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# WIND FARMS IN ONTARIO: JURISDICTION, INTERVENTION, RUAs and ADDITIONAL ISSUES

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## INTRODUCTION

Over the past six years, the government of Ontario has approved the construction of hundreds of renewable energy projects across the province, requiring municipalities and their residents to react to an influx of industrial wind and solar farms. While these projects have received support in certain areas of the province, in other regions, local governments and activist groups remain vehemently opposed to them for a variety of reasons, which include: (a) opposition to change generally; (b) aesthetic complaints; (c) allegations of environmental and health issues; (d) financial reasons; and (e) planning reasons. Regardless of viewpoint, industrial wind turbines have become a reality for virtually every municipality in Ontario. While the provincial government continues to award lucrative energy subsidies, municipalities have been left to protect municipal interests in after-the-fact negotiations with developers and tribunal/court intervention.

In 2013, the County of Middlesex intervened at the Ontario Energy Board with respect to three leave to construct wind infrastructure applications and persuaded the Board to grant leave to construct subject to the developer's compliance with the form of road use agreement forwarded by the County. Following such intervention, the County's form of agreement has become the starting point for many negotiations across Southwestern Ontario and apparently, on a broader basis.[1] By virtue of being the County Barrister & Solicitor who argued the interventions, the author of this paper is routinely asked by other municipal solicitors and developers to discuss jurisdiction with respect to wind farms and the types of municipal interests which can reasonably to be addressed at related proceedings. This paper provides such discussion, focusing primarily on jurisdictional issues related to intervention at administrative tribunals and the utility of a comprehensive Road Use Agreements, with a particular focus on the author's experience as counsel for the County of Middlesex. The paper will proceed as follows:

- Part I will provide background information about Ontario's Renewable Energy Plan;

[1] The County Barrister & Solicitor does not have scientific numbers in this regard. The Agreement has been shared with a number of municipalities across Ontario and many agreements seen on the internet from Ontario and the U.S. have a number of similarities to the particular brand and style of the County RUA, which was unique as of November 12, 2013.



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- Part II will explore the Ontario Feed-In-Tariff Program, the model used by the provincial government to contract for renewable energy;
- Part III will discuss the role of the Ontario Energy Board in the approval process;
- Part IV will set out the nature of the fundamental provisions included in the County of Middlesex Road Use Agreement;
- Part V will discuss how to apply for intervenor status at the Ontario Energy Board;
- Part VI will detail the County of Middlesex's experience at the Ontario Energy Board;
- Part VII will discuss jurisdictional and evidentiary issues which have caused problems for some renewable energy challenges;
- Part VIII will briefly overview some additional issues experienced by the County of Middlesex during the construction phase of wind farms and beyond; and
- The paper will end with a conclusion.

## PART I: ONTARIO & RENEWABLE ENERGY

In the early 2000s, the Ontario government recognized that there was a growing demand for electricity in Ontario and that the system, heavily reliant on nuclear and coal-fired generation, was both economically and environmentally unsustainable. In response, the government set out to create a long-term energy plan focused on using cleaner more efficient technology to provide Ontarians with a reliable electricity source.

In pursuit of the above mandate, the government established the Ontario Power Authority (OPA) in 2004.[2] In 2007, the OPA prepared *Ontario's Integrated Power System Plan* (IPIP),[3] a 20 year energy plan promising cleaner, more affordable energy sources for Ontario. Central to this plan was the increased use of renewable energy sources including hydroelectric, wind, solar and biomass.[4] While most individuals do not disagree with the general concept of cleaner, more efficient energy, many individuals disagree with the wisdom of IPIP. IPIP was rolled out with the enactment of the *Green Energy Act, 2009*[5] and introduction of Ontario's Feed-in Tariff (FIT) program. The FIT program, currently in its fourth phase, allows renewable energy producers to sell energy to the province at a guaranteed price for a fixed contract term, regardless of demand. The intent of the program was to attract clean energy producers from across the globe to establish large-scale wind and solar infrastructure in Ontario. In furtherance of the FIT projects, the provincial government released *Achieving Balance: Ontario's Long-Term Energy Plan*.[6] *Achieving Balance* builds on the clean energy strategy set out in IPIP and includes plans to extend the phasing-in of wind, solar and bioenergy projects in the hopes that by 2025 approximately half of Ontario's

[2] The OPA merged with the Independent Electricity System Operator (IESO) in January, 2015. The new body is referred to as the IESO.
[3] Ontario Power Authority, *Ontario's Integrated Power System Plan: The Road Map for Ontario's Electricity Future* (February 2007) <http://www.powerauthority.on.ca/sites/default/files/news/3628_REv._IPSP_brochure_Feb._2007_for_Web_site.pdf> [IPIP].
[4] *Ibid* at 3.
[5] *Green Energy Act, 2009*, SO 2009, c 12, Sch A [*GEA*].
[6] Ontario, Ministry of Energy, *Achieving Balance: Ontario's Long-Term Energy Plan* (Toronto: Queen's Printer for Ontario, 2013) <http://www.energy.gov.on.ca/en/files/2014/10/LTEP_2013_English_WEB.pdf>

installed generating capacity will come from renewable sources.[7] As 2016 approaches, the FIT program remains an essential part of IPIP.

## PART II: ONTARIO FIT PROGRAM

The IESO is responsible for the administration of Ontario's FIT program. As indicated above, the FIT program allows energy companies to contract with the province for the sale of energy at a fixed price for a fixed term.[8] Currently the contract provides for a 20 year term.[9] The number of FIT contracts awarded in any given year depends on the province's procurement target and connection availability.[10] The IESO uses a complex ranking system to determine whether and in what priority contracts are awarded.[11]

*Procurement Target*

The IESO sets a megawatt (MW) procurement target for the FIT program each year.[12] For example a total of 241.438 MW has been allocated for 2015.[13] A percentage of this target must be fulfilled by projects that receive the requisite level of municipal, aboriginal or other community support. These projects are designated as Contract Capacity Set Aside Projects (CCSA). The MW allocation for CCSA projects for 2015 is as follows:

- Municipal and Public Sector Entity CCSA = 53.653 MW.
- Aboriginal CCSA = 53.653 MW which includes;
    - 35.769 MW to First Nation CCSA
    - 17.884 MW to Métis CCSA
- Community CCSA = 53.653 MW.[14]

The remainder of the procurement target may be awarded to non-CCSA Eligible Projects. Note that non-CCSA Eligible Projects may have some municipal, community or aboriginal support, but not enough to be designated CCSA Eligible Projects.

