

**Step Plan for Potential Acquisition of the Assets
Greenfield South Power Corporation ("Greenfield")**

1. Approach OPG to determine if OPG willing to enter into a joint venture ("NewCo") with Eastern Power (a parent company of Greenfield) to develop a new facility (on an OPG site) with a capacity greater than 300 MW (perhaps 500 MW to 600 MW) ("New Facility"). Newco would be owned and controlled 50/50 by OPG and Eastern Power.
2. OPA would provide OPG with funds to capitalize NewCo. A partnership/joint venture agreement will be entered into with OPG and Eastern Power to govern the relationship (the unpaid Equity Sunk Costs of Eastern to be addressed in this agreement). The OPA, OPG and Eastern Power would enter into an implementation agreement ("IA") to negotiate the commercial and financial details of the New Facility for a period of [60-90] days.
3. NewCo would make a bid to acquire the assets of Greenfield in CCAA proceeding – NewCo would agree to assume all trade debt and existing equipment supply contracts (for Relocated Equipment to be used for the new facility (including the GE contract for the gas turbine)) of Greenfield under the bid and pay fair market value for Greenfield's assets. The debt of EIG would not be assumed. If agreement is reached under the IA for a New Facility, the costs incurred by NewCo in taking out the claims of Greenfield and the unpaid Equity Sunk Costs of Eastern would be factored into the NRR or capacity payment under the CES Contract for the New Facility. If there is no agreement on the New Facility, the OPA would indemnify OPG for its capitalization of NewCo and would agree to pay the balance of the unpaid Equity Sunk Costs to Eastern Power.
4. Financing would need to be made available to Greenfield in its CCAA proceedings. The lender entity (i.e., OPG) would need to be identified.
5. Osler and McMillan to identify a licensed firm to act as the purported monitor and its counsel of Greenfield in its CCAA proceeding (the "Monitor"). Greenfield files for protection under the CCAA with bid in hand from NewCo – able to tell court that it is a going concern outcome and preservation of jobs, supply chain etc – easier to manage CCAA process.
6. Sales process for the assets of Greenfield would need to occur under CCAA (30 to 60 day process).
7. If NewCo wins, the assets of Greenfield would be transferred to NewCo by court order free of the claims of EIG.

[NTD: We have not yet resolved what should happen with the OPA indemnity in favour of Greenfield South relating to Secured Lender claims proven in court and whether the Certificate of Air would be released by Greenfield as part of this process. This requires further discussion with Greenfield's counsel.]

Calwell, Carolyn (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: December 22, 2011 5:49 PM
To: Rehob, James (ENERGY)
Subject: FW: OPA Side letter
Attachments: OPA Letter Agreement - fully signed 14Dec2011.pdf

As discussed.

Carolyn

From: Michael Lyle [<mailto:Michael.Lyle@powerauthority.on.ca>]
Sent: December 22, 2011 11:12 AM
To: Perun, Halyna N. (ENERGY)
Cc: Calwell, Carolyn (ENERGY)
Subject: OPA Side letter

Michael Lyle
General Counsel and Vice President
Legal, Aboriginal & Regulatory Affairs
Ontario Power Authority
120 Adelaide Street West, Suite 1600
Toronto, Ontario, M5H 1T1
Direct: 416-969-6035
Fax: 416.969.6383
Email: michael.lyle@powerauthority.on.ca

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120 Adelaide Street West
Suite 1600
Toronto, Ontario M5H 1T1
T 416-967-7474
F 416-967-1947
www.powerauthority.on.ca

CONFIDENTIAL

December 14, 2011

Greenfield South Power Corporation
2275 Lake Shore Blvd. West, Suite 401
Toronto ON M8V 3Y3

Attention: Gregory M. Vogt, President

Dear Mr. Vogt:

Amended and Restated Clean Energy Supply (ARCES) Contract between Greenfield South Power Corporation ("Greenfield South") and Ontario Power Authority ("OPA") dated as of April 12, 2005 and amended and restated as of March 16, 2009 (the "Contract")

The OPA and Greenfield South are continuing to negotiate the terms of a "Facility Relocation and Settlement Agreement" between the OPA and Greenfield South (the draft dated November 25, 2011 and labelled "Osler Comments" being referred to herein as the "Draft FRSA"). Capitalized terms used but not defined in this letter agreement have the meanings given to them in the Draft FRSA.

In order for Greenfield South and the OPA to facilitate the ongoing negotiation of the Draft FRSA, Greenfield South and the OPA have agreed to the following:


1. Greenfield South and the OPA confirm that during the period between now and end of day on Friday, January 20, 2012, the obligations of the parties under the Contract continue to remain suspended and Greenfield South has agreed to continue to suspend all further work and activities in connection with the Facility (as defined in the Contract), other than anything that may be reasonably necessary in the circumstances to bring such work or activities to a conclusion and to maintain safety and security of the site.
2. In consideration of the extension contemplated under paragraph 1, the OPA agrees to pay to Greenfield South on the date hereof concurrent with the execution of this letter agreement, by certified cheque or wire transfer, the amount of \$35,000,000 on account of Equity Sunk Costs incurred by Eastern Power Limited ("Eastern"). Each of Greenfield South and Eastern represents and warrants to the OPA that at least \$35,000,000 of the Equity Sunk Costs has been incurred by Eastern. Greenfield South hereby directs the OPA to pay such amount on account of Equity Sunk Costs directly to Eastern. Such amount paid by the OPA shall be deducted from the total amount otherwise owing or payable by the OPA in respect of Equity Sunk Costs incurred by Greenfield South and its affiliates.

3. In order to permit negotiations in respect of the Relocated Facility contemplated by the Draft FRSA to proceed during the ongoing negotiation of the Draft FRSA, Eastern or one of its Affiliates shall be entitled to exercise the rights and benefits of Greenfield South under Section 2.5 of the Draft FRSA relating to the Relocated Facility in the place of Greenfield South, provided that such negotiations may involve the negotiation of a new clean energy supply contract for the Relocated Facility with Eastern or one of its Affiliates in lieu of an Amended ARCES which would be in substantially the same form as the Contract, with such amendments, modifications and other terms thereto provided for in the last sentence of Section 2.5 of the Draft FRSA.
4. At the request and direction of Greenfield South, the OPA will make the payments for and on behalf of Greenfield South of the amounts currently owing to the suppliers of the Relocated Equipment and other suppliers to the Facility, set out on Schedule A attached hereto and in the amounts set out on Schedule A attached hereto, promptly following verification of such amounts by the Independent Engineer.
5. Each of Greenfield South and Eastern represents and warrants to the OPA that the chart attached as Schedule B is a true and accurate representation of the direct and indirect equity interest holders of Greenfield South, and that no person holds any direct or indirect equity interests in either of Greenfield South or Eastern except as set out in Schedule B.

This letter constitutes Confidential Information (as such term is defined in the Contract).

Sincerely,

ONTARIO POWER AUTHORITY

By: 
Name: Colin Andersen
Title: Chief Executive Officer

Accepted and agreed on December 14 2011

GREENFIELD SOUTH POWER CORPORATION

Per: 

Name: Gregory M. Vogt
Title: President

EASTERN POWER LIMITED

Per: 

Name: Gregory M. Vogt
Title: President

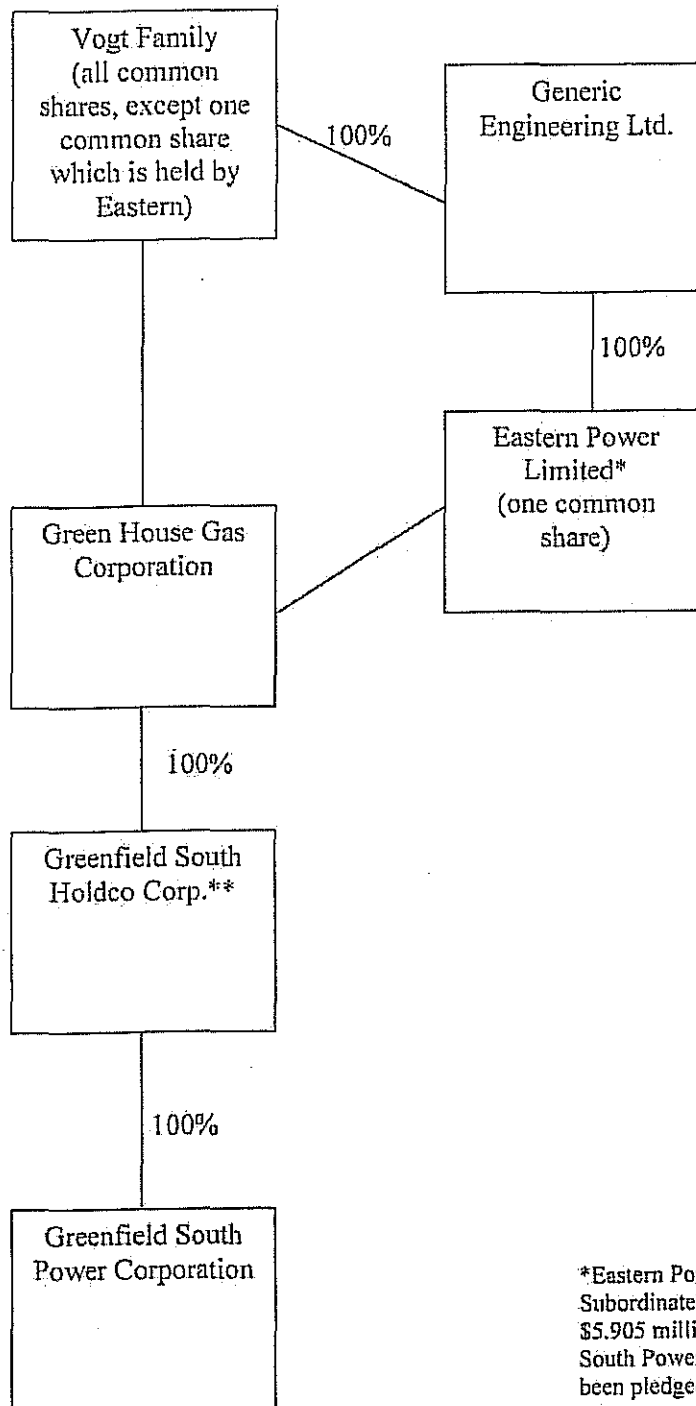
SCHEDULE A
PAYMENTS TO BE MADE FOR AND ON BEHALF OF GREENFIELD SOUTH

Name	Amount (CAD, except where otherwise stated)
ABB INC. US\$	418,603.80
ABB INC. (CANADA) GCB	44,300.00
ACKLANDS GRAINGER	1,073.58
ALBRECHT REINFORCING INC.	489,438.86
ARGO LUMBER INC.	54,118.20
ALL CANADA CRANE RENTAL CORP.	218,000.89
ANIXTER CANADA INC.	4,314.06
AMPOT PORTABLE TOILETS	9,268.33
ALPS WELDING LIMITED	55,404.90
BLAKE CASSELS GRAYDON LLP	104,079.19
BRENNAN'S CRANE SERVICES LIMITED	14,394.62
BELL CANADA	808.83
BATTLEFIELD EQUIPMENT RENTALS	5,119.58
BOB JEFFREYS	2,712.00
BRADO PRECISION MACHINE & TOOL CO LTD.	56,269.20
BRAMPTON PLATE & STRUCTURAL STEEL ROLLING INC.	107.35
BON W. MUELLER	587.60
CAMBRIDGE CONCRETE PUMPING	8,869.68
CONTROL COMPONENTS INC. US\$	41,000.00
CEDAR INFRASTRUCTURE PRODUCTS INC.	7,881.52
CANADA MAINTENANCE & SAFETY	1,639.22
COMCO PIPE & SUPPLY COMPANY	861.93
COOKSVILLE STEEL LIMITED	1,028,347.55
D HELDMAN SURVEYING LTD.	34,013.00
DUFFERIN CONCRETE	127,859.02
DVC CONTRACTING	138,140.81
EARL O NEIL ELECTRIC SUPPLY LIMITED	6,307.93
EFCO CANADA CO.	9,105.29
EMCO CORPORATION	24,728.62
ELECTRICAL SAFETY AUTHORITY	4,260.10
FORM & BUILD SUPPLY	1,259.00
FRANCESCHINI BROS. AGGREGATES	245,185.91
FACILITY SERVICES CORPORATION	762.75
FEDERAL WIRELESS COMMUNICATIONS INC.	9,229.84
GALVCAST MFG.INC.	124.30
GENERAL ELECTRIC COMPANY US\$	6,215,868.31
GE WATER & PROCESS TECHNOLOGIES US\$	72,350.80
GUILLEVIN INTERNATIONAL	41,062.15
GRANITE CONCRETE PUMPING	28,949.24

GRAZIER TRANSPORT LIMITED	508.50
GLOBAL WASTE SERVICES INC.	2,442.38
HD SUPPLY CANADA INC.	1,409.00
H.E.L.P. SAFETY SERVICES	69,259.75
HOWE GASTMEIER CHAPNIK LTD.	1,038.19
HOUSE OF ELECTRICAL	3,630.06
HOGAN LOVELLS US\$	14,676.00
HOWELL PIPE & SUPPLY	20,767.49
HY-TEC SECURITY INC.	339.00
JOHN BROOKS COMPANY LIMITED	2,288.03
KOBELCO COMPRESSORS AMERICA INC US\$	319,131.00
LAFARGE CANADA INC	901.56
LIVINGSTON	108.34
LLOYD & PURCELL LTD	3,950.59
LVM INC.	43,515.56
McMILLAN LLP	10,110.75
MUNRO CONCRETE PRODUCTS LTD	30,599.76
MEVA FORMWORK SYSTEMS INC.	203,512.74
MISSISSAUGA HARDWARE CENTRE INC.	54,909.86
MILLER MOBILE OFFICES	4,893.50
MMVI INC.ELECTRIC SERVICE	2,260.00
MATHESON VALVES	104,923.07
NATIONAL CONCRETE ACCESSORIES	19,537.26
NOOTER/ERIKSEN US\$	1,337,724.13
NORAMCO	20,701.13
NORTHWEST PIPE COMPANY	207,408.64
PRIMARY POWER DESIGNS INC.	312,784.00
PROCESS PIPE SUPPORT SYSTEMS INC.	3,671.78
PRAXAIR DISTRIBUTION	31,875.43
REPRODUX LIMITED	519.62
RICHARDS WILCOX CUSTOM SYSTEMS CRANES	9,492.00
RODAN ENERGY SOLUTIONS INC.	14,382.18
SESCO DIVISION OF SONEPAR CANADA	1,983.85
SKYWAY CANADA LTD.	1,107.40
SAMUEL SON & CO LIMITED	8,586.25
SUPER SAVE DISPOSAL (ONTARIO) INC.	96.05
STEPHENSON'S RENTAL SERVICES	131,585.73
STANTEC CONSULTING LTD.	8,179.12
SULZER PUMPS US\$	32,085.22
TEXCAN	33,374.68
THOMAS F. DONOVAN US\$	4,516.36
FASTENING HOUSE INC.	20,399.47
TRADE MARK INDUSTRIAL INC.	132,085.99
TRANSITAINER TERMINALS	6,610.50

ULINE CANADA CORPORATION	615.64
VINSON & ELKINS LLP US\$	21,282.93
VAN NESS FELDMAN US\$	1,076.24
VIRELEC LTD	52,629.19
WESTLAKE INDUSTRIES INC.	303,468.92
WILLIAMS SCOTSMAN	994.40
	13,140,357.20

SCHEDULE B
EQUITY INTEREST HOLDERS IN GREENFIELD SOUTH AND EASTERN



*Eastern Power Limited holds a Subordinated Promissory Note for \$5.905 million issued by Greenfield South Power Corporation which has been pledged to EIG.

** EIG holds warrants in Greenfield South Holdco Corp. representing up to 24.9% of the equity interests in Greenfield South Holdco Corp.

Calwell, Carolyn (ENERGY)

From: Michael Lyle [Michael.Lyle@powerauthority.on.ca]
Sent: December 22, 2011 5:57 PM
To: Perun, Halyna N. (ENERGY)
Cc: Calwell, Carolyn (ENERGY)
Subject: Greenfield

We have been advised by counsel for the major secured lender (EIG) that the Crown has been served as of yesterday with notice of proceedings against the Crown in this matter. This e-mail message and any files transmitted with it are intended only for the named recipient(s) above and may contain information that is privileged, confidential and/or exempt from disclosure under applicable law. If you are not the intended recipient(s), any dissemination, distribution or copying of this e-mail message or any files transmitted with it is strictly prohibited. If you have received this message in error, or are not the named recipient(s), please notify the sender immediately and delete this e-mail message.

Calwell, Carolyn (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: December 22, 2011 6:04 PM
To: Slater, Craig (JUS)
Cc: Lung, Ken (JUS)
Subject: FW: Greenfield

Hi Craig - wondering if you have seen a PACA notice on the Mississauga Gas Plant?

Carolyn

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

From: Michael Lyle [<mailto:Michael.Lyle@powerauthority.on.ca>]
Sent: December 22, 2011 5:57 PM
To: Perun, Halyna N. (ENERGY)
Cc: Calwell, Carolyn (ENERGY)
Subject: Greenfield

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Calwell, Carolyn (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: December 22, 2011 6:05 PM
To: Kendik, James (JUS)
Subject: FW: Greenfield

Hi James - in Craig's absence.

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

From: Calwell, Carolyn (ENERGY)
Sent: December 22, 2011 6:04 PM
To: Slater, Craig (JUS)
Cc: Lung, Ken (JUS)
Subject: FW: Greenfield

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Carolyn

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From: Michael Lyle [<mailto:Michael.Lyle@powerauthority.on.ca>]
Sent: December 22, 2011 5:57 PM
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Calwell, Carolyn (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: December 22, 2011 6:06 PM
To: 'Michael Lyle'
Subject: RE: Greenfield

Thanks - I will try to try down.

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

From: Michael Lyle [<mailto:Michael.Lyle@powerauthority.on.ca>]
Sent: December 22, 2011 5:57 PM
To: Perun, Halyna N. (ENERGY)
Cc: Calwell, Carolyn (ENERGY)
Subject: Greenfield

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Calwell, Carolyn (ENERGY)

From: Kendik, James (JUS)
Sent: December 22, 2011 6:09 PM
To: Calwell, Carolyn (ENERGY)
Subject: Re: Greenfield

I will check.

James Kendik, Crown Counsel

Deputy Director

Crown Law Office-Civil

McMurtry-Scott Building

720 Bay Street, 8th Floor Toronto, ON

M7A 2S9

Tel: (416) 326-7246 Fax:

(416) 326-4181

Blackberry: (416) 524-9407

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

From: Calwell, Carolyn (ENERGY)

To: Kendik, James (JUS)

Sent: Thu Dec 22 18:04:47 2011

Subject: FW: Greenfield

Hi James - in Craig's absence.

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

From: Calwell, Carolyn (ENERGY)

Sent: December 22, 2011 6:04 PM

To: Slater, Craig (JUS)

Cc: Lung, Ken (JUS)

Subject: FW: Greenfield

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Carolyn

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Sent: December 22, 2011 5:57 PM

To: Perun, Halyna N. (ENERGY)

Cc: Calwell, Carolyn (ENERGY)

Subject: Greenfield

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Calwell, Carolyn (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: December 22, 2011 6:26 PM
To: Lindsay, David (ENERGY); Jennings, Rick (ENERGY)
Cc: Silva, Joseph (ENERGY)
Subject: Greenfield

Confidential/Solicitor-Client Privileged

I just heard from the OPA that one of Greenfield's secured lenders filed a Proceedings Against the Crown notice yesterday. I am trying to track it down. If so, this is the first step in litigation, although a Statement of Claim must wait at least 60 days.

Carolyn

Calwell, Carolyn (ENERGY)

From: Collins, Jason R. (ENERGY)
Sent: December 22, 2011 10:30 PM
To: Calwell, Carolyn (ENERGY)
Subject: Re: Greenfield

Hi Carolyn - should this be flagged to Craig as well, if yes, should I send it over or would you?

Thanks much, Jason

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

From: Calwell, Carolyn (ENERGY)
To: Collins, Jason R. (ENERGY)
Sent: Thu Dec 22 18:26:43 2011
Subject: Fw: Greenfield

In Joseph's absence.

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

From: Calwell, Carolyn (ENERGY)
To: Lindsay, David (ENERGY); Jennings, Rick (ENERGY)
Cc: Silva, Joseph (ENERGY)
Sent: Thu Dec 22 18:25:53 2011
Subject: Greenfield

Confidential/Solicitor-Client Privileged

I just heard from the OPA that one of Greenfield's secured lenders filed a Proceedings Against the Crown notice yesterday. I am trying to track it down. If so, this is the first step in litigation, although a Statement of Claim must wait at least 60 days.

Carolyn

Calwell, Carolyn (ENERGY)

From: Lindsay, David (ENERGY)
Sent: December 23, 2011 5:17 AM
To: Calwell, Carolyn (ENERGY)
Cc: Jennings, Rick (ENERGY)
Subject: Re: Mississauga Gas Plant

Thanks Carolyn,

I did brief my colleagues in Finance and Cabinet office and everyone understood the basic concept of what the OPA was proposing (Based on my layman's explanation).

All expressed a desire for appropriate legal due diligence by government lawyers.

I will reach out to OPG to make sure we hear their version and that they are a willing partner in this arrangement.

The Secretary of Cabinet did ask that I also touch base with the Attorney General to make sure he was in the loop.

Let's keep on our toes on this one.

David

From: Calwell, Carolyn (ENERGY)
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY)
Sent: Thu Dec 22 17:47:37 2011
Subject: Mississauga Gas Plant

Confidential/Solicitor-Client Privileged

Deputy,

Thank you for your message about the OPA's current proposal to resolve the Greenfield site. I followed up with Mike Lyle and my Finance and CLOC colleagues and we are starting to think through the concept. Mike Lyle sent the attached description of the proposal. He described it as a work in progress.

I understand that the OPA will meet with OPG in the first week of January. We will think about the proposal and alternatives (although apart from paying the break fee, I'm not sure there are many). We will also start to get our heads around CCAA proceedings.

Carolyn

Carolyn Calwell
Deputy Director
Ministry of Energy & Ministry of Infrastructure
Legal Services Branch
Ministry of the Attorney General
416.212.5409

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Calwell, Carolyn (ENERGY)

From: Lindsay, David (ENERGY)
Sent: December 23, 2011 5:33 AM
To: Calwell, Carolyn (ENERGY); Jennings, Rick (ENERGY)
Cc: Silva, Joseph (ENERGY)
Subject: Re: Greenfield

Thanks Carolyn.

For the purposes of this file, our colleagues in Finance and the Ontario Finance Authority and appropriate folks in the AG and Cabinet office will want to be kept in the loop.

I will probably have to re-institute the system of periodic conference calls to keep everyone informed.

It doesn't sound like this development creates a sense of particular urgency over the Christmas Holiday but in the interests of 'no surprises' I guess we need to make sure finance and cabinet office are in the loop. Once you have a bit more understanding of what this is and any implications for our going forward strategy let me know.

I'm not in the office, but on my Blackberry.

Cheers
David

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

From: Calwell, Carolyn (ENERGY)
To: Lindsay, David (ENERGY); Jennings, Rick (ENERGY)
Cc: Silva, Joseph (ENERGY)
Sent: Thu Dec 22 18:25:53 2011
Subject: Greenfield

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Carolyn

Calwell, Carolyn (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: December 23, 2011 7:42 AM
To: Lindsay, David (ENERGY); Jennings, Rick (ENERGY)
Cc: Silva, Joseph (ENERGY)
Subject: Re: Greenfield

Understood. Will do. CLOC is tracking down the PACA notice. I should know at least a little more later this morning.

Carolyn

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

From: Lindsay, David (ENERGY)
To: Calwell, Carolyn (ENERGY); Jennings, Rick (ENERGY)
Cc: Silva, Joseph (ENERGY)
Sent: Fri Dec 23 05:33:06 2011
Subject: Re: Greenfield

Thanks Carolyn.

For the purposes of this file, our colleagues in Finance and the Ontario Finance Authority and appropriate folks in the AG and Cabinet office will want to be kept in the loop.

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Cc: Silva, Joseph (ENERGY)
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Carolyn

Calwell, Carolyn (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: December 23, 2011 9:21 AM
To: Rehob, James (ENERGY)
Subject: FW: Greenfield

Fyi - CLOC is tracking down the PACA notice. When we get it, I will ask you to do a note that can go up to the MO. I would also ask you to call Shona C. and let her know about this. I've been in touch with James Kendik who is acting for Craig Slater (and copied Ken), but I'm not sure how things are filtering around.

Carolyn

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

From: Lindsay, David (ENERGY)
Sent: December 23, 2011 5:33 AM
To: Calwell, Carolyn (ENERGY); Jennings, Rick (ENERGY)
Cc: Silva, Joseph (ENERGY)
Subject: Re: Greenfield

Thanks Carolyn.

For the purposes of this file, our colleagues in Finance and the Ontario Finance Authority and appropriate folks in the AG and Cabinet office will want to be kept in the loop.

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Carolyn

Calwell, Carolyn (ENERGY)

From: Kendik, James (JUS)
Sent: December 23, 2011 9:46 AM
To: Calwell, Carolyn (ENERGY)
Cc: Das, Karthik (JUS)
Subject: RE: Greenfield

Carolyn,

We received notice yesterday. I will ask my file intake clerk Karthik to send this to you asap. We are in the process of assigning counsel.

Thanks very much,
James

James Kendik, Counsel
Deputy Director
Crown Law Office-Civil
McMurtry-Scott Building
720 Bay Street, 8th Floor Toronto, ON M7A 2S9
Tel: (416) 326-7246 Fax: (416) 326-4181
Blackberry: (416) 524-9407
P Please consider the environment before printing this e-mail

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

From: Calwell, Carolyn (ENERGY)
Sent: December 22, 2011 6:05 PM
To: Kendik, James (JUS)
Subject: FW: Greenfield

Hi James - in Craig's absence.

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

From: Calwell, Carolyn (ENERGY)
Sent: December 22, 2011 6:04 PM
To: Slater, Craig (JUS)
Cc: Lung, Ken (JUS)
Subject: FW: Greenfield

Hi Craig - wondering if you have seen a PACA notice on the Mississauga Gas Plant?

Carolyn

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

From: Michael Lyle [<mailto:Michael.Lyle@powerauthority.on.ca>]
Sent: December 22, 2011 5:57 PM
To: Perun, Halyna N. (ENERGY)
Cc: Calwell, Carolyn (ENERGY)
Subject: Greenfield

We have been advised by counsel for the major secured lender (EIG) that the Crown has been served as of yesterday with notice of proceedings against the Crown in this matter.

This e-mail message and any files transmitted with it are intended only for the named recipient(s) above and may contain information that is privileged, confidential and/or exempt from disclosure under applicable law. If you are not the intended recipient(s), any dissemination, distribution or copying of this e-mail message or any files transmitted with it is strictly prohibited. If you have received this message in error, or are not the named recipient(s), please notify the sender immediately and delete this e-mail message.

Calwell, Carolyn (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: December 23, 2011 9:48 AM
To: Marsello, Leonard (JUS); Compton, Shona (JUS)
Cc: Rehob, James (ENERGY)
Subject: RE: Mississauga Gas Plant
Attachments: 22431262_1 (2).doc

Further to my message yesterday, we have now the attached one page summary of the OPA's proposal. It was described to me as a work in progress and you will see it is a concept, rather than a detailed procedure. Again, I don't expect much on this before the first week in January, but I wanted to keep you in the loop.

Carolyn

From: Calwell, Carolyn (ENERGY)
Sent: December 22, 2011 12:32 PM
To: Marsello, Leonard (JUS); Compton, Shona (JUS)
Subject: Mississauga Gas Plant

Hi – I have an update. As I think you are aware, one of Greenfield's secured creditors (and the large break fees it requires) is posing a challenge to concluding the Facility Relocation and Settlement Agreement (as it was called when I last saw it).

The Ontario Power Authority is currently developing a proposal around forcing Greenfield into CCAA protection. Ontario Power Generation would then have some sort of a joint venture with a new Greenfield entity to purchase the assets of the original Greenfield company. These assets would then be used to develop a new project at a new site.

Deputy Lindsay has asked us to think about this proposal (we've seen nothing in writing) and loop you in. At this point, I think we're just trying to get our heads around the structures and the advantages and disadvantages of proceeding in this way – to the extent they can be determined with the little information that we have.

I will let you know more as this unfolds. I understand that the OPA and OPG will meet in early January to explore this option thoroughly. I am certainly happy to try to answer any questions you might have in the meantime. I welcome any preliminary views that you might have.

Carolyn

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**Step Plan for Potential Acquisition of the Assets
Greenfield South Power Corporation ("Greenfield")**

1. Approach OPG to determine if OPG willing to enter into a joint venture ("NewCo") with Eastern Power (a parent company of Greenfield) to develop a new facility (on an OPG site) with a capacity greater than 300 MW (perhaps 500 MW to 600 MW) ("New Facility"). NewCo would be owned and controlled 50/50 by OPG and Eastern Power.
2. OPA would provide OPG with funds to capitalize NewCo. A partnership/joint venture agreement will be entered into with OPG and Eastern Power to govern the relationship (the unpaid Equity Sunk Costs of Eastern to be addressed in this agreement). The OPA, OPG and Eastern Power would enter into an implementation agreement ("IA") to negotiate the commercial and financial details of the New Facility for a period of [60-90] days.
3. NewCo would make a bid to acquire the assets of Greenfield in CCAA proceeding – NewCo would agree to assume all trade debt and existing equipment supply contracts (for Relocated Equipment to be used for the new facility (including the GE contract for the gas turbine)) of Greenfield under the bid and pay fair market value for Greenfield's assets. The debt of EIG would not be assumed. If agreement is reached under the IA for a New Facility, the costs incurred by NewCo in taking out the claims of Greenfield and the unpaid Equity Sunk Costs of Eastern would be factored into the NRR or capacity payment under the CES Contract for the New Facility. If there is no agreement on the New Facility, the OPA would indemnify OPG for its capitalization of NewCo and would agree to pay the balance of the unpaid Equity Sunk Costs to Eastern Power.
4. Financing would need to be made available to Greenfield in its CCAA proceedings. The lender entity (i.e., OPG) would need to be identified.
5. Osler and McMillan to identify a licensed firm to act as the purported monitor and its counsel of Greenfield in its CCAA proceeding (the "Monitor"). Greenfield files for protection under the CCAA with bid in hand from NewCo – able to tell court that it is a going concern outcome and preservation of jobs, supply chain etc – easier to manage CCAA process.
6. Sales process for the assets of Greenfield would need to occur under CCAA (30 to 60 day process).
7. If NewCo wins, the assets of Greenfield would be transferred to NewCo by court order free of the claims of EIG.

[NTD: We have not yet resolved what should happen with the OPA indemnity in favour of Greenfield South relating to Secured Lender claims proven in court and whether the Certificate of Air would be released by Greenfield as part of this process. This requires further discussion with Greenfield's counsel.]

Calwell, Carolyn (ENERGY)

From: Kendik, James (JUS)
Sent: December 23, 2011 9:57 AM
To: Calwell, Carolyn (ENERGY)
Cc: Das, Karthik (JUS); Slater, Craig (JUS); Salim, Fateh (JUS)
Subject: Re: Greenfield

Thanks Carolyn,

We will be assigning to Len, Shona and Will Maclarkey.

I'll be acting Director next week as well, and then its Fateh Salim for the first week of January.

James Kendik, Crown Counsel
Deputy Director
Crown Law Office-Civil
McMurtry-Scott Building
720 Bay Street, 8th Floor Toronto, ON
M7A 2S9
Tel: (416) 326-7246 Fax: (416) 326-4181
Blackberry: (416) 524-9407

----- Original Message -----
From: Calwell, Carolyn (ENERGY)
To: Kendik, James (JUS)
Cc: Das, Karthik (JUS)
Sent: Fri Dec 23 09:51:18 2011
Subject: RE: Greenfield

Thanks, James. Shona Compton and Len Marsello have been working on these issues a bit. Not sure if they are the right people in light of most recent developments, which also include a proposal by the Ontario Power Authority to get Greenfield into CCAA proceedings and have a joint venture involving Ontario Power Generation emerge with the assets and some of the debt. The thinking on that proposal is nascent, and will be pursued by the OPA and OPG in the first week of January. We will be asked for our thoughts as the proposal develops.

Carolyn

-----Original Message-----
From: Kendik, James (JUS)
Sent: December 23, 2011 9:46 AM
To: Calwell, Carolyn (ENERGY)
Cc: Das, Karthik (JUS)
Subject: RE: Greenfield

Carolyn,

We received notice yesterday. I will ask my file intake clerk Karthik to send this to you asap. We are in the process of assigning counsel.

Thanks very much,
James

James Kendik, Counsel
Deputy Director
Crown Law Office-Civil
McMurtry-Scott Building
720 Bay Street, 8th Floor Toronto, ON M7A 2S9
Tel: (416) 326-7246 Fax: (416) 326-4181
Blackberry: (416) 524-9407
P Please consider the environment before printing this e-mail

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

From: Calwell, Carolyn (ENERGY)
Sent: December 22, 2011 6:05 PM
To: Kendik, James (JUS)
Subject: FW: Greenfield

Hi James - in Craig's absence.

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

From: Calwell, Carolyn (ENERGY)
Sent: December 22, 2011 6:04 PM
To: Slater, Craig (JUS)
Cc: Lung, Ken (JUS)
Subject: FW: Greenfield

Hi Craig - wondering if you have seen a PACA notice on the Mississauga Gas Plant?

Carolyn

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

From: Michael Lyle [<mailto:Michael.Lyle@powerauthority.on.ca>]
Sent: December 22, 2011 5:57 PM
To: Perun, Halyna N. (ENERGY)
Cc: Calwell, Carolyn (ENERGY)
Subject: Greenfield

We have been advised by counsel for the major secured lender (EIG) that the Crown has been served as of yesterday with notice of proceedings against the Crown in this matter.

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Calwell, Carolyn (ENERGY)

From: Rehob, James (ENERGY)
Sent: December 23, 2011 9:57 AM
To: Calwell, Carolyn (ENERGY)
Subject: FW: Mississauga Gas Plant

FYI: Just now from Shona – thanks!
James

From: Compton, Shona (JUS)
Sent: December 23, 2011 9:50 AM
To: Rehob, James (ENERGY)
Cc: Kendik, James (JUS); MacLarkey, William (JUS)
Subject: Mississauga Gas Plant

James, thanks for the status update this morning. I have spoken to James Kendik who is acting CLOC Director this week and next week. He has suggested that if you require some help on the briefing note in respect of the PACA portion to call Will MacLarkey at CLOC. As I mentioned earlier, both Len and I are away next week and in our absence, if you require CLOC assistance, please contact James Kendik and he will assist.

Shona L. Compton, LL.B.
Counsel
Crown Law Office - Civil
720 Bay Street, 8th Floor
Toronto ON M7A 2S9

Tel: 416 327-9899
Fax: 416 326-4181
Email: Shona.Compton@ontario.ca

IMPORTANT NOTICE

This communication may contain confidential information and may be subject to solicitor-client privilege. If you have received this message in error, please notify me immediately and delete this message without copying, printing, disseminating or forwarding it to anyone.

Calwell, Carolyn (ENERGY)

From: Das, Karthik (JUS)
Sent: December 23, 2011 1:27 PM
To: Calwell, Carolyn (ENERGY)
Cc: Colrairie, Kim (JUS)
Subject: RE: Greenfield
Attachments: 0040-000043232 – EIG Management Company, LLC.pdf

Importance: High

Hello Ms. Calwell,

I am attaching a copy of the Greenfield notice of claim for your immediate reference.

Thanks very much.

Karthik Das
A/File Assignment & Case Management Coordinator Ministry of The Attorney General (Ontario)
Crown Law Office Civil 720 Bay St, 8th Floor Toronto, ON M7A 2S9

Tel - (416) 326 - 2572

Fax - (416) 326 - 4181

This communication may be solicitor/client privileged and contain confidential information intended only for the person(s) to whom it is addressed. Any dissemination or use of this information by a person other than the intended recipient(s) is prohibited. If you have received this message in error, please immediately notify Karthik Das, at Karthik.Das@ontario.ca and delete the message without forwarding it to anyone. Thank you.

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

From: Calwell, Carolyn (ENERGY)
Sent: Friday, December 23, 2011 9:51 AM
To: Kendik, James (JUS)
Cc: Das, Karthik (JUS)
Subject: RE: Greenfield

Thanks, James. Shona Compton and Len Marsello have been working on these issues a bit. Not sure if they are the right people in light of most recent developments, which also include a proposal by the Ontario Power Authority to get Greenfield into CCAA proceedings and have a joint venture involving Ontario Power Generation emerge with the assets and some of the debt. The thinking on that proposal is nascent, and will be pursued by the OPA and OPG in the first week of January. We will be asked for our thoughts as the proposal develops.

Carolyn

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From: Kendik, James (JUS)
Sent: December 23, 2011 9:46 AM
To: Calwell, Carolyn (ENERGY)
Cc: Das, Karthik (JUS)
Subject: RE: Greenfield

Carolyn,

We received notice yesterday. I will ask my file intake clerk Karthik to send this to you asap. We are in the process of assigning counsel.

Thanks very much,
James

James Kendik, Counsel
Deputy Director
Crown Law Office-Civil
McMurtry-Scott Building
720 Bay Street, 8th Floor Toronto, ON M7A 2S9
Tel: (416) 326-7246 Fax: (416) 326-4181
Blackberry: (416) 524-9407
P Please consider the environment before printing this e-mail

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Sent: December 22, 2011 5:57 PM
To: Perun, Halyna N. (ENERGY)
Cc: Calwell, Carolyn (ENERGY)
Subject: Greenfield

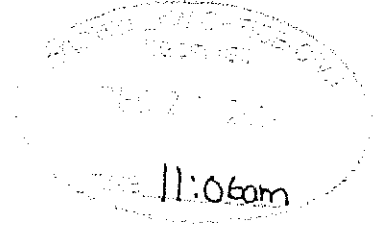
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STIKEMAN ELLIOTT

Stikeman Elliott LLP Barristers & Solicitors

5300 Commerce Court West, 199 Bay Street, Toronto, Canada M5L 1B9
Tel: (416) 869-5500 Fax: (416) 947-0866 www.stikeman.com



Peter F.C. Howard
Direct: (416) 869-5613
E-mail: phoward@stikeman.com

BY COURIER

December 20, 2011
File No.: 131814.1001

Crown Law Office - Civil
Ministry of the Attorney General
720 Bay Street, 8th Floor
Toronto, ON
M7A 2S9

Dear Sirs/Mesdames:

Re: Notice Pursuant to section 7(1) of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P. 27

I am enclosing a Notice of Claim on behalf of EIG Management Company, LLC which is served in accordance with the *Proceedings Against the Crown Act*.

Yours truly,

Peter F.C. Howard

/jh
encl.

TORONTO

MONTREAL

OTTAWA

CALGARY

VANCOUVER

NEW YORK

LONDON

SYDNEY

NOTICE OF CLAIM

TO: The Crown Law Office (Civil Law), Ministry of the Attorney General,
Toronto, Ontario

RE: Notice pursuant to section 7(1) of the *Proceedings Against the Crown Act*, R.S.O.
1990, c. P.27.

TAKE NOTICE that EIG Management Company, LLC for itself and as agent for the note holders (the "Note Holders") under the Note Purchase Agreement identified below (the "Claimant") intends to commence a claim against Her Majesty the Queen in Right of Ontario (the "Crown"), and possibly others, for damages and losses which Claimant has suffered as a result of the actions of agents and servants of the Crown for causes of action including in:

- (i) inducing Greenfield South Holdco Corp. and related entities (collectively "Greenfield") to breach the terms of a note purchase agreement dated May 26, 2011 (the "Note Purchase Agreement") with Claimant and related contracts;
- (ii) inducing the Ontario Power Authority (the "OPA") to repudiate the Amended and Restated Clean Energy Supply (ARCES) Contract dated April 12, 2005 and amended and restated as of March 16, 2009 (the "ARCES Contract") with Greenfield, which, in turn, caused Greenfield to breach its agreements with Claimant;
- (iii) interfering with Claimant's economic rights and/or relations with Greenfield as set out in the Note Purchase Agreement and related documents; and
- (iv) interfering in Claimant's economic relations with Greenfield by causing the OPA to repudiate the ARCES Contract, which in turn caused harm to Claimant.

I. MATERIAL BACKGROUND FACTS

1. On or about April 12, 2004, the OPA and Greenfield executed a Clean Energy Supply Contract for Greenfield to develop and operate the Greenfield South Generation Station which agreement was subsequently amended by the ARCES Contract. It was agreed that the power facility to be constructed would be built in Mississauga on Loreland Avenue.

2. Under the ARCES Contract, Greenfield had the right to obtain secured lending from third parties. The secured party was given certain rights under the ARCES Contract and would as well be subject to certain obligations thereunder.
3. On May 26, 2011, Greenfield entered into the Note Purchase Agreement with Claimant, acting as administrative agent for the Note Holders. Under the terms of that agreement, the Note Holders issued irrevocable financing commitments to Greenfield to finance the ownership, development, engineering, construction, testing, operation and maintenance of the Project.
4. Also on May 26, 2011, Greenfield, Claimant and the OPA entered into a secured lender consent and acknowledgement agreement (the "Secured Lender Consent Contract") under which the OPA acknowledged that, amongst other things, Claimant constituted, and therefore is entitled to the benefits of, the Secured Lender under the ARCES Contract.
5. On September 24, 2011, Liberal Leader and Ontario Premier Dalton McGuinty announced that the Ontario Government was permanently halting construction of the Greenfield South Generation Power Station.
6. On November 14, 2011, the OPA wrote to Greenfield effectively repudiating the ARCES Contract on the instructions of the Crown.
7. Subsequently, on November 18, 2011, the OPA and Greenfield agreed to a suspension of obligations under the ARCES Contract for a period until the end of the day on November 25, 2011 and neither party has performed under the ARCES Contract since November 18, 2011.

II. CLAIMS AGAINST THE CROWN

8. Claimant states that Premier Dalton McGuinty, Minister of Energy Chris Bentley and any individual within the Ontario Government who participated in, or agreed with, the decision to cause the end of construction of the Greenfield South Generation Station, are or were agents of the Crown.
9. In committing to terminate construction of the Greenfield South Generation Station, the Crown and its agents committed at least the torts of inducing breach of contract and interference with economic relations/rights to the damage and detriment of Claimant.
10. As a result of the commission of these torts by its agents, for which the Crown is liable, Claimant and the Note Holders have suffered damages. Claimant,

on behalf of itself and the Note Holders, therefore gives notice of its claim against the Crown for damages suffered as a result of this conduct.

11. This Notice is made pursuant to the requirements contained in section 7(1) of the *Proceedings Against the Crown Act*.
12. For further information pertaining to the within Notice of Claim, please contact solicitors for Claimant as below provided.

DATED at Toronto on Wednesday, December 21, 2011

Stikeman Elliott LLP
199 Bay Street, Suite 5300
Commerce Court West
Toronto, Ontario
M5L 1B9

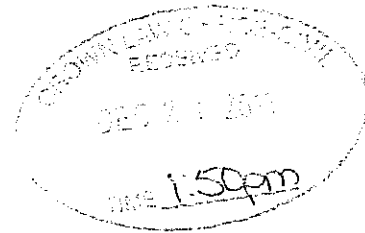
Peter F.C. Howard
Tel: (416) 869-5613
Fax: (416) 947-0866

Counsel for Claimant, EIG Management
Company, LLC and the Note Holders

SERVICE OF A COPY
ADMITTED THIS 21 DAY OF December 2011

Crown Law Office (CLC)
MINISTRY OF THE ATTORNEY GENERAL
FOR ONTARIO

Per 12/20/11 Time 1:50pm
FOR OFFICE



Calwell, Carolyn (ENERGY)

From: Kendik, James (JUS)
Sent: December 23, 2011 1:30 PM
To: Rehob, James (ENERGY); Calwell, Carolyn (ENERGY); MacLarkey, William (JUS); Marsello, Leonard (JUS); Compton, Shona (JUS)
Subject: Fw: Missisauga plant notice - 0040-000043232 – EIG Management Company, LLC
Attachments: 0040-000043232 – EIG Management Company, LLC.pdf
Importance: High

Here is the notice.

James Kendik, Crown Counsel
Deputy Director

Crown Law Office-Civil
McMurtry-Scott Building
720 Bay Street, 8th Floor Toronto, ON
M7A 2S9

Tel: (416) 326-7246 Fax: (416) 326-4181
Blackberry: (416) 524-9407

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

From: Das, Karthik (JUS)
To: Kendik, James (JUS)
Cc: Colrairie, Kim (JUS); Lambert, Erin (JUS)
Sent: Fri Dec 23 10:41:57 2011
Subject: RE: Missisauga plant notice - 0040-000043232 – EIG Management Company, LLC

Here it is sir.

Thanks

Karthik Das
A/File Assignment & Case Management Coordinator Ministry of The Attorney General (Ontario)
Crown Law Office Civil 720 Bay St, 8th Floor Toronto, ON M7A 2S9

Tel - (416) 326 - 2572
Fax - (416) 326 - 4181

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

From: Kendik, James (JUS)
Sent: Friday, December 23, 2011 10:32 AM
To: Das, Karthik (JUS)
Subject: Re: Missisauga plant notice

Yes.

James Kendik, Crown Counsel

Deputy Director

Crown Law Office-Civil

McMurtry-Scott Building

720 Bay Street, 8th Floor Toronto, ON

M7A 2S9

Tel: (416) 326-7246 Fax:

(416) 326-4181

Blackberry: (416) 524-9407

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

From: Das, Karthik (JUS)

To: Kendik, James (JUS)

Sent: Fri Dec 23 10:31:57 2011

Subject: RE: Missisauga plant notice

Is this the Greenfield matter you are referring to James?

Thanks

Karthik

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

From: Kendik, James (JUS)

Sent: Friday, December 23, 2011 10:13 AM

To: Das, Karthik (JUS)

Subject: Missisauga plant notice

Karthik, could you please flip this to me so I can also send to Malliha. Thank you.
James

James Kendik, Crown Counsel

Deputy Director

Crown Law Office-Civil

McMurtry-Scott Building

720 Bay Street, 8th Floor Toronto, ON

M7A 2S9

Tel: (416) 326-7246 Fax:

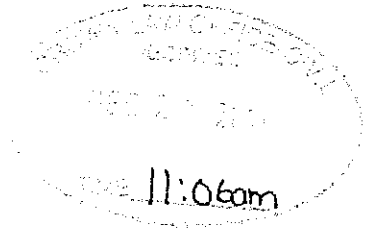
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STIKEMAN ELLIOTT

Stikeman Elliott LLP Barristers & Solicitors

5300 Commerce Court West, 199 Bay Street, Toronto, Canada M5L 1B9
Tel: (416) 869-5500 Fax: (416) 947-0866 www.stikeman.com



Peter F.C. Howard
Direct: (416) 869-5613
E-mail: phoward@stikeman.com

BY COURIER

December 20, 2011
File No.: 131814.1001

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Ministry of the Attorney General
720 Bay Street, 8th Floor
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M7A 2S9

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Peter F.C. Howard

/jh
encl.

