


**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

SHAWN DRENNAN AND TRISHA DRENNAN

PLAINTIFFS

AND



**K2 WIND ONTARIO INC.,
K2 WIND ONTARIO LIMITED PARTNERSHIP, AGATHA GARCIA WRIGHT,
DIRECTOR OF THE MINISTRY OF ENVIRONMENT and HER MAJESTY THE
QUEEN IN RIGHT OF ONTARIO**

DEFENDANTS

STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States or America, the period is sixty days.


Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGEMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. If you wish to defend this proceeding but are unable to pay legal fees, legal aid may be available to you by contacting a local Legal Aid office.

IF YOU PAY THE PLAINTIFFS' CLAIM AND \$2,000.00 for costs, within the time for service and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiffs' claim and \$100.00 for costs and have the costs assessed by the court.

Date: November 14, 2012

Issued by


Local registrar

Address of

Goderich Courthouse
1 Courthouse Square
Goderich, Ontario
N7A 1M2

TO: K2 WIND ONTARIO INC.
333 Bay Street
Toronto, Ontario
M5H 2T4

AND TO: K2 WIND ONTARIO LIMITED PARTNERSHIP
333 Bay Street
Toronto, Ontario
M5H 2T4

AND TO: AGATHA GARCIA WRIGHT
Director of the Ministry of Environment
2 St. Clair Avenue West
Toronto, Ontario
M4V 1L5

AND TO: HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
Ministry of the Attorney General
McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto, ON
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CLAIM

1. The Plaintiffs, Shawn and Trisha Drennan, claim:
 - a) General damages in the amount of \$2,000,000.00 (two million dollars);
 - b) Special damages in a sum to be disclosed before trial;
 - c) Punitive and/or exemplary damages in the amount of \$1,000,000.00 (one million dollars);
 - d) Aggravated damages in the amount of \$1,000,000.00(one million dollars);
 - e) A Declaration that a decision by the Director of the Ministry of the Environment to grant an approval for the K2 Wind Project will violate section 7 of the *Canadian Charter of Rights and Freedoms*;
 - f) A Declaration that section 47.5(1) and section 142.1 of the *Environmental Protection Act* violate section 7 of the *Canadian Charter of Rights and Freedoms*;
 - g) An interlocutory injunction, pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*, restraining the Director of the Ministry of Environment, from granting an approval, pursuant to section 47.5(1) of the *Environmental Protection Act*, for the K2 Wind Project;
 - h) An interlocutory injunction, restraining the Defendants, K2 Wind Ontario Inc. and K2 Wind Ontario Limited Partnership, from commencing construction of the K2 Wind Project until the trial or other disposition of this action;
 - i) Damages pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*;
 - j) Pre and post judgment interest pursuant to sections 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. 43;
 - k) Costs of this action on a solicitor and client basis, together with HST payable pursuant to the *Excise Act*; and
 - l) Such further and other relief as this Honourable Court deems just.

PART I: INTRODUCTION

(a) The Parties

1. The Plaintiffs, Shawn Drennan and Trisha Drennan, are landowners whose family farm is located in the Township of Ashfield-Colborne-Wawanosh, Ontario. The Plaintiffs live in an area that is currently targeted for a wind farm of upwards of 140 wind turbines (K2 Wind Project). One of the wind turbines will be as close as 650 meters from their home. Eleven more wind turbines will be located within two kilometers. In addition, a 270 MW substation is to be built within 500 metres of the Drennan residence.

2. The Defendant, K2 Wind Ontario Inc., is a corporation incorporated pursuant to the laws of Ontario. Its main office is located in Toronto, Ontario. K2 Wind Ontario Inc. is a general partner in K2 Wind Ontario Limited Partnership.

3. The Defendant, K2 Wind Ontario Limited Partnership is a limited partnership operating pursuant to the laws of Ontario. Its main office is located in Toronto, Ontario. K2 Wind Ontario Limited Partnership is a limited partner with K2 Wind Ontario Inc., CP K2 Holdings Inc. (an affiliate of Capital Power Corporation) Samsung Renewable Energy Inc., and Pattern K2 Holdings LLP (an affiliate of Pattern Renewable Holding Canada ULC).

4. The Defendant, Agatha Garcia Wright, Director of the Ministry of Environment, is appointed pursuant to section 5 of the *Environmental Protection Act*. Ms. Wright is responsible for granting, pursuant to section 47.5(1) of the *Environmental Protection Act*, an Applicant's application for renewable energy approval.