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[7] *Ibid* at 6.

[8] In 2014 the Ministry of Energy announced that beginning in 2015 FIT contracts would only be awarded for projects ≥ 500 kW. The Minister directed the OPA (now merged with the IESO) to establish a new competitive process for the procurement of renewable energy projects generally larger than 500 kW see: <http://www.powerauthority.on.ca/sites/default/files/MC-2014-2534.pdf>. Details on this new program, referred to on the IESO website as the Large Renewable Procurement (LRP) project have not yet been released.

[9] Independent Electricity System Operator, *FIT Program Pricing*, online: Independent Electricity System Operator <http://fit.powerauthority.on.ca/fit-program/fit-program-pricing>

[10] Independent Electricity System Operator, *FIT Program*, online: <http://fit.powerauthority.on.ca/what-feed-tariff-program> [*FIT Program*].

[11] Independent Electricity System Operator, *Feed-In Tariff Program FIT Rules Version 4.0* (June 26, 2015) at 25-26 <http://fit.powerauthority.on.ca/sites/default/files/version4/FINAL-FIT-Rules-V4.0.pdf> [*FIT Rules 4.0*].

[12] The IESO website indicates that targets for the first procurement of the Large Renewable Procurement (LRP) project include up to 300 MW of wind, 140 MW of solar, 50 MW of bioenergy and 75 MW of waterpower. See: <http://www.ieso.ca/Pages/Participate/Generation-Procurement/Large-Renewable-Procurement/default.aspx>

[13] *FIT Program*, *supra* note 8.

[14] *Ibid*.

A developer must request a CCSA designation in its application in order to be labelled as such and will only be considered for the designation if all application submission and eligibility requirements set out in the FIT Rules are met.[15] If these requirements are met, the IESO will evaluate the project to determine whether the project is CCSA eligible.[16]

*Ranking*

Each developer that meets the application submission and eligibility requirements, regardless of whether it receives a CCSA designation, may also be awarded Priority Points.[17] Priority Points are used to rank applications. An applicant must indicate the priority points it seeks in its application and provide appropriate documentation.[18] One way to garner Priority Points is to take a price reduction. An applicant can choose to take a reduction in the price per kilowatt payable to it under its FIT contract in order to receive Priority Points and increase its chances of being awarded a FIT contract.[19] Priority Points can also awarded based on factors such as municipal support in the form of a resolution.[20] Those applicants that receive support will be awarded contracts in advance of those that do not.[21] The intent of the resolution of support component of the FIT program was to encourage renewable energy producers to collaborate with municipalities and aboriginal communities prior to applying for a FIT contracts. Perhaps an unintended effect of this component, however, has been discussions at the municipal level with respect to declarations of "willing" and "unwilling" hosts.

*Connection Availability*

Once applications for projects have been ranked, they are then screened for sufficient transmission and distribution availability.[22] It is currently not economically or technically feasible to connect generating facilities in certain areas of the province. As a result, projects that would otherwise be eligible to participate in the FIT Program may not be awarded a FIT Contract.[23] If there is sufficient connection availability, eligible projects will receive an offer from the IESO for a FIT contract in order of priority.[24] Once a developer receives a FIT contract, it must obtain approval from the Ontario Energy Board (OEB) in order to begin construction.

## PART III: THE ONTARIO ENERGY BOARD

The OEB is the body responsible for the regulation of electricity and natural gas in Ontario. Its mandate and authority with respect to electricity is derived from the *Ontario Energy Board Act*,[25] the *Green Energy*

[15] *FIT Rules 4.0*, *supra* note 9 at 5-24.
[16] *Ibid* at 27-33.
[17] *Ibid*.
[18] *Ibid*.
[19] *Ibid*.
[20] *Ibid*.
[21] *Ibid*.
[22] *Ibid* at 33-35
[23] *Ibid* at 3.
[24] *Ibid* at 36.
[25] *Ontario Energy Board Act*, 1998, SO 1998, c 15, Sch B [*OEBA*].

*Act* and the *Electricity Act*.[26] Each of these acts promotes the use and generation of electricity from renewable energy sources.[27] The OEB is responsible for licensing generators, distributors, wholesalers and retailers of electricity and for approving the construction of electricity transmission and distribution lines, including those used to connect large scale industrial wind turbines to the grid.

Section 92(1) of the *Ontario Energy Board Act* provides:

> No person shall construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection without first obtaining from the Board an order granting leave to construct, expand or reinforce such line or interconnection.[28]

As a result, all renewable energy projects requiring the construction of an electricity transmission or distribution line are subject to OEB approval and the controls contained in the Board's governing legislation. This effectively gives the OEB approval authority over all wind projects in Ontario.

To determine whether to grant a person or corporation leave to construct a transmission or distribution line, section 96 of the *Ontario Energy Board Act* instructs the Board to do the following:

> (1) If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.[29]
>
> (2) In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:
>
> 1. The interests of consumers with respect to prices and the reliability and quality of electricity service.
> 2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources.[30]

Because the Ontario legislature has specifically instructed the Board to promote the use and generation of renewable energy, most renewable energy projects will be considered "in the public interest" and meet the test set out in section 92(2). That being said, those seeking to construct an electricity transmission or distribution line in Ontario must also satisfy a number of additional requirements. Section 97 of the *Ontario Energy Board Act*, requires that:

> In an application under section 90, 91 or 92, leave to construct shall not be granted until the applicant satisfies the Board that it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board.[31]

While the phrase "owner of land affected" contained in section 97 is broad enough to include owners of public streets and highways, section 41 of the *Electricity Act* specifically requires that agreements with owners of public streets and be reached prior to construction:

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[26] *Electricity Act*, 1998, SO 1998, c 15, Sch A [*EA*].
[27] *Ibid* ss 1(d), *OEBA*, *supra* note 22 ss 1(1)5, *GEA*, *supra* note 9 preamble.
[28] *OEBA*, *supra* note 22 ss 92(1).
[29] *Ibid* ss 96(1).
[30] *Ibid* ss 96(2) [emphasis added].
[31] *Ibid* s 97 [*emphasis added*].

