First International Symposium on Adverse Health Effects from Wind Turbines
The Global Wind Industry and Adverse Health Effects: Loss of Social Justice?
Picton, Prince Edward County, Ontario, Canada
October 29-31, 2010

Session V

The Consequences – Violation of Social Justice

Abstract and bio on slides 2 and 3 is reproduced from the Symposium Program

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Eric K. Gillespie, LLB–

SOCIAL JUSTICE AND THE LAW

Abstract: The advent of large-scale industrial wind turbine (IWT) projects has brought with it many legal challenges but also opportunities. Families, communities and municipalities are more aware of the risks posed by IWTs. At the same time, legal options are starting to be pursued that may lead to local resolutions of issues, or potentially provincial, national or even international changes. These legal strategies include (i) private litigation brought by individuals, (ii) public interest litigation raising broader issues; (iii) by-laws, resolutions and other steps taken by local government, and (d) administrative hearings outside of the court system. All of these areas will be reviewed, using Ontario as a case study but with examples of how communities around the world are also responding.

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Eric K. Gillespie, LLB–
SOCIAL JUSTICE AND THE LAW

Bio: Eric Gillespie practices civil litigation and administrative law with an emphasis on environmental issues. He graduated with Distinction from the University of Western Ontario Law School in 1994. He articled in part with the Canadian Environmental Law Association. Since then he has appeared before all levels of Ontario Courts and a wide variety of administrative tribunals including the Ontario Environmental Review Tribunal, the Ontario Municipal Board and at the Walkerton Water Inquiry. He has also assisted clients in other parts of Canada including New Brunswick, Quebec, Nova Scotia and Newfoundland. Gillespie is a lead litigator in a class action lawsuit that resulted in an award of $36 million being announced in July, 2010, the largest environmental class action award in Canada to date. In October, 2009, on behalf of his client Ian Hanna, his firm filed a court application for judicial review of the Green Energy Act, 2009 basedon the Precautionary Principle as it applies to industrial wind turbine installations. He also currently represents residents and community groups from across Ontario on wind related issues.

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Social Justice and the Law

Eric K. Gillespie

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Community Litigation

- The *Green Energy and Green Economy Act, 2009* (the "GEGEA"), became law on May 14, 2009
- GEGEA enacted stand-alone *Green Energy Act* 2009 (the "GEA")
- Accompanying Renewable Energy Approval Regulation (O. Reg. 359) came into force on September 24, 2009
- Like any new statute, it hasn't been tried and tested.
- From the "community/public" perspective, the GEA already has or is likely to spawned significant litigation

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Community Litigation

OVERVIEW:

- PRIVATE LAWSUITS
- PUBLIC LAWSUITS
  eg. *Hanna v. AG (MOE) litigation*
- PROPONENT LAWSUITS
  eg. Arran-Elderslie By-law
- RENEWABLE ENERGY APPROVAL (REA) APPEALS to the Environmental Review Tribunal (ERT)
- International examples

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Private Litigation

- Previous claims resulted in settlements and in some cases purchases
- New claims still being brought (Limitation period issues)
- Also being brought in other jurisdictions – UK, US, New Zealand.

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Public Litigation

- *Ian Hanna v. A.G. (MOE)*
- Application for judicial review brought by Ian Hanna
- Focuses on the 550 m setback for IWTs
- Based on Precautionary Principle under the MOE Statement of Environmental Values and at common law
- Motions and now proceeding through cross-examinations etc.
- Hearing scheduled for January 2011

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Public Litigation

- Relying in part on Ontario Divisional Court in *Lafarge Canada Inc.* v. *Ontario (Environmental Review Tribunal)*, which upheld a number of relevant findings of the Environmental Review Tribunal.
- Court required the MOE to be guided in its decision-making by its own Statement of Environmental Values, the Precautionary Principle, and the "ecosystem approach".

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Public Litigation

- Justice Swinton, in her decision with respect to the intervenor status of CanWEA wrote:

"If the application succeeds, the members [of CanWEA] will no longer have an opportunity to obtain regulatory approval for the construction of new wind energy projects in Ontario, and the development of utility-scale wind projects in Ontario will be effectively halted for an indeterminate period of time."

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Proponent Litigation

- Arran-Elderslie By-law No. 14-10,
- Sets out a number of conditions to the issuing of a building permit for the construction of any wind generation facility, including:
- Certificates from Health Canada and a number of provincial ministries confirming that the facility will not harm the health of residents
- Before the certificates are issued the Ministries must "provide original documentation to the satisfaction [of Council] that the necessary full and complete non-partisan third party, independent health studies on humans are presented to determine safe setbacks and noise limits

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Proponent Litigation

- Other municipalities now supporting or adopting similar by-laws
- By July 1, 2010, twenty municipalities had passed motions supporting the Arran-Elderslie By-law
- Will generate reverse litigation - proponents challenging municipality for not issuing building permit
- Will likely see litigation sooner rather than later

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Proponent Litigation

- In UK, two appeals by wind developer against failure of Councils to make a decision within prescribed time to the Planning Inspectorate – Middle Moor/Matlock Moor, Derbyshire.
- Councils would have refused the applications. Their reasons were taken into account by the Planning Inspector.
- The five main issues were identified as:
  - The character and appearance of the landscape (Peak District National Part)
  - The setting of nearby heritage assets
  - The local economy
  - Wildlife
  - The living conditions of nearby residents

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Proponent Litigation

- Finds significant adverse impact which would cause unacceptable harm to the landscape
- Unlikely to have significant adverse effect on local economy
- With respect to birds, finds the appellant's surveys inadequate and applies to precautionary principle – the likelihood of the proposed wind farm having a significant adverse effect cannot be ruled out.
- Finds that closest residents to proposed wind farm would be unacceptable harmed to varying degrees by noise and visual impact.
  - Was also concerned by the ease and speed with which and noise breaches could be addresses, and the uncertainties about noise levels.

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Appeals - ERT

- As Renewable Energy Approvals are granted we will start to see appeals of those REAs to the ERT
- Challenging new timeframes
  - Tribunal is required to issue its decision no later than six months after a Notice of Appeal is served (failing which the REA is deemed to be confirmed)
  - Persons bringing an appeal should assume they have to be ready for a Preliminary Hearing within four weeks of starting their appeal, a full Hearing after another four weeks
- Clients preparing … or should be

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Appeals - ERT

- Now there is an automatic right of appeal
- Previously, while could appeal a permit under section 38 of the EBR to the ERT, the prospective appellant needed to obtain leave to appeal.
- The test for leave, set out in section 41 of the EBR, was regarded as difficult to meet.

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Appeals - ERT

- Now, section 142.1 EPA:

  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.

- The harm must not only be serious (and irreversible), but the appellant must prove that it *will* occur as a result of the development in question.

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Appeals - ERT

- The implications of these changes in the appeal provisions for community participants are significant
- Easier to appeal
- More difficult to succeed
- More motions to dismiss etc.

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Other Appeals

- Wisconsin – attempt to complain to the Public Service Commission (independent regulatory agency responsible for public utilities)
- Utilities need PSC approval before undertaking major construction projects
- While complaint was not successful, Commission clearly stated had jurisdiction to impose conditions when it issues new "Certificates of Public Convenience and Necessity" (CPCNs) – closest analogy would be to Ontario's Certificate of Approval, including ordering compensation for certain losses.
- Contact us for further details.

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Conclusion

- Litigation going forward:

  Private – possible

  Public – more likely

  Proponent – more likely

  ERT Appeals – more likely but may be challenged

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Conclusion

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