

Wind from the North: Wind Litigation in Ontario, Canada

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Overview

- **Ontario wind energy legal regime**
- Anti-wind appeals:
 - Human health grounds
 - Constitutional breach?
 - Environmental grounds
- What's ahead?

Background:

Green Energy Policy in Ontario

- Long Term Electricity Plan:
 - Phase out coal
 - By 2025, about half of Ontario's installed capacity will be renewable
- Strong fear of wind turbines in rural communities, esp. in southwestern Ontario

Green Energy Legal Framework

- *Green Energy & Economy Act, 2009*
 - *Green Energy Act, 2009* established
 - Conservation, energy demand management & efficiency
 - Home efficiency disclosure
 - *Electricity Act*
 - Feed-in-Tariff Program
 - *Environmental Protection Act*
 - Renewable Energy Approvals (“REA”)

Environmental Protection Act

- Renewable energy approval (REA) from MOECC (s. 47.3(1))
- Director's discretion, if in the public interest (s. 47.5(1))
- Overrides local siting laws

Environmental Protection Act

- O. Reg. 359/09
 - REA application
 - Public consultation
 - 500 m. set-backs
 - Extensive documents & studies
 - E.g., bird, bat studies; natural heritage studies, construction & decommissioning plans

Environmental Protection Act

- REA appeals (s. 142.1)
 - Any Ontario resident may appeal
 - Appeals heard by the Environmental Review Tribunal (“ERT”) in 6 months
 - Grounds (s. 142.1(3))
 - Prove serious harm to human health; or
 - Prove serious and irreversible harm to plant life, animal life or the natural environment

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Human Health

- *Erickson v. Director, Ministry of the Environment* (2011)
 - First anti-wind appeal to reach the ERT
 - Complex evidentiary questions
 - Grounds included:
 - the renewable energy project will cause negative human health effects (tower collapse, blade failure, ice throw, vibration, shadow flicker, noise)
 - HELD: Appellants did not prove that serious harm to human health would occur

Human health summary

- Turbines make noise
- No direct physical harm
- Some people find them annoying and frightening
- Fear, annoyance can affect sleep
- Sleep loss can affect health
- Powerful nocebo effect
- Experts?

Annoyance levels?

- Health Canada study:
 - Statistically associated with increasing levels of wind turbine noise:
 - annoyance towards several wind turbine features (i.e. noise, shadow flicker, blinking lights, vibrations, and visual impacts)
 - Not associated with exposure to wind turbine noise:
 - Self-reported sleep, self-reported illnesses, self-reported perceived stress and quality of life
 - Note: no objective, double blind testing

Human Health

- *Chatham-Kent Wind Action Inc. v Director, MOE* (2012)
 - “Nocebo” effect not enough
- *Platinum Produce Company v Director, MOE* (2014)
 - Both workplace and residential exposure
- *Fata v Director, MOE* (2014)
 - Weather radar

Other health objections

- *Pitt v Director, MOE* (2014)
 - Sky divers might land on turbines
- *County of Lambton v Director, MOE* (2015)
 - Drivers might crash into transmission poles
- *Municipality of Clarington v Director, MOE* (2015)
 - Change in wind might disturb contaminated dust next door

Constitutional breach?

- Is making opponents prove serious harm unconstitutional?
- *Canadian Charter of Rights and Freedoms*, Section 7

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Constitutional breach?

- *Bovaird v Director, MOE (2013)*
 - ERT upholds statutory test
 - While some find turbines annoying, subjective annoyance does not infringe personal security to constitute a breach of the *Charter*.
 - Possible risk of harm (without known, pre-existing harm) not sufficient to engage s.7

Constitutional breach?

- *Cham Shan Temple v Director, MOE (2015)*
 - Wind farm does not violate the freedom of religion of worshippers at a Buddhist temple 12 km away, even if pilgrims walking to the temple could be distracted from their devotions.
 - “It is not the purpose of the *EPA* to prevent every change in the *status quo* so as to protect an idealized concept of a silent and beautiful environment. ... [T]here is not sufficient objective evidence ... that the Project will cause more than a trivial or insubstantial interference with the ... pilgrimage.”

Constitutional breach?

- *Dixon v Director, MOE* (Div. Ct)
 - Divisional Court upholds statutory test
 - The statutory test essentially codifies the same test that a s.7 *Charter* claimant must demonstrate: a serious and profound effect on a person's physical or psychological integrity
 - Fear/ annoyance not enough

Environmental Grounds

- *Bain v Director, MOE* (2014)
 - Risk to turtles, birds, cattle?
 - Evidence of "serious and irreversible harm to animal life" must be site-specific, species-specific, and quantifiable

Environmental Grounds

- *Lewis v Director, MOE (2014)*
 - Disturb a bald eagle nest?
 - No adequate evidence that the eagles would be disturbed. But ERT recommended that the proponent defer or relocate two turbines within 800 metres of the nest

Environmental Grounds

- *Prince Edward County Field Naturalists v Ostrander Point GP (2015) (ONCA)*
 - Extensive claims of serious threat to natural environment (birds, bats, butterflies, turtles, plants, and the alvar ecosystem) from proposed wind farm in an environmentally sensitive area
 - Held: no proof of serious, irreversible harm from the turbines

Environmental Grounds

- *Ostrander* (con't)
 - But long term use of the road to the turbines would cause serious and irreversible harm to Blanding's turtles in the immediate area, despite ESA permit.
 - Ontario Divisional Court overturned ERT decision
 - Court of Appeal restored it
 - Back to ERT to decide if closing the road will do enough to prevent serious and irreversible harm to local Blanding's turtles.