5. Pursuant to the *Proceedings Against the Crown Act*, the Defendant, Her Majesty the Queen in Right of Ontario, is the representative of the Ministry of the Environment and is

responsible for the *Environmental Protection Act* and any regulations passed pursuant to the *Act* that govern the renewable energy approval process. Her Majesty the Queen in right of Ontario is a necessary party pursuant to Rule 5.03 of the *Rules of Civil Procedure*.

PART II: FACTS

(a) The K2 Wind Project

6. Prior to the incorporation of K2 Wind Power Inc. and the creation of the K2 Wind Power Limited Partnership, (together, the “K2 Wind companies”), Capital Power LP had submitted an application for a wind turbine project called “Kingsbridge II” and had initiated the Ministry of the Environment’s Renewable Energy Approval (“REA”) process pursuant to the *EPA*. The Kingsbridge II project was proposed to overlap with an existing wind farm, the 40MW Kingsbridge I project. Kingsbridge 1 consists of 22 wind turbines which have been operating since 2006 in the Township of Ashfield-Colborne-Wawanosh. The closest existing wind turbine in the Kingsbridge I project is approximately 3 to 4 km from the Drennan family farm.

7. According to the proposed draft site plan of the Kingsbridge II project, one wind turbine was to be constructed within 650 metres of the Drennan family’s home and eleven more wind turbines were to be constructed within 2 km of the Drennan family farm. According to the proposed draft site plan, a 270MW substation was to be built within 550 metres of the Drennan family’s home.

8. The K2 Wind companies took over the project in 2011. In taking over the project, the K2 Wind companies changed the proposed wind turbine technology and the project layout. The K2 Wind companies restarted the REA process in June 2012. K2 Wind Ontario Inc. issued a new

Notice of Proposal to Engage in a Renewable Energy Project, Notice of Draft Site Plan and Notice of an upcoming Public Meeting (K2 Wind Project).

9. The K2 Wind Project has been slightly reduced in size from 150 wind turbines to 140 wind turbines, though its nameplate capacity has remained the same at 270 MW. The project will still be located in the Ashfield-Colborne-Wawanosh Township, on land leased from approximately 90 proponents. It still includes a 270MW transformer substation to be located within 500 m of the Drennan family's home, one wind turbine to be built within 650 metres, and eleven more wind turbines to be built within the surrounding 2 km. The impact on the Drennans remains the same as with the previous incarnation of the project.

10. The K2 Wind companies are expected to finalize an application to build and operate the wind farm, including the REA, by the end of 2012. Following regulatory approval, construction on the K2 Wind Project is expected to begin in 2013, with commercial operation in 2014.

11. The current Notice of a Proposal, including a draft site plan, and notice of a public meeting, was issued on June 6, 2012. The first public meeting was held on July 12, 2012. The second public meeting occurred on October 18, 2012.

12. The K2 Wind companies have not yet filed their request for approval with the Ministry.

(b) The Renewable Energy Approval Process

13. Prior to developing the project, the K2 Wind companies must obtain a renewable energy approval from the Ontario Ministry of the Environment. The process for obtaining this approval is outlined in *Ontario Regulation 359/09 – Renewable Energy Approvals* under Part V.0.1 of the *Environmental Protection Act*, R.S.O. 1990 c. E.19 (“EPA”).

14. Ontario Regulation 359/09 (the "Regulation") classifies various types of renewable energy facilities to determine the approval requirements. The K2 Wind Project would be a Class 4 facility under s. 6 of the Regulation.

15. Prior to submitting a renewable energy project for approval, the regulatory scheme requires the wind turbine company to hold two public meetings within the community. The Regulation provides strict guidelines on information or documents that must be submitted by the wind turbine company at the public meeting. These documents include the following:

- Construction Plan Report
- Consultation Report
- Decommissioning Plan Report
- Design and Operations Report
- Project Description Report
- Specifications Report
- Written summary of matters addressed in determining whether project is on protected property (a property of heritage value or interest)
- Written summary of matters addressed in determining whether project will impact on archaeological or heritage resource, or is on a property abutting a protected property
- If it will impact the above, an archaeological assessment report and/or a heritage assessment report as the case may be
- Environmental effects monitoring plan in respect of birds and bats
- Natural Heritage Assessment with a report setting out the records reviewed, the results of site review, and an evaluation of significance or provincial significance of natural features
- Water Assessment with a report setting out records reviewed and a report setting out results of a site review

16. At least 60 days before the second public meeting, all of the required documentation is to be made available to the public, including the Consultation Report. After the second meeting is held, the wind turbine project application can be submitted to the Ministry for approval.

