PART I - OVERVIEW

1. This application seeks judicial review of sections 35, 53, 54 and 55 of Ontario Regulation 359/09 (the "Regulation") made pursuant to the *Environmental Protection Act* ("EPA"). The Regulation followed amendments to the EPA brought under the *Green Energy Act* ("GEA").

2. Pursuant to these amendments, proponents are required to obtain renewable energy approvals ("REAs") to operate various types of facilities including industrial wind turbines ("IWTs"). Amongst other things, the Regulation establishes a minimum setback distance for IWTs of 550 metres from human "receptors" i.e. residences. The Regulation was enacted (the "Decision") by the Minister of Environment ("Minister") acting through the Lieutenant Governor in Council ("LGIC") and the Ministry of Environment ("Ministry").

3. Under the *Environmental Bill of Rights* ("EBR") the Ministry is required to prepare a Statement of Environmental Values ("SEV"). Section 11 of the EBR states "The minister shall take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry." Section 3 of the SEV states "As it develops Acts, regulations and policies, the Ministry will apply the following principles: … The Ministry uses a precautionary, science-based approach in its decision-making to protect human health and the environment."

4. This Honourable Court has already held the SEV, and specifically the precautionary approach, applies to decisions to issue approvals and develop legislation (*Lafarge*).

5. Judicial review of a ministerial decision to enact a regulation is available. Where a decision fails to comport with a condition precedent it is made *ultra vires* (*Inuit Tapirisat*).

6. The issues to be determined on this application may be stated as follows:

Issue # 1: What is the appropriate standard of review?

Issue # 2: As a matter of law, was the Minister required to comply with the SEV/precautionary principle as a condition precedent to making the Decision?

Issue # 3: As a matter of fact, did the Decision enacting the Regulation comply with the SEV/precautionary principle?

7. The standard of review on a question of law of the Minister's jurisdiction is correctness (*Dunsmuir*). Based on the SEV's mandatory language and the applicable case law, the SEV is a condition precedent that must be complied with (*Oldman River, Lafarge*, *Inuit Tapirisat*). This approach also comports with the precautionary principle in international law (*Baker*, *Spraytech*).

8. The standard of review on a question of fact regarding compliance with the SEV and precautionary principle is reasonableness (*Dunsmuir*). The court is not to become an "academy of science". There must be "some evidence" demonstrating the legal test is met (*Inuit Tapirisat*).

9. The applicant has filed evidence from three leading medical experts. They have reviewed the record before the Ministry. They state there is no medical evidence to support the conclusion a 550 meter setback is safe. There is no accepted method to measure noise from IWTs. There is no evidence persons with medical knowledge reviewed the Regulation before it was passed.

10. The respondent has filed evidence from two witnesses, an energy analyst and a qualified land use planner. They primarily discuss matters of policy and process that are not in issue here. Neither is qualified to express opinions on health or medical issues. Their evidence is non-expert, hearsay and not admissible. The intervenor has not sought to file expert evidence.

11. There is then no expert or admissible evidence the Minister took every reasonable step to consider the SEV and medical-human health issues when the Decision under review was made.

PART II - FACTS

A. BACKGROUND TO THE APPLICATION

12. Until 2009, most IWT projects of significant scale in Ontario were regulated pursuant to a framework that in many cases required proponents to obtain approvals or meet requirements under a variety of provincial legislation.[1]

13. The GEA was introduced in February 2009. It included a schedule amending the EPA to provide for the requirement that certain renewable energy facilities obtain REAs. The amendments also created new regulation making authority in respect of REAs.[2]

14. A primary goal of the GEA as presented was to streamline these processes by creating more of a "one window" approach. The GEA received Royal Assent on May 14, 2009.[3]

15. On September 24, 2009, the Regulation came into force. In regulating renewable energy facilities the Regulation establishes, amongst other things, setback distances between IWTs and the nearest human receptor.[4] The enactment of the Regulation is the Decision under review.[5]

16. Specifically sections 35, 53, 54 and 55 of the Regulation establish a minimum 550 metre setback distance for IWTs. The Ministry mandates larger setbacks for projects with more than five (5) turbines.[6] However, the Ministry has also created an exception whereby the setback can in fact be reduced in certain circumstances if the proponent produces a noise study.[7]

17. In the context of human health, subsection 54(1) of the Regulation states:

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[1] Affidavit of Dr. Robert McMurtry sworn Jan. 30, 2010, the "First McMurtry Affidavit", Application Record, Vol. I, Tab 2, p. 15, para. 37
[2] Affidavit of Marcia Wallace sworn Mar. 30, 2010, the "First Wallace Affidavit", Respondent's Record, Tab 6, p. 32, para. 3
[3] First McMurtry Affidavit, Application Record, Vol. I, Tab 2, p. 15, para. 38
[4] First Wallace Affidavit, Respondent's Record, Tab 6D, p. 146
[5] Amended Notice of Application, Application Record, Tab 1, p. 1; Decision, Respondent's Record, Tab 6D, p. 145
[6] *Ibid*, Tab 6B, p. 129 and O. Reg. 359/09, s. 55, Table
[7] *Ibid*, Tab 6D, p. 146

> **Specified wind turbines, prohibition and requirements**
>
> 54. (1) No person shall construct, install or expand a wind turbine that meets the following criteria unless the base of the wind turbine is located at a distance of at least 550 metres from the nearest noise receptor:
>
> The wind turbine has a name plate capacity of greater than or equal to 50 kW.
>
> The wind turbine is not located in direct contact with surface water other than in a wetland.
>
> The wind turbine has a sound power level that is greater than or equal to 102 dBA.[8]

18. Prior to this application being brought, requests were made both formally and informally at meetings with a wide variety of government representatives. However, no sound scientific basis was provided for concluding the (minimum) 550 metre separation distance established in the Regulation can be used as a reliable measure of the distance required to appropriately protect humans from health impacts associated with IWTs.[9]

19. These meetings took place with numerous senior government officials such as then Ministers George Smitherman, John Gerretsen and Leona Dombrowski, as well as with senior officials from Ontario Power Authority, Health Canada, Natural Resources Canada, Public Health Agency of Canada and Dr. Arlene King, Chief Medical Officer of Health for Ontario. None of these individuals or staff was able to offer a scientific basis for a 550 metre setback.[10]

B. THE EVIDENCE OF DR. ROBERT MCMURTRY

i. Qualifications

20. Since 1965, Dr. Robert McMurtry has been licensed as a Medical Doctor (M.D.). His designations include: F.R.C.S (C) (Fellow of the Royal College of Surgeons of Canada) and

[8] First McMurtry Affidavit, Application Record, Vol. I, Tab 2, p. 15, para. 38
[9] *Ibid*, Application Record, Vol. I, Tab 2, p. 15, para. 39
[10] *Ibid*, Application Record, Vol. I, Tab 2, pp. 15-16, paras. 40-41

F.A.C.S. (Fellow of the American College of Surgeons). His current medical practice focuses on orthopedic medicine including a substantial portion of chronic pain management.[11]

21. At the same time, during his career Dr. McMurtry has maintained a strong interest and been involved in many other aspects of medicine and health policy. His qualifications in the field of health policy and public health include:

a. In 1992 being appointed as Dean of Medicine at the University of Western Ontario, a post carrying considerable policy responsibility for education and research. He served in this post until 1997 when he became the Dean of Medicine and Dentistry;

b. In 1995 being appointed to the Medical Research Council of Canada which transitioned into the Canadian Institutes of Health Research ("CIHR"). He also served on the Interim Governing Council of the CIHR until its founding in 2000;

c. In 1999 being appointed as the first Cameron Visiting Chair at Health Canada - a post carrying the responsibility for providing policy advice to the Deputy Minister and Minister of Health for Canada;

d. In 2000 being appointed as the founding Assistant Deputy Minister of the Population and Public Health Branch of Health Canada;

e. In 2000 being appointed to the Romanow Commission on the Future of Health Care in Canada and in 2002 being appointed as a Special Advisor to Commissioner Romanow;

f. In 2003 being appointed to the Health Council of Canada; and

g. From 2003 to 2007 serving as Chair of the National Working Group on the Canadian Index of Well-Being on behalf of the Atkinson Charitable Foundation as well as currently serving on the Board of the Institute of Well-Being.[12]

22. Dr. McMurtry is also a resident of Prince Edward County, where he initially learned of IWTs and where six (6) or more major wind energy projects have been proposed. None of these projects have received final approval and consequently no IWTs have been constructed in Prince Edward County to date.[13]

[11] *Ibid*, Application Record, Vol. I, Tab 2, p. 7, para. 2
[12] *Ibid*, Application Record, Vol. I, Tab 2, p. 9, paras. 7-13
[13] *Ibid*, Application Record, Vol. I, Tab 2, p. 10, paras. 15-17

23. Since 2008, Dr. McMurtry has spent more than 2,000 hours reading and researching the issue of IWTs and adverse health effects. He has made numerous public presentations concerning IWTs and health related matters including presenting to the Standing Committee on General Government that held hearings regarding the GEA.[14]

24. Dr. McMurtry has continued to educate himself as a member of the Executive of the Alliance to Protect Prince Edward County, through Wind Concerns Ontario (which has 41 member organizations in 27 counties/districts) and through the Society for Wind Vigilance, of which he is Chair. The Society is comprised of international members and affiliated consultants with expertise in various disciplines. Its purpose is to provide an objective clearing house for scientific, including medical, information on the environmental and health effects of IWTs.[15]

25. Through these organizations he has also had the opportunity to meet and discuss issues related to IWTs with hundreds of residents from all across Ontario and experts from Ontario, other parts of Canada, the United States and United Kingdom.[16]

ii. Conclusions

26. The Ministry has acknowledged that the information relied upon by Dr. McMurtry to inform his assessment regarding the health impacts of IWTs was known to the Ministry at the time the Regulation was being considered.[17]

27. Based on the available science Dr. McMurtry has concluded:

a. persons living within close proximity (1.5 to 2 km) of IWTs are experiencing adverse health effects. In many cases these effects are significant or severe;

[14] *Ibid*, Application Record, Vol. I, Tab 2, p. 12, paras. 27-28
[15] Cross-examination of Dr. M. Nissenbaum, Respondent's Record, Tab 11, p. 251, q. 44
[16] First McMurtry Affidavit, Application Record, Vol. I, Tab 2, p. 11, paras. 21-23; Cross-examination of Dr. R. McMurtry, Respondent's Record, Tab 9, p. 210, q. 40
[17] Affidavit of Marcia Wallace sworn Sept. 15, 2010, the "Third Wallace Affidavit," Respondent's Record, Tab 8, p. 161, para. 7

b. these adverse health effects have a common element, medically referenced as annoyance, which manifests itself in various ways including difficulties with sleep initiation and sleep disturbance, stress and physiological distress. Stress and sleep deprivation are well known risk factors for increased morbidity including significant chronic disease such as cardiovascular problems including hypertension and ischemic heart disease;

c. none of the existing regulations or guidelines have been developed based on evidence related to these types of adverse health effects, as this type of evidence has yet to be produced; and

d. there is a need to complete additional research, including at minimum one or more longitudinal epidemiological studies in regard to the foregoing types of adverse health effects in the environments of IWTs.[18]

