

Court Awards Ostrander Costs in Blanding's Turtle Appeal

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The Ontario Divisional Court determined on April 4, 2014 that Prince Edward County Field Naturalists and the Alliance to Protect Prince Edward County should pay “fair and reasonable” costs to Ostrander Point GP Inc. within 30 days of the decision. The costs award follows the Court’s February 20, 2014 decision to allow an appeal by Ostrander and the Director of the Ministry of the Environment of the Environmental Review Tribunal’s revocation of the Director’s grant of a Renewable Energy Approval for a nine turbine wind farm in Prince Edward County. The costs award sends a message to citizen groups to budget for an award of potential litigation costs in the event a proponent or the government is successful.

Background

On February 20, 2014, the Ontario Divisional Court allowed an appeal by Ostrander Point GP Inc. (Ostrander) and the Director, Ministry of the Environment (Director) from the Environmental Review Tribunal’s (ERT) decision to revoke the Director’s decision to grant a Renewable Energy Approval for a nine turbine wind farm located on Crown land in Prince Edward County (see [“Ontario Court Overturns ERT Decision Revoking Ostrander’s Renewable Energy Wind Farm Approval”](#)). The Court also set aside the ERT’s decision and dismissed appeals by Prince Edward County Field Naturalists (PECFN) and the Alliance to Protect Prince Edward County (APPEC) from other parts of the ERT’s decision.

Ostrander then sought costs against PECFN in the amount \$120,000 inclusive of disbursements and HST. It also sought costs against APPEC in the amount of \$30,000 inclusive of disbursements and HST. The Director only sought reimbursement from PECFN in the amount \$2,926.70, representing the amount paid for transcripts.

Factors Considered in the Costs Decision

PECFN and APPEC argued that there should be no award of costs as the case involved matters of “public interest and also raised novel issues” (see [“Ontario Court Overturns ERT Decision Revoking Ostrander’s Renewable Energy Wind Farm Approval”](#)). They relied on *St. James’ Preservation Society v. Toronto (City)*, [2006] OJ No. 2726 (SCJ), which set out five factors to decide whether a particular proceeding constitutes public interest litigation. These factors, and the Court application of them to the Ostrander case, is as follows

- 1 **Nature of the unsuccessful litigant** – The PECFN and APPEC are not public advocacy groups pursuing a broad public policy mandate. As residents of Prince Edward County, they have a “direct and personal interest” in the outcome of the litigation.

- 2 **Nature of the successful litigant** – Ostrander is a private party and not a public one such as the Director.
- 3 **Nature of the case – was it in the public interest?** While there is a measure of public interest in the appeals, which did raise matters not previously been considered by the Court, that alone is not enough to dictate a costs award.
- 4 **Whether the litigation had any adverse impact on the public interest** – While there is no serious adverse impact on the public interest, the appeal caused a delay to the wind turbine project going forward, despite its approval by two provincial ministries.
- 5 **Final consequences to the parties** – While Ostrander is better suited to absorb costs associated with the litigation, that alone is not a reason to deny costs. One function of awarding costs is to ensure that all parties “consider the wisdom of pursuing litigation and understand that there are consequences for doing so”.

Costs Decision

Based on these factors, the Court determined that PECFN and APPEC should pay costs to Ostrander in an amount that is “fair and reasonable”. The Court noted that Ostrander’s appeal took up two of the three days of the appeals. With this in mind, the Court awarded Ostrander one third of what it had sought. PECFN was ordered to pay \$40,000 inclusive of disbursements and HST and APPEC was ordered to pay \$10,000 inclusive of disbursements and HST. ECFN was found liable (in the amount of \$2,926.70) for reimbursing the Director the cost of providing additional transcripts for the appeal.

All of the costs were payable within 30 days.

Implications

If the proponent has received a government approval or permit to proceed with a project, citizen groups should recognize that there is a very real prospect that “fair and reasonable” litigation costs could be awarded against them if the proponent is successful in the appeal. This litigation risk is real, despite the degree of public interest involved and the extent to which the issues raised are novel. Moreover, citizen groups should budget for such costs and ensure that access to sufficient funds is readily available as the time for payment can be very short.

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