



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 AND ORDER

The Proceeding

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 (the "Board") under section 92 of the *Ontario Energy Board Act, S.O. 1998, c.15*, Schedule B (the "*Act*"). Goldcorp sought an order of the Board granting leave to construct the following transmission facilities in the Municipality of Red Lake:

- a new switchyard connecting Hydro One Networks Inc's ("Hydro One's") tap on its E2R 115 kV transmission line approximately 2 km southwest of Harry's Corner with the proposed 115 kV transmission line;
- a new 10.7 km 115 kV single circuit transmission line running from the switchyard to the to-be-constructed Balmer Complex Transformer Station; and
- a 115 kV/44 kV Transformer Station at Goldcorp's Balmer Complex.

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

Following the publication of the Board's Notice, the Independent Electricity System Operator ("IESO"), Lac Seul First Nation ("LSFN") and Hydro One requested intervenor status and were granted such status. The Board also determined that LSFN is eligible to apply for an award of costs under the Board's *Practice Direction on Cost Awards*. The IESO and Hydro One indicated that they did not intend to seek an award of costs.

On May 26, 2011, the Board issued Procedural Order No. 1, which amongst other things, set out the list of approved intervenors and the schedule for interrogatories and submissions.

Pursuant to Procedural Order No 1, Board staff and LSFN filed each of their interrogatories on Goldcorp's evidence on June 9, 2011. Goldcorp filed its responses to all interrogatories on June 17, 2011.

The Board received the final submissions from LSFN and Board staff on June 28, 2011 and a final reply argument from Goldcorp on July 8, 2011.

Motions

Goldcorp Motions

Goldcorp filed two separate Notices of Motion. In the first motion, which was filed on the same date as the application, Goldcorp sought an *ex parte*, interim and interlocutory order under section 19 of the Act, granting leave to carry out civil engineering work at the Balmer Complex Transformer Station site and to clear and grub the right-of-way prior to the Board rendering its decision on the leave to construct application.

In a Decision and Order dated April 29, 2011, the Board dismissed the motion. In making its determination the Board considered the requirements of section 21(4)(b) of the Act and found as follows:

The Board cannot determine whether and to what extent any person, other than the applicant in this case, will be adversely affected by the outcome of this proceeding, without having provided notice in the Board's standard form of Notice and communicated in the Board's required methods. Therefore, the Board cannot at this time grant relief of the type sought by the Applicant.

The Board noted that it was issuing the Notice of Application and Letter of Direction in the main leave to construct application simultaneously with its Decision and Order on the Motion.

On May 3, 2011, the Board received a second Notice of Motion. In this second motion, Goldcorp sought an order to carry out the work contemplated in the original motion, however, the second motion was filed following the publication of the Board's Notice in the main leave to construct application. Goldcorp requested that the motion be heard orally and some ten days after the publication and service of the Board's Notice.

The Board convened an oral hearing on June 7, 2011 to hear the second motion. Goldcorp, LSFN and Board staff attended the oral hearing.

The Board issued its decision dismissing the motion on June 20, 2011. Copies of both decisions are attached as Appendix B and Appendix C to this order.

LSFN Motion

On June 27, 2011 LSFN filed a letter with the Board requesting access to Goldcorp's Mine Development Plan (the "Plan") which LSFN had asked for in interrogatory 16(A)(c). Goldcorp had refused to provide the Plan claiming that the Plan was subject to confidential communication privilege. LSFN took the position that Goldcorp had not requested confidentiality with respect to the Plan and further that LSFN had not had the opportunity to object to any such requests for confidentiality. LSFN requested a revision to Procedural Order No. 1 with respect to filing deadlines for submissions while the issue of confidentiality remained outstanding.

As noted above and in adherence to Procedural Order No.1 LSFN filed its final submissions on June 28, 2011.

On June 28, 2011 Goldcorp filed a letter objecting to LSFN's June 27, 2011 request. LSFN filed a further response dated July 4, 2011 and re-asserted the need to file the Plan.

In a letter dated July 5, 2011 the Board provided its response stating that it would not compel Goldcorp to file the Plan. The Board further stated:

The Board notes that LSFN has filed its submissions in which it argues that need has not been established and that it is necessary to examine the Plan as part of the determination of need. Goldcorp could have chosen to file the Plan and sought confidential treatment. Instead it has indicated that it will not file the Plan voluntarily, even on a confidential basis. The Board will not compel Goldcorp to file the Plan and will address in its decision the issue of the sufficiency of the evidence in support of the application.

