

PROJECTS BULLETIN

November 2007

OSFI RULING CREATES NEW OPPORTUNITIES FOR FOREIGN-BASED MONOLINE INSURERS

The Office of the Superintendent of Financial Institutions (OSFI) has provided welcome clarification of the law which will further open the door to the use of financial guarantee insurance in the context of Canadian infrastructure projects.

Financial guarantee insurance (sometimes known as a “monoline wrap”) is often used in infrastructure project financing to boost the credit rating of debt issuers for such projects, but such insurance has rarely been seen in Canada. The main reason was that under the federal *Insurance Companies Act* (ICA), it was not clear whether before providing such insurance in Canada, a foreign insurer would need to obtain a special order from the Office of the Superintendent of Financial Institutions (OSFI), which in turn would subject the insurer to the heavy regulatory burden of Part XIII of the ICA.

However, OSFI has recently published some guidance that makes it clear that foreign insurers providing this product would not be subject to Part XIII. Earlier, in a May, 2007 letter, OSFI announced its administrative position that risks located in Canada but insured outside Canada would no longer be subject to Part XIII requirements. In its September Advisory OSFI listed four broad indicia that it will use to determine whether a particular risk is insured in or outside of Canada (see box opposite). Most recently, in an October 25 ruling, OSFI applied these criteria to find that a foreign insurer proposing to provide financial guarantee insurance to Canadian entities that were raising funds to finance infrastructure projects in Canada would not be subject to Part XIII.

These developments are good news for foreign providers of monoline wraps and for Canadian infrastructure project bidders seeking a broader menu of financing options in an increasingly competitive bidding environment. The barriers have not come down completely, of course: insurers still face provincial regulation, which may impose licensing requirements, premium levies or other regulatory hurdles.

OTHER CANADIAN PPP NEWS:

- **Significant Transaction Volume in Ontario and MBM Leads the Way:** 2007 has been a busy year for Ontario’s alternative financing and procurement marketplace with a significant number of major projects reaching commercial and financial close thus far. McMillan Binch Mendelsohn’s Projects Group has been very active, representing consortia members, contractors or providers on infrastructure transactions with an aggregate project value of close to \$2 billion in the last twelve months. Among these transactions are the following Ontario projects:

- o Archives of Ontario at York University;
- o Greater Toronto Area Youth Centre in Brampton;
- o Sudbury Regional Hospital;
- o Trillium Health Centre in Mississauga;

In the September advisory, OSFI set out the following four broad categories of indicia to assess where a foreign insurer insures a risk:

- (a) the location where interaction leading to the formation of a policy takes place, having regard to such matters as the location of the policyholder when contacted; where the insurer receives the application; the location of the insurance agents; where the offer to insure is received; and where the policy is received;
- (b) representations made by the insurer regarding where it will perform its policy obligations and which office will decide matters related to the policy;
- (c) the jurisdiction with which the policy is most closely connected; and
- (d) where the insurer promotes its products.

Any member of our Projects Group would be pleased to discuss these factors in further detail.

- o Sault Area Hospital;
 - o Bluewater Health Capital Redevelopment Project in Sarnia; and
 - o Rouge Valley Ajax Pickering Hospital Phase I Redevelopment Project.
- **New Applications for the PPP:** Across Canada, the use of PPP-based structures has recently expanded beyond healthcare and transportation sectors to include social infrastructure and more innovative projects. The Alberta government recently announced a plan to build 18 schools by 2010 using the PPP model, while authorities in Ontario and New Brunswick are using similar structures to finance courthouses, highway service centres and justice facilities. Partnerships BC, in consultation with the Province of British Columbia, BC Hydro and industry, has recently launched a request for qualifications in connection with a PPP project to expand the existing transmission system into the northwest region of British Columbia. Montreal will soon see the construction of a new concert hall constructed using the PPP model.
 - **Québec.** The Québec Ministry of Transport has awarded the Province's first major PPP – the 35-year DBFOM project for Autoroute 25 - to Concession A25 S.E.C., a partnership of local and North American firms. Several other PPP projects in Québec are at the RFQ or RFP stage, including Autoroute 30; a package of 7 Highway Service Areas; the Centre hospitalier de l'Université de Montréal; the McGill University Health Centre; a Residential and long-term care centre; the Montréal Concert Hall and the Salaberry-of-Valleyfield Court House.

ABOUT MCMILLAN BINCH MENDELSON'S PROJECTS GROUP

McMillan Binch Mendelsohn is a market leader in project finance and public-private partnerships. Our Projects Group advises both public sector and private sector participants across Canada in a broad spectrum of arrangements where services or infrastructure traditionally provided by the public sector are instead provided in whole or in part by the private sector. Our team includes professionals with an unparalleled level of experience in negotiating and closing project-based transactions for public infrastructure.

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

WHO WE ARE

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