AIRD & BERLIS LLP
Barristers and Solicitors

Scott Stoll
Direct: 416.865.4703
E-mail: sstoll@airdberlis.com

November 22, 2013

BY COURIER, EMAIL AND RESS

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319, 27th Floor
2300 Yonge Street
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: Reply Submissions
EB-2013-0268

Pursuant to Procedural Order No. 1 dated October 30, 2013, please find attached two copies of the Reply Submissions of The Corporation of the County of Dufferin in the above noted matter.

Yours truly,

AIRD & BERLIS LLP

Scott Stoll

SAS/hm
Encl.

cc: Sonya Pritchard, County of Dufferin
Jeff Hammond, Dufferin Wind Power Inc.
Jonathan Myers, Torys LLP
Crawford Smith, Torys LLP
All Intervenors

15837768.1

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, (Sched. B) as amended (the "**Act**");

AND IN THE MATTER OF an application by Dufferin Wind Power Inc. ("**DWPI**") for an Order pursuant to section 99(5) of the Act granting authority to expropriate land for the purposes of constructing, operating and maintaining transmission and distribution facilities that will connect DWPI's planned Dufferin Wind Farm to the IESO-controlled grid.

REPLY SUBMISSIONS OF

THE CORPORATION OF THE COUNTY OF DUFFERIN

PART I: FACTS

1. Dufferin Wind Power Inc. ("**DWPI**") filed an application with the Ontario Energy Board (the "**Board**") on July 19, 2013 under section 99 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B. (the "**OEB Act**") seeking to expropriate lands, including lands owned by the County of Dufferin (the "**County**"), to construct, maintain, and operate a transmission line to connect DWPI's Wind Farm to the IESO-controlled grid.

2. On July 5, 2013, just 2 weeks prior the filing of this Application, the Ontario Energy Board issued its decision granting leave to construct for the Project in EB-2012-0365.

3. By Notice of Appeal dated August 21, 2013, Conserve Our Rural Environment ("**CORE**") filed an appeal in Divisional Court challenging the Board's decision granting leave to construct. This Appeal is currently in process.

4. Sub-section 33(4) of the OEB Act states that where the Divisional Court provides its opinion to the Board, the Board is mandated to make an order in accordance with that opinion.

> 33(4) The Divisional Court shall certify its opinion to the Board and the Board shall make an order in accordance with the opinion, but the order shall not be retroactive in its effect.

5. Concurrently with the appeal to the Divisional Court, six appellants have appealed the issuance of a Renewable Energy Approval by the Ministry of the Environment of DWPI's Wind Turbine project (the "**Project**"), which includes the transmission line, to the Environmental Review Tribunal (the "**ERT**"), known as *Bovaird v. Director, Ministry of the Environment*, case nos. 13-070-13-075. The appeals to the ERT raise a variety of issues including harm to human health and serious and irreparable harm to the environment.

6. On an appeal, the ERT has broad powers to amend or even entirely revoke the approval granted by the Ministry of the Environment.

> 145.2.1(4) If the Tribunal determines that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a) or (b), the Tribunal may,
>
> (a) revoke the decision of the Director;
>
> (b) by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations; or

(c) alter the decision of the Director, and, for that purpose, the Tribunal may substitute its opinion for that of the Director.

7. Pursuant to sub-section 145.2.1(6) the ERT must issue a decision in the appeal within six months of the appeal being filed. As such, the ERT is expected to render its decision on or prior to December 24, 2013.

8. Based upon the statutory powers granted to the Divisional Court and the ERT, the Board's Decision granting leave to construct could be overturned and/or subject to review and rehearing. This could change the nature of the Project or, in some instances, result in the discontinuation of the Project.

PART II: THE ISSUE

9. The issue for determination is whether the Board should stay its consideration the expropriation proceeding under s. 99 of the *OEB Act* pending the outcome of other related appeals.

PART III: THE LAW AND ARGUMENT

General Considerations

10. The test for granting a stay pending appeal engages three factors, all of which are considered together in determining whether the interests of justice call for a stay:

(a) does the appeal raise serious issues;

(b) would the moving party suffer irreparable harm if it is compelled to comply with, or be subject to, the Judgment before its rights can be determined on the appeal; and

(c) does the balance of convenience favour granting the relief sought when weighed against harm or prejudice to the other side.

***BPHL Holdings Inc. v. 2058756 Ontario Ltd.*, [2008] O.J. No. 3873 at para. 4.**

***RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17 at para. 43, 111 D.L.R. (4th) 385.**

11. There is judicial support for the proposition that "section 106 of the *Courts of Justices Act* 'gives the court a broad discretion to stay proceedings, unfettered by any specific test.'"

***Grand River Enterprises Six Nations Ltd. v. Canada (Attorney General)*, 2010 ONSC 2911, [2010] O.J. No. 2057 at para. 14.**

***Hester v. Canada*, [2007] O.J. No. 4719 (S.C.J.) at para. 57, aff'd [2008] O.J. No. 634 (Div. Ct.) at paras. 13-16.**

12. Notwithstanding this broad discretion, most cases rely on four factors when considering whether to issue a temporary stay pending the resolution of another proceeding in a different forum:

(a) whether there is substantial overlap of issues in the two proceedings;

(b) whether the two cases share the same factual background;

(c) whether issuing a temporary stay will prevent unnecessary and costly duplication of judicial and legal resources; and

(d) whether the temporary stay will result in an injustice to the party resisting the stay.

***Apotex Inc. v. Schering Corp.*, 2013 ONSC 1411, O.J. No. 1013 at para. 9 [*Apotex*].**

***Dadouch v. Bielak*, 2011 ONSC 1583, [2011] O.J. No. 1095 at para. 16 [*Dadouch*].**

***Hollinger International Inc. v. Hollinger Inc.* (2004), 11 C.P.C. (6th) 245 (Ont. S.C.J.) at para. 5, leave to appeal refused, [2005] O.J. No. 708 (Div. Ct.) [*Hollinger*].**

13. The "demanding test prescribed in *RJR-MacDonald*" does not apply to this type of stay, but some administrative tribunals have nonetheless relied on the *RJR-MacDonald* test in these circumstances.

> ***Apotex*, *supra* at para. 11.**
>
> ***Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312 at paras. 5-6 [*Mylan Pharmaceuticals*].**

14. Temporary stays pending the resolution of another proceeding "are typically granted when the other proceeding would 'substantially reduce the issues to be determined' or if success in the other proceeding could render the outstanding issues in the case 'substantially moot' or otherwise have a 'material' impact."

15. This is precisely the scenario presented to the Board in this motion. In the present case, the proceedings before the Divisional Court and ERT have the capacity to have a material, if not conclusive, impact upon the issues outstanding.

> ***Bank of Montreal v. Ken Kat Corp.*, 2010 ONSC 1990, [2010] O.J. No. 1341 at para. 69.**
>
> ***Ainsworth Lumber Co. v. Canada (Attorney General)*, 2001 BCCA 105, 1 C.P.C. (5th) 49 at para. 14, cited with approval by the Ont. S.C.J. in *Hollinger*, *supra* at para. 5.**

16. In *Tribute Resources*, the Board stayed several applications relating to the development of natural gas storage pools pending a Court of Appeal decision as to the ownership of the land under which one of the pools was to be developed. In its brief reasons, the Board found "that the outcome of the Court of Appeal Decision directly affects [the] Stanley Pool applications … and that the review of all of the applications in a single proceeding is more efficient and practical."

> **Procedural Order No. 2, 12 March 2010, EB-2009-0338, EB-2009-0339, EB-2009-0340 at pages 1, 3, 5 [*Tribute Resources*].**

***Tribute Resources Inc. v. 2195002 Ontario Inc.*, 2012 ONSC 25, [2012] O.J. No. 55 at para. 10.**

***Tribute Resources Inc. v. McKinley Farms Ltd.*, 2010 ONCA 392, [2010] O.J. No. 2293.**

17. In this case, the appeal to the Divisional Court and the appeals to the ERT deal with the exact same factual matrix. In fact, the appeal to Divisional Court is an appeal of the Board's decision which provides DWPI the ability to make an application for expropriation. Absent leave to construct, DWPI lacks the necessary statutory preconditions to making an expropriation application.

18. Further, the expropriation proceeding to the Board would be moot if the ERT or Divisional Court found in favour of the appellants. If the Divisional Court or ERT found in favour of the appellants, the expropriation of the railway lands would be entirely unnecessary.

19. Expropriation results in the placement of an encumbrance, the easement, on the landowner's title record.

20. Notably, DWPI has not indicated that there would be any injustice to DWPI as a result of a stay of this proceeding. As such the balance shifts to granting the stay.

21. At paragraph 21 of DWPI's Submissions on the Request for Stay dated November 15, 2013, the Applicants state that "[e]ven if the REA were to be revoked, this would not necessarily discontinue the project as Dufferin would have the right to appeal the ERT's decision and/or of changing its project or mitigating the issues in order to resubmit its REA application."

22. In the decision of *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment* ("**Ostrander**"), a Renewable Energy approval was **revoked in its entirety** and the ERT did not alter the approval to allow for mitigation of issues. It should be noted that the appeal in Ostrander was argued on the same basis (serious and irreversible harm to plants, animals, and the natural environment) as the appeals of this Project by CORE and others. It is not unreasonable to suggest that the Renewable Energy Approval for this Project could be revoked in its entirety by the ERT.

> ***Alliance to Protect Prince Edward County v. Director, Ministry of the Environment* [2013] O.E.R.T.D. No. 40**

23. In light of the foregoing, the County respectfully requests a temporary stay of this proceeding pending the outcomes of the appeal to the Divisional Court and ERT. The County submits it meets the test for granting the stay and that DWPI has not provided any evidence of injustice that would result from a temporary stay.

PART IV: CONCLUSION AND ORDER SOUGHT

24. The County respectfully requests:

a. Granting a stay of the Application pending a final determination of:

   i. The Divisional Court appeal of the Board's decision granting leave to construct in EB-2012-0365; and

   ii. The Environmental Review Tribunal's ("**ERT**") decision in the six appeals of the Dufferin Wind Power Inc. project which include the transmission line, known as *Bovaird v. Director, Ministry of the Environment*, case nos. 13-070-13-075.

b. Such other relief as this Board determines is reasonable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: November 22, 2013

The Corporation of the County of Dufferin

Scott Stoll

and Piper Morley

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INDEX

Case Name:

BPHL Holdings Inc. v. 2058756 Ontario Ltd.

RE: BPHL Holdings Inc., (Applicant), and 2058756 Ontario Limited, Malik S. Khalid and Malik S. Khalid, as Trustee for M.S. Khalid Family Trust and Central Diagnostic Inc., (Respondents)

[2008] O.J. No. 3873

170 A.C.W.S. (3d) 233

Court File Nos. 438/08 and 08-CV-7658-00CL

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

D.R. Aston J.

Heard: October 1, 2008.
Judgment: October 3, 2008.

(12 paras.)

Civil litigation -- Civil procedure -- Appeals -- Stay of proceedings pending appeal -- Balance of convenience -- Irreparable harm -- Serious issue to be tried -- Motion by Khalid for a stay of an order pending appeal dismissed -- The order compelled the sale of property held in trust for the Khalid Family Trust and BPHL Holdings -- The parties had the ability to protect their rights by coming back to court for any disputes over listing, offers or sale proceeds -- Thus, while there were serious issues to be decided on appeal, it was unlikely that the appellants would suffer irreparable harm and the balance of convenience did not particularly favour the appellants.

Statutes, Regulations and Rules Cited:

Ontario Business Corporations Act, R.S.O. 1990, c. B.16, s. 207, s. 248

Partition Act, R.S.O. 1990, c. P.4,

Counsel:

Jack Berkow/Antonio Dimilta, for the Applicant.

J. Lancaster, for the Respondents.

ENDORSEMENT

1 D.R. ASTON J.:-- The appellant, Malik Khalid, on his own behalf, as trustee for M.S. Khalid Family Trust, and on behalf of Central Diagnostics Inc. has appealed to the Divisional Court from

the order of Lederman J, dated August 8, 2008. The respondent 2058756 Ontario Limited holds title to two properties as a bare trustee for the appellants and the applicant BPHL Holdings Inc. ("BPHL"). The application brought under the Ontario Business Corporations Act ("OBCA") was to wind up the numbered corporation and compel the sale of the two parcels of property as part of that process. The application claimed alternative relief under the Partition Act.

2 This motion is for a stay of the Order under appeal pending the disposition of that Appeal.

3 The application was first before the applications judge on August 6, 2008. No one attended on behalf of the respondents and the matter was adjourned to the following day. On August 7, 2008, once again no one attended on behalf of the respondents. The applications judge then directed the respondents to appear at 9:30 a.m. the following day "to advise as to whether responding material is to be filed or on the terms of the proposed draft Order (Schedule A). Otherwise Order will issue on August 8". On August 8, 2008, a solicitor appeared on behalf of the respondents to request an adjournment. The applications judge adjourned the application sine die but also ordered the listing for sale of the two properties in Kingston and Brockville, reserving to the parties the right to return to court concerning any actual Offer to Purchase, any dispute about the listing or in relation to the distribution of net proceeds of sale. The appellants submit that the Order requiring the properties to be listed for sale must be a final Order because it deprives the appellants of the ability to challenge whether the property is to be sold and limits them to issues over the terms of sale and distribution of sale proceeds.

4 The test for granting a stay pending appeal engages three considerations:

(i) does the appeal raise serious issues;
(ii) will the moving party suffer irreparable harm if it is compelled to comply with, or be subject to, the Order before its rights can be determined on the appeal; and
(iii) does the balance of convenience favour granting the relief sought when weighed against harm or prejudice to the other side.

These criteria are not considered as three separate hurdles but are considered together in determining whether the interests of justice call for a stay. A weakness on one factor or criteria may be compensated for by the strength of some other factor.

5 The question of a serious issue involves a preliminary examination of the merits of the moving party's appeal. The threshold is low and the court at this stage does not engage in any extensive view of the merits so long as the court is satisfied that the issues raised on appeal are not frivolous or vexatious.

6 In this case, the grounds for appeal are:

(i) the refusal to grant an adjournment of all issues when there was no demonstrable urgency and the respondent had good reason to need more time, having only been served less than two weeks before the first return date;
(ii) ordering the two parcels of land sold without first making any finding under s.207 or 248 of the OBCA. (The appellant maintains that the part of the Order requiring the sale of the properties is a final Order which could only be made ancillary to a finding that the applicant was entitled to relief under the OBCA, a finding that was not made. Furthermore, the Order could not be an interim or interlocutory Order because no such relief was sought in the Notice of Application.)
(iii) the failure of the applications judge to give any reasons, either for the adjournment request or for the Order which he granted; and

(iv) that some of the material evidence before the applications judge was inadmissable and the evidentiary record was incomplete.

7 In response, BPHL Holdings Inc. submits that the applications judge did not make a final Order but rather exercised his broad latitude to grant an adjournment on terms, which included the listing of the two properties for sale. BPHL points to the wide discretion of a judge generally with respect to adjournment requests but also to the specific Practice Direction for the commercial list in Toronto. Furthermore, it is apparent "reading between the lines" of the short serial adjournments, August 6th and 7th, that the applications judge found some urgency in the relief sought. BPHL submits there is no onus on a judge to give reasons if there is no conflicting evidence and therefore no need to express factual findings.

8 It is not necessary for me to determine whether the Order was a final Order or an interlocutory Order nor to consider whether the applications judge derived jurisdiction from the Partition Act and not merely the OBCA. I find there are in fact serious issues to be decided on the Appeal and the Appeal is not frivolous or vexatious.

9 On the consideration of irreparable harm, the appellant submits that the apparently meritorious appeal will become moot if the stay is not granted. The appellant has perfected the appeal and undertakes to consent to any Order that would expedite the hearing of the Appeal. The properties may well be sold by the time any Appeal is heard and it will be too late to recover them. The appellant also submits that this is the wrong time to be selling these particular properties and he alludes to other "irreparable harm" he may sustain in paragraphs 13 to 19 of his affidavit in support of this motion. BPHL submits that there is no irreparable harm because this is simply a dispute over money between parties to a commercial agreement. It submits there is no harm that cannot be compensated by damages. Furthermore, it submits there is no irreparable harm because Khalid has the opportunity to purchase either property himself should he wish to do so.

10 BPHL further submits that the balance of convenience aspect of the test fails because of the possible harm or prejudice to BPHL. There is some evidence that the Order was made because of a risk a third party, Taggart, would exercise its own right to force a sale of one of the properties by public tender at a (likely) lower price. Taggart had signed a forbearance agreement on the strength of the promise or probability that the property would be listed for sale. There were substantial arrears of municipal taxes and utilities to the extent that the utilities were in danger of being cut off. BPHL also submits that the ability of the parties to come back to court concerning any dispute over the listing, any offer that is received, or any distribution of the sale proceeds means the rights of the parties are protected and that there is no balance of convenience in favour of the stay.

11 I do not find the grounds for appeal compelling. I am dubious the appellants will suffer irreparable harm. I do not find the balance of convenience favours the appellants particularly. On an overall consideration of the three aspects of the test, I am not satisfied a stay is warranted. The motion is therefore dismissed.

12 The appellants are ordered to pay costs fixed in the amount of $9,300.00 inclusive of GST and disbursements, as agreed.

D.R. ASTON J.

cp/e/qlbxm/qlcnt/qlaxw/qlaxr/qlaxw

Indexed as:

RJR-MacDonald Inc. v. Canada (Attorney General)

RJR-MacDonald Inc., Applicant;
v.
The Attorney General of Canada, Respondent, and
The Attorney General of Quebec, Mis-en-cause, and
The Heart and Stroke Foundation of Canada, Interveners on the
the Canadian Cancer Society, application for the Canadian
Council on Smoking and Health, and interlocutory relief
Physicians for a Smoke-Free Canada
And between
Imperial Tobacco Ltd., Applicant;
v.
The Attorney General of Canada, Respondent, and
The Attorney General of Quebec, Mis-en-cause, and
The Heart and Stroke Foundation of Canada, Interveners on the
the Canadian Cancer Society, application for the Canadian
Council on Smoking and Health, and interlocutory relief
Physicians for a Smoke-Free Canada

[1994] 1 S.C.R. 311

[1994] S.C.J. No. 17

File Nos.: 23460, 23490.

Supreme Court of Canada

1993: October 4 / 1994: March 3.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé,
Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.
APPLICATIONS FOR INTERLOCUTORY RELIEF

Practice -- Interlocutory motions to stay implementation of regulations pending final decision on appeals and to delay implementation if appeals dismissed -- Leave to appeal granted shortly after applications to stay heard -- Whether the applications for relief from compliance with regulations should be granted -- Tobacco Products Control Act, S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18. -- Tobacco Products Control Regulations, amendment, SOR/93-389 -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1) - - Rules of the Supreme Court of Canada, SOR/83-74, s. 27 - - Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1.

The Tobacco Products Control Act regulates the advertisement of tobacco products and the health warnings which must be placed upon those products. Both applicants successfully challenged the Act's constitutional validity in the Quebec Superior Court on the grounds that it was ultra vires Parliament and that it violates the right to freedom of expression in s. 2(b) of the Canadian Charter of Rights and Freedoms. The Court of Appeal ordered the suspension of enforcement until judgment was rendered on the Act's validity but declined to order a stay of the coming into effect of the Act until 60 days following a judgment validating the Act. The majority ultimately found the legislation

constitutional.

The Tobacco Products Control Regulations, amendment, would cause the applicants to incur major expense in altering their packaging and these expenses would be irrecoverable should the legislation be found unconstitutional. Before a decision on applicants' leave applications to this Court in the main actions had been made, the applicants brought these motions for stay pursuant to s. 65.1 of the Supreme Court Act, or, in the event that leave was granted, pursuant to r. 27 of the Rules of the Supreme Court of Canada. In effect, the applicants sought to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. They also requested that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of Tobacco Products Control Act.

This Court heard applicants' motions on October 4 and granted leave to appeal the main action on October 14. At issue here was whether the applications for relief from compliance with the Tobacco Products Control Regulations, amendment should be granted. A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants.

Held: The applications should be dismissed.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the Supreme Court of Canada Act and r. 27 of the Rules of the Supreme Court of Canada.

The words "other relief" in r. 27 of the Supreme Court Rules are broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered. It can apply even though leave to appeal may not yet be granted. In interpreting the language of the rule, regard should be had to its purpose: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal.

Section 65.1 of the Supreme Court Act was adopted not to limit the Court's powers under r. 27 but to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. It should be interpreted as conferring the same broad powers as are included in r. 27. The Court, pursuant to both s. 65.1 and r. 27, can not only grant a stay of execution and of proceedings in the traditional sense but also make any order that preserves matters between the parties in a state that will, as far as possible, prevent prejudice pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. The Court therefore must have jurisdiction to enjoin conduct on the part of a party acting in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court.

Jurisdiction to grant the relief requested by the applicants exists even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd. which established that the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established. If jurisdiction under s. 65.1 of the Act and r. 27 were wanting, jurisdiction would be found in s. 24(1) of the Canadian Charter of Rights and Freedoms. A Charter remedy should not be defeated because of a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

The three-part American Cyanamid test (adopted in Canada in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.) should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.

At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation into the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the Metropolitan Stores test.

At the second stage the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will normally determine the result in applications involving Charter rights. A consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation has in fact this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

As a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

Here, the application of these principles to the facts required that the applications for stay be dismissed.

The observation of the Quebec Court of Appeal that the case raised serious constitutional issues and this Court's decision to grant leave to appeal clearly indicated that these cases raise serious questions of law.

Although compliance with the regulations would require a significant expenditure and, in the event of their being found unconstitutional, reversion to the original packaging would require another significant outlay, monetary loss of this nature will not usually amount to irreparable harm in private law cases. However, where the government is the unsuccessful party in a constitutional claim, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

Among the factors which must be considered in order to determine whether the granting or

withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies. Although the required expenditure would impose economic hardship on the companies, the economic loss or inconvenience can be avoided by passing it on to purchasers of tobacco products. Further, the applications, since they were brought by two of the three companies controlling the Canadian tobacco industry, were in actual fact for a suspension of the legislation, rather than for an exemption from its operation. The public interest normally carries greater weight in favour of compliance with existing legislation. The weight given is in part a function of the nature of the legislation and in part a function of the purposes of the legislation under attack. The government passed these regulations with the intention of protecting public health and furthering the public good. When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. The applicants, rather, must offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation. The only possible public interest in the continued application of the current packaging requirements, however, was that the price of cigarettes for smokers would not increase. Any such increase would not be excessive and cannot carry much weight when balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

Cases Cited

Applied: Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110; considered: Labatt Breweries of Canada Ltd. v. Attorney General of Canada, [1980] 1 S.C.R. 594; American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396; referred to: R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401; Keable v. Attorney General (Can.), [1978] 2 S.C.R. 135; Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1924), 55 O.L.R. 127; Laboratoire Pentagone Ltée v. Parke, Davis & Co., [1968] S.C.R. 269; Adrian Messenger Services v. The Jockey Club Ltd. (No. 2) (1972), 2 O.R. 619; Bear Island Foundation v. Ontario (1989), 70 O.R. (2d) 574; N.W.L. Ltd. v. Woods, [1979] 1 W.L.R. 1294; Trieger v. Canadian Broadcasting Corp. (1988), 54 D.L.R. (4th) 143; Tremblay v. Daigle, [1989] 2 S.C.R. 530; Dialadex Communications Inc. v. Crammond (1987), 34 D.L.R. (4th) 392; R.L. Crain Inc. v. Hendry (1988), 48 D.L.R. (4th) 228; MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577; Hubbard v. Pitt, [1976] Q.B. 142; Mills v. The Queen, [1986] 1 S.C.R. 863; Nelles v. Ontario, [1989] 2 S.C.R. 170; Ainsley Financial Corp. v. Ontario Securities Commission (1993), 14 O.R. (3d) 280; Morgentaler v. Ackroyd (1983), 150 D.L.R. (3d) 59; Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791; Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans) (1988), 21 F.T.R. 304; Island Telephone Co., Re (1987), 67 Nfld. & P.E.I.R. 158; Black v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439; Vancouver General Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; Rio Hotel Ltd. v. Commission des licences et permis d'alcool, [1986] 2 S.C.R. ix; Ontario Jockey Club v. Smith (1922), 22 O.W.N. 373; R. v. Oakes, [1986] 1 S.C.R. 103.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1).
Code of Civil Procedure of Québec, art. 523.
Constitution Act, 1867, s. 91.
Fisheries Act, R.S.C. 1970 c. F-14.
Rules of the Supreme Court of Canada, 1888, General Order No. 85(17).
Rules of the Supreme Court of Canada, SOR/83-74, s. 27.
Supreme Court Act, R.S.C., 1985, c. S-26, ss. 65.1 [ad. S.C. 1990, c. 8, s. 40], 97(1)(a).
Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18.

Tobacco Products Control Regulations, amendment, SOR/93-389.

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Cassels, Jamie. "An Inconvenient Balance: The Injunction as a Charter Remedy". In Jeffrey Berryman, ed. Remedies: Issues and Perspectives. Scarborough, Ont.: Carswell, 1991, 271.
Sharpe, Robert J. Injunctions and Specific Performance, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (loose-leaf).

APPLICATIONS for interlocutory relief ancillary to constitutional challenge of enabling legislation following judgment of the Quebec Court of Appeal, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, allowing an appeal from a judgment of Chabot J., [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, granting the application. Applications dismissed.

Colin K. Irving, for the applicant RJR-MacDonald Inc.
Simon V. Potter, for the applicant Imperial Tobacco Inc.
Claude Joyal and Yves Leboeuf, for the respondent.
W. Ian C. Binnie, Q.C., and Colin Baxter, for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

Solicitors for the applicant RJR-MacDonald Inc.: Mackenzie, Gervais, Montreal.
Solicitors for the applicant Imperial Tobacco Inc.: Ogilvy, Renault, Montreal.
Solicitors for the respondent: Côté & Ouellet, Montreal.
Solicitors for the interveners on the application for interlocutory relief Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: McCarthy, Tétrault, Toronto.

The judgment of the Court on the applications for interlocutory relief was delivered by

SOPINKA AND CORY JJ.:--

I. Factual Background

1 These applications for relief from compliance with certain Tobacco Products Control Regulations, amendment, SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

2 The Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

3 The first part of the Tobacco Products Control Act, particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

4 Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(f) authorizes the Governor in Council to

adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(b) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

5 Each of the applicants challenged the constitutional validity of the Tobacco Products Control Act on the grounds that it is ultra vires the Parliament of Canada and invalid as it violates s. 2(b) of the Canadian Charter of Rights and Freedoms. The two cases were heard together and decided on common evidence.

6 On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, finding that the Act was ultra vires the Parliament of Canada and that it contravened the Charter. The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

7 Up to that point, the applicants had complied with all provisions in the Tobacco Products Control Act. However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

8 On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not ultra vires the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(b) of the Charter but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the Charter. Brossard J.A. agreed with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the Charter. The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

9 On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: Tobacco Products Control Regulations, amendment, SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

10 According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotograve cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about $30,000,000.

11 Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the Supreme Court Act, R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the Rules of the Supreme Court of Canada, SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates

sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of Tobacco Products Control Act.

12 The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

13 The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

> 3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
> (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
> (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

> 65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada, SOR/83-74, s. 27:

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

14 In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

15 Chabot J. concluded that the dominant characteristic of the Tobacco Products Control Act was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the Tobacco Products Control Act as a law regulating advertising of a particular product, a matter within provincial legislative competence.

16 Chabot J. found that, with respect to s. 2(b) of the Charter, the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that Charter guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

17 However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that advertising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

Court of Appeal (on the application for a stay)

18 In deciding whether or not to exercise its broad power under art. 523 of the Code of Civil Procedure of Québec to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

> But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a valid act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or delay the implementation or enforcement of valid legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

The Court made a partial grant of the relief sought as follows:

> Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under Sec. 5 after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it seems reasonable to order the suspension of enforcement under Sec. 5 of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.
>
> We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.
>
> ...
>
> Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid,

there is excellent reason why its effect and enforcement should not be suspended (A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd. [1987] 1 S.C.R. 110, 127, 135). [Emphasis in original.]

Court of Appeal (on the validity of the legislation), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. LeBel J.A. (for the majority)

19 LeBel J.A. characterized the Tobacco Products Control Act as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

20 LeBel J.A. applied the criteria set out in R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401, and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

21 LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(b) of the Charter but found that it was justified under s. 1 of the Charter. LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the Oakes test have been attenuated by later decisions of the Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [Translation] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

2. Brossard J.A. (dissenting in part)

22 Brossard J.A. agreed with LeBel J.A. that the Tobacco Products Control Act should be characterized as public health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

23 However, he did not think that the violation of s. 2(b) of the Charter could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

IV. Jurisdiction

24 A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

25 First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he

contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was intra vires s. 91 of the Constitution Act, 1867 and justified under s. 1 of the Charter. Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

26 The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations that were not even in existence at the time the appeal judgment was rendered.

27 The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the Supreme Court Act and r. 27 of the Rules of the Supreme Court of Canada.

Supreme Court Act

> 65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

28 Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see Rules of the Supreme Court of Canada, 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of the Act whence the Court derives its rule-making power. Subsection (1)(a) of that section provides that the rules may be enacted:

> 97. ... (a) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the

former, traditionally described as stays of execution, are contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See Keable v. Attorney General (Can.), [1978] 2 S.C.R. 135. The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1924), 55 O.L.R. 127 (C.A.). Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

29 Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

30 In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new regulations constitute conduct under a law that has been declared constitutional by the lower courts.

31 This, in our opinion, is the view taken by this Court in Labatt Breweries of Canada Ltd. v. Attorney General of Canada, [1980] 1 S.C.R. 594. The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

> It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court. I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

32 While the above passage appears to answer the submission of the respondents on this motion that Labatt was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

> Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Indeed, an examination of the factums filed by the parties to the motion in Labatt reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

33 In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110. In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in Metropolitan Stores strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

34 Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the Charter. A Charter remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

35 The applicants rely upon the following grounds:

1. The challenged Tobacco Products Control Regulations, amendment were promulgated pursuant to ss. 9 and 17 of the Tobacco Products Control Act, S.C. 1988, c. 20.
2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the Canadian Charter of Rights and Freedoms.
3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.
4. The tests for granting of a stay are met in this case:

    (i) There is a serious constitutional issue to be determined.
    (ii) Compliance with the new regulations will cause irreparable harm.
    (iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the

legal issues.

VI. Analysis

36 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra. If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

37 The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

38 On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

39 On the other hand, the Charter charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of Charter rights. Such a practice would undermine the spirit and purpose of the Charter and might encourage a government to prolong unduly final resolution of the dispute.

40 Are there, then, special considerations or tests which must be applied by the courts when Charter violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

41 Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In Metropolitan Stores, at p. 127, Beetz J. expressed the position in these words:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

42 We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

43 Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

B. The Strength of the Plaintiff's Case

44 Prior to the decision of the House of Lords in American Cyanamid Co. v. Ethicon Ltd., [1975]

A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong prima facie case" on the merits in order to satisfy the first test. In American Cyanamid, however, Lord Diplock stated that an applicant need no longer demonstrate a strong prima facie case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The American Cyanamid standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, Injunctions and Specific Performance (2nd ed. 1992), at pp. 2-13 to 2-20.

45 In Metropolitan Stores, Beetz J. advanced several reasons why the American Cyanamid test rather than any more stringent review of the merits is appropriate in Charter cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

46 The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following dicta of this Court in Laboratoire Pentagone Ltée v. Parke, Davis & Co., [1968] S.C.R. 269, at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits. It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in Adrian Messenger Services v. The Jockey Club Ltd. (No. 2) (1972), 2 O.R. 619 (C.A.), at p. 620:

> Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in Bear Island Foundation v. Ontario (1989), 70 O.R. (2d) 574 (H.C.), at p. 576:

> While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

47 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above

authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in Charter cases.

48 The Charter protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged Charter violation to review the matter carefully. This is so even when other courts have concluded that no Charter breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in Metropolitan Stores, at p. 128, that "the American Cyanamid 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

49 What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the Charter claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see Metropolitan Stores, supra, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

50 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

51 Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the American Cyanamid principle in such a situation in N.W.L. Ltd. v. Woods, [1979] 1 W.L.R. 1294, at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

52 In Trieger v. Canadian Broadcasting Corp. (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

> This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

53 In Tremblay v. Daigle, [1989] 2 S.C.R. 530, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

54 The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

55 The second exception to the American Cyanamid prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in Metropolitan Stores, at p. 133:

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the Canadian Charter of Rights and Freedoms, could not possibly be saved under s. 1 of the Charter and might perhaps be struck down right away; see Attorney General of Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

56 The suggestion has been made in the private law context that a third exception to the American Cyanamid "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in Dialadex Communications Inc. v. Crammond (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong prima facie case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in Charter cases. Even if the facts upon which the Charter breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. Irreparable Harm

57 Beetz J. determined in Metropolitan Stores, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

58 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

59 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (R.L. Crain Inc. v. Hendry (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (American Cyanamid, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (Hubbard v. Pitt, [1976] Q.B. 142 (C.A.)).

60 The assessment of irreparable harm in interlocutory applications involving Charter rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in Charter cases.

61 This Court has on several occasions accepted the principle that damages may be awarded for a breach of Charter rights: (see, for example, Mills v. The Queen, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; Nelles v. Ontario, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24 (1) of the Charter. In light of the uncertain state of the law regarding the award of damages for a Charter breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. The Balance of Inconvenience and Public Interest Considerations

62 The third test to be applied in an application for interlocutory relief was described by Beetz J. in Metropolitan Stores at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in Charter cases, many interlocutory proceedings will be determined at this stage.

63 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In American Cyanamid, Lord Diplock cautioned, at p. 408, that:

> [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to

> suggest the relative weight to be attached to them. These will vary from case to case.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

64 The decision in Metropolitan Stores, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in Ainsley Financial Corp. v. Ontario Securities Commission (1993), 14 O.R. (3d) 280, at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

65 Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in Metropolitan Stores. A few additional points may be made. It is the "polycentric" nature of the Charter which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., Remedies: Issues and Perspectives, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in Charter litigation is not unequivocal or asymmetrical in the way suggested in Metropolitan Stores. The Attorney General is not the exclusive representative of a monolithic "public" in Charter disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

66 It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

67 We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in Morgentaler v. Ackroyd (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.

> The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that these women would suffer irreparable harm, such evidence would not indicate any irreparable harm to these applicants, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

68 When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

69 Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the Fisheries Act, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

> (b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in Metropolitan Stores at p. 139. It was applied by the Trial Division of the Federal Court in Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans) (1988), 21 F.T.R. 304.

70 A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in Island Telephone Co. Re, (1987), 67 Nfld. & P.E.I.R. 158, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

> I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The public interest is equally well served, in the same sense, by any appeal. . . .

71 In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

72 A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

73 Consideration of the public interest may also be influenced by other factors. In Metropolitan Stores, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law than when the application of the law is suspended entirely. See Black v. Law Society of Alberta (1983), 144 D.L.R. (3d) 439; Vancouver General Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; Rio Hotel Ltd. v. Commission des licences et permis d'alcool, [1986] 2 S.C.R. ix.

74 Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in Ontario Jockey Club v. Smith (1922), 22 O.W.N. 373 (H.C.), the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. The Status Quo

75 In the course of discussing the balance of convenience in American Cyanamid, Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to ... preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the Charter is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. Summary

76 It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a Charter case.

77 As indicated in Metropolitan Stores, the three-part American Cyanamid test should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.

78 At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the Metropolitan Stores test.

79 At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

80 The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving Charter rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

81 We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. A Serious Question to be Tried

82 The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the Charter. The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in R. v. Oakes, [1986] 1 S.C.R. 103, to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. Irreparable Harm

83 The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

84 Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. Balance of Inconvenience

85 Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which

is under attack, and where the public interest lies.

86 The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of $50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondarily, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

87 Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the Tobacco Products Control Act. On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in Metropolitan Stores. However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation".

88 The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in Metropolitan Stores:

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically-elected legislatures and are generally passed for the common good, for instance: ... the protection of public health ... . It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

89 The regulations under attack were adopted pursuant to s. 3 of the Tobacco Products Control Act which states:

> 3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
> (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
> (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

90 The Regulatory Impact Analysis Statement, in the Canada Gazette, Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

> The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

91 These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

92 When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

93 The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

94 The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance that the applications for a stay must be dismissed with costs to the successful party on the appeal.

Case Name:

Grand River Enterprises Six Nations Ltd. v. Canada (Attorney General)

RE: Grand River Enterprises Six Nations Ltd., Jerry Bradwick Montour, Kenneth Ryan Hill, Curtis Styres and Gregory Scott Smith, Plaintiffs, and The Attorney General of Canada, Defendant

[2010] O.J. No. 2057

2010 ONSC 2911

Court File No. CV-08-466

Ontario Superior Court of Justice
Brantford, Ontario

R.A. Lococo J.

Heard: March 18, 2010.
Judgment: May 18, 2010.

(16 paras.)

Aboriginal law -- Aboriginal rights -- Duties of the Crown -- Application by Crown to stay negligence action commenced by corporation made up of status Indians allowed -- Corporation had proceeding pending the Tax Court to deal with issue of whether or not excise taxes properly levied on its sale of tobacco products on reserve -- Tax Court's determination had direct bearing on corporation's action, alleging misfeasance, breach of fiduciary duty and negligence in imposing taxes -- Second issue in litigation, regarding Crown's duty to combat contraband tobacco sales on reserve, dealt with some common issues -- No prejudice to corporation if action stayed.

Civil litigation -- Civil procedure -- Disposition without trial -- Stay of action-- Another proceeding pending -- Application by Crown to stay negligence action commenced by corporation made up of status Indians allowed -- Corporation had proceeding pending the Tax Court to deal with issue of whether or not excise taxes properly levied on its sale of tobacco products on reserve -- Tax Court's determination had direct bearing on corporation's action, alleging misfeasance, breach of fiduciary duty and negligence in imposing taxes -- Second issue in litigation, regarding Crown's

duty to combat contraband tobacco sales on reserve, dealt with some common issues -- No prejudice to corporation if action stayed -- Courts of Justice Act, ss. 106, 138.

Taxation -- Customs and excise -- Excise -- duties -- Tobacco -- Application by Crown to stay negligence action commenced by corporation made up of status Indians allowed -- Corporation had proceeding pending the Tax Court to deal with issue of whether or not excise taxes properly levied on its sale of tobacco products on reserve -- Tax Court's determination had direct bearing on corporation's action, alleging misfeasance, breach of fiduciary duty and negligence in imposing taxes -- Second issue in litigation, regarding Crown's duty to combat contraband tobacco sales on reserve, dealt with some common issues -- No prejudice to corporation if action stayed.

Application by the Attorney General to stay an action by GRE and certain shareholders for damages against the Crown for misfeasance, negligence and breach of fiduciary duty, respecting the imposition of excise taxes on its sale of tobacco products and the government's failure to combat the problem of contraband and counterfeit tobacco products on the reserve where GRE operated. GRE was the successor corporation to a partnership which engaged in the same activity, the manufacture and sale of tobacco products on the Six Nations Reserve. All of GRE's shareholders were status Indians. At the time of the application, GRE had appeals pending with the Tax Court regarding 23 assessments of excise tax.

HELD: Application allowed. The Tax Court's determination of the validity of the assessments would have a major impact on GRE's claim for damages in the present action. It would not be preferable to allow the action to proceed on the issue of whether or not the government was discharging its duty to prevent the sale of contraband on the reserve, because this issue was related to the excise tax issue and a multiplicity of proceedings was likely to result. The court exercised its broad discretion to stay the proceedings without reference to any specific test. A stay would not work any particular prejudice on GRE or its shareholders.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1985, c. C.43, s. 106, s. 138

Excise Act, 2001, S.C. 2002, c. 22, s. 174

Indian Act, R.S.C. 1985, c. I-5, s. 87

Counsel:

Bryan Finlay, Q.C. and Marie-Andrée Vermette, for the Plaintiffs.

Wendy J. Linden and Christine Mohr, for the Defendant.

ENDORSEMENT

1 **R.A. LOCOCO J.**:-- Grand River Enterprises Six Nations Ltd. (GRE Ltd) manufactures and sells tobacco products on the Six Nations of the Grand River Reserve (the Reserve) in Ontario. All

of its shareholders are status Indians as defined by the *Indian Act*, R.S., 1985, c. I-5. Prior to the incorporation of GRE Ltd, some of the shareholders of GRE Ltd were partners in a predecessor partnership known as Grand River Enterprises.

2 GRE Ltd and certain of its shareholders have brought an action for damages against the Attorney General of Canada (AG) for misfeasance, negligence and breach of fiduciary duty. Included in this action is a claim for the return of all excise taxes and duties wrongfully assessed, imposed or collected from GRE Ltd since 1997.

3 The plaintiffs' claim is grounded on two bases.

4 The first basis is the conduct of the Minister of National Revenue with respect to assessments of excise duties under the *Excise Act, 2001*, S.C. 2002, c. 22, against GRE Ltd, and specifically, the requirement that the predecessor partnership incorporate as a precondition to the issuance of an excise licence under the *Excise Act* (referred to below as the "Forced Incorporation" issue). According to the plaintiffs, had GRE Ltd not incorporated, the partners of the predecessor partnership would not have been subject to excise duties by reason of tax exemption rights in section 87 of the *Indian Act* or pursuant to a constitutionally protected aboriginal right to trade in tobacco.

5 The second matter upon which the action is based is the failure by the Government of Canada to combat the problem of contraband and counterfeit tobacco products on the Reserve, including the failure of government officials to properly implement or administer the Government's anti-smuggling initiative (referred to below as the "Contraband" issue").

6 GRE Ltd has also filed appeals with the Tax Court of Canada of 23 assessments under the *Excise Act* for each monthly period from September 2005 to July 2007.

7 The AG has brought a motion requesting a temporary stay of the plaintiffs' action in this court pending the outcome of GRE Ltd's appeal of the assessments to the Tax Court. The AG's position is that determination by the Tax Court of the validity of these assessments is a threshold issue in the present action, and will have a material impact on the plaintiffs' claim for damages in this Court.

8 GRE Ltd and its shareholders oppose the granting of a temporary stay. Their position is that the Tax Court has no jurisdiction to decide the matters raised in this action, since the action is based on the conduct of governmental officials rather than the validity of the assessments under the *Excise Act*, and that it would be unfair and prejudicial to the plaintiffs to grant the temporary stay.

9 I agree with the AG that a temporary stay of this action should be granted until final determination of the tax appeals. I have the authority under section 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, to stay any proceeding in this Court on such terms as are considered just. I am also directed by section 138 of that statute to avoid multiplicity of legal proceedings as far as possible.

10 In this case, I am satisfied that determination by the Tax Court of the validity of the assessments, a matter within the sole jurisdiction of the Tax Court, will have a major impact on the plaintiffs' claim for damages in this action. If the assessments that are the subject of the tax appeals are overturned and the duties refunded or credited to GRE Ltd, a significant portion of the damages claimed by the plaintiffs would be eliminated. (Although it is not clear on the evidence before me that GRE Ltd would be entitled to recover duties paid prior to September 2005 if the assessments are overturned, a substantial portion of the duties paid or credited appear to relate to the period since September 2005). If the assessments are confirmed, the plaintiffs' claim for the return of taxes may be subject to challenge on additional grounds (see 174 of the *Excise Act*, which limits any right of

recovery for amounts paid under that statute). I agree with the AG that it would be premature to permit this action to proceed until the assessment appeals in the Tax Court are finally determined.

11 The plaintiffs argue that there is no overlap between the issues to be decided by the Tax Court and those to be decided in this action. In particular, the validity of the assessments are not being challenged in this action, but rather the conduct of the Minister of National Revenue in requiring the Forced Incorporation as a precondition to GRE Ltd's receiving an excise licence, a matter within the sole jurisdiction of this Court and not the Tax Court. A similar argument was rejected by Madam Justice Lax in *Hester v. Canada* [2007] O.J. No. 4719 (S.C.J.) (leave to appeal to the Divisional Court on this issue denied 2008 O.J. No. 634 (Ont. S.C.D.C.)), in which she temporarily stayed an action for damages by a status Indian until the final determination of an appeal to the Tax Court of an assessment of goods and services tax (GST). In that case, the plaintiff's entitlement to tax exemption rights under section 87 of the *Indian Act* was apparently central to both the action for damages and the tax appeals. In this case GRE Ltd has amended its Notice of Appeal to eliminate reliance on section 87 of the *Indian Act* as a basis for its tax appeal, but despite this distinction, I continue to find the reasoning in the *Hester* decision as persuasive in support of granting a temporary stay in this case (see *Hester*, *supra*, paras. 53, 54 and 57). Without the defendant's alleged wrongful conduct in requiring the Forced Incorporation of GRE Ltd, the assessments that are the subject of the tax appeal would never have occurred, and (as indicated previously) determination by the Tax Court of the validity of the assessments will have a major impact on the plaintiffs' claim for damages in this action.

12 The plaintiffs also dispute that the validity of the assessments is central to the claim for damages because the damages claimed in relation to the Contraband issue are unrelated to the taxes and duties paid by GRE Ltd. While it is true that the measure of damages on this ground would not bear any necessary relationship to taxes paid, the Forced Incorporation issue remains a major basis for this action. In my view, the impact of the Tax Court's determination on the plaintiffs' action for damages on the basis of the Forced Incorporation issue alone would be sufficient to justify a temporary stay of the entire action. In this regard, I considered the possibility of staying the action only to the extent it is based on the Forced Incorporation issue, and allowing it to proceed to the extent that it is based on the Contraband issue. However, in my view, such an order would not necessarily avoid a multiplicity of proceedings as contemplated by section 138 of the *Courts of Justice Act*, and may well have the opposite effect. The arguments of counsel on this motion raised the prospect of future motions to strike pleadings or for summary judgment. Granting a stay on the Forced Incorporation issue and not the Contraband issue would raise the prospect of separate motions to deal with the pleadings or summary judgment on each of these issues separately, depending on the outcome of the tax appeals. In any case, as pointed out by the plaintiffs in their factum, certain causes of action pleaded in the Statement of Claim relate to both the Forced Incorporation issue and the Contraband issue, and it therefore may not be feasible to stay the action to the extent it is based one issue and not the other.

13 The plaintiffs further argue that in any case the AG has not met the test for the granting of a temporary stay, as set out in *Areva NPGmbH v. Atomic Energy of Canada Ltd.*, [2009] O.J. No. 861 (S.C.J.), at paras. 18-19, which notes that courts have considered the following factors in determining whether to grant a temporary stay:

* whether there is substantial overlap of issues in the two proceedings;
* whether the two proceedings share the same factual background;

* whether issuing a temporary stay will prevent unnecessary and costly duplication of judicial and legal resources, and
* whether the temporary stay will result in an injustice to the party resisting the stay.

14 However, as indicated by the Ontario Divisional Court in *Hester* (*supra*, at para. 15), section 106 of the *Courts of Justices Act* "gives the court a broad discretion to say proceedings, unfettered by any specific test". In my view, there is no requirement to meet the specific test articulated in *Areva, supra,* and even if that test were applicable, it would not be necessary for each of the factors listed above to be satisfied. In any case, the first three factors refer to above all relate to the degree of overlap between the two proceedings, which I have taken into account in reaching my conclusion that a temporary stay is justified in this case. As well, I am satisfied that there is no injustice or other significant prejudice to the plaintiffs in granting a temporary stay of an action brought in 2008 that is based principally on alleged wrongful conduct of the Minister of National Revenue that occurred prior to 1997 (in the case of the Forced Incorporation issue) as well as on the failure of government officials to properly implement or administer an initiative first announced in 1994 (in the case of the Contraband issue).

15 Accordingly, I order that this action be temporarily stayed until the appeal by GRE Ltd of the assessments of excise duties for the monthly periods from September 2005 to July 2007 are finally determined (including any further appeals). This temporary stay is without prejudice to the AG being permitted to move to strike the claim or potions of it once the stay is lifted.

16 On the question of costs, unless sooner resolved between the parties, each counsel shall provide the other and file with this Court brief written submissions together with a cost outline within 30 days of release of this endorsement. Each counsel will have the opportunity to provide reply submissions within seven days from receipt of the other counsel's submissions. Should all counsel prefer to make oral submissions, they should speak to the Trial Coordinator to arrange a date.

R.A. LOCOCO J.

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Email Request: Current Document: 1
Time Of Request: Wednesday, November 06, 2013 17:54:09

Case Name:

Hester v. Canada

Between
Joe Hester, Plaintiff, and
Her Majesty the Queen in Right of Canada, Minister of National Revenue, Minister of Indian Affairs, Commissioner of Customs and Revenue, Bill McCloskey, Robert Frappier, Michael Cox, Winford Smith, Denis Lefebvre, K.M. Burpee, Ken Fox, John Fennelly, Jeanne Flemming, Luisa Guyan, Ruby Howard, Ken McCuaig, Aileen Conway, Pierre Gravelle and Brian Dawe, Defendants

[2007] O.J. No. 4719

[2007] G.S.T.C. 172

[2008] 3 C.T.C. 44

162 A.C.W.S. (3d) 552

2008 G.T.C. 1142

Court File No. 00-CV-192586CP

Ontario Superior Court of Justice

J.L. Lax J.

Heard: October 3-4, 2007;
written submissions, October 24, November 2, 7, 2007.
Judgment: December 4, 2007.

(59 paras.)

Civil procedure -- Pleadings -- Striking out pleadings or allegations -- Grounds -- Failure to disclose a cause of action or defence -- Motion by defendants to strike proposed amended pleadings and to stay related action allowed -- Claims for breach of fiduciary duty, breach of duty to consult and accommodate, for conspiracy and for abuse of power were not tenable and struck -- Allegations of differential treatment, relating to administrative guidelines and relating to a plaintiff in a

separate action were struck -- Action stayed until final determination of related tax appeals and test cases.

Civil procedure -- Disposition without trial -- Stay of action -- Another proceeding pending -- Motion by defendants to strike proposed amended pleadings and to stay related action allowed -- Claims for breach of fiduciary duty, breach of duty to consult and accommodate, for conspiracy and for abuse of power were not tenable and struck -- Allegations of differential treatment, relating to administrative guidelines and relating to a plaintiff in a separate action were struck -- Action stayed until final determination of related tax appeals and test cases.

Motion by the defendants to strike proposed amended pleadings and to stay a related action -- As originally constituted, the plaintiff's action involved individual claims of another individual and claims by the plaintiff as representative on behalf of a prospective class for breach of fiduciary duty, breach of duty to consult and accommodate, violations of the Canadian Charter of Rights and Freedoms, 1982 and of the Constitution Act, abuse of power and conspiracy -- Following an order severing the action and striking the constitutional claims, the plaintiff proposed amendments to his statement of claim -- The defendants sought to strike the plaintiff's claims for breach of fiduciary duty, breach of the duty to consult and accommodate, allegations of the differential treatment of taxpayers, and claims relating to administrative guidelines on the grounds that they disclosed no reasonable cause of action and that raised issues that should be advanced in related severed action -- HELD: Motion granted -- The claims for breach of fiduciary duty and breach of the duty to consult and accommodate were not tenable and were struck without leave to amend -- It was plain and obvious that the alleged failure of the Crown to administer section 87 of the Indian Act in a manner that protected the tax exemption rights of native peoples could not give rise to a claim for breach of fiduciary duty and that the claim for the duty to consult did not fit the facts pleaded -- The allegations of differential treatment and the allegations relating to the administrative guidelines disclosed no reasonable cause of action and were struck without leave to amend as these claims were tied to claims that disclosed no reasonable cause of action -- The claim for conspiracy was struck with leave to amend on the ground that it made unparticularized allegations and asserted unparticularized damages -- The claim for abuse of power was struck with leave to amend as it did not identify which conduct was unlawful and failed to set out a claim for misfeasance in public office -- Although the defendants did not satisfy the Court that the action was frivolous or an abuse of process, the Court stayed the action on its own initiative until other related pending cases were finally determined as the plaintiff's action depended on whether the plaintiff and the class it represented were liable for taxes.

Statutes, Regulations and Rules Cited

Constitution Act, 1982, s. 25, s. 35

Courts of Justice Act, s. 106, s. 138

Indian Act, s. 87

Rules of Civil Procedure, Rule 21.01(3), Rule 21.01(3)(c), Rule 23.01(3)(d)

Counsel:

G. James Fyshe, for the Plaintiff/Responding Party.

John N. Birch, for the Defendants/Moving Parties.

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1 **J.L. LAX J.**:-- Roger Obonsawin is a status Indian and the proprietor of Native Leasing Services ("NLS"), an employee-leasing agency located on the Six Nations of the Grand River reserve that provides native workers to third-party off-reserve employers. Joe Hester is an NLS worker. In 2000, they commenced this action. As originally constituted, the action involved individual claims of Obonsawin as well as claims by Hester as representative plaintiff on behalf of a prospective class defined as all employees of Roger Obonsawin, carrying on business as NLS. The defendants were Her Majesty the Queen and crown servants who were either employed by or had some responsibility relative to the Canada Revenue Agency ("CRA") including the Minister of National Revenue, the Minister of Indian Affairs and the Commissioner of Customs and Revenue. The plaintiffs sought relief with respect to several causes of action, including breach of fiduciary duty and breach of duty to consult and accommodate owed by the Crown to aboriginal people; violations of s. 24(1) of the *Charter of Rights and Freedoms*; violations of s. 35 of the *Constitution Act, 1982*; the tort of abuse of power; and the tort of conspiracy.

2 In 2002, on motion by the defendants, Epstein J. ordered that the individual claims of Obonsawin be severed from the Hester claim and Obonsawin subsequently commenced an individual action in this court ("the Obonsawin action") that survived a motion to strike the claim for lack of jurisdiction and/or failure to disclose a reasonable cause of action. The Obonsawin claim is proceeding, although in a more limited form, with leave granted by Mr. Justice Belobaba to amend the claim. Leave to appeal the decision of Justice Belobaba to the Divisional Court was refused by Matlow J.

3 There are two motions before the court: (1) a motion by the plaintiff to amend the Statement of Claim in the Hester action; (2) a motion by the defendants to permanently, or alternatively, temporarily, stay the Hester action under Rule 21.01(3)(c) and (d) and s. 106 of the *Courts of Justice Act* on the basis that most, if not all of the matters covered by this action are the subject of other ongoing proceedings.

4 This action and the other proceedings that I will come to have their genesis in complaints by Obonsawin about the treatment of aboriginal employees, and specifically, employees of NLS, by CRA in regard to the availability of tax exemption rights for Indians under section 87 of the *Indian Act* R.S., 1985, C. I-5. The legislative framework, the jurisprudence impacting on tax exemption rights for aboriginal persons and the litigation history of this action and the other proceedings are described below.

Legislative Framework

5 Section 87 of the *Indian Act* provides:

> 87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 ... the following property is exempt from taxation:

...

(b) the personal property of an Indian or a band situated on a reserve.

Section 81(1)(a) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) provides:

81. (1) There shall not be included in computing the income of a taxpayer for a taxation year,

(a) an amount that is declared to be exempt from income tax by any other enactment of Parliament, ...

Section 25 of the *Constitution Act, 1982*, provides:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada ...

Section 35 of the *Constitution Act, 1982* provides:

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed ...

Response of CRA and NLS to s. 87 Jurisprudence

6 The exemption from income tax for aboriginal persons that is available under section 87 of the *Indian Act* has been the subject of evolving jurisprudence. Between 1983 and 1993, CRA interpreted section 87 as exempting from tax the income of employees working for on-reserve employers, even where such work was performed off the reserve in accordance with the law set out in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29. All of NLS's employees were exempt under this application of the law.

7 Hester asserts that CRA changed this policy in 1993. The defendants say that this was in response to the decision of the Supreme Court of Canada in *Williams v. Canada*, [1992] 1 S.C.R. 877, which formulated a "connecting factors" test to determine the *situs* of intangible personal property for the purposes of section 87. This represented a significant change from *Nowegijick* and required an analysis of the purpose of the exemption under s. 87, the type of property and the nature of the taxation of that property, with reference to the individual personal circumstances of each Indian person.

8 In 1993, CRA announced that it intended to change the manner in which it administered s. 87 in order to correspond to the test enunciated by the Supreme Court. To that end, on December 15, 1993, it released draft administrative guidelines for comment. Obonsawin and a number of other NLS workers made submissions to CRA, but these submissions were not adopted as in the opinion of CRA, they were not responsive to the newly formulated 'connecting factors' test.

9 In June 1994, CRA issued the *Indian Act Exemption for Employment Income Guidelines* (the "administrative guidelines") effective for the 1995 taxation year. This provoked protest by members of the aboriginal community, including employees of NLS, and in December, they occupied CRA's

Tax Services Office in Toronto demanding further consultations and changes to the administrative guidelines. This eventually resulted in an agreement in or about January 1995 whereby the protestors agreed to vacate CRA's premises; CRA agreed to hear further representations from Obonsawin on the application of the administrative guidelines to NLS workers; and both would take all available steps to expedite consideration by the courts of challenges to the guidelines (the "Test Case Agreement").

Test Cases

10 The purpose of the test cases was to establish an orderly determination of the application of aboriginal tax immunity rights and present a range of factual situations applicable to NLS workers in order for the court to adjudicate the application of section 87 to NLS and similar organizations. Eventually, four test cases ("Shilling", "Horn", "Clark" and "Williams") made their way to the Federal Court.

Shilling Test Case

11 Following a series of procedural motions, on November 23, 1998, Justice Reed of the Federal Court (Trial Division), [1999] F.C.J. No. 899, stated a question of law for determination by the court in the Shilling action, namely whether Shilling was entitled by operation of section 87 of the *Indian Act* to exemption from income tax with respect to the salary paid to her by NLS during specified years. The matter proceeded on an agreed statement of facts and, in the first instance, the court determined the question in favour of Shilling. On June 4, 2001, the Federal Court of Appeal reversed the decision of Justice Sharlow of the Trial Division. Leave to appeal to the Supreme Court of Canada was refused on March 14, 2002, [2001 S.C.C.A. No. 434.

12 Shilling sought to continue on to trial in the Federal Court. On November 18, 2003, [2003] F.C.J. No. 1732, Justice Simpson granted the Crown's motion for summary judgment and dismissed the Shilling action. The Federal Court of Appeal, [2004] F.C.J. No. 2082, dismissed Shilling's appeal from this decision and Shilling's subsequent application for leave to extend the time for seeking leave to appeal was dismissed by the Supreme Court of Canada on October 6, 2005, [2005] S.C.C.A. No. 262.

Horn, Clarke and Williams Test Cases

13 Although it was originally contemplated that the outcome of the Shilling test case would resolve most of the claims of NLS workers, NLS decided that the remaining three test cases needed to be litigated. To that end, the Crown sought and obtained timetables from the Federal Court (Trial Division) in order to bring these cases to completion. The Clarke test case was eventually settled on the consent of the parties. The Horn and Williams cases proceeded to trial on October 16, 2006. On October 16, 2007, Justice Phelan released his decision in the remaining test cases concluding that neither Horn nor Williams was entitled to exemption from tax pursuant to section 87 of the *Indian Act*. He dismissed the plaintiffs' claims for discrimination under section 15 of the *Charter*. Consequently, all three of the test cases have resulted in the tax exemption claims being denied, subject to appeals by Horn and Williams.

Administrative Guidelines Actions

14 In June 1998, Obonsawin commenced two actions in the Federal Court. In the first action, Obonsawin sought declarations that:

(a) the administrative guidelines are null and void and of no force and effect; and
(b) the administration of Section 87 through the Guidelines is a breach of the Crown's fiduciary obligations to the plaintiff.

15 In the second Federal Court action, Obonsawin sought declarations that

(a) the administrative guidelines are of no force and effect to the extent that they are construed or applied to require, as a major connecting factor for employers, that the employer must be an Indian band, a tribal council, or an Indian organization controlled by bands or tribal councils, and the persons benefiting from the employment for the most part live on reserve; and
(b) the administration of Section 87 through administrative guideline #4 is a breach of Canada's fiduciary obligations to the plaintiff.

16 The Crown moved to strike the claims in both of these actions. By Order dated May 18, 1999, [1999] F.C.J. No. 767, Prothonotary Giles of the Federal Court struck both Statements of Claim. In his decision, the Prothonotary determined that

(a) the administrative guidelines had no legally binding effect;
(b) the existence of the administrative guidelines might well be a cause of loss to the plaintiff but were not in breach of fiduciary obligations to the plaintiff; and
(c) there is no cause of action for the relief claimed and the Statements of Claim had to be struck.

17 Obonsawin appealed the Prothonotary's decision to a single judge of the Federal Court Trial Division. In a decision released on December 11, 1998, Justice Reed upheld the decision of Prothonotary Giles and said:

> I am not persuaded that even if consultation took place pursuant to a fiduciary obligation to consult, that the Guidelines have a character different from the ITA Bulletins or advance rulings that Revenue Canada routinely gives with respect to the interpretation of the *Income Tax Act*. They are not justiciable.
>
> In my view, the decision of the Senior Associate Prothonotary must be confirmed. I make this decision with some regret because I think counsel for the plaintiff is attempting to get the issues resolved in as efficient and as cost effective a manner as possible. As I mentioned at the hearing of this motion, it may be that the plaintiff could reformulate his claim (albeit probably not before this Court) to challenge the obligation on him as employer to withhold income tax payable by his employees, and thus raise the issues he seeks to raise in the present action in a justiciable form. I must, however, dismiss the present appeal: *Obonsawin (c.o.b. Native Leasing Services) v. Canada (Minister of National Revenue - M.N.R.)* [1998] F.C.J. No. 1819 (T.D.) at para. 10

18 Based on these decisions in the Federal Court, (which are final and have not been further appealed), it has been finally determined that the administrative guidelines are not justiciable.

Obonsawin's Ontario action

19 As I said earlier, this action as originally constituted included individual claims of Obonsawin as well as claims of Hester on behalf of a prospective class. After the severance order of Epstein J., Obonsawin commenced an individual action in this court in April 2003 alleging tort, equitable, constitutional and *Charter* claims arising from the GST assessment. The defendants moved to strike portions of the Statement of Claim and other portions were struck on consent pursuant to the order of Belobaba J. The surviving claims include claims for abuse of office, malicious prosecution, interference in economic relations, conspiracy and breach of fiduciary duty.

20 Justice Belobaba refused to strike the claims in tort and equity. In his endorsement, he said at paras. 7 and 10:

> This is not a claim about the correctness of the GST assessment but about an alleged abuse of power in the manner in which the tax provisions of the Indian Act were used or misused to allegedly target and neutralize the plaintiff and his business. Given these broader dimensions, this action does not fall within the exclusive jurisdiction of either the Tax Court or the Federal Court of Canada. Nor should it be stayed because there are other ongoing proceedings that are concerned with the correctness of related GST Assessments. I agree with and adopt the submissions set out by the plaintiff in paras. 25 to 77 of his factum. This court has a general and inherent jurisdiction to hear this matter. (para. 7)
>
> I do not agree with the defendant that the remaining claims in tort and equity do not disclose a reasonable cause of action. For the reasons set out in the plaintiff's factum, as noted below, I cannot conclude that the claims in tort and equity are "certain to fail" and have "no chance of success". (para. 10)

21 In his Ontario action, Obonsawin also sought a declaration that his GST assessment was null and void. Justice Belobaba denied the defendants' motion to strike this claim for relief in paragraph 1(l) of the Fresh as Amended Statement of Claim. On October 15, 2007, the Ontario Court of Appeal struck this paragraph on the basis that the pleadings as drafted did not provide a basis in fact or law for obtaining such a declaration. Although the court did not decide whether a Superior Court judge could ever have jurisdiction to declare a tax assessment null and void, the review of Obonsawin's GST assessment will take place within his existing appeal to the Tax Court of Canada.

Obonsawin's GST Appeal

22 CRA issued an assessment to Obonsawin requiring him to pay the GST that ought to have been collected on the fees charged by NLS to its client placement organizations. Obonsawin denies that he is required to collect GST from these organizations and remit the tax to CRA. Accordingly, he filed a Notice of Appeal in the Tax Court of Canada challenging the assessments. He later brought a motion to amend his Notice of Appeal to allege breach of fiduciary obligations, discriminatory treatment, breach of the test case agreement, abuse of power and malice and sought an order staying the Tax Court proceeding pending final disposition of Obonsawin's Ontario action. The Tax Court of Canada determined that it had exclusive jurisdiction to determine whether the GST assessment was correct and refused to stay proceedings in the Tax Court. It also determined that it had no jurisdiction to hear a claim for abuse of office or to grant damages remedies. Obonsawin's tax appeal is being case managed and is on its way to trial.

Income Tax Appeals of Hester and other NLS Workers

23 Beginning in February 2006 and on the understanding that NLS workers intended to be governed by the outcome of the test cases, CRA sent letters to NLS workers asking that they advise which of the four test cases was reflective of their individual situations. The NLS workers returned a form letter declining to identify which of the four factual situations applied to them. Believing that NLS workers no longer wished to be bound by the outcome of the test cases but instead wished to exercise their individual rights under the *Income Tax Act*, CRA then issued Notices of Confirmation confirming the income tax assessments. Hester and approximately 1200 other NLS workers served Notices of Appeal from their assessments. The scope of some of the appeals is broad asserting rights under section 81(1)(a) of the *Income Tax Act*, section 87 of the *Indian Act*, sections 25 and 35 of the *Charter* as well as an exemption from income tax on the basis of aboriginal or treaty rights. Subsequently, other NLS workers filed Amended Notices of Appeal and are only proceeding on the basis of section 87 of the *Indian Act*. The Chief Justice of the Tax Court is case managing all of these appeals, which are moving forward.

24 Against this background, I turn to the motions before me.

The Proposed Fresh as Amended Statement of Claim

25 The proposed amendments became necessary because of the severance order of Epstein J. and the decision of Justice Belobaba whereby the constitutional and *Charter* claims in the Obonsawin action were abandoned or struck. The proposed Hester pleading has been amended to delete references to Obonsawin as plaintiff, to remove the ministerial defendants and a defendant now deceased, to add the Attorney General of Canada as a representative party, to particularize the claim for damages and generally, to attempt to bring the pleading into compliance with the orders of Epstein J. and Belobaba J. The defendants take issue with many of the proposed amendments either because they assert they are untenable as a matter of law or they raise issues that relate to Obonsawin and ought to be advanced in his individual proceeding rather than by Hester on behalf of a proposed class.

