Ontario Energy Board

Commission de l'énergie de l'Ontario

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

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c.l5, 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.

Before: Marika Hare, Presiding Member

Paula Conboy, Member

DECISION WITH RESPECT TO PRELIMINARY QUESTIONS AND FINAL DECISION AND ORDERS

I. Background

Applications

Union Gas Limited ("Union") filed applications with the Ontario Energy Board (the "Board") on February 8, 2011 relating to proposed natural gas facilities and services in the Red Lake area. The applications were filed together and consist of requests for leave to construct a natural gas pipeline (the "Pipeline Project"), a Municipal Franchise Agreement ("MFA") for the Municipality of Red Lake ("Red Lake") and a Certificate of Public Convenience and Necessity ("CPCN") for Red Lake. Construction of the proposed Pipeline Project is divided into two phases: the first phase would run from an existing gas pipeline north of Ear Falls to the intersection of Highway 105/125, where it would serve various existing mine sites (collectively known as the "Red Lake Gold Mines") operated by Goldcorp Inc. ("Goldcorp"). Phase I is approximately 58 km in length consisting of 8 inch and 4 inch diameter pipelines.

Phase 2 would involve the extension of the pipeline constructed in Phase 1 to provide natural gas service to the residents and businesses of several nearby communities. Phase 2 is approximately 46 km in length. The CPCN and the MFA are required to allow Union to provide natural gas service to the communities that will be connected to Phase 2 of the Pipeline Project. Union is prepared to commence construction of Phase 1 immediately. Phase 2, however, would be contingent on additional funding from either the local communities or some other entity.

The Pipeline Project will be constructed almost entirely on existing road allowances or on privately owned land. The Board has assigned to the leave to construct application file number EB-2011-0040; the MFA application file number EB-2011-0041; and the CPCN application file number EB-2011-0042.

The Board's jurisdiction over the approval of natural gas pipelines is found in section 90 of the *Ontario Energy Board Act, 1998* (the "Act"). Section 96(1) sets out the test the

Board is to consider: "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."

The Board's authority over the CPCN and the MFA comes from the *Municipal Franchises Act*, sections 8 and 9 respectively.

Procedural steps to date

The Board issued a Notice of Applications and Hearing ("Notice") on March 8, 2011. Union served and published the Notice as directed by the Board. On April 1, 2011 the Board issued its Procedural Order No. 1 which outlined its process for written interrogatories and submissions.

Goldcorp registered as an intervenor in the proceeding in support of the applications and Enbridge Gas Distribution Inc. registered as an observer.

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

On April 1, 2011 the Board issued its Procedural Order No. 1 which outlined its process for written interrogatories and final submissions. Board staff and Union were the only active participants in the proceeding which was completed in accordance with the schedule set in the Procedural Order No. 1 on May 3, 2011 with Union's reply submissions to the Board Staff submissions dated April 29, 2011.

On May 5, 2011 the Board received a letter from the Grand Council of Treaty 3 (the "Grand Council") outlining concerns with the applications. On May 11, 2011 the Board requested that Union file a formal response to the letter. Union filed its response on May

12, 2011. On May 16, 2011 the Board invited the Grand Council to reply to Union's letter. The Grand Council filed its reply on May 30, 2011. The Grand Council's reply expressed concerns relating to the adequacy of the Crown's consultation efforts pursuant to the *Constitution Act, 1982* in respect of the applications.

On June 7, 2011, the Board issued its Procedural Order No. 2 in which it posed three questions relating to the Crown's duty to consult and scheduled written submissions and an oral hearing to address the questions. In submissions and in the oral hearing the Board restricted its consideration to submissions on the appropriate scope of its enquiry into any duty to consult issues in this proceeding. The Board sought submissions on the following questions:

1. The duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. In the current case, what is the conduct that the Crown has contemplated that has the potential to adversely impact an Aboriginal right or title? What is the Crown's responsibility with respect to this project, which is being undertaken by a private proponent?

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

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

On June 9, 2011 the Board received a request from the Lac Seul First Nation ("LSFN") requesting late intervention status. In Procedural Order No. 3, the Board granted the intervention request to the LSFN, at least for the purposes of making submissions on the preliminary questions. A complete Intervention List is attached as Appendix "A".

On June 10, 2011 the Board issued a Procedural Order No. 3 and set the extended date for filing written submissions on the three questions on the Crown consultation, by the parties and Board staff.

In accordance with Procedural Order No. 3, the following parties provided written submissions on June 17, 2011: Board staff, the Grand Council, LSFN, Union and Goldcorp.

Wabauskang First Nation ("WFN") informed the Board by a letter dated June 17, 2011 that it would appear in the oral hearing on June 20, 2011 and that it intended to make oral submissions. At the oral hearing, the Board allowed WFN to make submissions on the three scoping questions.

In a number of letters to the Board, Union confirmed that it had directly served the Notice of application on a number of potentially impacted Aboriginal groups as directed by the Board, including LSFN, the Grand Council, and WFN. Union also directly served Wabasemoong First Nation, Pikangikum First Nation, the Métis Nation of Ontario and published the Notice in the Wawatay News. All of these Aboriginal groups had received various communications (and in some cases meetings) regarding the Pipeline Project with Union in the months before the application was filed.

The oral hearing was held on June 20, 2011. A transcript of the hearing is available on public record. The following parties participated in the oral hearing: Board staff, the Grand Council, WFN, LSFN, Union and Goldcorp.

II. Analysis and Decision on Preliminary Questions

A. 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?

The Duty to Consult

The duty to consult, as described in the Supreme Court's *Haida Nation v. British Columbia (Minister of Forests)* ("Haida") decision, arises where the Crown has knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect it. In some cases, the duty to consult may lead to a duty to accommodate. The precise extent of the duty to consult and, possibly, accommodate will vary depending on the facts of each situation.[1] The exact role that tribunals are to play in discharging or assessing the duty to consult has been the subject of some legal debate. The Supreme Court's recent decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* [2]("Rio Tinto") decision has helped to clarify some of these issues. Generally speaking, tribunals which have the power to consider questions of law have the concomitant power to consider Constitutional issues, including the duty to consult.[3] Section 19(1) of the Act provides the Board with the power to consider questions of law.

The duty to consult is grounded in section 35(1) of the *Constitution Act, 1982*, ("section 35") which provides:

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The Pipeline Project

The Board is the sole approval authority for the Pipeline Project as a whole. The Board's power to approve the leave to construct application is found in section 96(1) of the Act: "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." A variety of other permits are required from a number of other Crown actors. However, most of these permits are required for discrete elements of the construction (for example, water crossings), and only the Board is charged with considering whether the entire Pipeline

---

[1] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 35 and paras. 47-49.
[2] [2010] 2 S.C.R. 650.
[3] Rio Tinto, paras. 66-73; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] S.C.J. No. 54, para. 39; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] S.C.J. No. 34, para. 39

Project is in the public interest. The Board is therefore of the view that it is in the best position to consider the issue of Crown consultation with respect to the Pipeline Project as a whole.

Should the Board conduct consultation itself?

In its letter to the Board dated May 30, 2011, the Grand Council stated: "To be clear, we are in no way suggesting that the Board itself has a duty to consult with the Grand Council." (Emphasis in original). In their letters seeking intervenor status, neither LSFN nor WFN suggested that it was the Board itself that should conduct independent consultation.

As this issue did not appear to be in dispute, the Board did not seek submissions on this issue in Procedural Order No. 2. This issue was raised in oral submissions by WFN, however, so the Board will address it.

Board staff's pre-filed submission contained a short section expressing the view that the Board did not have authority to undertake direct consultation itself, and noted that this point did not appear to be challenged by any party. Board staff quoted the Rio Tinto decision:

> 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.** Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with consultation.[4]

[4] *Rio Tinto*, para. 60 (emphasis added). See also para. 74.

In its oral submissions, however, WFN argued that the Board may indeed be responsible for conducting consultation itself (WFN did not pre-file any submissions). WFN submitted that the Board may indeed have the remedial powers necessary "to do what it is asked to do in connection with consultation." Specifically, WFN pointed to the Board's powers to approve leave to construct applications (section 96(1) of the Act) and the Board's general power to set conditions to its orders (section 23(1) of the Act). WFN further stated that the *Quebec (Attorney General) v. Canada (National Energy Board)* case[5] ("Quebec"), which had been cited by Board staff, had been superseded by Rio Tinto. WFN also observed that there is no prohibition in the Act against the Board conducting consultation directly.

The Board does not accept that it has an independent mandate to conduct direct consultation itself with Aboriginal groups whose Aboriginal or treaty rights may be adversely impacted by a project subject to Board approval. As discussed below, however, there is significant flexibility in the manner in which the duty to consult can be discharged, and the Board does find that its ordinary hearing processes (including the Environmental Guidelines and Report as described below) can serve to ensure that the duty to consult has been satisfied.

The Board is a quasi-judicial tribunal that owes a duty of fairness to all parties. As the Supreme Court observed in the Quebec case:

> The appellants' argument is that the fiduciary duty owed to aboriginal peoples by the Crown … extends to the Board, as an agent of government and creation of Parliament, in the exercise of delegated powers. …
>
> The courts must be careful not to compromise the independence of quasi-judicial tribunals and decision making agencies by imposing on them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty. Counsel for the appellants conceded in oral argument that it could not be said that such a duty should apply to the courts, as a creation of government, in the exercise of their judicial function. In my view, the considerations which apply in evaluating whether such an obligation is impressed on the process by which the Board

[5] [1994] 1 S.C.R. 159.

> decides whether to grant a licence for export differ little from those applying to the courts. The function of the Board in this regard is quasi-judicial. While the characterization may not carry with it all the procedural and other requirements identical to those applicable to a court, it is inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it.[6]

Although the case law with respect to section 35 rights has evolved since 1994, nothing in Rio Tinto or any other decision alters this finding, and absent clear instruction through its statute, the Board is not prepared to stray from its traditional role as a quasi-judicial tribunal that hears from parties and makes determinations and orders through the hearing process.

The Board does not accept WFN's submission that its broad general power to attach conditions to its orders qualifies as "remedial powers" as contemplated by the Supreme Court in Rio Tinto. The Supreme Court discussed the nature of the statutory grant of authority necessary to confer the power to actually conduct independent consultations at paragraph 74:

> While the *Utilities Commission Act* conferred on the Commission the power to consider whether adequate consultation had taken place, its language did not extend to empowering the Commission to engage in consultations in order to discharge the Crown's constitutional obligation to consult. As discussed above, legislatures may delegate the Crown's duty to consult to tribunals. However, the Legislature did not do so in the case of the Commission. Consultation itself is not a question of law, but a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests. The Commission's power to consider questions of law and matters relevant to the public interest does not empower it to itself engage in consultation with Aboriginal groups.

[6] Quebec, paras. 32 and 34-35.

It appears, therefore, that the Supreme Court contemplated something more direct than a simple general power to impose conditions. The Board finds that the statute does not provide the Board with the power to undertake direct one-on-one consultations with Aboriginal groups in the manner that a Crown ministry might. However, as discussed in further detail below, the Board does find that its application process (including the environmental review set out in the Board's Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario (6th Edition, 2011)) ("Environmental Guidelines") can serve to ensure that the duty to consult has been properly addressed. There is significant flexibility regarding the manner in which the duty to consult can be discharged, and consultation need not necessarily be one–on-one discussions between (for example) a Crown ministry and a First Nation.

What is the "Crown conduct" where the proponent is a private body seeking an approval from a quasi-judicial tribunal?

The issue before the Board is a complex one that has not been directly addressed by the Supreme Court. The duty to consult is triggered where the Crown contemplates conduct which has the potential to adversely impact Aboriginal or treaty rights. The proponent of the Pipeline Project is Union, a private corporation. Conduct by Union is not "Crown conduct". Although a variety of Crown ministries have some level of involvement with the Pipeline Project, none have any approval authority for the Pipeline Project as a whole. It is the Board that has approval authority over the Pipeline Project; however as discussed above the Board is not empowered to conduct consultations with Aboriginal groups itself.

