



Ontario Court Overturns ERT Decision Revoking Ostrander's Renewable Energy Wind Farm Approval

By Charles Birchall, Partner
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*On February 20, 2014, the Ontario Divisional Court set aside the Environmental Review Tribunal's (ERT) revocation of Ostrander Point GP's (Ostrander) renewable energy approval for a wind farm near Picton. In [Ostrander Point GP Inc. \(and another\) v. Prince Edward County Field Naturalists \(and another\)](#) (2014 ONSC 974), the Court found the ERT's prior decision to be "unreasonable" on the basis of several errors of law which, both individually and collectively, were fatal to the ERT's conclusions. **The decision clearly signals that it will be difficult to overturn a renewable energy approval on the basis that the wind farm will cause "serious and irreversible harm to plant life, animal life or the natural environment."***

The ERT's July 2013 Revocation of Ostrander's Renewable Energy Approval

The renewable energy approval issued by the MOE related to a nine turbine wind farm located on Crown land about 15 km south of Picton.

As reported in [the September 2013 issue of the Willms & Shier e-newsletter](#), the ERT decided to revoke the approval in July 2013 on the grounds that the project would cause "serious and irreversible harm" to a population of Blanding's turtles, a threatened species in Ontario. The ERT concluded that traffic on access roads to the project, together with an increase in poaching and predators, would cause serious and irreversible harm to the turtles on site. The ERT revoked the approval pursuant to section 145.2.1(4) of the Ontario *Environmental Protection Act* (EPA).

Ostrander and the MOE appealed the ERT's decision. The Prince Edward County Field Naturalists (PECFN) also appealed, claiming that the ERT had erred in not finding that the project also posed same threat to migratory birds and alvar plant life. The Alliance to Protect Prince Edward County (APPEC) appealed as well, on the grounds that the project would cause serious harm to human health.

The Ontario Divisional Court's Decision

In its decision of February 20, 2014, the Court found the following errors of law to be both individually and collectively fatal to the ERT's conclusions:

- 1 ***Failure to separately identify and explain reasons*** – The ERT failed to separately identify and explain its reasons for concluding that, if serious harm would result from the project, that serious harm was irreversible.

- 2 ***Evidence of “irreversibility” not to EPA standard*** – The Court found a lack of evidence demonstrating “irreversibility” since the ERT did not know: (i) the size of the Blanding’s turtle population on the site, in the surrounding area or in the rest of the province; (ii) the magnitude of the mortality rate for the species; and (iii) the data for existing or projected vehicular traffic at the site.
- 3 ***Failure to consider permit issued under Endangered Species Act*** – Considering the issue of irreversible harm, the Court held that the ERT did not take account of the fact that Ostrander had obtained a permit from the Ministry of Natural Resources under the *Endangered Species Act* (ESA). This permit allowed Ostrander to harm the Blanding’s turtle and its critical habitat when constructing and operating the wind farm. The ERT was obliged to apply its statutory mandate in a manner that would avoid any conflict with the ESA regime.
- 4 ***Parties not given opportunity to address appropriate remedy*** – After determining that the Blanding’s turtle population would be subject to serious and irreversible harm, the ERT (for reasons of natural justice and procedural fairness) should have given the parties an opportunity to address the appropriate remedy to be adopted by the ERT.
- 5 ***Error in finding that ERT not able to amend or alter MOE decision*** – The ERT erred in finding that it was not in a position under the EPA to alter the decision of the Director of the MOE to issue the renewable energy approval or to substitute its opinion for that of the Director pursuant to section 145.2.1(4) of the EPA.

The Court went on to deny the appeals made by the PECFN (respecting serious and irreversible harm to migratory birds and alvar plant life) and the APPEC (respecting serious harm to human health).

Next Steps

Based on media reports, it is expected that the PECFN will seek leave to appeal the Divisional Court decision.

[Charles \(Chuck\) J. Birchall](mailto:cbirchall@willmsshier.com), B.A. (Hons.), LL.B., LL.M., has over 23 years of legal experience devoted exclusively to environmental law. Chuck provides advice on environmental assessment and compliance, energy law and Aboriginal consultation and economic development. Chuck has particular experience advising on environmental assessment issues raised by mining, oil and gas, energy and infrastructure projects. He can be reached at 613-761-2424 or by e-mail at cbirchall@willmsshier.com.

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