TORONTO
MONTREAL
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NEW YORK
LONDON
SYDNEY

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DATED at Toronto on Wednesday, December 21, 2011

Stikeman Elliott LLP
199 Bay Street, Suite 5300
Commerce Court West
Toronto, Ontario
M5L 1B9

Peter F.C. Howard
Tel: (416) 869-5613
Fax: (416) 947-0866

Counsel for Claimant, EIG Management
Company, LLC and the Note Holders

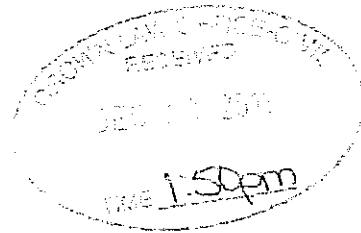
SERVICE OF A COPY
ADMITTED THIS 21 DAY OF December 2011

Crown Law Office (C/O) (Law)
MINISTER OF THE ATTORNEY GENERAL
FOR ONTARIO

Per [Signature] Time 1:50pm

BY FAX

TO: [illegible]



Calwell, Carolyn (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: December 23, 2011 2:20 PM
To: 'Michael Lyle'
Subject: RE: Greenfield
Attachments: 0040-000043232 -- EIG Management Company, LLC.PDF

Here is the notice. Received yesterday.

Carolyn

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

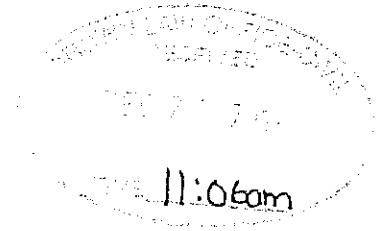
From: Michael Lyle [<mailto:Michael.Lyle@powerauthority.on.ca>]
Sent: December 22, 2011 5:57 PM
To: Perun, Halyna N. (ENERGY)
Cc: Calwell, Carolyn (ENERGY)
Subject: Greenfield

We have been advised by counsel for the major secured lender (EIG) that the Crown has been served as of yesterday with notice of proceedings against the Crown in this matter. This e-mail message and any files transmitted with it are intended only for the named recipient(s) above and may contain information that is privileged, confidential and/or exempt from disclosure under applicable law. If you are not the intended recipient(s), any dissemination, distribution or copying of this e-mail message or any files transmitted with it is strictly prohibited. If you have received this message in error, or are not the named recipient(s), please notify the sender immediately and delete this e-mail message.

STIKEMAN ELLIOTT

Stikeman Elliott LLP Barristers & Solicitors

5300 Commerce Court West, 199 Bay Street, Toronto, Canada M5L 1B9
Tel: (416) 869-5500 Fax: (416) 947-0866 www.stikeman.com



Peter F.C. Howard
Direct: (416) 869-5613
E-mail: phoward@stikeman.com

BY COURIER

December 20, 2011
File No.: 131814.1001

Crown Law Office - Civil
Ministry of the Attorney General
720 Bay Street, 8th Floor
Toronto, ON
M7A 2S9

Dear Sirs/Mesdames:

Re: Notice Pursuant to section 7(1) of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P. 27

I am enclosing a Notice of Claim on behalf of EIG Management Company, LLC which is served in accordance with the *Proceedings Against the Crown Act*.

Yours truly,

A handwritten signature of Peter F.C. Howard.

Peter F.C. Howard

/jh
encl.

TORONTO

MONTREAL

OTTAWA

CALGARY

VANCOUVER

NEW YORK

LONDON

SYDNEY

NOTICE OF CLAIM

TO: The Crown Law Office (Civil Law), Ministry of the Attorney General,
Toronto, Ontario

RE: Notice pursuant to section 7(1) of the *Proceedings Against the Crown Act*, R.S.O.
1990, c. P.27.

TAKE NOTICE that EIG Management Company, LLC for itself and as agent for the note holders (the "Note Holders") under the Note Purchase Agreement identified below (the "Claimant") intends to commence a claim against Her Majesty the Queen in Right of Ontario (the "Crown"), and possibly others, for damages and losses which Claimant has suffered as a result of the actions of agents and servants of the Crown for causes of action including in:

- (i) inducing Greenfield South Holdco Corp. and related entities (collectively "Greenfield") to breach the terms of a note purchase agreement dated May 26, 2011 (the "Note Purchase Agreement") with Claimant and related contracts;
- (ii) inducing the Ontario Power Authority (the "OPA") to repudiate the Amended and Restated Clean Energy Supply (ARCES) Contract dated April 12, 2005 and amended and restated as of March 16, 2009 (the "ARCES Contract") with Greenfield, which, in turn, caused Greenfield to breach its agreements with Claimant;
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II. CLAIMS AGAINST THE CROWN

8. Claimant states that Premier Dalton McGuinty, Minister of Energy Chris Bentley and any individual within the Ontario Government who participated in, or agreed with, the decision to cause the end of construction of the Greenfield South Generation Station, are or were agents of the Crown.
9. In committing to terminate construction of the Greenfield South Generation Station, the Crown and its agents committed at least the torts of inducing breach of contract and interference with economic relations/rights to the damage and detriment of Claimant.
10. As a result of the commission of these torts by its agents, for which the Crown is liable, Claimant and the Note Holders have suffered damages. Claimant,

on behalf of itself and the Note Holders, therefore gives notice of its claim against the Crown for damages suffered as a result of this conduct.

11. This Notice is made pursuant to the requirements contained in section 7(1) of the *Proceedings Against the Crown Act*.
12. For further information pertaining to the within Notice of Claim, please contact solicitors for Claimant as below provided.

DATED at Toronto on Wednesday, December 21, 2011

Stikeman Elliott LLP
199 Bay Street, Suite 5300
Commerce Court West
Toronto, Ontario
M5L 1B9

Peter F.C. Howard
Tel: (416) 869-5613
Fax: (416) 947-0866

Counsel for Claimant, EIG Management
Company, LLC and the Note Holders

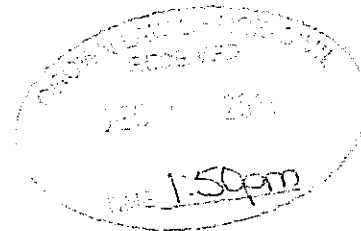
SERVICE OF A COPY
ADMITTED THIS 21 DAY OF December 2011

Clerk of the Court
MINISTER OF THE ATTORNEY GENERAL
FOR ONTARIO

Per 12/21/11 Time 1:50pm

FOR DEPOSIT

12/21/11 1:50pm



Calwell, Carolyn (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: December 23, 2011 2:31 PM
To: Wong, Taia (JUS); Lung, Ken (JUS)
Subject: RE: Greenfield
Attachments: 22431262_1 (2).doc

Attachment in aid of our discussion.

Carolyn

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

From: Wong, Taia (JUS)
Sent: December 23, 2011 2:11 PM
To: Calwell, Carolyn (ENERGY); Lung, Ken (JUS); Wong, Taia (JUS)
Subject: Greenfield
When: December 23, 2011 2:45 PM-3:15 PM (GMT-05:00) Eastern Time (US & Canada).
Where: Ken will call Carolyn

When: December 23, 2011 2:45 PM-3:15 PM (GMT-05:00) Eastern Time (US & Canada).
Where: Ken will call Carolyn

~~*~*~*~*~*~*~*

**Step Plan for Potential Acquisition of the Assets
Greenfield South Power Corporation ("Greenfield")**

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[NTD: We have not yet resolved what should happen with the OPA indemnity in favour of Greenfield South relating to Secured Lender claims proven in court and whether the Certificate of Air would be released by Greenfield as part of this process. This requires further discussion with Greenfield's counsel.]

Calwell, Carolyn (ENERGY)

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Sent: December 23, 2011 3:07 PM
To: Sinclair, James (FIN)
Cc: Hanslep, Malle (FIN)
Subject: RE: Mississauga Gas Plant
Attachments: 22431262_1 (2).doc; 0040-000043232 – EIG Management Company, LLC.PDF

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Carolyn

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Cc: Hanslep, Malle (FIN)
Subject: Mississauga Gas Plant

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Carolyn

Carolyn Calwell
Deputy Director
Ministry of Energy & Ministry of Infrastructure
Legal Services Branch
Ministry of the Attorney General
777 Bay Street, Suite 425
Toronto ON M5G 2E5
416.212.5409

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**Step Plan for Potential Acquisition of the Assets
Greenfield South Power Corporation ("Greenfield")**

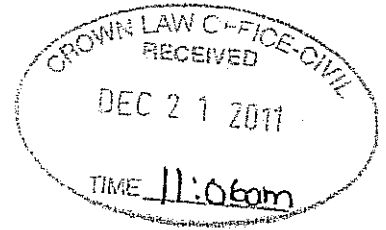
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Peter F.C. Howard
Direct: (416) 869-5613
E-mail: phoward@stikeman.com

BY COURIER

December 20, 2011
File No.: 131814.1001

Crown Law Office - Civil
Ministry of the Attorney General
720 Bay Street, 8th Floor
Toronto, ON
M7A 2S9

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Peter F.C. Howard

/jh
encl.

TORONTO
MONTREAL
OTTAWA
CALGARY
VANCOUVER
NEW YORK
LONDON
SYDNEY

NOTICE OF CLAIM

TO: The Crown Law Office (Civil Law), Ministry of the Attorney General,
Toronto, Ontario

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Commerce Court West
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M5L 1B9

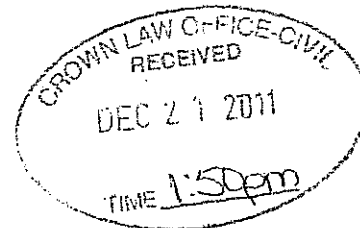
Peter F.C. Howard
Tel: (416) 869-5613
Fax: (416) 947-0866

Counsel for Claimant, EIG Management
Company, LLC and the Note Holders

SERVICE OF A COPY
ADMITTED THIS 21 DAY OF December 2011

Crown Law Office (CML) Ltd.
MINISTRY OF THE ATTORNEY GENERAL
FOR ONTARIO

Per [Signature] Time 1:50pm
720 BAY STREET
TORONTO, ONTARIO M5G 1B3



Calwell, Carolyn (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: December 23, 2011 3:08 PM
To: Maefs, Fred (FIN)
Subject: FW: Mississauga Gas Plant
Attachments: 22431262_1 (2).doc; 0040-000043232 – EIG Management Company, LLC.PDF

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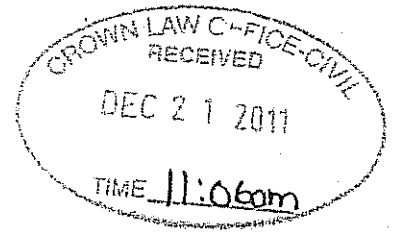
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Peter F.C. Howard
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File No.: 131814.1001

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720 Bay Street, 8th Floor
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Peter F.C. Howard

/jh
encl.

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4. Also on May 26, 2011, Greenfield, Claimant and the OPA entered into a secured lender consent and acknowledgement agreement (the "Secured Lender Consent Contract") under which the OPA acknowledged that, amongst other things, Claimant constituted, and therefore is entitled to the benefits of, the Secured Lender under the ARCES Contract.
5. On September 24, 2011, Liberal Leader and Ontario Premier Dalton McGuinty announced that the Ontario Government was permanently halting construction of the Greenfield South Generation Power Station.
6. On November 14, 2011, the OPA wrote to Greenfield effectively repudiating the ARCES Contract on the instructions of the Crown.
7. Subsequently, on November 18, 2011, the OPA and Greenfield agreed to a suspension of obligations under the ARCES Contract for a period until the end of the day on November 25, 2011 and neither party has performed under the ARCES Contract since November 18, 2011.

II. CLAIMS AGAINST THE CROWN

8. Claimant states that Premier Dalton McGuinty, Minister of Energy Chris Bentley and any individual within the Ontario Government who participated in, or agreed with, the decision to cause the end of construction of the Greenfield South Generation Station, are or were agents of the Crown.
9. In committing to terminate construction of the Greenfield South Generation Station, the Crown and its agents committed at least the torts of inducing breach of contract and interference with economic relations/rights to the damage and detriment of Claimant.
10. As a result of the commission of these torts by its agents, for which the Crown is liable, Claimant and the Note Holders have suffered damages. Claimant,

on behalf of itself and the Note Holders, therefore gives notice of its claim against the Crown for damages suffered as a result of this conduct.

11. This Notice is made pursuant to the requirements contained in section 7(1) of the *Proceedings Against the Crown Act*.
12. For further information pertaining to the within Notice of Claim, please contact solicitors for Claimant as below provided.

DATED at Toronto on Wednesday, December 21, 2011

Stikeman Elliott LLP
199 Bay Street, Suite 5300
Commerce Court West
Toronto, Ontario
M5L 1B9

Peter F.C. Howard
Tel: (416) 869-5613
Fax: (416) 947-0866

Counsel for Claimant, EIG Management
Company, LLC and the Note Holders

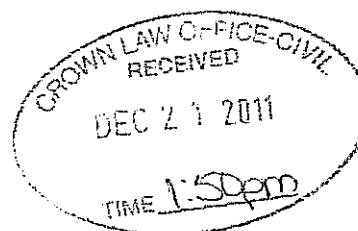
SERVICE OF A COPY
ADMITTED THIS 21 DAY OF December 2011

Crown Law Office (CLO) (Low)
MINISTRY OF THE ATTORNEY GENERAL
FOR ONTARIO

Per [Signature] Time 1:50pm

770 BAY STREET

TORONTO, ONTARIO M5S 2B5



Calwell, Carolyn (ENERGY)

From: Rehob, James (ENERGY)
Sent: December 23, 2011 3:39 PM
To: Calwell, Carolyn (ENERGY)
Subject: PACA Notice Expiry Date

Hi, Carolyn - I get February 20th, since the 60th day lands on Sunday, Feb 19th – go to the next business day which is Feb 20th.

James P. H. Rehob
Senior Counsel
Ministry of Energy and
Ministry of Infrastructure
Legal Services Branch
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Tel: 416-325-6676
Fax: 416-325-1781
james.rehob@ontario.ca

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Calwell, Carolyn (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: December 23, 2011 4:31 PM
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Collins, Jason R. (ENERGY)
Subject: Greenfield
Attachments: 0040-000043232 – EIG Management Company, LLC.PDF; Greenfield South BN.23 12 2011.2.doc

Confidential/Solicitor Client Privileged

Deputy,

Attached is the Proceedings Against the Crown Act notice, received by MAG yesterday. This puts EIG Management Company, LLC in position to issue a Statement of Claim against the Crown any time on or after February 20th. The attached note sets out claims in the PACA notice and also describes in high level terms the OPA's proposal. The PACA notice does not prevent pursuit of this proposal.

MAG, including CLOC and the ADAG's office, and MOF Legal are fully looped in. There isn't a lot more that we can do at this stage without further details of the proposal. I will follow up with Mike Lyle on January 3rd for further details.

Happy holidays!

Carolyn

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STIKEMAN ELLIOTT

Stikeman Elliott LLP Barristers & Solicitors

5300 Commerce Court West, 199 Bay Street, Toronto, Canada M5L 1B9
Tel: (416) 869-5500 Fax: (416) 947-0866 www.stikeman.com

Peter F.C. Howard
Direct: (416) 869-5613
E-mail: phoward@stikeman.com

BY COURIER

December 20, 2011
File No.: 131814.1001

Crown Law Office - Civil
Ministry of the Attorney General
720 Bay Street, 8th Floor
Toronto, ON
M7A 2S9

Dear Sirs/Mesdames:

Re: Notice Pursuant to section 7(1) of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P. 27

I am enclosing a Notice of Claim on behalf of EIG Management Company, LLC which is served in accordance with the *Proceedings Against the Crown Act*.

Yours truly,



Peter F.C. Howard

/jh
encl.

TORONTO

MONTREAL

OTTAWA

CALGARY

VANCOUVER

NEW YORK

LONDON

SYDNEY

NOTICE OF CLAIM

TO: The Crown Law Office (Civil Law), Ministry of the Attorney General,
Toronto, Ontario

RE: Notice pursuant to section 7(1) of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27.

TAKE NOTICE that EIG Management Company, LLC for itself and as agent for the note holders (the "Note Holders") under the Note Purchase Agreement identified below (the "Claimant") intends to commence a claim against Her Majesty the Queen in Right of Ontario (the "Crown"), and possibly others, for damages and losses which Claimant has suffered as a result of the actions of agents and servants of the Crown for causes of action including in:

- (i) inducing Greenfield South Holdco Corp. and related entities (collectively "Greenfield") to breach the terms of a note purchase agreement dated May 26, 2011 (the "Note Purchase Agreement") with Claimant and related contracts;
- (ii) inducing the Ontario Power Authority (the "OPA") to repudiate the Amended and Restated Clean Energy Supply (ARCES) Contract dated April 12, 2005 and amended and restated as of March 16, 2009 (the "ARCES Contract") with Greenfield, which, in turn, caused Greenfield to breach its agreements with Claimant;
- (iii) interfering with Claimant's economic rights and/or relations with Greenfield as set out in the Note Purchase Agreement and related documents; and
- (iv) interfering in Claimant's economic relations with Greenfield by causing the OPA to repudiate the ARCES Contract, which in turn caused harm to Claimant.

I. MATERIAL BACKGROUND FACTS

1. On or about April 12, 2004, the OPA and Greenfield executed a Clean Energy Supply Contract for Greenfield to develop and operate the Greenfield South Generation Station which agreement was subsequently amended by the ARCES Contract. It was agreed that the power facility to be constructed would be built in Mississauga on Loreland Avenue.

2. Under the ARCES Contract, Greenfield had the right to obtain secured lending from third parties. The secured party was given certain rights under the ARCES Contract and would as well be subject to certain obligations thereunder.
3. On May 26, 2011, Greenfield entered into the Note Purchase Agreement with Claimant, acting as administrative agent for the Note Holders. Under the terms of that agreement, the Note Holders issued irrevocable financing commitments to Greenfield to finance the ownership, development, engineering, construction, testing, operation and maintenance of the Project.
4. Also on May 26, 2011, Greenfield, Claimant and the OPA entered into a secured lender consent and acknowledgement agreement (the "Secured Lender Consent Contract") under which the OPA acknowledged that, amongst other things, Claimant constituted, and therefore is entitled to the benefits of, the Secured Lender under the ARCES Contract.
5. On September 24, 2011, Liberal Leader and Ontario Premier Dalton McGuinty announced that the Ontario Government was permanently halting construction of the Greenfield South Generation Power Station.
6. On November 14, 2011, the OPA wrote to Greenfield effectively repudiating the ARCES Contract on the instructions of the Crown.
7. Subsequently, on November 18, 2011, the OPA and Greenfield agreed to a suspension of obligations under the ARCES Contract for a period until the end of the day on November 25, 2011 and neither party has performed under the ARCES Contract since November 18, 2011.

II. CLAIMS AGAINST THE CROWN

8. Claimant states that Premier Dalton McGuinty, Minister of Energy Chris Bentley and any individual within the Ontario Government who participated in, or agreed with, the decision to cause the end of construction of the Greenfield South Generation Station, are or were agents of the Crown.
9. In committing to terminate construction of the Greenfield South Generation Station, the Crown and its agents committed at least the torts of inducing breach of contract and interference with economic relations/rights to the damage and detriment of Claimant.
10. As a result of the commission of these torts by its agents, for which the Crown is liable, Claimant and the Note Holders have suffered damages. Claimant,

on behalf of itself and the Note Holders, therefore gives notice of its claim against the Crown for damages suffered as a result of this conduct.

11. This Notice is made pursuant to the requirements contained in section 7(1) of the *Proceedings Against the Crown Act*.
12. For further information pertaining to the within Notice of Claim, please contact solicitors for Claimant as below provided.

DATED at Toronto on Wednesday, December 21, 2011

Stikeman Elliott LLP
199 Bay Street, Suite 5300
Commerce Court West
Toronto, Ontario
M5L 1B9

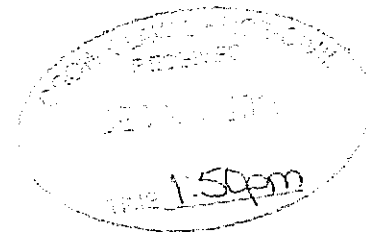
Peter F.C. Howard
Tel: (416) 869-5613
Fax: (416) 947-0866

Counsel for Claimant, EIG Management
Company, LLC and the Note Holders

SERVICE OF A COPY
ADMITTED TO 21 DAY OF December 2011

Court Law Office (2011)
MINISTER OF THE ATTORNEY GENERAL
FOR ONTARIO

Re: 12/15/11 Time: 1:50pm



Confidential and Solicitor-Client Privileged

Ministry of the Attorney General

Briefing Note

Legal Services Division

Legal Services Branch – ENE/MOI

ISSUE:

- Greenfield South Gas Generating Plant in Mississauga (the Greenfield South project)

CURRENT STATUS

- On December 21, 2011, EIG Management Company, LLC, a secured creditor of Greenfield South project, served a notice of claim under the *Proceedings Against the Crown Act*.
- The Ontario Power Authority is developing a proposal to have Greenfield South Power Corporation (Greenfield) seek *Companies' Creditors Arrangement Act* protection and to have Ontario Power Generation enter into a joint venture to make a bid for Greenfield's assets and trade debt and existing supply contracts.

Notice Under *Proceedings Against the Crown Act*

- On December 21, 2011, EIG Management Company, LLC ("EIG") (representing itself and certain note holders involved in the financing of the Greenfield South project) served a notice of claim under the *Proceedings Against the Crown Act*.
- This notice of claim represents the first procedural step in bringing a law suit against the Crown.
- The notice of claim alleges that, in committing to terminate construction of the Greenfield South project, the Crown and its agents, including Premier McGuinty and Minister Bentley, have committed the torts of (i) inducing breach of contract and (ii) interfering with economic relations/rights to damages of EIG.
- EIG may serve a statement of claim on the Province any time after February 20, 2011.

Negotiations between the OPA and Greenfield

- The OPA and Greenfield have been attempting to negotiate an agreement to allow development of the Greenfield South Project to cease, to determine the amount of Greenfield's sunk costs and to enter into negotiations to develop a gas plant at

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another site. Greenfield's secured creditors, including EIG, are involved in the negotiations.

- On December 14, 2011, the OPA and Greenfield agreed to continue negotiations and to continue to suspend obligations under the Amended and Restated Clean Energy Supply (ARCES) Contract, including suspension of construction activities until January 20, 2012.
 - The OPA agreed to pay \$35,000,000 to Greenfield in recognition of Greenfield's sunk costs incurred to date. In addition, the OPA will make direct payments to Greenfield's suppliers in the amount of approximately \$13.14 million on behalf of Greenfield.
- The OPA has advised ENERGY that EIG has noted Greenfield in default of its credit obligations.
- The OPA is developing a proposal that may assist in resolving negotiations, particularly with respect to secured creditors.
 - Greenfield would seek protection under the *Companies' Creditors Arrangement Act*.
 - Ontario Power Generation would enter into a joint venture with an entity related to the Greenfield parent company, Eastern Power, to acquire Greenfield's assets, trade debt and equipment supply costs.
 - The OPA would assist OPG in financing this entity. The assets would then be used by the joint venture to pursue a new gas plant at a different location.

NEXT STEPS

- The OPA and OPG plan to meet to discuss the OPA's proposal in early January 2012.
- Nothing is expected to happen with respect to EIG's notice of claim until at least February 20, 2012

BACKGROUND

- Originally, the Greenfield South project was to be a 280 MW combined cycle natural gas plant in the City of Mississauga on a 4.5 hectare property at 2315 Loreland Avenue.
- The Greenfield South project arose out of a Ministry of Energy Clean Energy Supply (CES) procurement process in 2004.

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- The original contract was executed in April, 2005.
 - The OPA subsequently assumed the contract. It was amended and restated in March, 2009 in recognition of process delays and complexities experienced by Greenfield.
 - In March 2011, the OPA renegotiated the initial Commercial Operation Date (C.O.D.) with Greenfield to Q3 2014.
- On September 24, 2011, the government announced a commitment to stop construction at the site and to relocate the plant.
- On November 21, 2011, Minister of Energy Chris Bentley issued a statement that the OPA had advised that Greenfield had agreed to stop construction immediately and that both the OPA and Greenfield were negotiating to relocate the plant.

Date: December 23, 2011

Prepared by: James P.H. Rehob
Senior Counsel
5-6676

Approved by: Carolyn Calwell, Deputy Director
Legal Services Branch
Ministry of Energy/Ministry of Infrastructure
2-5409

Calwell, Carolyn (ENERGY)

From: Lindsay, David (ENERGY)
Sent: December 23, 2011 4:44 PM
To: Calwell, Carolyn (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Collins, Jason R. (ENERGY)
Subject: Re: Greenfield

Thanks Carolyn,

I appreciate the update. So long as all are in the loop that is about as much as we can do at this point.

David

From: Calwell, Carolyn (ENERGY)
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Collins, Jason R. (ENERGY)
Sent: Fri Dec 23 16:30:52 2011
Subject: Greenfield

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Deputy,

Attached is the Proceedings Against the Crown Act notice, received by MAG yesterday. This puts EIG Management Company, LLC in position to issue a Statement of Claim against the Crown any time on or after February 20th. The attached note sets out claims in the PACA notice and also describes in high level terms the OPA's proposal. The PACA notice does not prevent pursuit of this proposal.

MAG, including CLOC and the ADAG's office, and MOF Legal are fully looped in. There isn't a lot more that we can do at this stage without further details of the proposal. I will follow up with Mike Lyle on January 3rd for further details.

Happy holidays!

Carolyn

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Calwell, Carolyn (ENERGY)

From: Rehob, James (ENERGY)
Sent: December 28, 2011 2:36 PM
To: Calwell, Carolyn (ENERGY)
Subject: RE: Greenfield

- Carolyn, I just noticed an error I made regarding the calculation of the 60-day period – I should have also excluded the new “Family Day” that actually (yikes!) lands on February 20th this year. Mind you, the way the statement appears in the note appears to me to be (still) correct – it reads “EIG may serve a statement of claim on the Province any time after February 20, 2011.” The word “after” saves it for us. Perhaps you caught it after all – at any rate, I note this error and I apologize.

Many thanks, Carolyn!

James

From: Calwell, Carolyn (ENERGY)
Sent: December 23, 2011 4:43 PM
To: Rehob, James (ENERGY)
Subject: FW: Greenfield

For your files.

From: Calwell, Carolyn (ENERGY)
Sent: December 23, 2011 4:31 PM
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Collins, Jason R. (ENERGY)
Subject: Greenfield

Confidential/Solicitor Client Privileged

Deputy,

Attached is the Proceedings Against the Crown Act notice, received by MAG yesterday. This puts EIG Management Company, LLC in position to issue a Statement of Claim against the Crown any time on or after February 20th. The attached note sets out claims in the PACA notice and also describes in high level terms the OPA's proposal. The PACA notice does not prevent pursuit of this proposal.

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Carolyn

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Jennings, Rick (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: October 11, 2011 2:04 PM
To: Lindsay, David (ENERGY); Kulendran, Jesse (ENERGY)
Cc: Jennings, Rick (ENERGY)
Subject: FW: Greenfield South Contract Deck
Attachments: Gas Plant Considerations 2 (2) (JPR Comments 2A).ppt

These are in progress – we'll have them in shape in about 15 min – but in any event – as far as we got

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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From: Calwell, Carolyn (ENERGY)
Sent: October 11, 2011 2:04 PM
To: Perun, Halyna N. (ENERGY)
Subject: FW: Greenfield South Contract Deck

I was only able to get to slide 5

From: Rehob, James (ENERGY)
Sent: October 11, 2011 1:59 PM
To: Calwell, Carolyn (ENERGY)
Subject: Greenfield South Contract Deck

Hi, Carolyn – my comments are attached. Please note that I'd be very happy to go over the deck again, but I thought I'd better get these comments to you now and we could work our way through them or proceed in any way that seems best.

Kindly,
James

James P. H. Rehob
Senior Counsel
Ministry of Energy and
Ministry of Infrastructure

Legal Services Branch
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Tel: 416-325-6676
Fax: 416-325-1781
james.rehob@ontario.ca

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Gas Plant Considerations

Date: October 11, 2011

Key Facts About the Greenfield South Plant

- Successful applicant in Ministry of Energy run **Clean Energy Supply (CES)** RFP, contract signed with the OPA in April 2005.
- Eastern Power, the project developer **based in Ontario**, has received all required provincial approvals, including Environmental Assessment and Certificates of Approval;
- Eastern Power has received all required municipal approvals, including building site approval from the City of Mississauga issued in May 2011;
- Eastern Power has **recently** secured financing (confirmed by the OPA).



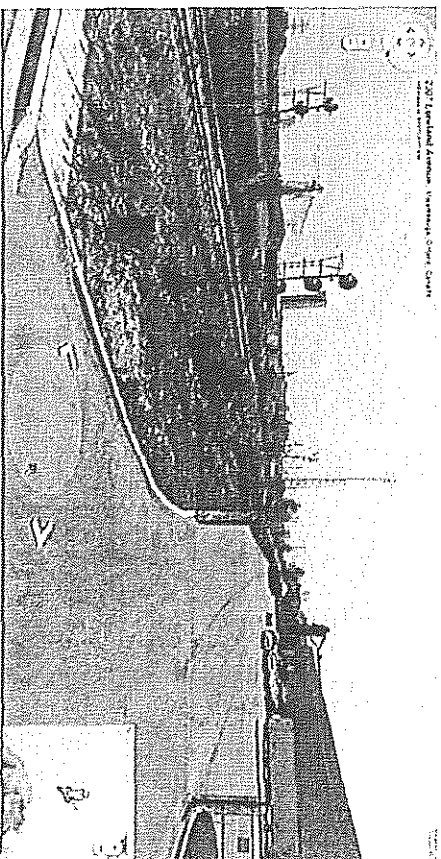
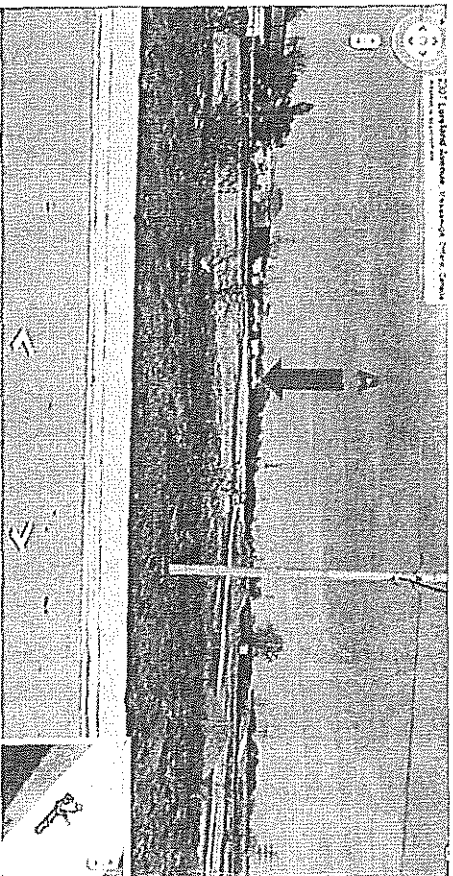
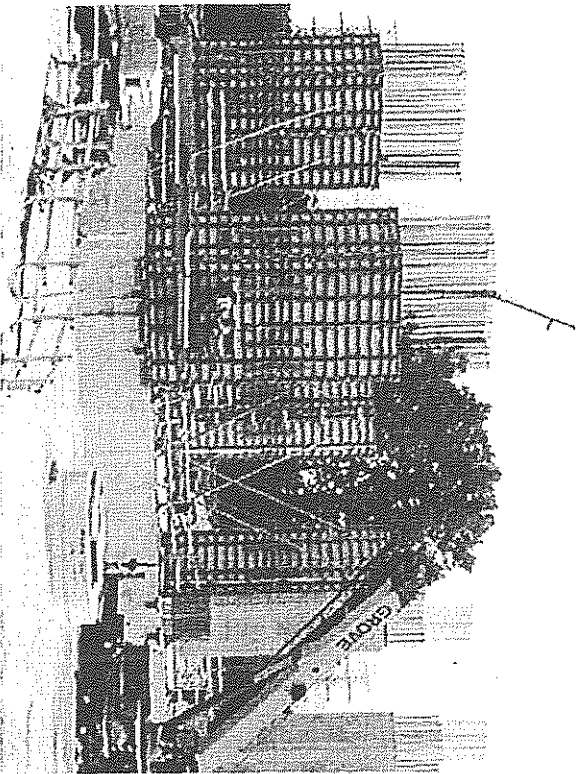
Legend:

- A – Proposed Greenfield Site
- B – Closest House
- C – Closest Subdivision (North)
- D – Closest Subdivision (South)
- E – Trillium Heath Centre
- F – Sherway Gardens Mall

Distance:

- A to B: 220 Meters
- A to C: 270 Meters
- A to D: 500 Meters
- A to E: 740 Meters
- A to F: 910 Meters

MINISTRY OF ENERGY



Recent Events

- On September 24, in Mississauga, local Liberal party candidates announced that “construction on the project would be halted” and that “if elected the Government would work with Eastern to choose a new site.” The Mayor of Mississauga attended the announcement and endorsed the decision.
- On September 28, the media carried pictures of the plant with construction well underway.
- On October 6, media reported Liberal insiders as saying that Eastern Power was warned back in May that any work they did was at their own risk. **Currently, according to the OPA, Eastern is contractually entitled and obliged continue construction.**

Issues

- Construction continues at the Greenfield South site.
- The project has all applicable approvals. A regulatory mechanism for stopping construction could be challenged **under the contract terms as well as in the courts**, in the absence of a breach of approval conditions. **A legislative solution, where carefully drafted, is less vulnerable to a successful suit.**
- Legal interaction with Eastern Power is through the **OPA** which **currently** holds and administers the contract.
- Statements have been made by local politicians that the plant would not be relocated to a site in Mississauga or Toronto. Alternative site options and alternative ways to supply Mississauga have not been identified. Alternative sites would require new provincial and municipal approvals processes to be undertaken **involving appreciable delay and expense.**

Options For Stopping the Plant

- **Legislative/Regulatory** – would have to **nullify** approvals already received
 - Legislation seen as more durable solution but requires time to enact and pass.
 - Developer could bring suit in interim, though legislation would ultimately trump
 - Legislation could provide for compensation, no compensation, manner of establishing compensation, arbitration/settlement process, etc.
 - There is some provincial precedent re. *Adams Mine* for a legislative approach.
- **Contractual** – unilateral cancellation would lead to legal action.
 - OPA contract includes limitation clauses.
 - OPA is vulnerable to damages which have to be recovered from the rate-base;
 - Government could be sued though likelihood of success may be limited since it is not a party.
- **Negotiations/arbitration/settlement** – in return for ceasing construction, coverage of expenses to date (e.g. sunk costs) and a new contract for a *[ntd-jpr: similar-sized plant at a] new [ntd-jpr: and comparable?] site.*

Next Steps

- OPA be could be requested to approach Eastern Power about negotiating settlement, could include covering costs to date (**sunk costs**) , covering foregone revenue, as well as establishing a contract for a new site. [
- Could require a Ministerial direction to the OPA to renegotiate the contract or cancel the contract. The Government could agree to cover some or all of the settlement costs.
 - There are some interpretive risks, including the argument that once the contract (initiative) is passed to it, the Minister is limited in his authority to further direct the OPA about the same initiative. May have to refocus “direction” in terms of “expectations”
- Cambridge is a potential alternate site: *[ntd-jpr: OPA mentioend KW and Lennox as well.]*
 - The project would have to be reconfigured (450 MW peaking plant versus 280 MW combined cycle plant);
 - the developer would likely ask the OPA to take approval risk; and,
 - TransCanada has been in discussions about this site although nothing has been agreed to.
 - Does not directly address supply needs in Mississauga and Toronto
- Proponent may be willing to settle for a large cash settlement representing foregone net revenue or may view its financial prospects as being better through the courts.

Jennings, Rick (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: October 18, 2011 4:13 PM
To: Lindsay, David (ENERGY); Jennings, Rick (ENERGY)
Cc: Calwell, Carolyn (ENERGY)
Subject: Fw: Greenfield South
Attachments: Greenfield South Options.pdf

Privileged and Confidential

Please see attached

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

From: Khatri, Anupa (ENERGY)
To: Perun, Halyna N. (ENERGY)
Sent: Tue Oct 18 16:11:24 2011
Subject: Greenfield South

Hi Halyna,

The scanned version is attached, as requested.

Regards,
Anupa Khatri
Director's Secretary
Ministries of Energy & Infrastructure
Legal Services Branch
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: 416-325-1841

Notice

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Jennings, Rick (ENERGY)

From: King, Ryan (ENERGY)
Sent: October 19, 2011 12:51 PM
To: Silva, Joseph (ENERGY); Lindsay, David (ENERGY)
Cc: McKeever, Garry (ENERGY); MacCallum, Doug (ENERGY); Jenkins, Allan (ENERGY); Jennings, Rick (ENERGY); Cayley, Daniel (ENERGY); Perun, Halyna N. (ENERGY)
Subject: RE: Deck
Attachments: Greenfield South Construction Oct 20 2011 LSB ESTDP (v6).ppt

This version replaces 'considered' with 'proposed' if it's not too late

From: King, Ryan (ENERGY)
Sent: October 19, 2011 12:49 PM
To: Silva, Joseph (ENERGY); Lindsay, David (ENERGY)
Cc: McKeever, Garry (ENERGY); MacCallum, Doug (ENERGY); Jenkins, Allan (ENERGY); Jennings, Rick (ENERGY); Cayley, Daniel (ENERGY); Perun, Halyna N. (ENERGY)
Subject: RE: Deck

Hi Joseph,
Updated deck attached.

From: Jennings, Rick (ENERGY)
Sent: October 19, 2011 12:29 PM
To: King, Ryan (ENERGY)
Cc: McKeever, Garry (ENERGY); MacCallum, Doug (ENERGY); Jenkins, Allan (ENERGY)
Subject: FW: Deck

Ryan this is the latest edited version from Legal. An addition to the Appendix per the Deputy's request is to add the other options proposed by the OPA. The list is in the deck now but please insert the description and pros and cons for each of the 3 other options from the OPA deck. I have left a copy on your desk.

Send to Joseph when this has been done. Thanks.

From: Calwell, Carolyn (ENERGY)
Sent: October 19, 2011 11:55 AM
To: Lindsay, David (ENERGY); Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Perun, Halyna N. (ENERGY)
Subject: Deck

Revised as discussed.

Carolyn

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Greenfield South Generating Station

Next Steps – Advice to Cabinet

Date: October 20, 2011

Local Context

- Local residents do not support the Greenfield South gas plant in Mississauga, which is currently under construction.
- On October 12 the Mississauga Council passed a motion requesting that the Government and the Premier take immediate action to cancel the contract, stop construction and return the site to pre-construction condition

Issues

- Construction continues at the Greenfield South site.
- The project has an enforceable contract with the Ontario Power Authority and all applicable approvals. The developer's work **appears to be** in compliance with the contract and current approvals.
- The OPA is party to and administers the contract with Eastern Power. The Province is not a party to the contract. The OPA **has advised that it has** no right under the contract to terminate **in the current circumstances**.
- The OPA has asked for instruction from government to approach the developer to begin negotiations to change or to terminate the contract.
- Eastern Power has informed the OPA that it will not 'down tools' until it receives formal notification of **next steps**.
- The identification of potential alternative site options has not yet been completed.
- **Some** local politicians have stated that the plant would not be relocated to a site in Mississauga or Toronto.

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Next Steps Involve the OPA

- The OPA to be asked to approach Eastern Power to initiate discussions. The discussion would likely include potential treatment of costs incurred to date (sunk costs – including equipment costs), treatment of construction and equipment related contracts, estimates and treatment of foregone revenue, and options and Eastern's interest with respect to relocating to an alternative site.
- The OPA has made some preliminary analysis of costs and foregone revenue. **Further analysis of these costs is required and their allocation between the tax base and the rate base is required.**
- The OPA has also identified several sites that would require government and OPA review before being shared with Eastern Power. Each of these alternative sites have various issues associated with them.
- Eastern Power may or may not be interested in developing the proposed alternative sites, may be willing to walk away from the Mississauga plant for a financial cash settlement or may view its prospects as being better through the courts.

Immediate Legal Issues

- Discussion with Eastern Power may not be successful and could require the Government to consider other options (e.g. legislation).
- Initiating discussions to relocate or otherwise cancel the Mississauga plant may immediately cause Eastern Power to launch a law suit against either or both of the OPA and the Government.
- The Minister's request of the OPA may be **found to be** contractual interference and may attract liability to the Province.
- The OPA may ask for a "direction" from the Minister under the *Electricity Act, 1998* before undertaking any discussions with Eastern Power. The Minister's authority to direct the OPA in this way is unclear.
- Eastern Power's financiers may have a claim under NAFTA if this project does not proceed.

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Cabinet Minute

Cabinet agreed that:

- The Ministry of Energy to work with the Ontario Power Authority to enter into discussions with Eastern Power toward a satisfactory resolution of the Mississauga site.
- The Ministry of Energy to work with the Ontario Power Authority, the Ministry of Finance and the Ministry of the Attorney General to develop strategies to reach an agreement with Eastern Power.
- The Minister of Energy to report back to Cabinet by December 2011 with the details of the discussions with Eastern Power.
- The Ministry of Energy to work with Premier's Office/Cabinet Office on a stakeholder management and communications strategy.

Appendix 1

Greenfield South Background

Key Facts About the Greenfield South Plant

- Greenfield South Power Corporation (controlled by Eastern Power Corporation) was the successful applicant in Ministry of Energy run Clean Energy Supply (CES) RFP and signed a contract with the OPA in April 2005.
- Eastern Power, based in Ontario, has received all required provincial approvals, including Environmental Assessment and Certificates of Approval.
- Eastern Power has received all required municipal approvals, including building site approval from the City of Mississauga issued in May 2011.
- Eastern Power has secured debt financing from Credit Suisse and EIG (confirmed by the OPA).

MINISTRY OF ENERGY



Legend:

- A – Proposed Greenfield Site
- B – Closest House
- C – Closest Subdivision (North)
- D – Closest Subdivision (South)
- E – Trillium Heath Centre
- F – Sherway Gardens Mall

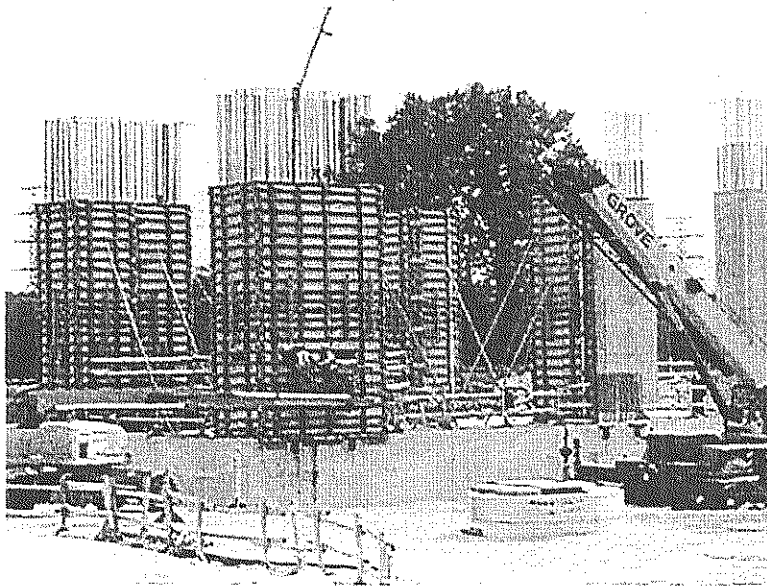
Distance:

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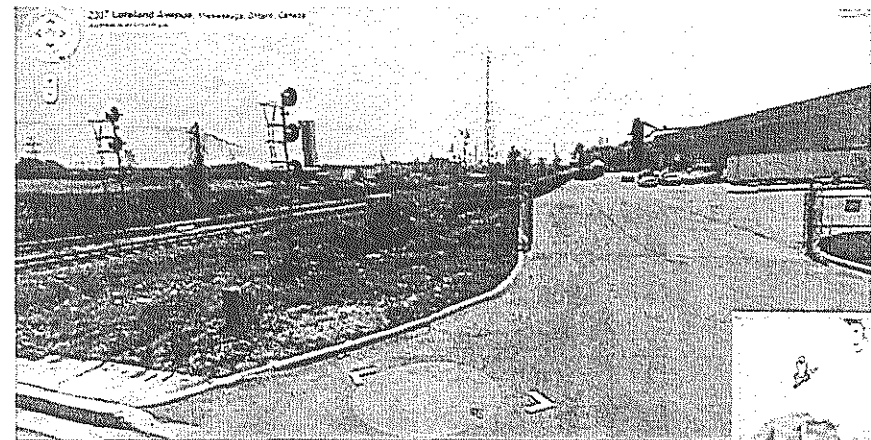
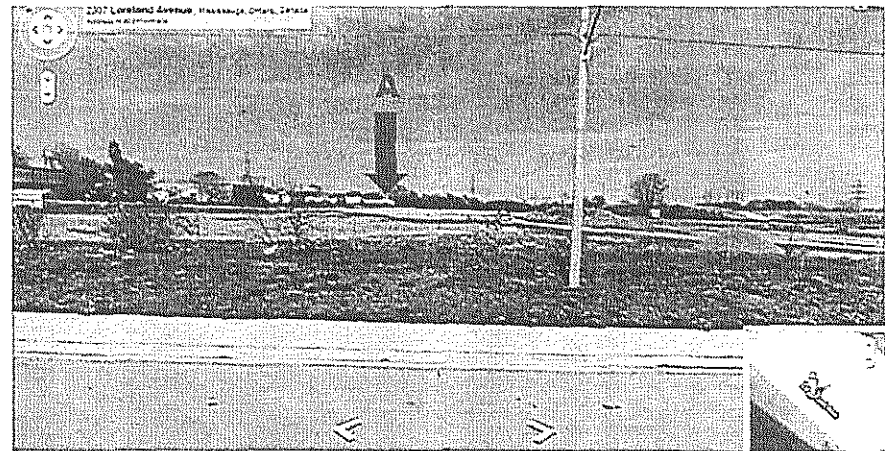
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MINISTRY OF ENERGY



*Plant construction as of 28 September 2011



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Appendix 2

Greenfield South Background

Other Options Proposed by the OPA

- **Unilateral termination of contract**
 - **Pros**
 - Greenfield South will be required to being to mitigate its damages which means they should stop construction (or at the very least, the OPA will not likely be liable for those additional costs that could have been avoided after date of termination of contract)
 - **Cons**
 - Does not provide opportunity to explore options for relocating project
 - Sends negative message to other OPA counter-parties

Other Options Proposed by the OPA Con'd

- **Legislation**

- **Pros**

- Allows Government to control level of compensation to be paid
 - Government can specify that no compensation will be paid for costs incurred past certain date (e.g. announcement of Government's policy or date of first reading)

- **Cons**

- Will be controversial
 - Potential impact on investment climate

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Other Options Proposed by the OPA Con'd

- Pay the plant not to run
 - Pros
 - OPA obligations to make monthly payments are low based on outcome of 2005 RFP process and paying plant not to operate over 20 years may be cheaper than paying for sunk costs, remediation of the site and potentially some lost profits
 - Cons
 - Will be difficult to convince community that plant will not operate

Jennings, Rick (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: October 19, 2011 2:25 PM
To: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); King, Ryan (ENERGY); Calwell, Carolyn (ENERGY)
Subject: FW: Greenfield South Options OPA
Attachments: doc20111019141522.pdf

Privileged and Confidential

Hi - just received a new deck from the OPA:

What's different from the previous version:

Page 2 - First two bullets and fourth bullet - new

Page 6-10 - pictures added of construction

Page 13 - bullet re siting discussions complicated by ongoing discussion with Trans Canada is new as is the last part of the last bullet which notes that some arrangements could be more straightforward or more complicated (the part 'the willingness of the host community...' to the end of the bullet is new)

Page 16 - Option 1 - Contract termination - precedent: Oakville gas plant - added

Page 17 - Option 2 new "con" in legislation option - "requires time to put in place" plus reference to Adams Mine Lake Act, 2004 added

Page 18 - Option 3 Negotiations option - revised second con; i.e. Greenfield South likely to continue construction while discussions ongoing unless incentive provided to them to stop

Page 19 - Option 4 "pros" is revised and new second "con" added; plus reference to Quebec facility as precedent.

