

# WIND TURBINES GO TO COURT – AND WIN!

*Robert Knox, Collingwood.  
Ontario Highlands Friends of Wind Power*

**Court File No. 2055/14  
ONTARIO SUPERIOR COURT OF JUSTICE, DIVISIONAL COURT**

Marrocco A.C.J.S.C., J. Henderson and D. Brown JJ  
Dixon v. Director, Ministry of the Environment, 2014 ONSC 7404  
**DIVISIONAL COURT FILES NOS.:** 2055/14, 2056/14 and 2073/14

**DATE:** 2014/12/29

In 2014, a number of people living near proposed wind generation sites in Ontario appealed the Ontario government's approval of these projects to the Ontario Superior Court.

Technically, the appeal is about Ontario's *Environmental Protection Act (EPA)*, the issuing of *Renewable Energy Approvals (REAs)* for wind turbine projects by the Director of the Ministry of the Environment (the Director) and how *Environmental Review Tribunals (ERT)* deal with appeals of the Director's decisions.

The substance of the appeal, however, relates specifically and primarily to the impact of the turbines on the health of people living near wind turbines.

### *The Position of the Appellants:*

The position of those making appeals is that the Director's decision and the appeal procedures are unfair because those making appeals are required to demonstrate that wind projects cause serious harm to human health.

Those making the appeal argue, among other things, that *Energy Review Tribunal* should:

- make a "reasonable prospect of harm to human health" the test for projects;
- apply section 7 of the *Canadian Charter of Rights and Freedoms* in making their decisions (*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.*).
- allow those appealing *Renewable Energy Approvals* to demonstrate serious harm to human health from their self-diagnosed symptoms without calling evidence from qualified medical experts.

### *The Government's Position:*

The Government's position is that measures are in place to protect the public from any potential harm created by wind turbines – that is, section 7 rights are already protected by government measures – so the onus is on complainants to establish that wind turbines, authorized and

regulated by the government, will cause serious harm to human health or to plant and animal life or the environment

*The Hearing and Decision by the Ontario Superior Court:*

The Appellants asked the Court to make following decisions:

- (i) The test for approving a wind project should be whether there is a reasonable prospect it will cause serious harm to human health;
- (ii) Section 7 of the *Charter* applies to any harms associated with living close to industrial wind turbines;
- (iii) The *ERT* can review the Director's renewable energy approvals to determine if they comply with the *Charter*;
- (iv) It is not necessary to call expert medical evidence to prove that wind turbines can create a reasonable prospect of serious harm to human health.

The Court considered four issues:

**Issue 1:** Is the "harm" test in sections 142.1(3) and 145.2.1(2) of the *Environmental Protection Act (EPA)* constitutionally valid?

Sections 142.1(3) and 145.2.1(2) of the *EPA* establish the grounds for *ERT* hearing complaints that proposed and existing renewable energy projects will cause, (a) serious harm to human health; and/or (b) serious and irreversible harm to plant life, animal life or the natural environment.

The Appellants claimed that these *EPA* sections violate section 7 of the *Charter* because they place the onus on those making appeals to establish harm and this requirement is impossibly high.

The *ERT* took the view, which the Court accepted, that requiring a complainant to show that turbines located and operating according government measures are causing or might cause harm is appropriate, does not violate section 7 of the *Charter* and is constitutionally valid.

The problem with this issue is that the Appellants appear not to understand the nature of the Constitutional obligations in section 7. Governments are responsible to ensure that citizens and their "*right to life, liberty and security of the person*" are protected.

Effectively, Appellants must demonstrate, based on substantive evidence, that the Ontario Government has failed in its duty established by section 7 of the *Charter*.

Canadian Governments, including Ontario, fulfill their Charter obligations through their policies, measures and operating systems, in this case through the *Environmental Protection Act* and the *Renewable Energy Approvals* and the *Environmental Review Tribunal*. Part of this process is to make certain that the information they receive is accurate. This requires testing the accuracy of the information they receive through the use of medical expert evidence and other means.

Specifically the Court said the following:

*[90] Given our conclusion that the Tribunals did not err in rejecting the Appellants' constitutional claim that the statutory harm test set out in EPA ss. 142.1(3) and 145.2.1(2) did not deprive the Appellants of the right to security of the person, it is not necessary on this appeal to address the submissions made by the parties about whether any deprivation was in accordance with the principles of fundamental justice nor to address their submissions on section 7 of the Charter.*

**Issue 2:** Were Tribunals wrong in their treatment of the “post-wind turbine witnesses”, that is witnesses who have lived near wind turbines?

Generally, Tribunals assessed the evidence of the post-turbine witnesses based on expert medical evidence they heard which was as follows:

- causal conclusions based solely on self-reported health problems were scientifically speculative and likely misleading;
- the level of information provided in the medical records of post-turbine witnesses was insufficient to allow medical practitioners and other objective witnesses to make definitive causal assessments between diagnoses, symptoms and wind turbines.

The Court took no position on this issue since Tribunals were not dealing with questions of law and these were not open to the court to review.

**Issue 3:** Were Tribunals wrong in taking the position they lacked the jurisdiction to review the Director's decisions to determine if they complied with s. 7 of the Charter?

Based on the legal precedents and the *Environmental Review Tribunal's (ERT)* specific mandate to deal only with wind turbines impact on human health and the environment, the Court decided Tribunals have no responsibility to consider matters of law outside this mandate.

**Issue 4:** Did tribunals fail to follow the principles of fairness or natural justice?

This issue relates to process. The Court found no issue with the *ERT*'s treatment of these matters.

Summary:

The Court dismissed all the appeals.

In effect, the Court has confirmed the constitutional validity of the Ontario government's system for approving and regulating wind turbines. The Court's decision should reduce appeals and eliminate charges that the system is unconstitutional.

On the other hand, the Court's decision will probably be appealed.