CITATION: Dixon v. Director, Ministry of the Environment, 2014 ONSC 7404
DIVISIONAL COURT FILES NOS.: 2055/14, 2056/14 and 2073/14
DATE: 20141229

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Marrocco A.C.J.S.C., J. Henderson and D. Brown JJ.

Court File No. 2055/14 **BETWEEN:** Scotty Dixon, Jennifer Dixon, Thomas Ryan and Catherine Ryan Appellants – **and** – The Director, Ministry of the Environment and St. Columban Energy LP Respondents **Court File No. 2056/14** **BETWEEN:** Shawn Drennan and Tricia Drennan Appellants – **and** – The Director, Ministry of the Environment and K2 Wind Ontario Inc., operating as K2 Wind Ontario Limited Partnership Respondents	*J. Falconer, A. James and J. Subhan,* for the Appellants *M. Horner, D. Meuleman, S. Wright, A. Huckins and D. Huffaker*, for the Respondent, Director, Ministry of the Environment *D. Cruz and E. Pellegrino*, for the Respondent, St. Columban Energy LP *C. Bredt*, for the Respondent, K2 Wind Power Inc. *J. Bunting and N. Read-Ellis*, for the Respondent, K2 Wind Ontario Inc. and SP Armow Wind Ontario GP Inc. *R. Macklin and N. Wilson*, for the Intervenor, The Coalition Against Industrial Wind Turbines (Ontario) *B. Davis*, for the Intervenor, The Corporation of The County of Lambton **HEARD at London:** November 17, 18, 19 and 20, 2014

Court File No. 2073/14	)
	)
BETWEEN:	)
Kenneth George Kroeplin and Sharon Anne Kroeplin	)
Appellants	)
– and –	)
The Director, Ministry of the Environment and SP Armow Wind Ontario GP Inc. as general partner for an on behalf of SP Armow Wind Ontario LP	)
Respondents	)

BY THE COURT

I. OVERVIEW

[1] In 2013 and 2014 the Director of the Ministry of the Environment authorized the construction and operation of three wind turbine generation farms in Huron and Bruce Counties: a 33 MW, 15 wind turbine farm operated by St. Columban Energy LP ("St. Columban Wind Project"); the 270 MW, 140 turbine wind farm owned by K2 Wind Ontario Limited Partnership ("K2 Wind Project"); and, the 180 MW, 92 turbine wind farm of SP Armow Wind Ontario LP ("Armow Wind Project"). For each project the Director issued a renewable energy approval ("REA") under the *Environmental Protection Act ("EPA").*[1]

[2] The Appellants in these three appeals were residents who lived close to the proposed sites of wind turbines in each of the three projects. Pursuant to the *EPA* they sought review hearings of the Director's decisions at the Environmental Review Tribunal ("ERT" or "Tribunal"). In each case the ERT dismissed their appeals.

[3] In accordance with appeal rights granted under the *EPA*, the Appellants have appealed each of the three ERT decisions to this Court "on a question of law".

[4] Two groups brought motions to intervene on these appeals as friends of the court under Rule 13.03(1) of the *Rules of Civil Procedure*: The Corporation of the County of Lambton and

[1] R.S.O. 1990, c. E.19.

The Coalition Against Industrial Wind Turbines. In addition to filing motion records for leave to intervene, both entities served and filed the factums upon which they intended to rely at the hearing. Although the motions to intervene were opposed by St. Columban Energy LP, K2 Wind Ontario Limited Partnership and SP Armow Wind Ontario LP, at the start of the hearing the panel asked each moving party to succinctly state the distinctive contribution which they could offer on these appeals, which they did. In the result, we grant both moving parties leave to intervene as friends of the Court and we have considered their oral and written submissions.

[5] The Appellants brought a motion for leave to file fresh evidence. We shall deal formally with that motion later in these Reasons.

[6] As will be explained in more detail later, the *EPA* establishes a specific statutory regime for the approval of commercial wind turbine farms:

(i) The wind farm proponent must obtain a renewable energy approval from the Director, Ministry of Environment. The Director granted such approvals to each of the three wind farm proponents under *EPA* s. 47.5;

(ii) Any person "resident in Ontario" may require a hearing by the ERT in respect of a decision made by the Director under EPA s. 47.5, but only "on the grounds that engaging in the renewable energy project in accordance with the renewable energy approval will cause (a) serious harm to human health…" The Appellants required such hearings before the Tribunal for each of the three wind farm projects. Those hearings were not appeals and should not be characterized as such;

(iii) *EPA* s. 145.2.1(2) stipulates that the "Tribunal shall review the decision of the Director and shall consider only whether engaging in the renewable energy project in accordance with the renewable energy approval will cause (a) serious harm to human health…" Under the statute the onus of proving such harm rested with the Appellants; and,

(iv) The statute requires confirmation of the Director's decision on such reviews. *EPA* s. 142.2.1(5) requires the Tribunal to confirm the Director's decision if it "determines that engaging in the renewable energy project in accordance with the renewable energy approval will not cause [serious harm to human health]". If the Tribunal has not disposed of the review hearing within six months, EPA s. 142.2.1(6) deems the Director's decision to be confirmed by the Tribunal.

[7] Against that background, the Appellants appealed to this Court "on a question of law" asserting that aspects of the statutory scheme for the review of the Director's decisions were constitutionally flawed – especially the requirement that the Appellants demonstrate that the projects would cause serious harm to human health – and arguing that the hearings before the Tribunals were procedurally unfair. More specifically, the Appellants contended that the Tribunal made the following errors of law:

(i) The ERT erred by denying the Appellant's request to adjourn the Dixon hearing, by failing to consolidate two of the hearings, and by failing to hear the Appellant's motion for abuse of process, thereby violating the principles of natural justice;

(ii) The ERT erred by failing to read down *EPA* s. 145.2.1 (2)(a) to provide that the test to be met was whether the three wind projects would cause a "reasonable prospect of harm to human health";

(iii) The ERT erred by failing to find that harm to human health provisions of the *EPA* violated s. 7 of the *Canadian Charter of Rights and Freedoms*;

(iv) The ERT erred by failing to review fully the decisions of the Director to issue the REAs; and,

(v) The ERT erred by finding that in order to demonstrate serious harm to human health it was necessary for the Appellants to call evidence from a qualified medical expert.

[8] The statements of relief sought by the Appellants varied between their notices of appeal and their Factum. As a result, at the hearing the panel asked the Appellants to submit a current statement of the relief sought, which they did. The Appellants sought the following relief on these appeals:

(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 also sought orders enjoining each wind farm from starting the testing of their wind turbines pending the disposition of these appeals. Counsel for the St. Columban and K2 Wind Projects advised that turbine testing would not start until mid-January, 2015.

[10] For the reasons set out below, we dismiss the appeals.

II. THE THREE WIND FARM PROJECTS AND THE APPELLANTS' COMPLAINTS

A. The St. Columban Wind farm project and the Dixon/Ryan Appellants

[11] The Director issued a REA to St. Columban Energy LP ("St. Columban") on July 2, 2013 for the construction and operation of a wind farm in the municipality of Huron East and the Township of Howick in the County of Huron, Ontario. The project will have a total name plate capacity of 32.982 MW, generating enough electricity to power approximately 10,000 homes. The project will consist of 15 wind turbines. Construction of the project began in late July, 2014 and is expected to be completed early in 2015, with a target date for commercial operation of March 13, 2015. Testing of the turbines is scheduled to start in mid-January, 2015.

[12] St. Columban has entered into Feed-In Tariff contracts ("*FIT Contracts*") with the Ontario Power Authority under which it will sell the electricity generated by the project.

[13] Scotty and Jennifer Dixon own a farm property in Huron County near the St. Columban wind farm, as do the appellants Thomas and Catherine Ryan.

[14] The Dixons work a farm comprised of 98 acres, 76 of which are workable land. They grow cash crops, corn, wheat and soybeans. They live on their farm with their two children, aged eight and five years old. The two wind turbines nearest the Dixon property, T9 and T10, will be located approximately 551 and 552m from the Dixon home. In her affidavit on the stay motion, Jennifer Dixon expressed several concerns about the placement of the wind turbines in such close proximity to their home:

> Our daughter has hyper-sensitive hearing and gets headaches easily because of loud noises such as sirens. The intensity of the headaches that my daughter experiences vary based on the intensity and duration of the noise source.
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> Our daughter also experiences sleep apnea and has been seen by an ENT specialist: Dr. Brian Hughes regarding this condition. It is difficult to say the amount of apneic periods she experiences during the night, and we are currently monitoring her and have further follow-up with pulmonologist: Dr. Brian Lyttle. My husband and I chose Huron County as the place to raise our family and we wish to remain in the community for many years. However, given the approval of the project, my husband and I are very concerned about the potential for negative health effects arising from living in close proximity to wind turbines.

> Specifically, I am worried about the health effects from both audible and inaudible noise. I understand that concerns have been raised about negative health effects associated with industrial wind operations, including sleep disturbance, stress, headaches, nausea, and tinnitus, amongst other symptoms. Our concerns heighten given the close proximity of the turbines to our home and the hypersensitivity to noise that our daughter suffers from.
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> …
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> The mere approval of the project by the MOE resulted in a 10% discounting of the residential contributory value of the property… My husband and I are concerned that once construction begins on the project, it will cause a further reduction to the current value of our property which we will not be compensated for if the appeal is successful…[2]
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> …
>
> The Appellants believe that our appeal, while undoubtedly affecting our personal interests, is inextricably linked to the public good. We believe that the provincial government should not allow "for profit" corporations to endanger the health of Ontario residents, particularly when the adverse health effects are only now being studied by the federal government. Many Ontario residents have raised concerns about health effects of wind turbines. The provincial government should only permit the construction of wind farms when it has been established that there are no adverse health effects caused by having wind turbines located so close to occupied homes.

[15] As to the circumstances and concerns of Thomas and Catherine Ryan, Ms. Dixon deposed, on information and belief, as follows:

> I have been advised by Thomas Ryan and do verily believe that he and his wife have lived on their farm property for 34 years. The farm has been in their family for nearly 150 years. They operate a dairy farm on which they currently milk approximately 70 cows, and also have approximately 150 head of cattle in total. They primarily ship milk but they also farm cash crops. They live on the property with their two children.
>
> I have been further advised by Thomas Ryan and do verily believe that his family has a long-standing connection to their land and to this community. I am advised by Thomas Ryan and do verily believe that his family has a strong desire to continue farming on their land, but that they are very concerned about the potential for negative health effects arising from living in close proximity to wind turbines.
>
> I am advised by Thomas Ryan and do verily believe that he and his wife are concerned about the negative health impacts associated with living in close proximity to industrial wind turbines.

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[2] St. Columban Energy filed evidence disputing the Dixon's assertion of diminished property values.

B. K2 Wind Farm and the Drennan Appellants

[16] On July 23, 2013, the Director issued a REA to K2 Wind Ontario Limited Partnership ("K2 Wind") for the construction and operation of a 140 turbine, 270 MW wind farm project located in the Township of Ashfield-Colborne-Wawanosh in the County of Huron, Ontario. Electricity generated by the project will be purchased by the Ontario Power Authority under a power purchase agreement with K2 Wind. Construction activities for the K2 Wind project were completed in 2014, with turbine commissioning scheduled to begin in mid-January, 2015.

[17] Scott Drennan, and his wife Tricia Drennan, own a parcel of land in the Township of Ashfield-Colborne-Wawanosh on which they farm. Scott Drennan's family has resided in the Township since 1879, and has lived on the property since 1922. Three generations of Drennan's have farmed the property. As stated by Mr. Drennan:

> My grandfather, father and I have put considerable effort into the viability of this farm property. The farm encompasses 300 acres: 285 workable acres, and 15 acres composed of a woodlot and a creek. In 1957, a milking parlor was installed, along with the first bulk tank in the county. Between 1957 in 2002, we raised dairy cattle and pigs, in addition to cultivating barley, corn, and soy as cash crops, and hay for feed. In 2005, we began concentrating on contract finishing on the pigs, raising approximately 3000 animals per year, while continuing to cultivate the cash crops as before.
>
> …
>
> My family has a long-standing connection to this land, and to this community. I strongly desire to continue farming and to remain in my ancestral home. Given this, I am very concerned about the potential for negative health effects arising from living in close proximity to wind turbines and the destruction of my farming land by the water run-off from the Ashfield Switching Station.

[18] Mr. Drennan deposed that one of the turbines (T230) will be located about 714m from his home, with 11 more turbines located within the surrounding 2 km. A 270 MW transformer sub-station was constructed approximately 500m from his family home.

C. Armow wind farm and the Kroeplin Appellants

[19] On October 9, 2013, the Director issued a REA to Armow Wind for the construction and operation of a 92 turbine, 180 MW wind farm in the municipality of Kincardine, Bruce County. Construction on the project started around September, 2014.

[20] Until this past July, Ken and Sharon Kroeplin owned a 100 acre family farm property near the proposed Armow Wind project. The project will involve the construction of a turbine approximately 559m southwest of their home. Another 12 turbines will be situated within a 2 km radius of their home.

[21] In a witness statement filed for their ERT hearing, the Kroeplins expressed their concerns about the proposed Armow Wind farm:

> Since learning of the project we began doing research on the Internet as well as speaking to other members of our community that have been living in close proximity to wind turbines. We found that there are a number of adverse health effects that have been associated with living in close proximity to wind turbines by a number of people living [in] all different parts of the world. The adverse health effects that are described have been consistent irrespective of location, gender and age. We are concerned that living in close proximity to this project will likely cause us to suffer severe headaches, tinnitus, insomnia, nausea, and inner ear problems among other issues. We are both relatively healthy individuals with no pre-existing health problems and none of the symptoms that we described above that we are concerned will be caused from living in close proximity to the wind turbines.
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> In addition to the health concerns raised we are also concerned with issues such as ice throw and shadow flicker…
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> …
>
> Once we heard about the project, we decided that we did not want to live in an area that would be surrounded by 44 turbines within a 4 km radius. We put our home on the market in July 2012…

[22] At the hearing Appellants' counsel informed us that the Kroeplins had moved from their property in July, 2014. When asked by the Court about the effect of this move on the Kroeplins' appeal, the Respondents advised that there would be no effect because an appeal to this Court lay with any party to the hearing before the ERT, which the Kroeplins were, and, as well, *EPA* s. 142.1(1) vests the right to seek a review of the Director's approval to the ERT in "a person resident in Ontario", which the Kroeplins remain.

