

Court File No. 2056/14  
ERT Case No. 13-097/13-098

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

**BETWEEN:**

**SHAWN DRENNAN and TRICIA DRENNAN**

Appellants/  
Appellants on Appeal

- and -

**THE DIRECTOR, MINISTRY OF THE ENVIRONMENT**

Respondent/  
Respondent on Appeal

- and -

**K2 WIND ONTARIO INC. OPERATING AS  
K2 WIND ONTARIO LIMITED PARTNERSHIP**

Respondent/  
Respondent on Appeal

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**COSTS SUBMISSIONS OF K2 WIND ONTARIO INC.  
OPERATING AS K2 WIND ONTARIO LIMITED PARTNERSHIP**

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**BORDEN LADNER GERVAIS LLP**  
44th Floor - 40 King Street West  
Toronto, ON M5H 3Y4

Christopher D. Bredt LSUC #23627Q

Tel: 416.367.6165  
Fax: 416.361.7063

**DAVIES WARD PHILLIPS & VINEBERG LLP**  
40th Floor – 155 Wellington Street West  
Toronto, ON M5V 3J7

James Bunting LSUC #48244K  
Nathaniel Read-Ellis LSUC #63477L

Tel: 416.863.0900  
Fax: 416.863.0871

Lawyers for the Respondent, K2 Wind Ontario  
Inc. operating as K2 Wind Ontario Limited  
Partnership

**TO:** Falconers LLP  
10 Alcorn Avenue  
Suite 204  
Toronto, ON M4V 3A9

Julian Falconer LSUC #29465R

Tel: 416.964.0495

Fax: 416.929.8179

Lawyer for the Appellants, Shawn Drennan and Tricia Drennan

**AND TO:** Ministry of the Attorney General  
135 St. Clair Avenue West  
10th Floor  
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. K2 Wind files these submissions for an order of costs against the Appellants. K2 Wind was entirely successful on this Appeal and on both of the Appellants' motions seeking a "stay" or injunction of K2 Wind's construction activities. This was high-stakes litigation brought by anti-wind advocates who knew and understood the potential cost consequences of litigating a Divisional Court appeal.

2. The stay motion in particular should never have been brought. The motion was unnecessary and without merit. K2 Wind clearly explained to the Appellants at an early stage why the motion could not possibly succeed and offered to resolve the motion on a reasonable basis. Instead of accepting that offer, the Appellants proceeded with their motion at considerable expense to K2 Wind.

3. Having regard to the factors that a Court may consider in exercising its discretion to award costs, K2 Wind requests the following:

- (a) **Stay Motion:** \$135,810.52 in fees and \$3,691.38 in disbursements on a substantial indemnity scale in respect of the Appellants' unsuccessful motion for a stay pending appeal, which was heard by Justice Leitch on September 22, 2014 and \$6,224.38 in fees and \$71.50 in disbursements on a substantial indemnity scale for the Appellants' unsuccessful motion to reconsider that decision.
- (b) **Appeal of the ERT Decision:** \$54,076.15 in fees and \$1,775.17 in disbursements on a partial indemnity scale in respect of this Appeal.

4. Bills of Costs in support of these amounts are attached as Appendix "A".<sup>1</sup>

5. The Appellants should not be entitled to shield themselves from cost exposure on the basis that this was "public interest" litigation. That submission was rejected by this Court in a prior appeal from the ERT in *Ostrander* where the two Appellants were ordered to pay an aggregate costs award of more than \$50,000.<sup>2</sup> Moreover, the stay motion primarily involved concerns the Appellants had about their personal property and was not motivated by broader concerns to protect the public interest.

#### I. THE APPELLANTS' UNSUCCESSFUL MOTION FOR A STAY

6. For the reasons that follow, K2 Wind submits that pursuant to Rule 57.01(4) costs on a substantial indemnity basis are appropriate in respect of the Appellants' motion for a stay.

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<sup>1</sup> The requested costs awards have 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 motion for a stay or the Appeal or the cross-examinations on affidavits.

<sup>2</sup> *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*, 2014 ONSC 2127 at paras. 5-7 and 11 (Div. Ct.).

