ONTARIO GOVERNMENT INTRODUCES THE

RELIABLE ENERGY AND CONSUMER PROTECTION ACT, 2002

- Clarifies Government’s right to sell Hydro One Shares
- Confirms sales of Municipal Electric Utilities
- Introduces “Energy Consumers’ Bill of Rights” concerning Electricity Retailers and Gas Marketers
- Hydro One transmission corridor land transfer to the Ontario Government
Introduction:

Readers will be aware of the recent decision of Mr. Justice Arthur Gans, of the Superior Court of Justice, in which the Court found that while the *Electricity Act, 1998* (the “Electricity Act”) granted the Ontario Government the authority to acquire and hold shares of Hydro One Inc. (“Hydro One”), owner (through its subsidiary, Hydro One Networks Inc.) of the bulk of the Province’s electricity transmission system, the legislation did not allow the Province to sell those shares. This effectively blocked the Province’s intended initial public offering of the Hydro One shares, pending a successful appeal of the decision and/or an amendment of the Electricity Act. The Government has appealed Justice Gans’ Decision.

In addition to pursuing the appeal, on May 29, 2002, the Provincial Government introduced the *Reliable Energy and Consumer Protection Act, 2002*. This Bill is intended to specifically allow the Ontario Government to dispose of the shares of Hydro One Inc. or its subsidiaries, although Ontario Premier Eves has stated that the government has not yet decided to proceed with the IPO.

In its current form, the Bill will do much more than allow for the sale of Hydro One shares. Among other things, the Bill introduces a “Consumer Bill of Rights” under the *Ontario Energy Board Act, 1998* (the “OEB Act”) in respect of consumer dealings with electricity retailers and gas marketers; transfers ownership of transmission corridor lands to the Province; expands the powers of the Market Surveillance Panel of the Independent Electricity Market Operator (the “IMO”); and authorizes regulations providing for a tracking system that will associate electricity with the processes and fuel types used by generation facilities, and with the quantities of contaminants emitted by those facilities. What follows is a summary of the key features of the Bill (relevant sections are referred to in parentheses):

Disposition of Hydro One Shares:

(a) Right to Complete Hydro One IPO

The Bill would repeal Part IV of the Electricity Act (“The Generation Corporation and the Services Corporation”), and replace it with a new Part IV (“Hydro One Inc.”) and Part IV.1 (“Ontario Power Generation Inc.”). Section 48 of the Electricity Act, by which the Province could acquire and hold shares of what is now Hydro One, would be replaced by Section 49, which permits the Minister of Environment and Energy, on behalf of the Province, to “...acquire, hold, dispose of and otherwise deal with securities or debt obligations of, or any other interest in, Hydro One Inc. or any of its subsidiaries.” Corporations may also be incorporated for the purpose of acquiring, holding, disposing of or otherwise dealing with the securities or debt obligations of, or any other interest in, Hydro One Inc. or any of its subsidiaries.

(b) No OEB Hearing for IPO

As noted in greater detail below, the Bill makes it clear that a Hydro One IPO or sale will not require a review by or the approval of the OEB. See page 8 under the heading “Disposition and Acquisition of Shares of a Transmitter or Distributor.”
(c) IPO Proceeds

This Part also addresses the treatment of the proceeds of the sale of Hydro One shares. Under proposed Section 50.3, all proceeds payable to the Province in respect of the disposition of the securities or debt obligations of, or any other interest in, Hydro One Inc. or the other corporations that may be established for the purpose of acquiring, holding, disposing of or otherwise dealing with the securities or debt obligations of, or any other interest in, Hydro One Inc. or any of its subsidiaries, would be paid to the Financial Corporation (“OEFC”), presumably for the purpose of paying down the stranded Ontario Hydro debt. The payment to OEFC would be “less any amount that the Minister of Finance considers advisable in connection with the acquisition of such securities, debt obligations or interest, including the amount of the purchase price, any obligations assumed and any other costs incurred by [the Province]; and less the amount of any costs incurred by [the Province] in disposing of the securities, debt obligations or other interest.”