28. Based on his broad experience in health policy, based on his research, based on his knowledge as a physician addressing many of the same types of adverse health effects, as well as having clinically examined many individuals exposed to IWTs, he has concluded:

a. scientific uncertainty exists regarding impacts to humans from IWTs;

b. no studies conducted to date have been sufficiently rigorous so as to resolve this uncertainty; and

c. in light of this uncertainty, the precautionary principle directs that it be resolved prior to setting regulatory standards and/or proceeding with further development of IWT projects in close proximity to human populations.[19]

C. THE EVIDENCE OF DR. CHRISTOPHER HANNING

i. Qualifications

29. Dr. Christopher Hanning has more than 25 years experience as a physician specializing in sleep medicine. He is a Fellow of the Royal College of Anaesthetists and also holds his doctorate. In 1996, he was appointed Consultant Anaesthetist with a special interest in Sleep Medicine to Leicester General Hospital. He founded and ran the Leicester Sleep Disorders Service, one of the longest standing and largest services in the U.K. The University Hospitals of

[18] Affidavit of Dr. Robert McMurtry sworn May 18, 2010, the "Second McMurtry Affidavit," Application Record, Tab 3, p. 246, para. 16
[19] *Ibid*, Application Record, Vol. I, Tab 3, pp. 241 & 247, paras. 6 & 20

Leicester National Health Service Trust recently named its Sleep Laboratory in his honour. He was a founding member and President of the British Sleep Society and is a Director of the Society for Wind Vigilance. He has written and lectured extensively on sleep and its disorders.[20]

ii. Conclusions

30. Dr. Hanning has also extensively researched the literature on sleep disturbance secondary to noise from industrial wind turbines. His conclusions are as follows:

a. Generally, it is recognized by all responsible health bodies including the World Health Organization ("WHO") that adequate refreshing sleep is necessary for human health. Sleep deprivation causes fatigue, sleepiness, impaired cognitive function and increases the risk of obesity, diabetes mellitus, hypertension and cardiovascular disease and cancer. Disturbed sleep is, in itself, an adverse health effect.[21]

b. The effect of noise in causing sleep disruption through arousals has been recognized for many years and is acknowledged in the WHO documents.[22]

c. There are sufficient cases and commonality of symptoms to conclude IWTs can and do adversely affect health and sleep. This conclusion is shared by many others.[23]

d. In addition, there are several studies which confirm that sleep disruption occurs at distances considerably greater than 550 meters and at external noise levels considerably less than those permitted by the GEA and Regulation. As well, no reduction in permitted night time noise levels is required contrary to established practice.[24]

e. There is good evidence that the impulsive noise emitted by wind turbines is considerably more annoying than traffic and aircraft noise at equivalent sound levels. There is some evidence that the impulsive noise characteristic of wind turbines is more likely to disturb sleep than a more constant noise. The precautionary principle would require that more stringent restriction of wind turbine noise be implemented until safe limits have been established.[25]

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[20] Affidavit of Dr. Christopher Hanning sworn Oct. 1, 2010, the "Hanning Affidavit", Application Record, Vol. III, Tab 5, p. 1139, paras. 1-2 and attached CV; Cross-examination of Dr. R. McMurtry, Respondent's Record, Tab 9, p. 210, q. 41

[21] *Ibid*, Application Record, Vol. III, Tab 5, p. 1140, para. 7

[22] It is also set out fully in an Expert Proof of Evidence for a U.K. Planning Inquiry prepared by Dr. Hanning; Hanning Affidavit, Application Record, Vol. III, Tab 5, p. 1140, para. 9;

[23] *Ibid*, Application Record, Vol. III, Tab 5, p. 1140, para. 10; Third Wallace Affidavit, Respondent's Record, Tab 8A, pp. 165 and 170-71, Refs. 6, 44 and 52

[24] *Ibid*, Application Record, Vol. III, Tab 5, p. 1140, para. 10

[25] *Ibid*, Application Record, Vol. III, Tab 5, p. 1140, para. 12

f. There is evidence that low frequency noise may have a particularly disturbing effect on sleep. IWTs are known to generate low frequency sound. Safe limits have not been established and the precautionary principle would require that more stringent restriction of wind turbine noise be implemented until safe limits have been established.[26]

31. The Ministry has acknowledged that much of the information relied upon by Dr. Hanning to inform his conclusions regarding IWTs was known to the Ministry at the time the Regulation was being considered.[27]

D. THE EVIDENCE OF DR. MICHAEL NISSENBAUM

i. Qualifications

32. Dr. Michael Nissenbaum is a graduate of the University of Toronto Medical School with post-graduate training at McGill University and the University of California. He is licensed to practice medicine in Ontario, Quebec and the State of Maine. [28]

33. He is a specialist in diagnostic imaging, whose work involves developing and utilizing an understanding of the effects of energy deposition, including sound, on human tissues. He is the former Associate Director of Magnetic Resonance Imaging at a major Harvard hospital, a former faculty member (junior) at Harvard University, a Director of the Society of Wind Vigilance and published author.[29]

34. He developed an interest in the health effects of wind turbine projects after becoming aware of complaints related to an industrial wind turbine installation in Mars Hill, Maine. Dr. Nissenbaum performed a simple public health study cataloguing the types and incidences of symptoms among twenty two (22) people living within 1,100 meters of a linear arrangement of

[26] *Ibid*, Application Record, Vol. III, Tab 5, p. 1141, para. 13
[27] *Ibid*, Application Record, Vol. III, Tab 5, p. 1140, paras. 9, 10 & 11; Third Wallace Affidavit, Respondent's Record, Tab 8A, pp. 165, 170-71 and 175, Refs. 6, 44, 52 and 84
[28] Affidavit of Dr. Michael Nissenbaum sworn Oct. 4, 2010, the "Nissenbaum Affidavit", Application Record, Vol. III, Tab 6, p. 1144, para. 2
[29] *Ibid*; Cross-examination of Dr. R. McMurtry, Respondent's Record, Tab 9, p. 210, q. 41

1.5 MW industrial wind turbines. They were compared to a control group of twenty seven (27) people living beyond the area impacted by turbine noise.[30]

35. The design of the study can be termed a 'controlled cross sectional cohort study'. Its goal was to compare the health changes following the start of turbine operations. The study is important because it is believed to represent the first controlled study of adverse health effects attributed to industrial wind turbines.[31]

36. This pilot study was undertaken as a public health service in order to report findings to the Public Health Subcommittee of the Maine Medical Association. Preliminary results were presented to the Maine Medical Association in March of 2009 and completed in May of 2009.[32]

ii. Conclusions

37. Dr. Nissenbaum has concluded that there is a high probability of significant adverse health effects and consequent high level of concern for those within 1100 meters of a 1.5 MW turbine installation based upon the experience of the subject group of individuals living in Mars Hill Maine. These health concerns include:

a. Sleep disturbances/sleep deprivation and the multiple illnesses that cascade from chronic sleep disturbance. These include cardiovascular diseases mediated by chronically increased levels of stress hormones, weight changes, and metabolic disturbances including the continuum of impaired glucose tolerance up to diabetes.

b. Psychological stresses which can result in additional effects including cardiovascular disease, chronic depression, anger and other psychiatric symptomatologies.

c. Increased headaches.

d. Auditory and vestibular system disturbances.

e. Increased requirement for and use of prescription medication.[33]

[30] Nissenbaum Affidavit, Application Record, Vol. III, Tab 6, p. 1145, paras. 3-4
[31] *Ibid*, Application Record, Vol. III, Tab 6, p. 1146, para. 7
[32] *Ibid*, Application Record, Vol. III, Tab 6, p. 1145, para. 5

38. The Ministry has acknowledged information developed by Dr. Nissenbaum regarding health impacts was known to the Ministry at the time the Regulation was being considered.[34]

E. THE EVIDENCE OF THE MINISTRY

i. No Qualified Experts

39. Although the issue of human health is the central issue in this application and medical experts from Canada, the U.S. and U.K. have provided evidence, the respondent initially served no scientific or technical information in response. Instead, two affidavits were filed addressing primarily the government's process leading to the GEA/Regulation and its policy regarding the choice of wind over coal generated-energy. Neither of these issues is raised in this proceeding.[35]

40. Moreover, during this application the respondent has only produced affidavits from these same two witnesses. The deponent Richard Jennings is an Assistant Deputy Minister, who has provided "key policy recommendations and advice" on all matters pertaining to energy supply in Ontario and decisions relating to efforts to reduce emissions from coal-fired generation.[36]

41. The deponent Marcia Wallace is the Manager, Program Development, Approvals Modernization at the Ministry, holds a Ph.D in land use planning and is a Registered Professional Planner with the Ontario Professional Planners Institute.[37] Neither is qualified to express opinions on matters of medicine or health effects. Where the affidavits purport to comment on human health the statements are hearsay. Sources of information are not provided.[38]

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[33] *Ibid*, Application Record, Vol. III, Tab 6, p. 1146, para. 8
[34] Third Wallace Affidavit, Respondent's Record, Tab 8A, p. 173, Ref. 66, Dr. Michael A. Nissenbaum: Presentation to the Maine Medical Association March 2009
[35] First Wallace Affidavit, Respondent's Record, Tab 6; Affidavit of Richard Jennings sworn Mar. 30, 2010, the "Jennings Affidavit", Respondent's Record, Tab 5; Amended Notice of Application, Application Record, Vol. I, Tab 1, pp. 1-6
[36] Jennings Affidavit, Respondent's Record, Tab 5, p. 13, paras. 1-3
[37] First Wallace Affidavit, Respondent's Record, Tab 6, p. 32, paras. 1-2
[38] *Ibid*, pp. 39 & 41, paras. 23 & 28; Third Wallace Affidavit, Respondent's Record, Tab 8, p. 163, paras. 7-8

42. Following a motion by the respondent to strike all of the applicant's evidence, the respondent for the first time produced the studies and reports that were known and considered by the Ministry prior to the enactment of the Regulation. The intervenor had previously sought party status, which was denied. Subsequently the intervenor has not sought to adduce evidence.[39]

43. The information produced by the respondent, i.e. the record on this application reveals the following:[40]

ii. The Record re: Wind Turbine Induced Annoyance, Stress and Sleep Disturbance

44. Peer reviewed scientific research known to the Ministry confirms humans must be protected from noise exposure that adversely affects human health and welfare.[41] [42]

45. References including reports, literature reviews and peer reviewed scientific articles have determined at common residential setbacks wind turbines produce noise which is capable of inducing adverse health effects in the local population.[43]

46. Acknowledged adverse health effects include annoyance, stress and sleep disturbance.[44]

[45] [46] [47] [48] [49]

