CITATION: Major Partner Wind Energy Corp. v. Ontario Power Authority, 2015 ONSC 6902
DIVISIONAL COURT FILE NO.: 207/14
DATE: 20151214

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

SANDERSON, WILTON-SIEGEL AND SPROAT JJ.

BETWEEN:	
MAJOR PARTNER WIND ENERGY CORP. Applicant	*Rocco Galati*, for the Applicant
– and –	
ONTARIO POWER AUTHORITY and ATTORNEY GENERAL OF ONTARIO Respondents	*Howard B. Borlack* and *David Elmaleh,* for the Respondent, Ontario Power Authority *No One Appearing* for the Attorney General of Ontario
	HEARD at Toronto: November 9, 2015

ENDORSEMENT

SPROAT J.

[1] The Ontario Power Authority ("OPA") moved before Sanderson J., sitting as a single judge of the Divisional Court, to dismiss this application for judicial review on account of delay. In her reasons released October 28, 2015 Sanderson J. found that the motion should be heard before the full panel on November 9, 2015. After hearing the motion to dismiss we advised that the application for judicial review was dismissed with reasons to follow.

[2] For readers who want to fully understand the background to this judicial review application, the reasons of Sanderson J. set out the history in some detail. For present purposes the relevant facts are as follows:

(a) On June 4, 2010, the applicant Major Partner Wind Energy Corp. ("Major") submitted an application to the OPA, under the feed in tariff ("FIT") rules, for a FIT contract to develop a large wind farm project. Major made an error in the legal description of the project lands.

(b) On June 29, 2010 the OPA advised Major that there appeared to already be a pending application for the project lands in question, which would make Major ineligible to submit an application. On June 30, 2010 Major emailed the OPA, copying Major's legal counsel, to advise that it nevertheless wished the application to proceed. (Applications were prioritized in the approval process based on the time stamp of the application. June 4, 2010 was the last day on which applications could be submitted to be considered in the next round of approvals. This appears to explain why Major was reluctant to re-file).

(c) On August 13, 2010 the OPA advised Major of its intent to reject the application on the basis there was already a pending application on the subject lands. Counsel for Major undertook to, and did, correct the error in the legal description within days. On August 17, 2010 the OPA advised Major that its application was rejected and that its $500,000 security deposit would be refunded within ten days.

(d) On August 18, 2010 Major emailed Ms. Fisher, a Senior Project Advisor in the Ministry of Energy and Infrastructure, to complain that the OPA was taking an unreasonable position regarding the error in the legal description of the lands. On August 24, 2010, Ms. Fisher responded that the OPA's application review team was looking into the matter and if Major did not hear from the team soon to let Ms. Fisher know.

(e) The OPA review team did not contact Major. Major did not contact Ms. Fisher. An OPA internal email evidences that the OPA requisitioned a cheque on August 17, 2010 to refund Major the $500,000 security deposit but through inadvertence it was not processed. Major contends, and for present purposes we accept, that since the OPA had not returned its security deposit Major understood that the OPA was proceeding to consider its application.

(f) On February 24, 2011 the OPA announced the successful applicants. Major inquired why it had not been offered a FIT contract. The OPA advised that the application had been rejected August 17, 2010 as discussed above. By letter dated March 4, 2011, then counsel for Major wrote to the OPA taking the position that Major's application, "... was not dealt with in a manner consistent with the

FIT rules." The OPA refunded Major's $500,000 security deposit on March 21, 2011.

(g) From March 2011 to January 2014, Paul Boreham, the principal of Major, pursued redress by communicating with OPA officials, various cabinet ministers, the Premier, government officials by writing to all members of the Liberal caucus.

(h) On September 20, 2013 the Minister of Energy and Infrastructure responded to a letter sent by Mr. Boreham to the Premier advising that, for the reasons earlier provided by the OPA, the matter of Major's application was closed.

(i) In February, 2014, Major retained Mr. Galati and its application for judicial review was filed on April 30, 2014. We accept there was a reasonable explanation for the delay to April 22, 2015 when the application was perfected.

