Ontario

MINISTRY OF
ENERGY

ENERGY Litigation Update

August 21, 2017

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LSB

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Overview

- This deck provides an overview of the following litigation matters:
  - Trade Disputes (*Mesa Power Group LLC, Windstream Energy LLC* and *Tennant Energy LLC and* US ITC Investigation)
  - Trillium Power Wind Corporation
  - Canadian Union of Public Employees (CUPE)
  - National Steel Car Limited
  - Indigenous Litigation (Southwind (Lac Seul First Nation); Robinson-Huron Treaty Annuities / Whitesand and Red Rock); Coon Come as well as cases of interest before the Supreme Court of Canada (*Clyde River; Chippewas of the Thames;* and *Ktunaxa*)
  - Other Matters (*Algoma Coalition v. OEB; HMQ v. Orlandis-Habsburgo and Lefrancois;* and *Capital Solar Power Association v. Ontario Power Authority*)

Trade Disputes: Background

- In trade disputes, Canada, rather than Ontario, is the party to the litigation as the party to international trade agreements.
- The Trade Law Bureau (JLT) of Global Affairs Canada leads the defence with Ontario's assistance.
- Ontario contributes human resources, including legal and subject matter expertise, and money to the defence of the Chapter 11 NAFTA arbitration matters.
- ENERGY's experience includes disputes under NAFTA, World Trade Organization agreements (General Agreement on Tariffs and Trade, Agreement on Trade-Related Investment Measures and Agreement on Subsidies and Countervailing Measures) and the Agreement on Internal Trade.

Mesa Power Group LLC v. Canada

Parties	Claimant: Mesa Power Group, LLC. (T. Boone Pickens) The Trade Law Bureau (JLT) Global Affairs Canada leads the defence with Ontario's assistance. ENERGY and MIT coordinate and work closely with the IESO.
Matter type	Trade: NAFTA Investor-State Arbitration under Chapter 11
Status	Arbitration before the Tribunal is concluded. Canada was successful. Mesa subsequently filed a petition and motion to vacate the Award in the U.S. District Court – District of Columbia (Washington D.C.) ("D.C. Court"). The petition and motion was dismissed by the D.C. Court on June 15, 2017.
Damages Claimed / Relief Sought	In the Arbitration, Mesa sought damages of not less than $657 million (CDN). In its Award, the Tribunal decided that Mesa should bear all the costs of the arbitration and a portion of Canada's legal costs, for a total of $2,948,701 (CDN). Through its petition and motion to vacate the Award, Mesa sought to have the D.C. court matter remanded to a new Tribunal.
Next Milestone	Canada and Ontario are considering next steps with respect to enforcement of the Award.

Mesa: Background

- Mesa Power Group, LLC is a U.S. renewable energy developer that applied for Feed-In Tariff (FIT) contracts in the Bruce area. Mesa's four proposed projects in Ontario (totalling 565 MW) failed to receive FIT contracts.
- Mesa alleges that Canada, through actions taken by Ontario, violated its obligations under Chapter 11 of NAFTA through:
  - Ontario and the Ontario Power Authority's allocation of transmission capacity and FIT contract awards in the Bruce area (e.g. allocating available transmission capacity to the Korean Consortium); and
  - Domestic content requirements of the FIT program.
- The arbitration hearing took place from October 26, 2014 to October 31, 2014.
- On March 31, 2016, the Tribunal issued its Award dismissing Mesa's claims and confirming that Canada was in compliance with its NAFTA obligations.
- The Tribunal decided that Mesa should bear all the costs of the arbitration, as well as a portion of the costs of Canada's legal defence, for a total of $2,948,701 CDN. The Tribunal ordered Mesa to pay the costs awarded to Canada within 30 days.
- On June 13, 2016, Mesa filed a Petition and Motion to vacate the Award under the U.S. *Federal Administration Act* (FAA) with the D.C. Court on the grounds of misbehaviour, excess of powers, and Manifest Disregard of the Law. Mesa sought to have the court remand the matter to a new tribunal.
- JLT and Ontario have retained U.S. Law Firm Baker & McKenzie to defend Canada in these proceedings and seek enforcement of the Award.

