

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

SCOTTY DIXON, JENNIFER DIXON, THOMAS RYAN and CATHERINE RYAN

Appellants

-and-

THE DIRECTOR, MINISTRY OF THE ENVIRONMENT

Respondent

-and-

ST. COLUMBAN ENERGY LP

Respondent

A N D B E T W E E N

SHAWN DRENNAN and TRICIA DRENNAN

Appellants

-and-

THE DIRECTOR, MINISTRY OF THE ENVIRONMENT

Respondent

-and-

**K2 WIND ONTARIO INC. OPERATING AS
K2 WIND ONTARIO LIMITED PARTNERSHIP**

Respondent

A N D B E T W E E N

KENNETH GEORGE KROEPLIN and SHARON ANNE KROEPLIN

Appellants

-and-

THE DIRECTOR, MINISTRY OF THE ENVIRONMENT

Respondent

-and-

**SP ARMOW WIND ONTARIO GP INC. as general partner for and on behalf of SP ARMOW
WIND ONTARIO LP**

Respondent

SUPPLEMENTARY NOTICE OF MOTION FOR LEAVE TO APPEAL

THE APPELLANTS, Scotty Dixon, Jennifer Dixon, Thomas Ryan, Catherine Ryan, Shawn Drennan, Tricia Drennan, Kenneth George Kroeplin and Sharon Anne Kroeplin, will make a motion for leave to

appeal in writing to be heard thirty-six days after service of their Motion Record and Factum, or on the filing of their reply factum, if any, whichever is earlier.

PROPOSED METHOD OF HEARING: The motion is to be heard in writing, pursuant to Rule 61.03(1) of the *Rules of Civil Procedure*.

THE MOTION IS FOR:

- (a) An order granting leave to appeal to the Court of Appeal from the decision dated December 29, 2014, of the Honourable Associate Chief Justice F. Marrocco, the Honourable Justice J. Henderson, and the Honourable Justice D. Brown, sitting as a panel of the Divisional Court, dismissing the Appellants appeal;
- (b) The costs of the motion; and
- (c) Such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

1. Section 6(1)(a) of the *Courts of Justice Act* and Rule 61.03.1 of the *Rules of Civil Procedure*.
2. The proposed appeal is *prima facie* meritorious and raises issues of significance to the parties as well as to the general public. The appeal raises issues around the interpretation of certain sections of the *Environmental Protection Act* (“EPA”); the constitutionality of certain provisions of the *EPA*; the jurisdiction of the Environmental Review Tribunal (“ERT”) to rule on the constitutionality of certain provisions of the *EPA*; and the interpretation of the general legal principles of section 7 of the *Canadian Charter of Rights and Freedoms*.
3. The proposed appeal raises arguable questions of law, and issues of significant importance to the parties and the public as a whole.
4. The proposed appeal raises questions of law which are of general interest to the public and the interpretation of those questions of law is of importance to a broad segment of the public.

I. OVERVIEW

1. This appeal seeks to determine whether the legislative scheme governing industrial wind projects as set out in the *Environmental Protection Act (EPA)* is constitutionally valid. The Appellants argue that it is not; but rather, that the *EPA* infringes section 7 of the *Canadian Charter of Rights and Freedoms* by permitting the state to act without regard to public health and by denying citizens a means of relief in the face of a reasonable prospect of serious harm to health.
2. This is an appeal of first instance, and represents the first time this Honourable Court would rule on the constitutional ramifications of the current legislative scheme for renewable energy projects.
3. The Appellants seek leave to appeal to this Honourable Court to obtain a ruling on the constitutionality of the provisions which set out the process for granting Renewable Energy Approvals, and the constitutionality of the provisions governing the appeal of those approvals.
4. The process for granting a REA, (a document required before the construction and operation of industrial wind projects) as set out in the legislation is relatively straightforward. Once a company has conducted two public meetings within the community, made specified documents available at those public meetings and submitted a complete REA application, a Director is given permissive authority to issue a REA. There is no requirement that a wind proponent provide any reports regarding any health ramifications to the public associated with the project.
5. Under the *EPA*, once a REA has been issued, a concerned citizen has only one choice of forum, the Environmental Review Tribunal. Members of the public may bring an appeal of the REA on only two grounds:
 - i) they must prove that the wind project will cause a serious harm to human health; or

