

Another million or two if Mayor Jackson or anyone damages Plover habitat again??

Concerns have been posted that Town of South Bruce Peninsula Mayor Janice Jackson or the town deliberately violated the Endangered Species Act by bulldozing the beach at Sauble in 2017, then challenged the MNRF to lay charges, then blew over a million of taxpayers' money fighting the charges and paying the associated fines.

Many also expressed concern that Ms. Jackson might put more cost on taxpayers with more appeals of the 2019 convictions, and could also put the taxpayers at risk again by continuing to damage plover habitat in contravention of the law, inviting more charges and much bigger fines.

Is Ms. Jackson planning to appeal the 2021 dismissal of the Town's appeal of the 2019 Anderson decision?

Town lawyer Lisus and his crew met in a TSBP council closed session March 16, 2021 to discuss Justice Morneau's March 8, 2021 dismissal of the town's appeal of the 2019 plover trial conviction. The council minutes contained a short report from closed session that said:

"Mayor Jackson indicated that Council heard a delegation from Town's lawyer and direction was given".

"Direction was given" is code for "a decision was made in closed session".

(Code is used because according to the Municipal Act all council decisions require votes and votes cannot be made in closed session so instead of making and voting on a motion in open session where the public can see it they just make a decision in closed and call it "direction was given").

At some point we may know what the "direction given" was, and who the "direction" was given to, and what the cost to the taxpayers of the "direction" might be.

Over a year ago Ms. Jackson indicated that the town was willing to appeal the 2017 conviction at several court levels if necessary.

It will be extremely harmful to taxpayers if Ms. Jackson follows that path.

Is Ms. Jackson planning to defy the law by damaging plover habitat again?

Ms. Jackson's persistent misrepresentations of Justice Morneau's March 8, 2021 findings regarding what was proven to be habitat and Ms. Jackson's persistent misrepresentations of the 2019 testimony of two crown witnesses suggest that Ms. Jackson is or may be planning to groom the beach again in ways that are in contravention of both the Endangered Species Act and the town bylaw.

After the 2020 appeal hearing, but before the 2021 appeal decision, Ms. Jackson made this claim:

One Expert testified that Main St. north to the Sixth St, washrooms is NOT habitat because of excessive human use. The other Expert testified the north end from Eleventh St. right up to the river is also NOT considered to be habitat because it's too heavily vegetated. (December 20, 2020 facebook)

About March 9, 2021, the day after Justice Morneau's decision was released, Ms. Jackson, on facebook, made this similar claim:

The decision on our Plover appeal came down yesterday. Justice Morneau upheld the JP's decision that the Town contravened the Endangered Species Act however she overruled the JP on two very critical points. Justice Morneau ruled that the entire south end of the beach is NOT plover habitat and any place Willow bushes exist is also NOT Plover habitat. This very important ruling is a relief as she confirmed our duty to maintain Sauble Beach, which we can resume. Removing the Willow Bushes is what started this entire debacle.

About March 11, 2011, Ms. Jackson made this claim:

The south end of the beach is Sixth St. to Main Street. The justice ruled that particular 2 km stretch of beach is not Plover Habitat.

Ms. Jackson's claims regarding the south end

Regarding the south end, Ms. Jackson has misrepresented Dr. Cuthbert's testimony and Justice Morneau's decision.

Justice Anderson's finding in the Plover trial of 2019 (Anderson October 3, 2019 p.4 lines 13 – 28) was:

As a result of the testimony from the above witnesses, in-chief, cross-examination, and re-examination, the court makes the finding the area from the Sauble River emptying into Lake Huron north of Geoff Peach Walkway south along the beach until the area of First Street North by the Crowd Inn to be the area included for the purposes of the definition of habitat. The only clarification by Dr. Cuthbert during cross-examination confirmed the south end of the beach in a heavily-recreated area would not be ideal for plover habitat because of the lack of vegetation, flatness, human activity, and recreational equipment. She further stated it didn't preclude the plover from nesting there.

The "south end" that Cuthbert and Anderson referred to is defined in the examination of Dr. Cuthbert on June 5, 2019.

In examination Dr. Cuthbert indicated that the area she referred to as the "south end" was near the Crowd Inn and was from the nearby beach washrooms southward.

The washrooms that Dr. Cuthbert was referring to are at Tara Street. The portion that Dr. Cuthbert identified as the “south end” was less than 200 meters North of the *Crowd Inn* property.

Contrary to Ms. Jackson’s claim of March 10, no expert testified that Main St. North to the Sixth St. washrooms is NOT habitat.

Justice Morneau said:

[62] His Worship’s determination that the entire length of Sauble Beach was plover habitat was in error.

[63] I would grant the appeal on this issue to the extent of clarifying that there was sufficient evidence for His Worship to conclude that Sauble Beach is habitat for the plover. However, the portion that was identified as the “south end” should not have been included in that finding. Notwithstanding this change there was sufficient evidence that the spring and fall work did cover the entire beach.