Although the recent Rio Tinto decision is helpful in clarifying the role of tribunals with respect to the duty to consult, in that case the proponent was a Crown actor, and there was no dispute that the proponent itself was responsible for actually conducting the consultation. In Rio Tinto, the "Crown conduct" in question was clear and not disputed: "BC Hydro's [i.e. the proponent, and not the tribunal] proposal to enter into an agreement to purchase electricity from Alcan is clearly proposed Crown conduct. BC Hydro is a Crown corporation. It acts in place of the Crown. No one seriously argues that the 2007 EPA does not represent a proposed action of the Province of British Columbia."[7] Under such circumstances, the Court held that the role of the tribunal was to assess whether the Crown conduct in question (i.e. BC Hydro's actions) had a

[7] Rio Tinto, para. 81.

potential adverse impact on Aboriginal or treaty rights, and if so what accommodation might be appropriate.

The question of what (if any) Crown conduct is contemplated where the proponent itself is not the Crown is not addressed in Rio Tinto. This is a distinguishing factor from the case currently before the Board. The Crown conduct being contemplated in Rio Tinto was different from any Crown conduct being contemplated in this case. The tribunal's role in that case was to assess whether the duty to consult had been triggered, and if so if it had been adequately discharged. In the current case the specific party or parties responsible for conducting any required consultation is not as clear.

All parties agree that Union is not the Crown. Union's conduct in planning and proposing (and ultimately, if approved, constructing) the Pipeline Project therefore does not trigger the duty to consult on its own. Several parties took the position, however, that the Board's decision itself is the conduct contemplated by the Crown[8].

The Board is unable to accept this argument. The Board's responsibilities as a quasi-judicial tribunal and the absence of clear empowering language in the statute prevent it from conducting consultation itself. The duty is triggered by the activities and approvals required by other Crown actors that have some oversight responsibility for this project, as discussed in further detail below. As counsel for LSFN observed, it is difficult to accept that more than 100 kilometers of pipeline could be built almost entirely on Crown land (albeit road allowance) without some manner of Crown conduct being involved. The Board's role, as described in Rio Tinto, is to assess the adequacy of the Crown's consultation efforts. As the approval authority for the Pipeline Project as a whole, the Board accepts that it must be satisfied that there has been an adequate process of consultation (and possibly accommodation) for the Pipeline Project as a whole.

The question that remains is by what means should the Board assess the adequacy of consultation through the current process. It was suggested by the participating Aboriginal groups that the Board should await the outcome of certain Crown consultations that may be occurring (or will be occurring) outside the Board's process – for example with respect to certain permits that will be required to build the pipeline. Once those consultations are complete, the Board could review the evidence and make

[8] Oral submissions of the Grand Council, transcript pp. 17-18; Oral submissions of WFN, transcript p. 59. Union also appears to take this view: see transcript pp. 157-158. Goldcorp appears to dispute this point: oral submissions of Goldcorp, transcript pp. 127-128.

a determination on the adequacy of these consultation efforts. Union and Goldcorp argued that the Board's existing process, in particular the environmental review process, already ensures that the duty to consult as it pertains to the Pipeline Project itself is satisfied, and that awaiting the results of any other outside process is unnecessary.

The Board finds that its existing process is the appropriate forum to address all Pipeline Project issues concerning the duty to consult. As explained below, the Board finds that it does not have to await the completion of any additional Crown consultation activities that may be occurring outside of the Board's process.

Case law relating to the duty to consult

The courts have long recognized that the duty to consult can be met through a wide variety of processes. In Haida, the Supreme Court observed that there is no one size fits all approach that would be appropriate in every situation. The Supreme Court held that: "The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed."[9] Discussing instances where a claim to Aboriginal or treaty rights is relatively strong, and potential infringements relatively high, the Court observed: "While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case."[10]

In discussing the standard of review courts should employ in considering appeals relating to the Crown's consultation efforts, the Court made further findings regarding the types of process that can be used to discharge the duty to consult:

[9] Haida, para. 39.
[10] Haida, para. 44.

> The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; **the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal rights in question**: Gladstone at. Para. 170. What is required is not perfection, but reasonableness. As stated in Nikal, at para. 110, "in … information and consultation the concept of reasonableness must come into play… . So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.[11]

In *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*[12] ("Taku"), an existing environmental assessment process was held to be sufficient to satisfy the duty to consult. Taku involved an approval for a new road through a First Nation's traditional territory. Even though the Supreme Court found that the First Nation's claim was relatively strong, it held that the environmental assessment process provided ample opportunity for its participation: "The chambers judge was satisfied that any duty to consult was satisfied until December 1997, because the members of the [First Nation] were full participants in the assessment process. I would agree. The Province is not required to develop special consultation measures to address [the First Nation's] concerns, outside the process provided for by the *Environmental Assessment Act*, which specifically set out a scheme that required consultation with affected Aboriginal peoples."[13]

The Court concluded:

> On the principles discussed in *Haida*, these facts mean that the honour of the Crown placed the Province under a duty to consult with the TRTFN [i.e. the First Nation] in making the decision to reopen the Tulsequah Chief Mine. In this case, the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of its duty. The TRTFN was part of the Project Committee, participating fully in the environmental

[11] Haida, para. 62 (emphasis added).
[12] [2004] 3 S.C.R. 550.
[13] Taku, para. 40.

> review process. It was disappointed when, after three and a half years, the review was concluded at the direction of the Environmental Assessment Office. However, its views were put before the Ministers, and the final project approval contained measures designed to address both its immediate and long-term concerns. The Province was under a duty to consult. It did so, and proceeded to make accommodations. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN.[14]

The flexible manner in which the duty to consult can be satisfied was again discussed by the Supreme Court in the *Beckman v. Little Salmon/Carmacks First Nation*[15] decision ("Little Salmon"). In this case, the Yukon territorial government had denied there was any duty to consult with regard to a certain decision. Despite this, it agreed to have discussions with the First Nation as a "courtesy". The Supreme Court found that the duty to consult was in fact engaged by the decision in question; however, it held that the process undertaken by the government was sufficient to discharge the duty even though it had not been characterized as consultation:

> Nevertheless, consultation *was* made available and *did* take place through the LARC process under the 1991 Agriculture Policy, and the ultimate question is whether what happened in this case (even though it was mischaracterized by the territorial government as a courtesy rather than as the fulfillment of a legal obligation) was sufficient. In *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 3 S.C.R. 550, the Court held that participation in a forum created for other purposes may nevertheless satisfy the duty to consult if *in substance* an appropriate level of consultation is provided.[16]

To date, there have been no Supreme Court decisions directly addressing the exact situation currently before the Board – in other words, how is the duty to consult engaged and best addressed where a private proponent seeks an approval from a quasi-judicial

[14] Taku, para. 22.
[15] [2010] 3 S.C.R. 103.
[16] Little Salmon, para. 39 (emphasis in original).

tribunal? There have, however, been decisions of the Federal Court and the Federal Court of Appeal that are directly on point. In *Brokenhead Ojibway Nation v. Canada (Attorney General)*[17] ("Brokenhead"), several First Nations sought declaratory relief from the Federal Court from a decision of the National Energy Board ("NEB") to approve the construction of certain pipelines. The First Nations argued that the Crown had not met the duty to consult with respect to these projects. In dismissing the case, the court expressed confusion over exactly what the nature of the potential infringements to Aboriginal rights were. It also held, however, that the NEB's ordinary hearing process could be a good forum through which concerns relating to the potential infringement of Aboriginal rights could be addressed:

> In determining whether and to what extent the Crown has a duty to consult with Aboriginal peoples about projects or transactions that may affect their interests, the Crown may fairly consider the opportunities for Aboriginal consultation that are available within the existing processes for regulatory or environmental review. Those review processes may be sufficient to address Aboriginal concerns, subject always to the Crown's overriding duty to consider their adequacy in any particular situation. This is not a delegation of the Crown's duty to consult but only one means by which the Crown may be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated. The NEB process appears well-suited to address mitigation, avoidance and environmental issues that are site or project specific. The record before me establishes that the specific project concerns of the Aboriginal groups who were consulted by the corporate Respondents or who made representations to the NEB … were well received and largely resolved.[18]

The Court further observed that the forum provided through the NEB process was preferable to any collateral discussions with Crown actors that were not as directly involved in the approval of the project:

> The Treaty One First Nations maintain that there must always be an overarching consultation regardless of the validity of the

[17] [2009] F.C.J. No. 608.
[18] Brokenhead, paras. 25-26.

> mitigation measures that emerge from a relevant regulatory review. This duty is said to exist notwithstanding the fact that Aboriginal communities have been given an unfettered opportunity to be heard. This assertion seems to me to represent an impoverished view of the consultation obligation because it would involve a repetitive and essentially pointless exercise. Except to the extent that Aboriginal concerns cannot be dealt with, the appropriate place to deal with project-related matters is before the NEB and not in a collateral discussion with either the GIC or some arguably relevant Ministry.[19]

The Court concluded:

> I am satisfied that the process of consultation and accommodation employed by the NEB was sufficient to address the specific concerns of Aboriginal communities potentially affected by the Pipeline Projects including the Treaty One First Nations. The fact that the Treaty One First Nations may not have availed themselves fully of the opportunity to be heard before the NEB does not justify the demand for a separate or discrete consultation with the Crown. To the extent that regulatory procedures are readily accessible to Aboriginal communities to address their concerns about development projects like these, there is a responsibility to use them. First Nations cannot complain about a failure by the Crown to consult where they have failed to avail themselves of reasonable avenues for seeking relief.[20]

The Federal Court of Appeal arrived at similar conclusions in *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*[21] ("Standing Buffalo"). This case also related a review of an NEB pipeline approval decision, and concerns expressed by First Nations that the Crown had not conducted sufficient consultation for the projects. The Court first rejected arguments that a Haida type analysis of the "Crown's" conduct in the case was required, as none of the project's proponents were Crown actors:

---

[19] Brokenhead, para. 37.
[20] Brokenhead, para. 42.
[21] [2009] F.C.J. No. 1434. Leave to appeal to Supreme Court of Canada denied, 2010 CanLII 70737.

> In the appeals under consideration, the applications before the NEB were made by Keystone, Enbridge Southern Lights and Enbridge, private sector entities that are not the Crown or its agent. Accordingly, I am of the view that *Kwikwetlem First Nation* does not support the proposition that the NEB is required to undertake the *Haida* analysis before considering the merits of the applications of Keystone, Enbridge Southern Lights and Enbridge that were before it.[22]

The court held, however, that the absence of a Haida type duty did not mean that Aboriginal rights or section 35 could be ignored.

> …[T]he decision in *Quebec (Attorney General) v. Canada (National Energy Board)* establishes that in exercising its decision making function, the NEB must act within the dictates of the Constitution, including subsection 35(1) thereof. In the circumstances of these appeals, the NEB dealt with three applications for Section 52 Certificates. Each of those applications is a discrete process in which a specific applicant seeks approval in respect of an identifiable project. The process focuses on the applicant, on whom the NEB imposes broad consultation obligations. The applicant must consult with Aboriginal groups, determine their concerns and attempt to address them, failing which the NEB can impose accommodative requirements. In my view, this process ensures that the applicant for the Project approval has due regard to existing Aboriginal rights that are recognized and affirmed in subsection 35(1) of the Constitution. And, in ensuring that the applicant respects such Aboriginal rights, in my view, the NEB demonstrates that it is exercising its decision making function in accordance with the dictates of subsection 35(1) of the Constitution.[23]

All of these decisions point to the flexible manner in which the duty to consult can be met, and recognize that a variety of different types of processes may serve. Considered

[22] Standing Buffalo, paras. 31-32. The court distinguished *Rio Tinto* on identical grounds – see para. 33.
[23] Standing Buffalo, para. 40.

together the cases present a road map for how the duty to consult can be addressed in the current circumstances.

Haida, Taku and Little Salmon all show that there is significant flexibility with respect to how the duty to consult can be discharged. A tailor-made, stand alone process is not always required to discharge the duty to consult, and pre-existing processes can often serve this function (for example, the environmental assessment process in Taku). In some cases, the Crown may not even have to accept that it is actually conducting consultation (Little Salmon).

Although not formally binding on Ontario tribunals, the Board is also persuaded by much of the reasoning in the Brokenhead and Standing Buffalo decisions. Both deal with situations very similar to the situation before the Board: a private proponent seeking approval from a quasi judicial tribunal to construct a natural gas pipeline.[24]. None of the Supreme Court cases deal directly with this situation. None of the Supreme Court cases conflict with Brokenhead or Standing Buffalo; indeed in the Board's view they are perfectly consistent. Although there was ultimately a private proponent behind the applications in both Haida and Taku, in those cases the Crown actor responsible for granting the approval and the Crown actor responsible for conducting the consultation were one and the same. In Rio Tinto, the proponent itself was a Crown actor. As described in further detail above, the Board finds this to be a key distinguishing feature.

