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M E M O R A N D U M

TO: Cheryl Carson, Director (A), Legal Services Branch
Ministry of Energy

FROM: Michael Burke, Counsel
Crown Law Office Civil

DATE: April 10, 2015

RE: ***Hydro One IPO***

ISSUE: **Aboriginal Legal Issues associated with the Proposed IPO**

CLOC has been asked to consider whether the current proposal (the "Proposal") for Ontario to divest a portion of its ownership interest in Hydro One Inc. and its subsidiaries (collectively "Hydro One") gives rise to any significant Aboriginal legal issues or risks.

The primary issue we have identified is whether the Proposal triggers the Crown's duty to consult with Aboriginal peoples. A secondary issue concerns potential implications for the IPO arising from existing or potential First Nation challenges to Hydro One's legal authority to operate or manage transmission and distribution assets on Indian reserve lands.

Summary of Advice

Duty to Consult

- The law in the area is evolving and we are unaware of case law directly on point. The advice presented below therefore is based on our understanding of the relevant principles articulated by appellate courts in Canada, and how the courts might reasonably apply those principles to the Proposal.

- There is some risk that a court would conclude that the Proposal triggers the duty to consult in relation to commonly recognized Aboriginal and/or treaty rights, such as hunting, fishing and trapping rights, because the Proposal involves the Crown giving up the right to fully control Hydro One, and Hydro One's operations have the potential for negative impacts on Aboriginal and treaty rights. We assess the magnitude of that risk – that the duty to consult is triggered - to be in the range of low to moderately-low.

- There is a low risk that the Proposal triggers the duty to consult in relation to economic-based Aboriginal or treaty rights assertions, such as resource revenue sharing, in part because such assertions are likely to be viewed by the courts as lacking in credibility and/or not adversely affected by the Proposal.

- If the Proposal does trigger the Crown's duty to consult, we expect that the requirements of the duty in this situation would likely fall at the lower end of the consultation spectrum. This would entail providing early notice of the Proposal to Aboriginal communities and soliciting their feedback. If this is done, the Ministry should consider any responses with an open mind, and be prepared to consider options for minimizing any potential adverse impacts on rights that may be credibly asserted during the consultation process.[1]

Permits over Reserve Lands

- Unresolved legal issues exist concerning the status of the former Ontario Hydro's authorizations for the use of Indian reserve lands (i.e. *Indian Act* permits and easements), and purported transfers of such interests by Ontario pursuant to orders made under the *Electricity Act, 1998*. It is possible that First Nation communities inclined to oppose the Proposal might raise or revive such challenges. This might arise in the context of a consultation challenge aimed at the IPO, or an action for a declaration as to the invalidity of the statutory transfer orders, possibly brought together with injunction proceedings against the Crown in relation to the IPO, or against Hydro One in trespass for its on-reserve operations.

- The Proposal does not appear to exacerbate the existing legal risks, however, or cause fresh adverse impacts in relation to the management of on-reserve assets beyond the merely speculative. CLOC is advised by OEFC that a change in the ownership structure of Ontario Hydro may make it more difficult for Hydro One to negotiate new *Indian Act* permits with First Nations and/or Canada for on-reserve assets. This is due to the fact that Canada and First Nations likely derive a certain level of comfort from Hydro One currently being 100% Crown-owned.

[1] *Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388, at para 64.

- A full assessment of the risk that a court would declare elements of the transfer orders invalid is beyond the scope of this opinion, but it may be prudent to disclose the existence of the transfer orders issue in the IPO prospectus, at least in summary fashion. There would appear to be only a low risk that injunctive relief could be obtained.

Background

Hydro One is the largest electricity transmission and distribution company in Ontario, with approximately $22.6 billion in total assets.[2] It owns and operates substantially all of Ontario's electricity transmission system, accounting for about 97% of Ontario's transmission capacity. Hydro One's distribution system is the largest in Ontario and spans approximately 75% of the province, serving Ontario's rural areas and municipalities.[3] While Hydro One is a solely Crown-owned Corporation, s.48(2) of the *Electricity Act, 1998* provides that it is not a Crown agent.[4] The company consults with Aboriginal communities in relation to its projects or undertakings, but does so pursuant to duties delegated by the Crown to all hydro transmission and distribution proponents, with the Crown maintaining the ultimate and substantive consultation duty. The Ministry of Energy does not consider Hydro One to owe independent and distinct consultation duties from those delegated to it by the Crown.[5]

The Proposal, as we understand it, is for Ontario to sell approximately 15% of its sole ownership interest in Hydro One in 2015 by way of an IPO, and to proceed with further IPOs in 2016, 2017, and 2018 (or thereabouts), ultimately reducing Ontario's ownership in Hydro One to a minority stake of approximately 40%. Draft legislation is being prepared which, if passed, will facilitate the marketability of Hydro One through the removal of certain legislative and regulatory constraints to which Hydro One is currently subject as a Crown corporation. These include removing the application to Hydro One of the *Auditor General Act*, the *Financial Administration Act*, the *Ombudsman Act*, Freedom of Information legislation, etc.

