Environmental Review Tribunal

Case No.: 11-208

Middlesex-Lambton Wind Action Group Inc. v. Director, Ministry of the Environment

In the matter of an appeal by Middlesex-Lambton Wind Action Group Inc. filed on November 15, 2011 for a Hearing before the Environmental Review Tribunal pursuant to section 142.1 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19, as amended ("*EPA*") with respect to Renewable Energy Approval Number 6250-8KFTCQ ("REA") issued by the Director, Ministry of the Environment ("MOE"), on October 31, 2011 and posted on the Environmental Registry on November 1, 2011 to Zephyr Farms Limited under section 47.5 of the *EPA*, in respect of a Class 4 Wind facility consisting of the construction, installation, operation, use, and retiring of four (4) wind turbine generators, located at Ebenezer Road and Churchill Line on Concession 14 South Part Lot 13 South ½ Lot 13, Concession 14 South Part Lot 14, and Concession 14 North Part Lot 15 pt W ¾ of N ¾ of Lot 15, in the Municipality of Brooke-Alvinston, in the County of Lambton, Ontario; and

In the matter of a Motion to scope evidence heard on December 15, 2011 at 10:00 a.m. in Hearing Room 16-2 at 655 Bay Street, Toronto, Ontario.

Before: Paul Muldoon, Panel Chair
Marcia Valiante, Member
Maureen Carter-Whitney, Member

Appearances:

Eric Gillespie and Rebekah Church	-	Counsel for the Appellant, Middlesex-Lambton Wind Action Group Inc.
Andrea Huckins and Sylvia Davis	-	Counsel for the Director, Ministry of the Environment
Christopher Harris	-	Articling Student for the Director, Ministry of the Environment
Albert Engel	-	Counsel for the Renewable Energy Approval Holder, Zephyr Farms Limited

Dated this **6th** day of **February, 2012.**

Reasons for Decision

Background:

On October 31, 2011, the Director, Ministry of the Environment ("MOE") issued a Renewable Energy Approval ("REA") under section 47.5 of the *Environmental Protection Act* ("*EPA*") to Zephyr Farms Limited (the "Approval Holder" or "Zephyr") to engage in a renewable energy project (the "Project") in respect of a Class 4 Wind facility located at Ebenezer Road and Churchill Line in the Municipality of Brooke-Alvinston, in the County of Lambton, Ontario. The Project consists of the construction, installation, operation, use and retiring of four wind turbine generators, each rated at 2.5 MW generating output capacity. The proposal for the Project was posted by the MOE on the Environmental Registry, established under the *Environmental Bill of Rights, 1993* ("*EBR* Registry"), for 30 days. The REA notice was posted on the *EBR* Registry on November 1, 2011.

On November 15, 2011, Middlesex-Lambton Wind Action Group filed a Notice of Appeal with the Environmental Review Tribunal (the "Tribunal") pursuant to section 142.1 of the *EPA*. On November 22, 2011, the Approval Holder brought a motion requesting from the Tribunal an Order limiting the scope of permissible evidence to be put before the Tribunal. The Approval Holder's position is that the evidence must be limited to two specific classes of evidence.

The Approval Holder also requested an Order varying the timeline of the appeal in order to allow sufficient time for the Motion to be heard.

The Motion was made returnable on November 25, 2011 at 10:00 a.m. The Parties agreed to put the Motion over to November 29, 2011 at 10:00 a.m. On November 26, 2011, Counsel for the Director served and filed a Motion to dismiss also returnable on November 29, 2011. On November 28, 2011, Counsel for the Appellant brought a Motion to adjourn the Motion to limit the scope of the evidence and the Motion to dismiss. Both the Approval Holder and the Director opposed the Motion to adjourn. The Motion to adjourn was granted.

On November 30, 2011, Fredericka Rotter, Counsel for the Director, wrote to the Tribunal requesting a teleconference with the Parties.

The Tribunal scheduled a teleconference to commence at 1:00 p.m. on December 1, 2011 for the purpose of discussing scheduling of the Motions. During that teleconference, the Tribunal also scheduled another teleconference to commence at 4:00 p.m. on December 8, 2011. An additional teleconference was held at 11:30 a.m. on December 2, 2011.

The Tribunal determined the Motion to dismiss and the Motion to scope the evidence before the Tribunal would be heard on December 15, 2011.

This Order provides the Tribunal's disposition and reasons regarding the Approval Holder's motion to scope the evidence.

Relevant Legislation:

Environmental Protection Act

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

(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.

Issue:

The issue in this motion is whether the scope of permissible evidence in this appeal of a REA pursuant to sections 142.1 and 145.2(1) and (2) of the *EPA* is limited to the following two classes of evidence:

(i) Evidence that was before the Director during his decision-making process that lead to his decision under section 47.5 of the *EPA*; and

(ii) New evidence that was not in existence during the Director's decision making process, or for reasons beyond the Appellant's control, was not obtainable during the Director's decision-making process, and which evidence is material to an issue to this Hearing, is credible and could affect the result of the Hearing.

Discussion and Analysis:

Zephyr's Submissions

Zephyr asks that the Tribunal rule on the correct interpretation of sections 142.1, 145.2(2) and 145.2.1 of the *EPA* with respect to the scope of a hearing of a REA appeal. Zephyr submits that

these sections define the scope of permissible evidence and takes the position that this evidence is limited by the fact that a REA hearing is not a new hearing. As a result, Zephyr argues that the Tribunal may only review the decision of the Director, and to do that may only review the record that was before the Director and any evidence that meets the test for new evidence.

Zephyr states that the Tribunal's ruling on the scope of evidence will be significant in defining future REA hearings, and that many are expected given the number of proposals for wind farms that are on the *EBR* Registry.

Zephyr notes as background that 16 comments were received on Zephyr's application for this REA during the 60-day *EBR* Registry comment period from June 6, 2011 to August 5, 2011. Zephyr further notes that the Director issued this REA on October 31, 2011 and posted a Decision Notice concerning it on the Registry on November 1, 2011 and that the Appellant came into existence on November 15, 2011 and requested this Hearing on November 15, 2011. Zephyr observes that the corporate Appellant therefore did not participate in the public consultation process or the Registry comment process, although the sole director of the corporate Appellant, Harvey Wrightman, was involved and did provide comments.

Zephyr submits that, in an appeal required by section 142.1 of the *EPA*, sections 145.2(2) and 145.2.1 of the *EPA* prevent the Tribunal from conducting a new hearing. Zephyr notes that previous decisions of the Tribunal and its predecessor have described what the Tribunal can do pursuant to the "new hearing" powers set out in section 145.2 of the *EPA* (and predecessor sections), and that the Tribunal does not have these "new hearing" powers in a REA hearing as a result of section 145.2(2) of the *EPA*. As such, Zephyr submits that the powers described by the Tribunal in cases that dealt with section 145.2 cannot apply to a section 142.1 hearing that is statutorily not a "new hearing," noting the following earlier Tribunal decisions: *Kawartha Lakes (City) v. Ontario (Director, Ministry of the Environment)*, [2010] O.E.R.T.D. No. 68, *Ontario (Ministry of the Environment & Energy) v. 724597 Ontario Inc.*, [1995] O.J. No. 3713 (Gen. Div.) ("*724597 Ontario Inc*"); *Montague v. Ontario (Ministry of the Environment)*, [2005] O.J. No. 868 (S.C.J.) ("*Montague*"), at paras. 23 to 26; *RPL Recycling & Transfer Ltd. v. Ontario (Ministry of Environment)*, [2006] O.E.R.T.D. No.13 ("*RPL Recycling*"), at paras. 18 to 20; *Detox Environmental Ltd. v. Ontario (Ministry of the Environment)*, [2009] O.E.R.T.D. No. 67 ("*Detox Environmental Ltd.*"), at para. 41; *AB Crushing Inc. v. Ontario (Ministry of the Environment)*, [2008] O.E.R.T.D. No. 60 ("*AB Crushing Inc.*"), at para. 48; *Associated Industries Corp. v. Director, Ministry of the Environment*, [2008] O.E.R.T.D. No. 57 ("*Associated Industries Corp.*"), at paras. 59 to 61; and *Strite Industries Ltd. v. Ontario (Ministry of the Environment)*, [2010] O.E.R.T.D. No. 30 ("*Strite Industries Ltd.*"), at para. 34.

