

Wind Farm Approval Revoked Due to Human Safety Concerns

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On August 16, 2017 the Environmental Review Tribunal (the “Tribunal”) released its decision in *Wiggins v Ontario (Environment and Climate Change)*, involving a challenge to the grant of a wind turbine farm approval.¹ Seven parties, including the Town of Collingwood, the Region of Simcoe² and the Township of Clearview appealed the approval on the basis that the turbines were too close to the Collingwood Regional Airport (“CRA”) and the Clearview aerodrome, and would cause loss of life.

The Tribunal revoked wpd Fairview Wind Incorporated’s (“wpd”) approval. In October 2016, the Tribunal had found that the renewable energy project will cause serious harm to human health arising from the proximity of proposed wind turbines to CRA and the Clearview aerodrome. In the recent decision, wpd was provided the opportunity to show measures to mitigate to this potential harm. Tribunal held that wpd failed to do so.

This case is the first instance of the Tribunal revoking a Renewable Energy Approval in Ontario on the grounds of likely harm to human health.

Background

On February 11, 2016, the Ministry of the Environment and Climate Change (“MOECC”) issued Renewable Energy Approval No. 3948-9RDLRF (“REA”) to wpd for an eight turbine wind farm in Clearview, Ontario. The proposed wind farm would be less than a mile from the Clearview aerodrome and within the operating airspace for CRA.

The appellants argued that the wind farm would cause serious and irreversible harm to the natural environment (dubbed the “Environment Test”) and serious harm to human health (the “Human Health Test”). Collingwood, Simcoe and Clearview are the first municipalities to appeal on human health grounds; they objected based on the obvious potential harm to pilots and passengers.

CRA is a busy regional transport center that hosts a large local community of light and ultra-light aircraft, commercial jets and medevac aircraft, as well as two flight schools that train beginner pilots. Several other flight schools in south-western Ontario use CRA as a stopping point for training flights. The aerodromes in question do not have air traffic control towers to assist pilots. The aerodromes are located in an area of unpredictable and changeable weather coming off of Georgian Bay.

¹ *Wiggins v Ontario (Environment and Climate Change)*, Case No.: 16-036, Decision dated August 19, 2017. [Remedy Hearing]

² This firm acted for Collingwood and Simcoe during the appeal.

Of particular importance, 90% of pilots in the area fly according to Visual Flight Rules (“VFR”, i.e. pilots navigating primarily visually). The Tribunal heard as evidence that VFR pilots are allowed to fly as low as 500 feet above the ground in order to stay clear of clouds. The proposed turbines would be just over 500 feet tall, skinny and white, and difficult to see against clouds or snow.

Collingwood and Simcoe led expert evidence that the pilots who use CRA and the Clearview aerodrome would be put at risk by the presence of the 500 foot turbines within the operating airspace of each of the aerodromes. To impress upon the Tribunal panel the vulnerabilities associated with light aircraft, Collingwood organized a site visit to CRA, with each Tribunal member taken on an airborne tour. The flights included take-offs and landings from both runways (paved and grass), with the proposed location of each turbine set out on the ground with large orange markers.

Turbulence

Wind turbines are known to create air turbulence. “Wake turbulence” is generated by the differential air pressure moving across the turbine’s fast-moving blades. It acts like moving vortices in the air; invisible, powerful and hazardous to planes.

wpd did not provide turbulence data in its original REA application materials, and turbulence was not considered by the MOECC when the REA was granted. wpd chose to file expert evidence at the Tribunal hearing that argued the likelihood of disturbance to the aerodromes was low. The appellants filed responding expert evidence about the increased risk posed by the turbine turbulence to aircraft during take-off and landings.

In cross-examination, one of wpd’s experts confirmed that the turbulence generated by the proposed wind farm would negatively impact take-offs and landings at both airports, and in particular at the Clearview aerodrome. In its written submissions following the hearings, the MOECC withdrew its support for the locations of two of the proposed turbines on the basis that the turbulence posed an unacceptable additional risk to pilots.³

Tribunal’s October 2016 Decision

In the Tribunal’s October 7, 2016 decision (“Hearing Decision”), the Tribunal found that the appellants satisfied both the Human Health Test and the Environment Test. The Tribunal went on to review the proponent’s proposed mitigation measures and determined that those measures could not ameliorate the Human Health or Environmental impacts.

The Tribunal held that the appellants met their onus to establish that the Human Health Test in respect of the Project’s effects on persons using both the Collingwood Regional Airport and Clearview aerodrome.⁴ The Tribunal further held that engaging in the Project in accordance with the REA will cause serious and irreversible harm to animal life, plant life or the natural environment.⁵

³ *Wiggins v Ontario (Environment and Climate Change)*, Case No.:16-036, Order delivered October 7, 2016 at para 93. [Hearing Decision]

⁴ Hearing Decision at para 175.

⁵ Hearing Decision at para 221.

The Remedy Hearing

As has become standard following the Ontario Court of Appeal's ruling in *Prince Edward County Field Naturalists v Ostrander Point GP Inc*, the Tribunal provided an opportunity to wpd to present additional evidence on possible mitigation; this secondary hearing is called a Remedy Hearing.⁶

wpd presented additional evidence on mitigation of harm to endangered bat species at the Remedy Hearing. wpd proposed an amendment to the REA, supported by expert witness evidence, to curtail the movement of the blades in the evenings when bats are at their most active.

Neither wpd nor the MOECC led evidence on any possible mitigation for harm to human health arising from the proximity of the Project to the Collingwood Regional Airport and the Clearview aerodrome.

REA Revoked

In its 39 page decision on the Remedy Hearing, the Tribunal revoked the REA, finding that:

... neither the Approval Holder nor the Director provided any additional evidence or mitigation proposals to address the Tribunal's finding in its October 2016 Order of serious harm to human health.

As the Tribunal has found that engaging in the Project in accordance with the REA will cause serious harm to human health, and neither the Approval Holder nor the Director have proposed effective means to mitigate this harm, the Tribunal finds that it is in the public interest to revoke the REA under s. 145.2.1(4)(a).⁷

The ERT found that the evidence about mitigation of harm to bats was sufficient, there was no reason to amend the REA because of the decision to revoke under the Human Health Test.⁸ In other words, while the REA can be amended to reduce the harm to bats, no steps were taken by wpd to mitigate the proven harm to humans. The proposed wind farm must be refused based on the likely harm to pilots.

wpd has 30 days to appeal this decision to the Ontario Divisional Court.

⁶ 2015 ONCA 269.

⁷ Remedy Hearing at paras 19 and 20.

⁸ Remedy Hearing at para 78.

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