SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE

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From: Lynne Ambrose, Judicial Assistant to The Honourable Mr. Justice G.A. Hainey

Date: October 15, 2012

Re: ***CORRINGENDUM***

Trillium Power Wind v. HMQ (Ontario)

Court file no: CV-11-436012

Pages: (20) inclusive of cover

Re: Judgment released Oct. 5/12.

Attached.

ONTARIO

SUPERIOR COURT OF JUSTICE

COURT HOUSE
361 UNIVERSITY AVENUE
TORONTO, ONTARIO M5G 1T3

MEMORANDUM

To: Counsel

From: Justice Robert Goldstein

Date: October 15, 2012

Re: Correction to Judgment released October 5, 2012

In: *Trillium Power Wind Corporation v. Her Majesty the Queen, in the Right of the Province of Ontario, as represented by the Ministry of Natural Resources, the Ministry of the Environment, and the Ministry of Energy*

Court file no: CV-11-436012, ONSC 5619

Corrigendum

Attached is an amended Judgment in the above-named matter.

Paragraph 77 on page 19 of the Reasons for Judgment dated October 5, 2012 are corrected to strike the words:

"The motion is dismissed."

and replaced with the words:

"The action is dismissed".

There have been no further amendments to the content of the Judgment.

cc: Legal Publishers
Data Entry

CITATION: Trillium Power Wind Corporation v. Ontario (Natural Resources), 2012 ONSC 5619
COURT FILE NO: CV-11-436012
DATE: 20121005

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
TRILLIUM POWER WIND CORPORATION	)	*Morris Cooper,*
	)	for the Plaintiff
Plaintiff	)	
	)	
	)	
- and -	)	
	)	
	)	
HER MAJESTY THE QUEEN, IN THE RIGHT OF THE PROVINCE OF ONTARIO, AS REPRESENTED BY THE MINISTRY OF NATURAL RESOURCES, THE MINISTRY OF THE ENVIRONMENT, AND THE MINISTRY OF ENERGY	)	*Kim Twohig, Eunice Machado & Kristin Smith,* for the Defendant
	)	
	)	
	)	
Defendant	)	
	)	
	)	
	)	
	)	**HEARD**: August 14, 2012

GOLDSTEIN J.:

[1] Trillium Power Wind Corporation, the plaintiff, ("**Trillium**") applied to set up an offshore wind farm. In 2011 the Defendant Ontario government imposed a moratorium on offshore wind farms.[1] Trillium sued the Defendant for damages. The Defendant moves to strike the Statement of Claim ("**the Claim**") on the basis that it does not disclose a reasonable cause of action. For the reasons set out below, the Claim is struck.

[2] I must confess at the outset to some confusion as to the tortious conduct pleaded by Trillium. The Claim is prolix, internally inconsistent, and references documents that actually

[1] Although multiple actions by multiple players within the Government of Ontario are impugned in the Claim, I will simply refer to "the Defendant."

contradict allegations in the pleadings. Much of the pleading deals with irrelevant matters. Trillium pleads some torts specifically and others by implication.

[3] With those observations in mind, I turn to the facts and the analysis.

FACTS

[4] An offshore wind farm is used to generate electricity by connecting large wind turbines to the electrical grid. An offshore wind farm is usually set up beyond the sight of people on shore. It therefore has the advantage of not raising aesthetic issues. Some fairly unique conditions are required for an offshore wind farm. The water must be relatively shallow and the bedrock sufficiently hard to support the weight of large turbines. Wind must blow gustily and reliably.

[5] Trillium pleads that it believed that it had found such a spot in Lake Ontario near Main Duck Island off Prince Edward County and entered into a process to develop and construct a wind farm. The process contemplated the lease of Crown land (the bedrock under Lake Ontario); regulatory approvals for building a wind farm including an environmental assessment; and a contract to supply electricity to the power grid.

[6] The development of wind power was the subject of much discussion and study by federal and provincial agencies and departments, as well as non-governmental stakeholders. In January 2004 the Ministry of Natural Resources ("**the MNR**") issued Policy PL 4.10.04 on the subject of Wind Power Development on Crown Land. The policy (which is referenced in the Claim) was subsequently updated in November 2004 and in April 2008. The policy set out the process by which wind resources would be tested and developed on Crown land. It stated:

> *The Province recognizes the economic and environmental benefits of increasing the use of wind energy to generate electricity. It anticipates that a number of energy developers may identify Crown land as a potential site for wind power generation. The Province also understands that wind energy developers require a fair, consistent, orderly, and timely approach to the allocation of Crown land for wind power development. To meet these expectations, MNR has developed, in consultation with the wind energy industry, this policy, which defines a two state process to accommodate*
>
> *1) the testing of wind resources on Crown land, and*
>
> *2) the subsequent development of wind farms where those resources prove to be economically viable, subject to required approvals.*

[7] The policy then stated (I have excerpted the relevant parts):

This policy applies provincially to the discretionary disposition of:

- *ungranted public lands (i.e., unpatented Crown land);*

- *lands under water which are deemed public lands under the provisions of the Beds of Navigable Waters Act.*

