CITATION: Wiggins v. WPD Canada Corporation, 2013 ONSC 2350
COURT FILE NO.: CV-11-1152
DATE: 20130422

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SYLVIA WIGGINS, CATHERINE MCINNIS, DONALD MCINNIS, DIANA GARBUTT. PAUL GARBUTT. JOHN HILTON SMITH, EDNA SMITH , DEBORAH SYNNOTT DONALD COUTTS BRENDA LYNNE COUTTS PETER GIGNAC JOANNE GIGNAC HUGH MCLACHLIN REBECCA MCLACHLIN, JAMES HUSTON and CLAUDIA HUSTON , Plaintiffs

AND:

WPD CANADA CORPORATION and BEATTIE BROTHERS FARMS LIMITED, Defendants

COURT FILE NO.: CV-12-0344

RE: MARY SKELTON and BETTY LOUIS SCHNEIDER and MEI.JODIE BURKETT and STANLEY BUDA and JO ANN BUDA, Plaintiffs

AND:

WPD CANADA CORPORATION and ED, BEATTIE & SON LIMITED, Defendants

BEFORE: THE HON. MADAM JUSTICE S.E. HEALEY

COUNSEL: E.K. Gillespie and E. Wallace, for the Responding Party/Plaintiffs

P.G, Duffy and I.A. Minott and J. Long, for the Moving Party/Defendants, WPD Canada Corporation

A, Faith, S. Lakhani, for the Moving Party/Defendants, Beattie Brothers Farms Limited and Ed. Beattie & Son Limited

HEARD: February 27 and March 1, 2013

ENDORSEMENT

Nature of the Motions

(1] There are four, motions before this court, brought by the defendants in each of court actions no. CV-11-1152 and CV-12-0344. The moving parties, wpd Canada Corporation ("wpd"), Beattie Brothers Farms Limited, and Ed Beattie & Sons Limited (collectively the "Beattie companies") all request the same relief in their motions: that the claims against them be dismissed in their entirety, or alternatively, that partial summary judgment be granted dismissing those parts of the claims which do not give rise to a genuine issue requiring a trial.

[2] In action no. CV-11-1 152, various landowners residing in Clearview Township, County of Simcoe (collectively "Wiggins et al." or "the plaintiffs") seek an interim, interlocutory and permanent injunction against wpd restraining the construction and operation of industrial wind turbines (the "Fairview Wind Project") on lands owned by Beattie Brothers Farms Limited, and seek compensatory damages of $11.8 million against both defendants for negligence, nuisance, trespass, and strict liability.

[3] In action no. CV-12-0344, various landowners (collectively "Skelton et al." or "the plaintiffs") seek the same injunctive relief against wpd and compensatory damages of $4.8 million against both defendants for negligence, nuisance, trespass, and strict liability.

[4] The claims mirror one another with respect to the specifics that have been pled for each cause of action.

Decision

(5] For the reasons that follow, this court orders that summary judgment shall be granted dismissing all of the claims in each action, as the plaintiffs are unable to show that a trial is needed to determine whether the plaintiffs have a cause of action at this time. The plaintiffs have also not shown that there is a genuine issue requiring a trial as to whether they have met the test for a *quia time!* injunction.

[6] This order is made without prejudice to the plaintiffs' rights to commence an action for identical or similar relief when and if the Fairview Wind Project receives the necessary approvals to be constructed.

Undisputed Filets

[7] There are two uncontentious facts. The first is that the Fairview Wind Project is not yet under construction. The second is that the regulatory approvals that must be granted for the project to go ahead through the renewable energy approval process (the "REA process") have not yet occurred, and the REA process is in its inception.

[Xi The plaintiffs° evidence is unchallenged, and the court was invited by the moving parties to take the plaintiffs' evidence as proven in order to place the plaintiffs' cases at their

most favourable for the purpose of these motions. I have adopted this submission even though these are not motions made pursuant to Rule 21 of *the Rules of Civil Procedure.* R.R.O. 1990, Reg. 194, but rather pursuant to Rule 20.01(3).

[9] In summary, the plaintiffs' evidence shows that they have already 'suffered harm through a loss in property values and a corresponding interference with the use and enjoyment of their properties. They have provided expert acoustic and medical evidence commenting on the adverse health effects to be expected from the proposed Fairview Wind **Project.**

Issues to be determined on the motion

[10] The parties agree that the questions to be determined are questions of law only, and are as follows: Is there a genuine issue requiring a trial with respect to the plaintiffs' claims in negligence, nuisance, trespass, strict liability as articulated by the rule in *Rylands v. Fletcher,* or with respect to their claim for injunctive relief?

Positions of the Parties

[11] It is the position of the moving parties that all of the plaintiffs' claims are speculative, premature, and incapable of proof given that the Fairview Wind Project has not yet been given **renewable** energy approval by the Ministry of the Environment ("MOE") and, *as* such the scope, and even the very existence, of the Project was uncertain when the actions were commenced. These uncertainties remain at the time of this motion.

[12] It is the position of the plaintiffs that they are currently experiencing harms that entitle them to both a *quirt timer* injunction and damages, and that they arc not required at law to let the regulatory approval process run its course before pursuing their common law remedies. They assert that the uncontradicted evidence filed by them in response to the motions shows that they have an arguable case requiring a trial in respect of all of the causes of action advanced.

The Test for Summary Judgment

[13] The purpose of the change from "no genuine issue for trial" to "no genuine issue requiring a trial" in the test for summary judgment was to make summary judgment more readily available. It was also to recognize that with the court's expanded forensic powers, although there may be issues appropriate for trial, these issues may not require a trial because the court has the power to weigh evidence on a motion for summary judgment. As noted in *Healey v. Lakeridge Health Corp.* 2010 ONSC 725, 72 C.C.L.T. (3d) 261, at para. 22, aff'd 2011 ONCA 55. 103 O.R. (3d) 401, "Rule 20.04(2.1) is a statutory reversal of the case law that held that a judge cannot assess credibility, weigh evidence, **or find facts on** a motion for summary judgment."

[14] **As stated in** *Canadian Imperial Bank of Commerce v. Mitchell,* 2010 **ONSC 2227, [2010] O.J. No. 1502,** at para. 20, the change in the wording in the Rules, **combined with** the powers granted to the motions judge to make evidentiary determinations, necessarily permits a more meaningful review of the paper record and expressly permits the motions judge to make evidentiary determinations and credibility findings. "**As** a result,

consistent with the new principle of proportionality in the Rules, cases or issues need not proceed to trial unless a trial is genuinely required": *Canadian Imperial Bank of Commerce v. Mitchell,* supra, at para, 20; *Cuthbert v. TD Canada Trust,* 2010 ONSC 88, 88 C.P.C. (60).359, at para. 10.

