Ministry of the Attorney General
Briefing Note
Crown Law Office – Civil
Legal Services Division

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File: ***Hydro One Initial Public Offering***

Issue: **Response to CUPE's public statements objecting to the Initial Public Offering of the Crown's interest in Hydro One**

A, Background:

Hydro One Inc. is a corporation incorporated under the *Business Corporations Act*. Hydro One is responsible for the transmission and distribution of electricity in Ontario. It is wholly owned by the provincial government.

In 2002, Ontario took steps to initiate an Initial Public Offering (IPO) for shares of Hydro One. Shortly before the issuance, the Canadian Union of Public Employees (CUPE) and the Communications, Energy and Paperworkers Union (CEP) obtained a declaration from the Ontario Superior Court of Justice that the government lacked the statutory authority to effect the sale of shares of Hydro One (*Payne v. Ontario (Minister of Energy, Science and Technology*, [2002] O.J. No. 1450 ("*Payne*")).

The government at the time responded by amending the *Electricity Act, 1998*, ["the *Act*"] to explicitly permit the Minister of Energy, on behalf of Her Majesty in Right of Ontario, to sell shares of Hydro One. In particular, section 49(1) of the *Act* was amended to provide the Minister with the following statutory discretion:

> The Minister, on behalf of Her Majesty in right of Ontario, may acquire, hold, dispose of and otherwise deal with securities or debt obligations of, or any other interest in, Hydro One Inc. or any of its subsidiaries.

As well, the following clause was added to the purposes of the Act in s. 1:

> (f.1) to facilitate the alteration of ownership structures of publicly-owned corporations that transmit, distribute or retail electricity

However, the amendments also restricted the use of the proceeds from any sale of shares to payment to the Ontario Electricity Financial Corporation (OEFC), for the purposes of servicing the debt obligations the OEFC had assumed from Ontario Hydro in 1999. Despite these legislative changes, no IPO of Hydro One shares were ever issued.

The *Payne* decision was appealed to the Court of Appeal of Ontario. As a result of the amendments, the Court of Appeal ruled the appeal moot and refused to address the merits of the appeal. In 2004, the purposes section of the *Act* was amended to remove section 1(f.1).

In 2015, Ontario has once again taken steps towards initiating an IPO for shares in Hydro One. In press releases, Ontario has voiced an intention to use the funds obtained from the IPO to fund infrastructure projects through the *Trillium Fund.*

In order to facilitate this process, the Legislature introduced further amendments to the *Act* in the 2015 Budget bill [*Bill* 91], which received Royal Assent on June 4, 2015. The amendments included:

- Amending the purposes of the *Act* to include facilitating the alteration of the ownership structure publicly-owned corporations that transmit, distribute or retail electricity;
- Amending the purposes of the *Act* to include the allocation of proceeds from any disposition of shares to any Government of Ontario purpose;
- Amending section 48.2 of the *Act* to limit individual persons or entities to a ten percent ownership share, and requiring the government to maintain a 40 percent share in Hydro One.
- Amending section 50.3 of the *Act* to stipulate that proceeds from any disposition of Hydro One may be payable to the Consolidated Revenue Fund (CRF) (rather than the OEFC). If the Minister deposits the proceeds into the CRF, the Minister is then required to provide the OEFC with an equivalent amount but the Minister has broad discretion as to the form of the payment.

On April 13 2015, the law firm Sack Goldblatt Mitchell LLP provided CUPE with a legal opinion concerning the legality of Ontario's possible sale of shares in Hydro One ["the April 2015 opinion"]. The April 2015 opinion did not consider the proposed amendments to the *Act* which received Royal Assent in June 2015. In the opinion, counsel for CUPE took the position that the proposed offering was unlawful for three reasons:

- Ontario lacked the lawful authority to use the proceeds from such a sale to fund infrastructure projects, as proceeds from any sale must be paid to the OEFC;

- Ontario lacked the lawful authority to proceed with the sale, as it is inconsistent with the purposes of the *Act;* and

- The exercise of statutory discretion to privatize Hydro One could be challenged on the administrative law grounds of unreasonableness and irrationality.

Further, though not identified as a formal ground for challenging the sale, the opinion also raised adverse impacts from privatizing Hydro One based on Canada's international trade law obligations.