17. The Director has the power to issue an approval as is set out in s. 47.5(1) of the *EPA*, which states:

After considering an application for the issue or renewal of a renewable energy approval, the Director may, if in his or her opinion it is in the public interest to do so,

- (a) issue or renew a renewable energy approval; or
- (b) refuse to issue or renew a renewable energy approval.

18. Under the *EPA*, if the project is approved, an appeal of the decision to grant an approval for a renewable energy project must be taken to the Environmental Review Tribunal (“ERT”). According to s. 142.1 of the *EPA*, an appeal of the approval can be taken on only two grounds. The appellant bears the burden of showing that the renewable energy project will cause:

- (a) serious harm to human health, or
- (b) serious and irreversible harm to plant life, animal life or the natural environment.

19. The Notice of Appeal must be served on the Director and the approval holder and filed with proof of service with the ERT within 15 days of approval.

20. Pursuant to section 143(1) of the *EPA*, filing a Notice of Appeal will not stay the project; rather, a stay motion must be brought before the ERT. Once the Notice of Appeal is filed, a party is assumed to be ready for a preliminary hearing within four weeks of filing its notice of appeal, and ready to proceed with a full hearing after a further four weeks.

21. The ERT is obliged by statute to give a final decision within six months of the filing of the appeal. If the ERT determines that engaging in the renewable energy project in accordance with the approval will cause harm, as defined in s.142.1 of the *EPA*, the ERT may; revoke the decision of the Director; by order, direct the Director to take such action as the ERT considers the Director should take in accordance with the *Act* and regulations; or alter the decision of the Director, for which purpose the ERT may substitute its opinion for that of the Director. If the ERT determines that no such harm will be caused, the ERT must confirm the Director's decision.

22. The range of setback distances is provided for in the table in section 55 of the Regulation. This provides that a minimum setback distance of 500 metres must be met in all cases, between the base of a turbine and the nearest noise receptor. A noise receptor is defined in the Regulation in part as the centre of a building used for overnight accommodation. The definition of a noise receptor would include the Drennan family's house.

PART III: CLAIMS

(a) Nuisance Claim against K2 Wind Ontario Inc. and K2 Wind Ontario Limited Partnership

23. The Plaintiffs claim that by constructing and operating the wind turbines as part of the K2 Wind Project, without mandatory minimum setbacks of greater than 2 km from their home, the Defendants and the K2 Wind companies will create a nuisance to the Plaintiffs.

24. Wind turbines that are built within 2 km of the Plaintiffs' home will create serious health concerns caused by the audible and inaudible sound that is emitted during their operation, and by the movement of the rotor blades which causes "shadow flicker" along the ground. These health concerns are substantial and constitute unreasonable interference with the use and enjoyment of the Plaintiffs' property.

25. The Plaintiffs claim that the health concerns associated with wind turbines constructed within 2 km of their home include, *inter alia*:

- a. Sleep related issues, including:
 - i. sleep disturbance; and
 - ii. chronic sleep deprivation.

- b. Health risks that result from chronic sleep disturbance, including:
 - i. cardiovascular disease;
 - ii. increased level of stress hormones;
 - iii. unintended changes in weight; and
 - iv. metabolic disturbances including impaired glucose tolerance.

- c. Physiological injury, including:
 - i. chronic headaches;
 - ii. nausea;
 - iii. unintentional changes in weight;
 - iv. dizziness; and
 - v. auditory and vestibular system disturbances.

- d. Psychiatric symptomatology, including;
 - i. depression;
 - ii. anger;
 - iii. anxiety;
 - iv. irritability;
 - v. hopelessness; and
 - vi. stress.

26. As a result of the health concerns set out in the immediately preceding paragraph, the Plaintiffs will sustain damages that cannot be compensated monetarily if the wind turbines are constructed within 2 km of their home.

27. In addition to the health concerns addressed above, the wind turbines built so close to the Drennan family property will bring down the value of their property causing them significant damages. Property values in neighboring townships, where wind turbine generators have been constructed within 3 kilometers of residences, have been significantly reduced.

28. As a result of the nuisance that will be caused by the Defendants, the K2 Wind Companies, the Plaintiffs are entitled to an interlocutory injunction which would restrain the Defendants from creating the aforesaid nuisance.