[15] To succeed on a motion for summary judgment, the moving party must establish that there is no genuine issue of *material* facts requiring a trial with respect to a claim or defence: *Irving Ungerman Lid, v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at. pp. 549-50; *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (CA.). "[T]he test for summary judgment — whether there is a genuine issue of material fact that requires a trial for its resolution as first articulated in *Irving Ungerman Lid v. Galanis* – has not changed" under the new Rule 20: *Cuthbert v. TD Canada Trust, supra,* at para. 11. If the moving party establishes that there is no genuine issue requiring a trial, the respondent must then establish his claim as being one with "a real chance of success": *Hercules Managements Ltd. v. Ernst & Young,* (1997] 2 S.C.R. 165, at para.15; *Guarantee Co. of North America v. Gordon Capital Corp.,* [1999] 3 S.C.R. 423, at para. 27.

[16] The court must take a hard look at the evidence on a motion for summary judgment to determine whether there is, or is not, a genuine issue for trial, and may freely canvass the facts and law in doing so. The moving party bears the onus of establishing that there is no triable issue; however, the responding party on a motion for summary judgment must "lead trump or risk losing": *1061590 Ontario Lid. v, Ontario Jockey Club, supra,* at p. 557. Although the onus is on the moving party to establish the absence of a genuine issue requiring a trial, there is an evidentiary burden on the responding party. who may not rest on the allegations or denials in the party's pleadings, **but** must present by way of affidavit, or other evidence, specific facts showing that there is a genuine issue for trial. It is only after the moving party has discharged its evidentiary burden of proving that there is no genuine issue which requires a trial for its resolution, that the burden shifts to the responding party to prove that its claim or defence has a real chance of success: *Cuthbert v. TD Canada Trust, supra,* at para. 12, citing *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.).

[17] Even with the change to Rule 20, however, it is to be remembered that the purpose of Rule 20 is not to deny the parties due process. As stated *in Dawson v. Rexcrqft Storage and Warehouse Inc., supra,* at para. 29, "[summary judgment] is not intended to deprive plaintiffs and defendants of their day in court absent demonstrated compliance with its requirements. . . [I]ts purpose is to weed out cases at the pre-trial stage when it can be demonstrated clearly that a trial is unnecessary", This principle has been reiterated in the now leading case under Rule 20.04, *Combined Air Mechanical Services Inc. v. Flesch,* 2011 ONCA 764, 108 O.R. (3d) 1 *("Combined Air"].* At para, 38 of *Combined Air,* the Court of Appeal emphasized that the purpose of the new rule is to eliminate unnecessary trials, not to eliminate all trials, and that the guiding consideration is whether the summary judgment process will provide an appropriate means for effecting a fair and just resolution of the dispute before the court.

[18] *Combined Air* **has of course articulated the "full appreciation test" as being that which the motions judge must apply to determine whether or not a trial is required in the interests of justice. The motions judge must ask the question: can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial? At para. 54 of** *Combined Air,* **the court directs the motions judge to assess whether the attributes of the trial process are necessary to enable him or her to fully appreciate the evidence and the issues. Unless full appreciation of the evidence and issues is attainable on the motion record, the judge cannot be satisfied that the issues are appropriately resolved on a motion for summary judgment. At para. 52 of *Combined Air* the court notes that the full appreciation test may he net in cases where there are limited contentious factual issues.**

[19] **As stated in *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at para. 17, "[t]he motions judge is entitled to assume that the record contains all the evidence which the parties will present if there is a trial." It is not sufficient for the responding party to say that more and better evidence will or possibly may be** available *at* **trial. The respondent must set out specific facts and coherent evidence organized to show that there is a genuine issue requiring a trial:** *Pizza Pizza Ltd. v. Gillespie* **(1990), 75 O.R. (2d) 225 (Gen. Div.), at p. 238;** *Canadian* ***Imperial Bank of Commerce v. Mitchell, supra,*** **at para. 18.**

[20] **Rule 20.04(4) provides that where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly.**

The Rezulatory Framework

[21] **In May 2010 wpd was awarded a contract to develop and operate the Fairview Wind Project under the Feed-in Tariff ("FIT") Program administered by the Ontario Power Authority ("OPA"). Pursuant to the FIT Program,** *a* **renewable energy producer may apply for a contract with the OPA guaranteeing a fixed compensation rate for a period of 20 years for the renewable energy that the applicant produces in Ontario. An applicant that satisfies the requirements for participation in the FIT Program is awarded a contract and may proceed with the development of the project once it obtains renewable energy approval from the MOE as required by s, 47.3 of the *Environmental Protection Act,* R.S.O. 1990, c. E.19 (the *"EPA").***

[22] **Other than the collector lines in the municipal allowance, all of the materials and infrastructure of the Fairview Wind Project will be located on land leased from** the **Beattie companies (the "Project Land"). All construction and installation activities, including vehicles and personnel, will be conducted within the boundaries of the Project Land.**

[23] **Under O. Reg. 359/09, the "Renewable Energy Approvals Regulation" (the "Regulation"), made under Part V.0.1 of the** *EPA,* **there are several key steps involved in the application for approval of a renewable energy project. At the first step, the applicant is required to engage the public, municipalities, and Aboriginal communities in**

discussions about the project. It is also required to prepare a report of the findings of any studies, along with the proponent's plans for constructing, operating and decommissioning the facility. Step two allows for optional consultation on pre-submission work, and at step three, the applicant provides all of the required information for provincial Ministry approvals. Mandatory consultation requirements must also ***be*** met for the application to be considered complete. At step four, a notice of the proposal is posted on the Environmental Registry by the MOE so the public can review and provide comments. At step five, as set out in s. 47.5 of the EPA, the Director may either issue or refuse to issue a renewable energy approval, depending on whether in his or her opinion it is in the public interest to do so. The Director has the power to impose terms and conditions on the renewable energy approval under s. 47.5(2). The Director has additional powers under s. 47.5(3). If in his or her opinion it is in the public interest to do so, the Director may do any of the following:

(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.

[24] The purpose of Part V.0.1 of the ***EPA,*** which deals with Renewable Energy, is set out in s. 47.2(1) to provide for the protection and conservation of the environment. "Environment" is given the same meaning as in the *Environmental Assessment Act,* R.S.O. 1990, c. E. IS, as follows:

"environment" means,

(a) air, land or water,

(b) plant and animal life, including human life,

(c) the social, economic and cultural conditions that influence ***the*** life of humans or community,

(d) any building, structure, machine or other device or thing made by humans,

(e) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities, or

(f) any part or combination of the foregoing and the interrelationships between any two or more of them, in or of Ontario.

