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January 16, 2015

VIA FAX

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Ministry of the Attorney General,
Legal Services Branch,
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Toronto ON M4V 1P5

Dear Counsel:

**Re: Dixon v. Director, Ministry of the Environment et al
Court File No. 2055/14**

Please find enclosed St. Columban's Costs Submissions, which are hereby served upon you according to the *Rules*.

Hard copies with supporting materials will follow.

Yours truly,

McCarthy Tétrault LLP



Eric Pellegrino
EP:dk
Enc.

DOCS 14132502

Court File No. 2055/14

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

BETWEEN:

**SCOTTY DIXON, JENNIFER DIXON, THOMAS RYAN and
CATHERINE RYAN**

**Appellants/
Appellants on Appeal**

- and -

THE DIRECTOR, MINISTRY OF ENVIRONMENT

**Respondent/
Respondent on Appeal**

- and -

ST. COLUMBAN ENERGY LP

**Respondent/
Respondent on Appeal**

COSTS SUBMISSIONS OF ST. COLUMBAN ENERGY LP

January 16, 2015

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**Lawyers for the Respondent,
St. Columban Energy Inc.**

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PART I - OVERVIEW

1. The appellants have deployed significant legal resources in an effort to halt the construction and operation of the St. Columban Wind Project (the "Project"). In total, their appeals to the tribunal below and to this Court have spanned 18 months and delayed the Project by approximately one year. While the appellants were entitled to bring the litigation, their decision to do so had significant consequences.

2. The appeal and motions to this Court required five hearing days. Many additional hours were needed to review transcript and documentary evidence, conduct research, prepare written materials, examine witnesses and prepare for oral argument. Yet in the end, the appellants' numerous grounds of appeal were found to be without merit and their appeal was dismissed.

3. An appellant – whether a private citizen or a large corporation – must bring litigation advisedly. This is particularly so where, as here, litigation will inevitably cause the delay and perhaps even the complete derailment of the targeted project. There must be an appreciation of the real disruption, and real cost, suffered by the adverse party.

4. As the appellants' litigation was unmeritorious, it is fair and just that they compensate St. Columban for the costs needlessly incurred. Accordingly, St. Columban seeks partial indemnity costs of \$120,000 from the appellants. This represents a significant reduction of its actual partial indemnity costs of \$155,000, in recognition that the appellants are private citizens.¹

PART II – MOTIONS AND MAIN APPEAL

5. Responding to the appellants' stay motion and appeal were of critical importance to St. Columban. At a minimum, the appellants' success in either proceeding would have resulted in substantial delay and severe financial consequences; at its highest, such success would have

¹ See Bill of Costs of St. Columban at Tab 2.

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resulted in the termination of the Project.

6. The crucial nature of these proceedings explains and justifies the hours spent in preparation by counsel for St. Columban. It was necessary and reasonable that counsel be thoroughly prepared for the hearings. Notably, almost all of the work associated with analyzing the record, preparing written materials and conducting legal research was completed by junior lawyers and students.

7. St. Columban's request for costs must be considered in the context of St. Columban's complete success on both the stay motion and appeal.

A. The motion for a stay was inappropriate and unnecessary

8. The appellants insisted on bringing a motion to stay the construction of the Project despite being aware that it would not become operational until after their appeal was heard. As all of the grounds of their appeal related to the operation of wind turbines, there was no need to seek a stay of construction in advance of the appeal.²

9. Inevitably, the Court dismissed the stay motion. However, the appellants unreasonably continued down the same path by filing a motion to have that decision reviewed by a panel of the Court. St. Columban was required to incur further and substantial costs to effectively re-litigate a motion that was doomed to failure from the start.

B. The main appeal was unnecessarily complicated

10. The appellants advanced no less than 5 constitutional challenges and 7 alleged errors of law as part of their appeal. St. Columban was required to assess and respond to each claim at great expense. The appellants also devoted a substantial portion of their appeal factum to a recounting of factual evidence, despite the statutory scope of their appeal being limited to

² The Appellants, Scotty and Jennifer Dixon, did allege that construction may affect the hearing and sleep patterns of their daughter. Not only was this allegation not at all related to their appeal, it was not supported by any medical or expert evidence.

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questions of law. As a result, St. Columban was required to review and synthesize the record to ensure that an accurate summary of the evidence was put before the Court.

11. St. Columban incurred further costs in preparing for and responding to the appellants' eleventh-hour motion to introduce unnecessary fresh evidence, which did not advance their case.

PART IV – THE APPELLANTS SHOULD NOT BE EXCUSED FROM COSTS

12. The appellants will argue that costs should not be awarded due to the purported “public interest” nature of this case. That argument is without merit. In *The Friends of the Greenspace Alliance v. Ottawa (City)*, Justice McKinnon outlined a five-part test to determine whether an unsuccessful party should be excused from paying costs: (a) the nature of the unsuccessful litigant; (b) the nature of the successful litigant; (c) the nature of the *lis* – was it in the public interest?; (d) has the litigation had any adverse impact on the public interest?; and (e) the financial consequences to the parties.³ The test from *Greenspace* was recently adopted by this Court in *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*⁴, in the context of an appeal from a decision of the tribunal in relation to a different wind project.

