Environmental Review Tribunal
Tribunal de l'environnement

ISSUE DATE: March 4, 2015 **CASE NO(S).:** 14-065 to 14-067

PROCEEDING COMMENCED UNDER section 142.1(2) of the *Environmental Protection Act,* R.S.O. 1990, c.E.19, as amended

Appellant:	Corporation of the County of Lambton (ERT File No.14-065)
Appellant:	Kimberley Bryce (ERT File No. 14-066)
Appellant:	Richard Lance Bryce (ERT File No. 14-067)
Approval Holder:	Suncor Energy Products Incorporated
Respondent:	Director, Ministry of the Environment and Climate Change
Subject of appeal:	Renewable Energy Approval for Cedar Point Wind Power Project
Reference No.:	6914-9L5JBB
Property Address/Description:	Substation located at the southwest corner of Cedar Point Line and Fuller Road. Other infrastructure located at various locations.
Municipality:	Municipality of Lambton Shores, Town of Plympton-Wyoming and Township of Warwick
Upper Tier:	County of Lambton
ERT Case No.:	14-065/14-066/14-067
ERT Case Name:	Lambton (County) v. Ontario (Environment and Climate Change)

Heard : November 12, 13 and 14, 2014, January 13, 14, 15, 16 and 28, and February 19, 2015 in Camlachie, Wyoming and Toronto, Ontario

APPEARANCES:

Parties	**Counsel/Representative[+]**
Corporation of the County of Lambton	David Cribbs
Kimberley and Richard Bryce	Asha James

Director, Ministry of the Environment and Climate Change	Andrea Huckins and Leila Beheshti
Suncor Energy Products Inc.	Albert Engel

Participants

Corporation of the Town of Plympton-Wyoming	Priya Vittal
Elizabeth Bellavance	Self-represented

Presenters

Sandra deJong	Self-represented
Dean deJong	Self-represented
John Cook	Self-represented
Nick Monsour	Self-represented
Gilda Yvonne Bressette (Anishinabekwewag-Kettle and Stony Point First Nation)	Shelly Bressette[+]

DECISION DELIVERED BY MAUREEN CARTER-WHITNEY AND ROBERT V. WRIGHT

REASONS

Background

[1] On August 22, 2014, Vic Schroter, Director, Ministry of the Environment ("MOE") issued Renewable Energy Approval No. 6914-9L5JBB (the "REA") under s. 47.5 of the *Environmental Protection Act* ("*EPA*"), to Suncor Energy Products Inc. (the "Approval Holder"). The REA is for a renewable energy project known as the Cedar Point Project (the "Project"), consisting of the construction, installation, operation, use and retiring of a Class 4 wind facility, consisting of up to 46 wind turbines, with a total nameplate

capacity of 100 megawatts (MW), with associated infrastructure at various locations within the Town of Plympton-Wyoming, Municipality of Lambton Shores, Warwick Township, and Lambton County, Ontario.

[2] On September 4, 2014, the Corporation of the County of Lambton (the "County") filed with the Environmental Review Tribunal (the "Tribunal") a notice of appeal of the decision of the Director to issue the REA. On September 5, 2014, Kimberley and Richard Lance Bryce (the "Bryce Appellants") also filed a notice of appeal of the REA decision. The County and the Bryce Appellants appealed under s. 142.1(3) of the *EPA* on the grounds that engaging in the Project in accordance with the REA will cause serious harm to human health. The Bryce Appellants also appeal on the ground that the Project will cause serious and irreversible harm to plant life, animal life or the natural environment. The Bryce Appellants also filed a notice of constitutional question alleging that the statutory harm test set out in s. 142.1(3) and s. 145.2.1(2) of the *EPA* and the Director's decision deprive the Bryce Appellants of the right to security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

[3] At the preliminary hearing, held on October 6, 2014, the Tribunal granted participant status to the Corporation of the Town of Plympton-Wyoming (the "Town") and Elizabeth Bellavance. The Tribunal also granted presenter status to Dean deJong, Sandra deJong, John Cook, Nick Monsour and Gilda Yvonne Bressette of the Anishnabekwewag (Anishnabeg Women) from the Chippewas of Kettle and Stony Point First Nation. The Tribunal's Order dated October 21, 2014 provides additional information about the preliminary hearing.

[4] On October 31, 2014, the Bryce Appellants filed a motion requesting a stay of the Director's decision to issue the REA. However, as a result of discussions among the parties, they reached an agreement whereby the Bryce Appellants agreed to adjourn their stay motion *sine die*, subject to certain terms and conditions respecting the Approval Holder's ongoing construction of the Project's components. These terms and

conditions were subsequently set out in written minutes of settlement executed on February 18, 2015, and filed with the Tribunal on February 23, 2015.

[5] The hearing was held over eight days in November 2014 and January 2015, and final oral submissions were heard on February 19, 2015.

[6] On December 10, 2014, the Bryce Appellants filed a motion to adjourn the hearing. The Tribunal dismissed the motion by an order dated December 23, 2014. The reasons for the order are attached as Appendix A.

[7] The Tribunal acknowledges the particularly thorough canvassing of the issues in this hearing by the parties, the participants and the presenters, and their mutual cooperation regarding the hearing process.

Relevant Legislation, Regulation and Rules

[8] The relevant legislation is:

Environmental Protection Act

> 142.1 (3) 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 or the natural environment.
>
> 145.2.1 (2) The Tribunal shall review the decision of the Director and shall consider only whether 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 or the natural environment.
>
> (3) The person who required the hearing has the onus of proving that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a) or (b).

(4) If the Tribunal determines that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a) or (b), the Tribunal may,

(a) revoke the decision of the Director;
(b) by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations; or
(c) alter the decision of the Director, and, for that purpose, the Tribunal may substitute its opinion for that of the Director.

Canadian Charter of Rights and Freedoms

GUARANTEE OF RIGHTS AND FREEDOMS

Rights and Freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

…

LEGAL RIGHTS

Life, liberty and security of the person

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.

Issues

[9] The issues are:

1. whether engaging in the Project in accordance with the REA will cause serious harm to human health; and
2. whether the statutory harm test set out in *EPA* s. 142.1(3) and s. 145.2.1(2), or the Director's decision, deprives the Bryce Appellants of the right to security of the person under s. 7 of the *Charter.*

[10] The Bryce Appellants' notice of appeal also refers to the ground for appeal that the Project will cause serious and irreversible harm to plant life, animal life or the natural environment. While the notice of appeal refers to a number of provisions of the REA, on this ground it only specifically identifies impacts to ground water resources as an issue. As the Bryce Appellants did not adduce any evidence or make any submissions on this ground water issue, and there was no other evidence of any substance regarding the Project's alleged impacts to ground water, there is no basis for the Tribunal to consider this issue on these appeals.

Discussion, Analysis and Findings

Issue 1: Whether engaging in the Project in accordance with the REA will cause serious harm to human health.

Introduction

[11] In reviewing the decision of the Director under s. 145.2.1(2)(a) of the *EPA*, the Tribunal is to consider whether engaging in the renewable energy project in accordance with the REA will cause serious harm to human health. Section 145.2.1(3) of the *EPA* provides that the person who requires the hearing has the onus of proving that engaging in the renewable energy project in accordance with the REA will cause the harm referred to in s. 145.2.1(2)(a).

[12] The County seeks to prove that engaging in the Project in accordance with the REA will cause serious harm to human health by demonstrating that construction of transmission infrastructure in or adjacent to County road allowances will increase the risk of vehicle collisions with this infrastructure. The focus of the County's appeal is alleged inadequate roadside safety ("Issue 1A").

[13] The Bryce Appellants seek to prove that engaging in the Project in accordance with the REA will cause serious harm to human health by showing that they and their

children will suffer serious physical and psychological harm. The focus of the Bryce Appellants' appeal is exposure to wind turbines and human health ("Issue 1B").

Issue 1A: Whether engaging in the Project in accordance with the REA will cause serious harm to human health due to inadequate roadside safety.

Evidence of the County

Jason Cole

[14] Jason Cole is a professional engineer who holds a Bachelor of Engineering Science from the University of Western Ontario. He is the Manager of the County Public Works Department. Mr. Cole was qualified by the Tribunal to give expert opinion evidence as a civil engineer with expertise in the design, construction and maintenance of highways within the province of Ontario.

[15] Mr. Cole raised concerns about the proposed construction of electrical Project infrastructure, including transmission lines and utility poles, adjacent to County road allowances. He said the County does not own any of the lands adjacent to the road allowance along portions of Thomson Line (the County road along which Project infrastructure is planned) and only has direct control over the road allowance. He indicated that the proposed pole locations run along Thomson Line for approximately three kilometres ("km") with the exception of a section where the line runs well to the north of Thomson Line (referred to as the "northern jog"). Mr. Cole noted that there is a "clear zone" beyond the road allowance, which would extend into the adjacent private lands. He stated that the Ministry of Transportation ("MTO") Roadside Safety Manual ("RSM"), has adopted a clear zone policy to reduce the number of serious road accidents and injuries. The clear zone is described as:

> the distance from the edge of the travelled portion of the roadway to the face of an unprotected hazard. This clear zone must be traversable,

> allowing errant vehicles to recover or come to a safe stop. Any hazards which remain within this offset must be either removed or shielded.

[16] Mr. Cole indicated that the RSM sets out an order of preference for addressing hazards in the clear zone, as follows: the first preference is for the removal of an immovable object from the clear zone; the second is the relocation of the hazard outside the clear zone; the third is to minimize the hazard by making it traversable or using breakaway devices; and the fourth is to shield the hazard with barriers or crash cushions. The RSM states that the removal of hazards is preferable to protection with a barrier since the barrier itself is a potential hazard. Mr. Cole also emphasized the statement in the RSM that clear offsets provide a degree of protection for approximately 80% of errant vehicles. He stated that it is his professional preference and the County's institutional preference to prohibit the construction of immoveable objects with significant mass within the boundaries of the road allowance and within the clear zone of county roads.

[17] Mr. Cole referred the Tribunal to provincial personal injury and fatality statistics published each year by the MTO in the Ontario Road Safety Annual Report. Based on data from 2005 to 2011 (the last year for which statistics are available currently), he created a table showing the injury and death numbers due to collisions with utility poles and with guide rails used to avoid collisions with utility poles. His table indicates the following totals of the data from 2005 up to and including 2011: 2,206 injuries and 28 deaths due to collisions with utility poles; 345 injuries and 6 deaths due to collisions with cable guide rails; and 1,176 injuries and 21 deaths due to collisions with steel guide rails. Mr. Cole stated that these statistics demonstrate that collisions with the type of infrastructure proposed as part of the Project would constitute a "real and present risk to the health and safety of the public using these roadways." He further noted that these statistics identify only the initial point of contact in a collision, so that the actual number of collisions involving such infrastructure may be higher.

[18] Mr. Cole stated that the County has negotiated a draft road use agreement with the Approval Holder although it continues to be an unwilling host for the Project. He

explained that the County nevertheless has a duty to protect its road infrastructure and a road use agreement is the best means to accomplish that if the Project goes ahead.

Evidence of the Approval Holder

Jody Hood

[19] Mr. Hood is the Manager of Development and Engineering for the Renewable Energy Group of Suncor Energy Services Inc., a subsidiary of the Approval Holder. He provided factual evidence at the hearing.

[20] Mr. Hood testified that the proposed utility poles would run adjacent and parallel to Thomson Line on poles that will be physically located on private land. He noted that that the transmission line would cross Thomson Line in some instances but there would be no poles located in the road allowance. He said the proposal is for the Project transmission line to be built generally within a 20 metre ("m") corridor along the transmission line route. He stated, under cross-examination, that he did not recall if the sections of the corridor along Thomson Line are limited to 20 m in the Approval Holder's agreements with landowners.

[21] Mr. Hood confirmed that the IBI Group was retained to conduct a clear zone analysis in relation to the Project infrastructure adjacent to Thomson Line. He stated that the Approval Holder worked with private landowners to secure their approval as to where utility poles would be placed within the 20 m corridor. Mr. Hood testified that the Approval Holder complied with feedback it received requesting that the poles be kept out of the County's road allowance. He also said there had been recent minor changes to move four of the proposed pole locations along Thomson Line further away from the roadway due to the discovery of underground utilities. Mr. Hood also described the REA application process and explained that the Approval Holder would not be able to construct the proposed poles prior to receiving Leave to Construct from the Ontario Energy Board (the "OEB").

Rob Cascaden and Matthew Colwill

[22] Mr. Cascaden and Mr. Colwill, both associates of the IBI Group consultancy, testified as a panel at the hearing. Mr. Cascaden is a professional engineer who holds a Bachelor of Science, Engineering from Queen's University. He was qualified by the Tribunal to give expert opinion evidence as a civil engineer with expertise in the design and construction of roads and related infrastructure including the application of roadside safety standards. Mr. Colwill is also a professional engineer and holds a Bachelor of Applied Science from the University of Waterloo. The Tribunal qualified him to give expert opinion evidence as a civil engineer specializing in road user safety and traffic operations.

[23] Mr. Cascaden and Mr. Colwill stated that they conducted an analysis to determine if clear zone distances could be attained in accordance with the requirements of Table 2.2.1 of the RSM. They concluded that all but two of the 25 proposed utility poles adjacent to Thompson Line complied with the required clear zone offset without modifications. Of the two poles that did not meet the requirements, they determined that one pole (#CP-65) would require a small extension added to an existing steel beam guide rail. They stated that the other pole (#CP-70) meets the clear zone offset in one direction only, but that an existing ditch is an obstruction from the other direction and mitigation such as a guide rail in this location would protect the ditch rather than the pole. They concluded that pole #CP-70 therefore meets the intent of the RSM and therefore does not require mitigation. On this basis, they came to the conclusion that they do not expect the location of the transmission poles to pose a material risk to road users. Both Mr. Cascaden and Mr. Colwill testified that all of the proposed pole locations either meet the RSM clear zone distances or are in compliance with the intent of the RSM. Under cross-examination, Mr. Cascaden acknowledged that no clear zone analysis was required for poles on the northern jog because they would be hundreds of metres away from the County road.

[24] Regarding the statement in the RSM that clear offsets provide a degree of protection for approximately 80% of errant vehicles, Mr. Colwill acknowledged that 20% of vehicles that leave the travelled portion of the roadway and encroach on the roadside would extend beyond the clear zone distances set out in Tab 2.2.1 of the RSM, and that it is a possibility that they would not be able to stop before reaching a pole. He described this as the standard for the level of risk that has been accepted with respect to errant vehicles and their encroachment on the roadside. Transmission Line Pole Offset plans indicated the proposed spacing between the utility poles carrying the transmission line along Thomson Line to be generally in the range of approximately 120 to 140 m, with less space between poles where the line crosses a road or intersection.

[25] Based on the data in the 2011 Ontario Road Safety Annual Report, Mr. Cascaden and Mr. Colwill testified that the frequency and likelihood of collisions involving utility poles is relatively low. They stated that, of 177,039 motor vehicle collisions in 2011, only 1,530 vehicles were involved in collisions related to utility poles and only three of those collisions were fatal. Mr. Colwill noted that the key variable in determining the probability of collisions occurring on a section of a road is the traffic volume on the roadway. He stated that the average daily volumes on the subject section of Thomson Line ranges from 122 to 139 vehicles, which is substantially less than the 6,000 vehicles per day for which the applied clear zone offsets are related, and concluded that the risk of collisions with utility poles on that section of roadway is very low.

Submissions of the County

[26] The County submits that that both personal injury and death qualify as "serious harm" within the meaning of s. 145.2.1(2)(a) of the *EPA*, noting that the Tribunal in *Lewis v. Director, Ministry of the Environment*, [2014] O.E.R.T.D. No. 45 ("*Lewis*") accepted that serious injury or death from a motor vehicle collision can constitute serious harm under that provision (paras. 122 and 124) [The County was an appellant in the *Lewis* proceeding with an appeal on the same grounds as in this matter]. The

County asserts that the potential for personal injury and death, as a result of increased danger to motorists from the proposed Project infrastructure to be constructed adjacent to the road allowance constitutes clearly foreseeable "serious harm" to human health.

