Environmental Review Tribunal

Case No.: 13-096

Platinum Produce Company v.
Director, Ministry of the Environment

In the matter of an appeal by Platinum Produce Company filed July 26, 2013 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, with respect to an amendment, issued by the Director, Ministry of the Environment, on July 11, 2013, to Renewable Energy Approval No. 2871-8UKGPC, issued by the Director, Ministry of the Environment , on June 15, 2012, to South Kent Wind GP Inc., as general partner for and on behalf of South Kent Wind LP, under section 47.5 of the *Environmental Protection Act* for changes in the location of three wind turbines, all within the existing approved project location, and a decrease in sound power level for another turbine located in the Municipality of Chatham-Kent, Ontario; and

In the matter of a hearing held on September 26, 27 and 30, October 1, 2, 3, 4, 7, 10, 17 and 25, and November 29, 2013 at St. Mary's Hall, 94 George Street, Blenheim, Ontario and at 655 Bay St., Toronto, Ontario, and by telephone conference calls on September 16 and 18, October 7, 17 and 28, November 1, 2013, and, January 20, 2014.

Before: Robert V. Wright, Vice-Chair

Appearances:

Eric K. Gillespie and Graham Andrews	-	Counsel for the Appellant, Platinum Produce Company
Sarah Kromkamp, Justin Jacob and Matthew Horner	-	Counsel for the Director, Ministry of the Environment
James Bunting, Sarah Powell and Alexandria Pike	-	Counsel for the Approval Holder, South Kent Wind GP Inc., as general partner for and on behalf of South Kent Wind LP

Dated this **27th** day of **January, 2014**

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REASONS FOR DECISION

Overview and Background

[1] This is the appeal of an amendment to a renewable energy approval ("REA") for a project with 124 wind turbines. The amendment relates to four of the wind turbines (the "Amendment"). The appeal concerns two of the four wind turbines (P038 and P039) whose location or sound level is altered by the Amendment. The appeal challenges the Amendment under s. 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), alleging the appellant's employees are deprived of security of the person, and, in the alternative, under the first branch of the renewable energy approval appeal test in the *Environmental Protection Act* ("*EPA*") alleging serious harm to human health. The appeal seeks to revoke the Amendment. For the reasons that follow, the Tribunal finds that the appellant has not established on the evidence either the alleged breach of s. 7 of the *Charter* or that the *EPA* renewable energy approval appeal test has been met.

The REA and the Amendment

[2] In June 2012 the Director of the Ministry of the Environment ("MOE") issued Renewable Energy Approval No. 2871-8UKGPC (the "REA") to South Kent Wind GP Inc. as general partner for and on behalf of South Kent Wind LP ("South Kent" or the "Approval Holder") pursuant to s. 47.5 of the *EPA* for a Class 4 wind facility consisting of the construction, installation, operation, use and retiring of a wind facility with 124 wind turbines and a total name plate capacity of 270 MW, located in the Municipality of Chatham-Kent, Ontario (the "Project").

[3] In July 2012 the REA was appealed by Chatham Kent Wind Action Inc. to the Environmental Review Tribunal (the "Tribunal"). The appeal was dismissed in December 2012 without the appellant calling any evidence.

[4] After the REA was issued, the Approval Holder became aware that a building on the property of Platinum Produce Company, an adjacent landowner, is used by greenhouse workers as a bunkhouse residence. On the application for the REA the Approval Holder incorrectly thought that it was an agricultural building, such as an equipment shed or barn.

[5] Recognizing the building as a residence, and that under the REA wind turbine P038 was approximately 50 meters too close to the bunkhouse where the predicted sound level would exceed the applicable limit of 40 dBA, the Approval Holder had a

noise re-assessment report prepared and applied for an amendment to the REA (the "Amendment"). The terms of the Amendment that are relevant to the appeal:

- move turbine P038 52 meters farther away from the bunkhouse;
- de-rate (reduce) the sound power level of turbine P038 from 105 dBA to 101 dBA; and
- de-rate the sound power level of turbine P039 from 105 dBA to 104 dBA.

[6] The Director decided to amend the REA as requested by the Approval Holder and issued the Amendment on July 11, 2013.

Bases of appeal

EPA health test

[7] On July 26, 2013, Platinum Produce Company ("Platinum" or the "Appellant") filed a notice of appeal of the Amendment with the Tribunal under s. 142.1 of the *EPA* based on the human health branch of the *EPA* s. 145.2(2) renewable energy approval appeal test set out below.

[8] The notice of appeal alleges, in paragraphs 8 and 9,:

> 8. The Appellant operates a greenhouse that employs approximately 60 (sixty) persons. The majority of these persons are resident year round in a bunkhouse dwelling located approximately 555 meters from the amended location of turbine P038. In addition, the greenhouse wherein these individuals work for approximately 50 hours per week, which covers approximately 50 acres, is located much less than 550 meters from this turbine. Turbine P037 is located approximately 550 meters from the green house and Turbine P039 is located approximately 450 meters from the green house. If between 5% and 30% of these individuals at these points of reception experience the health effects enumerated above, the impact of the Project on human health will be very serious.
>
> 9. In addition, the proximity of the greenhouse to the above mentioned IWTs raises serious concerns regarding serious harm to human health resulting from ice throw, turbine collapse and blade failure.

[9] The Appellant did not bring any evidence or make submissions regarding the allegations in paragraph 9 of the notice of appeal and so there is no further discussion of these allegations in this decision.

Charter challenge

[10] Also on July 26, 2013, the Appellant served a notice of constitutional question. It challenges the validity of s. 47.5 and s. 142.1 of the *EPA* and seeks a remedy under s. 52 of the *Constitution Act, 1982* declaring these provisions inoperative. The notice

alleges that the provisions allow for the violation of rights of the Appellant's employees to security of the person under s. 7 of the *Charter*, and the Appellant claims a remedy under s. 24(1) of the *Charter* in relation to an act or omission of the Government of Ontario.

[11] The Appellant's notice of constitutional question states:

> The material facts giving rise to the Appellant's constitutional question are set out in the notice of appeal, attached hereto.
>
> The following are the legal bases for the constitutional question:
>
> …
>
> 3. If a project such as the one described above is approved or amended, an appellant is entitled to appeal the Director's decision to the Environmental Review Tribunal. On July 26, 2013, the Appellant appealed the Director's decision to amend the REA on behalf of its employees, the majority of whom reside in a bunkhouse dwelling in close proximity to the Project and whose workplace is located less than 550 meters from the Project.
>
> …
>
> 5. The legislative scheme for granting approvals to wind farm projects violates the right to security of the person as guaranteed to the Appellant's employees by section 7 of the *Charter* in that approvals can be issued to project proponents notwithstanding the known adverse health effects.

Preliminary matters

[12] On September 5, 2013, the Tribunal held the preliminary hearing in Blenheim, Ontario. The Tribunal's order dated September 26, 2013, made after the preliminary hearing, reflects procedural matters that were scheduled by agreement of the parties, including a procedural consent order that was attached as an appendix. Some of the scheduled dates set out in the order were subsequently changed. There was some controversy during the hearing regarding the terms and fulfillment of the parties' consent order as it related to disclosure of information by the Appellant or its intended witnesses. There was no formal request for the Tribunal to resolve that matter and it is not necessary to do so at this point.

[13] The Director and the Approval Holder brought motions returnable at the preliminary hearing to strike the constitutional relief sought by the Appellant. The motions of the Director and the Approval Holder asserted that the Appellant lacks standing to bring constitutional claims under s. 7 of the *Charter*.

[14] Subsequent to the preliminary hearing, and after reviewing the written submissions of the parties filed on the issue of standing, the Tribunal requested further submissions from the parties on certain aspects of their argument. These were heard

on September 26, 2013 and the Tribunal gave an oral decision on that date that the Appellant has standing to pursue the constitutional claims of its employees pursuant to s. 7 of the *Charter* and any remedy that might be granted under s. 24(1) of the *Charter*. The Tribunal's reasons for the order are attached as Appendix B.

[15] The Director also brought a motion at the preliminary hearing, in the alternative, to strike the Appellant's claim that s. 47.5 of the *EPA* is constitutionally invalid, or that its application by the Director violated *Charter* rights, on the basis that the Tribunal lacks jurisdiction to consider such a claim. This motion was adjourned and the Appellant later withdrew this aspect of the appeal.

[16] The hearing of the evidence concluded on October 25, 2013.

[17] At the conclusion of the hearing on October 25, 2013 the Appellant advised the other parties and the Tribunal of its intention to bring a motion to admit new evidence. The Appellant filed its motion with the Tribunal on November 1, 2013. The Director and the Approval Holder filed responding materials, and the Appellant filed reply submissions with the Tribunal on November 12, 2013. The motion was heard in writing. The motion was dismissed by an order dated November 19, 2013, for reasons to be provided. The reasons for the order are attached as Appendix C.

[18] The parties filed written submissions in the main appeal, made oral submissions on November 29, 2013 in Blenheim, Ontario, and supplementary oral submissions on January 20, 2014 regarding some recent decisions that are discussed below.

Supplementary submissions

[19] Subsequent to the parties' oral submissions at the end of the hearing, three decisions relevant to the issues in this matter were released by the Supreme Court of Canada and the Tribunal. On January 20, 2014, the Tribunal heard further oral submissions from the parties regarding them. The decisions are: *Canada (Attorney General) v. Bedford*, 2013 SCC 72 ("Bedford"), dated December 20, 2013; *Bovaird v. Director, Ministry of the Environment*, 2013 Carswell Ont 18046, also cited as: *D&C VanderZaag Farms Ltd. v. Ontario, (Ministry of the Environment)*, [2013] O.E.R.T.D. No. 84 ("Bovaird") issued by the Tribunal on December 23, 2013; and *Dixon v. Director, Ministry of the Environment*, 2014 ("*Dixon*"), issued by the Tribunal on January 16, 2014.

Relevant Legislation and Rules

[20] The provisions of the *Charter* and the *EPA* most relevant to the submissions of the parties and the decision are set out here. Additional relevant provisions of the

Constitution Act, 1982 and the *Charter*, the *EPA*, and other legislation and Rules of Practice of the Tribunal, are set out in Appendix A.

Canadian Charter of Rights and Freedoms

> 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.
>
> …
>
> 24.(1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

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).

Issues

[21] The issues are:

1. whether the employees of the Appellant have been deprived of their s. 7 *Charter* right to security of the person except in accordance with the principles of fundamental justice; and
2. whether engaging in the Project pursuant to the Amendment and in accordance with the REA will cause serious harm to human health under the *EPA* renewable energy approval appeal test.

Discussion, Analysis and Findings

Recent decisions in Bedford, Bovaird and Dixon and theTribunal's reliance on them

[22] The two recent decisions of the Tribunal in *Bovaird* and *Dixon* dealt with substantially the same issues, and some of the same witnesses and evidence, as in this case. Both cases considered *Bedford*, the most recent decision of the Supreme Court of Canada dealing with s. 7 of the *Charter*. It will be discussed under Issue No. 1, below. The *Bovaird* and *Dixon* appeals were dismissed.

[23] In each case the Tribunal found that the evidence fell short of proving the appellants' *Charter* challenge and appeal on the *EPA* "harm to human health" branch of the renewable energy approval appeal test. (See the findings in *Bovaird* at paras. 377, 413, 414 and 522; and the findings in *Dixon* at paras. 160, 161, and 171 to 176.)

[24] The parties argue that the decision in this case should also be evidence-based, though they also make comprehensive submissions on the *Charter* and *EPA* case law as the appellants did in *Bovaird* and *Dixon*. Those decisions canvas the case law relevant to the *Charter* and *EPA* issues, including *Bedford*. In both cases, the decisions discuss, but expressly decline to determine, a number of legal arguments because the issues could be decided on a threshold evidentiary basis. This decision substantially adopts the legal analysis in *Dixon*, and the reasons that it incorporates from *Bovaird*. *Dixon* is the more recent of the two Tribunal decisions. The *Charter* issue was the focus in *Dixon*.