- ii) they must prove that the wind project will cause serious and irreversible harm to plant life, animal life or the natural environment.
6. At issue in this appeal is the constitutionality of the Director's decision. As was argued by the Appellants, the current process for granting a REA does not require the Director to consider the potential health effects, if any, of a project on the public. This case thus represents the opportunity to rule on whether an exercise of state power which is made without consideration of any potential health effects is a violation of section 7 of the *Charter*.
 7. Also at issue in this appeal is the constitutionality of the provisions governing the appeal of a REA. As was argued by the Appellants, the current test on appeal requires a concerned citizen to prove a serious harm to human health. This case thus represents the opportunity to rule on whether this test legislatively permits violations of section 7 of the *Charter* by denying citizens relief in the face of a reasonable prospect of serious harm to health.
 8. On appeal, the Appellants will seek from this Honorable Court:
 - (i) a declaration that *EPA* s. 145.2.1(2) was constitutionally invalid and an order reading into *EPA* s. 145.2.1(2)(a) that the test to be met is whether "a reasonable prospect of serious harm to human health" will be caused by engaging in the renewable energy project;
 - (ii) alternatively, an order reading down *EPA* s. 145.2.1(2)(a) to provide that the test to be met is whether "a reasonable prospect of serious harm to human health" will be caused by engaging in the renewable energy project;
 - (iii) a declaration that the harms associated with living in close proximity to industrial wind turbines are sufficient to engage section 7 of the *Charter*;
 - (iv) a declaration that the ERT possessed the jurisdiction to review the decision of the Director issuing the renewable energy approvals and a declaration that such decisions did not comply with the *Charter*;

- (v) a declaration that at hearings before the Tribunal dealing with renewable energy projects it is unnecessary for applicants to call expert medical evidence in order to prove that wind turbines can create a reasonable prospect of serious harm to human health;
 - (vi) an order granting the Appellants' motion for leave to file fresh evidence and, as a result, an order that the hearing of the three matters be remitted to the tribunal; and,
 - (vii) an order setting aside the order of Leitch J. dated September 24, 2014 which refused to stay all construction and commissioning activity on the three projects, and an order staying all construction and commissioning activity on those projects pending a decision on these appeals.
9. The appellants will seek to tender fresh evidence on the motion for leave to appeal which demonstrates that 69% of the population in London, Ontario and the surrounding areas are concerned that wind turbines are harmful to their health.
10. On a motion for leave to appeal, the court will consider factors, *inter alia*, such as: (i) whether the proposed appeal seeks the interpretation of legislation; (ii) whether the proposed appeal raises issues of constitutionality; and (iii) whether the proposed appeal raises issues of public importance.
11. The proposed appellants respectfully submit, as set out above, the proposed appeal raises issues about the interpretation of harm within the meaning of section 7 of the *Charter*.
12. The proposed appeal raises issues pertaining to the appropriate interpretation of section 145.2.1 of the *EPA*.
13. The proposed appeal raises issues pertaining to the interpretation of the results of the Health Canada Wind Turbine Study, which represents the first epidemiological study in Canada in respect of wind turbines and associated health effects.

14. The proposed appeal raises issues of first instance in Ontario and affects all Ontarians given the proliferation of wind projects in the province.

