

Ontario's Green Economy and Green Energy Act: Why a Well-Intentioned Law is Mired in Controversy and Opposed by Rural Communities

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This article explores the legal framework and resulting social tensions related to renewable energy development in Ontario, Canada. Under the Green Energy and Green Economy Act 2009, the government of Ontario has helped to create a successful, growing base of renewable electricity in the province. Despite successes in terms of increased procurement of renewables, the law-making process used to develop the GEGEA and the legal mechanisms which guide its implementation are an example of a failure by government to opt for a consensus-based decision making model. In this paper, through both legislative review and a critical discussion of current legal proceedings in the province, the authors analyse the evolution of renewable energy law and policy in Ontario between 2006 and 2016. The authors conclude that the province's centralised, top-down financing, development and approval processes are likely playing a role in terms of the perception of health problems, and are perpetuating environmental, social and procedural injustices. This article highlights the potential role of increased community-based project development and local involvement in approvals to reduce legal and political conflicts and concludes with proposals for some legal and policy changes that should be made in Ontario - and could be considered by legislators and policymakers in other similar jurisdictions - to facilitate approvals for projects and infrastructure necessary to promote long-term, sustainable renewable energy growth.

I. Introduction

Climate change demands strong action by governments to help consumers, institutions and industries shift from greenhouse gas intensive fuels towards more sustainable renewable energy sources such as wind, solar, geothermal and biofuels. When Ontario's Green Energy and Green Economy Act¹ (GEGEA) was

enacted in May 2009, it ushered in a new era of clean energy policy, one which aimed to increase renewable energy production, encourage energy conservation, combat climate change and boost the economy. Undoubtedly, the legislation was an initial success in terms of procurement² playing a role in the elimination of coal-fired electricity and supporting Ontario's shift away from other fossil fuels. The GEGEA also

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1 Bill 150, An Act to enact the Green Energy Act, 2009 and to build a green economy, to repeal the Energy Conservation Leadership Act, 2006 and the Energy Efficiency Act and to amend other statutes, 1st Sess, 39th Leg, Ontario, 2009 (assented to 14 May

2009), S.O. 2009, c. 12. [Referred to herein as: the Green Energy and Green Economy Act 2009]. The omnibus GEGEA contained the entire *Green Energy Act, 2009* as a stand-alone bill in Schedule A. The GEA focuses on changes to various laws administered by the Ministry of Energy. In sum, the result of the GEGEA was: 1) the GEA; and 2) amendments to 16 other laws in the other appendices contained in the GEGEA. A great deal of our focus is on changes to the 16 others laws (such as the Environmental Protection Act and the Planning Act) so we generally use GEGEA.

2 Leah Stokes, 'The politics of renewable energy policies: The case of feed-in tariffs in Ontario, Canada' (2013) 56 Energy Policy 490.

supported specific projects such as the Ontario Biogas Systems Financial Assistance Programme.³

Despite these early indicators of success, the GEGEA has been plagued by sustained controversy⁴ and opposition⁵, generated particularly by residents and municipal politicians living in rural communities most impacted by renewable energy projects. Unlike many other jurisdictions, most renewable energy projects in Ontario are no longer subject to a comprehensive environmental assessment process, with the possibility of a full public hearing. The powers of local municipal officials to regulate these projects have also been considerably reduced. Since September 2009, Ontario's wind energy projects have been subject to the Renewable Energy Approval (REA) process. The GEGEA's development process was also marked by a lack of consultation with key stakeholders and few attempts to account for the concerns of those most directly affected by renewable energy projects. In this paper we argue that resistance to the GEGEA and its implementation illustrates the conflicts that emerge when there is lack of social consensus about a new law and when that law is not developed in a collaborative manner.

Procedural fairness - defined here as a fair decision making process - in the passage of new laws is important⁶ but sometimes lacking, particularly when legislators perceive a need to act quickly. However, if a hastily developed law such as the GEGEA is seen by numerous core stakeholders as biased towards certain parties in the project approval process, then the outcome of decision-making over a lengthy period risks becoming a toxic stew of claims and counter-claims.

Elements of procedural justice⁷ in renewable energy development have been debated by lawyers and politicians and studied by social scientists in many jurisdictions for more than fifteen years, and considerable evidence suggests that unjust processes amplify opposition to local projects.⁸ The rise of opposition to renewable projects in Ontario is also indicative of the fact that wind and solar energy in particular are suffering from a lack of a social license⁹ - a problem historically associated with extractive industries in Canada such forestry, mining and oil and gas.

In some respects the GEGEA is an example where high-level support for a policy¹⁰ does not necessarily translate into broad public support, especially when it comes to implementation on the ground. Re-

searchers have described this situation as the 'social gap' between high-levels of support in urban centres and opposition in rural communities.¹¹ The relatively low success rates for wind farm applications in the United Kingdom in the late 2000s highlighted the split between rural versus urban communities on the value and efficacy of wind farms. Despite polls finding that the majority of Ontarians support wind energy,¹² rural communities located near proposed and approved renewable energy projects - especially wind turbines - continue to mount protests and legal challenges in opposition to these projects.

The aim of this article is to describe strengths and weaknesses in the current legal and policy framework for renewable energy projects in Ontario, Canada by focusing on large wind projects. The article begins with a brief introduction to the historical context that informs energy law and policy in Canada, and then outlines the background to the GEGEA, its key provisions and procedures and the motivations behind the significant resistance it has encountered. The injustices encountered through REAs also plague many resource development processes across Cana-

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- 3 The programme is a \$9-million investment is intended to help farmers and agri-food businesses develop and build generating systems that produce clean energy, reduce electricity costs and contribute to local economies.
 - 4 Jamie Baxter, Rakhee Morzaria and Rachel Hirsch, 'A case-control study of support/opposition to wind turbines: Perceptions of health risk, economic benefits, and community conflict' (2013) 61 *Energy Policy* 931.
 - 5 Chad Walker, Jaime Baxter and Danielle Ouellette, 'Beyond rhetoric to understanding determinants of wind turbine support and conflict in two Ontario, Canada communities' (2014) 46 (3) *Environment and Planning A* 730.
 - 6 Rolf Wüstenhagen, Maarten Wolsink and Mary Jean Bürer, 'Social acceptance of renewable energy innovation: An introduction to the concept' (2007) 35 (5) *Energy policy* 2683.
 - 7 *ibid.*
 - 8 Chris Buse, Cheryl Teelucksingh and Rebecca Hasdell, 'Seeking explanations for the "wind turbine syndrome" debate in Ontario, Canada: Contributions from procedural justice in the form of community power' in Shirley Thompson, Ryan Katz-Rosene and Chris Ling (eds), *Sustainability Soup: Selections of the Environmental Studies Association of Canada* (ESAC Press 2015).
 - 9 John Colton et al, 'Energy Projects, Social License, Public Acceptance and Regulatory Systems in Canada: A White Paper' School of Public Policy, University of Calgary.
 - 10 Environmental Defence, 'New Poll Shows Ontario Strongly Supports the Province's Green Energy Policies' (2016) <<http://environmentaldefence.ca/2016/05/25/new-poll-shows-ontarians-strongly-support-provinces-green-energy-policies/>> accessed 7 August 2016.
 - 11 Derek Bell, Tim Gray and Claire Haggett, 'The 'social gap' in wind farm siting decisions: explanations and policy responses (2005) 14 (4) *Environmental Politics* 460.
 - 12 Environmental Defence (n 10).

da. Unfortunately, the GEGEA's siting and approval processes have fostered conflicts between project proponents, provincial regulators, local residents and municipal officials.¹³ As we will show, Ontario's REA process has been characterised, from the perspective of many stakeholders, lawyers, social scientists and other observers, as a top-down, conflict-riddled and centralised policy and decision-making model. Thus, those advocating environmental justice values, fairness and protection of human health have felt disempowered.

The paper then highlights some pervasive current issues and a few proceedings where legal remedies were sought by people living near wind turbines in the province. In the context of increasing empirical evidence that serious resistance to renewable energy is somewhat unique to Ontario,¹⁴ we analyse the context of wind turbine litigation in the province and the perspectives of those who believe resistance to the GEGEA lacks merit. Finally, we discuss the fundamental flaws in the GEGEA – an Act that creates an unfair and incoherent process for renewable energy approvals – and propose a pathway forward to make the Act more sustainable. In particular, we advocate for a new comprehensive consultation process regarding the GEGEA, a shift toward small-scale community power and a revamped REA procedure. With-

out such changes, there is a reasonable prospect that the GEGEA, and continued growth in renewable energy more generally, will not survive as a durable legal policy in the long term.

1. Historical Background

When the Dominion of Canada was originally formed by four provinces in 1867 - Nova Scotia, New Brunswick, Quebec and Ontario - many aspects of government regulation related to energy generation and environmental protection were divided between the federal and provincial governments.¹⁵ The Constitution Act 1867¹⁶ delegated control and ownership of natural resources to the provinces. In 1870, almost 4 million square kilometres of land belonging to the Hudson's Bay Company was transferred to federal government control, land which would soon become the modern day provinces of Alberta, Saskatchewan and Manitoba. At that time, the federal government was unaware of the vast mineral prosperity the land held, specifically the massive quantities of fossil fuels. This gave the governments of those provinces, particularly Alberta's, far more wealth than Canada's founders ever anticipated.

Provincial governments possess jurisdiction over the generation and production of electricity and the development, conservation and management of non-renewable resources.⁶ In Alberta, the electricity sector is for the most part privatised; in Ontario, the development towards privatization is ongoing. In other provinces, electricity is generally generated and distributed by provincially-owned utilities.¹⁷ International and interprovincial/territorial trade of electricity and energy resources is regulated by the National Energy Board (NEB), created by the federal government in 1959, which is primarily funded by the Canadian energy industry.

Since the Constitution of Canada places natural resources primarily under the jurisdiction of the provinces, the result is that provincial governments control most of the country's electricity production. This means that the federal and provincial/territorial governments must coordinate their energy policies, and intergovernmental conflicts sometimes arise.¹⁸ For example, the 1980 National Energy Plan (NEP) sparked intense conflict when it was implemented under the Liberal government of Prime Minister Pierre Elliot Trudeau.¹⁹ The NEP set the price of

13 Stokes (n 2); Baxter, Mozaria and Hirsch (n 4); Walker, Baxter and Ouellette (n 5).

14 Stokes (n 2); Baxter, Mozaria and Hirsch (n 4); Walker, Baxter and Ouellette (n 5).

15 Historians and legal scholars believe that the fathers of Confederation intended to create a strong federation with provinces that were less powerful in reaction to the civil war occurring in the United States. However, the Privy Council of Britain and the courts in Canada have tended to interpret certain powers in the Canadian Constitution such as property rights as giving the provinces considerable power over energy development and resources. See Peter Hogg, *Constitutional Law of Canada* (Carswell 2002).

16 Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

17 K Gaudreau, 'The Year in Review' (2009) 35 (2) *Alternatives Journal* 20.

18 The energy-consuming provinces such as Ontario have the majority of Canada's population and thus the ability to elect federal governments that introduce policies favoring energy consumers and making energy resources cheaper. However, by exercising their constitutional authority, energy-producing provinces have the ability to defeat such policies.

19 Helen McKenzie, 'Western Alienation in Canada' (1981) *Current Issue Review*, Research Branch, Library of Parliament. The NEP was extremely unpopular in Alberta: with natural resources falling constitutionally within the domain of provincial jurisdictions, many Albertans viewed the NEP as an intrusion by the federal government into the province's affairs.

oil and natural gas, and neither the producers nor the consumers were charged full price for the resources²⁰ - meaning that the federal government implemented subsidies. Economists and researchers estimate Alberta lost between \$50-\$100 billion as a result of the NEP,²¹ which angered many Albertans and led many Western Canadians to distrust the federal government.²² Thus, energy-related conflicts have become particularly complex. This has implications for treaties involving energy production and consumption, such as the Paris Agreement (2015). Although the federal government has authority to sign treaties and international agreements, it requires the cooperation of provincial governments to implement them.

