

TRIBUNAL PERMITS APPELLANTS TO CHALLENGE RENEWABLE ENERGY PROJECTS UNDER THE CHARTER

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In a decision given by Vice-Chair Paul Muldoon on November 22nd, 2013, the Environmental Review Tribunal ("ERT" or the "Tribunal ") granted the Appellants a limited, but potentially still very important right to challenge s.142.1 of the *Environmental Protection Act* ("EPA") as violating their right not to be deprived of security of the person under section 7 of the Charter of Rights and Freedoms except in accordance with the principles of fundamental justice. (See *Dixon v Director Ministry of the Environment, case nos. 13-084 to 13-089, herein referred to as "Dixon"*) Section 142.1 allows residents of Ontario to require a hearing before the ERT only on the grounds that engaging in a renewable energy project in accordance with a renewable energy approval ("REA") will cause:

- a) serious harm to human health; or
- b) serious and irreversible harm to plant life, animal life or the natural environment.

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ONTARIO COURT OF APPEAL PERMITS CIVIL CLAIM AGAINST THE GOVERNMENT FOR CANCELLATION OF OFFSHORE WIND FARM TO PROCEED

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On November 12, 2013 the Ontario Court of Appeal in *Trillium Power Wind Corporation v Ontario (Natural Resources) 2013 ONCA 683* reversed a motion judge's decision striking a claim and permitted the claim to proceed on the very narrow basis that the Government's conduct was specifically targeted to injure the plaintiff, Trillium. At the same time, the Court did confirm the decision to strike the portions of the claim in respect of negligence and negligent misrepresentation. The claim arose from the Government's cancellation of Trillium's off-shore wind-farm.

The decision offers a good example of the application of the law to politically motivated decisions causing economic harm. ...**Continued on page 2**

NEW FISHERIES ACT PROHIBITION AND AUTHORIZATION FRAMEWORK IN FORCE AS OF NOVEMBER 25, 2013

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The new prohibition introduced in the 2012 amendments to s. 35(1) the *Fisheries Act* (see *Jobs, Growth and Long-Term Prosperity Act 2012, c.19,*) against carrying out a work, an undertaking or an activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery is now law. The more stringent penalties in the 2012 amendments have also come into effect. ...**Continued on page 3**



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The actual Charter hearing has yet to be heard.

The appellants in *Dixon* claim that their right to security of the person under section 7 of the *Charter of Rights and Freedoms* has been violated by the Director's approval of an REA for the construction, installation, operation, use and retiring of a Class 4 wind facility with a total name plate capacity of 32.982 Megawatts consisting of 15 turbines in Huron County. In the November 22nd decision, they have been given permission by the ERT to argue that the test of serious harm to human health, applicable to appeals before the ERT of the Ministry Directors' decision under s.142.1 EPA, is too high and allows violations of the right to security of the person which would fall short of the serious harm threshold.

The Tribunal attempted to follow closely the direction of the Supreme Court of Canada in *Nova Scotia (Worker's Compensation Board) v. Martin (2003)*, 231 D.L.R. (4th) 385 that the application by a tribunal of the Charter and Charter remedies is linked to the jurisdiction of that tribunal. The jurisdiction of the Tribunal in reviewing REA's is distinct from that of the Director. The Director has the mandate under s. 47.5 of the EPA to issue, or refuse to issue or to renew, an REA based on the public interest. Factors to be considered include public consultation, aboriginal interests, regulation and Ministry policy. Ontario Regulation 359/09 prohibits the construction, installation or expansion of an on shore wind turbine with a name plate capacity greater than or equal to 50 kW and a sound power level greater than 102 dBA at a distance of less than 550 metres from all noise receptors. The mandate of the ERT, on the other hand, is much narrower. The EPA does not give the ERT the authority to review the Director's discretion generally. Instead, the ERT's jurisdiction is limited to considering whether engaging in the renewable energy project, in accordance with the REA, will cause a) serious harm to human health; or b) serious and irreversible harm to plant life, animal life or the natural environment. The ERT wasn't prepared to consider that its Charter jurisdiction had widened as a result of *R. v Conway (2010)*, 320 D.L.R. (4th) 25 (S.C.C.) in which the Supreme Court did discourage a bifurcation of proceedings – having constitutional claims heard in superior court while the core proceedings continued before the tribunal.