[25] Once the renewable energy approval is issued, any person resident in Ontario *has* the right under s. 142.1 to appeal the Director's decision to the Environmental Appeal

Tribunal (the `•`Tribunal"). The grounds for such a hearing are set out in s. 142.1(3) of the *EPA* as follows:

> **A person may require a hearing under subsection (2) only on the grounds that engaging in the renewable energy project in accordance with the renewable energy approval will cause,**
>
> **(a) serious harm to human health; or**
>
> **(b) serious and irreversible harm to plant life, animal life for the natural environment.**

[26] **If an appeal is commenced, the Tribunal has the power under s. 143(2) to grant a stay of the Director's decision or order.**

[27] **As stated earlier, it is common ground between the parties that the Fairview Wind Project is at the very initial step required under the Regulation, which is the mandatory public consultation step. The Regulation required wpd to notify landowners within 550 metres of the project location, place a notice in the local newspaper, and hold at least two community consultation meetings at the beginning of the process. There is no dispute in this case that these things have occurred. Wpd published the first announcement of its plan on or about June 23, 2010, which incorporated a site map of the proposed project. A subsequent notice was issued on June 8, 2011. containing a Notice of Draft Site Plan and a Notice of a Public Meeting to occur at the Stayner Community Center. These latter documents were issued by wpd in accordance with ss. 15 and 54 of the Regulation, prior to wpd submitting its application for regulatory approval to the MOE.**

[28] **The Regulation also requires wpd to demonstrate that the location of the wind turbines will not adversely affect public health and the environment. As part of its REA application and in compliance with the mandatory requirements of the Regulation, wpd prepared numerous reports and conducted various assessments, including a Project Description Report, a Construction Plan Report, and a Noise Impact Assessment Report. These reports detail the potentially adverse environmental and health effects that may result from the Fairview Wind Project and the measures wpd must implement to address these adverse effects.**

[29] **The action of Wiggins et al. was commenced approximately five months after the second public notice was published, and it is the publication of that notice that was the genesis of both actions. The plaintiffs' core allegation is that wpd's publication of the Fairview Wind Project in June 2011 caused a decline in their property values.**

[30] **On August 31, 2012, wpd filed its REA application with the MOE. The Fairview Wind Project has not progressed further; the MOE is currently in the process of assessing wpd's application for completeness.**

The Plaintiffs' Evidence

[31] **In response to.the motions, the plaintiffs have filed expert appraisal evidence indicating that their properties are likely presently devalued by between 22 to SO per cent or more, based upon the Proposal as presented. In an appraisal report prepared by Ben Lansink, who has studied the trend of decreasing property values in the neighbourhood of wind turbines, he opines that:**

> **Where is strong evidence that the WPD announcement on June 23, 2010, WPD - Notice of Proposal to Engage in a Renewable Energy Project, has resulted in the inability of many land owners in Clearview being unable to sell their property. There will also likely be a reduction in value.**

[32] **In addition, the plaintiffs have filed extensive expert medical evidence demonstrating that there is a high probability that the Project will have numerous adverse health impacts. The plaintiffs have significant concerns about the undesirable health effects of living near a wind turbine including sleep disturbance, annoyance, headache, tinnitus, ear pressure, dizziness, vertigo, nausea, visual blurring, tachycardia, irritability, problems of concentration and memory, and/or panic episodes. It is the plaintiffs' evidence that they have never been warned by the defendants about any health risks. As well as the adverse health effects, the plaintiffs have filed evidence indicating that the presence of wind turbines in the neighbourhood can lower both the physical and environmental quality of life of individuals.**

[33] The plaintiffs have also filed expert technical evidence from an acoustician. He opines that there is a very strong probability that the Project will be unable to operate in compliance with regulatory standards, as it will exceed the MOE 40 dBA threshold for wind turbine noise, thereby exposing the plaintiffs to higher levels of sound than are considered safe for people in residential, educational, or other inhabited structures on a constant basis. Accordingly, the project poses significant direct health risks. The plaintiffs have presented evidence that wpd has been put on notice by their counsel that it has failed to fully and accurately describe any potential health effects of the Project as required as part of the REA process. Although a response was given by wpd that it was in the process of researching and collecting information, no further information has been provided by wpd regarding the potential health impacts of the Project.

Analysis

[34] The reason that each of the claims is being dismissed is that our law does not award damages without proof of an actionable wrong giving rise to liability. Even though an individual may suffer losses caused by another's behaviour, not all loss is compensable under our common law. it is a fundamental principle in tort law that damages will only be awarded where a plaintiff is able to show that there has been tortious behaviour — in this case, grounded in negligence, nuisance, trespass, or strict liability — for which compensation should be given to the persons injuriously affected. Even though in this case the court accepts that the plaintiffs have suffered, and are currently suffering, losses

culminating in diminished property values, as the evidence exists today the plaintiffs are unable to prove that they have been wronged by the defendants. They have not presented any evidence linking the diminution in property values to any tortious conduct.

[35] Similarly, the plaintiffs are unable to prove, currently, that the Fairview Wind Project *will* be built, The plaintiffs arc unable to prove, currently, that if the Fairview Wind Project *is* built, it will be built according to the specifications set out in the Draft Site Plan, They are unable to prove, currently, what conditions or restrictions *may* be imposed by the Director if approval is given, or by the Tribunal *if* the Director's decision is appealed. They are accordingly unable to prove that either of the defendants has subjected them, or will subject them, to any of the harms for which the tort claims seek redress.

[36] It is not in the interests of justice to require a trial where the evidentiary record reveals that the damage claims have no chance of success.

[37] It is possible, however, that they may he wronged by one or more of the defendants committing a tort in the future when and if the Fairview Wind Project is either given approval and/or constructed. For that reason the *claims* are being dismissed without prejudice to the plaintiffs' rights to advance the same and other claims in the future in relation to this venture.

Nuisance

[38] **The** nuisance claim as outlined in the statements of claim are that the industrial **wind** turbines will create a nuisance that will cause the plaintiffs to suffer loss and damage, which include pecuniary losses such as reduction in the value of the plaintiffs' properties and non-pecuniary losses, including special damages, anxiety and worry, annoyance, inconvenience, loss of comfort and enjoyment of a direct and substantial character, and loss of enjoyment of normal use of their property. The plaintiffs allege that the subject premises will be unreasonably, substantially, and permanently interfered with.