(b) Negligence claim against the K2 Wind Companies

29. Further and in the alternative, the Plaintiffs claim that the Defendants, the K2 Wind Companies, owe a duty of care to the Plaintiffs to ensure that the construction of the K2 Wind Project will not impact the use and enjoyment of their property or cause harm, including health concerns. The duty arises from the fact that the defendants are constructing massive and numerous wind turbines in close proximity to neighboring lands, including the Plaintiffs' land and residence.

30. The Plaintiffs claim that the K2 Wind Companies have breached the aforesaid duty of care, the particulars of said negligence include, *inter alia*:

- a. Proposing to construct wind turbines within 2 km of the Plaintiffs' residence;

- b. Failing to establish mandatory minimum setbacks of 2 km with respect of the construction of wind turbines from the Plaintiffs' residence;
- c. Failing to consider the significant health risks associated with the audible sound created by wind turbines constructed within 2 km of residences;
- d. Failing to properly assess the health risks concerned with the inaudible noise and infrasound effects of wind turbines constructed within 2 km of residences;
- e. Failure to consider the health risks associated with the "shadow flicker" created by wind turbines constructed within 2 km of residences; and
- f. Failure to conduct preconstruction sound modeling with respect to the K2 Wind Project.

(c) Damages - Nuisance and Negligence

31. The Plaintiffs claim that, as a result of the Defendants' nuisance and/ or negligence, the Plaintiffs will suffer damages. The particulars of which include *inter alia*:

- a. Increased susceptibility to the physical and physiological health risks detailed at paragraph 25;
- b. Decreased use and enjoyment of their property;
- c. Decreased quality of life; and
- d. Decreased property value.

32. The Plaintiffs claim that if the K2 Wind Project is allowed to continue without mandatory minimum setbacks of 2 km, the Plaintiffs will suffer irreparable harm that cannot be compensated monetarily.

(d) *Violation of section 7 of the Canadian Charter of Rights and Freedoms – Director Ministry of the Environment and Her Majesty the Queen*

33. The Plaintiffs plead that the statutory process for granting approval to wind farm projects violates the Plaintiffs' right to security of person as guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*. Specifically, the Plaintiffs plead that sections 47.5(1) and section 142.1 of the *EPA* create a regulatory scheme for granting approval to wind turbine generator projects that violates section 7 of the *Charter*.

34. The Plaintiffs pleads that sections 47.5 and 142.1 of the *EPA* establish a legislative scheme for granting approval for wind projects, without requiring the party applying for approval to establish that there are no adverse health effects from wind turbine generators erected within 2 km of a noise receptor as defined in the Regulation.

35. The Plaintiffs plead that there are adverse health effects caused by having wind turbine generators erected within 2 km from an occupied residential home. The Plaintiffs plead that the legislative scheme causes them severe psychological stress and exposes the Plaintiffs to the threat of a significant health risk because approvals can be issued in the face of adverse health effects. The Plaintiffs rely on the fact that the federal government has very recently initiated a study of the adverse health effects caused by wind turbines in response to concerns similar to those raised by the Plaintiffs. The Plaintiffs rely on the fact that there is sufficient concern raised on the issue of adverse health effects to warrant a study of the magnitude contemplated by the federal government.

36. Furthermore, at the appeal stage after an approval is granted, the Plaintiffs will bear the burden of establish serious harm to health. The reversal of the burden in a situation where there

is evidence and concern over adverse health effects is in itself a violation of s.7 of the *Canadian Charter of Rights and Freedoms*.

37. The Plaintiffs plead that the federal government's decision to study adverse health effects is consistent with similar moves in other jurisdictions, including the U.K., where construction of wind farms has been placed on hold pending further study.

38. The Plaintiffs plead that the discretion vested in the Director to grant or refuse approval is not absolute. The Director's decision must conform to the *Charter*. If the Director's decision results in an application of the *EPA* and Regulation in a manner that limits the section 7 rights of the Plaintiffs then the Director's discretion has been exercised in breach of the *Charter*.

39. The Plaintiffs plead that if the Director approves the K2 Wind Project, the approval violates their security of the person in that the Project will cause them severe psychological stress and exposes them to the threat of significant adverse health effects. The Plaintiffs plead that granting an approval of a wind turbine generator within 2 km of their residence, is state action that causes severe psychological stress and imposes a significant risk to the health of the Plaintiffs.