On May 13, 2015, Sack Goldblatt Mitchell LLP provided CUPE with a second opinion, in light of the aforementioned amendments to the *Act*. The May 2015 opinion did not identify substantive legal grounds for challenging the sale based on the *Act* as amended; it merely identified policy concerns about the prudence of privatization. In the May opinion, counsel for CUPE argues that the privatization of Hydro One will have the following negative impacts:

- Public control of Hydro One will be abandoned;
- Access to information on Hydro One activities will be limited;
- Hydro One will be exempt from the reporting, oversight and disclosure requirements that attach to its status as a public entity. Moreover, the Auditor General and Ombudsman will no longer have oversight responsibilities over Hydro One.
- It is open to Hydro One to sell off the majority of its transmission and distribution assets without ownership safeguards;
- Regulatory oversight of Hydro One will be significantly curtailed; and
- Proceeds from the sale of Hydro One assets are now to be deposited in the Consolidated Revenue Fund potentially undermining the commitment to retire debt of the Financial Corporation's debt with any sale proceeds.

On June 3, 2015, CUPE issued a press release wherein CUPE vowed to "ramp up pressure in the fight against the sale of Hydro One" by "target[ing] the process around the province's Initial Public Offering (IPO) to question the legality and wisdom of the sale".

On July 13, 2015, the Chiefs of Ontario ("COO") wrote a letter to the Minister of Energy advising that the First Nations would like to engage in a dialogue with a view to obtaining 10% ownership in Hydro One "in a way that we can settle the historic rent owed to us by Hydro One and ensure long term benefit for all First Nations". Similarly, on July 16, 2015, the Nishnawbe Aski Nation ("NAN") wrote to the Minister of Energy requesting bilateral discussions with Ontario on a number of energy issues, including a desire to acquire Hydro One's assets situated on First Nations land. In the letter, NAN refers to the Hydro One privatization stating that it "will further impact our people which I believe activates the Crown's duty to consult and accommodate our Aboriginal and Treaty rights".

The paragraphs below analyze the merits of each of CUPE's legal arguments and set out various options for addressing a potential legal challenge commenced by CUPE.

<u>B. Analysis:</u>

Issue 1: Ontario lacks the lawful authority to use the proceeds from the Hydro One IPO to fund infrastructure projects, as proceeds from any sale must be paid to the OEFC.

Response: The *Electricity Act, 1998*, as amended on June 4, 2015, provides Ontario with explicit authority to sell shares in Hydro One <u>and to use the proceeds for any purpose</u>.

Ontario's authority to sell shares of Hydro One is set out in section 49(1) of the *Electricity Act, 1998*:

> **Rights of the Minister**
> <u>49. (1)</u> The Minister, on behalf of Her Majesty in right of Ontario, may acquire, hold, dispose of and otherwise deal with securities or debt obligations of, or any other interest in, Hydro One Inc. or any of its subsidiaries.

With respect to the use of the proceeds of a sale, the CUPE Opinion dated April 13, 2015 was premised on the wording of the Act prior to the June 2015 amendments. As it read in April 2015, section 50.3 required that all proceeds payable to the Province in respect of the disposition of any securities or debt obligations (or any other interest) in Hydro One be paid to the OEFC. According to the CUPE opinion, the use of the proceeds to fund infrastructure and not pay down the stranded debt would be inconsistent with this provision.

The *Act* as amended on June 4, 2015, addresses the use to which any proceeds of a sale can be put. This issue is addressed through amendments to both section 1 of the Act dealing with the purposes of the *Act* and section 50.3. Section 1 of the *Act* was amended to explicitly state that the proceeding of the disposition of the Crown's interest may be appropriated for any Government purpose:

> **Purposes**
> 1. The purposes of this Act include the following:
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> . . . . .
>
> (g.1) to facilitate the alteration of ownership structures of publicly-owned corporations that transmit, distribute or retail electricity;
>
> (g.2) to facilitate the disposition, in whole or in part, of the Crown's interest in corporations that transmit, distribute or retail electricity, **<u>and to make the proceeds of any such disposition available to be appropriated for any Government of Ontario purpose</u>** [emphasis added];

In addition to the purposes section, section 50.3 of the *Act* was amended so as to allow the proceeds of the Hydro One IPO to be payable into the CRF. If the Minister deposits the proceeds into the CRF, the Minister is then required to provide the OEFC with an equivalent amount but the Minister has broad discretion as to the form of the payment. The funds can then be used in the same way as any other funds in the CRF.

