CITATION: SKYPOWER CL I LP et al. v. MINISTER OF ENERGY (ONTARIO) et al. 2012 ONSC #4979
DIVISIONAL COURT FILE NO.: 352/12
DATE: 20120910

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

SWINTON, NORDHEIMER AND CONWAY JJ.

BETWEEN:	
SKYPOWER CL 1 LP, SUNSPARK LP, GREENGIANT LP, LUMINESCENT LP, BRILLIANCE LP, SHINYLIGHT LP, CLEARLIGHT LP, CENTERLIGHT LP, PANELIGHT LP, AVIDLIGHT LP, STARLIGHT LP, WINTERLIGHT LP, SPRINGLIGHT LP, AUTUMNLIGHT LP, STAGELIGHT LP, SUNNYPARK LP, BRIGHTPARK LP, OXFORD SOLAR PARK LP, CRYSTALLIGHT LP, NOVAPARK LP, STANFORD LP, SURELIGHT LP, SOLARCELLS LP, ABSOLUTELIGHT LP, ASTRALLIGHT LP, BLAZINGLIGHT LP, EASTLIGHT LP, GLOWINGLIGHT LP, HOUSELIGHT LP, RADIANTLIGHT LP, REALSUNNY LP, SHIMMERLIGHT LP, TWINKLELIGHT LP, MAXLIGHT LP, KEYLIGHT LP, MAGLIGHT LP, HORIZONLIGHT LP, GLOBALLIGHT LP, WESTERNLIGHT LP, SOUTHLIGHT LP, STORMLIGHT LP, ASTROLIGHT LP, SUPERLIGHT LP, SPOTLIGHT SOLAR PARK LP, SPARKLIGHT LP, SAGELIGHT LP, REALLIGHT SOLAR PARK LP, ORANGELIGHT LP, ONELIGHT SOLAR PARK LP, GLOWLIGHT LP, FIRELIGHT LP, FINITELIGHT LP, EVERLIGHT SOLAR PARK LP, COPPERLIGHT LP, BRIGHTLIGHT SOLAR PARK LP,	*R.G. Slaght Q.C., T. Gilbert & A. Moeser*, for the applicants *K. Twohig & K. Smith*, for the respondent, Minister of Energy (Ontario) *L. La Horey & D. Elmalen*, for the respondent, Ontario Power Authority

BLUELIGHT SOLAR PARK LP, PHOTONLIGHT LP, CLEANLIGHT LP, SMARTLIGHT SOLAR PARK LP, EMITTINGLIGHT LP, PURELIGHT LP, NEWLIGHT SOLAR PARK LP, SILICONLIGHT LP, MAINLIGHT LP, BRILLIANTLIGHT SOLAR PARK LP, EXTRALIGHT LP, SHININGSTAR SOLAR PARK LP, INFINITELIGHT SOLAR PARK LP, DIRECTLIGHT SOLAR PARK LP, FORWARDLIGHT LP, PROGRESSIVELIGHT LP, ADVANCELIGHT LP, NEXTLIGHT LP, DAWNLIGHT LP, FUTURELIGHT LP, ZOOMLIGHT LP, YELLOWLIGHT LP, ROYALLIGHT LP, MIDLIGHT LP, KINGLIGHT LP, SOLLIGHT SOLAR PARK LP, HUBBLELIGHT LP, GALAXYLIGHT LP, LASERLIGHT SOLAR PARK LP, ATOMLIGHT LP, JOYLIGHT LP, ALPHALIGHT LP, BETALIGHT SOLAR PARK LP, GAMMALIGHT LP, OMEGALIGHT LP, PRISMLIGHT LP, AQUALIGHT SOLAR PARK LP, SIGMALIGHT LP, ROLLINGLIGHT LP, RAINBOWLIGHT SOLAR PARK LP, DISTINCTLIGHT LP, MISTLIGHT LP, GLITTERLIGHT LP, SAPPHIRELIGHT LP, RUBYLIGHT LP, MAGNIFICENTLIGHT LP, FLARELIGHT LP, SHEERLIGHT LP, VIVIDLIGHT LP, FULLLIGHT LP, MAJESTICLIGHT LP, ORIENTLIGHT LP, ANCIENTLIGHT LP, REGALLIGHT LP, EXTRAVAGANTLIGHT LP, ILLUSTRIOUSLIGHT LP, VIOLETLIGHT LP, EVENINGLIGHT LP, BLOOMLIGHT SOLAR PARK LP, SUNNYDAYLIGHT LP, CALMLIGHT LP, CLASSICLIGHT SOLAR PARK LP, FLASHLIGHT LP	)
Applicants	)
– and –	)

MINISTER OF ENERGY (ONTARIO) and ONTARIO POWER AUTHORITY

Respondents

HEARD at Toronto: August 24, 2012

NORDHEIMER J.:

[1] The applicants seek declarations that the respondents acted unreasonably in failing to process applications in accordance with the Ontario Power Authority's ("OPA") own rules; to declare that the Minister of Energy's new Directions are unfair, discriminatory and *ultra vires* the enabling legislation; and to order the Minister to direct the OPA to process existing applications in accordance with the Feed-In Tariff ("FIT") Program Rules 1.0.

[2] The applicants also sought, if we decided to reserve our decision on this application (as we did), an order prohibiting the OPA from accepting new applications pursuant to the FIT Rules 2.0 and awarding contracts pursuant to the FIT Rules 2.0, until a decision was rendered. While we were not inclined to make any interim order, the issue became somewhat moot when the parties advised us that, if our decision was received somewhat before the end of September, the need for any interim relief would not arise. In light of what the parties advised us, we confirmed that our decision would be released by September 21, 2012. Consequently, we declined to make any interim order.

Background

[3] The applicants comprise one hundred and eighteen limited partnerships. All of the limited partnerships are owned by the same persons and are similarly affected by the actions of the respondents. As more fully described below, the applicants have submitted a large number of applications under the FIT Program.

[4] In May 2009, the Legislature of Ontario brought into force the *Green Energy and Green Economy Act, 2009,* which enacted the *Green Energy Act, 2009* ("*GEA*") and amended and repealed various statutes. The legislative changes were made to pursue the policy objectives of the *GEA*. Those objectives were reflected in amendments to the *Electricity Act, 1998,* S.O. 1998, c. 15, Sch. A to create a FIT Program, to the *Environmental Protection Act,* R.S.O. 1990, c. E.19 to provide for a new streamlined renewable energy approval process, and to the *Planning Act,* R.S.O. 1990, c. P.13 to remove municipal approval requirements for renewable energy projects.

[5] The *Electricity Act, 1998* was amended to provide for the development of a FIT Program, delineate the responsibilities of the OPA and the Ministry in the implementation of a FIT Program, and provide for directions to be given by the Minister to the OPA in the development of the renewable energy generation facilities and systems to support a FIT Program.

[6] The Minister may issue directions that set out program goals, which are to be followed by the OPA in preparing the FIT Program. The *Electricity Act, 1998* defines a FIT Program as:

> ... a program for procurement, including a procurement process, providing standard program rules, standard contracts and standard pricing regarding classes of generation facilities differentiated by energy source or fuel type, generator capacity and the manner by which the generation facility is used, deployed, installed or located.

[7] The OPA is a corporation created without share capital established under the *Electricity Act, 1998*. The *Electricity Act, 1998* provides that the business and affairs of the OPA are to be carried on without the purpose of gain and any profits are to be used by the OPA for the purpose of carrying out its objects. The OPA acts in accordance with directions from the Minister of Energy. The objects of the OPA include forecasting electricity demand in the Province for the medium and long term.

[8] On September 24, 2009, the Minister gave directions to the OPA, pursuant to s. 25.32 and 25.35 of the *Electricity Act, 1998,* to create a FIT Program open to projects that produce electricity from renewable sources including wind, solar photovoltaic, bioenergy and waterpower up to 50 MW. The direction was publicly released and set out the broad policy objectives of the FIT Program including to promote clean energy, create jobs, introduce a simpler method to

procure and develop generating capacity from renewable energy sources, and, at the same time, encourage community and Aboriginal equity participation in the program. On the same day, the OPA issued the FIT Rules version 1.0 defining the specific procedure pursuant to which applications would be received and processed for FIT Contracts.

[9] The Minister's direction set out specific features to be included by the OPA in the design of the FIT Program including price setting, general contract provisions, transition provisions from previous renewable energy programs, domestic content, and restrictions to project siting on prime agricultural land. In addition, the OPA was required to develop and deliver a number of program elements to encourage community, Aboriginal and municipal involvement. The September 24, 2009 direction also required that the OPA conduct a formal program review at least once every two years.

[10] Significant features of the FIT Rules 1.0, aspects of which will be discussed in greater detail below, included: (a) defining the lands where solar photovoltaic projects could be located; (b) a Time Stamp priority for applications; (c) a review process by the OPA; (d) an assessment, in two stages, as to the connection availability for any particular Project and the categorization of a Project depending on the results of that assessment and the setting of application fees and security deposits. In terms of that assessment process, for eligible large FIT projects, the first stage of connection availability testing is a Transmission Availability Test ("TAT") and a Distribution Availability Test ("DAT"). The TAT and the DAT determine whether there is available capacity on the existing electricity grid to receive the electricity generated by a FIT project. If there is capacity on the existing grid, then the Project may receive a FIT Contract. If capacity is not immediately available, then the application passes to the second stage of connection availability testing – the Economic Connection Test ("ECT"). The purpose of the ECT was to determine whether updates to transmission and distribution systems and expansion to the electricity grid made it economically and technically feasible to connect renewable energy projects to the grid. The ECT analysis was complex. The OPA originally targeted the ECT to be every six months. As it turned out, the target of performing the ECT within six months could not be met due to the unexpected volume of applications, as mentioned below.

[11] The OPA developed and published all program-related documents including program Rules, the FIT Contract, FIT Pricing Schedule and standard definitions. The FIT Rules 1.0 that governed the FIT Program evolved as the program was reviewed and revised from time to time. In fact, there were seven versions of the FIT Rules 1.0 prior to the adoption of the FIT Rules 2.0. Each version of the FIT Rules included rules pertaining to eligibility criteria, application requirements, screening process, a connection capacity assessment, FIT Contract execution rules, and contract pricing. There were also specific rules to encourage Aboriginal and community projects.

[12] Considerable latitude was given within the FIT Program for it to evolve and change. The FIT Program was to be reviewed periodically and could be amended in accordance with the Rules. The FIT Program, Rules, forms of contract and pricing were subject to periodic program review and amendment at least every two years. Apart from the scheduled program reviews, the OPA could amend the FIT Program and Rules in response to ministerial directions, changes in laws, or significant changes in the market place. In addition, any changes to the FIT Rules can apply with respect to existing applications.

[13] The FIT Rules are said to reflect a number of competing interests and values as expressed in the policy objectives outlined in the Minister's direction to the OPA to create the FIT Program:

> (a) the creation of a green renewable energy industry had to be as cost effective as possible;
>
> (b) the FIT Program was subject to review and change within the discretion of the Minister and the OPA;
>
> (c) review and change was a function of public policy decision-making and broad-based stakeholder involvement; and
>
> (d) the financial risk in submitting applications was assumed by the applicant and for certain projects, timelines for processing the applications were approximate.

[14] Outside the formal process for the development of the FIT Program, the applicants say that their President had been assured by the then Minister of Energy, George Smitherman, that

the *GEA* provided for a "right to connect", and that the only reason for not connecting would be if the lines were full or if there was a technical impediment to connecting.

[15] The President of the applicants acknowledges that the FIT Rules "contain a provision whereby the OPA could make changes to the FIT Rules". He adds, however, that he was also assured by Minister Smitherman and his successor Minister, Brad Duguid, that changes to the FIT Program would only be undertaken within the context of the Program Review and would not affect existing applications. The Ministers further said that the only material changes to the FIT Program would be to pricing and the streamlining of the government processes.

[16] Further, following the issuance of the FIT Rules, both the OPA and the Minister made certain statements with respect to the review of FIT applications, including the following:

- On March 23, 2010, the OPA stated that applications submitted prior to June 4, 2010 would be considered under the first ECT starting on August 3, 2010. This ECT would be finished by early 2011. The OPA repeated this statement in a news release on April 8, 2010, in a presentation on May 19, 2010, and in a program update on June 1, 2010.

- After performing the TAT/DAT for Launch Period Applications in April 2010, the OPA wrote to the applicants who had not received FIT contracts, stating "at this time, your project will proceed to the next Economic Connection Test, which is scheduled to be performed during the summer of this year" and that it would be initiated in "mid-August".

- The OPA gave presentations on October 6 and November 17, 2010 indicating that applications would be assessed under the ECT.

- On February 24, 2011, the OPA indicated in a program update that those pre-June 4, 2010 applications that did not receive FIT Contracts would proceed to the ECT. The OPA also sent a notice in respect of each of the applicants' fifty-two pre-June 4, 2010 applications stating that these applications "will be subject to the first Economic Connection Test (ECT) under the FIT program".

- The OPA advised the applicants on March 1, 2011 that the ECT should happen shortly.

[17] Applications submitted to the OPA were time-stamped and assessed on a first-come, first-served basis. FIT Contracts were to be offered in the order applicants applied, subject to

eligibility and availability on the transmission and/or distribution system to connect the project and subject to OPA's general and other rights in the FIT Rules.

[18] The OPA developed a screening and assessment process to determine if a project was likely to be able to connect to the available electricity grid. FIT projects were divided into two categories based on the project size and feasibility of connection: (1) projects that were Capacity Allocation Exempt ("CAE" or "small") were no more than 500 KW; and (2) Capacity Allocation Required projects ("CAR" or "large") were more than 500 KW. A qualified CAE application could be offered a contract without undergoing a grid capacity assessment because its size would not necessitate changes to the existing transmission and distribution infrastructure. By comparison, qualified CAR projects were required to undergo and pass connection availability testing before a FIT Contract could be offered.

[19] In addition to those considerations, however, witnesses from both the OPA and the Ministry gave evidence when cross-examined about OPA's reserved rights under the FIT Rules. These included that the OPA had the right not to offer a FIT contract to an eligible application even if connectivity was available. In making such a decision, the OPA would consider any changes in government policy, limits or targets, considerations such as efficacy, efficiency, ratepayer value and value to the system and prudent economic sense. The OPA witness referred to these considerations as "filters".

[20] If an application passed the ECT and could be supported by grid expansion, it was to be placed in the "FIT Production Line" and could be offered a FIT Contract when grid expansion was completed. Applications that did not pass the ECT were to be placed in the "FIT Reserve", where the application retained its time stamp and would be re-evaluated when the ECT was run again.

[21] The Minister's direction of September 24, 2009 which launched the FIT Program did not set any targets for the amount of renewable energy to be procured by the OPA through the FIT Program. Without any targets, the OPA structured the FIT Rules so that small (CAE) projects would be offered contracts on an ongoing basis. For large projects, the OPA structured the FIT Rules based on its anticipation that contract capability would be allocated in bulk contract offers

following a TAT/DAT, and large projects that were unable to connect would serve as input to transmission and distribution planning through the ECT.

[22] The FIT Program created significant interest. Between the program launch on September 24, 2009 and June 4, 2010, over 2,300 applications were submitted by large-scale project developers (including the applicants) to supply over 14,000 MW of renewable energy. This level of interest signalled the need for a long-term plan for the supply of renewable energy to ensure that connection capacity was sufficiently economical and feasible to support the FIT Program, and that grid expansion would be done responsibly, as ratepayers would bear the considerable cost of expanding the electricity grid. In May 2010, the Ministry directed the OPA to provide recommendations for priority transmission projects.

[23] The OPA's transmission advice was based on a streamlined ECT analysis which identified three key bulk transmission projects that were "immediately identified as likely economic because of substantial amounts of renewable interest". The advice formed the basis for the Ministry's Long-Term Energy Plan ("LTEP"), published in November 2010 following extensive consultations with stakeholders. Among other policy goals, the LTEP set a target for non-hydroelectric renewable energy capacity of 10,700 MW by 2018 and committed to developing five priority transmission projects, three of which were to support renewable energy projects. The LTEP represented a significant policy shift for the FIT program.

[24] Between November 2010 and October 2011, the Ministry and OPA reviewed and considered whether and to what extent the FIT Program should be changed to align with the goals of the LTEP. They developed a three-part plan: (1) conduct TAT/DAT assessment for large projects submitted as of June 4, 2010; (2) make FIT Contract offers for large projects; (3) conduct a regional ECT and make FIT Contract offers for up to 1,050 MW for a defined geographic area to connect projects enabled by the Bruce-Milton transmission line, which predated the FIT Program. This plan was carried out by the OPA in 2011.

[25] During this time, the OPA amended the target dates for the ECT given the policy shift initiated by the LTEP, namely the target of 10,700 MW and the development of three new transmission lines. The Ministry was aware that the OPA had not run the ECT, but it was

satisfied that the OPA had followed the processes in the FIT Rules for screening applications and offering FIT Contracts. No directions were issued by the Minister to the OPA as to target dates for the ECT or whether or not to run the ECT. However, as the FIT Program did not set any targets for the amount of renewable energy to be procured by the OPA, the Ministry expected that the OPA would provide notice to the Ministry and seek confirmation from the Ministry before running an ECT as the ECT was designed to identify grid expansion projects that could lead to FIT Contract offers, the cost of which would be borne by ratepayers. Ultimately, on April 5, 2012, the Minister directed the OPA not to run the ECT "given the transmission projects planned through the Long Term Energy Plan and changes to the FIT Program".

[26] Under the FIT Program 1.0, two hundred and forty-nine FIT contracts were offered for large projects for both solar and wind totalling 4339 MW, and one thousand six hundred and seventy-five FIT contracts were offered for small projects for a total of 300 MW. Despite the original program objectives of encouraging Aboriginal and community participation, as a result of the first-come, first-served approach which encouraged sophisticated and experienced commercial developers, less than 5% of the contracts awarded were for projects with Aboriginal and community participation.

[27] All of the applicants' applications are for large projects. Of the total number of FIT contracts offered to date, the applicants were offered fifteen FIT Contracts representing 149 MW by February 24, 2011. The applicants' FIT Contracts are not affected by the directions the Minister gave to the OPA on April 5, 2012 and July 11, 2012 or the FIT Rules 2.0 developed by the OPA.

[28] A scheduled review of the FIT Program began on October 31, 2011 to examine a range of issues and make recommendations related to all aspects of the program. The FIT Review was announced as a comprehensive review to examine "program rules and pricing." Extensive consultations were held with industry, developers, community groups, municipalities, Aboriginal communities, environmental groups, consumer advocate groups, and interested individuals. The applicants had an opportunity to make submissions. The success of the FIT Program raised certain challenges that had to be addressed in the two year review. These included: the allocation of remaining non-hydro energy capacity to applicants within the LTEP targets; the

cost of energy to ratepayers; technical challenges including connection constraints in various parts of the Province; concerns expressed by municipalities with respect to their limited ability to participate in the approvals process; and the limited involvement of Aboriginal and community projects in FIT.

[29] When the FIT Review was launched, the OPA announced that FIT applications would not be processed during the Review. It also announced that:

> Amendments to the FIT Rules as a result of the FIT Review will apply to all applications that have not received a FIT Contract offer by October 31, 2011.

Existing applicants were informed that they could withdraw from the FIT Program and receive a refund of their application security deposits and application fees. The applicants chose not to withdraw any of their applications.

[30] On March 22, 2012, the Ministry published *Ontario's Feed-in Tariff Program: Two-Year Review Report,* which recommended changes to the FIT Program design. One of the key recommendations was to change the FIT Program from the assessment of applications based on a first-come, first-served approach to a priority point system that would rank applications based on the ability of the project to achieve a number of FIT Program objectives including (1) community and Aboriginal equity participation in the program; (2) local and municipal support for the program; and (3) project readiness.

[31] The Report also made recommendations to ensure that the FIT Program achieved the objectives, to address concerns about project siting, and to align the program with the LTEP, including:

> (a) set aside 10% of the remaining FIT contract capacity for projects that have 50% or more community or Aboriginal ownership;
>
> (b) clarify and strengthen project siting rules by removing zoning exemptions and prohibiting solar ground-mount projects on prime agricultural lands that contain Class 1, 2 and 3 soils and in residential areas and lands bordering residential areas; projects would be allowed on commercial or industrial lands if renewable energy is a secondary land use;

(c) as a result of the identification of three planned transmission projects, as well as other system upgrades underway or planned, the OPA should not conduct the ECT;

(d) reduce FIT prices by more than twenty per cent for solar and approximately fifteen per cent for wind projects to reflect lower capital and operating costs for developers; and

(e) provide a transition process for existing FIT applications to allow applicants to withdraw applications or retain original time-stamps in the FIT Program 2.0.

[32] On April 5, 2012, the Minister gave directions to the OPA pursuant to sections 25.32 and 25.35 of the *Electricity Act, 1998* requiring the OPA to make changes to the Rules to implement the recommendations of the Review Report. The OPA posted Draft FIT Rules 2.0 on April 6, 2012 for comment. The applicants made submissions to the Minister. As a result of all of the comments received on the Draft FIT Rules 2.0, the Minister issued a direction to the OPA on July 11, 2012 to make further amendments to the FIT Rules, in particular a commitment to re-examine the project siting restrictions. The FIT Rules 2.0 were posted on August 10, 2012.

[33] The changes introduced by the Minister's directions apply to both existing and new FIT applications. According to the respondents, maintaining the first-come, first-served approach as the only means by which to offer a FIT Contract would not allow the OPA to implement the points system that is integral to achieving the program objectives of facilitating greater Aboriginal and community participation and ensuring that, as the LTEP target of 10,700 MW is approached, renewable energy projects are developed on sites that are supported by the local community.

[34] All six thousand, four hundred and seventy-five existing applications (five thousand, seven hundred and twenty-nine small and seven hundred and forty-six large) submitted under the FIT Program 1.0 and awaiting review (including sixty-six SkyPower applications) may, at the option of applicants, be resubmitted under the FIT Program 2.0. This also applies to the three hundred and fifty-three applications screened by the OPA but not offered a FIT Contract (including fifty-two SkyPower applications).

[35] The applicants say that they have made significant investments in time and money to prepare complete and eligible applications for ground mount solar projects. These investments included: obtaining the rights to land; purchasing data layers and software; conducting analyses to determine appropriate project siting; applications fees; posting security in excess of $20 million; and staffing and consultant costs. These investments were necessary in order to satisfy the application requirements set out in the FIT Rules 1.0.

[36] The President of the applicants says that he directed such significant resources to be committed to the existing applications on the understanding that the government would follow through with processing applications in accordance with the FIT Rules 1.0, and would assess applications and assign priority in the order that they were received.

[37] It is acknowledged that the OPA failed to process applications according to the procedure set out in the FIT Rules 1.0, including the timelines in its representations. For large FIT applications submitted after June 4, 2010, it is also acknowledged that the OPA did not review these applications for eligibility or start the connection availability assessment.

[38] For large FIT applications submitted before June 4, 2010, the OPA failed to meet its early July deadline for performing the TAT/DAT. The OPA also failed to meet the sixty day target set out in the FIT Rules 1.0. The TAT/DAT was not performed until February 2011.

[39] The FIT Rules 1.0 prescribe the specific eligibility review and capacity assessment steps that will lead to the OPA issuing a FIT Contract. However, the Minister's witness admitted that in practice the OPA engaged in a "back and forth" with the Minister over both the timing and process for the awarding of FIT Contracts. The Minister's witness further stated that her understanding was that "before any multi-billion-dollar commitment on behalf of the ratepayer to award contracts, that they would always check in with the Ministry and Minister".

[40] Section 12.2(d) of FIT Rules 1.0 gives the OPA the right to cancel or suspend the program. The FIT program has not been cancelled or suspended. Section 12.2(g) states that the rules may be amended. The rules regarding the processing of applications in accordance with a Time Stamp and issuing contracts if capacity is available were not amended until April 5, 2012

with the issuance of a new Ministerial Direction. Until that time the previous rules were in full force and effect. Section 12.2(c) states that the OPA may, in its sole discretion, reject any application whether or not it contains all necessary information. The applicants' applications have never been rejected.

[41] The new FIT Rules 2.0 made some significant changes to the process by which applications are considered for approval. FIT Rules 2.0 overhaul the priority system for applications. Applications are now awarded points under s. 6.1, whereby projects with community or Aboriginal participation receive 3 points, projects with municipal or Aboriginal council support receive 2 points, and projects in the queue before July 4, 2011 receive 1 point. An application's time stamp is no longer relevant except as a tie breaker between two projects with equal points.

[42] As they relate to the applicants, the FIT Rules 2.0 introduce eligibility restrictions on ground mounted solar projects based on municipal zoning. The FIT Rules 2.0 preclude any such projects from being located on a "Residential Property" or a property abutting a "Residential Property" unless it is an "Exempt Residential Property". The FIT Rules 2.0 also prohibit solar projects on commercial or industrial zoned lands for which the Solar Projects would constitute the Principal Use of the property.

[43] Applications that are resubmitted and eligible under the FIT Rules 2.0 will receive points based on their original time stamp. The respondents say that it is not possible to determine whether any existing applications, including the applicants' applications, will meet the eligibility requirements of the FIT Program 2.0 unless the applications are re-submitted and subsequently assessed by the OPA. The applicants contend, however, that none of their outstanding applications will be eligible under FIT Rules 2.0, for the following reasons.

[44] In order to submit an application under FIT Rules 2.0 for a ground mounted solar project, an applicant must determine the zoning of the site, the zoning of abutting properties, and whether the zoning permits residential use as a non-ancillary use of the property if it is zoned for agriculture. This process is time-consuming. Furthermore, the eligibility depends upon the

specifics of the zoning by-laws in each municipality. There are over four hundred municipalities in Ontario.

[45] In addition, the transition provisions of the FIT Rules 2.0 prohibit applicants from changing the project lands on resubmission, severely limiting an existing applicant's ability to revise an application. According to the applicants, this fact is a significant reason why it is not feasible for them to simply withdraw and resubmit their applications for consideration under FIT Rules 2.0.

Analysis

[46] This application for judicial review raises the following issues:

(a) What is the appropriate standard of review of the Minister's decision to direct the OPA to make changes to the FIT Program?

(b) If the standard of review is reasonableness, are the Minister's directions to the OPA and the resulting changes to the FIT Program reasonable?

(c) Are the applicants entitled to a declaratory order akin to an order in the nature of mandamus compelling the Minister to direct the OPA to consider its one hundred and eighteen existing applications under the FIT Rules 1.0?

[47] In considering the reasonableness of the Minister's directions and the resulting changes to the FIT Program, the applicants raise a number of subsidiary issues including:

(a) Whether the OPA was required to follow its own standard program rules and whether the "unwritten rule" that the OPA needed to consult the Minister before conducting any connectivity testing or issuing contracts was unlawful.

(b) Whether the applicants had a legitimate expectation that the OPA would follow its own timelines and representations.

(c) Whether the OPA's actions in failing to perform connectivity assessment testing were unreasonable.

(d) Whether the general statutory presumption against retroactivity applies so that the Minister was precluded from issuing directions that changed eligibility criteria and priority rules.

(e) Whether the changes to the FIT Program were so fundamental as to be unreasonable and *ultra vires* the enabling legislation.

(f) Whether the applicants had a legitimate expectation that fundamental changes to the Rules would not be made and applied retroactively.

The standard of review

[48] I have concluded that the standard of review is reasonableness. Indeed, I do not understand the applicants to contend otherwise. The Minister is given a very broad discretion under the *Electricity Act, 1998* to direct the OPA to develop a FIT program. Discretionary decisions are entitled to considerable deference providing, of course, that they are made within the bounds of the jurisdiction conferred by the statute. At their core, the directions given by the Minister to the OPA concerning the objectives of the FIT Program are matters of public policy. They were designed to achieve certain goals as set by the Minister. The public policy aspects of the directions and the discretionary nature of the authority to make such directions are matters to which the court must give considerable deference in deciding whether the results of those directions fall within a broad range of acceptable, i.e. reasonable, outcomes. As was observed in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[49] It is with those considerations in mind that I approach the issue of whether the Minister's directions and the resulting changes to the FIT Program meet the standard of reasonableness.

The issues raised

[50] Before addressing the individual issues raised by the applicants, I wish to address their assertion that the implementation of FIT Rules 2.0 is *ultra vires* the enabling legislation. I see no foundation for that assertion. The applicants do not contend that the implementation of FIT Rules 1.0 was *ultra vires* the enabling legislation. If the Minister had the legislative authority to direct the OPA to implement the FIT Program along with FIT Rules 1.0, then he has the legislative authority to direct the OPA to implement any amendments to, or variations of, the program and the rules. FIT Rules 2.0 do not go outside of the enabling legislation. They may place more emphasis on certain aspects of the FIT Program (such as Aboriginal or community involvement) and less emphasis on others (such as simplifying the planning process) but those considerations all fall within the discretionary policy authority of the Minister as set out in s. 25.35(1) of the *Electricity Act, 1998* which reads:

> The Minister may direct the OPA to develop a feed-in tariff program that is designed to procure energy from renewable energy sources under such circumstances and conditions, in consideration of such factors and within such period as the Minister may require.

[51] That said, I acknowledge the possibility that there could be reasons, such as those advanced by the applicants that I will address below, why the respondents might be precluded from relying on FIT Rules 2.0 in respect of the applicants' specific applications but that is very much a different thing than concluding that the FIT Rules 2.0 are *ultra vires* the enabling legislation such that they would be of no effect for all purposes.

[52] I turn then to the individual issues raised by the applicants. The OPA initially developed the FIT Program and FIT Rules 1.0 in accordance with the directions of the Minister. The OPA did so after consultation with various stakeholders. The applicants responded to that program by making a large number of applications for approvals for various projects. I accept that the applicants, in doing so, expended considerable effort and significant amounts of money.

[53] I am also of the view, however, that the applicants must have been aware of two basic facts when they submitted their applications. One is that there was no guarantee of success for any application that might be submitted. Even assuming that the applications met all of the

criteria set out in FIT Rules 1.0, there was clearly no obligation on the OPA to permit any of those projects to be connected to the electricity grid in the Province. It may have been the intention of the OPA and of the Ministry, and the expectation[1] of the applicants, that if a project met the criteria and there was capacity to add that project to the electricity grid, it would be so added. Indeed, some projects were added including ones proposed by the applicants. Nonetheless, the applicants had to be aware, given the public nature of the entities with which they were dealing, that there was no firm and unalterable commitment by the Minister or the OPA that that would occur. In addition to the very broad discretion that the OPA had within the FIT Rules, any number of public policy considerations outside of the four corners of the FIT Rules could have reasonably caused the Minister and/or the OPA to decide not to permit such a connection. The applicants cannot reasonably claim that they were unaware of, or exempt from, the ever present reality that government policies and priorities can change.

[54] Among other reasons for so concluding are the contents of the FIT Rules 1.0 themselves. Those rules give the OPA an almost unlimited discretion in how the FIT Program will be run. Among others, the FIT Rules 1.0 contained provisions that provided that:

> (a) the OPA could amend the FIT Program and Rules in response to ministerial directions, changes in laws, or significant changes in the market place (section 10.1(a));
>
> (b) the OPA had the right to cancel or suspend all or any part of the FIT Program (section 12.2.(d));
>
> (c) the OPA had the right at its sole discretion to reject any application, even one properly completed (section 12.2(c));
>
> (d) the OPA can make changes to the FIT Rules, Contracts, Price Schedules including substantial changes, suspension, or termination of the Program without liability (section 12.2 (g)), and;
>
> (e) changes to the Rules may apply with respect to existing Applications, (sections 10.2(c) and 12.2(g)).

[55] In response, the applicants assert four grounds upon which they say that this court should conclude that the Ministry and the OPA have acted unreasonably:

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[1] I use the word "expectation" at this juncture in its usual meaning and not in the legal sense. I will deal with the legitimate expectations issue later.

(i) that the application process and the FIT Rules 1.0 were equivalent to a tender process and that certain rights arise as a consequence;

(ii) that the doctrine of legitimate expectations gives rise to certain rights on the part of the applicants;

(iii) that the applicants gained certain vested rights through the process in which they were engaged under the FIT Rules 1.0 and the Ministry and the OPA cannot interfere with those rights;

(iv) that applying FIT Rules 2.0 to the existing applications by the applicants offends the principle against the retroactive application of legislation and is fundamentally unfair to the applicants.

In my view, each of these grounds can be dealt with relatively briefly.

(i) Tender process

[56] In terms of the comparison to a tender process, I reject the contention that the application process for the FIT program and the contents of the FIT Rules 1.0 are akin or equivalent to a tender process. There is little in the FIT Program to which the applicants can point that mirrors a typical tendering process. The FIT Program did not involve fixed specifications for a contract where the main, if not sole, issue is the question of the price to be charged for the specified work to be performed. Under the FIT Program an applicant would only receive a contract if it met the application criteria and if the project passed the applicable connection availability assessment process. Grid availability is a precondition to a FIT contract and is subject to impact assessments that are required by the system operator, the transmitter or distributor and possibly the Ontario Energy Board. There were therefore many variables to the success of any application and the awarding of a contract.

[57] On this ground, the applicants rely on *Tercon Construction Ltd. v. British Columbia (Minister of Transportation and Highways)*, [2010] 1 S.C.R. 69. Yet, the situation in that case was much different that is the situation here. In *Tercon*, there was a Request for Proposals ("RFP") that set out detailed evaluation criteria and specified that they were to be the only criteria to be used to evaluate proposals. A specific form of agreement was attached. There were detailed provisions about pricing that were fixed and non-negotiable. A proponent was required to accept substantially the form of contract contained within the RFP. Here virtually

none of those same constraints are present. In particular, not only did the OPA expressly reserve to itself the right not to enter into a contract with any compliant bidder, the FIT Program itself makes it clear that the awarding of any contract is subject to grid availability and connectivity.

[58] In addition, and as is frequently the case with government programs, there were many other considerations outside of the formal FIT Rules that would legitimately impact on the awarding of contracts. Policy considerations relating to, and the cost to the ratepayer of, any particular project would invariably form part of the analysis in terms of deciding whether a specific project should proceed or not. An applicant might submit a fully compliant application but, if the cost to the ratepayer of adding it to the grid was found to be prohibitive, there was no obligation on the OPA to award a FIT Contract to the applicant.

[59] It is at this point that I deal with the assertion with which the applicants lead off their submissions: that the situation presented here involves matters strictly of a commercial nature and does not involve matters of social policy. I do not accept that characterization of the FIT Program, the FIT Rules and the application process in which the applicants were engaged. The FIT Program arose out of the desire of the Government of Ontario to increase the amount of energy provided in this Province from renewable sources. The Government also wished to create within this Province a favourable location for the development of renewable energy industries. Those objectives are evident from the statements made by the Minister at the time that the *GEA* was enacted.

[60] All of those objectives are matters of public policy. While I understand the desire of the applicants to portray the situation as one of strictly commercial dealings, because it aids in their efforts to contend that they had rights in the nature of contractual rights arising from their participation in the FIT Program, the suggestion that this situation is one solely of a commercial nature devoid of any foundation in social or public policy is entirely fictional. The FIT Program was the vehicle by which the Government intended to deliver their policy on renewable energy and the applicants were fully aware that that was the fundamental underpinning for the endeavour in which they chose to become engaged.

[61] Given all of those factors, I conclude that there was no intention by the OPA or the Minister to create contractual obligations through the submission of a proposed project under the FIT Program, even if all of the necessary criteria for the project identified under the FIT Program were met. That fact represents a fundamental distinction between this situation and that of a true tender process. The attempt to characterize the FIT Program as equivalent to a tender process fails.

(ii) Legitimate expectations

[62] Turning then to the ground of legitimate expectations, it is perhaps useful to begin with a definition of what the principle of legitimate expectations involves. The principle was set out in *Canada (Attorney General) v. Mavi*, [2011] 2 S.C.R. 504 where Binnie J. said, at para. 68:

> Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker's statutory duty.

[63] Once again, I find little to which the applicants can point that would constitute a representation that is "clear, unambiguous and unqualified". The statements to which the applicants do refer that were made by Ministers Smitherman and Duguid do not, on their face, amount to representations that are unambiguous and unqualified. They are also not directed specifically to the applicants. Rather, they were statements of general application. In addition, the statements were clearly made in relation to the FIT Program itself and have to be read with, and understood in the context of, the detailed requirements and conditions of that program to which I have made reference above. Read in context, the applicants could not reasonably assert a legitimate expectation based on these statements that the criteria for the FIT Program or the process under it would not change.

[64] Further, the doctrine of legitimate expectations forms part of the duty of fairness and gives rise to procedural rights. This is made clear in *Mavi*. The doctrine itself does not give rise

to substantive or contractual rights. At most, it requires the Government to follow a proper process before making a decision.

[65] The applicants argue that they had a legitimate expectation that the OPA would abide by the timelines in the FIT Rules for the processing of applications. In particular, they argue that they expected the OPA to run the ECT within six months, as contemplated by the FIT Rules, but that the OPA decided not to comply with the timeline.

[66] In fact, the OPA never made a decision about running the ECT up to the point that the Minister directed that the ECT not be run. Moreover, the OPA never made a decision regarding the pending applications filed by the applicants. As a consequence, there is no decision for this court to review to determine whether there has been a denial of procedural fairness. However, even if the applicants could establish a procedural unfairness, that result would permit this court, at most, to order the OPA to revisit the applicants' applications and follow the appropriate process. Given the contents of the FIT Rules 1.0 (assuming that those are the rules that would then apply), the OPA would not be bound to award the applicants any FIT Contracts.

[67] In apparent anticipation of that difficulty, the applicants place considerable emphasis on one particular section within the FIT Rules 1.0, namely, s. 12.4(k) which reads:

> **Time**. Time is of the essence in the performance of the Parties' respective obligations.

[68] The applicants say that the OPA is bound by that "time is of the essence" provision which gives rise, according to the applicants, to certain rights that they are entitled to enforce. In particular, the applicants say that the failure of the OPA to run the ECT within six months, as it stipulated that it would do within the FIT Rules 1.0, gives rise to legitimate expectations in terms of the process that had to be followed and which they are entitled to have this court enforce.

[69] I do not agree. The fluid nature of the FIT Rules, as evidenced by the myriad of provisions (some of which are referred to above) that allowed the OPA almost unlimited discretion in terms of when and in what manner the review process would unfold, undermines any contention that persons making applications acquired rights in the process of the nature that the applicants now assert. I would add, on this point, that the running of the ECT was dependent

on the completion of the TAT/DAT process. The TAT/DAT process itself was not scheduled to run at any specific point in time but had only a target start date (see s. 5.1(b) of the FIT Rules 1.0). Those facts reinforce the conclusion that the time for the running of the ECT was never a fixed or immovcable date to which s. 12.4(k) could apply.

[70] Further, the applicants were well aware of the fact that the OPA had not, and was not going to, run the ECT within the six month timeframe originally contemplated and yet the applicants did not bring any application for judicial review to enforce the rights, that they now say arose from that provision, back in the middle of 2010 when it became apparent that the ECT was not going to be run within six months of September 24, 2009.

[71] The fact is that the OPA had a legitimate reason for not running the ECT as originally planned. It was simply overwhelmed with the applications that were received under the FIT Program. The OPA regrouped and set out new timeframes for the ECT but those could not be met either at least, in part, because of the outcome of the LTEP. Again, the applicants did not seek any relief arising from that failure. Finally, circumstances overtook the intention to run the ECT when the Minister directed the OPA, on April 5, 2012, not to do so.

[72] I conclude that the applicants did not have any legitimate expectations regarding the specific time by which the ECT would be run of the type that would give rise to any remedy contemplated in the judicial review framework. However, even if such legitimate expectations did arise, I would conclude that the applicants have waived any entitlement that they may have had for relief, in the nature of mandamus or otherwise, because of the delay in seeking it.

[73] It is at this point that I choose to address another of the applicants' submissions. The applicants place great reliance on the recent decision in *Taylor v. Canada (Attorney General)*, [2012] O.J. No. 3208 (C.A.). The applicants submit that the decision in *Taylor* has greatly expanded the liability of government in its dealings with its citizens. I do not read *Taylor* as intending that result. Indeed, I read *Taylor* as establishing some significant hurdles to imposing liability on governments. It must of course be noted that the situation in *Taylor* is much different than the situation here both in terms of the regulatory process involved in *Taylor* and the nature of the involvement between the government and Ms. Taylor. We are also not here dealing with

the type of regulatory conduct that was involved in *Taylor*. In addition, the nature of the government statements in this case are very much different than the ones made in *Taylor*. Further, of course, *Taylor* dealt with a pleadings issue in the context of a tort claim in which the plaintiff alleged a governmental duty of care, not an application for judicial review of government decision making.

[74] However, to the degree that *Taylor* can be seen as having application to the facts of this case, it seems to me that the applicants cannot bring themselves within the dictates of that decision. In particular, the applicants fail, for the reasons that I have set out, to bring their dealings with the respondents[2] within the ambit described by Doherty J.A. at para. 118:

> The nature of any representations made by the regulator, and the nature of any reliance placed on those representations by the plaintiff, are part of the entirety of the circumstances to be considered in determining the directness of the relationship between the regulator and the plaintiff. Representations made specifically to a plaintiff and relied on by that plaintiff can clearly forge a direct connection between the regulator and the plaintiff. General representations made by the regulator to the public and relied on by the plaintiff as a member of the public do not, standing alone, create a direct relationship. However, general representations and reliance on those representations can, in combination with other factors, create a relationship between the regulator and the plaintiff that is sufficiently close and direct to render it fair and just to impose on the regulator, in the conduct of its duties, an obligation to be mindful of the plaintiff's legitimate interests.

(iii) Vested rights

[75] The third ground is the assertion that the applicants gained vested rights through the FIT Program, when they made their applications for their various projects, with the consequence that the previous rules continue to apply to those applications. The concept of vested rights is addressed in *Dikranian v. Quebec (Attorney General)*, [2005] 3 S.C.R. 530 where Bastarache J., at para. 37, approved of the test set out by Professor Côté as follows:

> Côté maintains that an individual must meet two criteria to have a vested right: (1) the individual's legal (juridical) situation must be tangible and concrete rather

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[2] While I am prepared to assume for the purposes of this discussion that the respondents can be characterized as "regulators", it is a characterization that I am not convinced can be properly applied here.

> than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement (Côté, at pp. 160-61).

[76] The first difficulty faced by the applicants in this assertion is that we are not here dealing with the change of a statute. We are not even dealing with a change in a regulation pursuant to a statute. Rather, we are dealing with a change to the rules of a government program. It is not clear therefore that the applicants can invoke the concept of vested rights in this situation.

[77] However, even assuming that the concept has application, it is clear from the factual matrix on this application that the applicants did not acquire any vested rights of a type that are tangible, concrete and distinctive. At most, the applicants had the prospect of obtaining one or more contracts to provide renewable energy to the Province. A prospect cannot be equated to a contract or a right. Indeed, the applicants' contention that it somehow acquired vested rights in this situation is inconsistent with its own complaint that the OPA never processed the vast majority of its applications. It is hard to see how someone could obtain vested rights from an unreviewed and consequently unapproved application. I find support for this point in *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271 where Dickson J. said, at p. 283:

> The mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued: [citations omitted].

[78] I conclude therefore that the applicants did not acquire any vested rights from their participation in the FIT Program under FIT Rules 1.0.

(iv) Retroactivity

[79] The fourth ground is the issue of retroactivity. The conclusion with respect to vested rights to some degree preordains the conclusion regarding this alternative argument that the adoption of FIT Rules 2.0 is unlawful because it has retroactive effect.

[80] It bears repeating that, with respect to the vast majority of the applicants' applications, there were no completed contractual arrangements between the applicants and the OPA to provide renewable energy. In those few instances where FIT Contracts have been awarded to the

applicants, those contracts are not affected by FIT Rules 2.0 and are being honoured. For the large balance of the applications, the applicants had, at most, properly completed and filed applications with the OPA for consideration and approval. The applicants were also aware that the terms of the FIT Program could be changed at any time. FIT Rules 1.0 had already been amended some seven times during the time that the applicants were submitting their applications or waiting for their applications to be considered. Indeed, the applicants made representations to the Ministry and the OPA regarding the changes that were being made to the FIT Rules 1.0. In addition, the applicants would have been aware that, when the FIT Program was announced, it was expressly subject to a minimum two year review.

[81] The issue of the retroactive application of legislation was also addressed in *Gustavson*. In that case, the Supreme Court of Canada was dealing with legislation that repealed the right of companies to deduct drilling and exploration expenses. The appellant taxpayer claimed the legislation was invalid because it had retroactive effect. The majority of the court rejected that argument. In doing so, Dickson J. said, at p. 279:

> First, retrospectivity. The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively. Superficially the present case may seem akin to the second instance but I think the true view to be that the repealing enactment in the present case, although undoubtedly affecting past transactions, does not operate retrospectively in the sense that it alters rights as of a past time. The section as amended by the repeal does not purport to deal with taxation years prior to the date of the amendment; it does not reach into the past and declare that the law or the rights of parties as of an earlier date shall be taken to be something other than they were as of that earlier date. The effect, so far as appellant is concerned, is to deny for the future a right to deduct enjoyed in the past but the right is not affected as of a time prior to enactment of the amending statute. [emphasis added]

[82] The same point can be made here. The applicants did not have any rights arising under the FIT Program. At its highest, the applicants had the opportunity to have their existing applications considered by the OPA. The rules to be applied to those applications have to be the

rules that are in effect when the consideration occurs. In determining that the applicants' applications would be considered under FIT Rules 2.0, the OPA was not going back and interfering with existing rights that the applicants had because, as I have attempted to explain, the applicants had no such rights. They had outstanding applications that might, at some point in the future, possibly give rise to rights if the applications were approved and FIT Contracts offered. It follows, just as was the case in *Gustavson*, that the rules to be applied to the applications are the rules that are current at the time, i.e., FIT Rules 2.0. Those are the rules that the OPA is duly bound to apply.

[83] Equally fatal to the applicants' application is the concept implicit in its position that once a government program is announced and a person applies under it, the government is precluded from making any changes to the program for those persons who have submitted applications even though those applications have not yet been considered or approved. Such a concept is untenable in relation to government programs. It would also be unworkable given the many different considerations that apply to government programs and the ever present prospect that those considerations may change over time. Government programs, after all, represent government policy and reflect government priorities. Those policies and priorities will inevitably change over time. As Dickson J. noted in *Gustavson*, at pp. 282-283:

> No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.

[84] The applicants assumed the same risk in making their applications to the FIT program, that is, that the terms of the program might change because of changing government policy. While it may sometimes seem unfair when rules are changed in the middle of a game, that is the nature of the game when one is dealing with government programs. As Binnie J. aptly noted in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, at para. 1:

> As my colleague points out in para. 97, "being entitled to the permit is different than actually holding it". In government, nothing is done until it is done.

Conclusion

[85] In the end result, the application for judicial review is dismissed.

[86] The parties may make written submissions on the costs of this application. The respondents shall file their written submissions within 15 days of the release of these reasons and the applicants shall file their responding submissions within 15 days thereafter. None of the submissions is to exceed five pages in length. No reply submissions are to be filed.

NORDHEIMER J.

SWINTON J.

CONWAY J.

Released: SEP 10 2012

CITATION: SKYPOWER CL I LP et al. v. MINISTER OF ENERGY (ONTARIO) et al. 2012 ONSC 4979
DIVISIONAL COURT FILE NO.: 352/12
DATE: 20120910

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

SWINTON, NORDHEIMER

and CONWAY JJ.

BETWEEN:

SKYPOWER CL 1 LP and others

Applicants

-- and --

MINISTER OF ENERGY (ONTARIO) and ONTARIO POWER AUTHORITY

Respondents

REASONS FOR JUDGMENT

NORDHEIMER J.

RELEASED: September 10, 2012