to some unique feature that could explain how the species could be benefitted as a whole in Ontario from the Project but irreversibly harmed in Prince Edward County, the conflict might be resolved. But the Tribunal provided no such explanation. The only apparent resolution of this conflict would be to accept that any increase in mortality of Blanding's turtles on the Project site equates to irreversible harm. It would follow from that conclusion, however, that a Renewable Energy Approval that results in any increase in mortality to an "at risk" species must result in both serious and irreversible harm. That conclusion, in turn, means that the test in such circumstances will always be met – a result, as I have already noted, that the Tribunal expressly rejected as the proper result for general application.

[73] This issue necessarily circles back to the lack of data on the population size. If there is a significant difference between the population of Blanding's turtles on the Project site and surrounding landscape, on the one hand, and that within Ontario as a whole, on the other hand, then that might provide a foundation for the distinction that the Tribunal drew between the *ESA* process and the Tribunal's conclusion. As I have already noted, though, no such data was before

the Tribunal. The Tribunal appears to have been aware of the importance of this data since it said, at para. 344 of its reasons:

> The analysis of serious and irreversible harm is closely linked to the size of the population considered.

No effort was made by the Tribunal to rationalize that statement with the complete absence of evidence regarding the population of Blanding's turtles, either within the Province as a whole or within the Project site and the surrounding landscape.

[74] In my view, the errors that I have identified in the Tribunal's reasons are both individually and collectively fatal to the Tribunal's conclusion. The errors include making findings with no factual foundation, failing to interpret and apply the *ESA* harmoniously with the *EPA* and a failure to separately consider the issue of irreversible harm. All of these errors go directly to the reasonableness of the decision reached. As was observed by Bastarache and LeBel JJ. in *Dunsmuir v. New Brunswick*, at para. 47:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [emphasis added]

[75] As a consequence of these errors, I conclude that the decision reached by the Tribunal was unreasonable in the circumstances.

B. The remedy imposed

[76] The last issue, on this first appeal, relates to the remedy ordered by the Tribunal. I address this issue notwithstanding my conclusion on the main aspect of the appeal because, even if the Tribunal's analysis and conclusion regarding irreversible harm was reasonable, the issue of the remedy granted raises a separate and important issue.

[77] The Tribunal revoked the decision of the Director to issue the Renewable Energy Approval. The range of available remedies is set out in s. 145.2.1(4) of the *EPA* that reads:

> 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.

It will be seen that the remedy imposed by the Tribunal in this case is the most extreme remedy of the ones available to it.

[78] Having found serious and irreversible harm to Blanding's turtle, the Tribunal was required to determine what an appropriate remedy was. In its reasons on this issue, the Tribunal first said, at para. 637:

> The Tribunal received no submissions on an appropriate remedy under s. 145.2.1(4) of the *EPA*.

[79] This observation itself raises a problem. There were many different attacks launched against the Renewable Energy Approval. There was an allegation of harm to human health, to Blanding's turtles, to birds, to bats, to butterflies and to alvar. It would, of course, be unknown to the parties whether any of these allegations of harm would be made out and, if so, which ones. It follows from that practical reality that the nature of the appropriate remedy might well vary, perhaps considerably, depending on the harm that was found to exist. For example, the appropriate remedy for harm to human health might be very different from the appropriate remedy for harm to alvar.

[80] Given that reality, it would have been prudent for the parties to have suggested to the Tribunal at the outset that it might be advantageous for all concerned to deal with the harm issue first and then return to the Tribunal to address the issue of remedy once the harms, if any, were found by the Tribunal. This did not happen.

[81] That said, the lack of a request from any of the parties did not prevent the Tribunal from adopting that process. Having reached the conclusion that serious and irreversible harm to Blanding's turtle had been demonstrated, but that none of the other alleged harms had been, the Tribunal could have released its findings on the threshold issues and then invited the parties to make submissions on the appropriate remedy. This also did not happen. While the determination of the procedure to be followed is a matter within the discretion of the Tribunal, whatever procedure is adopted must provide the necessary degree of procedural fairness.

[82] The factors that determine the content of the duty of fairness are set out in *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at paras. 23-26. In my view, a review of those factors establishes that there was a duty on the respondent to provide all parties with "the opportunity to present their case fully and fairly". That opportunity included allowing the parties a chance to make submissions on remedy before any decision was made, especially where the remedy that is decided upon is potentially of such consequence, namely, revoking the Director's decision and essentially ending the Project.