Taken together, these amendments provide a full answer to the assertion that Ontario does not have the lawful authority to use the proceeds of the IPO for any purpose other than paying down the OEFC debt.

Issue 2: Ontario lacked the lawful authority to proceed with the sale, as it is inconsistent with the purposes of the *Act*

Response: The sale of Hydro One securities is consistent with the purposes of the *Act,* based on the June 2015 amendments to the purposes section. In any event, s.49(1) explicitly permits the disposition of the Crown's interest in Hydro One.

As noted above, section 1 of the *Act*, dealing with the purposes of the *Act*, was amended on June 4, 2015, to facilitate the disposition of the Crown's interest in Hydro One. In particular, section 1(g.1) and (g.2) expressly contemplate the alteration of ownership structures and the disposition of the Crown's interest in Hydro One.

While the June 2015 amendments to the purposes section of the *Act* are a complete answer, certain other portions of the purposes section also implicitly support the Minister's authority to dispose of the Crown's interest in Hydro One.

> **Purposes**
>
> 1. The purposes of this Act include the following:
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> . . . . .
>
> (f) to protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service;

A more economically efficient post-IPO Hydro One is anticipated to provide electricity consumers with greater price protection over the longer term, as the company seeks greater efficiencies in operation.

> (g) to promote economic efficiency and sustainability in the generation, transmission, distribution and sale of electricity

One of the publicly stated purposes of the IPO is to use the transmission and distribution assets of Hydro One as a catalyst for consolidation (particularly in respect of the distribution sector). It is proposed that, given the high-quality of Hydro One's assets, and building on the intention to transform Hydro One into a more economically-efficient corporate entity, that the privatized post IPO Hydro One would be in a sound commercial position to both purchase other smaller distributors (e.g. embedded in its distribution system but owned by others such as municipalities) and to sell portions of its distribution system resulting in a more economically rationalized distribution sector overall.

> (h) to ensure that Ontario Hydro's debt is repaid in a prudent manner and that the burden of debt repayment is fairly distributed

Though section 50.3 as amended provides Ontario with greater discretion to allocate the proceeds of disposition of Hydro One securities, the IPO will provide the government with distinct financial benefits which can, at the Government's choosing, be recognized as part of its strategy to reduce the OEFC stranded debt as well as, directly or indirectly, capitalize the Trillium Trust in respect of infrastructure funding.

Accordingly the disposition of Hydro One securities implicitly furthers several purposes of the *Act*. In addition to the purposes section, as noted above, s.49(1) of the *Act* gives the Minister of Energy the explicit authority to sell common shares of Hydro One.

The amendments to the purposes section and s. 49(1) of the *Act* provide a complete answer to CUPE's argument that the Hydro One IPO is inconsistent with the objects and purposes of the *Act*.

Issue 3: The exercise of statutory discretion to privatize Hydro One could be challenged on the administrative law grounds of unreasonableness and irrationality.

Response: Non-adjudicative policy decisions cannot successfully be challenged on judicial review or otherwise so long as they are not viewed, on the evidence, as being arbitrary or capricious. There is no basis to argue the sale of Hydro One would be arbitrary or capricious.

The April 15, 2015 opinion claims that the decision to privatize Hydro One can be challenged on the basis that it is unreasonable and irrational. CUPE makes this argument on the basis that the policy decision to privatize Hydro One will not result in any benefit to Ontario. In reality, CUPE's argument amounts to a challenge of the efficacy of the policy. It is largely settled law that non-adjudicative acts by government officials cannot be challenged on the basis of the wisdom or effectiveness of the policy reasons for engaging in the impugned act (see *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64 and *Ontario Federation of Anglers & Hunters v. Ontario* 2002 CanLII 41606 (ON CA)). Absent bad faith, the review of these non-adjudicative acts is limited to the *vires* of the impugned act. As noted above, Ontario's decision to engage in the Hydro One IPO is not *ultra vires*. While CUPE may disagree with the policy reasons behind the IPO, it has not alleged bad faith and would be hard pressed to lead any evidence that demonstrates that the decision to engage in the Hydro One IPO is being done for bad faith reasons.

