CITATION: Big Thunder Windpark Inc. v. Her Majesty the Queen in Right of Ontario, 2014 ONSC 3050
DIVISIONAL COURT FILE NO.: 156/14
DATE: 20140516

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

THEN, SWINTON AND LEDERER JJ.

BETWEEN:	
BIG THUNDER WINDPARK INC., BIG THUNDER WINDPARK LP, HORIZON WIND INC. Applicants	*Awanish Sinha, Kosta Kalogiros* and *Michael J. P. O'Brien,* for the Applicants
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO as represented by the MINISTER OF THE ENVIRONMENT Respondent	*Sara J. Blake* and *Sarah E. Valair*, for the Respondent, Her Majesty The Queen in Right of Ontario as represented by the Minister of the Environment
-and -	
FORT WILLIAM FIRST NATION Respondent	*Chantelle J. Bryson, Mikaila M. Greene* and *Nicole D. O. Richmond*, for the Intervenor
	HEARD at Toronto: May 16, 2014

SWINTON J. (ORALLY)

Overview

[1] The applicants seek an order of *mandamus* to compel the Director of the Ministry of the Environment ("MOE") Assessments and Approvals Branch to issue a Renewable Energy Approval ("REA") under s. 47.5 of the *Environmental Protection Act*, R.S.O. 1990, c.E.19 ("*EPA*") in respect of the Big Thunder wind energy project in Thunder Bay. In the alternative, the applicants seek an order to compel the Director to make a decision, as well as various types of declaratory relief.

Relief in the Nature of *Mandamus*

[2] *Mandamus* is a discretionary remedy. It will not be issued unless there is a public legal duty to act and the duty is owed to the applicant (see *Apotex Inc. v. Canada*, [1994] 3 S.C.R. 1100, aff'g [1994] 1 F.C. 742 (F.C.A.) at para. 45 of the Federal Court of Appeal decision).

[3] Subsection 47.5(1) of the *EPA* allows the Director to issue a Renewable Energy Approval "if in his or her opinion, it is in the public interest to do so." Pursuant to s. 47.5(2), the Director may impose terms or conditions if, in his or opinion, it is in the public interest to do so.

[4] It is clearly a matter of the Director's discretion whether to issue an REA, with or without terms and conditions, after a determination whether it is in the public interest. Given there was no clear legal duty on the Director to issue an REA after the request for approval was made, this is not an appropriate case for an order of *mandamus* that would compel the issuance of an REA.

[5] In the alternative, the applicants seek an order to compel the Director to make the REA decision. They claim a legitimate expectation that such a decision would be made within six months of the submission of the application because of a service "guarantee" established by the

Ministry. In the alternative, they argue that a letter of February 11, 2014 from the Approvals Branch shows that the Ministry was satisfied that the Crown's obligation to consult aboriginal people had been met. It is on this basis that the applicants argue that the decision of the Director should have been made.

[6] There is no merit to the applicants' claim of a legitimate expectation that a decision regarding their REA application would be made by October 23, 2013, the end of the six month period. The doctrine of legitimate expectations, where applicable, gives a right to participate in a promised process prior to the making of a decision (see *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services),* [2001] 2 S.C.R. 281 at para. 32). The applicants are not seeking participation rights. Rather, they wish to impose a time limit on the Director to make a decision because of the service standard adopted by the Ministry. However, that standard does not give rise to any enforceable right, as it is not prescribed by a statute or regulation.

[7] Moreover, to give rise to a legitimate expectation there must be a representation by the Ministry. The only representation made directly to the applicants was in a letter dated April 23, 2013. That letter expressly stated that the six month service standard for a decision could be expected, "provided that there are no significant issues raised during the Ministry's review." The Ministry subsequently explained why the decision was not forthcoming on October 23, 2013, in part because of concerns about compliance with the Crown's duty to consult aboriginal people affected by the project.

[8] In the alternative, the applicants argue that the Crown's duty to consult was met by February 11, 2014 and the Director was then obligated to make a decision. It is for the Director

to determine whether the Crown has met the constitutional duty to consult, not this Court at this stage of the decision-making process (see *Beckman v. Little Salcom/Carmacks First Nation,* [2010] 3 S.C.R. 103 at para. 45).

[9] The Director did not proceed to render a decision in March 2014 because the respondent Fort William First Nation commenced applications for judicial review and sought interlocutory injunctive relief, all based on challenges to the adequacy of consultation. In light of these new circumstances, the Director decided to postpone the decision on the REA in the expectation that the interlocutory injunction motion would be heard in a timely manner. In doing so, the Director was not refusing to make a decision, nor did the Director take into account an irrelevant factor.

[10] Consequently, the applicants have failed to show that the Director refused to perform a public legal duty owed to them, and they are not entitled to an order of *mandamus.*

Declaratory Relief

[11] Each party has requested different declarations from this Court. The applicants requested a declaration in their factum that they had complied with their consultation requirement in s. 17 of the *Renewable Energy Regulation*, O. Reg. 359/09. Pursuant to s. 2(1)2 of the *Judicial Review Procedure Act*, R.S.O. 1990, c.J.1 ("*JRPA*"), this Court can give a declaration in relation to the exercise of a "statutory power." The applicants were not exercising a statutory power as defined in s. 1 of the *JRPA* when they engaged in consultation. Therefore, this Court has no jurisdiction to grant the declaration sought respecting the applicants' consultation.

[12] With respect to a declaration concerning the Crown's duty to consult, it is premature for this Court to rule on whether the duty has been met.

Conclusion

[13] For these reasons, the application for judicial review is dismissed.

THEN J.

COSTS

[14] On the issue of costs, the Crown respondent does not seek costs and submits that none should be awarded against the decision-maker.

[15] Counsel for the respondent Fort William First Nation seeks costs in the amount of $100,000 against both the applicants and the Crown. There is, in our view, no basis for costs against the Crown respondent on this application as the Crown supported the position of Fort William First Nation that the application be dismissed.

[16] We are not prepared to ascribe an oblique motive to the Crown to justify an award of costs against the Crown in the circumstances of this case. It is the expectation of the Court that comments with respect to the conduct of opposing counsel may be made but, if made, will be made with the appropriate measure of civility. The tenor of the comments of counsel for the respondent, Fort William First Nation was not helpful.

[17] The applicants submit that no costs should be awarded against them on the basis that Fort William First Nation was not a necessary party and because it was reasonable to expect that the

motion for an injunction would have been brought in a timely manner. However, the applicants consented to have the respondent, Fort William First Nation, added as a party. In our view, it is fair and reasonable to award costs to the respondent, Fort William First Nation in an amount that otherwise would be awarded by this Court in an application of this nature and complexity.

[18] Accordingly, we award costs in the amount of $7,500 all inclusive to the respondent, Fort William First Nation, payable by the applicants forthwith. As I have said, the Crown seeks no costs and none are awarded.

SWINTON J.

THEN J.

LEDERER J.

Date of Reasons for Judgment: May 16, 2014

Date of Release: May 22, 2014

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Applicants

– and –

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO as represented by the MINISTER OF THE ENVIRONMENT

Respondent

-and -

FORT WILLIAM FIRST NATION

Respondent

ORAL REASONS FOR JUDGMENT

SWINTON J.

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