

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
(MINISTRY OF NATURAL RESOURCES AND FORESTRY)**

Respondent

- and -

THE TOWN OF SOUTH BRUCE PENINSULA

Applicant

**FACTUM OF THE RESPONDENT
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
(MINISTRY OF NATURAL RESOURCES AND FORESTRY)**

April 29, 2021

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PART I. OVERVIEW

1. At trial, Justice Anderson (the “Trial Justice”) convicted the Town of South Bruce Peninsula (the “Town”) on two charges of damaging the habitat of the Piping Plover, contrary to s.10(1)(a) of the *Endangered Species Act*, 2007, S.O. 2007 (the “ESA”). The Town was subsequently sentenced on the basis of a joint submission, made without prejudice to the Town’s rights to appeal the convictions. Sentence is not at issue in this motion for leave to appeal.

Reasons for Judgment of Justice of the Peace C.W. Anderson, dated October 3, 2019, Town’s Motion Record at Tab 6

2. The Town appealed the convictions. Her Honour Justice Morneau (the “Appeal Judge”) upheld both convictions.

Reasons for Decision of Justice J.A. Morneau, dated March 8, 2021, Town’s Motion Record at Tab 8

3. The Town seeks leave to appeal from the Appeal Judge's decision on what appear to be three grounds. The Town alleges that the Appeal Judge erred
- i. by adopting an overly broad interpretation of the term "damage" in s. 10(1)(a) of the *ESA*;
 - ii. by failing to properly apply the test from *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 in her assessment of whether Suzanne Robinson, one of the two experts on Piping Plovers who gave evidence for the Crown at trial, should have been qualified as an expert; and
 - iii. by extending appellate deference to the Trial Justice's decision to qualify Suzanne Robinson as an expert on Piping Plovers.

Amended Notice of Motion at paras. 12-15

***White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 ("White Burgess"), Town's Brief of Authorities at Tab 9**

4. Leave to appeal should be denied for all three proposed grounds of appeal.

5. It is not essential in the public interest or for the due administration of justice that this Honourable Court address the proposed interpretive issues raised by the Town relating to the term "damage" in s. 10 of the *ESA*. There was no error in the Appeal Judge's decision and this issue does not require this Honourable Court's attention.

6. The proposed grounds of appeal relating to the decision to qualify Suzanne Robinson as an expert on Piping Plovers are not proper grounds for seeking leave to appeal. They do not raise a question of law alone, as is required by the provision governing this motion, s. 131 of the *Provincial Offences Act* (the "POA"). The decision about whether to qualify an expert is a question of mixed fact and law. As such, absent an error in principle, an appeal court "owes significant deference to an admissibility determination on expert opinion evidence."

[*R v Mills*, 2019 ONCA 940 at para 47, Respondent's Book of Authorities at Tab 1](#)

[See also *R v Shafia*, 2016 ONCA 812 at para 248, Respondent's Book of Authorities at Tab 2](#)

7. To the extent that there is any separable question of pure law relating to the issue of qualification of an expert, this question of law relates to established principles that do

not require this Court's guidance. The test established by the Supreme Court in *White Burgess* is by now well understood and has already been the subject of many decisions by this Honourable Court, both criminal and civil. Further, there are no contradictory applications of the *White Burgess* test pertinent to the facts of this case that would require this Court's guidance.

PART II. RESPONDENT'S STATEMENT AS TO FACTS

(A) Piping Plovers depend on Sauble Beach for their survival and reproduction

8. Piping Plovers are a species of small shorebird. The species is migratory, spending winters on beaches in the southern United States, and flying north in spring to breed and raise their young on beaches in the Great Lakes and elsewhere.

Examination-in-chief of Suzanne Robinson, transcript of June 4, 2019 at p. 14 Ins. 23-24 and p. 16 In. 28 to p. 17 In. 24, Respondent's Motion Record Vol. 1 ("RMR 1") at Tab 6

Francesca Cuthbert, transcript of June 5, 2019 at p. 1 In. 18 to p. 2 at In. 25.

9. By the early 1980s the species had completely disappeared from Ontario and was functionally extinct in the Great Lakes region.

Examination-in-chief of Suzanne Robinson, transcript of June 4, 2019 at p. 14 Ins. 29-31, RMR 1 at Tab 6

Examination-in-chief of Dr. Francesca Cuthbert, transcript of June 4, 2019 at p. 104 In. 23 to p. 105 at In. 19, p. 106 In. 27 to p. 107 In. 22, RMR 1 at Tab 7

Exhibit 32, Dr. Cuthbert documents, Tab 2 at p. 1, Respondent's Motion Record Vol. 2 ("RMR 2") at Tab 10, RMR 2 at Tab 10

10. In the spring of 2007, after a nearly thirty-year absence from Ontario, a pair of Piping Plovers returned to nest at Sauble Beach. Since 2007, Piping Plovers have returned to Sauble Beach every year to establish nests and raise their young. The birds have expanded to other beaches in Ontario. However, Sauble Beach and Wasaga Beach remain the only two sites in Ontario that consistently support breeding Piping Plovers.

Examination-in-chief of Suzanne Robinson, transcript of June 4, 2019 at p. 14 ln. 29 to p. 15 ln. 2 and p. 17 ln. 25 to p. 18 ln. 20, RMR 1 at Tab 6

Exhibit 13, Suzanne Robinson documents, Tab 2 at pp. 1-2, RMR 2 at Tab 7

Examination-in-chief of Dr. Francesca Cuthbert, transcript of June 5, 2019 at p. 11 Ins. 10-27, RMR 1 at Tab 7

11. Despite this progress, the Ontario population of Piping Plovers remain in peril with low numbers returning to the Great Lakes in any given year. Since their return in 2007, the greatest number of nesting pairs in all of Ontario was sixteen in 2016. Ontario has designated the Piping Plover on the Species at Risk in Ontario List as “endangered,” which grants the species and their habitat special protection under law.

Examination-in-chief of Suzanne Robinson, transcript of June 4, 2019 at p. 15 Ins. 3-9, RMR 1 at Tab 6

Ontario Regulation 230/08 made under the ESA, Schedule B

12. The main causes of the species’ decline in the twentieth century were habitat degradation and human threats such as public recreation. Despite intensive recovery management efforts in the United States and Ontario, these factors continue to threaten the birds’ recovery and survival.

Examination-in-chief of Dr. Francesca Cuthbert, transcript of June 4, 2019 at p. 104 ln. 23 to p. 106 ln. 26, p. 109 ln. 5 to p. 111 ln. 26 and p. 110 ln. 25 to p. 111 ln. 26, RMR 1 at Tab 7

Examination-in-chief of Suzanne Robinson, transcript of June 4, 2019 at p. 15 Ins. 3-25, RMR 1 at Tab 6

13. Piping Plovers that return to Sauble Beach spend almost half of their lives at the beach. They arrive at the beach mid-April. Over the next few weeks, they establish nests and lay eggs, which typically hatch towards the end of May or early June. Once the birds land at their breeding grounds, they do not leave until the late summer or early fall. Plovers raise their young until August or September when the chicks are old enough to fly south to their wintering habitats.

Examination-in-chief of Suzanne Robinson, transcript of June 4, 2019 at p. 17 Ins. 13-24, p. 28 ln. 15 to p. 29 ln. 9, p. 32 Ins. 1-23, RMR 1 at Tab 6

Examination-in-chief of Dr. Francesca Cuthbert, transcript of June 5, 2019 at p. 1 ln. 25 to p. 2 at ln. 25, and p. 30 Ins. 1-8, RMR 1 at Tab 7

14. Plovers depend on the specific features at Sauble Beach in several ways:

- a) Nesting and rearing: Plovers need firm sand to make a “scrape,” which is a shallow depression in firm sand used as a nest. To minimize risks of flooding, they seek out nest sites in raised “foredunes” (low, young dunes which eventually become dunes) or “hummocks” (slight mid-beach elevations that are often vegetated). They prefer areas surrounded by vegetation, cobble and woody debris for shelter and camouflage.
- b) Feeding: Plovers feed on invertebrate insects. They probe for insects in the sand substrate and forage in vegetation, swales and “wrack” (dead vegetation, driftwood and debris that has washed up along the shoreline). It is important for the species to have access to a variety of foraging habitats throughout the breeding season in proximity to their nest, because at certain times of year certain foraging sites are less or more available due to natural influences or human activity.
- c) Shelter and camouflage: Plovers are vulnerable to predators and weather. Gulls, hawks, rats, foxes and raccoons all feed on Plovers or their eggs. Hail, heavy rainfall, high water levels and blowing sand can kill a plover or wipe out a nest of eggs. Plovers camouflage and shelter in vegetation, behind hummocks, in foredunes and in woody debris found in the wrack and scatter across the beach. Access to these features across the beach is important throughout the breeding season so that the bird has safe access to resources for foraging, nesting and rearing along the beach.