[39] Endorsements of Swinton J. dated Jul. 19 & May 5, 2010, Respondent's Record, Tabs 2 & 4, pp. 6-8 & 10-12
[40] Third Wallace Affidavit, Respondent's Record, Tab 8, p. 161, para. 2
[41] World Health Organization, Guidelines for Community Noise, 1999, p. iii, paras. 1, 2 and 3, p. 43, para. 1 and p. 35, para. 2; Third Wallace Affidavit, Respondent's Record, Tab 8A, p. 169, Ref. 35 ["WHO – Community Noise"]
[42] World Health Organization, Night Noise Guidelines for Europe, 2009, p. vii, para. 1; Third Wallace Affidavit, Respondent's Record, Tab 8A, p. 172, Ref. 54 ["WHO – Night Noise"]
[43] National Research Council (NRC), Environmental Impacts of Wind-Energy Projects, 2007, p. 156; Second McMurtry Affidavit, Application Record, Vol. III, Tab 3V, p. 837 ["National Research Council"].
[44] Copes *et al*., Wind Turbines And Environmental Assessment, National Collaborating Centre for Environmental Health, June 23, 2009; Third Wallace Affidavit, Respondent's Record, Tab 8A, pp. 54-55, Ref. 113 ["National Collaborating Centre"]
[45] Minnesota Department of Health (MDH), Public Health Impacts of Wind Turbines, 2009; Third Wallace Affidavit, Respondent's Record, Tab 8A, pp. 25, para. 3, Ref. 69 ["Minnesota Department of Health"]
[46] Pedersen, E. and K. Persson Waye, Perception and annoyance due to wind turbine noise: A dose–response relationship, 2004, Journal of the Acoustical Society of America, 116: 3460–3470; Third Wallace Affidavit, Respondent's Record, Tab 8A, Page 3460, Paragraph 1, Ref. 60 ["Pedersen – Journal of Acoustical Society 2004"]
[47] Pedersen, E. and K. Persson Waye, *Occup Environ Med*, 2007; Third Wallace Affidavit; Respondent's Record, Tab 8A, p. 178, Ref. 110 ["Pedersen *et al.* – Occupational Environmental Medicine"]

47. Peer reviewed scientific research known to the Ministry confirms noise induced annoyance contributes to stress,[50] sleep disturbance[51] and an increased risk to health (morbidity).[52]

48. Peer reviewed scientific research confirms "…practical action to limit and control the exposure to environmental noise are essential. Such action must be based upon proper scientific evaluation of available data on effects, and particularly dose-response relationships."[53]

49. Peer reviewed scientific research confirms as of August 2009, namely at the same time the Regulation was being finalized: "No generalized dose-response curves have yet been modeled for wind turbines, primarily due to the lack of results of published field studies."[54]

iii. The Record re: Wind Turbine Low Frequency Noise and Infrasound

50. Peer reviewed scientific research known to the Ministry confirms low frequency noise can cause adverse health effects, stating "Health effects due to low-frequency components in noise are estimated to be more severe than for community noises in general… The evidence on low-frequency noise is sufficiently strong to warrant immediate concern."[55] See also.[56] [57] [58]

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[48] Pedersen *et al.*, Project WINDFARM perception Visual and acoustic impact of wind turbine farms on residents, 2008, at pp. 60-61; Third Wallace Affidavit, Respondent's Record, Tab 8A, Ref. 118, p. 179 (note the results of Project WINDFARMperception are presented in the peer reviewed article Pedersen, E., R. Bakker, J.Bouma and F van den Berg, Response To Noise From Modern Wind Farms in The Netherlands, Journal of the Acoustical Society of America, 2009) ["Pedersen *et al.* – EU"]

[49] Pedersen, E., R. Bakker, J.Bouma and F van den Berg, Response To Noise From Modern Wind Farms in The Netherlands, 2009, Journal of the Acoustical Society of America, p. 634, para. 1; Third Wallace Affidavit; Respondent's Record, Tab 8A, p. 174, Ref. 78 [Pedersen *et al.* – Journal of the Acoustical Society 2009]

[50] WHO – Night Noise, *supra* note 42 at pp. 62-63, para 2, Fig. 4.3

[51] *Ibid* at p. 59

[52] Niemann H, Bonnefoy X, Braubach M, Hecht K, Maschke C, Rodrigues C, Robbel N, Noise-induced annoyance and morbidity results from the pan-European LARES study, 2006, Noise Health; Second McMurtry Affidavit, Application Record, Vol. II, Tab 3R, p. 782

[53] WHO – Community Noise, *supra* note 41 at p. iii, para. 2

[54] Pedersen *et al.* – Journal of the Acoustical Society 2009, *supra* note 40 at p. 634, para. 3

[55] WHO – Community Noise *supra* note 41 at p. 43, para. 1, p. 35, para. 2

[56] Schust M, Effects of low frequency noise up to 100 Hz, 2004, Noise Health [serial online], p. 1; Second McMurtry Affidavit, Application Record, Vol. III, Tab 3T, p. 812 ["Schust – Noise Health"]

[57] DeGagne *et al.*, Incorporating Low Frequency Noise Legislation for the Energy Industry in Alberta, Canada, 2008, Journal of Low Frequency Noise, Vibration and Active Control, Section 3; Second McMurtry Affidavit, Application Record, Vol. III, Tab 3S, p. 795 ["DeGagne *et al.* – Journal of Low Frequency Noise"]

51. Evidence known to the Ministry at the time of the Regulation also indicates wind turbines produce audible low frequency noise and produce infrasound.[59] [60] Peer reviewed scientific research confirms "…LFN *(low frequency noise)* does not need to be considered "loud" for it to cause such forms of annoyance and irritation."[61] It is also incorrect to assume that inaudible low frequency noise cannot cause adverse health effects as peer reviewed scientific research confirms "…non-aural physiological and psychological effects may be caused by levels of low frequency noise below the individual hearing threshold."[62]

52. To protect people from the adverse health effect of noise annoyance the World Health Organization states "Noise with low-frequency components require lower guideline values."[63]

53. "The effects of infrasound or low frequency noise are of particular concern because of its pervasiveness due to numerous sources, efficient propagation, and reduced efficiency of many structures (dwellings, walls, and hearing protection) in attenuating low frequency noise compared with other noise."[64]

54. The U.S. National Research Council states "Low-frequency vibration and its effects on humans are not well understood. Sensitivity to such vibration resulting from wind-turbine noise is highly variable among humans,"[65] and "…studies on human sensitivity to very low frequencies are recommended."[66]

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[58] WHO – Community Noise, *supra* note 41 at p. 35, para. 2
[59] Safe Environs Program, Health Canada Environmental Assessment Nova Scotia, 2009; Second McMurtry Affidavit, Application Record, Vol. II, Tab 3L, p. 551
[60] National Research Council, *supra* note 43 at p. 97, para. 2
[61] DeGagne *et al.* – Journal of Low Frequency Noise, *supra* note 57 at s. 3
[62] Schust – Noise Health, *supra* note 56 at p. 1, para. 1
[63] WHO – Community Noise, *supra* note 41 at p. xiii, para. 4
[64] Leventhall, G. *et al.*, A Review of Published Research on Low Frequency Noise and Its Effects, 2003, p. 54, s. 13.2, para. 1; Third Wallace Affidavit, Respondent's Record, Tab 8A, p. 165, Ref. 4
[65] National Research Council, *supra* note 43 at p. 158, para. 5
[66] *Ibid* at p. 176, para. 7

iv. The Record re: Wind Turbine Shadow Flicker

55. Regarding visually induced adverse health effects, it is acknowledged shadow flicker may cause annoyance and/or stress. Wind turbines must also be sited to protect humans from the adverse health effect of visually induced annoyance as well as noise annoyance.[67] [68] [69] [70] [71] [72]

56. A recommended shadow flicker setback for current wind turbine designs is 10 rotational diameters which would typically translate to approximately 1000 metres.[73]

v. The Record re: Research Gaps and Scientific Uncertainty

57. In addition, reports, literature reviews and peer reviewed scientific articles known to the Ministry at the time the Regulation was created identified numerous other research gaps regarding IWTs and adverse health effects. Research is recommended on many issues including:

a. Dose-response data from published field studies,[74]

b. Health effects of low frequency sound,[75] [76]

c. Scientific methods to assess wind turbine noise,[77]

d. Research on wind turbine induced sleep disturbance,[78] [79] [80]

e. The need for epidemiological studies,[81]

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[67] *Ibid* at p. 175, para. 7
[68] Pedersen *et al*. – EU, *supra* note 48 at p. 36, para. 1
[69] National Collaborating Centre, *supra* note 44 at p. 55
[70] National Research Council, *supra* note 43 at p. 176
[71] Minnesota Department of Health, *supra* note 45 at p. 14, s. B, paras. 1-2
[72] National Collaborating Centre, *supra* note 44 at p. 54
[73] Minnesota Department of Health, *supra* note 45 at p. 14, s. B, para. 2
[74] Pedersen *et al.* – Journal of the Acoustical Society 2009, *supra* note 49 at p. 642
[75] National Research Council, *supra* note 43 at p. 176, s. "Information Needs," para. 1
[76] National Collaborating Centre, *supra* note 44 at p. 53, Bullet 1
[77] National Research Council, *supra* note 43 at p. 176, s. "Information Needs," para. 1
[78] National Collaborating Centre, *supra* note 44 at p. 53, Bullet 2
[79] Pedersen *et al.* – EU, *supra* note 48 at pp. 57-58
[80] DeGagne and A. Lewis, Development of Regulatory Requirements for Wind Turbines in Alberta, Alberta Energy and Utilities Board, Journal of the Canadian Acoustical Association, 2006, p. 23, s. 3, para. 4; Third Wallace Affidavit, Respondent's Record, Tab 8A, p. 168, Ref. 22
[81] Chouard, Claude-Henri, Impacts Of Wind Turbine Operation On Humans, National Academy Of Medicine, 2006, p. 8, s. 8, Recommendations, Bullet 2; Third Wallace Affidavit, Tab 8A, p. 174, Ref. 74

f. Research into wind turbine amplitude modulation,[82] [83]

g. Dizziness and migraine from shadow flicker,[84] and

h. Stress-induced health effects from noise, visual impact, shadow flicker.[85]

58. The need for further research is also clear from the Ministry's decision to simultaneously create a research chair with "a mandate related to renewable energy technology and health."[86]

vi. No Health Expertise When Regulation Developed

59. At the same time, the Ministry acknowledges it relied on acoustical engineers and other program and operational staff to develop the Regulation:[87]

> "…the proposed requirements for wind turbine projects were developed by ministry engineers and scientists and are based on the October 2008 Noise Guidelines for Wind Farms…the noise requirements outlined in the October 2008 Noise Guidelines for Wind Farms were developed in consultation with Dr. Ramani Ramakrishnan, representatives from the major acoustical consulting firms in Ontario, ministry scientists and engineers, representatives from the Canadian Wind Energy Association, as well as members from the local community interested in wind energy. At the time, Dr. Ramani Ramakrishnan, Ph. D., P.Eng., was the Lead Acoustician with Aiolos Engineering Corporation, the third party retained by the ministry in 2007 to review wind turbine facilities noise issues. This report led to the 2008 wind guidelines."[88]

60. However, acoustical engineers are not professionals qualified to opine on human health impacts. Correspondence from the Dr. Ramakrishnan states "I am not a medical doctor or a psychoacoustician or a physiological acoustician. I am an acoustician from the engineering science perspective. So, to comment on health issues is outside my area of expertise."[89]

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[82] Leventhall G., Infrasound from wind turbines: fact, fiction or deception, Canadian Acoustics, 2006, p. 34, s. 5 Conclusions, Bullets 3 and 4; Third Wallace Affidavit, Tab 8A, p. 170, Ref. 39
[83] Ramakrishnan, R., Wind Turbine Facilities Noise Issues, Acoustic Consulting Report, Ontario Ministry of Environment, 2007, p. 51, s. 4.5, Item D; Third Wallace Affidavit, Tab 8A, p. 178, Ref. 108
[84] National Collaborating Centre, *supra* note 44 at p. 53, Bullet 4
[85] *Ibid* at p. 53, Bullet 3
[86] First Wallace Affidavit, Respondent's Record, Tab 6, p. 40, paras. 26-27
[87] Third Wallace Affidavit, Respondent's Record, Tab 8, p. 162, para. 4.
[88] MOE correspondence from Kevin Perry dated July 20, 2009; Second Supplementary Affidavit of Dr. Robert McMurtry sworn Oct. 8, 2010, ("Third McMurtry Affidavit"), Application Record, Vol. III, Tab 4B, p. 1132
[89] MOE correspondence from R. Ramakrishnan, 2009; Second McMurtry Affidavit, Application Record, Vol. III, Tab 3X, p. 1091

61. There is no evidence the Chief Medical Officer of Health, her office, or anyone with health or medical expertise was consulted regarding the Regulation prior to its enactment.

vii. No Ability to Measure Noise or Compliance

62. Peer reviewed scientific references confirm noise regulations must be enforceable.[90] [91] At the same time that the Regulation was created, the Ministry also acknowledges it did not have the knowledge, skills or tools to scientifically measure wind turbine noise and/or low frequency noise and/or infrasound. The Ministry explicitly states "There is currently no scientifically accepted field methodology to measure wind turbine noise to determine compliance or to determine non compliance…"[92]

63. After the Regulation was announced, the Ministry has retained consultants "to develop a procedure to measure audible noise from wind turbines" and "to review low frequency noise impacts and develop recommendations."[93] These reports have not been completed.

viii. The Experts' Conclusions on the Record

64. The only qualified experts to file evidence in this proceeding have reviewed the record before the Ministry when the Regulation was enacted and have concluded the following:

Dr. Robert McMurtry

a. No documentation has been provided that demonstrates any scientific analysis of the references and evidence the Ministry claims to have considered in establishing the 550 meter set back distance for IWTs. It is expected such an analysis would be essential to the Ministry's decision and to document the scientific validity of its decision.

