

The Ontario Power Authority's

Renewable Energy

Standard Offer Program

An Introductory Guide to Legal Issues

By: Ron Clark
and
Matt Napier

AIRD & BERLIS LLP

Barristers and Solicitors

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INTRODUCTION

A New Program For Small Developers of Renewable Energy Generation

The Ontario Power Authority (OPA) and the Ontario Energy Board (OEB) have created a Renewable Energy Standard Offer Program (RESOP) for Ontario. The RESOP makes it easier for smaller renewable energy generation facilities to connect with their local distribution company (LDC) and help meet Ontario's power needs. The program pays an established price to operators of smaller wind, waterpower, biomass and solar generating facilities, and simplifies the contractual, pricing, connection and financing process.

Benefits of the Program

Creating more renewable energy will make a positive impact on air quality and overall environmental health. RESOP will help achieve the Ontario Government's goal of having 2,700 megawatts of electrical power generated by new renewable energy sources in the province by 2010. The energy grid is strengthened by increased coverage created by the distribution of renewable energy generation projects, and transmission losses will decrease by producing electricity locally where the demand is greatest.

The Old Regime

Prior to RESOP, small operators faced many obstacles to efficiently and profitably participating in the production of energy in Ontario. The high upfront capital costs of hardware, construction and maintaining facilities were often prohibitive. The complexities of energy contracts, and difficulties adapting Ontario's electricity grid can be overwhelming and returns on investment can be difficult to predict given fluctuating energy prices. RESOP attempts to overcome these barriers by simplifying the pricing, eligibility and contracting rules to support these projects, while simultaneously avoiding the complexity, costs and administrative bureaucracy associated with procedures intended for large-scale projects.

How This Guide Will Help

Despite the relative simplicity of RESOP, successfully developing a new facility can still prove difficult. Unsophisticated providers may not be familiar with energy contracts, obtaining the proper zoning and environmental permits can be onerous, and finding the right financing can be a major barrier to getting a project off the ground. This Introductory Guide to Legal Issues will provide an overview of all aspects of RESOP from a practical and legal point of view. Program eligibility, pricing, contractual issues, environmental assessments, zoning requirements, connectivity, licensing, site access, financing and tax incentives will all be addressed.

ELIGIBILITY

Threshold Eligibility

The OPA, in its Final Program Rules for RESOP, identifies four major categories of renewable energy sources which are eligible for participation in the project: wind; solar (including thermal solar and solar PV); renewable biomass (including biogas, biofuel and landfill gas); and waterpower. An eligible facility must be comprised of only one of the above-mentioned renewable energy sources, must be located in Ontario and must have an installed generating capacity of no more than 10MW.

Geographical Restrictions

The OPA places several restrictions on eligibility based on geography. The OPA may be forced to restrict otherwise-eligible generators from participating in the program in certain geographical locations on the provincial transmission grid as select areas are not able to accept new generation. The OPA has instituted a colour-coded grid zone system to indicate which areas are available for RESOP applications. Green zones have no limit on transmission capacity; Yellow zones have limited capacity; and Orange zones are at capacity. The OPA will only entertain applications for micro projects (less than or equal to 10kW) and farm-based bio-energy generation projects (less than or equal to 250kW). Currently, there is only one restricted area in Ontario: The Lake Huron and Georgian Bay Zone, which is classified Orange. All other zones are Green. As available capacity is constantly changing, the OPA website is updated from time to time with information concerning which areas are restricted to RESOP applicants and how the OPA will treat applications from these areas.

Connectivity Restrictions

Similarly, restrictions are placed on applicants who do not meet certain connection and metering requirements. Section 2.2 (f) of the OPA Final Program Rules states that, to be eligible, a proposed project shall connect to either:

- (i) The Distribution System of an OEB-licensed electricity distributor via a single connection at a voltage of 50kV or less which is exclusive to the Project, or
- (ii) A Load Customer (i.e. “behind-the-meter”). Such Load Customer must be connected directly to the Distribution System of an OEB-licensed electricity distributor at a voltage of 50kV or less which is exclusive to the Load Customer, provided the Load Customer has a direct billing relationship with the relevant LDC.

Once connected, the output must comply with the metering requirements of the OEB's Distribution System Code for settlement purposes. Any connection or metering costs incurred are the responsibility of the generator. Additional information on customer classification, electrical protection equipment, metering and other connection requirements should be discussed with your LDC.

