

CLIENT UPDATE NEWSLETTER

SPRING 2013

Inside this Issue:

Consolidation of Ontario's
Electricity Distribution Sector

Court of Appeal to Hear
Appeal by City of Kawartha
Lakes

SDTC - Forging Opportunities
in Foreign Markets for
Canadian Cleantech

Leadership Series Roundup

WeirFoulds Client Largo
Resources Ltd. Recognized

Welcome!

Welcome to the Spring 2013 edition of our Client Update Newsletter, a quarterly publication which contains our analysis of developments in business law with your business issues in mind. Whether you are a new or existing client, we are confident that you will find something of interest and value to you below.

This quarter's newsletter focuses on recent energy and environmental developments. Topics include the proposed consolidation of Ontario's electricity distribution sector, an update on an environmental contamination clean-up case, and opportunities for Canadian cleantech in foreign markets.

We hope you enjoy these insights and invite you to share this newsletter with your clients, colleagues and friends.

Consolidation of Ontario's Electricity Distribution Sector

Robert Warren

Background

The Province's Distribution Sector Review Panel has issued a Report recommending major changes in the electricity distribution sector. If carried out, the recommendations will have significant impacts on municipalities and on the electricity utilities they own.

At present, there are 76 local distribution electricity utilities (LDCs). As a result of 1998 legislation, all of those LDCs are *Ontario Business Corporations Act* companies. Almost all are owned by municipalities, either wholly by one municipality or jointly by a number of municipalities.

The Report found that the present system adds materially to customer costs, as a result of a number of factors:

- Smaller LDCs have higher per capita costs for operations, maintenance, and administration, on average approximately 75% higher than for larger LDCs
- The duplication of equipment and facilities

among neighbouring LDCs

- Smaller LDCs have to pay more to raise money
- There are significantly increased regulatory costs of having to oversee so many LDCs

The Report concludes that, if its recommendations were followed, electricity costs could be reduced by some \$1.2 billion over ten years, for an annual savings of about \$70 per customer.

Recommendations

The Report recommends consolidating the 76 LDCs into between 8 and 12 regional distributors. Two of those distributors would be in the north, with the remaining 6 to 10 distributors in the balance of the Province. Each of these would have a minimum of 400,000 customers.

The Report also proposes that a period of two years be granted for the voluntary merger of LDCs. If, at the end of that two-year period the recommendations in the Report have not

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been carried out, the Report recommends legislation requiring consolidation.

The Report proposes a number of incentives to encourage voluntary merger. These include allowing LDCs to recover their legitimate transition costs and avoiding an Ontario Energy Board review.

In order to protect their investments, municipalities owning the LDCs to be consolidated should receive equity in the new regional distribution utilities in proportion to the valuation of their assets used to create each of those new regional distributors. The objective is to ensure that LDCs' shareholders' fiscal positions are not adversely affected by the changes in the distribution sector.

The Report recommends that the government eliminate restrictions that prevent municipalities from making loans to distributors.

Two-thirds of the board of directors of the regional distributors should be composed of independent directors, although it would be preferable to have 100% independent board membership. It is also advised that the new regional distributors encourage their members to acquire proper training in the areas of governance and the roles of boards of directors.

Implications: Making the Decision to Merge

LDCs have been an important source of revenue for the municipalities that own them. As a result, many municipalities will be reluctant to surrender ownership, even with the Report's recommendation on the allocation of shares in the new regional distributors.

Municipalities and their LDCs will face difficult questions surrounding whether to merge, with whom to merge and how the assets of the LDCs should be valued. They will also have to address the impact of the merger on the assets, liabilities, rights and obligations of the merging entities and of the continuing entity formed by the merger. They will also face complex questions in the negotiation and finalization of the merger transaction and related documentation and concerning corporate governance, not just in the decisions related to the merger, but also in the post-merger governance arrangements. It will be essential that municipalities receive effective, independent advice about merger decisions.

Court of Appeal to Hear Appeal by City of Kawartha Lakes

John Buhlman

On November 28, 2012, the Court of Appeal granted the City of Kawartha Lakes leave to appeal from the Divisional Court's decision dismissing an appeal from the Environmental Review Tribunal. This case raises important issues on the ability of the MOE to issue an order to an innocent property owner requiring that owner to clean-up contamination emanating from a neighbouring property and the principles of fairness and the polluter pays.

Background

Several hundred litres of furnace oil leaked from the basement of a privately owned property in the City of Kawartha Lakes. The spilled furnace oil entered the City's municipal storm sewer system and was being discharged into Sturgeon Lake. A Provincial Officer issued an order to the property owner requiring the owner to eliminate any adverse effects and restore the natural environment.