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[90] DeGagne and A. Lewis, Development of Regulatory Requirements for Wind Turbines in Alberta, Alberta Energy and Utilities Board, Journal of the Canadian Acoustical Association, 2006, p. 21, Abstract, para. 1; Third Wallace Affidavit, Respondent's Record, Tab 8A, p. 168, Ref. 22 ["Degagne *et al.* – Journal of Canadian Acoustical Association"]

[91] WHO – Community Noise, *supra* note 41 at p. 61, para. 3

[92] Correspondence from Ministry of Environment September 30, 2009 ENV1283MC2009-4305, Third McMurtry Affidavit, Application Record, Vol. III, Tab 4C, p. 1136

[93] First Wallace Affidavit, Respondent's Record, Tab 6, p. 41, para. 28

b. Many of the references produced by the Ministry acknowledge IWTs are capable of causing adverse health effects in humans and that research is recommended.

c. Scientific uncertainty exists regarding impacts to humans from industrial wind turbines as also indicated in many of the documents relied on by the Ministry.

d. None of the references relied upon by the Ministry represent studies that resolve this uncertainty.[94]

65. No reply to this evidence was filed. It was not cross examined.

Dr. Christopher Hanning

a. Dr. Hanning reviewed the Affidavit of Marcia Wallace, the list of studies reviewed in developing the REA requirements (her Appendix A), the GEA Regulations and the Noise Guidelines for Wind Farms dated October 2008 (NGWF).

b. He can find no rationale for the mandatory setback of 550 metres nor for the noise levels set out in NGWF. There is no evidence that any consideration was given to the potential for sleep disturbance to human receptors in NGWF.

c. There is also no evidence as to what, if any, weight was given to issues such as the impulsive noise characteristics, low frequency noise and the potential for sleep disturbance by the Ministry in establishing a 550 metre set back under the GEA.[95]

66. No reply to this evidence was filed. It was not cross examined.

Dr. Michael Nissenbaum

a. Upon review of the literature reviewed in the Wallace affidavit, from the materials Dr. Nissenbaum is familiar with, he sees no evidence to support the conclusion that 550 meters is an adequate set back distance.

b. There are no medical studies that indicate that 550 meters is safe (i.e. does not result in sleep disturbance and other direct and cascading indirect health effects), and the conclusion that 550 meters is safe and protective is without foundation in medical terms.

c. The Precautionary Principle is applicable here, and should be applied until larger and more definitive studies that clearly correlate risk with distance are performed.[96]

67. No reply to this evidence was filed. It was not cross examined.

[94] Third McMurtry Affidavit, Application Record, Vol. III, Tab 4, pp. 1103-1104, paras. 2-5
[95] Hanning Affidavit, Application Record, Vol. III, Tab 5, pp. 1139-1141, paras. 4, 5, 14 & 15
[96] Nissenbaum Affidavit, Application Record, Vol. III, Tab 6, pp. 1146-1147, paras. 10, 14 & 15

PART III - ISSUES AND ARGUMENT

A. APPLICABLE STATUTORY PROVISIONS

68. The applicant relies on subsection 2(1) of the *Judicial Review Procedures Act* ("JRPA") and Rule 68 of the Rules of Civil Procedure in seeking judicial review of the Decision to proceed with the Regulation.

B. ISSUES FOR JUDICIAL REVIEW

69. The applicant submits the issues to be determined are:

> **Issue # 1**: What is the appropriate standard of review?
>
> **Issue # 2**: As a matter of law, was the Minister required to comply with the SEV/precautionary principle as a condition precedent to making the Decision?
>
> **Issue # 3**: As a matter of fact, did the Decision enacting the Regulation comply with the SEV/precautionary principle?

C. ISSUE # 1: THE STANDARD OF REVIEW

70. As set out in further detail below, the standard of review for an interpretation of law is correctness, the standard of review for questions of fact is reasonableness.

i. General Principles

71. If existing jurisprudence has not determined the standard of review, a variety of factors may be considered, including (1) the presence or absence of a privative clause; (2) the purpose of the decision-making body as determined by interpretation of enabling legislation, (3) the nature of the question in issue, and (4) the expertise of the decision-maker.

> *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9 (QL); Applicant's Authorities, Tab 1, pp. 20 & 24, paras. 45, 62-64

72. The applicant has not located existing jurisprudence specifically on the question of the standard of review to be applied to the enactment of a regulation under the EPA/EBR, nor any consideration of the impact of the SEV on the Minister/LGIC's exercise of its powers based on factual considerations. However, analogous case law appears instructive.

ii. Standards of Review Applicable to the Minister's Decision

73. For purposes of identifying the standard of review, two aspects of the Decision to enact the 550 metre setback must be considered: (i) the interpretation of the law, specifically the EPA, EBR and the SEV, and (ii) the findings of fact under those statutes.

74. For the interpretation of the legal constraints within which the Minister, the Ministry and LGIC operate, namely compliance with the EPA, EBR and SEV, the standard of review is correctness. This has consistently been the practice of courts when reviewing whether subordinate legislation, such as a regulation, is *intra vires* its delegating statute.

> *Dunsmuir v. New Brunswick, supra* para. 71; Applicant's Authorities, Tab 1, p. 23, para. 59
>
> *Canadian Council for Refugees v. Canada*, [2008] F.C.J. No. 1002 (QL)(C.A.); Applicant's Authorities, Tab 2, pp. 17-18, paras. 57-58
>
> D. Brown and J. Evans, *Judicial Review of Administrative Action in Canada*, 2nd ed., (Toronto, Canvasback Publishing, 2009) § 15:1211; Applicant's Authorities, Tab 3

75. The appropriate standard of review for findings of fact is reasonableness. Where a question is one of fact, deference will generally apply automatically.

> *Dunsmuir v. New Brunswick, supra* para. 71; Applicant's Authorities, Tab 1, p. 22, paras. 53-55

76. However, the application of a standard of reasonableness to determinations of fact, while deferential, remains substantive. In *Dunsmuir*, the Court stated:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of [page221] justification, transparency and intelligibility within the decision-making process. But it is also concerned with

> whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> *Dunsmuir v. New Brunswick, supra* para. 71, Tab 1, p. 21, para. 47

77. In *Inverhuron & District Ratepayers' Assn v. Canada (Minister of the Environment),* Sexton J.A. stated with respect to a review on a standard of reasonableness of a decision by the Minister of Environment to approve an environmental assessment:

> This does not mean, however, that the Court's approach to viewing the Minister's decision ought to be so deferential as to exclude all inquiry into the substantive adequacy of the environmental assessment. To adopt this approach would risk turning the right to judicial review of her decision into a hollow one….
>
> The Court is not required to agree with the Minister's decision. It must merely be able to perceive a rational basis for it.
>
> *Inverhuron & District Ratepayers' Assn v. Canada (Minister of the Environment),* [2001] F.C.J. No. 1008 (QL)(C.A.); Applicant's Authorities, Tab 4, pp. 12 & 13, paras. 38 & 40

D. ISSUE # 2: THE SEV IS A CONDITION PRECEDENT TO THE DECISION TO ENACT THE REGULATION

78. Canadian courts have consistently held the merits, wisdom or motives behind a regulation are not open to judicial review. In *Ontario Federation of Anglers & Hunters* the Court of Appeal stated "Governments are motivated to make regulations by political, economic, social or partisan considerations. These motives, even when known, are irrelevant to whether the regulation is valid." At the same time, the court went on to state "The wisdom of government policy through regulations is not a justiciable issue *unless* it can be demonstrated that the regulation was made without authority or raises constitutional issues." (emphasis added)

> *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources),* [2001] O.J. No. 1445 (QL)(C.A.), leave to appeal to S.C.C. refused Mar. 27, 2003; Applicant's Authorities, Tab 5, pp. 9 & 10, paras. 49 & 53

79. In *Apotex Inc. v. Ontario (Lieutenant Governor in Council)* the Court of Appeal held "… the validity of a regulation may be reviewable 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."

> *Apotex Inc. v. Ontario (Lieutenant Governor in Council)*, [2007] O.J. No. 3121 (QL)(C.A.); Applicant's Authorities, Tab 6, p. 8, para. 32

80. As stated by the Supreme Court in *Dunsmuir*:

> Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law.
>
> *Dunsmuir v. New Brunswick, supra* para. 71; Applicant's Authorities, Tab 1, p. 16, para. 29

81. This application concerns the province's compliance with the legal framework that governs the enactment of regulations under the EPA and interrelated statutes.

i. The Environmental Protection Act

82. The EPA has been enacted to regulate activities and infrastructure for the purposes of protecting the environment and the safety, health and welfare of the province's residents.

> *R. v. TNT Canada Inc.*, [1986] O.J. No. 1322 (QL)(C.A.); Applicant's Authorities, Tab 7, p. 5, para. 18

83. The Ministry can regulate renewable energy projects under Part V.0.1, that being sections 47.1 through 47.7 of the EPA. By virtue of EPA sections 175.1 and 176 (4.1) the LGIC is authorized to make regulations with respect to general matters and renewable energy facilities.

ii. The Environmental Bill of Rights

84. However, the Ministry is subject to the EBR, section 7 of which requires the Ministry to prepare a SEV. Section 7 of the EBR states that the SEV:

a. explains how the purposes of this Act [the EBR] are to be applied when decisions that might significantly affect the environment are made in the ministry; and

b. explains how consideration of the purposes of this Act should be integrated with other considerations, including social, economic and scientific considerations, that are part of decision-making in the ministry.

