

ONTARIO
SUPERIOR COURT OF JUSTICE

Court File No. CW-11-434766

SHAWN DRENNAN AND TRISHA DRENNAN

APPLICANTS

AND

2270573 ONTARIO INC., SUNCOR ENERGY INC. / SUNCOR ÉNERGIE INC.,
SUNCOR INC., SUNCOR ENERGY PROJECTS INC., ACCIONA ENERGY, ACCIONA
WIND ENERGY CANADA INC., ACCIONA RENEWABLE ENERGY CANADA GP
HOLDINGS INC., ACCIONA ENERGY DEVELOPMENT CANADA INC., ONTARIO
HYDRO DEVELOPERS INC., TRANSALTA CORPORATION, AND TRANSALTA
ENERGY CORPORATION

RESPONDENTS

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicants. The claim made by the applicants appears on the following pages.

THIS APPLICATION will come on for a hearing on a date and time to be determined by the Registrar of the Superior Court at 393 University Avenue, Toronto, Ontario M5G 1E6.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicants, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does

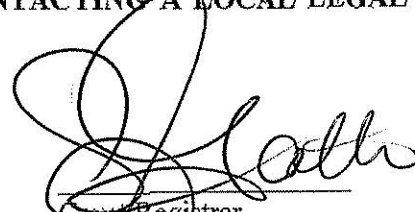
not have a lawyer, serve it on the applicant, and file it with proof of service, in the court office where the application is to be heard as soon as possible, but at least two days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

DATE:

Sept 12/11

ISSUED BY:



Court Registrar
Ontario Court of Justice
393 University Avenue
Toronto, Ontario
M5G 1E6

TO: 2270573 Ontario Inc.
c/o Paul Steep
McCarthy Tetrault LLP,
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Toronto, Ontario
Canada, M5K 1E6

AND TO: Suncor Inc., Suncor Energy Inc., Suncor Energy Projects Inc.
2489 Sheridian Way,
Mississauga, Ontario
Canada, L5K 1A8

AND TO: Acciona Energy, Acciona Wind Energy Canada Inc., Acciona Renewable Energy Canada GP Holdings Inc., Acciona Energy Development Canada Inc.
1 First Canadian Place,
Box 130, Suite 3400,
Toronto, Ontario,
Canada, M5X 1A4

AND TO: Ontario Hydro Developers Inc., wholly owned by TransAlta Corporation,
TransAlta Energy Corporation
C/o Director William Anderson
501, 20 Scrivener Square
Toronto, Ontario
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APPLICATION

1. The Applicants, Shawn Drennan and Trisha Drennan, are landowners facing a pending windfarm of upwards of 150 turbines (Kingsbridge II) in which one of the turbines will be as close as 650 meters from their home. Twelve more turbines will be located within the surrounding two kilometers. The Drennans seek to gather key health information from former residents of a neighbouring township (as well as another individual) about the effects of the wind turbines they endured (the Ripley and Amaranth/Melancthon Projects), but are effectively blocked from doing so by non-disclosure clauses that are conditions of Suncor-Acciona and TransAlta buyouts. These respondent companies required as a condition of sale that the former residents not disclose any negative experiences with the wind turbines including adverse health effects. This Application seeks the Court's intervention to invalidate these non-disclosure clauses; as it is submitted that the concealment by contract of serious public health and safety concerns is fundamentally against the public interest.

THE APPLICANTS MAKE APPLICATION FOR:

2. The Drennans seek this Honourable Court's guidance pursuant to Rule 14.05(3)(d), (g), (g.1) and (h) of the *Rules of Civil Procedure* in the form of declaratory relief in respect of the following:
 - (A) An interpretation of non-disclosure clauses in various wind turbine company buyouts to determine whether the contractual provisions expressly or impliedly have the purpose or effect of:
 - i) concealing any information regarding public health or safety; and/or

- ii) concealing any information which may be useful to members of the public in protecting themselves from adverse health effects or injury.
- (B) A Declaration that the herein described non-disclosure clauses, wherein they act to conceal any information regarding public health or safety, or any information which may be useful to members of the public in protecting themselves from adverse health effects or injury, are void as against public policy.
- (C) A Declaration that the herein described non-disclosure clauses, wherein they act to conceal any information regarding public health or safety, or any information which may be useful to members of the public in protecting themselves from adverse health effects or injury, is evidence relevant to the appeal of the approval of the Kingsbridge II project.
- (D) An Order relieving the residents of their confidentiality obligations where any non-disclosure clauses would bar said residents from providing any information regarding public health or safety, or any information which may be useful to members of the public in protecting themselves from adverse health effects or injury.
- (E) Further, and/or in the alternative, an order granting the Applicants the right to orally discover the above noted residents, unhampered by the non-disclosure clause. In addition, an order granting the Applicants documentary disclosure from the Respondent companies with reference to all file material bearing on the adverse effects caused by wind turbines raised by the affected parties.
3. The costs of this Application; and

4. Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE APPLICATION ARE:

Overview

5. The panel mandated to rule on wind turbine approvals, the Environment Review Tribunal, recently ruled in the seminal *Kent Breeze* decision that “. . . there are certainly legitimate concerns and uncertainties about the effects of wind turbines on human health . . .”:

There is actually a lack of peer-reviewed science on both sides of this debate . . . If numerous studies are undertaken to check for associations between turbines and serious health effects, the Tribunal can look at all of the results to determine whether a particular legal test has been satisfied. Further peer-reviewed science on the association and causation questions would be a welcome development in the debate (see *Erikson v. Director, Ministry of the Environment*, (July 18, 2011) Case Nos.:10-121/10-122 at p. 207 and 193-194).

6. The Applicants seek to marshal the very information said to be missing. They want to keep their home and they want to be safe. Ironically, the Chief Medical Officer of Health has not conducted research or studies which would meet the standards set by the Panel. It has been left for members of the public confronted with the wind farms to do the research.
7. The Drennan family has resided on their family farm in Ashfield-Colbourne-Wawanosh Township since 1922. Shawn Drennan and Trisha Drennan represent the third generation of Drennans to live on their farm.
8. The industrial windfarm that will end up beside the Drennans is the “Kingsbridge II” Project which has been proposed by Capital Power LP in partnership with Samsung Renewable Energy Inc., and Pattern Renewable Holdings Canada ULC. According to the

Notice of Draft Site Plan of the project, Kingsbridge II will see upwards of 150 wind turbines with a name plate capacity of approximately 270MW.

9. Given the family's longstanding connection to the land and the community, and their strong desire to continue farming and remain in their ancestral home, their concerns in the face of the Kingsbridge II project are for the potential health effects of residing in close proximity to wind turbines.
10. In anticipation of an appeal of the project's approval to the Environmental Review Tribunal, the Drennans seek to collect evidence of the adverse health effects, if any, of living in close proximity to wind turbines with a view to calling expert evidence at their Tribunal hearing. Of course, the gagged information would be essential to any expert report and would have to be collected and provided many months prior to the finalization of the report. However, in settling claims/complaints brought by former residents as well as in negotiations over lease agreements, the Respondent wind companies have required non-disclosure clauses which have the effect of concealing any information respecting health concerns.
11. By letter dated August 31, 2011, Counsel for the Applicants sought to interview six former residents, all of whom ended up selling their homes to wind turbine companies. In response to the request to interview these individuals concerning what, if any, health effects they experienced, their lawyer responded: "I will not be able to produce any of these individuals as they are prohibited by agreement from answering the questions referred to in your letter."

12. The Drennans apply to this Honourable Court for relief as a result of these non-disclosure clauses, as void against public policy, or, in the alternative, to obtain the evidence they require to mount an effective challenge to the Kingsbridge II project at the Environmental Review Tribunal.

The Industrial Windfarm Project, Kingsbridge II

13. Prior to developing a wind project, a company must obtain a Renewable Energy Approval from the Ontario Ministry of the Environment. The process for obtaining this approval is outlined in Ontario Regulation 359/09 – *Renewable Energy Approvals* under Part V.0.1 of the *Environmental Protection Act*, R.S.O. 1990 c. E.19 (“EPA”).
14. Capital Power LP, in partnership with Samsung Renewable Energy Inc., and Pattern Renewable Holdings Canada ULC is preparing to submit a Renewable Energy Approval application to the Ministry of the Environment for the project Kingsbridge II by the end of 2011.
15. According to the Notice of Draft Site Plan of the project, if approved, one of the 150 turbines will be located as close as approximately 650 meters from the Drennan’s home. Twelve more turbines will be located within the surrounding two kilometers. A switchyard will be located as close as approximately 500 meters from the Drennan’s home.
16. The project, once approved, will give rise to an action in the tort of nuisance, as the Drennan’s have property rights and privileges in respect of the use or enjoyment of their land, the noise from the project will cause an injury to the health and comfort of ordinary people in the vicinity, and the project owner, the partnership’s conduct will be the legal

cause of the invasion, an invasion that is intentional and unreasonable, or in the alternative, unintentional and actionable as it is neglectful, reckless or hazardous conduct.

The Appeal to the Environmental Review Tribunal

17. Under the *EPA*, if the project is approved, an appeal of the decision to grant an approval for a renewable energy project must be taken to the Environmental Review Tribunal. According to s. 142.1 of the *EPA*, an appeal of the approval can be taken on only two grounds. The appellant must show that the renewable energy project will cause:
 - a) serious harm to human health, or
 - b) serious and irreversible harm to plant life, animal life or the natural environment.

18. According to s. 142.1 of the *EPA* the Notice of Appeal must be served on the Director and the approval holder and then filed with proof of service with the Environmental Review Tribunal (the “Tribunal”) within 15 days of approval. Section 59 of Ontario Regulation 359/09 states that pardoning certain legislated exceptions, the Tribunal is required to issue its decision on the appeal no later than six months after a Notice of Appeal is served on the Tribunal, failing which the renewable energy approval is deemed to be confirmed.

19. According to “A Guide to Appeals by Members of the Public Regarding Renewable Energy Approvals under s. 142.1 of the Environmental Protection Act” due to the timeframe within which the Tribunal must make its decision, an expedited hearing process has been put in place. Once the Notice of Appeal is filed, a party is to assume they will have to be ready for a preliminary hearing within four weeks of the expiration of the 15 day appeal period, and ready to proceed with a full hearing after a further four weeks.

20. Given the timelines with which the Drenmans are expected to proceed, they are now beginning to collect the evidence required to mount an effective appeal of the approval at the Tribunal, including conducting interviews of potential witnesses and the preparation of expert reports.
21. As stated above, the *Kent Breeze* decision stands as a leading decision and recognizes that there is currently a lack of peer-reviewed science on both sides of the question as to whether wind turbines cause adverse health effects. The Tribunal stated that while there were uncertainties with respect to the adverse health effects of turbines, the legislative test for challenging the approval of a project places the onus of proof upon landowners such as the applicant to demonstrate adverse health effects. In doing so, the Tribunal stated that “there was no surprise” that the legal test, which requires proof of harm, had not been satisfied where the applicable scientific evidence was in such an early stage of development (see page 196).
22. Further, the Tribunal stated that in gathering evidence regarding whether harm would be caused by a project, evidence from other projects needed to outline the differences between the two projects, including the relative location of receptors, type of wind turbine and local topography, concluding that if a party failed to show how “transferable” the experience gained in one locale was to another, then the evidence would be “of little use in a hearing” (see page 134).
23. In the face of this serious uncertainty over the health effects of wind turbines, the Government of Ontario has opted, through the Chief Medical Officer of Health to simply conduct a literature survey from other jurisdictions without more. Members of the public

including the Drennans are left to fend for themselves to compile actual scientific study on the issue in order to comply with the standards set out in the *Kent Breeze* decision. The Chief Medical Officer of Health's Report (Dr. King, May 2010), in failing to actually conduct case studies and in failing to study or research health effects in Ontario, does not comply with the standard set out in *Kent Breeze*. The Drennans are compelled to do the work instead as there is currently no information on the adverse health effects, if any, of the 150 turbine windfarm that will surround the Drennans.