With the passage of the United States-Canada Free Trade Agreement in 1988, Canada agreed not to discriminate against American consumers and agreed to sell Canada's energy resources to US energy companies at prices equivalent to those charged to Canadians. This vital political decision and similar subsequent trade and investment agreements have shaped most subsequent energy policies in Canada and constrained the scope of laws and policies that federal and provincial governments can develop by limiting the scope of legislative discretion to promote specific Canadian operations or favour procurement of Canadian made renewable technologies.

2. Provincial and Territorial Energy and Climate Change Plans

Canada is the 4th largest global consumer of energy per capita and the 5th largest energy producer.²³ In 2010, 41% of the energy consumed in Canada was refined petroleum products (oil and gasoline), while other dominant forms of energy consumed were also carbon-based, such as coal and natural gas.²⁴ The country also relies on a wide range of other energy technologies, including renewable sources such as hydro, wind, solar, geothermal and biomass.

The absence of federal authority to implement measures to address climate change targets in international climate change agreements has fostered debate and policy confusion, such that many provincial, territorial, municipal and First Nations governments have begun to develop and implement their own legislation or plans for carbon emission reduction. For example, in July 2008, British Columbia implemented a \$10 per tonne tax on CO₂ emissions,

making it the first North American jurisdiction to implement a carbon tax. The tax increased annually until 2012, reaching a final price of \$30 per tonne.²⁵ Unlike previous proposals, the BC legislation keeps the tax revenue-neutral by reducing corporate and income taxes at an equivalent rate.²⁶ The government also reduced taxes above and beyond the carbon tax offset by \$481 million over three years.²⁷ These factors have led some to conclude that the programme has been a success.²⁸

With more than 38% of Canada's population,²⁹ Ontario is a key player in GHG emission reductions. Under its Go Green Plan formally released in December 2007, Ontario committed to GHG emission reduction targets of 6% below 1990 levels by 2014, 15% below 1990 levels by 2020 and 80% below 1990 levels by 2050.³⁰ In 2016 Ontario also committed to implementing a Cap and Trade system and took its first steps in this legal and policy area in the spring of 2016.³¹ Ontario also enacted the GEGEA in May 2009

20 Brian L Scarfe, 'The Federal Budget and Energy Programme, October 28th, 1980: A Review' Canadian Public Policy (Department of Economics, the University of Alberta, Winter 1981).

21 Mary Elizabeth Vicente, 'The National Energy Programme' *Canada's Digital Collections* (Heritage Community Foundation, 2005).

22 McKenzie (n 19).

23 Government of Canada, Natural Resources Canada, 'Energy', <<http://nrcan.gc.ca/earth-sciences/geography/atlas-canada/selected-thematic-maps/16872>> accessed 7 August 2016.

24 Statistics Canada, 'Energy' <<http://statcan.gc.ca/pub/11-402-x/2012000/chap/ener/ener-eng.htm>> accessed 7 August 2016.

25 Fiona Anderson, 'B.C. introduces carbon tax' *Vancouver Sun* (2009) <<http://canada.com/vancouver/news/story.html?id=ecea1487-507c-43ef-ab88-5a972898e0b7&k=38130>> accessed 31 December 2013.

26 Province of British Columbia, 'Balanced Budget 2008 Backgrounder' (Budget Update, September 2009) <http://www.bcbudget.gov.bc.ca/2008/backgrounders/backgrounder_carbon_tax.htm> accessed 20 December 2011.

27 Province of British Columbia, 'British Columbia Carbon Tax' (2008) <<http://rev.gov.bc.ca/document>> accessed 31 December 2015.

28 Stewart Elgie and Jessica McClay, 'Policy Commentary - BC's Carbon Tax Shift Is Working Well after Four Years (Attention Ottawa)' (2013) 39(Supplement 2) Canadian Public Policy S1-S10.

29 Statistics Canada, 'Population by year, province and territory' <<http://www.statcan.gc.ca/tables-tableaux/sum-som/101/cst01/demo02a-eng.htm>> accessed 29 September 2016.

30 Government of Ontario, 'Go Green: Ontario's Action Plan on Climate Change' (2009) <<http://www.ene.gov.on.ca/publications/6445e.pdf>> accessed 16 March 2010.

31 Keith Leslie, 'Ontario passes bill to create cap-and-trade system' *The Globe and Mail* (18 May 2016) <<http://theglobeandmail.com/news/national/ontario-passes-bill-to-create-cap-and-trade-system-to-fight-climate-change/article30074758/>> accessed 7 August 2016.

to promote renewable energy by subsidizing wind and solar projects. Introducing a carbon tax in Ontario together with a modified cap and trade system would have been a more holistic approach to greenhouse gas reduction and climate change mitigation, reducing fossil fuel use across all sectors rather than only in the electricity sector. This is especially relevant given that the transportation sector is the largest contributor (34%) to Ontario's greenhouse gas emissions.³²

3. Ontario's Hard Energy Path

In 1976 energy policy analyst Amory Lovins wrote a seminal paper that has shaped energy policy discussions for decades. He coined the term 'soft energy path' to describe an alternative future where energy efficiency and renewable energy sources steadily replace centralised energy systems based on fossil and nuclear fuels, the so-called 'hard path.'³³ Advocates of the soft path argue that it is necessary for tackling

climate change and pollution and for fostering a flexible and adaptable energy system with less environmental impacts. Wind and solar energy projects were proven technologies by the end of the 1970s³⁴ but they were not necessarily seen as cost effective or competitive with other energy supplies such as coal, hydroelectricity, nuclear or fossil fuels.

When Ontario's electricity system was first established, renewable hydroelectric power played a dominant role. Gradually, Ontario began to shift more production to coal, natural gas and nuclear to address increases and fluctuations in demand. By the 1970s, Ontario's electricity generation system was dominated by coal-fired plants (now replaced by gas), nuclear plants and large-scale hydro projects - hallmarks of the hard energy path.

II. The GEGEA: Purpose and Major Features

1. Background

In late 2008, the provincial Liberal party led by then Premier Dalton McGuinty instigated a significant shift in the Ontario government's energy and environmental policy by making renewable energy and conservation key planks of its energy strategy.³⁵ The provincial economy was in a precarious state and the Ontario Minister of Finance commented in his November 2009 Fiscal Statement that it had been hit hard.³⁶ In addition, in 2008 the province was struggling with a projected shortfall in future electricity supply, first identified in 2004.³⁷ The shortfall has been attributed to aging infrastructure, project delays and the provincial government's commitment to eliminate coal-fired electricity generation. The shortfall had persisted between 2003 and 2009, leading the Ministry of Energy to assert in its 2010 Long-Term Energy Plan that '15,000 Megawatts (MW) will need to be renewed, replaced or added by 2030.'³⁸

The Ontario government's plan prior to this change in 2008 was to invest billions of dollars in new and refurbished nuclear capacity, based on recommendations from the Ontario Power Authority (OPA).³⁹ With Ontario planning to close all of its coal fired plants by 2014, the OPA recommended nuclear as the preferred option for filling the gap, despite opposition from environmental groups and public concern about the environmental and financial costs of

32 Environmental Commissioner of Ontario, 'Looking for leadership: The costs of climate inaction' (Annual Greenhouse Gas Progress Report, 2014) <<http://eco.on.ca/uploads/Reports-GHG/2014/GHG2014%20Looking%20for%20Leadership.pdf>> accessed 1 March 2015.

33 Amory Lovins, 'Energy Strategy: The Road Not Taken?' (1976) Foreign Affairs; Amory Lovins, *Soft Energy Paths: Toward a Durable Peace* (Penguin Books 1977); D Morrison and D Lodwick, 'The social impacts of soft and hard energy systems' 1, 9.

34 Daniel V Hunt, *Windpower: A Handbook on Wind Energy Conversion Systems* (Van Nostrand Reinhold Company 1981) 9-10; David R Inglis, *Wind Power and Other Energy Options* (University of Michigan Press 1978) 1-17; Niki Nixon, 'Timeline: the history of wind power' *The Guardian* (17 October 2008); Jack Park, *The Wind Power Book* (Cheshire Books 1981) 13-15.

35 Ian Rowlands, 'The development of renewable electricity policy in the province of Ontario: the influence of ideas and timing' (2007) 24 (3) *Review of Policy Research* 185.

36 Ontario, Ministry of Finance, '2009 Ontario Economic Outlook and Fiscal Review' Queen's Printer for Ontario 2008) 21-22 <http://www.fin.gov.on.ca/en/budget/fallstatement/2009/paper_all.pdf> accessed 13 January 2012.

37 Ontario, Electricity Conservation and Supply Task Force, 'Tough Choices: Addressing Ontario's Power Needs' (Ontario Ministry of Energy 2004) 25 <<http://www.centreforenergy.com/documents/242.pdf>> accessed 13 January 2012.

38 Ontario, Ministry of Energy and Infrastructure (MEI), 'Ontario's Long Term Energy Plan: Building Our Clean Energy Future' (Queen's Printer for Ontario 2010) 9 <http://www.mei.gov.on.ca/en/pdf/MEI_LTEP_en.pdf> accessed 13 January 2012.

39 David McRobert, 'Consultations on approvals for the new nuclear plants at Darlington: What have we learned so far?' (Iler Campbell LLP, 2011) <http://www.ilercampbell.com/blog/wp-content/uploads/Energy-approvals-and-Darlington-Sept-2011.pdf> accessed 29 September 2016.

nuclear power. The OPA's environmental performance calculations were largely based on GHG output, and downplayed the long-term effects of nuclear power.⁴⁰ The consultation process around nuclear expansion was poorly executed, and the government's plans faced strong opposition and public concern, so the government did not implement the OPA's plan.⁴¹

In the wake of the 2008 economic recession, the McGuinty government saw the GEGEA as a means to pump life into the failing Ontario economy by creating jobs and attracting renewable energy investment. The move was supported by the Green Energy Alliance, a coalition of environmental non-government organizations (ENGOS), energy and engineering consultants and renewable energy industry stakeholders. The Alliance, many of its consultants and key environmental groups involved with it such as the Pembina Institute, was partly funded by the Ontario government and many of the consultants, activists and lawyers involved were closely tied to the governing Liberal Party of Ontario, some as former political staff and policy advisors to the Premier and cabinet ministers.⁴²

The Alliance perceived an opportunity to push hard and achieve strong legislative support for renewable energy, a policy approach some members had sought since the 1970s; moreover, they had the support of the Minister of Energy, George Smitherman, the Premier and some other key cabinet ministers to succeed. However, a strong push for renewable energy in Ontario was not widely popular, especially in rural areas and among electricity consumers. Shortly after Bill 150 (the basis for the GEGEA) was tabled in the Legislature in February 2009, a number of rural municipalities began to study and design by-laws to prohibit or restrict wind turbines and solar farms.

Absent a consensus-based process to develop a new law, government legislators in Ontario and most other parliamentary democracies have discretion to conduct lengthy consultations and hold standing committee hearings on proposed policies and laws to ensure that a wide range of views are expressed. These processes allow for consideration of issues that may need to be addressed in formulating policies and regulations to implement a particular law.

