CITATION: Hanna v. Ontario (Attorney General), 2011 ONSC 609
DIVISIONAL COURT FILE NO.: 491/09
DATE: 20110303

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CUNNINGHAM, A.C.J., JENNINGS, ASTON JJ

BETWEEN:	)	
	)	
Ian Hanna	)	*Eric K. Gillespie/Julia Croome*, for the Applicant
Applicant	)	
– and –	)	
	)	
Attorney General for Ontario	)	*Sara Blake/Myra Hewitt*, for the Respondent
Respondent	)	
– and –	)	
	)	
Canadian Wind Energy Association	)	*John Terry/Alexander Smith*, for the Intervenor
Intervenor	)	
	)	
	)	**HEARD:** January 24, 2011

REASONS FOR DECISION

ASTON J.

Overview

[1] This application for judicial review challenges the promulgation of sections 35, 53, 54 and 55 of O. Reg. 359/09 made under Part V.0.1 of the *Environmental Protection Act* ("the *EPA*"). The title of this regulation is the "Renewable Energy Approvals Regulation." The impugned sections in the regulation prescribe minimum setback requirements for wind energy

facilities and require that they conform to the Ministry of the Environment's published "Noise Guidelines for Wind Farms." The regulation came into effect on October 1, 2009, following a period of public consultation ending July 24, 2009.

[2] The regulation was enacted by the Lieutenant Governor-in-Council on the advice of the Minister of the Environment. The minister's decision to recommend promulgation is at the heart of this application for judicial review.

[3] Section 11 of the *Environmental Bill of Rights*, S.O 1993, c. 28 (the "*EBR*") requires the Minister of the Environment to "take every reasonable step to ensure that the ministry statement of environmental values (the "SEV") is considered whenever decisions that might significantly affect the environment are made in the ministry." The applicant submits that s. 11 of the *EBR* establishes a condition precedent for the decision by the minister to recommend promulgation of the regulation, and a breach of that condition renders his decision, and the regulation, *ultra vires*. In particular, the ministry's statement of environmental values sets out principles the ministry will apply in developing Acts, regulations and policies. One of those principles is that "the ministry uses a precautionary science-based approach in its decision making to protect human health and the environment." The applicant contends the minister failed to consider that "precautionary principle."

[4] The applicant puts forward evidence from three medical doctors who state there was no scientific evidence available to support the minister's conclusion that a 550 metre setback for industrial wind turbines from a residence is safe. The gist of their opinion evidence is that there is medical uncertainty about the impact on human health of living in proximity to an industrial wind turbine and that the "precautionary principle" mandates resolution of this scientific issue before setting regulatory standards.

[5] The Attorney General for Ontario has brought a motion to strike out this evidence as inadmissible. I will return to that motion later in these reasons. The Attorney General also opposes the application on the basis that the issues raised are precluded from judicial review by a full privative clause, are raised in the wrong forum, and inappropriately ask the court to adjudicate a hypothetical scientific issue.

[6] The intervenor supports the validity of the regulation and takes the position the minister complied with all requirements in validly enacting the regulation.

Scope of this Court's Jurisdiction

[7] Section 37 of the *EBR*, found in Part II of the *Act*, states "failure to comply with a provision of this Part does not affect the validity of any policy, Act, regulation or instrument except as provided in s. 118." This section applies to the minister's duty to consider the statement of environmental values because s. 11 of the *EBR* is also in Part II.

[8] Section 118(1) reads "no action, decision, failure to take action, or failure to make a decision by a minister or his or her delegate under this Act shall be reviewed in any court."

[9] Section 118(2) provides that any person resident in Ontario may make an application for judicial review on the grounds that a minister or his or her delegate "failed in a fundamental way to comply with the requirements of Part II respecting a proposal for an instrument**.**" [*emphasis added*] Under the definitions in the *EBR* an "instrument" includes a permit, licence, approval, authorization, direction, or order issued under the Act but does not include a regulation. It is worth noting that during the debates on s. 118 a proposed amendment to s. 118(2) that would have removed the words "respecting a proposal for an instrument", so that a regulation could be challenged through judicial review, was specifically rejected.

[10] In short, s. 118(2) does not apply in this case and the decision of the minister is protected from judicial scrutiny by two privative clauses, both s. 37 and s. 118(1) of the *EBR*. The court's jurisdiction is therefore quite circumscribed.

[11] Furthermore, government policy, expressed through a regulation, is not subject to judicial review unless it can be demonstrated that the regulation was made without authority or is unconstitutional. A regulation may be said to have been made without authority only if the Cabinet has failed to observe a condition precedent set forth in its enabling statute or if the power is not exercised in accordance with the purpose of the legislation. See *Apotex Inc. v. Ontario (Lieutenant Governor-of-Counsel)* [2007] O.J. No. 3121 (C.A.) at para. 32.

[12] The applicant agrees that the validity of the regulation is only justiciable if it was made *ultra vires*, due to the minister's failure to meet a condition precedent.

