Message

From:	Glenn Zacher [GZacher@stikeman.com]
Sent:	2017-05-24 11:14:15 AM
To:	Michael Boll [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=4811917e15054407b665fe16d12ff415-Michael Bol]
CC:	Peter Hamilton [PHamilton@stikeman.com]
Subject:	RE: Fair Hydro Legislation
Attachments:	Document1.docx

Michael –

In case you are tied up and we are unable to speak, here are our views on the proposed amendments to Bill 132.

I had some communications back and forth with Torys about the need for section 40.1. Torys' concern is with regards to a line of cases that date back to the SCC's decision in *Saskatchewan Wheat Pool* and which provide that there is no nominate tort for statutory breach (although statutory breach is in many cases regarded as prima facie proof of the breach of the applicable standard of care). I am still not sure that this new provision is needed, particularly since rule 14.05 provides aggrieved parties with the right to "apply" to court for the determination of rights under statute/regulation and to seek injunctive relief. Aaron at Torys agreed that it seems pretty obvious that they would have standing to bring a claim, but they do not want to leave any doubt. Aaron also added that they want to preserve a right to claim compensation/damages (not just injunctive relief) to address harm resulting from funds not being segregated, interest amounts and other potential consequential damages. I think it will be difficult to dissuade OPG/Torys on this point and, in light of the *Saskatchewan Wheat Pool* cases, I can understand why as a precaution they want to include this specific statutory right.

In the circumstances, I think the best strategy may be to suggest some minor edits to section 40.1 (see attached), but to push back on the new proposed change to para 7 of subsection 41(1), which is more problematic. In that regard, I think we should say to the Ministry that the proposed new para 7 is overly broad, is uncertain and effectively purports to make the IESO (and "any person") guarantors. The IESO and others should potentially be liable for breaches of the Act or regs, but they should not bound by these kinds of broad/uncertain positive obligations. Moreover, if para 7 is properly restricted to proscribing breaches of the Act or regulations, then it is probably unnecessary because remedies for such breaches are captured by the proposed new section 40.1. Alternatively, if the Ministry is disposed towards including something, then I would suggest something along the lines of the proposed edits in the attached, which are along the lines you earlier suggested. You will see I have also proposed that the obligations be limited to section 29 (1) - I do not think it makes sense to extend this to section 29 generally.

Give me a call if you wish to discuss further.

Glenn

Glenn Zacher
Tel : (416) 869-5688
gzacher@stikeman.com

From: Glenn Zacher
Sent: Wednesday, May 24, 2017 10:27 AM
To: Michael Boll
Cc: Peter Hamilton
Subject: RE: Fair Hydro Legislation

Michael – I just gave you a call. Are you able to give me a call to discuss?

Glenn Zacher
Tel : (416) 869-5688
gzacher@stikeman.com

From: Glenn Zacher
Sent: Wednesday, May 24, 2017 10:12 AM
To: Michael Boll
Cc: Peter Hamilton
Subject: RE: Fair Hydro Legislation

Michael – sorry just in midst of calls/mtg - - will look at this shortly and get back to you.

Glenn Zacher
Tel : (416) 869-5688
gzacher@stikeman.com

From: Michael Boll [mailto:Michael.Boll@ieso.ca]
Sent: Wednesday, May 24, 2017 9:36 AM
To: Glenn Zacher
Cc: Peter Hamilton
Subject: RE: Fair Hydro Legislation

Glenn and Peter, the proposed change in Motion 16 concerns me and I'd like your view. Glenn, this is a related theme to the new 40.1 that is being proposed relating to compliance and compensation orders.

Paragraph 7 of Section 41 currently provides:

"Providing for a right of compensation for investment interest owners affected by a breach under section 29 and the manner in which such a right may be enforced under this Act."

The new motion is:

Motion ~~15~~16

Schedule 1 to the Bill, paragraph ~~7 of subsection 41 (1)~~~~Paragraph~~ 7 of subsection 41 (1)

Paragraph 7 of subsection 41 (1) would be amended by striking out "a breach under section 29" and substituting "the failure of any person or entity to ~~comply with this Act~~ give effect to the rights and interests provided for under section 29".

My concern is this seems to broaden IESO's and LDC's obligations to "give effect to the rights and interests provided for under section 29", rather than to simply comply with the obligations imposed on us under the Act. I'm concerned this unnecessarily increases the risk for IESO and LDCs if an investment interest owner believes IESO or an LDC has done not done something to enable it to exercise a right under section 29, even if the IESO did not have an obligation to do so. A potential fix would be to add the underlined text as follows:

…"the failure of any person or entity to comply with this Act in order to give effect to the rights and interests provided for under section 29".

Michael

From: Glenn Zacher [mailto:GZacher@stikeman.com]
Sent: May 24, 2017 8:55 AM
To: Michael Boll
Cc: Peter Hamilton
Subject: FW: Fair Hydro Legislation

Michael – fyi. Will let you know what I hear back. Will also independently look into this.

Glenn Zacher
Tel : (416) 869-5688
gzacher@stikeman.com

STIKEMAN ELLIOTT LLP Barristers & Solicitors
5300 Commerce Court West, 199 Bay Street, Toronto, ON, Canada M5L1B9
www.stikeman.com

TORONTO MONTREAL OTTAWA CALGARY VANCOUVER NEW YORK LONDON SYDNEY

From: Glenn Zacher
Sent: Wednesday, May 24, 2017 8:52 AM
To: Myers, Jonathan; Emes, Aaron
Cc: Peter Hamilton
Subject: Fair Hydro Legislation

Hi Aaron, Jonathan –

The Ministry shared with the IESO yesterday their proposed Bill 132 draft motions, which included a proposed new section 40.1 providing the investment asset owner with the right to apply to the Ontario SCJ for injunctive and compensatory relief. We queried why this provision was necessary given that a person affected by a statutory breach has the right to bring a proceeding to enforce compliance (including claiming mandatory/prohibitive injunctive relief) or claim damages. Moreover, rule 14.05 (d), (g) of the Rules of Civil Procedure expressly provides recourse by way of "notice of application" for the purpose of determining rights pursuant to statute or regulation, including seeking injunctive relief. We also questioned why, in particular, section 40.1 (c) - which provides for seeking "compensation" from the IESO and LDCs - would be necessary.

The Ministry indicated that OPG apparently thought it needed this specific standing/remedy provision and had referenced an SCC case in support of its position. Can you provide us with some further explanation and if there is some SCC case or other authority that supports the need for this provision, pass it on. As it stands, we do not believe this provision is required. I understand the Ministry is under some time pressure to resolve this issue so if you can get back to me as soon as possible that would be great. If it is easier to have a call to discuss, please give me a call.

Thanks,
Glenn

Glenn Zacher
Tel : (416) 869-5688
gzacher@stikeman.com