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.

Submissions On Behalf of Goldcorp Canada Ltd. and Goldcorp Inc. ("Goldcorp")
(Procedural Order No. 2)

These are Goldcorp's submissions on the three questions that the Board posed on pp. 2-3 of Procedural Order No. 2 herein. An additional comment on Standing has been added at the end of these submissions.

Question 1:

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?

Summary

The conduct contemplated that has the potential to adversely impact an Aboriginal right or title is the proposed grant by the Ministry of Transportation Ontario ("**MTO**") to Union Gas of an easement along a public highway, on lands that are subject to Treaty 3[1], for the purpose of constructing a gas pipeline. In addition, permits and/or approvals will be issued by the Ministry of Natural Resources ("**MNR**") and Ministry of Tourism and Culture ("**MTC**").

The work that will be involved in the construction and operation of the pipeline will be wholly on lands owned and used by MTO as a public highway and subject to a Road Access Permit issued by MTO and archaeological approval by MTC. The project will have minimal impact on First Nations rights or title and, in the circumstances of this case, the Crown's duty to consult is limited to providing First Nations with notice of the project and affording the opportunity to make their views known.

Analysis

The Supreme Court of Canada ("**Supreme Court**") has held that the common law duty to consult applies only to the Crown (federal and provincial) and is triggered by a government

[1] Treaty 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions

decision.[2] This duty is grounded in the "Honour of the Crown" and is embodied in s. 35 of the *Constitution Act, 1982*. It is therefore a duty which can only be discharged by the Crown.

The Crown's duty to consult arises when it knows, or reasonably should know, of the potential existence of an Aboriginal right or title and where it contemplates conduct that might adversely affect that Aboriginal right or title.[3] The issue can arise in a number of different situations, for example:

a) where the project is adjacent or proximate to land reserved for First Nations;

b) where the adjacent land is owned in fee simple by a First Nation;

c) where the subject property is part of a disputed land claim;

d) where the subject property is within or could affect a traditional territory formerly or actively used by a First Nation (including lands subject to Treaty); or

e) where there is an known or possible First Nation cultural, archeological, burial or other sacred site on or under the subject property.[4]

It is essential to note that the duty is confined to the adverse impacts flowing from the Crown's current conduct or decision, and not to the larger adverse impact of the project of which it is a part:

> [49] The question is whether there is a claim or right that potentially may be adversely impacted by the current government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in Haida Nation, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation — the matter which is here at issue — a contemplated Crown action must put current claims and rights in jeopardy.

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[2] *Haida Nation vs. British Columbia (Minister of Forests)*, [2004] 3 SCR 511.
[3] *Haida Nation vs. BC, supra.*
[4] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 SCR 550.

...

> [53] ... *Haida Nation* negates such a broad approach. It grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. It confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue — not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the current decision under consideration. [5]

As can be seen, there are three elements which give rise to a duty to consult. The first is knowledge by the Crown of a potential claim or right, and the second is Crown conduct or decision. The third element, adverse effect of the proposed Crown conduct on an Aboriginal claim or right, requires a direct link between the government action and the potential for adverse impacts:

> [45] The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.[6]

The scope of the required consultation will vary with the circumstances of each case, and will be dictated by the proposed project or activity, the strength of the Aboriginal right or title claimed by the Aboriginal group, and the nature and scope of the potential adverse impact of the project on that right or title.[7]

With respect to lands taken up under Treaty and granted by the Province, such as the land which is in issue in this case, the *prima facie* level of consultation is at the low end of the spectrum[8] and be limited to impacts on adjacent land, if any, and matters of archaeological or sacred site concern, if any.