Examination-in-chief of Suzanne Robinson, transcript of June 4, 2019 at pp. 15-32, RMR 1 at Tab 6

Examination-in-chief of Dr. Francesca Cuthbert, transcript of June 5, 2019 at pp. 6-9, RMR 1 at Tab 7

Exhibit 13, Robinson documents, Tab 5 at 4, 8, 9, 10, 11, RMR 2 at Tab 7

15. Piping Plovers have nested at different locations along the full length of Sauble Beach every year since 2007. During their breeding season, a Plover’s needs for food and shelter must be met within 500 metres on either side of a nest, including shoreline and dune. However the birds will go beyond 500 metres and use the whole beach to forage.

Examination-in-chief of Suzanne Robinson, transcript of June 4, 2019 at p. 18 Ins. 4-20, p. 21 In. 7 to p. 22 In. 7, p. 91 In. 32 to p. 92 In. 4, RMR 1 at Tab 6

Exhibit 13, Robinson documents, Tab 2 at pp. 1-2, RMR 2 at Tab 7

Examination-in-chief of Dr. Francesca Cuthbert, transcript of June 5, 2019 at p. 8 Ins. 1-16, RMR 1 at Tab 7

16. The arrival of Piping Plovers at Sauble Beach in 2007 led to considerable recovery efforts by the provincial government and dedicated volunteers. Early each spring, Sauble Beach is monitored daily by one or more volunteers to determine when the birds first arrive. When they do arrive, the Ministry of Natural Resources and Forestry (“MNRF”) and volunteers initiate special protective measures. A 100 metre by 100 metre rope fence is installed around each nest to discourage human disturbance. “Exclosures” (open bottomed cages designed to protect Plovers) are then placed around each nest to discourage predators.

Examination-in-chief of Donald Kennedy, transcript of May 30, 2019 at p. 62 Ins. 1-9, RMR 1 at Tab 2

Examination-in-chief of Suzanne Robinson, transcript of June 4, 2019 at p. 25 In. 3 to p. 26 In. 17, RMR 1 at Tab 6

17. Every year since 2010, MNRF has hired a Piping Plover biologist or technician to work at Sauble Beach. MNRF biologists have made numerous presentations to Town Council since 2007 regarding the Piping Plover and have provided technical guidance to Town staff on how to avoid damaging Plover habitat.

***Voir dire* examination-in-chief of Suzanne Robinson, transcript of June 3, 2019 at p. 28 Ins. 23-25, p. 52 In. 18 to p. 53 In. 5, RMR 1 at Tab 5**

***Voir dire* cross-examination of Suzanne Robinson, transcript of June 3, 2019 at p. 40 Ins. 15-25, RMR 1 at Tab 5**

18. Town staff understood that raking Sauble Beach in the spring would damage Piping Plover habitat. The Town passed a by-law specifically addressing Piping Plover habitat protected by the *ESA* and beach maintenance. The by-law prohibited raking Sauble Beach prior to the arrival of the birds in the spring or within 30 feet of the dunes at any time of the year. Town staff regularly sought permission from MNRF to do minor maintenance work such as straightening the drainage swales, removing sand from around playground equipment and removing sharp objects.

Examination-in-chief of Donald Crain, transcript of May 30, 2019 at p. 76 In. 25 to p. 77 In. 6, p. 79 Ins. 10-25, and p. 80 In. 28 to p. 81 In. 9, RMR 1 at Tab 3

Exhibit 5, By-law Number 62-2015, Raking and Maintenance of Sand at Sauble Beach, at pp. 3-4, RMR 2 at Tab 3

Examination-in-chief of Andrew Sprunt, transcript of June 3, 2019 at p. 8 Ins. 9-16, p. 13 In. 27 to p. 14 In. 20, RMR 1 at Tab 4

19. In February and April 2017, Town staff and MNRF biologists met to discuss the Town's beach maintenance plan for the upcoming spring and to reaffirm what was and was not permitted under the *ESA*.

Examination-in-chief of Donald Crain, transcript of May 30, 2019 at p. 101 In. 12 to p. 102 In. 31, RMR 1 at Tab 3

(B) The Spring Work damaged Plover habitat

20. In April 2017, just days before the first Plover was expected to arrive, the Town mechanically raked Sauble Beach (the "Spring Work"). The surface of Sauble Beach was levelled, microtopography was flattened, and wrack, driftwood and emerging vegetation were removed.

Exhibit 1, photos taken by Kyle Mauthe on April 28, 2017, at 1-12, RMR 2 at Tab 1

Examination-in-chief of Donald Kennedy, transcript of May 30, 2019 at p. 61 In.17 to p. 66 In. 28, RMR 1 at Tab 2

Exhibit 4, photos taken by Donald Kennedy on April 13, 2017, at A-C, RMR 2 at Tab 2

Examination-in-chief of Suzanne Robinson, transcript of June 4, 2019 at p. 33 In. 31 to p. 34 In. 7, p. 38 In. 5 to p. 39 In. 20, p. 40 Ins. 7-11, RMR 1 at Tab 6

Exhibit 13, Robinson documents, Tab 6, at 4, RMR 2 at Tab 7

21. This work was far more extensive and destructive than the work that had previously been discussed with MNRF. While areas around the playground equipment and the drainage swales were untouched, every other part of Sauble Beach had been mechanically raked.

Exhibit 1, photos taken by Kyle Mauthe on April 28, 2017, at 1-12, RMR 2 at Tab 1

Exhibit 4, photos taken by Donald Kennedy on April 13, 2017, at A-C, RMR 2 at Tab 2

22. Two experts on Piping Plovers and their habitat reviewed pictures and summaries of the Spring Work and concluded that the Town's actions had damaged Plover habitat in the following ways:

- a) removed areas and features that plovers have used and could use for scrapes and nesting by loosening soil, removing vegetation and debris and levelling microtopography such as hummocks;
- b) removed foraging areas, such as vegetation and wrack;
- c) negatively impacted the invertebrate species that Plovers eat by disturbing the soil substrate in which they live;
- d) removed features along the beach that the Plovers use for shelter and camouflage, such as microtopography, vegetation and debris; and
- e) lowered the beach grade and loosened soil, which leads to flooding and erosion, "degrading the overall ecosystem that Piping Plover rely on".

Examination-in-chief of Suzanne Robinson, transcript of June 4, 2019 at p. 42 , RMR 1 at Tab 6

Examination-in-chief of Dr. Francesca Cuthbert, transcript of June 5, 2019 at pp. 37-44, RMR 1 at Tab 7

Exhibit 33, photos referenced by Dr. Cuthbert, at A-H, RMR 2 at Tab 11

23. Raking the beach in mid-April, just as the birds are arriving back from migration, is harmful to the Plovers. Habitat features are particularly important at that point in the birds' breeding season when their energy resources are low following a long migration. Food sources must be immediately available upon their arrival to sustain adult females' egg production, while adult males must have access to nest sites that will sustain a brood of chicks.

Examination-in-chief of Suzanne Robinson, transcript of June 4, 2019 at p. 43 Ins. 10-22, RMR 1 at Tab 6

Examination-in-chief of Dr. Francesca Cuthbert, transcript of June 5 at p. 6 Ins. 1-20, p. 9 Ins. 2-26, p. 35 In. 18 to p. 36 In. 5, RMR 1 at Tab 7

24. As a result of the Spring Work, both experts concluded that necessary habitat features for Plovers' survival would not be as valuable and available to the birds when they arrived for the 2017 breeding season.

