CONFIDENTIAL AND PRIVILEGED LEGAL ADVICE – Nov 30, 2017

Review of Blakes' mark-up dated November 28, 2017 as proposed response to OPG/Dealers/Torys/Oslers' Comments Daft November 24, 2017 [as updated by their further comments dated November 29, 2017 – not included yet.]

<u>Process Agreement</u>

1. Proposed Response: Agree with response to Footnote #1 – Closing mechanics are under consideration by Province.

2. P. 1 Recitals - OPG moved the provisions requiring delivery of the Initial Financing Plan, Initial Forecast and Initial Protection Agreement Maximum into the recitals as they suggest that these actions will have taken place prior the Ministers executing the Process Agreement and Protection Agreement. They would like to add a list of the "reference" agreements, the Initial Financing Plan and Initial Forecast as exhibits to the Process Agreement. This doesn't work for a number of reasons including:
   - The authority for provincial staff to "not object to" and "confirm" these documents flows from the Ministers' power to determine the terms and conditions of the limited guarantee.
   - The agreements and financing plan will not necessarily be in final form at the time that OPG is hoping that the Ministers sign the Process Agreement and Protection Agreement so it is not possible to attach the final form.
   - This reduces flexibility for the Province in reviewing these documents and revises the approach that has already been agreed to through negotiation to date on numerous iterations of the Process Agreement.
   - The recitals are inaccurate as the Province doesn't have a role to "not object to the financing plan" so it seems like OPG is trying to obtain some agreement on a point outside the parameters of the Process Agreement. Financing Plan is delivered to the Minister of Energy under the statute.
   - The Province's role as set out in s. 4.01(b) of the Process Agreement concerns how the Protection Agreement Maximum can be established: "the Province may disagree with the Initial Forecast and the initial Protection Agreement Maximum on the basis that (i) there appears to be inaccuracies in the Financing Plan or the Initial Forecast, (ii) the Initial Forecast is inconsistent with the Financing Plan or (iii) the initial Protection Agreement Maximum is not less than the Initial Forecast. If the Province disagrees, OPG shall discuss any discrepancies with the province, address any inaccuracies and inconsistencies so the reasonable satisfaction of the province and OPG and the initial Protection Agreement Maximum will be revised accordingly and confirmed by an amended notice to the Province."

   Proposed Response: Agree with Blakes' mark-up to revert to previous provisions on all these points.

3. P. 1, Recital 5 – Need to consider whether the delivery of the initial "Reference (formerly "Reviewed") Documents" should be moved into the body of the Process Agreement as an obligation for OPG and Province has right to object within 10 Business Days or such shorter period. OPG suggests adding a schedule that lists these documents but as noted above these Reference Documents are not likely to be in final form prior to Ministers executing agreements. How can these particular documents be identified as being the "Reference Documents" for the purposes of the agreement? Will they be sent under a particular covering letter or dated a particular date or version?

4. Concept of "not objecting to" vs "confirming or accepting". Understand that the preference is for the Province to "not object' rather than "confirm/accept". The original approach was for the Province to positively confirm in writing acceptance or approval but this was revised a few drafts ago. The reason for the revision was based to a certain degree on the limited time that the Province has to review any of the Reference Agreements and as a result the defined term was changed as well. So now certain documents (Reference (Reviewed) Agreements and the delivery of the Initial Forecast and subsequent Forecasts and Protection Agreement Maximum) are delivered to the Province and will be accepted unless the Province objects or disagrees with them. Right now there is a 10 day period for disagreeing in writing with forecast and Protection Agreement Maximum and then discussion and OPG to address discrepancies to reasonable satisfaction of Province and re-send Initial Forecast amount. Also the Province may "object" to any amendments of the "Reference Documents" by "delivery of an objection notice in writing delivered to OPG within 10 Business Days after it is provided to the Province" but no steps as to what happens when Province objects. Would it be informal discussion?
   <u>Province to decide</u>: Also, it is important now from a practical perspective to determine to whom at the Province the following documents are sent under the Process Agreement and who will determine whether or not to object/disagree on behalf of the Province:
   - Deliver initial Financing Plan (s. 2.01(a))
   - Deliver Reference Documents (as mentioned in recital or if moved to obligation under agreement)
   - Deliver Initial Forecast and initial Protection Agreement Maximum (s. 4.01(a))

5. 2.02(a)(v) – Addition of "unless waived in writing by the Province:
   Proposed Response: OK because any provision can be waived in writing by a party anyway.

