

FW_ Call with Cathy Beagan Flood.pdf

From: [Murray, Maud \(ENERGY\)](#)
To: [Mallen, Jane \(MAG\)](#)
Subject: FW: Call with Cathy Beagan Flood
Date: October 3, 2017 4:44:00 PM

Fyi, here is Blakes' initial position.

-----Original Message-----

From: BEAGAN FLOOD, CATHY [<mailto:CATHY.BEAGANFLOOD@blakes.com>]
Sent: October-03-17 4:31 PM
To: Murray, Maud (ENERGY); Thouin, Alena (ENERGY); WILSON, JUDY
Subject: Re: Call with Cathy Beagan Flood

Privileged and Confidential

Given the time sensitivity, I note:

- 1) I do not think that disclosure of the Navigant report would waive privilege over Blakes' advice to the Ministry in relation to the statute or the report.
- 2) while we can argue that the report is privileged, that is questionable Blakes was not involved in the instructions to Navigant until late in their process (although internal Ministry of Energy lawyers may have been), and given how late we received their report, it would be challenging to establish it was integral to our advice.

Happy to discuss further if that would be helpful.

Again I am extremely sorry for missing the call this afternoon, I should not have attempted to fit it between meetings.

From: Murray, Maud (ENERGY)
Sent: Tuesday, October 3, 2017 3:55 PM
To: BEAGAN FLOOD, CATHY; Thouin, Alena (ENERGY); PIDZAMECKY, LAURIE; WILSON, JUDY
Subject: RE: Call with Cathy Beagan Flood

Thanks, Cathy. This matter is time sensitive. Is there another time today that you are able to discuss?

From: BEAGAN FLOOD, CATHY [<mailto:CATHY.BEAGANFLOOD@blakes.com>]
Sent: October-03-17 3:54 PM
To: Murray, Maud (ENERGY); Thouin, Alena (ENERGY); PIDZAMECKY, LAURIE; WILSON, JUDY
Subject: RE: Call with Cathy Beagan Flood

I'm so sorry, I couldn't get out of the meeting that was supposed to end at 3:30. Would 9 or 9:30 tomorrow morning work?

Catherine Beagan Flood
Partner
cbe@blakes.com <<mailto:cbe@blakes.com>>
Office: 416-863-2269
Mobile: 416-209-9478

[cid:image001.gif@01D33C60.0F4910D0]

Blake, Cassels & Graydon LLP
199 Bay Street, Suite 4000, Toronto ON M5L 1A9
Tel: 416-863-2400 Fax: 416-863-2653
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From: Murray, Maud (ENERGY) [<mailto:Maud.Murray3@ontario.ca>]
Sent: Tuesday, October 03, 2017 3:49 PM
To: Thouin, Alena (ENERGY); PIDZAMECKY, LAURIE; BEAGAN FLOOD, CATHY; WILSON, JUDY
Subject: RE: Call with Cathy Beagan Flood

I have a 4pm and a 4:30. Can join a call at 5 if that works.

From: Thouin, Alena (ENERGY)
Sent: October-03-17 3:46 PM
To: Murray, Maud (ENERGY); PIDZAMECKY, LAURIE; BEAGAN FLOOD, CATHY; WILSON, JUDY
Subject: RE: Call with Cathy Beagan Flood

Still here...
Should we reschedule?

From: Murray, Maud (ENERGY) <Maud.Murray3@ontario.ca<<mailto:Maud.Murray3@ontario.ca>>>
Date: Tuesday, Oct 03, 2017, 3:36 PM
To: PIDZAMECKY, LAURIE
<LAURIE.PIDZAMECKY@blakes.com<<mailto:LAURIE.PIDZAMECKY@blakes.com>>>, Thouin, Alena (ENERGY) <Alena.Thouin@ontario.ca<<mailto:Alena.Thouin@ontario.ca>>>, Murray, Maud (ENERGY) <Maud.Murray3@ontario.ca<<mailto:Maud.Murray3@ontario.ca>>>, BEAGAN FLOOD, CATHY <CATHY.BEAGANFLOOD@blakes.com<<mailto:CATHY.BEAGANFLOOD@blakes.com>>>
Subject: RE: Call with Cathy Beagan Flood

I am on the line waiting. Am I on the right line?

-----Original Appointment-----

From: PIDZAMECKY, LAURIE [<mailto:LAURIE.PIDZAMECKY@blakes.com>]
Sent: October-03-17 3:11 PM
To: 'PIDZAMECKY, LAURIE'; Thouin, Alena (ENERGY); Murray, Maud (ENERGY); BEAGAN FLOOD, CATHY; Thouin, Alena (ENERGY)
Subject: Call with Cathy Beagan Flood

When: October-03-17 3:30 PM-4:00 PM (UTC-05:00) Eastern Time (US & Canada).

Where: Conference Call - Call-in Details: 1-855-453-6947 (primary); 416-933-3865 (secondary); Passcode: 9771156

FW_ MOE - Memo re Privilege Claims over Navigan....pdf

From: [BEAGAN FLOOD, CATHY](#)
To: [Murray, Maud \(ENERGY\)](#); [Thouin, Alena \(ENERGY\)](#)
Cc: [SHAMESS, BRITTANY](#)
Subject: FW: MOE - Memo re Privilege Claims over Navigant Report
Date: October 24, 2017 11:26:55 AM
Attachments: [TOR_2528-#23225509-v8-MOE - Memo_re_Privilege_Claims_over_Navigant_Report.DOCX](#)
[ORIGINAL - TOR_2528-#23225509-v6-MOE - Memo_re_Privilege_Claims_over_Navigant_Report - 23225509v8_MOE - Memo re Privilege Claims over Navigant Report.pdf](#)

Maud and Alena,

Please find the revised memo attached. Steve's recollection is that James Rehob may have attended at least one in-person meeting with Navigant, but he does not recall any specific communications from James to Navigant at that meeting. You may want to follow up with James. Steve spoke to Carolyn Calwell and Tom McKinlay about Navigant's work on numerous occasions, but does not know whether she was providing feedback directly to Navigant, or through the MOE client.

In light of that, we have revised the memo to say that to our knowledge, it does not appear that there is a strong privilege argument based on Legal Services' communications with Navigant.

Happy to discuss further at your convenience.

Catherine Beagan Flood

Partner

cbe@blakes.com

Office: 416-863-2269

Mobile: 416-209-9478



Blake, Cassels & Graydon LLP

199 Bay Street, Suite 4000, Toronto ON M5L 1A9

Tel: 416-863-2400 Fax: 416-863-2653

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TOR_2528-#23225509-v8-MOE_-_Memo_re_Privilege.pdf



Blake, Cassels & Graydon LLP
Barristers & Solicitors
Patent & Trade-mark Agents
199 Bay Street
Suite 4000, Commerce Court West
Toronto ON M5L 1A9 Canada
Tel: 416-863-2400 Fax: 416-863-2653

DRAFT MEMORANDUM

Reference: 14229/1

VIA E-MAIL
PRIVILEGED & CONFIDENTIAL

October 18, 2017

To: Maud Murray
Legal Director, ENERGY/MEDEI/MRI

c: Judy Wilson, *Blakes*
Stephen Ashbourne, *Blakes*

From: Catherine Beagan Flood
416-863-2269
Brittany Shamess

RE: The Navigant Report: Privilege Claims Assessment

You have asked us to assess the strength of the argument that the current version of Navigant Consulting Ltd.'s "Assessment of the Alignment of the Costs and Benefits of Clean Energy Assets" report (the "**Navigant Report**") (which we understand is different from the last version of the report that was shared with Blakes on June 29, 2017) is protected by litigation privilege and/or solicitor-client privilege.

You have also asked us to consider the consequences of disclosing the Navigant Report on related communications between Blakes and Navigant, and Blakes and the Ministry of the Attorney General's Legal Services Branch ("**MAG Lawyers**") and/or the Ministry of Energy ("**MOE**", together with the MAG Lawyers, the "**Government**").

EXECUTIVE SUMMARY

In our view, there is not a strong argument for claiming that the Navigant Report is protected by litigation privilege and/or solicitor-client privilege by virtue of Blakes' solicitor-client relationship with the Government. We note that there might be an argument for claiming that the Navigant Report is subject to solicitor-client privilege by virtue of the MAG Lawyers' solicitor-client relationship with the MOE. However, we understand that the MAG Lawyers' had minimal direct contact with Navigant (who predominantly dealt with the MOE directly), which makes it unlikely that solicitor-client privilege would apply on the basis of the MAG Lawyers/MOE relationship.

Even if the Navigant Report were privileged, its disclosure would likely not amount to a "waiver of privilege" over previous drafts of the Navigant Report or related correspondence between Blakes and Navigant or the Government. However, such disclosure would materially increase the risk of the Government being subject to a freedom of information request for records relating to the Navigant Report.

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In our view, it is likely that the Navigant Report would be exempt from disclosure in response to a freedom of information request by virtue of section 19(b) of the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 (“**FIPPA**”). Section 19(b) of FIPPA creates a “statutory” solicitor-client privilege claim over records that were prepared for legal counsel for use in giving legal advice. This statutory privilege is broader than common law privilege. Communications between Navigant and non-lawyers or that are unrelated to the provision of legal advice would not fall within the section 19 exemption from disclosure, but other exemptions would also need to be considered. We note, however, that if the MOE received a freedom of information request and claimed privilege over the requested documents, the requester could potentially bring an appeal to the Information and Privacy Commissioner of Ontario (the “**IPC**”). The IPC’s decision would ultimately be subject to judicial review by either the requester or MOE.

BACKGROUND INFORMATION

Navigant was retained on May 2, 2017 for “technical consultation services to conduct third party research that would support the implementation of Global Adjustment (GA) refinancing”. Blakes accepted the terms of Navigant’s retainer on behalf of the MOE. One of the purposes of the engagement was to assist Blakes in providing legal advice to the Government and for Blakes to advise Navigant of the legal context and framework of the Act to better enable Navigant to prepare the Navigant Report. Through May and June, as the *Ontario Fair Hydro Plan Act, 2017*, SO 2017, c 16, Sch 1 (the “**Act**”) was being developed, Navigant provided important input on several critical economic considerations on which the Act was based, including the economic quantification and alignment of clean energy costs and benefits and the basis upon which the “fair allocation amounts” contemplated in the Act could be determined. Blakes relied on those inputs in providing detailed comments on drafts of the Act and the associated regulations through that period. This was reflected in comments provided by Blakes to Navigant regarding the June 29, 2017 (“**6/29**”) draft of the Navigant Report on July 4, 2017, which suggested that the language “for purposes of informing legal advice from Blakes to the Ontario Ministry of Energy” be added into the description of the purpose of Navigant’s retainer in the Navigant Report. While Blakes has not received any subsequent draft or final version of the Navigant Report, Navigant did confirm that it would add the aforementioned language into the Navigant Report.

Blakes’ work with Navigant in the preparation of the Navigant Report focused on explaining the purposes, architecture and surrounding legal context of the Act to Navigant, and reconciling the language of the Act to coincide with the economic model being developed by Navigant. Blakes did not provide direction or instructions to Navigant, except to the extent that considerations raised by Blakes factored into the concurrent discussions that the MOE was having directly with Navigant. Much of Blakes’ correspondence about the Navigant Report was with the Government and not with Navigant directly (i.e. Blakes often received information about Navigant’s retainer and the Navigant Report through the Government, and provided comments on same to the Government). In several cases, Blakes participated in meetings with Navigant (by phone) and MOE (by phone and in person), during which detailed aspects of the economic model were discussed and reconciled. In addition, Blakes had a small number of discussions directly with Navigant to work through more technical and detailed aspects of the Navigant model. An important perspective underlying all of these interactions was the constitutional validity of the Act and the central role

that the alignment of clean energy costs and benefits over time played in supporting the MAG Lawyer's and Blakes' related legal analysis.

Between May 25th and June 16th, 5 draft versions of the Navigant Report were provided by Navigant to Blakes by email, marked "Privileged and Confidential". The agreed protocol was for Blakes to forward these drafts to the Government, again on a "Privileged and Confidential" basis. This approach was established so that the chain of communications would flow through Blakes, consistent with the engagement by Blakes of Navigant on behalf of the Government. Earlier and later exchanges of, or contemplating, the Navigant Report were not provided directly to Blakes by Navigant.

