CITATION: Capital Solar Power Corporation v. The Ontario Power Authority, 2019 ONSC 1137
COURT FILE NO.: 13-59225
DATE: 20190225

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
CAPITAL SOLAR POWER CORPORATION Plaintiff	Geoff R. Hall/Sam Rogers, for the Plaintiff
– and –	
THE ONTARIO POWER AUTHORITY Defendant	Howard Borlack/David Elmaleh, for the Defendant
	HEARD: November 19, 20, 21, 22, 23, 26, 28 and 29, 2018

REASONS FOR JUDGMENT

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REASONS FOR JUDGMENT

TOSCANO ROCCAMO J.

Introduction

[1] On September 24, 2009, the Ontario government announced the introduction of new regulations under the *Green Energy Act*,[1] designed to create thousands of new jobs, and to provide "a stable investment environment where companies know what the Rules are – giving them confidence to invest in Ontario, hire workers, and produce and sell renewable energy."[2] [Emphasis added].

[2] André Deschamps ("Mr. Deschamps") and Angela Monette ("Ms. Monette"), previously Angela Deschamps, incorporated Capital Solar Power ("CSP") in 2010. They had sold their cleaning business and invested its profits in CSP to participate in the green energy economy. CSP commenced as a small business in Ottawa and relied on the Ontario government's stated intention to establish a stable system for all stakeholders involved in renewable energy.

[3] CSP's turn-key operation involved the design, delivery and installation of solar power systems for residential homeowners and small businesses. Their services included completing all applications for government approval of the systems, purchasing all necessary parts, installing the systems, connecting to the Ontario power grid and completing required inspections. The business grew quickly – in its first year, in 2010, CSP had a revenue of approximately $342,000; by the following year, its revenue had tripled to approximately $1,138,000.[3]

[4] CSP operated in a highly technical and regulated industry. Neither Mr. Deschamps nor Ms. Monette had any prior experience in the solar power industry, or the renewable energy sector in Ontario.

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[1] *Green Energy Act*, 2009, S.O. 2009, c. 12. [*Green Energy Act*]
[2] Press Release, September 24, 2009, Exhibit 1, Joint Document Brief ["JDB"], Vol. 4, Tab 162, p. 1846.
[3] Balance Sheet, Exhibit 1, JDB, Vol. 3, Tab 154, at p. 1588.

The Ontario Power Authority (the "OPA")[4] is a not-for-profit corporation created pursuant to the Electricity Act, 1998,[5] as follows:

> **Ontario Power Authority**
>
> **25.1** (1) A corporation without share capital to be known in English as the Ontario Power Authority and in French as Office de l'électricité de l'Ontario is hereby established. 2004, c. 23, Sched. A, s. 29.
>
> ...
>
> **Not for profit**
>
> (2) The business and affairs of the OPA shall be carried on without the purpose of gain and any profits shall be used by the OPA for the purpose of carrying out its objects. 2004, c. 23, Sched. A, s. 29.

[5] The objects of the OPA are set out in section 25.2(1) of the *Electricity Act,* as follows:

> **Objects and Character**
>
> **25.2** (1) The objects of the OPA are,
>
> (a) to forecast electricity demand and the adequacy and reliability of electricity resources for Ontario for the medium and long term;
>
> (b) to conduct independent planning for electricity generation, demand management, conservation and transmission and develop integrated power system plans for Ontario;
>
> (c) to engage in activities in support of the goal of ensuring adequate, reliable and secure electricity supply and resources in Ontario;
>
> (d) to engage in activities to facilitate the diversification of sources of electricity supply by promoting the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources;
>
> (e) to establish system-wide goals for the amount of electricity to be produced from alternative energy sources and renewable energy sources;
>
> (f) to engage in activities that facilitate load management;

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[4] Effective January 1, 2015, the OPA amalgamated with the predecessor Independent Electricity System Operator. The name of the amalgamated corporation is the Independent Electricity System Operator (the "IESO"). Section 25.8(1)9 of the *Electricity Act,* S.O. 1998, c. 15, provides that the IESO is a party to each on-going proceeding to which the OPA is a party immediately before the subsection comes into force, replacing the OPA. While the OPA is therefore no longer in existence, for simplicity, the IESO will be referred to as the OPA for the purposes of this mediation brief.

[5] *Electricity Act*, 1998, S.O. 1998, c. 15, Sched. A. [*Electricity Act*]

(g) to engage in activities that promote electricity conservation and the efficient use of electricity;

(h) to assist the Ontario Energy Board by facilitating stability in rates for certain types of consumers;

(i) to collect and provide to the public and the Ontario Energy Board information relating to medium and long term electricity needs of Ontario and the adequacy and reliability of the integrated power system to meet those needs. 2004, c. 23, Sched. A, s. 29.

[6] The main functions of the OPA were to promote energy conservation in the Province; carry-out long-term planning for the province's electricity system; and procure the required generation resources.[6]

[7] On September 24, 2009, on the same day that the Ontario government announced new regulations under the *Green Energy Act*, it directed the OPA to create a feed-in tariff ("FIT") program, pursuant to section 35.35 of the *Electricity Act*, with the following objectives:

a. increase capacity of renewable energy supply to ensure adequate generation and reduce emissions;

b. introduce a simpler method to procure and develop generating capacity from renewable sources of energy;

c. enable new green industries through new investment and job creation; and

d. provide incentives for investment in renewable energy technologies.[7]

[8] The Directive further required the OPA to ensure that projects met certain domestic content thresholds; to establish policies and procedures; to conduct a review of the program, including the pricing schedule, at least once every two years; and to report to the Minister with results and suggestions.[8]

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[6] Sean Cronkwright's testimony at trial.
[7] Ministerial Directive, September 24, 2009, Exhibit 1, JDB, Vol. 1, Tab 1, p 1.
[8] *Ibid* at pp. 3, 6-7.

[9] The microFIT Program was designed as part of the FIT program, as a streamlined program for small renewable energy projects of 10 kWh in size or smaller.[9] In order to administer the microFIT Program, as required by section 25.35(4) of the *Electricity Act*, the OPA established microFIT Rules in September 2009 to "outline the process for participating in the microFIT Program."[10]

[10] CSP's business fell within the scope of the microFIT Program.

[11] In evidence, the OPA conceded that it expected applicants to follow the microFIT Rules and that the OPA would administer the microFIT Program in accordance with those Rules.[11]

[12] The microFIT Rules evolved over time, as the microFIT Program was reviewed and amended.[12]

[13] While the microFIT Rules were revised over time, the version that is most relevant to the events giving rise to this action is Version 1.6. Version 1.6 came into force on December 8, 2010, and remained in force until it was replaced by Version 2.0 on July 12, 2012.[13]

The Positions of the Parties

[14] CSP claims that the OPA committed the tort of misfeasance in public office when it amended the microFIT Rules Version (the "Rules") Version 1.6 during a Scheduled Program Review (as defined in Rules Version 1.6) without providing 90 days' notice of the effective date of amendments. It submits that the OPA acted deliberately and unlawfully. Rules Version 1.6 was promulgated by the *Electricity Act,* and the OPA had intended to comply with Rules Version 1.6. CSP contends that the goal of this deliberate action was to reduce the number of applicants to the microFIT Program, and to reduce the price the OPA had to pay to successful applicants. It observes

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[9] microFIT Rules Version 1.6, December 8, 2010, Exhibit 1, JDB, Vol. 1, Tab 11, p 114. [microFIT Rules Version 1.6]
[10] *Ibid.*
[11] Cross-Examination of Sean Cronkright, November 26, 2018.
[12] In the evidentiary record, there are multiple versions of rules including microFIT Rules Versions 1.1, 1.3, 1.5, 1.6 and 2.0, which are found at Exhibit 8 (Rules 1.1) and Exhibit 1, JDB, Vol. 1, Tabs 9, 10, 11, 12. There were also references in Mr. Cronkwright's evidence in the bi-weekly report of December 13, 2013 to a microFIT 3.0 regime, Exhibit 1, JDB, Vol. 4, Tab 245.
[13] microFIT Rules Version 1.6, *supra* note 9, and microFIT Rules Version 2.0, July 12, 2012, Exhibit 1, JDB, Vol. 1, Tab 12. [microFIT Rules Version 2.0]

that the OPA was particularly concerned about the conduct of companies like CSP, although there is no evidence that CSP operated in any way contrary to the law. Finally, CSP submits that the OPA had knowledge of the harm that would result from the failure to give the required notice of rule changes. Accordingly, CSP requests that the Court finds the OPA committed public misfeasance. CSP seeks damages arising from this public misfeasance.

[15] The OPA takes the position that CSP was only concerned with the OPA's compliance with one rule, notably section 7(b). CSP overlooked the importance of other microFIT Rules, the Ministerial Directives, the Long-Term Energy Plan or the other circumstances that the OPA was required to consider as of October 2011.

[16] The OPA submits that CSP's claim is not made out on liability and damages, and that this action should accordingly be dismissed.

The Issues

1. Did the OPA's decision to announce on October 31, 2011, that a new pricing schedule and rule changes would apply to all microFIT application submitted after August 31, 2011 amount to an "unlawful act" or "improper purpose"?
2. If so, did the OPA act in bad faith with intent to cause harm to CSP, or with reckless disregard or willful blindness as to likely injure to CSP?
3. If so, can it be said that but for the OPA's conduct, CSP suffered the losses claimed?
4. If so, what damages arise by reason of the OPA's conduct?

Misfeasance in Public Office: The Legal Framework

[17] The leading authority in Canada is *Odhavji Estate v. Woodhouse.*[14] The tort is based on the rationale that the rule of law requires that executive or administrative powers "be exercised only for the public good and not for ulterior and improper purposes".[15]

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[14] *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263. [*Odhavji*]
[15] *Ibid* at para. 26.

[18] There are two constituent elements to the tort. First, there must be deliberate, unlawful conduct in the exercise of a public function. Second, there must be awareness on the part of the public agent or official that his or her conduct is unlawful and is likely to injure the plaintiff.[16]

[19] Common to each element of the tort is the requirement that the public official must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer.[17] An act may be unlawful because an official acted in breach of a statutory provision, or in excess of the powers granted, or for an improper purpose.[18]

[20] In *Odhavji* at para. 22, the Supreme Court held that the tort of misfeasance in public office can arise in one of two ways. It may arise by conduct that is "specifically intended to injure a person or class of persons", referred to as "Category A." Alternatively, it may arise where a public officer acts "with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff", referred to as "Category B." In either case, the essential elements that must be established include: (1) deliberate and unlawful conduct in the exercise of public functions, and (2) awareness that the conduct is unlawful and likely to injure the plaintiff.[19] The distinguishing feature between the two categories of the tort was described by Iacobucci J. in *Odhavji*, at para. 23, in this way:

> What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.

[21] The state of mind required to establish liability depends on which category the tort falls into. Category A involves "targeted malice", whereas the requirement of intentional misconduct for Category B may be satisfied by "reckless indifference as to the legality of the act or its probable

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[16] *Ibid* at para. 32.
[17] *Ibid* at para. 23.
[18] *Ibid* at para. 24.
[19] *Ibid* at para. 23.

consequences."[20] As established in *Odhavji*, "[a]t the very least...the defendant must have been subjectively reckless or wilfully blind as to the possibility that harm was a likely consequence of the alleged misconduct."[21]

[22] Misfeasance in a public office requires an element of bad faith or dishonesty.[22] There must also be awareness that the unlawful conduct would harm the plaintiff. As the Supreme Court of Canada in *Odhavji* noted, "liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question."[23]

[23] A "public office holder" has been defined in a "relatively wide sense", and a collective public body can be liable for the tort.[24]

[24] Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in law.[25]

Jurisprudence Specifically Related to the FIT and MicroFIT Rules

[25] The changes to the FIT and the microFIT Rules, at times material to this action, were considered in two motions to strike pleadings.

[26] In *Skypower CL 1 LP v. Ontario Power Authority*,[26] at para. 2, Chiappetta J. struck the plaintiffs' action seeking damages for misfeasance in public office under rule 21.01(3)(d) and 25.11, as it relates to the FIT Rules, as follows:

> For reasons set out below I have concluded that the plaintiffs' action retells a complaint and restates a legal claim previously considered and finally determined

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[20] *Lewis N. Klar et al., Remedies in Tort*, vol. 4, looseleaf (Canada: Carswell, 1987, updated in 2007) at p. 24-60.25 referring to *Three Rivers District Council v. Bank of England* (No. 3), [2002] 2 W.L.R. 1220 (U.K. H.L.).
[21] *Odhavji, supra* note 14 at para. 38.
[22] *Ibid* at paras. 26 and 28.
[23] *Ibid* at para. 29.
[24] *O'Dwyer v. Ontario Racing Commission*, 2008 ONCA 446, 293 D.L.R. (4th) 559, at para. 43. [*O'Dwyer*]
[25] *Odhavji, supra* note 14 at para. 32.
[26] *Skypower CL 1 LP v. Ontario Power Authority*, 2014 ONSC 6950.

> by another forum. It is therefore properly dismissed as an abuse of process. Further, the pleading is deficient and fails to disclose a reasonable cause of action. The defendants' motion is allowed.

[27] Chiappetta J. drew heavily from the decision of the Divisional Court unanimously dismissing the plaintiffs' application for judicial review in *Skypower CL 1 LP v. Ontario (Minister of Energy)*.[27] At para. 6, she found the claim relied upon the same factual matrix, and concluded that:

> The Plaintiffs therefore advance a different theory of unreasonable and unlawful conduct, a different cause of action and a different narrative in terms of why Ontario changed the eligibility criteria, priority ranking and assessment process of the FIT Program. In my view, although the claim is presented in a different forum and seeks damages, it is nonetheless substantively the same complaint put before the Divisional Court and in essence an attempt to re-litigate the complaint despite it being finally determined by the Divisional Court.

[28] Her reasoning was affirmed by the Court of Appeal.[28]

[29] In a motion to strike the within action, brought under rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, heard less than a month after the release of Chiappetta J.'s decision, Minnema J. considered a similar factual matrix involving the two year Scheduled Program Review, specifically as it pertained to the changes to the microFIT Program and pricing schedule announced by the OPA on October 31, 2011.[29]

[30] Although the Divisional Court's decision in *Skypower CL 1 LP v. Ontario Power Authority* was cited at para. 23-24 of his Reasons, Minnema J. quite properly applied the test on a motion to dismiss as expressed in *Trillium Power Wind Corp. v. Ontario (Ministry of Natural Resources)*, 2013 ONCA 683, 117 O.R. (3d) 721; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 17-19; *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, 111 O.R. (3d) 161, at para. 22. In dismissing the

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[27] 2012 ONSC 4979, 355 D.L.R. (4th) 168 (Div. Ct.).
[28] 2015 ONCA 427.
[29] *Capital Solar Power Corp. v. Ontario Power Authority*, 2015 ONSC 2116.

motion to strike, Minnema J. prophetically borrowed from the decision of Iacobucci J. in *Odhavji*, at para. 42:

> If the facts are taken as pleaded, it is not plain and obvious that the action for misfeasance in a public office against the defendant...must fail. The plaintiff...may well face an uphill battle, but...should not be deprived of the opportunity to prove each of the constituent elements of the tort.

[31] The OPA posits that the Divisional Court's unanimous ruling in *Skypower CL 1 LP v. Ontario (Minister of Energy)* by a three-member panel, on nearly the same factual matrix, is binding upon this Court. The Divisional Court considered the retroactivity and lawfulness of the same conduct of the OPA in applying the new FIT Rules Version 2.0 to existing applications under FIT Rules Version 1.0 that had not yet been reviewed.

[32] By contrast, CSP urges this Court to distinguish the Divisional Court *Skypower CL 1 LP v. Ontario (Minister of Energy)* decision, not just on the basis that the remedy sought at the Divisional Court was in the nature of *mandamus*, but also on the basis that CSP does not attack the changes to the microFIT Rules *per se*. Rather, CSP takes issue with the decision announced by the OPA on October 31, 2011 to implement changes as of August 31, 2011, which it submits amounts to an unlawful breach of section 7(b) of Version 1.6 of the microFIT Rules. Section 7(b) required the OPA to provide 90 days' notice of any amendment resulting from a Scheduled Program Review.

[33] The OPA takes issue with the allegation that the announcement of the Schedule Program Review on October 31, 2011, amounted to any amendment of the Rules at that time. In the evidence tendered through its only witness, the OPA admitted its failure to provide notice under s. 7(b); however, the OPA justified its decision on the basis of other authority which I will address in the Reasons below.