Ontario's current power to appoint Hydro One's Board of Directors will be reduced, and its power under s.108 of the *Business Corporations Act*, as well as s. 50.1 of the *Electricity Act, 1998* to unilaterally issue unanimous shareholder directions to Hydro One will cease to apply. These powers permit Ontario to restrict in whole or in part the powers of Hydro One's directors to manage or supervise the management of the business and affairs of the corporation. They also permit Ontario to direct Hydro One to, among other things, transfer any of its securities, assets, liabilities, rights, obligations revenues and income to any person or entity, or transfer an interest in or entitlement to these things, and to impose conditions and restrictions.

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[2] Hydro One transmits and distributes electricity throughout Ontario, while Ontario Power Generation bears primary responsibility for the production or generation of this electricity.
[3] *http://www.hydroone.com/OurCompany/Pages/QuickFacts.aspx*
[4] *Electricity Act, 1998,* S.O. 1998 c. 15 Sch. A, s. 48(2).
[5] This position is in line with the conclusion of the Manitoba Court of Queen's Bench in *Sapotaweyak Cree Nation v. Manitoba,* [2015] M.J. No. 67 (para. 38), where the Court was not persuaded that the actions of Manitoba Hydro, a Crown corporation, were actions "of the Crown", thereby triggering independent consultation duties grounded in the Honour of the Crown.

Hydro One will continue, as in the past, to be a separate legal person from the Crown, and subject to all regulatory restrictions and requirements generally applicable in Ontario to electricity transmission and distribution companies. We also understand that the Crown plans to retain its title to Crown lands over which Hydro One transmission corridors have been constructed, and for which Hydro One enjoys easement rights. Finally, we are advised that the Proposal will ensure that remote communities, including certain Aboriginal communities, that are presently protected by regulation requiring Hydro One to provide remote community electricity distribution services, will remain protected.

Principles of the Duty to Consult

In order to assess whether the Proposal requires the Crown to consult with Aboriginal communities, it is necessary to consider the potential for the Proposal to adversely affect any known or credibly asserted Aboriginal or treaty rights. When the Crown has knowledge, real or constructive, of the existence or potential existence of an Aboriginal or treaty right and contemplates conduct that might adversely affect the right, the honour of the Crown imposes a duty to consult in good faith with affected Aboriginal communities.

An asserted right must be "credible" in order to give rise to the duty, but this does not impose an onerous threshold. The content and scope of the duty varies depending on the context, but may require that the right be accommodated. This duty has its source in the honour of the Crown and the constitutional protection accorded to Aboriginal and treaty rights under section 35 of the *Constitution Act, 1982*.

A Crown action or decision need not have a direct, immediate physical impact on the right asserted for the duty to consult to be triggered. A potential for adverse impact suffices and strategic, higher level decisions, for example structural changes to a resource's management, can trigger consultation duties if they set the stage for further decisions that will have an adverse impact on credibly asserted rights.[6] The adverse impact must be an "appreciable" one, however, and not "merely speculative".[7]

In *Rio Tinto*, the Supreme Court of Canada noted that a contract that transfers powers over a resource to a private party may remove or reduce the Crown's power to ensure that a resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. This can trigger the duty to consult with Aboriginal peoples and potentially accommodate their s. 35 rights, a process which permits the Crown to uphold its honour.[8] The

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[6] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43, [2010] 2 SCR 650 at paras. 43-47 (hereinafter "*Rio Tinto"*); *Haida Nation v Brisith Columbia (Minister of Forests),* 2004 SCC 73, [2004] 3 SCR 511, at para. 76.

[7] *Ibid, Rio tinto* at para. 46.

[8] Note also *Adams Lake Indian Band v. British Columbia,* 2011 BCSC 266, which related to the duty to consult before the incorporation of a municipality. The British Columbia Supreme Court held that a change in the identity of a decision maker "may potentially lead to adverse effects" on s.35 rights, as the new decision maker may approach its decision making with a different philosophy (paras. 143 and 160). A change in control may also, in some instances, affect the rights of Aboriginal communities to be consulted on future actions, should the change devolve power from a Crown entity owing consultation duties to an entity that does not. As a result, the duty to

Supreme Court also made it clear in this case that the Crown action must risk causing fresh adverse impact on a right, as past or ongoing infringement of a right does not trigger fresh consultation obligations.[9]

I. **Duty to Consult in Relation to Commonly Recognized Aboriginal and Treaty Rights**

It is necessary to consider whether the Proposal at issue, which includes a reduction of direct Crown control over Hydro One, including the loss of Ontario's ability to issue unanimous shareholder directives to the company, could result in adverse impacts to Aboriginal or treaty rights. Given Hydro One's nature – a company with a significant physical presence on Ontario's landscape – there is and always has been the potential for projects that may be undertaken by the company to have impacts on traditionally recognized Aboriginal and treaty rights, such as hunting, fishing, trapping, and the harvesting of plants. This reality does not in itself trigger a duty to consult, however, as the issue to be determined is whether the Proposal to divest a share of Ontario's ownership in the company has the potential to in some way change the state of affairs so as to risk fresh adverse impacts on rights.