Blakes did at times engage in direct email correspondence with Navigant (including on June 29, 2017 when it received a copy of the 6/29 draft of the Navigant Report). In several cases, the Government was not directly copied on Blakes' correspondence with Navigant. On July 4, 2017, Blakes emailed a number of comments about the 6/29 draft of the Navigant Report to Navigant and, on the same day, Navigant confirmed that it would incorporate those comments into the next draft. Blakes has not had any direct communications with Navigant subsequent to that date and is not aware of the specific content of subsequent Government communications with Navigant with respect to the Navigant Report. Since July 4th, Blakes has had several follow-up conversations with MAG Lawyers to identify aspects of the Act and the associated regulation that could impact the economic model and to suggest that Navigant's work and the Navigant Report be updated to reflect those aspects.

The curtailing of Blakes' direct involvement with Navigant and the Navigant Report roughly coincided with MOE's confirmation that Blakes would not be expected to provide a constitutional opinion to the Government or the ultimate market participants under the financing program contemplated by the Act. The initial expectation had been that Blakes could be called on to provide a constitutional opinion with respect to the Act and potentially also the associated regulations.

LITIGATION PRIVILEGE

General Principles

Litigation privilege protects against the disclosure of communications and documents that were created for the dominant purpose of preparing for litigation, whether such litigation is pending or reasonably apprehended.¹ In order to satisfy the "dominant purpose" requirement, the facts must support a finding that the document was, in fact, created for the *dominant* purpose of litigation. This requirement will not be satisfied if the document was created for the *substantial* purpose of litigation,² nor will it be satisfied if the

¹ *Blank v Canada (Department of Justice)*, 2006 SCC 39 ("**Blank**") at paras 59-60; *Moore v Getahun*, 2015 ONCA 55 at para 68. See also *Blank* at paras 28, 34 (the purpose of litigation privilege is to create a "zone of privacy" in relation to pending or reasonably apprehended litigation; It exists because there is a "need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate").

² *Blank* at paras 59-60.

document was created for the dominant purpose of *obtaining legal advice*.³ In order to satisfy the “reasonable apprehension of litigation” requirement, the court must be satisfied that there was more than a “mere suspicion”⁴ or “mere hypothetical possibility”⁵ of litigation. Moreover, until something arises to “give reality” to the prospect of litigation, the simple fact that a party is investigating a matter that could become litigious is not enough to satisfy the “reasonable apprehension of litigation” requirement.⁶

Unlike solicitor-client privilege, litigation privilege does not last forever; it expires when the litigation ends (except where closely related litigation is pending or reasonably apprehended).⁷ Also unlike solicitor-client privilege, litigation privilege can extend to communications of a non-confidential nature between the lawyer or client and third parties.⁸

Application to the Navigant Report

In order to claim litigation privilege over the Navigant Report, the Government would have to establish that the dominant purpose of the Navigant Report was to prepare for reasonably apprehended litigation. However, in our view, it will be difficult to satisfy this test because: (1) although the possibility of litigation was certainly considered at the time the Navigant Report was being prepared, such consideration would likely not amount to “reasonably apprehended litigation”; and (2) although assisting with the defence of potential litigation was one of the purposes of the Navigant Report, it will be difficult to establish that preparing for litigation was the dominant purpose of the Navigant Report.

With respect to the “reasonable apprehension of litigation” requirement: it will be difficult to establish that the prospect of litigation was more than a “mere hypothetical possibility.” Litigation was arguably no more anticipated than it is any time the government seeks to introduce legislation on a controversial policy matter.

Even if the court were to find that litigation was “reasonably apprehended”, the Navigant Report would likely fail on the “dominant purpose” part of the test. Taking into account the following factors, a court would likely conclude that litigation was not the dominant purpose of the report:⁹

- In light of the Supreme Court’s comments in *Allard*,¹⁰ Blakes recommended that the Government obtain a report from an expert, prior to passing the Act, as a potential source of evidence regarding the alignment between the clean energy costs and the clean energy benefits.

³ *Turnbull-Burnight v CIBC World Markets Inc.*, 2007 NBCA 43 at para 16 (when determining whether a document is subject to litigation privilege, “the proper question is not whether the notes were being prepared for the dominant purpose of obtaining legal advice, but for the dominant purpose of use in litigation”).

⁴ *Buzzi v Berger* (1998), 83 ACWS (3d) 572 (Ont Gen Div) at para 29.

⁵ *Blank* at para 53. See also *CIT Financial Ltd v JDS Uniphase Corp* (2003), 124 ACWS (3d) 455 (Ont SCJ) at para 8.

⁶ *General Accident Assurance Co v Chrusz* (1999), 45 OR (3d) 321 (ONCA) (“*Chrusz*”) at para 50.

⁷ *Blank* at paras 36, 38, 58.

⁸ *Chrusz* at para 23.

⁹ *Redhead Equipment Ltd v Canada (Attorney General)*, 2016 SKCA 115 (“*Redhead Equipment*”); *Chrusz* at paras 104, 120.

¹⁰ In *Allard Contractors Ltd v Coquitlam (District)*, [1993] 4 SCR 371 (SCC) (“*Allard*”), when considering the constitutionality of certain fees, the Supreme Court took into consideration the fact that an expert had provided evidence which indicated that the intention of the fees was to raise sufficient revenue to cover the costs of the regulatory scheme.

- Neither the retainer agreement between Blakes and Navigant, nor the 6/29 draft of the Navigant Report, make any reference to a pending or reasonably anticipated lawsuit.
- The “scope of work” section of the retainer agreement states that the purpose of the retainer is to obtain “technical consultation services to conduct third party research that would support the implementation of Global Adjustment (GA) refinancing.”
- The constitutionality of the Act was a central focus of Blakes’ legal analysis and advice to the Government, but not solely, or even predominantly, to prepare for potential litigation. While the Blakes team included litigators, given the prospect of constitutional litigation, the more immediate constitutional concern was the expectation that the marketplace for financing instruments arising under the financing arrangements contemplated in the Act would likely require supporting advice from Canadian counsel. Accordingly, the primary focus of Blakes’ advice has been to achieve a legally effective and financeable legal structure that achieves the Government’s financial, accounting and rate abatement objectives. As noted above, this is no longer primarily for the purpose of being able to advance a financing-level opinion, as it is anticipated that the marketplace will be satisfied with the protection arrangements contemplated to be provided by the Crown under section 5 of the Act. However, at the time of Blakes communications with Navigant, it was still anticipated that Blakes would be providing a constitutional opinion for financing purposes.
- There is no pending or threatened litigation (although there may have been some “noise” about the possibility of litigation, and it is reasonable to foresee constitutional challenges given the shifting of economic costs to future generations relative to the *status quo*, and the challenge that we understand has been commenced with respect to the current GA).

SOLICITOR-CLIENT PRIVILEGE and THIRD PARTY COMMUNICATIONS

General Principles and Case Law

Solicitor-client privilege only extends to communications between a solicitor and client (whether oral or written), which entail the seeking or giving of legal advice, and which are intended to be confidential by the parties.¹¹ However, it is well settled that solicitor-client privilege can extend to communications between a solicitor and a third party or between a client and a third party *where the third party communications are in furtherance of a function that is essential to the existence or operation of the solicitor-client relationship* (and where the third party communications meet the other criteria for solicitor-client privilege).¹²

The following functions are recognized in the case law as non-exhaustive examples of functions that are essential to the existence or operation of the solicitor-client relationship:

¹¹ *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 at para 15, quoting *Solosky v R*, [1980] 1 SCR 821 at para 28.

¹² *Redhead Equipment* at para 43; *Chrusz* at para 120.

1. The third party is a “line, or channel, of communication” between the solicitor and client (e.g. where the third party act as a “messenger, translator or transcriber” of communication between the solicitor and client);
2. The third party employs expertise to assemble information provided by the client and to explain the information to the solicitor; and/or
3. The third party is authorized by the client to seek legal advice from the solicitor on behalf of the client.¹³

For example, in *Susan Hosiery*,¹⁴ the client’s accountants met with the lawyer, at the client’s instructions, in order to convey information concerning the business affairs of the client and to discuss possible arrangements to, presumably, minimize tax consequences. Such communications were found to be covered by solicitor-client privilege because the accountants, as representatives of the client, were obtaining legal advice for the client from the lawyer,¹⁵ and because, as Doherty J.A. stated in *Chrusz*:

In a very real sense, the accountants served as translators, assembling the necessary information from the client and putting the client’s affairs in terms which could be understood by the lawyer. In addition, they served as a conduit of advice from the lawyer to the client and as a conduit of instructions from the client to the lawyer.¹⁶

As another example, in *Camp Development*, the BC Supreme Court concluded that a lawyer’s communications with, or in the presence of, a third party consultant (who had been retained to assist the client with property acquisitions) were subject to solicitor-client privilege because the lawyer had provided legal advice directly to the consultant with the knowledge and endorsement of the client. In *Camp Development*, both the lawyer and the consultant took instructions from the client and “worked hand-in-hand, within their respective areas of expertise, on an ongoing basis to advance the interests of [the client].” The court acknowledged that this was a practical reality in major commercial projects where teams of individuals with focused expertise are assembled. The lawyer may be required to give advice to different members of the team who work for the client. In this case, the court held that all the documents that involved the consultant were documents that engaged the “continuum of communications” within which the consultant sought advice or was provided with advice either directly from the lawyer or indirectly through the client, and that privilege was appropriately claimed.¹⁷

¹³ *Redhead Equipment* at para 45; *Chrusz* at paras 110-111, 120-121; *Pearson v Inco Ltd* (2008), 169 ACWS (3d) 524 (Ont SCJ) (“*Inco*”) at para 6; *Camp Development Corp v South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 (“*Camp Development*”) at paras 56-58.

¹⁴ *Susan Hosiery Ltd v Minister of National Revenue*, [1969] 2 Ex CR 27 (“*Susan Hosiery*”).

¹⁵ *Susan Hosiery* at para 14.

¹⁶ *Chrusz* at para 111.

¹⁷ *Camp Development* at paras 58, 60-65.

That being said, not every third party communication which facilitates or assists in giving or receiving legal advice is protected by solicitor-client privilege.¹⁸ As Doherty J.A. stated in *Chrusz*:

If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected.¹⁹

For example, in *Inco*, the Ontario Superior Court of Justice did not accept that documents prepared by a consulting firm at the request of Inco's in-house counsel for the purpose of providing legal advice to Inco were protected by solicitor-client privilege. The court was not satisfied that the third party consulting firm was a channel of communication between Inco and its lawyer, or that it was merely interpreting information provided by Inco. Instead, it appeared that the third party consulting firm was retained to gather and possibly interpret information from outside sources for the purposes of assisting Inco's lawyer to provide legal advice to Inco.²⁰

Application to the Navigant Report

The "Blakes – Government" Relationship

Applying the functional analysis from *Chrusz*, it is unlikely that a court would conclude that the Navigant Report is subject to solicitor-client privilege on the basis of Blakes' solicitor-client relationship with the Government.

There is no doubt that the draft Navigant Report informed Blakes' legal advice to the Government, that Navigant was employing its expertise to interpret and explain information to Blakes, and that Blakes advised Navigant on the legal context and framework of the Act in order to assist in the preparation of the Navigant Report. However, on balance, it is our view that the following factors militate against a finding that the Navigant Report was in furtherance of a function that was essential to Blakes' solicitor-client relationship with the Government:

- As noted above, the 6/29 draft of the Navigant Report is the last version of the Navigant Report that was shared with Blakes, and the period during which Blakes communicated directly with Navigant

¹⁸ *Chrusz* at paras 106, 108. See also *Wheeler v Le Marchant* (1881) 17 Ch D 675, [1881-5] All ER Rep Ext 1807 (Eng CA) ("*Wheeler*"), which is the authority for the principle corresponding to this footnote. In *Wheeler*, the English Court of Appeal rejected the argument that solicitor-client privilege protected information passed from a surveyor to a lawyer. The client had retained the lawyer to provide legal advice concerning a property, and the lawyer had in turn retained a surveyor to give him information about the property. In rejecting the argument that such information was privileged, the court noted that had the surveyor been employed as an agent on the part of the client to obtain the legal advice of the lawyer, he would stand in the same position of the client and his communications with the solicitor would be privileged. However, since the surveyor was employed by the lawyer on behalf of the client to do certain work, which was not the communicating with the lawyer to obtain legal advice, the documents were not protected by privilege.