[34] Suffice to say, that although the Divisional Court *Skypower CL 1 LP v. Ontario (Minister of Energy)* decision is not plainly "on all fours" with the case before me, insofar as the parties are concerned, the remedies that are claimed, and the microFIT Rules that are at issue, I find that in determining the subsidiary issues pertaining to the OPA's conduct, the Divisional Court reasons are highly persuasive, in that they consider the lawfulness and retroactive application of the announcement made by the OPA on October 31, 2011. My Reasons will, to that extent, reflect

reliance upon the reasoning of the Divisional Court in *Skypower CL 1 LP v. Ontario (Minister of Energy)*.

The MicroFIT Rules and Application Process

[35] As previously noted, CSP relied upon the microFIT Rules Version 1.6 which came into force on December 8, 2010, until it was replaced by Version 2.0 on July 12, 2012. In particular, CSP relied upon section 7(b) of the Rules Version 1.6, as follows:

> Notice of any amendment as a result of a Scheduled Program Review will be posted on the microFIT Program website at least 90 days before the effective date of the amendment.[30]

[36] However, other sections provide necessary context to the application of section 7(b) in Version 1.6. Section 1.1 (Background to the microFIT Program), explicitly states that:[31]

> The primary objective of this document is to outline the process for participating in the microFIT Program. This process is designed to be efficient and streamlined for project Applicants, Local Distribution Companies (each an "LDC") and the OPA.

[37] The microFIT Rules define an Applicant as "the Eligible Participant who has submitted an Application form and will become the Supplier upon accepting a microFIT Contract"[32] as per the Eligible Participant Schedule,[33] which "primarily focused on non-commercial applicants."[34] As listed in the Schedule, Eligible Participants included a wide range of potential participants, such as individuals, farmers, renewable energy cooperatives, municipalities, LDC Participants, universities, schools or colleges, hospitals or long-term care homes, aboriginal communities, social housing and affordable housing or faith-based organizations.[35] Companies like CSP were not specifically included in the list of Eligible Participants.

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[30] Section 7(b), microFIT Rules Version 1.6, *supra* note 9 at p .126.
[31] *Ibid* at p. 114.
[32] *Ibid* at p. 127.
[33] *Ibid* at p. 128.
[34] microFIT Eligible Participant Schedule, Exhibit 1, JDB, Vol. 4, Tab 169, p 1859.
[35] *Ibid* at pp. 1859 – 1863.

[38] In terms of the application process itself, an applicant to the microFIT Program could apply by completing an online application. Each version of the Rules provided an essential step: the OPA had to review each application for eligibility prior to a Conditional Offer being issued.[36]

[39] Section 1.2 of the microFIT Rules Version 1.6 provides an overview of the steps in the application process:[37]

> **1.2 Overview of the microFIT Program**
>
> The following outlines the key steps of the microFIT Program:
>
> 1. An Applicant will apply for a microFIT Contract using the online application form available on the microFIT Program website. Information collected from the Application will be provide to the applicable LDC and may be shared with other relevant industry agencies and government ministries (e.g. the Ministry of Energy and Infrastructure).
>
> 2. When an Application for a microFIT Project is submitted, a Reference Number is issued for the microFIT Project. The Reference Number will be used by the Applicant, the LDC and the OPA as a primary means of identifying the microFIT Project through the connection and contracting process.
>
> 3. **The OPA will review each Application to ensure that the microFIT Project meets the microFIT Program's eligibility requirements. If the microFIT Project meets the program eligibility requirements, the OPA will await confirmation from the applicable LDC that the Offer to Connect has been issued by the LDC.** [Emphasis added].
>
> 4. Where the Applicant is not an LDC, the Applicant will make a Connection Request to the LDC for the connection of the microFIT Project using the LDC's generation connection request form. The Applicant must include the applicable microFIT Project Reference Number on the form to identify the project.
>
> 5. The OPA will provide the Applicant a "Conditional Offer of microFIT Contract" only if the LDC has issued an Offer to Connect. The Conditional Offer of microFIT Contract will expire in 6 months if the conditions of the offer are not satisfied.

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[36] Exhibit 1, JDB, Vol. 1, Tab 112, p 114 (Section 1.2(3).
[37] microFIT Rules Version 1.6, *supra* note 9.

[40] Sections 3.1 (d) (e) and 3.2(a) further confirm that the eligibility review is a necessary pre-condition to a Conditional Offer from the OPA:

> d) The OPA will review the Application to confirm that the project meets the microFIT Program eligibility requirements as set out in Section 2 of this document. The OPA may ask for additional clarification with respect to the Application, if required. The OPA's target for processing Applications is 60 days following the submission of a complete Application.
>
> e) Upon completion of the review of eligibility requirements, the OPA will notify the applicant that in order for the application to proceed, the applicant must request and receive an Offer to Connect from the LDC.
>
> **3.2 Conditional Offer of microFIT Contract**
>
> a. If the OPA determines that the Application meets the microFIT Program eligibility requirements, then the OPA will issue the Applicant a Conditional Offer of microFIT Contract. The OPA will not issue a Conditional Offer of microFIT Contract unless the LDC has issued the Offer to Connect.

[41] In regard to the Contract Price for any microFIT Project, section 2 of the microFIT Rules provides that it will correspond to the FIT Price Schedule in effect on the date of the Conditional Offer of the microFIT Contract.

[42] In my opinion, consistent with the evidence considered below, the effect of section 7(b) and in particular, the application of any particular price schedule cannot be understood in a vacuum, or without regard to key steps in the microFIT Program, as outlined in section 1.2 "Overview of the microFIT Program", and section 3 respecting the Application, Conditional Offer and Connection.

The Evidence Pertaining to the Issues

1. **Was there deliberate unlawful conduct on the part of the OPA likely to injure the CSP?**

André Deschamps and Angela Monette

[43] Mr. Deschamps testified as to the history leading up to the incorporation of CSP. He noted his success as an entrepreneur of various small businesses including as a proprietor of a printing

business, as a disc jockey, and as the owner of a cleaning and renovation enterprise, which he operated with Ms. Monette until opening CSP.

[44] Mr. Deschamps was introduced to the microFIT Program through one of his acquaintances in 2010 and was made aware of the potential business opportunities. He investigated the opportunity and business potential over the course of a few months, relying on his friend, an engineer, for technical details. According to his assessment and considering the rates paid for the microFIT projects, he concluded that the microFIT Program presented a good financial opportunity.

[45] Mr. Deschamps conceded that neither he nor Ms. Monette had any prior experience in the solar power industry and in the renewable energy sector in Ontario. They had not worked with government entities such as the OPA, quasi-governmental organizations such as the Electrical Safety Authority and the Ontario Energy Board, nor had they previously dealt with LDCs such as Hydro One, Hydro Ottawa and the Ottawa River Power.

[46] When cross-examined on his lack of experience in the renewable energy sector, and on his ability to run a business in that sector, Mr. Deschamps explained that the solar power business, although different from previous businesses he had engaged in, made money in the same manner: it required him to "knock on doors" and sell the product to customers. Although aware that he had much to learn, he believed that he could operate the business based on his many years of experience as an entrepreneur.

[47] Consequently, he and Ms. Monette decided to sell their cleaning business for $150,000, and use the proceeds to start CSP. The plan was to focus on the microFIT market, and sell to homeowners, farmers, and small businesses, taking advantage of the simplified application process, and the stability that the program was intended to offer.

[48] Mr. Deschamps was responsible for sourcing customers and suppliers while Ms. Monette ran the rest of the business including office management, human resources, customer relations, review of the microFIT Rules, and administration of the application process.

[49] CSP was incorporated and commenced operations in 2010, shortly after which the business began selling solar systems. Mr. Deschamps and Ms. Monette testified that, at the early stages, in

2010 and 2011, CSP advertised its services through print mail, word of mouth, or by knocking on doors.

[50] This is evidenced by an old CSP customer list of leads generated in 2010 and prior to August 2011 through the different advertising methods.[38] The list both identified potential customers that did not retain CSP to submit an application to OPA on their behalf, as well as those who authorized CSP to submit an application on their behalf.

[51] In 2010, the business generated sales revenues of $341,188. In 2011, sales revenues tripled to approximately $1,137,646.[39]

[52] Mr. Deschamps testified that the price paid for microFIT projects, prior to August 31, 2011, strongly encouraged customers interested in solar power projects to go ahead with an application.

[53] Mr. Deschamps and Ms. Monette anticipated a Scheduled Program Review of the microFIT Program, including the Price Schedule in effect, as its two year anniversary was approaching in September 2011. As such, it was important for CSP to submit applications to the OPA from as many interested customers as possible, in order for them to benefit from the higher pricing before the Scheduled Program Review was commenced. In an effort to attract customers interested in purchasing solar panel systems, CSP bought radio advertisements on stations in the Ottawa region in the late summer of 2011.[40]

[54] The advertisements themselves did not contain information regarding the OPA, the microFIT Program, the cost of a solar system, the estimated return on investments or the amortization period. CSP advertised that customers could earn up to $1,000 on a monthly basis with a 10 kWh system.

> "Earn up to one thousand dollars a month for 20 years."[41]

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[38] Exhibit 1, JDB, Vol. 2, Tab 64.
[39] Exhibit 1, JDB, Vol. 3, Tab 154, p. 1588.
[40] Capital Solar Radio Campaign, Exhibit 1, JDB, Vol. 1, Tab 59, p 592.
[41] *Ibid.*

> "Up to one thousand a month. Guaranteed. Think about what you could do with a thousand dollars a month. Pay your mortgage AND your Hydro bill. Go on a shopping spree. Take a vacation…every month!"[42]

[55] In cross-examination, Mr. Deschamps stated that he had not received the $1,000 per month figure from the OPA, but rather that it had been calculated by CSP for the radio campaign.[43] Neither Mr. Deschamps nor Ms. Monette explained how the potential earnings per month were calculated, and this was not apparent in the ads.

[56] The advertisements also directed potential customers to the CSP website. During cross-examination, it was Ms. Monette's evidence that the CSP website displayed information regarding solar power projects, pricing, return on investment, the application process, CSP itself, and the microFIT Program. If interested, the customer then had to fill out a form and provide information to CSP. This would authorize CSP to submit an application to the OPA on behalf of the customer. Ms. Monette testified that some customers provided sufficient information through CSP's website to allow CSP to make an application to the OPA without speaking to the customer. Many, however, had difficulty with their property identification number (or PIN). This required CSP's staff to speak to many of the customers before putting their applications into the system.

[57] As a result of the successful advertising campaign, more than 250 potential customers signed up and provided their information to CSP. Their microFIT applications were largely completed before October 1, 2011. Ms. Monette testified that, as she believed the OPA was required to conduct a Scheduled Program Review after two years and the program had been launched on September 30, 2009, the review would start on October 1.

[58] Upon submitting applications to the OPA on behalf of its customers, CSP received a microFIT application number. CSP then made haste to submit applications to the various LDCs. CSP submitted applications to LDCs prior to and after the October 31, 2011 announcement by the OPA. Ms. Monette elaborated that they continued to submit applications to LDCs subsequent to the Scheduled Program Review announcement because:

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[42] *Ibid* at p. 593 – 594.
[43] *Ibid* at p. 592 – 594.

a. they were uncertain how long the review would take, or what the result would be, and they wanted to be prepared in the event the OPA restarted the program;

b. getting an Offer to Connect from an LDC had been, up to that point, the major hurdle in obtaining a Conditional Offer for a contract from the OPA. It therefore made sense to continue to attempt to obtain Offers to Connect; and

c. CSP felt it had an obligation to its clients to continue to move their applications forward – to represent their interests.

[59] CSP submits that, had it not continued to submit applications to the LDCs, the OPA's position would have been that there was no evidence of sufficient room for the customers on the power grid, and that CSP had abandoned its customers after submitting the applications to the OPA. Ms. Monette testified that by the October 31, 2011 announcement, CSP had obtained a minimum of 139 Offers to Connect out of the 250 or more potential customers who had responded to the Radio advertisement campaign.

[60] Ms. Monette confirmed that the applicants who received Offers to Connect were still awaiting approval or confirmation of eligibility for the microFIT Program from the OPA.

[61] The OPA contends that the Radio Ad applicants could not be considered customers, as they had not yet retained CSP – they had simply provided sufficient information for CSP to submit an application to the microFIT Program on their behalf. They had not yet paid any deposits to CSP. They were, at best, potential customers that expressed interest by inputting their personal information on CSP's website. Moreover, the OPA stresses that those applicants had not been reviewed for eligibility by the OPA, nor had they received notice of a Conditional Offer from the OPA.

[62] Mr. Deschamps and Ms. Monette both testified that they hoped the OPA's response to the alleged negative public reaction arising from the October 31, 2011 announcement would be similar to that generated by its July 2, 2010 announcement regarding retroactive changes to the ground-mount solar systems.

[63] On July 2, 2010, the OPA had announced a proposal for a new price category for ground-mount solar microFIT projects.[44] The new pricing was to apply to any applications that had been submitted, but had not received a microFIT contract or a Conditional Contract Offer.[45] The OPA also announced a 30 day consultation period during which it received significant negative feedback regarding the new price category. As a result of the proposed new pricing, customers cancelled orders and requested refunds from suppliers and/or installers. One company had business drop by 50% due to the price change. Businesses that had built up an inventory based on the old pricing, suddenly faced unanticipated cancellation of customer orders.[46] In response to the announced changes, the OPA received requests to grandfather in existing applications. [47]

[64] As a consequence, the OPA decided to grandfather in existing applications submitted prior to the July 2, 2010 price change announcement, when it subsequently announced the program change on August 13, 2010. [48]

[65] Mr. Deschamps and Ms. Monette testified that they had been aware of this sequence of events as they were in the industry and had their own ground-mount application "in the queue." They testified that they took this sequence of events as evidence of how the OPA would likely handle a similar situation in the future, should it arise.

[66] I find that Mr. Deschamps and Ms. Monette fully expected that the OPA would reverse course on any announced price change to the microFIT Program, and grandfather in any pending applications, including those of the Radio Ad applicants. Therefore, with the assistance of their accountant, they produced a Business Plan in March 2012 which was used to seek bank financing to support ongoing operations. They ultimately secured $125,000 out of a requested sum of $250,000 requested. They also secured the additional financial backing of an investor who contributed a further $250,000 towards anticipated ongoing and expanded operations.

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[44] News Release, July 2, 2010, Exhibit 1, JDB, Vol. 4, Tab 165, p 1850.
[45] *Ibid.*
[46] Teleconference Summary, July 6, 2010, Exhibit 1, JDB, Vol. 4, Tab 167, p 1855.
[47] *Ibid.*
[48] News Release, August 13, 2010, Exhibit 1, JDB, Vol. 4, Tab 168, p 1856.

[67] I note that Mr. Deschamps was unable to explain, however, the reason for a personal withdrawal of $250,000 on December 31, 2012 at or about the time CSP received the investor's contribution, as appears in the CSP Balance Sheet.[49]

[68] Although Mr. Deschamps, and more so Ms. Monette, testified as to their understanding of the microFIT Rules, Mr. Deschamps' evidence was that he did not read certain key parts of the microFIT Rules. Mr. Deschamps appears to have overlooked other important sections. Mr. Deschamps conceded that he had not read the following:

- the sections providing that the OPA was to conduct an eligibility review on any application before making a Conditional Offer;[50]
- the sections providing that the contract price for the microFIT project would correspond to the price in effect on the date of the Conditional Offer a microFIT Contract;[51]
- the section providing that all applications and requests would be prepared at the sole cost and expense of the applicant and that neither an LDC nor the OPA would be liable to pay any applicant costs or expenses under any circumstances,[52]
- the section providing that the OPA reserved the right to cancel all or any part of the microFIT Program at any time and for any reason or to suspend the microFIT Program in whole or in part for any reason in each case without any obligation or any reimbursement to the applicants;[53] and
- the section providing that, notwithstanding anything contained in the Rules, the OPA could reject any application whether or not completed properly and whether or not it contained all necessary information.[54]

Sean Cronkwright

[69] Mr. Cronkwright was the Director of Renewables Procurement at the OPA between November 2010 and December 2016. He testified in detail as to the enumerated objects of the OPA as set out at s. 25.2(1) of the *Electricity Act*, and the focus of his department on promoting

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[49] Exhibit 1, JDB, Vol. 3, Tab 150.
[50] microFIT Rules Version 1.6 *supra* note 9, sections 1.2 (3), 2.1, 3.1(c), 3.1(d), 3.1(e).
[51] *Ibid*, Sections 1.2 (13), 5.2(a).
[52] *Ibid*, Section 6.1(c).
[53] *Ibid*, Section 6.1(d).
[54] *Ibid*, Section 6.1(e).

conservation, long-term planning for energy supply and procurement and, in particular, renewable energy sources including solar power.

[70] In my opinion, Mr. Cronkwright gave an authoritative and even-handed review of the application of the FIT and microFIT Rules, as well as a chronology of the major developments in the renewable energy sector between late 2010 and July 2012. This is critical to an understanding of the changes in government policy affecting the FIT and microFIT Program leading up to and including the two year Scheduled Program Review in 2012.