[39] In order to form an actionable wrong, a nuisance claim can be founded on unreasonable interference with the use and enjoyment of land, or an interest in land: *St. Pierre v. Ontario (Minister of Transportation and Communications),* [1987] l S.C.R. 906, at para. 10 *[St. Pierre].* As discussed in ***St.*** *Pierre, the* interference *may* also take the form of physical injury to the land, which is not the type of nuisance being alleged by the plaintiffs in this case. They allege substantial and permanent interference of the former type, sometimes described as "amenity nuisance". The difference between physical damage nuisance and amenity nuisance was discussed at some length in *Smith v. Inco Limited,* 2011 ONCA 628, 107 O.R. (3d) 321, at pares. 42-47 *[Inca].* The court adopted, at para. 42, the definition of private nuisance set out in *St. Pierre:*

> **A person, then, may** be said to have **committed the tort of private** nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or of an interest in land, where, in the

> light of all the surrounding circumstances, this injury or interference is held to be unreasonable.

[40] The test for nuisance was articulated in *Antrim Truck Centre Ltd. v. Ontario (Transportation),* 2011 ONCA 419, 106 O.R. (3d) 81, at para. 80. and confirmed by the Supreme Court of Canada (2013 SCC 13), at para.18. Adopting the definition from Fleming *(The Law of Torts,* 9lh ed. (Sydney: The Law Book Company, 1998) at p. 466, to constitute illegal nuisance, "the annoyance or discomfort must be substantial and unreasonable". The test requires a two-part analysis, with the threshold aspect requiring that the plaintiff show that the interference is substantial. The court noted in *Antrim,* at para. 82, that at this stage of the analysis, claims that disclose no actual interference will be excluded.

[41] Given that the wind turbines have yet to be erected, the only "substantial interference" that the plaintiffs can point to at this point is the impact that the publication of the Notice of Draft Site Plan has had on their land values and the saleability of their properties. Although the allegation exists in the claim that the wind turbines as proposed will create a nuisance caused by noise/sound, vibrations, light flicker, and the resultant environmental impacts including those of physical and psychological health, these future potential impacts are speculative at this point because the plaintiffs are unable to prove what, if anything, will be approved by the Director. While it is not disputed that there is expert evidence advanced by the plaintiffs which opines that if the Fairview Wind Project goes ahead as proposed it will exceed the noise regulations permitted under the Regulation, until the Director's decision is known, or the Tribunal's decision following appeal is known, the final form and specifications of the Project remain unknown.

[42] That being the case, common sense dictates that it is impossible to measure the potential environmental impacts with any certainty and, accordingly, impossible to engage in an analysis of whether the nuisance concerning the plaintiffs will be substantial and unreasonable. Not only must the interference be an actual interference so that its impact can be measured, but it is literally impossible to apply the test for nuisance based on amenity interference in circumstances where the anticipated or expected harms are subject to change. The second part of the test requires the court to engage in a balancing of the gravity of the harm and the utility of the defendant's conduct; a consideration that looks at four factors including the severity of the interference: *Antrim,* at para. 83. Where that severity has yet to materialize, the analysis is academic at best and could never result in a finding of nuisance.

[43] That leaves open the question of whether a trial is necessary to determine whether a purely economic loss is compensable in these circumstances. I have determined that a trial is unnecessary, as this is strictly a question of law that must be answered in the negative.

[44] The moving parties rely on *Shuttleworth v. Vancouver General Hospital,* [1927] 2 D.L.R. 573 (B.C.S.C.), for the proposition that the mere fact of depreciation, without being accompanied by any legal wrong, cannot found an action. In that case the plaintiff alleged that an isolation hospital for the treatment of infectious diseases would constitute

a nuisance and create a decline in the value of his property. After determining that the plaintiff was unable to make out a claim in nuisance, the court stated, at para. 6:

> **... Evidence was led by plaintiff to shew that, in the opinion of real estate men, the value of plaintiffs property has been depreciated by the erection of the Isolation Hospital. But if depreciation has taken place the only reason given before me is the existence of the fear of infection. It being my view that this does not per se constitute a ground• for an action such as this, it follows that such depreciation — assuming it proven — has not been occasioned by any legal wrong. The mere fact of depreciation cannot found an action. The act complained of must be both tortious and hurtful. Pearce & Meston on Nuisances, p. 13 Fitz Gibbon, L.J. in the passage cited supra expressly states that depreciation of property accompanying a sentiment of danger will not without more give a cause of action.**

[45] **The plaintiffs argue that *Shuilleworth* is authority for their argument that a claim in nuisance can exist for the future Fairview Wind Project if the plaintiffs can prove wide-spread belief of the damages and that the belief is well-founded in fact. I disagree with this characterization of *S'hurdeworth.* The court in *Shuttleworth* was not dealing with a potential future harm, but rather with the allegation that the hospital presently posed a danger of infection to members of the plaintiffs household. Unlike the case before this court, the hospital was in operation at the time of the hearing. *At* para. 6, the court stated:**

> **In the absence of direct testimony, I cannot impute belief of the likelihood of infection to members of the plaintiffs household to any qualified physician. But the cases cited shew plaintiff must go further and prove not only wide-spread belief but that such belief must be well-founded in fact. He has failed to produce such proof.**

Thus, the court in *Shuttleworth* was faced with a gap in the evidence that may have been capable of proof had it been adduced; here we are faced with a gap in the evidence that is not yet capable of proof because the anticipated nuisance has not yet come to fruition.

[46] **The moving parties also rely on *Inco, supra,* for the proposition that a claim for loss of property value based solely on public concerns about a future potential impact is not sustainable. *Inco* differs from the case before me in that the type of nuisance claimed in *Imo* was based on actual physical injury to land caused by the deposit of nickel particles over time, as opposed to an amenity nuisance. In allowing the appeal, the court in *Inco* found the trial judge erred in finding that the nickel particles in the soil caused actual, substantial, physical damage to the claimants' lands, as *the* plaintiffs were unable to show that these particles caused actual harm or at least posed some realistic risk of actual harm to their health and well-being. Fifteen years after Inco stopped operating the refinery, public concerns about the potential health effects of the nickel in the soil negatively impacted the property values of the land in question. Even with proof of a decline in value caused by these public concerns, the court found that without actual, substantial, physical harm, the nuisance claim as framed by the plaintiffs could not succeed: at para**

67. By the same reasoning, in this case the plaintiffs, unable as they are to prove substantial and unreasonable interference with their properties, are unable to recover damages for the decline in value.