[25] The record in *Dixon* appears to have been substantial in terms of the number of appellants, their evidence and submissions. The *Dixon* case concerned a 15 turbine wind facility in the Municipality of Huron East, the Municipality of Morris-Turnberry and the Township of Howick in Huron County, Ontario. There were two groups of appellants represented by different counsel: the "Dixon/Ryan Appellants", and the Middlesex-Lambton Wind Action Group Inc. and Harvey Wrightman (collectively the "MLWAG Appellants"). The Dixon/Ryan Appellants only relied upon a challenge to the *EPA* "serious harm to human health" test under s. 7 of the *Charter*. The MLWAG Appellants challenged the *EPA* test and, additionally, the issuance of the renewable energy approval under s. 7 of the *Charter*. The MLWAG Appellants also argued, in the alternative, that engaging in the project in accordance with the renewable energy approval will cause serious harm to human health under the *EPA*.

[26] In *Dixon*, paras. 66 and 67 of the decision reflect the submissions of the Director and the approval holder that the alleged harm and the test, whether under the *Charter* or the *EPA*, must be established on a strong evidentiary basis. The Tribunal states at

para. 84 : “For a s. 7 *Charter* claim, the Tribunal finds that the onus is on the Appellants to establish, on the evidence, the claimants have suffered or will suffer serious physical or psychological harm,” and at para. 174: “Similarly, in *Bovaird*, the Tribunal found that the evidentiary burden was not met under the statutory test and later found that it was also not met for the s. 7 *Charter* claim.”

[27] The earlier decision in *Bovaird* was about a 49 turbine wind facility in the Township of Melancthon, County of Dufferin, Ontario. The law firm that represented MLWAG in *Dixon*, and represents Platinum in this case, acted for an individual appellant and a different firm represented a group of appellants. The issues in *Bovaird* included the additional issue of whether the project will cause environmental harm under the second branch of the renewable energy approval appeal test.

[28] The record in *Bovaird* appears to have been even more substantial than in *Dixon*. The decision dismissing the appeal was 127 pages long, with large portions summarizing the evidence. The *Charter* issue was one of the issues in *Bovaird*, but not the main focus of the decision as it was in *Dixon* and is in this appeal.

[29] In the Appellant’s supplementary oral submissions made after the *Bovaird* and *Dixon* decisions were issued, it argues that those decisions are not binding and that the evidence and submissions are significantly different, and more compelling in the Appellant’s favour, in this case, e.g., the Appellant’s employees are migrant workers both living and working in proximity to wind turbines most of the time. However, the Appellant also asserts that Tribunal decisions should be consistent, relying upon findings in *Erickson v. Ontario (Director, Ministry of the Environment)* (2011), 61 C.E.L.R. (3d) 1 (Ont. Env. Rev. Trib.) *(“Erickson”)* and *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment* (2013), 76 C.E.L.R. (3d) 171 (Ont. Env. Rev. Trib.) (“*APPEC*”) as an evidentiary roadmap for its submissions.

[30] In its written submissions, the Appellant relies upon the following quote from the decision of the Supreme Court of Canada in *Domtar Inc. v Québec (Commission d’appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 at 784, (“*Domtar*”):

> While the analysis of the standard of review applicable in the case at bar has made clear the significance of the decision-making autonomy of an administrative tribunal, the requirement of consistency is also an important objective. As our legal system abhors whatever is arbitrary, it must be based on a degree of consistency, equality and predictability in the application of the law.

[31] Applying *Domtar* to the facts of this case, the Appellant submits (emphasis added):

> A high value is placed on consistency in administrative law decision-making. It would be highly inconsistent and inefficient to require each appellant to re-litigate these issues every time a REA appeal is brought. The purpose of this hearing is to determine if, based on the already established science and law, the Appellant has provided sufficient evidence in this case in order to demonstrate that the turbine subject to this appeal of the amendment to the South Kent project, if operated as approved, will cause serious harm to human health.

[32] The Appellant further submits in its written submissions that the principle of consistency in decisions has "been enunciated and applied in numerous other decisions made by Tribunals here in Ontario", citing *2012722 Ontario Inc. v. Municipal Property Assessment Corp., Region No. 09*, [2012] O.A.R.B.D. No. 120 at para. 39 that (emphasis added):

> … However, the law has evolved where tribunal's own decisions are indeed being followed and adjudicators are encouraged to do so unless there is good reason to depart from them. This approach promotes certainty, consistency and predictability in tribunal decisions, all of which ultimately assist the parties appearing before the tribunal. Moreover, it respects the legal concept of *stare decisis*, a policy of courts to stand by precedent and not disturb a settled point. Rather, to apply the principle of law to all future cases where the facts are essentially the same.

[33] The Director and the Approval Holder do not agree with the Appellant's interpretation of the *Erickson* and *APPEC* decisions. However, they too submit that the decision in this case should be consistent with the decisions in *Bovaird* and *Dixon*. They argue that, despite the greater evidence in *Bovaird* and *Dixon* than in this case, those appeals were dismissed. They argue that the evidence in this case is only a "sub-set" of the evidence in previous appeals: for example, the Appellant's evidence only included one expert witness, Dr. Robert McMurtry, and he only gave reply evidence.

[34] The Tribunal agrees with the submissions of the parties that it should consider the "consistency in decision-making" principle. The principle is not inconsistent with deciding matters on a case-by-case basis, and each case on its own facts.

[35] The Tribunal will first consider the evidence and then examine the *Charter* and *EPA* issues in light of the findings of fact. As indicated below, this panel of the Tribunal agrees with the legal analysis in *Dixon*, and as it incorporates the analysis in *Bovaird* and, thus, a detailed analysis of the issues raised in those cases is not required.

Evidence

Appellant's employees

[36] Tim Verbeek, the Vice-President and Production Manager of Platinum, testified that the 50 employees live in the bunkhouse and work in the greenhouses. He

described them as migrant workers and stated that they must be in good health to obtain work visas for periods of eight to twenty-four months. While those workers with the visas for longer periods have some vacation time, the workers live and work in the vicinity of the wind turbines most of the time.

[37] Mr. Verbeek said that the concern is that the employees will be exposed to effects of industrial wind turbines almost continuously for very lengthy periods of time and that this will disrupt their sleep and have a "detrimental effect" on their morale, effectiveness and create greater risk of injury to themselves and others.

[38] The Director and the Approval Holder submit that the Appellant provided no direct evidence on the current health of any of the employees, or their predicted health when the turbines would start operating. They argue that Mr. Verbeek's evidence about the greenhouse workers is hearsay and vague. They submit that Mr. Verbeek's evidence about the effects of wind turbines on the health of the employees should be given no weight as he was not qualified to give such opinion evidence.

[39] The Approval Holder cross-examined Mr. Verbeek on the Appellant's motives for the appeal. Mr. Verbeek acknowledged that Platinum's co-generation application was turned down by the Ontario government in 2013, around the time that it would have received notice of its right to appeal the Amendment. The Approval Holder further argues that Platinum did not appeal the REA and is appealing the Amendment because its own application was turned down and not because it wants to protect the health of its workers. Mr. Verbeek denied this allegation.

[40] The Approval Holder argues that even though the employees did not appeal in their own names, they "could have at least testified and appeared before the Tribunal." The Director adds that the Tribunal only has Mr. Verbeek's evidence that the employees are fearful about participating in the process.

[41] The Approval Holder submits that in addition to the evidence about the Appellant's employees being based entirely on hearsay, the Appellant has provided no evidence or written records of the alleged concerns of the employees.

Bunkhouse

[42] In relation to the bunkhouse, the Amendment changes the REA by: moving wind turbine P038 a distance of 52 meters farther away from the bunkhouse; de-rating (reducing) the sound power level of wind turbine P038 from 105 dBA to 101 dBA; and de-rating the sound power level of turbine P039 from 105 dBA to 104 dBA.

[43] Under the Amendment, wind turbine P038 will be approximately 551 to 555 meters from the bunkhouse. The distance is greater than the required setback under Ontario Regulation 359/09 made under the *EPA* (the "Regulation") and none of the parties alleged that the small difference of 4 meters in the estimated distances is relevant to the appeal.

[44] Wind turbine P039 will be approximately 698 meters from the bunkhouse.

[45] The Director's submission provides the following succinct description of the bunkhouse derived from Mr. Verbeek's evidence:

> The greenhouse workers live in a bunkhouse on the Platinum property which is located between the two greenhouses. It is a single stor[e]y structure, made of wood, steel siding and a steel roof. It has six bedrooms, two kitchens, two living rooms, and two communal washrooms, and is designed to house up to 58 people. Each bedroom has one or two windows. The bunkhouse has a natural gas furnace located in the mechanical room and air conditioning system located outside of the bunkhouse. The bunkhouse also has televisions.

[46] Mr. Verbeek testified that the employees live in the bunkhouse, where they prepare and eat meals and spend most of their off-duty time.

[47] Colin Edwards is "a senior developer with Pattern Energy, one of the sponsors of the Project." He testified as to South Kent's efforts to identify structures that are residences and other regulated noise receptors within 2000 meters of the Project. Mr. Edwards explained that in the planning of the Project the bunkhouse had been incorrectly classified as an agricultural building instead of a residence. After the issuance of the REA the Approval Holder was made aware that the bunkhouse houses the Appellant's agricultural workers who work in the two greenhouses on the Appellant's property producing peppers.

[48] Mr. Edwards testified that the Approval Holder completed a noise re-assessment for the Amendment and that the predicted noise level outside of the bunkhouse and setback (40 dBA noise level limit and setback of 550 meters) would accord with the Regulation and the MOE Noise Guidelines for Windfarms dated October 2008 (the "Guidelines"), however he was not an expert witness.

[49] Mervyn Choy was called as a witness by the Approval Holder. He was qualified by the Tribunal as an expert in acoustics and noise engineering. His evidence was that the predicted maximum outside noise levels from the Project are 40 to 42 dBA at the southeast property line of the Appellant's property and 46 dBA at the northwest property

line. He further testified that the predicted outside noise levels from the Project at the bunkhouse will be slightly less than 40 dBA.

[50] Denton Miller is a Senior Noise Engineer in the Renewable Energy Approvals Unit of the Environmental Assessment Branch of the MOE. Mr. Miller is an Ontario licensed professional engineer and has been employed as an MOE noise engineer for 22 years. Since 2007 he has worked with the renewable energy section of the MOE during which time he was involved in the development of the Guidelines and the Compliance Protocol for Wind Turbine Noise. Mr. Miller was qualified by the Tribunal as an expert noise engineer with expertise in the Guidelines and the Compliance Protocol for Wind Turbine Noise.

[51] Mr. Miller recommended that the MOE approve the Amendment because the Approval Holder's revised noise assessment report showed that the changes to turbines P038 and P039 would be compliant with the 550 meters setback in the Regulation and the 40 dBA sound level limit in the Guidelines at the bunkhouse. He said that the sound level outside the bunkhouse is predicted to be 39.9 dBA and that this is equivalent to the sound of a quiet library or empty office with a central ventilation system. He added that the actual noise levels at the bunkhouse would likely be lower than the modelled levels because the placement of the greenhouses (between the turbines and the bunkhouse) would attenuate the noise at the bunkhouse by 2 to 5 dBA.

[52] Mr. Miller testified that there is a mandatory compliance protocol for the Project that requires at least three audits of the noise levels from the operating Project. The Approval Holder indicated in its submissions (this was not in the evidence and is not a factor in this decision) that:

> South Kent is agreeable to voluntarily conducting an additional acoustic audit (immission) at the Bunkhouse and then confirm to the MOE that the sound levels produced by the Project are in compliance with the Regulation and the Guidelines.

