ONTARIO BAR ASSOCIATION
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Submission on the Proposal for the *Green Energy Act* EBR Registry Number 010-6017

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Comments on Proposal for *Green Energy Act* – EBR Registry Number 010-6017

Introduction

The Ontario Bar Association (OBA) and its Environmental, Municipal, Natural Resources and Energy Law Sections welcome the opportunity to comment on the government's proposal to adopt Bill 150, the *Green Energy and Green Economy Act, 2009*.

The OBA consists of 18,000 lawyers from a broad range of sectors, including those working in private practice, government, non-governmental organizations and in-house counsel. Our members have, over the years, analyzed and provided comments to the Ontario government on numerous legislation and policy initiatives. More than 1,000 of these lawyers belong to our very active Environmental Municipal and Natural Resources and Energy Law Sections. Our members have considerable expertise and experience in how environmental, planning and natural resource laws and policy are interpreted and applied, and represent many points of view. The views expressed herein are the views of the OBA and its Environmental Municipal and Natural Resources and Energy Law Sections as a whole, and are not necessarily the views of each individual member or other organizations with which they may be involved.

Overview

The OBA supports the government's vision to reduce Ontario's carbon footprint and the transition to a green economy. We recognize that achieving this vision will require significant innovations in the generation, regulation, pricing and use of energy, and congratulate you on introducing Bill 150.

However, we urge the government to be clear and transparent about the goals it wishes to achieve, and how each element of Bill 150 will promote those goals. We also recommend that some elements of the Bill be amended. In particular, we have the following comments:

Renewable Energy Approvals (REA)

Schedule G, the amendments to the *Environmental Protection Act*, introduces the concept of renewable energy approvals. The renewable energy approvals regime would be set out in a proposed Part V.0.1 to the EPA.

Broad Meaning of "Environment"

The meaning of "environment" for the proposed Part V.0.1 differs from the meaning that applies to the rest of the EPA. Whereas the balance of the EPA employs the term "natural environment" as a reference simply to the air, land and water, or any combination thereof in Ontario, Part V.0.1 adopts the more expansive definition used in

the *Environmental Assessment Act*.[1] Outside of this definition, the only reference to the term "environment" is in the purpose provision of Part V.0.1, which states that the purpose of Part V.0.1 is to provide for the protection and conservation of the "environment".

We cannot gauge the effect of this more expansive definition of "environment" in Part V.0.1 without the relevant regulations that will govern the new renewable energy approvals.[2] However, such a broad definition, which includes diverse and at times competing elements, may bring significant uncertainty to the renewable energy approval process. When the Ministry reviews an application for any of the current permits/ approvals, its purpose is relatively narrow - it is to protect and conserve the natural environment (i.e. air, land and water). However, the purpose underlying the review of an application for a renewable energy approval will be far broader - the director must endeavour to protect air, land and water, as well as animal and human life, social, economic and cultural conditions, built environments, and more. This may create considerable uncertainty and the potential for inconsistency as to the relative weight that will be given to each component of the "environment" that is to be protected. How does the government plan to address this issue?

The "One-Window" Approach

While the renewable energy approval process will not provide a true one approvals "window" for renewable energy projects, it does reduce the number of approvals required and should therefore assist proponents. For biomass projects, the new approvals will also have the significant advantage of not labelling them as "waste disposal sites".[3]

Holders of a renewable energy approval would be exempt from certificates of approval for air and noise, waste disposal sites, waste management systems and sewage works, as well as permits for the taking of water and the construction of wells.[4] Regulations may prescribe additional exemptions. Finally, although not reflected in the proposed legislation, it is our understanding that, most likely through changes to O. Reg. 116/01

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[1] Where "environment" means (a) air, land or water, (b) plant and animal life, including human life, (c) the social, economic and cultural conditions that influence the life of humans or a community, (d) any building, structure, machine or other device or thing made by humans, (e) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities, or (f) any part or combination of the foregoing and the interrelationships between any two or more of them, in or of Ontario

[2] Which we understand may also address matters currently addressed under the *Environmental Assessment Act*

[3] Which creates major obstacles in siting, etc.