¹⁹ *Chrusz* at para 122.

²⁰ *Inco* at para 8.

(or with the Government about Navigant's work) was only from mid-May to the beginning of July. Assuming that the Government continued to work with Navigant after this period and that further drafts of the Navigant Report were prepared and exchanged, it will be very difficult to argue that the current version of the Navigant Report that the Government is considering publishing was in furtherance of a function that was essential to Blakes' solicitor-client relationship with the Government.

- In the circumstances, there is very little basis for concluding that Navigant served as a line of communication between the Government and Blakes.
- Unlike cases such as *Susan Hosiery*, Navigant did more than simply use its expertise to assemble information provided by the Government and put it into a format that could be understood or used by Blakes, as Navigant relied in part on information from outside sources (e.g. generation owners, the IESO, manufacturers, O&M firms) to produce its economic analysis. This makes it difficult to argue that Navigant stood in the same position as the client.²¹
- As discussed below, it is arguable that during the period in which Blakes communicated with Navigant (or with the Government about Navigant's work), the situation was comparable to that of *Camp Development*, as Blakes and Navigant were working together, in their respective areas of expertise, on behalf of the Government and in furtherance of the Government's interest in obtaining a report that determines whether the clean energy costs and benefits align. On that basis, the Government may be able to claim solicitor-client privilege over the 6/29 draft of the Navigant Report as well as Blakes' related communications with Navigant. However, because Blakes has not received a copy of the current version of the Navigant Report, it will be difficult to rely on a *Camp Development*-type argument to claim privilege over same.

The "MAG Lawyers – MOE" Relationship

Applying the functional analysis from *Chrusz*, it is unlikely that a court would conclude that the Navigant Report is subject to solicitor-client privilege on the basis of the MAG Lawyers' solicitor-client relationship with the MOE.

To our knowledge, the MAG Lawyers appear to have had minimal direct contact with Navigant. If that is correct, the facts will likely not support a conclusion that the MAG Lawyers provided legal advice to Navigant on behalf of the MOE (which was the ultimate basis upon which the court in *Camp Development* concluded that privilege was properly claimed). Additionally, to the extent that the MAG Lawyers may have provided policy, rather than legal, advice to their client and Navigant, purely policy advice would not be privileged.²²

²¹ See also *Prosperine v Ottawa-Carleton (Regional Municipality)* (2002), 116 ACWS (3d) 349 (Ont SCJ).

²² *R v Shirose*, [1999] 1 SCR 565 at para 50.

STATUTORY PRIVILEGE IN THE CONTEXT OF FREEDOM OF INFORMATION REQUESTS

If the Government decides not to make the Navigant Report public, in our view, there is a reasonable argument that it is exempt from disclosure under FIPPA. Subsection 19(b) of the “solicitor-client privilege” exception, which provides that “A head may refuse to disclose a record, (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation,” has been interpreted as providing a broader exemption than common law privilege.

The term “Crown counsel” has been interpreted broadly to refer to “any legal advisor employed or retained by the Crown ... [including] both the in-house counsel of the Ministry and the counsel from the private law firm.”²³ This means that Blakes and the MAG Lawyers would qualify as “Crown counsel” and – considering that Blakes retained Navigant for the purpose of informing the legal advice it gives to the Government²⁴ – there is a reasonable argument that the Navigant Report is exempt from disclosure under section 19(b) of FIPPA.

We note that if the MOE were to decide that the Navigant Report is exempt from disclosure in response to a freedom of information request, the requester could challenge the MOE’s refusal to disclose by bringing an appeal to the IPC. The IPC’s decision could then be subject to an application for judicial review by the requester or MOE.

CONSEQUENCES OF DISCLOSING THE NAVIGANT REPORT

Related Communications between Blakes and the Government or Navigant

Even if the Navigant Report were privileged, it is unlikely that its disclosure would be considered a waiver of privilege over Blakes’ related communications with the Government (the “**Related Communications**”).

Disclosure of part of a set of privileged communications or documents does not amount to a waiver of privilege over the entire set *unless* full disclosure is required in the interests of fairness and consistency.²⁵ A party seeking disclosure of the Related Communications would have to establish that the Navigant Report presents a misleading picture or is incomplete without disclosure of the Related Communications in order to successfully argue that privilege has been “waived by implication”.²⁶

If, however, the Government is considering the possibility of disclosing a redacted version of the Navigant Report, there is a risk that a court would consider the Government to have waived privilege over the entire Navigant Report and compel disclosure over the portions that were redacted.

²³ IPC Orders P-52, P170 and P-1571.

²⁴ See the “Background Information” section above.

²⁵ *Cromb v Bouwmeester*, 2014 ONSC 5318 (Ont SCJ) (“**Cromb**”) at paras 65-66; *S & K Processors Ltd v Campbell Avenue Herring Producers Ltd* (1983), 20 ACWS (2d) 183 (BCSC) at para 6.

²⁶ See, e.g., *Cromb* at paras 49, 51; *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co* (1995), 59 ACWS (3d) 864 (Ont Gen Div) at para 41; *Lawyers Professional Indemnity Co v Geto Investments Ltd* (2006), 152 ACWS (3d) 590 (Ont SCJ) at paras 22-23.

Furthermore, it is worth noting that because our above analysis suggests that the Navigant Report would likely not be subject to solicitor-client privilege (at least on the basis of Blakes' solicitor-client relationship with the Government), it is open to the Government to disclose the Navigant Report as a non-privileged document, but still argue that, following *Camp Development*, related correspondence between Blakes and Navigant and the drafts of the Navigant Report in which Blakes was involved are subject to solicitor-client privilege (as Blakes and Navigant were working hand-in-hand, within their respective areas of expertise, on an ongoing basis to advance the interests of the Government).

Freedom of Information Requests

If the Government discloses the Navigant Report, there is a material risk that someone would submit a freedom of information request for, among other things, all records relating to the Navigant Report and any advice provided to the Government in relation to the Navigant Report, including the Related Communications and draft versions of the Navigant Report.

There are, however, strong arguments for refusing to disclose the Related Communications and draft versions of the Navigant Report:

- Blakes' related communications with the Government are exempt from disclosure under section 19(a) of FIPPA, which provides that "A head may refuse to disclose a record, (a) that is subject to solicitor-client privilege";
- The Government could argue that Blakes' related communications with Navigant and the drafts of the Navigant Report are:
 - o Subject to solicitor-client privilege (following *Camp Development*), and are therefore exempt from disclosure under section 19(a) of FIPPA; and/or
 - o Part of the "continuum of communications"²⁷ that are exempt from disclosure under section 19(b) of FIPPA, which provides that "A head may refuse to disclose a record, (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation", and that such privilege was not waived by the disclosure of the Navigant Report.

As noted above, if the MOE were to decide that the Related Communications and draft versions of the Navigant Report are exempt from disclosure in response to a freedom of information request, the requester could bring an appeal to the IPC. The IPC's decision would then also be subject to judicial review.

²⁷ We note that solicitor-client privilege applies to a "continuum of communications" between a solicitor and client. See *Balabel v Air India*, [1988] 2 WLR 1036, [1988] 2 All ER 246 at 253 (Eng CA): "Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach".

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Blake, Cassels & Graydon LLP
Barristers & Solicitors
Patent & Trade-mark Agents
199 Bay Street
Suite 4000, Commerce Court West
Toronto ON M5L 1A9 Canada
Tel: 416-863-2400 Fax: 416-863-2653

DRAFT MEMORANDUM

Reference: 14229/1

VIA E-MAIL
PRIVILEGED & CONFIDENTIAL

October 11, 2017

To: Maud Murray
Legal Director, ENERGY/MEDEI/MRI

c: Judy Wilson, *Blakes*
Stephen Ashbourne, *Blakes*

From: Catherine Beagan Flood
416-863-2269
Brittany Shamess

RE: The Navigant Report: Privilege Claims Assessment

You have asked us to assess the strength of the argument that the current version of Navigant Consulting Ltd.'s "Assessment of the Alignment of the Costs and Benefits of Clean Energy Assets" report (the "**Navigant Report**") (which we understand is different from the last version of the report that was shared with Blakes on June 29, 2017) is protected by litigation privilege and/or solicitor-client privilege.

You have also asked us to consider the consequences of disclosing the Navigant Report on related communications between Blakes and Navigant, and Blakes and the Ministry of the Attorney General's Legal Services Branch ("**MAG Lawyers**") and/or the Ministry of Energy ("**MOE**", together with the MAG Lawyers, the "**Government**").

EXECUTIVE SUMMARY

In our view, there is not a strong argument for claiming that the Navigant Report is protected by litigation privilege and/or solicitor-client privilege by virtue of Blakes' solicitor-client relationship with the Government. ~~However, we note that, depending upon the nature of Navigant's role in legal advice provided by MAG Lawyers, it might be arguable~~
We note that there might be an argument for claiming that the Navigant Report is subject to solicitor-client privilege by virtue of the MAG Lawyers' solicitor-client relationship with the MOE. However, we understand that the MAG Lawyers' had minimal direct contact with Navigant (who predominantly dealt with the MOE directly), which makes it unlikely that solicitor-client privilege by virtue would apply on the basis of the MAG Lawyers' solicitor-client/MOE relationship with the MOE.

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MEMORANDUM

Even if the Navigant Report were privileged, its disclosure would likely not amount to a “waiver of privilege” over previous drafts of the Navigant Report or related correspondence between Blakes and Navigant or the Government. However, such disclosure would materially increase the risk of the Government being subject to a freedom of information request for records relating to the Navigant Report.

In our view, it is likely that the Navigant Report would be exempt from disclosure in response to a freedom of information request by virtue of section 19(b) of the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 (“**FIPPA**”). Section 19(b) of FIPPA creates a “statutory” solicitor-client privilege claim over records that were prepared for legal counsel for use in giving legal advice. This statutory privilege is broader than common law privilege. Communications between Navigant and non-lawyers or that are unrelated to the provision of legal advice would not fall within the section 19 exemption from disclosure, but other exemptions would also need to be considered. We note, however, that if the MOE received a freedom of information request and claimed privilege over the requested documents, the requester could potentially bring an appeal to the Information and Privacy Commissioner of Ontario (the “IPC”). The IPC’s decision would ultimately be subject to judicial review by either the requester or MOE.

BACKGROUND INFORMATION

~~Blakes Navigant was retained Navigant on behalf of the MOE on May 2, 2017. The retainer agreement states the following as the purpose of the engagement “The [MOE] is seeking on May 2, 2017 for “technical consultation services to conduct third party research that would support the implementation of Global Adjustment (GA) refinancing”. The purpose~~ Blakes accepted the terms of Navigant’s retainer on behalf of the MOE. One of the purposes of the engagement was ~~also~~ to assist Blakes in providing legal advice to the Government, and for Blakes to advise Navigant of the legal context and framework of the Act to better enable Navigant to prepare the Navigant Report. Through May and June, as the *Ontario Fair Hydro Plan Act, 2017*, SO 2017, c 16, Sch 1 (the “**Act**”) was being developed, Navigant provided important input on several critical economic considerations on which the Act was based, including the economic quantification and alignment of clean energy costs and benefits and the basis upon which the “fair allocation amounts” contemplated in the Act could be determined. Blakes relied on those inputs in providing detailed comments on drafts of the Act and the associated regulations through that period. This was reflected in comments provided by Blakes to Navigant regarding the June 29, 2017 (“**6/29**”) draft of the Navigant Report on July 4, 2017, which suggested that the language “for purposes of informing legal advice from Blakes to the Ontario Ministry of Energy” be added into the description of the purpose of Navigant’s retainer in the Navigant Report. While Blakes has not received any subsequent draft or final version of the Navigant Report, Navigant did confirm that it would add the aforementioned language into the Navigant Report.