26 Specifically, the defendants ask me to strike as disclosing no reasonable cause of action claims for (1) breach of fiduciary duty, (2) breach of the duty to consult and accommodate (3) differential treatment of taxpayers, and (4) claims relating to the administrative guidelines. They submit that the claim for conspiracy is not properly pleaded and that the pleading improperly pleads matters relating to Obonsawin contrary to the severance order of Epstein J.

The Test

27 The amendment of pleadings is governed by Rule 26.01 of the *Rules of Civil Procedure* and amendments are to be allowed absent prejudice that cannot be compensated by costs or an adjournment. In a class action, the elements of the cause of action and the material facts underlying them must be pleaded in respect of the representative plaintiff: *Hughes v. Sunbeam Corp. (Canada)* (2000), 11 B.L.R. (3d) 236 at para. 27 (S.C.J.), reversed in part on appeal on another issue at (2002), 61 O.R. (3d) 433 (C.A.).

28 Where amendments are resisted on the basis of tenability, the case law that has developed around Rule 21.01(1)(b) is engaged. A pleading should not be struck under this rule unless, assuming the facts as pleaded can be proved and reading the pleading generously, it is "plain and obvious" and "beyond doubt" that the plaintiff's statement of claim discloses no reasonable cause of action.

This cautious approach is amplified in cases where the law is unsettled or evolving: *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.* (1991), 5 O.R. (3d) 778 at p. 782 (C.A.). The length and complexity of the issues, the novelty of the causes of action and the potential for a strong defence do not foreclose the claim at the pleadings stage. The defendants must show that the claim is certain to fail: *Hunt v. Carey Inc.*, [1990] 2 S.C.R. 959 (S.C.C.).

Fiduciary Duty Claim

29 No case has determined that the Crown owes fiduciary duties to Indians in the administration of tax exemption rights under the *Indian Act,* but there remain many undecided issues in the area of fiduciary duties to the aboriginal peoples. In *Wewaykum Indian Band v. Canada,* [2002] 4 S.C.R. 245 at paras. 72-85, Binnie J. traces the development of the 'sui generis fiduciary duty' pointing out that since *R. v. Guerin*, [1984] 2 S.C.R. 335, Canadian courts have experienced a flood of fiduciary duty claims by Indian bands. In reaffirming the principle from *Lac Minerals Ltd. v. International Corona Resources Limited*, [1989] 2 S.C.R. 574, *per* Sopinka J. at 597 that not all obligations existing between parties to a fiduciary relationship are themselves fiduciary in nature, Binnie J. states that this principle applies to the relationship between the Crown and aboriginal people and that, "It is necessary, then, to focus on the particular obligation or interest that is the subject matter of the particular dispute and whether or not the Crown has assumed discretionary control in relation thereto to ground a fiduciary obligation." (para. 83). He continues:

> I do not suggest that the existence of a public law duty necessarily excludes the creation of a fiduciary relationship. The latter, however, depends on identification of a cognizable Indian interest, and the Crown's undertaking of discretionary control in relation thereto in a way that invokes responsibility "in the nature of a private law duty" as discussed below. (para. 85)

30 In *Bonaparte v. Canada (Attorney General)* (2003), 64 O.R. (3d) 1 (C.A.); [2003] O.J. No. 1046 (C.A.), the court refers to these passages from *Wewaykum* and states at paras. 32 and 33 (QL):

> Further, as Binnie J.'s review of the law in *Wewaykum Indian Band* reveals, fiduciary law in Canada, particularly in respect of the Crown's relationship with aboriginal peoples, is a very dynamic area of Canadian law. The nature and extent of the particular obligations that may arise out of this relationship are matters that remain largely unsettled in the jurisprudence. (para. 32).
>
> This state of the law does not mean, of course, that any claim for breach of fiduciary duty arising out of the relationship between the Crown and the aboriginal peoples of Canada must necessarily survive the pleadings stage. The same test under Rule 21 applies to this kind of action. It does mean, however, that more claims of this nature may be, as of yet, unprecedented but nonetheless tenable at law within the meaning of Rule 21. (para. 33).

31 The proposed pleading alleges that, "Canada owes the plaintiff and class members fiduciary duties with respect to the taxation of their income, and in particular to protect their tax exemption rights". The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests: *per* Binnie J. in *Wewaykum* at para. 81. Moreover, fiduciary protection accorded to Crown dealings with aboriginal interests in land has not to date been recognized by the Supreme

Court in relation to Indian interests other than land outside the framework of s. 35(1) of the *Constitution Act, 1982*. The plaintiff does not claim tax exemption rights arising out of aboriginal or treaty rights or s. 35(1) of the *Constitution Act,* 1982, but only under s. 87 of the *Indian Act*. As no fiduciary duty exists at large, the question is what discretionary control has the Crown assumed in relation to tax exemption rights under the *Indian Act*?

32 The pleading alleges that until 1993, the Crown and its servants applied s. 87 in a manner consistent with the fiduciary duties owed to native people to protect native property situated on a reserve, including the protection of employment income from taxation. The pleading does not allege that the administrative guidelines are inconsistent with the decision of the Supreme Court of Canada in *Williams*. The essence of the complaint is that in 1994, the Crown developed the guidelines and began to administer the tax exemption rights in accordance with them rather than in accordance with the principles in *Nowegijick*. Thus, the claim is founded on the premise that in order to avoid causing injury to the plaintiff and class members, CRA should have refused to apply the law or at least, should have continued to apply the law without regard to *Williams*.

33 The administrative guidelines are non-binding and are not justiciable. They have the same character as Interpretation Bulletins and other releases and are nothing more than expressions of opinion. They do not bind the Minster, the taxpayer or the courts: *Ludmer v. Canada*, [1995] 2 F.C. 3; [1994] F.C.J. No. 2007 (C.A.) (Fed. C.A.) at para. 24 (QL); *Obonsawin (c.o.b. Native Leasing Services) v. Canada (Minister of National Revenue-M.N.R.)*, [1998] F.C.J. No. 1819 at para. 9. Clearly, the Crown has the ability to issue notices of assessment and equally clearly, taxpayers have the right to appeal the assessments to the courts. Whether or not the tax exemption rights are available to the plaintiff and class members are being adjudicated in the test cases and in the tax appeals of the plaintiff and class members. As the administrative guidelines are not binding on a taxpayer, how have the plaintiff's rights been affected? Nothing CRA did or failed to do unilaterally affected those rights as the issue of tax liability is solely within the control of the courts and not the Crown or CRA.

34 In *Ludmer*, which was an appeal by a taxpayer allowing a motion to strike certain paragraphs of the statements of claim, the court considered the role of tax officials and whether equitable principles applied under the Canadian system of tax collection and said:

> ... Neither the Minister of National Revenue nor his employees have any discretion whatever in the way in which they must apply the *Income Tax Act*. They are required to follow it absolutely, just as taxpayers are also required to obey it as it stands ... In determining whether their decisions are valid, the question is not whether they exercised their powers properly or wrongfully, but whether they acted as the law governing them required them to act. (para. 44)

35 In *Perron v. Canada* (2003), 32 C.P.C. (5th) 165 (Ont. S.C.), C. Campbell J. struck a claim against the Crown alleging breach of fiduciary duty and held that the *Indian Act* does not confer discretion on the part of the Crown. In that case, the plaintiff, on behalf of a class of similarly-situated Indian persons, sought to invalidate a provision in the *Indian Act* that determined Indian status. Here, the plaintiff does not seek to invalidate s. 87 of the *Indian Act*, but asserts a fiduciary duty claim under this section of the Act. In my view, the effect is the same. The status issue there arose directly from the application of the sections of the *Indian Act* enacted by Parliament. Here, the availability of tax exemption rights similarly arises from the application of the statute. In issuing

notices of assessment under the *Income Tax Act* and administering tax exemption rights under the *Indian Act*, CRA is carrying out the statutory duty discussed in *Ludmer*. There is no discretionary control exercised by the Crown that invokes responsibility in the nature of a private law duty. In my view, it is plain and obvious that the alleged failure of the Crown and its servants to administer s. 87 of the *Indian Act* in a manner that protects the tax exemption rights of native peoples cannot give rise to a claim for breach of fiduciary duty. I conclude that this is not a tenable claim and should be struck. *Duty to Consult and Accommodate*

36 In *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, McLachlin C.J.C. described the duty to consult with aboriginal peoples and accommodate their interests as being grounded in the principle of the honour of the Crown, which must be understood generously. The duty arises when the Crown has knowledge, real or constructive of the potential existence of the aboriginal right or title and contemplates conduct that might adversely affect it.

37 The duty to consult and accommodate is part of a process of fair dealing and reconciliation that flows from the Crown's duty of honourable dealing toward aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an aboriginal people and *de facto* control of land and resources that were formerly in control of that people. (*per* McLachlin J. at p. 528). The Chief Justice said:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult, and where indicated, accommodate aboriginal interests. (p. 525).

38 The *Haida* decision has been understood as essential to working out a means by which Aboriginal nations could protect lands and resources in the interim on the way to reaching modern treaties or agreements: Christie G., "Developing Case Law: The Future of Consultation and Accommodation" (2006), 39 U.B.C.L. Rev. 139 at para. 58. Section 35 rights under the *Constitution Act, 1982* will necessarily give rise to a duty to consult, but the only right advanced in this action is the statutory right under s. 87 of the *Indian Act*, which, on its face deals with personal property. It is clear from *Haida* and the academic commentary (see, for example, Professor Christie's article, paras. 3, 17, 24, 30, 120, 121) that the duty to consult and accommodate arises when there is contemplated Crown conduct to exploit resources that are the subject of potential, but as yet proved land or treaty claims. It is doubtful that any such duty arises in the context of personal property, but assuming it does, there can be no contemplated Crown conduct on the facts pleaded as the Crown exercises no discretion in its administration of tax exemption rights. If Hester and class members are concerned that the notices of assessment impose taxation on income that is exempt from taxation under s. 87, their remedy lies in a tax appeal and ultimately, with the courts.

39 I appreciate that the duty to consult and accommodate is an evolving doctrine, but it cannot be made to fit the facts pleaded. As with the claim for breach of fiduciary duty, it is premised on injury to the plaintiff and class members because CRA reformulated its policy. There is no Crown

conduct in issue because the rights under s. 87 are a function of Parliament and not the Crown. This claim is not tenable and should be struck.

Differential Treatment

40 The defendants object to the allegations in paragraphs 34 to 39 regarding the program, "Interchange Canada". The plaintiff alleges that in denying the tax exemption rights of the plaintiff and class members, while recognizing such rights on the part of persons who are employed by, or temporarily assigned to similar undertakings, the defendants have discriminated against the plaintiff and class members contrary to the fiduciary duties and the duties of consultation and accommodation that are owed to them. As this claim is tied to claims that disclose no reasonable cause of action, these allegations should be struck. In any event, it is settled law that the tax treatment of others is irrelevant to the tax treatment of an individual taxpayer: *Ford Motor Company of Canada v. Minster of National Revenue* (1997), 212 N.R. 275 (Fed. C.A.) at paras. 47-48; *Sinclair v. R.* [2003] F.C.J. No. 1381, 2003 FCA 348 (Fed. C.A.) at para. 7. Therefore, if I have erred in striking the other claims, these allegations do not in any event give rise to a cause of action.

Administrative Guidelines

41 It is unclear whether it is alleged that the administrative guidelines give rise to a cause of action. No cause of action can be made out on the basis that CRA changed its policy as the guidelines do not have the force of law and as previously discussed, are not justiciable. To the extent this is pleaded in support of the claims for breach of fiduciary duty and the duty to consult and accommodate, these allegations should be struck for the reasons I have given.

References to Obonsawin

42 The defendants ask me to strike certain of these allegations on the basis that they offend the severance order of Epstein J. They are: paragraphs 6 to 13; 38 (final sentence); 41 (reference to Obonsawin); 44; 47 (reference to Obonsawin in first sentence); 48; 52 (second sentence); 54 to 57; 59; 63 (reference to Obonsawin in second sentence). The plaintiff submits that, although the order separated the claims of Obonsawin and Hester procedurally, it did not extend so far as to require that there be no references to Mr. Obonsawin in the Hester pleading and that the impugned paragraphs or references are material to the Hester claim.

43 Paragraphs 2 and 3 adequately describe the plaintiff, class members, Obonsawin, NLS, and their relationship to one another. The allegations in paragraphs 6-13, under the heading, "The Political and Economic Activities of NLS", are allegations in furtherance of alleged wrongs to Obonsawin and NLS. Paragraphs 54 to 57 under the heading, "GST Issues", are similarly claims of Obonsawin and are not material to the claims advanced by Hester in this action. Likewise, paragraph 59, are allegations in furtherance of a claim by Obonsawin and NLS for intentional interference in contractual relations. I would strike each of these paragraphs as well as the references to Obonsawin in paragraphs 38, 41, 63 as the allegations do not give rise to a cause of action by Hester and class members and are properly pleaded in the Obonsawin action. I will address the allegations in paragraphs 44 and 45 below.

Conspiracy

44 The tort of conspiracy exists (1) if the predominant purpose of the defendant's conduct is to cause injury to the plaintiff, whether or not the means were lawful; or (2) where the defendant's conduct is unlawful and directed towards the plaintiff (alone or with others) and in circumstances

that the defendants should know that injury to the plaintiff is likely to, and does, result: *Canada Cement LaFarge Ltd. v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452 (S.C.C.).

45 The conspiracy plea is set out in paragraphs 62 to 66. It alleges:

> 62. In and after 1994, the individual defendants agreed to conspire to cause harm to the Plaintiff and the Class Members by pursuing the course of conduct set out herein for improper and unlawful purposes as set out in the following paragraph.
> 63. In entering into this agreement, the Defendants' predominant purpose was unlawful. In particular, the Defendants sought to injure Obonsawin, the Plaintiff and the Class Members as a means of preventing them from continuing the campaign against Canada's aboriginal tax policies, and in particular, of (sic) preventing them from pursuing their tax exemption rights.
> 64. In pursuit of this purpose the Defendants agreed to undertake various unlawful activities, including those described in paragraphs 24-39 and 44-59 above.

46 Paragraphs 24 to 33 are allegations relating to the administration of tax exemption rights before 1993, the formulation of the guidelines, and the administration of the guidelines in breach of alleged fiduciary duties and the duty to consult and accommodate owed to the plaintiffs. I have found that the guidelines are not justiciable and that the claims for breach of fiduciary duty and breach of the duty to consult and accommodate are not tenable. These allegations cannot found a claim for conspiracy. Paragraphs 34 to 39 are allegations in relation to Interchange Canada. I have found that these allegations do not give rise to a reasonable cause of action. They cannot found a claim for conspiracy. Paragraphs 54 to 59 are allegations relating to Mr. Obonsawin's GST issues, which must be asserted in his action.

47 This leaves paragraphs 44 to 53. Paragraphs 44 and 45 allege that Revenue Canada has taken the position that NLS is not a legitimate employer and that the defendants have published this view knowing this was unlawful and with the intention to injure Obonsawin, the plaintiff and class members or with knowledge that this would cause injury.

48 Paragraphs 46 to 53 plead that the defendants breached the test case agreement. The nub of the wrongful conduct is pleaded in paragraphs 52 and 53:

> 52. Beginning in 1994, and in breach of the Test Case agreement, the Defendants unlawfully targeted Obonsawin, the Plaintiff, and Class Members, either with the intent of causing them injury or knowing that the Plaintiff and Class Members would suffer injury. The Defendants mounted a campaign of harassment, the object of which was to bully NLS and its employees, including the Plaintiff and the Class Members, into acquiescing in Revenue Canada's change in policy, and the consequent loss of their tax immunity rights.
> 53. In particular, the Defendants, or some of them, attempted to intimidate and harass the Plaintiff and the Class Members by *inter alia*:
>
> (a) contacting employees or their spouses at home;

(b) contacting employees' landlords;
(c) withholding tax refunds and attempting to collect taxes in contravention of the Test Case Agreement.

49 The essential elements for pleading the tort of conspiracy are that it should describe the parties and their relationship to one another. It should allege the agreement between the defendants to conspire and state precisely the purpose or objects of the alleged conspiracy. It must set forth with clarity and precision the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance of and in furtherance of the conspiracy. Finally, it must provide particulars of the resulting damages: *H.A. Imports of Canada Ltd. v. General Mills Inc. et al.* (1983), 42 O.R. (2d) 645 (Ont. H.C.) at 646; see also, *Title Estate v. Harris* (1990), 72 O.R. (2d) 468 (Ont. H.C.) at 475.

50 In its current proposed form, the conspiracy claim is deficient for the following reasons:

(a) although there are 19 defendants (15 of whom are individuals sued in their personal capacity), none of the allegations is advanced against any particular defendant;
(b) there are no particulars of which specific class members the conspiracy was directed against;
(c) there is no detail as to what alleged agreement was reached by the conspirators or at what time: paragraph 62 simply alleges that there was an agreement sometime in the last 13 years ("in and after 1994");
(d) paragraph 63 alleges a conspiracy against Obonsawin, a claim that cannot be made in this action;
(e) the unlawful acts that are alleged in paragraph 64 (which incorporates by reference paragraphs 24 to 39 and 44 to 59 of the Statement of Claim) cannot form the basis of a conspiracy claim in that:

    (i) paragraphs 24 to 39 are founded on legally untenable claims or on claims that are not justiciable;
    (ii) the allegations in paragraphs 44 and 45 that NLS was a sham employer relate to Obonsawin and, even if true, do not constitute an unlawful act or cause injury to the plaintiff and class members;
    (iii) paragraphs 54 to 57 relate to Obonsawin's GST issues and are not properly part of this action; and
    (iv) paragraphs 46 to 53 relate to alleged breaches of the test case agreement, but no reasonable level of particulars is provided, especially regarding alleged intimidation and harassment of Hester and the class members.

51 In summary, the claim makes unparticularized allegations against 15 individuals over a 13-year period and asserts unparticularized damages in paragraph 61 alleging "financial loss and "losses resulting from impairment of tax exemption rights and losses resulting from the loss of opportunity to earn income". I would strike the conspiracy claim, but with leave to amend and order further particulars of the claim for damages.

Abuse of Power

52 The tort of misfeasance in public office or abuse of power is an intentional tort. It requires deliberate unlawful conduct in the exercise of public functions and an awareness that the conduct is unlawful and likely to injure the plaintiff: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 (S.C.C.) at para. 32. The pleading alleges that, "In and after 1994, the defendants embarked on a deliberate course of conduct ("the impugned conduct") calculated to harm the Plaintiff, the Class Members and Obonsawin". It further alleges that "... the defendants were utilizing the powers of their respective offices when they undertook the impugned conduct, that conduct was nonetheless unlawful ... and was intended to injure the Plaintiff and Class Members or, in the alternative, the Defendants knew that the impugned conduct would cause injury ... and the Defendants knew that they lacked legal authority for the impugned conduct." The pleading does not identify which conduct was unlawful except to say that "particulars of the impugned conduct are set out in the following paragraphs". These paragraphs include allegations of sham employer (44 and 45); breach of the test case agreement (46 to 53); GST issues (54 to 59); damages (61); and conspiracy (62 to 64). It is far from clear how allegations of sham employer or alleged breaches of the test case agreement as described earlier can give rise to a claim for misfeasance in public office. Clearly, allegations relating to Obonsawin's GST claim do not give rise to such a claim in this action. I would strike the claim for abuse of power, but with leave to amend.

Motion to Stay

53 Each of the causes of action advanced in this action is, in one way or another, founded on the entitlement of the plaintiff and class members to tax exemption rights under s. 87 of the *Indian Act*. The plaintiff seeks to distinguish this action from the test cases and the individual tax appeals of the plaintiff and class members on the basis that the crux of the present case is mistreatment at the hands of the Crown and CRA in the *manner* of their tax assessments rather than the *correctness* of the assessments. In my view, this is a distinction without a difference.

54 It is clear from the pleading that the plaintiff and class members would have no objection to the *manner* of their treatment if CRA had continued to administer their tax exemption rights in accordance with *Nowegijick* rather than through the application of the 'connecting factors' test in *Williams*. The torts and equitable claims have no independent foundation: they are advanced in this action *on the assumption* that the tax exemption rights exist. The alleged wrongdoing of the defendants flows from this. If some or all of the class members ultimately prevail in their tax appeals, they will not be liable for tax under their assessments. If the Horn and/or Williams test cases are successfully appealed and the individual circumstances of some or all class members are analogous, they will similarly not be liable to pay tax. The only damages that can conceivably result on the pleading as it stands are damages for taxes that have been incorrectly assessed. The plaintiff has not particularized in this action any other kind of loss.

55 It is true that the Tax Court has no jurisdiction to adjudicate tort and equitable claims. Claims for breach of fiduciary duty and breach of the duty to consult and accommodate were advanced in the Horn and Williams actions in the Federal Court, but not pursued at trial. In my view, this action represents an attempt by Hester and NLS employees to turn a question of tax liability into a mass tort claim against the Crown and 15 of its employees when two other courts - the Federal Court and the Tax Court - are already adjudicating the real dispute between the parties.

56 Nonetheless, the defendants do not meet the test under Rule 21.01(3) for a stay. Rule 21.01(3)(c) requires another proceeding pending between the same parties in respect of the same subject matter. The tax appeals are between the same parties, but the Tax Court of Canada does not

have jurisdiction over the subject matter of the tort and equitable claims. The power to stay an action under Rule 23.01(3)(d) should only be used in the clearest of cases and, despite the inadequacies of the pleading, I am not satisfied that the action is frivolous or vexatious or otherwise an abuse of process of the court. Accordingly, the defendants cannot invoke this Rule to stay the action.

57 However, section 106 of the *Courts of Justice Act* permits the court on its own initiative, or on motion by any person, to stay any proceeding on such terms as are just. Section 138 of the *Courts of Justice Act* states that "as far as possible, a multiplicity of proceedings should be avoided". This action is dependent on and derivative of the determination of whether Hester and class members are liable for tax. Parliament has created a comprehensive scheme of review of tax matters and the Tax Court and Federal Court are the proper fora in which to adjudicate this: *Reza v. Canada*, [1994] 2 S.C. R. 394 at 405. I therefore order a stay of this action until the tax court proceedings and the test cases are finally determined, including all appeals. The plaintiff is not required to deliver a pleading in proper form until that time.

58 I am mindful that my colleague, Belobaba J., came to a different conclusion in respect of claims advanced by Mr. Obonsawin against the same defendants. Matlow J. provided no reasons for refusing leave to appeal. Belobaba J. reached his conclusion on a different pleading than the one that is before me. I would simply point out that while the narrative portion of both pleadings is the same, the pleadings are not identical. To the extent that they are similar, I respectfully disagree with the conclusion reached.

59 In summary, the claims for breach of fiduciary duty and breach of the duty to consult and accommodate are not tenable and are struck without leave to amend. The allegations of differential treatment and the allegations relating to the administrative guidelines disclose no reasonable cause of action and are struck without leave to amend. Allegations relating to Obonsawin that give rise to claims by him are struck as they properly belong in his action. The claims for conspiracy and abuse of power/misfeasance in public office are struck with leave to amend. I order particulars of the claim for damages. The action is stayed until final determination of the tax appeals and test cases. By agreement, I award costs of $7,500 to the defendants who have been substantially successful on the motion.

J.L. LAX J.

cp/e/qlkxl/qllkb/qlprp/qltxp/qlhcs/qlcas/qlesm/qljxl/qlrxg

Case Name:

Hester v. Canada

Between
Joe Hester, Plaintiff/Moving Party, and
Her Majesty the Queen in Right of Canada, Minister of National Revenue, Minister of Indian Affairs, Commissioner of Customs and Revenue, Bill McCloskey, Robert Frappier, Michael Cox, Winford Smith, Denis Lefebvre, K.M. Burpee, Ken Fox, John Fennelly, Jeanne Fleming, Luisa Guyan, Ruby Howard, Ken McCuaig, Aileen Conway, Pierre Gravelle and Brian Dawe,
Defendant/Respondents

[2008] O.J. No. 634

163 A.C.W.S. (3d) 910

234 O.A.C. 184

2008 G.T.C. 1228

[2008] G.S.T.C. 55

Court File No. 604/07

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

M.R. Dambrot J.

Heard: February 12, 2008.
Judgment: February 21, 2008.

(30 paras.)

Civil litigation -- Civil procedure -- Pleadings -- Striking out pleadings or allegations -- Sufficiency -- Disposition without trial -- Stay of action -- Another proceeding pending -- Appeals -- Leave to appeal -- Motion by plaintiff for leave to appeal from orders striking out claims of conspiracy and misfeasance of public office and staying plaintiff's action until final determination of two Tax Court actions -- Plaintiff commenced present proposed class action alleging entitlement to tax exemptions under Indian Act -- Temporary stay ordered as present action dependent on outcome of Tax Court proceedings -- Part of pleading struck due to lack of particulars -- Motion dismissed -- No basis for doubting correctness of either order and no conflicting decisions existed.

Motion by plaintiff for leave to appeal from orders striking out claims of conspiracy and misfeasance of public office and staying plaintiff's action until final determination of two Tax Court actions -- Plaintiff commenced present proposed class action alleging entitlement to tax exemptions under Indian Act -- Plaintiff and class members had appealed their tax assessments which appeals had not yet been determined -- Motions judge ordered temporary stay on basis that the claims in present

action were entirely dependent on non-existence of tax exemption rights being litigated in Tax Court -- With respect to pleading of conspiracy and misfeasance claims, motions judge held that conspiracy claim was unparticularized and that misfeasance claim did not identify the unlawful conduct -- HELD: Motion dismissed -- No basis for doubting correctness of either order and no conflicting decisions existed -- Tax issue was a major issue in present action and, if not decisive, would still need to be determined and would have a profound effect on shape and scope of present claim and how it should be managed -- Proposed appeal raised no issue of general importance -- Motions judge did not misapply test for review of adequacy of pleadings -- Even if motions judge misapplied test, such error on this procedural point did not warrant granting leave to appeal.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, s. 106

Indian Act, s. 87

Rules of Court, Rule 62.04(4)(c), Rule 62.04(4)(d)

Counsel:

G. James Fyshe, for the Plaintiff/Moving Party.

John N. B. Birch, for the Defendants/Respondents.

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1 **M.R. DAMBROT J.**:-- The Plaintiff seeks leave to appeal two interlocutory orders made by Lax J. on December 4, 2007 arising out of a motion brought by the Plaintiff for leave to amend the Plaintiff's statement of claim pursuant to R. 26.01 of the *Rules of Civil Procedure*, and a motion brought by the Defendants to stay this action. There were other matters decided by Lax J. arising out of the same hearing but these are not of concern on this motion.

2 In respect of the first motion, Lax J. ordered that:

> the claims of conspiracy and abuse of power/misfeasance of public office pleaded in the Fresh as Amended Statement of Claim are hereby struck with leave to amend.

3 In respect of the second motion, Lax J. ordered that:

> this action be and the same is hereby stayed in its entirety until
>
> (a) all proceedings in the Tax Court of Canada brought by the plaintiff and the prospective class members; and
> (b) the Federal Court actions by Sandra Williams and Margaret Horn (Federal Court file Nos. T-2242-95 and T-2241-95)
>
> are all finally determined (including any appeals).

4 I will begin with the stay.

THE STAY

5 In respect of the stay, Lax J. stated:

> Motion to Stay

[53] Each of the causes of action advanced in this action is, in one way or another, founded on the entitlement of the plaintiff and class members to tax exemption rights under s. 87 of the *Indian Act*. The plaintiff seeks to distinguish this action from the test cases and the individual tax appeals of the plaintiff and class members on the basis that the crux of the present case is mistreatment at the hands of the Crown and CRA in the *manner* of their tax assessments rather than the *correctness* of the assessments. In my view, this is a distinction without a difference.

[54] It is clear from the pleading that the plaintiff and class members would have no objection to the *manner* of their treatment if CRA had continued to administer their tax exemption rights in accordance with *Novegijick* rather than through the application of the 'connecting factors' test in *Williams*. The torts and equitable claims have no independent foundation: they are advanced in this action *on the assumption* that the tax exemption rights exist. The alleged wrongdoing of the defendants flows from this. If some or all of the class members ultimately prevail in their tax appeals, they will not be liable for tax under their assessments. If the Horn and/or Williams test cases are successfully appealed and the individual circumstances of some or all class members are analogous, they will similarly not be liable to pay tax. The only damages that can conceivably result on the pleading as it stands are damages for taxes that have been incorrectly assessed. The plaintiff has not particularized in this action any other kind of loss.

[55] It is true that the Tax Court has no jurisdiction to adjudicate tort and equitable claims. Claims for breach of fiduciary duty and breach of the duty to consult and accommodate were advanced in the Horn and Williams actions in the Federal Court, but not pursued at trial. In my view, this action represents an attempt by Hester and NLS employees to turn a question of tax liability into a mass tort claim against the Crown and 15 of its employees when two other courts - the Federal Court and the Tax Court - are already adjudicating the real dispute between the parties.

[56] Nonetheless, the defendants do not meet the test under Rule 21.01(3) for a stay. Rule 21.01(3)(c) requires another proceeding pending between the same parties in respect of the same subject matter. The tax appeals are between the same parties, but the Tax Court of Canada does not have jurisdiction over the subject matter of the tort and equitable claims. The power to stay an action under Rule 23.01(3)(d) should only be used in the clearest of cases and, despite the inadequacies of the pleading, I am not satisfied that the action is frivolous or vexatious or otherwise an abuse of process of the court. Accordingly, the defendants cannot invoke this Rule to stay the action.

[57] However, section 106 of the *Courts of Justice Act* permits the court on its own initiative, or on motion by any person, to stay any proceeding on such terms as are just. Section 138 of the *Courts of Justice Act* states that "as far as possible, a multiplicity of proceedings should be avoided". This action is dependent on and derivative of the determination of whether Hester and class members are liable for tax. Parliament has created a comprehensive scheme of review of tax matters and the Tax Court and Federal Court are the proper fora in which to adjudicate this: *Reza v. Canada*, [1994] 2 S.C.R. 394 at 405. I therefore order a stay of this action until the tax court proceedings and the test cases are finally determined, including all appeals. The plaintiff is not required to deliver a pleading in proper form until that time.

> [58] I am mindful that my colleague, Belobaba J., came to a different conclusion in respect of claims advanced by Mr. Obonsawin against the same defendants. Matlow J. provided no reasons for refusing leave to appeal. Belobaba J. reached his conclusion on a different pleading than the one that is before me. I would simply point out that while the narrative portion of both pleadings is the same, the pleadings are not identical. To the extent that they are similar, I respectfully disagree with the conclusion reached.

6 The plaintiff seeks leave to appeal this order on the basis that either:

* there appears to be good reason to doubt the correctness of the order temporarily staying this action, and the proposed appeal involves matters of such importance that leave to appeal should be granted (Rule 62.04(4)(d)); or
* there is a conflicting decision by another judge or court on the matter involved in the proposed appeal and it is desirable that leave to appeal be granted (Rule 62.04(4)(c)).

7 With respect to the first basis for leave to appeal, I see no reason to doubt the correctness of the decision.

8 The plaintiff says that Lax J. erred in concluding that these claims are entirely dependent on the non-existence of tax exemption rights being litigated in the Tax Court. The focus of this claim, he says, is on official conduct, not on legal rights. To quote his factum, he says that these claims "could *in theory* succeed, in the absence of the rights themselves." (Emphasis added.)

9 He finds support for this position in the judgment of Belobaba J. in the companion action brought by Obonsawin, referred to above.

10 In my view, this provides no basis to doubt the correctness of this aspect of the judgment of Lax J. First, as Lax J. noted, Belobaba J. reached his conclusion on different pleadings in a different, albeit related action. Second, I note that Belobaba J. was not considering a motion for a stay. Rather, he was addressing a motion to strike the statement of claim on the basis that the Tax Court and the Federal Court had exclusive jurisdiction to hear the matter. In that context, the argument that these claims could "in theory" succeed in the face of decisions against the plaintiff in the Tax Court and Federal Court was decisive. Here it is not.

11 I say this because, even if the plaintiff is right that his claim could "in theory" succeed in face of decisions against the plaintiff in the Tax Court and Federal Court, this would not give rise to reason to doubt the correctness of the decision of Lax J. to grant a temporary stay. The fact remains that the tax issue is a major issue in the action in this court, and if not decisive, would still need to be determined and would have a profound effect on the shape and scope of the litigation in this court and how it should be managed. The stay would still accomplish what Lax J. intended it to accomplish: the avoidance of a multiplicity of proceedings, at least on the tax issue.

12 In any event, the proposed appeal on this issue involves a matter that is of significance only to the parties, and that is not of such importance that leave to appeal should be granted.

13 With respect to the second basis for leave to appeal the stay, I am not of the view that there are conflicting decisions on the matter involved in the proposed appeal.

14 The Plaintiff points to two decisions that, he says, establish two preconditions to the granting of a stay pursuant to s. 106 of the *Courts of Justice Act* that were not met here, namely:

* that continuance of the action would work an injustice because it would be oppressive or vexatious or an abuse of process of the Court; and

* that the stay would not cause an injustice to the plaintiff.

15 In the first of these two cases, *Gruner v. McCormack*, [2000] O.J. No. 789 (Sup. Ct.), Epstein J. deduced this test from a series of cases considering when a civil court should defer to an ecclesiastical court, the very issue she was considering. I do not read her judgment to purport to be announcing a test that must be met in every motion for a stay regardless of the circumstances. The second case, *Audziss v. Santa*, [2002] O.J. No. 396 (Supp. Ct.), is of little assistance, since the court merely adopted the test in *Gruner v. McCormack* without analysis. The fact is that s. 106 gives the court a broad discretion to stay proceedings, unfettered by any specific test. Stays have been granted in many cases without reference to the test in *Gruner v. McCormack*, and subject only to the overriding constraint that the circumstances must be extraordinary. Finally, I note that the two cases in question involved the granting of permanent stays, while in this case, Lax J. ordered a temporary stay. It seems obvious to me that the court would approach a temporary stay differently than a permanent stay.

16 In any event, given the temporary nature of this stay, and the rationale for granting it, I do not consider it to be desirable to grant leave on this issue on the basis of a perceived conflict with other judgments.

THE PLEADINGS

17 I next turn to the order of Lax J. that the claims of conspiracy and abuse of power/misfeasance of public office pleaded in the Fresh as Amended Statement of Claim be struck with leave to amend.

18 With respect to the conspiracy claim, she stated:

> [49] The essential elements for pleading the tort of conspiracy are that it should describe the parties and their relationship to one another. It should allege the agreement between the defendants to conspire and state precisely the purpose or objects of the alleged conspiracy. It must set forth with clarity and precision the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance of and in furtherance of the conspiracy. Finally, it must provide particulars of the resulting damages: *H.A. Imports of Canada Ltd. v. General Mills Inc. et al.* (1983), 42 O.R. (2d) 645 (Ont. H.C.) at 646; see also, *Title Estate v. Harris*, (1990), 72 O.R. (2d) 468 (Ont. H.C.) at 475.
>
> [50] In its current proposed form, the conspiracy claim is deficient for the following reasons:
>
> (a) although there are 19 defendants (15 of whom are individuals sued in their personal capacity), none of the allegations is advanced against any particular defendant;
> (b) there are no particulars of which specific class members the conspiracy was directed against;
> (c) there is no detail as to what alleged agreement was reached by the conspirators or at what time: paragraph 62 simply alleges that there was an agreement sometime in the last 13 years ("in and after 1994");
> (d) paragraph 63 alleges a conspiracy against Obonsawin, a claim that cannot be made in this action;
> (e) the unlawful acts that are alleged in paragraph 64 (which incorporates by reference paragraphs 24 to 39 and 44 to 59 of the Statement of Claim) cannot form the basis of a conspiracy claim in that:
>
> (i) paragraphs 24 to 39 are founded on legally untenable claims or on claims that are not justiciable;

(ii) the allegations in paragraphs 44 and 45 that NLS was a sham employer relate to Obonsawin and, even if true, do not constitute an unlawful act or cause injury to the plaintiff and class members;
(iii) paragraphs 54 to 57 relate to Obonsawin's GST issues and are not properly part of this action; and
(iv) paragraphs 46 to 53 relate to alleged breaches of the test case agreement, but no reasonable level of particulars is provided, especially regarding alleged intimidation and harassment of Hester and the class members.

[51] In summary, the claim makes unparticularized allegations against 15 individuals over a 13-year period and asserts unparticularized damages in paragraph 61 alleging "financial loss and "losses resulting from impairment of tax exemption rights and losses resulting from the loss of opportunity to earn income". I would strike the conspiracy claim, but with leave to amend and order further particulars of the claim for damages.

19 With respect to the abuse of power/misfeasance of public office claim, Lax J. stated:

[52] The tort of misfeasance in public office or abuse of power is an intentional tort. It requires deliberate unlawful conduct in the exercise of public functions and an awareness that the conduct is unlawful and likely to injure the plaintiff: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 (S.C.C.) at para. 32. The pleading alleges that, "In and after 1994, the defendants embarked on a deliberate course of conduct ("the impugned conduct") calculated to harm the Plaintiff, the Class Members and Obonsawin". It further alleges that "... the defendants were utilizing the powers of their respective offices when they undertook the impugned conduct, that conduct was nonetheless unlawful ... and was intended to injure the Plaintiff and Class Members or, in the alternative, the Defendants knew that the impugned conduct would cause injury ... and the Defendants knew that they lacked legal authority for the impugned conduct." The pleading does not identify which conduct was unlawful except to say that "particulars of the impugned conduct are set out in the following paragraphs". These paragraphs include allegations of sham employer (44 and 45); breach of the test case agreement (46 to 53); GST issues (54 to 59); damages (61); and conspiracy (62 to 64). It is far from clear how allegations of sham employer or alleged breaches of the test case agreement as described earlier can give rise to a claim for misfeasance in public office. Clearly, allegations relating to Obonsawin's GST claim do not give rise to such a claim in this action. I would strike the claim for abuse of power, but with leave to amend.

20 Once again, the Plaintiff seeks leave to appeal this order on the basis that either:

* there appears to be good reason to doubt the correctness of the order temporarily staying this action, and the proposed appeal involves matters of such importance that leave to appeal should be granted (Rule 62.04(4)(d)); or
* there is a conflicting decision by another judge or court on the matter involved in the proposed appeal and it is desirable that leave to appeal be granted (Rule 62.04(4)(c)).

21 With respect to the first basis for leave to appeal, I see no reason to doubt the correctness of the decision.

22 The plaintiff points out that the only motion before Lax J. in respect of this pleading was a

motion to amend the Plaintiff's Statement of Claim in the manner requested by the Plaintiff. The Plaintiff says that on such a motion, Lax J. had no jurisdiction to strike his pleading, and erred in doing so.

23 In assessing this argument, it is important to examine the reality of the motion before Lax J. While the motion was a motion to amend the Plaintiff's Statement of Claim as the Plaintiff suggests, he actually sought an order amending his admittedly flawed original statement of claim by substituting a proposed Fresh as Amended Statement of Claim.

24 Lax J. did not purport to strike the Plaintiff's existing pleading. She obviously knew that she had no jurisdiction to do so. Instead, she "struck" "the claims of conspiracy and abuse of power/misfeasance of public office pleaded in the Fresh as Amended Statement of Claim" with leave to amend. While, Lax J. could have worded her order in a manner more clearly in conformity to the language of Rule 26.01, her intent was clear, and what she ordered was clearly within her jurisdiction. She granted the motion to replace the existing statement of claim with the Fresh as Amended Statement of Claim, but only after it is redrafted in accordance with this and several other orders that are not in issue before me.

25 In addition, the Plaintiff characterized the approach of Lax J. to the pleadings in respect of the conspiracy and abuse of power claims as erroneous because she misapplied the governing test. In essence, he says that she should have been more cautious in reaching the conclusion that the proposed pleadings were untenable, and that she should have given greater weight to the fact that in this case, the informational balance of power favours the Defendants.

26 I do not share the Plaintiff's view that Lax J. misapplied the governing test for review of the adequacy of pleadings by being insufficiently cautious or by failing to give sufficient weight to the informational power imbalance. But even if she did err in her application of the law in this manner, her mere misapplication of the law on this narrow procedural point could hardly be a matter of such importance that leave to appeal should be granted.

27 With respect to the second basis for leave to appeal, I am not of the view that there are conflicting decisions on this issue which make it desirable that leave to appeal be granted.

28 The essence of the argument made by the Plaintiff on this point is that the Plaintiff's claims of conspiracy and abuse of power have already been scrutinized by this Court and the pleadings found to be legally adequate. (See *Obonsawin v. Canada*, [2001] O.J. No. 369 (Sup. Ct.) and *Obonsawin v. Canada*, [2006] O.J. No. 3809 (Sup. Ct.).)

29 With respect to these decisions, I note that they relate to different, albeit similar pleadings, and that the scrutiny arose in different contexts. More importantly, however, Lax J. considered the adequacy of the pleadings on well-settled principles, and made no pronouncement on the law that is inconsistent with what was said in the earlier two cases. The reason for the availability of leave to appeal on the basis of conflicting decisions is so that controversies in the law can be resolved. Where the inconsistency amounts to nothing more than different judges reaching a different conclusion in similar circumstances, it is not desirable that leave be granted on that basis.

DISPOSITION

30 The motion for leave to appeal is dismissed. The parties may file brief submissions on costs within 14 days of the release of this judgment.

M.R. DAMBROT J.

cp/e/qlkxl/qlpxm/qljxl/qltxp/qljxl/qlcas

Case Name:

Apotex Inc. v. Schering Corp.

RE: Apotex Inc., Plaintiff, and Schering Corporation, Sanofi-Aventis, Sanofi-Aventis Deutschland GMBH and Sanofi-Aventis Canada Inc., Defendants

[2013] O.J. No. 1013

2013 ONSC 1411

Court File No. CV-11-429541

Ontario Superior Court of Justice

D.G. Stinson J.

Heard: February 4, 2013.
Judgment: March 7, 2013.

(24 paras.)

Civil litigation -- Civil procedure -- Disposition without trial -- Stay of action -- Appeals -- Stay of proceedings pending appeal -- Motion by defendants to strike plaintiff's statement of claim, or stay action pending outcome of appeal -- Motion for stay allowed -- Appeal had awarded damages for delay caused by defendants, brand-name drug patent holders, but had not established quantum -- Present action involved claim for more damages -- There was substantial overlap in issues and facts -- Stay would result in significant saving of judicial resources and legal expenses -- Final outcome of damages calculation in appeal were relevant in present case --Plaintiff would not suffer injustice.

Intellectual property law (patents) -- Patents -- Licenses -- Compulsory -- Food or medicine -- Remedies -- Damages -- Motion by defendants to strike plaintiff's statement of claim, or stay action pending outcome of appeal -- Motion for stay allowed -- Appeal had awarded damages for delay caused by defendants, brand-name drug patent holders, but had not established quantum -- Present action involved claim for more damages -- There was substantial overlap in issues and facts -- Stay would result in significant saving of judicial resources and legal expenses -- Final outcome of damages calculation in appeal were relevant in present case --Plaintiff would not suffer injustice.

Motion by the defendants to strike the plaintiff's statement of claim, or stay the action pending the outcome of an appeal. The action involved attempts by the plaintiff to market a generic version of a pharmaceutical drug, to which the defendant owned the brand-name patent rights. In the action under appeal, the plaintiff was awarded damages for a delay in marketing the generic drug caused by the defendants. The quantum of damages had not been resolved. The present action involved the plaintiff's claim for additional damages.

HELD: Motion for stay allowed. The factors to be considered in granting a temporary stay pending the resolution of another proceeding were whether: there was a substantial overlap of issues; there was the same factual background; it would prevent unnecessary and costly duplication, and; it would result in an injustice, deny access to the courts or substantially delay or impair the hearing. Here, there was substantial overlap between the issues of the present case and the appeal, primarily, the proper amount of compensation. Also, many of the same factual and legal questions were raised. The relief advanced in the present action sought damages arising from the same conduct, albeit on a different basis. As the appeal would resolve at least some of the issues raised in the current action, a stay would result in a significant saving of judicial resources and legal expenses. It would also avoid the risk of inconsistent outcomes. Most importantly, the final outcome of the damage calculation in the appeal would be taken into account in arriving at the damage award in the present case. Other than a possible delay in the recovery of damages, the plaintiff would not suffer an injustice or be denied access to the court.

Statutes, Regulations and Rules Cited:

An Act Concerning Monopolies and Dispensing with Penal Laws, and the Forfeitures thereof, 1624 21 Jac. I, c. 3, s. 4

An Act Concerning Monopolies and Dispensing with Penal Laws, etc., R.S.O. 1897, c. 323, s. 4

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 106

Patented Medicines (Notice of Compliance) Regulations, SOR/ 93-133, s. 8

Trade-marks Act, RSC 1985, c. T-13, s. 53.2

Counsel:

Julie Rosenthal and *Daniel Cappe* for Apotex Inc., responding party.

Gunars A. Gaikis and *Andrew E. Mandlsohn* for Sanofi-Aventis, Sanofi-Aventis Deutschland GmbH and Sanofi-Aventis Canada Inc., moving parties.

No one appearing for Schering Corporation, defendant.

ENDORSEMENT

1 D.G. STINSON J.:-- In their notice of motion, the moving parties ("Sanofi") sought an order striking Apotex Inc.'s ("Apotex") statement of claim, or in the alternative, a stay of this action pending the outcome of the appeal taken by Sanofi to the Federal Court of Appeal from the decision of Snider J. of the Federal Court of Canada in *Apotex Inc. v. Sanofi-Aventis,* 2012 FC 553, [2012]

F.C.J. No. 620 (F.C.) (the "Federal Court Action"), and any appeal therefrom. On the day of the hearing, counsel for the Sanofi informed the court of its intention to refocus its submissions due to the recent decision of Quigley J. in *Apotex Inc. v. Abbott Laboratories Limited*, 2013 ONSC 356, released January 15, 2013. Counsel stated that while Sanofi would not oppose a stay, it would no longer actively pursue this or any other alternative relief, focusing instead on its request for an order striking the statement of claim.

2 Despite this advice from counsel, I directed both sides to address the issue of a temporary stay. At the close of submissions on that topic, I ordered a temporary stay of the proceedings in this matter pending the outcome of the appeal of Snider J.'s decision in *the Federal Court Action*, with reasons to follow. These are those reasons.

BACKGROUND

3 The case at bar and the Federal Court Action both trace their origins to problems encountered by Apotex in trying to bring to market a generic version of a pharmaceutical drug known as Rampiril, a drug used to treat hypertension. Sanofi held or holds patent rights in relation to a brand-name version of Rampiril. It therefore took active steps to oppose efforts by its rival Apotex to offer for public sale its generic version, Apo-Rampiril.

4 In the Federal Court Action, the decision of Snider J. (that is now under appeal by Sanofi) awarded damages to Apotex pursuant to s. 8 of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 (the "*Regulations*"). That claim arose because, although Apotex received regulatory approval for its generic version (Apo-Ramparil) in 2004, it was unable to start selling it until December 2006. This was due to the fact that Sanofi had exercised its rights under the *Regulations* to initiate a "prohibition proceeding", which automatically resulted in a statutory stay prohibiting Apotex from selling Apo-Ramipril until the resolution of the prohibition proceeding. At the conclusion of the prohibition proceeding, Sanofi's objection was found to be invalid. As a consequence, Apotex was entitled under s. 8 of the *Regulations* to claim compensation for the losses it suffered by reason of the delay in bringing its product to market.

5 Among the issues addressed by Snider J. was the determination of what share of the Ramipril market Apotex would have captured had it been able to sell Apo-Ramipril during the period of delay that arose due to Sanofi's unfounded objection, and what losses it suffered as a result. In her 300-paragraph decision, Snider J. canvassed a substantial volume of fact and expert testimony and a range of legal questions. Despite reaching conclusions on a number of issues, Snider J. was unable to finalize the quantum of damages, that is, the correct measure of compensation for the losses Apotex suffered as a result of the unfounded delay in selling Apo-Ramipril. Based on her conclusions as to the applicable principles, Snider J. left it to the parties to determine the amount of s. 8 damages Sanofi was to pay. Sanofi has appealed Snider J.'s decision and so the issues addressed in that case are not yet finally resolved, the principles governing the damage award in favour of Apotex have not yet been finally determined, and the calculation of Apotex's damages is not yet final.

6 In the present action, Apotex has advanced what it asserts are additional damage claims arising from Sanofi's attempts to delay Apotex bringing Apo-Ramipril to market. It claims treble damages pursuant to s. 4 of *An Act Concerning Monopolies and Dispensing with Penal Laws, and the Forfeitures thereof*, 1624 21 Jac. I, c. 3 (the "UK *Statute of Monopolies*") and treble damages pursuant to s. 4 of *An Act Concerning Monopolies and Dispensing with Penal Laws, etc.*, R.S.O. 1897, c. 323 (the "Ontario *Statute of Monopolies*"). It further seeks damages or an accounting of Sanofi's

profits, pursuant to s. 53.2 of the *Trade-marks Act*, RSC 1985, c. T-13. Apotex also seeks disgorgement of Sanofi's profits generated from the sale of Rampiril as a consequence of the improper issuance of a patent and/or the delay in Apotex being permitted to sell Apo-Ramipiril due to Sanofi's invocation of the *Regulations*.

7 In reviewing the extensive materials filed by the parties in relation to this motion, the extensive overlap between the two proceedings became apparent to me. I became concerned that issues not yet finally resolved in the Federal Court Action had a direct bearing on the issues in this case. I also became concerned that litigating like issues in two parallel proceedings could be undesirable due to the risk of inconsistent outcomes and an undue duplication of effort and consumption of judicial resources. For these reasons, at the outset of the hearing before me I directed both sides to address the issue of the desirability of a temporary stay pending the final disposition of the Federal Court Action.

STAY OF PROCEEDINGS

8 Although the moving parties no longer actively pursue a stay of the proceedings, the court can issue a stay on its own initiative, as provided for in s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43:

> s. 106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

9 In *Hollinger International Inc. v. Hollinger Inc.*, [2004] O.J. No. 3464 at para. 5 (S.C.J.), Farley J. summarized the relevant factors a court will consider when deciding whether to issue a temporary stay pending the resolution of another proceeding:

> (a) whether there is substantial overlap of issues in the two proceedings;
> (b) whether the two cases share the same factual background;
> (c) whether issuing a temporary stay will prevent unnecessary and costly duplication of judicial and legal resources; and
> (d) whether the temporary stay will result in an injustice to the party resisting the stay.

See, more recently, *Catalyst Fund Limited Partnership II v. IMAX Corp.*, [2008] O.J. No. 3776 (S.C.J.) and *Dadouch v. Bielak*, 2011 ONSC 1583, [2011] O.J. No. 1095 (S.C.J.).

10 Courts will also be reluctant to grant a stay if the result of the stay is to deny the plaintiff access to the courts or to substantially delay or impair the plaintiffs right to have his or her case heard: *Campeau v. Olympia & York Developments Ltd.*, [1992] O.J. No. 1946 (Gen. Div.).

11 The discretionary nature of this type of stay motion was described by Stratas J.A. in *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312, [2011] F.C.J. No. 1607 (F.C.A.) at para. 5:

> *This Court deciding not to exercise its jurisdiction until some time later.* When we do this, we are exercising a jurisdiction that is not unlike scheduling or adjourning a matter. Broad discretionary considerations come to bear in decisions such as these. There is a public interest consideration - the need for proceedings to move fairly and with due dispatch - but this is qualitatively different from the

> public interest considerations that apply when we forbid another body from doing what Parliament says it can do. As a result, the demanding tests prescribed in *RJR-MacDonald*, [1994] 1 S.C.R. 311, do not apply here. This is not to say that this Court will lightly delay a matter. It all depends on the factual circumstances presented to the Court. In some cases, it will take much to convince the Court, for example where a long period of delay is requested or where the requested delay will cause harsh effects upon a party or the public. In other cases, it may take less. [Emphasis in original.]

12 Against the foregoing backdrop, I turn to a consideration of the factors relevant to the granting of a temporary stay in the present case.

(a) Whether there is substantial overlap of issues in the two proceedings

13 There is a substantial overlap between many of the issues in the present proceeding and those before Snider J. in the Federal Court Action. Key among these is the determination of the amount of compensation properly recoverable by Apotex as a result of Sanofi's conduct which delayed Apo-Ramipril from reaching market. As well, many of the same factual and legal questions raised in the Federal Court Action will again arise in the present case.

14 The present action will involve questions regarding the proper basis for determining what amount of damages (if any) would properly compensate Apotex or would be payable by Sanofi in respect of each of the current claims. When trying these claims the trial judge will need to consider the interaction among the various heads of damage, as well as the principle of avoiding double recovery (save where it is properly permitted). Another important element of the damage calculation in the present case will be the compensation already awarded to Apotex in the Federal Court Action. The mere fact that that compensation was awarded pursuant to a statutory cause of action under the *Regulations* does not negate its relevance or significance for purposes of the assessing Apotex's recoverable damages in the present case. If Apotex has already "been made whole" by reason of the amounts awarded to it under the statutory cause of action, that element may (and likely would) be a factor to take into account when determining how much more (if any) damages it should be awarded in the present case.

15 Additionally, it is conceivable, if not likely, that certain findings of fact decided in the Federal Court Action will be relevant, if not dispositive, of the like issues in the present case, based on principles of *res judicata* and issue estoppel. The determination by the Federal Court of applicable principles for calculation of damages may likewise be relevant.

(b) Whether the two cases share the same factual background

16 It is self-evident that the factual foundation of the damage claims in the present action overlaps significantly with that of the Federal Court Action: both are concerned with the impact of Sanofi's conduct in trying to exclude Apo-Rampiril from the market. That conduct was, in the Federal Court Action, found to have caused Apotex damages, that were (or were to be) calculated pursuant to the findings of Snider J. Each of the heads of relief advanced in the present action seeks damages arising from the same conduct, albeit on the basis of different (and disparate) legal theories and some additional factual complaints. Some of the present claims rely on statutory causes of action (eg. the UK and Ontario *Statute of Monopolies* or the *Trade-marks Act*) while others are based on common law or equitable principles. Common to all of these claims, however, is the correct as-

sessment and calculation of Apotex's recoverable damages. Also, the parties in both proceedings are identical, with the exception of the first-named defendant in this action (Schering Corporation, which has not been served with the Statement of Claim).

(c) Whether issuing a temporary stay will prevent unnecessary and costly duplication of judicial and legal resources.

17 The outcome of the Federal Court Action is likely to resolve at least some of the issues raised in the current action, resulting in a significant saving of judicial resources and legal expenses that would have otherwise been expended to address the same issues in this action. Issuing a stay of the current proceedings would also avoid the risk of inconsistent outcomes between this court and the Federal Court. Most importantly, the final outcome of the Federal Court Action, and in particular the damage calculation in that case, can and should be taken into account in arriving at the proper damage award in the present case. The result of the other proceeding may also provide the parties with a basis for reaching a compromise of the present action, thereby obviating the need for any additional judicial or legal resources to be devoted to this dispute.

18 It may (and likely would) also be prudent for the parties to await the outcome of the appeal of Quigley J.'s decision in *Apotex Inc. v. Abbott Laboratories Ltd.*, on which the moving parties now base this motion, as a number of relevant issues, particularly whether s. 8 damages under the *Regulations* is a complete code, will no doubt be relevant to the present matter.

(d) Whether the temporary stay will result in an injustice to the party resisting the stay.

19 As Stratas J.A. noted in *Mylan Pharmaceuticals,* the court will not lightly delay a matter, as the court is mindful that parties who have legitimate claims are entitled to come to court in the expectation that they will be dealt with as expeditiously as the available resources will permit. That said, the court has a duty and responsibility to see that cases proceed in an orderly fashion so that the limited available judicial resources are applied in the most effective fashion for all litigants. The present case involves a commercial dispute and a monetary claim between two substantial corporate parties. The issues regarding the ability of Apotex to market Apo-Rampiril have long since been resolved. Thus this case no longer involves a potential public interest in the availability of the generic product.

20 While granting a temporary stay will delay the date upon which Apotex may eventually recover such damage award in this action as it may be properly due, that is the only readily identifiable impact of a stay. Moreover, the length of the temporary stay sought should not be substantial, nor is it outside the parties' control. Rather, it will be tied to the pace at which the parties choose to pursue the determination of the appeal in the Federal Court Action. Apart from timing, there is no suggestion that Apotex will otherwise suffer an injustice or be denied access to the court. The nature of its claim and the fact it is already engaged in litigation in the Federal Court that must be resolved before the present case can be decided dictate that the present case be put on hold temporarily. Pre-judgment interest will continue to accrue on the damage claim.

CONCLUSION

21 The foregoing analysis supports the conclusion that a temporary stay is warranted in this case. It was for these reasons that I stayed the plaintiff's action pending the outcome of the appeal

taken by the defendants to the Federal Court of Appeal from the decision of Snider J., and any appeal therefrom.

22 I am conscious that the parties came to court on February 4, 2013 prepared to argue numerous other issues, including the potential availability of limitation period defences, among other points. At the end of the day, however, their dispute comes down to money, a subject over which there is always room for compromise. I have analyzed above the need for finality in the Federal Court Action before there can be a judicial determination of the possible amount of any damage award in the present case. Once that finality is achieved, each side will have the opportunity to assess whether and to what extent further litigation of the present claim, as opposed to compromise, would be the better course of action. In view of that possibility, in the interests of conservation of judicial resources and in the absence of any urgency or injustice, I did not ask counsel to argue those additional issues and I do not intend to address them. Once the outcome of the Federal Court Action is known and the temporary stay is lifted, should the parties consider it necessary or advisable to litigate the remaining issues, they may renew the defendants' motion in relation to them.

23 I have also noted that the parties may wish to wait for the outcome of the appeal in *Apotex Inc. v. Abbott Laboratories Ltd.* before proceeding with this present action, as it will likely provide appellate authority on a number of matters at issue in the present case. In any event, in view of Sanofi's decision to "refocus" its motion and its reliance on that decision, it would be appropriate for revised factums to be filed so that the arguments on both sides may be suitably focused when (and if) the defendants' motion is next before the court.

24 In the circumstances, having granted the temporary stay on the foregoing basis, I am not seized of those portions of the matter that have yet to be the subject of argument. Costs are reserved to the judge who decides the motion, if and when it is argued, or to the trial judge.

D.G. STINSON J.

cp/e/qlrpv/qlpmg/qlbdp

Case Name:

Dadouch v. Bielak

RE: Anita Dadouch and Faye White, Plaintiffs, and Robert Bielak, Marilyn Gold, Joel Gold, Sylvia Bielak, St. Helen's Meat Packers Limited, Grace Meats Limited, 1076393 Ontario Limited operating as Lazar Yitzchok Wrenport Investments Inc., 1014702 Ontario Limited, 1463135 Ontario Limited and Donald Carr, Defendants

[2011] O.J. No. 1095

2011 ONSC 1583

Court File Nos. CV-09-847500CL and 03-CV-258919CM2

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

March 11, 2011.

(25 paras.)

Counsel:

S. Brunswick and M. Sokolsky, for the Plaintiffs.

H. Daley, for the Defendant, Donald Carr.

REASONS FOR DECISION

D.M. BROWN J.:--

I. Nature of the motions

1 The defendant, Donald Carr, seeks a temporary stay of Action No. 03-CV-258919CM2 until the disposition of the arbitration to which the plaintiffs and the remaining defendants have submit-

ted their dispute. The plaintiffs have brought a cross-motion for an order to compel Mr. Carr to attend for examination for discovery within the next 30 days

II. Background events

2 In this Action the plaintiffs, two sisters who are members of the Bielak family, sue their siblings, other relatives, and the family-related corporations. The plaintiffs have also joined as a defendant Donald Carr, a lawyer, who had acted for many years for the Bielak family and their corporations.

3 The plaintiffs commenced this Action in November, 2003. Paragraph 6 of their Statement of Claim contained the following prayer for relief against Donald Carr:

> 6. The plaintiffs further claim against Donald Carr:
>
> a. Damages in the amount of $10,000,000 for breach of fiduciary duty.
> b. An order requiring the defendant to produce for inspection by the plaintiffs all documentation including correspondence, memoranda and financial records belonging to or relating to the estate and its related corporations in its possession or in the possession of his law firm Goodman and Carr.

Paragraph 7 of the Statement of Claim contained the following prayer for relief as against all defendants, including Donald Carr:

> 7. The plaintiffs claim against all defendants:
>
> a. A declaration that the plaintiffs are each the beneficial owners of 20% of the issued and outstanding shares of St. Helens, Grace Meats Limited, 1076393 Ontario Limited operating as Lazar Yitzchok, Wrenport Investments Inc., 1014702 Ontario Limited and 1463135 Ontario Limited subject to a 50% light interest in the income in favour of Marsha Bielak;
> b. An order that the defendants are not entitled to reimbursement for their legal expenses for this proceeding from the estate or any of the other corporate entities that are or were affiliated with the estate directly or indirectly.

Although paragraph 7(a) purports to seek relief against Donald Carr, given his position as the lawyer for the family and not the owner of any of the family's assets, paragraph 7(a) really seems directed by the plaintiffs against their siblings, other family members and the family-related businesses.

4 In paragraphs 18 and 19 of their claim the plaintiffs alleged that Carr owed them a fiduciary duty and duty of care which he breached by engaging in several "wrongful acts" including: either "conceiving of or acquiescing in" schemes by the plaintiffs' siblings, the defendants Robert Bielak and Marilyn Gold, to dilute the interests of the plaintiffs in estate corporate assets; the preparation of documents to the prejudice of the plaintiffs; the holding of meetings with inadequate notice to the plaintiffs; the giving of advice to other family members to the prejudice of the plaintiffs; failing to

ensure that the plaintiffs obtained independent legal advice; conceiving of or acquiescing in a scheme with Robert and Marilyn to intimidate the plaintiffs into agreeing to a reorganization of the estate; denying the plaintiffs access to information about the estate; and, improperly charging fees and disbursements to the estate.

5 Initially the plaintiffs did not require Mr. Carr to file a statement of defence in light of ongoing settlement discussions amongst family members. By March, 2004 the family member plaintiffs and defendants had agreed to retain forensic accountants to perform a business evaluation with a view to discussing a possible settlement. On March 17, 2004, the plaintiffs' counsel wrote, in a letter to the court: "we are further agreed that there may not be a need to involve Mr. Carr if a business solution can be achieved based upon the values found by the forensic accountants. Ms. Daley is content on behalf of Mr. Carr to await the business evaluation and the settlement negotiations among the family members."

6 The family member litigants participated in a mediation before Justice Winkler in the summer of 2006. Mr. Carr was not invited to participate. The mediation did not result in a settlement.

7 Ultimately the plaintiffs required Mr. Carr to file a statement of defence, which he did on February 9, 2007.

8 In 2007, the plaintiffs sought production of the Goodman and Carr files. Issues of privilege, of course, arose. Ultimately Mr. Carr satisfied himself that his former clients were waiving privilege and he delivered an affidavit of documents.

9 On October 26, 2009, the plaintiffs and all of the defendants, save for Mr. Carr, entered into minutes of settlement. Mr. Carr was not aware of the settlement at the time. Pursuant to the settlement the family member litigants agreed "to refer to arbitration all issues in the claim and counterclaim including all issues of compensation." The settlement agreement made no mention of Mr. Carr or the claims made against him in the Action. The parties to the settlement agreement then selected former Justice Cullity to act as arbitrator. That arbitration is now scheduled for 2 weeks in May, 2011.

10 On December 9, 2009, the plaintiffs issued an Amended Amended Statement of Claim, however the relief they sought against Mr. Carr did not change.

11 On June 16, 2010, plaintiffs' counsel advised Mr. Carr's lawyer that they wished to examine Mr. Carr. On October 7 plaintiffs' counsel repeated that request, and at the same time delivered the plaintiffs' affidavit of documents.

12 On October 12, Mr. Carr's counsel wrote to the plaintiffs:

> While Mr. Carr may be examinable in the action, his discovery evidence cannot be used in the arbitration, which is a separate proceeding. Since he is not a party to the arbitration he is not examinable in advance of the arbitration hearing.
>
> Do the plaintiffs intend to proceed with the civil action against Mr. Carr at this time? Please advise so we may obtain the appropriate instructions.

On October 13 plaintiffs' counsel responded: "Our clients intend to proceed with the case against Mr. Carr. Please contact us to arrange his discovery."

13 On November 18, 2010, plaintiffs' counsel delivered a discovery plan to Mr. Carr's counsel and a notice of examination requiring Mr. Carr to attend for examination for discovery on December 14, 2010 in respect of the issues in paragraphs 18 and 19 of the Amended Amended Statement of Claim.

14 That then prompted a letter from Mr. Carr's counsel of November 25, 2010 advising that Mr. Carr intended to proceed with a motion to dismiss the action for delay and alternative relief. Counsel proposed hearing dates in late January, 2011. Plaintiffs' counsel responded on November 26:

> While it is our clients' intention to vigorously oppose your client's motion, our clients would consider completing the examination of your client on December 14, 2010 without prejudice to your motion. Let us know if that is agreeable. In any event, please be advised that it is our clients' position that your client is bringing this motion simply to avoid being examined for discovery. That, in our view, is an abuse of process.

Mr. Carr's counsel did not agree to that proposal and, in turn, submitted a request form to the Commercial List for the scheduling of Mr. Carr's motion.

15 The parties have agreed that Mr. Carr's counsel can attend to observe the discoveries in the arbitration on a "watching brief" basis and Mr. Carr's counsel will claim no costs in respect of those attendances. To date no such discoveries have been conducted.