Examination-in-chief of Suzanne Robinson, transcript of June 4, 2019 at p. 43 Ins. 10-22, RMR 1 at Tab 6

Examination-in-chief of Dr. Francesca Cuthbert, transcript of June 5, 2019 at p. 40 Ins. 2-16, RMR 1 at Tab 7

25. Despite this damage to the Plovers' habitat, the Plovers had a successful summer at Sauble Beach in 2017 in terms of the number of birds that arrived at the beach and the number of chicks fledged. Nonetheless, there is no doubt that the Spring Work damaged their habitat. While habitat quality is an important factor in nesting success, in any given year there are a multitude of other factors, such as predator activity and weather conditions, which impact a specie's success. It is difficult to quantify or identify specific causes for success or failure.

Examination-in-chief of Suzanne Robinson, transcript of June 4, 2019 at p. 43 l. 23 to p. 48 l. 23, RMR 1 at Tab 6

Exhibit 13, Robinson documents, Tab 4, at p. 6, RMR 2 at Tab 7

(C) The Fall Work damaged Plover habitat

26. In the summer of 2017, Town Council voted to spend \$10,000 on more intensive beach maintenance. This work (the "Fall Work") was undertaken between August 23 and September 7, 2017 after the birds had left for the season. The goal of the work was to remove debris and vegetation and flatten the beach surface.

Examination-in-chief of Andrew Sprunt, transcript of June 3, 2019 at p. 6 In. 30 to p. 7 In. 6 and p. 17 Ins. 13-17, RMR 1 at Tab 4

Cross-examination of Andrew Sprunt, transcript of June 3, 2019 at p. 18 Ins. 6-10, RMR 1 at Tab 4

27. Town staff used a medium-sized bulldozer and an agricultural cultivator to work the full length of Sauble Beach. The bulldozer cut into the side of established foredunes and dunes, removed several feet of vegetated foredune in places and flattened and lowered the grade of the beach. Significant amounts of sand were relocated to level out elevations and depressions. Large swathes of vegetation along the length of the beach were removed entirely. MNRF did not approve of this work.

Examination-in-chief of Andrew Sprunt, transcript of June 3, 2019 at p. 7 In. 30 to p. 9 In. 23, p. 18 Ins. 6-32, RMR 1 at Tab 4

Examination-in-chief of Kyle Mauthe, transcript of May 30, 2019 at p. 27 In. 5 to p. 34 In. 5, RMR 1 at Tab 1

Exhibit 1, photos taken by Kyle Mauthe on September 12, 2017, at 13-25, RMR 2 at Tab 1

Exhibit 7, photos taken by Ann Rolfe August 23, 2017 near Geoff Peach Walkway, RMR 2 at Tab 4

Exhibit 10, video recording taken by John Strachan on August 23, 2017 at 4:00 p.m.

Exhibit 11, photos taken by John Strachan between July-September 2017, RMR 2 at Tab 5

Exhibit 12, photos taken by Peter Middleton on August 30, 2017 and March 2018, RMR 2 at Tab 6

Examination-in-chief of Suzanne Robinson, transcript of June 4, 2019 at p. 48 In. 24 to p. 51 In. 5, RMR 1 at Tab 6

Examination-in-chief of Dr. Francesca Cuthbert, Transcript of June 5, 2019 at p. 48 In. 22 to p. 49 In. 9, p. 51 In. 19 to p. 52 In. 19, p. 53 In. 10 to p. 58 In. 27, RMR 1 at Tab 7

28. Both Piping Plover experts concluded that the Fall Work damaged habitat in the following ways:

- a) removed features used for nesting, foraging, shelter and camouflage;
- b) loosened sand, exposing it to drying and erosion; and
- c) removed the foredunes, vegetation and topography which sustain and stabilize the entire beach dune ecosystem.

Examination-in-chief of Suzanne Robinson, transcript of June 4, 2019 at p. 50 In. 12 to p. 52 In. 15, RMR 1 at Tab 6

Exhibit 13, Robinson documents, Tab 7, RMR 2 at Tab 7

Examination-in-chief of Dr. Francesca Cuthbert, transcript of June 5, 2019 at p. 47 In. 11 to p. 58 In. 27, RMR 1 at Tab 7

Exhibit 33, photos referenced by Dr. Cuthbert, at J-R, RMR 2 at Tab 11

29. This damage to Plover habitat is expected to have long-term or even permanent impacts on Sauble Beach. Microtopography, foredunes and vegetation assemblages take

time to re-establish. The vegetation removed in the fall would not regrow by the 2018 breeding season and the destroyed foredunes will not return at all.

Examination-in-chief of Suzanne Robinson, transcript of June 4, 2019 at p. 50 Ins. 12-23, RMR 1 at Tab 6

Examination-in-chief of Dr. Francesca Cuthbert, transcript of June 5, 2019 at p. 47 Ins. 2-14, p. 53 Ins. 7-9, and p. 87 In. 15 to p. 89 In. 2, RMR 1 at Tab 7

(D) Suzanne Robinson was properly qualified as an expert on Piping Plovers

30. At trial, the Crown tendered two experts on Piping Plovers to give evidence on Plover biology, habitat and the damage to Plover habitat caused by both the Spring Work and the Fall Work.

31. The Town did not dispute that Dr. Francesca Cuthbert, a professor in the Department of Fisheries, Wildlife and Conservation Biology at the University of Minnesota with over thirty years studying Plovers and their habitat, should be qualified as an expert on Piping Plovers and their habitat.

32. The other expert tendered by the Crown, Suzanne Robinson, has been employed as a “Species at Risk/Management Biologist” with MNRF since 2007. She has extensive educational and work experience with Piping Plovers in Ontario generally and at Sauble Beach in particular.

- a) She studied biology and ecology and completed field work in ornithology.
- b) She maintained data and contributed to technical reports about Plovers’ habitat use in Ontario and liaised with partners regarding their protection at various sites in Ontario.
- c) She spent nearly ten years studying and observing Piping Plovers at Sauble Beach and other locations in Ontario.

Exhibit 13, Robinson documents, Tab 1, RMR 2 at Tab 7

***Voir dire* examination-in-chief of Suzanne Robinson, transcript of June 3, 2019 at p. 23 In. 7 to p. 36 In. 22, RMR 1 at Tab 5**

33. Robinson testified that she understood her role and obligation to the Court as an expert witness.

***Voir dire* examination-in-chief of Suzanne Robinson, transcript of June 3, 2019 at p. 35 Ins. 20-30, RMR 1 at Tab 5**

34. Robinson's *voir dire* evidence showed that she did not hold any biased views towards the Town and did not participate in MNRF's investigation, other than in the innocuous sense of reviewing relevant evidence and writing expert reports that informed the decision made by MNRF's enforcement officers to lay charges against the Town.

35. The Trial Justice applied the *White Burgess* test to the facts before him and accepted that Suzanne Robinson should be qualified as an expert. The following facts were of particular importance to the Trial Justice's ruling:

- a) Robinson is not an MNRF investigator or enforcement officer. She is a biologist.
- b) In cross examination, Robinson rejected the suggestion that she was part of what counsel for the Town characterized as "the group that was working on whether or not to charge the town". Rather, the evidence was that she prepared expert reports to assist the investigators in making their decision about whether charges against the Town for damaging Piping Plover habitat were warranted.

***Voir dire* cross-examination of Suzanne Robinson, transcript of June 3, 2019 at p. 64 In. 6 to p. 65 In. 21, RMR 1 at Tab 5**

- c) At the time of the offences and the subsequent investigation, Robinson was on maternity leave. She did not participate in investigative team meetings or witness interviews.