[71] While acknowledging awareness of the rise of commercial entities like the CSP, Mr. Cronkwright testified that the focus of the OPA was on non-commercial eligible participants, who applied to the OPA for 20 year contracts for the supply of solar power, so long as they met eligibility requirements. His evidence made it plain that the eligibility review by the OPA was a condition precedent to provision of a Conditional Contract to any applicant.

[72] In addition, Mr. Cronkwright testified that, only after the eligibility review was completed by the OPA within a targeted 60 day processing period following submission of the online application, per 3.1(d) of the microFIT Rules, would any applicant be directed to apply to an LDC for an Offer to Connect. Only after the LDC provided online notice of the Offer to Connect would the OPA then issue a Conditional Contract.

[73] Acknowledging the haste made by CSP in September 2011 to secure as many as 139 Offers to Connect from an LDC pending consideration of online applications submitted to the OPA following the Radio Ad campaign, Mr. Cronkwright testified that, if an applicant applied to the LDC prior to having the application reviewed for eligibility by the OPA, this was outside of the purview of the microFIT Program, as per s. 3.1(d) and (e) and 3.2(a) of the Rules.

[74] In accordance with the Agreed Statement of Facts (Exhibit 3), Mr. Cronkwright confirmed that on November 23, 2010, the Ministry of Energy publicized the Government of Ontario's Long-Term Energy Plan,[55] which set out a new target for renewable energy development in Ontario:[56]

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[55] Exhibit 1, JDB, Vol. 1, Tab 2, pp. 8 – 44 (date listed on p.41).
[56] Long-Term Energy Plan, Exhibit 1, JDB, Vol. 1, Tab 2, p. 24.

The Plan

> Ontario will continue to develop its renewable energy potential over the next decade. Based on the medium growth electricity demand outlook, a forecast of 10,700 MW of renewable capacity (wind, solar and bioenergy) as part of the supply mix by 2018 is anticipated. This forecast is based on planned transmission expansion, overall demand for electricity and the ability to integrate renewables into the system. This target will be equivalent to meeting the annual electricity requirements of two million homes.

[75] The Long-Term Energy Plan also forecasted the two year program review and a price reduction:[57]

> As part of the scheduled two-year review of the FIT Program in 2011, the FIT price of renewables in Ontario will be re-examined. Successful and sustainable FIT Programs in a number of international jurisdictions (such as Germany, France and Denmark) have decreased price incentives. Advances in technology and economies of scale reduce the cost of production. A new price schedule will be carefully developed to achieve a balance between the interests of ratepayer and the encouragement of investment in new clean energy in Ontario.

[76] The FIT Program Review was to address a range of issues, including a review of the microFIT Program. Specific to the microFIT Program, the issues included microFIT price reduction, maintaining a balance with ratepayer interests, the long-term sustainability of clean energy procurement and continuing to build on the success of Ontario-based manufacturing and clean energy job creation. The FIT Program Review was also to provide for stakeholder consultations and representations.[58]

[77] In its February 17, 2011 Directive, the Minister of Energy required the OPA to plan for a target of 10,700 MW of non-hydroelectric renewable energy procurement.[59] However, the OPA quickly realized by mid-2011 that the number of submitted applications that had not yet received conditional offers or contracts for microFIT projects was such that it would exceed the set target of 10,700 MW.

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[57] *Ibid,* p. 25
[58] Exhibit 1, JDB, Vol. 4, Tab 175, p. 1880.
[59] Exhibit 1, JDB, Vol. 1, Tab 3, p. 47.

[78] Mr. Cronkwright testified that this not only presented a capacity problem, but also with the cost of solar panels dropping, the global cost associated with energy production was also too high for ratepayers.

[79] Mr. Cronkwright observed that the OPA considered feedback from key stakeholders groups. Entities like CSP fell within the scope of "contractors and aggregators" and, therefore, were included in the stakeholder consultations.

[80] By Directive issued April 5, 2012, and as confirmed in evidence by Mr. Cronkwright[60], the Minister of Energy, Chris Bentley, directed the OPA to implement changes to the FIT and microFIT Programs in keeping with policy changes to reduce prices paid to applicants found eligible to participate in the FIT and microFIT Programs; to reduce prices to reflect lower costs; and to develop a transitional process giving precedence to applications, including those of CSP, submitted between September 1, 2011 and October 31, 2011.

[81] Mr. Cronkwright was pressed in cross-examination to acknowledge the admission he made at his Examination for Discovery on May 12, 2016,[61] that the OPA had not followed its own Rules of process by failing to provide 90 days' notice of the cut-off date for consideration of applications submitted after August 31, 2011 and before the announcement on October 31, 2011. Mr. Cronkwright qualified his answer by pointing out that the OPA complied with the sections in relation to a contract and Conditional Offer, and with the various directives in effect with which the OPA was obliged to comply.

[82] He peripherally addressed the apparent change of direction taken by the OPA after the July 2010 recommendations were put to the Minister to retroactively lower rates paid for ground-mount solar systems. While he was not acting in the role of Director of Renewables Procurement when the OPA announced price changes to ground-mount solar systems, he noted that after October 31, 2011, one of the objectives of the working groups established in relation to the Scheduled Program Review was to look at historical pricing of solar systems with a view to making recommendations to the Minister of Energy. In that context, his team examined the circumstances pertaining to rate

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[60] *Ibid,* Tab 7, p. 56, 59-60, and 63.
[61] Questions 479-481.

changes proposed to the Minister for ground-mount solar systems, in order to better understand the options that could be considered. He learned that, despite a recommendation made by the OPA to the Minister to drop prices from 0.802 cents/kWh to 0.404 cents/kWh for ground-mounts, the Minister of Energy directed that a lower price reduction be put in place instead of that which was proposed by the OPA, in keeping with the Minister's prerogative to do so. The OPA thus reversed course on August 13, 2010 and passed new ground-mount pricing, but allowed everyone with an application submitted before the date of the announcement to receive the old pricing.[62]

[83] Mr. Cronkwright was vigorously cross-examined as to the suggestion that the OPA acted in bad faith by selecting a cut-off date of August 31, 2011 for microFIT applications that would be paid the higher rate of 0.802 cents/kWh, so as to favour a reduction in prices paid by the ratepayers and to discourage the excess of solar energy supply over demand targeted by the Minister's Long-Term Energy Plan. Mr. Cronkwright offered no strong resistance to a number of propositions put to him, notably:

- The OPA did not, after November 2010, resile from the Minister's stated intention to provide a stable investment environment in which companies were aware of the Rules and had the confidence to invest in the production of renewable energy, as announced on September 24, 2009 – the same day the Minister issued a Directive to the OPA to develop a feed-in-tariff (FIT) program.[63]

- As revealed by the Minister's internal Q and A memo of November 2, 2011 copied to OPA team members[64] in relation to possible public messaging when seeking stakeholder feedback to contemplated price reductions for microFIT applications, the Minister hoped by the changes made to achieve a balance between the interests of the ratepayer and the investment in clean energy. The OPA was, at the same time, fully aware of the number of applications, in the "tens of thousands", sitting in queue which were submitted by companies like the CSP. This was despite consumer protection concerns about

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[62] Exhibit 1, JDB, Vol. 4, Tab 168, p. 1856.
[63] *Ibid*, Tab 162.
[64] *Ibid*, Tab 176.

representations made to microFIT applicants about high returns on investment in solar energy by companies like CSP.

- While the OPA knew that a class of applicants would be affected by the October 31, 2011 announcement, the OPA recommended that the Minister choose a "middle ground" or the second of three options considered, with a cut-off date of August 31, 2011. This option would come at some disadvantage to ratepayers, as it would grandfather in approximately 8,000 more applications at the old pricing that had not received a Conditional Offer. This option was favoured because it was perceived to be fair treatment of "legacy" applications backlogged in the system for 60 days or more awaiting eligibility review by the OPA or an Offer to Connect from an LDC under the old pricing[65]. At the same time, the OPA considered the price savings to ratepayers by analyzing the impact of various price reductions[66] and options for implementation of the changes[67]. To address consumer protection concerns, the OPA introduced the new Applicant Declaration, to ensure all applicants had information pertaining to the Rules and had password access to their own applications. Finally, to monitor the uptake on applications, the OPA introduced, as of October 2012, the Bi-weekly microFIT Report, documenting the impact of applications in progress towards the 2012 procurement target[68].

- The OPA did not cancel or suspend the microFIT Rules, as was open for it to do under Version 1.6 of the Rules. Instead, the OPA pressed forward with the Scheduled Program Review as announced to the public on October 31, 2011. The OPA sought and received stakeholder feedback by electronically submitted forms[69] up to December 14, 2011, further to a Webinar presented November 2, 2011[70]. Indeed, one such form was received from CSP, in addition to correspondence CSP sent to the OPA's Board of Directors[71] taking issue with the changes proposed for pending applications, including those submitted after

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[65] *Ibid*, Tab 170.
[66] *Ibid*, Tab 172.
[67] *Ibid*, Tab 181.
[68] *Ibid*, Tab 220.
[69] *Ibid*, Tab 187.
[70] *Ibid*, Tab 175 and 177.
[71] *Ibid*, Tab 190.

the Radio Ad campaign. However, the OPA received competing requests, including from consumer associations, pressing for ratepayer reductions.

2. Was the OPA aware that its conduct was unlawful and likely to injure CSP?

[84] CSP takes the position that it was open to the OPA to comply with section 7(b), as it had done so in relation to the ground-mount applications in August 2010. CSP argues that the OPA could have chosen to process applications to the microFIT Program submitted after August 31, 2011, within the 60 day processing time contemplated by the Rules.

[85] CSP relies upon the admission made by Mr. Cronkwright that the OPA considered all of the Rules, and understood it was not providing the 90 days' notice under section 7(b) by imposing a cut-off date of August 31, 2011, for the old pricing.

[86] The justification offered by the OPA for doing so was that the microFIT Program was so over-subscribed that it was in danger of procuring too much energy, and that the OPA was obliged to follow Ministerial Directives in keeping with the Minister's Long-Term Energy Plan of November 2010, and the Mixed Supply Directive of February 2011. CSP submits that neither of these explanations should justify the OPA's conduct or excuse the breach of the section 7(b) as:

a. the pending applications in question totalled 56 MW.[72] The OPA's target for 2018 was 10,700 MW.[73] Therefore, the applications, even if they were all completed (which they would not have been) represented approximately one-half of one percent of the OPA's procurement target. By contrast, the OPA had approximately 2,900 MW of FIT projects under development[74] – more than 50 times the size of the microFIT projects in question; and

b. none of the directives identified by the OPA prohibited the OPA from offering the lower pricing to applicants between August 31, 2011 and October 31, 2011, or required the OPA to stop processing microFIT applications between August 31, 2011 and October 31, 2011.

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[72] Treatment of microFIT Applications, October 27, 2011, Exhibit 1, JDB, Vol. 4, Tab 172, p 1873.
[73] Supply Mix Directive, February 17, 2011, Exhibit 1, JDB, Vol. 1, Tab 3, p 47.
[74] Two-Year Review Report, March 22, 2012, Exhibit 1, JDB, Vol. 4, Tab, 184, p 1926.

[87] CSP argues that there can be no debate that the OPA anticipated the harm that would be occasioned to CSP and others, as a result of their breach of the microFIT Rules. CSP posits that the OPA intentionally aimed to reduce the price paid to microFIT applicants and companies serving this customer base like CSP, as it would reduce the numbers proceeding with the program. CSP submits that Mr. Cronkwright's evidence and the documentation support this argument.

[88] Further, CSP submits that the OPA was specifically aware of its existence as its contact information was found on all the applications submitted on behalf of its customers.[75] Mr. Cronkwright also agreed that the OPA developed and introduced the Applicant Declaration form on July 12, 2012 in response to the operation of businesses like that of CSP.[76]

[89] CSP had also submitted feedback to the OPA before July 12, 2012 advising the OPA that the decision to deny the old prices for microFIT applications submitted between August 31 and October 31, 2011, would adversely affect their business, their customer relations, and their customers.[77] As Mr. Cronkwright admitted, the OPA had also received similar feedback from others. CSP submits that the OPA was, therefore, aware of the harm the change to pricing would cause.

[90] I do not fail to note that the feedback provided by CSP was similar to the feedback that the OPA had received when it considered changing the ground-mount price retroactively. Summaries of consultation discussions produced by the OPA show that they had received requests to grandfather in existing applications, and that there was significant impact on businesses as a result of the announced change.[78]

[91] CSP submits that the harm caused by the OPA's conduct was established in evidence by the fact that, out of approximately 11,500 applications pending prior to the enactment of Rules Version 2.0 in July 2012, only 2,201 were resubmitted under the new Rules. The OPA, however, stresses that of the 6,250 applicants that submitted microFIT applications between September 1,

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[75] For example, see: microFIT Application on behalf of Robert and Kim Love, Exhibit 1, JDB, Vol. 1, Tab 29, p 298.
[76] Applicant Declaration Form, Exhibit 2, Tab 50.
[77] Feedback Submission Form, May 2, 2012, Exhibit 1, JDB, Vol. 4, Tab 187, p 1982.
[78] Summary, July 6, 2010, Exhibit 1, JDB, Vol. 4, Tab 167, pp. 1854-1855.

2011 and October 31, 2011, about a third or 2,201 resubmitted their applications in accordance with the microFIT 2.0 Rules.

[92] The OPA reminds this Court that the Supreme Court in *Odhavji* held that the tort of misfeasance in public office is based on the rationale that the rule of law requires that executive or administrative powers "be exercised only for the public good and not for ulterior and improper purposes".[79] Bad faith or dishonesty is an essential ingredient of the tort of misfeasance in public office, and "the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office."[80]

[93] As such, the OPA echoes the suggestion made in *Powder Mountain Resorts Ltd. v. British Columbia*[81] that courts exercise caution when determining whether a claim satisfies the requirements of the tort of public misfeasance.

[94] Mr. Cronkwright's evidence, coupled with the documentary record, addressed the question of whether or not the OPA acted with awareness that its conduct was unlawful and likely to injure CSP.

[95] Mr. Cronkwright testified that the OPA carefully considered the treatment of microFIT applications in 2011 in view of the approaching Scheduled Program Review, and aimed to achieve the appropriate balance among competing interests. The OPA had determined that the costs to the ratepayer and returns on investment to electricity suppliers were too elevated as a result of the industry evolving, making renewable energy projects more affordable.

[96] Mr. Cronkwright testified that it was also important to treat all applications in a similar fashion as it was a standardized program. Applications to the FIT program that had not yet been processed were to be processed under the new Rules. Therefore, microFIT applications that had not yet been processed also had to be subject to the new Rules. In an effort to ensure consistency

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[79] *Odhavji, supra* note 14 at para. 26.
[80] *Ibid,* at para. 28.
[81] *Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619, 94 B.C.L.R. (3d) 14, at para. 2.

with the FIT Program, the OPA selected a cut-off date of August 31, 2011 for applications processed under the old Rules with the old pricing.

[97] Mr. Cronkwright pointed to the fact that there was a 60-day backlog between the time when an application was submitted and when an application would be reviewed by the OPA, which had formed due to the overwhelming amount of applications. As of October 27, 2011, there were 216 applications from 2010, 8,135 applications submitted between January 1, 2011 and August 31, 2011 and approximately 6,000 applications that had been submitted between September 1, 2011 and October 31, 2011:[82]

[98] The decision-making process and rationale in response to the circumstances was documented by the OPA in a memorandum prepared on August 17, 2011 and updated as late as October 27, 2011. As explained Mr. Cronkwright, three options were open to the OPA[83]:

- Option 1: applications that had not yet received a Conditional Offer prior to the Scheduled Program Review announcement would be subject to the new Rules [and new pricing].

- Option 2: applications that were not yet in process prior to the Scheduled Program Review announcement would be subject to the new Rules [and new pricing].

- Option 3: applications submitted after the Scheduled Program Review announcement would be subject to the new Rules [and new pricing].

[99] When assessing the three options, the OPA reasoned that Option 1 would have prevented any applicants from having the higher pricing, unless the applicant had secured a Contract or a Conditional Offer. However, Option 1 complied with the microFIT Rules that provided that an applicant would receive the price in effect at the time a Conditional Offer was made.

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[82] Exhibit 1, JDB, Vol. 4, Tab 172, p 1873.
[83] See Appendix 'E' to the defendant's Closing Submissions, for graphics summarizing the options and the ramifications of each option.

[100] Option 2 was noted to ensure equal treatment of similar applicants while managing ratepayer impact – it allowed applications received between January 1, 2011 and August 31, 2011, to be subject to the old Rules.