(March 8, 2021 paragraphs 62, 63):

Justice Morneau ruled that the portion “that was identified as the “south end” should not have been included. The portion “identified as the south end” was not from 6th street south. The portion “identified as the south end” was less than 200 meters north of the Crowd Inn.

Dr. Cuthbert did say that the very south end near the crowd inn was “not habitat”. But as discussed by Justice Morneau in her decision paragraphs 60 through 62, “Dr. Cuthbert qualified her opinion on this issue during cross examination”:

[60] The Appellant argues that Dr. Cuthbert testified that significant portions of the Beach were not habitat. His Worship did recognize that Dr. Cuthbert qualified her opinion on this issue during cross examination. She confirmed that the south end of the beach is heavily recreated and “would not be ideal” for plover habitat. His Worship noted the reasons for that qualification and why the south end would not be ideal “because of the lack of vegetation, flatness, human activity, and recreational equipment”. He also noted that Dr. Cuthbert stated that despite those limitations they “would not preclude the plover from nesting there”. [Reasons for judgment page 4.]

[61] Dr. Cuthbert did say in cross examination more on this issue. It was that the “south end of the Beach” is not plover habitat – “you can’t really call it habitat”. [Transcript June 5, 2019 page 100, 101] She also opined that plover habitat does not include willows which were found at points on the Beach.

(Morneau decision March 8, 2021 paragraphs 60 - 61)

This suggests that Justice Morneau saw some ambiguity in Dr. Cuthbert’s testimony regarding the south end.

Justice Morneau did not find that the southern 200 meters was not habitat.

All Justice Morneau was saying is that there was not sufficient evidence presented for Justice Anderson to conclude beyond the applicable threshold (beyond reasonable doubt) that the south end was included as habitat. Justice Morneau was saying that based on the evidence tried, Justice Anderson made an error in concluding that the 200 meter south end was habitat.

If Justice Anderson erred in concluding that the south end was habitat, one could not conclude from that that the south end is not habitat. It simply would not follow. And Justice Morneau properly did not draw the conclusion that the south end is not habitat. That conclusion was Ms. Jackson's, not Justice Morneau's.

Contrary to Ms. Jackson's claim of March 10, Justice Morneau clearly did not rule that "the entire south end of the beach is NOT plover habitat".

Contrary to Ms. Jackson's claim of March 11, Justice Morneau clearly did not rule that "that particular 2 km stretch of beach [Sixth St. to Main Street] is not Plover Habitat" .

Contrary to Ms. Jackson, Justice Morneau did not by any stretch, find, conclude, or say that the south end is not plover habitat.

Dr. Cuthbert has recently clarified (or corrected) her 2017 testimony.

In a recent affidavit in support of the applicant for judicial review regarding Ms. Jackson's proposal to remove dunes for parking near Kinloss, Dr. Cuthbert made very clear her view that the beach and dunes from the Crowd Inn to Sixth Street is plover habitat.

In the affidavit Dr. Cuthbert said:

"I understand that this project will take place between the Crowd Inn and Kinloss Lane. This portion of the beach is piping plover habitat. As described in my previous affidavit, plovers have nested in this stretch a number of times before in the past.

This portion of the beach has the coastal dune ecosystem that piping plovers gravitate to.

I recall that the term "south end" was used rather loosely when I was being asked questions by the lawyer for the Town in the previous case.

There were also a number of back and forths about nesting habitat versus general landscape habitat.

I do not recall saying anything that would mean that the area of the beach south of Kinloss Lane was not plover habitat.

If I did, it was due to miscommunication or my comments were misinterpreted.

I can say that plovers would likely not nest in the area south of the Crowd Inn in its current state and as it is currently being used. This portion is flat, has no dunes, has little or no vegetation, and is heavily used for parking and other human activity."

From South Bruce Peninsula Information Site (Facebook) March 8, 2021

(The "Kinloss" that Dr. Cuthbert refers to is just North of Tara Street).

Dr. Cuthbert's recent testimony that:

"This portion of the beach [between the Crowd Inn and Kinloss Lane] is piping plover habitat"

is clear and unequivocal. Dr. Cuthbert is clear that the beach and dunes between Kinloss and the Crowd Inn is piping plover habitat.

Of concern is that Ms. Jackson's misrepresentations could or will be used to try to justify extensive illegal grooming south of Sixth Street.

If Ms. Jackson or the town does this kind of illegal grooming there will be complaints and possible charges, convictions and fines.

If anyone does illegal grooming and there are charges, Justice Morneau's findings will not be a valid defence as Justice Morneau clearly did not find that 6th to Tara Street area or the stretch from Tara Street to the *Crowd Inn* was not habitat. There will be no valid defense for grooming these areas in contravention of the Endangered Species Act.