Ownership Restrictions

The OPA restricts eligibility based on the ownership of a facility. RESOP is not available for facilities which have previously contracted with Ontario Hydro, Ontario Electricity Financial Corporation or the Government of Ontario. Similarly, a facility owned by Ontario Power Generation Inc., or any of its affiliates, is not eligible. Other than these two ownership restrictions, RESOP does not restrict who can own eligible facilities, how many facilities an individual may own, or the total combined amount of energy produced, so long as each facility adheres to the 10MW cap.

Other Requirements

Eligibility for RESOP also depends on certain requirements being met at the time of filing an application with the OPA. These requirements include evidence of the following: a Connection Impact Assessment, an Environmental Assessment and Demonstrated Site Access. Each of these are discussed at greater length later in the Guide.

Phased and Incremental Projects

Phased projects and incremental projects may also be eligible for RESOP, so long as all other requirements are met. Phased projects are those which are to be completed in two or more phases, and they must be in commercial operation no longer than three years after the date of the contract to be eligible for payment. Incremental projects are initiatives that increase electricity output from existing facilities. Only the resulting increase in output is eligible for payment under RESOP.

Practical Eligibility Requirements

There are certain practical eligibility requirements which are specific to each major type of renewable energy. Zoning and environmental requirements will not be discussed in this section as they will be examined later in this Guide.



(a) **Wind**

Although not a requirement under the OPA's Final Program Rules, as a practical matter anyone proposing a RESOP wind energy project should first conduct an initial wind assessment. Because of the seasonal nature of wind, the assessment should begin at least a year, and preferably two years, before deciding on a final site for the generator. Wind measurements can be taken by erecting a meteorological tower on the proposed location. For the purpose of obtaining financing for the project, it is preferable to hire an independent company to conduct the assessment. The data should then be correlated with available Environment Canada data, taking into consideration factors such as wind direction, height of the measurements and whether the wind is blocked from any direction. Some wind data for proposed sites is available online at Environment Canada's website (www.windatlas.ca) or the Ontario Ministry of Natural Resources website (www.ontariowindatlas.ca).

Once the wind data has been collected and correlated with available governmental data, the wind estimate can be applied to the power curve of the proposed project's wind turbines and the facility's annual production can be estimated. With the information from this assessment, the proposed project can move forward to the next stages of eligibility, financing and contracting.

(b) **Solar**

Unlike wind energy, solar energy does not require a formal assessment to estimate annual energy production; however, it would be prudent to choose a location and orientation which maximizes the average daily sunlight exposure. Two available resources to aid in calculating peak sunlight hours are Environment Canada's Canadian Climate Normals 1971-2000 (www.climate.weatheroffice.ec.gc.ca/climate_normals), and Canadian Solar Industries Association Peak Solar Maps (www.cansia.ca/solarmap.asp).

(c) **Biomass**

Besides the normal cost considerations, operators proposing biomass projects should first consult with neighbours as the storage and fuel facilities can be quite large, and the proper handling of fuels is required to ensure safe operation.

(d) **Waterpower**

Of the four major sources of renewable energy, waterpower projects take the longest to complete. It is not uncommon for a project to take four to seven years before it is fully functional. Prior to spending time and money on a waterpower

project, it is essential that a potential operator first consult with neighbours and secure access to the waterway. Provincial waterways are governed by the Ontario Ministry of Natural Resources, which must be contacted to ensure proper approvals. Similarly, federal waterways are governed by Natural Resources Canada. The federal ministry's website contains a "Buyer's Guide" section which can help to identify a potential site (www.nrcan.gc.ca).

PRICING

A Market-based Approach to Pricing

The RESOP pricing format was created to simplify the pricing system as well as to minimize administrative costs to both the OPA and the energy generators. The OPA Final Program Rules establish a market-based approach to renewable energy pricing for all technologies except solar photovoltaic (PV). The Rules set a Base Rate to be paid to generators on a kilowatt-hour (kWh) basis, as well as bonus incentives to generators who can reliably provide energy output during peak hours. Inflation is also taken into account for all generators, other than solar PV generators, which are tied to the Consumer Price Index in Ontario.

Solar PV Pricing

Solar PV generators are treated differently for pricing purposes, as the OPA has recognized the solar PV technologies cannot be successful and profitable under the pricing system designed for other renewable energy sources. Solar PV projects are paid 42 cents per kWh and are not eligible for the peak-hour incentive or the inflation adjustment.

Base Rate

The initial base rate for wind, biomass and waterpower generators was 11.0 cents per kWh of electricity delivered. As of May 1, 2007, the base rate was increased to 11.04 cents per kWh delivered. This payment is based on electricity which is actually delivered to the LDC or consumed by the participant itself (as metered by the generator), not on the installed capacity of the facility.

