

**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*

**REPLY COST SUBMISSIONS OF SP ARMOW WIND ONTARIO GP INC. AS
GENERAL PARTNER
FOR AND ON BEHALF OF SP ARMOW WIND ONTARIO LP**

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1. The Appellants should be held to the normal cost consequences of their unsuccessful Appeal, notwithstanding their assertion that they are "public interest litigants".

2. As the Ontario Court of Appeal acknowledged in *St. James' Preservation Society v. Toronto (City)* and this Court recently reaffirmed in *Ostrander*, the following factors are relevant to determining whether to refuse a costs award on the basis of public interest:

- (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) whether the litigation had any adverse impact on the public interest; and
- (e) the financial consequence to the parties.¹

3. The Appellants did not to address the bulk of these factors in their costs submissions because they do not support their request for an order refusing to award costs. In fact, the Appellants did not address at all the decision that is most directly on point to the issue now before the Court: in *Ostrander*, unsuccessful opponents of a wind turbine project argued that the Divisional Court should not award costs to the successful wind company because the appeal in respect of the renewable energy approval was public interest litigation. The Divisional Court expressly rejected that argument in terms that are equally applicable to this Appeal:

¹ [*St. James' Preservation Society v. Toronto \(City\)*, 2007 ONCA 601](#) at para. 23; [*Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*, 2014 ONSC 2127](#) at para. 5 (Div. Ct.).

While the outcome of [the *St. James Preservation*] factors in this case is mixed, overall they do not support a conclusion that this was public interest litigation. First, PECFN and APPEC had a direct and personal interest in the outcome of this litigation. They represent one element of the interests of the residents of Prince Edward County. They clearly have a view about the wisdom of this wind turbine development. They are entitled to pursue that view but not with impunity. Second, Ostrander is a private actor, not a public one. It is more difficult to deny costs to a successful private actor than it is to a public one. The third factor is more favourable to PECFN and APPEC. As we have already said, there is a measure of public interest in this litigation. The fourth factor is more neutral. While there is no serious adverse impact on the public interest from this litigation, there is nonetheless an adverse impact associated with the delay that is occasioned in having a project go forward that has been either directly or indirectly approved by two provincial ministries. Fifth, while undoubtedly Ostrander is better suited financially to absorb the costs of the litigation, that alone is not a reason to deny costs. One of the functions of costs is to ensure that all parties consider the wisdom of pursuing litigation and understand that there are consequences to doing so. PECFN and APPEC chose to pursue this matter before the Tribunal and then chose to pursue it further in this court. They must have been aware that there would be costs considerations engaged by pursuing their appeals in this court. There is no compelling reason to treat PECFN and APPEC any differently than any other party to litigation in that regard. In particular, PECFN and APPEC are not general public advocacy groups whose work elsewhere might be adversely affected by a costs award.

In the end result, PECFN and APPEC should be required to pay costs to Ostrander.²

4. The Divisional Court in *Ostrander* ultimately ordered PECFN and APPEC to pay an aggregate costs award of more than \$50,000 – an amount that reflected the fact that there was "a measure of public interest" in the litigation.

5. Instead of distinguishing or even addressing *Ostrander*, the Appellants costs submissions focus on whether the Appellants are public interest litigants. Whether or not they are public interest litigants, that factor is not sufficient to relieve the Appellants of the costs consequences of the Appeal. They are in the same positions as

² [*Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*, 2014 ONSC 2127](#) at para. 5 (Div. Ct.).

PECFN and APPEC in *Ostrander*: the Appellants had a direct and personal interest in this litigation,³ and they represent one element of the interests of the local community. They are not entitled to pursue their view about the wisdom of the project with impunity.⁴

6. The Appellants' attempt to elevate this costs decision to an issue of "access to justice". There is no merit to this assertion.

7. First, the Appellants in each of the three appeals have had access to justice. Each of the appeals proceeded before the ERT with no order of costs being made following those hearings. The Armow hearing lasted nine days and included testimony from 29 witnesses. Similarly, the K2 Wind hearing lasted eight days and involved testimony from over 20 witnesses; the St. Columban hearing lasted eight days and involved testimony from 20 witnesses.

8. Second, the access to justice argument is advanced by the Appellants only by lumping together the costs sought in each of the appeals and the related stay motions. In doing so, the Appellants ignore the fact that there were three separate appeals, each with its own appellants, and that the bulk of the costs sought actually relate to the unsuccessful stay motions. Considered separately and without including the costs that resulted from the failed stay motions, the costs sought in respect of the appeals are reasonable and will not impede or undermine access to justice.

³ According to paragraph 3 of the Appellants' costs submissions, they were "acting to protect their home".

⁴ See also: [*Hamiltonians for Progressive Development v. Hamilton \(City\)*, 2014 ONSC 420](#) at paras. 7-10 (S.C.J.) in which the Court held that a successful private actor should not be deprived of its costs against an unsuccessful public interest litigant.

9. In fact, the costs sought are entirely consistent with the purpose of the cost regime in this province. The Kroeplins and Drennans, for example, chose to proceed with their appeal after being put expressly on notice by K2 Wind and Armow Wind, respectively, of the potential cost consequences, including the fact that the Divisional Court had awarded \$52,926.70 in costs in *Ostrander*.

10. Armow Wind is requesting \$17,250.53, less than a third of the amount awarded in *Ostrander*. Respectfully, this is a fair and reasonable amount and there is no compelling reason to depart from the decision in *Ostrander*.

Dated this 23rd day of February,
2015

by



Davies Ward Phillips & Vineberg LLP
James Bunting (LSUC #48244K)
Nathaniel Read-Ellis (LSUC #63477L)
Lawyers for Armow Wind

SCHEDULE A
(Cases)

1. *St. James' Preservation Society v. Toronto (City)*, 2007 ONCA 601
2. *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*, 2014 ONSC 2127 (Div. Ct.)
3. *Hamiltonians for Progressive Development v. Hamilton (City)*, 2014 ONSC 420 (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.

...

(4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,

...

- (c) to award all or part of the costs on a substantial indemnity basis

**KENNETH GEORGE
KROEPLIN et al**

and

**THE DIRECTOR, MINISTRY
OF THE ENVIRONMENT**

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

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

Appellants/
Appellants on
Appeal

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**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at London

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