Court File No: 2055/14
Tribunal Case No.: 13-084-13-087

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

B E T W E E N:

SCOTTY DIXON, JENNIFER DIXON, THOMAS RYAN and CATHERINE RYAN

Appellants/
Appellants on Appeal

-and-

THE DIRECTOR, MINISTRY OF THE ENVIRONMENT

Respondent/
Respondent on Appeal

-and-

ST. COLUMBAN ENERGY LP
Respondent/ Respondent on Appeal

A N D B E T W E E N

Court File No: 2056/14
Tribunal Case No.: 13-097/13-098

SHAWN DRENNAN and TRICIA DRENNAN

Appellants/
Appellants on Appeal

-and-

THE DIRECTOR, MINISTRY OF THE ENVIRONMENT

Respondent/
Respondent on Appeal

-and-

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

Respondent/
Respondent on Appeal

A N D B E T W E E N

Court File No: 2073-14
Tribunal Case No.: 13-124/13-125

KENNETH GEORGE KROEPLIN and SHARON ANNE KROEPLIN

Appellants/
Appellants on Appeal

-and-

THE DIRECTOR, MINISTRY OF THE ENVIRONMENT

Respondent/
Respondent on Appeal

-and-

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

Respondent/
Respondent

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PART I: OVERVIEW

1. The Appellants, Jennifer Dixon, Scotty Dixon, Catherine Ryan and Thomas Ryan ("Dixon-Ryan Appellants") (Court File No.: 2055/14) appeal from the decisions of the Environmental Review Tribunal ("Tribunal") dated November 22, 2013, January 15, 2014, and January 16, 2014.
2. The Appellants Shawn Drennan and Tricia Drennan ("Drennan Appellants") (Court File No.: 2056/14) appeal from the decisions of the Tribunal dated November 22, 2013, January 15, 2014, and February 6, 2014.
3. The Appellants Sharon and Kenneth Kroeplin (Kroeplin Appellants") (Court File No.: 2073/14) make this appeal from a decision of the Tribunal dated April 22, 2014.
4. The parties to these appeals have agreed, for the efficiency of judicial resources, and because the appeals raise similar issues, that all three appeals will be heard together by the same panel.
5. The Appellants raise constitutional challenges to the process for granting Renewable Energy Approvals (REAs) as well as the test before the Tribunal on an appeal. The appeals raise, *inter alia*, the following:

    a. That the approval for the project has a serious adverse impact on the Appellants' physical and psychological integrity;
    b. That the process for granting the Renewable Energy Approvals below does not require the Director to consider the potential health effects on the Appellants, and as such has a serious impact on the Appellants' psychological integrity;
    c. That the Appellants' right to security of the person is violated by a process for granting the Renewable Energy Approvals which does not comply with the

precautionary principle, and as such has a serious impact on the Appellants' psychological integrity;

d. That the granting of an approval for a wind project without requiring the wind company to conduct any form of study to determine adverse health effects on neighbours living in close proximity to the proposed project has a serious impact on the Appellants' psychological integrity; and

e. That the test of "serious harm to human health", applicable to appeals of the Director's decision by virtue of section 142.1 of the *Environmental Protection Act* ("*EPA*"), violates s. 7 of the *Charter* by permitting those violations of the Appellants' right to security of the person that fall short of the "serious harm" threshold.[1]

6. Each set of the Appellants had full hearings before the Tribunal and presented evidence of residents who have lived in close proximity to wind turbines ("post-turbine witnesses"). The post-turbine witnesses provided evidence about how the wind turbines have affected their health and their quality of life.

7. Each appeal was dismissed by the Tribunals below which held, *inter alia*, that a medical diagnosis was required for each of the post-turbine witnesses to prove that the wind turbines caused their adverse health effects.

8. The Appellants submit that *inter alia* the Tribunal erred in law:

a. in determining that it lacked jurisdiction to assess the Director's decision to issue the Renewable Energy Approval Number 3259-98EQ3G, to K2 Wind Ontario

[1] Dixon-Ryan Tribunal Notice of Appeal, Tab 9 of the Appellants' Appeal Book and Compendium, Drennan Tribunal Notice of Appeal, Tab 10 of Appellants' Appeal Book and Compendium, Kroeplin Tribunal Notice of Appeal, Tab 11 of Appellants' Appeal Book and Compendium

Inc. in respect of compliance with section 7 of the *Canadian Charter of Rights and Freedoms*;

b. in failing to read down section 142.1 of the *Environmental Protection Act*, such that it complied with section 7 of the *Canadian Charter of Rights and Freedoms*;

c. in holding that the Appellants were required to call health professionals with diagnostic skills to show a link between wind turbines and the adverse health effects suffered by witnesses living in close proximity to wind turbines ("post-turbine witnesses");

d. in holding that inferences could not be drawn as to the source of the post-turbine witnesses' adverse health effects, especially in circumstances where the medical witnesses called by the Respondents did not examine the post-turbine witnesses nor provide other causes for their adverse health effects;

e. in holding that the evidence of the post-turbine witnesses was insufficient to support an inference that their adverse health effects were linked to living in close proximity to wind turbines;

f. in finding that there was no evidence before the Tribunal to support a finding that harm to human health occurs at thresholds above the 40dBA limit; and

g. in holding that the adverse health to humans suffered when living in close proximity to wind turbines was insufficient to engage section 7 of the *Charter*.[2]

9. The appellants seek to have this Honourable Court revoke the respective Decisions of the Director to issue REAs in respect of all three appeals.

[2] Dixon-Ryan Divisional Court Notice of Appeal, Tab 1 of Appellants' Appeal Book and Compendium, Drennan Divisional Court Notice of Appeal, Tab 2 of Appellants' Appeal Book and Compendium, Kroeplin Divisional Court Notice of Appeal, Tab 3 of Appellants' Appeal Book and Compendium

PART II: THE FACTS

A. The Parties

I. *St. Columban Project*

10. The Dixon-Ryan Appellants live in Seaforth, Ontario, which is in Huron East County. This is the same county which will host the St. Columban Wind Project. The Dixons live on a 98 acre farm with their two young children. The St. Columban Project will consist of 15 industrial wind turbines, with a total name plate capacity of 33MW. The Dixons will have one turbine located 551 meters from their home, and they will have a second turbine located 552 meters from their home.[3]

11. The Dixon's daughter suffers from hyper-sensitive hearing and gets headaches from noises such as sirens. The Dixon's are concerned that the audible and inaudible noise (low frequency and infrasound noise) from the turbines will negatively impact the health of their daughter. When a wind company positions a wind turbine it must be 550 meters from the center of a residence. Unfortunately, in the Dixon's case, their children's bedroom will be closer to the turbine than this permissible set back distance because of where the bedrooms are located in their home.[4]

12. The Ryan Appellants also live in Huron East County and have a 150 acre farming property on which they operate a dairy farm with approximately 70 milking cows and 150 head of cattle. The Ryan farm has been in the family for nearly 150 years and the Ryan Appellants have lived on the property for 33 years. The Ryan Appellants will have one turbine 551

[3] Transcript evidence of the Dixons, Tab 17 of the Appellants' Appeal Book and Compendium Witness Statement of the Dixons, Exhibit 1 at Tribunal Hearing, Tab 16 of the Appellants' Appeal Book and Compendium
[4] Transcript evidence of the Dixons, Tab 17 of the Appellants' Appeal Book and Compendium Witness Statement of the Dixons, Exhibit 1 at Tribunal Hearing, Tab 16 of the Appeal Book

meters from their home and a second turbine will be located about 800 meters from their home.[5]

13. The Respondent, St. Columban Energy LP ("St. Columban"), is the owner/operator of the St. Columban Project and, received a REA from the Respondent, Director of the Ministry of the Environment on July 2, 2013.

II. K2 Wind Project

14. The Drennan Appellants live in the Township of Ashfield-Colborne-Wawanosh, which will be the site for the K2 Wind Energy Project. The Project will consist of 140 industrial wind turbines, a 270 MW substation and a 500 KW transformer station, the latter of which will be located approximately 500 meters from the Drennan family home. The Drennans will also have a wind turbine located approximately 715 meters from their home with another 11 turbines within a 2 kilometer radius of their home.[6]

15. The Drennan farm has been in the family since 1922 when Shawn Drennan's grandfather, Wilfred Drennan, moved to the farm. Shawn Drennan's father, James Drennan, was raised on the property and took over the farm operation in 1956. Shawn Drennan took over the farm operation in 1983, and he and his wife Tricia represent the third generation of Drennans to live on and farm this property, with their children being the fourth generation.[7]

16. The K2 Wind Project is owned/operated by the Respondent, K2 Wind Ontario Inc. operating as K2 Wind Ontario Limited Partnership ("K2 Wind"). K2 Wind received a REA from the Respondent, Director of the Ministry of the Environment on July 23, 2014.

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[5] Transcript Evidence of the Ryans, Tab 19 of the Appellants' Appeal Book and Compendium, Witness Statement of the Ryans, Exhibit 4 at Tribunal Hearing, Tab 18 of the Appellants' Appeal Book and Compendium

[6] Transcript Evidence of the Drennans, Tab 21 of the Appellants' Appeal Book and Compendium, Witness Statement of the Drennans, Exhibit 1 at Tribunal Hearing, Tab 20 of the Appellants' Appeal Book and Compendium

[7] Transcript Evidence of the Drennans, Tab 21 of the Appellants' Appeal Book and Compendium, Witness Statement of the Drennans, Exhibit 1 at Tribunal Hearing, Tab20 of the Appeal Book

III. SP Armow Wind Project

17. The Kroeplin Appellants live in the Municipality of Kincardine which will be host to the SP Armow Wind Project. The Project will consist of 92 turbines with a total name plate capacity of 180 MW. The Kroeplins will have one turbine within 599 meters of their home, 12 turbines within a 2 kilometer radius of their home and another 44 turbines within 4 kilometers of their home. The Kroeplin property is a family farm consisting of 100 acres. The farm is used primarily for cash crops and has been in the family for approximately 32 years. [8]

18. The SP Armow Wind Project is owned/operated by the Respondent, SP Armow Wind Ontario GP Inc., as a general partner for and on behalf of SP Armow Wind Ontario LP (SP Armow Wind). SP Armow Wind received a REA from the Respondent, Director of the Ministry of the Environment on October 9, 2013.

B. Regulatory Scheme for Renewable Energy Approvals

19. Before a wind company begins construction on a wind project, it must obtain a REA from the Ministry of the Environment ("MOE"), as outlined in Ontario Regulation 359/09 – Renewable Energy Approvals under Part V.0.1 of the *Environmental Protection Act*, R.S.O. 1990 c. E.19 ("*EPA*"). Prior to submitting a REA application, an applicant is required to hold two public meetings within the community. The wind company is required by the regulation to have specified documents available at the public meetings. Once a submitted application is deemed complete, the Director may, pursuant to section 47.5(1) of

[8] Transcript Evidence of the Kroeplins, Tab 23 of the Appellants' Appeal Book and Compendium, Witness Statement of the Kroeplins, Exhibit 11 at Tribunal Hearing, Tab 22 of the Appellants' Appeal Book and Compendium

the *EPA*, if in his or her opinion it is in the public interest to do so: (a) issue or renew a renewable energy approval; or (b) refuse to issue or renew a renewable energy approval.

20. "Public interest" is not defined in the *EPA* or its regulations. The Director is not required to provide reasons which outline why the wind project that receives the REA was deemed to be in the public interest. Despite the fact that the MOE is aware of noise compliance issues at wind turbine developments that are currently operational and despite the litany of complaints of adverse health effects made by residents living in close proximity to wind turbines, the MOE does not require a wind company to produce a single document which addresses any possible health impacts associated with living in close proximity to wind turbines.

C. An Appeal of the Director's Granting of a REA

21. Under the *EPA*, once approval for a wind project is granted, an appeal of that decision may be brought before the Tribunal. An appeal to the Tribunal can only be brought on two grounds. The onus is on the Appellant to show that the renewable energy project will cause: a) serious harm to human health, or b) serious and irreversible harm to plant life, animal life or the natural environment.

22. Pursuant to s. 142.1 of the *EPA*, a Notice of Appeal must be served on the Director and the approval holder (the wind company) within 15 days of the REA being issued. A decision from the Tribunal with respect to an appeal will be issued no later than six months after the Notice of Appeal was served, failing which the REA is deemed to be confirmed.