In the present case a decision to proceed with an IPO is within the *vires* of the legislation given the June 2015 amendments to the purposes section and the previous 2002 amendments to s.49(1) of the *Act*. Ontario's decision to initiate an IPO of Hydro One falls within the scope of the legislative power provided for under the *Act*, and is therefore a rational exercise of its statutory authority provided for under s.49 (see also ss.50-50.2) of the *Act*.

Issue 4) International Trade Arguments

The April 15 Opinion does not allege that the IPO itself would be inconsistent with any of Ontario's or Canada's trade commitments. Rather, the opinion speculates that the introduction of foreign ownership could restrict Ontario's ability to enact policy initiatives dealing with Hydro One in the future due to potential subsequent trade challenges.

Absent an argument that engaging in the Hydro One IPO is inconsistent with Ontario's trade obligations, CUPE's foreign investors analysis is irrelevant to the issue of whether the Hydro One IPO is *ultra vires* the legislation.

Issue 5) The May Opinion

As noted above, the May opinion does not offer any legal argument against the proposed IPO. In fact, in the opinion CUPE concedes that the amendments to the *Act* provide explicit authority to: (1) engage in the Hydro One IPO; (2) to deposit the proceeds of the IPO into the Consolidated Revenue Fund; and (3) use the proceeds of the sale for any purpose instead of the sole purpose of paying down OEFC's debt. Recognizing these three realities, the opinion addresses CUPE's policy arguments opposing the privatization of Hydro One.

As addressed in Issue 3 above, the wisdom or effectiveness of the policy reasons is not relevant to a challenge on the *vires* of the Hydro One IPO.

C. Options for addressing CUPE's threat of legal action

Option 1: Respond to a CUPE application

In 2002, CUPE launched the application in *Payne* after the filing of the Preliminary Prospectus. If CUPE intends to commence a similar application for a declaration, it is likely that it will commence the proceedings after the Preliminary Prospectus (anticipated to be filed by early September, 2015) or, potentially more damaging, after the underwriters begin to market the IPO after filing the Amended and Restated Prospectus.

Counsel for the Province has indicated that the marketing period will likely occur for approximately 3-4 weeks, with pricing occurring over a very short time (less than a day) at the end of that period and closing approximately 5 business days later. The underwriters will market the IPO after the Amended and Restated Prospectus is filed with the OSC. The Restructuring Secretariat is contemplating filing the Amended and Restated Prospectus in early October to allow marketing to be conducted in October and closing in mid to late November 2015, but this will depend on changes in Hydro One's board and management being effected during the summer as planned.

An outstanding application during the marketing period could have a significant impact on the Hydro One IPO including: (a) lowering the sale price of Hydro One shares; (b) affecting the underwriters' willingness to market the IPO; and (c) delaying the IPO pending the disposition of the application.

With respect to the timing of the IPO, it is critical that it be completed by December 31, 2015. Hydro One, along with OPG, have ratified collective bargaining agreements with Ontario PWU. The agreements are both 3 years in duration and include provisions relating to shares in Hydro One vesting in employees as an offset to increased pension contributions. The agreements also contain a default provision in case the IPO is not completed by December 31, 2015. In the case of default, the term of the agreements is reduced to 1 year with wage increases of 1%, employee pension contribution increases by 1% and Hydro One will pay employees a 1% lump sum to set off against those pension contribution increases. If the IPO does not occur by December 31, 2015, then Hydro One will not be in a position to provide shares to its employees and the default provision will govern.

If an application is commenced at the beginning of the marketing period, then Ontario would request an emergency date for the hearing of the application and an expedited timetable for the exchange of materials. Given the importance of the issue and the potential affect an application could have on the IPO, based on prior experience it is reasonable to expect that the Court will provide an early date for the hearing of the application. To mitigate the risk of any delay in obtaining a date for a hearing once an application is filed, CLOC is preparing responding materials so that Ontario can move quickly to address a potential application commenced after the filing of the Preliminary Prospectus. Taking these advance steps will assist in ensuring that Ontario is able to effectively respond to any application quickly.

Based on our experience, the process from the time CUPE commences an application to an initial decision could be completed in 4-6 weeks.[1] However, depending on when CUPE chooses to commence a proceeding, it may result in a delay of the Hydro One IPO past the desired late Fall 2015 closing date or have some of the other negative impacts as described above.

