

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

BETWEEN:

KENNETH GEORGE KROEPLIN and SHARON ANNE KROEPLIN

Appellants/
Appellants on Appeal

- and -

THE DIRECTOR, MINISTRY OF THE ENVIRONMENT

Respondent/
Respondent on Appeal

- and -

**SP ARMOW WIND ONTARIO GP INC. as general partner for and on behalf of
SP ARMOW WIND ONTARIO LP**

Respondent/
Respondent on Appeal

APPEAL UNDER Section 142.1 of the *Environmental Protection Act*

**COSTS SUBMISSIONS OF SP ARMOW WIND ONTARIO GP INC. as general
partner for and on behalf of SP ARMOW WIND ONTARIO LP**

DAVIES WARD PHILLIPS & VINEBERG LLP
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Toronto, ON M5V 3J7

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Lawyers for **SP Armow Wind Ontario GP Inc. as
general partner for and on behalf of SP Armow
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TO: Falconers LLP
10 Alcorn Avenue
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Toronto, ON M4V 3A9

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Lawyer for the Appellants, Shawn Drennan and Tricia Drennan

AND TO: Ministry of the Attorney General
135 St. Clair Avenue West
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Toronto, ON M4V 1P5

Danielle Muellman LSUC #49857M

Andrea Huckins LSUC #50774W

Tel: 416.314.6569

Lawyers for Respondent, The Director, Ministry of the Environment

1. Armow Wind files these submissions for costs against the Kroeplin Appellants. Armow Wind was entirely successful on this Appeal and having regard to the factors that a Court may consider in exercising its discretion to award costs, Armow Wind requests costs in the amount of \$15,475.35 in fees and \$1,775.17 in disbursements on a partial indemnity basis. A bill of costs in support of this amount is attached as Appendix "A".¹

2. This was high-stakes litigation brought by anti-wind advocates who knew and understood the potential cost consequences of litigating a Divisional Court appeal.

3. On September 11, 2014, in an attempt to limit the costs that it was ultimately forced to incur, Armow Wind offered to settle the Appeal on the basis that it would not seek its costs if the Appellants agreed to withdraw the Appeal. A copy of Armow Wind's offer to settle is attached as Appendix "B".

4. The Appellants chose to proceed with their Appeal in the face of that offer and the resulting costs incurred by Armow Wind are entirely reasonable.

5. The Appellants were represented by experienced legal counsel and they should have reasonably expected that their personal assets could be called upon to pay a cost order in the amount sought by Armow Wind. In fact, in its settlement offer Armow Wind advised the Appellants that they could expect to pay costs in excess of \$50,000, consistent with the aggregate costs award granted in *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists* – a three-day appeal to the Divisional Court in respect of a renewable energy approval for a wind turbine project – a decision that Armow Wind specifically brought to the Appellants' attention.²

6. The actual costs claimed by Armow Wind are less than one third of the amount awarded in *Ostrander* and, as in *Ostrander*, the Appellants should not be able to shield themselves from cost exposure on the basis that this was "public interest" litigation. This Court rejected that argument in *Ostrander* and ordered the two Appellants to pay an aggregate costs award of more than \$50,000.³

7. The analysis in *Ostrander* should be no different merely because the Appellants raised an unsupportable Charter claim. Indeed, in *Lobo v. Carleton University* both the Ontario Superior Court of Justice and Ontario Court of Appeal awarded costs to the defendant university for its successful motions to strike portions of the plaintiff's statement of claim, including the portions that alleged a Charter breach.⁴

¹ The requested costs award had been discounted to avoid any potential duplication. In particular, the Bill of Costs does not include the time billed by junior counsel to attend the hearing of the Appeal.

² *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*, 2014 ONSC 2127 (Div. Ct.).

³ *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*, 2014 ONSC 2127 at paras. 5-7 and 11 (Div. Ct.).

