

# FINANCIAL POST

## Ontario's wind farm approval process faces constitutional challenge



Photo: Peter J. Thompson/National Post. Julian Falconer, no stranger to public interest cases, represents families challenging the development of three wind farms near Lake Huron

Governments love windmills, people who live near them hate them. The result is a beautiful recipe for lawyers.

On Monday, lawyer Julian Falconer will rise in a London, Ont. courtroom to ask for a judicial order blocking the development of three wind farms near Lake Huron.

Mr. Falconer is one of the country's top constitutional and human rights lawyers. He represented the Smith family in a lawsuit into the death of Ashley Smith in custody. He worked on the Ipperwash Inquiry. He represented Maher Arar in a suit against the federal government over his rendition and torture in Syria. The list goes on. Point is, Mr. Falconer takes a special interest in holding government to account.

On Monday he'll be taking on windmills. He wants Ontario's Divisional Court to overturn the regulatory approvals of three projects, the St. Columban Wind and K2 Wind Energy project in Huron County, and the SP Armow Wind project near Kincardine, Ont.

His clients, who live near the projects, fear the noise and vibration of the wind turbines will trigger a host of serious health problems. Mr. Falconer will argue in court that Ontario's process for approving wind farms violates the Charter of Rights and Freedoms. Provincial legislation says anyone challenging a wind farm project before Ontario's Environmental Review Tribunal must prove "serious harm" to human health. Mr. Falconer says that threshold is unfair because it is too high.

"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," Mr. Falconer submits in his written argument.

The Charter argument is a fairly new wrinkle in the fight against wind farms. But litigation itself isn't. When the Divisional Court rules on the appeal, its decision will join the more than 30 Canadian reported court cases that have dealt with wind turbines — a number that shoots to nearly 100 when you include hearings before Canadian regulatory tribunals.

Wind farm opponents haven't had a great track record in the courts. Until now, the biggest anti-turbine victory involves the Ostrander Point GP Inc. project in Prince Edward County. Opponents claim wind farms cause numerous health problems, but the Ostrander project was blocked after the Prince Edward County Field Naturalists successfully argued that construction of the project would cause "serious and irreversible harm" to a population of Blanding's turtles. The developer and the province are appealing the case at a hearing next month at the Ontario Court of Appeal.

The mighty Blanding's turtle may have succeeded where humans have so far failed. Wind farm opponents claim industrial turbines cause a litany of health problems to

nearby residents — higher blood pressure, stress, tinnitus, loss of sleep, and migraine headaches. Yet a Health Canada study on wind farms released earlier this month found no direct links between turbines and health problems.

“It’s pretty clear that after doing this fairly exhaustive study they found no causative links between wind turbine noise and all these other health impacts,” says Jack Coop, a lawyer with Osler, Hoskin & Harcourt LLP who has represented wind farm proponents.

But wait a sec. The Health Canada study connected wind turbine noise with reports of “annoyance.” People exposed to such annoyances were more likely to report stress-related health effects. Mr. Coop says that doesn’t go far enough to give opponents the evidence of serious harm they would need to block projects.

“While the study hints that there could be a connection, it doesn’t make any finding of a serious impact,” Mr. Coop says. “In fact, it strongly suggests that the impacts are no different than what people experience from road noise.”

Eric Gillespie, who has represented project opponents in most of the wind farm cases in Ontario, disagrees. He says the Health Canada study bolsters the position of his clients.

“The authors have found a statistically significant relationship between industrial wind turbine noise and annoyance leading to reports of high blood pressure, migraines, tinnitus, and stress effects,” Mr. Gillespie says. “This is the first time in Canada that those types of effects have been scientifically linked to wind turbine noise exposures.”

Whether turbines merely “annoy” or are the source of significant harm to human health won’t be an issue if Mr. Falconer succeeds during the three-day hearing that begins Monday.

In his written argument, he says the need for the Health Canada study demonstrates that governments haven’t yet determined whether wind turbines affect human health. This “knowledge gap” offends a “precautionary principle” in which governments should not implement policies unless they’re sure those policies pose no health impacts.

Counsel for St. Columban Energy LP, Darryl Cruz and Eric Pellegrino of McCarthy Tétrault LLP, describe the constitutional challenge as a “last resort” to address a problem wind turbine opponents can’t fix: “Namely, that they failed to adduce any evidence capable of establishing that the Project will cause harm to human health at any level of materiality.”

When the constitutional hearing closes Wednesday, the matter will be left in the hands of Ontario's Divisional Court. Regardless what the court decides, opposition to wind farms will remain. Lawyers will come up with new ways to challenge turbines. Wind farm litigation will continue to go around. And around. And around. And around.

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