

Environmental Law

RECENT DEVELOPMENTS OF IMPORTANCE

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On May 14, 2009, *Bill 150* (the *Green Energy and Green Economy Act, 2009*) (the "Act") had Third Reading in the Ontario legislature and received royal assent. Additional program details have been announced throughout September. The Act constitutes the second significant attempt by the McGuinty government to make Ontario a national and international leader in the development of renewable energy through the introduction of a new power procurement program. Moreover, the Act will have a huge impact on all aspects of electricity production and consumption in Ontario, and in the process, Ontario will become a guinea pig for jurisdictions seeking to adapt European-style procurement programs for use in North America. Although former Energy Minister Smitherman and the government have expended significant energy in bringing the Act and its associated programs to fruition, for various reasons the results of this initiative may be disappointing, for the resources invested.

The New Feed-in Tariff Program

The Act introduces a new feed-in tariff concept to Ontario's electricity system through the requirement that the Ontario Power Authority (the "OPA") develop such a program. Based on feed-in tariff programs in Europe, the program allows for the sale of renewable energy at pre-set rates without the necessity of proponents seeking inclusion within a government RFP. The program is open to various renewable energy technologies — biogas, biomass, landfill gas, solar photovoltaic, wind and waterpower. Contract terms under the program are 20 years, 40 years for waterpower. Applications have been accepted since October 1st, and the OPA expects to sign the first contracts in December.

According to the OPA, prices are

intended to cover total project costs and provide a reasonable rate of return. Rates for the feed-in tariff ("FIT") vary based on energy source or fuel type, with further rate differentiations serving as incentives for the development of smaller capacity and community projects. FIT payments range from 10.3 cents per kilowatt hour (kWh) for landfill gas projects over 10 MW to 80.2 cents for residential solar rooftop projects up to 10 kW. Certain projects are eligible for a price "adder" where there is aboriginal or other community group involvement — the maximum adder for aboriginal projects is 1.5 cents per kWh, and 1 cent for community projects, with the actual amount dependent on the participant's equity stake in the project.¹

One significant benefit of this program is that well-designed, constructed and financed new projects will be able to take advantage of the feed-in tariff without having to dedicate the time and monetary resources necessary to compete with other projects within the framework of a RFP. This program will provide an opportunity for many entrepreneurs to bring forward projects that would not otherwise have been feasible, which will create opportunities in turn for equipment suppliers, financing and other services.

Unfortunately, the structure of the program appears very likely to provide less than optimal results for the investment committed. As the tariff rates for some of the classes of renewable energy, in particular small solar, are significantly higher than for others, the new regime runs the risk of overbuilding the highest cost options. This issue is clearly a product of the competing goals of the government to encourage the development of a green economy and to replace and expand the electricity generation infrastructure in the province. As well, incentives built into the Act and the feed-in tariff program to spur community groups, First Nations, co-operatives and other smaller economic actors to develop projects will result in less

efficient results from the new program. Proposed domestic content requirements may raise the cost of developing projects and lead to reduced project development, as detailed below. Finally, restrictions on project locations have the potential to reduce the efficiency and profitability of certain renewable energy projects.

Provincial Content Requirements

Among the announcements in September 2009 were details of the provincial content requirements. While not technically part of the eligibility criteria for the feed-in tariff program, one of the requirements is that proponents incorporate significant Ontario content into certain categories of program projects. For example, wind power projects are required to include 25 per cent provincial content if brought into commercial operation prior to the end of 2011 and 50 per cent thereafter; significant photovoltaic (solar) projects require 50 per cent Ontario content prior to the end of 2010, with 60 per cent thereafter. Even so-called MicroFIT projects (*e.g.*, homeowner rooftop solar) have significant provincial content requirements.

Those aware of the existing supply chain realities in respect of renewable energy projects acknowledge that these aggressive requirements are impossible to meet with existing Ontario production. That said, the provincial government did not develop the feed-in tariff program solely in order to replace fossil fuel generation with renewable energy generation, but expects the development and expansion of a supply chain for both wind and solar projects. This is one of several examples of a tension between the goals underlying the Act and its associated programs; the provincial content requirements will result in significantly slower take-up of the FIT program for most projects. As a result, less generation will come on-line and projects with marginal returns will not get built due to the higher cost of Ontario components.

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Setbacks and Other Geographic Restrictions

Complicating both existing planned projects and future projects, Ontario has taken a very conservative approach to setbacks and noise limits by establishing the largest minimum setback requirements in Canada, the US and many European countries. The minimum 550 meter setback requirement for wind farms is not based on any existing comprehensive study, but rather intended to subdue reaction to the removal of the municipal power to limit wind developments and affect project planning. Further, the setbacks increase with the number of turbines (more than five) and the sound level rating of those turbines.