D. The reviews before the Environmental Review Tribunal

[23] Appeals were taken to this Court from three decisions of the Tribunal.

[24] The Dixons and Ryans appealed the January 16, 2014 decision of the ERT in respect of the St. Columban Wind Project in which the ERT found as follows:

> The Tribunal finds that the Appellants have not established, on the facts of this case, that the renewable energy approval appeal provisions or the REA itself violated the Appellants' right to security of the person under s. 7 of the *Charter*.
>
> The Tribunal finds that the Appellants have not established that engaging in the project as approved will cause serious harm to human health under the *EPA*.
>
> The appeals by the Dixons/Ryan Appellants and the MLWAG Appellants are dismissed.

[25] The ERT reached similar conclusions in its February 6, 2014 reasons dismissing the Drennan's appeal concerning the K2 Wind project and in its April 22, 2014 decision dismissing the Kroeplin's appeal concerning the Armow Wind project.

[26] The Director was required to consider the three applications for REAs. The Director did so and issued approvals. Once a hearing was requested, the *EPA* required the Tribunal to conduct a hearing in the nature of a review, not in the nature of an appeal. The Tribunal had to determine whether engaging in each of the renewable energy projects in accordance with their respective REAs would cause serious harm to human health:

(i) If the Tribunal determined that it would, the Tribunal was authorized to revoke the Director's decision to issue the REA;

(ii) However, if the Tribunal determined that engaging in the particular renewable energy project in accordance with its REA would not cause serious harm to human health, the Tribunal was required to confirm the Director's decision issuing the REAs.

[27] In none of the three hearings which are the subject of these appeals did the Tribunal confirm the Director's decision. Nor did the Tribunal expressly determine "that engaging in the renewable energy project in accordance with the renewable energy approval will not cause [serious harm to human health]" as required by *EPA* s. 145.2.1(5).

[28] There is a difference between a negative determination that serious harm to human health has not been proven and a positive determination that engaging in the renewable energy project in accordance with the renewable energy approval will not cause serious harm to human health. Although no party raised as an issue on these appeals the failure of the Tribunal to confirm the decisions of the Directors, it is important that a tribunal follow its statutory mandate. Based on a substantive review of the Tribunal's three decisions,[3] we are satisfied that the Tribunal, in effect, complied with the requirements of *EPA* s. 145.2.1(5).

[29] In *Drennan v. the Director, Ministry of the Environment* released February 6, 2014 ("K2 Wind Decision"), the ERT made the following observation at paragraphs 212-213:

> Mr. James also raises a number of issues related to infrasound and low frequency sound. Most of these comments were general in nature and not related to the Project. More important (sic), he did not connect infrasound and low frequency sound to whether it would cause serious harm to physical health. Moreover, Dr. Mundt and Dr. McCunney gave evidence directly challenging Mr. James' evidence and the evidence of Dr. Mundt and Mr. McCunney is more persuasive at this point in time. In this proceeding, the Appellants have not established the evidentiary base for a s. 7 *Charter* claim based on the impacts from infrasound or low frequency sound.
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> In summary, as in the Dixon case, the Appellants did not provide professional medical opinions to diagnose the health complaints from the post-turbine witnesses and to

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[3] *Newfoundland and Labrador Nurses' Union vs. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, para. 14.

> establish a causal link between those complaints and wind turbines noise or noise from transformers. As importantly, the Tribunal has the benefit of the testimony of Drs. Mundt, McCunney and Moore that reinforce previous Tribunal findings that the post-turbine witnesses need to be properly diagnosed by a medical professional and that there is no reliable evidence to demonstrate that the Project will cause serious physical or any other serious harm.

Paragraph 212 of the *Drennan* decision was adopted by the Tribunal in paragraph 216 of *Kroeplin vs. the Director, Ministry of the Environment* released April 22, 2014 ("Armow Wind Decision").

[30] It is clear that in these two decisions the Tribunal accepted the evidence of Drs. Mundt, McCunney and Moore without qualification. The evidence of each of the doctors was summarized by the Tribunal. In the K2 Wind Decision the Tribunal summarized the relevant portion of Dr. Mundt's evidence at page 88 as follows:

> Dr. Mundt testified that his conclusion, after reviewing peer and non-peer reviewed literature, was that he cannot classify wind turbines as causing harm to human health or causing any disease in particular.

The Tribunal summarized the relevant portion of Dr. Moore's evidence as follows at page 91 of the K2 Wind Decision:

> Dr. Moore testified that he reviewed the evidence of the four post-turbine witnesses, including their medical evidence, and it is his opinion that nothing he has read in the medical records or witness statements of those four people changes his medical opinion that the current setbacks in decibel limits required by legislation will protect the public from harm.

Dr. McCunney adopted his witness statement as part of his testimony. At page 22 of that witness statement Dr. McCunney expressed the following opinion:

> In my view, based on the documents I have reviewed and my update of my review of the scientific literature, the Project, if operated in accordance with the REA, will not cause serious harm to human health.

[31] The Tribunal's acceptance of the testimony of these expert witnesses assists in interpreting its decisions. At paragraphs 227-229 of the K2 Wind Decision the Tribunal set out its conclusions and decision, finding that the Appellants had not established that the *EPA*'s renewable energy approval appeal provisions or the project's REA violated the Appellants' right to security of the person under section 7 of the *Charter*. The Tribunal concluded that the Appellants had not established that engaging in the project would cause serious harm to human health. Finally the Tribunal recorded its decision as: "The appeals are dismissed." The Tribunal came to a similar decision and conclusion in all three of the cases before us.

[32] Drs. Mundt, McCunney and Moore did not testify at the Dixon hearing for which the Tribunal released its decision on January 16, 2014 ("St. Columban Wind Decision"). At that

hearing Dr. Werner Richarz, who was qualified as an expert acoustician, testified and offered the opinion that if the noise levels outside of the receptors home were 40 dBA or below, he would not expect any adverse effects inside the home. It is clear from the St. Columban Wind Decision that the Tribunal accepted the evidence of Dr. Richarz.

[33] Given the Tribunal's express acceptance of the evidence of Drs. Mundt, McCunney, Moore and Richarz, it is appropriate to conclude that the Tribunal was satisfied that engaging in the three renewable energy projects in accordance with the REAs would not cause serious harm to human health. As well, when the Tribunal recorded that the appeals were dismissed, by implication it confirmed the Director's decisions to issue the respective renewable energy approvals.

III. THE REGULATORY REGIME FOR WIND TURBINE FARMS

A. The *Green Energy Act*

[34] The current regulatory scheme for commercial wind turbines was enacted in 2009 with the passage of the *Green Energy Act ("GEA"),*[4] the legislative objective of which was set out in its Preamble:

> The Government of Ontario is committed to fostering the growth of renewable energy projects, which use cleaner sources of energy, and to removing barriers to and promoting opportunities for renewable energy projects and to promoting a green economy.
>
> The Government of Ontario is committed to ensuring that the Government of Ontario and the broader public sector, including government-funded institutions, conserve energy and use energy efficiently in conducting their affairs.
>
> The Government of Ontario is committed to promoting and expanding energy conservation by all Ontarians and to encouraging all Ontarians to use energy efficiently.

[35] The statutory meaning of a "renewable energy project" flows from a combination of definitions found in the *GEA* and the *Electricity Act, 1998,*[5] the up-shot of which is that a "renewable energy project" means "the construction, installation, use, operation, changing or retiring of a renewable energy generation facility", with the latter term meaning a generation facility that generates electricity from a renewable energy source, defined as:

> an energy source that is renewed by natural processes and includes wind, water, biomass, biogas, biofuel, solar energy, geothermal energy, tidal forces and such other energy sources as may be prescribed by the regulations…

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[4] *Green Energy Act, 2009*, S.O. 2009, c. 12, Sched. A.
[5] *Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A.

B. The statutory approval scheme for renewable energy projects

[36] Prior to the enactment of the *Green Energy Act* in 2009, the regulatory approval process for commercial wind turbine farms was governed by the *Environmental Assessment Act*.[6] The *GEA* established a new wind turbine approval process in the *Environmental Protection Act* – Part V.0.1.

[37] The *EPA* prohibits the discharge of a "contaminant" into the natural environment if the discharge causes or might cause "an adverse effect" without obtaining regulatory approval. The *EPA* classifies as a "contaminant" any sound or vibration resulting from human activities that causes or may cause "an adverse effect".[7] The definition of "adverse effect" contains many components, the most relevant of which for this appeal are "harm or material discomfort to any person", "an adverse effect on the health of any person", "impairment of the safety of any person" and "loss of enjoyment of normal use of property".

Application to the Director for a "renewable energy approval"

[38] The new renewable energy provisions of the *EPA* set up an approval process for renewable energy projects different than that which governs other contaminant-discharge projects. The *EPA* states that the purpose of Part V.0.1 is "the protection and conservation of the environment", with "environment" including "human life" and "the social, economic and cultural conditions that influence the life of humans or a community".[8] Under s. 9(1) of the EPA a person is prohibited from constructing and operating any plant or equipment that might discharge a "contaminant" into the natural environment. Part V.0.1 exempts renewable energy projects from that requirement and, instead, s. 47.3(1) stipulates that a person not engage in a renewable energy project except under the authority of, and in accordance with, a renewable energy approval issued by the Director appointed under the *EPA*.

[39] Ontario Regulation 359/09 made under the *EPA* specifies the content and submission process for an application for a REA to the Director who may require an applicant to submit further plans, specifications, engineers' reports or other information and to carry out and report on any tests or experiments relating to the renewable energy project.

[40] The *EPA* then sets out the powers of a Director in respect of any application for a REA. Since one of the Appellants' grounds for appeal concerns how the Director exercised his powers in issuing REAs for these three wind projects, it is worth setting out the entirety of *EPA* s. 47.5(1) dealing with the Director's powers:

> 47.5 (1) After considering an application for the issue or renewal of a renewable energy approval, the Director may, if in his or her opinion it is in the public interest to do so,

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[6] *Environmental Assessment Act*, R.S.O. 1990, c. E.18.
[7] *EPA*, s. 1(1).
[8] EPA, ss. 47.1 and 47.2(1).

(a) issue or renew a renewable energy approval; or

(b) refuse to issue or renew a renewable energy approval.

(2) In issuing or renewing a renewable energy approval, the Director may impose terms and conditions if in his or her opinion it is in the public interest to do so.

(3) On application or on his or her own initiative, the Director may, if in his or her opinion it is in the public interest to do so,

(a) alter the terms and conditions of a renewable energy approval after it is issued;

(b) impose new terms and conditions on a renewable energy approval; or

(c) suspend or revoke a renewable energy approval.

(4) A renewable energy approval is subject to any terms and conditions prescribed by the regulations.

The review of the Director's decision to issue a Renewable Energy Approval

[41] The *EPA* grants a general right to "a person to whom an order of the Director is directed" – in the usual case an applicant or approval holder - to require a hearing by the ERT. In the case of orders made by the Director in respect of a renewable energy project the right to require a hearing before the ERT is granted to a broader class of persons. Specifically, *EPA* ss. 142.1 and 142.2 state, in part:

142.1 (1) This section applies to a person resident in Ontario who is not entitled under section 139 to require a hearing by the Tribunal in respect of a decision made by the Director under section 47.5.

(2) A person mentioned in subsection (1) may, by written notice served upon the Director and the Tribunal within 15 days after a day prescribed by the regulations, require a hearing by the Tribunal in respect of a decision made by the Director under clause 47.5 (1) (a) or subsection 47.5 (2) or (3).

(3) A person may require a hearing under subsection (2) only on the grounds that engaging in the renewable energy project in accordance with the renewable energy approval will cause,

(a) serious harm to human health; or

(b) serious and irreversible harm to plant life, animal life or the natural environment.

142.2 (1) An applicant for a hearing required under section 142.1 shall state in the notice requiring the hearing,

(a) a description of how engaging in the renewable energy project in accordance with the renewable energy approval will cause,

(i) serious harm to human health, or

(ii) serious and irreversible harm to plant life, animal life or the natural environment;

(b) the portion of the renewable energy approval in respect of which the hearing is required; and

(c) the relief sought.

[42] As mentioned, a hearing before the ERT is in the nature of a review of the Director's decision, not an appeal. The EPA limits the scope of the review which the ERT may conduct of the Director's decision, a limitation which lies at the heart of the Appellants' appeals. Specifically, EPA s. 145.2.1 states:

145.2.1 (1) This section applies to a hearing required under section 142.1.

(2) ***The Tribunal shall review the decision of the Director and shall consider only whether engaging in the renewable energy project in accordance with the renewable energy approval will cause,***

(a) serious harm to human health; or

(b) serious and irreversible harm to plant life, animal life or the natural environment.

(3) ***The person who required the hearing has the onus of proving that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a)*** or (b).

(4) ***If the Tribunal determines that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a)*** or (b), ***the Tribunal may***,

(a) revoke the decision of the Director;

(b) by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations; or

(c) alter the decision of the Director, and, for that purpose, the Tribunal may substitute its opinion for that of the Director.

(5) The Tribunal shall confirm the decision of the Director if the Tribunal determines that engaging in the renewable energy project in accordance with the renewable energy approval will not cause harm described in clause (2) (a) or (b).