7. On August 21, 2014, K2 Wind wrote to the Appellants and explained the lack of merit of the stay motion, including that there was no risk of harm to human health prior to the hearing of their appeal because the wind project would not be operational until 2015. In the same letter, K2 Wind offered to settle the motion on the basis that K2 Wind would not seek its costs if the Appellants agreed to withdraw the motion. A copy of the letter offering to settle the motion is attached as Appendix "B".

8. The Appellants' ignored this offer and proceeded with a motion that was both unnecessary and clearly without merit. Indeed, Justice Leitch dismissed the motion on the basis outlined in K2 Winds' offer to settle: that there was no risk of harm to human health pending the hearing of the Appeal.<sup>3</sup>

9. The lack of merit of the Appellants' motion was compounded by the unanimous decision of a three-judge panel of this Court in *Pitt v. Wainfleet Wind Energy Inc.*, which confirmed that the Divisional Court does not have jurisdiction to grant a stay of a REA or construction activities in the circumstances in which the Appellants requested that relief.<sup>4</sup> K2 Wind also explained to the Appellants in its offer to settle that their motion would fail on this basis.

10. In an attempt to compensate for these fatal weaknesses, the Appellants significantly increased the cost and complexity of their motion by attempting to justify a stay on alleged water management issues. These issues were never raised before the ERT or in the Notice of Appeal and appeared for the first time in the Appellants' Notice of Motion for a stay. The water management issues unnecessarily increased the complexity of the motion and K2 Wind's costs of opposing it. As Justice Leitch correctly held, these issues could not form the basis for a stay or injunctive relief because the water management issues were unconnected to the issues that the Appellants were raising on Appeal.<sup>5</sup>

11. Given the admitted fact that the wind farm would not be operational until after the hearing of the Appeal, the Appellants' insistence on pursuing a clearly unmeritorious stay motion appears to have been motivated by political opposition to Ontario's renewable energy regime rather than the protection or enforcement of any legal right. The Appellants are founding members of the anti-wind group, SWEAR. Mr. Drennan has stated under oath that he believes renewable energy projects under the REA regime are expensive scams with little to no environmental benefit.<sup>6</sup> He has previously taken steps to interfere with K2 Wind's construction activities by driving his tractor in front of delivery trucks and forcing those tractors to reduce their speed.<sup>7</sup> He

<sup>3</sup> *Dixon v. Ontario (Director, Ministry of the Environment)*, 2014 ONSC 5582 at paras. 70 and 72-73 (Div. Ct.).

<sup>4</sup> *Pitt v. Wainfleet Wind Energy Inc.*, 2014 ONSC 3970 (Div. Ct.).

<sup>5</sup> *Dixon v. Ontario (Director, Ministry of the Environment)*, 2014 ONSC 5582 at paras. 63-64 (Div. Ct.).

<sup>6</sup> Cross-examination of Shawn Drennan held August 13, 2014 at pp. 22-24, qq. 92-96; Mr. Drennan's Evidence, October 15, 2013 ERT Transcript, pp. 40, 56-57.

<sup>7</sup> Affidavit of Paul Wendelgass sworn July 21, 2014 at para. 46.

believes he is at "war" with K2 Wind<sup>8</sup> and viewed the stay motion as another step in his ongoing "war".

12. The Drennans are not impecunious. They own real property valued at nearly \$2 million, with a mortgage of only \$240,000 and they have a profitable farming business with various assets.<sup>9</sup> They should be held to the cost consequences that follow from their decision to pursue a meritless and unnecessary motion.

13. The Appellants should have reasonably expected that their personal assets could be called upon to pay a cost order in the amount sought by K2 Wind. Indeed, K2 Wind stated in its offer to settle that the Appellants should reasonably expect K2 Wind's costs to exceed \$100,000:

We have reviewed carefully your clients' materials and the applicable law, and see no basis on which the requested stay could be granted. We are writing to ensure that your clients are fully aware that K2 Wind intends to seek its costs of this motion should it be unsuccessful. Considering the scope of the affidavit evidence, the need for cross-examinations, the legal issues raised and the time for argument, your clients should reasonably expect that the associated costs could exceed \$100,000.