Potential Injunctive Relief

In addition to commencing an application for a declaration, CUPE could request an interim injunction preventing the IPO from proceeding prior to a final determination of an

[1] CUPE would have 30 days to appeal and any appeal would draw out this timing. However we expect that a strong decision at first instance would significantly mitigate the impact of an appeal.

application. However, it is unlikely that CUPE will seek interim injunctive relief or in any event would be successful in doing so for the following reasons:

(a) CUPE did not seek an injunction in *Payne*.

(b) Section 14(1) of the *Proceedings Against the Crown Act* (*PACA*) prohibits injunctions against the Crown[2] while section 14(2) of *PACA* permits injunctions against Ministers of the Crown when it is alleged that the Minister is acting *ultra vires* her statutory power and where the injunction would not, in essence, be an injunction against the Crown (see *Smith v. Nova Scotia (Attorney General),* [2004] N.S.J. No. 343 (C.A.) and *MacLean et al. v. Liquor Licence Board of Ontario et al.,* 1975 CanLII 513 (ON SC)).

CUPE may argue that by permitting the IPO, the Minister is acting outside of his legislative authority and, as a result, it is entitled to interim injunctive relief. While the Minister is provided with the statutory authority to dispose of the shares, the *Act* explicitly states that the Minister, in disposing of shares, acts on behalf of the Crown who is the actual owner of the shares (see section 49). Moreover, the proceeds of the IPO are owed to the Crown (see section 50.3). In this situation, a very strong argument could be made that granting of an interim injunction against the Minister would, in effect, be tantamount to granting an interim injunction against the Crown from being able to dispose of its interest in Hydro One. Accordingly a request for interim injunctive relief should be dismissed.

(c) Even if an exemption to the prohibition against injunctions exists, requesting an interim injunction would require CUPE to establish that its application raises a "serious issue". While the "serious issue" test for an injunction is a low threshold, the amendments to the *Act* provide a strong argument that CUPE's legal arguments are meritless.[3] One benefit of a motion for interim relief is that it would

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[2] There is conflicting case law on whether there are any exemptions to the prohibition against injunctions against the Crown. Some cases have stated that there are no exceptions (see *Smith v. Nova Scotia (Attorney General),* [2004] N.S.J. No. 343 (C.A.), *Deep v. Ontario*, [2004] O.J. No. 2734 (S.C.J.) and *Granite Power Corp. v. Ontario*, [2002] O.J. No. 2188 (S.C.J.)). Other cases have permitted interlocutory relief in the form of injunctions or declarations in situations where the Crown is "flouting the law" (see *Loomis v. Ontario (Ministry of Agriculture & Food),* 1993 CanLII 8625 (ON SC), and *Aroland First Nation v. Ontario,* 1996 CanLII 7961 (ON SC)). In addition, some cases have found the Court retains the jurisdiction to issue an injunction or preservation order to protect assets in order to ensure the Court's process and not render any subsequent declaration irrelevant (see *Couchiching First Nation et al. v. The Attorney General of Canada*, 2010 ONSC 4373 and *Canada (Attorney General) v. Law Society of British Columbia,* 1982 CanLII 29 (SCC)). Finally, there are cases that have found an exception to the prohibition against enjoining the Crown in cases where a Court is determining the constitutionality of a legislation (see *British Columbia Power Corp. v. British Columbia Electric Co.,* 1962 CanLII 43 (SCC)).

[3] On an interim injunction, the moving party will have to establish the following (see *R.J.R Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311):

1. That there is a serious issue to be tried;

likely be resolved before the marketing period is over, although if it is timed to disrupt marketing and pricing, that may not prevent the adverse impacts described above. If the court finds that CUPE's application does not raise a "serious issue", then the effect of CUPE's application on share prices or the behavior of underwriters could be significantly dampened.

Option 2: Commence an Application seeking various declarations

Instead of waiting for CUPE to commence an application at a time designed to cause maximum disruption to the IPO, Ontario could commence an anticipatory application, pursuant to rule 14 of the *Rules of Civil Procedure*, seeking the following declarations:

(a) That the *Act* provides the statutory authority to engage in the Hydro One IPO;

(b) That the Hydro One IPO does not conflict with the purposes and objects of the *Act*; and

(c) That the Hydro One IPO is not irrational or unreasonable.