Consumer Price Index Increase

The Final Program Rules and the Standard Offer Contract contain a calculation for an increase that would apply to 20 per cent of the base rate (as set out above) for all technologies other than solar PV. This increase is based on increases in the Consumer Price Index and is recalculated each year on May 1 for the duration of the Program. In any year when the Consumer Price Index indicates deflation, there will be no change to the base rate.

A Premium for On-Peak Performance

Projects, other than solar PV projects, which can reliably control generator output during peak hours are eligible for an On-Peak Performance Incentive Program premium of 3.52 cents per kWh on top of the base rate. "Peak hours" is defined as 11 a.m. to 7 p.m. Eastern Standard Time on business days. Eligible generators must be able to produce electricity during 80 per cent of peak hours each year. Intermittent generation projects are not eligible for this premium.

Section 5.2 of the Final Program Rules provides for the On-Peak Performance Incentive premium provided that the applicant include in the application an attestation signed by an accredited professional engineer licensed by Professional Engineers Ontario confirming that the proposed generator's plans and specifications include adequate investments and regulatory approvals as are necessary for the project to generate electricity for a minimum of 80 per cent of On-Peak hours. The applicant must also include an annual forecast of the monthly electricity production of the project during On-Peak hours as well as Off-Peak hours. The applicant must update the attestation no earlier than 120 days, and no later than seven days, prior to the Commercial Operation Date of the facility, and the facility's meter must provide hourly data to be eligible for the premium.

TERMS OF THE CONTRACT

RESOP Application

After meeting all the necessary eligibility requirements (including providing evidence of a recent Connection Impact Assessment, proof that an Environmental Assessment is underway and proof of Demonstrated Site Access), the operator of the prospective renewable energy generator must submit an application to the OPA at its own expense. The form of the application is prescribed by the OPA, may change from time to time, and is available on the OPA website. Applications are submitted electronically, with additional required documents, schedules and attachments to follow in hard copy. Send them to the OPA at 120 Adelaide Street West, Suite 1600, Toronto, ON, M5H 1T1.

Acceptance or Rejection of RESOP Application

Applications are accepted or rejected at the sole discretion of the OPA. Each application is reviewed by the OPA to determine completeness and eligibility. The OPA may request further information or clarification which must be provided by the prospective operator within thirty (30) days of the request. If such information or clarification is not provided within the thirty-day window, the application may be

deemed incomplete and therefore rejected. Complete and otherwise successful applications may be rejected on the basis that the proposed generator falls within a geographical location which is not able to accept new generation.

Notice of Acceptance or Rejection of Application

Upon completion of its assessment, the OPA will notify each applicant of the acceptance or rejection of the application by e-mail. Where e-mail is not available, notice will be given by fax, registered mail or courier. The OPA will attempt to assess each application within forty-five (45) days of its receipt, however this period is simply a guideline and the OPA may take longer without attracting liability.

Acceptance of RESOP Contract

If an application is assessed and rejected by the OPA, the OPA will give reasons for the rejection, and the applicant may submit a revised application for review by the OPA. If the application is accepted, the OPA will offer a contract to the applicant on the basis of the information set out in the application. The applicant will then have thirty (30) days to accept the offered contract. The RESOP contract is in a standardized form and sets out the contractual obligations and expectations of each party.

General Provisions of the Contract

The contract sets out the parties, the location of the generating facility and the type of generating facility as well as the gross nameplate capacity and the contract capacity of the generating facility and each phase thereof. The term of the contract is 20 years from the commercial operation date, subject to earlier termination. The term begins on the later of the date on which the generator achieves commercial operation and the date of the contract and ends on the last day of the payment period. With the exception of waterpower projects, all generators who accept the standard offer contract must achieve commercial operation within three (3) years of the date of the contract. The OPA must be satisfied that the generator is legally approved to produce electricity, and that it is actually producing and delivering electricity within three years of the date of the contract. The installed capacity must be at 100 per cent of the contract capacity.

Specific Timelines for Waterpower Projects

For waterpower projects, within the first three years after the date of the contract, the generator must obtain the necessary provincial or federal approvals. For provincial projects, the generator must have proof of written approval of the location of the waterpower project from the Minister of Natural Resources. This must include written approval of the plans and specifications of the waterpower

project. These requirements are governed by Sections 14 and 16 of the *Lakes and Rivers Improvement Act (Ontario)*. For waterpower projects on federal waters, the generator must obtain an interim licence issued under the *Dominion Water Power Regulations (Canada)*. All waterpower projects must attain commercial operation within eight (8) years of the date of the contract.