Lastly, in previous version on page 3 under "contract facility" there was a reference to statement that "all major items from the project are completed" - and this has been removed from the new version

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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Jennings, Rick (ENERGY)

From: Silva, Joseph (ENERGY)
Sent: October 19, 2011 3:34 PM
To: Calwell, Carolyn (ENERGY); Perun, Halyna N. (ENERGY); Jennings, Rick (ENERGY); King, Ryan (ENERGY)
Subject: RE: Greenfield South Construction Oct 20 2011 LSB 4.ppt

Thanks Carolyn.

Just discussed below with the Deputy.

He's fine with the changes, except wants Rick to weigh in on the second bullet (thinking we should remove the word "residential").

Will also flag bullet 1 (advice to cabinet)

From: Calwell, Carolyn (ENERGY)
Sent: October 19, 2011 3:27 PM
To: Silva, Joseph (ENERGY); Perun, Halyna N. (ENERGY); Jennings, Rick (ENERGY); King, Ryan (ENERGY)
Subject: RE: Greenfield South Construction Oct 20 2011 LSB 4.ppt

Here are the differences between our last version and MAG's. Legal's concerns (if any) in brackets that follow.

- Advice to Cabinet should be added to the footer
- Local Content (slide 2) – MAG added 2 bullets about location of plant in a residential area and proximity of plant to recently constructed residences prompting a policy reconsideration (Rick/Ryan – please address)
- Considerations (slide 3) – MAG took out the reference to some local politicians having concerns (no concerns)
- Next Steps Involve the OPA (slide 4) – MAG took out reference to allocation of costs between the rate and tax bases and the reference to work required on alternate sites (no concerns)
- Cabinet Minute (slide 6) – MAG took out the reference to ENE, OPA, MAG and MOF working together on strategies and the reference to the stakeholder/comms plan (no concerns)
- OPA alternative proposals – out (no concerns)

Carolyn

From: Silva, Joseph (ENERGY)
Sent: October 19, 2011 3:00 PM
To: Perun, Halyna N. (ENERGY); Calwell, Carolyn (ENERGY); Jennings, Rick (ENERGY); King, Ryan (ENERGY)
Subject: FW: Greenfield South Construction Oct 20 2011 LSB 4.ppt
Importance: High

Hi – for review please. Thanks.

From: Brown, Meredith (JUS)
Sent: October 19, 2011 3:00 PM
To: Silva, Joseph (ENERGY)
Subject: Greenfield South Construction Oct 20 2011 LSB 4.ppt

Please find attached the DAG approved slides.

Jennings, Rick (ENERGY)

From: King, Ryan (ENERGY)
Sent: October 19, 2011 3:48 PM
To: Silva, Joseph (ENERGY); Calwell, Carolyn (ENERGY); Perun, Halyna N. (ENERGY); Jennings, Rick (ENERGY)
Subject: RE: Greenfield South Construction Oct 20 2011 LSB 4.ppt
Attachments: Greenfield South Construction Oct 20 2011 LSB 4 (estdp edit).ppt

Edit to the local context slide and considerations slide. It is incorrect to refer to this as residential. It is zoned heavy industrial.

From: Silva, Joseph (ENERGY)
Sent: October 19, 2011 3:34 PM
To: Calwell, Carolyn (ENERGY); Perun, Halyna N. (ENERGY); Jennings, Rick (ENERGY); King, Ryan (ENERGY)
Subject: RE: Greenfield South Construction Oct 20 2011 LSB 4.ppt

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To: Silva, Joseph (ENERGY); Perun, Halyna N. (ENERGY); Jennings, Rick (ENERGY); King, Ryan (ENERGY)
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Sent: October 19, 2011 3:00 PM
To: Silva, Joseph (ENERGY)
Subject: Greenfield South Construction Oct 20 2011 LSB 4.ppt

Please find attached the DAG approved slides.

Greenfield South Generating Station

Next Steps – Advice to Cabinet

Date: October 20, 2011

Local Context

- Local residents strongly oppose the Greenfield South gas plant in Mississauga, which is currently under construction.
- On October 12 the Mississauga Council passed a motion requesting that the Government and the Premier take immediate action to cancel the contract, stop construction and return the site to pre-construction condition.
- The recent construction of condominium towers in the general area has prompted a policy reconsideration of the location of the gas plant.

Considerations

- Construction continues at the Greenfield South site.
- Greenfield South Power Corporation (controlled by Eastern Power Corporation) has an enforceable contract with the Ontario Power Authority and all applicable approvals. The developer's work appears to be in compliance with the contract and current approvals.
- The OPA is party to and administers the contract with Eastern Power. The Province is not a party to the contract. The OPA has advised that it has no right under the contract to terminate in the current circumstances.
- The OPA has asked for instruction from government to approach the developer to begin negotiations to change or to terminate the contract.
- Eastern Power has informed the OPA that it is awaiting a decision from Cabinet before it will enter into discussions with the OPA.
- The identification of potential alternative site options has not yet been completed. Each of these alternative sites have various issues associated with them.

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Next Steps Involve the OPA

- The OPA to be asked to approach Eastern Power to initiate discussions. The discussion would likely include potential treatment of costs incurred to date (sunk costs – including equipment costs), treatment of construction and equipment related contracts, estimates and treatment of foregone revenue, and options and Eastern's interest with respect to relocating to an alternative site.
- At this stage, the OPA has only made a preliminary analysis of costs.
- Eastern Power may or may not be interested in developing the proposed alternative sites, may be willing to walk away from the Mississauga plant for a financial cash settlement or may view its prospects as being better through the courts.

Legal Issues

- Discussion with Eastern Power may not be successful and could require the Government to consider other options (e.g. legislation).
- Initiating discussions to relocate or otherwise cancel the Mississauga plant may cause Eastern Power to launch a law suit against either or both of the OPA and the Government.
- The Minister's request of the OPA may be contractual interference and may attract liability to the Province.
- The OPA may ask for a "direction" from the Minister under the *Electricity Act, 1998* before undertaking any discussions with Eastern Power. The Minister's authority to direct the OPA in this way is unclear.
- Eastern Power's financiers may have a claim under NAFTA if this project does not proceed.

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Cabinet Minute

Cabinet agreed that:

- The Ministry of Energy to work with the Ontario Power Authority to enter into discussions with Eastern Power toward a satisfactory resolution of the Mississauga site.
- The Minister of Energy to report back to Cabinet by December 2011 with the details of the discussions with Eastern Power.

Appendix 1

Greenfield South Background

Key Facts About the Greenfield South Plant

- Greenfield South Power Corporation (controlled by Eastern Power Corporation) was the successful applicant in Ministry of Energy run Clean Energy Supply (CES) RFP and signed a contract with the OPA in April 2005.
- Eastern Power, based in Ontario, has received all required provincial approvals, including Environmental Assessment and Certificates of Approval.
- Eastern Power has received all required municipal approvals, including building site approval from the City of Mississauga issued in May 2011.
- Eastern Power has secured debt financing from Credit Suisse and EIG (confirmed by the OPA).



Legend:

- A – Proposed Greenfield Site
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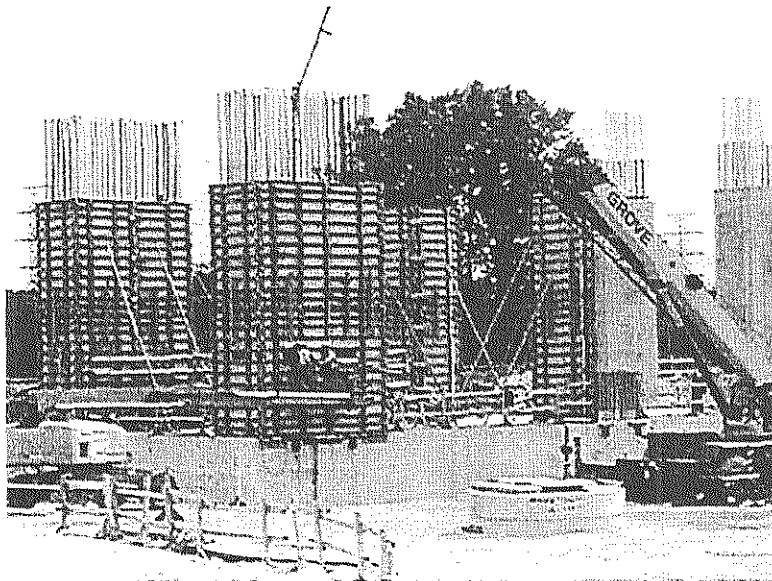
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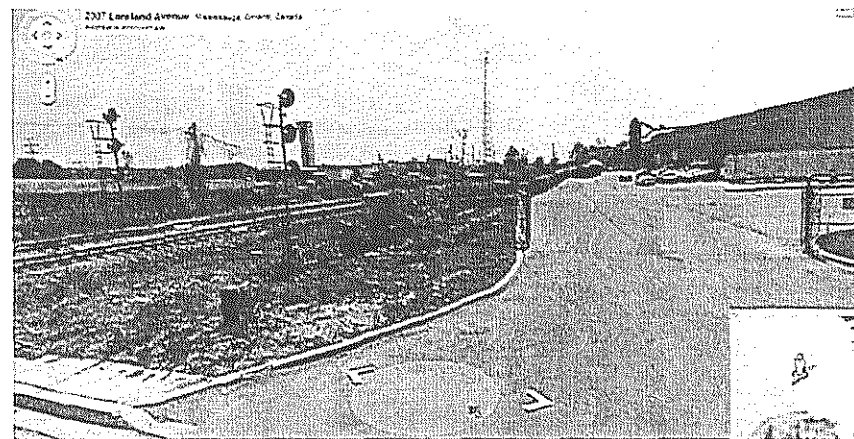
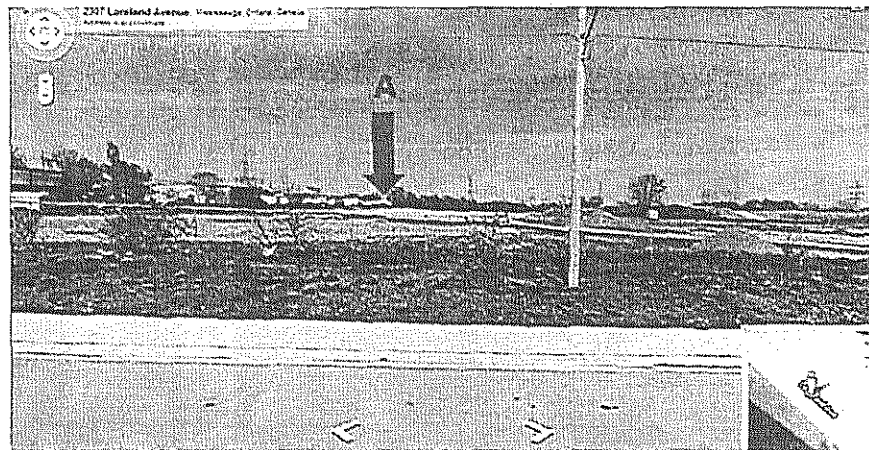
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MINISTRY OF ENERGY



*Plant construction as of 28 September 2011



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Jennings, Rick (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: October 19, 2011 4:37 PM
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Calwell, Carolyn (ENERGY); Silva, Joseph (ENERGY); King, Ryan (ENERGY)
Subject: note re plant
Attachments: Greenfield South BN LSB Oct 19-11 for DMLindsay.doc

Privileged and Confidential

David – This note outlines the legal issues with the contemplated option and sets out the alternative options (building on what's in the OPA deck) for your ease of reference. We'd be happy to review it with you.

Also, Mike Lyall left me a message asking about the status of the deck going to Cabinet. From the call it seems to me that the OPA is thinking that their revised deck is what will be used tomorrow. I'd like to let him know that it was helpful for us to have their deck but that the Ministry was asked to create a slimmer product.

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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Confidential and Solicitor-Client Privileged

Ministry of the Attorney General

Briefing Note

Legal Services Division

Legal Services Branch – ENE/MOI

ISSUE:

- Greenfield South Gas Generating Plant in Mississauga
- It is proposed that the Ministry of Energy work with the Ontario Power Authority (OPA) to enter into discussions with Greenfield South Power Corporation (controlled by Eastern Power Corporation, referred to as "Eastern Power") towards a satisfactory resolution of the Mississauga site

BACKGROUND

- Eastern Power is developing the Greenfield South Generating Station, a 280 MW combined cycle natural gas plant under construction in the City of Mississauga on a 4.5 hectare property at 2315 Loreland Avenue.
- The project arose out of a Ministry of Energy Clean Energy Supply (CES) procurement process in 2004. This contract was eventually assumed by the OPA.
- The project was undertaken to meet local reliability needs for the Southwest and Western GTA and has been positioned as part of the coal closure strategy.
- The plant is 200 metres from the nearest residence, 700 metres from the nearest hospital and 1.1 km from the nearest school.
- The project is strongly opposed by local residents. On October 12, 2011, the Mississauga Council passed a motion requesting that the government and the Premier take immediate action to cancel the contract, stop construction and return the site to pre-construction condition.
- In 2007, the Ontario Municipal Board reviewed and approved of the zoning of the project site after a lengthy and protracted process.
- In 2008, Ministry of Environment (MOE) granted all necessary environmental approvals.
- In March 2011, OPA renegotiated the initial Commercial Operation Date (C.O.D.) with Eastern Power, in recognition of lengthy regulatory approvals and financing delays experienced by Eastern Power. The new Milestone Date for Commercial Operation, when the plant is required to be fully operational, is September 1, 2014.
- In May 2011, Eastern Power finalized its financing arrangements with Credit Suisse and EIG. Around that time, the City of Mississauga issued building permits for the construction at the site.

- In June 2011, MOE announced that it will conduct an updated review of the approval for the gas plant to assess recent developments. No end-date was set for this process.
- In July 2011, Eastern Power reported that it had laid foundations for the steam and gas turbine halls and placed orders for the major equipment (generators, turbines, etc.).
- Construction continues at the site. Eastern Power has informed the OPA that it will not "down tools" until it receives formal notification of next steps.
- Next steps would require the OPA to be asked to approach Eastern Power to initiate discussions.
 - The discussion would likely include potential treatment of costs incurred to date (sunk costs – including equipment costs), treatment of construction and equipment related contracts, estimates and treatment of foregone revenue, and options and Eastern's interest with respect to relocating to an alternative site.

DISCUSSION:

- Discussion with Eastern Power may not be successful and could require the Government to consider other options (e.g. legislation).
- Initiating discussions to relocate or otherwise cancel the Mississauga plant may immediately cause Eastern Power to launch a law suit against either or both of the OPA and the Government.
 - Such a discussion will signal repudiation of the contract, which gives Eastern Power the right to sue the OPA.
- The Minister's request of the OPA may be found to be contractual interference and may attract liability to the Province.
 - Eastern Power could claim that the Crown induced the OPA's breach of contract where Eastern Power can show: 1) that the Crown knew about the contract; 2) the Crown's action was intended to cause the OPA to breach the contract; 3) the Crown's action caused the OPA to breach the contract; and 4) Eastern Power suffered damages as a result.
- The OPA may ask for a "direction" from the Minister under the *Electricity Act, 1998* before undertaking any discussions with Eastern Power. The Minister's authority to direct the OPA in this way is unclear.
 - The *Electricity Act, 1998* gives the Minister of Energy the authority to issue directions and directives to the OPA, which the OPA must follow.

- Under s.25.30(2), the Minister may issue, and the OPA shall follow in preparing its integrated power system plans, directives that have been approved by the Lieutenant Governor in Council that set out the goals to be achieved during the period to be covered by an integrated power system plan, including goals relating to,
 - (a) the production of electricity from particular combinations of energy sources and generation technologies;
 - (b) Increases in generation capacity from alternative energy sources, renewable energy sources or other energy sources;
 - (c) the phasing-out of coal-fired generation facilities; and
 - (d) the development and implementation of conservation measures, programs and targets on a system-wide basis or in particular service areas.
- Under s.25.32(4.1), the Minister may direct the OPA to undertake any request for proposal, any other form of procurement solicitation or any other initiative or activity that relates to,
 - (a) the procurement of electricity supply or capacity derived from renewable energy sources;
 - (b) reductions in electricity demand; or
 - (c) measures related to conservation or the management of electricity demand.
- Under s.25.32(7), the OPA shall enter into any contract following a procurement solicitation or other initiative referred to in clause (4) (a) [transition provision] if directed to do so by the Minister of Energy, and that contract shall be deemed to be a procurement contract that was entered into in accordance with any integrated power system plan and procurement process approved by the [Ontario Energy] Board.
- The Minister could likely rely on certain of these authorities to direct the OPA to enter into *negotiations* with Eastern Power but if the result is termination of the contract then none of these authorities unambiguously allows the Minister to direct the OPA to terminate a contract.
- Eastern Power's financiers may have a trade-related (e.g. NAFTA) claim if this project does not proceed.
 - An investor could allege treatment less favourable than that accorded to investments of other investors or could allege arbitrary and unfair application of government (including OPA) measures.
- Eastern Power's claim to damages is not clear. The contract limits liability for certain types of damages, including lost profits. The contract also provides for

damages for discriminatory action (e.g. legislation, regulation, or OIC that detrimentally affects Eastern Power). The enforceability of these provisions is not certain in these circumstances.

ALTERNATIVES CONSIDERED

Option 1 – Legislation

- The contract could be cancelled by legislation that would include provisions such as:
 - A provision expressly terminating the agreement;
 - A provision immunizing the Crown and the OPA from any and all lawsuits arising from the cancellation of the agreement
 - If desired, a provision addressing the types of compensation that will be provided and a mechanism (such as arbitration) for determining compensation, or alternatively stipulating that no compensation at all will be provided.
 - As the courts interpret these types of provisions very restrictively, the legislation would have to be drafted very carefully and be very clear and explicit.
 - Precedent: *Adams Mine Lake Act, 2004*
 - Pros
 - Allows Government to control level of compensation to be paid
 - Government can specify that no compensation will be paid for costs incurred past certain date (e.g. announcement of Government's policy or date of first reading)
 - Cons
 - Will be controversial and requires time to enact
 - Developer could bring law suit in the interim, though legislation could ultimately preclude liability and damages and address other issues under the contract, such as the discriminatory action clause
 - Potential impact on investment climate

Option 2 – Regulatory

- Existing regulatory approvals could be revoked or other regulatory steps could be taken to terminate the project
 - Pros
 - Eastern Power is subject to a Certificate of Approval under the *Environmental Protection Act*. Technically, approvals can be amended or revoked if legally justified.
 - Cons
 - Any revocation or other regulatory actions would be subject to appeal or judicial review. The Ministry of Environment would be required to demonstrate an environmental justification for the action

in order to successfully defend the challenge. No apparent environmental basis for action at this point.

- If such a challenge was successful, Eastern Power may initiate a civil action in tort against the Crown.
- Eastern Power may also seek a remedy against the OPA under the terms of the contract under the discriminatory action clause.

Option 3 – Negotiation (recommended)

- The OPA could attempt to commence negotiations with Eastern Power regarding stopping construction and developing a new location for a different facility.
 - Pros
 - OPA has the opportunity to assess position of Eastern Power and its interests in stopping construction.
 - OPA can begin discussion of a new site.
 - Cons
 - Eastern Power may refuse to commence discussions or seek to drag on discussions while it continues to construct the plant.

Option 4 – Unilateral termination of contract

- The OPA would inform Eastern Power that it will not perform its obligations under the contract
 - Pros
 - Eastern Power will be required to begin to mitigate its damages which means it should stop construction and the OPA will avoid damages for Eastern Power's additional costs that could have been avoided after the date of termination of contract
 - Cons
 - Does not provide opportunity to explore options for relocating project
 - Sends negative message to other OPA counterparties

Option 5 – Pay the plant not to run

- Allow plant to be constructed but ensure that it does not operate using contractual provisions related to directed dispatch.
 - Pros
 - OPA obligations to make monthly payments are low based on outcome of 2005 RFP process and paying plant not to operate over 20 years may be cheaper than paying for sunk costs, remediation of the site and potentially some lost profits
 - Cons
 - Will be difficult to convince community that plant will not operate

Date: October 19, 2011

Prepared by: Carolyn Calwell Deputy Director
Legal Service Branch
Ministry of Energy/Ministry of Infrastructure
(416) 212-5409

Approved by: Halyna Perun, A/Director
Legal Service Branch
Ministry of Energy/Ministry of Infrastructure
(416) 325--6681

Jennings, Rick (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: October 21, 2011 4:54 PM
To: Silva, Joseph (ENERGY); King, Ryan (ENERGY)
Cc: Perun, Halyna N. (ENERGY); Jennings, Rick (ENERGY)
Subject: Draft transition deck - take 2
Attachments: Greenfield South Construction Transition Oct 21 2011 (2).ppt

Confidential/Solicitor-Client Privileged

Joseph, thank you for taking the time to talk to me about the content of the deck. I have revised the last version that you saw to include the options considered by the OPA. I modified the pros and cons outlined in the OPA's deck in minor ways.

Rick/Ryan, this deck talks about alternate sites – you may want to change or modify these points.

Carolyn

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Greenfield South Generating Station

Date: October 21, 2011

Present Context

- Local residents do not support the Greenfield South gas plant in Mississauga, which is currently under construction.
- On October 12 the Mississauga Council passed a motion requesting that the Government and the Premier take immediate action to cancel the contract, stop construction and return the site to pre-construction condition.
- The recent construction of condominium towers in the general area has prompted a policy reconsideration of the location of the gas plant.

Background

- This project is a 280 MW combined cycle gas-fired generation station.
- The project was initiated by the Ministry of Energy through a request for proposals process in 2004.
- In 2005, the project was assigned to the OPA and the OPA entered into a contract with the project developer, Greenfield South Power Corporation (controlled by Eastern Power Corporation).
 - The Province is not a party to the contract
- The project suffered delays in securing approvals for constructing the project.
- The contract was amended in March 2009 to reflect these delays.
- The project has now received all required provincial and municipal approvals, including its Environmental Assessment, Certificates of Approval and building permit.
- Construction of the project is underway and continues.
- The contract requires the project to be in commercial operation by September 1, 2014.

Considerations

- The OPA has advised that it has no right under the contract to terminate in the current circumstances.
- The OPA has asked for instruction from government to approach the developer to begin negotiations to change or to terminate the contract.
- Eastern Power has informed the OPA that it will not 'down tools' until it receives formal notification of next steps.
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Options Considered by the OPA

1. Unilateral termination of contract

- OPA would inform Eastern Power that it will not perform its obligations under the contract
- Pros
 - Eastern Power will be required to begin to mitigate its damages, and should stop construction, and the OPA will avoid damages for Eastern Power's additional costs that could have been avoided after date of termination of contract
- Cons
 - Does not provide opportunity to explore options for relocating project
 - Sends negative message to other OPA counterparties

Options Considered by the OPA

2. Negotiation (recommended)

- OPA or designated negotiator could commence negotiations with Eastern Power regarding stopping construction and developing a new location for a different facility
- Pros
 - Provides the opportunity to assess position of Eastern Power and what it requires to cease construction and end the contract
 - Could consider alternative sites
- Cons
 - Eastern Power may refuse to commence discussions
 - OPA advises that Eastern Power is likely to continue construction while discussion is ongoing unless they receive an incentive to stop
 - May need to revert to other options at a later stage

Options Considered by the OPA

3. Legislation

- The contract could be cancelled by legislation that would include provisions expressly terminating the contract, immunizing the Crown and the OPA from law suits arising from termination of the contract and addressing types of and mechanisms to determine compensation
- Pros
 - Allows Government to control the compensation to be paid
 - Government can specify that no compensation will be paid for costs incurred past certain date (e.g. announcement of Government's policy or date of first reading)
- Cons
 - Will be controversial and requires time to enact
 - Eastern Power could commence law suit before legislation is enacted, although legislation could ultimately preclude liability and damages
 - Has a potential impact on investment climate

Options Considered by the OPA

4. Pay the plant not to run

- The OPA advises that the plant could be constructed but the developer could be directed to not operate it, using contractual provisions that give the OPA this authority.
- Pros
 - OPA obligations to make monthly payments are low based on outcome of 2005 RFP process and paying plant not to operate over 20 years may be cheaper than paying for sunk costs, remediation of the site and potentially some lost profits
- Cons
 - Will be difficult to convince community that plant will not operate

Legal Issues

- Any discussion with Eastern Power may not be successful and could require the Government to consider other options (e.g. legislation).
- Initiating discussions to relocate or otherwise cancel the Mississauga plant may cause Eastern Power to launch a law suit against either or both of the OPA and the Government.
- The Minister's request of the OPA to terminate the contract or commence discussions with Eastern Power may be contractual interference and may attract liability to the Province.
- The OPA may ask for a "direction" from the Minister under the *Electricity Act, 1998* before undertaking any discussions with Eastern Power. The Minister's authority to direct the OPA in this way is unclear.
- Eastern Power's financiers may have a claim under trade law if this project does not proceed.

MINISTRY OF ENERGY



Legend:

- A – Proposed Greenfield Site
- B – Closest House
- C – Closest Subdivision (North)
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- F – Sherway Gardens Mall

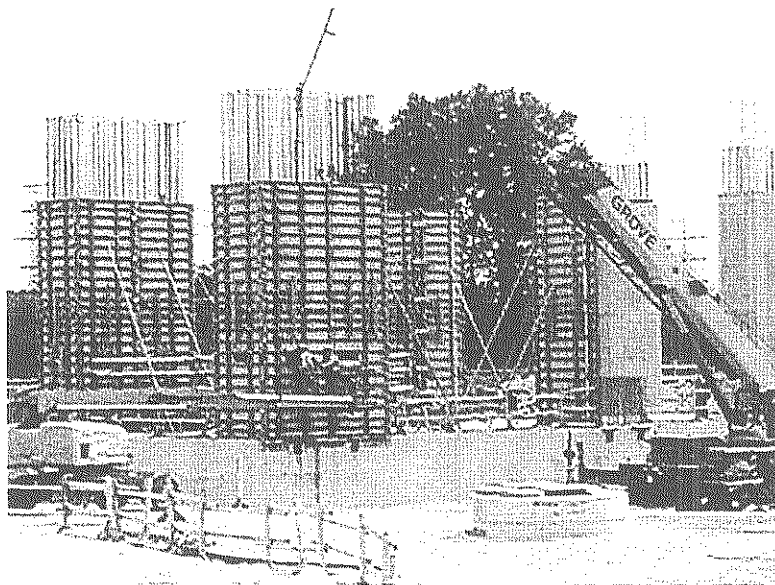
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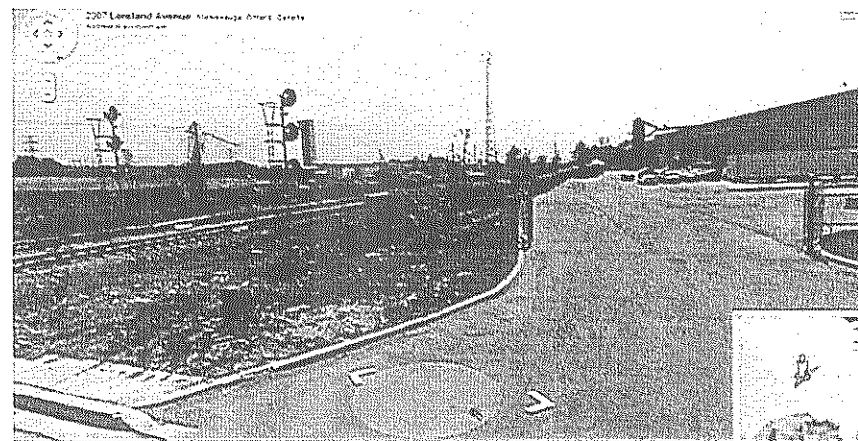
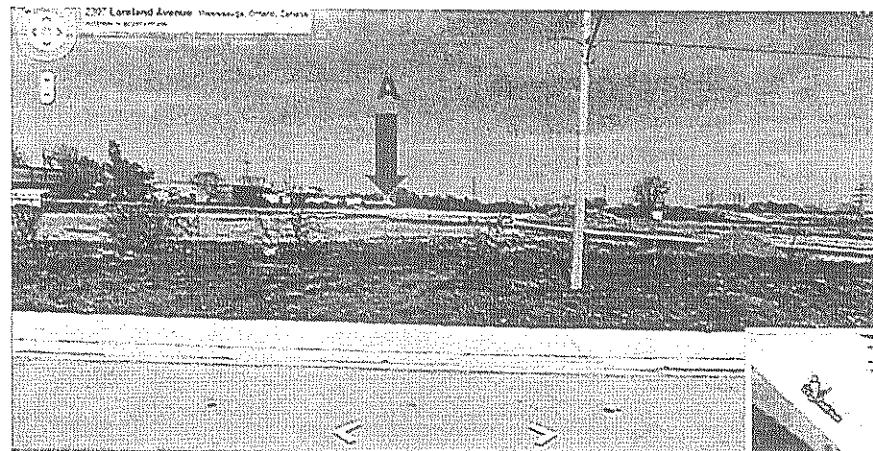
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MINISTRY OF ENERGY



*Plant construction as of 28 September 2011



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Jennings, Rick (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: October 21, 2011 12:52 PM
To: Silva, Joseph (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Jennings, Rick (ENERGY); King, Ryan (ENERGY)
Subject: transition deck re gas plant
Attachments: Greenfield South Construction to CO Oct 19 2011 PM.ppt

Hi Joseph – I understand the transition deck for gas plant is due end of day – what version of deck do you think we should include? The slim version of deck that we sent to CO (attached?) – modified to delete cab min slide and footer re Advice to Cabinet? Please remind me – thank you!

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

Notice

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Greenfield South Generating Station

Next Steps – Advice to Cabinet

Date: October 20, 2011

Local Context

- Local residents do not support the Greenfield South gas plant in Mississauga, which is currently under construction.
- On October 12 the Mississauga Council passed a motion requesting that the Government and the Premier take immediate action to cancel the contract, stop construction and return the site to pre-construction condition.
- The recent construction of condominium towers in the general area has prompted a policy reconsideration of the location of the gas plant.

Legal Issues

- Discussion with Eastern Power may not be successful and could require the Government to consider other options (e.g. legislation).
- Initiating discussions to relocate or otherwise cancel the Mississauga plant may cause Eastern Power to launch a law suit against either or both of the OPA and the Government.
- The Minister's request of the OPA may be contractual interference and may attract liability to the Province.
- The OPA may ask for a "direction" from the Minister under the *Electricity Act, 1998* before undertaking any discussions with Eastern Power. The Minister's authority to direct the OPA in this way is unclear.
- Eastern Power's financiers may have a claim under NAFTA if this project does not proceed.

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PRIVILEGED ADVICE TO CABINET



Cabinet Minute

Cabinet agreed that:

- The Ministry of Energy to work with the Ontario Power Authority to enter into discussions with Eastern Power toward a satisfactory resolution of the Mississauga site.
- The Minister of Energy to report back to Cabinet by December 2011 with the details of the discussions with Eastern Power.

Appendix 1

Greenfield South Background

Key Facts About the Greenfield South Plant

- Greenfield South Power Corporation (controlled by Eastern Power Corporation) was the successful applicant in Ministry of Energy run Clean Energy Supply (CES) RFP and signed a contract with the OPA in April 2005.
- Eastern Power, based in Ontario, has received all required provincial approvals, including Environmental Assessment and Certificates of Approval.
- Eastern Power has received all required municipal approvals, including building site approval from the City of Mississauga issued in May 2011.
- Eastern Power has secured debt financing from Credit Suisse and EIG (confirmed by the OPA).

Considerations

- Construction continues at the Greenfield South site.
- Greenfield South Power Corporation (controlled by Eastern Power Corporation) has an enforceable contract with the Ontario Power Authority and all applicable approvals. The developer's work appears to be in compliance with the contract and current approvals.
- The OPA is party to and administers the contract with Eastern Power. The Province is not a party to the contract. The OPA has advised that it has no right under the contract to terminate in the current circumstances.
- The OPA has asked for instruction from government to approach the developer to begin negotiations to change or to terminate the contract.
- Eastern Power has informed the OPA that it will not 'down tools' until it receives formal notification of next steps.
- The identification of potential alternative site options has not yet been completed. Each of these alternative sites have various issues associated with them.

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Next Steps Involve the OPA

- The OPA to be asked to approach Eastern Power to initiate discussions. The discussion would likely include potential treatment of costs incurred to date (sunk costs – including equipment costs), treatment of construction and equipment related contracts, estimates and treatment of foregone revenue, and options and Eastern's interest with respect to relocating to an alternative site.
- At this stage, the OPA has only made a preliminary analysis of costs.
- Eastern Power may or may not be interested in developing the proposed alternative sites, may be willing to walk away from the Mississauga plant for a financial cash settlement or may view its prospects as being better through the courts.

Next Steps Involve the OPA

- Discussion with Eastern Power would likely need to address potential treatment of costs incurred to date (sunk costs – including equipment costs), treatment of construction and equipment related contracts, estimates and treatment of foregone revenue, and options and Eastern's interest with respect to relocating to an alternative site.
- At this stage, the OPA has only made a preliminary analysis of costs.
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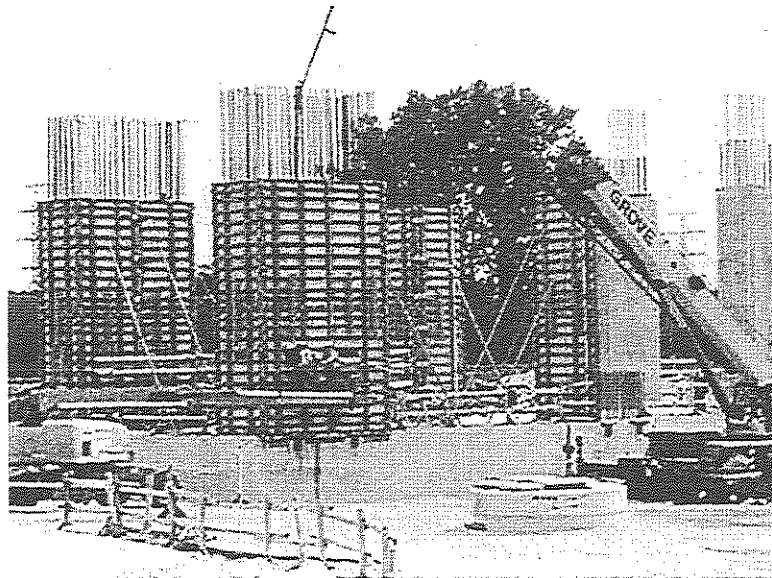
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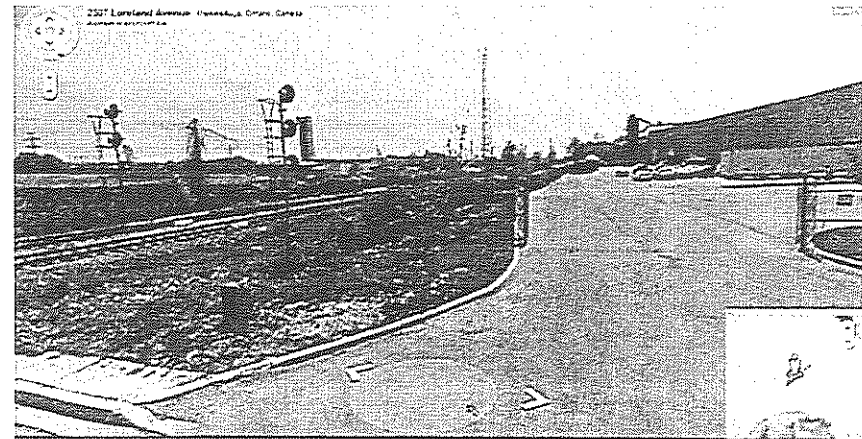
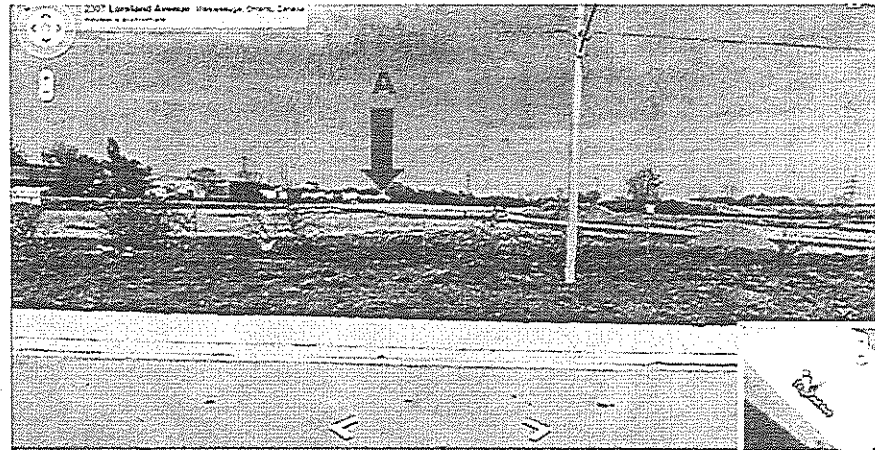
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*Plant construction as of 28 September 2011



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Jennings, Rick (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: October 21, 2011 2:39 PM
To: Silva, Joseph (ENERGY); King, Ryan (ENERGY)
Cc: Perun, Halyna N. (ENERGY); Jennings, Rick (ENERGY)
Subject: Draft transition deck
Attachments: Greenfield South Construction Transition Oct 21 2011.ppt

Confidential/Solicitor-Client Privileged

Please find attached a draft deck. It will look familiar to you. I wasn't quite sure how to cast it, as I'm not fully up to speed on any discussion that occurred yesterday. The "Next Steps involve the OPA" slide sort of makes a leap that could be addressed through comments if the Minister hasn't already been prepared for it.

Feel free to edit at will.

Carolyn

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Greenfield South Generating Station

Date: October 20, 2011

Present Context

- Local residents do not support the Greenfield South gas plant in Mississauga, which is currently under construction.
- On October 12 the Mississauga Council passed a motion requesting that the Government and the Premier take immediate action to cancel the contract, stop construction and return the site to pre-construction condition.
- The recent construction of condominium towers in the general area has prompted a policy reconsideration of the location of the gas plant.

Background

- This project is a 280 MW combined cycle gas-fired generation station.
- The project was initiated by the Ministry of Energy through a request for proposals process in 2004.
- In 2005, the project was assigned to the OPA and the OPA entered into a contract with the project developer, Greenfield South Power Corporation.
 - The Province is not a party to the contract
- The project suffered delays in securing approvals for constructing the project.
- The contract was amended in March 2009 to reflect these delays.
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- Construction of the project is underway and continues.
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Considerations

- The OPA has advised that it has no right under the contract to terminate in the current circumstances.
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Jennings, Rick (ENERGY)

From: Adkar, Samir (ENERGY)
Sent: October 21, 2011 4:45 PM
To: Jennings, Rick (ENERGY)
Subject: RE: Eastern Power

Hi Rick,

Eastern Power is "affiliated" with Greenfield South Power Corp. In fact, both companies have the same corporate address and same contact, Hubert Vogt, Vice President for their current OEB generation licences. (Eastern Power owns and operates 2 small landfill gas powered sites).

From very recent press that I've seen, it's Hubert who is making statements about the continued construction... I haven't heard anything from Greg recently.

Greg Vogt was vice-president back when I worked there many years ago, but he since became President (Herman Walter was president back when I worked there). I've seen Greg's name and title as President of Eastern Power in many places through the years (including being named in lawsuits), though I have not seen it very recently, though I would assume he's still president as I have not heard anything otherwise. I tried to discretely call Eastern Power, but I'm not getting an answer.

Greg and Hubert are the only principles I know of that are still with Eastern Power (and Greenfield South Power Corp.).

I hope that helps. Please let me know if you need further information.

Regards,
Samir

From: Jennings, Rick (ENERGY)
Sent: October 21, 2011 3:50 PM
To: Adkar, Samir (ENERGY)
Subject: Eastern Power

Samir, I have been asked if we can identify the principals and details around Eastern Power. While I have conveyed this on several occasions it appears that I am not believed. Could you summarize for me, based on your work experience there, who the principals are – Greg Vogt etc. and its structure?

Jennings, Rick (ENERGY)

From: Silva, Joseph (ENERGY)
Sent: October 21, 2011 5:14 PM
To: Calwell, Carolyn (ENERGY); King, Ryan (ENERGY)
Cc: Perun, Halyna N. (ENERGY); Jennings, Rick (ENERGY); Dunning, Rebecca (ENERGY)
Subject: RE: Draft transition deck - take 2
Attachments: Greenfield South Construction Transition Oct 21 2011 (2).ppt

Thanks very much Carolyn. Really appreciate this.

Rick – please do take a look if you can. The plan is to bring this as the transition document to guide Greenfield discussion.

Joseph

From: Calwell, Carolyn (ENERGY)
Sent: October 21, 2011 4:54 PM
To: Silva, Joseph (ENERGY); King, Ryan (ENERGY)
Cc: Perun, Halyna N. (ENERGY); Jennings, Rick (ENERGY)
Subject: Draft transition deck - take 2

Confidential/Solicitor-Client Privileged

Joseph, thank you for taking the time to talk to me about the content of the deck. I have revised the last version that you saw to include the options considered by the OPA. I modified the pros and cons outlined in the OPA's deck in minor ways.

Rick/Ryan, this deck talks about alternate sites – you may want to change or modify these points.

Carolyn

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4. Pay the plant not to run

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MINISTRY OF ENERGY



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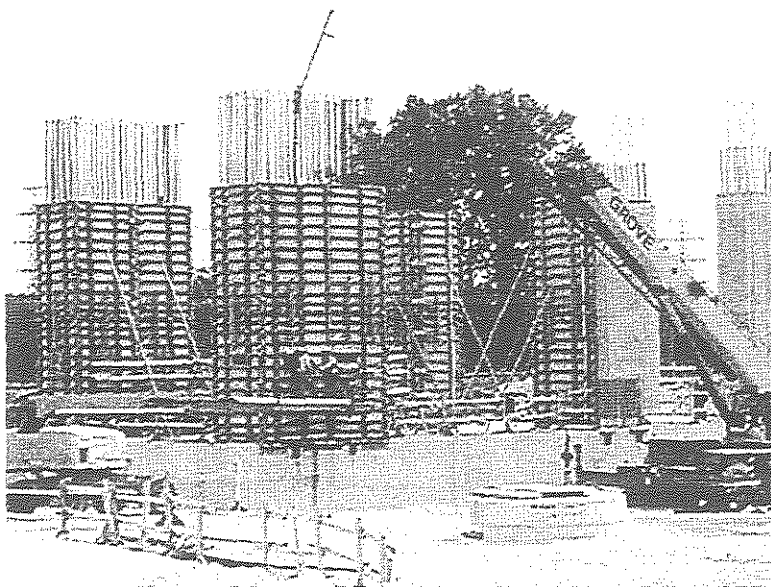
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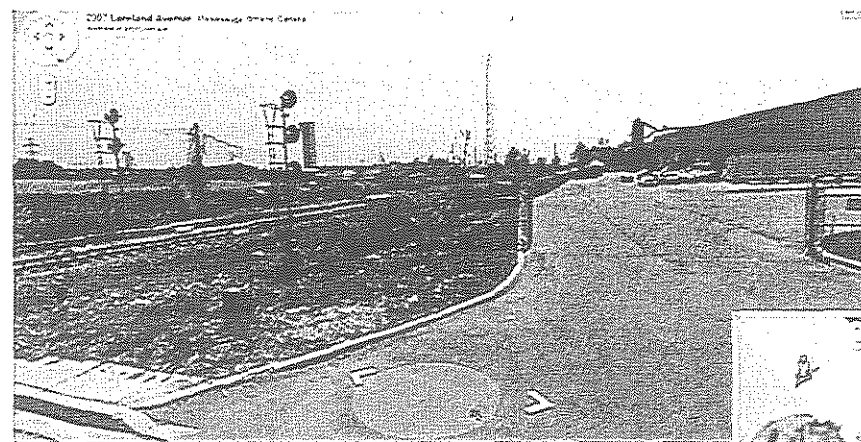
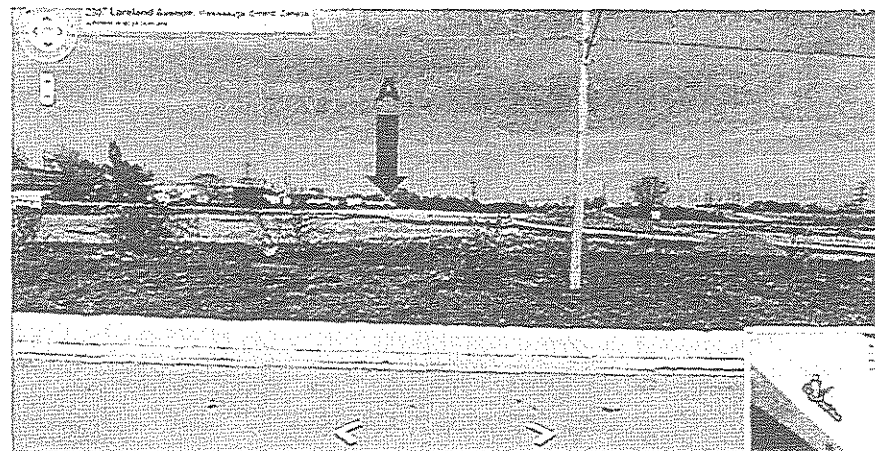
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Jennings, Rick (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: October 21, 2011 5:39 PM
To: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); King, Ryan (ENERGY)
Cc: Perun, Halyna N. (ENERGY)
Subject: FW: Draft transition deck - take 2 1/2
Attachments: Greenfield South Construction Transition Oct 21 2011 (2).ppt

Thank you, Rick.

For what it's worth, it would be preferable to refer to "resolution" (or something along those lines – instead of "settlement") in the 4th bullet of the Legal Issues slide because settlement implies litigation, which we hope to avoid. I made that change in the attached.

Carolyn

From: Jennings, Rick (ENERGY)
Sent: October 21, 2011 5:27 PM
To: Calwell, Carolyn (ENERGY); Silva, Joseph (ENERGY); King, Ryan (ENERGY)
Cc: Perun, Halyna N. (ENERGY)
Subject: RE: Draft transition deck - take 2

Attached are my edits –

Clarification of 2nd and 3rd bullets on Background
Update of 3rd bullet on considerations page
Correction of 4th bullet on Legal Issues page.

