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

SUBJECT: Canadian Union of Public Employees ("CUPE") Claim regarding the Broadening of Ownership of Hydro One Ltd. (Hydro One).

Background: On September 13, 2016, CUPE and its President Fred Hahn served a notice of their intention to make a claim against the Crown (namely the Premier and the Ministers of Finance and Energy) regarding the sale of the Province's shares in Hydro One. This Notice was required pursuant to the *Proceedings Against the Crown Act*, which requires that the Crown be provided with at least 60 days notice of any intended claim against the Province.

On December 6, 2016, CUPE, Fred Hahn, and two additional plaintiffs John Clarke and Dianne Dowling (collectively the Plaintiffs) served a Statement of Claim, which has the effect of commencing their lawsuit against the Province.

The Claim: The Plaintiffs have alleged that the Premier and the Ministers (collectively the Ministers) committed misfeasance in public office through their decisions and conduct with respect to both the Initial Public Offering in November, 2015 and the secondary offering in April, 2016 (the offerings).

The tort of misfeasance in public office involves three essential elements:[1]

(i) deliberate and unlawful conduct on the part of a public officer;

(ii) knowledge on the part of the public officer that his or her conduct was unlawful (or else reckless disregard for the need for lawful authority); and

(iii) knowledge on the part of the public officer that the unlawful conduct is likely to injure the plaintiff.

To satisfy the elements of this test, the Plaintiffs allege that the Ministers acted in bad faith, for an improper purpose, in conflict of interest, and contrary to the duties of their public office. The Ministers knew, or were recklessly indifferent or wilfully blind to the fact that the following decisions and conduct were improper and unlawful:

[1] *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 at paras. 23-24.

(a) authorizing the sale of shares in Hydro One to reward key benefactors of the Ontario Liberal Party in the financial services industry and to encourage their ongoing support and financial contributions to the Party;

(b) directing that the sale of Hydro One shares be conducted in a manner that would provide no less than 16 financial institutions the opportunity to profit from the offerings, thereby optimizing the opportunity to raise funds for the Ontario Liberal Party;

(c) structuring the privatization of Hydro One to reward private investors at the expense of ratepayers and taxpayers, in particular by effectively forgiving $2.6 billion in transfer taxes that should have been paid by Hydro One and circumventing the statutory obligation to pay proceeds to the OEFC;

(d) failing to use the proceeds of the sale of Hydro One shares to relieve ratepayers of the obligation to pay Debt Retirement Charges; and

(e) breaching the conflict of interest provisions of the *Members' Integrity Act* by making decisions relating to the sale of Hydro One shares while also actively soliciting funds on behalf of Ontario Liberal Party from the financial institutions that supported and stood to benefit from the sale.

The Plaintiffs allege that the Ministers were aware of, or recklessly indifferent or wilfully blind to, the likely that harm would be caused to the Plaintiffs and other residents of Ontario as a result of their unlawful decisions and conduct.

With respect to Ontario residents (as taxpayers) the Plaintiffs allege that the Ministers knowingly created harm by improperly and for the benefit of private investors:

(a) diverting the substantial profits that had been consistently earned by Hydro One while the Province was its sole shareholder to private investors despite the analysis from the Financial Accountability Officer that showed that the 2019-2020 the financial position of the province was projected to be worse by approximately $500 million per year as a result of the sale;

(b) relieving Hydro One of the obligation to pay a $2.6 billion departure tax to the Province upon the sale of Hydro One shares; and

(c) imposing substantially greater costs to raise the funds needed to invest in transit and other infrastructure projects by choosing to sell the shares rather than issuing government bonds to finance transit at a time when interest rates were at a historic low. The Plaintiffs allege that this resulted in a net annual loss of income to the province in excess of $130 million per year.

With respect to ratepayers who pay for Hydro One services, the Plaintiffs allege that the Ministers knowingly created harm improperly and for the benefit of private investors by:

(a) reducing the payment of proceeds from the sale of Hydro One shares to the OEFC, by including the $2.6 billion paid for additional common shares as part of the acquisition costs that were subtracted from the amounts payable to the OEFC;

(b) imposing ongoing Debt Retirement Charges to pay down the stranded debt that would otherwise have been completely paid if the Province had not paid $2.6 billion for additional shares;

(c) proposing that the cost of Hydro One services not be reduced on account of the substantial tax advantages arising from the sale. The Plaintiffs allege that the Ministers were very aware that Hydro One intended to seek to exclude the tax savings arising from the IPO from consideration in future rate setting.

The Plaintiffs are seeking the following two declarations (a declaration is a judgment from the Court that declares the state of the law that applies to the parties):

(a) A declaration that the Ministers' conduct and decisions in respect of the sale of shares in Hydro On Inc. and Hydro One Ltd., including the manner and structure of that sale, constituted misfeasance in public office, as would proceeding with the stated plan to further privatize Hydro One by ultimately selling 60% of Hydro One Shares; and

(b) A declaration that, owing to the Ministers' misfeasance in public office, Hydro One ratepayers, including the Plaintiffs, are being unlawfully required to pay more than $1.2 billion in Debt Retirement Chargers to the OEFC.

In addition to these declarations, the Plaintiffs are also seeking the following relief:

(a) An order for accounting of all funds received and/or disposed of in consequence of the sale of Hydro One shares (which is essentially a return of all of the proceeds received from the sale);

(b) Damages in the amount of $100,000 for misfeasance in public office;

(c) Punitive damages in the amount of $1 million; and

(d) Their costs of the action, along with interest.

Next Steps

The Ministry of the Attorney General will consider options for responding to the claim, and ENERGY will work closely with them to assist in preparing the response. In the meantime, ENERGY staff should preserve all documents relating to the IPO, and especially relating to the process used to select the bookrunners, and the decision to purchase $2.6 billion in additional shares prior to the IPO.

Originated: December 7, 2016