85. Section 11 of the EBR provides "The minister *shall* take *every reasonable step* to ensure that the ministry statement of environmental values is considered *whenever* decisions that might significantly affect the environment are made in the ministry." (emphasis added)

iii. The Statement of Environmental Values ("SEV")

86. Section 3 of the SEV states:

> 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 uses a precautionary, science-based approach in its decision-making to protect human health and the environment. (emphasis added)

87. With respect to the precautionary principle the SEV states:

> The Ministry *will* exercise a precautionary approach in its decision-making. Especially when there is uncertainty about the risk posed by particular pollutants or classes of pollutants, the Ministry *will* exercise caution in favour of the environment. (emphasis added)

iv. The Requirement to Comply with the SEV

88. Directives can found prerogative relief. In particular, a directive is legally binding where it goes beyond being a mere description of a policy or program, where it is formally enacted and promulgated, or where the text of the directive is mandatory in nature, expressing a clear intention that the directive shall bind all those to whom it is addressed.

> *Friends of the Oldman River Society*, [1992] 1 S.C.R. 3 (QL); Applicant's Authorities, Tab 8, pp. 22-23, paras. 41-45

89. In *Lafarge Canada Inc. v. Ontario* this Honourable Court upheld a decision of the Ontario Environmental Review Tribunal ("ERT") that the Ministry must comply with the SEV,

and specifically "exercise a precautionary approach in its decision making when there is uncertainty about the risk presented by particular pollutants or classes of pollutants. In such a case, the Ministry is to exercise caution in favour of the environment."

> *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)*, [2008] O.J. No. 2460 (QL)(Div. Ct.); Applicant's Authorities, Tab 9, p. 11, para. 52

90. While the Ministry disputed the ERT's (and the Court's) ultimate conclusion that the Ministry's decision to approve an application was subject to guidance by the SEV, the Ministry acknowledged that the SEV "was to be applied by the Ministry as it developed legislation."

> *Lafarge, ibid*, p. 11, para. 54

91. Justice Estey states in *Inuit Tapirisat,* quoting Pickup C.J.O. for the Court of Appeal in *Border Cities Press Club v. The Attorney General for Ontario*, [1955] O.R. 14, at 412 that:

> In exercising the power referred to, the Lieutenant-Governor in Council is not, in my opinion, exercising a prerogative of the Crown, but a power conferred by statute, and such a statutory power can be validly exercised only by complying with statutory provisions which are, by law, conditions precedent to the exercise of such power.
>
> *Canada (Attorney General) v. Inuit Tapirisat of Canada* (1980), 115 E.L.R. (3rd) 1 (S.C.C.); Applicant's Authorities, Tab 10, p. 11

92. In enacting the Regulation the Minister was exercising a power conferred by statute to develop legislation. The SEV is a condition precedent to any decision by the Minister that might significantly affect the environment. The Court can review the creation of the Regulation by construing the enabling statute(s), in this case the EPA, EBR and related SEV to determine if the legislative function was performed within these boundaries.

93. Compliance with the EBR and SEV and in particular the need to use a precautionary approach is mandatory. As noted, the Minister *must* take every reasonable step to consider the SEV when making an environmentally significant decision (EBR section 11); when developing Acts, *regulations* and policies, the Ministry *will* apply the following principles … *will* exercise a

precautionary approach in its decision-making … and *will* exercise caution in favour of the environment (SEV section 3). The EBR and SEV express a clear intention to bind.

94. This is also consistent with the approach to the precautionary principle taken by the Supreme Court. In *Baker v. Canada (Minister of Citizenship and Immigration)* the Court stated that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review." In *Spraytech v. Hudson*, the Court expressly relied on the precautionary principle as being "consistent with principles of international law and policy" on the basis of it also being enshrined in international law.

> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (QL); Applicant's Authorities, Tab 11, p. 28, para. 70
>
> *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 (QL); Applicant's Authorities, Tab 12, p. 18, paras. 30-32

95. As indicated, the question of whether the Minister must comply with the SEV and apply a precautionary approach is a question of law to be determined on a standard of correctness. The foregoing authorities appear to be dispositive of Issue # 2. The Decision to enact the Regulation clearly required compliance with the SEV precautionary approach/principle in order to be *vires*.

E. ISSUE # 3: THE DECISION TO ENACT THE REGULATION IS NOT SUPPORTED BY EVIDENCE

96. The role of the court when reviewing a legislative decision is recognized as being limited. In *Vancouver Island Peace Society v. Canada* the court held:

> It is not the role of the Court in these proceedings to become an academy of science to arbitrate conflicting scientific predictions, or to act as a kind of legislative upper chamber to weigh expressions of public concern and determine which ones should be respected.
>
> *Vancouver Island Peace Society v. Canada*, [1992] 3 F.C. 42 (QL)(T.D.); Applicant's Authorities, Tab 13, p. 6, para. 12

97. In *Inuit Tapirisat*, the Supreme Court went on to consider the evidence that is required to satisfy the factual requirements demonstrating a decision is *vires*.

> The Privy Council also determined in the case that factual issues, including the "reasonableness" or "sufficiency" of the evidence, were exclusively for the Lieutenant-Governor whose decision would not be reviewable by a court if there was "some evidence in support of the application".
>
> *Canada (Attorney General) v. Inuit Tapirisat, supra* para. 91; Applicant's Authorities, Tab 10, p. 11

98. In *David Suzuki Foundation v. British Columbia (AG)*, the discretion implied by the standard of "satisfaction" also led the Court to require "some evidence" in support of the LGIC.

> *David Suzuki Foundation v. British Columbia (AG),* [2004] B.C.J. No. 943 (QL)(S.C.); Applicant's Authorities, Tab 14, p. 32, para. 145

i. Applicant's Evidence – Uncontradicted

99. Three highly qualified medical experts have stated there is clear evidence on the record before the Minister that IWTs cause and/or are capable of causing adverse health effects. There is no medical evidence to support a conclusion that 550 metres is an adequate setback distance. There are no medical studies that indicate 550 metres is safe. There is no accepted method to measure audible or inaudible noise generated by IWTs. The conclusion that 550 metres is protective of health is without medical foundation. They have concluded the precautionary principle/approach is applicable until more definitive studies are performed. No reply to this evidence has been filed. No cross examination on it took place.

ii. Applicant's Evidence – Properly Admissible – R. v. Mohan

100. The law governing the admissibility of expert opinion evidence is well established. It depends on the application of the criteria set out in *R. v. Mohan*: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of any exclusionary rule; and (4) a properly qualified expert.

> *R. v. Mohan*, [1994] 2 S.C.R. 9 (QL); Applicant's Authorities, Tab 15, p. 9, para. 17

101. Regarding criteria (1), the respondent has previously stated that all health related evidence, particularly of Dr. McMurtry, is irrelevant. The applicant submits this evidence is clearly relevant to the test of demonstrating compliance with the legal condition precedent of the SEV.

102. To date no issues appear to have been raised regarding criteria (2) and (3). In relation to criteria (4), the respondent has submitted Dr. McMurtry's evidence is inadmissible based on a lack of qualifications. As set out in detail above, Dr. McMurtry's experience in public health matters is very extensive; he is also a practicing physician who has worked clinically with persons living near IWTs; he has also conducted more than 2,000 hours of research on this issue. He can surely be said to "have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify." The same is true of Drs. Hanning and Nissenbaum. Each witness exceeds this threshold requirement.

> *R. v. Mohan*, *supra* para. 110; Applicant's Authorities, Tab 15, p. 12, para. 27

103. The respondent has also submitted that Dr. McMurtry is "an advocate" and should not be permitted to testify. The record and case law very clearly does not support such allegations.

> *Children's Aid Society of Owen Sound and County of Grey v. A.C.*, [2005] O.J. No. 783 (QL)(O.C.J.); Applicant's Authorities, Tab 16, p. 5, paras. 27 & 31
>
> *Wynberg et. al. v. HMQ*, (2 June 2003), Ont. S.C.J. [unreported] per Kiteley J., Applicant's Authorities, Tab 17, p. 6, para. 31

104. The respondent has also submitted that the expert opinions provided by the applicant rely on hearsay. As widely recognized in the case law, expert witnesses are entitled to rely on hearsay evidence in the formulation of their opinions.

> An expert witness, like any other witness, may testify as to the veracity of facts of which he has first hand experience, but this is not the main purpose of his testimony. An expert is there to give an opinion. And the opinion more often than not will be based on second-hand evidence.
>
> *R. v. Abbey*, [1982] 2 S.C.R. 24 (QL); Applicant's Authorities, Tab 18, p. 14
>
> *R. v. Paul*, [2002] O.J. No. 4733 (QL)(C.A.); Applicant's Authorities, Tab 19, p. 12, para. 56

iii. Respondent's Evidence - No Experts

105. The sole deponent to bring forward any information for the respondent regarding human health, Ms. Wallace, has no medical knowledge. She is not tendered as an expert in either sound or in the human health impacts of IWTs. The respondent has, therefore, put no expert evidence before the Court to meet the requirement that there be "some evidence" of compliance with the human health requirements of the SEV precautionary approach and principles.

iv. Respondent's Evidence - Hearsay - Inadmissible under the Rules

106. Rule 39.01(5) states "an affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts *that are not contentious*, if the source of the information and the fact of the belief are specified in the affidavit." "Contentious" evidence is that which is "in dispute or to which there are differences between the contending parties."

> *Courts of Justice Act*, R.S.O. 1990, c. C.43, Reg. 194, ss. 39.01(5)
> *Ontario (AG) v. Paul Magder Furs Ltd.* (1989), 71 O.R. (2d) 513 (QL); Applicant's Authorities, Tab 20, p. 8

107. As also set out above, in many paragraphs of her affidavits Ms. Wallace tenders the information of others but does not indicate the sources of her information and belief. The information tendered on health is also clearly contentious hearsay. Consequently, not only is there no "expert" evidence from the respondent, its evidence is inadmissible under the Rules.

v. Intervenor's Evidence – None

108. As noted, the intervenor originally sought standing as a party to be able to file evidence and cross examine etc. That relief was not granted. Since then, notwithstanding the respondent producing the record now before the Court, the intervenor has not renewed its request for standing. As a result, the intervenor has not and cannot offer any admissible opinion on the expert evidence regarding health impacts from IWTs that is now before the Court.

F. EBR SECTION 118 DOES NOT PRECLUDE REVIEW

109. It has also been submitted by the respondent that the privative clause in subsection 118(1) of the EBR acts as a bar to judicial review.

110. However, a privative clause does not determine the question of the court's jurisdiction.

> However, not even an absolute privative clause may prevent a court from reviewing whether the tribunal acted within its statutory mandate.
>
> D.P. Jones and A.S. de Villars, *Principles of Administrative Law*, 5th ed. (Toronto: Carswell, 2009); Applicant's Authorities, Tab 21, p. 598-99

111. Given that the applicant alleges that the Regulation is *ultra vires* and consequently unlawful, subsection 118(1) does not apply and does not bar further consideration of the SEV/precautionary principle as it applies to the Regulation.

> For many years, the courts have resisted giving literal effect to most of these clauses by asserting that an *ultra vires* administrative action is a nullity which does not exist in the eyes of the law, and which, therefore, cannot attract the protection of a privative clause.
>
> S. Blake, *Administrative Law in Canada*, 4th ed. (Toronto: LexisNexis -Butterworths, 2006); Applicant's Authorities, Tab 22, p. 207

> The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a [decision maker], in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review.
>
> *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220 (QL); Applicant's Authorities, Tab 23, p. 14

112. In *Dunsmuir* the Supreme Court reaffirmed these principles, citing *Woodward Estate v. British Columbia (Minister of Finance)*, where a Ministerial decision was directly challenged:

> These authorities, however, go no further than to support the proposition that that portion of s. 5(2), as amended, which prohibited any review of the Minister's determination in any Court, would not preclude such a review, by way of certiorari, if he had acted beyond his jurisdiction or had failed to observe the rules of natural justice when making his determination.
>
> However, the statutory provision now under consideration does not stop at that point. It goes on to say that "any determination of the Minister made under this subsection is hereby ratified and confirmed and is binding on all persons." In my opinion those words gave statutory ratification to all determinations of the Minister made under s. 5(2), as amended, even though such determination would, in the absence of the provision, have been invalid.