Mesa: Current Status & Next Steps

- On June 1, 2017, oral arguments on the Petition and Motion to Vacate the Arbitral Award as well as Canada's Counter-Petition to Confirm and Enforce the Award were heard by the D.C. Court.
- Mesa sought to vacate the Award pursuant to the FAA on the following grounds:
  a) **Misbehaviour:** the misbehaviour of the Majority of the Tribunal prejudiced the rights of Mesa. Mesa argues that the majority of the Tribunal engaged in severe misconduct because it denied Mesa a fundamentally fair hearing by giving deference to Canada's (Ontario's) decision making.
  b) **Excess of powers:** the Majority of the Tribunal exceeded their authority in the way they rendered their decision.
  c) **Manifest Disregard of the Law:** the Majority of the Tribunal manifestly disregarded:
     - the applicable burden of proof for a finding of an Article 1105 violation (Minimum Standard of Treatment).
     - the plain language of the terms of NAFTA, Chapter 11.
- On June 15, 2017, the D.C. Court presiding judge released his decision denying Mesa's petition and motion to vacate and granting Canada's counter-petition to confirm the Tribunal's Award.
- Mesa has not yet paid the Award to Canada. Canada and Ontario are considering their options with respect to enforcement of the Award.

Windstream Energy LLC v. Canada

Parties	Claimant: Windstream Energy LLC The Trade Law Bureau (JLT) of Global Affairs Canada leads the defence with Ontario's assistance (provided by MAG, MIT, ENERGY, MNRF and MOECC as well as the IESO).
Matter type	Trade: NAFTA Investor-State Arbitration under Chapter 11
Status	On September 30, 2016, the Tribunal issued its Award, dismissing all claims against Canada except for one, finding that Canada breached the minimum standard of treatment. On March 16, 2017, Global Affairs Canada transferred $28,373,822.17 to Windstream, representing the amount of damages and costs awarded by the Tribunal, plus interest accrued on the Award.
Damages Claimed / Relief Sought	Windstream sought between CDN $277.8 and $594.3 million in damages plus interest, legal fees and costs. In its Award dated September 27, 2016, the Tribunal awarded Windstream damages and legal costs.
Next Milestone	NAFTA Arbitration now concluded. Related litigation between IESO and Windstream is proceeding.

Windstream: Background

- Windstream Energy LLC is a U.S. energy developer that applied for and was awarded a FIT contract for an offshore wind energy project at Wolfe Island.
- Windstream alleged that Canada, through actions taken by Ontario, breached Chapter 11 of NAFTA, specifically:
  - That Canada unlawfully expropriated Windstream's investments in the Wolfe Island wind project contrary to Article 1110
  - That Canada failed to accord Windstream's investments fair and equitable treatment contrary to Article 1105 (Minimum standard of treatment)
  - That Canada failed to accord Windstream's investments treatment no less favourable than that accorded to its own domestic investors contrary to Article 1102 (National treatment)
  - That Canada failed to accord Windstream's investments treatment no less favourable than that accorded to investors from other countries contrary to Article 1103 (Most favoured nation).
- Windstream claimed that the deferral of off-shore wind development frustrated the ability of its subsidiary Windstream Wolfe Island Shoals to obtain the approvals necessary to develop its 300 MW offshore wind project in accordance with its rights under the FIT contract granted by what was then the Ontario Power Authority (since merged with the Independent Electricity System Operator).
- Canada argued that the deferral decision was made in good faith for the reasons stated at the time. Scientific evidence was not sufficient to satisfy Ontario that offshore wind development was safe from the perspective of human health and the environment.

Windstream: Current Status & Next Steps

- The arbitration hearing took place from February 15-26, 2016.
- The Tribunal issued the private, confidential version of the Award, dated September 27, 2016 to the parties on September 30, 2016.
- The Tribunal dismissed all Windstream's claims against Canada except for one, finding that Canada breached the minimum standard of treatment owed to an investor under NAFTA Article 1105 and awarded Windstream $25,182,900. The Tribunal also ordered Canada to pay 50% of Windstream's legal costs in the amount of $2,912,432 for a total of $28,095,332. The Tribunal has also ordered Canada to pay approximately $595,508 to cover costs associated with administering the arbitration. The total amount payable by Canada is $28,690,840.
- Ontario paid the damages, legal costs awarded by the Tribunal to Windstream and interest accrued on the Award. Ontario made an arrangement with the Federal government to provide payment of the Tribunal's Award to Windstream.
- On April 3, 2017, Windstream discontinued enforcement proceedings to collect the award commenced in the Ontario Superior Court of Justice.
- The NAFTA arbitration has concluded.
- On March 27, 2017, Windstream filed a Notice of Application against the IESO formally commencing application proceedings in the Ontario Superior Court of Justice against the IESO related to its FIT contract. No other party has been named in Windstream's Notice of Application.