[83] On this issue, PECFN asserts that there was an obstacle to the Tribunal adopting such an approach and that is found in the legislated requirement that the Tribunal decide the appeal within six months. Section 145.2.1(6) of the *EPA* reads:

> 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.

[84] One must then turn to the applicable regulation which is O. Reg. 359/09. Section 59(1) of that regulation provides that the prescribed period of time for the purposes of s. 145.2.1(6) is six months from the day that the notice is served upon the Tribunal. That six month period is not absolute, however. Section 59(2) of O. Reg. 359/09 reads:

> 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.



[85] It is clear from the provisions of s. 59(2) of O. Reg. 359/09 that the Tribunal had the authority to adjourn the proceeding to permit submissions to be made on the appropriate remedy without running afoul of the six month time limit. The Tribunal could have done this on its own initiative if the Tribunal considered it necessary to "secure a fair and just determination of the proceeding on its merits". It was therefore entirely within the authority of the Tribunal to have provided an opportunity to the parties to make submissions on the issue of remedy and the Tribunal should have done so in these circumstances.

[86] Even aside from that issue, however, there is also a problem with the Tribunal's conclusion on the appropriate remedy. In considering this issue, one must keep in mind that the core concern of the Tribunal regarding its finding that the Project would cause serious and irreversible harm to Blanding's turtle was the issue of road mortality. I previously addressed that point in my consideration of the fresh evidence application. The Tribunal reinforced that concern when it came to the issue of remedy when it said in its reasons, at para. 640:

> Whether or not Crown land should be closed to public access in order to allow a wind development to proceed is a value judgment that is not within the purview of the Tribunal to make.

[87] Closure of the access roads was, of course, one way of eliminating the increased harm to Blanding's turtles from road mortality arising from public access to those roads. The Tribunal's conclusion that such mortality would be increased because of the additional access roads, which the public would be free to use, was of central importance to the Tribunal's conclusion that road mortality would increase for the Blanding's turtles. Putting aside for the moment the evidentiary

problems associated with that conclusion, that I have already outlined, it remains the fact that this concern lead directly to the Tribunal's conclusion.

[88] One might think, given that concern, that the Tribunal would have concluded that the appropriate remedy was one that focussed on eliminating the increased risk. One obvious way of doing that would be to prohibit public access to the roads. Such a prohibition would avoid all of the debate over whether mitigation measures such as speed bumps, signage and the like would be effective. However, that is not the route that the Tribunal chose to take. It did not do so because the Tribunal found, in the concluding paragraph of its reasons on the Blanding's turtle issue, at para. 641:

> The Tribunal is therefore not in a position to alter the decision of the Director, or to substitute its opinion for that of the Director. As a result, the Tribunal revokes the decision of the Director.

[89] With respect, that conclusion is plainly wrong. It is a conclusion that is contradicted by the express wording of s. 145.2.1(4)(c) that authorizes the Tribunal to "alter the decision of the Director, and, for that purpose, the Tribunal may substitute its opinion for that of the Director". It is hard to think of language that could be more clear regarding the Tribunal's authority in this regard.

[90] It is clear from the wording of s. 145.2.1(4) that the Tribunal could have overridden the Director's decision not to prohibit public access to the roads on the site and ordered that the public be precluded from using them and that Ostrander be required to take such steps as was deemed necessary to accomplish that result. The Tribunal's conclusion that it did not have authority to do so is an error of law. It is an error going to the Tribunal's jurisdiction and it is an error that fundamentally undermines the Tribunal's conclusion on the appropriate remedy.

Conclusion on appeal #1

[91] I have concluded that the Tribunal committed the following errors of law in arriving at its conclusion:

(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 evidences as to the degree of increase in vehicular traffic arising 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 Renewable Energy Approval 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;

(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 for that of the Director.

[92] The Tribunal's decision on serious and irreversible harm was unreasonable for the reasons that I have given. The Tribunal's decision on the appropriate remedy was reached following on a breach of the rules of natural justice by failing to accord procedural fairness to the parties. Consequently, neither of the decisions of the Tribunal can stand. The appeal is therefore allowed and the decision of the Tribunal is set aside.

Appeal #2 – serious and irreversible harm to birds and alvar

[93] Turning then to the second appeal, PECFN appeals from the dismissal by the Tribunal of its appeal in which it was asserted that the Project would cause serious and irreversible harm to animal life, namely birds, and would also cause serious and irreversible harm to plant life, namely alvar. PECFN had also appealed to the Tribunal regarding harm to other animal life, namely bats and butterflies, but no appeal is taken by PECFN from the Tribunal's dismissal of those appeals.