14. The costs claimed are also in-line with costs awards in comparable motions for injunctive relief. For instance:

- (a) in *Jazz Air LP v. Toronto Port Authority*, this Court upheld a costs award of \$160,000 for an unsuccessful, one-day motion for an interlocutory injunction;<sup>10</sup>
- (b) in *Longyear Canada v. 897173 Ontario Inc. (c.o.b. J.N. Precis)*, the Court granted an aggregate costs award of \$185,000 for an unsuccessful, one-day motion for an interlocutory injunction;<sup>11</sup>
- (c) in *ACCPAC International Inc. v. Softrak Systems Inc.*, the Court granted a costs award of \$89,550 for an abandoned motion for an interlocutory injunction;<sup>12</sup>

15. The costs incurred by K2 Wind were entirely reasonable. In contrast to the absence of any harm posed to the Appellants, the stay motion, if successful, would have had serious consequences for K2 Wind, and it demanded a fulsome response. In

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<sup>8</sup> Cross-examination of Shawn Drennan held August 13, 2014 at pp. 33-34, qq. 145-151.

<sup>9</sup> Cross-examination of Shawn Drennan held August 13, 2014 pp. 35-38 and 42, qq. 155, 157-168 and 184.

<sup>10</sup> *Jazz Air LP v. Toronto Port Authority*, [2007] O.J. No. 809 (Div. Ct.).

<sup>11</sup> *Longyear Canada v. 897173 Ontario Inc. (c.o.b. J.N. Precis)*, [2008] O.J. No. 374 (S.C.J.).

<sup>12</sup> *ACCPAC International Inc. v. Softrak Systems Inc.*, [2000] F.C.J. No. 1240 (T.D.).

particular, the order sought by the Appellants threatened serious delays to the K2 Project, significant financial penalties for K2 Wind, and potentially even the viability of the K2 Project – a major infrastructure project, for which K2 Wind had already obtained approval and begun construction.

## II. THE APPELLANTS' UNSUCCESSFUL APPEAL

16. The costs of the Appellants' unsuccessful Appeal should be awarded on a partial indemnity basis.

17. On September 24, 2014, in an attempt to limit the extensive costs that it was forced to incur, K2 Wind offered to settle the Appeal on the basis that K2 Wind would not seek its costs if the Appellants agreed to withdraw the Appeal. A copy of the letter offering to settle the Appeal is attached as Appendix "C".

18. The Appellants ignored the offer and proceeded with the Appeal. The costs incurred by K2 Wind were aggravated by the Appellants' changing position on the Appeal. Indeed, the Appellants' position had changed so dramatically from that advanced in their Notice of Appeal (let alone from that advanced in front of the Environmental Review Tribunal) that, at the hearing, the Court asked the Appellants to submit a current statement of relief. The hearing for the Appeal, which was initially scheduled for three days, spilled well into a fourth, largely to accommodate the Appellants' submissions.

19. The Appellants embarked on the Appeal with substantial assets, and they should have reasonably expected that their personal assets could be called upon to pay a cost order in the amount sought by K2 Wind. Indeed, K2 Wind stated in its offer to settle that the Appellants should reasonably expect K2 Wind's costs to exceed \$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 K2 Wind specifically brought to the Appellants' attention.<sup>13</sup>

20. As in *Ostrander*, the Appellants should not be protected from costs by asserting 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.<sup>14</sup>

21. The analysis in *Ostrander* should be no different merely because the Appellants raised an unmeritorious 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

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<sup>13</sup> *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*, 2014 ONSC 2127 (Div. Ct.).

<sup>14</sup> *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*, 2014 ONSC 2127 at paras. 5-7 and 11 (Div. Ct.).


the plaintiff's statement of claim, including the portions that alleged a Charter breach.<sup>15</sup> 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:

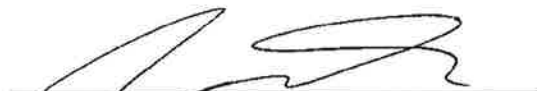
[while] there is merit to ensuring that adjudication of the novel issue related to Charter rights not be potentially foreclosed by the likely financial constraints of the student body collectively known in these proceedings as Carleton Life Line... the appropriate balance may be struck by making an award of cost to the Defendants in the cause fixed on a partial indemnity basis.<sup>16</sup>

22. In summary, K2 Wind seeks the following orders with respect to costs:
- (a) Costs of the stay motions fixed on a substantial indemnity basis in the amount of \$145,797.78 payable within 30 days with interest at a rate of three percent;
  - (b) In the alternative to (a), costs of the stay motions fixed on a partial indemnity basis in the amount of \$98,412.25 payable within 30 days with interest at a rate of three percent; and
  - (c) Costs of the Appeal fixed on a partial indemnity basis in the amount of \$55,851.32 payable within 30 days with an interest rate of three percent.