Goldcorp submits that, in this case, the Crown's duty to consult has been satisfied by notice of and information about the project and the opportunity to respond having been given to First Nations. Notice was provided by each of the Board, the applicant (Union Gas), and the Crown

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[5] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] SCR 650, at para. 53.
[6] *Rio Tinto v. Carrier Sekani TC*, *supra.*, at para. 45.
[7] *Haida Nation v. BC*, *supra.*, at paras. 43-45; *Taku River Tlingit v. BC*, *supra.*, at para. 32.
[8] *Beckman v. Little Salmon Carmacks First Nation*, [2010] 3 SCR 103, at paras. 73-76.

itself. This afforded and extended to First Nations the opportunity to participate in the application proceeding, to advise of any concerns, and to proffer any relevant information they may have.[9] Aboriginal groups have a reciprocal duty at all times to engage in the consultation process in good faith, to make their concerns known, to respond to the attempts by the Crown and/or the proponent to meet their concerns, and to attempt to reach a mutually satisfactory solution. The duty to consult does not provide First Nations with a veto right, and Aboriginal groups cannot attempt to frustrate reasonable good faith efforts at consultations by non response.[10]

The First Nations and Grand Council Treaty 3 chose not to seize the opportunity presented to them until the eleventh hour and, despite multiple opportunities, have not expressed any concerns with respect to this project.

Goldcorp also notes that despite Mr. Jane's statement that after this proceeding there will be *no further opportunities for consultation regarding project's impacts (sic)* on page 6 of his letter of May 30th, this is far from the last opportunity for First Nations to be consulted. Following the Board's normal practice and assuming all other requirements are met, leave to construct will be granted subject to the issuance of permits and approvals by the Crown, which may necessitate consultation by the Crown under other approval processes if the Crown duty to consult is triggered.

Question 2:

> 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)?

This question divides itself into two issues:

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[9] *Ibid.*
[10] *Haida Nation v. BC*, supra., at para. 42.

(A) Does the Board have the authority to review the consultation process engaged in by an applicant and First Nations in order to determine whether the Crown's constitutional duty to consult with First Nations has been discharged.

(B) If so, what is the scope of the impacts that consultation must address and the Board must review?

Summary

Based on its the analysis of Question 2 below, Goldcorp submits that:

1. The Board, in applications for leave to construct, has wide discretionary power to consider all relevant issues in respect of the matters before it, of which the duty to consult would be one.

2. In the right case, the *Ontario Energy Board Act, 1998* (or the "**Act**") confers power on the Board to grant leave to proceed with a pipeline, even if the Board were to find that the duty to consult has not been met.

3. Constitutionally, however, the Board could not do that unconditionally and would have to condition its approval in 2 by requiring that there be no construction until permits in respect of which the Crown has a duty to consult have been issued

4. The potential impacts that the Board should consider are those direct and future impacts described in the Board's Environmental Guidelines for Location, Construction, and Operation of Hydrocarbon Pipelines and Facilities in Ontario ("**Guidelines**").

Analysis

(A) Board's Authority to Review

In its *Rio Tinto* decision[11], the Supreme Court of Canada considered the role of tribunals like the Board with respect to consultation with First Nations or Aboriginal Peoples:

B. *The Role of Tribunals in Consultation*

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[11] *Rio Tinto Alcan Case ,supra, note 5 at paras. 55-63*

[55] The duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal. Tribunals are confined to the powers conferred on them by their constituent legislation: *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765. It follows that the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on it.

[56] The legislature may choose to delegate to a tribunal the Crown's duty to consult. As noted in *Haida Nation*, it is open to governments to set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process with respect to a resource.

[57] Alternatively, the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand.

[58] Tribunals considering resource issues touching on Aboriginal interests may have neither of these duties, one of these duties, or both depending on what responsibilities the legislature has conferred on them. Both the powers of the tribunal to consider questions of law and the remedial powers granted it by the legislature are relevant considerations in determining the contours of that tribunal's jurisdiction: *Conway*. As such, they are also relevant to determining whether a particular tribunal has a duty to consult, a duty to consider consultation, or no duty at all.

. . .

[60] A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of claims, the tribunal must be expressly or impliedly authorized to do so. The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law. ...

[61] A tribunal that has the power to consider the adequacy of consultation, but does not itself have the power to enter into consultations, should provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers expressly or impliedly conferred upon it by statute. The goal is to protect Aboriginal rights and interests and to promote the reconciliation of interests called for in *Haida Nation*.

...

[63] . . . the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal Peoples affected must seek appropriate remedies in the courts: *Haida Nation*, at para. 51.

Goldcorp submits that under the *Rio Tinto* tests, the Board is the type of tribunal that has the power to consider the adequacy of consultation and to review duty to consult issues, but not to conduct consultation itself.