To the extent that the regulatory framework that is applicable to Hydro One provides Ontario with the continued ability to ensure that Hydro One's future activities are carried out in a manner that respects Aboriginal and treaty rights, and which complies with Ontario's duty to consult, we believe there will be only a low risk that the Proposal can be seen to risk adverse impacts on Aboriginal or treaty rights as they have been commonly recognized to date (e.g. harvesting, fishing, trapping rights). The applicable regulatory framework is discussed below, but it should be noted at this point that somewhat different duty to consult considerations apply in the context of economic rights assertions, which are now being advanced on a more frequent basis by Aboriginal communities (for instance, resource revenue sharing). The risk that the duty to consult is triggered in relation to the Proposal by economic rights assertions is discussed separately below.

Ontario's Regulatory Framework for Electricity Projects

As indicated above, under the Proposal Hydro One will remain subject to regulatory requirements governing electricity transmission and distribution companies, and any procedural Aboriginal consultation duties delegated to it by Ontario. It will also remain subject to any existing restrictions on the company contained in prior regulatory authorizations or approvals pertaining to the operation of its network of transmission and distribution assets. Should Hydro One wish to proceed in the future with the construction of new transmission or distribution lines, or the modification or expansion of existing assets, it must do so in compliance with all environmental assessment requirements, OEB Leave-to-Construct

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consult may be triggered by the change. The decision was overturned by the British Columbia Court of Appeal, 2012 BCCA 333, however. The Court of Appeal found that the decision to incorporate the municipality did not alter in any material way the province's duty to consult in the future, or the First Nation's right to be consulted, and that a causal connection between the incorporation and any adverse impact was difficult to discern. The consultation that the Crown undertook (which was on the lower end of the spectrum) was held to be adequate (paras. 74-79).

[9] *Rio Tinto, supra* at 48-49, 92.

approvals (*OEB Act*, s.92), electricity transmission license requirements, and MNR approvals for the use of Crown lands. (e.g. *Public Lands Act* land use permits), as well as other applicable federal or provincial regulatory requirements (e.g. *Ontario Heritage Act* and *Endangered Species Act* requirements).

Although permits and authorizations may be required under a variety of statutes, the primary vehicle for the overall review of electricity projects and for Aboriginal consultation or engagement in relation to such projects to occur, remains those provided for under the *Environmental Assessment Act.* In fact, it is the practice of the Ontario Energy Board to issue Leave-to-Construct approvals for major and minor transmission lines, conditional on the successful completion of the EA process, including Aboriginal consultations.[10]

a) *Individual EA*

In the case of a major transmission line project[11] an individual environmental assessment is required by the regulations and must be approved by the Minister of the Environment in order for a proponent, such as Hydro One, to proceed with the project. Prior to approving the individual EA, the Minister must be satisfied that the project will be consistent with the purpose of the *Environmental Assessment Act* (the "*EAA*") and the public interest (*EAA* s. 5(4)). The purpose of the *EAA* is broadly defined in section 2 of the Act as "the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment to ensure that the project is in the public interest." The term "environment" is also broadly defined and includes, *inter alia*, air, land or water, plant and animal life (including human life), as well as the "social, economic and cultural conditions that influence the life of humans or a community" (*EAA* s.1) – a description that would include the rights or interests of Aboriginal communities. Key components of the individual EA process include consultation with government agencies and the public; consideration and evaluation of alternatives to the project; and the management of potential environmental effects.

The proponent's terms of reference for an individual EA must be approved by the Minister before the EA is conducted, and in preparing the terms of reference, the proponent is required to consult with interested persons, including Aboriginal communities. Proponents are to consult with the Ministry of Aboriginal Affairs on the identification of potentially affected Aboriginal communities, and the individual EA process itself requires Aboriginal consultations as appropriate. If the Minister is not satisfied with the terms of reference for an EA, including Aboriginal consultation, or is not satisfied, following the EA, that the project will be in the public interest or that sufficient Aboriginal consultation has occurred, the Minister may refuse to give approval to the terms of reference or to the project, or may give approval subject to conditions (*EAA* s. 6(4), and 9). The individual EA process also provides opportunities for Aboriginal communities to receive information concerning the project and to provide comments which the

[10] See OEB Order dated Sept. 15, 2008, EB-2007-0050 at p. 67-69, in the matter of an Application by Hydro One pursuant to s.92 of the OEB Act, for an Order granting leave to construct a transmission reinforcement project between Bruce Nuclear and Milton Switching Station.
[11] see *Environmental Assessment Act*, O. Reg 116/01 "Electricity Projects", s.3 and 5 and the associated Guide to Environmental Assessment Requirements for Electricity Projects.

Ministry will consider in its review of the EA.   Ontario can also undertake direct consultation with potentially affected Aboriginal communities before issuing an EA approval to Hydro One.

The Crown will therefore maintain significant control under the individual EA process applicable to major Hydro One transmission projects to ensure that Aboriginal and treaty rights are protected and the duty to consult complied with, even following a divestment of direct control over Hydro One pursuant to the Proposal.

b) Class EA and Environmental Screening Process

Not all future projects or "undertakings" that may be pursued by Hydro One would be subject to an individual EA, however. Smaller projects, such as minor transmission lines as defined in O. Reg 116/01, will be subject instead to more limited environmental assessment requirements as dictated by the Environmental Screening Process set out in the Guide to Environmental Assessment Requirements for Electricity Projects (the "Guide") (which have the force of law pursuant to O. Reg 116/01). This process is intended for projects which have potential environmental effects that can likely be mitigated.   Minor transmission line projects that are not associated with generation facilities are subject to the Class Environmental Assessment for Minor Transmission Facilities.   Class Environmental Assessments are environmental assessments approved under the EAA to pre-approve certain classes of projects that have predictable and mitigable environmental effects. A proponent who receives approval for a class of undertakings does not need to obtain separate Ministry approval for each specific project, provided the previously approved class planning process is adhered to.