Bill 150 took approximately 8 weeks to meander through the Legislature and was subject to numerous presentations from stakeholders - both support-

ers and opponents - at the Legislature's Standing Committee on General Government in April 2009.⁴³

Rural communities, farmers and nascent opposition groups such as Wind Concerns Ontario⁴⁴ expressed concerns to the committee, their Members of Provincial Parliament and Ontario's Environmental Commissioner about the impact of future projects on their health, farmland, natural habitat and views if dominated by turbines and solar panels.

Critics claim that because Bill 150 was rushed through a conflict-ridden legislative process there was no genuine consultation process and no serious opportunity for dialogue with municipalities or rural communities about the implications of the new law.

Ontario could have elected to use a consensus-based model for development of the legislation. This has been used to develop numerous regulations and laws in Ontario, including the Environmental Bill of Rights, 1993; the Class Proceeding Act, 1992; the Occupiers Liability Act, 1989; the Building Code, 2006 and the Construction Lien Act.⁴⁵ Other examples of

40 *ibid.*

41 *ibid.*

42 Christopher Ferguson-Martin and Stephen Hill, 'Accounting for variation in wind deployment between Canadian Provinces' (2011) 39 (3) *Energy Policy* 1647. See also Tom Adams, 'Green Energy Zombies' (Presentation to Professor Desrochers GGR Class, University of Toronto 2 October 2012) <<http://www.tomadamsenergy.com/wp-content/uploads/2012/10/Green-Energy-Zombies1.pdf>> accessed 29 September 2016. As Adams notes, the Alberta-based Pembina Institute has been a key architect and beneficiary of the Ontario government's renewable energy policies. Its staff and consultants such as 'Dr. Weis has had a longstanding involvement in the Green Energy Act Alliance.' Pembina gets substantial income from Ontario government agencies such as OPG. Here is an example: <<http://www.opg.com/power/thermal/Pembina%20Biomass%20Sustainability%20Analysis%20Final%20Rev%2015%20April%202011.pdf>> accessed 29 September 2016. See also: 'Home Invasion David Suzuki Style' (*Tom Adams Energy*, 23 June 2009).

43 See for example, the presentations made to the committee in London, Ontario on 15 April 2009: Ontario, Legislative Assembly, Standing Committee on General Government, Committee Transcripts, 15 April 2009, Bill 150, Green Energy and Green Economy Act, 2009 <http://www.ontla.on.ca/web/committee-proceedings/committee_transcripts_details.do?locale=en&BillID=2145&ParlCommID=8856&Business=&Date=2009-04-15&DocumentID=23801> accessed 29 September 2016.

44 Wind Concerns Ontario <<http://www.windconcernsontario.ca>> accessed 12 June 2016. See also Ontario Wind Resistance <<http://ontario-wind-resistance.org>> accessed 29 September 2016.

45 See David McRobert, 'A Proposed Process for Policy and Law Reform' in *Risky Business: The Use, Management, Handling and Disposal of Asbestos Waste in Canada* (Createspace 2012) Appendix 8. See also David McRobert et al (eds), *Using Consensus Based Processes to Develop Law and Policy* (Forthcoming 2017).

consensus-based laws include federal-provincial mirror laws⁴⁶ such as the Transportation of Goods Act, 1984 and the Workplace Hazardous Materials Information System, 1986 (WHMIS).

A more participatory and community-based approach (as seen in Nova Scotia, Canada⁴⁷) to the drafting of the GEGEA would have undoubtedly delayed its passage given that development of most consensus-based laws now operational in Canada required on average two or three years.⁴⁸ However, this approach may have avoided the subsequent fierce opposition to the legislation and its implementation. As an alternative, the government could have introduced an interim project law (such as the Intervenor Funding Project Act passed in 1988 or the Oak Ridges Moraine Protection Act, 2001) and begun to work on a more durable law. Rather than attempt to resolve differences early on, the legislative process that birthed the GEGEA ignored the considerable resistance to some of its core legal and policy features.

2. Nature of the GEGEA

Bill 150 was an omnibus bill tabled in the Ontario Legislature in February 2009 and proposed to establish a new stand-alone law, the Green Energy Act, 2009 (*GEA*) and amend 16 other Acts.⁴⁹ Omnibus bills generally are not viewed as conducive to consensus-making or democratic participation because they are more complex and involve changes to many different laws, thus making informed debate on their contents and potential amendments more challenging⁵⁰ – particularly for average citizens.

Perhaps the GEA's most prominent legal policy feature was the feed-in-tariff (FIT) programme modelled on Germany's renewable energy law,⁵¹ which provides producers with the ability to sell their power to the grid for higher than market electricity prices. The FIT was divided into two streams: the FIT Programme, through which the Independent Electricity System Operator (IESO) procured electricity produced by renewable energy generation systems with a nameplate capacity greater than 10 kilowatts, and the microFIT Programme, through which the IESO purchases electricity from generation systems of 10 kilowatts or less. In late 2014, Ontario announced that the development of Large-scale renewable energy projects would now be governed by the Large Renewable Procurement (LRP) processes, which is run by IESO, a successor to the Ontario Power Authority.⁵² In September 2016, the Ontario government announced a suspension of the programme citing the need to reduce costs associated with renewable electricity generation.⁵³

Given the supposed economic importance of the GEGEA in 'jump starting' Ontario's struggling manufacturing sector between 2009 and 2012, perhaps it is not surprising that neither the FIT nor the microFIT Programme were the subject of regular and balanced independent research before 2014. Indeed, the initial implementation of the GEGEA received significant criticism from Ontario's Auditor General⁵⁴ in November 2011 because the policy had not been comprehensively evaluated and little quantitative information about programme outcomes had been released to the public by Ontario's energy institutions.

46 See David McRobert, 'The Role of Mirror Laws' in *Risky Business: The Use, Management, Handling and Disposal of Asbestos Waste in Canada* (Createspace 2012) Appendix 6.

47 Michelle Adams, David Wheeler and Genna Woolston, 'A participatory approach to sustainable energy strategy development in a carbon-intensive jurisdiction: The case of Nova Scotia' (2011) 39 (5) *Energy Policy* 2550.

48 McRobert (n 46).

49 Bill 150, *An Act to enact the Green Energy Act, 2009 and to build a green economy*, SO 2009, c 12.

50 Omnibus bills have been criticized as 'anti-democratic' by numerous commentators. The federal Conservative government of Stephen Harper was heavily criticized for frequently pushing omnibus bills through the legislature and limiting debate. See for example CES Franks, 'Omnibus bills subvert our legislative process' *The Globe and Mail* (14 July 2010) <<http://theglobeandmail.com/opinion/omnibus-bills-subvert-our-legislative-process/article1387088/>> accessed 30 July 2016.

51 Rolf Wüstenhagen and Michael Bilharz, 'Green energy market development in Germany: Effective public policy and emerging customer demand' (2006) 34 (13) *Energy Policy* 1681.

52 Andrew Lord and Sean Tyler, 'Ontario 2015 renewable energy outlook: Procurement update' (*DLI Piper*, 2015) <<http://www.dlapiper.com/en/canada/insights/publications/2015/02/ontario-2015-renewable-energy-outlook-procurement>> accessed 25 May 2016.

53 Ministry of Energy, 'Ontario suspends Large Renewable Energy Procurement' <https://news.ontario.ca/mei/en/2016/09/ontario-suspends-large-renewable-energy-procurement.html?utm_source=ondemand&utm_medium=email&utm_campaign=p> accessed 29 September 2016.

54 Office of the Auditor General of Ontario, 'Chapter 3, Electricity Sector—Renewable Energy Initiatives, Annual Report of Auditor General of Ontario' (2011) <<http://www.auditor.on.ca/en/content/annualreports/arreports/en11/303en11.pdf>> accessed 29 September 2016.

The GEGEA also provided a priority right of access to the grid for eligible renewable energy producers. The legislation attempted to require electricity producers participating in the FIT programme to source up to 60% of their content domestically, but the World Trade Organization ruled the policy discriminatory in 2012.⁵⁵

Another component of a sustainable energy policy addressed by the GEGEA is energy conservation. The GEA, a stand-alone act created under the GEGEA, allows regulations to be made for the purpose of promoting energy conservation and efficiency in residential, industrial, commercial and governmental contexts. Energy efficiency often is framed in terms of household use of electricity (eg encouraging or incentivising consumers to purchase appliances, such as washing machines or refrigerators, which use less electricity to perform their functions). In larger industrial settings, installation of new machinery or energy efficient processes may achieve a similar goal. There are also opportunities to conserve energy and boost energy efficiency in many areas of the economy including tourism, waste management and water and wastewater treatment.⁵⁶

The GEA is intended to promote conservation by using regulations to designate goods, services and technologies that will promote energy conservation. Once goods, services or technologies are designated in regulations, those items can be used despite any laws, by-laws, encumbrances or agreements that otherwise prevent or restrict their use. The GEA contains further provisions that allow regulations to be made to prevent the sale of appliances or products that do not meet prescribed efficiency standards and ensure that all designated products have a label that confirms compliance with the efficiency standards.⁵⁷ At a larger scale, regulations also can be made under the GEA requiring public agencies to consider energy conservation and energy efficiency when purchasing goods and services or making capital investments.⁵⁸ Unfortunately, some of this regulatory system overlaps with similar federal regulations on products and services, which seems likely to result in gaps, overlaps and implementation difficulties.

a. Lack of Community-Based Development

Both the REA application and appeals processes and Ontario's FIT procurement programme have under-

gone changes in recent years, suggesting that agencies and decision-makers overseeing these programmes acknowledge the need to address perceptions about inadequate consultations in the REA process. For example, the new FIT procurement programme, established in 2016, is marked by 'an ever-increasing emphasis on community consultation, including during the pre-application phase of development.'⁵⁹ This new emphasis on community consultation is an encouraging change, but it does not go far enough to remedy the systemic unfairness of the REA process. For example, the points system associated with the new LRP does not require or even significantly encourage community-owned or planned projects. The system was created in order for projects with community or aboriginal support to gain more 'points'⁶⁰ and thus increase their likelihood of being approved. However, there is still no clear indication that projects lacking support from municipal councils or a majority of community residents will not be built.⁶¹

In the latest round of LRP approvals, one quarter of all projects did not receive municipal council support, while approximately 40% of projects did not receive acceptance from abutting landowners.⁶² As

55 Canadian Press. 'Ontario to change green energy law after WTO ruling' *The Globe and Mail* (Toronto, 2013) <<http://theglobeandmail.com/report-on-business/industry-news/energy-and-resources/ontario-to-change-green-energy-law-after-wto-ruling/article12236781/>> accessed 30 July 2016.

56 C Maas, 'Ontario's Water-Energy Nexus: Will We Find Ourselves in Hot Water or Tap into Opportunity?' POLIS Project on Ecological Governance (University of Victoria 2010). According to the POLIS study, a recent study on the link between water and energy found that the amount of energy used each year by water-related services, including pumping, was equivalent to the energy required to heat every home in Canada.

57 Ontario Regulation 82/95, General Regulation, made under the GEA, see s. As of 2016, these are primarily household items such as lamps, lights, refrigerators, heaters, air conditions and water source heat pumps. It appears that no new products have been added since the enactment of the GEGEA.

58 Green Energy Act, s 15.

59 *ibid.*

60 Government of Ontario, 'Priority Point System for IESO Ranking of FIT Applications' (2016) <<http://energy.gov.on.ca/en/renewable-energy-development-in-ontario-a-guide-for-municipalities/4-feed-in-tariff-programme/>> accessed 10 July 2016.

61 CBC, 'Ontario wind farm fight escalates over far away First Nations support' (2016) <<http://cbc.ca/radio/asithappens/as-it-happens-wednesday-edition-1.3533740/ontario-wind-farm-fight-escalates-over-far-away-first-nations-support-1.3533745>> accessed 7 July 2016.