A. The appellants pursued personal interests and are supported financially

13. The appellants are private actors, pursuing personal interests. They simply do not want the Project to be built near their homes. There is no evidence establishing that they are incapable of paying costs. In fact, the appellants denied requests for such evidence.⁵

14. Conversely, it is known that the appellants own property and operate commercial farms. It is also known that Scotty Dixon is the co-owner of a farm supply company and both Catherine Ryan and Jennifer Dixon are registered nurses.⁶ The appellants clearly are not impecunious.

³ *The Friends of the Greenspace Alliance v. Ottawa (City)*, 2011 ONSC 472 [“*Greenspace*”] at para 15, Tab 7.

⁴ *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*, 2014 ONSC 2127 at para 5, Tab 8.

⁵ Cross-Examination of Jennifer Dixon on August 15 2014 re Stay Motion, Transcripts Brief, Tab 3 [“*Dixon Transcript*”] at pp. 8-12 (qq. 20, 27 and 32), Tab 3; Letter from J. Falconer dated August 29, 2014, refusing all questions taken under advisement, Transcripts Brief, Tab 3(c) [“*Refusals Letter*”], Tab 4.

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15. Crucially, the appellants are also financially supported by an advocacy group, Huron East Against Turbines (HEAT).⁷ Although the appellants refused to disclose information regarding its finances, it is clear that HEAT has provided financial support to the appellants in this litigation.⁸

B. St. Columban is a private actor

16. Where the successful litigant is a private actor, who has done nothing illegal, it is difficult to justify depriving it of costs.⁹ St. Columban has done nothing wrong and has been forced to defend the Project through a lengthy tribunal hearing and five days of hearing time before this Court. St. Columban obviously incurred real and substantial costs as a result of this litigation.

C. This is not a public interest case

17. This case deals with the private interests of the owners of two pieces of property, who are opposed to an infrastructure development near their homes. Indeed, the appellants have conceded that they are concerned about pecuniary issues such as their property values and livestock.¹⁰ Just because the appellants advanced claims that touch upon matters of some public significance and the *Charter*, does not make this a public interest case or warrant excusing the appellants from costs.¹¹ That is precisely what this Court concluded in *Ostrander*, determining that those appeals did not constitute public interest litigation.¹²

D. The litigation has adversely impacted the public interest

18. The public interest has been harmed by this litigation because the operation of a significant renewable energy infrastructure project, which was approved by the government, has

⁶ Dixon Witness Statement, Exhibit 1 of Exhibit Book ["*Dixon Statement*"], Tab 5; Ryan Witness Statement, Exhibit 4 of Exhibit Book ["*Ryan Statement*"], Tab 6.

⁷ *Dixon Transcript* at pp. 8-13, Tab 3.

⁸ *Dixon Transcript* at pp. 15-16 (q. 51), Tab 3; *Refusals Letter*, Tab 4.

⁹ *The Friends of the Greenspace Alliance v. Ottawa (City)*, 2011 ONSC 472 at para 19, Tab 7.

¹⁰ *Dixon Statement*, Tab 5; *Ryan Statement*, Tab 6.

¹¹ *Galganov v. Russell (Township)*, [2011] OJ No 2416 at para 39 citing *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, Tab 9; *aff'd* [2012] O.J. No. 2679 (CA).

¹² *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*, 2014 ONSC 2127 at para 6, Tab 8.

been delayed. This has adversely affected the local community and the province at large.

E. St. Columban has endured substantial financial consequences

19. St. Columban has suffered substantial financial consequences in responding to the appellants' stay motion and appeal, which threatened to derail the Project.

PART IV - APPELLANTS MUST HAVE EXPECTED TO PAY THE COSTS CLAIMED

20. When considering the amount the appellants must reasonably expect to pay, it is appropriate to compare this appeal to proceedings of similar importance with similarly high stakes. Class action certification motions offer a good comparator.

21. By way of example, in *Pasian v. Academic Clinicians' Management Services*, Justice Perell awarded \$200,000 in costs on a certification motion which was argued over two days.¹³ In *Singer v. Schering-Plough Canada Inc.*, Justice Strathy awarded \$400,000 in total costs for a three day certification motion.¹⁴

22. While the Court in *Ostrander* ordered that the appellants pay total costs of \$50,000, a far more substantial costs award is warranted in the present case because:

- (a) Only 3 hearing days were required in *Ostrander*, as opposed to 5 in this case¹⁵;
- (b) *Ostrander* was the first case to reach this Court on health issues relating to wind turbines; the present case simply repackages the same arguments as *Charter* claims;
- (c) *Ostrander* dealt primarily with an environmental appeal regarding various at-risk species, introducing a measure of public interest not present in this case; and
- (d) The appellants in *Ostrander* were advocacy groups with no direct pecuniary interests, in the present case, the appellants are private citizens, with direct pecuniary interests in halting the Project.

23. The appellants elected to bring this litigation and were unsuccessful. They clearly are not impecunious and are financially supported by HEAT. There is no reason that they should be excused from the appropriate and significantly discounted costs sought by St. Columban.

