

They Ain't Making Any More of It

Land Lease Considerations for Alberta Renewable Energy Projects

written by

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The advantages of electricity generation from renewable resources are numerous; for the moment at least, sunlight and wind are free for the taking (when they are present), solar and wind projects generate few direct carbon emissions, and the ‘fuels’ are not depleted

through the generation of electricity. At the same time, interest in addressing climate change and renewable energy is surging, with major investment funds announcing they will no longer fund certain hydrocarbon based investments² and address climate change risks of the companies they invest in.³ It seems that not a week goes by without a major player announcing a commitment to becoming carbon neutral in their operations,⁴ and leaders of several large Canadian corporations (including several oil and gas producers) called upon the Federal Government to invest in a 'green recovery' following the COVID-19 pandemic.⁵

Although Alberta has traditionally been an oil and gas producing province, renewable electricity has a long, and growing, history here. Canada's first commercial wind farm was installed in 1993 near Pincher Creek, Alberta.⁶ As of 2016, Alberta generated 12.3% of its electricity from renewable sources.⁷ The World Bank's country factsheet for Canada indicates photovoltaic power potential in the south and eastern portions of Alberta⁸ and, with respect to wind energy, significant wind power potential is located in the same area, largely concentrated east of the Rocky Mountains.⁹

Given current market conditions, renewable electricity generation in Alberta will likely grow, and more projects will be developed. However, there is one resource, critical to the development of every renewable project which is in limited supply: land. In the immortal words of Mark Twain (or Will Rogers) "They ain't making any more of it." As the number of renewable energy projects grows, CAPL members may be called upon to negotiate leases for renewable energy projects. This article identifies some of the unique considerations which may apply to land leases for renewable energy projects, from a project owner perspective.

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TERMINOLOGY

In this article, the lease in question is a lease of the surface land, similar in principle to the CAPL-95 surface lease which readers will likely be familiar with, as distinct from the CAPL-91, CAPL-99, and CAPL-2014 mineral leases. In legal terms, the latter create a profit a prendre which gives the lessee the right to search for and win the leased substances. The former, and leases which are the subject of this article, create an interest which generally provide the lessee with the right to occupy and use the surface of the land.

Practically speaking, project owners may have a standard form land lease which forms the basis for negotiation with the landowner but, currently, there is no standard form like CAPL-95 for renewable energy project leases. As there is no set expectation for the terms of a renewable lease, this means that any and all terms are up for negotiation, subject only to the creativity and relative bargaining power of the parties.

LEGISLATIVE SCHEME

P&NG leases are subject to the *Land Agents Act*, which requires licensed land agents to negotiate, with some limited exceptions.¹⁰ However, no similar restriction is in place with respect to renewable projects leases, so negotiation is anyone's game.

Unlike P&NG leases, the *Surface Rights Act*¹¹ currently has limited application to renewable project leases. Unlike minerals, there is currently no split title system with respect to renewables which would allow a project owner to obtain rights to solar or wind resources without obtaining rights to the land under those resources. This may impact the negotiation dynamics as between the project owner and landowners. Unlike the situation where a landowner can be compelled to provide access, access to land for a renewable project can only be gained on terms acceptable to the landowner. Where a planned project requires a significant amount of land, covering multiple



landowners, confidentiality provisions and well-timed negotiations may be necessary to ensure the last landowner is not able to hold out and extract additional concessions from the project owner.

CONCURRENT LAND USE

Unlike oil and gas surface leases, which typically only need to be large enough to contain a pumpjack, tank battery, or similar equipment, renewable energy projects require significantly more land area. A review of recent decisions approving wind and solar projects in Alberta indicate that the land area required may be in the hundreds of acres for solar projects,¹² and thousands of acres in the case of wind projects¹³ Given the significant amount of land required, landowners (particularly those with large landholdings) may be more likely to lease their land for a renewable project if they are not precluded from continuing some uses of their land.

