TRILLIUM WIND: CAN DEVELOPERS SUE WHEN GOVERNMENT WIND PROJECTS ARE CANCELLED?

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Across Canada, provincial governments, either directly or through purchasing organizations or government-owned utilities, have been aggressively purchasing wind generation over the last five years.

What happens when the government changes its mind and cancels the project? That situation recently faced Trillium Wind Power Corporation, a Toronto-based developer building offshore wind turbines in Lake Ontario. The company had applied to lease provincial land under Ontario's wind power policy and had been granted Applicant of Record status by the Ministry of Natural Resources.

That status gave Trillium three years to test the wind power. After that, the company could proceed with an environmental assessment and obtain authorization to operate the wind farm.

Trillium subsequently notified the Ontario Ministry of Natural Resources that the company intended to close a $26 million financing for the project. On the same day the Government of Ontario issued a moratorium on offshore wind development including developers like Trillium that had Applicant of Record status. The government issued a press release stating that the projects were canceled pending further scientific research.

Trillium brought a number of claims against the Ontario government seeking $2 billion in damages. The claims included breach of contract, unjust enrichment, negligent misrepresentation, misfeasance in public office and intentional infliction of economic harm.

The province brought a motion to strike the Trillium Statement of Claim on the basis that it did not disclose a reasonable cause of action. The motion was successful. The motion judge found that the government decision to close the wind farms was a policy decision and therefore immune from suit.

The motion judge also found that the fact that Trillium had been granted Applicant of Record status did not amount to a contractual relationship between Trillium and the government. The motion judge concluded that the claim should be struck because it was plain and obvious that the claim could not succeed at trial.

Trillium appealed on two grounds: first,

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misfeasance in public office was a tenable claim as a matter of law; and second, the claim had been adequately pleaded. The Ontario Court of Appeal agreed.[1] It was not clear that the claim of misfeasance in public office would necessarily fail. Moreover, Trillium had properly pleaded that the province's actions were taken in bad faith for improper purpose. The Court also found that the government's decision was made to harm Trillium specifically. While the Court of Appeal did agree with the motions judge that a government decision involving political factors was immune, there was an exception for irrational acts of bad faith.

The facts in this case were unique. It was clear that the Trillium announcement disclosing new financing triggered the government action. And, as the court concluded, the government specifically targeted Trillium.

This is an important case for wind developers. Government contracting for wind is now common. And it is not unusual for governments to change these programs. Nor is it unusual for developers to incur substantial costs in processing their applications.

Successful claims against governments that cancel projects are rare but may increase.

This is the first time the tort of misfeasance in public office has found its way into the energy sector. The tort can be traced back to the English case of *Ashby v. White* in 1703.[2] But the principle was not clearly defined until the House of Lords decision in Three Rivers *District Council v Bank of England* in 2000.[3] The tort came to Canada in 1959 in *Roncarelli v Duplessis*[4] but was rarely used until the Supreme Court of Canada decision in *Odhavij Estate v. Woodhouse* in 2003.[5]

Two recent decisions in 2008, one by the Federal Court[6] and the other by the Ontario Court of Appeal,[7] suggest the tort may be successful where a tort of negligence would fail. In addition, malice and reckless indifference are difficult concepts making it hard to strike out these claims at the pleading stage.

In O Dwyer, the Ontario Court of Appeal found liability because the Commission officials were "recklessly indifferent or wilfully blind as to the illegality of their actions and their potential to harm the plaintiff." This is a broad principle that places a real constraint on questionable government action. ■

[1] *Trillium Power Wind Corp. v Ontario (Natural Resources)*, 2013 ONCA 683 at paras 54-55.
[2] *Ashby v White* (1703) 92 ER 126.
[3] *Three Rivers District Council v Bank of England* (2000) 2 WLR 1220 (HL).
[4] *Roncarelli v Duplessis* (1959) SCR 121.
[5] *Odhavij Estate v Woodhouse* (2003) SCJ No 74.
[6] *McMaster v The Queen* 2009 FC 937.
[7] *O Dwyer v Ontario Racing Commission* (2008) 293 DLR (4th) 559 (Ont CA).