III. Analysis

16 I accept, as an accurate statement of the test applicable to a request for a temporary stay of a proceeding, the following passages from the decision of Farley J. in *Hollinger International Inc. v. Hollinger Inc.* (2004), 11 C.P.C. (6th) 245 (Ont. S.C.J.):

> [5] ... It appears that temporary stays pending resolution of a foreign proceeding are typically granted when the foreign proceeding would "substantially reduce the issues to be determined" or if success in the foreign proceeding could render the local proceeding "substantially moot" or otherwise have a "material" impact on the outstanding issues in the case: see *Ainsworth Lumber Co. v. Canada (Attorney General)* (2001), 1 C.P.C. (5th) 49 (B.C.C.A.); *Dowell v. Spencer,* [2001] O.J. No. 5149 (Ont. S.C.J. Master); *Carom v. Bre-X Minerals Ltd.* (1998), 20 C.P.C. (4th) 163 (Ont. Gen. Div.). Courts have considered the following issues in deciding to exercise their discretion in issuing a temporary stay pending the resolution of another proceeding:
>
> (a) whether there is substantial overlap of issues in the two proceedings;
> (b) whether the two cases share the same factual background;
> (c) whether issuing a temporary stay will prevent unnecessary and costly duplication of judicial and legal resources; and
> (d) whether the temporary stay will result in an injustice to the party resisting the stay.

This Court applied that test recently in *Areva NP GmbH v. Atomic Energy of Canada Ltd.*, [2009] O.J. No. 861, 2009 CarswellOnt 1149 and *Catalyst Fund Limited Partnership II v. Imax Corporation* (2008), 92 O.R. (3d) 430 (S.C.J.).

17 Although I have not seen the pleadings in the arbitration, there can be no dispute that this Action and the arbitration share the same factual background and that a substantial overlap of issues exists in the two proceedings because in their October 26, 2009 Minutes of Settlement the other parties agreed "to refer to arbitration all issues in the claim and counterclaim including all issues of compensation." Although paragraph 19 of the Amended Amended Statement of Claim contains some discrete allegations of wrongful conduct against Mr. Carr regarding what he did, or failed to do, as estate solicitor - e.g. paragraphs 19(b)-(g) and (i)-(k) - those allegations all arise within the common factual background.

18 Moreover, two of the allegations - paras. 19(a) and (h) - predicate liability against Mr. Carr on a finding of liability against the defendants Robert Bielak and Marilyn Gold. Paragraph 19 of the Amended Amended Statement of Claim reads, in part, as follows:

> 19. Carr breached all of the above duties as set out below:
>
> > a/ Carr either conceived of or acquiesced in the schemes by Robert and Marilyn to dilute the interests of the plaintiffs in estate assets as set out above in paragraph 17(f), (g), (h), (i), (j), (n), (q) (r) and (s) ...
> >
> > h/ He conceived of or acquiesced in a scheme with Robert and Marilyn to intimidate the plaintiffs into agreeing to a reorganization of the estate and its business by falsely advising that if they did not agree by February 13, 2001, the plaintiffs would cause a tax liability to the estate in the amount of $2,000,000; that advice was false to the knowledge of Carr ...

Paragraph 17 of the Statement of Claim contains extensive pleadings of wrongful acts as against Robert and Marilyn.

19 In my view, the key considerations in the specific circumstances of this motion involve whether the issuance of a stay would prevent unnecessary and costly duplication of judicial or legal resources and whether it would result in an injustice to the plaintiffs.

20 There is much force in Ms. Daley's argument that, in light of the substantial overlap in issues between the two proceedings and given the manner in which two of the allegations - paras. 19(a) and (h) - inextricably link Mr. Carr to a determination of liability in respect of Robert and Marilyn, awaiting the outcome of the arbitration would most likely significantly narrow, or eliminate, the scope of any remaining claims against Mr. Carr and thereby would lower the costs of proceeding with this Action. Ms. Daley further submitted that if Mr. Carr ends up testifying at the arbitration in May, he is agreeable to having the transcript of his evidence in that proceeding stand as part of his examination for discovery in this Action. Why then, she asked, should he be required to submit to an examination for discovery at this point of time?

21 Those are both valid points. Against them, however, must be weighed two others. First, there is no certainty that the arbitration will proceed in May. Mr. Brunswick advised that the plaintiffs are moving to seek an adjournment of the arbitration due to certain positions taken by the de-

fendants. If the arbitration is adjourned, it may not proceed until the fall. Second, the plaintiffs submitted that Mr. Carr's age is an important factor to take into account. In his early 80's, Mr. Carr practices full-time at the Miller Thomson firm. The plaintiffs submitted in their Factum:

> Although no disrespect is intended, Carr is getting older. Carr's evidence could be lost if not preserved unless he is examined for discovery. Carr's evidence covers the period from 1980 through 2001. As time passes memories fade. The interests of justice require that the Plaintiffs be able to conduct an examination for discovery of Carr.

22 In their discovery plan dated November 18, 2010, the plaintiffs proposed a four (4) hour examination for discovery of Mr. Carr on the issues pleaded in paragraphs 18 and 19 of the Amended Amended Statement of Claim.

23 I think there is merit in the plaintiffs' submission that given the risks surrounding an older witness, who is also a party, it makes sense to secure his evidence sooner rather than later. On the other hand, if the arbitration proceeds in May and if Mr. Carr testifies in that proceeding, having Mr. Carr testify in advance of the arbitration would involve unnecessary cost and duplication of legal resources.

24 Accordingly, taking into account and balancing the relevant factors enunciated in the *Hollinger* decision, I order as follows:

(i) If the arbitration proceeds in May, 2011, as currently scheduled, and if Mr. Carr testifies in the arbitration, then the transcript of his evidence in the arbitration shall serve as the transcript of part of his examination for discovery in this Action. I say "part" because in the event this Action continues after the disposition of the arbitration, it is possible the plaintiffs might wish to examine him on some relevant issues which were not touched upon during Mr. Carr's evidence at the arbitration. In addition, I order that the transcript of the evidence Mr. Carr gives at the arbitration in May, 2011 may be used as evidence at the trial of this Action, subject to the discretion of the trial judge;

(ii) If the arbitration does not proceed in May, 2011, or if the arbitration proceeds in May but Mr. Carr does not testify, then I order him to appear for examination for discovery in this Action on or before June 15, 2011, such examination to continue for no more than four (4) hours, excluding breaks.

25 I would encourage the parties to try to settle the costs of these motions. If they cannot, they may serve and file with my office (c/o Judges' Administration, 361 University Avenue) written cost submissions, together with a Bill of Costs, by Monday, March 21, 2011. They may serve and file with my office responding written cost submissions by Monday, March 28, 2011. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

D.M. BROWN J.

cp/e/qlafr/qlvxw/qlced

Case Name:

Hollinger International Inc. v. Hollinger Inc.

Between
Hollinger International Inc., plaintiff, and
Hollinger Inc., The Ravelston Corporation Limited and Ravelston Management Inc., defendants
And between
The Ravelston Corporation Limited and Ravelston Management Inc., defendants (plaintiffs by counterclaim), and
Hollinger International Inc., Hollinger International Publishing Inc. and Hollinger Canadian Publishing Holdings Co., plaintiffs (defendants by counterclaim)

[2004] O.J. No. 3464

11 C.P.C. (6th) 245

133 A.C.W.S. (3d) 67

2004 CarswellOnt 3442

Court File No.: 04-CL-5326

Ontario Superior Court of Justice
Commercial List

Farley J.

Heard: June 29-30, 2004.
Judgment: August 11, 2004.

(12 paras.)

Conflict of laws -- Practice -- Stay of proceedings -- Where action should not be tried in Canada -- Injunctions -- To foreign proceedings.

Application by the defendant, Ravelston Companies, for an injunction restraining the plaintiff, Hollinger International, from bringing or maintaining any claim related to the management of the Hol-

linger Group in any jurisdiction outside Ontario. Hollinger International cross-applied for a temporary stay of Ravelston's counterclaim until resolution of proceedings it had commenced against Ravelston and the other members of the Hollinger Group in Illinois. In the Illinois action, Hollinger International's claim related to service fees charged by Ravelston. In Hollinger International's replevin action in Ontario, Ravelston counterclaimed for unpaid management services and oppression. Ravelston had made the same counterclaim in the Illinois action.

HELD: Application dismissed and cross-application allowed. The two actions shared a factual background. It would be inappropriate to have the discovery process duplicated in Illinois and Ontario. The Illinois action was more comprehensive as to the claims and the parties. Further, Ravelston was the only defendant who sought the injunction. If Ravelston were successful, it would be put in a different position than the other defendants, which could do mischief with respect to the Illinois action.

Counsel:

F. Paul Morrison, Darryl A. Cruz and Debra Lovinsky, for the plaintiffs, defendants by counterclaim, Hollinger International Inc., Hollinger International Publishing Inc. and Hollinger Canadian Publishing Holdings Co.

Robert W. Staley, Robyn M. Ryan Bell and Eric R. Hoaken, for the Special Committee of Hollinger International Inc.

Earl A. Cherniak, Q.C. and Lisa C. Munro, for the defendant, Hollinger Inc.

David R. Wingfield, Robert B. Warren and Kim A. Mullin, for the defendants, plaintiffs by counterclaim, The Ravelston Corporation Limited and Ravelston Management Inc.

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1 **FARLEY J.**:-- This was a motion by The Ravelston Companies ("R") for an anti-suit injunction restraining Hollinger International ("Inter") from bringing or maintaining any claim related to the management of the Hollinger Group ("Group") in any jurisdiction outside Ontario. The Group consists of Inter, Hollinger Inc. ("Inc.") and R and other related entities. Conrad Black maintained control over the Group through his multi-vote shareholdings through R which controlled Inc. which in turn controlled Inter.

2 Inter in response cross-motioned for a stay on a temporary basis (until its Illinois proceedings against R, Inc., Black and others were finally determined) of R's counterclaim in Inter's replevin action in Ontario. Inter's replevin action sought the return of documentation and books and records and other materials pursuant to the January 1, 1998 Services Agreement between R and Inter as per s. 11 thereof. The Services Agreement provides in section 15(b):

> 15(b) This Agreement shall be subject to and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein and each of the Company and the Manager hereby irrevocably attorns to the jurisdiction of the courts thereof.

3 The tangled web of relationships involved in the Black/Group situation has led to a tangled web of litigation. The relationships would appear to make Black and the Group members during periods of factual control privies as discussed in Banque Nationale de Paris (Canada) v. Canadian Imperial Bank of Commerce (2001), 52 O.R. (3d) 161 (C.A.); Bank of Montreal v. Mitchell (1997), 151 D.L.R. (4th) 574 (Ont. C.A.) affirming (1997), 143 D.L.R. (4th) 697 (Ont. Gen. Div.); ATL Industries Inc. (c.o.b. ATL Industries) v. Han Eol Ind. Co. (1995), 36 C.P.C. (3d) 288 (Ont. Gen. Div.); Veroli Investment Ltd. v. Liaukus (1998), 19 R.P.R. (3d) 321 (Ont. Gen. Div.).

4 The Inter replevin action - notwithstanding that it contains surplus facts - only claims relief as to paragraphs 1(a)(b)(c) aside from costs:

> 1(a) an Order for interim and permanent recovery of possession of all its property, described more particularly in Schedule "A" attached hereto* (the "Property"), which is currently in the possession of the Defendants at 10 Toronto Street, Toronto, Ontario (the "Premises"); [* Editor's note: Schedule "A" was not attached to the copy received from the Court and therefore is not included in the judgment.]
>
> (b) an Order requiring reasonable and necessary assistance and cooperation from the Defendants and their personnel in obtaining and recovering the Property from the Premises; and
>
> (c) an Order providing for immediate and ongoing access to the Premises and for itself and its auditors, and immediate and ongoing assistance and cooperation from the Defendants and their personnel, in meeting its legal obligations concerning payroll, pensions and accounting.

Interestingly, it went on at paragraph 26 to indicate that it would not be paying "a substantial amount of the pre-December 2003 claimed Management Fees pending the outcome of the Illinois action". Inter's Illinois claim is that Black and others (including those in the chain of control of Inter) in breach of their fiduciary duty arising from this control of Inter (which is a Delaware company) overcharged for the Management Services provided as well as stripping out or diverting assets or money from Inter. Section 6 of the Services Agreement provides that Inter was to pay R or as it directed a fee for the services provided on the basis that Inter's independent committee (namely its audit committee) would either accept the fee proposed by R or negotiate an acceptable revision. As characterized in Inter's complaint, the allegation was that the Illinois defendants "never provided the HLR audit committee with any information to support their management fee proposal', including for example, financial basis, breakdown or intended use of the proposed fee" and the committee never asked for any such information - in essence the claim is that the Illinois defendants hoodwinked a gullible audit committee and board. That type of claim in relation to the terms (or lack of terms) in the Services Agreement would not appear to me to invoke the provisions of s. 15(b) of the Services Agreement - that is, the Illinois claim does not appear to require any interpretation or application of the Services Agreement per se.

5 The R counterclaim in Ontario is for some $7 million of the pre-December 2003 fees R has invoiced for its services plus $150 million for oppression of Inc. and a further $150 million for intentional interference with Inc. (with respect to Inc.'s making interest payments on its Wachovia notes, default of which would result in Inc.'s collateral being seized). The oppression claim is not described and we must reasonably presume that it relates to and is involved with this Wachovia note problem. However, it is undisputed that Inc. in fact was able to pay the interest on the Wachovia

notes, and thereby avoid any seizure of collateral problem. Inc. has not specified how it has otherwise been harmed by the action of Inter in not paying the now disputed $7 million. It would not therefore appear necessary, nor indeed reasonable, to consider Inc.'s claims under the counterclaim any further with respect to the stay motion of Inter. It appears that temporary stays pending resolution of a foreign proceeding are typically granted when the foreign proceeding would "substantially reduce the issues to be determined" or if success in the foreign proceeding could render the local proceeding "substantially moot" or otherwise have a "material" impact on the outstanding issues in the case: see Ainsworth Lumber Co. v. Canada (Attorney General) (2001), 1 C.P.C. (5th) 49 (B.C.C.A.); Dowell v. Spencer, [2001] O.J. No. 5149 (Ont. S.C.J. Master); Carom v. Bre-X Minerals Ltd. (1998), 20 C.P.C. (4th) 163 (Ont. Gen. Div.). Courts have considered the following issues in deciding to exercise their discretion in issuing a temporary stay pending the resolution of another proceeding:

(a) whether there is substantial overlap of issues in the two proceedings;
(b) whether the two cases share the same factual background;
(c) whether issuing a temporary stay will prevent unnecessary and costly duplication of judicial and legal resources; and
(d) whether the temporary stay will result in an injustice to the party resisting the stay.

The Illinois complaint of Inter against Black and others including Inc. and R raise the overall fee for services rendered question and at stake here is not just the $7 million counterclaimed for in Ontario, but rather it would appear that this $7 million is subsumed in an overall $200 million excess fee complaint. The Illinois complaint is, in addition, about claims for other significant amounts as to other categories of stripping out, or diverting assets, money or other benefits from Inter. With respect to the fees question, there will be a sharing of the factual background. It would seem inappropriate to have the discovery process duplicated in Illinois and Ontario. R has not indicated any injustice to it or its loss of judicial advantage if a stay were granted on a temporary basis.

6 In addition, and this relates to the issue of R's anti-suit injunction against Inter relating to management of Inter, it is only R which has sought this relief. The other Illinois defendants including Inc. and Black have not done so. Curiously this would (if R were successful) carve out the middle player between Black and Inc. in relation to the control claim of Inter. To my mind, such a carve out could, and likely would, do mischief with respect to the Illinois action.

7 As was succinctly pointed out by Cumming J. in his early June 2004 decision in Bell Canada v. Manitoba Telecom Services Inc., [2004] O.J. No. 2319, Docket No. 04-CV-269292CM3 (Ont. S.C.J.), any injunctive (and by extrapolation any stay) relief is discretionary and should be governed by the equities of the situation. In that respect I would observe that the equities appear to clearly favour a temporary stay of the Ontario counterclaim and a dismissal of the R motion for an anti-suit injunction as to Inter's Illinois action. Indeed, it would seem to me that inherent jurisdiction should be exercised to control the process of this litigation in a fair and equitable way.

8 It seems to me that the Illinois forum is favoured by the following considerations:

- its choice would avoid a multiplicity of concurrent proceedings with overlapping issues and fact background;

- see my views above as to the non-involvement of s. 15(b) of the Services Agreement;
- Inc.'s complaint would appear to be now moot as pleaded;
- the location of parties and witnesses given their nature and financial ability (including their "professional approach" to frequent and international or cross-border travel) would appear to be relatively neutral;
- the hoodwinking is alleged to have taken place in the U.S.;
- the counterclaim appears to have come along somewhat "after the fact" and may be viewed with some suspicion as being "tactical" as opposed to strategic;
- the Illinois action is the more comprehensive as to the claims and the parties;
- R through its privy (indeed its controlling shareholder) Black has already counter-claimed in the U.S. to enforce the claim which R now seeks to assert in the Ontario counter-claims;
- aside from expressing concern that the RICO claims would potentially subject them to triple damages, the defendants in Illinois arguing here have not shown any prejudice to them nor why Inter should be deprived of this type of claim. Notwithstanding the view of Scalia J. it is not clear to me that a treble damage claim is other than a structured punitive / aggravated damages award situation which is certainly known to Canadian law; and
- Inter would be able to avail itself of the wider discovery rights available in the U.S. by using the U.S. federal court's subpoena power.

See Hunt v. T & N PLC, [1993] 4 S.C.R. 289 at p. 326 where it is stated:

> The assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections.

9 R has made no request to the Illinois court to have it stay the Illinois proceedings. While Sopinka J. in Amchem Products Inc. v. British Columbia (Workers' Compensation Board), [1993] 1 S.C.R. 897 at p. 931 did not say it was mandatory to make such a request before applying for the anti-suit injunction, but merely preferable, he did observe that such a course of action would be consonant with the principles of comity. R gave no explanation for its not following the preferable course of conduct. Indeed, it appears that R has delayed making its application to this Court. R waited for approximately three months after the replevin action was issued and proceeded only after its privies Black and Inc. lost in Delaware, while in the meantime a number of steps were taking place in the Illinois action. There was no demonstration that it would have been inappropriate for the Illinois court to have concluded that there was an alternative forum which was more clearly appropriate: see Amchem at p. 916.

10 In the end result, it appears to me that it is reasonable and fair on equitable grounds as discussed above to dismiss R's request for an anti-suit injunction and to grant Inter's request for a temporary stay of the Ontario counterclaim which Inc. and R brought in Inter's replevin action.

11 Orders accordingly.

12 Counsel were agreed that costs of $50,000 to the successful party would be appropriate. In that case, R is to pay Inter $50,000 forthwith and in no event later than September 15, 2004. I would merely observe $50,000 would not cover but a small fraction of the legal expense of any party in their multi-megalithic approach to these motions.

FARLEY J.

cp/e/nc/qw/qlrme/qlkjg

---- End of Request ----
Email Request: Current Document: 1
Time Of Request: Wednesday, November 06, 2013 17:56:38

Case Name:

Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.

Between
Mylan Pharmaceuticals ULC, Appellant, and
AstraZeneca Canada, Inc., AstraZeneca UK Limited, and the Minister of Health, Respondents

[2011] F.C.J. No. 1607

[2011] A.C.F. no 1607

2011 FCA 312

426 N.R. 167

98 C.P.R. (4th) 235

Docket A-344-11

Federal Court of Appeal
Ottawa, Ontario

Stratas J.A.

Heard: In writing.
Judgment: November 17, 2011.

(31 paras.)

Civil litigation -- Civil procedure -- Trials -- Conduct of -- Stay of proceedings -- Motion by AstraZeneca to stay appeal pending Supreme Court decision dismissed -- Motion by Mylan for order expediting its appeal dismissed -- Supreme Court case lacked sufficient factual nexus to Mylan's appeal to warrant significant delay that would result from waiting for its decision -- Supreme Court could order re-consideration of Mylan's appeal if decision conflicted with Supreme Court's decision -- Mylan was not entitled to expedited appeal where possible competitive advantage that could be achieved was mere speculation, and where Mylan was not conducting appeal in expeditious manner -- Federal Courts Act, s. 50 -- Supreme Court Act, s. 43(1.1).

Intellectual property law -- Patents -- Procedure -- Appeals -- Motion by AstraZeneca to stay appeal pending Supreme Court decision dismissed -- Motion by Mylan for order expediting its appeal dismissed -- Supreme Court case lacked sufficient factual nexus to Mylan's appeal to warrant significant delay that would result from waiting for its decision -- Supreme Court could order re-consideration of Mylan's appeal if decision conflicted with Supreme Court's decision -- Mylan was not entitled to expedited appeal where possible competitive advantage that could be achieved was mere speculation, and where Mylan was not conducting appeal in expeditious manner.

Motion by AstraZeneca for an order staying Mylan's appeal from a Federal Court decision pending a Supreme Court of Canada decision. The Supreme Court of Canada case involved separate parties and a challenge to a patent for the use of sildemafil for treating erectile disfunction. The allegation of insufficient disclosure was advanced by Teva, which took the position that the patent did not reveal which of the 260 quintillion compounds disclosed was observed to induce erections. In the present case, Mylan was not arguing that AstraZeneca's patent was invalid because it concealed the identity of anastozole among numerous other compounds. Both Mylan and AstraZeneca had relied on a particular statement made by the Federal Court of Appeal in the case that had gone to the Supreme Court. The Supreme Court case was scheduled to be heard in February 2012. The average time it took the Supreme Court to issue a decision was over seven months. Mylan moved for an order expediting its appeal, noting that the expiry of the patent at issue could take place prior to the hearing of the appeal. It also pointed out that it might obtain a first-to-market advantage over other generics if the case was decided prior to the expiry of the patent.

HELD: Motions dismissed. There was an insufficient factual nexus between the present case and the Supreme Court case to justify such a significant delay. There was no guarantee that the Supreme Court would deal with the issue relied upon by the parties in the present case in coming to its decision. If the Supreme Court decision rendered a decision made in the present case by the Federal Court of Appeal incorrect, the Supreme Court had the power to remand the case back to the Federal Court for re-determination. The appeal was likely to be heard before the patent would expire. AstraZeneca had undertaken not to argue that the appeal was moot. It was mere speculation that Mylan would obtain a first-to-market advantage over other generics if the appeal was decided before the patent expired. Further, Mylan was not prosecuting its appeal in a particularly expeditious manner.

Statutes, Regulations and Rules Cited:

Federal Courts Act, R.S.C. 1985, c. F-7, s. 50

Patented Medicines (Notice of Compliance) Regulations, SOR/ 93-133,

Rules of the Supreme Court of Canada, SOR/2002-156, Rule 6, Rule 55, Rule 59

Supreme Court Act, R.S.C. 1985, c. S-26, s. 43(1.1)

Counsel:

Written representations by:

J. Bradley White and Vincent M. de Grandpré, for the Appellant.

J. Sheldon Hamilton, Colin B. Ingram and Daniel S. Davies, for the Respondents.

REASONS FOR ORDER

1 **STRATAS J.A.**:-- Mylan Pharmaceuticals ULC appeals from a decision of the Federal Court: 2011 FC 1023. The appeal is yet to be heard.

2 Two motions have been brought in this Court, one telling us to go slow and the other telling us to go fast:

* AstraZeneca Canada, Inc. and AstraZeneca UK Limited move for an order staying the appeal until after the Supreme Court of Canada has rendered its decision in *Teva Canada Limited v. Pfizer Canada Inc., et al.* (S.C.C. file no. 33951).
* Mylan moves for an order expediting the appeal.

A. Astra Zeneca's motion for an order staying the appeal

(1) The applicable legal test

3 AstraZeneca submits that the legal test is whether, in all the circumstances, it is in the interests of justice to order the stay. It submits that this test emanates from section 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. That section empowers this Court to stay proceedings where "it is in the interests of justice that the proceeding be stayed."

4 On the other hand, Mylan submits that AstraZeneca must satisfy the tripartite test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

5 In considering this issue, the relief AstraZeneca seeks must be characterized. AstraZeneca is not asking this Court to enjoin another body from exercising its jurisdiction. Rather, it is asking this Court not to hear this appeal until some time later. There is a material difference between these two things and different considerations apply:

* *This Court enjoining another body from exercising its jurisdiction.* When we do this, we are forbidding another body from going ahead and exercising the powers granted by Parliament that it normally exercises. In short, we are forbidding that body from doing what Parliament says it can do. As the Supreme Court recognized in *RJR-MacDonald Inc.*, this is unusual relief that requires satisfaction of a demanding test. Two parts of that test are particularly demanding. First, there must be persuasive, detailed and concrete evidence of irreparable harm: *Stoney First Nation v. Shotclose*, 2011 FCA 232 at paragraphs 47-49; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraphs 14-22. Second, there must be a demonstration, through evidence, of inconvenience that outweighs public interest considerations, such as the right of the other body to discharge the mandate given to it by Parliament: *RJR-MacDonald Inc.*, *supra* at pages 343-347.

* *This Court deciding not to exercise its jurisdiction until some time later.* When we do this, we are exercising a jurisdiction that is not unlike scheduling or adjourning a matter. Broad discretionary considerations come to bear in decisions such as these. There is a public interest consideration - the need for proceedings to move fairly and with due dispatch - but this is qualitatively different from the public interest considerations that apply when we forbid another body from doing what Parliament says it can do. As a result, the demanding tests prescribed in *RJR-MacDonald* do not apply here. This is not to say that this Court will lightly delay a matter. It all depends on the factual circumstances presented to the Court. In some cases, it will take much to convince the Court, for example where a long period of delay is requested or where the requested delay will cause harsh effects upon a party or the public. In other cases, it may take less.

6 The conclusion that the *RJR-MacDonald* test does not apply in cases where the Court is deciding not to exercise its jurisdiction until some time later is supported by other cases in this Court: *Boston Scientific Ltd. v. Johnson & Johnson Inc.*, 2004 FCA 354; *Epicept Corporation v. Minister of Health*, 2011 FCA 209.

7 Mylan cites another authority of this Court and says that it is to the contrary: *D & B Companies of Canada Ltd. v. Canada (Director of Investigation and Research)* (1994), 58 C.P.R. (3d) 342 (F.C.A.).

8 In *D & B Companies*, a party asked the Competition Tribunal to delay its proceedings. The Competition Tribunal refused. It held that the factors relevant to its discretion to delay its proceedings were the same as those set out in *RJR-Macdonald.* A motion was then brought in this Court to stay the Competition Tribunal's proceedings. As an attempt to have this Court enjoin another body from carrying out its mandate, the test in *RJR-Macdonald* was properly applied and the stay was refused.

9 In the course of its reasons in *D & B Companies*, this Court observed that the Competition Tribunal was right to apply the test in *RJR-MacDonald* in order to determine whether it should delay the hearing before it. Mylan relies on this observation.

10 There are three considerations that reduce the authority of this observation. First, in *D & B Companies*, this Court had to apply the test in *RJR-Macdonald* anyway. So its observation must be seen as *obiter*. Second, *D & B Companies* can be seen as one where, in the particular circumstances of that case, the Competition Tribunal saw the factors normally canvassed under the *RJR-MacDonald* test to be relevant to the exercise of discretion before it. Third, *D & B Companies* may be explained as a decision by a specialist administrative tribunal - not this Court - about what factors ought to apply to such matters before it, and, in making its observation, this Court appropriately deferred to the tribunal's decision.

11 Because of these three considerations, the observation made by this Court in *D & B Companies* should not be seen as a statement of general principle, binding in all future cases.

12 As a result, I do not agree with the reasoning of certain Federal Court cases cited by Mylan that follow the observation in *D & B Companies*: *Sawridge Band v. Canada*, 2006 FC 1218 and *Re Zündel*, 2004 FC 198.

13 In any event, the reasoning in *Epicept* and *Boston Scientific* are preferable to that in *D & B Companies*. As explained above, cases such as *Epicept*, *Boston Scientific* and this case do not involve forbidding another body from doing what Parliament says it can do. As explained above, in such cases the *RJR-MacDonald* test is inapt.

14 Therefore, as Astra-Zeneca is asking this Court not to hear this appeal until some time later, the *RJR-Macdonald* test does not apply. Rather, we are to ask ourselves whether, in all the circumstances, the interests of justice support the appeal being delayed.

(2) Application of the test to the circumstances of this case

15 AstraZeneca submits that the decision of the Supreme Court of Canada in *Teva Canada Limited v. Pfizer Canada Inc., et al.* (S.C.C. file no. 33951) has such a bearing on this appeal that this Court should exercise its discretion in favour of waiting until the Supreme Court has released its decision.

16 Mylan disagrees. It emphasizes that if this Court waits until the Supreme Court has decided the *Teva* appeal, the wait will be a very long one. It also suggests that the decision of the Supreme Court may not have any bearing on the outcome of this appeal.

17 Mylan is correct about the possible length of the wait. The *Teva* appeal is scheduled to be heard on February 8, 2012. The most recent statistics of the Supreme Court of Canada, filed before me, show that the average time required by that Court to issue a decision after hearing an appeal is 7.7 months. There are recent cases, albeit rare, where it has taken 18 months after a hearing to issue a decision: *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815. Of course, a number of others are released well below the 7.7 month average.

18 The parties helpfully filed the memoranda of the parties in the *Teva* appeal. The issues appear to be of considerable complexity. Added to whatever time the Supreme Court takes must be the time for the parties to file their memoranda of fact and law in this Court and to get a hearing. This means that AstraZeneca's request that this Court wait until the Supreme Court has released its decision is really a request that this Court not hold its appeal hearing until, perhaps, the spring of 2013.

19 This is a request for a long wait. Only a very direct nexus between the issues in the *Teva* appeal and this appeal might warrant an exercise of discretion in favour of that wait.

20 Upon reviewing the memoranda of the parties in the *Teva* appeal, I am not convinced that such a direct nexus exists.

21 The *Teva* appeal involves an allegation made by Teva under the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 that a patent, which claims the use of sildenafil in the treatment of erectile disfunction, is invalid for insufficient disclosure. Teva's allegation of insufficient disclosure is based on a particular feature of this patent: it is said that this particular patent does not reveal which of 260 quintillion compounds disclosed was observed to induce erections in men. In this case, the patent at issue, unlike the patent at issue in the *Teva* appeal, only claims a single compound, anastrozole. Mylan is not arguing that the patent in issue in this case is invalid because it conceals the identity of anastozole among numerous other compounds.

22 In this case, both Mylan and the Federal Court relied on a particular statement made by this Court in its decision on the *Teva* appeal. AstraZeneca says that the validity of that statement is one

of the issues before the Supreme Court in the *Teva* appeal. That is true, but the Supreme Court may never decide that issue: many other arguments against the sufficiency and utility of the patent at issue are before it.

23 AstraZeneca expresses concern that if this Court does not delay the appeal, this Court may decide the appeal against it on a basis that turns out to be wrong in light of the later decision of the Supreme Court in the *Teva* appeal. It points to the unlikelihood of the Supreme Court granting it leave to appeal in such a circumstance.

24 AstraZeneca overlooks that in that situation the Supreme Court has the power to remand the case back to this Court and "order any further proceedings that would be just in the circumstances," such as a redetermination of the matter based on its decision in the *Teva* appeal: *Supreme Court Act*, R.S.C. 1985, c. S-26, subsection 43(1.1). This can be done without granting leave to appeal: see the words "notwithstanding subsection [43](1)" at the beginning of subsection 43(1.1). In light of this available avenue of relief, the concern expressed by AstraZeneca is insignificant.

25 I also point out that it may be possible for the parties to intervene in the *Teva* appeal and make submissions on issues that could conceivably affect them later in any remand proceedings ordered under subsection 43(1.1): see Rules 55-59 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, and see also Rule 6 on extensions of time. This option becomes attractive if, contrary to the view I take of the matter, there is in fact a very direct nexus between the issues in the *Teva* appeal and this appeal. An application for intervention in circumstances such as these is not without precedent: the Mounted Police Members' Legal Fund successfully applied to the Supreme Court to intervene in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3. The application was partly on the basis that the Supreme Court's decision might affect an appeal from a case in which it was a party (*Mounted Police Association of Ontario v. Canada (Attorney General)* (2009), 96 O.R. (3d) 20 (S.C.J.)): see Supreme Court of Canada, *Bulletin of Proceedings*, November 13, 2009 at page 1589 and the intervention materials filed with the Court.

26 For the foregoing reasons, I shall dismiss the motion for an order staying the appeal, with costs.

B. Mylan's motion to expedite the appeal

27 Mylan offers two reasons for expediting this appeal.

28 First, Mylan is concerned that if the appeal is not decided before the expiry of the '420 Patent on October 24, 2012, it may be considered moot. I reject this. AstraZeneca has undertaken not to argue that the appeal is moot. It is true that, on its own motion, this Court could raise the issue of mootness at the hearing of the appeal and dismiss the appeal on that basis. However, the current state of the hearing list is such that this appeal will be heard long before October 24, 2012, most likely in March-May, 2012.

29 Second, Mylan suggests that if the appeal is expedited, Mylan may gain a first-to-market advantage over other generics, assuming that the appeal is decided before expiry of the patent and Mylan is successful on the appeal. I reject this as well. In my view the evidence is purely speculative as to whether Mylan would get a first-to-market advantage if this appeal were allowed.

30 In any event, I would exercise my discretion against expediting the appeal. Those who seek expedition should themselves expedite. That has not happened here. Mylan took 25 days to issue its eight page notice of appeal, another 27 days to file the agreement as to the contents of the appeal

book, and another 27 days to file the appeal book. All three of these procedural steps took close to the maximum time permitted under the *Federal Courts Rules*. The uneventful pace at which the appeal is being prosecuted belies any need for an expedition order.

31 Therefore, for the foregoing reasons, I shall dismiss the motion to expedite, with costs.

STRATAS J.A.

cp/e/qlaim/qljxr/qlced/qlhcs/qlecl

Case Name:

Bank of Montreal v. Ken Kat Corp.

Between
Bank of Montreal, Applicant/ Respondent by Counter-Application, and
The Ken Kat Corporation, Respondent/ Applicant by Counter-Application, and
Brad Allen Wagner and Wagner Properties (Barrie) Inc., Applicants, and
Bank of Montreal, Respondent

[2010] O.J. No. 1341

2010 ONSC 1990

66 C.B.R. (5th) 249

2010 CarswellOnt 1992

Court File Nos. CV-08-00007505-00CL, 31-OR-207541-T,

31-OR-207540-T, 03-0484

Ontario Superior Court of Justice

D.R. Cameron J.

Heard: March 23, 2010.
Judgment: April 6, 2010.

(79 paras.)

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Pending concurrent proceedings -- Motion by lender for stay of proceedings pending determination of bankruptcy proceedings allowed -- Lender commenced bankruptcy proceedings following borrower's non-payment and series of transactions by principal that allegedly contravened lending arrangements -- Borrower and guarantors commenced separate action seeking damages and relief for alleged improper conduct by lender that harmed business and rendered debt null and void -- Lender sought stay of proceedings -- Court found that common issues were best resolved through bank-

ruptcy proceedings -- Possible duplication of proceedings and inconsistent findings warranted stay -- Bankruptcy and Insolvency Act, s. 43(11).

Motion by the Bank of Montreal for an order staying proceedings pending determination of bankruptcy proceedings and appointment of a case management judge. The respondent, Wagner, was the principal of the Ken Kat Corporation and Wagner Properties. Wagner Properties owned a premises that it leased to Ken Kat, a metal fabricator for the auto industry that no longer carried on business. The Bank had been the principal operating lender to Ken Kat and was the first ranking secured creditor over its assets. Wagner and Wagner Properties provided guarantees for the lending. Subsequently, the Bank expressed concern that Ken Kat was in ongoing breach of its financial covenants, and Chrysler had not taken delivery or paid for a final product supplied by Ken Kat. The Bank received no response. Notwithstanding the unavailability of further credit, the Bank honoured three cheques. Wagner did not cover the funds. Thereafter, payroll cheques were presented and returned NSF due to a failure by Wagner to inject further funds. Ken Kat owed the Bank $1.7 million. The Bank demanded repayment and took steps to enforce its security. A private receiver-manager was appointed. Bankruptcy proceedings were initiated when the respondents refused to cooperate with the receiver. The Bank alleged that the respondents evaded service and Wagner conducted a series of transactions through Ken Kat to his benefit in contravention of the lending agreements. Wagner and Wagner Properties commenced a separate action against the Bank seeking damages and relief from their obligations to pay under the guarantees given in respect of Ken Kat's indebtedness. A parallel counter-application seeking the same relief and a Notice of Dispute was filed by the respondents in response to the Bank's bankruptcy application. The Bank sought a stay pending determination of its bankruptcy application.

HELD: Motion allowed. The common and central allegation in the respondents' action, counter-application and Disputes to each of the bankruptcy proceedings was that the Bank breached its contractual and legal obligations to Ken Kat, thereby destroying its business and relieving it of its obligations to repay its indebtedness. Resolution of the issue of whether the debt was null and void was necessary to the bankruptcy proceedings, and if resolved in favour of the Bank, would nullify or render moot the other proceedings. There was no evidence of wrongful conduct by the Bank. A stay of proceedings in favour of determination of the bankruptcy proceedings was required to avoid the real possibility of inconsistent findings and costly duplication of legal and judicial resources.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 43(11), s. 244

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 106, s. 107(1)

Ontario Rules of Civil Procedure, Rule 6.01(1)

Personal Property Security Act, R.S.O. 1990, c. P.10,

Counsel:

Sandra L. Secord and *Stewart Thom*, for the Bank of Montreal.

K. William McKenzie, for The Ken Kat Corporation, Brad Allen Wagner and Wagner Properties (Barrie) Inc.

1 **D.R. CAMERON J.**:-- This is

(a) a motion by Bank of Montreal (the "Bank") for:

(i) An order that Brad Wagner's ("Wagner") Barrie Action, the Bank's Application and Wagner and The Ken Kat Corporation's ("Ken Kat") Counter-Application be temporarily stayed pending a determination of the Bank's Bankruptcy Proceedings;

(ii) The appointment of a Case Management Judge on the Commercial List to manage and set a timetable through to trial of the Bankruptcy Proceedings commenced June 27, 2008; and

(b) A cross-motion by Wagner and Wagner Properties (Barrie) Inc. ("Wagner Properties") that the Bank's Bankruptcy Proceedings and the Application and Counter Application be temporarily stayed pending the determination of the Barrie Action commenced April 30, 2008 by Wagner and Wagner Properties.

2 These proceedings consist of:

(a) Applications by the Bank dated April 29, 2008 for:

(i) The Bankruptcy of Ken Kat and of Wagner Properties Nos. 31-OR-207541-T and 31-OR-207540-T (the "Bankruptcy Proceedings")

(ii) an Order No. CV-08-00007505-00CL confirming the appointment of Shiner Kideckel Zweig Inc. ("Receiver") as private receiver and manager of the assets and undertaking of Ken Kat (the "Receivership Application");

(1) a mandatory Order requiring the Respondents to deliver control and possession of the Assets, including, without limitation, all books, documents and records, corporate and accounting, and information of any kind related to the business of The Ken Kat Corporation, along with any computer programs, computer tapes, discs or other data storage media, including all security passwords and codes ("Records") relating to the Assets to the Receiver in order to permit it to exercise its rights, duties and responsibilities as receiver and manager of the Assets;

(2) an Order that the Receiver is entitled to exercise all of the powers granted to it as receiver and manager pursuant to a certain Security Agreement granted by Ken Kat to the Bank, the first secured creditor of Ken Kat against the assets, including, without limitation, the power to realize all accounts receivable, and to dispose of all assets.

(b) A motion by Wagner dated May 13, 2008 to change the venue of the Application from Toronto to Barrie, which was denied;

(c) The Action commenced in Barrie on April 30, 2008 as No. 03-0484 by Wagner and Wagner Properties against the Bank (the "Barrie Action") seeking declarations, injunctions and damages of $2,000,000 that, if successful, might obviate any bankruptcy proceedings, served on May 21, 2008 without advising the Bank's solicitors and for the first time advising that they were seeking damages against the Bank and relief from their obligations to pay the Bank; and

(d) The Counter-Application commenced on May 30, 2008 commenced by Ken Kat against the Bank requesting relief similar to that claimed in the Action.

FACTS

3 Wagner is the principal, sole director, officer and directing mind of Ken Kat and Wagner Properties.

4 Wagner Properties was the owner of lands and premises municipally known as 95 Welham Road, Barrie (the "Property"). Ken Kat was the sole tenant of the Property.

5 Ken Kat was a metal fabricator of customized metal containers used for the shipping of larger automotive parts and a Tier 2 supplier of auto racking. Its primary customers included Daimler Chrysler Corporation ("Chrysler") and General Motors ("GM"). Ken Kat no longer carries on any business.

6 The Bank is the principal operating lender to Ken Kat pursuant to two separate credit facilities which were initially extended to Ken Kat in or about 2003. The Bank is also the first ranking secured creditor over the assets and undertaking of Ken Kat.

The Credit Facilities Advanced by the Bank

7 The credit facilities extended to Ken Kat by the Bank consist of:

(a) A demand loan credit facility in the maximum amount of $1,500,000, subject to a specific margin requirement setting the maximum credit availability at any one time as the total of 75% of good Canadian and U.S. accounts receivable (not including accounts receivable 61 days or more past due) plus 50% of Ken Kat's finished inventory, excluding work in progress, to a maximum margin value of $500,000 on inventory, plus certain funds on deposit in a U.S. dollar cash collateral account; and

(b) An Export Development Canada Program Facility ("EDC Facility") consisting of a demand revolving line of credit granted by the Bank to Ken Kat and supported under the Export Guarantee Program offered by Export Development of Canada ("EDC"). This credit facility is intended to finance work in progress, inventory and accounts receivable in relation to specific domestic or export projects for both Chrysler and GM. EDC provides guarantees to the Bank with respect to payment, up to a specific percentage of any approved contract receivable, whereby, in the event of non-payment

by the customer of Ken Kat, the Bank (provided all conditions of the guarantee are met), can demand payment from EDC on the particular guarantee.

8 The Bank has obtained the following from each of Wagner, Wagner Properties and Ken Kat as security for the indebtedness owed to the Bank:

(a) General Security Agreement ("GSA") from Ken Kat: on or about November 21, 2003, Ken Kat granted a GSA to the Bank pursuant to which Ken Kat granted security over all the assets and undertaking of Ken Kat in favour of the Bank.

(b) Guarantees from Wagner and Wagner Properties (collectively, the "Guarantees"): Wagner has personally guaranteed the Ken Kat debt to the Bank, limited to the principal amount of $750,000.00. Wagner Properties has also guaranteed the Ken Kat debt to the Bank to the maximum principal amount of $1,875,000.00. Each of the Guarantees given by Wagner and Wagner Properties provides that interest is due on the guarantee from demand until paid.

(c) Waiver of Distraint Agreement: As additional security to the Bank, Wagner Properties entered into a waiver of distraint (the "Waiver of Distraint Agreement") with the Bank dated November 21, 2003, which provides, inter alia, that in the event of a default by Ken Kat under the lease, Wagner Properties will provide the Bank with 15 days' notice prior to terminating the lease or accepting a surrender of the lease.

9 The loan was administered by the Barrie branch of the Bank but in March, 2008, it advised Wagner and Ken Kat that Mr. Patterson of special loans in Toronto would be handling the account. The Bank expressed its concerns to Wagner that:

a) Ken Kat was in ongoing breach of its financial covenant to maintain a Debt to Tangible Net Worth ratio not exceeding a ratio of 2.5:1

b) The Bank needed to understand how Ken Kat was going to finance the existing GM contract when there was no marginable credit available;

c) Why Chrysler had not taken delivery of product Ken Kat advised was finished; and

d) Why Chrysler was not paying for the finished product, given the loan amount relative to the contract was $1,035,000

Ken Kat provided no answer.

10 On March 20, 2008, Patterson wrote to Ken Kat with an agenda for a meeting to be held with Wagner on March 26. On March 24, Wagner had to cancel the meeting. On March 25, Patterson wrote to reschedule the meeting the following week in Barrie or on March 27 or 28 in Toronto.

11 There was no response from Wagner. No meeting ever occurred.

12 On March 28, 2008, Ken Kat provided the Bank with February margin calculations and as list of Accounts Payable and Accounts Receivable for the period ending March 28, 2008.

13 On the basis of these reports, the Bank advised Ken Kat that it had availability of $646,000 on its credit line. Ken Kat owed the Bank more than $646,000 and was in an overdraft beyond its authorized limit.

14 On March 25 three cheques were presented to the Bank. Notwithstanding there was no credit available, the Bank honoured the cheques and asked Wagner to deposit the funds to cover the cheques.

15 The Bank was concerned that the Chrysler contract had not been fulfilled, why Chrysler had not taken delivery and why Ken Kat was not pressing for payment. No meaningful response was given.

16 On April 2, 2008, payroll cheques totalling $62,904.88 were presented which would have put the loan at $142,185 beyond available marginable credit. No injection of cash was made into the account or undertaken to be made as the Bank had requested.

17 No funds were deposited. No meeting was set up. The payroll cheques were returned "NSF" on April 3, 2008 and Wagner was notified by email.

Ken Kat's Indebtedness to the Bank, the Bank's Demands for Repayment, and the appointment of a Receiver over the assets and undertaking of Ken Kat

18 As at April 8, 2008, Ken Kat was indebted to the Bank in the amount of $1,759,086.07.

19 On April 8, 2008, the Bank issued written demand for repayment to Ken Kat and a Notice of Intention to Enforce Security pursuant to s. 244 of the *Bankruptcy and Insolvency Act* against Ken Kat. Written demand for repayment pursuant to the Guarantees was also issued to Wagner and Wagner Properties on that same date.

20 Notwithstanding the Bank's demand for repayment, Ken Kat did not repay their indebtedness to the Bank. Neither Wagner nor Wagner Properties has paid the Bank pursuant to their Guarantees.

21 On April 21, 2008, the Bank appointed Shiner Kideckel Zwaig Inc. as private receiver-manager (the "Receiver") over the assets and undertaking of Ken Kat.

Refusal to cooperate with the Receiver and the initiation of the Bankruptcy Proceedings and Receivership Application

22 Ken Kat, Wagner and Wagner Properties refused to cooperate with the privately-appointed Receiver in the course of it exercising its mandate. Specifically,

(a) Prior to ceasing to carry on business, Ken Kat was required to provide the Bank with monthly margin certificates certifying the amount and value of its inventory and work in progress. The Receiver has not been able to locate the whereabouts of substantially all the inventory and work in progress of Ken Kat as shown on the monthly margin certificates;

(b) Immediately following its appointment, the Receiver requested access to the Property for the purpose of taking possession of the Assets and undertaking of Ken Kat, as is the usual procedure in a receivership. Ken Kat advised the Receiver it had unilaterally determined and arranged for all of Ken Kat's Assets, including its banking and financial records, to be placed

into seven trailers situated in the parking lot of Ken Kat's former premises for removal; and

(c) The Receiver has not received the complete financial books and records of Ken Kat. Five computers given over to the Receiver by Ken Kat had the hard drive removed and one had all information removed. Ken Kat advised it was not necessary for the Receiver to have this latter computer as it allegedly contained private information.

23 As a result of Ken Kat's failure to cooperate with the privately-appointed Receiver, on April 29, 2008, the Bank commenced the Receivership Application against Ken Kat requesting, inter alia, Court confirmation of the privately-appointed receiver and a mandatory Order requiring Ken Kat to comply with its obligations to cooperate with the Receiver pursuant to the *Personal Property Security Act* and the GSA.

24 On the same day, April 29, 2008, the Bank commenced two separate Applications for the Bankruptcy Proceedings against each of Ken Kat and Wagner Properties.

Concerns with respect to assets of Ken Kat

25 In or around this period, the Bank came to be aware of a number of facts which gave rise to concerns about the assets and undertaking and financial position of Ken Kat. For example:

(a) On April 4, 2008, at a time when Ken Kat was insolvent, Wagner caused Ken Kat to pass a resolution whereby a dividend in the sum of $641,556.27 was declared payable to Wagner by way of setting off and discharging Wagner's shareholder loan owed to Ken Kat in a like amount;

(b) Despite Ken Kat's covenant with the Bank to deposit all receivables at the Bank, and in breach of the GSA, on or about April 3, 2008, Wagner opened an account at a branch of the Canadian Imperial Bank of Commerce ("CIBC") in Barrie and deposited $294,360.57 of accounts receivables pledged to the Bank into that account. This amount included a payment of $121,732.04 by Chrysler, which funds were part of the EDC Facility and were to be deposited to the credit of the EDC Facility. Failure to do so has caused the EDC guarantee to the Bank to become null and void, causing the Bank significant financial loss;

(c) Wagner drew cheques on the CIBC account to either himself or for his benefit, including personal expenses, in the amount of $216,634.10, thereby depriving the Bank of the ability to recover such funds;

(d) On or about April 16, 2008, and after receiving demand on its guarantee, Wagner Properties purportedly borrowed the sum of $600,000 from Glenn Raymond Osborne Wagner, Wagner's father, which was purportedly supported by a guarantee granted by Ken Kat. This loan was secured by a mortgage registered on title to the Property, which effectively dissipated all or substantially all of the remaining equity in the Property;

(e) On April 16, 2008, Wagner Properties, in breach of the Waiver of Distraint Agreement with the Bank terminated or accepted the surrender of the lease of the Property with Ken Kat, and refused entry on site to the Receiver;

(f) Ken Kat and Wagner have withheld full financial records of Ken Kat's activities and frustrated the Receiver's efforts to investigate the affairs of Ken Kat. Refusal to provide such information has impeded the Receiver's attempts to realize on the assets and undertaking of Ken Kat;

(g) Wagner and Ken Kat, in contravention of its banking covenant, failed to cause receivables collected on loans covered by the EDC Facility to be credited against the specific EDC approved contract and knowingly deposited same into Ken Kat's general operating account to use as working capital. Failure to comply with the requirement to have such receivables applied on the specific EDC approved contract has caused the EDC guarantee to the Bank to be void and caused the Bank to sustain significant additional losses;

(h) Ken Kat had received EDC approval of several purchase order contracts with Chrysler. Payments from Chrysler were to be deposited to the credit of the EDC Facility. The Bank made numerous enquiries to Ken Kat as to why Chrysler had apparently not taken delivery of certain goods nor paid for them. The Bank was advised by Wagner that Chrysler continued to not take delivery. In fact, Chrysler had received the goods and made payments on account. Ken Kat failed to advise the Bank to apply payments on the EDC approved contract regarding Chrysler. Funds were deposited into Ken Kat's general account and improperly used by Ken Kat as working capital rather than to pay down the EDC guarantee;

(i) Pursuant to the loan agreement with the Bank, receivables covered by EDC guarantees were not to be included in any calculation of margin availability to Ken Kat. Ken Kat used such funds for working capital that it needed to fund operations, despite its agreement to not to do so; and

(j) Ken Kat ceased carrying on business before April 21, 2008.

26 At the time the Bankruptcy Proceedings were commenced:

(a) the Bank had made demand for repayment and had not been repaid;

(b) Ken Kat ceased to have any business premises (the lease of the Property had been either terminated by Wagner Properties or surrendered by Ken Kat prior to the commencement of the Bankruptcy Proceedings).

(c) Ken Kat's own internally-generated profit and loss statement of February 28, 2008 and balance sheet of April 30, 2008 provided to the Bank showed negative net income of $512,106.73 and $357,681.20 respectively.

27 Wagner has said of Ken Kat in sworn evidence that there is no possibility of Ken Kat continuing as a going concern.

Evasion of, and refusal to accept, service

28 The Bank encountered immediate and significant difficulties in serving the Bankruptcy Proceedings and Receivership Application. In fact, Mr. Wagner nearly hit a process server with his truck in the course of evading service. Mr. Wagner's apparent evasion of service was noted by the Honourable Madam Justice Hoy at the return of the Receivership Application on May 2, 2008.

29 Not only was Wagner evading service, but Mr. McKenzie, counsel for Ken Kat, Wagner Properties and Wagner, would not, despite having received copies of the Application materials, either accept service or provide any satisfactory response to inquiries made by counsel for the Bank as to an address for service for Mr. Wagner.

30 Mr. McKenzie did not attend the return of the Receivership Application on May 2, 2008, but instead advised on May 1, 2008 that he did not have instructions to accept service and would dispute Toronto as the proper venue for the Receivership Application (the "Venue Motion").

31 The Venue Motion was heard by the Honourable Mr. Justice Wilton-Siegel on May 20, 2008. His Honour dismissed the Venue Motion, and ordered that Ken Kat forthwith pay costs in the amount of $2,200 to the Bank. These costs have never been paid.

32 His Honour stated in his Endorsement that:

> In this proceeding, there is also the additional factor that the debtor [Ken Kat] has conducted itself in a manner which, whether or not intended, *was likely to raise suspicions on the part of the applicant [the Bank]*. This includes delivering the assets to the receiver, rather than granting access to the premises to the receiver, and the maintenance of a bank account at the CIBC. [emphasis added]

33 Mr. McKenzie only accepted service of the Receivership Application at the hearing of the Venue Motion before Justice Wilton-Siegel on May 20, 2008. During that appearance, Mr. McKenzie did not advise the Court or counsel for the Bank that an Action in Barrie concerning the same subject matter had been issued.

34 The Statement of Claim in the Barrie Action was served the next day, on May 21, 2008.

The Ken Kat Bankruptcy Proceeding

35 In the Bankruptcy Proceeding commenced by the Bank on April 29, 2008 against Ken Kat, the Bank states that:

(a) The greater part of the property of Ken Kat is located within the jurisdiction of this Court;
(b) Ken Kat is justly and truly indebted to the Bank in the aggregate sum of $1,765,577.99 as of April 23, 2008, together with accruing interest thereon;
(c) The Bank holds security for the payment of the said debt, which it values at the sum of $876,000, leaving an unsecured indebtedness owed to the Bank of $889,577.99;
(d) Ken Kat, within the six months next preceding the date of the filing of the Bankruptcy Proceeding against Ken Kat, committed the following acts of bankruptcy:

    (i) It ceased to meet its liabilities generally as they have became due in that it has failed to meet its obligations to the Bank and to others;
    (ii) In the alternative, the Bank is the single largest creditor of Ken Kat and there are suspicious circumstances in this matter that require the

investigation of the affairs of Ken Kat by a Trustee in Bankruptcy. These suspicious circumstances include, but are not limited to:

(1) Ken Kat has not repaid the indebtedness owed to the Bank despite demand for payment having been made on April 8, 2008;
(2) Ken Kat provided to the Bank a statement of Accounts Receivable and Accounts Payable to the Bank, with an effective date of March 28, 2008 (the "Statement"). The Statement reflects accounts receivable of $322,386.22 and accounts payable of $526,639.56. No funds have been deposited to the account of Ken Kat held at the Bank since March 26, 2008. The accounts receivable are pledged to the Bank. The Bank remains concerned as to where and how the receivables and payables are being dealt with;
(3) Ken Kat's lease had suddenly been terminated and it ceased to carry on business. The landlord is Wagner Properties, which is controlled by the same principal as Ken Kat. No notice of default of the lease was provided to the Bank by Wagner Properties. The Statement of March 28, 2008 does not show any rent arrears. Termination of the lease under these circumstances required further investigation. Wagner Properties executed the Waiver of Distraint Agreement with the Bank to provide 15 days prior notice of any default under the lease and to not accept a surrender of the lease. No notice of default or request for surrender of lease was given to the Bank. Ken Kat refused the Bank access to the Property;
(4) The Bank appointed the Receiver to realize upon its security. Ken Kat did not co-operate with the Receiver;
(5) Ken Kat did not provide information concerning the computer codes or other relevant information to facilitate a review of the financial books and records; and
(6) Those assets that were turned over to the Receiver are incomplete. Equipment and inventory reported in the Statement have not been accounted for. No explanation has been provided as to where additional assets are situated.

The Wagner Properties Bankruptcy Proceeding

36 In the Bankruptcy Proceeding commenced by the Bank on April 29, 2008 against Wagner Properties, the Bank states:

(a) The greater part of the property of Wagner Properties is located within the jurisdiction of this Court;
(b) Wagner Properties is justly and truly indebted to the Bank in the aggregate sum of $1,765,577.99 as of April 23, 2008, together with accruing interest thereon;

(c) The Bank holds no security for the payment of the said debt;
(d) Wagner Properties, within the six months next preceding the date of the filing of the Bankruptcy Proceeding against Wagner Properties, committed the following acts of bankruptcy:

(ii) It ceased to meet its liabilities generally as they have become due in that it has failed to meet its obligations to the Bank and to others;
(iii) In the alternative, the Bank is the single largest creditor of Wagner Properties and there are suspicious circumstances in this matter that require the investigation of the affairs of Wagner Properties by a Trustee in Bankruptcy. These suspicious circumstances include, but are not limited to:

(1) Termination or surrender of Wagner Properties' lease with Ken Kat of the Property. The termination or surrender of the lease eliminated the ability of the Bank to consider a sale of the business enterprise or assets of Ken Kat on a going concern basis. No explanation as to why the lease was terminated or surrendered has been given. The circumstances surrounding the termination/surrender of the lease require investigation by a Trustee.
(2) Wagner Properties agreed in writing with the Bank that it would not distrain on the assets of Ken Kat unless it provided 15 days prior notice to the Bank. No notice was given. The Waiver of Distraint Agreement further provides that Wagner Properties will not accept a surrender of the lease without the consent of the Bank. No request for such consent was made, nor did the Bank give same.
(3) On April 16, 2008, subsequent to the Bank's demand for payment on Wagner Properties, Wagner Properties granted a second mortgage in the amount of $600,000 on the Property to Glenn Raymond Wagner. The mortgage effectively reduced the equity in the Property to a point where there may be no equity remaining for creditors including the Bank.

The Receivership Application

37 The grounds cited in the Receivership Application commenced on the same date as the Bankruptcy Proceedings, namely April 29, 2008, are those noted at paragraph (23) of this factum, relating to Ken Kat's failure to cooperate with the Receiver.

The Barrie Action

38 On May 21, 2008, the next day following the Venue Motion and acceptance of service of the Receivership Materials, the Statement of Claim in the Barrie Action was served on the Barrie branch of the Bank, without notice to the Bank's counsel.

39 It was only on May 21, 2008 that Bank learned that, following the commencement of the Bankruptcy Proceedings and Receivership Application on April 29, 2008, Wagner and Wagner

Properties had commenced a separate Action in Barrie seeking damages against the Bank and relief from their obligations to pay under the guarantees given in respect of Ken Kat's indebtedness to the Bank.

40 In their Statement of Claim, Wagner Properties and Wagner claim:

(a) General damages against the Bank in the amount of $2 million;
(b) Relief from any obligation to pay pursuant to the guarantees given to the Bank in respect of Ken Kat's indebtedness. Such relief is based upon allegations that:

i. Wagner and Wagner Properties are collectively owed in excess of $1 million by Ken Kat;
ii. the Bank breached its contractual obligations to Ken Kat with respect to a crucial Pre-Shipment Financing Program, which resulted in Ken Kat being unable to complete a critical contract or contracts;
iii. the conduct of the Bank constituted intentional or negligent interference with the relationships between Ken Kat and its customers, and constituted conduct that was oppressive and unfairly prejudicial to the interests of Wagner and Wagner Properties; and iv. Wagner and Wagner Properties are unable to collect on the indebtedness owed to them by Kan Kat as a result of the conduct of the Bank.

The Counter-Application

41 On May 30, 2008, counsel for Ken Kat served a Counter-Application against the Bank, requesting relief that is literally a "cut and paste" copy of that claimed in the Statement of Claim in the Barrie Action. In fact, much of the relief claimed does not make sense at all in the context of the Counter-Application because references to the "Plaintiffs" and "Ken Kat Corporation" have not even been changed from those employed in the Barrie Statement of Claim and are not appropriate.

42 The grounds for the requested relief in the Counter-Application are stated as:

(a) The Bank destroyed Ken Kat's business by its arbitrary and wrongheaded decisions and, by its actions, obviated the completion of ongoing jobs which would have paid off part or all of Ken Kat's financial obligations and rendered Ken Kat profitable into the future; and
(b) In doing so the Bank negligently or intentionally interfered with the relationships between Ken Kat and its customers and thereby also interfered with the business or contractual relationships between Ken Kat and the Bank to a point where they were breached or, alternatively, are null and void and that, in either case, they are unenforceable.

Disputes to the Bankruptcy Proceedings

Bankruptcy Proceeding against Ken Kat

43 On May 27, 2008, counsel for Ken Kat and Wagner Properties served a Notice of Dispute to the Bankruptcy Proceeding against Ken Kat. Therein the Bankruptcy Application filed against Ken Kat is disputed on the basis that:

(a) The amount claimed by the Bank is at issue in the Receivership Application and Counter Application, wherein Ken Kat seeks damages against the Bank;
(b) Ken Kat is not insolvent;
(c) Ken Kat has, or would have, sufficient assets to pay the indebtedness to the Bank had the Bank not caused damage to and interfered with Ken Kat's business;
(d) Ken Kat has not ceased to meet its obligations generally or, if it has, this was caused by the Bank's failure to meet its obligations to Ken Kat;
(e) Ken Kat has not committed an act of Bankruptcy.

Bankruptcy Proceeding against Wagner Properties

44 On May 27, 2008, counsel for Ken Kat and Wagner Properties also served a Notice of Dispute to the Bankruptcy Proceeding against Wagner Properties. Therein the Bankruptcy Application filed against Wagner Properties is disputed on the basis that:

(a) The amount claimed by the Bank has been put in issue in the Barrie Action and Wagner Properties claims to be owed money by the Bank;
(b) Wagner Properties is not insolvent;
(c) Wagner Properties has sufficient assets to pay debts but is not willing to pay the Bank;
(d) Wagner Properties has not ceased to meet its obligations generally;
(e) Wagner Properties has not committed an act of Bankruptcy;
(f) The petition by the Bank is an abuse of process.

The Common Allegations in the Proceedings

45 Both the Counter-Application and the Statement of Claim seek identical relief in general and punitive damages. The various forms of injunctive relief and relief from any obligation to pay the Bank pursuant to the terms of either the GSA or the Guarantees are similarly identical. The grounds for said relief are, in both cases, based upon allegations that the Bank breached its contractual obligations to Ken Kat and intentionally or negligently interfered with the business relations between Ken Kat and its customers so as to destroy the business of Ken Kat and nullify the debt owing to the Bank.

46 In the Notices of Dispute to the Ken Kat Bankruptcy Proceeding, Ken Kat likewise alleges that, to the extent that it has been unable to meet its obligations generally as they become due, is a result of the conduct and actions of the Bank itself. The Notice of Dispute to the Ken Kat Bankruptcy Proceeding specifically references the Counter-Application as a parallel proceeding involving the same amounts in dispute.

47 The Notice of Dispute to the Wagner Properties Bankruptcy Proceeding likewise disclaims any obligation to pay pursuant to the Guarantee. It references the Statement of Claim in the Barrie Action as a parallel proceeding concerning the same amounts in dispute.

48 The common and central allegation in the Barrie Action, Counter-Application and disputes to each of the Bankruptcy Proceedings is that the Bank breached its contractual and legal obligations to Ken Kat, destroying Ken Kat's business. As a result, it is variously claimed that:

(a) Ken Kat no longer has any obligation to repay the credit facilities extended to it and has suffered damages;
(b) Wagner and Wagner Properties no longer have any obligation to pay on the Guarantees, and have suffered damages which flow from the destruction of Ken Kat's business.

49 The central question to be determined, before all others, is whether the debt owing to the Bank by Ken Kat is null and void, as this question will encompass the issue of whether the Bank has breached any contractual or legal obligations owing to Ken Kat. Resolving this question will involve a detailed analysis of the banking practices employed by the Bank and the terms of the facilities extended.

50 This question must of necessity be resolved in the Bankruptcy Proceedings and, if resolved in favour of the Bank, will nullify the other proceedings, or render them moot. Similarly, if resolved in favour of Ken Kat, this finding will substantially reduce the issues to be determined in the remaining Proceedings.

51 This factual and legal question is common to each of the Proceedings. As such, there is a real possibility, if not a likelihood, of inconsistent findings and costly duplication of legal and judicial resources if the Proceedings are permitted to continue separately, and in tandem.

52 In the Bankruptcy Proceedings, the Court will be required to:

(a) make findings of fact with respect to the allegations asserted by Ken Kat, Wagner and Wagner Properties regarding the Bank's conduct generally, and in particular, the allegations that the Bank did not process EDC documentation in a timely fashion and that the Bank made errors in calculating Ken Kat's credit availability;
(b) determine whether there is a valid and subsisting debt owed by Ken Kat to the Bank in light of Ken Kat's allegations; and
(c) examine the merits of the issues to assess whether, notwithstanding the obvious insolvency of Ken Kat, the Court should exercise its discretion not to grant a Receiving Order, based on the Bank's conduct. This determination will require the Court to decide if the Bank improperly caused Ken Kat to cease carrying on business, and to determine whether there is any merit to the allegations that the Bank's conduct constituted a breach of contract, intentional interference with contractual and economic relations and/or oppressive conduct.

53 The central allegations made regarding the conduct of the Bank raise commercial issues involving banking, compliance with statutes regulating banking practices, the customer/bank relationship and insolvency issues.

54 There is evidence from Mr. Patterson that the EDC guarantees are void so the Bank cannot collect. There is no evidence from the receiver as to what, if anything, he has collected. There is no evidence of other creditors having made claims against Ken Kat.

55 Mr. McKenzie says the Bank's affidavit in the Bankruptcy Proceedings is to a large extent hearsay evidence as the loan was instituted and administered by Barrie personnel. Mr. Patterson

only got the file in March 2008 and only had personal knowledge from that time. It contravenes s. 43(3) of the *BIA*. This is a matter for the Bankruptcy Proceedings not this hearing.

56 An issue to be tried is whether the Bank tripped up the EDC guarantee rather than Ken Kat. This issue can be determined in the Bankruptcy Proceedings.

57 Mr. McKenzie has made no effort to cross-examine the Bank in the Bankruptcy Proceedings.

DISCUSSION

58 The Bank argues that the Commercial List is uniquely well equipped to dispose of these questions in a timely and efficient manner. The Application, Counter-Application and the Barrie Action, which could take 2-3 years, should be temporarily stayed pending determination of the Bankruptcy Proceedings.

59 Furthermore, the Case Management Judge should be appointed from the Commercial List in Toronto which is familiar with bankruptcies and other issues involved.