¹³ *Pasian v. Academic Clinicians' Management Services*, 2014 ONSC 901, Tab 10.

¹⁴ *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 1737, Tab 11.

¹⁵ The 3 wind developers avoided overlap in submissions, indicating hearing time would have been consistent if the matters were not combined.

PART V - ORDER REQUESTED

24. St. Columban respectfully requests an Order for partial indemnity costs of \$120,000 from the appellants, all inclusive.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

January 16, 2015



Darryl Cruz
Chris Wayland
Eric Pellegrino

McCarthy Tétrault LLP
Lawyers for the Respondent,
St. Columban Energy Inc.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *The Friends of the Greenspace Alliance v. Ottawa (City)*, 2011 ONSC 472 (Div Crt)
2. *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*, 2014 ONSC 2127 (Div Crt)
3. *Galganov v. Russell (Township)*, [2011] OJ No 2416
4. *Pasian v. Academic Clinicians' Management Services*, 2014 ONSC 901
5. *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 1737

Court File No 2055/14
ERT Case No 13-084/13-087

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

BETWEEN:

SCOTTY DIXON, JENNIFER DIXON, THOMAS RYAN and CATHERINE RYAN

Appellants/
Appellants on Appeal

and

THE DIRECTOR, MINISTRY OF THE ENVIRONMENT

Respondent/
Respondent on Appeal

and

ST. COLUMBAN ENERGY LP

Respondent/
Respondent on Appeal

**PARTIAL INDEMNITY BILL OF COSTS ON BEHALF OF THE RESPONDENT,
ST. COLUMBAN ENERGY LP
(Appeal heard November 17-20, 2014)**

FEES - DETAILS:

DESCRIPTION	HRS	RATE	SUBTOTAL	TOTAL
Motion for Stay, receipt and review of motion for stay; compiling responding materials; preparing for stay; prepare for and conduct cross-examinations; related communication and correspondence; attend case conference.				
Darryl Cruz	39.7	\$350.00	\$13,895.00	
Christopher Wayland	0.1	\$275.00	\$27.50	
Eric Pellegrino	142.9	\$150.00	\$21,435.00	
Tyler Wentzell (Student)	23.9	\$60.00	\$1,434.00	
			Total	\$36,791.50
Attendance at Stay Motion on September 22, 2014, including preparation day of Motion and travelling to and from Toronto to London:				
Darryl Cruz	15.3	\$350.00	\$5,355.00	
Eric Pellegrino	15	\$150.00	\$2,250.00	
			Total	\$7,605.00

Motion to Reconsider Stay, attending to compiling facts; related communication and correspondence.				
Darryl Cruz	2	\$350.00	\$700.00	
Eric Pellegrino	16.5	\$150.00	\$2,475.00	
			Total	\$3,175.00
Appeal, receipt of appeal materials; compiling responding materials; preparing for appeal; related communication and correspondence.				
Darryl Cruz	50.3	\$350.00	\$17,605.00	
Christopher Wayland	63	\$275.00	\$17,325.00	
Eric Pellegrino	92	\$150.00	\$13,800.00	
Shanique Lake	41.3	\$150.00	\$6,195.00	
			Total	\$54,925.00
Attendance at Appeal on November 17-20, 2014, including preparation day of Motion and travelling to and from Toronto to London:				
Darryl Cruz	40.5	\$350.00	\$14,175.00	
Eric Pellegrino	45.4	\$150.00	\$6,810.00	
			Total	\$20,985.00
Bill of Costs, including reviewing dockets and disbursements and drafting Bill of Costs				
Kathy Stubits (Law Clerk)	3	\$80.00	\$240.00	
			Total	\$240.00

TOTAL FEES: (Partial Indemnity)

\$123,721.50

DISBURSEMENTS - DETAILS:

	TOTAL
Courier	\$706.30
Photocopies	\$8,220.94
Online Searches	\$1,187.22
Travel	\$2,363.71
Transcript/Court Reporter	\$1,108.19
Process Servers	\$200.00
Fax	\$6.00
Government Fees	\$19.00

TOTAL DISBURSEMENTS:

\$13,811.36

SUMMARY:

Fees	\$123,721.50
HST on Fees (13%)	\$16,083.80
Disbursements	\$13,811.36
HST on Disbursements (13%)	\$1,795.48

TOTAL FEES & DISBURSEMENTS:**\$155,412.13**

Lawyer	Year of Call
Darryl Cruz	1992
Christopher Wayland	1999
Eric Pellegrino	2012
Shanique Lake	2012
Tyler Wentzell	Student
Kathy Stubits	Clerk

January 15, 2015

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**Lawyers for the Respondent,
The Director, Ministry of the Environment**

DIXON et al
Appellants/Appellants on Appeal

**THE DIRECTOR, MINISTRY OF
THE ENVIRONMENT**
Respondent/Respondent on Appeal

and

ST. COLUMBAN ENERGY LP
Respondent/Respondent on Appeal

and

Court File No. 2055/14

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

Proceeding commenced at London

**COSTS SUBMISSIONS OF
ST. COLUMBAN ENERGY LP**

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