***Voir dire* cross-examination of Suzanne Robinson, transcript of June 3, 2019 at p. 62 Ins. 6-31, RMR 1 at Tab 5**

Re-examination of Kyle Mauthe, transcript of May 30, 2019 at p. 59 Ins. 4-7, RMR 1 at Tab 1

- d) There is no evidence that Robinson fostered ill will towards the Town or formed an opinion on possible damage to Plover habitat until she reviewed all of the relevant information.
- e) Contrary to the Town's claim at para. 32 of its factum, Robinson did not "recommend laying additional charges for harassing and harming a species" under s. 9 of the *ESA*. Robinson wrote in her draft report on the impacts of the Spring Work that "had these activities [i.e. the Spring Work] harassed Piping Plover in their breeding territories once they had arrived, harmed an individual or killed eggs or adults, it would be recommended that section 9 of the [*ESA*]

be considered.” In a note to MNR Staff Sergeant Maw, she commented that “we may want to remove this from the document if not pursuing section 9 contravention but wanted to include it for now FYI”.

During cross-examination, Robinson testified that the purpose of these comments was not to recommend charges but to clarify whether the investigators wanted her opinion in relation to s. 9 of the *ESA*.

Exhibit 19, email from Robinson to Maw and Benvenuti sent January 22, 2018, at p. 21, RMR 2 at Tab 8

***Voir dire* examination-in-chief of Suzanne Robinson, transcript of June 3, 2019 at p. 90 Ins. 5-28, RMR 1 at Tab 5**

- f) The Town cannot point to any part of her report or substantive testimony that suggests bias. The Town does not challenge Robinson’s substantive opinions on a scientific basis. Nor does the Town suggest that her opinion was not supported by foundational evidence, or that her opinion veered from known and accepted scientific principles.

36. The Appeal Judge considered the Trial Justice’s application of *White Burgess* to the *voir dire* evidence and confirmed that the Trial Justice “appears to have addressed the issues that are at the heart of *White Burgess*”. On that basis she declined to interfere with the Trial Justice’s decision to accept Suzanne Robinson as an expert on Piping Plovers.

Reasons for Decision of Justice J.A. Morneau, dated March 8, 2021, at paras. 77-89, Town’s Motion Record at Tab 8

PART III. ISSUES AND THE LAW

(A) Proposed grounds of appeal

37. In its Amended Notice of Motion, the Town appears to raise three grounds for seeking leave to appeal. The Town says that the Appeal Judge erred

- i. by adopting an overly broad interpretation of the term “damage” in s. 10(1)(a) of the *ESA*;
- ii. by failing to properly apply the *White Burgess* test in her assessment of whether Suzanne Robinson, one of the two experts on Piping Plovers who gave evidence for the Crown at trial, should have been qualified as an expert; and

- iii. by extending appellate deference to the trial Justice's decision to qualify Suzanne Robinson as an expert on Piping Plovers.

Amended Notice of Motion at paras. 12-15

(B) The test for leave to appeal

38. In order for leave to be granted under s. 131 of the *POA*,
 - a) the proposed special ground of appeal must be a question of law alone, and not a question of fact or mixed fact and law; and
 - b) the proposed question of law must be such that the public interest or the due administration of justice “makes it absolutely indispensable or necessary for the Court of Appeal to decide the issues raised.”

***POA*, s. 131**

[Ontario \(Ministry of the Environment and Climate Change\) v. Sunrise Propane Energy Group Inc., 2018 ONCA 461 \(“Sunrise Propane”\) at para. 15, Respondent’s Book of Authorities at Tab 3](#)

39. This Honourable Court has said that the threshold for granting leave to appeal is “very high”. Provincial offences appeal judgments are intended to be final in the overwhelming majority of cases. Leave should only be granted “in exceptional cases raising issues of broad importance.”

[Ontario \(Ministry of Labour\) v. Enbridge Gas Distribution Inc., 2011 ONCA 13 \(“Enbridge Gas”\) at para. 34, Respondent’s Book of Authorities at Tab 4](#)

[Sunrise Propane, supra at para. 13](#)

40. A mere error made in the application of established legal principles is not sufficient to warrant granting leave to appeal. The question of law to be resolved on appeal must be one that requires this Court's guidance, such as an issue where there is conflicting jurisprudence or a lack of existing jurisprudence. Questions that have no significance beyond the parties, or factual circumstances that are unlikely to arise again exactly the same way, or issues in relation to which the jurisprudence is well settled, will not raise questions of law requiring resolution in the public interest.

[Enbridge Gas, supra at paras. 35-37](#)

[R. v. Rankin, 2007 ONCA 127 at paras. 30-31, Respondent's Book of Authorities at Tab 5](#)

[R. v. Morillo, 2018 ONCA 582 at para. 9, Moving Party's Brief of Authorities at Tab 2](#)

41. The strength of the proposed grounds of appeal, “including whether there has been a clear or manifest error in the decisions below,” is a factor that may be taken into account in determining the significance of the proposed question of law to the administration of justice in the province.

[Enbridge Gas, supra at para. 38](#)

[R. v. Ul-Rashid, 2013 ONCA 782, supra at paras. 25-26, Respondent's Book of Authorities at Tab 6](#)

(C) There was no error in the interpretation of “damage”

42. The Town alleges that the Appeal Judge committed two errors of law in her interpretation of the term “damage” at paragraphs 13-14 of its factum:

13. Specifically, the Appeal Judge erred in holding that damage to habitat can be proven in the absence of any evidence of any negative impact to the species in issue.

14. Further, the Appeal Judge erred in finding that “damage” to habitat was broad enough to capture making the area “less attractive” or “valuable”, rather than focusing on whether a change to habitat affects a species’ ability to rely on it.

Amended Notice of Motion at paras 13-14

43. While the interpretation of the term “damage” in section 10 of the *ESA* could, in the right case, warrant this Honourable Court’s attention, this is not the right case for that exercise. The Appeal Judge did not commit any error of law in her interpretation of “damage.” The interpretive issues raised by the Town in this case are not credible and do not warrant leave to appeal.

a. Proof of damage to habitat does not require proof of harm to the species

44. There is no credibility to the suggestion that harm to species is an element of the offence of damaging habitat under s. 10 of the *ESA*. Harm to species is the core element of a different prohibition, the prohibition on killing, harming, harassing, capturing or taking a species at risk in s. 9 of the *ESA*:

9 (1) No person shall,

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

45. Sections 9 and 10 plainly prohibit different harms. Section 9 prohibits harm to species, while s. 10 prohibits harm to their habitat. This distinction is reflected in the *ESA*'s stated purpose of protecting "species that are at risk **and their habitats**" (emphasis added). Sections 9 and 10 must not be interpreted in a manner that removes this important distinction between the two different harms that they prohibit.

ESA, ss. 1, 9 and 10

b. The Appeal Judge did not err in her finding that damage to habitat under the *ESA* must be evaluated from the perspective of the species at risk

46. Where an area has not been prescribed by regulation as habitat of a species at risk, s. 2(b) of the *ESA* defines habitat as

(b) ... an area on which the species depends, directly or indirectly, to carry on its life processes, including life processes such as reproduction, rearing, hibernation, migration or feeding,

and includes places in the area described in clause ... (b) ... that are used by members of the species as dens, nests, hibernacula or other residences;

47. The Town objects to the Trial Justice's finding that damage to such habitat could include anything that makes the habitat "less attractive, useful, or valuable," arguing that

this definition is overly broad and that it should be narrowed to take into account potential economic impacts.

48. There is no hint of error here. As long as the evaluation of damage is made from the perspective of the species at risk – as it was by both the Trial Justice and the Appeal Judge – causing habitat to be “less attractive, useful or valuable” to the species at risk is indeed damage to the habitat under s. 10 of the *ESA*. This is precisely what the Appeal Judge found at para. 44 of her decision:

[44] His Worship’s adoption of a definition of damage that included causing something to be less *attractive, useful or valuable*, should be understood from the perspective of the [species at risk]. A flattened beach, the removal of foredunes and natural vegetation, on the evidence of the experts would result in the loss of nesting, foraging, shelter and camouflage for the [Plover].

49. It is difficult to understand what else damaging habitat could mean other than making it less attractive, useful or valuable to the species at risk that depends on that habitat for its survival. If a species is no longer attracted to habitat, it cannot make use of that habitat. If an area is made less useful or valuable to the species, that habitat is of less able to support the species. In either case, the habitat has been damaged.

50. The Town relies on this Court’s decision in *Wildlands League v Ontario (Lieutenant Governor in Council)*, 2016 ONCA 741, presumably to suggest that the s. 10 prohibition against damaging habitat must be construed narrowly to take into account economic goals and to balance those economic goals against protection of species at risk and their habitats.