[101] Mr. Cronkwright testified that Options 2 and 3 both presented disadvantages to the ratepayer, as a greater number of applications would be grandfathered in and favoured with the old and higher pricing, despite the fact that the cost of installation and materials had decreased significantly.

[102] However, the Ministry of Energy directed the OPA to implement Option 2 as it was perceived to be the "middle ground" which struck a balance between the interests of the ratepayer and electricity supplier, and fell within the mandate delegated to it by the Minister of Energy.

[103] When assessing the options in its Cost Analysis, the OPA assumed that microFIT pricing would drop by as much as 25%:

Cost Analysis

	microFIT apps (after August 31) at current pricing	microFIT apps at 15% degression	microFIT apps at 20% degression	microFIT apps at 25% degression
MWs	56 MW	56 MW	56 MW	56 MW
Ratepayer Impact (million)	$568	$483	$455	$426
Ratepayer Value (million)		$85	$114	$142

(As of Oct 27, 2011)

[104] Mr. Cronkwright testified that $142,000,000 was the present-value of savings the ratepayers would realize with Option 2, if the pricing dropped by 25%.[84]

microFIT 2.0 2012 Price Schedule

Fuel	Project Size Tranche	Original microFIT price (¢/kWh)	New microFIT price (¢/kWh)	% Change from Original Price
Solar Rooftop	≤ 10 kW	80.2	54.9	-31.5%
Solar Ground Mounted	≤ 10 kW	64.2	44.5	-30.7%
Wind	All Sizes	13.6	11.5	-14.8%
Water	≤ 10 MW	13.1	13.1	0%
Biomass	≤ 10 MW	13.8	13.8	0%
Biogas On Farm	≤ 100 kW	19.5	19.5	0%
Biogas	≤ 500 kW	16.0	16.0	0%
Landfill Gas	≤ 10 MW	11.1	11.1	0%

[105] The evidence at trial established that the price paid to microFIT applicants actually dropped from 0.802 cents/kWh to 0.549 cents/kWh, representing a drop in price of 31.5%.[85] Between September 1, 2011 and October 27, 2011, a total of 56 MW of applications had been submitted to the OPA for microFIT projects. Accordingly, corresponding savings to the ratepayers of Ontario amounted to $178,920,000 with Option 2.[86]

[106] The OPA submits this reality responds to the attempt made on behalf of CSP to minimize savings by dividing them among the Ontarian population.

[107] Mr. Cronkwright provided detailed and cogent evidence about the Scheduled Program Review undertaken after two years. He noted that on October 31, 2011 the Government of Ontario made the announcement regarding the Two Year Review. The OPA also announced that a review

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[84] Exhibit 1, JDB, Vol. 4, Tab 172, p 1875.
[85] *Ibid*, Tab 186, p 1978.
[86] This figure was calculated by taking the original cost of the 56MW ($568M) multiplied by the percentage price drop of 31.5%, which totals $178.92M.

of the FIT Program, including the microFIT Program stream was to take place, and that new prices and Rules would be enacted to balance the interests of ratepayers with the need to encourage investments in clean energy in Ontario.[87]

[108] He explained that microFIT applications that had been submitted up to August 31, 2011, were to be processed under the existing Rules and pricing schedule,[88] while microFIT applications submitted after August 31, 2011 would be subject to the new microFIT Rules and pricing schedule. The review was not to impact existing contracts and conditional offers.[89]

[109] He reasoned that the Two Year Review was to address a broad range of issues, including sustainable FIT pricing and the FIT Program objectives of maintaining a balance with ratepayer interests, the long-term sustainability of clean energy procurement and continuing to build on the success of Ontario-based manufacturing and clean energy job creation. The FIT Program Review was also to include stakeholder consultations and representations.[90]

[110] As such, the Government published a detailed report entitled "Ontario's Feed-in Tariff Program Two-Year Review Report" on March 19, 2012.[91] The Review Report was prepared by Deputy Minister Fareed Amin, and notified the public that:[92]

> We made every effort to develop final recommendations that would balance the interests of all Ontarians, recognizing ratepayers, community participants and the renewable energy sector.

[111] As mentioned previously, Mr. Cronkwright testified that the OPA considered feedback from key stakeholders. As stated in the Two Year Report[93], the OPA and the Minister of Energy undertook a broad outreach process for stakeholders to participate in the review process. These stakeholders included, but were not limited to: project developers, homeowners, farmers and landowners, aboriginal and community groups, associations, businesses, contractors and

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[87] Exhibit 1, JDB, Vol. 4, Tab 175, p. 1880.
[88] *Ibid.*
[89] *Ibid.*
[90] *Ibid.*
[91] *Ibid,* Tab 184, pp. 1923-1953.
[92] *Ibid,* Tab 184, pp. 1925.
[93] *Ibid,* Tab 184, p. 1934.

aggregators, manufacturers and retailers, investors, municipal, university school and hospital sector, local distribution companies and consumer/ratepayer protection groups.[94]

[112] Mr. Cronkwright testified that, on April 5, 2012, the Minister of Energy, Mr. Chris Bentley, provided the following direction to the OPA:[95]

> **Direction**
>
> Pursuant to the authority I have, as Minister of Energy, under sections 25.32 and 25.35 of the *Electricity Act, 1998*, I hereby direct the Ontario Power Authority (OPA) to continue the Feed-in-Tariff (FIT) and microFIT Programs developed pursuant to the direction issued September 24, 2009 subject to such amendments as may be required in order to implement the policies set out below:
>
> **Reducing Prices to Reflect Lower Costs**
>
> The OPA shall use the price schedules and adders published in the FIT Review Report and included in this direction as Appendix B with the new FIT and microFIT Program Rules.
>
> **Transitioning to new FIT and microFIT Rules**
>
> In relation to:
>
> microFIT applications submitted on or after September 1, 2011 and prior to the date of this direction; and
>
> FIT applications submitted prior to the date of this direction and in relation to which a contract offer had not been made (both 1 and 2 the "Pre-Existing Applications"); the OPA shall develop and implement a transition process to provide an opportunity for a Pre-Existing Application to be revised in accordance with the process and eligibility requirements in the new FIT and microFIT Rules (as applicable) as amended pursuant to this direction.
>
> The OPA shall provide such transition opportunity during the first available application window applicable to the type project applied for in the Pre-Exiting Application to be revised (i.e. microFIT, small FIT and large FIT). Subject to limits in the FIT Rules and microFIT Rules on (i) when a revised application must be submitted, and (ii) the type of revisions to a Pre-Existing Application, a revised Pre-Existing Application shall be entitled to retain its original timestamp. The OPA shall discontinue Pre-Existing Applications that are not revised during the first

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[94] FIT Program Review Webinar, November 2, 2011, Exhibit 1, JDB, Vol. 4, Tab 177, p. 1898.
[95] Exhibit 1, JDB, Vol. 1, Tab 7, pp. 56, 59-60, 63.

> applicable application window or that are withdrawn by the applicant. The OPA shall return the application fee and application security that had been paid in relation to the Pre-Existing Application.

[113] As per Mr. Cronkwright's evidence, draft Rules were posted in or around April 2012 and the microFIT Program was re-opened for applications in July 2012. Applicants having submitted applications on or after September 1, 2011 but prior to the date of microFIT Rules Version 2.0 were provided a period of time to revise their applications in order to comply with the new rules. The microFIT Rules Version 2.0[96] provided information regarding the transition period for existing applicants. To maintain priority status in relation to the limited availability power grid, pre-existing applicants had until August 10, 2012, to re-submit their application. The OPA submits that this demonstrates yet another example of the OPA's balanced and fair approach.

[114] The OPA submits that its conduct did not amount to misfeasance in public office. It had to overcome new challenges and consulted with the Ministry of Energy to attempt to best balance the interest of ratepayers with that of other stakeholders.

[115] The OPA submits its decision was not driven by bad faith or dishonesty, but rather was based in good faith. It nonetheless unfortunately adversely affected the interests of certain members of the public, while benefitting others, as well as the long-term sustainability of the renewable energy program the Government of Ontario sought to promote. In short, the OPA contends that *any* decision it made was bound to adversely impact the interests of certain members of the public. Consequently, the OPA submits that the CSP cannot establish the necessary intent or awareness that its conduct was unlawful.

Factual Findings Pertaining to Public Misfeasance

1. Mr. Deschamps and Ms. Monette, on behalf of CSP, had no prior experience in the renewable energy sector. In advancing this claim, they failed to consider the totality of the microFIT Rules which afforded the OPA broad discretion, as under Section 6 of the Rules, to reject any application, including one that met eligibility requirements; the right to cancel or suspend the program for any period of time without any obligation or reimbursement to

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[96] *Ibid*, Tab 12.

applicants; and the exemption from liability regarding the costs or expenses of applicants. Mr. Deschamps and Ms. Monette failed to appreciate that the microFIT Rules offered no guarantees that the OPA would not, in the attempt to balance the competing interests of members of the public and in the procurement of renewable energy, make decisions adverse to the interests of certain members of the public.

2. On November 23, 2010, the Ministry of Energy released the Government of Ontario's Long-Term Energy Plan.[97] The Ministry's Long-Term Energy Plan, which was publicly available, directed the OPA to set a new target for renewable energy development in Ontario of 10,700 MW in capacity, excluding hydroelectric projects.[98] It also anticipated the two year program review and a price reduction. However, the OPA, by mid-2011 quickly realized that the number of applications being received would exceed the renewable energy capacity target. This posed a problem as the costs associated to building solar systems were decreasing, making the price paid by ratepayers for the energy produced too elevated. Three options were considered by the OPA. The Minister of Energy directed the OPA to implement Option 2 which was perceived as the middle-ground. In my opinion, it provided a fair and balanced approach to the interests of stakeholders.

3. In the last month before an anticipated Scheduled Program Review, and at a time when Mr. Deschamps and Ms. Monette already expected a reduction in prices paid to applicants in the microFIT Program, CSP incurred the cost of a Radio Ad campaign that gave no consideration to any adverse consequences of rule changes.

4. Mr. Deschamps and Ms. Monette failed to consider the fact that not one of the 259 applications arising from the Radio Ad campaign had been reviewed for eligibility by the OPA. They failed to appreciate that an estimated 139 Offers to Connect received in relation to the 259 applications filed after September 1, 2011 and before October 31, 2011, were secured outside the parameters of the microFIT Program, as the applications had not been reviewed for eligibility. Because they were not reviewed for eligibility, they could not have "jumped the queue" of backlogged applications to receive a Conditional Offer in

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[97] *Ibid,* Tab 2, pp. 8 – 44 (date listed on p.41).
[98] Long-Term Energy Plan, Exhibit 1, JDB, Vol. 1, Tab 2, p. 24.

preference to other applications that had been subject to an eligibility review. CSP applied to the LDCs on behalf of the Radio Ad customers without first ensuring that the OPA reviewed the applications for eligibility and before the OPA provided the requisite notice of same to applicants via the online microFIT portal. Mr. Deschamps and Ms. Monette's understanding that once an LDC provided an Offer to Connect a Conditional Offer would automatically follow was incorrect.

5. According to the evidence as I find it, CSP's Radio Ad customers had not received Conditional Offers prior to October 31, 2011. The OPA had not yet reviewed any of these applications for eligibility due to a 60 day backlog.

6. CSP went forward with its Business Plan in March 2012 to secure funding from a lending institution and a private investor, despite the lack of commercial certainty with respect to the Rules and Price Schedule as of October 31, 2011.

7. I find the OPA's conduct does not give rise to misfeasance in public office. The requirement that the OPA was aware that its conduct was unlawful is not met. There was no element of "bad faith" or "dishonesty" in the actions taken by the OPA.

8. The OPA made a good-faith decision that was adverse to the interests of certain members of the public, both for the benefit of others and the long-term sustainability of the renewable energy program that the Government of Ontario wished to promote. It is also clear that *any* decision made by the OPA would have been adverse to the interests of certain members of the public.

9. The OPA consulted stakeholders in the course of the Two Year Review. A detailed report published on March 19, 2012 by the Government of Ontario, entitled "Ontario's Feed-in Tariff Program Two-Year Review Report" noted that it had deployed efforts to consult with different stakeholders and to consider interests of different members of the public to balance "the interests of all Ontarians, recognizing ratepayers, community participants and the renewable energy sector." [99] I accept Mr. Cronkwright's evidence that the OPA

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[99] Exhibit 1, JDB, Vol. 4, Tab 184, pp. 1925.

considered the feedback from key stakeholders and made the best decision under the circumstances, as directed by the Minister of Energy.

Application of the Jurisprudence on Public Misfeasance to the Facts as Found

[116] Canadian courts have recognized the potential for the abuse of the tort of misfeasance in public office, and the need to keep its ambit limited.[100] In *Powder Mountain Resorts Ltd. v. British Columbia,*[101] Newbury J.A. of the British Columbia Court of Appeal stated that:

> [2] [T]he tort must be used cautiously. Otherwise, the courts risk straying into the arena of political decision-making, bypassing the normal restraints associated with judicial review, and becoming the arbiters of the personal thought processes of public officials. One recent commentator (Phillip Allott, "EC Directives and Misfeasance in Public Office", [2000] 59 Camb. L.J. 4) has written that the court should not, by means of the tort, take on the role of "ombudsman, a parliamentary committee, or an organ of public opinion in reviewing even egregious acts of maladministration, official incompetence, or bad judgement." (at 6.) To avoid dangers of this kind, a balance must be sought between curbing unlawful behaviour on the part of governmental officials on the one hand, and on the other, protecting officials who are charged with making decisions for the public good, from unmeritorious claims by persons adversely affected by such decisions.

Caselaw pertaining to the element of unlawful conduct

[117] The Supreme Court in *Odhavji* clearly stated that the tort of public misfeasance is not directed at a public officer who inadvertently or negligently fails to adequately discharge the obligations of his or her office. Nor is it directed at a public officer who is unable to discharge his or her obligations because of factors beyond his or her control. Rather, the tort is directed at "a public officer who could have discharged his or her public obligations, yet willfully chose to do otherwise."[102]

[118] Unlawful conduct has been found or allegations of same were allowed to proceed to trial in the following instances:

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[100] *Lockyer-Kash v. British Columbia (Workers' Compensation Board)*, 2013 BCCA 459, 51 B.C.L.R. (5th) 119, at para. 34-35.
[101] *Powder Mountain Resorts*, *supra* note 81 at para. 2.
[102] *Odhavji*, *supra* note 14 at para. 26.

i. Failure by police officers under the *Police Services Act*, R.S.O. 1990, c. P. 15, to cooperate fully in the conduct of investigations;[103]

ii. Failure to maintain a sea wall or bank, the maintenance of which was a condition of the grant to a public corporation;[104]

iii. Failure to properly investigate a plaintiff's claim that she had been sexually assaulted by a police officer;[105]

iv. Improper issuance of a licence to a bank, and then failure to close a bank when it was evident it was necessary;[106]

v. Where the Court found that there was no legislative requirement that the RCMP comply with its own internal harassment policy[107] . The conduct was therefore not unlawful.[108] However, the conduct of the RCMP was found to be unlawful on the basis that the RCMP breached a section of the *RCMP Act*.

vi. Failure by the Racing Commissioners' Supervisor of Standardbred Racing to afford the applicant the statutory right to a hearing to challenge a decision of the Commission directing a general manager of a raceway not to approve the applicant for employment.[109]

vii. A *prima facie* case of deliberate conduct was made out where a municipality allegedly tried to obtain a list of municipal benefits not authorized by law, thereby adding delay and expense to the approval of a final sub-division plan sought a developer.[110]

viii. A claim in public misfeasance was adequately pleaded in respect of acts by or on behalf of the Ministry of Energy, allegedly intended to bring about early termination of a contract between a power corporation and the town of Gananoque. The town had granted the power corporation an exclusive right to supply, distribute and sell electricity to the town, said contract having predated the Minister's open market policy for electricity.[111]

ix. Failure to apply to disclose water tariff to an exporter of water from British Columbia, unlawful cancellation of the exporter's license; unlawful grant of exclusive rights to a

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[103] *Ibid*, at para. 34-36.
[104] *Henly v. Mayor of Lyme* [(1828), 5 Bing 91, 130 E.R. 995] cited in *Northern Territory of Australia v. Mengel* (1995), 129 A.L.R. 1 (Australia H.C.), at p 25, cited in *Odhavji*, at para. 20.
[105] *Garrett v. New Zealand (Attorney General)*, [1997] 2 N.Z.L.R. 332 (New Zealand C.A.) cited in *Odhavji*, at para. 21.
[106] *Three Rivers District Council v. Bank of England (No. 3)*, [2000] 2 W.L.R. 1220 (U.K. H.L.) cited in *Odhavji*, at para. 21.
[107] *Merrifield v. Canada (Attorney General)*, 2017 ONSC 1333, 42 C.C.L.T. (4th) 4, at para. 830. [*Merrifield*]
[108] *Ibid.*
[109] *O'Dwyer*, *supra* note 24 at paras. 46-48.
[110] *Georgian Glen Developments Ltd. v. Barrie (City)* (2005), 13 M.P.L.R. (4th) 194 (S.C.), at paras. 13-16.
[111] *Granite Power Corp. v. Ontario* (2004), 72 O.R. (3d) 194 (C.A.), at para. 40.