Zephyr states that the Tribunal's powers in a "new hearing" are similar to those described by the courts in other proceedings that involve "new hearings" or "hearings *de novo*," referring to *Union Gas Co. of Canada v. White,* [1970] 2 O.R. 85 (C.A.), at para. 5; *Lamb v. Canadian Reserve Oil & Gas,* [1977] 1. S.C.R. 77; *Lomond Grazing Association v. Pancanadian Petroleum Ltd. et al,*

[1985] A.S. No. 922, ("*Lomond Grazing*") at paras. 12 to 15; and *Mississauga Chinese Centre Ltd. v. Peel (Regional Municipality)*, [1995] O.M.B.D. No. 361.

Zephyr argues, however, that by enacting section 145.2(2) of the *EPA*, the Legislature took away the powers of the Tribunal that it has when conducting a "new hearing" under section 145.2(1) of the *EPA*. In doing so, the Legislature indicated that a REA hearing is to be conducted as a "true appeal" rather than a "new hearing". Zephyr notes that the Legislature specified in section 145.2.1 of the *EPA* what the Tribunal shall consider in a hearing required under section 142.1 of the *EPA*, and that section 145.2.1 does not provide any statutory authority for a hearing required under section 142.1 to be "a new hearing." Zephyr submits that the Tribunal's powers specific to a REA hearing, set out in sections 145.2.1(4) and (5), are virtually identical to those in section 145.2(1), except for the power to hold a new hearing.

Zephyr submits that, if the Legislature intended the Tribunal to conduct a "new hearing" with respect to whether engaging in a renewable energy project in accordance with its REA will cause serious harm to human health, the Legislature could have done so by stating, as it did in section 145.2, that "a hearing by the Tribunal under this Part shall be a new hearing" but it did not do so. Instead, the Legislature specified, in section 145.2(2) that section 145.2(1) "does not apply in respect of a hearing required under section 142.1." Zephyr submits that this is a clear indication that the Legislature intended renewable energy approval hearings to be conducted as true appeals, instead of new hearings, hearings *de novo* or trials *de novo*.

Zephyr quotes *Imperial Oil Ltd. v. British Columbia (Ministry of Water, Land and Air Protection),* [2004] B.C.E.A. No. 4 ("*Imperial Oil*"), at para. 15 to describe the difference between a "true appeal" and a "new hearing" or "trial *de novo*":

> Traditionally, the courts have distinguished between two different types of appeal – a "trial de novo" and a "true appeal." As noted by Imperial in its submissions, this distinction was described by the B.C. Court of Appeal in *Dupras v. Mason* [1994] B.C.J. No. 2456. In that case, the Court considered the nature of an appeal from the Chief Gold Commissioner to the B.C. Supreme Court at paragraph 15:
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> > The distinction between a trial de novo and a true appeal is that in a trial de novo the question before the court is the very question that was before the Chief Gold Commissioner, namely, was the claim located or recorded according to the Act and Regulations, whereas in a true appeal the question before the Court is whether the Chief Gold Commissioner made a reviewable error of fact, of law, or of procedure. A trial de novo ignores the original decision in all respects, except possibly for the purposes of cross-examination. A true appeal focuses on the original decision and examines it to determine whether it is right or wrong, flawed or unflawed.

Zephyr clarifies that under the statute in *Imperial Oil*, the board had the ability to hold a hearing *de novo* or a true appeal. Zephyr notes that there is little to be found in the case law that defines

a review or a hearing that is not a new hearing. Instead, cases mainly address general discussions on the differences between a hearing *de novo* and a true appeal. Zephyr also notes that courts accord greater deference where an expert decision maker has made the decision.

Zephyr submits that, applied to a REA hearing, a hearing in the form of a true appeal must be limited to a review of the REA issued by the Director and a consideration of only whether the Director correctly determined, based on the information that was before the Director and any new evidence that meets the new evidence test, whether engaging in the renewable energy project in accordance with the REA will cause serious harm to human health. Zephyr also notes that section 145.2.1(3) places the onus of proof on the person requiring the hearing.

Zephyr argues that, taken together, the true appeal nature of the hearing and the onus of proof limit the permissible evidence in REA hearings to relevant evidence that was before the Director at the time the decision was made, and only new evidence that passes the new evidence test. Zephyr states that the new evidence test, adopted from the Supreme Court of Canada's decision in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 at 775 can be summarized as follows:

1. The evidence should generally not be admitted if, by due diligence, it could have been put before the Director prior to the close of the Environmental Registry public comment period;
2. The evidence must be relevant to the issue of whether engaging in the renewable energy project in accordance with the renewable energy approval will cause serious harm to human health;
3. The evidence must be credible in the sense that it is reasonably capable of belief; and
4. It must be such that if believed it could reasonably, when taken with the other evidence considered by the Director in determining whether it is in the public interest to issue a renewable energy approval, be expected to have affected the result.

Zephyr asserts that its interpretation of sections 145.2(2) and 145.2.1 of the *EPA* is consistent with the approach to statutory interpretation that requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" as stated by the Tribunal in *Erickson v. Ontario* (*Director, Ministry of the Environment*) (2011), 61 C.E.L.R. (3d) 1, *("Erickson")* at para. 498.

Zephyr also asserts that consideration of the entire context of sections 145.2(2) and 145.2.1 of the *EPA* requires consideration of sections 47.1 to 47.7 of the *EPA*, and makes note of the purpose of Part V.0.1 Renewable Energy of the *EPA* in section 47.2 "to provide for the protection and conservation of the environment," and the other provisions in place to ensure public consultation and conditions in the REA to protect the health and safety of the public and the environment and prevent adverse effects. Zephyr also notes that the scheme of the *EPA* now provides for two separate types of hearings (section 142 hearings initiated by approval

holders and section 142.1 hearings initiated by others), and points to the objectives of the *Green Energy Act* amendments to the *EPA*.

Zephyr submits that sections 145.2 and 145.2.1 of the *EPA* should be interpreted so as to ensure that the renewable energy hearing process occurs harmoniously with the scheme of the REA process and the intention of the Legislature when it created the renewable energy hearing process. Zephyr further submits that the only interpretation of sections 145.2 and 145.2.1 that is harmonious with the scheme of the REA process, including the public consultation and comment period and the intention of the Legislature, is one that treats a REA hearing as a review of the Director's decision that is limited to a review of the materials described above. This interpretation requires prospective appellants to raise all existing evidence during the public consultation and comment periods if they seek to use that evidence in an appeal.

