



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

PRIVILEGED & CONFIDENTIAL

BY EMAIL

August 30, 2006

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Dear Mark, Dave and Morag:

**RE: UPDATE OF CELA'S LEGAL OPINION: APPLICABILITY OF ONTARIO'S
ENVIRONMENTAL ASSESSMENT ACT TO THE INTEGRATED POWER
SYSTEM PLAN**

At your request, we are writing to update and expand upon our opinion letter dated February 24, 2006 in relation to *Environmental Assessment Act* (EA Act) coverage of the Integrated Power System Plan (IPSP), particularly the nuclear component thereof.

In light of recent developments (see below), it is our overall conclusion that:

1. A judicial review application under the *Judicial Review Procedure Act* to quash or set aside Cabinet's decision to pass O.Reg.276/06 (or to enjoin further development of

the IPSP without EA Act coverage) is unlikely to succeed on jurisdictional grounds, and should not be pursued at this time.

2. It is possible to bring this matter to court via an application under Rule 14.05 of the *Rules of Civil Procedure* for an interpretation of certain statutory provisions (i.e. the *Environmental Bill of Rights* (EBR)) upon which public and/or private rights depend.
3. The precise remedies and grounds to be advanced in a Rule 14.05 application require further consideration and legal research before such an application can be prepared, served and filed. Conceptually, however, it appears reasonable to request the court to determine whether the manner in which O.Reg.276/06 was passed under the EA Act contravened public participation rights under the EBR.
4. A successful Rule 14.05 application may cause the Ontario government to withdraw the current exempting regulation, but then post (and ultimately pass) an identical regulation in accordance with proper EBR requirements. Thus, a Rule 14.05 application may buy some additional time, but it will not necessarily (or permanently) prohibit the Ontario government from developing and implementing the IPSP (including the nuclear component) outside the coverage of the EA Act.

In reaching these conclusions, CELA acknowledges and appreciates the valuable input received from Rob Wright and Hugh Wilkins of the Sierra Legal Defence Fund.

It goes without saying that this confidential update letter is subject to solicitor-client privilege, and that it should not be publicly disclosed or released without the express consent of all three client groups. In other words, given the privileged nature of this document, it should not be released or distributed unilaterally by any client group unless all three groups concur in the release.

However, we would strongly caution you not to release this update letter to even a small select audience for two main reasons: (a) such actions may constitute “waiver” of the privilege (meaning that we may not be to withhold this document from the respondents if litigation is commenced); and (b) the opinion contains a candid discussion of some possible weaknesses in certain legal arguments if litigation is commenced. In our view, it would be preferable not to tip off the potential respondents to real or perceived problems regarding the strength of the case discussed below.

PART 1 – THE FACTS

Subsequent to our February 24, 2006 opinion letter, the following significant events have occurred:

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| June 12, 2006 | The Ontario Cabinet passes O.Reg.276/06 under the EA Act. In effect, this regulation exempts the IPSP (and, more generally, all related Crown projects and activities) from the EA Act. |
| June 13, 2006 | The Minister of Energy publicly announces the various components of the Ontario government’s proposed IPSP, and releases a statutory directive |

(O.Reg.277/06) requiring the Ontario Power Authority (OPA) to “consult” the public and to “consider” the environment when developing the OPA. Among other things, the Energy Minister’s proposed content of the IPSP (a) is heavily dependent upon expensive, unreliable and risky nuclear refurbishment/expansion; (b) delays the long-promised closure of certain coal-fired plants; and (c) gives short shrift to renewables, conservation, and efficiency programs and targets. No mention is made by the Energy Minister that the IPSP was exempted from the EA Act the day before his announcement.

- June 14, 2006 O.Reg.276/06 is quietly posted to the Ontario government’s e-laws website.
- June 15, 2006 The Ministry of the Environment (MOE) posts an “information notice” on the EBR registry to announce *ex post facto* that O.Reg.276/06 was passed. This EBR posting does not solicit public input on the regulation, and further claims that the regulation was merely “administrative” in nature and was passed to clarify that the IPSP was not (in the view of the MOE) subject to the EA Act in the first place. Similar claims are made by the Environment Minister during extensive debates in the Ontario Legislature in the following days.
- June 16, 2006 The Environment Minister writes to CELA to rationalize the passage of O.Reg.276/06 on various grounds, including the curious claim that the “IPSP was designated because it is not subject to the EA Act.”
- June 19, 2006 CELA files an EBR Application for Review of O.Reg.276/06, and requests that the regulation be revoked for various reasons. On the same date, Ontario’s Environmental Commissioner issues a news release that sharply criticizes the Ontario government’s decision to pass O.Reg.276/06 without complying with EBR notice/comment requirements.
- June 20, 2006 The MOE slightly revises the EBR “information notice” to solicit public comment on O.Reg.276/06 by July 20, 2006. Approximately 2,000 individuals and groups file written comments in accordance with this notice. However, O.Reg.276/06 was not withdrawn or suspended during or after this “comment period.”
- June 22, 2006 A coalition of 11 environmental groups writes to Premier McGuinty to object to the exemption of the IPSP from the EA Act. On the same date, the MOE advises CELA that it will render its decision on the requested review of O.Reg.276/06 by August 21, 2006.
- August 21, 2006 The MOE fails to respond to CELA’s EBR Application for Review by the prescribed deadline.