competitor in violation of the statutory right to notice and to object, pursuant to the *Water Act*, R.S.B.C. 1979, c. 429;[112]

x. Failure by the Minister of Health and officials within the Health Protection Branch to approve the sale of a generic version of a drug in Canada, contrary to the terms of settlement in an ongoing disagreement over the data required for notice of compliance with Canadian drug safety requirements.[113]

[119] On the other hand, conduct was found not to amount to an illegal act, an excess of power granted, or acting for an improper purpose, in the following cases:

i. The Premier and Cabinet of British Columbia were found not to have acted illegally or in excess of power in bringing to cabinet for consideration the competing proposal of another developer of a commercial ski resort without notifying the plaintiff. The Premier and Cabinet were not bound to inform the plaintiff of a competing proposal after the plaintiff refused to agree to the Province's Alpine Ski Policy, and after Cabinet rejected the plaintiff's terms, which involved unacceptable financial risks Cabinet was not prepared to take contrary to the best interests of the Province.[114]

ii. The former Minister of the Department of Indian Affairs and Northern Development was found not liable for withholding millions of dollars in infrastructure funding to the plaintiff First Nation. The trial judge's finding that it was reasonable for the Minister to withhold the funds and request the First Nation to suspend its judicial review application as a condition of co-management because of a history of managerial and audit problems experienced by the First Nation, as well as a history of refusing to cooperate with a third party manager, was upheld on the basis that the Minister had to balance the needs of the community and to demonstrate sound administration of the public funds. The appeal court further held that the Minister's actions had to be considered in the context of the circumstances and facts at the time, where such actions were not motivated by extraneous or improper purposes. An action in public misfeasance did not invite scrutiny of every discretionary decision taken by the public official.[115]

iii. A fire department, the Office of the Fire Marshall, and the Fire Safety Commission did not engage in public misfeasance by issuing inspection orders; by requiring that they remain posted during a period in which the orders were stayed, and by withdrawing the orders prior to judicial review. The Court found that the fire department, in issuing the inspection orders, was entitled to rely on the input of the Office of the Fire Marshall with respect to whether the plaintiff's fire system met minimum safety thresholds given audibility concerns. The inspection orders were lawfully posted per the *Fire Prevention and Protection Act, 1997*, S.O. 1997, c. 4, which was silent on whether stayed orders could remain posted pending an appeal. Rescission of the inspection orders was found

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[112] *Rain Coast Water Corp. v. British Columbia*, 2016 BCSC 845, 28 C.C.L.T. (4th) 77.
[113] *R. v. Apotex Inc.*, 2017 CAF 73, 146 C.P.R. (4th) 93, at para. 92.
[114] *Power Mountain Resorts, supra* note 81.
[115] *Pikangikum First Nation v. Nault*, 2012 ONCA 705, 298 O.A.C. 14, at paras. 72-79. [*Pikangikum First Nation*]

not to be carried out to evade judicial review but in order to avoid unnecessary expenditures from the public purse to pursue expert reports. Finally, non-approval of the plaintiff's fire safety plan was not considered misfeasance when the plaintiff neglected to inform the defendants of its plan to satisfy the audibility concerns, after which the defendants' approval was to be immediately provided.[116]

iv. The Divisional Court in *Skypower CL 1 LP v. Ontario (Minister of Energy)*, considered the Minister of Energy's directions to the OPA to bring about amendments to the FIT Rules (which at the same time directed amendments to the microFIT Rules) in the context of the OPA's acknowledged failure to process applications according to procedures and timelines set out in the FIT Rules 1.0, and concluded that this did not establish a breach of statutory provisions, but only program Rules administering the Minister's Energy Policy. Although the Divisional Court considered the appropriate standard of review of the Minister's decision to direct the OPA to make changes to the FIT program; the reasonableness of the Minister's direction; and entitlement to an order in the nature of *mandamus*, its reasoning is highly persuasive as to whether or not there was any deliberate and unlawful conduct in the failure by the OPA to apply its own standard form microFIT Program Rules, including its failure to follow timelines and the imposition of a cut-off date in contravention of the 90 day Notice of Amendment provided in section 7(b). *Skypower CL 1 LP v. Ontario (Minister of Energy)* highlighted the fact that the applicants had to be aware that there were no guarantees of success for any applications, in that government policies and priorities can change. In coming to that conclusion, the Divisional Court considered the FIT Rules 1.0 that provided for very broad discretion to amend the program; cancel or suspend part or all of the program; reject any applications, and make changes without liability.

   The Divisional Court further concluded that there was no intention by the OPA or the Minister to create contractual obligations through the submission of a proposed project under the FIT program, even if the project met all criteria required. Thus, it noted the FIT program could not be considered to be a tender process.

   The Divisional Court also rejected an argument that time was of the essence in the performance of the parties' respective obligations under the FIT Rules, highlighting the fluidity of the Rules which the Court observed allowed the OPA "almost unlimited discretion in terms of when and in what manner the review process would unfold."[117] As such, the Divisional Court rejected an argument based on the reasonable expectations of the claimants who relied on prior statements made by the Minister encouraging private investment in the program, and who relied on an expectation that the OPA would abide by its stated timelines.

[120] Applying the reasoning in *Skypower CL 1 LP v. Ontario (Minister of Energy)*, it would be difficult for this Court to depart from the notion that the microFIT Rules were also created to allow

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[116] *Norquay Developments Ltd. v. Kasprzyk*, 2015 ONSC 5292, 43 M.P.L.R. (5th) 325.
[117] *Skypower CL 1 LP v. Ontario (Minister of Energy)*, *supra* note 26 at para. 54.

for discretion, flexibility and change, in keeping with a change in government priorities and policies.

[121] Because the Radio Ad customers processed by CSP had not been reviewed by the OPA for eligibility, and Offers to Connect were obtained outside the purview of the microFIT Rules, it cannot be concluded that they were guaranteed to receive a contract. As observed by the Divisional Court in *Skypower CL 1 LP v. Ontario (Minister of Energy)* citing *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 277, at para. 77, a prospect cannot be equated to a right or a contract.

[122] Following the reasoning of the Divisional Court in *Skypower CL 1 LP v. Ontario (Minister of Energy)*, neither the October 31, 2011 announcement nor the July 2012 amendments breached 7(b) of the Rules. These amendments were not retroactive – there was no past effective date, and the program amendments were announced well in advance of when they came into effect.

[123] There is no evidence to support that the OPA acted outside its legislative mandate or without statutory authority. Further, there is no evidence the OPA breached a Directive from the Minister of Energy pursuant to the Minister's authority in section 25.32 and 25.35 of the *Electricity Act*.

[124] The OPA was following an express Ministerial Directive dated April 5, 2012, when it amended the microFIT Rules and pricing and had those new Rules and pricing apply to pre-existing applications.

[125] I cannot conclude there was conduct for an unlawful or improper purpose undertaken by the OPA in carrying out the Minister's directives.

[126] In short, there is no conduct that rises to the level of misfeasance described, established or alleged in *Odhavji*, *O'Dwyer*, *Granite Power*, *Apotex*, *Merrifield*, or *Georgian Glen Developments*.

Caselaw pertaining to the knowledge requirement

[127] The second element of the tort of misfeasance concerns the state of mind required to establish liability; that is, knowledge that both the conduct is unlawful and that it is likely to harm

the plaintiff. The Supreme Court in *Odhavji* held that in cases under Category B, the knowledge requirement may be founded upon subjective recklessness or willful blindness as to the possibility that harm is a likely consequence of the alleged misconduct." [118]

i. In *Merrifield*, the plaintiff's misfeasance claim failed because the RCMP officers did not have the requisite knowledge that the conduct was likely to harm the plaintiff and were not recklessly indifferent to the probable consequences of their conduct:[119]

ii. Knowledge of harm, without the intent to cause harm was found insufficient to establish the tort of misfeasance in public office in *Pikangikum First Nation v. Nault*:

> The tort of misfeasance in public office is difficult to establish. The plaintiff must prove more than mere negligence, mismanagement or poor judgment. To succeed, the plaintiff must demonstrate that the defendant knowingly acted illegally and in bad faith chose a course of action specifically to injure the plaintiff. [120]

iii. The British Columbia Court of Appeal in *Powder Mountain Resorts Ltd. v. British Columbia* held that misfeasance in public office is an intentional tort requiring proof of bad faith, for which "clear proof commensurate with the seriousness of the wrong should be provided."[121]

iv. Just as the Court in *Norquay* found in considering the conduct of a fire department, I conclude that the OPA whether or not it appeared inflexible in carrying out its mandate in the case at bar, believed it was authorized by its own Rules, particularly section 6.0, to impose the August 31, 2011 cut-off date, and acted in good faith, motivated as it was to carry out the Minister's Long-Term Energy Policy and Mixed Supply Directive.

v. Just as the Court of Appeal in *Gratton-Masuy Environmental Technologies Inc. v. Ontario*[122] approved of the reasoning of the Divisional Court in assessing a pleading underpinning a claim in misfeasance in public office, assumptions and speculations about the motivations underlying the conduct of the OPA are insufficient in this case to ground the mental component of the tort of public misfeasance.

[128] I do not infer from the evidence of Mr. Cronkwright or on the documentary record that the OPA had knowledge that it acted for an improper purpose when it imposed a cut-off date of August

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[118] *Odhavji supra* note 14 at para. 38.
[119] *Merrifield, supra* note 107 at paras. 832, 833, 837.
[120] *Pikangikum First Nation, supra* note 115 at para. 77.
[121] *Powder Mountain, supra* note 81 at para. 8.
[122] *Gratton-Masuy Environmental Technologies Inc. v. Ontario*, 2010 ONCA 501, 101 O.R. (3d) 321.

31, 2011 for microFIT applications to be grandfathered in under the Rules Version 1.6, and the associated Price Schedule.

[129] According to Mr. Cronkwright's evidence, the OPA also had legitimate concerns regarding consumer protection for applicants and potential applicants. These concerns extended to companies like CSP that applied to the microFIT Program on behalf of applicants in circumstances where applicants were not informed of their rights, lacked material information or were misinformed. Mr. Cronkwright also testified that some companies used the OPA's logo without authorization, made unfounded promises regarding returns on investment, and advised customers that the applications and eventual contracts belonged to the companies, rather than the applicants. His testimony was supported by a summary chart generated from emails in the documentary record.[123]

[130] These concerns were addressed in Rules Version 2.0: the applicants were required to sign an Applicant Declaration Form in order to help ensure that the applicants had reviewed the Rules, and understood they could revoke authorization for a representative or company to act on her or his behalf at any time.

[131] Regarding the price change that applied to applications after the August 31, 2011 cut-off date, I find that the OPA had legitimate reasons for the price change and the manner in which it proceeded. These reasons included: the consideration of ratepayer value; the Long-Term Energy Plan; the February 17, 2011 Supply-Mix Directive that set a limited ceiling of 10,700 MW of renewable energy production excluding hydroelectric; consistency between the microFIT with the FIT Program; and the overwhelming number of pending applications "in the queue" that, if accepted, would risk surpassing the 10,700 MW target.

[132] As previously noted, the OPA considered three options in response to the circumstances, and was directed by the Minister of Energy to select Option 2, an option which treated applications more generously than the Rules required, by grandfathering in those applications whose

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[123] Exhibit 1, JDB, Vol. 2 and Vol. 3; and Exhibit 2, Supplementary Document Brief.

Conditional Offer had not been granted due to processing delays or delays obtaining an Offer to Connect through no fault on the part of the applicants.

[133] It cannot be said that the OPA acted with knowledge of an improper purpose. It reviewed its options, had the Ministry of Energy approve the changes, and followed through with the price changes in accordance with the Minister of Energy's express Ministerial Directive of April 5, 2012. The changes were not understood to be inconsistent with the obligations of its office. The OPA was only administering the renewable energy program in a maturing and evolving industry.

[134] In short, I have not been persuaded that the OPA was aware that its conduct was unlawful. I find that there was no element of bad faith or dishonesty on the part of the OPA. The OPA made good faith decisions, in accordance with the mandate given by the Minister of Energy. I find, just as the Court found in *Pikangikum First Nation*, that the OPA's actions must be considered in the context of the circumstances and facts it faced at the time the October 31, 2011 announcement was made.

[135] In summary, I have not been satisfied on the record before me that the CSP has proven:

1. any case of deliberate conduct, or improper purpose on the part of the OPA, or
2. that the OPA acted unlawfully with actual knowledge, subjective recklessness or willful blindness that its conduct was unlawful, and likely to injure CSP.

[136] Although my findings, related inferences from the factual findings and legal analysis, do not bring me to conclude that the claim based in misfeasance in public office can succeed, I go on to consider the issues of causation and damages, should I be found to be in error.

3. Causation

[137] The Closing Submissions received from the OPA did not squarely address the legal test for causation. Instead, they largely focused upon the lack of evidentiary foundation for the two methodologies advanced by CSP for the calculation of the damages based on lost profits. While I do acknowledge that there is evidence which points to other reasons why CSP's customer leads generated from the Radio Ad Campaign between September 1 and October 31, 2011 did not proceed with a microFIT application, in my opinion this does not fully dispose of the argument

that, but for the failure to give 90 days' notice of the August 31, 2011 cut-off date for the processing of applications under the more favourable pricing schedule in microFIT Rules Version 1.6, the CSP suffered adverse consequences in lost profits.

[138] I also accept the concerns raised on behalf of the OPA that, apart from the documentary record, there is a paucity of evidence underpinning the case on both causation and damages. Indeed, apart from the *viva voce* evidence of five of the "customer leads", and one affidavit admitted in evidence from another customer lead who was too ill to testify, the usual evidence in support of causation and damages was not tendered. I did not receive the evidence of Jessica Hull and Laura Holland, two CSP employees who helped generate the list of 259 customer leads[124] purporting to come from the Radio Ad campaign, and who would have had communications with persons on the list as to why they chose not to proceed with a microFIT application after October 31, 2011. They might also have provided relevant information pertaining to the response to the Customer Questionnaire intended to obtain customer feedback to the microFIT Rules Version 2.0[125] so as to gauge interest in a class action lawsuit CSP contemplated pursuing on behalf of its customers. I infer from the lack of evidence as to this customer feedback that it would not have assisted.

[139] I did not hear from the financial officer for CSP, Sita Bhandari and Howard Keck, CMA, who prepared the financial records for CSP[126]; and David Williams, the part-time accountant for CSP. Their assistance may have helped to guide me in answering questions arising from the Balance Sheet for CSP comparing revenues, cost of sales, and general administrative expenses for the period between 2010 and 2013, the years in which CSP carried on business.[127]

[140] Finally, I did not receive expert evidence with respect to the lost profits alleged by CSP, although at the outset of trial I learned that only the defence expert engaged to respond to an opinion commissioned on behalf of CSP would testify. In the end, the defence chose not to call

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[124] Exhibit 1, JDB, Vol. 2, Tab 63.
[125] Exhibit 1, JDB, Vol. 3, Tab 134.
[126] *Ibid*, Tabs 144-160.
[127] *Ibid*, Tab. 154.

their expert on the basis that there was no opinion or damages evidence to respond to. I am thus left to infer that the plaintiff's expert would have done little to assist.

[141] Nevertheless, after considering the evidence received and counsels' written submissions, I accept that "an inference of causation may be drawn although positive or scientific proof of causation has not been adduced".[128] To support the inference, I have employed "the robust and pragmatic" approach to causation described in *Goodwin (Litigation guardian of) v. Olupona,*[129] in review of the leading authorities from the Supreme Court of Canada on causation.

[142] I begin by noting that the evidence of Mr. Deschamps and Ms. Monette as to the reasons the business of CSP declined after the OPA's announcement of October 31, 2011 and leading up to its ultimate closure in 2013, was largely self-serving. Neither was able to reliably offer specifics with respect to other reasons noted in a Customer List as to why the Radio Ad customer leads did not proceed with microFIT applications. Only Mr. Deschamps testified about the company's financial records, and he was not able to provide reliable evidence with respect to discrepancies between representations as to financial outlooks in the Business Plan of CSP, and the contents of the Balance Sheet as of December 31, 2011. [130]

[143] However, CSP's financial documents for the first two years in business demonstrated that CSP was able to earn a healthy margin on its sales. Mr. Deschamps testified in cross-examination that CSP's gross margins on sales were 27% in 2010, 34% in 2011, and expected to increase as CSP sold more units. The Business Plan prepared by CSP in 2012 represented that CSP would "break even" with the sale of 30 units in a year. Subject to the price remaining the same as in 2010 and 2011, each sale was expected to earn $44,000 after the breakeven mark.