The Environmental Screening Process is a proponent driven, self-assessment process, where the proponent is responsible for determining if the process applies to its project. There are two stages of review required under the process, depending on the environmental effects: a Screening stage and an Environmental Review stage. The screening stage requires proponents to apply a series of screening criteria to identify potential environmental effects of the project. The more detailed Environmental Review study is required if potential concerns are raised during the screening stage that could not be readily addressed. The proponent is required to make its Screening Report or Environmental Review Report available to the public for a minimum 30-day review period. During the review period, members of the public (including Aboriginal communities), and government agencies, have the opportunity to request that the proponent voluntarily elevate the project to either an Environmental Review within the Environmental Screening Process, or to a full individual EA. If the proponent refuses, the party may within time limits make a request to the Ministry that the project be elevated. At any point in the Environmental Screening process, if it is determined that a project is likely to have significant negative environmental effects which warrant an individual EA, the Minister may of his or her own initiative require that a project be made subject to an individual EA. Elevation to an Individual EA gives rise to the requirement for Minster approvals for the proposed undertaking, with corresponding Crown consultation obligations.

The Class EA for Minor Transmission Facilities (which is in the process of being revised), applies to transmission lines ranging from 115 kV to 500 kV, with line lengths of 2km to 50 km, that are not associated with generation facilities. The Class EA provides guidance on how proponents are to consult with interested parties, including Aboriginal communities, and also includes mandatory notification points at the commencement and completion of the process, as well as opportunities to review project documentation and attend public information sessions and workshops. Impacts on persons or property, interference with the use of natural resources for any other purpose, detrimental effect on air, water, or ambient noise levels, impact on social structure of neighbouring communities, impacts on fish and wildlife, etc. are to be considered by the proponent during the Class EA process.[12] The Class EA also provides that an individual, such as an Aboriginal community, may make a request that the Minister order the proponent to do an individual EA, or the Minister may issue such an order unilaterally.

The Class EA for Minor Transmission Facilities, as well as the Environmental Screening Process, provide procedures that permit a proponent to proceed with prescribed projects upon the completion of the project without the necessity for Ministry reviews and Minister approval which are required for more complex individual EAs. They also contain a "screening process" by which relatively minor undertakings with a lower likelihood of environmental impacts can be screened out of the process by the proponent. While some proponent-driven consultation is required, there is not, in most cases, direct Ministry oversight or Aboriginal consultation (although the Crown will provide advice on duty to consult issues).

In comparison to an individual EA, the Class EA and the Environmental Screening Process has fewer or no potential Crown decision or approval points in relation to applicable undertakings, and thereby has fewer or no potential trigger points for Aboriginal consultation by the Crown. As a whole, this means a proponent has a moderately greater ability to proceed with an undertaking that could have adverse impacts on Aboriginal or treaty rights, than in the case of an individual EA. This means there is a greater risk in respect of projects subject to Class EAs and the Environmental Screening Process that the Crown will fail to meet any duty to consult, than in respect of a duty that arises where a project is subject to an individual EA. If Ontario retained control over Hydro One, Ontario would have the capability to reduce that risk by directing Hydro One to consult in matters not subject to a Class EA or the Environmental Screening Process. This change in Ontario's capability to ensure that consultation occurs – the Proposal – may, as a result, give rise to a duty to consult. However, the risk of a duty to consult in respect of the Proposal is derived from and dependent on the existence of any risk that Ontario might not meet a duty to consult in those rare cases where the Class EA process or Environmental Screening Process does not provide for adequate consultation.

This risk of inadequate consultation and further of a duty to consult is somewhat mitigated by the proponent-driven consultation process, the possibility of elevation to an individual EA, and the fact the projects applicable to these processes have been previously identified by the Crown as having less significant environmental impacts (which will lower but not eliminate the chance of affecting Aboriginal and treaty rights). While the Class EA and Environmental Screening Process have been scoped in a manner so as to reduce the likelihood of projects

[12] The proposed revisions to this Class EA expressly include environmental effects such as impacts to cultural heritage resources, including archaeological resources.

proceeding without adequate consideration of Aboriginal and treaty rights, the proponent driven nature of the processes, the decreased Crown involvement, and the requirement for an interested party (such as an Aboriginal community) to pro-actively request that a project be elevated to an individual EA, provide less protection for s.35 rights than an individual EA. In an individual EA the Crown must independently assess the project, as well as the Aboriginal consultation, and issue approvals.