II. **BACKGROUND FACTS**

(a) The Parties

15. The Dixon-Ryan Appellants live in Seaforth, Ontario, which is in Huron East County. This is the same county which hosts the St. Columban Wind Project. The Dixon Appellants live on a 97 acre farm with their two young children. The St. Columban Project consists of 15 industrial wind turbines, with a total name plate capacity of 33MW. The Dixons have one turbine located 551 meters from their home, and a second turbine located 552 meters from their home.
16. The Ryan Appellants also live in Huron East County and have a 150 acre farming property on which they operate a dairy farm with approximately 70 milking cows and 150 head of cattle. The Ryan farm has been in the family for nearly 150 years and the Ryan Appellants have lived on the property for 33 years. The Ryan Appellants have one turbine 551 meters from their home and a second turbine about 800 meters from their home.
17. The Respondent, St. Columban, is the owner/operator of the St. Columban Project and, received a Renewable Energy Approval (“REA”) Number 7042-96FQB7 for the construction, operation and maintenance of the wind project from the Respondent, Director of the Ministry of the Environment on July 2, 2013.
18. The Drennan Appellants live in the Township of Ashfield-Colborne-Wawanosh, which is the site for the K2 Wind Energy Project. The Project consists of 140 industrial wind turbines, a 270 MW substation and a 500 KW transformer station, the latter of which is located approximately 500 meters from the Drennan family home. The Drennans also have a wind turbine located approximately 715 meters from their home with another 11 turbines within a 2 kilometer radius of their home.

19. The K2 Wind Project is owned/operated by the Respondent, K2 Wind Ontario Inc. operating as K2 Wind Ontario Limited Partnership (“K2 Wind”). K2 Wind received REA Number 3259-98EQ3G from the Respondent, Director of the Ministry of the Environment on July 23, 2014.
20. The Kroeplin Appellants live in the Municipality of Kincardine which hosts the SP Armow Wind Project. The Project consists of 92 turbines with a total name plate capacity of 180 MW. The Kroeplin property has one turbine within 599 meters. 12 turbines within a 2 kilometer radius and another 44 turbines within 4 kilometers.
21. The SP Armow Wind Project is owned/operated by the Respondent, SP Armow Wind Ontario GP Inc., as a general partner for and on behalf of SP Armow Wind Ontario LP (SP Armow Wind). SP Armow Wind received REA Number 4544-9B7MYH from the Respondent, Director of the Ministry of the Environment on October 9, 2013.

(b) Regulatory Scheme for Wind farm Approval

22. Before a wind company begins construction on a wind project, it must obtain a REA from the Ministry of the Environment (“MOE”), as outlined in *Ontario Regulation 359/09 – Renewable Energy Approvals* under Part V.0.1 of the *EPA*. Prior to submitting a REA application, an applicant is required to hold two public meetings within the community. The wind company is required by the regulation to have specified documents available at the public meetings. Once a submitted application is deemed complete, the Director may, pursuant to section 47.5(1) of the *EPA*, if in his or her opinion it is in the public interest to do so: (a) issue or renew a renewable energy approval; or (b) refuse to issue or renew a renewable energy approval.
23. “Public interest” is not defined in the *EPA* or its regulations. The Director is not required to provide reasons which outline why the wind project that receives the REA was deemed to be in the public interest.

(c) Appeal of the Director's Decision to Grant the REAs

24. Under the *EPA*, once approval for a wind project is granted, an appeal of that decision may be brought before the Tribunal. An appeal to the Tribunal can only be brought on two grounds. The onus is on the Appellant to show that the renewable energy project will cause: a) serious harm to human health, or b) serious and irreversible harm to plant life, animal life or the natural environment.
25. The Dixon-Ryan Appellants filed a Notice of Appeal and Notice of Constitutional Question before the ERT on July 16, 2013. A decision in respect of the ERT appeal was issued on January 16, 2014, dismissing the appeal.
26. The Drennan Appellants filed a Notice of Appeal and Notice of Constitutional Question before the ERT on August 6, 2013. A decision in respect of the ERT appeal was issued on February 6, 2014, dismissing the appeal.
27. The Kroepelin Appellants filed a Notice of Appeal and Notice of Constitutional Question before the ERT on October 22, 2013. A decision in respect of the ERT appeal was issued on April 22, 2014, dismissing the appeal.
28. In each appeal, the Appellants raised the same issues surrounding the constitutionality of the Director's decision along with the constitutionality of the test before the Tribunal.