January 16, 2015

ALL OF WHICH IS RESPECTFULLY SUBMITTED

  
\_\_\_\_\_  
Christopher D. Bredt  
BORDEN LADNER GERVAIS LLP

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

<sup>15</sup> *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.).

<sup>16</sup> *Lobo v. Carleton University*, 2011 ONSC 5798 at para. 24 (S.C.J.).

**APPENDIX "A"**  
(see attached)



Court File No: 2056/14  
ERT Case No.: 13-097/13-098

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(Divisional Court)

BETWEEN:

SHAWN DRENNAN and TRICIA DRENNAN

Appellants/  
Appellants on Appeal

- and -

THE DIRECTOR, MINISTRY OF THE ENVIRONMENT

Respondent/  
Respondent on Appeal

- and -

K2 WIND ONTARIO INC. OPERATING AS  
K2 WIND ONTARIO LIMITED PARTNERSHIP

Respondent/  
Respondent on Appeal

COSTS OUTLINE OF K2 WIND ONTARIO INC. OPERATING AS  
K2 WIND ONTARIO LIMITED PARTNERSHIP

(RE: MOTION FOR STAY)

**Partial Indemnity Basis**

Fees (as detailed below)	\$	80,089.00	
13% HST	\$	10,411.57	
Sub-Total	\$	90,500.57	
Disbursements (includes HST per Appendix attached)	\$	3,691.38	
TOTAL	\$	94,191.95	

**Substantial Indemnity Basis**

Fees (as detailed below)	\$	120,186.30	
13% HST	\$	15,624.22	
Sub-Total	\$	135,810.52	
Disbursements (includes HST per Appendix attached)	\$	3,691.38	
TOTAL	\$	139,501.90	

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

- 2 -

SARAH POWELL	Year of Call	1993
JAMES BUNTING	Year of Call	2003
NATHANIEL READ-ELLIS	Year of Call	2013
RACHAEL LEE	Student	

The experience of the parties' lawyer at Borden Ladner & Gervais LLP:

CHRISTOPHER BREDT	Year of Call	1984
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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: Preparing and filing Responding Motion Record; Preparing for and conducting/attending cross-examinations on affidavits and following-up on undertakings; Conducting legal research; Reviewing Appellants' Factum, Book of Authorities and Affidavits; Preparing and filing Factum and Book of Authorities; Communications with Court, client and Appellants' counsel; and Lawyers' fee for preparation and attendance at hearing of Motion – Sept. 22-23, 2014.	Christopher Bredt	41.4	\$350.00	\$14,490.00	\$525.00	\$21,735.00
		Sarah Powell	60.2	\$350.00	\$21,070.00	\$525.00	\$31,605.00
		James Bunting	105.6	\$265.00	\$27,984.00	\$398.00	\$42,028.80
		Nathaniel Read-Ellis	103.9	\$150.00	\$15,585.00	\$225.00	\$23,377.50
		Rachael Lee	16	\$60.00	\$960.00	\$90.00	\$1,440.00
	<b>TOTAL FEE</b>				<b>\$80,089.00</b>		<b>\$120,186.30</b>

**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	\$1,768.90
Courier/Taxi	\$108.60
Transcripts	\$1,225.75
Law Research/Search fees	\$588.13
<b>TOTAL</b>	<b>\$3,691.38</b>

Shawn Drennan et al  
 Appellants / Respondent on Appeal

and

The Director, Ministry of the Environment  
 Respondent on Appeal

and

K2 Wind Ontario Inc. operating as K2 Wind Ontario Limited Partnership  
 Respondent / Respondent on Appeal

