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ONTARIO ENERGY BOARD (**the Board**)

In the matter of the *Ontario Energy Board Act, 1998,* as amended (the Act); the *Ontario Energy Board Transmission System Code of June 10, 2010* (**TSC**); Hydro One Networks Inc. (**HONI**); and the obligation of Goldcorp Canada Ltd. and Goldcorp Inc. to pay bypass compensation to HONI under the TSC.

APPLICATION

1. The Applicants are Goldcorp Canada Ltd. and Goldcorp Inc. (**Goldcorp**) acting jointly as Goldcorp. Goldcorp Canada Ltd. is a federal company with its head office in Vancouver. Goldcorp Inc. is an Ontario company with its head office in Toronto. Goldcorp carries on the business of, among other things, operating gold mines in Ontario.

2. **GOLDCORP HEREBY APPLIES TO THE BOARD** for the following orders:

   (a) an order under section 19 of the Act, declaring that ss. 4.1.3, 6.7.6, 6.7.7 and 11.2 of the TSC are *ultra vires* the Act;

   (b) an order, under section 19 of the Act, declaring that Goldcorp is not under any legal obligation to pay bypass compensation to HONI and that HONI may not demand such compensation from Goldcorp;

   (c) an interim order, under paragraph 7.1 of HONI's Electricity Transmission Licence and under its implied obligation not to enforce any requirement contrary to the Act, that pending final determination of this Application HONI shall work cooperatively with Goldcorp in good faith and with all dispatch to complete all analyses and negotiations and to execute all required agreements, contracts or other instruments required in order to connect and energize GL-1 in Q1 2012.

   (d) an order, under section 3.06 of the Board's Practice Direction on Cost Awards and subsection 30(2) of the Act, granting Goldcorp all of its costs of this Application: and,

   (e) such further and other order as may be required.

3. **THE GROUNDS FOR THE APPLICATION ARE:**

(a) On July 20, 2011, in File No. EB-2011-0106 the Board granted Goldcorp leave to construct 10.7 km of 115 kV single circuit transmission line from a connection point approximately 2 km south of Harry's Corner on HONI's existing E2R transmission line to the to-be-constructed Balmer Complex Transformer Station (TS), all in the Municipality of Red Lake, in north-western Ontario. In this file, for shorthand purposes, Goldcorp will refer to its newly approved transmission line as GL-1, for "Goldcorp Line 1".

(b) HONI has informed Goldcorp that under the TSC, Goldcorp must pay HONI bypass compensation in an amount between $8 million and $11 million. This obligation arises because GL-1 will cause some of the capacity at the Red Lake Transformer Station (RLTS) to become idle.

(c) The TSC is a code contemplated by section 70.1 of the Act.

(d) Section 70.1 does not describe either what subject matter codes may deal with or provide the Board with any specific authority to impose financially or legally burdensome requirements on persons

(e) Codes are a species of law known as delegated legislation. It is trite law that no piece of delegated legislation is valid unless it is expressly authorized by some provision in a statute enacted by the Legislative Assembly of Ontario (Legislative Assembly).

(f) The law does not allow a generally worded statutory provision, that does nothing more than permit the making of delegated legislation, to impose a financially burdensome requirement on persons. Clear legislative language authorizing such a burden is required before the Board may impose it.

(g) Put differently, the Board's power to issue codes does not authorize it to amend or extend the Act by creating new requirements not expressly referred to in the Act. Only the Legislative Assembly may impose such requirements.

(h) The TSC requirement to pay bypass compensation of $8 to $11 million is a burdensome financial requirement.

(i) Sections 4.1.3, 6.7.6, 6.7.7 and 11.2 of the TSC are therefore not authorized under the Act and are *ultra vires*.

(j) Goldcorp will refer to the Act, the TSC and the relevant jurisprudence.

4. This Application is supported by Pre-Filed Evidence, a Written Argument on the Application and Authorities. For convenience the Pre-Filed Evidence is Exhibit B, Tabs 1-19), the Written Argument on The Application and Authorities are Exhibit "C", Tabs 1 and 2, respectively. The Pre-Filed Evidence may be supplemented from time to time prior to the Board's decision.

5. **REQUEST FOR AN INTERIM ORDER:**

6. Above, Goldcorp has requested:

2(c) an order, under paragraph 7.1 of HONI's Electricity Transmission Licence and under HONI's implied obligation not to enforce any requirement that is contrary to the Act, that pending final determination of this Application HONI shall work cooperatively with Goldcorp in good faith and with all dispatch to complete all analyses and negotiations necessary to tie-in and energize GL-1 prior to Q! 2012.

7. Goldcorp has filed a Notice of Motion seeking interim order (Ex A, Tab 4).

8. Goldcorp seeks Order 2(c) out of concern about being able to enter GL-1 into service by the end of Q1 2012. Goldcorp's reasons for having GL-1entered into service by that time are provided in the record in File No. EB-2011-0106 and these were noted in the Board's Decision of July 24th, 2011.

9. Currently, however, Goldcorp and HONI are negotiating a Connection Cost Recovery Agreement (**CCRA**) respecting GL-1. HONI has been practically non responsive to

Goldcorp's requests to complete the agreement expeditiously. In addition HONI has demanded funding of $25K for a review of SNC- Lavalin's engineering of GL-I, $15K for a review of its Environmental Study Report which the Minister of the Environmental has approved, and has indicated that there may be additional demands. In addition, Goldcorp and HONI still have to negotiate cost sharing of the additional reactive compensation facilities at Ear Falls TS as required by the IESO's System Impact Assessment Report of January 21, 2011. Goldcorp would not want to see HONI delay matters further, either in general or specifically, on the grounds that Goldcorp has brought this application before the Board. Goldcorp submits that it would clarify matters for everyone admirably if the Board would make the requested interim order, and so requests that the Board do so.

10. Goldcorp therefore requests that this Motion be decided quickly. Goldcorp is available to appear before the Board in an oral hearing at the Board's earliest convenience.

SERVICE

11. Goldcorp requests that a copy of all documents filed with the Board be served on the Applicant and the Applicant's counsel, as follows:

Goldcorp

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Gardiner Roberts LLP
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Goldcorp Inc.

TORONTO-#254672-v2-Application

SUMMARY OF PRE-FILED EVIDENCE

1. This is an application to the Board for the following orders:

(a) an order under s. 19 of the Act, declaring that ss. 4.1.3, 6.7.6, 6.7.7 and 11.2 of the TSC are *ultra vires* the Act;

(b) an order, under s. 19 of the Act, declaring that Goldcorp is not under any obligation to pay bypass compensation to HONI and that HONI may not demand such compensation from Goldcorp;

(c) an order, under paragraph 7.1 of HONI's Electricity Transmission Licence and under its implied obligation not to enforce any requirement contrary to the Act, that pending final determination of this Application HONI shall work cooperatively with Goldcorp in good faith and with all dispatch to complete all analyses and negotiations and to execute all required agreements, contracts or other instruments required in order to connect and energize GL-1 in Q1 2012.

(d) an order, under s. 3.06 of the Board's Practice Direction on Cost Awards and subs. 30(2) of the Act, granting Goldcorp all of its costs of this Application; and,

(e) such further and other order as seems appropriate in the circumstances.

PART II - FACTS

2. Goldcorp has never entered into any written agreement with HONI with respect to HONI's provision of electricity supply and related services to Goldcorp's Red Lake Gold Mines. Instead, the process followed by HONI each year has been to inform Goldcorp in writing about the capacity allotment it is prepared to provide. Goldcorp then pays for the electricity delivered.

3. On July 20, 2011, the Board approved the construction of GL-1 (Ex. B, Tab 1). As stated in the Application, Goldcorp and HONI are currently negotiating a Connection and Cost Recovery Agreement (**CCRA**) respecting GL-1. HONI has been practically non responsive to Goldcorp's requests to complete the CCRA expeditiously. In addition, HONI has

demanded funding of $25,000 for a review of SNC- Lavalin's engineering of GL-I, $15,000 for a review of SNC-Lavalin's Environmental Study Report which the Minister of the Environmental approved, and has indicated that there may be additional funding demands. What is more, Goldcorp and HONI still have to negotiate cost sharing of the additional reactive compensation facilities at HONI's Ear Falls TS as required by the IESO's System Impact Assessment Report (CAA ID 2010-407) filed in EB-2011-0106. Goldcorp cannot risk further delay by HONI on the grounds that Goldcorp has brought this application before the Board.

4. Once GL-I is entered into service, Goldcorp plans to transfer its Red Lake, Campbell and Balmer complexes' loads, currently served through the Red Lake Transformer Station (**RLTS**), to GL-1. Goldcorp's Cochenour Complex will continue to be supplied through the RLTS at distribution voltages (Ex. B, Tab 2). Goldcorp's loading of GL-1 will result in some capacity at the RLTS being underutilized for an uncertain period (Ex. B, Tab 3).

5. Goldcorp and HONI have been negotiating the placing of GL-1 into service since April 10, 2010. At that time, HONI informed Goldcorp that it would have to pay bypass compensation for the underutilized capacity at the RLTS. On April 15th, 2010, HONI estimated bypass compensation at $8 million (Ex. B, Tab 3, p. 2). On April 29, 2010 HONI re-estimated it as between $8 and $11 million.

6. On November 4, 2010, Goldcorp met with HONI again (Ex. B, Tab 5). Goldcorp tabled an information request seeking information about the determinants of HONI's $8 to $11 million estimate, saying it would formally submit it again at another time (Ex. B, Tab 5, p.3). Goldcorp's position was that it was inappropriate for HONI to charge it bypass compensation because Goldcorp is an important economic engine in the Red Lake area, HONI's idle capacity will probably be reutilized in the near future by economic growth caused by Goldcorp and other local area consumers, because Goldcorp's plans to transfer GL-1and its system benefits to HONI at no net cost and because there are desirable offsetting system benefits which it considers are a sufficient surrogate for bypass compensation. These offsetting system benefits are that GL-1 expands HONI's transmission system in an economically efficient manner. No other alternative costs less, can be commissioned sooner or provide similar improvements to the quality of electricity

service to electricity consumers Red Lake area. Again, GL-1 will be transferred at a price that will not increase Uniform Transmission Rates

7. On December 17th, 2010 Goldcorp and HONI, joined by Rubicon Minerals Corporation (**Rubicon**), met for a third time. Goldcorp and Rubicon informed HONI that they were negotiating an agreement under which Rubicon would utilize some, but not all, of the idle capacity at the RLTS that Goldcorp's proposed loading of GL-1 would create. It was then agreed that Goldcorp and Rubicon would provide up-to-date load forecasts to HONI and that HONI would then provide a new estimate of Goldcorp's required bypass compensation (Ex. B, Tab 6). Goldcorp and Rubicon provided their load forecasts on January 10, 2011 (Ex. B, Tab 7). On January 21, 2011 HONI requested a clarification from Goldcorp about certain scenarios in Goldcorp's load forecast (Ex. B, Tab 7). Goldcorp reserved its response until it had received a favourable decision about GL-1 from the Board.

8. On April 1, 2011 Goldcorp, Rubicon and HONI met for a fourth time concerning Goldcorp's plans for entering GL-1 into service. At this meeting, using the terminology of *stranded asset charge* the topic of bypass compensation was discussed again, without resolution. The discussion was as follows:

> The discussion of stranded assets reflected the parties long standing differences. Ian Blue stated that the electricity supply issues in the Red Lake area differ from those that the TSC contemplated. Naomi Martin confirmed that Stranded Asset charges require a trigger and depend on timing which Raj Ghai sought to clarify. Curtis Pedwell described that Goldcorp's proposed Balmer TS would be loaded incrementally as RLTS was offloaded in response to Ibrahim el-Nahas' inquiry of how its capacity would be utilized. Raj Ghai indicated that the 'lumpiness' of loads to be transferred could be examined. Ian Blue also pointed out that Goldcorp's proposed 115 kV line would facilitate connecting renewable generation in the Red Lake area. HONI acknowledged that such opportunities exist and that, to their knowledge, none are under development. HONI staff acknowledged that an OEB exemption from the TSC may clarify or resolve the stranded asset issue. The OEB Codes were acknowledged to have force of law. All recognized that the OEB has power either to amend its Codes

The meeting notes show no inclination on the part of HONI to exempt Goldcorp from paying bypass compensation (Ex. B, Tab 8).

9. On July 26th, 2011, counsel for Goldcorp provided HONI with new load forecast matrices using Goldcorp's most recent load data which assumed, again, that all electricity except the Cochenour complex's requirements would be transferred from the RLTS to GL-1. Counsel also formally requested responses to a fresh information request (Ex. B, Tabs 2 and 15).

10. As a condition of licence, HONI is bound by the TSC (Ex. B, Tab 17, condition 5). Appendix A to the TSC provides a *pro forma* F*orm of Connection Agreement for Load Customers* (CALC). This CALC, ninety-two pages long, contains among other provisions paragraph 3 which states:

> 3. INCORPORATION OF TRANSMISSION SYSTEM CODE
>
> 3.1 The Code is hereby incorporated in its entirety by reference into, and form an integral part of, this Agreement. Unless the context otherwise requires, all references in this Agreement to this Agreement shall be deemed to include a reference to the Code.
>
> 3.2 Without limiting the generality of s. 3.1:
>
> (a) the Transmitter hereby agrees to be bound by, and at all times to comply with, the Code; and
>
> (b) the Customer acknowledges and agrees that the Transmitter is bound at all times to comply with the Code in addition to complying with the provisions of this Agreement (Ex. B, Tab 9).