Blakes’ work with Navigant in the preparation of the Navigant Report focused on explaining the purposes, architecture and surrounding legal context of the Act to Navigant, and reconciling the language of the Act to coincide with the economic model being developed by Navigant. Blakes did not provide direction or instructions to Navigant, except to the extent that considerations raised by Blakes factored into the concurrent discussions that the MOE was having directly with Navigant. Much of Blakes’ correspondence about the Navigant Report was with the Government and not with Navigant directly (i.e. Blakes often received information about Navigant’s retainer and the Navigant Report through the Government, and provided comments on same to the Government). In several cases, Blakes participated in meetings with

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Navigant (by phone) and MOE (by phone and in person), during which detailed aspects of the economic model were discussed and reconciled. In addition, Blakes had a small number of discussions directly with Navigant to work through more technical and detailed aspects of the Navigant model. An important perspective underlying all of these interactions was the constitutional validity of the Act and the central role that the alignment of clean energy costs and benefits over time played in supporting the MAG Lawyer's and Blakes' related legal analysis.

Between May 25th and June 16th, 5 draft versions of the Navigant Report were provided by Navigant to Blakes by email, marked "Privileged and Confidential". The agreed protocol was for Blakes to forward these drafts to the Government, again on a "Privileged and Confidential" basis. This approach was established so that the chain of communications would flow through Blakes, consistent with the engagement by Blakes of Navigant on behalf of the Government. Earlier and later exchanges of, or contemplating, the Navigant Report were not provided directly to Blakes by Navigant.

Blakes did at times engage in direct email correspondence with Navigant (including on June 29, 2017 when it received a copy of the 6/29 draft of the Navigant Report). In several cases, the Government was not directly copied on Blakes' correspondence with Navigant. On July 4, 2017, Blakes emailed a number of comments about the 6/29 draft of the Navigant Report to Navigant and, on the same day, Navigant confirmed that it would incorporate those comments into the next draft. Blakes has not had any direct communications with Navigant subsequent to that date and is not aware of the specific content of subsequent Government communications with Navigant with respect to the Navigant Report. Since July 4th, Blakes has had several follow-up conversations with MAG Lawyers to identify aspects of the Act and the associated regulation that could impact the economic model and to suggest that Navigant's work and the Navigant Report be updated to reflect those aspects.

The curtailing of Blakes' direct involvement with Navigant and the Navigant Report roughly coincided with MOE's confirmation that Blakes would not be expected to provide a constitutional opinion to the Government or the ultimate market participants under the financing program contemplated by the Act. The initial expectation had been that Blakes could be called on to provide a constitutional opinion with respect to the Act and potentially also the associated regulations.

LITIGATION PRIVILEGE

General Principles

Litigation privilege protects against the disclosure of communications and documents that were created for the dominant purpose of preparing for litigation, whether such litigation is pending or reasonably apprehended.¹ In order to satisfy the "dominant purpose" requirement, the facts must support a finding that the document was, in fact, created for the *dominant* purpose of litigation. This requirement will not be

¹ *Blank v Canada (Department of Justice)*, 2006 SCC 39 ("**Blank**") at paras 59-60; *Moore v Getahun*, 2015 ONCA 55 at para 68. See also *Blank* at paras 28, 34 (the purpose of litigation privilege is to create a "zone of privacy" in relation to pending or reasonably apprehended litigation; It exists because there is a "need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate").

MEMORANDUM

satisfied if the document was created for the *substantial* purpose of litigation,² nor will it be satisfied if the document was created for the dominant purpose of *obtaining legal advice*.³ In order to satisfy the “reasonable apprehension of litigation” requirement, the court must be satisfied that there was more than a “mere suspicion”⁴ or “mere hypothetical possibility”⁵ of litigation. Moreover, until something arises to “give reality” to the prospect of litigation, the simple fact that a party is investigating a matter that could become litigious is not enough to satisfy the “reasonable apprehension of litigation” requirement.⁶

Unlike solicitor-client privilege, litigation privilege does not last forever; it expires when the litigation ends (except where closely related litigation is pending or reasonably apprehended).⁷ Also unlike solicitor-client privilege, litigation privilege can extend to communications of a non-confidential nature between the lawyer or client and third parties.⁸

Application to the Navigant Report

In order to claim litigation privilege over the Navigant Report, the Government would have to establish that the dominant purpose of the Navigant Report was to prepare for reasonably apprehended litigation. However, in our view, it will be difficult to satisfy this test because: (1) although the possibility of litigation was certainly considered at the time the Navigant Report was being prepared, such consideration would likely not amount to “reasonably apprehended litigation”; and (2) although assisting with the defence of potential litigation was one of the purposes of the Navigant Report, it will be difficult to establish that preparing for litigation was the dominant purpose of the Navigant Report.

With respect to the “reasonable apprehension of litigation” requirement: it will be difficult to establish that the prospect of litigation was more than a “mere hypothetical possibility.” Litigation was arguably no more anticipated than it is any time the government seeks to introduce legislation on a controversial policy matter.

Even if the court were to find that litigation was “reasonably apprehended”, the Navigant Report would likely fail on the “dominant purpose” part of the test. Taking into account the following factors, a court would likely conclude that litigation was not the dominant purpose of the report:⁹

² *Blank* at paras 59-60.

³ *Turnbull-Burnight v CIBC World Markets Inc*, 2007 NBCA 43 at para 16 (when determining whether a document is subject to litigation privilege, “the proper question is not whether the notes were being prepared for the dominant purpose of obtaining legal advice, but for the dominant purpose of use in litigation”).

⁴ *Buzzi v Berger* (1998), 83 ACWS (3d) 572 (Ont Gen Div) at para 29.

⁵ *Blank* at para 53. See also *CIT Financial Ltd v JDS Uniphase Corp* (2003), 124 ACWS (3d) 455 (Ont SCJ) at para 8.

⁶ *General Accident Assurance Co v Chrusz* (1999), 45 OR (3d) 321 (ONCA) (“*Chrusz*”) at para 50.

⁷ *Blank* at paras 36, 38, 58.

⁸ *Chrusz* at para 23.

⁹ *Redhead Equipment Ltd v Canada (Attorney General)*, 2016 SKCA 115 (“*Redhead Equipment*”); *Chrusz* at paras 104, 120.

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- In light of the Supreme Court's comments in *Allard*,¹⁰ Blakes recommended that the Government obtain a report from an expert, prior to passing the Act, as a potential source of evidence regarding the alignment between the clean energy costs and the clean energy benefits.
- Neither the retainer agreement between Blakes and Navigant, nor the 6/29 draft of the Navigant Report, make any reference to a pending or reasonably anticipated lawsuit.
- The "scope of work" section of the retainer agreement states that the purpose of the retainer is to obtain "technical consultation services to conduct third party research that would support the implementation of Global Adjustment (GA) refinancing."
- The constitutionality of the Act was a central focus of Blakes' legal analysis and advice to the Government, but not solely, or even predominantly, to prepare for potential litigation. While the Blakes team included litigators, given the prospect of constitutional litigation, the more immediate constitutional concern was the expectation that the marketplace for financing instruments arising under the financing arrangements contemplated in the Act would likely require supporting advice from Canadian counsel. Accordingly, the primary focus of Blakes' advice has been to achieve a legally effective and financeable legal structure that achieves the Government's financial, accounting and rate abatement objectives. As noted above, this is no longer primarily for the purpose of being able to advance a financing-level opinion, as it is anticipated that the marketplace will be satisfied with the protection arrangements contemplated to be provided by the Crown under section 5 of the Act. However, at the time of Blakes communications with Navigant, it was still anticipated that Blakes would be providing a constitutional opinion for financing purposes.
- There is no pending or threatened litigation (although there may have been some "noise" about the possibility of litigation, and it is reasonable to foresee constitutional challenges given the shifting of economic costs to future generations relative to the *status quo*, and the challenge that we understand has been commenced with respect to the current GA).

SOLICITOR-CLIENT PRIVILEGE and THIRD PARTY COMMUNICATIONSGeneral Principles and Case Law

Solicitor-client privilege only extends to communications between a solicitor and client (whether oral or written), which entail the seeking or giving of legal advice, and which are intended to be confidential by the parties.¹¹ However, it is well settled that solicitor-client privilege can extend to communications between a solicitor and a third party or between a client and a third party *where the third party communications are in*

¹⁰ In *Allard Contractors Ltd v Coquitlam (District)*, [1993] 4 SCR 371 (SCC) ("**Allard**"), when considering the constitutionality of certain fees, the Supreme Court took into consideration the fact that an expert had provided evidence which indicated that the intention of the fees was to raise sufficient revenue to cover the costs of the regulatory scheme.

¹¹ *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 at para 15, quoting *Solosky v R*, [1980] 1 SCR 821 at para 28.

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furtherance of a function that is essential to the existence or operation of the solicitor-client relationship (and where the third party communications meet the other criteria for solicitor-client privilege).¹²

The following functions are recognized in the case law as non-exhaustive examples of functions that are essential to the existence or operation of the solicitor-client relationship:

1. The third party is a “line, or channel, of communication” between the solicitor and client (e.g. where the third party act as a “messenger, translator or transcriber” of communication between the solicitor and client);
2. The third party employs expertise to assemble information provided by the client and to explain the information to the solicitor; and/or
3. The third party is authorized by the client to seek legal advice from the solicitor on behalf of the client.¹³

For example, in *Susan Hosiery*,¹⁴ the client’s accountants met with the lawyer, at the client’s instructions, in order to convey information concerning the business affairs of the client and to discuss possible arrangements to, presumably, minimize tax consequences. Such communications were found to be covered by solicitor-client privilege because the accountants, as representatives of the client, were obtaining legal advice for the client from the lawyer,¹⁵ and because, as Doherty J.A. stated in *Chrusz*:

In a very real sense, the accountants served as translators, assembling the necessary information from the client and putting the client’s affairs in terms which could be understood by the lawyer. In addition, they served as a conduit of advice from the lawyer to the client and as a conduit of instructions from the client to the lawyer.¹⁶

As another example, in *Camp Development*, the BC Supreme Court concluded that a lawyer’s communications with, or in the presence of, a third party consultant (who had been retained to assist the client with property acquisitions) were subject to solicitor-client privilege because the lawyer had provided legal advice directly to the consultant with the knowledge and endorsement of the client. In *Camp Development*, both the lawyer and the consultant took instructions from the client and “worked hand-in-hand, within their respective areas of expertise, on an ongoing basis to advance the interests of [the client].” The court acknowledged that this was a practical reality in major commercial projects where teams of individuals with focused expertise are assembled. The lawyer may be required to give advice to different members of the team who work for the client. In this case, the court held that all the documents that involved the consultant were documents that engaged the “continuum of communications” within which

¹² *Redhead Equipment* at para 43; *Chrusz* at para 120.

¹³ *Redhead Equipment* at para 45; *Chrusz* at paras 110-111, 120-121; *Pearson v Inco Ltd* (2008), 169 ACWS (3d) 524 (Ont SCJ) (“*Inco*”) at para 6; *Camp Development Corp v South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 (“*Camp Development*”) at paras 56-58.

¹⁴ *Susan Hosiery Ltd v Minister of National Revenue*, [1969] 2 Ex CR 27 (“*Susan Hosiery*”).

¹⁵ *Susan Hosiery* at para 14.

¹⁶ *Chrusz* at para 111.