[94] The respondent, Ostrander, raises a preliminary issue regarding PECFN's appeal. Ostrander submits that PECFN does not have a right of appeal on these separate issues because it was successful in its overall objective of getting the Tribunal to revoke the Renewable Energy

Approval. Ostrander submits that PECFN is, in essence, attempting to appeal from the reasons of the Tribunal as opposed to the result and that is not allowed: Sopinka and Gelowitz, *The Conduct of an Appeal*, 3rd ed. (Toronto: LexisNexis, 2012) at pp. 6-7.



[95] In advancing this submission, Ostrander fairly concedes that the result may not make any practical difference since Ostrander accepts that PECFN would be entitled to try and uphold the decision of the Tribunal on a different basis if Ostrander was successful in its appeal on the Blanding's turtle issue.

[96] Given that there is no practical consequence to the resolution of this issue, I do not intend to reach a definitive conclusion on it. I will say, however, that I have some difficulty with Ostrander' submission on this point. It seems to me that the situation is more akin to a plaintiff who sues a defendant and advances two different causes of action. If the trial judge finds in favour of the plaintiff on one cause of action but against it on the other, and the defendant appeals the first finding, I do not see any reason why the plaintiff cannot cross-appeal on the second finding. I would be concerned that if the plaintiff did not do so, and then attempted to uphold the trial judge's decision based on the second cause of action, the plaintiff might well be met with the argument that it had not appealed that finding and therefore it was not open to the plaintiff to advance that position.

[97] In any event, given that Ostrander accepts that the issues raised by PECFN must be addressed under either route, the issue is much more an academic question than a real one.

[98] Moving then to the submissions of PECFN on the issues of birds and alvar, I should first note that there is agreement between the parties that the standard of review applicable to the Tribunal's decision on this issue is reasonableness.

(i) Birds

[99] The Tribunal concluded that the evidence placed before it did not establish that the Project would cause serious harm to migratory bird habitat. The Tribunal found that the Project "might" cause such harm but that the evidence failed to establish that the Project "will" cause such harm.

[100] In reaching that conclusion, the Tribunal said that the expert witnesses for both sides substantially agreed that a wide variety of species, and large numbers of individual birds, "are found at, or pass through, the Prince Edward County south shore peninsula". The Tribunal found that birds heavily use Ostrander Point and that some species are migratory while others breed in the area. The Tribunal noted that Environment Canada had described the site as "one of the best areas for birds" that it had seen in southern Ontario.

[101] At the same time, the Tribunal noted the mitigation measures for the Project relating to birds including blade feathering and the possible shut down of individual turbines. It also pointed to a radar early detection system that would alert the operators of the turbines to any influx of large groups of birds and to the Project's 200 metre set-back from Lake Ontario. In reaching its conclusion, the Tribunal, correctly in my view, found that the mitigation measures for birds in the Renewable Energy Approval was part of its statutory mandate to consider the operation of the Project in accordance with the Renewable Energy Approval – see again s. 145.2.1(2) of the *EPA*.

[102] PECFN asserts that the Tribunal failed to provide an interpretation of the scale that it used to assess whether serious and irreversible harm would be caused to birds by the Project. In failing to do so, PECFN submits that the Tribunal failed to give adequate reasons for its decision and therefore committed an error of law.

[103] I do not agree with PECFN's core submission. While I accept that the reasons of the Tribunal do not have a separate and distinct portion that address the scale issue directly, unlike the situation on the first appeal, the Tribunal's consideration and analysis of this issue is readily apparent from a review of the reasons as a whole. The Tribunal noted that the two experts called by Ostrander, namely Dr. Strickland and Dr. Kerlinger, had expertise in the specific area of wind turbine impacts on bird populations and mortality. The Tribunal preferred the evidence of these two experts over those called by PECFN, as the Tribunal was entitled to do. In the course of its reasons, the Tribunal reviewed their evidence in detail. The Tribunal noted that Dr. Strickland's evidence was that he looked for "a biologically significant impact on a population at a regional level". Dr. Strickland went on to note the relatively small size of the Project in terms of its area

and the number of turbines. Dr. Strickland's opinion, as recorded by the Tribunal, is that the Project:

> … will not cause a population impact on breeding birds, has a low potential to have a significant impact on aerial insectivore populations, the fatality rate will not have any measurable effect on night migrating songbirds and there will be no effect on raptor populations.