Woodward Estate v. British Columbia (Minister of Finance), [1973] S.C.R. 120 (QL); Applicant's Authorities, Tab 24, p. 7

Dunsmuir v. New Brunswick, *supra* para. 71; Applicant's Authorities, Tab 1, p. 16, para. 31

113. Section 118 of the EBR contains no language similar to that found in *Woodward*. Errors going to the jurisdiction of the Minister in this case are reviewable.

G. INTERLOCUTORY RELIEF IS AVAILABLE AGAINST THE CROWN

114. It has also been submitted that section 14 of the *Proceedings Against the Crown Act* precludes the granting of injunctive-interlocutory relief. A very recent Ontario decision has affirmed that as part of its inherent jurisdiction, the court has the power to grant such relief against the Crown. Whether that relief is termed interlocutory or injunctive is not material.

Couchiching First Nation v. Canada (Attorney General), [2010] O.J. No. 4194 (QL) (S.C.J.); Applicant's Authorities, Tab 25, p. 17, para. 82

PART IV - ORDER SOUGHT

115. The applicant respectfully requests:

a. a declaration that sections 35, 53, 54 and 55 of the Regulation are invalid;

b. an interlocutory or interim injunction restraining the respondent from granting approvals under Parts IV and V of the Regulation with respect to wind facilities;

c. the applicant's costs of this application on a substantial indemnity basis; and

d. such further and other relief as counsel may advise and this Court may permit.

All of which is respectfully submitted this 6th day of December, 2010.

_____

Eric K. Gillespie
Of counsel for the applicant

_____

Julia A.S. Croome
Of counsel for the applicant

SCHEDULE A

Caselaw

114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241 (QL)

Apotex Inc. v. Ontario (Lieutenant Governor in Council), [2007] O.J. No. 3121 (QL)(C.A.)

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 (QL)

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SCHEDULE B

Ontario Regulation 359/09

35. (1) No person shall construct, install or expand a transformer station that form.s part of a renewable energy generation facility and that is capable of operating at a nominal voltage of 50 kV or more unless,

(a) the transformer station is constructed, installed or expanded with an acoustic barrier with a density of 20kg/m^2 that breaks the line of sight with any noise receptors and is located at a distance of at least 500 metres from the nearest noise receptor; or

(b) the transformer station is located at a distance of at least 1,000 metres from the nearest noise receptor.

(2) Subsection (1) does not apply if, as part of the application for the issue of a renewable energy approval in respect of the renewable energy generation facility, the applicant submits,

(a) if the application is in respect of a wind facility, a report prepared in accordance with the publication of the Ministry of the Environment entitled "Noise Guidelines for Wind farms" dated October 2008, as amended from time to time and available from the Ministry; or

(b) if the application is in respect of a facility other than a wind facility, a noise study report prepared in accordance with Table 1.

WIND FACILITIES

Class 3, 4 and 5 wind facilities

53. (1) No person shall construct, install or expand a wind turbine that is to form part of a Class 3, 4 or 5 wind facility unless,

(a) the distance between the base of the wind turbine and any public road rights of way or railway rights of way is equivalent to, at a minimum, the length of any blades of the wind turbine, plus 10 metres; and

(b) the distance between the base of the wind turbine and all boundaries of the parcel of land on which the wind turbine is constructed, installed or expanded is equivalent to, at a minimum, the height of the wind turbine, excluding the length of any blades.

(2) Clause (1) (b) does not apply in respect of a boundary of the parcel of land on which the wind turbine is constructed, installed or expanded if the abutting parcel of land on that boundary is,

(a) owned by the person who proposes to engage in the renewable energy project in respect of the wind turbine; or

(b) owned by a person who has entered into an agreement with the person mentioned in clause (a) to permit the wind turbine to be located closer than the distance specified in clause (1) (b).

(3) Clause (1) (b) does not apply if,

(a) the distance between the base of the wind turbine and all boundaries of the parcel of land on which it is constructed, installed or expanded is equivalent to, at a minimum, the length of any blades plus 10 metres; and

(b) as part of an application for the issue of a renewable energy approval or a certificate of approval in respect of the construction, installation or expansion of the wind turbine, the person who is constructing, installing or expanding the wind turbine submits a written assessment,

(i) demonstrating that the proposed location of the wind turbine will not result in adverse impacts on nearby business, infrastructure, properties or land use activities, and

(ii) describing any preventative measures that are required to be implemented to address the possibility of any adverse impacts mentioned in subclause (i).

Specified wind turbines, prohibition and requirements

54. (1) No person shall construct, install or expand a wind turbine that meets the following criteria unless the base of the wind turbine is located at a distance of at least 550 metres from the nearest noise receptor:

1. The wind turbine has a name plate capacity of greater than or equal to 50 kW.

2. The wind turbine is not located in direct contact with surface water other than in a wetland.

3. The wind turbine has a sound power level that is greater than or equal to 102 dBA.

(2) Subsection (1) does not apply in respect of a wind turbine that is constructed, installed or expanded as part of a Class 4 or 5 wind facility if, as part of an application for the issue of a renewable energy approval or a certificate of approval in respect of the facility, the person who proposes to construct, install or expand the wind turbine, submits,

(a) results of measurements or calculations showing that the lowest hourly ambient sound level at a noise receptor is greater than 40 dBA due to road traffic for wind speeds less than or equal to 4 metres per second, obtained in accordance with the publication of the Ministry of the Environment entitled NPC-206 “Sound Levels due to Road Traffic”, dated October 1995, as amended from time to time and available from the Ministry; and

(b) a report prepared in accordance with the publication of the Ministry of the Environment entitled “Noise Guidelines for Wind farms”, dated October 2008, as amended from time to time and available from the Ministry, including a demonstration that the proposed facility will not exceed the lowest hourly ambient sound level measured or calculated under clause (a).

(3) If the issue of a renewable energy approval or a certificate of approval is required in respect of the construction, installation or expansion of one or more wind turbines mentioned in subsection (1) in a circumstance described in subsection (4), the person who is constructing, installing or expanding a wind turbine shall submit, as part of the application for the issue of the renewable energy approval or certificate of approval, a report prepared in accordance with the publication of the Ministry of the Environment entitled “Noise Guidelines for Wind farms”, dated October 2008, as amended from time to time and available from the Ministry.

(4) Subsection (3) applies if,

(a) one or more of the wind turbines has a sound power level greater than 107 dBA;

(b) the application is in respect of one or more wind turbines that are to form part of a renewable energy generation facility consisting of 26 or more wind turbines, any of which has a sound power level greater than or equal to 102 dBA and less than 107 dBA; or

(c) the application is in respect of a renewable energy generation facility that would, once constructed, installed or expanded, result in 26 or more wind turbines located within a three kilometre radius of any noise receptor.

(5) For the purposes of clause (4) (c), the number of wind turbines within a three kilometre radius of a noise receptor shall be calculated by determining the sum of,

(a) the wind turbines with a sound power level equal to or greater than 102 dBA that the person proposes to construct, install or expand as part of the facility;

(b) any wind turbines with a sound power level equal to or greater than 102 dBA that have already been constructed or installed;

(c) any wind turbines with a sound power level equal to or greater than 102 dBA that have not yet been constructed or installed but in respect of which a renewable energy approval or certificate of approval has been issued by the Director; and

(d) any wind turbines with a sound power level equal to or greater than 102 dBA that have been proposed to be constructed or installed and,

(i) in respect of which notice of the proposal for the issue of a renewable energy approval or certificate of approval has been posted on the environmental registry established under section 5 of the *Environmental Bill of Rights, 1993*, and

(ii) the Director has not refused or approved the proposal.

Wind turbines, requirements re location

55. (1) This section applies to a person who applies for the issue of a renewable energy approval or a certificate of approval in respect of a wind facility consisting of a wind turbine mentioned in subsection 54 (1) if, at the time of the application, within a three kilometre radius of a noise receptor of the facility,

(a) the person proposes to construct or install more than one wind turbine with a sound power level equal to or greater than 102 dBA as part of the same renewable energy generation facility;

(b) a wind turbine with a sound power level equal to or greater than 102 dBA has been constructed or installed;

(c) the construction or installation of a wind turbine with a sound power level equal to or greater than 102 dBA has not yet been completed but a renewable energy approval or certificate of approval has been issued by the Director in respect of it; or

(d) a wind turbine with a sound power level equal to or greater than 102 dBA has been proposed to be constructed or installed and,

(i) notice of the proposal for the issue of a renewable energy approval or a certificate of approval in respect of the facility has been posted on the environmental registry established under section 5 of the *Environmental Bill of Rights, 1993*, and

(ii) the Director has not refused or approved the proposal.

(2) Subject to subsection (3), no person shall construct, install or expand a wind turbine mentioned in subsection 54 (1) except in accordance with the following rules if, within a three kilometre radius of a noise receptor, the sum of the wind turbines at the proposed facility and the number of wind turbines mentioned in clauses (1) (b), (c) and (d) equals a number set out in Column 1 of the Table to this section:

1. If the sound power level of the wind turbines at the proposed facility corresponds to the sound power level set out in Column 2 of the Table opposite the number of wind turbines, the total distance from the wind turbine to its nearest noise receptor shall be, at a minimum, the distance set out in Column 3 opposite the sound power level.

2. For the purposes of this section, if the proposed facility is to consist of different models of wind turbines with varying sound power levels, the greatest sound power level of a wind turbine at the proposed facility shall be deemed to be the sound power level of every wind turbine at the facility.

(3) Subsection (2) does not apply if, as part of an application for the issue of a renewable energy approval or a certificate of approval in respect of a wind facility that consists of a wind turbine mentioned in subsection 54 (1), the person who is constructing, installing or expanding the facility submits a report prepared in accordance with the publication of the Ministry of the Environment entitled "Noise Guidelines for Wind farms", dated October 2008, as amended from time to time and available from the Ministry.