[144] However, I am loathe to attach much weight to the evidence tendered by CSP through customer leads, Robert Swaita, Caroline Risi, Cam Cowley, Steve Carkner, John Wakelin and the affidavit of Ian Campbell. Each furnished letters dated May 11, 2017 or May 5, 2018 which parrot the same suggestions: that they did not proceed with their microFIT application after October 31,

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[128] *Snell v. Farrell*, [1990] 2 S.C.R. 311 at p. 330.
[129] 2013 ONCA 259, 305 O.A.C. 245, at paras. 44-46.
[130] Exhibit 1, JDB, Vol. 1, Tab 58 and Exhibit 1, JDB, Vol. 3, Tab 154.

2011, because the Government of Ontario reduced the prices paid for power generated by solar panels; because they would not make sufficient return on investments and would have to wait too long to make money; and because they no longer trusted the OPA after it made the price changes.

[145] In cross-examination, it was established that none of these customers had signed a customer agreement with CSP or had received a PV analysis from Mr. Deschamps setting out essential information on the cost of the solar system, the projected return on investment, and the amortization period after which the customer would return a profit. None of the customer leads whose evidence was received at trial had paid CSP a deposit towards the purchase of a solar system, or were anywhere near the point of signing a contract with CSP. More importantly, none of the customer leads had any clear memory of the microFIT Program Rules in place at the material times, although Steve Carkner testified that he was familiar with the program.

[146] Of particular note, none of the customer leads who testified had received a conditional contract from the OPA entitling them by the Rules to any guaranteed pricing under Rules Version 1.6, the Price Schedule in effect prior to October 31, 2011. Not one of the customers testified that their online applications to the microFIT Program made following the Radio Ad campaign had ever been reviewed for eligibility by the OPA.

[147] Indeed, the evidence of Steve Carkner was that he expected no guaranteed pricing because he had not received a Conditional Offer. He simply had a vague notion from representations made by CSP that the price was fixed for three months from the date of the online application. Equally important, when referred to the PV analysis CSP prepared for another customer, Adam Duncan[131] , which represented that this customer proceeded to purchase a 9.75 kWh solar system from CSP using the new and lower rate of 0.54 cents per kilowatt hour, Mr. Carkner conceded that the customer would have earned a return on investment of 10% with an amortization period of 7.9 years, based on a contract price of $53,625. Mr. Carkner would have considered this return on investment a great one. Indeed, he was prepared to proceed on a return of 3.8%, based on his own detailed calculations, even though he admitted his calculations contained an error for failure to consider the effect of degradation of solar panels over time on return on investment.

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[131] Exhibit 1, JDB, Vol. 2, Tab. 75.

[148] In cross-examination, John Wakelin also testified that he would have been satisfied with a return on investment of 10% on the sale price of a system at $63,625 amortized over 7.9 years, when referred to the project completed for Adam Duncan under the new price regime of 0.54 cents per kilowatt hour.[132]

[149] Despite having signed a letter dated May 5, 2018[133] suggesting that she did not proceed with a microFIT application under the Rules Version 2.0 due to the price changes and mistrust of the OPA, Caroline Risi admitted in cross-examination, as was evident in an email to Jessica Hull dated May 16, 2012,[134] that she did not proceed with her application because she moved to a rental property.

[150] Although Robert Swaita testified as a Radio Ad customer who did not purchase a solar panel from CSP because of price reductions, Mr. Swaita does not properly form part of what Mr. Deschamps referred to at trial as the 'Radio Ad Customers.'

[151] Mr. Swaita did not recall when he applied. CSP's Customer List revealed that he applied on November 28, 2011, one month after the OPA made its announcement.[135] Mr. Swaita testified that he had not learned about CSP through the Radio Ad campaign, but rather had been acquainted with Mr. Deschamps as a long-time customer of Mr. Swaita's restaurant.

[152] That said, the best evidence that a number of CSP's customer leads generated prior to October 31, 2011 would have likely gone ahead with their projects through to completion, but for the changes to the pricing introduced by the OPA effective August 31, 2011, may be inferred from the data generated by the OPA itself.

[153] Mr. Cronkright testified that the OPA published data highlighting the number of applications submitted to the OPA and the number of contracts it executed. The data was broken down by each version of the Rules under which the applications were submitted, thus allowing for a comparison between the number of applications resulting in contracts under Rules Versions 1.3

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[132] *Ibid.*
[133] Exhibit 5.
[134] Exhibit 1, JDB, Vol. 3, Tab 118.
[135] Exhibit 1, JDB, Vol. 2, Tab 63, p. 639.

to 1.6, and the number of applications resulting in contracts under Rules Version 2.0. As of December 13, 2013, the OPA's data demonstrated that, under microFIT Rules Versions 1.3 to 1.6:

a. the OPA had received 13,863 PV Groundmount applications, 17,860 PV Rooftop applications, and 6,108 Solar PV applications, for a total of 37,831 applications for solar projects;[136] and

b. the OPA had executed 6,032 PV Groundmount contracts, 5,939 PV Rooftop contracts, and 3,020 Solar PV contracts, for a total of 14,991 contracts.[137]

[154] Accordingly, approximately 39.6%[138] of applications submitted under Rules Versions 1.3 to 1.6 resulted in a completed project.

[155] On the other hand, as of December 13, 2013, the OPA's data revealed that, under the microFIT Rules Version 2.0:

a. the OPA had received 3,200 PV Groundmount applications, 22,426 PV Rooftop applications, and 0 Solar PV applications, for a total of 25,626 applications for solar projects;[139]

b. the OPA had executed 146 PV Groundmount contracts, 3,055 PV Rooftop contracts, and 0 Solar PV contracts, for a total of 3,201 contracts.[140]

[156] Accordingly, approximately 12.4%[141] of applications under Rules Version 2.0 resulted in a completed project.

[157] This data allows for an inference that customers were more likely to pursue microFIT projects under the Rules Versions 1.3 to 1.6, than they were under Rules Version 2.0, with the new pricing schedule.

[158] On this evidence, coupled with the evidence of Mr. Cronkwright, who conceded that the OPA expected that there would be some inevitable adverse consequences to some applicants to

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[136] Bi-Weekly microFIT Report, Exhibit 1, JDB, Vol. 4, Tab 245, p 2315. Note that "Solar PV" was the term for both groundmount and rooftop projects before the July 2010 rule change that resulted in different pricing (they were tracked separately from that date forward). [Bi-Weekly microFIT Report]
[137] *Ibid.*
[138] 14,991 / 37,831
[139] Bi-Weekly microFIT Report, *supra* note 136.
[140] *Ibid.*
[141] 3,201 / 14,991.

the microFIT Program, by reason of the implementation of the August 31, 2011 cut-off date imposing the new pricing schedule, I am satisfied that but for these changes, CSP would not have suffered a loss of at least some portion of its gross profits.

4. Damages

[159] The more thorny issue I contend with is the question of what loss of gross profits can be said to have arisen by reason of the cut-off date of August 31, 2011, based on the limited record received at trial.

[160] I note the submissions advanced by the OPA as to inherent difficulties associated with reliance upon either of the two methodologies proposed on behalf of CSP for the calculation of damages claimed.

[161] I can more easily address the first methodology advanced on behalf of CSP, as it received little to no attention at trial and in closing submissions. It arises from the largely unfounded assertion proffered by Mr. Deschamps, and reiterated in the executive summary found in CSP's Business Plan[142] that a big strength of the business in March 2012 was that, if necessary, the company could "raise additional cash by selling some of its contracts to install PV systems for at least $15,000 each." CSP further represented that it only needed to install 30 PV systems to "break even", based on projected costs with a projected gross profit of $44,000 per system, such that it would rather complete contracts than sell them off.

[162] There is no independent and reliable evidence to support this theory for the calculation of damages. Firstly, no names of potential buyers or companies that would have purchased contracts to install from CSP for $15,000 each were furnished by Mr. Deschamps or Ms. Monette. Mr. Deschamps admitted that there were only initial inquiries and expression of interest. Secondly, the Radio Ad customers had not yet secured conditional contracts from the OPA – their applications had not yet been reviewed for eligibility. Thirdly, Mr. Cronkwright's evidence was that CSP did

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[142] Exhibit 1, JDB, Vol. 1, Tab 58, page 560.

not possess ownership of the applications; the microFIT applicants retained ownership of their contracts.

[163] The second methodology for the calculation of damages advanced by CSP was to first estimate the number of customers who submitted applications between September 1 and October 31, 2011, and who would have eventually obtained a microFIT contract, but for the OPA's announcement of the August 31, 2011 cut-off date for applications grandfathered in under the microFIT Rules Version 1.6 price of 0.802 cents/kWh. Per this method, one would then multiply these by the estimated profit margin reflected in the Balance Sheet for CSP as at December 31, 2011 on a contract price of $75,000 per system installed. The profit based on the reduced price of 0.54 cents/kWh would then be subtracted to arrive at the net damages allegedly incurred.

[164] The OPA advanced detailed arguments suggesting the second methodology for the calculation of damages is essentially speculative, and does not support the inferences CSP invites the Court to make.

[165] Firstly, the OPA submits that there was never any certainty that a homeowner that showed an interest in the CSP marketing would follow through and spend tens of thousands of dollars to invest in the microFIT Program. This is because there is no evidence that Radio Ad customers ever read or understood the microFIT Program and the rights and obligations associated with the program. Indeed, the radio advertisements to which the potential customers had responded featured very little information. Notably, no information was provided regarding the following:

- The sale price of the solar panel system that CSP was charging (an average of $75,000 exclusive of HST);
- The return on investment to the potential customer;
- The amortization period (length of time to earn back initial investment);
- The payment terms;
- The warranty terms.

[166] Secondly, the OPA further maintains that, although CSP submitted applications on behalf of its customer leads, there was no agreement or sales contract between CSP and the customer

leads. Mr. Deschamps and Ms. Monette both testified that, according to CSP's business model, a Preliminary PV System Analysis would need to be conducted for a customer lead. Mr. Deschamps would then attend at the potential customer's house to encourage the customer to retain CSP to supply and install the project. Additionally, Mr. Deschamps and Ms. Monette testified that the information omitted in the Radio Ad would be communicated after CSP submitted the online application was submitted, and after the LDC had issued an Offer to Connect.

[167] Thirdly, the OPA points to the lack of evidence as to how many customer leads actually knew of the price difference per kilowatt hour under microFIT Rules Version 1.6 and microFIT Rules Version 2.0, or who would have been content with the return on investment under Rules Version 2.0. The OPA submits that most of the alleged customers only learned of a price change through a mass email from CSP dated July 23, 2012.

[168] The OPA observes that, out of the approximately 6,250 applicants who submitted microFIT applications between September 1, 2011 and October 31, 2011, about a third or 2,201 resubmitted applications under the microFIT Rules Version 2.0. Mr. Cronkwright testified that the OPA also continued to accept applications after the announcement of the Scheduled Program Review. Approximately 3,000 applications were submitted between November 1, 2011 and January 2012. The OPA, therefore, submits that there is a lack of direct evidence suggesting that CSP's potential customers did not proceed due to the October 31, 2011 announcement.

[169] In a detailed critique of the second methodology set out in its Closing Submissions, the OPA scrutinized the potential customers listed by CSP as falling within the group affected by the cut-off date of August 31, 2011. Per **Appendix B** of the Closing Submissions of the OPA **(attached)**, it would appear that of the 259 Radio Ad customers, there is evidence that only 208 of the potential customers could form part of CSP's claim. More specifically, 51 of the customers listed do not specify when the OPA application for a microFIT project was submitted, or suggest that they applied after the October 31, 2011 price announcement, after which there can be no question that they would be subject to the new Rules and pricing.

[170] As such, I accept the submission made by the OPA that any calculation of damages should, therefore, begin with a pool of 208, not 259, customer leads.

[171] However, the OPA goes on to observe that the pool of potential customers of CSP that can properly be construed as forming part of its claim dwindles even further when this Court considers that there is evidence of only 126 Offers to Connect provided by LDCs. The OPA reviewed all of the Offers to Connect at Tab 161 of Exhibit 1 for the customer leads listed in Tab 63. The OPA suggests that 13 of the offers are inapplicable to CSP's claim for the reasons set out in **Appendix C** of their Closing Submissions **(attached)**: the majority being duplicates, and one having received no corresponding response from the appropriate LDC actually issuing an Offer to Connect.

[172] Of the remaining 113 potential customers that could theoretically be relevant to a claim for damages, there is no documentary evidence in the record that these customers were aware of the sales price of a solar system; the return on investment; or the amortization period, prior to submitting their applications. The OPA therefore urges this Court not to infer that they would have gone forward, but for the OPA's reduction of the price for applications submitted after August 31, 2011 and other Rule changes.

[173] The OPA submits that there is no evidence that the potential customers had sufficient information to make any informed comparison between Rules Versions 1.6 and 2.0 and related price schedules, and this was confirmed by customers who testified at trial. The OPA's position is that the evidence tendered at trial suggests the opposite inference: customers did not move forward due to other reasons. For example, at **Appendix D** to the OPA's Closing Submissions **(attached)** is a chart in which various reasons are provided why CSP's potential customers did not proceed forward, and in which none of these individuals declined to move forward due to the price changes or other changes in the Rules.

[174] By contrast, the OPA points to the evidence that shows that some customers proceeded to apply to the microFIT Program with CSP, notwithstanding the price and other changes. On November 20, 2012, four months after the Scheduled Program Review, Jessica Hull of CSP e-mailed to Mr. Deschamps a document listing the status of 40 current, potential and interested customers.[143] Out of the 40 potential customers, 8 proceeded with solar system installations and 4 were awaiting installations. Further, when Ms. Hull updated Mr. Deschamps on the remaining

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[143] Exhibit 2, Tab 42, pp. 96-97.

potential customers, 6 were not approved for financing, 2 awaited financing, 7 had outstanding documentation, 3 had requested more information, 4 were interested in proceeding at a later date due to moving or undergoing home renovations, 2 were to be contacted by Ms. Hull, 1 was impacted by system constraints; and 3 had cancelled projects.

[175] The OPA submits that there is no reasonable basis for this Court to infer that customers under the new price regime would not have gone forward due to a less favourable PV analysis conducted after the new rules and pricing. The OPA submits that the PV analyses conducted after the new rules and pricing could even be perceived by some customers as more appealing, as the upfront costs for the installation of solar systems were lower, and were in around $55,000 rather than $75,000 per system.

[176] Indeed, CSP's internal documents demonstrated that 19 of 113 potential customers received a detailed Preliminary PV analysis. The OPA compared the PV System Performance Analysis prepared for Hari and Rashmi Prameswaran[144] under the old pricing regime of 0.802 cents/kWh and a Preliminary PV System Analysis dated April 16, 2012, using the new pricing system of 0.54 cents/kWh. The comparison revealed that, with the lower upfront costs for the installation of the solar system, similar returns on investment with a similar amortization period could be achieved.

[177] As previously noted, of the 6,250 applicants who submitted microFIT applications between September 1, 2011 and October 31, 2011, about a third or 2,201 resubmitted their applications in accordance with the microFIT Rules Version 2.0. Thus, the OPA submits that the CSP has failed to adduce any direct evidence that demonstrates that CSP's potential customers did not proceed due to the October 31, 2011 announcement of a price reduction and Rule changes.

[178] I have concluded that the detailed submissions of the OPA to the effect that a number of the customer leads would not have proceeded with a microFIT contract for any number of reasons, including lack of eligibility, no Offer to Connect, no ability to finance, or choosing to proceed with another solar company after losing confidence in CSP would, in my opinion, be addressed in the data tracked by the OPA as the percentage of applications submitted and eventually executed under

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[144] Hari & Rashmi Prameswaran are not listed as one of the customers associated with this action.

Rules Versions 1.3 to 1.6 (the old Rules) , as compared to those that were submitted and eventually executed under Rules Version 2.0. As previously noted, Mr. Cronkwright testified at trial that the OPA published data concerning the number of applications that were submitted to the OPA, and the number of contracts that were eventually executed under each version of the Rules.

[179] As previously noted, the data generated by the OPA establishes that contracts executed under the old Rules represented approximately 39.6% of applications submitted, as compared to 12.4% under Rules Version 2.0.