[53] The Appellant's submissions on the bunkhouse are directed at the alleged cumulative, or additive, impact on the employees of the wind turbine noise because they live and work in proximity to wind turbines. These submissions are expanded on below.

[54] The Director and Approval Holder submit that because of the Amendment the setback and noise levels at the bunkhouse will now comply with the Regulation and the Guidelines.

Greenhouses

[55] Mr. Verbeek testified that the employees work in the greenhouses about 50 hours per week, year round, where they operate tools and machinery and can work at heights of one storey.

[56] Under the Amendment, wind turbine P038 will be approximately 240 meters from the closest greenhouse, and, as noted above, the sound power level will be de-rated (reduced) from 105 dBA to 101 dBA. Wind turbine P039 will be located approximately 400 to 450 meters from one of the greenhouses. It will not be moved under the Amendment but its sound power level will be de-rated from 105 dBA to 104 dBA.

[57] Mr. Miller testified that the greenhouses are not defined as noise receptors under the Regulation, e.g., they are not a "dwelling", nor are they considered noise receptors under the Guidelines. He described the greenhouses as a workplace and that occupational noise limits are enforced by the Ministry of Labour under the *Occupational Health and Safety Act*. He said that the workplace noise limit is 85 dBA over an 8 hour period.

[58] Mr. Miller testified that the noise re-assessment predicted maximum noise outside the greenhouses will be 46 dBA and that this would be well below typical workplace noise levels of 50 to 60 dBA. He said that the modelling was done using the worst case scenario and some attenuation factors were not considered by the assessment.

[59] Mr. Miller's evidence was that the sound levels inside the greenhouse structures would be "well below 40 decibels" because their exteriors are made of glass and plastic that attenuates sound by approximately 20 dBA to 40 dBA respectively. He testified that the sound from the turbines would still be attenuated by at least 10 dBA even when a greenhouse roof is open.

[60] Mr. Miller speculated that other sounds within and around the greenhouses would likely mask the turbine sound. e.g., the ventilation system, boilers and music played for the workers. His evidence was: "any external noise would have a very small, and likely undetectable impact, on higher sound levels generated within the Greenhouses."

[61] The opinion of Mr. Choy, the acoustic engineer, was "that in an occupational setting such as the Greenhouses, internal noise sources usually drown out any external noise sources".

[62] The Appellant submits that the predicted noise from the wind turbines at the greenhouses will exceed the safe sound levels under the Regulation and the Guidelines.

[63] The Director and the Approval Holder submit that the predicted noise levels are safe whether outside or inside the greenhouses, and that the best and only evidence is that the noise levels inside the greenhouses will meet the Regulation and Guidelines.

[64] The evidence regarding the alleged health impacts of the sound levels at the bunkhouse and greenhouses is set out below by witness name.

Sound level modelling variance

[65] Some of the arguments of the Appellant are based on the allegation that the predicted noise levels from the wind turbines at the bunkhouse and greenhouses can vary from the actual noise levels on site when they are operating +/- 5 dBA. The Appellant argues that this is relevant to whether it has been demonstrated that the sound levels comply with the Regulation and the Guidelines. The evidence in this regard was based on a document that was cited by a witness of the Appellant but not admitted into evidence, as discussed further below.

Cumulative or additive effects

[66] While the Appellant states that it is a fact that there will be a cumulative effect of noise exposure on the workers from the Project's wind turbines, the Appellant submits that out of the evidence "a question arises as to whether the cumulative exposure of such parties [the workers] would exceed the safety limits to human health contemplated by the Regulations". The Appellant submits that this uncertainty is germaine to its *Charter* argument that there is an initial onus on the Director to prove that there will not be serious harm from the Project as per the Amendment before the Appellant's statutory onus under s. 145.2.1(3) is triggered.

[67] The Director and the Approval Holder submit that there was no specific expert evidence of any alleged cumulative, or additive, impacts on the employees of the sound levels within the bunkhouse and the greenhouses.

Alleged receptor fronting on Communication Road

[68] In the course of the hearing, after the Appellant had closed its case except for reply evidence, one of the documents put in evidence indicated that there is a residence on the Appellant's property that fronts on Communication Road. The Appellant alleges that this is a residential receptor that was missed by the Approval Holder and its consultant in the noise re-assessment for the Amendment, and prior to

that in the process approving the REA. The noise level at this residence was not raised as an issue in the notice of appeal, and, as noted, the Appellant did not seek to give any evidence in chief about this matter. The Tribunal notes that the evidence indicates that this residence is further from the wind turbines relating to the Amendment than the bunkhouse and the greenhouses and the Director submits that it appears that the noise level at this location would be below 40 dBA.

Post-turbine witnesses

[69] The Appellant describes persons who have lived or continue to live within 2 kilometers ("km") of wind turbine projects in Ontario as "post-turbine" witnesses. In this case the Appellant called four such witnesses. Three of the Appellant's post-turbine witnesses are a family. The witnesses will be referred to as post-turbine witnesses Nos. 1, 2, 3 and 4, with the first three being the family members (mother, father and son respectively).

[70] The family lives approximately 1,100 meters from the closest turbine in the 8 turbine Kent Breeze Wind Farm that began operating in mid-April of 2011. Witness No. 1, the mother, gave evidence listing her current symptoms, based on how she feels when at home, her medications and her medical conditions prior to the turbines. She has also been on a number of medications with known side-effects. Witness No. 2, the husband, is a self-employed construction worker and renovator. He described his symptoms based on how differently he feels when away from home. Witness No. 3, the son, has worked with his father in construction since 2008. The family associates their symptoms with wind turbines because they say that the symptoms occurred within a few months of the turbines operating and they appear to diminish when they are away from home. The family began began a civil lawsuit against the operator of the Kent Breeze Wind Farm, Suncor, in September 2011.

[71] Witness No. 4 lives near two wind farms. She estimated that the two closest wind turbines are approximately 767 meters from her home. They are part of the Port Alma Wind Farm (a Kruger project).

[72] Witness No. 4 provided a list of her symptoms and claims that wind turbines have caused her, and her husband and children, physical and emotional problems. She acknowledged that she had prior medical and emotional problems (e.g., pre-existing symptons of anxiety and stress, chest, neck and back pain, mood disorder and various skin issues) for which she received medical attention and uses medications that can have side effects. She has expressed her concerns publicly. One of her doctors used the term "wind turbine syndrome" in the notes produced. She testified that she became

certain wind turbines are causing the problems after a long process of having lived near them for five years. She created a website blog in which she expressed her concerns in May 2009. She is involved in a lawsuit against Kruger, the owner of one of the nearby wind projects.

[73] The family (witness Nos. 1, 2 and 3) and witness No. 4 have given their evidence in other renewable energy approval appeals heard by the Tribunal. As summarized by the Appellant in this case, collectively they describe their health problems as: "debilitating and enduring experiences with sleep disturbance, vertigo, nausea, tinnitus, heart palpitations, memory and concentration loss, mood swings, chronic fatigue, breathing difficulty, headaches/migraines, and even suicidal thoughts" and they testified that that they "began to experience serious adverse health effects or their pre-existing medical conditions became aggravated when the IWTs turbines near their home became operational". As further summarized by the Appellant, those with pre-existing medical conditions (back pain, chronic fatigue, fibromyalgia, and high blood pressure) "spoke of how these conditions worsened with the turbines becoming functional" and they all said that they began to feel relief from their symptoms when away from their homes. They all have lengthy medical histories of various degrees of seriousness prior to the wind turbines, except for witness No. 3, the son.

[74] The Director submits that the evidence of the "post-turbine" witnesses is self-reported and there is no expert medical evidence of medical diagnoses that their symptoms are caused by wind turbines directly or indirectly (as discussed in *APPEC*). Regarding the medical records that were produced, and the witnesses' conversations with medical professionals, the Director submits that they may be admitted as evidence of the transactions they describe but not for the truth of any medical opinions. The Director argues that the evidence of the post-turbine witnesses is even weaker in this case than in *APPEC* because there is no expert medical evidence linking the heath conditions of the post-turbine witnesses to nearby turbines. The Director submits that, at its highest, the Appellant's post-turbine witness health evidence is a "case series" that, according to Dr. McCunney (whose evidence is discussed below), is at the low end of reliable medical diagnosic tools and does not establish causation.

[75] The Director further submits that Dr. McCunney testified that self-reported symptoms are particularly susceptible to recall bias, and that the medical records and information about the post-turbine wintesses' symptoms are inadequate to make a reliable diagnosis and that a diagnosis is a completely different exercise from determining causation.

[76] The Director's submissions are supported and repeated by the Approval Holder. The Approval Holder adds that the Appellant is in breach of the consent order for disclosure by the Appellant's witnesses as medical records were missing and the information forms were over two years old.

Sarah Laurie

[77] The Appellant sought to qualify Sarah Laurie as an expert witness, namely a medical school graduate with experience in the delivery of health care. A joint panel of the Tribunal was convened to determine the issue of her qualification as an expert witness. After lengthy evidence and submissions, the Tribunal denied the request by an order dated November 6, 2013. However, Ms. Laurie was allowed to give evidence of a factual nature.

[78] The Appellant did not seek to qualify any other medical expert for its case-in-chief.

[79] Ms. Laurie is a medical graduate from Flinders University (1995) in South Australia (Bachelor of Medicine, Bachelor of Surgery). She obtained post graduate training in Rural General Practice and was a partner in a local clinical practice in South Australia.

[80] She spoke about the health complaints that she has heard from people in Australia who live near wind turbines and believe the turbines have caused their symptoms. She had direct contact with post-turbine witnesses and noted the health symptoms they reported, which they said either began or worsened when turbines near their homes started operating.

[81] Ms. Laurie also referred in her witness statement to a number of peer reviewed papers regarding health and the operation of industrial wind turbines and some documents that she had authored. As per the Tribunal's order of November 6, 2013, the papers authored by third parties were not admitted as evidence and Ms. Laurie's documents were admitted but not for the truth of the medical opinions expressed in the papers.

[82] Ms. Laurie admitted that she had no knowledge about the South Kent Wind Project or "the particular noise levels that the post-turbine witnesses experienced when complaining of their symptoms."

[83] The Director submits that Ms. Laurie's evidence is of little relevance and should be given little or no weight because she was not qualified to give any opinion evidence and her evidence regarding individuals who were not witnesses was hearsay.

[84] The Approval Holder submits that Ms. Laurie is not licensed to practice medicine, not entitled to diagnose persons, has not diagnosed anyone with adverse health effects from wind turbines, and does not know anything specifically about the Appellant and its employees or this appeal.

Dr. Robert McCunney

[85] Dr. Robert McCunney was called as a witness by the Approval Holder. He was qualified by the Tribunal as a medical doctor specializing in occupational and environmental medicine, with particular expertise in the health implications of noise exposure. He was previously qualified as an expert witness in *Erickson* and *APPEC*. He is certified in occupational and environmental medicine, is a research scientist, and was the Director at the Massachusetts Institute of Technology Department of Biological Engineering. He co-authored an expert panel review of peer-reviewed scientific literature regarding wind turbines and human health and has an active clinical practice.

[86] In 2009 Dr. McCunney was a member of an expert panel that did a critical review of literature on the health effects of wind turbines for the American Wind Energy Association ("AWEA"). He testified that the conclusions of the panel are still valid.

[87] Dr. McCunney testified that sounds from industrial wind turbines are not unique and that in his view there is no evidence that audible or sub-audible sounds emitted by industrial wind turbines have any direct, adverse physiological effects.

[88] He said that none of the post-turbine witnesses had been properly diagnosed and that this is necessary for a causality analysis. He described the post-turbine witnesses as having nonspecific symptoms that cannot be diagnosed on the information provided. He described their evidence as case studies at best and weak epidemiological evidence with recall and selection bias.