[4] As listed in section 47.3 of the proposed Part V.0.1

under the *Environmental Assessment Act*, environmental assessment requirements for renewable energy projects will also be subsumed into the renewable energy approvals process.

Given the proposed amendments to the *Planning Act* set out in Schedule K, projects will also be exempt from zoning and official plan restrictions. We strongly support Bill 150's goal to streamline Ontario's environmental and municipal approvals process in order to encourage the development of renewable energy projects, and we share your sense of urgency. However, Bill 150's (Schedule K) proposed approach to "NIMBYism" (i.e., by exempting projects from official plan control, demolition control areas and Part V of the *Planning Act*) must be carefully balanced against the need to ensure that a renewable energy project makes sense in terms of its relationship with other land uses. While we understand that some planning issues will be addressed through regulations, we expect that such balancing will be a complex task. For example, we do not believe that province-wide setback requirements - in and of themselves - will necessarily ensure "good planning" when siting renewable energy projects. As a result, careful thought must be given to the drafting of Bill 150's regulations to ensure that the goal of increasing renewable energy is consistent with sound and sustainable planning decisions.

Another potential land use problem is whether zoning bylaws will continue to restrict a proponent's ability to collect the information needed to apply for a renewable energy approval. For example, wind proponents must often erect temporary masts to collect wind data in evaluating a potential wind farm site. The mast will not itself qualify for a renewable energy approval; will it therefore continue to be subject to zoning restrictions? If so, this could be a significant obstacle to many proponents.

Bill 150's "one window" approach still leaves several other approval requirements under provincial jurisdiction. (Obviously the process excludes any federal approvals.) A true "one window" would include other approvals under the authority of the Ministry of Natural Resources that have particular significance to hydroelectric projects. These include approvals under the *Lakes and Rivers Improvement Act*, the *Public Lands Act* and the *Beds of Navigable Waters Act*. In addition, as indicated by Section 2 of Schedule L to Bill 150, while a Conservation Authority's discretion would be constrained further in respect of a renewable energy project, a proponent would still have to seek the separate approval or permission of a Conservation Authority under the *Conservation Authorities Act*.

Please clarify how the federal environmental assessment process[5] and First Nations consultations will fit into the renewable energy approvals process.

[5] Depending on the changes to environmental assessment requirements that are proposed by regulation or otherwise.

The Service Guarantee

We understand that the government intends to offer a six-month service guarantee to the renewable energy approvals process. Based on a diagram provided in a recent stakeholder session, it appears that the Ministry's intention is for this service guarantee to apply starting after all technical studies, pre-submission and First Nations consultations and consideration of land use planning requirements have been completed. Specifically, the guarantee would apply to the period from the date on which notice is posted on the Environmental Registry until the date on which the EBR decision notice is posted. Any appeal process that results from that decision and the building permit process would take place subsequent to the close of the six-month service guarantee.

The guarantee would not, however, be of much value if it is applied the same way as the service time "guarantee" provided by the Ministry of the Environment re O. Reg. 153/04 (Records of Site Condition) and Section 7.9 of the Ministry's *Records of Site Condition - A Guide on Site Assessment, the Cleanup of Brownfield Sites and the Filing of Records of Site Condition*. The MOE can repeatedly start and stop the clock during the review process, largely stripping the guarantee of real meaning. The actual review period often turns out to be considerably longer than the "guarantee". We recommend that an initial review of applications for completeness be carried out. Once an application is accepted as complete, then the Ministry should place the EBR notice, undertake its review, make its determination on the basis of the information filed and post the decision notice, all within the period of the service guarantee, with no stopping of the clock.

Transitional Provisions

The Bill lacks several key transitional and operational concepts, such as:[6]

First, how will the proposed renewable energy approval regime affect renewable energy projects that are currently in the process of seeking the approvals and permits that are to be replaced by the renewable energy approval? We recommend that proponents of renewable energy projects should have the option to complete their existing approval processes (including associated review mechanisms) and not be forced to start over under the new process.

Second, Bill 150 does not clearly indicate when, if ever, proponents will be required to obtain amendments to a renewable energy approval due to changes in the renewable energy project. We recommend that the amendment process (including any appeal mechanism) should be proportional to the potential environmental impact of the proposed

[6] While the government's intention may be to address these matters in the regulations associated with the amendments to the EPA, we want to take this opportunity to identify these concepts, which (we believe) are particularly important and which we anticipate you are already considering.

changes and that relatively minor operational changes should not subject proponents to the entire renewable energy approvals process.

