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Environment @ Gowlings

July 10, 2013 - Volume 10, Number 1

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An Ontario First: Tribunal Revokes Wind Farm Approval

By: Rod Northey[1]

On July 3, 2013, the Environmental Review Tribunal (the "Tribunal") released a landmark decision under Ontario's renewable energy approval regime. In *Alliance to Protect Prince Edward County v. Director*, *Ministry of the Environment*, the Tribunal made the unprecedented decision of allowing an appeal and revoking a renewable energy approval issued by the Director to the Ostrander Point wind energy facility ("*Ostrander Point*"). This proposed facility was to be located on Crown land in Prince Edward County.

Two other aspects of the decision are also without precedent and make it important reading for a number of audiences:

- the basis for the revocation was a finding that the project was likely to cause serious and irreparable harm to animal life, namely, harm to the Blanding's turtle, a species designated as "Threatened" under Ontario's *Endangered Species Act*, *2007* (ESA); and
- the Tribunal finding of serious and irreparable harm arose in a circumstance where the permit holder had obtained a permit under the ESA to authorize such harm, thus highlighting legal differences between the Tribunal's test for decision-making on a renewable energy approval (REA) appeal and the test for obtaining an ESA permit.

The finding of serious and irreparable harm to animal life has broad implications for other renewable energy projects, such as solar energy facilities, not just wind farms.

The finding that a permit issued under Ontario's endangered species legislation does not excuse harm resulting from a renewable energy approval has implications for other projects affecting endangered species, not just renewable energy projects.

The Tribunal also made findings of importance to other audiences:

- Its findings on the qualification and use of expert witnesses will be important to parties appearing before the Tribunal on all matters, not just REA appeals.
- Its findings on the Ministry of Natural Resources (MNR) framework for access to and use of Crown lands will be important for a wide range of projects on Crown lands, and not just the renewable energy project before this Tribunal.

Lastly, the decision has implications for existing power purchase agreements with the Ontario Power Authority (OPA). Behind the permit holder's REA is its power purchase agreement with the OPA. The Tribunal decision raises important questions about next steps under this agreement, particularly in relation to its terms regarding "force majeure." Whatever this decision triggers there is likely to be an additional important precedent.

There is no indication yet whether the permit holder or province will seek to appeal this decision. Such an appeal must focus on errors of law. On this point, it is notable that both tribunal members are lawyers, the decision provides 121 pages of reasons plus ten appendices

that include reasons on interim rulings, and the decision pays explicit regard to the legal tests defining the Tribunal mandate on appeal. Nevertheless, given the immediate implications of this decision, the importance of the precedents established by it, and the range of legal issues in play, it should not be surprising if this decision is appealed to court very shortly.

New Precedents

(1) Tribunal Revoking an REA

Since its establishment in 2009, the right of appeal has been a key aspect of the renewable energy approvals framework inserted as Part V.0.1 into Ontario's Environmental Protection Act (EPA). It is a novel right. It is available to any person; it does not involve the preliminary step of seeking leave to appeal; and it focuses exclusively on harm, not the merits or reasonableness of the Ministry of the Environment (MOE) decision maker. These three points make the REA right of appeal unlike the existing right set out in the Environmental Bill of Rights, 1993 (EBR) that applies to other major environmental approvals issued by the MOE.

The concluding aspect of the REA appeal framework is not unusual, however. Where the Tribunal finds that the appellant has established harm in the degree required, then the EPA provides the Tribunal with three alternative remedies: (a) revoke the decision by the MOE Director; (b) order the Director to take such action as the Tribunal considers necessary under this REA framework; or (c) alter the decision of the Director, such as the conditions of approval issued by the Director.

Here, the Tribunal identified no alternatives to the remedy of revoking the REA. In particular, the Tribunal advises that it received no submissions on the appropriate remedy. Most importantly, it advises that it received no submissions on how the project could proceed in a way that would not cause the serious and irreversible harm identified by the Tribunal, namely increased road mortality to an endangered species.

