

ENVIRONMENTAL & ENERGY LAW

DIVISIONAL COURT SETS ASIDE ENVIRONMENTAL REVIEW TRIBUNAL DECISION TO REVOKE OSTRANDER POINT RENEWABLE ENERGY APPROVAL

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On July 3, 2013, Ontario's Environmental Review Tribunal ("Tribunal") revoked the Renewable Energy Approval ("REA") that had been issued by Ontario's Ministry of the Environment for the construction of a 22.5 MW wind energy project known as Ostrander Point. The Tribunal's decision was based on its finding that engaging in Ostrander Point in accordance with its REA would cause serious and irreversible harm to Blanding's Turtle, a threatened species in Ontario.

The Tribunal's decision was appealed to Ontario's Divisional Court. The appeal was argued during the week of January 20, 2014.

On February 20, 2014, the Divisional Court released its decision on the appeal (2014 ONSC No. 974) and overturned the Tribunal's decision for the following reasons, as summarized by the court at paragraph 91 of its decision:

- (i) the Tribunal failed to separately identify and explain its reasons for concluding that, if serious harm would result from the Project, that serious harm was irreversible;
- (ii) the Tribunal concluded that serious and irreversible harm would be occasioned to Blanding's turtle without any evidence as to the population size affected;
- (iii) the Tribunal concluded that serious and irreversible harm would be occasioned to Blanding's turtle arising from road mortality without any evidence as to the current level of vehicular traffic on the Project site or any evidence as to the degree of increase in vehicular traffic arising from the Project;
- (iv) the Tribunal failed to give sufficient weight to the existence of an Endangered Species Act ("ESA") permit, the conditions attached to that permit, the obligation of the Ontario Ministry of Natural Resources ("MNR") to monitor and enforce the permit and the fact that the Renewable Energy Approval expressly required Ostrander to comply with the ESA permit;
- (v) the Tribunal failed to give a proper opportunity to the parties to address the issue of the appropriate remedy and thereby violated the principles of natural justice and procedural fairness;



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(vi) the Tribunal erred in finding that it was not in a position to alter the decision of the Director, or to substitute its opinion for that of the Director.

In coming to its decision, the Divisional Court also dismissed cross-appeals on issues of harm to birds, alvar and human health. With respect to birds and alvar, the court found that the Tribunal's decisions on these issues were reasonable.

With respect to the human health appeal, the court confirmed at paragraphs 121 and 122 that there is a higher standard required before a fact finder can admit and rely on expert evidence, especially when that expert evidence promotes a novel scientific theory and that it is not sufficient for the purposes of relying on a novel scientific theory to simply conclude that the theory may be correct. The court found that the theory advanced to support the health appeal before the Tribunal had not been tested, medically peer reviewed, or generally accepted and its error rate was not known. As such, the court agreed that the Tribunal applied the correct standard to its consideration of this evidence, namely reliability. The court went on to find that the Tribunal's conclusion on this evidence was reasonable.

The Divisional Court's decision effectively reinstates the REA for Ostrander Point and construction may proceed. However, the decision may be appealed with leave, to the Ontario Court of Appeal. A notice of motion for leave to appeal to the Ontario Court of Appeal is due within 15 days of February 20, 2014.