60 On the other hand, Wagner and Wagner Properties are asking for a stay of the Bankruptcy Proceedings until a determination is made of whether funds are owing to the Bank. This is best done, they say, in the context of the Barrie Action. When that is established, the Bankruptcy Actions may then proceed.

61 Ken Kat has no practical interest in the proceedings. Wagner and Wagner Properties want to avoid claims on their Guarantees.

62 Both sides are agreed that these files should be case managed so that the issues can be resolved in an organized, logical and efficient fashion at a minimal cost and to avoid inconsistent findings. They are not agreed whether it should be in Toronto or in Barrie.

63 Section 106 of the *Courts of Justice Act* ("*CJA*") permits a "stay of any proceeding in the court on such terms as are considered just."

64 Section 107(1) of the *CJA* permits a transfer to another court, consolidation or a stay.

65 Rule 6.01(1) provides in part:

> Where two or more proceedings are pending in the court and it appears to the court that
>
> (a) they have a question of law or fact in common;
> (b) the relief claimed in them arises out of the same ... series of transactions
>
> ...
>
> The court may order that,
>
> ...
>
> (e) any of the proceedings be (i) stayed until after the determination of any other of them or ...

66 Section 43(11) of the *Bankruptcy and Insolvency Act* ("*BIA*") permits the court to

> make an order staying the proceedings under an application, either altogether or for a limited time, on any terms and subject to any conditions that the court may think just.

67 The granting of a stay is an inherent discretionary power that the Court has to control its own process and each case will be decided on its own facts: *Investors Group v. Berkshire Group*, [2001] O.J. No. 512 (O.S.C.J.) per Lax J. at para. 4.

68 Where a party seeks a temporary stay of another proceeding, a lower threshold applies.

69 Temporary stays pending resolution of another proceeding are typically granted when the other proceeding would "substantially reduce the issues to be determined" or if success in the other proceeding could render the outstanding issues in the case "substantially moot" or otherwise have a "material" impact: *Hollinger International Inc. v. Hollinger Inc.*, [2004] O.J. No. 3464 (O.S.C.J.) at para. 5 per Farley J.

70 In *Re The Bankruptcy of Brock R.V. Centre Inc.* (2007), 33 C.B.R. (5th) 219 at para. 47, Ground J. said the test under s. 43(11) *BIA* is:

1. a *bona fide* claim exists against the petitioning creditor by the debtor;
2. the claim is of a substantial nature;
3. the claim would be likely to disappear if the bankruptcy application is given priority over the action, and
4. in preferring the action to the bankruptcy application there would be no prejudice to other creditors.

71 I see a dispute concerning credit facilities and EDC guarantees. The Bankruptcy Proceedings were commenced first.

72 I am not persuaded by the debtor that the dispute is *bona fide*. I see no evidence of wrongful conduct by the Bank.

1. There was a dividend of over $640,000 from a possibly insolvent company the day after the Bank returned $62,000 in cheques marked "NSF";
2. There was the opening of the CIBC account and deposit of $294,000 into it;
3. The cancellation of the lease contrary to the Waiver of Distress Agreement;
4. Failure to give the receiver access to the premises;
5. Leaving the company's assets in trailers in the parking lot so the receiver could not see if they were all the assets;
6. No cooperation with the receiver;
7. The evasion of service of the Bankruptcy Proceedings; and
8. $2,200 in costs ordered by Mr. Justice Wilton-Siegel to be paid "forthwith" are still outstanding 22 months later.

73 There is no evidence of other creditors.

74 Wagner is likely to be the principal witness for the debtor.

75 In my opinion, the Commercial List will be cheaper and quicker and is likely to answer the questions with greater expertise than the Court in Barrie.

DECISION

76 I stay the Barrie Action and the Application and Counter-Application pending disposition of the Bankruptcy Proceedings or until further order of the court.

77 I appoint a Judge on the Commercial List in Toronto, to be designated by the head of the Commercial List, to case manage the Bankruptcy Applications.

78 The Bank is directed to arrange a 9:30 appointment with a Judge on the Commercial List within 2 weeks to schedule a timetable and the hearing of the Bankruptcy Proceedings.

COSTS

79 If the parties cannot agree on costs, the Applicant Bank shall file its submissions within 15 days of the release of these reasons. The Respondent shall reply within 10 days thereafter.

D.R. CAMERON J.

cp/e/qllxr/qlaxd/qlmxb/qlaxw/qlana

Indexed as:

Ainsworth Lumber Co. v. Canada (Attorney General)

Between
Ainsworth Lumber Co. Ltd., plaintiff
(respondent), and
The Attorney-General of Canada and Paul Martin,
defendants (appellants)

[2001] B.C.J. No. 255

2001 BCCA 105

149 B.C.A.C. 263

85 B.C.L.R. (3d) 62

1 C.P.C. (5th) 49

2001 D.T.C. 5136

102 A.C.W.S. (3d) 903

Vancouver Registry No. CA027732

British Columbia Court of Appeal
Vancouver, British Columbia

Cumming, Newbury and Hall JJ.A.

Heard: January 11, 2001.
Judgment: February 12, 2001.

(15 paras.)

Practice -- Trials -- Stay of proceedings -- When available -- Circumstances where granted.

Appeal by the Attorney General and the Minister of Finance, from the dismissal of their application for a temporary stay of proceedings. Ainsworth Lumber brought an action against the Attorney General and the Minister for negligent misrepresentation as a result of the discontinuance of the

Federal Special Investment Tax Credit. The Minister had announced in a press release that there would be a transitional period for projects that were substantially advanced at the date of the speech. Ainsworth had undertaken discussions with the Province of Alberta for the construction of a board plant. It considered that although the construction had not begun, the project was substantially advanced and would qualify for the credit. It based its bid on the anticipated tax credits. When the legislation was introduced, the Minister reassessed Ainsworth and did not allow it to claim the tax credit. Ainsworth filed an appeal from the assessment in the Tax Court. The Attorney General and the Minister argued that the proceedings should be stayed pending the determination of the case in the Tax Court.

HELD: Appeal allowed. The two actions substantially overlapped. The proceedings in the Tax court had a material impact on the issues outstanding in the misrepresentation action. A favourable outcome in the Tax court would eliminate any damage to Ainsworth as a result of the alleged misrepresentation.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rule 13(10).

Income Tax Act.

Counsel:

M. Ciavaglia, for the appellants.
M.R.V. Storrow, Q.C., and B. Elwood, for the respondent.

The judgment of the Court was delivered by

1 **HALL J.A.**:-- This is an appeal with leave from a judgment of a chambers judge dated 21 September 2000, [2000] B.C.J. No. 1897, refusing an application by the defendants/appellants for a temporary stay of proceedings of this action.

2 The background of the matter is helpfully set out in the Reasons of the learned chambers judge:

> In the early fall of 1993 the plaintiff began discussion with the appropriate provincial authority in Alberta for the construction of a board plant in Grande Prairie. At the time, such an operation would have qualified for a Federal Special Investment Tax Credit ("SITC") equal to 30 per cent of the cost of the buildings and the machinery.
>
> During the course of his February 1994 Budget speech, the Minister of Finance, Paul Martin, announced that the Federal government intended to discontinue the SITC but there would be a transition period and projects which were already under construction as at the date of the speech would continue to qualify. The plaintiff had not started construction and hence did not qualify. Later, in a Press

Release dated March 30, 1994, the Minister announced that after consultations with industry, the transition period would include projects acquired before 1996 "where the property is used in a project that was substantially advanced, as evidenced in writing, on February 22, 1994 [the date of the Budget Speech], and construction commences before 1995." The plaintiff, in part because of the work the Province of Alberta had put into developing the project, believed it qualified and that the Alberta project was "substantially advanced" on February 22, 1994. As a result, the plaintiff anticipated receiving SITCs up to $26,000,000 and, based upon that assumption, it calculated it's financing requirements and the stumpage fee it offered the Alberta Government. The plaintiff's bid was successful and construction began in September 1994.

When the Minister introduced the Bill amending the Income Tax Act and eliminating the SITC, subject to the transitional rule, in the House of Commons on November 24, 1994, the words used were:

> ...properties acquired by the taxpayer for use in a project that was substantially advanced **by or on behalf of the taxpayer**, as evidenced in writing before February 22, 1994. [emphasis added]

Because of the addition of the words emphasized above, the defendant Ministry held that the plaintiff was no longer able to rely upon the work done by the Province of Alberta to qualify for the transitional relief. In July 1995 the plaintiff commenced this action against the defendants for negligent misrepresentation. When, in November 1996, the Minister of National Revenue reassessed the plaintiff's tax return for the fiscal year 1993 and disallowed the SITC claimed, the plaintiff filed an appeal to the Tax Court of Canada. That appeal is pending later this fall. Between the filing of this action and the appeal to the Tax Court, the parties had exchanged documents in this action but, because of financial constraints, the plaintiff took no further steps from late 1997 until late 1999. On January 6, 2000 the plaintiff delivered a Notice of Intention to Proceed and three months later filed an Amended Statement of Claim pleading the November 1996 tax assessment. The defendants gave notice of this application in June 2000.

3 When the matter came before this Court on 11 February 2001, we were advised that the case in the Tax Court of Canada had been heard in early November of 2000 and judgment in that Court was under reserve.

4 At the outset, I think it important to note that the application in the instant case was not an application that the action be stayed generally and indefinitely, but rather was an application for an order for a temporary stay of proceedings. Because of that circumstance, the cases that consider the principles applicable to the grant of a stay of proceedings or cases that deal with a forum non conveniens issue have virtually no applicability in the circumstances being argued in this case.

5 It is and was the argument of the appellants that these proceedings ought to be ordered to be stayed pending resolution of the litigation in the Tax Court of Canada because if the taxpayer respondent should receive from that Court a favourable decision allowing it to claim the applicable deduction, then in that event the proceedings on foot in this Court will be rendered substantially

moot. As can be seen from the recital of facts set forth supra, the respondent in the Tax Court claims that by reason of the state of progress and status of the Alberta board plant project, it is entitled to a Special Investment Tax Credit ("SITC") for income tax purposes equal to a stipulated percent of the cost of buildings and machinery constructed and utilized in the project. The essence of the claims advanced in the case at bar against representatives of the Federal Government is that the defendant Minister acted negligently or improperly in failing to use accurate language in a news release, in failing to issue a further news release, by failing to ensure that a transitional rule described in a news release was an accurate description of the transitional rule in legislation eventually introduced and further that he acted in bad faith and in breach of the respondent's legitimate expectations thereby causing the respondent to suffer loss and damage.

6 At issue in the proceedings in the Tax Court is the propriety of an assessment by the Minister of National Revenue denying the respondent a requested SITC concerning the Alberta project. If the respondent should succeed in its argument in the Tax Court and obtain the SITC, then it is difficult to see what loss or damages it could have suffered arising out of its activities relating to the project. It was said in argument by counsel for the respondent that it could advance other heads of loss and damages including additional costs arising out of the instant proceedings but I should think that questions of costs could be appropriately addressed in the Tax Court proceedings, in the event the respondent is successful in the litigation in that Court. It seems to me that the respective actions are, in essence, seeking to attain the same economic end result by different routes. At bottom, the respondent seeks a quantifiable financial benefit in the amount of the relevant SITC. If it achieves its objective in the Tax Court of Canada, then it will have suffered no damages or loss and will not have any viable cause of action to advance in this proceeding. If, on the other hand, its action is not successful in the Tax Court of Canada, then assuming that it can establish liability under one or more of the causes of action asserted in this proceeding, the damages it would seek to recover would be equivalent to the amount of lost SITC.

7 The chambers judge, relying inter alia upon Bennett v. British Columbia (Securities Commission) (1992), 69 B.C.L.R. (2d) 171 and Westec Aerospace Inc. v. Raytheon Aircraft Co., [1999] B.C.J. No. 871 B.C.C.A., concluded that because the matter at issue in the Tax Court of Canada was quite distinct from the issues facing the trial court in this action and that the parties defendant in the two actions were different, declined to make an order temporarily staying these proceedings. In the Bennett case, this Court upheld a decision of the chambers judge declining to stay proceedings before the Provincial Securities Commission concerning alleged insider share trading offences. The appellants there had argued that they were prejudiced because they faced multiple proceedings, being proceedings both in Ontario and British Columbia. This Court noted at p. 182 that none of the proceedings commenced in Ontario had ever reached a hearing stage and accordingly the only extant proceedings were apparently those in British Columbia. That factual circumstance has no resemblance to the present situation in this case, which involves active ongoing litigation in two courts.

8 The Westec case involved litigation between Raytheon, a Kansas company, carrying on the business of manufacturing aircraft in Kansas and Westec, a computer software company, carrying on business in British Columbia. Westec had entered into a licensing agreement with Raytheon for the provision of certain software and hardware to Raytheon for use in Kansas. A dispute occurred between the parties concerning an allegation that Raytheon had failed at the expiry of the agreement to return to Westec certain of the software and hardware pursuant to the terms of the agreement. Raytheon then commenced action in Kansas for a declaration that it was not in breach of its con-

tractual obligations. Two months later Westec commenced action in British Columbia for damages against Raytheon and claimed that it had the right to serve process upon Raytheon outside of British Columbia on the ground that the proceeding was in respect of a breach of contract committed in British Columbia. Subsequent to the commencement of the British Columbia action, Westec filed a defence and cross claim in the Kansas action seeking damages against Raytheon. Raytheon brought a motion here under Rule 13(10) of the Rules of Court for an order setting aside service of the writ ex juris. That application was refused by a chambers judge and Raytheon appealed to this Court. When the case came on for hearing in this Court in March 1999, the Kansas action had been set to proceed to trial in the fall of 1999.

9 This Court, relying on principles enunciated in a recent case in this Court, 472900 B.C. Ltd. v. Thrifty Canada Ltd. (1998), 57 B.C.L.R. (3d) 332, concluded that the British Columbia proceedings ought to be stayed. The Court found that no juridical advantage would be lost to Westec by being required to proceed in Kansas as opposed to British Columbia and that Kansas was an appropriate forum in which to resolve the dispute between the parties. Rowles J.A. noted that the concept of comity was the animating principle of contemporary Canadian jurisprudence in this area.

10 In my view, none of the cases relied upon by the learned chambers judge, to support his conclusion that there ought not to be a temporary stay ordered in this case, have proper application to the circumstances disclosed here. Considerations that are significant in considering the grant of a permanent stay or permitting service ex juris are very different from the analysis performed when a court is considering the propriety or otherwise of the grant of a temporary stay of proceedings. The respondent correctly pointed out in argument that the chambers judge had a discretion to exercise, which discretion will not be interfered with lightly by an appellate court. However, I consider the chambers judge approached the matter on an incorrect basis when he considered cases like those referred to supra, which dealt with different issues.

11 In this case, while the named defendants in this Court may be nominally different from the named defendants in the Tax Court of Canada, in essence the two actions of the respondent are against the Government of Canada. As noted above, there is a substantial overlap, if not a nearly total congruence between the result sought in the two proceedings. A case in this jurisdiction that, in principle, appears quite similar to the instant situation is Delsom Estates Ltd. v. Delta (District), [1994] B.C.J. No. 1917, a judgment of Madam Justice Saunders, when she was on the Supreme Court. In that case, the Highways Ministry had expropriated from the plaintiff Delsom Estates Ltd. certain land located in Delta. The expropriation spawned a considerable amount of dispute and litigation between the plaintiff and the Municipality of Delta and the Ministry. Madam Justice Saunders described the factual background in this way:

> This action is one of several legal proceedings involving the Delsom lands and the expropriation for the new roadways. In December 1993, in Action No. SO-9781, New Westminster, Mr. Justice Lander dismissed an appeal by the petitioners from decisions of the local approving officer on seven subdivision applications covering portions of the Delsom lands. In addition to that action and this petition, there are two further proceedings pending. One is a claim filed under the Expropriation Act, S.B.C. 1987, c. 23, for compensation for expropriation of lands and injurious affection to the remaining Delsom lands resulting from construction of Nordel Way, L-200 and the 84th Avenue Connector. The other is an action commenced by the Corporation of Delta against Delsom Estates Ltd. in

which Delta claims damages, alleging the company breached its zoning bylaws. Delsom Estates Ltd. has counterclaimed for damages from both Delta and Delta's solicitors for refusing to permit rezoning and development of the Delsom lands, and conspiring to require the company to create a park in excess of statutory requirements.

II. The Minister's and Ministry's Application to Stay Proceedings

The Minister and Ministry of Transportation and Highways apply under Rule 19(24)(b) and (d) for an order staying the proceedings on the basis that the petitioners are concurrently seeking appropriate and alternative remedies before the Expropriation Compensation Board, saying that to proceed with the petition at this time would be unnecessary, vexatious or an abuse of the process of the court (Rule 19(24)(b) and (d)).

In Rogers v. Bank of Montreal (1984), 49 B.C.L.R. 85, 4 D.L.R. (4th) 507, [1984] 2 W.W.R. 597 (C.A.), a case concerning actions on the same subject matter in two different provinces of Canada, the Court of Appeal noted that a stay of proceedings may be granted under a rule of court or under the inherent jurisdiction of the court. In British Columbia Rule 19(24) is authority for granting a stay, as is Section 8 of the Law and Equity Act, R.S.B.C. 1979, c. 224. Mr. Justice Craig speaking for the majority reviewed the genesis of the (relatively new) Rule 19(24) authority to order a stay of proceedings. He concluded the Rule gave the court no wider authority to grant a stay than it previously had. He found the proper consideration for the court is whether the action amounts to an abuse of process in any way, saying at p. 110:

> In adopting this approach, we must give due emphasis to the right of a plaintiff to bring an action in his own jurisdiction and give particular consideration to whether allowing the action to continue will result in a severe injustice to the defendant.

12 After acceding to an application to strike out certain claims made by the petitioner, Delsom, Madam Justice Saunders concluded that it would be appropriate to order the proceedings against the Highways Ministry be temporarily stayed pending resolution of the expropriation compensation proceedings. She said this at paras. 12 and 13 of her judgment:

> The petitioners contend this petition seeks different relief from their expropriation compensation claim, and that the Expropriation Compensation Board, having no jurisdiction to address the legal obligations of the respondents to provide access, will be unable to address the issues raised in this petition.
>
> In my view, the petitioners contention ignores the objective of the Expropriation Act, which is to make the expropriated or injuriously affected landowner economically whole. For example, injurious affection to land which is so exten-

> sive as to render the land valueless may attract a compensation award much like an award for clear taking. In British Columbia the Expropriation Act is the primary avenue of redress for landowners adversely affected by an expropriating authority in respect of a project for which it had the power to expropriate land.

13 She stated her conclusion thus, at para. 15:

> In my view, these judicial review proceedings against the Ministry and Minister of Transportation and Highways are at least premature and should be stayed until the compensation proceedings have been concluded.

14 It seems to me that the reasoning in the Delsom case is particularly applicable to the circumstances of this case. The proceedings before the Tax Court of Canada certainly have the capacity to have a material, if not conclusive, impact upon the issues outstanding in this case. If the plaintiff respondent succeeds on the substance of its claim in the Tax Court of Canada, it appears to me that the causes of action alleged in the proceedings in the Supreme Court of British Columbia cease to have any substance or possibility of success. Success in the Tax Court of Canada by the respondent would render these proceedings superfluous and unnecessary. Of course, a lack of success would have the very opposite result because in that event this action would have a very real utility. As the Court observed to counsel during the course of the hearing, we would not propose in this case to grant a scope of relief any wider than that we would consider necessary and appropriate to do justice between the parties. I would consider it appropriate to order that these proceedings be stayed temporarily pending a decision by the Tax Court of Canada. After a decision has been reached by the Tax Court, I should think the applicants would face a difficult task in endeavouring to persuade any court to grant a further stay because then there will be a considered court decision on the matter, which decision would have to be considered correct until reversed by an appellate court.

15 As mentioned earlier, the hearing in that Court concluded some two and a half months ago and the parties are awaiting judgment. I consider that the learned chambers judge failed to give due weight to the consideration that the stay being applied for in this case was not a stay of the proceedings generally but only a temporary one. Ordering a stay here in the terms I have indicated will prevent unnecessary and costly duplication of judicial and legal resources. I do not consider that a time limited stay in the terms granted here has any capacity to work an injustice on the respondent. Accordingly, I would allow the appeal and order these proceedings stayed until a decision has been rendered by the Tax Court of Canada. Because there must of necessity be a considerable measure of uncertainty as to whether these proceedings will or will not proceed further, I would simply order that the costs of this application be costs in the cause.

HALL J.A.
CUMMING J.A.:-- I agree.
NEWBURY J.A.:-- I agree.

cp/i/qltlm/qlmxd

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2009-0338
EB-2009-0339
EB-2009-0340

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B; and in particular sections 36.1 (1), 38(1), 38(3), 40(1), 90(1).

PROCEDURAL ORDER No. 2

Tribute Resources Inc. and Bayfield Resources Inc., on behalf of Huron Bayfield Limited Partnership and Bayfield Pipeline Corp. (the "Applicants") have filed applications with the Ontario Energy Board, (the "Board") dated September 22, 2009. These applications were subsequently amended on December 15, 2009. The applications were filed under sections 36.1(1), 38(1), 38(3), 40(1) and 90(1) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B (the "Act") and would, if granted, allow the Applicants to develop natural gas storage pools located in the geographic area of the County of Huron and in the County of Middlesex Ontario (the "Project").

The Board issued a Notice of Application and Hearing dated January 13, 2010. The notice was served and published as directed by the Board. The registered intervenors in the proceeding are: McKinley Farms Ltd. ("McKinley"); 2195002 Ontario Inc. Zurich Landowners Association ("Zurich Landowners"); Union Gas Limited ("Union"); Municipality of Bluewater ("Bluewater"); the Huron County Federation of Agriculture ("HCFA"); and Stanley Bayfield Landowners Group ("SBLG").

The Applications

The Applicants have applied for the following:

- EB-2009-0338 - Application under section 90(1) of the Act for Leave to Construct by Bayfield Pipeline Corp.

- EB-2009-0339 - Application to develop the Bayfield storage pool by Tribute Resources Inc. and Bayfield Resources Inc. on behalf of Huron Bayfield Limited Partnership. The Applicants have requested the following:

    - designation of the proposed Bayfield gas storage pool under s. 36.1 of the Act;
    - authorization to inject, store and withdraw gas under s. 38(1) of the Act; and
    - a favourable report to the Minister of Natural Resources regarding licences to drill 4 wells within the designated storage area under s. 40 of the Act.

- EB-2009-0340 - Application to develop the Stanley 4-7-XI storage pool (the "Stanley Pool") by Tribute Resources Inc. and Bayfield Resources Inc. on behalf of Huron Bayfield Limited Partnership. The Applicants have requested the following:

    - designation of the proposed Stanley Pool under s. 36.1 of the Act;
    - authorization to inject, store and withdraw gas under s. 38(1) of the Act;
    - a favourable report to the Minister of Natural Resources regarding licences to drill 4 wells within the designated storage area under s. 40 of the Act; and
    - an order determining just and equitable compensation payable to any owner of any gas or oil rights or the right to store gas within Stanley Pool under section 38(3) of the Act.

Concurrent Proceedings – Superior Court of Justice

Both Tribute and McKinley applied to the Superior Court of Justice pursuant to Rule 14.05 of the Ontario *Rules of Civil Procedure*, seeking a declaration as to the validity of two separate contracts entered into between them or their predecessors with respect to the ownership of the land under which the Stanley Pool is located. Mr. Justice Little, in a decision dated June 29, 2009, found that both contracts relating to the land in question: an Oil and Gas Lease as amended by a Unit Operation Agreement, and a Gas Storage Lease Agreement on the McKinley land over the Stanley Pool, had been void and vacated. Tribute appealed this decision and on January 26, 2010 the Ontario Court of Appeal ("Court of Appeal") heard Tribute's appeal with respect to the validity of the Gas Storage Lease. The Court reserved its decision.

As a result, the Board decided that it was necessary to consider the question of whether the Board's proceeding should be stayed until the Court of Appeal decision on Tribute's appeal is rendered. To assist with this consideration the Board, by way of Procedural Order No. 1, dated February 9, 2010, directed the parties to file submissions with respect to whether or not the proceedings before the Board should be stayed pending the release of the decision of the Court of Appeal.

Submissions

The Board received submissions on the question of whether or not the proceedings should be stayed from the Applicants, Board staff, the HCFA and McKinley and 2195002 Ontario Inc.

The Applicants filed submissions on February 12, 2010 and have taken the following position with respect to the question of a stay:

> "The Applicants accept deferring the entire proceedings, including the Applications pertaining to the Bayfield Storage Pool and the Bayfield Pipeline Corp. until the Ontario Court of Appeal has issued a decision in the Stanley case, after which the Ontario Energy Board and all parties can review and respond to that decision."

In written submissions, dated February 18, 2010, Board staff supported having the proceedings stayed in their entirety until such time as the Court of Appeal has issued a decision. Board Staff noted that, a stay would not be required for all the applications before the Board, as some of the applications do not turn on the issue currently being considered by the Court. However, Board staff submitted that it would seem impractical in this case for the Board to hear certain matters, such as the designation applications, separately, and as such a stay would be appropriate in these circumstances.

On February 22, 2010, the HCFA filed a submission supporting "postponing the proceedings, until the Ontario Court of Appeal has issued a decision in the Stanley case".

Mr. Jed Chinneck, Legal Counsel for McKinley and 2195002 Ontario Inc., filed a submission on February 22, 2010. Mr. Chinneck requested that the Board stay certain proceedings related to the Stanley Pool application (EB-2009-0340) as follows:

- authorization to inject, store and withdraw gas under s. 38(1) of the Act;
- a favourable report to the Minister of Natural Resources regarding licences to drill 4 wells within the designated storage area under s. 40 of the Act; and
- an order determining just and equitable compensation payable to any owner of any gas or oil rights or the right to store gas within Stanley Pool under section 38(3) of the Act.

and to proceed with the following:

- application for leave to construct the proposed transmission pipeline (EB-2009 0338);
- all sections of application to develop the proposed Bayfield Pool (EB-2009-0339); and
- designation section of application to develop the proposed Stanley Pool (EB-2009-0340).

McKinley and 2195002 Ontario Inc. submitted that the Board's review of the above applications do not turn on issues that are subject to the Court of Appeal Decision and should therefore be processed in the ordinary course.

No other submissions were received.

Board Findings

The Board reviewed the submissions and decided to stay its review of all of the applications. The Board view is that the outcome of the Court of Appeal Decision directly affects only Stanley Pool applications under sections 38(1), 40 and 38(3). However, The Board notes that the pre-filed evidence for applications under all 3 file numbers is interrelated and that the review of all of the applications in a single proceeding is more efficient and practical.

At this time the Board considers it necessary to make provision for the following procedural matters. Please be aware that this procedural order may be amended, and further procedural orders may be issued from time to time.

THE BOARD ORDERS THAT:

1. The proceeding for the applications under file numbers EB-2009-0338/0339/0340 be stayed until the Court of Appeal decision on the storage rights ownership in Stanley 4-7-XI is rendered.

2. The Applicants file with the Board, and all the intervenors, a copy of the Court of Appeal Decision no later than 15 days from the date it would be rendered.

All filings to the Board must quote file numbers EB-2009-0338/0339/0340 be made through the Board's web portal at www.errr.oeb.gov.on.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.oeb.gov.on.ca. If the web portal is not available you may email your document to the BoardSec@oeb.gov.on.ca. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file seven paper copies. If you have submitted through the Board's web portal an e-mail is not required."

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

DATED at Toronto, March 12, 2010

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

Case Name:

Tribute Resources Inc. v. 2195002 Ontario Inc.

RE: Tribute Resources Inc., (Applicant), and 2195002 Ontario Inc., (Respondent)

[2012] O.J. No. 55

2012 ONSC 25

Court File No. 5186/2011

Ontario Superior Court of Justice

A.W. Bryant J.

Heard: November 16-18, 2011.
Judgment: January 6, 2012.

(26 paras.)

Counsel:

Christopher Lewis, for the Applicant.

William Mitches, for the Respondent.

ENDORSEMENT

A.W. BRYANT J.:--

I. Background

1 McKinley Farms Limited ("McKinley") is a private corporation which owns 200 acres of land in the Township of Stanley, County of Huron. McKinley provides care to poultry breeder stock and leases out surplus lands. Tribute Resources Inc. ("Tribute") is a publically traded company which carries on the business of gas exploration, production and storage.

2 On October 13, 1977, Tribute (or its predecessor) and McKinley (or its predecessor) entered into the Tribute Oil and Gas Lease for oil and gas extraction. This lease was amended by the Unit

Operation Agreement dated November 30, 1984. On September 24, 1998, Tribute and McKinley entered into a Gas Storage Lease to store gas beneath McKinley lands.

3 On March 4, 2009, McKinley and 2195002 Ontario Inc. ("219 Ontario") entered into an Oil and Gas Lease ("219 Ontario Oil and Gas Lease") and a Gas Storage Lease ("219 Ontario Gas Storage Lease"). McKinley and 219 Ontario are related corporations.

4 Tribute and McKinley's disagreement on the interpretation and validity of these leases has resulted in litigation the subject matter of which is relevant to the current proceedings between 219 Ontario and Tribute.

II. Analysis and Decision

5 In late 2008, McKinley took the position that the Tribute Oil and Gas Lease and the Tribute Gas Storage Lease were void. On December 10, 2008, Tribute filed an application in the Superior Court for: (1) a declaration that the Tribute Oil and Gas Lease is a valid and subsisting lease; and, (2) a declaration that the Tribute Gas Storage Lease is a valid and subsisting lease.

6 On January 16, 2009, McKinley filed a cross-application in the Superior Court for: (1) a declaration that the Tribute Oil and Gas Lease was invalid and void; and, (2) a declaration that the Tribute Gas Storage Lease was invalid and void.

7 On June 17 and 18, 2009, the two applications were argued together before Justice T. David Little. On June 29, 2009, the applications' judge held that the Tribute Oil and Gas Lease terminated in 2001 and the Tribute Gas Storage Lease expired in 1999. Tribute appealed the decision of the applications' judge to the Ontario Court of Appeal ("the Appeal").

8 On September 21, 2009, prior to the hearing of the Appeal, Tribute applied to the Ontario Energy Board ("Board") under sections 36.1, s. 38(1), 38(3), 40(1) and 90(1) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B ("*Act*"). The applications, if granted, would allow Tribute to develop natural gas storage pools in the geographic areas of the County of Huron including the Stanley Pool, part of which is beneath the McKinley lands.

9 On February 9, 2010, the Board issued Procedural Order No. 1 in relation to Tribute's September 21, 2009 (as amended on December 15, 2009) application to the Board. The Board noted that on January 26, 2010, the Court of Appeal had heard Tribute's appeal of the applications' judge's decision that the Tribute Oil and Gas Lease and Tribute Gas Storage Lease were void. The Board requested submissions from Tribute and McKinley regarding whether the pending proceedings before the Board with respect to the Stanley Pool should be stayed until the Court of Appeal's decision on the Appeal.

10 On February 12, 2010, Tribute requested the Board to stay the scheduled hearings pending the decision of the Ontario Court of Appeal. In Procedural Order No. 2, dated March 12, 2009, the Board reported that its staff supported the stay of the proceedings pending the decision of the Court of Appeal. The Board stayed Tribute's application pending notification of the decision of the Court of Appeal.

11 On April 7, 2010, the Ontario Court of Appeal released its judgment in *Snopko v. Union Gas Ltd.*, 2010 ONCA 248, [2010] O.J. No. 1335. Sharpe J.A. held that under the *Act*, the Board has a broad jurisdiction to regulate the storage of natural gas, to designate an area as a gas storage area, to authorize the injection of gas into that storage area, and to order compensation to the owners of the property overlaying the storage area (para. 22). Sharpe J.A. recognized that the Board has the au-

thority to hear and determine all questions of law and fact in all matters within its jurisdiction. He stated that the substance of the claim, and not its legal characterization, should determine jurisdiction. He held that if the substance of the claim falls within s. 38 of the *Act*, the Board has jurisdiction regardless of the legal label of the claim (paras. 24 and 27).

12 The Court of Appeal, through John Kromkamp, Senior Legal Officer, requested counsel for Tribute and McKinley to file written submissions regarding the impact, if any, of the Court of Appeal's decision in *Snopko, supra,* on the Appeal and whether counsel for the Board should be invited to make submissions regarding the jurisdiction of the Board to deal with issues central to the Appeal.

13 Counsel for Tribute filed written submissions dated May 4, 2010, to the Court of Appeal. Counsel submitted that in *Snopko, supra,* the Board had issued an order in 1993 designating an area as a storage pool and that the Board had granted Union Gas' application under s. 38(1) of the Act authorizing it to inject, store and remove gas from the designated storage areas. Counsel further submitted that the Board had made the designation under s. 38 of the *Act* because it had exclusive jurisdiction to determine all aspects of compensation in the absence of any agreement under s. 38(3). Counsel further submitted that the Board should not be invited to make submissions regarding its jurisdiction to deal with issues that are central to the Appeal.

14 On May 6, 2010, Counsel for McKinley filed brief concurring written submissions. Counsel further submitted that the *Snopko* decision had no impact on the Appeal and that the Board should not be invited to make submissions regarding its jurisdiction to deal with issues that are central to the Appeal.

15 On June 2, 2010, the Court of Appeal released its decision in *Tribute Resources Inc. v. McKinley Farms Ltd.* 2010 ONCA 392, [2010] O.J. No. 2293. The Court held that the Tribute Gas Storage Lease was terminated in 1999 but that the Tribute Oil and Gas Lease was valid.

16 On April 20, 2011, Tribute withdrew its September 21, 2009, application to the Board and filed a fresh application to the Board for an order designating proposed storage areas, including the Stanley Pool, and other orders under the *Act*. On August 4, 2011, Tribute sought to amend its application for orders pursuant to s. 38(1) and s. 38(3). The amended applications were for: the development and operation of a proposed gas storage area referred to as the Stanley Pool; a proposal for the designation of the Stanley Pool as a gas storage area; and, a request for licenses to drill injection/withdrawal wells.

17 The Board found that the application under s. 38(3) was incomplete and stayed the application. On August 24, 2011, Tribute pre-filed evidence and the Board amended the notices of application.

18 On September 1, 2011, 219 Ontario filed an application in the Superior Court of Justice for: (1) a declaration that there are "no gas sands" in, on or under the lands owned by McKinley; (2) a declaration that the Tribute Oil and Gas Lease does not permit Tribute to store gas in or under McKinley lands; and, (3) a declaration that the 219 Ontario Gas Storage Lease permits the injection into, storage under, and withdrawal of, stored gas from beneath the McKinley lands. The Board has not made an order under sections 36.1(1), 38(1), 38(3) or 40(1) of the *Act* in relation to Tribute's application as of September 1, 2011.

19 On September 21, 2011, Tribute filed an application for: (1) a declaration that the Superior Court does not have jurisdiction to grant the relief sought by 219 Ontario in its September 1, 2011 application which application should be dismissed; and, (2) a declaration that the Ontario Energy Board has exclusive jurisdiction in respect of the relief sought by 219 Ontario in connection with the storage rights beneath the McKinley lands.

20 On November 8, 2011, the Board stayed Tribute's pending applications until the hearing and adjudication of Tribute's jurisdictional application in the Superior Court.

21 In my view, the Ontario Court of Appeal decision in *Tribute v. McKinley, supra* resolves the jurisdictional issue raised by Tribute. Tribute's written submissions, dated May 4, 2010, to the Court of Appeal on the question of jurisdiction stated:

> The issues in the pending Appeal involve the interpretation and validity of a Petroleum and Natural Gas Lease and Grant [Tribute Oil and Gas Lease and Tribute Gas Storage Lease] between Tribute and McKinley. The OEB has not made an order under s. 36.1 of the Act designating any part of the McKinley lands as a gas storage area nor has it made an order under s. 38(1) of the Act authorizing any person to inject gas into, store gas in and remove gas from a designated gas storage area involving McKinley lands. Because neither of these orders has been made by the OEB in connection with the subject matter of this pending Appeal, the privative clause set out in section 38(3) of the Act is not operative in respect of the issues before this Court in this Appeal. The issues in this Appeal do not include the issue of compensation payable under s. 38 of the Act. It is therefore submitted that the *Snopko* decision has no impact on this Appeal. This Court has inherent jurisdiction[1] to deal with the issues on this Appeal, which jurisdiction is not displaced by section 38(3) of the Act.

As mentioned above, counsel for McKinley concurred with Tribute's written submissions to the Court of Appeal.

22 The Court of Appeal in *Tribute v. McKinley, supra*, at paras. 18 and 19 stated:

> The parties are agreed that the recent decision of this court in *Snopko et al. v. Union Gas Ltd.*, 2010 ONCA 248, does not apply to this case. In *Snopko*, this court examined the scope of the privative clause set out in s. 38(3) of the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sched. B (the "Act"), which states as follows:
>
> > No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board.
>
> Section 38(1) provides that the OEB may make a designation order authorizing a person to "inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose" and such an authorized person is required under s. 38(2) to make "just and equitable compensation" for the right to store gas or for any damage

resulting from the authority to do so. The substances of the claims in this case do not fall within the language of s. 38(2) as no designation order has been made by the OEB in relation to these lands. The court's jurisdiction to determine the questions on appeal is not at issue.

23 The pending application filed by 219 Ontario, dated September 1, 2011, requests a judge of the Superior Court to interpret the Tribute Oil and Gas Lease and the 219 Ontario Gas Storage Lease. The Board has not "designated a gas storage area" or "authorized a person to inject gas into, store gas in and remove gas from a designated gas storage area and to enter into and upon the land in the area and use the land for that purpose" or made a compensation order under s. 36.1, s. 38(1) s 38(2) or s. 38(3) of the *Act*. Although the Board has power to require the preparation of evidence prior to a hearing, the Board cannot make an order under the *Act* until it holds a hearing (s. 21(2)).

24 In my view, the substance of the claims made by 219 Ontario in its application to the Superior Court for the interpretation of leases does not fall within the language of s. 36.1, s. 38(1) or s. 38(2) of the *Act*. I find that judges of the Superior Court regularly interpret leases and other contracts and have the jurisdiction to interpret the contracts at issue and to grant the relief sought by 219 Ontario. I further find that the interpretation of the leases is not within the exclusive jurisdiction of the Board because the Board has not made an order designating the proposed storage areas under s. 36.1 or 38 of the *Act* (*Tribute v. McKinley, supra*, at paras. 18 and 19).

25 Tribute's application is dismissed for the above reasons.

26 The Court fixes costs in the amount of $13,000.00 payable forthwith.

A.W. BRYANT J.

cp/e/qlafr/qlvxw

1 The Superior Court of Ontario has inherent jurisdiction but the Ontario Court of Appeal is a statutory Court (*Courts of Justice Act* R.S.O. 1990, Chap. C-43, s. 2(1), 6(1) and 11(2)).

Case Name:

Tribute Resources Inc. v. McKinley Farms Ltd.

Between
Tribute Resources Inc., Applicant (Appellant), and
McKinley Farms Ltd., Respondent (Respondent in Appeal)
And between
McKinley Farms Ltd., Applicant (Respondent in Appeal), and
Tribute Resources Inc., Respondent (Appellant)

[2010] O.J. No. 2293

2010 ONCA 392

263 O.A.C. 214

Docket: C50782

Ontario Court of Appeal
Toronto, Ontario

R.P. Armstrong, S.E. Lang and R.G. Juriansz and JJ.A.

Heard: January 26, 2010.
Judgment: June 2, 2010.

(31 paras.)

Contracts -- Terms -- Classification -- Conditions -- Condition precedent -- Express terms -- Term and termination -- Renewal -- Appeal by lessee of oil and gas rights and gas storage facility from dismissal of application for declaration leases were valid allowed in part -- Judge erred in finding oil and gas lease terminated -- Amending agreement provided for continuation of oil and gas lease as long as rental payments being made -- Judge properly held application for Energy Board approval of lands subject to gas storage lease was condition precedent for extending gas storage lease beyond 10-year term -- No application made within term so gas storage lease terminated -- Oil and gas lease continued to be valid as payments made.

Natural resources law -- Oil and gas -- Lease or license for production -- Terms and conditions -- Obligation to pay -- Terms -- Termination -- Contracts -- Terms and conditions -- Appeal by lessee of oil and gas rights and gas storage facility from dismissal of application for declaration leases

were valid allowed in part -- Judge erred in finding oil and gas lease terminated -- Amending agreement provided for continuation of oil and gas lease as long as rental payments being made -- Judge properly held application for Energy Board approval of lands subject to gas storage lease was condition precedent for extending gas storage lease beyond 10-year term -- No application made within term so gas storage lease terminated -- Oil and gas lease continued to be valid as payments made -- Ontario Energy Board Act, s. 38.

Appeal by Tribute from the dismissal of its application for a declaration that two leases were valid. Tribute's predecessor executed an Oil and Gas Lease with McKinley's predecessor in 1977. The lease gave Tribute oil and gas rights in exchange for monthly payments. The term was 10 years and so long thereafter as oil and gas were produced in paying quantities. In 1984, the parties amended the Oil and Gas Lease with a Unit Operating Agreement. The Agreement replaced the terms of the Oil and Gas Lease dealing with rental payments, and substituted a term requiring Tribute to make an annual per-acre rental payment for the lands subject to the lease. The Agreement also provided, in the same section dealing with payment, that the lease would continue as long as rental payments were made. As of July 2001, gas was no longer produced in paying quantities, but Tribute continued to make the annual rental payments set out in the Agreement, some of which were tendered and accepted late. In September 1998, the parties entered into a Gas Storage Lease, pursuant to which Tribute leased certain land from McKinley for the purpose of constructing and operating a gas storage facility. The Gas Storage Lease provided that it was to terminate in 10 years, unless one of the parties made an application to the Ontario Energy Board to have the subject lands designated as a gas storage area. No such application was ever made, but Tribute nonetheless made a rental payment pursuant to the Gas Storage Lease after 10 years had passed and McKinley accepted the payment. In October 2008, Tribute asked McKinley to enter into a Gas Storage Agreement for one more year, to give it time to make the application to the Board. McKinley declined, and returned the payment Tribute proffered for that period. A judge found both leases had terminated in dismissing an application by Tribute for a declaration that they were both valid. The judge found the Oil and Gas Lease terminated in 2001 when gas was no longer produced in paying quantities. He construed the Unit Operating Agreement against Tribute, the author of the Agreement. He found the payment section of the Agreement ineffective to extend the term of the original Oil and Gas Lease, as McKinley would not have expected such a term to be buried in a clause dealing with payment. The judge also found the Gas Storage Lease had terminated based on its clear requirement that an application to the Board within its 10-year term was required to extend the term.

HELD: Appeal allowed in part. The Oil and Gas Lease was valid but the Gas Storage Lease had terminated. The judge properly interpreted the Gas Storage Lease. It was clear that an application to the Board prior to the expiry of the 10-year term was a condition precedent to the extension of the term. The judge erred in his determination that the Oil and Gas Lease had terminated. All the agreements between the parties were sophisticated commercial documents. There was no evidence that the term in the Unit Operating Agreement providing for an extension of the Oil and Gas Lease was camouflaged or buried by Tribute in the document. Because Tribute continued to make and McKinley continued to accept rental payments, the Oil and Gas Lease continued.

Statutes, Regulations and Rules Cited:

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, s. 38(1), s. 38(2), s. 38(3)

Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 14.05

Appeal From:

On appeal from the judgment of Justice T. David Little of the Superior Court of Justice dated June 29, 2009.

Counsel:

Christopher A. Lewis, for the appellant.

Jed Chinneck and William Mitches, for the respondent.

[Editor's note: Corrections were released by the Court July 23 and 27, 2010; the changes have been made to the text and the corrections are appended to this document.]

The judgment of the Court was delivered by

1 R.G. JURIANSZ J.A.:-- Tribute Resources Inc. ("Tribute") appeals from the dismissal of its application to declare valid two leases: an Oil and Gas Lease and a Gas Storage Lease. The same judgment granted the respondent, McKinley Farms Ltd. ("McKinley"), declarations that these leases were terminated. At issue in this appeal is the validity of the two leases.

2 For the reasons that follow, I would allow the appeal in part. I would find the Oil and Gas Lease is valid and subsisting, but that the Gas Storage Lease terminated.

A. FACTS

3 Tribute, through its predecessor, executed an Oil and Gas Lease with the predecessor of McKinley Farms Inc. ("McKinley") on October 12, 1977, by which McKinley leased certain oil and gas rights to Tribute for annual rental payments. The term of the Oil and Gas Lease was "ten years and so long thereafter as oil or gas are produced in paying quantities, or storage operations are being conducted".

4 The Oil and Gas Lease was amended by a Unit Operating Agreement dated October 30, 1984. Paragraph three of the Unit Operating Agreement dealt with payments to be made by Tribute to McKinley "in lieu of all payments under the said lease". One of the payments required to be made or tendered was an annual rental payment of $2.50 for every acre of the lands retained by Tribute. Section 3(b) of the Unit Operating Agreement provided, in part, as follows:

> And as long as the payments in this clause provided are made or tendered, operations for the production of the leased substances from the unit area shall be deemed to be conducted by the lessee on the said lands under the said lease, and the said lease as hereby amended shall remain in full force and effect as to all of the said lands retained by the lessee under the said lease and/or this agreement.

5 As of July 31st, 2001, gas was no longer produced in paying quantities. Tribute continued to pay McKinley the annual rental payments pursuant to the Unit Operating Agreement, some of which were tendered and accepted late.

6 The parties entered into a Gas Storage Lease Agreement dated September 24, 1998. Under this lease, which is subject to the (amended) Oil and Gas Lease, Tribute leased certain of McKinley's land for the purpose of constructing and operating a gas storage facility. The term of the Gas Storage Lease was 10 years. Schedule B of this lease provided that "all provisions of the schedule shall be additional and shall be paramount with any of the terms in the original agreement". One term in Schedule B stated as follows:

> This Gas Storage Lease Agreement shall terminate on the tenth anniversary date, if and only if, the lessee or some other person has not applied to the Ontario Energy Board to have the said lands or any part thereof designated as a gas storage area on or before the tenth anniversary date hereof.

7 No application was made to the Ontario Energy Board ("OEB") before the tenth anniversary of the lease on September 24, 2008. However, in August 2008 Tribute had delivered to McKinley a cheque for the gas storage rental for the period of September 24, 2008 to September 23, 2009. Though the cheque was dated September 19, McKinley was able to deposit it to its account on August 25, 2008.

8 In October 2008, Tribute asked McKinley to enter into a Gas Storage Lease Amendment which would allow Tribute an additional year, until September 24, 2009, to make an application to the OEB to designate the lands as a gas storage area. McKinley sought legal advice. Eventually, McKinley, by a letter from its lawyer dated December 9, 2008, declined to execute the Gas Storage Lease Amendment, took the position that the Gas Storage Lease had terminated on September 24, 2008, returned the rental payment for the ensuing year, and invited an offer "for a fair market value lump-sum payment to reflect the value of acquiring control of the reservoir". It also took the position that the Oil and Gas Lease had terminated in 2001 when oil or gas were no longer produced in paying quantities.

9 Tribute applied to the court pursuant to rule 14.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, seeking declarations that the two leases each remained valid and McKinley applied for declarations that each of the leases had terminated.

B. THE APPLICATIONS JUDGE'S DECISION

10 The applications judge first considered the Oil and Gas Lease by itself. The Oil and Gas Lease's term of 10 years would be extended so long as oil and gas were being produced in paying quantities. He found that when production in paying quantities ceased in 2001 and the "well ran dry", the Oil and Gas Lease terminated.

11 The applications judge then considered whether this result was affected by s. 3(b) of the Unit Operating Agreement, which I have quoted above. He observed first that s. 3 dealt with "payments" under the original lease, and did not purport to amend the term of the lease. He described it as "camouflaged under a section one would expect dealt solely with compensation". Second, he observed, that s. 3(b) refers only to "deemed production" and not "deemed production 'in paying quantities'". As both the Oil and Gas Lease and the Unit Operating Agreement had been drafted by Tribute or its predecessor, the *contra proferentum* principle applied. Therefore, the applications judge concluded that "the failure to incorporate the necessary wording 'in paying quantities' is fatal" and that "[e]xact wording would have to be used in order to make that deemed production clause effective."

12 The applications judge added that there was no reason to expect that a party signing such an amending agreement "would anticipate finding, buried in a sub-clause dealing with payment, the potential change of the duration and term of the lease."

13 The applications judge declared that therefore the Oil and Gas Lease had terminated in 2001.

14 The applications judge's analysis of the Gas Storage Lease was straightforward. The clause in Schedule B was clear -- it provided that the lease would terminate automatically on the tenth anniversary date if no application was made to the OEB. That clause was paramount to the renewal clauses in the Gas Storage Lease itself.

15 The applications judge reasoned that it did not matter whether either party knew about the term in the lease or what actions they took subsequent to the lease. The automatic termination clause did not require Tribute to make an application to the OEB. Therefore its failure to do so could not be regarded as a default from which relief against forfeiture could be claimed. The reason that no application was made within the 10 year time limit did not matter. No application was made and the lease came to an end. The applications judge concluded that no contractual or equitable remedy was available to revive the Gas Storage Lease.

16 Therefore the applications judge granted a declaration that the Gas Storage Lease terminated on September 24, 2008.

17 Having found in McKinley's favour that both leases were terminated, the applications judge ordered Tribute to pay McKinley costs in the amount of $81,135.37 all inclusive.

C. ANALYSIS

18 The parties are agreed that the recent decision of this court in *Snopko et al. v. Union Gas Ltd.*, 2010 ONCA 248, does not apply to this case. In *Snopko*, this court examined the scope of the privative clause set out in s. 38(3) of the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sched. B (the "Act"), which states as follows:

> No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board.

19 Section 38(1) provides that the OEB may make a designation order authorizing a person to "inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose" and such an authorized person is required under s. 38(2) to make "just and equitable compensation" for the right to store gas or for any damage resulting from the authority to do so. The substances of the claims in this case do not fall within the language of s. 38(2) as no designation order has been made by the OEB in relation to these lands. The court's jurisdiction to determine the questions on appeal is not at issue.

20 Turning to those questions, I begin with the Gas Storage Lease. I agree with the analysis of the applications judge that the automatic termination clause of Schedule B is a true condition precedent. It provides that the Gas Storage Lease will terminate on the tenth anniversary date "if and only if" Tribute or "some other person" has not made an application to the OEB. The words of the clause and the contract read as a whole do not indicate that the automatic termination provision was for the benefit of one party or the other. Rather, the parties chose a particular event, the non-occurrence of which would terminate the contract. The clause does not place any obligation of

performance on Tribute that McKinley could waive. The applications judge was correct to find that the initial acceptance of the rental payment for the ensuing year could not constitute a waiver or estoppel by conduct on the part of McKinley.

21 The applications judge was correct to grant the declaration that the Gas Storage Lease terminated on September 24, 2008.

22 I do not, however, agree with the result reached by the applications judge in regard to the Oil and Gas Lease. The Oil and Gas Lease and the Unit Operating Agreement are composed entirely of fine print. While Tribute is an oil and gas company and McKinley operates a farm, these are commercial documents that create a sophisticated and long-term commercial arrangement. I see no issue of a "camouflaged" clause or of language being "buried in a sub-clause". McKinley must be taken to have assented to the contents of the documents that it, or its predecessor, executed. All that is necessary is to construe the language of the contract.

23 The language of the contract does not support the distinction the applications judge made between "deemed production" and "deemed production in paying quantities". I repeat the language of para. 3 of the Unit Operating Agreement for convenience:

> And as long as the payments in this clause provided are made or tendered, operations for the production of the leased substances from the unit area shall be deemed to be conducted by the lessee on the said lands under the said lease, and the said lease as hereby amended shall remain in full force and effect as to all of the said lands retained by the lessee under the said lease and/or this agreement.

24 What is deemed are "operations for the production of the leased substances from the unit area". These operations are deemed "to be conducted by the lessee on the said lands under the said lease". The words "under the said lease" imply production in paying quantities because that is what the lease is about. The more important point is that the clause provides that "deemed production" keeps the lease in full force and effect. Moreover, I cannot agree that the location of the clause in the Unit Operating Agreement can be taken to mean it applies to compensation only and not to the term of the lease. The words that the lease as amended shall "remain in full force and effect" could not be a clearer reference to the duration and term of the lease.

25 I would conclude that the "deemed production clause" extended the lease as long as the annual rental payments continued to be made. The rental payments were made, though some were late.

26 The applications judge did not find it necessary to deal with McKinley's alternative submission that the Oil and Gas Lease terminated automatically when Tribute failed to make the annual rental payments by January 20 of every year. As noted above, McKinley accepted the payments in the years in which they were made late. I would not give effect to McKinley's submission.

27 The Oil and Gas Lease, as I read it, does not stipulate that failure to make the rental payments on time should operate to automatically terminate the contract. Such a construction is inconsistent with the provision of the Oil and Gas Lease that provides:

> In the event of default on the part of the Operator in making any payments hereunder or in complying with any of the conditions herein contained, the Land Owner shall notify the Operator by registered mail of his intention to cancel this

> lease. The Operator shall have 30 days from the receipt of such notice in which to remedy such default failing which the Land Owner may proceed to cancel this lease according to law.

28 McKinley never gave Tribute notice of default and intention to cancel the lease but accepted the late payments.

29 I would conclude that the applications judge erred by declaring that the Oil and Gas Lease terminated when the production of gas in paying quantities ceased in 2001. Operations for such production were deemed to continue by Tribute making annual rental payments, and the lease remained in full force and effect.

D. CONCLUSION

30 I would allow the appeal in part by setting aside the applications judge's declaration that the Oil and Gas Lease terminated. I would grant a declaration that it is a valid and subsisting lease. I would dismiss the appeal in regard to the applications judge's declaration that the Gas Storage Lease terminated.

31 I would fix the appellant's costs of the appeal in the amount of $15,000 including disbursements and GST. As success before the applications judge should have been divided, I would set aside the applications judge's disposition of costs and replace it with an order of no costs.

R.G. JURIANSZ J.A.
R.P. ARMSTRONG J.A.:-- I agree.
S.E. LANG J.A.:-- I agree.

* * * * *

Correction
Released: July 23, 2010

In the title page the judges are not listed in seniority order.

* * * * *

Correction
July 27, 2010

The cost amount in paragraph 17 should be **$81,135.37** instead of $18,125,37.

cp/e/qllxr/qljxr/qljxh/qljyw

Case Name:

Alliance to Protect Prince Edward County v. Ontario (Ministry of the Environment)

IN THE MATTER OF appeals by Alliance to Protect Prince Edward County and Prince Edward County Field Naturalists filed on January 4, 2013 for a hearing before the Environmental Review Tribunal pursuant to section 142.1 of the Environmental Protection Act, R.S.O.1990, c. E.19, as amended, with respect to Renewable Energy Approval Number 7681-8UAKR7 issued by the Director, Ministry of the Environment, on December 20, 2012 to Ostrander Point GP Inc., as a general partner for and on behalf of Ostrander Point Wind Energy LP, under section 47 of the Environmental Protection Act, regarding the construction, installation, operation, use and retiring of a 9 wind turbine generator, Class 4 wind facility with a total name plate capacity of 22.5 megawatts located within South Marysburgh, Prince Edward County; and
IN THE MATTER OF a hearing held over 40 hearing days in March, April, May and June 2013 at the Sophiasburgh Town Hall, Demorestville, Ontario, and at 655 Bay Street, Toronto Ontario with access by telephone conference call

[2013] O.E.R.T.D. No. 40

76 C.E.L.R. (3d) 171

2013 CarswellOnt 9187

Case Nos.: 13-002, 13-003

Ontario Environmental Review Tribunal
Demorestville and Toronto, Ontario

Panel: Robert V. Wright, Panel Chair; Heather I. Gibbs, Vice-Chair

Heard: March, April, May and June 2013 by teleconference.
Decision: July 3, 2013.

(646 paras.)

For the relevant legislation and rules, maps, sample witness information form, excerpts of transcripts with oral Tribunal rulings in this matter, please see the Appendix.

Appearances:

Eric Gillespie, Natalie Smith and David Hwang - Counsel for the Appellants, Prince Edward County Field Naturalists and Alliance to Protect Prince Edward County.

Sylvia Davis and Sarah Kromkamp - Counsel for the Director, Ministry of the Environment.

Douglas Hamilton, Douglas Thomson, Bryn Gray, Darryl Cruz, Sam Rogers and Eric Pellegrino - Counsel for the Approval Holder, Ostrander Point GP Inc. as general partner for and on behalf of Ostrander Point Wind Energy LP.

Parker Gallant - Representative for the Participant, Wind Concerns Ontario.

Alban Goddard-Hill, Ian Dubin, Don Chisholm and Deborah Hudson - Presenters, on their own behalf.

Table of Contents

Issue 3: If the answer to either Issue 1 or 2 is "yes", whether the Tribunal should revoke the decision of the Director, by order direct the Director to take some action, or alter the decision of the Director

Other Matters - June 27, 2013 Motion for new evidence

DECISION

Appendix A - Relevant Legislation and Rules

Appendix B - Map of Ostrander Crown Land Block and proposed location of wind turbines, transformer substation and wetland natural features

Appendix C - Map of Prince Edward County South Shore and IBA

Appendix D - Map of Receptors and set-back distances for the Ostrander Crown Land Block wind project

Appendix E - Sample Witness Information Form - Post Turbine

Appendix F - Excerpt of Transcript with oral Tribunal ruling on relevance of medical records, March 6, 2013

Appendix H - Excerpt of Transcript with oral Tribunal ruling on admissibility of Dr. McMurtry's evidence as an expert, May 28, 2013

Appendix I - Excerpt of Transcript with oral ruling on expertise of Ian Dubin, April 25, 2013

Appendix J - Excerpt of Transcript with oral Tribunal Ruling on Dr. Beaudry, March 18, 2013

REASONS FOR DECISION

Overview

1 This appeal concerns a renewable energy approval issued by the Director, Ministry of the Environment ("MOE") on December 20, 2012 to put nine wind turbine generators with a total installed nameplate capacity of 22.5 megawatts (MW) and supporting facilities on 324 hectares of provincial Crown land in Prince Edward County. This is the first wind project approval in Ontario that is proposed to be located entirely on Crown land, known as the Ostrander Point Crown Land Block.

2 The 135 metre ("m") high turbine towers would require concrete platforms, 5.4 kilometres of on-site access roads (in addition to the existing roads), underground cabling and overhead distribution lines, and a parking/maintenance yard at the north end, adjacent to a 25 mega-volt-ampere transformer substation for connection to the Hydro One grid. In keeping with the definitions used in the Approval Holder's application materials, the Ostrander Point Wind Energy Park will be referred to as the "Project". The proposed location of the Project on the Ostrander Point Crown Land Block is shown on the map attached as Appendix B (relevant legislation and rules are labeled Appendix A). The "Subject Property", also referred to in these reasons as the "Site", is synonymous with all of the Ostrander Point Crown Land Block.

3 The Crown land would be leased to Ostrander Point GP Inc., as general partner for and on behalf of Ostrander Point Wind Energy LP (collectively, the "Approval Holder") for 25 years, with one extension for a further term of 15 years, via a "Commercial Wind Energy Lease".

4 The Ostrander Point Crown Land Block is about 15 km south of Picton. It is roughly bordered on the north by Helmer Road, on the west by Petticoat Point Trail, on the east by Ostrander Point Road, and on the south by Lake Ontario. The Project would be located on the south shore of Prince Edward County, which is a peninsula that extends into the north east portion of Lake Ontario, approximately in the middle of the peninsula. At the eastern end of the peninsula is the Prince Edward Point National Wildlife Area, which hosts the Prince Edward Point Bird Observatory ("PEPtBO"), and Point Petre Provincial Wildlife Area is to the west. The Prince Edward County South Shore ("PECSS") peninsula is shown on Appendix C.

5 The south shore of Prince Edward County is one of the least developed areas in the County with a low population, a mixture of year-round and seasonal residences, very few commercial operations and virtually no industrial operations. The Subject Property is relatively flat, with predominantly low lying vegetation, with a provincially significant wetland in the southeast corner and seasonal wetlands scattered throughout, and other provincially significant as well as seasonal wetlands in the vicinity, and is bounded by Lake Ontario to the south.

6 On January 4, 2013, Alliance to Protect Prince Edward County ("APPEC") and Prince Edward County Field Naturalists ("PECFN") filed appeals for a hearing before the Environmental Review Tribunal (the "Tribunal") pursuant to s. 142.1 of the *Environmental Protection Act* ("*EPA*").

7 During the course of the 40 day hearing of this matter, the Tribunal received extensive evidence, including 185 exhibits and testimony of 31 expert witnesses, and submissions on both branches of the test that applies to a renewable energy appeal under s.145.2.1 of the *EPA*. They are: whether engaging in Project in accordance with the renewable energy approval (the "REA") will cause serious harm to human health, or serious and irreversible harm to plant life, animal life or the natural environment.

8 For the reasons given below, the Tribunal concludes that the appellant citizen group APPEC has not met the first branch of the test regarding harm to human health because no causal link has been established between wind turbines and human health effects at the 550 m setback distance required under this REA.

9 Regarding the second branch of the appeal test, for the reasons outlined below, the Tribunal concludes that the appellant citizen group PECFN has shown, on a balance of probabilities, that engaging in the Project in accordance with the REA will cause serious and irreversible harm to plant life, animal life or the natural environment. This is on the basis of findings that such harm will be caused to Blanding's turtle.

10 As the Tribunal has determined that engaging in the Project in accordance with the REA will cause the harm referred to in s. 145.2.1(2)(b) of the *EPA*, it may, under s. 145.2.1(4) of the *EPA,*

(a) revoke the decision of the Director;
(b) by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with the *EPA* and the regulations; or
(c) alter the decision of the Director, and, for that purpose, the Tribunal may substitute its opinion for that of the Director.

11 The Tribunal revokes the decision of the Director.

Relevant policies

12 REAs are granted under the *Green Energy Act, 2009*, S.O. 2009, c. 12, Sched. A ("*GEA*") and amendments made to the *EPA*. The *GEA* states the underlying policy of the Ontario government to be:

> The Government of Ontario is committed to fostering the growth of renewable energy projects, which use cleaner sources of energy, and to removing barriers to and promoting opportunities for renewable energy projects and to promoting a green economy.

13 It is also the policy of the Ontario government to promote the use of Crown land for renewable energy projects. The Ministry of Natural Resources ("MNR") policy and supporting procedure regarding "Onshore Windpower Development On Crown Land" (no. PL 4.10.04) are dated January 28, 2008 and were issued on July 5, 2010. It states:

> To support the role that Crown land can play in providing areas for windpower projects, the Ministry of natural Resources (the Ministry) has developed a windpower policy and procedure to provide for a fair, consistent and orderly approach to the management of Crown land from project concept through to construction and operation. ...
>
> 2.3 Goal
>
> To ensure that the management and disposition of Crown lands for windpower generaton contributes to the environmental, social and economic well being of the Province, by providing a fair, orderly and consistent approach for its development. ...

3.1.2 Application Review

The Ministry will review applications to ensure that a site is available for a windpower project and identify if there are any areas that may be prohibited due to existing land use and resource management statutes, regulations, or policies that would preclude a windpower testing project or windpower project.

This initial review by the Ministry for coarse or broad level issues is not a replacement for a subsequent, more detailed review which will be carried out through the renewable energy approval processes.

14 The municipal land use policies for the area are of interest, although not binding. The Noise Impact Assessment prepared for the Project provides a succinct land use description of the Ostrander Crown Land Block:

> The site is publicly-owned Crown land and municipal policy is not technically binding. Similarly, the County's comprehensive Zoning By-Law does not apply. However, considering the local high-level policies in the Region of Prince Edward County's Official Plan is helpful in understanding the social context and municipal direction for the site and the surrounding area.
>
> Ostrander Point is bound by roads designated 'Rural Service' under Prince Edward County's Official Plan in the north, east and west and by the Lake Ontario shoreline in the south. Schedule E, the Land Use plan for the Official Plan, indicates the northern portion of the site is designated in part as 'Outdoor Recreation Land'. Generally, this designation is meant to provide a range of recreational and open space opportunities to residents and tourists. The southern portion of the site in proximity to Lake Ontario is designated as 'Environmental Protection' under the Official Plan. Generally, this designation is meant to provide protection to wetlands identified as provincially or locally significant or other wetland areas identified through air photos or field visits.
>
> There is one provincially significant wetland on the site. Schedule A indicates there is an Environmentally Sensitive Area designated 'Other Sensitive Site or Area' adjacent to the south eastern corner of the site. This implies the presence of a representative example of the County's biological or geological history and diversity. ...

The Ostrander Point Crown Land Block

15 The Ostrander Point Crown Land Block is known for its alvar vegetation; providing habitat for species of concern including the provincially threatened Blanding's turtle and Whip-poor-will; being a migratory corridor/pathway for birds, bats and the Monarch butterfly; being the middle portion of the internationally recognized PECSS Important Bird Area ("IBA"); its provincially significant wetland; and being identified by the MNR as a candidate area of natural and scientific interest ("ANSI").

16 Existing recreational land uses of the Ostrander Point Crown Land Block include camping, hiking, "birding", and "ATVing" (the use of all terrain vehicles). Paths and unfinished/gravel roads cross the Site, and there are fire pits on the lakeshore. Eric Prevost, an employee of the MNR, testified that overnight camping on Crown lands is generally permitted by default. There are no significant visible signs of the past use of the area as farm land and by the military for tank maneuvers and a testing range. The only existing structure on the Subject Property is a 60 m high meteorological tower.

Additional Project details

17 Each of the nine turbines would require excavation and construction of a concrete platform octagonal in shape with a diameter of approximately 18 m and a depth of approximately 3 m and anchored into the bedrock. The turbine hub height is 85 m, with a rotor diameter of 100 m, for a total tip height of 135 m. The rotor swept area would be 7854 m [Superscript 2]. The three blades have a rotational speed of 5-14 rpm. The speed and blade angles to the wind can be adjusted. The row of four wind turbines along the shoreline would be set back 200 metres from Lake Ontario.