On July 8, 2011 the Board received a Notice of Motion from LSFN in relation to the same matter it had raised in its letter of June 27, 2011. In the Notice of Motion, LSFN stated that it had not had an opportunity to formally address the matter and to make complete submissions before the Board rendered its decision not to compel disclosure of the Plan. The motion was for:

- An order directing Goldcorp to provide full and adequate response to interrogatory 16(A)(c) and to file the Plan;
- Alternately, an order that Goldcorp file portions of the Plan that are not considered confidential;
- And, that the Board order Goldcorp to file the Plan on a confidential basis, and that the Plan be provided to parties that have executed the Board's Confidentiality Declaration and Undertaking pending the resolution of this matter.

The Board has addressed the motion under the Project Need section of this Decision and Order.

Decision of the Board

For the reasons that follow the Board grants Goldcorp leave to construct the facilities applied for in its application, subject to conditions.

Positions of Parties and Board Findings

Section 96(2) of the Act provides that for an application under section 92 of the Act, when determining if a proposed work is in the public interest, the Board shall only consider the interests of consumers with respect to prices and reliability and quality of electricity service, and where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources. In the context of this application, the Board has considered the following categories of evidence in relation to its mandate under section 96(2):

- Project Need
- System Impact Assessment and Customer Impact Assessment
- Environmental Assessment, Land Matters and Permits
- Project Costs and Impact on Ratepayers

Project Need

Goldcorp submitted that the proposed transmission facilities are needed to meet its increasing electricity demand related to mining activities in the Red Lake area.

Goldcorp's evidence is that the current peak demand for all of its complexes in Red Lake is 39.7 MVA and is forecast to increase to 50 MVA by 2015. Goldcorp's evidence further indicates that due to rising demand from other customers in the area and capacity limitations on the E2R line, Hydro One had imposed a limit of 41.7 MVA on Goldcorp's demand. Goldcorp submitted that it expected to exceed the imposed limit by 2012.

Goldcorp's evidence indicates that it had considered a number of alternatives to the proposed facilities, such as, obtaining additional supply from Hydro One, temporary use of diesel generation, on-site Natural Gas fired generators, wind and solar projects and conservation and demand management options. For each of the alternatives considered, Goldcorp explained why the alternatives were not appropriate and indicated that the building of the proposed transmission facilities was the most suitable alternative as it was technically feasible, made use of Goldcorp patented lands and available Crown lands and was supported by other users in the Red Lake area.

Goldcorp stated that the proposed facilities will also benefit other electricity customers in the area by improving the quality of electricity service and by freeing-up capacity at the Red Lake Transformer Station, which could be used to serve new customers. Goldcorp

also noted that the proposed facilities will allow it to avoid adverse operational and environmental effects of diesel generation and to meet the requirements of its Mine Development Plan, thereby creating employment opportunities in the Red Lake area.

LSFN submitted that the Board should not grant the relief sought by Goldcorp at this time.

LSFN argued that Goldcorp had not adequately demonstrated need for the proposed facilities and that Goldcorp's assertions regarding the benefits of the project, should be adopted with caution as they promote Goldcorp's self interest and not the broader public interest. With respect to the alternatives considered, LSFN submitted that Goldcorp's evidence lacked details and that Goldcorp had not fully considered all available conservation and demand management options, including lowering production. LSFN also submitted that the proposed facilities will likely not negate the need for diesel generation, noting that the System Impact Assessment Report had indicated that due to existing grid limitations, Goldcorp may have to arrange for additional supply "through other means, including from generators, not connected to the IESO-controlled grid".¹

LSFN further submitted that the Board was being asked to approve a project that it knew little about. LSFN noted Goldcorp's refusal to provide the Mine Development Plan and argued that without the Plan, it was not possible to determine need or to test Goldcorp's load forecast.

Board staff submitted that Goldcorp had established need for the project and that the proposed facilities represented the best of the alternatives examined.

Goldcorp submitted that the Board should not accept LSFN's arguments. Goldcorp submitted that the question of need was not a determinative issue because under subsection 96(2) of the Act, the Board may only consider the interest of consumers with respect to prices and the reliability and quality of service. Goldcorp further submitted that there was no reason why Goldcorp, as a public-for-profit company, would invest millions in a project, if the project was not needed. Goldcorp also noted that LSFN had adduced no contrary evidence on the question of need and did not raise the matter at the oral hearing.

