

Information No. 2560-999-19-0038

ONTARIO COURT OF JUSTICE

HIS MAJESTY THE KING

v.

CONSOLIDATED HOMES LTD.

R E A S O N S F O R J U D G M E N T

BEFORE THE HONOURABLE JUSTICE C. MATHIAS
on August 20, 2024, at NORTH BAY, Ontario

APPEARANCES:

B. Wilkie

Counsel for the Crown

G. Kramer

Counsel for Consolidated Homes Ltd.

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TUESDAY, AUGUST 20, 2024

THE COURT: Okay, so I have all counsel before the Court and there's an individual here in the courtroom, I'm not sure – what's your name, sir?

ROBERTO SUSKO: Robert Susko.

THE COURT: All right. Mr. Susko is in the body of the Court if individuals can't see him.

MS. KRAMER: Thank you, Your Honour, Mr. Susko was in attendance last day and is the representative of the appellant.

THE COURT: Okay, thank you. All right.

R E A S O N S F O R J U D G M E N T

Mathias, J. (Orally)

THE COURT: So, this is an appeal of a decision that was made by Her Worship Nichols. This matter involves Consolidated Homes Ltd. (CHL). This appeal is pursuant to s. 116(1) and 116(2)(a) of the *Provincial Offences Act* against the conviction of and sentence order by Her Worship, Justice of the Peace Nichols on October 12th, 2022.

Her decision was a finding that CHL unlawfully damaged Blanding's turtle habitat between June 1st and August 5th of 2018 contrary to s. 10(1)(a) of the *Endangered Species Act* 2007. Her Worship imposed a fine of \$1.00 and orders CHL to pay \$200,000 to the Nature Conservancy of Canada.

The counsel for the appellants is asking that this Court, sitting as an appeal court, respectfully

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asks the Court to either a) enter an acquittal and set aside Her Worships conviction; or b) in the alternative allow the appeal and order a new trial; or c) in the further alternative impose a fit and proper sentence.

So, this matter was argued before me on earlier date, and I reserved my decision to allow me to review the case law and receive the transcripts from the date that the appeal was heard, which was April 30th, of 2024. And I have reviewed those transcripts and case law.

So, getting to the matter at present, the damaged area was from the time period of June 1st, 2018, to August 5th of 2018. The vacant property blocks in the geographic Township of Widdifield within North Bay in the Northeast Region which are numbered property information numbers 49142-037349142-0374 and 49142-0246.

The offence specifically is unlawfully damaged or destroy the habitat of a species that is listed on the Species at Risk in Ontario List as threatened species, Blanding's turtles, contrary to the *Endangered Species Act* s. 10(1)(a).

The offence location is Circle Lake Road, just south of the word Road in the Circle Lake area map. That was referred to by Shamus Schnell as Exhibit A, Tab A in the Book of Exhibits.

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5 A brief summary of the facts are as follows, that the damaged area was 100 by 200 feet and the conviction pertains to a small portion of the land, 0.459 acres and in meters that would be 30.48 by 60.496. Tim Caddell provided this estimate at trial as set out in the transcript from March 28, 2022, at page 38.

10 In looking at the timeline, June 6 of 2018, Mr. Susko contacted the North Bay-Mattawa Conservation Authority to advise that CHL was levelling old piles of dirty at the site to stop illegal dumping, and an email was sent to Valerie Murphy, as well as application and fee that was submitted on June 6th of 2018.

15 On June 14th, 2018, development interference with wetlands and alterations permit, referred to as DIA permit was signed by Brian Taylor on June 14, 2018, and enforced from June 14 of 2018 to June 14 of 2020. And the purpose of that was to place fill and grade the site. And I refer to this site as the area that I gave the 0.459 acres.

25 June 12th of 2018, Valerie Murphy was the first environmental officer to attend the site. She did not identify the site as a Blanding's turtle habitat during her visit and she did not see Blanding's turtles at the site.

30 The Court also reviewed the documents from Shamus Schnell who was identified and acknowledged as an

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expert in Blanding's turtles' biology including habitat needs.