11. Even though Goldcorp has never signed any agreement with HONI, the TSC purports to answer that problem in s. 4.1.3, which states:

> 4.1.3. Where a transmitter does not have a connection agreement with a customer whose facilities were connected to the transmitter's transmission system prior to the Code revision date, the transmitter shall be bound by the applicable version of the connection agreement set out in Appendix 1 in relation to that customer and shall be permitted to consider that customer's continued acceptance of transmission service as acceptance by that customer of all of the terms and conditions of the connection agreement in the form set out in the applicable version of the connection agreement set out in Appendix 1.

12. The TSC deals with bypass compensation in ss. 6.7.6, 6.7.7 and 11.2.1 which state:

6.7.6 . . . for all or a portion of existing load a load customer may bypass a transmitter-owned connection facility with its own connection facility or the connection facility of another person, provided that the load customer compensates the transmitter.

6.7.7 . . . the transmitter shall calculate bypass compensation by first multiplying the net book value of the bypassed connection facility, including a salvage credit and reasonable removal and environmental facility. The transmitter shall then divide the resulting figure by the total normal supply capacity of the bypassed connection facility. For purposes of this calculation:

(a) the bypassed capacity on the relevant connection facility shall be equal to the difference between the customer's existing load on that connection facility at the time of bypass and the customer's average monthly peak load in the three-month period following the date on which bypass occurred; and

(b) the normal supply capacity of the bypassed connection facility shall be determined by the transmitter in accordance with the Board-approved procedure referred to in s. 6.2.7.

11.2.1 A transmitter shall require bypass compensation from a customer if:

(a) the customer disconnects its facility from the transmitter's connection facilities and subsequently connects that facility to a generation facility or to the facilities of any person such that both the load facility and a generation facility are connected to the transmitter's transmission facilities on that person's side of the connection point; and

(b) the transmitter will no longer receive line connection or transformation connection rate revenues in relation to that facility (Ex. B, Tab 10).

The transmitter shall calculate bypass compensation using the methodology set out in s. 6.7.7.

13. The above TSC provisions were added in 2005, with the following explanation:

Why was the Code Revised?

Numerous expressions of concern were received from stakeholders regarding the application and interpretation of the Code. This included applications for changes to the Code. The Board decided that the Code, in its previous form, was not sustainable and a broad review was needed. A primary objective was to refine the Code to enhance the level of regulatory certainty for participants in the Ontario electricity market.

. . .

Major Policy Issues

1. Available Capacity & Bypass

. . . .

> A transmitter will not have an automatic right to require customers to use the transmitter's available capacity to service *new* customer load. Accordingly, a customer opting to build its own facilities to met new load will not be considered to have bypassed the transmitter's facilities. This approach allows for greater competition, which should increase economic efficiency on the part of the transmitter, without resulting in any uncompensated stranding of assets. It also enhances customer choice. However, this will only apply where the load is new – in other words, where the load has not been part of a customer's contractual forecast of its needs. In such cases, the customer will be held accountable for its forecast (i.e., by way of true up payments), throughout the economic evaluation period. Transmitters invest in the connection assets based on the customer(s) contractual forecast and customers must be held accountable for the costs of facilities built to meet it. It would be inappropriate to burden all the rest of the transmitter's customers with such costs.
>
> If a customer chooses to build its own new connection facilities, those new facilities may be used to supply the customer's *existing* load, provided the customer

Goldcorp requests a written hearing for this proceeding because the issue is purely legal and no facts are in dispute. The written hearing format provides parties with sufficient flexibility to present their case fully and fairly.

Goldcorp submits that it will be in the public interest for the Board, rather than the Divisional Court, to hear this Application at first instance. The Board is familiar with origin, history, purpose, intent and process that lead to including the bypass compensation provisions in the TSC and the Board's treatment of those matters in a Board decision would be of valuable assistance to any appeal court.

PROCEDURAL ORDERS/AFFIDAVITS/CORRESPONDENCE

NOTICE OF MOTION

ONTARIO ENERGY BOARD (**the Board**)

In the matter of the *Ontario Energy Board Act, 1998,* as amended (the Act); the *Ontario Energy Board Transmission System Code of June 10, 2010* (**TSC**); Hydro One Networks Inc. (**HONI**); and the obligation of Goldcorp Canada Ltd. and Goldcorp Inc. to pay bypass compensation to HONI under the TSC.

NOTICE OF MOTION

WHEREAS:

Goldcorp Canada Ltd. and Goldcorp Inc. (Goldcorp) will make a motion to the Board on a date and at a time to be fixed by the Board, at the Board premises, 2300 Yonge Street, Toronto, Ontario.

THE MOTION is to be heard orally.

THE MOTION IS FOR:

1. an interim order, under paragraph 7.1 of HONI's Electricity Transmission Licence and under its implied obligation not to enforce any requirement contrary to the Act, that pending final determination of this Application HONI shall work cooperatively with Goldcorp in good faith and with all dispatch to complete all analyses and negotiations and to execute all required agreements, contracts or other instruments required in order to connect and energize GL-1 in Q1 2012.
2. such further and other order as may be required.

THE GROUNDS FOR THE MOTION ARE:

1. Goldcorp seeks this Interim Order out of concern about being able to enter GL-1 into service by the end of Q1 2012. Goldcorp's reasons for having GL-1 into service by that time are provided in the record in File No. EB-2011-0106 and these were noted in the Board's Decision of July 24th, 2011 which counsel will refer when the motion is argued.

2. Currently, Goldcorp and HONI are negotiating a Connection Cost Recovery Agreement (**CCRA**) respecting GL-1. HONI has been practically non responsive to Goldcorp's requests to complete the agreement expeditiously. In addition, HONI has demanded funding of $25K for a review of SNC- Lavalin's engineering of GL-I, $15K for a review of its Environmental Study Report which the Minister of the Environmental has already approved, and has indicated that there may be additional demands for funding from Goldcorp. In addition, Goldcorp and HONI still have to negotiate cost sharing of the additional reactive compensation facilities as required by the IESO's System Impact Assessment Report of January 21, 2011. Goldcorp would not want to see HONI delay matters further, either in general or specifically, on the grounds that Goldcorp has brought this application before the Board. Goldcorp submits that it would clarify matters for everyone admirably if the Board would make the requested interim order, and so requests that the Board do so.

THE FOLLOWING EVIDENCE WILL BE USED AT THE HEARING OF THE MOTION:

- Affidavit of Curtis C. Pedwell sworn October 5, 2011 and Exhibits referred to therein.
- The Application herein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

IAN A. BLUE, Q.C.
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Counsel for Goldcorp

AFFIDAVIT OF CURTIS C. PEDWELL

ONTARIO ENERGY BOARD

In the matter of the *Ontario Energy Board Act, 1998,* as amended (the Act); the *Ontario Energy Board Transmission Code of June 10, 2010* (**TSC**); Hydro One Networks Inc. (**HONI**); and the obligation of Goldcorp Canada Ltd. and Goldcorp Inc. to pay bypass compensation to HONI under the TSC.

AFFIDAVIT OF CURTIS C. PEDWELL

I, Curtis Pedwell, of the Municipality of Red Lake, am the Maintenance Manager at Goldcorp Red Lake Gold Mines. I make oath and say as follows:

1. I hold the qualification of Interprovincial Millwright. I have been employed in the mining industry since 1981. I have been employed in mine management since 1996. I was appointed Manager Maintenance – Red Lake Gold Mines in 2008. As such, I have knowledge of all the matters sworn to in this affidavit except where stated to be on information and belief.

2. As Maintenance Manager at Goldcorp Real Lake Gold Mines, my responsibilities include ensuring that the electricity system and facilities serving Red Lake Gold Mines are capable of satisfying forecast peak electricity demand with high quality electricity service

3. Goldcorp has never entered into any written agreement with HONI with respect to HONI's provision of electricity supply and related services to Goldcorp's Red Lake Gold Mines. Instead, the process followed by HONI each year has been to inform Goldcorp in writing about the capacity allotment it is prepared to provide. Goldcorp then pays for the electricity delivered.

4. On July 20, 2011, the Board approved the construction of GL-1. Now shown to me and marked as (**Ex. A**) to my affidavit is a true copy of the Board's Decision in File No. EB-2011-0106.

5. As stated in the Application, Goldcorp and HONI are currently negotiating a Connection and Cost Recovery Agreement (**CCRA**) respecting GL-1. HONI has been practically non responsive to Goldcorp's requests to complete the CCRA expeditiously even though the required in service date for GL-1 is Q1 2012. In addition, HONI has demanded funding of $25,000 for a review of SNC- Lavalin's engineering of GL-I, $15,000 for a review of SNC-Lavelin's Environmental Study Report which the Minister of the Environmental approved, and has indicated that there may be additional funding demands. What is more, Goldcorp and HONI still have to negotiate cost sharing of the additional reactive compensation facilities at HONI's Ear Falls TS as required by the IESO's System Impact Assessment Report (CAA ID 2010-407) filed in EB-2011-0106. Goldcorp cannot tolerate further delay by HONI now on the grounds that Goldcorp has brought this Application before the Board to declare the bypass compensation provisions of the TSC as ultra vires the Act.

6. Once GL-I is entered into service, Goldcorp plans to transfer its Red Lake, Campbell and Balmer complexes' loads, currently served through the Red Lake Transformer Station (**RLTS**), to GL-1. Goldcorp's Cochenour Complex will continue to be supplied through the RLTS at distribution voltages. Now shown to me and marked as (**Ex. B**) to my affidavit is a true copy of the e-mail from Ian Blue to Raj Ghai dated July 26, 2011, setting out this information.

7. Goldcorp's loading of GL-1 will result in some capacity at the RLTS being underutilized for an uncertain period. Now shown to me and marked as (**Ex. C**) to my affidavit is a true copy of an e-mail from Curtis Pedwell to Luc Major dated April 16, 2010, 7:31 a.m. and chain reporting this information reporting this information.

8. Goldcorp and HONI have been negotiating the placing of GL-1 into service since April 10, 2010. At that time, HONI informed Goldcorp that it would have to pay bypass compensation for the underutilized capacity at the RLTS. On April 15th, 2010, HONI estimated bypass compensation at $8 million. Now shown to me and marked as (**Ex. C**) to my affidavit is a true copy of an e-mail from Curtis Pedwell to Luc Major dated April 16, 2010, 7:31 a.m. and chain reporting this information.

9. On April 29, 2010 HONI re-estimated by pass compensation as between $8 and $11 million. Now shown to me and marked as (**Ex. D**) to my affidavit is a true copy of an e-

mail from Pappur Shankar of SNC- Lavalin to Luc Major, Robert Bustraen, Hadi Banakar dated April 30, 2010 at 3:06 p.m. and chain, reporting this information.

10. On November 4, 2010, Goldcorp met with HONI again. Goldcorp tabled an information request seeking information about the determinants of HONI's $8 to $11 million estimate, saying it would formally submit it again at another time. Goldcorp's position was that it was inappropriate for HONI to charge it bypass compensation because Goldcorp is an important economic engine in the Red Lake area, HONI's idle capacity will probably be reutilized in the near future by economic growth caused by Goldcorp and other local area consumers, and because Goldcorp's plans to transfer GL-1and its system benefits to HONI at no net cost which it considers is sufficient bypass compensation. HONI and Goldcorp disagreed on whether Goldcorp should have to pay bypass compensation. Now shown to me and marked as (**Ex. E**) to my affidavit is a true copy of Minutes – Goldcorp Red Lake Gold Mines, Meeting November 4th, 2010, prepared by HONI.

11. On December 17th, 2010 Goldcorp and HONI, joined by Rubicon Minerals Corporation, (**Rubicon**) met for a third time. Goldcorp and Rubicon informed HONI that they were negotiating an agreement under which Rubicon would utilize some, but not all, of the idle capacity at the RLTS that Goldcorp's proposed loading of GL-1 would create. It was then agreed that Goldcorp and Rubicon would provide up-to-date load forecasts to HONI and that HONI would then provide a new estimate of Goldcorp's required bypass compensation. . Now shown to me and marked as (**Ex. F**) to my affidavit is a true copy of Minutes – Goldcorp Red Lake Gold Mines, Meeting December 17th, 2010, prepared by HONI.

12. Goldcorp and Rubicon provided their load forecasts on January 10, 2011 On January 21, 2011 HONI requested a clarification from Goldcorp about certain scenarios in Goldcorp's load forecast .Now shown to me and marked as (**Ex. G**) to my affidavit is a true copy of an e-mail from Raj Ghai to Ian Blue dated January 21, 2011, 4:16 p.m. and chain, containing this information.