When the owners' insurance coverage had reached its limits and the owners advised they did not have the financial resources to complete the clean-up, a Provincial Officer issued an order to the City requiring the City to take all reasonable steps to prevent the discharge of contaminants from its own property and to remediate its own property. The Director confirmed the order with some minor modifications.

Environmental Review Tribunal Decisions

The City appealed the Director's order to the Environmental Review Tribunal. The ERT issued two important decisions. The first determined that the issue of fault was not relevant, given the wording of the *Environmental Protection Act*, and, therefore, did not allow the City to lead any evidence on the issue of fault. It was acknowledged by all parties that the City was not at fault; the City was an innocent property owner. The City wanted to lead evidence of fault to make its case on the issue of "fairness".

On the appeal of the merits, the ERT upheld the Director's order requiring the City to clean-up the contamination. This was the second important decision issued by the ERT, which found that the legislation specifically contemplated making innocent owners initially responsible for clean-up and prevention of contamination. Any complaint about

fairness was with the legislation.

Divisional Court Decision

The City appealed the ERT's decision to the Divisional Court on a question of law. In a decision released on May 28, 2012, the Divisional Court upheld both decisions of the ERT. The Court held that the ERT did not err in refusing to permit evidence of fault since the ERT is not required to determine fault under the legislation.

On the merits of the order, the Divisional Court upheld the ERT's decision that the legislation is based on "owner pays" rather than "polluter pays". The court agreed with the ERT that the complaint is with the legislators that drafted the legislation and not the statutory decision makers acting in accordance with the mandate given under the legislation.

Issues on the Appeal

The appeal to the Court of Appeal raises important issues regarding the principle of fairness established many years ago by the ERT and Divisional Court. Is "fairness" dead? Does fault not matter? How broadly can the MOE cast its net when looking for someone to clean-up contamination?

It is interesting to note that the Divisional Court in its reasons stated that the City was seeking to have the ERT consider evidence about the fault of the MOE itself, among others. The consequence of these decisions is that the MOE can use its powers under the legislation to order an innocent property owner to clean-up contamination even if the MOE has some fault in the first place. The ERT will not even consider evidence of that fault and will not determine what is fair in such circumstances. The innocent property owner is left to pursue a remedy in an often cumbersome and time consuming civil action, with no guarantee of recovery at the end.

As is usual, the Court of Appeal gave no reasons for its decision granting leave to appeal.

SDTC - Forging Opportunities in Foreign Markets for Canadian Cleantech

Rajeev Dewan

The Canadian clean technology ("cleantech") industry continues to demonstrate impressive competitive performance and growth in international

Leadership Series Roundup

In February, as part of our *Leadership Perspective* series, Linda Hasenfratz, CEO, Linamar Corporation spoke to a room of business leaders about her leadership principles, dealing with difficult times, and strategies for long term growth.

Linda Hasenfratz - Sound Bites

"Look for the opportunity in every corner and see opportunity in everyone you meet - even if you are meeting someone on a train or in an airport."

"Tough times don't last but tough teams do."

"You cannot cut your way out of a crisis. You have to grow your way out of it."

Stay tuned for more events in the *Leadership Perspective* series!

markets. Sustainable Development Technology Canada ("**SDTC**") is a not-for-profit foundation with a mandate to facilitate the commercialization of cleantech by bridging the "funding gap" which exists between research and commercialization. WeirFoulds has been a proud supporter of SDTC's Venture Summit, which introduces SDTC-backed companies to both venture investors and corporations seeking to adopt new clean technologies, since 2010.

Over the past few months, SDTC has undertaken some key initiatives towards facilitating opportunities for cleantech companies in international markets and supporting its objective as an organization in building global Canadian cleantech companies.

These initiatives consisted of the following:

United Arab Emirates ("UAE") Memorandum of Understanding ("MOU"): In September 2012, SDTC entered into a MOU with the UAE Ministry of Economy to create a framework fostering cleantech opportunities between SDTC and the UAE government through measures such as joint projects, technology transfer and the sharing of information. The UAE government has in recent years indicated its desire to move towards a knowledge-based economy and pursue economic policies with a particular emphasis on small-medium sized companies. In light of this mandate, the MOU should be viewed as some validation of SDTC's model

of innovation. In addition, this MOU is likely to provide the basis to facilitate strategic financing and partnership opportunities in the UAE for Canadian cleantech companies as it provides the means to identify and connect relevant companies to business opportunities in both countries.