Between 2017 and 2020, Mr. Schnell worked at the North Bay District. He was assigned as the lead for all species at risk surveys and all reviews for any projects that required a review under the *Endangered Species Act*. Mr. Schnell testified that there were three turtle observations close to Circle Lake. One directly on Circle Lake and Wallace Road, north of Circle Lake near the bus terminal by an MNRF employee and there was two identifications of public individuals.

The arguments of the Crown on this appeal are as follows, that despite warnings from and discussions with staff of the MNRF about Blanding's turtles in the vicinity of Circle Lake in North Bay, the commercial builder used heavy equipment to remove all vegetation and its roots, referred to as grubbed to the edge of the wetland directly adjacent to Circle Lake. The grubbing negatively impacted all of the habitat functions. The Crown asks that this appeal be dismissed.

In June and August of 2018, the appellant used a large excavator to grub on the property located south of Circle Lake Road. The grubbing work pushed the soil towards and into the wetland and blurring the original wetland boundary.

Further arguments of the Crown is that Shamus now

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5 a management biologist provided expert opinion about Blanding's turtles and that they are listed as threatened under the *ESA Act* that Blanding's turtles are known to utilize wetlands and other appropriate habitat in the North Bay area, including Circle Lake.

10 The general habitat description referred to as the GHD for the Blanding's turtle is a document produced by the Province of Ontario and provides greater clarity on the area of habitat protected for species. The GHD was based on best available scientific information obtained for various researches.

15 Further that the GHD described three categories. Category one and more specifically, category two includes wetland complexes near species sightings out as well as a 30-meter buffer around those wetlands.

20 Further arguments is that the appellants property was mapped during the search warrant to identify the wetland boundary and using that to map the category to habitat extending 30 meters out from the wetland and that almost all the grubbing occurred in the category two habitat according to the GHD.

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30 Crown counsel also submitted that evidence at trial established that the grubbing was done in an area that Blanding's turtles use directly and it

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damaged that habitat in a number of ways.

Firstly, removal of the vegetation and shaded areas affecting the turtles' thermal regulation opportunities. And two, removal of vegetation made the site less valuable as a nesting habitat as both eggs and young turtles would be susceptible to predators.

At the time of the offence, the appellant knew the existing of Blanding's turtles in and around Circle Lake as seven years before the offence, the appellant acknowledged in an application to the City that both Circle and Depensiers Lake provided suitable habitat for the species and that "it is highly likely that Blanding's turtles are using the area" and that would be Exhibit Eight, Tab D, the Environmental Impact Study's Report.

The Crown further argues that the appellant was reminded of the presence of Blanding's turtles around Circle Lake on March 2nd, 2017, when the MNRF issued a stop order for work that it was doing on Wallace Road. The MNRF staff met with Mr. Orsi, Mr. Susko, and Mr. Bilz on October 6th, 2017, and a PowerPoint presentation was done about the Blanding's turtles and the options to comply.

On November 9th, 2017, Mr. Bilz and Mr. Schnell and two other Ministry staff attended near Wallace Road and Seymour to physically map the wetland boundary.

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5 The new wetland boundary was adopted in a development proposal by Mr. Bilz in 2017 which was the scope site environmental study report for the Wallace Road Condominium Application, part of Broken lots 16 Concession D.

10 Further, the original developmental footprint near Circle Lake is category two Blanding's turtles' habitat and that residential development is one of the biggest risks.

15 Further that with risk to the offence location, the appellant was verbally warned twice, June 12th of 2018, that Ms. Murphy advised Mr. Susko that the area was potentially a habitat for the species and the appellant was also warned by Rick Miller, president of Urso and Miller Surveying.

20 The appellant raises eight areas on appeal as it relates to conviction as well as one as it relates to sentence. And the position of the appellant CHL is that Her Worship Nichols made nine reversible errors in convicting CHL.

25 Firstly, that her finding was CHL was in contravention of s. 10(1)(a) under the *Endangered Species Act*. The first argument was there was no admissible evidence that the site was actually Blanding's turtles' habitat at the relevant time. Her Worship failed to take into account that none of the officials who inspected the site during or

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shortly after the relevant time period observed any Blanding's turtles or any evidence that they were using the site as habitat.