This is unusual: most parties within a lengthy hearing do contemplate the range of possible outcomes and offer submissions on each. A key reason why this practice was not followed here is evident in the Tribunal finding that "All experts agreed that the entire Site is a patchwork of suitable Blanding's turtle habitat" (¶337). This point provides the Tribunal with a major point of departure from another recent Tribunal hearing on endangered species where there was significant disagreement on the extent of endangered species habitat.[2] This point also has major implications for the options available to the Tribunal and the instrument holder: if the habitat clearly exists across the entire site, then all proposed turbines would depend on the access roads in question, and there would be no alternative access routes capable of avoiding this habitat.

For this reason, it seems likely that the instrument holder and the Director had no option to advancing an "all or nothing" approach to the remedies available to the Tribunal.

It is also important to highlight that, legally, an REA proponent is in a different position than many instrument holders before the Tribunal. An REA proponent has limited flexibility on proceeding with only part of its project since behind an REA is usually a power purchase agreement (PPA) with the OPA. A fundamental change to the area available for a project is likely to reduce the power that may be delivered and thus affect the signed PPA.

(2) Tribunal Finding of Serious and Irreversible Harm to Animal Life

The EPA sets out a two-branch test for an REA appeal. The appellant must establish that a project is likely to cause:

1. serious harm to human health; or
2. serious and irreversible harm to plant life, animal life, or the natural environment.

Prior to Ostrander Point, most REA appeals have concentrated on the first branch of the appeal and examined whether a project is likely to cause "serious harm to human health." The leading decision on this human health test is the 2011 Erickson[3] decision. This lengthy 228-page decision concluded the Tribunal's first appeal under the new legislation and focused exclusively on harm to human health.

Notably, the Tribunal in Erickson concluded that the evidence before it did not meet the onus of establishing, on a balance of probabilities, that the wind energy project before the Tribunal would cause serious harm to human health.

In Ostrander Point, one of the two appellants continued this human health focus, seeking to build on Erickson with new evidence. This line of appeal was unsuccessful. It will be relevant to future appeals on the human health issue to determine what new evidence the Tribunal in Ostrander Point considered on top of the existing Erickson evidence, but these points will not be examined in the present paper.

The successful appeal argument in Ostrander Point established that the project would cause serious and irreversible harm to "plant life, animal life or the natural environment." This appeal argument has broader significance than the human health argument which derives from the noise emitted by wind energy facilities. In particular, this test for granting an appeal has relevance to solar energy facilities as, depending on location, these facilities also involve a new use of land and therefore have potential to cause serious and irreparable harm to animal habitat, including the habitat of endangered species.

In other circumstances, a reference to plant life, animal life, and the natural environment may be grouped together as the "biophysical environment" because the EPA defines the natural environment to mean the physical environment, namely air, water, and land; however, an important feature of the Ostrander Point decision is that the Tribunal did not group these terms; instead, it expressly distinguished

among harm to "plant life," "animal life," and the "natural environment." Its reasons examine the evidence on each of these three topics. Further, its conclusions apply the appeal test to each of these three topics.

Based on this approach, the Tribunal found that only one component of these three categories of features met the appeal test of serious and irreversible harm. The Tribunal found that the evidence established serious and irreversible harm to animal life. As concerns the evidence of harm to plant life and harm to the natural environment, the Tribunal concluded in each case that such evidence did not meet the legal test.

Equally, within its review of harm to animal life, the Tribunal examined the evidence of harm to birds, bats, and butterflies, not just the Blanding's turtle. The Tribunal also reached specific conclusions on each of these topics. For each category of "animal"[4] other than the Blanding's turtle, the Tribunal concluded that the evidence before the Tribunal did not establish that engaging in the project would cause serious and irreversible harm.

Turning to the single topic that did meet the test, the Tribunal reasons begin with legal analysis. Two important conclusions from this analysis are:

1. the appropriate scale of analysis for harm was the "ecosystem"; and
2. where an ecosystem feature was identified as "at risk," factors of "considerable weight" when considering the legal test of harm would be (i) evidence showing a decline in that species' population or habitat, or (ii) evidence showing the alteration or destruction of that species' habitat.