The Duty to Consult and the Board's Process

As discussed above, the Board has found that it cannot be responsible for conducting consultation with Aboriginal groups – the Act does not create such a role and Board's responsibilities to other parties prevent such an approach. Similarly, and as described in further detail below, the Board is not convinced that the appropriate course is for it (and the Applicant) to await some form of separate consultations from some other Crown actors to occur, and then conduct a Haida type analysis to determine if those consultations were sufficient. Instead, it is the Board's view that the procedural elements of the duty to consult have been effectively delegated to Union through the Ontario

[24] The Board does not accept Board staff's submission that Standing Buffalo stands for the proposition that the duty to consult itself may not apply in cases such as this, (even though the underlying section 35 duties remained). Standing Buffalo accepted that the hearing process itself could discharge section 35 and the duty to consult, and therefore a separate Haida type analysis of other Crown actors was not necessary.

Pipeline Coordinating Committee and the Environmental Guidelines, and that the Board is in a position to determine whether consultation efforts have been adequate.

The Board's Environmental Guidelines apply to all natural gas leave to construct applications. The Environmental Guidelines describe the environmental assessment process for constructing hydrocarbon pipelines and facilities and provide comprehensive guidance on how proponents are to assess and mitigate the potential environmental impacts associated with proposed projects. Unlike electricity transmission and distribution projects, for natural gas pipelines no separate Environmental Assessment under Ontario's *Environmental Assessment Act* is required, and the Board is responsible for environmental matters relating to the Pipeline Project. Applicants are required to prepare and file an Environmental Report to demonstrate that all the requirements of the Environmental Guidelines have been met.

The Environmental Guidelines were originally developed in the 1970s, and are currently in their 6th edition. The Environmental Guidelines were developed by the Board in conjunction with the Ontario Pipeline Coordinating Committee ("OPCC"). The purpose of the OPCC is described in the Environmental Guidelines as follows:

> The purpose of the OPCC is to coordinate the Ontario government agencies review of facilities projects in Ontario requiring approval from the Board or the NEB, with the goal of minimizing negative impacts. In effect, the OPCC provides a single contact for identifying provincial
> concerns related to transmission and storage proposals. The OPCC is chaired by a Board staff member and currently includes representation from the following ministries and agencies: Technical Standards and Safety Authority ("TSSA"), Ministry of Environment ("MOE"), Ministry of Agriculture, Food and Rural Affairs ("OMAFRA"), Ministry of Tourism and Culture ("MTC"), Ministry of Municipal Affairs and Housing ("MMAH"), Ministry of Natural Resources ("MNR"), Ministry of Transportation ("MTO") (the "OPCC representatives"). In addition to the OPCC representatives, affected regional and local municipalities, and conservation authorities are involved in the OPCC review.

> The Guidelines have been developed in consultation with representatives of the OPCC. Therefore, the Guidelines are consistent with the mandates of the above ministries and agencies.[25]

The Environmental Guidelines set out express expectations with respect to consultation with Aboriginal peoples:

> 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 Métis peoples. The proposed projects may potentially affect existing or asserted Aboriginal or treaty rights, as well as Métis' 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 Métis Traditional Ecological Knowledge Studies or other information sources, First Nations treaty rights, any filed and

[25] Environmental Guidelines, p. 7.

> outstanding claims or litigation concerning Aboriginal treaty rights, treaty land entitlement or Aboriginal title or rights.
>
> The information gathered and recorded in the ER [i.e. Environmental Report] 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 Peoples 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 letters 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.[26]

Union has followed and documented all of the steps established in the Environmental Guidelines.

The Environmental Guidelines require that copies of the Environmental Report be provided to all OPCC members for comment prior to the filing of the application with the Board. In some cases, OPCC members will provide comments on the Environmental Report, for example to recommend changes to the routing, construction procedures or

---

[26] Environmental Guidelines, pp. 18-19 (citations omitted). It should be noted that the Board sought input from many Aboriginal groups prior to enacting this section of the Environmental Guidelines. Other portions of the Environmental Guidelines could also be relevant to the issue of consultation, for example section 4.3.4 – Cultural Heritage Resources.
The 6th edition of the Environmental Guidelines was released in January 2011, and is the version that applies to this case. The Environmental Report itself, however, was prepared prior to the release of the 6th edition. The sections dealing with Aboriginal consultation in the 5th edition were not as detailed as the 6th edition. However, Union had received drafts of the 6th edition amendments prior to completing the Environmental Report Union took all of the steps required by the 6th edition.

some form of mitigation in relation to a proposed project. In the current case, OPCC members identified no concerns regarding the Environmental Report filed by Union.

Although the Environmental Guidelines are issued by the Board, they are drafted with significant involvement from the OPCC. The OPCC's involvement in the establishment of the Environmental Guidelines sets out (amongst other things) the OPCC's expectations with respect to the activities that should be undertaken by project proponents. The Environmental Guidelines recognize that many different government agencies may have interests and responsibilities pertaining to the construction of a pipeline. The Environmental Guidelines are therefore designed to serve several functions: they ensure that relevant governmental agencies are made aware of all pipeline applications before the Board; they require proponents to undertake certain activities to ensure that impacts associated with the proposed projects (including potential impacts to Aboriginal interests) are identified and, where appropriate, mitigated or accommodated; and they allow the governmental agencies to express any concerns about the impacts of the proposed project to the proponent and, ultimately, the Board.

The Environmental Report was also provided to various Aboriginal groups (including those participating in this proceeding) for comment prior to the filing of the application. Union initially received no comments, though in a March 2011 letter to Union WFN indicated a general concern that their rights and title had not been adequately considered, and that they had not been sufficiently consulted.

The Board finds that the existing process with respect to the preparation of the Environmental Report (in conformity with the Environmental Guidelines) is a suitable process for addressing the duty to consult with respect to any impacts arising from the Pipeline Project as a whole. Although the procedural aspects of the consultation are undertaken by the (in this case private) proponent, these procedural aspects have been in a sense delegated by the OPCC members (who are all Crown actors with some potential oversight role respecting natural gas pipeline projects) to the proponent through the Environmental Guidelines. In reviewing the proponent's draft Environmental Report, the OPCC members are able to satisfy themselves that any of their concerns with respect to the impacts of the project have been addressed. To the extent they have outstanding concerns, the OPCC members will request that the proponent make changes or undertake additional remedial action with respect to the project. In cases where the OPCC members are satisfied that the Environmental Report is complete and addresses all potential impacts of the proposed project in an

appropriate manner, they will not seek any changes. With respect to any potential adverse impacts to Aboriginal or treaty rights arising from a proposed project, OPCC members are able to indicate any concerns they have with respect to the consultations (and potentially accommodation) conducted by the proponent.

To the extent that an Aboriginal group is not satisfied that the duty to consult has actually been discharged, it is given notice of the Board's hearing and offered the opportunity to participate. If an Aboriginal group believes there will be potential adverse impacts to Aboriginal or treaty rights arising from the project that have not been sufficiently accommodated, it can bring those arguments to the Board. In these circumstances the Board is able to perform its role, as described in Rio Tinto, of assessing whether or not the Crown's consultation efforts with respect to the Pipeline Project (as delegated to Union) were adequate. To the extent that the Board finds that there are potential impacts to Aboriginal or treaty rights that have not been adequately accommodated, it can in effect require changes to the project, or reject the application if the changes are not made.

The process established through the Environmental Guidelines addresses the types of issues that are discussed in the case law. In Haida, the Supreme Court determined: "the question is whether the regulatory scheme or government action 'viewed as a whole, accommodates the collective aboriginal rights in question'" Similarly, in Little Salmon the Supreme Court placed the focus on whether the process in substance provided an appropriate level of consultation. The Board finds that its current process meets both of those tests.

In Haida, the Court held that at the most stringent end of the consultation "spectrum", the requirements would typically entail "the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case." Although the Board does not necessarily accept that the current case falls at the most stringent end of the spectrum[27], the process required through the Environmental Guidelines meets these requirements. The Environmental Guidelines required Union to identify all potentially impacted Aboriginal groups and to provide them with detailed information about the Project. Union did this, including providing copies of the

[27] As noted above, almost the entire Project will be built on existing road allowances or private property. The Environmental Report did not identify any significant environmental concerns with respect to the Project.

Environmental Report, in January 2011 to local agencies, municipalities, First Nations and Metis Nation (which was prior to the filing of the application with the Board). Union was required to seek comments from the Aboriginal groups, which it did. Had any concerns been raised with Union, it would have been required to explain how these concerns were to be mitigated or accommodated (or if they weren't, then explain why not).

The Board required Union to provide direct notice of the current proceeding to potentially impacted Aboriginal groups. Those Aboriginal groups were free to intervene in the proceeding, although they did not seek to do so until after the evidentiary phase of the proceeding had closed. Had they intervened when the notice was issued, they would have had every opportunity to file interrogatories on the Union's evidence, including the Environmental Report. They could have filed their own evidence respecting any potential impacts arising from the Pipeline Project. They could have made submissions to the Board with respect to the potential infringement of any Aboriginal or treaty rights. Although they did not avail themselves of these opportunities, that is not a failing of the process that has been established by the Environmental Guidelines.[28]

In Taku, it was held that an existing environmental assessment process, which specifically set out a scheme with respect to Aboriginal consultation, was a suitable vehicle for discharging the duty to consult. The Board finds that the same reasoning applies in this case: the Environmental Guidelines (which serve as the environmental assessment in this case) set out explicit requirements with respect to Aboriginal consultation. To the extent that an Aboriginal group believes that there are outstanding potential impacts to Aboriginal or treaty rights that are not appropriately identified or addressed by the Environmental Report, they are free to respond to the Board's notice and bring these concerns to the Board through the ordinary hearing process. The Board is well placed to assess the adequacy of the consultation, and where appropriate, accommodation.

In addition to the Board's approval, Union requires various permits from various Crown ministries to build the pipeline. Although the relevant approval authorities may undertake some level of consultation with Aboriginal groups in respect of those permits, the Board finds that it is not its role to assess whether any consultation for individual permits is adequate. The Board has approval authority for the Pipeline Project as a

[28] See Brokenhead, para 42 (quoted in full above).

whole. The permits required by Union relate to discrete portions or elements of the Pipeline Project. These permits are required from a number of different ministries, none of whom have authority over the Pipeline Project as a whole. In addition, the Board has no actual authority over these permits (although it is a standard condition to all leave to construct approvals that all necessary permits be obtained prior to the commencement of construction). Although the Board recognizes that the facts situations are not identical, the Supreme Court discussed this issue in Haida. It concluded that the duty to consult is best addressed at a strategic planning level as opposed to the permitting stage. The Board finds that the same logic applies in the current case, and that the process outlined by the Environmental Guidelines is a better forum for addressing the duty to consult for the Pipeline Project as a whole than any process that may be associated with the granting of various individual permits. Any Board review of the permitting process would represent, as stated in Brokenhead: "a repetitive and essentially pointless exercise. Except to the extent that Aboriginal concerns cannot be dealt with, the appropriate place to deal with project-related matters is before the [tribunal] and not in a collateral discussion with either the GIC or some arguably relevant Ministry."[29]

Land Claims

The Board accepts that there are some issues with respect to Aboriginal or treaty rights that cannot be properly addressed through the Board's process. Aboriginal land claims, for example, fall outside the Board's jurisdiction. In Brokenhead, the court came to the same conclusion:

> [The NEB's] regulatory processes appear not to be designed, however, to address the larger issues of unresolved land claims. As already noted in these reasons, the NEB and the corporate respondents have acknowledged that obvious limitation. … It follows from this that the NEB process may not be a substitute for the Crown's duty to consult where a project under review directly affects an area of unallocated land which is the subject of a land claim or which is being used by Aboriginal peoples for traditional purposes.[30]

[29] Brokenhead, para. 42.
[30] Brokenhead, paras. 27 and 29.

Rio Tinto is also clear that a tribunal's ability to consider duty to consult issues is limited by its jurisdiction. At paragraph 69 of the decision, the Supreme Court observed: "The power to decide questions of law implies a power to decide constitutional issues **that are properly before it** …" (Emphasis added). The Supreme Court then cited the Conway case with approval: "specialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates."[31] The Board does not, of course, have any power to resolve any land claims. LSFN has advised the Board that it is in the process of filing a specific claim with the federal government relating to lands near Bruce Lake, though it did not yet know if the proposed Project would cross any of those lands.[32] Any concerns with respect to the resolution of underlying land claims cannot lie properly before the Board.