[89] Dr. McCunney said that he reviewed information specific to the Project including the revised noise assessment report and that in his opinion the predicted noise levels at the bunkhouse and the greenhouses from the wind turbines would not result in serious harm to human health.

[90] He said that annoyance is not a recognized health effect based on the AWEA literature review and his subsequent literature review.

[91] Dr. McCunney's witness statement did not deal with the evidence that the predicted sound level outside the greenhouses from the operation of the wind turbines is 46 dBA. When asked about that predicted sound level at the hearing, Dr. McCunney

said that the evidence does not change his opinion. He testified that a sound level of 46 dBA outside the greenhouses, will not "present a risk of serious harm to human health."

Dr. Robert McMurtry

[92] Dr. Robert McMurtry was the only medical expert witness to give evidence for the Appellant. His evidence was given as a reply witness for the Appellant regarding the evidence of the Director and the Approval Holder that the predicted noise level outside the greenhouse[s] in the vicinity of wind turbine P038 will be 46 dBA and would not cause serious harm to human health. Although Dr. McMurtry's testimony was reply evidence, he was given some latitude to discuss this predicted sound level in the context of the overall sound levels and the health of the Appellant's employees.

[93] Dr. McMurtry was qualified by the Tribunal as a physician and surgeon with experience in the delivery of health care, health care policies, and health policy. He is certified as a specialist in orthopedic surgery by the Royal College of Physicians of Canada, with a sub-specialty in hand surgery and severe injuries. Between 1999 and 2002 he held positions with Health Canada; he was medical advisor to the Romanow Commission on publicly funded health care; and from 2003 to 2008 chaired a National Working Group and sat on the Advisory Board for the Canadian Index of Wellbeing.

[94] Dr. McMurtry became involved in wind turbine issues in 2008 when he learned that projects were planned for Prince Edward County where he lives. He said that he spent over 7,000 hours researching wind turbine issues over the last five years. In addition, he was involved in groups concerned about the use of wind turbines, e.g., he was a founding member and Chair of the Alliance to Protect Prince Edward County. He participated in public awareness activities regarding wind turbines and commenced a lawsuit alleging a decrease in property values related to wind turbines. Dr. McMurtry has since resigned from those positions and withdrawn the lawsuit. He said that this was partly to counter bias allegations in proceedings such as this one.

[95] Dr. McMurtry's opinion is that the Project as approved will cause serious harm to the health of Platinum's workers. He referred to a number of studies, papers and other publications to support his opinion, including the following.

- The 2004 and and 2009 Eja Pederson articles say that the percentage of people annoyed, or very annoyed, by wind turbine noise increases as noise levels increase. On cross-examination, Dr. McMurtry agreed that this study focused on residential areas and not industrial or business locations and appears to show a decrease in annoyance above 45 dBA. The articles indicate that annoyance associated with wind turbines is a subjective reponse

(related to noise sensitivity and attitude). The Director submits that there is no evidence regarding these factors and the greenhouse workers.

- A 2009 Howe Paper indicates that there can be a "+/- 5 dB" variance between predicted sound levels and those measured in the field. The paper was not admitted as evidence but was cited by Dr. McMurtry. The Director submits that this is merely a quote from an unpublished paper by an acoustical engineer, that the evidence is outside Dr. McMurtry's expertise, could not be tested by cross-examination, and thus should not be accepted.
- The paper "Low Frequency Noise and Infrasound Associated with Wind Turbine Generator Systems, A Literature Review" prepared by Howe Gastmeier Chapnik Limited ("HGC") that Dr. McMurtry cites for the statement that "audible sound from wind turbines is nonetheless expected to result in a non-trivial percentage of persons being highly annoyed." This document was also not admitted as evidence. However, Dr. McMurtry's summary was that low frequency noise matters and the current Ontario regulations will not protect people. On cross-examination he agreed that the report says: "publications by medical professionals indicate that, at the typical setback distances in Ontario, the overall magnitude of the sound pressure levels produced by wind turbine generators does not represent a direct health risk. This includes noise at low and infrasound frequencies."
- The World Health Organization ("WHO") publication "Burden of disease from environmental noise: Quantification of healthy life years lost in Europe" (the "2011 WHO Paper") that Dr. McMurtry says supports the statement that "high levels of annoyance" are an "adverse health effect which contributes significantly to morbidity in exposed populations and makes this a serious public health issue." The Director submits that this paper recognizes annoyance caused by environmental noise as a potential "environmental health burden" but that is subject to debate. The Director also points out that the 2011 WHO Paper considers transportation noise and not wind turbine noise, and doesn't consider noise at less than 48 dBA. On cross-examination, Dr. McMurtry agreed that annoyance does not appear in the International Classification of Disease list.

[96] Dr. McMurtry testified that greater than 16 per cent of people exposed to wind turbine noise between 40 and 45 dBA indoors would be rather annoyed or very annoyed and that this is twice the response rate for people exposed to wind turbine noise of

between 35 and 40 dBA. He cited the HGC study to say that noise from wind turbines can be expected to result in a "non-trivial percentage of persons being highly annoyed" and that the WHO recognizes high levels of annoyance as an "adverse health effect".

[97] On cross-examination Dr. McMurtry acknowledged that he did not draft his reply witness statement and that the witness statement should be corrected to state his opinion that it is "more probable than not" the Project will cause serious harm to human health of the workers. He also failed to provide a signed "Acknowledgement of Expert's Duty" form prior to giving his evidence.

[98] Importantly, cross-examination also established that Dr. McMurtry's opinion was based on the misunderstanding that the noise levels inside the greenhouses would be 46 dBA, rather than outside them.

[99] The Director submits that Dr. McMurtry is an "expert generalist". The Director points out that Dr. McMurtry spent some time reviewing technical acoustic documents regarding public health, but only a small percentage of his time, and that he never formally studied epidemiology or statistics. The Director further argues that Dr. McMurtry has no special knowledge of occupational health issues and that his evidence in areas of acoustical engineering and environmental and occupational health are beyond his professional experience and area in which he was qualified by the Tribunal. The Director questions Dr. McMurtry's objectivity and is concerned that he is advocating on behalf of the Appellant. The Director submits that his evidence is largely improper reply evidence, and should be regarded with extreme caution and given little weight.

[100] The Director submits that Dr. McMurtry has not provided an "adequate pathway" to his conclusion (see *Lewis v. Ontario (Ministry of the Environment)*, [2013] O.E.R.T.D. No. 70 at paras. 111-112) that the turbines will more likely than not cause serious harm to human health.

[101] The Approval Holder and the Director submit that the Tribunal should prefer Dr. McCunney's evidence that the predicted noise level of 46 dBA will not present a risk of serious harm to the evidence of Dr. McMurtry because Dr. McCunney is an expert in occupational health medicine and Dr. McMurtry's evidence was based on a misunderstanding of the facts (that the 46 dBA sound level is predicted inside the greenhouse) and an inapplicable World Health Organization ("WHO") study.

[102] The Approval Holder points out that the WHO study applies to "environmental noise" that is described in the study as "noise emitted from all sources except for noise at the industrial workplace", i.e., the greenhouses. The Approval Holder argues that Dr. McMurtry's evidence should be given little or no weight because of alleged bias in

connection with his personal opposition to wind turbines, e.g., a discontinued lawsuit against a wind project near his home in Prince Edward County and his previous position in an organization opposing wind turbines.

Dr. David Michaud

[103] The Appellant brought a motion, after its evidence in chief, to introduce as evidence in this hearing the transcript of Dr. David Michaud's evidence as a witness in the *Dixon* appeal. The Director and Approval Holder opposed the motion and the Tribunal did not admit the evidence on the basis that it was not proper reply evidence and because of procedural unfairness in that counsel representing the Director and Approval Holder in this case would be deprived of the ability to cross-examine Dr. Michaud and test his evidence. Nevertheless, the Appellant included at least eight paragraphs in its written submissions regarding the evidence of Dr. Michaud. The Tribunal disregards those paragraphs.

Issue No. 1: Whether the employees of the Appellant have been deprived of their s. 7 Charter right to security of the person except in accordance with the principles of fundamental justice.

[104] As indicated above, s. 7 *Charter* challenges have been raised before the Tribunal in several cases, and thus far decided on the merits in *Bovaird* and *Dixon*. Those *Charter* challenges, based on much of the same evidence as in the *EPA* renewable energy approval appeals, fell short in meeting the applicable test. They have not demonstrated serious psychological or physical harm or increased risk of such harm as a result of the renewable energy approval appeal provisions or specific renewable energy approval decisions.

[105] The case law is clear that a claimant under s. 7 of the *Charter*, in this case the Appellant on behalf of its employees, must demonstrate on a balance of probabilities that: (a) the impugned state conduct has or will deprive the employees of security of the person, and (b) that it has done so in a manner that is inconsistent with the principle of fundamental justice. This is a two-step process. (*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para. 47.) The Appellant has the onus of proving both steps on a balance of probabilities. (*Bedford*, *supra*, affirming 2012 ONCA 186, at para.89; and *R. v. Collins*, [1987] 1 S.C.R. 265 at para. 21.)

[106] Under the first step of the above framework for analysis on a s.7 *Charter* challenge alleging deprivation of security of the person, the claimant must show, on a balance of probabilities, that the claimant, in this case the Appellant on behalf of its

employees, has been deprived of the right to security of the person because: (i) the harm suffered (whether psychological or physical) is serious, and (ii) the serious harm is state-imposed. (See *Dixon* and *Bovaird*, citing *Charter* case law.)

[107] In the *Charter* challenges that the Tribunal has dealt with to date, and in this case, appellants have mainly turned their sights on the renewable energy approval appeal process, including the test and the onus, and the alleged lack of an underpinning of scientific knowledge concerning human health and the operation of wind turbine projects.

[108] In *Dixon*, the Tribunal quoted from *Chaoulli v.Québec (Attorney General)*, 2005 SCC 35, at para.123, that: “Not every difficulty rises to the level of adverse impact on security of the person under s. 7. The impact, whether psychological or physical, must be serious.” The Tribunal found, at para. 71, that: “From the *Chaoulli* decision …the case law is clear that the level of harm, whether psychological or physical, must be ‘serious”’, and, at para. 84: “For a s. 7 *Charter* claim, the Tribunal finds that the onus is on the Appellants to establish, on the evidence, the claimants have suffered or will suffer serious physical or psychological harm.”

[109] The s. 7 *Charter* challenge in *Dixon* was defused at an early stage in the legal analysis because the Tribunal found that the appellants had not met their evidentiary burden to prove serious physical or psychological harm. Similarly, the Tribunal in *Bovaird* found that there was a “lack of an evidentiary foundation of serious harm.” The consequence of the evidentiary findings in both appeals was that they were dismissed.

[110] However, the *Dixon* and *Bovaird* decisions do not close the door on *Charter* challenges in future renewable energy approval appeals. The decisions expressly state that, given their findings on the evidence or the lack of evidence of serious harm, there was no need to proceed with the other aspects of the legal analysis. Examples of matters in the first step of the *Charter* framework analysis that the decisions leave open for consideration in future cases are: whether a “state imposed” deprivation of a s. 7 *Charter* right can be characterized to protect “positive rights”; and whether the test to prove a causal connection under s. 7 of the *Charter* is less onerous or stringent than the *EPA* renewable energy approval appeal test.

[111] As the result of their findings on the first stage of the *Charter* analysis, the panels of the Tribunal in *Dixon* and *Bovaird* found that it was not necessary to proceed to consider the second stage of the analysis, i.e., whether the deprivation is in accordance with the principles of fundamental justice, nor the general saving provision under s. 1 of

the *Charter*. Therefore, those matters are also open for consideration in future *Charter* challenges of renewable energy approvals.