From: Calwell, Carolyn (ENERGY)
Sent: October 21, 2011 4:54 PM
To: Silva, Joseph (ENERGY); King, Ryan (ENERGY)
Cc: Perun, Halyna N. (ENERGY); Jennings, Rick (ENERGY)
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Background

- This project is a 280 MW combined cycle gas-fired generation station.
- In 2004, the Ministry of Energy launched a competitive request for proposals for gas-fired generation in Ontario.
- In April 2005, Eastern Power was selected along with three other gas-fired projects. These projects were assigned to the OPA and the OPA entered into a contract with the project developer, Greenfield South Power Corporation (controlled by Eastern Power Corporation).
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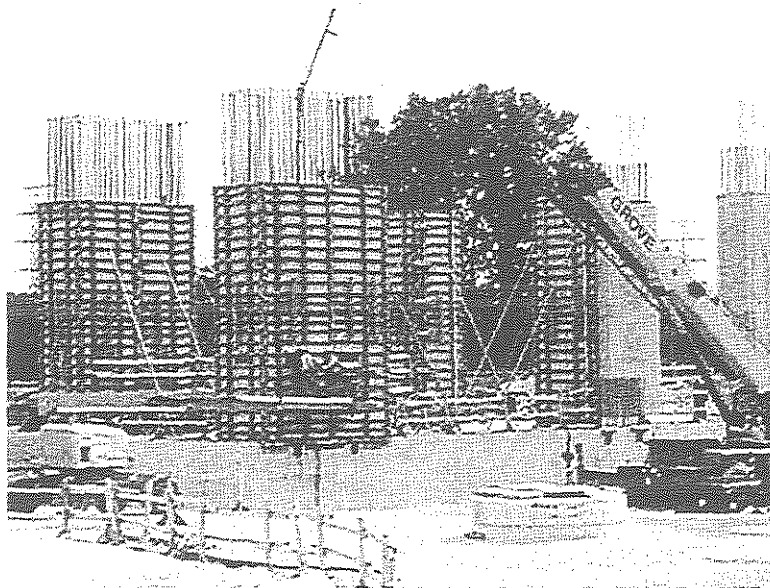
Distance:

- A to B: 220 Meters
- A to C: 270 Meters
- A to D: 500 Meters
- A to E: 740 Meters
- A to F: 910 Meters

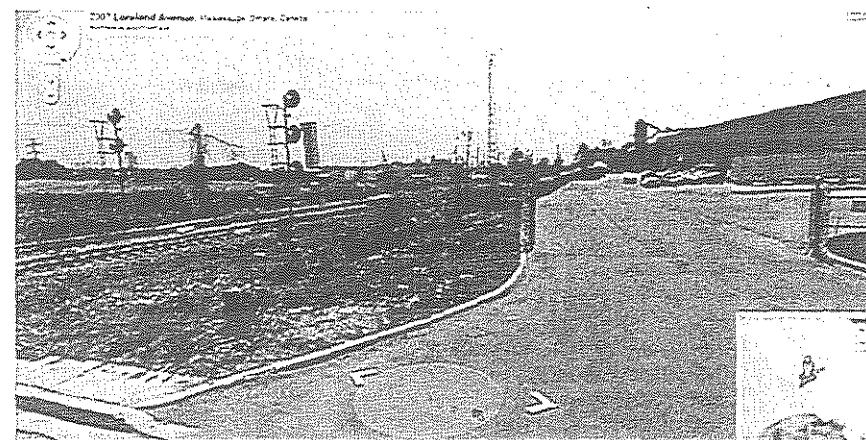
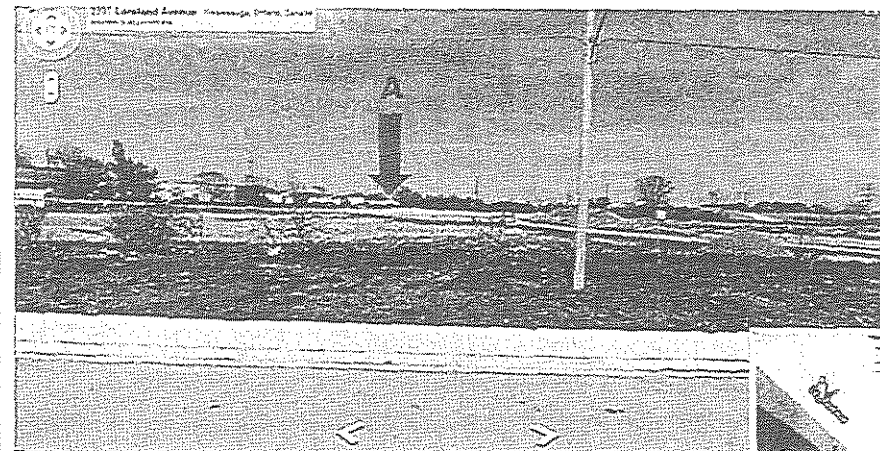
CONFIDENTIAL / ADVICE TO MINISTER
SOLICITOR-CLIENT PRIVILEGED



MINISTRY OF ENERGY



*Plant construction as of 28 September 2011



CONFIDENTIAL / ADVICE TO MINISTER
SOLICITOR-CLIENT PRIVILEGED



Jennings, Rick (ENERGY)

From: King, Ryan (ENERGY)
Sent: October 24, 2011 12:26 PM
To: Rehob, James (ENERGY); Johnson, Paul (ENERGY); Sharkawi, Rula (ENERGY)
Cc: Jennings, Rick (ENERGY); Perun, Halyna N. (ENERGY); Calwell, Carolyn (ENERGY); McKeever, Garry (ENERGY); MacCallum, Doug (ENERGY); Jenkins, Allan (ENERGY)
Subject: RE: Mississauga decision tree
Attachments: Greenfield South Decision Tree.doc

Importance: High

James, Paul, Rula,
Attached is a draft decision tree. I'm not sure if this is precisely what MO envisaged so please change if needed or expanded. I'm told we need to have something this afternoon.

From: Perun, Halyna N. (ENERGY)
Sent: October 24, 2011 11:10 AM
To: Silva, Joseph (ENERGY); Calwell, Carolyn (ENERGY); Sharkawi, Rula (ENERGY); Jennings, Rick (ENERGY); King, Ryan (ENERGY)
Cc: Rehob, James (ENERGY); Johnson, Paul (ENERGY)
Subject: RE: Mississauga decision tree

Ryan – just talked to Joseph – and if you could take the pen on this (as Carolyn is at a forum and I am going into the briefings) we would appreciate it

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Letter goes out today – with two boxes –

(1) they agree to negotiate – what follow ;

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so what happens in each scenario and what can be said publicly.

The request is for this product for the 4 p. briefing today.

I have asked James and Paul to work on this – so please loop them in

Thank you

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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From: Silva, Joseph (ENERGY)

Sent: October 24, 2011 11:02 AM

To: Perun, Halyna N. (ENERGY); Calwell, Carolyn (ENERGY); Sharkawi, Rula (ENERGY); Jennings, Rick (ENERGY)

Subject: Mississauga decision tree

Importance: High

Hi everyone,

PO/CO would like to send the letter out today. In order to facilitate Minister review and possibly signature today, Craig would like to see a "decision tree" type document setting out what could happen after we send out the letter. He would like Communications lens on each step (messaging, etc).

Halyna – can you guys take the lead on this, with input from Rick and Rula? Let's chat over the phone. We'll need a draft early afternoon. I think we've got the thinking already, just need to organise and put on paper.

Many thanks
Joseph

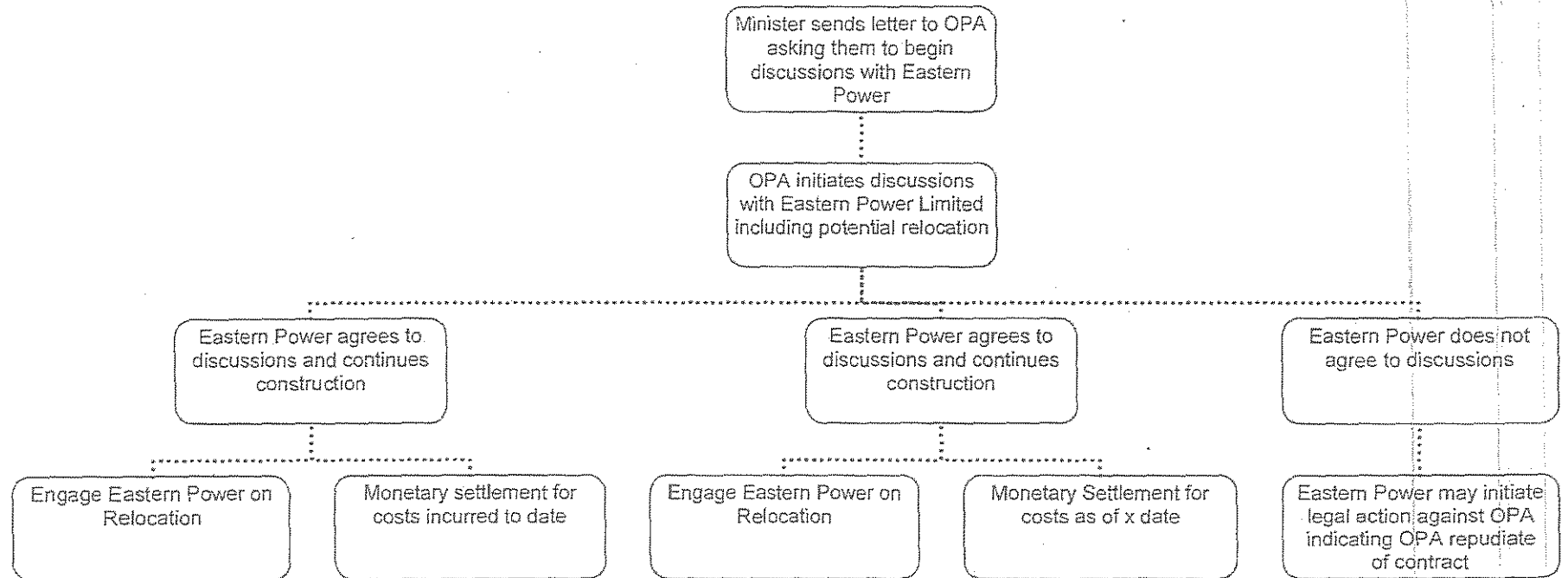
Joseph Silva

Executive Assistant (A) to the Deputy Minister of Energy

Hearst Block 4th Flr, 900 Bay St Toronto ON M7A 2E1

Tel: 416-325-2371 , Email: Joseph.Silva@ontario.ca

Greenfield South: Decision Tree



Jennings, Rick (ENERGY)

From: King, Ryan (ENERGY)
Sent: October 24, 2011 12:31 PM
To: Rehob, James (ENERGY); Johnson, Paul (ENERGY); Sharkawi, Rula (ENERGY)
Cc: Jennings, Rick (ENERGY); Perun, Halyna N. (ENERGY); Calwell, Carolyn (ENERGY); McKeever, Garry (ENERGY); MacCallum, Doug (ENERGY); Jenkins, Allan (ENERGY)
Subject: RE: Mississauga decision tree
Attachments: Greenfield South Decision Treev2.doc

Please use this version (a typo in one of the boxes)

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Sent: October 24, 2011 12:26 PM
To: Rehob, James (ENERGY); Johnson, Paul (ENERGY); Sharkawi, Rula (ENERGY)
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Subject: RE: Mississauga decision tree

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I have asked James and Paul to work on this – so please loop them in

Thank you

Halyna

Halyna N. Perun
A/Director
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Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
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Ph: (416) 325-6681 / Fax: (416) 325-1781
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Subject: Mississauga decision tree
Importance: High

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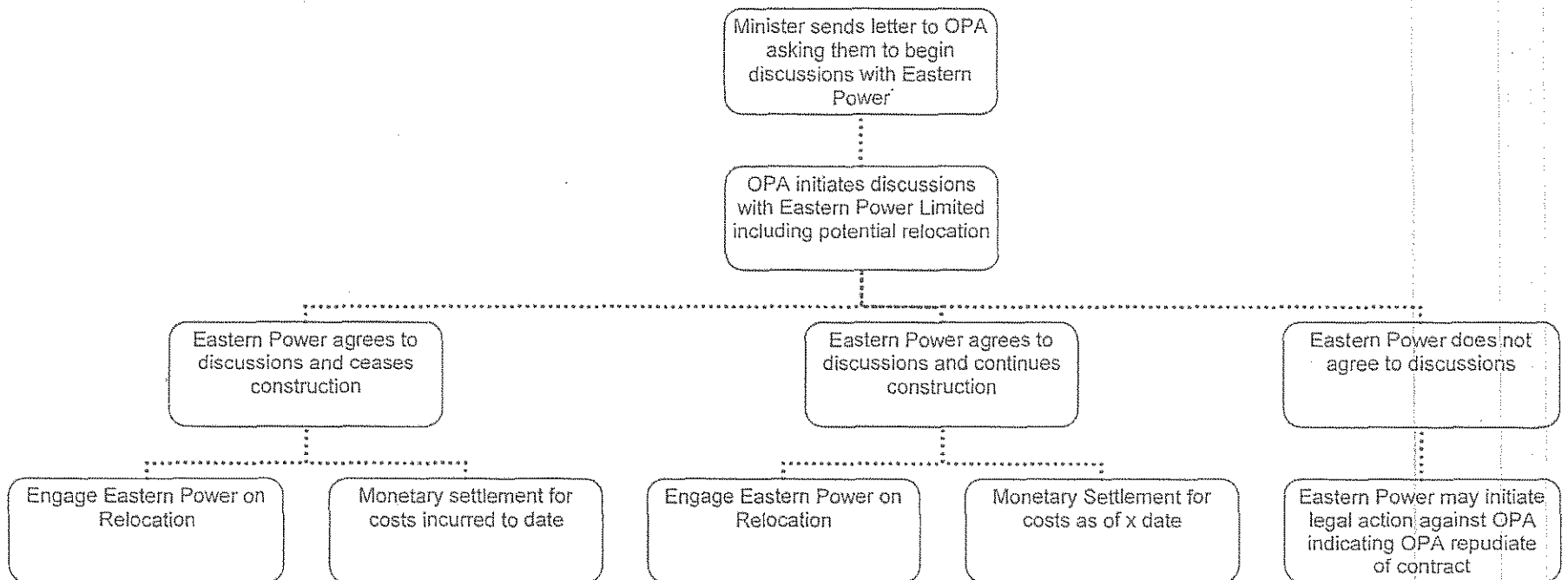
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Joseph Silva
Executive Assistant (A) to the Deputy Minister of Energy
Hearst Block 4th Flr, 900 Bay St Toronto ON M7A 2E1
Tel: 416-325-2371 , Email: Joseph.Silva@ontario.ca

Greenfield South: Decision Tree



Jennings, Rick (ENERGY)

From: Rehob, James (ENERGY)
Sent: October 24, 2011 12:54 PM
To: King, Ryan (ENERGY); Johnson, Paul (ENERGY); Sharkawi, Rula (ENERGY)
Cc: Jennings, Rick (ENERGY); Perun, Halyna N. (ENERGY); Calwell, Carolyn (ENERGY); McKeever, Garry (ENERGY); MacCallum, Doug (ENERGY); Jenkins, Allan (ENERGY)
Subject: RE: Mississauga decision tree
Attachments: Greenfield South Decision Treev2 (LSB (JPR) Cmnts - Oct 24-11 (1A)).doc

Privileged & Confidential Legal Advice / Solicitor & Client Privileged

October 24, 2011

Hi, Ryan. Attached, please find a gently revised version of your good Decision Tree document which reflects LSB comments on the understanding that this document (i) is only dealing with one, discrete option – the option of sending a non-binding letter from the Minister to the OPA as opposed to a binding letter of direction; (ii) that the option deals only with the OPA entering into "discussions/negotiations" with the OPA with a view to finding an appropriate resolution to the matter.

Please consider these proposed revisions and contact me at x.56676 should you wish to further discuss.

One final point: although it is true that the OPA should be the main focal point of the commercial liability associated with this matter (e.g. Easter Power should focus any and all litigation interest on the OPA given the manner in which the legislation is structured and the fact that the OPA is the official counterparty to the contract, and the reasonably low risk that a successful action against Government would occur in the circumstances where the Minister sends a non-binding letter, I simply note that it remains open to Eastern to attempt to add the Crown as a party to any suit, if only to increase settlement pressure on the OPA – this may not need to be noted specifically on the decision tree, but it may be useful to bear in mind nonetheless as we develop the options.

Kindly note that Carolyn, Halyna or Paul may have further comments on the matter for us, hence more may be coming.

Kindly,

James

From: King, Ryan (ENERGY)
Sent: October 24, 2011 12:31 PM
To: Rehob, James (ENERGY); Johnson, Paul (ENERGY); Sharkawi, Rula (ENERGY)
Cc: Jennings, Rick (ENERGY); Perun, Halyna N. (ENERGY); Calwell, Carolyn (ENERGY); McKeever, Garry (ENERGY); MacCallum, Doug (ENERGY); Jenkins, Allan (ENERGY)
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Importance: High

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Subject: RE: Mississauga decision tree

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Halyna

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Subject: Mississauga decision tree
Importance: High

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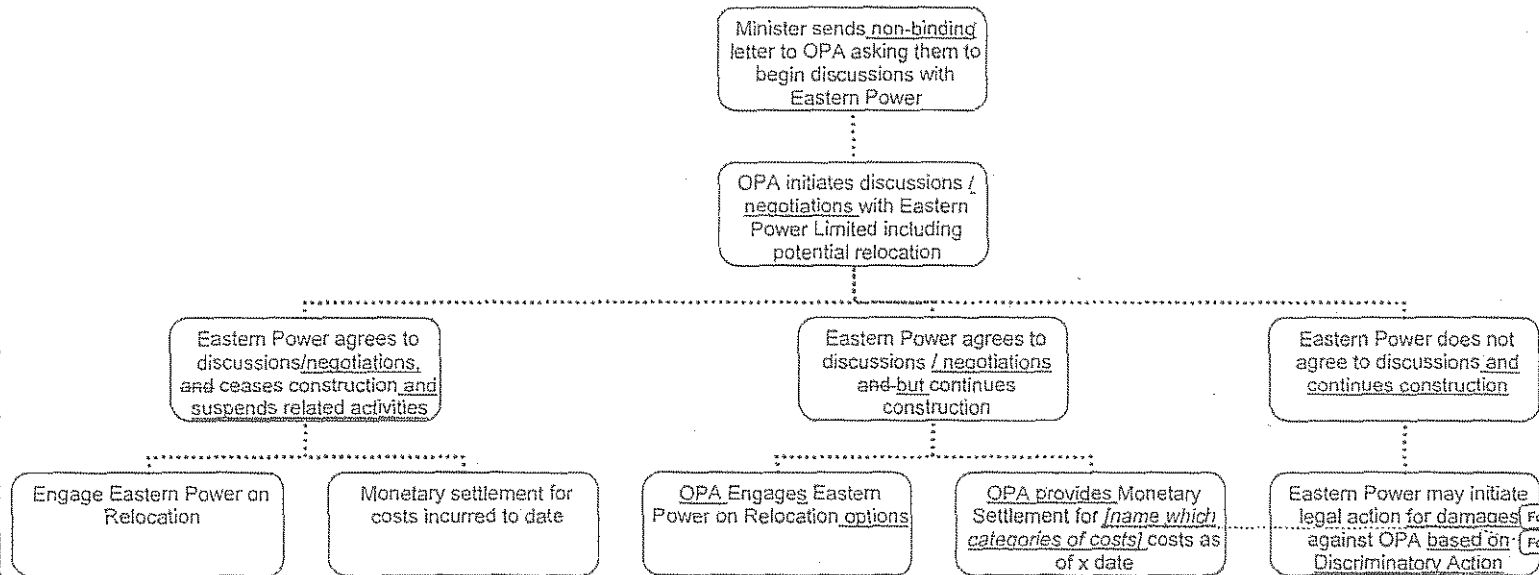
Many thanks
Joseph

Joseph Silva

Executive Assistant (A) to the Deputy Minister of Energy
Hearst Block 4th Flr, 900 Bay St Toronto ON M7A 2E1
Tel: 416-325-2371 , Email: Joseph.Silva@ontario.ca

LSB Comments (Oct-24-11) – Greenfield South: Decision Tree

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Jennings, Rick (ENERGY)

From: Rehob, James (ENERGY)
Sent: October 24, 2011 5:36 PM
To: Kovesfalvi, Sylvia (ENERGY); King, Ryan (ENERGY); Perun, Halyna N. (ENERGY); Sharkawi, Rula (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Johnson, Paul (ENERGY); Jennings, Rick (ENERGY); Silva, Joseph (ENERGY)
Subject: RE:

Hello,

1. My information on corporation is from its own website and lists it as **Eastern Power Limited**. Here is the link:

<http://greenfieldsouth.ca/Aboutus.htm>

2. The "it would be inappropriate to provide..." language is fine with me, though consider adding the phrase "...further information" since the messaging currently states that discussions are underway, etc. – it is *always* an option in these kinds of circumstances to use the "inappropriate to comment further" language when negotiations are in flux and until options are more firmly developed and certain decisions are made (my view);

From: Kovesfalvi, Sylvia (ENERGY)
Sent: October 24, 2011 5:28 PM
To: Rehob, James (ENERGY); King, Ryan (ENERGY); Perun, Halyna N. (ENERGY); Sharkawi, Rula (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Johnson, Paul (ENERGY); Jennings, Rick (ENERGY); Silva, Joseph (ENERGY)
Subject: RE:

Hi all –

Three observations from Coms:

- is it Eastern Power or Powers? It appears as both throughout.
- Can we add a general message that says something like: As discussions are ongoing, it would be inappropriate to provide that detail at this time – that we can use in response to the myriad of questions we are already getting (why are you continuing to build? What are the mechanics/process of contract cancellation? what was the output and cost for Oakville estimated at. What was the date of cancellation? What is the output and cost for Mississauga and what is the anticipated date of completion?)
- The Minister issued the following statement this afternoon. May not align with the third recommended messaging guideline (should wait until Eastern has signalled interest in relocation).

"The Ontario government is committed to relocating the natural gas plant originally planned for Mississauga. The government will work with the company to find a suitable location for this plant. More information will become available as discussions progress."

From: Rehob, James (ENERGY)
Sent: October 24, 2011 5:18 PM
To: King, Ryan (ENERGY); Perun, Halyna N. (ENERGY); Sharkawi, Rula (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Johnson, Paul (ENERGY); Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Kovesfalvi, Sylvia (ENERGY)
Subject: RE:

Looks good to me – the "Advice to Minister" heading looks good too – thanks - James

From: King, Ryan (ENERGY)
Sent: October 24, 2011 5:07 PM
To: Rehob, James (ENERGY); Perun, Halyna N. (ENERGY); Sharkawi, Rula (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Johnson, Paul (ENERGY); Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Kovesfalvi, Sylvia (ENERGY)
Subject: RE:

V6 with some minor re-spacing

From: King, Ryan (ENERGY)
Sent: October 24, 2011 4:55 PM
To: Rehob, James (ENERGY); Perun, Halyna N. (ENERGY); Sharkawi, Rula (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Johnson, Paul (ENERGY); Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Kovesfalvi, Sylvia (ENERGY)
Subject: RE:

Thanks James,
I've incorporated into the revised note.

From: Rehob, James (ENERGY)
Sent: October 24, 2011 4:50 PM
To: King, Ryan (ENERGY); Perun, Halyna N. (ENERGY); Sharkawi, Rula (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Johnson, Paul (ENERGY); Jennings, Rick (ENERGY); Silva, Joseph (ENERGY)
Subject: RE:

Hi, Ryan - here is my input into the points stated below:

Minister Messaging Guidelines:

- Should use language that highlights ongoing discussions between OPA and Eastern Power
- Could consider statements emphasizing Government's encouragement of expeditious resolution of matter, etc. on reasonable commercial terms, putting rate-payer first.
- Should avoid making premature commitments that could hinder negotiations.
- Should wait until Eastern Power has signalled interest in negotiation. (ie Eastern may not be interested in relocation).
- Should be non-committal at each stage until decisions or agreements have been arrived at/agreed to.
- Should use extreme caution if referring to legislative option to note that it requires approval of Cabinet and Legislature to proceed.

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

From: King, Ryan (ENERGY)
Sent: October 24, 2011 4:36 PM
To: Perun, Halyna N. (ENERGY); Rehob, James (ENERGY); Sharkawi, Rula (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Johnson, Paul (ENERGY); Jennings, Rick (ENERGY); Silva, Joseph (ENERGY)
Subject: RE:

Revised decision-tree. Rula, please add or subtract messaging as you guys see fit. The key issue is that we would not want to have messaging that does not get ahead of/or prejudices any negotiations that are occurring.

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

From: Perun, Halyna N. (ENERGY)
Sent: October 24, 2011 4:07 PM
To: Rehob, James (ENERGY); King, Ryan (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Johnson, Paul (ENERGY); Jennings, Rick (ENERGY); Sharkawi, Rula (ENERGY); Silva, Joseph (ENERGY)
Subject: Re:

Hi - Craig M asked for an "overlay" of what min can/ cannot say - to be added to the decision tree doc - and comms need to be looped in - thanks

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

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

From: Silva, Joseph (ENERGY)
To: Rehob, James (ENERGY); King, Ryan (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Perun, Halyna N. (ENERGY); Johnson, Paul (ENERGY)
Sent: Mon Oct 24 15:12:21 2011
Subject: Re:

Thanks very much James

Sent using BlackBerry Wireless

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

From: Rehob, James (ENERGY)
To: Silva, Joseph (ENERGY); King, Ryan (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Perun, Halyna N. (ENERGY); Johnson, Paul (ENERGY)
Sent: Mon Oct 24 15:10:58 2011
Subject: RE:

Hi, Joseph - looks good - final comment would be that you may wish to re-add the colour to the "Legislative" option box since it is a special option - it involves the Legislature taking a very deliberate action in respect of a commercial transaction. Consider - otherwise, those are my comments. Please do let me know if you require anything further - x.56676.
James

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

From: Silva, Joseph (ENERGY)
Sent: October 24, 2011 3:00 PM
To: Rehob, James (ENERGY); King, Ryan (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Perun, Halyna N. (ENERGY); Johnson, Paul (ENERGY)
Subject: RE:

Thanks very much. Tried to make it simpler (redundant now but easier to follow).

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

From: Rehob, James (ENERGY)
Sent: October 24, 2011 2:56 PM
To: King, Ryan (ENERGY); Silva, Joseph (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Perun, Halyna N. (ENERGY); Johnson, Paul (ENERGY)
Subject: RE:

Hi, it's a bit busy but can't be helped given need expressed for comms points. Nothing further from me on this version (captures most of LSB's previous comments very effectively.

Great work, Ryan!

Let me know if you need anything further - x.56676

James

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

From: King, Ryan (ENERGY)

Sent: October 24, 2011 2:49 PM

To: Silva, Joseph (ENERGY); Rehob, James (ENERGY)

Cc: Calwell, Carolyn (ENERGY); Perun, Halyna N. (ENERGY); Johnson, Paul (ENERGY)

Subject: RE:

Revised decision tree attached.

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

From: Silva, Joseph (ENERGY)

Sent: October 24, 2011 2:34 PM

To: Rehob, James (ENERGY); King, Ryan (ENERGY)

Cc: Calwell, Carolyn (ENERGY); Perun, Halyna N. (ENERGY); Johnson, Paul (ENERGY)

Subject: Re:

Tx James

Ryan will tweak...

Ryan - will need pls within next 15 mins or so

Sent using BlackBerry Wireless

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

From: Rehob, James (ENERGY)

To: King, Ryan (ENERGY); Silva, Joseph (ENERGY)

Cc: Calwell, Carolyn (ENERGY); Perun, Halyna N. (ENERGY); Johnson, Paul (ENERGY)

Sent: Mon Oct 24 14:12:42 2011

Subject: RE:

The only thing I would note is that, unless we radically change the process in this case, most if not all letters to the OPA from the Minister (directions or otherwise) are public (certainly subject to disclosure under FIPPA). Hence, we'll likely want to have some level of public/media positioning at the ready (just one lawyer's view) - if not on the slide itself then on a further slide.

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

From: King, Ryan (ENERGY)

Sent: October 24, 2011 2:07 PM

To: Silva, Joseph (ENERGY)

Cc: Rehob, James (ENERGY)

Subject: RE:

Can you please call me? Most of the steps in this process, I assume are fully confidential including the OPA discussions. Messaging would only apply in the event a settlement has been reached or in the alternative, the matter proceeds to the courts. I can add messaging in here but I don't believe there would be much else unless it is the Minister's intent to make these proceeding public.

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

From: Silva, Joseph (ENERGY)

Sent: October 24, 2011 2:03 PM

To: King, Ryan (ENERGY)

Cc: Calwell, Carolyn (ENERGY); Perun, Halyna N. (ENERGY); Rehob, James (ENERGY); Jennings, Rick (ENERGY); Jenkins, Allan (ENERGY); McKeever, Garry (ENERGY); Sharkawi, Rula (ENERGY)
Subject: RE:

Thanks Ryan. We'll need to add comms messaging/positioning under each one...

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

From: King, Ryan (ENERGY)
Sent: October 24, 2011 1:56 PM
To: Silva, Joseph (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Perun, Halyna N. (ENERGY); Rehob, James (ENERGY); Jennings, Rick (ENERGY); Jenkins, Allan (ENERGY); McKeever, Garry (ENERGY); Sharkawi, Rula (ENERGY)
Subject: RE:

Draft decision tree attached. Please let us know any additions/suggestions

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

From: Rehob, James (ENERGY)
Sent: October 24, 2011 1:41 PM
To: Silva, Joseph (ENERGY); King, Ryan (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Perun, Halyna N. (ENERGY)
Subject: RE:

Legal has been working with Ryan and has fed comments/revisions to slide. Slide looked quite good from LSB perspective given one-slide format - Ryan?
James

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

From: Silva, Joseph (ENERGY)
Sent: October 24, 2011 1:40 PM
To: Rehob, James (ENERGY); King, Ryan (ENERGY)
Subject:

Hi guys how are we doing with decision tree? Our briefings are \$oving quickly

Sent using BlackBerry Wireless

Jennings, Rick (ENERGY)

From: King, Ryan (ENERGY)
Sent: October 24, 2011 7:26 PM
To: Kovesfalvi, Sylvia (ENERGY); Perun, Halyna N. (ENERGY)
Cc: Sharkawi, Rula (ENERGY); Jennings, Rick (ENERGY)
Subject: Re: Proposed Responses to Greenfield Inquiries

We can't guarantee that Eastern Power will agree to our be interested in relocating. That's the risk with making this commitment now.

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

From: Kovesfalvi, Sylvia (ENERGY)
To: King, Ryan (ENERGY); Perun, Halyna N. (ENERGY)
Cc: Sharkawi, Rula (ENERGY)
Sent: Mon Oct 24 19:02:13 2011
Subject: Fw: Proposed Responses to Greenfield Inquiries

See below. OPA will be responding to Spears (Q1). Ok?

Sent from my BlackBerry Wireless Handheld

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

From: Block, Andrew (ENERGY)
To: Kovesfalvi, Sylvia (ENERGY)
Cc: Sharkawi, Rula (ENERGY); Gerard, Paul (ENERGY)
Sent: Mon Oct 24 18:46:32 2011
Subject: Re: Proposed Responses to Greenfield Inquiries

Hi - sorry that edit does not work. Needs to stay as 'committed to relocating'

National Post has the statement. Spears should be covered by OPA.

I'll look at the 3rd one...

Andrew Block
Office of the Minister
Ministry of Energy
416 327 6747

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

From: Kovesfalvi, Sylvia (ENERGY)
To: Block, Andrew (ENERGY)
Cc: Sharkawi, Rula (ENERGY); Gerard, Paul (ENERGY)
Sent: Mon Oct 24 18:36:20 2011
Subject: Re: Proposed Responses to Greenfield Inquiries

One change from policy/legal: pls say 'committed to having discussions about relocating' rather than 'committed to relocating'.

Andrew - pls reconfirm who will be responding (there's been some back and forth this aft so I'm not sure - tx).

Sent from my BlackBerry Wireless Handheld

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

From: Kovesfalvi, Sylvia (ENERGY)
To: Block, Andrew (ENERGY)
Cc: Sharkawi, Rula (ENERGY); Gerard, Paul (ENERGY)
Sent: Mon Oct 24 18:02:05 2011
Subject: FW: Proposed Responses to Greenfield Inquiries

Hi Andrew - OPA's proposed responses - am running these through legal/policy now.

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

From: Kristin Jenkins [mailto:Kristin.Jenkins@powerauthority.on.ca]
Sent: October 24, 2011 6:00 PM
To: Sharkawi, Rula (ENERGY); Kovesfalvi, Sylvia (ENERGY)
Cc: Patricia Phillips; Mary Bernard; Tim Butters
Subject: Proposed Responses to Greenfield Inquiries

Third one requires more info but deadline not until Wed.

- John Spears, Toronto Star (mechanics of cancelling the contract – how it's done, has it been done)

Recommended response:

The provincial government is committed to relocating the plant. WE want to do this fairly and discuss options directly with the proponent not through the media. More information will be made available as the process moves forward.

- Tristin Hopper, National and Toronto desk of the National Post, request for OPA to confirm status of development

Recommended response:

The provincial government is committed to relocating the plant. The plant has been under construction since May 2011. More information will be available as the relocation process moves forward.

- Ian Harvey, Freelance Writer, Q: what was the output and cost for Oakville estimated at. What was the date of cancellation. What is the output and cost for Mississauga and what is the anticipated date of completion.

Recommended response:

The Oakville Generating Station was to have had a capacity of 900 MW with an in service date of X. The cost to construct the plant was estimated at 1 billion. The plant was cancelled before it obtained approvals. New transmission will replace the Oakville plant to ensure local supply and reliability.

Greenfield South's capacity is 280 MW with an in service date of X. The cost to construct is estimated at 300 to 400 million. Without this capacity in the southwest GTA, transmission expansion will have to take place two to three years earlier than anticipated.

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Jennings, Rick (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: October 24, 2011 8:27 PM
To: King, Ryan (ENERGY); Kovesfalvi, Sylvia (ENERGY)
Cc: Sharkawi, Rula (ENERGY); Jennings, Rick (ENERGY)
Subject: Re: Proposed Responses to Greenfield Inquiries

Hi - I agree but it seems to be a message that the govt wants to stick to -

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

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

From: King, Ryan (ENERGY)
To: Kovesfalvi, Sylvia (ENERGY); Perun, Halyna N. (ENERGY)
Cc: Sharkawi, Rula (ENERGY); Jennings, Rick (ENERGY)
Sent: Mon Oct 24 19:25:33 2011
Subject: Re: Proposed Responses to Greenfield Inquiries

We can't guarantee that Eastern Power will agree to our be interested in relocating. That's the risk with making this commitment now.

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

From: Kovesfalvi, Sylvia (ENERGY)
To: King, Ryan (ENERGY); Perun, Halyna N. (ENERGY)
Cc: Sharkawi, Rula (ENERGY)
Sent: Mon Oct 24 19:02:13 2011
Subject: Fw: Proposed Responses to Greenfield Inquiries

See below. OPA will be responding to Spears (Q1). Ok?

Sent from my BlackBerry Wireless Handheld

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

From: Block, Andrew (ENERGY)
To: Kovesfalvi, Sylvia (ENERGY)
Cc: Sharkawi, Rula (ENERGY); Gerard, Paul (ENERGY)
Sent: Mon Oct 24 18:46:32 2011
Subject: Re: Proposed Responses to Greenfield Inquiries

Hi - sorry that edit does not work. Needs to stay as 'committed to relocating'

National Post has the statement. Spears should be covered by OPA.

I'll look at the 3rd one...

Andrew Block
Office of the Minister
Ministry of Energy
416 327 6747

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

From: Kovesfalvi, Sylvia (ENERGY)
To: Block, Andrew (ENERGY)
Cc: Sharkawi, Rula (ENERGY); Gerard, Paul (ENERGY)
Sent: Mon Oct 24 18:36:20 2011
Subject: Re: Proposed Responses to Greenfield Inquiries

One change from policy/legal: pls say 'committed to having discussions about relocating' rather than 'committed to relocating'.

Andrew - pls reconfirm who will be responding (there's been some back and forth this aft so I'm not sure - tx).

Sent from my BlackBerry Wireless Handheld

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

From: Kovesfalvi, Sylvia (ENERGY)
To: Block, Andrew (ENERGY)
Cc: Sharkawi, Rula (ENERGY); Gerard, Paul (ENERGY)
Sent: Mon Oct 24 18:02:05 2011
Subject: FW: Proposed Responses to Greenfield Inquiries

Hi Andrew - OPA's proposed responses - am running these through legal/policy now.

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

From: Kristin Jenkins [mailto:Kristin.Jenkins@powerauthority.on.ca]
Sent: October 24, 2011 6:00 PM
To: Sharkawi, Rula (ENERGY); Kovesfalvi, Sylvia (ENERGY)
Cc: Patricia Phillips; Mary Bernard; Tim Butters
Subject: Proposed Responses to Greenfield Inquiries

Third one requires more info but deadline not until Wed.

John Spears, Toronto Star (mechanics of cancelling the contract – how it's done, has it been done)

Recommended response:

The provincial government is committed to relocating the plant. WE want to do this fairly and discuss options directly with the proponent not through the media. More information will be made available as the process moves forward.

Tristin Hopper, National and Toronto desk of the National Post, request for OPA to confirm status of development

Recommended response:

The provincial government is committed to relocating the plant. The plant has been under construction since May 2011. More information will be available as the relocation process moves forward.

Ian Harvey, Freelance Writer, Q: what was the output and cost for Oakville estimated at. What was the date of cancellation. What is the output and cost for Mississauga and what is the anticipated date of completion.

Recommended response:

The Oakville Generating Station was to have had a capacity of 900 MW with an in service date of X. The cost to construct the plant was estimated at 1 billion. The plant was cancelled before it obtained approvals. New transmission will replace the Oakville plant to ensure local supply and reliability.

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Jennings, Rick (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: October 31, 2011 8:18 PM
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Calwell, Carolyn (ENERGY)
Subject: Greenfield South Gas Plant

Privileged and Confidential

For your consideration, our analysis with respect to

- (1) The Minister's authority to issue a direction to the OPA in regards to the Greenfield South Gas Plant contract;
- (2) An alternative approach that could include assignment of the contract back to the Crown; and
- (3) Repudiation of the contract by the OPA and whether this would halt the construction.

Our short answers:

(1) We are proceeding to develop a Minister's direction to the OPA that we'll send to MAG tomorrow for review and comment, in the event that a direction may be desired; however, the Minister does not have clear legal authority to direct the OPA to take any significant commercial steps in relation to the contract. We note that the risk of proceeding with a direction is that the proponent could bring a judicial review challenging the Minister's decision to issue a direction, which likely would be successful. Further, this type of document is likely to be used against the government as evidence of the government's interference in a contract in any future lawsuit brought by the proponent.

(2) We analysed the possibility of assignment of the contract back to the Crown. As you'll see this is certainly possible. The advantage of this approach is that the Minister/Government controls the outcome without having to rely on the OPA's Board of Directors. However, there are a number of significant disadvantages.

(3) Repudiation of the contract by the OPA may not halt the construction. As Greenfield currently possesses all legal and regulatory approvals, and provided its own financing is sustainable, it could continue construction despite any repudiation of the contract.

As per your request, I will let MAG know that a draft direction will be coming their way tomorrow (we will also ask Rick to review it before we send it to MAG). If you'd like anything further or different, please let me know. I'd be happy to review with you further.

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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prohibited. If you have received this message in error please notify the writer and permanently delete the message and all attachments. Thank you.

From: Rehob, James (ENERGY)
Sent: Mon 31/10/2011 3:56 PM
To: Calwell, Carolyn (ENERGY); Perun, Halyna N. (ENERGY)
Subject: RE: Greenfield South Gas Plant - Legal Authority Issues

Privileged & Confidential Legal Advice / Solicitor & Client Privileged

October 31, 2011

Good afternoon, Halyna. I write in order to provide you with my views and analysis in relation to the authority to direct the OPA as regards the Greenfield South Gas Plant contract, including our options, as I see them, in this regard.

Issue:

- Does the Minister have clear, legal authority to direct the OPA to take any significant commercial steps in relation to the Greenfield South contract?

Conclusions:

- **No, the better view is that the Minister does not have clear, legal authority to so direct the OPA.**
 - Based on the clear language of s.25.32(4)-(7), and in particular (4) and (5), once the "initiative" (including a procurement contract) is passed to the OPA, the Crown ceases to have any direct legal authority to further direct the OPA in relation to that initiative.
 - Any attempts to craft a direction which aims to provide the "look and feel" of a binding, statutory direction to the OPA in relation to the Greenfield South project are susceptible to legal challenge, including a potential judicial review of the Minister's exercise of his statutory authority. There is, in my opinion, a sound legal basis to base such a challenge in terms of the Minister having exceeded his statutory authority in this regard.
 - **Potential reliance on 25.32(7):** There exists a potential, though weak/modest, argument for a direction based on s.25.32(7), if one can get past the wording of that section on its face. This argument attempts to disconnect the OPA's position when directed under (7) by distinguishing the independence language (that the OPA assumes all responsibilities and liabilities of the Crown, etc.) provided for in (4) and (5). The main thrust of the strategy would be to portray the OPA's position when directed under (7) as somehow different to the position it is in when directed under (4).

Points to consider:

- If one attempts to argue (7) as an independent authority, disconnected from (4) and (5), there is no explicit statutory restriction on Crown's ability or inability to further direct the OPA.
- Subsection (7) does refer back to clause (4)(a) in order to isolate the "initiative" (e.g. procurement contract) about which the (7) direction is to be made, and does not include explicit language relating to the transfer of responsibility and liability of the Crown to the OPA.
- However, I view this approach as weak since, arguably (7) is an extension of (4) and part of the system of provisions which was designed to provide the Government with an alternative mechanism to transfer initiatives created under (4) to the OPA. It does not operate as an independent authority outside of those provisions.
- However, one presumably can not ignore the OPA's express "natural person powers" under 25.2(4) and, absent the express authority to further direct the OPA in relation to (7), the issue is at least overlaid with appreciable doubt.
- Finally, the system of provisions relating to the OPA's independence once directed by the Minister appears to me to militate toward the OPA having full, unfettered discretion to carry out the terms of its direction once an initiative of this type is passed to it.
- However, the (7) argument does exist and may provide some very modest (weak, in my own assessment) basis upon which to found a further direction to the OPA in relation to a CES contract previously passed to it.

Relevant Statutory Provisions and Framework

- The Minister has the authority to direct the OPA in relation to the procurement of non-renewable energy supply and capacity under EA s.25.32(4) (references to demand management, reduction, etc., are excluded for this email as not directly relevant).
 - This transitional authority expires on the OEB's approval of the OPA's first IPSP and follow-on procurement process (EA s.25.32(4)(a)(ii))
 - This transitional authority is connected to EA s.25.32(7), the provision which authorizes the Minister to "put" or "place" contracts which have their genesis in a Crown procurement or initiative with the OPA. Those contracts can be said to have their legal genesis in a Crown (including Crown agency such as OEFC – see (4)(b)) initiative, etc. referenced in 25.32(4) but, having been fully negotiated, placed with the OPA.
 - These transitional authorities can be used both for the procurement of renewables and non-renewables,
 - These provisions (25.32(4),(7)) have the legal effect of creating a contract which is deemed to be a cost-recoverable procurement contract, compliant with the IPSP, which removes most of the regulatory risk re. cost-recovery.
 - Importantly, in accordance with 25.32(5), once the contract or initiative is transferred to the OPA, the OPA is responsible for the completion of the initiative and the Crown is no longer responsible or liable for same.

Assignment Back to Crown/Crown Agency – An Alternative Approach:

- Consideration can be given to persuading the OPA to exercise their contractual authority (I believe under sub-clause 16.5 (d) to unilaterally assign the contract back to the Crown or a Crown agency, such as the OEFC.
- The main precondition for this unilateral assignment is that the party to whom the contract is assigned must have the same (or now lower) credit rating than that of the OPA itself, as provided for by a recognized credit rating agency such as Standard & Poors, DBRS, etc.. If successful, the assignment back to the Crown would have the legal effect of placing the Crown into the position of counter party to the contract.

Advantages

- As counter party, all legal and commercial responsibility for all elements of the contract would be that of the Crown's and not the OPA's. This may provide the Ministry with the distinct advantage of being able to directly negotiate or repudiate the contract, or to take whatever commercial step it wishes to take, without having to be concerned with the OPA's appetite to take such step, as dictated by the OPA's Board of Directors.
- Essentially, this may provide the Minister or Government with the ability to control, if not the ultimate outcome of the transaction, at least some of the major commercial steps and timing leading up the litigation phase, should it go that far.

Disadvantages

- The Crown or the Crown and the Crown Agency (e.g. OEFC) to whom the contract is passed would be solely legally responsible for the outcome
 - The opportunity to distance Government from the ongoing progress of the transaction (project) would be greatly diminished if not eliminated;
 - There may be some commercial arguments that the OPA shares responsibility (and therefore liability) for steps taken up to the date of the assignment back to the Crown;
- The Crown may not be in as sound a position to manage the contract (depending upon what entity within the Crown the contract is assigned to);
- The Crown does not have the legal authority to require the transfer back, but presumably the OPA would be open to such an a strategy were its Board of Directors properly approached.
- The Crown would have to warrant that the Agreement is "a valid and binding obligation...enforceable in accordance with its terms..."

Repudiation by OPA. Repudiation (sometimes described as "anticipatory breach") occurs where a party to the contract states its intention not to perform its obligation(s) under a contract or to abandon the contract. Repudiation, when successful (e.g. accepted by the other party to the contract) is commonly viewed as having the effect of nullifying the terms of the contract, and we use the term here to refer to a wholesale denial or abandonment of the contract.

- In this particular instance, the OPA would declare its intention to abandon its obligations under the contract, presumably without legal justification beyond the adherence to a direction or letter issued by Government.
- Such a declaration would be delivered to Greenfield by the OPA on or before the time at which its major obligations are next to be performed.
- If Greenfield were to accept the OPA's position in respect of its' repudiation of the contract, the obligations of the OPA would arguably continue on and Greenfield would nonetheless sue for damages, etc.

- Greenfield may choose not to accept the OPA's repudiation at first instance and continue to attempt, as best it can, to perform its own obligations under the contract in order to preserve its legal position going forward.
- Careful consideration will have to be given by the OPA and its advisors as to what terms of the contract are "essential" or fundamental, capable of forming the basis for repudiation, etc.

Points to consider

- There is some serious doubt as to whether the commercial / legal step of the OPA repudiating the contract with Greenfield would have the desired effect of halting construction by Greenfield.
 - The OPA, as we understand their position thus far, may not be inclined to repudiate the contract of their own accord, and may well require to be directed in order to take this step;
 - Even where the OPA repudiates the contract, Greenfield could continue on with its construction activities (so long as its own financing is sustainable), since it currently possesses all legal and regulatory approvals to proceed with construction (pending the outcome of the current MOE renewed review of related activities).
 - While Greenfield would be expected to take steps to mitigate damages, arguably cessation of construction is only one means by which it could do so – that is, Greenfield could argue that continuing on with the completion of the project would put it in the best position to generate income (deriving income from bidding into the IESO-controlled market) and then suing the OPA for any differential based on the terms of the contract.
 - Greenfield's position in respect of its major suppliers may limit its ability to instantly halt construction, in order to preserve its own legal position under its follow-on contracts.

Expropriation - LSB Energy would have to further research and analyze options which are based on the *Expropriations Act* (Ontario) and the authority provided in the *Ministry of Infrastructure Act, 2011* and potentially *solicit* the advice of CLOC on the circumstances under which the Expropriation route can be utilized.

As per your most recent email, I will begin drafting a form of direction for your consideration.