> **B. Question 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)?

The relationship between the Crown conduct in question and the potential adverse impact has been discussed in a number of cases. The Crown conduct in question is the Board's (potential) approval of the Project. The law appears to be settled that the conduct in question must bear a causal connection to the potential infringement. In Rio Tinto, the Court stated: "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."[33] The Court continued:

> The respondent's submissions are based on a broader view of the duty to consult. It argues that even if the 2007 EPA will have no impact on the Nechako River water levels, the Nechako fisheries or the management of the contested resource, the duty to consult may be triggered because the 2007 EPA is part of a larger hydro-electric project which continues to impact its rights. The effect of

[31] Rio Tinto, para. 69.
[32] Oral submissions of LSFN, transcript pp. 42-43.
[33] Rio Tinto, para. 49.

> this proposition is that if the Crown proposes an action, however limited, that relates to a project that impacts Aboriginal claims or rights, a fresh duty to consult arises. The current government action or decision, however inconsequential, becomes the hook that secures and reels in the constitutional duty to consult on the entire resource.
>
> I cannot accept this view of the duty to consult. *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.[34]

The suggestion from the First Nations intervenors that the Board must consider potential impacts from different projects that could ultimately be enabled by the gas pipeline is problematic for a number of reasons. The evidence on the record is that the primary purpose of the Project is to reduce energy costs and provide the opportunity for gas driven electric generation at the Red Lake Gold Mines[35]. A secondary purpose to the Project (phase 2, which is contingent on additional funding being obtained) is to provide natural gas service to the communities of Red Lake, Balmertown, Cochenour, and Chukani River Subdivisions[36]. The Board accepts that additional development, whether at the Red Lake Gold Mines or local communities, could be facilitated by the Project; however this does not appear to be the purpose of the Project. Regardless, the possibility of future development would be a very difficult issue for the Board to consider. There are innumerable projects that could in theory be enabled by a new gas pipeline, and such projects could be initiated well into the future. These are not potential impacts from the current decision before the Board. There is no practical manner in which the Board could consider such undefined possible developments in a meaningful way. Potential impacts from such possible developments are too remote to

[34] Rio Tinto, paras. 52-53 (emphasis in original).
[35] Pre-filed evidence, Project Summary, p. 1 of 18.
[36] Pre-filed evidence, Project Summary, p. 1 of 18.

be considered in the current application – in other words there is not a sufficient causal link.

More importantly, the Board would have no jurisdiction whatsoever over such projects. The Board accepts that it has the responsibility to consider the duty to consult relating to matters within its jurisdiction. In Rio Tinto, the Court stated:

> The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power (*Conway*, at para. 81; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55 (CanLII), 2003 SCC 55, [2003] 2 S.C.R. 585, at para. 39). "[S]pecialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates": *Conway*, at para. 6.[37]

The Board's power to consider questions of law comes from section 19(1) of the Act: "The Board has in all matters **within its jurisdiction** authority to hear and determine all questions of fact and law." (Emphasis added). The Board's ability to consider Constitutional issues (such as section 35 issues) is therefore limited to matters that fall within the Board's jurisdiction. The Pipeline Project lies firmly within the Board's jurisdiction. Any possible future development at the Red Lake Gold Mines or in the District of Kenora do not.

For these reasons, the Board finds that the scope of its review in this case is confined to potential impacts from the Pipeline Project itself. The Board will not consider potential impacts from other projects over which the Board has no authority which may some day be served by the Pipeline Project.

C. Question 3 - Can the Crown impliedly delegate the duty to consult to a private proponent?

[37] Rio Tinto, para. 69.

All parties were in agreement that the ultimate responsibility to ensure the duty to consult is satisfied lies with the Crown, although procedural aspects may be delegated to private proponents. Several parties referred to the Haida decision, where the Supreme Court stated:

> The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. … However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.[38]

Union filed with the Board a letter a letter dated June 17, 2011, addressed to counsel for the Grand Council and signed by the Ontario Ministry of Natural Resources, the Ontario Ministry of Transportation, and the Ministry of Tourism and Culture (collectively the "Crown Ministries"). In this letter, the Crown Ministries indicated that procedural aspects of the consultation with respect to Project had been delegated to Union through the Board's Environmental Guidelines. The letter further described additional contact the Crown Ministries had had with potentially affected Aboriginal Groups, in particular with reference to certain permits Union had obtained (for example for access to highway rights of way).

Given the Board's findings above, it is not necessary to address Question 3 in additional detail. The Board has held that the duty to consult with respect to the Pipeline Project itself can be addressed through the Environmental Guidelines and the Board's hearing process. Certain procedural aspects of the duty have been delegated to the proponent through the Environmental Guidelines.

D. Need for further process?

The case law is clear that consultation must be between willing participants. It is not open to either the Crown or the potentially affected Aboriginal groups to frustrate good faith attempts at consultation. As the Court observed in Haida:

[38] Haida, para. 53.

> At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised, through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached. Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.[39]

Union formally notified the First Nations about the project in October 2010. It later provided the Environmental Report and sought comments. Union made several attempts to follow-up with these requests for comments. To date, none of the First Nations appear to have identified to Union any specific concerns with respect to impacts arising from the Pipeline Project itself (although WFN apparently did contact Union with respect to general concerns regarding a lack of Crown consultation with respect to the Project).

The notice for this proceeding was served directly on the First Nations on March 23, 2011. Not until May 5, 2011 – after the close of the evidentiary phase of the proceeding - did the Grand Council first contact the Board with any concerns about the Project. LSFN and WFN did not seek to intervene until June 9 and June 17 respectively.

The Board recognizes that many First Nations may not have sufficient resources to respond immediately to each and every request for comments or notice that falls across their desks. However, in the current case there seems to be little to no satisfactory explanation for the extended delay. Although LSFN has informed the Board of a pending land claim on Bruce Lake, this was known to LSFN when it received the Environmental Report and the Notice. There seems to be little question that the First Nations were aware of the Pipeline Project by late 2010, and of the Board's proceeding by March of 2011.

[39] Haida, para. 42 (citations omitted).

The Board is also sympathetic to the concerns of Union and Goldcorp regarding any further delay in this process. Union has followed all of the Board's directions. The Board recognizes that the construction season in the District of Kenora is a short one, and that further delay may mean that construction of the Project cannot commence until 2012. Undoubtedly this would lead to additional expense for Union and Goldcorp.

In addition, the letters of intervention filed on behalf of the First Nations did not identify any specific concerns regarding impacts from the Pipeline Project itself. The First Nations clearly articulate a concern that there has been inadequate Crown consultation with respect to the Pipeline Project; however, given the findings above that the Environmental Guidelines and the Board's process can serve (or could have served) as Crown consultation for the Project, this argument has essentially already been rejected by the Board. The Grand Council in particular also argued in its letter dated May 30, 2011 that potential increased development that could be enabled by the Pipeline Project may have impacts on Aboriginal or treaty rights. Given the Board's findings with respect to question 2, however, any such possible impacts are outside the scope of the Board's review. As discussed in further detail below, the Board is satisfied that the application (in particular the Environmental Report) has demonstrated that there will be little if any significant adverse environmental or socio-economic impacts resulting from the Pipeline Project. The pipeline will be buried, and the great majority of it will be constructed along an existing road allowance - in other words on land that is already disturbed. No specific potential impacts to any existing Aboriginal rights to, for example, hunting, fishing or harvesting have been identified.

The Board has therefore determined that it will not re-open the record and that no additional process is required in this hearing, and will proceed now to consider the evidence on the record and make a determination with respect to the applications.

III. LEAVE TO CONSTRUCT DECISION, MFA DECISION, AND CERTIFICATE DECISION

Pipeline Project Description

The Phase I facilities (also known as the Red Lake Lateral) will commence at Union's existing facilities at the Bruce Lake Mine site located in the Township of Ear Falls, and will proceed for about 43.6 km along the Highway 105 until it reaches the intersection of Highway 105 and Highway 125 called Harry's Corner. From Harry's Corner the NPS 8

pipeline will continue north along Highway 125 for 6.4 kilometres and then continue across Goldcorp land for 1.15 km to connect to the Balmertown mine complex. The pipeline will continue as NPS 4 for about 1.1 kilometres northeast along Highway 125 and run for additional 5.6 km as NPS 4 to the Cochenour Mine Site.

Phase II of the expansion will provide distribution pipe into the Municipality of Red Lake. It will involve constructing distribution pipelines to provide natural gas service to the residents and businesses of Red Lake, Balmertown, Cochenour, Chukuni River Subdivisions. The following distribution pipelines are proposed for the Phase II: about 2 km (1,934 m) of steel NPS 4 pipe; about 60 metres of steel NPS 2 pipe; about 5 km (5,175 m) of plastic NPS 4 pipe; and about 40 km (39, 232 m) of plastic NPS 2 pipe. (As described above, collectively Phase I and Phase II are referred to in this decision as the "Pipeline Project").

The Board approves the proposed routing for Phase I and Phase II and finds that the approval of Franchise Agreement and the CPCN will provide for the Phase II distribution system expansions by Union within the municipal road allowances.

The Board approves the Leave to Construct application, subject to two separate sets of conditions to address the two phases of this project: (i) Phase I conditions and (ii) Phase II conditions. The conditions encompass both standard conditions of approval for Leave to Construct applications as well as project specific conditions associated with unique features of each phase of the project. The Board's Decision with Reasons is set out below.

The Public Interest Test

The leave to construct application is filed under section 90 of the Act. Section 96 of the Act provides that the Board shall make an order granting leave to construct if the Board finds that "the construction, expansion or reinforcement of the proposed work is in the public interest". The Board is further guided by its objectives with respect to natural gas, which are found in section 2 of the Act. When determining whether a project is in the public interest, the Board typically examines the need for the project, the economics, impact on the ratepayers, environmental impacts, the impact on land owners and pipeline design technical requirements. The Board has considered the following issues:

- Is there a need for the proposed pipeline?

- Are there any undue negative rate implications for Union's existing rate payers caused by the construction and operation of the proposed pipeline?

- Are there any outstanding landowner matters for the proposed pipeline routing and construction?

- Is the pipeline designed in accordance with the current technical and safety requirements?

- What are the environmental impacts (which may include Aboriginal issues) associated with construction of the proposed pipeline and are they acceptable?

Board findings on each of these issues are given below.

Project Need

The need for the phased project is two-fold: Phase I need is to serve the mining operations of Goldcorp (owner of Red Lake Gold Mines); and Phase II need is to serve the residents and small businesses of the Municipality of Red Lake.

Union planned and designed the Red Lake Lateral capacity above the demand of the Goldcorp operations alone to provide for the anticipated capacity needed for Phase II of the Project. The capacity of the proposed Phase I facilities is 13,961 m^3/h. It is expected that Goldcorp will use 72% while the residents and small businesses in Red Lake will use 28% of the Phase I capacity after Phase II has been constructed.

For the Goldcorp mining operations, the primary benefit is described as better energy cost-effectiveness as natural gas would be replacing other energy types currently in use. The evidence also describes the benefits of the potential for developing gas-driven electricity generation to serve the mining operations. Other project benefits identified by Union are: reduced air emissions, payment of utility taxes to various levels of government, and the generation of employment opportunities.

Goldcorp and Union entered into two (2) ten-year Northern Gas Distribution Contacts. Also, Goldcorp is committed to paying a significant capital contribution towards the construction of Phase I. In a letter to the Board dated March 23, 2011, Goldcorp confirmed the need for the Project, benefits of energy cost savings at its Red Lake mining operations and asked that the Board expeditiously approve the Project.

With respect to the need for Phase I, the Board finds that there is sufficient evidence supporting the need for the project.

Phase II of the Project will provide gas service to the residents and businesses of Red Lake. Phase II is anticipated to provide lower heating and energy costs for the residential and commercial customer groups. The Red Lake municipal council and several members of the general public have expressed their support for the project.

Red Lake City Council passed the by-law to authorize a franchise agreement between itself and Union Gas Limited (By-Law No. 1409-10). In support of the need for the Phase II expansion, Union cited a September 2010 residential survey conducted by Ipsos Reid that indicated that 60% of residents would likely switch to natural gas heating if available. The current energy sources for heating homes in Red Lake are largely propane, fuel oil and electricity. Union also obtained a survey of commercial facilities in Red Lake from Clow Darling consultants in September 2010. About 65% of the respondents (150 surveys were completed) expressed some interest in converting to natural gas heating systems, mostly within the first 12 months. In addition to these surveys, Union provided in evidence (Schedule 2, page 1) a Phase II forecast of customer attachments. By the end of the tenth year a total of 1,221 residential and 206 commercial customer attachments are forecasted.