[112] As already noted, in this case the Tribunal received supplementary submissions from the parties on the recent decisions of the Supreme Court of Canada in *Bedford* and the Tribunal in *Bovaird* and *Dixon*. This panel of the Tribunal adopts the legal analysis in *Dixon*, which decision, in turn, incorporates aspects of the *Bedford* and *Bovaird* decisions. Therefore, this decision draws upon *Dixon*'s fulsome legal analysis of the *Charter* issue without repeating most of that analysis. As it appears that the parties in this matter address a very similar suite of *Charter* legal arguments to those made in *Bovaird* and *Dixon*, this decision focuses on the evidence in this case that the Appellant alleges should lead to a different result in the application of the *Charter* test to the facts.

[113] The Appellant submits that the "factual considerations …at the heart of the debate over the s. 145 Test" in the context of its *Charter* submissions, and which factual considerations distinguish this case from the Tribunal's previous *Charter* decisions regarding renewable energy approval appeals, are:

- the workers (the Appellant describes them as "exposed workers") reside in a bunkhouse just above the mandated setback distance;
- the workers have no respite from the wind turbine noise because they do not commute to work elsewhere, unlike usual residents;
- the workers would be spending their workday approximately 250 meters inside the setback under the Regulation with an added exposure of 46 dBA, whereas usual residents would be exposed to wind turbine noise of 40 dBA or lower;
- "there would thus be a cumulative effect of exposure on the workers that must be considered by the Director as subjecting these individuals to exposure risks – and hence, serious harm to health – beyond the safety limits mandated by the government";
- "the estimated margin of error for dBA exposures (+/- 5 dBA) actually subjects the workers to cumulative exposures beyond the safety limits mandated by the government"; and
- in light of the above, "the proponent's plans and estimates should be looked at far more carefully to ensure that they are in compliance with the

> Regulations and the government limits beyond which there is a 'great deal of scientific uncertainty' concerning their effects."

[114] In short, the Appellant submits that the renewable energy application and the Director's decision to approve the Amendment did not consider the unique circumstance of the Appellant's employees both residing and working in close proximity to the wind turbines. The Appellant submits:

> The exposure of the Appellant's workers to wind turbine noise in levels high enough to cause them to become highly annoyed both in their workplace and in their dwelling will allow them no respite whatsoever from these effects and will cause serious harm to their health
>
> .

[115] As in previous cases, the Appellant alleges that the post-turbine witnesses appear, on a balance of probabilities, to have suffered serious harm as a result of living in close proximity to industrial wind turbines, irrespective of the turbine make, model, size, distance, sound levels, topography, etc., and that this evidence is supported by studies and expert evidence called by both the Appellant and the respondents.

[116] The Appellant argues that the Tribunal's decision in *Erickson* determined that industrial wind turbines can cause harm to human health if placed too close to residences, and the issue should be one of degree, i.e., whether current setbacks and sound levels are protective of human health. The Appellant's chain of reasoning on the *Charter* challenge flowing from that determination is:

- the renewable energy appeal process "does not require the project proponent to establish that there are no adverse health effects associated with IWTs [industrial wind turbines], it is clear that there will be health effects that will violate the section 7 rights of the Appellant's employees"; and
- where there is evidence of health effects from wind turbines, reversing the onus in the renewable energy approval appeal test also violates s. 7 *Charter* rights.

[117] In addition, the Appellant argues that the following summary in the *Erickson* decision, at para. 432, of the evidence given by Dr. Leventhall in that case, should be accepted as a fact in this case:

> [A]nnoyance is a completely different thing; it is a psychological effect which can induce physical problems due to high levels of stress. …[T]he symptoms that Dr. Pierpont described as wind turbine syndrome (sleep disturbance, headache, tinitus, ear pressure, dizziness, vertigo, nausea,

> visual blurring, tachycardia, irritability, problems with concentration and memory, panic episodes) as the effects of extreme annoyance… [T]hey are largely somatoform disorders that occur when stress goes from your brain into your body and they occur in a very small number of people …

[118] The above summary describes, and distinguishes between, direct effects and indirect effects regarding wind turbines, such as effects from extreme annoyance. However, Dr. Leventhall was not called as a witness in this hearing and this evidence was not adopted by any of the experts who were called as medical witnesses and who were qualified to give opinion evidence on this subject.

[119] An additional alleged factual basis for the Appellant's arguments is:

> There is … undisputed evidence before this Tribunal that at sound levels at or below those approved for the operation of this Project, 6%-20% of people will be very annoyed. There is a causal chain between annoyance, stress, sleep disturbance, and adverse health effects.

[120] The Appellant submits that the evidence demonstrates:

> In sum, the Appellant's employees are more likely than not to suffer serious physical and psychological harm as a result of the approval of the Project pursuant to the REA provisions and the appeal process outlined in s. 142.1 of the *EPA*. The causal links between the risk of harm and the IWTs are amply established in the evidence. The appellant's employees are being deprived of their *Charter*-protected right to security of the person.

[121] The Director and the Approval Holder argue that the Appellant's evidence in this case is much lower in quantity, quality and relevance than in other *Charter* challenges and renewable energy approval appeals decided by the Tribunal. They submit that the Appellant's evidence falls well short of meeting its onus of proving serious physical or psychological harm to a human being in respect of s. 7 of the *Charter* or serious harm to human health under the *EPA* test.

[122] The Director and the Approval Holder argue that the Appellant's evidence regarding the employees is based entirely on hearsay as none of them were called as witnesses. The Approval Holder emphasizes that all of the evidence about the concerns of the employees cannot be adequately challenged on cross-examination because it is hearsay. Its submission cites the Supreme Court of Canada decision of *Innisfil (Township) v. Vespra (Township)*, [1981] 2 S.C.R. 145 at p. 17, that describes cross-examination as the "procedural substructure upon which the common law itself has been built". While administrative tribunals can admit hearsay evidence under s. 15 of the *Statutory Powers Procedure Act*, the Approval Holder submits that they:

> must consider the underlying purposes of the rules of evidence: (i) establishing a sound factual basis for decisions; (ii) ensuring a proper balance between the harm in accepting evidence and the value in doing so; and (iii) maintaining a fair and effective process." (Robert W. Macaulay and James L.H. Sprague, Hearings Before Administrative Tribunals (4th), (Toronto: Carswell, 2010) at Ch. 17, at 17.1(d).)

[123] The Director and the Approval Holder further submit that: the post-turbine witnesses were self-diagnosed; the Appellant called no medical expert evidence in chief or that was directly relevant to the Project, the employees or the post-turbine witnesses; and the one expert witness called by the Appellant was in reply and based his opinion on a misunderstanding of the sound level at the greenhouses. The Director and Approval Holder submit that the evidence of the Appellant's witnesses should be given little weight or disregarded as not being relevant.

Findings on Issue No. 1

[124] The evidence regarding predicted noise levels at the bunkhouse and greenhouses, and alleged cumulative or additive negative impacts on the Appellant's employees from the noise from the operation of the wind turbines, is central to the submissions of the parties and the Tribunal's decision on both the *Charter* and *EPA* issues in this appeal. The parties also strongly argue the weight to be given to the evidence of witnesses, particularly hearsay evidence, and whether expert witnesses testified to matters within their expertise.

[125] The fact that the Appellant's employees reside and work in proximity to wind turbines most of the time is clearly different from the focus of evidence that was put forward in previous cases, where there was no focus on a workplace receptor such as the greenhouses, at the distances and sound levels and involving the number of workers present here. The Tribunal finds, however, that the Appellant still needs to show how these workers will be subjected to serious harm or increased risk of serious harm in these different circumstances.

[126] The Appellant's list above of key factual considerations in this case includes matters that the Tribunal finds were not proven by the evidence in this case.

[127] The Tribunal finds that Appellant has not proven that the workers will be exposed to 46 dBA when they are working in the greenhouses. The evidence is that some portions of the greenhouses will be subject to sound levels to a maximum of 46 dBA outside of the greenhouses. The Tribunal accepts the evidence of the witnesses

Messrs. Miller and Choy, and finds, on a balance of probabilities, that the noise from the wind turbines inside the greenhouses will be attenuated by the greenhouse structures and, in addition, masked by the noise generated by the activities of the workers and the operation of the greenhouse facilities, e.g., the ventilation system, boilers and music played by the workers.

[128] The Tribunal further finds that the Appellant has not demonstrated on the evidence that the sound inside the greenhouses from the wind turbines will be at a level that causes the workers serious harm to their health or can be attributed to the wind turbines in a meaningful way for the purpose of this proceeding. In this regard, the Tribunal relies on the uncontradicted evidence of the witnesses for the Director and the Approval Holder (Messrs. Miller and Choy). Mr. Verbeek was not qualified to speak to these matters and Dr. McMurtry's evidence was not helpful as he misunderstood earlier evidence and gave his opinion evidence on the incorrect understanding that the sound level inside the greenhouses from the operation of the wind turbines would be 46 dBA.

[129] The Tribunal finds that there was no credible evidence of cumulative or additive effects from the noise of the wind turbines, or that there is a +/- 5 dBA margin for error. The Appellant did not have a qualified expert witness testify to this effect and these "facts" asserted by the Appellant were not established through the evidence of the witnesses for the Director and the Approval Holder. In any event, in the absence of evidence to the contrary, the Tribunal accepts the evidence of Dr. McCunney that the predicted sound levels in the bunkhouse and the greenhouses attributable to noise from the wind turbines P038 and P039 will not cause serious harm to the Appellant's employees. The Tribunal further finds that the evidence put forward in this case does not demonstrate that the Appellant's employees will be exposed to sound levels beyond the safety levels mandated by the government.

[130] While the facts in this case are different than those in previous renewable energy approval appeal cases involving the *Charter*, which have focused on residential rather than workplace receptors, the Tribunal has not been provided with evidence demonstrating that serious physical or psychological harm, or increased risk of such harm, will occur to the Appellant's employees. The onus is still on the Appellant to show that serious harm will occur on the specific facts of this case, including the wind turbine distances and sound levels applicable here. It is not enough to assert that there are pertinent differences in the facts of this case compared to those in prior unsuccessful appeals. The question is whether those factual differences lead to a different legal result which the Tribunal finds has not been shown in this case.

[131] The Appellant's novel argument, that its evidentiary onus under the *Charter* test is never engaged because the Director has not met the threshold onus of demonstrating that the Project, as per the Amendment, complies with the wind turbine distance and sound levels under the Regulation and the Guidelines, fails for at least two reasons: firstly, the *Charter* cases have consistently held that a s. 7 *Charter* "security of the person" claimant has the onus of demonstrating an evidentiary base for alleged serious harm, and, secondly, the Tribunal finds that there is evidence that the Project does comply with the Regulation and Guidelines, on a balance of probabilities. As noted, the very purpose of the Amendment is to ensure compliance with the setbacks and noise levels under the Regulation and the Guidelines.

[132] In a sense, the Appellant's "onus on the Director" argument in relation to the *Charter* test is based on the alleged fact of "uncertainty" regarding the Project's compliance, under the Amendment, with the safety requirements of the Regulation and the Guidelines. This runs counter to all of the case law on s. 7 of the *Charter* that requires that the claimant prove an evidentiary basis for the *Charter* challenge. The Appellant did not provide any authority for the proposition that the fact of "uncertainty", even if proved, which is not the case here, is a sufficient evidentiary basis.

[133] The Tribunal has examined the unique facts of this case and the allegations of serious harm by the Appellant and finds that the *Charter* test has still not been met. The Tribunal agrees with the submissions of the Director and the Approval Holder on the Appellant's evidence of alleged deprivation of security of the person under s. 7 of the *Charter*, discussed above, and finds that the Appellant has not met its evidentiary burden to prove serious physical or psychological harm, or increased risk of such harm, at the distances and sound levels of the wind turbines in relation to the Appellant's employees.

Issue No. 2: Whether engaging in the Project pursuant to the Amendment and in accordance with the REA will cause serious harm to human health under the *EPA* renewable energy approval appeal test.