> (1) A transmitter or distributor may, over, under or on any public street or highway, construct or install such structures, equipment and other facilities as it considers necessary for the purpose of its transmission or distribution system, including poles and line. …
>
> (9) The location of any structures, equipment or facilities constructed or installed under subsection (1) shall be agreed on by the transmitter or distributor and the owner of the street or highway, and in case of disagreement shall be determined by the Board.[32]

In addition, if the proposed project requires the construction of a work upon, under or over a highway, utility line or ditch, a developer must also apply to the Board for leave to construct pursuant to section 101(1) of the *Ontario Energy Board Act*. This section provides as follows:

> The following persons may apply to the Board for authority to construct a work upon, under or over a highway, utility line or ditch:
>
> 1. Any person who has leave to construct the work under this Part.
> 2. Any person who intends to construct the work and who is exempted under section 95 from the requirement to obtain leave.
> 3. Where the proposed work is the expansion or reinforcement of a transmission or distribution system, any person who is required by the Board, pursuant to a condition of the person's licence, to expand or reinforce the transmission or distribution system.
> 4. The officers, employees and agents of a person described in paragraph 1, 2 or 3.[33]

Once the OEB has approved the agreements required under the foregoing provisions, it may grant leave to construct pursuant to section 96(1) and 101(1), as applicable.

To summarize the foregoing legislative framework, an energy producer seeking to construct a transmission or distribution line in Ontario must: (1) satisfy the OEB that its project is in the public interest when considering (a) interests of consumers with respect to prices, (b) the reliability and quality of electricity service, and (c) the policies of the Government of Ontario; and (2) satisfy the OEB that the form of agreement offered to affected landowners, including the owners of public streets and highways, is acceptable. Where an energy producer intends to place infrastructure on, over or under municipal roads, the combination of sections 101(1) of the *Ontario Energy Board Act* and section 41(9) of the *Electricity Act* require it to enter into an agreement with the affected municipalities. Where the above elements have been satisfied the Board may grant leave to construct under both section 96(1) and 101(1), as applicable.

The foregoing provisions, in conjunction with the *Municipal Act* and the *Planning Act*, require developers to enter into agreements with those municipalities in which the project is to be located. The form of these agreements is discussed in the following section.

[32] *EA*, *supra* note 23 ss 41(1) and (9).
[33] *OEBA*, *supra* note 22 ss 101(1).

# PART IV: ROAD USE AGREEMENTS

The *Municipal Act, 2001 ("Municipal Act")*[34] and the *Planning Act*[35] provide authority for road use agreements. Pursuant to the *Municipal Act*, municipalities are responsible for the approval of certain activities affecting public rights of way, highways, streets, sidewalks, walkways, driveways, ditches and boulevards, collectively referred to as "Road Allowances."[36] Pursuant to section 50(3)(d.1) of the *Planning Act*, a municipality may enter into an agreement with any person, corporation or entity intending to make use of a municipal Road Allowance.[37] These agreements are generally referred to as Road Use Agreements.

Under normal circumstances, a municipality has relatively unrestrained control over the content of its Road Use Agreements. With respect to renewable energy sources, such control is restrained by a combination of the *Green Energy Act,* the *Ontario Energy Board Act*, the *Electricity Act*, and certain exemptions in the *Planning Act*. Such restraints limit the arguments that can be made by municipalities against the use of Road Allowances for electrical infrastructure. To the surprise of developers, and as demonstrated in EB-2013-0040, EB-2013-0041 and EB-2013-0361 (discussed in Part V of this paper), this does not mean that a renewable energy producer can build infrastructure in any manner that it chooses or that municipalities have no say in the matter. A municipality can prepare a road use agreement that protects municipal interests so long as such agreement takes care to do so within the jurisdictional constructs of province of Ontario. The following section will highlight the important components of the road use agreement that the County of Middlesex required signature of in EB-2013-0040, EB-2013-0041 and EB-2013-0361, which are the components that it continues to require moving forward.

*County of Middlesex Road Use Agreement*

The Middlesex County form of road use agreement involved in EB-2013-0040, EB-2013-0041 and EB-2013-0361 and beyond is an agreement with respect to the use, installation, construction, maintenance and operation of transmission infrastructure on, over, under and within County Road Allowances. In the drafting stage of the agreement, County Council had two primary concerns which it wanted to address: (1) that all renewable energy projects be required to adhere to road safety standards; and (2) that all potential renewable energy producers be required to make the appropriate financial commitment to installation, maintenance, potential movement and decommissioning of its infrastructure.

As a result, the County Road Use Agreement requires renewable energy producers to agree to the following:

- That the proposed infrastructure will follow a specific and detailed route approved by the County Engineer;
- That the proposed route will address MTO Road Safety Guidelines;

[34] *Municipal Act*, 2001, SO 2001, c 25 [*MA*].
[35] *Planning Act*, RSO 1990, c P.13 [*PA*].
[36] *MA*, *supra* note 31 s 24-66.
[37] *PA*, *supra* note 32 s 50(3)(d.1).

- That the producer follow the County's by-law process which requires all applications to be completed for and approved by the County Engineer prior to construction;
- That all relevant municipal permits in relation to the access to and work on/in County road allowances and movement on/in County roads be obtained in accordance with County by-laws; and
- That the producer will provide a level of responsibility and financial commitment with respect to its proposed infrastructure satisfactory to the County. More specifically:
    - That the producer maintain assets in a specified amount for each project;
    - That the producer's lenders will become liable upon breach by the producer;
    - That the producer provide the County with an annual fee of $4,000 per kilometer of transmission lines and distribution lines providing security for their obligations for each project;
    - That the producer provide two letters of credit for each project in a specified amount as security for its obligations;
    - That the producer take 100% financial responsibility for the future movement of infrastructure for any reason;
    - That the producer fully indemnify the County from all potential and resulting damages;
    - That the producer obtain insurance covering the County for potential damages at the producer's cost; and
    - That the producer take full responsibility for the restoration of County property and ultimate decommissioning of the project.

These requirements are not merely matters of self-interest or financial/commercial interest of the County. Pursuant to the *Municipal Act*, the County is a regulatory body responsible for ensuring the safety of roads within its jurisdiction.[38] By requiring developers to meet the safety and other standards set out in the road use agreement, the County is fulfilling its delegated regulatory role as a responsible regulator of road allowances, which makes its action a *de facto* government policy.

Since Road Use Agreements must be negotiated by the parties the terms included in each may vary from case to case. While not everyone will necessarily agree, the author's view is that the above should serve as a basic floor for road use agreements. It is open to an energy producer to refuse a road use agreement prepared by a municipality and to present its form of agreement to the OEB for approval. However, where an energy producer takes such a position, a municipality may apply for intervenor status in OEB proceedings and argue in favour of approval being granted based on its form of agreement.