Where endangered species are present at a site, these two conclusions provide the framework for future appeal hearings on the second branch of the REA appeal test.

(3) Tribunal Finding Serious and Irreversible Harm To Animal Life Despite Permit Authorizing Harm Under Ontario's Endangered Species Act

The starting point for the Tribunal's approach to this topic was the following comment:

> The Approval Holder was required to consider potential impacts on species at risk pursuant to the *Endangered Species Act* ("*ESA*"). This process is completely separate from the renewable energy approval process and falls outside of the MOE's jurisdiction (¶265).

This is a defining point for the Tribunal: it highlights how the Tribunal understands the relationship between the REA appeal and the prior REA application, process, and decision making. In Ostrander Point, the Tribunal has followed Erickson in contending that an REA appeal is about legal tests and topics that are distinct from the detailed requirements set out in O.Reg.359/09 ("Reg.359") to obtain an REA.

This position is not only unusual within regulatory law, it also has very significant consequences for REA applicants. By this reasoning, REA applicants must first go through a regulatory process that contains more detailed and rigorous requirements than virtually any other similar approval. Then, following approval, they are subject to an appeal as of right on topics not part of the approval process.

In these circumstances, it is useful to review how the Tribunal got to this position. It is important to appreciate that this position did not emerge in Ostrander Point: this position derives from the Tribunal's first REA decision in Erickson. As set out above, the Erickson case was about harm to human health. In that case, the permit holder made legal submissions that sought to find continuity between the REA appeal and the prior process and decision. It did so by highlighting the legal definition of an "adverse effect": this term has been part of the EPA from its inception and expressly includes "an adverse effect on the health of any person." In this way, the permit holder argued that the Director issuing the REA addressed possible harm to human health by addressing the prevention of "adverse effects." However, in Erickson, the Tribunal did not accept this approach to understanding harm to human health.[5]

Now, in Ostrander Point, the Tribunal has extended this reasoning from Erickson to the second branch of the REA appeal test. Consistent with Erickson, the Tribunal in Ostrander Point has taken the position that, as concerns harm to plant life, animal life, and the natural environment, there is no legal continuity between the process and decision leading to the REA and the REA appeal.

In support of this position, the Tribunal made the following observation about the REA monitoring requirements:

> While the Environmental Effects Monitoring Plan ("EEMP") requires the Approval Holder to notify the MNR of any and all mortality of species at risk within 24 hours of observation or the next business day, there are no requirements specific to Blanding's Turtle in the EEMP (¶266).

This point about the EEMP highlights an important point about the legal scope of the EEMP. As noted above, the EEMP requirement was added to legal requirements for an REA applicant in 2010. Importantly, however, it is a limited requirement. In the first place, it applies to wind facilities only, not all REA facilities. Secondly, it is limited because it applies to birds and bats only, not all types of animal. Thus, as concerns EEMP monitoring, the REA process and conditions of approval are clearly narrower in scope than an REA appeal.

However, other aspects of the REA process merit consideration in assessing whether the ESA and the ESA permit process are "completely separate" from the REA process. In particular, Reg.359 contains the novel requirement (within Ontario environmental approvals) that an applicant cannot apply to the MOE for an REA unless and until the MNR provides the applicant and the MOE with a

two-tiered sign-off on natural features. The first tier sign-off involves the MNR accepting that the applicant has followed accepted procedures to identify the existence of natural features and evaluate their significance (s.28). The second tier sign-off involves the MNR accepting that the applicant has complied with mandatory setbacks from stipulated natural features or has carried out an environmental impact study report that accords with MNR requirements (ss.37, 38).

Since Reg.359 defines a "natural feature" to include "wildlife habitat," it seems beyond doubt that turtle habitat is a natural feature under the REA process. This suggests that the REA process would be legally incomplete if the MOE Director made a decision without the MNR sign off on wildlife habitat.[6] Further, in the present case, the ESA permit was issued months before the REA so that the Director's decision on the REA built upon the terms of the ESA permit.[7] In light of these points, more needed to be said by the Tribunal to understand the basis for its position that the ESA process is completely distinct from the REA process.