D. The state of the scientific research on the health effects from wind projects

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

> This case has successfully shown that the debate should not be simplified to one about whether wind turbines can cause harm to humans. The evidence presented to the Tribunal demonstrates that they can, if facilities are placed too close to residents. The debate has now evolved to one of degree. The question that should be asked is: What protections, such as permissible noise levels or setback distances, are appropriate to protect human health? [at pg. 206]
>
> There is actually a lack of peer-reviewed science on both sides of this debate . . . If numerous studies are undertaken to check for associations between turbines and serious health effects, the Tribunal can look at all of the results to determine whether a particular legal test has been satisfied. Further peer-reviewed science on the association and causation questions would be a welcome development in the debate [at pg. 134]
>
> …the Tribunal cannot find that the Kent Breeze Project operated according to the current Ontario standards "will cause serious harm to human health". That is the test in the statute, but the evidence presented in this Hearing is insufficient to meet it. What the Tribunal can state is that the need for more research came up several times during this Hearing. Time will tell as to what that research will ultimately demonstrate. The Tribunal is hopeful that, whatever the results, further research will help answer some of the concerns and uncertainties raised during this Hearing [at pg. 6].
>
> Just because the appellants have not succeeded in their appeals this is no excuse to close the book on further research. On the contrary, further research should help resolve some of the significant questions that the appellants have raised [at pg. 207].[9]

24. On July 10, 2012, the federal government announced that Health Canada, in collaboration with Statistics Canada, would be conducting a peer-reviewed study which would look at

[9] *Erickson v. Director, Ministry of the Environment*, Case Nos.: 10-121/10-122

the health effects of low frequency noise emitted from wind turbines. The study was in response to questions raised by residents living in close proximity to wind turbines about the possible health effects and the sharp increase in wind turbine generated electricity in Canada. The study will be peer-reviewed by the World Health Organization.[10]

25. The Principal Investigator for the Health Canada Study, Dr. David Michaud, testified before the Tribunal in respect of the Dixon/Ryan appeal and the Drennan appeal. Dr. Michaud indicated that there is a knowledge gap surrounding the impact of wind turbines on human health.[11]

26. In 2011, the Ontario Government placed a moratorium on off-shore wind turbines because of limited scientific evidence on environmental impacts, including the impact on fish. Ironically, the Ontario Government has thus far declined to place a moratorium on wind turbines located in close proximity to people's homes. This is in spite of the acknowledged "knowledge gap" about the impacts of wind turbines on human health, and in the face of numerous complaints from residents about adverse health effects.[12]

E. Procedural History- Dixon-Ryan Appeal and the Drennan Appeal

I. Motion to Consolidate and Motion for an Adjournment

27. Prior to the commencement of the Dixon-Ryan appeal and the Drennan appeal, the Dixon-Ryan Appellants and the Drennan Appellants brought a motion before the Tribunal to consolidate the two appeals or in the alternative, to have the two appeals heard by the same

[10] Health Canada: Health Impact and Exposure to Sound from Wind Turbines: Updated Research Design and Sound Exposure Assessment, Exhibit 40 at Dixon-Ryan Tribunal Hearing, Tab 25 of the Appellants' Appeal Book and Compendium

[11] Transcript Evidence of Dr. David Michaud, page 22-23, Dixon-Ryan Tribunal Hearing, Tab 24 of Appellants' Appeal Book and Compendium

[12] Health Canada Policy and Research Approach for Wind Turbine Noise, Exhibit 41 at Dixon-Ryan Tribunal Hearing, Tab 26 of Appellants' Appeal Book and Compendium.

panel so that evidence could be called only once, and closing submissions could be done together. This approach was vigorously opposed by the Respondents.

28. In their Notice of Motion, the appellants set out that both appeals and both Notices of Constitutional Questions raised identical issues. The appellants proposed this as most expeditious and cost-effective method of addressing these very similar constitutional issues.[13]

29. The Tribunal Rules of Procedure only permit consolidation with the consent of the parties; however, the Tribunal could order that the appeals be heard back to back by the same panel. The Tribunal reserved its decision on the Appellants' request.

30. Subsequently, on September 4th, 2013, the Dixon-Ryan Appellants and the Drennan Appellants commenced an adjournment motion, seeking to delay the start of the hearings by two months such that all relevant evidence could be put before the Tribunal, mainly evidence that was being sought by the Chief Medical Officer of Ontario, Dr. Arlene King, on the data gaps suggested by her report. Dr. King was refusing to present herself for examination, even after a Superior Court Justice ordered that she had relevant evidence to the issue of the effects of wind turbines on human health. Additionally, the Appellants sought the adjournment so that senior counsel would be available for the hearings. The Appellants sought an adjournment of approximately seven weeks, moving the start date from September 11th, to November 4th, 2013.[14]

31. The Tribunal released its order on the adjournment and consolidation requests on September 10, 2013. The Tribunal ordered that the appeals commence on September 23,

[13] Appellants Notice of Motion for Consolidation, August 16, 2013, Tab 12 of Appellants' Appeal Book and Compendium

[14] Appellants Notice of Motion for Adjournment, September 4, 2013, Tab 13 of Appellants' Appeal Book and Compendium

2013, rather than September 11, 2013, and that whether the appeals were heard by the same panel would be determined at a later date. The full decision on these motions was not released until January 15, 2014, a full month after closing submissions were heard in both the Dixon-Ryan appeal and the Drennan appeal.[15]

II. *Motion to Strike and Abuse of Process Motion*

32. On August 8, 2013, the Respondent Director and the Respondent St. Columban brought a motion to strike the Dixon-Ryan Appellants' Notice of Constitutional Question. The Respondent St. Columban argued that the Tribunal did not have the jurisdiction to review the Director's decision to determine if it complied with the *Charter*, and that the Tribunal did not have the jurisdiction to read down the test for an appeal before the Tribunal.

33. The Director also brought a motion to strike the Appellants' Notice of Constitutional Question on the grounds that the Tribunal lacked the jurisdiction to review the Director's decision to determine if it complied with the *Charter*.

34. In response to the Director's motion to the strike, the appellants brought an abuse of process motion arguing that the Director took a different position before the Superior Court of Justice in *Drennan v. The Director*, Court File Number 200-2012. Namely, that before the Superior Court, the Director argued that all the Constitutional issues raised in the Notice of Constitutional Question could be raised before the Tribunal and the court should not hear the issue.[16]

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[15] Tribunal decision dated September 10, 2013, Tab 5 of Appellants' Appeal Book and Compendium, Tribunal decision dated January 15, 2014, Tab 5 of Appellants' Appeal Book and Compendium

[16] Appellants Abuse of Process Notice of Motion, August 21, 2013, Tab 14 of Appellants' Appeal Book and Compendium, The Ministry's factum on the Motion to Strike, Court File Number 200-2012, Tab 15 of Appellants' Appeal Book and Compendium

35. The Tribunal made an oral ruling that they would not review the Director's decision on the basis that they lacked jurisdiction. The reasons for decision were not released until November 22, 2013. The Director brought the same motion in respect of the Drennan appeal and the Kroeplin appeal. The parties agreed to limit the Tribunal's review powers based on the oral decision provided by the Tribunal without prejudice to the appellants to raise the issue on appeal. The Tribunal never addressed the abuse of process motion.[17]

F. Evidence of the Post-Turbine Witnesses

36. Following the Tribunal ruling on the Appellants' motion to consolidate, the parties agreed that the evidence of post-turbine witnesses could be entered at subsequent appeals by way of transcript. The evidence of the post-turbine witnesses has been divided into the following categories:

i. Evidence of post-turbine witnesses heard on all three appeals;
ii. Evidence of post-turbine witnesses heard on the Drennan appeal; and
iii. Evidence of post- turbine witnesses heard on the Kroeplin appeal.

37. On an appeal before the Tribunal, the Tribunal is statutorily mandated to review the Director's decision and determine:

a. whether or not the project as approved will cause serious harm to human health; or,
b. whether or not the project as approved will cause serious and irreversible harm to plant life, animal life or the natural environment.

[17] Tribunal decision on Motion to Strike, November 22, 2013, Tab 6 of Appellants' Appeal Book and Compendium

38. In these three appeals before the Tribunal, the Appellants argued that they need only prove that the project will likely cause harms to their health, and that the term "serious harm" is not limited to death or an irreversible disease, but includes the types of harms that had been suffered by the post-turbine witnesses.

I. Evidence of post-turbine witnesses heard on all three appeals

39. The Dixon-Ryan Appellants called the evidence of two post-turbine witnesses, Barb Ashbee and Sandy MacLeod, both of whom were forced to leave their home because of the effects that the wind turbines were having on their health. Their evidence was subsequently entered before the Tribunal by way of transcript on the Drennan and Kroeplin appeals.

40. In 2005, Barb Ashbee and her husband moved into a home located in Shelbourne, Ontario. The home was intended to be their retirement property. Shelbourne is home to one of the first wind power projects in Ontario, the Melancthon EcoPower Project. The project consists of two phases and is comprised of approximately 123 wind turbines.[18]

41. When Ms. Ashbee first learned of the project she was excited about the prospect of wind energy. She recalled telling her family and friends about how exciting it was that they were getting turbines, and would go out in her backyard and take pictures. [19]

42. Ms. Ashbee's home was affected by phase two of the project which began commercial operation in 2008. Ms. Ashbee's home was located 457 meters from the closest turbine. She had four more turbines located within one kilometer, and another 15 turbines within two kilometers.[20]

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[18] Transcript Evidence of Barb Ashbee in the Dixon-Ryan Appeal, page 3, 5, Tab 28 of Appellants' Appeal Book and Compendium
[19] *Ibid* at pages 34-35
[20] *Ibid* at page 4

43. Shortly after the project began operation, Ms. Ashbee and her husband noticed that they were having trouble sleeping. She began keeping a journal to describe what the noise sounded like and any symptoms she and her husband were experiencing.

44. Ms. Ashbee experienced sleep deprivation, stomach aches, heart palpitations, headaches, and dizziness. In addition, she began having nosebleeds and experiencing terrible cognitive and memory problems as time wore on.[21]

45. Ms. Ashbee never sought medical attention specifically for the symptoms she was experiencing but did explain to her doctors what was going on with the wind turbines. Ms. Ashbee recounted that she informed her doctors about the wind turbines "because when I had the appointment with them I was severely sleep deprived and impacted and I wasn't my normal self and I did want to tell them about what was going on."[22]

46. Ms. Ashbee immediately reported her symptoms to the project owner and they began conducting testing. Soon thereafter the MOE became involved in the process of monitoring the turbines and of receiving complaints. After the MOE and the project owner began testing on the project, they indicated to Ms. Ashbee that the project was in compliance with the guidelines and the 40dBA level permitted by the regulatory guidelines.[23]

47. To try and mitigate the effects that the Ashbees were experiencing in their home, the wind company shut down the five turbines closest to their home. Despite this, the Ashbees reported still feeling a vibration and humming in the house, and they continued to be deprived of sleep and to experience headaches.[24]

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[21] *Ibid* at page 6
[22] *Ibid* at page 8
[23] *Ibid* at pages 17-19
[24] *Ibid* at pages 21-22

48. The Ashbees tried to adjust to the turbine noise with ear plugs, but found no relief with these because the vibration was being felt throughout the house. They moved their bed out into the detached garage to see if it would help but this did not give much relief.[25]

49. During the period from May 8, 2009 to June 25th, 2009, at which time they left their home for good, the Ashbees moved into a tent in their backyard with their animals to gain respite from the vibration they were experiencing within their home.

> Q. Okay. And so during the entire period did you remain in your house?
>
> A. Yeah.
>
> Q. And so you slept the entire time in your bedroom?
>
> A. No, we got to the point we started looking for a rental and because our, like, we were all affected and we started, first I started looking for a rental, but we had three dogs, two cats to move and there's not very many people that will rent with that many pets. And plus we were paying the mortgage and would have to pay out money for rent again and it was horrible.
>
> And we thought well, we'll rent a trailer, like, park it on the driveway; four wheel trailer thing. And I phoned around to a few places and there was nothing. I couldn't find anything, nobody rented them.
>
> We moved the bed out into the detached garage hoping it would be quieter out there so we wouldn't have the vibration and noise and it was actually out there too. So it really didn't help anything.
>
> The wind company offered us a house a concession over from us and we did attempt to move into it. There were problems with it, with mould in it, so we couldn't move in. So we were stuck, again.
>
> So we ended up moving into a tent in the backyard because the turbines were being shut down at night and the vibration wasn't there like it was in the house. You would feel it a little bit, a little bit of it but it wasn't resonating like it was in the house. So we bought a tent. We went through two, actually, put the tent in the backyard, put our bed out there, a

[25] *Ibid* at page 24

little table and a heater and a light and all the animals slept out there with us and that's how we coped.