13. Goldcorp reserved its response until it had received a favourable decision about GL-1 from the Board.

14. On April 1, 2011 Goldcorp, Rubicon and HONI met for a fourth time concerning Goldcorp's plans for entering GL-1 into service. At this meeting, using the terminology of *stranded asset charge* the topic of bypass compensation was discussed again, without resolution. The discussion was as follows:

> The discussion of stranded assets reflected the parties long standing differences. Ian Blue stated that the electricity supply issues in the Red Lake area differ from those that the TSC contemplated. Naomi Martin confirmed that Stranded Asset charges require a trigger and depend on timing which Raj Ghai sought to clarify. Curtis Pedwell described that Goldcorp's proposed Balmer TS would be loaded incrementally as RLTS was offloaded in response to Ibrahim el-Nahas' inquiry of how its capacity would be utilized. Raj Ghai indicated that the 'lumpiness' of loads to be transferred could be examined. Ian Blue also pointed out that Goldcorp's proposed 115 kV line would facilitate connecting renewable generation in the Red Lake area. HONI acknowledged that such opportunities exist and that, to their knowledge, none are under development. HONI staff acknowledged that an OEB exemption from the TSC may clarify or resolve the stranded asset issue. The OEB Codes were acknowledged to have force of law. All recognized that the OEB has power either to amend its Codes

The meeting notes show no inclination on the part of HONI to exempt Goldcorp from paying bypass compensation. Now shown to me and marked as (**Ex. H**) to my affidavit is a true copy of Meeting Notes, April 1, 2011 prepared by Goldcorp.

15. On July 26th, 2011, counsel for Goldcorp provided HONI with new load forecast matrices using Goldcorp's most recent load data which assumed, again, that all electricity except the Cochenour complex's requirements would be transferred from the RLTS to GL-1. Counsel also formally requested responses to a fresh information request. Now shown to me and marked as (**Ex. B**) to my affidavit are true copies of the e-mail from Ian Blue to Raj Ghai dated July 26, 2011, setting out this information and Goldcorp's Information Request to Hydro One Networks Inc. dated July 26, 2011 setting out this information.

16. As a condition of licence, HONI is bound by the TSC. Now shown to me and marked as (**Ex. I**, to my affidavit is a true copy of Electricity Transmission Licence, ET-2003-0035, Hydro One Networks Inc. valid until December 2, 2023. Condition 5 of that licence imposes this condition.

17. Appendix A to the TSC provides a *pro forma* Form of Connection Agreement for Load Customers (CALC). This CALC, ninety-two pages long, contains among other provisions paragraph 3 which states:

> 3. INCORPORATION OF TRANSMISSION SYSTEM CODE
>
> 3.1 The Code is hereby incorporated in its entirety by reference into, and form an integral part of, this Agreement. Unless the context otherwise requires, all references in this Agreement to this Agreement shall be deemed to include a reference to the Code.
>
> 3.2 Without limiting the generality of s. 3.1:
>
> (a) the Transmitter hereby agrees to be bound by, and at all times to comply with, the Code; and
>
> (b) the Customer acknowledges and agrees that the Transmitter is bound at all times to comply with the Code in addition to complying with the provisions of this Agreement .

Now shown to me and marked as (**Ex. J**, to my affidavit is a true copy of paragraph 3 of Appendix A to the TSC from which the above quote was drawn.

18. Even though Goldcorp has never signed any agreement with HONI, the TSC purports to answer that problem in s. 4.1.3, which states:

> 4.1.3. Where a transmitter does not have a connection agreement with a customer whose facilities were connected to the transmitter's transmission system prior to the Code revision date, the transmitter shall be bound by the applicable version of the connection agreement set out in Appendix 1 in relation to that customer and shall be permitted to consider that customer's continued acceptance of transmission service as acceptance by that customer of all of the terms and conditions of the connection agreement in the form set out in the applicable version of the connection agreement set out in Appendix 1.

The TSC deals with bypass compensation in S. 6.7.6, 6.7.7 and 11.2.1 which state:

> 6.7.6 . . . for all or a portion of existing load a load customer may bypass a transmitter-owned connection facility with its own connection facility or the connection facility of another person, provided that the load customer compensates the transmitter.
>
> 6.7.7 . . . the transmitter shall calculate bypass compensation by first multiplying the net book value of the bypassed connection facility, including a salvage credit and reasonable removal and environmental facility. The transmitter shall then divide the resulting figure by the total normal supply capacity of the bypassed connection facility. For purposes of this calculation:
>
> (a) the bypassed capacity on the relevant connection facility shall be equal to the difference between the customer's existing load on that connection

facility at the time of bypass and the customer's average monthly peak load in the three-month period following the date on which bypass occurred; and

(b) the normal supply capacity of the bypassed connection facility shall be determined by the transmitter in accordance with the Board-approved procedure referred to in s. 6.2.7.

11.2.1 A transmitter shall require bypass compensation from a customer if:

(a) the customer disconnects its facility from the transmitter's connection facilities and subsequently connects that facility to a generation facility or to the facilities of any person such that both the load facility and a generation facility are connected to the transmitter's transmission facilities on that person's side of the connection point; and

(b) the transmitter will no longer receive line connection or

The transmitter shall calculate bypass compensation using the methodology set out in s. 6.7.7.

Now shown to me and marked as (**Ex. K**) to my affidavit is a true copy of Sections 4.1.3, 6.7.6, 6.7.7 and 11.2 of the TSC.

19. The above TSC provisions were added in 2005, with the following explanation:

Why was the Code Revised?

Numerous expressions of concern were received from stakeholders regarding the application and interpretation of the Code. This included applications for changes to the Code. The Board decided that the Code, in its previous form, was not sustainable and a broad review was needed. A primary objective was to refine the Code to enhance the level of regulatory certainty for participants in the Ontario electricity market.

. . .

Major Policy Issues

1. Available Capacity & Bypass

. . . .

A transmitter will not have an automatic right to require customers to use the transmitter's available capacity to service *new* customer load. Accordingly, a customer opting to build its own facilities to met new load will not be considered to have bypassed the transmitter's facilities. This approach allows for greater competition, which should increase economic efficiency on the part of the transmitter, without resulting in any uncompensated stranding of assets. It also enhances customer choice. However, this will only apply where the load is new –

in other words, where the load has not been part of a customer's contractual forecast of its needs. In such cases, the customer will be held accountable for its forecast (i.e., by way of true up payments), throughout the economic evaluation period. Transmitters invest in the connection assets based on the customer(s) contractual forecast and customers must be held accountable for the costs of facilities built to meet it. It would be inappropriate to burden all the rest of the transmitter's customers with such costs.

If a customer chooses to build its own new connection facilities, those new facilities may be used to supply the customer's *existing* load, provided the customer adequately compensates the transmitter for the loss of that customer's existing load.

20. Now shown to me and marked as (**Ex. L and M**, to my affidavit are true copies of OEB File No.RP-2002-0120, Phase 1 Policy Decision with Reasons, Chapter 52 and Synopsis of Changes to the Transmission System Code, July 25, 2005, respectively from which the information I quote was drawn.

21. I make this affidavit in support of the Orders sought by Goldcorp and not for any other reason.

SWORN before me at the City of Toronto, in the Province of Ontario, this 5th day of October, 2011.

A Commissioner for taking affidavits.

Curtis C. Pedwell

TORONTO-#268494-v1-Affidavit_of_Curtis_Pedwell

Linda Dianne Robinson, a Commissioner, etc.,
Province of Ontario, for
Gardiner Roberts LLP, Lawyers.
Expires July 9, 2012.

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2011-0106

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

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

BEFORE: Ken Quesnelle
Presiding Member

Cynthia Chaplin
Member and Vice-Chair

Marika Hare
Member

This is Exhibit "A" referred to in the affidavit of Curtis C. Pedwell sworn before me, this 5th day of October 2011

A COMMISSIONER, ETC.

Linda Dianne Robinson, a Commissioner, etc., Province of Ontario, for Gardiner Roberts LLP, Lawyers. Expires July 9, 2012.

DECISION AND ORDER

The Proceeding

Goldcorp Canada Ltd. and Goldcorp Inc. acting jointly as Goldcorp ("Goldcorp" or the "Company") filed an application, dated April 25, 2011, with the Ontario Energy Board (the "Board") under section 92 of the *Ontario Energy Board Act, S.O. 1998*, c.15, Schedule B (the *"Act"*). Goldcorp sought an order of the Board granting leave to construct the following transmission facilities in the Municipality of Red Lake:

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

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

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

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

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

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

Motions

Goldcorp Motions

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

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

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

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

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

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

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

LSFN Motion

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

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

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

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

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

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

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

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

Decision of the Board

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

Positions of Parties and Board Findings

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

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

Project Need

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

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

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

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

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

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

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

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

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

[1] Draft System Impact Assessment, p.i.

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

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

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

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

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

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

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

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

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

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

The purpose of the SIA was to study how the supply capability of the circuit E2R can be expanded beyond the existing 57 MVA threshold.[2] In that regard, the SIA concludes that the proposed facilities will not result in "any significant adverse impacts to the IESO controlled grid, provided that the requirements listed in this report are met".
Similarly, the CIA concludes that the proposed transmission line will have a minimal impact on local supply facilities, no adverse affect on short circuits and will not materially affect the reliability of Hydro One's E2R line.[3]

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[2] Draft System Impact Report, Ex B/T6/S3, p. i
[3] Final Customer Impact Assessment Report, dated June 10, 2011

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

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

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

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

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

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

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

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

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

Goldcorp submitted that not having the necessary permits is not a valid reason to deny the application. Goldcorp noted that it was usual Board practice to grant orders that were conditional on the issuance of the relevant permits. Goldcorp also referred to the Board's Decision in Yellow Falls[4] where the Board provided reasons in support of such an approach.

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

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

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

[4] EB-2009-0120, Decision and Procedural Order No. 4 dated November 18, 2009.
[5] Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Counsel, [2010] 2 S.C.R.650.

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

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

Project Cost and Impact on Ratepayers

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

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

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

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

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

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

Conclusion

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

THE BOARD ORDERS THAT:

1. Pursuant to section 92 of the Act, Goldcorp is granted leave to construct the proposed transmission facilities, all in the Municipality of Red Lake, subject to the Conditions of Approval attached as Appendix A to this Order.

2. The Board had previously determined that LSFN was eligible to apply for an award of costs. Claims in this regard should conform with the Board's Practice Direction on Cost Awards, and shall be filed with the Board and one copy served on Goldcorp by **August 3, 2011**. Goldcorp should review the cost claims and any objections must be filed with the Board and one copy must be served on the claimant by **August 10, 2011**. LSFN will have until **August 17, 2011** to respond to any objections. All submissions must be filed with the Board and one copy is to be served on Goldcorp. Goldcorp shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

ISSUED at Toronto, July 20, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX A

TO DECISION AND ORDER

CONDITIONS OF APPROVAL

EB-2011-0106

DATED: JULY 20, 2011

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

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1 General Requirements

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

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

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

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

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

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

2 Project and Communications Requirements

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

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

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

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

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

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

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

3 Monitoring and Reporting Requirements

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

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

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

-- End of document --

APPENDIX B

TO DECISION AND ORDER

DECISION ON MOTION DATED APRIL 29, 2011

EB-2011-0106

DATED: JULY 20, 2011

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2011-0106

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

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

BEFORE: Ken Quesnelle
Presiding Member

Cynthia Chaplin
Member and Vice-Chair

Marika Hare
Member

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

BACKGROUND

Goldcorp Canada Ltd. and Goldcorp Inc. acting jointly as Goldcorp ("Goldcorp" or the "Applicant") filed an application, dated April 25, 2011, with the Ontario Energy Board under sections 92 and 19 of the *Ontario Energy Board Act, S.O. 1998*, c.15, Schedule B (the "Act"). Goldcorp is seeking an order of the Board granting leave to construct 10.7 km of 115 kV single circuit transmission line from Hydro One Networks Inc.'s ("HONI")

115 kV E2R Transmission line at a point approximately 2 km south of Harry's Corner to the to-be-constructed Balmer Complex Transformer Station ("TS"), all in the Municipality of Red Lake. Goldcorp filed a Notice of Motion of the same date seeking an *ex parte*, interim and interlocutory order under section 19 of the Act, granting leave to carry out civil engineering work at the proposed Balmer Complex TS site and to clear and grub the right-of-way prior to the Board rendering its decision on the leave to construct application and without prejudice to the Board's determination of that application.

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

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

THE MOTION

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

> 19(1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.
>
> (2) The Board shall make any determination in a proceeding by order.
>
> (6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act.

The evidence filed by the Applicant indicates that the Motion filed pursuant to section 19 of the Act is to authorize Goldcorp and its contractors to carry out:

- civil engineering work including grading, fencing, installing foundation for and constructing walls of the Balmer Complex TS building for the Balmer Complex TS. The Applicant proposed to commence with work on May 1 and continue this work until the Board makes its determination with respect to whether to grant leave to construct under section 92 of the Act.
- Clearing and grubbing the right-of-way for the applied for transmission line starting May 1, 2011 and lasting until the commencement of the nesting season

for breeding and migrating birds in May, and then again in mid July on the portions of the right-of-way outside the buffer zone for two separate bald eagle nests on the proposed right-of-way, and finally, in September, 2011 after the bald eagle nesting period is complete.