Court File No: 2056/14  
 ERT Case No.: 13-097/13-098

**ONTARIO  
 SUPERIOR COURT OF JUSTICE  
 (Divisional Court)**  
 Proceeding commenced at London

**COSTS OUTLINE OF K2 WIND ONTARIO INC.,  
 OPERATING AS K2 WIND ONTARIO LIMITED  
 PARTNERSHIP**

BORDEN LADNER GERVAIS LLP  
 44th Floor - 40 King Street West  
 Toronto, ON M5H 3Y4

Christopher Brett LSUC No.: 23627Q  
 Tel: 416.367.6165  
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 Toronto ON M5V 3J7

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 Nathaniel Read-Ellis LSUC No.:63477L  
 Tel: 416.863.0900  
 Fax: 416.863.0871

Lawyers for Respondent / Respondent on Appeal,  
 K2 Wind Ontario Inc. operating as K2 Wind Ontario  
 Limited Partnership



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ONTARIO  
SUPERIOR COURT OF JUSTICE  
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- and -

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Respondent/  
Respondent on Appeal

- and -

K2 WIND ONTARIO INC. OPERATING AS  
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Respondent/  
Respondent on Appeal

COSTS OUTLINE OF K2 WIND ONTARIO INC. OPERATING AS  
K2 WIND ONTARIO LIMITED PARTNERSHIP

(Re: **Motion to Reconsider Stay**)

**Partial Indemnity Basis**

Fees (as detailed below)	\$	3,671.50	
13% HST	\$	477.30	
Sub-Total	\$	4,148.80	
Disbursements (includes HST per Appendix attached)	\$	71.50	
<b>TOTAL</b>	\$	<b>4,220.30</b>	

**Substantial Indemnity Basis**

Fees (as detailed below)	\$	5,508.30	
13% HST	\$	716.08	
Sub-Total	\$	6,224.38	
Disbursements (includes HST per Appendix attached)	\$	71.50	
<b>TOTAL</b>	\$	<b>6,295.88</b>	

- 2 -

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 experience of the parties' lawyer at Borden Ladner & Gervais LLP:

CHRISTOPHER BREDT	Year of Call	1984
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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 Motion Record;  Preparing and filing Factum;  Communications with client and Appellants' counsel; and  Lawyers' fee for preparation and attendance at hearing of Motion.	Christopher Bredt	4.1	\$350.00	\$1,435.00	\$525.00	\$2,152.50
		James Bunting	2.1	\$265.00	\$556.50	\$398.00	\$835.80
		Nathaniel Read-Ellis	11.2	\$150.00	\$1,680.00	\$225.00	\$2,520.00
	<b>TOTAL FEE</b>				<b>\$3,671.50</b>		<b>\$5,508.30</b>



**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	\$71.50
<b>TOTAL</b>	<b>\$71.50</b>

Shawn Drennan et al and the Director, Ministry of the Environment

K2 Wind Ontario Inc. operating as K2 Wind Ontario Limited Partnership

Appellants / Respondent on Appeal

Respondent / Respondent on Appeal

Respondent / Respondent on Appeal

Court File No: 2056/14  
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SUPERIOR COURT OF JUSTICE  
(Divisional Court)**  
Proceeding commenced at London

**COSTS OUTLINE OF K2 WIND ONTARIO INC.,  
OPERATING AS K2 WIND ONTARIO LIMITED  
PARTNERSHIP**

(Re: Motion to Reconsider Stay)

BORDEN LADNER GERVAIS LLP  
44th Floor - 40 King Street West  
Toronto, ON M5H 3Y4

Christopher Bredt LSUC No.: 23627Q  
Tel: 416.367.6165  
Fax: 416.361.7063

DAVIES WARD PHILLIPS & VINEBERG LLP  
155 Wellington Street West  
Toronto ON M5V 3J7

James Bunting LSUC No.: 48244K  
Nathaniel Read-Ellis LSUC No.: 63477L  
Tel: 416.863.0900  
Fax: 416.863.0871

Lawyers for Respondent / Respondent on Appeal,  
K2 Wind Ontario Inc. operating as K2 Wind Ontario  
Limited Partnership



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K2 WIND ONTARIO INC. OPERATING AS  
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Respondent/  
Respondent on Appeal

COSTS OUTLINE OF K2 WIND ONTARIO INC. OPERATING AS  
K2 WIND ONTARIO LIMITED PARTNERSHIP

(Re: Appeal)