Q. And how long did you have to do that for?
A. May until we left.
Q. And when did you leave?
A. June 25th. I think it was May, early May. It'll be in here, actually I guess. Do you want the date?
Q. If you have it.
A. May 7 we bought the tent.
Q. Okay. So then would May 8 be your first night in the tent?
A. Yeah, that was yeah, we set it up and put the bed in.
Q. And, sorry, you said you left June 25th?
A. Twenty fifth.
Q. So for almost two months did you sleep in the tent constantly every night?
A. Pretty much. The odd night when it didn't seem too bad we would try it in the house. We put the spare bed in the tent and we still had the bed in there but there weren't very many nights we were able to stay in the house.

Q. So did you have some alleviation from your symptoms while you slept in the tent?
A. Oh, yeah, we could sleep again, yeah. It still wasn't the best because we were in a tent and it was still pretty cold still, but it was better than the house.[26]

50. Once Ms. Ashbee and her husband moved from their home, they no longer experienced any of the adverse health effects they had while living in the home.

Q. And so the symptoms that you described for us earlier, do you still suffer from any of those symptoms?
A. No.
Q. Okay. And when did those symptoms stop altogether?

A. Within pretty much within weeks, a month after we moved. Like, the sleep deprivation stopped immediately. The headaches stopped and that. I mean, the other effects, the upset and anger and that lasted a little bit longer, but as far as the stomach aches, the chest pressure, that was pretty much gone.

[26] *Ibid* at pages 24-26

Q. Okay. And just so that we make sure it's on the record, can you tell us how long you were in the environment when you were exposed to the wind turbines and these adverse health effects?

A. From early December 2008 to June 25th, 2009.[27]

51. During cross examination, Ms. Ashbee was vigorously questioned about the source of the noise and vibration that she experienced in her home. The questioning was directed at demonstrating that her concerns arose not from the audible noise, but rather from some low frequency sound. This low frequency sound and its impacts is the same issue that Health Canada is now investigating through their study.

Q. And how long after they became operational did you notice that you were having problems?

A. Pretty much right away, like, within the first week, two weeks.

Q. And you talked about and I know from reading through your journal that the vibration was particularly a problem for you, correct?

A. Yeah, mm hmm.

Q. Would you say that that was the bigger problem than the noise?

A. It was as big a problem. The noise was a big problem. When they started shutting them down, it alleviated that, but the vibration was just as bad. Like, it didn't fix that part of it.

Q. And you would know that because when five of the closest turbines were down around you, you were still bothered significantly by the noise?

A. The vibration.

Q. Or by the vibration, yes.

A. Yeah.

Q. Including the fact that you were in a tent and it was better in the tent than in your home, right?

A. Yes, it was.

Q. Okay. And you think that's because of the and I don't mean to demean you by saying you think your belief is that that's because there was vibrations at that time with the turbines down was the problem?

[27] *Ibid* at pages 32-33

A. Well, it was in the house. Whether it was coming from the turbines or the electrical, I don't know.

Q. Okay. So you still have never been given an answer on that?

A. No. Excuse me, there was a 160 spike measured by the wind developer, low frequency spike and so that was determined that it was in our house. It was measured. And Gary Tomlinson told me that that 160 hertz was coming off all the turbines, not just the one behind us.

Q. So when you say a spike, was that a one time thing?

A. No, it's acoustical terminology. And I don't know acoustics.

Q. You're as blind as me on that.

A. They showed us the graph and it's a spike. It's continuous, but it shows the spike and they were outside measuring and inside measuring and a spike happened and they went oh, there's a 160 spike and then the wind developer told us there's definitely a problem with the low frequency in our house. So I don't understand the rest.

Q. That was going to be my next question that you have said the wind turbine company acknowledged to you that there was a problem in your home because of the turbine, some aspect of the operation of the turbines?

A. Yeah.

Q. And to your knowledge, was that the reason for the buy out of your home?

A. They agreed that we couldn't live there any more, yeah.[28]

52. Although Ms. Ashbee and her husband suffered these adverse health effects, they did not seek medical attention. Ms. Ashbee chose not to seek medical attention because her doctors "were not very engaging with wind turbine problems" at the time she was experiencing her symptoms. Additionally, Ms. Ashbee felt that she knew that the wind turbines were what was causing her health problems.

Q. And it's fair to say that they weren't concerning you enough that you went to a doctor to have them checked out?

A. I knew what was causing them so.

Q. Okay, but even if you know the cause of something, it didn't concern you enough to go to a doctor to have them check out whether or not they should be doing something, putting you on heart medication?

[28] *Ibid* at pages 36-37

> A. I talked to this doctor and I talked to my doctor in Toronto, and they weren't very engaging with wind turbine problems. So I mean, I -- what do you want me to do? I know what's causing them. If they stopped them, we knew because, I mean, we were both going through the same thing, sometimes at different times it would come on.[29]

53. Ms. Ashbee's evidence is consistent with the evidence of other post-turbine witnesses that when they left the vicinity of the wind project, they no longer experienced the adverse health effects. Another witness that provided similar evidence before the Tribunal was Ms. Sandy MacLeod. Ms. MacLeod is a high school teacher and lived in Ripley, Ontario, the home of the Ripley Wind Project.

54. The Ripley Project consists of 38 wind turbines and began commercial operation in December 2007. Ms. MacLeod owned a 15.5 acre farm where she lived with her husband and two children. They had lived on the property for 19 years and intended to remain there. Unfortunately as a result of the adverse health effects she experienced from living in close proximity to the wind turbines her property was purchased by the wind developer.[30]

55. The closest wind turbine to the MacLeod residence was 800 meters from the house. Ms. MacLeod indicated to the Tribunal that the adverse health effects she experienced began as soon as the project began operating, even through the testing phase.

> Q. Now you said that you suffered adverse effects living since the turbines became operational?
>
> A. Yeah.
>
> Q. Can you describe for us what some of those effects were?
>
> A. The sleep deprivation was first and just the sensation that there was a bit of humming in back of my ears and always that you felt, you felt as if you had had five or six cups of coffee, like, all the time.

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[29] *Ibid* at page 55

[30] Transcript Evidence of Sandy MacLeod in the Dixon-Ryan Appeal, pages 7-8; 11, Tab 29 of Appellants' Appeal Book and Compendium

It progressed to ringing in your ears. And, again, still sleep deprivation. You would try and go to sleep, but you never solidly went to sleep. There were difficulties with my hip was sore before, it was exceedingly sore after.

I had my blood pressure increased. When the winds were high, the vision would be blurred, and I had difficulty at work as well and I was I struggled with my lesson plans. I struggled with remembering my students names which I felt was a gift I had to remember.

My heart would race, even though I would be sitting in a Lazy Boy chair. Like, I had heart palpitations and then your chest would feel as if somebody was sitting on it or you had been doing some excessive swimming in deep water and just felt like a lot of pressure on your chest.

I would be sensitive to I'm more sensitive to wireless environments which had never bothered me before and. I became, I started to grind my teeth at night, which I had never done before either. It wasn't all of those things occurred and the evidence is really clear there.

Q. Were you the only person in your family to suffer as a result?

A. No, no in my witness statement, you can see where I talked about John and how he kind of started to have some problems, more about a month after I did.

MR. PELLEGRINO: Mr. Vice Chair, this is the objection I foresaw. I believe Ms. MacLeod is getting into her family history here and her husband has not provided a witness statement nor is he a witness at this hearing and that's contrary to the disclosure order that we dealt with on the first day of the preliminary hearing.

MR. MULDOON: Maybe, Ms. MacLeod, you can give in broad terms what is the impact on your husband.

THE WITNESS: In broad terms, John's health was severely effected as well. He also required respite as well. My daughter, the same. Hers was more intestinal, weight loss but she also experienced sleep deprivation and tinnitus in her ears and she required to be rested outside the home as well. Does that help?

MR. MULDOON: Thank you.[31]

56. Ms. MacLeod raised these concerns with her family doctor and was sent to a number of specialists to have testing done for tinnitus, as well as stress tests and ECGs. No abnormalities were identified in her tests. This is consistent with Ms. MacLeod's observation that she enjoyed relief from her symptoms when she would go into town, but that the symptoms would return when she returned to her home.[32]

57. In April 2008, Ms. MacLeod determined it was necessary to seek refuge outside of her home. The wind company was billeting families at hotels, motels and in the homes of others because of the adverse health effects that residents reported. Ms. MacLeod and her family also rented cottages in Kincardine to get some respite from the wind turbines.[33]

58. On one occasion, on February 22, 2009, Ms. MacLeod began experiencing cardiac symptoms and was admitted to hospital. At this time, Ms. MacLeod and her family were living at their home for intermittent periods, between being billeted at various locations by the project owner. Ms. MacLeod was advised by her treating physician that her environment needed to change. She advised the doctor of the wind turbines and that it had been the only change in her environment. From this point on Ms. MacLeod realized that, for the sake of her health, she could no live in her home.[34]

59. One of the major symptoms that Ms. MacLeod experienced when living in close proximity to the wind turbines was elevated blood pressure. Ms. MacLeod did concede on cross examination by St. Columban's counsel, that her blood pressure levels were slightly elevated prior to the operation of the wind turbines. However, once the turbines became

[31] *Ibid*, pages 11-12
[32] *Ibid*, pages 15-16; 42
[33] *Ibid*, pages 9; 41
[34] *Ibid*, pages 16-17

operational, Ms. MacLeod's family doctor recommended a home blood pressure machine to monitor her levels. Blood pressure readings taken in the doctor's office were generally in the range of 150/90. However, Ms. MacLeod's blood pressure reading at home, where she was exposed to the wind turbines, was recorded as high as 180/115.[35]

60. Ms. MacLeod advised the Tribunal that after moving away from her home, her sleep has returned to normal and that she "sleeps like a baby".[36]

61. The symptoms described by Ms. Ashbee and Ms. MacLeod are consistent with the symptoms experienced by the other post-turbine witnesses that testified at the three Tribunal hearings below.

II. Evidence of post-turbine witnesses on Drennan appeal

62. In addition to the evidence of Ms. Ashbee and Ms. MacLeod that was entered on the Drennan appeal by way of transcript, the Drennan Appellants also called the evidence of Donna Weaver and Ted Whitworth.

63. Ms. Donna Weaver, a post-turbine witness, gave evidence that she began experiencing pressure in her head, sharp pain in her ears, and trouble falling asleep and staying asleep once the wind turbines in the Conestoga Wind Project became operational. Ms. Weaver indicated that she experienced no such symptoms prior to the wind turbines becoming operational.[37]

64. Ms. Weaver described her house as having a "terrible pressure" that was not present prior to the wind turbines. This pressure would sometimes cause the furniture inside the house to vibrate. To gain relief from the health effects experienced when living in her home, Ms.

[35] *Ibid*, pages 84-93; 140
[36] *Ibid*, page 25
[37] Transcript Evidence of Donna Weaver in Drennan Appeal, pages 133-134, Tab 31 of Appellants' Appeal Book and Compendium

Weaver and her husband began living in their motor home which they parked in a parking lot across the street from her husband's office.[38]

65. During cross examination Ms. Weaver was asked about a pre-existing medical condition that she suffered from known as PIE Syndrome, which causes pneumonia like symptoms in individuals. Ms. Weaver made clear to the Tribunal that the symptoms that are associated with her PIE Syndrome are not the symptoms of headache, sleep disturbance and pressure in her ears that she associates with the wind turbines.[39]

66. Ted Whitworth, a resident living 490 meters from the transformer station for the Melancthon Wind Project in Shelbourne, Ontario, gave similar evidence. After the project became operational, Mr. Whitworth and his family began experiencing disturbed sleep, headaches, pressure in the chest, and "this feeling as if your body was vibrating. Mr. Whitworth described nights in which he would be awoken at night and his entire body would be "shaking".[40]

67. Mr. Whitworth sought medical attention for the ringing he was experiencing in his ear. His physician's opinion was that the ringing was possibly a low frequency tinnitus.[41]

III. Evidence of post-turbine witnesses on the Kroeplin appeal

68. As with the Drennan appeal, the Kroeplin Appellants entered the evidence of Sandy MacLeod and Barb Ashbee before the Tribunal by way of transcript. In addition to their evidence, the Kroeplin appellants also called the evidence of post-turbine witnesses Bill

[38] *Ibid*, page 110; page 131
[39] *Ibid*, page 192
[40] Transcript Evidence of Ted Whitworth in Drennan Appeal, pages 11-12, Tab 32 of Appellants Appeal Book and Compendium
[41] *Ibid*, page 16

MacKenzie and Nelly Reyneveld, both of whom suffered adverse health effects associated with living in close proximity to wind turbines.