Ontario Power Generation Inc.

The Bill would maintain the existing wording of the Electricity Act with respect to shares of Ontario Power Generation Inc. (“OPG”) – that is, the proposed new Section 53.2 states that “The Minister, on behalf of Her Majesty in Right of Ontario, may acquire and hold shares of Ontario Power Generation Inc.” As a result, the Bill does not add any explicit ability for the Ontario Government to dispose of the shares of OPG.

Disposition of Local Distribution Company Shares:

The Bill proposes an amendment in respect of local electricity distribution companies (“LDCs”), the successor corporations to the former municipal hydro electric commissions, that is similar to the proposed new Section 49 (that Section would explicitly permit the Province to dispose of its shares of Hydro One). The current Subsection 142(5) of the Electricity Act permits a municipal corporation to acquire and hold shares of an LDC. The Bill would replace the current Subsection 142(5) with a new Subsection 142(5), which would read as follows:

“(5) A municipal corporation may acquire, hold, dispose of and otherwise deal with shares of a corporation incorporated pursuant to this section that carries on business in the municipality.”

Under Section 31 of the Bill, this amendment would be deemed to have come into force on November 7, 1998, so that municipal corporations would be explicitly considered to have had the authority to sell their LDC shares from the date that the Electricity Act came into force.
Energy Consumers’ Bill of Rights:

The Bill would introduce a new Part V.1 to the OEB Act, the “Energy Consumers’ Bill of Rights”. Part V.1 introduces significant prospective and retroactive changes to the business of retailing electricity and natural gas, but also leaves significant details of specific measures to be issued under future regulations.

(a) New Bill of Rights Would Apply to Identified Groups of Consumers

The Energy Consumers’ Bill of Rights is to apply to (i) the retailing of electricity to consumers who use less than the amount of electricity “prescribed by regulation” (the existing Regulations define “residential or small business consumer” as a consumer who annually uses less than 150,000 kilowatt hours of electricity, but it is not clear from the current text of the Bill whether the same threshold would be used); and (ii) gas marketing to consumers who are “low volume consumers” as defined under section 47 of the current OEB Act.

(b) No Ability to Contract Out

Notably, section 88.2 provides that Part V.1 is to apply despite any agreement or waiver to the contrary. Further, section 88.3 provides that the consumer protection rights of Part V.1 are in addition to any other rights of consumers under any other Act or by operation of law, and that if there is a conflict of law, the law that provides the consumer with the greatest protection shall prevail.

(c) “Unfair Practices” Prohibited

Part V.1 lays out a structure for defining “unfair practices” by gas marketers or electricity retailers. Section 88.4 provides the framework for “prescribing by regulation” practices by such retailers and their salespersons that constitute “unfair practices” and prohibits electricity retailers and gas marketers from engaging in these practices. Section 88.4 introduces a new, broad definition of “salesperson”. Under the Bill, the prohibition against unfair practices could be breached by a retailer or marketer if a salesperson carries on an unfair practice, where the salesperson’s action would be an unfair practice if carried on by the retailer or marketer.

(d) OEB Powers

Where the OEB’s Director of Licensing believes there are reasonable grounds that a gas marketer/electricity retailer has engaged in or is engaging in an “unfair practice”, section 88.5 would give the Director the power to issue an order to such person to comply with section 88.4 in respect of the unfair practice. Section 88.5 provides for notice to the gas marketer/electricity retailer and the opportunity for a hearing before the OEB.

Despite the above opportunity for a hearing before the OEB regarding an order of the Director of Licensing, section 88.6 would provide for the Director to make an order for immediate compliance by the offending gas marketer/electricity retailer if, in the Director’s opinion, it were necessary for the protection of the public. Although the order would take effect immediately, the
gas marketer/electricity retailer could still request a hearing on the matter before the OEB and the Board could grant a stay of the order.