Third, please clarify that existing renewable energy projects that have already obtained approvals and permits will not be required to obtain the new approval.

Resources

For the renewable energy approvals process to work effectively, the Ministry must ensure that sufficient resources are in place to administer and efficiently process the applications it receives and that these resources are organized in a manner that supports such an integrated process. Given that this new form of approval subsumes a number of traditional permits and approvals, as well as the environmental assessment process, consultation processes and land use planning considerations, the assessment of a renewable energy approval application appears to be a significant undertaking. We encourage the Ministry to carefully consider how it will efficiently and effectively review renewable energy approval applications, which contain information that previously would have been sent to all the relevant persons by the proponent.

Of particular concern is ensuring that the appropriate land use planning expertise and experience is brought to bear on these applications. In addition, this regime will apply to a variety of relatively new and emerging renewable energy technologies with which Ministry staff may not have familiarity, which may require the MOE to be proactive in understanding the potential environmental issues generally associated with these technologies prior to the submission of applications in order to meet the service guarantee. If it is intended that the Ministry of the Environment serve as the "window" for these approvals, i.e. will then have to coordinate the review of applications with various other Ministries, including Municipal Affairs, Energy and Natural Resources, it may be challenging for the Ministry to satisfy the service guarantee.

The Proposed Right of Appeal

Schedule G provides an appeal process for those who wish to oppose a renewable energy approval. Its key features are:

- a 15-day **timeframe** for notices of appeal (unless varied by regulation);
- **leave to appeal** is not required;
- deemed approval if the appeal is not resolved within a **timeframe** set out in regulations;
- an opponent must prove that the approval will cause **serious and irreversible harm** to the natural environment, plant or animal life, or human health or safety; and
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- the Tribunal must decide the appeal consistent with any **Ministerial policies** issued under s.47.7 of the EPA that are in effect at the time of the approval is issued.

We acknowledge that the current approval process for green projects is too slow, too expensive and too uncertain. We also acknowledge that local issues must often give way to the larger public interest. Just as environmental assessment had to be simplified and expedited to allow transit projects to be built on time and on budget, it is also necessary to simply and expedite approvals for green energy projects.

However, the proposed appeal process is unique, compared to other rights of appeal / judicial review re environmental decision-making in Ontario. It is unclear how the new approvals will be reconciled with existing common law and property rights, such as the law of nuisance. The appeal process should expressly comply with Canadian constitutional law and the conventions and principles of international law. Some of our members believe the Bill will unduly limit opportunities for municipalities and neighbours to influence renewable energy projects. The Bill should provide for an effective public consultation and conflict management process. There are also some drafting inconsistencies that should be corrected.[7]

Relationship to other rights of appeal / judicial review

Despite the *Statutory Powers and Procedures Act*, Ontario has no consistent approach to rights of appeal in environmental cases. The proposed appeal process differs from each of the existing appeal processes in Ontario's environmental and land-use decision-making.[8]

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[7] For example, there are inconsistencies in:

(1) The scope of the "grounds of appeal" and the definition of "environment" used by applicants and the Director; and

(2) The description of the Tribunal's jurisdiction on the appeal as between (a) the duty to consider and address only the test set out as grounds for appeal, and (b) the duty to make its decision consistent with the applicable policies of the Minister.

[8] (1) Planning Act: anyone who is interested in the proposal and demonstrates legitimate planning concerns may appeal.

(2) EAA: for individual EAs, anyone can request a hearing, Minister's has unfettered discretion to order a hearing; no rights of appeal;

(3) EPA/OWRA: applicants, and no one else, may appeal a negative decision as of right;

(4) EBR: persons interested in a decision may seek leave to appeal any EPA/ OWRA decision; onerous statutory leave test, although significantly loosened by tribunal and judicial decisions;

This will require lawyers, the Environmental Review Tribunal and the courts to develop a fresh body of jurisprudence as to its meaning, which could create uncertainty in the early years.

