Green Energy Act Reforms:

Opportunities for Promoting Aboriginal Participation

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The *Green Energy Act* and Regulations:
Implementation Reforms and Issues
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Summary:

The *Green Energy Act, 2009* and related statutory amendments included in the *Green Energy and Green Economy Act*, regulations and several programs rolled out with the legislative package provide some support and incentives – including especially a price adder incentive - for First Nation and Métis communities to take on roles as proponents, or equity owners, in green energy projects. There is some interest from some aboriginal communities (and already some uptake) in developing or partnering to develop green energy projects. The level of uptake may be slow due to the lack of technical capacity in many of the communities. It remains to be seen how meaningful the programs will be in increasing uptake of these opportunities on a widespread basis – green energy developers' decisions to partner (or not) with aboriginal communities will be a key determinant.

The *GEA* initiative provides some statutory and policy implementation of the duty to consult. However, the initiative may in fact make it more difficult for First Nations and Métis communities to obtain meaningful consultation and accommodation with respect to renewable energy projects affecting them, because of the streamlined Renewable Energy Approval process.

1. Introduction

Other speakers in this program are providing details about the many intricacies of the GEA initiative, but for purposes of coherency of this paper, I will summarize some of its key components.

The *Green Energy Act, 2009,* S.O. 2009, Ch. 12 (the *GEA*) aims to promote energy conservation and increase the production of renewable energy sources such as solar, wind, water, biomass, biogas and landfill gas. The main components of the GEA and related amendments and initiatives are:

- A Feed-In-Tariff program, allowing individuals and companies to sell renewable energy into the grid at set rates [amd. to *Electricity Act*]

- Domestic content requirements, setting a percentage of projects that must be produced in Ontario. Current requirements are 25% of wind projects (increasing in January 2011) and 50% of solar projects (increasing in January 2012)

- Creation of an Ontario Renewable Energy Facilitation Office, billed as "a one-stop shop to help renewable energy projects get off the ground faster." [GEA ss. 11-13]

- Faster and easier approval processes for proponents of renewal energy projects; what Ontario calls "a streamlined approvals process and a service guarantee to bring developers greater certainty." These amendments include amendments to s. 25.32 of the *Electricity Act* and various other Acts. Key amendments are also made to the *Environmental Protection Act* which provide that a person engaging in a renewable energy project is exempt from various approval and permit requirements, and other procedural changes favour proponents of renewable energy projects. The *Planning Act* amendments exempt renewable energy projects from various requirements, including

provincial policy statements, provincial plans, official plans, demolition control by-laws, zoning by-laws and related orders, development permit regulations and by-laws, etc.

2. First Nations and Métis Communities as Partners and Renewable Energy Project Developers

The GEA initiative was supported and promoted by a group called the Green Energy Act Alliance, who operated a website throughout the drafting process (and still run it), www.greenenergyact.ca. The Alliance is made up of eight organizational members[1]. One member, the First Nations Energy Alliance, includes on its website 21 members, mostly First Nations and several companies.[2] The level of awareness of some of the member First Nations in the details of the legislative and policy initiatives is, however, not uniformly extensive. Membership of a First Nation in the First Nations Energy Alliance cannot, of itself, be taken as a sign that a member First Nation will be immediately supportive of a proposed green energy project in their traditional territory.

As with the general public, some aboriginal communities have questions about the impacts of green energy projects on their rights, claims and interests. Wind farms, for example, have raised concerns among some First Nations in Ontario, due to their visibility and concern about impacts on migratory birds which many aboriginal people still actively hunt in the exercise either of their treaty or aboriginal rights, as well as concerns about impacts on human health given the proximity of some of the proposed wind farms to residences on reserve. The mercury impacts from flooding due to past Ontario Hydro projects still are of concern to northern First Nations like Grassy Narrows First Nation, and so figure large in how they consider small hydro projects.

The relevant statutory provisions regarding potential roles for First Nations as developers/partners in renewable energy projects are found in the amendments to s. 25.32 of the *Electricity Act*:

> Direction re programs for aboriginal participation
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> (4.5) The Minister may direct the OPA to establish measures to facilitate the participation of aboriginal peoples in the development of renewable energy generation facilities, transmission systems and distribution systems and such measures may include programs or funding for, or associated with, aboriginal participation in the development of such facilities or systems.