62 IESO, 'Large Renewable Procurement' (2016) <<http://www.ieso.ca/Pages/Participate/Generation-Procurement/Large-Renewable-Procurement/default.aspx>> accessed 5 July 2016.

a recent approval in Dutton-Dunwich shows, projects will go forward even when local support is very low.⁶³ Many argue that a significant overhaul of the approvals process is required for the GEGEA to obtain legitimacy in the eyes of farmers and rural communities in Ontario. This overhaul must include genuine engagement with municipalities; as explained below, an ongoing grievance for many rural residents and farmers is that the GEGEA's amendments to the Planning Act strip municipalities of the ability to designate (or zone) certain areas in their territories as off-limits to wind and solar project developers.⁶⁴

Other countries in the world have had much more success in promoting wind turbines in rural communities, building support by establishing community-owned rather than corporate-owned renewable energy projects which generate electricity for adjacent communities. Research has shown that 'persons who share ownership and reap the direct financial benefits of [wind turbines] have a decreased risk of annoyance despite exposure to similar sound levels as others who live within the same proximity.'⁶⁵ For example, homes and businesses on the island of Samso in Denmark are solely powered (100%) by renewable energy from a combination of wind, solar, biomass and plant-based energy sources, and Samso's residents generally support living in close proximity to this energy infrastructure.⁶⁶ The island's renewable energy transformation was made possible through a community-driven process. Members of

the rural farming community championed renewable energy as a means of raising revenue and addressing the challenges of energy access, convincing many community members of the benefits of renewable energy and giving them a stake in project investments. Similarly, in Canada, Nova Scotia developed a Community-Based Feed-In Tariff programme that is well regarded both in terms of energy procurement⁶⁷ and local support.⁶⁸

b. A Revised and Streamlined Approval Process

Another major feature of the GEGEA is the changes to Ontario's Environmental Protection Act (EPA) and its regulations⁶⁹ related to fast tracking approvals of wind and solar projects and dismantling of local zoning controls.

The principal regulator in Ontario is the Ministry of the Environment and Climate Change (MOECC), which oversees a multi-faceted approval approach. The key MOECC laws, regulations and policies related to renewable energy projects include the EPA, the Environmental Assessment Act (EAA) and the Environmental Bill of Rights, 1993 (EBR).

Prior to September 24, 2009, most renewable electricity generation project approvals were governed by an overarching environmental assessment (EA) approval system under Ontario's EAA and proponents were required to follow MOECC's Environmental Assessment Requirements for Electricity Projects, which was described by the Ministry as a proponent-driven, self-assessment process.⁷⁰ It should be noted that some elements of the EA system in place prior to September 2009, such as the key role of proponents in addressing resident concerns and the extensive list of studies proponents must prepare before their application to MOECC will be deemed 'complete', remain in place as of August 2016.

Under the pre-2009 process, concerns raised by residents with MOECC staff were usually referred to the project proponents, often not made public or communicated to the residents concerned, and treated as *ex parte* communications between proponents and MOECC officials. Moreover, while the Director and Minister of Environment had statutory discretion to order elevated or individual environmental assessments in the case of Class EAs, this discretion was in practice rarely exercised. As of 3 September 2009, Ontario residents and community groups had

63 Debora Van Brenk and John Miner, 'Ontario has awarded contracts for five more wind farms' *London Free Press* (ON 2016).

64 *ibid.*

65 Buse, Teelucksingh and Hasdell (n 8).

66 Diane Cardwell, 'Green energy inspiration off the coast of Denmark' *The New York Times* (New York, 2015).

67 Nova Scotia Department of Energy, 'COMFIT' (2016) <<http://energy.novascotia.ca/renewables/programmes-and-projects/comfit>> accessed 22 July 2016.

68 Chad Walker and Jamie Baxter, 'It's hard to say "I don't want my community to benefit!": Wind energy siting and distributive justice in Canada' (Forthcoming 2017).

69 Ontario Regulation 359/09: Renewable Energy Approvals under Part V.0.1 of the Act, made under the EPA, RSO 1990, as amended to 1 May 2016.

70 MOECC's Environmental Assessment Requirements for Electricity Projects, 2006. The guide for the Class Environmental Assessments posted on the Ministry's website states, 'The environmental screening process is a proponent-driven, self-assessment process.' The guidelines further state that 'because the environmental screening process is a self-assessment process, reports that proponents prepare under the environmental screening process are not approved by the MOE.'

requested elevations to full environmental assessments for 31 industrial wind turbine projects but, in every case, either the Director or the Minister had rejected these requests.⁷¹ It would be misleading (and perhaps disingenuous) for Ontario regulators to claim that they did not understand how controversial wind project approvals had become in the 2000s in the wake of the EA elevation requests. Indeed, this is reflected in the public comments on O. Reg. 359/09, the regulation that governs technical aspects of REAs in Ontario, as summarised by the MOECC⁷² and reviewed by the Environmental Commissioner of Ontario in its 2009-2010 Annual Report.

In Ontario, the respective *EPA* regulations (enabled by the GEGEA) and policies regarding REAs came into force in September 2009. Ontario Regulation 359/09 requires that developers of wind energy projects consisting of wind turbines with a nameplate capacity greater than 3 kW must obtain a REA from the MOECC prior to engaging in the construction and operation of their wind energy project. The issuance of the REA gives the developer provincial approval to proceed with the construction and operation of its project, subject to any appeals that may be launched at the Environmental Review Tribunal or the courts. Under the GEGEA, renewable energy projects are exempted from the EAA.⁷³

All wind turbines must also be sited in accordance with applicable provincial, municipal and federal regulatory requirements. For example, if a proposed turbine is to be situated in the vicinity of an airport, Transport Canada must be engaged to ensure a developer meets their requirements. Municipal approvals, such as building permits and road use permits, are often also required. All electrical systems must comply with applicable electrical codes and be inspected by the Ontario Electrical Safety Authority. According to MOECC, 'rules regarding setback distances from residences where people reside and other sensitive receptors, as well as environmental features, now apply consistently across the province.'⁷⁴ However, by the date of writing this article, apart from requirements spelled out in REAs posted on the Environmental Registry, empirical evidence to support this claim was not identified.

The REA process is intended to consider and protect natural spaces by prohibiting development in specified areas, establishing setbacks from significant features, and requiring projects to assess and prevent harmful environmental impacts on endan-

gered species. Proponents also must comply with the Ontario Planning Act, which is the responsibility of the Ministry of Municipal Affairs and Housing, and to policies and requirements set by the Ministry of Natural Resources under various pieces of legislation. The approval process does not, however, address requirements from the federal government, municipalities, First Nations or other agencies. Proponents also have a duty to consult with indigenous peoples if the project could impinge on indigenous communities.⁷⁵

Depending on the project's type and location, the applicant can expect to carry out a variety of studies about environmental, archeological and heritage resources and other potential impacts of the proposed project. The complete application submission provides information about the applicant and various aspects of the project, including the results of studies.

Another significant difference between Ontario's approval regime and those in place elsewhere is that renewable energy projects are no longer subject to land use planning instruments under the *Planning Act* (eg zoning by-laws and official plans). Direct municipal control prior to 2009 of areas where wind turbines could be located under zoning by-laws approved under Ontario's *Planning Act* and other related laws and policies had resulted in a patchwork approval system. Wind developers and residents across

71 Randy Richmond, 'Ontario wind farm projects are being assessed by proponents and not independent environmental experts, figures show' *The London Free Press* (3 September 2009) <<https://mlwindaction.org/2009/09/>> accessed 29 September 2016.

72 See MOECC, Proposed Ministry of the Environment Regulations to Implement the Green Energy and Green Economy Act, 2009, Decision Notice Posted on the Environmental Registry, 6 November 2009, EBR Registry Number: 010-6516 <<http://ebr.gov.on.ca/ERS-WEB-External/displaynoticecontent.do?noticeId=MTA2NDQ5&statusId=MTYxMzc&language=en>> accessed 29 September 2016.

73 Green Energy Act.

74 Ontario Ministry of Energy, 'Guide to Provincial Approvals for Renewable Energy Projects' <<http://www.energy.gov.on.ca/en/renewable-energy-facilitation-office/resources-and-contacts-2/guide-to-provincial-approvals-for-renewable-energy-projects/#Overview>> accessed 30 July 2016.

75 Consultation with indigenous peoples (including Metis peoples) is mandatory for applicants of projects requiring an REA, except for small wind projects. The nature of the consultation will vary depending on the project. The applicant must contact the MOECC for a list of Aboriginal communities that must be notified regarding the proposed project. If a project is to be located on Crown land, this list will reflect what was already required by the MNRF. The documentation is required to outline any potential adverse affects on Aboriginal or treaty rights identified by the community and the measures proposed to address them.

the province began to regularly appeal decisions on zoning at the Ontario Municipal Board (OMB). Lengthy hearings were undertaken at the OMB on wind projects between the late 1990s until 2008.⁷⁶ As Szybalski observed in May 2007, '[t]he novelty of private energy projects (especially wind farms) and their encroachment into more densely populated areas has given rise to 'NEPAism' or 'No Energy Projects Anywhere' attitudes, culminating in OMB hearings.'⁷⁷

In response to pressure from ratepayers and residents, municipalities also increasingly began to adopt zoning by-laws prohibiting wind turbines in areas that were sensitive both environmentally⁷⁸ and politically, effectively thwarting efforts by industry to promote many wind projects. This prompted the Ontario government to enact regulation-making powers in the Planning Act in 2006 providing that an undertaking or class of undertakings relating to energy was not subject to the Planning Act if it had been approved or exempted under the EAA. However, the GEGEA eliminated the need to promulgate

these regulations by removing municipal zoning powers for REAs but allowing municipalities to maintain symbolic controls such as approving road allowances and issuing site construction permits.

i. Consultation Requirements for Approvals

For large wind projects, there are three main phases in the consultation process. A full description of the consultation process, as described by the Ministry of Energy, is provided in a comprehensive guide.⁷⁹

Before submitting an application for an REA to the MOECC, the applicant must undertake certain pre-submission work. This work includes: 1) describing the facility and project location; and 2) evaluating how to assess and mitigate impacts and potential environmental effects associated with the project during a) Construction, b) Design and operation, and c) Decommissioning. In addition the applicant must: 1) demonstrate how the project will meet setbacks depending on the class of project; and 2) prepare a report of the findings of any studies, along with their plans for construction, operation and decommissioning of the facility. Proponents are also encouraged to engage the public, municipalities and Aboriginal communities in discussions about the project at the earliest opportunity.

Second, mandatory consultation requirements must also be met for the application to be considered a complete REA application.⁸⁰ Proponents are required to engage the public, municipalities and Aboriginal communities in discussions about the project at this stage.

Third, once an application is made for an REA, a notice of a proposal is posted on the Environmental Registry established under the EBR by the MOECC so that the public can review it and provide comments. Where multiple permits and approvals are subject to public notice requirements, additional notices may be posted on the Registry. Ministries will coordinate timing and content of the postings. To date, the first REA was posted on the Registry for comment in May 2010 and more than 330 REA proposal notices were posted between May 2010 and June 2016. In addition, the MOECC has posted more than 180 decision notices outlining the REAs granted and comments made by the public on each REA; appeals of each decision also are summarised on the MOECC's Registry system.⁸¹

76 Damian Szybalski, 'Section 24 of Bill 51: Should We Be Concerned?' (2007) 22 (3) Ontario Planning Journal; As Szybalski notes, '[s]ubject to existing Planning Act requirements, several energy projects have stagnated. In Prince Edward County, a 21MW wind power proposal was appealed to the OMB (PL020917) by local residents despite receiving County official plan and zoning by-law amendment approval. The Melancthon II wind project, a 132MW project straddling the Townships of Amaranth and Melancthon, also was appealed to the OMB (PL060653, PL060754). The OMB also had jurisdiction over a 200MW wind power project contemplated for Huron County, for which an eight-week hearing was scheduled in 2007 (PL060986). In Chatham-Kent, the appeal of official plan and zoning by-law amendments related to a 101MW wind power project was dismissed by the OMB without holding a hearing (PL061144). In the Township of Frontenac Islands, a 198MW wind farm was appealed in 2006 (PL070039).