The Application would name CUPE as a respondent to the application. Commencing an anticipatory application could have the following benefits:

(a) By commencing an application relatively soon, Ontario may be in a position to obtain a hearing date and decision on the application prior to the filing of the Preliminary Prospectus (early September, 2015) or at least prior to the filing of the Amended and Restated Initial Prospectus (early October).

(b) Courts are reluctant to rule on hypothetical issues that are tantamount to a reference when there is no live dispute between parties with conflicting position (see *New Brunswick (Minister of Health and Community Services) v. G.(J.), 1999 CanLII 653 (SCC)and Canadian Civil Liberties Association (Corporation of the) v. Canada (Attorney General of), 1998 CanLII 6272 (ON CA)*). Relying on CUPE's legal opinions and press releases and past behaviour,

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2. That the moving party will suffer irreparable harm if the injunction is not granted; and
3. That the balance of convenience favours the granting of the injunction.

In public interest cases, the Court's will not require the moving party to establish that it has suffered irreparable harm; rather, the Court will determine whether the public interest will be irreparably harmed absent an injunction (see *Friends of Point Pleasant Park v. Canada (Attorney General)*, [2000] FCJ No. 1355 and *Guelph v. Soltys,* 2009 CarswellOnt 4758). If CUPE can establish that there is a serious legal issue in respect of the IPO, then there is a strong argument that permitting the IPO to continue will irreparably harm the public in that the Crown's interest in Hydro One will be unlawfully disposed of. Finally, the balance of convenience may favour CUPE if Ontario is unable to establish that there is some significant prejudice to the public interest by delaying the sale.

Ontario could credibly argue that it was reasonable to name CUPE as respondent as CUPE has demonstrated an intention to commence an application and has done so in the past. Naming CUPE as respondent may force it to reveal whether it intends to commence an application in the future. If CUPE reveals that it has no intention to commencing an application, then Ontario could discontinue its application.

While there are benefits to this approach, there are several risks associated with this option:

(a) CLOC is unable to locate any previous precedent for seeking an anticipatory application in the nature contemplated above, and the Court may be reluctant to provide a ruling in the absence of an actual challenge.

(b) Commencing an anticipatory application is a very aggressive option that runs a risk of unnecessarily antagonizing CUPE. Given the amendments to the *Act* and the absence of any legal analysis in the second CUPE opinion, there is a real possibility that CUPE may not commence an application.

(c) Commencing an anticipatory application may give the impression that Ontario is not confident in its position that it is entitled to engage in the Hydro One IPO and may giving more credence to the weak legal argument made by CUPE.

(d) While COO and NAN's letters of mid-July do not threaten litigation in relation to the Hydro One IPO, if Ontario were to initiate litigation, there is a risk that they would seek to intervene and to expand the issues to be decided by the Court. There is a significant risk that the Court would allow COO and NAN to intervene and expand the scope of the issues before the Court. This creates a risk of lengthening and complicating the proceedings.

Option 3: Direct a Reference to the Court of Appeal

Pursuant to s. 8 of the *Courts of Justice Act*, the Lieutenant Governor in Council may refer "any question to the Court of Appeal for hearing and consideration." The Crown alone has the power to direct a reference[4]; however, the Court may direct that any person interested (or representatives of a class of persons interested), be notified and be entitled to make submissions to the Court.

Under the reference procedure, the Court of Appeal provides an advisory opinion on the questions posed by the LGIC. An advisory opinion does not have the force of a binding decision of the Court of Appeal. However, in practice, reference opinions are followed.[5]

[4] *Payne v Ontario*, [2002] O.J. No. 2566 (CA) at para 33
[5] *Canada v Bedford* [2013] 3 SCR 1101 at para 40

The Court must "certify its opinion to the Lieutenant Governor in Council" and for the purposes of an appeal, the opinion is considered a "judgment in an action" which can be appealed as of right to the Supreme Court.[6]

The Ontario Court of Appeal has held that in dealing with a reference, a court may answer, qualify the answer, answer in general terms or refuse to answer a question that is too general or ambiguous.[7] Moreover, the Supreme Court of Canada has refused to answer reference questions that are 'purely political' and lack 'a sufficient legal component to warrant a decision from the Court.'[8]

The reference process has been used on several occasions to obtain prospective legal opinions about the constitutional validity of legislation, or other prospective government action of high public importance. In fact, when the Court of Appeal dismissed the government's appeal in *Payne* as moot, it referenced the fact that Crown had the right to direct a reference to the Court.[9]

If a favourable advisory opinion can be obtained prior to the filing of a preliminary prospectus, then the market impact of any litigation brought by CUPE after the filing of a preliminary prospectus would be rendered nugatory.