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

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

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

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

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

BOARD FINDINGS

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

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

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

> Despite section 4.1 of the *Statutory Powers Procedure Act*, the Board may, in addition to its power under that section, dispose of a proceeding without a hearing if,
>
> ...
>
> (b) ***the Board determines that no person, other than the applicant,*** appellant or licence holder ***will be adversely affected in a material way by the outcome of the proceeding*** and the applicant, appellant or licence holder has consented to disposing of a proceeding without a hearing. [Emphasis added]

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

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

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

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

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

ISSUED at Toronto, April 29, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX C

TO DECISION AND ORDER

DECISION ON MOTION DATED JUNE 20, 2011

EB-2011-0106

DATED: JULY 20, 2011

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2011-0106

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

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

BEFORE: Ken Quesnelle
Presiding Member

Cynthia Chaplin
Member and Vice-Chair

Marika Hare
Member

DECISION ON MOTION

BACKGROUND

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

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

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

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

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

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

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

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

Positions of parties:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

[2] Arzem v. Ontario (Ministry of Community & Social Services) and Greenspace Alliance of Canada's Capital v. Ontario (Director, Ministry of the Environment)
[3] Oral Hearing Transcript, Vol. 1, p. 118

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

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

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

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

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

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

[4] Decision granting entry on land in connection with the Bruce to Milton line, dated August 20, 2011

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

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

BOARD FINDINGS

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

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

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

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

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

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

ISSUED at Toronto, June 20, 2011

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Blue, Ian

From: Blue, Ian
Sent: Tuesday, July 26, 2011 3:05 PM
To: raj.ghai@HydroOne.com; naomi.martin@HydroOne.com
Cc: 'Curtis Pedwell'; Kathi Litt; 'Luc Major'
Subject: Re: Goldcorp's 115 kV Transmission Line from South of Harry's Corner to Balmer Complex Transformer Station Approved by the OEB I reply to Raj's e-mail of January 21, 2011.
Attachments: Goldcorp Information Request.PDF; 110726V3-InfoReq-Scenarios-byQuarter.xls

Hi Naomi and Raj,

Goldcorp has now decided that as soon as its new 115 kV line which we have referred to for shorthand purposes as **GL1** is commissioned, Goldcorp will transfer the electricity supply for the Red Lake , Campbell and Balmer Complexes from the E2R line onto GL1 and cease to rely on HONI's Red Lake Transformer Station (RLTS) and the section of E2R between the tap at Harry's Corner and the RLTS. Electricity for the Cochenour Complex will continue to be supplied through the RLTS and be received at distribution voltages.

I enclose:

1. A table forecasting the unutilized capacity on HONI's facilities as a result of transferring electricity supply to GL1,

2. A table that we ask you to complete in order to identify and quantify bypass charges under the Transmission System Code resulting from the described loading of GL1, and

3. Information Requests which we ask you to respond to, in good faith, in order to allow us to assess HONI's calculation of bypass charges.

Goldcorp requests HONI's co-operation.

If you have any questions, please let me know.

Thanks

Ian A. Blue, Q.C.
d 416-865-2962
iblue@gardiner-roberts.com
GARDINER ROBERTS LLP
Scotia Plaza, 40 King Street West, Suite 3100
Toronto, ON, Canada M5H 3Y2
t 416 865 6600 | f 416 865 6636
www.gardiner-roberts.com

This is Exhibit "B" referred to in the affidavit of Curtis C. Pedwell sworn before me, this 5th day of October 20 11

Linda Robinson
A COMMISSIONER, ETC.

Linda Dianne Robinson, a Commissioner, etc., Province of Ontario, for Gardiner Roberts LLP, Lawyers. Expires July 9, 2012.

From: raj.ghai@HydroOne.com [mailto:raj.ghai@HydroOne.com]
Sent: Friday, January 21, 2011 4:16 PM
To: Blue, Ian
Cc: cbouchard@rubiconminerals.com; dboyd@rubiconminerals.com; gord.caul@HydroOne.com; bdominique@casselsbrock.com; chris.dougherty@nordmin.com; timo.hakkarainen@HydroOne.com; sho@gardiner-roberts.com; gkumoi@rubiconminerals.com; klitt@era-inc.ca; luc.major@goldcorp.com; naomi.martin@HydroOne.com; michael.medeiros@HydroOne.com; nmelchio@wmnlaw.com; Andrew.Moshoian@goldcorp.com; bruce.parker@HydroOne.com; curtis.pedwell@goldcorp.com
Subject: RE: 101224-InfoReq-Scenarios.xls

Ian,
We have reviewed the various scenarios presented in your January 10, 2011 e-mail and our comments are as follows:

1) In scenario 3, the dates were displaced and we have made the necessary changes. Please see the attached spread sheet for total loading for various scenarios as follows:
    a. Load forecast for Red Lake TS for various scenarios from Dec. 2010 to Dec. 2014
    b. Load forecast for Goldcorp proposed 115 kV line from Dec. 2010 to Dec. 2014

2) The decline in Red Lake TS load indicates the start of bypass i.e. December 11. The bypass is defined as transfer of customer existing load from the transmitter owned connection facility to the customer owned facility or a third party owned facility. The bypass can be temporary or permanent depending upon whether the transferred load returns back to the transmitter owned facility. Also, the bypass is calculated at a point in time when a customer transfers all or part of their load from transmitter owned facility resulting in stranding of all or part of the capacity.
3) The loading of Red Lake TS varies between December 2010 and December 2014 for various scenarios. Please indicate the point in time when we should calculate the bypass compensation for Red Lake TS. My proposal is to use December 2010 as the reference point for Red Lake TS load. There is a 5 MW drop in December 2012 and additional 4 MW load drop in December 2014 (total load drop of 9 MW).
4) The loading of new Goldcorp 115 kV line has no impact on Red Lake TS bypass calculations.

If you are in agreement with above then we can calculate bypass compensation.

Raj Ghai
Hydro One - TCT15
Phone: 416.345.5302
Cell: 416.985.5359

Please consider the environment before printing this email.

From: Blue, Ian [mailto:iblue@gardiner-roberts.com]
Sent: Monday, January 10, 2011 11:50 AM
To: Blue, Ian; Bourchard, C_Rubicon; Boyd, D_Rubicon; CAUL Gordon; Dominique,B_Goldcorp; Dougherty, C_Rubicon; GHAI Raj; HAKKARAINEN Timo; Ho,S_Goldcorp; Kumoi,G_Rubicon; Litt,K_Goldcorp; Major,L_Goldcorp; MARTIN Naomi; MEDEIROS Michael; Melchiorre,N_Rubicon; Moshoian,A_Goldcorp; PARKER Bruce; Pedwell, C_Goldcorp
Subject: FW: 101224-InfoReq-Scenarios.xls

Please have a look at this IR that we should send to HONE stemming from our meeting wiyh them of December 17th.

Ian A. Blue, Q.C.
d 416-865-2962
iblue@gardiner-roberts.com
GARDINER ROBERTS LLP
Scotia Plaza, 40 King Street West, Suite 3100
Toronto, ON, Canada M5H 3Y2
t 416 865 6600 | f 416 865 6636
www.gardiner-roberts.com

From: Kathi Litt [mailto:klitt@Elenchus.ca]
Sent: Monday, January 10, 2011 11:02 AM
To: Blue, Ian
Subject: FW: 101224-InfoReq-Scenarios.xls

As promised

From: Kathi Litt
Sent: December 24, 2010 9:32 AM
To: Q. C. Ian A. Blue (iblue@gardiner-roberts.com)
Subject: 101224-InfoReq-Scenarios.xls

Hi Ian

Attached is the draft information request to HONI – please review and revise and then circulate to the rest of the team.
Scenario 1 is intended to provide the Baseline data, Scenario 2 is an intended to scope the results of favourable timing of load changes while Scenario 3 is intended to scope the results of less than favourable timing of load changes.
You will see that I have assumed that All Other parties do not experience any load growth; this is because I have incomplete information about magnitude and no information about timing.

The TSC references are sections 6.7 and 11.2.

By way of follow up:
Do you know the status of the SIA or any other reports from the IESO?
Has Naomi provided any past Decisions on Stranded Assets?
What is the status of Rubicon's Offer to Connect from HONI?

I think that's it, is there anything I've overlooked?

Kathi

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Goldcorp Information Request by Goldcorp to Hydro One Networks Inc.
July 26, 2011;

Re: Bypass Changes for Goldcorp's 115 kV line
Approved by the OEB's Decision of July 20th, 2011 in EB-2011-0106

1. Re: Net Book Value of Red Lake Transformer Station (RLTS)

Please provide a continuity statement, organized by year, of the Net Book Value of the Red Lake TS that provides the value and date incurred of:

(a) Capital additions
  (i) Direct costs (eg., materials)
  (ii) Indirect or allocated or assigned costs (eg., overheads)
  (iii) Capitalized expenses (eg., labour, depreciation)
  (iv) Other costs included in capital additions costs
(b) Interest During Construction
(c) Provision for End of Life costs (eg., environmental remediation, asset removal)
(d) All other costs recorded to this asset
(e) The annual depreciation expense of the Red Lake TS
(f) The depreciation rate applied to the Red Lake TS
(g) Any write downs, impairments, removals or other changes to the value of the RLTS.

2. Re: rebuild and refurbishment of the Red Lake TS

Please provide the Red Lake area electricity load forecast relied on:

(a) to support the decision to rebuild/refurbish the Red Lake TS in 2007
(b) for engineering purposes when designing the 2007 Red Lake TS rebuild/refurbishment.

Please provide the following information:

(c) the origin of the load forecast
(d) the name of the party who provided the load forecast or data input to the load forecasting model;
(e) documentation of all adjustments, revisions, updates and other changes made to this data by HONI and the supporting rationale.

3. Re: Red Lake capacity assigned to Goldcorp

Please provide a copy of the current connection agreement between HONI and Goldcorp, if any, with respect to RLTS available capacity and Goldcorp's assigned capacity on the Red Lake.

(a) Please provide Goldcorp's annual assigned capacity on the Red Lake TS since 1995.

(b) Please provide all reports or memorandum concerning the provision of capacity to Goldcorp at the Red Lake TS pursuant to section 6.2.7 of the Transmission System Code (TSC).

4. Re: definition or determination of time of bypass

Please provide HONI's definition of 'time of bypass' that is relied on when administering section 6.7.7 of the TSC.

5. Re: determination of bypass charges

Please provide the following information on the three most recent bypass charges remitted to HONI anywhere on HONI's system. Please protect customer confidentiality.

(a) date and amount of bypass charge;

(b) asset bypassed.

6. Re: Red Lake TS

Please provide the unutilized capacity at Red Lake TS on a monthly basis for the period July 2008 to June 2011; please state all assumptions and supporting facts.

7. Re: Red Lake TS

Please provide a schematic of HONI's Transmission assets from OPG's Ear Falls generating station up to and including HONI's RLTS. For each transmission asset please provide:

(a) maximum allowed loading;

(b) annual maximum loading for the 2006-2011 period on a coincident and non-coincident peak basis;

(c) average loading for the 2006-2011 period.

8. Forecasts

Please provide estimated transmission revenues by Network, Line Connection and Transformer Connection for the following scenarios:

(a) Scenario A: all Red Lake area loads are served by RLTS , peak load is 52.1MVA;

(b) Scenario B: 33.9MVA of Red Lake area load is served by Goldcorp's 115kV Transmission line and 17.8MVA of Red Lake area load is served by RLTS.

Please state all supporting facts and simplifying assumptions.