Force Majeure Clause

Force Majeure applies when an unforeseen event prevents the generator from meeting its obligations, particularly achieving commercial operation by the third anniversary of the date of the contract. If Force Majeure is triggered, the effect is that the Party relying on the clause will not be liable for failure to perform. The Party shall then be granted a reasonable time extension in which to complete the performance of the obligation. However, notwithstanding Force Majeure, all projects (including waterpower projects) must achieve commercial operation by the eighth anniversary of the date of the contract. An event of default will apply to the generator if it fails to deliver energy for a period of twenty-four (24) consecutive months at any time after the commercial operation date, regardless of an event of Force Majeure.

Events of Default and Available Remedies

Section 7 of the contract sets out events of default and available remedies for both the generator and the OPA. The events of default by the generator include not attaining commercial operation by the third anniversary of the contract (or the eighth anniversary if Force Majeure is triggered), failure to produce electricity for a period of twenty-four (24) consecutive months at any time after the commercial operation date, any breach of a representation, warranty or covenant, failure to hold a valid generator licence issued by the OEB or any other required government approval. If such an event occurs, the OPA may, in addition to any rights and remedies available at law or in equity, terminate the agreement, suspend any contract payment and/or set off any amount payable by the generator to the OPA against any payments due to the generator.

The OPA triggers an event of default if it fails to make payment when due, fails to have received and maintained applicable approvals or breaches any representations made in the agreement, among other things. If such event occurs, the generator has the option to, along with all other remedies available at law or in equity, terminate the contract and set off any payments due to the OPA against any amounts payable by the OPA to the generator.

Transfer of Environmental Attributes and other Related Products

The contract provides that the generator must transfer and assign all of its rights, title and interest in “Related Products” to the OPA. Related Products are defined to include all “Environmental Attributes” and products related to the load-carrying capability of the generator. This includes products or services of value that may be traded in the markets established by the Independent Electricity System Operator of Ontario (the “IESO”) or which are otherwise sold or have value but for which no market exists. Environmental Attributes are defined as environmental attributes associated with the contract facility which decrease environmental impacts and include, among others, any renewable energy certificate, credit, reduction right, emission reduction allowance or other proprietary or contractual right resulting from the displacement of emissions. Certain federal incentives are excluded from the definition of Environmental Attributes (see below: Federal Incentives - EcoENERGY for Renewable Power).

Change of Control and Assignment of Contract Provisions

The contract includes provisions regarding change of control and assignment of the contract. The generator may assign the contract without consent of the OPA, provided the assignee is eligible to participate in the Standard Offer Program. Although consent is not required, the generator must provide the OPA with prior written notice. Similarly, a change of control of the generator is permitted without consent so long as the resulting Party is eligible to participate in the program and prior written notice has been provided to the OPA. The OPA may also assign the contract without consent provided that prior written notice has been given.

Other Contractual Provisions

The contract states that all information provided to the OPA is governed by the *Freedom of Information and Protection of Privacy Act* (FIPPA). The contract also outlines the rights and obligations of secured lenders. Finally, dispute resolution is through arbitration.

ENVIRONMENTAL ASSESSMENT

General Requirement to Produce an Environmental Assessment

After the RESOP contract is signed, one of the first steps to take is completing an Environmental Assessment. The assessment is required both as a term of the RESOP contract, and as a matter of provincial and federal law. Producing a valid Environmental Assessment is a precondition to the further performance of the RESOP contract.

Provincially, the *Environmental Assessment Act* is the governing statute. The Act details the form, content, timelines and all other information necessary for the completion of an assessment in Ontario. The associated *Electricity Projects Regulation* outlines further requirements applying to the types of generating facilities under RESOP. At the federal level, the *Canadian Environmental Assessment Act* applies to the performance of any federal Environmental Assessment. In addition to the statutes and regulations, a myriad of Environmental Assessment documents and guidelines have been published which give further insight into the scope and content of the assessment.

Importance of Properly Attending to An Environmental Assessment

The environmental impact of a proposed energy project can be one of the most contentious issues faced by a generator when attempting to develop a renewable energy project. It is at this stage of the process that operators must be sure to engage stakeholders in a public consultation. If not done properly, this step can become time consuming and costly as people and groups adverse in interest to the generating facility can delay the process, causing lost profits or failure to meet a contractual anniversary requirement. On the other hand, if accomplished well, this consultation period can lay the groundwork for continued cooperation with the community.