[*Wildlands League v Ontario \(Lieutenant Governor in Council\)*, 2016 ONCA 741, Town’s Brief of Authorities at Tab 7 \(“Wildlands League”\)](#)

Factum of the Town at para. 50

51. As noted by the Appeal Judge, the Town’s submission misconstrues this Court’s decision in *Wildlands League*. In *Wildlands League*, this Court did find that the *ESA* contains tools that allow for regard to social, economic and social considerations. However, the Court located these tools in the statutory and regulatory instruments in the

ESA that allow, in certain circumstances, for carefully and strictly circumscribed exemptions from the broad prohibitions in ss. 9 and 10 of the *ESA*. These instruments are located in ss. 16-20 and 55(1)(b) of the *ESA*. Sections 16 to 20 give the Minister the authority to authorize habitat damage where it would further social, economic or cultural objectives. Similarly, s. 55(1)(b) allows the Lieutenant Governor in Council to promulgate regulations that create circumscribed exemptions from ss. 9 and 10 of the *ESA*.

Reasons for Decision of Justice J.A. Morneau, dated March 8, 2021, at paras 29-33, Town’s Motion Record at Tab 8

52. Nowhere in *Wildlands League* does this Court adopt the astonishing suggestion that the core prohibitions in ss. 9 and 10 of the *ESA* should be read narrowly to take into account social and economic considerations that are nowhere mentioned in the plain wording of those provisions. To the contrary, the Court in *Wildlands League* describes the prohibitions in ss. 9 and 10 as “broad,” while economic and social considerations are to be accounted for through the explicit statutory tools in ss. 16-20 and 55:

[92] The preamble to the Act speaks of the contributions of biological diversity as “an important part of sustainable social and economic development.” It refers to the people of Ontario doing “their part in protecting species that are at risk, with appropriate regard to social, economic and cultural considerations.” **The legislation proceeds on the presumption of the protection of SAR, which includes the broad prohibitions contained in ss. 9(1) and 10(1). The Act provides for exceptions however to these prohibitions through permits, stewardship agreements and other instruments. Importantly, s. 55(1)(b) explicitly provides for regulated exceptions to the general prohibitions under ss. 9(1) and 10(1).** While the overall objective or motivation of the Act is to protect and preserve SAR, the statutory scheme has regard for the social and economic context in which this protection and preservation operate. [emphasis added]

[Wildlands League, supra at para. 92](#)

53. To read some sort of balancing of economic interests into s. 10 would undermine this explicit statutory structure, that provides for exceptions to the broad prohibitions in ss. 9 and 10 only through carefully circumscribed tools provided elsewhere in the *ESA* and its regulations.

54. In summary, there is no credibility to the suggestion that either the Trial Justice or the Appeal judge erred by failing to take economic factors into account in their interpretation of “damage to habitat.”

(D) The application of *White Burgess* to the specific facts of this case is not a question of law alone

55. The Town describes its first proposed grounds of appeal relating to the application of the *White Burgess* test as follows at para. 15 of its Amended Notice of Motion:

The Appeal Judge erred in law by failing to properly apply controlling authority of the Supreme Court of Canada that disallows a key member of an investigative team from being qualified as an expert witness in a prosecution arising from that investigation.

56. With respect, although this proposed ground of appeal is skillfully phrased to look like it raises a question of law alone, the Town is really asking this Court to revisit the findings of fact and of mixed fact and law made at trial regarding Ms. Robinson’s ability to discharge her duty to the court and give unbiased evidence. This is not a ground of appeal for which leave can be granted under s. 131 of the *POA*.

57. Nowhere in *White Burgess* does the Supreme Court say that “a key member of an investigative team” or that an employee of a prosecuting agency must be disqualified from giving expert evidence on the basis of bias. *White Burgess* requires a court to consider the factual circumstances of a case and the *voir dire* evidence and determine whether the proposed expert is unwilling or unable to provide an unbiased opinion. As the Supreme Court put the point in *White Burgess*, “the decision as to whether an expert should be permitted to give evidence despite having an interest or connection with the litigation is a matter of fact and degree.”

***White Burgess, supra* at paras. 49-50**

58. This question of “fact and degree” is precisely the issue of mixed fact and law that was engaged in the *voir dire* held at trial. The Trial Justice decided that Suzanne Robinson was not “a key member of the investigative team” in any sense that would preclude her from giving unbiased expert testimony. To the contrary,

- a) she is not an investigator or enforcement officer. She is a biologist.
- b) She did not plan investigative steps. She did not interview any witnesses. She did not attend meetings with the investigators. Indeed, she was on maternity during the investigation.
- c) She could only be described as “a member of the investigative team” in the completely innocuous sense that she was asked to provide an expert opinion on whether the Town had damaged Piping Plover habitat, which opinion the team of investigators (which did not include Ms. Robinson herself) used to inform the decision about whether charges should be laid against the Town.

59. In short, while Ms. Robinson was involved in the investigation in her capacity as an expert on Piping Plovers, she was not “a key member of the investigative team” in any sense that suggests any error in either the Trial Justice’s or the Appeal Judge’s application of the *White Burgess* test to the specific facts of this case. It is trite law that “The mere fact that an expert has somehow been involved in the investigation of [a] case in and of itself cannot be a ground for exclusion.” Courts regularly and properly qualify experts who were involved in investigations and/or who prepared pre-charge expert reports, so long as the proposed expert is willing and able to provide an unbiased opinion.

[R. v. Live Nation, 2016 ONCJ 223 at para 25, Respondent’s Book of Authorities at Tab 7](#)

60. This proposed ground of appeal is really just a veiled request for this Honourable Court to revisit the Trial Justice’s assessment, based on the particular facts of the case, that Suzanne Robinson’s role in the investigation would not prevent her from providing an unbiased opinion. This is not an issue of law alone on which leave can be granted under s.131 of the *POA*.

61. Even if a pure issue of law relating to *White Burgess* could somehow be extracted, the test established by the Supreme Court in *White Burgess* is by now well understood and has already been the subject of many decisions by this Honourable Court, both criminal and civil. There are no contradictory applications of the *White Burgess* test

pertinent to the facts of this case that would require this Court's guidance. As such, it is respectfully submitted that this Court's guidance is not required.

(E) The Appeal Judge was correct to grant deference to the Trial Justice's decision to qualify Suzanne Robinson as an expert

62. In paragraph 15 of the Amended Notice of Motion, the Town proposes a second ground of appeal relating to the qualification of Suzanne Robinson:

The Appeal Judge further erred in law by extending deference to the Justice of the Peace's ruling on this issue. As the Justice of the Peace erred in his articulation of the *White Burgess* test, his decision was not entitled to deference.

63. The Town alleges that the Trial Justice erred by misapplying the *White Burgess* test and, as such, the Appeal Judge was in error to accord any deference to the Trial Justice's decision to qualify Suzanne Robinson as an expert. This allegation rests on the Trial Justice's comment that "I have distinguished the case at bar from the cited case law presented. I do find – pardon me – the *White Burgess* case to apply in this case, but in a more limited scope, of which I will describe hereafter."

64. The Appeal Judge was alive to the possibility that the Trial Judge had fallen into error by applying *White Burgess* "in a more limited scope." She explicitly highlighted this possibility in her reasons for decision stating "His Worship's reference to applying *White Burgess* "in a *more limited scope*" requires careful consideration." However, as she correctly identified, the ultimate issue for her to decide was "whether His Worship applied *White Burgess*."

Reasons for Decision of Justice J.A. Morneau, dated March 8, 2021, at para. 77, Town's Motion Record at Tab 8

65. The Appeal Judge went on to carefully consider whether the Trial Justice had correctly applied *White Burgess*. After reviewing his decision in detail, she concluded that "he appears to have addressed the issues that are at the heart of *White Burgess*." This was a determination she was entitled to make and not one which raises an issue of law alone. Further, this is not an issue of law of such wide importance that it is essential

in the public interest or for the due administration of justice that this Honourable Court provide guidance on the issue within the meaning of s. 131 of the *POA*. The issue of whether Suzanne Robinson was properly qualified as an expert is of interest only to the parties to this particular case and is not one “of broad importance.”

