

ENVIRONMENTAL & ENERGY LAW

COURT OF APPEAL SUSPENDS FURTHER WORK ON WIND ENERGY PROJECT PENDING DISPOSITION OF APPEAL

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In the continuing saga of the Blanding's turtle, the Ontario Court of Appeal on March 25, 2014 ONCA 227 granted a stay to the Prince Edward County Field Naturalists (PECFN). The stay prevents any further work on Ostrander Point Wind Energy Project at least until the motion by the PECFN for leave to appeal to the Court of Appeal is determined. Should the Court grant leave to appeal, the stay suspending future work will likely continue until the appeal is finally decided on its merits.

In the February 20, 2014 issue of this Newsletter, the Divisional Court decision which is the subject of the Court of Appeal's stay was reported. The Divisional Court reinstated the Renewable Energy Approval (REA) for Ostrander Point allowing construction work to proceed. The Divisional Court decided that the Environmental Review Tribunal (ERT) should not have stayed the operation of the REA as it related to Blanding's turtle. The ERT's reasons and evidentiary basis for concluding that there was serious and irreversible harm to Blanding's turtle were deficient. There was a lack of information on the turtle population and the vehicular traffic which the Tribunal concluded posed a threat. The Divisional Court said that the ERT failed to give sufficient weight to the existence and conditions of an *Endangered Species Act* ("ESA") permit and the obligation of the Ontario Ministry of Natural Resources ("MNR") to monitor and enforce compliance with the permit. Finally, the Divisional Court concluded that the Tribunal failed to give a proper opportunity to the parties to address the issue of the appropriate remedy.

Under the terms of the Divisional Court's reinstated REA, Ostrander is prohibited from engaging in construction on the wind power site between May and October 15. This is the time of year when Blanding's turtle wanders from the ponds and lives and nests on the terrain. Following that decision, Ostrander advised PECFN that it intended to proceed with construction work on the project. The work would include: (i) staking out the limits of the construction; (ii) vegetation removal; (iii) dealing with an Unexploded Ordinance clearance requirement; and (iv) possibly road construction, time permitting. When requested by the PECFN to give further details about what Ostrander intended to do, Ostrander responded that "it was not in a position to provide this information". PECFN contended that if the work proceeded prior to the disposition of its motion for leave to appeal, the turtle would be irreparably harmed and any appeal would become meaningless.

The Court of Appeal considered that the three part test for granting a stay had been met by PECFN. Firstly, there were serious issues for consideration on appeal: 1) the proper interpretation of the term "serious and irreversible harm"; 2) the test to be met by a person seeking to review an REA; 3) the evidentiary standard required to meet that test; and 4) the nature of the remedy provided by the reviewing tribunal.

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The Court observed that this was the first time that the courts were asked to deal with an appeal from an REA. Secondly, the Court agreed with PECFN that permanent irreparable harm would result if a stay wasn't granted. Finally, that the balance of convenience favoured a stay given the irreparable harm which would otherwise ensue.

MARCH 20 -SUPREME COURT OF CANADA GRANTS THE OEB LEAVE TO APPEAL ON ITS REDUCTION OF OPG'S NUCLEAR COMPENSATION COSTS BY \$140 MILLION.

As reported in the July 12th Newsletter, the Ontario Energy Board had disallowed \$140 million dollars in Ontario Power Generation (OPG)'s costs to be recovered from the rate base on the basis that these costs did not meet the prudence review test. The Board had bench-marked staffing numbers and rates of pay against other comparable utilities and had found the costs to be too high. The Ontario Court of Appeal (2013) ONCA 359 rejected this approach for committed costs, reasoning that existing union contracts and the expectations of the Canadian Nuclear Safety Commission had placed these costs out of the control of OPG. The Supreme Court of Canada has not yet set a date for the hearing of the appeal.