Her Worship also failed to consider s. 2(2) of the *Endangered Species Act*, which provides the definition of "habitat". And s. 2(1) does not include an area where species formerly occur or has the potential to be reintroduced.

Her Worship attached considerable weight to the general habitat description for Blanding's turtles which was referred to as the GHD. It is not a legal instrument and is intended to only provide generic non-specific information about areas which may potentially provide suitable habitat for the species and the GHD is a technical document.

The fifth err that was raised by CHL is that Her Worship attached weight to two unsworn reports by unidentified persons who reported having seen a Blanding's turtle prior to the offence date and not at the site and that they were not called as witnesses.

Further errs that Her Worship attached weight to evidence of a witness who saw Blanding's turtles two years after the relevant time period, also not at the site and that Her Worship failed to attach weight to the cross-examination of Shamus Schnell who stated that the site was functioning as habitat, but conceded he did not have any

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confirmation or prove that it was utilized for travel purposes, nesting, or thermogenic activities by Blanding's turtles.

And also, that Her Worship erred in finding that CHL was made aware by Ms. Murphy on June 6th, 2018, that the site was for Blanding's turtles' habitat.

And lastly, that Her Worship erred in attaching weight to hearsay evidence that the president of CHL limited was advised by a land surveyor and not a biologist that the area is likely Blanding's turtles' habitat.

As I referenced earlier, the relevant portions of the *Provincial Offences Act* for this appeal are s. 120(1), which sets out,

On the hearing of an appeal against a conviction or against a finding as to the ability, because of mental disorder, to conduct a defence, the court by order,
(a) may allow the appeal where it is of the opinion that,
(i) the finding should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
(iii) on any ground, there was a miscarriage of justice; or
(b) may dismiss the appeal where,
(i) the court is of the opinion that the appellant, although the appellant was not properly convicted on a count or part of an information, was properly convicted on another count or part of the information,
(ii) the appeal is not decided in favour of the appellant on any ground mentioned in

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clause (a), or
(iii) although the court is of the opinion
that on any ground mentioned in subclause (a)
(ii) the appeal might be decided in favour of
the appellant, it is of the opinion that no
substantial wrong or miscarriage of justice
has occurred.

And then s. 122(1) deals with appeal as taken
against sentence.

So, dealing with this matter at trial, Her Worship
Nichols heard from five Crown witnesses being
Officer Tim Caddell, Officer Nathan Kirby, Bonnie
Kennedy, Maria Badilla, Valerie Murphy, and Shamus
Schnell, who was qualified as an expert to give
opinion evidence on Blanding's turtles.

So, these are the findings of my review on appeal
that Her Worship also relied heavily on the GHD
document which is the General Habitat Description
for Blanding's turtles which is not a legal
instrument and generic description of sites.

So, sitting as an appeal court, this Court would
agree with that comment, while this Court is
mindful that the GHD of Blanding's turtles is a
document produced by the Province of Ontario to
provide greater clarity on the area of habitat
protected for species as set out in the three
categories of habitat it is not a legal document.

The *Endangered Species* s. 10(a) sets out, so this
is 10(1)(a) of the *Endangered Species Act*, it

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says,

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.

What's also is important to consider is the definition sections of habitat at s. 2(1) which states, that habitat names,

(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.

And further, the definition of habitat, and this is set out in s. 2(2),

For greater certainty, clause (b) of the definition of "habitat" in subsection (1) does not include an area where the species formerly occurred or has the potential to be reintroduced unless existing members of the species depend on that area to carry on their life processes.

The area for which CHL was charged was a very small specific area being proposed for grading which was 85 by 35 meters in size. Expert Shamus Schnell also provided extensive background on Blanding's turtles at trial and referenced the GHD

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document and a cross-examination a number of questions were put to him by the defence counsel which I will just reference.

So, this is page 36 of the transcripts, and this was cross-examination by Mr. Laplante who was original counsel for CHL when this matter was heard. So, this is a question put by Mr. Laplante to Mr. Schnell. So, page 36, I'm starting at line 12. [As read]

Q. Okay, in other words, you can't really avoid Blanding's turtles' habitat 100 percent. It's a matter of, as you said, your words, not mine, risk mitigation - risk mitigation?

