

Environmental Review Tribunal exercises discretionary remedial power in Ostrander wind farm case

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In its June 6, 2016 decision, the Ontario Land Tribunal revoked the Renewable Energy Approval (REA) that had been granted to Ostrander Point GP Inc. (Ostrander) to develop a nine turbine wind farm. This decision is relevant for stakeholders in Ontario's renewable energy industry because it is the first case to provide insight into how the Tribunal will exercise its discretionary remedial powers where a REA is found to meet the "harm test" in section 145.2.1(2)(b) of the *Environmental Protection Act* (EPA).

Factual and procedural background

In December 2012, the Ontario Ministry of the Environment and Climate Change (Ministry) issued a REA authorizing Ostrander to construct and operate nine wind turbines on a site in Prince Edward County (the Project). In July 2013, the Tribunal revoked Ostrander's REA on the grounds that the Project would cause serious and irreversible harm to the Blanding's turtle, an endangered species. The Tribunal's decision was significant because it was the first REA appeal where the harm test had been met.

The proponent appealed the Tribunal's decision to the Ontario Divisional Court. The Divisional Court overturned the Tribunal's ruling and allowed the REA for the Project to stand (see our previous [Osler Update](#) on this decision).

Opponents of the Project appealed the Divisional Court's decision to the Ontario Court of Appeal. The Court of Appeal held that the Tribunal's finding that "serious and irreversible harm" would befall the Blanding's turtle as a result of the Project was reasonable, but that the Tribunal's decision on the appropriate remedy to grant in the circumstances – revoking the REA – was unreasonable because the Tribunal had simply revoked the REA without any analysis or submissions from the parties on remedy (see our previous [Osler Update](#) on the Ontario Court of Appeal's decision). On that basis, the Ontario Court of Appeal remitted the issue of remedy back to the Tribunal to decide.

The Tribunal's June 6, 2016 decision^[1] was the Tribunal's ruling on the appropriate remedy in this case after hearing evidence from all parties concerning the additional mitigation measures proposed by the proponent, Ostrander, to avoid such harm to the Blanding's turtle population on the Project site.

The Tribunal's decision

Statutory provisions

The harm test in section 145.2.1(2)(b) of the EPA asks whether a REA will cause “serious and irreversible harm to plant life, animal life or the natural environment”. As the Court of Appeal had already confirmed the harm test had been met, the key issue in this case was the appropriate remedy. According to section 145.1.1(4) of the EPA, the Tribunal may exercise its discretionary remedial power to:

(a) revoke the decision of the Director;

(b) by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations; or

(c) alter the decision of the Director, and, for that purpose, the Tribunal may substitute its opinion for that of the Director.

The scope of the Tribunal’s remedial powers

A significant part of the Tribunal’s decision is spent considering the scope of its remedial powers under s. 145.2.1(4) of the EPA. The Director and Ostrander argued for a narrow approach, in which the Tribunal could only exercise its powers under s. 145.2.1 of the EPA to focus upon the precise “serious and irreversible harm” in question. The opponents of the Project argued for a broader approach, in which the Tribunal “stands in the shoes of the Director” and exercises all of the Director’s REA approval powers, and considers the general purpose of the EPA and the Ministry’s Statement of Environmental Values (e.g., precautionary principle, ecosystem approach), among other things.

The Tribunal opted for the broader approach, concluding that where the harm test has been met, it has the power to “step into the shoes of the Director” and exercise the Director’s powers to determine what is in the public interest.

Regarding burden of proof, the Tribunal appears to have ruled that once an appellant has discharged its burden of proving the serious and irreversible harm and the Tribunal moves to a consideration of the appropriate remedy, no one party bears the “burden of proof”. Rather, the Tribunal will exercise its discretion “on the basis of the parties’ submissions on the evidence, as proved on a balance of probabilities” – in other words, after weighing all of the remedy evidence.

Tribunal’s consideration of the evidence

The balance of the decision reviews and rules upon the evidence presented by all parties at the remedy hearing. It is noteworthy that while Ostrander adduced “fresh evidence” on a variety of the mitigation measures it proposed with a view to preventing or reducing the harm to the Blanding’s turtle population, the Director and appellants were permitted to adduce responding evidence. Ostrander was given a further right of reply.