¹ Draft System Impact Assessment, p.i.

Goldcorp further submitted that LSFN's submissions did not directly address the question of need and are more emotive than material. In regards to the filing of the Plan, Goldcorp submitted that the Board had already ruled that it will not compel Goldcorp to file the Plan.

In the Board's view, the need for a project is a matter to be determined in the context of the Board's review of the interests of consumers with respect to "price". That is, if there is going to be any impact on "price" (i.e., impact on transmission rates), the Board will review the evidence of the applicant with respect to the costs for the project and any rate impacts against the evidence advanced by the applicant with respect to the need for the project. If the evidence demonstrates that the project is needed, then the Board must determine whether the price and, therefore, the rate impacts, if any, are commensurate with need. In section 92 applications, where the proponent is paying for a facility, the issue of impacts on ratepayers with regard to price does not surface.

However, where a proponent builds and then transfers a facility to a licensed transmitter (as is the case here), the rate impacts are addressed in the context of the Connection and Cost Recovery Agreement ("CCRA"). The Board notes that Goldcorp has provided assurances that the intent is for the CCRA, which will ultimately be entered into by Goldcorp and Hydro One, to hold provincial ratepayers harmless. The Board also notes that the terms of the CCRA are governed by the Transmission System Code and are a condition of Hydro One's licence. Further, parties will have an opportunity to examine the transfer of assets and the associated cost recovery in a future Hydro One rate application.

The issue of "price", (i.e. impacts on ratepayers) therefore does not arise in this case, and as a result the Board need not examine the issue of need in detail because it is not determinative. Certainly, even in the instance where there is no adverse impact on ratepayers, the Board would be unlikely to approve a project for which there was no demonstrable need. That is not the situation here. Goldcorp has provided evidence regarding its energy requirements. The Board finds that the evidence is sufficient.

LSFN's July 7th Motion for an Order compelling Goldcorp to provide the Plan either on a confidential or non-confidential basis is grounded on its assertion that "need" is a determinative factor in this application. The Board has determined that "need" is not a determinative factor in this application and therefore the Motion is hereby dismissed without a hearing.

System Impact Assessment (SIA) and Customer Impact Assessment (CIA)

The Board's filing requirements for leave to construct applications, specify that an applicant is required to file a SIA performed by the IESO and a CIA performed by the relevant licensed transmitter.

Goldcorp filed a draft SIA report and a draft CIA report. The SIA was performed by the IESO and the CIA was carried out by Hydro One. In response to a staff interrogatory, Goldcorp filed the final CIA.

Goldcorp submitted that the SIA confirms the need for the project and that the proposed facilities are adequate and will not adversely affect the IESO controlled grid, provided the conditions imposed by the IESO are met. Goldcorp submitted that the CIA confirms that the proposed transmission line will have a minimal impact on local supply facilities and on the reliability of service.

LSFN argued that the proposed facilities do not meet Goldcorp's long-term electricity requirements and that further upgrades would be needed to achieve the intended purpose. LSFN also submitted that it was unclear as to who would pay for these future upgrades. LSFN further submitted that there was no evidence on the impact on reliability and quality of service and that it was notable that Goldcorp had only received conditional approval in the SIA.

Goldcorp submitted that the proposed facilities are required to relieve the existing bottleneck at the Red Lake Transformer Station and if approved, would meet that intended purpose. With respect to LSFN's concerns regarding future upgrades, Goldcorp submitted that these would be resolved through discussions with Hydro One and others and would be the subject of future applications.

The purpose of the SIA was to study how the supply capability of the circuit E2R can be expanded beyond the existing 57 MVA threshold.² In that regard, the SIA concludes that the proposed facilities will not result in "any significant adverse impacts to the IESO controlled grid, provided that the requirements listed in this report are met".

Similarly, the CIA concludes that the proposed transmission line will have a minimal impact on local supply facilities, no adverse affect on short circuits and will not materially affect the reliability of Hydro One's E2R line.³

² Draft System Impact Report, Ex B/T6/S3, p. i

³ Final Customer Impact Assessment Report, dated June 10, 2011

The SIA and the CIA demonstrate that the project will have no adverse impact on the reliability and quality of electricity supply as long as Goldcorp fulfills the requirements included in each report. The Board's order will be conditioned accordingly to ensure these requirements are fulfilled and the final SIA is filed.