Different Regime Depending on Type of Project

The proper statutory framework for an Environmental Assessment will depend on whether the project falls within the provincial or federal realm. Even though RESOP is a provincial program, federal law must be adhered to in certain circumstances. For instance, if any federal money, waterway or land is involved, the assessment may be governed by federal statute. Similarly, if the generator is to operate on federally recognized Aboriginal lands, federal law will apply. Certain projects will be properly identified as a hybrid of provincial and federal jurisdiction, and the generator must meet both standards. Determining which law applies is the first important step in the Environmental Assessment, and must be made with the advice of legal counsel and the assessment consultant.

MUNICIPAL APPROVALS

Overview

In Ontario, municipal bodies have been delegated the authority to enforce legislation with respect to the planning and development of land. When beginning the RESOP process, a proposed generator must be mindful of obtaining the necessary municipal approvals. The most common required approvals are examined below.

Zoning

Section 34 of the *Planning Act* gives municipalities the authority to pass zoning by-laws restricting the use of land. Typically, a zoning by-law sets out the acceptable uses of a particular piece of land and any use of the land contrary to the zoning is not permitted. Before proposing a location for a RESOP generator, the applicant should ensure the applicable zoning allows the construction and use of a RESOP generating facility. If a zoning by-law does not allow for this type of use, the applicant may apply to amend the by-law. The success of such a proposed amendment will depend on a number of factors, including the impact of surrounding and abutting lands, future development proposals and proximity to residential and commercial areas.

Site Plan Approval

Section 41 of the *Planning Act* gives municipalities the authority to approve site plans. This means that even if an area is properly zoned for a RESOP generator, the municipality still has the power to exercise development control over the land and is not obligated to allow a development to proceed if not in accordance with approved plans and drawings. A site plan must include, among other requirements, the locations of all buildings and structures to be erected and drawings of elevation and cross-elevation views for each building to be erected. The purpose of site plan control is to ensure that the development of the new structures do not unduly interfere with other buildings, structures or other desired uses of the land or surrounding land. The applicant should consult with the municipality before submitting plans and drawings to ensure they conform to the proper development of the land.

Building Permits

The *Building Code Act, 1992* provides that no building shall be constructed or demolished unless a permit has been issued by the chief building official of a local municipality. A chief building official must issue a permit upon application unless certain enumerated requirements have not been met. Even if such requirements have not been met by the applicant, the chief building official may issue a conditional permit for any stage of construction provided certain requirements are met and the



use is permitted by the zoning by-law. If a proposed generator has obtained site plan approval to develop on appropriately zoned lands, and the applicant meets the requirements under the *Building Code Act, 1992*, a permit will be issued.

Other Licences

Municipalities may require the issuance of further approvals or licences depending on the scope and nature of the development. The proposed generator should consult with legal counsel to ensure compliance with all necessary municipal requirements.

CONNECTION

The Distribution System Code

The OEB's Distribution System Code (The "Code") applies to all LDCs and sets out minimum conditions that a distributor must meet in carrying out its obligation to distribute electricity. The conditions contained in the Code apply to all transactions and interactions between an LDC and all retailers, generators, distributors, transmitters and consumers of electricity who use the LDC's distribution system. The Code also sets out the responsibilities of a distributor to generators. Of particular interest to RESOP generators, the Code describes contracts and applications for connecting a generator to the LDC as well as the process and technical requirements for connecting embedded generation facilities. It is important for RESOP generators to have a working knowledge of the Code in order to ensure compliance.

Requirements for Connection

The appendices to the Code describe in more detail some of the technical information and requirements which will be of interest to RESOP generators. Appendix F provides for the standardization of connection processes, size categories and the time frames for connection of embedded generation facilities to the distribution system. The process varies depending on the size of the generator. As all RESOP-eligible generators must be under 10MW, the generator may qualify as a micro, small or mid-sized generator depending on its energy production. The appendix describes the step-by-step process and technical requirements for each sized generator in order to connect to the distribution system. Other appendices describe the contracts and applications for connecting a generator to the LDC, and what information should be included in a connection agreement with a customer.

Connection Impact Assessment

The Connection Impact Assessment is a document required by the OPA for

participation in RESOP which details the technical specification for the connection and determines its impact on the regional and provincial power systems. The document must cover the project's generator and transformer characteristics and expected peak and base production. The Connection Impact Assessment is undertaken by the LDC. However, the cost of the assessment is covered by the developer of a generating facility.

Connection Agreement

The Connection Agreement is a contract between the generator and the LDC and is only signed once all required work and approvals are complete. The agreement details the responsibilities and obligations of each party. Examples of standardized contracts can be found in Appendix E of the Code. The applicable form of contract will vary with the size of the generation facility. The agreement includes provisions covering facility standards; charges, settlement and billing; modification to the facility; insurance coverage; disconnection of facility to permit maintenance and repairs; and dispute resolution. The agreement also mandates a disconnection switch at the point of connection for the facility that meets all CSA standards and is at all times accessible and located for ease of access to the distributor's personnel. Provisions also exist to address the disconnection of the facility from the distributor's system in instances of contractual termination or breach, during an emergency, or in accordance with any law or court order. The generator is solely responsible for the costs of connection.

