**CASE LAW UPDATE**

*Tiffany Tsun* *

# *Hanna v Ontario (Attorney General)*

2011 ONSC 609 (Released March 3, 2011)

**Judicial Review – Regulations – Renewable Energy**

On March 3, 2011, the Divisional Court dismissed a judicial review application challenging sections of Ontario Regulation 389/09 (the "Regulation"), made under Part V.0.1 of the *Environmental Protection Act*, RSO 1990, c E19 (the "*EPA*"). The impugned sections deal with minimum setback requirements and conformity to noise guidelines for wind energy facilities. The Regulation streamlines the approval process for green energy projects and is the culmination of the government's initiatives to reduce greenhouse gas emissions for the purpose of protecting the environment and public health.

The Divisional Court's decision finally disposes of the proceeding, which was the subject of a number of interlocutory decisions wherein the court granted intervenor status to the Canadian Wind Energy Association and struck out some of the applicant's affidavit evidence.

The applicant, a farmer, argued that the regulation was *ultra vires* because the Minister had failed to follow the process mandated by section 11 of the *Environmental Bill of Rights*, SO 1993, c 28 (the "*EBR*") before recommending promulgation of the regulation. Section 11 of 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". One of the principles set out in the SEV requires the Ministry to use a precautionary science-based approach in its decision-making to protect human health and the environment. The applicant argued that the Minister failed to consider the "precautionary principle", as there was medical uncertainty about the impact on human health from industrial wind turbines located at the minimum setback of 550 metres from a residence.

The court prefaced its analysis by noting that the decision of the minister is protected from judicial scrutiny by two privative clauses in the *EBR*, and that the court's jurisdiction was "therefore quite circumscribed".

The court found that health concerns for persons living in proximity to wind turbines do not trump all other considerations, especially given the availability of an appeal to the Environmental Review Tribunal for an individual wishing to challenge the approval of an industrial wind turbine. The Tribunal has the authority to revoke approval if it is persuaded by evidence that the 550 metre minimum setback is inadequate to protect human health from serious harm. The court held that this was the relevant context in which the Minister's consideration of the SEV had to be analyzed.

In dismissing the application, the court was satisfied that the Minister had complied with the process mandated by section 11 of the *EBR*, which requires the Minister to take every reasonable step to consider all 10 principles in the SEV, including the "precautionary principle" and a principle requiring the Minister to "place priority" on preventing and minimizing pollution. There was a full public consultation prior to recommending the promulgation of the regulation. The ministerial review included science-based evidence from the World Health Organization and acoustical engineering experts. The "precautionary principle" did not preclude the decision taken by the Minister.

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