LFSN raises concerns about potential future projects. The Board finds that future projects are beyond the scope of this proceeding. In any event, any concerns regarding future projects can be addressed at the appropriate time.

Environmental Assessment ("EA"), Land Matters and Permits

Goldcorp's evidence indicates that it was required to seek project approval under two Class EAs - *Class EA for Minor Transmission Facilities* and *Class EA for Resource Stewardship and Facility Development*. The pre-filed evidence notes that the project received approval from the Ministry of the Environment under the *Class EA for Minor Transmission Facilities* and that approval from the Ministry of Natural Resources (MNR) for the *Class EA for Resource Stewardship and Facility Development* was still pending. In its pre-filed evidence, Goldcorp indicated that approval from the MNR was expected by April 26, 2011. At the hearing of the motion, Goldcorp informed the Board that the MNR's approval and the issuance of permits was delayed until the MNR was satisfied that appropriate consultation with the affected First Nations had occurred.

With respect to land matters, Goldcorp's evidence is that the proposed facilities are to be constructed on land owned either by the province (Crown land held by the Ministry of Natural Resources) or by Goldcorp. Goldcorp stated that the necessary land rights required are confined to easements it expects to receive from the MNR over Crown lands and temporary access rights.

With respect to permits, in undertaking JM1.1, provided at the motion hearing, Goldcorp supplied a list of permits that it requires and the timelines for acquiring these permits. Goldcorp indicated that it would secure the necessary work permits from the MNR over Crown lands.

Board staff submitted that the Board's approval should be conditional on the completion of both Class EAs and on Goldcorp obtaining all necessary approvals.

LSFN submitted that granting leave to construct was premature and potentially adverse to the public interest. LSFN noted the Board should refrain from making a decision on

the application until the MNR had confirmed that duty to consult had been fully discharged. LSFN submitted that granting leave to construct prior to the conclusion of the consultation effectively narrows the range of possibility for adequate accommodation and presents a risk that the project may be cancelled due to lack of appropriate consultation, after it has been approved by the Board. LSFN also noted that Goldcorp had not yet acquired many of the permits that were required to begin construction.

Goldcorp submitted that not having the necessary permits is not a valid reason to deny the application. Goldcorp noted that it was usual Board practice to grant orders that were conditional on the issuance of the relevant permits. Goldcorp also referred to the Board's Decision in Yellow Falls⁴ where the Board provided reasons in support of such an approach.

With respect to the duty to consult, Goldcorp again referred to the Yellow Falls Decision, in which the Board made a decision on a question of law, namely that in electricity leave to construct applications, the Board does not have the power to consider whether the degree of consultation with First Nations in relation to the EA process (which is conducted separately) has been adequate. Goldcorp further submitted that the Board's approach has been supported by the decision of the Supreme Court of Canada in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Counsel*.⁵

The Board does not believe it is necessary to refrain from making a decision in this application because of ongoing consultations being undertaken as part of the EA process. In the Board's view, to the extent there are any concerns with respect to the completion of the EA process or the acquisition of permits, these are appropriately dealt with by making the Board's approval conditional on the successful completion of both Class EA's and on Goldcorp obtaining all necessary permits. This has been the Board's practice in leave to construct applications for some time. Further, in its preliminary Decision in the Yellow Falls case the Board stated:

Board approvals of leave to construct applications invariably include conditions which require the proponent to procure all of the necessary permits and approvals associated with the project. This means that the Board's approval is strictly conditional on the successful completion of the various permitting and assessment processes. Under this architecture there is no danger that the project will somehow begin without all of the necessary

⁴ EB-2009-0120, Decision and Procedural Order No. 4 dated November 18, 2009.

⁵ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Counsel*, [2010] 2 S.C.R.650.

regulatory steps mandated by various agencies of government being completed. This is as true of the Ministry of Natural Resources permits, as it is of the environmental assessment process itself. [Emphasis Added]

Therefore, the Board's order granting leave to construct is conditional on Goldcorp obtaining all necessary Class EA approvals and all other necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the proposed facilities.

Project Cost and Impact on Ratepayers

Goldcorp's evidence is that the total cost of the proposed transmission facilities is approximately \$15 million. Based on the breakdown provided, the cost of the transmission line is \$2.6 million, the cost of the work on the switchyard is \$0.5 million and the cost of the Balmer Complex Transformer Station is approximately \$10 million.