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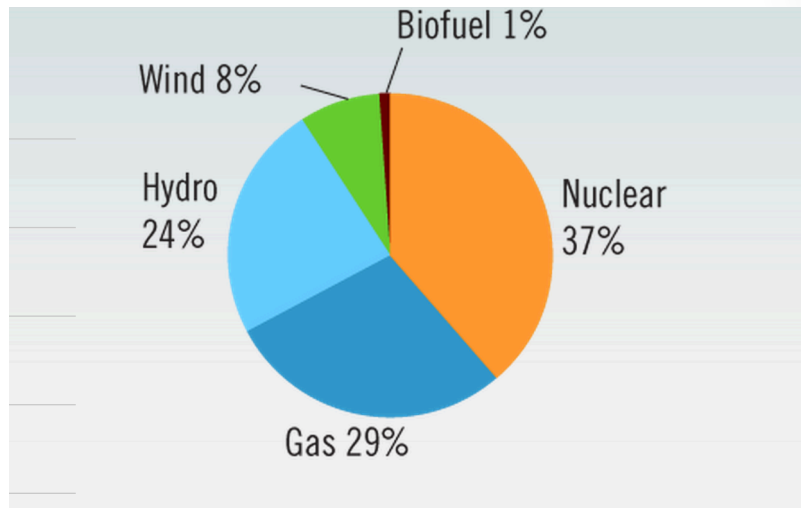
What's ahead?

- May 2014 election – Liberal majority
- Green Energy Act safe for now
- Wind projects opening

What's ahead?

- Claims that proximity to wind projects decrease property values have been unsuccessful (*Kenney v MPAC; Wiggins v Wpd; Wrightman v Director, MOE*)
- ERT appeals starting to settle down
 - No successful challenge on human health
 - Limited success on environmental grounds (*Ostrander*)
 - Dim prospects for constitutional challenges
 - Tougher approach on “expert” anti-wind evidence (*Bovaird*)

Wind up to 8% of capacity



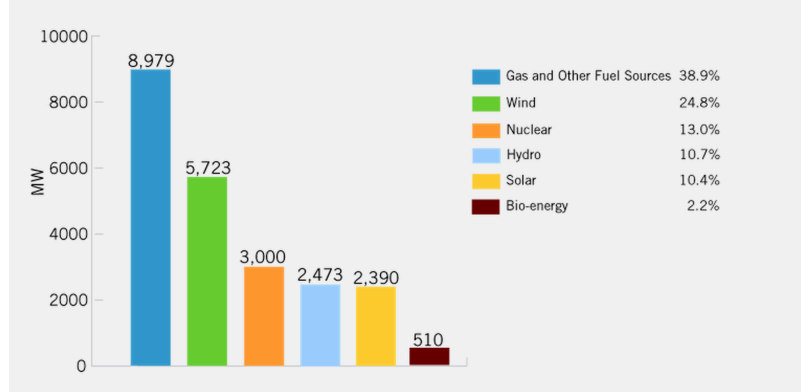
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25% of contracted generation

Total Contracted Generation, First Quarter 2015

Generation capacity under IESO contract in the Ontario transmission and distribution grid.



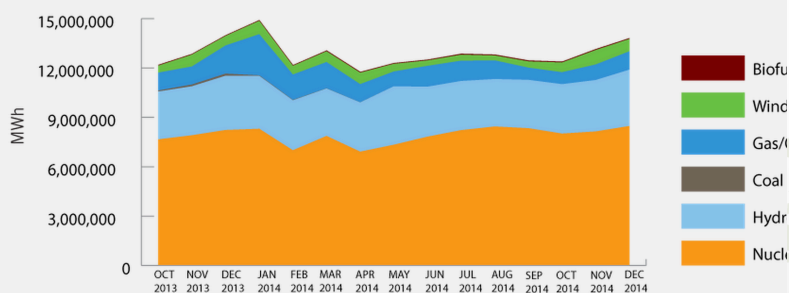
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Wind up to 4% of energy

Monthly Energy Output By Fuel Type

Monthly values of total output (in MWh) for all Ontario generators registered as a market participant, in from previous years are found in the tables below.



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Conclusion

- Ontario is world hotspot for anti-wind litigation
- Has added cost and delay
- Almost all legal challenges unsuccessful
- Wind generation growing rapidly

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Questions?

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