> (6) The decision of the Director shall be deemed to be confirmed by the Tribunal if the Tribunal has not disposed of the hearing in respect of the decision within the period of time prescribed by the regulations. (emphasis added)

IV. THE APPELLATE JURISDICTION AND POWERS OF THIS COURT

[43] The *EPA* affords a party to a review hearing before the ERT two possible avenues of appeal. *EPA* s. 145.6 provides that such a party may appeal from a decision or order of the ERT to this Court "on a question of law" and may appeal, in writing, to the Minister of the Environment "on any matter other than a question of law".

[44] Accordingly, the scope of our appellate review is limited to questions of law.

V. FIRST ISSUE: IS THE "HARM" TEST IN SECTIONS 142.1(3) AND 145.2.1(2) OF THE *ENVIRONMENTAL PROTECTION ACT* CONSTITUTIONALLY VALID?

A. The issue stated

[45] The Appellants submitted that *EPA* ss. 142.1(3) and 145.2.1(2) violated s. 7 of the *Charter* because the legislation placed the onus on the Appellants to prove that the wind projects would cause "serious harm to human health", a standard the Appellants submitted was impossibly high to achieve as a practical matter.

B. The Appellants' constitutional challenge as framed before and decided by the ERT

[46] The Tribunal rejected the Appellants' *Charter* claims in each of the three decisions. The reasoning of the ERT in the St. Columban proceeding was illustrative of how each Tribunal disposed of the Appellants' claims. Given that the arguments before this Court closely tracked those placed before the ERT, it is worth reproducing from the Tribunal's St. Columban Wind Decision the parties' arguments on the *Charter* s. 7 issue, together with the ERT's disposition of them.

[47] Before the Tribunals the Appellants challenged sections of the *EPA* dealing with the test which they were required to meet in order to secure a reversal of the Director's issuance of REAs to the three wind farm projects. The decision of the ERT dealing with the St. Columban Project described the issue raised by those Appellants:

> [14] The Dixon/Ryan and MLWAG Appellants challenge the constitutionality of various sections of the *EPA*, primarily related to the test under s. 142.1.
>
> [15] Section 7 of the *Charter* states:
>
> > 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

> [16] Two of the key and relevant sections of the *EPA* being relied upon in these appeals include [ss. 142.1 and 145.2.1].
>
> [17] The Dixon/Ryan Appellants submit that the "serious harm to human health" test under s. 142.1 of the *EPA* violates the protections afforded respecting security of the person under s. 7 of the *Charter*.
>
> [18] More specifically, the Dixon/Ryan Appellants submit that the evidence heard at the hearing establishes that there:
>
> > [H]as yet to be established a safe setback distance or appropriate noise level to protect humans from harm to their health associated with industrial wind turbines. The evidence before this Tribunal is that even at setback distances of 800m and noise compliance with 40dBA, Ontario residents are still exposed to adverse health effects associated with noise emitted from industrial wind turbines. It is therefore submitted that because the legislative scheme for the creation of industrial wind turbine projects exposes the public to a risk to their health, the legislative scheme must comply with s. 7 of the *Charter*.
>
> [19] The Dixon/Ryan Appellants submit that the test under s. 142.1 of the *EPA* violates s. 7 of the *Charter* and should therefore be disregarded by the Tribunal and read down such that the section requires appellants to show that engaging in the REA will likely cause an adverse effect to human health. Accordingly, they are seeking a revocation of the Director's decision to approve the REA.

The section 7 *Charter* challenge was framed in substantially similar ways in the ERT proceedings involving the K2 Wind and Armow Wind projects.[9]

B.1 Appellants' Issue No. 1 before the ERT: Was the deprivation complained of by the Appellants state-imposed?

[48] The ERT first dealt with the issue of whether the deprivation complained of by the Appellants was state-imposed:

> [31] The Appellants submit the harm or deprivation in this case, a requirement for a s. 7 *Charter* claim, is state imposed because the deprivation emanates from a state action. In this case, the Dixon/Ryan Appellants submit that a regulatory regime dealing with wind turbines creates the deprivation. They state that, under this regime, the Appellant must show harm to health, rather than the state having to establish that the proposed projects are safe...
>
> …

[9] ERT K2 Wind Decision, paras. 11 to 17; ERT Armow Wind Decision, paras. 220 to 223.

[35] The Director submits that, for a claim to be successful under s. 7 of the *Charter*, the deprivation or harm complained of must be state imposed. In this case, he submits the deprivation outlined by the Appellants is not state imposed and therefore the claim must fail.

[36] The Director submits that a necessary requirement of a s. 7 *Charter* claim is that the harm complained of must come from state action and that there is no state action involved in this proceeding.

…

[38] The Director states that because the wind turbines are not owned by the state, the proper route for those that have issues with REAs is an appeal. He states that the legislation is protective and there is nothing that puts the Appellants at further risk. He submits that the Appellants, in essence, are asserting a positive rights claim by wanting a more protective regime and the Courts have been consistent in asserting that s. 7 does not allow positive rights claims. In short, he states that there must a criminal or civil prohibition in order for the state imposed requirement to be met.

…

[41] The Tribunal agrees with the submission of the Director that the jurisprudence to date has not promoted the notion that s. 7 *Charter* claims are intended to further positive rights, but instead, to protect claimants from state imposed harms. However, the Tribunal is also cognizant that the courts, such as in the dissent in *Gosselin*, have considered the possibility that positive rights may be the subject of a s. 7 *Charter* claim in the future.

…

[43] The Tribunal also finds that it is not necessary to determine which characterization is more appropriate in light of the findings below. The Tribunal further finds that either characterization may be put forth and considered by the Tribunal in a future proceeding.

[44] It is important to note that, with respect to a s. 7 *Charter* claim, an appellant must not only prove the harm complained of is state imposed, but that there is a causal connection between the harm and the state action. The Tribunal agrees with the Director's submission that where there is a proven risk of harm, it must be established that the state action or impugned provisions create an increased risk of harm.

…

[46] However, the Appellants in this case must not just prove a risk of harm, they must establish that there is a deprivation that results in an increased risk of harm. With respect to the present case, it is not enough to say wind turbines may cause harm. It must be established in evidence that there is an increased risk of harm resulting from state action or the impugned provisions. Presumably, the Appellants would argue that there is an increased risk of harm because wind turbines can now operate within the regulatory boundaries set under the *EPA* (i.e., 550 m from a non-participating receptor and within 40 dbA) and the appeal process does not address complaints from noise if wind turbines operate within those regulatory boundaries.

…

[50] In summary, the Tribunal leaves open the possibility that an appellant might frame the s. 7 *Charter* deprivation in a manner that it could be characterized as "state imposed" in circumstances such as in the present claim. However, the Tribunal notes that the onus is on an appellant to demonstrate that there is a sufficient causal connection between the psychological or physical harm complained of (that is, health and psychological effects from the operation of wind turbines at the regulatory requirements and decibel levels) and the impugned state actions or renewable energy approval appeal provisions.

B.2 Appellants' Issue No. 2 before the ERT: What degree of harm did the Appellants have to establish to demonstrate a violation under *Charter* s. 7?

[49] The ERT then considered the issue of the extent of the harm a claimant must establish to prove a section 7 *Charter* violation:

[56] In summary, the Dixon/Ryan Appellants submit that physical harm that is non-trivial and clinically significant meets the threshold for a s. 7 *Charter* claim.

[57] The Director submits that, based on the ruling in *Chaoulli*, there is no difference between the standard for psychological harm and the standard for physical harm. The Director submits that in both cases the harm must be serious.

…

[61] The Approval Holder submits that the harm envisioned under s. 7 of the *Charter* is that it must be serious, whether it refers to physical or psychological harm.

…

[63] …As will be discussed below, the Tribunal will not have to make a specific finding of what is meant by "serious" in this case…

…

[68] A number of cases have discussed the required threshold for a s. 7 *Charter* claim. In terms of psychological stress, the Supreme Court of Canada in *G(J)* at paras. 59-60 stated as follows: [quotation omitted]…

[69] The threshold stated by the Court, namely, that the impugned state action must have a "serious and profound effect on a person's psychological integrity" seems well accepted and should be followed by the Tribunal.

…

[72] A second observation is that the comments in *Chaoulli* suggest that the term "serious" connotes a "clinically significant health condition." Although still general in

nature, the Court has provided significant and useful guidance in holding that in order to meet the threshold for a s. 7 claim, the deprivation must be serious in the sense that the claimant has a health condition that is clinically significant. This, presumably, is a diagnosis made by medical professionals. What is a clinically significant health condition, of course, was not definitively laid out by the Court, and, it can be assumed, will have to be assessed on a case-by-case basis.

[73] An understanding of what is meant by "serious" in the context of a s. 7 *Charter* claim also can shed light on the threshold needed to meet the "serious harm to human health" ground under s. 142.1 of the *EPA*. It can be assumed that there will be some parallels in analysis and thresholds between a *Charter* claim and the health ground of appeal for a REA appeal. However, future cases will have to determine whether a "clinically significant" health condition that satisfies the threshold for a s. 7 *Charter* claim would also satisfy the test for a s. 142.1 *EPA* appeal (or *vice versa*).

B.3 Appellants' Issue No. 3 before the ERT: Did the Appellants establish a violation of their *Charter* s. 7 rights?

[50] The ERT finally considered the onus the Appellants bore to establish a s. 7 *Charter* violation:

> [81] In reviewing the case law on s. 7 *Charter* claims, it is apparent that the courts have all held that the onus is on the claimant to establish, on the evidence provided, serious physical or psychological harm. Speculation, allegations and mere concerns do not suffice.
>
> …
>
> [84] For a s. 7 *Charter* claim, the Tribunal finds that the onus is on the Appellants to establish, on the evidence, the claimants have suffered or will suffer serious physical or psychological harm. The next section will review the Appellants' evidence to assess whether they have met this onus.

[51] After reviewing at some length the evidence filed before it, the ERT stated:

> [141] The Dixon/Ryan Appellants submit that the harm suffered by those living within close proximity to wind turbines is harm which is sufficient to warrant clinical attention, as borne out by the witnesses before the Tribunal and findings in the *Erickson* decision.
>
> …
>
> [143] Both the Director and the Approval Holder submit that the Appellants have not met the burden to establish a s. 7 *Charter* claim. The Director states there has been no evidence put forward by the Appellants with respect to the level of noise (audible, infrasound, low frequency noise) that may be associated with annoyance, much less evidence of a causal link to serious harm to human health. The Director further submits

> that no new evidence has been brought which would warrant a conclusion that is different from the Tribunal's conclusions in *Erickson* and *Ostrander*.
>
> …
>
> [151] In summary, it is fair to say that the Tribunal has consistently held in a variety of cases that the evidence of post-turbine witnesses alone has not met the evidentiary threshold so as to meet the "serious harm to human health" test under s. 142.1 of the *EPA*. The question is whether such evidence, although not meeting the threshold for the *EPA* test, nevertheless would meet the test for a s. 7 *Charter* claim.
>
> …
>
> [153] Hence, although the Tribunal in *Ostrander* was considering whether post-turbine witness evidence is sufficient to address the *EPA* test, the Tribunal finds that its general conclusions are equally applicable to the s. 7 *Charter* test…
>
> …
>
> [170] The Tribunal will make no finding as to whether the "serious harm to human health" test set out in s. 145.2.1 of the *EPA* and the threshold of "serious physical harm" or "serious and profound psychological harm" required to establish a deprivation as required in a s. 7 *Charter* claim, are the same or similar. Further, the Tribunal will not make any specific finding as to whether the test in s. 145.2.1 of the *EPA* requiring the Appellants to establish that the Project "will cause" serious harm to human health is the same as the need to establish a "sufficient connection" as required in a s. 7 *Charter* claim. However, it is abundantly apparent from the jurisprudence pertaining to both the *EPA* test and s. 7 *Charter* test, that a solid evidentiary foundation is required for both tests.
>
> …
>
> [161] Even if one argues that the test to prove a causal connection under s. 7 of the *Charter* so as to establish serious psychological or physical harm is less onerous or stringent than the required s. 142.1 threshold under the *EPA* to establish serious harm to human health, the burden has not been met by the Appellants. It is not necessary in this case for the Tribunal to determine if the threshold under s. 7 of the *Charter* is less stringent.

C. The positions of the parties in the Divisional Court on the issues raised by the Appellants

[52] In their Factum the Appellants submitted that the conclusions reached by the ERT in the three hearings on their *Charter* s. 7 claims were incorrect for the following reasons:

> [158] [A] person appealing an REA must show that engaging in the project will cause "serious harm to human health." The Appellants respectfully submit that requiring an appellant to show "serious harm" to human health violates section 7, because it exceeds the section 7 threshold that a claimant need only show that it will interfere with bodily integrity or cause serious state-imposed psychological stress.

…

[160] It is respectfully submitted that the St. Columban Project, the K2 Wind Project, and the SP Armow wind project as approved in the REA, will cause a serious and profound effect on the Appellants' psychological integrity.

[161] With respect to threshold for physical harm within section 7, the Appellants submit that the harm must be non-trivial, but that it is not required to rise to the level of "serious" harm.

…

[164] It is respectfully submitted that the harm suffered by those living within close proximity to wind turbines is harm that is sufficient to warrant clinical attention, as borne out by the witnesses before the Tribunal, and as found by the Tribunal in the *Erickson* decision. A test that requires an appellant to show that the project will cause serious harm fails to capture all the harms that are protected by section 7 of the *Charter*.

…

[165] The Appellants submit that the deprivation of their right to security of the person is not in accordance with the principles of fundamental justice…

[166] The Appellants respectfully submit that the imposition of a standard that requires claimants to prove "serious harm" is arbitrary and grossly disproportionate to the interests at stake. The effects of wind turbines are felt in the most private and personal areas of residents' lives, in their homes and beds, where the state has its lowest interest in intrusion. Given the lack of knowledge about the health effects of wind turbines and the broad range of interests protected by s. 7 of the *Charter*, the imposition of a "serious harm" standard has no basis in logic or human experience.