[27] The County states that Mr. Cole, Mr. Cascaden and Mr. Colwill agree, based on data from the Ontario Road Safety Annual Reports, that in Ontario each year individuals are injured and killed in collisions involving utility poles, and are injured and sometimes killed in collisions with cable and steel guide rails. The County also notes that the clear zone is designed to be effective in only 80% of errant vehicle situations.

[28] The County acknowledges that the Tribunal in *Lewis* found, at para. 124, that any increase in risk to the travelling public would not rise to the level of "will cause" as required in s. 145.2.1(2)(a) of the *EPA*. The County observes, however, that this Tribunal panel is not bound by the decision in *Lewis*. The County asserts that it is not possible to prove scientifically that an accident will happen on a balance of probabilities, and further asserts that to require a party to do so to meet the test in s. 145.2.1(2)(a) would be absurd and makes the test impossible to meet. However, the County says that it has scientifically demonstrated that injury and death from collisions with immovable objects such as utility poles does occur each year in Ontario.

[29] The County submits that a reasonable interpretation of the test in relation to serious harm caused by motor vehicle collisions, as opposed to medical causation, is to determine if an increased risk to health and safety exists. The County further submits that if an increased risk to health and safety is established, the proposed route for transmission infrastructure should be required to be constructed in the manner that creates the lowest possible risk to the travelling public unless there is a compelling reason not to do so.

[30] To ensure the lowest possible risk, the County asserts that all poles should be located outside of the clear zone and ideally should be so far removed from the clear zone that a clear zone analysis would not even be necessary. The County would prefer

that all poles in the vicinity of Thomson Line be located in a manner consistent with those on the northern jog, well away from the road. The County states that this would accord with its institutional preference that there should be no immoveable objects in the clear zone of county roads.

[31] The County seeks the following relief, ranked in order of preference:

- that the transmission route be ordered redesigned to the extent that no clear zone analysis is required for any pole on the basis that they are so far removed from the travelled portion of the County road system so as to constitute no appreciable threat to the travelling public;
- that the transmission route be redesigned or moved so as to avoid the need for clear zone analysis, except for poles or portions of the transmission line where the permit holder can demonstrate undue hardship; or
- that the proposed location of the poles be moved as far as possible from the travelled portion of the roadway within the easements to which the Approval Holder has access.

[32] The County further requests that the Tribunal order the Director to undertake meaningful consideration of road and traffic safety in the design of this and other future proposed renewable energy projects prior to the issuance of other REAs.

Submissions of the Town

[33] The Town supports the County's submissions regarding the issue of road use and safety, and the submissions of the Bryce Appellants. The Town pointedly recognizes the contribution to the hearing by the other participants and presenters from the community.

[34] The Town submits that there is no certainty that the roadside safety concerns will be mitigated and asks that the evidence of Mr. Cascaden and Mr. Colwill be viewed with

caution. The Town submits: “The further away they are from the road, the lower the risk there would be to the travelling public.”

Submissions of the Approval Holder

[35] The Approval Holder submits that the evidence of Mr. Colwill and Mr. Cascaden has established that there would be minimal risk to human health resulting from the proposed pole locations, because the pole locations meet the applicable safety standards and those standards are consistent with best industry practices and are protective of public safety. The Approval Holder asserts that the evidence establishes that, in meeting the intent of the RSM, the pole locations minimize any possible risks to the public associated with roadside safety, and that the two poles proposed to be in the clear zone would not pose any material risk to public safety.

[36] The Approval Holder relies on the *Lewis* decision, noting that the Tribunal in that proceeding heard similar evidence with respect to the proposed location of 49 utility poles along approximately 8 km of Thomson Line and the County argued that compliance with the RSM was not sufficient. The Approval Holder submits that the Tribunal in *Lewis* found that the County’s evidence did not refute the evidence of Mr. Cascaden and Mr. Colwill that, based on traffic volumes and mitigation measures, the risk of a collision with a pole at the proposed locations would be very small on the section of Thomson Line at issue in that appeal, amounting to no material risk. The Approval Holder further cites the finding in *Lewis*, at para. 124, that even if there were a material increase in risk, it would have to rise to the level of “will cause” for the test in s. 145.2.1 of the *EPA* to be met. The Approval Holder asserts that the Tribunal in this proceeding should make the same finding as the Tribunal panel did in *Lewis*, and dismiss the County’s appeal.

[37] The Approval Holder relies on the submissions made by the approval holder in *Lewis*, summarized at para. 115 of that decision:

> the County has overstated the risks of a collision by misinterpreting the evidence indicating that 20% of vehicles that left a highway went beyond the clear zone specified in the RSM. The Approval Holder argues that this evidence did not mean that those 20% of vehicles were involved in a collision with a fixed object, so that there remains only a very small risk of collision with a transmission pole, as the poles are widely spaced….

[38] The Approval Holder notes that the REA issued by the Director approved the Project, including the turbines and the transmission line route, within a 20 m wide corridor, but did not approve the specific location of the transmission lines. The Approval Holder states that Leave to Construct from the OEB is required in order to locate and construct the poles. The Approval Holder submits that the County requested that the poles not be located in the County road allowance and the Approval Holder complied with that request through its negotiations with landowners about pole locations.

Submissions of the Director

[39] The Director acknowledges that all of the experts who gave evidence in the hearing agreed that the preferred approach is to remove immovable objects from the road allowance and clear zone where possible, but submits that the test is not whether the Project may add risk of harm to human health, no matter how small that risk. Citing *Lewis*, the Director submits that evidence of the potential or threat of harm is not sufficient to meet the higher burden of the statutory test under s. 145.2.1(2) of the *EPA*, and that harm that is merely a possibility or a small increase in the risk of harm does not meet the burden of proof because the test requires that the appellant prove that the project will cause serious harm to human health on a balance of probabilities.

[40] The Director notes that the County has put forward a definition of “serious” that includes “possible” consequences, and asserts that the word “serious” must be read in its entire context and considered in light of the entire provision, which requires a finding that a Project operating in accordance with its approval will cause serious harm. The Director submits that possible consequences fall outside the realm of consideration by the Tribunal.

Findings on Issue 1A

[41] The County seeks to prove that the proposed utility pole locations will cause serious harm to human health. The parties agree that the RSM sets out the provincial standards for roadside safety and highway design. As noted above in the summary of Mr. Cole's evidence, the RSM states an order of preference for actions to deal with hazards in the clear zone. The most preferred option is to remove an immovable object from the clear zone. Less preferable options include relocating a hazard outside the clear zone, making the hazard traversable or using breakaway devices and shielding it with barriers or crash cushions. The County maintains that its institutional preference is that there not be any immoveable objects in the clear zone, consistent with the most preferred option in the RSM, and seeks to go beyond the standards in RSM by asserting that all utility poles should be so far away from the clear zone that clear zone analysis would not be required, as on the northern jog.

[42] Nevertheless, the Approval Holder proposes to locate the transmission lines along certain portions of Thomson Line in order to locate the utility poles according to agreements made with private property owners from whom the Approval Holder is leasing land for the Project. As a result, the Approval Holder retained the IBI Group to perform a clear zone analysis. The evidence of Mr. Cascaden and Mr. Colwill on their clear zone analysis demonstrates that 23 of the 25 proposed utility poles on Thomson Line would comply with the required clear zone offset without any need for modifications. It is their evidence that the remaining two poles meet the intent of the RSM, with no need for mitigation beyond the extension of a guide rail in the case of pole #CP-65 (fourth in the RSM's order of preference for addressing hazards in the clear zone). Although pole #CP-70 only meets the clear zone offset in one direction, in the opinion of Mr. Cascaden and Mr. Colwill, it is safer to not to add a guide rail in this location. The Tribunal heard no expert opinion evidence contradictory to their clear zone analysis.

[43] As noted above, the Tribunal recently dealt with very similar evidence and submissions on this issue in an appeal by the County concerning utility poles proposed for another section of Thomson Line in respect of a different renewable energy project, the Jericho Wind Energy Centre, which was the subject of the *Lewis* decision. A greater number of poles and a longer stretch of Thomson Line were at issue in *Lewis*, as summarized at para. 118:

> there will be 49 transmission poles installed in Lambton County, along approximately 8 km of roadway, specifically Thomson Line. Of the 49 poles, 20 will be within road allowances owned by the County, and 29 will be on private property. Of the 20 located within 3 km of public road allowances, nine meet the requisite clear zone offset with 11 requiring shielding, some by extending existing guide rails and the rest by constructing new guide rails. Of the 29 located on private property, 24 meet the clear zone offset and five require mitigation in the form of regrading.

[44] In *Lewis*, the Tribunal made the following findings, at para. 124:

> In applying the statutory test found in the *EPA*, the Tribunal has repeatedly held in previous renewable energy approval appeal decisions that evidence of the potential or threat of harm is not sufficient to meet the higher burden of the statutory test, that is, that the Project *will cause* serious harm to human health. It was not disputed that, in some collisions, injury to vehicle occupants would be severe enough to meet the "serious harm" requirement of the Health Test. However, the Tribunal finds that the evidence adduced by the County and the Approval Holder indicates that the risk of collisions with transmission poles generally is very low, and the installation of the Project's transmission poles, in their proposed locations, will not materially increase this risk. Even if there were a material increase in risk, it would still have to rise to the level of "will cause" in order for the Health Test to be met. In this case, the evidence falls far short of establishing that a collision will occur, let alone a collision causing serious harm. Consequently, on this ground, the Tribunal finds that the County has adduced insufficient evidence to establish that the Health Test has been met.

[45] The County asserts that it is not possible to prove an accident will occur. The Tribunal understands the County's submission to be that it is not possible to prove with absolute certainty that an accident will occur. However, under s. 145.2.1(a) of the *EPA*, the County must demonstrate not merely that an accident is possible, but, on a balance of probabilities, that engaging in the Project in accordance with the REA will cause an

accident resulting in serious harm to human health. To determine whether it is more likely than not that an accident will occur, the Tribunal must base its findings on the likelihood of such an accident in the context of the particular facts of the appeals before it.

[46] There is evidence before the Tribunal in this case, based on recent MTO accident statistics, that a number of injuries and deaths occur every year as a result of collisions involving utility poles, in addition to injuries, and in some years deaths, due to collisions with cable and steel guide rails. Also in evidence is a statement at page 0202-2 of the RSM that "clear offsets provide a degree of protection for approximately 80% of errant vehicles." However, it is clear from the evidence of Mr. Colwill that, while 20% of vehicles may leave the travelled portion of the roadway and extend beyond the clear zone, that does not mean that they necessarily will collide with an immoveable object such as a utility pole or guide rail. The Tribunal notes that there is space between the proposed pole locations along Thomson Line. Mr. Colwill further testified that the risk of collisions with utility poles is very low because the average daily traffic on the relevant portion of Thomson Line ranges from 122 to 139 vehicles, far less than the 6,000 vehicles per day for which the applicable clear zone offsets set out in Column A of Table 2.2.1 of the RSM are developed. Based on their clear zone analysis and recommended modification to pole #CP-65, Mr. Cascaden and Mr. Colwill concluded that they did not expect the location of the transmission poles to pose a material risk to road users. The Tribunal accepts this opinion evidence as it was not contradicted by the Appellants' witnesses.

[47] Based on this evidence, the Tribunal finds that there would be an increase in the risk to drivers as a result of the Project utility poles. However, the Tribunal must consider whether the Appellant has established that the risk to drivers is sufficient to meet the test under s. 145.2.1(2)(a) of the *EPA*. In this regard, the Tribunal must also consider the very limited amount of traffic on this portion of Thomson Line. The Tribunal, therefore, also finds, as in *Lewis* at para. 122, that "the risk of a collision with a pole will be very small along this stretch of roadway, amounting to "no material risk",…"

based on the evidence adduced by the Appellants in this proceeding. Consequently, the County has not satisfied the Tribunal that it is more likely than not that the proposed utility pole locations, when considered in conjunction with recommended mitigation measures, will cause serious harm to human health. Therefore, the Tribunal finds that the County has not met the test under s. 145.2.1(2)(a), and, consequently, the County's appeal is dismissed.

Issue 1B: Whether engaging in the Project in accordance with the REA will cause serious harm to human health due to exposure to wind turbines.

Overview of Evidence

[48] The evidence summarized below provides the basis for the submissions, analysis and findings in both Issue 1B and Issue 2.

Evidence of the Bryce Appellants

Kimberley Bryce and Richard Lance Bryce

[49] The Bryce Appellants testified together at the hearing as fact witnesses. They live with their four children in the vicinity of the Project. The closest proposed turbine would be approximately 1,285 m from their home and there would be a total of eight or nine turbines within approximately 3 km of their home. Two of their children attend a school located next door to the family's home and the other two children attend a high school in Forest, which is also in the vicinity of proposed turbines.

[50] The Bryce Appellants stated that they and three of their children have a range of existing medical conditions and they fear that noise from the Project will exacerbate them. The conditions experienced by various members of the Bryce family include: ulcerative colitis, which flares up during times of stress; thyroid gland failure, which includes symptoms such as memory loss and fatigue; a learning disability with a

sensitivity to sound that requires a quiet environment for studying and is exacerbated by lack of sleep; a learning disability that is exacerbated by background noises; and ear infections that have required the insertion of ear tubes and resulted in sensitivity to loud noise.

[51] The Bryce Appellants are concerned that their family's medical conditions will be exacerbated due to noise from the turbines as well as annoyance and stress. They fear that Project turbines will affect their children while they are in their home and also at school.

Post-turbine witnesses

[52] The Bryce Appellants introduced the evidence of two "post-turbine" witnesses (lay witnesses testifying that they experience health effects that have been caused by exposure to industrial wind turbines). This evidence was received by the Tribunal, on consent of the parties, through transcripts of evidence they provided in the hearing in *Dixon v. Director, Ministry of the Environment* (2014), 85 C.E.L.R. (3d) ("*Dixon*"). They are referred to in this section as Witnesses No. 1 and 2.

[53] Witness No. 1 lived on a farm in proximity to the Ripley Wind Project, consisting of 38 wind turbines, of which the closest turbine was approximately 800 m from her home. She testified that her only diagnosed health concern, prior to the turbines operating, was slightly elevated blood pressure. It was her evidence that, after the turbines began to operate in December 2007, she experienced a range of symptoms, including sleep deprivation, humming and ringing in her ears, a sore hip, increased blood pressure levels, blurred vision, issues with memory, heart palpitations and grinding her teeth at night. Although her doctor sent her to see specialists, none of them connected the turbines to her symptoms or suggested an alternative cause for her symptoms.

[54] Witness No. 1 said that her experience of sleep deprivation and other health effects caused her to heave her home, and that the developer of the wind farm paid for her and her family to stay in hotels for months. She said her husband and daughter also experienced adverse health effects that diminished when they were away from their home. She testified that she and her family moved out of their home in April 2008 and sold it in March 2011, although she spent some time in the home after April 2008. She stated that a sound study conducted in 2009 determined that seven turbines were out of compliance and would be reduced to half power. However, no noise measurements taken at her property were included in her evidence.

[55] Witness No. 2 lived in the vicinity of Phase 2 of the Melancthon Wind Project, which consisted of 123 turbines and began operation in December 2008. Her home was located 456 m from the closest turbine, 700 m from a second turbine and within a 1 km radius of five turbines. She testified about her medical history prior to the introduction of the turbines, noting that she was a liver donor, underwent a gallbladder procedure, and suffered an incident of bronchitis and from abdominal pain. She said that, after the turbines commenced operation, both she and her husband began to experience a number of health effects they had not experienced before, which included sleep deprivation, ringing in the ears, heart palpitations, memory loss, feelings of disorientation and dizziness. She stated that she raised her concerns about adverse health effects with her doctor, but said he did not note her concerns in her medical records. She noted that others in her neighbourhood also experienced adverse health effects.