Thank you,

James

James P. H. Rehub
 Senior Counsel
 Ministry of Energy and
 Ministry of Infrastructure
 Legal Services Branch
 777 Bay Street, 4th Floor, Suite 425
 Toronto, ON M5G 2E5
 Tel: 416-325-6676
 Fax: 416-325-1781
james.rehub@ontario.ca

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Jennings, Rick (ENERGY)

From: Rehob, James (ENERGY)
Sent: November 1, 2011 11:59 AM
To: Jennings, Rick (ENERGY); King, Ryan (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Perun, Halyna N. (ENERGY)
Subject: Draft Direction to OPA - Greenfield South project.
Attachments: OPA Greenfield South Direction (25-32-7) (2) (Nov 1-11).DOC

Privileged & Confidential Legal Advice / Solicitor & Client Privileged

November 1, 2011

Good morning, Rick and Ryan. Please find attached a draft direction to the OPA related to the cancellation ("...bringing to an immediate end") of the Greenfield South gas generation contract.

Kindly note that we have drafted using a general instruction to the OPA to bring the contract to an immediate end, on the understanding that the OPA may push back for something more specific. However, we recognize that the MO/DMO may wish to have the language remain more general.

Please do comment and fact-check as required, and I will be at my desk from 1:15 pmish onward (416-325-6676) as well, I'll be on my cell (647-218-3964) between 12 noon and 1:15 pm.

Kindly,
James

James P. H. Rehob
Senior Counsel
Ministry of Energy and
Ministry of Infrastructure
Legal Services Branch
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Tel: 416-325-6676
Fax: 416-325-1781
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Draft: March 23, 2005

DRAFT DIRECTION FOR CONSIDERATION

Ontario Power Authority
Attention: Mr. Collin Andersen, Chief Executive Officer

Re: Immediate Cancellation, etc. of the Contract for a 280 MW Gas Generation Facility –
Greenfield South Power Corporation (Mississauga)

I write in connection with my authority as the Minister of Energy in order to exercise the statutory power of ministerial direction which I have in respect of the Ontario Power Authority (the "OPA") under section 25.32 of the *Electricity Act, 1998* (the "Act").

My predecessor had, pursuant to subsection 25.32(7) of the Act, previously directed that the OPA execute and deliver numerous contracts under a direction entitled "Request for Proposals for 2,500 MW of New Clean Generation and Demand-Side Projects issued September 13, 2004, as amended (the "2,500 MW RFP")", dated March 24, 2005.

In recognition that the Government no longer wishes to have the OPA proceed with one of these projects, namely the 280 MW gas-fired generation facility being developed by the Greenfield South Power Corporation (the "proponent"), which had been planned for the municipality of Mississauga (the "project"), and pursuant to my authority under s. 25.32 of the Act, I hereby authorize and direct the OPA to take all necessary legal, commercial and other steps in order to bring the contract with the proponent to an immediate end.

Further, pursuant to my authority under section 25.32 of the Act, the OPA is also hereby authorized and directed to take such steps, including negotiations, and to execute and deliver such ancillary documents, deeds instruments or things in connection with, pertaining to, or arising out of, this direction.

This Direction shall be effective and binding as of the date hereof.

Dated: November 1, 2011

Christopher *[nttl- does he prefer "Chris?"]* Bentley
Minister of Energy

Confidential

Jennings, Rick (ENERGY)

From: King, Ryan (ENERGY)
Sent: November 1, 2011 1:02 PM
To: Jennings, Rick (ENERGY)
Subject: RE: Comments on Direction needed soon
Attachments: OPA Greenfield South Direction (25-32-7) (2) (Nov 1-11) (rk).DOC

Rick, my suggested edits attached

From: Rehob, James (ENERGY)
Sent: November 1, 2011 12:50 PM
To: Jennings, Rick (ENERGY); King, Ryan (ENERGY)
Cc: Perun, Halyna N. (ENERGY); Calwell, Carolyn (ENERGY)
Subject: Comments on Direction needed soon

Privileged & Confidential Legal Advice / Solicitor & Client Privileged

November 1, 2011

Hi, Rick and Ryan – please note that I will be having a call with CLOC early this afternoon (say by 2 pm though the specific timing has not yet been set) – if possible, it would be best to have your comments integrated by then so that I can include your good comments with the draft letter of direction I send to CLOC.

Thanks very much!

James

James P. H. Rehob
Senior Counsel
Ministry of Energy and
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Legal Services Branch
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In recognition that it has been determined that the 280 MW gas-fired generation facility being developed by the Greenfield South Power Corporation (the "proponent"), which had been planned for the municipality of Mississauga (the "project") not proceed at its current location, and pursuant to my authority under s. 25.32 of the Act, I hereby authorize and direct the OPA to take all necessary legal, commercial and other steps in order to bring the contract with the proponent to an immediate end.

Further, pursuant to my authority under section 25.32 of the Act, the OPA is also hereby authorized and directed to take such steps, including negotiations, and to execute and deliver such ancillary documents, deeds instruments or things in connection with, pertaining to, or arising out of, this direction.

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Dated: November 1, 2011

The Hon. Christopher *[ntd- does he prefer "Chris?"]* Bentley
Minister of Energy

Confidential

Jennings, Rick (ENERGY)

From: King, Ryan (ENERGY)
Sent: November 1, 2011 1:12 PM
To: Rehob, James (ENERGY); Jennings, Rick (ENERGY)
Cc: Perun, Halyna N. (ENERGY); Calwell, Carolyn (ENERGY)
Subject: RE: Comments on Direction needed soon
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Thanks very much!

James

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From: Perun, Halyna N. (ENERGY)
Sent: November 1, 2011 6:12 PM
To: Silva, Joseph (ENERGY)
Cc: Jennings, Rick (ENERGY); Calwell, Carolyn (ENERGY); Rehob, James (ENERGY)
Subject: RE: Greenfield South Gas Plant
Attachments: OPA Greenfield South Direction Nov 1-11.DOC

Privileged and Confidential

Hi Joseph – Please see attached draft direction to the OPA. This draft is likely to make its way through the Assistant Deputy Attorney General to the Deputy Attorney General this evening. The ADAG and DAG have not opined on this version as yet (though we did work with staff at CLOC) but we thought it would be helpful for Deputy Lindsay to see this work in progress in the event that the DAG should call him about it.

Please let us know if you need anything further.

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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To: Lindsay, David (ENERGY)
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(2) We analysed the possibility of assignment of the contract back to the Crown. As you'll see this is certainly possible. The advantage of this approach is that the Minister/Government controls the outcome without having to rely on the OPA's Board of Directors. However, there are a number of significant disadvantages.

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As per your request, I will let MAG know that a draft direction will be coming their way tomorrow (we will also ask Rick to review it before we send it to MAG). If you'd like anything further or different, please let me know. I'd be happy to review with you further.

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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From: Rehob, James (ENERGY)
Sent: Mon 31/10/2011 3:56 PM
To: Calwell, Carolyn (ENERGY); Perun, Halyna N. (ENERGY)
Subject: RE: Greenfield South Gas Plant - Legal Authority Issues

Privileged & Confidential Legal Advice / Solicitor & Client Privileged

October 31, 2011

Good afternoon, Halyna. I write in order to provide you with my views and analysis in relation to the authority to direct the OPA as regards the Greenfield South Gas Plant contract, including our options, as I see them, in this regard.

Issue:

- Does the Minister have clear, legal authority to direct the OPA to take any significant commercial steps in relation to the Greenfield South contract?

Conclusions:

- No, the better view is that the Minister does not have clear, legal authority to so direct the OPA.
 - Based on the clear language of s.25.32(4)-(7), and in particular (4) and (5), once the "initiative" (including a procurement contract) is passed to the OPA, the Crown ceases to have any direct legal authority to further direct the OPA in relation to that initiative.
 - Any attempts to craft a direction which aims to provide the "look and feel" of a binding, statutory direction to the OPA in relation to the Greenfield South project are susceptible to legal challenge, including a potential judicial review of the Minister's exercise of his statutory authority. There is, in my opinion, a sound legal basis to base such a challenge in terms of the Minister having exceeded his statutory authority in this regard.
 - Potential reliance on 25.32(7): There exists a potential, though weak/modest, argument for a direction based on s.25.32(7), if one can get past the wording of that section on its face. This argument attempts to disconnect the OPA's position when directed under (7) by distinguishing the independence language (that the OPA assumes all responsibilities and liabilities of the Crown, etc.) provided for in (4) and (5). The main thrust of the strategy would be to portray the OPA's position when directed under (7) as somehow different to the position it is in when directed under (4).

Points to consider:

- If one attempts to argue (7) as an independent authority, disconnected from (4) and (5), there is no explicit statutory restriction on Crown's ability or inability to further direct the OPA.
- Subsection (7) does refer back to clause (4)(a) in order to isolate the "initiative" (e.g. procurement contract) about which the (7) direction is to be made, and does not include explicit language relating to the transfer of responsibility and liability of the Crown to the OPA.
- However, I view this approach as weak since, arguably (7) is an extension of (4) and part of the system of provisions which was designed to provide the Government with an alternative mechanism to transfer initiatives created under (4) to the OPA. It does not operate as an independent authority outside of those provisions.
- However, one presumably can not ignore the OPA's express "natural person powers" under 25.2(4) and, absent the express authority to further direct the OPA in relation to (7), the issue is at least overlaid with appreciable doubt.
- Finally, the system of provisions relating to the OPA's independence once directed by the Minister appears to me to militate toward the OPA having full, unfettered discretion to carry out the terms of its direction once an initiative of this type is passed to it.
- However, the (7) argument does exist and may provide some very modest (weak, in my own assessment) basis upon which to found a further direction to the OPA in relation to a CES contract previously passed to it.

Relevant Statutory Provisions and Framework

- The Minister has the authority to direct the OPA in relation to the procurement of non-renewable energy supply and capacity under EA s.25.32(4) (references to demand management, reduction, etc., are excluded for this email as not directly relevant).
 - This transitional authority expires on the OEB's approval of the OPA's first IPSP and follow-on procurement process (EA s.25.32(4)(a)(ii))
 - This transitional authority is connected to EA s.25.32(7), the provision which authorizes the Minister to "put" or "place" contracts which have their genesis in a Crown procurement or initiative with the OPA. Those contracts can be said to have their legal genesis in a Crown (including Crown agency such as OEFC – see (4)(b)) initiative, etc. referenced in 25.32(4) but, having been fully negotiated, placed with the OPA.
 - These transitional authorities can be used both for the procurement of renewables and non-renewables,
 - These provisions (25.32(4),(7)) have the legal effect of creating a contract which is deemed to be a cost-recoverable procurement contract, compliant with the IPSP, which removes most of the regulatory risk re. cost-recovery.
 - Importantly, in accordance with 25.32(5), once the contract or initiative is transferred to the OPA, the OPA is responsible for the completion of the initiative and the Crown is no longer responsible or liable for same.

Assignment Back to Crown/Crown Agency – An Alternative Approach:

- Consideration can be given to persuading the OPA to exercise their contractual authority (I believe under sub-clause 16.5 (d) to unilaterally assign the contract back to the Crown or a Crown agency, such as the OEFC.

- The main precondition for this unilateral assignment is that the party to whom the contract is assigned must have the same (or now lower) credit rating than that of the OPA itself, as provided for by a recognized credit rating agency such as Standard & Poors, DBRS, etc.. If successful, the assignment back to the Crown would have the legal effect of placing the Crown into the position of counter party to the contract.

Advantages

- As counter party, all legal and commercial responsibility for all elements of the contract would be that of the Crown's and not the OPA's. This may provide the Ministry with the distinct advantage of being able to directly negotiate or repudiate the contract, or to take what ever commercial step it wishes to take, without having to be concerned with the OPA's appetite to take such step, as dictated by the OPA's Board of Directors.
- Essentially, this may provide the Minister or Government with the ability to control, if not the ultimate outcome of the transaction, at least some of the major commercial steps and timing leading up the litigation phase, should it go that far.

Disadvantages

- The Crown or the Crown and the Crown Agency (e.g. OEFC) to whom the contract is passed would be solely legally responsible for the outcome
 - The opportunity to distance Government from the ongoing progress of the transaction (project) would be greatly diminished if not eliminated;
 - There may be some commercial arguments that the OPA shares responsibility (and therefore liability) for steps taken up to the date of the assignment back to the Crown;
- The Crown may not be in as sound a position to manage the contract (depending upon what entity within the Crown the contract is assigned to);
- The Crown does not have the legal authority to require the transfer back, but presumably the OPA would be open to such an a strategy were its Board of Directors properly approached.
- The Crown would have to warrant that the Agreement is "a valid and binding obligation...enforceable in accordance with its terms..."

Repudiation by OPA. Repudiation (sometimes described as "anticipatory breach") occurs where a party to the contract states its intention not to perform its obligation(s) under a contract or to abandon the contract. Repudiation, when successful (e.g. accepted by the other party to the contract) is commonly viewed as having the effect of nullifying the terms of the contract, and we use the term here to refer to a wholesale denial or abandonment of the contract.

- In this particular instance, the OPA would declare its intention to abandon its obligations under the contract, presumably without legal justification beyond the adherence to a direction or letter issued by Government.
- Such a declaration would be delivered to Greenfield by the OPA on or before the time at which its major obligations are next to be performed.
- If Greenfield were to accept the OPA's position in respect of its' repudiation of the contract, the obligations of the OPA would arguably continue on and Greenfield would nonetheless sue for damages, etc.
- Greenfield may choose not to accept the OPA's repudiation at first instance and continue to attempt, as best it can, to perform its own obligations under the contract in order to preserve its legal position going forward.
- Careful consideration will have to be given by the OPA and its advisors as to what terms of the contract are "essential" or fundamental, capable of forming the basis for repudiation, etc.

Points to consider

- There is some serious doubt as to whether the commercial / legal step of the OPA repudiating the contract with Greenfield would have the desired effect of halting construction by Greenfield.
 - The OPA, as we understand their position thus far, may not be inclined to repudiate the contract of their own accord, and may well require to be directed in order to take this step;
 - Even where the OPA repudiates the contract, Greenfield could continue on with its construction activities (so long as its own financing is sustainable), since it currently possesses all legal and regulatory approvals to proceed with construction (pending the outcome of the current MOE renewed review of related activities).
 - While Greenfield would be expected to take steps to mitigate damages, arguably cessation of construction is only one means by which it could do so – that is, Greenfield could argue that continuing on with the completion of the project would put it in the best position to generate income (deriving income from bidding into the IESO-controlled market) and then suing the OPA for any differential based on the terms of the contract.
 - Greenfield's position in respect of its major suppliers may limit its ability to instantly halt construction, in order to preserve its own legal position under its follow-on contracts.

Expropriation - LSB Energy would have to further research and analyze options which are based on the *Expropriations Act* (Ontario) and the authority provided in the *Ministry of Infrastructure Act, 2011* and potentially *solicit* the advice of CLOC on the circumstances under which the Expropriation route can be utilized.

As per your most recent email, I will begin drafting a form of direction for your consideration.

Thank you,

James

James P. H. Rehb
Senior Counsel
Ministry of Energy and
Ministry of Infrastructure
Legal Services Branch
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Tel: 416-325-6676
Fax: 416-325-1781
james.rehob@ontario.ca

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Jennings, Rick (ENERGY)

From: Silva, Joseph (ENERGY)
Sent: November 1, 2011 6:13 PM
To: Perun, Halyna N. (ENERGY)
Cc: Jennings, Rick (ENERGY); Calwell, Carolyn (ENERGY); Rehob, James (ENERGY)
Subject: RE: Greenfield South Gas Plant

Sounds good, thanks very much Halyna

Joseph

From: Perun, Halyna N. (ENERGY)
Sent: November 1, 2011 6:12 PM
To: Silva, Joseph (ENERGY)
Cc: Jennings, Rick (ENERGY); Calwell, Carolyn (ENERGY); Rehob, James (ENERGY)
Subject: RE: Greenfield South Gas Plant

Privileged and Confidential

Hi Joseph – Please see attached draft direction to the OPA. This draft is likely to make its way through the Assistant Deputy Attorney General to the Deputy Attorney General this evening. The ADAG and DAG have not opined on this version as yet (though we did work with staff at CLOC) but we thought it would be helpful for Deputy Lindsay to see this work in progress in the event that the DAG should call him about it.

Please let us know if you need anything further.

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
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From: Perun, Halyna N. (ENERGY)
Sent: October 31, 2011 8:18 PM
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Calwell, Carolyn (ENERGY)
Subject: Greenfield South Gas Plant

Privileged and Confidential

For your consideration, our analysis with respect to

- (1) The Minister's authority to issue a direction to the OPA in regards to the Greenfield South Gas Plant contract;
- (2) An alternative approach that could include assignment of the contract back to the Crown; and
- (3) Repudiation of the contract by the OPA and whether this would halt the construction.

Our short answers:

(1) We are proceeding to develop a Minister's direction to the OPA that we'll send to MAG tomorrow for review and comment, in the event that a direction may be desired; however, the Minister does not have clear legal authority to direct the OPA to take any significant commercial steps in relation to the contract. We note that the risk of proceeding with a direction is that the proponent could bring a judicial review challenging the Minister's decision to issue a direction, which likely would be successful. Further, this type of document is likely to be used against the government as evidence of the government's interference in a contract in any future lawsuit brought by the proponent.

(2) We analysed the possibility of assignment of the contract back to the Crown. As you'll see this is certainly possible. The advantage of this approach is that the Minister/Government controls the outcome without having to rely on the OPA's Board of Directors. However, there are a number of significant disadvantages.

(3) Repudiation of the contract by the OPA may not halt the construction. As Greenfield currently possesses all legal and regulatory approvals, and provided its own financing is sustainable, it could continue construction despite any repudiation of the contract.

As per your request, I will let MAG know that a draft direction will be coming their way tomorrow (we will also ask Rick to review it before we send it to MAG). If you'd like anything further or different, please let me know. I'd be happy to review with you further.

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
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From: Rehob, James (ENERGY)
Sent: Mon 31/10/2011 3:56 PM
To: Calwell, Carolyn (ENERGY); Perun, Halyna N. (ENERGY)
Subject: RE: Greenfield South Gas Plant - Legal Authority Issues

Privileged & Confidential Legal Advice / Solicitor & Client Privileged

October 31, 2011

Good afternoon, Halyna. I write in order to provide you with my views and analysis in relation to the authority to direct the OPA as regards the Greenfield South Gas Plant contract, including our options, as I see them, in this regard.

Issue:

- Does the Minister have clear, legal authority to direct the OPA to take any significant commercial steps in relation to the Greenfield South contract?

Conclusions:

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 - Any attempts to craft a direction which aims to provide the "look and feel" of a binding, statutory direction to the OPA in relation to the Greenfield South project are susceptible to legal challenge, including a potential judicial review of the Minister's exercise of his statutory authority. There is, in my opinion, a sound legal basis to base such a challenge in terms of the Minister having exceeded his statutory authority in this regard.
 - **Potential reliance on 25.32(7):** There exists a potential, though weak/modest, argument for a direction based on s.25.32(7), if one can get past the wording of that section on its face. This argument attempts to disconnect the OPA's position when directed under (7) by distinguishing the independence language (that the OPA assumes all responsibilities and liabilities of the Crown, etc.) provided for in (4) and (5). The main thrust of the strategy would be to portray the OPA's position when directed under (7) as somehow different to the position it is in when directed under (4).

Points to consider:

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 - However, one presumably can not ignore the OPA's express "natural person powers" under 25.2(4) and, absent the express authority to further direct the OPA in relation to (7), the issue is at least overlaid with appreciable doubt.
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- These provisions (25.32(4),(7)) have the legal effect of creating a contract which is deemed to be a cost-recoverable procurement contract, compliant with the IPSP, which removes most of the regulatory risk re. cost-recovery.
- Importantly, in accordance with 25.32(5), once the contract or initiative is transferred to the OPA, the OPA is responsible for the completion of the initiative and the Crown is no longer responsible or liable for same.

Assignment Back to Crown/Crown Agency – An Alternative Approach:

- Consideration can be given to persuading the OPA to exercise their contractual authority (I believe under sub-clause 16.5 (d) to unilaterally assign the contract back to the Crown or a Crown agency, such as the OEFC.
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Advantages

- As counter party, all legal and commercial responsibility for all elements of the contract would be that of the Crown's and not the OPA's. This may provide the Ministry with the distinct advantage of being able to directly negotiate or repudiate the contract, or to take what ever commercial step it wishes to take, without having to be concerned with the OPA's appetite to take such step, as dictated by the OPA's Board of Directors.
- Essentially, this may provide the Minister or Government with the ability to control, if not the ultimate outcome of the transaction, at least some of the major commercial steps and timing leading up the litigation phase, should it go that far.

Disadvantages

- The Crown or the Crown and the Crown Agency (e.g. OEFC) to whom the contract is passed would be solely legally responsible for the outcome
 - The opportunity to distance Government from the ongoing progress of the transaction (project) would be greatly diminished if not eliminated;
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- The Crown does not have the legal authority to require the transfer back, but presumably the OPA would be open to such an a strategy were its Board of Directors properly approached.
- The Crown would have to warrant that the Agreement is "a valid and binding obligation...enforceable in accordance with its terms..."

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- In this particular instance, the OPA would declare its intention to abandon its obligations under the contract, presumably without legal justification beyond the adherence to a direction or letter issued by Government.
- Such a declaration would be delivered to Greenfield by the OPA on or before the time at which its major obligations are next to be performed.
- If Greenfield were to accept the OPA's position in respect of its' repudiation of the contract, the obligations of the OPA would arguably continue on and Greenfield would nonetheless sue for damages, etc.
- Greenfield may choose not to accept the OPA's repudiation at first instance and continue to attempt, as best it can, to perform its own obligations under the contract in order to preserve its legal position going forward.
- Careful consideration will have to be given by the OPA and its advisors as to what terms of the contract are "essential" or fundamental, capable of forming the basis for repudiation, etc.

Points to consider

- There is some serious doubt as to whether the commercial / legal step of the OPA repudiating the contract with Greenfield would have the desired effect of halting construction by Greenfield.
 - The OPA, as we understand their position thus far, may not be inclined to repudiate the contract of their own accord, and may well require to be directed in order to take this step;

- o Even where the OPA repudiates the contract, Greenfield could continue on with its construction activities (so long as its own financing is sustainable), since it currently possesses all legal and regulatory approvals to proceed with construction (pending the outcome of the current MOE renewed review of related activities).
- o While Greenfield would be expected to take steps to mitigate damages, arguably cessation of construction is only one means by which it could do so – that is, Greenfield could argue that continuing on with the completion of the project would put it in the best position to generate income (deriving income from bidding into the IESO-controlled market) and then suing the OPA for any differential based on the terms of the contract.
- o Greenfield's position in respect of its major suppliers may limit its ability to instantly halt construction, in order to preserve its own legal position under its follow-on contracts.

Expropriation - LSB Energy would have to further research and analyze options which are based on the *Expropriations Act* (Ontario) and the authority provided in the *Ministry of Infrastructure Act, 2011* and potentially *solicit* the advice of CLOC on the circumstances under which the Expropriation route can be utilized.

As per your most recent email, I will begin drafting a form of direction for your consideration.

Thank you,

James

James P. H. Rebob
 Senior Counsel
 Ministry of Energy and
 Ministry of Infrastructure
 Legal Services Branch
 777 Bay Street, 4th Floor, Suite 425
 Toronto, ON M5G 2E5
 Tel: 416-325-6676
 Fax: 416-325-1781
james.rebob@ontario.ca

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Jennings, Rick (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: November 4, 2011 3:06 PM
To: Jennings, Rick (ENERGY); King, Ryan (ENERGY)
Cc: Perun, Halyna N. (ENERGY); Rehob, James (ENERGY)
Subject: OPA Letter
Attachments: Greenfield South Power Plant.mark up.doc

Confidential/Solicitor-Client Privileged

Attached is a letter that we received from the OPA this afternoon, marked with changes that we recommend. We would appreciate your review and comment. We will also send the letter over to CLOC for its input.

We expect that the Minister would look to the record of public (media) comment that James is preparing in determining an appropriate response (which James is also starting to draft). It is not clear to me when the OPA is expecting to hear back from us about this draft.

Carolyn

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CONFIDENTIAL & PRIVILEGED

Dear Minister

I am writing to you on behalf of the Ontario Power Authority's (OPA) Board of Directors with respect to the Greenfield South Power Plant, which the Ministry of Energy procured in 2004. The OPA was subsequently directed to enter into a contract with Greenfield and is now the sole counterparty. The Board clearly understands that the government's intention to relocate the plant as outlined in your letter to the OPA on October 24, 2011. The purpose of this letter is to ensure that the government's intention is met.

The OPA Board of Directors takes very seriously its responsibilities to our contract counter-parties. Like the provincial government, we would like to achieve a resolution for the Greenfield South plant that provides both fair treatment to the counterparty and Ontario ratepayers. We also think it is important that electricity developers generally continue to have confidence to invest in Ontario and that gas-fired generation continues to be accepted as an important, cost-effective and safe part of the province's electricity supply mix. At the same time, we recognize the public concern about the location of this plant and public requests that construction of the plant stop.

After receiving your October 24th letter, OPA commenced discussions with Greenfield South. To date, OPA's objective has been to reach an agreement with Greenfield South to stop construction and negotiate an arrangement to relocate the plant or terminate the contract. Since then, it has become clear that Greenfield South is unlikely to agree to such an approach which makes termination of the contract a logical next step.

We would seek to continue discussions with Greenfield South to arrive at an agreement on appropriate compensation. Given our shared interest in ratepayer value, the board would then also like to commence a dialogue with you on the most appropriate way to allocate the compensation between ratepayers and taxpayers.

I look forward to your reply.

Yours sincerely,

Jim Hinds
Chair

Jennings, Rick (ENERGY)

From: King, Ryan (ENERGY)
Sent: November 4, 2011 3:31 PM
To: Jennings, Rick (ENERGY)
Subject: FW: OPA Letter
Attachments: Greenfield South Power Plant mark up(rk).doc

Rick, my suggested edits

From: Calwell, Carolyn (ENERGY)
Sent: November 4, 2011 3:06 PM
To: Jennings, Rick (ENERGY); King, Ryan (ENERGY)
Cc: Perun, Halyna N. (ENERGY); Rehob, James (ENERGY)
Subject: OPA Letter

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We expect that the Minister would look to the record of public (media) comment that James is preparing in determining an appropriate response (which James is also starting to draft). It is not clear to me when the OPA is expecting to hear back from us about this draft.

Carolyn

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The OPA Board of Directors takes very seriously its responsibilities to our contract counter-parties. Like the provincial government, we would like to achieve a resolution for the Greenfield South plant that provides both fair treatment to the counterparty and Ontario ratepayers. We also think it is important that electricity developers generally continue to have confidence to invest in Ontario and that gas-fired generation continues to be accepted as an important, cost-effective and safe part of the province's electricity supply mix. At the same time, we recognize the public concern about the location of this plant and public requests that construction of the plant stop.

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I look forward to your reply.

Yours sincerely,

Jim Hinds
Chair

Jennings, Rick (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: November 7, 2011 9:26 AM
To: Jennings, Rick (ENERGY); King, Ryan (ENERGY); Silva, Joseph (ENERGY)
Cc: Perun, Halyna N. (ENERGY)
Subject: Response letter
Attachments: Letter #2 to the OPA.07 11 2011.doc

Confidential/Solicitor-Client Privileged

We've drafted a response from the Minister to Colin Andersen regarding Greenfield, based on the letter that we received from the OPA and marked up. We would appreciate your review. We will also send it to CLOC for their input – we haven't yet heard from them on the OPA letter and will follow up.

Carolyn

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**CONFIDENTIAL DRAFT – SOLICITOR & CLIENT PRIVILEGED – DRAFT
FOR DISCUSSION**

Dear Mr. Andersen:

In response to your letter of [date] and in recognition that community opposition to the Greenfield South Generation Facility is ongoing and well documented, I am writing to confirm the government's endorsement of the OPA's termination of the contract with the developer of that facility, Greenfield South Power Corporation.

While full recognition must be given to rate-payer value and the fair treatment of contractual counterparties, as suggested in your letter, in light of the strong and persistent opposition to the plant, the government supports any appropriate commercial and other steps the OPA must take with the objectives of terminating the contract and ensuring that construction of the gas plant at its current location in Mississauga ceases imminently.

The government is responding to unique circumstances in Mississauga. The government remains committed to a strong, stable supply of electricity for Ontario and continued support of those making investments in Ontario's electricity system.

Sincerely,

Chris Bentley,
Minister

Jennings, Rick (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: November 8, 2011 11:30 AM
To: Lindsay, David (ENERGY); Jennings, Rick (ENERGY)
Cc: Silva, Joseph (ENERGY); King, Ryan (ENERGY); Calwell, Carolyn (ENERGY)
Subject: letters
Attachments: Greenfield South Power Plant OPA letter Nov 8 final.doc; Energy Letter to the OPA Nov 8 final.doc

Privileged and Confidential

Enclosed please find the two proposed letters – one from the OPA, the other from the Minister. These proposed letters are MAG approved. We've sent them both to Mike Lyle. I'll follow up with Mike shortly. He's not likely to be in a position to let us know this afternoon whether our edits of the Board's letter would be acceptable to the Board, but we will advance this as much as possible.

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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CONFIDENTIAL & PRIVILEGED

Dear Minister

I am writing to you on behalf of the Ontario Power Authority's (OPA) Board of Directors with respect to the Greenfield South Power Plant, which the Ministry of Energy procured in 2004. The OPA was subsequently directed to enter into a contract with Greenfield and is now the sole counterparty. The Board clearly understands that the government's intention to relocate the plant as outlined in your letter to the OPA on October 24, 2011.

The OPA Board of Directors takes very seriously its responsibilities to our contract counter-parties. Like the provincial government, we would like to achieve a resolution for the Greenfield South plant that provides both fair treatment to the counterparty and Ontario ratepayers. We also think it is important that electricity developers generally continue to have confidence to invest in Ontario and that gas-fired generation continues to be accepted as an important, cost-effective and safe part of the province's electricity supply mix. At the same time, we recognize the public concern about the location of this plant and public requests that construction of the plant stop.

After receiving your October 24th letter, OPA commenced discussions with Greenfield South. To date, OPA's objective has been to reach an agreement with Greenfield South to stop construction and negotiate an arrangement to relocate the plant or terminate the contract. Since then, it has become more clear that Greenfield South may not agree to such an approach which makes termination of the contract a logical next step.

Following termination of the contract, we would seek to continue discussions with Greenfield South to arrive at an agreement on appropriate compensation. Given our shared interest in ratepayer value, the board would then also like to commence a dialogue with you on the most appropriate way to allocate the compensation.

I look forward to your reply.

Yours sincerely,

Jim Hinds
Chair

CONFIDENTIAL DRAFT – SOLICITOR & CLIENT PRIVILEGED – DRAFT
FOR DISCUSSION

Dear Mr. Andersen:

In response to your letter of [date] and in recognition that community opposition to the Greenfield South Generation Facility is ongoing and well documented, I am writing to confirm that the government supports OPA's decision to terminate the contract with the developer of the facility, Greenfield South Power Corporation. The government remains hopeful that the plant can be relocated and that the OPA will be able to achieve a satisfactory resolution of the Mississauga site through discussion with Greenfield SPC.

While full recognition must be given to rate-payer value and the fair treatment of contractual counterparties, as suggested in your letter, in light of the strong and persistent opposition to the plant, the government supports any appropriate commercial and other steps the OPA must take with the objectives of terminating the contract and ensuring that construction of the gas plant at its current location in Mississauga ceases imminently.

The government is responding to unique circumstances in Mississauga. The government remains committed to a strong, stable supply of electricity for Ontario and continued support of those making investments in Ontario's electricity system.

Sincerely,

Chris Bentley,
Minister

Jennings, Rick (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: November 8, 2011 2:45 PM
To: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY)
Cc: King, Ryan (ENERGY); Calwell, Carolyn (ENERGY)
Subject: Mississauga Power letters
Attachments: Energy Letter to the OPA Nov 8 final(OPA comments).doc; Greenfield South Power Plant OPA letter Nov 8-11 (wOPA comments).doc

Privileged and Confidential

We've heard back from OPA's counsel – please see attached proposed changes. These revisions have also now been sent to the MAG for review.

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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CONFIDENTIAL DRAFT – SOLICITOR & CLIENT PRIVILEGED – DRAFT
FOR DISCUSSION

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While full recognition must be given to rate-payer value and the fair treatment of contractual counterparties, as suggested in your letter, in light of the strong and persistent opposition to the plant, the government supports termination of the contract and any other appropriate commercial and other steps the OPA must take in seeking to stop construction of the gas plant at its current location. ~~with the objectives of terminating the contract and ensuring that construction of the gas plant at its current location in Mississauga ceases imminently.~~

The government is responding to unique circumstances in Mississauga. The government remains committed to a strong, stable supply of electricity for Ontario and continued support of those making investments in Ontario's electricity system.

Sincerely,

Chris Bentley,
Minister

CONFIDENTIAL & PRIVILEGED

Dear Minister

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The OPA Board of Directors takes very seriously its responsibilities to our contract counter-parties. Like the provincial government, we would like to achieve a resolution for the Greenfield South plant that provides both fair treatment to the counterparty and Ontario ratepayers. We also think it is important that electricity developers generally continue to have confidence to invest in Ontario and that gas-fired generation continues to be accepted as an important, cost-effective and safe part of the province's electricity supply mix. At the same time, we recognize the public concern about the location of this plant and public requests that construction of the plant stop.

After receiving your October 24th letter, the OPA commenced discussions with Greenfield South. To date, the OPA's preferred approach objective has been to reach an agreement with Greenfield South to stop construction and negotiate an arrangement to relocate the plant or terminate the contract. Since then, it has become more-clearer that Greenfield South may not agree to such an approach which makes termination of the contract a logical next step. The Board of Directors is therefore seeking the Government's support in taking this step.

I wish to assure you that, even after taking this step, the OPA shall sFollowing termination of the contract, we would seek to continue discussions with Greenfield South to arrive at an agreement on appropriate compensation. Given our shared interest in ratepayer value, the board would then also like to commence a dialogue with you on the most appropriate way to allocate the compensation between the OPA and the Crown..

I look forward to your reply.

Yours sincerely,

Jim Hinds
Chair

Jennings, Rick (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: November 9, 2011 9:10 AM
To: Silva, Joseph (ENERGY)
Cc: Jennings, Rick (ENERGY); Calwell, Carolyn (ENERGY)
Subject: Draft letters
Attachments: Greenfield South Power Plant OPA 09 11 2011.doc; Energy Letter to the OPA 09 11 2011 (3) doc (3).doc

Privileged and Confidential

Hi Joseph – these are the latest versions of both letters. Please note that the Minister's letter to the OPA is with DAG's office for review. They should not be shared with MO until we've heard back from DAG.

Thank you

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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CONFIDENTIAL & PRIVILEGED – DRAFT FOR DISCUSSION

Dear Minister:

I am writing to you on behalf of the Ontario Power Authority's (OPA) Board of Directors with respect to the Greenfield South Power Plant, which the Ministry of Energy procured in 2004. The OPA was subsequently directed to enter into a contract with Greenfield and is now the sole counterparty. The Board clearly understands that the government's intention to relocate the plant as outlined in your letter to the OPA on October 24, 2011. The purpose of this letter is to ensure that the government's intention is met.

The OPA Board of Directors takes very seriously its responsibilities to our contract counter-parties. Like the provincial government, we would like to achieve a resolution for the Greenfield South plant that provides both fair treatment to the counterparty and Ontario ratepayers. We also think it is important that electricity developers generally continue to have confidence to invest in Ontario and that gas-fired generation continues to be accepted as an important, cost-effective and safe part of the province's electricity supply mix. At the same time, we recognize the public concern about the location of this plant and public requests that construction of the plant stop.

After receiving your October 24th letter, the OPA commenced discussions with Greenfield South. To date, the OPA's preferred approach has been to reach an agreement with Greenfield South to stop construction and negotiate an arrangement to relocate the plant or terminate the contract. Since then, it has become clearer that Greenfield South may not agree to such an approach which makes termination of the contract a logical next step.

I wish to assure you that, even after taking this step, the OPA will seek to continue discussions with Greenfield South to arrive at an agreement on appropriate compensation. Given our shared interest in ratepayer value, the board would then also like to commence a dialogue with you on the most appropriate way to allocate the compensation between the OPA and the Crown.

I look forward to your reply.

Yours sincerely,

Jim Hinds
Chair

CONFIDENTIAL & PRIVILEGED – IN CONTEMPLATION OF LITIGATION -- DRAFT
FOR DISCUSSION

Dear Mr. Hinds:

In response to your letter of [date] and in recognition that community opposition to the Greenfield South Generation Facility is ongoing and well documented, I am writing to acknowledge the OPA's efforts to negotiate with the developer of the facility, Greenfield South Power Corporation, with an aim to achieving a satisfactory resolution of the Mississauga site. The government remains committed to having the plant relocated.

I have given careful consideration to public statements, correspondence to the government and resolutions of the Council of the City of Mississauga. While full recognition must be given to rate-payer value and the fair treatment of contractual counterparties, as suggested in your letter, in light of the strong and persistent opposition to the plant, the government supports the OPA's decision to terminate the contract and any other appropriate commercial and other steps that the OPA must take in seeking to stop construction of the gas plant at its current location.

The government is responding to unique circumstances in Mississauga. The government remains committed to a strong, stable supply of electricity for Ontario and continued support of those making investments in Ontario's electricity system.

Sincerely,

Chris Bentley,
Minister

Jennings, Rick (ENERGY)

From: King, Ryan (ENERGY)
Sent: November 10, 2011 4:43 PM
To: Jennings, Rick (ENERGY)
Subject: RE: Greenfield South - Questions

Rick, my comments in red. Please let me know what you think

From: Rehob, James (ENERGY)
Sent: November 10, 2011 4:27 PM
To: King, Ryan (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Perun, Halyna N. (ENERGY)
Subject: Greenfield South - Questions

Privileged & Confidential / Solicitor & Client Privileged

November 10, 2011

Hi, Ryan – In connection with our conversation, here are some questions we need your assistance with:

1. Confirmation of site/municipal address: We have it as "Lot 3, Concession 1, in Municipality of Mississauga, municipal address: 2315 Loreland Avenue; (yes)
2. Description of project: Currently, the description for the project reads: "'project" means the Greenfield South Power Project undertaken by the Corporation on the site" and site has a description related to the above-noted land description/municipal address; – are there any other elements of the project which you wish us to capture as part of the "project" – e.g. any related facilities, equipment, buildings, lands or structures not necessarily captured by the bolded language above but which you want us to capture in order to cease or halt activity? The plant is a natural gas-fired combined cycle electricity generating facility with a capacity of 280 MW. We should use the OPA contract as the basis for legal reference.
3. Other structures on, improvements to, the land –
 - a. Do you want to (i) maintain the structures that are both related and unrelated to the project? Do you just want those structures unrelated to the project? (fencing, lighting, storage buildings on site that are not directly project-related - not sure what they'd be but we put the question forward. Put another way, should land be completely cleared or remain "as is" at the time construction ceases. (I believe it's been referenced as restoring the site to its pre-construction condition)
 - b. Electricity-related equipment/installation – do we know what transmission-connection or other equipment are now on-site? Is all such equipment to be removed? This could be confirmed and verified in discussions with the proponent but all equipment would need to be removed to ensure the pre-construction condition is met.
 - c. Are there other structures on adjacent property, on the street (hydro poles, sewer/water manes, etc.) which need to be dealt with? (removed?); only insofar as those structures were required or added to support the proposed plant.
 - d. Confirm whether our approach of leaving all municipal services (electrical, water, sewage) in place to the extent those services have been provided. Can you assist in helping us confirm whether such services are now in place? We would need to determine what infrastructure was in place prior to construction.
4. Remediation of the land: in line with the above, is it the intention that the land be returned to its "pre-remediation stage" (yes) or will the construction simply be expected to cease and the land left "as is" (e.g. with the partial construction-related improvements remaining). If the latter, this will likely form part and parcel of "sunk costs" where there might be some salvage or alternative use value that the developer might be expected to provide for itself (e.g. to sell to another project-developer, to return to the supplier, to put to an alternative use (doubtful) – I gather any salvage value would be quite low but we have to consider).
5. Currently, the legislative draft differentiates between the "generation facility" (e.g. turbines, equipment, etc.) and the "land" (real property) on which the generation facility is located. This is to reflect the fact that the turbines and equipment may well be relocated to another site, and the site put to an alternative, more environmentally benign

use. Let us know if at first blush this approach causes any problems from the information or policy instructions you have for us at this time. Obviously we understand that the policy is still maturing. (No concerns for now)

6. Financing – did the OPA or any other entity (e.g. the Crown) provide "up front" financing that needs to be repaid to the Crown? On this point, we understand that the main financiers are "EIG" and "Credit Swiss"- can you confirm – are there any additional lenders? (Our understanding is that these were the sole lenders)
7. Follow-on Contracts: The main contract between the OPA and Greenfield South Power Co. is obviously the main target. However, significant liability will arise under the many follow-on contracts including with sub-contractors, contracts for equipment, installation of gas line and provision of natural gas, other related suppliers. Is there any policy decision on whether or not to compensate suppliers for the loss or termination of those contracts? (this should be taken into consideration as 'sunk costs' in discussions with Eastern power) (We will be looking at these issues closely with CLOC but your directional advice at this point is important for us to keep the Bill moving forward). Termination of all contracts can give rise to several types of liability including (i) liability for sunk costs which we are addressing; (ii) liability for lost revenue (no instructions yet – can you confirm position on same?) (iii) liability based on the penalty/default and other discipline provisions contained in the follow-on contracts (do you have any policy instructions on whether these are to be addressed? Of course the positions Energy takes may have to be modified once we run the issues and the drafts of this Bill by CLOC who have to consider wider Government implications).
8. Note re. Date/Timing: The current draft uses "April 12, 2005" (which is the date of the restated contract entered into between the OPA and Greenfield South as the trigger date). We are exploring whether we need to take the date back further (e.g. date at which the RFP was issued). Do you have any thoughts or instructions on this?

Kind regards,

James

James P. H. Rehob
Senior Counsel
Ministry of Energy and
Ministry of Infrastructure
Legal Services Branch
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Tel: 416-325-6676
Fax: 416-325-1781
james.rehob@ontario.ca

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Jennings, Rick (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: November 14, 2011 11:15 AM
To: Botond, Erika (ENERGY)
Cc: Kulendran, Jesse (ENERGY); Silva, Joseph (ENERGY); Jennings, Rick (ENERGY); Calwell, Carolyn (ENERGY)
Subject: FW: Greenfield
Attachments: Greenfield South Letters - Letterhead - November 11 2011 - reworded.wbk

Privileged and Confidential

As requested – proposed letters from the OPA to Eastern

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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From: Nimi Visram [mailto:Nimi.Visram@powerauthority.on.ca]
Sent: November 11, 2011 1:54 PM
To: Perun, Halyna N. (ENERGY)
Cc: Michael Lyle
Subject: Greenfield

Mike asked that I forward the attached to your attention.

Thnx
Nimi

Nimi Visram | Ontario Power Authority | Executive Assistant & Board Coordinator, to General Counsel & Vice President, Legal, Aboriginal and Regulatory Affairs

120 Adelaide St W., Suite 1600 | Toronto, Ontario, M5H 1T1

☎ Phone: 416.969.6027 | 📠 Fax: 416.969.6383 | ✉ Email: nimi.visram@powerauthority.on.ca

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120 Adelaide Street West
Suite 1600
Toronto, Ontario M5H 1T1
T 416-967-7474
F 416-967-1947
www.powerauthority.on.ca

CONFIDENTIAL

November 11, 2011

Greenfield South Power Corporation
2275 Lakeshore Blvd. West, Suite 400
Toronto ON M8V 3Y3

Attention: Greg Vogt, President

Dear Mr. Vogt:

Re Amended and Restated Clean Energy Supply (ARCES) Contract between Greenfield South Power Corporation and Ontario Power Authority ("OPA") dated as of April 12, 2005 and amended and restated as of March 16, 2009 (the "Contract")

In response to the local community's concerns about the Greenfield South Generation Station, the Government has committed to relocate the plant. It is the OPA's continuing desire to reach mutual agreement to terminate the Contract and negotiate terms of a new contract for a facility in a different location. If these negotiations are not successful, the OPA will not proceed with the Contract.

Therefore, in light of your obligations to mitigate any damages resulting from the OPA's decision not to proceed with the Contract if negotiations are not successful, the OPA requests that you cease all further work and activities in connection with the Facility (as defined in the Contract), other than anything that may be reasonably necessary in the circumstances to bring such work or activities to a conclusion.

This letter constitutes Confidential Information (as such term is defined in the Contract).

Sincerely,

ONTARIO POWER AUTHORITY

By: _____

Name: Colin Andersen
Title: Chief Executive Officer

cc:

McMillan LLP
Brookfield Place
181 Bay Street, Suite 2500
Toronto, Ontario M5J 2T7
Attention: Carl DeVuono
Fax: 416-304-3755



120 Adelaide Street West
Suite 1600
Toronto, Ontario M5H 1T1

T 416-967-7474
F 416-967-1947
www.powerauthority.on.ca

CONFIDENTIAL

November 11, 2011

Greenfield South Power Corporation
2275 Lakeshore Blvd. West, Suite 400
Toronto ON M8V 3Y3

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In response to the local community's concerns about the Greenfield South Generation Station, the Government has committed to relocate the plant. As a result, the OPA is terminating the Contract. It is the OPA's continuing desire to reach mutual agreement on a satisfactory resolution of this matter and negotiate terms of a new contract for a facility in a different location.

Therefore, in light of your obligations to mitigate any damages resulting from the OPA's decision to terminate the Contract, the OPA requires that you cease all further work and activities in connection with the Facility (as defined in the Contract), other than anything that may be reasonably necessary in the circumstances to bring such work or activities to a conclusion.

This letter constitutes Confidential Information (as such term is defined in the Contract).

Sincerely,

ONTARIO POWER AUTHORITY

By: _____
Name: Colin Andersen
Title: Chief Executive Officer



120 Adelaide Street West
Suite 1600
Toronto, Ontario M5H 1T1

T 416-967-7474
F 416-967-1947
www.powerauthority.on.ca

CONFIDENTIAL

November 11, 2011

Greenfield South Power Corporation
2275 Lakeshore Blvd. West, Suite 400
Toronto ON M8V 3Y3

Attention: Greg Vogt, President

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In response to the local community's concerns about the Greenfield South Generation Station, the Government has committed to relocate the plant. As a result, the OPA will not proceed with the Contract. It is the OPA's continuing desire to reach mutual agreement to terminate the Contract and negotiate terms of a new contract for a facility in a different location.

Therefore, in light of your obligations to mitigate any damages resulting from the OPA's decision not to proceed with the Contract, the OPA requires that you cease all further work and activities in connection with the Facility (as defined in the Contract), other than anything that may be reasonably necessary in the circumstances to bring such work or activities to a conclusion.

This letter constitutes Confidential Information (as such term is defined in the Contract).

Sincerely,

ONTARIO POWER AUTHORITY

By: _____
Name: Colin Andersen
Title: Chief Executive Officer

Jennings, Rick (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: November 14, 2011 12:24 PM
To: King, Ryan (ENERGY); Rehob, James (ENERGY)
Cc: Perun, Halyna N. (ENERGY); Jennings, Rick (ENERGY)
Subject: Deck for 1:00 today
Attachments: GS Options on Site.14 11 2011.ppt

Confidential/Solicitor-Client Privileged

I understand that the DM wants to walk a deck into a meeting about Greenfield that he is having today to start a conversation about the draft legislation. Ryan, I've built on the version that you sent me to address the compensation question – please see attached.

I welcome your comments – I don't pretend this version is at all definitive. I need to get this to Joseph by about 1.