Zephyr also submits that this is the only interpretation that is consistent with:

1. The detailed renewable energy application process that requires applicants to address negative environmental effects;
2. The scheme of the EPA of preventing adverse effects;
3. The REA that addresses and seeks to prevent adverse effects; and
4. Upholding the importance of the public consultation that is carried out through the renewable energy application process including the Environmental Registry public comment period.

Based on its submissions, Zephyr asserts that the scope of permissible evidence that may be brought in a hearing required by section 142.1 of the *EPA* is limited by sections 145.2 and 145.2.1 of the *EPA* to the following:

(i) Evidence, relevant to the issue of whether engaging in the renewable energy project will cause serious harm to human health, that was before the Director when he or she made his or her decision to issue the REA made up of the following:

(a) The portions of the application for the REA prepared in accordance with O. Reg. 359/09, relevant to the issue of whether engaging in the renewable energy project will cause serious harm to human health;

(b) Any additional information relevant to the issue of whether engaging in the renewable energy project will cause serious harm to human health, that the Director considered in consideration of the public interest pursuant to section 47.5(1) of the *EPA*; and

(c) Public comments received during the public comment period of the posting of the proposal notice on the Environmental Registry relevant to the issue of whether engaging in the renewable energy project will cause serious harm to human health;

(ii) The REA; and

(iii) New evidence relevant to the issue of whether engaging in the renewable energy project in accordance with the REA will cause serious harm to human health that meets the new evidence test that was not available by the close of the public comment period on the Environmental Registry, which in this case was August 5, 2011.

Zephyr states that the "additional information" referred to under (i)(b) above includes the information in the application submitted to the Director as well as additional information relevant to the issues.

Zephyr further argues that the scheme and object of the renewable energy sections of the *EPA* are the relevant scheme and object for this motion, which include the detailed study, consultation and application process set out in O. Reg. 359/09, and the narrowed appeal right described in sections 142, 142.1, 145.2 and 145.2.1 of the *EPA*. Zephyr further argues that the Legislature has decided, through its renewable energy scheme, to rely on the expertise of the Director and the staff at the MOE to do a thorough review of the relevant evidence, rather than assigning that task to the Tribunal. Zephyr submits that the focus of an appeal is whether the Director's decision was right or wrong, based on a review of the decision, which could only be made if the Director decided that it was in the public interest.

Zephyr submits that the proper interpretation of the renewable energy amendments to the *EPA*, made under the *Green Energy and Green Economy Act, 2009*, S.O. 2009, c.12, is at issue in this motion. In response to the Appellant's suggestion that the Legislature envisioned granting the Tribunal broad powers to determine REA appeals, Zephyr submits that this is contrary to the statutory direction of section 145.2(2) of the *EPA* that takes away the Tribunal's "new hearing" powers. Zephyr submits that limiting the scope of the permissible evidence in an REA appeal to that permitted by the enabling statute in no way limits the information that was available to the Director.

Zephyr submits that a ruling on the proper interpretation of sections 145.2 and 145.2.1 is required before proceeding to prepare for this hearing. Zephyr notes that in *Erickson*, when the issue of the permissible scope of evidence, or record, in a renewable energy approval appeal was raised in final submissions, the Tribunal held that "[I]f a party has an interpretation of the statute that would operate so as to significantly limit the necessary evidence in a hearing, it should raise such an issue as soon as possible in the proceeding" (para. 550). Also in *Erickson*, the Tribunal found that the approval holder's submission "that the record on these appeals includes only the record of the decision-maker whose decision is subject to the appeals; that would include the REA application and supporting documents, the *EBR* public comments, the Ministry's review documents, the Director's decision and the REA...is too narrow a view of the record" (para. 547).

Zephyr adds that the Tribunal in *Erickson* went on to state that "certainly there are other documents that could be considered part of the record, although no attempt will be made in this Decision to definitely outline the parameters of the record" (para. 547), and commented that "in

hindsight, now that the evidence has all been heard, it is clear that some of the evidence heard during this Hearing was not useful to the Tribunal for a number of reasons" (para. 725).

Zephyr submits that the Tribunal's discussion of deference in *Erickson* at para. 559 is irrelevant to determining the scope of evidence permitted by sections 145.2(2) and 145.2.1 of the *EPA*. Zephyr also submits that the Tribunal's discussion of the broad powers conferred on the Tribunal are relevant only to the extent that by corollary, the Tribunal's powers in a hearing that is statutorily prevented from being a "new hearing" must necessarily be narrow. Zephyr asserts that there is no case law authority on the interpretation of sections 145.2(2) and 145.2.1 of the *EPA*, and this motion seeks to establish that authority.

In response to the Appellant's position that the evidence available in a "new hearing" is the same as the evidence available in a hearing that is not a "new hearing," Zephyr argues that this would be an absurd result, and cannot be the correct interpretation of sections 145.2 and 145.2.1 of the *EPA*. Zephyr asserts that in *Erickson* the Tribunal was not asked to, and did not, deal with an interpretation of sections 145.2 and 145.2.1 of the *EPA*.

Zephyr also provides its answers to the following questions posed by the Tribunal in *Erickson*:

(i) Do would-be appellants have an onus to raise all necessary evidence during the public consultation?
Zephyr submits that sections 145.2 and 145.2.1 require that would-be appellants do have an onus to raise all existing evidence during the public consultation if they seek to use that evidence in a renewable energy approval hearing.

(ii) Could an appeal not consider new evidence that came to light after the consultation phase?
Zephyr submits that the Tribunal may consider new evidence relevant to the whether engaging in the renewable energy project in accordance with the REA will cause serious harm to human health that meets all aspects of the new evidence test.

Zephyr also notes that since the filing of this Notice of Motion, the initial timelines issued by the Tribunal on November 24, 2011 have been amended, and a new timeline was circulated to the Parties on December 8, 2011. Zephyr points out that Rule 32 of the Tribunal's Rules requires exceptional circumstances to vary the schedule of events set out in Appendix A to the Tribunal's Rules.

Zephyr submits that, for this motion, the exceptional circumstances are:

(a) the Tribunal has not previously addressed the legal matters at issue in this motion at this preliminary stage in an REA appeal;

(b) the matters at issue are points of law that will determine the scope of evidence at this hearing and do not now require project-specific or appeal-specific evidence;

(c) failure to address these points of law now will subject all parties to the unnecessary time and expense of providing evidence that may be inconsistent with the statutory requirements; and

(d) in *Erickson* this Tribunal advised that this kind of legal point be raised early in the REA appeal process.

Zephyr further submits that the timelines for all steps in a REA hearing must conform to the rules of natural justice and as such provide all parties with sufficient time to prepare and respond to materials presented by other parties. The amount of time that will be sufficient will necessarily vary based on the volume of materials provided by other parties.

Zephyr asserts that allowing the scope of permissible evidence in a REA appeal to include all evidence that was available to the Director, as opposed to the evidence that the Director considered, would make section 145.2(2) of the *EPA* superfluous because a hearing that considers all evidence that was available to a decision-maker both before and after a decision was made is a "new hearing." Referring to sections 145.2(2) and 145.2.1(4) and (5) of the *EPA*, Zephyr submits that the only interpretation of section 145.2(2) that gives it any meaning is that it takes away the Tribunal's "new hearing" powers in a REA hearing.