In respect of solar projects, and despite the estimate that only 0.1 per cent of prime farmland in the province would be utilized for existing planned solar projects, ground-mounted solar projects exceeding 100 kW are prohibited on Class One and Two lands (prime agricultural acreage) and so-called "Specialty Crop Areas", and limited to a total of 500 MW on Class Three lands, to be allocated on a regional basis. Similar to the setback issue, it appears that the government has bent to the will of certain opposition groups without any genuine concern of losing a material amount of farmland to these developments. Further, it arbitrarily limits the ability of farmers to use solar developments to supplement income from cash crops.

Uploading of Municipal Responsibilities

The Act amends many existing statutes with the goal of reducing for renewable energy projects the restrictions that currently exist when undertaking any industrial project, such as the building of a power plant. The intention is to create a permitting system in which a single renewable energy approval will address all otherwise applicable permit requirements. Unfortunately, there is no indication that

the burden of documentation and other information to be submitted will be reduced, and certain additional approvals will still be required in particular circumstances (for example, for projects located on Crown land). The new provisions act to "upload" decision-making from municipalities to the province, effectively expropriating municipal power to determine location of these projects. With the stated objective of facilitating the construction of new renewable energy facilities and creating consistent treatment of such projects across the province, these changes will in effect centralize the process of obtaining approvals for new facilities.

Unfortunately, this streamlining exercise is accompanied by unhelpful procedures for appeals of the required provincial approval. Because the new "renewable energy approval" may be appealed to Ontario's Environmental Review Tribunal ("ERT"), the focus of NIMBY ("Not In My Back Yard") forces in Ontario will move from the Ontario Municipal Board ("OMB"), the appeal entity for changes to zoning by-laws and other municipal decisions, to the ERT. Disregarding the cost and time associated with preparations necessary for a hearing at the ERT, the Act eliminates any formal leave to appeal process and allows any person resident in Ontario to require a hearing at the ERT with respect to a renewable energy approval. While the onus of proof rests with the party alleging that there is "serious harm to human health" or "serious and irreversible harm to plant life, animal life or the natural environment", project proponents will need to prepare for a full hearing on the facts, notwithstanding that there may be little or no substance to the claim.

Role of the Ontario Energy Board

Prior to passage of the Act, the objective of the Ontario Energy Board (the "OEB") was essentially to operate an efficient system. The Act adds to the OEB

mandate by requiring it to promote the conservation of electricity, to facilitate the implementation of a smart grid and to promote the use and generation of electricity from renewable energy sources.

The additional mandate items will dramatically change the OEB's role in terms of economic regulation in the province. It is far from clear as to how the new mandate items can be integrated with the old and there will likely be a period of adjustment and confusion.

Renewable Energy Facilitation Office

The new Renewable Energy Facilitation Office will have broad powers to assist or encourage the development of qualifying renewable energy projects. Materials useful to homeowners, developers and others intended to be active under the new FIT program will be produced by this office. The usefulness of this new organization will depend on the staffing and other resources provided to it.

Smart Grid Development and Transmission Enhancements

The Act mandates the development of a "smart grid" in the province. The concept behind the smart grid system is to adjust or rebuild the system in order to minimize transmission inefficiencies. While the Act sets forth this objective, implementation is to be spelled out in the regulations. Among the September 2009 announcements was former Minister Smitherman's speech to the Canadian Wind Energy Association Annual Conference detailing additional transmission capacity to be added in order to facilitate greater amounts of distributed generation in many parts of the province. Obviously, the success of these initiatives will depend on the ability of Hydro One to move as quickly as reasonably possible in order not to thwart generation development. As in many parts of North America, sufficient transmission is the most significant roadblock to the successful addition of renewable energy to the grid.

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Energy Conservation

The Act introduces for the first time a number of mechanics directed at improving conservation throughout Ontario. As one example, energy audits will be required on the sale of residential premises. The concept of “conservation and demand management” (“CDM”) targets is introduced for distributors of electricity and CDM targets can be specified as conditions of licenses held by the distributors.

Conclusion

Overall, the changes initiated by the passage of the Act comprise an interesting experiment in facilitating and incentivizing renewable energy development, energy conservation and the growth of a green economy in Ontario. Provincial content requirements, in particular, may have a significant dampening effect on associated programs without a large number of supply chain actors moving quickly to establish operations in the province; this appears

unlikely given recent developments in non-tariff trade barrier reduction talks between the United States and Canadian provinces, which could put pressure on Ontario to remove or amend these requirements, and which creates uncertainty within this sub-industry. However, despite its faults, the Act is likely to improve the speed at which certain renewable energy projects are developed in Ontario, and other North American jurisdictions will be keeping a close watch on the results. ■

1. All currency is in Canadian dollars



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