69. Additionally, post-turbine witnesses also sought to have presenter status at the Kroeplin appeal. This means that they were not called by any party, but chose to come forward and provide the Tribunal with relevant evidence of their experience living in close proximity to wind turbines. One such presenter was Ms. Norma Schmidt.

70. Bill MacKenzie, Nelly Reyneveld and Norma Schmidt all gave evidence regarding the sleep disturbances, vibrations, and cognitive difficulties. All gave evidence that once they were away from the turbines, their symptoms dissipated. Mr. MacKenzie and Ms. Schmidt moved away from their homes to alleviate their symptoms.[42]

71. What is consistent from the evidence of the post-turbine witnesses is that once the wind projects began operating, all of the witnesses experienced sleep deprivation, headaches, and pressure in either their chest or head. All of the witnesses testified that when they were away from their home that they had relief from their symptoms and when they returned to their home, their symptoms returned. Those witnesses that have permanently moved from their home no longer experience any of the adverse health effects caused by the turbines, while those that do not have the option of leaving their home, continue to suffer the symptoms they described in their evidence outlined above.

G. No Help from the MOE

72. During their evidence before the Tribunal, the post-turbine witnesses indicated that when they began experiencing their respective negative health effects that they contacted the

[42] Transcript Evidence of Bill MacKenzie in Kroeplin Appeal, pages 483; 489, Tab 33 of Appellants' Appeal Book and Compendium; Transcript Evidence of Nelly Reyneveld in Kroeplin Appeal, pages 683-684; 696-697, Tab 34 of Appellants' Appeal Book and Compendium; Transcript Evidence of Norma Schmidt in Kroeplin Appeal, pages 243-244, Tab 35 of Appellants' Appeal Book and Compendium

MOE, in its capacity as the government body responsible for the wind turbines. The MOE has a spills action line, where residents with complaints relating to noise or adverse health effects caused by the wind turbines, have been directed to file reports.

73. The Appellants called the evidence of two MOE field officers regarding MOE procedures for complaints of adverse health effects associated with wind turbines. Gary Tomlinson, who provided evidence before the Tribunal in the Dixon-Ryan appeal and the Drennan appeal, described the types of complaints his office receives in respect of the turbines as sleeplessness, headaches, congestion of the head and ears, and "shadow flicker".[43]

74. This is consistent with the complaints received by MOE District Supervisor, Heather Pollard, who was called in the Kroeplin appeal. Ms. Pollard indicated that her office receives either noise related or health related complaints. The health related complaints are "people usually indicat[ing] that they are having sleep disturbance, headaches, nausea, vertigo, or tinnitus."[44]

75. During their respective evidence, it became clear that there is nothing that the MOE can meaningfully do in response to complaints that the turbines are affecting residents' health. The MOE has a wind turbine noise protocol that was implemented in 2011. The protocol is a four step process which includes: an initial screening of the complaint; site visit and interview; noise testing performed by the MOE; and finally an acoustic study undertaken by the company. Ms. Pollard gave evidence that this process could take upwards of a year to complete and during that time, the MOE is not permitted to shut down the offending

[43] Transcript Evidence of Gary Tomlinson in the Dixon-Ryan Appeal, pages 28-29, Tab 37 of Appellants' Appeal Book and Compendium
[44] Transcript Evidence of Heather Pollard, page 760, Tab 39 of Appellant's Appeal Book and Compendium

turbine, even with complaints of adverse health, and even when measurements indicate that the turbine is operating outside of the 40dBA allowable limit.[45]

76. Both Ms. Pollard and Mr. Tomlinson indicated that the MOE currently has no protocol for testing low frequency or infrasound noise emanating from the wind turbine. The MOE is limited to determining whether the impugned turbine complies with the 40dBA limit.[46]

H. The Canadian Experience

77. As set out above in paragraph 23, on July 12, 2012, Health Canada announced that it was undertaking the first epidemiological study in Canada relating to adverse health effects associated with wind turbines. The lead investigator, Dr. David Michaud gave evidence before the Tribunal at the Dixon-Ryan and Drennan appeals. The Health Canada study will look into various measurable endpoints that have been associated with living in close proximity to wind turbines, such as sleep disturbance, headaches, increased blood pressure and annoyance.

> Q. The next paragraph talks about the World Health Organization and it defines health as, "a state of complete physical, mental, and social wellbeing and not merely the absence of disease or infirmity." Is that a definition that Health Canada subscribes to?
>
> A. When the department provides advice on environmental assessments we have to choose endpoints that we can essentially use to provide that opinion to a responsible authority as to whether or not a project warrants noise mitigation strategies.
>
> So we need to pick endpoints that align with the mandate of the department. And because Health Canada recognizes this definition we choose endpoints that range from wellbeing to health effects like sleep disturbance.[47]

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[45] *Ibid* at 765-769;
[46] *Ibid* at page 793; *Supra* note 43 at pages 34-35

78. In his evidence, Dr. Michaud also discussed why the noise impact from the wind turbines may have a greater effect in rural areas as compared to urban environments.

> Q. I also note that in this document that we have just been reviewing, the health impacts and exposure to sound, it discusses why there may be some more concern in rural environments regarding exposure from wind turbine noise. I was just wondering if you could provide us with any information on that.
>
> A. The idea behind that is in Canada rural areas tend to have a very low background sound level to start with. And so the concern is that when you introduce a source like wind turbine noise, although it may be relatively quiet compared to something like road traffic noise, the concern is that the absolute increase in the sound can be quite large and, therefore, noticeable, especially at night.[48]

79. Dr. Michaud explained that there is a "knowledge gap" in understanding the dose-response relationship and the impact of wind turbines on human health. Dr. Michaud testified that there are both direct and indirect effects associated with environmental noise. The indirect effects include annoyance, sleep disturbance, and interference with activities. Put simply, he testified that we don't really know how the wind turbines impact on human health.[49]

80. In addition to the Health Canada study, whose results are expected at the end of 2014, the Ontario Ministry of the Environment has funded a study to be conducted by the University of Waterloo. Dr. Philip Bigelow, an epidemiologist and a professor at the School of Public Health and Health Systems at the University of Waterloo, provided evidence on the Kroeplin appeal related to the research being undertaken by the University of Waterloo. Dr. Bigelow indicated that one of the studies undertaken by the University found a

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[47] *Supra* note 11 at page 8
[48] *Ibid*
[49] *Ibid* at page 18

statistically significant relationship between the distance one lives from turbines and sleep disturbance and vertigo.[50]

81. While Dr. Bigelow did acknowledge that the response rate for the distributed survey was low, and that more study was warranted, he indicated that peer-review of the paper would not invalidate the findings that the associations described above were statistically significant.[51]

I. The Respondent's Evidence

I. The Dixon-Ryan Appeal

82. St. Columban called the evidence of Dr. Werner Richarz, an acoustical engineer with a PhD in aerospace engineering. In his witness statement filed before the Tribunal, Dr. Richarz concluded that the project would not cause serious harm to human health.

83. In cross examination, Dr. Richarz agreed that there is a "knowledge gap" about the effects of low frequency noise and its impact on human health. Dr. Richarz identified a need for clinical studies regarding these health effects but that it is almost impossible to ethically conduct a study that will deliberately expose research subjects to harmful health effects.[52]

84. Dr. Richarz agreed that the St. Columban Project could produce adverse health effects in some individuals, and that it could cause annoyance to a non-trivial number of residents. Dr. Richarz opined that sleep disturbances, headaches, dizziness, increased blood pressure and chest pressure should not be classified as "serious health effects."[53]

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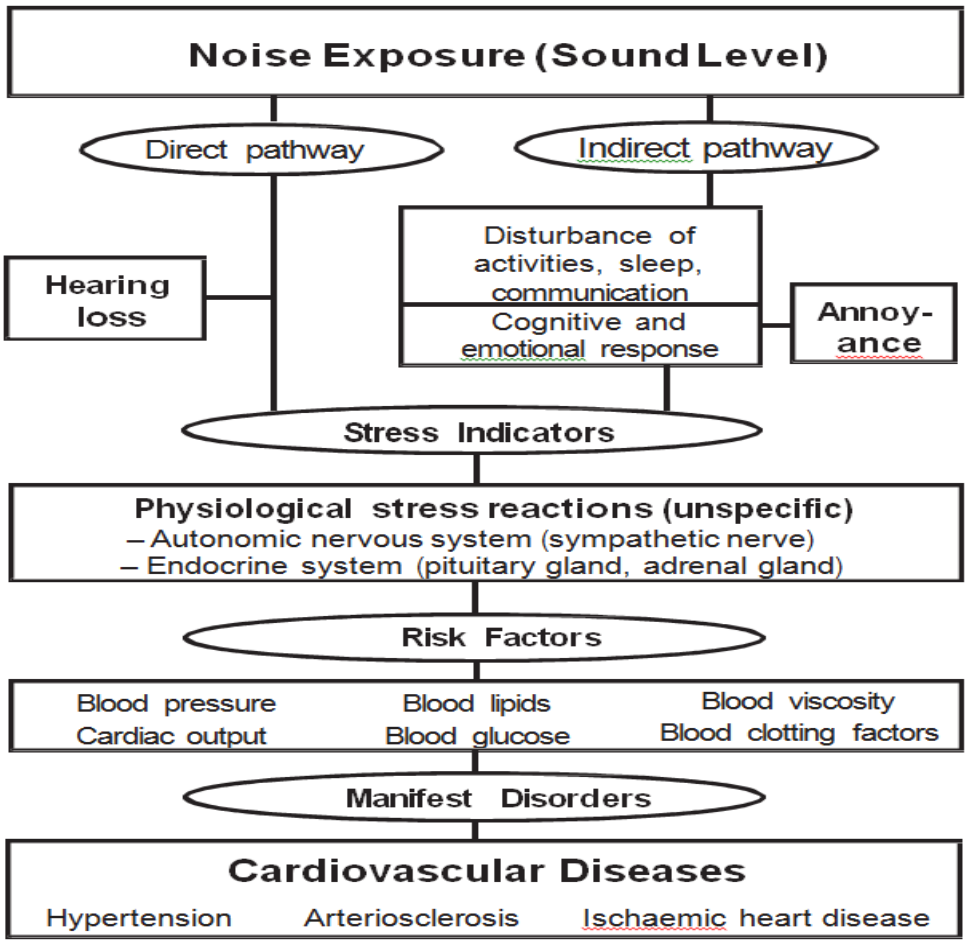
[50] Transcript Evidence of Dr. Phil Bigelow on Kroeplin Appeal, pages 1175-1176, Tab 40 of Appellants' Appeal Book and Compendium
[51] *Ibid*, page 1220
[52] Transcript Evidence of Dr. Werner Richarz on Dixon-Ryan Appeal, pages 93-94, Tab 42 of Appellants' Appeal Book and Compendium
[53] *Ibid* at pages 110-111; 113-115

85. Dr. Richarz gave evidence that the World Health Organization ("WHO") Night Noise Guidelines for Europe 2009 is authoritative research on the impacts of noise on human health. The WHO Night Noise Guidelines sets out the various pathways, both direct and indirect that noise emissions can lead to adverse health effects. [54]



II. Drennan Appeal and Kroeplin Appeal

86. The Respondents in the Drennan and Kroeplin appeals called the same medical experts in respect of both hearings: Dr. McCunney, a medical doctor specializing in environmental

[54] Exhibit 48 at the Dixon-Ryan Tribunal Hearing, World Health Organization, Night Noise Guidelines for Europe at page 62, Tab 43 of Appellants' Appeal Book and Compendium

health; Dr. Mundt, an epidemiologist; and, Dr. Moore, associate Medical Officer of health for the Kingston region.

