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RENEWABLE ENERGY

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ENVIRONMENTAL REVIEW TRIBUNAL RELEASES DRAFT RULES FOR APPEALING RENEWABLE ENERGY APPROVALS

BY SVEN HOMBACH AND ADAM PATCHET, SUMMER LAW STUDENT

In 2009, the Province of Ontario passed the *Green Energy and Green Economy Act, 2009*, which introduced a new Renewable Energy Approval (“REA”) process for wind, solar, and other renewable energy facilities. Fraser Milner Casgrain LLP (FMC) previously published a [newsletter](#) summarizing these developments. One of the highlights of the REA process was a curtailed and streamlined right of appeal by project opponents to the Environmental Review Tribunal (“ERT”).

On May 14, 2010, the ERT finally published draft rules for the REA appeals process (the “Draft Rules”). Stakeholders can comment on the Draft Rules until June 14, 2010. A complete copy of the Draft Rules can be obtained at www.ert.gov.on.ca/english/home.html.

The 2009 REA amendments require the ERT to adhere to a six-month processing timeline between the issuance of a notice of appeal and the rendering of a decision. This requirement has translated into tight timelines in the proposed appeal process. The ERT has further published a draft “Guide to Appeals by Members of the Public regarding Renewable Energy Approvals under section 142.1 of the *Environmental Protection Act*” (the “Guide”), which sets out additional timelines not directly reflected in the Draft Rules. The Guide can also be accessed at www.ert.gov.on.ca/english/home.html.

Between the Draft Rules and the Guide, the ERT has set up the following standard timetable for various steps in the appeal process:

- Service and filing of a notice of appeal within 15 days of the decision by the Director of the Ministry of the Environment to issue an REA. This timeline is a statutory requirement arising from section 142.1(2) of the *Environmental Protection Act*.
- Within 14 days of the notice of appeal having been served and filed, the Director must serve and file responding materials.
- Within four weeks of the deadline for filing a notice of appeal, the ERT will hold a preliminary hearing.
- At least four days before the preliminary hearing, any person seeking status as a party, participant or presenter, must file a written request for status, as well as a statement of issues and submissions with respect to the substantive issues on the appeal.
- At least one day before the preliminary hearing, the appellant, Director and holder of the REA must each serve and file responding submissions to any requests for status.
- If applicable, within five weeks of the deadline for appealing the REA, the ERT offers a voluntary mediation by an ERT member that cannot sit on the subsequent hearing. This service is provided at no cost to the parties.
- Within 5.5 weeks of the deadline for appealing the REA, all parties must disclose any additional documents and witness statements to be relied on at the hearing, as well as the resumes of any expert witnesses. Witness statements include those of qualified experts and their opinion evidence.
- Within eight weeks of the deadline for appealing the REA, the ERT will hold the hearing.

- At least seven days before the hearing, the parties must file a brief, setting out any material facts and issues still in dispute.
 - At least four days before the hearing, the ERT will schedule a further preliminary hearing to finalize issues and witness lists, and provide procedural direction with respect to the hearing.
 - Within six months of the appeal being launched, the ERT will render a decision on the hearing.
- (a) achieve electricity self-sufficiency by 2016;
 - (b) become a net exporter of electricity from clean or renewable resources;
 - (c) generate at least 93% of the electricity in B.C. from clean or renewable resources and to build the infrastructure necessary to transmit that electricity;
 - (d) establish concrete targets for reductions in both provincial electricity demand and greenhouse gas emissions;
 - (e) encourage the use and development of green and renewable energy sources; and
 - (f) foster the development of First Nation and rural communities through the development of green and renewable energy projects.

While this timeframe represents an ambitious commitment to provide a fast track hearing process, there is currently no commitment by the Province of Ontario to provide additional resources to the ERT. In light of the fact that the Ontario Power Authority awarded 184 FIT contracts in April 2010, with an additional 256 applications still awaiting the economic connection test, it is likely that the ERT will see a significant increase in activity. Accordingly, there is a risk of other ERT matters being delayed if the ERT must prioritize REA appeals.

It should further be noted that the ERT can “stop the clock” with respect to the above-noted timeline at any time on consent, or where “the Tribunal determines that an adjournment is necessary to secure a fair and just determination of the proceeding on its merits.” As such, it remains to be seen how the process will work in practice, and whether the ERT will develop a practice of granting adjournments on its own accord.

THE CLEAN ENERGY ACT

BY RON STUBER, KEITH BUSTARD AND JEFFREY SHON,
STUDENT-AT-LAW

Introduction and Objectives

The government of British Columbia tabled the *Clean Energy Act* (the “Act”) on April 28, 2010. This draft legislation has the potential to significantly impact the energy sector in the province. The Act is a clear response by the government to the recent ruling by the B.C. Utilities Commission (the “Commission”) that BC Hydro’s 2008 Long-Term Acquisition Plan, a plan highly focused on the development of clean energy in the province, was not “in the public interest”. The Act opens the door for the export of clean energy to other jurisdictions. As of the date of publication, the Act has only passed first reading in the legislature and its final form could contain important changes.

The Act establishes a number of different objectives for the energy sector in B.C. Among the most important goals are to:

Consolidation of B.C. Hydro and BCTC

The Act consolidates the BC Transmission Corporation (“BCTC”) and BC Hydro. All of BCTC’s assets, rights, liabilities, property and contracts are to be transferred to BC Hydro. BC Hydro is tasked with several new responsibilities, including the creation of an integrated resource plan outlining means of servicing the province’s energy demands over the next 30 years. The energy plan must address infrastructure development, demand reduction initiatives and energy export policies. BC Hydro is also required to develop prescribed long-term energy sales contracts for domestic consumers. The plan must generally rely on no energy and no capacity from the Burrard Thermal Plant, a conventional natural gas-fired generating station.

Reduction in the Commission’s Role

The role of the Commission is significantly reduced. The Commission’s approval is no longer required for many of the province’s “marquee” energy projects. These projects include the Clean Power Call, Site C, the Northwest Transmission Line, the Standing Offer Program and several other listed generation projects. The Commission does, however, maintain its authority to establish rates for domestic electricity usage.

Standing Offer and Feed-in Tariff Programs

The Act modifies the Standing Offer Program published in June 2008 by allowing it to accept projects capable of producing more than the initially established 10-megawatt threshold. If selected by BC Hydro, these larger projects can enter into standard form electricity purchase agreements.

The Act also grants BC Hydro the ability to establish a feed-in tariff program for provincial energy production. Feed-in tariff programs are generally designed to encourage the use and development of renewable energy through provisions granting long-term supply contracts, access to transmission systems and purchase prices linked to the sources of energy production.

Heritage Assets

The Act protects certain specified “heritage assets” by reinforcing the prohibition on their sale, thereby ensuring they remain under BC Hydro’s control. Heritage assets are specifically designated low-cost projects which are intended to provide the province with electricity.

Smart Meter Program

The Act also requires BC Hydro to establish a “smart meter” program which involves the installation of electricity usage monitors in private residences. The information recorded by these meters will help BC Hydro plan and develop future infrastructure projects.

CONTACT US

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