PART 2 – THE LAW

The overall constitutional and legislative framework governing EA Act coverage of the IPSP (including the nuclear component) was summarized in our February 24, 2006 opinion letter, and does not need to be repeated here in detail.

Similarly, our previous opinion letter outlined the potential scope (and potential adverse cost implications) of Rule 14.05 applications. Should you have further questions about Rule 14.05 applications in general, please refer to our previous opinion letter or, alternatively, please contact us at your earliest convenience.

Accordingly, this update letter will focus on three specific matters:

- (a) Cabinet's jurisdiction to pass exempting regulations under the EA Act;
- (b) EBR public notice/comment requirements for passing exempting regulations under the EA Act; and
- (c) potential grounds and relief that may be raised in an application under Rule 14.05 of the *Rules of Civil Procedure*.

(a) Jurisdiction to Pass Exempting Regulations under the EA Act

As a matter of law, it is clear that the Ontario Cabinet has wide-ranging authority to designate and/or exempt virtually any proponent or undertaking from the requirements of the EA Act.

In particular, section 39(f) provides as follows:

39. The Lieutenant Governor in Council may make regulations...

- (f) exempting any person, class of persons, undertaking, or class of undertakings from this Act or the regulations or a section or portion of a section thereof and imposing conditions with respect to the exemption.

It should be noted that under section 3.2 of the EA Act, the Minister is also empowered to issue "declaration orders" to exempt proponents or undertakings from the EA Act. In this case, however, the exemption granted in relation to the IPSP was set out in a regulation, not a declaration order. Presumably, in passing this regulation, the Ontario Cabinet relied upon its section 39 authority.

Nevertheless, the mere fact that the Ontario Cabinet can point to section 39 authority is not necessarily determinative of whether O.Reg.276/06 was lawfully passed. In our view, the essential question is whether the section 39 authority was exercised in this case in accordance with applicable statutory preconditions. For the reasons described below, it is our conclusion that O.Reg.276/06 was passed in a manner that contravened public notice/comment requirements under the EBR.

(b) EBR Requirements for Passing Exemption Regulations under the EA Act

Prior to the enactment of the EBR in 1994, the MOE was not statutorily obliged to provide public notice and comment opportunities in relation to exemptions under the EA Act. In many instances, such exemptions were granted under the EA Act without permitting interested stakeholders to express their views on whether the exemptions were appropriate, or whether certain terms and conditions should be imposed on the exemption.

The EBR attempts to remedy this situation by generally requiring regulations under the EA Act to be posted as proposals on the EBR Registry, and to be subject to public comment, before the regulations are finalized and passed.

In particular, subsection 16(1) of the EBR states that:

16(1). If a minister considers that a proposal under consideration in his or her ministry for a regulation under a prescribed Act could, if implemented, have a significant effect on the environment, the minister shall do everything in his or her power to give notice of the proposal to the public at least thirty days before the proposal is implemented.

The EA Act is a prescribed statute for the purposes of subsection 16(1): see section 3 of O.Reg.73/94, as amended. Notice of proposed regulations is to be given on the EBR Registry and other appropriate means: see subsection 27(1) of the EBR. In this case, however, no such public notice was provided on the Registry (or anywhere else) at least 30 days before O.Reg.276/06 was passed.

Subsection 16(2) of the EBR further provides that the Minister's duty to provide public notice of proposed regulations under prescribed statutes does not apply "to a regulation that is predominantly financial or administrative in nature." As noted above, the Environment Minister has publicly claimed that O.Reg.276/06 is merely "administrative", and therefore did not trigger public notice/comment requirements under the EBR. This claim, however, has been correctly rejected by the Environmental Commissioner, whose June 19th news release states that:

This is the first regulation under the EA Act that has not been posted on the Environmental Registry for public review and comment in the 12-year history of the EBR. This decision goes against the whole principle of government accountability and transparency enshrined in the Act. Exempting the province's long-term electricity plans from the environmental assessment process – to consider the possible impacts of those plans – is clearly environmentally significant and should have been posted on the Registry for public comment (emphasis added).

Furthermore, the EBR also requires the MOE (and other prescribed ministries) to develop and implement a "Statement of Environmental Values" (SEV) to explain how the purposes of the EBR (i.e. public participation in environmental decision-making) are to be applied by the MOE. Significantly, the MOE's SEV contains an express commitment to ensuring public participation, and endorses key environmental planning principles (i.e. ecosystem approach, precautionary principle, etc.).