Common law rights

Ontario courts have recently clarified[9] that environmental approvals must take into account the common law rights of those affected, and the Statements of Environmental Values of the affected ministry. Will the Ministry of the Environment Statement of Environmental Values be amended to contemplate renewable energy approvals?

Some residents might be able to prove that a proposed renewable energy project is likely to cause a nuisance, but fall short of proving serious and irreversible harm. How does the government intend to address such situations? Will they be addressed as part of an ERT hearing; a conflict management process, or left to judicial reviews and/or injunctions before the courts? Multiplicity of litigation is not in the best interests of either proponents or their neighbours.

Constitutional law

As currently drafted, an approval might offend constitutionally protected rights, thus forcing those affected to seek relief from the courts.

For example, an approval might affect the treaty or aboriginal rights of First Nations, but this does not constitute grounds for appeal, even for the First Nation affected.[10]

- Another important point of comparison is how such an appeal right compares to the power to judicially review an approval decision under the GEA.

* statutory test is similar to test to obtain an injunction, with a common emphasis on "irreversible harm"; traditionally, very few "environmental" matters have given rise to injunctive relief; on the other hand, at common law, a nuisance may give rise to injunctive relief;

* statutory test more onerous than non-injunctive judicial review test, where an applicant may succeed by showing that the approval decision was contrary to, at least one of, procedural fairness, the Director's jurisdiction, statutory duties, or the proper exercise of discretion. However, judicial review also raises onerous standard of review issues that do not face statutory appellants.

[9] *Lafarge v. Director*

[10] We note that aboriginal rights are accommodated in other “streamlined” environmental approval processes, such as the Transit EA regulation.

The proposed limits on rights of appeal may sometimes be inconsistent with the conventions and principles of international law, such as:

> Espoo Convention on Transboundary Environmental Impact Assessment; Biodiversity Convention; Climate Change Convention, and International Labour Organization conventions related to indigenous peoples.[11]

An approval might offend section 7 of the *Charter of Rights and Freedoms*, by threatening an adverse impact on human health that is serious, but not proven irreversible. This would not give the affected person grounds of appeal. Any infringement of s. 7 must be demonstrably justified under s. 1 of the *Charter*. The Bill should clarify how this balance will be struck, and whether those affected will be entitled to compensation.

For proponents

For proponents, the new appeal process is considerably better than the existing situation: no longer is there potential for a leave to appeal each environmental approval; nor is there any potential for an OMB hearing; and there appears likely to be an overall timeframe to the new appeal, where all current appeal processes involve uncertain timeframes. We recognize that such uncertainty poses a serious obstacle to potential green energy developers.

On the other hand, there is no requirement for leave to appeal or that the appellant be personally affected by the project, or even live in the area. Although this limits a proponent to one point of appeal from opponents, it makes it considerably easier for appellants to commence appeals. Thus, it adds the potential cost of preparing for and attending an appeal to every single project.

For opponents

The new process is restrictive for residents and municipalities opposed to a renewable energy project. Municipalities have no decision-making authority; the standard for appeal is very onerous; and appellants must be well organized from the outset and throughout the appeal process to avoid exceeding the deemed approval timeframe.

Persons and/or governments with special constitutional or international or rights (i.e., First Nations, foreign governments) do not appear to have commensurate status under the proposed appeal regime. This may infringe Canadian constitutional law and Canada's international obligations.

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[11] These principles include notice and consultation on projects that may cause transboundary impacts; precautionary principle; and rights of indigenous peoples to consultation, and participation in the use, management and conservation of natural resources pertaining to their lands.

Electricity Rates

Environmental Attributes

Potential proponents need to know who will own the environmental attributes that will be generated by renewable energy projects that benefit from the various aspects of the Bill, such as the right to connect, the renewable energy approvals and/or the feed-in tariff. OPA officials seem to suggest that the OPA expects to automatically acquire the environmental attributes in exchange for the feed in tariff. The Bill leaves this a mystery. The Bill also does not disclose what the OPA will do with the attributes, which is a matter of considerable public interest.

Renewable energy generators would relish the opportunity to sell the environmental attributes created by their projects into the new cap and trade system that Ontario has committed to enter, such as the Western Climate Initiative. Generally, it would be helpful for the government to explain how it will integrate Bill 150 with its WCI commitments.