[134] In the alternative to the *Charter* argument, the Appellant argues that the evidence of its witnesses, bolstered by findings in the decisions of the Tribunal in *Erickson* and *APPEC*, demonstrates that engaging in the Project in accordance with the Amendment will cause serious harm to the health of the Appellant's employees under the *EPA* test.

[135] The Appellant's submissions on this issue are very brief as they focus on the *Charter* issue. However, it appears that the types of harm that the Appellant alleges that its employees will suffer are the symptoms described by the post-turbine witnesses

of extreme annoyance and an increased risk of workplace injury because of sleep disturbance.

[136] The Director submits that the Appellant's evidence fails to meet the threshold under the statutory *EPA* s. 145.2.1 test. The Director submits that there is (emphasis in the original):

- **"no evidence or expert opinion** … that suggests that the Appellant's greenhouse workers will be exposed to **any** noise from the wind turbines";
- "no evidence that the cumulative exposure to noise form turbines in a dwelling and in an occupationnal setting will result in annoyance or other adverse health effects";
- "no direct evidence from anyone who will be directly impacted by the turbines";
- "no expert evidence or opinion that any of the symptoms experience by any of the "post-turbine witnesses" is in any way causally connected to wind turbines";
- no credible evidence that the noise caused by the wind turbines P038 and P039 will result in serious harm to human health. "Dr. McMurtry failed to provide any support for his proposition that a non-trivial percentage of persons who <u>both live and work</u> near turbines will be highly annoyed. … Nor is there any evidence about how any of the subjective influencing factors that affected the response of residential dwellers … apply to the greenhouse workers";

[137] The Director submits that it is very clear that the onus of proof is placed on the Appellant (see s. 145.2.1(3) of the *EPA*) and that there is no new evidence in this case to warrant a different result from the results in *Erickson*, *APPEC*, *Bovaird* and *Dixon*.

[138] The Approval Holder, in addition to supporting, or making independently, the above submissions of the Director, submits that the Appellant offered no expert medical opinion evidence diagnosing any of the Appellant's witnesses with alleged health effects. The Approval Holder argues that the evidence of Dr. McCunney demonstrates that the Amendment complies with the Regulation and the Guidelines and, as Dr. McCunney phrased it, "does not present a serious risk of harm to human health."

Finding on Issue No. 2

[139] In the renewable energy approval appeals regarding human health that have been decided by the Tribunal to date, no appellant has met the serious harm to human

health test based on the evidence provided in each case. The *EPA*, or statutory, test is that harm will be caused, not may be caused, and no case has established that the requisite harm will occur with respect to the project at issue. The Tribunal has acknowledged the seriousness of several of the effects that have been alleged but the cases have failed by not demonstrating that such serious effects will result from a given project operated in accordance with a renewable energy approval. The Tribunal has frequently found that medical expert evidence of appellants has fallen short of establishing causation and, even if causation were shown, medical evidence would be required to link the evidence of pre and post-turbine witnesses to the alleged serious harm.

[140] In *Dixon* the Tribunal compared the evidence in that case to the evidence in *APPEC* and *Bovaird*, and commented, at para. 174: "In those cases both similar, and substantially more, evidence was called and the Tribunal made findings that the test was not met." Likewise, it appears that in *APPEC*, *Bovaird* and *Dixon* there was "both similar, and substantially more, evidence" than in this case.

[141] The Tribunal refers to the above finding on Issue No. 1 and incorporates the findings on the lack of evidence of serious harm; the evidence here that fails to meet the s. 7 *Charter* test also fails to meet the *EPA* test. Again, the Tribunal leaves for future decisions to determine if the serious harm tests in the *Charter* and *EPA* are the same.

[142] The Tribunal adds that just as the Amendment was an important factor in the Tribunal's decision that the Appellant had standing to bring the *Charter* challenge on behalf of its employees because the Amendment was prompted by their living in proximity to wind turbines, the nature of the Amendment is also fundamental to the decision on this second issue. The very purpose of the Amendment is to ensure compliance with the setbacks and noise levels under the Regulation and the Guidelines.

[143] The Tribunal finds that the Appellant has not met its evidentiary burden to prove that engaging in the Project pursuant to the Amendment and in accordance with the REA will cause serious harm to human health under the *EPA* renewable energy approval appeal test.

Overall Conclusion on Issues

[144] The Tribunal finds, on the evidence and the facts as determined in this case, that the Appellant has not established that:

1. the employees of the Appellant have been deprived of their s. 7 *Charter* right to security of the person except in accordance with the principles of fundamental justice; and
2. engaging in the Project pursuant to the Amendment and in accordance with the REA will cause serious harm to human health under the *EPA* renewable energy approval appeal test.

DECISION

[145] The appeal is dismissed.

Appeal Dismissed

"Robert V. Wright"
Robert V. Wright, Vice-Chair

Appendix A – Relevant Legislation and Tribunal Rules
Appendix B – Reasons for the order made September 26, 2013 granting Appellant standing on behalf of employees
Appendix C – Reasons for the order made November 19, 2013 refusing Appellant's motion to admit new evidence

Appendix A – Relevant Legislation and Tribunal Rules

CONSTITUTION ACT, 1982

PART I

CANADIAN *CHARTER* OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

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 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.

…

ENFORCEMENT

Enforcement of guaranteed rights and freedoms

24.(1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

…

PART VII

GENERAL

Primacy of Constitution of Canada

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Rules of Practice of the Environmental Review Tribunal

Appeals of Renewable Energy Approvals under section 142.1 of the Environmental Protection Act

Constitutional Questions

73. A Party, Participant or Presenter who intends to request a remedy under subsection 24(1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Ontario or the Government of Canada or raise a question as to the constitutional

validity or constitutional applicability of an Act applied by the Tribunal or a regulation or by-law made under the Act shall serve a Notice of a Constitutional Question on the Attorney-General of Canada and the Attorney-General of Ontario.

…

81. The Tribunal may choose to hear the arguments as preliminary matters before beginning to hear evidence, particularly if the constitutional question deals with the Tribunal's jurisdiction.

82. If the Tribunal determines that making a decision on the constitutional question will require it to have an extensive factual basis that will be provided by the evidence at the Hearing, the Tribunal may direct that the arguments regarding the constitutional question be heard later in the Hearing and that the Tribunal will make a decision later in the Hearing or at the end of the Hearing.

83. After hearing arguments at the beginning of the Hearing, the Tribunal may choose to reserve its decision until later in the Hearing or at the end of the Hearing if it appears to the Tribunal that this delay is advisable.

Environmental Protection Act, R.S.O. 1990, c E.19

Interpretation

1. (1)

In this Act,

"natural environment" means the air, land and water, or any combination or part thereof, of the Province of Ontario;

PART V.0.1
RENEWABLE ENERGY

Definition

47.1 In this Part,

"environment" has the same meaning as in the *Environmental Assessment Act*. 2009, c. 12, Sched. G, s. 4 (1).

…

Purpose

47.2 (1) The purpose of this Part is to provide for the protection and conservation of the environment. 2009, c. 12, Sched. G, s. 4 (1).

…

PART XIII
APPEALS TO TRIBUNAL

…

Hearing re renewable energy approval

142.1 (1) This section applies to a person resident in Ontario who is not entitled under section 139 to require a hearing by the Tribunal in respect of a decision made by the Director under section 47.5. 2009, c. 12, Sched. G, s. 9.

Same

(2) A person mentioned in subsection (1) may, by written notice served upon the Director and the Tribunal within 15 days after a day prescribed by the regulations, require a hearing by the Tribunal in respect of a decision made by the Director under clause 47.5 (1) (a) or subsection 47.5 (2) or (3). 2009, c. 12, Sched. G, s. 9.

Grounds for hearing

(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.

…

Hearing required **under s. 142.1**

145.2.1 (1) This section applies to a hearing required under section 142.1. 2009, c. 12, Sched. G, s. 13.

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). 2009, c. 12, Sched. G, s. 13.

Environmental Assessment Act, R.S.O. 1990, c. E.18

PART I
INTERPRETATION AND APPLICATION

Interpretation

1. (1)In this Act,

…

"environment" means,

(a) air, land or water,

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

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

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

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

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

in or of Ontario; ("environnement")

Appendix B – Reasons for the order made September 26, 2013 granting Appellant standing on behalf of employees

Background

On September 26, 2013 the Tribunal gave an oral decision that the Appellant has standing to pursue the constitutional claims of its employees pursuant to s. 7 of the *Charter* and any remedy that might be granted under s. 24(1) of the *Charter*. These are the reasons for that order.

The relevant background information regarding the motions of the Director and the Approval Holder in relation to the Appellant's claim for constitutional relief is set out in the Tribunal's order dated September 26, 2013 made regarding the preliminary hearing that was held on September 5, 2013.

Relevant Legislation and Rules

Canadian Charter of Rights and Freedoms

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.

…

24.(1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Rules of Practice of the Tribunal

Constitutional Questions

81. The Tribunal may choose to hear the arguments as preliminary matters before beginning to hear evidence, particularly if the constitutional question deals with the Tribunal's jurisdiction

Issue

The issue is whether the Appellant's *Charter* challenge that its employees are being deprived of security of the person under s. 7 of the *Charter* should be struck for lack of standing. If it is not struck, then the question is what the appropriate scope of permissible challenge and remedy should be.

Discussion and Analysis

The parties agree that the four types of standing for a *Charter* rights claim are listed in the decision in *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, at

para. 35. They are standing: as of right; involuntary, e.g., the "*Big M Drug Mart*" exception where a corporation is brought before the court involuntarily; in the public interest; and residuary discretion where a case has been fully argued on the merits.

The case law has determined that s. 7 of the *Charter* does not protect the rights of a corporation in its own right because "everyone" has been interpreted to mean human beings (*Irwin Toy Ltd. v. Quebec Attorney General*, [1989] 1 S.C.R. 927, para. 96 ("*Irwin Toy*")).

The Director and the Approval Holder submit that the Appellant, being a corporation, does not have direct standing to raise the s. 7 *Charter* challenge because that section does not protect corporate rights and only extends to natural persons. They submit that the Appellant has not provided any evidence or valid argument to support any of the exceptions.

The Appellant's first argument is that it has standing as of right to bring the *Charter* challenge on behalf of its employees because it has standing as of right to bring the appeal under s. 142.1 of the *EPA*. The Appellant's written submissions do not elaborate upon this submission and the Tribunal is not aware of any authority for the proposition. In its reply submissions, the Director disputes that s. 142.1 of the *EPA* gives the Appellant direct standing to raise a *Charter* s. 7 claim. The Director submits that there is a distinction between statutory standing to bring a claim under the *EPA* on the ground that a renewable energy project will cause serious and irreversible harm to human health or serious and irreversible harm to the environment, and standing to seek constitutional relief based on a *Charter* right. The Tribunal agrees with the submission of the Director and finds that the Appellant's framing of the issue in relation to the *EPA* does not give the Appellant direct standing to seek a s. 7 *Charter* remedy. The Tribunal rejects this argument of the Appellant.

The Appellant's alternative argument is that it should be granted public interest standing to advance the rights of its employees. This is the primary focus of the parties' submissions on the issue.

The Courts have identified three factors to determine public interest standing. They are whether: a serious justiciable issue is raised; the plaintiff has a real stake or a genuine interest in it; and, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts. The factors are to be applied purposively and flexibly. (See *Canada (Attorney General v. Downtown Eastside Sex Workers United Violence Society*, [2012] 2 S.C.R. 524 ("*Downtown Eastside*"), para. 37).

Regarding the first two factors, the Appellant submits: that the justiciable issue is whether engaging in the Project in accordance with the Amendment will cause serious harm to human health, i.e., the Appellant's employees. The Appellant argues that it "has a genuine interest in the welfare of its employees, as would any reasonable employer and is required to provide a safe working environment for those same employees."