Notwithstanding the utility of an affirmative advisory opinion, there are several drawbacks and risks to this approach:

(a) Similar to an anticipatory application, directing a reference is an aggressive option that could unnecessarily antagonize CUPE. As noted above, there is a real possibility that CUPE may not bring an application.

(b) The reference process is generally reserved for matters of legal importance. Perhaps even more so than an anticipatory application, directing a reference to the Court of Appeal may give the impression that Ontario is not confident in its legal position Moreover, were the Court to exercise its discretion not to answer the question(s) for any of the reasons identified above, this could be interpreted as suggesting that the positions set out in the CUPE opinion have some merit.

(c) Unlike the application process, the reference process is not intended to be a summary procedure. It is not clear that Ontario would be able to obtain an advisory opinion from the Court of Appeal before the filing of a preliminary prospectus although the Court may be prepared to expedite the timing in the circumstances. If CUPE is given notice of the reference and permitted to make submissions, it is arguable that it would have the standing necessary to seek

[6] *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 36.
[7] *Reference re Constitution Act, 1867, s. 92(10)(a)*, [1988] OJ No. 176 (CA) at para 24
[8] *Re Canada Assistance Plan*, [1991] 2 SCR 525 at 545
[9] *Payne v Ontario*, [2002] O.J. No. 2566 (CA) at para 33

an appeal, as of right, to the Supreme Court of Canada.[10] It would be exceptionally difficult to obtain a decision on an appeal to the Supreme Court of Canada before the filing of the preliminary prospectus, but we again expect that a strong decision at first instance would mitigate the risk of the adverse impact of an appeal.

(d) As with an application initiated by Ontario, the First Nations may seek to intervene and to expand the issues to be decided by the Court. While the procedure on a reference only contemplates that the LGIC can refer the question and therefore it may be possible to argue that the Court of Appeal cannot consider the issues raised by the First Nations, there is a significant risk that the Court would permit COO and NAN to intervene. The determination of COO and NAN's participation and the scope of the reference would lengthen and complicate the proceedings regardless of the outcome.

Option 4: Retain External Counsel to Issue a Counter Opinion

Ontario could retain experienced external counsel or a retired judge to provide an opinion on the legality of the proposed IPO. We expect the legal opinion to confirm the arguments set out in Part B of this note, in direct response the assertions set out in the April and May 2015 CUPE opinions.

This opinion could be shared with the underwriters to assure them that there is no merit to the CUPE opinions and that any legal challenge commenced by CUPE would certainly fail. If Ontario is seeking the opinions, then steps will have to be taken to ensure that a waiver of the privilege can be obtained on an expedited basis. If the opinions are to be disseminated to more than the underwriters (i.e. made available to the public), then there is a risk that Ontario will begin debating the legal and policy merits of the Hydro One IPO with CUPE in the public realm. Publicly debating these issues with CUPE may give the impression that CUPE's arguments have merit.

Obtaining counter legal opinions does not preclude CUPE from commencing an application and/or seeking injunctive relief to prevent the IPO. However, it is the least drastic anticipatory step available, and could be taken in concert with any of the other procedural options set out above.

Conclusion: Responding materials to a potential CUPE application are being prepared. With responding materials finalized before CUPE commences an application, Ontario may be able to proactively manage the risk that a hearing and decision on the application would not be obtained prior to the end of the marketing period. In order to

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[10] See *Reference re Employment Insurance Act (Can.)*, 2005 SCC 56; *Reference re Canada Assistance Plan (B.C.)*, [1991] S.C.J. No 60; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61; *Reference re Remuneration of Judges*, [1997] S.C.J. No 75 – in all the Supreme Court decisions cited, it was a party given notice of the reference, not the provincial Attorney General, that appealed the provincial Court of Appeal opinion to the Supreme Court of Canada.

provide further comfort to the underwriters, a legal opinion from experienced counsel or a retired judge should be obtained in advance of the filing of the preliminary prospectus.

If early certainty is preferred, and the need for certainty outweighs the risks detailed above, then Ontario could take the step of commencing an anticipatory application that names CUPE as a respondent or direct a reference to the Court of Appeal.

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