87. All three doctors admitted during their respective testimony that they never examined or met with any of the post-turbine witnesses that gave evidence before the Tribunal. Furthermore, Dr. Mundt had not conducted any studies relating to wind turbines and their effect on human health. Dr. McCunney's only involvement in the study of wind turbines and its effects on human health was a literature review conducted in 2009.[55]

88. Drs. McCunney, Moore, and Mundt all agreed that annoyance is an attributable adverse effect of wind turbines on residents living in close proximity to them. Dr. McCunney confirmed that extreme annoyance could be associated with sleep disturbance, headaches, dizziness, nausea, tachycardia, irritability and problems with concentration and memory.[56]

89. Dr. Moore acknowledged that research undertaken by his Board of Public Health recognizes, consistent with World Health Organization, annoyance to be an adverse health effect. Dr. McCunney admitted in cross examination that the World Health Organization considered annoyance as an adverse health effect; this was contrary to his expert report, which asserted that the World Health Organization did not recognize annoyance in any aspect when considering health effects. Dr. McCunney conceded on cross examination that annoyance can lead to a number of stress related symptoms such as high blood pressure. [57]

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[55] Transcript Evidence of Dr. Mundt Transcript at Kroeplin Appeal, page 1361, Tab 45 of Appellants' Appeal Book and Compendium; Transcript Evidence of Dr. Robert McCunney Transcript on Drennan Appeal, page 59, Tab 46 of Appellants' Appeal Book and Compendium

[56] McCunney Transcript, *Supra* note 55, pages 68-71

[57] Transcript Evidence of Dr. Kieran Moore on Drennan Appeal, pages 71-73;Tab 49 of Appellants' Appeal Book and Compendium; McCunney Transcript, *Supra* note 55, pages 79-83; WHO Information Fact Sheet, dated February 2001, Exhibit 52 on Drennan Tribunal Hearing, Tab 48 of Appellants' Appeal Book and Compendium; Transcript Evidence of Dr. Robert McCunney on Kroeplin Appeal, page 1412, Tab 47 of Appellants' Appeal Book and Compendium

J. Evidence from other jurisdictions

90. In a recent decision from the Portuguese Supreme Court of Justice, the court was tasked with determining whether or not the operation of industrial wind turbines in close proximity to the appellants' home was causing them harm in that case.

91. In determining that the wind turbines were causing harm to the appellants, through sleep deprivation, headaches and cognitive impairments, the court weighed the rights of the appellants' to maintain their personal integrity against the public good of the community being able to utilize green energy. The court found the following:

> There were several judgments whereby the Supreme Court of Justice, having been called to decide, has successively confirmed that the right to rest, sleep and tranquility are inherent requirements to the fulfilment of the right to health and quality of life, constituting an emanation of the fundamental personality Rights, namely of the rights to the physical and moral integrity, to a healthy life environment, constitutionally protected as Fundamental Rights in the field of the personal rights, liberties and guarantees, always to conclude that the illicitness of a noisy action that harms the rest, tranquility and sleep of other, is on the fact of, unjustifiably and beyond the limits of the socially tolerable, harm those bastions of personal integrity, the damage being an actual harm to that right, in any of its components.
>
> …
>
> In essence, private individuals, in any case, are not subject to the duty, in the name of the public interest, of exclusively supporting damages to their rights or of supporting sacrifices in the name of the common good, it being up to society, in the cases where those sacrifices may and must be imposed, compensate them for the resulting damages, such as it happens with the expropriations of land.[58]

[58]Supreme Court of Justice Judgment, Court File No.: 2209/08.0TBTVD.L1.S1, May 30, 2013 at page 84 and 94

92. The Portuguese Supreme Court of Justice ordered that the turbines causing the appellants harm be shut down because it found that the impact of the turbines infringed on their fundamental right of personal integrity.[59]

93. Additionally, in a recent case from the Higher Regional Court of Munich, the court recognized that emissions from a wind project are not insignificant and that the burden rests on the wind developer to demonstrate and prove that an adverse effect is insignificant. The court further stated that there is no obligation on an individual resident to tolerate an adverse effect.[60]

94. Jurisdictions around the world are recognizing that industrial wind turbines sited in close proximity to residences are causing significant adverse health effects for the residents.

PART III: ISSUES

95. The Appellants submit that the following issues are raised in the appeal herein:

A. What is the appropriate standard of review?

B. Were the Appellants denied natural justice and procedural fairness when their motions to consolidate and to adjourn were dismissed?

C. Did the Tribunal err in law in ruling that it does not have jurisdiction to consider whether the Director's decision complies with the *Charter*?

D. Does the standard for reviewing a REA set forth in section 142.1 of the *EPA* violate section 7 of the *Charter*?

[59] Supreme Court of Justice Judgment, Court File No.: 2209/08.0TBTVD.L1.S1, May 30, 2013
[60] *Sander v. Bavaria Windpark GmbH & Co. KG*, 27 U 342/11 and 27 U50/12 , January 31, 2014

PART IV: LAW AND ANALYSIS

A. The Standard of Review is Correctness

96. This proceeding is an appeal of a decision of the Environmental Review Tribunal pursuant to section 145.6(1) of the *Environmental Protection Act* which provides as follows:

> 145.6 (1) Any party to a hearing before the Tribunal under this Part may appeal from its decision or order on a question of law to the Divisional Court in accordance with the rules of court.

97. The questions raised in this appeal are all matters of law. In accordance with section 145.6(1), the questions concern the constitutionality of the various processes by which the Tribunal arrived at its decision to dismiss the appeal of the Appellants.

98. In *Housen v. Nikolaisen*, the Supreme Court of Canada held that on pure questions of law, the applicable standard of review is correctness.[61]

99. Accordingly, the Appellants submit that the standard of review applicable to the herein appeal is correctness and no deference is owed to the decision maker below.

B. The Appellants were denied natural justice and procedural fairness because of the dismissal of two interlocutory motions

I. The nature of the motions

100. Prior to the hearing on the main issues, the Appellants in each of the proceedings below brought two interlocutory motions that were denied by the Tribunal.

101. The first motion was to have the Drennan Appeal and the Dixon-Ryan Appeal consolidated or, in the alternative, heard back-to-back. The premise of the motion to consolidate the matters was that the Appellant landowners were at a significant financial disadvantage vis-

[61] *Housen v. Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33 (CanLII)at paras 8 – 9.

à-vis the proponents of the wind farms. Consolidating the matters was an effective means of ensuring access to justice because each of the appeals raised similar issues.

102. In the context of an appeal by individual landowners against well-resourced energy companies, the motion to consolidate the matters was the most expeditious and cost-effective means of addressing the similar constitutional issues before the Tribunal.

103. The second motion was a motion to adjourn. The motion to adjourn was brought on two bases. First, the motion to adjourn was based on the availability of relevant evidence, in particular the evidence of the Chief Medical Officer of Health for Ontario, Dr. Arlene King. Dr. King exercised her statutory power to investigate the risk to the public health of wind turbines. In her May 2010 report entitled "The Potential Health Impact of Wind Turbines", Dr. King conducted a literature review of reports from jurisdictions other than Ontario and identified a "key data gap" in the existing research. According to Dr. King, there is a data gap in respect of research on the sound levels of wind turbines erected in residential areas, including in rural areas. This evidence would have supported the Appellants' arguments below.

104. In an application before the Superior Court of Justice, the Drennan Appellants issued a summons to Dr. King returnable October 27, 2011, seeking to elicit evidence from Dr. King on the "data gaps" and follow-up studies referenced in her May 2010 report. Dr. King failed to attend for the examination and failed to bring a motion to quash the summons. A motion was brought by the Drennan Appellants to compel Dr. King's attendance. The issue of Dr. King's attendance for examination was to be argued at the Court of Appeal for Ontario on December 18, 2013. The appeal was ultimately dismissed, on consent, on ground that it was moot because the hearings in respect of the Drennan

appeal had substantially concluded by December 18, 2013. An adjournment would have permitted the Appellants an opportunity to have Dr. King's evidence admitted before the Tribunal.

105. The second basis for the motion to adjourn was to permit the Appellants to have counsel of choice attend the Tribunal hearing. As a result of the motion to adjourn being dismissed, the Appellants' counsel of choice was unable to attend the hearing.

106. It is Tribunal practice to set the dates for the appeal without consultation of counsel in respect of their availability. After learning of the dates for the appeal on August 14, 2013, counsel for the Appellants sent an email to the Respondents advising that they were unavailable during the dates proposed by the Case Coordinator. Counsel for the Appellants proposed alternate dates for the hearing of the Drennan Appeal and the Dixon-Ryan Appeal but these dates were rejected by counsel for the other parties on the ground that the hearings would be completed outside of the six month statutory timeframe for completing the hearing and for the Tribunal to render a decision.

II. The Tribunal dismissed the motions

107. The Tribunal dismissed the motions on the basis that an adjournment would cause the Tribunal to miss a six-month statutory deadline for rendering a decision.

108. Section 59(1) of O. Reg. 359/09 provides that if the Tribunal has not rendered a decision within six months from the day that a notice of a request for hearing is filed by an appellant with the Tribunal, the Director's decision is deemed to be confirmed.[62]

109. In dismissing the motion to adjourn, the Tribunal held that:

[62] Renewable Energy Approvals under Part V.0.1 of the Act, O Reg 359/09 at s. 59(1) ["O. Reg. 359/09"] .

> 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. While the Tribunal will often make minor adjustments to suit the parties, counsel and witnesses, a lengthy adjournment should only be granted when necessary to secure a fair and just determination.
>
> …
>
> The moving parties did not pursue, in oral argument, the grounds relating to the alleged unconstitutionality of the six month deadline or the issue relating to Dr. King's evidence.

III. Dismissing the motions amounts to a breach of natural justice and procedural fairness

110. The Appellants submit that the Tribunal erred in law is dismissing the motions. The Tribunal breached principles of natural justice and procedural fairness.

111. The Tribunal did not provide any analysis of the importance of Dr. King's evidence to the appeal and as a basis for the motion to adjourn. The Tribunal merely stated that the Appellants did not address the point in oral submissions.

112. The Appellants, however, addressed the matter at length in its Notice of Motion dated September 4, 2013:[63]

> **Adjournment required to have all relevant evidence before the Tribunal**
>
> 17. According to s. 142.1 of the *Environmental Protection Act ("EPA")*, an appeal of the approval can be taken on only two grounds. The appellant must show that the renewable energy project will cause:
>
> (a) serious harm to human health, or
>
> (b) serious and irreversible harm to plant life, animal life or the natural environment.

[63] *Supra* note 14.

18. The Appellants have taken the position that this test violates section 7 of the *Charter* as it permits those violations of the Appellants' right to security of the person that fall short of the "serious harm" threshold.

19. The Tribunal's decision in *Erikson v. Director, Ministry of the Environment* (July 18, 2011) Case Nos.:10-121/10-122 at pg. 196) recognizes that there is currently a lack of peer-reviewed science on either side of the question as to whether wind turbines cause adverse health effects. The Tribunal stated that:

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

20. The Chief Medical Officer of Health for Ontario, Dr. King, exercised her statutory power to investigate a risk to the public health in a May, 2010 report titled, "The review of reports from jurisdictions other than Ontario and identified a "key data gap" in the existing research:

> The review also identified that sound measurements at residential areas around wind turbines and comparisons with sound levels around other rural and urban areas, to assess actual ambient noise levels prevalent in Ontario is a key data gap that could be addressed. An assessment of noise levels around wind power developments and other residential environments, including monitoring for sound level compliance, is an important prerequisite to making an informed decision on whether epidemiological studies looking at health outcomes will be useful.

21. The Drennan Appellants, in an application before the Superior Court of Justice (Court File No.: CV-11-434766), issued summons to Dr. King returnable October 27, 2011, seeking to elicit evidence from Dr. King on the data gaps and follow-up studies referenced in her May, 2010 report. Dr. King failed to attend for the examination and failed to bring a motion to quash the summons. A motion was brought by the Drennan Appellants to compel Dr. King's attendance. The issue of Dr. King's attendance for examination will be argued before the Ontario Court of Appeal on December 18, 2013.

22. The Appellants submit that Dr. King's evidence will be relevant to whether or not section 142.1 of the *EPA* violates the Appellants section 7 *Charter* rights.

113. The Tribunal's failure to address these submissions in its reasons, on its own, amounts to a breach of natural justice and procedural fairness.

114. In determining whether there is a breach of natural justice or procedural fairness, a court is not required to engage in an analysis of the appropriate standard of review. In *Kalin v. Ontario College of Teachers*, the Superior Court held that "where there has been a breach of natural justice or procedural unfairness, it is not necessary to engage in an analysis of the appropriate standard of review. Decisions which do not comply with the rules of procedural fairness and natural justice cannot stand".[64]

115. The common law duty of procedural fairness is aimed at ensuring that "administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker".[65]

116. In *Baker v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada ruled that there are five factors that should be considered in determining the content of the duty of fairness. The Court ruled that the factors are non-exhaustive and that

> [t]he values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision".66

117. The refusal of the adjournment motion directly impaired the Appellants' ability to present their case fully and fairly by depriving them of their ability to call Dr. King's evidence. Dr.