6. 2.02(a)(v)(D) – This provision would not allow Financing Entity to enter into transactions where there is penalty or make-whole payment or consent right required for Province to assume the obligations?

Proposed Response: Need to discuss whether this is still relevant to be preserved if no assumption right?

7. 2.02(b)(iv) – OPG says they will not be aware of any event that with the passage of time or the giving of notice would be a Protection Event.– we propose adding "known to OPG" so that if they do know something they should not go ahead and exercise redemption etc. rights.
Proposed Response: Agree with Blakes mark-up to insert "known to OPG".

8. 2.02(c) – OPG inserted that its obligations under the Process Agreement are subject to OPG's obligation as FSM and as Manager. At the Tuesday evening meeting, we had asked them to narrow this wording so that it identified any points at which their fiduciary or other obligations under those agreements might conflict with the obligations under the Process Agreement, but they haven't narrowed it so the effect is that they could rely on this to say that in any particular case there is a conflict with their other role so they can't comply with their obligation to the Province
Proposed Response: Agree with Blakes mark-up not to accept this addition.

9. 2.02(c) – OPG wants to reference that nothing in the Protection Agreement limits the obligations of the Province under the Indemnity Agreement to indemnify OPG. OPG in its own capacity is not a party to the Protection Agreement. Don't understand why this needs to be added and how anything in the Protection Agreement would affect the Indemnity Agreement. [Need further explanation of disadvantage to Province.]
Proposed Response: Agree with Blakes mark-up not to accept this addition.

10. 3.01 Process Certificate: OPG has significantly reduced the amount of information and its responsibilities under the Process Agreement and is proposing to only provide the Province with a certificate under s. 3.01 in the same circumstances that OPG is giving one to the dealers under the Protection Agreement. The Province agreed to limit delivery of OPG's certificate under the Protection Agreement because dealers' counsel refused to agree to provision of a certificate in the case where funding obligations were amended (and the Province agreed to a compromise position where notice of amendments is given to the province under the trustee indenture amendment provisions). OPG has now deleted delivery of that certificate to the Province under the Process Agreement too, which was never discussed or agreed to by the Province. In addition, it has narrowed the obligations for which a certificate is provided under the Process Agreement to the narrower category of Certified Primary Obligations – borrowing, master ISDA agreement and other agreements for with a term of 3 years or longer (without termination within 3 years and above a $5 million thresholds, etc. The Province agreed to a narrower circumstance in the Protection Agreement on the insistence of dealers counsel that there was too much uncertainty associated with when the guarantee applied and so these categories were

delineated. Again, there was no discussion about so restricting the delivery of certificates under the Process Agreement. The principle is quite different and the Process Agreement is between the Province and OPG to ensure that Province receives sufficient information about obligations to which the Province's guarantee will apply.

Proposed Response: Revert to previous version of Process Agreement so that Province receives broader information and certificates. Consider specifically the following:

- Certificate should be provided before amendment to guaranteed obligations as previously agreed.
- Footnote 2 on p. 7 - When should certificate be provided? Previously said before earlier of pricing and incurrence of obligation. Have now agreed before "incurrence" In Protection Agreement – do we still want it before earlier of pricing and incurrence of obligation?

- What is the scope of obligations for which certificate must be provided? Previously said Funding Obligations above a $ threshold. $ threshold has not yet been included. The way it is drafted it would apply a $ threshold to all types of obligations. Also, in Protection Agreement, have narrowed it to Certified Primary Obligations as set out above. Would say that this is too narrow for swaps - definitely want it for swap confirms in process agreement as ISDA Master is not informative of any transactions guaranteed. Need to consider this further – what about other obligations? Note that these certificates are informational – they don't determine whether the Limited Guarantee applies.