The proposed facilities will be owned and constructed by Goldcorp until commissioned, following which, the switchyard and 115 kV transmission line, but not the Balmer Complex Transformer Station, will be transferred to and operated by Hydro One. The planned in-service date is December 2011.

In Board staff interrogatory no. 2, Goldcorp stated that the CCRA, under which the assets are to be transferred to Hydro One, had not been completed. In LSFN interrogatory no. 13, Goldcorp acknowledged that it had been informed by Hydro One that the terms of the asset transfer must not result in any negative impacts on electricity rates.

LSFN submitted that no evidence was provided with respect to the current project or with respect to possible future upgrades and their impact on electricity rates. As indicated above, the potential impact of other future projects is beyond the scope of this proceeding.

Goldcorp confirmed that it intended to transfer the facilities to Hydro One at no net cost to Hydro One and therefore the transfer will not adversely affect electricity rates. Goldcorp further submitted that it will follow the Transmission System Code Economic Evaluation and the CCRA to achieve the stated objective.

With respect to the matter of impact on ratepayers, as noted earlier in this Decision and Order, due to the fact that the proponent is paying for the facility, there is no ratepayer impact to be assessed. With regard to the intended future transfer of the assets, Hydro One, as a condition of its licence, is required to comply with the terms of the Transmission System Code Economic Evaluation when entering into the CCRA with Goldcorp thereby holding ratepayers harmless. Hydro One has an ongoing requirement to comply with the Transmission System Code and adherence to the Economic Evaluation provisions is a matter to be examined when Hydro One applies to have assets added to its rate base in a cost of service application.

Conclusion

Having considered all of the evidence related to the application, the Board finds the proposed project to be in the public interest in accordance with the criteria established in section 96(2) of the Act.

THE BOARD ORDERS THAT:

1. Pursuant to section 92 of the Act, Goldcorp is granted leave to construct the proposed transmission facilities, all in the Municipality of Red Lake, subject to the Conditions of Approval attached as Appendix A to this Order.
2. The Board had previously determined that LSFN was eligible to apply for an award of costs. Claims in this regard should conform with the Board's Practice Direction on Cost Awards, and shall be filed with the Board and one copy served on Goldcorp by **August 3, 2011**. Goldcorp should review the cost claims and any objections must be filed with the Board and one copy must be served on the claimant by **August 10, 2011**. LSFN will have until **August 17, 2011** to respond to any objections. All submissions must be filed with the Board and one copy is to be served on Goldcorp. Goldcorp shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

ISSUED at Toronto, July 20, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX A
TO DECISION AND ORDER
CONDITIONS OF APPROVAL
EB-2011-0106
DATED: JULY 20, 2011

**Conditions of Approval for the
Goldcorp Transmission Line and Associated Facilities (the "Project")
EB-2011-0106**

1 General Requirements

1.1 Goldcorp shall construct the Project and restore the Project land in accordance with its Leave to Construct application, evidence and undertakings, except as modified by this Order and these Conditions of Approval.

1.2 Unless otherwise ordered by the Board, authorization for Leave to Construct shall terminate July 31, 2012, unless construction of the Project has commenced prior to that date.

1.3 Goldcorp shall obtain all necessary Class Environmental Assessment approvals and all other necessary approvals, permits, licences, certificates and easement rights required to construct, operate and maintain the proposed facilities, and shall provide copies of all such written approvals, permits, licences and certificates upon the Board's request.

1.4 Goldcorp shall satisfy the Independent Electricity System Operator ("IESO") requirements and recommendations as reflected in the Final System Impact Assessment Report, and such further and other conditions which may be imposed by the IESO. Goldcorp shall file the final System Impact Assessment Report with the Board, immediately upon its receipt and prior to the facilities being commissioned.

1.5 Goldcorp shall satisfy the Hydro One Networks Inc. requirements as reflected in the Final Customer Impact Assessment document dated June 10, 2011, and such further and other conditions which may be found to be necessary.

1.6 Goldcorp shall advise the Board's designated representative of any proposed material change in the Project, including but not limited to material changes in the proposed route, construction techniques, construction schedule, restoration procedures, or any other material impacts of construction. Goldcorp shall not make a material change without prior approval of the Board or its designated representative. In the event of an emergency the Board shall be informed immediately after the fact.

2 Project and Communications Requirements

2.1 The Board's designated representative for the purpose of these Conditions of Approval shall be the Manager, Electricity Facilities and Infrastructure Applications.