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[64] *Kalin v. Ontario College of Teachers*, 75 OR (3d) 523; 254 DLR (4th) 503, 2005 CanLII 18286 (ON SCDC) at para. 9 [*Kalin*].
[65] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193, 1999 CanLII 699 (SCC) at para 22 [*Baker*].
[66] *Baker* at para 28.

King's evidence was central to the issues before the Tribunal. For these reasons, the Appellants submit that the dismissal of the motions constitutes a breach of the common law duty of procedural fairness.

118. A consolidation or a hearing of the matters back-to-back would have allowed the Appellants to reduce their costs by minimizing the costs of travel, for counsel and witnesses, and spreading costs across multiple parties, thereby reducing the burden borne by each party.

119. As noted in *Baker*, above, it is a principle of natural justice that the social context of the decision must be taken into account. The social context of this appeal is that individual landowners are going to court against a well-resourced energy company that is seeking to change the status quo.

120. The discrepancy in resources between the parties should be taken into account in deliberating on the motion to consolidate. This is particularly so given that Rule 105 of the Rules of Practice Directions of The Environmental Review Tribunal directs the Tribunal to consider the public interest in the delivery of "just, timely and cost effective" services determining whether to grant a motion to adjourn.

C. The Tribunal erroneously ruled that it does not have jurisdiction to consider whether the Director's decision complies with the *Charter*

I. *The Tribunal has jurisdiction to determine whether the Director's decision complies with the* Charter

121. At the Tribunal, the Appellants claimed that (i) section 47.5 of the *EPA* is constitutionally invalid; (ii) the Director's application of section 47.5 of the *EPA* violated the *Charter*; and (iii) section 54 of O. Reg. 359/09 violated the *Charter*. The Respondents brought a motion to strike the Appellants' constitutional claims.

122. Ultimately, the Tribunal ruled that it does not have jurisdiction to consider the constitutional validity of various aspects of the Director's decision.[67] The Tribunal held that it had a limited scope of review jurisdiction pursuant to section 145.2.1(2) of the *EPA* which implicitly suggests that it does not have the power to determine the constitutionality of the decisions of the Director made pursuant to section 47.5 of the *EPA.* According to the Tribunal:

> 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.

123. The jurisdiction of the Tribunal to review the decision of the Director is found in section 145.2.1 of the *EPA*. The section reads as follows:

> What Tribunal must consider
>
> (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.

124. Section 145.2.1(2) of the *EPA* explicitly obligates the Tribunal to "review the decision of the Director". The section uses the compulsory language "shall". While the provision limits the manner in which the Director's decision (i.e. the REA) can be revoked or varied,

[67] This motion was brought in respect of the Dixon-Ryan Appeal only. In respect of the Drennan Appeal and the Kroeplin Appeal, the parties agreed to limit the Tribunal's review powers based on the oral decision provided by the Tribunal on September 11, 2013, without prejudice to the appellants to raise the issue on appeal. The reasons for decision were issued on November 22, 2013.

it is clear from the wording of section 145.2.1 that the Tribunal **must** review the decision of the Director. Obviously, the statutory conditions found in section 145.2.1(a) and (b) can only be measured as against the REA issued. Put another way, the issue of serious harm to human health or irreversible harm to the natural environment can only be analyzed within the context of the actual REA issued and the project proposed.

125. It is respectfully submitted that section 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.

i. The broader approach – the Supreme Court of Canada's decision in *Conway*

126. The jurisprudential evolution in respect of an administrative tribunal's ability to determine *Charter* issues culminated with the Supreme Court of Canada's decision in *R. v. Conway*.[68] In *Conway*, the Supreme Court of Canada merged three distinct strands of jurisprudence and consolidated them into one test, irrespective of whether relief is sought pursuant to section 24(1) of the *Charter* or section 52 of the *Constitution Act*.

127. In determining whether a Tribunal has the power to address constitutional questions and grant particular remedies, a Tribunal must now engage in the two-part *Conway* test. The first part of the test examines whether the Tribunal has the power to resolve constitutional questions. The Supreme Court has articulated this part of the test as follows:

> 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

[68] *R. v. Conway*, [2010] S.C.J. No .22

> 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[69]

128. The second part of the *Conway* test requires the Tribunal to determine whether it can grant the particular remedy sought. The Supreme Court described this part of the test as follows:

> Once the threshold question has been resolved in favour of Charter jurisdiction, the remaining question is whether the tribunal can grant the particular remedy sought, given the relevant statutory scheme. Answering this question is necessarily an exercise in discerning legislative intent. On this approach, what will always be at issue is whether the remedy sought is the kind of remedy that the legislature intended would fit within the statutory framework of the particular tribunal. Relevant considerations in discerning legislative intent will include those that have guided the courts in past cases, such as the tribunal's statutory mandate, structure and function (Dunedin). [70]

129. In *Conway*, the Supreme Court of Canada broadened the narrower language used in *Nova Scotia v. Martin*[71]. A broader approach was necessary in order to ensure that there was not a bifurcated process where constitutional issues are addressed by the courts and other issues are addressed by the administrative Tribunal:

> Over two decades of jurisprudence has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for **bifurcated proceedings between superior courts and administrative tribunals** (Douglas College, at pp. 603-4; Weber, at para. 60; Cooper, at para. 70; Martin, at para. 29). The denial of early access to remedies is a denial of an appropriate and just remedy, as Lamer J. pointed out in Mills, at p. 891**. And a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction** (Weber; Regina Police Assn.; Quebec (Commission des droits de la personne et des droits de la jeunesse); Quebec (Human Rights Tribunal); Vaughan;

[69] *R. v. Conway* [2010] 1 S.C.R. 765 at para. 81
[70] *R. v. Conway* [2010] 1 S.C.R. 765 at para. 82
[71] *Nova Scotia v. Martin* [2003] 2 S.C.R. 504

> Okwuobi. See also Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 49.).[72] (emphasis added)

130. As such, the Supreme Court of Canada articulated a broader test that asks whether a Tribunal can address issues of law and whether *Charter* jurisdiction has been excluded by statute. Constitutional questions "whose essential factual character falls within the tribunal's specialized statutory jurisdiction" fall within the jurisdiction of the administrative Tribunal. The *Charter* issues are not limited to questions of law in relation to a particular provision.

131. It is respectfully submitted that the *Conway* decision has broadened the jurisdiction of administrative tribunals such that tribunals are no longer limited by the language in *Martin*. Instead, an administrative Tribunal has the power to address constitutional issues if it can decide questions of law, the power to address constitutional questions has not been explicitly taken away by parliament, and "whose essential factual character falls within the tribunal's specialized statutory jurisdiction".

132. As the Superior Court of Justice found in *Drennan v. K2 Wind Ontario Inc.,* the Tribunal clearly can decide issues of law and there is no statutory provision in the *EPA* that explicitly removes the jurisdiction of the Tribunal to review *Charter* questions.[73] The essential factual character of the constitutional questions, the granting of the REA and the appeal process provided by the *EPA*, fall squarely within the statutory jurisdiction of the Tribunal.

133. Furthermore, the Tribunal clearly has jurisdiction over the remedy sought by the Appellants, namely, the authority to revoke the three REA's at issue.

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[72] *R. v. Conway* [2010] 1 S.C.R. 765 at para. 79
[73] *Drennan v. K2 Wind Ontario Inc*., 2013 ONSC 2831 (CanLII) at para. 56 to 57

134. Adopting the Supreme Court of Canada's approach in *Conway*, there can be little doubt that the Tribunal has the power to review the constitutionality of section 47.5 of the *EPA*.

ii. The Tribunal's decision implies a bifurcated process

135. In the case of *Drennan v. K2 Wind Ontario Inc.*, the same *Charter* issues raised in the proceeding below were raised by the plaintiffs in the Superior Court of Justice. The Drennan plaintiffs sought an injunction preventing the Director from issuing a REA on the grounds that section 47.5 of the *EPA* violated their section 7 *Charter* rights. This is the same argument the Respondents argued is not within the jurisdiction of the Tribunal to review. In the *Drennan* decision, Justice Grace of the Superior Court of Justice stayed the plaintiffs' action because, *inter alia*, the *Charter* issues should be raised before the Tribunal:

> The Legislature has assigned authority to review a decision of the Director to an administrative tribunal, not the court. Except in rare circumstances, that allocation of responsibility will be respected. In *C.B. Powell Ltd. v. Canada (Border Services Agency),* Stratas J.A. wrote:
>
> …absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted…
>
> Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, so long as that process allows the issues to be raised and an effective remedy to be granted.
>
> The Drennans submit an exception should be made because the process is fatally flawed. I disagree for these reasons.[74]

[74] *Drennan v. K2 Wind Ontario Inc*.,, 2013 ONSC 2831 (CanLII) at para. 36

136. In *Drennan*, the Court held that its jurisdiction should be used only sparingly, where it can be shown that the administrative Tribunal lacks the power to review the constitutional issues raised, or lacks the ability to grant the constitutional remedy sought. This reasoning is consistent with the Supreme Court of Canada's approach in *Conway* and the desire to avoid bifurcated proceedings. If the Tribunal's ruling is not overturned, it would require the appellants to commence an application in Superior Court to have their constitutional challenges heard and to continue with Tribunal hearings for non-constitutional legal challenges. Such a bifurcated process would run contrary to the Supreme Court of Canada's decision in *Conway*.

II. The granting of a REA pursuant to section 47.5 of the EPA violates the Appellants section 7 Charter rights

i. The process for granting a REA pursuant to section 47.5 of the EPA engages section 7 of the Charter.

137. Under the *EPA,* a wind project proponent can make an application to the Director of the Ministry of the Environment for a Renewable Energy Approval ("REA") to operate a wind facility. *EPA* Regulation 359/09 has a comprehensible table in respect of all material that a wind project proponent must submit in respect of an application for a REA. The table indicates that a wind power proponent is not required to submit any reports regarding any possible adverse health impacts associated with living within close proximity to wind turbines.[75]

138. Once the application is received and deemed complete, the application will be reviewed by the Director. Pursuant to section 47.5(1) of the *EPA*, the Director may grant an application

[75] Table 1 to *Environmental Protection Act*, Ontario Regulation 359/09, Tab 50 of Appellants' Appeal Book and Compendium

for the REA if, in the opinion of the Director, it is in the "public interest" to do so. While there is a public consultation phase, where comments can be submitted to the Director in respect of the proposed project, the Director does not have the ability to adjudicate questions raised in the public submissions regarding the constitutionality of the REA process, nor is the Director required to provide written reasons regarding, what, if any, information was considered in the issuing of the REA.

139. The Appellants submit that the government has been provided with cogent evidence that wind turbines have raised significant health concerns for those individuals that live in close proximity. In fact, all of the epidemiological studies performed to date show an association between wind turbines and some form of human distress.[76] Despite these facts, the Ontario government has created a legislative scheme that permits the siting of wind turbines in close proximity to homes without requiring the project owner to provide any evidence whatsoever that they will cause no harm.

140. The Appellants submit that a legislative scheme that creates a risk to health and then places the burden on the citizen to prove the health risks profoundly impacts the Appellants' psychological integrity. The Supreme Court has held that state action that causes effects on a person's psychological integrity, short of a diagnosable psychiatric illness implicates section 7.

> For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.[77]

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[76] *Supra* note 55 at page 115

[77] *New Brunswick (Minister of Health and Community Services) v.G. (J.) [J.G.]*, [1999] 3 S.C.R. 46 at para 60,

141. The Appellants submit that they have a right to a healthy living environment, which includes the right to rest, sleep and tranquility in their home environment and that this right is fundamental to the physical and moral integrity of the individual. Government action that arbitrarily interferes with this right, without engaging in any analysis of the associated risks that they are placing on Ontario residents will cause distress, anxiety, and a disruption of family, social life and work, and impacts the psychological integrity of a person of reasonable sensibility.

142. Furthermore, the legislative scheme for wind turbines creates a compliance regime that does not permit the MOE to take any steps to address or ameliorate health complaints. The MOE protocol is only concerned with noise levels irrespective of complaints of adverse health effects. This added disregard for the health of the Appellants only heightens the infringement on the psychological integrity of the Appellants.[78]

143. The Tribunal, in the case of *Erickson v. Director, Ministry of the Environment,* found that wind turbines do cause harm to humans.