If concurrent uses are to be permitted, project owners will likely want to take steps to protect the equipment installed from improper access (vandalism, theft, etc.) and minimize the risk of damage from any permitted concurrent uses. One such method (other in addition to simply fencing off the site) could include a

blanket prohibition on all uses, except for an enumerated list of permitted activities. For example, the possibility of collision damage from farm equipment may preclude growing crops as a concurrent use, but permitting grazing animals may be acceptable provided that sufficient protection for renewable facilities is in place (a prohibition on motorized vehicles for herding, for example). Using grazing animals for weed and brush control around renewable facilities may provide an opportunity for a revenue offset to the landowner (provided the project owner is willing to pay for the service), while concurrently avoiding the use of hydrocarbon fuels for weeding and brush control, reducing the overall carbon footprint of the renewable project. Alternatively, permitting continued use of the land for grazing may enable the project owner to negotiate a lower lease rate.

TERM

As in any lease, a major consideration for a renewable lease will be the term. Unlike a P&NG lease (and, to some extent, oil and gas surface leases), the term of a renewable project lease is not limited by the presence of recoverable substances. As long as the wind blows or the sun shines,

renewable electricity can be generated. However, unless the project owner is willing to purchase the land outright, landowners may not be willing to agree to a lease term beyond the expected 20 – 25 year lifespan of renewable electricity generating equipment.

Necessary preparatory work for renewable projects may also need to be reflected in lease terms. For example, although wind projects are often initially sited based on wind potential maps, preliminary wind monitoring work may be necessary to determine the actual generation potential of a project or detailed siting for wind turbines. This will require access to land and, assuming results are favourable, the ability to lock down the necessary land for a project to proceed. Alternatives to address this may be an initial exploration lease, with an option to lease the necessary land if monitoring demonstrates the project is viable, or long-term lease with an early termination provision allowing the project owner to terminate the lease if monitoring determines the project is not viable.

A project owner may also want to include an “economic termination” provision, which allows termination of the lease if the project turns out to be uneconomic, or less economic than is expected at the project start. An in-depth discussion of the electricity market in Alberta is beyond the scope of this article but it is important to note that, in Alberta, wind and solar compete with other sources of generation to be dispatched on,¹⁴ and are subject to a maximum share of the total electricity generation in Alberta. Accordingly, the amount of electricity and revenue generated is highly dependent on market conditions. If a fixed payment model is chosen for the lease, this may leave the project

owner with fixed costs but insufficient revenue to cover those costs. To address this risk, it may be advantageous to a project owner to have the right to terminate a lease, and the project as a whole, if the revenue generated is insufficient to cover the lease payments.

REGULATORY CONSIDERATIONS

All new generation facilities in Alberta are subject to approval by the Alberta Utilities Commission (“AUC”), which may refuse the approval (in which case the project cannot proceed) or impose conditions on the project. The conditions imposed may impact the project economics. Further, AUC proceedings may involve participation by interveners impacted by a project which,

in turn, may impact the timing of regulatory approvals. As the project owner will likely need to have leased or optioned land prior to seeking AUC approval, each of these creates a risk which may need to be addressed in a land lease.

To address the possibility of conditions imposed by the AUC on project approval, a project owner may want to include a term in a lease allowing for certain terms (such as compensation) to be re-negotiated or adjusted if the AUC imposes conditions on the approval. In addition, it may be desirable to include a general term which permits or requires the lease to be amended to reflect any conditions imposed by the AUC. Further, a term allowing the project owner to terminate the lease if AUC-imposed conditions render the project

un-economic or if the AUC refuses its approval. With respect to timing of AUC approvals, a project owner may want to include a term delaying the commencement of lease payments until AUC approval is obtained or

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providing a right to terminate the lease if AUC approval is not obtained by a certain date.

COMPENSATION

A basic, but crucial, term of any lease is the compensation payable to the land owner. As noted earlier, the other terms and conditions included in the lease may impact the compensation a landowner demands for a lease. Compensation may include some or all of the following:

- a) a one-time lump-sum payment for access, construction, and so on (similar to the “First Year” payment under CAPL-95);
- b) periodic (monthly, yearly, or otherwise) payments independent of the amount of electricity generated by the product; or
- c) periodic payments based on the revenue generated by the project

With no ‘industry standard’ form of lease, these are certainly not the only ways a landowner may be compensated. In Ontario, for example, in at least one renewable energy agreement, compensation included a share of greenhouse gas or any other environmental credits.¹⁵ From a landowner perspective, a fixed periodic payment may be the most desirable, as it provides a consistent and predictable revenue stream. However, as revenue from a renewable project may be quite variable, this may leave the project owner with fixed expenses that cannot always be covered by the revenue generated.