66. Finally, when viewed in the context of the submissions and cases relied upon in the qualification *voir dire*, the Trial Justice’s comment about applying *White Burgess* “in a more limited scope” was clearly just an awkward way of distinguishing a criminal line of cases in which *White Burgess* was applied to exclude proposed evidence from police officers who were deeply implicated in the investigations at issue. Read in this context, Justice Anderson comments do not misapply *White Burgess*. Rather, his comments correctly distinguished, on their facts, a line of criminal cases involving proposed police officer experts who could not be impartial because of their deep involvement in the investigations at issue.

PART IV. ORDER REQUESTED

67. For all the above reasons, the Crown requests that this Honourable Court deny leave to appeal on all of the proposed grounds of appeal.

All of which is respectfully submitted this 29th day of April, 2021.



Madeline Ritchie and Nicholas Adamson

SCHEDULE A – LIST OF AUTHORITIES

1. [*R v Mills*, 2019 ONCA 940](#)
2. [*R v Shafia*, 2016 ONCA 812](#)
3. [*Ontario \(Ministry of the Environment and Climate Change\) v. Sunrise Propane Energy Group Inc.*, 2018 ONCA 461](#)
4. [*Ontario \(Ministry of Labour\) v. Enbridge Gas Distribution Inc.*, 2011 ONCA 13](#)
5. [*R. v. Rankin*, 2007 ONCA 127](#)
6. [*R. v. Morillo*, 2018 ONCA 582](#)
7. [*Wildlands League v Ontario \(Lieutenant Governor in Council\)*, 2016 ONCA 741](#)
8. [*R v Live Nation*, 2016 ONCJ 223](#)

SCHEDULE B – LEGISLATION

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

Historical version for the period June 30, 2008 to June 5, 2019.

Preamble

Biological diversity is among the great treasures of our planet. It has ecological, social, economic, cultural and intrinsic value. Biological diversity makes many essential contributions to human life, including foods, clothing and medicines, and is an important part of sustainable social and economic development.

Unfortunately, throughout the world, species of animals, plants and other organisms are being lost forever at an alarming rate. The loss of these species is most often due to human activities, especially activities that damage the habitats of these species. Global action is required.

The United Nations Convention on Biological Diversity takes note of the precautionary principle, which, as described in the Convention, states that, where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.

In Ontario, our native species are a vital component of our precious natural heritage. The people of Ontario wish to do their part in protecting species that are at risk, with appropriate regard to social, economic and cultural considerations. The present generation of Ontarians should protect species at risk for future generations.

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

...

Purposes

1 The purposes of this Act are:

1. To identify species at risk based on the best available scientific information, including information obtained from community knowledge and aboriginal traditional knowledge.
2. To protect species that are at risk and their habitats, and to promote the recovery of species that are at risk.
3. To promote stewardship activities to assist in the protection and recovery of species that are at risk.

Definitions

2 (1) In this Act,

...

“enforcement officer” means an enforcement officer under section 21;

...

“habitat” means,

(a) with respect to a species of animal, plant or other organism for which a regulation made under clause 56 (1) (a) is in force, the area prescribed by that regulation as the habitat of the species, or

(b) with respect to any other species of animal, plant or other organism, an area on which the species depends, directly or indirectly, to carry on its life processes, including life processes such as reproduction, rearing, hibernation, migration or feeding,

and includes places in the area described in clause (a) or (b), whichever is applicable, that are used by members of the species as dens, nests, hibernacula or other residences;

...

Prohibition on killing, etc.

9. (1) No person shall,

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

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

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

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

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

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

Possession, etc., of species originating outside Ontario

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

Specified geographic area

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

Possession by Crown

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

Transfer for certain purposes

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

(a) scientific or educational purposes; or

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

Interpretation

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

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

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

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

Prohibition on damage to habitat, etc.

10. (1) No person shall damage or destroy the habitat of,

(a) a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species; or

(b) a species that is listed on the Species at Risk in Ontario List as an extirpated species, if the species is prescribed by the regulations for the purpose of this clause. 2007, c. 6, s. 10 (1).

Specified geographic area

(2) If the Species at Risk in Ontario List specifies a geographic area that a classification of a species applies to, subsection (1) only applies to that species in that area. 2007, c. 6, s. 10 (2).

Transition

(3) Clause (1) (a) does not apply to a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species under clause 7 (7) (c) or (d) until the earlier of the following dates:

1. The date that a regulation made under clause 55 (1) (a) that applies to the species comes into force.

2. The fifth anniversary of the day section 7 comes into force. 2007, c. 6, s. 10 (3).

...

Agreements, Permits and Other Instruments

Stewardship agreements

16. (1) The Minister may enter into agreements for the purpose of assisting in the protection or recovery of a species specified in the agreement that is listed on the Species at Risk in Ontario List. 2007, c. 6, s. 16 (1).

Response to recovery strategy

(2) Before entering into an agreement under this section, the Minister shall consider any statement that has been published under subsection 11 (8) with respect to a recovery strategy for the species specified in the agreement. 2007, c. 6, s. 16 (2).

Authorization provided by agreement

(3) An agreement under subsection (1) may authorize a party to the agreement to engage in an activity specified in the agreement that would otherwise be prohibited by section 9 or 10. 2007, c. 6, s. 16 (3).

Same

(4) An authorization described in subsection (3) does not apply unless the party to the agreement who seeks to rely on the authorization complies with any requirements imposed on the party by the agreement. 2007, c. 6, s. 16 (4).

Permits

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

Limitation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Response to recovery strategy

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

Conditions

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

Same

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

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

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

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

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

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

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

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

Compliance

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

Amendment or revocation

(7) The Minister may,

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

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

(ii) amend the permit, if,

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

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

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

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

(iii) revoke the permit; or

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

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

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

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

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

Delegation

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

Instruments under other Acts

Minister's instruments

18. (1) An instrument authorizing a person to engage in an activity has the same effect as a permit issued under section 17 if,

(a) the instrument was entered into, issued, made or approved by the Minister;

(b) the instrument was entered into, issued, made or approved under a provision of an Act of Ontario or Canada or a provision of a regulation made under an Act of Ontario or Canada;

(c) the instrument affects a species specified in the instrument that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species;

(d) before entering into, issuing, making or approving the instrument, the Minister considered any statement that had been published under subsection 11 (8) with respect to a recovery strategy for the species specified in the instrument; and

(e) at the time the instrument was entered into, issued, made or approved,

(i) the Minister was of the opinion that the activity authorized by the instrument was necessary for the protection of human health or safety,

(ii) the Minister was of the opinion that the main purpose of the activity authorized by the instrument was to assist, and that the activity would assist, in the protection or recovery of the species specified in the instrument, or

(iii) the Minister was of the opinion that the main purpose of the activity authorized by the instrument was not to assist in the protection or recovery of the species specified in the instrument, but,

(A) the Minister was of the opinion that an overall benefit to the species would be achieved within a reasonable time through requirements imposed by the instrument,

(B) the Minister was of the opinion that reasonable alternatives had been considered, including alternatives that would not adversely affect the species, and the best alternative was adopted, and

(C) the Minister was of the opinion that reasonable steps to minimize adverse effects on individual members of the species were required by the instrument. 2007, c. 6, s. 18 (1).