With respect to Phase II, the Board is satisfied that there is a need to supply gas to the Red Lake. The Board notes that letters of support for the project are from the Municipality of Red Lake and businesses in the Municipality which would be directly affected by the Phase II of the project.

Project Economics and Financing

The Board finds no undue negative rate implications for Union’s rate payers caused by the construction and operation of the proposed pipelines in Phase I and Phase II.

Phase I Economics

The estimated capital cost for Phase I is $27.3 million.

The Phase I Union's discounted cash flow analysis indicates a contribution in aid of construction ("CIAC") is required to allow the Project to reach a profitability index of 1 (PI=1). A PI of 1 means that the Project is economically feasible on a stand-alone basis. It is also an indication that the existing ratepayers of Union will not be negatively financially impacted by the project. The CIAC was calculated at $25.6 million and Goldcorp has committed to make this funding contribution. The relatively large CIAC indicates that Goldcorp is willing to assume most of the Project's associated financial risk. Union's existing ratepayers would be exposed to only Union's portion of funding of $1.7 million. The analysis is appropriately based on the Board's E.B.O. 188 guidance. On a "stand alone basis" Phase I project is feasible [cost effective?](with a PI=1) given the capital contribution by the Goldcorp.

The Board accepts Union's evidence that this amount is not material nor will Union's ratepayers bear any significant financial risks with Phase I.

The Board notes that, according to the evidence, Goldcorp has agreed to provide the full required amount of the CIAC for Phase I construction, with a caveat that an amount of $7.0 million of that contribution be re-paid to Goldcorp by the Municipality prior to Phase II construction.[40]

The Board concludes that the project is economically feasible and poses no significant risk to Union nor will it impose any undue negative rate implications to existing rate payers.

On March 11, 2011, Goldcorp signed two ten year contracts with Union for natural gas service. The first is a Rate 10 contract for the Cochenour Complex and the second is a Rate 20 contract for the Balmertown complex. Both contracts are filed on the record. The Rate 20 contract will be upgraded to a Rate 100 on November 1, 2014 when Goldcorp has all of its new gas generation facilities in place. The contracts outline the

[40] The Red Lake Council Resolution attached by Union in response to IR # 16, contains a statement that the $7.0 million advance payment "is at Goldcorp's risk".

CIAC payment schedule by Goldcorp to Union and set the rate which is the revenue basis incremental to the project.

The Board is aware that the actual costs will not be available until the project is completed and for this reason, the following condition is attached to Board approval of Phase I:

1.6 Within 18 months of the final Phase I in-service date, Union shall file with the Board Secretary a Post Construction Financial Report. The Report shall indicate:

a) the actual capital costs of the project and an explanation for any significant variances from the estimates filed in this proceeding.

b) the actual capital costs for the project borne by Union and the actual costs contributed towards construction by Goldcorp including the method and the actual cost inputs used to determine the final amount of the contribution by Goldcorp.

The complete list of conditions to the Board's approval is attached as Appendix C, Schedules 1 and 2.

Phase II Economics

Phase II has an estimated capital cost of $12 million. The Phase II project requires a CIAC of $4.9 million to elevate it from a PI of 0.64 to a PI of 1 on a stand-alone basis. Red Lake would therefore be required to contribute $4.9 million in addition to the $7.0 million "loan" repayment to Goldcorp for the Phase I CIAC that it made on the municipality's behalf. The Board notes that this means the Municipality must secure a total of $11.9 million in funding contributions in order for Phase II to proceed (i.e., $4.9 plus $7.0). Red Lake in the Resolution of the Council of the Municipal Corporation, filed on the record and dated November 20, 2010, has indicated that it is seeking funds from government sources but did not provide any other details.

For transparency reasons and to complete the evidence and the record, the Board would request that Union file future documentation underpinning the CAIC from Red

Lake to Union. This requirement is reflected in the following condition of approval for Phase II:

1.7 Prior to construction of gas facilities for Phase II and the operation of such facilities, Union shall file with the Board documentation, including a full disclosure of any financial arrangements, including those related to contributions in aid of construction from the Municipality of Red Lake or any other party. Union shall file these documents with the Board at the same time as they are executed.

Union has used a P.I. of 1 in its analysis of the capital contribution required for Phase II. The Board notes that the gas utilities have some discretion under EBO 188 to determine the economic feasibility of individual expansions projects while maintaining a positive investment portfolio. Under EBO 188 a P.I. of 1 is not required for attaching new communities and the minimum profitability threshold for individual projects of this nature may be a P.I. of 0.8.

To ensure that that there is no potential for significant cross subsidy of the Red Lake distribution expansion by its other customers the Board imposes the following condition of approval for Phase II:

1.8 Prior to construction commencement, with respect to Phase II, Union shall file with the Board, as soon as the inputs are available, the Discounted Cash Flow analysis, on stand-alone basis, with Net Present Value and Profitability Index, completed in accordance with the requirements and methodology set in the Ontario Energy Board's EBO 188 Report.

The Board is aware that the actual costs will not be available until the project is completed and for this reason, the following condition is attached to Board approval of Phase II:

1.9 Within 15 months of the final Phase II in-service date, Union shall file with the Board Secretary a Post Construction Financial Report. The Report shall indicate:

a) the actual capital costs of the project Phase II and an explanation for any significant variances from the estimates filed in this proceeding.

b) the actual capital costs for the project borne by Union

and the actual costs contributed towards construction including the method and the actual cost inputs used to determine the final amount of the contributions.

Union requested that there should be no construction start date or termination date attached as a Board condition of approval for either Phase I or Phase II. Board staff did not agree with this request. In Board staff's submission, matters such as Leave-to-Construct new facilities should not be left open-ended because facts and circumstances related to construction projects change over time and for this reason, the Board should issue approvals within a reasonable and certain timing window. Board staff proposed a condition of a 3-year termination date of approval of construction start for Phase II meaning that it would expire on December 31, 2014. The Board agrees with the Board staff proposal and notes that Union did not object to this timeline in its reply submission. Therefore the Board attached the following condition to its approval for Phase II:

1.2 Unless otherwise ordered by the Board, authorization for Leave to Construct Phase II shall terminate on December 31, 2014, unless construction has commenced prior to that date.

Land Matters

Pipelines for both Phase I and Phase II of the Pipeline Project will be located mainly within road allowances except for a few short sections on private lands which require easement agreements with landowners.

The Red Lake Lateral will be constructed within the road allowance of Highway 105 with the exception of a 1.7 kilometre section from the Bruce Lake Mine site to the Highway 105 right-of-way at the starting point of the Red Lake Lateral.

Most of Phase II pipelines will be located within road allowances. Union indicated that due to the physical layout of the Red Lake area, easements may be required on private land as final pipeline running lines are determined.

Pursuant to section 97 of the OEB Act, Union has to satisfy the Board that it "has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board." The Board approves a form of easement that Union that Union filed and that Union will offer to all landowners when negotiating

easement rights for Phase I and Phase II of the project. The Board specified this requirement in the following condition for both Phase I and Phase II.

4.1 Union shall offer the form of agreement approved by the Board to each landowner, as may be required, along the route of the proposed work.

Pipeline Design Specifications

According to Union's evidence the design, installation, and testing of the pipelines will conform to the requirements of *Ontario Regulation* 210/01 under the *Technical Standards and Safety Act 2000, Oil and Gas Pipeline Systems.*

Union confirmed that all steel pipelines will be manufactured by the electric resistance welding process in accordance with the *Canadian Standards Association 2245.1-07 Steel Line Pipe Standard for Pipeline Systems and Materials.* Union also confirmed that all polyethylene pipe and fittings will be manufactured and certified in accordance with the *Canadian Standards Association B137.4-09 Polyethylene (PE) Piping systems for Gas Services.*

The minimum depth of cover to the top of the pipe and pipe appurtenances will be in accordance with the requirements of Clause 4.11 of the *CSA Code 2662-07* for steel piping and Clause 12.4.7 of the *CSA Code 2662-07* for polyethylene piping. Additional depth will be provided to accommodate existing or planned underground facilities, or where greater depth of excavation is warranted.

Union indicated that it will provide inspection staff to enforce Union's construction specifications and Ontario Regulation *210/01* under the *Technical Standards and Safety Act 2000, Oil and Gas Pipeline Systems.*

The Technical Standards Safety Authority ("TSSA") has reviewed and accepted the design and pipe specifications for the Project. A copy of correspondence from TSSA is on the record.

In Board's view Union's evidence demonstrates that the proposed pipelines for both Phase I and Phase II are designed in accordance with the requirements of Ontario Regulation 210/01, Oil and Gas Pipeline Systems, under the Technical Standards and Safety Act, 2008 and the CSA Z662-07 Oil and Gas Pipeline Systems standard. The

Board notes that the TSSA reviewed the pipeline design specification and did not raise any issues regarding the construction and operation of the pipelines. The TSSA is the agency primarily responsible for implementation of pipeline design and safety requirements.

Environmental Matters

An environmental assessment and routing study was completed by Union's Environmental Planning Department with an environmental information report prepared by the independent consulting firm of KBM Forestry Consultants Inc. Union filed its environmental report entitled "Red Lake Pipeline Project, Environmental Protection Plan" dated December 2010 (this report has been defined above as the "Environmental Report") as Schedule 13 in the pre-filed evidence.

The Environmental Report was submitted to the Ontario Pipeline Co-ordination Committee (OPCC) for review on January 21, 2011. Copies of the Environmental Report were also submitted to local agencies, municipalities, First Nations and Métis Nation. Union conducted a community information session on November 25, 2010 at the Heritage Centre in Red Lake as part of the environmental assessment process.

Union confirmed that the Environmental Report covers Phase I and Phase II pipelines and addresses the following areas: watercourse crossings, archaeology, water wells, blasting, environmental protection areas, hazard land, species at risk and mitigation.

There are 32 watercourses associated with both phases of the Project.
Union stated it would adhere to the agreement with the Department of Fisheries and Oceans ("DFO"), Ontario Great Lakes Area, 2008. This agreement allows Union to Union conduct watercourse crossings under a specific set of conditions and mitigation measures without DFO review.

Union indicated that bedrock is located along the proposed routes for both Phase I and Phase II. Union anticipates that blasting will be required during the construction along the most of the length of the pipeline routes for both phases, with mechanical removal methods in some locations. Union included in the evidence as Schedule 12 "Specifications for Rock Excavation" with detailed specifications for blasting.

Union confirmed that it will follow its standard rock removal specifications in Schedule 12 and additional recommendations outlined in the ER for rock removal. The Board

includes a condition for approval of both Phase I and Phase II to address blasting procedures during construction:

1.4 During construction, Union will apply its “Specification for Rock Removal” in Schedule 12 of the pre-filed evidence and any other applicable municipal, provincial, and national regulations or standards applicable to blasting and mechanical rock removal.

The ER includes Union’s plan to develop a water well monitoring program in consultation with an independent hydrogeologist. The Board expects Union’s full implementation of this program.

As the Phase II construction start can occur within several years Union proposed that it update the ER by completing an environmental screening as set in the EBO 188. The Board agrees that the environmental screening methodology would be appropriate because the Phase II pipelines, in terms of the design, location and size, can be considered distribution system expansion pipelines which are addressed in EBO 188. Accordingly, the Board included the following condition in the Phase II approval:

1.5 Prior to Phase II construction start, Union shall file with the Board a report on the environmental screening conducted pursuant to “Environmental Screening Principles for Distribution System Expansion Projects by Ontario Natural Gas Utilities” as outlined in the Ontario Energy Board’s E.B.O. 188 Report.

According to Union’s evidence Union will have to obtain all required additional environmental and construction approvals prior to construction of Phase I and Phase II. The Board includes a condition 5.1 addressing this matter, for both Phase I and Phase II, as follows:

5.1 Union shall obtain all other approvals, permits, licences, and certificates required to construct, operate and maintain the proposed project, shall provide a list thereof, and shall provide copies of all such written approvals, permits, licences, and certificates upon the Board’s request.

