



**EB-2011-0106**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*,  
S. O. 1998, c. 15, Schedule B;

**AND IN THE MATTER OF** an application by Goldcorp  
Canada Ltd. and Goldcorp Inc. for leave to construct  
new 115kV transmission facilities in the Municipality  
of Red Lake, and other orders.

**BEFORE:** Ken Quesnelle  
Presiding Member

Cynthia Chaplin  
Member and Vice-Chair

Marika Hare  
Member

## **DECISION ON MOTION**

### **BACKGROUND**

Goldcorp Canada Ltd. and Goldcorp Inc. acting jointly as Goldcorp ("Goldcorp" or the "Company") filed an application, dated April 25, 2011, with the Ontario Energy Board under section 92 of the *Ontario Energy Board Act, S.O. 1998, c.15, Schedule B* (the "*OEB Act*"). Goldcorp is seeking an order of the Board granting leave to construct 10.7 km of 115 kV single circuit transmission line from Hydro One Networks Inc.'s ("HONI") 115 kV E2R Transmission line at a point approximately 2 km south of Harry's Corner to

the to-be-constructed Balmer Complex Transformer Station ("TS"), all in the Municipality of Red Lake.

The Board issued a Notice of Application and Hearing ("Notice") on April 29, 2011. The Notice was served on all affected and interested parties and was published in the Northern Sun News and the Wawatay News.

On May 3, 2011, the Board received a Notice of Motion from Goldcorp, for:

1. An interim order authorizing Goldcorp and its contractors to carry out civil engineering work including grading, fencing, installing foundation for and constructing walls of the Balmer Complex TS building, commencing on May 25, 2011 and continuing until the Board decides the leave to construct application.
2. An interim order authorizing Goldcorp and its contractors to carry out clearing and grubbing of the right-of-way for the applied for transmission line starting subsequent to completion of the nesting season for breeding and migrating birds, on the portions of the right-of-way outside the buffer zone for two separate Bald Eagle nests on the proposed right-of-way, and, finally, in September, 2011 after the Bald Eagle nesting period is complete.

Goldcorp requested an oral hearing of the motion. The grounds cited for the motion are provided at Exhibit A, Tab 4, Schedule 1, pages 3-6.

On May 26, 2011, the Board issued Procedural Order No.1, which amongst other things, set out the schedule for interrogatories and submissions on the main application and set a date for an oral hearing to hear the motion.

The oral hearing was held on June 7, 2011, in the Board's North Hearing Room at 2300 Yonge Street, Toronto. Goldcorp, Lac Seul First Nation (LSFN) and Board staff attended the oral hearing.

### **Positions of parties:**

Goldcorp submitted that in order to achieve the target in-service date of December 2011, it needed to begin civil engineering work on the Balmer transformer site as soon as possible, and to begin clearing and grubbing of the right-of-way by the end of July.

Goldcorp acknowledged and accepted the financial risk of undertaking the proposed work ahead of the Board's determination of the leave to construct application.

Goldcorp submitted that failure to meet the target in-service date would affect production and have a detrimental effect on the Red Lake economy and the Company's ability to meet the requirements of its Mine Development Plan.

Goldcorp argued that the work proposed in the motion did not impact any private landowners, as the Balmer transformer site is located on Goldcorp land and the right-of-way is located on Crown land. Goldcorp also submitted that the proposed facilities will help alleviate system constraints and improve the reliability of service in the Red Lake area.

With respect to environmental restrictions, Goldcorp confirmed that there were no seasonal restrictions at the Balmer transformer site, however it also noted that due to Ministry of Natural Resource (MNR) restrictions<sup>1</sup>, clearing and grubbing of the right-of-way could not be carried out within 1 kilometer of Bald Eagle nests until September 1, 2011. The evidence indicates that clearing and grubbing could be carried out on the rest of the right-of-way after July.

Goldcorp further submitted that the project had received approval under the *Class Environmental Assessment (EA) for Minor Transmission Facilities*, and that it was waiting for MNR approval for the *Class EA for Resource Stewardship and Facility Development*. MNR's approval and the issuance of permits were originally expected to occur by April 26, 2011. At the hearing, Goldcorp informed the Board that the Class EA approval and the issuance of permits were delayed until MNR was satisfied that appropriate consultation with the affected First Nations had occurred.