TABLE

Item	Column 1	Column 2	Column 3
	Number of wind turbines calculated in accordance with subsection (2)	Sound power level of wind turbine (expressed in dBA)	Total distance from wind turbine to nearest noise receptor of the wind turbine (expressed in metres)
1.	1-5	102	550
		103 – 104	600
		105	850
		106 – 107	950
2.	6-10	102	650
		103 – 104	700
		105	1000
		106 – 107	1200
3.	11-25	102	750
		103 – 104	850

		105	1250
		106 – 107	1500

***Environmental Protection Act*, R.S.O. 1990, c. E.19**

Regulations, general

175.1 The Lieutenant Governor in Council may make regulations,

(a) exempting any person, licence holder, insurer, industry, contaminant, source of contaminant, motor vehicle, motor, waste, waste disposal site, waste management system, activity, area, location, matter, substance, sewage system, product, material, beverage, packaging, container, discharge, spill, pollutant or thing from any provision of this Act and the regulations and prescribing conditions for the exemptions from this Act and the regulations;

(b) prohibiting, regulating or controlling, (including prescribing conditions for the prohibition, regulation or control) the making, use, sale, display, advertising, transfer, transportation, operation, maintenance, storage, recycling, disposal, or discharge, or manner thereof, of any contaminant, source of contaminant, motor vehicle, motor, waste, waste disposal site, waste management system, activity, area, location, matter, substance, sewage system, product, material, beverage, packaging, container, discharge, spill, pollutant or thing;

(c) governing and requiring the payment of fees to the Crown or to any other person or body specified by the regulations, including prescribing the amounts or the method of calculating the amounts of the fees, and governing the procedure for the payment,

(i) in respect of a certificate of approval, provisional certificate of approval, permit, licence or renewal of licence, examination, inspection or certification,

(ii) in respect of any registration or record required by this Act or the regulations,

(iii) in respect of an activity pursuant to a provision of a regulation that exempts a person from the requirement to obtain a certificate of approval, provisional certificate of approval or permit, or

(iv) in respect of the supply of information, services, or copies of documents, maps, plans, recordings or drawings;

Regulations relating to Part V.0.1

176 (4.1) The Lieutenant Governor in Council may make regulations relating to Part V.0.1,

(a) governing the preparation and submission of applications for the issue, renewal or revocation of renewable energy approvals and applications to alter the terms and conditions of renewable energy approvals or to impose conditions on renewable energy approvals;

(b) governing eligibility requirements relating to applications for the issue, renewal or revocation of renewable energy approvals, applications to alter the terms and conditions of renewable energy approvals or to impose conditions on renewable energy approvals, including requirements for consultation;

(c) governing renewable energy generation facilities in relation to,

(i) planning, design, siting, buffer zones, notification and consultation, establishment, insurance, facilities, staffing, operation, maintenance, monitoring, record-keeping, submission of reports to the Director and improvement,

(ii) the discontinuance of the operation of any plant, structure, equipment, apparatus, mechanism or thing at a renewable energy generation facility,

(iii) the closure of renewable energy generation facilities;

(d) governing the location of renewable energy generation facilities, including prohibiting or regulating the construction, installation, use, operation or changing of renewable energy generation facilities in parts of Ontario;

(e) prohibiting the transfer of a renewable energy approval or prescribing requirements for transferring a renewable energy approval, including requiring the written consent of the Director;

(f) providing for transitional matters that, in the opinion of the Lieutenant Governor in Council, are necessary or desirable to facilitate the implementation of Part V.0.1. 2009, c. 12, Sched. G, s. 20 (2).

PART V.0.1
RENEWABLE ENERGY

Definition

47.1 In this Part,

"environment" has the same meaning as in the *Environmental Assessment Act*. 2009, c. 12, Sched. G, s. 4 (1).

Purpose

47.2 (1) The purpose of this Part is to provide for the protection and conservation of the environment. 2009, c. 12, Sched. G, s. 4 (1).

Application of s. 3 (1)

(2) Subsection 3 (1) does not apply to this Part. 2009, c. 12, Sched. G, s. 4 (1).

Requirement for renewable energy approval

47.3 (1) A person shall not engage in a renewable energy project except under the authority of and in accordance with a renewable energy approval issued by the Director if engaging in the project involves engaging in any of the following activities:

1. An activity for which, in the absence of subsection (2), subsection 9 (1) or (7) of this Act would require a certificate of approval.
2. An activity for which, in the absence of subsection (2), subsection 27 (1) of this Act would require a certificate of approval or provisional certificate of approval.
3. An activity for which, in the absence of subsection (2), subsection 34 (3) of the *Ontario Water Resources Act* would require a permit.

Note: On the later of the day subsection 4 (1) of Schedule G to the *Green Energy and Green Economy Act, 2009* comes into force and the day subsection 1 (8) of the *Safeguarding and*

Sustaining Ontario's Water Act, 2007 **comes into force, paragraph 3 is repealed and the following substituted:**

3. An activity for which, in the absence of subsection (2), subsection 34 (1) of the *Ontario Water Resources Act* would require a permit, if the activity would not involve a transfer as defined in subsection 34.5 (1) of that Act.

See: 2009, c. 12, Sched. G, ss. 4 (2), 26 (2).

4. An activity for which, in the absence of subsection (2), section 36 of the *Ontario Water Resources Act* would require a well construction permit.

5. An activity for which, in the absence of subsection (2), subsection 53 (1) or (5) of the *Ontario Water Resources Act* would require an approval.

6. An activity for which, in the absence of subsection (2), a provision prescribed by the regulations would require an approval, permit or other instrument.

7. Any other activity prescribed by the regulations. 2009, c. 12, Sched. G, s. 4 (1).

Exemptions

(2) The following provisions do not apply to a person who is engaging in a renewable energy project:

1. Subsections 9 (1) and (7) of this Act.

2. Subsection 27 (1) of this Act.

3. Subsection 34 (3) of the *Ontario Water Resources Act*.

Note: On the later of the day subsection 4 (1) of Schedule G to the *Green Energy and Green Economy Act, 2009* comes into force and the day subsection 1 (8) of the *Safeguarding and Sustaining Ontario's Water Act, 2007* comes into force, paragraph 3 is repealed and the following substituted:

3. Subsection 34 (1) of the *Ontario Water Resources Act*, if the person engaging in the renewable energy project is not engaged in a taking of water that involves a transfer as defined in subsection 34.5 (1) of that Act.

See: 2009, c. 12, Sched. G, ss. 4 (3), 26 (2).

4. Section 36 of the *Ontario Water Resources Act*.

5. Section 53 of the *Ontario Water Resources Act*.

6. A provision prescribed by the regulations for the purpose of paragraph 6 of subsection (1). 2009, c. 12, Sched. G, s. 4 (1).

Application

47.4 (1) An application for the issue or renewal of a renewable energy approval shall be prepared in accordance with the regulations and submitted to the Director. 2009, c. 12, Sched. G, s. 4 (1).

Director may require information

(2) The Director may require an applicant under subsection (1) to submit any plans, specifications, engineers' reports or other information and to carry out and report on any tests or experiments relating to the renewable energy project. 2009, c. 12, Sched. G, s. 4 (1).

Director's powers

47.5 (1) After considering an application for the issue or renewal of a renewable energy approval, the Director may, if in his or her opinion it is in the public interest to do so,

(a) issue or renew a renewable energy approval; or

(b) refuse to issue or renew a renewable energy approval. 2009, c. 12, Sched. G, s. 4 (1).

Terms and conditions

(2) In issuing or renewing a renewable energy approval, the Director may impose terms and conditions if in his or her opinion it is in the public interest to do so. 2009, c. 12, Sched. G, s. 4 (1).

Other powers

(3) On application or on his or her own initiative, the Director may, if in his or her opinion it is in the public interest to do so,

(a) alter the terms and conditions of a renewable energy approval after it is issued;

(b) impose new terms and conditions on a renewable energy approval; or

(c) suspend or revoke a renewable energy approval. 2009, c. 12, Sched. G, s. 4 (1).

Same

(4) A renewable energy approval is subject to any terms and conditions prescribed by the regulations. 2009, c. 12, Sched. G, s. 4 (1).

Water transfers: Great Lakes-St. Lawrence River, Nelson and Hudson Bay Basins

47.6 A renewable energy approval shall not authorize a person to take water contrary to subsection 34.3 (2) of the *Ontario Water Resources Act*. 2009, c. 12, Sched. G, s. 4 (1).

Policies, renewable energy approvals

47.7 (1) The Minister may, in writing, issue, amend or revoke policies in respect of renewable energy approvals. 2009, c. 12, Sched. G, s. 4 (1).

Same

(2) A policy or the amendment or revocation of a policy takes effect on the later of the following days:

1. The day that notice of the policy, amendment or revocation, as the case may be, is given in the environmental registry established under the *Environmental Bill of Rights, 1993*.

2. The effective day specified in the policy, amendment or revocation, as the case may be. 2009, c. 12, Sched. G, s. 4 (1).

Same

(3) Subject to section 145.2.2, decisions made under this Act in respect of renewable energy approvals shall be consistent with any policies issued under subsection (1) that are in effect on the date of the decision. 2009, c. 12, Sched. G, s. 4 (1).

***Environmental Bill of Rights*, 1993 S.O. 1993, c. 28**

Purposes of Act

2. (1) The purposes of this Act are,

(a) to protect, conserve and, where reasonable, restore the integrity of the environment by the means provided in this Act;

(b) to provide sustainability of the environment by the means provided in this Act; and

(c) to protect the right to a healthful environment by the means provided in this Act. 1993, c. 28, s. 2 (1).

Same

(2) The purposes set out in subsection (1) include the following:

1.The prevention, reduction and elimination of the use, generation and release of pollutants that are an unreasonable threat to the integrity of the environment.

2.The protection and conservation of biological, ecological and genetic diversity.

3.The protection and conservation of natural resources, including plant life, animal life and ecological systems.

4.The encouragement of the wise management of our natural resources, including plant life, animal life and ecological systems.

5.The identification, protection and conservation of ecologically sensitive areas or processes. 1993, c. 28, s. 2 (2).

Same

(3) In order to fulfil the purposes set out in subsections (1) and (2), this Act provides,

(a) means by which residents of Ontario may participate in the making of environmentally significant decisions by the Government of Ontario;

(b) increased accountability of the Government of Ontario for its environmental decision-making;

(c) increased access to the courts by residents of Ontario for the protection of the environment; and

(d) enhanced protection for employees who take action in respect of environmental harm. 1993, c. 28, s. 2 (3).

Ministry statement of environmental values

7. Within three months after the date on which this section begins to apply to a ministry, the minister shall prepare a draft ministry statement of environmental values that,

(a) explains how the purposes of this Act are to be applied when decisions that might significantly affect the environment are made in the ministry; and

(b) explains how consideration of the purposes of this Act should be integrated with other considerations, including social, economic and scientific considerations, that are part of decision-making in the ministry. 1993, c. 28, s. 7.

Public participation in statement

8. (1) After the draft ministry statement of environmental values is prepared and not later than three months after the day on which this section begins to apply to a ministry, the minister shall give notice to the public that he or she is developing the ministry statement of environmental values. 1993, c. 28, s. 8 (1).

Means of giving notice

(2) Notice under this section shall be given in the registry and by any other means the minister considers appropriate. 1993, c. 28, s. 8 (2).

Contents of notice

(3) Notice given under this section in the registry shall include the following:

1. The text of the draft statement prepared under section 7 or a synopsis of the draft.

2. A statement of how members of the public can obtain copies of the draft statement.

3. A statement of when the minister expects to finalize the statement.

4. An invitation to members of the public to submit written comments on the draft statement within a time specified in the notice.

5. A description of any additional rights of participation in the development of the statement that the minister considers appropriate.

6. An address to which members of the public may direct,

i. written comments on the draft statement,

ii. written questions about the draft statement, and

iii. written questions about the rights of members of the public to participate in developing the statement.

7. Any information prescribed by the regulations under this Act.

8. Any other information that the minister considers appropriate. 1993, c. 28, s. 8 (3).

Time for public comment

(4) The minister shall not finalize the ministry statement of environmental values until at least thirty days after giving the notice under this section. 1993, c. 28, s. 8 (4).

Same

(5) The minister shall consider allowing more than thirty days between giving the notice under this section and finalizing the statement in order to permit more informed public consultation on the statement. 1993, c. 28, s. 8 (5).