III. CONSTITUTIONAL CHALLENGE TO SECTIONS OF THE ENVIRONMENTAL PROTECTION ACT

(a) Appeal Before the Divisional Court

29. The Dixon-Ryan Appellants, appealed their ERT decisions to the Divisional Court, by way of Notice of Appeal filed on February 14, 2014. The Drennan Appellants appealed their ERT decision by Notice of Appeal dated February 28, 2014, and the Kroepelin Appellants appealed their ERT decision by Notice of Appeal dated May 13, 2014.

30. By Order of the Honourable Justice R. Pomerance, the three appeals were heard together before a sitting of the Divisional Court in London, Ontario. The appeals were heard on November 17th, 18th, 19th, and 20th, 2014.

31. The appeals before the Divisional Court raised, *inter alia*, the following:

- a. That the approval for the project has a serious adverse impact on the Appellants' physical and psychological integrity;
- b. That the process for granting the Renewable Energy Approvals below does not require the Director to consider the potential health effects on the Appellants, and as such has a serious impact on the Appellants' psychological integrity;
- c. That the Appellants' right to security of the person is violated by a process for granting the Renewable Energy Approvals which does not comply with the precautionary principle, and as such has a serious impact on the Appellants' psychological integrity;
- d. That the granting of an approval for a wind project without requiring the wind company to conduct any form of study to determine adverse health effects on neighbours living in close proximity to the proposed project has a serious impact on the Appellants' psychological integrity; and
- e. That the test of "serious harm to human health", applicable to appeals of the Director's decision by virtue of section 142.1 of the Environmental Protection Act ("EPA"), violates s. 7 of the Charter by permitting those violations of the Appellants' right to security of the person that fall short of the "serious harm" threshold.

32. The Appellants submit that, *inter alia*, the following legal errors were committed by ERT and the court below:

- a. in determining that the Tribunal lacked the jurisdiction to assess the Director's decision to issue the Renewable Energy Approvals in respect of compliance with section 7 of the *Canadian Charter of Rights and Freedoms*;
- b. in failing to read down section 142.1 of the *Environmental Protection Act*, such that it complied with section 7 of the *Canadian Charter of Rights and Freedoms*;
- c. in holding that the Appellants were required to call health professionals with diagnostic skills to show a link between wind turbines and the adverse health effects suffered by witnesses living in close proximity to wind turbines ("post-turbine witnesses") despite the fact that this is a new and emerging area of science;
- d. in holding that inferences could not be drawn as to the source of the post-turbine witnesses' adverse health effects, especially in circumstances where the medical witnesses called by the Respondents did not examine the post-turbine witnesses nor provide other causes for their adverse health effects;

- e. in holding that the evidence of the post-turbine witnesses was insufficient to support an inference that their adverse health effects were linked to living in close proximity to wind turbines;
- f. in finding that there was no evidence before the Tribunal to support a finding that harm to human health occurs at thresholds below the 40dBA limit; and
- g. in holding that the adverse health to humans suffered when living in close proximity to wind turbines was insufficient to engage section 7 of the *Charter*.

(b) The state of the scientific research on the health effects from wind projects

33. The first Tribunal hearing that dealt with the potential health effects of wind projects was the case of *Erickson v. Director, Ministry of the Environment*. The decision was released on July 18, 2011, and highlights the lack of peer-reviewed science on both sides of the question as to whether wind turbines cause adverse health effects. In its decision the Tribunal highlighted the uncertainty in the science:

This case has successfully shown that the debate should not be simplified to one about whether wind turbines can cause harm to humans. The evidence presented to the Tribunal demonstrates that they can, if facilities are placed too close to residents. The debate has now evolved to one of degree. The question that should be asked is: What protections, such as permissible noise levels or setback distances, are appropriate to protect human health? [at pg. 206]

