

APPEC Report (Part 2) on Jan 23, 2014 ERT Appeal Hearing on health

APPEC's case is being heard by Justices Nordheimer, Linhares de Sousa and Whitaker of the Ontario Superior Court of Justice (Divisional Court).

To give some background APPEC appealed the Environmental Review Tribunal's Decision of last July (2013) to dismiss APPEC's appeal based on its findings that:

[627] The evidence in this proceeding did not establish a causal link between wind turbines and either direct or indirect harm to human health at the 550 m set-back distance required under this REA.

[628] The evidence in this hearing did not establish that engaging in the Ostrander Point wind turbine project in accordance with the REA will cause serious harm to human health.

[629] For these reasons the Tribunal finds that the Appellant has not established that engaging in the Project in accordance with the REA will cause serious harm to human health

The grounds for appeal are narrow: the Court will only consider whether errors of law were committed by the Environmental Review Tribunal (Robert Wright and Heather Gibbs) in arriving at their decision to dismiss APPEC's case.

However APPEC's grounds are solid. As Eric Gillespie argues the demands of the Environmental Review Tribunal for scientific validation far exceeds the legal test that some people living in the vicinity of industrial wind turbine projects will "more likely than not" experience serious health effects.

This is the first time in the province that a decision by an Environmental Review Tribunal has been challenged in a higher court.

APPEC Cross Appeal Legal Arguments

In his opening statement Eric Gillespie noted that the issue before the Panel is the standard that was applied by the Tribunal. The correct standard has already been identified at previous hearings as the balance of probability. Mr. Gillespie argued that if that standard had been applied in this case it would have been a different decision.

Mr. Gillespie began by noting Dr. Robert McMurtry's credentials, qualifications and experience in the field of medicine. Mr. Gillespie noted that at the present time there is no one anywhere as qualified as Dr. McMurtry to speak to the first branch of the REA appeal test, serious harm to human health.

Mr. Gillespie told the Panel that Dr. McMurtry has provided a case definition in his article "Toward a Case Definition of Adverse Health Effects in the Environs of Industrial Wind

Turbines: Facilitating a Clinical Diagnosis”. This article appears in the *Bulletin of Science, Technology and Society*, an international peer-reviewed journal. Dr. McMurtry acknowledged at the hearing that this case definition has not been validated. Mr. Gillespie noted testimony by Dr. McMurtry that more studies are needed in order to establish scientific certainty. Until these studies are done there is no getting past the balance of probabilities.

Mr. Gillespie noted that Dr. McMurtry’s case definition formed the basis for the review of witnesses called by APPEC, including many at the hearing today. APPEC called 15 witnesses over the course of 16 hearing days. 11 of these witnesses had lived within 1500 km or less from wind turbines. All of these 11 witnesses began experiencing serious health effects after the wind turbines located nearby became operational. Some of the witnesses experiencing these effects had pre-existing medical conditions which they believe were aggravated by the wind turbines.

Mr. Gillespie referred to the Tribunal’s findings: “The Tribunal accepts the witness’ testimony as entirely credible” and “The Tribunal has no difficulty finding that all the witnesses were credible.” The Tribunal did query evidence of 4 of the 11 witnesses – and issues raised by the Tribunal in that regard raise questions of their own – but that still left 7 witnesses who gave evidence that was accepted by the Tribunal without qualification.

Mr. Gillespie noted that this was not the first time the Tribunal has heard evidence of adverse health effects. At Erickson (2011) the Tribunal made a number of findings among them being that industrial wind turbines can cause harm to human health if placed too close to residences. The theory that wind turbines can cause harm was accepted by that Tribunal. The question, according to that Tribunal, was one of degree. With that foundation already in place, APPEC called Dr. Robert Thorne, Dr. John Harrison and Dr. McMurtry as expert witnesses.

Mr. Gillespie asked the Panel to focus on the fact that Dr. McMurtry’s case definition deals with 3 categories: possible, probable and confirmed. The “probable” category is the one that was applied in this case, i.e., the witnesses called by APPEC. It is APPEC’s position that when you reach “probable” you have reached the balance of probability: it is more probable than not that these individuals have suffered serious harm.

Mr. Gillespie drew the Panel’s attention to the Tribunal decision where it is noted that Dr. McMurtry’s case definition “has admittedly not been validated”. The problem here is the standard of scientific certainty. Validation is a process of raising the bar up to scientific certainty. If the bar had been set at the right level APPEC’s case with respect to the balance of probabilities would have been made.

The question before the Court is: What is the correct standard and was the standard correctly applied?

