

**ONTARIO ENERGY BOARD**

**APPLICATION OF GOLDCORP CANADA LTD. And GOLDCORP INC. for leave to  
construct a 115 kV Electricity Transmission Line,  
and for Ancillary Orders**

**File No. EB-2011-0106**

**SUBMISSIONS OF LAC SEUL FIRST NATION  
Motion returnable June 7, 2011**

1. The Applicant has brought a motion requesting the Board to grant an interim order in relation to its section 92(1) application for leave to construct.
2. The Ontario Energy Board is a creature of statute. It receives its substantive powers through the *Ontario Energy Board Act, 1998*. (the *Act*) It is a well-established principle of administrative law that administrative tribunals have only the powers conferred upon them by statute.
3. The Board's power to grant an interim order prior to deciding an application for leave to construct is found in sections 21(7) and section 98(1.1):

**Interim orders**

21(7) The Board may make interim orders pending the final disposition of a matter before it.

**Interim order**

98(1.1) The Board may, upon application, issue an interim order authorizing a person and the officers, employees and agents of that person to enter on land at the intended location of any part of a proposed work and to make such surveys and examinations as are necessary for fixing the site of the work and as are specified in the order if,

- (a) the person has applied for leave under section 90 or 92 and has complied with section 94;
- (b) the person has applied to the Board for an exemption under section 95; or
- (c) the Board has commenced a proceeding to determine whether to require the person, pursuant to a condition of the person's licence, to expand or reinforce a transmission or distribution system.

### **Damages**

- (2) Any damages resulting from an entry onto land carried out under subsection (1) or pursuant to an order under subsection (1.1) shall be determined by agreement or, failing agreement, in the manner set out in section 100.

4. The *Act* does not authorize the Board to grant an interim order authorizing the Applicant to carry out clearing and grubbing of the right-of-way for the applied transmission line.

5. If the Legislature had intended to give the Board this power, it would have done so. At page 168 of her authoritative update of *Driedger on the*

*Construction of Statutes*, Professor Ruth Sullivan stated:

An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.

6. In the present case, there is good reason to believe that, having made the Applicant's right to conduct surveys and examinations subject to Board approval with an accompanying power to calculate resulting damages, the

Legislature would have imposed at least the same restriction on the Applicant's right to conduct more destructive clearing and grubbing operations.

7. The Legislature's silence, both with respect to the Board's power to allow entry for clearing and grubbing purposes and to calculate the resulting damages, clearly manifest the Legislature's intention to exclude the Board's power to grant an interim order for that purpose.
8. Nor can that power be found in section 16.1 of the *Statutory Powers Procedure Act* which provides:

**Interim decisions and orders**

16.1(1) A tribunal may make interim decisions and orders.

**Conditions**

(2) A tribunal may impose conditions on an interim decision or order.

**Reasons**

(3) An interim decision or order need not be accompanied by reasons.

9. Section 16.1(1) authorizes the Board to make interim orders only with respect to procedural matters. It does not empower the Board to provide substantive relief beyond that specifically authorized by the *Ontario Energy Board Act, 1998*. Decisions of two other Ontario tribunals are submitted in support of that submission: *Arzem v. Ontario (Ministry of Community & Social Services)* 2005 CarswellOnt 10194, 2005 HRTO 11 and *Greenspace Alliance of Canada's Capital v. Ontario (Director, Ministry of the Environment)* 2009 CarswellOnt 3245, 43 C.E.L.R.(3d) 264.

10. Goldcorp's Environmental Study Report is not yet finalized and approved.

Final approval under the Class EA for Resources Stewardship and Facility Development and all permits is outstanding. Goldcorp has not undertaken adequate consultation nor addressed the issues and concerns of Lac Seul First Nation.

11. Lac Seul First Nation requests this Board deny the interim order requested by the Applicant and dismiss this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

David G. Leitch

Keshen & Major