Tennant Energy LLC v. Canada

Parties	Claimant: Tennant Energy LLC The Trade Law Bureau (JLT) of Global Affairs Canada leads the defence with Ontario's assistance (provided by MAG, MIT and ENERGY as well as the IESO).
Matter type	Trade: NAFTA Investor-State Arbitration under Chapter 11
Status	On June 1, 2017, Tennant Energy LLC (Tennant) filed a Notice of Arbitration (NOA) formally commencing an investor-state arbitration under Chapter 11 of the North American Free Trade Act (NAFTA) with Canada
Damages Claimed / Relief Sought	Tennant is seeking CDN$100 million in damages, and CDN$65 million in moral damages for wrongful conduct and the alleged suppression of evidence.
Next Milestone	An arbitral tribunal must be constituted to hear the dispute.

Tennant: Background

- Tennant LLC, a California company, claims to own all of the shares of an Ontario corporation, Skyway 127 Wind Energy Inc. (Skyway).
- According to Tennant, in November 2009, Skyway submitted an application for 100 MW of wind power in the Bruce Transmission Zone but did not receive a contract.
- Tennant alleges that:
  - measures and actions taken by the Government of Ontario in relation to the feed-in tariff (FIT) program and the Green Energy Investment Agreement (GEIA) violate its rights under NAFTA.
  - the Government of Ontario acted unlawfully by giving special treatment to politically connected investors, and introduced measures or actions that granted more favourable treatment to Canadian and foreign investors in like circumstances.
  - Ontario's administration of the FIT program was non-transparent and opaque, and that it took steps to destroy government records and suppress the release of information.
- Tennant filed a Notice of Arbitration (NOA) on June 1, 2017. The NOA formally commences an arbitration against Canada under NAFTA, Chapter 11.

Tennant: Current Status & Next Steps

- An arbitral tribunal has not yet been constituted. Both Canada and Tennant have 90 days from the date the Notice of Arbitration was filed (until August 30, 2017) to appoint the tribunal members.
- The arbitral tribunal will consist of three members: one to be appointed by Canada; one to be appointed by Tennant; and one to be appointed jointly by Canada and Tennant.
- If Canada does not appoint a Tribunal member within the 90 day timeframe, Tennant could request that the Secretary-General of the International Center for the Settlement of Investment Disputes (ICSID) appoint the Tribunal.
- Canada and Ontario are continuing to working together to determine a suitable candidate to be appointed to the Tribunal. Tennant has not yet chosen their Tribunal member.
- Once the Tribunal is constituted, it will establish procedures and timelines for how it will hear the dispute.
- Canada has committed to provide Ontario with a Preliminary Legal Risk Assessment which will set out the legal risk of Tennant's claim being successful.
- Canada and Ontario fully executed a Joint Defence and Confidentiality Agreement on August 10, 2017.
- Canada and Ontario are working to execute a cost sharing MOU as soon as possible.

U.S. ITC Investigation on Crystalline Silicon Photovoltaic Cells

Parties	Petitioner: Suniva Inc. and Solar World Americas, Inc.
Matter type	U.S. International Trade Commission investigation into Crystalline Silicon Photovoltaic Cells (whether or not partially or fully assembled into other products)
Status	Investigation is currently in the injury phase
Damages Claimed / Relief Sought	As filed Suniva's petition requests four forms of relief: 1. A tariff and minimum import price on imports that evolves over four years 2. A share of money distributed to domestic producers from the duty deposits currently being held by the US government as a result of the AD/CVD proceedings on CSPV cells and modules from China and Taiwan. 3. Creation of an economic investment development program, managed by the Commerce Department and funded with any safeguard duties collected by the U.S. government. 4. Bilateral and multilateral negotiations by the U.S. government to reduce global excess capacity and restore a supply and demand balance in the global market.
Next Milestone	Post hearing briefs are due August 22, 2017

US ITC Investigation: Background

- On May 23, 2017, following the receipt of a petition under Section 201 of the *Trade Act of 1974* from two American manufacturers, Suniva Inc. and Solar World Americas Inc. the U.S. International Trade Commission (USITC) opened a global safeguard investigation of solar cell and module imports.
  - Suniva is a U.S. manufacturer of high-efficiency crystalline silicon photovoltaic (PV) solar cells and high-power solar modules with a global market. In April 2017, Suniva filed for bankruptcy.
  - Solar World Americas Inc., a multi-national company based in Germany, is one of the world's largest solar-technology producers and the largest U.S. solar panel manufacturer for over 40 years.
- There are two phases to a USITC investigation: an injury phase followed by a remedy phase. Each phase has an oral hearing. The investigation is currently in the injury phase.