(e) “Written Assurance of Voluntary Compliance”

Where the Director of Licensing proposes to make a compliance order (or where an order has been made) against a gas marketer/electricity retailer, the marketer/retailer may enter into a "written assurance of voluntary compliance undertaking to not engage in the specified unfair practice" under section 88.8. The written assurance of voluntary compliance is to be maintained on the public record, and under a proposed new Subsection 126.1(2),

“A copy of an assurance of voluntary compliance, purporting to be certified by the director is, without proof of the offence or signature of the director, admissible in evidence in any prosecution or other proceeding as proof, in the absence of evidence to the contrary, of the facts stated.”

(f) Reaffirmation of Electricity and Gas Contracts

The proposed Part V.1 also addresses the business of contracting with consumers. Section 88.9 provides that where the gas marketer/electricity retailer enters a contract with a consumer that is protected by the Bill of Rights, it must deliver a written copy of the contract to the consumer; however, the contract ceases to have effect unless “reaffirmed by the consumer” before the 31st day following the day on which the written copy of the contract is delivered to consumer. Furthermore, the consumer may only “reaffirm” following the 14th day after a copy of the contract is delivered to the consumer. The method of the consumer’s “reaffirmation” is to be prescribed in regulation, thereby making it difficult to determine the form of the reaffirmation at this time. The consumer may also give notice to “not reaffirm” the contract at any time before the 31st day following the day on which the written contract is delivered to the consumer. These provisions regarding “reaffirmation” would apply to contracts entered into on or after the day the section comes into force.

(g) “Negative Option” Renewals

With respect to the renewal of contracts, section 88.9(5) provides that a contract with terms providing for renewal or extension of the contract cease to have effect unless the consumer “reaffirms the term” in accordance with the as yet undisclosed regulations. However Subsection 88.9(5) would apply to contracts entered into either before or after Section 88.9 comes into force. Accordingly, the application of this section to contract renewals will affect existing contracts with consumers.

(h) Invalidity of Retail Contracts

Overall, section 88.9 would provide that a contract “ceases to have effect” and that there is “no cause of action against the consumer” if the contract is (i) not reaffirmed, (ii) the consumer gives notice not to reaffirm and/or (iii) the renewal term is not reaffirmed, all as to be specified in the regulations. Where a contract ceases to have effect, the gas marketer/electricity retailer shall refund the consumer any prepaid amounts.
(i) **Contents of Contracts**

Part V.1 also proposes to mandate specific information to be included in a contract with a consumer. Section 88.10 would give authority for as yet unspecified regulations to require mandatory information to be included in such contracts. Further, section 88.10 would entrench in legislation a requirement that any information required by the as-yet unspecified regulations and the relevant OEB codes must also be included in the customer contract. If that requirement is not met, the consumer may cancel the contract within one year of entering into the contract. This section applies to contracts entered into on or after the day this section comes into force. Section 88.11 would provide that there is no specific form of consumer cancellation. It may be expressed in writing in any way, as long as it indicates the intention of the consumer to cancel the contract. The proposed Section also provides that if a contract is cancelled, any prepaid amounts are to be returned to the consumer.

(j) **Prohibition of False or Misleading Statements**

Finally, the proposed Bill would prohibit false, misleading or deceptive statements in any advertisement, circular, pamphlet or material published by any means that relates to gas marketing or electricity retailing to consumers. In such cases, the OEB’s Director of Licensing could order the cessation, retraction or correction, effective immediately. Where a gas marketer/electricity retailer is named in a Director’s order, and the order is confirmed, the retailer or marketer would be required to submit all statements in advertisements, circulars, pamphlets or other published material etc. to the Director of Licensing for pre-approval before publication for a prescribed period. The Director of Licensing may also request a restraining order from the Superior Court of Justice.