LSFN opposed the motion and argued that the Board did not have jurisdiction to grant the relief Goldcorp was seeking in its motion.

On the matter of jurisdiction, LSFN argued that the work proposed in the motion involved extensive construction activities at the Balmer transformer site and the right-of-

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<sup>1</sup> In a letter dated June 6, 2011 MNR stated that "The restrictions on work in the proximity of the Bald Eagle nests were proposed by SNC Lavalin in the Environment Study Report. MNR endorsed this proposal, and still favours it, although it is not strictly required under the Forest Management Plan guidelines governing forestry work in proximity to Bald Eagle nests".

way, and approval to carry out this work could only be granted after the Board had made a final determination in the leave to construct application.

LSFN acknowledged that the Board had jurisdiction to make interim orders on all matters before it, however noted that in relation to leave to construct applications that authority was fairly limited, as provided in section 98(1.1). LSFN submitted that section 98(1.1) expressly defines, and as such limits, the type of work that can be carried out as part of an interim order to “surveys and examinations as are necessary for fixing the site for the work”. LSFN argued that the work contemplated in the motion was far more extensive and intrusive than that provided for under section 98(1) and therefore the Board did not have jurisdiction to grant the relief that Goldcorp was seeking.

LSFN relied on the maxim of statutory interpretation called “implied exclusion”, and argued that it was reasonable to conclude that if the legislature had intended to give the Board powers to make interim orders in relation to construction activities it would have expressly done so. LSFN also noted that the *OEB Act* did not have any provisions for compensation for damages in relation to the activities proposed by Goldcorp, as it has under section 98(1.1). LSFN argued that this exclusion was deliberate and was indicative of the Board’s restricted authority in this matter.

LSFN also addressed the interim order provisions in section 16(1) of the *Statutory Powers and Procedure Act (SPPA)* and argued that the Board was not empowered under section 16(1) of the *SPPA* to make substantive interim orders. LSFN argued that section 16(1) can only be used to grant relief that was of a procedural nature. LSFN referred to two decisions<sup>2</sup> in support of this argument.

On the merits of the motion, LSFN submitted that Goldcorp had not adequately supported the need for the relief sought and that Goldcorp had alternatives, such as diesel generation, in the event the project was delayed. LSFN also stated that its concerns predominantly relate to the right-of-way, which is located on Crown land and not to the Balmer transformer site, which is located on Goldcorp land.<sup>3</sup> LSFN also submitted that its intention was not to delay the proceeding and noted that it had expressed concerns as far back as October 2010 with the baseline archeological work undertaken by Goldcorp as part of the EA.

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<sup>2</sup> *Arzem v. Ontario (Ministry of Community & Social Services)* and *Greenspace Alliance of Canada’s Capital v. Ontario (Director, Ministry of the Environment)*

<sup>3</sup> Oral Hearing Transcript, Vol. 1, p. 118

Board staff submitted that the Board did not have jurisdiction to grant the relief sought by Goldcorp.

Board staff agreed with LSFN that the principle of “implied exclusion” applies to this case and noted that section 98 and section 103 make clear that the legislature turned its mind to the concept of entry on land by a proponent. Board staff submitted that if the legislature had intended to allow entry on land for clearing and grubbing and to carry out civil engineering work, it would have expressly done so. Board staff also submitted that sections 19(1) and section 21(7), while broad, are circumscribed with respect to the entry onto land by a proponent. Board staff did note, however, that if the Board were to find that it has jurisdiction under section 19(1) and section 21(7), and decided to grant the relief sought by Goldcorp in this motion, then the approval could and should be conditional on approval of both Class EAs and receipt of necessary permits.

Board staff submitted that while the activities contemplated by Goldcorp have too significant an impact to authorize under an interim order, Goldcorp should not be prohibited from doing the work if it is able to negotiate access with landowners directly. Staff noted that the Board had followed a similar approach in EB-2007-0051<sup>4</sup>.

Specifically in relation to the request for interim orders, Board staff submitted that such orders may not be needed at the present time.