Judge Nordheimer proposed to Mr. Gillespie that this is the standard the Tribunal has to apply: Dr. McMurtry has a theory but he hasn't proven it. The theory may be right. It may be wrong. That is absolutely the exercise the Tribunal should have been involved in. Mr. Gillespie agreed that Dr. McMurtry has a theory. But by validating the theory one raises it to the level of scientific certainty. Gillespie suggested to Judge Nordheimer that they were discussing the same issue – the concern is where the bar should be set. APPEC's position is that the bar should have been set at the balance of probability.

Judge Nordheimer asked Mr. Gillespie what he was relying on. Mr. Gillespie indicated that he was willing to start with the Supreme Court case mentioned by Judge Nordheimer. Mr. Gillespie noted that this Supreme Court case, like any other case, would be judged on the balance of probabilities.

Mr. Gillespie noted that the theory that these effects can occur has been accepted by the Tribunal (Erickson, 2011). Dr. McMurtry was referring to his case definition at the hearing. But it is important to note that Dr. McMurtry's case theory has been accepted. A Tribunal has agreed that you are going to have these adverse effects. While the theory may not be generally accepted a Tribunal has said the theory has merit.

Judge Nordheimer asked Mr. Gillespie where the Panel will find the Tribunal's references to Erickson and whether other experts of equal qualification have reviewed Dr. McMurtry's article. Mr. Gillespie replied that the article is in an international journal and that one of the requirements for publication is that the article be peer-reviewed.

As noted by Mr. Gillespie, APPEC fully agrees that the theory is not validated. No one has been diagnosed with anything. But as it has already been noted a diagnosis falls into "confirmed". Dr. McMurtry and the Tribunal found 9 of 13 witnesses credible. The majority of witness called by APPEC – 7 of the 11 post-turbine witnesses and 2 of the pre-turbine witnesses – passed muster. That is the balance of probability.

Gilead Power Submissions

Gilead lawyer Darryl Cruz began by noting that everyone agrees that balance of probability applies here. The question is did the Tribunal apply that standard? Mr. Cruz noted that the only standard mentioned in the decision is probability. The Tribunal cites Erickson (2011) and Monture (2012) so they know what to do.

The Tribunal said that you cannot rely on this evidence for their purpose. They had to rely on expert evidence. There is no medically-recognized definition. Health professionals could not rule out other causes and other diagnoses. The Tribunal recognizes this.

That notwithstanding, Mr. Cruz argues that the Tribunal is not looking at scientific certainty alone. The Tribunal is taking evidence of Dr. McMurtry and witnesses into account. The Tribunal accepted the evidence of respondents as to what's happening. With respect to Dr. McMurtry's case definition the Tribunal finds it "a work in progress".

Mr. Cruz told the Panel that the Tribunal is not applying scientific certainty as is seen in the way they handled the evidence. The Panel can presume that the Tribunal is using the right standard if it cites the “balance of probabilities”. The Panel should presume that the Tribunal was operating with the correct standard. The Panel has to presume that the Tribunal knows the standard and that they are using it. There is no reason to review testimony. The Tribunal had the test before it and they refused it.

[Editor’s Note: Contrary to what Mr. Cruz has stated the balance of probability is not “cited” anywhere by the Tribunal in its decision for the ERT appeal on health. The Tribunal does refer to balance of probability in the PECFN portion of the decision (7 times)].

Director (MOE) Submissions

Ms. Davis noted that the key challenges at Erickson (2011) were 550 metre setbacks and audible noise. That Tribunal did acknowledge that people can suffer adverse effects from too much noise. Ms. Davis went on to note that there is nothing in Erickson that heart attacks are caused by industrial wind turbines. The Tribunal found that the burden of proof is not met.

APPEC reply

In reply to comments by the Director (MOE), Mr. Gillespie asked the Panel to draw their attention to the Tribunals’ finding in Erickson that wind turbines can cause harm if placed too close to homes. This theory has been accepted by the Tribunal. It is worth noting as well that Dr. McMurtry’s case definition has not been challenged anywhere by the Tribunal.

The use of the words “balance of probabilities” by Mr. Cruz’s notwithstanding, Mr. Gillespie noted that where we go next is to see what the Tribunal actually did in making that decision. To recall, Dr. McMurtry’s case definition categories are “possible”, “probable” and “confirmed”. To confirm sleep disturbances, sleep studies are needed to rule out alternate explanations. If you want to go above the standard of balance of probabilities to scientific certainty you must then prove these effects.

Mr. Gillespie notes that all of the Tribunal’s comments without exception fall into the “Confirmed” category. When we go to see if the Tribunal actually applied the standard of probability what you will find is that they applied the scientific standard. The Tribunal did not apply the probability standard because they said “look at all these problems”.

The Tribunal erred in law. This can be seen by looking at what they did with the actual evidence before them. Mr. Gillespie noted that APPEC is not asking the Tribunal to prefer one witness. APPEC is asking that the correct legal standard be applied – “knocking out” scientific certainty and applying the standard of balance of probabilities to what is left.