77 *ibid.*

78 Wind turbines proposed for Georgian Bay which is an area where many very wealthy cottagers live were viewed as particularly controversial and resulted in numerous applications for investigation and review and letters to the Environmental Commissioner of Ontario. For background, see: Bill Bialkowski, 'Wind farm battle surfaces dire energy realities GBA looks at energy options for the Bay' (2006) 16 (1) Georgian Bay Association Update <<http://www.georgianbayassociation.com/update-newsletter/vol16no1.pdf>> accessed 29 September 2016.

79 Guide to Provincial Approvals for Renewable Energy Projects (n 74).

80 *ibid.*

81 Based on a search of the Registry conducted using 'renewable energy approval' as the search phrase. Contact David McRobert for this summary of data. Readers also can search the Registry at the following link: <<https://www.ebr.gov.on.ca/ERS-WEB-External/searchNoticeRefine.do?actionType=performRefine>>. Researchers should ensure that their search includes all years (ie 2009 to present) otherwise the Registry search engine defaults to provide REA links for the current year only.

After considering an application for the issuance or renewal of an REA and all public comments received through the Registry, the MOECC director may do either of the following: 1) Issue, renew or amend an REA; or 2) Refuse to issue, renew or amend an REA. The director notifies the applicant of the decision and posts it on the Registry. In coordination with the issuance of the REA, other provincial ministries will make decisions on any additional approvals or permits required and, if necessary, will post decisions on the Registry at the same time as the MOECC. If a decision is made to approve the application, the applicant must acquire any remaining necessary approvals before starting construction. This includes, but is not limited to, a municipal building permit, the notice to proceed under the FIT contract and any federal requirements.

ii. Third-Party Hearing

A third-party (anyone other than the applicant or the issuing authority such as MOECC) seeking an automatic hearing with respect to an REA must make a request to the Environmental Review Tribunal (ERT) within 15 days of the posting of the notice of the approval on the Registry.⁸²

The ERT is statutorily restricted as to what it may consider when adjudicating an REA appeal.⁸³ The statute requires that the ERT shall consider only whether constructing and undertaking the project *in accordance with the REA will cause serious harm to human health or the environment*.

Finally, section 142.1 of the EPA places the heavy onus of proving that the project will cause serious harm to human health or the environment on the appellant(s). In doing so, the project, after predicted effects are supposedly mitigated, is assumed to produce only benign effects on human health, the environment, viewsapes and species habitats. If an appellant is able to convince the ERT that engaging in a wind energy project in accordance with its REA will cause serious harm to human health or the environment, then the Tribunal gains the jurisdiction to, among other actions, revoke the REA. If a project's REA is revoked, the project can no longer be constructed. This is the ultimate goal of most appellants. The Tribunal, which has a regulated timeline under the EPA, must then hold a hearing and make a decision within six months of the request. If the Tribunal does not meet the timeline requirement, as a gener-

al rule the director's decision is confirmed. The Tribunal can adjourn the hearing should all parties agree or where it is necessary to ensure a fair and just hearing.

iii. Problems with the Public Consultation Process

Lawyers and regulatory experts have noted that the public consultation process prescribed for wind turbine projects has proven unsuccessful in stimulating substantive debate and dialogue. The dominant approach to consultations and public meetings for REAs is a 'show-and-tell' format where members of the public are invited to ask questions of consultants at various display stalls in a public meeting hall. This approach appears to have been modified from similar processes used by consultants conducting environmental assessments (EAs) and municipal planners, and could be characterised as a fusion or hybrid of an EA and a conventional environmental approval. The format of these events is developed by proponents without MOECC prescription or oversight regarding how information should flow from proponents to members of the public and how proponents must incorporate the feedback they receive. Consequently many residents question the validity of this truncated project planning process.⁸⁴ Other experts have suggested that these projects, similar to large pipeline and energy megaprojects, may lack 'social license' because of how they have been developed. Thus, in the context of perceived inadequate approval processes, it is perhaps not surprising that some rural municipalities, often at the urging of their increasingly militant residents, have been adopting by-laws on road construction and the issuance of work permits with very different standards and requirements.

82 Applicants may also appeal an REA and some Ministry of Natural Resources decisions to the ERT. See MOECC's Approvals and Permitting Requirements document for more information.

83 Opponents to a wind energy project are provided with the opportunity to appeal the issuance of an REA on two narrow statutory grounds: (1) 'serious harm to human health, and (2) serious and irreversible harm to plant life, animal life, or the natural environment'; see s 142.1(3) of the EPA.

84 Steward Fast et al, 'Lessons learned from Ontario wind energy disputes' (2016) 1 Nature Energy 15028; Anahita AN Jami and Phillip R Walsh, 'The role of public participation in identifying stakeholder synergies in wind power project development: The case study of Ontario, Canada' (2014) 68 Renewable Energy 194-202.

c. Stringent Appeal Test

One of the sources of significant discontent with the REA approval system is the appeal process that was developed and enacted in 2009. Prior to the enactment of the GEGEA, appeals of most wind energy approvals were being addressed under municipal or local planning laws such as the Planning Act, the Municipal Act and the Building Code. In addition, residents and municipalities could request elevation or bump-up requests for full EAs under the EAA.

Under current REA regulations, once a project has been approved and posted to the Environmental Registry website, the public has only 15 days to appeal to the ERT. Consistent with the streamlined approach to approvals, access to justice is constrained by limiting the ability of opponents to challenge REAs.⁸⁵ This appeal mechanism was developed as part of an internal consultation process that took place in late 2008, and involved government officials and close advisors to the responsible Minister. One goal of the process was to eliminate some of the uncertainty and frustration proponents had experienced as a result of the implementation of the introduction of third party appeals under the EBR. The discussion occurred in the wake of the Ontario Divisional Court's 2008 decision in *Lafarge Canada Inc v Ontario (Environmental Review Tribunal)*⁸⁶ which upheld an ERT decision revoking an approval granted to Lafarge Canada for a tire burning operation at its Bath, On-

tario cement manufacturing plant. The *Lafarge* decision had caused concern among many industrial associations, leading them to write to the Premier and Cabinet in late 2008. They argued that the ERT was acting undemocratically and had misinterpreted the EPA approval and the EBR appeal provisions, and, if allowed to stand, the *Lafarge* decision would discourage investment in Ontario.⁸⁷

The EBR required that applicants first obtain permission (or leave) from the ERT before an appeal could be brought. However, leave was granted in approximately 32% of cases filed at the ERT between 1995 and 2004.⁸⁸ Unlike the EBR, the GEGEA contains an automatic right of appeal for those discontent with approvals made under the Act. The major problem for opponents is that the test for appeals is stringent and narrow, only requiring a hearing if a project '[will cause either] *serious harm* to human health [or] *serious and irreversible harm* to plant life, animal life or the natural environment'⁸⁹ [emphasis added]. This test makes the chance of a successful appeal unlikely at best, given that the grounds of appeal require an evidentiary burden and place a very high threshold for opponents to meet. Limiting viable complaints to human health or the environment may also cause those opposed to be selective in terms of their objections to a renewable energy project⁹⁰ - possibly masking more general quality of life impacts delegitimised by law. As of early 2016, more than 20 appeals of large wind projects have been filed with Ontario's ERT.⁹¹

85 Carmen Krogh, 'Industrial wind turbine development and loss of social justice?' (2011) 31 (4) *Bulletin of Science, Technology & Society* 321-333.

86 *Dawber v Ontario* (Director, Ministry of the Environment) (2007), 28 C.E.L.R. (3d) 281; *affd.* (2008), C.E.L.R. (3d) 191 (Ont.Div.Ct.); leave to appeal refused (Ont. C.A. File No. M36552, 26 November 2008), 2008 CanLII 30290 (ON SDC).

87 David McRobert, *We Don't Want to Start That Tire Fire: Cases and Materials on Lafarge v the (Ontario) Environmental Review Tribunal* (2008) (Createspace 2012) 64-66.

88 Birchall Northey, 'Legal Review of the EBR Leave to Appeal Process' (September 2004). This study was conducted for the Environmental Commissioner of Ontario during the 10th anniversary review of the EBR in 2004-2005 and is available upon request from the ECO office. See also Rick Lindgren, 'Third-Party Appeals under the EBR in the Post-Lafarge Era: The Public Perspective' (Presentation to Ontario Bar Association, 2 February 2009; and McRobert, *ibid.*

89 Green Energy Act, SO 2009, c 12, s 142.1(3)

90 Chad Walker, Jaime Baxter and Danielle Ouellette, 'Adding insult to injury: the development of psychosocial stress in Ontario Wind Turbine communities' (2015) 133 *Social Science & Medicine* 358-365.

91 *Erickson v Ontario* (Ministry of the Environment) (2011) OERTD No 29 (*Erickson*); *Middlesex-Lambton Wind Action Group Inc v*

Ontario (Ministry of the Environment) (2012) OERTD 73 (*MLWAG 1*); *Monture v Ontario* (Ministry of the Environment) (2012) OERTD No 50 (*Monture 1*); *Chatham-Kent Wind Action Inc v Ontario* (Ministry of the Environment) (2012) OERTD No 64 (*CKWA*); *Monture v Ontario* (Ministry of the Environment) (2012) OERTD No 69 (*Monture 2*); *Haldimand Wind Concerns v Ontario* (Ministry of the Environment) (2013) OERTD No12 (HWC); *Alliance to Protect Prince Edward County v Ontario* (Ministry of the Environment) (2013) OERTD No 40 (*APPEC*); *MLWAG v Ontario* (Ministry of the Environment) (2013) OERTD No 67 (*MLWAG 2*); *Lewis v Ontario* (Ministry of the Environment) (2013) OERTD No 70 (*Lewis*); *Bovaird v Ontario* (Ministry of the Environment) (2013) OERTD No 87 (*Bovaird*); *Dixon v Ontario* (Ministry of the Environment) (2014) OERTD No 5 (*Dixon*); *Platinum Produce Company v Ontario* (Ministry of the Environment) (2014) OERTD No 8 (*Platinum Produce*); *Drennan v Ontario* (Ministry of the Environment) (2014) OERTD No 10 (*Drennan*); *Wrightman v Ontario* (Ministry of the Environment) (2014) OERTD No 11 (*Wrightman*); *Bain v Ontario* (Ministry of the Environment) (2014) OERTD No 13 (*Bain*); *Moseley v Ontario* (Ministry of the Environment) (2014) OERTD No 23 (*Moseley*); *Kroepelin v Ontario* (Ministry of the Environment) (2014) ERTD No 24 (*Kroepelin*); *Pitt v Ontario* (Ministry of the Environment) (2014) OERTD No29 (*Pitt*); *Fata v Ontario* (Ministry of the Environment) (2014) OERTD No 42 (*Fata*); *Van Den Bosch v Ontario* (Ministry of the Environment) (2014) OERTD No 46 (*Van Den Bosch*).