"...at present, the Tribunal does not interpret Conway as vesting tribunals with new authority to decide Charter claims. Conway itself makes it clear that, in order to address a Charter claim, a tribunal must have the jurisdiction, explicitly or impliedly, to decide the relevant question of law." [see par.47]

In the result, the ERT found it had no authority to address Charter challenges to the Director's general discretion to issue, renew or revoke an REA under s. 47.5 EPA or the constitutionality of the Province's Regulation 359/09 imposing a setback parameter for wind turbines. The ERT accepted the Approval Holder's motion to strike out paragraphs of the Appellant's Notice of Appeal in which the Appellant attempted to challenge the process for granting the REA on the grounds that it didn't require the Director to consider potential health effects and that it didn't follow the precautionary principle. The ERT struck as a ground of constitutional challenge the Director's failure to require a study to determine the adverse health effects on neighbours living in close proximity to the project. The Tribunal further struck grounds of appeal alleging that the provincial government hadn't applied the precautionary principle in selecting a minimum setback of 550 metres and had acted arbitrarily in that regard.

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Trillium alleged that it had notified the Office of the Premier in early 2011 that it intended to finalize the \$26 million financing for its proposed wind farm within the week. The Ontario Government issued a press release just before the end of the week that offshore wind development in Ontario would be cancelled. As a result the financing did not close.

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Referring to *R. v Imperial Tobacco Canada Ltd.* 2011 SCC 42, the Court of Appeal confirmed that core policy decisions were generally immune from review by the courts in the context of civil tort action unless they were irrational or made in bad faith. The government's stated reason for the cancellation was that further study was required but Trillium took issue with this statement because the government was aware there were no water quality issues. The Court found that this contention was insufficient to make the decision to cancel irrational. Likewise, on the issue of bad faith:

"...it is not "inconsistent with the obligations of office" for the Premier and his or her Ministers to respond to public pressure, even where that response is designed to shore up the government's electoral base and win more seats in an election. Ministerial policy decisions made on the basis of "political expediency" are part and parcel of the policymaking process and, without more, there is nothing unlawful or in the nature of "bad faith" about a government taking into account public response to a policy matter and reacting accordingly. That is what governments do, in pursuit of their political and partisan goals in a democratic society." [at par. 54]

It was only to the extent that Ontario's decision to cancel was made with the specific intention of injuring Trillium that the decision was subject to attack in tort.

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The definition of "serious harm to fish" – "the death of fish or any permanent alteration or destruction of fish habitat" codifies the requirement for "permanency" recognized in previous case-law see e.g. *R. v Leveque* (2001), 43 C.E.L.R. (N.S.) 294 (Ont.S.C.J.). While much attention has been focused on how the new prohibition shifts the issue of harm to fish from fish habitat, the new definition of "serious harm" includes alteration or destruction of fish habitat, and the previous case-law defining fish habitat and the impacts upon it should continue to be relevant. With respect to the protected categories of fish, existing case-law recognized that a fishery had to contain fish with some commercial or sporting value. See e.g. *R. v Sapp* [2004] B.C.J. No.2552 (Prov.Ct.) The addition of an Aboriginal fishery to the protected categories better aligns the *Fisheries Act* with the developed law on aboriginal rights.

The real significance of the coming into force of the new amendments lies in the documentation of detailed guidance both in the law and policy governing the granting of Ministerial authorizations for industries which inevitably cause serious harm to fish and require regulatory approval to carry on their business operations. Section 6 of the amended *Fisheries Act* provides that before the Minister or a prescribed person may authorize work which results in serious harm to fish, the following factors shall be considered:

- (a) the contribution of the relevant fish to the ongoing productivity of commercial, recreational or Aboriginal fisheries;
- (b) fisheries management objectives;
- (c) whether there are measures and standards to avoid, mitigate or offset serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or that support such a fishery; and
- (d) the public interest.

