Legal Issues in the Development and Financing of Wind Power Projects

Marc Dorion, Q.C.

October 17th, 2004
Introduction

- Key Objective of the Developer
  - Secure financing (debt and/or equity) in order to construct and operate plant
    - Road map of Project must take into account what will be required by the investor/lender prior to committing and disbursing funds
    - To assess such requirements, one should look at what a construction and term lender would require
Introduction

- Alternate investment or financing modes such as strategic partnership, underwriting (IPO), bridge loans, leasing structures or sophisticated tax-driven structures may have different requirements, depending on the nature of the investment and the development stage of the Project.

- In the end, one will likely be faced with the construction and term lender’s requirements in one form or another.
Introduction

- The construction and term lenders finance cash flows, not equipment.
- Anything that is necessary to generate or protect the generation of such cash flows must be properly addressed and secured.
Introduction

- The Project risks identified should, where possible, be passed on to third parties or covered by insurance and/or warranties.
- The Project’s revenues and expenses must be clearly established and projected.
General Lending Criteria

- Proven Technology
- Long-term PPA or competitive cost
- Strong financial & Technical sponsorship
- Strong project economics
- Suitable location
- Acceptable country risk
Conditions Precedent

- Site
- Wind Studies
- Financials
- Permits & Authorizations
- Independent Engineer and other consultants’ reports
- Key Documents
- Equity and Other Contributions
- Financing Documents
Conditions Precedent

- **Site**
  - Private land – land options granting right to Developer to own constructions, works and plantations situated on real property belonging to another person
  - Crown land – Leases must be entered into and appropriate authorizations are required
  - In all cases, you want to make sure there is a renunciation to the benefit of accession by the owner of the land
Conditions Precedent

- Site
  - Sites exposed to strong winds are often times located in remote area – consider access roads, local infrastructure
  - Consider wind impact of neighbouring wind farms
  - Proximity of transmission lines – integration feasibility and costs
  - Native claims
Conditions Precedent

- Wind Studies
  - Need to be somehow conclusive
  - Generally contain disclaimers with respect to liability
  - Complemented by turbine manufacturer’s analysis and independent engineer report
Conditions Precedent

- Financials
  - Establishment of a base case pro forma providing cash flow projections
  - Efficient tax structure should be put in place
  - Maximize use of incentive programs
Conditions Precedent

- Permits & Authorizations
  - Possible need for public consultation (delays, resources involved, local support for the Project)
  - Permits relating to land, public roads, construction, hauling, access roads, watercourses, etc.
Conditions Precedent

- Permits & Authorizations
  - Required studies relating to protected species
  - Certificate of officer listing permits & authorizations, legal opinion on environment & regulatory (including Native Claims) supported by Officer’s Certificate and consultants
Conditions Precedent

- Independent Engineer and other consultants’ reports
  - Retained by lender/investor
  - IE report to confirm reasonableness of production, revenue, operating costs, major maintenance assumptions, overall wind farm design, EPC Contract and other Project Documents, as well as a review of the pro forma
Conditions Precedent

- Independent Engineer and other consultants’ reports
  - IE review would normally include a wind and associated power production forecast based on i) updated wind resource data recently collected and ii) turbine power curve specs, expected availability of turbines and actual site and resources characteristics
Conditions Precedent

➢ Other consultants include
  ➢ Wind consultant
  ➢ Environmental consultant (Phase I, Phase II assessments, protected species studies, etc.)
  ➢ Insurance consultant
  ➢ Certificate of design approval
Conditions Precedent

- Key Documents
  - PPA
  - Interconnection Agreement
  - Land Options / Leases
  - EPC and IP License
  - Warranty, Maintenance and Service Agreements
  - Management/O&M Agreement
  - Partnership/Shareholder/Unitholder Agreement
Key Documents

- PPA
  - Term (phases)
  - Price structure and inflation
  - Government incentive payments
  - Milestones
  - Guarantees and liquidated damages - insurance
  - Exclusivity – ownership of installations
Key Documents

- PPA
  - Delivery requirements (minimum and maximum delivery obligations)
  - Delivery of power prior to in-service date
  - Liquidated damages or penalties
  - Right of offset
  - Assignment/Change of control
Key Documents

- PPA
  - Refusal to take delivery
  - Force majeure
  - Termination prior to in-service date
  - Termination after in-service date
  - Emissions reduction credits (ERC’s)
  - Local content
Key Documents

- Interconnection Agreement
- Term
- Cost of interconnection
- Delay for interconnection – impact on PPA
- Maximum capacity
- Interconnection points
Key Documents

- Interconnection Agreement
- Reimbursement of fees – guarantees
- Force majeure
- Assignment/ change of control
- Termination
Key Documents