⁴ *Lobo v. Carleton University*, 2011 ONSC 5798 (S.C.J.); *Lobo v. Carleton University*, 2012 ONCA 498, aff'g 2012 ONSC 254 (S.C.J.).

In awarding costs, the Superior Court of Justice rejected the plaintiff's argument that its novel Charter claim justified a no costs award. The Court held:

[while] there is merit to ensuring that adjudication of the novel issue related to Charter rights not be potentially foreclosed by the likely financial constraints of the student body collectively known in these proceedings as Carleton Life Line... the appropriate balance may be struck by making an award of cost to the Defendants in the cause fixed on a partial indemnity basis.⁵

8. In summary, Armow Wind seeks the following order with respect to costs:
- (a) Costs of the Appeal fixed on a partial indemnity basis in the amount of \$17,250.53 payable within 30 days with interest at a rate of three percent.

January 16, 2015

ALL OF WHICH IS RESPECTFULLY SUBMITTED


James Bunting
Nathaniel Read-Ellis
DAVIES WARD PHILLIPS & VINEBERG LLP

⁵ *Lobo v. Carleton University*, 2011 ONSC 5798 at para. 24 (S.C.J.).

APPENDIX "A"
(see attached)

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)**

BETWEEN:

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Appellants/
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- and -

THE DIRECTOR, MINISTRY OF THE ENVIRONMENT

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**SP ARMOW WIND ONTARIO GP INC. as general partner for and on behalf of
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**COSTS OUTLINE OF SP ARMOW WIND ONTARIO GP INC. as general partner
for and on behalf of SP ARMOW WIND ONTARIO LP**

(Re: Appeal)

Partial Indemnity Basis

Fees (as detailed below)	\$	13,695.00	
13% HST	\$	1,780.35	
Sub-Total	\$		15,475.35
Disbursements (includes HST per Appendix attached)	\$		1,775.17
TOTAL	\$		17,250.52

Substantial Indemnity Basis

Fees (as detailed below)	\$	20,562.00	
13% HST	\$	2,673.06	
Sub-Total	\$		23,235.06
Disbursements (includes HST per Appendix attached)	\$		1,775.17
TOTAL	\$		25,010.23

The experience of the parties' lawyers at Davies Ward Phillips & Vineberg LLP:

JAMES BUNTING	Year of Call	2003
NATHANIEL READ-ELLIS	Year of Call	2013

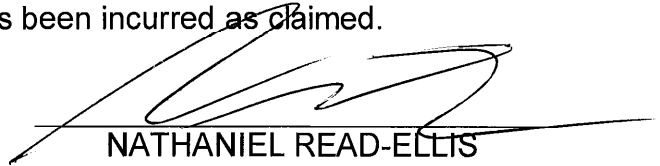
The hours spent, the rates sought for costs and the rate actually charged by the parties' lawyers:

	FEE ITEMS	PERSONS	HOURS	PARTIAL INDEMNITY RATE	PARTIAL INDEMNITY RATE MULTIPLIED BY HOURS	SUBSTANTIAL INDEMNITY RATE	SUBSTANTIAL INDEMNITY RATE MULTIPLIED BY HOURS
1	Fee for: Reviewing Notice of Appeal; Conducting legal research; Reviewing Appellants' Factum, Book of Authorities; Preparing and filing Appeal Book, Factum, Compendium and Book of Authorities; Communications with Court, client and Appellants' counsel; and Lawyers' fee for preparation and attendance at hearing of Appeal.	James Bunting	39	\$265.00	\$10,335.00	\$398.00	\$15,522.00
		Nathaniel Read-Ellis	22.4	\$150.00	\$3,360.00	\$225.00	\$5,040.00
	TOTAL FEE				\$13,695.00		\$20,562.00

LAWYER'S CERTIFICATE

I CERTIFY that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

January 16, 2015



NATHANIEL READ-ELLIS

APPENDIX

Disbursements (inclusive of HST)