Generally, the Board has no concerns regarding the environmental matters related to Phase I and Phase II given Union’s commitment to implementing all the plans and

measures in the pre-filed evidence and its adherence to the proposed conditions of approval for both Phase I and Phase II.

Conclusions

For the reasons presented above the Board finds that leave to construct Phase I and Phase II of the proposed Pipeline Project, the approval of the Municipal Franchise Agreement with Red Lake and the issuance of the Certificate of Public Convenience and Necessity are in the public interest. Further, in all the circumstances, the assent of the municipal electors with respect to the Municipal Franchise Agreement can properly be dispensed with.

The Board's Orders with respect to the Leave to Construct Application, the Municipal Franchise and the Certificate of Public Convenience and Necessity are attached as Appendix C, D and E respectively.

DATED at Toronto, July 25, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX “A”

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

Union Gas Limited

List of Parties

Union Gas Limited
EB-2011-0040/EB-2011-0041/EB-2011-0042

APPLICANT & LIST OF INTERVENORS

July 25, 2011

APPLICANT	**Rep. and Address for Service**
Union Gas Limited	**Mark Murray** Manager, Regulatory Projects and Lands Acquisition Union Gas Limited 50 Keil Drive North Chatham, ON N7M 5M1 Tel: 519-436-4601 Fax: 519-436-4641 UNIONregulatoryproceedings@uniongas.com

APPLICANT COUNSEL	
	Dan Jones Assistant General Counsel, Legal Department Union Gas Limited 50 Keil Drive North Chatham ON N7M 5M1 Tel: 519-436-5396 Fax: 519-436-5218 dxjones1@uniongas.com

INTERVENORS	**Rep. and Address for Service**
Goldcorp - Red Lake Gold Mines	**Andrew Moshoian** Goldcorp Canada Ltd. 130 Adelaide Street West Suite 3201 Toronto ON M5H 3P5 Tel: 416-363-4229 Fax: 416-363-5950 Andrew.Moshoian@goldcorp.com

Union Gas Limited
EB-2011-0040/EB-2011-0041/EB-2011-0042

APPLICANT & LIST OF INTERVENORS

- -

July 25, 2011

Goldcorp - Red Lake Gold Mines

William Burden

Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
Toronto ON M5H 3C2
Tel: 416-869-5963
Fax: 416-640-3019
bburden@casselsbrock.com

Goldcorp Inc. - Red Lake Mine

Patrick Boileau

Windeau Investments Inc.
771 Hilldale Road
Thunder Bay ON P3G 2J1
Tel: 807-627-7420
Fax: Not Provided
pboileau@windeau.com

Curtis Pedwell
Goldcorp Inc. - Red Lake Mine
Bag 2000
Balmertown ON P0V 1C0
Tel: 807-735-2077 Ext: 5118
Fax: Not Provided
curtis.pedwell@goldcorp.com

Ian Blue
Gardiner Roberts LLP
Suite 3100, Scotia Plaza
40 King St. W.
Toronto ON M5H 3Y2
Tel: 416-865-2962
Fax: 416-865-6636
iblue@gardiner-roberts.com

Union Gas Limited
EB-2011-0040/EB-2011-0041/EB-2011-0042

APPLICANT & LIST OF INTERVENORS

July 25, 2011

Janes Freedman Kyle

Robert Janes
Janes Freedman Kyle
1175 Douglas Street
Suite 816
Victoria BC V8W 2E1
Tel: 250-405-3460
Fax: Not Provided
rjanes@jfklaw.ca

Grand Chief Diane Kelly
Janes Freedman Kyle
1175 Douglas Street
Suite 816
Victoria BC V8W 2E1
Tel: 250-405-3460
Fax: Not Provided
grand.chief@treaty3.ca

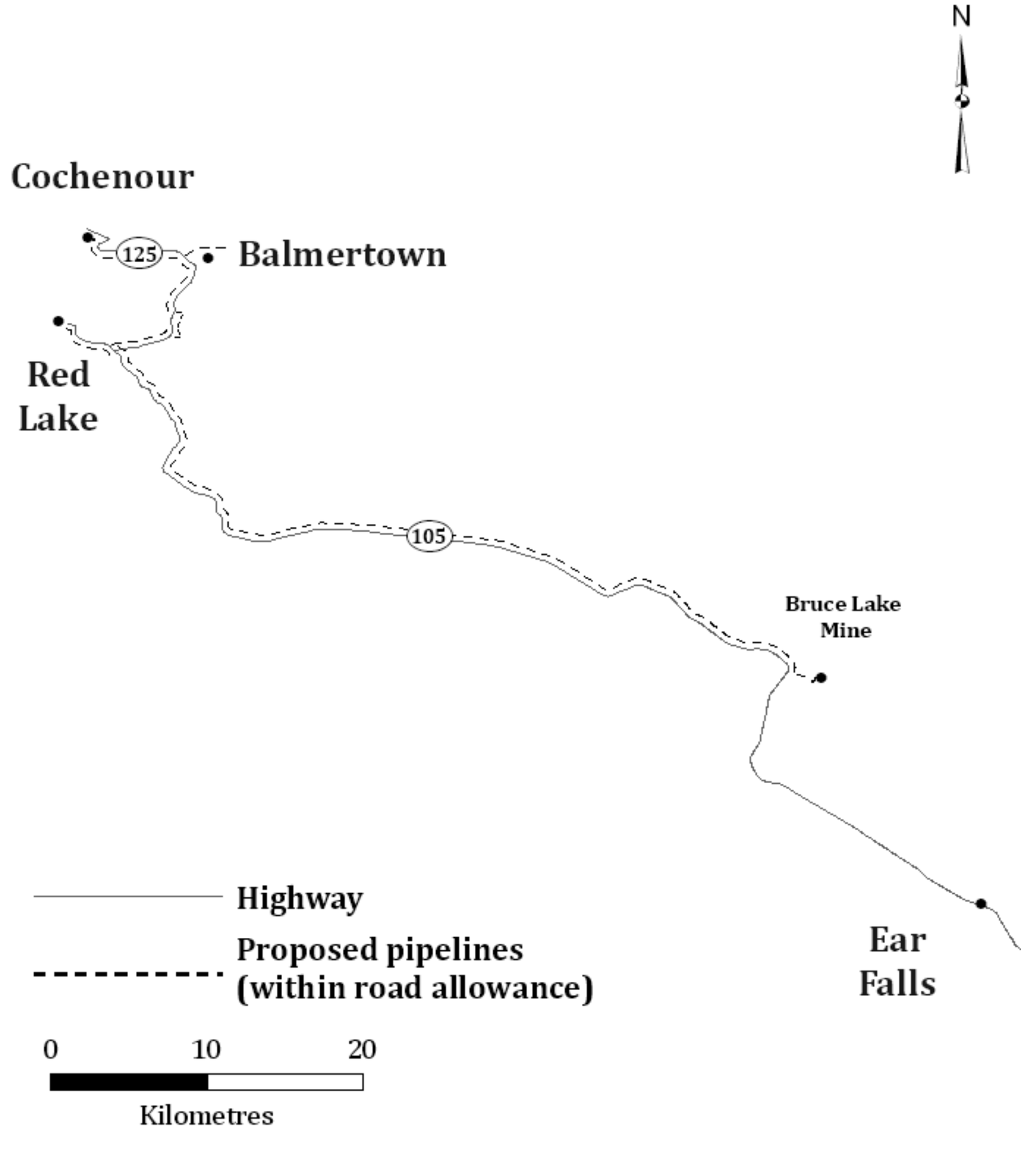
Lac Seul First Nation (LSFN)

William Major
Keshen & Major
Suite 200-120 Second Street South
Kenora ON P9N 1E9
Tel: 807-469-3073
Fax: 807-468-4893
wjmajor@mac.com

APPENDIX “B”

MAP OF THE RED LAKE PROJECT

Schedule A


N
Cochenour
125
Balmertown
Red
Lake
105
Bruce Lake
Mine
Ear
Falls
Highway
Proposed pipelines
(within road allowance)
0
10
20
Kilometres

APPENDIX “C”

LEAVE TO CONSTRUCT ORDER

RED LAKE PROJECT

EB-2011-0040

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2011-0040

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c.l5, 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.

BEFORE: Marika Hare, Presiding Member

Paula Conboy, Member

LEAVE TO CONSTRUCT ORDER

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

The Board issued a Notice of Applications and Hearing ("Notice") on March 8, 2011. Union served and published the Notice as directed by the Board. The Board proceeded by way of written hearing.

On July 25, 2011 the Board issued a Decision with Reasons approving all the applications sought by Union under Board File Nos. EB-2011-0040; EB-2011-041; and EB-2011-0042. This leave to construct order is issued in accordance with the Board's July 25, 2011 Decision with Reasons.

For the reasons set out in the July 25, 2011 Decision with Reasons, the Board finds that the pipeline project being proposed by Union in this proceeding is in the public interest and grants the leave to construct subject to the conditions for Phase I and Phase II of the project set out in Schedule 1 and Schedule 2 respectively.

THE BOARD ORDERS THAT:

1. Union Gas Limited is granted leave, pursuant to subsection 90 (1) of the Act, to construct approximately 43.6 km of nominal pipe size ("NPS") 8 (eight inch diameter) natural gas pipeline and of 4 sections of NPS 8 and NPS 4 pipelines delivering gas to Goldcorp Inc.'s mine sites in Balmertown and Cochenour in the Municipality of Red Lake and the Township of Ear Falls, both in the District of Kenora, subject to the conditions of approval set forth in Schedule 1.

2. Union Gas Limited is granted leave, pursuant to subsection 90 (1) of the Act, to construct approximately 2 km (1,934 m) of steel NPS 4; approximately 60 metres of steel NPS 2; approximately 5 km (5,175 m) of plastic NPS 4; and approximately 40 km (39, 232 m) of plastic NPS 2 natural gas pipelines in the Municipality of Red Lake in the District of Kenora subject to the conditions of approval set forth in Schedule 2.

3. Union Gas Limited shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

DATED at Toronto, July 25, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Wali
Board Secretary

Schedule 1- Conditions of Approval Phase I

Union Gas Limited
Leave to Construct Application
EB-2011-0040

1 General Requirements

1.1 Union Gas Limited ("Union") shall construct the facilities and restore the land in accordance with its application and the evidence filed in EB-2011-0040 except as modified by this Order and these Conditions of Approval.

1.2 Unless otherwise ordered by the Board, authorization for Leave to Construct Phase I shall terminate on December 31, 2011, unless construction has commenced prior to that date.

1.3 Union shall implement all the recommendations of the Environmental Report filed in the pre-filed evidence, and all the recommendations and directives identified by the Ontario Pipeline Coordinating Committee ("OPCC") review.

1.4 During construction, Union will apply its "Specification for Rock Removal" in Schedule 12 of the pre-filed evidence and any other applicable municipal, provincial, and national regulations or standards applicable to blasting and mechanical rock removal.

1.5 Union shall advise the Board's designated representative of any proposed material change in construction or restoration procedures and, except in an emergency, Union shall not make such 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.

1.6 Within 18 months of the final Phase I in-service date, Union shall file with the Board Secretary a Post Construction Financial Report. The Report shall indicate:

a) the actual capital costs of the project Phase I and an explanation for any significant variances from the estimates filed in this proceeding.

b) the actual capital costs for the project borne by Union and the actual costs contributed towards construction by the Goldcorp including the method and the actual cost inputs used to determine the final amount of the contribution by the Goldcorp.

2 Project and Communications Requirements

2.1 The Board's designated representative for the purpose of these Conditions of Approval shall be the Manager, Natural Gas Applications.

2.2 Union 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. Union shall provide a copy of the Order and Conditions of Approval to the project engineer, within seven days of the Board's Order being issued.

2.3 Union shall give the Board's designated representative and the Chair of the OPCC ten days written notice in advance of the commencement of the construction.

2.4 Union shall furnish the Board's designated representative with all reasonable assistance for ascertaining whether the work is being or has been performed in accordance with the Board's Order.

2.5 Union shall file with the Board's designated representative notice of the date on which the installed pipelines were tested, within one month after the final test date.

2.6 Union shall furnish the Board's designated representative with five copies of written confirmation of the completion of construction. A copy of the confirmation shall be provided to the Chair of the OPCC.