The Board's authority to review the adequacy of consultation and duty to consult issues is found in sections 19(1), 90(1) and 96(1) of the *Ontario Energy Board Act, 1998* (the "Act")[12] which state:

> **19.(1)** The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.
>
> **90. (1)** No person shall construct a hydrocarbon line without first obtaining from the Board an order granting leave to construct the hydrocarbon line if,
>
> (a) . . . (d)...
>
> **96. (1)** If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.

Goldcorp submits that in determining whether sections 19(1) and 96(1) provide it with the authority to review duty to consult issues, the Board should consider a purposeful interpretation of those provisions. The Supreme Court has said:

> Our Court has given great importance to the need for purposeful interpretations. In *R. v. Ulybel Enterprises Ltd.* [2001] 2 S.C.R. 867, 2001 SCC 56, Iacobucci J. gives a detailed explanation of the rules of statutory interpretation, showing that one must first consider the wording of the Act, then the legislative history, the scheme of the Act, and the legislative context.[13]

Wording

Section 19(1) provides the Board with the authority to hear and determine questions of law within its jurisdiction. In the above passage from *Rio Tinto* the Supreme Court said that such authority is an indication that a tribunal has authority to consider duty to consult issues.

The principal feature of section 96(1) is its test for whether leave to carry out work should be granted. This test is whether the proposed work *is in the public interest*. On its face, the public interest test is a broad discretionary grant of authority. It is a simpler but equal formulation of older statutory tests for determining whether a facility should be approved, namely, whether the facility is required by the *present and future public convenience and necessity*.

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[12] Stats. Ont. 1998, c. 15, Sched. B, as amended.
[13] *R. v. Kapp*, [2008] 2 SCR 483, at para. [82]

Referring to a *public convenience and necessity* provision in the *National Energy Board Act*,[14] the Federal Court of Canada[15] quoted the Judicial Committee of the Privy Council:

> It would be difficult to conceive a wider discretion than is conferred on the board as to the considerations to which it is to have regard...Not only is it not precluded negatively from having regard to any considerations, but is enjoined positively to have regard to every consideration which in its opinion is relevant. So long as that discretion is exercised in good faith the decision of the board as to what considerations are relevant would appear to be unchallengeable.[16]

In its *Memorial Gardens* decision where the question was whether a facility was required by the *public convenience and necessity*, the Supreme Court said as follows:

> The phrase also appears in The Municipal Franchises Act, R.S.O. 1950, c. 249 (considered by this Court in Union Gas Company of Canada Limited v. Sydenham Gas and Petroleum Company Limited [[1957] S.C.R. 185, 7 D.L.R. (2d) 65, 75 C.R.T.C. 1.]), in the Aeronautics Act, R.S.C. 1952, c. 2, and I have no doubt in other provincial and federal statutes, and it would, I think, be both impracticable and undesirable to attempt a precise definition of general application of what constitutes public convenience and necessity. As has been frequently pointed out in the American decisions, the meaning in a given case should be ascertained by reference to the context and to the objects and purposes of the statute in which it is found.
>
> As this Court held in the Union Gas case, supra, the question whether public convenience and necessity requires a certain action is not one of fact. It is pre-dominantly the formulation of an opinion. Facts must, of course, be established to justify a decision by the Commission but that decision is one which cannot be made without a substantial exercise of administrative discretion. In delegating this administrative discretion to the Commission the Legislature has delegated to that body the responsibility of deciding, **in the public interest,** the need and desirability of additional ...facilities, and in reaching that decision the degree of need and of desirability is left to the discretion of the Commission.[17] (emphasis added)

Goldcorp submits that these principles are equally applicable to the Board's *public interest* test in section 96(1). They establish that the wording of section 96(1) makes the Board's power to decide whether a pipeline is required in the public interest broadly discretionary. They indicate that this discretion is something that the Legislative Assembly of Ontario ("**Legislature**") has delegated to the Board. The Board's duty is to decide, in the public interest, whether a pipeline is needed or desirable, but the degree of need and desirability is left to the discretion of the Board. The Board may, but is not obligated to, consider any matter in reaching it decision. As the Board is aware, this administrative law discretion is fundamental to the effective functioning of every energy or utility tribunal in Canada, including this Board.