[56] Witness No. 2 stated in her witness statement that the wind company would turn off the closest turbines at times, and this would provide some relief from the noise but the hum and vibration still occurred. She said that she and her husband moved into a tent in the backyard and were able to sleep if the closest turbines were turned off. She noted, however, that their symptoms returned as soon as the turbines were operational again. She testified that the wind company conducted testing and measured noise to be between 60 and 70 dBA, but no noise measurements were provided in her evidence.

She stated that she and her husband moved out of their home in June 2009, and then stopped suffering from the health effects they experienced while living near the wind turbines.

Dr. Mariana Alves-Pereira

[57] Dr. Alves-Pereira holds a Master's degree in Biomedical Engineering from Drexel University in Pennsylvania and a Doctoral degree in Environmental Sciences from Universidade Nova de Lisboa in Portugal. She is an Associate Professor at Universidade Lusófona in Lisbon, Portugal and, from 1988 to 2013, was a Senior Researcher and Assistant Coordinator for the Vibroacoustic Disease Project at the Centro de Performance Humana. Dr. Alves-Pereira was qualified by the Tribunal to give opinion evidence as an expert in environmental science with particular expertise in respect of the biological response to noise exposure, including low frequency noise exposure on humans and animals from a biomedical engineering perspective.

[58] Dr. Alves-Pereira testified that about her work with a biomedical research team at the Centro de Performance Humana that investigated the effects of low frequency noise rich occupational environments on workers, noting that her role was to take medical histories of people involved with studies and to analyze acoustical data. She described a study of a Portuguese family living near wind turbines (the "Portuguese study"), stating that the family contacted her team in 2007 about adverse health effects allegedly caused by four wind turbines located between 321 and 642 m from their home. She said the family was concerned about the growing difficulties their 12-year-old son, who had previously been an excellent student, was having with schoolwork due to tiredness. Dr. Alves-Pereira noted in her witness statement that, after noise measurements were taken, her team analyzed the data and concluded that the amount of low frequency noise present was "sufficient to produce low frequency noise-induced pathology" and that "given that sleep time was being spent in this acoustical environment, it was likely that the onset of signs and symptoms, corroborated by appropriate diagnostic medical testing, would have an accelerated onset when compared to occupationally exposed

workers." She stated that, in May 2013, the Supreme Court of Justice in Portugal decreed that all four of the wind turbines should be permanently removed.

[59] Dr. Alves-Pereira testified that low frequency noise causes biological effects in the form of cellular changes in humans and animals, through the thickening of arterial walls in the due the production of collagen, which she termed vibroacoustic disease. She stated that a non-audible perception of low frequency noise is an uncomfortable feeling in the body and that people exposed to low frequency noise develop intolerance to any kind of noise. Dr. Alves-Pereira said that the effects of being exposed to low frequency noise are cumulative. It was her opinion that, if the Bryce Appellants' children are exposed to low frequency noise at home and at school, she "would expect to see a rapid decrease in the cognitive capabilities of the child."

[60] In cross-examination, Dr. Alves-Pereira acknowledged that vibroacoustic disease is not listed as a disease or accepted diagnosis in the International Classification of Diseases ("ICD-10"), and confirmed that she is not a medical doctor. She also agreed that the Portuguese study had been the subject of conference paper but had not been published in a peer reviewed scientific journal, and the findings had not been replicated.

Dr. Arline Bronzaft

[61] Dr. Bronzaft has Masters and Ph.D. degrees in Psychology from Columbia University. She is a Professor Emerita at Lehman College, City University of New York and has been a volunteer Member and Chair of the New York City Noise Committee since 1985. The Tribunal qualified Dr. Bronzaft to give opinion evidence as an expert in environmental psychology with knowledge of noise and its effects on humans.

[62] Dr. Bronzaft testified about the difference between sound and noise, stating that the interpretation of sound is psychological and that we tend to think of a sound that is deemed as unwanted, unpredictable or intrusive as noise. She further testified that noise can cause physiological effects in the form of stress, and that an individual may

develop a feeling of learned helplessness that exacerbates stress. She also said that uncontrollable noise may disturb people regardless of its volume, and that repetitive sounds can be annoying even if they are not loud. Dr. Bronzaft stated that noise may have an effect on children's ability to learn if it prevents them from concentrating. Her evidence was based on her own research on the impacts of noise from trains on children in school at noise levels of 59 to 89 dBA, as well studies on aircraft noise.

[63] Dr. Bronzaft stated that she has not conducted research on the impacts of wind turbine sounds on people, but spoke about her own reaction to the sound of a wind turbine. She said she has used information from studies on aircraft, rail and highway noise to generalize to wind turbine noise because "noise is noise." Based on research she has reviewed, Dr. Bronzaft stated that some people living near turbines complain that wind turbine sounds disturb their sleep and cause headaches, nausea, irritability and dizziness. She said these complaints should not be dismissed.

Dr. Jeffery Aramini

[64] Dr. Aramini is President and Chief Executive Officer of Intelligent Health Solutions Inc., and holds Doctor of Veterinary Medicine and Master of Science degrees from the University of Saskatchewan and a PhD from the University of Guelph Department of Population Medicine. The Tribunal qualified Dr. Aramini to give expert opinion evidence as an epidemiologist with knowledge of public health, statistics and statistical analysis.

[65] Dr. Aramini provided reply evidence in respect of a Health Canada document entitled "Wind Turbine Noise and Health Study: Summary of Results" (the "Study Summary"), dated November 6, 2014. He provided his opinion that key findings in the Study Summary lead him to believe that they support the hypothesis that wind turbine noise is associated with adverse health effects. Dr. Aramini noted that the Summary Study reports that increasing levels of wind turbine noise were found to be statistically associated with annoyance, and annoyance was statistically associated with both self-

reported and objectively measured adverse health effects (such as cortisol and blood pressure), but that there was no association between wind turbine noise and self-reported and objectively measured adverse health effects. He testified that further analysis was needed "to understand how A can be associated with B, B with C, and not C with A."

[66] Dr. Aramini provided his opinion that the finding of statistically significant associations between wind turbine noise and annoyance supports the hypothesis that exposure to wind turbine noise beyond some level, stated as greater than or equal to 35 dBA in the Study Summary, may lead to the prospect of adverse health effects in some people. He said that access to the raw data underlying the Health Canada study is important to fully understand its findings.

[67] Dr. Aramini stated that vulnerable groups potentially may be highly annoyed by wind turbine noise at 30 to 40 dBA. He also said that, while the prevalence of severe annoyance increases as decibels go up, "that doesn't mean that some people aren't severely annoyed below that, which again actually fits with the Health Canada story which is once you're annoyed, the annoyance was associated with these health outcomes… so once you hit that point it doesn't matter how loud…"

[68] Under cross-examination, Dr. Aramini agreed that the Health Canada study alone would not be determinative or conclusive with respect to causation, noting that rarely if ever would one epidemiological study prove or disprove causation.

Dr. Hazel Lynn

[69] Dr. Lynn's evidence was provided in the form of a transcript of her evidence given on September 9 and 23, 2014 in a previous Tribunal proceeding (*Gillespie v. Director, Ministry of the Environment*, 2014 CarswellOnt 18121) ("*Gillespie 1*"). She is the Medical Officer of Health for the Grey Bruce Health Unit, and is a Medical Doctor Graduate of the University of Toronto, Faculty of Medicine, who also holds a Master of

Health Science specializing in Community Health and Epidemiology from the University of Toronto. The Tribunal in *Gillespie 1* qualified her as an expert in public health, with specializations in community health and epidemiology and knowledge of industrial wind turbines.

[70] Dr. Lynn described complaints she has received, in her capacity as Medical Officer of Health for Grey Bruce, from area residents living near wind turbines about symptoms they have experienced, including dizziness, headaches, sleep disturbance and tinnitus. Dr. Lynn said she was on a technical working group that provided advice on the May 2010 Ontario Chief Medical Officer of Health Report entitled "The Potential Health Impact of Wind Turbines". She also reported to the Board of the Grey Bruce Health Unit on industrial wind turbines in 2011 and co-authored a paper entitled "Systematic Review 2013: Association Between Wind Turbines and Human Distress" with Dr. Ian Arra and others ("Lynn/Arra Review"). She also discussed the nine criteria established for assessing evidence of causation established by Sir Bradford Hill.

[71] Dr. Lynn testified that she uses the term "distress" rather than the term "annoyance" because it refers to the ability to deal with stress, and due to the negative connotations of the term "annoyance". She noted that the term "distress" in the Lynn/Arra Review was intended to include numerous outcomes measured in the studies under review, including annoyance. She said that the Lynn/Arra Review concluded that there is reasonable evidence supporting the existence of an association between wind turbines and distress in humans. She further stated that the existence of a dose-response relationship between distance from wind turbines and distress, and the consistency of association across studies found in the scientific literature, supports the credibility of this association. Dr. Lynn also said, however, that the Lynn/Arra Review found that there "is still no evidence of whether or not a causal relationship between distance from wind turbines and distress exists".

[72] Dr. Lynn stated that might take 15 to 20 years prove whether or not there is a causal relationship between distance from wind turbines and distress. She also referred

to research that communities generally experience 10 to 15 years of volatility and disturbance during the early stage of introducing new technology for which the communities have not been properly prepared.

Evidence of the participants and presenters of like interest to the Bryce Appellants

Town of Plympton-Wyoming

[73] The Town is a participant and was represented by counsel throughout the hearing. Mr. Kyle Pratt is the Town's CAO. He made a presentation regarding the human health issue and the Town's concerns on behalf of its citizens, including road use and safety (Mr. Cole's evidence); low frequency noise affecting the cognitive abilities of children, pathological changes and aggravating pre-existing medical conditions, e.g., the Bryce family (Dr. Alves-Pereira's evidence); the psychological effects of noise diminishing the quality of life (Dr. Bronzaft's evidence); and annoyance and health effects (Dr. Aramini's evidence).

[74] Mr. Pratt commented on Dr. Lynn's evidence (in particular the study that she co-authored), and the Study Summary.

Elizabeth Bellavance

[75] Ms. Bellavance is a participant. She spoke in her personal capacity and as a representative of the group "We're Against Industrial Wind Turbines, Plympton-Wyoming ("WAIT PW")", which she describes as a grassroots community-based organization that was formed in 2012. Her written submissions state that WAIT PW "is against the irresponsible siting of wind turbines, particularly the practice of shoehorning them into populated rural communities."

[76] Ms. Bellavance has been very active in the community opposing the Project and referred to a petition that was delivered to the MOE opposing the Project, which she

believes was not reflected in the number of comments about the Project set out in the province's Environmental Registry. She testified that disclosure regarding the Project was deficient and that responses to freedom of information requests were much too slow.

[77] Ms. Bellavance testified about the Study Summary and it was made an exhibit to her evidence. She testified that the Project is harming her personal psychological integrity.

[78] Ms. Bellavance spoke about the World Health Organization's definition of "health" as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity", and stressed that the Project is causing harm to community health. She said that people have exchanged threats and some people have had to leave their homes to sleep elsewhere.

[79] When Ms. Bellavance was giving her evidence and provided her written submissions the Director and the Approval Holder raised concerns about the admissibility and weight to be given to the large number of documents prepared by third parties that Ms. Bellavance included with her evidence. The Director and the Approval Holder objected to these documents as evidence on the basis that it is hearsay, and because they contained a great deal of opinion evidence. However, for the purposes of this proceeding only, they consented to its admission into evidence "on the basis that they informed Ms. Bellavance's concerns, and were not being admitted for the truth of their contents." When Ms. Bellavance gave her evidence, the Tribunal accepted these documents as part of her evidence on this basis. Regarding the many documents appended to her final written submissions, some of which were in the nature of new evidence that had not been put forward during the hearing of the evidence, the Director and the Approval Holder again indicated to the Tribunal that they would consent to admission of the additional documents on the same basis as set out above. The Tribunal deferred its ruling on these additional documents. The Tribunal can admit hearsay evidence and decide what weight it should be given. However, Ms. Bellavance

was not qualified as an expert witness to give opinion evidence and the Tribunal finds that she is not entitled to adopt the information and opinions expressed in the various documents as supporting her opinions on the issues before the Tribunal. The Tribunal accepts the new documents attached to Ms. Bellavance's final written submissions on the same basis that they informed her concerns, but are not admitted for the truth of their contents. This ruling is subject to reference to the Study Summary by other witnesses and by the parties in their submissions, discussed elsewhere in these reasons.

Nick Monsour

[80] Mr. Monsour is a presenter. He is a retired engineer. He said that engineering projects, such as this, are about safety and health and that his concern is that he has not heard or read that wind farms are safe.

Gilda Yvonne Bressette

[81] Ms. Bressette, and Shelly Bressette as her representative with Kylie Rose Bressette assisting, presented on behalf of Anishinabekwewag from four generations including Great Grandmothers, Grandmothers, Mothers and Granddaughters from the Chippewas of Kettle and Stony Point First Nation. They presented oral testimony of their Elders that they had recorded and transcribed. They indicated that the Elders are experts in traditional knowledge of medicines, plants, hunting and fishing. They oppose the installation of more wind turbines within their traditional territory, which they say includes the proposed site of the Project. They said that they are not against wind turbines but against where the wind turbines would be placed. There written submission states:

> We are Anishinabekwewag who are united in our position that we do not support the development known as the Suncor Cedar Point Wind Farm as we firmly believe the wind turbines have long-lasting and irreversible negative effects on human life, plant life and animal life in this territory and will seriously affect our traditional way of life as Anishinabeg.

[82] Ms. Bressette said that members of her family live near wind turbines of another project (along the 14th Concession, Rawlings Rd.) and that they have experienced health symptoms, including dizziness, migraines and inability to sleep.

[83] The Elders are concerned that wind farms affect the overall health of the community and "felt as though their community was being treated as "guinea pigs" by the wind farm corporations and government to determine if there are health risks from the turbines erected around their community."

Evidence of the Approval Holder

Jody Hood

[84] Mr. Hood's evidence is discussed above.

Brian Howe

[85] Mr. Howe was qualified by the Tribunal as a mechanical engineer with expertise in acoustics, noise and vibration, and with special expertise in infrasound, low frequency noise and wind turbine noise.

[86] Regarding the 2008 Noise Guidelines, Mr. Howe testified that "the actual measured levels definitely can vary by plus/minus 5". In a 2009 paper entitled "Recent developments in assessment guidelines for sound wind power projects in Ontario, Canada, with a comparison to acoustic audit results" he concluded: "These improvements have increased the consistency between assessments, although there remains in practice variations of at least plus or minus 5 dB between the predicted impacts and sound levels measured in the field".

[87] A literature review report that Mr. Howe prepared states: “The audible sound from wind turbines is nonetheless expected to result in a non-trivial percentage of persons being highly annoyed.” Mr. Howe explained, as set out in his witness statement, that by “non-trivial” he means 6% of people experiencing noise levels between 35 and 40 dBA would be highly annoyed, and 20% at noise levels over 40 dBA, based on European standards.

[88] Mr. Howe said that high annoyance is determined in Europe and in the Health Canada study by people self-reporting their annoyance and that there is no other way to measure annoyance.

[89] Mr. Howe agreed on cross-examination that the research indicates that annoyance, and not just high annoyance, can lead to certain stress-related effects.

Dr. Christopher Ollson

[90] Dr. Ollson has Master of Science and Doctorate of Philosophy degrees in Environmental Science from the Royal Military College of Canada. He is the Vice President, Strategic Development and Senior Environmental Health Scientist at Intrinsik Environmental Sciences Inc. Dr. Ollson was qualified by the Tribunal to provide expert opinion evidence in environmental health science, practising in the evaluation of potential risks and health effects of people and the ecosystem associated with environmental issues.