18 Approximately 5.4 km of gravel access roads will be constructed, approximately 6 m wide with larger turnarounds. A gravel parking lot will be created of 21 x 47 m next to the transformer station. Crane pads (turbine assembly

areas) measuring 20 x 40 m, adjacent to the turbines, will be used for construction and kept in place throughout the life of the Project. During construction, turbines and their components will be placed in temporary "laydown areas", approximately 70 m long, close to the turbine base.

19 A map of proposed turbine locations on the Ostrander Crown Land Block, along with set-back distances as described in the Noise Report prepared for the Approval Holder's application, is attached as Appendix D.

The appeal process

20 The Director issued the REA on December 20, 2012. Also on December 20, 2012, the MNR issued a number of "tenure instruments" for the Project, such as temporary land use and work permits, easements for power lines, a Crown land lease for the turbines, and provision for the sale of Crown land for the transformer substation. The Non-Forestry Road-Use Management Strategy, appended to the Work Permit issued by the MNR for the proposed access road, provides that the Project is within General Resource Area E. "The general intent for Area E includes the encouragement of outdoor recreational opportunities through provincial parks, fisheries and wildlife production and forest production."

21 On July 23, 2012 the MNR also issued Permit Number PT-C-003-12 to the Approval Holder under s.17(2)(c) of the Ontario *Endangered Species Act, 2007* (the "*ESA*") to allow it to "damage and destroy the habitat of Eastern Whip-poor-will", as well as to "kill, harm, harass, capture, possess and transport" both Blanding's turtle and Whip-poor-will, resulting from the development and operation of the Project, under the conditions listed (the "*ESA* Permit").

22 The appeals for a hearing before the Tribunal were filed on January 4, 2013 pursuant to s. 142.1 of the *EPA*. Both APPEC and PECFN are citizen groups. The APPEC appeal focuses on the health issues under the first branch of the REA appeal test. PECFN appeal focuses on the environmental issues under the second branch of the REA appeal test.

23 PECFN argues that this Crown land on the south shore of Prince Edward County is a highly sensitive ecological area and the wrong location for a wind farm because it is particularly susceptible to serious and irreversible harm, and that as Crown land, it "is a resource that belongs to all Ontarians." PECFN submits that if wind turbines can be erected in this location, then they can be erected anywhere in Ontario. PECFN further submits that the proposed "mitigation technologies are untested, uproven and unreliable."

24 APPEC relies extensively on findings made in an earlier Tribunal decision, *Erickson v. Director (Ministry of the Environment),* [2011] O.E.R.T.D. No. 29 ("*Erickson*") regarding the harm to health branch of the REA appeal test, and argues that, in the present case, the evidence of persons suffering serious harm from other windfarms under a variety of conditions, combined with a Case Definition proposed by Dr. Robert McMurtry, leads to the conclusion that this Project will cause serious harm to the health of persons living in its vicinity, including a highly sensitive resident.

25 Wind Concerns Ontario ("WCO"), a participant, and the presenters Alban Goddard-Hill and Ian Dubin, oppose the Project at this location. The presenters Deborah Hudson and Don Chisholm support the Project at this location.

26 The Approval Holder and the Director argue that the appellants have not met their onus under the statutory test for a REA appeal, the Project will not cause serious harm to human health or serious and irreversible harm to plant life, animal life or the natural environment and that any potential harm can be mitigated.

27 Regarding the PECFN appeal, the Director submits that the issues raised by the appellant will be mitigated by the Approval Holder's adaptive management program and the *ESA* Permits. Regarding the APPEC appeal, the Director submits that there is no credible evidence that the alleged symptoms of the witnesses living near other wind farms have been caused by the turbines, and that "a 550 m setback to all receptors and a 40 dBA noise limit at all receptors protects the health of the public from serious harm."

28 Regarding the PECFN appeal, the Approval Holder argues there are 12 legal principles that it submits underly the statutory appeal test, which has not been met. Regarding the APPEC appeal, the Approval Holder argues that the appellant has not proven that other wind farms have caused serious harm to human health, nor that wind farms cause harm to human health at the regulated 550 m set-back and 40 dB(A) noise limit, nor that this Project will cause serious harm to human health.

29 The preliminary hearing was held on three separate dates in February 2013. Additional background information is contained in the order of the Tribunal dated March 1, 2013, in regards to the preliminary hearing.

30 The hearing began on March 4, 2013. It proceeded in two phases: first the hearing of the environmental issues under the second branch of the REA appeal test, and then the hearing of the health issues under the first branch of the test.

31 On March 5, 2013, the parties, the participant and the presenters, or their respective representatives, and the Tribunal panel went on a site visit of portions of the Ostrander Crown Land Block.

32 The PECFN appeal hearing took place over 24 hearing days and the APPEC appeal hearing took 16 days. The Tribunal heard from nine witnesses for the appellant PECFN, 15 for the appellant APPEC, 10 for the Director and 13 for the Approval Holder.

33 During the course of the hearing there were a number of motions, and other interlocutory matters, raised by the parties, and decided by the Tribunal. These are summarized as they are referred to in the decision.

34 The evidence was completed on June 7, 2013. The parties provided written submissions to the Tribunal on June 13, 2013, and made oral reply submissions in person on June 21, 2013 at Toronto.

35 Counsel for PECFN brought a motion on June 27, 2013 to allow further evidence under Rules 233 and 234 of the Tribunal's Rules of Practice ("Rules"). It is addressed at the end of these reasons under "Other Matters".

Issues

36 The issues are:

1: Whether engaging in the Project in accordance with the REA will cause serious harm to human health.

2: Whether engaging in the Project in accordance with the REA will cause serious and irreversible harm to plant life, animal life or the natural environment.

3: If the answer to either Issue 1 (a) or (b) is "yes", whether the Tribunal should revoke the decision of the Director, by order direct the Director to take some action, or alter the decision of the Director.

Relevant Legislation and Regulations

37 The relevant legislation and regulations are set out in Appendix A.

Discussion, Analysis and Findings

Issue 1: Whether engaging in the Project in accordance with the REA will cause serious harm to human health.

38 Throughout this section, reference to "the appellant" is a reference to APPEC.

Groundwork laid by Erickson v. MOE

39 In its opening statement, APPEC outlined how it would approach the test outlined in s. 145.2.1 of the *EPA*. The appellant noted that in *Erickson*, 25 expert witnesses were heard. Rather than re-calling those experts in this proceeding, the appellant took the approach that this case builds on the findings made in *Erickson*, and allows the panel to focus on the remaining issues. In particular, the appellant relies on four points that it argues arise from *Erickson*.

40 First, the appellant argues that Dr. Leventhall, an expert acoustician who testified on behalf of the approval holder in the *Erickson* hearing, accepted a list of health effects as resulting from "extreme annoyance". Paragraph 432 of *Erickson* reads as follows:

> 432 Dr. Leventhall was one of the authors of the AWEA/CanWEA Report. He stated that he agreed with the conclusions of the Report that there is no need to conduct any further study on the direct patho-physiological effects of wind turbine noise. He stated that the definition of direct

> patho-physiological effects comes from Dr. Pierpont's work (Pierpont 2009) and includes infrasound entering the body and vibrating the diaphragm or infrasound entering the ear and disturbing the vestibular system. He stated that annoyance is a completely different thing; it is a psychological effect which can induce physical problems due to high levels of stress. He stated that he accepted the symptoms that Dr. Pierpont described as wind turbine syndrome (sleep disturbance, headache, tinnitus, ear pressure, dizziness, vertigo, nausea, visual blurring, tachycardia, irritability, problems with concentration and memory, panic episodes) as the effects of extreme annoyance. He stated that they are largely somatoform disorders that occur when stress goes from your brain into your body and they occur in a very small number of people. Dr. Leventhall acknowledged that sleep disturbance is an adverse health effect. He stated that the conclusion in the AWEA/CanWEA Report that "sound from wind turbines does not pose a risk of hearing loss or any other adverse health effects in humans" was referring to direct effects on the body and he acknowledged that the words direct patho-physiological effects could be inserted in the conclusion to make it more accurate.

41 Thus, APPEC argues that the following health effects are known to be caused by extreme annoyance, which need not be proven in this case:

* Sleep disturbance
* Headache
* Tinnitus
* Ear pressure
* Dizziness
* Vertigo
* Nausea
* Visual blurring
* Tachycardia (heart palpitations)
* Irritability
* Concentration/memory problems
* Panic episodes

42 Secondly, the appellant argues that there was agreement in *Erickson*, as reflected at paragraph 640 of that decision, that the listed health effects are serious. The Tribunal noted in this regard that many of the medical conditions discussed were agreed to be serious, and that the debate is confined to whether the effects will result from the project:

> 640 In this case, there is apparent agreement that many of the medical conditions discussed by the witnesses are serious (the debate on those is, therefore, confined to whether they will result from the Project). It is, therefore, largely unnecessary to engage in an abstract discussion of the boundaries of "serious" in this case. There are several types of harm alleged by the Appellants that are clearly serious. The question is whether the Project will cause these types of harm, not whether they are serious. This is not to say that there is complete agreement on the appropriate categorization of the alleged harms raised by the Appellants. In fact, there is disagreement on the interplay between the concept of "annoyance" and "serious harm to human health". ...

43 The third point alleged is that the Tribunal in *Erickson* found at paragraph 819 that the appellants do not have to demonstrate the mechanism that is causing these effects. As a result, APPEC did not call evidence in this case to determine which mechanism, or which combination of them, is the operative one. Paragraphs 818 and 819 state:

> 818. One of the issues raised in the proceeding is whether the Appellants have to prove which mechanism(s) caused an effect or whether cause and effect is sufficient. It would seem that, when reviewing the test in the *EPA*, the key issue is whether the wind turbines will cause serious harm to human health. The mechanisms of how that harm occurs seem secondary to the finding of fact that the receptor will experience serious human health impacts resulting from a wind turbine operation.
>
> 819. For this reason, it is not necessary for the Tribunal to make a finding at this point in time as to whether noise from wind turbines is unique and different from other sources of industrial noise. ... For the purposes of this Decision, the Tribunal finds that the Appellants can attempt to satisfy

> the section 145.2.1(2) test even if there is uncertainty about the specific mechanism that causes the alleged health effects. ... What needs to be shown here, given the wording of the legal test, is that the effect is being caused by the Project, even if the exact mechanism is unclear.

44 Fourthly, the appellant argues that, with respect to causation, *Erickson*"advanced the state of the debate". The appellant submits that the Tribunal in *Erickson* accepted that wind turbines can cause harm if placed too close to homes, and that the debate has evolved to one of degree. Paragraph 872 reads:

> 872. While the Appellants were not successful in their appeals, the Tribunal notes that their involvement and that of the Respondents, has served to advance the state of the debate about wind turbines and human health. This case has successfully shown that the debate should not be simplified to one about whether wind turbines can cause harm to humans. The evidence presented to the Tribunal demonstrates that they can, if facilities are placed too close to residents. The debate has now evolved to one of degree. The question that should be asked is: What protections, such as permissible noise levels or setback distances, are appropriate to protect human health? ...

45 APPEC relies on *Domtar Inc. c Québec (Commission d'appel en matière de lésions professionnelles),* [1993] 2 S.C.R. 756 at paragraph 59, to highlight the importance of consistency in tribunal decisions.

46 The Approval Holder and the Director both accept the principle of persuasive case law, but argue that evidence should not be imported from one case into another, where the parties are different and had no opportunity to question or cross examine witnesses in the prior case. In any event, they argue that *Erickson* does not stand for the proposition that a causal link is no longer required. They argue that causation must be shown for APPEC to succeed in its appeal.

47 The Tribunal agrees that it is unnecessary to re-hear the same uncontested evidence at each and every REA appeal. For example, it is well accepted in the occupational safety and environmental health field, as noted by the Approval Holder's witness Dr. Robert McCunney, that chronic, high levels of noise (70-80 dB(A)) can cause physiological health effects. The World Health Organization ("WHO") Nighttime Noise Guidelines recognize that lower levels of audible noise can cause stress and disturb sleep.

48 It is a basic principle that legal conclusions from a tribunal decision are persuasive for a subsequent tribunal hearing, but not binding. The Tribunal also recognizes the importance of consistency in decision-making, especially where new legislation is beginning to be interpreted, such as with the REA appeals. The Tribunal should nevertheless be wary of relying on findings related to contested evidence from another case.

49 Dr. Leventhall testified for the approval holder in *Erickson*, and although originally on the witness list for the Approval Holder in this proceeding, he was never called. If the Approval Holder disagreed with how Dr. Leventhall's evidence was interpreted in the earlier decision, or wished to have him give different or updated evidence, it clearly had the opportunity to do so. The Tribunal therefore infers that Dr. Leventhall's evidence, as reflected in *Erickson*, was not contested.

50 The Tribunal accepts the findings in *Erickson*, which are unchallenged, that wind turbine noise can cause harm to human health if placed too close to residents. The Tribunal also understands *Erickson* to say that an appellant does not have to establish whether harm is caused by low frequency noise, infrasound, or some other mechanism; however, it is clear from the legal test in s.145.2.1 of the *EPA* that causation must be shown. That is, whether human health is being harmed through direct effects (i.e., audible noise) or indirect effects (i.e., infrasound, low frequency sound, severe annoyance, or by some other mechanism), the appellant must show that the alleged effects are being caused by the project, and by the project when operating in accordance with the REA.

51 The focus of the appellant's evidence in this appeal was on causation, and to establish that harm has been experienced at distances greater than the 550 m set-back provided for in the REA conditions.

Sub-Issue 1: Whether APPEC has established a causal link between wind turbines and human health effects

52 The appellant sought to establish causation in three ways: through testimony of 11 individuals who resided within 2 km of an operating wind turbine project in Ontario ("post-turbine witnesses"); through testimony of Dr. McMurtry, an expert witness, to make the medical link between illnesses suffered and turbine noise; and through testimony of pre-turbine witnesses who allege they are sensitive to noise and live "in the environs" (2041 m) of a proposed turbine.

a. Post-turbine witnesses from other wind projects

53 The post-turbine witnesses filed witness statements consisting of a completed questionnaire provided to them by counsel for APPEC, entitled Witness Information Form ("WIF"). The WIF was designed to elicit information relating to impacts the individuals believe were experienced due to proximity to wind turbines. A blank sample form is attached as Appendix F. Many witnesses also updated their WIFs prior to the hearing.

Interim Rulings

54 There was extensive discussion at the preliminary stages of the hearing regarding the necessity of disclosing the witnesses' medical records. Counsel for the appellant originally took the view that medical records of the post-turbine witnesses to support the allegations of health effects caused by turbine exposure were not relevant or necessary to the proceedings. Both the Approval Holder and the Director argued that medical records were necessary in order to cross examine the witnesses on their statements.

55 Following motions and lengthy discussions, the Tribunal made an oral ruling on March 6, 2013 that medical records of the post-turbine witnesses should be produced. The transcript of the Tribunal's oral ruling in this regard is attached as Appendix G. The Tribunal ordered that not less than half of all post-turbine witnesses to be called must produce medical documentation. Some of the witnesses were able to do so, and others were not. In an oral ruling on May 7, 2013, the Tribunal determined that sufficient medical documents had been produced such that 11 post-turbine witnesses could be called pursuant to the March 6, 2013 Order.

56 In addition, the witnesses completed 175 responses to written interrogatory questions which were put to them pursuant to a consent agreement among the parties. The interrogatories were not entered into evidence but formed the basis for cross examination.

57 Each post-turbine witness testified and was subject to cross-examination. The Approval Holder and Director raised issues around the neutrality of the witnesses, given that some have ongoing law suits against the turbine companies in their area and some have spoken out publicly against wind turbines. Nevertheless, the Tribunal finds that each witness testified in a forthright manner to the best of his or her ability and recollection, and finds all of the post-turbine witnesses to be credible in reporting their symptoms, and how their symptoms negatively impact their quality of life.

58 The witnesses testified to a wide array of health problems, ranging from tinnitus and headaches to diabetes and high blood pressure, to severe psychological conditions.

59 An issue arose as to whether these "lay witnesses" (i.e., persons not medically trained) could give evidence as to diagnoses they had been given, or give an opinion as to what medical condition they are suffering from. As noted by the Tribunal in *Kawartha Dairy Limited v. Director, Ministry of the Environment*, 2008 CarswellOnt 8830, confirmation of medical conditions requires the diagnostic skills of a qualified health professional. A separate question, however, is what reliance the Tribunal should place on post-turbine witnesses' beliefs as to the cause of their health concerns.

60 In short, the witnesses were permitted to testify as to their symptoms (i.e., what they felt and experienced), and their understanding of what their doctors told them. They provided medical records in many cases, which noted dates and times of visits, the observations of the health professional, and prescriptions. In a very few cases, a letter from a specialist was provided which reflected a diagnosis.

61 Another question that arose in the hearing was how the Tribunal would consider the information recorded in the medical records.

62 Tribunals are empowered to accept hearsay evidence under the *Statutory Powers Procedure Act* ("*SPPA*"), although untested evidence is not generally given the same weight as that which is tested under cross examination. The notes and records of medical professionals included in the medical records produced, are hearsay evidence.

63 The Tribunal heard a motion related to whether the documents should be admitted for "the truth of their contents", or whether they should be admitted as "business records", akin to s.35 of the *Ontario Evidence Act*. The Approval Holder and the Director consented to have the documents relied on as business records, but not for the truth of their contents with respect to medical diagnoses, akin to s.55 of that *Act*. The appellant argued they should be entered for the truth of their content, given the need for efficiencies in a time-restricted REA hearing and the broad discretion given to a tribunal under the *SPPA* with respect to evidence.

64 The Tribunal held that it would accept the medical records into evidence as relevant information. Where a diagnosis was made, however, the parties should be given an opportunity to cross examine the health professional before the Tribunal would be able to accept the document for the truth of its contents. The transcript of the Tribunal's oral ruling on May 21, 2013 in this regard is attached as Appendix H.

65 Some records include notes by medical professionals that the individual raised the issue of living in the environs of wind turbines, as a possible reason for their complaint. Such notes are considered to be a record of the interaction between medical professional and patient, akin to the business records provision under the *Evidence Act*.

66 In no case, however, did a notation include a "diagnosis" by a medical professional that an illness resulted from exposure to wind turbines. This is not surprising as there is no case definition currently for "wind turbine syndrome" or anything of that nature, as acknowledged by APPEC's expert witnesses, referenced below. No health professionals were called for cross examination of the records.

67 Counsel for the Approval Holder and the Director used the medical records to cross-examine the post-turbine witnesses, in order to test the validity of their assertion that relevant symptoms began or were exacerbated following the installation of a wind project, and to determine whether the causes of the symptoms were explored. The Tribunal wishes to note that it was important to the value of the oral evidence of the post-turbine witnesses, when it was able to be tested with documented histories.

Testimony of post-turbine witnesses

68 The Tribunal heard from 11 post-turbine witnesses. The following chart notes the name of the Project closest to each of the post-turbine witnesses, and the approximate distance from their home to the closest turbine, as confirmed by them in their testimony.

Post-turbine witness	Project name	Distance to closest turbine (m)
Witness 1	Clear Creek, Frogmore & Cultus	526
Witness 2	Clear Creek, Frogmore & Cultus	433
Witness 3	Port Alma	641
Witness 4	Wolfe Island	1102
Witness 5	Wolfe Island	1154
Witness 6	Talbot	1776
Witness 7	Talbot	1066
Witness 8	Talbot	737
Witness 9	Melancthon	351
Witness 10	Melancthon	481.8
Witness 11	Kent-Breeze	1110

69 As noted above, the witnesses were cross-examined through use of their medical records, where available. In some cases, the documents confirmed that the individuals had raised symptoms such as headaches and dizziness with their doctors, and asked for testing as to whether they might be caused by the turbines. In a number of cases, the ques-

tioning and close examination of the medical records revealed inaccurate recall of pre-existing health conditions, or the onset of conditions. Examples include the onset of high blood sugar or high blood pressure. Dates of onset or aggravation of conditions are important because APPEC argues they were caused by the turbines.

70 The Tribunal wishes to emphasize that it found no attempts by any witness to mislead the Tribunal. Rather, expert witnesses including Dr. Cornelia Baines and Dr. Kieran Moore described the common phenomenon of "recall bias", in which a person misremembers the timing or severity of past symptoms. It is a known hazard in designing reliable epidemiological studies. Dr. McCunney also spoke to this common phenomenon. The Tribunal has no difficulty finding that all the witnesses were credible, and some of the health conditions they described could certainly be described as seriously impacting their quality of life. The issue whether those health conditions were caused by wind turbines is the key question before REA appeals.

b. Dr. McMurtry's Case Definition

i) Description of Case Definition and weight to be given it

71 Dr. Robert McMurtry was called as an expert witness by APPEC. He was qualified to give expert opinion evidence as a physician and surgeon with experience in the delivery of health care, health care policy and health policy.

72 The Approval Holder and the Director objected to the qualification of Dr. McMurtry and to the admissibility of his evidence. While the Approval Holder and Director took no issue with Dr. McMurtry's expertise as requested, they argued that it was irrelevant to the issue to be determined by the Tribunal. Specifically, he is an orthopedic surgeon, not an epidemiologist or an expert in any of the illnesses allegedly caused by exposure to wind turbines. Secondly, they argued the evidence should be inadmissible as Dr. McMurtry could not be neutral and unbiased as required of an expert witness under the Tribunal's Practice Direction, due to involvement in wind turbine issues as an advocate. Dr. McMurtry is a former Director of APPEC.

73 The Tribunal found that, despite Dr. McMurtry's involvement in wind turbine issues in general and with APPEC in particular, he could be qualified as an expert. The reasons include that health impacts of wind turbines is an emerging area of science with few experts at the ready to testify; that Dr. McMurtry has engaged with more individuals alleging these health effects than anyone in Canada; that Dr. McMurtry testified as an expert in the *Erickson* hearing; and due to his demonstrated personal integrity as an advocate of public health. The Tribunal found that issues of bias would go to weight, rather than admissibility of the evidence. With respect to the area of expertise, the Tribunal found Dr. McMurtry to be an expert in the area requested, and that it was not able to make a determination on relevance at the qualifications stage in the proceeding. An excerpt from the transcript of the Tribunal's oral ruling in this regard is attached as Appendix I.

74 Although Dr. McMurtry's witness statement from the *Erickson* proceeding was referenced in his current witness statement and included in his book of documents, the focus of Dr. McMurtry's evidence in this proceeding centred on his proposed case definition as described in his article "Toward a Case Definition of Adverse Health Effects in the Environs of Industrial Wind Turbines: Facilitating a Clinical Diagnosis", which was published in the peer-reviewed journal *Bulletin of Science, Technology and Society*, 2011 31:316.

75 The Abstract for that article notes:

> This article identifies the need to create a case definition to establish a clinical diagnosis. A case definition is proposed that identifies the sine qua non diagnostic criteria for a diagnosis of adverse health effects in the environs of industrial wind turbines. Possible, probable, and confirmed diagnoses are detailed. The goal is to foster the adoption of a common case definition that will facilitate future research efforts.

76 The Case Definition of Adverse Health Effects in the Environs of Industrial Wind Turbines ("AHE/IWT") ("Case Definition") is a central feature of APPEC's case. Dr. McMurtry testified that the Case Definition is intended to be used by primary health care practitioners, to identify whether a patient is suffering from AHE/IWT. It was not designed to be used in a court or tribunal. The article goes through possible, probable, and confirmed diagnoses.

77 The article notes the following as *Possible adverse health effects*:

> Report of a change in health status by people living within 5 km of a wind farm installation. Further confirmation is required to validate or exclude AHE/IWT by establishing a medical history that satisfies the criteria identified under "Probable Adverse Health Effects" below.

78 Under *Probable adverse health effects*, the article lists first-order, second-order and third-order criteria.

79 The Case Definition requires that all four of the following first-order criteria be present:

a) Domicile within 5 km of industrial wind turbines (IWT)
b) Altered health status following the start-up of, or initial exposure to, and during the operation of, IWTs. There may be a latent period of up to 6 months
c) Amelioration of symptoms when more than 5 km from the environs of IWTs
d) Recurrence of symptoms upon return to environs of IWTs within 5 km.

80 At least three of the four listed second-order criteria must occur or worsen after the initiation of operation of IWT:

a) Compromise of quality of life
b) Continuing sleep disruption, difficulty initiating sleep, and/or difficulty with sleep disruption
c) Annoyance producing increased levels of stress and/or psychological distress
d) Preference to leave residence temporarily or permanently for sleep restoration or well-being.

81 The Case Definition requires that at least three of 18 third-order criteria occur or worsen following the initiation of IWTs. The third-order criteria are divided into 6 systems: otological and vestibular, cognitive, cardiovascular, psychological, regulatory disorders, and systemic.

82 Under *Confirmed adverse health effects*, the article notes:

> The confirmation of AHE/IWT is achieved by a clinical evaluation and physiological monitoring of individuals during exposure to IWT sonic energy or an accurate facsimile (recording or other imitative source of IWT sound). Ideally, sleep studies should be carried out in the home of people experiencing AHEs. The complex physiological monitoring equipment required for a sleep study is not readily made mobile. Accordingly, sleep studies need to be carried out in an established clinical sleep laboratory with a source of sonic energy that accurately reflects the person's exposure to IWTs.
>
> The process may be simpler once controlled studies comparing possible victims with a nonexposed matched population are carried out. These studies could help determine the core physiological change(s) that is (are) likely occurring to those who live in the environs of IWTs.
>
> The need to rule out alternate explanations is the responsibility of the licensed clinician. While adherence to the criteria has resulted in no false positive diagnosis to date further validation is required.

83 Lastly, the article includes a section on "Differential Diagnosis". It considers three other possible explanations for the listed symptoms: the wind itself; a stressful home environment; and psychological issues and/or mood disorders that may be simultaneously or independently present. The article notes that for each of those explanations, there is a lack of correlation of the onset of symptoms with the IWTs starting up, or symptom improvement when away from the turbines, or a revealed preference for sleeping away from home. The article concludes that "Apart from the foregoing, there are very few if any imitative AHEs that can meet the three orders of criteria outlined above. However, the author invites critical commentary that might indicate a different conclusion."

84 Dr. McMurtry explained that the conditions are sequential; that is, if the conditions listed in the first and second-order criteria are not met, one would not proceed to consider the third-order criteria. In response to the concern that the Case Definition contains a multiplicity of symptoms, Dr. McMurtry cited the example of adverse drug reactions reporting ("ADR") where there is a problem with ADR reports capturing only a tiny fraction of the total side effects experienced by patients. He noted that "the implications for the (under)reporting of adverse health effects in the environs of IWT is obvious". While he agreed there are numerous symptoms listed under the third-order criteria, Dr.

McMurtry commented that they must not be taken to the exclusion of first and second-order criteria: "Taken alone the third-order criteria are unhelpful in establishing a diagnosis."

85 He testified that the first-order criteria are not self-reported. Rather, they would arise in discussions between an individual and the primary health care practitioner, such as a family doctor or chiropractor.

86 He also explained that the second-order criteria are not symptoms, but a "history of" these criteria. While Dr. McMurtry acknowledges that the histories such as sleep disturbance are common in the population, he notes they are only relevant if they started or worsened after a wind turbine project began. If "quality of life" or "stress" are raised, they should lead to further discussion with the primary health practitioner.

87 With respect to the third-order criteria, Dr. McMurtry testified that it is not a complete list. The conditions listed in the article were chosen because they are the most frequently occurring within the symptoms reported among individuals he has spoken to, and complaints made to a self-reported telephone survey he is familiar with.

88 Dr. McMurtry testified that the 5 km distance noted in the article is not a recommended set-back for wind turbines; rather, it is mentioned because the Case Definition is intended to be used into the future, and turbines are getting larger all the time with a correspondingly higher sound energy output. This number was arrived at through consultations with various people, including those who allege AHEs, medical professionals and, to get an idea of legal ramifications, Mr. Gillespie. Dr. McMurtry testified that he believes a 2 km setback would be appropriate to protect the health of residents, for the current size of turbines. This is also the setback recommended by Wind Concerns Ontario.

89 Dr. McMurtry acknowledged that the Case Definition has not yet been validated.

90 He agreed that two types of studies are still needed: laboratory tests that can confirm the diagnosis (he noted work being done by researchers to create a device that would imitate the signature sound of a wind turbine, at which point testing could take place in the home), and epidemiological studies to determine the incidence of AHE/IWT in the general population.

91 Dr. McMurtry testified that whether a person's response to IWT is psychological or truly physical, is a false dichotomy. He referred to the WHO which has noted that this separation is a fiction.

92 In his reply to criticisms by other expert witnesses that there was no plausible biological mechanism for AHE/IWT, Dr. McMurtry cited the 2010 report by HGC Engineering, led by Brian Howe, commissioned by the MOE. The HGC Report noted:

> The audible sound from wind turbines, at the levels experienced at typical receptor distances in Ontario, is nonetheless expected to result in a non-trivial percentage of persons being highly annoyed. As with sounds from many sources, research has shown that annoyance associated with sound from wind turbines can be expected to contribute to stress related impacts in some persons.

93 Dr. McMurtry cites literature observing that chronic stress related impacts are possible on all body systems in some sensitive people.

94 He further cites the WHO 2011 document "*Burden of Disease from Occupational Noise (Quantification of healthy life years lost in Europe)*" which notes at p. xvii:

> There is sufficient evidence from large-scale epidemiological studies linking the population exposure to environmental noise with adverse health effects. Therefore, environmental noise should be considered not only as a cause of nuisance but also as concern for public health and environmental health.

ii) Application of Case definition to post-turbine witnesses

95 With respect to the application of the proposed Case Definition in this case, Dr. McMurtry reviewed all of the WIFs completed by post-turbine witnesses who were to be called by APPEC. Dr. McMurtry concluded, as per his witness statement of January 24, 2013, that in all cases "the symptoms described by the individual witnesses meet the case definition of adverse health effects in the environs of Industrial Wind Turbines ("IWTs") as defined in my article. ..." He added that there were four individuals (only three of whom testified in this case) who "did not provide sufficient information in their Witness Information Form or Supplementary Witness Information Form to make a determination on all

listed criteria, however, their symptoms are consistent with the case diagnosis". In oral testimony, Dr. McMurtry noted that he had since received further information regarding the three witnesses in question, and he found they also meet the criteria.

96 Dr. McMurtry acknowledged on cross-examination that he did not "diagnose" any of the post-turbine witnesses as a result of the information he received from their WIFs. He had more information for two individuals than for the others because he saw them in his medical practice as an orthopedic surgeon. He stated, however, that he would make the determination for all the post-turbine witnesses, that their "findings are compatible" with the Case Definition. He acknowledged that none of the post-turbine witnesses have a "confirmed" diagnosis by these criteria.

97 Dr. McMurtry noted that it is not his custom to make a diagnosis in this fashion; however, what has happened here is out of the ordinary. He said that the individuals were scrutinized and cross-examined by legal counsel for both sides. He testified that as a result, the process that has emerged in this hearing is more vigorous than he would use in his practice.

98 Dr. McMurtry noted that he does not use the term "wind turbine syndrome", which has been used in articles in the past to denote impacts from wind turbine sound energy on the inner-ear, although this is unproven. He therefore avoids this diagnostic category. Dr. McMurtry testified that he does not profess to know the pathway by which people are experiencing adverse health effects.

iii) Criticisms of the Proposed Case Definition and its application

Dr. Kieran Moore

99 Dr. Kieran Moore is the Associate Medical Officer of Health for Kingston, Frontenac, Lennox & Addington. He testified on behalf of the Director. He was qualified to provide expert opinion evidence as a physician with expertise in family and emergency medicine, public health and preventative medicine.

100 Dr. Moore testified as to Dr. McMurtry's proposed Case Definition, what use a physician could make of the WIFs and medical records provided by the post-turbine witnesses, and whether the Ontario Guidelines that require wind turbines to be set back 550 m from a receptor are protective of public health.

101 Dr. Moore summarized at paragraph 100 of his witness statement the medical conclusions that he felt could be reached after reviewing the WIFs and medical records of the post-turbine witnesses:

> In summary, it is a challenge to come to any scientific conclusions regarding the witness information provided, given the subjective nature of the symptoms, the limited documentation of overall exposures and limited medical histories provided. The reported complaints are very common clinical conditions, especially those that refer to depression, sleep disorder, vertigo or dizziness, as documented by the prevalence study described above. In fact, this would be a normal list of patients presenting in a family doctor's office anywhere in Ontario, given the high prevalence of these symptoms in our population. Many witnesses document significant medial pathology that was present before the implementation of the wind turbines. The information only includes a very limited set of data for evaluation. More complete records and further investigation of underlying medical and social problems is required. Other factors can be predisposing to these subjective complaints, such as age, gender, marital status, employment status, education; income, health insurance coverage, nutrition; social stresses and pre-existing medical and psychiatric problems.

102 Dr. Moore noted at paragraph 121 that "This submission of witness information forms is a very small sample of the total population exposed to noise from wind turbines in Ontario. This sample may have significant recall, reporting, interview, selection and exclusion biases".

103 Dr. Moore outlined some common side-effects to common medications, many of which have been prescribed for a number of post-turbine witnesses, and which produce symptoms among those in Dr. McMurtry's third-order criteria.

104 He also noted that many of the chronic conditions listed by the post-turbine witnesses wax and wane, which could explain temporary improvement or deterioration of symptoms by the witnesses, which they may subjectively associate with being close to or away from the turbines.

105 Dr. Moore testified that "Hill's criteria" are the most widely accepted guidelines that have been developed to enable a critical evaluation of evidence from epidemiological studies to infer a causal relationship. Hill's criteria include the strength of association, consistency, specificity, temporality, biological gradient, plausibility, coherence, experimental evidence, and analogy.

106 Dr. Moore testified that the MOE Guidelines require a minimum setback for wind turbines of 550m, which is intended to limit sound level at the nearest residence to 40 decibels, in the "A" weighted scale ("dB(A)"). Dr. Moore noted that this limit is consistent with the WHO Night-Time Noise Guideline of 40 dB(A) for the protection of human health.

107 Dr. Moore concludes, on his review of the existing scientific evidence, that:

> In my opinion, appropriate evidence-based regulations to guide industry and protect the population from any significant exposure or harm from noise from wind turbine shave been put in place. To date, the scientific literature does not provide any convincing evidence of health effects, other than annoyance and indirect health effects, at current regulated setbacks and sound levels in Ontario. While a strong relationship has been found between annoyance and being able to hear the wind turbines, a strong relationship has also been found between annoyances and being able to see the wind turbines. This finding suggests it may not the noise of the wind turbines causing the alleged health problems.

Dr. Cornelia Baines

108 Dr. Cornelia Baines is a Professor Emerita in the Dalla Lana School of Public Health at the University of Toronto, and a Fellow of the American College of Epidemiology. Dr. Baines was qualified to give opinion evidence as a physician-epidemiologist with special expertise in the design, measurement, and evaluation of research studies.

109 Counsel for APPEC raised an issue with respect to the neutrality of Dr. Baines, given her history of testifying on behalf of wind turbine proponents. As with the other witnesses, the Tribunal found such arguments would go to weight rather than admissibility.

110 Dr. Baines' criticism of the idea that one could prove serious harm to human health through the post-turbine witness' experience is summed up in the phrase: "the plural of anecdote is not data". In other words, a small group of persons self-reporting does not give a reliable sample upon which one can rely to draw broader conclusions.

111 She opines at paragraph 10 of her witness statement that "the most compelling evidence to prove that 'serious' adverse health effects are caused by wind turbines would be the demonstration that the complaints that have been documented by turbine opponents are either totally different or, if not different, greatly in excess as compared to complaints suffered by the general population." She states this has not been done.

112 Dr. Baines raised the possibility that the large variety of illnesses reported by wind turbine opponents from exposure to wind turbines may be psychogenic. She stated that psychogenic diseases are physical illnesses that stem from emotional or mental stresses. She testified they may also arise from prior expectations, and in this regard she referenced a recent research paper from Australia, Chapman et el., "Spatio-temporal differences in the history of health and noise complaints about Australian wind farms: evidence for the psychogenic, "communicated disease" hypothesis" (Submitted for publication).

113 Dr. Baines elaborated on the seven relevant criteria to demonstrate causation: temporal relationship between cause and effect; strong association between cause and effect; specificity; constancy (i.e., the effect reliably follows the cause); biological plausibility; dose-response effect; and reversibility. In Dr. Baines' view, none of the seven criteria are satisfied in this case.

114 Dr. Baines discussed the prevalence of the symptoms reported in the proposed Case Definition, in the general population. She notes that a recent poll by the US National Sleep Foundation, with 1,506 respondents, found that

> 75% experience insomnia, snoring, sleep apnea or restless legs syndrome a few nights a week or more, 33% of those polled experience at least one insomnia episode every night or almost every night and a further 21% have these symptoms a few nights a week.

115 She quotes other studies that show 51.7% prevalence of chronic diseases in the general population, several of which are included in the proposed Case Definition such as high blood pressure and diabetes. In short, she states that all of the symptoms listed in the proposed Case Definition are very prevalent in the general population, and many increase with age.

116 Dr. Baines lists the symptoms reported in the WIFs, and concludes "the reality of these symptoms is not disputed. What is disputed is that the symptoms are caused by wind turbines."

Dr. Robert McCunney

117 Dr. McCunney is a medical doctor, board certified in occupational and environmental medicine and a research scientist at the Massachusetts Institute of Technology Department of Biological Engineering. Dr. McCunney co-authored a 2009 review of the peer-reviewed scientific literature with respect to wind turbines and human health (Colby et al, 2009). Dr. McCunney was qualified to give opinion evidence as a medical doctor, specializing in occupational and environmental medicine with particular expertise in health implications of noise exposure.

118 Dr. McCunney comments that the proposed Case Definition was published in a journal with a low influence rating, and which is not indexed in the USA National Library of Medicine's database known as PubMed.

119 Dr. McCunney notes that, once the first order criteria are met, "there are 72 different combinations of symptoms that would result in a 'diagnosis' of AHE/IWT. These numerous combinations reflect a lack of precision and sensitivity in the case definition". In addition to the lack of precision, Dr. McCunney also believes the Case Definition lacks "biological plausibility" for a large number of the listed symptoms.

120 Dr. McCunney notes that in the evaluation of any potential exposure-related illness, it is critical to define the exposure and specify how it was measured or estimated. In this case, the exposure is to wind turbine noise. However, rather than including an objective exposure metric such as noise measurements or scientifically credible estimates, he notes, the Case Definition proposes the exposure metric to be "living within 5 km of a wind turbine". Dr. McCunney believes this metric is too imprecise and "sets the stage for false positive assessments", and appears to be arbitrary and not based on any specific scientific references. In any event, distance from a wind turbine is an imprecise measure of noise, which is essential.

121 In addition, he testified that the Case Definition overlooks the importance of assessing dose-response, "a fundamental principle in occupational and environmental medicine in evaluating causality".

122 Dr. McCunney listed the six types of scientific studies that can be done, one of which is a case series. He notes that case series are not generally used to draw causal connections, citing the guidelines of the International Agency for Research on Cancer, an agency of the WHO.

123 Dr. McCunney also notes that the Case Definition has not been validated.

124 With respect to making any conclusions about the post-turbine witnesses, Dr. McCunney testified that he would have to do a physical exam and take a case history before making a diagnosis. He testified that, from his review of the existing literature, it has not been credibly established that wind turbines cause adverse health effects.

c. Noise Guidelines and set-back distances

Dr. Robert Thorne

125 Dr. Thorne testified on behalf of the appellant with respect to noise. He was qualified as an expert in environmental health in relation to acoustics and psycho-acoustics. Acousticians measure sound, while psycho-acousticians assess human perception of sound, which they may perceive as noise.

126 Dr. Thorne's opinion is that "individuals, when exposed to wind farm noise and wind turbine generated air pressure variations, will more likely than not be so affected there is serious harm to human health." Dr. Thorne refers to the WHO definition of health, which is "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."

127 More specifically, he concludes that an outdoor environment characterised by fluctuating noise from wind turbines with sound levels 32 dB(A) or above, or an indoor environment characterised by fluctuating noise from wind turbines with sound levels 22 dB(A) or above, will more likely than not seriously harm individuals. Dr. Thorne's view is

that, depending on room construction, there may be an additive effect inside such that the levels in some frequencies can actually be louder inside than outside.

128 He had no criticisms of the Helimax Report with respect to the proposed Project. Rather, he agreed with a concluding observation by Dr. Leventhall in his witness statement (who ultimately did not testify): "The problem is not what you hear, it is what you feel about what you hear".

129 Dr. Thorne's opinion is that wind turbine noise is unique and has effects on some people at a lower decibel threshold than for other types of noise, such as general industrial, ventilation or transportation noise. Dr. Thorne testified that the characteristics of the sound produced by wind turbines, such as "whoosh" and "thump" as the blade passes the tower, or a "rumble thump" sounding "like a boot in the dryer" when the blades turn in the wind to re-align, can be described generically as "amplitude modulation". He notes that modulation may be more pronounced in certain sound level bands. This is the sound, he suggests, that wakes people up at night. Dr. Thorne noted that there is not yet a good objective measure for the character of audible turbine sound.

130 Dr. Thorne noted that Dr. Werner Richarz, who testified on behalf of the Approval Holder, agreed that amplitude modulation occurs in wind turbine sound, which he quantified at approximately 1% of the time. Dr. Thorne accepts the number of 1%.

131 Dr. Thorne bases his opinion on a study he conducted in January 2012, in which he recorded noise levels and health effects at two wind farm locales in New Zealand and four wind farm locales in Australia. Dr. Thorne noted that the results of his study, which involved 23 subjects and 2 controls, "suggest that the individuals living near the wind farms of this study have a degraded Health-Related Quality of Life through annoyance and sleep disruption and that their health is significantly and seriously adversely affected (harmed) by noise." He acknowledged that this was essentially a pilot study.

132 Dr. Thorne testified that his working hypothesis is that "Adverse health effects are experienced by sensitive individuals due to modulating air pressure variations broadly measured in the 1 Hz to 80 Hz and 160 Hz third octave bands".

133 Dr. Thorne commented on the WHO Night-Time Noise Guidelines of 40 dB(A), in noting that they are guidelines only, and apply to all types of noise. Dr. Thorne believes wind turbine noise is more annoying due to its fluctuation.

134 The Director argues that Dr. Thorne's study should not be relied on, as it was too small to make any conclusions, the group was far too diverse, it was methodologically unsound, and there was no information as to the percentage of the general population that the subjects represented.

135 The Director also argues that the sound attenuation from an average Canadian home, which according to Dr. Richarz ranges from 15-30 dB(A), would reduce the indoor sound level to that recommended by Dr. Thorne [40 dB(A) outside would result in 10-25 dB(A) inside, after attenuation].

Dr. John Harrison

136 Dr. John Harrison testified on behalf of APPEC in reply evidence. Dr. Harrison is a physicist who was qualified as an expert in physics with knowledge of acoustics, noise and sound.

137 He reinforced Dr. Thorne's point regarding amplitude modulation. He testified that when turbines operate in a large wind speed gradient, the blade angle cannot be optimum for both the high wind speed at the top and the low wind speed at the bottom of the blade swept area; hence, the amplitude modulation is enhanced by 5-8 dB(A), and in extreme cases by up to 15 dB(A).

138 Dr. Harrison disagreed with the testimony of Denton Miller on behalf of the Director, that the MOE uses conservative assumptions in its noise assessment. He pointed to the ground parameter and the margin of error used by the MOE as examples where the numbers were not conservative.

Dr. Warner Richarz

139 Dr. Warner Richarz testified on behalf of the Approval Holder. He has a doctorate in aerospace engineering and was qualified as an expert in acoustics and the assessment of wind turbine noise.

140 Dr. Richarz notes in his witness statement that "there is no doubt that high levels of sound pressure are detrimental to many aspects of our well-being." With respect to Dr. Thorne's evidence, he testified that there is no physical basis why a sound pressure level of 22 dB(A) indoors would impart the identical dose to a listener as 32 dB(A) outdoors.

141 Dr. Richarz gave evidence that the sound levels likely to be experienced by the nearest residences to the Ostrander Point turbines will be well below 40 dB(A).

Tribunal findings on Sub-Issue 1 (Causation)

142 The Tribunal finds that it cannot rely on the testimony of the post-turbine witnesses to make the link between their health complaints and the wind turbines. The reasons for this finding include:

- A finding that wind turbine noise causes harm to human health would be a medical conclusion. The panel has no medical expertise and must therefore rely on experts in the field (see *Kawartha Dairy, supra*).
- The Tribunal accepts the expert evidence by Doctors Baines, Moore and McCunney that subjective recall and reporting has been shown to be unreliable in scientific studies. The Tribunal observes that subjective reporting by the post-turbine witnesses of both onset or aggravation of symptoms, and association with turbine noise, was shown to be unreliable in this case on at least four occasions:
    * The MOE provided noise screening tests for one witness. It was established that, on 6 occasions out of 15 complaints to the turbine company of adverse health effects, the turbines were off;
    * Another witness sent a letter thanking the energy producer for turning off the turbines for three days, during which she had respite from adverse health effects. It was later confirmed the turbines were in operation those days;
    * Another witness testified to increased blood sugar levels after the turbines were activated, but the medical records demonstrate that the levels actually went down;
    * Another witness alleged that the turbines were causing him to suffer sleep disturbance, but a sleep study later demonstrated he had sleep apnea.
- The post-turbine witnesses' testimony was not accompanied by noise level measurements, such that the Tribunal could draw any conclusions as to whether they were experiencing symptoms at sound pressure levels below 40 dB(A), i.e., the Noise Guideline limits. For two witnesses, the MOE attended their homes pursuant to the 2011 Compliance Protocol and made noise measurements. However, the measurements proved inconclusive as to noise level limits, and require further testing.
- As would be required under Dr. McMurtry's proposed Case Definition, health care professionals have not ruled out other causes for the post-turbine witnesses' symptoms.

143 With respect to the proposed Case Definition of AHE/IWTs, the Tribunal finds that it is a work in progress. It is a preliminary attempt to explain symptoms that appear to be suffered by people with whom Dr. McMurtry is familiar, who live in the environs of wind turbines. Dr. McMurtry's case definition has admittedly not been validated; thus there is currently no grouping of symptoms recognized by the medical profession as caused by wind turbines.

144 Other drawbacks are: it is vague with respect to distance within which the effects may be felt, and there is no indication as to prevalence of symptoms within exposed individuals. There are additional weaknesses in its application, as health professionals have not ruled out other causes and no one has actually been diagnosed with anything.

145 In conclusion, the Tribunal finds that, taking the post-turbine witnesses' testimony and all of the expert evidence and Dr. McMurtry's proposed Case Definition together, APPEC has not established that the alleged health effects are caused either by direct exposure to wind turbine noise, or indirectly through some other mechanism.

Sub-Issue 2: Whether engaging in the Ostrander Point project in accordance with the REA will cause serious harm to human health

146 Section 145.2.1 of the *EPA* stipulates the Tribunal shall consider only whether engaging in the renewable energy project **in accordance with** the renewable energy approval will cause serious harm to human health.

147 The Approval Holder and Director argue that the Project must comply with all the REA conditions which include regulated setbacks and the Noise Guideline, and as a result will not cause serious harm to human health. The appellant argues that the Project will cause serious harm to human health, despite complying with the regulated setbacks and Noise Guideline.

a. Noise Impact Assessment Report (Helimax report)

148 Shant Dokouzian testified on behalf of the Approval Holder and presented the Noise Impact Assessment for Ostrander Point Wind Energy Park ("NIA"), of which he was a co-author, prepared by Helimax Energy Inc. and dated July 2010.

149 Mr. Dokouzian is a civil engineer with the current position of Team Leader of Project Development Services for GL Garrad Hassan, "the world's largest renewable energy consultancy". At the time the NIA Report was written he was employed by Helimax, which was subsequently bought by GL Garrad Hassan. Mr. Dokouzian was recognized by the Tribunal as an expert in noise assessments for wind farms.

150 There is no disagreement that the proposed project is in an area considered under the MOE's *Noise Guidelines for Wind Farms*, October 2008 ("Noise Guidelines") as Class 3, which is defined as a "rural area with an acoustical environment that is dominated by natural sounds having little or no road traffic". Under the Noise Guidelines, sound level limits for a Class 3 area vary according to the wind speed, as outlined in the following chart (Table 3-1 from the NIA, p.7):

		Wind Speed (m/s)				
		6	7	8	9	10
Class 3 Receptors	Wind Turbine Noise Criterion NPC-232 [dB(A)]	40	43	45	49	51

151 Wind farm noise modeling is done using the international standard ISO 9613-2 as a model that propagates sound outdoors. Parameters are input into the computer model to attenuate sound in terms of distance, atmospheric and ground attenuation, and environmental effects.

152 Under the MOE Noise Guidelines, a "point of reception" can be a permanent or seasonal resident, and includes vacant lots. The noise limits do not apply to participating receptors, which means properties under contract with the wind project. The precise definition is noted below.

153 The noise modelling done by Helimax according to the ISO 9613 standard concludes that the noise produced by the turbines was within the acceptable limits for all identified Points of Reception for the Ostrander Point Project, within 1500 m of one or more turbines for wind speeds of 6, 7, 8, 9 and 10 m/s. These conclusions were not challenged.

154 Counsel for the Approval Holder notes that some of the receptors identified are "vacant lots" or "seasonal residences". The Noise Guidelines draw no distinction between a vacant lot and a year-round residence, however, and the Tribunal has had no regard to the permanence of the receptors currently identified.

155 "Camping grounds" are included in the Noise Guidelines as a receptor. It is acknowledged that this project proposal is entirely within the Ostrander Point Crown Land Block, and camping is permitted on Crown Land. This issue will be dealt with below, under "public safety".

b. Presenter Dr. Goddard-Hill

156 Dr. Goddard-Hill was granted presenter status at the preliminary hearing in this matter, to give evidence on both portions of the appeal; impact on human health and on plant life, animal life or the natural environment. He is a

family doctor living and working in the area, and was qualified on consent of the parties as an expert in family medicine.

157 Dr. Goddard-Hill's presentation made the link between stress and sleep disturbance, to increased risk of drowsiness while driving, to the increased possibility of fatal vehicle accidents due to the driver's lack of sleep. In this regard, he sought to show a causal link between serious harm to human health and turbine noise.

158 Dr. Goddard-Hill's position is that it is not possible to make fully informed decisions regarding the risk posed by wind turbines, without the health studies that are currently underway. He therefore submitted that the Tribunal should deny the REA application on health grounds, until the health effects are understood.

c. APPEC evidence: Pre-turbine witnesses

159 Two individuals who live in the environs of the proposed Ostrander Point Project testified in the proceeding. They were referred to as "pre-turbine witnesses". The couple lives in a converted turn-of-the-century barn, 2041 m from the closest proposed turbine. One individual (the "sensitive pre-turbine witness") suffers from vertigo and has highly sensitive hearing, which she has learned to manage over her lifetime by taking early action when she feels an attack of vertigo coming on. Both individuals expressed concern that the Project will seriously harm their health.

160 The appellant argues that people residing within 5 km of the project will suffer serious harm to their health, and in this case the sensitive pre-turbine witness is likely to suffer serious harm as she has very sensitive hearing and suffers from vertigo.

161 Dr. McMurtry testified that there are eight receptors of the Ostrander Point Project who share the same two common characteristics that the post-turbine witnesses share: (i) they reside within 2 kms of a wind turbine, and (ii) the turbine is rated in excess of 1.5 MW capacity. It is therefore his opinion that "it is more probable than not that there will be individuals who will suffer serious harm to their health due to their exposure to IWTs as a result of the Ostrander Point project operating as approved."

162 Where this opinion is based on the post-turbine witnesses' evidence, however, the Tribunal cannot rely upon it, as noted above.

163 Where Dr. McMurtry's opinion is based on his experience and literature reviews, the Tribunal must weigh it against the other expert evidence provided. The Tribunal in *Erickson* found that the scientific evidence currently does not support a finding that turbines cause harm to human health at a decibel level of 40 dB(A). While Dr. Thorne proposes that the unique noise signature of wind turbines may have an adverse health effect at levels less than 40 dB(A), and that A-weighted decibel rating may not be appropriate for this type of noise, the Tribunal finds his study to be preliminary and inconclusive. There was insufficient evidence filed before the Tribunal in this proceeding that would alter the conclusion reached in *Erickson*.

164 With respect to the sensitive pre-turbine witness, there is simply insufficient reliable evidence before the Tribunal that people who live 2 km from a turbine, including individuals with sensitive hearing, will suffer serious harm to their health. Dr. McMurtry himself testified that he believes 2 km is a reasonable setback for current turbine technology, and the 5 km distance noted in the Case Definition is to allow for more powerful turbines that may come on line in the future. Dr. McMurtry also agrees a safe set-back distance depends on numerous variables, including the landscape, environmental conditions (wind speed and direction), number of turbines and their alignment, size and model of turbines, and the sensitivity of the individual.

165 Nor has the appellant established who, out of the general population, will be sensitive to turbine noise, or how many people on average within the population will be sensitive. It is clear that not everyone is affected; Dr. McMurtry testified simply that "some will".

166 As noted above, the Tribunal finds it cannot rely on the testimony of the post-turbine witnesses to establish causation of harm to human health in this case.

d. Harm to human health other than noise: Psychosomatic illnesses

167 What emerges from a review of available literature, is that there is no conclusive evidence one way or the other as to what is causing health complaints from people who live in the environs of wind turbines.

168 Workplace exposure studies and environmental health studies have shown that chronic exposures to high dB(A) levels, such as 70-80 dB(A), can negatively impact the otological system, such as loss of hearing, as noted by Dr. Richarz and Dr. McCunney.

169 What is less clear is whether there are indirect health effects (i.e. caused by stress and/or sleep deprivation due to audible noise at night) at or below the noise threshold of 40 dB(A), and whether wind turbine sound exposure at or below 40 dB(A) may nonetheless cause psychosomatic health impacts for some individuals.

170 The Director's submissions are that:

> It is the position of the Director that for an adverse health effect to be caused by a wind turbine, the turbine itself must cause a physiological effect. It is not enough that the sight of the turbine causes annoyance or that concerns regarding property values causes stress. If dislike or distrust were enough to meet the test set by s.145.2.1(2) of the EPA, that section would be rendered meaningless. It would also be impossible for the Director to issue an approval for any project, no matter the type, as subjective dislike would be enough to overturn the Director's decision.

171 The Director argues that the Tribunal in *Chatham-Kent Wind Action Inc. v. Ontario (Director, MOE)*, [2012] O.E.R.T.D. No. 64 (*Chatham-Kent*) rejected such an interpretation of the test, referring to paragraphs 56 and 59 in support. The Tribunal disagrees with the Director's interpretation of that case. In paragraph 56 of *Chatham-Kent* the Tribunal recounts the submissions of Mr. Ternoey, a self-represented participant in the proceedings. The Tribunal goes on, in paragraph 59, to find that Mr. Ternoey presented no evidence to support his submissions, and to reject them on that basis. The Tribunal did not turn its mind to the question of whether only physiological effects could be considered as adverse health effects.

172 APPEC does not distinguish between physiological effects and psychosomatic health effects in the environs of wind turbines. It points to Dr. Leventhall's evidence in *Erickson*, in which he agreed that severe annoyance could lead to adverse health effects. Dr. McMurtry dismissed as archaic the distinction between psychological and physiological causes of adverse health effects.

173 Dr. Baines referred to the recent study by researchers at the University of Auckland entitled "Can Expectations Produce Symptoms from Infrasound Associated with Wind Turbines?" (Crichton et al., (2013, March 11) *Health Psychology.* Advance online publication. Doi: 10.1037/a0031760). It compared symptom reports from healthy volunteers exposed to infrasound and sham infrasound, after being given information about the expected physiological effect of infrasound. They found that psychological expectations could explain the link between wind turbine exposure and health complaints. Another study, Chapman et el., noted above (pending peer review), concludes that "the reported spatio-temporal variations in complaints are consistent with psychogenic hypotheses that health problems arising are "communicated diseases" with nocebo effects likely to play an important role in the aetiology of complaints". The authors note that health complaints are much higher in areas where anti-wind activists are most vocal.

174 The Tribunal acknowledges that these articles recognize the possibility that some health problems that arise in the vicinity of wind turbines could have psychological causes. The testimony of one post-turbine witness in particular raised the possibility of adverse health effects being related to mental health, which is another variation.

175 The Tribunal accepts the witness' testimony as entirely credible; however, there are dangers inherent in attempting to draw general conclusions about "wind turbine effects" from anecdotal, personal and unique experiences. It is even more problematic to apply conclusions made from those unique personal circumstances at a certain location, to projects at other locations. Once a causal connection is established (which in this case it is not), one would need, for example, evidence that criteria have been identified which would increase the risk among a certain percentage of the population of having a similar negative health effect. No such evidence was presented here.

Findings on Sub-issue 2 (Ostrander Point project)

176 The individual experiences of post-turbine witnesses at other projects cannot be extrapolated in this case to conclude under s.145.2.1 of the *EPA* that engaging in the Ostrander Point Project in accordance with the REA will cause serious harm, because it has not been proven their health complaints were caused by turbines.

177 As a result, the Tribunal finds that APPEC has not established that engaging in the renewable energy project in accordance with the renewable energy approval will cause serious harm to human health.

Crown land and public safety

178 No parties addressed the issue of whether the fact that this Project is taking place on Crown land, which is publicly accessible, results in health or safety issues for occasional users of the Site. The Tribunal notes that there is effectively no setback for users of the Crown land for noise or other safety concerns.

179 The issue of public safety was not raised in the Notice of Appeal. The Tribunal simply wishes to note its concern in this regard. The Tribunal's concern remains with respect to the lack of set-back for the safety of the public using the site. There is a 120 m set-back requirement from roads, for example, due to manufacturer specifications, which appears to have been waived by the MNR on behalf of the public.

Conclusion on Issue 1

180 The evidence in this proceeding did not establish a causal link between wind turbines and either direct or indirect serious harm to human health at the 550 m set-back distance required under this REA.

181 The evidence in this hearing did not establish that the Ostrander Point Project operating in accordance with the REA will cause serious harm to human health.

182 For these reasons the Tribunal finds that the appellant has not established that engaging in the Project in accordance with the REA will cause serious harm to human health, and dismisses APPEC's appeal.

Issue 2: Whether engaging in the Project in accordance with the REA will cause serious and irreversible harm to plant life, animal life or the natural environment.

183 Throughout this section, reference to "the appellant" is a reference to PECFN.

The Legal Test

184 Under s. 145.2.1(3) of the *EPA*, PECFN has the onus of proving that engaging in the Project in accordance with the REA will cause serious and irreversible harm to plant life, animal life or the natural environment.

Previous decisions of the Tribunal

185 Previous decisions of the Tribunal have considered some aspects of the second branch of the renewable energy approval test.

* An appellant is required to show such harm on the civil standard of a balance of probabilities. (*Erickson*, paras. 595 and 629; *Monture v. Ontario (Ministry of the Environment)*, (2012), 73 C.E.L.R. (3d) 87 ("*Monture 2*"), para. 31)
* Regarding the phrase "in accordance with" the terms of the REA, the Tribunal has held: "Any harm that may be caused by exceedances will not be relevant to the Tribunal's decision." (*Monture 1* at p. 21, 22)
* Evidence that only raises the potential for harm does not meet the onus of proof. (*Monture v. Ontario (Ministry of the Environment)*, (2102) 68 C.E.L.R. (3d) 191 ("*Monture 1*"), para. 70; *Monture 2*, para. 31).
* "Will cause" must be proved on a balance of probabilities. (*Erickson*, paras. 595 and 629; *Monture 2*, para. 31)
* The Tribunal can consider whether both "direct" and "indirect" effects will be caused. (*Erickson*, para. 631; *Monture 2*, para. 31)
* The word "serious" should be interpreted in a way that suits both branches of the test (*Erickson*, para. 638; *Monture 2*, para. 31)

Serious and irreversible harm

186 The phrase of the test that the parties focus on in their submissions is "serious and irreversible harm" Previous decisions of the Tribunal have not considered this phrase in depth, but have found that:

* the word "serious", and the phrase "serious and irreversible", must be interpreted on a case-by-case assessment according to all relevant factors. (*Erickson*, para. 638; *Monture 1*, para. 79; *Monture 2*, para. 31); and

* one bird or bat mortality will not always constitute "serious and irreversible harm to plant life, animal life or the natural environment", but may be sufficient in certain circumstances. (*Monture 1*, paras. 71 and 80; *Monture 2*, para. 31)
* the test would be meaningless if it were to be interpreted to always be met or to never be met. (*Monture 1*, para 71)

187 PECFN's interpretation of the phrase is that "serious and irreversible harm will occur if it can be demonstrated that a single project will cause measurable declines of species that are already deemed at-risk, i.e., endangered, threatened or special concern." In its final oral submissions, PECFN submits that there must be a measurable (i.e., significant) impact on a species that is in decline, and that a project will add to that harm.

188 PECFN agrees with the Director's submission (supported by the Approval Holder) that the second branch of the test should be interpreted using an "ecosystem approach", and additionally submits: "that 'plant life' and 'animal life' warrant broad interpretations such that the focus must be on the overall environment."

189 The Director submits:

> The ordinary meaning of the words "animal life" and "plant life" connote an ecosystem approach. The terms "plant life" and "animal life" are akin to the terms "flora" and "fauna". In fact, the Canadian Oxford Dictionary defines fauna as "the animal life of a particular region, geological period or environment". Similarly, the Dictionary of Environmental Law and Science defines fauna as "animal life". As for flora, it is defined as "the plants or plant life of a given area, habitat or epoch" by the Shorter Oxford English Dictionary.

190 The Director interprets the phrase "serious and irreversible harm" in the test "to signify a population level impact to plant life or animal life." However, the Director's interpretation, cited below, also incorporates aspects of PECFN's "diminishing species" interpretation (emphasis added):

> Given the different vulnerabilities of various species, the amount of mortality that would result in a population level impact will vary from species to species and from site to site. Potential impacts must therefore be evaluated on a case-by-case basis and will depend on factors such as the degree to which a species' population is threatened, the vulnerability of a species, the dispersal of the population, the availability of habitat, the extent of harm caused by the project and the use of avoidance or mitigation measures to reduce this impact.

191 The Director submits that its witness Ms. McGuiness, and the Approval Holder's witnesses Dr. Kerlinger and Dr. Strickland, testified that serious and irreversible harm should be assessed: "in terms of impacts on the regional population of a species" and that: the geographic range of a regional population can vary considerably, depending on the species. A population of a migratory birds species, for example, will generally be spread over a much larger geographic area than the regional population of a less mobile species, such as Blanding's turtles.

192 The Approval Holder adopts the Director's submissions (first made by the Director in *Monture 1*, and repeated by the Director in this case), that "the Legislature chose the words 'animal life' and 'plant life' which connote an ecosystem approach" and "the focus of the *EPA* is the overall environment and not the protection of an individual plant or animal."

193 The Approval Holder submits that "serious and irreversible harm requires significant harm that causes a biologically significant and irrecoverable decline in the population of the species at issue." The Approval Holder expands on this interpretation saying (emphasis in the original): "Collectively, these criteria require that harm be suffered by plant life, animal life or the natural environment that *remains* serious even *after* all available restoration or recovery through human effort or natural processes."

194 The Approval Holder argues that the scope of the enquiry is whether there is any residual, "unmitigated" harm (emphasis in the original):

> ... we submit that harm will only be [*sic*] characterized as "irreversible" if it is beyond the power of human effort (or natural processes) to correct or undo the resulting "serious" damage. More specifically -- given that the statutory appeal test in s-s. 145.2.1(2)(b) is only satisfied by harm that is both "serious" and "irreversible" -- we submit that the test will only be met if -- *after* all

> human efforts and all natural recovery have occurred -- the remaining (unmitigated) harm continues to be properly characterized as "serious" ... .

195 The Approval Holder submits that the MNR Bird and Bat Guidelines, and a document entitled "Assessing Significance of Impacts from Onshore Windfarms on Birds Outwith Designated Areas by Scottish Natural Heritage" (the "Scottish Document") provide helpful guidance to the meaning of the phrase "serious and irreversible harm".

196 Regarding the MNR Guideline, the Approval Holder argues that mortality rates falling at or below the guideline levels cannot constitute "serious and irreversible harm." The Approval Holder argues that PECFN's "measureable" qualification to the "diminishing species" interpretation does not equate with "serious and irreversible".

197 The Approval Holder submits that the Scottish Document provides guidance on the interpretation of the phrase "serious and irreversible harm" and accords with the "population viability" interpretation. The Scottish Document is used by Scottish National Heritage ("SNH") to assess whether impacts of wind farms on birds in Scotland should be considered sufficiently significant to be of concern. However, the Approval Holder, and the Scottish Document itself, say that its principles are generally applicable to other development in a rural area, and may apply to other species. One of its principles is as follows:

> To assess the significance of a windfarm on a bird species, information should be available regarding the impact on the species in terms of added mortality, any loss of habitat and nesting or feeding territory, and any expected loss in the population. These impacts should be placed in context through information addressing the total population number and distribution (where known), current annual mortality, and the area of suitable habitat for the species in the region. Where a PVA [Population Viability Analysis] analysis has been possible, the predicted impacts of added mortality should be interpreted in terms of its likely and possible effects on the species population.

198 The Approval Holder argues that PECFN's expert witnesses did not undertake the above type of population viability assessment.

199 In reply, PECFN submits that the "population viability" interpretation sets the bar so high that the second branch of the test would be meaningless because no appellant could ever satisfy the test. PECFN argues that the test would become a licence for wind projects to cause fatalities at very high levels, to every species, because there would never be measureable population effects.

200 PECFN further argues that a simple and inclusive interpretation is preferable and that a case-by-case (in the sense of every species) analysis of the test would take too long in the context of the very short time frame for REA appeal hearings, and be very expensive and, therefore, too onerous for appellants. PECFN argues that its interpretation is more practical and effective. In short, PECFN argues, if there is a species already in decline a wind project should not be allowed to go forward if it will add to the decline. PECFN further argues that the *ESA* permit process is not the solution for species in decline because it is has a different purpose and different process. In this case, the MNR required *ESA* permits for Blanding's turtle and Whip-poor-will.

201 PECFN further argues that the "population viability" interpretation does not distinguish between common plants and animals with large populations and species at risk. In previous cases the Tribunal has found that the test would be rendered meaningless if the death of one bird or bat due to the operation of a renewable energy project is always "serious and irreversible" harm (although there might be situations where that can be demonstrated). PECFN argues that the "population viability" interpretation of "serious and irreversible harm" would be equally meaningless.