> This case has successfully shown that the debate should not be simplified to one about whether wind turbines can cause harm to humans. The evidence presented to the Tribunal demonstrates that they can, if facilities are placed too close to residents. The debate has now evolved to one of degree. The question that should be asked is: What protections, such as permissible noise levels or setback distances, are appropriate to protect human health?[79]

144. The answer to the question "what are the appropriate protections to protect human health" is simply: "we do not know". As set out above, at paragraphs 77-80, Dr. Michaud identifies that there is a knowledge gap surrounding the dose response relationship between wind turbines and human health. Medical science is incapable of establishing safe sound limits

[78] 2011 Compliance Protocol for Wind Turbines, Exhibit 31 at Kroeplin Tribunal Hearing, Tab 38 of Appellants' Appeal Book and Compendium
[79] *Erickson v. Director, Ministry of the Environment*, Case Nos.: 10-121/10-122 at page 206

or distances at which human health is unaffected by these large scale industrial projects. The Ontario government's solution is to approve these projects without understanding the risks, and to place the onus on the resident to show that the project will cause harm when both the federal and provincial governments have no understanding of the nature and severity of the harm which will occur.

145. The Appellants respectfully submit that a process for granting REAs, which does not require any form of study or report from the wind developer as to the associated health risks, violates the Appellants' right to security of the person.

ii. The deprivation to the appellants is not in accordance with the principles of fundamental justice.

146. The Appellants further submit that this deprivation of their rights is not in accordance with the principles of fundamental justice. The Courts have recognized that the principles of fundamental justice encompass natural justice and the duty of fairness. While there is no exhaustive catalogue of the principles of fundamental justice, the following factors are considerations in determining what procedural protections must be provided:

> (1) the nature of the decision made and the procedures followed in making it, that is, "the closeness of the administrative process to the judicial process"; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself.[80]

147. The Appellants submit that the highly arbitrary process which the Director employs to grant the REA is not in accordance with the principles of fundamental justice and does not contain the hallmarks of natural justice. There is no definition or criteria for the exercise of

[80] *Suresh v. Canada (M.C.I.)*, [2002] 1 S.C.R. at para 115

discretion in the "public interest." The Director exercises his or her discretion without regard to evidence that industrial wind turbine projects erected within close proximity to residences could cause harm to the public and in the absence of scientific consensus that the wind turbine projects are not harmful to human health.

148. In determining whether or not the Director exercises his or her discretion in accordance with fundamental justice, the following statement from the Court in *Barbra Schlifer Commemorative Clinic* provides guidance in assessing whether or not a principle is one of fundamental justice.

> For a principle to be one of fundamental justice, it must count among the basic tenets of our legal system: ... it must generally be accepted as such among reasonable people. As explained by the majority in *Malmo-Levine*, 2003 SCC 74 (CanLII), [2003] 3 S.C.R. 571, at para. 113:
>
> …
>
> Thus, the formal requirements for a principle of fundamental justice are threefold. First, it must be a legal principle, second, the reasonable person must consider it as vital to our societal notion of justice which implies a significant societal consensus. Third, it must be capable of being identified with precision and applied in a manner that yields predictable results.[81]

149. The Appellants submit that just as the MOE invoked the precautionary principle for offshore wind turbines because there is a lack of scientific evidence on the environmental impacts (including on the health of fish), the precautionary principle must also be invoked in respect of the Appellants health given that the Canadian government has indicated there is a lack of scientific evidence regarding how wind turbines affect human health.

150. The Appellants submit that a reasonable person would consider the precautionary principle to be vital to our "societal notion of justice". The Supreme Court of Canada has recognized the precautionary principle in the context of environmental harm and has characterized it as an:

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[81] *Barbra Schlifer Commemorative Clinic v. HMQ Canada*, 2012 ONSC 5271 at para 59

> emerging international law principle [that] recognizes that since there are inherent limits in being able to determine and predict environmental impacts with scientific certainty, environmental policies must anticipate and prevent environmental degradation.[82]

151. In the context of health, the precautionary principle was described by the court in *Canadian Blood Services v. Freeman*, as "that in the face of some evidence of a potential health hazard, we need to implement policies to avoid that health hazard, even though we may not have complete knowledge of the hazard."[83]

152. It would be inconsistent with the principles of fundamental justice to restrict the precautionary principle to environmental harm, or to deny its application to human health. The *EPA* legislative scheme does just this: it creates a process that denies the application of the precautionary principle. It permits the approval of a REA in the face of an admitted knowledge gap regarding the dose-response relationship between noise emitted from industrial wind turbines and its effect on human health, and in circumstances where the Tribunal jurisprudence acknowledges harm to human health from wind turbines.

153. The Appellants submit that section 47.5 of the *EPA* is unconstitutional, and as such the Director's decision made thereunder should be revoked.

D. **The Tribunal appeal standard breaches section 7 of the *Charter***

I. Introduction

154. Pursuant to section 142.1 of the *EPA*, an appellant who seeks to revoke the decision of the Director to issue a REA must prove the following:

> … that engaging in the renewable energy project in accordance with the renewable energy approval will cause,

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[82] *Castonguay Blasting Ltd. v. Ontario (Environment)*, [2013] 3 SCR 323, 2013 SCC 52 (CanLII) at para 20
[83] *Canadian Blood Services v. Freeman*, [2010] O.J. No. 3811 at para 27

(a) serious harm to human health; or

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

155. In the proceedings before the Tribunal, the Appellants argued that the test pursuant to section 142.1 of the *EPA* violated the Appellants' constitutional rights pursuant to section 7 of the *Charter*.

156. The Appellants' made the following submissions, *inter alia*:

a. in order for section 7 to be engaged an appellant must only show that it will interfere with bodily integrity or cause serious state-imposed psychological stress – it does not require that the higher standard of "serious harm" be proven; and

b. the interference with bodily integrity must only be non-trivial and not "serious" in order to engage section 7.

157. In each of the three appeals, the Tribunal made an error of law in ruling that section 142.1 of the *EPA* does not violate section 7 of the *Charter*.

i. The "serious harm to health" threshold violates section 7 of the *Charter*

158. As outlined above, 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.[84]

159. During cross examination, both Dr. McCunney and Dr. Moore agreed that the scientific literature showed an association between industrial wind turbine noise emissions and annoyance. The Appellants submit that the World Health Organization recognizes

[84] *R. v. Morgentaler*, [1988] 1 SCR 30 (SCC) at para 57

annoyance as an adverse health effect and that this annoyance is an indirect pathway to psychological stress, which leads to the symptoms expressed by the witnesses of increased blood pressure, chest palpitations and chest pressure, ringing of the ears, and cognitive dysfunction. The Appellants rely on the work done by the World Health Organization that recognizes that exposure to sound leads to an indirect pathway of psychological stress.[85]

160. It is respectfully submitted that the St. Colubman 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 that to rise to the level of "serious" harm.

162. For example, in *Chaoulli v. Quebec (Attorney General)*, the court found that the denial of health care for a condition that is clinically significant to one's current and future health engages the protection of section 7.[86] The Appellants submit that the threshold envisioned by the Court in *Chaoulli* is simply "serious" enough to warrant clinical attention, rather than being life-altering or life-threatening.

163. This proposition is supported by case law in which courts have found that the threshold for violations of physical integrity is not as high as the threshold for psychological harm, and that state action that has the likely effect of impairing a person's health engages security of

[85] WHO Occupation and Community Noise (February 2001).
[86] *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 (CanLii) at para 123

the person.[87] It should be noted that the definition in *Morgentaler* contemplated simple "interference with bodily integrity" or "serious psychological harm" (emphasis added.).[88]

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*.

ii. The deprivation of the Appellants' rights is not in accordance with the principles of fundamental justice.

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. As noted above, the Courts have recognized that the principles of fundamental justice encompass natural justice and the duty of fairness.

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 at paragraphs 143, 145, and 147-149, the Appellants submit that the "precautionary principle" should be included as a tenet of fundamental justice. The

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[87] *R v Monney*, [1999] 1 SCR 652, 1999 CanLII 678 (SCC) at para 55; see also *R v Stillman*, [1997] 1 SCR 607, 1997 CanLII 384 (SCC) at paras 91-92, *Trang v. Alberta*, 2006 ABQB 834 (CanLII) at para 97

[88] *Morgentaler*, at para 46

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.

iii. The Tribunal erred in finding that the evidence of the post-turbine witnesses did not constitute serious harm.

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.

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.

172. The Supreme Court of Canada in the case of *Farrell v. Snell*, held that inferences can be drawn from the evidence presented before the trier of fact for a finding of causation even

where causation cannot be proved with scientific certainty. In determining that inferences in respect of causation are permissible, the Court stated:

> These references speak of the shifting of the secondary or evidential burden of proof or the burden of adducing evidence. I find it preferable to explain the process without using the term secondary or evidential burden. It is not strictly accurate to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is a matter of weighing evidence. The defendant runs the risk of an adverse inference in the absence of evidence to the contrary. This is sometimes referred to as imposing on the defendant a provisional or tactical burden. See Cross, op. cit., at p. 129. In my opinion, this is not a true burden of proof, and use of an additional label to describe what is an ordinary step in the fact-finding process is unwarranted.
>
> The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced.[89]

173. Additionally, Justice Sopinka, writing for the court stated that, "causation need not be determined by scientific precision" and in quoting Lord Salmon stated "... essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory."[90]

174. In the case of *Fisher v Victoria Hospital*, the Ontario Court of Appeal stated the following:

> Whatever test for causation is applied, it is clear that scientific precision is not required to support a finding of causation: Snell, at p. 328; see also: Aristorenas v. Comcare Health Services 2006 CanLII 33850 (ON CA), (2006), 83 O.R. (3d) 282 (C.A.). Accordingly, in medical malpractice cases, an expert capable of providing a firm opinion that supports the plaintiff's theory of causation is not required: Snell, at p. 330. Rather, the trial judge is entitled to consider all the facts and circumstances established by the evidence at trial, and, where appropriate, to draw an inference of causation through the application of

[89] *Snell v. Farrell*, [1990] 2 SCR 311 at para 32-33; *Athey v Leonati*, [1996] 3 SCR 458 at para 16
[90] *Ibid at para 29*

> reason and common sense. This approach has been termed "the robust and pragmatic approach"… [91]

175. In summary, the Appellants respectfully submit that the Tribunal's determination that expert evidence of a medical diagnosis was required to prove causation was an error in law. The Appellants submit the evidence of the post-turbine witnesses satisfied the test for causation as outlined in the cases above.

PART V: ORDER SOUGHT

176. The Appellants respectfully request that this Honourable Court allow the appeal and revoke the decisions of the Director, Ministry of the Environment, to issue:

    a. REA7042-96FQB7 to St. Columban Energy Inc.;
    b. REA 3259-98EQ3G to K2 Wind Ontario Inc. operating as a general partner of and on behalf of K2 Wind Ontario Limited Partnership; and REA
    c. REA 4544-9B7MYH to SP Armow Wind Ontario GP Inc. as general partner for and on behalf of SP Armow Wind Ontario LP.

177. The Appellants further request that this Honourable Court order costs in the herein matter.

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[91] *Fisher v Victoria Hospital*, 2008 ONCA 759 at para 54, *Clements v Clements*, 2012 SCC 32 at paras 9-11, 38, 43-44, 47-49

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Toronto this 21st day of July, 2014.

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SCHEDULE "A" - AUTHORITIES

1. *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town),* 2001 SCC 40 (CanLII)

2. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193, 1999 CanLII 699 (SCC)

3. *Barbra Schlifer Commemorative Clinic v. HMQ Canada*, 2012 ONSC 5271

4. *Bedford v. Canada (Attorney General)*, 2012 ONCA 186 (CanLII)

5. *Blencoe v British Columbia (Human Rights Commission),* 2000 SCC 44 (CanLII)

6. *Castonguay Blasting Ltd. v. Ontario (Environment)*, [2013] 3 SCR 323, 2013 SCC 52 (CanLII)

7. *Canadian Blood Services v. Freeman*, [2010] O.J. No. 3811

8. *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 (CanLii)

9. *Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 OR (3d) 487, [1998] OJ No 2681 (QL)

10. *Drennan v. K2 Wind Ontario Inc*., 2013 ONSC 2831 (CanLII)

11. *Erickson v. Director, Ministry of the Environment,* Case Nos.: 10-121/10-122

12. *Gosselin v Québec (Attorney General),* 2002 SCC 84 (CanLII)

13. *Housen v. Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33 (CanLII)

14. *Kalin v. Ontario College of Teachers*, 75 OR (3d) 523; 254 DLR (4th) 503, 2005 CanLII 18286 (ON SCDC)

15. *New Brunswick (Minister of Health and Community Services) v.G. (J.) [J.G.]*, [1999] 3 S.C.R. 46

16. *Nova Scotia v. Martin* [2003] 2 S.C.R. 504

17. *R. v. Conway*, [2010] S.C.J. No .22

18. *R. v. Morgentaler*, [1988] 1 SCR 30 (SCC)

19. *R v Monney,* [1999] 1 SCR 652, 1999 CanLII 678 (SCC)

20. *R v Stillman*, [1997] 1 SCR 607, 1997 CanLII 384 (SCC)

21. *R v White*, [1999] 2 SCR 417, 1999 CanLII 689 (SCC)

22. *Sander v. Bavaria Windpark GmbH & Co. KG*, 27 U 342/11 and 27 U50/12 , January 31, 2014

23. Schachter v Canada, [1992] 2 SCR 679

24. *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177, 1985 CanLII 65 (SCC)

25. Supreme Court of Justice Judgment, Court File No.: 2209/08.0TBTVD.L1.S1, May 30, 2013

26. *Suresh v. Canada (M.C.I.)*, [2002] 1 S.C.R.