Section 11 of the EBR places a mandatory duty upon the Environment Minister to “take every reasonable step” to ensure that the MOE’s SEV is considered whenever environmentally significant decisions are being made within the ministry. In this case, however, it is difficult to understand how the SEV commitments to public participation were considered or applied when there was a complete dearth of public notice/comment opportunities on O.Reg.276/06 before it was passed. Accordingly, we suspect that the Environment Minister will be hard-pressed to satisfactorily demonstrate, on the record, that she used “every reasonable step” to ensure compliance with the SEV.

(c) Potential Grounds and Relief in a Rule 14.05 Application

As we noted on page 29 of our previous opinion letter, Rule 14.05 provides litigants with an opportunity to bring certain statutory interpretation questions to court for adjudication.

In particular, Rule 14.05(3) permits the bringing of applications “where the relief claimed is... (d) the determination of rights that depend upon the interpretation of a statute, order in council, regulation, or municipal by-law or resolution”, or “(h) in respect of any matter where it is unlikely that there will be any material facts in dispute.” Furthermore, paragraph (g) of Rule 14.05(3) permits the application to request “an injunction, mandatory order or declaration...or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by notice of application.”

As noted above, the precise grounds and remedies that could be raised in a Rule 14.05 application in this case requires further strategic consideration and additional legal research. In broad terms, however, the Rule 14.05 application could pose the following questions (or some variation thereof):

- was the Environment Minister required by section 11 of the EBR to comply with the MOE’s SEV (including the public participation commitments) when O.Reg.276/06 was passed?
- did the Environment Minister comply with section 16(1) of the EBR when O.Reg.276/06 was passed (or, alternatively, is O.Reg.276/06 “administrative” in nature, thereby triggering the exception in subsection 16(2) of the EBR)?
- if the answer to either main question is “yes”, should the Court declare that O.Reg.276/06 was passed in a manner that contravenes the EBR (or, alternatively, declare that O.Reg.276/06 should be revoked and re-posted in accordance with proper EBR procedures)?

If pursued, the Rule 14.05 application must be drafted in a manner which does not involve any material facts that will be contested or disputed by the respondent(s). In addition, the Rule 14.05 application must not run afoul of the privative clause in subsection 118(1) of EBR, which generally provides that a Ministerial actions or decisions under the EBR shall not be judicially reviewed in any court. Accordingly, the issues in a Rule 14.05 application should be framed as “neutral” questions of law, rather than a direct attack which attempts to quash or set aside the Minister’s decision in this case.

However, subsection 118(2) of the EBR provides that this privative clause does not bar judicial review of Ministerial decisions respecting “instruments” where there has been a fundamental failure to comply with EBR requirements. This exception raises another interesting question of statutory interpretation that could also be placed before the court in a Rule 14.05 application:

- since O.Reg.276/06 affects the issuance of IPSP instruments,
 - (a) does the privative clause even apply in this case; and
 - (b) is the MOE required to provide EBR notice of such instruments?

The gist of this concern is that section 32 of the EBR provides, in effect, that instruments for undertakings that have been approved/exempted under the EA Act may not be subject to the public notice, comment and third-party appeal rights under the EBR. Thus, from the public interest perspective, it will be important to determine whether this “EA exception” in section 32 means that there is no statutory obligation on the MOE to provide public notice/comment opportunities if, for example, an IPSP project requires air or wastewater approvals under the *Environmental Protection Act* or *Ontario Water Resources Act*. In our opinion, this is a serious and legitimate question of statutory interpretation, and the court’s answer to that question will have considerable practical and far-ranging implications for public participation rights in relation to IPSP instruments that will be applied for and received as the IPSP is implemented.

PART 3 – CONCLUSIONS AND RECOMMENDATIONS

For the foregoing reasons, it is our opinion that an arguable Rule 14.05 application can be drafted in this case to address questions of statutory interpretation under the EBR which greatly affect public/private rights.

If a 14.05 application is pursued in this case, consideration should be given to inviting the Environmental Commissioner to intervene as a “friend of the court” in support of the application. As you may know, the Environmental Commissioner has intervened in other high-profile cases (i.e. Hollick, Inco) where key provisions of the EBR are being considered by the courts.

Unfortunately, due to other litigation commitments this fall, I will be unable to take the lead in preparing, serving and filing a Rule 14.05 application until at least November. If you wish to pursue this option before November, then perhaps Rob Wright and Hugh Wilkins of SLDF may be able to provide assistance and/or legal representation. It may also be timely to convene a second “friendly lawyers” session to brainstorm about this and other options.

In closing, we trust that this update letter sheds some additional light on this highly complex area of environmental, administrative and constitutional law. If you have any questions or comments about this opinion letter, please contact us at your earliest convenience. If requested, we would be pleased to meet with you (or participate in a conference call) to further discuss the findings and recommendations contained within this opinion letter.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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Counsel

cc. Rob Wright
Hugh Wilkins