[167] For the reasons outlined above…, the Appellants submit that the "precautionary principle" should be included as a tenet of fundamental justice. The Appellants submit that the "serious harm" threshold violates the precautionary principle. As such, the Appellants submit that s.142.1 of the *EPA* should be read down to include the precautionary principle. The Appellants submit that the evidence led in the Tribunal below met a *Charter* complaint standard for revoking the impugned REAs.

[168] However, if this Honourable Court finds that the precautionary principle is not a tenet of the principles of fundamental justice, the Appellants submit that a legislative scheme, which puts the onus on the claimant to show a serious risk to human health despite the fact that the regulatory bodies themselves accept that there are knowledge gaps with respect to how industrial wind turbines effect health, is not in accordance with the principles of fundamental justice.

[53] The Respondents on these appeals advanced several arguments in support of the ERT's decisions dismissing the Appellants' *Charter* s. 7 claims. First, the Respondents submitted that

Charter s. 7 was not engaged because the harm alleged by the Appellants was not state-imposed. As put by the Director in its Factum:

> Charter s. 7 exists to constrain government action, not to guarantee a specific model of regulation of industrial activity or land use. In these appeals, in addition to their being insufficient evidence to establish that the project will cause serious physical or psychological harm and thus engage s. 7, there was no evidence before the ERT that s. 142.1 (or s. 47.5) of the *EPA* itself causes serious physical or psychological harm and thus engages s.7.
>
> Indeed, instead of depriving the Appellants of any right, the impugned law provides an opportunity for any resident of Ontario to effectively block or modify a renewable energy project if they can demonstrate before an independent, impartial adjudicative Tribunal that the project will cause serious harm to human health. There is no government prohibition on the Appellants that interferes with their rights. In other words, there is no state imposed deprivation of security of the person as contemplated by Charter s. 7.
>
> In this regard, the Appellants' claim is fundamentally a positive rights claim to a regulatory regime of their choosing. Section 7 does not impose such an obligation on government.

[54] In addition, the Respondents argued that:

(i) The ERT was correct in holding that *Charter* s. 7 required the Appellants to demonstrate serious harm;

(ii) The Tribunal correctly dismissed the Appellants' *Charter* claims because they had failed to establish that their security of the person was engaged on the facts of their cases. K2 Wind submitted that the Appellants' allegation that the ERT had erred in law by failing to find that the "serious harm to health" standard did not violate *Charter* s. 7 was undercut by the finding of fact made by the ERT that the Appellants had not established a breach of Charter s. 7 even under the lower threshold of harm they had urged upon the Tribunal; and,

(iii) On the issue of the principles of fundamental justice, any limit imposed by *EPA* s. 142.1 on the Appellants' security of the person took place in the context of a statutory regime which was not arbitrary and, as well, the precautionary principle was not a principle of fundamental justice.

D. The standard of review

[55] The parties agreed that the standard of review with respect to the Tribunal's determinations of the constitutional question was correctness. Nevertheless, we are mindful of

the following observation made by the Supreme Court of Canada in *Martin vs. Nova Scotia (Workers Compensation Board)*[10] at paragraph 30: "… Charter disputes do not take place in a vacuum. They require a thorough understanding of the objectives of the legislative scheme being challenged as well as of the practical constraints it faces and the consequences of proposed constitutional remedies.… In this respect, the factual findings and record compiled by an administrative tribunal as well as its informed and expert view of the various issues raised by the constitutional challenge will often be invaluable…"

E. Analysis

E.1 Did the nature of the Appellants' claims engage an analysis under the *Charter*?

[56] In each of the three decisions the ERT considered and disposed of the claims advanced by the Appellants under *Charter* s. 7. Put another way, the Tribunal did not proceed on the basis that the *Charter* claims advanced by the Appellants in respect of the *EPA* statutory harm test did not engage or require an examination under the *Charter*. Given that manner of proceeding by the ERT and in light of the absence of a notice of cross-appeal by any of the Respondents on that determination, little time need be spent on the Respondents' alternate submission that the Appellants' claims did not engage or attract scrutiny under the *Charter* in the sense that no arguable link existed between the deprivation of security of person alleged by the Appellants and government action.

[57] The *Charter* regulates the relations between government and private persons. The *Charter* applies to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.[11] Two aspects of the Appellants' s. 7 *Charter* claims are significant in this regard. First, the Appellants, on proper notice of a constitutional question, challenged the constitutional validity of provisions in provincial legislation, the *EPA*. Such challenges to the validity of provincial legislation required the ERT to engage in a *Charter* analysis, which it did.

[58] Second, put in colloquial terms the Appellants alleged that the provincial government was allowing bad, harmful things to come into their neighbourhoods. Translating that into more legal language, the statutory regime in the *EPA* which the Appellants challenged under the *Charter* proscribed certain activity - the construction and operation of a renewable energy project - "except under the authority of and in accordance with a renewable energy approval issued by the Director", who was a person appointed by the Ontario Minister of the Environment.[12] The *EPA* therefore prevents the construction of a commercial wind farm without first obtaining the authorization of the Director, and the Appellants contended that the granting of such authorizations would negatively impact or limit their security of the person.[13] The government's authorization of a construction activity which the Appellants allege will cause them harm

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[10] 2003 SCC 54
[11] *Constitution Act, 1982*, s. 32(1)(b).
[12] *EPA*, s. 47.3(1).
[13] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, para. 58.

constitutes a sufficient causal connection between the government activity and the alleged prejudice to embark upon a review and consideration of their *Charter* claims – i.e. the Appellants asserted a reasonable *Charter* "cause of action" at law.[14] Whether the Appellants could establish, on the evidence, a violation of their *Charter* right to the security of the person involved a separate, subsequent step in the analysis.

E.2 Did the formulation of the statutory harm tests in *EPA* ss. 142.1(3) and 145.2.1(2) infringe upon the Appellants' security of the person?

[59] The Appellants challenged two related provisions of the *EPA* dealing with the statutory right to secure a review of the Director's issuance of a REA before the Tribunal – s. 142.1(3) which limited the ability of a person to require such a hearing, in part, only on the ground that the wind farm project "will cause serious harm to human health", and s. 145.2.1(2) which provided that the Tribunal could consider only whether the project "will cause serious harm to human health". The crux of their argument was that the statutory test of "will cause serious harm to human health" was constitutionally infirm because it exceeded the "harm test" implicit in *Charter* s. 7 of simply demonstrating that a wind farm project would cause "a reasonable prospect of serious harm to human health".

The language of the statutory test in light of the jurisprudence

[60] In our view the ERT correctly rejected that constitutional claim by the Appellants. First, the statutory language of "will cause serious harm to human health" found in *EPA* ss. 142.1(3) and 145.2.1(2) closely tracks the jurisprudential requirement that in order to establish a violation of security of the person a claimant must demonstrate "serious" harm.

[61] The current state of the law was summarized by the Supreme Court of Canada in their decisions in *New Brunswick (Minister of Health and Community Services) v. G. (J.),*[15] *Blencoe v. British Columbia (Human Rights Commission)*[16] and *Chaoulli v. Quebec (Attorney General).*[17] In *G.(J.)* the Supreme Court of Canada observed that it was clear the right to security of the person did not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. Instead, for an infringement of security of the person to be made out, the impugned state action must, when the effects are assessed objectively, have a serious and profound effect on the psychological integrity of a person of reasonable sensibility. [18]

[62] Then, in *Blencoe* the Supreme Court of Canada held that where the psychological integrity of a person is at issue, actionable claims for the violation of the security of the person are restricted to serious state-imposed psychological stress resulting from state interference with

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[14] *Ibid.*, paras. 75 and 76.
[15] [1999] 3 S.C.R. 46
[16] 2000 SCC 44
[17] 2005 SCC 35
[18] *G.(J.), supra.*, paras. 59 and 60.

an individual interest of fundamental importance, with a sufficient causal connection existing between the state action and the prejudice suffered by the claimant.[19] Finally, in *Chaoulli* that Court re-iterated that not every difficulty rises to the level of adverse impact on the security of the person under *Charter* s. 7; for an impact, whether psychological or physical, to do so, it must be serious.[20]

[63] The Appellants submitted that the *Chaoulli* decision in fact established a lesser threshold of proof for a *Charter* s.7 violation, holding it to be sufficient for the claimant to demonstrate the imposition by state action of "a condition that is clinically significant to their current and future health".[21] When read in context, that language in the *Chaoulli* decision does not stand for the proposition advanced by the Appellants because the Supreme Court of Canada continued by stating:

> Access to a waiting list is not access to health care. As we noted above, there is unchallenged evidence that in some serious cases, patients die as a result of waiting lists for public health care. *Where lack of timely health care can result in death, s. 7 protection of life itself is engaged. The evidence here demonstrates that the prohibition on health insurance results in physical and psychological suffering that meets this threshold requirement of seriousness*. (emphasis added)

[64] In sum, the statutory review test adopted by the Ontario Legislature in *EPA* ss. 142.1(3) and 145.2.1(2) in respect of the impact on human health of contaminants, such as sound and vibration, discharged from commercial wind farms does not, on its face, depart from the jurisprudential test for establishing a state violation of a person's security of person – i.e. the demonstration that the state action must have a serious and profound effect on a person's physical or psychological integrity.

A contextual examination of the statutory language

[65] Second, expanding the analysis to include a contextual examination of the statutory test does not result in a different conclusion. Consider, for example, a circumstance where the Ministry of the Environment authorized the operation of an industrial plant which would discharge mercury into a river. Given what is known about the effect of mercury in water on human health, one could not say that enacting a test which required a person who sought to set aside such an approval to demonstrate that the operation of the plant would cause serious harm to human health would be unduly onerous.

[66] This brings us to the heart of the Appellants' s. 7 claims. They contend that unlike the certainty of scientific knowledge which surrounds the effects of the discharge of a contaminant such as mercury, when dealing with the effect of noise and vibrations from commercial wind farms we are dealing with "known unknowns". The uncertainty of the state of scientific

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[19] *Blencoe*, *supra*., paras. 57, 60 and 82.
[20] *Chaoulli*, *supra*., para. 123.
[21] *Ibid.*

knowledge about the effects on human health of commercial wind farms, according to the Appellants, materially informs the analysis of the *Charter* adequacy of the review tests found in *EPA* ss. 142.1(3) and 145.2.1(2). Which leads, then, to the question of whether the statutory test adopted by the Legislature materially departed from the consensus scientific view about the impact of commercial wind turbines on human health.

[67] The Renewable Energy Approvals Regulation made under the *EPA* (O. Reg. 359/09, or the "REA Regulation") enacts a general prohibition on the construction of a wind turbine unless it meets two fundamental requirements:

(i) The centre of the base of the wind turbine is located at least 550m from all noise receptors, which in the case of a dwelling house is the centre of that house; and,

(ii) The wind turbine has a sound power level that is greater than or equal to 102 dBA.[22]

However, in the case of commercial wind turbine farms of the kind at issue on these appeals – Class 4 wind facilities – the regulation modifies the prohibition so that it does not apply provided, that:

> [A]s part of an application for the issue of a renewable energy approval or an environmental compliance approval in respect of the facility, the person who proposes to construct, install or expand the wind turbine, submits,
>
> > (a) results of measurements or calculations showing that the lowest hourly ambient sound level at a noise receptor is greater than 40 dBA due to road traffic for wind speeds less than or equal to 4 metres per second, obtained in accordance with the publication of the Ministry of the Environment entitled NPC-206 "Sound Levels due to Road Traffic", dated October 1995, as amended from time to time and available from the Ministry; and
> >
> > (b) a report prepared in accordance with the publication of the Ministry of the Environment entitled "Noise Guidelines for Wind farms", dated October 2008, as amended from time to time and available from the Ministry, *including a demonstration that the proposed facility will not exceed the lowest hourly ambient sound level measured or calculated under clause (a)*. (emphasis added)[23]

[68] The October 2008 *Noise Guidelines for Wind Farms* published by the Ministry of the Environment prescribe the permissible sound level limits for wind turbine generators. At the lowest specified wind speed the permissible sound level limit in urban areas is 45 dBA, whereas in rural (Class 3) areas it is 40 dBA. The *Guidelines* describe the Noise Assessment Report which all wind proponents must file with the Ministry.

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[22] O. Reg. 359/09, s. 54(1).
[23] *Ibid.*, s. 54(2).

[69] According to the parties, the result of this regulatory regime is that Class 4 facility wind turbines in rural areas must be set-back a minimum of 550m from a noise receptor (i.e. dwelling house) and, at that distance, not exceed the 40 dBA sound level at the lowest specified wind speed.

[70] Back in 2011, in the case of *Hanna v. Ontario (Attorney General)*,[24] this Court was asked to consider the validity of the sections of the REA Regulation which established the set-back and sound level limits. In that case the applicant argued that the Minister of the Environment had promulgated those regulatory limits without taking into account section 11 of the *Environmental Bill of Rights*[25] which stated:

> 11. The minister shall take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry.

[71] Section 3(a) of the Statement of Environmental Values provides, in part:

> The Ministry of the Environment is committed to applying the purposes of the EBR when decisions that might significantly affect the environment are made in the Ministry. As it develops Acts, regulations and policies, the Ministry will apply the following principles:
>
> …
>
> The Ministry uses a precautionary, science-based approach in its decision-making to protect human health and the environment.

[72] In *Hanna* this Court ultimately found that the Minister had complied with the process mandated by s. 11 of the *Environmental Bill of Rights*. In the course of its reasons this Court described the process by which the Ministry had adopted the set-back and sound level limits for commercial wind farms:

> [16] The regulation is part of a new renewable energy approval process ("REA"). A wind turbine, located on land, with a capacity of 3kW of power does not require an REA. Wind facilities on land generating between 3kW, but less than 50 kW, require an REA but there are no minimum setback requirements in the regulations. The targeted sections of the regulation in this application are for industrial wind facilities generating more than 50 kW. Depending on the sound power level (a measure of a turbine's "loudness"), most of these wind turbines must meet a minimum 550-metre setback from residences or other "noise receptors".