A. Well, I would argue that Blanding's turtle habitat can be completely avoided because you can map where is expected to occur and have your proposed development activities outside of that.

Q. Okay, so where was - so, where was your survey protocol for this particular conclusion that you already opined upon?

A. Which conclusion are - conclusion are we referring to?

Q. The conclusion that the area that was grubbed was Blanding's turtle habitat.

A. So, my conclusion is based on my personal experience with Blanding's turtle having to do with going out and surveying habitat and capturing them. My educational experience both as a fish and wildlife technologist technician and my bachelor - my bachelor's in education as a biologist, my work experience as it related to the assessment of habit and the scientific literature based on the description of Blanding's turtle's habitat.

Q. So, it's not....

A. In relation to the general habitat description.

Q. So, it's not based on any particular survey protocol because there is none?

A. No, there is not a survey protocol.

Q. So, it's just based on you and your

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experience and not a proper survey?

A. Yes.

Q. Is that why the condos were built in effectively the same category two Blanding's turtle habitat because it was a risk mitigation strategy?

A. I don't believe I can comment on that.

Q. Okay, well do you know the - well we do know the condos were built?

A. Yeah, the condos were definitely built in category two habitat, yeah.

Q. And the grubbing work was done in category two habitat - habitat and that's the source of the charge?

A. That's correct.

Q. And the grubbing in the impugned area of the grubbing is outside of the stop work order that wasn't altered at any point in time even after you came into the picture.

A. It was outside of the red hatch area, yes.

Q. Yeah, and you indicated some potential or what were your words, related activities take place, but you've got no proof any nesting occurred in the area that any thermogenic activities took place and that any travel activities took place in the Blanding's turtle in the impugned area?

A. Sorry, can you say that once more, please?

Q. Sure, what evidence do you have that the Blanding's turtle used the impugned area for thermogenic activities, nesting activities, or travel activities?

A. So, we have a number of Blanding's turtle occurrences that are either adjacent to the subject property or within the lake itself.

[And then a further answer] And so, what - so, what we are utilizing is the habitat that was naturalized there prior to the disturbance to relate that to the functions of the Blanding's turtle.

Q. Right, so you are not able to tell this Court today that you can confirm the habitat was used for a specific purpose. It's more so that it has potential for habitat. How is that?

A. It's definitely contributing to the function of habitat of the wetland, yes.

Q. So, it's got the potential for habitat, you

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just don't have any specific confirmation of what purpose it had?

A. Well, we can imply or interpret the function of that habitat based on what we suspect was there. If you are asking if I had placed a radio transmitter on that turtle and it walked across the impinged property, then the answer is no.

Q. All right. I'm going to suggest to you that what your evidence is really about, because I accept your qualifications, the habitat, the land itself has potential of habitat. You don't have specific proof that it was used for thermogenic nesting or travel purposes?

A. Sorry, say that once more again.

Q. Sure. The impugned property has potential for habitat. Are we agreed there?

A. We are agreed, but I would go so far as to argue that it is functioning as habitat.

Q. But you don't have any confirmation or proof that it was utilized for travel purposes, nesting, or thermogenic activities by Blanding's turtles?

A. That is correct.

Ms. Valerie Murphy, a regulations officer with the North Bay-Mattawa Conversation Authority and also was a former MNRF biologist attended the site on June 12th, 2018, and stated that the site had the potential for Blanding's turtles. However, she did not identify the lands a Blanding's turtles' habitat on that particular date.

The area in question is set out in Exhibit Two, Tab E. The black area outlined depicting east of Wallace Road and the south of Circle Lake.

The appellant also submits that Her Worship erred by relying on two sightings of Blanding's turtles

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approximate to the site in 2007 which is 10 years before the offence date and in 2017 by an MNRF staff, and then lastly by Maria Badilla who took a photo on June 22nd, 2022, at Circle Lake and her Worship did accept Ms. Badilla's evidence.