## PART V: INTERVENTION AT THE ONTARIO ENERGY BOARD

In order for a renewable energy producer to obtain approval from the OEB, it must, upon application: (1) satisfy the OEB that its project is in the public interest when considering (a) interests of consumers with respect to prices, (b) the reliability and quality of electricity service, and (c) the policies of the Government of Ontario; and (2) satisfy the OEB that the form of agreement offered to affected landowners, including

[38] *MA*, *supra* note 31 s 24-66.

the owners of public streets and highways, is acceptable. Where these elements have been satisfied, the Board may grant leave to construct under both section 96(1) and section 101(1), where applicable.

Based on the foregoing, a third party may intervene in an application on the grounds that a project is not in the public interest. If the third party is an affected land owner, it may also apply to make submissions with respect to the form of agreement offered to it by the developer. A third party can obtain intervenor status by writing to the OEB, indicating its request to intervene and articulating the grounds for intervention.

## PART VI: THE COUNTY OF MIDDLESEX EXPERIENCE

In 2013, following the initial unwillingness of a renewable energy applicant to sign the County's form of Road Use Agreement in relation to the three renewable energy applications (as outlined in Part IV above), the County of Middlesex applied for intervenor status at the OEB. The applicant had taken issue with a number of provisions contained in County's form agreement, including the route specifications, security requirements and indemnity provisions. The applicant took the position that it could place infrastructure on or under road allowances as of right, in any manner of its choosing, and that there was no obligation for it to obtain municipal permits or adhere to municipal policies for construction - all due to the provisions contained in the *Electricity Act*. In addition, the applicant took alleged that the County's financial and security requests were unreasonable.

While the financial provisions were important to the County, its primary concern was that the proposed project, as originally applied for, did not meet MTO Road Safety Guidelines or County road policies. Throughout proceedings, the County maintained that compliance with these standards was paramount to the province's renewable energy scheme and that it was authorized to require the developer to agree to the specified route and construction parameters (mitigation measures) contained in its road use agreement.

*Intervenor Status*

The County requested intervenor status at the OEB to forward its position with respect to:

(1) Whether or not the proposed transmission and distribution line would constitute a reliable and quality line;
(2) Whether or not the proposed transmission and distribution line would adhere to government policies (both 1 and 2 of which are matters that the Board will be considering pursuant to subsections 96(2)1-2 of the *Ontario Energy Board Act*); and
(3) The form of a road use agreement (pursuant to subsection 101(1) of the *Ontario Energy Board Act* and section 41(9) of the *Electricity Act*).

The County was granted intervenor status.

*County Request*

In its submissions, the County requested that the Board grant leave to construct subject to the developer's compliance with its form of road use agreement. The County's submissions in support of this request are set out below.

*Applicant Submissions*

The applicant initially maintained that OEB approval should not be made subject to compliance with the County Road Use Agreement. As alluded to above, the applicant relied on section 41(1) of the *Electricity Act* which provides that:

> a transmitter or distributer may, over, under or on any public street or highway, construct or install such structures, equipment and other facilities as it considers necessary for the purpose of its transmission or distribution system, including poles and lines.[39]

The applicant proposed that based on the above, it could construct its transmission line in the manner of its choosing, that it did not need to have regard for municipal by-policies, and that it need not comply with provincial road safety guidelines. The applicant also contended that its general form of agreement, which contained no security or indemnity provisions, should satisfy the Board for the purposes of section 97 and 101(1) of the *Ontario Energy Board Act*.

*County Submissions*

In its submissions, the County of Middlesex argued that subsection 41(1) of the *Electricity Act* could not be read in isolation, but rather must be read in context with sections section 41(9) of the *Electricity Act* and section 96(2), 97 and 101(1) of the *Ontario Energy Board Act*. As set out in Part III of this paper, these sections require those seeking to construct a transmission or distribution line in Ontario to:

(1) satisfy the OEB that its project is in the public interest when considering (a) the interests of consumers with respect to prices, (b) the reliability and quality of electricity service, and (c) the policies of the Government of Ontario (the public interest test); and
(2) satisfy the OEB that the form of agreement, with respect to the owners of public streets and highways, is acceptable.

It was the County's position that if the project did not comply with the specified route and construction parameters (mitigation measures) contained in its road use agreement, the developer could not establish that the development would provide reliable, quality electrical service or that the policies of the Government of Ontario had been complied with pursuant to section 96(2) of the *Ontario Energy Board Act*.

The County further submitted that the Board should accept its road use agreement pursuant to section 97 of the *Ontario Energy Board Act* because (a) it ensured compliance with the specified route which was required for the project to meet the public interest test, and/or (b) if the Board rejected the public interest argument, simply because the agreement was both responsible and reasonable under section 101(1) of the *Ontario Energy Board Act*.

Based on the foregoing propositions, the County requested that the Board make its order granting leave to construct subject to compliance with its Road Use Agreement. Support for the County's position is provided below.

[39] *EA*, *supra* note 23 ss 41(1).

(1) Public Interest Test

(A) Reliability and Quality of Electrical Services

Pursuant to section 96(2)1 of the *Ontario Energy Board Act*, construction of a transmission line can only be approved where the construction is in the public interest with respect to the reliability and quality of the electricity services. The County took the position that but for it ensuring through its road use agreement and its by-law/permit process:

(a) a safe location for the infrastructure within the road allowance and compliance with MTO Road Safety guidelines or acceptable mitigation measures; and
(b) the mitigation of conflicts with users of the road and the road allowance;

the otherwise unregulated location of the infrastructure within the road allowance would be at risk of placement in locations where interaction with the public and other uses in the road allowance would negatively impact the reliability and quality of the electrical service over the long term. The County submitted that motor vehicle accidents or other accidents due to the transportation of wind farm materials, incompatibilities with other road allowance uses, widening of the travelled portion of the road and/or related to the regular maintenance of the road allowance are all examples of occurrences that if not mitigated through municipal regulation with respect to placement, would harm the regular operation of the proposed electrical infrastructure (which is critical to providing a reliable and quality electrical service). As a result, the development could not be considered within the public interest pursuant to section 96 of the *Ontario Energy Board Act.*

(B) Government Policy

In addition to the foregoing argument, the County made submissions with respect to section 96(2)2 of the *Ontario Energy Board Act* which provides that construction of a transmission line can only be approved where it is in the public interest as being consistent with the policies of the Government of Ontario. The County contended that this includes MTO Road Safety Guidelines and road safety policies enacted by municipalities pursuant to the *Municipal Act*, provided there is no conflict of law.[40] The County highlighted that neither the provincial guidelines nor the County safety standards were in conflict with the *Electricity Act* or the *Ontario Energy Board Act*, for all could be complied with simultaneously.