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[24] 2011 ONSC 609
[25] S.O. 1993, c. 28.

> [17] On June 9, 2009, the government posted a proposal for the Renewable Energy Approval regulation, as required by the EBR. The public comment period closed July 24, 2009.
>
> [18] The public consultation process is outlined in the evidence of Marcia Wallace. It describes standing committee hearings, technical workshops bringing together knowledgeable persons such as scientists, engineers and academics, facilitated discussion groups, public information sessions and aboriginal consultation sessions. There were approximately 1,300 written submissions. Of approximately 4,000 comments that were noted, about 8 per cent were directed at health issues related to wind turbines. The applicant himself did not participate in this process.
>
> [19] The Ministry of the Environment considered all of the public comments provided. In addition, the ministry considered more than 100 studies and publicly available scientific literature, as identified in the application record before this court. As a consequence of all that input, some changes were made to the proposed regulation.

[73] The Tribunals also had before them the 2009 World Health Organization Night Noise Guidelines for Europe which summarized, in section 5.6, the relationship between night noise exposure and health effects. Those Guidelines reported that a number of effects on sleep were observed at night sound levels of 30 to 40 dBA - e.g. body movements, awakening, self-reported sleep disturbance and arousals. However, even in the worst cases the effects seemed modest. By contrast, at sound levels in the range of 40 to 55 dBA, "adverse health effects are observed among the exposed population. Many people have to adapt their lives to cope with the noise at night. Vulnerable groups are more severely affected." The Guidelines stated:

> There is no sufficient evidence that the biological effects observed at the level below 40 $dBL_{night,outside}$ are harmful to health. However, adverse health effects are observed at the level above 40 $dBL_{night,outside}$, such as self-reported sleep disturbance, environmental insomnia, and increased use of somnifacient drugs and sedatives.

[74] At the hearings before the ERT the Appellants did not adduce expert evidence which expressed opinions different from the views found in the 2008 Ministry *Noise Guidelines for Wind Farms* or 2009 WHO Europe Night Noise Guidelines:

(a) In the St. Columban Wind hearing the Appellants called an expert acoustician, Mr. Rick James, but his testimony focused on alleged deficiencies in the noise assessment report prepared for the project. St. Columban Energy called an acoustician, Dr. Werner Richarz, who testified that if the noise levels outside a receptor's home were 40 dBA or below, he would not expect there to be any adverse effects inside the home. In the result, the Tribunal preferred the evidence of the proponent's experts over that of Mr. James;

(b) In the K2 Wind hearing, the Appellants again called Mr. James to testify about the noise assessment report for the project. The Respondents called Dr. Kenneth Mundt, an epidemiologist, who had undertaken a review of available peer-reviewed scientific studies with respect to wind turbines and human health and concluded that "there is no convincing evidence that residential exposure to wind turbines causes harm to human

health although the literature reports an association between sound pressure levels and annoyance". Dr. Mundt also testified that while some individuals may experience an annoyance from wind turbine noise, "there is no indication of a co-relation between annoyance from wind turbine noise and adverse health effects in the studies – nor is there any indication of serious harm". The Respondents also called Dr. Robert McCunney, a medical doctor specializing in occupational and environmental medicine with particular expertise in the health implications of noise exposure. Based on his review of the noise assessment report for the K2 project, the relevant scientific literature and the evidence presented by the Appellants, Dr. McCunney concluded that the project would not cause harm to human health if operated in accordance with the REA. Again, the ERT preferred the evidence of the Respondents' expert witnesses over that of the Appellants;

(c) In the Armow Wind proceeding, the Appellants called Mr. James who critiqued the project's noise assessment report. The Respondents called Dr. Mundt who testified that his review of the literature indicated that there was not sufficient, clear and convincing evidence of wind turbine emissions causing any harm to human health. The Respondents also called Dr. McCunney who testified that there were no scientific studies which demonstrated adverse health effects from sub-audible infrasound at the levels encountered in the vicinity of wind turbines. Dr. McCunney also gave evidence that annoyance associated with wind turbines was a subjective phenomenon primarily related to attitudes to the visual impact of wind turbines and economic benefit associated with wind farms. He stated that annoyance was not a health effect. The Tribunal preferred the expert evidence adduced by the Respondents.

[75] On appeals such as these our Court can only consider a question of law; we cannot re-weigh or re-assess the evidence which was before the Tribunals or the factual findings they made. Our purpose in describing the expert evidence which was before the Tribunals on the issue of the impact of wind turbines on human health is a narrow one: to identify that the Tribunals did not have before them expert evidence which seriously called into question the principle underpinning the *EPA*'s renewable energy project regulatory regime – i.e. that wind turbines which are set back 550m from a dwelling house and which do not generate noise levels in excess of 40 dBA at the lowest specified wind speed do not cause serious harm to human health based upon the current state of scientific knowledge.

The Appellants' motion for leave to adduce fresh evidence

[76] Which leads then to the final aspect of this issue – the Appellants' motion for leave to adduce fresh evidence on these appeals. By way of background, at the St. Columban Wind hearing the Appellants summonsed Dr. David Michaud who testified about a study then being undertaken by Health Canada. As described by the ERT:

> [104] The Dixon/Ryan Appellants state that they recognize that the Health Canada study being conducted by Dr. Michaud's on wind turbines is not intended to demonstrate a definitive link between wind turbines and harm to health, but instead, examines whether there is a statistical association…
>
> …

> [106] Both the Director and the Approval Holder submit that the evidence of Dr. Michaud does not provide evidence that the Project will cause serious harm to human health. The Director states that even if the study being undertaken by Health Canada was released today, the study is not designed to assess causation. Instead, the Director notes that the study is examining association and it will not be the final or ultimate word on the issue.
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> …
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> [157] In terms of Dr. Michaud, his testimony revealed that the Health Canada study he is conducting is designed to determine whether there is an association between wind turbines and health effects. He testified that the data from his study would not be available for another year. He stated that his study, at best, would assist in determining whether there was an association between wind turbines and certain human health effects. The study alone would neither be determinative nor conclusive with respect to that causation.

[77] A summary of the study described by Dr. Michaud in the Fall of 2013 was released on November 6, 2014, a few days before the hearing of these appeals. The summary was entitled, "Wind Turbine Noise and Health Study: Summary of Results" ("Study Summary"). In their notice of motion the Appellants submitted that the Study Summary was conclusive on the issue of whether the Appellants were provided with an opportunity to be heard on the basis of a full factual record because the summary showed that they were denied natural justice as the onerous timelines enforced by the tribunal guaranteed that it would not consider relevant evidence.

[78] The Respondents opposed the admission of the fresh evidence.

[79] In *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*[26] this Court considered a motion for leave to file fresh evidence on an appeal from the ERT involving a wind farm project. As observed in that case, the starting point of the analysis is whether the evidence could have been obtained by the exercise of reasonable diligence prior to the hearing before the ERT. Given that the Study Summary was not published until November, 2014, the Appellants could not have obtained it prior to the hearings before the ERT.

[80] That does not end the analysis. In *Sengmueller v. Sengmueller*[27] the Court of Appeal observed that leave to file fresh evidence usually will be granted only in the event the evidence, if admitted, would likely be conclusive of an issue in the appeal. The Court of Appeal stated:

> One obvious problem with admitting on appeal evidence which did not exist at the time of trial is that such evidence could not possibly have influenced the result at trial. It is argued for the appellant that admitting such evidence on appeal would result in there being no finality to the trial process, that it would tend to turn appeal courts into trial courts, and that it would unacceptably protract legal proceedings. All of these objections

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[26] 2014 ONSC 974 (Div. Ct.)
[27] (1994), 17 O.R. (3d) 208 (C.A.)

> are valid and compelling. However, *in a case where the evidence is necessary to deal fairly with the issues on appeal, and where to decline to admit the evidence could lead to a substantial injustice in result, it appears to me that the evidence must be admitted*. In my view in the particular and unusual circumstances of this case, this is such a case.[28]

[81] Notwithstanding that conclusion, in *Ostrander* this Court commented that the limited scope of our appellate jurisdiction on appeals under *EPA* s. 145.6(1) to questions of law cast doubt on the relevance of fresh factual evidence to the issues on the appeal:

> [16] An appeal court can only receive fresh evidence that is relevant to an issue over which the appeal court has jurisdiction. There is nothing to be gained by receiving fresh evidence that addresses an issue that the appeal court cannot consider. In this case, this court can only consider questions of law. We have no jurisdiction to consider questions of fact or questions of mixed fact and law unless they amount to an error of law: *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235 at para. 27.
>
> …
>
> [22] I conclude that this court cannot receive evidence regarding a material change of fact given the appellate jurisdiction of this court is confined to a question of law. The fresh evidence does not address whether the Tribunal made an error in law in reaching the conclusions that it did. Rather, it is an attempt to undermine the factual conclusions reached by the Tribunal or to show that the facts have sufficiently changed that the Tribunal's conclusions are now unreliable.
>
> [23] However one wishes to characterize the effect of the proposed fresh evidence, it is clear that it is directed to matters of fact and those matters are not within the jurisdiction of this court on this appeal.

[82] Although we see no merit in the Appellants' submission that the Study Summary showed that the Tribunals had denied them natural justice – the Study was not available at the time of the ERT hearings nor did the Appellants seek an adjournment to await its release – we do grant leave to file the Study for the limited purpose of assessing the constitutional validity, or reasonableness, of the statutory harm test contained in ss. *EPA* ss. 142.1(3) and 145.2.1(2).

[83] However, when reviewed, the conclusions of the Study Summary do not assist the Appellants. First, the Study Summary clearly stated that its "results do not permit any conclusions about causality". Second, it stated that the "results should be considered in the context of all published peer-reviewed literature on the subject".

[84] Third, the Study Summary reported that from the self-reported questionnaire results, the following were not found to be associated with wind turbine noise exposure: (i) self-reported

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[28] *Sengmueller, supra.*, p. 211(emphasis added)

sleep (e.g., general disturbance, use of sleep medication, diagnosed sleep disorders); (ii) self-reported illnesses (e.g., dizziness, tinnitus, prevalence of recurrent migraines and headaches) and chronic health conditions (e.g., heart disease, high blood pressure and diabetes); and (iii) self-reported perceived stress and quality of life. The Study Summary did report that annoyance towards several wind turbine features - noise, shadow flicker, blinking lights, vibrations, and visual impacts - were found to be statistically associated with increasing levels of wind turbine noise.

[85] Finally, in terms of objectively measured results, the Study Summary reported:

> The results from multiple linear regression analysis revealed consistency between hair cortisol concentrations and scores on the Perceived Stress Scale…with neither measure found to be significantly affected by exposure to WTN (Wind Turbine Noise). Similarly, while self-reported high blood pressure (hypertension) was associated with higher measured blood pressure, no statistically significant association was observed between measured blood pressure, or resting heart rate, and WTN exposure…
>
> …
>
> While it can be seen that many variables had a significant impact on measured sleep, calculated out door WTN levels near the participants' home was not found to be associated with sleep efficiency, the rate of awakenings, duration of awakenings, total sleep time, or how long it took to fall asleep.

[86] To the extent that the Health Canada Study suggested that there was an association between wind turbine noise and annoyance, it did not suggest anything which was unknown or disputed in the K2 and Armow Wind Project hearings. The opinion evidence before the Tribunal in those hearings was that an association was not sufficient to permit an inference of causation. The Health Canada Study dealt with the association between the two, but specifically declined to state an affirmative conclusion about causation.

[87] Taken together, the results of the Study Summary do not offer any new relevant evidence on the constitutional supportability or reasonableness of the statutory test - "will cause serious harm to human health" – primarily because the Study Summary expressly disclaims that its results permit drawing any conclusions about causality.

F. Conclusion

[88] By way of summary, we conclude that the statutory review test adopted by the Ontario Legislature in *EPA* ss. 142.1(3) and 145.2.1(2) in respect of the impact on human health of contaminants, such as sound and vibration, discharged from commercial wind farms does not, on its face, depart from the jurisprudential test for establishing a state violation of a person's security of person under *Charter* s. 7.

[89] We also conclude that that statutory test did not depart from the consensus scientific view on the impact of commercial wind turbines on human health. On this point an analogous case can be found in the 2003 decision of the British Columbia Supreme Court in *Millership v.*

Kamloops (City).[29] In that case a municipal by-law had authorized the fluoridation of the city's water supply. A resident alleged that such fluoridation infringed his security of the person under *Charter* s. 7. After reviewing the expert evidence the Court concluded:

> [108] There is debate among scientists about the effects of fluoridated water. However, the predominant opinion is that public water fluoridation is effective for the purposes of reducing dental caries, and aside from dental fluorosis, if the levels are not excessive, the evidence does not indicate that the health risks complained of are caused by consumption of optimally fluoridated water.

That led the Court to conclude that the fluoridation of the public water supply pursuant to the municipal by-law did not infringe the plaintiff's section 7 rights provided that fluoridation was maintained within the range of recommended optimal levels.[30]

[90] We therefore conclude that the Tribunals did not commit an error of law in rejecting the Appellants' claims that the statutory review test violated their right to security of the person under *Charter* s. 7.

[91] The Tribunals concluded that in light of those findings, it was not necessary for them to address the issue of whether any such deprivation of the Appellants' security of the person was in accordance with the principles of fundamental justice. Given our conclusion that the Tribunals did not err in rejecting the Appellants' constitutional claim that the statutory harm test set out in *EPA* ss. 142.1(3) and 145.2.1(2) did not deprive the Appellants of the right to security of the person, it is not necessary on this appeal to address the submissions made by the parties about whether any deprivation was in accordance with the principles of fundamental justice nor to address their submissions on section 1 of the *Charter*.