Photocopying, printing and binding	\$1,579.60
Courier	\$14.34
Process Server	\$32.50
Law Research	\$148.73
TOTAL	\$1,775.17

APPENDIX "B"
(see attached)

September 11, 2014

James D. Bunting
T 416.367.7433
jbunting@dwpv.com

File No. 247904

WITHOUT PREJUDICEMr. Julian Falconer & Asha James
Falconers LLP
10 Alcorn Avenue, Suite 204, Toronto, ON
M4V 3A9

Dear Counsel:

Re: *Kroeplin v. Director, Ministry of the Environment*, Court file No. 2073/14

We are writing in respect of your clients' Appeal from the decision of the Environmental Review Tribunal. We have reviewed your clients' factum in support of the Appeal and are of the view that the Appeal will be dismissed. We also note that the Kroeplins have sold their home. This may have repercussions on the ability of the Kroeplins to maintain a section 7 *Charter* challenge.

We are writing to ensure that your clients are fully aware that Armow Wind intends to seek its costs of this Appeal from them personally should the Appeal be unsuccessful. Your clients should reasonably expect that the associated costs could exceed \$50,000. See, for example, the costs decision of the Divisional Court awarding \$50,000 in costs against the Appellants in the *Ostrander* case.

If your clients are prepared to agree to withdraw their Appeal on or before September 17, 2014, Armow Wind is prepared to agree that it will not seek the costs it has incurred to date in responding to their Appeal. Please treat this letter as an offer to settle pursuant to Rule 49. Should the Appellants choose to pursue their Appeal, Armow Wind intends to rely on this letter in its costs submissions.

Yours very truly,

DAVIES WARD PHILLIPS & VINEBERG LLP

Per: James Bunting

SCHEDULE A
(Cases)

1. *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*, 2014 ONSC 2127 (Div. Ct.)
 2. *Lobo v. Carleton University*, 2011 ONSC 5798 (S.C.J.)
 3. *Lobo v. Carleton University*, 2012 ONCA 498
 4. *Lobo v. Carleton University*, 2012 ONSC 254 (S.C.J.)
-

**SCHEDULE B
(Statutes)**

***Courts of Justice Act*
R.S.O. 1990 Chapter C.43**

...

Postjudgment interest

129. (1) Money owing under an order, including costs to be assessed or costs fixed by the court, bears interest at the postjudgment interest rate, calculated from the date of the order.

...

131. (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

***Rules of Civil Procedure*
R.R.O. 1990, Reg. 194**

...

RULE 57 COSTS OF PROCEEDINGS

GENERAL PRINCIPLES

Factors in Discretion

57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

- (c) the complexity of the proceeding;
 - (d) the importance of the issues;
 - (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
 - (f) whether any step in the proceeding was,
 - (i) improper, vexatious or unnecessary, or
 - (ii) taken through negligence, mistake or excessive caution;
 - (g) a party's denial of or refusal to admit anything that should have been admitted;
 - (h) whether it is appropriate to award any costs or more than one set of costs where a party,
 - (i) commenced separate proceedings for claims that should have been made in one proceeding, or
 - (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
 - (i) any other matter relevant to the question of costs.
-

Kenneth George
Kroeplin et al

and

The Director, Ministry of
the Environment

and

SP Armow Wind Ontario GP
Inc. as general partner for
and on behalf of SP Armow
Wind Ontario LP

Court File No: 2073/14
ERT Case No.: 13-124/13-125

Appellants /
Appellants on Appeal

Respondent /
Respondent on Appeal

Respondent /
Respondent on Appeal

**ONTARIO
SUPERIOR COURT OF JUSTICE**
Proceeding commenced at London

**COSTS OUTLINE OF SP ARMOW
WIND ONTARIO GP INC. as general partner
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(Re: Appeal)

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Lawyers for Respondent / Respondent on Appeal,
SP Armow Wind Ontario GP Inc. as general partner
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