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[14] In this case, the version of the *National Energy Board Act*, was R.S.C. 1970, c. N-6]
[15] *Union Gas Ltd. v. TransCanada Pipelines Ltd.*, [1974] 2 F.C. 313, at paras. 14-15
[16] *Canadian National Railways v. Canada Steamship Lines Limited*, [1945] A.C. 204, at 211.
[17] *Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co.* [1958] S.C.R. 353, at 357.

Legislative History

Section 19(1) is a provision that has been around in many federal and provincial administrative tribunal statutes since time out of mind.

The public interest test in section 96(1) was not new in 1998. It has been around since 1964[18]. In earlier *Ontario Energy Board Acts*, the provision read:

> (8) Where after the hearing the Board is of the opinion that the construction of the proposed line or station *is in the public interest*, it may make an order granting leave to construct the line or station. (emphasis added)

Since 1998 the Legislature has amended the *Ontario Energy Board Act, 1998* several times but has not amended either section 19(1) or section 96(1)[19]. Therefore, the Legislature has not attempted to limit the Board's discretion under section 96(1) or has it altered any of the administrative law principles applicable to it.

Since the *Environmental Assessment Act* was enacted in 1975[20], the Board has worked with the Ontario Pipeline Coordinating Committee ("OPCC") in administering its jurisdiction over hydrocarbon pipelines. The OPCC is chaired by a member of Board Staff and is made up of representatives of several Ontario ministries including MOE, MNR, and MTC. Natural gas pipelines are not subject to the *Environmental Assessment Act* but instead must address to the Board's Guidelines which were developed by the Board in consultation with the members of the OPCC.[21]

The Guidelines contain the following statements by the Board:

> These Guidelines prescribe environmental analysis and reporting related to gas facilities applications as follows:
>
> - Hydrocarbon pipelines leave to construct applications under sections 90, 91, 95 and 98 of the Act.
>
> ...

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[18] Stats. Ont. 1964, c. 74, s. 39(8)

[19] *Electricity Pricing, Conservation and Supply Act*, 2009, Stats. Ont. 2002, c. 23; *Ontario Energy Board Amendment Act (Electricity Pricing)* 2003, Stats. Ont. 2003, c. 8; *Green Energy Act*, 2009, Stats. Ont. 2009, c. 12; *Better Tomorrow for Ontario (Budget Measures)*, 2011, Stats. Ont. 2011, c. 9, sched. 27

[20] *Environmental Assessment Act*, Stats. Ont. 1975, c. 69

[21] Ontario Energy Board, Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario, 6th Edition, 2011 ("Guidelines")

The Board must be satisfied that the application is in the public interest before it will authorize the development of the facilities. In arriving at its decision, the Board generally considers a number of factors including the need for the project, its economic feasibility and the environmental impacts as described in these Guidelines. Environmental impacts are broadly defined to include impacts on all components of the environment.

...

The Board expects an applicant to comply with these Guidelines, during and after construction.

The Guidelines expressly refer to the subject of Aboriginal Peoples Consultation as follows:

3.3 ABORIGINAL PEOPLES CONSULTATION

For the purpose of these Guidelines, and according to section 35(2) of the Constitution Act, 1982, Aboriginal Peoples are defined as to include the Indian, Inuit and Metis peoples. The proposed projects may potentially affect existing or asserted Aboriginal or treaty rights, as well as Metis' Traditional Harvesting Territories, cultural heritage and traditional activities. Therefore, it is important that the proponent determine, at the very onset of planning, if there is a potential that these parties are affected. The prospective applicants are expected to initiate consultation with any potentially affected Aboriginal Peoples, early in the planning process. The prospective applicants are expected to continue and maintain this communication, until the preferred alternative is selected and the Environmental Report is completed. It is recommended that the prospective applicant keep a record of communication and consultation and file it as prefiled evidence, together with other materials documenting agency and general consultation conducted during the planning of the project.

The first step is to identify all potentially affected Aboriginal Peoples' groups that will be contacted in respect of the proposed project. It is expected that the prospective applicants gather information such as Traditional Harvesting Territories, significant portage routes, trapping lines and other areas of concern identified through Metis Traditional Ecological Knowledge Studies or other information source, First Nations treaty rights, any filed and outstanding claims or litigation concerning Aboriginal treaty rights, treaty land entitlement or Aboriginal title or rights.