8/3/2011
Prepared [illegible] Blue, K Litt

Goldcorp
Load data per Goldcorp, Rubicon
Presented by quarter

Summary Table of Unutilized Capacity of HONI Facilities Associated With Goldcorp's Utilization of Goldcorp's Proposed 115kV Line, Phased per Goldcorp's Plan

	Source of Supply	December, 2011	Q1 2012	Q2 2012	Q3 2012	Q4 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013	Q1 2014	Q2 2014	Q3 2014	Q4 2014
Assumed Loads (in MVA)														
Goldcorp	115 kV line	10.6	10.6	28.398	37.955	38.256	39.44	39.632	40.243	40.618	40.375	40.439	40.501	40.598
Goldcorp	RLTS	29.191	29.484	12.015	2.625	3.675	3.675	3.675	3.885	3.885	3.885	3.885	5.46	8.332
Rubicon	RLTS	1.5	1.5	2	4	5	6	6	7	8	8	8	8	8
Pikangikum	RLTS	1	1	1	1	1	1	1	1	1	1	1	1	1
All Other Loads	RLTS	16.4	16.4	16.4	16.4	17.9	17.9	17.9	17.9	16.2	16.2	16.2	16.2	18.2
CALCULATIONS														
Utilized RLTS capacity		48.091	48.384	31.415	24.025	27.575	28.575	28.575	29.785	29.085	29.085	29.085	30.66	35.532
Utilized 115 kV line Capacity		10.6	10.6	28.398	37.955	38.256	39.44	39.632	40.243	40.618	40.375	40.439	40.501	40.598
Utilized Capacity downstream of Ear Falls		58.691	58.984	59.813	61.98	65.831	68.015	68.207	70.028	69.703	69.46	69.524	71.161	76.13
Unutilized Capacity Downstream of Ear Falls		4.309	4.016	3.187	1.02	-2.831	-5.015	-5.207	-7.028	-6.703	-6.46	-6.524	-8.161	-13.13
Unutilized RLTS Capacity		8.909	8.616	25.585	32.975	29.425	28.425	28.425	27.215	27.915	27.915	27.915	26.34	21.468
RLTS														
Theoretical Maximum Capacity		57	57	57	57	57	57	57	57	57	57	57	57	57
Maximum Available Capacity		52.4	52.4	34.602	25.045	24.744	23.56	23.368	22.757	22.382	22.625	22.561	22.499	22.402
Utilized Available Capacity		48.091	48.384	31.415	24.025	27.575	28.575	28.575	29.785	29.085	29.085	29.085	30.66	35.532
Unutilized Available Capacity		4.309	4.016	3.187	1.02	-2.831	-5.015	-5.207	-7.028	-6.703	-6.46	-6.524	-8.161	-13.13
Theoretical Maximum Capacity less Utilized Available Capacity			8.616	25.585	32.975	29.425	28.425	28.425	27.215	27.915	27.915	27.915	26.34	21.468
Goldcorp Proposed 115kV Line Capacity Downstream of Harry's Corner														
Maximum Capacity		50	50	50	50	50	50	50	50	50	50	50	50	50
Utilized Available Capacity		10.6	10.6	28.398	37.955	38.256	39.44	39.632	40.243	40.618	40.375	40.439	40.501	40.598
Unutilized Available Capacity		39.4	39.4	21.602	12.045	11.744	10.56	10.368	9.757	9.382	9.625	9.561	9.499	9.402
E2R Capacity Downstream of Ear Falls														
Maximum Capacity		63	63	63	63	63	63	63	63	63	63	63	63	63
Utilized Available Capacity		58.691	58.984	59.813	61.98	65.831	68.015	68.207	70.028	69.703	69.46	69.524	71.161	76.13
Unutilized Available Capacity		4.309	4.016	3.187	1.02	-2.831	-5.015	-5.207	-7.028	-6.703	-6.46	-6.524	-8.161	-13.13

Assumptions

	Conversion Priority	2011	Q1 2012										
Goldcorp Balmer Complex	3 Q3 2012	9.456	9.475	9.495	9.515	9.536	10.678	10.698	11.213	11.437	11.151	11.172	11.192	11.213
Goldcorp Campbell Complex	2 Q2 2012	17.53	17.594	17.798	17.84	18.12	18.162	18.334	18.43	18.581	18.624	18.667	18.709	18.785
Goldcorp Red Lake Complex	1 Q4 2011	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6
Goldcorp Cochenour Complex	0	2.205	2.415	2.52	2.625	3.675	3.675	3.675	3.885	3.885	3.885	3.885	5.46	8.332
RLTS Maximum Capacity		57 MVA												
E2R capacity downstream of Ear Falls		[redacted] MVA												
capacity increase via capacitors	Q1 2013	SIA												

Documentation

Load Assumptions: all Goldcorp loads are per Northwinds Energy's load forecast.
non-Goldcorp/non-Rubicon/non-Pikangikum loads are per the filed load forecast
Rubicon load forecast is per D Boyd email of December 31, 2010.
RLTS and E2R capacity limits are per the SIA.
GL1 capacity has been assumed to be 50 MVA.
The RLTS Maximum Available Capacity is the lesser of: 57 MVA (per the SIA) OR the difference between E2R's limit and Goldcorp loading on the new line.
GL1 is assumed to serve Goldcorp's Red Lake, Campbell and Balmer complexes.
Unutilized Capacity is computed as the difference between the maximum/available capacity and the proposed loading.
Simplifying assumption: RLTS loss factor assumed to be 0%.
-ve data is indicative of the need to self-supply (Goldcorp installs generators) or shed load (shedding load requires that Goldcorp forgo economic gold production)'

Goldcorp
Information Request to HONI
Identification and Quantification of Bypassed Asset Charges per TSC

Scenario 1

Delivery Recipient	Source of Supply	December, 2010	December, 2011	December, 2012	December, 2013	December, 2014
Goldcorp	110 kV line	0	12	26	26	34
Goldcorp	RLTS	34	29	22	24	16
Rubicon	RLTS	1	5	8	8	10
All Other Loads	RLTS	14	14	14	14	14

Results

MW of Bypassed Capacity per TSC						
Bypassed Asset Charge, per TSC						
HONI NBV RLTS						
Party Responsible for Bypassed Asset Charge						
Maximum Deliveries Downstream of RLTS (MW)						
Maximum Deliveries to RLTS (MW)						
Source of RLTS Throughput Constraint						

Scenario 2

Delivery Recipient	Source of Supply	December, 2010	October, 2011	March, 2012	August, 2011	December, 2012	December, 2013	December, 2014
Goldcorp	110 kV line	0	0	12	12	26	26	34
Goldcorp	RLTS	34	34	29	29	22	24	16
Rubicon	RLTS	1	5	5	5	8	8	10
All Other Loads	RLTS	14	14	14	14	14	14	14

Results

MW of Bypassed Capacity per TSC							
Bypassed Asset Charge, per TSC							
HONI NBV RLTS							
Party Responsible for Bypassed Asset Charge							
Maximum Deliveries Downstream of RLTS (MW)							
Maximum Deliveries to RLTS (MW)							
Source of RLTS Throughput Constraint							

Scenario 3

Delivery Recipient	Source of Supply	December, 2010	December, 2011	May, 2011	June, 2011	December, 2012	May, 2013	December, 2013	December, 2014
Goldcorp	110 kV line	0	12	12	12	26	26	26	34
Goldcorp	RLTS	34	29	29	29	22	22	24	16
Rubicon	RLTS	1	1	1	5	8	8	8	10
All Other Loads	RLTS	14	14	14	14	14	14	14	14

Results

MW of Bypassed Capacity per TSC							
Bypassed Asset Charge, per TSC							
HONI NBV RLTS							
Party Responsible for Bypassed Asset Charge							
Maximum Deliveries Downstream of RLTS (MW)							
Maximum Deliveries to RLTS (MW)							
Source of RLTS Throughput Constraint							

Notes
All deliveries are peak monthly MVA

Bl lan

From: Curtis Pedwell [Curtis.Pedwell@goldcorp.com]
Sent: Friday, April 16, 2010 7:31 AM
To: Luc Major
Cc: Mike Lalonde
Subject: FW: Bypass calculations
Attachments: goldcorp red lake bypass calculation 2010 04 15.pdf

Luc,

Finally got this information from John, he told me earlier that this matrix was convoluted and hard to understand, I guess he must have dumbed it down for us. Let's discuss this morning when we get together.

Curtis Pedwell
Maintenance Manager
Goldcorp - Red Lake Gold Mines
W 807-735-2077 x 5118
Email curtis.pedwell@goldcorp.com

GOLDCORP
Red Lake Gold Mines

This is Exhibit "C" referred to in the affidavit of Curtis C. Pedwell sworn before me, this 5th day of October 20 11

A COMMISSIONER, ETC.
Linda Dianne Robinson, a Commissioner, etc., Province of Ontario, for Gardiner Roberts LLP, Lawyers. Expires July 9, 2012.

From: john.breen@HydroOne.com [mailto:john.breen@HydroOne.com]
Sent: Friday, April 16, 2010 4:46 AM
To: Curtis Pedwell
Cc: len.mcmillan@HydroOne.com; john.breen@HydroOne.com; marc.boucher@HydroOne.com; philip.yc.poon@HydroOne.com
Subject: Bypass calculations

<<goldcorp red lake bypass calculation 2010 04 15.pdf>>

Curtis

Attached is a note on the calculations for the bypass compensation at Red Lake TS. Calculations involved the net book value of the station and a winter loading value. Further calculations will need to be done at such time Goldcorp decides what their needs are and what their power supply configuration will be.

Hopefully this information will assist you in determining whether Goldcorp Red Lake Mines will be connected to the transmission system or remain being supplied from the Red Lake TS or a combination of the two.

If you have any questions, please contact me.

Again thanks for your patience in this matter.

John Breen
Northwest Zone
Hydro One
Thunder Bay
Please consider the environment before printing this e-mail

April 15, 2010

Preliminary Bypass Calculation

For Goldcorp Inc. at Red Lake TS

Prepared by: Philip Poon, Hydro One

Transmission Bypass Compensation is calculated in accordance with Section 6.7.7 of the Transmission System Code, which stipulates that:

> *...the transmitter shall calculate bypass compensation by first multiplying the net book value of the bypassed connection facility, including a salvage credit and reasonable removal and environmental remediation costs, if applicable, by the bypassed capacity on the relevant connection facility. The transmitter shall then divide the resulting figure by the total normal supply capacity of the bypassed connection facility. For purposes of this calculation:*
>
> *(a) the bypassed capacity on the relevant connection facility shall be equal to the difference between the customer's existing load on that connection facility at the time of bypass and the customer's average monthly peak load in the three-month period following the date on which bypass occurred; and*
>
> *(b) the normal supply capacity of the bypassed connection facility shall be determined by the transmitter in accordance with the Board-approved procedure referred to in section 6.2.7.*

Bypass Compensation	=	NBV	× (Bypassed Capacity / Total Normal Supply Capacity)
	=	\$15 M	× (33 MVA / 61.5 MVA)
	=	\$15 M	× 0.537
	=	**\$8 M**	

Notes & Assumptions:

1) The bypass compensation amount above is a low-quality, preliminary estimate only. Additional work would be needed to develop the actual bypass compensation amount payable by Goldcorp, at the time of actual bypass. The re-calculated amount may differ significantly from this preliminary calculation.

2) NBV is the estimated Net Book Value of Red Lake TS, as of December 31, 2011 – the assumed date of bypass. (Note: The NBV is subject to change with time due to depreciation and incremental station investments.)

3) The above bypass compensation calculation is based on NBV only and excludes any removal or environmental remediation costs or salvage credit amounts. The actual bypass compensation amount, calculated at the time of actual bypass, would need to include these amounts.

4) The Bypassed Capacity is Goldcorp's existing load at Red Lake TS prior to the station refurbishment in 2007. Goldcorp's load growth since 2007 is not counted as bypassed capacity as it forms part of the load forecast that was used to justify the refurbishment work advancement (from 2010 to 2007), for which a separate true-up process applies.

5) The Total Normal Supply Capacity value is the Winter 10 Day Limited Time Rating of Red Lake TS.

Blue, Ian

From: Shankar, Pappur [Pappur.Shankar@snclavalin.com]
Sent: Friday, April 30, 2010 3:06 PM
To: Luc Major; Bustraen, Robert; Banakar, Hadi
Subject: RE: Stranding and who pays for Network improvements

HI Luc

in the interest of Goldcorp, you should look into the best possible ways how it will be beneficial.. $8M is only a no, could be $11M as they were quoting yesterday. Hadi was saying if you install transfer switch, you may have to pay certain % of the load transferred for stranded costs.

Political is dangerous and lead time could go to 6 months to 2 years

---

From: Luc Major [mailto:luc.major@goldcorp.com]
Sent: April 30, 2010 3:01 PM
To: Bustraen, Robert; Banakar, Hadi; Shankar, Pappur
Subject: RE: Stranding and who pays for Network improvements

By the way we are talking about an upgrade cost and stranded assets that occurred only a few years ago. The age of the transformers triggered the upgrade. That is probably why we did not need to get into a contract.

I've also been telling the mine this for quite some time.

Regards,

Luc Major
Major Consulting
Phone - (807) 662-2525
Cell - (807) 727-0690
Fax - (807) 662-4458

This is Exhibit "D" referred to in the affidavit of Curtis C. Pedwell sworn before me, this 5th day of October 20 11

Linda Robinson
A COMMISSIONER, ETC.

Linda Dianne Robinson, a Commissioner, etc., Province of Ontario, for Gardiner Roberts LLP, Lawyers. Expires July 9, 2012.

From: Bustraen, Robert [mailto:Robert.Bustraen@snclavalin.com]
Sent: April-30-10 1:38 PM
To: Luc Major; Banakar, Hadi; Shankar, Pappur
Subject: RE: Stranding and who pays for Network improvements

Luc:

You may be on to something. I'd suggest though that you might wish to have some legal person look at the Transmission Code, because there may be wording in it that says something like "This Code covers all future contracts and agreements. All existing connection, whether legally bound by agreements or not are considered henceforth to be bound at the power levels supplied by HONI over the past one year period."

Bob

From: Luc Major [mailto:luc.major@goldcorp.com]
Sent: April 30, 2010 2:29 PM
To: Banakar, Hadi; Shankar, Pappur; Bustraen, Robert
Subject: FW: Stranding and who pays for Network improvements

Sorry, I forgot the SNC crew. It was getting late in the evening.

