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Ministry of the Attorney General
Briefing Note
Civil Law Division
ENERGY / MEDG / MOI / MRIS / ADO

SUBJECT: Ontario Power Generation ("OPG") Indemnity Agreement (the "Indemnity") in relation to Ontario's Fair Hydro Plan (the "Plan"")

ISSUE: OPG is requesting the following provisions be included in the Indemnity, which pose particular risk to the Province:

1) Waiver by the Province of its right to make any claim it, as the shareholder of OPG, could otherwise make relating in any way to the activities of OPG, its subsidiaries, and each of their directors, officers and employees (the "Protected Persons" or "Protected Person") relating to the Plan ("Provision A").
2) A confirmation by the Province that if a Protected Person is found not to have conducted a reasonable investigation of securities documents (such as the prospectus, registration statement, offering documents, etc.), the Province does not intend for this to disentitle the Protected Person from indemnification under the Indemnity ("Provision B").

The Ministry will need to decide whether or not to accept these provisions in the Indemnity.

ANALYSIS:

On May 11, 2017 the Government introduced Bill 132, which, if passed would require the involvement of Ontario Power Generation ("OPG") among other government entities in implementation. OPG has requested an indemnity covering its corporations, subsidiaries, and respective directors, officers and employees in relation to their roles in carrying out the Plan (the Indemnity).

The Ministry prepared the Indemnity based on the Ministry of Finance's general indemnity agreement template ("Province's Template"). OPG suggested a number of revisions varying from the Province's Template. Provision A and Provision B remain at issue and will need to be resolved with OPG before the Indemnity is finalized. LSB has been in consultation with MOF Legal, TBS Legal and IGS on the risks associated with the Ministry including Provision A and Provision B in the Indemnity.

The following is a summary of considerations relating to the potential risks with including the two outstanding provisions requested by OPG, Provision A and Provision B, in the Indemnity.

Provision A – Risks and Considerations

Provision A (paragraph 8 in the attached Indemnity Draft) is a waiver by the Province of its right to bring any claim, whether now or in the future, as sole shareholder of OPG, against the Protected Persons in relation to the Protected Persons' activities, acts or omissions in the implementation of, or otherwise relating to, the Plan.

This type of waiver is typically not included in indemnity agreements entered into by the Province and poses the following risks to the Province:

- The Indemnity does not cover acts of a Protected Person found to constitute gross negligence, an act of willful misconduct or dishonesty, which is a reasonable commercial provision. This waiver could prevent the Province, as sole shareholder, from being able to bring a claim against the Protected Persons for these types of breaches in the event they may occur (e.g. including where they engaged in criminal or other illegal activity that resulted in adverse consequences for the Province). From a legal perspective, this is a significant restriction of the Province's rights.

- From a business perspective, there are concerns that restricting the Province's rights in this way will provide OPG with greater room to carry out its roles and responsibilities in a manner that does not necessarily comply with due diligence standards.

- MOF Legal and TBS Legal also recommend against including this provision in the Indemnity for the reasons above. If the provision is included, the variance from the template would need to be explained in light of the risk in the business case for section 28 approval under the *Financial Administration Act* (Ontario). MOF and TBS have also flagged that inclusion of this provision may make obtaining section 28 approval more difficult.

- There is significant sensitivity around this provision from OPG's perspective. OPG has voiced a strong concern that if Provision A is not included in the Indemnity, the Indemnity Agreement may not be executed and that taking out the provision from the Indemnity may be a non-starter for their Board.

- The OPG has indicated that since the Province is asking OPG's directors and officers to undertake activities with respect to the Plan, it is not appropriate for the Province to be able to make a claim against them in the future (particularly for claims of gross negligence of willful misconduct).

- OPG is willing to limit the application of this provision to its directors, employees, and officers (carve out OPG and its subsidiaries as corporations), but this does not resolve the risk to the Province.

Provision B – Risks and Considerations

The Indemnity provides that it does not apply with respect to Losses of a Protected Person as a result of the Protected Person's dishonesty, willful misconduct or gross negligence where such breaches have been established by a final and non-appealable court judgment or final adjudication (paragraph 2(c) of the Draft Indemnity attached).

OPG has requested that this provision be further clarified to provide that if a Protected Person is found not to have conducted a reasonable investigation of securities documents (such as the prospectus, registration statement, offering documents, etc.) or that the due diligence defence under securities law is not available to the Protected Person(s), the Province does not intend for this to constitute "gross negligence" or "willful misconduct" or otherwise disentitle the Protected Person from indemnification under the Indemnity.

The inclusion of Provision B in the Indemnity poses the following risks to the Province:

- It would require the Province to indemnify Protected Persons where the due diligence defence under securities laws is found not to be available to the Protected Persons with respect to reviewing securities documents for misrepresentations, even if this involved a breach that constitutes "gross negligence" or "willful misconduct" (including potentially, criminal activity). Indemnification for the Protected Persons in such circumstances may be inconsistent with public policy.
- From a business perspective, providing an indemnity to the Protected Persons in these circumstances could potentially remove any incentive for the protected Persons to act reasonably in carrying out activities that are within the scope of the indemnity.
- MOF Legal and TBS Legal have indicated that it is atypical for an indemnity to protect a party in these types of situations, as the protected party would basically be insured against their own intentional wrongdoing or wanton acts by the Province.
- MOF Legal and TBS Legal have indicated that such a provision may not be enforceable for public policy reasons and recommend against its inclusion in the Indemnity. They have pointed out that courts may decline to enforce a contractual provision that could be seen as purposefully facilitating an illegality. In discussing provisions of indemnities for underwriters, such indemnities have not been enforced where the underwriters have had knowledge of material misstatements or omissions made with respect to a public offering, and even where there was only negligence. Although not settled law in Canada, this may be unenforceable.
- OPG has indicated that since OPG is involving itself in the financing component of the Plan at the Province's request, it needs this protection. OPG has indicated that if for whatever reason a finding is made that the due diligence defence is not available, the directors and officers will not want the Province to use that finding to deny them indemnification. This is one of the key areas of risk that the

directors and officers are concerned about and are seeking the Province to indemnify OPG in these circumstances.

NEXT STEPS:

- The Ministry to determine whether to accept the inclusion of Provision A and Provision B in the Indemnity.

Prepared on: May 26, 2017

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