In response to the Appellant's assertion that the Tribunal is permitted and required to consider the information that was available to the Director at the time of the decision, and that any information that the Director reasonably could have consulted is admissible as evidence in this appeal, Zephyr submits that the Appellant's interpretations do not give meaning to section 145.2(2) of the *EPA*. Zephyr argues that the issue of what information the Tribunal is to consider was not discussed and determined in the cases cited by the Appellant, although it was raised but not determined in *Erickson* at paras. 547 and 551. Zephyr further argues that a hearing that considers any information that the Director reasonably could have consulted would constitute a "new hearing" and be contrary to sections 145.2(2) and 145.2.1(2) of the *EPA*.

Zephyr agrees that the different categories of information cited by the Appellant were available to the Director, but disagrees that the test for admission in a section 142.1 appeal is based solely on availability and relevance. Instead, Zephyr submits that sections 145.2(2) and 145.2.1 of the *EPA*, by virtue of preventing a "new hearing" and requiring a "review of the decision", limit the scope of permissible evidence to only that information that is relevant to whether engaging in the renewable energy project in accordance with the renewable energy approval will cause serious harm to human health, that the Director considered when making the decision to issue the renewable energy approval.

Zephyr states that it is not suggesting the Director does not know anything about other wind turbine projects, but that only the relevant information that the Director considered in making a decision on the specific project at issue is admissible.

Zephyr disagrees with the submission of the Appellant that Zephyr is asking the Tribunal to rule that public consultation "trumps all other objectives of the scheme as a whole." Rather, Zephyr seeks that the Tribunal maintain the fairness and integrity of the REA application process by

requiring would-be appellants to become involved in the process throughout the consultation and comment period, rather than allowing them to wait until the last day of the appeal period to incorporate, and for the first time become involved in the process. Zephyr notes that this practice of waiting has been previously considered and rejected in *Lomond Grazing* at para. 14, and the Tribunal previously cautioned in *Erickson* at para. 552 that it is "important for concerned persons to fully participate in the public consultation process such that their issues about human health, plant life, animal life and the natural environment are on the record prior to an appeal being initiated."

Zephyr asserts that for Appellants to put forward evidence they must be involved in the public consultation and *EBR* Registry process prior to approval of the REA in order to ensure that the Director considers information that they consider to be relevant. Zephyr submits that a would-be appellant must submit evidence, and not simply raise issues, at the consultation stage in order for evidence concerning those issues to be automatically permissible in a REA hearing. Zephyr notes that it is for the Tribunal to decide whether raising concerns during the consultation period satisfies the onus and states that where an appellant is only able to bring forward the evidence later it would need to meet the evidence test in order to be brought before the Tribunal.

Zephyr acknowledges that because the *EPA* provides all residents of Ontario with the right to appeal a REA, even appellants who have not been involved in the prior consultation processes may launch an appeal. Zephyr asserts that such appellants would need to meet the new evidence test in relation to evidence that was not before the Director.

Zephyr submits that the Tribunal may be made aware of relevant information if it passes the new evidence test, in situations where there was due diligence but an appellant was unable to provide it to the Director prior to the Director making his decision. This would ensure that any relevant information is put before the Tribunal, even if it was not before the Director.

Zephyr argues that there is no basis for the Appellant's submission that the "Director is asked to base the approval decision on the issue of adverse effects," because section 47.5(1) of the *EPA* states that after "considering an application" the Director may, "if in his or her opinion it is in the public interest to do so" issue a renewable energy approval. Zephyr submits that there is no basis for the Appellant's assertion that submissions of public comments are aimed at informing the Director's decision on "adverse effect" and not "serious harm."

Zephyr notes that in the *Hanna* decisions, the Divisional Court was asked to rule on whether Reg. 359/09 was properly made, not on the proper interpretation of sections 145.2 and 145.2.1 of the *EPA*. Zephyr further notes that, in *Hanna*, the applicant was unsuccessful and the court ultimately ruled that it did not need to parse the applicant's evidence to rule on its admissibility. Zephyr submits that its interpretation of sections 145.2 and 145.2.1 of the *EPA* is consistent with the Divisional Court's description of the Tribunal's process at para. 29 of *Hanna v. Ontario (Attorney General),* [2011] O.J. No. 944 ("*Hanna*").

In response to the Appellant's submission that a REA hearing differs from a true appeal because, in a true appeal, the trial judge is not represented by counsel and does not participate, Zephyr argues that it is irrelevant that the Director is represented and participates in the hearing.

In response to the Appellant's submission that the Tribunal has already decided in *Erickson* that it is too narrow to view the record as only the REA application and supporting documents, the *EBR* public comments, the Ministry's review documents, the Director's decision and the REA, Zephyr argues that this issue has not yet been determined by the Tribunal. Zephyr clarifies that it is submitting that, based on its review of *Erickson*, the permissible scope of evidence includes that record and any new evidence that passes the new evidence test.

Zephyr submits that what is permissible as evidence is information relevant to the question of serious harm to human health, which the Director considered in making decision. Zephyr further submits that the information referred to in *Hanna* is not relevant in this matter because the Tribunal has already ruled in *Erickson,* at para. 828, that it is exploratory, not confirmatory, in nature. Zephyr argues that the Tribunal should not be put in the position of reconsidering all of that information. Furthermore, Zephyr argues that Director may decide that some information submitted during the public consultation is not relevant because the Tribunal has already ruled on it.

In response to the three practical implications suggested by the Appellant in respect of Zephyr's position on scoping, Zephyr states:

1. If the Tribunal accepts Zephyr's interpretation, an appellant who has been involved in the consultation process, highlighted concerns and provided evidence will be able to show they have made material available to the Director that ought to have been considered. A determination of whether or not the evidence is relevant to the issue of harm to health would be the subject of argument in the hearing as it progresses.

2. Zephyr states that it is not the case that its interpretation of the scope of evidence would result in every Ontario resident needing to have all evidence ready to present to the Director during the *EBR* comment period. Zephyr says that only residents of Ontario who are would-be appellants would need to do this.

3. Zephyr submits that only relevant information considered by the Director should be put before the Tribunal. If the evidence presented in *Erickson* and *Hanna* was not enough to meet the tests in those cases, it should not be reconsidered in any future REA hearing.

Zephyr also submits that the cut-off date for evidence to be considered by the Director would be the last day of the *EBR* comment period, not the date of the decision on the REA, as stated by the Appellant.

Appellant's Submissions

The Appellant notes that the implications of the Tribunal's decision on this Motion are very significant in that the outcome will not only impact the present appeal, but will likely determine the direction for future appeals of REAs under the *EPA*.

The Appellant submits that Zephyr has put forward a very narrow view of the evidence to be admitted, including only the evidence before the Director at the time of the decision, the REA, and new evidence that meets the "new evidence test" in *R. v. Palmer*.

The Appellant agrees that this appeal is not a hearing *de novo*. However, the Appellant argues that Zephyr's proposed scope of evidence is too restricted and that the information available to the Director is not limited to the highly truncated version of the record offered by Zephyr, but instead includes any information that would have been reasonably available to the Director in making the decision to issue the approval.