Regards,

Luc Major
Major Consulting
Phone - (807) 662-2525
Cell - (807) 727-0690
Fax - (807) 662-4458

From: Luc Major
Sent: April-29-10 8:45 PM
To: John Breen
Cc: Mike Lalonde; Dale Kosie; Curtis Pedwell; David Gelderland; David Boileau (dboileau@windeau.com); A MacIver; Vic Gignac; Bob Ritchie
Subject: FW: Stranding and who pays for Network improvements

John,

Can you please pass this on to all that was at the meeting from your end?

During the meeting it was said HONI did not need a contract to impose stranded assets costs. Please note, in the attached, the first paragraph that was highlighted. Twice it mentions 'Contractual Forecast' when it comes to system upgrades and stranded asset costs. I'm not a lawyer and I may be reading this the wrong way.

This is one of the reasons I asked for a copy of some agreement between Goldcorp and HONI. It is also a good reason to see the details of the stranded cost calculations. I think it's probably within Goldcorp's right to see this before they even consider bringing the $8,000,000 cost to head office's attention. It will also help with the financial decision on whether or not we move 1, 2 or 3 of our 4 sites to 115 kV should it be decided to go that way.

Regards,

Luc Major
Major Consulting
Phone - (807) 662-2525
Cell - (807) 727-0690
Fax - (807) 662-4458

From: David Boileau [mailto:dboileau@windeau.com]
Sent: April-19-10 9:12 AM
To: Mike Lalonde; Luc Major; Curtis Pedwell; David Gelderland
Subject: Stranding and who pays for Network improvements

Hello,

Alex has forwarded document that provides a good explanation of standing triggers and responsibility as well as principles for customer contributions on new Network assets. I have printed it in a PDF (attached) and high some key sections.

Regards,

David

From: A MacIver [mailto:a_maciver@sympatico.ca]
Sent: April-19-10 7:50 AM
To: dboileau@windeau.com
Subject: Re: Rational for stranding and line connection

More updated synopsis, explains it pretty good. Need to give a year notice to bypass.

http://www.theimo.com/imoweb/pubs/corp/TSC_Synopsis-2005July26.pdf

----- Original Message -----
From: David Boileau
To: 'A MacIver'
Sent: Sunday, April 18, 2010 6:46 PM
Subject: RE: Rational for stranding and line connection

Thanks Alex,

Can you find rules/decisions regarding customer contributions to reinforcements. For example if E2R is fully loaded how does OEB rule on who pays and what are the inputs to the formula?

Regards,

David

From: A MacIver [mailto:a_maciver@sympatico.ca]
Sent: April-18-10 6:17 PM
To: dboileau@windeau.com
Subject: Rational for stranding and line connection

You may know all this but it contains the reasoning behind the stranding costs and what they are, available capacity and customer arranging for own connection. In particular sections 4.4, 4.8, 5.3,5.5, and the synopsis at the end.

http://www.hydroone.com/RegulatoryAffairs/Documents/Archives/RP-2002-0101%20EB-2002-0242/Phase1%20Decision.pdf

----- Original Message -----
From: David Boileau
To: 'A MacIver'
Sent: Sunday, April 18, 2010 11:13 AM
Subject: RE: Questions

Thanks Alex,

This info help me to structure the package. Luc will have the answers to some of the questions and we will embed the rest of the questions in the text.

Regards,

David

From: A MacIver [mailto:a_maciver@sympatico.ca]
Sent: April-18-10 9:49 AM
To: dboileau@windeau.com
Subject: Questions

Here are some questions for HONI. Luc asked for them from us, not sure if he still wants them or they are being integrated into your presentation and submitted within. Anyways add to them as you see fit.

----- Original Message -----
From: David Boileau
To: 'A MacIver' ; 'Luc Major'
Cc: 'Mike Lalonde' ; 'Curtis Pedwell' ; 'David Gelderland'
Sent: Saturday, April 17, 2010 11:06 AM
Subject: line losses and other items

Hi Alex and Luc,

The priority objectives in the initial presentation to be sent to HONI are:

1) Clarify for HONI the loads and required schedule for power capacity at RLGM.
2) Build the case for the 115 kV tap and (competitive) HONI ownership of the 115kV line up to the to the Goldcorp substation.
3) Make a case to minimize stranded asset charges for 44kV infrastructure.
4) Make a case to maximize the HONI contribution (rate base) to the 115 kV tap option as well as the E2R twinning.
5) Provide a Goldcorp perspective of opportunities, risks and barriers.

In the package that we prepare for next Wednesday, we will want to raise every item that supports the case for a 115kV tap solution. This includes reasons why the 44 kV is not serving Goldcorp/HONI and ratebase needs. For example the 3 circuits (and proposed 4th circuit) must be expensive to maintain, more failure points, more right of way issues, more line losses etc. In addition to the burden on Goldcorp, these are costs that are ultimately paid by the rate base and would actually act as a credit to the 115 kV case.

HONI has an obligation to loads to deliver quality power and reliable service. They also have an obligation to the rate base to do so in a cost efficient manner.

We already have a lot of solid information from the spreadsheet and matrix exercise. However, now we need to expand our review to consider issues/benefits for HONI, non-RLGM loads and the issues/benefits and other loads. So if you can give me a list that explains and quantifies all of the deficiencies of the 44kV service, it will help me develop the argument to support the 115kV case. Also I need a list of all of the efficiencies, benefits and deficiencies of the 115kV tap so we can better defend our position.

Luc, for the Northern Loop project, has HONI ever discussed their position on the feasibility of this line? For the Pikangikum line, I understand that it was to be constructed as a 115kV line but operated at 44kV. Is this the case? How much would be saved by the FN if the 115kV terminated near the Nungesser? Road in Balmertown? On the map it looks like about 12 km from the Nungesser Road to RLTS. What would the line loss savings be for Pik if the line was 115kV? What are the other savings/costs (e.g. distribution vs

transmission rates, extra costs of transformation)? Who will be the owner of the Pik line, HONI or the FN.

Since the Target case is now similar to the Optimistic case for the first 5 years, and since HONI is predicting an increased demand from non-RLGM loads, the capacity of the E2R could be exceeded as early as 2012. This means that we will need to address the E2R twinning now, perhaps as a separate discussion but certainly it will be on the table. So, we will need to demonstrate that the rate base should pay a good portion of the E2R twinning. What are the E2R annual line losses (MWh and $ cost) at the current load? How much does this change as load approaches 80 MW. How would this compare to losses if the line was twinned? What other non-RLGM loads benefit from twinning and how?

This may be a naive question, but since RLGM proposes a tap at Harry's corner on the existing E2R, what happens when the 2nd circuit arrives at RLTS. In a line outage situation, (e.g. E2R old is out) how will E2R new power be delivered to the tap point at Harry's corner? Either an automatic isolation switch would be required at Harry's corner for the 2 circuits or the Goldcorp 115kV service line would need to terminate at RLTS. I assume that this was considered in the costing of the options – please confirm.

At this stage we do not need exact figures on costs, losses etc. A range of +/- 15% is ok. We just want to get all of the issues on the table. HONI and SNC can refine the figures once the scope and loads are well understood by the parties.

Regards,

David

No virus found in this incoming message.
Checked by AVG - www.avg.com
Version: 8.5.437 / Virus Database: 271.1.1/2812 - Release Date: 04/18/10 06:31:00

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Checked by AVG - www.avg.com
Version: 8.5.437 / Virus Database: 271.1.1/2812 - Release Date: 04/18/10 18:31:00

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Version: 8.5.437 / Virus Database: 271.1.1/2812 - Release Date: 04/18/10 18:31:00

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·dro One Networks
, Bay Street
Toronto, ON M5G 2P5

hydro one

Meeting Minutes – Goldcorp Red Lake Gold Mines

DATE OF MEETNG:	November 4, 2010	FILE NO:	
LOCATION:	483 Bay Street Toronto	WRITTEN BY:	Timo Hakkarainen
SUBJECT:	Electrical Supply in Red Lake Area	REVISION NO:	FINAL
CUSTOMER:	Goldcorp – Red Lake Gold Mines		
PROJECT TITLE:			

PRESENT:		
Goldcorp Representatives:	Curtis Pedwell	Goldcorp – Project Manager
	Luc Major	Major Consulting
	Kathi Litt	Elenchus Research Associates Inc.
	Ian Blue	Cassels Brock Lawyers
Hydro One Representatives:	Naomi Martin	Senior Legal Counsel, Hydro One Networks Inc.
	Mike Medeiros	Hydro One Network Management – Distribution Planning
	Ibrahim El Nahas	Hydro One Transmission Planning Manager
	Raj Ghai	Hydro One Sr. Network Management–Transmission Planning
	Timo Hakkarainen	Hydro One Account Executive

Objective

Objective of the meeting is to review electrical supply planning in the Red Lake Area.

Discussion

Hydro One stated that in accordance with its license and Rubicon's express requirements, it was not prepared to provide any information with respect to Rubicon.

Ian did, however, review for the benefit of Hydro One, and in the context of Goldcorp's own plans, what Rubicon had advised Goldcorp in respect of Rubicon's proposed line at their meeting on October 21st. Ian referred to the following:

- A copy of the aerial photograph of Rubicon's requested right-of-way from Nungesser Road to the Phoenix Mine Site that Rubicon provided to Goldcorp and to Rubicon's March 8, 2010 public presentation on the Phoenix Project.
- Goldcorp received a request from Hydro One Networks for easement rights from Goldcorp for its proposed M5 line to connect with Rubicon's right of way line, which proposed M5 line would necessarily cross lands

This is Exhibit "E" referred to in the affidavit of Curtis C. Pedwell sworn before me, this 5th day of October 20 11

Linda Dianne Robinson, a Commissioner, etc., Province of Ontario, for Gardiner Roberts LLP, Lawyers. Expires July 9, 2012.

A COMMISSIONER, ETC.

owned either by Goldcorp or by the joint venture between Goldcorp and Premier Gold. Ian had learned of the Hydro One Networks request the afternoon after the October 21st meeting between Goldcorp and Rubicon, at Goldcorp's offices.

- Goldcorp advised Hydro One that once its 115 kV line is constructed, which will be in service in 2011 Q4, it would be prepared to transfer its loads from the M6 line to its 115 kV line. This would free up capacity at the Red Lake Transformer Station (RLTS) and on the M6 line.
- Goldcorp stated it would make sense for Rubicon to utilize the freed up capacity in the RLTS and on the M6 line, rather than have Hydro One construct the new M5 line.
- The proposed M5 line runs across gold prospects owned by Goldcorp and the joint venture and, for that reason, Goldcorp is not inclined to grant any easements to Hydro One on, in, over or under those lands at this or any other time.
- In response to a question of Ian, Hydro One stated that it had no policy with respect to expropriating for distribution lines (or for transmission lines for that matter but that it has expropriated for a customer connection in the past but has not had to do so to date for a distribution connection) and made it clear that it would explore all other alternative routes as it would be required to do to satisfy the expropriation requirements under the *Ontario Energy Board Act, 1998* before deciding whether to do so.
- Ian believes that a meeting between Hydro One, Rubicon and Goldcorp would be extremely fruitful for all three companies in the interests of efficient system planning. Ian will e-mail Rubicon to recommend that a tri-party discussion be held.

Review of Goldcorp's 10.2 km 115 kV line from Harry's Corner to Balmer Complex

Goldcorp is considering options for loading the new 115 kV line. Present plan is to leave existing load on at Red Lake TS and load the 115 kV line with new load. This would result in the least impact for stranded asset costs for Goldcorp at Red Lake TS.

- Curtis reviewed the power quality and efficiency benefits for Goldcorp to move away from the 44 kV connection to a transmission connection.
- A System Impact Assessment (SIA) currently being performed by the IESO for the new line.
- Hydro One will do a Customer Impact Assessment (CIA) once part one of the SIA part is available.
- A Study Agreement will need to be executed prior to Hydro One performing a CIA.
- Hydro One requested that Goldcorp provide Hydro One with load forecast including the amount of capacity that Goldcorp would like to remove from the Red Lake TS (as well as their proposed timeline for so doing) so that Hydro One can determine whether the needs of all of its customers in the area can be met without a new transformer at Red Lake TS.

ACTION: Timo will provide a Study Agreement to Goldcorp for signing in advance so that the CIA can be completed.

- The amount of capacity available on the E2R line is limited and has been discussed with Goldcorp in past meetings. The SIA should confirm the capacity limitations.
- Hydro One is working with SNC Lavalin to review the connection of the line to E2R.
- Goldcorp may wish to have Hydro One take over ownership of the new line and SNC Lavalin has requested 115 kV functional design specifications from Hydro One for the new line.
- Goldcorp indicated they plan to build the new line to 230 kV specifications but operate it at 115 kV. As a result, the function design specifications to be provided need to be changed.

ACTION: Goldcorp will expeditiously confirm with SNC Lavalin that the new line design will be 230 kV and if so confirmed, Goldcorp or SNC Lavalin will revise their request for functional design specifications.

Stranded Assets Charge

Kathi provided Hydro One with a list of questions (attached) regarding Stranded Assets Charges.


hppscan16.pdf

Meeting Adjourned.

