

ENDANGERED SPECIES SUCCESSFULLY CHALLENGE RENEWABLE ENERGY DEVELOPERS

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The Decision: In a unanimous decision released on Monday April 20, 2015 in *Ostrander Point Wind Energy LP 2015 ONCA 269*, the Ontario Court of Appeal overturned the decision of the Ontario Divisional Court (reported in Fogler's E&E Newsletter on February 20, 2014) and sent back to the Environmental Review Tribunal (ERT) the matter of whether the Ministry's Renewable Energy Approval (REA) for a 9 turbine windfarm in Eastern Ontario should be revoked.

The Court affirmed the ERT's finding that the Blanding's Turtle, an endangered species globally and in Ontario, would suffer serious and irreversible harm from the windfarm.

The Findings: Expert evidence led by the Prince Edward County Field Naturalists at the initial Tribunal hearing had established that the female turtles travel in order to locate suitable nesting sites and find the gravel shoulders and embankments of roadways to be particularly desirable nesting habitat. This increases the risk of mortality to adult females and hatchlings from motor vehicles. Road mortality poses the most serious threat to Blanding's turtle survival.

This finding of harm then required the Tribunal to determine under section 145.2.1 (4) of the *Environmental Protection Act* whether any remedial measures were available as an alternative to revoking the REA. The project proponent introduced evidence at the initial hearing that they could mitigate this harm with educational signage and reduced speed limits, but the Tribunal rejected these measures as insufficient because the project would be on Crown land and open to public access. On subsequent appeal, the proponent argued that the scope of the remedies it would apply to protect the turtles had been unduly restricted by the Tribunal. The proponent sought to introduce evidence that public access to the roads would be closed thereby eliminating the mortality threat. The Court of Appeal was not convinced that the threat of mortality from the project would be completely eliminated by the closing of the road. The project would require the addition of 5.4 kilometres of roadway. Expert evidence at the hearing had established that the turtle was susceptible to poachers and predators who typically attacked their nests, and this threat was increased as the roadways could be used to easily access nesting habitat. The additional roadway offered additional threats from poaching and predators which could best be assessed by returning the matter to the ERT.

Significance of Decision: The Court of Appeal held that the permit from the Ministry of Natural Resources (MNR) under the *Endangered Species Act* allowing harm to the turtle for the benefit in Ontario of the species as a whole, did not release the project proponent from complying with all other laws. In fact the permit from the MNR said as much. The Court noted that while the MNR looked at the impacts to the turtle provincially, the Tribunal was entitled to consider the impacts locally. Permit holders must always be wary of permits which caution that their authorization does not discharge them from complying with obligations under other municipal, provincial and federal laws. This merely speaks to the importance of reviewing all laws with potential relevance to a project and making all necessary inquiries with the regulators involved on the application of their laws to the proposed project.

The Court further rejected the suggestion that sufficient numerical data was required as to the depletion of the specie before a finding of serious and irreversible harm could be made. The absence of numerical measures of population, vehicles, traffic data and mortality rates, was not fatal to the case for revocation of the REA. Ironically, this decision can be of use to proponents who not uncommonly rely on qualitative as opposed to quantitative analysis in support of their projects. see e.g. the Inverhuron Ratepayers Assn case which deals with the environmental assessment for the *Bruce Used Nuclear Fuel Waste Storage facility (2000) 34 C.E.L.R. (N.S.) 1 at par. 53 affirmed at (2001) 39 C.E.L.R. (N.S.) 161 at pars. 54-56.*



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