[180] I find that the argument advanced by the OPA that a number of customers, like Steve Carkner and John Wakelin, would have proceeded under Rules Version 2.0, satisfied by the return on investment, regardless of the reduced rates paid per kWh, given the generally reduced cost of solar systems, would be addressed by the OPA's data on the number of applications submitted under Rules Version 2.0, which resulted in an executed contract. In other words, the likely percentage of applications that would have resulted in an executed contract among the putative 208 customer leads that submitted applications through CSP between September 1, 2011 and October 31, 2011 would be represented by the percentage difference between 39.6% and 12.4%, or 27.2%. Out of the 208 customer leads on the Customer List generated by CSP, approximately 56.576 customers, rounded up to 57 would therefore have potentially resulted in a loss of gross profits for CSP.

[181] However, I find that the evidence of CSP, as elicited through the cross-examination of Mr. Deschamps, warrants further adjustment to the claim for damages. Mr. Deschamps admitted that there were material errors made in the Business Plan dated March 10, 2012 used to obtain bank financing. It notably represented that CSP had a pool of 250 applications representing $18.75 million dollars in sales, if the OPA grandfathered in all of the applications under the old Price Schedule. The Business Plan also represented that CSP had obtained Offers to Connect for 150 applicants which was not the case. On the uncontradicted evidence of Mr. Cronkwright, any Offers to Connect received were outside the purview of the microFIT Program.

[182] As previously noted, none of the applications had been reviewed for eligibility by the OPA, a necessary precondition within the microFIT Program to obtain a Conditional Contract. The

Business Plan was incorrect to suggest that, without the eligibility review, conditional offers were almost guaranteed, if the CSP had obtained Offers to Connect.

[183] The error in the Business Plan key to calculation of damages is that it overstated gross profits at 58.7% when Mr. Deschamps agreed that in 2010 gross profits were only 24%, and in 2011 they were only 36%. He notably further agreed that he would not have expected the business to subsist on those margins, although he expected to break even on as few as 30 solar system installations per year at the same price paid for kilowatt hour, and at the same contact price per system. These were two assumptions that he and Ms. Monette conceded could not be made as of March 2012. In fact, the propositions with respect to gross profit margins put to Mr. Deschamps on cross-examination rested on inflated profit margins, based as they were on erroneous mathematical assumptions. In my view, lower percentage profit margins for 2011 can be arrived at by subtracting total cost of sales from total revenues to arrive at a gross profit of $252,426 for 2011, representing a profit margin of 22%, not 36%, as put to Mr. Deschamps in cross-examination.

[184] Applying a profit margin of 22% as against a contract price of $75,000 would result in a gross profit per customer of $16,500, not $25,500, as contended on behalf of CSP. As such, if 57 applications on CSP's Customer List had been executed through to completion, this would represent $940,500 in gross profits. However, that figure warrants further reduction for negative contingencies.

[185] I accept the submissions advanced on behalf of the OPA that other factors justify further adjustment to the claim for damages, which would have been found owing by the OPA, if a cause of action in public misfeasance had been established.

[186] CSP lost money in every year of operation, including in the two years before the Scheduled Program Review and up to 2013, when it was dealing with microFIT projects well after the two-year review:[145]

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[145] Exhibit 1, JDB, Vol. 3, Tab 154, p.1589.

INCOME STATEMENT AT DECEMBER 31ST	2010	2011	2012	2013
NET INCOME (LOSS)	($22,181.00)	($1,965.00)	($297,368.00)	($196,316.00)

[187] Mr. Deschamps gave evidence about the financial statements and Business Plan of CSP, but could not explain them in a coherent manner. He could not explain the discrepancies between the charts in the Business Plan and financial statements prepared by his certified accountant. He could not explain the inflated gross profit margin in the Business Plan that deviated from the actual gross profit as contained in the financial statements. He could not explain how his business model failed in 2013 when the new prices and Rules applied, and simply said "we could not recover."

[188] Despite only completing 18 installations in 2010 and 2011, CSP developed a Business Plan in which it expected to install over 200 installations in approximately 6 months. Given the colossal difference between CSP's historical results and future projections, I am not satisfied that CSP had the cash flow or the capital to proceed.

[189] CSP sought funding of $250,000 from RBC in March 2012 but only received $150,000 according to Mr. Deschamps' evidence. Mr. Deschamps further testified that he received a capital infusion from an investor for $250,000 in April 2012. Yet, he could not explain the line-item in the financial statement suggesting that he soon after withdrew the $250,000, a withdrawal which would have affected cash flow and the capital needed to execute its Business Plan:[146]

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[146] *Ibid*, Tab 150, p.1538.

Capital Solar Power Corp
Balance Sheet
As of 31 December 2012

	31 Dec 12
Long Term Liabilities	
Vehicle Lease	
Vehicle Lease-Chev Equinox	28,376.03
Vehicle Lease - Chevrolet Subu	32,350.52
Total Vehicle Lease	60,726.55
Total Long Term Liabilities	60,726.55
Total Liabilities	293,675.44
Equity	
Common Share	250,000.00
Owners Withdrawals - Andre Des.	-259,075.06
Retained Earnings	-24,145.66
Net Income	-118,473.29
Total Equity	-151,694.01
TOTAL LIABILITIES & EQUITY	141,981.43

[190] CSP offered a contingency plan in its Business Plan, which assumed that the company could prosper with minimal installations each year. However, CSP more or less achieved the stated number of installations in the Business Plan, yet still lost money.

[191] Ms. Monette did not provide any testimony regarding the financial statements. She provided no information relevant to the calculation of damages.

[192] The OPA submits that CSP's financial data demonstrates that it was unsuccessful both before and after October 31, 2011, and that this is insufficient to justify an inference by the Court that CSP's business would have become more efficient and profitable over the course of time.

[193] In my opinion, these factors warrant a further reduction by 50%, resulting in potential damages of **$470,250**, not the $2,397,000 claimed in closing submissions.

Conclusion

[194] I have not been persuaded by the evidence at trial that the OPA is liable to CSP for the tort of misfeasance in public office.

[195] The conclusions that I have formed from the trial evidence, both oral and documentary, is that the business of CSP suffered and ultimately failed for a number of reasons, not the least of

which was its principals' lack of experience in the solar power industry, and unfounded expectations about the government-regulated green energy sector.

[196] Although the evidence was limited with respect to both causation and damages, I have calculated the damages on the basis of inferences drawn from the record. I find that profit losses would have amounted to no more than **$470,250**.

[197] André Deschamps and Angela Monette both garnered the Court's sympathy. They presented as hardworking and earnest small business owners. Yet, they invested all the proceeds from the sale of their prior business to speculate in an unknown area of business. It is unfortunate that CSP failed. Nevertheless, it cannot be said that its failure was as a result of any actionable wrongdoing by the OPA.

Costs

[198] The cooperation among counsel, which was evident throughout the trial, resulted in an agreement with respect to the quantum of costs. By letter dated December 7, 2018, counsel agreed to fix costs on a partial indemnity basis payable in the all-inclusive amount of **$250,000**, but reserved the right to make additional submissions in writing after judgment was rendered. As such, if the parties cannot arrive at a final agreement on costs payable, the parties shall each deliver costs submissions of no more than five pages in length, along with Costs Outlines and Bills of Costs within 30 days.

[199] I thank counsel for the skill apparent in the preparation and conduct of the trial.

M. Toscano Roc

Madam Justice Toscano Roccamo

Released: February 25, 2019

APPENDIX B

LIST OF CUSTOMERS PROVIDED BY PLAINTIFF
VOLUME 2 TAB 63: Plaintiff Lists 259 Customers

CUSTOMERS IMPROPERLY LISTED AND/OR OUTSIDE OF CLAIM PERIOD

	Exhibit 1 Volume 2 Page #	Applicant Name	MicroFIT #	Reason for Inapplicability
1.	612	#10 – Jason Ellis	FIT-MXXJTPD	Application to OPA submitted post October 31, 2011
2.	623	#103 Susan MacDonald	FIT-MIH4UZK	Application to OPA submitted post October 31, 2011
3.	625	#113 – Sheila Bush	FIT-MV2C3JD	Application to OPA submitted post October 31, 2011
4.	625	#114- Sheila Bush	FIT-MBI36C4	Application to OPA submitted post October 31, 2011
5.	625	# 115 – Sheila Bush	FIT-M3NKIK6	Application to OPA submitted post October 31, 2011
6.	625	#116 – Sheila Bush	FIT-MYVZ4DM	Application to OPA submitted post October 31, 2011

7.	625	#117 – Sheila Bush	FIT-MPAN3J4	Application to OPA submitted post October 31, 2011
8.	625	#118 – Sheila Bush	FIT-MKNM4CQ	Application to OPA submitted post October 31, 2011
9.	634	#189 – Daniel Boissonneault	FIT-MA4DPYJ	Application to OPA submitted post October 31, 2011
10.	639	#227 – Robert Swaita	FIT-MY23VX8	Application to OPA submitted post October 31, 2011
11.	639	#228 – Robert Swaita	FIT-MDAZNTW	Application to OPA submitted post October 31, 2011
12.	639	#229 - Robert Swaita	FIT-MKCRCW4	Application to OPA submitted post October 31, 2011
13.	639	#230 – Robert Swaita	FIT-MKNM4GQ	Application to OPA submitted post October 31, 2011
14.	643	#258 – Cam Cowley	FIT-MMM4WHB	Application to OPA submitted post October 31, 2011
15.	643	#259 – Tom White	FIT-MKP3KIE	Application to OPA submitted post October 31, 2011
16.	612	#11 – Jason Bujaki	FIT-MPGRQCI	No evidence/date of submitted application (Potentially applied before

				August 31, 2011 or after October 31, 2011)
17.	612	#12 – Celina Suess	FIT-MV2T6DV	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
18.	613	#21 – Derek Weichental	None Listed	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
19.	614	#27 – Jennifer Balzamo	FIT-M6Y9NW8	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
20.	614	#30 - Gail Greer	FIT-MMGBUZ7	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after

				October 31, 2011)
21.	615	#36 - Joel Prokaska	FIT-MA9GUDG	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
22.	615	#37 – Luc Brixhe	FIT-MPUDD9Q	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
23.	615	#38 – Dwayne Royle	FIT-MVKGGDB	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
24.	615	#39 – Luc Menard	FIT-MHKXYXK	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after

				October 31, 2011)
25.	616	#43 – Chris Briere	FIT-MQW6FVX	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
26.	616	#47 – Christopher Derdzinski	FIT-M3IGGZ2	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
27.	618	#63 – Morgan Mackenzie	FIT-M7XZ9F7	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
28.	618	#64 – Karen Sirosky	FIT-M4BT34Z	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after

				October 31, 2011)
29.	619	#69 – Sam Elias	FIT-M&X4DYE	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
30.	620	#74 – Lucille Jodoin	FIT-MBEXP6G	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
31.	620	#79 – Sam Elias	FIT-MTWH7YE	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
32.	621	#81 – Walter Fassbender	FIT-MTP9ZMC	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after

				October 31, 2011)
33.	621	#86 – Ariel Martinez	FIT-M7ZTMVG	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
34.	621	#88 – Sharon McKenna	FIT-MW8AQ9B	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
35.	622	#89 – Cheryl Beimers	FIT-MC7YEXZ (same FIT# as below)	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
36.	623	#99 – Danny Daigle	FIT-MC7YEXZ (same FIT# as above)	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after

				October 31, 2011)
37.	623	#101 – Normand Roy	FIT-MM64IFA	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
38.	623	#102 – David Barrett	FIT-MM9B43T	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
39.	624	#108 – Roch Savage	FIT-MAD96U7	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
40.	624	#109 – Steven Moreau	None Listed	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after

				October 31, 2011)
41.	626	#122 – Malcolm McGibbon	FIT-ME8IE7Y	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
42.	626	#128 – John Chenier	FIT-MIKYKY6	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
43.	627	#129 – Wayne Cordy	FIT-MF77ATJ	No evidence/date of submitted application
44.	627	#130 – Paul MacEachern	FIT-MQUHGJE	(Potentially applied before August 31, 2011 or after October 31, 2011)
45.	627	#134 – Adam Crosbie	None Listed	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after

				October 31, 2011)
46.	627	#136 – Catherine Ellen Hill	FIT-MMM78NJ	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
47.	631	#167 – Barbara Merkley	FIT-MAUHVJR	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
48.	632	#176 – Dragosz Tomala	FIT-MN8WJ2N	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
49.	640	#240 – Ronald Clark	FIT-MJ6G6WE	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after

				October 31, 2011)
50.	642	#255 – Stanley Kravitz	FIT-M3NUA6P	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
51.	642	#256 – Bruce Neville	FIT-MEQUVG2	No evidence/date of submitted application (Potentially applied before August 31, 2011 or after October 31, 2011)
TOTAL CUSTOMERS IMPROPERLY CLAIMED: 51				

*** Source Exhibit 1 TAB 63**

APPENDIX C

LIST OF OFFERS TO CONNECT

	Exhibit 1 Volume 3 Page #	Applicant Name	MicroFIT #	Offer to Connect
1.	1710	Dennis Tanguay	FIT-M4QXFKE	23-Oct-11 Hydro One Networks
2.	1711	Glen Lindsay	FIT-MBRXJR8	2-Nov-11 Hydro One Networks
3.	1712	Glen & Kathy Hunt	FIT-MZ32AGR	2-Nov-11 Hydro One Networks
4.	1713 & 1725	Gaetan Roy	FIT-MWU3ZRU	26-Apr-12 (PDF) 12-Oct-12 (Julie Patenaude) Hydro One Networks
5.	1714	Hugh William Boyle	FIT-MAM8YE8	4-May-12 Hydro One
6.	1715 & 1720	James Rowan	FIT-MIMPK2M	15-May-12 24-Dec-12 Hydro One Networks
7.	1716	Dale Jason	FIT-MTVJV4FX	4-May-12 Hydro One Networks
8.	1717	Jay R. Fredericks	FIT-MM27X6K	7-May-12 Hydro One Networks
9.	1718	Barry Jackson [Jackson Motors and Marine]	FIT-MY8HVXC	4-May-12 Hydro One Networks
10.	1719	James Ross	FIT-MUNC3B7	20-Oct-11 Hydro One Networks
11.	1721	James Lowe [JC Davison & DC Lowe]	FIT-MDUQIWC	25-May-12 Hydro One Networks
12.	1722	Jennifer Crate	FIT-MEE4QDE	16-May-12 Hydro One Networks
13.	1723	Joseph Cote	FIT-MWM39NX	26-Oct-11 Hydro One Networks
14.	1724	J. Allan Scott	FIT-MAYRTMX	29-Mar-12 Hydro One Networks
15.	1726	Kristi Castilloux	FIT-MPRBW2K	14-Oct-11 Hydro One Networks
16.	1728	Kevin Foisy	FITMICF2IR	12-Nov-12 Hydro One Networks
17.	1729	Louise Bean	FIT-MJXW3QN	26-Oct-11 Hydro One Networks

18.	1730 & 1747	Denis Lacourciere	FIT-MQ3B63H	24-Apr-12 14-Dec-12 Hydro One Networks
19.	1734	Andrew Mark Laraby	FIT-MDIKCGH	23-Apr-12 Hydro One Networks
20.	1735	Adam David MacArthur	FIT-MDVEFEX	21-Oct-11 Hydro One Networks
21.	1736	Andrew Jasiak	FIT-MH6WH4C	18-Nov-11 Hydro One Networks
22.	1737	Barbara Merkley	FIT-MAUHVJR	22-Oct-11 Hydro One Networks
23.	1738	Celine Talbot	FIT-MHWIPEG	20-Oct-11 Hydro One Networks
24.	1739	Claude & Caroline Lemire	FIT-M389PXY	22-Nov-11 Hydro One Networks
25.	1740	Celina Suess	FIT-MV2T6DV	26-Apr-12 Hydro One Networks
26.	1741	Corey Brass	FIT-MEV2MVQ	2-May-12 Hydro One Networks
27.	1742	Dwayne Royle	FIT-MVKGGDB	18-Apr-12 Hydro One Networks
28.	1743	Derek Recoskie	FIT-MET4JYW	23-May-12 Hydro One Networks
29.	1744	Donald Lemire	FIT-M1M9UM3	16-May-12 Hydro One Networks
30.	1745	Daniel Boissoneault	FIT-MA4DPYJ	18-May-12 Hydro One Networks
31.	1748	David Peter Young	FIT-M8PJFA8	22-Oct-11 Hydro One Networks
32.	1749	Darcy J Leblanc	FIT-MRW3XWP	23-Apr-12 Hydro One Networks
33.	1750	Lori Hutton	FIT-MBNUNJE	9-May-12 Hydro One Networks
34.	1751	Lynn Latour	FIT-MNBMF8P	3-Nov-11 Hydro One Networks
35.	1753	Mark Leach - Super Shine Coin Wash	FIT-M8PK6D2	26-Oct-11 Hydro One Networks
36.	1754	Mildred Murray	FIT-M3KN8IN	6-Dec-11 Hydro One Networks
37.	1756	Mathieu Groulx	FIT-MJKJHK6	21-Oct-11 Hydro One Networks
38.	1757	David Charles Skinner	FIT-MUQFU4Q	22-Oct-11 Hydro One Networks
39.	1758	Rene Corbeil	FIT-MYGE4UW	7-May-12 Hydro One Networks