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the consultant sought advice or was provided with advice either directly from the lawyer or indirectly through the client, and that privilege was appropriately claimed.¹⁷

That being said, not every third party communication which facilitates or assists in giving or receiving legal advice is protected by solicitor-client privilege.¹⁸ As Doherty J.A. stated in *Chrusz*:

If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected.¹⁹

For example, in *Inco*, the Ontario Superior Court of Justice did not accept that documents prepared by a consulting firm at the request of Inco's in-house counsel for the purpose of providing legal advice to Inco were protected by solicitor-client privilege. The court was not satisfied that the third party consulting firm was a channel of communication between Inco and its lawyer, or that it was merely interpreting information provided by Inco. Instead, it appeared that the third party consulting firm was retained to gather and possibly interpret information from outside sources for the purposes of assisting Inco's lawyer to provide legal advice to Inco.²⁰

Application to the Navigant Report

The "Blakes – Government" Relationship

Applying the functional analysis from *Chrusz*, it is unlikely that a court would conclude that the Navigant Report is subject to solicitor-client privilege on the basis of ~~the~~ Blakes' solicitor-client relationship with the Government.

There is no doubt that the draft Navigant Report informed Blakes' legal advice to the Government, that Navigant was employing its expertise to interpret and explain information to Blakes, and that Blakes advised Navigant on the legal context and framework of the Act in order to assist in the preparation of the Navigant Report. However, on balance, it is our view that the following factors militate against a finding that the Navigant Report was in furtherance of a function that was essential to Blakes' solicitor-client relationship with the Government:

¹⁷ *Camp Development* at paras 58, 60-65.

¹⁸ *Chrusz* at paras 106, 108. See also *Wheeler v Le Marchant* (1881) 17 Ch D 675, [1881-5] All ER Rep Ext 1807 (Eng CA) ("*Wheeler*"), which is the authority for the principle corresponding to this footnote. In *Wheeler*, the English Court of Appeal rejected the argument that solicitor-client privilege protected information passed from a surveyor to a lawyer. The client had retained the lawyer to provide legal advice concerning a property, and the lawyer had in turn retained a surveyor to give him information about the property. In rejecting the argument that such information was privileged, the court noted that had the surveyor been employed as an agent on the part of the client to obtain the legal advice of the lawyer, he would stand in the same position of the client and his communications with the solicitor would be privileged. However, since the surveyor was employed by the lawyer on behalf of the client to do certain work, which was not the communicating with the lawyer to obtain legal advice, the documents were not protected by privilege.

¹⁹ *Chrusz* at para 122.

²⁰ *Inco* at para 8.

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- As noted above, the 6/29 draft of the Navigant Report is the last version of the Navigant Report that was shared with Blakes, and the period during which Blakes communicated directly with Navigant (or with the Government about Navigant's work) was only from mid-May to the beginning of July. Assuming that the Government continued to work with Navigant after this period and that further drafts of the Navigant Report were prepared and exchanged, it will be very difficult to argue that the current version of the Navigant Report that the Government is considering publishing was in furtherance of a function that was essential to Blakes' solicitor-client relationship with the Government.
- In the circumstances, there is very little basis for concluding that Navigant served as a line of communication between the Government and Blakes.
- Unlike cases such as *Susan Hosiery*, Navigant did more than simply use its expertise to assemble information provided by the Government and put it into a format that could be understood or used by Blakes, as Navigant relied in part on information from outside sources (e.g. generation owners, the IESO, manufacturers, O&M firms) to produce its economic analysis. This makes it difficult to argue that Navigant stood in the same position as the client.²¹
- As discussed below, it is arguable that during the period in which Blakes communicated with Navigant (or with the Government about Navigant's work), the situation was comparable to that of *Camp Development*, as Blakes and Navigant were working together, in their respective areas of expertise, on behalf of the Government and in furtherance of the Government's interest in obtaining a report that determines whether the clean energy costs and benefits align. On that basis, the Government may be able to claim solicitor-client privilege over the 6/29 draft of the Navigant Report as well as Blakes' related communications with Navigant. However, because Blakes has not received a copy of the current version of the Navigant Report, it will be difficult to rely on a *Camp Development*-type argument to claim privilege over same.

The "MAG Lawyers – MOE" Relationship

~~Although there is not a strong argument for claiming privilege over~~ Applying the functional analysis from *Chrusz*, it is unlikely that a court would conclude that the Navigant Report ~~on the basis of Blakes' is subject to~~ solicitor-client ~~relationship with the Government, there may be an argument for claiming~~ privilege on the basis of the MAG Lawyers' solicitor-client relationship with the MOE. ~~In this regard, the *Camp Development* case may serve as a useful precedent for arguing that Navigant performed a function that was integral to the MAG Lawyers' solicitor-client relationship with the MOE, but only if (i)~~

To our knowledge, the MAG Lawyers appear to have had minimal direct contact with Navigant. If that is correct, the facts will likely not support a conclusion that the MAG Lawyers provided legal advice to Navigant on behalf of the MOE (which was the ultimate basis upon which the court in *Camp Development* ~~Camp Development~~ concluded that privilege was properly claimed), ~~and (ii) the facts support a conclusion. Additionally, to the extent~~ that the MAG Lawyers ~~were providing legal, and not may have~~

²¹ See also *Prosperine v Ottawa-Carleton (Regional Municipality)* (2002), 116 ACWS (3d) 349 (Ont SCJ).

MEMORANDUM

provided policy, rather than legal, advice, to their client and Navigant, ~~(purely business or policy advice is/would not be privileged)~~.²²

STATUTORY PRIVILEGE IN THE CONTEXT OF FREEDOM OF INFORMATION REQUESTS

If the Government decides not to make the Navigant Report public, in our view, there is a reasonable argument that it is exempt from disclosure under FIPPA. Subsection 19(b) of the “solicitor-client privilege” exception, which provides that “A head may refuse to disclose a record, (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation,” has been interpreted as providing a broader exemption than common law privilege.

The term “Crown counsel” has been interpreted broadly to refer to “any legal advisor employed or retained by the Crown ... [including] both the in-house counsel of the Ministry and the counsel from the private law firm.”²³ This means that Blakes and the MAG Lawyers would qualify as “Crown counsel” and – considering that Blakes retained Navigant for the purpose of informing the legal advice it gives to the Government²⁴ – there is a reasonable argument that the Navigant Report is exempt from disclosure under section 19(b) of FIPPA.

We note that if the MOE were to decide that the Navigant Report is exempt from disclosure in response to a freedom of information request, the requester could challenge the MOE’s refusal to disclose by bringing an appeal to the IPC. The IPC’s decision could then be subject to an application for judicial review by the requester or MOE.

CONSEQUENCES OF DISCLOSING THE NAVIGANT REPORT

Related Communications between Blakes and the Government or Navigant

Even if the Navigant Report were privileged, it is unlikely that its disclosure would be considered a waiver of privilege over Blakes’ related communications with the Government (the “**Related Communications**”).

Disclosure of part of a set of privileged communications or documents does not amount to a waiver of privilege over the entire set *unless* full disclosure is required in the interests of fairness and consistency.²⁵ A party seeking disclosure of the Related Communications would have to establish that the Navigant Report presents a misleading picture or is incomplete without disclosure of the Related Communications in order to successfully argue that privilege has been “waived by implication”.²⁶

²² *R v Shirose*, [1999] 1 SCR 565 at para 50.

²³ IPC Orders P-52, P170 and P-1571.

²⁴ See the “Background Information” section above.

²⁵ *Cromb v Bouwmeester*, 2014 ONSC 5318 (Ont SCJ) (“**Cromb**”) at paras 65-66; *S & K Processors Ltd v Campbell Avenue Herring Producers Ltd* (1983), 20 ACWS (2d) 183 (BCSC) at para 6.

²⁶ See, e.g., *Cromb* at paras 49, 51; *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co* (1995), 59 ACWS (3d) 864 (Ont Gen Div) at para 41; *Lawyers Professional Indemnity Co v Geto Investments Ltd* (2006), 152 ACWS (3d) 590 (Ont SCJ) at paras 22-23.

MEMORANDUM

If, however, the Government is considering the possibility of disclosing a redacted version of the Navigant Report, there is a risk that a court would consider the Government to have waived privilege over the entire Navigant Report and compel disclosure over the portions that were redacted.

Furthermore, it is worth noting that because our above analysis suggests that the Navigant Report would likely not be subject to solicitor-client privilege (at least on the basis of Blakes' solicitor-client relationship with the Government), it is open to the Government to disclose the Navigant Report as a non-privileged document, but still argue that, following *Camp Development*, related correspondence between Blakes and Navigant and the drafts of the Navigant Report in which Blakes was involved are subject to solicitor-client privilege (as Blakes and Navigant were working hand-in-hand, within their respective areas of expertise, on an ongoing basis to advance the interests of the Government).

Freedom of Information Requests

If the Government discloses the Navigant Report, there is a material risk that someone would submit a freedom of information request for, among other things, all records relating to the Navigant Report and any advice provided to the Government in relation to the Navigant Report, including the Related Communications and draft versions of the Navigant Report.

There are, however, strong arguments for refusing to disclose the Related Communications and draft versions of the Navigant Report:

- Blakes' related communications with the Government are exempt from disclosure under section 19(a) of FIPPA, which provides that "A head may refuse to disclose a record, (a) that is subject to solicitor-client privilege";
- The Government could argue that Blakes' related communications with Navigant and the drafts of the Navigant Report are:
 - Subject to solicitor-client privilege (following *Camp Development*), and are therefore exempt from disclosure under section 19(a) of FIPPA; and/or
 - Part of the "continuum of communications"²⁷ that are exempt from disclosure under section 19(b) of FIPPA, which provides that "A head may refuse to disclose a record, (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation", and that such privilege was not waived by the disclosure of the Navigant Report.

²⁷ We note that solicitor-client privilege applies to a "continuum of communications" between a solicitor and client. See *Balabel v Air India*, [1988] 2 WLR 1036, [1988] 2 All ER 246 at 253 (Eng CA): "Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach".



MEMORANDUM

As noted above, if the MOE were to decide that the Related Communications and draft versions of the Navigant Report are exempt from disclosure in response to a freedom of information request, the requester could bring an appeal to the IPC. The IPC's decision would then also be subject to judicial review.

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Document comparison by Workshare Compare on Tuesday, October 24, 2017
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Description	ORIGINAL - TOR_2528-#23225509-v6-MOE_-_Memo_re_Privilege_Claims_over_Navigant_Report
Document 2 ID	PowerDocs://TOR_2528/23225509/8
Description	TOR_2528-#23225509-v8-MOE_-_Memo_re_Privilege_Claims_over_Navigant_Report
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Moved to	1
Style change	0
Format changed	0

Total changes	56
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Blake, Cassels & Graydon LLP
Barristers & Solicitors
Patent & Trade-mark Agents
199 Bay Street
Suite 4000, Commerce Court West
Toronto ON M5L 1A9 Canada
Tel: 416-863-2400 Fax: 416-863-2653

DRAFT MEMORANDUM

Reference: 14229/1

VIA E-MAIL
PRIVILEGED & CONFIDENTIAL

October 11, 2017

To: Maud Murray
Legal Director, ENERGY/MEDEI/MRI

c: Judy Wilson, *Blakes*
Stephen Ashbourne, *Blakes*

From: Catherine Beagan Flood
416-863-2269
Brittany Shamess

RE: The Navigant Report: Privilege Claims Assessment

You have asked us to assess the strength of the argument that the current version of Navigant Consulting Ltd.'s "Assessment of the Alignment of the Costs and Benefits of Clean Energy Assets" report (the "**Navigant Report**") (which we understand is different from the last version of the report that was shared with Blakes on June 29, 2017) is protected by litigation privilege and/or solicitor-client privilege.

You have also asked us to consider the consequences of disclosing the Navigant Report on related communications between Blakes and Navigant, and Blakes and the Ministry of the Attorney General's Legal Services Branch ("**MAG Lawyers**") and/or the Ministry of Energy ("**MOE**", together with the MAG Lawyers, the "**Government**").