MINUTES OF MEETING

DATE: Dec 17, 2010	RECORDER: Michael Medeiros	ISSUED BY: Michael Medeiros
PROJECT: Goldcorp – Hydro One Red Lake Area Power Supply Meeting with Goldcorp and Rubicon Present.		
LOCATION OF MEETING: 483 Bay St., South Tower 5th floor Room G, Toronto, ON		DATE OF MEETING: Dec 17, 2010
PURPOSE OF MEETING: To discuss transmission and distribution system upgrade requirements to meet Gold Corp's and Rubicon's load forecast for the Red Lake TS area.		

ATTENDED BY:

- Curtis Pedwell (CP), Maintenance Manager, Goldcorp
- Luc Major (LM), Goldcorp Consultant
- Michael Medeiros (MM), Distribution Development, Network Management Engineer, Hydro One
- Naomi Martin, , Senior Legal Counsel, Hydro One
- Raj Ghai (RG), Transmission System Development, Sr. Network Management Engineer, Hydro One
- Timo Hakkarainen (TH), Account Executive, Customer Business Relations, Hydro One
- Ian Blue, Gardiner Roberts LLP, Goldcorp's legal counsel
- Claude Bouchard, VP Operations, Rubicon
- B. Dominique, Legal Counsel, Goldcorp
- Glenn Kumoi, VP General Counsel, Rubicon
- Nick Melchiorre, Barrister and Solicitor, Weiler, Maloney, Nelson for Rubicon
- Darrly Boyd, Manager Regulatory Affairs, Rubicon.
- Chris Dougherty, Rubicon
- Kathi Litt, Goldcorp
- A. Moshoian, Goldcorp

DISTRIBUTION: Attendees, Ron Salt, Ibrahim El Nahas, Philip Poon,

This is Exhibit "F" referred to in the affidavit of Curtis C. Pedwell sworn before me, this 5th day of October 20 11

Linda Robinson
A COMMISSIONER, ETC.

Linda Dianne Robinson, a Commissioner, etc., Province of Ontario, for Gardiner Roberts LLP, Lawyers. Expires July 9, 2012.

Disclaimer

These meeting minutes are for the sole use of Goldcorp Inc, Rubicon and Hydro One Networks Inc. and are for information purposes only. The material in this document does not constitute a commitment from Hydro One Networks Inc. The ratings referred to in this document are the best estimate that could be provided at the time and are meant for reference only. Actual operating ratings may differ for these referenced ratings.

Summary of Minutes

A meeting was held to discuss the electrical supply in the Red Lake TS area with both Rubicon and Goldcorp present. The purpose of the meeting was to identify possible synergies between supply of Goldcorp and Rubicon. The Agenda agreed to by Rubicon and Goldcorp for the proposed meeting is attached in Appendix A. Ian Blue indicated that Goldcorp and Rubicon had had a meeting in the morning and had agreed to swap load on the M6 feeder. Ian Blue talked to points 1 to 5 of the agenda and then the meeting moved to the discussion of the stranded asset cost for Red Lake TS.

Background

Goldcorp has been in ongoing discussions with Hydro One Networks Inc. ("Hydro One") regarding new load growth in the Red Lake area. The last meeting held between Goldcorp and Hydro One took place on November \19, 2010. In this meeting Hydro One's Distribution representatives and Hydro One's Transmission representatives discussed the possibility of replacing Goldcorp's load with another customer's load to reduce Goldcorp's stranded asset cost on Red Lake TS.

Discussion

1. Review of HONI's Red Lake Transformer Station Upgrade

   The Transformer station upgrade is in the preliminary design stage.

2. Review of Goldcorp's 10.2 km 115 kV line from Harry's Corner to Balmer Complex

   Expected in service is end of 2011. SIA still pending.

3. Rubicon's 44 kV line to Phoenix Mine Site

   HONI's detailed design has been completed, easements have not been secured for the new M5 or for Rubicon's portion of the tap off the existing M6.

4. Proposal to have Rubicon utilize the capacity freed up at the Red Lake Transformer Station to the extent Goldcorp offloads the M6 line. (There would be potential to mitigate or preclude stranding assets.)

   Rubicon and Goldcorp have agreed to swap capacity on the M6. Goldcorp will move load off the M6 to accommodate new load from Rubicon. This is a two party agreement between Goldcorp and Rubicon.

5. Possible duplication of Hydro One assets if Hydro One proceeds with construction of the proposed M5 line and third transformer at the Red Lake Transformer Station.

   Hydro One Distribution agreed that there is possible duplication and that a load swap between Goldcorp and Rubicon could work in principle.

6. Stranded Assets.

   Ian Blue stated that stranding costs associated with moving load from the Red Lake TS should not apply to Goldcorp at all if Goldcorp removes load from Res Lake TS. Naomi Martin stated that Hydro One disagreed with that assertion on the basis of the provisions of the Transmission System Code. Hydro One will calculate bypass compensation based on the actual load bypassed at Red Lake TS when bypass of Red Lake TS occurs in accordance with the provisions of the Transmission System Code that Hydro One has discussed with Goldcorp previously. Rubicon and Goldcorp are to send revised load forecasts. Hydro One will provide a new estimate of the bypass compensation amount payable by Goldcorp based on the new load information. Hydro One indicated that bypass is determined based on actual load information and at the time that bypass occurs and if Rubicon's load does not

materialize as envisaged by Goldcorp and Rubicon that Goldcorp will be liable to pay bypass compensation.

Action Items

#	Description	Deadline	Accountability	Status
1	Send out revised load forecast for Goldcorp based on proposed swap and IESO SIA for new TS.	TBD	Luc Major, Goldcorp	Complete d
2	Send out revised load forecast for Rubicon based on proposed swap and IESO SIA for new TS.	TBD	Darryl Boyd, Rubicon	Complete d
3	Prepare new estimate for stranded asset cost after revised load forecast have been made available by Rubicon and Goldcorp.	Dependent on 1 and 2.	Raj Ghai, Hydro One	In progress
	If there are any errors or omissions in the above, please contact the undersigned within 7 days.			
	_____ Michael Medeiros (416) 345-6848			

Follow up Summary

#	Description	Action Date
1	Received scenarios from Ian Blue on behalf of Goldcorp via email.	Jan. 10, 2011
2	Received load forecast by Quarter from Darryl Boyd from Rubicon via email.	Dec. 31, 2010
3	Raj Ghai requested a clarification from Goldcorp regarding scenarios to Ian Blue via email on Jan. 21, 2011.	TBD
4		
5		
6		
7		
8		
	If there are any errors or omissions in the above, please contact the undersigned within 7 days.	
	_____ Michael Medeiros (416) 345-6848	

Appendix A: Agenda for Meeting Re: Electrical Supply in Red Lake Area

1. Review of HONE's Red Lake Transformer Station Upgrade
   - Current status (allotment, schedule, cost)
   - Flexibility
2. Review of Goldcorp's 10.2 km 115 Kv line from Harry's Corner to Balmer Complex
   - Current status (permitting, procurement, construction)
   - Benefits to Goldcorp and system
   - Disadvantages including possibility of stranding assets
3. Rubicon's 44 Kv line to Phoenix Mine Site
   - Current status (permitting, procurement, construction)
   - Route and required easement
     - by Rubicon
     - by HONE
   - Advantages to Rubicon and to system
4. Proposal to have Rubicon utilize the capacity freed up at the Red Lake Transformer Station to the extent Goldcorp offloads the M6 line. (There would be potential to mitigate or preclude stranding assets.)
5. Possible duplication of Hydro One assets if Hydro One proceeds with construction of the proposed M5 line and third transformer at the Red Lake Transformer Station.

Blue, Ian

From: raj.ghai@HydroOne.com
Sent: Friday, January 21, 2011 4:16 PM
To: Blue, Ian
Cc: cbouchard@rubiconminerals.com; dboyd@rubiconminerals.com; gord.caul@HydroOne.com; bdominique@casselsbrock.com; chris.dougherty@nordmin.com; timo.hakkarainen@HydroOne.com; sho@gardiner-roberts.com; gkumoi@rubiconminerals.com; klitt@era-inc.ca; luc.major@goldcorp.com; naomi.martin@HydroOne.com; michael.medeiros@HydroOne.com; nmelchio@wmnlaw.com; Andrew.Moshoian@goldcorp.com; bruce.parker@HydroOne.com; curtis.pedwell@goldcorp.com
Subject: RE: 101224-InfoReq-Scenarios.xls
Attachments: Goldcorp_Rubicon_LF_summary.xls

Ian,
We have reviewed the various scenarios presented in your January 10, 2011 e-mail and our comments are as follows:

1) In scenario 3, the dates were displaced and we have made the necessary changes. Please see the attached spread sheet for total loading for various scenarios as follows:
    a. Load forecast for Red Lake TS for various scenarios from Dec. 2010 to Dec. 2014
    b. Load forecast for Goldcorp proposed 115 kV line from Dec. 2010 to Dec. 2014

2) The decline in Red Lake TS load indicates the start of bypass i.e. December 11. The bypass is defined as transfer of customer existing load from the transmitter owned connection facility to the customer owned facility or a third party owned facility. The bypass can be temporary or permanent depending upon whether the transferred load returns back to the transmitter owned facility. Also, the bypass is calculated at a point in time when a customer transfers all or part of their load from transmitter owned facility resulting in stranding of all or part of the capacity.
3) The loading of Red Lake TS varies between December 2010 and December 2014 for various scenarios. Please indicate the point in time when we should calculate the bypass compensation for Red Lake TS. My proposal is to use December 2010 as the reference point for Red Lake TS load. There is a 5 MW drop in December 2012 and additional 4 MW load drop in December 2014 (total load drop of 9 MW).
4) The loading of new Goldcorp 115 kV line has no impact on Red Lake TS bypass calculations.

If you are in agreement with above then we can calculate bypass compensation.

Raj Ghai
Hydro One - TCT15
Phone: 416.345.5302
Cell: 416.985.5359

Please consider the environment before printing this email.

This is Exhibit "G" referred to in the affidavit of Curtis C. Pedwell sworn before me, this 5th day of October 20 11

Linda Robinson
A COMMISSIONER, ETC.
Linda Dianne Robinson, a Commissioner, etc., Province of Ontario, for Gardiner Roberts LLP, Lawyers. Expires July 9, 2012.

From: Blue, Ian [mailto:iblue@gardiner-roberts.com]
Sent: Monday, January 10, 2011 11:50 AM

To: Blue, Ian; Bourchard, C_Rubicon; Boyd, D_Rubicon; CAUL Gordon; Dominique,B_Goldcorp; Dougherty, C_Rubicon; GHAI Raj; HAKKARAINEN Timo; Ho,S_Goldcorp; Kumoi,G_Rubicon; Litt,K_Goldcorp; Major,L_Goldcorp; MARTIN Naomi; MEDEIROS Michael; Melchiorre,N_Rubicon; Moshoian,A_Goldcorp; PARKER Bruce; Pedwell, C_Goldcorp
Subject: FW: 101224-InfoReq-Scenarios.xls

Please have a look at this IR that we should send to HONE stemming from our meeting wiyh them of December 17th.

Ian A. Blue, Q.C.
d 416-865-2962
iblue@gardiner-roberts.com
GARDINER ROBERTS LLP
Scotia Plaza, 40 King Street West, Suite 3100
Toronto, ON, Canada M5H 3Y2
t 416 865 6600 | f 416 865 6636
www.gardiner-roberts.com

From: Kathi Litt [mailto:klitt@Elenchus.ca]
Sent: Monday, January 10, 2011 11:02 AM
To: Blue, Ian
Subject: FW: 101224-InfoReq-Scenarios.xls

As promised

From: Kathi Litt
Sent: December 24, 2010 9:32 AM
To: Q. C. Ian A. Blue (iblue@gardiner-roberts.com)
Subject: 101224-InfoReq-Scenarios.xls

Hi Ian

Attached is the draft information request to HONI – please review and revise and then circulate to the rest of the team.
Scenario 1 is intended to provide the Baseline data, Scenario 2 is an intended to scope the results of favourable timing of load changes while Scenario 3 is intended to scope the results of less than favourable timing of load changes.
You will see that I have assumed that All Other parties do not experience any load growth; this is because I have incomplete information about magnitude and no information about timing.

The TSC references are sections 6.7 and 11.2.

By way of follow up:
Do you know the status of the SIA or any other reports from the IESO?
Has Naomi provided any past Decisions on Stranded Assets?
What is the status of Rubicon's Offer to Connect from HONI?

I think that's it, is there anything I've overlooked?

Kathi

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Red Lake TS Load Forecast (Combined Goldcorp,Rubicon and Retaill Load)

	Dec-10	Oct-11	Dec-11	Mar-12	May-12	Jun-12	Aug-12	Dec-12	May-13	Dec-13	Dec-14
Scenario 1	49		48					44		46	40
Scenario 2	49	53		48			48	44		46	40
Scenario 3	49		44		44	48		44	44	46	40

Goldcorp 115 kV line Load Forecast

	Dec-10	Oct-11	Dec-11	Mar-12	May-12	Jun-12	Aug-12	Dec-12	May-13	Dec-13	Dec-14
Scenario 1	0		12					26		26	34
Scenario 2	0	0		12			12	26		26	34
Scenario 3	0		12		12	12		26	26	26	34

Goldcorp

Meeting Notes

Date of Meeting: April 1, 2011

Attendance

Goldcorp	Curtis Pedwell
	Luc Major (by teleconference)
	Ian Blue
	Kathi Litt
	Craig Pruitt
	Mary Shea
Rubicon	Daryl Boyd
	Nick Melchiorre
HONI	Naomi Martin
	Gord Caul
	Kelly Charbonneau
	Raj Ghai
	Timo Hakkarainen
	Michael Medeiros
	Ibrahim el-Nahas

This is Exhibit "H" referred to in the affidavit of Curtis C. Pedwell sworn before me, this 5th day of October 2011

A COMMISSIONER, ETC.

