

Gilead wins over turtle at Divisional Court

An Ontario Divisional Court panel at Belleville last week overturned an Environmental Review Tribunal's 2013 decision to revoke Gilead Energy's Renewable Energy Approval for a nine-turbine wind farm at Ostrander's Point, in Prince Edward County.

The ERT had ruled that the REA had not given adequate consideration to the habitat of the endangered Blanding's turtle. In particular, among other things, the ERT found that increased traffic on access roads would ruin the turtle's habitat.

Both Gilead and the Ministry of Environment appealed the ERT's decision to the court. Toronto lawyer Eric Gillespie and Natalie Smith opposed the appeal on behalf of two local anti-wind groups: Alliance to Protect Prince Edward County (APPEC) and Prince Edward County Field Naturalists (PECFN).

At the outset of the three-day hearing, Mr. Gillespie opposed the introduction of evidence of public exclusion from the access roads that had not been adduced at either the REA or the ERT. The court agreed, saying that it was confined to issues of law, whereas the new evidence would be an issue of fact.

As well, the court agreed with Mr. Gillespie on introduction of new evidence. It viewed two precedential cases (authorities), both of which ruled generally that, to be introduced, the evidence could not have been known to the respondent prior to the hearing.

“While those two tests differ in their terms, especially regarding the degree of impact that the fresh evidence must have regarding the decision under appeal, both tests begin with one identical criteria – that the evidence “could not have been obtained by the exercise of reasonable diligence, prior to the hearing at first instance,” the decision notes.

Nonetheless, the panel's final decision centred mainly on whether or not the wind farm would place an endangered species risk of serious and irreversible harm.

Mr. Justice Ian Nordheimer, writing for the three-member panel, said, “I have concluded that the Environmental Review Tribunal committed the following errors of law in arriving at its conclusion:

“The (ERT) failed to separately identify and explain its reasons for concluding that, if serious harm would result from the Project, that serious harm was irreversible;

“(it) concluded that serious and irreversible harm would be occasioned to Blanding's turtle without any evidence as to the population size affected;

“(it) 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 evidences as to the degree of increase in vehicular traffic arising from the Project;

“(it) failed to give sufficient weight to the existence of the ESA permit, the conditions attached to that permit, the obligation of the MNR to monitor and enforce the permit and the fact that the Renewable Energy Approval expressly required Ostrander to comply with the ESA (Endangered Species Act) permit;

“(it) 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;

“(It) 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.

“(Its) decision on serious and irreversible harm was unreasonable for the reasons that I have given. The Tribunal's decision on the

appropriate remedy was reached following on a breach of the rules of natural justice by failing to accord procedural fairness to the parties.

?Consequently, neither of the decisions of the Tribunal can stand. The appeal is therefore allowed and the decision of the Tribunal is set aside,? Mr. Justice Ian Nordheimer wrote.

There had been other issues in the appeal, but the court noted that the ERT decision had focussed on the turtle.

By Wes Keller