It should also be recognized, however, that the EA regime is not the only regime applicable to Hydro One operations, or the only regime that can trigger Crown consultation. The development of any new transmission or distribution line on Crown lands will require permits from the Ministry of Natural Resources and Forestry, and generally the creation of interests in land, such as easements. MNRF decisions with respect to such permits and interests will trigger the Crown's duty to consult in the event there is the potential for negative impacts on s. 35 rights, which will often be the case.

c. EA Exempted Undertakings

A further category of electricity projects set out in the Guide and regulations are those which are expected to have minimal environmental effects and which are exempted from the requirement to obtain approval under the *EAA*, and which are also not subject to the Environmental Screening Process. It is this category of projects over which the *EAA* regulations provide the least Crown control and for which a proponent, such as Hydro One, has the greatest ability to proceed without obtaining Crown approvals, at least in the *EAA* context. The Crown is not without any power, however, as it is still possible for a project in this category to be designated by the Minister of the Environment (with the approval of the Lieutenant Governor) as being subject to an individual EA. In addition, if Crown land or resources are required, there are requirements under the *EAA* related to the disposition of Crown resources, e.g., an environmental review by MNRF, and as noted above, MNRF decisions regarding permits and interests over Crown lands can and frequently do trigger the duty to consult. Other regulatory approvals may also apply, such as the requirements under the *Endangered Species Act,* and, where there is likely to be significant ground disturbance in areas of archaeological potential, the *Ontario Heritage Act*.

Loss of Control through Unanimous Shareholder Directives

With respect to projects that Hydro One might pursue in the future, the divestment of Crown ownership and control, with the resulting loss of Ontario's ability to issue unanimous shareholder directives, removes one useful tool from Ontario's box that can be utilized to resolve issues that may arise from time to time involving Aboriginal communities and Aboriginal rights or assertions. This tool can at present be utilized by the Crown to require Hydro One to take or cease certain actions, for example, enter into an agreement with an Aboriginal community for the transfer of assets, revenues or income, create a joint ownership structure with a First Nation for a subsidiary, cease or delay the construction of a project, pursue further Aboriginal consultation, or agree to certain accommodations. The loss of this tool may make it somewhat more difficult in the future for the Crown to avoid or resolve Aboriginal related disputes or issues, or prevent an adverse impact on Aboriginal or treaty rights. The risk of this loss, while difficult to quantify, is perhaps more pronounced in relation to projects that fall into the Class EA or Environmental Screening Process categories, or which are exempt from the *EAA* altogether, since the Crown's regulatory oversight of such projects is already reduced.

Implications for Duty to Consult re Traditionally Recognized s, 35 Rights

Although it can be argued that this loss of direct control over Hydro One triggers the duty to consult in relation to the Proposal, we assess this risk as being in the range of low to moderately-low. This is because the potential for adverse impacts on Aboriginal or treaty rights can plausibly be viewed as speculative or insufficiently appreciable. While predicting outcomes in this rapidly evolving area of the law is a challenge, we expect that an Aboriginal community seeking to oppose the Proposal based on a failure to consult and the risk arising from the loss of the unanimous shareholder power would be unlikely to succeed.

An Aboriginal litigant would have to demonstrate that the Proposal risks adversely affecting s. 35 rights or removing Crown capacity to ensure consultation occurs, but do so in the absence of any context concerning the future Hydro One projects that may arise, or what course of action Hydro One or the Crown might take in the future to ensure that the community's rights are in fact respected. Absent the context of a proposed project, it would be difficult for the Aboriginal community to satisfy this onus.

Although not entirely on point, insights on speculative risk can be drawn from the Federal Court of Appeal's recent decision in *Hupacasath First Nation v. Canada*[13] where a judicial review application challenging the Crown's failure to consult was dismissed on the basis that the alleged impacts were overly speculative. Hupacasath First Nation challenged the decision of the federal government to ratify an agreement between Canada and the People's Republic of China designed to protect and promote investment. The plaintiff First Nation alleged that the agreement would lead to impacts down the road through increased resource development, and that the investor protections, including rights provided to foreign investors to sue Canada for breaches of the agreement, would provide disincentives to the federal government to rigorously protect the plaintiff's rights. In dismissing the application, the Court stated:

> **98** … At this time, we can only guess as to what will happen under the Agreement and what decisions or events will arise, or whether there will ever be any decisions or events requiring response. And, as we shall see, after the Agreement comes into effect, if any actual non-speculative effects on the appellant's rights appear on the horizon and become possible, the appellant will have many opportunities to protect its rights fully and prevent any harm, especially irreversible harm.
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> **99** Until there is at least a prospect of a decision or event prompted by the Agreement and until we know the nature of that decision or event, we cannot say with any degree of confidence or estimate any possibility that there will be a collision between protecting Aboriginal rights and a monetary award under the Agreement. If a decision or an event prompted by an agreement affecting Aboriginal rights were in prospect, a duty to consult might then arise depending on whether it causes a possibility of harm. But nothing is in prospect at this time, nothing can be

[13] *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, [2015] FCJ No. 4

> defined, nor can we even say that anything problematic might ever arise. At this time, all we can do is imagine decisions or events and impacts from them that might or might not happen as a result of the Agreement. However, the duty to consult is triggered not by imaginings but by tangibilities. …
>
> **102** … An impact that is, at best, indirect, that may or may not happen at all (such that we cannot estimate any sort of probability), and that can be fully addressed later is one that falls on the speculative side of the line, the side that does not trigger the duty to consult. …
>
> **105** Bearing in mind the aims the duty to consult is meant to fulfil, I cannot say that imposing a duty to consult in this case would further those aims at all. There is no apprehended, evidence-based potential or possible impact on Aboriginal rights. The imposition of a duty here is not necessary to preserve the future use of the resources claimed by Aboriginal peoples. Any adverse impact on rights stemming from the Agreement, if any, can be addressed later when they rise beyond the speculative and trigger the duty to consult. The appellants have failed to show that anything will be evasive of review before any harm is caused, if ever it is caused.