In support of this provision, s. 25.32(2) of the *Electricity Act, 1998* also provides that

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[1] The organizations in the Green Energy Act Alliance are: First Nations Energy Alliance, David Suzuki Foundation, Ontario Federal of Agriculture, Environmental Defence, Community Power Fund, Pembina Institute, Ivey Foundation, Ontario Sustainable Energy Association

[2] The First Nations Energy Alliance is made up of the following First Nations, companies and organizations: Wahta, Wikwemikong, Shawanaga, M'Chigeeng, Nawash, Henvy Inlet, Walpole Island, Wahnapitae, Invenergy Canada, Nipissing, Magnetewan, Big Grassy First Nation, Mohawks of Akwesasne, Ojibways of Pic River, Moose Deer Point, Algonquin Woodland Métis Aboriginal Tribe, Eolectric Inc., Five Nations Energy Inc., Zhiibaahaasing First Nation. See www.firstnationsenergyalliance.org.

> The OPA shall not enter into a procurement contract that does not comply with,
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> …..
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> (b) a direction issued under subsection (4), (4.1), **(4.4), (4.5)**, (4.6) or (4.7) or section 25.35. (emphasis added)

Also relevant are provisions of the new s. 25.35 (1) and (2) of the *Electricity Act, 1998* relating to the Feed-in Tariff Program (essentially, a guaranteed pricing structure, called the FIT Program for short) that the OPA will run. The FIT Program is designed to procure energy from renewable energy sources. These incentives could lead to greater participation by aboriginal peoples in renewable energy projects.

There are price incentives for Aboriginal communities, under certain conditions, as part of the Feed-in Tariff Program.[3] The FIT Program is open for RE projects of over 10 kW. For waterpower projects, to come into the FIT Program, they must be under 50 MW, and for solar PV projects, they cannot exceed 10 MW in size.

The two aboriginal incentives in the FIT Program are

(1) Reduced Security Payments: Projects in which an aboriginal community[4] has a greater than 50% interest are eligible for reduced security payments:

- For "application security", it is reduced to $5/kW (or 5,000/MW, regardless of the renewable fuel type), compared to the standard $10/kW for others and $20/kW for solar PV projects.

- For "first completion and performance security" it is reduced to $5/kW vs. $20/Kw for others and $50/kW for solar PV.

- For "second completion and performance security", it is reduced to $5/kW vs. $10/kW for others and $25/kW for solar PV.

All these security payments will be returned if the project proceeds, but these financial incentives do assist somewhat.

(2) Price Adders – Projects in which an aboriginal community has 10% or more of an Economic Interest are eligible to receive an increased price per kWh above the standard FIT price. "Economic Interest" is defined in s. 9 of the FIT Rules to mean, "with respect to any

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[3] *Feed-in Tariff Program Overview, Version 1.1*, published by the Ontario Power Authority, dated September 30, 2009 provides a useful overview. Available online on the OPA website, http://fit.powerauthority.on.ca/.

[4] "Aboriginal community" is a defined term for purposes of the FIT Program and means either (a) a band under the Indian Act, (b) the Métis Nation of Ontario or any of its active Chartered Community Councils, (c) a person other than a natural person that is determined by ON to represent the collective interests of a community composed of Métis or other aboriginal individuals, or (d) a corporation wholly owned by one or more aboriginal communities described in (a)-(c) above. The definition is found in section 9 of the FIT Rules.

Person other than an individual, the right to receive or the opportunity to participate in any payments arising out of or return from, and an exposure to a loss or risk by, the business activities of such Person." This economic interest could thus take the form of shares or a share of cash flow, but does not require participation in the running of the business.

The increase is proportional to the level of aboriginal involvement and goes up to a specified maximum amount; e.g. the maximum aboriginal price adder for a wind or solar PV project is 1.5 cents/kWh more than the standard FIT price.[5]

These "giving a hand up" incentives do have some potential to increase aboriginal communities' uptake of participation in developing green energy projects. It has been the experience in other parts of the country, where impacts and benefits agreements ("IBAs") have been entered into or are being negotiated that include provisions to give aboriginal partnerships an advantage in seeking contracts for business opportunities associated with large projects, that aboriginal business participation in these large projects can be quite substantial. However, the aboriginal communities will not, in most cases, be able to go it alone as they are clearly not in the business of being developers of renewable energy projects. As well, having to invest their own equity into the project (which has not been a requirement for aboriginal businesses in other IBAs throughout the country) will also be a limiting factor. The key question in my view will be whether renewable energy developers approach the aboriginal communities, or vice versa, to take advantage of these incentives.