Carolyn

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Ontario

MINISTRY OF ENERGY

Greenfield South Power Corporation Options

DRAFT FOR DISCUSSION

Confidential/Solicitor Client Privileged

November 14, 2011

Issues

- Next steps to resolve the Greenfield South gas plant require the government and the OPA to determine:
 - 1) what compensation Greenfield South should receive for termination of the contract; and
 - 2) what will happen with the Greenfield South site

Compensation

- There are at least 3 options to address compensation
 1. Formula based on provable costs incurred by Greenfield South
 2. Fixed amount based on estimated costs incurred by Greenfield South
 3. Referral to a third party arbitrator for determination of compensation
- Compensation is assumed to include construction and equipment sunk costs; costs paid to terminate construction and equipment contracts; soft development costs, such as engineering, design, surveys, and legal fees
- There is a decision point as to whether compensation should include lost profits

Option 1 – Formula based on costs incurred

- Greenfield would receive compensation for reasonable costs incurred in developing the project based on costs that it could prove through documentation and, potentially, audit
- Pros
 - Places onus on Greenfield South to prove its costs
 - Payment would be based on verifiable information
 - This approach was taken in the *Adams Mine Lake Act, 2004*
- Cons
 - It is unclear whether a formula could be negotiated with Greenfield

Option 2 – Fixed Amount

- Greenfield would receive compensation based on an amount determined by the OPA. This amount would be an estimate of costs to the date of termination of the contract, without verification from Greenfield South
- Pros
 - An amount could be determined quickly
- Cons
 - Would require implementation through legislation.
 - Greenfield would not agree to an amount imposed by the OPA or the government
 - Appears arbitrary and unfair

Option 3 – Referral to Arbitrator

- An arbitrator could be appointed to resolve compensation either with consensus of Greenfield South or through legislation
- Pros
 - Provides for resolution of compensation through an independent third party
 - Allows for fair, impartial assessment of the amount of compensation
- Cons
 - Could result in a lengthy process, although process could be negotiated or legislated
 - Once arbitration commences, the ability of the OPA and the government to control the process is reduced

The Project Site

- There are at least 3 options to address the project site, which is a brownfield in a mostly industrial and commercial area:
 1. Acquire the site
 2. Greenfield retains the site
 3. Engage the City of Mississauga to seek its interest in acquiring the site from Greenfield South or contributing to compensation to Greenfield South

Site Option 1 – Acquisition

- Infrastructure Ontario or Ontario Power Generation acquires the site “as is” from Greenfield South
- Greenfield is compensated for sunk costs of project development and fair value for land
- Pros
 - Quick to implement
 - Costs of demolition and restoration of site are deferred
 - Site becomes available for public use or for resale
- Cons
 - Costs of security of site
 - Tantamount to expropriation

Option 2 – Greenfield retains site

- Use of site for electricity generation is prohibited through agreement or legislation
- Greenfield is compensated for sunk costs of project development, costs of restoring site to its pre-construction state and retains title to the land
- Pros
 - Limits OPA's and government's interests to financial
 - Less intrusive to private interests
- Cons
 - Public may continue to have ongoing concerns about future use of site

Option 3 – City of Mississauga Participation

- Begin discussions with the City of Mississauga to seek their interest in acquiring the site from Greenfield South Power Corporation or playing a role in resolution of the site
- City could contribute financially to compensation for Greenfield South and in turn have a say in the future use of the land
- Pros
 - Could potentially reduce total costs borne by the OPA or the Province
 - City could show that it is doing something positive in light of the cancellation
- Cons
 - Would likely require some convincing of the City.

Other Considerations

- Relocation – Greenfield South develops a generation project at another site or Greenfield South's turbines are used at another site
 - Relocation complicates and potentially delays resolution of the Mississauga site



120 Adelaide Street West
Suite 1600
Toronto, Ontario M5H 1T1
T 416-967-7474
F 416-967-1947
www.powerauthority.on.ca

CONFIDENTIAL

November 14, 2011

Greenfield South Power Corporation
2275 Lakeshore Blvd. West, Suite 400
Toronto ON M8V 3Y3

Attention: Greg Vogt, President

Dear Mr. Vogt:

Re Amended and Restated Clean Energy Supply (ARCES) Contract between Greenfield South Power Corporation and Ontario Power Authority ("OPA") dated as of April 12, 2005 and amended and restated as of March 16, 2009 (the "Contract")

In response to the local community's concerns about the Greenfield South Generation Station, the Government has committed to relocate the plant. It is the OPA's continuing desire to reach mutual agreement to terminate the Contract based on the payment of appropriate compensation to Greenfield South and negotiate terms of a new contract for a facility in a different location. If these negotiations are not successful, the OPA will not proceed with the Contract.

Therefore, in light of your obligations to mitigate any damages resulting from the OPA's decision not to proceed with the Contract if negotiations are not successful, the OPA requests that you cease all further work and activities in connection with the Facility (as defined in the Contract), other than anything that may be reasonably necessary in the circumstances to bring such work or activities to a conclusion.

This letter constitutes Confidential Information (as such term is defined in the Contract).

Sincerely,

ONTARIO POWER AUTHORITY

By: 
Name: Colin Andersen
Title: Chief Executive Officer

cc: McMillan LLP
Brookfield Place
181 Bay Street, Suite 2500
Toronto, Ontario M5J 2T7
Attention: Carl DeVuono
Fax: 416-304-3755

Jennings, Rick (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: November 14, 2011 4:59 PM
To: King, Ryan (ENERGY); Rehob, James (ENERGY)
Cc: Perun, Halyna N. (ENERGY); Jennings, Rick (ENERGY)
Subject: RE: Deck for 1:00 today

Confidential/Solicitor-Client Privileged

Ryan, thanks for looking at this draft so quickly and for your question about further recourse Greenfield might have if we fix an amount for compensation through legislation. If we take this approach, we would also use the legislation to extinguish all rights to any other compensation, including any ability for Greenfield to proceed through the courts. Our remaining exposure is through NAFTA, as we can't legislate away any risk associated with our trade agreements.

Carolyn

From: King, Ryan (ENERGY)
Sent: November 14, 2011 1:12 PM
To: Calwell, Carolyn (ENERGY); Rehob, James (ENERGY)
Cc: Perun, Halyna N. (ENERGY); Jennings, Rick (ENERGY)
Subject: RE: Deck for 1:00 today

One comment/question on slide 5 (attached)

From: Calwell, Carolyn (ENERGY)
Sent: November 14, 2011 12:24 PM
To: King, Ryan (ENERGY); Rehob, James (ENERGY)
Cc: Perun, Halyna N. (ENERGY); Jennings, Rick (ENERGY)
Subject: Deck for 1:00 today

Confidential/Solicitor-Client Privileged

I understand that the DM wants to walk a deck into a meeting about Greenfield that he is having today to start a conversation about the draft legislation. Ryan, I've built on the version that you sent me to address the compensation question – please see attached.

I welcome your comments – I don't pretend this version is at all definitive. I need to get this to Joseph by about 1.

Carolyn

This communication may be solicitor/client privileged and contain confidential information only intended for the person(s) to whom it is addressed. Any dissemination or use of this information by others than the intended recipient(s) is prohibited. If you have received this message in error please notify the writer and permanently delete the message and all attachments. Thank you.

Jennings, Rick (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: November 15, 2011 9:49 AM
To: Sharkawi, Rula (ENERGY); Silva, Joseph (ENERGY); Gemmiti, Paola (ENERGY)
Cc: Jennings, Rick (ENERGY); Calwell, Carolyn (ENERGY); King, Ryan (ENERGY)
Subject: Fw: ARCES Contract Between Greenfield Power Corporation and the OPA
Attachments: November 14 2011 OPA Letter to Greenfield South.pdf

Importance: High

Hi - please see attached - the comms material may need to be adjusted to reflect this approach (OPA still negotiating - hasn't terminated)

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

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

From: Michael Lyle <Michael.Lyle@powerauthority.on.ca>
To: Perun, Halyna N. (ENERGY)
Cc: Calwell, Carolyn (ENERGY)
Sent: Tue Nov 15 09:39:52 2011
Subject: FW: ARCES Contract Between Greenfield Power Corporation and the OPA

Michael Lyle
General Counsel and Vice President
Legal, Aboriginal & Regulatory Affairs
Ontario Power Authority
120 Adelaide Street West, Suite 1600
Toronto, Ontario, M5H 1T1
Direct: 416-969-6035
Fax: 416.969.6383
Email: michael.lyle@powerauthority.on.ca

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

From: Michael Killeavy

Sent: November 15, 2011 7:39 AM

To: Gergory M. Vogt (gvogt@easternpower.on.ca)

Cc: abirchenough@cogeco.ca

Subject: ARCES Contract Between Greenfield Power Corporation and the OPA

Importance: High

Greg,

Further to your conversation yesterday with Colin Andersen, attached please find the letter Colin mentioned.

Michael

Michael Killeavy, LL.B., MBA, P.Eng.

Director, Contract Management

Ontario Power Authority

120 Adelaide St. West, Suite 1600

Toronto, Ontario, M5H 1T1

416-969-6288 (office)

416-969-6071 (fax)

416-520-9788 (cell)

Michael.killeavy@powerauthority.on.ca

Jennings, Rick (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: November 15, 2011 11:21 AM
To: Kulendran, Jesse (ENERGY); Jennings, Rick (ENERGY)
Cc: Silva, Joseph (ENERGY); Sharkawi, Rula (ENERGY); Gemmiti, Paola (ENERGY); Kovesfalvi, Sylvia (ENERGY)
Subject: RE: DRAFT OPA STATEMENT

No concerns. Note that we may need to adjust if Greenfield downs tools today.

Carolyn

From: Kulendran, Jesse (ENERGY)
Sent: November 15, 2011 11:19 AM
To: Jennings, Rick (ENERGY); Calwell, Carolyn (ENERGY)
Cc: Silva, Joseph (ENERGY); Sharkawi, Rula (ENERGY); Gemmiti, Paola (ENERGY); Kovesfalvi, Sylvia (ENERGY)
Subject: RE: DRAFT OPA STATEMENT

MO made changes to the 2nd and 3rd paragraphs.

Rick/Carolyn – do you have any concerns with the revised version before we send it back to OPA?

DRAFT-Nov 15 11 AM

OPA TERMINATES CONTRACT FOR MISSISSAUGA POWER PLANT

TORONTO, November 16, 2011- The Ontario Power Authority announced today, that despite best efforts to work with Greenfield South Power Corporation, the contract for Greenfield's power plant in Mississauga is being terminated.

After several weeks of discussions it has become clear that Greenfield South has no intent to consider relocation and continues construction. In light of this, the company has been notified that the contract is terminated. Greenfield is financially liable for any further investments in the project.

The OPA will continue to work with the government to identify another site for the gas plant based on local generation needs and transmission and distribution support to ensure a long-term reliable supply of electricity.

-30-

From: Kulendran, Jesse (ENERGY)
Sent: November 15, 2011 11:00 AM
To: Botond, Erika (ENERGY); Dunn, Ryan (ENERGY); Kett, Jennifer (OPO)
Cc: Jennings, Rick (ENERGY); Calwell, Carolyn (ENERGY); Silva, Joseph (ENERGY); Sharkawi, Rula (ENERGY); Gemmiti, Paola (ENERGY); Kovesfalvi, Sylvia (ENERGY)
Subject: DRAFT OPA STATEMENT

Here's OPA's draft statement – we've set up a call at 2pm to discuss our feedback and next steps.

DRAFT-Nov 15 11 AM

OPA TERMINATES CONTRACT FOR MISSISSAUGA POWER PLANT

TORONTO, November 16, 2011- The Ontario Power Authority announced today, that despite best efforts to work with Greenfield South Power Corporation, the contract for Greenfield's power plant in Mississauga is being terminated.

The OPA is taking this action after the owners made it clear they were not interested in negotiating an agreement to relocate the plant. With the contract terminated, Greenfield is financially liable for any further investments in the project.

OPA will work with the government to identify another site for the gas plant based on local generation needs and transmission and distribution support. Once options are identified, the public will be consulted.

Electricity supply in the southwest Greater Toronto Area is sufficient for the next five years.

-30-

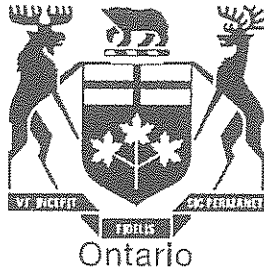
Jesse Kulendran - Senior Coordinator, Policy & Special Projects
Office of the Deputy Minister - Ministry of Energy
Tel.: 416-327-7025, Blackberry: 416-206-1394

Jennings, Rick (ENERGY)

From: King, Ryan (ENERGY)
Sent: November 15, 2011 2:42 PM
To: Jennings, Rick (ENERGY); Calwell, Carolyn (ENERGY)
Subject: Greenfield South
Attachments: licence_eg_greenfield_20090603.pdf

Was able to track down Greenfield South Power Corporation's Generator License which is valid until June 2, 2029

Ryan King | Sr. Advisor and Executive Assistant
Energy Supply, Transmission and Distribution Policy Division
Ministry of Energy | Tel: +1 416-314-6204



Electricity Generation Licence

EG-2009-0023

Greenfield South Power Corporation

Valid Until

June 2, 2029

Original signed by

Jennifer Lea
Counsel, Special Projects
Ontario Energy Board
Date of Issuance: June 3, 2009

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
27th. Floor
Toronto, ON M4P 1E4

Commission de l'énergie de l'Ontario
C.P. 2319
2300, rue Yonge
27e étage
Toronto ON M4P 1E4

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1 Definitions

In this Licence:

"Act" means the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B;

"Electricity Act" means the *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A;

"generation facility" means a facility for generating electricity or providing ancillary services, other than ancillary services provided by a transmitter or distributor through the operation of a transmission or distribution system and includes any structures, equipment or other things used for that purpose;

"Licensee" means Greenfield South Power Corporation;

"regulation" means a regulation made under the Act or the Electricity Act;

2 Interpretation

- 2.1 In this Licence words and phrases shall have the meaning ascribed to them in the Act or the Electricity Act. Words or phrases importing the singular shall include the plural and vice versa. Headings are for convenience only and shall not affect the interpretation of this Licence. Any reference to a document or a provision of a document includes an amendment or supplement to, or a replacement of, that document or that provision of that document. In the computation of time under this Licence where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens. Where the time for doing an act expires on a holiday, the act may be done on the next day that is not a holiday.

3 Authorization

- 3.1 The Licensee is authorized, under Part V of the Act and subject to the terms and conditions set out in this licence:
- a) to generate electricity or provide ancillary services for sale through the IESO-administered markets or directly to another person subject to the conditions set out in this Licence. This Licence authorizes the Licensee only in respect of those facilities set out in Schedule 1;
 - b) to purchase electricity or ancillary services in the IESO-administered markets or directly from a generator subject to the conditions set out in this Licence; and
 - c) to sell electricity or ancillary services through the IESO-administered markets or directly to another person, other than a consumer, subject to the conditions set out in this Licence.

- 4 Obligation to Comply with Legislation, Regulations and Market Rules**
 - 4.1 The Licensee shall comply with all applicable provisions of the Act and the Electricity Act, and regulations under these acts, except where the Licensee has been exempted from such compliance by regulation.
 - 4.2 The Licensee shall comply with all applicable Market Rules.
- 5 Obligation to Maintain System Integrity**
 - 5.1 Where the IESO has identified, pursuant to the conditions of its licence and the Market Rules, that it is necessary for purposes of maintaining the reliability and security of the IESO-controlled grid, for the Licensee to provide energy or ancillary services, the IESO may require the Licensee to enter into an agreement for the supply of energy or such services.
 - 5.2 Where an agreement is entered into in accordance with paragraph 5.1, it shall comply with the applicable provisions of the Market Rules or such other conditions as the Board may consider reasonable. The agreement shall be subject to approval by the Board prior to its implementation. Unresolved disputes relating to the terms of the Agreement, the interpretation of the Agreement, or amendment of the Agreement, may be determined by the Board.
- 6 Restrictions on Certain Business Activities**
 - 6.1 Neither the Licensee, nor an affiliate of the Licensee shall acquire an interest in a transmission or distribution system in Ontario, construct a transmission or distribution system in Ontario or purchase shares of a corporation that owns a transmission or distribution system in Ontario except in accordance with section 81 of the Act.
- 7 Provision of Information to the Board**
 - 7.1 The Licensee shall maintain records of and provide, in the manner and form determined by the Board, such information as the Board may require from time to time.
 - 7.2 Without limiting the generality of paragraph 7.1 the Licensee shall notify the Board of any material change in circumstances that adversely affects or is likely to adversely affect the business, operations or assets of the Licensee, as soon as practicable, but in any event no more than twenty (20) days past the date upon which such change occurs.
- 8 Term of Licence**
 - 8.1 This Licence shall take effect on June 3, 2009 and expire on June 2, 2029. The term of this Licence may be extended by the Board.
- 9 Fees and Assessments**
 - 9.1 The Licensee shall pay all fees charged and amounts assessed by the Board.

10 Communication

- 10.1 The Licensee shall designate a person that will act as a primary contact with the Board on matters related to this Licence. The Licensee shall notify the Board promptly should the contact details change.
- 10.2 All official communication relating to this Licence shall be in writing.
- 10.3 All written communication is to be regarded as having been given by the sender and received by the addressee:
- a) when delivered in person to the addressee by hand, by registered mail or by courier;
 - b) ten (10) business days after the date of posting if the communication is sent by regular mail; or
 - c) when received by facsimile transmission by the addressee, according to the sender's transmission report.

11 Copies of the Licence

- 11.1 The Licensee shall:
- a) make a copy of this Licence available for inspection by members of the public at its head office and regional offices during normal business hours; and
 - b) provide a copy of this Licence to any person who requests it. The Licensee may impose a fair and reasonable charge for the cost of providing copies.

SCHEDULE 1 LIST OF LICENSED GENERATION FACILITIES

The Licence authorizes the Licensee only in respect to the following:

1. Greenfield South Power Project, owned and operated by the Licensee at 2315 Loreland Avenue, Mississauga, Ontario.

Jennings, Rick (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: November 15, 2011 6:24 PM
To: Kovesfalvi, Sylvia (ENERGY); Jennings, Rick (ENERGY); King, Ryan (ENERGY)
Cc: Perun, Halyna N. (ENERGY); Sharkawi, Rula (ENERGY); Gemmiti, Paola (ENERGY); Silva, Joseph (ENERGY); Kulendran, Jesse (ENERGY); Nutter, George (ENERGY)
Subject: RE: Updated QA
Attachments: QA-repudiationNov15(gas-plant%20siting).620pm[LSB].doc

Please see proposed changes in the attached.

We should probably also revisit the Scenario A and B distinction. We now know that the OPA will only advise Greenfield that it is not proceeding with the contract. As such, I'm not sure that I see any ongoing distinction between the 2 scenarios as we had previously distinguished them, except possibly to the extent that some discussions continue to occur between the OPA and Greenfield or don't - it seems like these are the more realistic scenarios at this point.

Carolyn

From: Kovesfalvi, Sylvia (ENERGY)
Sent: Tue 15/11/2011 5:24 PM
To: Jennings, Rick (ENERGY); King, Ryan (ENERGY); Calwell, Carolyn (ENERGY)
Cc: Perun, Halyna N. (ENERGY); Sharkawi, Rula (ENERGY); Gemmiti, Paola (ENERGY); Silva, Joseph (ENERGY); Kulendran, Jesse (ENERGY); Nutter, George (ENERGY)
Subject: Updated QA

Hi –

Attached are updated QA/messaging based on incorporating a gas-plant siting review in Minister's statement.

Once I've incorporated your comments, will share with MO and then OPA.

Thank you.

Sylvia
7-4334

Greenfield Contract Termination (Repudiation)
November 154, 2011 (44:47-pm)

MEDIA PROTOCOL

Generally the Minister's Office responds to strategic questions and OPA responds to operational questions.

Strategic - Minister's Office (Minister or Erika Botond)

- Government's decision to relocate the plant
- Government's commitment to relocate the plant.

Operational - OPA (Colin Andersen or Kristen Jenkins)

- Status of contract negotiations, and process for finding another site
- History of Greenfield site selection (required approvals, public consultation, etc).

Process

- The OPA immediately notifies the Ministry of Energy of any Greenfield-related media call (Communications Director, Media Manager and Spokesperson).
- The Ministry immediately notifies Minister's Office, Deputy Minister's Office, Legal and Cabinet Office.
- The OPA submits proposed responses; the ministry secures approvals (Cabinet Office, DMO, Legal, Policy).
- The Minister's Office confirms who responds and how (phone/email).

WHO SAYS WHAT – General Guidelines

	MINISTER	OPA
Key Messages	<p>SCENARIO A - If OPA sends letter to Greenfield South advising unsuccessful <u>negotiations lead to termination (2-step approach)</u></p> <p>The OPA is in negotiations with Greenfield South.</p> <p>I understand the OPA has notified Greenfield South that it will not be proceeding with the contract.</p> <p>It is our expectation that Greenfield South will stop construction at the site.</p> <p><u>SCENARIO B - If Contract is Terminated</u></p> <p>I understand the OPA has had discussions with the developer – Greenfield South. The OPA has notified Greenfield that the OPA is not proceeding with the contract.</p> <p>The OPA will look for another site for the gas plant.</p> <p>The government will continue to ensure that the best interests of Ontario's communities and ratepayers remain the primary priority.</p>	<p><i>We are in discussions with Greenfield South.</i></p> <p><i>We have notified them that we will not be proceeding with the contract.</i></p> <p><i>It is our expectation that Greenfield South will stop construction at the site.</i></p> <p><i>After pursuing discussions to reach a negotiated agreement, we have notified Greenfield South that the OPA is not proceeding with the contract.</i></p> <p><i>We are seeking to continue discussions with Greenfield South on next steps. We cannot provide any additional information on these discussions at this time.</i></p> <p><i>We will look for another site for the gas plant.</i></p> <p><i>Once potential sites have been identified, the public will be consulted before a final decision is made.</i></p>

	<p>SCENARIO C – If letter/letters become public</p> <p>Despite OPA's best efforts, a <u>successful negotiations were not successful-could-not-be-reached.</u></p> <p>OPA has decided that the contract <u>will</u> come to an end and we support their decision.</p> <p>The government is committed to relocating this plant. It is in the ratepayer's interest to stop construction of this plant as soon as possible.</p> <p>It is also in the interest of Ontario's economy to resolve this as quickly as possible. We need to reassure electricity developers and investors that Ontario remains a good place to make energy investments.</p> <p>Gas-fired generation <u>has</u> an important and cost-effective role in building a cleaner, more modern electricity system that meets Ontario's energy needs.</p> <p><u>To ensure Ontario is following best practices, the government will review the gas-plant siting process. It has already started to investigate how siting is dealt with in other jurisdictions and this investigation will continue.</u></p> <p>The government remains committed to providing a strong, stable supply of electricity for Ontario. We also remain committed to <u>providing support to those making investments in Ontario's electricity system.</u></p> <p>The government will continue to ensure that the best interests of Ontario's communities and ratepayers remain the primary priority.</p>	<p><i>Despite our best efforts, a successful negotiation could not be reached.</i></p> <p><i>We have decided that the contract <u>will</u> come to an end and appreciate the government's support.</i></p> <p><i>The government is committed to relocating this plant. It is in the ratepayer's interest to stop construction of this plant as soon as possible.</i></p> <p><i>It is also in the interest of Ontario's economy to resolve this as quickly as possible. We need to reassure electricity developers and investors that Ontario remains a good place to make energy investments.</i></p> <p><i>Gas-fired generation <u>has</u> an important and cost-effective role in building a cleaner, more modern electricity system that meets Ontario's energy needs.</i></p> <p><i>We share the government's commitment to ratepayer value.</i></p> <p><i>We hope to continue discussions with the developer to arrive at a resolution fair to all parties.</i></p>
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<p><u>Letters</u></p> <p>What does/do these letters mean?</p> <p>Does this mean construction stops immediately?</p> <p>What kind of penalty does the developer face if they don't stop construction?</p> <p>Why did negotiations fail?</p> <p>How long did the OPA give it? How extensive have the discussions been?</p>	<p><i>If they mean the government supports OPA's decision to terminate <u>not proceed with the contract with Greenfield South</u>.</i></p> <p>That is what the OPA asked and that is our expectation.</p> <p>The developer will not be able to recover its costs of ongoing construction. We expect Greenfield to stop construction.</p> <p>The OPA and the developer could not reach an agreement.</p> <p>I understand the OPA and developer have been speaking frequently for the past month.</p>	<p><i>If they mean negotiations had stalled and the OPA recognized the best next step for all parties involved – ratepayers, the developer and OPA – was <u>not to proceed with terminate-the contract</u>. The OPA decided to terminate <u>not to proceed with the contract</u> and the government indicated their support.</i></p> <p><i>That is what we asked and that is our expectation.</i></p> <p><i>The developer will not be able to recover its costs of ongoing construction. We have asked them to stop and that is our expectation.</i></p> <p><i>We could not reach an agreement.</i></p> <p><i>We have been speaking frequently with the developer for the past month.</i></p>
--	---	---

<p>There's been strong and persistent opposition in other communities – Northern York Region for example, yet those plants are proceeding. Why are you stopping this one?</p>	<p>This is a unique case and these circumstances do not apply to other contracts or issues.</p>	<p><i>This is a unique case and these circumstances do not apply to other contracts or issues.</i></p>
<p>What does “most appropriate way to allocate compensation between the OPA and Crown” mean?</p>	<p>It means that we will sit down together to determine how to share the cost of cancelling<u>not proceeding with</u> -the contract, giving full recognition to ratepayer value and contractual obligations.</p>	<p><i>It means that we will sit down together to determine how to share the cost of cancellation<u>not proceeding with</u> the contract, giving full recognition to ratepayer value and contractual obligations.</i></p>
<p>Exactly how much is it going to cost to cancel this contract?</p>	<p>That has yet to be determined. The- OPA is committed to resolving this matter with ratepayer value top of mind.</p>	<p><i>We hope to start negotiations soon. We are committed to finding a fair resolution that upholds ratepayer value.</i></p>
<p>How long will settlement negotiations take? Is there a drop-dead date?</p>	<p>The OPA will take the time necessary to come to a fair resolution.</p>	<p><i>We will take the time needed to find a fair solution.</i></p>
<p>Are these letters precedent-setting? Has the Ministry or OPA sent similar</p>	<p>No. Such letters are not precedent-setting. Our government conducts business on behalf of the people of Ontario in an open and transparent manner.</p>	<p><i>No. Such letters are not precedent-setting. Our agency conducts business on behalf of the people of Ontario. We do so in an open and transparent manner.</i></p>

letters before?		
<u>Contract Termination</u>	<u>SCENARIO A</u>	
Has the contract been terminated?	No, however if negotiations are not successful, the OPA has notified Greenfield South that it will not be proceeding with the contract. In the meantime, the OPA has asked Greenfield South to stop construction at the site.	No. We are in discussions with Greenfield South. We have notified them however that if our negotiations are not successful, we will not be proceeding with the contract. In the meantime, we have asked Greenfield South to stop construction at the site.
Who terminated the contract?	<u>SCENARIO B AND C</u>	
Why was the contract terminated? Were other solutions not viable?	<p>Following discussions with Greenfield South, OPA decided that not proceeding with the contract would best serve the public's interest.</p> <p>Contract negotiations are commercially sensitive. These discussions are confidential. We are confident the OPA is working in the best interests of Ontarians.</p>	<p>After pursuing discussions to reach a negotiated agreement, we have notified Greenfield South that the OPA is not proceeding with the contract.</p> <p>Contract negotiations are commercially sensitive. These discussions are confidential. We will continue to negotiate in the best interests of Ontarians.</p>
Did the OPA terminate the contract at the government's request?	The OPA, as the contract holder, has been in discussions with Greenfield South to resolve this matter in the best interests of Ontarians. Following discussions with Greenfield South, OPA decided that not proceeding with the contract best serves the	<p>The government has been clear that it is committed relocating the plant. Given the government's commitment, and following discussions with Greenfield South, we decided not proceeding with the contract was the appropriate next step.</p> <p>Our goal has been to resolve this matter in the best interests of Ontarians. We believe this decision</p>

<p>Why wasn't the contract terminated sooner?</p> <p>If the OPA is terminating the contract, how can you get the company to work with the OPA to relocate the site?</p> <p>Will Greenfield South be the company to build the relocated plant? Do you have assurances from them on that?</p> <p>Will you put this back out to tender?</p> <p>What is the process for finding another site?</p>	<p>public's interest. We support the OPA's decision.</p> <p>Discussions began as soon as they could between OPA and Greenfield South. This decision is the result of those discussions.</p> <p>The OPA will pursue further discussions with Greenfield South and we expect them to find a satisfactory resolution.</p> <p>The OPA will pursue further discussions with Greenfield South to find a satisfactory resolution.</p> <p>The OPA will pursue further discussions with Greenfield South to find a satisfactory resolution.</p> <p>The OPA is best able to answer this. We can confirm that the site selection will include public consultation.</p>	<p>best serves the public interest. Contract negotiations are commercial sensitive and we cannot say more than that.</p> <p>We initiated discussions with Greenfield South as soon as they could we received the Minister's letter asking us to begin discussions. Not proceeding with the contract is the result of these discussions.</p> <p>We will pursue further discussions with Greenfield South.</p> <p>We expect to continue discussions with Greenfield South and hope to reach a satisfactory resolution.</p> <p>We expect to continue discussions with Greenfield South and hope to reach a satisfactory resolution.</p> <p>This will require further consideration, but we will consider local generation needs and transmission and distribution support. Once options are identified, the public will be consulted.</p>
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Comment [U1]: Note that the origin response will generate a request for a cc Minister's first letter.

<p>How come you've cancelled the plants in Mississauga and Oakville but not in Northern York Region?</p>	<p>These are two very different situations. The OPA has advised that Southwest GTA's local reliability issues can be addressed through building transmission. Transmission projects were rejected by the people of Northern York Region, and a generating facility is required immediately in the region to meet North American standards for reliability.</p>	<p>These are two very different situations. Southwest GTA's local reliability issues can be addressed through building transmission. Transmission projects were rejected by the people of Northern York Region, and a generating facility is required immediately in the region to meet North American standards for reliability.</p>
<p><u>Gas-Siting Review</u></p> <p><u>What does this review involve and how long will it take?</u></p> <p><u>Will your findings be made public?</u></p> <p><u>Will the OPA be leading this review?</u></p>	<p>Our government works hard to incorporate – and often – establish best practices in our activities. This is part of our commitment to delivering value for money to the people of Ontario.</p> <p>Earlier this year the Ministry began to investigate how gas plants are sited in other jurisdictions. We will continue this investigation and, based on our findings, make changes to our existing processes. We will try to do this as quickly as possible.</p> <p>Yes they will.</p> <p>No. This will be a government review. The OPA will certainly provide their input.</p>	<p><u>OPA messaging to all questions related to gas-plant siting process:</u></p> <p><i>The government is leading this initiative and is best able to answer your questions.</i></p> <p><i>We are pleased to help the government's gas-plant siting review as required.</i></p>

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<u>Why are you starting the review now?</u>	<u>This is something that we have been considering for some time. Given the need to find a new location for this gas plant, we thought we would start with a review.</u>	Formatted: Font: Bold
<u>Why didn't you initiate a review for Northern York, or Oakville or Mississauga?</u>	<u>All of these plants had been part of longer term planning and all required approvals were in place. All of these plants had been planned for a long time. In Mississauga's case, circumstances changed – as they did for Oakville. The Northern York community had voted against the transmission alternative and need the plant to meet local requirements.</u>	Comment [U2]: Approvals were not Oakville, so this isn't accurate. Formatted: Highlight
<u>Will a new site be named after the review – or before?</u>	<u>We will complete the review before naming the site.</u>	Formatted: Font: Bold
<u>Will the review affect the public consultation process?</u>	<u>It's too early to say how the review will affect current processes. We know public consultation will remain a key component of any siting exercise.</u>	Formatted: Font: Bold
<u>Will the review findings affect other gas plant locations?</u>	<u>No. The findings of our review will apply to future site selection only.</u>	Formatted: Font: Bold
<u>What has the gas siting process been to date?</u>	<u>A rigorous process is in place today that involves numerous approvals including zoning, environmental assessment approvals and public consultations and Ontario Municipal Board approval. Sites are selected based on local generation requirements, transmission capability, environmental needs and cost.</u>	Formatted: Font: Bold
<u>How was the Mississauga site picked?</u>	<u>The site was selected based on local generation requirements and available options. The site was located in a predominantly industrial area, bounded by a railway line, transmission corridor and the Queen Elizabeth Highway. It was selected because it was zoned for</u>	Formatted: Highlight Formatted: Font: Bold

	industrial activity, including power generation.	
<u>Will this review be limited to gas plants only – and if so, why?</u>	<p><u>Yes. Gas-fired generation is helping our province replace coal with cleaner sources of power. As it is playing an increasingly important role in our energy mix, we believe it is prudent to review our existing practices to ensure we continue to follow best practices. Processes, like everything else, evolve.</u></p> <p><u>Our government recently established the most conservative set-backs for wind at 550 metres, based on current industry practices.</u></p>	
<p><u>Construction</u></p> <p>Now that the OPA has terminated the contract, will work stop at the site?</p> <p><u>Will legislation be required to stop construction?</u></p>	<p>SCENARIO A</p> <p>My understanding is that the OPA has notified the developer that it will not be proceeding with the contract. The OPA has asked the developer to stop work at the site.</p> <p>SCENARIO B & C</p> <p>My understanding is that the OPA has notified the developer that it is not proceeding with the contract. The OPA requires the developer to stop work at the site.</p> <p>Legislation is an option, however, the best option, and the one we are choosing at this time, is to have the OPA work with Greenfield South to find satisfactory resolution.</p> <p>It is our expectation the OPA and Greenfield South will work</p>	<p>SCENARIO A</p> <p><i>We have notified Greenfield South that we will not be proceeding with the contract and asked Greenfield to stop construction. We have made it clear that Greenfield is financially liable if construction continues. We will pursue further discussions about stopping work at the site.</i></p> <p>SCENARIO B & C</p> <p><i>The government is best able to answer this question.</i></p> <p><i>We have notified Greenfield South- that we are not proceeding with the contract. We have stated that we require Greenfield to stop construction. We have made it clear that Greenfield is financially liable if construction continues. We will pursue further discussions about stopping work at the site, and</i></p>

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Minister, your spokesperson said that legislation was not needed, is this true?	<p>together to find a satisfactory resolution.</p> <p>The best option, and the one we are choosing at this time, is to have the OPA work with Greenfield South to find satisfactory resolution to the site.</p>	<p>hope to reach a satisfactory resolution.</p> <p>The government is best able to answer this question.</p>
<p><u>Contract Value</u></p> <p>Why should anyone want to contract with OPA or government after this?</p> <p>What's the status of negotiations with TransCanada?</p> <p>Will the cost of these contract cancellations be made public knowledge at some time?</p>	<p>The government and our agencies have successful track records for negotiating and fulfilling contracts in the best interest of Ontario taxpayers. This is a unique case and these circumstances do not apply to other contracts or issues.</p> <p>Like any other business, energy partners work together to respond to changing conditions. Contracts are renegotiated or terminated on a small and large scale across businesses of all types.</p> <p>Discussions with TransCanada continue. We do not have an update at this time.</p> <p>Our government is committed to conducting business in an open and transparent manner. We will provide what we can when we can.</p>	<p>Our agency has a successful track record for negotiating and fulfilling contracts in the best interest of Ontario ratepayers.</p> <p>This is a unique case and these circumstances do not apply to other contracts or issues.</p> <p>Discussions with TransCanada continue. We do not have an update at this time.</p> <p>Contracts are commercially sensitive. It is up to the developer to determine what they are willing to make public and when.</p>

Jennings, Rick (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: November 16, 2011 1:14 PM
To: King, Ryan (ENERGY); Rehob, James (ENERGY)
Cc: Perun, Halyna N. (ENERGY); Jennings, Rick (ENERGY)
Subject: Revised options deck
Attachments: GS Options on Site.16 11 2011.ppt

We had the opportunity to take the DM through the Greenfield options deck this morning and to discuss compensation and site issues. The DMO is now trying to schedule a briefing for the Minister, which could happen as early as tomorrow morning. Would you please take a look at the attached revised deck and provide your comments? The changes aren't intended to fundamentally revisit the approach but rather are supposed to clarify – if that hasn't happened, please let me know. The DMO is looking for the revised deck by end of day. My apologies for the short turn around.

Thank you!

Carolyn

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Ontario

MINISTRY OF ENERGY

Greenfield South Power Corporation Options

Minister's Briefing
Confidential/Solicitor Client Privileged
November 17, 2011

Issues

- Next steps to resolve the Greenfield South gas plant require the government and the OPA to determine:
 1. what compensation Greenfield South should receive for termination of the contract; and
 2. what will happen with the Greenfield South site
- These issues inform both negotiations with Greenfield South and, potentially, draft legislation
 - All options are not equally feasible and may need to be adjusted depending on circumstances

Compensation

- There are at least 3 options to address compensation:
 1. Formula based on provable costs incurred by Greenfield South
 2. Fixed amount based on estimated costs incurred by Greenfield South
 3. Referral to a third party arbitrator for determination of compensation

Compensation

- Compensation is assumed to include:
 - Sunk costs of construction and equipment
 - Costs paid to terminate construction and equipment contracts
 - Soft development costs, such as engineering, design, surveys, and legal fees
 - Costs of securing the site once construction stops
- Compensation could include:
 - Lost profits
 - Costs of acquiring the site

Option 1 – Formula based on costs incurred

- Greenfield would receive compensation for reasonable costs incurred in developing the project based on costs that it could prove through invoices and other documentation and, potentially, audit
- A formula could define “reasonable costs” and the time periods in which those costs were incurred
- Pros
 - Places onus on Greenfield South to prove its costs
 - Payment would be based on verifiable information
 - This approach was taken in the *Adams Mine Lake Act, 2004*
 - Provides a rational basis for negotiations
- Cons
 - Negotiations could become bogged down in settling a formula without getting to the application of the formula

Option 2 – Fixed Amount

- Greenfield would receive compensation based on an amount determined by the OPA. This amount would be an estimate of costs to the date of termination of the contract, without verification from Greenfield South
- Pros
 - An amount could be determined quickly
 - Could be used as a tactic in the context of legislation to advance negotiations
- Cons
 - Would require implementation through legislation.
 - Greenfield would not agree to an amount imposed by the OPA or the government
 - Appears arbitrary and unfair

Option 3 – Referral to Arbitrator

- An arbitrator could be appointed to resolve compensation either with consensus of Greenfield South or through legislation
- Pros
 - Provides for resolution of compensation through an independent third party
 - Allows for fair, impartial assessment of the amount of compensation
- Cons
 - Could result in a lengthy process, although process could be negotiated or legislated
 - Once arbitration commences, the ability of the OPA and the government to control the process is reduced

The Project Site

- There are at least 3 options to address the project site, which is a brownfield in a mostly industrial and commercial area:
 1. Acquire the site
 2. Greenfield retains the site
 3. Engage the City of Mississauga to seek its interest in acquiring the site from Greenfield South or contributing to compensation to Greenfield South

Site Option 1 – Acquisition

- Infrastructure Ontario or Ontario Power Generation acquires the site “as is” from Greenfield South
- Greenfield is compensated in the manner determined above and for the fair value of the land
- Pros
 - Quick to implement
 - Costs of demolition and site restoration, if necessary, are deferred
 - Site becomes available for public use or for resale
- Cons
 - Costs of security of site
 - May be perceived as expropriation, even if Greenfield is a willing seller

Option 2 – Greenfield retains site

- Use of site for electricity generation is prohibited through agreement or legislation
- Greenfield is compensated as determined above, for costs of restoring site to its pre-construction state, if desirable, and retains title to the land
- Pros
 - Limits OPA's and government's interests to immediate financial interests
 - Less intrusive to private interests than acquiring the site
- Cons
 - Public may continue to have ongoing concerns about future use of site

Option 3 – City of Mississauga Participation

- Begin discussions with the City of Mississauga to determine their interest in acquiring the site from Greenfield South Power Corporation or playing a role in resolution of the site
- City could contribute financially to compensation for Greenfield South or take on the liability of owning the site and in turn have a say in or control over the future use of the land
- Pros
 - Could potentially reduce total costs borne by the OPA or the Province
 - City could show that it is doing something positive in light of the cancellation
- Cons
 - Interest of the City is unknown. City unlikely to make a financial contribution

Other Considerations

- Relocation – Greenfield South develops a generation project at another site or Greenfield South's turbines are used at another site
 - Relocation complicates and potentially delays resolution of the Mississauga site

Jennings, Rick (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: November 17, 2011 11:39 AM
To: Lindsay, David (ENERGY); Jennings, Rick (ENERGY); Silva, Joseph (ENERGY)
Cc: Perun, Halyna N. (ENERGY)
Subject: FW: Draft Agreement
Attachments: DRAFT Construction Stoppage and Settlement Agreement.docx

We received the attached draft Construction Stoppage and Settlement Agreement from the OPA last evening and understand that this draft has been sent to Greenfield.

This agreement would require Greenfield to:

- immediately cease construction of the plant and demobilize from site
- maintain the safety and security of the site
- seek to have its environmental approval and its generation license cancelled

The OPA would be required to:

- pay Greenfield its costs of ceasing construction and demobilizing and costs of maintaining safety and security of the site
- provide a letter of credit (amount to be determined) that Greenfield can draw upon if the OPA doesn't pay the costs in the bullet above

All of Greenfield's costs may be verified through documentation and audit.

The Keele Valley claims would be settled for \$10M to be paid from the OEFC to Eastern Power and the related litigation would be dismissed.

The Clean Energy Supply (ARCES) contract between Greenfield and the OPA would be suspended for the duration of this Construction Stoppage and Settlement Agreement. The parties agree to work together in good faith to negotiate the mutual termination of the ARCES agreement and negotiate a new contract for a facility at a different location.

All discussions in relation to this agreement and in relation to the ARCES contract are confidential. Greenfield and the OPA may make a public announcement that they have entered into an agreement that provides for the permanent end to construction, the revocation of environmental approvals and licenses and further negotiation to determine the resolution of the cancellation of the facility.

The agreement has a term of 60 days, which may be extended for an additional 60 days. When this agreement expires, the ARCES Contract is terminated and the OPA and Greenfield shall commence a dispute resolution process (that ultimately includes arbitration) to determine the compensation owed to Greenfield.

We haven't heard of Greenfield's response (if any). We will follow up with Mike Lyle.

Carolyn

From: Michael Lyle [mailto:Michael.Lyle@powerauthority.on.ca]
Sent: November 16, 2011 5:34 PM
To: Perun, Halyna N. (ENERGY); Calwell, Carolyn (ENERGY)
Subject: Draft Agreement

This was sent to Greenfield late this afternoon.

Michael Lyle
General Counsel and Vice President
Legal, Aboriginal & Regulatory Affairs
Ontario Power Authority

120 Adelaide Street West, Suite 1600
Toronto, Ontario, M5H 1T1
Direct: 416-969-6035
Fax: 416.969.6383
Email: michael.lyle@powerauthority.on.ca

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Jennings, Rick (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: November 18, 2011 4:57 PM
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Calwell, Carolyn (ENERGY)
Subject: Greenfield

Privileged and Confidential

Mike Lyle advises that looks like there is an agreement in principle but he had to hang up before he could explain more. He asked us to stand by on the weekend – I'll follow up shortly with him for more details

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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Jennings, Rick (ENERGY)

From: Lindsay, David (ENERGY)
Sent: November 18, 2011 5:09 PM
To: Perun, Halyna N. (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Calwell, Carolyn (ENERGY)
Subject: RE: Greenfield

Great news. Thanks for the heads up.

David

From: Perun, Halyna N. (ENERGY)
Sent: November 18, 2011 4:57 PM
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Calwell, Carolyn (ENERGY)
Subject: Greenfield

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Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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Jennings, Rick (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: November 18, 2011 6:17 PM
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Calwell, Carolyn (ENERGY)
Subject: RE: Greenfield

Privileged and Confidential

Greenfield came back with settlement on the OEFC Keele Valley claims in the amount of \$15.3 M. There has been some discussion that Greenfield would settle for \$10 M plus \$5 + M in some other form – like a NUG contract. He thought that this extra \$5 M was not significant and would not be a deal breaker.

Also, Keele Valley settlement may need to be set out in a separate agreement. OPA counsel has been in discussion with OEFC counsel (Sarah Neville) today about such agreement.

Issue of NUG contract not landed as yet – Mike advises that OPA is looking at whether a Minister's direction is needed should this route be desired. We'll look at the need for a direction as well.

Also, I'll loop in MOF legal.

OPA is planning to send out next draft to Greenfield tomorrow and counsel are working on drafting this evening. He'll be sending the next draft to me tomorrow then as well.

Aim is to land all of this for an announcement on Monday.

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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From: Lindsay, David (ENERGY)
Sent: November 18, 2011 5:09 PM
To: Perun, Halyna N. (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Calwell, Carolyn (ENERGY)
Subject: RE: Greenfield

Great news. Thanks for the heads up.

David

From: Perun, Halyna N. (ENERGY)
Sent: November 18, 2011 4:57 PM
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Calwell, Carolyn (ENERGY)
Subject: Greenfield

Privileged and Confidential

Mike Lyle advises that looks like there is an agreement in principle but he had to hang up before he could explain more. He asked us to stand by on the weekend – I'll follow up shortly with him for more details

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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Jennings, Rick (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: November 19, 2011 5:20 PM
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Calwell, Carolyn (ENERGY)
Subject: Revised draft agreement - OPA/Greenfield
Attachments: #22077989v8_LEGAL_1_ - Facility Relocation and Settlement Agreement (Osler draft).docx

Privileged and Confidential

Attached please find latest iteration of a proposed agreement between the OPA and Greenfield. Key changes to note from OPA's first draft that we saw:

- Title of Agreement changes from "Construction Stoppage and Settlement Agreement" to "Facility Relocation and Settlement Agreement"
- Whereas clarified that it's as a result of the commitment of the Government of Ontario to relocate the Facility and at the request of the OPA that Greenfield is agreeing to stop construction and that the OPA and Greenfield agree to relocate the facility as per the agreement.
- The proposed agreement allows for the continuing manufacture of the gas turbine, the heat recovery steam generator, the transformers and the pumps (presumably to be used in the Relocated Facility). Greenfield is to arrange for suitable storage of this equipment in the meantime.
- The reference to Greenfield requesting that its Electricity Generation Licence be cancelled has been deleted as the licence is not site specific and presumably will be used for the Relocated Facility.
- Greenfield's Equity Sunk Costs (costs re engineering, designing, permitting etc) are to be substantiated by an Independent Engineer
- Greenfield and OPA agree to work together in good faith to determine a suitable site for a new nominal 300 MW natural gas fuelled combined cycle generating facility and the OPA agrees to assist Greenfield in obtaining all licenses, permits, certificates, approvals etc need to advance the Relocated Facility, plus potentially an additional 300 MW depending on system needs.
- The OPA agrees to indemnify, defend and hold harmless Greenfield and its General Contractor from and against any and all losses "relating to, arising out of, or resulting from any claims by Contractors, Suppliers, Governmental Authorities and employees resulting from the cessation of construction of the Facility."
- Greenfield's damages to be determined as the net present value of the net revenues from the Facility that are forecast to be earned by Greenfield during the term of the ARCES contract, taking into account any actions that Greenfield should reasonably be expected to take to mitigate the effect of the termination of the ARCES contract.
- The references to the settlement of the Keele Valley claims have been deleted as the intent is to deal with them in a separate document (we have not seen this document as yet).

This draft agreement is now with Greenfield's counsel for review.

Will keep you posted.

