

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

BETWEEN:

SCOTTY DIXON, JENNIFER DIXON, THOMAS RYAN and
CATHERINE RYAN

Appellant/
Appellants on Appeal

- and -

THE DIRECTOR, MINISTRY OF ENVIRONMENT

Respondent/
Respondent on Appeal

- and -

ST. COLUMBAN ENERGY LP

Respondent/
Respondent on Appeal

REPLY COSTS SUBMISSIONS OF ST. COLUMBAN ENERGY LP

February 23, 2015

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REPLY COSTS SUBMISSIONS OF ST. COLUMBAN

1. St. Columban's initial costs submissions already provide a full answer to the Appellants' responding submissions. However, the following points merit emphasis:

A. This appeal did not constitute public interest litigation

2. Of the many cases cited by the Appellants regarding public interest litigation in their responding costs submissions, they have failed to address the case that is most on point, *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*.¹ In *Ostrander*, this Court adopted a five-factor analysis for deciding whether an appeal of a decision of the Environmental Review Tribunal regarding the approval of a wind project constituted public interest litigation; precisely the same assessment that is before the Court in this case. The factors are (1) the nature of the unsuccessful litigant; (2) the nature of the successful litigant; (3) The nature of the lis -- was it in the public interest?; (4) has the litigation had any adverse impact on the public interest?; and (5) the financial consequences to the parties.²

3. Following a detailed analysis, the Court in *Ostrander* concluded that the appeal did not constitute public interest litigation. It is worth quoting directly from the Court's analysis because it applies equally and with greater certainty to this case. Therefore, the analysis of each factor in *Ostrander* will serve as headings for the consideration of the present appeal.

[Consideration of the First Factor] 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.:**

4. The appellants in *Ostrander* clearly had personal interests in their appeal but they did not have a direct financial stake. The Appellants in this case are private actors pursuing

¹ *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*, 2014 ONSC 2127

² In its initial costs submissions, St. Columban has already applied the five-part test to demonstrate that present appeal does not constitute public interest litigation.

largely pecuniary interests. They are concerned about the impact that a specific wind project will have on their property values and commercial farming businesses. Even more than the appellants in *Ostrander*, the Appellants in this case were clearly litigating their personal interests, which included substantial financial considerations. They were entitled to do so but not with impunity.

[Consideration of the Second Factor] 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.:**

5. The Appellants have cited several cases in their responding submissions for the proposition that, in exceptional cases, a court has discretion to not award costs to a successful party. Critically, in all of those cases, the successful party was either the government, a public authority, or an entity exercising a statutory monopoly. St. Columban is a private actor attempting to construct a relatively small green-energy facility. St. Columban has incurred substantial financial harm as a result of the Appellants' litigation, for which it is entitled to compensation.

[Consideration of the Third Factor] 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.:

6. In *Ostrander*, the appellants were citizen groups with a mandate to block industrial development in Prince Edward County. The Court viewed that mandate as introducing a "measure" of public interest. In the present case, the Appellants are landowners who simply do not want the St. Columban Project built near their properties. They adduced no evidence to suggest that halting the Project was an issue of public concern beyond their personal interests.

[Consideration of the Fourth Factor] 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.:

7. The St. Columban Project was approved by the government and is part of a province-wide initiative to reduce greenhouse emissions; a clear indication that its operation is in the public interest. The Appellants' litigation has delayed the Project and the generation of green-electricity, thereby significantly harming the public interest.

[Consideration of the Fifth Factor] 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.:**

8. The Appellants have not produced and indeed, have denied requests for their financial records. Rather, they rely on the bald assertions of their counsel that they cannot satisfy a costs award and face "financial ruin". What is known is that the Appellants own property and operate commercial farming businesses. It is also known that they are financially supported by Huron East Against Wind Turbines, but have chosen to ignore that fact in their reply costs submissions. There is no evidence to suggest that the Appellants cannot satisfy a costs award and in fact, the available evidence indicates that they can.

9. In addition to the submissions above, St. Columban adopts the reply costs submissions of Armow Wind with respect to the Appellants' arguments regarding public interest litigation and access to justice.

B. The motion for a stay was ill-advised and completely unnecessary

10. In their responding costs submissions, the Appellants have not even attempted to

justify their decision to push forward with their unnecessary motion for a stay of construction. The motion was illogical from the outset because the Appellants' appeal related to the operation of the St. Columban Wind Project, which would not occur until after their appeal was heard.

11. After their motion was inevitably dismissed, the Appellants insisted on bringing a further motion to have that decision reviewed. St. Columban incurred substantial costs responding to both of these unnecessary motions. It would be unfair to now excuse the Appellants from compensating St. Columban for the costs needlessly incurred.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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3. Following a detailed analysis, the Court in *Ostrander* concluded that the appeal did not constitute public interest litigation. It is worth quoting from the Court's analysis of the five factors because it applies equally and with greater certainty to this case. The analysis of each factor in *Ostrander* will serve as headings for the consideration of this case.

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