2.2 Goldcorp shall designate a person as Project engineer and shall provide the name of the individual to the Board's designated representative. The Project engineer will be responsible for the fulfillment of the Conditions of Approval on the

construction site. Goldcorp shall provide a copy of the Order and Conditions of Approval to the Project engineer, within ten (10) days of the Board's Order being issued.

2.3 Goldcorp shall develop, as soon as possible and prior to the start of construction, a detailed construction plan. The detailed construction plan shall cover all material construction activities. Goldcorp shall submit two (2) copies of the construction plan to the Board's designated representative at least ten (10) days prior to the commencement of construction. Goldcorp shall give the Board's designated representative ten (10) days written notice in advance of the commencement of construction.

2.4 Goldcorp shall furnish the Board's designated representative with all reasonable assistance needed to ascertain whether the work is being or has been performed in accordance with the Board's Order.

2.5 Goldcorp shall, in conjunction with Hydro One Networks Inc., Ontario Power Generation and the IESO, develop an outage plan which shall detail how proposed outages will be managed. Goldcorp shall provide two (2) copies of the outage plan to the Board's designated representative at least ten (10) days prior to the first outage. Goldcorp shall give the Board's designated representative ten (10) days written notice in advance of the commencement of outages.

2.6 Goldcorp shall furnish the Board's designated representative with two (2) copies of written confirmation of the completion of Project construction. This written confirmation shall be provided within one month of the completion of construction.

3 Monitoring and Reporting Requirements

3.1 Both during and for a period of twelve (12) months after the completion of construction of the Project, Goldcorp shall monitor the impacts of construction, and shall file two (2) copies of a monitoring report with the Board within fifteen (15) months of the completion of construction of the Project. Goldcorp shall attach to the monitoring report a log of all comments and complaints related to construction of the Project that have been received. The log shall record the person making the comment or complaint, the time the comment or complaint was received, the substance of each comment or complaint, the actions taken in response to each if any, and the reasons underlying such actions.

3.2 The monitoring report shall confirm Goldcorp's adherence to Condition 1.1 and shall include a description of the impacts noted during construction of the Project and the actions taken or to be taken to prevent or mitigate the long-term effects of the impacts of construction of the Project. This report shall describe any outstanding concerns identified during construction of the Project and the condition of the rehabilitated Project land and the effectiveness of the mitigation measures undertaken. The results of the monitoring programs and analysis shall be included

and recommendations made as appropriate. Any deficiency in compliance with any of the Conditions of Approval shall be explained.

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APPENDIX B

TO DECISION AND ORDER

DECISION ON MOTION DATED APRIL 29, 2011

EB-2011-0106

DATED: JULY 20, 2011



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 *EX PARTE*, INTERIM AND INTERLOCUTORY MOTION UNDER
SECTION 19 OF THE OEB ACT**

BACKGROUND

Goldcorp Canada Ltd. and Goldcorp Inc. acting jointly as Goldcorp ("Goldcorp" or the "Applicant") filed an application, dated April 25, 2011, with the Ontario Energy Board under sections 92 and 19 of the *Ontario Energy Board Act*, S.O. 1998, c.15, Schedule B (the "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. Goldcorp filed a Notice of Motion of the same date seeking an *ex parte*, interim and interlocutory order under section 19 of the Act, granting leave to carry out civil engineering work at the proposed Balmer Complex TS site and to clear and grub the right-of-way prior to the Board rendering its decision on the leave to construct application and without prejudice to the Board's determination of that application.

Goldcorp Canada Ltd. is a federal company headquartered in Toronto, and carries on the business of, among other things, operating gold mines in Ontario.

This Decision deals solely with the section 19 Motion and with the threshold issue of the *ex parte* nature of the motion. For this reason, the Board has determined that no further submissions are required on the Motion.

THE MOTION

The relevant portions of section 19 of the Act read as follows:

19(1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.

(2) The Board shall make any determination in a proceeding by order.

(6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act.

The evidence filed by the Applicant indicates that the Motion filed pursuant to section 19 of the Act is to authorize 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 for the Balmer Complex TS. The Applicant proposed to commence with work on May 1 and continue this work until the Board makes its determination with respect to whether to grant leave to construct under section 92 of the Act.
- Clearing and grubbing the right-of-way for the applied for transmission line starting May 1, 2011 and lasting until the commencement of the nesting season

for breeding and migrating birds in May, and then again in mid July 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.