While the Director and the Approval Holder do not agree that the Appellant has satisfied the first two factors, the parties all focused their submissions on the third factor to determine public interest standing: whether the Appellant's *Charter* challenge is a reasonable and effective way to bring the issue before the Tribunal.

The Director and the Approval Holder submit that a claimant with standing as of right should be preferred (*Downtown Eastside*, *supra* at para. 37), e.g., the employees in this case and individuals in other cases. Relying upon the Tribunal's decision in *Municipality of North Middlesex v. Ontario (Ministry of the Environment)*, [2013] O.E.R.T.D. No. 43, affirmed by the Ontario Divisional Court on September 13, 2013, 78 C.E.L.R. (3D) 305 ("*North Middlesex*"), the Director argues that the Appellant is "ill-positioned to advance a *Charter* s. 7 claim compared to persons with direct standing" and that the Appellant has not provided any evidence to show why an employee could not have `reasonably or effectively brought such a claim, or that any of its employees support the Appellant bringing a claim on their behalf.

The Approval Holder argues that the Appellant has the onus of establishing that it should be granted public interest standing on the evidence. The Approval Holder further argues that the Appellant has not shown that this appeal is a reasonable and effective means of bringing the issue before the Tribunal because individuals have standing as of right to appeal a renewable energy approval, or its amendment, and there are other appeals before the Tribunal in which individuals with standing as of right have raised a s. 7 *Charter* challenge.

The Approval Holder cites the following passage from the decision in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at paras. 28, 36 and 37, the emphasis added by the Approval Holder:

> The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. **The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant.** The principles for granting public standing set forth by this Court need not and should not be expanded. The decision whether to grant status is

> a discretionary one with all that that designation implies. Thus underserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.

While the Approval Holder cites the above passage for the principle that the third factor is not satisfied if it is likely that another individual will bring the same s. 7 *Charter* claim in another renewable energy approval appeal, it is also of note that the court comments that "the applicable principles should be interpreted in a liberal and generous manner."

Here the Appellant relies upon the material facts alleged in its "pleadings" to support its public interest argument, those being the notice of appeal and the Notice of Constitutional Question.

The notice of appeal, in paras. 8 and 9, states:

> 8. The Appellant operates a greenhouse that employs approximately 60 (sixty) persons. The majority of these persons are resident year round in a bunkhouse dwelling located approximately 555 meters from the amended location of turbine P038. In addition, the greenhouse wherein these individuals work for approximately 50 hours per week, which covers approximately 50 acres, is located much less than 550 meters from this turbine. Turbine P037 is located approximately 550 meters from the green house and Turbine P039 is located approximately 450 meters from the green house. If between 5% and 30 % of these individuals at these points of reception experience the health effects enumerated above, the impact of the Project on human health will be very serious.
>
> 9. In addition, the proximity of the green house to the above mentioned IWTs raises serious concerns regarding serious harm to human health resulting from ice throw, turbine collapse and blade failure.

The Notice of Constitutional Question provides:

> The material facts giving rise to the Appellant's constitutional question are set out in the Notice of Appeal, attached hereto.
>
> The following are the legal bases for the constitutional question:
>
> …
>
> 3. If a project such as the one described above is approved or amended, an appellant is entitled to appeal the Director's decision to the Environmental Review Tribunal. On July 26, 2013, the Appellant appealed the Director's decision to amend the REA on behalf of its employees, the majority of whom reside in a bunkhouse dwelling in close proximity to the Project and whose workplace is located less than 550 meters from the Project.
>
> …
>
> 5. The legislative scheme for granting approvals to wind farm projects violates the right to security of the person as guaranteed to the

> Appellant's employees by section 7 of the Charter in that approvals can be issued to project proponents notwithstanding the known adverse heatlh effects.

In its written submissions on this motion, the Appellant states (emphasis added):

> the majority of those employed in the greenhouse by the Appellant are **migrant** agricultural workers residing in Ontario **on a temporary basis in order to earn enough money in the growing season to support themselves and what family they may have in their home countries**.

With respect, some of the bolded information above goes beyond the information contained in the Notice of Appeal, Notice of Constitutional question and the evidence on the motions. For instance, there is no information to support the Appellant's allegation that the employees are supporting families in other countries. There is also no information that these are "migrant" workers in the sense that they come from other countries. As noted below, the evidence does establish that they are seasonal employees at a minimum.

What is clear from the Notice of Appeal, the Notice of Constitutional Question and the evidence on the motions is that the Appellant's employees are agricultural workers who work in a greenhouse and mostly reside in a bunkhouse, and that both structures are on the Appellant's property in proximity to industrial wind turbines of the Project. The Appellant alleges that engaging in the Project in accordance with the Amendment will cause serious harm to the employees' health.

It is important that the Amendment, which involves the relocating and de-rating of wind turbines because of potential health and safety concerns for human beings, appears to be primarily the result of the Appellant advising the Approval Holder that the bunkhouse is a residence for seasonal greenhouse workers and not just an agricultural building. This information is confirmed in the affidavits of Colin Edwards and Tanya Zitt, filed in support of the Approval Holder's motion.

In particular, Exhibit "A" to the affidavit of Ms. Zitt, a letter dated April 9, 2013 from the Approval Holder's consultant to the Environmental Assessment and Approvals Branch of the Ministry of Environment contains a table that explains the proposed changes to the Project as the result of the Amendment. The table, under the heading "Rationale for Change" for moving and/or de-rating the above-noted wind turbines (identified as P038 and P039), states:

> After REA was issued by the MOE, an adjacent non-participating landowner advised South Kent of a bunkhouse on their property used by seasonal greenhouse workers. This receptor was not previously

> identified [the following is added to the reference to turbine P038] and was located within 550 m of turbine P038.

Of the four changes to the Project set out in the table, the rationale for two of the changes specifically relates to the Appellant's employees who are described as "seasonal greenhouse workers". This confirms the material facts alleged in the notices that it filed.

In support of its submission that the Appellant's employees are not well positioned to advance the alleged breach of their section 7 *Charter* rights on their own behalf, the Appellant cites the decision of the Supreme Court of Canada in *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, para. 168:

> In this case, there is no doubt that agricultural workers, unlike the RCMP officers in Delisle, do generally suffer from disadvantage, and the effect of the distinction is to devalue and marginalize them within Canadian society. Agricultural workers "are among the most economically exploited and politically neutralized individuals in our society" and face "serious obstacles to effective participation in the political process" (D.M. Beatty, Putting the Charter to Work: Designing a Constitutional Labour Code (1987), at p. 89). Indeed, the trial judge clearly found, at p. 216, that "agricultural workers have historically occupied a disadvantaged place in Canadian society and that they continue to do so today. For the purposes of the s. 15 analysis, I have no hesitation in finding on the evidence that agricultural workers are a disadvantaged group. They are poorly paid, face difficult working conditions, have low levels of skill and education, low status and limited employment mobility.

While the Appellant further submits that the greenhouse workers are disadvantaged as non-citizens, the Appellant has not directed the Tribunal to where that information is contained in the Notice of Appeal, Notice of Constitutional Question, or the evidence on the motions.

Regarding the Approval Holder's argument that there are other appeals before the Tribunal in which individuals with standing as of right have raised a s. 7 *Charter* challenge, the Appellant submits:

> while it may be possible for a future appellant to bring similar claims, it would not allow for the rights of the Appellant's employees in this case to be protected, an outcome that does not correspond with the principles of natural justice and procedural fairness and/or fundamental justice as required in section 7 of the *Charter*.

The Director also submits that there is no evidence of record to support a claim of public interest standing on the *Charter* challenge. The Director argues that there is no evidence of the employees' motivation for working, or that they fear reprisals or have language difficulties, or that they support or consent to a claim being brought on their

behalf. The Director points out that in *Downtown Eastside* numerous affidavits of sex workers were filed as to their unwillingness to bring forward the *Charter* challenge. The Director submits that the Tribunal should not speculate on whether allowing the Appellant to bring a *Charter* challenge is in the interests of the employees.

The Director further argues that in *Dunmore* the agricultural workers were found to be disadvantaged because of poor working conditions largely in the control of their employer and that it would be inappropriate to grant such an employer public interest standing if that is the case here, which is not known because there is no evidence in that respect.

In *North Middlesex*, the Director and the approval holder argued that the municipality (the appellant) raised the s. 7 *Charter* issue on its own behalf, and not on behalf of its residents. The Notice of Constitutional Question in *North Middlesex* sought the remedy alleging that the *EPA* provisions "allow for the violation of the Municipality of North Middlesex's rights under section 7" of the *Charter*. The Director and approval holder submitted that the municipality did not raise a justiciable issue, which is the first factor to be considered regarding public interest standing. The Tribunal found that the municipality did not have s. 7 *Charter* rights and, therefore, such rights could not be violated. The Tribunal found that the principle applies generally to corporations: "As has long been settled by the Supreme Court of Canada in *Irwin Toy*, corporations have no s. 7 *Charter* rights of their own."

Applying the *Downtown Eastside* factors, the Tribunal in *North Middlesex* found that the appellant's s. 7 *Charter* claim did not raise a serious justiciable issue, the first of the factors listed in *Downtown Eastside*. The Tribunal found this to be determinative of the standing issue, but went on to consider the other factors.

Regarding public interest standing, the Tribunal in *North Middlesex* noted that there was one mention of "residents'" s. 7 rights in the appellant's notice of constitutional question (which adopted the allegations in the notice of appeal, as in the case before this panel of the Tribunal) but that did not change the specific allegation in the constitutional question regarding the rights of the municipality. The Tribunal also discussed the need for the municipality to amend the notice of constitutional question if the claim was to proceed, although the appellant did not make that request, and went on to consider the third factor in *Downtown Eastside* (whether there is a reasonable and effective means of bringing the issue before the Tribunal) to help determine if an amendment would make any difference to the result.

In *North Middlesex*, the circumstances in respect of the public interest standing claim were further complicated because an individual (also represented by counsel for the municipality) was seeking to be added as a party to the proceeding for the very purpose of making a s. 7 *Charter* claim on the "serious harm to human health" branch of the *EPA* renewable energy approval test. The Tribunal exercised its discretion to deny the individual's request for party status, gave detailed reasons and added:

> To allow a constitutional question to be raised by a new party at this stage would adversely affect the timeliness of the proceeding and would countenance the Municipality's and Mr. Verkley's failure to pursue the constitutional question properly at an earlier point in the proceeding.

The Tribunal found in *North Middlesex* that to allow the municipality to amend the notice of constitutional question at a late stage in the proceeding would not be a reasonable and effective means of bringing the constitutional issue forward. The Tribunal emphasized that its finding was made in the "narrow and unusual circumstances" of the case, including the original flawed notice of constitutional question, the expedited nature of renewable energy appeal proceedings, and the fact that other individuals could make a s. 7 *Charter* claim in such appeals.

The appellant's appeal of the Tribunal's decision in *North Middlesex* was dismissed by the Divisional Court. The Divisional Court also stated that it agreed that the Tribunal's conclusion in *Bovaird v. Director, Ministry of the Environment*, 2013 Carswell Ont 18046 ("*Bovaird*") is distinguishable from that in the *North Middlesex* case. In *Bovaird* the Tribunal had dismissed the Director's motion to strike out an individual's claim for constitutional relief under s. 7 of the *Charter*.

In *North Middlesex* the Director and the Approval Holder also argued that the municipality did not provide any evidence to support the granting of public interest standing. However, according to the Tribunal's reasons in that case, the approval holder also submitted that "the Notice [of Constitutional Question] forms the basis of the claim, and that the plain words of the Notice allege that the Municipality is claiming that its rights are being infringed." The Tribunal in that case considered material facts alleged in the notice of constitutional question, e.g., the reference to residents, in deciding whether the municipality had standing to bring the *Charter* challenge. In the case before this panel of the Tibunal the Notice of Constitutional Question incorporates the Notice of Appeal and together they form the basis of the claim. In addition, in this case there is evidence to support the allegation of material facts in the "pleadings", as the Appellant refers to them, in the materials filed by the Approval Holder. Furthermore,

the situation of the Appellant's employees in this case goes to the root of the rationale for the Approval Holder seeking the Amendment and the Director approving it.