**Partial Indemnity Basis**

Fees (as detailed below)	\$	47,855.00	
13% HST	\$	6,221.15	
Sub-Total	\$		54,076.15
Disbursements (includes HST per Appendix attached)	\$		1,775.17
TOTAL	\$		55,851.32

**Substantial Indemnity Basis**

Fees (as detailed below)	\$	71,802.00	
13% HST	\$	9,334.26	\$
Sub-Total	\$		81,136.26
Disbursements (includes HST per Appendix attached)	\$		1,775.17
TOTAL	\$		82,911.43

- 2 -

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 experience of the parties' lawyer at Borden Ladner & Gervais LLP:

CHRISTOPHER BREDT	Year of Call	1984
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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 Appeal.	Christopher Bredt	97.6	\$350.00	\$34,160.00	\$525.00	\$51,240.00
		James Bunting	39	\$265.00	\$10,335.00	\$398.00	\$15,552.00
		Nathaniel Read-Ellis	22.4	\$150.00	\$3,360.00	\$225.00	\$5,040.00
	<b>TOTAL FEE</b>				<b>\$47,855.00</b>		<b>\$71,802.00</b>

**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
<b>TOTAL</b>	<b>\$1,775.17</b>



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Lawyers for Respondent / Respondent on Appeal,  
K2 Wind Ontario Inc. operating as K2 Wind Ontario  
Limited Partnership

**APPENDIX "B"**  
(see attached)



155 Wellington Street West  
Toronto ON M5V 3J7  
dwpv.com

August 21, 2014

James D. Bunting  
T 416.367.7433  
jbunting@dwpv.com

File No. 247022

**WITHOUT PREJUDICE**

Mr. Julian Falconer  
Asha James  
Falconers LLP  
10 Alcorn Avenue, Suite 204  
Toronto, ON  
M4V 3A9

Dear Counsel:

**Re: *Drennan v. Director, Ministry of the Environment*, Court file No. 2056/14**

We are writing in respect of your client's motion seeking a stay. We have reviewed carefully your clients materials and the applicable law, and see no basis on which the requested stay could be granted. We are writing to ensure that your clients are fully aware that K2 Wind intends to seek its costs of this motion should it be unsuccessful. Considering the scope of the affidavit evidence, the need for cross-examinations, the legal issues raised, and the time for argument, your client's should reasonably expect that the associated costs could exceed \$100,000.

With respect to the lack of merit to your client's motion, it is our view that the motion is both without merit and unnecessary, including because:

- (a) the Divisional Court does not have jurisdiction to grant a stay in respect of a Renewable Energy Approval ("REA"), as recently confirmed in *Pitt v. Wainfleet Wind Energy Inc.*, 2014 ONSC 3970;
- (b) the drainage issues alleged in Mr. Drennan's Affidavit were not raised in the hearing before the ERT and cannot form the basis for the requested stay; and
- (c) there is no evidence of any material harm that will arise to your clients in the short two month period between the hearing of the stay motion and the hearing of their appeal. In particular, (i) there is no risk of harm to human health from wind turbines pending appeal because the wind turbines will not be operational before the appeal is heard, and (ii) there are not currently any material drainage or flooding issues on the Appellants' property and the continued construction

activities will only further relieve any future stormwater runoff onto the Appellants' property.

If your clients are prepared to agree to withdraw the stay motion on or before August 29, 2014, K2 Wind is prepared to agree that it will not seek to recover the very substantial costs it has incurred to date in responding to the motion. Please treat this letter as an offer to settle pursuant to Rule 49. Should the Appellants choose to pursue their motion for a stay, K2 Wind intends to rely on this letter in its costs submissions.

Yours very truly,

DAVIES WARD PHILLIPS & VINEBERG LLP

Per: James Bunting

JDB/klj

**APPENDIX "C"**  
(see attached)



155 Wellington Street West  
Toronto ON M5V 3J7  
dwpv.com

September 24, 2014

James D. Bunting  
T 416.367.7433  
jbunting@dwpv.com

File No. 247904

**WITHOUT PREJUDICE**

Mr. Julian Falconer & Asha James  
Falconers LLP  
10 Alcorn Avenue, Suite 204, Toronto, ON  
M4V 3A9

Dear Counsel:

**Re: *Drennan v. Director, Ministry of the Environment*, Court file No. 2056/14**

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 are writing to ensure that your clients are fully aware that K2 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 30, 2014, K2 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, K2 Wind intends to rely on this letter in its costs submissions.