202 The Appellant's experts went to great lengths to demonstrate the measurable impacts the Project will have on the alvar ecosystem, birds, Blanding's turtles, bats and Monarch butterflies. One way or another they all agreed that wind turbines should not be sited at Ostrander Point, an environmentally unique and valuable site for numerous species at risk. The evidence clearly demonstrates that numerous species at risk will, more likely than not, see further declines as a direct result of this Project. Consequently, it should not proceed.

Conclusion on the legal test

203 The Tribunal sees merit in some aspects of the interpretations of the phrase "serious and irreversible harm" by each of the parties, but also agrees with some of their mutual criticisms. Consistent with previous decisions, the Tribunal finds that the second branch of the test would be rendered meaningless if it will always be satisfied or because it

would be impossibly high to meet. In this case, the Tribunal finds PECFN's "declining species" interpretation of the phrase "serious and irreversible harm" is too broad, and the "population viability" interpretation of the Director and the Approval Holder, when used for all species, is too restrictive.

204 The one principle all of the parties advocate is an "ecosystem approach". The Tribunal agrees with their submissions on this point. The ecosystem approach reflects the plain language and purpose of the *EPA*, to provide for the protection of the natural environment. It is also reflected in s. 47.2(1) of the *EPA*, which is relevant to "Renewable Energy", and provides that "[t]he purpose of this Part [Part V.0.1 "Renewable Energy"] is to provide for the protection and conservation of the environment."

205 The *ESA* provides, in s.13, that a recovery strategy or management plan for endangered or threatened species may be prepared using an ecosystem approach. A recovery strategy for endangered of threatened species shall include identification of the habitat needs of the species and recommendation to the minister on the area that prescribes an area as the habitat of the species.

206 Consistent with earlier REA cases, the Tribunal finds that, in determining serious and irreversible harm to plant life, animal life or the natural environment, the relevant factors, and their respective importance and weight, must be assessed on a case by case basis.

207 The factors that have assisted the Tribunal's consideration of the second branch of the test in this case are discussed in these reasons in relation to each section on plant life and animal life. The factors discussed are not all-inclusive.

208 For example, when dealing with plant life, animal life or a feature of the natural environment that has been identified as being at risk, a decline in the population or habitat of the species, or the alteration or destruction of such feature, will generally be factors with considerable weight when considering "serious and irreversible harm" and applying the test.

209 For plant life, animal life or a feature of the natural environment that has not been identified as being at risk, then the analysis would require greater preliminary consideration of such factors as the degree to which a species' population is threatened, the vulnerability of a species, the dispersal of the species' population, and the quantity and quality of habitat.

Arguments of Participants and Presenters

210 Mr. Dubin was given presenter status on March 1, 2013 during a preliminary hearing in this matter. He asked to be qualified to give expert opinion evidence on the environmental impact assessment ("EIA") process. The Director and Approval Holder objected to Mr. Dubin being qualified as an expert. As noted above, a telephone conference call was held and the parties were able to cross examine Mr. Dubin on his qualifications. The connection was broken, however, before Mr. Dubin could give his presentation. As a result, the Tribunal made a ruling on expertise and then received Mr. Dubin's written presentation, filed earlier, as his evidence.

211 The Tribunal recognized Mr. Dubin as an expert in the EIA process on April 25, 2013, due to his extensive experience performing environmental assessments in Hong Kong and China, experience with the Canadian, Federal Environment Assessment process, and relevant experience in assessing the environmental impact assessment process in Ontario. It was recognized that he does not have experience in the specific area of wind farm impacts, nor has he referred to his having personal knowledge regarding the site for this project, but he has had recent involvement in pro bono and advisory work in environment and sustainability with local government in Kingston, Ontario. The Tribunal's oral ruling in this regard is attached as Appendix J.

212 The Tribunal is not engaged in reviewing the EIA process, in a REA appeal. In that regard, issues relating to whether the EIA process was properly followed are outside the jurisdiction of the Tribunal.

213 Mr. Dubin's presentation includes a number of points that are relevant, however, to the question of the Project's impact on Blanding's turtle, on bird populations, and on the ecosystem components at Ostrander Point. In particular, Mr. Dubin explains that he objects to the Ostrander Point Project due to its location in an IBA; within a candidate ANSI which, he stated, if confirmed would prohibit the development; technical issues related to the EIS Report; the site would not fit Federal Environment Canada site selection criteria or recent siting guidelines by the Nature Conservancy; concerns with draft versions of the EIS Report; under Federal EA Requirements the public concerns expressed would re-

quire that the Project be taken to review or mediation; and Federal EA procedures include a requirement for a cumulative impact assessment.

214 The Tribunal has considered this evidence along with the evidence discussed under each of the relevant parts below.

215 Dr. Goddard-Hill made a presentation supporting both APPEC and PECFN in their appeals of the proposed Project. His comments on health effects are noted above. Dr. Goddard-Hill lives in Prince Edward County, has an interest in ornithology and started his own public interest research group, the Eastern Lake Ontario Environmental Research Group, in 2000.

216 Dr. Goddard-Hill commented on the global phenomenon of declining bird populations. He noted the complexities of ecosystems, and the fact that each animal death is a loss of genetic material, which at some point becomes critical for survival of a population. He commented on the importance of Prince Edward Point to bird migrations, and noted from personal experience that many renowned birders value the site.

217 Parker Gallant spoke on behalf of the participant Wind Concerns Ontario (WCO), which supports PECFN's appeal. WCO brought a number of concerns to the Tribunal's attention regarding danger that wind turbines present to bats. The presentation criticised various elements of Stantec's Bat Report, as well as the MNR's Bat Guidelines. WCO described its concerns related to development in or close to wetlands at the Project Site, and noted that, according to its information, Quinte Region Conservation Authority has not been contacted by the MOE or the MNR with respect to the REA and wetland issues.

218 Don Chisholm made a presentation in support of the Project. He presented material to put the need for green energy in a global context. He compared the diminishing "energy return on investment" of traditional oil and gas production with renewable energy, which he stated has a much better future. Mr. Chisholm emphasized the high environmental cost of oil and gas production and consumption.

219 Deborah Hudson also made a presentation in support of the Project. She spoke about the history of the Prince Edward County South Shore, and Ostrander Point Crown Land Block, describing both agricultural uses and as an artillery or bombing range by the military.

Sub-Issue 1: Whether engaging in the Project in accordance with the REA will cause serious and irreversible harm to animal life

Blanding's turtle

1. Overview

220 The Site has been identified as habitat for Blanding's turtle, a threatened species in Ontario. One of the most serious threats to Blanding's turtle is road mortality. The appellant argues that the construction and improvement of roads in the Ostrander Point Crown Land Block will increase traffic to the area, both project-related and by the public, and increase nest predation and poaching. As a result the Project will cause serious and irreversible harm to this vulnerable species. The Director and the Approval Holder argue that any negative impact the Project might have on Blanding's turtle will be successfully mitigated through the *ESA* Permit conditions, such that there is no serious and irreversible harm. They argue that the *ESA* Permit issued by the MNR ensures that the Project will result in a net benefit for the species.

221 On this issue, the following experts were called: Dr Frederic Beaudry, Kari Gunson, Dr. Christopher Edge, and Dr. Fraser Shilling.

222 Dr. Beaudry was qualified as an expert in Blanding's turtle. He is an Assistant Professor of Environmental Science at Alfred University, New York. He holds a Ph.D. in wildlife ecology from the University of Maine.

223 Ms. Gunson was qualified to give expert opinion on the impacts of roads on wildlife. She is the principal of Eco-Kare International and the primary road ecologist consultant with the Ontario Road Ecology Group.

224 Dr. Edge was qualified as an expert on Blanding's turtle. He received his Ph.D. in biology at the University of New Brunswick in 2012 and is currently doing post-doctoral research at the University of Alabama on the effects of herbicides on wetlands. Dr. Edge radio-tracked turtles for two years in 2006 and 2007 in Algonquin Park as part of his Master's degree.

225 Dr. Shilling was qualified as an expert in assessing the impacts of roads on wildlife and ecosystems. He holds a Ph.D. from the University of Southern California in aquatic ecology. He directs the UC Davis Road Ecology Center.

226 In addition, Andrew Taylor, an employee of Stantec, spoke to the Stantec Report filed in support of the REA application. The MOE called no experts on turtles. Melissa LaPlante testified, an MNR biologist who was qualified as an expert in "reviewing impacts of proposed projects on species at risk", as well as Andy Baxter, an MNR employee, who spoke as a fact witness with respect to the process involved in obtaining an *ESA* Permit.

2. Whether Blanding's turtle is properly an issue before the Tribunal

227 As was the case with alvar, the Approval Holder argues that PECFN did not include harm to turtles as a ground of appeal, and therefore the Tribunal should disregard these portions of the appeal under Rule 28 of the Tribunal's Rules of Practice. In the alternative, the Approval Holder asks for an order for costs to "compensate the Approval Holder for the necessity of responding to these new issues without adequate notice".

228 The objection to inclusion of this issue was raised only at the closing submissions stage. In this regard, the same reasons cited in the Alvar section of these reasons apply to the Tribunal's finding that Blanding's turtle is also an appropriate issue before the Tribunal.

229 Under the heading "Indirect effects -- Habitat loss" at paragraph 18, the Notice of Appeal mentions turtles as one of a list of species with habitat on the Site, and for which "the Project will cause serious indirect harm that cannot be reversed."

230 The Approval Holder was well aware that Blanding's turtle was a species of concern on the Site, given that it had done specific reports for the MNR on this species and was required to obtain a permit under the *ESA*.

231 PECFN listed Kari Gunson as an expert witness on its original list of witnesses, filed on February 20, 2013. She directly addresses Blanding's turtle and Whip-poor-will in her witness statement.

232 Dr. Frederic Beaudry, an expert in Blanding's turtle, was not originally on PECFN's list of intended witnesses. A report that Dr. Beaudry had prepared, "Comments on the Effects of the Proposed Ostrander Point Wind Energy Park on a Blanding's turtle Population" (dated September 15, 2011), had been attached to a presentation filed on February 22, 2013 with the Tribunal by Ian Dubin, a presenter in this proceeding. On March 6, 2013, the Approval Holder noted its objection to Mr. Dubin relying on the report. Mr. Dubin testified via teleconference on March 7, 2013 because he was in Hong Kong and unable to attend the hearing. The teleconference was cut short before the fate of the reports was discussed. PECFN informed the other parties on Monday, March 11, 2013 of its intention to call Dr. Beaudry as a witness, as it appeared he would not be called by Mr. Dubin. Since the request to add a new expert witness was opposed, PECFN made a motion to the Tribunal to add Dr. Beaudry as a witness in its case on March 18, 2013. The Director and the Approval Holder argued that they had already structured their case to reply to the witnesses on the list, and it would create prejudice to have to deal with a new witness once the case had already begun. There were also concerns regarding the available hearing time under the REA process. However, the Approval Holder did not object to the issue of Blanding's turtle as an appropriate issue in the hearing.

233 The Tribunal ruled on March 18, 2013 that Dr. Beaudry could be called by PECFN as an additional expert witness. A second additional expert, Mr. Smith, was not permitted. The Tribunal's ruling is attached as Appendix K.

234 The Tribunal finds that PECFN raised the issue of habitat loss to "land-based populations i.e., turtles and snakes" in its Notice of Appeal, which was sufficient to include Blanding's turtle. All parties had notice of the specifics of the habitat loss allegations and prior notice of the report Dr. Beaudry intended to rely upon. There was no prejudice to any party and the Tribunal dismissed the Approval Holder's request to disregard this portion of the appeal.

3. Conservation status

235 The following overview information is not contested.

236 Seven of Ontario's eight native turtle species are threatened, endangered or of special concern.

237 Blanding's turtle is ranked S3 (vulnerable) in Ontario and is currently designated as a Threatened species on Schedule 1 of Ontario's *ESA* and the federal *Species at Risk Act* (2002). The Nova Scotia population of Blanding's turtle is listed as Endangered.

238 The *Blanding's Turtle Habitat Assessment, Draft for Discussion* dated October 2009 by Stantec Consulting Ltd. (the "Stantec Report"), which was prepared as part of the NHA/EIS, notes that for reptile species on provincially-owned Crown land, only the provincial *ESA* applies which prohibits the killing, harming, harassing or capturing of Blanding's turtle. Habitat regulations are not yet in effect and need to be finalized in order for the damage or destruction of Blanding's turtle habitat to be prohibited.

239 At the time the Stantec Report was written, Blanding's turtle was listed as "G4", which is "common". However, the International Union for Conservation of Nature (part of the United Nations Environment Program) revised the status of Blanding's turtle in 2011 to Endangered for the entire species.

240 The population of Blanding's turtle in Ontario, and at the Site, is not known. There are historic sightings throughout Prince Edward County, and a number of sightings by Stantec during its investigations from 2007 to 2009. Subsequent surveys on the subject property for the Ostrander Point Project have confirmed that the species is present.

4. Blanding's turtle biology

241 The following information is not contested.

242 Blanding's turtle is a semi-aquatic turtle that only occurs in northeastern and Midwestern North America, occupying a disjunct range with distinct populations in New England, New York, and Nova Scotia. Within Ontario, the species is spottily distributed in the southern and central portions of the province.

243 Blanding's turtle uses a variety of wetland types depending on availability, including emergent mashes, bogs, forested swamps, and temporary pools. Habitat use is generally driven by needs such as food, summer refuges from dry periods, and in winter protection from freezing temperatures. In some areas a single large wetland could accommodate all of those needs, but in most places Blanding's turtle uses several wetlands over the year, requiring overland trips.

244 In early summer, nesting females seek an appropriate site for egg laying with an exposure to direct sunlight. Such sites include beaches, grasslands, rocky outcrops, agricultural fields, road and railway embankments, lawns, forest cuts, dredge piles, and borrow pits. Blanding's turtles have been found to move extensively overland to nesting sites -- movements up to 6km have been reported.

245 The population ecology of Blanding's turtle is dominated by a reproductive strategy where a limited yearly reproductive output is offset by a very long breeding history. Females do not reach sexual maturity before 18-20 years, and not every mature female reproduces every year -- the breeding interval being 1.5 years on average. The clutch size is 10-14 eggs, and females do not nest more than once within a breeding season. Nest success is variable, but generally low due to predators.

246 The period where hatchlings make their way from the nest to a wetland is a very high risk period in terms of predation due to their small size. Once in the wetland, it takes the turtle five to seven years to grow beyond "gape" size. These life history traits mean that there is very little chance that a single egg will make it to a breeding turtle.

247 In order for the species to persist, its low annual reproductive output needs to be repeated over decades of breeding opportunities. The life-span is over 70 years.

248 Turtles move slowly when crossing a road, and their reaction to a threat is to hide in their shell, rather than flee.

249 In addition, Blanding's turtle is attractive and good-natured, making it a highly desired pet and target of poaching; a threat that is increased with easier access to habitat.

5. Project impacts on Blanding's turtle

a. Road impacts

250 Currently the Site contains several kilometers of tertiary road that is only passable with four wheel drive vehicles and all-terrain vehicles. The Project requires that 5.4 km of roadway be created.

251 There was consensus among the experts that the major source of anthropogenic mortality to Blanding's turtle is road impacts: animals struck and killed on roadways while travelling among wetlands; when females travel overland to reach nesting sites; and when females nest in the shoulders of roads. Other threats caused by roads include increased poaching and predation.

252 There was agreement among the experts that Blanding's turtle inhabits the Ostrander Point Site and adjacent areas, and there is suitable habitat on the Site for all life stages (nesting, the activity period, and overwintering).

253 Suitable nesting sites include any region with sandy or gravel substrate, minimal canopy cover, and little grass cover. Dr. Christopher Edge, who testified as an expert witness on behalf of the Approval Holder, testified that such habitat could be found throughout the study site, and all roadways within 200 m of a wetland should be considered nesting habitat. Dr. Edge stated that in addition to the roadways, there was additional nesting habitat throughout the region, specifically in the northeast section of the property.

254 Seasonally wet areas are used during the activity season. They are important for foraging because temporary wetlands do not have fish and thus are a good source of tadpoles and frog and salamander larvae. The southern area of the Project Site in particular contains a large number of seasonally wet areas.

255 In the late summer (late August and early September) Blanding's turtles will return to the permanent wetlands that they use for overwintering. Dr. Edge said that suitable habitat for overwintering occurred in wetlands MAS2-4 and SWD2-2a, in the south eastern corner of the subject property, as well as wetlands to the east, to the west, and to the north of the Ostrander Point Crown Land Block. A suitable overwintering wetland is deep enough that the turtle can stay below the ice.

256 The Stantec Report acknowledges that the number of Blanding's turtles on the Project Site is not known, but concludes at p. 4.1 that "Prince Edward County appears to support **numerous populations** of Blanding's turtles." (emphasis added)

257 Dr. Edge described the Project Site as similar to the lands surrounding it: "The area on the southern shore of Lake Ontario here in Prince Edward County is what I would describe as homogeneous matrix of various wetland types both permanent and temporary, so the whole shore is suitable habitat for Blanding's turtles".

258 Dr. Edge added that there appeared to be one permanent wetland very close to Babylon Road on the "compensation property" (described further below), and two coastal marshes, in the southeast and southwest of the Project Site. In his opinion, turtles likely overwinter in wetlands on site and travel off site during the active season to nest, and turtles that overwinter off site may travel on site to nest. He opined that no habitat type on the subject property appears to be limiting or rare at the scale of the subject property or the area surrounding the subject property. He added that there were additional temporary wetlands north of the proposed road on the southern extent of the site, not identified in the Stantec Report.

259 The Stantec Report recognizes that, "as the Project will be situated in currently undisturbed areas", the following are "potential indirect disturbance effects to Blanding's turtles from the turbines or an increase in human activity":

- Increased risk of mortality on new access roads, which may experience an increase in traffic over current conditions
- Increased predation of nests due to predators (i.e., coyotes and foxes) using access roads to traverse through the habitat
- Increased poaching for the pet trade due to increased access and awareness of the local Blanding's turtle population

260 Dr. Beaudry's specific concern with the construction of roads on the Ostrander Point Site is that, while they would not merely be "close to" Blanding's turtle habitat, they would be right **in** the habitat. A single turtle would undertake several road crossings in its annual cycle.

261 Dr. Beaudry stated that the use of roads as travel corridors for medium-sized predators such as skunks and raccoons should not be minimized. Roads increase nest predation, and make the rest of the study area more available to predators. In addition, predators are "subsidized" and encouraged follow the roads when they find road kill and food scraps.

262 Ms. Gunson referred to a study by D. Seburn, "Recovery Strategy for Species at Risk in Ontario: Draft Report for the Ontario Multi-species Turtles at Risk Recovery Team" (2007), which identifies road mortality as a threat of urgent priority for 5 of Ontario's 8 turtle species and had contributed to local population declines and extirpation throughout the province. Ms. Gunson relied on a study by J. Congdon et al. in concluding that any acute or sudden increase in adult mortality (e.g., from road-kill) would likely result in population decline. She added that recovery of turtle populations from an increase in adult mortality was slow.

263 In her opinion, the manifold effects of roads extend far beyond road-kill caused by vehicles. She referred to studies which found that roads and their ensuing vehicle use and increased human activity also harm wildlife indirectly, including landscape fragmentation and alteration of physical conditions (e.g., light, heat, vibration, chemical) and plant composition in their vicinity. Joyal et al.'s study indicates that in order for small populations of Blanding's turtles to remain viable they required large areas of suitable intact habitat to complete both their aquatic and terrestrial life history.

264 Ms. Gunson opined that the development of access roads separating Blanding's turtle overwintering habitat from upland terrestrial habitat combined with the increased risk of road-killed adults would cause serious and irreversible harm to these populations of animals.

b. ESA Permit and Required Mitigation Measures

265 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. The Stantec Report was prepared as part of this process, and is appended to the NHA/EIS.

266 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.

267 Melissa Laplante, an MNR employee, was qualified as an expert in reviewing impacts of proposed projects on species at risk. She is not an expert in the Blanding's turtle. Ms. Laplante testified that, if surveys determine that a species is present on site, the impacts of the project are then considered to determine if there will be any negative impacts to either the species or the habitat. If it is determined that there is a high likelihood that negative impacts cannot be avoided, the MNR recommends that the proponent apply for apermit under s.17(2)(c) of the *ESA*.

268 An *ESA* Permit is an exemption from the general prohibition on killing, harming or harassing of a single member of an endangered or threatened species and/or the prohibition on damaging the habitat of an endangered or threatened species. In the case of the Project, an *ESA* Permit was required for Blanding's turtle and Whip-poor-will bird species.

269 Andy Baxter, an MNR employee, testified that a permit under the *ESA* is issued after consideration of several factors, including: alternatives; steps to minimize the impacts; the actions through the permit must achieve an "overall benefit" for the species; and the Government Response Statement for the species must be considered. According to Mr. Baxter, "overall benefit" means that **the species as a whole in Ontario** has to be better off as a result of the project than it was prior to the permit being issued. The consideration of "alternatives" was limited to alternatives within the Project area, and did not include a consideration of alternative sites for the proposed Project.

270 A summary of the mitigation measures for Blanding's turtle that are required in the *ESA* Permit, is as follows:

- Develop an Impact Monitoring Plan prior to the commencement of construction activities. Minimum elements to be included: (a) ensure Site restoration and mitigation measures are installed and functioning properly; (b) identification of "high frequency intersects" leading to mitigation measures such as relocation of signage/underground passage/modified culvert constructed, through adaptive management; and (c) monitor species mortality.
- Ostrander Point shall not undertake any construction activities, any vegetation clearing, or road maintenance on the Site from May 1 to October 15 of any year.
- If a Blanding's turtle or nest site is found on the Site during construction, to cease construction until certain precautions are taken.
- Speed bumps shall be installed and maintained.
- No road maintenance involving chemical spraying.
- Training of staff and contractors with respect to Blanding's turtle.
- Education signage at the Site regarding possible presence of species at risk.
- Speed limits.
- Strategic creation of nesting habitat on the eastern side of the Site located within 250 m of wetland habitat and at least 400 m away from the Project access roads, for the duration of the *ESA* Permit. Nesting habitat will be monitored annually and subject to reporting requirements.
- Turtle crossing signs.

- 37.65 ha property, outside the Project Site, to be set aside to provide, restore and actively maintain habitat for Blanding's turtle (known as the "Property"), subject to a 20 year conservation easement.
- The Property shall be maintained in its current state until the MNR approves a Property Management Plan.
- General monitoring for Blanding's turtle during construction.
- Impact monitoring for Blanding's turtle during construction.
- Species Encounter Report summary twice a year, and annual report.

271 Under the *ESA* Permit, the Approval Holder is required to create enhanced habitat for both Blanding's turtle and Whip-poor-will on the 37.64 ha compensation property, located to the north of Helmer Road.

c. Expert opinions on mitigation measures

272 The expert witnesses reviewed the *ESA* Permit requirements and the NHA/EIS and EEMP commitments, and disagreed on their effectiveness.

273 Dr. Edge and Dr. Shilling opined that the mitigation measures will be effective to decrease the chance of adult Blanding's turtle mortality. Dr. Beaudry and Ms. Gunson opined that the mitigation measures have not been proven to be effective, and although certain measures may reduce turtle mortality, they will not prevent serious and irreversible harm to Blanding's turtle at Ostrander Point.

Dr. Beaudry

274 Dr. Beaudry described a "population" as a group of intermingling individuals that could potentially breed with each other. In his view, the population at the Project Site is small, due to the fact the project area is small, and Blanding's turtle does not occur densely. He would include turtles on adjacent properties as part of the same population, although he is not able to state how far the population extends off site. The term "population segment" refers to separate populations based on a geographic distribution. In North America, there are four distinct population segments: Great Lakes (including Ostrander Point), North East (including New England), New York, and Nova Scotia.

275 Dr. Beaudry testified that the spatial arrangement of the proposed roads triggered a serious concern for him, given that the roads are in the middle of a network of wetlands. This is a different situation from a location where the turtles may stumble upon a road in the course of their extensive overland movements; on this site, he testified, the likelihood that these turtles will cross a road is extremely high, multiple times in their annual cycle. In his view, the whole of Ostrander Point Crown Land Block is "critical habitat" for Blanding's turtle, in that it is all used for its life functions.

276 The mitigation measures do nothing to reduce increased nest predation or poaching.

277 Dr. Beaudry acknowledged that driver training and speed limits may be effective for drivers affiliated with the project, but will not be effective for the general public. In his experience, speed limits are only as good as their enforcement. He testified that he was aware of only one study on the effectiveness of signs. It showed that signs were only marginally effective at slowing down drivers when accompanied by a lower speed limit and fashing lights, but the lower speed did not translate into fewer wildlife collisions.

278 He testified that culverts can be a good approach to maintain connectivity for frogs, salamanders and some turtles, but they do not work for Blanding's turtle. The construction of culverts assumes the precise location where the turtles will cross the road. Dr. Beaudry has done extensive work around the concept of finding hot spots where turtles will cross roads, and has published more peer-reviewed articles than anyone on Blanding's turtle. His studies have concluded that Blanding's turtles do not travel in a straight line from wetland to wetland, but travel in sweeping arcs and do not follow the same route each time. As a result, where there is a road between wetlands, the road segment where the turtles will cross is uncertain and may vary by up to 1500 m. He therefore does not believe that culverts, tunnels, or grade passage will be effective for Blanding's turtle at the Project Site.

279 Dr. Beaudry explains in his witness statement why he believes the compensation property will not prevent serious and irreversible harm:

> This measure [the protection of a nearby site] certainly could prevent further development in the area and have a positive effect on the rare alvar vegetation communities, or on the resident amphibian communities. However, if Blanding's turtles do not occur at the off-site location current-

> ly, it is unlikely that they will move there on their own accord and abandon the wind farm site; mortality risks would remain high. Translocations, especially to a nearby site, are a complex and risky endeavor that in my opinion is unlikely to have any success. And in the event there already are Blanding's turtles at the proposed off-site mitigation area, the ultimate goal when protecting it becomes hazy. Activities leading to the harm or killing of Blanding's turtles, as well as damage or destruction to their habitat, are already prohibited under the Ontario Endangered Species Act. Therefore it would not be clear what benefit additional protection would bring, and the proposed project would still result in a net loss of turtles and probably of a local population.

280 Dr. Beaudry testified that the only mitigation measure that would work at the Ostrander Point Crown Land Block is preventing the serious and irreversible harm by not building the roads. He acknowledged in cross-examination that he had written an article recommending temporary signs, speed reduction and temporary road closures at "hot moments" in the year, when Blanding's turtle is most vulnerable, but stated that he had made that recommendation in the context of a location where roads had been in existence since colonial times, it was "all we could do", and his advice related to maximizing the limited mitigation measures available.

Kari Gunson

281 Ms. Gunson testified that road effects on turtles are both direct, due to being hit by vehicles, and indirect through habitat loss and fragmentation, changes to vegetation, and changes to hydrology.

282 Ms. Gunson testified that the use of signage, speed bumps, driver training, and reduced speed limits were not proven to reduce the risk of adult turtle mortality. Those mitigation measures are grouped in a similar category in that the onus and effectiveness of each of these mitigation measures depends on the responsibility and awareness of the motorist. Studies recommend keeping turtles off roads, rather than relying on motorist responsibility; studies show that some motorists intentionally run over turtles. She did acknowledge that some motorists stop to assist turtles when they see them on the road.

283 Ms. Gunson stated that there was no direct correlation between traffic volume or speed, and traffic mortality. She added that there was no linear relationship with regard to turtles.

284 With regard to turtle crossing signs, Ms. Gunson agreed that there had not been any before and after effectiveness studies to test whether turtle crossing signs were effective. She added that driver habituation was a problem and, in her expert opinion, the signs were not an effective tool to negate enough adult turtle road mortality to prevent the population from declining. Ms. Gunson explained that signage was a temporary measure that could be effective if used properly with a planning strategy. By "temporary", she meant both spatially and temporally. Spatially, because with proper monitoring the signs could be moved to increase their effectiveness, whereas a crossing structure such as a culvert was not a temporary measure; temporally in that the measure should be replaced by more effective measures, as part of an overall strategy.

285 With respect to identifying intersects and the use of culverts, Ms. Gunson believes they would not work here. Ms. Gunson has been involved with numerous projects in the past that involved road mortality mitigation, and has recommended the use of culverts and determined the best location for them. She cited a study by Steen et al. to support her opinion that Blanding's turtles would most likely not use underground modified culverts, because they would favour the road-side habitat for nesting. Further, it would be difficult to locate probable intersects at a scale required for the mitigation proposed (modified culverts) because inter-wetland or nesting Blanding's turtle movements could be up to 6 km and they utilized both the aquatic and terrestrial habitat throughout the study area extensively. She added that the road network traversed this mosaic.

286 In her opinion, to provide the best-proven mitigation for both road mortality and fragmentation, many culverts with fencing would be required; regardless, research was lacking that showed whether road mitigation effectively negated irreversible and harmful impacts of roads at a population level, according to a study by Roedenbeck et al., "The Rauischholzhausen agenda for road ecology" (2007) 12 Ecology and Society [online].

287 She testified there was not a good methodology from road ecology science to find the intersects where Blanding's turtles would cross a road and locate it at a scale where the turtles would use the modified culvert. Ms. Gunson testified that since the habitat adjacent to the roads at the Project Site was homogenous, the turtles would use all of it making it difficult to identify the hot spots. Much of the 5.4 kilometres of road to be built would be hot spots which would require fencing and result in creating a barrier effect.

Dr. Edge

288 Dr. Edge said that he assessed all threats to turtle life by considering that the subject property was part of a larger habitat matrix in Prince Edward County and that any turtles present on the subject property were part of a larger population in Prince Edward County.

289 In his opinion, the threat of additional roadway mortality would be mitigated through the use of signage, speed limits and driver training. In his opinion, each of the mitigation measures on their own was effective at reducing some mortality and together as a suite of mitigation measures they could essentially reduce mortality down to a negligible level. He said speed limits and speed bumps were used in Algonquin Park and during the two years he conducted his research there, he did not observe any road mortality of Blanding's turtles.

290 Dr. Edge explained that an adaptive management strategy was a series of mitigation measures that could be modified to make best use of the mitigation measures. Dr. Edge confirmed that he had been involved in offering his professional opinion on impact monitoring plans but had never been involved in enforcement and implementation.

291 Dr. Edge acknowledged that the Site's Crown land status would affect mitigation in that the educational mitigation strategies would not affect the public accessing Ostrander Point. Dr. Edge also agreed that poaching could be a problem and that signs alerting drivers to the presence of turtles would identify the area to poachers.

292 Dr. Edge agreed that, simply by protecting the compensation lands, there would not be a net increase in the amount of land available as Blanding's turtle habitat, given that in his view the compensation site was already suitable habitat. Dr. Edge noted, however, that the monitoring plan and the development plan called for improvements to the land, although he had not conducted the kind of study that would allow him to say that in this case the habitat can be improved.

293 Dr. Edge confirmed that his analysis did not look at cumulative effects. He added that he would not be able to determine cumulative effects without seeing the plans for the other proposed sites.

Dr. Shilling

294 Dr. Shilling opined that traffic speed control, a proposed mitigation measure, would reduce disturbance because disturbance was roughly proportional to speed. He explained disturbance as inhibition of wildlife movement and said that road mortality increased with driving speed.

295 Dr. Shilling referred to a study by Dr. Beaudry entitled "Identifying Road Mortality Threat at Multiple Spatial Scales for Semi-aquatic Turtles", (2008) 141 Biological Conservation 2550 which listed possible conservation measures as seasonally reduced speed limits, exclusionary fencing or zonal signage. Dr. Shilling said that speed control was one of the mitigation measures proposed in the Design and Operation Report which was consistent with Dr. Beaudry's advice. On this, Dr. Beaudry testified that he gave such advice for a circumstance where a road was already in existence, and the objective was to mitigate mortality from an existing road.

296 Dr. Shilling said that the proposed traffic was in relation to the maintenance or post-construction activity and that there would be at most "a few cars a day". At that rate, the mitigation activities of careful observation for adults, nest sites and emerging hatchlings, reduced speeds, and driver education, were likely to reduce the risk to Blanding's turtle populations from the proposed access road at both the Site and Prince Edward County scale. He testified that it was unlikely that strikes on the site would jeopardize the Blanding's turtle population at the scale of Prince Edward County. He explained that mitigation was designed to reduce risk and impacts and the ones proposed in the reports were sufficient in his expertise to reduce risk to most wildlife living there.

297 Dr. Shilling stated that driver behaviour was a more important target than a few culverts strategically placed, citing Dr. Beaudry's article, *supra,* which had concluded that "the wide distribution of road mortality risk at the finest scale of individual movements challenges the notion that management interventions, operating at a single point location, such as underground passages, can be effective for wide ranging turtle species".

298 In cross-examination, Dr. Shilling was referred to a document called "*Wildlife-Vehicle Collisions and Crossing Mitigation Measures: A Tool Box for the Montana Department of Transportation*" by M.P. Huijser et al., (2007) Final Report for the State of Montana Department of Transportation ("Montana Study"), where the authors concluded that evidence on the effectiveness of advisory speed limits at reducing wildlife-vehicle collisions remained sparse. Dr. Shilling acknowledged that advisory speed limits on highways were difficult to enforce with the public. However, he said that a reduced speed limit set up in a national park in Australia was shown to be effective. He said when it was enforced

people responded appropriately and it was effective at slowing people down. He agreed that people driving through parks behaved differently than people driving on public highways. In his opinion, a speed limit could be advised and enforced at the Project Site.

299 The same study (Montana Study) addressed the effectiveness of driver education. The authors had concluded that there were no known studies proving the effectiveness of driver education or public information efforts in reducing the number or severity of wildlife collisions. Dr. Shilling said that this was true for large public highway networks because of the large numbers of drivers in the public but not true for the contained example in Australia.

300 Dr. Shilling said that mitigation activities that are taking place on the Site could have benefits that extend beyond the Site because turtles interact within a population that extends across the County. For example, the speed limit of 15 km/hr could be extended to the whole southern part of the County to benefit Blanding's turtle.

301 With regards to the creation of artificial nesting sites, Dr. Shilling testified that, by increasing nesting opportunities onsite and offsite, it would increase the likelihood that there would be successful recruitment away from roads, and potentially increase the population, assuming that there were not any big causes of mortality. In this regard he quoted some passages from an article by Dr. Beaudry, that "the ability to use newly disturbed areas signals that artificial nesting sites can be detected and used rapidly by turtles" and, "along with direct nest protection through the installation of nest cages artificial nesting sites could be used to increase local population recruitment".

302 Dr. Shilling referred to a study by Ennison and Litzkus which examined the population biology of Spotted turtles which he said were similar in some ways to Blanding's turtles. The authors developed a population model to understand the effects of losing individuals in the population and whether an organism goes extinct. He said that the authors found that when the population is considered as a meta-population, which is a group of interacting populations, then the risk of extinction of the species was low because they were able to interact with each other among the wetlands. Therefore, Dr. Shilling concluded that a population would live as long as it could have that kind of interaction or connectivity among different areas and if there was low road mortality the chance of persistence was very high.

303 Dr. Shilling said that the adjacent property acquired by the developer was suitable for Blanding's turtle, but he did not know whether it was currently used by the turtles.

6. Analysis

304 As noted above, the Tribunal must apply the s.145.2.1 test set out in the *EPA* in a REA appeal, considering that the Project will operate "in accordance with" the REA and its conditions. The Approval Holder and the Director draw a comparison between the analysis of mitigation measures in this appeal, and the issue of "compliance" with conditions, which has been raised in previous REA appeals dealing with human health. The Tribunal finds the comparison a faulty one. The issue before the Tribunal is not whether the Approval Holder will operate the Project in compliance with the REA conditions. Rather, the issue is whether the mitigation measures themselves, contained in the conditions, will be effective in preventing serious and irreversible harm.

305 The testimony of Ms. Gunson, Dr. Beaudry and Dr. Edge all accord with the conclusion of the Stantec Report, that "Loss of adult Blanding's turtles, due to accidental mortality, could have a significant negative impact on the local populations."

306 Dr. Beaudry and Ms. Gunson disagree with the next phrase in the report:

> "... however, current site activities (e.g. recreational vehicle use) have a similar potential effect, and through implementation of appropriate construction and post-development mitigation measures, the risk of accidental injury or mortality to Blanding's turtles can be significantly reduced." Ms. Gunson reviewed the historical reports of Blanding's turtle sightings in the vicinity of Ostrander Point Crown Land Block; a number were dead turtles on county roads, and none were found on ATV trails. While he acknowledged that ATV trails allow access for poachers, Dr. Beaudry testified that the difference between ATV use of trails currently, and vehicle use of roads after construction, is "enormous". He believes that an adult turtle struck by an ATV would have a very good chance of survival, due to the lighter weight of the ATV and the sturdy shell of the Blanding's turtle. In addition, he has concerns that a "reduction" in mortality is not effective mitigation. He testified that "population ecology tells us any mortality of an adult Blanding's turtle can be problematic".

a. Effectiveness of mitigation measures

307 The Tribunal will turn to a closer examination of the mitigation measures, to determine their track record of success, or failure.

Development setbacks from "critical habitat"

308 There are some mitigation measures proposed in the Stantec Report on Blanding's turtle, which are generally accepted by the experts as effective, and the Tribunal finds them to be so. A setback of 120 m was recommended around overwintering and nursery habitat, located in the permanent wetlands in the southeastern portion of the study area, "as a buffer to avoid disturbance or encroachment". Where development is prohibited by a mitigation measure, it will clearly be effective. Thus, there will be no road mortality within the setback.

309 However, the setback was only proposed around habitat deemed by the Stantec Report to be "critical habitat" for Blanding's turtle within the Ostrander Point Study Area. Stantec defines "critical habitat" as that "which is essential for the survival of the species and which if altered by the proposed Project could result in a significant negative impact to the population within the Study Area and surrounding landscape." The Report then lists a number of factors considered in the determination of "critical habitat". The source of the list of factors is not referenced. Figure 1 attached to the Report depicts "habitat", while Figure 2 purports to depict "critical habitat".

310 Dr. Beaudry criticised the concept of critical habitat in the report. His witness statement notes there is a "mismatch" between the summarized critical habitat and the definition provided: "If any of the types of habitat discussed is altered in such a way as to decrease fecundity or survival rates, for example by increased vehicle traffic, a significant negative impact on the population could be observed." Dr. Beaudry testified that conservation biologists for the past 20 years have used the definition of critical habitat as "all necessary habitat needed to fulfill the life cycle without reducing its fitness, without reducing reproductive output or increasing mortality or decreasing survivorship". Thus conservation biologists consider critical habitat to be the whole of the types of habitat required for all phases of Blanding's turtle life activities.

311 Dr. Edge agreed with Dr. Beaudry's definition of critical habitat, rather than the one used in the Stantec Report.

312 Of note, Blanding's turtle was not a species at risk at the time the Stantec Report was written. It is now threatened in Ontario and endangered in Nova Scotia, and considered globally endangered by the IUCN. The definition of "habitat" in the *ESA*, for a species such as Blanding's turtle which does not yet have a habitat regulation, is:

> 2.(1) "habitat" means,
>
> (b) with respect to any other species of animal, plant or other organism, an area on which the species depends, directly or indirectly, to carry on its life processes, including life processes such as reproduction, rearing, hibernation, migration or feeding,

313 Given the expertise of Drs. Beaudry and Edge, the Tribunal prefers their interpretation of critical habitat over the approach taken by Stantec, of labelling only permanent wetlands (overwintering and nursery habitat), as "critical habitat". Under such a definition, the whole of the Ostrander Point Crown Land Block should benefit from a development setback.

No construction or maintenance activities during active period

314 Another mitigation measure included in the Stantec Report and accepted as effective by Drs. Beaudry and Edge, is to prevent construction and road maintenance activities from taking place during the active period of Blanding's turtle. This mitigation measure was proposed in the Stantec Report in response to the acknowledged increased risk of road mortality to Blanding's turtles during the construction phase of the Project. The Report notes:

> Blanding's turtles are likely to be at an increased risk of accidental injury or mortality during construction. In particular, equipment moving through flooded pools in the spring and early summer may result in injury to Blanding's turtle. Turtles using access roads as basking sites or for movement are also likely to be at an increased risk. Loss of adult Blanding's turtles, due to accidental mortality, could have a significant impact on the local populations. (at p. 4.5)

315 The mitigation measures are thus intended to address this "increased risk" and "significant impact on the local populations" that are using access roads.

316 This mitigation measure is echoed in the *ESA* Permit, which is a separate instrument from the REA. Although the Approval Holder is bound by the *ESA* Permit, a contravention of which may lead to prosecution under the *ESA*, for the Tribunal's purposes in this analysis it is simply evidence relevant to conditions to the REA, which must be assessed as would any other condition. The panel notes that neither of the MNR witnesses who testified with respect to the *ESA* Permit are Blanding's turtle experts.

317 The *ESA* Permit prohibits construction activities from May 1 to October 15. Although there was no map provided to the Tribunal showing the new roads, or their location, the Tribunal accepts that preventing construction from May 1 to October 15 is an effective method of reducing road mortality during construction, as well as road maintenance activities post-construction where they are prohibited from May 1 to October 15. However, the Report does not go on to prevent these same risks arising from turtles' use of the roads, when they occur during the active period in the years post-construction.

Reduced speeds, driver education and turtle crossing signs

318 Dr. Shilling's witness statement notes his opinion at paragraph 7(4) as follows:

> At the scale of Prince Edward County, it is unlikely that strikes on the Property would jeopardize the Blanding's turtle population. Mitigation activities of careful observation for adult and nest sites, as well as emerging hatchlings, reduced speeds, and driver education are likely to reduce the risk to Blanding's turtle populations from the proposed access road at both the Property and Prince Edward County scale.

319 Dr. Shilling's statement concludes mitigation activities reduce risk, but he does not indicate to what degree.

320 In addition, Dr. Shilling's statement includes the assumption that the following mitigation activities will be taking place:

- There is careful observation for adult and nest sites and emerging hatchlings;
- There are reduced speeds;
- There has been driver education.

321 The "careful observation" for turtles, nests and hatchlings is within the power of the Approval Holder to make happen. The Tribunal has no difficulty with this mitigation requirement. However, whether drivers reduce their speed, and how they respond to education if they receive it, are not within the power of the Approval Holder. This is particularly true for members of the public accessing the Site. Dr. Shilling testified that, when enforced, there is a measurable reduction in wildlife-vehicle mortality. He noted that for the Ostrander Point project, the conceptual description says that a speed limit of 15 kilometers per hour would be used and at least staff drivers would be advised about the importance of this, which means there is a greater influence on that class of drivers. Whether there would be law enforcement because of the other potential drivers on the roads I have no idea.

322 Dr. Shilling referred to a study from Australia, which found that speed limits were effective to slow down people driving through a national park. When counsel for the appellant referred to the Montana Study, *supra*, which found that there were no known studies proving the effectiveness of driver education or public information efforts in reducing the number or severity of wildlife collision, Dr. Shilling agreed this was true for large public highway networks because of the large numbers of drivers in the public, but not true for the contained example in Australia.

323 The Tribunal finds that Ostrander Point Crown Land Block is open to public access at all times. If the Ostrander Point Site were to be managed as a provincial park or protected area, with staff at the entrance and the expectation of speed limit enforcement, the success of speed limits and education as mitigation measures to reduce but not eliminate fatalities, would likely improve. However, there are no such requirements in either the REA or the *ESA* Permit.

324 The *ESA* Permit requires educational signage. The Tribunal accepts Ms. Gunson and Dr. Beaudry's testimony, supported by the Montana Toolbox study, that turtle crossing signs do not work for the general public. While they may have some positive impact for people who are motivated to protect turtles, driver habituation renders them ineffective. The Montana Study, *supra*, concludes as follows:

> Data on effectiveness of several other mitigation measures are lacking or insufficient to justify a wildlife-vehicle reduction estimate. Nonetheless, the authors of this report suggest implementing some of these measures, at least under certain conditions (Table 4). For example, public education may not reduce wildlife-vehicle collisions, or at least not substantially, but the public may appreciate being informed about the extent of the wildlife-vehicle collision problem and the efforts that are undertaken to reduce the problem at specific locations. However, public education as a stand alone mitigation measure is unlikely to result in a substantial reduction of wildlife-vehicle collisions. ...
>
> Some other measures appear promising and worthy of (further) study because of intuitive potential benefit, available data appear encouraging, or because the measure may only be applicable for specific situations (Table 4). These measures, however, lack a wildlife-vehicle collision reduction estimate at this time. Measures that fall into this category are traffic volume and speed reduction, wildlife crossing guards, non-standard and seasonal wildlife warning signs, animal detection systems (with or without wildlife fencing), on-board animal detection systems, roadway lighting, vegetation removal, culling, reducing habitat quality, boulders in right-of-way, and fencing in combination with a signed gap in the fence or a crosswalk.

325 Dr. Edge's experience with Blanding's turtle in Algonquin Park is of limited value as evidence with respect to road mortality. First, as he acknowledged, it is anecdotal. Second, the density of turtles in the two locations is likely quite different, given the different geographic conditions in that Ostrander Point habitat involves a barrier at the shore of Lake Ontario. Dr. Beaudry testified that, although Blanding's turtle is thinly distributed as a species, there is variation in density from site to site. Dr. Edge's experience at Algonquin Park is illustrative of this, as it took three weeks to see his first Blanding's turtle in the park, but he was surprised at finding two Blanding's turtles during one visit to the area of the Project Site.

326 Ms. Gunson and Dr. Beaudry clearly believe that speed limits and driver education will not be successful for the general public. The condition of the road will dictate speed of drivers, not posted signs. The conditions of the roads will be dramatically improved, and there will be more of them.

327 In addition, the signs will increase public knowledge about presence of Blanding's turtle and increase the likelihood of poaching, as acknowledged by Dr. Edge. Dr. Beaudry noted that the risk of poaching is taken seriously enough by herpetological researchers and scientific journal editors so as to lead them to modify the location of published research results, to prevent recognition of the features and find locations of Blanding's turtle on the ground.

328 The Stantec Report recommends "to minimize awareness to the presence of Blanding's turtles, in an effort to avoid poaching, on-site signage should be discreet about species presence. It is likely that the presence of the operating facility with surveillance and maintenance staff will deter illegal activity within the project area, thus discouraging poaching." There are no *ESA* Permit requirements to mitigate the increased risk of turtle poaching.

329 Of note, Dr. Beaudry found the concept of "reducing road mortality" to be problematic for species such as Blanding's turtle, where the populations are small or thinly distributed. Populations can have natural fluctuations due to climate or an increase in predator populations; adding road mortality for this type of species is very dangerous. Dr. Beaudry's opinion, assuming a low traffic volume on the Project's roads, is that the only effective mitigation measure in this situation is not to build the roads, in order to prevent serious and irreversible harm to this population of Blanding's turtle.

330 With better and longer roads the Site will be more accessible, there will be more traffic than previously, and more traffic than simply construction and maintenance vehicles. The Tribunal finds that on a balance of probabilities, turtle crossing signs are not effective, and will not reduce mortality enough to offset the increased risk of mortality and poaching caused by the introduction of new and better roads on this Site.

Creation of nesting habitat

331 The *ESA* Permit requires, at para. 10.2, that the Approval Holder strategically create nesting habitat for Blanding's turtle on the eastern side of the site located within 250 m of wetland habitat and at least 400 m away from the project access roads, for the duration of the *ESA* Permit. The nesting habitat would be monitored annually and subject to reporting requirements.

332 The location is blacked out in the copy filed into evidence in the hearing, evidently due to protection concerns for the turtles. However, it is not at all clear that Blanding's turtles would choose artificial nest sites over natural sites, or roadsides. Dr. Beaudry testified that he has done studies on the question of whether artificial nest sites can be created close to wetlands, to reduce road risk. He found, however, that Blanding's turtles bypassed sites that appeared suitable to the researchers. He concluded that our understanding of nesting sites is "coarse", and that the species has an "agenda" that we don't understand. He did agree on cross examination that artificial nesting sites should be explored, where no other mitigation measures are possible.

333 There is already significant nesting habitat throughout the wetland matrix on and adjacent to the Project Site. The creation of "strategic" nesting habitat , even if it were successful in attracting turtles, has not been shown to be effective at dissuading Blanding's turtles from using roadways as nesting habitat. Although not considered as such in a calculation of habitat gain or loss, the creation of 5.4 km of new roadways *de facto* creates many kilometres' worth of new, but perilous, nesting habitat for Blanding's turtle, thereby increasing their risk of road mortality.

Impact monitoring plan

334 The *ESA* Permit requires that the Approval Holder design an Impact Monitoring Plan ("IMP") for Blanding's turtle, prior to construction. No IMP was presented to the Tribunal, nor was a draft one entered as an exhibit (in contrast to the Draft Alvar Management Plan). The *ESA* Permit lists the following minimum elements to be included in an IMP:

- Ensuring impact monitoring takes place every year;
- Ensure the Site restoration and mitigation measures are installed, maintained and function as intended;
- Identification of Blanding's turtle high frequency intersects with the proposed road using an MNR approved methodology. Once these intersects are identified and provided to MNR, using adaptive management, site specific mitigation measures may be implemented, to the approval of MNR (e.g., relocation of signage to raise awareness and wildlife travel corridor/underground passage/modified culvert constructed); and
- Monitoring mortality of Blanding's turtle in accordance with an MNR approved protocol as a result of the Construction Activities and Maintenance Activities.

335 As with the Property Management Plan ("PMP") referred to in the *ESA* Permit, which is intended to eventually guide the management of the compensation property, and as with the Alvar Management Plan, this future IMP is referred to in the REA materials but there are no details finalized. As a result, the Tribunal cannot evaluate its effectiveness. In addition, the appellant PECFN, on whom the onus rests to prove that engaging in the Project in accordance with the REA will cause serious and irreversible harm, cannot bring evidence on the IMP or the PMP. The REA therefore lacks important detail for some mitigation plans.

336 There are a number of weaknesses with the intended minimum IMP measures. One refers to ensuring mitigation measures "function as intended". The list of minimum IMP elements does not include contingency measures, however, in the event the untested mitigation measures are ineffective.

337 The *ESA* Permit refers to site specific mitigation measures such as signage, underground passage or modified culverts to prevent road mortality. However, their efficacy relies on identifying high frequency intersects. As noted above, the Tribunal accepts the evidence of Dr. Beaudry and Ms. Gunson with respect to the inefficacy of culverts or passages at the Project Site. Dr. Shilling endorsed Dr. Beaudry's opinion in this regard. All experts agreed that the entire Site is a patchwork of suitable Blanding's turtle habitat, with temporary wetlands scattered throughout. All experts agreed that Blanding's turtles will criss-cross the Site during the active period. The evidence reveals that there are permanent wetlands in the south-east corner of the Site, as well as adjacent to the Site to the north, with connected wetlands angling down to the Lake adjacent to the Subject Property on the west side (see Appendix B). The Tribunal accepts that it would not be possible to identify high frequency intersects at the granularity of the site scale.

Compensation property

338 The REA conditions require that 37.65 ha property to be set aside to provide, restore and actively maintain habitat for Blanding's turtle, subject to a 20 year conservation easement. In addition, the property shall be maintained in its current state until MNR approves a Property Management Plan.

339 The Tribunal was not given a map showing the location of the compensation property, but was informed it was generally north of Helmer Road, west of Babylon Road, in the form of a rectangle with a long north-south orientation, and narrow east-west frontage.

340 However, the area north of Helmer Road is already considered Blanding's turtle habitat. Dr. Edge noted there are permanent wetlands suitable for overwintering habitat in the compensation property, and he observed a Blanding's turtle at that location during his visit to the area. The compensation property therefore does not add to Blanding's turtle habitat, and any habitat lost on the Project Site will amount to a net loss of Blanding's turtle habitat in Prince Edward County. There was no evidence to the effect that the habitat on the compensation site would benefit from improvements.

341 The compensation property is also on the north side of Helmer Road, west of Babylon Road, which are county roads that separate the compensation property from the permanent wetlands which Stantec identified as "critical habitat", to the south. Therefore, in order to reach the compensation property, the turtles using the southern wetlands must cross a County Road, with its associated risks.

a. Serious and Irreversible harm

342 The Director argues that, since an *ESA* Permit may only be issued if the Minister of Natural Resources is satisfied that the conditions of the permit will result in an overall benefit to the species, this permit provides strong evidence that there will not be serious and irreversible harm to Blanding's turtle and Eastern Whip-poor-will.

343 However, as noted by Mr. Baxter, the *ESA* Permit is issued by the MNR after a determination that the species **as a whole in Ontario** will have an overall benefit. The Tribunal is considering the status of the Blanding's turtle population that occupies this Project Site and the surrounding landscape. Due to the difference in scale, the MNR's determination of "overall benefit" for the species will therefore not be determinative of the second branch of the test with respect to Blanding's turtle.

344 The analysis of serious and irreversible harm is closely linked to the size of the population considered.

345 Dr. Edge gave a description of the geographic extent of the population at Ostrander Point, as roughly extending from the southern shore of Lake Ontario up five or six kilometers inland to where the landscape changes from more of a wetland forested matrix to agriculture, east to west along the entire south shore of Prince Edward County.

346 Dr. Beaudry testified that, in his opinion, "serious" harm is something that can lead to a decrease in reproductive output, or an increase in mortality, that can lead a local population to extinction. He does not distinguish between "serious" and "irreversible".

347 Dr. Beaudry pointed to modeling efforts that have been undertaken to project virtual population survival. The estimated annual survivorship of Blanding's turtle is 96%. Studies have found that with an additional 2% road mortality, i.e., a drop to 94% adult survivorship, there is a clear loss of individuals which will result in a fairly quickly declining population. Slower declines may occur with 1% - 2% road mortality. Road mortality is very damaging especially where populations are small or thinly distributed, as are Blanding's turtle populations.

348 Dr. Beaudry noted that the loss of a population would have a number of consequences to the ecology of a site, including removing a "stepping stone" population that can result in isolation of other populations, and thus have consequences on a broader scale.

349 Dr. Beaudry was confident in concluding the Project will cause serious and irreversible harm to Blanding's turtle without knowing the population size at Ostrander Point, because the initial size of the population will only lead to a different end-time when the population will go extinct. The length of time, he stated, is the only variable. He assumed the population would be stable in all other respects, which is the best case scenario.

350 Ms. Gunson testified that research on Blanding's turtle indicates that a population could sustain a 2 to 5 per cent mortality. She said that having an individual die would lead to a decline in population. Ms. Gunson noted that there is no place in southern Ontario more than 1.5 km from a road.

351 The Report by the Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") on Blanding's turtle (2005) notes that, due to its life-history strategy, with a delayed maturity and great longevity, they are "highly vulnerable to any chronic increase in adult mortality rates, even when these increases are quite small (<5%)" (at p.14). The same Report cites, at p.20, the findings from a study by Browne (2003) in Point Pelee National Park, that "if one extra (beyond natural mortality) adult female is killed by a vehicle every two years, and if nest mortality is >32% annu-

ally, the population would slowly decline to extinction". It also remarks on the findings of male-biased populations, which "could be the result of road mortality affecting nesting females more than their male counterparts".

352 As noted above, Dr. Shilling used the scale of "Prince Edward County" for his opinion that engaging in the Project will not cause serious and irreversible harm to this species. However, Dr. Shilling said he did not know how many Blanding's turtles, or populations of such turtles, there are in Prince Edward County or at the Project Site. Dr. Shilling also relied on the concept of a "meta-population", which is a group of interacting populations.

353 In the article Dr. Shilling submitted to support the concept of meta-populations, (Enneson and Litzgus), the authors do note that "the meta-population model suggests that dispersal between wetlands used for breeding by spotted turtles contributes to persistence." However, the final conclusion at pp.1252-1253 is sobering:

> Our case study of PVAs for spotted turtles at a relatively pristine site indicated a relatively high risk of extinction in the absence of anthropogenic additive mortality (e.g., habitat destruction, harvesting, and road mortality). Application of our models to populations that are in less pristine habitats would indicate a grim future for the species.

354 Dr. Shilling stated that his opinion is based on the extent of appropriate habitat in the area, the number of observations of Blanding's turtles in the area and the rate of road mortality in the area. He said all of these factors led him to conclude that the Project, taking in consideration the construction and mitigation activities, was not going to cause serious and irreversible harm. The Tribunal notes that his opinion is predicated on successful mitigation of road impacts. In addition, he acknowledged that serious and irreversible harm may eventually occur from the combination of all the development along the Prince Edward County south shore. Dr. Shilling agreed that, if there were three Blanding's Turtles at the site and one of them got killed, that would be serious and irreversible harm.

355 As noted above, interpretation of serious and irreversible harm will involve a case-by-case consideration of a number of factors. For the purposes of its analysis with respect to Blanding's turtle, the Tribunal accepts the scale of the population that was used by Stantec in the preparation of its Blanding's Turtle Report, at p. 4.1, *Extent of the local population,* where it has considered "the population within the study area and surrounding landscape." (See also excerpt from Stantec's "critical habitat" consideration, noted above). This accords with Dr. Edge's description of the population, and Dr. Beaudry's comments on the biological definition of population, which in this area would extend off site to the wetlands surrounding the study area.

356 No data was available on the size of the Blanding's turtle population, whether on site, in the surrounding area, or in Prince Edward County as a whole. There is no report on current or expected traffic to the area, nor has any study been done on the density of Blanding's turtle on the Ostrander Point Crown Land Block. The Approval Holder argues that any uncertainties, such as the size of the population, must work in favour of the Approval Holder because uncertainty cannot rise to the test of "will cause".

357 The approach suggested by the Approval Holder would require an "absolute" level of certainty with respect to the impacts of a Project. Such an approach is incompatible with the nature of biology, and our imperfect understanding of the impacts of human activity on plant life, animal life and the natural environment. The Tribunal is mindful of the following conclusion at the last page of the article by Roedenbeck et al., which is in evidence:

> For road ecology, and especially those issues relevant to landscape-level planning and management, a strong weight of evidence, i.e., scientific proof, is unattainable in practice, and to insist upon it is tantamount to discounting all the scientific research that is likely to be conducted now or in the foreseeable future.

358 An enormous amount of information on this species was brought forward in this appeal. There is certainly enough information for the Tribunal to make findings on the conservation status of the species, its life history traits that make it vulnerable to harm from the Project, the precise type of harm that the Project will cause, and the significance of this type of harm (road mortality and poaching) on Blanding's turtle. The Tribunal finds that in such a case, knowledge of the exact size of the population that will be impacted by the Project, although helpful, is not required.

7. Conclusions on sub-issue 1

359 The Tribunal finds that engaging in the Project in accordance with the REA will cause serious and irreversible harm to Blanding's turtle. The Tribunal makes this finding having regard to the biological population that will be impacted by the Project; that is, the population that uses the habitat on the Project Site and the surrounding area.

360 It appears that the mitigation measures to be employed during the construction phase of the Project, i.e., no construction or maintenance from May 1 to October 15, would be effective to prevent serious and irreversible harm to Blanding's turtle from construction activities of the Project itself. However, such measures do not prevent use of the roads in the post-construction phase. In addition, the Tribunal finds on a balance of probabilities that the fact that this Project is on Crown land and open to public access will reduce the effectiveness of road mortality mitigation measures, including educational signage and reduced speed limits, to the point they will no longer be effective in reducing mortality to a level that would prevent serious and irreversible harm to Blanding's turtle. The one mitigation measure that the evidence indicates would be effective to some degree, i.e., speed bumps, does not nearly outweigh the increased use of the Site that will take place due to maintenance traffic and easier public access, and the measure will have no impact on poaching.

361 As noted in the "Legal Test" section above, whether the evidence in a hearing establishes harm rising to the level of serious and irreversible harm will be a case-by-case analysis. Each wind farm project may impact plant life, animal life or the natural environment in a unique way.

362 The Tribunal finds that, in its analysis of Blanding's turtle for the Ostrander Point Project, the following elements are importantin determining whether engaging in the Project in accordance with the REA, will cause serious and irreversible harm:

* Conservation status of the species
* Species habitat on the site and in the area
* Vulnerability of the population
* Type and extent of harm caused by the Project
* Vulnerability of the species to this type and extent of harm due to its life history traits
* Mitigation measures in the REA
* Demonstrated effectiveness of the mitigation measures.

363 The Tribunal finds that mortality due to roads, brought by increased vehicle traffic, poachers and predators, directly in the habitat of Blanding's turtle, a species that is globally endangered and threatened in Ontario, is serious and irreversible harm to Blanding's turtle at Ostrander Point Crown Land Block that will not be effectively mitigated by the conditions in the REA.

Birds

Evidence of PECFN witnesses

Mr. Okines

364 David Okines was qualified to give expert opinion evidence on the banding, identification and movement of birds, including migratory birds, in the Prince Edward County South ShoPECFN argues that re Important Bird Area ("PECSS IBA"). Mr. Okines is a biologist who has been the resident Station Manager for the past ten years at PEPtBO collecting the data, including radar imagery, required to establish the daily estimate of the numbers of birds of each species in and/or passing through the area.

365 The PEPtBO monitoring station, which is 10 kilometres from Ostrander Point, is one of 25 stations in the Canadian Migration Monitoring Network, which sends data to Bird Studies Canada to create species population indices. The annual density of birds in the Prince Area Point area is 500,000 to 750,000 birds. Mr. Okines stated that data suggests that the same density of birds were passing through the whole of the PECSS IBA. It is Mr. Okines' evidence that the PECSS is a major migration highway "used by millions of birds" as a stopover site and staging area.

366 Mr. Okines provided evidence with respect to the average and total number of various bird species observed by PEPtBO during spring and fall migrations over the past 10 years. Mr. Okines explained that diurnal passerine migrants and nocturnal passerines had different migration habits. During their fall migration, nocturnal passerines arrive at Lake Ontario shortly before dawn and either land on the shoreline or attempt to cross the lake. If they did not have enough time to cross the lake before sunrise, they would return to the shore and would move up to 5 km inland to feed during the day before re-starting the migration south through the PECSS IBA in the evening. He opined that these migrants would therefore be exposed to wind turbines three times during one day. Mr. Okines also testified that peak migration periods for one species would not be the same for another species.

367 Mr. Okines testified that diurnal passerine migrants, such as blue jays and raptors, move over the land and avoid going over water bodies. Therefore these birds fly down the length of the coast and when they get to the end, they may turn and go over short distances of water but would not fly 60 miles across the lake.

368 Mr. Okines showed radar sequences that he testified demonstrate that millions of birds were crossing Lake Ontario to and from their breeding sites further north. He said the images also illustrate that the birds are using the entire shoreline of the PECSS IBA.

369 Mr. Okines stated that the highest number of passerines is seen when their migration reaches its peak in mid-May. The birds counted in the beginning of August are local breeding birds, and the number of birds starts to increase mid-to late August with the number of migrants from the Boreal Forest arriving. Mr. Okines explained that in the spring, the peak was around 4,500 birds going north to breed and when they come back in the fall the peak number was around 8,000 birds.

370 Mr. Okines stated that the average number of birds expected to cross the whole PECSS IBA per day in the fall was 85,000 birds. With regards to hawks, Mr. Okines added that 35,000 individuals have been counted in the fall for the five day count period.

371 With respect to ducks, which is part of the reason the area was designated an IBA, Mr. Okines named the species that winter and those that migrate through the area. He noted that the number of Long-tailed ducks seen in one day in a peak year could be 225,000, which is about 20 percent of the North American population. A one-day peak of 6,000 Mergansers had been observed in late October, but the average number of Mergansers in both spring and fall was around 250, per 5 day count period.

372 In Mr. Okines' view, the introduction of wind turbines anywhere along the south shore would create serious and irreversible harm to plant life, animal life or the natural environment and would create an unnecessary obstacle to the safe migration of all species.

373 On cross-examination, Mr. Okines agreed that Henslow's Sparrow has not been recorded in the area since 1994. Also, PEPtBO has not observed a Kirtland's Warbler, but Mr. Okines stated that the chances of seeing one of the six birds in Canada was pretty small but there was a chance that they could pass through Ostrander Point during their fall migration. Regarding resident birds, Mr. Okines noted that there are eight Whip-poor-wills that breed in the vicinity of the Project.

Mr. Cheskey

374 Ted Cheskey was qualified as an expert in bird natural history, bird conservation in Ontario, and IBAs. He is the manager of Nature Canada's bird conservation programs and works with BirdLife International, which began the internationally recognised IBA program in the 1980's, although he was testifying as an individual rather than a representative of Nature Canada.

375 Mr. Cheskey explained that IBAs are part of a program of Bird Life International that was established to identify, monitor and protect a global network of sites for the conservation of the world's birds and other biodiversity. He explained that the IBA program came to Canada in 1996 and is run by Nature Canada and Bird Studies Canada.

376 Mr. Cheskey explained that the three criteria for a site to qualify as an IBA are: it supports large numbers of birds, of both species and individuals; it can support threatened species; or it supports birds that are highly restricted by range or habitat. He indicated that there are three different levels of qualification: global, continental and national, and that most IBAs in Canada met the threshold based on the number of individual birds, i.e., 1 per cent of the species population at either the global, continental or national level at a site. He indicated that there are 600 IBAs recognized in Canada at all levels of significance and added that roughly 300 of them, including the PECSS IBA, are considered globally significant.

377 Mr. Cheskey agreed that the PECSS is recognized as an IBA on the global and national levels due to its waterfowl, particularly Long-tailed Duck, Greater Scaup and the White-winged Scoter. He also agreed that the "Complete Bird Records" for the PECSS IBA identified 2000 raptors, which is short of the 10,000 raptors needed for the site to qualify as a nationally significant IBA, although he noted that the intent of the criteria was to apply them over a period of time and not on one particular day.

378 Regarding the effect of the Project on bird migration, Mr. Cheskey indicated that the PECSS IBA contained the largest natural coastline on Lake Ontario. He explained that the peninsula is essential to bird migration because it pro-

vides staging and landing areas, and has wetlands that provide food sources. In his witness statement he said that a combination of factors elevates the risk to birds at the Project Site beyond what can be expected to be reduced by mitigation, the primary ones being its location on a Great Lakes peninsula, and its ecology as a highly productive ecosystem of natural habitat proximate to a productive literal zone and coastal wetlands. He believes declining species like Tree Swallows and Purple Martins would be put at special risk, based on high mortality rates at the Wolfe Island project.