The Appellant agrees with Zephyr's submission that, as a result of section 145.2 of the *EPA*, this proceeding cannot be considered a "new hearing," but notes that the significance of this provision was reviewed by the Tribunal in *Erickson*, where the Tribunal discussed the meaning and effect of the term "new hearing" in relation to the issue of deference to the Director's decision. The Tribunal noted that certain aspects of the Director's decision are not open to review as part of a REA appeal, giving as examples certain types of "adverse effects" that do not amount to "serious harm", or "any number of procedural decisions made by the Director". The Appellant quotes *Erickson* at paras. 556-557:

> Looked at another way, it is simply a case that the Tribunal does not address those other parts of the Director's decision at all, by virtue of the statute. It is perhaps better to state that the Legislature is requiring that parts of the Director's decision be deferred to as a matter of jurisdiction. They are not to be raised before the Tribunal. To that extent, this is not a full "new hearing" of what was or could have been raised before the Director.

The Appellant notes that Zephyr cites *724597 Ontario Inc.*, *Montague*, *RPL Recycling*, *Detox Environmental Ltd.* and *AB Crushing Inc.* as decisions that have discussed the powers of the Tribunal in relation to section 145.2 (and predecessor sections) of the *EPA*, where it has been consistently concluded that the "new hearing" jurisdiction confers broad powers on the Tribunal. The Appellant observes that in a new hearing, there is a greater emphasis on substance (i.e., evidence), rather than the decision-making process at issue.

The Appellant submits that Zephyr has argued that because this is not a hearing *de novo* the evidence admissible in this appeal is extremely limited, but has not cited any authority for this proposition. The Appellant further submits that the proper interpretation, given the contextual analysis of the legislative scheme and previous decisions of the Tribunal and Divisional Court, is

that the scope of evidence admissible in this proceeding appears to be any information reasonably available to the Director at the time of the decision.

The Appellant asserts that the scheme and object of the *EPA* support the proposition that the record in this appeal should, in fact, be broad in order to best further the goals of environmental protection, public consultation, and the public interest. The Appellant submits that, if environmental protection is a primary goal of the legislative scheme, drastically curtailing the evidence the Director did or ought to have considered from the wealth of available evidence, and in turn denying the Tribunal the opportunity to consider it, appears counterproductive. The Appellant further submits that more informed, better decisions will always be made by a Director and subsequently by the Tribunal if all available evidence has been considered, and a broad record would be far more appropriate for both bodies to have before them when making decisions in order to provide for environmental protection and conservation.

The Appellant argues that, by allowing a broader scope of evidence in this appeal, the public interest is also furthered because it allows the Hearing to proceed with all available and relevant evidence and ultimately, produce a better decision in respect of the impacts on human health. The Appellant also notes that the *EPA* itself includes other indicators that support a broad interpretation of the scope of evidence on a REA appeal, such as section 142.1 of the *EPA*, which grants standing to appeal a REA to all residents of Ontario. The Appellant submits that it would be inconsistent to have a broad standing test and then set a restrictive evidentiary bar.

In respect of the factors that Zephyr suggests be considered in its contextual analysis of the *EPA* provisions at issue, the Appellants argue that the goals of addressing negative environmental effects and seeking to prevent adverse effects would be enhanced by allowing a broad evidentiary record to allow as much information as possible, and the goal of upholding the public consultation process would also be respected as this information would be included in the evidentiary record before the Tribunal. The Appellant submits that the converse would be true if Zephyr's position is accepted, as limiting the available information undermines both the Director's and Tribunal's decision-making abilities.

The Appellant also argues against Zephyr's view that potential appellants have an onus to raise all existing evidence during the public consultation if they seek to use that evidence in a REA hearing. The Appellant suggests that in such an interpretation of the legislative scheme, the goal of public consultation would effectively trump all other objectives of the scheme, and while public consultation is an important part of the REA process, the issues of health, adverse effects, and environmental protection cannot be excluded.

The Appellant further submits that to effectively adjudicate an appeal of a REA, the Tribunal would be best equipped to make its decision by being aware of relevant information available to the Director, regardless of whether this information was submitted during the public consultation process. The Appellant notes that the Director is not limited to considering public comments in determining whether to issue an approval and has a responsibility to consult relevant sources of available information in making a decision.

The Appellant also notes that during the public consultation phase of the approval process the Director is asked to base the approval decision on the issue of adverse effects, and this is a separate and distinct issue from the question before the Tribunal in an appeal under section 142.1 of whether the approval will cause serious harm to human health. The Appellant suggests that submissions of public comments are aimed at informing the Director's decision on "adverse effect" not "serious harm," and it is not clear to the public that submissions would have to meet the threshold of an appeal under section 142.1.

The Appellant argues that Zephyr's narrow interpretation of sections 145.2(2) and 145.2.1 that a REA hearing is a review of the Director's decision and limited to the review of the materials that were before the Director at the time of the decision, in addition to new evidence that passes the new evidence test, fails to account for the role and expertise of the Tribunal. The Appellant cites the Divisional Court in *Montague*, noting at para. 26 that "if the powers of the Board were limited to ensuring that the Director exercises his or her discretion in good faith and within the ambit of his or her statutory powers, there would be little need for such a Board, since judicial review is available for an excess of jurisdiction." The Appellant asserts that in hearing this appeal under section 145.2.1(4)(c), the Tribunal is empowered to substitute its own opinion for that of the Director, as in *Montague*.

The Appellant submits that the Tribunal must consider whether the REA will cause serious harm to human health, which is a substantive question requiring specific types of evidence and is also a separate question from the Director's main consideration in deciding whether to issue the approval: whether the REA will cause an adverse effect. The Appellant states that the Tribunal discussed the distinction between these two tests in *Erickson* in the context of deference to the Director at para. 559:

> The Tribunal has to assess whether there will be "serious harm" regardless of what other considerations the Director had in mind and regardless of whether the Director ever turned his mind to the question of "serious harm". The Tribunal is to apply the distinct test set out in section 145.2.1(2) and exercise discretion under section 145.2.1(4) if the test is met. It is not replicating or even directly addressing the full and detailed process required by Part V.0.1 of the EPA or the regulations. It is, therefore, the Tribunal's finding that the question of deference raised by the Parties is largely irrelevant to this Hearing before the Tribunal.

Given that the Tribunal is tasked with addressing whether the REA will cause serious harm to human health, a different question than the Director, the Appellant submits that this appeal will not focus solely on the issue of whether the Director's decision was correct or incorrect and that, as a result, the *Imperial Oil* case referenced by the Approval Holder is not applicable.

The Appellant also cited the Divisional Court's discussion of the expertise and issues to be examined by the Tribunal in *Hanna* at para. 29.

The Appellant asserts that the Tribunal's expertise in adjudicating environmental matters, and the specific role assigned to the Tribunal in this appeal both support a much broader

interpretation of section 145.2 of the *EPA*, so that the evidence admissible in this appeal should not be restricted to the very limited categories proposed by Zephyr.

The Appellant also notes a number of previous decisions of the Tribunal and the Divisional Court. Citing the Tribunal's decisions in *Erickson*, *Associated Industries Corp.* and *Strite Industries Ltd.*, the Appellant submits that they make it clear that the appropriate definition of the record in this appeal is all information available to the Director at the time of the decision, and that this category should not be narrowly construed to include only the information before the Director (i.e., it should not be limited to the decision record) but rather, should encompass any information that the Director reasonably could have consulted when deciding whether to issue the approval.