[3] Paul Boreham is the sole director and shareholder of Major. He filed an affidavit. On cross-examination he agreed that as of March 4, 2011 he knew Major's application had been rejected. He also agreed that, on Major's direction, its lawyers advised the OPA in a letter of that date that, in their opinion, pursuant to the FIT rules Major should have been offered a FIT contract. It was suggested to him that he, therefore, then had all of the information necessary to bring a judicial review application. His answer was not responsive but it was instructive. Mr. Boreham stated:

> No, that wouldn't be my first preference. No real businessman goes to the lawyer seeking to attack the province. We asked for justice, that's all. Someone who put something into litigation right away, that's an American perspective, it's not a Canadian.

Simply put, Mr. Boreham opted to pursue a bureaucratic-political solution instead of litigation.

[4] Mark Binnington, the Vice President of Major, filed a three paragraph affidavit describing himself as Mr. Boreham's "right hand" and concurring with the contents of his affidavit. On the cross-examination of Mr. Binnington, he was asked if Major had sued the law

firm acting for it in making its application in June, 2010. Mr. Galati answered that Major had sued its law firm for negligence and that the action had been settled. Mr. Galati raised solicitor-client privilege and further details such as when the action was commenced, the particulars of the alleged negligence and the terms of settlement were not pursued. Mr. Binnington also indicated that until Mr. Galati was retained he was not aware of the availability of a judicial review application.

[5] The position of the OPA is that by March 2011 at the latest, when its security deposit was refunded, Major knew that its application had been finally rejected by the OPA. The further delay of approximately 36 months before retaining counsel to bring a judicial review application was undue delay.

[6] The position of Major is that its appeals for redress to members of the legislature, the cabinet and the Premier were analogous to pursuing an internal appeals procedure. As such, delay should only be calculated from September 20, 2013 being the date upon which the Minister of Energy and Infrastructure ("the Minister") advised that the matter of Major's application was "closed".

[7] In *Jeremiah v. Ontario (Human Rights Commission)*, [2008] O.J. No. 3013 (Div. Ct.), Molloy J., for the Court, stated at para. 45:

> This Court has held that a delay in excess of six months in bringing a judicial review application may be grounds for refusing the remedy sought. In OPSEU v. The Crown in Right of Ontario (Ministry of Labour), [2001] OLRB Rep. Mar./Apr. 549 (Div.Ct.), Lederman, J. stated:
>
> > It is noteworthy that no time limits for commencing an application for judicial review and for perfection are set out in the Judicial Review Procedure Act. Nonetheless, this Court has repeatedly recognized that in judicial review proceedings the applicant is under an obligation to commence and perfect the application in an expeditious fashion. Judicial review is an equitable and

> discretionary remedy and an obligation remains upon an applicant to bring the matter before the court without undue delay. Failure to do so has been held to be an independent basis for the denial of the application, regardless of the merits of the case.
>
> While each case must turn upon its own circumstances, this Court has held that delay on the part of an applicant of six or more months in the commencement of an application and/or twelve or more months in the perfection of an application could be serious enough to warrant the dismissal of the application.

[8] In *Ransom v. Ontario* [2010] O.J. No. 2430 (Div. Ct.) the applicant had been terminated from his position as an instructor at the Ontario Police College. He wrote to his supervisor objecting to his dismissal and the employer agreed that its Assistant Deputy Minister would conduct a review. The review took approximately four months to complete. It was not until five years after termination that the applicant gave notice that he intended to seek judicial review. While the Court dismissed the application for delay, it found that requesting the internal review and then awaiting its outcome was reasonable.

[9] As cited in the OPA Factum, many applications for judicial reviews have been dismissed based upon far shorter periods of delay:

(a) 11 months, in *Zhang v. The University of Western Ontario*; [2010] O.J. No. 5723 (Div. Ct.)

(b) 11 – 12 months in *Holmes v. White,* [2013] O.J. No. 2886 (Div. Ct.)

(c) 13 months in *Selkirk v. Schorr*, [1977] O.J. No. 2149 (Div. Ct.)

(d) 16 months in *York University Faculty Assn. v. York University*, [2002] O.J. No. 1665 (Div. Ct.)

(e) 21 months in *Balanyk v. Greater Niagara General Hospital*, 2002 Carswell 1192, 161 O.A.C. 204 (Div. Ct.)