As noted above, the County Road Use Agreement required that the developer adhere to specific route requirements. These requirements were based on MTO Road Safety Guidelines and County road safety policies. The County submitted that:

[40] It should be noted that pursuant to section 62.0.2(1) and (3) of the *Planning Act*, planning policies enacted in accordance with that Act do not affect a renewable energy undertaking. This includes a municipality's Official Plan. It was the County's position in these proceedings that this did not mean that policies enacted by municipalities pursuant to the *Municipal Act*, such as those concerning road safety, did not affect renewable energy undertakings, or that such policies could not be considered policies of the Government of Ontario pursuant to section 96(2)2 of the *Ontario Energy Board Act*. The County's position was affirmed in the OEB's decision discussed in detail below.

(a) because both the MTO Road Safety Guidelines and County road safety policies are policies of the Government of Ontario, and
(b) but for the County Road Use Agreement ensuring that the developer would adhere to the approved route, that
(c) the project could not be considered within the public interest pursuant to section 96 of the *Ontario Energy Board Act* as it would conflict with policies of the Government of Ontario.

(2) Form of Agreement

As noted above, section 97 of the *Ontario Energy Board Act* provides that leave to construct shall not be granted until the applicant satisfies the Board that it has offered to each owner of land affected by the approved route or location an agreement in a form approved by the Board. Similarly, section 41(9) of the *Electricity Act* provides that the location of any structures, equipment or facilities constructed or installed shall be agreed on by the transmitter or distributor and the owner of the street or highway, and in case of disagreement shall be determined by the Board. Further, section 101(1) of the *Ontario Energy Board Act* cannot be granted in absence of a proper agreement.

The County as both a landowner and the owner of a highway for which construction was proposed on, in or under, submitted that its road use agreement should be the form of agreement accepted by the Board based on the public interest arguments outlined above. The County also submitted that its form of agreement should be accepted irrespective of the Board's findings on the public interest arguments because its agreement was both reasonable and responsible. The County argued that the route specifications and the security and indemnity provisions were reasonable requests that protected the safety and financial interests of taxpayers and that for these reasons the Board should approve the agreement.

(3) Leave Subject to Agreements

Based on the foregoing submissions, the County requested that the Board make leave to construct subject to the developer's compliance with the Road Use Agreement pursuant to either section 92(1) or section 101(1) of the *Ontario Energy Board Act*.

*Preliminary Proceedings*

Being provided leave to intervene was the first indication that the Board may find some merit in the County's case. The OEB generally proceeds with matters by way of a written hearing unless a party satisfies the Board that there is good reason to hold an oral hearing. While a number of intervenors to the application, including the County of Middlesex, requested an oral hearing, the County argued that cross-examination would be necessary to sort out the credibility issue which clearly existed between the County Engineer and the developer's engineers. The developer maintained that the issues relevant to the proceeding could be adequately considered by way of a written hearing. In its first Procedural Order, the Board stated that it would begin proceedings by written hearing and proceed to determine whether an oral hearing was required after the completion of the interrogatory phase.[41] It was during the

[41] *Procedural Order No 1* (15 April 2013), EB-2013-0040 and EB-2013-0041, online: OEB <http://www.ontarioenergyboard.ca/OEB/Industry/Regulatory+Proceedings/Decisions>

interrogatory phase that the County Engineer, an expert with respect to the building and maintenance of road infrastructure, established a strong case for the County through his testimony.

The County requested documents from the developer during the interrogatory phase pertaining to the placement of the proposed electrical infrastructure. The developer refused to produce the documentation, claiming that it was privileged. The Board received evidence from the County with respect to why it required the information. The County succeeded in showing that the documents were necessary to establish that the project's proposed route did not comply with provincial or County road safety standards. The Board ordered the developer to produce the information to the County Barrister & Solicitor alone.[42] This Order was the second indication that the Board had found some merit in the County's case.

Procedural Order No 8 provided further indication that the Board may find the County's submissions persuasive. In Procedural Order No 8, the Board stated that it would proceed with an oral proceeding. In its reasons the Board placed particular value on the road safety arguments submitted by the County and stated affirmatively that:

> matters relating to road safety for county roads are generally under the authority of the County.[43]

The oral hearing confirmation and above statement with respect to the authority of the County had a significant impact on the negotiations between the County and the developer. Following Procedural Order 8's issuance, the developer acknowledged that the County had the authority to require the developer to follow County road use guidelines and agreed to sign the County form of road use agreement.

To have the developer agree to the terms of the County's road use agreement marked a significant victory for the County of Middlesex. By signing the agreement, the developer not only agreed to the road safety requirements, but also to the security and indemnity provisions contained therein. While the County was extremely pleased with this outcome, it refused to withdraw from the proceeding following signature, as hoped by the developer, and pursued confirmation by OEB Order that leave to construct would be subject to the developer's compliance with the road use agreement.

*OEB Decisions*

In the Board Decision referenced as EB-2013-0040 and EB-2013-0041, dated November 12, 2013, the OEB granted the developer leave to construct subject to the terms of the Road Use Agreement agreed to by the Applicant and the County:

> The Board approves the construction of the transmission facilities on municipal road rights of way as agreed to by the Applicants and the County. The approval of the Board is subject to the condition that the proposed facilities be constructed in accordance with the settlement between the Applicants and the County to the extent that the terms of the settlement address that [which] are within the jurisdiction of the Board pursuant to section 101 of the Act.[44]

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[42] *Procedural Order No 5* (19 June 2013), EB-2013-0040 and EB-2013-0041, online: OEB http://www.ontarioenergyboard.ca/OEB/Industry/Regulatory+Proceedings/Decisions

[43] *Procedural Order No 8* (23 August 2013), EB-2013-0040 and EB-2013-0041 at 3, online: OEB <http://www.ontarioenergyboard.ca/OEB/Industry/Regulatory+Proceedings/Decisions>

[44] *Decision and Order* (12 November 2013) EB-2013-0040 and EB-2013-0041 at 13, online: OEB http://www.ontarioenergyboard.ca/OEB/Industry/Regulatory+Proceedings/Decisions, at 12.