Ostrander adduced fresh evidence on two types of mitigation measures proposed to reduce road mortality in the Blanding’s turtle: measures to keep the turtles off the roads and measures to keep traffic off the roads where turtles are present. The measures to keep turtles off roads included the use of culverts, fencing, and the creation of artificial nesting sites in safe locations, to name a few.

With respect to fencing, the Tribunal found that it was not an appropriate mitigation

measure for several reasons, including: the difficulty of locating high-frequency intersects at which to place the fencing; the fact that the proposed roads effectively circled the site while turtles may criss-cross the site in every direction for their various life cycle requirements; and the fact that fencing would fragment this high quality habitat, creating more harm than good.

With respect to the creation of artificial nesting sites, the Tribunal concluded that because Ostrander's expert could provide no scientific studies showing these have been successful, it preferred the opinion of the expert for the Prince Edward County Field Naturalists who indicated that creating artificial nest sites has not been shown to be successful at directing Blanding's turtles away from nesting on roadsides.

The Tribunal also rejected evidence that Ostrander could create artificial wetlands or harden road shoulders with new vegetation to discourage roadside nesting. With regard to the latter, it found that the proposed mitigation measures were "exceedingly vague, and their consequences in this location had not been examined".

Concerning the use of nesting cages to prevent predation, the Tribunal found that nest cages help protect eggs from predation and thus increase hatchling survival, but do not serve as an effective tool to mitigate against adult turtle road mortality or poaching.

With respect to the other types of mitigation measures – keeping traffic off the roads where turtles are present – Ostrander proposed gated access to the access roads for the Project, which would be locked from May to October each year and otherwise monitored by trained staff, to eliminate public access to these roads. However, experts for the Project opponents noted that members of the public could drive around the gates, could disregard the no access signage, and that these measures would have no effect on the poaching opportunities afforded by the access roads. The Tribunal also noted that, under Ostrander's *Endangered Species Act* permit, no road maintenance was permitted during the nesting season (May to October), and otherwise there was no evidence that Ostrander employees would be present at the site during this time period to engage in monitoring and enforcement. As a result, the Tribunal accepted that:

... on a balance of probabilities, that the gates will deter some public road users, and it is likely that there will be less public traffic on Project access roads with the gates, than without them. For all of the listed reasons, however, the Tribunal concludes that the success of the gates in preventing public access over the time period of relevance to this species depends almost entirely on well-intentioned visitors not to use the access roads because they are gated and signed. It is unlikely poachers will be deterred at all, and in fact easier access to the Site via better roads will likely facilitate poaching. The Tribunal received insufficient evidence on which it can reliably find, on a balance of probabilities, that the elements of the Road Access Control Plan will effectively deter members of the public from driving vehicles on access roads.

Tribunal's conclusion on the evidence

Based on all the above, the Tribunal concluded that the mitigation measures proposed by Ostrander would not be effective in preventing serious and irreversible harm to the Blanding's turtle, stating:

[132] For the above reasons, the Tribunal finds that Ostrander and the Director have not demonstrated, on a balance of probabilities, that the measures outlined in the IMP dated November 15, 2013, including the Road Access and Control Plan, together with the pre-existing REA conditions, will prevent serious and irreversible harm to the population of

Blanding's turtle at the Project Site and surrounding area, as was found in the 2013 APPEC decision.

[133] The Tribunal finds that a small number of individual adult turtles will be killed annually, that poaching will not be reduced but rather facilitated, and that there will be no measurable change to the impacts of predation. The Tribunal finds that these harms cumulatively over the lifetime of the Project will cause irreversible harm to the local population, and lead to the eventual loss of the population.

Tribunal's ruling on appropriate remedy

In considering its remedial powers and the appropriate remedy on the facts of this case, the Tribunal concluded that revocation of the REA remained the appropriate remedy:

[143] In summary, and although the promotion of renewable energy and its related benefits, and streamlining approvals, are important factors in consideration of the public interest, the Tribunal finds that not proceeding with this nine wind turbine Project in this location best serves the general and renewable energy approval purposes in sections 3(1) and 47.2(1) of the EPA, the public interest under s. 47.5, and the precautionary principle and ecosystem approach.