[8] In May 2004 Osiris Energy Corporation, the corporate predecessor of Trillium, made an application to lease Crown land under the wind-power policy. The application was for the particular "grid cells" associated with waters near Main Duck Island. The MNR responded with a letter acknowledging the receipt of the application and indicating the next steps. The letter cautioned:

> *Acceptance of your application or a request to attend a pre-screening meeting does not in any way infer a commitment on the part of the Crown to further entertain your application.*

[9] In October 2004 Trillium paid approximately $35,000 in fees to MNR as part of the application. The MNR acknowledged the payment and further indicated in a letter (which is referenced in the Claim):

> *This letter acknowledges that the company is proceeding with the review of the site for the purpose of wind testing and that receipt of the above fees in no way guarantees that the site will be approved for wind power testing or development.*

[10] In December 2005 Trillium was informed by MNR that it was the Applicant of Record for grid cells in the area of Main Duck Island. Trillium pleads that Applicant of Record status granted Trillium specific rights that would lead to contractual status as a wind power supplier, subject to Trillium's compliance with "established steps".

[11] In November 2006 MNR advised Trillium that it was imposing a moratorium on offshore wind power development in order to conduct environmental and social studies (this is not the moratorium at issue in these proceedings). Trillium pleads that the moratorium was for political purposes in anticipation of the provincial election to be held in October 2007. Trillium further pleads that a "former senior political staffer" indicated to Trillium that the moratorium would be lifted after the election. In January 2008 the provincial government indicated in a news release (which is referenced in the Claim) that the moratorium was lifted.

[12] On December 1 2008, Trillium received a letter (which is referenced in the Claim) from the MNR advising that it had been granted Applicant of Record status. Although it is not specifically addressed in the Claim or the documents, what must have occurred is that Trillium had to re-apply after the lifting of the November 2006 moratorium.

[13] The letter of December 1, 2008 indicated that there were two phases to Applicant of Record status. The first phase granted Trillium three years to test for wind power. The second phase provided Trillium with the opportunity to go through the environmental assessment process and obtain the other necessary approvals to operate a wind farm. The letter continued:

> *There are no rights or tenure associated with this Applicant of Record status and it does not constitute MNR approvals of your proposed project. In addition, this*

Applicant of Record Status does not provide the right to make any alterations or improvements on Crown land.

[14] Applicant of Record status, in this context, meant that Trillium was given the opportunity to conduct the necessary testing and apply for the necessary approvals in order to develop a wind farm on the Main Duck Island. Applicant of Record status did not give Trillium any right or authority to begin constructing wind turbines.

[15] In February 2011, the Defendant issued a press release indicating that offshore wind power development would be subject to another moratorium. The press release referred to the "cancellation" of offshore wind site leases, including sites with Applicant of Record status. The press release indicated that further scientific studies were required.

[16] In September 2011 Trillium issued the Claim, setting set out numerous causes of action as a result of the February, 2011 moratorium and claiming $2.25 billion in damages as a result of lost profits over the life of the wind farm. Trillium pleads that the decision to impose a moratorium was a political decision. Trillium also pleads that the decision was made in bad faith. Trillium further pleads:

- The Defendant's actions were deceptively characterized as a moratorium when, in fact, the Defendant's actions amounted to a confiscation of property rights. Trillium specifically referred to "property" and an "asset" confiscated by the Defendant.
- At the time of the moratorium, Trillium was in the process of closing a financing deal with Dundee Corporation. The decision to issue a press release was taken with the specific purpose preventing the financing so that it could not begin construction of the Main Duck Island wind farm.
- The moratorium was specifically designed to stop Trillium before it had the financial resources to litigate with the Government of Ontario.
- No further studies were required. The moratorium was imposed for political purposes in anticipation of the 2011 provincial election. The political concerns regarded wind farms on Lake Erie and Lake Huron that had nothing to do with Trillium. Trillium pleads that "the only science involved in the Defendant's February 11, 2011 decision was political science."
- Trillium has expended over $5,000,000 in testing and development directly as a result of relying on representations made to it by the Defendant
- The decision to impose a moratorium was made unlawfully, as it was in breach of the *Green Energy Act*, 2009, S.O. 2009 c. 12 Sched. A ("**the GEA**"), the *Electricity Act*, S.O. 1998, c. 14, Sched. A ("**the Electricity Act**"), and the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40 ("**the OWRA**"). The Defendants actions had no legal authority and were not taken pursuant to the exercise of any statutory power.
- The Defendant had actual intent to inflict injury and economic harm upon Trillium.

- The moratorium constituted breach of a contract by the defendant.
- The Defendant is liable for unjust enrichment.

[17] The Defendant has not filed a Statement of Defense.

[18] In a response to a demand for particulars, Trillium defined "property" and "asset" identically as:

> *... the "exclusive" right granted by MNR to Trillium Power Wind in MNR correspondence to Trillium Power of October 8, 2004, October 26, 2004, and December 1, 2008 to test for wind resources, and finding them sufficient, to proceed through the approval process to construction and operations....*

[19] Trillium was also asked for particulars of the "contract" referred to in the Claim. Trillium responded by indicating that the "contract" in the Claim referred to its contractual status as Applicant of Record.

