



EB-2011-0040
EB-2011-0041
EB-2011-0042

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B, and in particular, Section 90 thereof;

AND IN THE MATTER OF an Application by Union Gas Limited for an Order granting leave to construct a natural gas pipeline and ancillary facilities in the Township of Ear Falls and the Municipality of Red Lake, both in the District of Kenora;

AND IN THE MATTER OF the Municipal Franchises Act, R.S.O. 1990, c.M.55, as amended; and in particular Sections 8 and 9 thereof;

AND IN THE MATTER OF an Application by Union Gas Limited for an Order approving the terms and conditions upon which the Corporation of the Municipality of Red Lake is, by Bylaw, to grant to Union Gas Limited the right to construct and operate works; to supply gas to the inhabitants of the said municipality; and the period for which such rights are to be granted;

AND IN THE MATTER OF an Application by Union Gas Limited for an Order directing and declaring that the assent of the municipal electors of the Municipality of Red Lake to the by-law is not necessary;

AND IN THE MATTER OF an Application by Union Gas Limited for a Certificate of Public Convenience and Necessity to construct works to supply gas to the inhabitants of the Municipality of Red Lake.

PROCEDURAL ORDER NO. 2

Union Gas Limited ("Union") filed applications with the Ontario Energy Board (the "Board") on February 8, 2011 relating to proposed natural gas facilities and services in the Red Lake area. The applications were filed together and consist of requests for Leave to Construct a natural gas pipeline, a Municipal Franchise Agreement for the Municipality of Red Lake ("Red Lake") and a Certificate of Public Convenience and Necessity ("CPCN") for Red Lake. The Board has assigned to the Leave to Construct application file number EB-2011-0040; the franchise application file number EB-2011-0041; and the CPCN application file number EB-2011-0042.

The Board issued a Notice of Applications and Hearing ("Notice") on March 8, 2011. Union served and published the Notice as directed by the Board. The Board indicated its intention to proceed with this matter by way of a written hearing unless a party satisfied the Board that there is a good reason for holding an oral hearing. No party requested an oral hearing.

Goldcorp Inc. registered as an intervenor in the proceeding in support of the applications and Enbridge Gas Distribution Inc. registered as an observer. An Intervener List is attached as Appendix "A" to this Procedural Order.

On March 23, 2011 the Board received a letter of support for the proposed project from Goldcorp. On March 24, 2011, Goldcorp filed with the Board 10 letters of support for the proposed project that were forwarded to Goldcorp by the Municipality of Red Lake. The support letters include: The Corporation of the Municipality of Red Lake, Red Lake Margaret Cochenour Memorial Hospital, Ontario Provincial Police Red Lake Detachment, Red Lake Indian Friendship Centre, Red Lake Airport, Sunset Lodge on Red Lake, Chukuni Community Development Corporation, North American Lumber, Red Lake Branch, Two Feathers Forest Products, LP and Red Lake District High School. All of the letters form part of the public record. The Board will consider these letters in making its decision on Union's applications.

On April 1, 2011 the Board issued its Procedural Order No. 1 which outlined its process for written interrogatories and submissions.

On May 5, 2011 the Board received a letter from the Grand Council of Treaty 3 (the "Grand Council") outlining concerns with the Red Lake Project. On May 11, 2011 the

Board requested that Union file a formal response to the letter. Union filed its response on May 12, 2011. On May 16, 2011 the Board invited the Grand Council to reply to Union's letter. The Grand Council filed its reply on May 30, 2011. The Grand Council's reply expressed concerns relating to the adequacy of the Crown's consultation efforts pursuant to the *Constitution Act, 1982* in respect of the Red Lake Project.

The Board has considered the submissions and determined that it will hear further submissions with respect to the manner in which issues related to the duty to consult can be addressed in this proceeding.

The Board has well established *Rules of Practice and Procedure* in order to ensure that the public interest is upheld and that all participants, including applicants, receive a just, expeditious, and efficient determination on the merits of every proceeding. The Board recognizes that considering the Grand Council's concerns at this late date is a significant technical and financial imposition on Union and Goldcorp. It is clear that the Grand Council received notice of this application, and missed not only the deadline for intervention but the entire evidentiary portion of the proceeding. The Board understands that it is important that Union receives any approval from the Board quickly or the project cannot be completed until next year.

However, the Board finds that the Grand Council has raised important questions on the Crown's duty to consult. Unlike electricity leave to construct applications, the Board's jurisdiction with respect to gas pipeline leave to construct applications is not limited by section 96(2) of the Act. Given the importance of Constitutional issues, the Board is not prepared to dismiss the Grand Council's concerns on account of its late participation request.

The Board does intend, however, to restrict its consideration at this time to submissions on the appropriate scope of its enquiry into any duty to consult issues in this proceeding.

The Board will therefore seek submissions from Union and the Grand Council on the following questions:

1. The duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. In the current case, what is the conduct that the

Crown has contemplated that has the potential to adversely impact an Aboriginal right or title? What is the Crown's responsibility with respect to this project, which is being undertaken by a private proponent?

2. To the extent that there are duty to consult issues associated with the project, what is the scope of the Board's power to review them? In particular, should the Board's review be limited to potential impacts arising directly from the proposed natural gas pipeline itself (over which it has approval authority), or indirect impacts such as potential expansions to the mine or the town that may be enabled by the pipeline (over which it has no approval authority)?
3. Can the Crown impliedly delegate the duty to consult to a private proponent?

The Board will consider the Grand Council an intervenor for the purposes of addressing the scoping questions. The Grand Council's intervenor status may be addressed again following the decision on the scoping issues.

The Board will therefore make provision for the following procedural matters. Please be aware that this procedural order may be amended, and that further procedural orders may be issued from time to time.

THE BOARD THEREFORE ORDERS THAT:

1. Parties (including Board staff) who wish to make submissions on the questions listed above shall file pre-file written submissions with the Board and deliver them to all the other parties by **June 15, 2011**.
2. The Board will hear oral argument in the Board's hearing room commencing on **June 20, 2011** at 2300 Yonge Street, 25th Floor, Toronto at 9:30 a.m.

All filings to the Board must quote file numbers EB-2011-0040, EB-2011-0041, and EB-2011-0042 be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address.

Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the boardsec@ontarioenergyboard.ca. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file seven paper copies. If you have submitted through the Board's web portal an e-mail is not required.

All communications should be directed to the attention of the Board Secretary at the address above, and be received no later than 4:45 p.m. on the required date.

DATED at Toronto, June 7, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX “A”
List of Intervenors

**Union Gas Limited - Red Lake Project
EB-2011-0040 / EB-2011-0041 / EB-2011-0042
APPLICANT & LIST OF INTERVENORS**

June 7, 2011

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**Union Gas Limited - Red Lake Project
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APPLICANT & LIST OF INTERVENORS**

June 7, 2011

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Mine**

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