There is actually a lack of peer-reviewed science on both sides of this debate . . . If numerous studies are undertaken to check for associations between turbines and serious health effects, the Tribunal can look at all of the results to determine whether a particular legal test has been satisfied. Further peer-reviewed science on the association and causation questions would be a welcome development in the debate [at pg. 134]

...the Tribunal cannot find that the Kent Breeze Project operated according to the current Ontario standards “will cause serious harm to human health”. That is the test in the statute, but the evidence presented in this Hearing is insufficient to meet it. What the Tribunal can state is that the need for more research came up several times during this Hearing. Time will tell as to what that research will ultimately demonstrate. The Tribunal is hopeful that, whatever the results, further research will help answer some of the concerns and uncertainties raised during this Hearing [at pg. 6].

Just because the appellants have not succeeded in their appeals this is no excuse to close the book on further research. On the contrary, further research should help resolve some of the significant questions that the appellants have raised [at pg. 207].

(c) **The Health Canada Study**

34. On July 10, 2012, the Government of Canada announced that Health Canada, in collaboration with Statistics Canada, would conduct a peer-reviewed study which would assess the health effects of noise emitted from wind turbines (the “Health Canada Study”). The study was in response to questions raised by individuals living in close proximity to wind turbines about possible adverse health effects and the sharp increase in wind turbine generated electricity in Canada.
35. On November 6, 2014, The Health Canada Study Summary was released to the public. The Health Canada Study Summary is a summary of preliminary findings by Health Canada from an extensive study of the effects of wind turbine noise on human health.
36. The Health Canada Study Summary provides the following findings as it relates to exposure to wind turbine noise and annoyance:

5 Annoyance

5.1 Community Annoyance as a Measure of Well-being

The questionnaire, administered by Statistics Canada, included themes that were intended to capture both the participants' perceptions of wind turbines and reported prevalence of effects related to health and well-being. In this regard, one of the most widely studied responses to environmental noise is community annoyance. There has been more than 50 years of social and socio-acoustical research related to the impact that noise has on community annoyance. Studies have consistently shown that an increase in noise level was associated with an increase in the percentage of the community indicating that they are "highly annoyed" on social surveys. The literature shows that in comparison to the scientific literature on noise annoyance to transportation noise sources such as rail or road traffic, community annoyance with WTN begins at a lower sound level and increases more rapidly with increasing WTN.

Annoyance is defined as a long-term response (approximately 12 months) of being "very or extremely annoyed" as determined by means of surveys. Reference to the last year or so is intended to distinguish a long term response from one's annoyance on any given day. The relationship between noise and community annoyance is stronger than any other self-reported measure, including complaints and reported sleep disturbance.

5.2 Community Annoyance Findings

Statistically significant exposure-response relationships were found between increasing WTN levels and the prevalence of reporting high annoyance. These associations were found with annoyance due to noise, vibrations, blinking lights, shadow and visual impacts from wind turbines. In all cases, annoyance increased with increasing exposure to WTN levels.

The following additional findings in relation to WTN annoyance were obtained:

- At the highest WTN levels (≥ 40 dBA in both provinces), the following percentages of respondents were highly annoyed by wind turbine noise: ON-16.5%; PEI-6.3%. While overall a similar pattern of response was observed, the prevalence of WTN annoyance was 3.29 times higher in ON versus PEI (95% confidence interval, 1.47 - 8.68).
- A statistically significant increase in annoyance was found when WTN levels exceeded 35 dBA.
- Reported WTN annoyance was statistically higher in the summer, outdoors and during evening and night time.
- Community annoyance was observed to drop at distances between 1-2km in ON, compared to PEI where almost all of the participants who were highly annoyed by WTN lived within 550m of a wind turbine. Investigating the reasons for provincial differences is outside the scope of the current study.
- WTN annoyance significantly dropped in areas where calculated nighttime background noise exceeded WTN by 10dB or more.
- Annoyance was significantly lower among the 110 participants who received personal benefit, which could include rent, payments or other indirect benefits of having wind turbines in the area e.g., community improvements. However, there were other factors that were found to be more strongly associated with annoyance, such as the visual appearance, concern for physical safety due to the presence of wind turbines and reporting to be sensitive to noise in general.