Halyna

Halyna N. Perun

A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
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Jennings, Rick (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: November 21, 2011 12:16 AM
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Calwell, Carolyn (ENERGY)
Subject: Re: Revised draft agreement - OPA/Greenfield

Privileged and Confidential

On my end only heard from Mike late into the evening. We understand that parties are getting close to an agreement. Apparently one key outstanding issue is whether residual value gets included in calculating lost profit if no relocation agreement and lost profits end up being arbitrated. Also we've been told that the OPA has a side letter w Eastern re negotiating a new contract for Keele (designed to get them the settlement above 10 M that we understand OEFC has not agreed to pay).

Mike did send me a further iteration of the agreement - but I will hold off sending you it - as there will be more to come though apparently not tonight.

The latest version I received more clearly addresses the possibility of a further nominal 300 MW facility should an incremental 300 MW at the relocated facility not be feasible

Also this version shows that the OPA is to provide Greenfield w security for the performance of OPA's indemnity and other obligations in the amount equal to 150 M.

We understand that comms roll out has OPA statement at 9:30 and min at ten. But as finance, for one, needs to approve the settlement of the keele valley litigation - comms has to be careful not to get ahead of what needs to be in place before announcement made.

Can discuss further in the am

Regards,

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

From: Perun, Halyna N. (ENERGY)
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Calwell, Carolyn (ENERGY)
Sent: Sat Nov 19 17:20:01 2011
Subject: Revised draft agreement - OPA/Greenfield

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This draft agreement is now with Greenfield's counsel for review.

Will keep you posted.

Halyna

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 777 Bay Street, 4th Floor, Suite 425
 Toronto, ON M5G 2E5
 Ph: (416) 325-6681 / Fax: (416) 325-1781
 BB: (416) 671-2607
 E-mail: Halyna.Perun2@ontario.ca

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Jennings, Rick (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: November 22, 2011 6:51 PM
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Calwell, Carolyn (ENERGY)
Subject: Revised draft agreement - OPA/Greenfield

Privileged and Confidential

Hi – No resolution as yet. The key outstanding item remains the residual value issue.

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
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E-mail: Halyna.Perun2@ontario.ca

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From: Perun, Halyna N. (ENERGY)
Sent: November 21, 2011 12:16 AM
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Calwell, Carolyn (ENERGY)
Subject: Re: Revised draft agreement - OPA/Greenfield

Privileged and Confidential

On my end only heard from Mike late into the evening. We understand that parties are getting close to an agreement. Apparently one key outstanding issue is whether residual value gets included in calculating lost profit if no relocation agreement and lost profits end up being arbitrated. Also we've been told that the OPA has a side letter w Eastern re negotiating a new contract for Keele (designed to get them the settlement above 10 M that we understand OEFC has not agreed to pay).

Mike did send me a further iteration of the agreement - but I will hold off sending you it - as there will be more to come though apparently not tonight.

The latest version I received more clearly addresses the possibility of a further nominal 300 MW facility should an incremental 300 MW at the relocated facility not be feasible

Also this version shows that the OPA is to provide Greenfield w security for the performance of OPA's indemnity and other obligations in the amount equal to 150 M.

We understand that comms roll out has OPA statement at 9:30 and min at ten. But as finance, for one, needs to approve the settlement of the keele valley litigation - comms has to be careful not to get ahead of what needs to be in place before

announcement made.

Can discuss further in the am

Regards,

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

From: Perun, Halyna N. (ENERGY)
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Calwell, Carolyn (ENERGY)
Sent: Sat Nov 19 17:20:01 2011
Subject: Revised draft agreement - OPA/Greenfield

Privileged and Confidential

Attached please find latest iteration of a proposed agreement between the OPA and Greenfield. Key changes to note from OPA's first draft that we saw:

- Title of Agreement changes from "Construction Stoppage and Settlement Agreement" to "Facility Relocation and Settlement Agreement"
- Whereas clarified that it's as a result of the commitment of the Government of Ontario to relocate the Facility and at the request of the OPA that Greenfield is agreeing to stop construction and that the OPA and Greenfield agree to relocate the facility as per the agreement.
- The proposed agreement allows for the continuing manufacture of the gas turbine, the heat recovery steam generator, the transformers and the pumps (presumably to be used in the Relocated Facility). Greenfield is to arrange for suitable storage of this equipment in the meantime.
- The reference to Greenfield requesting that its Electricity Generation Licence be cancelled has been deleted as the licence is not site specific and presumably will be used for the Relocated Facility.
- Greenfield's Equity Sunk Costs (costs re engineering, designing, permitting etc) are to be substantiated by an Independent Engineer
- Greenfield and OPA agree to work together in good faith to determine a suitable site for a new nominal 300 MW natural gas fuelled combined cycle generating facility and the OPA agrees to assist Greenfield in obtaining all licenses, permits, certificates, approvals etc need to advance the Relocated Facility, plus potentially an additional 300 MW depending on system needs.
- The OPA agrees to indemnify, defend and hold harmless Greenfield and its General Contractor from and against any and all losses "relating to, arising out of, or resulting from any claims by Contractors, Suppliers, Governmental Authorities and employees resulting from the cessation of construction of the Facility."
- Greenfield's damages to be determined as the net present value of the net revenues from the Facility that are forecast to be earned by Greenfield during the term of the ARCES contract, taking into account any actions that Greenfield should reasonably be expected to take to mitigate the effect of the termination of the ARCES contract.
- The references to the settlement of the Keele Valley claims have been deleted as the intent is to deal with them in a separate document (we have not seen this document as yet).

This draft agreement is now with Greenfield's counsel for review.

Will keep you posted.

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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Jennings, Rick (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: November 24, 2011 5:31 PM
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Calwell, Carolyn (ENERGY); Silva, Joseph (ENERGY)
Subject: FW: Greenfield

Privileged and Confidential

As I mentioned this aft, I have now sent the below summary to William as I kept promising him this info throughout the week.

Halyna

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From: Perun, Halyna N. (ENERGY)
Sent: November 24, 2011 5:24 PM
To: Bromm, William (CAB)
Cc: Calwell, Carolyn (ENERGY); Silva, Joseph (ENERGY)
Subject: Greenfield

Confidential/In contemplation of Litigation and Solicitor-Client Privileged

Hi William,

Our understanding is that the OPA and Greenfield South Power Corporation continue to negotiate on a particular outstanding issue, noted below, and have not landed a final Facility Relocation and Settlement Agreement as yet.

On Monday I had suggested to you that we hold off sending you details as I thought that the parties were quite close on settling the agreement. However, as we are now closer to the end of the week and as I understand that your office continues to be interested in knowing more, I am sending you the below summary of the details of the agreement as we know them to date, which Carolyn Calwell has prepared. The summary is based on the OPA's draft of November 20th. We have not seen a further turn of the agreement. We understand that the Keele Valley litigation will be settled through a separate agreement, which we also have not yet seen.

We understand that there is an outstanding issue with respect to compensation for the residual value of the gas plant at the end of the 20 year term of the ARCES Contract [The ARCES contract is the Amended and Restated Clean Energy Supply Contract between Greenfield and the OPA of March 16th, 2009]. We have not seen any draft language to address this point. The draft that we have seen addresses the following issues.

The agreement requires Greenfield to:

- immediately cease construction of the plant and demobilize from site, other than activities reasonably necessary to bring work to a conclusion;
- maintain the safety and security of the site, including insurance coverage;
- apply for a review of its environmental approval (Certificate of Approval – Air) and request its revocation without issuance of a new certificate;
- provide the OPA and an Independent Engineer with a list of and documentation supporting all costs ("Equity Sunk Costs") incurred up to the effective date of the agreement (including engineering, design, permitting, letter of credit interest and development costs);
- seek any required consent of its secured lenders to enter into the agreement.

In addition, Greenfield is prohibited from reapplying for an environmental compliance approval, recommencing any construction activity at the site and granting any security interest in, encumbering or transferring the facility or the land. Greenfield may continue the manufacture of the gas turbine, the heat recovery steam generator, the transformers and the pumps and is to arrange for suitable storage of this equipment.

All of Greenfield's costs may be verified through documentation and audit. The OPA may inspect the site.

The OPA is required to:

- pay Greenfield its costs of ceasing construction, demobilizing, maintaining safety and security of and insurance for the site;
- reimburse Greenfield for Equity Sunk Costs that are certified by the Independent Engineer;
- indemnify Greenfield, the parent company of Greenfield (Greenfield South Holdco Corp.) and North Green Limited from losses related to claims by contractors, suppliers, governmental authorities and employees resulting from the cessation of construction of the facility;
- provide a letter of credit to Greenfield in the amount of \$150M, which Greenfield may draw upon if the OPA doesn't pay the Equity Sunk Costs or doesn't honour its indemnification obligations;
- pay the costs of the Independent Engineer;
- pay to Greenfield's secured lenders accrued and unpaid interest and make whole payments or breakage fees which Greenfield is required to pay, plus the outstanding principal amount for any of Greenfield's debt (in exchange for full and final releases from the secured lenders in favour of Greenfield, Greenfield Holdco, the OPA and Ontario).

Greenfield and OPA agree to work together in good faith to determine a suitable site for a new nominal 300 MW natural gas fuelled combined cycle generating facility and negotiate amendments to the ARCES contract to reflect this relocated facility. The OPA agrees to assist Greenfield in obtaining all licenses, permits, certificates, approvals, etc. needed to advance the relocated facility. The Amended ARCES contract would also provide for further negotiation of potential opportunities to expand the relocated facility by an additional 300 MW or to find a suitable site for a further nominal 300MW facility, depending on system needs, IESO requirements and provided that technical or commercial impediments can be reasonably satisfied. Greenfield's security requirements under an amended ARCES will be reduced.

The ARCES Contract is suspended for the duration of the Facility Relocation and Settlement Agreement, which has a term of 60 days and which may be extended for an additional 60 days. If the Facility Relocation and Settlement Agreement expires, the ARCES Contract is terminated and the OPA and Greenfield shall commence a dispute resolution process (that ultimately includes arbitration) to determine the compensation owed to Greenfield.

If the ARCES contract is terminated, Greenfield's damages shall be determined as the net present value of the net revenues from the Facility that are forecast to be earned by Greenfield during the term of the ARCES contract, taking into account (i) any actions that Greenfield should reasonably be expected to take to mitigate the effect of the termination of the ARCES contract, (ii) Greenfield's costs in connection with development, construction, financing, operation and maintenance of the facility and (iii) any proceeds of sale or salvage value of equipment. Upon payment of damages, Greenfield shall release all claims against the OPA and Ontario.

The parties represent and warrant as to their power and authority to enter into this agreement.

All discussions in relation to this agreement and in relation to the ARCES contract are confidential. Greenfield and the OPA may make a public announcement that they have entered into an agreement that provides for the permanent end to construction, the revocation of environmental approvals and licenses and further negotiation to determine the resolution of the cancellation of the facility.

Failure by the OPA to perform its obligations under this agreement terminates the ARCES agreement. Compensation to Greenfield is determined as set out above. Failure by Greenfield to perform its obligations constitutes default under the ARCES contract and entitles the OPA to exercise its remedies under that agreement.

We will provide a further update when we see a further draft of the agreement. In the meantime, please contact me if you have any questions.

Halyna

Halyna N. Perun
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777 Bay Street, 4th Floor, Suite 425
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Jennings, Rick (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: November 24, 2011 10:35 PM
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Calwell, Carolyn (ENERGY); Silva, Joseph (ENERGY)
Subject: Re: Greenfield

Privileged and Confidential

Mike Lyle called to advise that the parties will not be reaching an agreement tomorrow and that the agreement in principle which led to work stoppage on the site as of last Friday will be extended for two more weeks (I only now understand that there was an actual letter sent by the OPA and signed back by Greenfield last week wherein Greenfield agreed to stop construction with the understanding that the parties would close on a Facility Relocation and Settlement Agreement by this Friday). Two issues remain - one being with respect to the compensation for the residual value of the gas plant (as noted previously) and the other that now the secured lenders want to be paid out at the same time as the deal closes. Mike is of the view that both issues will be resolved but more time is needed and he underlined that this is not a breakdown of negotiations. I'd be happy to review this further with you tomorrow.

Halyna Perun
A/Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

From: Perun, Halyna N. (ENERGY)
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Calwell, Carolyn (ENERGY); Silva, Joseph (ENERGY)
Sent: Thu Nov 24 17:30:37 2011
Subject: FW: Greenfield

Privileged and Confidential

As I mentioned this aft, I have now sent the below summary to William as I kept promising him this info throughout the week.

Halyna

Halyna N. Perun
A/Director
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Subject: Greenfield

Confidential/In contemplation of Litigation and Solicitor-Client Privileged

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- provide a letter of credit to Greenfield in the amount of \$150M, which Greenfield may draw upon if the OPA doesn't pay the Equity Sunk Costs or doesn't honour its indemnification obligations;
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We will provide a further update when we see a further draft of the agreement. In the meantime, please contact me if you have any questions.

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Jennings, Rick (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: November 25, 2011 8:21 PM
To: Lindsay, David (ENERGY); Jennings, Rick (ENERGY); Calwell, Carolyn (ENERGY); Silva, Joseph (ENERGY)
Subject: Greenfield

Privileged and Confidential

In a call with Mike Lyle this evening he advised that

- letter of agreement to stop work was extended today to Dec 16 (same two issues noted today - lenders wish to be paid on closing and loss of profits needs to be resolved - though as he said yesterday neither is a "deal breaker" but the lenders issue particularly needs more time for due diligence re paying out)

- last evening Eastern wanted the settlement monies of 10 million for the Keele Valley litigation paid out today (ie the original closing date and not on the extended date). OEFC refused. As a result OPA provided a certified cheque to Eastern for that amount today. This amount is an early payment of 5.4 million OPA agreed to in a side letter deal last week with Eastern (which I did not know about til now but you may recall Eastern wanted to settle Keele Valley for 15.4 and OPA had thought it could find the extra 5.4 to top up the 10 million OEFC agreed to as settlement) plus Mike advises that the additional 4.6 million the OPA provided today would be credited against future payments under a new contract with a further stipulation made for the return of that money should negotiations fail.

- finally there was a further separate letter agreement executed today addressing indemnification during the extension period.

It's a bit like peeling an onion, I must say - I honestly don't know if we now know all the letters and side letters that are out there pertaining to this matter.

I asked Mike to send me all of pertinent info: the latest draft of the settlement agreement and all letters he referred to - cessation letter; extension of cessation; side letter re 5.4 million; indemnity letter.

Once we review the documents we hope to be in a position to provide you with a more complete picture -

Halyna Perun
A\Director
Ph: 416 325 6681
BB: 416 671 2607

Sent using BlackBerry

Jennings, Rick (ENERGY)

From: King, Ryan (ENERGY)
Sent: December 14, 2011 2:17 PM
To: Jennings, Rick (ENERGY)
Subject: Fw: Mississauga Plant
Attachments: Greenfield South (14 Dec).ppt; Greenfield South BN .doc

Should have ccd you

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

From: King, Ryan (ENERGY)
To: Imbrogno, Serge (OFA)
Sent: Wed Dec 14 14:16:51 2011
Subject: Fw: Mississauga Plant

Hi Serge, some greenfield materials attached.
Ryan

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

From: King, Ryan (ENERGY)
To: 'Jennings, Rick (ENERGY)'
Sent: Wed Dec 14 10:14:38 2011
Subject: RE: Mississauga Plant

Rick, a few materials including background material from a recent deck, and a note that has the chronology. If you're ok with this I can send along to Serge.

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

From: Jennings, Rick (ENERGY)
Sent: December 14, 2011 9:54 AM
To: Imbrogno, Serge (OFA)
Cc: King, Ryan (ENERGY)
Subject: RE: Mississauga Plant

Yes we'll send you something on this.

On a unrelated matter do you have a slide deck you were planning to use to brief your Minister on the US GAAP / IFRS decision? We have some OPG slides but it might be a good idea for us to use your material to brief our Minister.

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

From: Serge Imbrogno [mailto:Serge.Imbrogno@ofina.on.ca]
Sent: December 14, 2011 6:26 AM
To: Jennings, Rick (ENERGY)
Subject: Mississauga Plant

Hi Rick,

Steve O. asked for a briefing on the Mississauga plant. Do you have any notes or presentations that you could share with me? We've mainly been involved because of Keele Valley so I don't have much on the core issue.

Serge

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Appendix 1

Greenfield South Background

Key Facts About the Greenfield South Plant

- Greenfield South Power Corporation (controlled by Eastern Power Corporation) was the successful applicant in Ministry of Energy run Clean Energy Supply (CES) RFP and signed a contract with the OPA in April 2005.
- Eastern Power, based in Ontario, has received all required provincial approvals, including Environmental Assessment and Certificates of Approval.
- Eastern Power has received all required municipal approvals, including building site approval from the City of Mississauga issued in May 2011.
- Eastern Power has secured debt financing from Credit Suisse and EIG (confirmed by the OPA).



Legend:

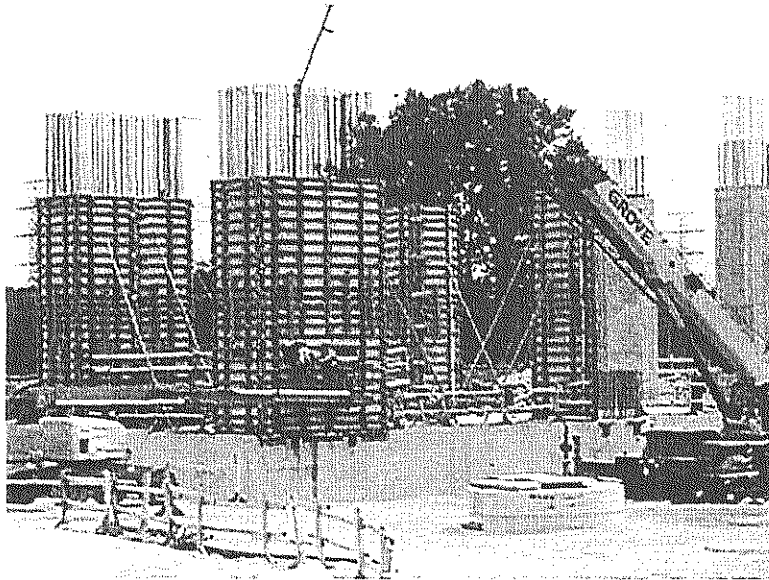
- A – Proposed Greenfield Site
- B – Closest House
- C – Closest Subdivision (North)
- D – Closest Subdivision (South)
- E – Trillium Heath Centre
- F – Sherway Gardens Mall

Distance:

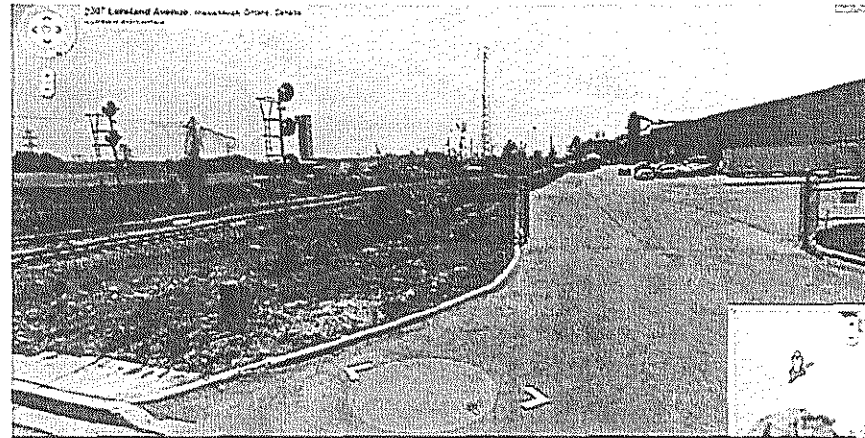
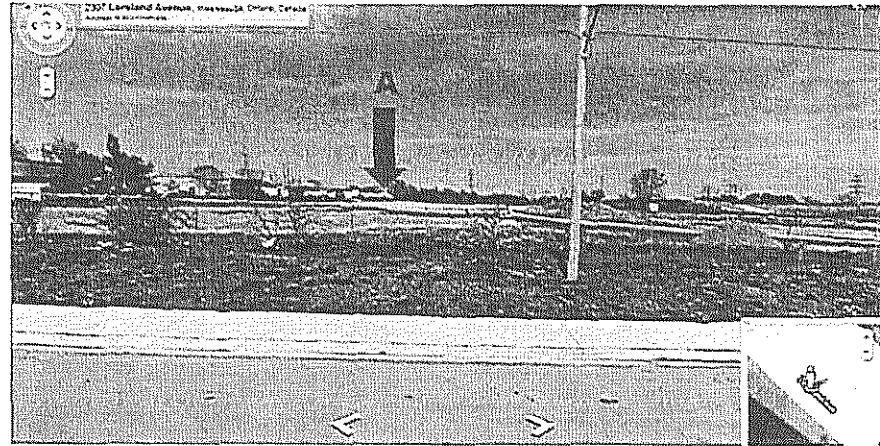
- A to B: 220 Meters
- A to C: 270 Meters
- A to D: 500 Meters
- A to E: 740 Meters
- A to F: 910 Meters

CONFIDENTIAL / SOLICITOR-CLIENT
PRIVILEGED

MINISTRY OF ENERGY



*Plant construction as of 28 September 2011



CONFIDENTIAL / SOLICITOR-CLIENT
PRIVILEGED



Confidential and Solicitor-Client Privileged

Ministry of the Attorney General

Briefing Note

Legal Services Division

Legal Services Branch – ENE/MOI

ISSUE:

- Greenfield South Gas Generating Plant in Mississauga
- It is proposed that the Ministry of Energy work with the Ontario Power Authority (OPA) to enter into discussions with Greenfield South Power Corporation (controlled by Eastern Power Corporation, referred to as "Eastern Power") towards a satisfactory resolution of the Mississauga site

BACKGROUND

- Eastern Power is developing the Greenfield South Generating Station, a 280 MW combined cycle natural gas plant under construction in the City of Mississauga on a 4.5 hectare property at 2315 Loreland Avenue.
- The project arose out of a Ministry of Energy Clean Energy Supply (CES) procurement process in 2004. This contract was eventually assumed by the OPA.
- The project was undertaken to meet local reliability needs for the Southwest and Western GTA and has been positioned as part of the coal closure strategy.
- The plant is 200 metres from the nearest residence, 700 metres from the nearest hospital and 1.1 km from the nearest school.
- The project is strongly opposed by local residents. On October 12, 2011, the Mississauga Council passed a motion requesting that the government and the Premier take immediate action to cancel the contract, stop construction and return the site to pre-construction condition.
- In 2007, the Ontario Municipal Board reviewed and approved of the zoning of the project site after a lengthy and protracted process.
- In 2008, Ministry of Environment (MOE) granted all necessary environmental approvals.
- In March 2011, OPA renegotiated the initial Commercial Operation Date (C.O.D.) with Eastern Power, in recognition of lengthy regulatory approvals and financing delays experienced by Eastern Power. The new Milestone Date for Commercial Operation, when the plant is required to be fully operational, is September 1, 2014.
- In May 2011, Eastern Power finalized its financing arrangements with Credit Suisse and EIG. Around that time, the City of Mississauga issued building permits for the construction at the site.

- In June 2011, MOE announced that it will conduct an updated review of the approval for the gas plant to assess recent developments. No end-date was set for this process.

- In July 2011, Eastern Power reported that it had laid foundations for the steam and gas turbine halls and placed orders for the major equipment (generators, turbines, etc.).

- On June 16, the Minister of the Environment John Wilkinson announced that the Ministry of the Environment would conduct an updated review of the approval for the Greenfield South facility to assess recent developments. The review was to take as long as the ministry needed to confirm that the project can proceed in a manner that is fully protective of public health and the environment.

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- The Environmental Approval for the generating plant is specific to the site, and is not transferable.

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- On September 24th, several media outlets reported on the Liberal party's campaign commitment to relocate the proposed Greenfield South generating station to a location outside Mississauga and Oakville.

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- In a news release, Ontario Liberal candidates Charles Sousa, Donna Cansfield, Laurel Broten and Dipika Damerla said the party would work with the developer to find a new location for the plant.

- On October 24, 2011, as the result of a release from the leader of the Opposition, several media reported on the continuing construction at the site, including delivery of a generator.

- On November 21, 2011, Minister of Energy Chris Bentley issued a statement that the OPA had advised that Greenfield had agreed to stop construction immediately. Discussions between OPA and GS on relocation continue.

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- Construction continues at the site. Eastern Power has informed the OPA that it will not "down tools" until it receives formal notification of next steps.

- Next steps would require the OPA to be asked to approach Eastern Power to initiate discussions.

- The discussion would likely include potential treatment of costs incurred to date (sunk costs—including equipment costs), treatment of construction and equipment-related contracts, estimates and treatment of foregone revenue, and options and Eastern's interest with respect to relocating to an alternative site.

Jennings, Rick (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: December 22, 2011 5:48 PM
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY)
Subject: Mississauga Gas Plant
Attachments: 22431262_1 (2).doc

Confidential/Solicitor-Client Privileged

Deputy,

Thank you for your message about the OPA's current proposal to resolve the Greenfield site. I followed up with Mike Lyle and my Finance and CLOC colleagues and we are starting to think through the concept. Mike Lyle sent the attached description of the proposal. He described it as a work in progress.

I understand that the OPA will meet with OPG in the first week of January. We will think about the proposal and alternatives (although apart from paying the break fee, I'm not sure there are many). We will also start to get our heads around CCAA proceedings.

Carolyn

Carolyn Calwell
Deputy Director
Ministry of Energy & Ministry of Infrastructure
Legal Services Branch
Ministry of the Attorney General
416.212.5409

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Jennings, Rick (ENERGY)

From: Lindsay, David (ENERGY)
Sent: December 23, 2011 5:33 AM
To: Calwell, Carolyn (ENERGY); Jennings, Rick (ENERGY)
Cc: Silva, Joseph (ENERGY)
Subject: Re: Greenfield

Thanks Carolyn.

For the purposes of this file, our colleagues in Finance and the Ontario Finance Authority and appropriate folks in the AG and Cabinet office will want to be kept in the loop.

I will probably have to re-institute the system of periodic conference calls to keep everyone informed.

It doesn't sound like this development creates a sense of particular urgency over the Christmas Holiday but in the interests of 'no surprises' I guess we need to make sure finance and cabinet office are in the loop. Once you have a bit more understanding of what this is and any implications for our going forward strategy let me know.

I'm not in the office, but on my Blackberry.

Cheers
David

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

From: Calwell, Carolyn (ENERGY)
To: Lindsay, David (ENERGY); Jennings, Rick (ENERGY)
Cc: Silva, Joseph (ENERGY)
Sent: Thu Dec 22 18:25:53 2011
Subject: Greenfield

Confidential/Solicitor-Client Privileged

I just heard from the OPA that one of Greenfield's secured lenders filed a Proceedings Against the Crown notice yesterday. I am trying to track it down. If so, this is the first step in litigation, although a Statement of Claim must wait at least 60 days.

Carolyn

Jennings, Rick (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: December 22, 2011 6:26 PM
To: Lindsay, David (ENERGY); Jennings, Rick (ENERGY)
Cc: Silva, Joseph (ENERGY)
Subject: Greenfield

Confidential/Solicitor-Client Privileged

I just heard from the OPA that one of Greenfield's secured lenders filed a Proceedings Against the Crown notice yesterday. I am trying to track it down. If so, this is the first step in litigation, although a Statement of Claim must wait at least 60 days.

Carolyn

Jennings, Rick (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: December 23, 2011 7:42 AM
To: Lindsay, David (ENERGY); Jennings, Rick (ENERGY)
Cc: Silva, Joseph (ENERGY)
Subject: Re: Greenfield

Understood. Will do. CLOC is tracking down the PACA notice. I should know at least a little more later this morning.

Carolyn

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

From: Lindsay, David (ENERGY)
To: Calwell, Carolyn (ENERGY); Jennings, Rick (ENERGY)
Cc: Silva, Joseph (ENERGY)
Sent: Fri Dec 23 05:33:06 2011
Subject: Re: Greenfield

Thanks Carolyn.

For the purposes of this file, our colleagues in Finance and the Ontario Finance Authority and appropriate folks in the AG and Cabinet office will want to be kept in the loop.

I will probably have to re-institute the system of periodic conference calls to keep everyone informed.

It doesn't sound like this development creates a sense of particular urgency over the Christmas Holiday but in the interests of 'no surprises' I guess we need to make sure finance and cabinet office are in the loop. Once you have a bit more understanding of what this is and any implications for our going forward strategy let me know.

I'm not in the office, but on my Blackberry.

Cheers
David

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

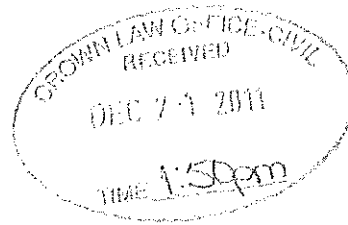
From: Calwell, Carolyn (ENERGY)
To: Lindsay, David (ENERGY); Jennings, Rick (ENERGY)
Cc: Silva, Joseph (ENERGY)
Sent: Thu Dec 22 18:25:53 2011
Subject: Greenfield

Confidential/Solicitor-Client Privileged

I just heard from the OPA that one of Greenfield's secured lenders filed a Proceedings Against the Crown notice yesterday. I am trying to track it down. If so, this is the first step in litigation, although a Statement of Claim must wait at least 60 days.

Carolyn

SERVICE OF A COPY
ADMITTED THIS 21 DAY OF December 2011
Crown Law Office (Civil Law)
MINISTRY OF THE ATTORNEY GENERAL
FOR ONTARIO
Per [Signature] Time 1:50pm
7th DAY COURT



Jennings, Rick (ENERGY)

From: Lindsay, David (ENERGY)
Sent: December 23, 2011 4:44 PM
To: Calwell, Carolyn (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Collins, Jason R. (ENERGY)
Subject: Re: Greenfield

Thanks Carolyn,

I appreciate the update. So long as all are in the loop that is about as much as we can do at this point.

David

From: Calwell, Carolyn (ENERGY)
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Collins, Jason R. (ENERGY)
Sent: Fri Dec 23 16:30:52 2011
Subject: Greenfield

Confidential/Solicitor Client Privileged

Deputy,

Attached is the Proceedings Against the Crown Act notice, received by MAG yesterday. This puts EIG Management Company, LLC in position to issue a Statement of Claim against the Crown any time on or after February 20th. The attached note sets out claims in the PACA notice and also describes in high level terms the OPA's proposal. The PACA notice does not prevent pursuit of this proposal.

MAG, including CLOC and the ADAG's office, and MOF Legal are fully looped in. There isn't a lot more that we can do at this stage without further details of the proposal. I will follow up with Mike Lyle on January 3rd for further details.

Happy holidays!

Carolyn

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Jennings, Rick (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: December 23, 2011 4:31 PM
To: Lindsay, David (ENERGY)
Cc: Jennings, Rick (ENERGY); Silva, Joseph (ENERGY); Collins, Jason R. (ENERGY)
Subject: Greenfield
Attachments: 0040-000043232 – EIG Management Company, LLC.PDF; Greenfield South BN.23 12 2011.2.doc

Confidential/Solicitor Client Privileged

Deputy,

Attached is the Proceedings Against the Crown Act notice, received by MAG yesterday. This puts EIG Management Company, LLC in position to issue a Statement of Claim against the Crown any time on or after February 20th. The attached note sets out claims in the PACA notice and also describes in high level terms the OPA's proposal. The PACA notice does not prevent pursuit of this proposal.

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Confidential and Solicitor-Client Privileged

Ministry of the Attorney General

Briefing Note

Legal Services Division

Legal Services Branch – ENE/MOI

ISSUE:

- Greenfield South Gas Generating Plant in Mississauga (the Greenfield South project)

CURRENT STATUS

- On December 21, 2011, EIG Management Company, LLC, a secured creditor of Greenfield South project, served a notice of claim under the *Proceedings Against the Crown Act*.
- The Ontario Power Authority is developing a proposal to have Greenfield South Power Corporation (Greenfield) seek *Companies' Creditors Arrangement Act* protection and to have Ontario Power Generation enter into a joint venture to make a bid for Greenfield's assets and trade debt and existing supply contracts.

Notice Under *Proceedings Against the Crown Act*

- On December 21, 2011, EIG Management Company, LLC ("EIG") (representing itself and certain note holders involved in the financing of the Greenfield South project) served a notice of claim under the *Proceedings Against the Crown Act*.
- This notice of claim represents the first procedural step in bringing a law suit against the Crown.
- The notice of claim alleges that, in committing to terminate construction of the Greenfield South project, the Crown and its agents, including Premier McGuinty and Minister Bentley, have committed the torts of (i) inducing breach of contract and (ii) interfering with economic relations/rights to damages of EIG.
- EIG may serve a statement of claim on the Province any time after February 20, 2011.

Negotiations between the OPA and Greenfield

- The OPA and Greenfield have been attempting to negotiate an agreement to allow development of the Greenfield South Project to cease, to determine the amount of Greenfield's sunk costs and to enter into negotiations to develop a gas plant at

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another site. Greenfield's secured creditors, including EIG, are involved in the negotiations.

- On December 14, 2011, the OPA and Greenfield agreed to continue negotiations and to continue to suspend obligations under the Amended and Restated Clean Energy Supply (ARCES) Contract, including suspension of construction activities until January 20, 2012.
 - The OPA agreed to pay \$35,000,000 to Greenfield in recognition of Greenfield's sunk costs incurred to date. In addition, the OPA will make direct payments to Greenfield's suppliers in the amount of approximately \$13.14 million on behalf of Greenfield.
- The OPA has advised ENERGY that EIG has noted Greenfield in default of its credit obligations.
- The OPA is developing a proposal that may assist in resolving negotiations, particularly with respect to secured creditors.
 - Greenfield would seek protection under the *Companies' Creditors Arrangement Act*.
 - Ontario Power Generation would enter into a joint venture with an entity related to the Greenfield parent company, Eastern Power, to acquire Greenfield's assets, trade debt and equipment supply costs.
 - The OPA would assist OPG in financing this entity. The assets would then be used by the joint venture to pursue a new gas plant at a different location.

NEXT STEPS

- The OPA and OPG plan to meet to discuss the OPA's proposal in early January 2012.
- Nothing is expected to happen with respect to EIG's notice of claim until at least February 20, 2012

BACKGROUND

- Originally, the Greenfield South project was to be a 280 MW combined cycle natural gas plant in the City of Mississauga on a 4.5 hectare property at 2315 Loreland Avenue.
- The Greenfield South project arose out of a Ministry of Energy Clean Energy Supply (CES) procurement process in 2004.

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- The original contract was executed in April, 2005.
 - The OPA subsequently assumed the contract. It was amended and restated in March, 2009 in recognition of process delays and complexities experienced by Greenfield.
 - In March 2011, the OPA renegotiated the initial Commercial Operation Date (C.O.D.) with Greenfield to Q3 2014.
- On September 24, 2011, the government announced a commitment to stop construction at the site and to relocate the plant.
 - On November 21, 2011, Minister of Energy Chris Bentley issued a statement that the OPA had advised that Greenfield had agreed to stop construction immediately and that both the OPA and Greenfield were negotiating to relocate the plant.

Date: December 23, 2011

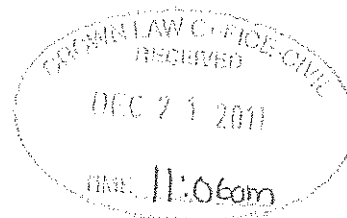
Prepared by: James P.H. Rehob
Senior Counsel
5-6676

Approved by: Carolyn Calwell, Deputy Director
Legal Services Branch
Ministry of Energy/Ministry of Infrastructure
2-5409

STIKEMAN ELLIOTT

Stikeman Elliott LLP Barristers & Solicitors

5300 Commerce Court West, 199 Bay Street, Toronto, Canada M5L 1B9
Tel: (416) 869-5500 Fax: (416) 947-0866 www.stikeman.com



Peter F.C. Howard
Direct: (416) 869-5613
E-mail: phoward@stikeman.com

BY COURIER

December 20, 2011
File No.: 131814.1001

Crown Law Office - Civil
Ministry of the Attorney General
720 Bay Street, 8th Floor
Toronto, ON
M7A 2S9

Dear Sirs/Mesdames:

Re: Notice Pursuant to section 7(1) of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P. 27

I am enclosing a Notice of Claim on behalf of EIG Management Company, LLC which is served in accordance with the *Proceedings Against the Crown Act*.

Yours truly,

A handwritten signature in dark ink, appearing to read "Peter F.C. Howard".

Peter F.C. Howard

/jh
encl.

TORONTO
MONTREAL
OTTAWA
CALGARY
VANCOUVER
NEWYORK
LONDON
SYDNEY

NOTICE OF CLAIM

TO: The Crown Law Office (Civil Law), Ministry of the Attorney General,
Toronto, Ontario

RE: Notice pursuant to section 7(1) of the *Proceedings Against the Crown Act*, R.S.O.
1990, c. P.27.

TAKE NOTICE that EIG Management Company, LLC for itself and as agent for the note holders (the "Note Holders") under the Note Purchase Agreement identified below (the "Claimant") intends to commence a claim against Her Majesty the Queen in Right of Ontario (the "Crown"), and possibly others, for damages and losses which Claimant has suffered as a result of the actions of agents and servants of the Crown for causes of action including in:

- (i) inducing Greenfield South Holdco Corp. and related entities (collectively "Greenfield") to breach the terms of a note purchase agreement dated May 26, 2011 (the "Note Purchase Agreement") with Claimant and related contracts;
- (ii) inducing the Ontario Power Authority (the "OPA") to repudiate the Amended and Restated Clean Energy Supply (ARCES) Contract dated April 12, 2005 and amended and restated as of March 16, 2009 (the "ARCES Contract") with Greenfield, which, in turn, caused Greenfield to breach its agreements with Claimant;
- (iii) interfering with Claimant's economic rights and/or relations with Greenfield as set out in the Note Purchase Agreement and related documents; and
- (iv) interfering in Claimant's economic relations with Greenfield by causing the OPA to repudiate the ARCES Contract, which in turn caused harm to Claimant.

I. MATERIAL BACKGROUND FACTS

1. On or about April 12, 2004, the OPA and Greenfield executed a Clean Energy Supply Contract for Greenfield to develop and operate the Greenfield South Generation Station which agreement was subsequently amended by the ARCES Contract. It was agreed that the power facility to be constructed would be built in Mississauga on Loreland Avenue.

2. Under the ARCES Contract, Greenfield had the right to obtain secured lending from third parties. The secured party was given certain rights under the ARCES Contract and would as well be subject to certain obligations thereunder.
3. On May 26, 2011, Greenfield entered into the Note Purchase Agreement with Claimant, acting as administrative agent for the Note Holders. Under the terms of that agreement, the Note Holders issued irrevocable financing commitments to Greenfield to finance the ownership, development, engineering, construction, testing, operation and maintenance of the Project.
4. Also on May 26, 2011, Greenfield, Claimant and the OPA entered into a secured lender consent and acknowledgement agreement (the "Secured Lender Consent Contract") under which the OPA acknowledged that, amongst other things, Claimant constituted, and therefore is entitled to the benefits of, the Secured Lender under the ARCES Contract.
5. On September 24, 2011, Liberal Leader and Ontario Premier Dalton McGuinty announced that the Ontario Government was permanently halting construction of the Greenfield South Generation Power Station.
6. On November 14, 2011, the OPA wrote to Greenfield effectively repudiating the ARCES Contract on the instructions of the Crown.
7. Subsequently, on November 18, 2011, the OPA and Greenfield agreed to a suspension of obligations under the ARCES Contract for a period until the end of the day on November 25, 2011 and neither party has performed under the ARCES Contract since November 18, 2011.

II. CLAIMS AGAINST THE CROWN

8. Claimant states that Premier Dalton McGuinty, Minister of Energy Chris Bentley and any individual within the Ontario Government who participated in, or agreed with, the decision to cause the end of construction of the Greenfield South Generation Station, are or were agents of the Crown.
9. In committing to terminate construction of the Greenfield South Generation Station, the Crown and its agents committed at least the torts of inducing breach of contract and interference with economic relations/rights to the damage and detriment of Claimant.
10. As a result of the commission of these torts by its agents, for which the Crown is liable, Claimant and the Note Holders have suffered damages. Claimant,

on behalf of itself and the Note Holders, therefore gives notice of its claim against the Crown for damages suffered as a result of this conduct.

11. This Notice is made pursuant to the requirements contained in section 7(1) of the *Proceedings Against the Crown Act*.
12. For further information pertaining to the within Notice of Claim, please contact solicitors for Claimant as below provided.

DATED at Toronto on Wednesday, December 21, 2011

Stikeman Elliott LLP
199 Bay Street, Suite 5300
Commerce Court West
Toronto, Ontario
M5L 1B9

Peter F.C. Howard
Tel: (416) 869-5613
Fax: (416) 947-0866

Counsel for Claimant, EIG Management
Company, LLC and the Note Holders

Rehob, James (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: Friday, October 07, 2011 4:05 PM
To: Rehob, James (ENERGY)
Cc: Calwell, Carolyn (ENERGY)
Subject: mississauga plant

Privileged and Confidential

The Deputy has just relayed the following to me. The Premier called the SOC an hour ago – what he has asked is for options on the Mississauga Gas Plant. He has asked for staff to be creative: policy and legal options.

Legal – ideas: how to stop the building of the plant: termination of contract; changing the set back rules; legislation to accomplish

We've been asked to develop options for Tuesday afternoon or Wed. morning. Rick Jennings will be contact Kevin French at MOE. The Deputy has contact Colin Anderson and I have put in a call to Mike Lyle.

SOC has asked the Premier to caution political staff not to talk about options, make promises etc

I've advised the Deputy that I will likely need to engage CLOC on some of this and also MOE legal. He's fine with that.

James – we've now spoken – so thanks for taking a crack at ideas – much appreciated.

Thank you!

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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From: Rehob, James (ENERGY)
Sent: October 7, 2011 5:02 PM
To: Perun, Halyna N. (ENERGY)
Cc: Calwell, Carolyn (ENERGY)
Subject: Cancelling Green South Gas Plant / Preliminary Advice on Options and Issues
Privileged & Confidential Legal Advice / Solicitor & Client Privileged

October 7, 2011

Good day, Halyna. You asked me to provide you with a list of considerations (options and issues) which could be considered in relation to the cancellation of the Greenfield South power plant, presently being constructed in Mississauga. Here are my views in this regard:

References to commercial contract payments, damages and other funds will usually be cost-recovered from the rate-base. Hence, there will be rate-payer impacts.

- **OPTION 1** Since the OPA is the counterparty to the original 2005 contract (which arose out of the Ministry passing it the initiative to procure clean energy supply), direct the OPA to take all necessary legal and commercial steps to cancel the contract, including but not limited to:
 - o Directing the OPA to renegotiate the contract with a view to settlement, relocation or temporary (indefinite) suspension (would involve compensatory payments on a commercial basis likely plus premium for inconvenience, compensation for the cancellation/suspension of supplier contracts etc.)
 - o **Termination on Notice (if timing permits)**
 - Include notification of immediate stopping the flow of funds (recognizing that this will give rise to cascading liability claims from the proponent and all related suppliers against OPA re. the project)
 - o Attempting to trigger *force majeure* provisions.
 - o (Attempting to recharacterize the entire transaction from a gas-plant to something more environmentally innocuous such as biofuels if that would be any more acceptable to the community)

Risk: Government and OPA would face commercial claims from the developer and any suppliers involved in the construction of the project, including gas companies constructing the gas line and supplying natural gas to the project – Union and Enbridge are large, powerful, well-connected entities and this should form part of the considerations. Note: in contrast with Option 2 below, that having the OPA cancel the contract keeps the liability with the OPA as the primary target, although the Crown would likely be added to any suit brought by the developer going forward. Proponent will explore whether Government has breached the discriminatory action (Government/Legislature changing law causing commercial harm) clause under the contract. (You noted that the contract itself may provide for the overarching liability limitation – capping liability at the total of sunk costs. I wonder whether this includes ongoing supplier contracts, etc.)

- **OPTION 2:** Government could (together with OPA) arrange settlement discussions with the developer, (directing either explicitly or implicitly the OPA to engage and participate with Government in these settlement discussion) – **OPTION 2A** could even consider having OPA re-assign the contract back over to the Crown (a commercial step) and allow Government all and immediate authority to negotiate directly with the developer.
 - o Government can then directly participate and control the negotiation process and make all major decisions independent of the OPA (avoiding OPA internal decision/approval processes, such as Board of Director approvals, which could slow timing)

Risk: Government would be the sole (primary) location for all contract damages suits of developer and suppliers.

- **OPTION 3: Injunction:** While quite weak, the Government could consider bringing an Application for Injunctive Relief (*ex parte*) if it can prove that there is a serious issue to be tried by the court, that irreparable harm will ensue if the relief sought (the immediate stopping of construction) is not granted, and that the balance of conveniences favours the court granting the injunction (issuing a declaratory order ordering the construction to cease). I believe that this would likely have to proceed as part of a wider action (e.g. the Court may wish to see that the matter was part of a claim and not a stand-alone issue for it to resolve), but this would have to be confirmed with CLOC.

file://C:\Users\RehobJa\AppData\Local\Microsoft\Windows\Temporary Internet Files\Con... 5/29/2012

- **OPTION 4:** OIC and Directive to OEB which could explore adding additional license conditions to the licensee's (Developer's) license that required it to meet, or prove to the OEB that will be in a position to meet, any new environmental requirements provided for the Ministry of Environment or Ministry of Natural Resources, assuming that MOE imposes new requirements as part of its ongoing review being conducted since July, 2011. (Weak legislative basis since OEB does not have a primary role in environmental review and OEB has already granted leave to construct.)

I wish to acknowledge the kind assistance of Jennifer, who assisted me in brainstorming and locating documents – thank you.

Kindly,
James

James P. H. Rebob
Senior Counsel
Ministry of Energy and
Ministry of Infrastructure
Legal Services Branch
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Tel: 416-325-6676
Fax: 416-325-1781
james.rebob@ontario.ca

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Rehob, James (ENERGY)

From: Rehob, James (ENERGY)
Sent: Friday, October 07, 2011 5:24 PM
To: Rehob, James (ENERGY)
Subject: Commercial Info
Attachments: The OPA and Res III Contracts.doc; Cancelling Green South Gas Plant Preliminary Advice on Options and Issues.htm; Contract Termination Presentation (LSD Portal).ppt; mississauga plant.htm

James P. H. Rehob
Senior Counsel
Ministry of Energy and
Ministry of Infrastructure
Legal Services Branch
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Tel: 416-325-6676
Fax: 416-325-1781
james.rehob@ontario.ca

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Ministry of the
Attorney General

Crown Law Office
Civil Law

720 Bay Street
8th Floor
Toronto ON M5G 2K1

Tel/Tél: (416) 326-4140
Fax/Téléc.: (416) 326-4181

Ministère du
Procureur général

Bureau des avocats
de la Couronne Droit civil

720 rue Bay
8^e étage
Toronto ON M5G 2K1

Please refer to File
S.V.P. se référer au dossier
No.



Confidential and Solicitor-Client Privileged

MEMORANDUM

TO: Malliha Wilson
Assistant Deputy Attorney General
Legal Services Division

FROM: Crown Law Office – Civil

DATE: August 5, 2009

RE: The OPA and Res III Contracts

We are responding to your urgent request for a legal opinion on the possible liability of the Ontario Power Authority (the "OPA") and the Crown in the event that a proposed environmental regulation regarding noise setbacks is made. The proposed regulation would impose noise set back requirements for the construction of wind turbine facilities. The OPA has entered into contracts for the development of such facilities with six energy suppliers (the "Suppliers") and there is a concern that the proposed regulation, if made, would increase the Suppliers' costs under those contracts, or decrease their anticipated revenues.