EXECUTIVE SUMMARY

In our view, there is not a strong argument for claiming that the Navigant Report is protected by litigation privilege and/or solicitor-client privilege by virtue of Blakes' solicitor-client relationship with the Government. ~~However, we note that, depending upon the nature of Navigant's role in legal advice provided by MAG Lawyers, it might be arguable~~
We note that there might be an argument for claiming that the Navigant Report is subject to solicitor-client privilege by virtue of the MAG Lawyers' solicitor-client relationship with the MOE. However, we understand that the MAG Lawyers' had minimal direct contact with Navigant (who predominantly dealt with the MOE directly), which makes it unlikely that solicitor-client privilege ~~by virtue would apply on the basis~~ of the MAG Lawyers' ~~solicitor-client~~ MOE relationship ~~with the MOE.~~

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MEMORANDUM

Even if the Navigant Report were privileged, its disclosure would likely not amount to a “waiver of privilege” over previous drafts of the Navigant Report or related correspondence between Blakes and Navigant or the Government. However, such disclosure would materially increase the risk of the Government being subject to a freedom of information request for records relating to the Navigant Report.

In our view, it is likely that the Navigant Report would be exempt from disclosure in response to a freedom of information request by virtue of section 19(b) of the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31 (“**FIPPA**”). Section 19(b) of FIPPA creates a “statutory” solicitor-client privilege claim over records that were prepared for legal counsel for use in giving legal advice. This statutory privilege is broader than common law privilege. Communications between Navigant and non-lawyers or that are unrelated to the provision of legal advice would not fall within the section 19 exemption from disclosure, but other exemptions would also need to be considered. We note, however, that if the MOE received a freedom of information request and claimed privilege over the requested documents, the requester could potentially bring an appeal to the Information and Privacy Commissioner of Ontario (the “IPC”). The IPC’s decision would ultimately be subject to judicial review by either the requester or MOE.

BACKGROUND INFORMATION

~~Blakes Navigant was retained Navigant on behalf of the MOE on May 2, 2017. The retainer agreement states the following as the purpose of the engagement “The [MOE] is seeking on May 2, 2017 for “technical consultation services to conduct third party research that would support the implementation of Global Adjustment (GA) refinancing”. The purpose~~ Blakes accepted the terms of Navigant’s retainer on behalf of the MOE. One of the purposes of the engagement was ~~also~~ to assist Blakes in providing legal advice to the Government, and for Blakes to advise Navigant of the legal context and framework of the Act to better enable Navigant to prepare the Navigant Report. Through May and June, as the *Ontario Fair Hydro Plan Act, 2017*, SO 2017, c 16, Sch 1 (the “**Act**”) was being developed, Navigant provided important input on several critical economic considerations on which the Act was based, including the economic quantification and alignment of clean energy costs and benefits and the basis upon which the “fair allocation amounts” contemplated in the Act could be determined. Blakes relied on those inputs in providing detailed comments on drafts of the Act and the associated regulations through that period. This was reflected in comments provided by Blakes to Navigant regarding the June 29, 2017 (“**6/29**”) draft of the Navigant Report on July 4, 2017, which suggested that the language “for purposes of informing legal advice from Blakes to the Ontario Ministry of Energy” be added into the description of the purpose of Navigant’s retainer in the Navigant Report. While Blakes has not received any subsequent draft or final version of the Navigant Report, Navigant did confirm that it would add the aforementioned language into the Navigant Report.

Blakes’ work with Navigant in the preparation of the Navigant Report focused on explaining the purposes, architecture and surrounding legal context of the Act to Navigant, and reconciling the language of the Act to coincide with the economic model being developed by Navigant. Blakes did not provide direction or instructions to Navigant, except to the extent that considerations raised by Blakes factored into the concurrent discussions that the MOE was having directly with Navigant. Much of Blakes’ correspondence about the Navigant Report was with the Government and not with Navigant directly (i.e. Blakes often received information about Navigant’s retainer and the Navigant Report through the Government, and provided comments on same to the Government). In several cases, Blakes participated in meetings with

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MEMORANDUM

Navigant (by phone) and MOE (by phone and in person), during which detailed aspects of the economic model were discussed and reconciled. In addition, Blakes had a small number of discussions directly with Navigant to work through more technical and detailed aspects of the Navigant model. An important perspective underlying all of these interactions was the constitutional validity of the Act and the central role that the alignment of clean energy costs and benefits over time played in supporting the MAG Lawyer's and Blakes' related legal analysis.

Between May 25th and June 16th, 5 draft versions of the Navigant Report were provided by Navigant to Blakes by email, marked "Privileged and Confidential". The agreed protocol was for Blakes to forward these drafts to the Government, again on a "Privileged and Confidential" basis. This approach was established so that the chain of communications would flow through Blakes, consistent with the engagement by Blakes of Navigant on behalf of the Government. Earlier and later exchanges of, or contemplating, the Navigant Report were not provided directly to Blakes by Navigant.

Blakes did at times engage in direct email correspondence with Navigant (including on June 29, 2017 when it received a copy of the 6/29 draft of the Navigant Report). In several cases, the Government was not directly copied on Blakes' correspondence with Navigant. On July 4, 2017, Blakes emailed a number of comments about the 6/29 draft of the Navigant Report to Navigant and, on the same day, Navigant confirmed that it would incorporate those comments into the next draft. Blakes has not had any direct communications with Navigant subsequent to that date and is not aware of the specific content of subsequent Government communications with Navigant with respect to the Navigant Report. Since July 4th, Blakes has had several follow-up conversations with MAG Lawyers to identify aspects of the Act and the associated regulation that could impact the economic model and to suggest that Navigant's work and the Navigant Report be updated to reflect those aspects.

The curtailing of Blakes' direct involvement with Navigant and the Navigant Report roughly coincided with MOE's confirmation that Blakes would not be expected to provide a constitutional opinion to the Government or the ultimate market participants under the financing program contemplated by the Act. The initial expectation had been that Blakes could be called on to provide a constitutional opinion with respect to the Act and potentially also the associated regulations.

LITIGATION PRIVILEGE

General Principles

Litigation privilege protects against the disclosure of communications and documents that were created for the dominant purpose of preparing for litigation, whether such litigation is pending or reasonably apprehended.¹ In order to satisfy the "dominant purpose" requirement, the facts must support a finding that the document was, in fact, created for the *dominant* purpose of litigation. This requirement will not be

¹ *Blank v Canada (Department of Justice)*, 2006 SCC 39 ("**Blank**") at paras 59-60; *Moore v Getahun*, 2015 ONCA 55 at para 68. See also *Blank* at paras 28, 34 (the purpose of litigation privilege is to create a "zone of privacy" in relation to pending or reasonably apprehended litigation; It exists because there is a "need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate").

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satisfied if the document was created for the *substantial* purpose of litigation,² nor will it be satisfied if the document was created for the dominant purpose of *obtaining legal advice*.³ In order to satisfy the “reasonable apprehension of litigation” requirement, the court must be satisfied that there was more than a “mere suspicion”⁴ or “mere hypothetical possibility”⁵ of litigation. Moreover, until something arises to “give reality” to the prospect of litigation, the simple fact that a party is investigating a matter that could become litigious is not enough to satisfy the “reasonable apprehension of litigation” requirement.⁶

Unlike solicitor-client privilege, litigation privilege does not last forever; it expires when the litigation ends (except where closely related litigation is pending or reasonably apprehended).⁷ Also unlike solicitor-client privilege, litigation privilege can extend to communications of a non-confidential nature between the lawyer or client and third parties.⁸

Application to the Navigant Report

In order to claim litigation privilege over the Navigant Report, the Government would have to establish that the dominant purpose of the Navigant Report was to prepare for reasonably apprehended litigation. However, in our view, it will be difficult to satisfy this test because: (1) although the possibility of litigation was certainly considered at the time the Navigant Report was being prepared, such consideration would likely not amount to “reasonably apprehended litigation”; and (2) although assisting with the defence of potential litigation was one of the purposes of the Navigant Report, it will be difficult to establish that preparing for litigation was the dominant purpose of the Navigant Report.

With respect to the “reasonable apprehension of litigation” requirement: it will be difficult to establish that the prospect of litigation was more than a “mere hypothetical possibility.” Litigation was arguably no more anticipated than it is any time the government seeks to introduce legislation on a controversial policy matter.

Even if the court were to find that litigation was “reasonably apprehended”, the Navigant Report would likely fail on the “dominant purpose” part of the test. Taking into account the following factors, a court would likely conclude that litigation was not the dominant purpose of the report:⁹

² *Blank* at paras 59-60.

³ *Turnbull-Burnight v CIBC World Markets Inc*, 2007 NBCA 43 at para 16 (when determining whether a document is subject to litigation privilege, “the proper question is not whether the notes were being prepared for the dominant purpose of obtaining legal advice, but for the dominant purpose of use in litigation”).

⁴ *Buzzi v Berger* (1998), 83 ACWS (3d) 572 (Ont Gen Div) at para 29.

⁵ *Blank* at para 53. See also *CIT Financial Ltd v JDS Uniphase Corp* (2003), 124 ACWS (3d) 455 (Ont SCJ) at para 8.

⁶ *General Accident Assurance Co v Chrusz* (1999), 45 OR (3d) 321 (ONCA) (“*Chrusz*”) at para 50.

⁷ *Blank* at paras 36, 38, 58.

⁸ *Chrusz* at para 23.

⁹ *Redhead Equipment Ltd v Canada (Attorney General)*, 2016 SKCA 115 (“*Redhead Equipment*”); *Chrusz* at paras 104, 120.

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- In light of the Supreme Court's comments in *Allard*,¹⁰ Blakes recommended that the Government obtain a report from an expert, prior to passing the Act, as a potential source of evidence regarding the alignment between the clean energy costs and the clean energy benefits.
- Neither the retainer agreement between Blakes and Navigant, nor the 6/29 draft of the Navigant Report, make any reference to a pending or reasonably anticipated lawsuit.
- The "scope of work" section of the retainer agreement states that the purpose of the retainer is to obtain "technical consultation services to conduct third party research that would support the implementation of Global Adjustment (GA) refinancing."
- The constitutionality of the Act was a central focus of Blakes' legal analysis and advice to the Government, but not solely, or even predominantly, to prepare for potential litigation. While the Blakes team included litigators, given the prospect of constitutional litigation, the more immediate constitutional concern was the expectation that the marketplace for financing instruments arising under the financing arrangements contemplated in the Act would likely require supporting advice from Canadian counsel. Accordingly, the primary focus of Blakes' advice has been to achieve a legally effective and financeable legal structure that achieves the Government's financial, accounting and rate abatement objectives. As noted above, this is no longer primarily for the purpose of being able to advance a financing-level opinion, as it is anticipated that the marketplace will be satisfied with the protection arrangements contemplated to be provided by the Crown under section 5 of the Act. However, at the time of Blakes communications with Navigant, it was still anticipated that Blakes would be providing a constitutional opinion for financing purposes.
- There is no pending or threatened litigation (although there may have been some "noise" about the possibility of litigation, and it is reasonable to foresee constitutional challenges given the shifting of economic costs to future generations relative to the *status quo*, and the challenge that we understand has been commenced with respect to the current GA).

SOLICITOR-CLIENT PRIVILEGE and THIRD PARTY COMMUNICATIONSGeneral Principles and Case Law

Solicitor-client privilege only extends to communications between a solicitor and client (whether oral or written), which entail the seeking or giving of legal advice, and which are intended to be confidential by the parties.¹¹ However, it is well settled that solicitor-client privilege can extend to communications between a solicitor and a third party or between a client and a third party *where the third party communications are in*

¹⁰ In *Allard Contractors Ltd v Coquitlam (District)*, [1993] 4 SCR 371 (SCC) ("**Allard**"), when considering the constitutionality of certain fees, the Supreme Court took into consideration the fact that an expert had provided evidence which indicated that the intention of the fees was to raise sufficient revenue to cover the costs of the regulatory scheme.

¹¹ *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 at para 15, quoting *Solosky v R*, [1980] 1 SCR 821 at para 28.