VI. SECOND ISSUE: DID THE TRIBUNALS ERR IN THEIR TREATMENT OF THE "POST-WIND TURBINE WITNESSES"?

A. The Appellants' claim

[92] The Appellants' *Charter* s. 7 claim contained a second element. As put in their Factum:

> [169] In the alternative, if this Honourable Court finds that the test before the Tribunal on an appeal of a REA complies with the *Charter,* the Appellants submit that the Tribunal erred in law in finding that the Appellants had not demonstrated serious harm.
>
> [170] The Appellants repeat and rely on the evidence of the post-turbine witnesses outlined above at paragraphs 39-71, as evidence of the serious harm suffered by residents living in close proximity to wind turbines.

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[29] 2003 BCSC 82
[30] *Ibid.*, para. 112.

> [171] The Appellants submit that the Tribunal erred in law in holding that a medical diagnosis was required for the post-turbine witnesses to prove causation. The Appellants submit that they need not call scientific evidence to prove that the wind turbines caused the adverse health effects suffered by the post turbine witnesses.

B. The decisions of the Tribunals

[93] Before the Tribunals the Appellants led evidence from several witnesses who lived near already constructed wind farms. In the St. Columban Wind case the ERT described the nature of such evidence:

> [146] Both the Dixon/Ryan and MLWAG Appellants put forward a total of seven post-turbine witnesses, that is, witnesses that live, or have lived, near a wind turbine project and state that they have suffered harm from the projects…
>
> …
>
> [147] The witnesses outlined their concerns and the health impacts that they say they have experienced when living near wind turbines, including, sleep deprivation, headaches, pressure in the ear, high blood pressure and stress, among others.

[94] The ERT then explained how it would assess such evidence from what the parties called "post-turbine witnesses":

> [148] The evidence of post-turbine witnesses has been put forward in a number of appeals under s. 142.1 of the *EPA*. The Tribunal has not found in any case that the evidence of post-turbine witnesses alone, that is, without the qualified diagnostic skills of a health professional, is sufficient to establish the evidentiary base to meet the test in s. 142.1.
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> …
>
> [151] In summary, it is fair to say that the Tribunal has consistently held in a variety of cases that the evidence of post-turbine witnesses alone has not met the evidentiary threshold so as to meet the "serious harm to human health" test under s. 142.1 of the *EPA*. The question is whether such evidence, although not meeting the threshold for the *EPA* test, nevertheless would meet the test for a s. 7 *Charter* claim.
>
> …
>
> [153] Hence, although the Tribunal in *Ostrander* was considering whether post-turbine witness evidence is sufficient to address the *EPA* test, the Tribunal finds that its general conclusions are equally applicable to the s. 7 *Charter* test. The Tribunal in *Ostrander* also held that:
>
> > 175. The Tribunal accepts the witnesses testimony as entirely credible; however, there are dangers inherent in attempting to draw general conclusions about "wind turbine effects" from anecdotal,

> personal and unique experiences. It is even more problematic to apply conclusions made from those unique personal circumstances at a certain location, to projects at other locations. Once a causal connection is established (which in this case it is not), one would need, for example, evidence that criteria have been identified which would increase the risk among a certain percentage of the population of having a similar negative health effect. No such evidence was presented here.

[95] In the K2 Wind proceeding the ERT heard the evidence of Dr. McCunney that the post-turbine witnesses had not been properly diagnosed and that a proper diagnosis was needed in order to establish any causation between alleged health effects and wind turbine noise. It also considered the evidence of Dr. Moore who explained the importance of complete medical histories for the post-turbine witnesses in order to form a medical diagnosis. That led the ERT in the K2 Wind proceeding to conclude:

> [205] In paras. 149 and 150 of the *Dixon* decision, the Tribunal reviewed a number of cases, including *Ostrander* and *Bovaird*, that discussed the role of post-turbine witnesses in establishing causation. At para. 151, the Tribunal concluded that:
>
> > In summary, it is fair to say that the Tribunal has consistently held in a variety of cases that the evidence of post-turbine witnesses alone has not met the evidentiary threshold so as to meet the "serious harm to human health" test under s. 142.1 of the *EPA*. The question is whether such evidence, although not meeting the threshold for the *EPA* test, nevertheless would meet the test for a s. 7 *Charter* claim.
>
> [206] In the *Dixon* decision, the Tribunal relied on the *Ostrander* case and found that its general conclusions with respect to the role of post-turbine witnesses under an *EPA* appeal are equally applicable to the s. 7 *Charter* test. The evidence provided by the Drennans is also insufficient on its own to establish a s. 7 *Charter* claim.
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> …
>
> [213] In summary, as in the *Dixon* case, the Appellants did not provide professional medical opinions to diagnose the health complaints from the post-turbine witnesses and to establish a causal link between those complaints and wind turbines noise or noise from transformers. As importantly, the Tribunal has the benefit of the testimony of Drs. Mundt, McCunney and Moore that reinforce previous Tribunal findings that the post-turbine witnesses need to be properly diagnosed by a medical professional and that there is no reliable evidence to demonstrate that the Project will cause serious physical or any other serious harm.

[96] The ERT gave further consideration to the issue in the Armow Wind proceeding. Again, the Appellants adduced evidence from post-turbine witnesses about the impact of the turbines

near which they lived. That evidence included the medical records of the witnesses. The Respondents called Dr. Mundt. As put in the ERT's Armow Wind Decision:

> [115] Dr. Mundt gave evidence that self-reported health problems do not constitute valid epidemiological assessments, and that "causal conclusions based solely on self-reported health problems are scientifically speculative and likely misleading." He stated that conclusions regarding causation require valid epidemiological evaluation.

[97] Dr. McCunney also testified:

> [120] Dr. McCunney reviewed and provided comments on the witness statements and medical records provided by post-turbine witnesses, including two of the presenters. He determined that the level of information provided in the medical records was insufficient to allow a medical practitioner to make definitive causal assessments between diagnoses, symptoms and wind turbines. He noted that the medical records made no diagnosis related to wind turbine exposure. He stated that the health effects claimed by the post-turbine witnesses in their witness statements were general in nature, self-reported and could relate to numerous conditions.

[98] In Armow Wind the ERT spent some time in its Decision considering and dealing with the probative value of the evidence from the post-turbine witnesses:

> [200] The Tribunal's role is to review and weigh the evidence that is put before it and to reach findings based on that evidence. While there is no impediment to the Tribunal drawing an inference of causation in appropriate circumstances, the appropriateness of that step will depend on the nature and quality of the evidence that is before it.
>
> [201] In this case, the Appellants have the onus of proving that serious harm will result from the Project. They have conceded that the "pre-turbine" evidence of the Kroeplins alone is not sufficient. Instead, they rely on the evidence of the post-turbine witnesses to demonstrate that exposure to wind turbines has caused serious harm to health in the past and will do so in the future here. This evidence consists of witnesses testifying regarding the health conditions and symptoms that they experience, which they sincerely believe have been caused or exacerbated by living near wind turbines…
>
> …
>
> [203] Here, the medical records of the post-turbine witnesses can help confirm some of the health conditions from which they suffer. However, because there may be a number of potential causes of their medical conditions and symptoms, there is also the need to prove the causal link between exposure to wind turbines and those conditions. The Tribunal could draw an inference of that link if there was evidence of sufficient reliability before it, but it cannot just assume that link to be there because the post-turbine witnesses sincerely believe it to be so.
>
> [204] A finding of causation must be justified on the evidence. As the Ontario Court of Appeal stated in *Fisher*, a flexible approach to causation is not a substitute for evidence

> and does not reduce the level of proof required. In some other REA appeal hearings, appellants have combined post-turbine evidence with evidence from medical practitioners to try to prove that wind turbines have caused harm to human health. In all of those cases, the Tribunal has found the evidence to be insufficient to establish on a balance of probabilities that serious harm to health will result from operation of the wind turbine project. With more limited evidence on the record in this proceeding, it would be difficult to justify an inference of causation.
>
> [205] It is also important to recognize that the Appellants' evidence is not the whole of the evidence that the Tribunal must weigh. There is also the evidence of the respondents, who proffered several experts to contradict the Appellants' evidence. As the Court held in *Snell*, an inference of causation may be appropriate in the absence of any evidence to the contrary, but that where there is contradictory evidence adduced, the exercise that must be carried out is to weigh all of the evidence and reach a finding that is justified. While this approach may demand that respondents adduce evidence to counter an adverse inference possibly arising from an appellant's evidence, it does not mean that the onus shifts to the respondents to prove an alternate explanation for the symptoms experienced by the post-turbine witnesses, as the Appellants argued.

C. Analysis

[99] The Appellants submitted that the Tribunals committed an error of law by crafting and applying a "blanket rule" of evidence which treated the testimony of the post-turbine witnesses as incapable of establishing a *Charter* s. 7 violation in the absence of expert medical evidence establishing a causal link between the activity of wind turbines and the physical or psychological problems testified to by those witnesses.

[100] St. Columban Energy submitted that generally in the adjudication of civil cases some expert testimony on the issue of causation is required to link the physical or psychological problems complained of by a plaintiff to the conduct of the defendant because what causes a medical condition is a scientific matter and outside the ordinary knowledge and experience of the trier of fact. K2 Wind argued that the Appellants' submission on this point did not raise a question of law because issues of causation involve questions of fact, or mixed fact and law, which are not reviewable by this Court on this type of appeal under the *EPA*.

[101] Although in assessing the evidence of the post-turbine witnesses the Tribunal in the St. Columban Wind proceeding was influenced heavily by how the ERT had weighed and assessed such evidence in previous appeals involving REA's, it was clear from the Tribunals' decisions in the K2 Wind and Armow Wind proceedings that they assessed and weighed the evidence of the post-turbine witnesses in light of the expert medical evidence which they heard. That evidence was to the effect that causal conclusions based solely on self-reported health problems were scientifically speculative and likely misleading and that the level of information provided in the medical records of the post-turbine witnesses was insufficient to allow a medical practitioner to make definitive causal assessments between diagnoses, symptoms and wind turbines.

[102] In sum, the Tribunals assessed the evidence which they heard from fact witnesses in the light of expert medical evidence which they heard about the inferences of causation which could

or could not be drawn from such fact evidence. In so doing, the Tribunals were not determining questions of law, but were making findings of fact or, at most, findings of mixed fact and law. Those determinations are not open to this Court to review on an appeal under *EPA* section 145.6, and we therefore give no effect to this ground of appeal by the Appellants.

VII. THIRD ISSUE: DID THE TRIBUNALS ERR IN FINDING THAT THEY LACKED THE JURISDICTION TO REVIEW THE DIRECTOR'S DECISIONS ISSUING REAs FOR FAILURE TO COMPLY WITH SECTION 7 OF THE *CHARTER*?

A. The positions of the parties

[103] In the St. Columban Wind proceeding the Appellants sought orders from the ERT that (i) *EPA* s. 47.5 authorizing the Director to issue a REA was constitutionally invalid, (ii) the Director's application of *EPA* s. 47.5 violated the *Charter*, and (iii) section 54 of the REA Regulation (the set-back/sound level provisions) violated the *Charter*. The Respondents brought a motion to strike out those claims, which the Tribunal granted. Although the motion was only brought in the St. Columban Wind proceeding, the parties to the K2 Wind and Armow Wind proceedings agreed that the Appellants could raise the same issue on these appeals.

[104] In their Factum the Appellants framed their appeal on this issue as follows:

> [125] [S]ection 145.2.1 explicitly requires the Tribunal to review the Director's decision, which encompasses a review as to whether that decision, and the process underlying that decision was compliant with the *Charter*. The Appellant submits that the Tribunal erred in law in ruling that the Tribunal cannot review the REA process for *Charter* compliance.

B. The decision of the Tribunal

[105] In its Decision in the St. Columban Wind proceeding the ERT explained why it granted the Respondents' motion to strike the Appellants' constitutional claims relating to the decision made by the Director under *EPA* s. 47.5:

> [40] In reviewing the interplay of s. 47.5 and s. 142.1 of the *EPA*, it is apparent that the legislation delineates the respective roles of the Director and the Tribunal in the issuance and appeal of a REA. The role of the Director is to consider a number of factors (such as public consultation, aboriginal interests, among others) and, in the Director's discretion of what is in the public interest, to decide whether to issue the REA. If the REA is issued, the Tribunal's role is to review the Director's decision to issue the REA, but this review is clearly defined and circumscribed. The *EPA* does not give the Tribunal the authority to review the Director's discretion generally. Instead, the Tribunal's role is to consider only whether engaging in the renewable energy project in accordance with the renewable energy approval will cause, (a) serious harm to human health; or (b) serious and irreversible harm to plant life, animal life or the natural environment. This finding is consistent with the Tribunal's understanding of its role as defined under the legislation in a number of cases.

…

[43] The Tribunal's jurisprudence is consistent in its understanding of the relationship between s. 47.5 and s. 142.1 of the *EPA*. In the former instance, the *EPA* empowers the Director to review an array of considerations in the Director's discretion to determine whether it is in the public interest to issue the REA. However, the Tribunal's role is much more limited under s. 142.1 and s. 145.2.1, in that its basic and sole role is to "consider only whether engaging in the renewable energy project in accordance with the renewable energy approval will cause, (a) serious harm to human health; or (b) serious and irreversible harm to plant life, animal life or the natural environment." In short, the legislature neither intended nor empowered the Tribunal to "go behind" the Director's discretion in granting the REA, and instead, limited the Tribunal's powers to assessing whether it meets the two health and environment grounds enumerated above.

…

[47] …[A]t present, the Tribunal does not interpret *Conway* as vesting tribunals with new authority to decide *Charter* claims. *Conway* itself makes it clear that, in order to address a *Charter* claim, a tribunal must have the jurisdiction, explicitly or impliedly, to decide the relevant question of law. The Tribunal has already found that its basis in this regard is limited to s. 145.2.1 of the *EPA*, and does not extend to a review of s. 47.5. As such, the Tribunal finds that *Conway* does not widen the jurisdiction of the Tribunal.