[104] In terms of Dr. Kerlinger's evidence, the Tribunal noted that Dr. Kerlinger had said that, from a biological perspective, "bird populations extend well beyond the area of a project and are examined on a regional basis to determine population impacts". He went on to note that the regional area for many species would include other parts of Ontario, upstate New York and parts of Quebec. Dr. Kerlinger also offered the opinion, as recorded by the Tribunal, that there was "no reason to believe that the Project will cause serious and irreversible harm to populations of birds that nest, winter, or migrate through the Project area". Dr. Kerlinger was also of the opinion that the bird fatalities at Ostrander Point would not likely reach "biologically significant numbers".

[105] It is, in my view, clear from the Tribunal's reasons that, based on the evidence of these two experts, the Tribunal determined that a regional population for birds was the appropriate scale to be used in evaluating whether the Project would cause serious and irreversible harm. The Tribunal implicitly rejected the position of PECFN that the relevant scale was that of the Project site alone. The Tribunal noted the expert evidence that bird populations are fluid and may extend out for "50 or 100 miles in any direction". The Tribunal also had the evidence of Dr. Kerlinger and Dr. Strickland who made the relative comparison between the small size of the Project (approximately 0.06 $km^2$) and the size of the Important Bird Area of the Prince Edward County South Shore (approximately 279 $km^2$) in terms of evaluating the likely impact of the Project on the relevant bird populations.

[106] It is not therefore a fair criticism of the Tribunal's decision to assert that it failed to identify the scale that it used for determining serious and irreversible harm to birds. What PECFN's complaint boils down to is that the Tribunal did not adopt the scale that PECFN

contended that it 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.

[107] PECFN also asserts that the Tribunal improperly considered the mitigation measures that Ostrander was obliged to put into place to address the possibility of increased bird mortality, as I have mentioned above. PECFN contends that there was a total lack of evidence to support the effectiveness of those mitigation measures. That contention is not borne out by the evidence. There was evidence of the effectiveness of the mitigation measures. The Tribunal reviewed that evidence and it expressly noted that some of those measures, notably the radar system, were controversial and, in the specific case of the radar system, unproven. However, as the Tribunal correctly noted, the statutory onus rests on the person appealing the Renewable Energy Approval. The Tribunal found that PECFN had not met its onus on this issue. Specifically, the Tribunal said:

> The Tribunal finds that the PECFN has not proven that the mitigation measures incorporated into the REA regarding birds are so deficient that the Project will cause "serious and irreversible harm".

[108] Given the evidence that was before the Tribunal, its conclusion on this point was, once again, a reasonable one.

(ii) Alvar

[109] The other issue raised was the potential impact of the Project on plant life, namely, alvar. Alvars are described in the Tribunal's reasons, quoting from the Federation of Ontario Naturalists' publication, "The Alvars of Ontario", as "naturally open areas of thin soil over flat limestone or marble rock with trees absent or at least not forming a continuous canopy". The Tribunal noted that alvars are globally imperilled.

[110] The Tribunal had expert evidence that the Ostrander Point area is an alvar or alvar landscape. The Tribunal also noted that the Ostrander Point Crown Land Block within the Ostrander Point area is considered a "Legacy site" by the Department of National Defence. The area had been used by the DND as a bombing, gunnery and rocket range in 1952. It had also apparently been used for tank manoeuvres. The Tribunal found that there had been significant

disturbance to the Ostrander Point site in the past, arising from these and other activities, although the precise degree of disturbance was not clear.

[111] On this issue, PECFN submits that the Tribunal's finding, that the Project would not cause irreversible harm to the alvar, was not supported by the evidence. It contends that there was no evidence regarding the extent of the disturbance caused by military activities and therefore the Tribunal improperly concluded that, since the alvar regenerated after that activity, it would likely regenerate after the Project's activity. Indeed, in its oral submissions, PECFN went so far as to suggest that the military activity had not occurred at the Project site but in an area adjacent to it. PECFN apparently based this latter suggestion on the opinion of its expert, Dr. Catling, who had visited the site and had not observed any disturbance on it consistent with military use.

[112] I do not accept either of PECFN's submissions on this point. In the evidence, there is a report by the DND regarding an environmental assessment of the Project site as it related to the use of that site by the DND. A map of the site, that is attached to that report, shows the proposed location of the wind turbines and the areas that the military used. Two of the wind turbines are located within an area identified as a "bombing range". Another wind turbine is in or directly adjacent to an area identified as "small arms range". Three more wind turbines are in or directly adjacent to an area identified as a "grenade range". All of the wind turbines are shown by DND as being within the "legacy site".