[91] Based on his review of peer-reviewed scientific articles on the issue of causation between industrial wind turbines and alleged health effects, Dr. Ollson provided his opinion that, when sited properly, wind turbines are not related to adverse health effects. He said that because attitudes about turbines are strongly linked to annoyance, a segment of the population may remain annoyed or report other health impacts even when noise limits are enforced. He also stated that he was part of a research team investigating infrasound and low frequency noise, and their analysis indicated that

health-based audible noise guidelines, as provided by the MOE, are suitable for the protection of human health.

Dr. Robert McCunney

[92] Dr. McCunney holds a Medical Doctor degree from the Thomas Jefferson University and a Master of Public Health in Occupational Medicine from the Harvard School of Public Health, and is board certified in occupational and environmental medicine. He is a Research Scientist at the Massachusetts Institute of Technology and a Staff Physician at Brigham and Women's Hospital in Boston, and co-authored a 2009 scientific literature review, entitled "Wind Turbine Sound and Health Effects: An Expert Panel Review". He also conducted an updated literature review prior to testifying in this matter. The Tribunal qualified Dr. McCunney to give expert opinion evidence as a medical doctor specializing in occupational and environmental medicine with particular expertise in the health implications of noise exposure.

[93] Based on his literature search of peer-reviewed articles concerning the evaluation of potential health effects among people living in the vicinity of wind turbines, Dr. McCunney stated that detectable levels of infrasound and low frequency sound are not at harmful levels near wind farms. He said there are no studies demonstrating harmful effects to humans as a result of exposure to infrasound or low frequency sound at the noise levels measured in the vicinity of wind turbines or in experimental studies involving noise levels several orders of magnitude higher than those in the vicinity of wind turbines.

[94] In Dr. McCunney's opinion, noise associated with wind turbines is not a health risk, and that annoyance associated with wind turbines is a subjective phenomenon that appears to be related primarily to attitudes to the visual impact of wind turbines and the economic benefit associated with wind farms. He testified that annoyance is not a health effect. He also stated that vibroacoustic disease is not listed in the ICD-10 as a disease or an accepted diagnosis. In cross-examination, Dr. McCunney agreed that a

number of stress-related symptoms could be associated with extreme annoyance, including sleep disturbances, headaches, nausea, tachycardia, irritability and difficulties with concentration and memory.

Dr. Kenneth Mundt

[95] Dr. Mundt has a Master of Science degree in Epidemiology from the University of Massachusetts, and a Doctorate in Epidemiology from the University of North Carolina. He is an Adjunct Professor in the Department of Epidemiology, University of North Carolina at Chapel Hill, and the Health Sciences Practice Area Leader and Director of Epidemiology at ENVIRON International Corporation. Dr. Mundt was qualified by the Tribunal to give opinion evidence as an expert in epidemiology.

[96] Dr. Mundt's evidence was based on his review of peer-reviewed, published epidemiological literature addressing potential health impacts of noise emissions from industrial wind turbines, mainly consisting of cross-sectional surveys and experiments in which volunteers are exposed to recorded wind turbine sounds under controlled conditions. He concluded that the literature does not establish that residential exposure to wind turbines causes any harm to human health, let alone serious harm. He further stated that, at most, the literature reports an association or correlation between sound pressure levels and self-reported or perceived annoyance, although these findings may reflect attitudes toward wind turbines or perceptions of economic loss or aesthetic degradation.

[97] Dr. Mundt testified that disease such as hypertension and self-reported conditions such as headaches were not found to differ with annoyance or measured sound pressure levels, but some associations between sleep disturbance and annoyance from wind turbine noise were observed. However, he said it was not established whether the noise caused the sleep disturbance, or sleep problems led to annoyance with the noise. He stated that, while some individuals report annoyance

from wind turbine noise, there is no indication of a correlation between wind turbine noise and adverse health effects or serious harm.

Evidence of the presenters of like interest to the responding parties

Sandra deJong, Dean deJong and John Cook

[98] Mr. deJong, Ms. deJong and Mr. Cook testified as a panel of presenters. They said that they were giving an "alternate voice" of the community in favour of the Project. Ms. deJong spoke about her concerns about global warming and climate change and that wind power reduces emissions of pollutants into the atmosphere. Mr. deJong said that wind farms are an extension of an ancient technology, and he referred to the Study Summary and studies in Alberta and Australia. Mr. Cook referred to a study by University of Waterloo researchers of newspapers serving communities in Ontario where wind turbines are located. The study concluded that the newspapers used terminology described as "fright factors" in articles about wind turbines and health that may produce fear, concern and anxiety for readers.

[99] In her concluding remarks, Ms. deJong said that stopping wind turbines would have negative effects on the environment that would result in adverse health effects.

Submissions of the Bryce Appellants

[100] The Bryce Appellants submit that in previous REA appeal decisions, the Tribunal has applied a strict "but for" test [that the serious harm will not be caused but for the operation of the turbines] in determining whether appellants have proven that the renewable energy projects at issue will cause serious harm to human health. The Bryce Appellants submit that a "but for" test is not an appropriate test for proving causation on renewable energy approval appeals, characterizing them as public law health cases where damages are not at issue, science and technology are evolving and both sides acknowledge that additional research is needed. They argue that, in such cases,

different causation considerations should apply, and they submit a lower threshold of a "material contribution" test [causation established where a defendant's negligence "materially contributed" to an injury occurring] should apply.

[101] The Bryce Appellants cite the material contribution test as set out in *Athey v. Leonetti* (1996), 140 D.L.R. (4th) 235 (S.C.C.) ("*Athey*"), at para. 15, as:

> The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury…. A contributing factor is material if it falls outside the *de minimis* range.

[102] The Bryce Appellants further rely on *Clements v. Clements*, 2012 S.C.C. 32 ("*Clements*"), at para. 44, submitting that the Supreme Court of Canada has recognized that the material contribution test is part of the law in Canada and that new situations may raise new considerations for the application of the test. They suggest, for example, a situation such as mass toxic tort litigation involving multiple plaintiffs, where it is established statistically that the defendant's acts injured some members of the group but it is not possible to know which ones. The Bryce Appellants assert that renewable energy approval appeals are a new situation that requires new consideration of the material contribution test and that the threshold for proving causation is less onerous than a "but for" test in such circumstances, including a renewable energy approval appeal.

[103] The Bryce Appellants submit that the material contribution test is appropriate in situations where the issue under consideration is not damages, and where deficiencies in scientific knowledge hamper proof of effects on human health under a "but for" test. They state that modified causation principles are important where an imbalance of resources between the parties, such as appeals by residents of renewable energy approvals for commercial wind farms, puts respondents, such as the Approval Holder and the Director, in a better position to marshal evidence. The Bryce Appellants submit that the Tribunal should apply a forgiving approach to causation, saying it is necessary and just: necessary where science is incapable of providing an answer and just

because it protects rights while scientific knowledge is developed. The Bryce Appellants say that reliable anecdotal evidence of causation is available and recognized in the jurisprudence as a suitable substitute for scientific proof where studies are lacking or inconclusive.

[104] The Bryce Appellants note that the Study Summary reported that wind turbine noise above 35 dBA is statistically associated with high, or extreme, annoyance, and that high/extreme annoyance is statistically associated with measured health endpoints, such as hair cortisol concentrations, blood pressure, resting heart rate and measured sleep. They note the position of the Approval Holder's expert witnesses regarding the Study Summary that it cannot be shown with certainty whether wind turbine noise is causing annoyance or if other factors such as attitudes towards wind turbines are a factor. The Bryce Appellants submit that, in such circumstances, it is incumbent on the Tribunal to use the material contribution test.

[105] The Bryce Appellants assert that their argument that a material contribution test is appropriate, is distinct from the argument put forward by the appellants in *Kroeplin v. Ontario (Ministry of the Environment)*, [2014] O.E.R.T.D. No. 24 ("*Kroeplin*"), which was upheld on appeal by the Divisional Court in *Dixon et al v. Director, Ministry of the Environment*, 2014 ONSC 7404 ("*Dixon, Drennan, Kroeplin*"), issued on December 29, 2014. They note that the appellants in *Kroeplin* argued that the Tribunal could draw an inference of causation without the appellants being required to call a medical expert to prove causation, but the Tribunal held that such an inference could not be drawn in that case.

[106] The Bryce Appellants submit that the noise from the turbines and stress related symptoms associated with annoyance due to the turbines will exacerbate their already serious medical conditions. Regarding the evidence of the two post-turbine witnesses, they submit that an inference should be drawn that wind turbine noise caused Witness No. 1 such adverse health effects that she was required to leave her home, and that

there were no other plausible explanations for the adverse health effects Witness No. 2 experienced.

[107] Based on Dr. Bronzaft's evidence, the Bryce Appellants assert that the inability of individuals to control unwanted noise, regardless of the sound levels, leads to learned helplessness, which exacerbates stress. They submit this is consistent with findings in the Study Summary that associations for self-reported and measured health endpoints were not dependent on particular levels of noise or distances from turbines. They also assert that this accords with Dr. Aramini's evidence that, once an individual is annoyed, they may experience high annoyance regardless of actual noise levels. They make further submissions concerning the evidence of the expert opinion witnesses that are discussed below in relation to Issue 2.

Submissions of the Town

[108] The Town submits that Dr. Lynn's study establishes that: "Current scientific knowledge … indicates serious harm to human health is occurring as a result of the exposure of humans to industrial wind turbines. The Town further submits, based on Dr. Lynn's evidence, "that wind turbine projects can be extremely divisive, disruptive and stressful on communities as a whole, therefore resulting in poor community health" and resulting in unhappiness and distress. The Town submits that this is evidence of serious harm to human health.

[109] The Town submits that the preliminary Study Summary analysis indicates that "statistically significant exposure-response relationships were found between increasing wind turbine noise (WTN) levels and the prevalence of reporting high annoyance", and that this "supports the findings of Dr. Lynn that industrial wind turbines are associated with negative health effects." The Town supports Dr. Aramini's analysis of the Study Summary that the raw data would help "to examine how annoyance in fact plays a role in determining health effects".

[110] The Town disagrees with the conclusions of Mr. Howe regarding low frequency sound and infrasound, and those of Drs. Ollson, McCunney and Mundt regarding health effects of wind turbines and their views that annoyance is not a serious health effect. The Town argues that whether there is a causal link between human health and wind turbines should not be determinative of the health claims. The Town submits that its citizens should not be test subjects for future studies to determine the long term effects of wind turbines on health.

Submissions of Ms. Bellavance

[111] Ms. Bellavance submits that using the precautionary principle, on a balance of probabilities, the Project as approved will cause serious harm to human health.

[112] She testified that the Project is harming her personal psychological integrity. She submits that this is a violation of her s. 7 *Charter* right to security of the person.

[113] Ms. Bellavance submits that the Study Summary neither proves nor disproves causation and that it was not designed to do so. She asks how appellants can be expected to have the resources to prove causation when the government has spent a significant amount of money on the Health Canada study and it did not even establish causation one way or the other.

[114] Ms. Bellavance submits that the community is an unwilling host to industrial wind farms and that the health of the community as a whole, and individual members, should not be sacrificed when there is no evidence that they reduce our carbon footprint. She supported Dr. Bronzaft's evidence that people are suffering and they should not have to wait for science to catch up. She submits that the evidence of the Approval Holder's experts was not impartial and should not be given any weight.

[115] Ms. Bellavance submitted that the wind turbine noise performance limits discriminate between participating and non-participating receptors because the latter

can choose where the wind turbines will go such that they can be placed further away from dwellings.

[116] Ms. Bellavance submits that the REA complaint protocol should be improved.

Submissions of the Approval Holder

[117] In response to the Bryce Appellants' assertion that a material contribution test should be applied because a "but for" test is unworkable, the Approval Holder submits that the burden of proof is not scientific certainty and that an appellant is only required to prove that it is more likely than not that serious harm will occur, which is not an unworkable causation test. The Approval Holder states that *Athey* is not analogous to the present situation. The Approval Holder notes that the plaintiff in that case suffered a proven herniated disc injury that was contributed to either by his physician, the car accidents, or both. The Approval Holder states that the judge in *Athey* held that although the car accidents were not the only cause of the disc herniation, they played some causative role.

[118] The Approval Holder argues that, in *Athey*, it was 'unworkable' to determine, on a balance of probabilities, who was more at fault but, in the Bryce Appellants' appeal, it has not been proven that wind turbines have ever caused a serious injury and, as such, it is inappropriate to apply a material contribution test. The Approval Holder argues that the *Clements* case also is not analogous to the Bryce Appellants' appeal, stating that there is no statistical or scientific evidence in the appeal before the Tribunal on which to prove that anyone, on a balance of probabilities, has been harmed in a serious manner.

[119] The Approval Holder submits that there is no basis for Ms. Bellavance's discrimination claim because here there are neither non-participating nor participating receptors within the regulatory 550 m setback.

[120] The Approval Holder submits that the Bryce Appellants, and the participants and presenters in support of their position, did not lead any evidence capable of establishing a causal link between the operation of wind turbines and serious harm to human health. The Approval Holder argues that they only adduced evidence of their concerns, maintaining that this is not sufficient to establish, on a balance of probabilities, that serious harm to human health will occur as a result of engaging in the Project in accordance with its REA. The Approval Holder submits, therefore, that the health aspect of the Bryce Appellants' appeal should be dismissed.

Submissions of the Director

[121] The Director notes that the Tribunal recognized in *Kroeplin*, at paras. 200 and 204, that it is open to the Tribunal to make an inference of harm to human health in assessing the evidence, but the appropriateness of that step will depend on the nature and quality of evidence before it, and a flexible approach to causation is not a substitute for evidence, nor does it reduce the level of proof required. The Director states that the decision in *Snell v. Farell*, [1990] 2 S.C.R. 311 ("*Snell*") does not relieve appellants of renewable energy approvals of their burden to prove that it is more probable than not that a project will cause harm to human health. The Director submits that the Bryce Appellants' evidence does not support an inference that the Project will cause serious harm to human health.

[122] The Director submits that the Bryce Appellants have failed to prove that the Project as approved will cause serious harm to human health under s. 145.2.1 of the *EPA*, noting that the Tribunal has held in past decisions that appellants must establish that a project will cause serious harm to human health on a balance of probabilities. The Director argues that the evidence adduced by the Appellants fails to meet this threshold, and that mere speculation about the possible effects of the Project will not meet the threshold.

Findings on Issue 1B

[123] The Bryce Appellants' submission that the Tribunal should apply a "material contribution" test in determining whether they have proven that the Project will cause serious harm to human health, instead of applying a "but for" test, appears to be a refinement of the argument that was made by the appellants in *Kroeplin* that the Tribunal should infer causation.

[124] The appellants in the *Kroeplin* proceeding asserted that the Tribunal in past decisions had wrongly required that (i) the appellants prove with scientific certainty that industrial wind turbines cause harm; and (ii) the evidence of post-turbine witnesses alone, without the qualified diagnostic skills of a health professional, is not sufficient to prove causation. Relying on several cases, including the Supreme Court of Canada decisions in *Snell*, *Athey* and *Clements*, the appellants in *Kroeplin* argued that the requirement for a qualified medical diagnosis was inconsistent with the law of causation and that "these decisions allow the Tribunal to draw an inference of causation from the evidence adduced in this case, in the absence of scientific proof, through the application of reason and common sense."

[125] The Tribunal in *Kroeplin*, at para 197, noted that Tribunal decisions had consistently held that the burden of proof on renewable energy approval appellants is the balance of probabilities, meaning that an appellant must meet the *EPA* statutory onus by proving that it is more likely than not that serious harm to human health will result from the operation of a renewable energy project, under s. 145.2.1 of the *EPA*. The Tribunal in *Kroeplin* further noted that the Tribunal had not in any case demanded that harm be proved to a level of scientific certainty.