[471 The plaintiffs rely on para. 57 of *Inca* **for the proposition that the law recognizes that there can be a claim for future harms. In the referenced paragraph the court stated "it was incumbent on the claimants to show that the nickel particles cause actual harm to the health of the claimants** *or at least posed some realistic risk of actual harm* **to their health and well-being" (emphasis added), Again, with respect, I disagree with counsel's interpretation of this statement. What the court was referring to was the standard of proof required to prove physical harm to land, the branch of nuisance that we are not concerned with in this case, which could include "realistic risk of actual harm" to the property owner's health. The right to occupy property without harm to one's health is considered part of the bundle of rights associated with one's private property. The plaintiffs agree that their claim does not concern itself with this branch of nuisance. As pointed out by the court in** *Inc°* **at paras. 45 and 46, where it quoted from** *St. Helen's Smelting Co. v. Tipping* **(1965), 11 H.L.C. 642, there is a fundamental difference between the two types of nuisance. Injury to property is less tolerable than interference with enjoyment caused by competing interests of neighbours. What I understand the court in** *Imo* **to be saying in the passage referred to above is that, where it can be proven on the balance of probabilities that there is a real risk of harm posed by the threat of a health concern, that may be sufficient to establish material injury to property. The court was not saying that one can claim damages now for an alleged nuisance that may or may not transpire. Contrary to what the plaintiff argues, the court in** ***Me°*** **makes quite clear at para. 59 that future, potential nuisance claims are undesirable:**

> **The approach followed by the trial judge effectively removes any need to show that Inco's operation of its refinery caused any harm of any kind to the claimants' land. It extends the tort of private nuisance beyond claims based on substantial actual injury to another's land to claims based on concerns, no matter when they develop and no matter how valid, that there may have been substantial actual injury caused to another's land. On this approach, nuisance operates as an inchoate tort hanging over a property to become actionable, not by virtue of anything done to the property by the defendant, but because of public concerns generated many years after the relevant events about the possible effect of the defendant's conduct on the property.**

[48) The plaintiffs also rely on *Ladd v. Vale Canada Lid,* **2012 ONSC 6498, [2012) O.J. No. 5441, where the plaintiff successfully defeated a motion for summary judgment in an action grounded in strict liability, negligence and nuisance, where she alleged that the defendant had caused soil contamination that resulted in a reduction in the value of her property. Again, the facts differ from the case before this court because Ladd had evidence that may have led the trial judge to a finding of nuisance created by** *the* **presence of contamination in the soil and the water and, consequently, that she had suffered a major reduction** in property **value as a result. The court found that there was an issue**

requiring a trial as to whether the tort of nuisance, among the other alleged torts, had occurred. In the case of the Fairview Wind Project, although there is currently evidence of potential damage if the Project is erected as proposed, there is no current prospect that the plaintiffs will be able to establish the necessary elements of the tort of nuisance for the reasons previously explained.

[49] The plaintiffs have advanced the argument that even before environmental or health risks have an opportunity to exist, the mere publication of the statutorily-required notices of the Fairview Wind Project interfered with the use and enjoyment of their properties and consequent decline in property value. It is not alleged that the defendants failed to follow any of the statutory requirements related to the notice provisions of the public consultation process. It is impossible, in my view, to sustain an action for nuisance related solely to the publication of the Draft Site Plan. It remains that the only claim that the plaintiffs may have been able to pursue at trial would be that related to the economic impact on their properties created by the publication of the Draft Site Plan. For the reasons explained above, the law does not allow such a claim within the tort of nuisance.

(50] A trial is unnecessary. There is no genuine issue regarding the damage claim in nuisance.

[51] The plaintiffs' allegations with respect to negligence relate to wpd's decision to announce the Fairview Wind Project prior to performing the necessary studies to determine the effects of the Project on the environment and on the health of the plaintiffs as neighbouring land owners. The basis of the plaintiffs' claim for negligence is the failure to carry out the necessary studies, and failure to warn the plaintiffs of the prospective risks of the Project. It is alleged that these two failures caused the plaintiffs to suffer their current loss of property value, and in future. will continue to impact on their use and enjoyment both financially and by virtue of health-related problems. It was the public announcement of the Project, in circumstances where there was a breach of the duty of care, that triggered the plaintiffs' damages, according to the claims.

[52] For greater certainty, the specific allegations of negligence set out in the claims are as follows:

The plaintiffs state that wpd:

(a) failed to study the effects of the industrial wind turbine arrays;

(b) failed to warn of the risks from its operation;

(c) breached its/their duty of care to the plaintiffs;

(d) failed to take measures to prevent the noise/sound from causing physical interference with the plaintiffs' properties

> in what amounted to a trespass against the plaintiffs' properties.

[53] In respect of each plaintiff. the claims allege that the reduction in value that followed the announcement of the proposed Fairview Wind Project was immediate and substantial. As this court understands it, the plaintiffs' claim is that, had the defendant carried out the necessary studies, the Fairview Wind Project would never have developed to the point of publication and therefore the property values would not have been adversely affected by the publication of the Notice of Draft Site Plan. The alleged breach of a duty to warn and the relationship of such breach to a decline in property values is more difficult to understand,

[54] The moving parties argue that the principles of negligence do not extend to a situation such as this one.

[55] The duty of care, as alleged, is that the defendants should have carried out the health studies prior to announcing the Project, and further that the defendants should have warned the plaintiffs of the health risks posed by the Project prior to announcing it.

[56] As in any negligence claim. the onus is on the plaintiffs to show that a duty of care was owed to them, and that the defendants have breached the required standard of care. Since the plaintiffs allege that this duty arose prior to the publication of the Notice of Draft Site Plan, both the duty and standard of care will be examined in that time frame,

[57] Do the circumstances of this case disclose sufficient proximity to justify the imposition of liability for negligence? In *Cooper v. Hobart,* 2001 SCC 79, [2001] 3 S.C.R. 537, at para. 30, the Supreme Court of Canada confirmed the manner in which courts are to approach the duty of care:

> In brief :compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the Anns analysis is best understood as follows. At the first stage of the Arms test, two questions arise: (I) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship **between the plaintiff and the** defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima face duty of care arises. At the second stage of the Anns test, the question still **remains whether there** *are* residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.