Importantly, however, it may be difficult to challenge this aspect of the Ostrander Point decision. In particular, consistent with this position that the REA appeal differs from what was before the Director, the Tribunal allowed parties to file evidence that was not before the Director. This included evidence from multiple experts including a Blanding's turtle expert for the instrument holder that was not part of the ESA process or before the MOE Director. If an REA appeal is to be a true appeal of the REA decision and not a new hearing, this new evidence would not be permitted.[8]

Moving on from this point, the key legal position of the Tribunal regarding the ESA and permit is that neither addresses the test to be applied by the Tribunal on an REA appeal. There are multiple legal aspects to this position. In its lengthy reasons, the Tribunal in Ostrander Point addresses some but not all of the relevant legal points by focusing on the specific circumstances and terms of the ESA Permit:

> First, the Tribunal compared the context for the ESA assessment against that of the REA. Regarding the ESA, the Tribunal cited an MNR witness that the assessment of harm used for the ESA permit was that of "the species as a whole in Ontario" (¶269); this approach under the ESA contrasts with the approach taken by the applicant in the REA process whose consultant focused on the "local population" (¶355); it also contrasts with the Tribunal's conclusion that an REA appeal must focus on harm at an ecosystem level which it considered to be the "Site and the surrounding landscape" (¶204, ¶343).
>
> Second, the Tribunal compared the role of ESA conditions against the REA test. It concluded that compliance with ESA conditions is not itself an answer to the REA appeal question of whether a project will cause serious and irreversible harm to an endangered species (¶304).
>
> Third, the Tribunal examined the role of compensation under the ESA and REA test. It noted that the ESA permit allowed the permit holder to address the loss of habitat and/or negative impacts by proposing new habitat as compensation for the loss (¶338–339); however, as concerns the REA test, the Tribunal concluded that this approach to compensation would not prevent serious and irreversible harm to the population of Blanding's turtle at the site and surrounding area (¶359).

The Tribunal also addressed many factual issues in detail. Key factual issues and conclusions concerned:

1. the extent of habitat protected: the Tribunal concluded that certain mitigation measures such as setbacks applied only partially to all relevant habitat (¶309);
2. the timeframe for habitat protection: the Tribunal concluded that many mitigation measures applied to the construction period only, not the active years post construction (¶317); and
3. the enforceability of protection measures: the Tribunal concluded that measures such as speed reduction could not be enforced by the Permit Holder and found no requirements that others provide such enforcement (¶323).

These legal and factual findings provide detailed guidelines to future applicants requiring such approvals and facing a potential REA appeal.

Other Important Tribunal Observations

(1) Approach to expert witnesses

The Tribunal decision pays repeated regard to the earlier Erickson decision; however, in one important respect, it departs from Erickson. In Erickson, the Tribunal decision took an unusual, if not unprecedented, approach to the qualification of expert witnesses. In recent years, appeal courts, commissions, and task forces have demanded that trial judges perform a "gatekeeper role" regarding experts. This means ensuring that no person gives opinions without being properly qualified to give such opinions. In a tribunal hearing, this means addressing the qualification of each expert as a preliminary step to allowing that person to provide opinion evidence. In Erickson, however, the Tribunal deferred the question of qualifications to allow several experts to give opinion evidence and then advised parties to address qualifications in their final submissions:

> In some cases, the Tribunal considered the objections, allowed the opinion evidence to be put forth but pointed out that questions about the scope of a witness's evidence vis-à-vis the area in which the expert was qualified and the weight of that witness's opinion evidence would be considered by the Tribunal in light of any further submissions made by Counsel (p.165).