[126] The Tribunal in *Kroeplin* held, at para. 200, that the role of the Tribunal:

> is to review and weigh the evidence that is put before it and to reach findings based on that evidence. While there is no impediment to the Tribunal drawing an inference of causation in appropriate circumstances,

> the appropriateness of that step will depend on the nature and quality of the evidence that is before it.

[127] The Tribunal in *Kroeplin* went on to review the evidence before it in that manner, in particular the evidence of post-turbine witnesses testifying regarding the health conditions and symptoms they had experienced, which they believed had been caused or exacerbated by living near wind turbines. The Tribunal in *Kroeplin* cited past Tribunal jurisprudence concerning the need for a qualified medical diagnosis for the Tribunal to reach a reliable conclusion on causation, stating that because there may be a number of potential causes for medical conditions and symptoms, there is a need to prove the causal link with exposure to wind turbines (para. 201 to 203).

[128] The Tribunal concluded, at para. 204 of *Kroeplin*, that a finding of causation must be justified on the evidence, and that a flexible approach to causation is not a substitute for evidence and does not reduce the level of proof required. The Tribunal in *Kroeplin* also observed, at para. 205, that the evidence of an appellant is not the only evidence the Tribunal must weigh:

> There is also the evidence of the respondents, who proffered several experts to contradict the Appellants' evidence. As the Court held in *Snell*, an inference of causation may be appropriate in the absence of any evidence to the contrary, but that where there is contradictory evidence adduced, the exercise that must be carried out is to weigh all of the evidence and reach a finding that is justified. While this approach may demand that respondents adduce evidence to counter an adverse inference possibly arising from an appellant's evidence, it does not mean that the onus shifts to the respondents to prove an alternate explanation for the symptoms experienced by the post-turbine witnesses.

[129] In *Dixon, Drennan, Kroeplin*, the Divisional Court specifically quoted passages of the Tribunal's analysis from paras. 200 to 205 in *Kroeplin*, and said, at para. 101, that the Tribunal in *Kroeplin* had weighed the evidence of the post-turbine witnesses in light of the expert medical evidence heard. The Divisional Court described that evidence as being:

> to the effect that causal conclusions based solely on self-reported health problems were scientifically speculative and likely misleading and that

> the level of information provided in the medical records of the post-turbine witnesses was insufficient to allow a medical practitioner to make definitive casual assessments between diagnoses, symptoms and wind turbines.

[130] The Divisional Court, at para. 102, concluded as follows on the issue of whether the Tribunal panels had erred in their treatment of the post-turbine witnesses:

> In sum, the Tribunals assessed the evidence which they heard from fact witnesses in the light of expert medical evidence which they heard about the inferences of causation which could or could not be drawn from such fact evidence. In so doing, the Tribunals were not determining questions of law, but were making findings of fact or, at most, findings of mixed fact and law. Those determinations are not open to this Court to review on an appeal under EPA section 145.6, and we therefore give no effect to this ground of appeal by the Appellants.

[131] Turning to the cases cited by the Bryce Appellants, the Tribunal observes that *Athey* involved a civil negligence action in which a material contribution test was applied, in determining liability, to assess the contribution of different factors to the plaintiff's medical condition. In *Athey*, the Supreme Court of Canada stated that the "but for" test is the general, but not conclusive, test for causation that requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant, and that the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of an injury.

[132] In the majority decision in *Clements*, the Supreme Court of Canada distinguished between "but for" causation and material contribution to risk. The Court stated, at para. 14, that "but for" causation is a factual inquiry into what likely happened, while the material contribution to risk test removes the requirement for "but for" causation and substitutes proof of material contribution to risk.

[133] The Bryce Appellants submit that the *Athey* and *Clements* decisions are authorities for the argument that the material contribution test should be applied in renewable energy approval appeals in place of the "but for" test (the usual test in determining causation).

[134] The Court in *Clements* noted that the "but for" test continues to be the appropriate test and that the material contribution test is appropriate only in exceptional circumstances, and only where the "but for" test has already been met.

[135] The Tribunal notes, as stated in *Kroeplin*, that a finding of causation must be justified on the evidence. The Supreme Court of Canada has applied the material contribution test in tort cases in exceptional circumstances. It is not necessary for the Tribunal to address the Bryce Appellants' argument that the material contribution test be applied in the context of REA appeals because the Tribunal in *Erickson v. Ontario (Ministry of the Environment)*, [2011] O.E.R.T.D. No. 29 ("*Erickson*"), at para. 819, has already addressed their concern and found that the test in s. 145.2.1(2) of the *EPA* may be met even if the exact mechanism is unclear:

> …For the purposes of this Decision, the Tribunal finds that the Appellants can attempt to satisfy the section 145.2.1(2) test even if there is uncertainty about the specific mechanism that causes the alleged health effects. As noted by Dr. Speechly (albeit in the context of the application of scientific findings, as opposed to the section 145.2.1(2) test itself), an understanding of the specific causal mechanism is not an absolute precondition to action. What needs to be shown here, given the wording of the legal test, is that the effect is being caused by the Project, even if the exact mechanism is unclear.

[136] Having considered the evidence adduced by the Bryce Appellants, the evidence of the concerns raised by the participants and presenters supporting the Bryce Appellants, and the discussion and analysis of that evidence set out below under Issue 2, the Tribunal finds that the evidence does not establish that engaging in the Project in accordance with the REA will cause serious harm to human health pursuant to s. 145.2.1(2) of the *EPA*.

Issue 2: Whether the statutory harm test set out in *EPA* s. 142.1(3) and s. 145.2.1(2), or the Director's decision, deprives the Bryce Appellants of the right to security of the person under s. 7 of the *Charter.*

Introduction

[137] The Tribunal has considered s. 7 of the *Charter* in a number of recent decisions on renewable energy approval appeals. None of those *Charter* challenges has been successful. In the recent *Dixon, Drennan, Kroeplin* decision, the Tribunal's analyses and decisions in three previous appeals were approved and upheld by the Divisional Court. The Tribunal's subsequent decision in *Gillespie v. Ontario (Ministry of the Environment)*, [2014] O.E.R.T.D. No. 72 ("*Gillespie 2*") applied the previous decisions of the Court and the Tribunal in dismissing the s. 7 *Charter* challenge in that case. This is the second renewable energy approval appeal after *Dixon, Drennan, Kroeplin* to deal with a s. 7 *Charter* challenge. Counsel for the Bryce Appellants were also counsel for the appellants in the *Dixon, Drennan, Kroeplin* appeals. The same panel of the Tribunal on this appeal heard the *Gillespie 2* appeal, and adopts the analysis and findings in that decision.

[138] The analysis of a s. 7 *Charter* challenge was summarized in *Gillespie 2*, at para. 73, as follows:

> A *Charter* s. 7 challenge on the basis of deprivation of security of the person is a two-step process. The claimant must first demonstrate, on a balance of probabilities: serious physical harm, or serious and profound psychological harm, and a sufficient connection with the impugned state conduct; and, secondly, that this deprivation is not in accordance with the principles of fundamental justice. A deprivation may still be saved under s. 1 of the *Charter*, which provides that *Charter* rights are subject to "such reasonable limits as can be demonstrably justified in a free and democratic society." *(New Brunswick (Minister of Health and Community Services) v. G. (J.)* [1999] 3 S.C.R. 46; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 S.C.C. 44, at paras. 47; *Chaoulli v. Quebec (Attorney General)*, 2005 S.C.C. 35, at para. 123; *Dixon*, at para. 27; *Platinum*, at para. 105; and *Gillespie 1*, at paras. 161 and 162.)

Discussion, Analysis and Findings

[139] This portion of the reasons first sets out the constitutional issues raised by the Bryce Appellants in this proceeding, and by the appellants in the *Dixon, Drennan, Kroeplin* appeals, and then provides an overview of the submissions of the parties, followed by discussion, analysis and findings regarding specific issues in this appeal.

[140] The evidence relevant to Issue 2 is discussed above in regard to Issue 1A.

The notice of constitutional question and the relief requested

[141] The Bryce Appellants' notice of constitutional question includes the following as the legal bases for the constitutional question:

> …
>
> (b) The appellants' security of person interest is violated by the Director granting approval for the Suncor Cedar Point Project that will cause adverse health effects;
>
> (c) The process for granting the Renewable Energy Approval does not require the Director to consider the potential health effects on the appellants, and as such has a serious impact on the appellants' psychological integrity;
>
> (d) The appellants' right to security of the person is violated by a process for granting the Renewable Energy Approval which does not comply with the precautionary principle, and as such has a serious impact on the appellants' psychological integrity;
>
> (e) The Director granting approval for a wind project without requiring Suncor Energy Products Inc. to conduct any form of study to determine adverse health effects on neighbours living in close proximity to the proposed project has a serious impact on the appellants' psychological integrity;
>
> (f) The test of "serious harm to human health", applicable to appeals of the Director's decision by virtue of sections 142.1 and 145.2.1 of the *EPA*, violates s. 7 of the *Canadian Charter of Rights and Freedoms* by permitting those violations of the appellants' right to security of the person that fall short of the "serious harm" threshold.

[142] The constitutional relief requested in the Bryce Appellants' written submissions is:

> a. The test under sections 142.1 and 145.2.1 of the *EPA* violates section 7 of the *Canadian Charter of Rights and Freedoms* and should therefore be disregarded by the Tribunal;
>
> b. The Tribunal will read down sections 142.1 and 145.2.1 of the *EPA* such that it complies with the *Charter* and requires the Appellants to show that engaging in the renewable energy approval exposes the Appellants to a reasonable prospect of serious harm to human health; and
>
> c. A revocation of the Director's decision on the grounds that engaging in the renewable energy approval exposes the Appellants to a reasonable prospect of serious harm to human health.

[143] The constitutional relief sought by the appellants in *Dixon, Drennan, Kroeplin* included:

> (i) a declaration that *EPA* s. 145.2.1(2) was constitutionally invalid and an order reading into *EPA* s. 145.2.1(2)(a) that the test to be met is whether "a reasonable prospect of serious harm to human health" will be caused by engaging in the renewable energy project;
>
> (ii) alternatively, an order reading down *EPA* s. 145.2.1(a) to provide that the test to be met is whether "a reasonable prospect of serious harm to human health" will be caused by engaging in the renewable energy project;
>
> (iii) a declaration that the harms associated with living in close proximity to industrial wind turbines are sufficient to engage section 7 of the *Charter*;
>
> (iv) a declaration that the ERT possessed the jurisdiction to review the decision of the Director issuing the renewable energy approval and a declaration that such decisions did not comply with the *Charter*;
> …

[144] The Divisional Court in *Dixon, Drennan, Kroeplin* concludes "that the Tribunals did not commit an error of law in rejecting the Appellants' claims that the statutory review test violated their right to security of the persons under Charter s. 7 because:

> … the statutory review test adopted by the Ontario Legislature in *EPA* ss. 142.1(3) and 145.2.1(2) in respect of the impact on human health of contaminants, such as sound and vibration, discharged from commercial wind farms does not, on its face, depart from the jurisprudential test for establishing a state violation of a person's security of the person under *Charter* s. 7. [para. 88];
> …
> … that statutory test did not depart from the consensus scientific view on the impact of commercial wind turbines on human health. [para. 89]

Overview of Submissions

[145] The Bryce Appellants argue that the constitutional issues on this appeal are not foreclosed by the *Dixon, Drennan, Kroeplin* decision. They submit that there is additional relevant evidence for the Tribunal to consider in these appeals, such as the evidence of Dr. Alves-Pereira and Dr. Bronzaft, and the evidence of Dr. Aramini regarding the Health Canada study. They also rely on evidence of Mr. Howe regarding the percentage of receptors who are annoyed by wind turbine noise of 35 dBA or above. Mr. Howe said: "two or three fairly comprehensive studies in Europe on annoyance versus sound levels, they have found that in the range of about 35 to 40 dBA, you know, about six percent of people will be annoyed, as the term is considered, and above 40 dBA, that number jumps to about 20 percent." The evidence of these witnesses is summarized above and the Health Canada Study Summary is outlined in the summary of Ms. Bellavance's evidence.

[146] The Bryce Appellants further argue that the Divisional Court did not determine whether the appropriate test on renewable energy approval appeals under the *EPA* should be whether or not there is "a reasonable prospect of serious harm to human health", and, therefore, the Court did not decide an important aspect of the s. 7 *Charter* challenge. They indicate that leave is being sought to appeal the *Dixon, Drennan, Kroeplin* decision to the Ontario Court of Appeal.

[147] The Director and the Approval Holder submit that the relevant constitutional issues in this appeal are identical to those considered and decided in *Dixon, Drennan,*

Kroeplin, that decision is binding on the Tribunal, the additional evidence on these appeals does not change the result, and the *Charter* challenge should be dismissed.

[148] The Approval Holder also submits that the constitutional arguments of the Bryce Appellants have been rejected by the Tribunal in previous decisions in *Bovaird v. Ontario (Ministry of the Environment)*, [2013] O.E.R.T.D. No. 87 ("*Bovaird*"), *Dixon*, *Drennan*, *Kroeplin*, *Gillespie 1* and *Gillespie 2* on the basis that "the appellants did not provide an evidentiary basis for the Tribunal to conclude on a balance of probabilities that engaging in the wind facilities will cause serious harm of any kind." The Approval Holder further argues: "The Bryce Appellants have provided no evidentiary or legal basis for the Tribunal to come to a different conclusion than that which it reached in similar health appeals and in similar constitutional challenges."

[149] The Approval Holder submits that the Bryce Appellants have not established that the impugned provisions of the *EPA* result in a deprivation of security of the person within the meaning of s. 7 of the *Charter* as the scientific evidence and the evidence of the post-turbine witnesses does not show "a causal relationship between wind turbines and adverse effects on human health … and the REA process involves no deprivation whatsoever."

The Bryce Appellants' proposed reasonable prospect of serious harm to human health test and the Director's decision

[150] A focus of the Bryce Appellants' constitutional challenge is that s. 142.1 and s. 145.2.1 of the *EPA* should be "read down" such that they comply with the *Charter* and require the Bryce Appellants to show that engaging in the renewable energy approval exposes the Bryce Appellants to a reasonable prospect of serious harm to human health. If the *EPA* health test is read down, then the Bryce Appellants submit the Director's decision should be revoked on the grounds that engaging in the renewable energy approval exposes the Bryce Appellants to a reasonable prospect of serious harm to human health. The Bryce Appellants submit that the Divisional Court in *Dixon,*

Drennan, Kroeplin did not determine whether the *EPA* test should be whether there is a reasonable prospect of serious harm to human health.

[151] The Bryce Appellants argue that the harm that will be caused to the health of the Appellants will be indirect, such as a person being exposed to noise and then exhibiting stress and developing other related symptoms, and that this is sufficient to meet the appeal test (See *Erickson, supra,* at paras. 821 and 822). They refer to the Supreme Court of Canada decision of *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.), at para. 56, which held that a breach of security of the person occurs where there is state action which interferes with bodily integrity or causes serious state-imposed psychological stress.

[152] The Bryce Appellants submit that harm that has not yet occurred, or future harm, can meet the standard for interference with security of the person. They argue that security of the person includes freedom from the threat of physical punishment or suffering (see *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at para. 47), and "that when looking at future harm, an appellant need not be certain that the harm will occur, or that it be measurable with scientific precision, but rather that the risk [of] harm is likely to occur" (*Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1988), O.R. (3d) 487 (Ont. Ct.) at para. 163; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para. 127).

[153] The Bryce Appellants submit that they have adduced sufficient evidence to prove that the Project as approved will subject the Bryce Appellants to a reasonable prospect of serious harm to human health that will likely cause an adverse effect to their health.