[13] The applicant concedes that it is not this Court's function to weigh the evidence or information upon which the minister exercised his discretion. However, he submits there must be some evidence that a 550 metre setback is sufficient to protect against risks to human health. Otherwise the minister's decision is purely arbitrary and amounts to a failure to consider a fundamental part of the SEV, specifically the "precautionary principle."

[14] Was the minister required to comply with s. 11 of the *EBR* as a condition precedent to his decision to recommend promulgation of the regulation? Did he do so?

[15] The Attorney General submits that the consideration of the statement of environmental values is not a condition precedent to the minister's decision because the SEV only reflects internal ministry policy, not a statute or regulation. If the Court must not engage in a review of government policy, it should not engage in a review of whether the minister has complied with government policy. Ms. Blake therefore submits that there is no justiciable issue. Alternatively, she submits the minister did comply with the requirements under s. 11 of the *EBR*.

The Evidence

[16] The Regulation is part of a new renewable energy approval process (REA). A wind turbine, located on land, with a capacity of 3kW of power does not require an REA. Wind facilities on land generating between 3kW, but less than 50 kW, require an REA but there are no minimum setback requirements in the regulations. The targeted sections of the regulation in this

application are for industrial wind facilities generating more than 50 kW. Depending on the sound power level (a measure of a turbine's "loudness") most of these wind turbines must meet a minimum 550 metre setback from residences or other "noise receptors."

[17] On June 9, 2009, the government posted a proposal for the Renewable Energy Approval regulation, as required by the *EBR*. The public comment period closed July 24, 2009.

[18] The public consultation process is outlined in the evidence of Marcia Wallace. It describes standing committee hearings, technical workshops bringing together knowledgeable persons such as scientists, engineers and academics, facilitated discussion groups, public information sessions and Aboriginal consultation sessions. There were approximately 1300 written submissions. Of approximately 4,000 comments that were noted, about eight percent were directed at health issues related to wind turbines. The applicant himself did not participate in this process.

[19] The Ministry of the Environment considered all of the public comments provided. In addition, the Ministry considered more than 100 studies and publicly available scientific literature, as identified in the Application Record before this Court. As a consequence of all that input, some changes were made to the proposed regulation.

[20] The applicant acknowledges that virtually all of the information relied on by Dr. McMurtry to form his assessment regarding the health impacts of industrial wind turbines was known to the Ministry at the time the regulation was being considered. However, the applicant contends that this information was never assessed by any qualified medical expert other than the applicant's own witnesses.

[21] The Attorney General's motion to strike out the affidavit evidence of the applicant was adjourned to the panel hearing the application. The applicant has filed evidence from three medical doctors. They have each reviewed the record considered by the ministry. They state there is no medical evidence to support a conclusion that a 550 metre setback is safe. They say there is no accepted method to measure noise from industrial wind turbines. They observe there is no evidence any person with medical knowledge reviewed the regulation before it was passed. Based upon this, the applicant submits that there is no expert evidence or admissible evidence the minister "took every reasonable step to consider" the SEV and human health issues for persons in proximity to industrial wind turbines when the minister's decision was made.

[22] The evidence tendered by the applicant on this application, if it is admissible as expert opinion, would establish the following:

(i) scientific uncertainty exists regarding the impact of industrial wind turbines on human health;

(ii) no studies conducted to date have been so significantly rigorous as to resolve this uncertainty; and

(iii) notwithstanding the scientific uncertainty, there is at least some evidence that persons living within close proximity of industrial wind turbines may experience adverse and potentially significant health effects in various forms such as sleep difficulties, physiological distress, emotional stress, headaches, auditory disturbance and other concomitant or consequential health problems.

[23] Peer reviewed scientific research known to the Ministry is said to confirm that low frequency noise can cause adverse health effects, highly variable among people and not necessarily dependent on whether the emitted noise is audible or not.

[24] The applicant does concede that there was non-medical scientific evidence and other information considered by the minister, his advisors and staff. It included studies recommending night time noise limits to protect against sleep disturbance, and the "Pederson study" which found that with a setback of 550 metres the noise level from the noisiest class of wind turbine included in the regulation would be less than 40 dBA. This represents a dBA figure recommended by the World Health Organization and prescribed by the ministry's own "Noise Guidelines for Wind Farms."

Analysis

[25] As noted, s. 11 of the *Environmental Bill of Rights Act* requires the minister to "take every reasonable step" to ensure that the ministry's statement of environmental values is "considered" whenever decisions that might significantly affect the environment are made in the ministry.

[26] The SEV provides, in part (emphasis added):

> The Ministry of the Environment is committed to applying the purposes of the *EBR* when decisions that might significantly affect the environment are made in the Ministry. As it develops Acts, regulations and policies, the Ministry will apply the following principles:
>
> - The Ministry adopts an ecosystem approach to environmental protection and resource management. This approach views the ecosystem as composed of air, land, water and living organisms, including humans, and the interactions among them.
>
> - The Ministry considers the cumulative effects on the environment; the interdependence of air, land, water and living organisms; and the relationships among the environment, the economy and society.
>
> - The Ministry considers the effects of its decisions on current and future generations, consistent with sustainable development principles.