<u>Injury Phase:</u>

- Prehearing briefs of the Parties for the Injury Phase were filed on August 8, 2017.
- The Injury Hearing took place in Washington D.C. on August 15, 2017. Ministry of Energy staff attended.
  - At the Hearing, Suniva and SolarWorld Americas Inc.'s (collectively the "Petitioners") main argument was that global over supply fuelled by exponential growth in manufacturing capacity has led to rapid price decrease and market distortion of PV modules and cells and the domestic market has not been able to keep pace. The Petitioners argued the petition is representative of the entire U.S. market including the 28 manufacturers that went bankrupt over the past 5 years.
  - There were numerous non-party entities (including solar industry representatives, government and embassy representatives) that filed notices to appear and provided statements at the Hearing.

US ITC Investigation: Next Steps

- The parties are required to file their post-hearing briefs on August 22, 2017.
- Non-parties may also file a post-hearing statement on August 22, 2017.
  - GAC has proposed to include Ontario policy interests, to its complement the legal arguments, in Canada's post-hearing brief instead, which Canada has confirmed it will file on August 22, 2017.
- Before the USITC recommends any trade remedy, it must first complete an injury determination by September 22, 2017.

Remedy Phase:

- If the USITC makes a negative injury determination, the case will end.
- If the USITC makes an affirmative injury determination, it will commence and conduct a remedy assessment (the second hearing is scheduled for October 3, 2017). The USITC is obligated to forward any remedy recommendations to the U.S. President by November 13, 2017.

Trillium Wind Power Corporation v. Ontario

Parties	Plaintiff: Trillium Wind Power Corporation Defendant: Ontario (MNR, MOECC, ENERGY)
Matter type	Renewable Project
Status	Ongoing litigation in the Ontario Superior Court of Justice
Damages Claimed / Relief Sought	$500,000,000.00 in damages
Next Milestone	Motion for summary judgment expected to be filed in the coming months. The matter has been set down for trial starting June 11, 2018 for three weeks.

Trillium: Background

- Trillium alleges that Ontario's actions related to the cancellation of Trillium's applications for offshore wind development were in contravention of the *Green Energy Act, 2009* , and inconsistent with the *Electricity Act, 1998* , and *Ontario Water Resources Act* . Trillium alleges that their site release applications were withdrawn in a manner that is inconsistent with what was communicated to them by MNR.
- Ontario proceeded with a motion to strike the statement of claim, which was heard on August 14, 2012. On October 5, 2012, Ontario's motion was successful and Trillium's claim was dismissed in its entirety.
- Trillium appealed the Superior Court's decision and the appeal was heard on March 22, 2013. The Court ruled that the motion judge had properly struck all of the causes of action advanced by Trillium, except for its claim in misfeasance in public office.
- On December 12, 2013, Trillium filed an amended Statement of Claim focusing on a claim for misfeasance in public office. Trillium now seeks $500,000,000 in damages.
- On June 2, 2015, the Parties completed mandatory mediation; however the case was not settled.
- On June 18, 2015,the court granted an order allowing Trillium to amend its Statement of Claim to add allegations of spoliation of evidence.
- Trillium's current claim alleges misfeasance in public office and spoliation (i.e. deliberate destruction) of evidence relevant to Trillium's misfeasance claim.

Trillium: Current Status & Next Steps

- The matter has been set down for trial starting June 11, 2018 for three weeks.
- The Province is considering bringing a possible summary judgment motion in the Fall of 2017, which would seek to dispose of this matter on a summary basis, without a full trial. If the Province is not successful, the matter would proceed to trial.

CUPE v HMQ in right of Ontario

Parties	Plaintiff: The Canadian Union of Public Employees, et al. Defendant: Ontario
Matter type	Civil litigation
Status	Plaintiffs' Statement of Claim is struck and action is dismissed (judgment rendered on August 14, 2017)
Damages Claimed / Relief Sought	• A declaration that the manner and structure of the sale of Hydro One shares and the plan to further privatize Hydro One constituted misfeasance in public office; • A declaration that Hydro One ratepayers, including the plaintiffs, are being unlawfully required to pay more than $1.2 billion (or $50 million per month to March 31, 2018) in Debt Retirement Charges to the Ontario Electricity Financial Corporation; • An order for an accounting of all funds received and/or disposed of in consequence of the sale of Hydro One shares; • Damages of $100,000 for misfeasance in public office; • Punitive damages of $1 million arising from the sale of shares in Hydro One by the province; • Costs of the action; and • Pre and post-judgment interest in accordance with the *Courts of Justice Act* .
Next Milestone	Plaintiffs to serve a Notice of Appeal by 30 days if they wish to appeal