The Federal Court of Appeal distinguished the facts in *Hupacasath* from cases cited by the appellant showing that high-level management decisions or structural changes can trigger a duty to consult. The Court found that each decision cited by the appellant concerned Crown conduct that directly concerned the applicant First Nation's claimed territories or the resources situated upon those territories, and a causal relationship existed between the Crown action and the potential for adverse impacts. This was not the case for the investment agreement, however, and the potential impacts asserted by the appellant were speculative as they could only be reached by way of a "chain of reasoning where one or more of the links are assumption, conjectures or guesses or where assumptions, conjectures or guesses are needed to join them"[14]. The Court concluded at para. 121:

> Such a tenuous triggering and aggressive application of the duty to consult would undercut one of its aims, namely respect for "countervailing Crown interests" – in this example, the Crown's interest in workable governance: *Rio Tinto, supra* at paragraph 50.

In CLOC's view, the logic in *Hupacasath* is applicable to the potential adverse impacts which a court would have to contemplate in a duty to consult challenge to the Crown's implementation of the Proposal. The Proposal is not directed at specific lands, nor does it involve a specific project or development, and causal links between the proposal and possible impacts must be filled in with assumptions, conjectures, or guesses. On this basis, we assess the risk of the Proposal triggering the duty to consult in connection with commonly recognized Aboriginal and treaty rights (e.g. hunting, fishing, and trapping rights) as low to moderately-low.

We should add that we are not aware of the extent to which shareholder directives have in the past been used by Ontario to ensure that Hydro One respects s. 35 rights and that the Crown's consultation obligations are fully performed. If this has been done in the past, and particularly if it has been done frequently, evidence to this effect might assist an Aboriginal litigant arguing that the Proposal triggers the duty to consult, increasing somewhat the risk of a court accepting this proposition.

[14] *Ibid,* at paras 114-117.

If a court were to conclude that the Proposal triggers the duty to consult, we expect that the scope of the duty to consult imposed on the Crown would likely fall at the lower end of the consultation spectrum, for much the same reasons that we would argue the duty is not triggered - the very limited and amorphous connection between the Proposal and potential negative impacts on s. 35 rights. This would require the Ministry to provide early notice of the proposal to Aboriginal communities across the Province, including Métis and non-status First Nation communities, and solicit their feedback, and to consider any responses with an open mind, and be prepared to consider options for minimizing any potential adverse impacts on rights that may be credibly asserted during the consultation process.[15] Should the government wish to proceed with greater caution in the implementation of the Proposal, it may choose to conduct itself in this manner, as if the duty to consult was triggered.

II. Duty to Consult in Relation to Economic Based Rights Assertions

The discussion above focussed on the potential for the Proposal to have adverse impacts on Aboriginal and treaty rights as they are most commonly recognized (e.g. impacts on hunting, fishing and harvesting). The discussion that follows considers whether the Proposal could trigger the duty to consult in relation to Aboriginal and treaty rights assertions that are economic based, for example, assertions by communities of a right to share in the revenue or economic benefits that may be derived from the extraction or utilization of natural resources within their traditional territories. These assertions are sometimes described as the right to resource benefit sharing, or resource revenue sharing, and in the context of the Robinson Huron and Robinson Superior Treaties, they have been advanced as a right to “augmented” treaty annuity payments based on profit derived from the Treaty territories. The stated basis for the assertions by First Nations is frequently an interpretation of Ontario’s treaties as solemn agreements between the Crown and First Nations to “share” the land, as well as its resources, and the economic benefits or revenues flowing from the lands. First Nations generally reject the more traditional interpretation of Treaties as involving land surrenders to the Crown in return for reserves, cash payments, harvesting and other defined rights.

Based on these assertions, an argument could potentially be advanced by Aboriginal communities that the Crown’s divestment of an ownership stake in Hydro One adversely affects their economic-based claims, as Hydro One’s operations, as well as its past and future profits, are intimately tied to the extraction or use of natural resources (e.g. the transmission of energy derived from hydro-electric dams on water bodies located in traditional Aboriginal territories). The argument advanced may be that the divestment of the Crown’s ownership stake through an IPO results in a divestment to private investors of the company’s future resource based revenues, without consideration of Aboriginal communities asserted interests in resource revenue. Alternatively, the communities might argue that Hydro One’s present value, and therefore the proceeds of any IPO, are tied to the future extraction of resource revenues, and that their economic based assertions provide them with a right to a portion of the IPO proceeds and/or the right to be consulted in relation to the IPO.

[15] *Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388, at para 64.

On the law as it currently stands, we believe that the risk is low that economic-based assertions by Aboriginal communities are sufficient to trigger the duty to consult in the context of the Proposal.