[20] Trillium further particularized that "misfeasance in public office" applied to Energy Minister Duguid, Environment Minister Wilkinson, Natural Resources Minister Jeffrey, and Premier McGuinty along with their senior staff. The particulars of the "misfeasance in public office" include:

1. The decision by the governing Liberal Party to place political expediency in relation to an upcoming election over the public interest in "Green Energy".
2. The named Ministers issued a press release in advance of the October 2011 provincial election for purely political reasons related to close races in ridings held by the Liberal Party. The named Ministers knew the press release would destroy Trillium's financing.

[21] The Defendant seeks the following relief:

1. An order striking the Claim and dismissing the action;
2. In the alternative, an order naming the proper defendant and striking several paragraphs.

[22] The Defendant relies on the following grounds for striking the Claim:

1. The Claim fails to disclose a reasonable cause of action (Rule 21.01(1)(b));
2. The Claim does not contain material facts in support of the alleged torts (Rule 25.06(2)) and does not plead the particulars of malice (Rule 25.06(8));
3. Trillium has no legal capacity to bring the action (Rule 21.01(3)(b));
4. The statement contains allegations that are scandalous, frivolous, vexatious, or embarrassing.

[23] The crux of the Defendant's argument is that the decision to impose a moratorium was a core policy decision. As a result, the Defendant says it is immune from liability.

ANALYSIS

[24] I commence with an analysis of the regulatory scheme governing offshore power development and its application in relation to Trillium.

[25] The development and regulation of renewable energy projects engages several statutes and regulations, and at least three different ministers. The regulatory scheme for the production of power, the electricity market, and the development of renewable energy is complex and diverse. Failure to obtain every approval at every stage and from every authority will prevent the ultimate operation of a wind farm.

[26] The generation and management of electricity resources is governed by the *Electricity Act*, which sets up a highly detailed structure for generating electricity, hooking up power generation facilities to the electrical grid, the creation of an electricity market and a power generation authority, and many other aspects of power generation. At every step of the regulatory process, the Minister of Energy has very broad discretion to issue policies and approvals. Of relevance here is the Feed-In-Tariff Program ("**the FIT**"). The FIT program is designed to procure energy from renewable energy sources. The *Electricity Act* provides the Minister of Energy with the discretionary authority to direct the Ontario Power Authority ("**the OPA**") to develop a FIT program. As an aside, Trillium claims that it provided expert data to the Ministry of Energy and that this data led to the enactment of the FIT sections of the *Electricity Act*, although this is a bare allegation with no facts pleaded in support of it. Trillium never obtained a contract to provide power to the OPA under the FIT.

[27] Wind power projects must obtain a Renewable Energy Approval pursuant to s. 47.3 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19 ("**the EPA**"). The Minister of the Environment has broad policy powers under the EPA:

> *47.7 (1) The Minister may, in writing, issue, amend or revoke policies in respect of Renewable Energy Approvals.*

[28] The Director under the Part V.O.1 of the EPA has very broad powers to grant, amend, or terminate Renewable Energy Approvals:

> *47.5 (1) After considering an application for the issue or renewal of a Renewable Energy Approval, the Director may, if in his or her opinion it is in the public interest to do so,*
>
> *(a) issue or renew a renewable energy approval; or*
>
> *(b) refuse to issue or renew a renewable energy approval.*
>
> *(2) In issuing or renewing a renewable energy approval, the Director may impose terms and conditions if in his or her opinion it is in the public interest to do so.*

(3) On application or on his or her own initiative, the Director may, if in his or her opinion it is in the public interest to do so,

(a) alter the terms and conditions of a renewable energy approval after it is issued;

(b) impose new terms and conditions on a renewable energy approval; or

(c) suspend or revoke a renewable energy approval.

[29] Trillium did not obtain a Renewable Energy Approval.

[30] Finally, the release of Crown land for testing and, ultimately, the construction of wind farms is the responsibility of the Minister of Natural Resources, who has discretionary authority to manage Crown land under the *Public Lands Act,* R.S.O. 1990, c. P.43 ("**the Public Lands Act**"). As noted earlier in these reasons, the MNR issued a wind power policy under which Trillium obtained Applicant of Record status. The policy provided for a three-stage process: first, testing and review; second, wind power development and review; and third, permits for the development of a wind farm. It is only after the third stage that Trillium would have been able to apply for any of the other approvals. Trillium had not yet reached the third stage of the approval process.

[31] Trillium has also pleaded that the Defendant breached the GEA and the OWRA. The GEA does not apply to wind farms. Broadly, the GEA sets standards for energy efficiency in government facilities and labelling standards for consumer products. It has nothing to do with power generation. Likewise, the OWRA does not apply. It is true that the OWRA deals with the supervision of lakes, but is primarily concerned with water transfers, sewage systems, wells, groundwater, pollution, and water quality standards. It grants discretionary authority to the Minister of the Environment to manage water resources. In any event, it is unclear from the Claim what right Trillium alleges was breached by the violations of the GEA and the OWRA it says took place. Even if those statutes were breached, no individual cause of action exists for the free-standing violation of a statute in the absence of a provision expressly authorizing one: *R. v. Saskatchewan Wheat Pool*, [1983] 1 SCR 205.