CUPE: Background

- On December 6, 2016, Ontario was served with the Statement of Claim (the "Claim") seeking:
  - a declaration that the manner and structure of the sale of Hydro One shares constituted misfeasance in public office, as would proceeding with the plan to further privatize Hydro One;
  - a declaration that Hydro One ratepayers, including the plaintiffs, are being unlawfully required to pay more than $1.2 billion (or $50 million per month to March 31, 2018) in Debt Retirement Charges to the Ontario Electricity Financial Corporation;
  - an order for an accounting of all funds received and/or disposed of in consequence of the sale of Hydro One shares;
  - damages of $100,000 for misfeasance in public office;
  - punitive damages of $1 million arising from the sale of shares in Hydro One by the province;
  - costs of the action; and
  - pre and post-judgment interest in accordance with the *Courts of Justice Act* .

- Ontario filed a motion for the plaintiffs' Claim to be struck and for the action to be dismissed.

CUPE: Current Status & Next Steps

- The grounds for the motion were as follows:
  - the Claim is an impermissible attack on a policy decision and on legislation (the *Electricity Act*, 1998), resulting in the Claim not being justiciable;
  - the Claim is barred by the doctrine of parliamentary privilege;
  - the Claim is a "collateral attack" on the Integrity Commissioner's findings under the *Members' Integrity Act*, 1994 and constitutes an abuse of process; and
  - the Claim does not disclose a reasonable cause of action for misfeasance in public office.

- On June 12, 2017, the motion to strike was heard by the Ontario Superior Court of Justice and a judgment was rendered by Justice Cavanagh on August 14, 2017.
  - The Claim was struck and the action was dismissed.

- CUPE has 30 days (until September 13, 2017) to serve a Notice of Appeal.

National Steel Car Limited v. Independent Electricity Systems Operator (IESO), Ministry of Attorney General (Ontario), Minister of Energy (Ontario)

Parties	Plaintiff: National Steel Car Limited Defendant: IESO, Ontario (MAG, Energy)
Matter type	Civil litigation
Status	Ongoing
Damages Claimed / Relief Sought	• A declaration that the Global Adjustment ("GA") is an unconstitutional tax and not a valid regulatory charge; or alternatively, if the GA is a tax, it is an invalid tax that contravenes the Taxpayer Protection Act, 1999; • Restitution of the Applicant's GA payments made from July 31, 2015 to the date of Judgment; • An order declaring that the Applicant is entitled to be provided with a complete accounting of all GA payments made to all generators of electricity; and • Interest, costs, and other relief.
Next Milestone	Energy and MAG to review complete application record and prepare evidence and responses.

National Steel Car Limited: Background

- On August 4, 2017, Ontario received a Notice of Application (the "Application") from National Steel Car Limited which alleges that the revenues, or some portion of the revenues, collected by the IESO for the Global Adjustment is an unconstitutional tax and an invalid regulatory charge.

- The Application was made on the following grounds:
  - The Global Adjustment is an indirect tax imposed by a regulatory body to fund the Ontario government's policy initiatives; and

  - The Global Adjustment is *ultra vires* the *Constitution Act, 1867* (Canada) as it is in pith and substance an indirect tax.

National Steel Car Limited: Current Status and Next Step

- On August 10, 2017, the IESO filed the Notice of Appearance, signaling its intent to defend the application. MAG - Constitutional Law Branch (CLB) filed its Notice of Appearance on August 14, 2017.

- Energy is working with CLB in developing response materials and to assist in any defence of the Application.

- Scheduling for litigation process steps (e.g. motions, hearings dates etc.) has not yet been established. Intermediate steps will involve reviewing the complete application record, preparing evidence, identifying the appropriate affiant, etc.

