

The IP/Competition Law Interface Updated

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In the second phase of a planned two-phase revision process, the Canadian Competition Bureau released its draft Intellectual Property Enforcement Guidelines (“Draft IPEGs”) for comment by the legal and business communities on June 9, 2015. The Draft IPEGs are the first major revision to the Bureau’s 2000 *Intellectual Property Enforcement Guidelines* and follow the Bureau’s more modest September 2014 revision that updated the 2000 guidelines chiefly to reflect changes in the *Competition Act* since 2000. Going beyond the 2014 update, the Draft IPEGs are a thorough-going update to the Bureau’s analytical framework concerning intellectual property issues in light of the last decade and a half of developments, with particular emphasis on issues of reverse payments in patented medicines disputes, product-switching, patent assertion entities, and standard-essential patents.

Confirmation of Existing Approach - Mostly

1. “Mere Use” and “Non-Use”

As with the 2000 and 2014 IPEGs, the Draft IPEGs confirm the Bureau’s recognition that intellectual property and competition laws are complementary. Again, as with the earlier IPEGs, the Draft IPEGs confirm that “something more” than the “mere exercise” of an intellectual property right is necessary to warrant the scrutiny of the Competition Bureau under the *Competition Act*’s general provisions. In this context, “mere exercise” means either the owner’s own use or the owner’s unilateral exclusion of others from using the intellectual property. This much is consistent with the 2000 IPEGs. However, the Draft IPEGs also contain an important change to the “mere exercise” approach of the 2000 IPEGs. Like last year’s updated IPEGs, the Draft IPEGs indicate that an owner’s *non-use* of an IP right could be more than the “mere exercise” of that IP right. Thus, the Draft IPEGs assert that such non-use of an IP right could be the basis of a Bureau enforcement action, particularly in the context of alleged “products switching”. (We discuss this issue detail in our *Use It Or..... Else: Patent Non-Use as Abuse of Dominant Market Position*.)

2. Criteria for special remedies under the Competition Act

Just as with the earlier IPEGs, the Draft IPEGs state that where the conduct under scrutiny constitutes the “mere exercise” of intellectual property rights (that is, without “something more”), the Bureau will generally not concern itself except in certain exceptional circumstances, as noted below.

Like the earlier IPEGs, the Draft IPEGs note that the Bureau may consider recommending enforcement pursuant to the special intellectual property-related remedy provision under the *Competition Act* in respect of a “mere exercise” of an IP right only if the Bureau is satisfied on two fronts.

- First, that an IP owner’s refusal to license its IP (usually a perfectly legitimate exercise of an owner’s IP right) has adversely affected competition in a relevant market to a substantial degree.
- Second, that invoking the Act’s special remedy against the IP owner is unlikely to stifle future innovation. If both of these criteria are met, the Draft IPEGs confirm that the Bureau may recommend to the Attorney General of Canada that he seek such special remedy from the Federal Court of Canada. The Attorney General can, among other things, ask the court to void an existing license, restrain some or all aspects of the exercise of an existing license or mandate a compulsory license.

Analysis Under Standard Provisions of *Competition Act*

As noted, the Draft IPEGs are consistent with the 2000 and 2014 IPEGs in stating that the Bureau will examine conduct involving “something more” than the “mere exercise” of an IP right under the *Competition Act*’s general provisions – that is, the same provisions that apply in respect of any commercial activity and any type of property over which the Bureau normally has jurisdiction – and not look to the Act’s special remedy provision.

Like both the 2000 IPEGs and their 2014 update, the draft IPEGs contain many examples of how the Bureau will go about analyzing intellectual property rights and their exercise under the *Competition Act*. In general, the analytic approach illustrated by those examples is consistent with the Bureau’s approach under its earlier IPEGs and contain useful illustrations of the Bureau’s analysis, pertaining in particular to exclusive licensing and supply agreements, patent-pooling arrangements and refusal to license IP rights. However, the Draft IPEGs also touch on four new areas, some that have engendered much scrutiny and debate over the last 15 years, namely: (1) arrangements between innovative drug manufacturers and generic manufacturers (including settlements) in the context of Canada’s Patented Medicines Notice of Compliance (“**PMNOC**”) regulations under the *Patent Act*; (2) product-switching; (3) patent assertion entities; and (4) patents that are essential to an industry standard.