III. Renewable Energy: Current Issues and Litigation in Ontario

Ontario's REA process has been plagued by litigation, protests and media battles in the seven years since it was implemented in the Fall of 2009. Legal battles have centred on claims about potential adverse effects on human health due to noise and 'shadow flicker' associated with the spinning turbines, alleged violations of constitutional human rights, the erosion of municipal zoning powers on project siting, and alleged impacts on the natural environment and endangered species. While the government of Ontario and project proponents have been successful in the courts on nearly every occasion – with a few notable exceptions – the hailstorm of litigation has been a rallying cry for wind turbine opponents and a symptom of discontent with the province's approach to REAs.

On its face, the GEGEA appears to promote a more sustainable, soft energy approach. Since the early 1970s renewable energy projects, in their design and implementation, have typically been portrayed by advocates as decentralised, small-scale, and distributed. Promoting community based power systems is important but Ontario's GEGEA has not succeeded to the extent European programmes have. As a direct result of the Ontario FIT programme, Ontario has close to 2.5 times as much community-owned renewable energy capacity as the entire United States but less than 1% of what Germany has achieved.⁹² Moreover, the GEGEA's conservation provisions are aligned with a soft approach that aims to tackle climate change and pollution, and to foster a flexible and adaptive policy that reduces dependency and overconsumption. However, a deeper analysis reveals that the GEGEA process is more of a hybrid soft-hard energy path, with the balance tipped in favour of multinational companies who have the upfront capital to invest in renewable energy projects.

While rooftop solar and other small-scale projects owned by individuals are possible through the microFIT programme, practical realities dictate that corporations, who can hire consultants and lawyers to prepare their applications and take advantage of economies of scale, benefit most from the FIT programme. This creates a dynamic where power and profits remain centralised and larger-scale renewable energy projects are more common than small-scale ones. Some smaller solar providers have tried to overcome this constraint by locating suitable residential

roof locations and then negotiating agreements with home owners to build and operate a solar system on their property.⁹³ Under the agreements, the property owner would be provided with a sum of money usually in the range of \$3,000 to \$8,000 but would agree that all future income from their microFIT contracts would flow to the solar company who designed and built the project. Arguably, Ontario's microFIT programme never was intended to permit this type of arrangement and it obviously was subject to misrepresentation and abuse. As noted by one solar panel installation company in Ontario on its website in April 2016, '[i]t seems that a small number of bad apple contractors have been cheating the system, submitting applications without homeowner permission.'⁹⁴ To its credit, IESO stopped accepting microFIT applications in early 2016, then re-opened the process in June 2016 'with tighter application rules and increased bureaucracy' to prevent this ongoing problem.⁹⁵

1. Not Just NIMBYism: Opponents Raise Genuine Concerns

Many ardent supporters of action on climate change pledge their unconditional support for renewable energy projects, citing the urgency of climate change and the need to replace fossil fuels. To urban-based environmentalists, resistance to wind and solar farms is often seen as nothing more than Not in My Backyard attitudes (NIMBYism), and turbine opponent concerns are trivialised. Indeed when political debates began on Bill 150 in early 2009 then Premier McGuinty vowed that 'NIMBYism will no longer prevail' and delay approvals of renewable energy projects.⁹⁶ However, it is noteworthy that some of the prime concerns

92 TREC, 'The Power of Community' (June 2016) <<http://www.trec.on.ca/report/the-power-of-community/>> accessed 29 September 2016.

93 Personal Communication to David McRobert from Simon Boone, P Eng (*Generation Solar*, 8 August 2016) <<http://www.generationsolar.com/>> accessed 29 September 2016.

94 'Well, they've done it again' (*Generation Solar*, April 2016) <<http://www.generationsolar.com/2016/04/well-theyve-done-it-again.html>> accessed 29 September 2016.

95 IESO, 'microFIT version 4.0 applications now being accepted' (21 June 2016).

96 Keith Leslie, 'McGuinty says he won't tolerate "NIMBYism" in green energy projects' *The Toronto Star* (10 February 2009) <http://thestar.com/news/ontario/2009/02/10/mcguinty_says_he_wont_tolerate_nimbyism_in_green_energy_projects.html> accessed 7 August 2016.

that motivated support for the soft energy path beginning in the 1970s were related to the environmental, social, aesthetic and economic impacts related to the siting, planning, construction and operation of centralised power projects (such as nuclear plants).

While some opposition to wind turbine farms and solar panels is likely motivated by NIMBY sentiment, many communities opposed to these projects have genuine concerns about impacts on environmental integrity, viewscales, food production, and social fabric. Indeed many rural residents argue that everyone should share the environmental and social burdens associated with our energy production and distribution systems. Moreover, the supposed 'NIMBY syndrome' has been criticised by environmental justice scholars and others as an oversimplification of opposition that more accurately is based on a complex mix of factors including perceptions about a lack of procedural and distributive justice in approval processes.⁹⁷

Farmers and rural communities in Ontario have been some of the most prominent investors in renewable energy and have been encouraged to do so by the Ontario Ministry of Agriculture, Food and Rural Affairs (OMAFRA) as a means to reduce their electricity costs and generate additional income. In 2008 the province's agricultural communities were not prospering. Small and medium-sized family farms

had been experiencing declining net operating income since 1995.⁹⁸

Despite the benefits seen by some, non-participating farmers have become some of the most vocal opponents of wind turbines, and not simply because of their concern about impacts on health or despoliation of viewscales. Wind turbine construction requires significant infrastructure, including roads and transmission lines, while solar farms often require large areas of productive farmland. At a time when protecting Ontario's farmland is of utmost importance, the concerns of farmers about the impacts of wind turbine construction should be meaningfully considered in the REA decision-making process. In rural Ontario, the push for large solar projects is creating tension between solar proponents and those who want to protect prime farmland. One Napanee, Ontario city councillor who opposed a 300-acre solar farm in his community commented that he is not opposed to solar energy, but cannot accept the destruction of farmland: 'Put the solar panels over parking lots. Put 'em over arenas, places where land has already been lost...Three hundred acres is food for 300 or 350 people, lost in favour of charging their cell-phones and laptops.'⁹⁹

Viewing opposition to wind turbines from an environmental justice perspective, some observers argue that perhaps it is more productive and fairer to adopt a Not in Anyone's Backyard (NIABY) approach, rather than paint opposition to large energy projects as NIMBYism that should be disregarded. Most often used in the context of waste disposal facilities, the NIABY approach is motivated by a concern that the negative impacts of development projects should not be placed disproportionately on any one group of people. NIABYism also hones in on the process of how the government and corporations treat people and communities when they stand up to stop pollution from contaminating them and their children.

2. Negative Health Claims: the Wind Turbines, or the Process Itself?

Opposition to wind energy in Ontario has focused on negative health effects allegedly caused by living in close proximity wind turbines.¹⁰⁰ Many studies have researched the phenomenon of 'wind turbine syndrome' (WTS), but health studies including a recent study by Health Canada¹⁰¹ have yet to establish

97 Patrick Devine-Wright, 'Beyond NIMBYism: towards an integrated framework for understanding public perceptions of wind energy' (2005) 8 (2) *Wind Energy* 125-139.

98 Canada, Statistics Canada, 'Summary Tabulation of the Canadian Farm Financial Database Total Income of Farm Families (Unincorporated Sector)' (table), Canadian Farm Financial Database (database), 2010 (14 January 2010) <<http://bit.ly/2dgEQsP>> accessed 4 October 2016. Net operating income was calculated by selecting the following database variables: all years, total for all regions, total of farm types, all income classes under CAD 249,999. Net operating income is adjusted for capital cost allowance and excludes off-farm income. The average net operating income of family farms with revenues between CAD 50,000 and CAD 100,000 had been negative since 2003, while farms in lower revenue classes had been experiencing such conditions since at least 1995.

99 Peter Kuitenbrouwer, 'Solar flares: How renewable energy is raising hackles in rural Ontario — and across Canada' (7 August 2015) <http://business.financialpost.com/news/energy/solar-flares-how-renewable-energy-is-raising-hackles-in-rural-ontario-and-across-canada?_isa=0015-0ce8> accessed 7 August 2016.

100 Benjamin Deignan, Erin Harvey and Laurie Hoffman-Goetz, 'Fright factors about wind turbines and health in Ontario newspapers before and after the Green Energy Act' (2013) 15 (3) *Health, Risk & Society* 234.

101 David Michaud et al, 'Exposure to wind turbine noise: Perceptual responses and reported health effects' (2016) 139 (3) *The Journal of the Acoustical Society of America* 1443.

a causal link between proximity to wind turbines and adverse health effects. Instead, a growing amount of literature is pointing to connections between annoyances, disapproval or psychosomatic pathways¹⁰² as possible explanations for the health problems residents have been experiencing. The lack of legitimate scientific evidence has made it very difficult for appellants to file appeals and judicial review applications on wind project approvals in English-speaking countries (such as the United States, the United Kingdom and Canada). Our research suggests that cases filed in English-speaking countries primarily on the basis of alleged health effects have consistently failed, because courts and tribunals have been unwilling to recognise that the alleged health effects associated with wind turbines have been proven on a balance of probabilities based on the evidence presented to approval decision-makers, tribunals and appellate courts.¹⁰³ In Ontario, opponents of wind farms and smaller projects also have failed to have health concerns recognised in federal and provincial courts or at the ERT in appeals filed on REAs since September 2009.¹⁰⁴ Nevertheless, this poor track record has not stemmed the flow of wind litigation in Ontario and many other jurisdictions, partly because communities often are determined to fight the turbines aggressively and have been able to attract wealthy and middle class donors and a small cadre of lawyers has found lucrative employment representing these rural groups. Meanwhile, environmental and energy groups, health experts and consultants who are supportive of the GEGEA cite the lack of evidence supporting anti-wind health claims, whether conclusive or not, as a basis to dismiss anti-wind opposition efforts.

The legal community is divided on the issue of the legitimacy of the GEGEA and the reasonableness of anti-wind litigation. Some lawyers regard ongoing litigation efforts by anti-wind groups as lacking merit, causing costly delays to renewable energy projects. These commentators focus on the fact that wind opponents simply cannot muster the evidence required to establish that wind turbines cause negative health effects. Environmental lawyer Diane Saxe noted that '[s]tudy after study around the world has shown that, contrary to what many fear, wind farms at the Ontario minimum setbacks do not directly cause serious harm to human health, even though some people find them stressful and annoying.'¹⁰⁵ Similarly, lawyer Jack Coop downplays the 'annoyance' associ-

ated with wind turbines, arguing that these impacts are too trivial to rise to the level of 'serious' harm to health.¹⁰⁶ It is noteworthy that Saxe was appointed as Ontario's fourth environmental commissioner in late 2015, signalling that the Ontario government wished to appoint an outspoken and strong supporter as an allegedly independent reviewer of its implementation of the GEGEA.¹⁰⁷

These arguments are convincing at one level, but they disregard the lived experiences¹⁰⁸ of people who are vehemently opposed to siting wind turbines near their homes and farms. We argue that instead of dismissing negative health claims as baseless, a better approach would be to identify the source of the annoyance and the stress, and attempt to accommodate it with effective remedies. Regardless of the lack of success of anti-wind litigation within the current legislative framework, persistent and prolific litigation by directly affected groups is unhealthy, and a sign that there is something fundamentally wrong with the process of project approvals.

While it is true that most anti-wind court challenges based on adverse health effects will ultimately fail and that the evidence necessary to be successful simply does not exist at this time, we should not dismiss these challenges as inherently wrong-headed. These legal, political, economic and social conflicts about REAs should be viewed as a symptom of

102 Fiona Crichton et al, 'The link between health complaints and wind turbines: support for the nocebo expectations hypothesis' (2014) 2 *Front Public Health* 220.