The OPA is mindful of the challenges facing aboriginal communities wishing to participate in the electricity sector. In consultations on the Integrated Power System Plan that began in 2007, the OPA has been seeking to engage with First Nation and Métis communities to discuss, among other things,

- How perceived barriers to First Nations and Métis participation in the electricity sector can be addressed and overcome;

-Aboriginal partnerships in matters of generation and transmission in Ontario;

Records of these consultations are filed with the Ontario Energy Board.

One of the matters that aboriginal communities themselves need to consider in developing business arrangements is that the non-aboriginal business partner may or may not be willing to assist in building business capacity on the part of the aboriginal partner. Aboriginal communities should consider carefully what they are seeking out of the business arrangement – is it just an "Economic Interest" as defined (i.e. a share in profits or cash flow), or are they also interested in building up business-planning and operation and management capacity?

Section 25.35(2) also provides that Ministerial directions may include setting out specific goals to be achieved under the Feed-in Tariff Program for participation by aboriginal peoples in developing and establishing renewable energy projects.

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[5] Feed-in Tariff Program: FIT Rules Version 1.1, September 30, 2009, section 9.

Two different programs also hold potential to increase uptake by aboriginal communities who wish to be engaged in developing projects:

- Aboriginal Energy Partnerships Program:
    - This program, to be managed by the Ontario Power Authority, will provide funding and other support to Aboriginal communities considering renewable energy projects for three purposes: community energy plans, pre-feasibility and feasibility studies, and developing an Aboriginal Renewable Energy Network that is designed to allow for networking.

- Aboriginal Loan Guarantee Program:
    - This program is to be launched with $250 million and will be run by the Ontario Financing Authority. Aboriginal communities will be eligible for loans to take on equity participation in renewable energy generation and transmission projects. ALGP will guarantee up to 75% of an Aboriginal corporation's equity in an eligible project, up to a max of $50 million per project.

3. Proponent Consultation and Crown Consultation and Accommodation

The GEA includes an interpretative clause in s. 1(2) which provides:

> "This Act shall be interpreted in a manner that is consistent with section 35 of the *Constitution Act, 1982* and with the duty to consult aboriginal peoples."

Amendments to s. 25.32 of the *Electricity Act*, affecting the Ontario Power Authority, contain specific provisions about aboriginal consultation during the development process for renewable energy projects.

> Directions re consultation
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> (4.4) The Minister may direct the OPA to implement procedures for consulting aboriginal peoples and other persons or groups as may be specified in the direction, on the planning, development or procurement of electricity supply, capacity, transmission systems and distribution systems and the direction may specify the manner or method by which such consultations shall occur and the timing within which such consultations shall occur.

The Renewable Energy Approval Process, which is designed to be quick and to limit the procedural barriers faced by proponents in getting their projects up and running, may in fact make it more difficult for First Nations and Métis communities to obtain meaningful consultation and accommodation with respect to renewable energy projects affecting them, because of the streamlining.

In other Crown approval processes involving other types of proposed private or Crown developments, one of the chief complaints of aboriginal communities is the lack of sufficient time, funding and capacity to respond to proposed developments in their traditional territories that may affect their treaty and aboriginal rights or claimed rights.

INAC does not fund First Nations to hire or train staff in technical matters so that they can respond effectively to the consultation requests that they are faced with from developers in their traditional territories. Some First Nations are overwhelmed by the need to properly participate in consultation and accommodation processes. The Ontario Crown will often provide no funding nor require the proponent to do so, or may only provide additional funding after much effort to obtain that funding on the part of the First Nations. Other First Nations are concerned with the extent of delegation by the Ontario Crown of procedural aspects of the duty to consult to proponents, and believe that Ontario is not merely delegating but rather is also offloading those duties without taking an adequate and involved role.

Some duty to consult and accommodate cases end up in court, while many of them are dealt with through negotiated resolution. The Renewable Energy Approval process will almost certainly face the same challenges, but even more exacerbated because of the tighter time frames.

It is not the case that all aboriginal communities are opposed to green energy projects, of course, but many are concerned about how these projects will affect their rights and interests. As well, treaty and aboriginal rights are already often affected by a myriad of other developments (think, for example, of southern Ontario First Nations like the Walpole Island and Aamjiwnaang First Nations near Sarnia). Infringement of aboriginal or treaty rights to the point that there remains "no meaningful right to hunt", for example, may not be permissible.[6]

It also bears noting that the Courts have not merely established on the part of the Crown a duty to "consult" when aboriginal or treaty rights may be affected, or when aboriginal claims may be affected. As has been noted in several key cases, the Crown is also required, where appropriate, to "accommodate." A leading case on this point is the Supreme Court of Canada's decision in the Mikisew Cree case:

> Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. Treaty making is an important stage in the long process of reconciliation, but it is only a stage[7].