40. The Plaintiffs plead that the Ministry of Environment, as represented by HMQ, has not conducted any study with respect to the adverse health effects caused by constructing and operating wind turbine generators within 2 km of an occupied residence. The Plaintiffs plead that HMQ has acted in a manner that is contrary to the principles of fundamental justice in that it has arbitrarily, without study, legislated a scheme that permits the approval for massive wind farms, in residential and rural communities, without even investigating the possibility of

adverse health effects. The Plaintiffs plead that the current legislative minimum setback of 550 m was established arbitrarily without any study that demonstrates that this setback is safe.

41. In addition, the Plaintiffs plead that the principles of fundamental justice include the precautionary principle. The precautionary principle states that if there is reason to believe that an action or policy could cause harm to the public or to the environment, in the absence of scientific consensus that the action or policy is or is not harmful, the burden of proof that it is not harmful falls on those taking the action or establishing the policy.

(e) Interlocutory Injunction

42. The Plaintiffs seek an interlocutory injunction against the K2 Wind Companies pursuant to the common law and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. The Plaintiffs seek an interlocutory injunction against the Director pursuant to section 24(1) of the *Charter*.

43. The Plaintiffs plead that a section 24(1) *Charter* injunction does not require the Plaintiffs to establish a "very strong probability" that harm will occur. Rather, a section 24(1) *Charter* injunction requires the Plaintiffs to establish that there is a serious issue as to whether a *Charter* violation has occurred and that the Plaintiffs *Charter* rights will not be vindicated or adequately compensated absent an injunction. Finally, a section 24(1) *Charter* injunction will require an analysis of whether the balance of convenience favours granting the injunction.

44. The Plaintiffs plead that the construction of the wind turbine generators within 2 km of their property will cause them irreparable harm. If the wind farms are constructed then harm suffered by the Plaintiffs could not be recovered at the time of a decision on the herein claim.

45. The Plaintiffs further plead that the public interest will be served by granting the requested injunction as it would prevent people similarly situated to the Plaintiffs from the threat of exposure to significant health risks.

46. The Plaintiffs plead that they ought not to be required to fulfill a damages undertaking as part of the injunction process. The Plaintiffs are not in a position to provide a meaningful undertaking to the Defendants. In addition, the Plaintiffs claim that the damages undertaking should be lifted in this case because the public interest is engaged by the issues concerning public health and the ongoing development of wind turbine projects across Canada.

47. The Plaintiffs further plead that the public interest will be served by granting the requested injunction as it would prevent people similarly situated to the Plaintiffs from the threat of exposure to significant health risks. Given that the federal government has deemed the health issue is significant enough to merit study, it is submitted that requiring the Plaintiffs to comply with an undertaking would actually undermine the public interest in this issue.

48. The Plaintiffs plead that requiring them to comply with an undertaking will infringe their right to expression guaranteed by s.2(b) of the *Canadian Charter of Rights and Freedoms* as it will effectively preclude them from bringing the within injunction application.

49. By reason of the facts set out herein, and in particular the highhanded, shocking, contemptuous conduct of the defendants, the plaintiffs claim exemplary, aggravated and/or punitive damages.

50. The Plaintiffs plead Rule 5 the *Ontario Rules of Civil Procedure*.

51. The Plaintiffs plead sections 2(b), 7 and 24(1) of the *Canadian Charter of Rights and Freedoms*.

52. The Plaintiffs plead the *Environmental Protection Act*, R.S.O. 1990 c. E.19 and the regulations passed pursuant to the Act, including Ontario Regulation 359/09 – Renewable Energy Approvals.

53. The Plaintiffs plead the *Green Energy Act*, S.O. 2009 c. 12 and the regulations passed pursuant to the Act.

54. The Plaintiffs propose that this action be tried in Goderich, Ontario.

Date: November 14, 2011

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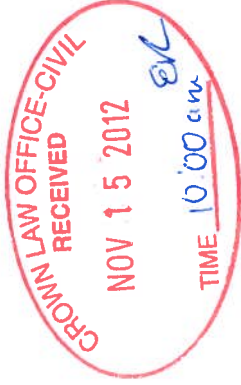
Shawn Drennan et al.
Plaintiffs

-and-

K2 Wind Ontario. et al.
Defendants

Court File No: *200-2012*

**ONTARIO
SUPERIOR COURT OF JUSTICE**
Proceedings Commenced in Goderich



Statement of Claim

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