Same

(6) In considering how much time ought to be allowed under subsection (5), the minister shall consider the following factors:

1. The complexity of the matters on which comments are invited.
2. The level of public interest in the matters on which comments are invited.
3. The period of time the public may require to make informed comment.
4. Any private or public interest, including any governmental interest, in resolving the matters on which comments are invited in a timely manner.
5. Any other factor that the minister considers relevant. 1993, c. 28, s. 8 (6).

Notice of final statement

9. (1) Within nine months after the day on which this section begins to apply to a ministry, the minister shall finalize the ministry statement of environmental values and give notice of it to the public. 1993, c. 28, s. 9 (1).

Means of giving notice

(2) Notice under this section shall be given in the registry and by any other means the minister considers appropriate. 1993, c. 28, s. 9 (2).

Contents of notice

(3) The notice shall include a brief explanation of the effect, if any, of comments from members of the public on the development of the statement and any other information that the minister considers appropriate. 1993, c. 28, s. 9 (3).

Amending the statement

10. (1) The minister may amend the ministry statement of environmental values from time to time. 1993, c. 28, s. 10 (1).

Same

(2) Sections 7 to 9 apply with necessary modifications to amendments of the statement. 1993, c. 28, s. 10 (2).

Effect of statement

11. The minister shall take every reasonable step to ensure that the ministry statement of environmental values is considered whenever decisions that might significantly affect the environment are made in the ministry. 1993, c. 28, s. 11.

Right of action

84. (1) Where a person has contravened or will imminently contravene an Act, regulation or instrument prescribed for the purposes of Part V and the actual or imminent contravention has caused or will imminently cause significant harm to a public resource of Ontario, any person resident in Ontario may bring an action against the person in the court in respect of the harm and is entitled to judgment if successful. 1993, c. 28, s. 84 (1).

Steps before action: application for investigation

(2) Despite subsection (1), an action may not be brought under this section in respect of an actual contravention unless the plaintiff has applied for an investigation into the contravention under Part V and,

(a) has not received one of the responses required under sections 78 to 80 within a reasonable time; or

(b) has received a response under sections 78 to 80 that is not reasonable. 1993, c. 28, s. 84 (2).

Same

(3) In making a decision as to whether a response was given within a reasonable time for the purposes of clause (2) (a), the court shall consider but is not bound by the times specified in sections 78 to 80. 1993, c. 28, s. 84 (3).

Steps before action: farm practices

(4) Despite subsection (1), an action may not be brought under this section in respect of actual or imminent harm to a public resource of Ontario from odour, noise or dust resulting from an agricultural operation unless the plaintiff has applied to the Farm Practices Protection Board under section 5 of the *Farm Practices Protection Act* with respect to the odour, noise or dust and the Farm Practices Protection Board has disposed of the application. 1993, c. 28, s. 84 (4).

Same

(5) A person seeking to bring an action under this section in respect of harm from odour, noise or dust resulting from an agricultural operation is a person aggrieved by the odour, noise or dust within the meaning of subsection 5 (1) of the *Farm Practices Protection Act*. 1993, c. 28, s. 84 (5).

When steps before action need not be taken

(6) Subsections (2) and (4) do not apply where the delay involved in complying with them would result in significant harm or serious risk of significant harm to a public resource. 1993, c. 28, s. 84 (6).

Action not a class proceeding

(7) An action under section 84 may not be commenced or maintained as a class proceeding under the *Class Proceedings Act, 1992*. 1993, c. 28, s. 84 (7).

Burden of proof: contravention

(8) The onus is on the plaintiff in an action under this section to prove the contravention or imminent contravention on a balance of probabilities. 1993, c. 28, s. 84 (8).

Other rights of action not affected

(9) This section shall not be interpreted to limit any other right to bring or maintain a proceeding. 1993, c. 28, s. 84 (9).

Rules of court

(10) The rules of court apply to an action under this section. 1993, c. 28, s. 84 (10).

No judicial review

118. (1) Except as provided in section 84 and subsection (2) of this section, 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. 1993, c. 28, s. 118 (1).

Exception

(2) Any person resident in Ontario may make an application for judicial review under the *Judicial Review Procedure Act* 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. 1993, c. 28, s. 118 (2).

Same

(3) An application under subsection (2) shall not be made later than twenty-one days after the day on which the minister gives notice under section 36 of a decision on the proposal. 1993, c. 28, s. 118 (3).

***Judicial Review Procedure Act,* R.S.O. 1990, c. J.1**

2(1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review," the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.

2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

(2) The power of the court to set aside a decision for error of law on the face of the record on an application for an order in the nature of certiorari is extended so as to apply on an application for judicial review in relation to any decision made in the exercise of any statutory power of decision to the extent it is not limited or precluded by the Act conferring such power of decision.

***Proceedings Against the Crown Act,* R.S.O. 1990, c. P.27**

No injunction or specific performance against Crown

14. (1) Where in a proceeding against the Crown any relief is sought that might, in a proceeding between persons, be granted by way of injunction or specific performance, the court shall not, as against the Crown, grant an injunction or make an order for specific performance, but in lieu thereof may make an order declaratory of the rights of the parties.

Limitation on injunctions and orders against Crown servants

(2) The court shall not in any proceeding grant an injunction or make an order against a servant of the Crown if the effect of granting the injunction or making the order would be

to give any relief against the Crown that could not have been obtained in a proceeding against the Crown, but in lieu thereof may make an order declaratory of the rights of the parties. R.S.O. 1990, c. P.27, s. 14.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

39.01 (1) Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 39.01 (1).

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(4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (4).

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(5) An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (5).

STATEMENT OF ENVIORNMENTAL VALUES: MINISTRY OF ENVIORNMENT

1. INTRODUCTION

The Ontario Environmental Bill of Rights (EBR) was proclaimed in February 1994. The founding principles of the EBR are stated in its Preamble:

- The people of Ontario recognize the inherent value of the natural environment.

- The people of Ontario have a right to a healthful environment.

- The people of Ontario have as a common goal the protection, conservation and restoration of the natural environment for the benefit of present and future generations.

While the government has the primary responsibility for achieving this goal, Ontarians should have the means to ensure that it is achieved in an effective, timely, open and fair manner. The purposes of the Act are:

- To protect, conserve and where reasonable, restore the integrity of the environment;

- To provide sustainability of the environment by the means provided in the Act; and

- To protect the right to a healthful environment by the means provided in the Act.

These purposes include the following:

- The prevention, reduction and elimination of the use, generation and release of pollutants that are an unreasonable threat to the integrity of the environment.

- The protection and conservation of biological, ecological and genetic diversity.

- The protection and conservation of natural resources, including plant life, animal life and ecological systems.

- The encouragement of the wise management of our natural resources, including plant life, animal life and ecological systems.

- The identification, protection and conservation of ecologically sensitive areas or processes.

To assist in fulfilling these purposes, the Act provides:

- The means by which Ontarians may participate in the making of environmentally significant decisions by the Government of Ontario;

- Increased accountability of the Government of Ontario for its environmental decision-making;

- Increased access to the courts by residents of Ontario for the protection of the environment; and

- Enhanced protection for employees who take action in respect of environmental harm.

The EBR requires a Statement of Environmental Values from all designated ministries. The designated ministries are listed at:
http://www.ebr.gov.on.ca/ERS-WEBExternal/content/index2.jsp?f0=aboutTheRegistry.statement&f1=about the Registry.statement.value& menuIndex=0_3

Statements of Environmental Values (SEV) are a means for designated government ministries to record their commitment to the environment and be accountable for ensuring consideration of the environment in their decisions. A SEV explains:

- How the purposes of the EBR will be applied when decisions that might significantly affect the environment are made in the Ministry; and

- How consideration of the purposes of the EBR will be integrated with other considerations, including social, economic and scientific considerations, which are part of decision-making in the Ministry.

It is each Minister's responsibility to take every reasonable step to ensure that the SEV is considered whenever decisions that might significantly affect the environment are made in the Ministry.

The Ministry will examine the SEV on a periodic basis to ensure the Statements are current.

2. MINISTRY VISION, MANDATE AND BUSINESS

The Ministry of the Environment's vision is an Ontario with clean and safe air, land and water that contributes to healthy communities, ecological protection, and environmentally sustainable development for present and future generations.

The Ministry of the Environment develops and implements environmental legislation, regulations, standards, policies, guidelines and programs. The Ministry's research, monitoring, inspection, investigations and enforcement activities are integral to achieving Ontario's environmental goals.

Specific details on the responsibilities of the Ministry of the Environment can be found on the Ministry website www.ene.gov.on.ca.

3. APPLICATION OF THE SEV

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 clean up 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.

Decisions on proposed Acts, regulations and policies reflect the above principles. The ministry works to protect, restore and enhance the natural environment by:

- Developing policies, legislation, regulations and standards to protect the environment and human health,

- Using science and research to support policy development, environmental solutions and reporting,

- Ensuring that planning, which aims to identify and evaluate environmental benefits and risks, takes place at the earliest stages in the decision- making process;

- Undertaking compliance and enforcement actions to ensure consistency with environmental laws, and

- Environmental monitoring and reporting to track progress over time and inform the public on environmental quality.

In addition, the Ministry of the Environment uses a range of innovative programs and initiatives, including strong partnerships, public engagement, strategic knowledge management, and economic incentives and disincentives to carry out its responsibilities.

4. INTEGRATION WITH OTHER CONSIDERATIONS

The Ministry of the Environment will take into account social, economic and other considerations; these will be integrated with the purposes of the EBR when decisions that might significantly affect the environment need to be made. In making decisions, the Ministry will use the best science available. It will support scientific research, the development and application of technologies, processes and services.

The Ministry will encourage energy conservation in those sectors where it provides policy direction or programs.

5. MONITORING USE OF THE SEV

The Ministry of the Environment will document how the SEV was considered each time a decision on an Act, regulation or policy is posted on the Environmental Registry. The Ministry will ensure that staff involved in decisions that might significantly affect the environment is aware of the Ministry's Environmental Bill of Rights obligations.

The Ministry of the Environment monitors and assesses changes in the environment. The Ministry reviews and reports, both internally and to the Environmental Commissioner's Office, on its progress in implementing the SEV.

6. CONSULTATION

The Ministry of the Environment believes that public consultation is vital to sound environmental decision-making. The Ministry will provide opportunities for an open and consultative process when making decisions that might significantly affect the environment.

7. CONSIDERATION OF ABORIGINAL PEOPLES

The Ministry of the Environment recognizes the value that Aboriginal peoples place on the environment. When making decisions that might significantly affect the environment, the Ministry will provide opportunities for involvement of Aboriginal peoples whose interests may be affected by such decisions so that Aboriginal interests can be appropriately considered. This commitment is not intended to alter or detract from any constitutional obligation the province may have to consult with Aboriginal peoples.

8. GREENING INTERNAL OPERATIONS

The Ministry of the Environment believes in the wise use and conservation of natural resources. The Ministry will support Government of Ontario initiatives to conserve energy and water, and to wisely use our air, water and land resources in order to generate sustainable environmental, health and economic benefits for present and future generations.

The Ministry of the Environment is committed to reducing its environmental footprint by greening its internal operations, and supporting environmentally sustainable practices for its partners, stakeholders and suppliers. A range of activities is being undertaken to reduce the Ministry's air emissions, energy use, water consumption, and waste generation. These include: monitoring and reducing the Ministry's carbon footprint, promoting energy and water conservation in ministry outreach and educational activities, and supporting government-wide greening and sustainability initiatives.