The level of consultation required depends on the strength of the asserted claim to rights or to land title, and on the extent to which the proposed decision or activity will potentially harm those existing or asserted rights.[8]

Where there is a weak claim or a minor impact to the First Nations' rights, the Crown must at a minimum provide adequate notice that it is making a decision that will impact those rights and what that impact may be, disclose all relevant information and provide enough time to the First Nation to respond, discuss any issues that may arise in response to the notice, and accommodate by attempting to address the concerns raised and be willing to consider alternatives to mitigate the expected impact.

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[6] This issue has been directly raised in the Alberta Court of Queen's Bench Alberta in connection with oil sands developments, in *Alphonse Lameman on his own behalf and on behalf of all other Beaver Lake* Cree Nation *beneficiaries v. Alberta and Canada*, launched in May, 2008.

[7] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* [2005] S.C.J. No. 71, para. 54.

[8] *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511 at para. 39, for example.

Where there is a strong claim or there may be severe impact, then the Crown's obligations under the duty to consult and accommodate are much more substantial. In addition to completing minimum requirements set out above, the Crown should negotiate how the consultations should proceed, provide the opportunity for submissions, and allow for formal participation in the decision-making process. What this often results in is creating and funding a special consultation process, outside of already-existing decision-making processes such as statutory environmental assessments.[9] Funding can also include money for participation and review by experts to make the information accessible to First Nations that will be impacted. At this high end of the spectrum, the Crown will likely be required to demonstrate how it took into consideration the concerns raised by First Nation, and accommodated those concerns by taking steps to avoid, minimise and/or compensate for harm.

What then of the nature of the consultation process with aboriginal peoples in the context of renewable energy projects in Ontario? Developing an effective process is an ongoing effort. Since 2004 the OPA has issued 3 major Requests for Proposals (RFPs) for renewable energy supply projects from the private sector. These are RES I, II and III. RES III seeks 500 MW of renewable energy supply located in Ontario to deliver power to the grid.

Section 4.11 of RES III sets out a specific Aboriginal consultation requirement. This process is explained in more detail in the OPA consultation guideline document released in July 2008.[10] The requirements and the associated guideline were developed by the OPA in collaboration with the Crown, in response to a Directive from the Minister of Energy and Infrastructure. The main features of this process are:

- Prior to submitting its proposal: The OPA "expects" the proponent to "engage with" Aboriginal peoples at an early stage, but the requirement is informal.

- Consultation Information Request: The proponent contacts the Ministry after their award, but before signing the RES III contract. Their letter must set out a record of their pre-contract engagement with Aboriginal peoples, and it asks the Ministry for information.

- Crown letter (Min. of Energy & Infrastructure): Within 45 days of the proponent entering into the RES III contract, the Ministry will send the proponent a letter in either Form A or Form B. Form B requires the proponent to enter into an Aboriginal Consultation Agreement with the Crown within 90 days of the RES III contract.

- Aboriginal Consultation Agreement: This will set out a "consultation plan" to be agreed between the proponent and the Crown, as to their respective responsibilities in conducting consultation with Aboriginal peoples.

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[9] Some legal commentators are of the view that aboriginal consultation should, as far as possible, take place within existing environmental regulatory processes. See, for example, Lambrecht, K. "Environmental Assessment and Aboriginal Consultation: One Sovereignty or Two Solitudes" in Berger, S. and Saxe, D. *Environmental Law: the Year in Review, 2007* (Aurora, Ontario: Canada Law Book, 2007).

[10] Ontario Power Authority, "Consulting with First Nation and Métis Communities: Best Practices, Good Business", July 11, 2008.

In conclusion, there are no clear and simple rules to how to successfully carry out the duty to consult and accommodate aboriginal communities. There is, however, one starting principle that a proponent must have in approaching an aboriginal community if the proponent is to be successful and the relationship is to be a good one. The proponent must begin from the perspective of respect for the constitutionally protected aboriginal and treaty rights of the aboriginal community. Information sharing is also a key consideration – developing trust does not work when a proponent chooses not to share the results of its studies of environmental impacts. Finally, a willingness to allow for independent assessment of the proponent's work, and to fund that, will also improve the consultation process with aboriginal peoples. Finally, imposed consultation processes are not generally welcomed – developing the consultation process collaboratively with the affected aboriginal communities will help in having a successful process and outcome.