5.3 Annoyance and Health

- WTN annoyance was found to be statistically related to several self-reported health effects including, but not limited to, blood pressure, migraines, tinnitus, dizziness, scores on the PSQI, and perceived stress.
 - WTN annoyance was found to be statistically related to measured hair cortisol, systolic and diastolic blood pressure.
 - The above associations for self-reported and measured health endpoints were not dependent on the particular levels of noise, or particular distances from the turbines, and were also observed in many cases for road traffic noise annoyance.
 - Although Health Canada has no way of knowing whether these conditions may have either pre-dated, and/or are possibly exacerbated by, exposure to wind turbines, the findings support a potential link between long term high annoyance and health.
 - Findings suggest that health and well-being effects may be partially related to activities that influence community annoyance, over and above exposure to wind turbines.
37. An appellant before the Tribunal can be successful on an appeal if they can show that a project will have a serious impact on health that is either direct or indirect:

One of the initial issues is whether “indirect” health impacts are included in the test for serious harm under section 145.2.1(2) of the EPA. The Tribunal has found above that “serious harm to human health” includes both direct impacts (e.g., a passer-by being injured by a falling turbine blade or a person losing hearing) or indirect impacts (e.g., a person being exposed to noise and then exhibiting stress and developing other related symptoms). This approach is consistent with both the WHO definition of health and Canadian jurisprudence on the topic.

None of the Parties took the view that all indirect health impacts are outside the scope of the phrase “serious harm to human health.” Indeed, Suncor acknowledges that in some cases, protracted annoyance can result in adverse health effects. Hence, the issue in this matter is not whether indirect health impacts can be considered, but whether those impacts will be caused here at a level that meets the “serious harm to human health” threshold. (Erickson at pg. 190)

38. The Appellants submit that the Health Canada Summary of Study Results provides, for the first time, evidence of a dose-response relationship of an indirect adverse health impact as it relates to wind turbine noise and annoyance.

39. The Appellants submit that the proposed appeal will provide guidance on an appropriate, constitutionally valid Tribunal test regarding ERT appeals in circumstances where the science relating to the health impacts is new and emerging.

IV. ISSUES OF PUBLIC IMPORTANCE

40. The proposed appeal raises issues of public importance in that it is the first time in Ontario that the Courts are reviewing the constitutionality of certain provisions of the *Environmental Protection Act*.

41. The proposed appeal is a matter of public importance in that the Divisional Court erred in interpreting the severity of the harm suffered by the appellants and have permitted wind companies to construct and operate industrial wind projects which have a reasonable prospect of causing serious harm to the appellants and to other Ontarians living in close proximity to wind turbines.

42. The issues raised in the proposed appeal have garnered media attention throughout the province in light of the rapid growth of wind power in Ontario, and in light of the fact that a vast majority of rural Ontarians are being subjected to large industrial wind projects.

V. CONCLUSION

43. The proposed appeal raises issues of public importance concerning the constitutionality of certain provisions of the *EPA*, particularly, the public interest in respect of the appropriate legal test for appeals before the ERT in circumstances where the scientific evidence is new and emerging and there is a lack of consensus in the scientific community.

44. Section 6(1)(a) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43;

45. Rules 1.04(1.1) and 61.03.1 of the *Rules of Civil Procedure*

46. The *Environmental Protection Act*, R.S.O. 1990, CHAPTER E.19; and

47. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The motion record of the Appellants; and
2. Such further and other evidence as counsel may advise and this Honourable Court may permit.

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