1. *PMNOC Arrangements*

The first of these new issues involve the settlement of patent disputes. There has been considerable debate about the issue, particularly in the United States. The key question has been whether a payment to a party seeking to enter into the generic production of a

patented drug by the holder of that patent may be challenged as anticompetitive. The Draft IPEGs indicate that “in the vast majority of cases” the Bureau will consider the implications of settlement of disputes with respect to PMNOC issues under the *Competition Act*’s civil competitor collaboration provision or, in certain circumstances, under the Act’s abuse of dominance provision. In those circumstances, the Bureau will determine whether the PMNOC settlement under scrutiny is likely to lead to a substantial lessening or prevention of competition before it would consider enforcement action in respect of such a settlement. Moreover, the Draft IPEGs confirm that a PMNOC settlement will be reviewed under the Act’s criminal conspiracy provision “only where the intent of the payment was to fix prices, allocate markets or restrict output” and adds that “[t]he Bureau anticipates that such circumstances would occur on a limited basis.” The examples in the Draft IPEGs concerning the analysis of PMNOC settlements suggest that the Bureau will only review such settlements under the Act’s criminal conspiracy provision where, for example, the “Bureau found convincing documentary evidence that both parties [that is, both the innovative and generic manufacturers] recognize that the patent was not valid.”

The examples of the Bureau’s analytic approach to PMNOC settlements also suggest a “safe harbour” of sorts for settlements that both

- permit the generic manufacturer to enter the market with its generic product at the expiry of the innovative manufacturer’s patent (or earlier) and
- do not involve any additional consideration paid by one party to the other.

Where a PMNOC settlement involves additional consideration paid to the generic manufacturer by the innovative manufacturer, the Bureau will look at the magnitude of such consideration to determine whether the intent was to settle the PMNOC litigation or to delay the generic manufacturers entry into the market. If the Bureau determines that the magnitude of the payment was so large that:

- it was probably for the purpose of delaying entry;
- the competitive effects from the generic manufacturer’s delay were significant; and
- timely entry from other generic suppliers was not likely to occur on a scale and magnitude sufficiently to constrain the ability of the parties to the arrangement to exercise market power in the relevant market,

then the Bureau would conclude that the settlement substantially prevented or lessened competition. In such circumstances, say the examples, the Bureau would likely seek

enforcement action under the *Competition Act*'s competitor collaboration provision. As noted, only in extraordinary cases would challenge be brought under the Act's criminal provisions.

2. *Product Switching*

The process of developing and patenting new processes and products is generally a continuing one. An innovator will generally look at ways of improving its process or product and seek to obtain patent protection for that improvement. In the pharmaceutical field, these improvements may include different forms of an existing, patent-protected drug that has improved properties or new method of delivery, *e.g.* timed release. However, the Bureau has noted that this conduct can give rise to adverse effects on competition. In particular, since generic drugs are often dispensed automatically to fill prescriptions for the typically more expensive original brand name product, the substitution of a new version of the original drug, coupled with the withdrawal of the prior version facing generic competition, may deprive the generic of its ability to be substituted and thereby stifle competition.

Recently, the Bureau investigated a case in which an innovator, Alcon Canada Inc., introduced a new version of its drug ("**Pataday**"), but withdrew from the marketplace the older version ("**Patanol**") prior to the expiration of the patent on Patanol. This is sometimes referred to as "product hopping" or "product switching". Following the Bureau's investigation, Alcon re-introduced Patanol into the market place and the Bureau issued a position statement in May 2014 addressing the case and indicating its general approach to analyzing such "life-cycle management" strategies and asserted a right to address such conduct under the general provisions of the *Competition Act*, even though the conduct simply involved refusing to supply a patented product, and supplying a patented product.

The Draft IPEGs include an analogous example to the *Alcon* case. The analysis accompanying the Draft IPEG's product switching example is consistent with the Bureau's position statement on the *Alcon* case. The example suggests that the Bureau would seek, based on expert medical opinion, to determine whether the newly-introduced product provided a "substantive medical benefit" compared to the old product. As there is no indication in the Bureau's position statement on the *Alcon* case that it relied on expert medical advice to determine whether there was a valid business justification for Alcon's withdrawal of Patanol from the marketplace in favour of Pataday, this is arguably a novel element in the Bureau's analytic approach to such questions.

This raises the issue of how an innovative drug manufacturer is to know *ex ante* whether the Bureau's panel of medical experts will determine whether the manufacturer's new product will lead to a "substantive medical benefit". Since medical opinions can differ even in respect of long-standing medical controversies, how medical experts can reach a consensus on the "substantive medical benefit" of a drug which, by definition, is novel is not at all clear.

3. *Patent Assertion Entities*

There has been considerable debate recently on the desirability from a policy perspective of certain types of conduct of patent assertion entities (often disparagingly called “patent trolls”) and their aggressive assertion of their acquired patent rights. The Draft IPEGs do not address these broad policy considerations. Rather, they approach such entities only in the rather narrow context of whether such an entity’s assertion of its patent rights in an indiscriminate manner might comprise the reviewable or criminal practice of making a false or misleading representation to the public. The IPEGs example contemplates a patent assertion entity sending out thousands of notices to businesses stating that it had proof that the recipient was infringing one or more of the patents owned by that entity, and demanding that each recipient pay a licensing fee to avoid litigation. The Bureau’s analysis of these hypothetical facts suggest that if the patent assertion entity did indeed have proof of the alleged infringement, no *Competition Act* provision would be engaged. Likewise, if the evidence showed that the patent assertion entity was sending such infringement notices to businesses indiscriminately, or was indifferent to whether the representations were misleading, then the misrepresentations might be seen to have been made knowingly or recklessly and could raise concerns under both the reviewable matters and criminal provisions the Act.

While helpful in making clear one way in which the Bureau will look at the conduct of patent assertion entities, few familiar with those provisions of the Act would find much new in this example and its related analysis.

4. *Standard Essential Patents*

Technological standards arise through developments under the auspices of formal standard development organizations (“SDOs”) or through other means such as government action or the rise of a *de facto* standard through operation of market forces. In the context of standard essential patents, the Draft IPEGs recognize that such technical standards can be pro-competitive and lead to such benefits as the lowering of production costs, increases in efficiency and consumer choice, and the fostering of innovation. However, the Draft IPEGs also recognize that standards development can raise competition concerns. These could include reducing price competition, foreclosing innovative technologies and restricting the ability of firms to compete by denying access to the standard or providing access on discriminatory terms. The examples set out in the draft IPEGs provide the Bureau’s analytic approach to so-called “patent hold-up” and “patent ambush” scenarios; scenarios where patent holders reneged on so-called FRAND/RAND (that is, “fair, reasonable and non-discriminatory”) licensing commitments in the context of an SDO, where a patent that was the subject of such commitments was subsequently transferred from the patent holder to a third party; and where a patent holder sought an injunction against a prospective licensee in such a context. The Draft IPEGs make clear that, in general, the Bureau will analyze most

conduct related to standard essential patents pursuant to the Act's abuse of dominance provisions, since "patent hold-ups" and "patent ambushes" necessarily involve "something more" than the "mere exercise" of the patent rights of those engaging in such conduct and are aimed at enhancing their market power through their dishonest dealings with SDOs.

The Draft IPEGs also note that competitors collaborating to set a technical standard in the context of an SDO risk criminal price-fixing allegations if their collaboration extends to the joint discussion of licensing terms and conditions and, even absent such discussion, risks investigation under the Act's civil competitor collaboration provision. In short, the Draft IPEGs make clear that while SDOs can serve pro-competitive functions, competitors must exercise caution when coming together in such a manner.

Conclusion

In general, the Draft IPEGs are a welcome clarification on the Bureau's analytic approach to questions that have come much more to the fore in recent years. That said, and as noted above, the Draft IPEGs raise some genuine and potentially controversial issues. Parties interested in making submissions to the Competition Bureau are invited to do so before August 10, 2015.

Amendments to the *Statutory Accident Benefits Schedule*

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On August 28, 2015, the highly anticipated amendments to the *Statutory Accident Benefits Schedule* (SABS), proposed by the government in the 2015 Ontario budget and in accordance with Bill 15 (*Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*), were filed. The Financial Services Commission of Ontario issued Bulletin A-06/15 on the changes contained in O. Regs. 250/15 and 251/15. According to the Bulletin, the amendments apply only to policies issued or renewed on or after June 1, 2016 and existing contracts remain subject to the current limits until the automobile policy is terminated or renewed.

The most significant changes are:

- **Medical, Rehabilitation & Attendant Care** benefits are combined into a new standard benefit maximum limit of \$65,000 for non-catastrophic cases. For catastrophic impairment claims, the new standard benefit limits are \$1 million. This new standard benefit is available in non-catastrophic cases for 5 years from the date of the motor vehicle accident. In the case of an insured person who was under 18 years of age at the time of the accident, entitlement ceases after the insured person's 28th birthday. These time limits do not apply in catastrophic cases or if the insured bought optional benefits for \$1 million for non-catastrophic impairment or \$2 million for catastrophic impairment as a result of the accident.
- **Optional Benefits** are now available for the new standard benefit to the following maximum amounts: (i) \$130,000 or \$1 million for any one accident for non-catastrophic impairments; and (ii) an optional catastrophic impairment benefit of \$2 million. The 5 year time limit does not apply to optional benefits for \$1 million (non-catastrophic impairment) and/or \$2 million (catastrophic impairment).
- **Catastrophic Impairment Definition** includes new criteria for traumatic brain injuries for adults and children, amputations, ambulatory mobility, loss of vision, and mental and behavioural impairments. There is a new process for combining physical with mental and behavioural impairments to determine whether an insured person is catastrophically impaired.
- **Professional attendant care benefits limited to actual expenses incurred** - If an actual expense incurred for paid attendant care service providers is lower than the monthly amount under the Form 1, then the insurer is liable to pay only for the incurred expense amount.

- **New hourly rate for attendant care** - A new Attendant Care Hourly Rate Guideline reflects the scheduled increase in the minimum wage to \$11.25/hour effective October 1, 2015 for calculations of Level 2 basic supervisory functions. This applies to accidents occurring on or after October 1, 2015.
- **Non-Earner Benefit** duration is now limited to up to a maximum of 2 years following the accident with an initial waiting period of four weeks. It is payable to an insured person who is 18 years or older at the time of the accident.

The anticipated legislative changes will have a significant impact on the purchase and renewal of policies. We anticipate further amendments and it remains unclear whether this will give rise to more or less accident benefit litigation given the amounts in issue are less. However, the Plaintiffs' bar continues to press for increasing benefits. Time will tell.

The Constitutionality of Administrative Monetary Penalties: Defining the Punitive Paradigm

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I have previously written in this Journal about the apparent contradiction between administrative monetary penalties ("AMPs") and the position of some regulators that AMPs are not meant to punish but rather only promote compliance.² The Supreme Court of Canada has recently released its anticipated decision in *Guindon v. Canada*³ on July 31, 2015, which held that administrative monetary penalties ("AMPs") under section 163.2 of the *Income Tax Act* (the "ITA")⁴ are not offences that trigger constitutional protections such as the right to be presumed innocent.

Other AMPs schemes and the punitive paradigm

The door is still open for constitutional challenges to the myriad of other AMPs if they fall within the 'punitive paradigm'. In *Guindon*, the Supreme Court observed that "[a] monetary penalty may or may not be a true penal consequence" and "[i]t will be so when it is, in purpose or effect, punitive."⁵ Where a penalty's purpose or effect is punitive, this will trigger *Charter*⁶ rights. The Court articulated a balancing test to determine whether an outcome is punitive:

"Whether this is the case is assessed by looking at considerations such as the magnitude of the fine, to whom it is paid, whether its magnitude is determined by regulatory considerations rather than principles of criminal sentencing, and whether stigma is associated with the penalty."⁷

Applied to section 163.2 of the ITA, the balancing test led to the conclusion that the penalty in question was administrative in nature and not punitive. An important factor was that section 163.2 utilizes a somewhat mechanical formula for the assessment of the penalty. By

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2 Kenneth Jull, "Penalties that do not Punish: Administrative Monetary Penalties under the Canadian Anti Spam Legislation" Toronto Law Journal (May 2015), http://c.ymcdn.com/sites/tlaonline.site-ym.com/resource/resmgr/Toronto_Law_Journal_2015/Penalties_that_do_not_Punish.pdf.

3 2015 SCC 41 ("*Guindon*").

4 R.S.C. 1985, c. 1 (5th Supp.).

5 *Guindon* at paragraph 76. The Court does not tackle the semantic point that a penalty is defined as "[a] punishment imposed for breaking a law, rule, or contract" (see <http://www.oxforddictionaries.com/definition/english/penalty>). For a comment on this point, see Kenneth Jull, "Penalties that do not Punish: Administrative Monetary Penalties under the Canadian Anti Spam Legislation" Toronto Law Journal (May 2015), http://c.ymcdn.com/sites/tlaonline.site-ym.com/resource/resmgr/Toronto_Law_Journal_2015/Penalties_that_do_not_Punish.pdf.

6 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

7 *Guindon* at paragraph 76.

way of contrast, other administrative regimes identify relevant factors in a manner that is far more similar to relying on principles used in criminal sentencing. Those other regimes will be open to constitutional challenges in the future.

The decision in *Guindon* is somewhat unique in that only four judges of the Court made a determination on the merits. The Court sat in a panel of seven as Justice Côté had not yet been sworn in. The judgment of the four-judge majority was delivered by Rothstein and Cromwell JJ., while the three remaining judges dissented in reasons delivered by Abella and Wagner JJ. The dissenting judges concluded that the absence of notice of a constitutional question to the Attorneys General indicated that the Court lacked the benefit of a full and tested evidentiary record and that it should refrain from deciding the merits of the AMPs issue. It is therefore possible that, in a future challenge to an AMPs scheme where notice is properly given, a fully-constituted Supreme Court might adopt a different test or approach than the one set out in *Guindon* on a more fulsome evidentiary record.⁸

Robust procedural and appeal protections

The Court noted that even though traditional constitutional protections under section 11 of the *Charter* are not engaged by section 163.2 of the ITA, those against whom penalties are assessed are not left without recourse or protection. They have a full right of appeal to the Tax Court of Canada and have access to other potential administrative remedies.⁹ This reference to appeal rights and other remedies sets a high bar for comparing the regime in issue in *Guindon* with other AMPs regimes. To the extent that other regimes do not provide such robust appeal rights and administrative remedies, there may be even further room for a constitutional challenge.

AMPs, knowledge and culpable conduct

The federal ITA contains an array of penalty provisions relating to various types of proscribed conduct.¹⁰ The particular penalty in issue in *Guindon* was the so-called 'tax preparer penalty' contained in subsection 163.2(4) of ITA, which reads:

Every person who makes, or participates in, assents to or acquiesces in the making of, a statement to, or by or on behalf of, another person (in this subsection, subsections

8 See e.g. *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3 at para. 131, where the Court commented as follows:

"[The Supreme] Court's most recent pronouncement on the question of overruling was in [*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609]. Writing for the Court, Justice Binnie first noted at para. 44 that the Court's practice is against departing from precedent unless there are compelling reasons to do so. However, he also recognized that 'while rare, departures [from precedent] do occur'. He further noted that constitutional decisions, including *Charter* decisions, are not immutable and may be overruled, though he held that '[t]he Court should be particularly careful before reversing a precedent where the effect is to diminish *Charter* protection.'"

9 *Guindon* at paragraph 90.

10 Different circumstances may lead to relatively modest fixed monetary penalties (e.g. \$25 per day to a maximum of \$2,500), more serious civil penalties or criminal fines (the limits of which are generally based on a percentage of the tax amount in issue and may equate many millions of dollars), or imprisonment (e.g. for a term not exceeding five years).

(5) and (6), paragraph 12(c) and subsection (15) referred to as the "other person") that the person knows, or would reasonably be expected to know but for circumstances amounting to culpable conduct, is a false statement that could be used by or on behalf of the other person for a purpose of this Act is liable to a penalty in respect of the false statement. [emphasis added]

Ms. Guindon argued that the use of the term "culpable conduct" in subsection 163.2(4) indicates a *mens rea* requirement, which is classically criminal in nature. Some academics have argued that administrative penalties ought not to be used for intentional or reckless conduct but that they should instead be reserved for carelessness or negligence.¹¹ The Court ruled that this is irrelevant to the analysis because the "criminal in nature" test is concerned with the process and the nature of the proceedings, not the conduct that attracts the imposition of the AMP. The Court sets out a wide spectrum of conduct that may be the subject of an AMP:

"While some regulatory penalties are imposed without consideration of the person's state of mind, in other cases it is rational that the state would only wish to impose a penalty on those who engage in misconduct knowingly, recklessly, or with a particular intention. Providing a due diligence defence or including a mental element as a component of the penalty does not detract from the administrative nature of the penalty."¹²

If one applied the above test literally, it is possible to envision an AMP for fraud that would impose a civil penalty for intentional conduct or wilful blindness. I do not think that the Supreme Court intended to suggest with the above wording that an AMP for fraud would be constitutional. Indeed, the Court itself recognized that "[w]ilful, reckless or wanton disregard of the law" refers to concepts well-known to the law, commonly encountered as degrees of *mens rea* in criminal law.¹³

I would argue that in future cases the above wording must properly be read in the context of the four-part balancing test to determine whether a particular AMP is punitive. For example, the combination of an intentionality concept coupled with criminal sentencing-like principles would likely lead to the conclusion that an AMP is punitive in nature.

11 Professor Richard Macrory, *Regulatory Justice: Making Sanctions Effective*, Final Report (November 2006). See Figure 3.1 and Effective Sanctioning System. Also see "Regulatory and Corporate Liability from Due Diligence to Risk Management", (Archibald, Jull & Roach), *Canada Law Book*, Chapter 15.

12 Guindon at paragraph 72.

13 Guindon at paragraph 58.

Whether stigma is associated with the penalty

The Court found that "no stigma comparable to that attached to a criminal conviction flows from the imposition of the penalty."¹⁴ The decision does not elaborate on the reasons for this conclusion. There is no doubt that the stigma from a criminal conviction with the possibility of imprisonment and the imposition of a criminal record is higher than an AMP. Yet the nature of the violation in this case suggests that the stigma would be higher than that associated with some other AMPs. The wording of the section itself, as noted above, requires that the false statement must be made knowingly or in circumstances amounting to culpable conduct. Moreover, the Supreme Court described the conduct at issue in very serious language.

In future cases, the measure of stigma could perhaps be the subject of expert evidence using an appropriate sample size in a future case.¹⁵

A new pyramid

From a public policy perspective going forward, regulators ought to consider a 'rational pyramid' approach to AMPs. The Court in *Guindon* gave the example of parking tickets that can involve relatively small fines: where these are imposed in conformity with the general criminal process (*e.g.* pleading guilty or contesting the fine before a judge, prosecution by a Crown attorney), section 11 rights apply.¹⁶ By way of comparison, the penalty in the *Guindon* case exceeded \$500,000 but did not engage constitutional rights. This type of imbalance in administrative penalties may be characterized as an 'inverted enforcement pyramid' created by the process defined by the legislature. Various bodies have called for reform of these types of penalties and fines.¹⁷ AMPs should be in the mid range of an escalating pyramid of enforcement with clear lines that define the punitive paradigm.

14 *Guindon* at paragraph 84.

15 Robert J. Currie, "The Contextualized Court: Litigating 'Culture' in Canada," (2005) 9 *International Journal of Evidence & Proof* 73 at 91. A very recent decision underlines that judicial notice of cultural factors cannot be made in the absence of expert evidence (See *Quebec (Attorney General) c. 156158 Canada Inc. (Boulangerie Maxie's)* 2015 QCCQ 354 at paragraphs 46-47).

16 *Guindon* at paragraph 64.

17 See *e.g.* Law Commission of Ontario, *Modernization of the Provincial Offences Act*, Final Report (Toronto, August 2011), <http://www.lco-cdo.org/POA-Final-Report.pdf>.

Municipal Law Caught Between Renewable Energy and Public Health: *Wpd Sumac Ridge Wind Inc. v. Corporation of the City of Kawartha Lakes*

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In *Wpd Sumac Ridge Wind Inc. v. Corporation of the City of Kawartha Lakes*,¹ the Ontario Divisional Court ruled that municipalities cannot arbitrarily prohibit the use of roadways explicitly referenced in a Renewable Energy Approval (REA). The decision is undoubtedly good news for wind farm developers and proponents of renewable energy projects in Ontario. The decision is bad news, however, for public health advocates - including municipal governments - urging precaution and local decision-making in the absence of evidence of the public health safety of wind turbines.

Context: Wind Turbine Syndrome and Unwilling Hosts

In September 2010 Wpd Sumac Ridge Wind Inc. (“Wpd”) initiated a project to build and operate five industrial wind turbines (“IWT”); Sumac Ridge is one of the three proposed IWTs in the area. Kawartha Lakes (the “City”), like many other municipalities, is “not a willing host” to wind energy projects.²

An instructive case in point is the Wisconsin municipality of Glenmore, a rural community just south of Green Bay. Last year, Glenmore persuaded its county’s board of health to declare that the sounds of an eight-turbine wind farm pose a “human health hazard.”³ The board’s decision is reportedly the first of its kind, and it lends support to the argument advanced by opponents of wind energy that low-frequency noise and “infrasound” typically undetectable (consciously) by the human ear cause the illness of “wind turbine syndrome.” Reported symptoms of wind turbine syndrome include sleep deprivation, headaches, nausea, and dizziness.

The energy project in question in Wisconsin - the Shirley wind farm owned and operated by Duke Energy - produces 20 megawatts of electricity, which is supplied to the utility Wisconsin Public Service Corp., enough energy to power approximately 6,000 homes.

In 2011, the state requested a study on the reported sound and health issues reported near the Shirley turbines. In 2012, the Public Service Commission of Wisconsin, an independent

¹ 2015 ONSC 4164 (On. Div. Ct.) (CanLII) [“*Wpd v. Kawartha Lakes*”].

² *Ibid* at para. 13.

³ Jeremy P. Jacobs, “Renewable Energy: Wis. ‘health hazard’ ruling could shock wind industry,” E&E News (16 September 2015), online: <<http://www.eenews.net/stories/1060024771>>.

regulatory agency, and Clean Wisconsin, an environmental nongovernmental organization (ENGO), released a study including the findings of four acousticians working from a variety of perspectives and interests, including at various times in the past on both sides of the issue of wind turbine syndrome. The report's primary conclusion reads as follows:

The four investigating [acoustician] firms are of the opinion that enough evidence and hypotheses have been given herein to classify [low frequency noise] and infrasound as *a serious issue, possibly affecting the future of the industry*.⁴

While the report acknowledged the "sparse or non-existent" evidence of wind-turbine-related sickness in the peer-reviewed literature, the report's authors nonetheless "strongly recommend additional testing" at the Shirley farm.⁵

Meanwhile, returning to Ontario, Kawartha Lakes asked the province in 2012 to impose "a moratorium on approvals of IWT projects in Ontario" pending further study of their impacts on human health. Moreover, at a Special Council meeting in February 2013 convened to hear submissions from local residents opposed to wind turbines, City Council adopted a resolution calling on the provincial government to reject the Sumac Ridge Wind Farm Project proposal.⁶

In December 2013, however, the Ministry of the Environment granted Wpd an REA for Sumac Ridge pursuant to the *Green Energy and Green Economy Act*.⁷ Central among the conditions of the REA is the requirement that Wpd conclude a Road Users Agreement with the City, as the use of local roads was at the heart of the REA application.⁸ One road in particular - the Wild Turkey Road - provided most critical and contentious. The City refused to open the Wild Turkey Road for development, and maintains that it "consistently advised [Wpd] that there was no public support for opening the Wild Turkey Road."⁹ Kawartha Lakes also argued that "the requested opening of [the road] would result in a private access road, constructed solely for the benefit of wpd's commercial interests, on public property" with no corresponding public benefit.¹⁰

In March 2014, the City passed a Resolution providing that

... any request by wpd Canada and/or future successors for the use of the unopened portion of Wild Turkey Road for property access and/or

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Wpd v. Kawartha Lakes*, *supra* note 1, at para. 13.

⁷ 2009 S.O. 2009 C.12 ["GEA"].

⁸ *Wpd v. Kawartha Lakes*, *supra* note 1, at para. 14.

⁹ *Ibid.* at para. 16.

¹⁰ *Ibid.*

other vehicular traffic to support proposed wind turbine development be refused ...¹¹

Wpd sought an order quashing the Resolution, and sought further orders directing the City to (i) consider and decide in good faith Wpd's application to upgrade and use the road; (ii) consider and decide in good faith Wpd's applications for permits necessary for the expeditious construction and operation of the Sumac Ridge Wind Project; and (iii) allow the expeditious construction and operation of the project.¹² Wpd later conceded that its third request exceeded the scope of the REA.

The City maintained that its resolution was consistent with its jurisdiction over roads pursuant to the *Municipal Act*.¹³ The City further argued that a standard of review of correctness must be applied to any challenge of a by-law passed in good faith.

The Divisional Court's Ruling: All Roads Lead to the REA

The Court agreed that a correctness standard of review applied, but found that Kawartha Lake's Resolution frustrates the purpose of the REA, and that in passing the Resolution the City acted in bad faith.¹⁴

In its earlier decision in *East Durham Wind Inc. v. West Grey (Municipality)*, the Court found that "the purpose of the *GEA* regime as a whole is to encourage and facilitate the development of renewable energy projects in Ontario, including wind energy projects."¹⁵ Moreover, because an REA issued pursuant to the *GEA* is a legislative instrument, to the extent a by-law conflicts with the REA, that by-law is *ultra vires* and thereby without effect.

Indeed, the *GEA* is itself a complete code in respect of Ontario's renewable energy regime. As the Court found in *East Durham Wind*:

The *GEA* provides a complete regime for carrying out the government's policy in this regard. It features an economic incentive for project developers (the FIT program); a comprehensive approval process to scrutinize the potential effects of each project on the health of humans, plants and animals and to identify any conditions that might be necessary to account for local conditions (the REA); and an appeal process for REAs that utilizes a specialized tribunal (the ERT) and the oversight of the courts on questions of law. *To maintain this streamlined system the ability of municipalities to restrict renewable*

¹¹ *Ibid* at para. 2.

¹² *Ibid* at para. 3.

¹³ S.O. 2001, c. 25.

¹⁴ *Wpd v. Kawartha Lakes*, *supra* note 1, at para. 12.

¹⁵ 2014 ONSC 4669 (Div. Ct.) (CanLII), at para. 37 [*"East Durham Wind"*].

*energy development through various powers under the Planning Act and the Municipal Act has been curtailed.*¹⁶

Because Kawartha Lake's Resolution frustrates the REA issued pursuant to the *GEA*, the Court concluded that the Resolution must be quashed - the *Municipal Act* simply does not allow for conflicts between by-laws and provincial legislative instruments.¹⁷

The Court proceeded to consider whether in passing the Resolution the City acted in bad faith, and found that it has so acted: "The record indicates that the Resolution was intended to accomplish indirectly that which the City had been unable to achieve directly through the REA process: to stop the Sumac Ridge IWT project."¹⁸ Proceeding further, the Court concluded that

Permitting the City to take issue with the use of the WTR at this stage and in these circumstances, given the WTR's centrality in the project and the failure to propose alternative routes during the REA process, would permit the City to launch a collateral attack on the REA and undermine the *comprehensive process* set out in the *GEA*.¹⁹

Conclusion: The Larger Context of Precaution, Subsidiarity, and Sustainability

As Coop *et al.* correctly observe, the Court's decisions in *Wpd v. Kawartha Lakes* and earlier in *East Durham Wind* confirm that "municipalities cannot prohibit access under the guise of their authority over roads pursuant to the *Municipal Act*."²⁰

But there is a larger issue at play here. These cases are not about roads. They are about the public health risks of wind projects in the context of legislative efforts aimed at promoting sustainable development. Despite the number of benefits of wind power generation, especially its ability to reduce overall air and carbon pollution, there remain serious concerns about wind turbines' health impacts on people. Wind energy proponents typically point to absence of evidence linking wind turbines to adverse public health impacts. But the absence of evidence is not evidence absence.

In such cases of scientific uncertainty, notwithstanding the unequivocal urgency of transitioning to a decarbonized and green energy economy, a precautionary approach is plainly required. Section 11 of Ontario's *Environmental Bill of Rights* provides that the Minister shall take every reasonable step to consider the Ministry Statement of Environmental

¹⁶ *Ibid* at para. 37 [emphasis added].

¹⁷ *Wpd v. Kawartha Lakes*, *supra* note 1, at para. 56.

¹⁸ *Ibid* at para. 57.

¹⁹ *Ibid* at para. 72 [emphasis added].

²⁰ Jack Coop *et al.*, "Ontario Court Clarifies Degree to Which Municipality Can Restrict a Wind Developer's Use of Roadways," *Osler* (11 September 2015), online: <<https://www.osler.com/en/resources/regulations/2015/ontario-court-clarifies-degree-to-which-municipali>>.

Values when making decisions affecting the environment. In turn, the Ministry's Statement of Environmental Values obligates the Ministry to use "a precautionary, science-based approach in its decision-making to protect human health and the environment."²¹

Although formulations vary, the core idea animating the precautionary principle is that "where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."²² Some formulations, however, go even further and stipulate that where there is the potential for serious or irreversible harm in the face of scientific uncertainty, the onus of proof ought to shift from a project opponent having to prove harm to the project proponent having to prove safety.²³

However, in the rush to "streamline" the approval process of renewable energy projects under the "comprehensive" *GEA*, it is not clear that the Ministry is living up to its commitment to precautionary, science-based decision-making.²⁴

Just as importantly, the "streamlined" and "comprehensive" process mandated by the *GEA* arguably undermines not only the precautionary principle but also the equally fundamental environmental principle of "subsidiarity," or "the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, *but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity.*"²⁵

Not coincidentally, many of the most promising environmental protection and sustainable development initiatives are occurring at the municipal level (e.g., the Mayors Climate Protection Center; the C40 Cities Climate Leadership Group; the recent gathering of 60 mayors at the Vatican to address climate change; and climate change adaptation planning initiatives throughout the world tend to be developed at the municipal level).

While the Divisional Court's reasoning was properly limited to the road access issue implicated by the conflict between the municipality's by-law and the legislative REA, there is nevertheless an air of unreality swirling through the judgment. The collateral attack the Court refers to in its reasons is of course a reference to the municipality's - and other municipalities' - failure to successfully oppose the REA for wind turbine development on local public health grounds. Municipal decision-making, though perhaps best positioned to mediate

²¹ *Environmental Bill of Rights*, S.O. 1993, c. 28, s. 11.

²² *Bergen Ministerial Declaration on Sustainable Development* (1990).

²³ See e.g. the United Nations Global Compact ("Businesses should support a precautionary approach to environmental challenges"), online:

<<https://www.unglobalcompact.org/abouttheGC/thetenprinciples/index.html>>.

²⁴ See e.g. Jason MacLean, "Throwing the Precautionary Principle to the Wind? Determining the Constitutionality of Ontario's Green Energy Act in *Dixon v. Director, Ministry of the Environment*," *Toronto Law Journal* (January 2015), online: <<http://archive.constantcontact.com/fs158/1107293291635/archive/1119832853882.html>>.

²⁵ *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, at para. 3 [emphasis added].

the increasing tensions among energy projects (both renewable and nonrenewable projects alike), sustainability, and public health, is increasingly hamstrung - particularly in Ontario - by purportedly comprehensive legislative processes at the provincial and national levels. Because these larger processes appear so intent on hastily pushing - "fast-tracking" - project approvals, they tend to neglect if not ignore altogether the salutary aspects of precautionary and local decision-making. While the Court's decision in this case rightly closes the back door of the courts to this debate, given recent developments like those in Glenmore, Wisconsin, the front door of the courts may soon blow wide open.