Indigenous Litigation: Background

- The Ministry of Energy's involvement in Indigenous litigation matters is declining.
- Indigenous litigation generally fits into one of the following two categories:

  1. Challenges to new energy projects based on the constitutional duty to consult
     - No cases at present
     - The number of new cases has declined as ENERGY coordinates and ensures thorough consultation on major energy projects.
  2. Challenges raising historic grievances
     - ENERGY normally not a named party and increasingly participates on request to share funding burden with MIRR and other front-line resource ministries
     - Cases arise regularly and may raise flooding, resource revenue, Indigenous title or other past grievances usually with some kind of connection to energy

Southwind (Lac Seul FN) v. Canada, HMQ and Manitoba

Parties	Plaintiff: Southwind (on behalf of Lac Seul FN) Defendant: Canada Third Parties: Ontario and Manitoba
Matter type	Indigenous litigation
Status	Trial was completed on June 7, 2017 in the Federal Court – Trial Division
Damages Claimed / Relief Sought	$100 million in damages for historic flooding
Next Milestone	Judgment was reserved. No estimated timeline for the decision was given.

Southwind: Background (cont.)

- Southwind (Lac Seul First Nation) is suing Canada for flooding damage to its reserve and traditional territories and interests from the Ear Falls Development and the Lake St. Joseph/Root River Diversion planned and built beginning in the late 1920s through 1970s.
- It claims $100m damages in compensation on grounds that the flooding and damages occurred without its consent and lawful authority. It also claims it received inadequate compensation.
- In November 2006, OPG settled a past grievance claim against it with Lac Seul in respect of the same facilities and damages in return for a 25% partnership in a new Lac Seul hydroelectric project (operational in 2009).
- OPG did not settle on behalf of Ontario. (In future cases, pursuant to the 2015 government Memorandum of Agreement with ENERGY, OPG is required to seek releases for its shareholder as well as itself.)
- Lac Seul commenced its litigation claim in 2006 and Canada brought Ontario and Manitoba into the case as third parties in 2009.

Southwind: Current Status

- The trial commenced in the Federal Court, Trial Division, on September 12, 2016.
- 100 trial days were scheduled for evidence and argument.
- Mediation before former Justice Colin Campbell was not successful. A settlement offer was rejected by the First Nation.
- Ontario has submitted its written closing submissions to the court.
- The trial was completed in the Federal Court, Trial Division, on June 7, 2017.
- Judgment was reserved.

Ontario

Southwind: Next Steps

- CLOC considers it likely Canada will be found liable and Ontario will face paying damages of $3 to 10 million based on its having partially funded the project.
- CLOC estimates the total cost for Ontario for the trial at $1,000,000. Costs would be borne by ENERGY, MIRR and MNRF.
- The judgment was reserved. CLOC expects it will take 6 months to 1 year to receive the decision.

Robinson Annuities

Parties	Whitesand et. al (Robinson Superior Treaty beneficiaries) v. Canada and Ontario Restoule et. al (Robinson Huron Treaty Beneficiaries) v. Canada and Ontario
Matter type	Indigenous litigation
Status	Trial in the Robinson Huron matter is scheduled for the mid September 2017 on a sub-set of the issues. The Robinson Superior plaintiffs prefer a trial on the full set of issues.
Damages Claimed / Relief Sought	Compensation for failure to increase the $4 per person annual treaty annuity since 1850
Next Milestone	Trial tentatively set for mid September 2017. Potential motion dates earlier. Ontario exploring settlement options.

Robinson Annuities: Background

- The Whitesand and Red Rock First Nations (Robinson Superior) commenced litigation in 2001. Six Robinson Huron First Nations commenced litigation in 2014.
- In both cases, the plaintiffs allege breach of a treaty promise. The Robinson treaties, signed in 1850, contemplated paying up to $4 per individual treaty beneficiary per year if the Crown's revenues from the territory ceded justified the payment. Canada has paid $4 ever since without adjustment for inflation.
- The plaintiffs interpret the treaties as requiring resource revenue sharing or, in the alternative, at least indexation of the $4 payments, and compensation.
- These two cases are, like the Lac Seul case, past grievance cases. Historic, energy-related provincial revenues may be relevant to the issues. ENERGY may also be implicated in any settlement discussions that raise revenue-benefit sharing.

Robinson Annuities: Background cont.

Robinson Treaties, 1850

Robinson Annuities: Current Status & Next Steps

- Trial in both the Robinson Huron and Robinson Superior matters is scheduled for three months beginning September 25, 2017.
- The case is complex and requires historic evidence.
- In both cases, CLOC evaluates the risk as at least moderate that the Court will order indexation. Division of liability between Canada and Ontario continues to be a live issue.
- CLOC and MIRR recommend opening settlement discussions, but have no mandate. CLOC is exploring whether to formally concede that annuities owing under the Robinson Treaties should be indexed to inflation.
- Canada has not come to the table.