[48] The same holds true with respect to s. 54 of O. Reg. 359/09. The Tribunal is acting under s. 145.2.1 of the *EPA* in respect of an appeal initiated under s. 142.1. It is not reviewing s. 54 of O. Reg. 359/09 itself and is not bound to confirm a REA that complies with the setbacks set out in that regulation.

[49] In summary, the Tribunal finds that it does not have the authority to address a *Charter* claim relating to s. 47.5 of the *EPA* or s. 54 of O. Reg. 359/09 but does have the authority with respect to s. 142.1 of the *EPA*.

C. Analysis

[106] Whether one approaches this issue as one involving the interpretation by a tribunal of its home statute attracting a standard of review of reasonableness or one involving the consideration by the tribunal of a constitutional question attracting the correctness standard, we conclude that the ERT did not err in reaching the conclusion which it did.

[107] In *Nova Scotia (Workers' Compensation Board) v. Martin*[31] the Supreme Court of Canada stated:

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[31] 2003 SCC 54

> 48 The current, restated approach to the jurisdiction of administrative tribunals to subject legislative provisions to *Charter* scrutiny can be summarized as follows: (1) The first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law arising *under the challenged provision*…(3) If the tribunal is found to have jurisdiction to decide questions of law arising under a legislative provision, this power will be presumed to include *jurisdiction to determine the constitutional validity of that provision* under the *Charter*…[32] (emphasis added)

[108] Subsequently, in *Tranchemontagne v. Ontario (Director, Disability Support Program),*[33] the Supreme Court repeated what it had said in *Martin* and added:

> [24] …This can be contrasted with the power to subject a statutory provision to *Charter* scrutiny, which will only be found where the tribunal has jurisdiction to decide questions of law relating to that specific provision: see Martin, at para. 3.
>
> [25] I must conclude that the contrast in the wording of *Martin* is deliberate. Where a specific provision is being declared invalid, it is necessary to ensure that the tribunal is empowered to scrutinize it. Power to scrutinize other provisions is not sufficient, because the constitutional analysis is targeting one specific provision...

[109] Most recently, in *R. v. Conway,*[34] the Supreme Court of Canada re-affirmed those principles:

> [78] The jurisprudential evolution leads to the following two observations: first, that administrative tribunals with the power to decide questions of law, and from whom constitutional jurisdiction has not been clearly withdrawn, have the authority *to resolve constitutional questions that are linked to matters properly before them*…
>
> …
>
> [81] Building on the jurisprudence, therefore, when a remedy is sought from an administrative tribunal under s. 24(1), the proper initial inquiry is whether the tribunal can grant *Charter* remedies generally. To make this determination, the first question is whether the administrative tribunal has jurisdiction, explicit or implied, to decide questions of law. If it does, and unless it is clearly demonstrated that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction, the tribunal is a court of competent jurisdiction and can consider and apply the *Charter* — and *Charter* remedies — *when resolving the matters properly before it*. (emphasis added)

[110] The Appellants submitted that the *Conway* decision broadened the jurisdiction of administrative tribunals so that they are no longer limited by the language in *Martin* and that the

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[32] *Ibid.*, para. 48.
[33] 2006 SCC 14
[34] 2010 SCC 22

power of an administrative tribunal to determine *Charter* questions is not limited to questions of law in relation to a particular provision.

[111] The *Martin*, *Tranchemontagne* and *Conway* decisions must be read together. The focus in *Conway* was on the jurisdiction of an administrative tribunal to grant a remedy under *Charter* s. 24(1). By contrast, in *Tranchemontagne* the Court specifically dealt with the issue of the jurisdiction of a tribunal to declare a statutory provision invalid because of inconsistency with the *Charter* and emphasized that "where a specific provision is being declared invalid, it is necessary to ensure that the tribunal is empowered to scrutinize it." As the Supreme Court observed in *Conway*:

> [80] If, as in the *Cuddy Chicks* trilogy, expert and specialized tribunals with the authority to decide questions of law are in the best position to decide constitutional questions when a remedy is sought under s. 52 of the *Constitution Act, 1982*, there is no reason why such tribunals are not also in the best position to assess constitutional questions when a remedy is sought under s. 24(1) of the *Charter*…

[112] *Conway* did not depart from the need to establish a link between a tribunal's statutory mandate – the "matters" assigned to it - and its jurisdiction to grant *Charter* remedies. The Supreme Court of Canada stated:

> [22] …The question instead should be institutional: Does this particular tribunal have the jurisdiction to grant *Charter* remedies generally? The result of this question will flow from whether the tribunal has the power to decide questions of law. If it does, and if *Charter* jurisdiction has not been excluded by statute, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising *in the course of carrying out its statutory mandate* (*Cuddy Chicks* trilogy; *Martin*). A tribunal which has the jurisdiction to grant *Charter* remedies is a court of competent jurisdiction. The tribunal must then decide, given this jurisdiction, whether it can grant the particular remedy sought *based on its statutory mandate*. The answer to this question will depend on legislative intent, *as discerned from the tribunal's statutory mandate* … (emphasis added)

The jurisdiction of a tribunal to grant a *Charter* remedy therefore depends upon discerning the tribunal's statutory mandate. Put another way, a claimant cannot expand the jurisdiction of a tribunal merely by asserting a *Charter* remedy; the availability of a *Charter* remedy to a claimant will depend upon a determination of the tribunal's statutory mandate.

[113] What is the statutory mandate of the ERT in respect of renewable energy projects or, using different language from *Conway*, what matters are properly before the ERT in respect of such projects? In the present case the Appellants sought from the Tribunal declarations that certain statutory and regulatory provisions were unconstitutional. In considering whether it possessed the jurisdiction to decide questions of law arising under *EPA* s. 47.5 and s. 54 of the REA Regulation, the Tribunal held that it lacked jurisdiction to do so because of the scope of review accorded to it by *EPA* s. 145.2.1(2) which empowered it to "review the decision of the Director and shall consider only whether engaging in the renewable energy project in accordance with the renewable energy permit will cause (a) serious harm to human health…" The Tribunal

did not err in so concluding. The *EPA* did not grant the Tribunal jurisdiction to decide questions of law under EPA s. 47.5 or s. 54 of the REA Regulation. The jurisdiction of the ERT in respect of renewable energy projects is triggered by a request for a hearing under *EPA* s. 142.1. At such hearings the *EPA* does not grant the ERT a broad power to review the Director's decision issuing a REA, but only grants a limited power of review to determine if the approved renewable energy project will cause serious harm to human health. It therefore was not open to the Tribunal to review the decision of the Director to issue a REA generally to ascertain whether the decision complied with the *Charter* – as argued by the Appellants before us – but only to review whether the project to which the REA was issued would cause serious harm to human health. The Tribunal correctly held that its power to address a *Charter* claim was limited to the matters assigned to it by *EPA* s. 142.1.

[114] It is also important to recall that the hearing before the ERT was not in the nature of the appeal, but a hearing in which it was open to the Appellants to present fully evidence and argument about the impact of the wind farm projects on human health, including the constitutional implications of the ERT's statutory review provisions.[35] Only on that issue could the ERT revoke or alter the Director's decision to issue a REA or to direct the Director to take certain action.

[115] Accordingly, we do not give effect to this ground of appeal.

VIII. FOURTH ISSUE: DID THE TRIBUNAL FAIL TO FOLLOW THE PRINCIPLES OF FAIRNESS OR NATURAL JUSTICE?

A. The grounds of appeal

[116] A further ground of appeal advanced by the Appellants involved an allegation of the denial of natural justice and procedural fairness in two of the proceedings before the Tribunals. In their notice of appeal in respect of the St. Columban Wind proceeding, the Appellants alleged that the ERT had breached principles of natural justice, or had contravened their *Charter* section 7 rights, by (i) denying the Appellants' request for an adjournment; (ii) dismissing the Appellants' motion for an adjournment so that their appeal could be heard concurrently with that concerning the K2 Wind project; and, (iii) refusing to entertain the Appellants' motion for abuse of process in respect of the Director's motion to strike out portions of the Appellants' notice of constitutional question. In their notice of appeal for the K2 Wind proceeding, the Appellants also advanced grounds (i) and (ii). No ground of appeal dealing with the denial of natural justice or procedural fairness was advanced in the notice of appeal concerning the Armow Wind project.

[117] At the request of the panel, on the third day of the hearing Appellants' counsel submitted a document specifying the relief requested. None of the relief related specifically to the Appellants' allegations of denial of natural justice or breach of procedural fairness.

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[35] *EPA*, s. 145.2(1).

B. Standard of review

[118] We adopt the following statement made by this Court in *Senjule v. Law Society of Upper Canada*[36] on the issue of the standard of review for these issues:

> [20] The crux of the appellant's position is that there was a denial of natural justice or procedural fairness at his disciplinary hearing. Where this type of allegation is advanced, the standard of review does not apply in the usual sense. The court must determine whether a party has been denied procedural fairness or natural justice. If so, the hearing was unfair and any resulting decision must be set aside.

C. Denial of adjournment requests

C.1 The issue

[119] On July 2, 2013, the Director issued the REA for the St. Columban Wind project. On July 16, 2013, the Dixons and Ryans filed their notices of appeal with the ERT. On July 23, 2013, the Director issued the REA for the K2 Wind project, and on August 6 the Drennan's filed their notices of appeal with the Tribunal. The same counsel represented the Dixons, Ryans and Drennan's.

[120] On August 22, 2013, counsel for the Dixons/Ryans informed the ERT they were seeking an adjournment of the main hearing in the St. Columban Wind matter.

[121] A combination of *EPA* s. 145.2.1(6) and the REA Regulation requires that the ERT dispose of an appeal within six months from the day that the appellants serve their notice of appeal on the Tribunal.[37] The REA Regulation provides that the six-month time clock shall stop running in the event the Tribunal grants an adjournment.

[122] The *Rules of Practice of the Environmental Review Tribunal* deal with the scheduling of hearings and requests for adjournment:

> 32. Within eight days from the appeal expiry date, the Tribunal will provide the Parties with a schedule of events for the determination of the appeal. Absent exceptional circumstances, the events and the intervals between them will be set in accordance with the timeline in Appendix A to these Rules.
>
> …
>
> 104. A Party seeking an adjournment shall provide evidence and submissions in support of the motion respecting: … (b) detailed reasons for the request, including, if appropriate, affidavit evidence; (c) evidence that the Party made all reasonable efforts to avoid the

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[36] 2013 ONSC 2817 (Div. Ct.)
[37] O. Reg. 359/09, s. 59(1).

> need for the adjournment request; … (e) any inconvenience to other Parties, Participants and Presenters due to the adjournment; and (f) any other factors relating to the considerations listed in Rule 105.
>
> 105. In deciding whether or not to grant a request for an adjournment, the Tribunal may consider: (a) the interests of the Parties in a full and fair Hearing … (d) the circumstances giving rise to the need for an adjournment; … (h) the consequences of an adjournment, including expenses to other Parties; (i) the effect of an adjournment on Participants and Presenters; (j) the public interest in the delivery of the Tribunal's services in a just, timely and cost effective manner; and (k) *whether the proceeding before the Tribunal is an appeal of a renewable energy approval under section 142.1 of the Environmental Protection Act*.

[123] The ERT heard the Appellants' adjournment request on September 9, 2013 and issued an order on September 10, 2013, supported by written reasons released January 15, 2014 ("Adjournment Reasons"). In those reasons the Tribunal described the nature of the request sought by the Appellants and their reasons for it:

> [13] On behalf of the Dixons, Ryans and Drennans, Mr. Falconer sought to adjourn the dates of the Dixon and Drennan appeals and for the appeals to be heard immediately following one another by the same Tribunal panel. He also sought an order that the six month time period for the Tribunal's disposition of the appeals be suspended under s. 59(2) of O. Reg. 359/09 for the period of adjournment.
>
> [14] The proposed new hearing dates for the two sets of appeals were certain specified dates falling within the period November 4, 2013 to February 18, 2014. It was estimated that the hearing of the evidence for each set of appeals would take approximately 15 days (for a total of 30 days), with closing submissions being heard in both proceedings following the hearing of the evidence in the second proceeding.
>
> [15] The original hearing dates for the Dixon appeal were September 11 to 13 and 22 to 27 and September 30 to October 3, 2013 as discussed at the preliminary hearing held on August 14, 2013. The Drennan appeal hearing was set to commence on October 2, 2013 and be completed later that month…
>
> [16] Mr. Falconer stated that the Dixon and Drennan appeals seek similar relief and rely on the same constitutional arguments. The appeals raise similar issues and the collective appellants intend to call some of the same witnesses at both hearings. Mr. Falconer argued that consecutive hearings would be expeditious and cost-effective.
>
> [17] Mr. Falconer argued that, since the issues are so similar, multiple hearings could lead to conflicting decisions and multiple court proceedings. He argued that consecutive hearings by the same panel will avoid this potential problem.
>
> …

> [18] …Mr. Falconer claimed that he is being forced to conduct a hearing when he is not available for the scheduled dates. He claimed that the six month time line is arbitrary and does not comply with issues of natural justice and procedural fairness.
>
> …
>
> [19] In oral argument, Mr. Falconer emphasized the issues relating to counsel availability and creating an efficient hearing process.