In particular, the Appellant notes that the Tribunal in *Erickson*, at para. 547, disagreed with narrowing the record to the extent that Zephyr is proposing in this motion:

> Suncor submits that the record on these appeals includes only the record of the decision-maker whose decision is subject to the appeals; that would include the REA application and supporting documents, the *EBR* public comments, the Ministry's review documents, the Director's decision and the REA. The Tribunal finds that this is too narrow a view of the record. Certainly there are other documents that could be considered part of the record, although no attempt will be made in this Decision to definitely outline the parameters of the record.

The Appellant also cites the Divisional Court's decision in *Hanna*, in which the admissibility of evidence concerning the health effects of O. Reg. 359/09 was contested on a number of grounds. The Court held that only evidence post-dating the adoption of the regulation was inadmissible and that all other evidence which was relevant or which could have informed the decision was properly admissible, stating at paras. 9-13 that scientific material published after the public consultation period but available prior to the adoption of the regulation is arguably relevant, as it could have informed the regulatory decision.

The Appellant notes that this appeal is not a judicial review, which would have the narrowest boundaries for admissible evidence. The Appellant asserts that the test articulated in *Hanna* is useful as a minimum threshold test and, based on this ruling, any evidence which is not "clearly irrelevant" and which was available before the date of the decision is properly admissible in this proceeding. The Appellant states that this approach was endorsed more recently in *Smith v. Smith Inquest (Coroner of)*, [2011] O.J. No. 1900 (Div. Ct.), at paras. 21-22.

The Appellant therefore submits that the proper scope of evidence admissible in this appeal is evidence that is not "clearly irrelevant" and that was available to the Director at the time of the decision. The Appellant agrees that any new evidence must meet the threshold test proposed by Zephyr, but submits that the new evidence category includes only two types of material: any information that came into existence after the date of the decision to approve the project; and evidence that would clearly not have been available to the Director.

The Appellant submits that many sources of information were available to the Director in making the decision to issue this REA, including the following:

1. The decision record before the Director, including technical reports but also filings by and correspondence with the proponent, internal documentation, reports and/or assessments of references, assessments of *EBR* submissions by the public, and peer-reviewed references used in the decision-making process;

2. All evidence submitted in the *Erickson* REA appeal before the Tribunal, including witness statements, submissions, disclosure documents, exhibits, official transcripts, final submissions, responses from appellants, responses from respondents, and the Tribunal's decision;

3. Information disclosed by the Minister of the Environment in the *Hanna* judicial review before the Divisional Court, including witness statements, submissions, disclosure documents, exhibits, official transcripts, final submissions, responses from appellants, responses from respondents, and the Court's decision;

4. All information provided to the Ministry of the Environment from outside sources on the issue of industrial wind turbines, including all *EBR* comments submitted for this and other Renewable Energy Approvals or Environmental Review Reports for wind projects, such as the Conestogo, Flesherton and Manitoulin projects; meetings and meeting records, correspondence between the Ministry of the Environment and Ministry of Health and Long-Term Care, and information provided to the Minister of the Environment, the Director, Ministry of the Environment, and the Director of the Approvals Program;

5. The large body of scientific and other literature available to the general public, including peer reviewed articles, Canadian and international legal decisions, internet postings, Wind Concerns Ontario postings, and newspaper and other media reports; and

6. Any freedom of information requests made by the public for records relating to industrial wind turbines.

The Appellant notes that Zephyr in its reply submissions concedes that all six categories of material proposed by the Appellants were available to the Director at the time a decision on the REA was made, but that Zephyr submits that the Tribunal can only look at those materials the Director considered in making a decision. However, the Appellant argues that it is logical that the Director must have considered all of the documents listed by the Appellant in the six categories.

The Appellant submits that it is not taking the position that the Tribunal is being asked to rule that all information in its proposed six categories would be admissible at a hearing. However, the Appellant submits that, for the purpose of determining the record, all of that information should be provided as part of disclosure so that Parties may begin to prepare for the Hearing. Whether or not it is relevant under the *Statutory Powers Procedure Act* (*"SPPA"*) would need to be shown, challenged and determined by the Tribunal at the Hearing.

The Appellant observes that, in a REA appeal, the decision-maker (the Director) is a Party and full participant. This differs from a true appeal of a judicial decision, in which the trial judge is not represented by counsel and does not participate.

The Appellant asks whether the MOE's system is so compartmentalized that the Director considers information relating to each REA in a silo, without considering information in relation to any other project. The Appellant submits that if members of the public are expected to be diligent in monitoring new information that arises concerning the impacts of wind turbines, the Director should do the same. The Appellant suggests that it is not logical to require that members of public be so knowledgeable that they can submit evidence at the public consultation stage, while the Director needs to know only information specifically related to the Zephyr project. The Appellant argues that any information available should be considered in making decisions on each REA project.

The Appellant submits that there will be three practical implications if the Tribunal accepts Zephyr's position on scoping:

1. At the preliminary stage of a hearing, the Tribunal will have to vet large amounts of information. Where little has been submitted at the public consultation stage, there will be lengthy motions in which appellants attempt to have new evidence admitted under the new evidence test during the statutory time limits. At the same time, the Director will not prepare materials for disclosure, saying that they are just responding. This will create delays at every hearing. The Appellant asserts that the Divisional Court determined a simple way to deal with this problem with the "not clearly irrelevant" test, which would allow disputes to be resolved based on actual facts and evidence. The Appellant acknowledges that not every piece of evidence subject to disclosure will ultimately be admitted at the hearing.

2. In order for their evidence to be admissible without having to meeting the onerous standard of the new evidence test, appellants will not simply have to prepare their cases at the Notice of Appeal stage, but will have to prepare their cases at the public consultation stage. This will be problematic because there are many proposed approvals but it is not known which ones will be granted. Many proposals will need to be monitored, which will create a large burden for Ontario residents. Even where proposals are approved, it will not be known at the proposal stage what conditions may be imposed or whether proposals may be modified.

3. During every REA public consultation, hundreds of scientific studies and other evidence from past hearings will have to be re-submitted, despite the fact that they are all in the possession of the Director in other project files.

The Appellant submits that a REA appeal cannot be considered a new hearing for the following reasons:

- As determined in *Hanna*, the date of a decision on a REA is a cut-off date for evidence. The Appellant agrees with the submission that evidence that comes to

> light after that date will need to meet the new evidence test. A hearing *de novo* would have no cut-off date.
>
> - The scope of a REA hearing is different and more limited than a true hearing *de novo*.
>
> - The sources of information in a REA hearing are limited and must form part of the record that the Director considered or ought to have considered.
>
> - Under the REA regime in the *EPA*, hearings do not start from a blank slate each time but build on the evidence from past hearings such as *Erickson*.

As an alternate interpretation, the Appellant submits that a REA appeal is "not a new hearing" in the sense that each REA hearing is not a blank slate, but has regard for what has happened in past REA hearings, such as *Erickson* and *Hanna*.

The Appellant requests that Zephyr's motion to limit the scope of evidence to the record before the decision-maker, the REA, and any new evidence meeting the new evidence test be dismissed. Instead, the Appellant respectfully requests an Order that:

> The scope of evidence admissible in this appeal is evidence which is not "clearly irrelevant" and which was available to the Director at the time of the decision. In addition, any evidence that (1) came into existence after the date of the decision to approve the project, or (2) would clearly not have been available to the Director, should also be admitted if it satisfies the criteria in *R. v. Palmer* and the Tribunal's Rule 234.

Director's Submissions

In the Director's written submissions of November 24, 2011, the Director takes no position with respect to Zephyr's Motion.