[144] Having weighed all of the relevant considerations, the Tribunal finds that the remedies proposed by Ostrander and the Director are not appropriate in the unique circumstances of this case. The Tribunal finds that the appropriate remedy under s. 145.2.1(4) is to revoke the Director's decision to issue the REA.

Implications of the Tribunal's decision

This decision is significant, from both a legal and practical perspective.

Relaxation of legal test for revoking REAs at remedy stage

Legally, it is significant for its ruling that once "serious and irreversible harm" is found and the Tribunal moves into a consideration of appropriate remedy, the Tribunal will step into the Director's shoes to fashion an appropriate remedy. The Tribunal has now ruled that, in doing so, it may consider the general purpose of the EPA, the general purpose of REAs, the public interest under section 47.5 of the EPA, and the principles set out in the Ministry's Statements of Environmental Values (including the ecosystem approach and the precautionary principle).

This legal ruling is important because in its earlier decision in *Erickson* (on which we reported in our previous [Osler Update](#)) the Tribunal took the position that for an appellant to satisfy the stringent legislative harm test under s. 145.2.1 of the EPA, it could not rely upon the precautionary principle and such other factors. With the *Ostrander* decision, the Tribunal now appears to be saying that once the more stringent harm test has been met, and the Tribunal moves to a consideration of "remedy", it has licence to consider a much broader range of factors, including the precautionary principle. This raises the question of whether the decision has opened a backdoor for the Tribunal to relax the stringent harm test imposed by the statute.

Proponents must prove harm can be eliminated at remedy stage

Moreover, at the remedy stage, all parties will be allowed to adduce evidence on proposed mitigation measures, and the Tribunal will consider all the evidence in determining what has been proven, on a balance of probabilities. Although the Tribunal suggests that this remedy hearing process does not impose a “burden of proof” on any one party, one cannot help but note that, in considering the evidence and making a ruling on remedy, the Tribunal effectively imposed upon Ostrander the burden of proving, on a balance of probabilities, that its additional mitigation measures would completely **eliminate** the serious and irreversible harm to the Blanding’s turtle. Given the long life and low reproductive rate of the turtle, reduction of mortality was not enough.

Proponents should not wait until remedy stage to adduce all mitigation measures

Practically, the decision is significant because it suggests that in a “remedy hearing”, once a finding of “serious and irreversible harm” has already been made by the Tribunal in the hearing proper, the die may already be cast. That is, it may be very difficult for a project proponent to persuade the Tribunal that it has fresh evidence of mitigation measures, which were not previously considered by the Tribunal, that will effectively eliminate the serious and irreversible harm in question. While on the face of this decision, the Tribunal in this case, after being directed to do so by the Court of Appeal, appeared to conduct an additional “remedy hearing” in which it scrutinized and weighed all available evidence relating to the relevant mitigation measures, both pro and con, one cannot help but conclude that it may have been more effective and persuasive to present this evidence in the hearing proper, and hopefully maximize the chances of avoiding a finding of “serious and irreversible harm” at first instance.

Impact upon other REA projects

The decision is of further practical importance because of the effect it could have on other REA projects in similar situations. For example, located in close proximity to the Ostrander site is the proposed White Pines Wind Farm Project. In its decision released on April 8, 2016, after making findings of serious and irreversible harm to Little Brown Bats and the Blanding’s turtles, the Tribunal stayed the proposed 29 turbine White Pines project pending a remedy hearing. It would appear that the Tribunal is now automatically applying the suggestion of the Court of Appeal in *Ostrander*, regarding a remedy hearing, to all REA hearings. Arguably, this should not be necessary, either legally or practically speaking, where a proponent is prepared in the main hearing to present all of its mitigation measure evidence.

Appeal possible

Finally, we note that in *Ostrander* there may yet be a right to appeal the remedy hearing decision to the Divisional Court, so the *Ostrander* saga may not be over.

^[1] *Prince Edward County Field Naturalists v. Ostrander Point GP Inc.* (Environmental Review

Tribunal, Case No. 13-003, June 6, 2016).