Secondly, instead of reaching specific conclusions about the opinions of each expert, the Tribunal in Erickson reached global conclusions on the quality of the evidence regardless of expert:

> The evidence presented by the Appellants, in totality, establishes that there may be an association between exposure to noise from wind turbines and certain indirect health effects, but the evidence is not sufficient to establish a causal connection at the distances and/or noise levels for this Project. The Tribunal finds that the evidence marshalled by the Appellants, such as the Nissenbaum Study and Dr. Aramini's application of it, is exploratory in nature, not confirmatory. The legal test, however, imposes a standard that requires more than exploratory evidence (pp.192–93).

These approaches were not the product of consensus among the parties: there was initial and repeated objection to virtually every witness for the appellants from the MOE, the Permit Holder, or both.

Aware of these concerns, the Tribunal in *Erickson* advised that its novel approach should not be taken as a precedent for future hearings:

> The Tribunal's generous approach to the admission of expert evidence in this Hearing should not be taken as an invitation for future Parties to ignore the Tribunal's Practice Direction or the relevant case law such as *Mohan.* The Tribunal is rarely faced with a case where so many experts in emerging areas of inquiry must be heard in such a short time. These appeals of Suncor's renewable energy approval had a relatively unique set of attributes. There is a regulated timeline, with which the Tribunal must comply. There is a legal test that calls for expert evidence. There is the potential, at least in this case, for novel opinions to be offered by experts in emerging fields. When all of those factors are looked at in totality, it became challenging for the Tribunal to obtain the expert assistance it needed to answer questions raised by the Appellants in the limited timeframe afforded without relaxing its gatekeeping role somewhat (pp.169–70).

In Ostrander Point, the Tribunal does not follow the Erickson approach to expert witnesses. Instead, it addresses each expert individually, and begins by setting out the nature of the expert's accepted expertise before addressing that expert's evidence.

This approach has direct influence on the second aspect of important guidance from this Tribunal on expert witnesses. In Ostrander Point, the weight of Tribunal attention to each expert witness depended very much on the degree of specific expertise provided by the expert. Thus, significantly, the evidence receiving the greatest attention from the Tribunal was the evidence from the most qualified experts. In the case of the Blanding's turtle, the Tribunal observed that two witnesses—one for the appellants and one for the instrument holder—were qualified as experts on this specific species. The decision then pays greatest regard to the evidence from these witnesses in its decision.

It is notable that the government provided no expert witness on this species. This circumstance differs from the recent Nelson Aggregate decision (cited above) where one of the two experts qualified on the endangered species (Jefferson Salamander) before that tribunal was from the MNR.

This aspect of *Ostrander Point* raises important strategic issues for REA applicants: do they obtain specialized experts up-front to assist in the REA and applicable ESA process or do they wait for a hearing, but then accept the addition of new experts from all parties at the hearing? *Ostrander Point* reflects the latter approach.

(2) Approach to new access to Crown lands

The Ostrander Point decision is the first REA appeal decision to address a project on Crown lands.

A key issue for the Tribunal was the development of roads used to access the wind project site. The Electricity Act, 1998 includes in O.Reg.160/99 an expansion to the definition of a "renewable energy generation facility" to include all transportation systems constructed solely to provide access to the facility, including "systems on Crown land"; however, the facility does not include "a highway intended for or used by the general public for the passage of vehicles": ss.1(4) and (5). This exclusion makes it important to review the use of roads needed to establish the new renewable energy facility. The Tribunal carried out this review by examining a work permit provided by the MNR to the REA permit holder. This work permit advised that the proposed roads would be "multipurpose" and would allow "greater access to the Crown land resource for hunting and trapping and other passive recreational activities" (¶639). The only restrictions would be to those roads at each turbine location and the transformer station that were subject to a Crown lease.

In its summary of findings, the Tribunal set out serious concern with this approach on access to Crown lands, as follows:

> In the Tribunal's view, the current REA indicates the MNR is trying to have it both ways; to allow an increased level of public use, while at the same time allowing a wind energy project. Although such a result would be a "win-win", in the Tribunal's view it will cause serious and irreversible harm to Blanding's turtle at the Project Site and in the surrounding habitat areas (¶640).