[154] The Director submits that a *Charter* s. 7 claimant must demonstrate, on a balance of probabilities, firstly, that the impugned legislation or state action deprives the claimant of life, liberty or security of the person, and, secondly, that such deprivation is not in accordance with a principle of fundamental justice.

[155] The Director submits that the Divisional Court in *Dixon, Drennan, Kroeplin* rejected the argument, repeated by the Bryce Appellants, that there is "a lower threshold for proving a *Charter* s. 7 claim than for meeting the statutory threshold". The Director further argues that the *Charter* claim is effectively redundant if the *EPA* statutory harm test is not met.

[156] The Director submits: "Sections 142.1 and 145.2.1 of the *EPA* are consistent with the rights protected by s. 7 of the *Charter* and the Bryce Appellants have failed to demonstrate any violation of their rights at any stage of the *Charter* analysis."

[157] The Director submits that the *Dixon, Drennan, Kroeplin* decision is consistent with previous decisions of the Tribunal in: *Bovaird, Platinum Produce Co. v. Ontario (Ministry of the Environment)*, [2014] O.E.R.T.D. No. 8 ("*Platinum*"); *Fairfield v. Ontario (Ministry of the Environment)*, [2014] O.E.R.T.D. No. 71; *Gillespie 1* and *Gillespie 2*.

[158] The Director argues that:

> Dr. Alves-Pereira admits that the theory she puts forward has not been tested, peer-reviewed or generally accepted, Dr. Bronzaft admits that her research relates to the health effects of noise in significant excess of the noise levels approved under the REA, and Dr. Aramini agrees that the Health Canada study alone would neither be determinative or conclusive of causation. Such evidence cannot outweigh or seriously call into question the extensive scientific record reviewed by the Court in *Dixon*, or reiterated before this Tribunal by Drs. McCunney and Mundt.

[159] Likewise, the Approval Holder submits that the additional evidence on this appeal does not change the result that the *Charter* claim should be dismissed. The Approval Holder argues that the evidence of Dr. Alves-Periera should not be given any weight because it is a new scientific theory and not, at this stage, reliable scientific evidence.

[160] The Approval Holder argues that: the Study Summary is all that is available at this time and that it only provides preliminary results that have not been subject to peer review; the evidence of Ollson, Howe, McCunney and Mundt is that it is consistent with

previous studies that show that at noise levels greater than 35 dBA a certain proportion of industrial wind turbine noise receptors will be annoyed; the Study Summary results cannot be generalized; it states that it does not address causation; and associations do not equal causation. The Approval Holder further submits that the Study Summary should only be accepted as having informed Ms. Bellavance's views and not for the truth of its contents.

[161] The Approval Holder also submits that the "reasonable prospect of serious harm" standard proposed by the Bryce Appellants was rejected in *Dixon, Drennan, Kroeplin*. The Approval Holder further asserts that the Divisional Court considered the decisions of the Supreme Court of Canada in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, *Blencoe v. British Columbia (Human Rights Commission)* and *Chaoulli v. Quebec (Attorney General)* (all of which are cited above) and concluded, at para. 64:

> In sum, the statutory review test adopted by the Ontario Legislature in *EPA* ss. 142.1(3) and 145.2.1(2) in respect of the impact on human health of contaminants, such as sound and vibration, discharged from commercial wind farms does not, on its face, depart from the jurisprudential test for establishing a state violation of a person's security of person – i.e. the demonstration that the state action must have a serious and profound effect on a person's physical or psychological integrity.

[162] The Approval Holder submits that "any future harm that may arise as a result of scientific uncertainty regarding wind turbine health impacts does not engage s. 7 *Charter* protection." It submits that the Divisional Court in *Dixon, Drennan, Kroeplin* rejected this argument "on the basis that the consensus scientific view is that wind farms meeting the minimum setbacks and noise levels do not cause serious harm to human health."

Findings on the Bryce Appellants' proposed reasonable prospect of serious harm to human health test and the Director's decision

[163] The Tribunal will first consider the Bryce Appellants' argument that the Divisional Court did not decide the issue of whether the *EPA* "will cause serious harm to health" test should be read down to "a reasonable prospect of serious harm to human health" test by virtue of s. 7 of the *Charter*. The Tribunal will then consider their argument that the additional evidence in this appeal requires a different result on the *Charter* issue than in *Dixon, Drennan, Kroeplin*.

[164] In *Dixon, Drennan, Kroeplin*, beginning at para. 59 of the decision, the Court clearly considered the argument that the *EPA* test should be "read down" because it differs from the s. 7 *Charter* harm test.

> … The crux of their argument was that the statutory test of "will cause serious harm to human health" was constitutionally infirm because it exceeded the "harm test" implicit in *Charter* s. 7 of simply demonstrating that a wind farm project would cause "a reasonable prospect of serious harm to human health".

The Court concludes, as set out above, that the *EPA* harm test "does not, on its face, depart from the jurisprudential test for establishing a state violation of a person's security of the person …", and that "a contextual examination of the statutory test does not result in a different conclusion."

[165] On the comparison of the *EPA* statutory test and the *Charter* jurisprudential test, the Divisional Court cites, at para. 51, a passage from the Tribunal's decision on the St. Columban Wind Farm (*Dixon*) matter:

> The Tribunal will make no finding as to whether the "serious harm to human health" test set out in s. 145.2.1 of the *EPA* and the threshold of "serious physical harm" or "serious and profound psychological harm" required to establish a deprivation as required in a s. 7 *Charter* claim, are the same or similar. Further, the Tribunal will not make any specific finding as to whether the test in s. 145.2.1 of the *EPA* requiring the Appellants to establish that the Project "will cause" serious harm to human health is the same as the need to establish a "sufficient

> connection" as required in a s. 7 *Charter* claim. However, it is abundantly apparent from the jurisprudence pertaining to both the *EPA* test and s. 7 *Charter* test, that a solid evidentiary foundation is required for both tests. [para. 170]

[166] The Bryce Appellants submit that the *Dixon, Drennan, Kroeplin* decision does not explicitly reject the "reasonable prospect of serious harm to human health" test that they allege is implicit in the *Charter* s. 7 "harm test" and, they argue, is the proper *EPA* statutory harm test for appeals of renewable energy approvals. While the Court's decision simply indicates that one test "does not, on its face, depart from" the other, the Court did not read down the *EPA* harm to human health test as the appellants in the *Dixon, Drennan, Kroeplin* appeals requested, which the Bryce Appellants also request in this appeal.

[167] In its contextual examination of the *EPA* statutory test, the Divisional Court described, at para. 66, "the heart of the Appellants' s. 7 claims." This is summarized in *Gillespie 2* at paras. 94 to 96.

> The Court in *Dixon, Drennan, Kroeplin* discusses the uncertainty of scientific knowledge and the effects of commercial wind turbines. The Court observes, at para. 66 of the decision:
>
> > This brings us to the heart of the Appellants' s. 7 claims. They contend that unlike the certainty of scientific knowledge which surrounds the effects of the discharge of a contaminant such as mercury, when dealing with the effects of noise and vibrations from commercial wind farms we are dealing with "known unknowns". The uncertainty of the state of scientific knowledge about the effects on human health of commercial wind farms, according to the Appellants, materially informs the analysis of the *Charter* adequacy of the review tests found in *EPA* ss. 142.1(3) and 145.2.1(2). Which leads, then, to the question of whether the statutory test adopted by the Legislature materially departed from the consensus scientific view about the impact of commercial wind turbines on human health.
>
> The Court describes O. Reg. 359/09 as a "principle underpinning the *EPA*'s renewable energy project regulatory regime". The Court refers to the Divisional Court decision in *Hanna v. Ontario (Attorney General)*, 2011 ONSC 609, which found that the Minister of the Environment had complied with s. 11 of the *Environmental Bill of Rights, 1993*, S.O. 1993,

> c. 28 and the ministry statement of environmental values in setting the set-back and sound level limits for commercial wind farms.
>
> The Divisional Court deals with the uncertainty and onus arguments in its finding in *Dixon, Drennan, Kroeplin*, at para. 89 (cited above), [stating] that the *EPA* statutory test did not depart from the consensus scientific view on the impact of commercial wind turbines on human health.

[168] The Divisional Court's full conclusion on the s. 7 *Charter* analysis in para. 88 of the *Dixon, Drennan, Kroeplin* decision is:

> By way of summary, we conclude that the statutory review test adopted by the Ontario Legislature in *EPA* ss. 142.1(3) and 145.2.1(2) in respect of the impact on human health of contaminants, such as sound and vibration, discharged from commercial wind farms does not, on its face, depart from the jurisprudential test for establishing a state violation of a person's security of the person under Charter s. 7.
>
> We also conclude that statutory test did not depart from the consensus scientific view on the impact of commercial wind turbines on human health. …
>
> We therefore conclude that the Tribunals did not commit an error of law in rejecting the Appellants' claims that the statutory review test violated their right to security of the person under *Charter* s. 7.

[169] The Tribunal finds that the Divisional Court fully considered the argument, also advanced by the Bryce Appellants in this proceeding, that the *EPA* "will cause serious harm to health" test should be read down to "a reasonable prospect of serious harm to human health" test by virtue of s. 7 of the *Charter* and rejected the argument on the basis that the statutory *EPA* test does not, on its face, depart from the jurisprudential *Charter* s. 7 test for establishing a state violation of a person's security of the person. The Tribunal follows the Divisional Court's finding in the present case.

[170] The Tribunal notes that the Divisional Court's conclusion on its contextual analysis that the statutory test does not depart from the consensus scientific view on the impact of commercial wind turbines on human health is based upon the current state of scientific knowledge.

[171] The next question, then, is whether the additional expert evidence heard on this appeal, and the Health Canada Study Summary, should alter the result in this case from the results in the *Charter* challenges in *Dixon, Drennan, Kroeplin* and the various Tribunal decisions on the issue. In other words, do the additional evidence of Drs. Alves-Pereira, Bronzaft and Aramini, and the Health Canada study, change the current state of scientific knowledge or the consensus scientific view regarding industrial wind turbines and harm to human health?

[172] The scientific consensus was fundamental to the Court's decision in *Dixon, Drennan, Kroeplin*. The Court acknowledged that it was not to re-weigh or re-assess the Tribunals' factual findings and stated, at para. 75 (emphasis added):

> Our purpose in describing the expert evidence… is a narrow one: to identify that the Tribunals did not have before them expert evidence which seriously called into question the principle underpinning the EPA's renewable energy project regulatory regime – i.e. that wind turbines which are set back 550m from a dwelling house and which do not generate noise levels in excess of 40 dBA at the lowest specified wind speed do not cause serious harm to human health <u>based upon the current state of scientific knowledge</u>.

[173] The evidence of Drs. Alves-Pereira, Bronzaft and Aramini is summarized above under Issue 1B.

[174] Regarding the evidence of Dr. Alves-Pereira, the Tribunal finds that her evidence should be given little weight. The study that she participated in had a small data base, has not been replicated, has not been peer reviewed, and according to the Approval Holder's expert science witnesses is not generally accepted as authoritative in the scientific community.

[175] The Tribunal finds that Dr. Bronzaft's evidence does contribute something of value to the body of knowledge concerning the association between noise and annoyance. In addition, Dr. Aramini has raised valid questions regarding the purported gap in the analysis of the Health Canada study that although wind turbine noise is

associated with annoyance, and annoyance is associated with measureable health effects, there is no stated association between wind turbine noise and health effects.

[176] It should be noted that, while the evidence of Drs. Alves-Pereira, Bronzaft and Aramini was not provided in the hearings that resulted in the appeals before the Divisional Court, the appellants in *Dixon, Drennan, Kroeplin* were successful on their motion for leave to adduce the Health Canada Study Summary as fresh evidence on the appeals. Leave was granted to file the Study Summary for the limited purpose of assessing the constitutional validity, or reasonableness, of the statutory harm test contained in *EPA* s. 142.1(3) and s. 145.2.1(2). The Court states, at para. 86, that the opinion evidence before the Tribunal in two of the hearings on appeal was that an association between wind turbine noise and annoyance "was not sufficient to permit an inference of causation." The Court finds, at para. 87:

> Taken together, the results of the Study Summary do not offer any new relevant evidence on the constitutional supportability or reasonableness of the statutory test – "will cause serious harm to human health" – primarily because the Study Summary expressly disclaims that its results permit drawing any conclusions about causality.

[177] The parties initially advised the Tribunal that they agreed to the Health Canada Study Summary being made an exhibit to the evidence of Ms. Bellavance on the basis that it informed her concerns, and not for the truth of its contents. However, the Bryce Appellants later submitted that the Study Summary provides new information regarding the association between annoyance and measurable physical symptoms. The Director and the Approval Holder submit that the Study Summary is only preliminary, has not been peer reviewed, should be given little or no weight at this time, and, at most, merely confirms what is already known from previous studies.

[178] While the evidence of Dr. Aramini in this proceeding raises valid questions about the gap in the Study Summary's association analyses, he did not indicate in his evidence that answers to those questions, or that analysis of the underlying data for the Study Summary data itself, would change the scientific knowledge base or consensus

and demonstrate a causal connection between industrial wind turbine noise and harm to human health. The Study Summary states: "The following was found to be statistically associated with increasing levels of WTN: annoyance towards several wind turbine features (i.e. noise, shadow flicker, blinking lights, vibrations, and visual impacts)." The Summary Study also states that there is an association between annoyance and self-reported and measured health endpoints. However, the Tribunal finds that Dr. Aramini did not say that further consideration of those associations, or a review and analysis of the raw data would, or could, change the scientific knowledge and consensus and demonstrate that wind turbine noise causes annoyance and that annoyance causes serious harm to human health.

[179] Given the findings of the Divisional Court that the Study Summary indicates that the Health Canada study will not demonstrate causation and, therefore, it will not change the scientific consensus underlying the *EPA* statutory regime, and the Tribunal's finding that the additional evidence of Drs. Alves-Pereira, Bronzaft and Aramini in this hearing does not change that result, the Tribunal finds that the Bryce Appellants have not established, in this case, a factual or legal basis for their proposed reasonable prospect of serious harm to human health test, or that the Director's decision violates s. 7 of the *Charter* on the basis of their proposed test.

"Serious" harm

[180] In the context of their *Charter* argument and "serious" harm in this appeal the Bryce Appellants argue that where and when industrial wind turbine noise is experienced by a receptor in a dwelling is a particularly important consideration. They submit:

> that the harm experienced as a result of the exposure to wind turbine noise is serious because of where that harm is experienced, in the home, in the bedroom, at night, when one is trying to have respite. The experts called for the Appellants and the Respondents both agree that the body rests and regenerates at night. The Supreme Court of Canada has recognized the sanctity of the home in respect of an individual's right to privacy." [*R. v. Tessling*, [2004] 3 S.C.R. 432 at para. 22.]

[181] The Bryce Appellants argue that the harm in *R. v. Tessling* ("*Tessling*") is analogous to harm experienced in the home of an individual. They refer to the World Health Organization ("WHO") definition of "health" as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." In *Erickson*, the Tribunal found, at para. 645, that the WHO's broad approach to the meaning of human health best fits with the renewable energy approval statutory scheme, and in *Monture v. Ontario (Ministry of the Environment),* [2012] O.E.R.T.D. No. 69 ("*Monture 2"*) at paras. 33 to 35, the Tribunal applied the WHO definition of "human health" to the first branch of the *EPA* renewable energy approval appeal test in an aboriginal context.

[182] The Bryce Appellants also rely upon the evidence of Dr. Bronzaft that a noisy home environment could affect children and that the inability to control unwanted noise can develop "learned helplessness".