Yours very truly,

  
James Bunting

**SCHEDULE A**  
**(Cases)**

1. *Ostrander Point GP Inc. v. Prince Edward County Field Naturalists*, 2014 ONSC 2127 (Div. Ct.)
2. *Dixon v. Ontario (Director, Ministry of the Environment)*, 2014 ONSC 5582 (Div. Ct.)
3. *Pitt v. Wainfleet Wind Energy Inc.*, 2014 ONSC 3970 (Div. Ct.)
4. *Jazz Air LP v. Toronto Port Authority*, [2007] O.J. No. 809 (Div. Ct.)
5. *Longyear Canada v. 897173 Ontario Inc. (c.o.b. J.N. Precis)*, [2008] O.J. No. 374 (S.C.J.)
6. *ACCPAC International Inc. v. Softrak Systems Inc.*, [2000] F.C.J. No. 1240 (T.D.)
7. *Lobo v. Carleton University*, 2011 ONSC 5798 (S.C.J.)
8. *Lobo v. Carleton University*, 2012 ONCA 498
9. *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.

...

(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

Shawn Drennan et al  
Appellants on Appeal

and  
The Director, Ministry of  
the Environment  
Respondent on Appeal

and  
K2 Wind Ontario Inc.  
operating as K2 Wind  
Ontario Limited Partnership  
Respondent on Appeal

Court File No: 2056/14  
ERT Case No.: 13-097/13-098

Appellants /

Respondent /

Respondent /

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(Divisional Court)  
Proceeding commenced at London**

**COSTS OUTLINE OF K2 WIND ONTARIO INC.,  
OPERATING AS K2 WIND ONTARIO LIMITED  
PARTNERSHIP**

BORDEN LADNER GERVAIS LLP  
44th Floor - 40 King Street West  
Toronto, ON M5H 3Y4

Christopher Bredt LSUC No.: 23627Q  
Tel: 416.367.6165  
Fax: 416.361.7063

DAVIES WARD PHILLIPS & VINEBERG LLP  
155 Wellington Street West  
Toronto ON M5V 3J7

James Bunting LSUC No.: 48244K  
Nathaniel Read-Ellis LSUC No.: 63477L  
Tel: 416.863.0900  
Fax: 416.863.0871

Lawyers for Respondent / Respondent on Appeal,  
K2 Wind Ontario Inc. operating as K2 Wind Ontario  
Limited Partnership

Please see attached.

Thank you.

Lisa Drover  
Assistant to Nathaniel Read-Ellis



Lisa Drover  
Legal Assistant

155 Wellington Street West  
Toronto, ON M5V 3J7

T 416.863.0900 Ext 822233  
ldrover@dwpv.com

DAVIES WARD PHILLIPS & VINEBERG LLP

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The logo for DAVIES, consisting of the word "DAVIES" in a serif font inside a dark square.

155 Wellington Street West  
Toronto ON M5V 3J7  
dwpv.com

## Facsimile

**From** Nathaniel Read-Ellis  
416.367.7468  
nread-ellis@dwpv.com

**Date** January 16, 2015  
**File No.** 247022  
**No. of Pages** 35

<b>To</b>	<b>Company</b>	<b>Telephone</b>	<b>Fax</b>
Julian Falconer	Falconers LLP	416.964.3408	416.929.8179
Daniel Meuleman Andrea Huckins	Crown Counsel, Ministry of the Attorney General	416.314.7605	416.314.6579

Attached please find the Costs Submissions of K2 Wind served upon you pursuant to the *Rules of Civil Procedure*.

Notice: This fax should not be read by, or delivered to, anyone other than the person to whom it is addressed. It may contain privileged or confidential information. If you have received this fax in error, please call us immediately (collect if necessary) at 416.863.0900, ext 7725. Also, please call us at this number if there are any transmission problems.

DAVIES WARD PHILLIPS & VINEBERG LLP