Coon Come: Quebec Cree Title Claim

Parties	Grand Chief Coon Come et al v. Canada and Ontario
Matter type	Indigenous litigation
Status	Early stage of claim. Moose Cree FN was added as a party defendant and NAN was added as an intervener friend of the court.
Damages Claimed / Relief Sought	Declarations of Aboriginal title and other Aboriginal rights over lands within Ontario.
Next Milestone	Motions by Canada and Ontario to strike part of the statement of claim, with leave to amend, scheduled to be argued on October 23 – 25, 2017.

Quebec Cree Title Claim

- Quebec Grand Chief Matthew Coon Come (suing on behalf of himself and in a representative capacity for the Quebec James Bay Crees and the Ten Quebec Cree Bands as well as MoCreebec, located in Ontario), the Quebec Grand Council of the Crees and the Quebec Cree Nation Government (collectively the "Claimants") commenced an action against Canada and Ontario asserting Aboriginal title and rights to lands situated within Ontario. (See map for the area in Ontario that is subject to the claim).
- The Aboriginal title claim area is defined by the red line. Other Aboriginal rights are claimed from the Quebec border further west to the edge of the blue line.

Quebec Cree Title Claim

- A successful claim could conceivably have implications for existing OPG hydroelectric facilities (e.g. on the Abitibi River) and the revenues OPG derives from these. Water resources are expressly mentioned in the claim. In addition to the declaratory relief, it is notable that the plaintiffs seek $495,000,000 in damages, presumably to compensate for resource use.
- Motions by Canada and Ontario to strike part of the statement of claim, with leave to amend, scheduled to be argued on October 23 – 25, 2017.
- A trial on this matter would still be years away.

Indigenous Litigation: Recent Cases of Interest before the Supreme Court of Canada

- The SCC granted leave to appeal in 3 Indigenous litigation cases involving the duty to consult:
  - *Hamlet of Clyde River et al. v. Petroleum Geo-Services Inc. (PGS) et al.* ("*Clyde River*")
  - *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., et al.* ("*Chippewas of the Thames*")
  - *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Operations)* ("*Ktunaxa*")
- The *Chippewas of the Thames* and *Clyde River* cases are appeals from the Federal Court of Appeal on judicial review of decisions of the National Energy Board ("NEB"). In each instance the Crown was not a proponent of the relevant project and was not a formal party before the NEB.
- *Clyde River* concerns the duty to consult about seismic testing in waters off Nunavut where residents of Clyde River were concerned about their treaty fishing rights. *Chippewas of the Thames* relates to the duty to consult in an application to the NEB seeking approval to reverse the flow of part of an oil pipeline, and to change the nature of the liquid that travels through it.
- Ontario intervened in the proceeding.
- Ontario argued that where a tribunal is properly authorized and engages in an honourable and respectful process that otherwise satisfies the Crown's consultation obligations, there is no need for additional Crown consultation or review. The requirements of "deep consultation" depend on the facts of each case and as such any guidance the Court provides should encourage flexibility and responsiveness to the particular circumstances.
- The matter was heard on November 30, 2016 and the SCC released companion decisions regarding *Clyde River* and *Chippewas of the Thames* on July 26, 2017.

Indigenous Litigation: Recent Cases of Interest before the Supreme Court of Canada

Clyde River (Hamlet) v. Petroleum Geo -Services Inc. , 2017 SCC 40

- The SCC allowed the Appeal and quashed the NEB's authorization of seismic testing
- The SCC confirmed that some or potentially all aspects of the Crown's duty to consult can be fulfilled by administrative bodies. However, the court found the consultation and accommodation efforts in this case were inadequate and fell short in several respects:
  - The NEB's inquiry focused on adverse environmental effects, rather than to the source of the Inuit's treaty rights, nor to the impact of the proposed testing on those rights.
  - The Crown did not make it clear to the Inuit that it was relying on the NEB to fulfill the duty to consult.
  - The process provided by the NEB did not fulfill the Crown's duty to conduct the deep consultation that was required: limited opportunities for participation and consultation were made available; there were no oral hearings and there was no participant funding and there was no mutual understanding on the core issues, i.e. the potential impact on treaty rights, and possible accommodations.