[183] The Director submits that there is no authority in regards to s. 7 of the *Charter* for the Bryce Appellants' argument that the harm from wind turbine noise is "serious" because it is experienced "in the home". The Director distinguishes *Tessling* as a *Charter* s. 8 "search and seizure" case that considered an accused person's expectation of privacy in the home. The Director also distinguishes a decision of the Portuguese Supreme Court (cited by the Bryce Appellants) as that case involved a private law dispute determined under a civil code and it is not clear whether the statutory regime was equivalent, e.g., the noise limits.

[184] The Approval Holder argues that the Bryce Appellants did not demonstrate with evidence that there is a causal link between wind turbines and serious harm to human health but merely provided evidence of personal concerns.

[185] The Approval Holder submits: "This is not a case about a person's fundamental interest in bodily and psychological integrity – no person is being forced by threat or

sanction to endure physical or psychological suffering." The Approval Holder submits that the *Dixon, Drennan, Kroeplin* decision "held that the Tribunal was correct in its conclusion that the 'ordinary stresses' a person of reasonable sensibility would suffer as a result of government action does not meet the threshold for serious harm set out in s. 7" (at paras. 61 and 64, citing *G. (J.)*, *Blencoe* and *Chaoulli*).

Finding on "serious" harm

[186] While the Tribunal accepts the importance of where and when noise is experienced, the Bryce Appellants did not provide any expert medical opinion evidence specific to the Project as to how wind turbine noise will affect their family. The Tribunal finds that there is insufficient evidence to establish, on a balance of probabilities, that the family of the Bryce Appellants will suffer serious harm to their health under either the *Charter* or *EPA* harm tests, or even the *EPA* test proposed by the Bryce Appellants.

The legislative scheme and psychological integrity

[187] The Bryce Appellants submit:

> a legislative scheme that creates a risk to health and then places the burden on the citizen to prove the health risk profoundly impacts the Appellants' psychological integrity. The Supreme Court of Canada has held that state action that causes effects on a person's psychological integrity, short of a diagnosable psychiatric illness implicates section 7." (*New Brunswick (Minister of Health and Community Services) v. G. (J.) [J.G]*, [1999] 3 S.C.R. 46 at para. 60.)

[188] The Bryce Appellants link their home environment, the legislative scheme, and alleged serious harm to their psychological integrity.

> The Appellants submit that they have a right to a healthy living environment, which includes the right to rest, sleep and tranquility in their home environment and that this right is fundamental to the physical and moral integrity of the individual. Government action that arbitrarily interferes with this right, without engaging in any analysis of the associated risks that they are placing on Ontario residents will cause

> distress, anxiety, and a disruption of family, social life and work, and impacts the psychological integrity of a person of reasonable sensibility.

[189] Regarding deprivation resulting from the impugned legislation (the *EPA*), the Director submits that the Bryce Appellants raise the identical constitutional claims to those raised in the *Dixon, Drennan, Kroeplin* appeals, and that the Divisional Court upheld the constitutionality of the test for statutory harm under s. 142.1(3) and s. 145.2.1(2) of the *EPA*, by rejecting the claims that the test infringes the right of security of the person under s. 7 of the *Charter*. The Director also submits that there is no evidence that the approval process itself has caused the Bryce Appellants any serious psychological harm.

[190] The Approval Holder also argues that the Bryce Appellants did not provide any evidence that their psychological integrity is affected by the onus to prove serious harm to their health being placed on them by the legislative scheme of the *EPA*, and that they cannot rely on the evidence of others, such as Ms. Bellavance, in that regard. In the alternative, the Approval Holder argues: “If there is any effect, it only rises to the level of ‘ordinary stresses’ and anxieties that a person with reasonable sensibility may suffer”.

Finding on the legislative scheme and psychological integrity

[191] The Divisional Court in *Dixon, Drennan, Kroeplin* comprehensively reviews the renewable energy approval legislative scheme. The Court describes Ontario Regulation 359/09 as a “principle underpinning the *EPA*’s renewable energy project regulatory regime” and states that the consensus scientific view is that wind farms meeting the minimum setbacks and noise levels do not cause serious harm to human health. As noted above, this is contingent upon the current state of scientific knowledge. The Bryce Appellants would not be living within the prescribed minimum setbacks and noise levels for the Project. The Tribunal finds that they have not provided scientific evidence that alters the consensus scientific view, nor have they adduced any medical or other evidence sufficient to establish that their psychological integrity has or will be seriously harmed under either of the *Charter* s. 7 or the *EPA* harm tests.

The legislative scheme and addressing health complaints

[192] The Bryce Appellants allege: “the legislative scheme for wind turbines creates a compliance regime that does not permit the MOE to take any steps to address or ameliorate health complaints” and that this “only heightens the infringement on the psychological integrity of the Appellants.”

[193] The Approval Holder submits that renewable energy approval legislation and the process were created to address health complaints, and that just because the Appellants’ concerns do not amount to “serious harm” this does not mean that health issues have not been addressed in the Project’s approval.

[194] The Bryce Appellants allege that this infringement of their s. 7 *Charter* rights “only heightens the infringement” of their psychological integrity. The Tribunal has found above that the Bryce Appellants have not met their evidentiary burden respecting harm to their psychological integrity. The Tribunal considers their argument regarding the legislative scheme and the addressing of health complaints to be an aspect of the immediately preceding issue and comes to the same conclusion as it did on that issue.

State action

[195] The Approval Holder submits that “an infringement of a person’s s. 7 right to security of the person will be established only if serious harm results from state action” and that there is “no causation by state action” in this case. The Approval Holder submits:

> The REA process imposes no prohibitions on individuals that would interfere with a person’s ability to take control over his or her own body or impose serious psychological stress. … Indeed, if anything, the REA process promotes and protects human health, and is therefore complementary of the rights protected by s. 7, including by: … promoting renewable energy to protect the environment, including human life ….

[196] The Bryce Appellants and the Director did not make any specific submissions on this issue.

Finding on State action

[197] Regarding deprivation by state action, in *Dixon, Drennan, Kroeplin* the Court finds, at para. 58, that the appellants' claims engage an analysis under the *Charter* for two reasons: firstly, the *Charter* regulates the relations between government and private persons and the challenge to the validity of provincial legislation required the Tribunal to engage in a *Charter* analysis; and, secondly: "The government's authorization of a construction activity which the Appellants allege will cause them harm constitutes a sufficient causal connection between the government activity and the alleged prejudice to embark upon a review and consideration of the Charter claims … ."

[198] The Tribunal finds that the Divisional Court's finding set out immediately above disposes of the Approval Holder's submission on this issue in this proceeding.

Conclusion

[199] The Tribunal finds, on the evidence, that the Bryce Appellants have not met the "serious harm" test(s) under either the *EPA* or s. 7 of the *Charter*.

[200] The Tribunal also finds that the Bryce Appellants have not demonstrated that the statutory harm test set out in *EPA* s. 142.1(3) and s. 145.2.1(2), or the Director's decision, deprives them of the right to security of the person under s. 7 of the *Charter*. Given this finding, it is not necessary to determine in this hearing whether there is a deprivation of the Bryce Appellants' security of the person in accordance with the principles of fundamental justice. Nor is it necessary for the Tribunal to consider the saving provision in s. 1 of the *Charter*.

DECISION

[201] The Tribunal dismisses the appeals and confirms the decision of the Director approving Renewable Energy Approval No. 6914-9L5JBB.

Appeals Dismissed
Decision of Director Confirmed

"Maureen Carter-Whitney"

MAUREEN CARTER-WHITNEY
MEMBER

"Robert V. Wright"

ROBERT V. WRIGHT
VICE-CHAIR

Appendix A – Reasons for Order dated December 23, 2014

Appendix A

Reasons for Order dated December 23, 2014

REASONS

Overview

On August 22, 2014, the Director, Ministry of the Environment ("MOE") issued Renewable Energy Approval No. 6914-9L5JBB (the "REA") under s. 47.5 of the *Environmental Protection Act* ("*EPA*"), to Suncor Energy Products Inc. (the "Approval Holder"). The REA is for a renewable energy project known as the Cedar Point Project (the "Project"). The Project consists of a Class 4 wind facility, with a maximum of 46 wind turbines, and a total nameplate capacity of 100 megawatts (MW), located within the Town of Plympton-Wyoming, Municipality of Lambton Shores, Township of Warwick, and County of Lambton, Ontario.

The Corporation of the County of Lambton (the "County") and Kimberley Bryce and Richard Bryce (the "Bryce Appellants") filed appeals of the decision of the Director to issue the REA with the Environmental Review Tribunal (the "Tribunal")..

After the commencement of the main hearing in this proceeding, the Bryce Appellants brought a motion to adjourn the hearing for a period of six months. The basis for the motion was that the Bryce Appellants wish to retain an expert to review the source data for a Health Canada study in respect of health effects related to wind turbines.

There is a statutory time period of six months for the Tribunal's review of the Director's decision, beyond which the decision is statutorily deemed to be confirmed by the Tribunal. Therefore, the Bryce Appellants also requested that the period of the requested adjournment be excluded from the six-month time period for a review.

After hearing the submissions of the parties, the Tribunal dismissed the motion on December 23, 2014. These are the reasons for that decision.

Background

The REA Appeals

The County and the Bryce Appellants appeal under s. 142.1(3) of the *EPA* on the ground that engaging in the Project in accordance with the REA will cause serious harm to human health. The Bryce Appellants also filed a notice of constitutional question, alleging that the REA violates their right to security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

The evidence of the Appellants, and the participants and presenters opposing the Project, was heard from November 12 to 14, 2014. The hearing of the evidence was then adjourned to December 17, 2014 for the hearing of the evidence of the Approval Holder, and the Director if any.

On November 6, 2014, prior to the commencement of the hearing of the evidence, Health Canada released on its website a document entitled "Wind Turbine Noise and Health Study: Summary of Results" (the "Study Summary").

The Appellants did not seek to enter the Study Summary as an exhibit during their evidence heard on November 12 to 14. It was made an exhibit on the presentation of the participant Elizabeth Bellavance when she gave her evidence on November 14, 2014. Counsel for the Bryce Appellants, the Director and the Approval Holder advised the Tribunal that they agreed to the Study Summary being put into evidence on the basis that it informed the concerns of Ms. Bellavance about wind turbines, but not for the truth of its contents.

On November 26, 2014, counsel for the Bryce Appellants (of Falconers LLP) wrote to the Tribunal and counsel for the other parties stating that the Bryce Appellants wished to have their case remain open in order to call additional evidence relating to the release of the Study Summary (specifically, "to examine the preliminary research findings in greater detail, including the raw data, and to adduce evidence related thereto"), and asking the Tribunal to confirm that they would not be required to bring a motion in order to do this. The Tribunal responded in writing on November 28, 2014, indicating that counsel for the Bryce Appellants might wish to discuss the matter with counsel for the other parties and then take such proceedings as may be appropriate under the Tribunal's Rules of Practice (the "Rules").

On December 10, 2014, the Bryce Appellants filed with the Tribunal a notice of motion requesting:

> (a) An Order adjourning the Tribunal hearing for six months, such that the Appellants can retain an expert to review the data emerging from the Health Canada Study in respect of health effects related to wind turbines;
> (b) An Order that the six-month time period for rendering a decision on ERT Case Nos. 14-06/1a4-066/14-067 as prescribed by the *Environmental Protection Act*, O. Reg. 359/09, exclude the period of the adjournment requested by the Bryce Appellants;
>
> …

In support of the motion, the Bryce Appellants provided the affidavit evidence of Odi Dashsambuu, who is a legal assistant with Falconers LLP. The Approval Holder provided responding affidavit evidence from Jody Hood, Manager of Development and Engineering for the Approval Holder, and from Dr. Christopher Ollson, Vice President, Strategic Development and Senior Health Scientist at Intrinsik Environmental Sciences Inc., who works as a senior environmental health scientist, risk assessor and environmental toxicologist. There were no cross-examinations on the affidavits.

Mr. Dashsambuu's affidavit states that on November 13, 2014, Falconers requested that Health Canada provide copies of the following documents: "Wind Turbine Noise Calculations"; "Analysis, Modeling, and Prediction of Infrasound and Low Frequency Noise from Wind Turbine Installation Phase 1: PEI Site Final report"; "Analysis, Modeling, and Prediction of Infrasound and Low Frequency Noise from Wind Turbine Installation Phase 2: Southern Ontario Site Final report"; and "Summary of wind turbine noise propagation below 100Hz".

Mr. Dahsambuu states that Falconers received the documents referred to in the preceding paragraph on November 18, 2014, and that on November 22, 2014, Falconers began contacting various experts about having additional expert evidence adduced before the Tribunal regarding the Study Summary.

Mr. Dashsambuu's affidavit indicates that on December 4, 2014, Asha James, counsel for the Bryce Appellants, contacted an epidemiologist, Dr. Jeff Aramini, regarding the possibility of providing an opinion on the Study Summary. The affidavit indicates that Dr. Aramini advised Ms. James that he would require access to the raw survey data collected by Health Canada to provide an adequate expert opinion, and that it would take approximately three to four months to review the raw data once received. The affidavit further indicates that, after corresponding with Statistics Canada, Falconers LLP was informed on December 9, 2014 that the raw data is only available to a researcher deemed to be an employee of Statistics Canada following security clearance, training, signing a confidentiality agreement and swearing an oath to uphold the *Statistics Act*, R.S.C., 1985, c. S-19, a process that would take approximately two months.

The Tribunal heard the Bryce Appellants' motion on December 18, 2014, at Camlachie. The County took no position on the motion, but raised a secondary issue submitting that if the motion were to be granted then the County's appeal should also be adjourned.

On December 23, 2014 the Tribunal issued the order dismissing the motion, with reasons to follow.

Issues

The issues on the motion are:

1. whether the hearing of the Bryce Appellants' appeal should be adjourned;
2. whether the six-month time period for rendering a decision should exclude the period of the adjournment; and
3. if Issues 1 and 2 are answered in the affirmative, whether the County's appeal should also be adjourned.

Relevant Legislation, Regulation and Rules

The relevant legislation, regulation and rules regarding an adjournment request in the context of a renewable energy approval appeal are:

Statutory Powers Procedure Act

> 21. A hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held.

Rules of Practice of the Environmental Review Tribunal

> 104. A Party seeking an adjournment shall provide evidence and submissions in support of the motion respecting:
> a) whether the other Parties consent to the request and the date suggested for the commencement or continuation of the Hearing;
> b) detailed reasons for the request, including, if appropriate, affidavit evidence;
> c) evidence that the Party made all reasonable efforts to avoid the need for the adjournment request;
> d) any urgency for the request because of the public interest;
> e) any inconvenience to other Parties, Participants and Presenters due to the adjournment; and

f) any other factors relating to the considerations listed in Rule 105.

105. In deciding whether or not to grant a request for an adjournment, the Tribunal may consider:

a) the interests of the Parties in a full and fair Hearing;
b) the interests of others potentially affected by the matters before the Tribunal who, after notification of the Hearing, may have arranged their affairs in the expectation of observing or participating in the Hearing;
c) the integrity of the Tribunal's process;
d) the circumstances giving rise to the need for an adjournment;
e) the timeliness of the request for the adjournment;
f) the position of the other Parties on the adjournment request;
g) whether an adjournment will cause or contribute to any existing or potential risk of environmental harm;
h) the consequences of an adjournment, including expenses to other Parties;
i) the effect of an adjournment on Participants and Presenters;
j) the public interest in the delivery of the Tribunal's services in a just, timely and cost effective manner; and
k) whether the proceeding before the Tribunal is an appeal of a renewable energy approval under section 142.1 of the *Environmental Protection Act*.

Environmental Protection Act

Hearing required under s. 142.1

145.2.1 (1) This section applies to a hearing required under section 142.1.

What Tribunal must consider

(2) The Tribunal shall review the decision of the Director and shall consider only whether 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 or the natural environment.

Onus of proof

(3) The person who required the hearing has the onus of proving that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a) or (b).

