



## Memorandum

**To:** *Independent Electricity System Operator (“IESO”)*

**From:** Elliot Smith, Partner  
*Osler, Hoskin & Harcourt LLP*

**Date:** February 24, 2020

**Subject:** Review of Generation Contracts Directive dated October 25, 2019 (the “Directive”)

Re: Termination Rights

You have asked us to review those IESO contracts that are subject to the analysis the IESO is undertaking in connection with the Directive (the “**Reviewed Contracts**”) and comment on any termination rights under the Reviewed Contracts that the IESO as Buyer (or Sponsor) could exercise.

We have divided our analysis into two time periods, prior to the project achieving commercial operation and following commercial operation. For each of these time periods, we have considered both termination at the IESO’s discretion (commonly referred to as “termination for convenience”) and termination for default.

### **Prior to Commercial Operation**

With respect to the IESO’s right to terminate any of the Reviewed Contracts prior to commercial operation at the IESO’s discretion, only the Feed-in Tariff (FIT) and Large Renewable Procurement (LRP) contracts contain this right. These are some of the later forms of contract developed by the IESO and the earlier contracts do not contain this right.

Under the FIT form of contract, the IESO has the right to terminate the agreement prior to the Supplier achieving a milestone called “Notice to Proceed”, and upon such a termination the IESO’s liability is capped at an amount intended to correspond to the project’s early development costs. In order to achieve the Notice to Proceed milestone, the Supplier must have its Renewable Energy Approval, a Financing Plan, a Domestic Content Plan (if applicable), the completion of all required Impact Assessments, and must post incremental Completion and Performance Security. Once all of the Notice to Proceed requirements have been achieved, versions 1, 2 and 3 of the FIT contract no longer provides the IESO with a termination for convenience right.

Versions 4 and 5 of the FIT contract and the LRP form of contract provides the IESO with the right to terminate for convenience at any time prior to the facility achieving commercial operation.



In the case of LRP, the contract contains Key Development Milestones, which are analogous to the Notice to Proceed requirements in the FIT contract. The consequences for terminating for convenience prior to the Key Development Milestones being achieved is similar to terminating under FIT prior to Notice to Proceed. However, once the Key Development Milestones have been achieved under LRP, or Notice to Proceed has been issued under version 4 and 5 of the FIT contract, a much more extensive compensation regime applies to a termination for convenience, in recognition of the fact that typically significantly more money would have been spent and binding commitments made in the later phases of project development and construction.

We understand from the IESO that for all FIT and LRP contracts where there was the opportunity for cost savings if the IESO exercised its discretionary termination right, the IESO has already done so.

All of the Reviewed Contracts include the right for the IESO to terminate the contract if the Supplier is in default of its obligations. Prior to commercial operation, generally the Supplier's main obligation under the contract is to achieve commercial operation within a specified timeframe. Accordingly, where the Supplier has failed to achieve commercial operation within this timeframe, the IESO may terminate the contract for default. To our knowledge, most of the projects that are the subject of the Reviewed Contracts have already achieved commercial operation. We understand from the IESO that, as a contract management practice, the IESO enforces the obligations in its contracts, including the obligation for projects to reach commercial operation by the specified dates, and exercises available termination rights where material obligations have been breached.

### **Following Commercial Operation**

None of the Reviewed Contracts provide the IESO with the right to terminate the contract for convenience once the facility has achieved commercial operation. Once a project is operational, there may be very little or no opportunity for savings by the IESO having the right to terminate the contract for convenience, after taking into account all of the incurred costs and the break fees that would normally be incurred in an early termination. Conversely, including such a termination right could result in increased costs to finance the project due to increased contractual uncertainty, and therefore could increase the overall project cost.

The circumstances where the IESO could potentially exercise a termination right for a Supplier default that occurs after the facility has achieved commercial operation are extremely limited. After a facility has achieved commercial operation, the Supplier's obligations during the operating term are generally easily achievable for any prudent Supplier. As such, absent unique circumstances, it is unlikely the IESO would have the right to terminate any contracts for default for any facilities that have achieved commercial operation.