[32] In my view, it is clear that the Defendant, acting through various ministers of the Crown, was empowered to set or alter policy with regard to the development of wind power. Each of the statutes confers a broad discretion with regard to every aspect of renewable energy, from the release of Crown land for testing to the granting of a contract to supply energy and hook up to the grid. The determination of whether the Defendant's actions were illegal is a legal issue. Legal issues can be determined on a Rule 21 motion: *1597203 Ontario Ltd. v. Ontario*, [2007] O.J. No. 2349 (Sup.Ct.).

[33] Thus, I disagree with Trillium. It is clear that the actions of the Defendant were not illegal. It is also clear from a review of the Claim and the regulatory scheme that Trillium had not obtained the requisite approvals to construct and operate a wind farm at the time the moratorium was imposed. These basic findings determine much of what follows.

[34] I turn now to an analysis of the issues:

(a) Does the plaintiff have legal capacity to bring this action?

(b) What documents can the Defendant rely on in this motion?

(c) Does the Claim disclose a reasonable cause of action?

(d) Does the Claim contain allegations that are scandalous, frivolous, vexatious, or embarrassing?

(e) Should leave be granted to amend?

(a) Does the plaintiff have legal capacity to bring this action?

[35] The plaintiff Trillium has brought this lawsuit, although it appears that some of the various applications were made in the name of Osiris Energy Corporation, and that Osiris's status as an Applicant of Record was transferred to Trillium. As Ms. Twohig, on behalf of the Defendant, has wisely admitted, it would be open to Trillium to amend the style of cause if that is necessary. I would not dismiss the action on this basis.

(b) What documents can the Defendant rely on in this motion?

[36] Mr. Cooper, for Trillium, argues that the Defendant has "cherry-picked" documents that support its position and strongly objects to the inclusion of documents not properly referenced in the Claim. No evidence is admissible in determining a motion pursuant to Rule 21.01(1)(b). A party may submit, and a court may consider, documents specifically referred to and relied on in a pleading: *Webb Offset Publication Ltd. v. Vickery* (1999), 43 O.R. (3d) 802, [1999] O.J. No. 2760 (C.A). After reviewing the Claim and the record, I do not accept Mr. Cooper's characterization of the documents submitted in the Defendant's record as having been "cherry-picked". The documents submitted by the Defendant that I refer to in these reasons are expressly referenced in the Claim.

(c) Does the Claim disclose a reasonable cause of action?

[37] The summary of principles to be applied on a Rule 21 motion set out by Conway J. in *1597203 Ontario Ltd. v. Ontario, supra*, is helpful:

> *There are well-settled principles which apply to Rule 21 motions to strike pleadings. The leading case is Hunt v. Carey Canada Inc. [1990] 2 S.C.R. 959. The governing principles to be applied on Rule 21 motions are:*
>
> *(a) The facts in the pleading are to be taken as proven and true unless they are patently ridiculous or incapable of proof.*
>
> *(b) It must be "plain and obvious" that the pleading is unfounded or contains no reasonable cause of action in order for the motion to succeed.*

(c) The threshold for sustaining a pleading is not high - a "germ" or "scintilla" of a cause of action will be sufficient.

(d) The pleading will only be struck if the allegations do not give rise to a recognized cause of action or if the claim fails to plead the necessary elements of an otherwise recognized cause of action.

(e) No evidence is to be admitted on the motion.

(f) The pleading is to be read generously.

(g) The novelty of the claim does not prevent a plaintiff from proceeding with its case.

(h) The court's role at the motion stage is not to determine the strength of the case or the likelihood of success.

See also: *Miguna v. Ontario (Attorney General)* (2008), 301 D.L.R. (4th) 540, 2008 ONCA 799 (C.A.).

[38] As noted, the Claim is confusing and the tortious conduct complained of is difficult to understand. The Defendant has helpfully subdivided the alleged causes of action on the basis of what it calls a "generous" reading of the Claim. It appears that Trillium pleads the following causes of action:

- Breach of contract;
- Unjust enrichment;
- Taking without compensation, which the Defendant has characterized as expropriation;
- Negligent misrepresentation and negligence;
- Misfeasance in public office;
- Intentional infliction of economic harm.

Breach of Contract:

[39] Despite the laboured attempts of Trillium to argue that it entered into a contractual arrangement with the Defendant, the facts as pleaded lead to the conclusion that it entered into something different: a complex regulatory process that might have led to approvals to build a wind farm. There are no facts pleaded to suggest that there was offer, acceptance, and consideration, the essential elements of a contract. Trillium stated in a response to a demand for particulars that the contract was its status as an Applicant of Record. The documents referenced in the Claim make it clear that the facts do not support the inference that Applicant of Record status can be characterized as a contract. Indeed, the documents referenced in the pleadings actually contradict the allegations in the pleadings, since those documents make it very clear that Applicant of Record Status confers no rights, obligations, tenure, or approval. At most, Applicant of Record status granted Trillium the right to continue with the regulatory process and proceed to the next level of approvals. I accept that simply because the facts disclose a novel or

new tort it is not a reason to strike the claim: *Jane Doe v. Toronto Police Commission* (1990), 74 O.R. (2d), 72 D.L.R. (4th) 580 (Div.Ct.). Novelty does not consist of pleading a cause of action and then trying to shoehorn facts to fit it.