With respect to the civil engineering work on the Balmer transformer site, Board staff submitted that it did not see the necessity for Board approval, given that the work proposed did not involve the connection of any equipment to the electricity grid. In this regard, Board staff acknowledged that while the definition of “transmission line” in section 89 of the *OEB Act* includes transformers, that definition specifies that the equipment must be “used for conveying electricity”.

With respect to the work on the right-of-way, Board staff noted that the clearing and grubbing of the right-of-way cannot be started before mid-July and given the current schedule for the proceeding, it is conceivable that the Board will be able to issue a decision around that time. Therefore, staff submitted that an interim order may not be required for this work either.

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<sup>4</sup> Decision granting entry on land in connection with the Bruce to Milton line, dated August 20, 2011

In final reply argument, Goldcorp submitted that the Board has jurisdiction to grant the relief sought in the motion. Goldcorp submitted that the argument of “implied exclusion” was based on an obsolete approach to interpreting statutes and argued that statutes should instead be read in a broad, liberal and purposive manner. Goldcorp pointed the Board to the case of *R. v. Kapp* in which the Supreme Court of Canada said that statutes should be interpreted in a purposive manner. Goldcorp also noted that Ontario’s *Legislation Act* requires that statutes should be interpreted in a liberal and purposeful manner.

Goldcorp also disagreed with Board staff and LSFN’s interpretation of section 98. Goldcorp argued that section 98 does not deal with early access, but rather with getting access to land that a proponent does not own. Goldcorp also submitted that section 16(1) of the *SPPA* allows the Board to make interim orders to which the Board may attach conditions and for which the Board is not required to provide reasons. Goldcorp referred to two decisions of the Ontario Labour Relations Board<sup>5</sup> and submitted that these cases were of equal authority to the *Arzem* decision. Goldcorp submitted that the two Ontario Labour Relations Board decisions support the view that section 21(7) of the *OEB Act* permits substantial interim orders.

## BOARD FINDINGS

The motion is denied. With respect to the civil engineering work (including grading, fencing, installing foundation for and constructing walls) at the Balmer transformer site, the Board is of the view that because the work proposed is on Goldcorp land and does not include the electrification of the facilities (i.e. will not be connected to the electricity grid) at the Balmer site, an explicit order of the Board is not required. In the Board’s view, Goldcorp is free to undertake the civil engineering work, provided that Goldcorp is able to acquire any and all necessary permits and on the understanding that none of the facilities at the Balmer site will be energized.

With respect to the interim order to clear and grub the right-of-way, the Board finds that such an order is premature. Based on the current case schedule and on the basis that no new procedural or substantive issues arise, it is reasonable to expect that the Board will be able to issue a decision in the leave to construct application on or before the earliest time that Goldcorp, by its own evidence, has indicated that it could commence

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<sup>5</sup> *OPSEU v. Ontario (Management Board of Cabinet)*, [1996] OLRB Rep. 780 & *Martin v. Tricin Electric Ltd.*, [2004] OLRB dep. 823

construction on the right-of-way, i.e. mid to end of July, 2011. The Board therefore finds that an interim order is not needed at this time.

The Board also notes that Goldcorp has not yet received approval from MNR for the Class EA and until that approval is received, and MNR is satisfied that appropriate consultation with affected First Nations and Metis has occurred, the evidence of Goldcorp is that MNR will not issue the permits needed to carry out the proposed work. According to Goldcorp's original pre-filed evidence, the approval for the Class EA and the necessary permits was expected by April 26, 2011, however given MNR's concerns that approval has been indefinitely delayed. While Goldcorp was not able to give an estimate as to when the permits from MNR will be issued, LSFN's assessment was that consultation matters could be resolved by the end of summer. Therefore, it is unlikely that Goldcorp will have the necessary permits to carry out the proposed work on the right-of-way before the end of summer and as such an interim order is not needed at this time.

Given that the motion is denied on its merits, there is no need for the Board to address the issue of jurisdiction.

**ISSUED** at Toronto, June 20, 2011

**ONTARIO ENERGY BOARD**

*Original signed by*

Kirsten Walli  
Board Secretary