In its reply submissions the Approval Holder underscores that the Appellant's "pleading does not explain why the Appellant's employees could not advance an appeal directly in their own right" and that there must be evidence that public interest should be granted because, for instance, the employees are vulnerable and not able to bring their own claim.

The Approval Holder submits that the Supreme Court of Canada has held that public interest standing is not needed for a representative of refugees because they are able to exercise their *Charter* rights themselves (*Canadian Council of Churches v. Canada (Minister of Employment and Immigration*) *supra*). The Approval Holder cites other court decisions in which agricultural workers have brought actions to protect their own rights, e.g., in *Espinoza v. Canada (Attorney General)*, 2013 ONSC 1506, 279 C.R.R. (2d) 162 (migrant agricultural workers from Mexico sued their Ontario employer for wrongful dismissal) and *Chahal v. Canada (Minister of National Revenue)*, 2008 TCC 347, [2008] T.C.J. No. 268 (seasonal agricultural workers in British Columbia made a claim in respect of their insurable earnings).

Findings on Standing

The Tribunal can determine questions of law, such as a constitutional question, regarding matters within its jurisdiction. (*Drennan v. K2 Wind Ontario Inc.*, [2013] O.J. No. 2202 (S.C.J.), paras. 46, 56, 57 and 68, and *North Middlesex* at para. 47.)

The Director and the Approval Holder argue that that there is no evidence to support the Appellant's submissions on public interest. As already noted, the information contained in Exhibit "A" to the affidavit of Ms. Zitt filed on behalf of the Approval Holder is to the contrary. Importantly, the information in the affidavit is the basis for the very Amendment that is the subject of the appeal.

The decisions in both *North Middlesex* and *Bovaird* are distinguishable on their facts from this case, mainly because the former involved a flawed constitutional notice of the municipality and the latter was a *Charter* challenge by an individual with direct standing. However, it is of note that the Tribunal in *Bovaird* found that the notice of constitutional question in that case provided sufficient basic information (similar to the information provided by the Appellant here) so that the Director and the approval holder would not be surprised and that it could be supplemented at a later date.

It is not necessary to decide in this case if the material facts alleged in the Notice of Appeal and the Notice of Constitutional Question are sufficient, on their own, to satisfy the third factor in the public interest test because the Approval Holder's evidence on the motion is confirmatory of some of that essential information.

In this case, it is clear from the Notice of Appeal, Notice of Constitutional Question, and the rationale for the Amendment, explained in Exhibit "A" to the affidavit of Ms. Zitt, that the Appellant in the case before me does not assert *Charter* rights of its own; the Appellant asserts s. 7 *Charter* rights of individual persons, its employees.

Applying the public interest factors here, and applying them purposely and flexibly, the Tribunal finds that the Appellant, on behalf of its employees, has raised a serious justiciable issue in regards to alleged harm to human health; the Appellant and the employees have a real stake or a genuine interest in the employees' health and well-being; and, in all the circumstances, the proposed *Charter* challenge, in the context of the unique circumstances of this case where the seasonal employees live and work in close proximity to industrial wind turbines and their employer has brought a renewable energy approval appeal under the *EPA*, is a reasonable and effective way to bring the issue before the Tribunal.

The motions of the Director and the Approval Holder to dismiss the Appellant's constitutional claim under s. 7 of the *Charter* on the basis of lack of standing are dismissed.

Remedy Claimed

Having found that the Appellant has standing to bring a s. 7 *Charter* challenge on behalf of its employees, the next question is what is the appropriate scope of challenge to be permitted and what remedy should be considered. The Appellant seeks a remedy under both s. 24(1) of the *Charter* and s. 52 of the *Constitution Act, 1982* (the "*Act*".).

Section 24 of the *Charter*. It is remedial and generally provides a personal remedy. Section 52 of the *Act* deals with the validity of laws. It provides as follows:

> 52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The reason for granting status to the Appellant to bring the s.7 *Charter* challenge on behalf of its employees was the public interest exception arising out of the unique situation and personal circumstances of the seasonal employees. In addition the very Amendment that is the subject of the appeal was prompted by the situation of the employees residing in a bunkhouse in proximity to the wind turbines and this being

"discovered" by the Approval Holder subsequent to the REA. It follows that, on the unique facts of this case, the personal remedy under s. 24(1) of the *Charter* is the appropriate potential remedy for the s. 7 *Charter* challenge and not s. 52 of the *Act*.

The Tribunal will consider only the specific circumstances facing these employees as the result of the REA Amendment on the application of the renewable energy approval appeal provisions here and whether.the Appellant, on their behalf, should be granted a s. 24(1) *Charter* remedy. The Tribunal is not considering a general challenge of the *EPA*'s renewable energy provisions by the Appellant as there are other persons with direct standing available to pursue that wider challenge (e.g., in Dixon and Bovaird). Allowing a general challenge here would not be a reasonable and effective way to bring the issue forward. Therefore, the Tribunal will not be considering the broad claim for a remedy under s. 52 of the *Act*.

Summary of Findings

The Tribunal finds that the Appellant has standing to pursue a s. 7 *Charter* challenge in respect of the REA Amendment regarding the claim of deprivation of the right of security of the person of the seasonal workers of the Appellant, and any remedy that might be granted under s. 24 of the *Charter*.

Appendix C – Reasons for the order made November 19, 2013 refusing Appellant's motion to admit new evidence

Background

The Appellant brought a motion for an order to admit new evidence. The motion was heard in writing. The motion was dismissed by an order dated November 19, 2013, for reasons to be provided. These are the reasons for the order.

The hearing of the appeal began on September 26, 2013. The Appellant called six witnesses in its case-in-chief and closed its case on October 3, 2013.

The Director and the Approval Holder called their evidence on October 3 and 4, 2013.

On October 25, 2013, the Appellant called reply evidence, and the hearing of the evidence was concluded.

At the conclusion of the hearing on October 25, 2013 the Appellant advised the other parties and the Tribunal of its intention to bring a motion to admit new evidence.

The Appellant filed its motion with the Tribunal on November 1, 2013. The Director and the Approval Holder filed responding materials, and the Appellant filed reply submissions with the Tribunal on November 12, 2013.

In support of the motion, the Appellant filed an affidavit of Graham Andrews sworn October 29, 2013. The motion sought to have the following documents, attached to his affidavit as exhibits, admitted into evidence:

- a transcript of oral evidence given by Dr. David Michaud on October 4, 2013 in the *Dixon v Director, Ministry of the Environment*, Environmental Review Tribunal Case Nos. 13-084 to 13-089 (the "Transcript");
- documents relating to a Health Canada study that is being conducted and in which Dr. Michaud is involved (the "Health Canada documents");
- a press release from Carmen Krogh entitled "University of Waterloo Research Chair industrial wind turbine (IWT) study results statistically significant", dated October 24, 2013 (the "Press Release");
- a poster entitled "Wind Turbine Noise, Sleep Quality, and Symptoms of Inner Ear Problems" (the "Poster"); and
- four papers presented at a conference held in Innsbruck, Austria in September 2013 (the "Conference Papers").

Relevant Rules

Rules of Practice of the Tribunal

> 233. Once the Hearing has ended but before the decision is rendered, a Party may make a motion to admit new evidence.
>
> 234. The Tribunal shall not admit new evidence unless it decides that the evidence is material to the issues, the evidence is credible and could affect the result of the Hearing, and either the evidence was not in existence at the time of the Hearing or, for reasons beyond the Party's control, the evidence was not obtainable at the time of the Hearing.

Issue

The issue is whether the new evidence should be admitted under Rule 234 of the Tribunal's Rules of Practice.

Discussion, Analysis and Findings

The Appellant must satisfy a four-part test under Rule 234 to admit new evidence:

(i) the evidence is material to the issues;

(ii) the evidence is credible;

(iii) the evidence could affect the result of the hearing; and

(iv) either the evidence was not in existence at the time of the hearing or, for reasons beyond the party's control, the evidence was not obtainable at the time of the hearing.

The Appellant must show that all of the requirements of Rule 234 have been met.

The Appellant submits that the Transcript, Health Canada Documents, Conference Papers, the Press Release and the Poster are evidence that is:

- credible, as they are documents from prominent organizations, government bodies and individuals well-known in the field";
- material to the issue raised in the appeal whether engaging in the Project in accordance with the REA will cause serious harm to human health because it "demonstrates relationships between the distance from turbines and such issues as sleep quality, vertigo and tinnitus in addition to issues such as annoyance"; and
- could affect the result of the hearing because it supports the Appellant's contentions in the appeal, including "that the Project as approved, if permitted to proceed, will be the cause of serious harm to human health.

The Director and Approval Holder submit that the Appellant has not discharged its onus under Rule 234, for the various reasons that the new evidence could have been tendered previously and that the motion materials do not provide compelling reasons why the evidence is material and could affect the result of the hearing.

The Transcript

The Transcript became available on October 4, 2013, before the completion of the evidence in this hearing on October 25, 2013. The Appellant gives some explanation in the affidavit filed about difficulties in arranging for Dr. Michaud to give evidence.

Dr. Michaud's evidence was given under oath in another hearing before the Tribunal and is credible in that sense. However, the Director and the Approval Holder do not consent to it being admitted and argue that the work that Dr. Michaud was doing was underway well before the completion of the evidence in this hearing and the Appellant had not named Dr. Michaud as a potential witness in this case. The Appellant counters that it would not be calling him as an expert witness, which the Director and Approval Holder say undercuts the Appellant's argument that it could affect the result in the hearing.

The Tribunal finds that the substance of Dr. Michaud's evidence was available well before the hearing, and that even the transcript of the evidence he gave as a witness in another hearing was also available prior to the completion of this hearing. The Appellant has not provided compelling evidence that, for reasons beyond its control, the evidence was not obtainable at the time of the hearing.

The Tribunal finds that the Transcript is not admissible as new evidence because it was available at the time of the hearing. The Tribunal finds it unnecessary to address the other requirements of Rule 234.

Health Canada Documents

The Health Canada documents were available online prior to the commencement of this hearing. This evidence was in existence at the time of the hearing, and the Appellant has not demonstrated that, for reasons beyond its control, the evidence was not obtainable at the time of the hearing.

Tribunal finds that the Health Canada Documents are also not admissible as new evidence under Rule 234

Press Release and Poster

The Press Release and the Poster are related. They give general information about a survey about wind turbine noise and its relationship to sleep quality and inner ear problems.

The Appellant is not tendering the actual survey as evidence or to call a witness who was involved in the survey process. The Appellant would also not be calling the authors, or creators, of these documents as witnesses. The Press Release and Poster contain hearsay.

While the Tribunal can accept hearsay, the Appellant has provided too little information for the Tribunal to make a finding as to whether the information in these documents is credible. In addition, the Appellant called witnesses who spoke to similar matters and, as the proposed evidence is hearsay, the Tribunal is not convinced that evidence of this sort, being a summary of information, tendered at this stage of the proceeding would likely be given little weight and, therefore, it would be unlikely that the new evidence could affect the result of this hearing.

For the above reasons, the Tribunal finds that the Press Release and Poster are not admissible as new evidence under Rule 234.

The Conference Papers

These papers were posted on a public website at the end of September or the beginning of October 2013, prior to the completion of this hearing. The Appellant has not provided any compelling reason as to why the evidence was not obtainable at the time of the hearing, for reasons beyond the Appellant's control.

The Tribunal, therefore, finds that the Conference Papers are not admissible as new evidence under Rule 234.

Summary

The Appellant did not meet the requirements of Rule 234 for any of the proposed new evidence. The motion to admit new evidence is dismissed.