[40] An essential element of breach of contract is that there be a contract. There are no facts pleaded upon which a court could conclude that there was a contract to breach.

[41] In *Pacific National Investments v. Victoria (City)*, [2000] 2 S.C.R. 919 the City of Victoria entered into an agreement with a developer, who purchased land and water lots. The city later re-zoned the water lots, making them less valuable to the developer. The developer sued the city for breach of contract, arguing that the city had breached an implied term of the contract not to change the zoning by-law. The Supreme Court rejected that argument, and commented:

> *All of PNI's attempts to transform its case into a claim for compensation cannot hide the fact that it is demanding compensation precisely because the City exercised its legislative powers in a particular way. A municipality's choice to use its legislative powers to rezone land so that the municipality's zoning continues to reflect its best wisdom is a legitimate choice and a choice that is very much part of its legislative power: see Wall and Redekop Corp. v. City of Vancouver (1974), 16 N.R. 436 (B.C.C.A.), aff'd (1976), 16 N.R. 435 (S.C.C.). Indeed, it must be remembered that the new zoning by-law was never attacked as illegal. A duty to compensate for a particular legislative choice along these lines would necessarily make that legislative choice subject to considerations other than an objective examination of what is best for the community of which the developer is undoubtedly also a part.*

[42] In *1597203 Ontario Ltd. v. Ontario*, *supra*, the plaintiff was the owner of two private physiotherapy clinics. In 2004 the Ontario government stopped funding physiotherapy services, which meant that the plaintiff would no longer be able to collect OHIP fees. Business dropped off. The plaintiff sued the government alleging breach of contract, expropriation, negligence, and negligent misrepresentation. Conway J., applied the reasoning of the Supreme Court of Canada in *Pacific National*. She found that the there was no tortious conduct by the government, as it was simply making a regulatory change. No contract existed and none had been broken. The plaintiff was trying to obtain compensation for the impact of a change in a regulation.

[43] In my view, the reasoning in *Pacific National* and *1597203 Ontario Ltd. v. Ontario* applies here. Trillium is attempting to obtain compensation for the exercise of regulatory authority while characterizing it, incorrectly, as a breach of contract.

Unjust Enrichment:

[44] The essential elements of the tort of unjust enrichment are an enrichment of the defendant, a deprivation of the plaintiff, and an absence of a juristic reason for the enrichment: *Garland v. Consumer's Gas Co.*, [2004] 1 S.C.R. 629. Although the Claim alleges that Trillium has suffered deprivation, no facts are pleaded that would show an enrichment of the plaintiff.

[45] I have some difficulty with the notion that Trillium was deprived of anything. Trillium does not plead that it had constructed an operating wind farm that was subsequently taken. Indeed, it specifically pleads the opposite: that it was deprived of an opportunity to construct a wind farm. That said, assuming without deciding that the facts as pleaded do show that Trillium has been deprived, I do not understand how the Defendant could have been enriched – it already owned the Crown land upon which the proposed wind farm would have been constructed. In any event, as noted, there are simply no facts pleaded that show a corresponding enrichment of the Defendant.

***Taking without compensation*:**

[46] Trillium pleads that the Defendant "confiscated" its "asset" and "property". Although Trillium does not specifically plead expropriation, the Defendant correctly points out that Trillium uses the language of expropriation. The "property" and "asset" referred to in the Claim are not defined or the subject of more detail in the pleading. As I have noted, in a response to a demand for particulars Trillium stated that "property" or "asset": was the exclusive right to test for wind power and then proceed through the approval process.

[47] Trillium pleads that the asset that was taken is its Applicant of Record status. Trillium also set out in a reply to demand for particulars that the contract is its Applicant of Record status. Something cannot be both property and a contract, at least not in the circumstances of this case. Black's Law Dictionary defines "contract" as:

> *1. An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. 2. The writing that sets out such an agreement. 3. A promise or set of promises by a party to a transaction, enforceable or otherwise recognizable at law.*

[48] Black's defines "property" as:

> *1. The right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel); the right of ownership.*

[49] No doubt there are many types of contract that can be bought and sold like property, such as a futures contract. In my view, Applicant of Record status is not property. It is merely a right to enter into a regulatory process that might, eventually, result in a wind farm and a contract to supply power.

[50] Trillium also refers to its intellectual property (site development data and information) having been taken. I have also have difficulty with the notion that such data and information can be intellectual property. Aside from that concern, Trillium's pleading on this point is internally inconsistent as it also pleads that it was required to make this information public and disseminate it as part of the required ongoing public consultation process. I do not see how a thing can be both exclusive intellectual property that has use and value and at the same time be a thing that must be publicly disseminated.