Powers of Tribunal

(4) If the Tribunal determines that engaging in the renewable energy project in accordance with the renewable energy approval will cause harm referred to in clause (2) (a) or (b), the Tribunal may,

(a) revoke the decision of the Director;
(b) by order direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations; or
(c) alter the decision of the Director, and, for that purpose, the Tribunal may substitute its opinion for that of the Director.

Same

(5) The Tribunal shall confirm the decision of the Director if the Tribunal determines that engaging in the renewable energy project in accordance with the renewable energy approval will not cause harm described in clause (2) (a) or (b).

Deemed confirmation of decision

(6) The decision of the Director shall be deemed to be confirmed by the Tribunal if the Tribunal has not disposed of the hearing in respect of the decision within the period of time prescribed by the regulations.

Ontario Regulation ("O. Reg.") 359/09

Date of deemed confirmation

59. (1) Subject to subsections (2) and (3), the prescribed period of time for the purposes of subsection 145.2.1 (6) of the Act is six months from the day that the notice is served upon the Tribunal under subsection 142.1 (2) of the Act.

(2) For the purposes of calculating the time period mentioned in subsection (1), any of the following periods of time shall be excluded from the calculation of time:

1. Any period of time occurring during an adjournment of the proceeding if,
   i. the adjournment is granted by the Tribunal on the consent of the parties, or
   ii. the adjournment is,
      A. on the initiative of the Tribunal or granted by the Tribunal on the motion of one of the parties,
      B. not being sought for the purpose of adjourning the proceeding pending the resolution of an application for judicial review, and
      C. necessary, in the opinion of the Tribunal, to secure a fair and just determination of the proceeding on its merits.

2. If an application for judicial review under the *Judicial Review Procedure Act* has been commenced with respect to the proceeding, the period of time from the day that the application is commenced until the day that the application is disposed of, if a stay of the proceeding before the Tribunal is granted by the Divisional Court.

> (3) For the purposes of calculating the time period mentioned in subsection (1), if an adjournment of the proceeding pending the resolution of an application for judicial review under the *Judicial Review Procedure Act* was granted by the Tribunal before the day Ontario Regulation 333/12 made under the Act comes into force, the following periods of time shall be excluded from the calculation of time:
>
> 1. The period of time from the day the application was commenced until the day the application was disposed of, if the application was disposed of before the day Ontario Regulation 333/12 made under the Act comes into force.
> 2. The period of time from the day the application was commenced until the day Ontario Regulation 333/12 comes into force, if the application has not been disposed of before the day Ontario Regulation 333/12 comes into force.

Issue 1: Whether the hearing of the Bryce Appellants' appeal should be adjourned.

Discussion

Bryce Appellants' Submissions

The Bryce Appellants submit that the Tribunal must first consider the criteria in the Tribunal's Rules and then consider whether to suspend the timeline if it determines that an adjournment should be granted.

The Bryce Appellants submit that s. 21 of the *Statutory Powers Procedure Act* ("*SPPA*") provides that a tribunal may grant an adjournment where it is required to permit an adequate hearing to be held.

Regarding their interest in a full and fair hearing under Rule 105(a), the Bryce Appellants submit that the evidence they seek to adduce goes to the fundamental question on the appeal before the Tribunal as to whether or not the Project will cause them serious harm.

The Bryce Appellants note the requirement in s. 142.1 of the *EPA* that an appellant must show that a renewable energy project will cause serious harm to human health, and state that this test violates their right to security of the person under s. 7 of the *Charter* by allowing the Project to proceed even if they are capable of showing that it will cause a reasonable prospect of harm to them. They say that the Tribunal's decision in *Erickson v. Ontario (Ministry of the Environment)*, [2011] O.E.R.T.D. No. 29 ("*Erickson*"), at para. 831, recognized that there is currently a lack of peer-reviewed science on both sides of the question of whether or not wind turbines cause adverse health effects, and found that indirect health effects are sufficient to find that a project will cause serious harm (at paras. 815 to 816).

The Bryce Appellants quote excerpts from the Study Summary, saying it clearly states that there is evidence of an indirect adverse health impact regarding wind turbine noise and annoyance. They say the adjournment is required so that they can have the opportunity to fully engage an expert to undertake a review of the Health Canada study data to ascertain the magnitude of the health impacts associated with living in close proximity to wind turbines. They submit that this evidence is vital to ensuring they have the opportunity to have a full and fair hearing on whether or not the Project will have a serious impact on their health, and that the evidence will also be relevant to whether or not s. 142.1 of the *EPA* violates their s. 7 *Charter* rights.

The Bryce Appellants assert that the Study Summary has found, for the first time, a statistically significant increase in annoyance when wind turbine noise exceeded 35 A-weighted decibels ("dBA"). They say this is the first study to establish a dose-response relationship at levels greater than 35 dBA. They refer to their evidence that members of their family have a range of health issues and submit that the issue of how their family will be affected by wind turbine noise at these levels goes to the core question of whether the Project will cause serious harm to their health.

In response to the Director's assertion that Health Canada has stated that the Study Summary alone would not be conclusive with respect to causation, the Bryce Appellants

submit that the current state of scientific research is such that no one can provide a definitive answer in respect of causation, and so, therefore, the Tribunal should make a determination that the *EPA* harm to health test is met, on the balance of probabilities, where studies show statistical associations between noise and adverse health effects.

The Bryce Appellants submit that where scientific causation cannot be proven, and in the absence of evidence to the contrary, the trier of fact is able to draw inferences from the evidence to determine causation. In support of this submission, they rely on Supreme Court of Canada jurisprudence in *Snell v. Farell*, [1990] 2 S.C.R. 311, *Athey v Leonati*, [1996] 3 S.C.R. 458, and *Clements v. Clements,* 2012 S.C.C. 32.

With respect to the integrity of the Tribunal's process pursuant to Rule 105(c), the Bryce Appellants say that denying their request for an adjournment would deprive them of the ability to marshal relevant evidence going to the heart of the issue. They assert that this would make a mockery of the Tribunal hearing process.

Regarding Rule 105(d) and (e), the Bryce Appellants state that the requested adjournment could not have been avoided because the Study Summary was only made available on November 6, 2014. They say they took immediate steps to retrieve the underlying data of the Health Canada study, and the timeline for receiving the raw data from Statistics Canada is outside of their control.

The Bryce Appellants argue that an adjournment will not prejudice the other parties pursuant to Rule 105(h). Specifically, they submit that all Feed-in Tariff ("FIT") and Ontario Power Authority contracts have a *force majeure* clause that permits an extension of the commercial operation dates if, for example, an order is made restraining a party from performing its obligations under a contract.

Approval Holder's Submissions

The Approval Holder submits that the requested adjournment is not necessary to ensure a fair and just determination of the issues before the Tribunal on their merits, stating that the Bryce Appellants have not adduced the necessary evidence in support of their motion under Rule 104, and have not satisfied the applicable considerations in Rule 105.

In particular, the Approval Holder says the Bryce Appellants have not provided detailed reasons for the requested adjournment, pursuant to Rule 104(b), because they have not provided affidavit evidence that the raw data from the Study Summary is vital to their case. To the contrary, the Approval Holder points to the limitations stated in the Study Summary that the "results may not be generalized to areas beyond the sample as the wind turbine locations in this study were not randomly selected from all possible sites operating in Canada", and the "results do not permit any conclusions about causality".

The Approval Holder provides affidavit evidence from Dr. Christopher Ollson in support of its submissions. Dr. Ollson is an environmental health scientist, who has been qualified to testify as an expert witness in several previous renewable energy approval appeal hearings, and has been engaged by the Approval Holder to provide opinion evidence in respect of the appeal of the REA for the Project. Based on the affidavit evidence of Dr. Ollson, the Approval Holder submits that the raw data from the Study Summary will not assist the Tribunal in determining whether the Project will cause serious harm to human health.

Regarding Rule 105(a), the Approval Holder submits that denying the adjournment request will not deprive the parties of a full and fair hearing because there is no evidence that an expert's review of the raw data will provide the Tribunal with evidence that will be of assistance to the Tribunal. The Approval Holder refers to Dr. Ollson's evidence that the results of the Study Summary do not indicate that serious harm to human health will result from the operation of wind turbines, but, instead, indicate that

annoyance towards several wind turbine features (such as noise, shadow flicker, blinking lights, vibrations and visual impacts) was found to be statistically associated with increasing levels of wind turbine noise. The Approval Holder further submits that an independent evaluation of the raw data will not overcome the limitations set out in the Study Summary and allow the data to be translated to the Bryce Appellants' situation, nor will it provide the Tribunal with any further evidence that is relevant to the issue of whether or not engaging in the Project will cause serious harm to human health than what the Study Summary already provides. The Approval Holder notes that the Bryce Appellants chose not to enter the Study Summary as part of their case.

Regarding Rule 105(c) and the integrity of the Tribunal's process, the Approval Holder asserts that the integrity of the expedited REA appeals process would be undermined if the announcement of every new study were to result in the adjournment of REA appeals.

With respect to the criteria in Rule 104(e) and Rule 105(f), the Approval Holder submits that a six-month adjournment would cause further delays to the Project and any further delays could result in the termination of the FIT contract and other financial penalties or losses.

Regarding the Bryce Appellants' assertion that that the Study Summary results are the first study to establish a dose-response relationship between wind turbine noise and annoyance at levels greater than 35 dBA, the Approval Holder submits that this is not what the Study Summary says. Furthermore, the Approval Holder argues that existing peer-reviewed literature has already shown dose-response relationships above 35 dBA. The Approval Holder notes that it did not introduce these studies into evidence on the motion because the Bryce Appellants did not make this assertion in their written motion materials but first raised the matter in their oral submissions.

Director's Submissions

The Director asserts that the Bryce Appellants are requesting the adjournment without any supporting evidence that an expert has been, or will be, retained to undertake this work or that such expert evidence is necessary to determine whether the Project as approved will cause serious harm to human health or infringe the Bryce's s. 7 *Charter* rights.

The Director further submits that the results of the Study Summary will not assist the Tribunal in determining whether the Project will cause serious harm to human health, based on both the Study Summary, and the testimony of Dr. David Michaud, the lead researcher for the Health Canada study, in a previous proceeding. The Director states that in the 2013 Tribunal hearing of *Dixon v. Ontario (Ministry of the Environment)*, [2014] O.E.R.T.D. No. 5 ("*Dixon*") Dr. Michaud testified that the Health Canada study would not permit anyone to draw any conclusions about causality. The Director argues that the Study Summary also concludes that the results of the Health Canada study will not permit any conclusions about causality.

The Director disagrees with the Bryce Appellants' assertion that the Study Summary is the first study to establish a dose-response relationship between wind turbine noise and annoyance. The Director refers to the summary of Dr. Michaud's testimony in the *Dixon* decision at Appendix A, p. 54, which sets out that Dr. Michaud "agreed that there was credible scientific support for an association between wind turbine noise and community annoyance" and "stated that high quality studies done in Sweden and the Netherlands showed an association between wind turbine noise and community annoyance".

The Director notes the Bryce Appellants' assertion in the notice of motion that the Study Summary provides evidence of an indirect adverse health impact as it relates to wind turbine noise and annoyance. The Director disputes this assertion, arguing that it is opinion evidence that can only be made expressed by a properly qualified expert. The

Director submits that the Bryce Appellants have not provided such expert evidence in support of their motion.

The Director further submits that the Bryce Appellants have not put forward sufficient evidence on the motion to demonstrate that the adjournment request is reasonable or that the Health Canada study data can support a conclusion as to causality. The Director observes that the Bryce Appellants have not provided expert affidavit evidence to show that the analysis of the Health Canada study that they propose to undertake would be relevant to the issues to be determined by the Tribunal, nor have they filed an affidavit of a proposed expert outlining why the six-month adjournment is necessary or how the proposed work would assist them in proving their case.

The Director notes the integrity of the Tribunal process as a factor under Rule 105(c), and asserts that adjourning the hearing for six months would result in a lengthy disruption without an evidentiary basis to justify the adjournment.

Analysis and Findings on Issue 1

The Tribunal has general authority to grant adjournments under s. 21 of the *SPPA*. Rule 104 of the Tribunal's Rules sets out the evidence and submissions to be provided by a party seeking an adjournment, and Rule 105 lists what the Tribunal may consider in deciding whether or not to grant a request for an adjournment.

Rule 104(b) requires the Bryce Appellants to provide detailed reasons for the adjournment request, including affidavit evidence if appropriate. The only affidavit evidence in support of the Bryce Appellants' motion is from a legal assistant with Falconers LLP, the Bryce Appellants' counsel, and it only addresses the process undertaken to try to obtain the raw data.

While the Bryce Appellants' submissions address several of the criteria set out in Rule 105, their primary argument is that the requested adjournment is necessary for a full

and fair hearing pursuant to Rule 105(a). They submit that the raw data for the Health Canada study goes to the central issues before the Tribunal of whether the Project will cause them serious harm to human health and whether s. 142.1 of the *EPA* violates their s. 7 *Charter* rights. Specifically, the Bryce Appellants contend that evidence concerning the raw data is necessary because the Study Summary identifies, for the first time, a statistically significant increase in annoyance when wind turbine noise exceeds 35 dBA.

However, on this motion the Tribunal only has before it the affidavit of a legal assistant with Falconers LLP, the text of the Study Summary, and the submissions of Ms. James. The Bryce Appellants have not provided any direct evidence to support these assertions, and, it will be recalled, did not even enter the Study Summary as part of their evidence. It is not disputed that their proposed review and analysis of the Health Canada study data must be done by qualified experts. It follows, therefore, that expert opinion evidence is required to support the Bryce Appellants' assertion that the proposed review and analysis will produce relevant evidence respecting the causation issue. The Tribunal notes that the Bryce Appellants have not provided any expert opinion evidence regarding the alleged importance of the Health Canada study data to the causation issue with respect to industrial wind turbine noise and serious harm to human health.

In contrast, the Approval Holder has brought forward supporting affidavit evidence from two witnesses, including evidence of Dr. Ollson that the results described in the Study Summary "are consistent with the past decade of research in the field of wind turbine noise and community health" and that nowhere "does Health Canada state that individuals should be concerned about serious harm to their health as a result of living near wind turbines." Dr. Ollson states that the raw data will not assist the Tribunal in determining whether the Project will cause serious harm to human health.

Consequently, the Tribunal finds that the Bryce Appellants have adduced insufficient evidence to demonstrate that the Study Summary data is necessary for a full and fair

hearing of the health claim and the *Charter* s. 7 claim, as required under Rules 105(a), or for an “adequate” hearing of those claims under s. 21 of the *SPPA*.

In summary, having considered the evidence on the motion and the submissions of the parties regarding s. 21 of the *SPPA* and the criteria in Rule 105, the Tribunal finds that the Bryce Appellants’ motion for an adjournment should be dismissed.

Issue 2: Whether the six-month time period for rendering a decision should exclude the period of the adjournment.

Under s. 59 of O. Reg. 359/09, if the Tribunal grants a motion of one of the parties for an adjournment of a renewable energy approval appeal proceeding, and in the opinion of the Tribunal the adjournment is necessary to secure a fair and just determination of the proceeding on its merits, then the period of time occurring during the adjournment of the proceeding shall be excluded from the calculation of the six-month time period under s. 145.2.1(6) of the *EPA* and the regulation.

As the Tribunal has found in Issue 1 that the adjournment should not be granted, it is not necessary to consider whether the period of an adjournment should be excluded from the six month time period.

Issue 3: If Issues 1 and 2 are answered in the affirmative, whether the County’s appeal should also be adjourned.

Given the Tribunal’s finding on Issue1, it is not necessary to address Issue 3.

ORDER

The motion to adjourn brought by the Bryce Appellants is dismissed.

The hearing will continue on January 13, 14, 15 and 16, 2015, commencing at 10 a.m. at Camlachie Community Centre, 6767 Camlachie Road, Plympton-Wyoming, Ontario.