379 Mr. Cheskey pointed out that Ostrander Point has the fourth highest migration density of raptor sites in North America. He added that the MNR had designated it a priority area for restoring Bald Eagles. In his opinion, raptor populations are especially vulnerable to wind turbines because of their soaring habits and low reproductive rates.

380 Regarding breeding birds, Mr. Cheskey believes that principally grassland species are at risk, such as Eastern Meadowlark, Eastern Kingbird, and Field Sparrow, all with declining populations. American Woodcock and Common Snipe were also vulnerable because of their aerial courtship displays at turbine blade level. In his opinion the turbines and pads, the road network, and the other infrastructure, as well as the associated disturbances would have a serious negative impact on the healthy breeding bird community at Ostrander Point.

381 Mr. Cheskey stated that Dr. Kerlinger did not identify all of the types of risks to birds from the Project. Mr. Cheskey would include collisions with the turbine blades, the meteorological tower, power lines and towers; loss of breeding and feeding habitat because of displacement by the turbines and service roads; electrocution from contact with the power lines; and an avoidance or "barrier" effect for certain bird species.

382 Mr. Cheskey stated that the bird fatality rates are underestimated by Dr. Kerlinger because none of Dr. Kerlinger's examples resemble the habitat and geographical conditions at Ostrander Point. Mr. Cheskey said that there are no other sites within Ontario, and likely Canada, where a wind farm has been built on a peninsula with such highly productive natural habitats along a shoreline.

383 Mr. Cheskey disagreed with Dr. Kerlinger's conclusion that bird use of the Project area would not be significant. Mr. Cheskey said that nine turbines would cover about 50,000 m[superscript 2] of air space, and that radar studies showed that 40 to 50% of "targets" detected are within the range of the turbine blades.

384 Mr. Cheskey stated that his opinion that the casualty rates from the Project would exceed MNR thresholds was based on the fact that there are no other wind projects built on a Great Lakes peninsula with natural habitat comparable to the Project, that shorelines are disproportionally important for birds, and the Project turbines would be located within 200 metres of the shoreline.

385 Mr. Cheskey said the types of mitigation that were proposed, the use of a radar- based detection system, turbine shutdowns, and studies could address the on-site impact to migrating birds, but that the Project would also have an impact on the breeding bird community at Ostrander Point through displacement.

Mr. Evans

386 William Evans was qualified as an expert in avian acoustic monitoring and nocturnal bird migration.

387 Mr. Evans took a "didactic" approach in his testimony. He first considered the meaning of "serious and irreversible harm" in s. 145.2.1 of the *EPA*, and then focused his evidence as an example of how it would play out for one species in decline, Purple Martin. Purple Martin is an aerial insectivore whose population has declined 5 per cent per year in Ontario since surveys began in 1967. He used this species to demonstrate his assertion that it is conceivable that the cumulative impact of Ontario wind farms will accelerate the 5 to 7.5 per cent annual decline in Ontario of Purple Martin population.

388 Mr. Evans stated that bird carcass counts typically used in turbine mortality monitoring are not actual fatality rates but "indices of fatalities based on the survey methods employed." He compared the different survey methods used at Maple Ridge and Wolfe Island (the two wind farms closest to Ostrander Point) and concluded that, if the survey methods used at Maple Ridge had been adopted at Wolfe Island, it would have produced significantly different results, i.e., a much higher number of bird fatalities at Wolfe Island, including as many as 100 Purple Martins.

389 Regarding the Project, Mr. Evans believes that it will kill more birds than the Wolfe Island project, which has the highest fatality rate in Ontario, because Ostrander Point has a greater concentration of migrating birds, it is a peninsula with a long stretch of shoreline, and the turbines will be 8.5 m taller.

390 Mr. Evans is concerned that the Project Site would become a population sink for Purple Martin. He noted that while the Stantec study had reported 67 Purple Martins at the Project Site, the count is an underestimate because the surveys were done in the early morning, which is not prime time for surveying aerial insectivores.

391 To demonstrate the impact of scale, Mr. Evans testified that, if there are 20 individual birds left in Canada and a single one is killed by the Project, it would constitute serious and irreversible damage for the population in Canada. On the other hand, the death of one bird, out of the total global population of 50,000, would not constitute serious and irreversible damage to the global population.

392 In Mr. Evans' opinion there should be a cumulative impact study of impacts to aerial insectivores from wind farm projects along the north shorelines of Lake Ontario and Lake Erie. In his opinion, the likely late summer concentration dynamics of Purple Martin, Tree Swallow and other aerial insectivores such as Common Nighthawk and Chimney Swift, in the vicinity of the Project would lead to very high fatality rates.

393 He also anticipates that the Project would cause exceptionally high mortality of night migrating songbirds in fall, and high raptor mortality rates. Mr. Evans was uncertain what the level of waterfowl and shorebird fatalities would be at the Project.

394 Mr. Evans summarised his opinions in his witness statement as follows:

* the Project would not have a measureable impact to global populations of any bird species based on current population levels;
* the Project would have serious and irreversible impacts to local breeding populations in the immediate vicinity of the Project;
* the cumulative impact of the Project and other wind energy facilities along the north shoreline regions of Lake Erie and Lake Ontario could be expected to have serious and irreversible effects on the Ontario populations of a number of species of aerial insectivores (e.g., Purple Martin, Tree Swallow, Common Nighthawk, Chimney Swift);
* the Project would have the highest fatality rates per MW for night migrating songbirds in North America; and
* the Project would have the highest fatality rates per MW for raptors in North America.

Mr. Scott

395 Martin Scott was qualified as an expert on birds in the United Kingdom and in renewable energy projects in the United Kingdom. He is an ecologist with thirty five years of experience in ornithology including ten years in relation to the interaction of birds and renewable energy projects, mainly in Scotland, but also in Canada. Mr. Scott provides technical, environmental and planning support to utilities, developers, industry and communities in relation to ecology. Mr. Scott testified that when he is providing technical, environmental and planning advice to a developer, the key consideration is "location, location, location". It is his view that a key ecological indicator is that Ostrander Point is an important migration corridor.

396 It is Mr. Scott's view that the proposed Project is an "egregious example" of a "renewable energy project that is simply in the wrong place." In this regard, Mr. Scott referred to a letter from Environment Canada ("EC") to the MNR dated February 24, 2010, with comments on Ostrander Point Wind Energy Park, made in relation to EC's regulatory interest in migratory birds, species at risk and water quality. EC states:

> The Study Area contains unique habitats (i.e. alvar, open woodland) that are uncommon in southern Ontario. In terms of overall quality, it is one of the best areas for birds EC has seen in southern Ontario. EC agrees that this project merits a Level 4 Category of Concern." (p.2)

397 It is Mr. Scott's opinion that the Project as approved will cause serious and irreversible harm to birds through fatalities and habitat displacement. He is also concerned that allowing industrial wind turbines in an IBA "would set a damaging precedent for all internationally important sites". He described the proposed radar mitigation system ("MERLIN") as a technology in its infancy that is useful for mapping and recording bird activity but not useful for collision avoidance.

398 He stated that in Scotland where a development will affect, or has the potential to affect, a site designated as an IBA, the Scottish Government is required to consider a series of legal tests set down in Article 6 of the European Commission's Habitats Directive (Directive 92/43). The first question is whether there would be a significant adverse effect

on the integrity of the site. If the proposal failed the first test, the government would ask whether there might be alternative solutions to the proposal including other locations or technologies. He added that the government would then have to consider whether there were imperative reasons of overriding public interest which justified allowing such a development. In his opinion, the Project would have a significant adverse effect on the integrity of the site and there were many clear alternatives to the proposed Project.

399 Mr. Scott stated that there is increasing evidence that both the locating of poorly sited turbines and the effects of habitat fragmentation would be a direct threat and cause serious and irreversible harm to the breeding bird community. He listed the species he felt would be impacted.

400 Mr. Scott stated that the Project area is also important for migratory birds, and he listed the migrating species he thought were likely to be impacted.

401 Regarding species linked to the IBA, Mr. Scott noted the species of waterfowl and shore birds which are migratory birds that are linked to the IBA.

402 Mr. Scott indicated that turbines were likely to create a barrier effect which would be amplified by the "isthmus factor". He stated that the area was already a bottle neck for migrants and that funnel would be narrowed greatly if even the precautionary displacement factor was applied.

403 Mr. Scott also stated that cumulative impact is a significant issue. He stated that one wind project would be additive to another.

404 When cross-examined as to which species-specific factors are relevant to assessing the bird vulnerability and mortality from a wind farm, in addition to foraging ranges, collision risk, disturbance distances and other relevant aspects of behavioural and population ecologies, Mr. Scott explained that increased prevalence of prey such as small mammals in wind farm areas drew eagles and vultures similar to increased presence of grouse species attracting larger species that prey on them.

405 When cross-examined on what site-specific factors are relevant to assessing the bird vulnerability and mortality at a wind farm, Mr. Scott identified collision risk, flight lines of each species in the area, and the level of bird activity on the site.

Director's witnesses

Ms. McGuiness and Mr. Prevost

406 Fiona McGuiness is a biologist with a Master of Science degree in Watershed Ecosystems. She is a Fish and Wildlife Policy and Program Advisor for the Renewable Energy Program of the Ontario MNR, and supported the development of MNR's Bird and Bird Habitat Guidelines for Wind Power Projects ("*Bird Guidelines*"), and Bat and Bat Habitat Guidelines for Wind Power Projects ("Bat Guidelines"), both updated in 2011. Ms. McGuiness was qualified as an expert in the impacts of wind turbines on birds and bats, and in the MNR Bird and Bat Guidelines.

407 It was her evidence that the MNR is not generally concerned with bird mortality at wind farms because the average is around 2.5 birds per turbine, which is considered low. The Bird and Bat Guidelines provide methods to monitor bird fatalities. The area searched is 50 m with correction factors for scavengers, searcher efficiency and unsearchable areas. Ms. McGuiness says that "the Bird and Bat Guidelines are adaptive and will be improved, as necessary, in light of emerging science."

408 Ms. McGuiness also testified with respect to the Wind Energy Bird and Bat Monitoring Database. One of the purposes of collecting bird and bat mortality data in the database is to evaluate cumulative impacts of wind farm development on birds and bats and make changes to the Bird and Bat Guidelines. In turn, under condition 12(1) of the REA for the Project, the EEMP and EIS are to be updated if there are changes to the Guidelines.

409 Ms. McGuiness testified that the bird and bat mortality thresholds are not intended to address population level impacts. Instead, they are designed to weed out "outlier" turbines. It was her evidence that even if mortality rates are at the Guideline thresholds, this would not cause population level impacts to birds.

410 Eric Prevost, an MNR employee who reviews reports required in REA applications including the NHA, EIS and EEMP, testified on behalf of the MOE. Mr. Prevost did not review the reports associated with this application; his colleague, Erin Cotnam, did so. He testified that in his view, they were complete.

411 Both Mr. Prevost and Ms.McGuiness testified that the MNR considers an IBA to be a "coarse screening tool", as not all areas in an IBA will be significant wildlife habitat as IBAs often contain towns and industrial areas.

Ms. Laplante and Mr. Baxter

412 Testimony relating to Melissa Laplante and Andy Baxter is noted above, under the section on Blanding's turtle. Regarding the Ostrander Crown Land Block, Ms. Laplante testified that of the seven species noted as "possibly occurring or utilizing the site", four were protected at the time under the *ESA* (Blanding's turtle, Eastern Whip-poor-will, Golden Eagle, and Peregrine Falcon), and three others were listed as being of special concern under the *ESA* or Species at Risk in Ontario List: the Bald Eagle, Golden-Winged Warbler, and Short-eared Owl. The determination of which species required an *ESA* Permit was based on a records review, information provided by the Approval Holder's consultants, and information provided from the Site itself.

413 Regarding birds at Ostrander Point, Ms. Laplante said that MNR required the Approval Holder to produce surveys for Eastern Whip-poor-will and Golden Eagle. Detailed breeding surveys for Henslow's Sparrow had already been conducted at Ostrander Point. The MNR then determined that Blanding's turtle (discussed above), and the Eastern Whip-poor-will and its habitat would be adversely impacted by the proposed Project, and recommended that the Approval Holder apply for an *ESA* Permit for those two species.

Approval Holder's witnesses

Dr. Strickland

414 Dr. Dale Strickland was qualified on behalf of the Approval Holder as an expert in the impacts of wind farms on birds. He holds a PhD in Zoology from the University of Wyoming and an M.S. in Wildlife Management from the University of Tennessee.

415 Dr. Strickland said that when studying impacts of wind farms on birds, he looked for a biologically significant impact on a population at a regional level and whether it can remain viable. He noted the relatively small size of the Project in terms of its area and the number of turbines. In his opinion, the Project will not cause a population impact on breeding birds, has a low potential to have a significant impact on aerial insectivore populations, the fatality rate will not have any measurable effect on night migrating songbirds, and there will be no effect on raptor populations. Also in Dr. Strickland's opinion, Swallow and Purple Martin fatalities at the Project will be lower than at Wolfe Island because the Stantec surveys indicate low use of the proposed Project area during fall migration.

416 Regarding the IBA, Dr. Strickland concluded that due to the low number of expected bird fatalities, the very small proportion of land area within the IBA affected by the Project, and the Approval Holder's commitment to mitigate high levels of avian fatalities, the Project is unlikely to cause any significant impacts. Regarding waterfowl specifically, Dr. Strickland said that he did not believe that the Project would affect them because they concentrate off shore and are not particularly susceptible to collision with wind turbines. He concluded that the Project would have no measurable effect on the IBA.

417 Regarding habitat loss for birds, Dr. Strickland concluded that the Project might displace some local birds, but because of its small size and the Approval Holder's commitment to mitigate any significant displacement, there would be no serious and irreversible impact to the breeding bird populations. With respect to the compensation property, Dr. Strickland's understanding was that the plan is to manage the property to maximize its benefits for those two species, Eastern Whip-poor-will and Blanding's turtle, but that other species will benefit from the stewardship of the area. As a result there is a potential for a complete replacement of the habitat that might be lost on the Project Site, and perhaps an enhancement of habitat for those two species in the general area. Dr. Strickland agreed with Dr. Kerlinger that construction should take place between October 15 and May 1, outside the bird breeding season.

Dr. Paul Kerlinger

418 Dr. Kerlinger was qualified as an expert in the impacts of wind farms on birds. He holds a Master's degree and Ph.D. in Biology from the State University of New York at Albany. He has done more than 75 risk assessments for wind power projects in the United States, Puerto Rico, Mexico and Spain. He designed the work, analyzed the data and wrote the report on the Maple Ridge wind project, which is one of the closest wind projects to Ostrander Point. He has conducted 20 post-construction impact studies.

419 Dr. Kerlinger stated that displacement impacts involve individuals of a species being disturbed, or their habitat altered or removed, resulting in their moving away from wind turbines so that the population is less dense close to the

turbines. He indicated that there are few "empirically demonstrated" displacement cases, that the impacts have not been strictly quantified, and that they are "species specific".

420 Dr. Kerlinger stated that collision impacts involve birds flying into turbine components, such as the blade, nacelle or tower. He indicated that average fatality rates on a per turbine basis are roughly 4 to 7 birds per turbine per year. However, he stated that there have been higher fatality rates of about 15 birds per turbine per year at two projects for which research is ongoing, one of which is Wolfe Island in Ontario. He indicated that as turbines have become taller, fatality rates have slightly increased. He testified that, to date, "fatality studies at more than 50 wind plants in the U.S. and Canada have failed to demonstrate impacts that would cause a serious and irreversible harm to populations of the bird species involved". He added that wind turbine bird fatality rates are minimal in comparison with other types of collision (e.g., windows -- 550 million, and car/trucks -- 80 million, annually), and that cats cause hundreds of millions of bird deaths annually.

421 Dr. Kerlinger agreed that a wide variety of species, and large numbers of individual birds, are found at, or pass through, the Prince Edward County Peninsula. He said this includes migrating concentrations of raptors and songbirds, and that waterfowl and marsh birds gather in the offshore, coastal and wetland areas.

422 Dr. Kerlinger stated that among the REA mitigation measures, the most important are the mortality thresholds and prevention requirements. He is of the opinion that the bird mortality threshold levels "will not cause serious and irreversible harm to birds" and will not be met or exceeded during the operation of the Project. He also said that limiting the construction dates to periods outside the nesting season (May 1 to October 15) will minimize impacts to nesting birds. He added that turbines will not be built within 200 m of the lakeshore and the *ESA* Permit for the threatened Eastern Whip-poor-will contains additional conditions.

423 Dr. Kerlinger stated that there is "no reason to believe that the Project will cause serious and irreversible harm to populations of birds that nest, winter, or migrate through the Project area". He indicates that the project is small and covers a relatively small amount of land, and that even if the number of birds killed per turbine per year is the same as the highest fatality rates in North America, namely around 14 per turbine at Wolfe Island, the total number killed would amount to less than 135 individuals across one or two dozen or more abundant and resilient species. He states that such impacts have not been demonstrated to result in population level impacts to any species.

424 Dr. Kerlinger used the scientific term "biological significance", i.e., "impacts that cause population decline". It is his opinion that an impact that causes a significant decline in the population of a species can be construed as being serious and irreversible. Dr. Kerlinger states that, from a biological perspective, bird populations extend well beyond the area of a project and are examined on a regional basis to determine population impacts. For the Project, the regional area for many species would include other parts of Ontario, upstate New York and parts of Quebec. In his opinion, the bird fatalities at Ostrander Point are not likely to reach biologically significant numbers.

425 Dr. Kerlinger indicated that, of the 17 "species at risk" that occur at Ostrander Point/Prince Edward Peninsula, only the Whip-poor-will nests on or near the Site. He added that the populations for species that nest at or around the site generally exceed one million individuals in North America.

426 Dr. Kerlinger does not agree with Mr. Evans' statement that the cumulative impact of the Project and others along the north shoreline of Lake Ontario and Lake Erie can be "expected to have serious and irreversible effects on the Ontario populations of a number of species of aerial insectivores", for example, Purple Martins, Tree Swallows, Chimney Swifts, or Common Nighthawks. Dr. Kerlinger states that none of these species is currently endangered or threatened.

427 For example, there are 11 million Purple Martins in North America and about 90,000 in Ontario. Although the Ontario population is declining, Dr. Kerlinger states the birds are not in danger of extinction and wind turbines are not causing serious and irreversible harm to any population. He states that there is no evidence that Purple Martin populations are threatened by wind turbines in the fatality database. He indicates that fatalities have occurred only at Wolfe Island, where 13 carcasses were found in the first 2.5 years of studies.

428 Dr. Kerlinger stated that Mr. Evans' claim that the Project will have the highest fatality rates per MW for night migrating songbirds and raptors in North America is not substantiated by quantitative analysis or presentation of data.

429 Dr. Kerlinger disagreed with Mr. Okines' evidence that the abundance of birds in the PEPtBO count is representative of the entire PECSS IBA; Mr. Okines was extrapolating from a small area at the tip of the peninsula to an area tens of kilometers away to the southwest, where the habitat and topography are different. Dr. Kerlinger stated that the

radar studies show that migration at the east end of Lake Ontario is a broad front and not funneled through the Prince Edward County Peninsula.

430 With respect to the Golden Eagle, Dr. Kerlinger testified the Ostrander Point project would not cause serious and irreversible harm because it migrates closer to the tip of the peninsula, and to date there is not one reported collision at a wind project on the Appalachian ridges, where hundreds and hundreds of Golden Eagles migrate. He clarified that a number of Golden Eagles are killed at the Altamont Pass project in California each year. However, he noted Altamont was not a migration corridor, but rather one of most abundant feeding sites for Golden Eagles.

431 When it was pointed out to Dr. Kerlinger that a memo from Stantec to the MNR mentioned 10 Golden Eagle sightings at the Project Site, 100 m above ground, he agreed that they were within the rotor zone of a turbine.

432 Dr. Kerlinger testified that, to see collision rates similar to Altamont, the Ostrander Point project would have to experience a mortality level of 2.5 eagles per turbine per year, which for 9 turbines would be 22 per year. The REA condition, however, requires that it can have no more than 2 raptor fatalities per year per project. The project must operate in accordance with the conditions.

433 Regarding the scale of population, Dr. Kerlinger said populations are fluid. Birds that nest in Ontario, for example, could be derived from birds nesting in New York or Quebec because these birds disperse at the end of their breeding season. Maps do not show population movement or dispersal distances, so the original area that Dr. Kerlinger would include if looking at a population impact would be the continuous breeding areas of species that nest at Ostrander, that might extend out for 50 or 100 miles in any direction, or possibly further depending on species and dispersal distances. He added that a "population" at Ostrander Point could be a series of populations or sub-populations that go out long distances because it is a year round area with many migrants.

434 Dr. Kerlinger discussed the utility of a population viability analysis to determine whether impacts are significant to those populations.

435 For the Whip-poor-will, the population at Ostrander Point could extend as far as Sudbury, farther northwest or possibly into Quebec as far as Quebec City. They could also be birds from across Lake Ontario that might disperse northward toward the end of summer.

Dr. Voltura

436 Dr. Voltura was qualified as an expert in bird behaviour and avian radar systems.

437 Dr. Voltura is the Director of Wind Energy and Avian Systems for DeTect, which manufactures the MERLIN avian radar system referred to in condition I19 of the REA. Dr. Voltura explained that the system continuously monitors "targets" (including birds and bats) in the horizontal and the vertical planes to give an altitude profile of all birds moving in an area. It also quantifies the number of birds in the area. This information is used to assess collision risk, and it is stored in a database that can be analyzed based on real-time and historical activity.

438 With regard to the use of the MERLIN system in post-construction mitigation, Dr. Voltura stated that the system provides information about bird passage rates in the rotor swept zone. This information can be analyzed, together with other collision risk factors such as weather and visibility, to predict in real-time when high activity in the rotor swept zone will occur. The turbines could then be curtailed or shut down during periods of high-risk.

Submissions

439 PECFN focuses its submissions on its species at risk "declining population" argument. Because such species are already designated as being at risk, PECFN argues that evidence of a measurable further decline in the species' population proves "serious and irreversible" harm. PECFN argues that the area of the Site has many species of nesting birds, and, as part of the PECSS peninsula migratory bird highway, also has dense populations of migrating birds. PECFN says that the nesting and migratory birds include species at risk that will suffer further declines because of the Project. PECFN argues that bird mortality rates at the Project will be very high; much higher than the numbers estimated by the Approval Holder's bird consultants and experts. PECFN submits that this will cause further measurable declines in the population of such species as the Henslow's Sparrow, Loggerhead Shrike, Kirtland's Warbler, Purple Martin and Golden Eagle and, therefore, the second branch of the test is met. PECFN underscores that the Project should not be in this area as it is within the PECSS IBA designation, and "recognised as being globally important for the conservation of birds."

440 The Director submits that the small size of the Project, the generally low mortality rates of birds associated with wind turbines, and the expert opinions, demonstrate that the Project operating in accordance with the REA will not cause serious and irreversible harm to birds through direct impacts. The Director submits that the Project has been thoroughly considered in the REA process, and the *ESA* process; potential impacts will be mitigated as much as possible; post-construction monitoring and mitigation will deal with actual impacts using an "adaptive management" approach; and the EEMP and EIS will be updated when there are changes to the Bird and Bat Guidelines.

441 The Approval Holder submits that PECFN has not shown that the Project will cause serious and irreversible harm despite the REA conditions and required mitigation measures contained in the various documents incorporated into the REA and the ESA permits. The Approval Holder further submits that PECFN has not brought evidence that reaches the high level of certainty of the "will cause" phrase in the test.

442 The submissions of the Approval Holder and the Director rely upon a "population viability" interpretation of the test, and they argue that the best evidence is that wind turbines do not, and this Project will not, have any effect on the viability of bird populations. They submit that the mortality thresholds act as a fail safe mechanism, and that even if birds are killed at those levels, there will still be no impact on the viability of bird populations.

Analysis

Bird Species

443 The expert bird witnesses for both sides substantially agree that a wide variety of species, and large numbers of individual birds, are found at, or pass through, the Prince Edward County south shore peninsula. In addition, the "Ostrander Point Wind Energy Park Draft Environmental Review Report" and "The Bird Report, an Acadia Radar Study" prepared by the Approval Holder's consultant make it clear that birds heavily utilize Ostrander Point, and that some of the birds are migratory species and some breed in the area. The letter from Environment Canada describing the Site is pertinent. To repeat, it provides: "In terms of overall quality, it is one of the best areas for birds EC has seen in southern Ontario."

444 The evidence of Mr. Cheskey was that the Project's infrastructure and its operation, would have a serious negative impact on breeding birds at the Site, grassland species in particular as they all have declining populations. Mr. Scott referenced the Whip-poor-will and the Henslow's Sparrow. His opinion is that there will be a terminal decline for the Henslow's Sparrow, a rare and endangered bird, through displacement and collision. However, his evidence was speculative in relation to the impact of wind turbines on these species.

445 While there was evidence that eight Whip-poor-wills breed in the vicinity of the Project that could potentially be hit by the turbines, PECFN's evidence did not specifically challenge the efficacy of the Whip-poor-will *ESA* permit conditions, or argue that potential harm to this species meets the test at s.145.2.1 of the *EPA*.

446 Mr. Evans also gave evidence regarding the Purple Martin, a species of aerial insectivore whose population is in decline in Ontario. He called the Project a potential population sink for this species, and said the number of potential mortalities has been underestimated. However, his conclusion was that it is "conceivable" that the cumulative impact of wind farms in Ontario will accelerate that decline.

447 Mr. Okines and Mr. Evans gave the example of the Kirtland's Warbler as a species at risk that they allege migrates through the area. If one were to be killed by a turbine, they said that it would be catastrophic to the species. However, there are so few of them that they had not been recorded at PEPtBO. This is another example of a species possibly using the Site, but for whom there is simply a lack of evidence that the Project will cause them the required harm under the test.

448 The witnesses of the Approval Holder testified that there was simply no evidence that the alleged level of harm will be caused to any of the species identified by the PECFN witnesses. For example: Dr. Strickland's evidence was that there would be no serious and irreversible impact to the breeding bird populations and that, in fact, the REA conditions will improve habitat in the area, possibly leading to benefits over and above current conditions, for more species than just the Whip-poor-will; and Dr. Kerlinger stated that there is no evidence that Purple Martin populations are threatened by wind turbines in the fatality database, except for a small number at the Wolfe Island wind turbine operation.

Bird mortality

449 The mortality thresholds that trigger mitigation measures at the Project are: 14 birds per turbine per year at individual turbines or turbine groups, 2 raptors per wind power project per year, 10 or more birds at any one turbine

during a single monitoring survey, 33 or more birds (including raptors) at multiple turbines during a single monitoring survey.

450 Mr. Cheskey stated his opinion that the casualty rates from the Project would exceed the MNR thresholds based on the fact that there are no other wind projects built on a Great Lakes peninsula with natural habitat comparable to the Project, that shorelines are disproportionately important for birds, and the Project turbines would be located within 200 m of the shoreline. Mr. Evans' calculations of estimates supported the evidence that mortality rates for many species will likely be very high.

451 However, even if Mr. Cheskey and Mr. Evans are correct, and Dr. Kerlinger has underestimated bird mortality rates, mitigation measures are triggered if the thresholds are met. The evidence of the expert witnesses of the Director and the Approval Holder that meeting the mortality thresholds will generally not impact bird populations was very strong. The possible exception is impacts to species at risk, depending on the evidence. As Mr. Scott testified, it would be a mistake to assume that only resilient species will be impacted.

452 Mr. Cheskey testified that mortality rates would also increase because the turbines will only be 200 m from the shoreline. Dr. Kerlinger had prepared a study in 2007 in which he recommended a 400 m setback from Lake Erie in an area of IBAs. Dr. Kerlinger explained that this was a compromise distance. The parties did not provide the Tribunal with any additional evidence as to whether 200 m would be the appropriate setback distance in this case.

453 To repeat, Dr. Strickland's succinct opinion on the matter of bird mortality is that, given: "the low number of expected bird fatalities, the very small proportion of land area within the IBA affected by the Project, and the Approval Holder's commitment to mitigate high levels of avian fatalities, the Project is unlikely to cause any significant impacts" on bird populations.

454 Dr. Strickland and Dr. Kerlinger have expertise in the specific area of wind turbine impacts on bird populations and mortality. While PECFN questioned whether Dr. Kerlinger was free from bias, no such allegations were raised with Dr. Strickland. While Mr. Cheskey and Mr. Okines have extensive familiarity with the south shore of Prince Edward County and the birds that are found there, they lack the same level of authority with respect to turbine mortality impacts on birds.

455 PECFN's witnesses raised concerns that collision mortality for all species of birds at the Ostrander Point wind energy park would exceed the mortality thresholds outlined in the MNR's Bird Guidelines, but they did not take into account the mitigation measures outlined in the REA that would be triggered if the thresholds are breached. None of the witnesses testified that, if the proposed Project operates within the mortality thresholds, it will cause serious and irreversible harm to species that are not at risk.

456 Mitigation measures for the Project relating to birds include mortality monitoring (contained in the EEMP), mortality thresholds that trigger mitigation mechanisms such as blade feathering and shut down of individual turbines, a radar early detection system, and a 200 m set-back from Lake Ontario. Dr. Kerlinger stated that among the REA mitigation measures, the most important are the mortality thresholds and prevention requirements.

457 The Tribunal considers the mitigation measures for birds in the REA to be part of the consideration of "engaging in the Project in accordance with the REA".

458 The proposed MERLIN radar system, and whether it will prevent bird collisions was controversial. Dr. Voltura explained the operation of the MERLIN radar system. Mr. Scott testified that the "technology is in its infancy" and that it has not been proven to be helpful to prevent collisions, although it is useful for mapping and recording bird activity.

459 Regarding mitigation, the Scottish Document poses the questions:

> Are the mitigation measures deliverable. Will mitigation for one natural heritage aspect impact on another? Has the mitigation been tried anywhere else before, if so what was the outcome? Is there a need for the mitigation to be implemented and its effectiveness demonstrated before the windfarm is built? What monitoring will be undertaken and how will it inform management decisions?

460 Even if the answers to some of the above questions are not clear in this case, e.g., the details of some of the other mitigation measures have not been fully planned yet, the statutory onus at this appeal stage in the process is on the appellant to prove that engaging in the Project in accordance with the REA will cause the requisite harm. The Tribunal

finds that the PECFN has not proven that the mitigation measures incorporated into the REA regarding birds are so deficient that the Project will cause "serious and irreversible harm".

461 For the reasons in this section and the immediately preceding one, the Tribunal finds that PECFN has not shown that engaging in the Project in accordance with the REA will cause serious and irreversible direct harm to populations of bird species.

Bird habitat

462 The Project will cause some direct harm to bird habitat on the Site, e.g., where the turbine infrastructure will be constructed, and in the air space above, and have indirect effects to some bird species in the immediate vicinity, e.g., displacement. However, as the Director and the Approval Holder emphasize, it is an important fact in relation to bird species that the Project is for a small number of turbines that cover a relatively small area. The evidence demonstrates that, with mitigation, such harm in relation to birds will not be extensive, i.e., not serious and irreversible.

463 There is strong evidence that the Site is in a major migration highway for birds. Mr. Okines' estimates of the number of migratory birds that use the Site, and fly over it, as part of the PECSS peninsula is based on years of his "hands on" experience with birds in the area, including the use of radar data. Mr. Cheskey is particularly knowledgeable about the PECSS IBA. He also referred to the Environmental Commissioner of Ontario's recommendation that IBAs should be an "exclusion zone for wind energy projects" and other industrial uses. Mr. Scott gave an international perspective. While acknowledging that the Project is for a relatively small number of turbines, in his opinion the Project would be located in an important migration "bottleneck" in the region. It was also his opinion that it is wholly unsafe to assume that "the species impacted would be primarily abundant and resilient species".

464 Dr. Kerlinger disputed that the area is a funnel for bird migration, but he confirmed dense migration in the area. His evidence was based on some studies and not any first hand experience.

465 The evidence shows, on balance, that migratory birds use the entire shoreline of the PECSS peninsula, that it provides staging and landing areas for them and has wetlands that provide food sources.

466 The peninsula has been designated as the PECSS IBA on the basis of waterfowl and the evidence is that waterfowl would not be impacted by the Project to any great degree.

467 The MOE witnesses, Mr. Prevost and Ms. McGuiness, described an IBA as a "coarse screening tool" as "not all areas in an IBA will be significant wildlife habitat as IBAs often contain towns and industrial areas." However, the PECSS IBA does not have that kind of development.

468 Dr. Kerlinger has done work for the Audubon society, which supports the policy that wind power should not be in IBAs or major migratory bird corridors.

469 Mr. Scott's evidence was that there are a variety of migratory waterfowl and shore birds species that are linked to the area of the IBA. However, as noted above, there is no dispute in the evidence that the Project would not have any significant direct mortality impacts on waterfowl and that they would not be impacted in any significant way by the Project's turbines and infrastructure.

470 The Scottish Document makes the following observations regarding migratory bird populations and their habitat (emphasis added):

> For migratory species, patterns of migration may determine the spatial framework within which impacts should be considered. For example, corncrake migrate up the west coast of Ireland and Scotland and <u>any impacts during migration</u> throughout that wider region <u>would be likely to affect the population as a whole</u>.

471 In relation to migratory birds that are species at risk, the definition of "habitat" in s. 2.(1) of the *ESA* includes (emphasis added): "an area on which the species depends, directly or indirectly, to carry on its life processes, including life processes such as reproduction, rearing, hibernation, <u>migration or feeding</u>." The evidence of all of the experts is that the PECSS peninsula, including the Site, is used by migratory birds for their life processes.

472 It is also clear from the evidence of all of the experts that the migratory pathway extends both along the shore of the peninsula in an east-west direction, and across the peninsula in a north-south direction for birds not dissuaded

from crossing Lake Ontario. The Tribunal accepts the evidence of the PECFN witnesses that this migratory pathway is heavily used and very important to the life processes of numerous species, and numbers, of migratory birds.

473 The turbines will be 135 m in height and will sweep an estimated area of 7854 m[superscript 2] of air space at a height that migratory birds pass through in a shoreline area such as this. Four of the turbines will be 200 m from the shoreline. The shoreline area of the Site includes migratory bird landing and staging area. The Site is in the middle of the PECSS peninsula migratory bird corridor, between two protected areas. There is also evidence that the Approval Holder's expert, in a study that he prepared in relation to a wind project on the shore of Lake Erie, recommended a greater setback distance than 200 m from the Lake Erie shoreline as a compromise, partly because the project was in the vicinity of IBAs.

474 At its highest, the evidence is that the Project might cause harm to migratory bird habitat, but not that it will cause such harm. The Tribunal finds that the evidence does not attain the level of "serious and irreversible harm" to bird habitat within the meaning of the statutory test.

Conclusion

475 The Tribunal finds that PECFN has not met the statutory onus of proving that engaging in the Project in accordance with the REA will cause serious and irreversible harm to birds or their habitat.

Bats

476 PECFN alleges that engaging in the Project in accordance with the REA will cause serious and irreversible harm to bats. The Tribunal heard evidence from three experts on bats: Dr. Barclay for the Appellants, Dr. Fenton for the Approval Holder, and Fiona McGuiness, biologist with the MNR, who testified on behalf of the Director with respect to the MNR's Bat Guidelines.

477 There are eight species of bats known to occur regularly in Ontario, all of which have a range that overlaps the Ostrander Point Crown Land Block: big brown bat, hoary bat, silver-haired bat, eastern pipistelle, red bat, little brown bat, northern long-eared bat, and small-footed bat. The majority of them are currently considered endangered in Ontario.

478 The experts agree that the greatest threat to the survival of Ontario's hibernating bats is white-nosed syndrome, a fungal infection that wipes out entire hibernacula. The experts also agree that there is very little scientific research available on the impact of wind turbines on bats, partly because bats are extremely difficult to study. There have been some cases found of large-scale bat deaths through turbine collisions.

479 Where the experts disagree is relating to the effectiveness of bat mortality mitigation measures, and the effectiveness of the Bat Guideline's threshold of 10 bat mortalities per turbine per year.

Stantec's Bat Report

480 Stantec prepared the Ostrander Point Wind Energy Park Acoustic Bat Monitoring Report (the "Bat Report") as part of the NHA/EIS. When the Bat Report was prepared in January 2010, no bats in Ontario were considered to be at risk by the federal agency COSEWIC, or the Committee on the Status of Species at Risk in Ontario ("COSSARO"), although the Report notes the eastern pipistrelle and the northern long-eared bat were ranked vulnerable in the province, and the small-footed bat was ranked vulnerable to imperiled. Since that time, however, the status of the little brown bat and the northern long-eared bat has changed to endangered in Ontario.

481 The Bat Report highlights that effects to bats due to wind power facilities may be either direct (through injury or death by collision) or indirect (displacement or population declines) and that the majority of bat fatalities at wind power facilities occur in the late summer and fall. The Bat Report identifies the long-distance migratory bats (i.e., hoary bat, eastern red bat, and silver-haired bat) to be most vulnerable to collisions with moving turbine blades.

482 Stantec undertook acoustic bat monitoring in July, August and September 2008 and in July and August 2009. The Bat Report relied on a pre-construction monitoring program that consisted of acoustic monitoring at four stations within the Project Area. Station "SW" was located approximately 50 m from the shoreline in a tree approximately 4 m above the ground, stations "MET-High" (30 m height in 2008, 40 m height in 2009) and "MET-Low" (15 m height) were located approximately 650 m from the shoreline on the existing meteorological tower. Station NE was located approximately 1500 m from the shoreline in a tree approximately 4 m above the ground. Due to similarity of call signature between several species, the Bat Report categorised all calls into four guilds or species groups: the unknown guild, the Myotid guild, the Red bat/pipistrelle guild and the big brown/silver-haired and hoary bat guild.

483 The Bat Report concluded that activity levels of long-distance migratory bats at the Project Site were not unusually high. The majority of hoary and silver-haired bats appeared to have passed through the Project area by the end of August. However, the eastern red bat was observed into mid-September, in lower numbers. The Bat Report concluded that higher overall bat activity was observed at detectors that were closer to the shoreline. The activity along the shoreline was likely indicative of foraging bats and high activity levels could have been caused by multiple detections of individual bats. The Bat Report reached the conclusion that the low bat activity levels at the elevated detector indicated that the majority of bat flight was occurring at lower elevations, below wind turbine blade sweep height.

Fiona McGuiness

484 Ms. McGuiness testified as to the development of the Bird and Bat Guidelines, and explained that they are mandated by regulation. She testified that Ontario's Bird and Bat Guidelines are unique in North America in establishing mortality thresholds, upon which scoped monitoring and mitigation, including changes to operating procedures, are required. She also noted in her reply witness statement that the Bird and Bat Guidelines are adaptive, such that "if new science informs refined mortality estimates or methodologies, MNR's guidelines will be updated in cooperation with EC-CWS [Environment Canada -- Canadian Wildlife Service]".

485 The Bat Guidelines provide that mitigation measures are required where a wind turbine project reaches a mortality threshold of 10 bats/turbine/year, which translates roughly to 5-7 bats/mW/year. Ms. McGuiness testified that the threshold number was established by MNR science and wildlife biologists who looked at post-construction bat mortality data from existing wind turbine projects. She noted that a range of mortality was recorded, and that levels from some projects were quite high. Ms. McGuiness testified that 10 is "at the lower end of the mortality range", and considered a protective threshold "based on expert opinion". She agreed that population levels of bats are not well known.

486 Ms. McGuiness acknowledged that the Guidelines provide a threshold on a per- turbine basis, rather than per-megawatt basis, and that as turbine sizes increase, it may have an impact on the effect of the thresholds. In her view, such effect would be marginal. She also acknowledged that the threshold applies across a project, as does mitigation. Thus, if only one turbine in a project was killing a large number of bats, but others were not, the result may be acceptable if it averaged out to 10 bats/turbine/year.

487 Ms. McGuiness noted that non-migratory (resident) and migratory bats are both included in the bat mortality calculation that is evaluated against the bat mortality threshold. Should the bat mortality threshold in the Guidelines be exceeded, she stated, operational mitigation is required so that mortality is reduced. She noted that the mitigation prescribed is based on wind power mitigation research conducted by Baerwald et al. and Arnett et al. (cited below under Dr. Barclay's evidence).

Dr. Robert Barclay

488 Dr. Barclay was qualified to provide opinion evidence as an expert in bats. Dr. Barclay is a Professor and the Head of the Biological Sciences Department at the University of Calgary.

489 Dr. Barclay testified that he was generally encouraged by the quality of Stantec's Bat Report, given that it used a number of monitoring sites including one microphone at elevation, and given that it took place for more than one season. However, he testified that in his view, the methodology of the Bat Report underestimates potential fatalities for migratory and non-migratory bats.

490 With respect to migratory bats, Dr. Barclay opined that the elevated microphone should have been the one closest to the shoreline. The Bat Report indicated that the highest proportion of migratory bats was detected at the elevated microphones compared to the ground level microphones. Dr. Barclay noted that this reflects the fact that migratory bats generally fly higher than resident hibernating bats, with a higher activity level in the blade-swept area of turbines. This explains why migratory bats generally account for the highest number of bat fatalities at wind turbines. Dr. Barclay pointed out that the Bat Report acknowledged that the migrating bats often travel along shorelines yet the detector site closest to the shoreline did not have an elevated detector activity of migratory bats. As such, the Bat Report underestimated the activity of migratory bats. He indicated that the geography of the site suggested that migratory bats were likely to fly through the wind-facility area, particularly along the shoreline of the lake, as they migrated south during late summer and fall. He stated that bats also use lakeshores as navigation routes, and Ostrander Point site was likely to be used in that way.

491 Secondly, he noted that no recordings were made in September 2009 while relatively high activity of migratory bats was recorded in September 2008, indicating that activity levels may have been under-estimated.

492 Finally, he noted, the Bat Report's conclusion, that the activity of long-distance migratory bats was not unusually high, implied that the activity levels recorded by the study were compared to those of other studies. However, there were no other studies or data presented, and no comparisons were made.

493 He added that even if the activity level was correct, there was a significant probability that bat fatality would exceed the 10 bats per turbine per year threshold set by the MNR's Bat Guidelines. He explained that at three sites in Alberta where pass rates ranged from 3 to 8 per night the fatalities were between 22-32 bats per year; therefore, the 7.3 migratory bat passes per night at the Project Site was reason for concern.

494 Dr. Barclay also stated that the Bat Report seemed to have ignored, and hence underestimated the potential fatalities for, non-migratory species of bats which make up a significant proportion of fatalities at wind facilities. He noted that the activity of non-migratory species such as various *Myotis* was high according to the Bat Report.

495 Dr. Barclay explained that the Bat Report placed call results into four bat categories, including one that was labelled "big brown/silver-haired/hoary". He noted that big-brown and silver-haired bats are difficult to distinguish on the basis of their echolocation calls, with the difficulty increasing with height of the bats from the ground. Because of these limitations, Dr. Barclay questioned the conclusion of the Bat Report which determined that the majority of call sequences in the "big brown/silver-haired/hoary" category belonged to the big brown bats. Big brown bats are resident hibernating bats, while silver-haired/hoary bats are migratory. He noted that the pattern of activity peaks in August and September were indicative of migrating bats not of non-migratory species such as big brown bats.

496 Dr. Barclay re-calculated the bats in the mixed category as if they were all migratory, silver haired bats, and came up with an average of 7.3 passes per night. Dr. Barclay compared these figures to the mean migratory activity and mean fatality rate in three sites in Alberta in his study with Erin F. Baerwald, "Geographic Variations in Activity and Fatality of Migratory Bats at Wind Energy Facilities", published in the *Journal of Mammalogy*. At the three sites in that study, the mean fatality rate was 32 bats per turbine per year, 23 bats per turbine per year, and 21 bats per turbine per year. Dr. Barclay concluded that the potential for bat fatalities at Ostrander Point to exceed 10 bats per turbine per year is significant, especially given the likelihood of underestimating the actual activity levels.

497 Dr. Barclay noted that if the "big brown/silver-haired/hoary" activity at the elevated detector was indeed mostly big brown bats, then the fatality rate of these bats was likely to exceed the 10 bats per turbine per year threshold as the bats were flying within the blade-swept area.

498 During cross-examination, Dr. Barclay was referred to his article "A Large-Scale Mitigation Experiment to Reduce Bat Fatalities at Wind Energy Facilities", which looked at the potential effect of mitigation measures, namely changing the wind cut-in speed and blade feathering, associated with the operation of wind turbines. Dr. Barclay acknowledged that the experimental turbines showed an approximately 60 per cent reduced fatality rate. He also stated that his opinions and conclusions were based on the activity levels reported in the Bat Report and the subsequent fatality rate predictions that stemmed from those.

499 With respect to indirect impacts of wind turbines on bats, Dr. Barclay testified that there were a number of studies that indicated that bats avoided areas with high noise levels such as roadways and one method that had been tested to scare bats away from turbines was to produce a very loud sound that they could hear. The current data available did not permit any conclusions on the possibility of habitat alteration from wind turbines.

500 Dr. Barclay had some comments on the Bat Guidelines. He stated that the threshold of 10 bats per turbine fatality rate was arbitrary and did not take into account cumulative effects of all the wind facilities that particular populations of these species encountered. He noted that there were two to four other proposed wind farms around Ostrander Point with many more turbines than at Ostrander Point. He said the cumulative effects of all of those wind projects, each allowed to kill 10 bats per turbine per year on average without mitigation, would have a much different effect on those populations that Ostrander Point taken in isolation. He noted that British Columbia's draft threshold is 7 bats per turbine while in the United States, the thresholds vary from 1 in Hawaii, where there is a single species of bat, to 3 migratory bats in West Virginia, to 26 in Pennsylvania's draft guidelines.

Dr. Reynolds

501 Dr. Reynolds was qualified as an expert in the impact of wind farms on bats. He is a population biologist by training with a PhD in the physiological ecology of bats, and has been conducting research and working with the impact of wind turbines on bats since 2003.

502 Dr. Reynolds agreed with much of the testimony of Dr. Barclay, except with respect to his ultimate conclusion. Dr. Reynolds testified that the Ostrander Point Project will not cause serious and irreversible harm to bat populations, taking the mitigation measures into account.

503 Dr. Reynolds noted that two of the non-migratory bat species, little brown and northern long-eared, have had their populations decimated in the last few years due to white-nose syndrome. As a result there are few bats around to be impacted by wind projects.

504 Dr. Reynolds noted in his witness statement:

> Mortality rates at wind projects throughout North America vary substantially, with a range of 0.3 bats per turbine per year up to 63.9 bats per turbine per year. Although the determination of relative risk is somewhat imprecise in the absence of site-specific population densities for each species, it is clear that some species are being killed at a higher rate than would be predicted based on their abundance determined from capture surveys. Post-construction mortality surveys throughout North America show that the non-hibernating migratory tree bats (hoary bat *Lasiurus cinereus*, red bat *L. borealis*, and silver-haired bat *Lasionycteris noctivagans*) are more susceptible to wind turbines than are hibernating bats.

505 He acknowledges that "part of the difficulty in determining the impact of wind development on bat populations is the absence of baseline population surveys or knowledge of migratory behaviour in bats." Most bat mortality, it has been shown, occurs in August when the migratory bats would begin their fall migration.

506 Dr. Reynolds noted that wind development presents up to four potential negative impacts to bats: collision mortality; loss of roosting and foraging habitat; "barrier effect" to movement across a landscape; and interference with echo-location. He testified that there is no real evidence to suggest that barrier effects or acoustic interference has any significant ecological effect.

507 With respect to habitat destruction, it is possible that bats could be killed as a result of construction activities if their roosting sites are destroyed while they are roosting. However, he testified that construction activities are unlikely to have any direct impact on bats in this case, as no caves or mines are known to exist on, or in the vicinity of, the Subject Property, and the Stantec EIS Report concluded that features that support small maternity colonies of bats were limited or absent on the Site. Dr. Reynolds also visited the Site, and agreed with that finding. Further, bats in this region are habitat generalists, and Dr. Reynolds concludes that it is unlikely that any avoidance would impact their ecology.

508 With respect to direct impact, he testified that the largest source is mortality resulting from bats colliding with rotating blades while they are foraging, commuting or migrating. Most bat activity and bat mortality occurs at low wind speeds. Dr. Reynolds testified that the mitigation technique of stopping or feathering the turbine blade at wind speeds of less than 5.5 m/s has been shown to be effective at significantly reducing bat mortality, by 50 to 80 per cent. Dr. Reynolds noted the conditions of this REA, which require such operational curtailment.

509 Overall, Dr. Reynolds was impressed by the science-based conditions related to bats in the Ostrander Point REA. He noted in his witness statement that mitigation research has not been consistently incorporated into siting permits for wind development in some jurisdictions, and "this inconsistency has the potential to create wind development in areas that are politically expedient rather than ecologically appropriate. This would appear to be the worst way to develop wind potential." With respect to the bat mitigation measures, he comments that the Ostrander Point REA is "one of the best science -- and adaptive management-based approvals" he has seen.

510 While Dr. Reynolds recognized that radar systems are unproven, he was nevertheless appreciative of the inclusion of measures related to radar early-detection, in an attempt to incorporate a pro-active response system, rather than simply a reactive one.

511 Dr. Reynolds is fully confident that, even if the Project were to exceed the Bat Guidelines' threshold of 10 bats/turbine/year, the mitigation measures required of operational curtailment of the turbines below 5.5 m/s wind speed each night from July 15 -- September 30 and an additional three years of post-construction monitoring, would prevent serious harm to bats.

Findings on Bats

512 The Stantec Bat Report found that the Ostrander Point site is being used by all of the bat species found in Ontario, and the experts agreed it contains and abuts habitat for resident bats, and is in a migratory pathway. While there was some dispute as to the actual number of bats using the Site, this does not affect the Tribunal's finding.

513 The impact of wind turbine projects on bats is an important question, given that seven of the eight bat species found in Ontario are endangered or threatened. However, it is clear that the biggest threat to hibernating bat populations currently is white-nose syndrome. Further, the experts in this proceeding focused on the question of collision mortality, rather than that of habitat loss.

514 According to the studies conducted by Dr. Reynolds, there are very few good predictors of collision mortality other than weather, especially wind speed.

515 Dr. Reynolds and Ms. McGuiness expressed confidence that, should mortality rates be found to be "high" (i.e., the Guideline threshold of 10 bats/turbine/year) through the regulated monitoring that will occur at this Site, the mitigation measures provided in the REA conditions would function to successfully avoid serious harm to bats. Dr. Barclay also acknowledged the effectiveness of feathering turbine blades at low wind speeds, to reduce bat collision mortality.

516 The REA includes the following conditions with respect to bats:

> I4. The Company shall contact the Ministry of Natural Resources and the Director if any of the following bird and bat mortality thresholds, as stated in the Environmental Effects Monitoring Plan for Wildlife and Wildlife Habitat for the Ostrander Wind Energy Park described in Conditions I1 and I2(1), are reached or exceeded:
>
> (1) 10 bats per turbine per year;
>
> I5. If the bat mortality threshold described in Condition I4 (1) is reached or exceeded, the Company shall:
>
> (1) implement operational mitigation measures consistent with those described in the Ministry of Natural Resources publication entitled "Bats and Bat Habitats: Guidelines for Wind Power Projects" dated July 2011, as amended.
> (2) increase cut-in speed to 5.5 m/s or feather wind turbine blades when wind speeds are below 5.5 m/s between sunset and sunrise, from July 15 to September 30 at all turbines, for the operating life of the Facility; and
> (3) implement an additional three (3) years of effectiveness monitoring.
>
> I6. If the bat mortality threshold described in Condition I4(1) is reached or exceeded after operational mitigation is implemented in accordance with Condition I5, the Company shall prepare and implement a contingency plan, in consultation with the Ministry of Natural Resources, to address mitigation actions.

517 The Tribunal is cognizant of Dr. Barclay's concern that the threshold of 10 bats/turbine/year is arbitrary and not based on science. Indeed, there appears be no method of calculating a number of bat fatalities that would constitute serious and irreversible harm, both due to the difficulties inherent in estimating the size of bat populations, and given the numerous other factors involved in estimating the impact of one type of development on a population. The Tribunal therefore declines to comment on whether such a fatality rate would constitute serious and irreversible harm to bats. The number of 10 operates as a red flag to the Approval Holder and the MOE, to indicate there are "significant levels of mortality upon which mitigation is required to reduce to below those levels", according to Ms. McGuiness.

518 The evidence is strong that the mitigation measures of increasing the turbine cut- in speed to 5.5 m/s, during the season when migrating bats are present in the spring and fall, and during the time of day (evening and sunrise) when bats are active, is effective at significantly reducing the risk of collision mortality. In Ms. McGuiness's words, the mitigation measures for bat collision mortality have been shown scientifically, through Dr. Reynolds' work, to be "sure-fire". The Tribunal accepts Dr. Reynold's opinion that, with these mitigation measures in place, the Project as approved will not cause serious and irreversible harm to bats.

519 There was simply insufficient evidence presented to the Tribunal that wind turbine projects negatively impact bat habitat on the Project Site.

520 The Tribunal concludes, therefore, that PECFN has not established that engaging in the Project in accordance with the REA, will cause serious and irreversible harm to bats.

Butterflies

Donald Davis

521 The Tribunal heard from Donald Davis on behalf of the appellant, with respect to Monarch butterflies. Mr. Davis is a citizen scientist with Monarch Watch, who has devoted many hours to the study, tagging and monitoring of Monarch butterflies, and been consulted on documentaries about the species. He was recognized by the Tribunal as an expert on Monarch butterfly migration, breeding and habitat.

522 Mr. Davis has been studying and tagging Monarch butterflies since 1967 with the Insect Migration Association. He has been authorized by the MNR to collect and band Monarch butterflies. Since 1985, he has been tagging Monarch butterflies at Presqu'ile Provincial Park. He was a co-author of the North American Monarch Conservation Plan and has served as a technical reviewer of scientific publications on the Monarch. He is the Secretary of the Monarch Butterfly Fund, a U.S. based non-profit organization which supported reforestation and scientific projects.

523 Mr. Davis explained that Monarch butterflies require four different habitats, i.e., overwintering habitat, nectaring habitat for food, milkweed for breeding, and staging areas during migration. In his opinion, the Project would cause "irreversible harm to the site and to Monarch butterflies" mainly because of its removal of breeding habitat due to construction of the Project components.

524 He said there are three International Monarch Butterfly Reserves in Ontario: Long Point, Point Pelee and Prince Edward Point National Wildlife Area, which is close to the Project area. Mr. Davis added that international recognition was given to the Prince Edward County Wildlife Area in the 1990s and a plaque was erected to designate the area under the International Network of Monarch Butterfly Reserves. In his opinion, the Project would disrupt numerous ecosystems in the area and seasonal patterns, of which the Monarch butterfly was one affected species.

525 Mr. Davis stated that the Monarch butterfly was listed both provincially under the *ESA* and federally as a species of "Special Concern" and that permits were required from the MNR for breeding, tagging and other research projects.

526 Mr. Davis explained that as a summer resident, Monarchs were part of the local ecosystem contributing as pollinators and that various life forms of the Monarch, i.e,. egg, larva, pupa and adult forms) were food for many parasites and invertebrate species. He said that milkweed was the sole food source for Monarch caterpillars which was a host plant for numerous other invertebrates. Mr. Davis stated that the decline in the amount of available milkweed had been one factor in the general decline of the Monarch population.

527 In his opinion, the construction of the Project would result in irreversible harm to the Site and to the Monarchs. He stated that the Site had an abundance of nectar sources and flower sources for the Monarchs to nectar on as well as an abundance of milkweed on which they reproduced; and that the construction of the project would remove the amount of breeding habitat available which was a serious problem, particularly, in light of the low numbers coming back to Canada from Mexico this year.

528 Mr. Davis stated that historic evidence indicated that the lands of Prince Edward County were a significant migratory pathway for many insects and other animal forms. He said that large numbers of Monarchs, arriving from the east and north stop to nectar on available nectar sources and rest for the night in adjacent trees, to continue to migrate in a south-westerly direction, passing through Prince Edward County towards their wintering grounds in Mexico. He pointed out that very large clustering might not happen or be seen every year.

529 Mr. Davis was doubtful that Chip Taylor, a Monarch expert with whom Mr. Davis has corresponded, would have made a comment attributed to him in the Design and Operations Report, that southern Ontario did not host significant thousands of Monarchs that regularly occurred at the three main staging areas.

530 Mr. Davis also disagreed with the statement in the Design and Operations Report that the majority of migrating Monarchs in Ontario used the Point Pelee, Long Point and Presqu'ile Point staging areas. He said Presqu'ile Point was not a staging area but that Presqu'ile Provincial Park was and that there was no literature to substantiate this statement that the majority of the Monarchs used these three areas. Similarly he said the statement that most of the eastern Ontario population of Monarch were believed to cross Lake Ontario from Presqu'ile Point staging area was unsubstantiated. He added that while these areas were important Monarch staging areas, Monarchs used many other staging areas along the

north shores of Lake Ontario and Lake Erie. He pointed out that the statement that Prince Edward Point was used to a lesser extent was not substantiated.

531 Mr. Davis pointed to a table depicting the Monarch population status, published by Monarch Watch in March 2013, which shows the population counted in the Monarch's overwintering grounds in Mexico to be at its smallest recorded population since first being recorded, in 1975.

532 Mr. Davis opined that more intensive, extensive investigations and observations needed to take place to confirm that the Project would not cause serious and irreversible harm to the species and ecosystems in question and specifically with regard to the Monarch Butterflies.

Jessica Linton

533 Ms. Linton testified on behalf of the Approval Holder with respect to butterflies. She was recognized as an expert in butterfly habitat and behaviour.

534 Ms. Linton testified that Monarch butterfly habitat is found throughout Ontario. While she agreed with Mr. Davis' assessment that the Site provides suitable stopover butterfly habitat, she testified that it was no better habitat than any other, along the south shore of Prince Edward County. She described Monarchs as "habitat generalists", in that they occur anywhere milkweed occurs; i.e., throughout southern Ontario. She agreed with Mr. Davis' evidence that the Monarch population has been in decline for the past several years, but testified that they are a very adaptable and resilient species. Ms. Linton noted that the Monarch population has rebounded from devastating population losses, such as one disastrous winter in Mexico when up to 80 per cent of the population was wiped out. She testified that the North Eastern population of Monarchs currently numbers around several hundred million.

535 On cross-examination, Ms. Linton agreed that the Site is in a butterfly movement corridor, and that landforms such as the Great Lakes are used by Monarchs to guide their migration. Ms. Linton testified that Monarchs do not necessarily return to the same stopover areas every year, or even for several years in a row, which is why one only needs to determine whether a particular site provides suitable habitat. Ms. Linton agreed that the Ostrander Point Site does provide suitable habitat.

536 She testified that, although the Site lies within the migratory pathway of the north shore of Lake Ontario, the 6 ha of habitat that is estimated will be lost at the Project Site is not a significant amount. Roosting will not be impacted by the turbines as the butterflies are close to the ground. Construction will not impact the butterflies as they are not present after September, and the REA conditions require that construction take place after October 15.

Finding on Butterflies

537 Both experts agreed that indirect effects (i.e., habitat loss) is the only issue for butterflies arising from this wind energy project, and not direct effects (i.e., impact mortality).

538 The Project Site includes suitable Monarch habitat, including milkweed. It is also in a migration corridor. While the footprint of the turbines, transformer station and additional access roads will remove approximately 6 ha of butterfly habitat, it has not been established that the presence of wind turbines will negatively impact Monarch butterfly habitat. The Tribunal accepts Ms. Linton's opinion, that 6 ha is not a significant amount due to the fact that Monarchs are resilient, adaptable habitat generalists, that are found throughout southern Ontario.

539 Mr. Davis testified that in his opinion, more detailed studies are required to determine whether the Project will not cause harm to the species and ecosystems found at the Site. This falls short of the section 145.2.1 test, in which an appellant has the onus of establishing that engaging in the project in accordance with the REA will cause serious and irreversible harm to plant life, animal life or the natural environment.

540 The Tribunal finds that PECFN has not established that engaging in the Project in accordance with the REA will cause serious and irreversible harm to Monarch butterflies.

Sub-issue 2: Whether engaging in the Project in accordance with the REA will cause serious and irreversible harm to plant life.

Alvar

1. Whether alvar is properly an issue before the Tribunal

541 The Approval Holder argues that PECFN did not include harm to plant life in its Notice of Appeal, and therefore the Tribunal should disregard these portions of the appeal under Rule 28 of the Tribunal's Rules of Practice. In the alternative, the Approval Holder asks for an order for costs to "compensate the Approval Holder for the necessity of responding to these new issues without adequate notice".

542 The Notice of Appeal filed by PECFN only makes reference to plant life under the general appeal listing the wording of the section under which the appeal was filed, "serious and irreversible harm to plant life, animal life and the natural environment". It does note in paragraph 8 that "Ostrander Point has also been designated a Candidate Area of Natural and Scientific Interest by the MNR". The Candidate ANSI status is related to the presence of alvar on the Site, as discussed below.

543 The Tribunal notes that the first time the Approval Holder raised any objection to the inclusion of alvar as an issue, was at the final written submissions stage on June 13, 2013. The Approval Holder did not object when PECFN provided a witness statement by Dr. Paul Catling on February 20, 2013, in which he stated he will be "providing evidence concerning alvar vegetation at the Ostrander Crown Land Black and he is qualified to do this as a result of being widely recognized as a North American expert on this kind of vegetation ...". The Approval Holder did not raise an objection when PECFN outlined its case in an opening statement on March 4, 2013; it did not raise an objection when Dr. Catling was called to give oral evidence, beginning on March 6, 2013. The Approval Holder began its evidence over one month later, on April 9, 2013, giving it ample time to assure all issues could be canvassed by its witnesses, or to raise the issue with the Tribunal. The Approval Holder was provided significant hearing time to cross-examine Dr. Catling, as he was under cross examination for over two full days. The Approval Holder called as a witness Dr. Larson, an expert in restoration ecology and the ecology of alvars, whose witness statement was filed Februrary 22, 2013. Alvars are clearly a component of the REA that the Approval Holder was aware of, given that one of the conditions prior to construction being able to take place, is that an Alvar Restoration Plan be approved by MNR.

544 As all parties to this appeal are keenly aware, REA appeals take place under legislated time constraints and all parties have asked for, and been granted, flexibility by the Tribunal in presenting their cases.

545 The Tribunal finds that there has been nothing improper in the way alvar has been raised and addressed, and there has been no prejudice to the Approval Holder in this regard. The Tribunal will not disregard the portion of PECFN's case dealing with alvar.

2. What is alvar

546 Alvar is defined in the Federation of Ontario Naturalists' publication, "The Alvars of Ontario", (Brownell and Riley, 2000), at p.5 as follows:

> Alvars are naturally open areas of thin soil over flat limestone or marble rock with trees absent or at least not forming a continuous canopy. It is estimated that at least three-quarters of the total area of alvars in the Great Lakes region are in Ontario. Most of the communities found within alvar landscapes are considered rare in Ontario and throughout their ranges; and over 100 rare, threatened and endangered plant and animal species are largely confined to the alvars. Alvars also contain many disjunct species with southern, western and northern affinities, as well as endemic taxa.
>
> Alvars are characterized by a mosaic of distinctive plant associations adapted to extreme environmental conditions, including periodic flooding and severe drought, mediated by shallow soil depths, variable water tables and dramatic runoff patterns.

547 Alvars are globally imperilled.

3. Description of the plant life on the Project Site

548 The EEMP notes at section 2.2.6, "Alvar Habitat":

> Meadow, shrub and treed alvar communities, together with alvar indicator plant species, were identified within and adjacent to the Project location. The MNR considers all alvar habitat in Ecoregion 6E to be provincially rare, and as a result these communities are all considered significant wildlife habitat in the form of rare habitats.

549 Dr. Catling was qualified as an expert in alvar vegetation. He has extensive experience as a botanist and research scientist.

550 Dr. Catling testified that much of the Ostrander Point area is an alvar or an alvar landscape. Several types of alvar communities are globally imperilled. Based on his personal observations and international designation of those types of communities, Dr. Catling opined that at least six globally imperilled and vulnerable vegetation communities exist on the Ostrander Point Site.

551 There is agreement by all experts that the Site has some disturbance, including evidence of camp fires on the beach, garbage, ATV trails and deer hunting stands. In addition there is some quantity of invasive species, although the degree of degradation on this account was in dispute.

552 The Ostrander Point Crown Land Block is considered a "Legacy site" by the Department of National Defence. The "South Bay Bombing, Gunnery and Rocket Range" was established by the Royal Canadian Air Force on 322 ha of land adjacent to Ostrander Point in 1952. According to the *Due Diligence Environmental Assessment Screening Report for the Proposed EO Assessment and Clearance in Ostrander Point*, prepared for the Department of National Defence in March 2011 and included with the Approval Holder's materials, "The RCAF used the Site for air-to-ground rocket and gunnery strafing and as a practice bombing range." The Bland Report, prepared for the MNR in 1997, states the Site was used for "tank maneuvers".

553 The evidence establishes that there was significant disturbance to this Site in the past, although the precise disturbance is not clear. The Tribunal accepts that the alvar landscape has naturalized from an earlier land use that significantly disturbed it.

4. REA Conditions related to alvar

554 A Class Environmental Assessment ("EA") was conducted for this project under the *Environmental Assessment Act* ("*EAA*") with respect to the MNR's proposed disposition of Crown Land to facilitate the construction of access roads. A notice of completion related to the Class EA was issued on March 2, 2011. In a letter dated December 19, 2012 addressed to the Minister of Natural Resources, the Minister of the Environment rejected a request by members of the public for a direction that the MNR conduct an individual environmental assessment, but nonetheless listed a number of the conditions on the Project:

> 1. The Ministry of Natural Resources shall ensure that the Alvar Management Plan (Plan) referenced in the Project File is prepared with the input of those members of the public who participated in the Class Environmental Assessment planning process, and any public agencies prior to the commencement of construction of the access roads.
> 2. The Plan shall include:
>
> a. A description of and components that will address the control of aggressive non-native species;
> b. The raw data collection or recorded as part of the Plan; and,
> c. A description of public/agency participation in the Plan.
>
> ...
>
> With this decision having been made, the Ministry of Natural Resources may now proceed with the Project, subject to the conditions I have imposed and any other permits or approvals required. The Ministry of Natural Resources must implement the Project in the manner it was developed and designed, as set out in the Project File and inclusive of all mitigating measures and environmental and other provisions therein.