ISSUE:

Are the OPA or the Crown subject to legal duty to reimburse the Suppliers for any increased costs or loss of revenue if the proposed regulation is made?

OPINION:

- X If the noise setback regulation is passed, there is a high risk that the OPA will be liable to compensate the Suppliers for any increases in costs and loss of revenue they suffer as a result of the change in the law under the Discriminatory Action clause in Article 13 of the contract. This provision specifically addresses the payment of compensation where a project is affected because of a new regulation and appears to contemplate the precise circumstances at issue in the present matter.
- X However, if a Supplier cancels a project as a result of the regulation, this raises special issues. It is less certain that Article 13 may apply where a project is cancelled. Instead, OPA may be able to establish that the change in law that forced the cancellation of the project constitutes a force majeure in accordance with Article 11 of the contract. Under this provision, a Supplier is relieved of the obligation to perform the contract where an action or event beyond its control prevents performance of the contract. If this provision applied, there is only a limited right to compensation. However, because the Discriminatory Action clause in Article 13 specifically addresses changes in the law, there is at least a moderate risk that it would be found to be applicable, even in the case of the cancellation; this would result in the OPA being liable for the substantial compensation contemplated by that provision.
- X The Crown is not a party to the contract and, accordingly, would not be subject to any legal liability for its breach or under its terms, including the Discriminatory Action clause in Article 13. We are also of the view that no cause of action in tort could be asserted against the Crown. Further, s. 25.32(5) of the *Electricity Act* provides the Crown with statutory immunity from legal liability in these circumstances.

BACKGROUND:

- X The OPA is a non-profit, statutory corporation established under the *Electricity Act*, 1998, S.O. 1998, c. 15, Sched A. The directors of the Board of the OPA are appointed by the Minister of Energy and Infrastructure (the "Minister").
- X Section 25.3 of the *Electricity Act* stipulates that the OPA is not an agent of the Crown.
- X Under its statutory objects the OPA may engage in activities to ensure adequate, reliable and secure electricity supply and resources in Ontario. Further, under s. 25.2(5)(b) of the *Electricity Act* the OPA can enter into contracts relating to the procurement of electricity supply.
- X Under s. 25.32(4) the Minister of Energy may direct the OPA to assume responsibility for exercising the Crown's responsibilities relating to, among other things, the procurement of electricity supply. S. 25.32(5) requires the OPA to assume responsibility in accordance with any direction and, further, expressly releases the Crown "from any and all liabilities and obligations with respect to the matters for which the OPA has assumed responsibility".

- X Pursuant to this authority, in a letter dated August 27, 2007, the Minister directed the OPA to assume responsibility as of the date of the letter "for the acquisition of up to 2,000 MW of new renewable electricity supply from projects that are greater than 10 MW in size". The letter recognized that, as a consequence of this direction, the OPA would enter into contracts with suppliers to implement the initiative.
- X The OPA issued an RFP in connection with the initiative in August 2008 and a contract was awarded to six suppliers in January 2009 (the "contract"). The contract requires the six Suppliers to design and build wind power generation facilities. The contract contains a "Discriminatory Action" clause that provides that the OPA will reimburse a Supplier for additional costs or lost revenue in the event of a statutory or regulatory change that results in such costs or loss of revenue. The Crown is not a party to the contract, although it contains special provisions regarding the Crown's responsibility for aboriginal consultation.
- X In June 2009, the Ministry of the Environment posted information about a proposed Renewable Energy Approval regulation which would establish a new noise setback requirement of 550 meters. The setback refers to the distance in meters separating a structure and the base of the closest wind turbine.
- X The OPA has provided information to the government about the possible effect of the proposed regulation on the contract. In particular, in a letter dated July 29, 2009 to the Minister of Energy and Infrastructure, the OPA advised that the proposed setback requirement would significantly impact the wind projects being developed under the contract. All of the projects have been designed to meet the environment requirements in place at the time the contract was executed. The letter states that most of the projects are in an advanced state of obtaining the necessary permits and approvals to proceed with construction, although the impact of the setback on the projects will vary. The letter notes that there may be significant reductions in project sizes and construction delays. There is a possibility that one project would get cancelled completely. Finally, the letter notes that "Significant cost increases are expected as projects may have to be redesigned and reductions in overall project size will result in losses of economies in scale". It states that the total costs could amount to as much as \$100 million. We note that we do not have any other information about the effect of the regulation on the contract, including possible costs to the Suppliers.
- X We understand that one Supplier has written to the OPA that it will formally invoke the "Discriminatory Action" clause in the event that the proposed setback regulation is made.

ANALYSIS

A. Liability of the OPA

- X Any liability of the OPA would flow from the contract. We have not been provided with any information about any representations or conduct on the part of the OPA that could give rise to a cause of action in tort.

Discriminatory Action Clause

- X The likely source of any liability under the contract is the "Discriminatory Action" clause, which expressly provides for compensation in the event of changes to the law. One of the Suppliers has already indicated that it will invoke this clause in the event that the proposed regulations are made. This clause, which is found in article 13, states:

A "Discriminatory Action" shall occur if:

- (a)
 - (i) the Legislative Assembly of Ontario causes to come into force any statute that was introduced as a government bill in the Legislative Assembly of Ontario or causes to come into force or makes any order-in-council or regulation first having legal effect on or after the date of the submission of the Proposal; or
 - (ii) the Legislative Assembly of Ontario directly or indirectly amends this Agreement without the agreement of the Supplier;
- (b) the effect of the action referred to in Section 13.1(a):
 - (i) is borne principally by the Supplier; or
 - (ii) is borne principally by the Supplier and one or more Other Suppliers who have a RES Contract or another bilateral arrangement with the Buyer similar in nature to this Agreement; and
- (c) such action increases the costs that the Supplier would reasonably be expected to incur under this Agreement in the generation and delivery of the Contract Energy and/or Environmental Attributes or adversely affects the revenues of the Supplier from the Contract Facility, except where such action is in response to any act or omission on the part of the Supplier that is contrary to Laws and Regulations (other than an act or omission rendered illegal by virtue of such action) or such action is permitted under this Agreement. Despite the preceding sentence, none of the following shall be a Discriminatory Action:
 - (i) Laws and Regulations of general application, including an increase of Taxes of general application, or any action of the Government of Ontario pursuant thereto;

- X Clearly, under this clause, the making of a regulation could give rise to a discriminatory action if the effect of the regulation was borne principally by the Suppliers and either increases the costs that the Suppliers would incur under the contract or would adversely affect the revenues under the contract. Accordingly, on the basis of the facts provided by the OPA concerning the impact the proposed regulation would have on the Suppliers, if the regulation is in fact made, this would constitute discriminatory action under the clause. The effect of the change in the law would be borne principally by the Suppliers and would increase their costs and could, at least in some cases, affect their revenues.
- X We note that s. 13.1(a)(i) defines a discriminatory action as occurring if the "Legislative Assembly of Ontario ... causes to come into force or makes any order in council or regulation". Clearly, the Legislative Assembly does not itself make regulations and will not have made the regulation at issue here. Instead, if made, will be promulgated by the Lieutenant Governor in Council pursuant to a statute.
- X It could be argued, therefore, that the regulation would not fall within the scope of this provision. However, we have serious doubt about whether an arbitrator or a court would give effect to this argument. While technically correct, the intent of the provision is clear and, accordingly, we doubt that a court or tribunal would allow this clear purpose to be defeated by what amounts to a misdescription of a the legislative process.
- X Section 13.2 addresses the consequences of discriminatory action. It provides that the supplier shall have the right to obtain from the OPA the amount of the cost increase and any loss revenues attributable to the regulation. The provision provides a process, including notice requirements, for invoking article 13. Finally, if the process is invoked, any disputes "shall" be resolved by binding arbitration in accordance with the arbitration provisions in the contract.

Exception: Laws and Regulations of General Application

- X Article 13 provides some exceptions to the type of legislation that may constitute a discriminatory action; the only exception that is possibly relevant in the present circumstances in s. 13.1(i), which stipulates that "Laws and Regulations of general application" cannot give rise to a discriminatory action.
- X The contract does not define a law or regulation of general application. However, the courts have considered what constitutes a law of general application for the purposes of the *Indian Act*. The Supreme Court of Canada in *R. v. Kruger*, [1978] 1 S.C.R. 104, at 110, stated the following test for provincial laws of general application:

There are two indicia by which to discern whether or not a provincial enactment is a law of general application. It is necessary to look first to the territorial reach of the Act. If the Act does not extend uniformly throughout the territory, the inquiry is at an end and the question is answered in the negative. If the law does extend uniformly throughout the jurisdiction the intention and effects of the

enactment need to be considered. The law must not be "in relation to" one class of citizens in object and purpose. But the fact that a law may have graver consequence to one person than to another does not, on that account alone, make the law other than one of general application. There are few laws which have a uniform impact. The line is crossed, however, when an enactment, though in relation to another matter, by its effect, impairs the status or capacity of a particular group.

While the courts have refined this test, particularly with respect to *Indian Act* issues, the test remains a useful guide to how the term may be interpreted in the contract.

- X Clearly, the regulation at issue applies throughout Ontario and is not limited to the six Suppliers or their projects. Indeed, it applies to anyone in Ontario who constructs a wind power facility. Thus, there is basis for arguing that the regulation constitutes a law of general application and, accordingly, would not amount to discriminatory action under Article 13.
- X However, there is a strong argument that the regulation in question would not be a law of general application. Under the test itself, a law of general application "must not be 'in relation to' one class of citizens". In the present circumstances, the provision in question, while not limited to the Suppliers projects, is aimed at wind power producers and thus might be said to apply to one class of citizens and thus not be a law of general application. As well, it could be argued on contract interpretation principles that a law directed to wind power producers is precisely the kind of law to which the discriminatory action clause was intended to apply; indeed, if such a law did fall within the scope of the Article, the Article would be effectively limited to legislation specifically directed to the six Suppliers. If such a narrow scope were intended, it is likely that contract would be worded differently. Finally, the contract provides, as an example of a law of general application, changes to tax laws. This example supports an interpretation that laws of general application are intended to be matters of a broad scope that affect the population generally rather than being limited to a class only such as wind power producers.
- X Accordingly, in our view, there is a significant risk that a court or arbitrator would find that the regulatory provision in question is not a law or regulation of general application and that the discriminatory action clause applies.

Enforceability of Discriminatory Action Clause

- X It is an accepted principle of law that the exercise of the Crown's legislative or statutory powers cannot be fettered by contract. Accordingly, a contractual provision that expressly seeks to prohibit the exercise of these powers by a public authority is void and unenforceable. See, for example, *The King v. Dominion of Canada Postage Stamp Vending Company*, [1930] S.C.R. 500; *Reference re: Canada Assistance Plan (B.C.)*, (1991), 83 D.L.R. (4th) 297 (SCC). It is quite clear therefore that a contractual provision that expressly and directly constrains the discretion of the Crown is

unenforceable and that breach of such a provision by the Crown does not give rise to damages.

- X The Supreme Court of Canada in *Pacific National Investments v. Victoria (City)*, [2000] 2 S.C.R. 919 ("*Pacific*") extended the fettering rule to cover contractual provisions that indirectly fetter the legislative powers of a municipality. A direct fetter is a provision that expressly prohibits the government from exercising its discretion. An indirect fetter is a contractual provision that requires the government to pay compensation if it exercises its discretion and thus, indirectly, inhibits the exercise of that discretion.
- X In *Pacific*, a municipality agreed in a contract with a developer not to change the zoning of a particular property. A subsequent municipal council did, in fact, change the zoning and the developer sued for breach of contract. The Court concluded that the municipality could not legally directly fetter its legislative discretion. The developer argued that there was an implied provision in the contract that if the municipality changed the zoning it would compensate the developer. The Court also rejected this argument and held that a promise to pay compensation for exercising its legislative discretion to change the zoning was equally unenforceable. The Court held that a distinction between direct and indirect fettering was without legal basis and inconsistent with "the principles that undergird this area of the law."
- X *Pacific* was a municipal law case and there are few subsequent cases that have considered whether it applies equally to provincial contracts. However, recently, the Ontario Superior Court accepted that it applied to a contract with the provincial government and that a court would not enforce a contractual provision that required the provincial government to pay compensation for changes to the law: see 1597203 *Ontario Ltd v. Ontario*, [2007] O.J. No. 2249. This approach is also supported by obiter comments in *Club Pro Adult Entertainment Inc. v. Ontario*, [2006] O.J. No. 5027, aff'd without mention of this point by the Ontario Court of Appeal [2008] O.J. No. 777. However, the law on this issue is still developing and, in other jurisdictions, courts have held that *Pacific* applies only in the municipal context: see, for example, *Anglehart v. Canada*, [2008] A.C.F. No. 1792 (F.C. T.D.).
- X In the present case, even if the approach in *Pacific* applies to provincial Crown, the Crown is not a party to the contract and, accordingly, the contract does not purport to directly or indirectly fetter the Crown's discretion to legislate. Indeed, since the OPA does not itself legislate, the rationale underlying the decision in *Pacific* would appear not to apply. However, it might be argued that, even though the OPA is not part of government and is not even a Crown agent, it has sufficient links to the Crown that the Crown might be indirectly fettered in carrying out its legislative responsibilities if the OPA were required to pay compensation as a result of a change in the law. For example, the OPA carries out certain responsibilities of the Crown and can receive loans from the Crown. However, in our view, there is a significant risk that this argument would not be accepted by a court or tribunal since a court is unlikely to expand the rule to a body, such as the OPA, that does not have any legislative functions.

- X Accordingly, there is a high risk that, if the proposed regulation is made, it would constitute discriminatory action under Article 13 of the contract and the OPA would be liable to compensation the Suppliers for additional costs and any loss of revenue attributable to the new noise setback requirements in the regulation.

Contract Cancellations

- X As noted above, it is possible that one of the Suppliers may cancel the project if the regulation is passed on the basis that the project would no longer be viable. The cancellation of a project gives rise to special considerations.
- X It is possible that a Supplier who cancels a project as a result of the change in law would seek to rely on the Discriminatory Action clause in Article 13. It is not entirely clear, however, that this provision would apply to a cancellation. On its face, the provision does not address cancellations and, indeed, some of its language might be interpreted to contemplate that the Supplier continues to perform its obligations under the contract. If the Article were intended to provide for damages, including expectation damages (lost revenue), upon the termination of the contract, it would be expected that this circumstance would be specifically addressed in the contract. This approach is strengthened by the fact that there are other sections of the contract that expressly address termination of the contract. In particular, the force majeure clause (Article 11), discussed below, arguably contemplates the cancellation of a project as a result of changes to the law.
- X On the other hand, Article 13 clearly addresses impacts on projects as a result of regulatory changes and therefore it can be argued that it should also apply where the effect of the regulatory change compels the Supplier to cancel the contract. There is nothing in the language of Article 13 that expressly excludes this approach and the fact that the circumstances fall within the subject matter of the provision supports this argument.
- X As we noted above, there is an argument that the force majeure provision of the contract in Article 11 may in fact be the applicable contract provision where a Supplier cancels the contract due to a change in the law. Article 11 provides that where a force majeure occurs a party is released from its duty to perform its contractual obligations and is not liable to the other party for damages, although it has a duty to attempt to remedy the situation (s. 11.1(c)). Under s. 11.1(h), either party may terminate the agreement if the force majeure is not remedied within 24 months "without any costs or payments of any kind to either Party". However, s. 11.1(e) provides that parties must make payments due to the other party before the force majeure and any payments that otherwise become due during the period the force majeure continues (until termination).
- X Further, the compensation scheme under Article 11 is separate from the compensation scheme under Article 13. As we have noted, under Article 11 the right to compensation where a cancellation of a contract occurs as result of a force majeure is very limited. Further, since Article 11 addresses the compensation payable in the

event of a force majeure, if Article 11 applies to a cancellation of a contract, then compensation under Article 13 would not be payable.

- X Although the force majeure provision does not address the effect of changes to the law as clearly or specifically as Article 13, there is an argument that the definition of force majeure is nonetheless broad enough to encompass them. Section 11.3 defines force majeure as "any act, event, cause or condition that prevents a party from performing its obligations...that is beyond the affected Party's reasonable control". In addition to this general definition, section 11.3 goes on to provide some specific examples of actions or events that may give rise to a force majeure, including one that may be applicable in the present circumstances. Clause (h) states that "any inability to obtain... a permit or approval" from a government authority constitutes a force majeure.
- X Accordingly, it can be argued that if a Supplier must cancel a project because of a change in the law, the change in law constitutes a force majeure either under the general definition of force majeure or possibly under clause (h) because the Supplier could not obtain a permit under the new regulation. This approach would significantly limit the OPA's liability if a project had to be cancelled as a result of a new regulation.
- X In our view, the force majeure clause in Article 11 seems designed to address situations where a party must cancel a contract because it cannot be performed; a force majeure could include changes to the law. Further, Article 11 expressly permits a party to terminate a contract. Thus, the OPA may be able to rely on this provision, and its limited right to compensation, in the event a contract is cancelled. However, although Article 13 does not address the cancellation of the contract, it is specifically designed to deal with the effect on projects of changes to the law. Accordingly, there is at least a moderate risk that a court or arbitrator would find the discriminatory action clause in Article 13, with its significant right to compensation, applies even in the case of a cancellation of a project.
- X Finally, it is worth noting that, where the facts permit, the force majeure clause may be invoked by either party. Therefore, a supplier who wishes to end its obligations under the contract might attempt to rely on the force majeure clause to do so. Although the supplier's compensation would be very limited, it would permit the supplier to end all of its obligations under the contract. However, as we noted above, a party seeking to rely on the force majeure clause has a duty to first make all reasonable efforts to remedy the situation. Accordingly, if a supplier attempts to rely on the force majeure clause to end its obligations under the contract because of the change in law, it would only be able to do so, where as a result of the force majeure it simply is unable to perform its contractual obligations.

Frustration of a Contract at Common Law

- X Although the contract contains a force majeure clause, it is possible that a supplier who is unable to perform its obligations under the contract, may seek to rely on the

common law doctrine of frustration. In some ways, this doctrine is similar to force majeure in that it allows a party to be relieved of its obligations under a contract due to an event beyond the control of both parties and provides a right to only limited compensation.

- X A court may find a contract to be frustrated if a situation arises for which the parties made no provision in the contract and in which the performance of the contract becomes a thing radically different from that which was undertaken in the contract. *Naylor Group Inc. v. Ellis-Don Construction Ltd.* (2001), 204 D.L.R. (4th) 513 at 531 (S.C.C.). In *Petrogas Processing Ltd. v. Westcoast Transmission Co.* (1988) 59 Alta L.R. (2d) 118 at 136 (Q.B.); affirmed without considering issue of frustration (1989), 58 D.L.R. (4th) 156 (C.A.), the Court stated:

The courts have recognized a variety of circumstances arising after the making of a contract as frustrating events. These include subsequent changes in the law or the legal framework within which the contractual obligations were to be performed, rendering performance something quite different from what was originally contemplated.

- X The Court held that legislation fixing the price at which natural gas was sold resulted in frustration of a contract for the sale of natural gas which had been entered into prior to the enactment of the legislation. The Court found that the provisions of the contract relating to price were material provisions and that the contract was frustrated because "price regulation made performance of a fundamental term of the Contract illegal" (at p. 137). The Court also found that the introduction of price regulation destroyed the commercial basis of the contract resulting in frustration of the contract because performance would have been "a fundamentally different thing than what the parties originally agreed upon." (at pp. 139-40).
- X If a contract is frustrated then the *Frustrated Contracts Act*, R.S.O. 1990, c. F.34, sets out the liabilities that either party may face. Where a contract is frustrated, the amount of compensation is very limited. A party may face liability in relation to amounts already paid or payable under the contract and may also be compensated for expenses incurred and benefits already provided under the contract, but otherwise loss of revenue under the contract would not be recoverable.
- X Thus, a supplier who wishes to cancel a contract because a change in the law renders the performance of the contract impossible, may seek to rely upon the common law doctrine of frustration, but only if it can demonstrate that the force majeure clause of the contract does not apply.

B. Liability of the Crown

Contract

- X It is axiomatic that to be liable under a contract a person must be a party to the contract. The Crown is not a party to the contract, and, accordingly, it cannot be held

legally liable for its breach or under any of its terms, including the Discriminatory Action clause in Article 13. Indeed, Article 13 specifically provides that any liability under that provision is imposed on the "Buyer" which is defined in the contract as the OPA, even though changes to the law would be made not by the OPA but by the Legislature or the Crown. In contrast, the OPA has the legal authority to enter into contract and is a sueable entity. Further, the *Electricity Act* provides that the OPA is not a crown agent and, accordingly, there is no issue of the Crown being liable for the actions of its agent.

- X Accordingly, it is our view, that the OPA rather than the Crown would be liable under the contract for any compensation payable to the Suppliers attributable to a change in law.

Tort

- X We have not been provided with any information about representations or conduct by the Crown or its officials that would give rise to tort liability. The only possible basis upon which it might be argued that the Crown may have liability in tort would therefore be that the Crown enacted a new regulation which changed the law.
- X It is well-established that no cause of action lies in tort against the government for enacting legislation. For example, in *A.O. Farms Inc. v. Canada*, [2000] F.C.J. No. 1771 the plaintiffs sued the federal government for negligently enacting certain regulations. The plaintiffs had relied upon the regulations being valid when they entered into certain contractual arrangements. Subsequently, the legal validity of the regulations were challenged, and ultimately the government revoked the regulations. The revocation of the regulations made the contracts more difficult and costly to perform and the plaintiffs sued the government in tort. The Court found that the government was not liable in tort as "legislative decisions are not actionable". The Court stated that "the relationship between the government and governed is not one of individual proximity". Further, at para 12 the Court stated:

A public authority must be free to make its choices with an eye only to their political consequences, not to the possibility of being sued for damages...Government, when it legislates, even wrongly, incompetently, stupidly or misguidedly is not liable in damages.

The Ontario Court of Appeal recently adopted the approach of *A.O. Farms* in *Attis v. Canada (Minister of Health)*, [2008] O.J. No. 3766 at para. 65.

- X Furthermore, the damage that may result to the suppliers if the regulation is made, would be purely economic. There are only limited circumstances in which tort claims for pure economic loss may be asserted. The Supreme Court of Canada recently reviewed the ability to recover pure economic loss in *Design Services Ltd. v. Canada*, [2008] 1 S.C.R. 737. The Court held, at para. 31, that there are five recognized categories of negligence where economic loss may be claimed. These categories were first identified by Professor Feldthusen and are:

1. The independent liability of statutory authorities;
2. Negligent Misrepresentation;
3. Negligent performance of a services;
4. Negligent supply of shoddy goods or structures; and
5. Relational economic loss.

- X In our view, economic loss arising from changes in the law do not fall within any of these categories. In particular, we note that the first category involves regulatory negligence: see Feldthusen, "Economic Loss in the Supreme court of Canada: Yesterday and Tomorrow" (1991), 17 Canadian Business Law Journal 356. The category of relational economic loss also cannot apply since, as the Supreme Court explained, this category applies only where a third party suffers economic loss flowing from physical damage to a person or property.
- X In this case the Court also noted that a new duty of care for pure economic loss could in theory be recognized provided that the requirements of the well-known Ann/Cooper test for negligence were met. The issue in this was whether an owner in a tendering process owes a duty of care in tort to subcontractors. On the facts of the case before it, the Court refused to recognize a new duty of care and found that there was no tort. The Court in fact warned against the creation of new tort liability in a contractual setting. Rothstein J. stated at para. 56:

In my view, the observation of Professor Lewis N. Klar...that the ordering of commercial relationships is usually in the bailiwick of the law of contract – is particularly apt in this type of case. To conclude that an action in tort is appropriate when commercial parties have deliberately arranged their affairs in contract would be to allow for an unjustifiable encroachment of tort law into the realm of contract.

- X In light of this approach, we think it is very unlikely that a court would create a new tort category for economic loss in the present situation, particularly in view of the traditional approach which the courts take to the Crown's immunity from tort liability for changes to law.

Statutory Immunity

- X Finally, the Crown also has the benefit of a statutory immunity in the present circumstances. As we noted above, the OPA entered into the contract with the six Suppliers as a result of a direction from the Minister under s. 25.32 of the *Electricity Act*. Section 25.32(5) provides that where such a direction is made the Crown, and any Crown agency, "are released from any and all liabilities and obligations with respect to the matters for which the OPA has assumed responsibility". This provision should provide additional protection to the Crown for any legal liability arising under the contract with the Suppliers.

Constitutional Issues

- X The Constitutional Law Branch ("CLB") advises that there is a low risk of a successful constitutional challenge being brought against the Crown in these circumstances. First, in a series of cases, the Supreme Court and lower courts have repeatedly held that there the Charter does not protect economic or contractual/corporate/commercial rights. For a most recent restatement of this principle, reference may be had to the decision of the Superior Court of Justice in *Clitheroe v. Hydro One Inc.*, 2009 CanLII 33029.
- X Second, CLB has also considered whether an argument could be mounted based on the words "rule of law" in the preamble to the Constitution Act, 1982, since this argument had been made in past cases involving expropriation and property rights. In our view, such an argument would be very difficult after the Supreme Court of Canada's decision in *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473 at para. 59 where the court stated "it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content."

We trust you will find the foregoing of assistance.

CROWN LAW OFFICE - CIVIL

Per: Daphne Intrator, General Counsel and Scott Feltman, Counsel

cc. Victoria Vidal-Ribas, Director
Legal Services Branch, Ministry of Energy and Infrastructure

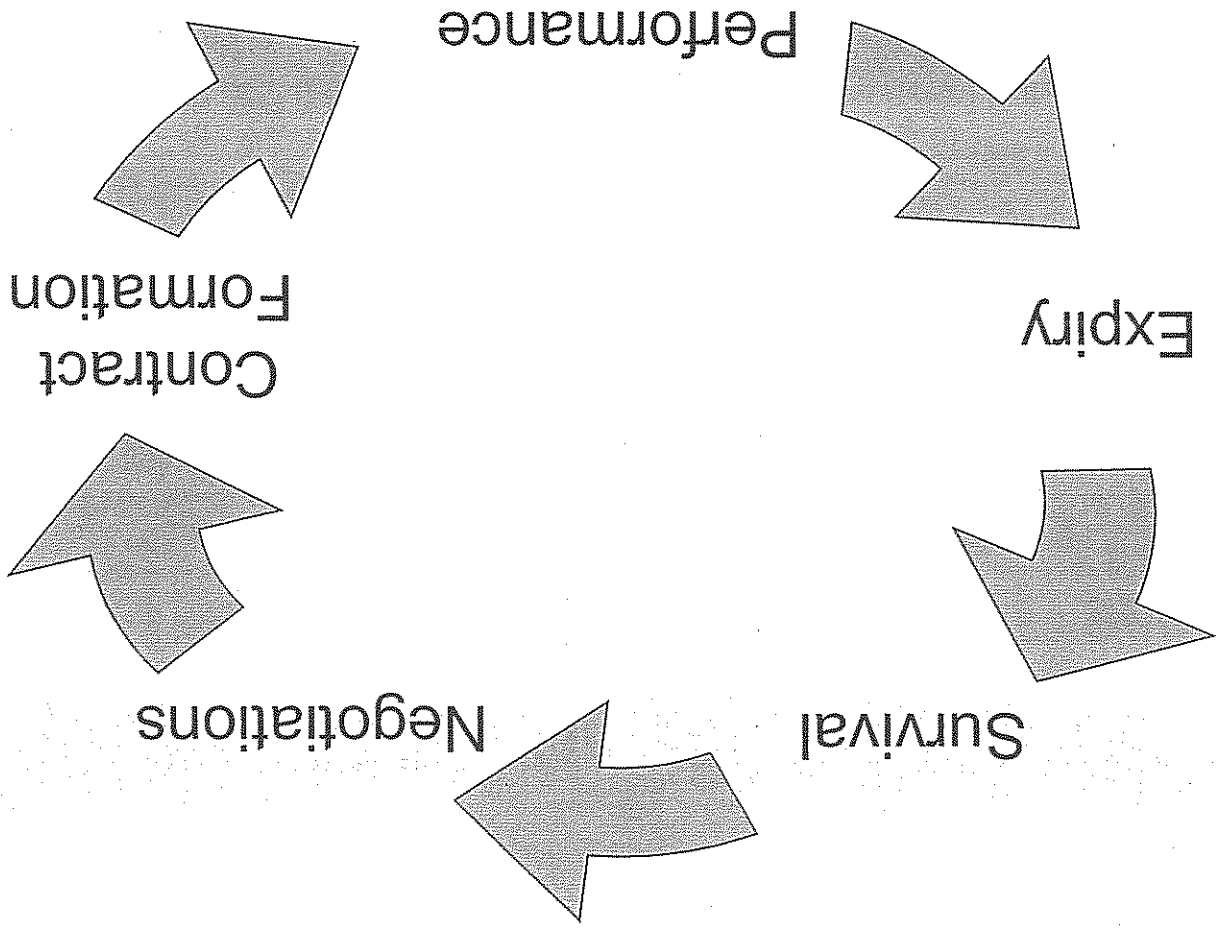
Rand Roszell, Director
Legal Services Branch, Ministry of the Environment

Contract Law Updates Contract Termination

Peter Spencer
Counsel, MCI/MCL/MTOUR

MAG/ALOC Lawyers Learning Committee
Lunch and Learn
April 22, 2008

Contract Cycle



Common Law

Termination On Notice

- *Llanelly Railway & Dock Co. v. London & North Western Railway Co.* (House of Lords 1875): where on the face of the instrument the term is indefinite and unlimited, onus is to show non-perpetual based on nature of subject or rule of law.
- Contracts involving the following are generally exceptions to the presumption of perpetuity:
 - Trust or confidence
 - Delegation of authority
 - Necessity of being satisfied with each other's conduct
 - Personal relations between the parties
 - Example: employment contract

Termination On Notice

- *Martin-Baker Ltd. v. Canadian Flight Ltd.* (Q.B. 1955): question of notice versus perpetuity should be judged based on the construction of the contract and without any presumption of perpetuity.
- *Hillis Oil & Sales v. Wynn's Canada* (SCC 1986): if a distributor agreement does not contain a termination without cause provision, it can only be terminated on reasonable notice of termination.

Termination On Notice

- Can reasonable notice be relied upon to terminate a commercial contract?
- *Credit Security Insurance Agency Inc. v. CIBC Mortgages Inc.* (ON Superior Ct. 2006, ON CA 2007): Must look at the time of contract formation to determine what is commercially reasonable. Contract provided for two specific ways to terminate (mutual agreement or material breach).

Termination On Notice

- Uncertain whether a commercial contract can be terminated on notice where there is no such provision.
- Duration of the period of notice is uncertain (could be lengthy and costly).
- Contra proferentum rule: meaning least favourable to the author of the document prevails.

Termination Provisions in Contracts

- On the occurrence of specific events
 - Triggers
 - Events of Default
- On notice (for convenience)
- Where no appropriation

Termination on Default

- Customize list to suit circumstances
- Requires breach (or material breach) by other party
- Ability to remedy/cure
- Notice period vs. immediate
- Consequences of termination

Termination for Convenience

- Allows for flexibility
- Notice period
- Consequences of termination
- Unilateral or reciprocal?

Termination Where No Appropriation

Financial Administration Act, Section 11.3:

- (1) No agreement or undertaking shall be entered into in a fiscal year that would result in a charge to an appropriation for that fiscal year in excess of the amount available under that appropriation.
- (2) Every agreement providing for the payment of money by the Crown is deemed to contain a provision stating that the payment by the Crown of moneys that come due under the agreement shall be subject to,
 - (a) an appropriation to which that payment can be charged being available in the fiscal year in which the payment becomes due; or
 - (b) the payment having been charged to an appropriation for a previous fiscal year.
- (3) This section applies only in respect of fiscal years commencing on or after April 1, 2003.

Government Directives - Procurement

- *Procurement Directive* dated November 2007:

“All contracts must include appropriate cancellation or termination clauses and ministries should seek appropriate legal advice on the development of these clauses. Particularly for goods and services procured as part of an I&IT project, ministries must consider as appropriate, the use of contract clauses that permit cancellation or termination at critical project lifecycle stages.” (s.5.6.8)

Government Directives - Procurement

- *Procurement Operating Policy* dated November 2007:
 - Early termination provisions to be considered as part of procurement planning process (s.5.1.2)
 - Procurement documents should allow the ministry to terminate an agreement where a conflict of interest has not been disclosed or cannot be resolved (s.5.6.2(j))
 - Form of agreement must include appropriate termination clauses (s.5.6.2(k))

Government Directives – Transfer Payment

- *Transfer Payment Accountability Directive* dated August 31, 2007:
 - Signed agreements must be in place that include any corrective action the government is entitled to take if agreed upon results are not achieved (p.5)

Government Directives – Transfer Payment

- *Transfer Payment Accountability Best Practices Guide* dated November 2007:
 - **“Events of default and corrective action** – A description of what would constitute an event of default under the TP agreement and possible corrective actions that could be taken in appropriate circumstances is a key risk management tool. It helps to ensure that the parties have considered what could happen if, for example, the TP recipient fails to achieve expected results, misspends the TP funds or otherwise breaches the TP agreement. The Directive contemplates progressive corrective action in proportion to the risk associated with the degree of non-compliance. Depending on the circumstances, corrective action could include increased monitoring and reporting, reduced funding, early termination of the agreement and repayment of misspent funds.” (p.17)

Sample Provisions

- Please see attached sample provisions from:
 - RFP Template Form of Agreement
 - Transfer Payment Agreement Template

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OPTIONS FOR STOPPING WORK ON THE GREENFIELD SOUTH GAS PLANT

Expropriation

- Government has 2 separate expropriating powers:
 - The Minister of Infrastructure has authority to expropriate land necessary for the use or purposes of the government.
 - The LGIC may direct the Minister of Infrastructure to expropriate land that the LGIC considers necessary for the benefit of the public.
- Pros
 - Would trigger a known process under the *Expropriations Act*, including the establishment of value to be paid for land
 - Could be used in combination with other options to secure control of land.
 - Triggering of expropriation process should result in termination of construction as funding may be impacted and current owner may not want to invest further if ownership not secure
- Cons
 - May take some time to complete process under Expropriations Act.
 - Exercise of expropriation authority could be challenged by current owner as not being necessary for purposes of government or necessary for the benefit of the public.

Ministerial Zoning Order

- Ministerial Zoning Orders (MZO's) are issued by the Minister of Municipal Affairs and Housing under the *Planning Act*.
- An MZO would impose Minister's zoning on the land and change the permitted uses of the land (e.g. an MZO could say that there could never be generation on this site moving forward)
- Pros
 - Sends a message to the community to wipe off use of site. In this way an MZO could be used as a political message.
 - Doesn't freeze the land for other uses (i.e. Owner could still use land in other ways that are compliant with MZO)
 - Any future building permits would have to comply with the MZO
 - Financers may react negatively to the removal of the generation use
 - Can be imposed quickly and may work as interim step while more permanent solution developed

- Cons
 - Does not necessarily stop construction – operates on a prospective basis
 - Would not affect rights under existing building permits and construction under these permits can continue

Hydro One Declaration/Resolution

- The Minister of Energy, as sole-shareholder of Hydro One Inc. may issue a shareholder declaration and resolution which would require Hydro One not to connect Greenfield South generation facility to the transmission system
- Pros
 - Would stop the generator from ultimately generating electricity into the IESO-controlled grid (transmission system)
 - Sends a very strong signal to the community, industry and stakeholders that the Government is extremely committed to relocating the plant.
- Cons
 - Would not immediately stop construction, but would make ongoing financing of the project difficult
 - Requires Hydro One to conduct its operations in ways which are contrary to the “open/non-discriminatory access” requirements in the *Electricity Act, 1998* (which provides that every generator would normally have access to the grid on a level-playing field, excluding technical constraints such as lack of capacity).
 - Likely to attract litigation to the Crown and Hydro One and exposes the Crown to the liability
 - Hydro One may refuse to comply with the declaration and resolution as being contrary to its statutory mandate

Stop Work Orders

- Legislation provides authority for certain persons to issue stop orders or stop work orders in certain circumstances. We are not aware of any circumstances in this situation which would give rise to a stop work order in this case.
- The following are examples where stop work orders may be issued:
 - Building inspectors have authority to stop construction or demolition work where another order made by that inspector (for example, to open up work) is not complied with.
 - Ministry of Labour inspectors can stop work where they perceive a situation dangerous to life or property.
 - Certain people can direct work to stop where dangerous circumstances exist pursuant to occupational health and safety legislation.
 - The *Environmental Protection Act* provides for authority to issue a stop order where a contaminant is discharging into the natural environment.

Rehob, James (ENERGY)

From: McKeever, Garry (ENERGY)
Sent: Tuesday, October 11, 2011 11:23 AM
To: Perun, Halyna N. (ENERGY); Jennings, Rick (ENERGY); Jenkins, Allan (ENERGY); King, Ryan (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Rehob, James (ENERGY)
Subject: RE: mississauga gas plant

Halyna

The contract is confidential. We have not seen it. It would have to come from the OPA. In Mike's absence, you might want to call JoAnne Butler.

Garry

From: Perun, Halyna N. (ENERGY)
Sent: October 11, 2011 11:09 AM
To: Jennings, Rick (ENERGY); Jenkins, Allan (ENERGY); King, Ryan (ENERGY); McKeever, Garry (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Rehob, James (ENERGY)
Subject: mississauga gas plant

Hi - I have not been successful in reaching Mike Lyle this morning – We need to review the contract in place re Mississauga Gas Plant as soon as possible – do any of you have it? Please let us know and we'll come by to pick up a copy thank you

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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Rehob, James (ENERGY)

From: Jennings, Rick (ENERGY)
Sent: Tuesday, October 11, 2011 12:09 PM
To: Perun, Halyna N. (ENERGY); Jenkins, Allan (ENERGY); King, Ryan (ENERGY); McKeever, Garry (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Rehob, James (ENERGY)
Subject: RE: mississauga gas plant

I have been trying to touch base with JoAnne Butler at the OPA on this. I suspect that the OPA staff including Mike are working on options. I will let you know when I hear back from them.

From: Perun, Halyna N. (ENERGY)
Sent: October 11, 2011 11:09 AM
To: Jennings, Rick (ENERGY); Jenkins, Allan (ENERGY); King, Ryan (ENERGY); McKeever, Garry (ENERGY)
Cc: Calwell, Carolyn (ENERGY); Rehob, James (ENERGY)
Subject: mississauga gas plant

Hi - I have not been successful in reaching Mike Lyle this morning – We need to review the contract in place re Mississauga Gas Plant as soon as possible – do any of you have it? Please let us know and we'll come by to pick up a copy thank you

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Rehob, James (ENERGY)

From: Perun, Halyna N. (ENERGY)
Sent: Tuesday, October 11, 2011 1:57 PM
To: Calwell, Carolyn (ENERGY); Rehob, James (ENERGY)
Subject: FW: Mississauga Gas Plant

Halyna

Halyna N. Perun
A/Director
Legal Services Branch
Ministries of Energy & Infrastructure
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Ph: (416) 325-6681 / Fax: (416) 325-1781
BB: (416) 671-2607
E-mail: Halyna.Perun2@ontario.ca

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From: Slater, Craig (JUS)
Sent: October 11, 2011 1:49 PM
To: Perun, Halyna N. (ENERGY)
Cc: Salim, Fateh (JUS); Kendik, James (JUS); Scarfone, Janet (JUS)
Subject: FW: Mississauga Gas Plant

For your information.

John Kelly spoke to Mike Lyle, who indicated, as you had earlier indicated, the Colin Andersen and Deputy Lindsey will be part of the meeting tomorrow to discuss options.

The view at the OPA is that there has been nothing done here that would prevent the OPA from relying on the limitation of damages clause that is in this agreement with Eastern Power, as it was in the TCE agreement – but which (given the Oct 2010 letter) we could not rely on. However, Mike indicated that Eastern Power is very litigious. Mike also mentioned that the hope is to negotiate an alternative site, perhaps in Nanticoke, as part of any settlement of the termination of the agreement, if the decision is made to terminate. The OPA's view is that given the experience in Oakville and Mississauga that the location of such plants in populated areas is now not advisable. The OPA is trending to the same option as in TCE – negotiation of an alternate site and arbitration of the damages, which may be less than TCE because of our reliance on the limitation of damages clause. However, Mike confirmed that Eastern Power has all approvals in place and is constructing the plant in full compliance with its agreement with the OPA.

In terms of NAFTA, we may need to do a little more digging. Bloomberg lists the proponent Greenfield South Power Corporation and Eastern Power as private corporations. The Greenfield South Power Corporation website lists Eastern Power as an affiliate. There may be foreign investors, but since both companies appear to not make public filings, it is difficult to ascertain.

Rehob, James (ENERGY)

From: Calwell, Carolyn (ENERGY)
Sent: Monday, October 31, 2011 3:34 PM
To: Rehob, James (ENERGY)
Subject: FW: Greenfield South Gas Plant - Legal Authority Issues

James, please see suggestions below.

Carolyn

From: Rehob, James (ENERGY)
Sent: October 31, 2011 2:47 PM
To: Perun, Halyna N. (ENERGY)
Cc: Calwell, Carolyn (ENERGY)
Subject: Greenfield South Gas Plant - Legal Authority Issues

Privileged & Confidential Legal Advice / Solicitor & Client Privileged

October 31, 2011

Good afternoon, Halyna. I write in order to provide you with my views and analysis in relation to the authority to direct the OPA as regards the Greenfield South Gas Plant contract, including our options, as I see them, in this regard.

Issue:

- Does the Minister have clear, legal authority to direct the OPA to take any significant commercial steps in relation to the Greenfield South contract?

Conclusions:

- **No, the better view is that the Minister does not have clear, legal authority to so direct the OPA.**
 - Based on the clear language of s.25.32(4)-(7), and in particular (4) and (5), once the "initiative" (including a procurement contract) is passed to the OPA, the Crown ceases to have any direct legal authority to further direct the OPA in relation to that initiative.
 - **Any attempts to craft a direction which aims to provide the "look and feel" of a binding, statutory direction to the OPA in relation to the Greenfield South project are susceptible to legal challenge, including a potential judicial review of the Minister's exercise of his statutory authority.** There is, in my opinion, a sound legal basis to base such a challenge in terms of the Minister having exceeded his statutory authority in this regard.
 - **Potential reliance on [alternative argument—] 25.32(7):** There exists a potential argument for a direction based on s.25.32(7). This argument attempts to aimed at distinguishing a direction made under (4) from one made under (7), with the objective of attempting to disconnect the OPA's position when directed under (4) by focusing on the independence language (that the OPA assumes all responsibilities and liabilities of the Crown, etc.) provided for in (4) and (5) from the OPA's position when directed under (7).
 - If one attempts to argue (7) as an independent authority, disconnected from (4) and (5), there is no explicit statutory restriction on Crown's ability or inability to further direct the OPA.
 - Subsection (7) does refer back to clause (4)(a) in order to isolating the "initiative" (e.g. procurement contract) about which the (7) direction is to be made, and does not include explicit language relating to the transfer of responsibility and liability of the Crown to the OPA.
 - However, I view this approach as weak since, arguably in my view, (7) is an extension of (4) and part of the system of provisions which was designed to provide the Government with an alternative mechanism to transfer initiatives created under (4) to the OPA. It does not, in my respectful view, operate as an independent authority outside of those provisions.

- However, one presumably can not ignore the OPA's express "natural person powers" under 25.4(5) and, absent the express authority to further direct the OPA in relation to (7), the issue is at least overlaid with appreciable doubt.
- Finally, the system of provisions relating to the OPA's independence once directed by the Minister appears to me to militate toward the OPA having full, unfettered discretion to carry out the terms of its direction once an initiative of this type is passed to it.
- However, the (7) argument does exist and may provide some very modest (weak, in my own assessment) basis upon which to found a further direction to the OPA in relation to a CES contract previously passed to it.

Relevant Statutory Provisions and Framework

- The Minister has the authority to direct the OPA in relation to the procurement of non-renewable energy supply and capacity under EA s.25.32(4) (references to demand management, reduction, etc., are excluded for this email as not directly relevant).
 - This transitional authority expires on the OEB's approval of the OPA's first IPSP and follow-on procurement process (EA s.25.32(4)(a)(ii))
 - This transitional authority is connected to EA s.25.32(7), the provision which authorizes the Minister to "put" or "place" contracts which have their genesis in a Crown procurement or initiative with the OPA. Those contracts can be said to have their legal genesis in a Crown (including Crown agency such as OEFC – see (4)(b)) initiative, etc. referenced in 25.32(4) but, having been fully negotiated, placed with the OPA.
 - These transitional authorities can be used both for the procurement of renewables and non-renewables,
 - These provisions (25.32(4),(7)) have the legal effect of creating a contract which is deemed to be a cost-recoverable procurement contract, compliant with the IPSP, which removes most of the regulatory risk re. cost-recovery.
 - Importantly, in accordance with 25.32(5), once the contract or initiative is transferred to the OPA, the OPA is responsible for the completion of the initiative and the Crown is no longer responsible or liable for same.

Assignment Back to Crown/Crown Agency – An Alternative Approach:

- Consideration can be given to persuading the OPA to exercise their contractual authority (I believe under sub-clause 16.5 (b-d) to unilaterally assign the contract back to the Crown or a Crown agency, such as the OEFC.
- The main precondition for this unilateral assignment is that the party to whom the contract is assigned must have the same (or now lower) credit rating than that of the OPA itself, as provided for by a recognized credit rating agency such as Standard & Poors, DBRS, etc.. If successful, the assignment back to the Crown would have the legal effect of placing the Crown into the position of counter party to the contract.

Advantages

- As counter party, all legal and commercial responsibility for all elements of the contract would be that of the Crown's and not the OPA's. This may provide the Ministry with the distinct advantage of being able to directly negotiate or repudiate the contract, or to take what ever commercial step it wishes to take, without having to be concerned with the OPA's appetite to take such step, as dictated by the OPA's Board of Directors.
- Essentially, this may provide the Minister or Government with the ability to control, if not the ultimate outcome of the transaction, at least some of the major commercial steps and timing leading up the litigation phase, should it go that far.

Disadvantages

- The Crown or the Crown and the Crown Agency (e.g. OEFC) to whom the contract is passed would be solely legally responsible for the outcome
 - The opportunity to distance Government from the ongoing progress of the transaction (project) would be greatly diminished if not eliminated;
 - There may be some commercial arguments that the OPA shares responsibility (and therefore liability) for steps taken up to the date of the assignment back to the Crown;
- The Crown may not be in as sound a position to manage the contract (depending upon what entity within the Crown the contract is assigned to);
- The Crown does not have the legal authority to require the transfer back, but presumably the OPA would be open to such an a strategy were its Board of Directors properly approached.
- The Crown would have to warrant that the Agreement is "a valid and binding obligation...enforceable in accordance with its terms..."

Expropriation - LSB Energy would have to further research and analyze options which are based on the *Expropriations Act* (Ontario) and the authority provided in the _____ and potentially *solicit* the advice of CLOC on the circumstances under which the Expropriation route can be utilized.

As per your most recent email, I will begin drafting a form of direction for your consideration.

Thank you,

James

James P. H. Rehob
Senior Counsel
Ministry of Energy and
Ministry of Infrastructure
Legal Services Branch
777 Bay Street, 4th Floor, Suite 425
Toronto, ON M5G 2E5
Tel: 416-325-6676
Fax: 416-325-1781
james.rehob@ontario.ca

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