The information gathered and recorded in the ER on Aboriginal consultation should include the following:

i) how the Aboriginal Peoples' groups were identified;

ii) when contact was first initiated;

iii) the individuals within the groups who were contacted, and their position in or representative role for the group;

iv) a listing, including the dates, of any phone calls, meetings and other means that may have been used, to provide information about the project and hear any interests or concerns of Aboriginal People with respect to the project;

v) written documentation of the notes or minutes, that may have been taken at meetings or from phone calls, or letter received from, or sent to Aboriginal Peoples; and

> vi) a description of the issues or concerns that have been raised by Aboriginal Peoples in respect of the project and, where applicable, how those issues or concerns will be mitigated or accommodated.[22]

Goldcorp submits that the legislative history of sections 19(1) and 96(1), together with their relationship to the Guidelines, is consistent with the wording of section 96(1). It further shows that in arriving at its decision the Board generally considers a number of factors, including the need for the project, its economic feasibility and its environmental impacts as described in the Guidelines. It also shows that no one factor, even duty to consult issues, is necessarily determinative. The Legislature has made it clear that whether an application for a hydrocarbon pipeline is in the public interest is solely for the Board to decide.

Scheme of the Act

Goldcorp submits that the Scheme of the Act suggests that the Board's discretion under section 96(1) is constrained by Section 2:

> 2. The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:
>
> 1. To facilitate competition in the sale of gas to users.
>
> 2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
>
> 3. To facilitate rational expansion of transmission and distribution systems.
>
> . . .
>
> 5.1. To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.

Under the Act, if in a section 96(1) determination it were to be suggested that duty to consult issues should result in dismissal of an application, the Board would have to ask itself 'how would giving determinative weight to that factor facilitate competition?' 'How would doing so protect the interest of consumers with respect to prices and the reliability of quality of service?' 'How

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[22] Guidelines, pp. 19-20

would doing so facilitate the rational expansion of the system?' The section 2 statutory objectives are a scales upon which any duty to consult issue must be weighed.

Part III – Gas Regulation and Part IV- Gas Marketing of the Act do not throw additional light on the Board's powers under section 19(1), or its discretion under 96(1), or attenuate the Board's objectives in section 2.

Goldcorp submits that the scheme of the Act suggests that while the Board may consider duty to consult issues, such issues probably were not intended by the Legislature to be determinative of whether an application should be approved, if the project was otherwise required in order to meet one of the statutory objectives in section 2.

Legislative Context

Goldcorp submits that in considering the Board's powers under sections 19(1) and 96(1), it is necessary to be cognizant of the legislative context in which the Board operates. As mentioned, and unlike electricity transmission companies, natural gas transmission companies are not subject to the *Environmental Assessment Act*[23].

Gas transmission companies, therefore, do not have a duty to consult First Nations or Aboriginal Peoples under, for example, the Class Environmental Assessment for MNR Resource Stewardship and Facility Development Projects (2003),[24] or under section 13.1 of the *Environmental Assessment Act*. A gas transmission company, however has the legal obligation to meet the requirements of the Guidelines on consultation.

Goldcorp submits that another feature of the legislative context is the fact that every legislature and government in Canada has had its consciousness raised about sections 35 of the *Constitution Act, 1982* and the Crown's duty to consult since at least December 11, 1997 when the Supreme Court released its *Delgamuukw* decision.[25] Governments were further jolted by the duty of the Crown to consult with First Nations created by the Supreme Court's *Haida Nation* decision on

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[23] RSO 1990, c. E. 18, as amended, see ss. 3(b) and 39(d).
[24] See pp. 54-55.
[25] *Delgamuukw v British Columbia* [1997] 3 S.C.R. 1010.

November 18, 2004.[26] Yet despite these and a battery of lower court decisions the Legislature has not imposed any additional consultation duties on applicants for hydrocarbon pipelines or placed any additional consultation responsibilities on the Board. This fact indicates that the Legislature has not limited the Board's discretion under section 96(1).