Prescribed instruments

(2) An instrument authorizing a person to engage in an activity has the same effect as a permit issued under section 17 if,

(a) the instrument was entered into, issued, made or approved under a provision of an Act of Ontario or Canada or a provision of a regulation made under an Act of Ontario or Canada;

(b) the provision referred to in clause (a) is prescribed by the regulations;

(c) the Minister has entered into an agreement with the authorizing official that, for the purpose of this subsection, applies to the entering into, issuance, making or approval of instruments under the provision referred to in clause (a);

(d) the instrument affects a species specified in the instrument that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species;

(e) before entering into, issuing, making or approving the instrument, the authorizing official considered any statement that had been published under subsection 11 (8) with respect to a recovery strategy for the species specified in the instrument; and

(f) at the time the instrument was entered into, issued, made or approved,

(i) the authorizing official was of the opinion that the activity authorized by the instrument was necessary for the protection of human health or safety,

(ii) the authorizing official was of the opinion that the main purpose of the activity authorized by the instrument was to assist, and that the activity

would assist, in the protection or recovery of the species specified in the instrument, or

(iii) the authorizing official was of the opinion that the main purpose of the activity authorized by the instrument was not to assist in the protection or recovery of the species specified in the instrument, but,

(A) the authorizing official was of the opinion that an overall benefit to the species would be achieved within a reasonable time through requirements imposed by the instrument,

(B) the authorizing official was of the opinion that reasonable alternatives had been considered, including alternatives that would not adversely affect the species, and the best alternative was adopted, and

(C) the authorizing official was of the opinion that reasonable steps to minimize adverse effects on individual members of the species were required by the instrument. 2007, c. 6, s. 18 (2).

Application of subs. (2)

(3) Subsection (2) applies only if the instrument was entered into, issued, made or approved,

(a) after the regulation referred to in clause (2) (b) came into force; and

(b) during a period when the agreement referred to in clause (2) (c) was in effect. 2007, c. 6, s. 18 (3).

Compliance

(4) Subsections (1) and (2) do not apply to an instrument unless the person seeking to rely on the instrument has complied with any requirements imposed by the instrument. 2007, c. 6, s. 18 (4).

Definitions

(5) In this section,

“authorizing official” means,

(a) with respect to an agreement that authorizes a person to engage in an activity, any federal, provincial or municipal official who entered into the agreement, or

(b) with respect to any other instrument, the person who issued, made or approved the instrument; (“agent autorisateur”)

“instrument” means an agreement, permit, licence, order, approved plan or other similar document. (“acte”) 2007, c. 6, s. 18 (5).

Aboriginal persons

19. (1) The Minister may, for the purposes of this Act, enter into an agreement with any of the following persons or bodies that relates to a species specified in the agreement that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species:

1. A band as defined in the *Indian Act* (Canada).
2. A tribal council.
3. An organization that represents a territorially-based aboriginal community. 2007, c. 6, s. 19 (1).

Authorization

(2) An agreement under subsection (1) may authorize aboriginal persons described in the agreement or a party to the agreement to engage in an activity specified in the agreement that would otherwise be prohibited by section 9 or 10. 2007, c. 6, s. 19 (2).

Permits

(3) The Minister may issue a permit to a person or body referred to in subsection (1) that, with respect to a species specified in the permit that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species, authorizes aboriginal persons described in the permit or the holder of the permit to engage in an activity specified in the permit that would otherwise be prohibited by section 9 or 10. 2007, c. 6, s. 19 (3).

Limitation

(4) The Minister shall not enter into an agreement or issue a permit under this section if he or she is of the opinion that the agreement or permit would authorize an activity that would jeopardize the survival or recovery, in Ontario, of the species specified in the agreement or permit. 2007, c. 6, s. 19 (4).

Response to recovery strategy

(5) Before entering into an agreement or issuing a permit under this section, the Minister shall consider any statement that has been published under subsection 11 (8) with

respect to a recovery strategy for the species specified in the agreement or permit. 2007, c. 6, s. 19 (5).

Permit conditions

(6) Subsections 17 (4) and (5) apply, with necessary modifications, to a permit issued under this section. 2007, c. 6, s. 19 (6).

Reliance on authorization

(7) An authorization described in subsection (2) or (3) does not apply to,

(a) an aboriginal person who seeks to rely on the authorization, unless he or she complies with any requirements imposed on the aboriginal person by the agreement or permit; or

(b) a person or body referred to in subsection (1) who seeks to rely on the authorization, unless the person or body complies with any requirements imposed on it by the agreement or permit. 2007, c. 6, s. 19 (7).

Compliance with permit

(8) The holder of a permit issued under this section and the aboriginal persons who are authorized by the permit to engage in an activity that would otherwise be prohibited by section 9 or 10 shall comply with any requirements imposed on them by the permit. 2007, c. 6, s. 19 (8).

Amendment or revocation of permit

(9) The Minister may,

(a) with the consent of the holder of a permit issued under this section, revoke or amend the permit; or

(b) without the consent of the holder of a permit issued under this section, but subject to section 20, revoke or amend the permit, if the Minister is of the opinion that the revocation or amendment,

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

(ii) is necessary for the protection of human health or safety. 2007, c. 6, s. 19 (9).

Amendment or revocation of permits without consent

20. (1) Before amending or revoking a permit under clause 17 (7) (b) or 19 (9) (b), the Minister shall give the holder of the permit notice of the intention to amend or revoke the permit. 2007, c. 6, s. 20 (1).

Contents of notice

(2) The notice shall,

(a) set out the amendments that the Minister intends to make to the permit, or state that the Minister intends to revoke the permit, as the case may be;

(b) set out the Minister's reasons for amending or revoking the permit; and

(c) state that a hearing on the amendment or revocation of the permit may be required in accordance with subsection (5). 2007, c. 6, s. 20 (2).

Service of notice

(3) The notice shall be served personally or by registered mail addressed to the holder of the permit at the person's last known address. 2007, c. 6, s. 20 (3).

Registered mail

(4) A notice served by registered mail shall be deemed to have been served on the fifth day after the day of mailing, unless the person served establishes that the person did not, acting in good faith, through absence, accident, illness or other cause beyond the person's control, receive the notice until a later date. 2007, c. 6, s. 20 (4).

Hearing

(5) A person who is served with a notice under subsection (3) may require a hearing by mailing or delivering to the Minister, within 15 days after service of the notice, a written request for a hearing that includes a statement of the reasons for requesting the hearing. 2007, c. 6, s. 20 (5).

No request of hearing

(6) If the Minister does not receive a request for a hearing in accordance with subsection (5), the Minister may amend or revoke the permit as set out in the notice under subsection (2). 2007, c. 6, s. 20 (6).

Appointment of hearing officer

(7) If the Minister receives a request for a hearing in accordance with subsection (5), the Minister shall appoint a hearing officer to hold the hearing. 2007, c. 6, s. 20 (7).

Parties

(8) The person who required the hearing and such other persons as the hearing officer may specify are parties to the hearing. 2007, c. 6, s. 20 (8).

Minister entitled to be heard

(9) The Minister is entitled to be heard at the hearing. 2007, c. 6, s. 20 (9).

Procedure

(10) Sections 5.1, 5.2, 6 to 15.1, 16, 21, 21.1, 22 and 23 of the *Statutory Powers Procedure Act* apply, with necessary modifications, to the hearing. 2007, c. 6, s. 20 (10).

Report

(11) After the hearing, the hearing officer shall issue a report to the Minister that contains,

- (a) a summary of the evidence presented at the hearing;
- (b) the hearing officer's opinion on the merits of amending or revoking the permit, having regard to the requirements of clause 17 (7) (b) or 19 (9) (b), as the case may be, and the hearing officer's recommendations; and
- (c) the reasons for the hearing officer's opinion and recommendations. 2007, c. 6, s. 20 (11).

Minister's decision

(12) After considering the hearing officer's report, the Minister may, subject to clause 17 (7) (b) or 19 (9) (b), as the case may be,

- (a) amend the permit as set out in the notice under subsection (2) or in another manner;
- (b) revoke the permit as set out in the notice under subsection (2), or amend the permit instead of revoking it as set out in the notice under subsection (2); or
- (c) refrain from amending or revoking the permit. 2007, c. 6, s. 20 (12).

Notice of decision

(13) The Minister shall give notice of his or her decision under subsection (12) and a copy of the hearing officer's report to the parties to the hearing. 2007, c. 6, s. 20 (13).

...

Regulations

55. (1) Subject to subsection (2) and section 57, the Lieutenant Governor in Council may make regulations,

(a) prescribing, for the purpose of clause (a) of the definition of “habitat” in subsection 2(1), an area as the habitat of a species that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species;

(b) prescribing exemptions from subsection 9(1) or 10(1), subject to any conditions or restrictions prescribed by the regulations;

(c) providing that subsection 11(1) or (7) has no application to a species, if subsections 9(1) and 10(1) have no application to the species;

(d) governing the preparation of recovery strategies under section 11 and management plans under section 12;

(e) prescribing or respecting any matter that this Act refers to as a matter prescribed by the regulations or as otherwise dealt with by the regulations, other than regulations that are required by section 7. 2007, c. 6, s. 55 (1).