40.	1759	Michael Boisvert	FIT-MVBZGQW	22-Oct-11 Hydro One Networks
41.	1761	Mary Viola Cureston	FIT-M7J8QYF	27-Apr-12 Hydro One Networks
42.	1762	Marc Bertrand	FIT-MW82HUC	2-May-12 Hydro One Networks
43.	1763	Michael Verdon	FIT-MID7DN9	2-Nov-11 Hydro One Networks
44.	1765	Ozay Mehmet	FIT-MT9KM4Y	17-Nov-11 Hydro One Networks
45.	1767	Randy Stuart	FIT-MT6Y2A8	3-Nov-11 Hydro One Networks
46.	1768	Robert Fry	FIT-MZPVAQ3	Nov-4-11 Hydro One Networks
47.	1770	Robert Bedard	FIT-MRKBK3C	1-May-12 Hydro One Networks
48.	1771	Robert Eilbeck	FIT_M3GX66E	4-May-12 Hydro One Networks
49.	1772	Roch Savage	FIT-MAD96U7	18-May-12 Hydro One Networks
50.	1773	Ronald Clark	FIT-MFNQFKH	26-Oct-11 Hydro One Networks
51.	1774	Ronald Clark	FIT-MJ6G6WE	26-Oct-11 Hydro One Networks
52.	1775	Ronald Wood	FIT-M3HB6MW	23-Oct-11 Hydro One Networks
53.	1780 & 1786	Steven Taylor	FIT-MPH2WB3	8-Nov-11 14-May-12 Hydro One Networks
54.	1781	Sam Elias	FIT-MVHGTFW	4-May-12 Hydro Ottawa
55.	1782	Stan Kravitz	FIT-M3NUA6P	27-Oct-11 Hydro One Networks
56.	1783	Stephane Chenier	FIT-MRFKIPE	12-Oct-11 Hydro One Networks
57.	1784	Jacqueline Menard (Solar/Photovoltaic Cells)	FIT-MMF3AYB	28-Nov-11 Hydro One Networks
58.	1785	Steve Lanoue	FIT-M8I2JUB	9-May-12 Hydro One Networks
59.	1787	Terrence Headrick	FIT-MXMHU79	4-Nov-11 Hydro One Networks
60.	1788	Thomas Engleberts	FIT-MVMZBH7	16-May-12 Hydro One Networks
61.	1789	Tracey McKnight	FIT-M4GRJEA	23-Apr-12 Hydro One Networks

62.	1790	Wendy & Steve Morris	FIT-MGAFHBC	22-Nov-11 Hydro One Networks
63.	1791	Traci Nobert	FIT-MBG4TAY	18-May-12 Hydro One Networks
64.	1792	Vivianne Leduc	FIT-M9UNEKZ	23-Apr-12 Hydro One Networks
65.	1793	Vicky Lacroix	FIT-M4N6NAK	26-Apr-12 Hydro One Networks
66.	1794	Bill Croxall	FIT-MI8IC8E	2-May-12 Hydro One Networks
67.	1796	Elizabeth Summerton	FIT-MWG49CF	22-Aug-12 Hydro One Networks
68.	1797	Lise Mongeau	FIT-MQ9WRXW	15-May-12 Hydro One Networks
69.	1799	Bonnie MacKay [Adams Ave]	FIT-MCNCABY	9-Nov-11 Hydro Ottawa
70.	1800	Perry Lanoue [Anderson Rd]	FIT-MMKYU8M	10-Nov-11 Hydro Ottawa
71.	1801	Denise Righetto [Athlone Ave]	FIT-MBYBZJG	18-Nov-11 Hydro Ottawa
72.	1802	Kelsey Trott [Barrhaven Cress]	FIT-ME9EZM6	15-Nov-11 Hydro Ottawa
73.	1803	Guy Lavack [Beauclaire Dr]	FIT-MIDN4TR	9-Nov-11 Hydro Ottawa
74.	1804	Gerard Monette [Bloor Ave]	FIT-MGAX4NM	9-Nov-11 Hydro Ottawa
75.	1805	Robert Cloutier [Bradley Ave]	FIT-MRK8T9N	21-Dec-11 Hydro Ottawa
76.	1806	Steven Bellemare [Burfield Ave]	FIT-MDXE6DG	9-Nov-11 Hydro Ottawa
77.	1807	Eloi Brunet [Bramblegrove cres]	FIT-M8UNJ29	16-Nov-11 Hydro Ottawa
78.	1808	David Lafreniere [Cedarock Dr]	FIT-MH7YN29	15-Oct-11 Hydro Ottawa

79.	1809 & 1814 duplicate documen t	Leslie Karasz [Conant Place]	FIT-M6VYVNT	10-Nov-11 Hydro Ottawa
80.	1810	Valerie Draper [Chester Cres]	FIT-MNX4WYU	15-Nov-11 Hydro Ottawa
81.	1811	Bill Williams [Cockburn St]	FIT-MHJQU8P	4-Nov-11 Hydro Ottawa
82.	1812	Jean Marc Menard Murphy [Cone Terrace]	FIT-MDTW93Q	9-Nov-11 Hydro Ottawa
83.	1813	Thomas McCarthy [Copeland Road]	FIT-MRABB4W	17-Nov-11 Hydro Ottawa
84.	1815	Robert Swaita [Daze St]	FIT-MDAZNTW	5-Feb-2013 Hydro Ottawa
85.	1816	Ozay Mehmet [Delmar Dr]	FIT-MC3J49Q	17-Oct-11 Hydro Ottawa
86.	1817	William Kinkade [Fernbank Rd]	FIT-M4MV9ID	7-Nov-11 Hydro Ottawa
87.	1818	John Wakelin [Harry Douglas Dr]	FIT-MAYERRU	25-Nov-11 Hydro Ottawa
88.	1819	Joshua Amiel [122 Henderson Ave]	FIT-MU4UJYH	9-Nov-11 Hydro Ottawa
89.	1820	Sam Elias [217 Henderson Ave]	FIT-M7X4DYE	24-Jan-12 Hydro Ottawa
90.	1821	Adam Duncan [Knudson Dr.]	FIT-MARWMET	16-Nov-11 Hydro Ottawa

91.	1822	Lorie Holmes [Kelowna St]	FIT-M36F789	14-Nov-11 Hydro Ottawa
92.	1823	Susan Carkner [Lockhart Ave]	FIT-MYZQUMI	10-Nov-11 Hydro Ottawa
93.	1824	Kurt Koenig [Longman Cres]	FIT-MAJWWWJ	9-Nov-11 Hydro Ottawa
94.	1825	Patrick Guerette [Meadowcroft Cres]	FIT-MM28QP3	Nov-14-11 Hydro Ottawa
95.	1826	Mark Gyuraszi [Maxwell Bridge Rd]	FIT-MKMZFNC	Nov-15-11 Hydro Ottawa
96.	1827	Jason Bolton [Moore St]	FIT-MJ4QADX	14-Nov-11 Hydro Ottawa
97.	1828	Caroline Risi [Polo Lane]	FIT-MW8AQ9B	14-Nov-11 Hydro Ottawa
98.	1829	Adrian Sunter [30 Ridgefield Cres]	FIT-MUARFUB	15-Nov-11 Hydro Ottawa
99.	1830	Marc Tasse [Richelieu Ave]	FIT-MCDV2WG	9-Nov-11 Hydro Ottawa
100.	1831	Wendy Moore [938 River Rd]	FIT-MEUKGR8	21-Nov-11 Hydro Ottawa
101.	1832	Roger Barrette [St. Denis St]	FIT-MWZ4WXV	2-Nov-11 Hydro Ottawa
102.	1833	Priscilla Corcoran [Steel St]	FIT-MM9B43T	17-Nov-11 Hydro Ottawa

103.	1834	Frank Papai [Stonemeadow Dr]	FIT-MHXIF8I	14-Nov-11 Hydro Ottawa
104.	1835	Nicholas Andrew Davidson [Second Line Rd]	FIT-MDW4I3N	16-Nov-11 Hydro Ottawa
105.	1836	Rory McCloskey [Serena Way]	FIT-MTU7QWV	19-Nov-11 Hydro Ottawa
106.	1837	Adrian Sunter [686 Syton Dr.]	FIT-MRNFVY6	5-Jan-12 Hydro Ottawa
107.	1838	Robert Swaita [Shellbrook Way]	FIT-MKCRCW4	5-Dec-11 Hydro Ottawa
108.	1839	Sam Elias [85 Stewart St]	FIT-MG6F2W9	23-Nov-11 Hydro Ottawa
109.	1840	Sam Elias [Sweetland Ave]	FIT-MWBQUUH	10-No-11 Hydro Ottawa
110.	1841	Nicole Beauchamp [Spartan Ave]	FIT-M4UU97R	14-Nov-11 Hydro Ottawa
111.	1843	Paul Skinner [Tauvette St]	FIT-M8XMUHU	12-Oct-11 Hydro Ottawa
112.	1844	Mark Waymann [Uplands Dr]	FIT-MIIQZ4G	19-Sep-11 Hydro Ottawa
113.	1845	Adla Hijazi [Upwood St]	FIT-MCA7B8T	9-Nov-11 Hydro Ottawa

TOTAL OFFERS TO CONNECT RELATED TO THIS ACTION: 113

INAPPLICABLE OFFERS TO CONNECT PRODUCED BY PLAINTIFF

	Volume 3 Page #	Applicant Name & MicroFIT #	Offer to Connect	Reason for Inapplicability
1.	1727	Kelsey Trott and Kristin Trott FIT-MYIM3ME	15-Oct-12 Hydro One Networks	MicroFIT number does not form part of customer list produced at Volume 2, TAB 63
2.	1731	Andre Deschamps FIT-MGBIGNM	4-Dec-12 Hydro One Networks	MicroFIT number does not form part of customer list produced at Volume 2, TAB 63
3.	1732	Andre Deschamps FIT-MIJKXA8	4-Apr-12 Hydro One Networks	MicroFIT number does not form part of customer list produced at Volume 2, TAB 63
4.	1733	Andre Deschamps FIT-MGCFTJG	21-Mar-12 Hydro One Networks	MicroFIT number does not form part of customer list produced at Volume 2, TAB 63
5.	1752	Michael Sheridan FIT-M26IKX2	31-Oct-12 Hydro One Networks	MicroFIT number does not form part of customer list produced at Volume 2, TAB 63
6.	1766	Randy Stuart FIT-MDWA9GY	Oct-21-11 Hydro One Networks	MicroFIT number does not form part of customer list produced at Volume 2, TAB 63
7.	1797	Sheila Bush FIT-MBI36CA	10-May-12 Hydro One Networks	Application to OPA submitted post October 31, 2011
8.	1777	Sheila Bush FIT0M3NKIK 6	2-May-12 Hydro One Networks	Application to OPA submitted post October 31, 2011
9.	1778	Sheila Bush FIT-MYVZ4DM	18-Apr-12 Hydro One Networks	Application to OPA submitted post October 31, 2011
10.	1779	Sheila Bush FIT-MKNM4GQ	10-May-12 Hydro One Networks	Application to OPA submitted post October 31, 2011

11.	1795	Wendy & Steve Morris FIT-MZI9QAZ	22-Mar-13 Hydro One Networks	MicroFIT number does not form part of customer list produce at Volume 2, TAB 63
12.	1798	Colin R. Brophy FIT-M84VJM8	18-Nov-11 Ottawa River Power Corp.	This is an Application to Connect not an Offer to Connect
13.	1842	2736 Traverse Drive	24-Jun-11 Hydro Ottawa	Address does not form part of customer list produced at Volume 2, TAB 63

TOTAL INAPPLICABLE OFFERS TO CONNECT: 13

[k]Source Exhibit 1 TAB 161

APPENDIX D

Evidence that potential Customers did not proceed specifically for other reasons or no mention of OPA's of price reduction

Page No. Exhibit 1 Volumes 2 & 3	Applicant Name	Date	Reason
980	Dwayne Royle	July 31, 2012	Reviewed the proposal provided by Capital Solar and decided it was not for him
991	Kristi Castilloux	May 10, 2012	Decided not to move forward with the solar panels
1007	Dr. Steven Bellemare	August 15, 2012	"No thanks"
1009 & 1010	Dennis Tanguay	November 4, 2011 August 7, 2012	Decided not to pursue solar panel project
1017	Robert Bedard	May 14, 2012	Initial costs beyond his means
1030	Morgan Mackenzie	November 1, 2011	Not interested in pursuing microFIT project through Capital Solar
1031	Karen Sirosky	November 1, 2011	Decided to submit through Solar Logix
1037	Wendy Moore	August 16, 2012	Interested in microFIT program but has to replace roof first for $30,000.00
1046	Valerie Draper	August 16, 2012	Applicant unemployed
1094	Nicole Lindsay	June 1, 2012	"I received a phone call at work yesterday May 31 to confirm the appointment for that evening at 7:00, nobody showed. This is the second time the appointment has been broken, I am going to call the whole thing off, I see this as a very poorly run business"

1098	Greg Eilbeck	March 6, 2012	Bank and Accountant concerned and required additional information
1109	Kelsey Trott	August 16, 2012	Moved but still interested in applying again with new address
1126	Tom Mccarthy	April 25, 2012	Declined to proceed due to financial obligations
11228 & 1129	Donna Boisvert	April 25, 2012 & April 28, 2012	"…decided not to go ahead with the application."
1130	Mindy Shouldice	April 25, 2012	No longer interested
1177	Less Karasz	August 16, 2012	"I did not receive a phone call from you guys in the past couple of weeks and when I requested an on site survey of my roof top, the agent didn't show up the day I made the appointment for. He didn't even call to say he couldn't make it. It took forever for you guys to get back in touch with me after initially applying for the project. I think I will not be taking this opportunity with your company."
1182	Lori Hutton	May 3, 2012	"We are not financially able to move forward with any kind of solar installation at this time."
1239	Mike & Cathy Clarmo	August 15, 2012	"..I think I will pass on this now."
1243	Nicole Beauchamp	August 16, 2012	"..we are no longer interested in putting solar panel on our roof."
1255	Caroline Risi	May 16, 2012	Moved
1265	Kathy Hunt	August 7, 2012	"…this e-mail is to notify you that we are cancelling our application."
1273	Corey Brass	August 15, 2012	Garage issues
1274	Roger Barrette	August 15, 2012	"…I will not be pursuing this endeavour any further at this time."
1284	Vicky Lacroix	August 20, 2012	Not worth her while
1286	Priscilla Corcoran	August 30, 2012	Financial reasons
1304	Colin Brophy	August 16, 2012	Moved

Page No. Exhibit 2	Applicant Name	Date	Reason
18	Denise Righetto	September 20, 2012	At her age would benefit more from a different income making source
24	Elizabeth Summerton	October 18, 2012	Financing issues
36	Jenn Crate	September 26, 2012	"No thank you"
37	David Lafreniere	September 27, 2012	"I won't be going through with the solar panels at this time. I do still have your business card in case this changes."
47	Wendy Moore	March 13, 2013	Roof renovations
49	Philippe Lafleche	October 21, 2012	Decided to cancel the microFIT project
50	Brian Tom	January 9, 2013	Loss of trust in Capital Solar
56	Daen Mosley	December 6, 2012	Busy
57	Rilee Russell	December 6, 2012	Busy
58	Michelle Ferguson	December 9, 2012	"Hi decided against the project at this time. Thanks for your help."
61	Roch Savage	January 14, 2013	Financing declined
63	Corey Brass	March 13, 2013	Roof renovations
65	Dorothey Blake	March 14, 2013	Could not get Offer to Connect
67	Mack McGibbon	April 2, 2013	Moving
94	Various	November 19, 2012	Loan not approved by RBC: Marc Bertrand Kelsey Trott Steve Kerr Thomas Engelberts Elizabeth Summerton Julie Patenaude Ronald Clark

***Sources Exhibit 1 Volume 2 & 3 and Exhibit 2**

CITATION: Capital Solar Power Corporation v. The Ontario Power Authority, 2019 ONSC 1137
COURT FILE NO.: 13-59225
DATE: 20190225

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CAPITAL SOLAR POWER CORPORATION

Plaintiff

– and –

THE ONTARIO POWER AUTHORITY

Defendant

REASONS FOR JUDGMENT

Toscano Roccamo J.

Released: February 25, 2019