[51] Assuming, however, that Trillium could establish that Applicant of Record status is property, it would be required to prove that it was taken by the government for its own use or for the purposes of destruction. In *A &L Investments Ltd. v. Ontario* (1997), 36 O.R. (3d) 127, [1997] O.J. No. 4199 (C.A.) the provincial government passed rent control legislation limiting the increases in rent that could be charged by landlords to tenants. The legislation voided all previous orders under previous rent control legislation that had granted the right to charge rent increases into the future. A group of landlords sued the government for compensation on the grounds that there had been a statutory taking of their property. Goudge J.A., for the court, stated:

> *28 In my view, the plaintiffs' claims in these actions cannot be fitted within the description required by the rule. While the property rights of the plaintiffs voided by the 1991 Act may, in one sense, be said to have been taken from the plaintiffs, in no sense can they be said to have been acquired by the Crown. The Crown transferred no property from the plaintiffs to itself by means of this legislation.*
>
> *29 The 1991 Act is not an act of expropriation by the Crown. Rather it is an exercise of its regulatory authority. There is no principle of statutory interpretation that would presume that those adversely affected by a statute regulating their affairs are entitled to compensation unless the statute says otherwise. No policy basis is readily apparent for such a rule. Indeed, such a principle would severely hamper the operation of the modern state where most regulatory legislation, however remedial, adversely affects someone...*

[52] In my view that is what has occurred here: the defendant exercised its regulatory authority to impose a moratorium. Be that as it may, the Claim does not plead that property was transferred from Trillium to the Defendant for its own use or for the purposes of destruction. Thus, an essential element of the tort is not pleaded.

Negligent Misrepresentation and Negligence:

[53] In order to establish either negligent misrepresentation or negligence, Trillium must establish that there is a private law duty of care owed by a governmental authority. The determination of whether a duty of care exists is a legal issue, and therefore can be determined on a Rule 21 motion: *1597203 Ontario Ltd. v. Ontario, supra.* In order to determine whether a duty of care exists, the Court must apply the two-part test set out by the House of Lords in *Anns v. Merton London Borough Council,* [1978] A.C. 728 and recently updated in *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45:

> *39 At the first stage of this test, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this is established, a prima facie duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this prima facie duty of care should not be recognized: Hill v.*

Hamilton-Wentworth Regional Police Services Board, 2007 SCC 41, [2007] 3 S.C.R. 129.

[54] Proximity can arise in two ways: first, through the existence of a *prima face* private law duty of care set out in the statute, or, second, where a specific series of interactions gives rise to a special relationship.

[55] In order to determine whether a private law duty of care is created by statue, the court must examine the legislative scheme. A statute must create sufficient proximity to give rise to a duty of care: *Imperial Tobacco, supra,* at paras. 40-45.

[56] As I have already noted, the regulatory scheme for the approval, construction, and operation of a wind farm is complex and requires the approvals of several different ministers any one of whom, through a change in policy or a discretionary refusal to issue a permit or approval exercised in the public interest, could have stopped Trillium from proceeding. It is clear that the development of wind power is motivated by a general policy of promoting green energy for the benefit of the people of Ontario. The policy for the development of wind power on Crown land, which I have already quoted, makes it clear that the policy recognizes the economic and environmental benefits of wind power. I see no reason why the Minister would not be permitted to change the policy in accordance with the public interest. As I also noted, the Director under the EPA has broad powers to issue, reject, or amend Renewable Energy Approvals. The EPA explicitly requires that the Director do so in accordance with the public interest. Clearly, the Minister would be permitted to issue policy advice to a Director: EPA, s. 47.7(1).

[57] There is nothing that I can find in the regulatory scheme to suggest that there is a private law duty of care owed to Trillium by statute. Indeed, it is clear to me that the overall thrust of the regulatory scheme established by the various statutes, regulations, and policies is the promotion of renewable energy in the public interest.

[58] Being a stakeholder is not enough to find a duty of care. The regulatory scheme imposes a general duty of care on individual ministers to the public as a whole, not to any individual or corporation: *Granite Power Corp. v. Ontario* (2004), O.R. (3d) 194, [2004] O.J. No. 3257 (C.A.). Thus, proximity is not established by statute or regulation.

[59] Was there a special relationship by reason of interactions between the Defendant and Trillium? A special relationship may be created where the defendant ought reasonably to foresee that the plaintiff will rely on the representation, and where such reliance would in the circumstances of the case be reasonable: *Imperial Tobacco*, para. 52. Trillium pleads that it was heavily involved in the creation of the regulatory process and had close relationships with high-level government actors. It points to some contacts in the government beyond that of a mere applicant for a licence. Mr. Cooper argues that these contacts establish proximity.

[60] Although much of what is pleaded strikes me as either hyperbole or irrelevant, or both, I conclude that there is a scintilla or a germ of fact pleaded that could give rise to a special relationship. I emphasize that when I say a scintilla or a germ, it is no more than that. I doubt very much that the facts as pleaded would lead to a positive result for Trillium, but that is not the test.