This Court would find this an error in considering habitat is defined under the *Endangered Species Act* s. 2 and more specifically s. 2(2). The Scope Site Environmental Impact Study Report for the Wallace Road Condominium Application part of broken lot 16 Concession D at page nine references "none of the above noted species or any other SAR were observed or heard on or within the 120 meters of the study area during our investigation nor was there use..." It is highly likely Blanding's turtles are using the area. "While onsite anecdotal evidence was provided by a local resident that Blanding's turtles were using this lake."

This Court sitting as an appeal court would also find that Her Worship erred in accepting the evidence of Maria Badilla, a homeowner of a property close to Circle Lake. She had taken a photo of a Blanding's turtle on June 11th, 2020, at Circle Lake itself, not at the site. The Court would agree that in reference to s. 2(2) of the *Endangered Species Act* which states,

For greater certainty, clause (b) of the definition of habitat in subsection (1) does not include an area where species formerly occurred or has the potential to be re-

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introduced unless existing members of the species depend on that area to carry out their life processes.

This is evidence after the fact.

Defence at trial raised the point that “the site was outside of the hatched area” which it was as attached to the stop work order and noted as Appendix A and B. And this was a submission of Mr. Laplante and to convict someone on the basis that the habitat has potential.

The Court is aware that the stop order of work was made March 2nd, 2017, along Wallace Road, which was another portion of the lands approximate to the site.

In November of 2017, Mr. Bilz, Mr. Schnell, and two other Ministry employees attended the appellant’s property near Wallace Road and Seymour Street and physically mapped the wetland boundary for the purpose of delineating the Blanding’s turtle habitat.

The new wetland boundary was adopted in a development proposal by Mr. Bilz on behalf of the appellant in December of 2017.

On February 1st, 2018, the MNRF hosted a meeting attended by Mr. Orsi, Mr. Susko, Mr. Bilz, and the topic was to discuss the appellant’s development proposal along Wallace Road and how to best protect the Blanding’s turtles. Many meetings

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were held about the Wallace Road and Seymour Road Condominium Plan. And over time, the disturbance boundary was adjusted in the area.

Mr. Susko and Mr. Bilz were engaged with various agencies and individuals such as Shamus Schnell who was the management biologist, Valerie Murphy. Mr. Susko gave a statement to Tim Caddell and there were also various emails that were shared such as for example, an email on August 18th, 2018, where Officer Caddell was telling Mr. Susko to hold back on work until he had heard from the North Bay-Mattawa Conservation Authority.

In describing the relationship that Valerie Murphy had with Mr. Susko, she said all her interactions with Mr. Susko were positive. Nathan Kirby also stated in his evidence, and this is at page 107 line 16, "so, there was some ongoing discussions as a result of some educational work with the Ministry and Consolidated Homes as there was some, I feel there was some actually some quite good discussion".

Nathan Kirby was also not able to identify the shells that were found near the site to be Blanding's turtles shells.

The use of "potential possibly Blanding's turtles' sights" and when it was put to Mr. Schnell, he indicated [As read]

Q. You don't have any confirmation or proof

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that it was utilized for travel purposes, nesting, or thermogenic activities by Blanding's turtles?

A. That's correct.

5 This Court would also find that the email exchange on June 15th, 2018, between Mr. Susko and Valerie Murphy, it's stated the following, I'll just refer to that. All right so, just going back to Exhibit B, this is in the Book of Exhibits of Valerie Murphy, it was from Consolidated Homes on June 6th, 10 2018, to Valerie Murphy, indicating, [As read]

15 Good morning, Valerie. I just wanted to give you a heads up that Paul has started to level some piles of dirt at the end of the road. People are dumping garbage behind them so he's knocking everything flat. I know he needs a permit; he just didn't give me any notice - or he just didn't give me any notice. I'll fill in a permit today and get it to you. I just wanted you to be aware in case you got any calls, you shouldn't, but just in case.