[113] PECFN's assertion that the military activity did not include the Project site, but was in an area adjacent to it, is simply not borne out by the evidence. Indeed, the evidence directly contradicts that assertion. Dr. Catling's visual observations some sixty years after the military use of the area can hardly refute the clear evidence emanating from the DND.

[114] PECFN is also not correct in its assertion that there was no evidence as to the extent of the disturbance from the military activity. There was some evidence regarding the extent of the disturbance albeit not conclusive evidence. However, the Tribunal did not make any finding as to the specific extent of that disturbance nor was it required to do so. The Tribunal did find that the disturbance to the land was "severe". That was a reasonable conclusion to reach given the

evidence that the Tribunal had. It was open to the Tribunal to draw the reasonable inference that the military's use of the site for bombing runs, air-to-ground rockets, gunnery strafing and tank manoeuvres would have caused significant disturbance. The exact extent of the disturbance was not the critical issue. The critical issue was that the site had suffered significant disturbance that would have impacted on the alvar but that the alvar had recovered from that disturbance. That reality provided a sufficient foundation for the Tribunal's conclusion that the alvar would likely recover from any disturbance associated with the Project and therefore there was no basis upon which it could conclude that any harm to the alvar was irreversible. More specifically, the Tribunal said:

> The Tribunal finds that the Ostrander Point Crown Land Block has recovered to the status of an important, diverse, self-sustaining alvar, following severe disturbance in the past. This past recovery mitigates against a finding that the harm to plant life in this case will be irreversible.

In reaching its conclusion on this issue, the Tribunal also correctly considered the mitigation requirements contained in the Renewable Energy Approval.

(iii) Conclusion

[115] On appeal #2, I find that the conclusions of the Tribunal on the issue of harm to the birds and harm to the alvar are reasonable ones. They are entirely within the scope of the Tribunal's statutory mandate and they are borne out by the evidence heard and evaluated by the Tribunal. Certainly, none of the issues raised regarding the conclusions reached by the Tribunal rise to the level of an error of law that would give this court jurisdiction to intervene.

[116] The appeal by PECFN regarding the Tribunal's decision on birds and alvar is dismissed.

Appeal #3 – serious harm to human health

[117] This appeal can be dealt with more briefly. I will, at the outset, point out that the test under the *EPA* is different for this issue than it is for the issue regarding harm to plant or animal life. For the purposes of harm to human health, the test only requires a finding of serious harm and not the additional requirement of irreversible harm. I will note that there is again agreement

between the parties that the standard of review applicable to the Tribunal's decision on this issue is reasonableness.

[118] The Tribunal made two findings that are central to its conclusion that serious harm to human health had not been demonstrated by APPEC to the level required under s. 145.2.1(2)(b). One of those findings was that the fact witnesses, who gave evidence regarding their perceived effects from exposure to wind turbines, were inherently unreliable. That conclusion drew from the fact that the expert witnesses gave evidence that the subjective recall of individuals regarding health effects has been shown, through scientific studies, generally to be unreliable. The Tribunal went on to give examples of how that general lack of reliability was revealed in this case with respect to the fact witnesses from whom the Tribunal had heard. In at least four instances, fact witnesses had reported health effects or changes that were clearly demonstrated not to be related to wind turbines despite the witnesses' fervent belief that they were.

[119] The other finding of the Tribunal was with respect to APPEC's expert witness, Dr. McMurtry. The Tribunal rejected Dr. McMurtry's evidence largely because it was based on a theory that had yet to be proven. The Tribunal also found Dr. McMurtry's theory was vague with respect to the radius around the wind turbines within which effects will be experienced and that there was no indication of the prevalence of symptoms within exposed persons. The Tribunal ultimately concluded that neither the expert evidence called by APPEC, nor the factual evidence, established, on a balance of probabilities, that any of the alleged health ill-effects were caused by wind turbines.

[120] APPEC says that the Tribunal erred in this conclusion because it subjected their evidence to a standard of scientific certainty rather than deciding it on a balance of probabilities. I do not agree. In my view, the core problem with APPEC's submission is that it confuses the standard for admissible expert evidence with the standard to be applied in deciding the ultimate issue, that is, whether the test under s. 145.2.1(2) has been met.