Feed-In Tariff Preferential Rates

The proposed feed-in tariff rate structure will pay different rates for different renewable technologies and different sizes of projects, depending on the government's estimate of the cost of production. This is a significant departure from the historical concept of buying power at the lowest price.

The government should clearly explain how the proposed differential rates would affect the cost of power, spur and reward innovation and make renewable energy more competitive over time. They should also explain how the tariff for each type of power has been developed, how often it will be updated, and on what basis. In particular, is the government willing to fund an unlimited amount of the most expensive types of power, such as solar electricity, before maximizing less expensive options, such as conservation?

Please clarify the economic and policy justification for premium rates for small projects. Will this simply encourage developers to game the system? We are concerned that the size brackets on solar, in particular, will cause larger projects to be broken up, similar to the experience with certain wind projects under the RESOP program. Are these subsidies to homeowners and small businesses? If so, are they consistent with maximizing green energy development at a price that consumers can afford? If the main goals of the Act are to maximize renewable power and promote "green jobs", will the proposed preferences really achieve this? Will this be measured, and if so, how? On what criteria, and over what time frame?

The government should also explain why it is appropriate to give preferential rates to community based projects. Are there economic justifications for the preference, such as the benefits of local generation in hardening communities against transmission

disruptions? Or is this simply a public policy preference for certain types of organizations?[12] If so, are electrical rates really the best way to promote them?

There will need to be clear rules for qualifying for the preferential community rate. There will need to be clear rules for qualifying for the preferential community rate. Who will speak for the community group? What will happen if five years into a PPA, a community group sells a minority interest to a private party? A majority interest? The entire project? Will joint ventures be eligible for the preference? Again, this provides another opportunity for conflict management process in decision making.

Low Income Ratepayers and Conservation

One of the consequences of the Bill is expected to be an increase in electrical rates, at least in the short term. Low income ratepayers need special consideration and attention to ensure they are meaningfully engaged, are able to conserve energy, and still have access to sufficient amounts of electricity. Many low-income ratepayers live in buildings that are old and particularly inefficient in their use of energy; assistance to upgrade such facilities would benefit both the public and the residents. We therefore support proposals to:

> expand the objectives of the Ontario Energy Board to focus on conservation and renewable energy;[13]
>
> have the Minister of Energy require the OEB to establish conservation and demand side management targets;
>
> adopt regulations under the OEB Act to foster low income access to electricity and to conservation, including appropriate incentives for retro-fits;[14]
>
> adopt regulations regarding rate protection and other benefits for low-income consumers.

To have real results for low-income consumers, conservation programs must be long-term in nature and include a range of measures to reduce energy consumption. Some

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[12] If so, aren't other program funds available to support community development? Why is this an appropriate function of electrical rates?

[13] This is a much-needed step toward ensuring that the Board's objectives are not merely economic in nature, and include these fundamentally important environmental considerations.

[14] It is important that conservation programs set up to achieve the Board's conservation and demand side management targets include a focus on low-income Ontarians, so that these individuals are able to participate in the provincial culture of conservation, and are able to reduce their energy use and bills.

members believe that a low-income energy rate assistance program should accompany these programs.

Right to Connect

We support the proposed right to connect renewable energy projects to the grid, on a shared cost basis. This right is essential to encourage new renewable energy generation, thus assisting Ontario to reduce its carbon footprint and its dependence on thermal power. However, this will be a very complex right to implement.

For example, one major obstacle to renewable energy generation has been the orange and yellow zones created by the Ontario Power Authority to preserve transmission capacity for nuclear plants. The "right to connect" will exist only theoretically in these zones, since it is subject to an "economic" and technical test. In other words, if adequate transmission capacity does not already exist (the express justification for the orange and yellow zones), a threshold question will be whether sufficient new generating capacity is proposed to justify expanding or improving the transmission system.[15] This underscores a major problem that the *Green Energy Act* does not solve. Generating electricity is only the beginning - one has to be able to take it where it's needed.

The economic "threshold" will work against small scale, local and community power, and in favour of mega projects.[16] The Ministry of Energy should consider ways[17] to help small generators cooperate to generate sufficient threshold demand.