The *Fisheries Protection Policy Statement* issued in October 2013 <http://www.dfo-mpo.gc.ca/pnw-ppe/pol/index-eng.html> explains how these factors should be considered:

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With respect to a) above -productivity:

"...In general, the metrics and level of detail used to provide estimates of impacts to productivity will depend on both the type and scale of the impact. For projects with a low likelihood of causing impacts to productivity, or in which the impacts are relatively small, proponents only need to qualitatively document the key impacts and their associated links to components of productivity (e.g., growth, performance, survival, migration and reproduction). For projects likely to cause large-scale impacts on the quantity or quality of fish habitat, metrics of productivity should be chosen based on the type of impact. These include metrics of productivity related to habitat area or metrics related to components of productivity that are linked to the life cycle of the fish. Very large-scale impacts that are likely to result in ecosystem transformation will require the most detailed estimates of impacts to productivity, likely involving quantitative fish population models."

With respect to b) above -fisheries management objectives:

"...Where they exist, fishery-specific objectives found in federal, provincial, territorial or co-management board fishing plans will be considered foremost when making regulatory decisions related to the fisheries protection provisions."

With respect to c) above -the measures to avoid, mitigate, or offset serious harm:

"...This hierarchy emphasizes that efforts should be made to prevent (avoid) impacts first. When avoidance is not possible, then efforts should be made to minimize (mitigate) impacts caused by the project in question. After these actions, any residual impacts would normally require authorization and should then be addressed by off-setting."

These measures may ultimately be included as conditions of authorizations.

With respect to d) above- the public interest, a range of issues may, in the discretion of the Minister be included:

"...These may range from issues related to economic development to long-term sustainable development to impacts on ecosystem goods and services."

On the determination of "serious harm" requiring an authorization, the Policy Statement advises proponents of projects to identify the following:

1. *Impacts to fish and fish habitat caused by the project...*
2. *The expected duration of impacts:* For example, is the duration short enough that it does not diminish the ability of fish to carry out one or more of its life processes? ...
3. *The geographic scale of impacts:* For example, is the scale small enough that the disturbance will not displace fish that would otherwise be occupying the habitat?
4. *The availability and condition of nearby fish habitat:* Is the habitat that is being altered or destroyed the only habitat of its type and quality in the area of the project?

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5. *The impact on the relevant fish:* For example, are the fish that are affected by the proposed project likely to experience increased mortality rates, increased stress and reduced fitness as a result of direct injury or reduced habitat function such that a localized effect on a fish population or stock is possible?

6. *Proposed avoidance and mitigation measures:* Will measures to avoid and mitigate *serious harm to fish* be applied such that all *serious harm to fish* is avoided? If so, an authorization is not required. If *serious harm to fish* remains after all avoidance and mitigation measures have been applied, an authorization may be required."

The *Applications for Authorization Regulations SOR /2013-191* also now in force see *Canada Gazette Vol.147, no.23* set out in section 3 and Schedule 1 the information and documentation to be provided in the application. The following are included:

- an irrevocable letter of credit to cover the costs of implementing the offsetting plan;
- contact information of the applicant and, if applicable, their authorized representative;
- a description of the proposed work, undertaking or activity and, if applicable, of the project of which the proposed work, undertaking or activity is a part;
- a description of the anticipated phases of the proposed work, undertaking or activity and, if applicable, of the project of which it may be a part;
- a description of the location of the proposed work, undertaking or activity and, if applicable, of the project of which it may be a part;
- a description of the fish and fish habitat found at the location of the proposed work, undertaking or activity and within the area likely to be affected by the proposed work, undertaking or activity;
- a description of the likely effects of the proposed work, undertaking or activity on fish that are part of a commercial, recreational or Aboriginal fishery or on fish that support such a fishery, and the likely effect on the habitat of those fish, including a description of the serious harm to fish;
- a description of the measures and standards that will be implemented to avoid or mitigate serious harm to fish;
- a description of the monitoring measures that will be put in place;
- a description of the contingency measures that will be implemented;
- a quantitative description of the anticipated serious harm to fish that is likely to result from the work, undertaking or activity despite the implementation of the measures and standards to avoid or mitigate serious harm to fish; and
- an offsetting plan in respect of the serious harm to fish that is likely to result from the work, undertaking or activity despite the implementation of the measures and standards to avoid or mitigate serious harm to fish.