(f) 22 months in *David Green v. Ontario Human Rights Commission,* 2010 CarswellOnt. 3309, 263 O.A.C. 270 (Div. Ct.)

(g) 29 months in *Gigliotti v. Conseil d'Administration du Collége des Grands Lacs*, [2005] O.J. No. 2762 (Div. Ct.)

(h) 30 months in *United Food and Commercial Workers International Union v. Welling*, [1997] O.J. No. 2704

[10] Mr. Galati argued that the three years that Major spent pursuing a political resolution was analogous to the internal review in *Ransom*. This was premised on his further submission that the Minister had the authority to intervene and direct the OPA to approve Major's application. Mr. Galati acknowledged that there was nothing in the *Energy Act* that expressly conferred such authority on the Minister. He argued, however, that it was implicit in the statutory framework that the Minister had this authority. As further support for this position he cited evidence from Mr. Boreham that he had "personal knowledge that, through Ministerial intervention" a specific project had been approved. What exactly this means is unclear. Mr. Boreham did not provide any detail of the alleged intervention and he was not cross-examined on this point.

[11] I do not agree that Major was pursuing what amounted to an internal appeal process. First, the OPA was the decision-maker not the Minister. Indeed, while the Minister was originally named as a respondent, by the time this matter was heard the application against the Minister had been abandoned.

[12] Secondly, there is no evidence the Minister in fact directed the OPA in relation to the other application other than the vague assertion by Mr. Boreham. Even assuming for the sake of argument the Minister had directed the OPA as to how to deal with a particular application, any such direction was not authorized by statute.

[13] As discussed we know little about the legal advice Major received during this three year period of delay. Major presumably obtained legal advice and retained counsel to commence the

solicitor's negligence action. What is clear is that by March 4, 2011 Major had an opinion from its then counsel that its application had not been dealt with in a manner consistent with the FIT rules. Further, Major had the ability to retain counsel throughout and at some point it opted to pursue a solicitor's negligence claim which it settled. On the record before us this is not, therefore, a case in which a lack of access to legal advice contributes to establishing a reasonable explanation for delay.

[14] In any event, there was no reason why Major could not have pursued a bureaucratic-political solution at the same time as it proceeded with an application for judicial review.

[15] Major knew that OPA had made a final decision to reject its application by, at the latest, March 21, 2011 when the OPA refunded its security deposit. We are, therefore, left with at least three full years of unjustified delay. I also accept that there has been some prejudice to the OPA and indirectly to the public interest. The FIT program has undergone a series of fundamental changes. In fact, projects of the size of the proposed Major project are no longer dealt with under the FIT rules and are instead subject to a request for proposals process with a cap on the aggregate capacity to be allocated. To require the OPA to reconsider Major's application, and potentially award Major a FIT contract on 2010 terms, would be unfair to other applicants who met the eligibility requirement at the time. As Major did not resubmit in the current round of applications it could be unfair, in particular to the applicants in that process, if Major took up part of the capacity that would otherwise be available.

[16] The application for judicial review is therefore, dismissed for delay.

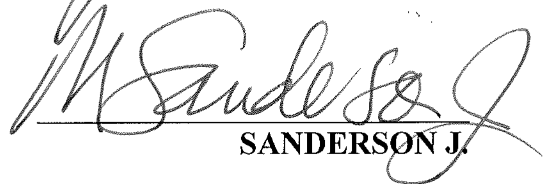
[17] The OPA claims $21,435 on a partial indemnity basis. Mr. Galati does not take issue with the hourly rates or time spent. He does argue that the delay in bringing the motion, and the

fact that the OPA was unsuccessful in having Sanderson J. dismiss the application, should result in no order as to costs.

[18] The motion to dismiss could and should have been brought much earlier. The fact that it was only brought recently means that both parties had to expend considerable time and effort on the delay motion as well as the substantive issues. In addition, the OPA was not successful in its attempt to have the delay issue decided by a single judge.

[19] I agree these factors should reduce but not eliminate the entitlement of the OPA to costs. I, therefore, award OPA costs in the amount of $10,000 plus H.S.T.

SPROAT J.



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WILTON-SIEGEL J.

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