Consideration of recovery strategy

(2) Before a regulation is made under clause (1)(a) prescribing an area as the habitat of a species, the Minister shall consider any recovery strategy that has been prepared for the species under section 11 and any statement that has been published under subsection 11(8) with respect to the recovery strategy. 2007, c. 6, s. 55 (2).

Description of habitat

(3) Without limiting the generality of clause (1)(a), a regulation under that clause prescribing an area as the habitat of a species,

(a) may describe the area by,

(i) describing specific boundaries for the area,

(ii) describing features of the area, or

(iii) describing the area in any other manner;

(b) may prescribe areas where the species lives, used to live or is believed to be capable of living; and

(c) may prescribe an area that is larger or smaller than the area described by clause (b) of the definition of “habitat” in subsection 2 (1). 2007, c. 6, s. 55 (3).

Conditions and restrictions on exemptions

(4) Without limiting the generality of clause (1)(b), a regulation under that clause may, as a condition or restriction on an exemption, provide that the exemption only applies to a person if the person complies with an agreement entered into between the person and the Minister. 2007, c. 6, s. 55 (4).

Habitat regulations

56. (1) If a species is listed on the Species at Risk in Ontario List as an endangered or threatened species, the Minister shall, not later than the date described in subsection (2),

(a) give notice to the public under section 16 of the *Environmental Bill of Rights, 1993* of a proposal to make a regulation under clause 55(1)(a) that would prescribe an area as the habitat of the species;

(b) publish a notice on the environmental registry established under the *Environmental Bill of Rights, 1993* that,

(i) states that the Minister is of the opinion that additional time is required to prepare a proposal to make a regulation described in clause (a),

(ii) sets out the Minister’s reasons for the opinion referred to in subclause (i), and

(iii) provides an estimate of when notice of a proposal to make a regulation described in clause (a) will be given to the public under section 16 of the *Environmental Bill of Rights, 1993*; or

(c) publish a notice on the environmental registry established under the *Environmental Bill of Rights, 1993* that,

(i) states that the Minister is of the opinion that no regulation under clause 55(1)(a) is required with respect to the species because,

(A) the only locations in Ontario where the species is known to live in the wild are on federal land within the meaning of the *Species at Risk Act* (Canada),

(B) pursuant to a regulation made under clause 55(1)(b), clause 10 (1) (a) has no application to the species, or

(C) other circumstances prescribed by the regulations exist, and

- (ii) sets out the reasons for the Minister's opinion referred to in subclause (i). 2007, c. 6, s. 56 (1).

Time period

(2) The date referred to in subsection (1) is,

(a) the second anniversary of the date the species is listed on the Species at Risk in Ontario List as an endangered species; or

(b) the third anniversary of the date the species is listed on the Species at Risk in Ontario List as a threatened species. 2007, c. 6, s. 56 (2).

Transition

(3) This section does not apply to a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species under clause 7(7)(a), (c) or (d). 2007, c. 6, s. 56 (3).

Special requirements for certain regulations

57. (1) If a proposal for a regulation under subsection 55(1) is under consideration in the Ministry, the proposed regulation would apply to a species that is listed on the Species at Risk in Ontario List as an endangered or threatened species, and either or both of the following criteria apply, the Minister shall consult with a person who is considered by the Minister to be an expert on the possible effects of the proposed regulation on the species:

1. In the case of any proposed regulation under subsection 55(1), the Minister is of the opinion that the regulation is likely to jeopardize the survival of the species in Ontario or to have any other significant adverse effect on the species.
2. In the case of a proposed regulation under clause 55(1)(a), the Minister is of the opinion that the regulation is likely to result in a significant reduction in the number of members of the species that live in the wild in Ontario. 2007, c. 6, s. 57 (1).

Limitation

(2) If the Minister is required by subsection (1) to consult with a person who is considered by the Minister to be an expert on the possible effects of a proposed regulation on a species, the Minister shall not recommend the regulation to the Lieutenant Governor in Council, and the Lieutenant Governor in Council shall not make the regulation, unless,

(a) the Minister is of the opinion that the regulation will not result in the species no longer living in the wild in Ontario;

(b) the person consulted by the Minister under subsection (1) submitted a written report to the Minister on the possible effects of the proposed regulation on the species and the report included the person's opinion on,

(i) in the case of any proposed regulation under subsection 55(1), whether the regulation will jeopardize the survival of the species in Ontario or have any other significant adverse effect on the species, and, if so, whether the regulation will result in the species no longer living in the wild in Ontario, and

(ii) in the case of a proposed regulation under clause 55(1)(a), whether the regulation will result in a significant reduction in the number of members of the species that live in the wild in Ontario;

(c) the Minister considered alternatives to the proposal for a regulation, including,

(i) entering into one or more agreements under section 16 or issuing one or more permits under section 17, or

(ii) making a different regulation;

(d) the Minister gave notice of the proposal for a regulation to the public under section 16 of the *Environmental Bill of Rights, 1993* at least two months before the day the regulation is made; and

(e) the notice given under clause (d),

(i) in the case of any proposed regulation under subsection 55(1),

(A) set out the Minister's opinion on whether the regulation will jeopardize the survival of the species in Ontario or have any other significant adverse effect on the species, and

(B) stated that the Minister is of the opinion that the regulation will not result in the species no longer living in the wild in Ontario,

(ii) in the case of a proposed regulation under clause 55(1)(a), set out the Minister's opinion on whether the regulation will result in a significant reduction in the number of members of the species that live in the wild in Ontario,

(iii) gave the Minister's reasons for the opinions referred to in subclauses (i) and (ii),

(iv) set out a copy of the report referred to in clause (b),

(v) set out alternatives to the proposal for a regulation that the Minister considered under clause (c),

(vi) set out the reasons for making the proposed regulation, including any significant social or economic benefit to Ontario, and

(vii) set out steps that could be taken to minimize any adverse effects of the proposed regulation on individual members of the species. 2007, c. 6, s. 57 (2).

Fundamental changes in a proposal

(3) For the purposes of subsection (1), the question of whether a proposal has been so fundamentally altered as to become a new proposal is in the sole discretion of the Minister. 2007, c. 6, s. 57(3).

Interpretation

(4) In this section,

“proposal for a regulation” has the same meaning as in the *Environmental Bill of Rights, 1993*. 2007, c. 6, s. 57 (4).

O. Reg. 230/08: Species at Risk in Ontario List, made under the *Endangered Species Act, 2007, S.O. 2007, c. 6*

Historical version for the period June 15, 2016 to June 1, 2017.

SCHEDULE 2
ENDANGERED SPECIES

Column 1	Column 2	Column 3	Column 4
Item	Species Grouping	Common Name	Scientific Name
...			
98.	Birds	Piping Plover	<i>Charadrius melodus</i>

Historical version for the period June 2, 2017 to July 31, 2018.

SCHEDULE 2
ENDANGERED SPECIES

Column 1	Column 2	Column 3	Column 4
Item	Species Grouping	Common Name	Scientific Name
...			
105.	Birds	Piping Plover	<i>Charadrius melodus</i>

Provincial Offences Act, RSO 1990, c P33

Appeal to Court of Appeal

131 (1) A defendant or the prosecutor or the Attorney General by way of intervention may appeal from the judgment of the court to the Court of Appeal, with leave of a judge of the Court of Appeal on special grounds, upon any question of law alone or as to sentence.

Grounds for leave

(2) No leave to appeal shall be granted under subsection (1) unless the judge of the Court of Appeal considers that in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that leave be granted.

Appeal as to leave

(3) No appeal or review lies from a decision on a motion for leave to appeal under subsection (1).
R.S.O. 1990, c. P.33, s. 131.

HER MAJESTY THE QUEEN (MNRF)
Respondent

- and -

THE TOWN OF SOUTH BRUCE PENINSULA
Applicant

COURT OF APPEAL FOR ONTARIO

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