The Legislature, however, has not ignored the Crown's duty to consult. In fact, the Legislature has actively imposed a duty to consult on both Ministers of the Crown and other public bodies. Goldcorp has already referred to section 13.1 of the *Environmental Assessment Act* which imposes that duty. The following list, which is not exhaustive, provides other examples.

> *Oak Ridges Moraine Conservation Act, 2001*[27]
>
> s. 3(5) states that the Minister may establish the Oak Ridges Moraine Conservation plan for the Oak Ridges Moraine area and during a review of the plan, the Minister **shall consult with affected public bodies (public bodies is defined to include First Nations)**
>
> *Greenbelt Act, 2005*[28]
>
> s. 11(4) states that the Minister **shall consult affected public bodies** if an amendment to the Greenbelt Plan is proposed (**public bodies is defined to include First Nations**)
>
> *Places to Grow Act, 2005*[29]
>
> s. 9(2) states that during a review of a growth plan by the Minister, he/she **shall consult with affected public bodies** that could be affected by the review (**public bodies is defined to include First Nations)**
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> *Local Health System Integration Act, 2006*[30]

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[26] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511.
[27] S.O. 2001, c. 31
[28] S.O 2005, c. 1
[29] S.O. 2005, c. 13
[30] S.O. 2006, c. 4

s. 16(4) states that a local health integration network **shall engage** the community of diverse persons involved with the system on an ongoing basis and in doing so, the network **shall engage the Aboriginal and First Nations** health planning entity for the geographic area of the prescribed network

Metrolinx Act, 2006[31]

s. 6(3)(b) states that the Corporation, in developing a transportation plan, **shall consult with First Nations** in the regional transportation area

Green Energy Act, 2009[32]

s. 1(2) states that the Act shall be interpreted in a manner that is consistent with s. 35 of the *Constitution Act, 1982* and with **the duty to consult Aboriginal Peoples**

Far North Act, 2010[33]

s. 1(c) states that a purpose of the Act is to provide for community based land use planning in the far north that is done in a manner that is **consistent with the recognition and affirmation of existing Aboriginal and treaty rights, including the duty to consult**

The *Green Energy Act*[34] contains a requirement that it be interpreted consistent with section 35 of the *Constitution Act, 1982* and with the duty to consult Aboriginal Peoples. The *Green Energy Act* also made numerous amendments to the *Ontario Energy Board Act, 1998*. Those amendments, however, did not impose a similar requirement in the *Ontario Energy Board Act, 1998* or upon applicants or touch sections 19(1) or 96(1).

The legislative context of section 96(1) of the Act, therefore, demonstrates that the Legislature has ably shown that it can refer to section 35 and the duty to consult and impose consultation

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[31] S.O. 2006, c. 16
[32] Stats. Ont. 2009, c. 12, Sch. A
[33] S.O. 2010, c. 18
[34] Supra, note

duties when it wants to, but has chosen not to impose such duties on either the Board or applicants for hydrocarbon pipelines.

Conclusion on Question 2.A.

Goldcorp submits that the wording, legislative history, scheme of the Act and legislative context of sections 19(1) and 96(1) of the Act lead to the following conclusion:

(a) under the Act, the Board has a wide discretion to consider any factor it considers relevant in deciding whether to grant leave to proceed with a hydrocarbon pipeline, including duty to consult issues;

(b) under the Act, having considered all factors, the Board could grant leave to proceed with a hydrocarbon pipeline, even if it finds that the duty to consult has not been met.

Goldcorp further submits, however, that the Board could not grant leave in the situation described in (b) unconditionally. This is because the Board now has a duty in such situations to consider whether sufficient consultation has occurred in respect of the matter before it. Goldcorp submits that in the hypothetical situation in (b), consistent with the Board's normal practice, the Board would decide to grant leave to proceed with the pipeline, as stated, but would make that leave subject to a condition requiring that before any construction could commence required Crown permits and approvals would have to be issued.

B. Scope of the Board's Consideration of Impacts

Goldcorp submits that the scope of the impacts that the Board should review must be considered in accordance with legal principles.