Economic based assertions of a right to resource benefit or revenue sharing have not, to date, been recognized by the Courts as credible, and such rights are not apparent on the face of the Treaties. With respect to the pending claims for increased annuities under the Robinson Treaties, the Privy Council held in the 1890s that Canada rather than Ontario was responsible for payment of these annuities, and strong arguments can be made that no obligation exists to increase the annuities beyond the cap stated in the Treaty texts.[16] In the recent (and only) Ontario decision directly addressing the right to be consulted in the context of resource revenue sharing assertions, the Divisional Court held that the First Nation applicant had failed to establish a duty to consult and accommodate with respect to revenue-sharing and shared decision-making under Treaty 3 (1873).[17] CLOC accepts that this single decision is not conclusive as to the credibility of all resource revenue sharing assertions in the province, however. Treaties are to be liberally interpreted so as to give effect to the mutual understanding of the treaty parties, and are not always limited to their written terms, but it remains the case that there is no judicial support for assertions of economic treaty rights that might trigger a duty to consult.

Perhaps more significant to our assessment of risk is that it appears highly unlikely that the sale of a portion of Hydro One could in fact result in adverse impact to the economic-based assertions of Aboriginal communities. To the best of our knowledge, there are no assertions (credible or otherwise) by Aboriginal communities to a right to the direct corporate profits of Hydro One, as opposed to Crown revenues generally, and a strong argument exists that in the event economic based assertions are ultimately established as credible, Aboriginal communities would not be harmed in their rights by the IPO since they can be made economically whole through the Crown revenues at large, e.g. payments from the CRF in recognition of Crown revenue and/or private profit generated from the extraction or utilization of resources. It is unlikely, in CLOC's view, that any such economic-based rights, if established, would be so directly tied to Hydro One's operation as to provide an Aboriginal community with a right to the company's direct corporate profits, and therefore a basis to require consultation on the Proposal. Further, funds received by Ontario as a result of the Proposal are in effect a proxy for forgone future profits Ontario would otherwise receive as a shareholder. If Aboriginal litigants could establish a right to share in the profits of Hydro One – a tenuous proposition at best – they could assert a claim to the proceeds of the IPO, suggesting again that the IPO does not prejudice their rights.

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[16] *A-G Canada v. A-G. Ontario* (Robinson Annuities no.1), (1895), 25 S.C.R. 434 at p. 508; [1897] A.C. 199 (P.C.) at p. 202 and 212

[17] "On the record before me, I do not accept that WFN had such rights arising from Treaty 3." (*Wabauskang First Nation v. Minister of Northern Development and Mines et al,* 2014 ONSC 4424 (Div. Ct.), leave to appeal to the Court of Appeal dismissed).

III. <u>Implications relating to status of *Indian Act* Authorizations for Transmission Facilities located on Indian Reserves</u>

This issue concerns the status of *Indian Act* permits or easements that were previously issued by the Federal government to Ontario Hydro or its predecessors, and which are now, pursuant to "transfer orders" made under the authority of the *Electricity Act, 1998,* held by the Ontario Electricity Financial Corporation ("OEFC"). The assets are managed by Hydro One pursuant to an Indemnity and Trust Agreement between Hydro One and OEFC. OEFC is a Crown agent pursuant to s.56 of the *Electricity Act, 1998*.

When Ontario Hydro was dismantled in 1998, Ontario needed to devolve to the successor corporations the assets held by the company. This was done through the issuance of "transfer orders" made by the Lieutenant Governor in Council pursuant to the *Electricity Act, 1998.* Through a series of such orders, the vast majority of Ontario Hydro's assets, liabilities, rights, and obligations were divided between Ontario Power Generation ("OPG") and Hydro One, as well as their respective subsidiaries. Generally speaking, Hydro One received assets related to its transmission and distribution operations, and OPG received assets relating to electricity generation, as well as assets that related to both generation and transmission/distribution.

Certain assets, liabilities, rights and obligations, most notably those related to Indian Reserves, which were prohibited from being transferred either on their terms or by operation of law, remained in the name of Ontario Hydro, and are today retained by OEFC, as the corporate successor to Ontario Hydro. Pursuant to the transfer orders, they are to be held by OEFC in trust for Hydro One or OPG, to the extent permitted by law, and until such time as they can be fully and effectively transferred in law to either Hydro One or OPG, as appropriate.[18] Also as part of the restructuring, Hydro One and OEFC entered into an Indemnity and Trust Agreement in 1999 (clarified by letter on Dec. 10, 2001), which provides, *inter alia*, that Hydro One shall manage these on-reserve assets for OEFC, in accordance with terms, and in compliance with all applicable laws. It shall also comply with any terms and conditions applicable to the assets retained by Hydro One (e.g. conditions on *Indian Act* permits).

Hydro One is required by the Indemnity and Trust Agreement to take "such reasonable instructions from OEFC" in respect of any matter relating to the management of the on-reserve assets that could have a material adverse effect on OEFC's interests. OEFC also specifically retains the right to take control of and to manage all or any part of the on-reserve assets, although the terms of the agreement describe the manner by which the parties will co-operate to protect the value of such assets.

We are advised by OEFC that at the time of the reorganization, Ontario Hydro had transmission and distribution assets located on and across Indian Reserves, and that depending on the nature of the interest obtained, most of the related *Indian Act* permits or authorizations were not assignable or transferable, and thus remained with OEFC after restructuring. In some cases,

[18] See Transfer Order to Services Corporation, paras. 2.1, 3.2, and 8.1; Exhibit G thereto, and the Schedule to Exhibit G, para. 11.