This approach to road access was under permits issued by the MNR and not within the jurisdiction of the Tribunal to alter. It thus provided the Tribunal with further reason to conclude that there was no alternative project design available to it that "avoids the road mortality issue" identified by the Tribunal regarding the Blanding's turtle (¶637).

Conclusions

The precedents established by this decision have many audiences.

Despite the details provided by the Tribunal in its lengthy reasons, there are many legal issues arising from the decision that remain to be answered.

Given the implications of this decision on the Province and on the instrument holder, an appeal to court may be the next step in this lengthy REA process.

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1. The author was co-counsel for the REA holder in the *Erickson* decision discussed in this article and for the City of Burlington (along with Konstantine Stavrakos and Blake Hurley) in the *Nelson Aggregate* decision also discussed.
2. In *Nelson Aggregate Co., Re* (2012), 74 OMBR 281 (OCH), a joint board (made up of Tribunal and Ontario Municipal Board members) dismissed an application to establish a new quarry because of implications of the quarry location on the habitat of the Jefferson Salamander, an endangered species under the ESA. This decision also involved review of the ESA requirements in relation to other legal regimes. Like *Ostrander Point*, the *Nelson Aggregate* decision found the ESA requirements less onerous than the requirements of other applicable legal regimes, particularly the requirements of the *Niagara Escarpment Planning and Development Act* and Plan.
3. Erickson v Director, *Ministry of the Environment*, Case Nos 10-121/10-122, July 18, 2011.
4. There appears to have been no disagreement among the parties or the Tribunal that birds, bats, and butterflies are each "animals" within the meaning of this aspect of the EPA. In support of this consensus, it is notable that the government amended O.Reg.359/09 in 2010 to add the requirement that an REA applicant prepare environmental effects monitoring plans in respect of birds and bats: see s.23.1. Also, notably, then-existing Ministry of Natural Resources guidance to REA applicants for their reports on natural heritage features expressly reference butterflies and butterfly stopover habitat: see the July 2011 Natural Heritage Assessment Guide, Appendix A, p.65 and Appendix D, p.93. On the other hand, there appear to be legal differences between the first branch of the REA test and existing guidance to REA applicants.
5. See *Erickson*, at 118, 128, and 130.
6. A perplexing aspect of the REA process is evident, however, from comparing its list of natural features to those found in the 2005 Provincial Policy Statement (PPS). The PPS list makes express reference to endangered species and their habitat; the Reg.359 definition of "natural feature" does not. This point may add further support to the Tribunal's approach that endangered species and their habitat are not part of the REA process; however, this point was not expressly addressed in *Ostrander Point*. It also involves additional legal complexities (which are beyond the scope of this paper to address).
7. At places in its review of impacts on the Blanding's turtle, the Tribunal goes beyond the ESA Permit conditions of approval to pay explicit regard to the REA conditions of approval: see, for example, ¶338, ¶363, and ¶630.
8.This acceptance of new evidence is consistent with the decision by the Tribunal in *Erickson*, but it remains difficult to determine how this approach follows the statutory guidance in s.145.2(1) of the EPA that an Environmental Review Tribunal hearing on an REA is not a new hearing.

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Wainfleet Wind Energy Inc. V. Township Of Wainfleet: Case Comment

By: Gatlin Smeijers and Thomas J. Timmins

On April 10, 2012, the Township of Wainfleet (the "Township") enacted a municipal by-law pursuant to the *Municipal Act*, 2001, that was intended to restrict the construction of wind energy projects within its municipal limits. The by-law expressly applied to all property located within the Township, and was premised on three core provisions:

- All industrial wind turbines within the Township were subject to a minimum setback distance of 2 km from any "property";
- Noise emitted from any industrial wind turbine within the Township was not to exceed 32 dB at the nearest "property"; and
- The Developer of a wind energy project within the Township was to provide a 100 per cent indemnification for any loss of property value or adverse health effect caused by an industrial wind turbine.

