

# Blakes Bulletin

## CleanTech/Energy

### Green Energy Remains a Priority as Liberals Retain Power in Ontario

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After a closely contested race, the October 6, 2011 election has returned the Ontario Liberal Party, under the leadership of Premier Dalton McGuinty, to Queen's Park for a third consecutive term. However, the Liberal's success in 53 ridings fell one seat short of the 54 required for a majority government.

This election was a critically important one for the renewable energy industry. The industry had flourished in Ontario in the wake of the *Green Energy and Green Economy Act, 2009* (Green Energy Act) – see our February 2009 *Blakes Bulletin: Ontario's New Green Energy Act Set to Energize the Province with Renewable Energy* – but its prospects had been clouded by the stated plans of the Progressive Conservative Party to terminate the Green Energy Act feed-in tariff (FIT) program if elected. The Progressive Conservatives had also promised to cancel the renewable energy contract between Ontario and Samsung which would end Samsung's commitment to invest C\$7-billion in renewable energy in Ontario and create thousands of jobs.

#### BACKGROUND

The FIT Program, modelled after the successful program implemented in Germany and a number of other European countries, offers stable prices under long-term contracts with the Ontario Power Authority (OPA) for energy generated in Ontario from renewable sources, such as bioenergy (biomass, biogas and landfill gas), wind, solar photovoltaic and waterpower. It is North America's first comprehensive FIT Program and has resulted in substantial investments in green energy development in Ontario. Under this program, renewable sources have grown to 5% of the total supply of energy in Ontario, and are projected to increase to 13% by 2018. The FIT Program is estimated to have created more than 20,000 new jobs to date and to have attracted more than C\$26-billion in investments.

The rapid development of renewable energy projects under the FIT Program was discussed in our April 2010 *Blakes Bulletin: Ontario Announces 184 Feed-in Tariff Contracts for 2,421 MW of Renewable Energy*.

While the re-election of the Liberal government has removed the uncertainty which had clouded the future of the FIT Program, the program is due for its first biennial review – the FIT Program was launched in October 2009 and *Section 10.1(a) of the FIT Rules* provides for the OPA to conduct regular biennial reviews of the FIT Program – and still faces a few challenges. The likelihood of further changes to the program over the coming term of the provincial legislature has also been increased by the requirement that the Liberals obtain the support of at least one member of the New Democratic Party or the Progressive Conservative Party in order to ensure the passage of legislation.

#### THE ROAD AHEAD

##### Biennial Review

The FIT Program may be amended at any time in response to directions from the provincial government or changes in the law. In addition, the FIT Rules also provide for the regular biennial review of the FIT Program, the FIT Rules, the Price Schedule and the form of FIT Contract. It is expected that the first biennial review will be performed by the end of 2011 and will result in changes to the FIT Program Price Schedule (and possible changes to other aspects of the program).

One of the issues raised by the Progressive Conservatives during the election campaign was the high price (C\$0.802 per kilowatt-hour) paid for the power generated by rooftop solar PV systems under the microFIT Program. While the small size (10 kW or less) of these systems means that the impact on the price paid for electricity by consumers was minimal – less than one cent per month for the typical household – the price is high by current international standards. The continually and rapidly falling prices of solar photovoltaic generation (more than 50% since 2007) have led other FIT jurisdictions such as Germany to move to more

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frequent (e.g., semi-annual) reviews and downward revisions of the FIT prices, and have resulted in FIT prices as low as 50% of the prices currently offered in Ontario. Significant reductions in the prices for solar PV power may well result from the upcoming biennial review. In addition, the government and the OPA may wish to provide for more regular reviews of the Price Schedule and/or to link the rate of price reductions under the FIT Program to the additional capacity built during the prior period, as is provided for under the current German FIT model. Such a mechanism can be used to provide greater stability and predictability as the prices will decrease more rapidly if there is an oversupply of projects at the current price until an equilibrium is achieved.