20 Ms. Murphy responds with an email chain, and it starts, this would be June 15th, 2018, so, this is from Consolidated Homes to Valerie Murphy, "good morning, Valerie. Any chance I can get a copy of that permit today, please." And then on that same date, June 15th, 2018, at 7:16 a.m., Ms. Murphy 25 writes back, "hi Rob, I got it signed at the end of yesterday. I will email it as soon as I get to work". And then subsequently, at 8:17 a.m. on June 15th, 2018, Ms. Murphy states, [As read]

30 Hi Rob, please find attached the email of an electronic copy of the permit plans and application for work being complete off Circle Lake Road. Placed an original in the mail to your attention. If you have any questions or

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5 concerns, please let me know. Also, so you are aware, I received a call from the MNRF, it sounds like they have been receiving phone calls regarding concerns for Blanding's turtles' habitat. I advised her that we are working together to get a DIA permit out for the work. I also let her know we did a site visit, and I was aware that you had marked and were leaving approximately a 30-meter buffer between the work and the lake all remaining with vegetation. I'm not sure if they were going to try to connect with you or not but wanted you to be aware of this anyways.

10 On June 18th, of 2018, that was the day the property was walked as stated by Valerie Murphy at page 23 of the transcripts from the trial date of May 3rd, 2022, which reads as follows, and this is Ms. Murphy, she was being asked questions by Mr. Gonzalez, [As read]

15 Q. And then photo three, Ms. Murphy [so this is referring her to photos that were filed in Exhibit Seven at Tab C].

20 A. Photo Number Three, I'm again standing by the disturbed area south of Circle Lake. And in this case here, I'm showing a picture again of the extent of the disturbed area. How far it goes south on the property at the current date and time. I'm looking in a south - southwest direction and you could see here the backyards of the houses along Wallace Road in the backyard of the picture.

25 Q. Did you see any flagging tape while on the site, June 12th?

A. Yes, I did.

Q. What was the significance?

30 A. So, when we were on site, Robert Susko had indicated that the flagging tape, the red flags on the property represented 100-foot setback from the shoreline of Circle Lake and I was told the site grading would not extend passed those flags on site.

Q. Is that 100 feet you said?

A. Yes.

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Q. Okay. And the grading that you saw to the extents that you could make an assessment, where did it end in relation to the flag boundary?

A. The grading that was done while I was on site ended before or just at the flags. It did not surpass the flags.

In addition, relying on the evidence that Mr. Susko was told and this another area that Her Worship relied on at trial was that Mr. Susko had been told by Mr. Miller, a land surveyor, that the site was likely Blanding's turtles' habitat. This Court would find is not reliable evidence before the Court. Mr. Miller did not give evidence; he was not a witness, and he was not a biologist or ecologist.

And further, based on the review of the case as well as the submissions that were made on the last day, I would allow the appeal on behalf of Consolidated Homes for the reasons as I have stated and would find that the errs that were set out, I have highlighted a number of errs that occurred with Her Worship's decision and therefore would allow the appeal and enter an acquittal on behalf of Consolidated Homes finding that the property was not properly proven to be Blanding's turtles habitat at the time. So, that is my decision on this appeal.

MR. WILKIE: Thank you, Your Honour.

MS. KRAMER: Thank you.

THE COURT: All right. So, anything else we need to address?

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MS. KRAMER: No, Your Honour.

MR. WILKIE: No.

THE COURT: Okay. All right. Thank you.

MR. WILKIE: Thank you, Your Honour.

MS. KRAMER: Thank you.

...END OF REASONS FOR JUDGMENT

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FORM 3

ELECTRONIC CERTIFICATE OF
TRANSCRIPT (SUBSECTION 5(2))*Evidence Act*

I, Megan MacMillan, certify that this document is a true and accurate transcript of the recording of *R. v. Consolidated Homes Ltd.*, in the Ontario Court of Justice, held at NORTH BAY, Ontario, on Tuesday, August 20, 2024, taken from Recording No. 2511_305_20240820_090909__6_MATHIAC.dcr which has been certified in Form 1.

August 28, 2024

Date



(electronic signature of authorized person)

Legend

[sic] -Indicates preceding word has been reproduced verbatim and is not a transcription error.

(ph)-Indicates preceding word has been spelled phonetically.

Transcript Ordered: August 21, 2024

Audio Received: August 22, 2024

Transcript Completed: August 28, 2024

Notified Ordering Party: August 28, 2024