GENERATION LICENSING

The OEB requires that most generators become OEB-licensed to participate in RESOP, although there is an exception for very small generators (less than or equal to 500kW) which do not require licensing based on their size. All other generators must obtain an OEB license prior to commercial operation. The cost of licensing is currently a one-time application fee of \$100, and the OEB has waived the annual fee for generators with an output of 10MW or less. This waiver applies to the proponent, not the generation facility itself. Therefore, if a proponent operates more than one facility with a combined output of more than 10MW, the proponent may be subject to the annual fee.

SITE ACCESS

Private or Public Lands

The process by which access to a specific development site is gained will depend on whether the site is located on private or public lands. To date, the majority

of wind, solar and biogas generation facilities are located on privately owned rural lands – mostly farms and undeveloped property. When building on private lands, site access is usually achieved through a contractual easement granted by the owner to the developer. The contract will govern the rights and responsibilities of the parties as between each other and with respect to access to the lands. The Ontario Sustainable Energy Association (OSEA) has published several documents which give examples of contractual provisions in an attempt to standardize these private site access contracts and promote fairness.

Access to Crown Lands

As the majority of water power projects, and a number of wind power projects, are developed on Crown lands, the Ministry of Natural Resources (MNR) has prepared development documents dealing with access to public lands for Wind and Water power. These documents detail the process by which developers must apply to gain access to Crown lands.

Wind Power

The MNR's *Wind Power Development on Crown Lands* policy outlines a two stage process to accommodate the testing of wind resources on Crown land and the subsequent development of wind farms. Applications will be processed through one of the following avenues chosen by the applicant: a non-competitive "right-to-explore," a competitive bid, or a far-north remote community bid. Generally, the costs of connection would make a project in a far-north remote community impractical.

The right to conduct wind studies is covered by MNR's concept of "explore." If the District Manager of the MNR is satisfied with the information contained in the application, a land use permit (LUP) and an Option Agreement are issued covering the grid cells approved for exploration. A non-competitive right-to-explore applicant will be awarded exclusive exploration rights, and will pay a substantially higher fee in recognition that no other applicant will be considered for testing in the selected grid cells. The competitive process is open to any applicant wishing to explore the land. At this exploration stage, the MNR does not guarantee any or all of the grid cells will be available for future wind power development. After the exploration process is complete, the applicant may wish to move to the second stage which involves the issuance of a Crown lease.

If the applicant wishes to move forward with development, the MNR requires completion of necessary assessments and consultations, as well as the completion of an approved Plan of Development (POD). If the requirements are met, and approval is granted, a Crown lease is issued and construction may commence

in accordance with the POD. The term on a Crown lease is typically 25 years with a possible extension for a further term of 15 years.

Water Power

The process by which water power generators apply for site access to Crown lands is slightly different than the process for wind power generators. The MNR's policy document, *Waterpower Site Release and Development Review*, applies to:

- a) "Greenfield" projects (where no water control structures previously existed);
- b) The release of Crown-owned water control infrastructure (MNR dams); and
- c) The development or redevelopment of existing facilities on Crown land.

An applicant who is successfully granted the right to pursue a waterpower project is known as the "Applicant of Record." Different policies apply to other types of projects, such as development on First Nation Reserve Lands.

Greenfield Water Projects

Greenfield projects proposed on Crown lands will be released to the applicant based on one of the following three site release processes:

- a) A Direct Site Release Process;
- b) A Non-Competitive Site Release Process; or
- c) A Competitive Site Release Process.

The Direct Site Release Process applies to proposed developments if the development will have an installed capacity of less than or equal to 1MW; or if the development is proposed by the riparian owner; or if the proposed development is found within the basins of the Severn, Winisk (Weenusk), Attawapiskat, Albany rivers; and is proposed by a local Aboriginal community(ies) and/or their partner; and is 25MW or less. The Non-Competitive Site Release Process applies to proposed developments which will have an installed capacity of more than 1MW and less than or equal to 10MW, and does not otherwise qualify for Direct Site Release. The Competitive Site Release Process applies to all other applicants who do not otherwise qualify for Direct Site Release or Non-Competitive Site Release.