Another issue which was raised during the election campaign, and which may be addressed in connection with the biennial review, relates to the limits on the authority of local municipalities to review and block the development of FIT projects. The Green Energy Act limited the role of municipalities in order to streamline the approval and implementation of such projects. However, several municipalities have expressed concerns about large scale wind projects, including Lambton Shores, Plympton-Wyoming and Dawn-Euphemia Township, and have passed resolutions calling for a provincial moratorium on wind farms and an independent health study. The leader of the New Democratic Party has publicly stated that municipalities should have more say in green energy projects and may be expected to push for changes to give effect to this promise.

### **Grid and Distribution Capacity Constraints**

The past year has brought unexpected uncertainty and delays to many projects due to connection issues and grid capacity constraints. A substantial number of small-scale projects that are capacity allocation exempt (CAE) and thus were supposed to be connected to the distribution grid as of right were told that they could not connect to the local distribution grid until upgrades were made to the distribution system. (The October 11, 2011 decision and order of the Ontario Energy Board in response to the Application by Hydro One Networks Inc. for a Six Month Exemption from the Timelines for the Connection of Micro-Embedded Generators (EB-2011-0118) disclosed that, as of July 29, 2011, Hydro One had received 15,630 applications, had

issued offers to connect to 10,443 of the applicants; 4,169 have received refusals, and 1,018 were still being processed). These limitations were reflected in changes made to the FIT Program earlier this year (see [February 9, 2011 – Rule change for CAE-FIT Applications](#)) which require CAE FIT applicants to obtain a Connection Impact Assessment from their local distribution company after the OPA issues a contract. These changes put more power in the hands of local distribution companies and Hydro One than was originally provided for under the FIT Program. These connection issues, which have arisen with respect to microFIT as well as CAE FIT projects, have become a significant concern and could constrain the potential development of the market. Similarly, for larger scale projects, the process for obtaining connections has been significantly delayed and the volume of FIT Project applications vastly exceeds the available grid capacity. The construction of additional transmission capacity is now a constraint for utility scale projects in many areas of the province. In response to widespread delays in granting required approvals, on February 9, 2011, the OPA offered to extend the milestone date for commercial operation of FIT contracts by up to a year (see [February 9, 2011 – One-year extension of Milestone Date for Commercial Operation available for FIT contract holders](#)).

### **World Trade Organization Challenges**

Certain parts of the FIT Program have been challenged at the World Trade Organization (WTO) by Japan and the European Union, including, among other things, the program's domestic content requirements, which require wind and solar projects to include a minimum percentage of goods and services from Ontario.

On September 13, 2010, Japan [filed a WTO challenge against the program](#), requesting consultations with Canada. Japan claims that the domestic content provisions of the FIT program are in violation of Articles III:4 and III:5, among others, of the GATT 1994. The allegations are based on the grounds that the provisions are regulations affecting the sale and purchase of renewable energy equipment that favour domestic over imported equipment; and that they are internal quantitative regulations relating to the mixture and proportion of equipment used in the renewable energy facilities that require the equipment to come

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from sources inside Ontario. WTO's Dispute Settlement Body established the members of the panel on the same day as the election (October 6, 2011). Australia, Brazil, China, El Salvador, the European Union, Honduras, India, the Kingdom of Saudi Arabia, Korea, Mexico, Norway, Chinese Taipei and the United States have reserved their rights to participate in the proceedings as third parties.

In addition, on August 11, 2011, the European Union filed a separate WTO challenge against the FIT Program, requesting consultations with Canada relating to the domestic content provisions. The grounds for the claim are basically similar to the Japanese complaint. Japan and the United States have joined the consultations. These disputes are at relatively early stages. Canada is currently in negotiations with Japanese, European and other interested parties on this matter. There is no indication that these proceedings will have any impact on the FIT Program in the near future.

Ontario's continuing leadership in green energy is being closely followed by many throughout North America and around the world. In order to sustain and build on this momentum, the industry must continue to work closely with the OPA and other stakeholders to encourage the adoption of international best practices to overcome the connectivity and other challenges which currently face the industry.

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