[124] The Tribunal gave detailed reasons for denying the Appellants' request for a long adjournment and for only giving a short adjournment of about two weeks. Amongst the key findings made by the ERT in its Adjournment Reasons were the following:

> [62] The Tribunal finds that a lengthy adjournment (i.e., one measured in months), in which the schedule would be changed to accommodate the moving parties' proposed dates in the period November 2013 to February 2014, must be assessed according to both the Tribunal's Rules and s. 59 of O. Reg. 359/09. This is so because the Tribunal finds that the proposed dates for the hearing of evidence and receipt of closing submissions would lead to the Tribunal failing to meet the six month statutory deadlines for both proceedings. Consequently, the Tribunal must reach an opinion on whether the adjournment is "necessary… to secure a fair and just determination of the proceeding on its merits" under s. 59 of O. Reg. 359/09.
>
> [63] …Consequently, in the case of adjournment requests that may cause the six month deadline not to be met (as is the case here, given the proposed range of dates for both cases to conclude and the applicable six month deadlines that fall in January and February 2014), the Tribunal needs to look at the Rule 104-105 factors and the s. 59 test in an integrated manner. The determination must be made on a case by case basis according to all relevant factors (see: *Oppose Belwood, supra*, at para. 29).
>
> [64] For the reasons that follow, and in light of all of the case law submitted by the parties read in the context of the applicable Rules, legislation and regulation, the Tribunal finds that the moving parties have failed to bring adequate evidence and argument for the Tribunal to conclude that s. 59 of O. Reg. 359/09 has been met and or to conclude that the Rule 104-105 factors favour a lengthy adjournment.
>
> [65] Counsel availability is not a compelling reason to grant a lengthy adjournment of a REA appeal proceeding for the reasons outlined in *Oppose Belwood, supra*…
>
> [66] The applicable legislation and regulation call for an expedited hearing process and it would be contrary to that legislative direction for the Tribunal to allow parties (whether appellants or respondents) to dictate the timing of the hearing according to their chosen counsel's calendars. Parties contemplating filing a REA appeal or responding to a REA appeal must consider the schedule of events set out in the Tribunal's Rules and the six month deadline arising from O. Reg. 359/09 and the *EPA* and choose a representative who is available to meet the deadlines…
>
> [67] While Mr. Falconer also alleged, in oral argument, that appellants may have fewer affordable options for counsel than respondents to REA appeals, the Tribunal finds that the moving parties did not provide the necessary evidence or argument relating to the

> circumstances here to lead to a conclusion by the Tribunal that a lengthy adjournment was necessary to secure a fair and just determination…
>
> [68] The presence of common issues and evidence is not, on its own, a compelling reason for a lengthy adjournment (see also: *Preserve Mapleton 2, supra)*…
>
> [69] … Given the stringent wording of s. 59 of O. Reg. 359/09, the Tribunal cannot stop the six month clock because a proposed adjournment may be simply convenient. A higher threshold is required by O. Reg. 359/09. The Tribunal must be of the opinion that the adjournment is necessary to secure a fair and just determination. With respect to the moving parties' arguments regarding common issues and evidence and the potential for inconsistent Tribunal decisions on similar appeals, they do not meet the test of necessity set out in O. Reg. 359/09. However, as noted below, some aspects of these arguments do lead the Tribunal to conclude that a short adjournment is warranted, without any effect on the six month deadline.
>
> …
>
> [73] The Tribunal adds that the answer to the question posed in oral argument regarding whether the six month timeline is more important than procedural fairness is "no". The Tribunal finds that a "fair and just determination" under s. 59 incorporates the administrative law concept of procedural fairness and that moving forward with an expedited proceeding that would not comply with procedural fairness can be avoided through resort to s. 59. However, the moving parties have not demonstrated that proceeding as planned or after a short adjournment would lead to a procedurally unfair hearing. Therefore, no lengthy adjournment is necessary to satisfy procedural fairness requirements.

C.2 Analysis

[125] Turning to the Dixon/Ryan/Drennan Appellants' argument that the ERT unfairly denied their request to adjourn the St. Columban Wind and K2 Wind hearings, a fair hearing requires that a party have the opportunity to present his or her case effectively.[38] In considering how the power to grant adjournments fits into the larger requirement to afford parties a fair hearing, in *Senjule v. Law Society of Upper Canada* this Court stated:

> [21] …[T]his court acknowledges the discretionary nature of decisions involving adjournment requests. The decision to permit or deny an adjournment falls squarely within the discretion of the hearing panel. In *Olech v. Royal College of Dental Surgeons of Ontario*, [1994] O.J. No. 520 (Ont. Div. Ct.), this Court observed in para. 3 that: "it is only in the rarest of cases that the court would intervene because of such a decision and only if it reaches the conclusion that the tribunal proceeded on a wrong principle". Tribunals have an inherent power to control their own processes, which includes the power to grant or refuse adjournments, and to impose reasonable conditions on such

[38] *G.(J.), supra*., para. 73.

> adjournments (*Re Amourgis and Law Society of Upper Canada* (1984), 1984 CanLII 1872 (ON SC), 12 D.L.R. (4th) 759 (Ont. Div. Ct.) at 761).
>
> [22] In this case, the determination of whether there was a denial of natural justice or procedural fairness requires us to consider the exercise of a discretionary power. Given the deference that is usually accorded discretionary determinations, the standard of review in this case is akin to one of reasonableness. The inquiry must focus on whether the panel took account of relevant considerations in balancing the competing interests, and whether it made a decision consistent with the interests of justice. Natural justice and procedural fairness were infringed only if it can be said that the panel exercised its discretion in an unreasonable or non-judicious fashion.

[126] We conclude that the ERT did not exercise its discretion to deny what it considered would be lengthy adjournments of the St. Columban Wind and K2 Wind proceedings in an unreasonable or non-judicious fashion. The Tribunal was required to exercise its discretion in the context of a regulatory scheme which required the disposition of a hearing within six months of the filing of a notice of appeal, absent the granting of an adjournment. The Tribunal had adopted comprehensive and reasonable *Rules* governing requests for adjournments. As can be seen from the lengthy extract of the Tribunal's reasons set out above, the ERT applied those *Rules* in a considered fashion to the evidence placed before it. The Tribunal reasonably concluded that an adjournment of any significant length should only be granted when necessary to secure a fair and just determination of the issues, and the Tribunal reasonably concluded that, as a general rule, parties contemplating an appeal should choose a legal representative who was available to meet the ERT's procedural deadlines.

[127] At the hearing before us the Appellants repeated that that the Tribunal's refusal to grant the requested adjournment because of the unavailability of senior counsel was unfair, but the Appellants did not identify any prejudice which flowed from the Tribunal's adjournment decision relating to their ability to call the evidence of their choice at the hearing or to advance the arguments they wished to make. Although in their Factum the Appellants argued that the ERT's refusal to grant an adjournment resulted in their inability to call as a witness Dr. Arlene King, the Chief Medical Officer of Health for Ontario, to testify about a May, 2010 report prepared by her office, the record did not bear out that assertion. The Appellants' Disclosure Statements in the St. Columban Wind proceeding were dated prior to their adjournment motion and the Statements did not list Dr. King as a potential witness.[39] The Appellants did not attempt to summons Dr. King to testify at the ERT hearings.[40] Moreover, the May, 2010 Report – *The Potential Health Impact of Wind Turbines* – was filed in evidence before the ERT in the K2 Wind proceeding as part of the literature reviewed by Dr. Moore in his witness statement.[41] The May, 2010 Report stated:

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[39] Respondents' Joint Compendium, Tabs 1A and 1B.
[40] St. Columban Wind Adjournment Reasons, para. 26.
[41] K2 Wind Exhibit Book, Tab 54, para. 83 and pp. 4097-4109.

> The review concludes that while some people living near wind turbines report symptoms such as dizziness, headaches, and sleep disturbance, the scientific evidence available to date does not demonstrate a direct causal link between wind turbine noise and adverse health effects. The sound level from wind turbines at common residential setbacks is not sufficient to cause hearing impairment or other direct health effects, although some people may find it annoying.[42]

At the hearing before us counsel for the Appellants conceded that in their adjournment request before the ERT they did not put forward any affidavit evidence contending that an adjournment was required because they were looking for hearing evidence other than that of Dr. King.[43]

[128] We would also observe that the Drennan's counsel brought an application in the Superior Court of Justice in November, 2012, anticipating the possibility of the approval of a wind turbine renewable energy project in the vicinity of their farm. Counsel was engaged in this matter for about eight months before the Director granted the REA for the K2 Wind Project. The Tribunal was entitled to take that fact into consideration when assessing whether the Appellants would be able to marshal their evidence and present their case properly within timetable set by the Tribunal.

[129] We do not accept the suggestion by Appellants' counsel that the Tribunal was slavishly committed to a pre-determined timeline. Counsel for the Respondents advised that in the past there had been cases where the Tribunal deviated from its timeline and extended the six month time period within which the REA Regulation generally requires it to render a decision. Further, although the Tribunal elected to proceed without waiting for the completion of the Health Canada Study, Dr. Michaud, who led that study, testified before the Tribunal and explained the scope of the study. The fresh evidence placed before us which consisted of the release of the results of that study was consistent with the evidence offered by Dr. Michaud to the Tribunal. Dr. Michaud was not tendered as a witness in the Kroeplin hearing and the Appellants did not move to adjourn the Armow Wind Project hearing. Finally, as we noted earlier, the Health Canada Study reported an association between wind turbine noise and annoyance, but the Study did not resolve the question of causation which lay at the heart of this case.

[130] Consequently, we conclude that the Tribunal's refusal to grant the adjournment requested by the Appellants in the St. Columban Wind and K2 Wind proceedings did not result in a denial of natural justice or procedural unfairness. We give no effect to this ground of appeal.

D. Denial of consolidation request

[131] As to the Tribunal's refusal to consolidate both appeals, Rule 173(a) of the ERT's *Rules of Practice* only permits the ERT to combine proceedings which involve the same or similar questions of fact, law or policy where the parties consent. Such consent was not given in the St.

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[42] *Ibid.*, p. 4098.

[43] In paragraph 70 of its Adjournment Reasons, the ERT noted that the Appellants did not pursue in oral argument adjournment grounds "relating to Dr. King's evidence".

Columban Wind and K2 Wind proceedings. Nevertheless, in those proceedings the ERT directed the parties to make best efforts to use all appropriate provisions of the *Statutory Powers Procedure Act* and the Tribunal's *Rules of Practice* to promote the efficiency of the two proceedings, including opportunities for avoiding duplication of evidence or submissions in the event that the same main hearing panel presided over both proceedings.

[132] In the result, the Tribunals hearing the St. Columban Wind and K2 Wind proceedings shared a common panel member. As well, the Tribunals accepted the parties' agreement to use a simplified process to admit evidence adduced in the first proceeding on the second proceeding and "back-to-back" hearings were scheduled for the St. Columban Wind and K2 Wind proceedings. In light of that process adopted by the Tribunals, we see no procedural unfairness resulting from the ERT's refusal to consolidate the St. Columban Wind and K2 Wind proceedings. We give no effect to this ground of appeal.

E. The Appellants' abuse of process motion

[133] Finally, in the St. Columban Wind proceeding the Director and St. Columban Energy brought motions to strike out some or all of the Appellants' claims for constitutional relief, including the claim that *EPA* s. 47.5 was constitutionally invalid. Those motions in turn elicited a motion from the Dixon/Ryan Appellants to strike the Director's motion on the basis of an alleged abuse of process. The Appellants previously had commenced an action in this Court claiming that *EPA* s. 47.5 and the process by which the Director grants a REA violated *Charter* s. 7. In May, 2013, Grace J. ordered that the action should not be allowed to proceed at that point of time and stayed it pending completion of the ERT process established by the *EPA*.[44] The Appellants argued that the motion to strike brought by the Director before the ERT was inconsistent with the position he had taken in the court action concerning the ability of the Appellants to argue for certain constitutional relief.

[134] The ERT in the St. Columban Wind proceeding disposed of the Appellants' motion to strike for abuse of process as follows:

> [56] The Tribunal and the parties discussed this motion at the hearing. It was agreed that, even if the Appellants' abuse of process motion is successful and the Director's motion to strike the appellants' charter claims is granted, the Approval Holder's motion to strike is unaffected by the Appellants' motion. As such, the Tribunal found that the Appellants' motion is, in effect, moot in the sense it has no practical effects with respect to the issues before the Tribunal.
>
> [57] As such, the Tribunal dismisses the motion by the Dixons/Ryan Appellants for an order striking the Director's motion to strike portions of the Appellants' claim for constitutional relief on the basis of abuse of process.

[44] 2013 ONSC 2831.

[135] We see no error in that reasoning or conclusion. As the Tribunal observed, St. Columban Energy also brought a motion before the ERT to strike out the Appellants' constitutional claims, and its ability to do so could not be affected by the quite separate conduct of the Director in the action before this Court. Further, it would have been necessary in any event for the Tribunal to determine whether it possessed the jurisdiction to grant the constitutional relief sought by the Appellants in respect of *EPA* s. 47.5 and the related provisions of the REA Regulation challenged by the Appellants. The Tribunal's obligation to consider its own jurisdiction arose regardless of any litigation conduct of the Director in an action before this Court. Consequently, we give no effect to this ground of appeal.

IX. SUMMARY AND COSTS

[136] For the reasons set out above, the appeals are dismissed.

[137] As a result of that disposition of the appeals, there is no need to deal with the Appellants' motion to set aside the order of Leitch J. made September 29, 2014 or to deal with the Appellants' request for an injunction preventing the commencement of wind turbine commissioning before the release of these Reasons.

[138] We would encourage the parties to attempt to settle the costs of these appeals. If they are unable to do so and if any party wishes to seek costs, written requests for costs should be served and filed in triplicate no later than January 16, 2015, and any responding written cost submissions should be served and filed in triplicate no later than January 30, 2015. The cost submissions, excluding Bills of Costs, should not exceed five pages in length.

Marrocco A.C.J.S.C.

J. Henderson J.

D. Brown J.

Released: DEC 2 9 2014

CITATION: Dixon v. Director, Ministry of the Environment, 2014 ONSC 7404
DIVISIONAL COURT FILES NOS.: 2055/14, 2056/14 and 2073/14
DATE: 20141229

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Marrocco A.C.J.S.C., J. Henderson and D. Brown JJ.

BETWEEN:

Scotty Dixon, Jennifer Dixon, Thomas Ryan and Catherine Ryan

Appellants

– and –

The Director, Ministry of the Environment and St. Columban Energy LP

Respondents

ET AL.

REASONS FOR JUDGMENT

Released: 20141229