In *Rio Tinto*, the Supreme Court provided identifiable boundaries on the types of effects in respect of which First Nations can claim a right to be consulted. "Mere speculative" impacts will

not suffice.[35] There must be an "appreciable" adverse effect on the First Nation's ability to exercise its Aboriginal right[36]. The adverse effect must be on the future exercise on the right itself[37] and not on, say, the First Nation's bargaining position. The adverse effects must be a "direct result" of the government action[38]. An underlying or continuing breach of First Nations rights is not an adverse impact giving rise to a duty to consult[39]. Old and continuing breaches of First Nations rights, including prior failures to consult, do not give rise to a duty to consult unless the government action of today causes a novel adverse impact on a present claim or existing right[40]; the Crown action must put current claims and rights in jeopardy[41].

Goldcorp submits that tested against these principles, the Board's Guidelines are a sufficient indication of what impacts on First Nations or Aboriginal Peoples the Board should consider in a section 96(1) application. If we use the Board's own example in its statement of Question 2 "should the Board's review be limited to potential impacts arising directly from the proposed natural gas pipeline itself...or indirect impacts such as potential expansions to the mine as or town that may be enabled by the pipeline...", these questions can be answered by referring to the Guidelines. Sections 4.3.13 of the Guidelines, for example, deals with Social Impacts and Section 4.3.14 deals with Cumulative Effects.

Goldcorp would like to make one additional but important point about the Board's question. If a new mine was to be opened, the process necessary for that to happen would entail duties to consult with Aboriginal Peoples at each stage under the *Mining Act*.[42] Similarly, a town expansion would be governed by the *Planning Act*,[43] and its extensive public consultation requirements.[44] If, therefore, a hydrocarbon pipeline created growth in a community that adversely impacted the rights of Aboriginal Peoples, or was of general concern to Aboriginal Peoples, they would (a) have the right to be consulted by the Crown, and (b) have the right

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[35] *Rio Tinto, supra,* note 5, at para. 46.
[36] *Ibid.*
[37] *Ibid.*
[38] *Rio Tinto, supra.,note 5,* at para. 47.
[39] *Rio Tinto, supra.,* note 5 at para. 48.
[40] *Rio Tinto, supra, Note 5,*at para. 49.
[41] *Ibid.*
[42] *Mining Act,* RSO 1990, c. M. 14, as amended, sections 2, 78.2, 78.3(2), 105, 112, 139.2(4.1), 140.(1), 141(1).(c) and 170.1
[43] RSO 1990, c. P. 13
[44] Ibid, see sections 17(15), 21(3.1), 26(3) and 34(10.0.1)

generally to participate in the public consultation processes even if that development did not trigger an adverse effect on an existing or potential Aboriginal rights. This Board, therefore, should consider only the duty to consult issues that relate to the direct effects that are described in the Guidelines because other Crown decision-makers will consider effects that are more remote in time and space.

Question 3

Can the Crown impliedly delegate the duty to consult to a private proponent?

Summary

The Crown cannot expressly or impliedly delegate its duty to consult to a private proponent but it can delegate the procedural aspects of that duty to a proponent.

Analysis

Procedural aspects of consultation can be delegated by statute or other lawful delegation to proponents seeking approval of a particular project.[45] Exactly what this might require has not yet been made clear by the jurisprudence. To the extent that some form of consultation may be called for in the approval process, the proponent can specify measures that it will take to identify and consult with First Nations which claim an Aboriginal interest, but the ultimate legal responsibility remains with the Crown.[46] Practically speaking, an applicant's role is to manage the process, and to assist the Crown in that process so that the Crown's duty to consult is discharged.

However, in this case, because of the refusal of First Nations to participate despite the efforts of Union Gas and the Crown to engage them, the Board should find that since the duty to consult was at the low end at the spectrum, the Crown consultation requirement has been met.

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[45] *Haida Nation v. BC, supra.*, at para. 53.
[46] *Ibid.*

4. Standing

The issues which the Board has posed in Procedural Order No. 2 are narrow. Goldcorp notes, however, for the Board's consideration, that there is a significant question as to whether the Grand Council of Treaty 3 (the "**Grand Council**") has standing in the within proceeding to assert claims relating to the adequacy of Crown consultation. Although the Board need not decide the matter of standing today, it should be pointed out that the Grand Council is a corporation which has administrative responsibilities under Treaty 3, but it is not a rights holder. Therefore, Mr. Janes, for the Grand Council, in his letter dated May 30, 2011 complained that Grand Council has not been given notice or consulted by the Crown must be viewed sceptically because Grand Council is not a rights holder which is entitled to notice or consultation.