[58] **Section 15 of the Regulation contains detailed provisions regarding who is to be involved in the consultation process at the pre-approval stage of the REA process, circumscribing those who must be included in the notice provisions based upon proximity to the project location, among other criteria. It also sets out the rules by which the notice must be published. For this reason, the defendants are given guidance in ascertaining those individuals who are likely to be affected by any wrongdoing, and accordingly who the defendants should have in mind as individuals with whom they have sufficient proximity to cause harm as a result of any tortious behaviour on their part. At the time when wpd was assembling the documents and studies required by the Regulation, it did so with a view to fulfilling the requirements of the legislation in part by giving notice to potentially affected persons. The persons to whom a duty of care is owed is prescribed by the legislation. That a duty of care could arise explicitly or by implication from a statutory scheme was confirmed by the Supreme Court of Canada in** *R. v. Imperial Tobacco Canada Ltd.,* **2011 SCC 42, [2011] 3 S,C.R. 45, at para. 43.**

[59] **And even if there were no legislative requirement detailing to whom notice must be given, in my view those property owners who live in the area of the Project would fall even within the most basic of frameworks that ground a duty of care. As set out** *in Donoghue v. Stevenson,* **[1932] A.C. 562 (HI.) at pp. 580 — 81:**

> **Who then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that ought reasonably to have them in contemplation as being so affected when 1 am directing my mind to the acts or omissions which are called in question.**

[60] **Accordingly, I agree with the plaintiffs that imposing a duty of care on the defendants at the pre-approval stage even prior to the Notice of Draft Site Plan does not open up the "spectre of unlimited liability" as referred to in** *Canadian National Railway Co. v. Norsk Pacific Steamship Co.,* **[1992] 1 S.C.R. 1021, at para. 258. Rather, as explained by the Supreme Court of Canada in** *Hill v. Hamilton-Wentworth Pollee Services,* **2007 SCC 41, [2007] 3 S.C.R. 129** *[Hill],* **at para. 29:**

> **The most basic factor upon which the proximity analysis fixes is whether there is a relationship between the alleged wrongdoer and the victim, usually described by the words "close and direct". This factor is not concerned with how intimate the plaintiff and defendant were or with their physical proximity, so much as with whether the actions of the alleged wrongdoer have a close and direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed.**

[61] **Along with proximity is the requirement that the plaintiffs demonstrate foreseeability. In this case the plaintiffs need to demonstrate that it was foreseeable that publication of the Notice of Draft Site Plan could have immediate, negative consequences for the land values of the individuals required to receive such notice. Based upon the plethora of studies presented by the plaintiffs, it could be possible for a court to determine that wpd**

would have knowledge of these or like studies and should have foreseen that the surrounding landowners, i.e. the plaintiffs, would fall victim to the public perception that properties in proximity to a wind turbine are less desirable than comparable properties not located near a wind turbine.

[62] Accordingly, I conclude that the relationship between the plaintiffs and the defendant wpd discloses sufficient foreseeability and proximity to establish *a prima facie* duty of care. This finding does not extend to the Beanie companies, as they have no duty of notice prescribed by the Regulation.

[63] In the event that this is a not a case in which the duty of care falls within a recognized category of recovery, the next issue to determine is whether there are any policy considerations which should operate to negate or limit that duty of care: *Hill, supra,* at para. 20; *Cooper* v. *Hobart, supra,* at paras. 30 and 39. Again, the policy consideration raised by the defendants is that imposing a duty of care in these circumstances would expose them and other similarly situated developers to indeterminate liability. As previously explained, the circumstances of this case do not lend themselves to such a concern due to the requirements of the Regulation. In such cases, where the identity of the potential plaintiffs is known to the defendants, the courts have found that this particular policy concern does **not** arise: *Hill,* supra, at para. 60; *Hercules Management Ltd, v. Ernst & Young,* [1997] 2 S,C.R. 165, at para. 37.

[64] However, while the plaintiffs may be able to establish a duty of care prior to the Notice being issued, it is not possible for them to prove a breach of the standard of care. In *Mustapha v. Culligan of Canada Ltd.,* 2008 SCC 27, [2008] 2 S.C.R. 114, the Supreme Court of Canada stated, at para. 7, that "(t]he second question in a negligence action is whether the defendant's behaviour breached the standard of care. A defendant's conduct is negligent if it creates an unreasonable risk of harm."

[65] The argument of the plaintiff is that the Project does create an unreasonable risk of harm, about which the defendants failed to warn them, and about which the defendants failed to inform themselves of by carrying out the proper studies. But as previously stated, those risks remain =ascertained at this stage of the project. The plaintiffs state that they can demonstrate that the defendants have breached the standard of care because **there** is =contradicted evidence that the Project is going to exceed the 40 dBA regulatory standard and that a number of adverse health effects will result. They state that this is a breach of s. 14 of the *EPA,* **which provides** that no person shall discharge into the environment any contaminant if the "discharge causes or may cause an adverse effect". Relying upon *Canada v. Saskatchewan Wheat Pool,* [1983] 1 S.C.R. 205, the plaintiffs point to this evidence of breach of a statutory provision as *prima facie* evidence of negligence. Again, this argument involves the court making the **leap of logic that the** mere threat of a prospective statutory breach should result in a finding of negligence. This runs counter to **every principled application** of negligence law, as no remedy in damages can be awarded for a breach of standard of care that has not yet occurred. So to **the extent that** the plaintiffs are claiming damages in negligence that flow from the defendants' failure to perform the necessary **studies into the health** risks of the Project and failure to give sufficient warning to the plaintiffs that their health is at risk. this claim

is not currently sustainable — their health has not yet been placed at risk and may never be placed at risk: For the same reason, the circumstances do not fit within the rubric of a duty to warn of the risk of danger such as recognized in *Rivtow Marine Ltd v. Washington Iron Works, [197 4]* S.C.R. 1189. In that case the crane that posed the hazard was constructed and in operation at the time when the defendants knew of, but failed to warn of, the safety hazard posed by the manufacturer's negligence. Again, here it is only a speculative risk given that no approvals have been given by the MOE.

[66] The plaintiffs are unable to show a breach of the Regulation, and there is no allegation that the defendant failed in its duty to follow the procedure outlined m the Regulation for the giving of Notice and the public consultation process. The plaintiffs have failed to show that the standard of care related to any of the required steps prior to or at the time of issuing the notice has been breached. There is also a significant flaw in the overall argument, which is premised on the idea that if wpd had done studies reflecting the same findings as the plaintiffs' studies. the Project would never have moved forward and the plaintiffs would not have suffered damages. This ignores two things: first, there is no evidence that wpd would have changed the Draft Site Plan in this hypothetical fact situation, and second, it supposes that no decline in value would have occurred if the "proper" studies had been undertaken. Yet it is clear from the evidence filed by the plaintiffs that market values of real property are affected by public perception, and it is the threat of erection of the wind turbines themselves, not the threat of wind turbines that *may* exceed statutory requirements, that have resulted in the losses currently being experienced by the plaintiff's.

(67) In the alternative, the plaintiffs argue that, if the damages claimed are characterized as being purely for economic loss caused by the diminished property values, the law allows for recovery of pure economic loss if a proximate relationship exists between the tortfeasor and victim. They rely on *Canadian National Railway Co. v. North Pacific Steamship Co., supra, at* para. 258, where McLachlin J. stated:

> In summary, it is my view that the authorities suggest that pure economic loss is prima facie the recoverable where, *in addition to negligence and foreseeable loss,* there is sufficient proximity between the negligent act and the loss. Proximity is the controlling concept which avoids the spectre of unlimited liability. Proximity may be established by a variety of factors, depending on the nature of the case. To date, sufficient proximity has been found in the case of negligent misstatements where there is an undertaking and correlative reliance *(Medley Byrne),* where there is a duty to warn *(Rivtow);* and where a statute imposes a responsibility on a municipality towards the owners and occupiers of land *(Kamloops).* But the categories are not closed. As more cases are decided, we can expect further definition on what factors give rise to liability for pure economic loss in particular categories of cases. In determining whether liability should be extended to a new situation, courts will have regard to the factors traditionally relevant to proximity such us the relationship between the parties.