3 Monitoring and Reporting Requirements

3.1 Both during and after construction, Union shall monitor the impacts of construction, and shall file four copies of both an interim and a final monitoring report with the Board. The interim monitoring report shall be filed within six months of the in-service date, and the final monitoring report shall be filed within fifteen months of the in-service date. Union shall attach a log of all complaints that have been received to the interim and final monitoring reports. The log shall record the times of all complaints received, the substance of each complaint, the actions taken in response, and the reasons underlying such actions.

3.2 The interim monitoring report shall confirm Union's adherence to Condition 1.1 and shall include a description of the impacts noted during construction and the actions taken or to be taken to prevent or mitigate the long-term effects of the

impacts of construction. This report shall describe any outstanding concerns identified during construction.

3.3 The final monitoring report shall describe the condition of any rehabilitated land and the effectiveness of any 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.

Easement Agreements

4.1 Union shall offer the form of agreement approved by the Board to each landowner, as may be required, along the route of the proposed work.

5 Other Approvals

5.1 Union shall obtain all other approvals, permits, licences, and certificates required to construct, operate and maintain the proposed project, shall provide a list thereof, and shall provide copies of all such written approvals, permits, licences, and certificates upon the Board's request.

Schedule 2-Conditions of Approval Phase II
Union Gas Limited
Leave to Construct Application
EB-2011-0040

1 General Requirements

1.1 Union Gas Limited ("Union") shall construct the facilities and restore the land in accordance with its application and the evidence filed in EB-2011-0040 except as modified by this Order and these Conditions of Approval.

1.2 Unless otherwise ordered by the Board, authorization for Leave to Construct Phase II shall terminate on December 31, 2014, unless construction has commenced prior to that date.

1.3 Union shall implement all the recommendations of the Environmental Report filed in the pre-filed evidence, and all the recommendations and directives identified by the Ontario Pipeline Coordinating Committee ("OPCC") review.

1.4 During construction, Union will apply its "Specification for Rock Removal" in Schedule 12 of the pre-filed evidence and any other applicable municipal, provincial, and national regulations or standards applicable to blasting and mechanical rock removal.

1.5 Prior to Phase II construction start, Union shall file with the Board a report on the environmental screening conducted pursuant to "Environmental Screening Principles for Distribution System Expansion Projects by Ontario Natural Gas Utilities" as outlined in the Ontario Energy Board's E.B.O. 188 Report.

1.6 Union shall advise the Board's designated representative of any proposed material change in construction or restoration procedures and, except in an emergency, Union shall not make such 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.

1.7 Prior to construction of gas facilities for Phase II and the operation of such facilities, Union shall file with the Board documentation, including a full disclosure of any financial arrangements, including those related to contributions in aid of construction from the Red Lake or any other party. Union shall file these documents with the Board at the same time as they are executed.

1.8 Prior to construction commencement, with respect to Phase II, Union shall file with the Board, as soon as the inputs are available, the Discounted Cash Flow analysis, on stand-alone basis, with Net Present Value and Profitability Index,

completed in accordance with the requirements and methodology set in the Board's Report EBO 188.

1.9 Within 15 months of the final Phase II in-service date, Union shall file with the Board Secretary a Post Construction Financial Report. The Report shall indicate:

a) the actual capital costs of the project Phase II and an explanation for any significant variances from the estimates filed in this proceeding.

b) the actual capital costs for the project borne by Union and the actual costs contributed towards construction including the method and the actual cost inputs used to determine the final amount of the contributions.

2 Project and Communications Requirements

2.1 The Board's designated representative for the purpose of these Conditions of Approval shall be the Manager, Natural Gas Applications.

2.2 Union 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. Union shall provide a copy of the Order and Conditions of Approval to the project engineer, within seven days of the Board's Order being issued.

2.3 Union shall give the Board's designated representative and the Chair of the OPCC ten days written notice in advance of the commencement of the construction.

2.4 Union shall furnish the Board's designated representative with all reasonable assistance for ascertaining whether the work is being or has been performed in accordance with the Board's Order.

2.5 Union shall file with the Board's designated representative notice of the date on which the installed pipelines were tested, within one month after the final test date.

2.6 Union shall furnish the Board's designated representative with five copies of written confirmation of the completion of construction. A copy of the confirmation shall be provided to the Chair of the OPCC.

3 Monitoring and Reporting Requirements

3.1 Both during and after construction, Union shall monitor the impacts of construction, and shall file four copies of both an interim and a final monitoring report with the Board. The interim monitoring report shall be filed within six months of the in-service date, and the final monitoring report shall be filed within fifteen months of the in-service date. Union shall attach a log of all complaints that have been received to the interim and final monitoring reports. The log shall record the times of all complaints received, the substance of each complaint, the actions taken in response, and the reasons underlying such actions.

3.2 The interim monitoring report shall confirm Union's adherence to Condition 1.1 and shall include a description of the impacts noted during construction and the actions taken or to be taken to prevent or mitigate the long-term effects of the impacts of construction. This report shall describe any outstanding concerns identified during construction.

3.3 The final monitoring report shall describe the condition of any rehabilitated land and the effectiveness of any 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.

Easement Agreements

4.1 Union shall offer the form of agreement approved by the Board to each landowner, as may be required, along the route of the proposed work.

5 Other Approvals

5.1 Union shall obtain all other approvals, permits, licences, and certificates required to construct, operate and maintain the proposed project, shall provide a list thereof, and shall provide copies of all such written approvals, permits, licences, and certificates upon the Board's request.

APPENDIX "D"

MUNICIPAL FRANCHISE AGREEMENT

EB-2011-0041

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2011-0041

IN THE MATTER OF the *Municipal Franchises Act,* R.S.O. 1990, c. M.55, as amended;

AND IN THE MATTER OF an application by Union Gas Limited for an order approving the terms and conditions upon which, and the period for which, the Corporation of the Municipality of Red Lake is, by by-law, to grant to Union Gas Limited the right to construct and operate works for the distribution, transmission and storage of natural gas and the right to extend and add to the works in the Municipality of Red Lake;

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 to the by-law is not necessary.

BEFORE: Marika Hare
Presiding Member

Paula Conboy
Member

DECISION AND ORDER

Union Gas Limited ("Union") filed an application dated February 8, 2011 with the Ontario Energy Board (the "Board") under section 9 of the *Municipal Franchises Act*, R.S.O. 1990, c. M.55, as amended (the "Act"), for an order of the Board approving the terms and conditions upon which and the period for which the Corporation of the Municipality of Red Lake (the "Corporation") is, by by-law, to grant to Union the right to construct and operate works for the distribution of gas and the right to extend and add to the works in the Municipality of Red Lake (the "Municipality"). Union also applied for an order of the

Board declaring and directing that the assent of the municipal electors to the by-law is not necessary.

The Board assigned file number EB-2011-0041 to this application.

Union submitted a resolution passed by the Council of the Municipality on November 15, 2010, approving the form of the draft by-law and requesting that the Board declare and direct that the assent of the municipal electors to the by-law is not necessary.

The Board's Notice of Application and Hearing was published as directed by the Board. Goldcorp Inc. intervened in the proceeding but made no submissions on the application.

Union holds a Certificate of Public Convenience and Necessity for the Municipality, EB-2011-0042, issued on July 25, 2011.

The proposed franchise agreement is in the form of the 2000 Model Franchise Agreement approved by the Board as a standard form of agreement.

Based on the information provided in the application, granting the orders requested is in the public interest. Further, in all the circumstances, the assent of the municipal electors can properly be dispensed with.

IT IS ORDERED THAT:

1. The terms and conditions upon which, and the period for which, the Corporation of the Municipality of Red Lake is, by by-law, to grant to Union Gas Limited, the right to construct and operate works for the distribution, transmission and storage of natural gas and the right to extend and add to the works, as set out in the franchise agreement attached as Appendix A, are approved.

2. The assent of the municipal electors of the Corporation of Municipality of Red Lake to the by-law is not necessary.

DATED at Toronto, July 25, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

SCHEDULE 1

TO BOARD ORDER

EB-2011-0041

DATED: JULY 25, 2011

FRANCHISE AGREEMENT

2000 Model Franchise Agreement

THIS AGREEMENT effective this day of , 20

BETWEEN:

THE CORPORATION OF THE MUNICIPALITY OF RED LAKE

hereinafter called the "Corporation"

- and -

LIMITED

hereinafter called the "Gas Company"

WHEREAS the Gas Company desires to distribute, store and transmit gas in the Municipality upon the terms and conditions of this Agreement;

AND WHEREAS by by-law passed by the Council of the Corporation (the "By-law"), the duly authorized officers have been authorized and directed to execute this Agreement on behalf of the Corporation;

THEREFORE the Corporation and the Gas Company agree as follows:

Part I - Definitions

1. **In this Agreement**

   (a) "decommissioned" and "decommissions" when used in connection with parts of the gas system, mean any parts of the gas system taken out of active use and purged in accordance with the applicable CSA standards and in no way affects the use of the term 'abandoned' pipeline for the purposes of the *Assessment Act*;

(b) "Engineer/Road Superintendent" means the most senior individual employed by the Corporation with responsibilities for highways within the Municipality or the person designated by such senior employee or such other person as may from time to time be designated by the Council of the Corporation;

(c) "gas" means natural gas, manufactured gas, synthetic natural gas, liquefied petroleum gas or propane-air gas, or a mixture of any of them, but does not include a liquefied petroleum gas that is distributed by means other than a pipeline;

(d) "gas system" means such mains, plants, pipes, conduits, services, valves, regulators, curb boxes, stations, drips or such other equipment as the Gas Company may require or deem desirable for the distribution, storage and transmission of gas in or through the Municipality;

(e) "highway" means all common and public highways and shall include any bridge, viaduct or structure forming part of a highway, and any public square, road allowance or walkway and shall include not only the travelled portion of such highway, but also ditches, driveways, sidewalks, and sodded areas forming part of the road allowance now or at any time during the term hereof under the jurisdiction of the Corporation;

(f) "Model Franchise Agreement" means the form of agreement which the Ontario Energy Board uses as a standard when considering applications under the *Municipal Franchises Act*. The Model Franchise Agreement may be changed from time to time by the Ontario Energy Board;

(g) "Municipality" means the territorial limits of the Corporation on the date when this Agreement takes effect, and any territory which may thereafter be brought within the jurisdiction of the Corporation;

(h) "Plan" means the plan described in Paragraph 5 of this Agreement required to be filed by the Gas Company with the Engineer/Road Superintendent prior to commencement of work on the gas system; and

(i) whenever the singular, masculine or feminine is used in this Agreement, it shall be considered as if the plural, feminine or masculine has been used where the context of the Agreement so requires.

Part II - Rights Granted

2. **To provide gas service**

The consent of the Corporation is hereby given and granted to the Gas Company to distribute, store and transmit gas in and through the Municipality to the Corporation and to the inhabitants of the Municipality.

3. **To Use Highways**

Subject to the terms and conditions of this Agreement the consent of the Corporation is hereby given and granted to the Gas Company to enter upon all highways now or at any time hereafter under the jurisdiction of the Corporation and to lay, construct, maintain, replace, remove, operate and repair a gas system for the distribution, storage and transmission of gas in and through the Municipality.

4. **Duration of Agreement and Renewal Procedures**

(a) If the Corporation has not previously received gas distribution services, the rights hereby given and granted shall be for a term of 20 years from the date of final passing of the By-law.

or

(b) If the Corporation has previously received gas distribution services, the rights hereby given and granted shall be for a term of 20 years from the date of final passing of the By-law provided that, if during the 20 year term of this Agreement, the Model Franchise Agreement is changed, then on the 7th anniversary and on the 14th anniversary of the date of the passing of the By-law, this Agreement shall be deemed to be amended to incorporate any changes in the Model Franchise Agreement in effect on such anniversary dates. Such deemed amendments shall not apply to alter the 20 year term.

(c) At any time within two years prior to the expiration of this Agreement, either party may give notice to the other that it desires to enter into negotiations for a renewed franchise upon such terms and conditions as may be agreed upon. Until such renewal has been settled, the terms and conditions of this Agreement shall continue, notwithstanding the expiration of this Agreement. This shall not preclude either party from applying to the Ontario Energy Board for a renewal of the Agreement pursuant to section 10 of the *Municipal Franchises Act*.

Part III – Conditions

5. **Approval of Construction**

(a) The Gas Company shall not undertake any excavation, opening or work which will disturb or interfere with the surface of the travelled portion of any highway unless a permit therefore has first been obtained from the Engineer/Road Superintendent and all work done by the Gas Company shall be to his satisfaction.