As was stated in *Delgamuukw v. British Columbia*[47], Aboriginal title is held communally and cannot be held by individual Aboriginal persons; it is a collective right to land held by all members of an Aboriginal Nation.

Identifying the proper rights holder involves a two stage process. The first is to identify the historic community to exercise the right, the second is to identify the contemporary right-bearing community.[48]

Thus, it is the First Nations located in the land which is the subject matter of the application herein which must assert the Aboriginal claims or rights. In *Komoyue Heritage Society v. British Columbia (Attorney General)*[49], a dissident group of members of a First Nation incorporated a company, the Komoyue Heritage Society, which purported to represent the First Nation in a petition which challenged the issuance of an environmental assessment certificate. It was denied standing by the court. As was explained by B.M. Davies J.:

> [54] In my opinion, the Komoyue Heritage Society has no status to bring this petition either in its own right or as a representative petitioner. I reach that conclusion for the following reasons:
>
> (1) Aboriginal rights and treaty rights are communal in nature and cannot be

[47] [1997] 3 SCR 1010, at para. 115.
[48] *Xeni Gwet'in First Nations v. British Columbia*, 2007 BCSC 1700, at paras. 441-444.
[49] 2006 BCSC 1517

assigned, transferred, surrendered or sold to any entity other than the Crown: See: ***R. v. Van der Peet,*** [1996] 2 S.C.R. 507, 23 B.C.L.R. (3d) 1; ***Delgamuukw v. British Columbia,*** [1997] 3 S.C.R. 1010, 66 B.C.L.R. (3d) 285 ***[Delgamuukw]; Marshall*** (at ¶ 17); ***R v. Badger,*** [1996] 1 S.C.R. 771, 133 D.L.R. (4th) 324.

(2) If a group of individuals allegedly possessing legal rights incorporate a body for the purpose of promoting those rights, the incorporated body does not automatically have capacity in its own name to pursue litigation involving a breach of those rights. As a minimum precondition, the rights must be vested in the incorporated entity.

(3) A full discussion of those issues in the context of the assignment of aboriginal rights is found in ***Anishinaabeg of Kabapikotawangag Resource Council Inc. v. Canada (Attorney General),*** [1998] 4 C.N.L.R. 1, 66 O.T.C. 378 (Ont. Ct Gen. Div.) in which McCartney J. said at ¶ 12 and 13:

So in summary what the Chief Justice [in ***Delgamuukw]*** is saying is as follows:

(a) Aboriginal rights are sui generis i.e. they are particular kinds of rights which can only be understood by reference to both common law and Aboriginal perspectives.

(b) As such they are inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown.

(c) Aboriginal rights have their source in the prior occupation of the country i.e. prior to the introduction of the European society.

(d) Aboriginal title or Aboriginal rights are held communally and cannot be held by individual aboriginal persons i.e. "Aboriginal title is a collective right to land held by all members of an aboriginal nation."

It is quite evident to me, therefore, considering the above description of this very unique right, that it is and must continue to be a collective right of the aboriginal community which holds it, and cannot be transferred to anyone else, even if the purported transferee were a corporate body purportedly controlled by the Aboriginal community.

(4) I agree with that analysis.

(5) Since no alleged aboriginal rights could be transferred to the Komoyue

Heritage Society by any members of the alleged Q-KFN or any of the alleged descendants of the signatories of the Queackar-Douglas Treaty, they are not a necessary party to this proceeding. See also: ***Barlow v. Canada*** (2000), 186 F.T.R. 194, 95 A.C.W.S. (3d) 787 (F.C.T.D.), ***Native Council of Nova Scotia v. Canada (Attorney General)*** (2002), 111 A.C.W.S. (3d) 36, 2002 FCT 6.

(6) It follows that the Komoyue Heritage Society lacks capacity to act as a representative petitioner.[50]

There is no evidence of any vesting of rights of First Nations in the Grand Council and, in any case, the right to consult which is in issue herein is one that cannot be asserted by Grand Council. Grand Council therefore has no standing before the Board in this proceeding.

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[50] *Ibid.*, at para. 54