In the Board decision referenced as EB-2013-0361, dated May 6, 2014, the Board held:

> All of the parties have submitted that in their view it would be appropriate for the Board's approval to be conditional on compliance with Schedule B of each RUA concerning location of the transmission lines and related infrastructure within the municipal ROWs. The Board agrees. …
>
> [The Applicant] is responsible for obtaining all necessary approvals, permits, licenses, certificates and easement rights required to construct, operate and maintain the proposed Transmission Facilities. [The Applicant] will be required to comply with these requirements… to the extent required by RUAs and imposed by law.[45]

*Significance*

Following decisions in EB-2013-0040, EB-2013-0041 and EB-2013-0361, the Middlesex County form of road use agreement has been used by a number of municipalities across Ontario and beyond[46] and has served as the pre-requisite for the construction of all industrial wind turbine projects in the County. The takeaway points from EB-2013-0040, EB-2013-0041 and EB-2013-0361 are that:

a) municipalities can require adjustment to electrical infrastructure applications where there is a jurisdictional/legal basis for doing so;
b) the OEB has accepted that matters relating to road safety are generally under the authority of municipalities; and
c) With the applicants related to EB-2013-0040, EB-2013-0041 and EB-2013-0361 having signed the County form of road use agreement and two subsequent wind farm applicants having obtained Board approval through the signature of the same form of agreement, the Middlesex County brand of road use agreement has now been approved by the Board on five separate occasions, not counting any approvals of similar modified agreements of other municipalities. The logical inference is that it is reasonable for municipalities to require the financial and security guarantees from renewable energy producers.

## PART VII: JURISDICTIONAL ISSUES

When intervening in wind farm proceedings, the importance of having a jurisdictional basis and strong expert evidence in support cannot be overstated. Intervenors opposed to wind farms on principle alone have not been successful in influencing wind farm particulars or challenging projects. The following section briefly discusses some cases wherein intervention either lacked a jurisdictional basis and/or sufficient evidence.

[45] *Decision and Order* (6 May 2013), EB-2013-0361, online: OEB http://www.ontarioenergyboard.ca/OEB/Industry/Regulatory+Proceedings/Decisions, at 10.

[46] The County Barrister & Solicitor does not have scientific numbers in this regard. The Agreement has been shared with a number of municipalities across Ontario and many agreements seen on the internet from Ontario and the U.S. have a number of similarities to the particular brand and style of the County RUA, which was unique as of November 12, 2013.

*Ontario Energy Board and the Broader Public Interest*

The OEB has on numerous occasions made it clear that it will only hear arguments grounded in the provisions of the *Ontario Energy Board Act* and not the broader public interest. In OEB decision EB-2013-0040/EB-2013-0041 the Board stated:

> The wording of subsection 96(2) requires the Board to consider only the factors specified in subsection 96(2) in determining whether the proposed…transmission facilities are in the public interest. While it may be appropriate to consider the concept of public interest from a broader perspective in other contexts, the Act clearly limits the factors the Board is to consider in the context of the Applications. Given the focus established by subsection 96(2), health and aesthetic issues related to wind turbines and transmission lines are not within the scope of this proceeding. [47]

In other words, the OEB will not hear submissions based on environmental, health or aesthetic issues and municipalities should avoid bringing such arguments to the OEB.

*Environmental Review Tribunal and Health Effects*

In addition to challenges at the OEB, some municipalities and interest groups have challenged renewable energy projects at the Environmental Review Tribunal (ERT). Renewable energy projects require Renewable Energy Approval (REA) from the Ministry of Environment (MOE) pursuant to the *Environmental Protection Act* (EPA).[48] In order to receive approval, *O Reg 359/09*[49] requires that applicants undertake specific detailed environmental studies and submit the results to the MOE. Where the MOE is satisfied that all of the requisite environmental standards have been met, it will issue an approval pursuant to section 47.5 of the EPA.[50] In accordance with the EPA, any person "resident in Ontario" may require a hearing at the ERT in respect of an approval issued by the MOE on the grounds that the renewable energy project in question will cause (a) serious harm to human health or (b) serious and irreversible harm to plant life, animal life or the natural environment.[51]

Pursuant to section 145.2.1(2), the ERT "shall review the decision of the [MOE] and shall consider only whether engaging in the renewable energy project in accordance with the renewable energy approval will cause (a) serious harm to human health or (b) serious and irreversible harm to plant life, animal life or the natural environment."[52] A challenger of renewable energy particulars in this forum has the high onus of proving that engaging in the renewable energy project in accordance with the REA will certainly cause serious harm.[53] The ERT will confirm the REA if it "determines that engaging in the renewable energy project in accordance with the renewable energy will not [certainly] cause [serious] harm [to human health, plant life, animal life, or the natural environment]."[54] Where a project does not receive environmental approval, then construction, installation, use, or operation cannot commence regardless of whether the project has received a FIT contract or OEB approval.[55] With respect to the same wind farm applications which were resolved by Middlesex County in EB-2013-0040, EB-2013-0041 and EB-2013-0361

[47] *Ibid* at 5.
[48] *Environmental Protection Act*, RSO 1990, c E.19 [*EPA*].
[49] *Renewable Energy Approvals under Part V.0.1 of the Act*, O Reg 359/09 [*O Reg 359/09*].
[50] *EPA*, *supra* note 43 s 47.5.
[51] *Ibid* ss 142.1(3).
[52] *Ibid* ss 145.2.1(2).
[53] *Ibid* ss 145.2.1(3).
[54] *Ibid* ss 145.2.1(5).
[55] *Ibid* s 47.3.

before the OEB, the County did attend the first appearance of the ERT proceedings with respect to the same applications to preserve its right to pursue that venue. In reviewing the particular evidence in its possession of the County and the jurisdiction of the ERT, the County determined that its interests were best served before the OEB as opposed to at the ERT or through participation at both venues.