**Ownership and Use of Corridor Lands:**

Under a proposed new Part IX.1 of the Electricity Act, all land used for the Hydro One Inc. (or a subsidiary’s) transmission system, or acquired for that purpose, as of May 29, 2002, and all land owned by Hydro One Inc. or a subsidiary abutting that land, would be transferred to the Provincial Government at no additional cost. The only compensation for this “corridor land” would be Hydro One and its subsidiaries retaining the “statutory right to use corridor land” for a transmission system (s.114.2(3) and s.114.5). The Provincial Government’s Backgrounder to the Bill notes that the transfer is being done “...in order to protect these lands for public uses such as transportation, recreation and infrastructure.” That statutory right may be transferred by Hydro One, subject to notice to the Chair of the Management Board of Cabinet. The corridor land may be transferred back to the party with the statutory right to use the land, in exchange for the fair market value of the land on May 29, 2002, without the consent of the party having that statutory right, provided that the corridor land in question shall not be subject to encumbrances that are greater than those to which it was subject on May 29, 2002 or be of a condition which has significantly changed since May 29, 2002.

The Bill provides that a person or entity who owns the corridor land shall not use it in such a way that the level of service provided by a transmission system is reduced, and the OEB may order the owner of corridor land to restrict or discontinue any use of the land that interferes with the
expansion of the transmission system [proposed s.114.6]. However, the Bill also provides that the party with the statutory right to use the corridor land “...shall, to the extent practicable, ensure that the design and construction of any transmission system on the land maximizes the area available for other uses” (proposed s.114.7) and the Chair of the Management Board of Cabinet (the “Chair”) may give directions to the entity with the statutory right regarding the location of buildings, structures or equipment, provided that the Chair shall not give a direction that would have the effect of reducing level of service provided by transmission system (s.114.8); and the Chair may direct the person with the statutory right, to move a building, structure or equipment, again provided that the Chair shall not give a direction that would have the effect of reducing the level of service provided by transmission system (s.114.9).

Leasehold interests in corridor land that are subordinate to the fee simple interest would not be affected. (s. 114.4) Persons having an interest in or having entered into agreements to use the corridor land (or a building, structure or equipment located thereon), however, will have a duty to provide the Chair, upon request, such information as the Chair may request with respect to the use of the said land, building, structure or equipment for the purposes of administering and enforcing Part IX.1.

The Bill also includes special provisions which exempt Hydro One or a subsidiary from having to make any payments in lieu of taxes (“PILs”) as result of the transfer of the corridor land to the Province. In addition, land transfer tax will not apply to the transfer of the corridor land.

**Other Electricity Act Amendments (Schedule A):**

1. **MARKET SURVEILLANCE PANEL**

The Electricity Act currently provides for a Market Surveillance Panel (the “Panel”) of the IMO, and the Panel’s members have been appointed. The Panel “may investigate any activity related to the IMO-administered markets or the conduct of a market participant.” The Panel will typically investigate inappropriate market behaviour. Section 37 of the Electricity Act governs Panel investigations, and provides for matters such as OEB orders compelling market participants or their affiliates to provide information to the Panel, to permit the Panel to enter the market participant or affiliate’s business premises, and to produce documents for examination by the Panel. All information provided to the Panel in the course of an investigation is deemed “confidential” and cannot be used as evidence in any other proceeding except for OEB reviews relating to abuse of market power.

The proposed amendments would broaden the powers of the Panel by replacing the existing Section 37. The Bill would grant the Panel the same authority as the Superior Court of Justice to compel testimony and the production of documents from any person (not only market participants and their affiliates), and the Superior Court may punish for contempt those persons refusing to attend or testify before the Panel. The Panel would no longer need an OEB order to enter a business premises to conduct an inspection, and the Panel would also be permitted to apply to the Ontario Court of Justice for warrants to search and seize anything which may reasonably relate to an investigation. The Bill would provide for fines of up to $50,000 for obstructing persons conducting inspections or searches. Information not already public and
obtained by the Panel would be confidential, subject to the Panel's right to release such information either: (a) to the OEB upon summons or direction to do so; (b) to police forces or investigatory or regulatory agencies; or (c) to the public, if the Panel determines that it would be in the public interest to do so (in which case, the party having provided the information will have a right to be heard by the Panel prior to disclosure).