[61] I now turn to the second part of the *Anns* test. Are there are policy reasons why the *prima facie* duty of care should not be recognized? In *Imperial Tobacco*, Chief Justice McLachlin determined that "core" policy decisions are immune from suit:

> *90 I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being "non-operational". It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of "policy" involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.*

[62] In my view, the Defendant correctly characterizes the decision to impose a moratorium as a "core policy decision". The stated reason for the moratorium was that further scientific studies were required, a reason very directly "*based on public policy considerations, such as economic, social and political factors*". The Defendant clearly possessed the power to impose the moratorium. This is exactly the type of policy decision that is protected from suit. The following comment of Chief Justice McLachlin is helpful:

> *87 Instead of defining protected policy decisions negatively, as "not operational", the majority in Gaubert[2] defines them positively as discretionary legislative or administrative decisions and conduct that are grounded in social, economic, and political considerations. Generally, policy decisions are made by legislators or officers whose official responsibility requires them to assess and balance public policy considerations. The decision is a considered decision that represents a "policy" in the sense of a general rule or approach, applied to a particular situation. It represents "a course or principle of action adopted or proposed by a government": New Oxford Dictionary of English (1998), at p. 1434. When judges are faced with such a course or principle of action adopted by a government, they generally will*

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[2] *United States v. Gaubert*, 499 U.S. 315 (1999).

find the matter to be a policy decision. The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason, decisions and conduct based on these considerations cannot ground an action in tort.

88 Policy, used in this sense, is not the same thing as discretion. Discretion is concerned with whether a particular actor had a choice to act in one way or the other. Policy is a narrow subset of discretionary decisions, covering only those decisions that are based on public policy considerations, like economic, social and political considerations. Policy decisions are always discretionary, in the sense that a different policy could have been chosen. But not all discretionary decisions by government are policy decisions.

89 While the main focus on the Gaubert approach is on the nature of the decision, the role of the person who makes the decision may be of assistance. Did the decision maker have the responsibility of looking at social, economic or political factors and formulating a "course" or "principle" of action with respect to a particular problem facing the government? Without suggesting that the question can be resolved simply by reference to the rank of the actor, there is something to Scalia J.'s observation in Gaubert that employees working at the operational level are not usually involved in making policy choices.

[63] Trillium also pleads that the moratorium was imposed for fundamentally political, specifically electoral reasons, and that it is untrue that scientific reasons were at the heart of the decision to proceed with a moratorium. Leaving aside the question of misfeasance in public office, which I turn to below, making a decision for a political purpose would still not ground a cause of action. Chief Justice McLachlin in *Imperial Tobacco* explicitly mentions political factors as a legitimate public policy consideration. The remedy for a political decision that a party does not agree with is found in the ballot box, not the courtroom. Political factors are not illegitimate. A government may well be justified in not proceeding with a project on the bases of vigorous community opposition. Democratic governments are supposed to be sensitive to public opinion. Courts are manifestly ill-equipped to determine which types of political considerations are legitimate and which are not, which is why our analysis is confined to legality. The following comment by Chief Justice Roberts of the United States Supreme Court in the recent case of *National Federation of Independent Business v. Sebelius*, June 28, 2012 (No. 11-393) is apposite:

Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation's elected leaders. "Proper respect for a co-ordinate branch of the government" requires that we strike down an Act of Congress only if "the lack of constitutional authority to pass [the] act in question is clearly demonstrated." United States v. Harris, 106 U. S. 629, 635 (1883). Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the

people disagree with them. It is not our job to protect the people from the consequences of their political choices.

Misfeasance in Public Office

[64] Trillium pleads misfeasance in public office:

74. Trillium Power further states that in the events as described herein the defendants had no legal authority and were not in the exercise of any statutory power or purpose. The defendant's February 11, 2011 decision to terminate offshore wind power in Lake Ontario constituted an invalid decision, either made negligently or, in the alternative, made deliberately as a misfeasance in office by Ministers of the Crown.

[65] Although it is not entirely clear what facts Trillium relies on in support of this allegation, the following paragraphs appear to be connected:

58. Trillium Power states that the Government's actions were precipitous and high-handed, and constituted bad faith Ministerial decisions for political expediency, with specific concern for geographic areas of the Province completely unrelated to Trillium Power. Those areas, predominantly near Lake Erie and Lake Huron, constituted ridings that were perceived by the Provincial Government as susceptible to loss in the forthcoming election.

59. Trillium Power states further that the Defendant knew and was well aware that there were no water quality issues relating to offshore wind development in relation to Trillium Power specifically, and in relation to offshore wind generally. Consequently, Trillium power states and the fact is that the only science involved in the Defendant's February 11, 2011 decision was political science.

61. Trillium Power further states that the Defendant's decision and the cancellation and confiscation in February, 2011 was specifically targeted to stop Trillium Power's offshore wind power project in Lake Ontario before Trillium Power had the financial resources to litigate with the Province of Ontario.

[66] It is apparent that the claim in Paragraph 58 that the Defendant's actions were unrelated to Trillium is inconsistent with the claim in Paragraph 61 that the decision was specifically made to target Trillium.