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furtherance of a function that is essential to the existence or operation of the solicitor-client relationship (and where the third party communications meet the other criteria for solicitor-client privilege).¹²

The following functions are recognized in the case law as non-exhaustive examples of functions that are essential to the existence or operation of the solicitor-client relationship:

1. The third party is a “line, or channel, of communication” between the solicitor and client (e.g. where the third party act as a “messenger, translator or transcriber” of communication between the solicitor and client);
2. The third party employs expertise to assemble information provided by the client and to explain the information to the solicitor; and/or
3. The third party is authorized by the client to seek legal advice from the solicitor on behalf of the client.¹³

For example, in *Susan Hosiery*,¹⁴ the client’s accountants met with the lawyer, at the client’s instructions, in order to convey information concerning the business affairs of the client and to discuss possible arrangements to, presumably, minimize tax consequences. Such communications were found to be covered by solicitor-client privilege because the accountants, as representatives of the client, were obtaining legal advice for the client from the lawyer,¹⁵ and because, as Doherty J.A. stated in *Chrusz*:

In a very real sense, the accountants served as translators, assembling the necessary information from the client and putting the client’s affairs in terms which could be understood by the lawyer. In addition, they served as a conduit of advice from the lawyer to the client and as a conduit of instructions from the client to the lawyer.¹⁶

As another example, in *Camp Development*, the BC Supreme Court concluded that a lawyer’s communications with, or in the presence of, a third party consultant (who had been retained to assist the client with property acquisitions) were subject to solicitor-client privilege because the lawyer had provided legal advice directly to the consultant with the knowledge and endorsement of the client. In *Camp Development*, both the lawyer and the consultant took instructions from the client and “worked hand-in-hand, within their respective areas of expertise, on an ongoing basis to advance the interests of [the client].” The court acknowledged that this was a practical reality in major commercial projects where teams of individuals with focused expertise are assembled. The lawyer may be required to give advice to different members of the team who work for the client. In this case, the court held that all the documents that involved the consultant were documents that engaged the “continuum of communications” within which

¹² *Redhead Equipment* at para 43; *Chrusz* at para 120.

¹³ *Redhead Equipment* at para 45; *Chrusz* at paras 110-111, 120-121; *Pearson v Inco Ltd* (2008), 169 ACWS (3d) 524 (Ont SCJ) (“*Inco*”) at para 6; *Camp Development Corp v South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 (“*Camp Development*”) at paras 56-58.

¹⁴ *Susan Hosiery Ltd v Minister of National Revenue*, [1969] 2 Ex CR 27 (“*Susan Hosiery*”).

¹⁵ *Susan Hosiery* at para 14.

¹⁶ *Chrusz* at para 111.

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the consultant sought advice or was provided with advice either directly from the lawyer or indirectly through the client, and that privilege was appropriately claimed.¹⁷

That being said, not every third party communication which facilitates or assists in giving or receiving legal advice is protected by solicitor-client privilege.¹⁸ As Doherty J.A. stated in *Chrusz*:

If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected.¹⁹

For example, in *Inco*, the Ontario Superior Court of Justice did not accept that documents prepared by a consulting firm at the request of Inco's in-house counsel for the purpose of providing legal advice to Inco were protected by solicitor-client privilege. The court was not satisfied that the third party consulting firm was a channel of communication between Inco and its lawyer, or that it was merely interpreting information provided by Inco. Instead, it appeared that the third party consulting firm was retained to gather and possibly interpret information from outside sources for the purposes of assisting Inco's lawyer to provide legal advice to Inco.²⁰

Application to the Navigant Report

The "Blakes – Government" Relationship

Applying the functional analysis from *Chrusz*, it is unlikely that a court would conclude that the Navigant Report is subject to solicitor-client privilege on the basis of ~~the~~ Blakes' solicitor-client relationship with the Government.

There is no doubt that the draft Navigant Report informed Blakes' legal advice to the Government, that Navigant was employing its expertise to interpret and explain information to Blakes, and that Blakes advised Navigant on the legal context and framework of the Act in order to assist in the preparation of the Navigant Report. However, on balance, it is our view that the following factors militate against a finding that the Navigant Report was in furtherance of a function that was essential to Blakes' solicitor-client relationship with the Government:

¹⁷ *Camp Development* at paras 58, 60-65.

¹⁸ *Chrusz* at paras 106, 108. See also *Wheeler v Le Marchant* (1881) 17 Ch D 675, [1881-5] All ER Rep Ext 1807 (Eng CA) ("*Wheeler*"), which is the authority for the principle corresponding to this footnote. In *Wheeler*, the English Court of Appeal rejected the argument that solicitor-client privilege protected information passed from a surveyor to a lawyer. The client had retained the lawyer to provide legal advice concerning a property, and the lawyer had in turn retained a surveyor to give him information about the property. In rejecting the argument that such information was privileged, the court noted that had the surveyor been employed as an agent on the part of the client to obtain the legal advice of the lawyer, he would stand in the same position of the client and his communications with the solicitor would be privileged. However, since the surveyor was employed by the lawyer on behalf of the client to do certain work, which was not the communicating with the lawyer to obtain legal advice, the documents were not protected by privilege.

¹⁹ *Chrusz* at para 122.

²⁰ *Inco* at para 8.

MEMORANDUM

- As noted above, the 6/29 draft of the Navigant Report is the last version of the Navigant Report that was shared with Blakes, and the period during which Blakes communicated directly with Navigant (or with the Government about Navigant's work) was only from mid-May to the beginning of July. Assuming that the Government continued to work with Navigant after this period and that further drafts of the Navigant Report were prepared and exchanged, it will be very difficult to argue that the current version of the Navigant Report that the Government is considering publishing was in furtherance of a function that was essential to Blakes' solicitor-client relationship with the Government.
- In the circumstances, there is very little basis for concluding that Navigant served as a line of communication between the Government and Blakes.
- Unlike cases such as *Susan Hosiery*, Navigant did more than simply use its expertise to assemble information provided by the Government and put it into a format that could be understood or used by Blakes, as Navigant relied in part on information from outside sources (e.g. generation owners, the IESO, manufacturers, O&M firms) to produce its economic analysis. This makes it difficult to argue that Navigant stood in the same position as the client.²¹
- As discussed below, it is arguable that during the period in which Blakes communicated with Navigant (or with the Government about Navigant's work), the situation was comparable to that of *Camp Development*, as Blakes and Navigant were working together, in their respective areas of expertise, on behalf of the Government and in furtherance of the Government's interest in obtaining a report that determines whether the clean energy costs and benefits align. On that basis, the Government may be able to claim solicitor-client privilege over the 6/29 draft of the Navigant Report as well as Blakes' related communications with Navigant. However, because Blakes has not received a copy of the current version of the Navigant Report, it will be difficult to rely on a *Camp Development*-type argument to claim privilege over same.

The "MAG Lawyers – MOE" Relationship

~~Although there is not a strong argument for claiming privilege over~~ Applying the functional analysis from *Chrusz*, it is unlikely that a court would conclude that the Navigant Report ~~on the basis of Blakes' is subject to~~ solicitor-client ~~relationship with the Government, there may be an argument for claiming~~ privilege on the basis of the MAG Lawyers' solicitor-client relationship with the MOE. ~~In this regard, the *Camp Development* case may serve as a useful precedent for arguing that Navigant performed a function that was integral to the MAG Lawyers' solicitor-client relationship with the MOE, but only if (i)~~

To our knowledge, the MAG Lawyers appear to have had minimal direct contact with Navigant. If that is correct, the facts will likely not support a conclusion that the MAG Lawyers provided legal advice to Navigant on behalf of the MOE (which was the ultimate basis upon which the court in *Camp Development* ~~Camp Development~~ concluded that privilege was properly claimed), ~~and (ii) the facts support a conclusion. Additionally, to the extent~~ that the MAG Lawyers ~~were providing legal, and not may have~~

²¹ See also *Prosperine v Ottawa-Carleton (Regional Municipality)* (2002), 116 ACWS (3d) 349 (Ont SCJ).

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provided policy, rather than legal, advice, to their client and Navigant, ~~(purely business or policy advice is/would not be privileged)~~.²²

STATUTORY PRIVILEGE IN THE CONTEXT OF FREEDOM OF INFORMATION REQUESTS

If the Government decides not to make the Navigant Report public, in our view, there is a reasonable argument that it is exempt from disclosure under FIPPA. Subsection 19(b) of the “solicitor-client privilege” exception, which provides that “A head may refuse to disclose a record, (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation,” has been interpreted as providing a broader exemption than common law privilege.

The term “Crown counsel” has been interpreted broadly to refer to “any legal advisor employed or retained by the Crown ... [including] both the in-house counsel of the Ministry and the counsel from the private law firm.”²³ This means that Blakes and the MAG Lawyers would qualify as “Crown counsel” and – considering that Blakes retained Navigant for the purpose of informing the legal advice it gives to the Government²⁴ – there is a reasonable argument that the Navigant Report is exempt from disclosure under section 19(b) of FIPPA.

We note that if the MOE were to decide that the Navigant Report is exempt from disclosure in response to a freedom of information request, the requester could challenge the MOE’s refusal to disclose by bringing an appeal to the IPC. The IPC’s decision could then be subject to an application for judicial review by the requester or MOE.

CONSEQUENCES OF DISCLOSING THE NAVIGANT REPORT

Related Communications between Blakes and the Government or Navigant

Even if the Navigant Report were privileged, it is unlikely that its disclosure would be considered a waiver of privilege over Blakes’ related communications with the Government (the “**Related Communications**”).

Disclosure of part of a set of privileged communications or documents does not amount to a waiver of privilege over the entire set *unless* full disclosure is required in the interests of fairness and consistency.²⁵ A party seeking disclosure of the Related Communications would have to establish that the Navigant Report presents a misleading picture or is incomplete without disclosure of the Related Communications in order to successfully argue that privilege has been “waived by implication”.²⁶

²² *R v Shirose*, [1999] 1 SCR 565 at para 50.

²³ IPC Orders P-52, P170 and P-1571.

²⁴ See the “Background Information” section above.

²⁵ *Cromb v Bouwmeester*, 2014 ONSC 5318 (Ont SCJ) (“**Cromb**”) at paras 65-66; *S & K Processors Ltd v Campbell Avenue Herring Producers Ltd* (1983), 20 ACWS (2d) 183 (BCSC) at para 6.

²⁶ See, e.g., *Cromb* at paras 49, 51; *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co* (1995), 59 ACWS (3d) 864 (Ont Gen Div) at para 41; *Lawyers Professional Indemnity Co v Geto Investments Ltd* (2006), 152 ACWS (3d) 590 (Ont SCJ) at paras 22-23.

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If, however, the Government is considering the possibility of disclosing a redacted version of the Navigant Report, there is a risk that a court would consider the Government to have waived privilege over the entire Navigant Report and compel disclosure over the portions that were redacted.

Furthermore, it is worth noting that because our above analysis suggests that the Navigant Report would likely not be subject to solicitor-client privilege (at least on the basis of Blakes' solicitor-client relationship with the Government), it is open to the Government to disclose the Navigant Report as a non-privileged document, but still argue that, following *Camp Development*, related correspondence between Blakes and Navigant and the drafts of the Navigant Report in which Blakes was involved are subject to solicitor-client privilege (as Blakes and Navigant were working hand-in-hand, within their respective areas of expertise, on an ongoing basis to advance the interests of the Government).

Freedom of Information Requests

If the Government discloses the Navigant Report, there is a material risk that someone would submit a freedom of information request for, among other things, all records relating to the Navigant Report and any advice provided to the Government in relation to the Navigant Report, including the Related Communications and draft versions of the Navigant Report.

There are, however, strong arguments for refusing to disclose the Related Communications and draft versions of the Navigant Report:

- Blakes' related communications with the Government are exempt from disclosure under section 19(a) of FIPPA, which provides that "A head may refuse to disclose a record, (a) that is subject to solicitor-client privilege";
- The Government could argue that Blakes' related communications with Navigant and the drafts of the Navigant Report are:
 - Subject to solicitor-client privilege (following *Camp Development*), and are therefore exempt from disclosure under section 19(a) of FIPPA; and/or
 - Part of the "continuum of communications"²⁷ that are exempt from disclosure under section 19(b) of FIPPA, which provides that "A head may refuse to disclose a record, (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation", and that such privilege was not waived by the disclosure of the Navigant Report.

²⁷ We note that solicitor-client privilege applies to a "continuum of communications" between a solicitor and client. See *Balabel v Air India*, [1988] 2 WLR 1036, [1988] 2 All ER 246 at 253 (Eng CA): "Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach".