Wainfleet Wind Energy Inc. ("WWE"), a proponent of a proposed wind energy project in the Township and the applicant in *Wainfleet Wind Energy Inc. v. Township of Wainfleet),* sought to challenge the validity of the by-law in Superior Court, as WWE's proposed project would have been entirely prohibited by the by-law's setback requirements. WWE based its application on several grounds, including:

- The by-law was void for vagueness and uncertainty;
- The by-law was in conflict with provincial law; and
- The by-law was outside of the Township's municipal authority.

In concluding that the by-law was invalid and without effect, Superior Court Justice Reid found that the definition of "property" incorporated into the core provisions was sufficiently unintelligible to render the by-law void on the basis of vagueness and uncertainty. Specifically, the by-law incorporated undefined terms such as "inhabitants of all species used for private or business or public purposes" into the definition of "property". As the term "property" could not be interpreted in any logical or reasoned way that would allow Courts to apply the core provisions, the by-law could have no legal effect.

While the *Wainfleet* decision might be seen as an excellent example of how *not* to draft a municipal by-law intended to control wind

energy projects, the most interesting aspects of the decision do not speak to this point. Given that the Court found the by-law to be of no effect due to the drafting deficiencies, its analysis of whether the by-law was in conflict with provincial law was provided on a gratuitous basis (i.e., in *obiter*).

On this issue, the Court concluded that, while the by-law may have created a "potential" for conflict with the *Green Energy and Green Economy Act*, 2009(the *Green Energy Act*), it did not in and of itself create an actual conflict which would render the by-law of no effect. However, the Court did identify two scenarios where such a by-law would frustrate the *Green Energy Act*'s purpose of removing barriers to and fostering the growth of renewable energy projects, specifically:

- Where a Renewable Energy Approval (REA) has been issued for a project authorizing wind turbine locations that contravene the municipal by-law; and
- Where the effect of the municipal by-law was to entirely prevent the construction of wind energy projects anywhere within the municipality.

Based on the foregoing, the *Wainfleet* decision has some inherent uncertainty. On one hand, municipalities have legal authority to enact by-laws that establish setbacks and noise limits applicable to wind energy projects, and such by-laws are not necessarily in actual conflict with provincial law. On the other hand, where a REA has been issued for a project that contravenes such a by-law, the by-law is of no effect.

Therefore, from a practical perspective the question remains: do Ontario municipalities have any actual ability to restrict renewable energy projects?

The answer is yet to be seen given the vast array of restrictions that could be placed on projects in the interests of protecting human health and mitigating nuisance. What is clear, however, is that municipalities seeking to control (stop) renewable energy projects, will need to resort to more sophisticated controls than setbacks and noise limits. How the Courts will view such municipal restrictions in other contexts, and whether they will be perceived as frustrating the purposes of the *Green Energy Act*, will need to be judged on a case-by-case basis.

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What's Happening

Rod Northey, Konstantine Stavrakos, Michelle Axbey and John Wilson join the Environmental Law National Practice Group at Gowlings

Rod Northey, Konstantine Stavrakos, Michelle Axbey and John Wilson have joined the Environmental Group in the Toronto Office of Gowlings as of July 2, 2013. They are joined by their assistant Michelle Hooks.

Rod Northey joins the Environmental Law Group at Gowlings as a partner. He brings close to 25 years of private-practice experience in environmental law. Rod focuses on environmental approvals, hearings and appeals. He has in-depth experience with virtually all approval regimes involving the environment — including land use, resource extraction, and transportation, energy and water infrastructure. Rod approaches the approval process strategically, integrating multiple regimes while identifying inconsistencies and anticipating conflicts.

As litigation counsel, Rod has been involved in more than 40 reported environmental law decisions before Ontario environmental and land use tribunals, and federal and Ontario trial and appellate courts. His litigation experience includes multiple hearings involving environmental assessment, provincial plans, hydrogeology, hydrology, wetlands, endangered species, noise, air quality, human health, agriculture, conservation biology and fisheries.