Ms. Jackson's claims regarding Willows

Ms. Jackson said:

The other Expert testified the north end from Eleventh St. right up to the river is also NOT considered to be habitat because it's too heavily vegetated. (Dec 20, 2020 facebook)

The "other expert" was Suzanne Robinson.

Ms. Robinson testified:

it was my understanding that these activities occurred along the entirety of the linear beach at Sauble Beach from the water's edge, and as demonstrated in the photographs, into the dunes. If we refer back to tab two, page 2, this map shows that the entirety of Sauble Beach where these activities occurred is habitat for Piping Plover.

Transcript June 4, 2019 p.43 lines 1-9

Ms. Robinson also testified:

[Lisus]: And as far as you are concerned, though, the willows or the part of the beach where there is this heavy willow vegetation in the north end, you do consider that - your own opinion is that that's Plover habitat, right?

[Robinson]: Yes.

Transcript June 4, 2019 p.80 lines 16-21

Contrary to Ms. Jackson, Ms. Robinson clearly did not testify that: “the north end from Eleventh St. right up to the river is also NOT considered to be habitat”.

Justice Anderson said:

Expert witness, Suzanne Robinson, from the Ministry of Natural Resources and Forestry – I may refer to this as MNR from hereon in just to save some words; so, if you hear that, you'll know what I'm referring to – described the area of the habitat of the plover from the north end of the beach by Geoff Peach Walkway to the area north of First Street near the Crowd Inn. This was referenced in Exhibit 13, Tab 2, Nesting Locations 2007 to 2017.

(Anderson October 3, 2019 P.4)

“Geoff peach parkway” is near the river mouth, and is about 300 meters north of 11th street.

Justice Anderson’s statement is further indication that Robinson did not testify that “the north end from Eleventh St. right up to the river is also NOT considered to be habitat”.

Ms. Jackson stated (March 10, 2021):

Justice Morneau ruled that any place Willow bushes exist is also NOT Plover habitat.

Justice Morneau said (March 8, 2012):

[61] Dr. Cuthbert did say in cross examination more on this issue. It was that the “south end of the Beach” is not plover habitat – “you can’t really call it habitat”. [Transcript June 5, 2019 page 100, 101] She also opined that plover habitat does not include willows which were found at points on the Beach.

That is the only reference to “willows” in Justice Morneau’s decision.

Justice Morneau said only that Dr. Cuthbert “opined that plover habitat does not include willows which were found at points on the Beach”. Justice Morneau went no further.

Repeating, Justice Morneau said:

[62] His Worship’s determination that the entire length of Sauble Beach was plover habitat was in error.

[63] the portion that was identified as the “south end” should not have been included in that [Anderson finding that the entire Sauble Beach is habitat for the plover].

(March 8, 2021 paragraphs 62, 63):

While Moreau explicitly connected Dr. Cuthbert’s evidence about the south end to her conclusion that Justice Anderson had erred in finding the entire beach habitat, Justice Morneau made no similar connection to Dr. Cuthbert’s opinion about willows.

If Justice Morneau had wanted to say that Justice Anderson had erred regarding willows, Justice Morneau would have made a statement similar to the paragraph 63 reference to the south end, except about willows. Surely Justice Morneau would have added to paragraph 63 something like this (addition in italics):

I would grant the appeal on this issue to the extent of clarifying that there was sufficient evidence for His Worship to conclude that Sauble Beach is habitat for the plover. However, the portion that was identified as the “south end” *and any area with willows* should not have been included in that finding. Notwithstanding this change there was sufficient evidence that the spring and fall work did cover the entire beach. (italics added)

(March 8, 2021 paragraphs 63 modified):

Justice Morneau did not add that kind of language.

Contrary to Ms. Jackson’s claim, Justice Morneau did not find that “any place Willow bushes exist is also NOT Plover habitat”. Justice Morneau did not even say anything close to that. Ms. Jackson’s claim is ridiculous.

Ms. Jackson may use her misrepresentation to justify grooming anywhere there are willows, even low density willows or single willows that provide food and shelter for plovers. This may be seen as damaging habitat contrary to section 10 of the Endangered Species Act.

The Act and Bylaw should prevail

Town staff should groom the beach only if the grooming clearly and comfortably conforms to the Beach Maintenance bylaw and only if the grooming clearly and comfortably conform to the Endangered Species Act.

In addition, to avoid costly misunderstandings, maintenance should not proceed without a written opinion from MECP that the proposed maintenance will not contravene the Act.

Ms. Jackson’s misrepresentations should not be considered a licence to violate the act or the bylaw.

Can council members or staff be held accountable?

Section 37 of the Endangered Species Act says:

37. If a corporation commits an offence under this Act, an officer, director, employee or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is party to and guilty of the offence and is liable on conviction to the punishment provided for the offence, whether or not the corporation has been prosecuted for the offence.

Craig Gammie March 30, 2021