(b) Prior to the commencement of work on the gas system, or any extensions or changes to it (except service laterals which do not interfere with municipal works in the highway), the Gas Company shall file with the Engineer/Road Superintendent a Plan, satisfactory to the Engineer/Road Superintendent, drawn to scale and of sufficient detail considering the complexity of the specific locations involved, showing the highways in which it proposes to lay its gas system and the particular parts thereof it proposes to occupy.

(c) The Plan filed by the Gas Company shall include geodetic information for a particular location:

(i) where circumstances are complex, in order to facilitate known projects, including projects which are reasonably anticipated by the Engineer/Road Superintendent, or

(ii) when requested, where the Corporation has geodetic information for its own services and all others at the same location.

(d) The Engineer/Road Superintendent may require sections of the gas system to be laid at greater depth than required by the latest CSA standard for gas pipeline systems to facilitate known projects or to correct known highway deficiencies.

(e) Prior to the commencement of work on the gas system, the Engineer/Road Superintendent must approve the location of the work as shown on the Plan filed by the Gas Company, the timing of the work and any terms and conditions relating to the installation of the work.

(f) In addition to the requirements of this Agreement, if the Gas Company proposes to affix any part of the gas system to a bridge, viaduct or other structure, if the Engineer/Road Superintendent approves this proposal, he may require the Gas Company to comply with special conditions or to enter into a separate agreement as a condition of the approval of this part of the construction of the gas system.

(g) Where the gas system may affect a municipal drain, the Gas Company shall also file a copy of the Plan with the Corporation's Drainage Superintendent for purposes of the *Drainage Act*, or such other person designated by the Corporation as responsible for the drain.

(h) The Gas Company shall not deviate from the approved location for any part of the gas system unless the prior approval of the Engineer/Road Superintendent to do so is received.

(i) The Engineer/Road Superintendent's approval, where required throughout this Paragraph, shall not be unreasonably withheld.

(j) The approval of the Engineer/Road Superintendent is not a representation or warranty as to the state of repair of the highway or the suitability of the highway for the gas system.

6. **As Built Drawings**

The Gas Company shall, within six months of completing the installation of any part of the gas system, provide two copies of "as built" drawings to the Engineer/Road Superintendent. These drawings must be sufficient to accurately establish the location, depth (measurement between the top of the gas system and the ground surface at the time of installation) and distance of the gas system. The "as built" drawings shall be of the same quality as the Plan and, if the approved pre-construction plan included elevations that were geodetically referenced, the "as built" drawings shall similarly include elevations that are geodetically referenced. Upon the request of the Engineer/Road Superintendent, the Gas Company shall provide one copy of the drawings in an electronic format and one copy as a hard copy drawing.

7. **Emergencies**

In the event of an emergency involving the gas system, the Gas Company shall proceed with the work required to deal with the emergency, and in any instance where prior approval of the Engineer/Road Superintendent is normally required for the work, the Gas Company shall use its best efforts to immediately notify the Engineer/Road Superintendent of the location and nature of the emergency and the work being done and, if it deems appropriate, notify the police force, fire or other emergency services having jurisdiction. The Gas Company shall provide the Engineer/Road Superintendent with at least one 24 hour emergency contact for the Gas Company and shall ensure the contacts are current.

8. **Restoration**

The Gas Company shall well and sufficiently restore, to the reasonable satisfaction of the Engineer/Road Superintendent, all highways, municipal works or improvements which it may excavate or interfere with in the course of laying, constructing, repairing or removing its gas system, and shall make good any settling or subsidence thereafter caused by such excavation or interference. If the Gas Company fails at any time to do any work required by this Paragraph within a reasonable period of time, the Corporation may do or cause such work to be done and the Gas Company shall, on demand, pay the Corporation's reasonably incurred costs, as certified by the Engineer/Road Superintendent.

9. **Indemnification**

The Gas Company shall, at all times, indemnify and save harmless the Corporation from and against all claims, including costs related thereto, for all damages or injuries including death to any person or persons and for damage to any property, arising out of the Gas Company operating, constructing, and maintaining its gas system in the Municipality, or utilizing its gas system for the carriage of gas owned by others. Provided that the Gas Company shall not be required to indemnify or save harmless the Corporation from and against claims, including costs related thereto, which it may incur by reason of damages or injuries including death to any person or persons and for damage to any property, resulting from the negligence or wrongful act of the Corporation, its servants, agents or employees.

10. **Insurance**

(a) The Gas Company shall maintain Comprehensive General Liability Insurance in sufficient amount and description as shall protect the Gas Company and the Corporation from claims for which the Gas Company is obliged to indemnify the Corporation under Paragraph 9. The insurance policy shall identify the Corporation as an additional named insured, but only with respect to the operation of the named insured (the Gas Company). The insurance policy shall not lapse or be cancelled without sixty (60) days' prior written notice to the Corporation by the Gas Company.

(b) The issuance of an insurance policy as provided in this Paragraph shall not be construed as relieving the Gas Company of liability not covered by such insurance or in excess of the policy limits of such insurance.

(c) Upon request by the Corporation, the Gas Company shall confirm that premiums for such insurance have been paid and that such insurance is in full force and effect.

11. **Alternative Easement**

The Corporation agrees, in the event of the proposed sale or closing of any highway or any part of a highway where there is a gas line in existence, to give the Gas Company reasonable notice of such proposed sale or closing and, if it is feasible, to provide the Gas Company with easements over that part of the highway proposed to be sold or closed sufficient to allow the Gas Company to preserve any part of the gas system in its then existing location. In the event that such easements cannot be provided, the Corporation and the Gas Company shall share the cost of relocating or altering the gas system to facilitate continuity of gas service, as provided for in Paragraph 12 of this Agreement.

12. **Pipeline Relocation**

(a) If in the course of constructing, reconstructing, changing, altering or improving any highway or any municipal works, the Corporation deems that it is necessary to take up, remove or change the location of any part of the gas system, the Gas Company shall, upon notice to do so, remove and/or relocate within a reasonable period of time such part of the gas system to a location approved by the Engineer/Road Superintendent.

(b) Where any part of the gas system relocated in accordance with this Paragraph is located on a bridge, viaduct or structure, the Gas Company shall alter or relocate that part of the gas system at its sole expense.

(c) Where any part of the gas system relocated in accordance with this Paragraph is located other than on a bridge, viaduct or structure, the costs of relocation shall be shared between the Corporation and the Gas Company on the basis of the total relocation costs, excluding the value of any upgrading of the gas system, and deducting any contribution paid to the Gas Company by others in respect to such relocation; and for these purposes, the total relocation costs shall be the aggregate of the following:

(i) the amount paid to Gas Company employees up to and including field supervisors for the hours worked on the project plus the current cost of fringe benefits for these employees,

(ii) the amount paid for rental equipment while in use on the project and an amount, charged at the unit rate, for Gas Company equipment while in use on the project,

(iii) the amount paid by the Gas Company to contractors for work related to the project,

(iv) the cost to the Gas Company for materials used in connection with the project, and

(v) a reasonable amount for project engineering and project administrative costs which shall be 22.5% of the aggregate of the amounts determined in items (i), (ii), (iii) and (iv) above.

(d) The total relocation costs as calculated above shall be paid 35% by the Corporation and 65% by the Gas Company, except where the part of the gas system required to be moved is located in an unassumed road or in an unopened road allowance and the Corporation has not approved its location, in which case the Gas Company shall pay 100% of the relocation costs.

Part IV - Procedural And Other Matters

13. Municipal By-laws of General Application

The Agreement is subject to the provisions of all regulating statutes and all municipal by-laws of general application, except by-laws which have the effect of amending this Agreement.

14. Giving Notice

Notices may be delivered to, sent by facsimile or mailed by prepaid registered post to the Gas Company at its head office or to the authorized officers of the Corporation at its municipal offices, as the case may be.

15. Disposition of Gas System

(a) If the Gas Company decommissions part of its gas system affixed to a bridge, viaduct or structure, the Gas Company shall, at its sole expense, remove the part of its gas system affixed to the bridge, viaduct or structure.

(b) If the Gas Company decommissions any other part of its gas system, it shall have the right, but is not required, to remove that part of its gas system. It may exercise its right to remove the decommissioned parts of its gas system by giving notice of its intention to do so by filing a Plan as required by Paragraph 5 of this Agreement for approval by the Engineer/Road Superintendent. If the Gas Company does not remove the part of the gas system it has decommissioned and the Corporation requires the removal of all or any part of the decommissioned gas system for the purpose of altering or improving a highway or in order to facilitate the construction of utility or other works in any highway, the Corporation may remove and dispose of so much of the decommissioned gas system as the Corporation may require for such purposes and neither party shall have recourse against the other for any

loss, cost, expense or damage occasioned thereby. If the Gas Company has not removed the part of the gas system it has decommissioned and the Corporation requires the removal of all or any part of the decommissioned gas system for the purpose of altering or improving a highway or in order to facilitate the construction of utility or other works in a highway, the Gas Company may elect to relocate the decommissioned gas system and in that event Paragraph 12 applies to the cost of relocation.

16. **Use of Decommissioned Gas System**

(a) The Gas Company shall provide promptly to the Corporation, to the extent such information is known:

(i) the names and addresses of all third parties who use decommissioned parts of the gas system for purposes other than the transmission or distribution of gas; and

(ii) the location of all proposed and existing decommissioned parts of the gas system used for purposes other than the transmission or distribution of gas.

(b) The Gas Company may allow a third party to use a decommissioned part of the gas system for purposes other than the transmission or distribution of gas and may charge a fee for that third party use, provided

(i) the third party has entered into a municipal access agreement with the Corporation; and

(ii) the Gas Company does not charge a fee for the third party's right of access to the highways.

(c) Decommissioned parts of the gas system used for purposes other than the transmission or distribution of gas are not subject to the provisions of this Agreement. For decommissioned parts of the gas system used for purposes other than the transmission and distribution of gas, issues such as relocation costs will be governed by the relevant municipal access agreement.

17. **Franchise Handbook**

The Parties acknowledge that operating decisions sometimes require a greater level of detail than that which is appropriately included in this Agreement. The Parties agree to look for guidance on such matters to the Franchise Handbook prepared by the Association of Municipalities of Ontario and the gas utility companies, as may be amended from time to time.

18. **Other Conditions**

None.

19. **Agreement Binding Parties**

This Agreement shall extend to, benefit and bind the parties thereto, their successors and assigns, respectively.

IN WITNESS WHEREOF the parties have executed this Agreement effective from the date written above.

THE CORPORATION OF THE MUNICIPALITY OF RED LAKE

Per: _____

Phil Vinet, Mayor

Per: _____

Shelly Kocis, Clerk

UNION GAS LIMITED

Per: _____

Rick Birmingham, Vice President

Per: _____

Joe Marra, Assistant General Counsel

APPENDIX “E”

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

EB-2011-0042

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2011-0042

IN THE MATTER OF the *Municipal Franchises Act*, R.S.O. 1990, c. M.55, as amended;

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.

BEFORE: Marika Hare
Presiding Member

Paula Conboy
Member

DECISION AND ORDER

Union Gas Limited ("Union") filed an application on February 8, 2011 with the Ontario Energy Board (the "Board") under section 8 of the *Municipal Franchises Act*, R.S.O. 1990, c. M.55, as amended (the "Act"), for an order of the Board granting a Certificate of Public Convenience and Necessity for the Municipality of Red Lake.

The Board has assigned File No. EB-2011-0042 to this application.

The Board's Notice of Application and Written Hearing was published as directed by the Board. Goldcorp Inc. intervened in the proceeding but made no submissions on the application.

The Board finds that it is in the public interest to grant the application and that public convenience and necessity requires that approval be given.

IT IS THEREFORE ORDERED THAT:

1. A Certificate of Public Convenience and Necessity, attached as Appendix A to this Decision and Order, is granted to Union Gas Limited to construct works to supply gas in the Corporation of the Municipality of Red Lake.

DATED at Toronto, July 25, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

SCHEDULE 1

TO BOARD DECISION AND ORDER

EB-2011-0042

DATED: JULY 25, 2011

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR

THE CORPORATION OF THE MUNICIPALITY OF RED LAKE

EB-2011-0042

Certificate of Public Convenience and Necessity

The Ontario Energy Board hereby grants

Union Gas Limited

approval under section 8 of the *Municipal Franchises Act*, R.S.O. 1990, c. M.55, as amended, to construct works to supply gas to the

Corporation of the Municipality of Red Lake

DATED at Toronto, July 25, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary