Toronto Law Journal

The Franchisors' Implied Duty to Protect and Enhance the Brand under Quebec Law

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After much anticipation, the Quebec Court of Appeal released its decision in *Dunkin' Brands Ltd. c. Bertico inc.*, 2015 QCCA 624, on April 15, 2015. Although the case turned in large part on the implicit obligations imposed upon contracting parties under the *Civil Code of Quebec*, the decision could be significant for franchisors and franchisees outside of Quebec. The Court of Appeal unanimously affirmed the trial judge's conclusion that the franchisor had an implied obligation to take reasonable measures to protect and enhance the brand. It also upheld his determination of liability but reduced the damages awarded to the plaintiff franchisees from $16.4 million to $10.9 million.

Facts

Dunkin' Donuts had been a presence in Quebec since 1961 and was the industry leader in that province until the mid-1990s when Tim Hortons began to assert its dominance. In 1996, the franchisees complained to the franchisor that it was not attentive to their needs and, in particular, that it was not providing the support and collaboration needed to combat the new competition. The situation continued to worsen and in 2000 a group of franchisees wrote to the franchisor asking that a new plan of action be put in place to remedy the situation. The franchisees took the position that the failure of the franchisor to invest the money, time and resources necessary to protect and increase the trademark's image and value was resulting in the collapse of the brand in Quebec.

The franchisor responded by implementing a plan centred around the renovation of individual stores. The plan outlined the anticipated cost that would be incurred by participating franchisees as well as the financial contribution the franchisor would make to each participating franchisee. In exchange, participating franchisees were

required to sign a general release that would prevent them from asserting any and all claims against the franchisor.

The renovation plan failed. In the face of intensifying competition from Tim Hortons, many franchisees closed up shop. In 2003, 21 franchisees commenced the underlying action claiming damages for breach of contract and resiliation (termination) of the franchise and lease agreements then in force. After a 71-day trial, Justice Tingley of the Quebec Superior Court allowed the franchisees' claim in its entirety, resulting in the award of $16.4 million. Needless to say, the franchisor appealed.

The Decision of the Court of Appeal

The Court of Appeal upheld Justice Tingley's interpretation of the obligational content of the franchise agreements and his conclusions regarding both the franchisor's breach of those obligations and the causal link between the franchisor's fault and the damages suffered by the franchisees. The franchisor's obligations rested on three foundations. First, the express language of the franchise agreements supported the view that the franchisor, "in connection with the long-term, collaborative relationship that the parties established … would protect and enhance the value of the brand, beyond the time of the franchise start-up, through the assistance it provided to individuals and by ensuring that franchisees across the network maintain and improve standards of cleanliness and quality" (¶ 55).

Secondly, the Court of Appeal agreed with Justice Tingley that the franchisor's obligations flowed not only from the language of the franchise agreements but were implicit in the nature of the franchise arrangement as contemplated by article 1434 of the *Civil Code*. The Court stated:

> [64] Given the role the Franchisor assigned to itself in overseeing the on-going operation of the network and the uniform system of standards, it is fair to characterize the obligation of means to protect and enhance the brands as a "complement neccessaire" of the contracts due to their nature. It was thus appropriate, in my view, for the judge to infer that the Franchisor had implicitly agreed to undertake reasonable measures to help the franchisees, over the life of the arrangement, to support the brand. This included a duty to assist them in staving off competition in order to promote the on-going prosperity of the network as an inherent feature of the relational franchise contract.

The Court also agreed with the trial judge in his reliance on the Court of Appeal's earlier decision in *Provigo Distribution inc. v. Supermarche A.R.G. inc*, [1998] R.J.Q. 47, in support of "an implicit obligation of good faith which, in connection with the present franchising arrangement, buttressed the obligation to protect and enhance the brand based on the parties presumed intent" (¶ 69). Thus, the franchisees were entitled to rely on the franchisor to take reasonable measures to protect them from the market challenge presented by Tim Hortons (¶ 72). The trial judge's reliance on *Provigo* was not an extension of the implied duty of good faith discussed in that case but simply the "application of established law to a new set of facts" (¶ 76).

Importantly, the Court of Appeal agreed that the duty to protect and enhance the brand is a contractual duty owed to the whole network, adding that, "[b]y imposing duties on franchisees to keep their stores clean, to use approved products to ensure uniform quality, to keep stores open for long hours, and to contribute to the advertising fund, to cite some examples, the Franchisor also implicitly undertook to the group that it would take reasonable measures to ensure that all these obligations would be respected" (¶ 78). The undertaking to take reasonable measures to protect and enhance the brand formed part of the agreement each franchisee relied upon when he or she agreed to become a member of the system (¶ 80). That is, the franchisor held out to each franchisee as an inducement to join the network that the brand was something of value. In denying that it had a duty to protect and enhance the brand, "the judge rightly saw the Franchisor as going back on its word in each individual contract by denying the very existence of the cause of the arrangement" (¶ 81). This implicit obligation was most evidently expressed in the unstated duty to see that delinquent franchisees were called to account. The failure to take action against "bad apples" in the system was a breach of the implied duty to support the brand (¶ 82).

The Court of Appeal rejected the franchisor's assertion that the trial judge effectively imposed on it an obligation to guarantee the franchisees' success or to insulate them from competition. The Court agreed that the terms of the contract did not impose any such obligation. However, as the Court pointed out, the trial judge did not come to that conclusion. Rather, Justice Tingley found that the franchisor was under an obligation of means, not an obligation of results (¶¶ 89-96). The Court of Appeal also rejected the franchisor's argument that the trial judge failed to apply the

business judgment rule, which precludes the court from second-guessing business decisions made in good faith even when those decisions fail to bring about the desired result. The Court noted that the rule is "usually applied in matters relating principally to the personal responsibility of directors and officers to shareholders and not as a means of exculpating a corporate contracting party from liability for fault under a contract with third parties" (¶ 101). Thus, the rule had no application to the facts of the case.

The Court of Appeal also agreed that the releases signed by those franchisees that chose to participate in the renovation plan were null. The trial judge found that the releases were obtained by misrepresentation, which vitiated the franchisees' consent. That was a finding of fact and was owed deference. The franchisor failed to establish any palpable and overriding error on that point that would allow the Court of Appeal to intervene (¶ 138). Having found that Tingley J. was correct in finding the franchisor at fault, the Court concluded that he did not err in finding as a matter of fact that the fault caused the franchisees' loss (¶¶ 123-131).

The Court of Appeal did, however, disagree with Tingley J.'s assessment of damages. First, the trial judge erred in his calculation of damages for lost profits through an inexact application of the appropriate limitation period, which resulted in an over-inclusion of three months' lost profits in the amount of $248,000 (¶ 174). Second, the trial judge erred by not setting off the royalty and other payments due under the franchise agreements against those losses up to the date the agreements were resiliated. The trial judge's reference to "fundamental breach" did not relieve the franchisees from their obligations under the agreements. The award was therefore reduced in the amount of $899,528 on that account (¶ 178). Third, the trial judge erred in fixing damages in an amount equivalent to 100% of the growth achieved by Tim Hortons as a comparable business in that industry sector. By assessing damages at the 100% mark, the trial judge failed to take into account the competition that Dunkin' Donuts franchisees would have faced even if the franchisor had not been at fault, including the competitive advantage Tim Hortons had by virtue of their "drive-thru" service. Damages were accordingly discounted to 75% of Tim Hortons' rate of growth (¶ 191). Overall, the damages under this head were reduced from $7.36 million to $4.37 million.

As to damages for loss of investments, the Court of Appeal held that the quantum should similarly be based on 75% rather than 100% of Tim Hortons' growth. In addition, franchisees that received a contribution under the renovation plan were required to reimburse the franchisor. Having been fully compensated for the lost investment of a renovated store, the trial judge should have deducted the franchisor's contribution to avoid double recovery (¶¶ 214, 215). Taking these factors into consideration, the damages awarded were reduced from $9.05 million to $6.54 million (¶ 224). The resulting global award of $10.9 million was to be divided among the plaintiff franchisees in accordance with the Court's reasons (¶ 225). The Court also affirmed Tingley J.'s order regarding the costs of the trial and ordered the franchisor to pay 75% of the plaintiffs' costs of the appeal.

Conclusion

The decision in *Dunkin' Brands Ltd.* is of significance to franchisors, franchisees and their counsel in Quebec as it clearly articulates an implied obligation on the part of the franchisor to take reasonable measures to protect and enhance the brand, particularly in the face of competitive pressure. The contractual performance standards imposed on franchisees and the representation that the rights to the brand they are purchasing are of value give rise to a corollary duty on the franchisor to support and enhance the system. This includes taking effective action against those franchisees that fail to meet required performance standards. While the franchisor is not required to guarantee success, it cannot take a "business as usual" approach in the face of increased competition, declining market share and poor franchisee performance.

The import of the decision outside of Quebec is unclear. The implied obligation to take reasonable measures to protect and enhance the brand flowed from the *Civil Code of Quebec* and the presumed intention of the parties based on the particular language of the franchise agreements at play. Whether this duty, or some variant of it, can or will be adopted outside of Quebec remains to be seen. What can be said is that franchisors must develop proactive responses to brand erosion and declining market share due to aggressive competition. The conclusions drawn by the Court of Appeal emphasize the need to be diligent in dealing with delinquent franchisees as a means of supporting the system and protecting and enhancing the value of the brand. A failure

to meet these obligations could expose a franchisor to liability along the lines discussed in this case.

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Penalties that do not Punish: Administrative Monetary Penalties under the Canadian Anti Spam Legislation

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University of Toronto philosophy professor Joseph Heath argues for a reinstatement of rationality in social and political discourse in his new book, *Enlightenment 2.0*.[1] This book provides modern examples of statements by politicians that are not based on proper factual or logical foundations.

We could use some rational logic in the world of administrative monetary penalties. The new Canadian Anti Spam Law, (CASL)[2] is enforced by a maximum administrative penalty (AMP) of $1,000,000 in the case of an individual, and $10,000,000 in the case of any other person. AMPs defy logic in two significant ways.

First, CASL states explicitly under the heading of "Administrative Monetary Penalties", "Violations" and the "purpose of penalty" that "the purpose of a penalty is to promote compliance with this Act and not to punish."[3] The proposition that penalties do not punish not only defies logic but also violates basic rule of the English language. Penalty is defined as "A punishment imposed for breaking a law, rule, or contract."[4]

Secondly, the scheme defies logic by setting the amount of the penalty before submissions are made on the threshold issue of liability for the alleged violation.

This note submits that there is a way to resolve the logical paradox of penalties that do not punish, based on the distinction between "prices" as contrasted to "sanctions". This conceptual distinction was articulated over 20 years ago by Robert Cooter in his article "Prices and Sanctions"[5]

(A) REPUTATIONAL DAMAGE CAUSED BY A NOTICE OF VIOLATION

A recent example under CASL is the issuance by the Canadian Radio-television and Telecommunications Commission's (CRTC) of a notice of violation to Compu-Finder on March

[1] Joseph Heath, *Enlightenment 2.0: Restoring Sanity To Our Politics, Our Economy, and Our Lives*, HarperCollins Publishers. See the review by Benjamin Leszcz, National Post April 25, 2014, http://news.nationalpost.com/arts/books/book-reviews/enlightenment-2-0-by-joseph-heath-review

[2] *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*, S.C. 2010, c. 23, Assented to 2010-12-15 (CASL).

[3] CASL section 20 (2).

[4] http://www.oxforddictionaries.com/definition/english/penalty

[5] Robert Cooter, "Prices and Sanctions" (1984), 84 Col. Law Rev. 1523.

5, 2015 assessing the penalty to be $1.1 million. The e-mails sent by Compu-Finder promoted training courses to businesses.[6]

The assessment of a $1.1 million penalty "front loads" the scheme by putting the penalty cart before the liability horse. CASL does provide a mechanism to contest the Notice of Violation, which shall "inform the person that they may make representations to the Commission within 30 days after the day on which the notice is served or any longer period set out in the notice, and set out the manner for making the representations."[7]

The front loading of the penalty (before liability is confirmed by the Commission) creates the possibility of reputational damage being caused to an entity that is "not guilty" of the violation.

In a statement, Manon Bombardier, chief compliance and enforcement officer with the CRTC said Compu-Finder " . . . flagrantly violated the basic principles of the law by continuing to send unsolicited commercial electronic messages after the law came into force to e-mail addresses it found by scouring web sites. Complaints submitted to the Spam Reporting Centre clearly indicate that consumers didn't find Compu-Finder's offerings relevant to them. By issuing this Notice of Violation, my goal is to encourage a change of behaviour on the part of Compu-Finder such that it adapts its business practices to the modern reality of electronic commerce and the requirements of the anti-spam law."[8] I am not being critical of Ms. Bombardier for making this statement, as this is clearly her mandate, but rather my comment is directed at the structure of AMPs themselves, which put the penalty cart before the liability horse.

The headline of one media story following this case declared "Quebec company hit with $1.1 penalty under CASL."[9] I am not faulting the author of the story who properly pointed out that "Compu-Finder has 30 days to submit written representation to the CRTC, or pay the penalty. It also has the option of requesting an undertaking with the CRTC — a form of settlement under the legislation to which the CRTC would have to agree."[10]

What I do take issue with is the mechanism in CASL of setting the magnitude of the penalty in advance of the making of representations. AMPs defy logic by assessing a penalty before there is a finding of liability. Suppose for the sake of argument that Compu-Finder has a valid due diligence defence. A person must not be found to be liable for a violation if they establish that they exercised due diligence to prevent the commission of the violation.[11] If a person makes representations in accordance with the notice, the Commission must decide, on a balance of probabilities, whether the person committed the violation and if there is a valid

[6] CRTC Notice of Violation, http://www.crtc.gc.ca/eng/archive/2015/vt150305.htm
[7] CASL section 22(2) (d).
[8] Jennifer Brown, "Quebec company hit with $1.1-million penalty under CASL" , March 9, 2015, In House, Canadian Lawyer Magazine, http://www.canadianlawyermag.com/5499/Quebec-company-hit-with-$1.1-million-penalty-under-CASL.html?utm_source=responsys&utm_medium=email&utm_campaign=CLNewswire_20150309
[9] Jennifer Brown, supra
[10] Jennifer Brown, supra
[11] CASL section 33.

due diligence defence established by the entity, the Commission will find that no violation has been committed.[12]

For the sake of argument, if Compu-Finder had a valid due diligence defence resulting in a finding that they did not violate CASL, the reputational damage arising from headlines referring to million dollar penalties is hard to undo, if not impossible. Moreover, in light of the CASL legislation that permits penalties to be assessed prior to liability, a company that is exonerated would have no legal recourse to recover damages caused to its business reputation.

Imagine if this were the process in regulatory offence procedure whereby the prosecutor announced that a company was charged with violating occupational health and safety law and in the same breath stated that the fine would be $1.1 millions. For a more extreme example, imagine a prosecutor stating to the media before a trial commenced that the sentence for a person charged with fraud should be seven years in the penitentiary. Such conduct would violate the presumption of innocence. Therein lies a key distinction. Administrative monetary penalties are not offences and do not attract *Charter* protection.

Many cases confirm that large penalties, indeed very large penalties, can qualify as administrative monetary penalties governed by administrative law principles, free from the requirements of s. 11 of the Charter: *United States Steel Corporation v. Canada (Attorney General);* [13] *Rowan v. Ontario Securities Commission;* [14] *Lavallee v. Alberta (Securities Commission);*[15] and *R. v. Guindon.*[16] The *Guindon* case was heard by the Supreme Court of Canada concerning a constitutional challenge to the AMPs scheme in the *Income Tax Act*. The case was heard in December of 2014 and judgment is under reserve.

(B) PENALTIES THAT DO NOT PUNISH; PRICES VERSUS SANCTIONS

As noted earlier, CASL states explicitly that "the purpose of a penalty is to promote compliance with this Act and not to punish."[17] .

The legislated concept that penalties are not meant to punish violates rationality on many different levels. First, it violates the English language. The CASL legislation operates in a parallel universe where penalties do not punish. This is truly a bizarro world where everything that you thought was the case, in fact is the reverse.[18] It is the equivalent of a legislature defining the addition of 2 plus 2 to be 5 and not 4. The problem with the legislative intervention in English rules or mathematical rules is that it throws into doubt all of the other English and mathematical rules.

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[12] CASL section 25.
[13] *United States Steel Corporation v. Canada (Attorney General);* 2011 FCA 176.
[14] *Rowan v. Ontario Securities Commission,* 2012 ONCA 208.
[15] Lavallee v. Alberta (Securities Commission), 2010 ABCA
[16] *R. v. Guindon*, [2013] 5 C.T.C. 1, 2013 FCA 153.
[17] CASL, section 20(2).
[18] Seinfeld: Season 8, Episode 3; The Bizarro Jerry (3 Oct. 1996)
Elaine meets Kevin's friends and feels likes she's entered the world of Bizarro Jerry where her world is in reverse.

On a second level, the concept that penalties are not meant to punish undermines the very concept of deterrence that the legislature intended. If the penalties do not punish, how can they deter conduct? If penalties do not punish, is there not a danger that they become a mere licence fee to do business?

This note submits that there is a way to resolve the logical paradox of penalties that do not punish, based on the distinction between "prices" as contrasted to "sanctions". This conceptual distinction was articulated over 20 years ago by Robert Cooter in his article "Prices and Sanctions."[19]

Cooter suggests a "simple" test for deciding whether a law creates a sanction or a price: "Sanctions increase with the need for deterrence, as indicated by the actor's state of mind, whereas prices increase with the amount of external harm caused by the act, which is invariant with respect to the actor's state of mind."[20] Cooter provides an example to illustrate the difference in these concepts. A parking ticket does not increase with subsequent infractions. One could choose to park every day on the street and pay the ticket, rather than parking in a private lot. Parking tickets are "prices".[21] By way of contrast, drunken driving is enforced by "sanctions" that increase with subsequent violations. As a society we condemn drunken driving because of the potential that it may kill people, and there is a strong need for deterrence based on escalating penalties including mandatory jail sentences for subsequent offences.

AMPs could be rationalized as being "prices" rather than "sanctions". In this respect, AMPs play a proper role at the lower level of the enforcement pyramid, which can be escalated to the regulatory offence or criminal model where sanctions apply. If this model were adopted, there would be a hard dividing line between AMPs and regulatory and criminal offences, which would not require the twisting of the English language. We need to return to a system that adheres to both linguistic and mathematical rules.[22] Logic dictates that we should accept no less.

[19] Robert Cooter, "Prices and Sanctions" (1984), 84 Col. Law Rev. 1523.
[20] Ibid., at pp. 1537-38.
[21] Ibid., at p. 1551.
[22] For a proposed pyramid model of AMPs, see Archibald, Jull and Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Canada Law Book, 2014 updated annually).

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Mohan Test No Longer the Law on Experts Evidence

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Expert evidence is presumptively not admissible as experts are called to give opinions and not to testify as to facts they themselves perceived. More generally the impression of authority - experts are usually impressive professionals - is taken to create a risk that the expert's opinion will be given excessive weight.

As a result expert evidence is admissible but only on the fulfillment of conditions precedent intended to minimize the danger of overweight and limit such evidence to when it is strictly necessary.

In recent years the precise conditions precedent to the admission of expert testimony have been uncertain.

The Supreme Court decision in *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23 clarifies and largely rewrites the law on admissibility of expert evidence.

Following *R. v. Mohan,* [1994] 2 S.C.R.9 the law was usually taken to say that expert evidence should be admitted based on four criteria:

- It must be relevant,
- necessary to assist the trier of fact,
- should not trigger any exclusionary rules, and
- must be given by a properly qualified expert.

The Ontario Court of Appeal in *R. v. Abbey,* 2009 ONCA 624 proposed a new test involving a two step process.

First the *Mohan* criteria are considered and, if met the Court is to decide if the benefits of the proposed evidence outweigh the danger of prejudice inherent in expert testimony.

White Burgess Langille Inman v. Abbott and Haliburton Co adopts the *Abbey* test as the law and makes clear that the admission of expert testimony is a two step process:

> "[23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: *J.-L.J.*, at paras. 33, 35-36 and 47; *Trochym*, at para. 27; Lederman, Bryant and Fuerst, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance: *Abbey* (ONCA), at para. 82; *J.-L.J.*,

> at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: *D.D.*, at para. 57; see D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 209-10; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290, at para. 13; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, at para. 72.
>
> [24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J.-L.J.*, Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para 47. Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76."

Beyond establishing a new test for the consideration of expert evidence the Supreme Court added an impartiality requirement for experts at the first step of the new two part test. In effect the criteria from *Mohan* have been expanded to include an impartiality requirement. The Court holds:

> "[53] In my opinion, concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the *Mohan* framework: S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed. (loose-leaf)), vol. 2, at s. 12:30.20.50; see also *Deemar v. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97, at para. 21; Lederman, Bryant and Fuerst, at pp. 826-27; *Halsbury's Laws of Canada: Evidence*, at para. HEV-152 "Partiality"; *The Canadian Encyclopedic Digest* (Ont. 4th ed. (loose-leaf)), vol. 24, Title 62 — Evidence, at §469. A proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert. Situating this concern in the "properly qualified expert" ensures that the courts will focus expressly on the important risks associated with biased experts: Hill, Tanovich and Strezos, at s. 12:30.20.50; Paciocco, "Jukebox", at p. 595."

The *Mohan* test is no longer the law. The more elaborate and arguably more discretionary approach suggested in *Abbey* has now been adopted as the law in Canada. All litigators must know the new test.

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Ontario Court of Appeal Decides Ostrander Wind Farm Project and Sends Dispute Back to the ERT

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On April 20, 2015, in an important decision for stakeholders in the Ontario renewable energy industry, the Ontario Court of Appeal overturned[2] the Divisional Court of Ontario's February 2014 decision,[3] which had reinstated a Renewable Energy Approval (REA) previously revoked by the Environmental Review Tribunal (ERT). The REA was for the construction and operation of a wind farm in Prince Edward County. The Ontario Court of Appeal held that the ERT's decision – that "serious and irreversible harm" would befall the Blanding's turtle as a result of the project – was reasonable, but that the ERT's decision on the appropriate remedy to grant in the circumstances – revoking the REA – was unreasonable. On that basis, the Ontario Court of Appeal remitted the issue of remedy back to the ERT to decide. As a result, although the REA has now gone through three levels of judicial consideration – the ERT, the Divisional Court and the Ontario Court of Appeal, only to be sent back to the ERT to be dealt with again – the status of the REA issued by the Ministry of the Environment, who originally approved of the project, remains unresolved.

Background

In December 2012, the Ontario Ministry of the Environment and Climate Change (Ministry) issued a REA, authorizing Ostrander Point GP Inc. (Ostrander) to construct and operate nine wind turbines on a site in Prince Edward County (the Project). In its July 2013 decision,[4] the ERT revoked Ostrander's REA. The ERT's decision was based solely on its determination that the Project would cause serious and irreversible harm to the Blanding's turtle, an endangered species, which had been identified in the area. All other grounds of appeal (i.e., alleged impacts to human health and to other animal and plant species) by the Prince Edward County Field Naturalists (PECFN) and the Alliance to Protect Prince Edward County (APPEC) were dismissed by the ERT.

The ERT's decision was significant in that, of the many appeals to the ERT seeking to overturn the issuance of a REA for a wind farm, it was the first appeal in which a REA was revoked. The Divisional Court's decision, which overturned the ERT's decision and reinstated the REA, was also significant since the Divisional Court generally defers to the ERT as expert in environmental matters and will not overturn ERT decisions lightly. Please see our previous Osler Update[5] which discussed the details of the Divisional Court's decision.

PECFN Appeal to the Ontario Court of Appeal

Having lost before the Divisional Court, PECFN sought leave to appeal to the Ontario Court of Appeal. Pending the Court's decision on the leave to appeal application, PECFN also sought a stay of the reinstated REA. The Court of Appeal granted the stay[6] in March 2014, holding that the issues raised on the proposed appeal were issues of broad public implication in the field

of environmental law, and also granted leave to appeal. Ostrander cross-appealed, claiming the Divisional Court erred in dismissing its fresh evidence application.

Standard of Review – Deference to the ERT – a Key Issue for the Ontario Court of Appeal

According to the Court of Appeal, the main issue on appeal was whether the Divisional Court identified the appropriate standard of review and applied it correctly. The Divisional Court had identified the correct standard of review – whether the ERT's decision was "reasonable" – and had correctly noted that it could not review the ERT's findings of fact because the right of appeal under the governing statute, the *Environmental Protection Act* (the EPA), was confined to questions of law. However, according to the Court of Appeal, the Divisional Court erred in its application of this standard of review by failing to accord the Tribunal proper deference.

The Court concluded that "[o]n appeal the question for the court is whether the Tribunal's decision is reasonable. In determining whether the decision is reasonable, the reviewing court is concerned with 'justification, transparency and intelligibility' of the Tribunal's reasons … It is sufficient if the Tribunal's reasons serve the purpose of showing that the result falls within a range of possible reasonable outcomes."

***"Serious and Irreversible Harm"* to the Blanding's Turtle**

In applying the standard of review, the Court of Appeal overturned each reason given by the Divisional Court for concluding that the ERT's decisions that Blanding's turtle would suffer "irreversible harm," was unreasonable. In doing so, the Court of Appeal upheld the ERT's decision that "serious and irreversible" harm would be caused to the Blanding's turtle.

Firstly, the Court of Appeal disagreed with the Divisional Court's conclusion that the ERT erred in failing to separately consider whether the Project would cause "irreversible" harm to the Blanding's turtle. The ERT had already found that the harm would be "serious" because there would be an increase in the Blanding's turtle mortality; the "only real question for the Tribunal to decide was whether the increase in mortality resulting from the roads would be irreversible." The Court of Appeal found that the ERT's reasons, as a whole, were entirely focussed on the question of irreversibility and there was no need for the ERT to separately analyze what was evident and not disputed: whether the harm was also serious.

Secondly, the Court of Appeal rejected what it saw as the Divisional Court overstepping its bounds by conducting its own assessment of the expert evidence before the Tribunal on the size of the population impacted, the extent of the road mortality currently experienced at the site, the current vehicular traffic on the site, and the increase in vehicular traffic that could result from the Project. As the Court stated, the "assessment of" the expert evidence "was a matter for the Tribunal, not the Divisional Court."

Ultimately, the Court of Appeal decided that the ERT's reasons for accepting the opinions of certain experts were intelligible, and the ERT's conclusion that there would be "serious and irreversible harm" to the Blanding's turtle "falls within the range of reasonable outcomes and should not be disturbed."

The ESA Permit

The Court of Appeal also overturned the Divisional Court's analysis that the ERT had erred in failing to attach proper weight to Ostrander's Ministry of Natural Resources (MNR) permit for the Project which had previously been obtained under the Ontario *Endangered Species Act* (the ESA), and failing to adequately explain the conflict between the MNR's decision to issue the ESA permit (which permitted harm to the Blanding's turtle)[7] and the ERT's own conclusion to revoke the REA.

The Court of Appeal accepted the ERT's rationale that there was no conflict because the ESA permit merely addressed the issue of whether the Project would result in an "overall benefit" to the Blanding's turtle province-wide, whereas in examining the question of irreversible harm under the EPA, the ERT was looking at a much smaller scale of population and local area impacts. The Tribunal, in "carrying out its distinct statutory mandate under s. 145.2.1(2) of the EPA," was entitled to (and did), "exercise… its independent judgment and [find] that the evidentiary value of the permit was outweighed by the expert evidence introduced."

However, the ERT's rationale, as accepted by the Court of Appeal, raises a concern for future projects as to whether the mere existence and need for an ESA permit issued by the MNR (which is issued on the basis of overall benefit, recognizing local impact to a species at risk) could serve as the supporting basis for an argument before the ERT that serious and irreversible harm will occur to a local and smaller-scale population subset of the species. Given that ESA permits are required separately from REAs and referenced in the terms and conditions of REAs themselves, there remains a concern regarding the appearance of a conflict between these two regulatory regimes.

Cross Appeal – Ostrander's Fresh Evidence Ought to have been Permitted

The Court of Appeal upheld Ostrander's cross-appeal to introduce fresh evidence relating to the steps Ostrander had taken, after the ERT's decision, to lease certain property within the Project site from the MNR to allow Ostrander to prohibit public access to the roads in that area (thereby reducing turtle mortality). The Court held that the Divisional Court applied the fresh evidence test too strictly, and disagreed with its conclusion that Ostrander could have led the fresh evidence before the Tribunal had it exercised due diligence. The Court recognized that the parties were not in a position to address remedy (to which the fresh evidence was relevant) without knowing the ERT's decision on its merits. The Court of Appeal confirmed that "Ostrander could not reasonably have been expected to address the appropriate remedy in relation to each of the many different attacks mounted" by PEFCN and APPEC.

The ERT's Approach to Remedy was not Reasonable

In determining that the ERT erred in simply revoking Ostrander's REA, without any analysis or submissions from the parties on remedy, the Court of Appeal focussed on the unintelligible nature of the ERT's reasons on remedy, and on its denial of procedural fairness to Ostrander and the Ministry – i.e., that these parties were not given the chance to address remedy after learning of the Tribunal's decision on the merits.

The Court stated: "… it is clear the Tribunal either adopted a limited view of its remedial power or considered that it lacked the information necessary to exercise it. Whether one or

the other, the Tribunal should have provided the parties with the opportunity to address remedy. …"

The Court explained that in a REA appeal such as this, "given the broad and varied range of attacks launched against the REA, it was not realistic to expect the parties to address the appropriate remedy at the end of the hearing of the merits without knowing what the Tribunal's findings were in regard to the broad range of alleged harms. Without the contributions of the parties on the question of remedy, it is not surprising the Tribunal found itself "not in a position" to consider the full range of remedial options."

Although the Court of Appeal agreed with the Divisional Court that the ERT erred in the way it decided the remedy in this case, it declined to decide the issue of remedy itself, preferring to send the matter back to the ERT for determination.

Significance of Decision

The Court of Appeal decision is significant in that it confirms the following:

- Deference should be given by the courts to ERT findings of fact, both on judicial review and statutory appeal.

- The ERT has broad remedial powers on appeals from decisions of the Director, and is not confined to simply accepting or striking down the Director's decision.

- In complex ERT appeals such as those challenging a REA, the ERT may be required to conduct a bifurcated hearing – first making a decision on the merits, and second, as a matter of procedural fairness, allowing the parties to lead additional evidence and make additional submissions as to remedy. Failure by the ERT to afford the parties procedural fairness as to remedy may justify overturning its decision.

- On appeal from the ERT to the Divisional Court, the court should not apply the fresh evidence rule too strictly and should permit the introduction of new evidence which could have been submitted to the ERT on remedy, had the ERT conducted its hearing fairly.

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[2] *Prince Edward County Field Naturalists v. Ostrander Point GP Inc.*, 2015 ONCA 269 (see http://www.ontariocourts.ca/decisions/2015/2015ONCA0269.htm)

[3] *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*, 2014 ONSC 974 (CanLII) (see http://www.canlii.org/en/on/onscdc/doc/2014/2014onsc974/2014onsc974.html)

[4] *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*, Case Nos.: 13-002/13-003 (see http://www.osler.com/uploadedFiles/APPEC-v-Director-MOE-ERT.pdf)

[5] http://www.osler.com/NewsResources/Divisional-Court-Overturns-Environmental-Review-Tribunal-Decision-and-Allows-Wind-Project-to-Proceed/

[6] *Prince Edward County Field Naturalists v. Ostrander Point GP Inc.*, 2014 ONCA 227 (CanLII) (see http://www.canlii.org/en/on/onca/doc/2014/2014onca227/2014onca227.html?resultIndex=5)

[7] This ESA permit expressly allowed Ostrander to "kill, harm, harass, capture, possess and transport Blanding's Turtle," subject to certain conditions set out in the permit.