In the Director's written submissions of November 28, 2011, the Director notes that Zephyr's Motion deals with a question of law and does not require documentary disclosure from the Director for its determination. The Director stated that, regardless of how the Director has defined the record, if Zephyr's motion is accepted, the Appellant would be limited to bringing evidence that was either on the record, or not available to the Director at the time the record was compiled. However, if the Tribunal finds that this appeal is in the nature of a limited hearing "*de novo*", the record of the Director is immaterial, and the Appellant will be free to bring whatever evidence it chooses.

While taking no position on this motion, the Director does express concern about the order being requested by the Appellant and makes submissions on that request. Regarding the Appellant's request that the scope of evidence admissible in this appeal be evidence that is not clearly irrelevant and that was available to the Director at the time of the decision, the Director submits that this would contradict section 15 of the *SPPA*, which states that evidence

admissible at a hearing must be relevant to the subject-matter, as opposed to not clearly irrelevant.

The Director raises concerns that such a broad test would widen the scope of evidence to include information that was available to the Director at the time of decision. The Director submits that the Appellant's list of information that was available to the Director is a catalogue of all information about wind turbines in Ontario, and not new or specific evidence unavailable at the *Erickson* hearing. The Director states that all of this information is not necessarily relevant to the decision to grant a REA to Zephyr, nor should the Director necessarily have considered it in making the decision.

The Director asserts that the Tribunal should only allow evidence that is relevant to the subject-matter, and that first needs to be defined in deciding on the Director's Motion to dismiss. The Director notes that the Tribunal's decisions on these motions will determine how the obligations that have been imposed in the REA appeal process and timetable will be fulfilled.

The Director clarified for the Tribunal that there is currently one Director in the MOE that considers all applications for REAs. Counsel for the Director does not believe that there is any general guidance document in the Ministry on issuing REAs.

Counsel for the Director also clarified that there were representatives of the MOE present at the judicial review hearing in *Hanna*, although counsel was not sure whether or not Mr. Mahmood, the Director, was present.

Findings:

The Meaning of Section 145.2.1 of the EPA

The question of the nature of the hearing held by the Tribunal pursuant to section 145.2.1 of the *EPA* is important because it has implications with respect to how the Tribunal approaches the issues to be decided, the information that the parties are required to disclose prior to the hearing, the scope of evidence that may be admitted into the hearing and, potentially, the remedies available.

All Parties agree that, because of section 145.2(2) of the *EPA*, the Tribunal does not hold a "new hearing" with respect to REA hearings that are required by any person other than the applicant. This is unlike other hearings under the *EPA*, brought under section 139, including hearings required by an applicant for an REA, all of which would be "new hearings".

Not being a "new hearing" does not by itself answer the question of what the nature of the REA hearing is to be. The parties disagree on the appropriate characterization of the REA hearing. Zephyr argues that there is only one other option if the hearing is not a "new hearing", and that is one analogous to a "true appeal". By a true appeal, Zephyr means that the role of the Tribunal is to review the Director's decision and decide only if it was right or wrong. By implication, the scope of evidence permitted is very narrow and limited chiefly to the "record" of evidence that was before the Director when making the initial decision.

The Appellant argues that the REA hearing is something other than a “true appeal”, while still less than a “new hearing”, but gives little guidance on what it considers the nature of the REA hearing to be. The Director takes no position on this question.

The statute, in section 145.2.1(2), states that when a hearing is required by someone other than the REA applicant, 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 either “serious harm to human health” or “serious and irreversible harm to plant life, animal life or the natural environment.” What the Tribunal is required is to do is “review” the Director’s decision *and* “consider” whether issuance of the REA in this specific case will result in the requisite harm. If the Tribunal finds that the issuance of the REA will cause such harm, it has the power to revoke the Director’s decision, direct the Director to take such action as the Tribunal considers the Director should take in accordance with this Act and the regulations, or alter the Director’s decision and substitute its opinion for that of the Director.

The statute is not clear on what type of hearing is intended. While expressly not a “new hearing”, the statute does not say that the Tribunal shall review the decision of the Director and determine whether it is “correct” or “reasonable”, or meets some other standard that would be similar to a “true appeal” or to judicial review, which continues to be available. Nor is there a threshold test that must be met before a hearing can be held, such as applies with leave to appeal applications under the *EBR*. One would expect some such guidance in the statute if this were intended to be a “true appeal”. Instead, the Tribunal is required to do more than just review the Director’s decision. The Tribunal must make independent findings of fact about a limited set of concerns regarding harm, and has no authority to make findings about other matters considered by the Director that may have led him or her to a final decision. If, after consideration of the decision and the evidence presented, the Tribunal concludes that the project approved by the REA will result in harm as specified in section 145.2.1(2), then the Tribunal has broad powers to revoke or modify the approval, similar to the powers it has in hearings brought pursuant to section 139. The only significant differences from other *EPA* hearings are that the Tribunal shall confirm the decision of the Director if it finds that there is no “serious harm”, the Tribunal’s decision or order “shall be consistent with” policies issued by the Minister under section 47.7 of the *EPA* that are in effect on the date of the Director’s decision, and the decision of the Director shall be deemed to be confirmed if the Tribunal fails to dispose of the hearing within six months of the Notice of Appeal. It is clear from the amendments that the Legislature intended the REA hearing to be an expedited, narrowly focused hearing on the merits.

In addition, the Tribunal is required to answer a different question than the one the Director must address. The only criterion on which the Director makes his or her decision, as set out in section 47.5 of Part V.0.1 of the *EPA*, is whether the project would be “in the public interest”. The Director must consider all of the information provided by the applicant and all of the comments gathered through the mandatory consultation processes. He or she does so within the limits of the *EPA* and its purpose, that is, with a view to the conservation and protection of

the environment. The decision must also be consistent with MOE policies issued under section 47.7 of the *EPA*. The Director is asking a broader question than the narrow question before the Tribunal. It may be that in a particular case the Director does not even reach a conclusion about "serious harm". If so, the Tribunal can reach a conclusion and adjust the approval according to its view of what is appropriate. Or, if the Director does reach a conclusion about "serious harm", the Tribunal can reach a conclusion that differs from the Director's and modify the decision. Overall, this statutory framework is not indicative of a "true appeal".

The Parties present no relevant case law on this specific point. None could point to any cases that interpreted similar statutory language. The issue was raised in the first hearing brought under section 145.2.1: *Erickson.* However, it was raised at the close of the hearing, and the Tribunal determined that it did not have adequate submissions on which to base a ruling. However, in *Erickson*, the Tribunal did decide that the Director's decision was not to be accorded deference because

> the Tribunal is to apply the distinct test set out in section 145.2.1(2) and exercise discretion under section 145.2.1(4) if the test is met. It is not replicating or even directly addressing the full and detailed process required by Part V.0.1 of the *EPA* or the regulations. It is, therefore, the Tribunal's finding that the question of deference raised by the Parties is largely irrelevant to this Hearing before the Tribunal (para. 559).

The Tribunal finds that the role of the Tribunal in a REA hearing under section 145.2.1 is to "review" the Director's decision and "consider only" whether the listed harms will be caused by the approved project. Thus, the hearing is not a full new hearing but is limited to the consideration of a restricted set of issues. To carry out its mandate, the Tribunal must make independent findings of fact about the specific harms an appellant claims will be found in the circumstances and must reach a conclusion that could very well differ from that of the Director. If so, the Tribunal can revoke the REA or fashion its own remedy.