Rod is the author of a book on federal environmental assessment and a number of recently published papers on the role of municipalities in national and provincial energy strategies, integrated planning for infrastructure projects, federalism and environmental law, and environmental law reform. He is certified as a Specialist in Environmental Law and is recognized nationally and internationally by *Who's Who Legal: The International Who's Who of Business Lawyers* and *The Best Lawyers in Canada for his expertise in environmental law.*

Outside his legal practice, Rod is chair of the Friends of the Greenbelt Foundation and the Greenbelt Fund. He is also an adjunct faculty member at Osgoode Hall Law School's Municipal Law LLM program for its course on environmental protection.

Konstantine Stavrakos was called to the Bar in 2006. He provides advice and representation to municipalities, corporations and residents' groups on issues involving interrelated environmental, municipal and planning regimes, including environmental assessments, environmental approvals, municipal by-laws and planning applications. He has appeared in complex litigation before courts and tribunals, including the Ontario Court of Appeal, the Divisional Court, the Superior Court of Justice, the Joint Board and the Ontario Municipal Board.

Michelle Axbey is a law clerk and has worked in environmental law exclusively since 2002. She has extensive experience and interest in matters where human health and the environment intersect. Michelle is currently responsible for document preparation and management for matters before the Ontario Courts and Environmental Review Tribunal.

John Wilson is a law clerk and has worked in environmental and municipal law exclusively since 2007. He has extensive experience with all Ontario Land Tribunals, including the Ontario Municipal Board, the Environmental Review Tribunal, the Niagara Escarpment Hearing Office, the Ontario Assessment and Review Board, and the Consolidated Hearings Office.

Awarding of the David Estrin Prize

This year's David Estrin Prize winner was Katrina Andres (University of Victoria, Faculty of Law) for her article "Professional Reliance in the Great Bear Rainforest: A Case Study".

This Award has been established in honour of David Estrin, a pioneer of environmental law in Canada. David's thirty-year career spans the evolution of environmental law in Canada. A founding member of the Canadian Environmental Law Association, he has government agencies, corporations and institutions, assisted in policy development and drafting of legislation in Ontario, Alberta in Canada and has appeared before Provincial and Federal Courts. He is a Partner in the Environmental Law Group at Gowling Lafleur Henderson LLP. He has written six books including the definitive text "Business Guide to Environmental Law". The prize is donated to the Canadian Bar Association National Environmental, Energy and Resources Law Section's Law School Essay Contest and is supported by Gowling Lafleur Henderson LLP as Foundation Sponsor, and by members of the Environmental, Energy and Natural Resources Law Community.

Katrina Andres is being awarded the David Estrin Prize by Jennifer Danahy (Gowlings) and Chuck Birchall (Chair CBA NEERLS)

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Save the Date - Upcoming Seminars

We hope you can join us for the next Gowlings – Environmental Law for Business complimentary seminars. Each seminar will be held in Toronto between 8:00 a.m. and 10:00 a.m. and will bring together industry experts focusing on the top Environmental legal and regulatory issues.

The next seminar is scheduled for September 18, 2013, and will focus on Canada's Chemical Management Plan and the inter-relationship with chemical regulatory regimes in the U.S. and Europe.

Confirmed speakers include:

Harry Dahme, Gowlings
Jennifer Danahy, Gowlings
Joyce Borkhoff, Director, Chemicals Group, Intertek

On October 22, we will be presenting a seminar on Directors' and Officers' Environmental Liability, focusing on proactive measures and a corporate environmental policy to avoid potential consequences to corporate and personal liability.

Confirmed speakers include:

Glenn Jennings, Gowlings
Gatlin Smeijers, Gowlings
Joseph D. Picciotti, Harris Beach PLLC (for the perspective from the United States)

Our November 20th seminar will focus on Environmental Assessment.

Confirmed speakers include:

David Estrin, Gowlings
Rod Northey, Gowlings

For more information on any of these seminars, please contact Nory Paredes or any member of the Environmental Law Group in Toronto.

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Harry Dahme (Toronto)

Contributors

Rod Northey
Gatlin Smeijers
Thomas J. Timmins