11. 3.02 Acknowledgement – OPG added a provision in which Province acknowledges that OPG will provide a certificate to Indenture Trustee and that if there is a Suspension Notice, OPG agrees not to deliver any further certificates. In general, this provision seems ok, but OPG deleted the Suspension Notice Delivery provision which should be re-inserted with the specific range of suspension events.
    Proposed Response: Agree with Blakes mark-up to include Acknowledgement but also include a specific acknowledgement about Province's entitlement to deliver a Suspension Notice under the Protection Agreement if there is a Program Breach or Breach Event under Process Agreement and also inclusion in 6.01 of the definition of Breach Event.

12. 6.01 Election to Assume – Deleted.

Protection Agreement

1. Footnote 1 – Agree that logistics of closing are under consideration by Province

2. Footnotes 2 and 3 – Legal note to Torys' that Province will accept Torys opinion on due execution point and establishment of trust as financing entity point.

3. Recital 2 – Insert OIC number 1981/2017 made September 27, 2017

4. P. 2 – Proposed Response: accept deletion of “or amended” because no adherence conditions required on amendments. (compromise position that Province will get notice under Trust indenture).

5. 1.12 – Question from LSB only – Are we going to request original executed copies of these agreements by all parties? Typically we ask for originals. Perhaps we can discuss further?

6. 2.01(a) – Proposed Response: Agree to deletion of form of “Guarantee Settlement Statement” in advance given timing.

7. 2.01(a)(iv)(B) – Proposed Response: Agree to revised wording. The change is to reflect the Province’s subrogation rights. After a Protection Event the Province pays the whole amount owed to the Beneficiary, and not just the deficiency. The Province then receives any payments that it has a right to receive by being subrogated to the rights of the Beneficiary after making payment on the Limited Guarantee. [NTD: Blakes is undertaking further review on this issue and may suggest further changes.]

8. 2.01(b) – Proposed Response: OK, conforming change

9. 2.01(e) – Proposed Response: Fine for completeness.

10. 2.08 – Proposed Response: Fine, 8.01 is the section describing when Limited Guarantee ends – when all obligations are paid.

11. 4.01 – Addition of ability for Province in its sole discretion designate in writing that it is an Approved Obligation.
    Proposed Response; OK, adds flexibility and it is in Province’s sole discretion.

12. 4.02 (b) – Changes to delivery by OPG of Certificate to **[Indenture Trustee][NTD: Is it sufficiently clear who the Certificate is delivered to?]** to confirm adherence of Guarantee to reflect business issues raised by dealers’ counsel re: Protection Agreement. However, OPG has proposed using the same approach for the Process Agreement which is discussed above. We also do not agree to the description of the contents of the Certificate as it must say that OPG has complied with its obligations to the Province and internal requirements and processes in connection with adherence of Limited Guarantee to the Certified Primary Obligation, not that it has delivered all certifications to Province as required.
    Proposed Response: Agree with Blakes mark-up.

    Additional Issues with respect to Certificates:

a) new narrowed concept of Certified Primary Obligation in Definitions for which a certificate will be required for adherence includes: (i) obligations incurred to fund investment interests or repay such funding, (ii) Master ISDA Agreement (not confirms or trades) and (iii) other contracts that have a term of more than 3 years and not terminable within 3 years and with aggregate amount payable of more than $5million.

b) timing of certificate (before incurrence but not more than 5 days in advance). – before it was the earlier of pricing and closing – but reflects discussion at meeting that it would be provided before closing.

13. 4.02(c) – re-insert reference to "in respect of which the Adherence Conditions had been satisfied" because it has to be clear that it is only a Refinancing of an existing Primary Obligation to which the Limited Guarantee already properly applied that is not affected by a Suspension Notice.