103 Diane Saxe, 'Wind opponents lose health challenges around the world' (Saxe Law Office, 2014) <<http://envirolaw.com/wind-opponents-lose-health-challenges-around-world/>> accessed 4 July 2016.

104 Albert Engel, 'Legal Requirements for Human-Health Based Appeals of Wind Energy Projects in Ontario' (2014) 2 *Front Public Health* 248.

105 Diane Saxe, 'Divisional Court rejects anti-wind constitutional claim' (Siskinds LLP, 2015) <<http://www.mondaq.com/canada/x/367570/Environmental+Law/Divisional+Court+Rejects+AntiWind+Constitutional+Claim>> accessed 4 July 2016.

106 Drew Hasselback, 'Ontario's wind farm approval process faces constitutional challenge' *Financial Post* (Toronto, 17 November 2014).

107 Ontario Wind Resistance, 'New Environmental Commissioner: Wind Turbine Lover Dianne Saxe' (14 September 2015) <<http://ontario-wind-resistance.org/2015/09/14/new-environmental-commissioner-wind-turbine-lover-dianne-saxe/>> accessed 29 September 2016. Saxe follows the lead of the previous Ontario Environmental Commissioner, Gord Miller, who consistently dismissed concerns about the installation of wind turbines as bizarre and wrong-headed in media interviews between 2009 and the end of his tenure in May 2015.

108 Walker, Baxter and Ouellette (n 90) 358.

a larger problem, one that transcends the direct impacts of wind turbines and goes to the core of the GEGER and the REA process itself. As scholars, analysts, legal professionals and community leaders we must begin to ask ourselves why perceived health problems from wind turbines are surging in Ontario compared to other places around the developed world. In light of the fact that the same or similar energy technologies are being used across jurisdictions, we conclude that risk perception is at least partially a social construction¹⁰⁹ and that inadequate policy may be the source of some of the problem.

3. Increasing Legal Complexity of Ontario-based cases

As of November 2014, there were already more than 30 Canadian reported court and tribunal cases that have dealt with wind turbines. The fact that these challenges continue to mount in Ontario in particular cannot be ignored, and it demonstrates that the legal system and the GEGER are not adequately resolving the disputes generated by renewable energy projects in the province.¹¹⁰

109 Karl Dake, 'Myths of nature: Culture and the social construction of risk' (1992) 48 (4) *Journal of Social Issues* 21.

110 Hasselback (n 106). As noted by Hasselback on the November 2014 constitutional challenge to the EPA's statutory appeal test, 'Regardless what the court decides, opposition to wind farms will remain...Wind farm litigation will continue to go around. And around. And around. And around.'

111 Kawartha Lakes This Week Staff, 'Province approves Snowy Ridge wind project in Manvers' *Kawartha Lakes This Week* (2015) <<http://www.mykawartha.com/news-story/5686918-province-approves-snowy-ridge-wind-energy-project-in-manvers/>> accessed 10 June 2016.

112 Peterborough This Week Staff, 'Council to send strong message against wind turbine project' *Peterborough This Week* (2013) <<http://www.mykawartha.com/news-story/3714682-council-to-send-strong-message-against-wind-turbine-project/>> accessed 10 June 2016.

113 Bruce Bell, 'Turbine decision creating turmoil' (2015) *The Peterborough Examiner* (2015) <<http://www.thepeterboroughexaminer.com/2015/07/22/turbine-decision-creating-turmoil/>> accessed 11 June 2016.

114 Elliot Ferguson, 'Wind energy projects opponents try new tactic' *The Kingston Whig Standard* (2015) <<http://www.thewhig.com/2015/09/20/wind-energy-projects-opponents-try-new-tactic/>> accessed 14 June 2016.

115 Jack Coop et al, 'Ontario court clarifies degree to which municipality can restrict a wind developer's use of roadways' (*Osler, Hoskin & Harcourt LLP*, 2015) <<http://www.osler.com/en/resources/regulations/2015/ontario-court-clarifies-degree-to-which-municipali/>> accessed 3 July 2016.

116 *ibid.*

Recent wind farm approvals near Bethany, Ontario have been subject to multiple legal challenges: not only appeals to the ERT, but also applications for judicial review.¹¹¹ Opposition is coming from public interest groups and municipal governments such as the City of Kawartha Lakes.¹¹² In Prince Edward County, the mayor has been joined by three conservation groups in speaking out against the decision by the MOECC to approve a wind turbine project sited in an area specially designated as protected bird habitat.¹¹³

Some Ontario litigants are turning to novel tactics in their fight against wind turbines. A group in the Bon Echo, Ontario area has filed a complaint with the United States Justice Department against the parent companies of a wind energy project in Lennox and Addington County. The complaint alleges that the parent companies 'violated the United States' Foreign Corrupt Practices Act when their Canadian subsidiaries offered financial compensation in exchange for resolutions of municipal support.'¹¹⁴ Legal efforts like these demonstrate the lengths to which wind opponents will go in their efforts to stop new wind developments under the GEGER, as well as concerns about the corporate tactics of wind and solar companies.

In August 2015 an Ontario court decision made clear that municipalities cannot try to block the implementation of a renewable energy project once it has been approved by the MOECC.¹¹⁵ The municipality of the City of Kawartha Lakes had passed a resolution aiming to prohibit the use of a key roadway by a wind development corporation which had been granted an REA. The court found that the City had acted unreasonably and confirmed that 'municipalities cannot arbitrarily or for an improper purpose deny an approval-holder the use of a roadway that is explicitly referenced in an ...[REA]'.¹¹⁶ This decision is not surprising given that municipalities are creatures of the provinces under the Canadian Constitution and the provinces ultimately have the power to approve upper-tier municipal and regional land use plans. However, the resolve of a duly elected municipal council, on advice of its lawyers, to pursue such an aggressive legal challenge highlights the divide between some municipal governments and the MOECC related to stripping them of local power over land-use planning.

The only cases in which concerned groups have been successful in challenging wind turbine REAs

were decided with regard to environmental impacts, not human health effects.⁶⁹ The 2015 decision of the Ontario Court of Appeal in *Prince Edward County Field Naturalists v Ostrander Point*¹¹⁷ upheld the finding of the ERT that the proposed Ostrander Point wind project would cause serious and irreversible harm to the Blanding's Turtle, a threatened species in Ontario.¹¹⁸ The opponents of the project thus met the legal test for appeals brought in by the GEGEA. The Court of Appeal sent the matter back to the ERT to determine the appropriate remedy given its finding with respect to impacts on the Blanding's Turtle.¹¹⁹ After hearing new evidence from the proponent and the Prince Edward County Field Naturalists (PECFN), the ERT decided on June 6, 2016 that the appropriate remedy was to revoke the issuance of the Ostrander Point REA.¹²⁰ According to the ERT, there was not sufficient evidence that the proponent's proposed mitigation measures would avoid serious and irreversible harm to the Blanding's Turtle. Following this protracted court battle, PECFN celebrated in early July when the 30-day period in which to appeal the ERT decision passed without the proponent or the Minister of Environment and Climate Change filing a notice to appeal.¹²¹

While the Ostrander Point case has received a relatively high profile, there is another recent case where wind turbine opponents were partially successful at the ERT.¹²² In December 2015, the ERT allowed in part an appeal of an REA approving the construction of a wind turbine facility in the Oak Ridges Moraine Area.¹²³ The Tribunal held that the project would cause serious and irreversible harm to sensitive woodlands, and that proposed compensation and mitigation measures were not sufficient to offset the harm.¹²⁴ Together, these two cases demonstrate that the ERT is prepared to accept and act on evidence of serious and irreversible harm to the environment, and that wind project REAs may be overturned on that basis. On the other hand, claims against wind turbine REAs on the basis of human health effects have been consistently rejected.

a. Constitutional Challenges to REA Approval System

In addition to alleging serious harm to human health, the appellants in seven cases of the ERT appeals decided as of July 2016¹²⁵ - namely *Drennan*, *Kroepelin*, *Bovaird*, *Dixon*, *Platinum Produce*, *Wrightman* and *Fa-*

ta - have challenged the constitutional validity of the REA provisions of the EPA (Charter Challenge). In *Bovaird*, the appellants argued that the REA process violated their right to security of the person guaranteed by Section 7 of the Canadian Charter of Rights and Freedoms (Charter). Section 7 of the Charter provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The Tribunal determined that in order to be successful in their Charter Challenge, appellants needed to show that (a) Section 7 of the Charter was engaged; (b) the deprivation of security of the person is serious; and (c) there is proven serious or psychological harm. Ultimately, in *Bovaird*, the Tribunal found that the appellants did not establish serious deprivation of security of the person or serious psychological or physical harm. Similar challenges were subsequently brought and dismissed by the Tribunal in the cases mentioned above. Of those cases, *Dixon*, *Drennan* and *Kroepelin* were appealed to Ontario's Divisional Court on the Charter Challenge where they were unsuccessful. Ontario's top court later denied the appellants leave to appeal.¹²⁶

For now and until the issue reaches Canada's top court, the Supreme Court of Canada, the matter is

117 *Prince Edward County Field Naturalists v Ostrander Point GP Inc*, 2015 ONCA 269.

118 *ibid.*

119 Zoe Thoms, 'ERT Upholds Revocation Of Wind Farm's Renewable Energy Approval – Risk Of Harm To Blanding's Turtle' (*Aird and Berlis LLP*, 2016) <<http://www.mondaq.com/canada/x/504642/Renewables/ERT+Upholds+Revocation+Of+Wind+Farms+Renewable+Energy+Approval+Risk+Of+Harm+To+Blandings+Turtle>> accessed 2 August 2016.

120 *ibid.*

121 Bruce Bell, 'Appeal period passes for Ostrander Point' *The Peterborough Examiner* (7 July 2016).

122 *SLWP Opposition Corp v Ontario* (Environment and Climate Change), 2015 CanLII 83848 (ON ERT)

123 Laura Geddes, 'Further wind litigation in the Oak Ridges Moraine: Part II' (*Siskinds Law Firm*, 2016) <<http://www.siskinds.com/further-wind-litigation-in-the-oak-ridges-moraine-part-ii/>> accessed 14 June 2016.

124 *ibid.*

125 See list of ERT appeal decisions (n 87).

126 Paula Boutis, 'Court of appeal ends anti-wind Charter challenge' (*Saxe Law Office*, 2015) <<http://envirolaw.com/court-of-appeal-ends-anti-wind-charter-challenge/>> accessed 7 July 2016.

settled: according to the law in Ontario, there is nothing unconstitutional about requiring residents who challenge REAs to prove that wind projects would cause 'serious harm to human health'.

Although the courts have confirmed the constitutionality of the EPA appeal test created by the GEGEA, it still raises red flags about procedural unfairness. The EPA appeal mechanism lacks the ability to review or consider concerns about procedural fairness and procedural justice, which are often fundamental to appeals related to environmental and human health concerns. This barrier to environmental justice shields the REA decision-making process from review, dealing a further blow to individuals and communities who feel their voices have not been heard or respected during the approval process.

IV. Discussion

While research and court decisions have consistently rejected claims that wind turbines cause health effects, we believe that the Ontario government should not use this evidence alone to ignore those who continue to make such health claims. This gap between scientific evidence and perceived reality is not readily explicable, but a growing body of research suggests that principles of procedural fairness and environmental justice should be considered when evaluating the 'wind turbine syndrome' debate.¹²⁷ It may be the unfair process of renewable energy approvals, rather than the wind turbines themselves that is contributing to poor health.¹²⁸ Indeed in the case of wind turbines, 'a lack of procedural justice and the exclusion of communities from decision-making processes is a possible antecedent cause of psychosocial stress that may indirectly contribute to ill health claims'¹²⁹. A process that breeds strong feelings of

disempowerment and marginalization which in turn lead to negative health effects is an injustice that warrants serious consideration and the active pursuit of effective remedies. This analysis is fundamental to understanding opposition to wind power and other renewable energy projects in Ontario.