The Tribunal finds that the legislative scheme for an REA hearing required by a non-applicant creates neither a "new hearing" nor a "true appeal". The nature of the REA hearing fits somewhere on a spectrum between these two types of proceedings, and has elements of both. The REA hearing is a novel regime designed to further the legislative scheme promoting renewable energy while respecting the government's obligations to protect human health and the environment.

Scope of Evidence

Given that it is a unique type of hearing, the question about the appropriate scope of evidence in the REA hearing cannot be answered simply by looking to the practices that apply to either a new hearing or to a true appeal. In a new hearing, the Tribunal essentially starts over and stands in the shoes of the Director with respect to the issues raised in the appeal in considering all relevant evidence. In a true appeal, the basis of the hearing is the written record that was

closed at the time of the initial decision and there are generally no witnesses or new evidence presented, subject to some exceptions, such as motions to adduce new evidence.

In an REA hearing, the Tribunal will "review the decision of the Director". Thus, rather than starting with an application, the Tribunal starts with a decision and then considers whether the project that has been approved by this decision will cause "serious harm" to human health or "serious and irreversible harm" to plants, animals or the natural environment. The onus is on the appellant to prove that this is so if it is to succeed in the hearing.

Zephyr submits that the nature of the appeal and the onus on the applicant limit the permissible evidence to information that was in the hands of the Director at the time he or she made the decision to issue the REA, plus new information that passes the test for "new evidence" set out in *R. v. Palmer*. This position might be appropriate if this were a "true appeal"; however, it is too limited given the Tribunal's finding that this type of hearing is not a "true appeal". The *EPA* does not limit the evidence that can be submitted in a hearing to information that was or could have been considered by the Director and has placed the onus on the appellant to prove that the decision will cause particular types of harm. By doing so, the Legislature has signaled that this type of hearing is narrow in terms of the issues that may be raised, but not in the scope of evidence that can be brought before the Tribunal by an appellant. This conclusion is supported as well by the Divisional Court's discussion of the Tribunal's powers under these provisions, in the *Hanna* case. There the Court stated, at para. 29:

> The health concerns for persons living in proximity to wind turbines cannot be denigrated, but they do not trump all other considerations. This is particularly so because these persons do have a remedy. Any person resident in Ontario, whether or not the person lives in proximity to a proposed wind turbine, can challenge the approval of an industrial wind turbine under the *EPA* amendments that came into force with the *GEA*. This challenge takes the form of an appeal to the Environmental Review Tribunal (the "Tribunal"), which has the mandate to determine, on a case-by-case basis, whether a renewable energy approval would cause serious harm to human health. Thus, if the Tribunal is persuaded by *evidence* that the 550-metre minimum setback is inadequate to protect human health from serious harm, the Tribunal has authority to revoke the decision of the director, or at the request of the applicant increase the minimum setback prescribed for the proposed wind turbines. *The Tribunal would hear relevant expert evidence and would be able to consider topography, wind patterns, make, model, size and dBA specifications of the wind turbine, its exact location, and the location of any other proximate turbines or noise receptors (i.e., residences). The Tribunal can conduct site inspections. It has authority to appoint its own scientific experts to assist it in its endeavours.* (Emphasis added)

Clearly, a Tribunal conducting a "true appeal" would not appoint experts to assist.

Zephyr submits that potential appellants must submit all evidence they intend to rely on at the hearing to the Director during the public consultation stage, that is, during the period for comments following the posting of the proposal notice on the *EBR* Registry. The Tribunal does not agree with Zephyr's position. There is nothing in the *EPA* or *EBR* that requires persons to

submit comments on a proposal posted on the Registry as a pre-condition to later requiring a hearing. If a member of the public has concerns about health or environmental harm associated with an REA, it would be a good idea to raise those concerns early, so that the Director will be made aware of them and will have an opportunity to use his or her authority to require further investigation by the applicant, to impose further conditions, or to deny the REA outright. However, there is no statutory bar to raising concerns in the Notice of Appeal as grounds for a hearing if one fails to raise them during the consultation period. In addition, the *EBR* process is an opportunity to raise concerns and make comments on a *proposal*, prior to the Director making a final decision. There is no statutory requirement that commentators submit "evidence" at that stage. There is no way for a member of the public to know all of the information that is already available to the Director so that they can find an expert to fill in the gaps. Nor can a member of the public be expected to predict what the final decision will be after the Director has considered all of the comments. The *EBR* requires the Director to "take every reasonable step to ensure that all comments relevant to the proposal" received during consultations "are considered when decisions about the proposal are made" and the expectation of the public is that valid concerns raised at this stage will influence the Director's final decision. Members of the public making comments on a proposal do not see themselves necessarily as "potential appellants" and, given the short time period in which they have to make comments, it would be unfair to require them to marshal all their appeal "evidence" at that stage.

This means that information relevant to the issues in appeal can be brought before the Tribunal at the hearing as evidence even if that information was not submitted to the Director at an earlier stage. Such information is not required to pass the "new evidence" test in *R. v. Palmer*. The key determinant of admissibility of evidence at the hearing should be the relevance of the material to the issues under consideration, as defined in the Notice of Appeal and limited by the statute.

Regarding disclosure, Tribunal Rule 33 requires that the Director provide to the Appellant and the Tribunal, within 14 days of the service of the Notice of Appeal, "all applicable reports set out in Table 1 of Ontario Regulation 359/09 with respect to the application for a renewable energy approval that relate to the grounds of appeal…." In the timeline set out in Appendix A to the Rules, this is referred to as "material relevant to the statutory test from public consultation on renewable energy approval application." For Class 4 Wind REAs, the reports that must be provided include:

- a construction plan report;
- a consultation report;
- a decommissioning plan report;
- a design and operations report;
- a project description report; and
- a wind turbine specifications report.

These are the documents that form the heart of the material upon which the Director based the REA decision. With this material before it, the Tribunal does not start from scratch in terms of evidence, as it would if this were a new hearing.

Beyond the Rule 33 requirement for specific documents to be disclosed, disclosure among the parties follows the ordinary practice of the Tribunal, with the important difference of the expedited timeline. That is, Rule 166 applies and requires that the Parties provide to all other Parties "a copy of every relevant document in the possession, control or power of a Party, except for those documents that are privileged." The primary determinant of what documents must be disclosed are those that are relevant to the issues in the Notice of Appeal. Rule 167 requires a Party then to "provide all the documents that the Party intends to rely on at the main Hearing to the Tribunal and to all other Parties within the time ordered by the Tribunal."

The Tribunal, therefore, finds that the scope of permissible evidence in an appeal of a REA pursuant to sections 142.1 and 145.2(1) and (2) of the *EPA* is *not* limited to the following two classes of evidence: (i) evidence that was before the Director during his decision-making process that lead to his decision under section 47.5 of the *EPA*; and (ii) new evidence that was not in existence during the Director's decision-making process, or for reasons beyond the Appellants' control, was not obtainable during the Director's decision-making process, and which evidence is material to an issue to this hearing, is credible and could affect the result of the Hearing.

Order

The Motion to scope evidence in the appeal is dismissed.

Motion to Scope Evidence Dismissed

Paul Muldoon, Panel Chair

Marcia Valiante, Member

Maureen Carter-Whitney, Member