[121] All parties agree that the test under s. 145.2.1(2) is to be decided on a balance of probabilities. That is the standard that the Tribunal applied in reaching its decision. However, there is a higher standard that is required before a fact finder can admit and rely on expert

evidence, especially when that expert evidence promotes a novel scientific theory. The balance of probabilities onus of proof does not apply to the reliability of a scientific theory. For a court to conclude that a novel scientific theory is reliable, there must be more than a finding that the theory is more probable or more likely than not. Rather, it requires the fact finder to be satisfied that the theory is, in fact, a reliable one. The matter was put this way in *R. v. Mohan*, [1994] 2 S.C.R. 9, by Sopinka J. at p. 25:

> In summary, therefore, it appears from the foregoing that expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert.

[122] It is not sufficient for the purposes of relying on a novel scientific theory to simply conclude that the theory may be correct. In that situation, the theory will not have crossed the threshold of reliability for the purpose of establishing the necessary causal link between the activity in issue and the consequences said to arise from that activity. Rather, the party attempting to rely on a novel scientific theory must first establish threshold reliability before the fact finder may consider it.

[123] The Supreme Court of Canada has set out four factors to be considered in determining whether threshold reliability is met. In *R. v. J.-L.J.*, [2000] 2 S.C.R. 600, the four factors were identified, at para. 33, as:

(i) whether the theory or technique can be and has been tested;
(ii) whether the theory or technique has been subjected to peer review and publication;
(iii) the known or potential rate of error or the existence of standards; and,
(iv) whether the theory or technique used has been generally accepted.

[124] Viewed from the medical perspective, and that is the perspective that is relevant in this case since harm to human health is being asserted, the expert evidence offered by APPEC, through Dr. McMurtry, failed when tested against any of these factors. Dr. McMurtry's theory has not been tested, it has not been medically peer reviewed, it is not known what the error rate might be and the theory has not been generally accepted.

[125] As the Tribunal observed in its reasons at para. 143:

> With respect to the proposed Case Definition of AHE/IWTs, the Tribunal finds that it is a work in progress. It is a preliminary attempt to explain symptoms that appear to be suffered by people with whom Dr. McMurtry is familiar, who live in the environs of wind turbines. Dr. McMurtry's case definition has admittedly not been validated; thus there is currently no grouping of symptoms recognized by the medical profession as caused by wind turbines.

[126] Contrary to APPEC's submission, the Tribunal did not err in applying the wrong standard of proof to Dr. McMurtry's evidence. To the contrary, the Tribunal applied the correct standard, that is, was the evidence reliable. The Tribunal found that it was not.

[127] It was up to the Tribunal to decide whether it was satisfied that it could rely on Dr. McMurtry's theory for the purpose advanced, namely, to establish that symptoms complained about could be linked to the operation of wind turbines. The Tribunal decided that the expert evidence did not satisfy it of that link. It was up to the Tribunal to make that determination and their decision in that regard is entitled to deference from this court. As was said in *Canada v. Capitol Life Insurance Co.,* [1986] 2 F.C. 171 (C.A.) by Mahoney J., at p. 177:

> In context, the court has said no more than what is trite law: the weight to be given expert evidence is a matter for the trier of fact and an expert's conclusion which is not appropriately explained and supported may properly be given no weight at all.

[128] The Tribunal's conclusion on this issue was a reasonable one. Consequently, there is no basis for this court to interfere with that conclusion.

Summary

[129] The appeal by Ostrander and the Director from the decision of the Tribunal is allowed and the Tribunal's decision to revoke the Director's decision to grant the Renewable Energy Approval is set aside. The appeal by PECFN and the appeal by APPEC are both dismissed.

[130] The parties may make written submissions on costs. Ostrander and the Director shall file one set of costs submissions, directed to all of the appeals, within 20 days of the date of these reasons and PECFN and APPEC shall file one set of submissions within 10 days thereafter. The

submissions shall not exceed 10 pages in length. No reply submissions shall be filed without leave of the court.

[131] Neither of the interveners sought costs. No costs are awarded to or against either of the interveners.

**NORDHEIMER J.**

**LINHARES de SOUSA J.**

**WHITAKER J.**

**Date of Release: February 20th, 2014**

**CITATION:** Ostrander Point GP Inc. and another v. Prince Edward County Field Naturalists and another 2014 ONSC #974
**DIVISIONAL COURT FILE NOs.:** 341/13, 342/13, 357/13



**ONTARIO**
**SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**NORDHEIMER, LINHARES de SOUSA & WHITAKER JJ.**

**BETWEEN:**

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

Appellants

**– and –**

PRINCE EDWARD COUNTY FIELD NATURALISTS

Respondent

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**REASONS FOR JUDGMENT**

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**NORDHEIMER J.**

**Date of Release: February 20th, 2014**