In ERT *Hearing No 13-040*[56] and proceedings before the Divisional Court in *Dixon v. Director*[57], intervenors and appellants argued that a wide range of negative health effects are caused by the noise emitted from industrial wind turbines, such that environmental approval should be denied.[58] In *Hearing No. 13-040*, the ERT found that the appellant had failed to meet the onus of proving that engaging in the project would cause serious harm to human health and indicated that "the appellant [had] not [led] any evidence identifying what the specific health effects might be or where they might occur in relation to [the] project."[59] In *Dixon v. Director*, the Divisional Court confirmed that while it was appropriate to accept the testimony of post-turbine witnesses as "entirely credible:"

> there are dangers inherent in attempting to draw general conclusions about 'wind turbine effects' from anecdotal, personal and unique experiences. It is even more problematic to apply conclusions from those unique personal circumstances at a certain location, to projects at other locations. Once a causal connection is established (which in this case it is not), one would need, for example, evidence that criteria have been identified which would increase the risk amount a certain percentage of the population of having a similar negative health effect. No such evidence was presented here.[60] …
>
> In summary, it is fair to say that the Tribunal has consistently held in a variety of cases that the evidence of post-turbine witnesses alone has not met the evidentiary threshold so as to meet the 'serious harm to human health' test under s. 142.1 of the EPA.[61] …
>
> [T]he Appellants did not provide professional medical opinions to diagnose the health complaints from the post-turbine witnesses and to establish a causal link between those complaints and wind turbine noise or noise from transformers. As importantly, the Tribunal has the benefit of the testimony of Drs. Mundt, McCunney and Moore that reinforce previous Tribunal findings that the post-turbine witnesses need to be properly diagnosed by a medical professional and that there is no reliable evidence to demonstrate that the Project will cause serious physical or any other serious harm.[62]

Each of EB-2013-0040, EB-2013-0041, EB-2013-0361, *Hearing No 13-040* and *Dixon v. Director* are all indicative of the need to have strong evidentiary basis rooted in expert evidence if an intervenor is going to be successful at arguing in favour of changed particulars or denial of permission to construct a renewable energy project.

*Road Safety Arguments at the Environmental Review Tribunal*

In 2014, the MOE approved a renewable energy project in Southwestern Ontario pursuant to section 47.5 of the EPA. The county in which the proposed project was to be located borrowed the County of Middlesex argument from EB-2013-0040, EB-2013-0041 and EB-2013-0361 made at the OEB (that the particulars did not meet the safety standards set out in the MTO Road Safety Guidelines and municipal

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[56] *Middlesex-Lambton Wind Action Group Inc v Director, Ministry of the Environment* (29 October 2013), 13-040 at para 38, online: <http://www.ert.gov.on.ca/english/decisions/index.htm>
[57] *Dixon v. Director*, Ministry of the Environment, 2014 ONSC 7404 (Div. Crt.) at paras 93-98.
[58] *Middlesex-Lambton Wind Action Group Inc v Director, Ministry of the Environment, supra* note 52 at para 38.
[59] *Ibid* at para 44.
[60] *Dixon v. Director*, Ministry of the Environment, *supra* note 53 at para 94.
[61] *Ibid* at para 95.
[62] *Ibid*.

policies) but attempted to use such argument in relation to a different location and at an ERT proceeding to try and establish the serious harm to human health threshold.[63] In submissions, the affected county claimed that "the construction of the transmission infrastructure adjacent to county road allowances [would] increase the risk of vehicle collisions with this infrastructure"[64] and that as a result, the infrastructure constituted a "real and present risk to the health and safety of the public using these roadways."[65] The county presented recent MTO accident statistics indicating that a number of injuries and deaths occur every year as a result of collisions involving utility poles[66] and contended that both the personal injury and death that would result from the increase in collisions qualified as "serious harm" within the meaning of section 145.2.1(2)(a) of the EPA.[67] Given the "risk to human health" presented, the county took the position that the proposed route of the infrastructure should be adjusted in order to receive environmental approval.[68]

In its reasons, indexed as ERT No. 14-065/14-066/14-067, the ERT set out the test to be met in order for the county to prove serious harm to human health in an ERT proceeding:

> Under s. 145.2.1(a) of the EPA, the County must demonstrate not merely that an accident is possible, but, on a balance of probabilities, that engaging in the Project in accordance with the REA will cause an accident resulting in serious harm to human health.[69]

Given the very limited amount of traffic on the portion of the road in question, the tribunal found:

> the risk of a collision with a pole [would] be very small along this stretch of roadway, amounting to 'no material risk"…" and that "consequently, the county [had] not satisfied the Tribunal that it is more likely than not that the proposed utility pole locations, when considered in conjunction with recommended mitigation measures [would] cause serious harm to human health.[70]

The *ERT No. 14-065/14-066/14-067* decision further illustrates the paramount importance of adducing strong expert evidence when proceeding with a renewable energy intervention. While it is technically possible in the event a municipality had extremely strong accident data which correlates with the placement of electrical infrastructure to establish serious harm to human health, in light of the high evidentiary burden required at the ERT and the results in decisions EB-2013-0040, EB-2013-0041 and EB-2013-0361, road safety arguments are more likely to have more success at the OEB, provided they are bolstered by strong expert evidence.

*By-Laws*

In addition to taking matters before the OEB and ERT, some municipalities in Ontario have attempted to circumvent renewable energy projects through the passage of by-laws. In 2012, a municipality in Southwestern Ontario enacted three by-laws targeted at renewable energy producers. The first by-law

[63] *Decision* (4 March 2015), 14-065 to 14-067 at para 30, online: <http://www.ert.gov.on.ca/english/decisions/index.htm>
[64] *Ibid* at para 12.
[65] *Ibid* at para 17.
[66] *Ibid*.
[67] *Ibid* at para 26.
[68] *Ibid* at para 30.
[69] *Ibid* at para 45.
[70] *Ibid* at paras 39 and 47.

increased the building permit fee for wind turbines. The second increased the required setbacks for wind turbines, established noise level limits, and contained indemnification provisions and the third created a wind turbine development charge.[71]

The passing of such by-laws was essentially an attempt to use municipal jurisdiction with respect to by-laws (conferred by the *Municipal Act*) to prevent the construction of a wind project which had already received a FIT contract and OEB approval. The affected renewable energy producer brought an action in the Superior Court of Justice to quash the by-laws for illegality. While the court in *Suncor Energy Products Inc. v. Plympton-Wyoming (Town)*[72] was not prepared to "wade into any bad faith analysis" on the part of the municipality, it did quash all three by-laws.[73] The first by law, which imposed three types of fees on wind turbines, including a $200,000 security deposit,[74] and the third by law which set out "development charges" were quashed for illegality.[75] The second by law which increased required setbacks was quashed for vagueness and uncertainty and the indemnification provisions contained therein were found to be *ultra vires*.[76] In furthering the jurisdictional focus of this paper, the *Suncor* decision serves as additional confirmation that those seeking to challenge particulars associated with renewable energy projects or the approval of projects must have a clear and valid jurisdictional basis for doing so in order to achieve success.

## PART VIII: ADDITIONAL WIND FARM RELATED ISSUES

Even where a municipality intervenes at the OEB and succeeds in obtaining approval of a favourable road use agreement by the Board, additional issues can still arise during the construction phase of a renewable energy project and beyond. This section details some of the issues encountered by Middlesex County during the construction phase of renewable energy projects and beyond. Fortunately, the risk to the County from each of the additional issues discussed below was covered by the provisions of Middlesex County's road use agreement, which as noted above, provides the County with indemnification against "any and all claims, suits, demands, liabilities, losses, costs, damages, and other expenses of every kind" that the County may incur or suffer as a direct consequence of the Easement Rights granted under the road use agreement, with the exception of those caused by the negligent or intentional acts of the County."

*Road Damage*

Damage to County Roads is one of the additional issues that was encountered by the County of Middlesex. During the preliminary stages of construction of a renewable energy project, certain roads were damaged by contractor equipment, the type of which was promised 'not to be used' in accordance with the County's access permit conditions. While the developer knew that the manner in which its subcontractors intended to use the equipment would cause road damage, the developer chose to use the equipment in any event because the action would speed up completion of the renewable energy project. As a result of the Road Use Agreement in place, the developer incurred the cost of the damages. Had the County road use

[71] *Suncor Energy Products Inc v Plympton-Wyoming (Town)* [2014] OJ No 2492 at paras 34 – 36 and 39.
[72] *Ibid*.
[73] *Ibid* at para 128.
[74] *Ibid* at paras 152-162.
[75] *Ibid* at paras 163-173.
[76] *Ibid* at paras 97-110 and 131-151.

agreement not contained the indemnification provision outlined above, these damages either could have been the County's responsibility or the County would have had to engage in a long litigation process to be compensated.

*Bridge Use*

A second issue experienced by Middlesex County pertained to the use of County bridges. Certain components used in the construction of electrical infrastructure exceeded County bridge weight restrictions. While the County initially maintained that the developer could find another means around the bridge via an alternative trucking route, the developer maintained that the use of an alternative route was not feasible (meaning that it would take more time). While the indemnification provisions of the County Road Use Agreement would have covered any damage to County bridges, the County ultimately decided to allow the developer to cross the bridge upon the signing of an additional bridge use agreement which provided additional security against potential damages and required the developer to use specialized bridge supports when transporting its equipment. The result was that developer caused a study to be conducted following the crossing, which confirmed not even a hairline crack to the bridge.

*Locates*

In addition to the road damage and bridge issues, the County encountered problems with respect to proper locating. The *Ontario Underground Infrastructure Notification System Act, 2012*[77] requires that an "excavator"[78] to contact ON1CALL to request locates for all underground infrastructure that may be affected by an excavation or dig, prior to commencing the excavation or dig.[79] Section 8 of the Act provides that a person or entity who does not comply with the foregoing is guilty of an offence.[80] Some contractors failed to request any locates. While this was ultimately an issue under provincial jurisdiction, the indemnification clause in its Road Use Agreement covered any potential damages to the County. The County would have encountered much greater risk in the event such clause was not present, thus highlighting the importance of such a clause.

*Construction Liens*

The final additional issue of note pertains to construction liens registered and construction lien claims made against County road allowances. After the construction of electrical infrastructure and following disputes between a developer and a number of its subcontractors with respect to payment for work, five construction liens were registered/statement of claims issued against the County in amounts totaling $22,693,598.58 in claims. While pursuant to the *Construction Liens Act*,[81] such liens are not to attach to highways owned by municipalities, the fact was that real property registrations did stare the County directly in the face. The County was certainly wowed by the claims figure and was extremely annoyed that it would be required to use any legal resources at all in preparing Statements of Defence and launching motions to vacate and discharge the liens.

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[77] *Ontario Underground Infrastructure Notification System Act*, 2012, SO 2012, c 4.
[78] *Ibid* s 1.
[79] *Ibid* ss 7(2)(a).
[80] *Ibid* s 8.
[81] *Construction Lien Act*, RSO 1990, c E.30 [CLA] ss. 16(3).

Fortunately, pursuant to the responsibility and indemnity provisions of the Road Use Agreement, the developer was responsible for the cost of the liens and their vacation and discharge. In angry correspondence, the County requested that the developer file a bond for the full amount of the liens with the Superior Court of Justice and the developer agreed. Even though this issue involved what should have been unnecessary County legal involvement, the liens were ultimately vacated and discharged effectively. For future consideration, it is notable that had the developer been unwilling to file the bonds, the County would not have been able to avoid taking more extensive legal action to discharge the liens. As a result, municipalities may consider the inclusion of even more specific language with respect to construction liens in their road use agreements to accompany broad responsibility and indemnity language.

## CONCLUSION

As the number of renewable energy projects in Ontario continues to grow, municipalities should be prepared to negotiate with developers and intervene at tribunals/court to protect their jurisdictional interests. A municipality can prepare a comprehensive road use agreement and intervene at the OEB and ERT. Middlesex County's experience at the OEB confirms that municipalities can challenge particulars with respect to proposed renewable energy projects where there is a jurisdictional/legal basis for doing so when such is supported by strong expert evidence. Middlesex's experience also confirms that it is reasonable for municipalities to require financial guarantees and security from renewable energy producers.

The importance of having a jurisdictional basis when advancing arguments at the OEB or the ERT cannot be overstated. Intervenors opposing particulars of renewable energy projects on principle alone will not be successful. Even where municipalities have successfully negotiated a road use agreement and/or succeeded at the OEB, additional issues may arise during the construction phase and beyond. A strongly worded responsibility and indemnification clauses in the road use agreement can help to protect municipalities from unexpected costs and/or litigation.

The County of Middlesex road use agreement contains what this author considers to be a floor of provisions that ensure the protection of municipal interests, including route specifications, decommissioning guarantees, and indemnification provisions. Following OEB decision EB-2013-0040, EB-2013-0041 and EB-2013-0361, subsequent wind farm applicants in Middlesex County have not disputed such provisions. Moving toward 2016, Middlesex County has not encountered any further additional issues like the ones described in Part VIII in this paper. There are currently five wind farm projects constructed in Middlesex County and a number of new applications have been made for 2016.