MEMORANDUM

As noted above, if the MOE were to decide that the Related Communications and draft versions of the Navigant Report are exempt from disclosure in response to a freedom of information request, the requester could bring an appeal to the IPC. The IPC's decision would then also be subject to judicial review.

~~23225509-6~~[23225509.8](tel:232255098)

Document comparison by Workshare Compare on Tuesday, October 24, 2017
10:29:54 AM

Input:	
Document 1 ID	file://C:\Users\Lpi\Desktop\ORIGINAL - TOR_2528-#23225509-v6-MOE_-_Memo_re_Privilege_Claims_over_Navigant_Report.DOCX
Description	ORIGINAL - TOR_2528-#23225509-v6-MOE_-_Memo_re_Privilege_Claims_over_Navigant_Report
Document 2 ID	PowerDocs://TOR_2528/23225509/8
Description	TOR_2528-#23225509-v8-MOE_-_Memo_re_Privilege_Claims_over_Navigant_Report
Rendering set	Custom rendering set

Legend:	
<u>Insertion</u>	
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Style change	
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Inserted cell	
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Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	28
Deletions	26
Moved from	1
Moved to	1
Style change	0
Format changed	0

Total changes	56
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Re_ OFHPA Document Due Diligence Memo.pdf

From: [Cox, Hilary \(ENERGY\)](#)
To: [Cayley, Daniel \(ENERGY\)](#)
Cc: [Christie, Tim \(ENERGY\)](#); [Lightbody, Ava \(ENERGY\)](#)
Subject: Re: OFHPA Document Due Diligence Memo
Date: December 7, 2017 1:19:03 PM

Thanks

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Cayley, Daniel (ENERGY)
Sent: Thursday, December 7, 2017 1:18 PM
To: Cox, Hilary (ENERGY)
Cc: Christie, Tim (ENERGY); Lightbody, Ava (ENERGY)
Subject: FW: OFHPA Document Due Diligence Memo

Hilary – the memo is attached.

Daniel

From: Thouin, Alena (ENERGY)
Sent: November 22, 2017 3:04 PM
To: Christie, Tim (ENERGY); Cayley, Daniel (ENERGY)
Cc: McKinlay, Tom (MAG)
Subject: FW: OFHPA Document Due Diligence Memo

Good afternoon

Please kindly review Steve's comments and we can group to discuss. The due diligence memo is a standard part of this type of transaction. Few notes:

- a. We must be careful with comments on the financing plan.
- b. Steve is looking for the Offering Memoranda which I have not shared with him yet, we should discuss the timing of doing so.
- c. We can discuss further once you had a chance to review.

Please let me know when you have time for a call in the next 24 hours.

Thanks
Alena

From: ASHBOURNE, STEPHEN [<mailto:STEPHEN.ASHBOURNE@blakes.com>]
Sent: November 22, 2017 2:57 PM
To: Hanslep, Malle (MOF); McKinlay, Tom (MAG); Thouin, Alena (ENERGY); Whitfield, Tobias P. (MOF)
Cc: VINER, JON; PALMER, AARON
Subject: OFHPA Document Due Diligence Memo

PRIVILEGED AND CONFIDENTIAL

Restricted Circulation

Malle, Tom, Alena and Toby,

As discussed, we have undertaken a limited review of the documentation being prepared by Torys and circulated to date in connection with the Fair Hydro financing program. Consistent with the directive from accounting professionals and the general delegation made to OPG under the OFHPA and General Regulation, we have not engaged in commercial discussions with Torys regarding the propriety of these documents or whether they optimize the financing opportunities afforded by and anticipated under the OFHPA. Instead, we have limited our involvement in the documentation process to:

1. Protection Agreement – Identifying features directly relevant to the on-going discussions pertaining to the Change of Law Protection Agreement and the Change of Law Process Agreement (accepting the principle that the Limited Guarantee will extend broadly to virtually all obligations and liabilities of the Trust, which based on the transaction documentation reviewed are potentially very expansive and currently unconstrained).
2. Purposes of OFHPA – Identifying inconsistencies between the documentation and the basic framework of the OFHPA and General Regulation, which could compromise the internal consistency of the scheme and expose the overall scheme to legal challenge or principled criticisms (recognizing the principle that the Financing Plan contemplated in the OFHPA is intended as the primary mechanism to flesh out, among other things, the broad parameters for OPG to manage the program, mitigate risks and achieve the cost efficiency and alignment purposes of the OFHPA, and that the program documentation is the mechanism through which the Financing Plan is to be implemented in the capital markets context).

As you know, I have been a strong proponent for the Province to look to the Financing Plan as the means to address anticipated key concerns, such as those that could impact ratepayers (through the amount of CEAs to be charged), the achievement of the alignment and efficiency purposes of the OFHPA and the mitigation of known risks and conflicts of interest (e.g., OPG's various roles and interests). My September 14th outline was meant to elaborate on those matters. Very recently, a first draft of the Financing Plan was circulated (Alena provided it to me), which did not address many of the considerations that I had identified. I have not been directly involved with MOE in providing input on that draft and there has been no follow-up on my September 14th outline.

3. Capital Markets Functionality – Identifying features observed in the limited document review, undertaken for the purposes of 1 and 2, above, that appear to raise significant “financability” concerns given the orientation of the financing program to the rated, structured finance, debt capital markets. In this regard, I have raised several basic concerns that in my view will undermine the potential flexibility of the financing program to achieve its full potential in the capital markets over time. For example, the compulsory cross acceleration of Trust obligations will inhibit the ability to tailor tranche issuances based on the tenor of the debt issuances – recognizing that a long-term bond may be evaluated by buyers based on the risk

that an above-market interest rate could be upended by the decision of short-term bondholders decision to accelerate. Another example is that the program documentation makes no attempt to facilitate multiple financing entities, even though additional entities may make sense in the future (e.g., USD bonds through a US-based financing entity). The opportunity to envision “co-ownership” terms among potential financing entities, as contemplated in s. 29(4) of the OFHPA, has not been addressed with the result that it will be difficult/expensive to add those terms after the initial issuances have been completed. I used those important examples in our discussions to gauge the Province’s appetite for making specific structuring comments on the documentation, and determined that there is very little opportunity for the Province to make use of those sorts of inputs given the practical constraints the Province faces (including respecting the separateness objectives underlying OPG’s and the Province’s accounting analysis and the fact that the OFHPA envisions that OPG will run the financing program without specific supervision or over-sight from the Province or the Ministers). On that basis, our commenting on “financeability” considerations has been intentionally curtailed.

The other aspects that we anticipate for pre-launch documentation review include:

4. Offering Documentation – Despite requests to Torys, draft offering documents have not yet been provided to the Province (although we were told by Rima last week that a draft offering circular is quite far advanced). I expect that the Province will want to undertake a limited review of any offering circular focusing on matters of direct consequence and significance to the Province, including items such as (a) ensuring that the description of the Protection Agreement is accurate and does not overstate the Province’s obligations, (b) ensuring that the limitations contemplated in s. 40 of OFHPA and s.19 of the General Regulation have been observed, (c) eliminating any implied/moral undertakings by the Province to bondholders, (d) scrutinizing any “risk factors”, particularly as they might relate to the context in which Protection Events may arise, (e) confirming any disclosures regarding the Province’s (Ministers’) roles, including in setting the “fair allocation amount”, accepting the “Financing Plan” provided to the Minister of Energy, etc., (f) ensuring that any description of the Crown, Crown immunity, the OFHPA, the regulations made under it, the OIC, the authority of the LGIC, the provisions of the Electricity Act and related regulations and processes, the Financing Plan, the electricity market regulatory infrastructure and other relevant legal principles and contexts are all properly and accurately described (recognizing the risk that any statement may be attributed to the Province based on its close proximity to the program, and could become consequential in any future legal process that seeks to interpret the statute), (g) scrutinizing disclosures that could later become evidence in any legal proceeding that would challenge the validity of the OFHPA and related laws, (h) confirming any “electricity market” disclosures that could impact on underlying considerations, such as the potential for and impact of off-grid migration and by-pass risks and (i) the propriety of disclosures regarding matters that could impact on the pricing or rating of the issued bonds. This preliminary list illustrates why the Province may want to insist on being provided with early drafts of any offering documentation, rather than acquiescing to a late sign-off scenario with little ability to impact the disclosure or rating processes.
5. Specific Limitations in “Reference Documentation” – The Process Agreement affords the Province the ability to provide specific comments on the base or template forms of certain key documents to be used under the financing program.

Where specific limitations or constraints are identified by the Province (even where initially addressed in the Financing Plan – since the Financing Plan can change in the future without the Province's input), the Province will probably want to ensure that these items are adequately reflected in the received documents, which will become the “black box” within which OPG will be able to run the financing program without further input or concurrence by the Province. Potential examples (based on ideas raised during our conversations over the past few weeks) include: (a) restricting non-CAD issues, (b) restricting primary distributions outside of Canada, (c) setting out specific financial limitations (e.g., embedding into the Reference Documentation caps on certain expense amounts (rating agency commitments) or mandating benchmarking for rates/spreads, maximum term of Trust commitments), (d) restricting flexibility of future detrimental terms (e.g., restricting the addition of events of default/termination, which additions would otherwise be unconstrained), (e) stipulating pre-conditions or requirements applicable to any incurrence (e.g., “fairness” opinions regarding market terms/quotes/fees; accounting sign-off; etc.), (f) matters to address OPG conflicts of interest in relation to sub-notes, management fees, treasury decisions, etc. and (g) restrictions on the use of capital reserve (sinking fund) accounts, etc. No comments of this sort have yet been made on the received documents, and unless such matters are reflected in those provided documents prior to the first closing (in fact much earlier, in practice), the Province's ability to limit the “black box” based on the concepts included for Reference Documentation under the Protection Agreement will be foregone. Specific direction from you for this purpose would be very appreciated.

6. Conformity to Comments Made to Date – In developing the Protection and Process Agreements, we have identified various terms of the Trust Indenture and Funding Obligation Agreements that will need to be conformed, including several items in order to ensure that the Province's rights of subrogation are binding and effective and to address basic legal considerations (such as whether the Trust is a “financing entity” under the OFHPA). Other than the specific notice of amendment provisions we insisted be included in the Trust Indenture, none of the items identified (see, in particular, the yellow footnotes in the most recent draft of the Protection and Process Agreement) have been reflected in the underlying documents. We will look for these changes in the next turn of the program documents.

As mentioned, to provide a modest level of reassurance that there is nothing starkly out of place in the underlying program documents we have been provided, I asked my structured finance partner, Aaron Palmer, to review the overall documentation package for completeness. Aaron's review was not informed by a thorough understanding of the OFHPA and related considerations or background on the project generally. Since Aaron is a fresh set of eyes, I thought he could usefully check whether what Torsys has produced generally “hangs together”. Aaron is producing a due diligence memo for me, based on that limited mandate and without significant background. Aaron's draft memo (copy attached) is intended to provide a useful summary of several of the basic financing program documents, provide a basic understanding of the overall mechanics for issuance and identify matters for specific consideration by the Province. The attached draft memo has not been “filtered” by me or stylized, so it is important to recognize that the memo does not necessarily reflect my views or all of the relevant concerns. To make it somewhat more useful, I have shaded parts of Aaron's draft memo where I thought issues he raised added new thoughts to our on-going discussion or where highlighting for emphasis would help

your focus. Please ensure that Aaron's draft memo does not receive circulation outside of the Province and then to those who understand the limitations of Aaron's review and background and the intended and limited purpose of Aaron's 'fresh look'.

After you have had an opportunity to reflect on the foregoing and Aaron's draft memo, please let me know what you would like us to do as it pertains to further review, commenting and follow-ups on the finance program documentation as it is circulated.

If you have any questions or concerns, please give me a call.

Regards, Steve

Stephen R. Ashbourne
Partner
stephen.ashbourne@blakes.com
Dir: 416-863-3086



Blake, Cassels & Graydon LLP
199 Bay Street, Suite 4000, Toronto ON M5L 1A9
Tel: 416-863-2400 Fax: 416-863-2653
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