Even where new transmission is economically justified,[18] new or improved transmission capacity must actually be permitted and constructed before renewable energy facilities

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[15] We suggest that priority should be given to making the existing grid "smarter", and more able to handle renewable energy, and that construction of new transmission lines should be secondary. It would be useful for the Ministry of Energy to encourage and publicize research on how much the transmission system can be improved by becoming "smart" and how much new transmission will be necessary.

[16] Is this one of the justifications for the preferential tariff for small projects? If so, wouldn't it be more economically efficient to separate the connection issues from the long-term rate for power?

[17] Perhaps this will be one of the responsibilities of the Facilitator.

[18] The U.S. stimulus bill has promised $11 billion for improvements to the US electrical grid, in order to permit increased reliance on renewable energy. The Canadian federal budget promised an unstated portion of $1 billion. But we understand that permitting, not money, is the major obstacle to constructing new

can connect.[19] However, finding a timely way to site and build transmission lines will likely be just as important to a low carbon future as finding ways to site and build renewable energy generation projects. The public will likely support giving priority treatment to transmission facilities that are dedicated primarily to green energy, but not if this appears to be camouflage for transmission facilities for nuclear or fossil power.

A second major issue is whether proponents will be expected to bear any part of the connection/upgrade cost for new projects. We agree that proponents should not have to bear the entire cost of such connections, because there is a general public benefit to reducing our carbon footprint and reliance on nuclear power.

Environmental Commissioner

Schedule F would amend the *Environmental Bill of Rights, 1993* to require the Environmental Commissioner to report annually to the legislature on efforts to conserve energy and reduce greenhouse gas emissions. The OBA Environmental Law Section supports such provisions but suggests that complementary amendments will be necessary to allow the Commissioner to do his job. These include the confidentiality provisions of Schedule A (the *Green Energy Act*), and the notice provisions of Schedule G (amendments to the *Environmental Protection Act*).

Under Schedule A, sections 11 and 12, the Renewable Energy Facilitator must keep secret information from a proponent or government institution respecting a renewable energy project.[20] The Facilitator may only disclose such information to his/her counsel, to a law enforcement agency, with the consent of the proponent, or as *required* to fulfil the objects of his/her office. This obligation of confidentiality prevails over the *Freedom of Information Act*.

It is difficult to see how the Commissioner can perform his/her function without access to the Facilitators' information. Schedule A should require the Facilitator to disclose such information to the Environmental Commissioner.

In addition, sections 11 and 12 of the *Green Energy Act* suggest that the Facilitator must or may keep secret, from the public, hazards to the environment or human health or safety. If so, this does not serve the public interest. Schedule A should require the

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transmission lines. We note that Ontario has constructed very little high voltage transmission since the *Environmental Assessment Ac*t came into force.

[19] In the short term, proponents will still have to build projects where the transmission system is not constrained, or can readily be upgraded.

[20] Such information is deemed to be a *trade secret or scientific, technical, commercial, financial or labour relations information, the disclosure of which could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization*.

Facilitator to disclose to the public information about environmental, human health and safety hazards, notwithstanding sections 11 and 12 of the *Green Energy Act*.

We also recommend that you consult with the Environmental Commissioner whether s/he wishes to receive notice of applications for approval of renewable energy projects under section 47.4 and appeals of approvals for such projects under section 142.1(2) of the *Environmental Protection Act*. The Commissioner should determine what form of information he/she wishes to receive about such applications and appeals.

Cooperative Corporations Act

We support the proposed amendments to the *Co-operative Corporations Act* to encourage communities to set up renewable energy cooperatives. The existing legal requirement that cooperatives sell only to their members is not practical for the generation of electricity, which must economically be sold into the public power grid. We support the proposal to allow renewable energy cooperatives to sell their power into the grid, and to share the resulting income in accordance with their own bylaws.

Conclusion

Thank you for this opportunity to comment on the government's proposal to adopt Bill 150, the *Green Energy and Green Economy Act, 2009*. The OBA supports the government's vision to reduce Ontario's carbon footprint and the transition to a green economy, and hopes that our comments will help you achieve this.