- Land Options / Leases
  - Term
  - Price
  - Renunciation to right of accession by land owner
  - Management of land selection process when dealing with private land or neighbouring owners
Key Documents

- EPC and IP License Agreement
- Price
- Construction of work according to specs – performance of work vs. wind availability
- Guaranteed delivery date – liquidated damages covering financing costs and payments owed under PPA for late delivery
Key Documents

- EPC and IP License Agreement
  - Buydown Liquidated Damages if EPC contractor does not deliver wind farm which cannot deliver power according to specifications - Lump sum payment representing loss of revenue over the life of the Project – generally used to reduce debt
Key Documents

- EPC and IP License Agreement
  - Force Majeure provisions to track those of the PPA and IA
  - Allocation of risks (interconnection and subsoil)
  - Consortium vs. single contractor – single contract vs. several contracts
  - Local content provisions of the PPA
Key Documents

- Warranty, Maintenance and Service Agreements
  - Often in separate agreements since will survive EPC contract
  - Term (from substantial completion, for a defined period of years)
  - Warranties for turbine and balance of plant can be provided by different parties
Key Documents

- Warranty, Maintenance and Service Agreements
  - Fees payable
  - Provide for replacement of defective parts
  - Can also provide for cash compensation in the event of deficient performance
    - availability warranty
    - power output warranty
Key Documents

- Management/O&M Agreement
  - Not in all cases
  - Frequent when main sponsor is an institutional investor – often covered by Warranty Maintenance and Services Agreement
  - Term
Key Documents

- Management/O&M Agreement
  - Structure – costs – incentives
  - Scope of services – must be adequately defined
  - Termination
Key Documents

- Partnership/Shareholder/Unitholder Agreement
  - Parties
  - Governance rules - conflicts
  - Financial contributions
  - Veto rights
  - Term
  - Termination - impact
Conditions Precedent

- Equity and other contributions
  - Contribution by sponsors (equity or subdebt)
  - Flow-through shares – CRCE (Canadian Renewable and Conservation Expense)
  - Government/Utility production credits or Green power rates (eq. WPPI)
  - Emissions reduction credit (ERC’s)
Conditions Precedent

- Financing Documents
  - Term Sheet
  - Credit Agreement
  - Security documents
  - Consent & Acknowledgement Agreements for Key Agreements
  - Guarantees (cost overruns – wind impact) - LCs
Conclusion

- Plan to properly allocate or mitigate risks
- Need to secure rapidly key elements, such as site, PPA, interconnection feasibility and transmission capacity
- Establish a strategy to develop and maintain strong local support for the Project
- Each contract entered into should be considered from a lender’s perspective
Conclusion (cont’d)

- Several contracts must be back-to-back, to reflect a sound risk allocation grid
- Select your lender/investor at an early stage
- Work in partnership with your lender/investor
- Sound structure and governance rules
Conclusion

➢ Thank you

Marc Dorion, Q.C.
McCarthy Tétrault LLP
(418) 521-3007
(514) 397-5676
mdorion@mccarthy.ca
**Vancouver**
Pacific Centre,
Suite 1300, 777 Dunsmuir Street
P.O. Box 10424
Vancouver BC V7Y 1K2
Tel: 604.643.7100
Fax: 604.643.7900

**Toronto**
Toronto Dominion Bank Tower
Suite 4700, Box 48
Toronto ON M5K 1E6
Tel: 416.362.1812
Fax: 416.868.0673

**Québec**
Le Complexe St-Amable
1150, rue de Claire-Fontaine, 7e étage
Québec QC G1R 5G4
Tel: (418) 521-3000
Fax: (418) 521-3099

**Calgary**
Suite 3300, 421-7th Avenue SW
Calgary AB T2P 4K9
Tel: 403.260.3500
Fax: 403.260.3501

**New York**
25th Floor, One New York Plaza
New York NY 10004-1980
USA
Tel: 212.785.6410
Fax: 212.785.6438

**London**
One London Place
Suite 2000, 255 Queens Avenue
London ON N6A 5R8
Tel: 519.660.3587
Fax: 519.660.3599

**Ottawa**
The Chambers
Suite 1400, 40 Elgin Street
Ottawa ON K1P 5K6
Tel: 613.238.2000
Fax: 613.563.9386

**United Kingdom & Europe**
1 Plough Place
London EC4A 1DE
England
Tel: +44 (0)20.7822.1500
Fax: +44 (0)20.7822.1555

**Montréal**
Le Windsor
1170, rue Peel
Montréal QC H3B 4S8
Tel: (514) 397-4100
Fax: (514) 875-6246

---
mccarthy.ca