Indigenous Litigation: Cases of Interest before the Supreme Court of Canada

Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., 2017 SCC 41

- The SCC dismissed the appeal, finding that the NEB had adequately statutory powers to fulfill the Crown's duty to consult and that it had adequately discharged the duty
- The Court explained that the Crown may rely on a regulatory agency in this way so long as the agency has statutory power to do what the duty requires in the particular circumstances.
- The circumstances of this case made it sufficiently clear that the NEB process was intended to constitute Crown consultation and accommodation and that "notwithstanding the Crown's failure to provide timely notice, its constitutional obligation was met".
- Given the NEB's expertise in supervision and approval of federally regulated pipeline projects, the NEB is well positioned to assess the risks posed by such projects to Indigenous groups.
- The NEB's written reasons were sufficient to satisfy the Crown obligation.

Indigenous Litigation: Recent Cases of Interest before the Supreme Court of Canada

Potential impact of the SCC decisions in *Clyde River* and *Chippewas of the Thames* :

- The SCC has clarified that the duty to consult can be fulfilled by administrative tribunals properly empowered by statute.

- This confirms the legality of ENERGY's existing approach under which certain aspects of the Crown duty are fulfilled by the Ontario Energy Board, namely the determination of sufficiency of consultation and accommodation in a leave to construct application.

- ENERGY also already ensures that Indigenous communities are notified of the role of various parties in the duty to consult process.

Indigenous Litigation: Recent Cases of Interest before the Supreme Court of Canada

Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Operations) (“*Ktunaxa*”)

- Ktunaxa arises from development of a ski resort which the community claims infringes their freedom of religion. Ontario is not intervening in this case.
- The matter was heard on December 1, 2016. Judgment was reserved and has not yet been released.
- LSB will continue to monitor these proceedings.

Other Matters

- The Legal Services Branch continues to monitor other litigation matters:
  - *Algoma Coalition v. OEB*
  - *HMQ v. Orlandis-Habsburgo and Lefrancois*
  - *Capital Solar Power Association v. Ontario Power Authority*

Other Matters – Algoma Coalition

- The **Algoma Coalition** filed an application for judicial review of an Ontario Energy Board decision to deny the Coalition its costs for its participation as an intervener in an OEB matter dealing with Hydro One Inc.'s application seeking approval to purchase the voting shares of Great Lakes Power Transmission Inc.
- The OEB granted intervener status to the Coalition but denied it eligibility for costs on the basis that:
  - costs of intervention are not available to a municipality under section 3.05(i) of the OEB's *Practice Direction on Costs;* and
  - the Coalition is a "municipality" under this section of the practice direction because it represents the interests of a group of municipalities.
- The Attorney General has a standing right to intervene on applications for judicial review. MAG will not be intervening in this case.

Other Matters – Orlandis-Habsburgo

- In **Orlandis-Habsburgo**, an LDC noticed that the Applicants' electricity usage pattern was consistent with a marijuana grow-op and alerted the authorities. Police commenced an investigation and the LDC provided further information to the authorities. Following execution of a search warrant, marijuana and a large sum of money were found on the premises.
- The Applicants allege that personal information was shared without their knowledge or consent and claim that s.4.3.1 of the OEB's Distribution System Code is inconsistent with the *Charter of Rights and Freedoms.* The Applicants also claim that various sections of *MFIPPA, FIPPA and PIPEDA* are inconsistent with the *Charter.*
- A decision dismissing the Applicants' claim was released on May 22, 2014. The Applicants sought leave to appeal.
- The Court of Appeal dismissed the Applicants' appeal on August 10, 2017, but concluded that the appellants had a reasonable expectation of privacy in their energy consumption data and the police must obtain a warrant or the appellants' consent to obtain or use such data.
- The constitutional challenge to the Distribution System Code, MFIPPA, FIPPA and PIPEDA were dismissed since the relevant provisions are permissive in nature and the LDC still has discretion to decide whether to disclose electricity consumption data.

Other Matters – Capital Solar

- **Capital Solar** filed an amended Statement of Claim against the then-OPA in August 2014 alleging that:
  - Capital Solar expended vast sums of money and labour-power in recruiting microFIT customers based on the original microFIT pricing and that changes the OPA made to pricing were unlawful and inconsistent with the obligations of the OPA as a public officer
  - as a result of OPA's misfeasance in public office, Capital Solar suffered the loss of all customers they had attracted, including 175 customers who had received offers to connect (as well as any potential profits associated with these customers)
  - a few customers have taken legal action against Capital Solar
  - Capital Solar lost the opportunity to sell its customers to a third party and all profits associated with such a sale.
- Mediation in the matter is scheduled for October 16, 2017.