Indian Act permits had not been issued in the first place, or they had expired and not been renewed. According to a draft prospectus prepared by Hydro One in 2002, the on-reserve assets at issue represented approximately 0.4% of Hydro One's total assets at the time, and consisted primarily of approximately 123 kilometres of transmission lines and approximately 1000 kilometres of distribution lines (of which 14 kilometres were used solely for serving customers off the reserves).

A process was initiated by Hydro One shortly after the 1998 restructuring to attempt to regularize Hydro One's permits, generally through the issuance of new federal permits or easements, and the relinquishment by OEFC of existing permits or easements. However, we are advised that despite the successful negotiation of memorandums of understanding between Hydro One and a significant number of First Nations, only a handful of such permits have been issued by the Federal government to date. Due to the delays, some of the MOUs have now expired and must be renegotiated.

CLOC is aware of at least three proceedings[19] commenced by First Nations in which the legality of the transfer orders and the arrangement by which OEFC holds on-reserve assets in trust for Hydro One or OPG, and by which these companies in turn manage the assets, was called into question. For example, in a notice of action filed by Wabaseemoong First Nation in 2008, it was claimed that the transfer orders to the extent that they apply to assets on reserves are *ultra vires* the jurisdiction of the province in view of the federal Crown's responsibility over lands reserved for Indians.[20] It was also claimed, alternatively, that the transfer orders are void and of no effect as they operate as a *de facto* transfer of reserve assets to OPG in the absence of consultation.

Settlement agreements have been concluded in relation to the Wabaseemoong matter and the two further claims raising these issues. The issues raised in these proceedings are not unique to the First Nations that asserted them, however, and could therefore be raised in the future by any First Nations holding reserves on which transmission, distribution or generation assets may be present. It is at least possible that First Nation communities inclined to oppose the Proposal might raise or revive such challenges as an offensive move against the Proposal. This might arise in the context of a consultation challenge aimed at the IPO, or possibly an action for a declaration as to the invalidity of the statutory transfer orders, brought together with injunction proceedings against the Crown for the IPO, or against Hydro One in trespass for its on-reserve operations.

It might be argued by First Nations that an adverse impact on their rights may arise from the Proposal since Hydro One will be under less direct Crown control, and therefore at greater liberty to take actions in relation to the on-reserve assets. To the extent that Hydro One may be presently managing assets on reserves without valid federal permits or authorizations, and therefore in trespass, it may be asserted by First Nations that the Crown cannot sell a portion of the company without first consulting them. An argument could be advanced that Hydro One,

[19] Whitesand and Red Rock First Nations flooding claim, Mishkeegogamang and Slate Falls flooding and land claim, and Wabaseemoong arbitration.

[20] *Constitution Act, 1867,* s.91(24).

freed of direct Crown control, will be in a stronger position to manage on-reserve assets in a fashion that adversely affects First Nation communities' rights or underlying property interests and that the duty to consult is therefore triggered.

Notwithstanding the unresolved legal issues pertaining to the transfer orders made under the *Electricity Act, 1998*, in CLOC's opinion the present Proposal does not exacerbate the existing situation by causing fresh adverse impacts, beyond the mere speculative, on First Nation's rights or interests in relation to their reserve lands. We note that Hydro One's management of the on-reserve assets is subject to the Indemnity and Trust Agreement whereby Hydro One is obligated to take instructions from OEFC, a Crown agency, if its actions could have a material adverse effect on OEFC. OEFC also retains the right to take control of and manage these assets, provided it does so in a manner that will facilitate Hydro One's operations. In addition, for the construction of new transmission or distribution facilities on reserve, Hydro One will be subject to all *Indian Act* easement or permit requirements, as well as any other applicable regulations. First Nations will also continue to have the ability to protect and enforce their reserve rights should Hydro One's continued management of the on-reserve assets on any particular reserve become unwanted (e.g. trespass proceedings). The IPO does not itself transfer any rights or interest to or from Hydro One, or OEFC, and therefore does not materially alter the situation created by the 1998 restructuring.

As we know from *Rio Tinto,* and as discussed above, fresh adverse impacts are required to trigger the duty to consult:

> [48] An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. …
>
> [49] The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right.

In CLOC's opinion, issues relating to the validity of on-reserve permits do not alter the duty to consult analysis and conclusions set out above.

We also consider the risk of a successful interim injunction proceeding by a First Nation in connection with this issue to be low as the speculative nature of potential adverse impacts in the absence of any actual proposal to make physical changes to on-reserve assets, will make it difficult to demonstrate irreparable harm under the *RJR MacDonald* test.[21] In addition, the balance of convenience element of the test will be difficult to satisfy given the significant impact of an injunction on either the effective management of electricity services in the province (including the servicing of First Nations homes and businesses), or on a key economic/policy priority of the province (i.e. the IPO).

[21] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paras. 77-80

A full assessment of the risk of adverse declarations against Ontario, OEFC or Hydro One following a full hearing on the merits of the legality of the transfer orders in connection with on-reserve operations, is outside the scope of this opinion, but may be greater (prior advice has been provided by CLOC on this issue). In that context, it may be prudent to disclose the existence of the transfer orders issue in the IPO prospectus, at least in summary fashion. We understand that a notice of this sort was included in the draft 2002 prospectus prepared for the previously considered Hydro One IPO.