The structure of compensation may also have knock-on effects on other terms in the lease. For example, if a landowner is to take a portion of the revenue generated through selling electricity, a landowner may seek to impose a requirement on the project owner to make electricity market offers that are likely to result in the project being dispatched on and royalties are generated. Such an agreement would have to be compliant with *Fair, Efficient, and Open Competition Regulations*.¹⁶

Alternatively (or additionally) a landowner may insist on payments, similar to the “suspended well payments” under CAPL-91, which provided for payments if no revenue from electricity is generated, or if the project is not “dispatched on” following energization.

FUTURE REGULATORY CHANGES

In recent years, the electricity market in Alberta has seen significant shifts, particularly with respect to renewable electricity generation, including changes to implementation of an energy and capacity market for electricity and the changes in the Alberta Government’s Renewable Energy Program. As such, it seems likely that the regulatory environment for renewable electricity generation will change again during the expected lifespan of current renewable electricity projects. For example, the *Surface Rights Act* may be amended to cover renewable electricity generation, including a scheme of compulsory access, review of compensation rates, and protection for landowners from default. Further, the electricity market in Alberta may be altered in a way that fundamentally affects project economics. To address these risks, and the possibility of other regulatory changes, project owners may wish to include a term in their leases which allows for re-negotiation or termination of

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the lease if legislative changes make the renewable project unprofitable.

CONCLUSION

As the Alberta renewable electricity industry grows, more and more land will likely be taken up for renewable projects. With considerations specific to renewable projects in mind, project owners will be better equipped to obtain favourable terms and protect themselves from the uncertainties that come with investment in a growing sector. ♦

NOTES

1. Daniel B.R. Johnson is a partner at Borden Ladner Gervais LLP. This article is presented for information purposes only and is not legal advice. Each specific project and lease will have their own challenges and considerations, so specific legal advice should be obtained.
2. <https://www.goldmansachs.com/s/environmental-policy-framework/#climateChangeGuidelines> (accessed July 23, 2020).
3. <https://www.goldmansachs.com/s/environmental-policy-framework/#climateChangeGuidelines>; <https://www.blackrock.com/corporate/investor-relations/blackrock-client-letter> (last accessed July 23, 2020); https://www.db.com/newsroom_news/2020/deutsche-bank-to-end-global-business-activities-in-coal-mining-by-2025-en-11650.htm (last accessed July 27, 2020).
4. See, for example: “Apple commits to be 100 percent carbon neutral for its supply chain and products by 2030” Press Release, July 21, 2020, <https://nr.apple.com/dE9n5d3o7T>, (last accessed July 23, 2020).
5. “Open letter from business leaders calls for bold green recovery”, June 29, 2020; <https://www.corporateknights.com/channels/leadership/open-letter-business-leaders-calls-bold-green-recovery-15934468/> (last accessed July 23, 2020).
6. “Alberta and Modern Wind Power” <http://www.history.alberta.ca/energyheritage/energy/wind-power/alberta-and-modern-wind-power.aspx>; (last accessed July 23, 2020).
7. “Canada’s Renewable Power Landscape – Energy Market Analysis 2017, National Energy Board, p. 13 (<https://www.cer-rec.gc.ca/nrg/sttstc/lctrct/rprt/2017cndrnwblpwr/2017cndrnwblpwr-eng.pdf>).
8. Global Photovoltaic Power Potential Country Factsheet: Canada; World Bank Group (2020) <https://globalsolaratlas.info/global-pv-potential-study> (last accessed July 28, 2020).
9. Wind Energy in Canada/L’énergie éolienne au Canada; Canadian Geographic Enterprises (2009) (https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/canmetenergy/pdf/fichier/81770/windtrm_resource_map.pdf) (last accessed July 31, 2020).
10. *Land Agents Act* RSA 2000 c L-2.
11. *Surface Rights Act* RSA 2000 c S-24.
12. See, for example, AUC Decisions 23841-DOI-2019; 22499-DOI-2017; 23821-DOI-2019; 23332-DOI-2018.
13. See, for example, AUC Decisions 22456-DOI-2019; 23711-DOI-2019, 24699-DOI-2019.
14. i.e. to be directed to generate and supply electricity to the Alberta Interconnected Electric System.
15. *Georgian Windpower v. Stelco* 2011 ONSC 3430, at para. 18.
16. AR 159/2009.