27. *Trang v. Alberta*, 2006 ABQB 834 (CanLII)

SCHEDULE "B" - LEGISLATION

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11

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.

…

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

…

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes

(a) the Canada Act 1982, including this Act;

(b) the Acts and orders referred to in the schedule; and

(c) any amendment to any Act or order referred to in paragraph (a) or (b).

Environmental Protection Act, RSO 1990, c E. 19

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,

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

(b) refuse to issue or renew a renewable energy approval. 2009, c. 12, Sched. G, s. 4 (1).

Terms and conditions

(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. 2009, c. 12, Sched. G, s. 4 (1).

Other powers

(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. 2009, c. 12, Sched. G, s. 4 (1).

Same

(4) A renewable energy approval is subject to any terms and conditions prescribed by the regulations. 2009, c. 12, Sched. G, s. 4 (1).

…

Hearing re renewable energy approval

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. 2009, c. 12, Sched. G, s. 9.

Same

(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). 2009, c. 12, Sched. G, s. 9.

Grounds for hearing

(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. 2009, c. 12, Sched. G, s. 9.

…

Hearing required under s. 142.1

145.2.1 (1) This section applies to a hearing required under section 142.1. 2009, c. 12, Sched. G, s. 13.

What Tribunal must consider

(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. 2009, c. 12, Sched. G, s. 13.

Onus of proof

(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). 2009, c. 12, Sched. G, s. 13.

Powers of Tribunal

(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. 2009, c. 12, Sched. G, s. 13.

Same

(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). 2009, c. 12, Sched. G, s. 13.

Deemed confirmation of decision

(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. 2009, c. 12, Sched. G, s. 13.

…

Appeals from Tribunal

145.6 (1) Any party to a hearing before the Tribunal under this Part may appeal from its decision or order on a question of law to the Divisional Court in accordance with the rules of court. 2005, c. 12, s. 1 (28).

Appeal to Minister

(2) A party to a hearing before the Tribunal under this Part may, within 30 days after receipt of the decision of the Tribunal or within 30 days after final disposition of an appeal, if any, under subsection (1), appeal in writing to the Minister on any matter other than a question of law and the Minister shall confirm, alter or revoke the decision of the Tribunal as to the matter in appeal as the Minister considers in the public interest. 2005, c. 12, s. 1 (28).

Decision of Tribunal not automatically stayed on appeal

(3) An appeal of a decision of the Tribunal to the Divisional Court or to the Minister under this section does not stay the operation of the decision, unless the Tribunal orders otherwise. 2005, c. 12, s. 1 (28).

Divisional Court or Minister may grant or set aside stay

(4) If a decision of the Tribunal is appealed to the Divisional Court or to the Minister under this section, the Divisional Court or the Minister may,

(a) stay the operation of the decision; or

(b) set aside a stay ordered by the Tribunal under subsection (3). 2005, c. 12, s. 1 (28).

***Renewable Energy Approvals under Part V.0.1 of the Act*, O Reg 359/09**

Specified wind turbines, prohibition and requirements

54. (1) Subject to subsections (1.1) to (2), no person shall construct, install or expand a wind turbine that meets the following criteria unless the centre of the base of the wind turbine is located at a distance of at least 550 metres from all noise receptors:

1. The wind turbine has a name plate capacity of greater than or equal to 50 kW.
2. The wind turbine is not located in direct contact with surface water other than in a wetland.
3. The wind turbine has a sound power level that is greater than or equal to 102 dBA. O. Reg. 333/12, s. 16.

(1.1) Subsection (1) applies in respect of a noise receptor described in paragraph 4 of subsection 1 (4) only if the noise receptor is specified in the environmental compliance approval or the renewable energy approval. O. Reg. 333/12, s. 16.

(1.2) If the person proposing to construct, install or expand the wind turbine issued or published a notice of completion in respect of the renewable energy generation facility pursuant to Ontario Regulation 116/01 (Electricity Projects) made under the *Environmental Assessment Act*, subsection (1) does not apply in respect of a noise receptor that did not exist on the day on which the notice was issued or published. O. Reg. 333/12, s. 16.

(1.3) Subsection (1) does not apply in respect of a noise receptor that did not exist on the day the person proposing to construct, install or expand the wind turbine submitted an application for the issue of an environmental compliance approval or a renewable energy approval in respect of the renewable energy project. O. Reg. 333/12, s. 16.

(1.4) If the person proposing to construct, install or expand the wind turbine has not yet submitted an application for the issue of an environmental compliance approval or the issue of a renewable energy approval in respect of the renewable energy project, has published or posted notice of a draft site plan in accordance with subclause 54.1 (c) (i) or (ii) and the following conditions are met, subsection (1) does not apply in respect of a noise receptor that did not exist on the day before the person first published or posted the notice of the draft site plan:

1. If the construction, installation or expansion is on private land, the person must have obtained property rights sufficient to permit the construction, installation or expansion of all of the wind turbines that are proposed to form part of the wind facility.

2. The person must submit an application for the issue of an environmental compliance approval or an application for the issue of a renewable energy approval in respect of the renewable energy project within 18 months after the publication or posting of the notice.

3. The person must meet the requirements set out in section 54.1 in respect of each draft site plan that is made available.

4. If the person proposes to change the location of one or more wind turbines, the person must, within the 18-month period mentioned in paragraph 2, prepare an updated draft site plan and meet the requirements set out in section 54.1 in respect of each updated draft site plan.

5. If the notice of a draft site plan or updated draft site plan is published or posted after the day Ontario Regulation 333/12 made under the Act came into force, the person must prepare a draft report 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 and make the draft report available along with the draft site plan in accordance with clauses 54.1 (d) and (e). O. Reg. 333/12, s. 16.

(1.5) Subsection (1) does not apply in respect of a noise receptor that did not exist on the day before the person proposing to construct, install or expand the wind turbine made the location of the proposed wind turbine available to the public by publishing the location in a newspaper or on the person's website, if the person has a website, or by disclosing the location at a public meeting required to be held under section 16, if the following conditions are met:

1. The day the location information was made available to the public must have been a day before subsection 1 (1) of Ontario Regulation 521/10 made under the Act came into force.

2. The person must submit an application for the issue of an environmental compliance approval or a renewable energy approval in respect of the renewable energy project within six months after the day subsection 1 (1) of Ontario Regulation 521/10 made under the Act came into force or within a longer period of time as may have been specified by the Director. O. Reg. 333/12, s. 16.

(1.6) Revoked: O. Reg. 333/12, s. 16.

(2) Subsection (1) does not apply in respect of a wind turbine that is constructed, installed or expanded as part of a Class 4 or 5 wind facility if, as 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). O. Reg. 359/09, s. 54 (2); O. Reg. 231/11, s. 5 (1).

(3) If the issue of a renewable energy approval or an environmental compliance approval is required in respect of the construction, installation or expansion of one or more wind turbines mentioned in subsection (1) in a circumstance described in subsection (4), the person who is constructing, installing or expanding a wind turbine shall submit, as part of the application for the issue of the renewable energy approval or environmental compliance approval, 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. O. Reg. 231/11, s. 5 (2).

(4) Subsection (3) applies if,

(a) one or more of the wind turbines has a sound power level greater than 107 dBA;

(b) the application is in respect of one or more wind turbines that are to form part of a renewable energy generation facility consisting of 26 or more wind turbines, any of which has a sound power level greater than or equal to 102 dBA and less than 107 dBA; or

(c) the application is in respect of a renewable energy generation facility that would, once constructed, installed or expanded, result in 26 or more wind turbines located within a three kilometre radius of any noise receptor. O. Reg. 359/09, s. 54 (4).

(5) For the purposes of clause (4) (c), the number of wind turbines within a three kilometre radius of a noise receptor shall be calculated by determining the sum of,

(a) the wind turbines with a sound power level equal to or greater than 102 dBA that the person proposes to construct, install or expand as part of the facility;

(b) any wind turbines with a sound power level equal to or greater than 102 dBA that have already been constructed or installed;

(c) any wind turbines with a sound power level equal to or greater than 102 dBA that have not yet been constructed or installed but in respect of which a renewable energy approval or environmental compliance approval has been issued;

(d) any wind turbines with a sound power level equal to or greater than 102 dBA that have been proposed to be constructed or installed and,

(i) in respect of which notice of the proposal for the issue of a renewable energy approval or environmental compliance approval has been posted on the environmental registry established under section 5 of the *Environmental Bill of Rights, 1993*, and

(ii) in respect of which the proposal has not been approved or refused under the Act; and

(e) any other wind turbines with a sound power level equal to or greater than 102 dBA that have been proposed to be constructed or installed and,

(i) are identified in an environmental screening report or environmental review report that is made available under the Environmental Screening Process pursuant to Ontario Regulation 116/01 (Electricity Projects) made under the *Environmental Assessment Act*,

(ii) are identified in a draft site plan of the project location at which the renewable energy project in respect of a wind facility will be engaged in that is made available or distributed in accordance with section 54.1, unless paragraph 2 of subsection (1.2) has ceased to apply under subsection (1.4), or

(iii) are identified in information made available to the public by publishing the locations of the wind turbines in a newspaper or on the person's website, if the person has a website, or by disclosing the locations at a public meeting required to be held under section 16, if the day the location information was made available to the public was before the day subsection 1 (1) of Ontario Regulation 521/10 made under the Act comes into force, unless paragraph 4 of subsection (1.2) has ceased to apply under subsection (1.5).O. Reg. 359/09, s. 54 (5); O. Reg. 521/10, s. 31 (3); O. Reg. 231/11, s. 5 (3, 4); O. Reg. 195/12, s. 20 (5, 6).

…

Date of deemed confirmation

59. (1) Subject to subsections (2) and (3), the prescribed period of time for the purposes of subsection 145.2.1 (6) of the Act is six months from the day that the notice is served upon the Tribunal under subsection 142.1 (2) of the Act. O. Reg. 359/09, s. 59 (1); O. Reg. 333/12, s. 19 (1).

(2) For the purposes of calculating the time period mentioned in subsection (1), any of the following periods of time shall be excluded from the calculation of time:

1. Any period of time occurring during an adjournment of the proceeding if,

i. the adjournment is granted by the Tribunal on the consent of the parties, or

ii. the adjournment is,

A. on the initiative of the Tribunal or granted by the Tribunal on the motion of one of the parties,

B. not being sought for the purpose of adjourning the proceeding pending the resolution of an application for judicial review, and

C. necessary, in the opinion of the Tribunal, to secure a fair and just determination of the proceeding on its merits.

2. If an application for judicial review under the *Judicial Review Procedure Act* has been commenced with respect to the proceeding, the period of time from the day that the application is commenced until the day that the application is disposed of, if a stay of the proceeding before the Tribunal is granted by the Divisional Court. O. Reg. 359/09, s. 59 (2); O. Reg. 333/12, s. 19 (2, 3).

(3) For the purposes of calculating the time period mentioned in subsection (1), if an adjournment of the proceeding pending the resolution of an application for judicial review under the *Judicial Review Procedure Act* was granted by the Tribunal before the day Ontario Regulation 333/12 made under the Act comes into force, the following periods of time shall be excluded from the calculation of time:

1. The period of time from the day the application was commenced until the day the application was disposed of, if the application was disposed of before the day Ontario Regulation 333/12 made under the Act comes into force.

2. The period of time from the day the application was commenced until the day Ontario Regulation 333/12 comes into force, if the application has not been disposed of before the day Ontario Regulation 333/12 comes into force. O. Reg. 333/12, s. 19 (4).