

DIVISIONAL COURT CONFIRMS ERT'S INTERPRETATION OF REA APPEAL SCHEME

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On June 28, 2016, Ontario's Divisional Court released its decision in *Bryce v. Ontario (The Environment and Climate Change)*, 2016 ONSC 4191 ("**Bryce**") and provided parties to future Renewable Energy Approval ("**REA**") appeals with clear direction regarding s.145.2.1(5) of the *Environmental Protection Act* ("**EPA**"), causation and adjournment requests.

Bryce involved two appeals of ERT decisions dismissing appeals of REAs issued by the Ministry of the Environment and Climate Change ("**MOECC**") for two different wind energy projects, one to Suncor Energy Products Inc., ("**Suncor**") and one to Grey Highlands Clean Energy Development LP ("**Grey Highlands**"). The appeals were heard together because they involved the common legal issue of the meaning and effect of s.145.2.1 of the EPA, specifically s.145.2.1(5). Two additional issues were raised in the Suncor REA appeal, namely: whether the material contribution test applies to causation in s.145.2.1(2) of the EPA, and whether appellants were denied natural justice when the ERT refused their motion to adjourn proceedings.

With respect to s.145.2.1 of the EPA, the Divisional Court confirmed that in an REA appeal, if an appellant fails to meet its onus of proving that a renewable energy project will cause harm, neither s.145.2.1(5) of the EPA, nor the Divisional Court's decision in *Dixon v. Ontario (Director, Ministry of the Environment)*, 2014 ONSC 7404 ("**Dixon**") require the ERT to make a separate determination that the project will not cause harm, prior to confirming the MOECC's decision to issue the REA.

The Divisional Court went on to uphold the ERT's rejection of the less onerous material contribution test for causation in the context of REA appeals. In doing so, the Court observed that the material contribution test is inconsistent with both the clear and unambiguous test in s.145.2.1(2) of the EPA, that requires proof that the REA will cause specified harms, and the principle underpinning the EPA's renewable energy project regulatory scheme that wind turbines sited and operated in accordance with the regulatory regime do not cause serious harm to human health based upon the current state of scientific knowledge.

Finally, the Court determined that natural justice was not denied when the ERT refused to grant a 6 month adjournment requested by appellants to retain an expert to review source data from the Health Canada Summary that was released during the Suncor REA appeal. The Court held that the ERT followed its Rules of Practice, and found that the appellants had adduced insufficient evidence to demonstrate that the information that would be sought during the adjournment was necessary for a full and fair hearing.



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