> **physical propinquity, assumed or imposed obligations and close causal , connection. And they will insist on sufficient special factors to avoid the imposition of indeterminate and unreasonable liability. The result will be a principled, yet flexible, approach to tort liability for pure economic loss. It will allow recovery where recovery is justified, while excluding indeterminate and inappropriate liability, and it will permit the coherent development of the law in accordance with the approach initiated in England by Hedley Byrne and followed in Canada in** *Rivtow, Kamloops* **and** *Hofstrand.* **[Emphasis added).**

[68] **Accordingly,' recovery for pure economic loss must still be accompanied by proof of negligence. In** *Norsk,* **negligence was established on the part of a barge owner, Norsk Pacific Steamship Company, when the barge collided with a railway bridge owned by Public Works Canada and used by Canadian National Railway Company.** *Norsk* **is a case entirely different from that presented by the plaintiffs, since it involved the question of contractual relational economic loss that arose when CN sued Norsk for the monetary loss caused by its inability to use the railway line during the period of repair. the use of which it had contracted with Public Works to have. However, the point is that the law does recognizes that economic loss is recoverable in tort in some cases. But in order to recover damages** for economic **loss, the law is clear that one must prove that there has been a breach of a standard of care, even if no injury to the person or one's property has yet occurred. Accordingly, in the other case relied upon by the plaintiffs,** *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd.,* **[1995] 1 S.C.R. 85, it was the negligent construction of a building which led to the issue of whether a general contractor who was responsible for the faulty construction could be held tortiously liable to a subsequent purchaser of the building, who was not in contractual privity with the contractor. Likewise, in** *Hughes v. Sun Beam Corp (Canada)* **(2002), 61 O.R. (3d) 433, where an allegedly defective smoke detector had been produced and was being used, the Court of Appeal refused to strike out the plaintiff's negligence claim on a Rule 21 motion because of a lack of clarity in the law surrounding the rationale for compensating dangerous versus non-dangerous defects.**

[69] **The plaintiffs rely upon para. 26 of** *Sunbeam,* **where Laskin, J.A. stated:**

> **The underlying rationale for permitting recovery for pure economic loss in a case like** *Winnipeg Condominium* **is safety, the prevention of threatened harm. By compensating the owner of the dangerously defective product for the cost of repair, the law can encourage the owner to make the product safe before it causes** injury to persons **or property. By contrast compensation to repair a defective but not dangerous product will improve the product's quality but not its safety.**

[70] **The plaintiffs say that this case supports the proposition that the law encourages prevention of the threatened harm. But allowing compensation in order to avoid risk of**

harm where that risk is present because of a breach of a standard of care is completely different from awarding compensation to place the plaintiffs in a position that they would have been in had the harm not occurred, when there has not yet been any negligent behaviour causing the harm in question.

[71] Further, I find that the plaintiffs' claim does not fall within any of the five recognized categories that may permit recovery in tort for economic losses: *Norsk,* at para. 31 These are:

1. the independent liability of statutory public authorities;
2. negligent misrepresentation;
3. negligent performance of the service;
4. negligent supply of shoddy goods or structures; and,
5. relational economic loss,

[72] Given that this• court is unable to find any current breach of a standard of *care, a trial* is unnecessary. There is no genuine issue regarding the damage claim in negligence.

Trespass

[73] The plaintiffs allege that *the* **Fairview** Wind Project will create a trespass as a result of the escape of damaging noise/sound, vibration, and light flicker on to the plaintiffs' properties. This claim is clearly prospective, as there is currently no sound, vibration, **or** light flicker yet in existence. The plaintiffs argue that the defendants, in exceeding the statutory requirements, have facilitated a trespass onto the plaintiffs' properties.

[74] The plaintiffs liken this case to that of *Flaunt v. Renfrew Power Generation,* 2011 ONSC 4087, [2011] 0. J. No. 2995, in which the court found on a motion to certify a class proceeding that it was not "plain and obvious" that the statement of claim disclosed no reasonable cause of action. The plaintiffs in *Plount claimed* that the Renfrew Power Generation Inc. had intentionally and continuously trespassed on their land on many occasions by operating **a dam** so as to store water in the lake abutting their property at levels which caused water to erode, and cover, part of the plaintiffs' lands. However, the difference between this case and *Plaunt* is that there was evidence that the water was flooding onto the property owner's lands, and accordingly the court found that if it was the actions of Renfrew Power Generation that caused the level of the lake to rise above a certain elevation, this could be considered a trespass or **nuisance. Until the parameters** of the Fairview Wind Project are finalized, it is speculative to conclude that the defendants will **exceed the statutory requirements,** or that the **plaintiffs could otherwise prove** a trespass.

[75] **In** *Grace v. Fart Erie (Town),* **[2003] 0. J. No. 3475 (S.C.),** at para. **86, the** court quotes from L.N. Klar,let al., *Remedies in Tort,* vol. 3, looseleaf (Toronto: Carswell, 1987) at

para. 12-24, to describe the elements of trespass as including "any direct or physical intrusion onto land that is in the possession of the plaintiff", and that "some form of physical entry onto or contact with the plaintiffs land is essential to constitute a trespass".

[76] Given that one of the primary elements of trespass cannot be proven at this time, a trial is not required to determine any issue relating to the tort of trespass, or whether damages could be awarded for this tort.

Ram& v. Fletcher

[77] A cause of action based on strict liability is set out in the claims as follows:

> The Industrial Wind Facility constitutes a non-natural use of the neighbouring properties and will permit the escape of damaging noise/sound, vibration and light flicker onto the Plaintiffs' Properties.

[78] Like the claim in trespass, this claim is clearly prospective, as there is currently no sound. vibration, or light flicker yet in existence.

[79] The rule in *Rylands v. Fletcher* imposes strict liability for damages caused to a plaintiff's property by the escape from the defendant's property of a substance "likely to cause mischie': *Inca, supra,* at para. 68; *rock v. St. John's Metropolitan Area Board,* [1989] 2 S.C.R. 1181. In *Theo.* the Court of Appeal explained that strict liability *"aims* not at all risks associated with carrying out an activity, but rather with the risk associated with the accidental and unintended consequences of engaging in an activity" (at para. 82).