2. ALLOCATION OF FEDERAL TAX

Subsection 90(1) of the current Electricity Act provides that if Hydro One or a subsidiary of Hydro One, or OPG or a subsidiary of OPG (collectively the “corporations”), is exempt from the payment of taxes, then a payment shall be made to OEFC by the corporation(s), in an amount equal to the amount of the tax that it would be liable to pay if it were not exempt. This is a PILs payment similar to that required from LDCs.

Hydro One and municipally owned LDCs are currently exempt from federal income tax. A new Section 91.1, proposed in the Bill, would apply to any of Hydro One Inc., a subsidiary of Hydro One Inc., an LDC, or a successor of any of them, that might cease at any time to be tax exempt under subsection 149(1) of the Income Tax Act. If the Province receives any credit or reimbursement in respect of a payment of federal income taxes by one of these entities, the Province would be required to make an equivalent payment to OEFC. Similar rules would apply if the payment or credit were received directly by the corporation, provided that the federal government intended that the equivalent payment be made to OEFC. It would not appear likely, however, that the federal government would be providing reimbursements or credits for these purposes.

Other OEB Act Amendments (Schedule B):

1. SUBSECTION 21(4) – OEB JURISDICTION TO DISPOSE OF A PROCEEDING WITHOUT A HEARING

This Subsection of the OEB Act sets out the grounds on which the OEB may make a decision in a proceeding without a hearing. Clause (b) of that Subsection contemplates that approach where the OEB determines that “…no person, other than the applicant, appellant or licence holder will be materially affected by the outcome of the proceeding and the applicant, appellant or licence holder has consented to disposing of a proceeding without a hearing.” The Bill would amend this clause by inserting the words “will be adversely affected in a material way” in place of “will be materially affected”. This may allow the OEB greater flexibility in disposing of matters without a hearing.

2. DISPOSITION AND ACQUISITION OF SHARES OF A TRANSMITTER OR DISTRIBUTOR

Under the existing Subsection 86(1) of the OEB Act, transmitters and distributors may not sell, lease or otherwise dispose of their systems as entireties or substantially as entireties, or those parts of their systems that are necessary in serving the public, without prior OEB approval. The Bill proposes to amend Subsection 86(1) to provide that the requirement to obtain OEB approval
does not apply in the case of a disposition of securities of a transmitter or distributor, or of a corporation that owns securities in a transmitter or distributor. Presumably these amendments are intended to address arguments made following the Province’s IPO announcement to the effect that OEB approval would be required prior to the sale of shares.

Subsection 86(2), which requires OEB approval prior to the acquisition of voting securities of a transmitter or distributor that would bring a person’s level of ownership above 20 percent of the voting securities of the transmitter or distributor, or of a corporation holding more than 20% of the voting securities of the transmitter or distributor, would also be amended. The Bill provides that no OEB approval would be required for the acquisition of shares where the acquisition is made by the Crown, an underwriter who holds the securities solely for purpose of distributing them to the public, someone acting as an intermediary for trades of securities, or any person holding securities by way of security only.

3. “TRACKING SYSTEM” FOR ELECTRICITY, PROCESSES, FUEL TYPES AND CONTAMINANTS

Section 88 of the OEB Act currently provides for regulations requiring, among other things, disclosure by generators of information related to contaminants, and evidence that generation facilities meet emissions standards under the Environmental Protection Act. The Bill would add a clause (a.1) to Subsection 88(1) which would permit the making of regulations providing for a “...tracking system to associate electricity with the processes and fuel types used by generation facilities and with the types and quantities of contaminants emitted by generation facilities.” Persons prescribed in the regulations may be required to submit information to the administrator of the tracking system, and that information may in turn be made public (provided that applicable regulations are made). Regulations may authorize the tracking system administrator to charge fees in connection with the tracking system.

For further information in respect of the Bill, please contact Linda Bertoldi at (416) 367-6647, or Mark Rodger at (416) 367-6190.
This publication has been prepared as a service to clients and friends of Borden Ladner Gervais LLP and other persons involved in energy markets. It is not intended to be an exhaustive statement of law or an opinion on any subject. If you have specific areas of concern or require further details we would be pleased to elaborate on any of the matters set out above. Please contact:

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