MNR Dams Site Release

This process is open to any applicants who wish to take over control of an existing MNR dam. If successful, the applicant will be required to assume full responsibility for the control, maintenance, long-term structural integrity and liability for the MNR dam(s) under the application.

Development or Redevelopment of Existing Facilities on Crown Lands

A successful applicant will be selected by the MNR as the Applicant of Record to develop new structures on existing Crown lands or to redevelop existing facilities if the MNR determines the applicant meets eligibility, availability and competence standards. If the proponent becomes the Applicant of Record, the MNR will work with the Applicant of Record to coordinate the acquisition of an Environmental Assessment and other approvals.

FIRST NATIONS ISSUES

Duty of Crown to Consult with First Nations

Distinct from consultations with neighbours proximate to a proposed project, if a generator is to be built on or near First Nation lands, there is a legal requirement to consult with First Nations. Canadian case law has placed a positive duty on the Crown, not the generator, to consult with First Nations before acting in any manner which might impinge upon aboriginal title or treaty rights. This means that before the government issues any permits, licences or approvals to a proposed generator, they must first consult with the First Nations who may be affected by the project. The importance of First Nations consultation cannot be overstated as in recent years there have been numerous challenges to development otherwise approved by the government on the ground that the First Nations consultation was lacking or deficient.

Role of the Generator in Consultation

Although the Crown is ultimately responsible for the consultation process, it is beneficial for the proposed generator to participate and the MNR process specifically contemplates such consultation. Fostering a relationship with the relevant aboriginal government, and ultimately entering into a Memorandum of Understanding outlining the fundamentals of the future relationship and a structure for resolving conflicts, is of fundamental importance. Depending on the scope and intrusiveness of the project, other agreements may be entered into in order to ensure the expectations of all parties are met moving forward. For example, a proposed waterpower generator should negotiate Impact and Benefit Agreements detailing specific matters such as environmental management, and fish and game

mitigation and compensation. The legal and political landscape dealing with First Nations land issues is complex and charged with emotion and history – it is important to approach building on First Nations lands with appropriate care and sensitivity.

CORPORATE STRUCTURE AND FINANCING

Different Business Arrangements

A number of legal structures may be utilized to carry on business activity. These include sole proprietorship, partnership, limited partnership and corporation.

Sole Proprietorship

A sole proprietorship exists whenever an individual carries on business for the individual's own account without using the medium of any other form of business organization or involving the participation of other individuals, except as employees. The individual is the sole owner of the business and all benefits flowing from the business accrue to the exclusive enjoyment of the sole proprietor. Conversely, all liabilities and obligations associated with the business are the sole proprietor's responsibility. Because the structure is simple and there are comparatively few associated costs, many small businesses are organized as sole proprietorships.

Partnerships and Limited Partnerships

When two or more persons, whether individuals or corporations, carry on business together with a view to profit, the relationship is called a partnership and the members of the partnership are called partners. A partnership is like a sole proprietorship in that the partners carry on the business themselves directly. The law of Ontario recognizes two types of partnerships. One is a general partnership, usually just called a partnership. In a general partnership, the liability of each partner for the debts and obligations of the partnership is unlimited. The second type of partnership is called a limited partnership. The major difference between a general and limited partnership is that in a limited partnership, the liability of one or more of the partners (general partners) is unlimited and the liability to one or more of the other partners (limited partners) is limited to the amount which that partner or those partners have contributed or agreed to contribute to the partnership business as stated in the record of limited partners. Partners, whether general or limited, may be corporations or natural persons.

Corporation

A corporation with share capital is the business entity used most frequently to carry on commercial activities. A corporation is a legal entity separate in law from its owners, the shareholders of the corporation. A corporation may own property,

carry on business, possess rights and incur liabilities. The shareholders own the corporation through their ownership of shares. The shareholders do not own the business or the property belonging to the corporation, and the rights and liabilities of the corporation are not the rights and liabilities of the shareholders.

Choosing the Best Method

Care must be taken to determine which method will be most appropriate for a generator under a RESOP contract. The choice between structuring your business as a sole proprietorship, partnership, limited partnership or corporation will depend on a number of factors, including: liability, desirability of perpetual existence, estate planning, number of proposed proprietors, relationship of proposed proprietors, employees, costs, flexibility and financing.

Financing

Financing, at its core, is about finding the right type of money to fund the project. All sources of financing are not created equal, and money may be more or less expensive to raise depending on the tax, regulatory, legal and other consequences of choosing a certain financing structure. Fundamentally, there are two ways a business can externally raise cash: through debt or equity. Simplified, debt is a claim on the business's assets when it borrows money. Raising money through debt creates an obligation to repay borrowed monies, along with interest. A business raises money through equity when it issues shares representing an ownership interest in the business.