[80] It may be that when and if the Project obtains regulatory approval the plaintiffs may be able to establish that it presents a non-natural use of property. To this point, however, the publication of the Notice of Draft Site Plan cannot constitute a non-natural use of land for which strict liability could be imposed.

[81] Given that the primary element of strict liability cannot be proven at this time, a trial is not required to determine *any* issue relating to strict liability, or whether damages could be awarded for this tort.

Limitations Argument

[82] Counsel for the Beattie companies raised an important and compelling point in argument: a failure to dismiss the damage claims would mean that this court had accepted that the plaintiffs had discovered, at the time of the issuance of the Notice of the regulatory procedure, that they had a cause of action. Pursuant to s. 5 of the *Limitations Act,* 2002, S.O. 2002, c. 24, Sched. B., an action is discovered on the earlier of

a) the day on which the person with the claim first knew,

i) that the injury, loss or damage had occurred,

ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

iii) that the act or omission was that of the person against whom the claim is made, and

iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

[83] If it is held that the publication of the Notice of Site Plan triggers the cause of action because it was at this early stage that the plaintiffs discovered that they had a claim, such a case would have a significant impact on the commencement date for limitation periods both in cases where a regulatory regime is being followed, and possibly on the issue of discoverability generally. It would mean that future potential plaintiffs would have to ensure that their actions are commenced well in advance of an approval being given by the Minister, since it is common ground that the REA process is a lengthy one that can take many years to complete.

[84] The plaintiffs rely on *Roberts v. Portage la Prairie (City),* [1971] S.C.R. 481, to argue that an original cause of action can arise each day that the tort, in this case nuisance, remains unabated. Again, *Roberts* is distinguishable from the case before the court because the city had constructed and continued to operate its sewage lagoon, which proved to be a nuisance. In the case before the court the nuisance has yet to occur, but allowing the damage claim to go forward would imply that a cause of action exists today and did exist at the time that the notice of Draft Site Plan was published. This is incorrect for the reasons already discussed.

[85] Accordingly, it is necessary to dismiss the damage claims outright, without prejudice as previously stated, instead of imposing a stay.

The Claim for an IniUnctio12

[86] The claims seek against wpd an interim, interlocutory and permanent injunction restraining the construction and operation of all or part of the Fairview Wind Project. The plaintiffs are seeking a *quia limet* injunction based on the alleged nuisance because they seek to prevent the construction of the Project before it starts.

[87] In determining whether an injunction should be granted the court will consider whether: (I) there is a serious question to be tried; (2) the plaintiff will suffer irreparable harm if the injunction is not granted; and, (3) the balance of convenience favours the granting of the injunctive relief sought: *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311. The Supreme Court of Canada in *Operation Dismantle v. Canada,* [1985] 1 S.C.R. 441, at paras. 34-36, affirmed the principle that, in order for a party to be granted a

quia timet injunction, "there must be a high degree of probability that the harms will in fact occur". The words "high degree" differ from those used in a much earlier case, *Attorney-General (Boswell) v. Rathmines & Pembroke Joint Hospital Board* [1904] 1 Ir. Ch. D. 161, at pp. 1712, where the court noted that:

> To sustain an injunction the law requires proof by plaintiff of a well-founded apprehension of injury, proof of actual and real danger -- a strong probability almost amounting to moral certainty that if the Hospital be established, it will be an actionable nuisance.

[88] The degree of probability that would amount to "moral certainty" is not measurable in any useful terms, in my view, and therefore 1 adopt only the term "high degree of probability" used in *Operation Dismantle.*

[89] Accepting that the evidence of harm has been unchallenged and therefore it must be taken as a given that the wind turbines *if constructed as proposed in the Draft Site Plan* will cause harm, the real question for this court is whether there is an issue requiring a trial as to whether the REA process will produce an outcome exactly like, or even worse from the perspective of being an actionable nuisance, than the Draft Site Plan. The occurrence of the harm will only transpire when and if the REA process goes in wpd's favour. Is there a high degree of probability that the final parameters of the Project will be the same as, or "worse" than, the proposal presently being evaluated by the MOE?

[90] How could a trial ever answer that question? A trial judge will have no better information than this court presently does about the REA process and the Director's decision. The court would he speculating on how the Minister would deal with the application, or how the Tribunal would alter that decision on appeal, if at all. The courts will not impose injunctive relief where there is no way of assessing whether the future harm will transpire.

[91] The plaintiffs have argued throughout that their common law claims can run separately from the REA process and they do not have to wait for the outcome of the regulatory process to seek relief. While this court agrees with that as a proposition of law, awaiting the Director's answer to the application is a practical necessity within the context of this lawsuit for all of the reasons set out above.

[92] The plaintiffs presented two cases from the United States: *Sowers v. Forest Hills Subdivision,* [2013] 129 Nev. No. 58609 (Sup. Ct, Nev.) and *Burch v. Nedpower Mount Storm, LLC,* 647 S.E. 2d 879 (Sup. Ct. W. Va). In *Sowers,* on appeal the court confirmed the trial judge's order of a permanent injunction to enjoin the construction of a proposed wind turbine on the grounds that it constituted a nuisance, finding that it would substantially interfere with the neighbouring residents' enjoyment and use of their property. In reaching his decision, the trial judge was able to conduct a site visit to the location of a comparable wind turbine. Based on this evaluation, the trial judge was able to make findings based on the final form of the project, findings with which the appellate court agreed. This court is not in the same position; *as* stated above. it cannot yet know the final specifications of this project and how they will impact on any nuisance *claim*

[93] In *Burch,* the Public Service Commission was the authority responsible for approval of wind turbines, and notably, is not an environmental review tribunal. The trial court issued an injunction, but that injunction was sought after the Public Service Commission process had reviewed the matter and had reached a decision.

[94] When considering wind turbine cases from another jurisdiction there may very well be different considerations than facing Canadian courts, such as statutory definitions of nuisance, a different regulatory regime, or a different test for a *quia timer* injunction. However, I find that it is not necessary to delve into an in depth consideration of such issues given the very obvious distinction between the facts of *Sowers* and *Burch,* and the case presented by the plaintiff's.

[95] Accordingly, a trial is not necessary to determine whether the plaintiffs, at this stage, can meet the test for a *quia time! injunction.*

[96] This court orders that judgment shall issue in accordance with paragraphs 5 and 6 of these Reasons. If the parties are unable to agree upon the costs of these motions, they may file brief Arritten submissions not exceeding 3 pages in length plus a Bill of Costs, on a timetable agreed upon between counsel but with all submissions to be filed by no later than May 31, 2013, through the office of the judicial assistants in Barrie.

HEALEY J.

Date: April 22, 2013