555 Arising from the Class EA was the requirement to create an Alvar Restoration and Management Plan ("ARMP"), which is also a component of the EEMP of the REA. The ARMP must be approved by the MNR prior to construction of the Project.

556 The conditions in the REA (dated December 20, 2012) relevant to alvar state:

I3. The Company shall implement the post-construction monitoring described in the Environmental Effects Monitoring Plan for Wildlife and Wildlife Habitat and the Environmental Impact Study, described in Condition I1 and I2(1). The plan shall include the following:

(1) ...
(2) ... .
(3) ... .
(4) Creation and implementation of Alvar restoration and management plan that includes effectiveness monitoring and reporting.

I17. The Company shall create an Alvar Restoration and Management Plan as described in the Environmental Effects Monitoring Plan and the Environmental Impact Study, including the following:

(1) The plan shall be approved by the Ministry of Natural Resources prior to the commencement of construction.
(2) The plan shall include activities that will enhance Alvar vegetation communities on site, by controlling non-native species, and include the restoration of three parcels (4.2ha total) of cultural meadow to Alvar by seeding or transplanting native Alvar species, and will include contingency measures.
(3) The plan shall include a multi-year monitoring program that measures the success of enhancement and restoration activities.
(4) The plan shall include communications activities, that at a minimum includes;

(a) Reporting to MNR on the results of the multi-year monitoring.
(b) Publishing of a report on the multi-year monitoring program to the company's website.

557 At the time of the hearing of this appeal, the ARMP was in draft form and had not yet received input from the interested parties with a right to comment on it.

5. How might the project impact alvar?

558 While there is agreement that the Project will have some negative impact on the alvar vegetation at the Site, there is disagreement as to the kind and extent of damage. Table 5.2 in the NHA/EIS summarizes potential impacts to Alvar Habitat, and Recommended Mitigation Measures.

Table 5.2 Summary of Potential Impacts and Recommended Mitigation Measures

Potential Impact	Recommended Mitigation Measures	Net Effects
operation		
Significant Wildlife Habitat: Rare Vegetation Communities, Alvar		
Loss of alvar habitat	• Minimization of road widths and lengths. Project infrastructure will directly affect 5.2 ha (1.6%) of the Study Area's alvar habitat	• Small loss of alvar habitat
Introduction and spread of invasive species	• The limits of vegetation clearing will be staked in the field. The Construction Contractor will ensure that no construction disturbance occurs beyond the staked limits and that edges of sensitive areas adjacent to the work areas are not disturbed • All disturbed areas of the construction site should be re-vegetated as soon as conditions allow	• Low net effects
Disturbance and fragmentation of habitat, changes to hydrology	• Access roads will be constructed at existing grade • Creation of an alvar management and monitoring program as part of the Environmental Effects Monitoring Plan	

559 Three potential impacts to alvar from the wind project are listed: "Loss of alvar habitat"; "Introduction and spread of invasive species"; and "Disturbance and fragmentation of habitat, changes to hydrology". The net effects for the first impact are predicted to be "Small loss of alvar habitat", and for the last two to be "low net effects".

560 The following is a summary of the disagreements in the appeal.

561 The Approval Holder's consultants predict the Project will cause a loss of 5.2 ha of open, treed and shrub alvar habitat, due to infrastructure including roads and turbine pads. Approximately 4 ha of cultural meadow is proposed to be restored to alvar habitat by re-seeding, leaving a net loss of 1.2 ha. Dr. Catling predicts that closer to 50 ha will be lost, due to impact of changes to surface water movement, and contaminants being spread by water.

562 The Approval Holder predicts that proposed mitigation measures will be successful to avoid serious harm to the alvar. It proposes to re-vegetate areas damaged by direct impacts such as crushing and digging, to pre-construction conditions, and to improve the general health of the alvar through management of invasive species. Dr. Catling believes the alvar vegetation will be irreparably lost, and that attempts to manage and restore the remaining alvar will not be effective.

563 The Tribunal turns to the evidence of the experts in more detail.

Dr. Catling

564 Dr. Paul Catling made three main points in his testimony: that much of the Site is composed of alvar vegetation, which is globally imperilled; that the Site has not been sufficiently studied to have a full understanding of its importance in relation to other alvars in Ontario, although on the basis of the incomplete studies conducted to date it would be "one of the most significant Sites" in the province; and that serious and irreversible damage will occur to the alvar on this Site.

565 Dr. Catling testified that, in his opinion, the Project would cause serious and irreversible harm to the alvar plant communities in the following ways:

(i) Direct damage due to crushing of sensitive plants during construction, and removal of sensitive plants for the roads and turbine towers, that will not grow back ("over 50 ha"). This includes additional invasive species spread to the Site through construction vehicles and increased human use of the Site.

(ii) Nutrient changes and pollution (e.g., additional contaminants on the Site brought in from vehicle tires and turbine and construction fluids such as oil)

(iii) Water availability changes (i.e., changes to hydrology of the Site from roads and construction)

566 He stated that while roads and turbine bases would totally eliminate plant communities and change drainage, other modifications in the area including staging, working, and parking areas would also result in the direct destruction of vegetation by crushing. He estimated that the extent of this kind of direct damage would be 50 ha, within the Crown Land Block area of 324 ha. He noted that this amount is a major concern for two reasons: First, plants moved around an area over time and required the services of pollinators and other insects that could be located for nesting outside of the immediate area of a present occurrence of rare plants. As a result, areas needed to protect plants were often larger than expected. Second, the information available to locate damage without it being serous to plants was insufficient.

567 He testified that changes in drainage as a result of surface landscape modification would result in changes over a much more extensive area because of the high water table and the fact that surface flow plays an important role in maintaining certain kinds of vegetation. Dr. Catling explained his estimation of over 50 ha of damage to the Site, as based on his years of experience visiting alvars and witnessing the disturbance they have been subject to.

568 Dr. Catling used "Coefficients of Conservatism" ("COC") to quantify the tolerance of a plant species to disturbance caused by people. All plant species in Ontario have been assigned a COC number by a panel of experts, which represents the biological features of the species. The lower the COC, the less harm can be expected from human disturbance. For example, a plant that is common, aggressive, resilient, broadly adapted, and not susceptible to disturbance would have a COC of zero. Dr. Catling listed a number of plants that he testified occur within the Ostrander Point Crown Land Block, that have a very high COC.

569 Dr. Catling presented a list of plants that he states are present on the Site. He acknowledged that the field notes that support the list do not include all of the plants on the list. However, Dr. Catling testified that the field notes were not prepared for a scientific study, they were for personal reasons when he saw something of interest and to jog his memory. He relied on his expertise in recognizing and identifying plants, to state he was certain that the plants on his list are present on the Site, including the following plants that score a COC of 9: Philadelphia Witch Grass (8) (Tab 8a p. 9); *verbena simplex* (9); *Carex Craway.*

570 The "Floristic Quality Index" ("FQI") for an area takes into account all the species present and their coefficients. The FQI is thus the natural quality of an area reflected by its richness of conservative species. Dr. Catling termed the FQI the "value" of the landscape, and its susceptibility to disturbance. Dr. Catling testified that a high FQI indicates restoration is much less likely. An old field would typically have a FQI of 3.89. Drier alvar would have a FQI of 35.43, meaning it is ten times less tolerant of anthropogenic activity. Most of Ostrander Point is an alvar landscape. As a result, Dr. Catling believes that a management plan that includes restoration or re-vegetation of alvar, with the goal returning to "pre-construction conditions", is not likely to be achieved.

571 Dr. Catling also testified that the number of species present in an area that grow only, or mostly, in alvar habitat, termed "confined species", is an important indicator of the value of the alvar. An example is Crawe's sedge, which is confined to limestone plains. Dr. Catling created a table of "confined" vs. total alvar vegetation, to evaluate this Site.

572 As an expert in alvars, then, he has spent many years studying impact of water on alvar vegetation. Dr. Catling believes that a biologist is better placed to assess the extent of damage through changed hydrology to an ecosystem, than an engineer or hydrologist, as it is a biological question. Water plays a significant role in the extent of the damage he predicts.

573 The soil moisture regime is extremely important to alvars. In Dr. Catling's view, vehicle ruts alter the soil moisture. He quotes the "International Alvar Initiative" (Reschke et al, 1999) that "management plans for alvar Sites should prevent all vehicles from driving over alvars...", for this reason.

574 Dr. Catling noted that, due to the shallow drainage and flat landscape, contaminants of surface and ground water from fill, oil and lubricants from vehicles and transformers can be carried over large areas.

575 Although not a hydrologist himself, Dr. Catling has worked with many hydrologists and testified that, in any event, a hydrologist is not the best placed to comment on impact of water changes on biology; a biologist should do that. Alvars depend on soil moisture, which includes a complex of variables including water levels, flow rates, and water chemistry.

576 Dr. Catling acknowledged that the draft ARMP cites an intention to maintain roads "at grade". However, his concerns extend to surface runoff as well as groundwater and also the spread of pollutants, such as lubricants used on the Site.

577 With respect to the roads planned east-west across the Site, he says that they will interfere with north/south drainage. Dr. Catling notes that there is no hydrological study. He believes that both north/south and east/west drainage is important to the alvar vegetation on the Site.

578 Dr. Catling commented on the Draft ARMP. The stated aim of the plan, as noted under section 1.2 (Introduction), is "restoring areas of alvar habitat that have been previously degraded due to the presence of invasive species, and enhancing additional areas of alvar habitat within the Crown Land Block".

579 In particular, Dr. Catling categorically and emphatically testified that the idea of creating new alvar, and restoration to "pre-construction conditions", are impossible.

580 Dr. Catling testified that removing invasive species and seeding or planting native plants is "remediation" of an alvar Site. He termed these remediation measures "gardening". These are the elements of remediation included in the draft ARMP. However, in his view these gardening attempts at remediation are temporary (i.e., they are only effective while they are being undertaken). While they are "better than nothing" and may assist in staving off invasive species from an existing alvar, there has never been a single instance of a recovery of an alvar to a self-sustaining ecosystem. Alvars are, he testified, a very complex ecosystem, involving hydrology, climate, animal life and plant life. They simply cannot be created or re-created. Dr. Catling's conclusion is that the only way to maintain this important alvar, is to prevent damage in the first place.

581 With respect to the degree of disturbance to the Site, and the amount of invasive species, Dr.Catling testified that some alvar Sites are more prone to invasive species than others. He said he wouldn't describe the invasive species here as "a great deal", and that it "may be negligible". In reply to the description in the Stantec report (May 2011, page 47), Dr. Catling agreed "there is clearly a degree of disturbance that has continued".

582 Dr. Catling concluded with the comment that "Most of Ostrander Point is an alvar landscape and, very importantly, it is globally imperilled. It is a very, very important place." In his opinion, serious and irreversible damage will occur, "supported by biological information".

Dr. Larson

583 Dr. Doug Larson was qualified as an expert terrestrial ecologist, with expertise in restoration ecology, ecology of alvars and experimental design.

584 Dr. Larson is a Professor Emeritus in the Department of Integrative Biology at Guelph University. He holds a Ph.D. from McMaster University in plant ecology.

585 Dr. Larson described the Site as a heavily disturbed landscape with large numbers of disturbance tolerant trees, shrubs and herbaceous plants. Alvar vegetation is well established within this matrix. His view is that it is regenerating after a massive disturbance.

586 Dr. Larson agrees with Dr. Catling's prediction that all vegetation communities under the turbine pads will be destroyed completely and that areas of ground around each construction Site will have vegetation damaged to some degree. Dr. Larson does not know how Dr. Catling was able to make his estimate that 50 hectares will be the total area so damaged. Stantec suggests about 5.2 ha of alvar habitat will be directly affected by construction and associated activities.

587 Dr. Larson agrees with Dr. Catling's comments dealing with restoration ecology, as it is not known what the impacts of the turbines and their construction will be on the hydrology of the Site.

588 However, his view is that such uncertainty about the future success of ecological restoration is widely accepted in science making it difficult or impossible to state with certainty that certain irreversible disturbances will impact the vegetation.

589 While it is not known whether complete alvar communities can be restored at Ostrander Point, Dr. Larson is confident that we in Ontario have sufficient scientific knowledge and trained personnel to come up with an ARMP that will prevent serious and irreversible harm to the alvar plant community at the Site.

590 Dr. Larson has advised Stantec of two important areas that remain unresolved: Selection of the restoration target (one of three options available (a) pre-settlement conditions, (b) current alvar structure, (c) improved alvar structure), and selection of the best quantitative vegetation monitoring methods.

591 Dr. Larson concludes that, if implemented, the draft management plan will provide conditions that permit Site restoration, but success depends entirely on the restoration target selected. He says that if the pre-settlement target is selected, the likelihood of restoration success is low because we lack clear understanding of pre- settlement conditions. Restoration is likely to be completely successful if the current conditions are the target. If the target is an improved alvar, restoration success will be no less than what is currently on the Site. In Dr. Larson's view, regardless of the target selected, if the Site is restored, there will not have been serious and irreversible harm to the alvar plan community created by the construction of the wind farm.

Steve Brown

592 The Approval Holder called a hydrological engineer, Steve Brown, to present the Water Report. Mr. Brown was qualified as an expert in surface water resource engineering. Mr. Brown confirmed that the water report was focused on water courses and fish habitat as defined by the *Fisheries Act*. It did not deal with surface water or alvar.

Andrew Taylor

593 Andrew Taylor, a terrestrial biologist with Stantec, did the vascular plant survey for the Natural Heritage Assessment. Mr. Taylor was not qualified by the Tribunal as an expert. He was found to be a terrestrial biologist with experience in the assessment and mitigation of environmental impacts at wind farms with respect to vegetation and wildlife.

Analysis and Findings

a. Findings on expertise

594 Counsel for the Approval Holder raised the issue during reply evidence, that Dr. Catling was qualified as an expert in alvar vegetation but not alvar "ecosystems". The Approval Holder also objected to Dr. Catling giving opinion evidence on water and on the impact of water on the alvar ecosystem, as this was outside his expertise.

595 The Tribunal finds that the study of plants, and in this case alvar vegetation, is inextricably linked with an understanding of the importance of water to those plants. For example, biologists delineate significant wetlands; in fact, wetlands are delineated through the identification of wetland vegetation. As such, Dr. Catling is qualified to discuss the importance of the water regime on alvar vegetation. His testimony illustrated how surface water movement impacts alvar vegetation; he did not do a study of the Site, nor had he read one. Dr. Catling stated his observations made on the Site, and opined that water likely moves across the Site parallel to the lake.

596 Further, the Tribunal finds that alvar is a prime example of the ecosystem approach that the term "plant life", in s.145.2.1, refers to. Alvar has been alternately described as an ecosystem, a community of plants, and a landscape, among others. It is clear that the diversity of plants and their inter-relationship is critical to an alvar, and Dr. Catling, being an expert in alvar, is equally an expert in alvar ecosystems.

597 Mr. Taylor was not qualified to provide any opinion on the quality or extent of the alvar habitat, or the likely success of mitigation measures. Where Dr. Catling's testimony conflicted with Mr. Taylor's, the Tribunal accepts that of Dr. Catling, who has had decades of experience in finding and classifying alvar plants, to be more reliable. Specifically, the Tribunal accepts Dr. Catling's testimony, supported by Dr. Larson, that the Site is important alvar. The Tribunal accepts his view that the Stantec Report significantly understates the alvar diversity on the Site, which is the very feature that makes this alvar a significant one. Nonetheless, this finding has no practical significance, as the MNR considers all alvars within Eco-Region 6E to be significant wildlife habitat. Significant wildlife habitat requires an EIS and mitigation measures to "minimize impacts to the extent possible".

b. Amount of alvar likely to be lost

598 The Stantec Report concludes that the amount of alvar that will be directly lost due to infrastructure and construction is 5.2 ha, and if restoration of the cultural meadow is successful, only 1.5 ha. Dr. Catling did not testify that the

loss of 1.5 ha of alvar habitat within the Ostrander Point Crown Land Block is serious and irreversible. Rather, his concern was that some larger amount may be lost or otherwise negatively impacted due to water issues.

599 The Tribunal finds that Dr. Catling's suggestion that 50 ha of alvar will be impacted by the Project is not supported by evidence. He testified that it is based on personal experience; however, Dr. Catling agreed the figure is an estimate and that no hydrology work has been done on the Site.

600 This is not to say the Tribunal agrees with the Approval Holder's view, that only 1.5 ha will be impacted. It is very possible that some alvar vegetation will be negatively impacted by hydrological changes to the landscape due to road and infrastructure construction, as Dr. Catling has witnessed elsewhere. However, the level of certainty required in a REA appeal must be higher than "possible" and "concern".

601 There is no hydrology report to accurately predict the impact of the road building on surface water at the Site, which the Tribunal accepts is critical to the alvar's survival as an important, self-sustaining ecosystem.

602 The Tribunal has significant concerns about the lack of studies to date on the impact of water on the globally significant alvar on the Project Site. Mr. Brown, a surface water resource engineer with no experience in alvar landscapes, testified that the Water Report was intended to map watercourses and fish communities. It does not cover predicted changes to the surface movement of water over the Site.

603 Despite the Water Report's purported conclusions that the Project will follow existing roads "wherever possible", it does not provide information on where, or for what percentage of the 5.4 km of roads, it is not possible to do so. It is not clear therefore whether the roads will fragment alvar significant wildlife habitat. Further, there is no information in the Water Report on the "height of land", or any indication that topographic maps have been prepared for the Project Site, to support the Report's conclusions that the roads will be built at the height of land to minimize impact. The Water Report is vague as to how changes to water movement will be measured, referring only to a "visual inspection". Aside from the obvious imprecision in such an inspection, no pre-construction studies have yet been done, with which a visual comparison could be made. The references to the EEMP in section 3.1 of the Water Report specify that they are with respect to aquatic habitats. Any monitoring required will, therefore, be with respect to fish habitat only, and not for impact on alvar vegetation.

604 Similarly, the REA provides that the roads are not predicted to cause problems because they are built "at grade, wherever possible". There is no indication, however, as to how much of the roads will be at grade, nor that this will prevent harm due to changes in the movement of surface water.

605 For all of these reasons, the Tribunal finds that 1.5 ha is an optimistic prediction, and it is likely that more than 1.5 ha (1.6% of the alvar on the Project Site) will be lost due to direct and indirect impacts. How much more, however, is not clear. Since the amount of alvar to be lost is not clear, the Tribunal cannot accept the Director's and Approval Holder's argument that the small amount to be lost mitigates in favour of a finding that the harm is not serious.

606 There is considerable evidence supporting a finding that loss to this alvar is serious. The very need for an alvar management plan is an indication that the MNR finds loss of alvar at this Site to be significant harm which requires mitigation.

607 In addition, the Ostrander Point Crown Land Block is a "candidate ANSI".

> According to the NHA/EIS at section 2.2.2:
>
> The entire Subject Property is situated within a Candidate Life Science ANSI, the Prince Edward to Ostrander Point ANSI. This Candidate ANSI is shown on Figure 1 (Appendix A) and extends from Prince Edward Point to approximately Petticoat Point, encompassing 2000 ha. As noted by the MNR (2008) "the combination of size, extent of shoreline, known species diversity and special features make this site unique in the Site District".

608 Dr. Catling included in his materials an excerpt from the report "Life Science Areas of Natural and Scientific Interest in Site District 6E-15" (Snetsinger et al., March 2001), prepared for the MNR, Kingston Area Office ("Snetsinger Report"). The Snetsinger Report studied an area of 2000 ha, "Prince Edward Point to Ostrander Point", and notes that "a large number of rarities have been reported, and further work will likely reveal more." The Report recommends: "Due to some parts of the Site having globally significant status, as well as the Site's importance to migratory

birds and its unique botanical characteristics, it is recommended that the Prince Edward Pt. to Ostrander Pt. be considered a provincially significant ANSI." (at p. 122)

609 Section 3.3.2 of the NHA/EIS notes that Stantec's Site investigations "confirmed the presence of life science values". However, it concludes at s.4.2.2 that "MNR correspondence indicates that the ANSI status is currently unconfirmed and therefore an evaluation of significance is not required and the feature is not subject to development prohibitions or setbacks (MNR, March 8, 2010)".

610 If this area were a confirmed, rather than a candidate ANSI, it would be afforded further protections under the *EPA*. See, for example, section 5.7 of the Natural Heritage Assessment Guide for Renewable Energy Projects, as follows:

> 5.7 Areas of Natural and Scientific Interest
>
> Under the REA Regulation, Areas of Natural and Scientific Interest (ANSIs) are defined as areas which have values related to protection, scientific study or education. ANSIs are areas of land and water containing natural landscapes or features identified by MNR as life science and/or earth science sites (or both) depending on natural heritage values.
>
> ANSIs are identified systematically based on established science criteria, and contribute to the natural features and landscapes of Ontario. MNR assesses the ANSIs as being provincially, regionally or locally significant. To date, more than 500 provincially significant ANSIs have been confirmed. When conducting site investigations for ANSIs, applicants must confirm the presence and boundaries of all ANSIs identified through the records review. The boundaries of an ANSI can only be changed by MNR, using the ANSI Identification and Confirmation Procedure.
>
> With the exception of specified provincial plan areas (Table 3), only ANSIs confirmed by MNR as provincially significant are afforded protection through the REA Regulation. **Applicants are not required to identify additional ANSIs through site investigation.** (emphasis added)

611 Similarly, if this alvar were located in the "Natural Heritage System" of the Greenbelt Plan, it would be afforded further protections under the Regulation in that there is a prohibition against development in the feature or within 120 m of the feature, unless an EIS is done.

612 While Ostrander Point Crown Land Block is a candidate ANSI, there was no evidence before the Tribunal that it is designated as a protected landform. It has simply not yet been designated as such by the MNR.

613 The evidence before the Tribunal raises the question of whether a wind project development will prevent a candidate ANSI from being considered as an ANSI in the future. The Tribunal has considered this possible future harm to the Site, due to removal of this opportunity for long-term protection. However, these concerns have not been proven to the standard required under s. 145.2.1 of the *EPA*.

614 Nonetheless, the direction by the Minister of the Environment to the Minister of Natural Resources that an ARMP must be developed for the Site, has filled the potential gap created here by the ANSI not having been confirmed.

615 The Tribunal notes that the only place where there is an actual development prohibition is in provincial parks and conservation reserves (Table 4 of the NHA Guide), under s. 16 of the *Provincial Parks and Conservation Reserves Act, 2006.*

Table 3: Additional Development Prohibitions in Provincial Plan Areas

Additional: Applies to project locations proposed in the Oak Ridges Moraine Conservation Plan Area or the Natural Heritage System of the Greenbelt Plan's Protected Countryside Area*		
Natural feature	**Prohibition on development** (construction, installation, or expansion)	**Exception(s) based on EIS**
Sand barrens	In feature or within 120 m setback	Development within feature and setback
Savannahs		
Tallgrass prairies		
Southern wetlands that are not provincially significant		
Areas of natural and scientific interest (life science)		
Alvars (Natural Heritage System of the Greenbelt Plan only)		

*** In the Greenbelt Plan Area, the prohibitions in Table 3 do not apply to project locations proposed entirely within a Protected Countryside settlement area. In the Oak Ridges Moraine Conservation Plan Area, the prohibitions in Table 3 do not apply to project locations proposed entirely within an Oak Ridges Moraine settlement area[6].**

Table 4: Development Prohibitions for Provincial Parks and Conservation Reserves

Protected area	Prohibition on development (construction, installation, or expansion)	Exception(s) based on EIS
Provincial parks	In protected area or within 120 m setback	Development within setback[7]
Conservation reserves		

Natural features which meet the definition of a water body under the REA Regulation, or overlap with the boundaries of a water body (e.g. a wetland which is also a seepage area), may be subject to additional development prohibitions for some project components. Prohibitions for water bodies are outlined in Sections 39, 40, 44, and 45 of the REA Regulation. The MOE reviews and approves water body reports.

616 The Tribunal finds that PECFN has established on a balance of probabilities that damage **to alvar vegetation** and to **the alvar ecosystem** in this case will be serious. In making this determination, the Tribunal has given weight to the following factors: the conservation status and the COC of alvar plant life; alvar vegetation is more vulnerable than other types of vegetation that are more broadly adapted and resilient; the protections accorded by the MNR to alvar vegetation in Eco-region 6E; and the size, rarity and diversity in plant life of the Ostrander Point Crown Land Block as an alvar Site.

617 The test at s. 145.2.1(b) requires a demonstration of serious **and** irreversible harm, however, and the Tribunal now turns to an evaluation of "irreversible".

618 The Tribunal finds that the Ostrander Point Crown Land Block has recovered to the status of an important, diverse, self-sustaining alvar, following severe disturbance in the past. This past recovery mitigates against a finding that the harm to plant life in this case will be irreversible.

619 The Tribunal listened with interest to the disagreements between Doctors Catling and Larson with respect to the philosophy of restoration. Dr. Catling believes a natural alvar must be left alone, and that attempts to restore it will remove its natural self-sustaining character and replace it with a reasonable facsimile of a natural alvar. The restoration will not in fact "restore", because it is gardening that must continue.

620 Dr. Larson, on the other hand, believes that natural systems can be improved by restoration efforts undertaken by humans.

621 Dr. Larson was clear in his evidence, that the Site is undergoing natural regeneration, and that the draft management plan will provide conditions that permit the completely successful restoration of the Site to the current alvar structure. Dr. Catling's conclusion of serious and irreversible harm was predicated on a much greater area of harm (50 ha) and the assumption that the ARMP would not be successful.

622 The Tribunal finds the evidence of regeneration of the Site from past disturbance to its current status as an important alvar, to be compelling. It is a demonstration that the alvar vegetation currently found on the Site, was not irreversibly damaged in the past. The final line of the Snetsinger Report also supports this conclusion, as it states "If the landowners should decide to abandon farm operations on these lands, it is expected that they will quickly take on the ecological character of the surrounding lands." (at p. 122)

623 The Tribunal finds that Dr. Catling's concerns regarding harm to plant life that is more widespread due to changes in hydrological conditions on the Project Site, has not been proven on a balance of probabilities. The Tribunal notes that these concerns strike closer to the heart of "irreversible" harm to plant life; permanent changes to surface water flow would be more likely to have a permanent impact on the vegetation on a Site.

624 Dr. Catling's concerns regarding contaminants leaking onto the Site from vehicles and turbine components did not take into consideration the conditions of the REA related to spills and truck washing. Similarly, his concerns regarding the introduction of invasive species did not take into consideration the requirement to provide for truck washing, and the minimum measures listed in the REA, that are to be included in the ARMP to control invasive species. The Tribunal agrees that any finding of serious and irreversible harm must be made after taking into consideration all mitigation measures. As a result, the appellant has not established serious and irreversible harm to the alvar vegetation through contamination or introduction of invasive species.

Conclusion on Alvar

625 The Tribunal finds that, in this case, the removal of alvar plant life due to construction of the turbine bases and the access roads, taking into account the mitigation measures required under the ARMP, is not "serious and irreversible harm" to the alvar vegetation or the alvar ecosystem at Ostrander Point. As Ostrander Point itself has demonstrated, it has naturalized into an alvar landscape after former uses were abandoned. If one considers the permanence of the 1.5ha loss, the wind project has a projected life of 25 years plus a possible 15 year extension, totalling 40 years. The evidence is that the alvar vegetation will likely recolonize the area of the project components, once the infrastructure is removed.

626 The Tribunal therefore finds that PECFN has not shown that engaging in the Project in accordance with the REA, (i.e., including the minimum mitigation measures outlined in s. I17 of the REA that must be included in a future ARMP), will cause serious and irreversible harm to alvar plants or the alvar ecosystem at the Ostrander Point Crown Land Block.

Summary of Findings

Issue No. 1: Whether engaging in the Project in accordance with the REA will cause serious harm to human health.

627 The evidence in this proceeding did not establish a causal link between wind turbines and either direct or indirect harm to human health at the 550 m set-back distance required under this REA.

628 The evidence in this hearing did not establish that engaging in the Ostrander Point wind turbine project in accordance with the REA will cause serious harm to human health.

629 For these reasons the Tribunal finds that the Appellant has not established that engaging in the Project in accordance with the REA will cause serious harm to human health, and dismisses APPEC's appeal.

Issue No. 2: Whether engaging in the Project in accordance with the REA will cause serious and irreversible harm to plant life, animal life or the natural environment.

Sub-issue 1: animal life

630 The Tribunal finds that mortality due to roads, brought by increased vehicle traffic, poachers and predators, directly in the habitat of Blanding's turtle, a species that is globally endangered and threatened in Ontario, is serious and irreversible harm to

Blanding's turtle at Ostrander Point Crown Land Block that will not be effectively mitigated by the conditions in the REA.

631 The Tribunal finds that the appellant has not established that engaging in the Project in accordance with the REA will cause serious and irreversible harm to birds or their habitat.

632 The Tribunal concludes that PECFN has not established that engaging in the Project in accordance with the REA will cause serious and irreversible harm to bats.

633 The Tribunal finds that PECFN has not established that engaging in the Project in accordance with the REA will cause serious and irreversible harm to Monarch butterflies.

Sub-issue 2: plant life

634 The Tribunal finds that PECFN has not shown that engaging in the Project in accordance with the REA, (i.e., including the minimum mitigation measures outlined in s. I17 of the REA that must be included in a future ARMP), will cause serious and irreversible harm to alvar plants or the alvar ecosystem at the Ostrander Point Crown Land Block.

Issue 3: If the answer to either Issue 1 or 2 is "yes", whether the Tribunal should revoke the decision of the Director, by order direct the Director to take some action, or alter the decision of the Director.

635 As noted above, the Tribunal finds that mortality due to roads, brought by increased vehicle traffic, poachers and predators, directly in the habitat of Blanding's turtle, a species that is globally endangered and threatened in Ontario, is serious and irreversible harm to Blanding's turtle at Ostrander Point Crown Land Block that will not be effectively mitigated by the conditions in the REA.

636 Under s. 145.2.1(4) of the *EPA,* the Tribunal may do one of the following where the test has been satisfied:

(a) revoke the decision of the Director;
(b) by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with the *EPA* and the regulations; or
(c) alter the decision of the Director, and, for that purpose, the Tribunal may substitute its opinion for that of the Director.

637 The Tribunal received no submissions on an appropriate remedy under s.145.2.1(4) of the *EPA.* In particular, the Tribunal received no submissions on how the Project could proceed in a way that avoids the road mortality issue identified by the Tribunal.

638 The Project Description report states that the "Ostrander Point Crown Land Block has also been designated a Resource Management Area by the MNR and it has been determined that the Project is considered to be compatible with existing land uses. ... existing recreational land uses ... will remain on the unleased land".

639 The Non-Forestry Road-Use Management Strategy Declaration of Responsibility, attached to the Work Permit issued by the MNR for the access roads, specifically notes that "the proposed multipurpose access road will allow greater access to the Crown land resource for hunting and trapping and other passive recreational activities". There is a chart labelled "Management Strategies", which notes under "Access Control" that "Access control can only occur at each turbine location under Crown Lease and at the Transformer Station. Other than the turbine location and the transformer station, the remainder of the access roads are open to public travel as per the MNR's Free Use Policy (PL.3.03.01)".

640 Whether or not Crown land should be closed to public access in order to allow a wind development to proceed is a value judgment that is not within the purview of the Tribunal to make. At its essence, it is a decision whether the Ostander Point Crown Land Block will be used for wind energy generation, rather than current Crown land uses which do not involve road development. The Tribunal is also left with concerns regarding the compatibility of hunting in an area where there is no setback to the base of the turbine towers. 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.

641 The Tribunal is therefore not in a position to alter the decision of the Director, or to substitute its opinion for that of the Director. As a result, the Tribunal revokes the decision of the Director.

Other Matters -- June 27, 2013 Motion for new evidence

642 On June 27, 2013, PECFN brought a motion to admit four documents as new evidence under Rule 234 of the Tribunal's Rules. The motion was heard in writing. The Director and the Approval Holder filed a written response on June 28, 2013 and July 2, 2013 respectively. PECFN filed reply submissions on July 2, 2013.

643 Having considered the submissions of the parties, the Tribunal dismisses the Motion. Reasons for the Tribunal's dismissal of the Motion will follow.

DECISION

644 The appeal of APPEC is dismissed under s.145.2.1 (5) of the *EPA*.

645 The appeal of PECFN is allowed under s. 145.2.1(5) of the *EPA*.

646 The Tribunal revokes the decision of the Director.

APPEC Appeal Dismissed

PECFN Appeal Allowed

Robert V. Wright, Panel Chair

Heather I. Gibbs, Vice-Chair

Appendices

Appendix A - Relevant Legislation and Rules

Appendix B - Map of Ostrander Crown Land Block and proposed location of wind turbines, transformer substation and wetland natural features

Appendix C - Map of Prince Edward County South Shore and IBA

Appendix D - Map of Receptors and set-back distances at the Ostrander Crown Land Block

Appendix E - Sample Witness Information Form - Post-Turbine

Appendix F - Excerpt of Transcript with oral Tribunal ruling on relevance of medical records, March 6, 2013

Appendix G - Excerpt of Transcript with oral Tribunal ruling on use to be made of medical records, May 21, 2013

Appendix H - Excerpt of Transcript with oral Tribunal ruling on admissibility of Dr. McMurtry's evidence as an expert, May 28, 2013

Appendix I - Excerpt of Transcript with oral ruling on expertise of Ian Dubin, April 25, 2013.

Appendix J - Excerpt of Transcript with oral ruling on PECFN's request to call Dr. Beaudry, March 18, 2013

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Appendix A - Relevant Legislation and Rules

Environmental Protection Act

3.(1) The purpose of this Act is to provide for the protection and conservation of the natural environment.

Grounds for hearing

142.1 (3) A person may require a hearing under subsection (2) only on the grounds that engaging in the renewable energy project in accordance with the renewable energy approval will cause,

(a) serious harm to human health; or
(b) serious and irreversible harm to plant life, animal life or the natural environment.

What Tribunal must consider

145.2.1 (2) The Tribunal shall review the decision of the Director and shall consider only whether engaging in the renewable energy project in accordance with the renewable energy approval will cause,

(a) serious harm to human health; or
(b) serious and irreversible harm to plant life, animal life or the natural environment.

Onus of proof

(3) The person who required the hearing has the onus of proving that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a) or (b).

Powers of Tribunal

(4) If the Tribunal determines that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a) or (b), the Tribunal may,

(a) revoke the decision of the Director;
(b) by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations; or
(c) alter the decision of the Director, and, for that purpose, the Tribunal may substitute its opinion for that of the Director.

Same

(5) The Tribunal shall confirm the decision of the Director if the Tribunal determines that engaging in the renewable energy project in accordance with the renewable energy approval will not cause harm described in clause (2) (a) or (b).

Endangered Species Act

2.(1) "habitat" means,

(a) with respect to a species of animal, plant or other organism for which a regulation made under clause 55 (1) (a) is in force, the area prescribed by that regulation as the habitat of the species, or
(b) with respect to any other species of animal, plant or other organism, an area on which the species depends, directly or indirectly, to carry on its life processes, including life processes such as reproduction, rearing, hibernation, migration or feeding,

and includes places in the area described in clause (a) or (b), whichever is applicable, that are used by members of the species as dens, nests, hibernacula or other residences; ("habitat")

(2) For greater certainty, clause (b) of the definition of "habitat" in subsection (1) does not include an area where the species formerly occurred or has the potential to be reintroduced unless existing members of the species depend on that area to carry on their life processes.

Permits

17.(1) The Minister may issue a permit to a person that, with respect to a species specified in the permit that is listed on the Species at Risk in Ontario List as an extirpated, endangered or threatened species, authorizes the person to engage in an activity specified in the permit that would otherwise be prohibited by section 9 or 10.

Limitation

(2) The Minister may issue a permit under this section only if,

(c) the Minister is of the opinion that the main purpose of the activity authorized by the permit is not to assist in the protection or recovery of the species specified in the permit, but,

(i) the Minister is of the opinion that an overall benefit to the species will be achieved within a reasonable time through requirements imposed by conditions of the permit,

(ii) the Minister is of the opinion that reasonable alternatives have been considered, including alternatives that would not adversely affect the species, and the best alternative has been adopted, and

(iii) the Minister is of the opinion that reasonable steps to minimize adverse effects on individual members of the species are required by conditions of the permit

Evidence Act

35.(1) In this section,

"business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise; ("entreprise")

"record" includes any information that is recorded or stored by means of any device. ("document")

Where business records admissible

(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

Notice and production

(3) Subsection (2) does not apply unless the party tendering the writing or record has given at least seven days notice of the party's intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within five days after giving notice to produce the same.

Surrounding circumstances

(4) The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility.

Previous rules as to admissibility and privileged documents not affected

(5) Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged.

52.(1) In this section,

"practitioner" means,

(a) a member of a College as defined in subsection 1 (1) of the *Regulated Health Professions Act, 1991*,
(b) a drugless practitioner registered under the *Drugless Practitioners Act*,
(c) a person licensed or registered to practise in another part of Canada under an Act that is similar to an Act referred to in clause (a) or (b).

Medical reports

(2) A report obtained by or prepared for a party to an action and signed by a practitioner and any other report of the practitioner that relates to the action are, with leave of the court and after at least ten days notice has been given to all other parties, admissible in evidence in the action.

Entitlement

(3) Unless otherwise ordered by the court, a party to an action is entitled, at the time that notice is given under subsection (2), to a copy of the report together with any other report of the practitioner that relates to the action.

Report required

(4) Except by leave of the judge presiding at the trial, a practitioner who signs a report with respect to a party shall not give evidence at the trial unless the report is given to all other parties in accordance with subsection (2).

If practitioner called unnecessarily

(5) If a practitioner is required to give evidence in person in an action and the court is of the opinion that the evidence could have been produced as effectively by way of a report, the court may order the party that required the attendance of the practitioner to pay as costs therefor such sum as the court considers appropriate.

Statutory Power Procedures Act

15.(1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

(a) any oral testimony; and
(b) any document or other thing,

relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

What is inadmissible in evidence at a hearing

(2) Nothing is admissible in evidence at a hearing,

(a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or
(b) that is inadmissible by the statute under which the proceeding arises or any other statute.

Rules of Practice of the Environmental Review Tribunal

29. A Notice of Appeal respecting a renewable energy approval filed under section 142.1 of the *Environmental Protection Act* shall include:

(a) the Appellant's name, address, telephone number, facsimile number and email address and the name and contact information of anyone representing the Appellant;
(b) a copy of the renewable energy approval being appealed;
(c) identification of the portions of the renewable energy approval that the Appellant is appealing;
(d) a description of how engaging in the renewable energy project in accordance with the renewable energy approval will cause,

(i) serious harm to human health, or
(ii) serious and irreversible harm to plant life, animal life or the natural environment;

(e) a statement of the issues and material facts relevant to the subject matter of the appeal that the Appellant intends to present at the main Hearing;
(f) a description of the relief requested; and
(g) an indication of whether the Appellant will seek a stay of the renewable energy approval.

A Notice of Appeal respecting a renewable energy approval is accepted by the Tribunal when it meets all the requirements for filing an appeal under the *Environmental Protection Act*.

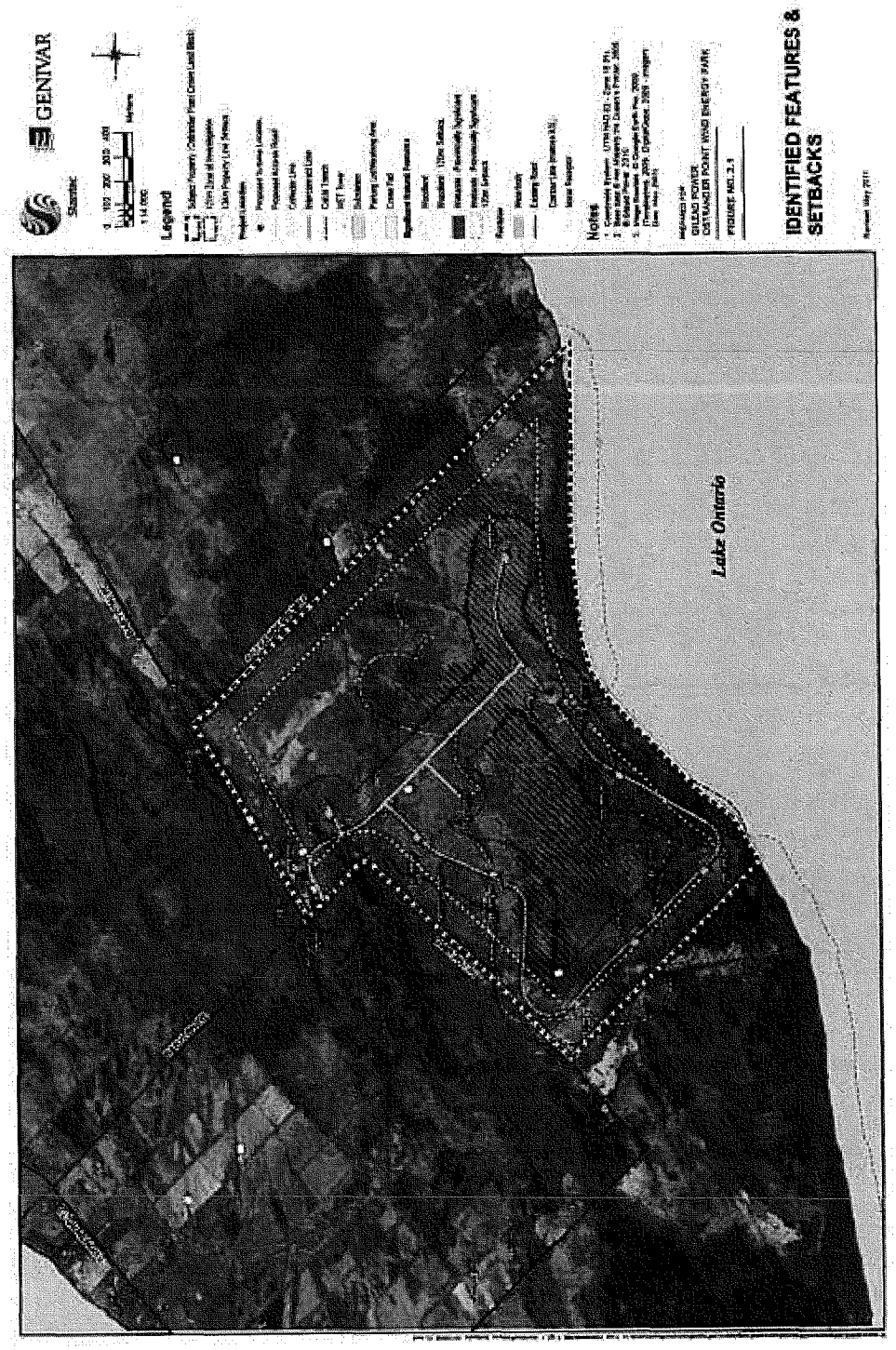
183. Subject to evidence being inadmissible under a statute or because of privilege, the Tribunal may admit as evidence in a hearing, whether or not given under oath or affirmation or admissible in a court, any oral testimony and any document or other thing relevant to the subject-matter of the proceeding and may act on it, but the Tribunal may exclude anything unduly repetitious.

233. Once the Hearing has ended but before the decision is rendered, a Party may make a motion to admit new evidence.

234. The Tribunal shall not admit new evidence unless it decides that the evidence is material to the issues, the evidence is credible and could affect the result of the Hearing, and either the evidence was not in existence at the time of the Hearing or, for reasons beyond the Party's control, the evidence was not obtainable at the time of the Hearing.

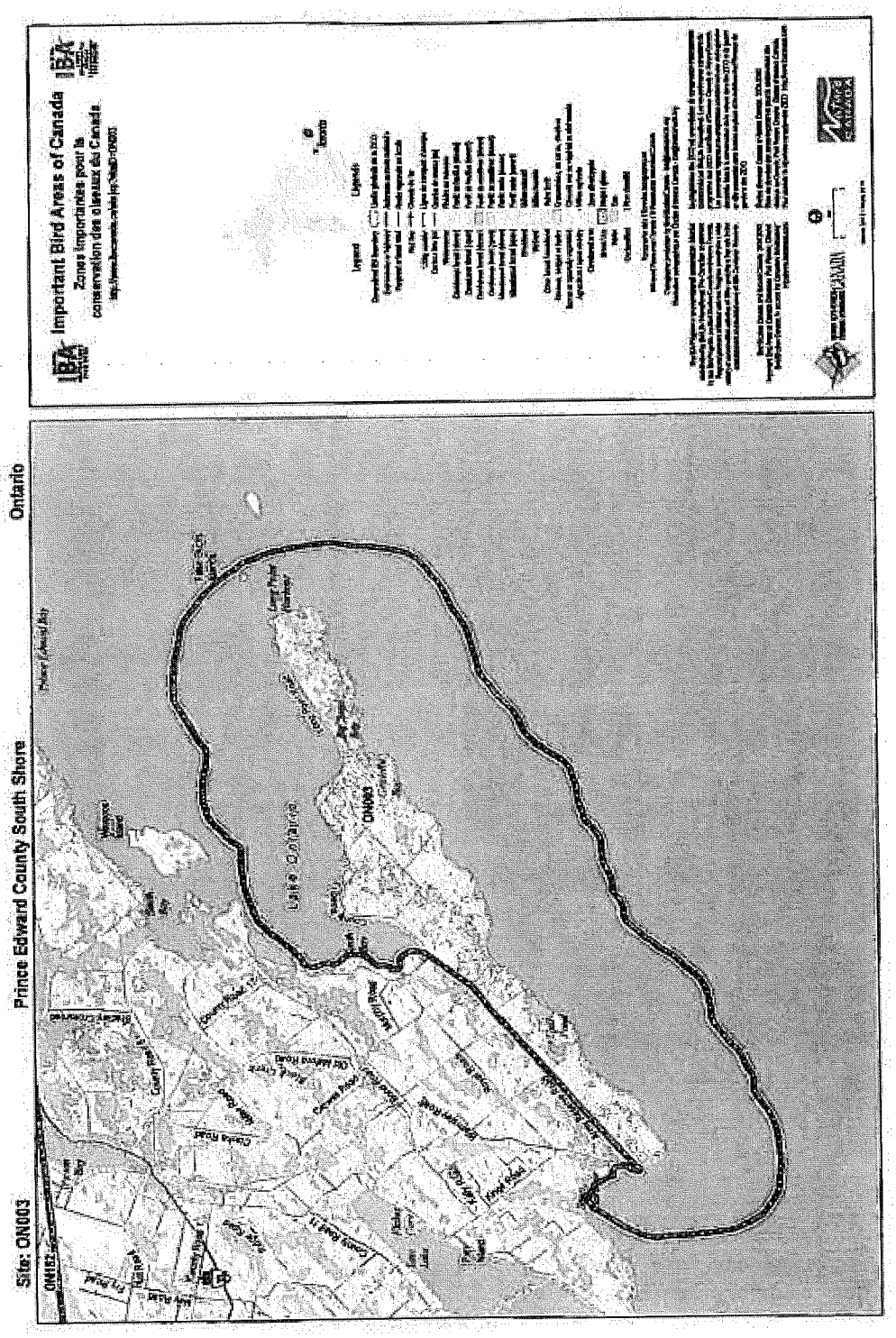
* * * * *

Appendix B -- Map of Ostrander Crown Land Block and proposed location of wind turbines, transformer substation and wetland natural features



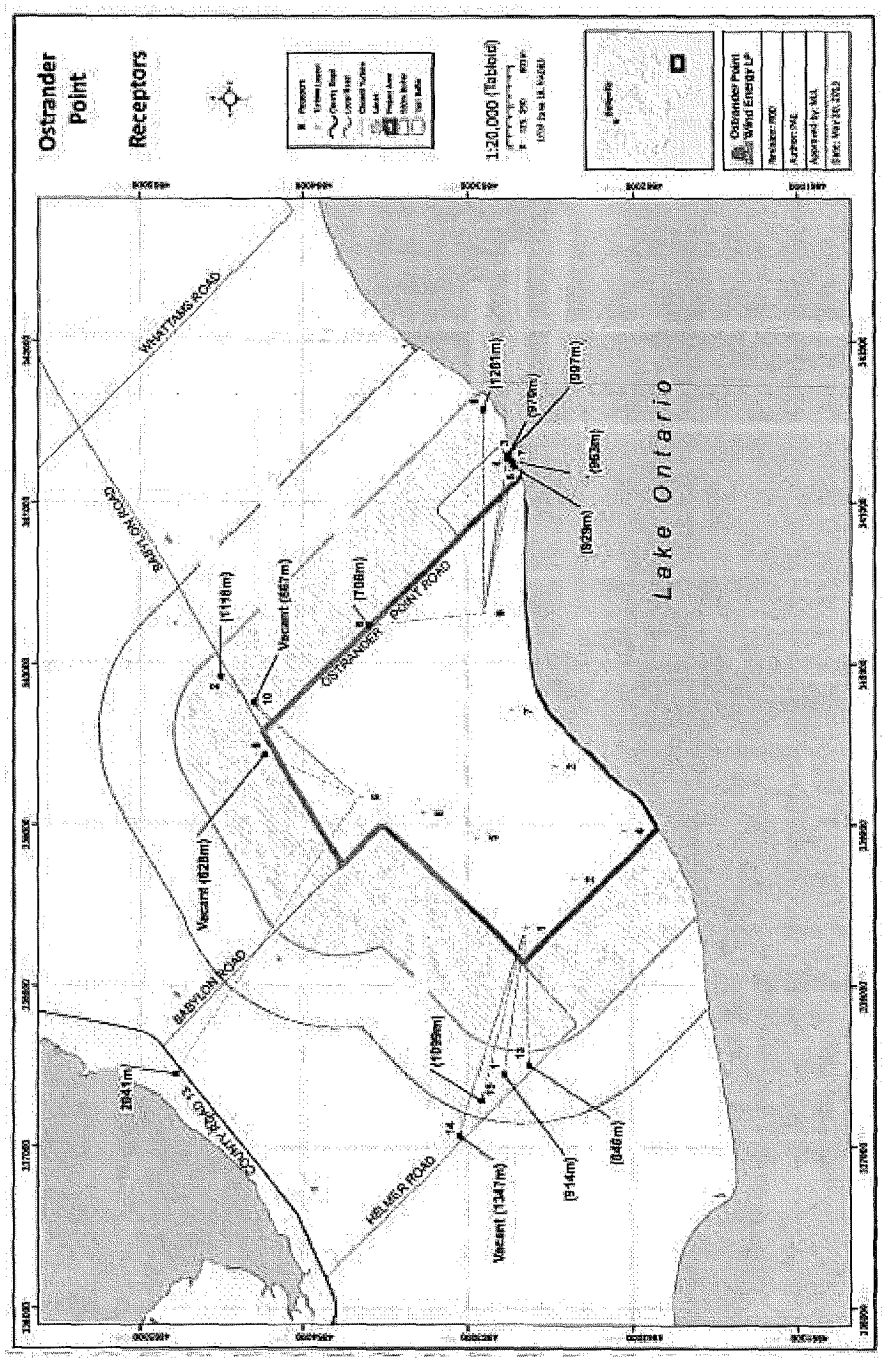
* * * * *

Appendix C -- Map of Prince Edward County South Shore and IBA



* * * * *

Appendix D -- Map of Receptors and set-back distances for the Ostrander Crown Land Block wind project



* * * * *

Appendix E -- Sample Witness Information Form - Post Turbine

1. Name(s) and age(s) of witness(es):
2. Address of residence you live in (or have lived in) within 2 kms of a Wind Project:
3. Current Address (if different from above):
4. Name(s), age(s) and relationship(s) to other persons who live(d) in household:
5. Name of the Industrial Wind Turbine (IWT) Project and Operator (if known):
6. Name of Environmental Consultant for IWT Project (if known):

7. Make, Model, Size and Number of IWTs (as best you know):
8. Project Layout and Distance of Turbines from your Location:
9. Do you know the maximum dbA level:

   (a) predicted at your house
   (b) allowed for the Project

10. Date of Start of Operation:
11. Please describe your residence's construction materials exterior/interior/windows etc.

For questions 12 to 16 note "health" includes physical health, mental health and well being.

12. What, if any, pre-existing health conditions did any witness(es) have prior to the IWT Project?
13. What, if any, pre-existing health conditions did any other people living in your household have prior to the IWT Project?
14. What, if any, health effects has the IWT Project had on the witness(es)?
15. What, if any, health effects has the IWT Project had on other people in your household?
16. What, if anything, have you done in response to any health effects from the IWT Project?

If not discussed in your answer to Question 16, as a result of the IWT Project:

17. Have you contacted the Ministry of Environment and/or MOE's Spills Line?
18. If so, what happened?
19. Have you contacted Doctor(s), Hospital(s) or other Heath Care Professional(s)?
20. If so, what happened?
21. Have you been or are you involved in any legal action(s)?
22. If so, what happened
23. Have you sold your home or has it been purchased as a result of the IWT Project?
24. What, if any, restrictions are there on what you can discuss?
25. Please list any documents you would like to refer to when giving evidence:

* * * * *

Appendix F -- Excerpt of Transcript with oral Tribunal ruling on relevance of medical records, March 6, 2013

RULING:

The following is a determination of the motions by the Director and the Approval Holder for the disclosure of medical records by the Appellant, Alliance to Protect Prince Edward County, APPEC. Reasons will be provided at a later date.

APPEC shall forthwith request its pre-turbine witnesses who claim that they will suffer serious health effects due to living in close proximity to the proposed wind turbines to obtain medical records relevant to such claims for the period commencing five years prior to the date of the filing of APPEC's appeal with the Tribunal to the present and to provide them to APPEC forthwith. APPEC shall forthwith disclose such medical records to the Director and the Approval Holder on a date to be agreed upon by the parties or determined by the Tribunal. I'm going to suggest by Thursday, March 7th, which is when we have the session in Toronto.

The parties are to attempt to agree on a date for that disclosure, failing which the Tribunal will do so.

APPEC shall, forthwith, request that its post-turbine witnesses, subject to the election referred to below, who claim that they have suffered serious health effects due to living in proximity to wind turbines, obtain medical records relevant to such claims for the period commencing five years prior to the date the witness began residing near the wind turbine project in question to the present and to provide them to APPEC forthwith.

APPEC may elect to only request such medical records from no less than one-half of its post-turbine witnesses. APPEC shall forthwith disclose such medical records to the Director and the Approval Holder.

Then there is the same requirement as to the parties agreeing upon a date or the Tribunal will set one.

The order regarding disclosure of medical records is not a determination by the Tribunal of the ultimate relevancy of the medical records so disclosed at the hearing. Nor does it foreclose a possibility that further disclosure of medical records

by APPEC and its post-turbine witnesses may be requested by the Director or the Approval Holder or required by the Tribunal in the course of the evidence of the post-turbine witnesses at the hearing.

The parties are to attempt to resolve any issues of confidentiality regarding disclosure of the medical records, failing which they may seek direction from the Tribunal.

* * * * *

Appendix G -- Excerpt of Transcript with oral Tribunal ruling on use to be made of medical records, May 21, 2013

For those on the phone, at the end of last week there was an issue regarding what medical records and what use to make of them. So, this is the panel's decision on that.

RULING BY THE TRIBUNAL

THE CHAIR: The parties asked for directions regarding the opinions, including diagnoses contained in medical records put into evidence by the APPEC witnesses.

The Approval Holder, supported by the Director, submits that the medical records are admissible as business records under Section 35 of the Ontario Evidence Act, but not for the truth of their contents regarding opinions, including diagnoses under Section 52 of that act.

The Approval Holder and the Director argue that they would be deprived of the right to cross-examine on those opinions and diagnoses. The Appellant APPEC submits that the medical records are admissible for the truth of their contents.

The Tribunal finds that there is no statutory bar to admitting the medical records under Section 15(2)(b) of the Statutory Powers of Procedure Act, and that the Tribunal Rule 183 also applies.

The medical records are admissible as evidence, but not as expert opinion evidence. That evidence has not been tested. Therefore, if the parties wish to rely upon opinions, including diagnosis, then they should, at this stage, in this REA appeal proceeding, seek leave to call the appropriate witness in that regard.

* * * * *

Appendix H -- Excerpt of Transcript with oral Tribunal ruling on admissibility of Dr. McMurtry's evidence as an expert, May 28, 2013

THE CHAIR: The Appellant seeks to qualify Dr. Robert McMurtry as a "physician and surgeon with experience in delivery of health care, health care policy and health policy." The witness was so qualified in *Erickson*, the first Renewable Energy Approval appeal hearing by the Environmental Review Tribunal.

The Approval Holder and the Director do not take issue with Dr. McMurtry's expertise as stated, but oppose the qualification on the basis of relevance and alleged bias. Dr. McMurtry is an orthopaedic surgeon by training and practice, but he also has a strong background in health policy matters, including involvement in the Romanow Commission and the preparation of a Canadian Index of Well-Being. He has done a lot of self-study regarding the impacts of industrial wind turbines on human health and has discussed these matters with in excess of 40 persons who claim such impacts. He has also reported on a total of 53 such cases.

He has written an article entitled "Toward a Case Definition of Adverse Health Effects In the Environs of Industrial Wind Turbines: Facilitating a Clinical Diagnosis", which has been published in a peer-reviewed journal and referenced in some others.

It is Dr. McMurtry's evidence that he is not anti-industrial wind turbines, per se, and that his focus is to protect human health and to promote prevention of detrimental effects of industrial wind turbines in relation to their proximity to humans.

Dr. McMurtry lives in Prince Edward County, approximately 2,800 metres away from the site of the proposed wind project. In the above referenced article he recommends a safety zone of 5 kilometres. He has been a Director of APPEC and made financial contributions, is an Appellant in this matter, has been a plaintiff in a lawsuit alleging reduced property values due to the proximity of another wind project, White Pines Development, and spoken publicly against wind projects.

Dr. McMurtry says that he resigned his position with APPEC and has withdrawn from the lawsuit, partly to enable to be an independent witness in proceedings such as this.

The Appellants submit that Dr. McMurtry has discussed the alleged detrimental impacts of industrial wind turbines with more persons than any other medical practitioner in Canada and that he has the only article relating to the subject of a clinical diagnosis that has appeared in a peer-reviewed journal and been referred to in other peer-reviewed journals.

The Approval Holder and the Director do not contest that Dr. McMurtry has the qualifications referred to, but they say that such qualification is not relevant to the issues to be determined in this hearing, namely whether engaging in the renewable energy project in accordance with the Renewable Energy Approval will cause serious harm to human health being the issue relevant to this Appellant's case.

The Approval Holder and the Director ask that the Tribunal exercise its gatekeeper function and not hear Dr. McMurtry's evidence at all, as the issue before the Tribunal is not one of policy but as already stated.

The Director also argues that this case is different than *Erickson* where APPEC was not an Appellant and that the Tribunal in that case gave substantial leeway but did not open the door to similar evidence in all future cases.

The Appellant argues that Dr. McMurtry will be the only witness on human health from a broad perspective and that the Appellant will be attempting to link health policy, including case definitions, with health care delivery to individuals.

In *Erickson*, at paragraph 715 the Tribunal stated:

> Given the novelty of the issues being raised in this proceeding and the relatively small number of individuals who have been involved in the recent research on health effects from turbines, the Tribunal found that it was appropriate to hear from these witnesses (especially given two of the most contested witnesses co-authored the Nissenbaum Study that was at the heart of the present appeals). Nevertheless, the Tribunal has kept in mind the relative objectivity of the various witnesses in reaching its conclusions on the evidence.

And again at paragraph 723 in *Erickson* the Tribunal stated:

> In other cases, some aspects of the testimony appeared to be less than objective and strayed somewhat towards advocacy. The Tribunal adds that such issues arose with respect to witnesses from all Parties. In many ways it was probably unrealistic to expect that a stable of completely impartial witnesses would be called upon to testify on such novel questions as those that were raised in this proceeding. At present, there are studies and reports emanating from various sources that are actively involved in the debate about wind turbines. As compared to other fields of expertise, there are comparatively few sources of information. This is to be expected in a nascent situation such as this, especially where there is a tight timeline associated with the Hearing.

The recent Goudge Report and case law serve to emphasize the gatekeeper function of the Tribunal.

In this case, the Tribunal finds that Dr. McMurtry has the expert qualifications as requested. The Tribunal cannot say at this point that his evidence would likely have no relevance to the issue to be decided. On the matter of bias, while the Tribunal can envisage situations where the likelihood of bias would outweigh the value of receiving evidence of a witness, this is not such a case. Dr. McMurtry's track record of public service alone overrides any such concern in this case.

In referring to the Practice Directions of the Environmental Review Tribunal, and in particular 9(e), it states:

> The witness must never assume the role of an advocate for a party. Argument and advocacy should be left to counsel or agents presenting the party's case. This does not preclude the vigorous advancement of strongly held scientific or other professional opinions or prevent a duly qualified witness who is also a party from advancing technical and opinion evidence.

As has consistently been the finding in cases cited by counsel, the matters raised by the Approval Holder and the Director will be considered in the weight to be given to the evidence of the witness.

Just to reiterate then, the Tribunal finds Dr. McMurtry to be a physician and surgeon with experience in the delivery of health care, health care policy and health policy.

* * * * *

Appendix I -- Excerpt of Transcript with oral ruling on expertise of Ian Dubin, April 25, 2013.

RULING

THE CHAIR: So, for Mr. Dubin and for those present from the public, we had had a teleconference dealing with his request to be qualified as an expert, and also dealing with -- or how to deal with his evidence we were intending to deal with his evidence.

He had earlier been a presenter. So Ian Dubin has presenter status in this proceeding, as set out in the order of the Tribunal dated March 1, 2013. Mr. Dubin also seeks to give his evidence as a qualified expert in the Environmental Impact Assessment process. The Approval Holder and the Director oppose qualifying Mr. Dubin as an expert. The appellants have not stated a position. Mr. Dubin lives in Hong Kong. He has not attended the hearing in person and will not be doing so. The Tribunal arranged for Mr. Dubin to make his request to be qualified as an expert and to provide his oral evidence by teleconference on March 7th, 2013.

While Mr. Dubin participated by teleconference from Hong Kong, the Tribunal and counsel for the parties were gathered in a hearing room at Toronto. Prior to the teleconference, Mr. Dubin had sent information about his qualifications and proposed evidence to the Tribunal and counsel. During the teleconference, the Tribunal heard Mr. Dubin's evidence regarding his expertise. He was cross-examined by Ms. Smith on behalf of the Appellants, Ms. Davis on behalf of the Director and Mr. Gray on behalf of the Approval Holder.

Before the Tribunal could hear submissions of Mr. Dubin, and the parties on the question of his expertise, the teleconference was cut short, possibly due to technical difficulties with the connection. The Tribunal subsequently requested written submissions from Mr. Dubin and the parties on the question of his expertise. Mr. Dubin, the Director and the Approval Holder completed their written submissions before the end of March 2013. No submissions were received from the Appellants.

The evidence is that Mr. Dubin has extensive experience performing environmental assessments in Hong Kong and China, experience with the Canadian, Federal Environment Assessment process, and relevant experience in assessing the environmental impact assessment process in Ontario. He does not have experience in the specific area of wind farm impacts, nor has he referred to his having personal knowledge regarding the site for this project, but he has had recent involvement in pro bono and advisory work in environment and sustainability with local government in Kingston, Ontario.

The Tribunal finds that Mr. Dubin has expertise in the Environmental Impact Assessment process. Mr. Dubin has already provided the parties and the Tribunal with his written evidence regarding the proposed project. Given that Mr. Dubin has presenter status and the fact that he will not be attending the hearing in person, the Tribunal accepts his written material and the oral evidence that he has already given on the March 7, 2013 teleconference, as his evidence-in-chief in these appeals. In regards to Mr. Dubin's evidence, and as is the case for any expert witness, the Tribunal will only consider opinions that fall within the expertise of the witness, to be expert opinion evidence. The Tribunal also notes the Director's submission supported by the Approval Holder that the Renewable Energy Approval process is different from the Environmental Impact Assessment process. This will be a factor in determining the relevance of Mr. Dubin's opinion evidence and its weight, with respect to the issues before the Tribunal. The other parties are entitled to cross-examine Mr. Dubin on his evidence.

* * * * *

Appendix J -- Excerpt of Transcript with oral Tribunal Ruling on Dr. Beaudry, March 18, 2013

THE CHAIR: Okay, so regarding the two witnesses, for Dr. Beaudry, we are going to accept the calling of Dr. Beaudry as a witness. Yes, there are the time constraints, and in this case it is a bit mixed as there has been some advance notice of what that witness would say, albeit Mr. Gray makes a good point that the Approval-Holder and the Director have structured their case based on the information they were given when they were given it during the schedule and did not anticipate having to deal with Dr. Beaudry as a witness.

Nevertheless, there is some time we feel in the schedule. It can still fit within the schedule such as the schedule is, subject to change at the moment.

On the other hand, with Dr. Smith, we have a concern. If he is at this stage, for the very reasons that these things are to be advised earlier on in the schedule, it would cost us possibly three days in the order of things, because we don't think the Approval-Holder should be proceeding with its case and have the Appellant splitting its case effectively for after the Approval-Holder already has gotten well down the road.

So we don't think -- that certainly would be a question of fairness there. We are saying yes to Beaudry. We are not going to deal with Smith now, and the reason being we are going to be asking you folks -- we are concerned about the scheduling, and we don't think we have got enough detail here. We would like a little more detail and would like a little more certainty as to the scheduling and some thought given, so we don't get into a situation, as we have today, where to be fair to all parties we were having a witness having to come back now because we didn't get through with that witness.

cp/e/qlhxc/qlacx/qlacx/qlhcs