Risk and Ownership

The concepts of debt and equity are linked to the concepts of risk and ownership. It is more risky to take on high levels of debt, as it may become increasingly difficult to pay obligations when they become due. However, by taking on debt, the business is not relinquishing any ownership interest in the company. On the other hand, raising money through equity may make it easier to pay obligations, but the cost is that ownership of the business becomes less concentrated. Debt and equity have many differentiating characteristics and choosing the right combination can be difficult but ultimately profitable.

FEDERAL INCENTIVES

EcoENERGY for Renewable Power

When the new federal government came into power in 2006, many renewable energy programs and incentives were cancelled or temporarily frozen. The Wind Power Production Incentive (WPPI), which was in effect, and the

Renewable Power Production Incentive (RPPI), which was planned but not yet implemented, were discontinued, retooled and repackaged as one program: EcoENERGY for Renewable Power (EERP). EERP provides an incentive of one cent per kW hour for up to 10 years. The maximum contribution payable over the life of the program is \$256 million, and the maximum contribution payable per project is \$80 million. The federal government has pledged \$1.48 billion over 14 years to EERP. The incentive will be shared 50/50 by the OPA and the proponent.

Canadian Renewable and Conservation Expense

The Canadian Renewable and Conservation Expense (CRCE) is a federal tax incentive designed to promote the growth of generators of renewable energy. The CRCE allows investors to fully write off certain intangible costs associated with investments in renewable energy and energy conservation projects. In the year they are incurred, eligible expenditures are 100 per cent deductible, or they can be carried forward indefinitely to be deducted in later years. If a flow-through agreement was entered into before the expense was incurred, the expenditures can also be renounced to shareholders, allowing the investor to deduct almost the entire subscription price from their taxable income.

Accelerated Depreciation

Class 43.1 and Class 43.2 in Schedule II of the *Income Tax Act* allows taxpayers an accelerated write-off of certain equipment used to produce energy in a more efficient manner or to produce renewable energy. Eligible capital expenditures can be depreciated at an annual rate of 30 per cent or 50 per cent on a declining basis. If this incentive were not available, much of the equipment would be deducted at rates of 4 or 20 per cent.



ABOUT AIRD & BERLIS LLP

Firm Profile

Located in the heart of Toronto's Bay Street business district, the firm of Aird & Berlis LLP comprises a diverse group of more than 120 of Canada's most talented lawyers. The firm provides a wide range of legal services for Banking, Corporate/Commercial, Corporate Finance, Energy, Environmental, Insolvency and Restructuring, Litigation, Municipal and Land Use Planning, Real Estate and Tax.

Energy Industry Team

The development of an energy project is a multi-dimensional process. Aird & Berlis LLP uses an interdisciplinary team approach to get the job done. Depending on the nature of the project, the Energy Team includes experts in:

- Regulatory compliance issues: preparation of complex regulatory applications
- Commercial contracts: negotiating and preparing fuel, steam and power sales contracts, construction contracts and other commercial arrangements
- Corporate transactions: securities and taxation
- Financing: project finance and commercial lending
- Environmental law: permits and approvals, environmental assessments and audits, and due diligence investigations

Our Energy Team works with private and public sector clients to assist with the strategic planning necessary to navigate the complex regulatory environment faced in the development of an energy generation undertaking. We advise clients involved in energy projects in Canada, the United States and the United Kingdom, representing producers, brokers, industrial users, utilities, developers, governments and lenders. Our clients are involved in alternative energy projects such as wind power, biogas and ethanol as well as more traditional forms of energy.

Contact Information

Fred Cass

E-mail: fcass@airdberlis.com

Phone: 416.865.7742

Fax: 416.863.1515

Ron Clark

E-mail: rclark@airdberlis.com

Phone: 416.865.7701

Fax: 416.863.1515

Dennis O'Leary

E-mail: doleary@airdberlis.com

Phone: 416.865.4711

Fax: 416.863.1515

Scott Stoll

E-mail: ssoll@airdberlis.com

Phone: 416.865.4703

Fax: 416.863.1515

Legal Disclaimer:

This Guide to Legal Issues is for information purposes only and is not intended to provide legal advice. Readers should seek professional legal advice on the particular legal issues that concern them. For definitive provisions and obligations, the OPA Standard Offer Program Contract and Final Program Rules must be referred to.

Aird & Berlis LLP
Brookfield Place, 181 Bay Street, Suite 1800
Toronto, ON M5J 2T9

T 416.863.1500 **F** 416.863.1515 **W** www.airdberlis.com