Export Development Canada ("EDC") Collaboration Agreement:

In October 2012, SDTC entered into a collaboration agreement with EDC to further develop Canada's international capabilities in the cleantech sector. Specifically, under this agreement, EDC will seek to deploy its range of products, including bonding, guarantees, financing and political risk insurance, in projects or transactions involving later-stage SDTC companies. SDTC will share with EDC its assessment of technology risks and the capacity of portfolio companies to perform in international markets. EDC will also look for opportunities within its network of foreign buyers and top global corporations, and leverage its many partnerships with multilateral organizations whose activities and programs present opportunities for the technology solutions developed by SDTC portfolio companies.

This agreement represents an important step for SDTC funded companies expanding abroad as it allows these companies to leverage a globally recognized platform and partner with an organization that has a successful track record in supporting Canadian companies in accessing capital and international markets.

India Trade Mission: In November 2012, SDTC participated in a Trade Mission to India led by Prime Minister Stephen Harper which resulted in 14 Canada-India trade deals being signed of which one-third consisted of agreements signed with SDTC funded companies. These deals illustrate that Canadian cleantech companies are in demand in global markets and are fostering opportunities in high growth markets like India.

The importance of these initiatives is highlighted by a recent report issued by a leading cleantech consulting firm Analytica Advisors, which states that Canadian cleantech companies derive approximately 53 per cent of revenues from international markets. This demand has been primarily driven by the need in various international markets to access innovative technology and solutions which address their current sustainability challenges and represents a significant export opportunity for Canada. Moreover, these initiatives reinforce the pivotal role played with SDTC in the Canadian economy in fostering and growing the cleantech industry.

WeirFoulds Client Largo Resources Ltd. Recognized

Ian Mitchell

Last week marked the 2013 Prospectors and Developers Association of Canada (PDAC) international convention. In light of this four-day annual convention

that brings together leaders from around the world in the mineral exploration industry, WeirFoulds would like to congratulate its client – Largo Resources Ltd. – for being awarded Project Finance Magazine’s Latin American Mining Deal of the Year 2012.

Background

Largo Resources Ltd. is a Canadian based strategic mineral company focused on developing its vanadium and tungsten projects in Brazil and Canada. Its primary focus is to continue to advance its flagship Maracás Vanadium Project with the target to commence production in Q4 2013. The Maracás Vanadium Project is poised to become one of the world’s premier producers of vanadium as a result of the high grade and projected low operating costs.

The Deal

The nature of the deal itself is innovative as this was one of just a few full non-recourse project finance transactions relating to a greenfield mining project in Brazil – meaning the lending bank or banks are only entitled to repayment from the profits of the project the loan is funding, not from other assets of the borrower.

The deal involved different banks each providing different financing to Largo’s Brazilian subsidiary Vanádio de Maracás S.A. A bridge loan was provided by Banco Itaú BBA S.A. and Banco Votorantim S.A. (“Bridge Banks”)

in the amount of R\$54 million. Long term financing was provided by Banco Nacional de Desenvolvimento Econômico e Social (“BNDES”) through a facility agreement in the amount of R\$333 million, fully backed and guaranteed by the Bridge Banks and Banco Bradesco S.A. (together, “Banks”) through a guarantee agreement governing the issuance of relevant bank guarantees in favour of BNDES.

The syndicate of banks were involved in all phases of the deal, including due diligence in respect of their greenfield project, as well as on all phases of the non-recourse project finance transaction including the bridge loan transaction and the long term financing transaction. Due to the multijurisdictional aspects, a number of law firms from Canada, Brazil, Switzerland, the Caymans, and England were involved in the project.

WeirFoulds acted as Canadian counsel to Largo Resources Ltd., in connection with obtaining the required approvals and reviewing for Largo matters not governed under Brazilian law. In addition, WeirFoulds was involved in reviewing and negotiating the facility agreement, guarantee agreement, security package, and the engineering, procurement, and construction management agreement with the management team in Toronto, the Board, and related interactions with relevant parties outside of Brazil.

CONTRIBUTORS



John Buhlman is an experienced litigator who acts on complex environmental and commercial litigation. A key part of his practice involves advising clients on regulatory compliance with environmental laws.



Rajeev Dewan is a corporate finance lawyer with a wide range of international regulatory and transactional experience relating to capital markets, private equity and financial services regulation.



Ian Mitchell’s practice is focused on corporate finance and securities, with an emphasis on public and large private company transactions and advice.



Robert Warren is recognized as one of Canada’s leading regulatory lawyers. He specializes in the energy, environmental and transportation fields.



We would love to hear from you!

We invite your feedback, and welcome ideas for topics that may be of interest to you. Please contact us at publications@weirfoulds.com.

ABOUT THIS NEWSLETTER

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