The grounds cited for the Motion are provided at Exhibit A, Tab 4, Schedule 1, pages 3-6 of the Applicants evidence.

In essence Goldcorp indicates that it needs to have its proposed facilities in service by Q4 2011 in order to meet the requirements of its Mine Development Plan and the construction schedule dictates that construction should start sometime in June, 2011 and proceed continuously until November, 2011. The Applicant indicates that because the Board's normal procedure and timing for a leave-to-construct application could result in a decision on the leave to construct as late as the first of September, 2011 this would not allow the applicant to complete construction until February of 2012.

Goldcorp's evidence indicates that it is further constrained by seasonal restrictions imposed by the Ministry of Natural Resources ("MNR") which relate to bird nesting periods. The evidence indicates that there are no breeding bird nesting areas on or around the site and the Balmer Complex where the Applicant plans to locate the Balmer Complex TS, and that there are therefore no MNR restrictions on construction in that area. However, due to MNR rules, clearing and grubbing on the right-of-way may not be carried out within 1 km of two Bald Eagle nests found on the right-of-way until September 1, 2011. Clearing and grubbing may be carried out on the rest of the right-of-way until mid May and after mid July.

Goldcorp indicates that it is unaware of any opposition to its project or proposed facilities and that it expects all required permits from MNR by around April 26, 2011.

Goldcorp further indicates that it is prepared to accept the financial and regulatory risk of spending the money necessary to carry out these pre-construction activities before the Board has made a decision on its section 92 application.

BOARD FINDINGS

The Board has reviewed the evidence provided by the Applicant and considered the evidence relevant to the section 19 motion.

The Board has determined that it will not grant an *ex parte*, interim and interlocutory order granting the Applicant leave to carry out civil engineering work at the proposed Balmer Complex TS site and to clear and grub the right-of-way.

In making its determination, the Board has considered the requirements of section 21(4)(s) of the Act, which reads as follows:

Despite section 4.1 of the *Statutory Powers Procedure Act*, the Board may, in addition to its power under that section, dispose of a proceeding without a hearing if,

...

- (b) ***the Board determines that no person, other than the applicant, appellant or licence holder will be adversely affected in a material way by the outcome of the proceeding*** and the applicant, appellant or licence holder has consented to disposing of a proceeding without a hearing. [Emphasis added]

In essence, the Applicant has asked that the Board dispose of its motion, which is in substance, a proceeding in which the Applicant seeks leave to have access to, enter upon, and complete certain works, some of which are of a permanent nature, on certain lands on an *ex parte* basis, that is without providing notice to parties that may be adversely affected in a material way by the outcome of the proceeding. Subsection 21(4)(b) is therefore operative in this case.

The Applicant has provided evidence to indicate that it has identified and notified stakeholders who may have an interest in the proposed transmission facilities and that it has conducted a public consultation process. Goldcorp also provided a list of stakeholders, including First Nations, that may have an interest in the proposed transmission facilities as well as a description of the consultation program and a list of correspondence.

The Board cannot determine whether and to what extent any person, other than the applicant in this case, will be adversely affected by the outcome of this proceeding, without having provided notice in the Board's standard form of Notice and communicated in the Board's required methods. Therefore, the Board cannot at this time grant relief of the type sought by the Applicant. The Board notes that it is issuing

the Notice of Application and Letter of Direction simultaneously with this Decision. The Board intends to take all reasonable steps to expedite the proceeding where possible and appropriate. In that context, the Applicant may consider seeking some form of relief in advance of the Board's final disposition of the application.

THE BOARD THEREFORE ORDERS THAT the Motion filed by the Applicant pursuant to section 19 for an *ex parte* interim and interlocutory order authorizing Goldcorp and its contractors to carry out (1) civil engineering work including grading, fencing, installing foundation for and constructing walls of the Balmer Complex TS building for the Balmer Complex TS and (2) clearing and grubbing the right-of-way for the applied for transmission line starting May 1, 2011 and lasting until the commencement of the nesting season for breeding and migrating birds in May, and then again in mid July 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; is hereby denied.

ISSUED at Toronto, April 29, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX C
TO DECISION AND ORDER
DECISION ON MOTION DATED JUNE 20, 2011
EB-2011-0106
DATED: JULY 20, 2011



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) restrictions¹, 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-

¹ 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 decisions² 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.³ 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.

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

³ 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-2007-0051⁴.

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.

⁴ 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 Board⁵ 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

⁵ *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