14. Proviso to 4.02 – Agree with wording that adherence conditions only apply to Certified Primary Obligations.

15. 4.03 – Reflects discussion at meeting permitting reliance on OPG certificate (without verifying officer authority) and allows for adherence if it can be demonstrated that OPG did comply with Process Agreement respecting delivering certificates for Certified Primary Obligation. However need to review wording "OPG had delivered to the Province all certifications required by the Province in connection with the adherence of the Limited Guarantee to the Certified Primary Obligation – compare this to the wording in 4.02(b)?

16. 5.01(b) and 5.02 – Conforming – To confirm with Blakes.

17. Delete Article VI – Assumption Option - Given the changes that have been made and the reality that OPG is not building this right into the initial documents means that there is limited prospect for the assumption right to be meaningful. Even if exercised with respect to some obligations, does not remove the structure in the event of a Protection Event because there will still be outstanding obligations that are not capable of being assumed, except where the Province is subject to negotiations with certain creditors who may not allow assumption without compensation.

18. 6.03 – Agree with conforming Indenture Trustee reps to whatever is contained in Master Trust Indenture.

19. 7.01 – **Suspension of Adherence**. OPG has significantly reduced the rights of the Province with respect to the Province's rights to suspend the adherence of the Limited Guarantee to new obligations. This relates to the Process Agreement. In previous versions the Province had a right to suspend based on a breach of the Process Agreement, and this has been carved back to a narrower

right to suspend based on a breach in connection with an incurrence of a Primary Obligation. This needs to be revised to provide a link so that a breach of the Process Agreement can result in a suspension of the Limited Guarantee for new obligations going forward.
Proposed Response: Agree with Blakes' mark-up to insert clear suspension right for Program Breach and other defaults related to internal requirements and processes. [NTD: Review wording because perhaps all of the requirements don't actually concern adherence of the Limited Guarantee – consider this because adherence conditions only apply to Certified Primary Obligations.]

20. 7.01 – Note new wording requiring a certification from FSM prior to incurrence that proceeds will be used for refinancing of a Certified Primary Obligation incurred prior to the Suspension. Need to review and consider whether the Province is comfortable with allowing the FSM to make determinative when the suspension may have been a result of FSM breach. Difficult to predict scenarios under which suspension has occurred, but should consider what issues may arise.

21. 7.02 – Do not accept deletion of "amended" as Limited Guarantee should not apply where obligations are amended after suspension event.

22. [OLD 8.03] – Agree to delete Termination Notice as not necessary.

23. 8.01 – Agree to new wording that Agreement continues until amounts are paid under Limited Guarantee.

24. 8.02 – Notices to Province – to whom at MOF and MOE – Should it be Minister or someone else – most likely to be a payment demand? Any other notices that are likely?

25. Definition of Approved Obligation Amount – Should the regulation be referenced here? The "capping regulation" as opposed to just the Act. Footnote 5: **Needs review by MOE**.

26. Footnote 6: We would suggest that monthly draws under warehouse should be Certified Primary Obligations as they will be large amounts and significant obligations under the Protection Agreement.

27. See discussion above about definition of Certified Primary Obligation, including questions in Footnote 7.

28. Definition of Executive Officer – Footnote 8 – Looks like Torys has changed it to National Instrument in next draft which appears to be a better definition – more senior officers. – OFA to confirm whether this works.

29. Definition of Lien [used in 2.01(v)] and Loan Agreement [not used] – Do we need to include these? Lien is a generally understood concept, or do we need more specificity?

30. Definition of Master Agreement – Agree we should delete 1992 as it might not always be a 1992?

31. Definition of Primary Obligation – Footnote 9: Torys to confirm that this matches the Trust Indenture. See question in footnote.

32. Footnote 10 – Deletion because not in Trust Indenture, but a question for Torys because this concept may be included in a supplemental indenture.

33. Definition of "Refinancing" - Footnote 11 - This should be linked to the Act and Regulations. The General Regulation allows for a Refinancing to include amounts incurred within 6 months prior to the maturity date of a funding obligation. Need to consider whether this could lead to any problems with amounts that are intended for a refinancing but then are not used to refinance such debt. Suggesting some review with MOE on this point.

34. We should review the forms of notices attached to agreement.