24. The applicants seek the right to collect the public health information that could create the kind of peer reviewed study the Tribunal requires and the Chief Medical Officer of Health has not produced.
25. In settling claims/potential claims brought by neighbouring landowners, the wind companies named as Respondents have required non-disclosure clauses that prohibit the former landowners from discussing the terms of the settlement. These provisions extend to barring discussion of any health effects associated with the turbines and may also include a ban on speaking in a negative way about the companies.
26. Further, in signing lease options with the wind companies, landowners are barred from speaking about the health effects of the turbines, even before they are placed on the property.
27. These non-disclosure clauses, which serve to conceal any information regarding public health or safety, or any information which may be useful to members of the public in

protecting themselves from adverse health effects or injury, are void as against public policy

28. Further, these non-disclosure clauses, which serve to conceal any information regarding public health or safety, or any information which may be useful to members of the public in protecting themselves from adverse health effects or injury, will bar the Drennans' counsel from taking the necessary steps to gather evidence and information concerning the appeal to the Tribunal. In particular, these provisions will serve to bar the signatories from disclosing to medical experts retained by the Drennans any information regarding possible negative health effects of residing in close proximity to wind turbines. Evidence of former residents who chose to leave their homes entirely could represent evidence of the most extreme cases of adverse health effects. Given the proximity of these former residents to the Drennans, and the evidentiary burden upon the Drennans, such evidence will be required in respect of an effective appeal of the approval of the Kingsbridge II project.
29. The approval of industrial wind turbines in close proximity to the Drennans implicates their right to security of the person as guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*, in view of the potential health effects arising from the project. Principles of fundamental justice require that the Drennans enjoy the right to meaningfully participate in the process through which the approval of this project is reviewed and determined. Section 7 guarantees the Drennans' entitlement to oppose the approval through a meaningful legal process, including the right to marshal and present evidence to challenge the approval. To the extent that the impugned non-disclosure

clauses are enforced, the applicants' rights to security of the person have been impaired in a manner contrary to the principles of fundamental justice.

30. There are no material facts in dispute.
31. The relief claimed herein involves a determination of the Applicants' rights that depend on the interpretation of a contract or other instrument and/or in the interpretation of a statute or regulation. These rights include:
- a. A right to the quiet enjoyment of their property;
 - b. The right to a safe and secure environment including the right not to be subjected to the adverse health effects of wind turbines placed unreasonably close to their home;
 - c. The right to a full and fair hearing before the Environmental Review Tribunal including the right to be heard and to present a full and fair case relating to the health effects of wind turbines; and
 - d. A right to security of the person under section 7 of the Charter including a right to be safe and healthy in circumstances where Government legislation and proceedings do not unduly expose the public to unknown health risks.

Rules, Statutes and Regulations Relied Upon

32. Rules 14.05(3)(d), (g), (g.1) and (h) of the *Ontario Rules of Civil Procedure*;
33. Sections 7 and 24(1) of the *Canadian Charter of Rights and Freedoms*;
34. The *Environmental Protection Act*, R.S.O. 1990 c. E.19 and the regulations passed pursuant to the *Act*, including Ontario Regulation 359/09 – *Renewable Energy Approvals*;

35. The *Green Energy Act*, S.O. 2009 c. 12 and the regulations passed pursuant to the *Act*;
36. The *Sunshine in Litigation Act*, Fla. Stat. Ann. s 69.081(4) (West 2005), Arkansas Code Ann. S. 16-55-122 (1991) and Rule 76A of the *Texas Rules of Civil Procedure*;
37. Such further and other grounds as Counsel may advise and this Honourable Court permits;

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION:

- i) The affidavit of Shawn Drennan affirmed September 10, 2011; and
- ii) Such further and other material as counsel may advise and this Honourable Court permits.

Date: September 12, 2011

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Applicant

-and-

2270573 Ontario Inc. et al.

Respondents

Court File No: CW-11-434766

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings Commenced in Toronto

NOTICE OF APPLICATION

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