In order to address the GEGEA's fundamental unfairness over the long term, two related shifts must take place: a revamped procedure to ensure respect for participatory rights and a renewed focus on community power. Respectful and genuine engagement with municipalities and rural communities is also essential for the long-term political and social legitimacy of the GEGEA. If Ontario follows its current path, resistance to renewable energy projects - especially wind turbines - seems likely to continue to grow and spread, especially in rural areas.

In sum, Ontario must change course from its developer-led model and into one that allows and promotes small scale, community-based development. Otherwise known as the soft path, this method of development is much more conducive to implementing renewable energy projects through a method that will be accepted and perhaps even embraced by the communities and individuals who will be most affected by those projects. If farmers and community members have a stake in the power being generated near their homes and workplaces, they are much less likely to be opposed to the projects being built.¹³⁰

An emphasis on community-owned energy would also keep the profits from renewable energy projects within Ontario and would ensure that financial benefits from the GEGEA flow back to Ontarians. There are examples of successful implementation of community energy programmes in Canada including Nova Scotia's Community Feed-In Tariff (COMFIT) programme.¹³¹ Emerging empirical research is showing that the COMFIT approach was successful across many fronts including higher rates of local support (three times higher compared to Ontario).¹³² A soft energy path can simultaneously remedy a number of the fundamental issues with the GEGEA. By fostering community power, smaller-scale renewable energy projects, and more dispersed and equitable distribution of energy projects and their impacts, the soft path can create a climate that empowers farmers and rural communities to benefit from the GEGEA.

Ontario had the opportunity to follow Germany's lead by shaping the GEGEA in a way that would promote small-scale and community-owned renewable

127 Buse, Teelucksingh and Hasdell (n 8).

128 *ibid.*

129 *ibid.* 38.

130 Tineke van der Schoor and Bert Scholtens, 'Power to the people: Local community initiatives and the transition to sustainable energy' (2015) 43 *Renewable and Sustainable Energy Reviews* 666; Charles Warren and Malcolm McFadyen, 'Does community ownership affect public attitudes to wind energy? A case study from south-west Scotland' (2010) 27 (2) *Land use policy* 204.

131 Kenny Corscadden, Adam Wile and Emmanuel Yiridoe, 'Social license and consultation criteria for community wind projects' (2012) 44 *Renewable energy* 392.

132 Walker and Baxter (n 68).

energy projects over subsidies for large companies. Six years since the passage of the GEGEA, Ontario has made some progress toward building more community-based projects,¹³³ but it pales in comparison to Germany, where over 65% of renewable energy generation is individual or community-owned.¹³⁴ Ontario's 'renewable energy revolution' is still largely a boon for corporations, not communities, farmers or families.

One of the logistical challenges to taking the soft energy path is that Ontario's grid is not well equipped for small-scale, distributed power generation. As a result, particularly in the short term, community-owned power is more costly and time-consuming, requiring an overhaul to the grid to accommodate small-scale generation. There is no quick or easy fix to the system, but efforts can and must be made to soften Ontario's approach to energy. In August 2016, the Pembina Institute released a report documenting how grid-connected distributed renewable energy generators 'could reduce the need for centralized baseload power plants, creating greater resilience in the system.'¹³⁵ The report explains how new wireless information technologies could empower system operators, consumers and utilities to manage generation and demand in real time, and in a more sustainable and symbiotic way. Greater flexibility could be provided by new kinds of energy storage, both on the grid and behind the meter.¹³⁶

Another notable shortcoming of the GEGEA in place today is the limited ways in which local and rural citizens in particular can take part in the renewable energy approval process. A lack of access in this respect raises questions of procedural justice - a topic that is increasingly being explored in the context of Ontario-based wind energy development. Mechanisms have existed previously in Ontario to allow the public to apply for funding to assist with participation in environmental approval processes. Ontario's Intervenor Funding Project Act, 1988 (IFPA), which expired in 1996, allowed certain decision-making boards to provide funding for public interest interveners to cover costs such as legal fees or expert witnesses. Reviving the IFPA and making it applicable to the GEGEA could infuse some respect for procedural fairness into REAs and enhance the quality of REA decision-making.¹³⁷ Fostering democratic participation in decision-making by affected groups is fundamental to an equitable process and increases the likelihood of a consensus-based result.

In addition to an analysis of the GEGEA, this paper also showcased a sampling of recent legal proceedings in the province. Excessive litigation and widespread community opposition to the GEGEA are symptoms of a failure by the Ontario government to adopt a consensus-based approach to the development of its green energy laws. We argue that broader legal principles of procedural fairness should guide and frame how we view opposition to the GEGEA. In this way, we can move from dismissive to constructive dialogue.

From a more hopeful perspective, it is evident that the solutions to the controversy surrounding REAs can address alleged health effects and other impacts while continuing to promote the expansion of renewable energy in Ontario. If, as we and others suspect, the root of the problem is the policy and siting process rather than the projects themselves, then Ontario can change the way it develops renewable energy and experience far less resistance than it currently does. If the current imbalance which privileges corporations shifts to support less powerful groups such as farmers, churches, schools and individuals in generating renewable energy, then not only will support grow but more localised benefits and a greater degree of environmental justice will also result. The REA process thus far has not had much respect for the consent of directly affected communities, and this must change in order to inject some fairness and justice into the GEGEA.

133 Kristopher Andersen, 'Without consent, our sustainable energy future looks dark' (*Corporate Knights*, 2014) <<http://www.corporateknights.com/channels/utilities-energy/ontario-power-authority-14182272/>> accessed 3 June 2016.

134 Damian Carrington, 'Germany's renewable energy revolution leaves UK in the shade' *The Guardian* (2012) <<http://www.theguardian.com/environment/2012/may/30/germany-renewable-energy-revolution>> accessed 7 June 2016.

135 Eli Angen and Binu Jeyakumar, 'Grid Modernization in Ontario' (Pembina Foundation, 2016) <<http://pembina.org/reports/on-gridmodernization.pdf>> accessed 7 August 2016.

136 *ibid.*

137 David McRobert, 'Intervenor Funding and Access to Environmental Justice: Time for the Ontario Political Parties to revisit this issue?' (2011) <http://www.ilercampbell.com/blog/wp-content/uploads/Intervenor-Funding-and-Participation.pdf> accessed 29 September 2016; see also: David McRobert and Paula Boutis, 'Application submitted to the Environmental Commissioner of Ontario pursuant to s. 61 of the Ontario EBR respecting Reforming Laws and Policies Related to Development of an Intervenor and Participant Funding Act in Ontario' (Submitted to the Ministers of Environment, Energy, Natural Resources and others, February 2012) <<http://ilercampbell.com/blog/2012/01/david-mcrobert-and-paula-boutis-propose-an-ontario-participant-and-intervenor-funding-act/#more-311>> accessed 29 September 2016.

More consultation and consensus building is required in order for the GEGEA to adequately balance the different environmental, social and economic factors engaged by renewable energy projects. Only once the Ontario government actively listens to local concerns can it take action to remedy these concerns. As the cases here have shown, Ontarians living near proposed renewable energy projects are so frustrated with the approvals process that they are willing to resort to time-consuming and expensive means to try to stop these projects from going ahead. A process that genuinely listened to the concerns of renewable energy opponents could avoid the worst of these conflicts and tensions.

Legal processes are time-consuming and expensive for all involved and cause delays in project implementation. Protests and negative media coverage have only hurt the credibility and reputation of the GEGEA and the push for renewables in Ontario. Such conflicts demonstrate the shortcomings of streamlined approvals that fail to take a democratic and fair approach. While consensus-based decision-making processes require much more time and effort upfront by government, industry proponents and affected stakeholders, the decision made tends to be accepted by public participants. Protracted legal proceedings and media controversies are thus avoided or at the least subdued.

V. Conclusion: A Proposal to Salvage the GEGEA

Canadians are becoming increasingly aware that combating climate change should be a top political and economic priority in the coming decades. However, because Canada is a federation and approximately 80% of environmental jurisdiction rests in the hands of the provincial, territorial, municipal and First Nations governments, the development of coherent national climate change laws and policies to promote renewable energy has proven extremely challenging.

The GEGEA's goals remain fundamentally important to Ontario's role in climate change action and the necessity of building renewable energy capacity in the province. Other provinces and jurisdictions considering similar legislation will look to Ontario for guidance and their willingness to do so may hinge on the success or failure of Ontario's legislation. If

the GEGEA's goals are to be realised and more renewable energy projects constructed, the REA process must be revamped. The Ontario government needs to acknowledge the flaws in the GEGEA and recognise and respect the considerable opposition from directly affected communities to renewable energy projects, and repair the damage done to date.

An important place to start is by overhauling key elements of the REA process (ie approvals, appeals and public participation) and taking a more collaborative and consensus-based approach to REAs and the GEGEA. Therefore in the short term, we recommend that the Ontario government undertake the following steps to improve the GEGEA and the REA process:

1. Conduct an inquiry into the GEGEA and the REA process which involves engagement and consultation with affected REA stakeholders and communities. The inquiry would be chaired by an independent and experienced official.

2. Revive the provision of participant and intervenor funding. The goal would be to create a more level playing field and ensure that groups are able to participate early in the planning process. The Intervenor Funding Project Act, 1988 (which expired in 1996) could provide an initial legal and policy framework.

3. Establish a fairness commissioner to address ongoing conflicts (eg farmers who feel their farms will be seriously compromised by road construction for wind turbines).

4. Research and consider amendments to the Planning Act to allow municipalities to establish round table processes in order to advise the municipalities on the costs and benefits of becoming a willing host for wind turbines and other renewable energy projects. The benefits for municipalities could include reduced electricity costs. The goal would be to use consensus-based processes to educate stakeholders and the public on the value of REAs.

5. Consider the equivalent of a franchisee protection law to clarify the power balance between farmers who allow turbines to be sited on their land and REA holders for wind turbine and solar projects, especially when the REA holders are large corporate entities.

As recognised and implemented in Nova Scotia, affected communities need a voice at the table when it comes to developing the process by which renewable energy projects will be approved. We recom-

mend that Ontario undertake a concerted effort to support small-scale, community owned renewable energy projects such as rooftop solar. A renewed emphasis on community power would shift the power imbalance by delivering benefits to people instead of maintaining windfalls for large companies - propelling Ontario towards the soft energy path and reducing localised concerns. For large projects going through the REA process, the government must put in place new mechanisms for procedural justice and for the inclusion of stakeholders in decision-making. Promoting and approving renewable energy projects in a manner that disregards public opinion and silences the voices of those most affected by the projects is a form of injustice, even if the result involves more wind turbines and solar panels. A process that pits communities against multinational corporations and the government in a highly stacked and unequal relationship is not the type of action that proponents of environmental protection

should condone. Nor is it a laudable when multinational corporations profit with few benefits for directly affected communities. Instead, members of the rural farming community should be engaged as full partners in order to raise revenue and address the challenges of energy access that occur in remote areas. In Nova Scotia, this process may have convinced community members of the benefits of having renewable energy near their homes, and gave people a stake in the investments derived from these projects.

Ultimately, Ontario's GEGEA has delivered on its promise to boost renewable energy production, but has done so in a fundamentally unfair and unbalanced manner. The time is ripe for an injection of fairness into REA and GEGEA processes in order to galvanise support for renewable energy in tandem with establishing a type of social license, if not a large degree of consent, from directly affected communities.