- The Ministry uses a precautionary, science-based approach in its decision-making to protect human health and the environment.

- The Ministry's environmental protection strategy will place priority on preventing pollution and minimizing the creation of pollutants that can adversely affect the environment.

- The Ministry endeavours to have the perpetrator of pollution pay for the cost of cleanup and rehabilitation consistent with the polluter pays principle.

- In the event that significant environmental harm is caused, the Ministry will work to ensure that the environment is rehabilitated to the extent feasible.

- Planning and management for environmental protection should strive for continuous improvement and effectiveness through adaptive management.

- The Ministry supports and promotes a range of tools that encourage environmental protection and sustainability (e.g. stewardship, outreach, education).

- The Ministry will encourage increased transparency, timely reporting and enhanced ongoing engagement with the public as part of environmental decision making.

[27] The government of Ontario has a long-standing policy aimed at the reduction of annual greenhouse gas emissions for the purpose of protecting the environment and the health of the general public. One initiative is to work towards replacement of coal-fired electricity generation by increasing electricity generation capacity from renewable energy sources such as industrial wind turbines. The policy development process that began in 2003 culminated in the enactment of the *Green Energy and Green Economy Act 2009* ("*GEA*") on May 14, 2009. The main purpose of the GEA is to streamline the process for developing green energy projects, including wind facilities. The GEA did this by amending the *EPA* to add Part V.0.1 which deals with renewable energy. The GEA amended the *EPA* to establish processes for the approval of renewable energy projects, such as wind turbines, and the authorization of regulations governing those projects. Section 11 of the *EBR* and the SEV are parts of a broad environmental policy.

[28] The issue raised by this judicial review application singles out the precautionary science-based approach, one of ten principles in the SEV. It is described as "the precautionary principle." This application rests primarily on its emphasis of the medical science and potential health effects for persons living in proximity to wind turbines. However, under s. 11 of the *EBR*, the minister must take every reasonable step to consider all ten principles, a process which

involves a policy laden weighing and balancing of competing principles. One of those SEV principles is to "place priority" on preventing and minimizing pollution.

[29] The health concerns for persons living in proximity to wind turbines cannot be denigrated, but they do not trump all other considerations. This is particularly so because those persons do have a remedy. Any person resident in Ontario, whether or not the person lives in proximity to a proposed wind turbine, can challenge the approval of an industrial wind turbine under the *EPA* amendments that came into force with the *GEA*. This challenge takes the form of an appeal to the Environmental Review Tribunal (the "Tribunal") which has the mandate to determine, on a case by case basis, whether a renewable energy approval would cause serious harm to human health. Thus, if the Tribunal is persuaded by evidence that the 550 metre minimum setback is inadequate to protect human health from serious harm, the Tribunal has authority to revoke the decision of the Director, or at the request of the applicant increase the minimum setback prescribed for the proposed wind turbines. The Tribunal would hear relevant expert evidence and would be able to consider topography, wind patterns, make, model, size and dBA specifications of the wind turbine, its exact location, and the location of any other proximate turbines or noise receptors (i.e. residences). The Tribunal can conduct site inspections. It has authority to appoint its own scientific experts to assist it in its endeavours.

[30] It was in this context that the minister considered the SEV.

[31] It is not the court's function to question the wisdom of the minister's decision, or even whether it was reasonable. If the minister followed the process mandated by s. 11 of the *EBR*, his decision is unassailable on a judicial review application. If he did not comply with the mandated process, the court would have to decide if the failure to do so means he acted without lawful authority.

Decision

[32] We are satisfied that the minister complied with the process mandated by s. 11 of the *Environmental Bill of Rights.*.

[33] There was a full public consultation and a consideration of the views of interested parties. The ministerial review included science-based evidence, such as reports of the World Health Organization and the opinions of acoustical engineering experts. Cognizant of the possible health concerns the minister decided the minimum 550 metre setback was adequate. He made that decision knowing the adequacy of the minimum setback could be challenged in any particular case before a specialized tribunal.

[34] In the context of the broad policy issues at play, the alternative protections provided by the Environmental Review Tribunal and the absence of clear evidence the 550 metre setback requirement is necessarily insufficient we find that the minister did comply with the requirement in s. 11 of the *EBR*, notwithstanding the "precautionary principle" in the statement of

environmental values. The precautionary principle does not preclude the decision that was taken by the minister.

[35] It is not necessary parse the applicant's evidence to rule on the respondent's motion. Suffice it to say that at least some of that evidence is admissible and nothing in the rest of that evidence, taken at its highest, would lead us to a different conclusion.

[36] The application is therefore dismissed.

[37] If counsel are unable to agree on costs, brief written submissions may be made within the next thirty (30) days.

Cunningham, A.C.J.

Jennings J.

Aston J.

Released: March 3, 2011

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