[67] Rule 25.06(8) states:

> *25.06(8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.*

[68] The elements of the tort of misfeasance in public office were comprehensively summarized by Iacobucci J. of the Supreme Court of Canada in *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263:

> *22 What then are the essential ingredients of the tort, at least insofar as it is necessary to determine the issues that arise on the pleadings in this case? In Three Rivers, the House of Lords held that the tort of misfeasance in a public office can arise in one of two ways, what I shall call Category A and Category B. Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff. This understanding of the tort has been endorsed by a number of Canadian courts: see for example Powder Mountain Resorts, supra; Alberta (Minister of Public Works, Supply and Services) (C.A.), supra; and Granite Power Corp. v. Ontario. It is important, however, to recall that the two categories merely represent two different ways in which a public officer can commit the tort; in each instance, the plaintiff must prove each of the tort's constituent elements. It is thus necessary to consider the elements that are common to each form of the tort.*
>
> *23 In my view, there are two such elements. First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such [page282] as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.*

[69] Since I have already found that there was nothing unlawful about the decision to impose a moratorium on offshore wind power, that alone is sufficient to dismiss this aspect of the Claim.

[70] In *Ontario v. Gratton-Masuy Environmental Technologies Inc.* (2010), 101 O.R. (3d) 321, 2010 ONCA 501, [2010] O.J. No. 2935 the plaintiff was in the sewage treatment business. It was authorized to use a particular type of treatment system. The provincial regulatory body proposed amending the authorizations under which the plaintiff operated. The plaintiff sued, alleging, inter alia, misfeasance in public office. The Court of Appeal set out the following principles:

- An express plea of actual malice in the form of a specific intent to injure a person or class of persons is required: Para. 84.

- The pleading must meet a "stringent standard of particularity. A bald plea of malice is insufficient to defeat a Rule 21 motion": Para. 89.

- "Broadly cast allegations of bad faith, malice, and bias based merely on assumptions and speculation about the motivations underlying the conduct" of government officials do not satisfy the rules of pleading: Para. 103.

[71] In my view, the facts pleaded in paragraphs 58, 59, 61, and 74 constitute bald allegations based on speculation and assumptions about the underlying motivations of government officials. Even after demands for particulars, Trillium has been unable to fully particularize this claim. For example, in reply to a demand for particulars, Trillium stated:

> *The Plaintiff states that "misfeasance in office" applies to all persons who may have initiated, participated, supported and executed any actions that resulted in the acts perpetrated against the Plaintiffs on February 11, 2011. The identity of such persons is solely within the knowledge of the Defendants. The injury suffered by the Plaintiff is recited in detail in the Claim.*

[72] An amended reply to the demand for particulars was subsequently provided by Trillium. I have already summarized that reply, above. It named four cabinet ministers and then repeated the allegation that the moratorium was imposed for political considerations, as well as to prevent Trillium from having the resources to litigate. In my view, the allegation in the pleading amounts to a bare assertion that the Defendant cancelled the offshore wind power program for electoral considerations. No facts are pleaded that would connect the named cabinet ministers to the unlawful or malicious acts and none were supplied in the replies to demands for particulars. It is plain and obvious that this aspect of the Claim has no chance of success.

Intentional Infliction of Economic Harm

[73] Trillium pleads in the further alternative that the Defendant had actual intent to inflict injury and economic harm. In order to establish this tort, Trillium must prove:

1. An intention to injure the plaintiff;
2. Interference with the plaintiff's business by illegal means;
3. Economic loss caused thereby.

See: *Lineal Group Inc. v. Atlantis Canadian Distributors Inc.* (1998), 42 O.R. (3d) 157, [1998] O.J. No. 4499 (C.A.).

[74] I have already found that the moratorium was not imposed illegally. This alone is enough to dispose to of this aspect of the Claim. I agree with the Defendant that malice is, at

least by implication, an element of the tort. For the reasons I have already given, malice has not been sufficiently pleaded.

(d) Does the Claim contain allegations that are scandalous, frivolous, vexatious, or embarrassing?

[75] Since I find that the Claim must be struck on the grounds that it discloses no reasonable cause of action, it is not necessary for me to determine this issue.

(e) Should leave be granted to amend?

[76] Given my conclusion that the Defendant's action was not illegal, and that the decision to impose a moratorium was a core policy decision, I find that there is no basis to allow an amendment. With regard to misfeasance in public office, Trillium has responded to two demands for particulars without improving its position. Under the circumstances, I see no basis to grand leave to amend: *Wilson v. Toronto (Metropolitan Police Service)*, [2002] O.J. No. 383 (C.A.).

DISPOSITION

[77] The action is dismissed. If the parties are unable to agree on costs, the Defendant may submit, within 14 days, a brief costs submission (not exceeding 2 pages). Trillium may submit, within 10 days after that, a brief costs submission (also not exceeding 2 pages) in reply.

Goldstein J.

GOLDSTEIN, J.

DATE: October 5, 2012

CITATION: Trillium Power Wind Corporation v. Ontario (Natural Resources), 2012 ONSC 5619
COURT FILE NO: CV-11-436012
DATE: 20121005

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

TRILLIUM POWER WIND CORPORATION

Plaintiff

- and -

HER MAJESTY THE QUEEN, IN THE RIGHT OF THE PROVINCE OF ONTARIO, AS REPRESENTED BY THE MINISTRY OF NATURAL RESOURCES, THE MINISTRY OF THE ENVIRONMENT, AND THE MINISTRY OF ENERGY

Defendant

JUDGMENT

GOLDSTEIN J.

Released: October 5, 2012