Linda Dianne Robinson, a Commissioner, etc., Province of Ontario, for Gardiner Roberts LLP, Lawyers. Expires July 9, 2012.

The meeting opened with introductions. Three agenda items were entered by Ian Blue:

- Timing of Option 2;
- Treatment of capacity allocation under Option 2;
- Stranded asset charge.

Michael Medeiros also acknowledged that Red Lake's electrical supply issues are not normal. No other HONI staff disputed this characterization. Michael Medeiros described that Option 2's April 30 deadline reflects HONI's target in-service date and confirmed that the transformer that is the subject of Option 2 has not been ordered.

HONI's capacity reallocation protocol requires a demonstration that a load has been permanently disconnected. Naomi Martin described that HONI must physically remove assets to complete a disconnection. Michael Medeiros described that Rubicon must apply to use any

capacity downstream of Red Lake Transmission Station ("RLTS") that may be freed-up by Goldcorp transferring load to its proposed 115kV line. He reminded all present that HONI must manage the system to meet all loads - including loads that may emerge in future (HONI would have knowledge of emerging loads through the Offer to Connect mechanism) and that HONI considers reasonable outcomes, impacts on other customers and impacts on rate payers.

HONI confirmed that maximum throughput at RLTS, using existing infrastructure, is 57 MVA and that a maximum of 5.3 MVA of this capacity can be made available to Rubicon. An incremental 10 MVA could be realized by installing capacitor banks and the provision of a further increment in capacity requires a load rejection scheme. Naomi Martin recommended that Goldcorp review HONI's Transmission Connection Procedures and reminded Goldcorp and Rubicon that the TSC provides for a one year grace period under its 'use it or lose it' requirements.

HONI staff did not oppose the proposition that Option 1 was duplicative. Nick Melchiorre observed that Option 1 rests on commitments and presents fewer or lower risks than does Option 2.

The discussion of stranded assets reflected the parties long standing differences. Ian Blue stated that the electricity supply issues in the Red Lake area differ from those that the TSC contemplated. Naomi Martin confirmed that Stranded Asset charges require a trigger and depend on timing which Raj Ghai sought to clarify. Curtis Pedwell described that Goldcorp's proposed Balmer TS would be loaded incrementally as RLTS was offloaded in response to Ibrahim el-Nahas' inquiry of how its capacity would be utilized. Raj Ghai indicated that the 'lumpiness' of loads to be transferred could be examined. Ian Blue also pointed out that Goldcorp's proposed 115 kV line would facilitate connecting renewable generation in the Red Lake area. HONI acknowledged that such opportunities exist and that, to their knowledge, none are under development. HONI staff acknowledged that an OEB exemption from the TSC may clarify or resolve the stranded asset issue. The OEB Codes were acknowledged to have force of law. All recognized that the OEB has power either to amend its Codes or to allow exemptions from specific provisions.

Timo Hakkarainen clarified that the CCRA is in progress; it will provide budget accuracy to 20%, provides HONI with pre-inspection rights and that its Terms and Conditions are available. Naomi Martin requested the most current load forecast. Raj Ghai probed the requested in-service date

which Curtis Pedwell confirmed as Q4, '11 (Q1, '12 at the latest). Naomi Martin described that HONI has a single blanket permit from the Ministry of Natural Resource which would need to be amended to incorporate the permits acquired by Goldcorp. Naomi Martin reminded Goldcorp that warranties are expected to be transferable.

Ian Blue and Craig Pruitt probed the mechanisms for transferring ownership of the proposed 115kV line. Naomi Martin described that a formal agreement transferring ownership and a connection agreement are required. Ibrahim el-Nahas confirmed that SNC must satisfy HONI's standards and Raj Ghai indicated that HONI had provided SNC with the required information. Curtis Pedwell clarified that the line will be designed, engineered, constructed to operate at 115kV and that a 795mcil conductor and wood poles will be used. Raj Ghai pointed out certain discrepancies that have engaged other HONI staff.

Naomi Martin requested that Goldcorp provide a 10 year annual load forecast, consistent with its classification as a medium high risk load based on its industry classification.

A discussion of the use of herbicides ensued. Mary Shea clarified that the ESR documented that herbicides would not be used in rare plant growth areas.

Nick Melchiorre questioned whether a 3 party agreement would be appropriate. Naomi Martin reminded him that HONI is bound to Freedom of Information legislation and that any 3 party agreement should be considered with care and caution.

Ontario

Electricity Transmission Licence

ET-2003-0035

Hydro One Networks Inc.

Valid Until
December 2, 2023

Mark C. Garner
Secretary
Ontario Energy Board
Date of Issuance: December 3, 2003
Date of Amendment: August 11, 2004

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
26th. Floor
Toronto, ON M4P 1E4

Commission de l'Énergie de l'Ontario
C.P. 2319
2300, rue Yonge
26e étage
Toronto ON M4P 1E4

This is Exhibit "I" referred to in the affidavit of Curtis C. Pedwell sworn before me, this 5th day of October 2011

A COMMISSIONER, ETC.

DocID: OEB: 12ZKZ-1

Linda Dianne Robinson, a Commissioner, etc., Province of Ontario, for Gardiner Roberts LLP, Lawyers. Expires July 9, 2012.

1 Definitions

In this Licence:

"**Accounting Procedures Handbook**" means the handbook, approved by the Board which specifies the accounting records, accounting principles and accounting separation standards to be followed by the Licensee;

"**Act**" means the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B;

"**Affiliate Relationships Code for Electricity Distributors and Transmitters**" means the code, approved by the Board which, among other things, establishes the standards and conditions for the interaction between electricity distributors or transmitters and their respective affiliated companies;

"**Board**" means the Ontario Energy Board

"**Electricity Act**" means the *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A;

"**Licensee**" means: Hydro One Networks Inc.;

"**Market Rules**" means the rules made under section 32 of the Electricity Act;

"**Performance Standards**" means the performance targets for the distribution and connection activities of the Licensee as established by the Board in accordance with section 83 of the Act;

"**Rate Order**" means an Order or Orders of the Board establishing rates the Licensee is permitted to charge;

"**transmission services**" means services related to the transmission of electricity and the services the Board has required transmitters to carry out for which a charge or rate has been established in the Rate Order;

"**Transmission System Code**" means the code approved by the Board and in effect at the relevant time, which, among other things, establishes the obligations of the transmitter with respect to the services and terms of service to be offered to customers and retailers and provides minimum technical operating standards of transmission systems;

14 "**wholesaler**" means a person that purchases electricity or ancillary services in the IMO-administered markets or directly from a generator or, a person who sells electricity or ancillary services through the IMO-administered markets or directly to another person other than a consumer.

15 **2 Interpretation**

16 2.1 In this Licence words and phrases shall have the meaning ascribed to them in the Act or the Electricity Act. Words or phrases importing the singular shall include the plural and vice versa. Headings are for convenience only and shall not affect the interpretation of the licence. Any reference to a document or a provision of a document includes an amendment or supplement to, or a replacement of, that document or that provision of that document. In the computation of time under this licence where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens and where the time for doing an act expires on a holiday, the act may be done on the next day.

17 **3 Authorization**

18 3.1 The Licensee is authorized, under Part V of the Act and subject to the terms and conditions set out in this Licence to own and operate a transmission system consisting of the facilities described in Schedule 1 of this Licence, including all associated transmission equipment.

19 **4 Obligation to Comply with Legislation, Regulations and Market Rules**

20 4.1 The Licensee shall comply with all applicable provisions of the Act and the Electricity Act and regulations under these Acts except where the Licensee has been exempted from such compliance by regulation.

21 4.2 The Licensee shall comply with all applicable Market Rules.

22 **5 Obligation to Comply with Codes**

23 5.1 The Licensee shall at all times comply with the following Codes (collectively the "Codes") approved by the Board, except where the Licensee has been specifically exempted from such compliance by the Board. Any exemptions granted to the licensee are set out in Schedule 2 of this Licence. The following Codes apply to this Licence:

24 a) the Affiliate Relationships Code for Electricity Distributors and Transmitters;

25 b) the Transmission System Code;

26 5.2 The Licensee shall:

a) make a copy of the Codes available for inspection by members of the public at its head office and regional offices during normal business hours; and

b) provide a copy of the Codes to any person who requests it. The Licensee may impose a fair and reasonable charge for the cost of providing copies.

6 Requirement to Enter into an Operating Agreement

6.1 The Licensee shall enter into an agreement ("the Operating Agreement") with the IMO providing for the direction by the IMO of the operation of the Licensee's transmission system. Following a request made by the IMO, the Licensee and the IMO shall enter into an Operating Agreement within a period of 90 business days, unless extended with leave of the Board. The Operating Agreement shall be filed with the Board within ten (10) business days of its completion.

6.2 Where there is a dispute that can not be resolved between the parties with respect to any of the terms and conditions of the Operating Agreement, the IMO or the Licensee may apply to the Board to determine the matter.

7 Obligation to Provide Non-discriminatory Access

7.1 The Licensee shall, upon the request of a consumer, generator, distributor or retailer, provide such consumer, generator, distributor or retailer, as the case may be, with access to the Licensee's transmission system and shall convey electricity on behalf of such consumer, generator or retailer in accordance with the terms of this Licence, the Transmission System Code and the Market Rules.

8 Obligation to Connect

8.1 If a request is made for connection to the Licensee's transmission system or for a change in the capacity of an existing connection the Licensee shall respond to the request within 30 business days.

8.2 The Licensee shall process connection requests in accordance with published connection procedures and participate with the customer in the IMO's Customer Assessment and Approval process in accordance with the Market Rules, its Rate Order(s), and the Transmission System Code.

8.3 An offer of connection shall be consistent with the terms of this Licence, the Rate Order, the Market Rules and the Transmission System Code, and Schedules 3 [12ZL7-0:1]and 4 [12ZL8-0:1]of this Licence.

8.4 The terms of such offer to connect shall be fair and reasonable.

8.5 The Licensee shall not refuse to make an offer to connect unless it is permitted to do so by the Act or any Codes, standards or rules to which the Licensee is obligated to comply with as a condition of this licence. 39

9 Obligation to Maintain System Integrity 40

9.1 The Licensee shall maintain its transmission system to the standards established in the Transmission System Code and the Market Rules and have regard to any other recognized industry operating or planning standards required by the Board. 41

10 Transmission Rates and Charges 42

10.1 The Licensee shall not charge for the connection of customers or the transmission of electricity except in accordance with the Licensee's Rate Order(s) as approved by the Board and the Transmission System Code. 43

11 Separation of Business Activities 44

11.1 The Licensee shall keep financial records associated with transmitting electricity separate from its financial records associated with distributing electricity or other activities in accordance with the Accounting Procedures Handbook and as required by the Board. 45

12 Expansion of Transmission System 46

12.1 The Licensee shall not construct, expand or reinforce an electricity transmission system or make an interconnection except in accordance with the Act and regulations, the Transmission System Code and the Market Rules. 47

12.2 In order to ensure and maintain system integrity or reliable and adequate capacity and supply of electricity, the Board may order the Licensee to expand or reinforce its transmission system in accordance with Market Rules and the Transmission System Code, in such a manner as the Board may determine. 48

12.3 The Licensee shall use its best efforts to expand inter-tie capacity to neighbouring jurisdictions by approximately 2000 MW by May 1, 2005. 49

12.4 Paragraph 12.3 in no way limits the obligation on the Licensee to obtain all necessary approvals including leave of the Board under Section 92 of the Act, where such leave is required. 50

12.5 The Licensee shall provide information to the Board as soon as practicable following May 1, 2005 or at an earlier date in order that the Board may determine whether or not, as of the end of such 36 51

month period, the Licensee has used its best efforts to expand inter-tie capacity to neighbouring jurisdictions by approximately 2000 MW.

13 Provision of Information to the Board

13.1 The Licensee shall maintain records of and provide, in the manner and form determined by the Board, such information as the Board may require from time to time.

13.2 Without limiting the generality of condition 13.1 the Licensee shall notify the Board of any material change in circumstances that adversely affects or is likely to adversely affect the business, operations or assets of the Licensee as soon as practicable, but in any event no more than twenty (20) business days past the date upon which such change occurs.

14 Restrictions on Provision of Information

14.1 The Licensee shall not use information regarding a consumer, retailer, wholesaler or generator obtained for one purpose for any other purpose without the written consent of the consumer, retailer, wholesaler or generator.

14.2 The Licensee shall not disclose information regarding a consumer, retailer, wholesaler or generator to any other party without the written consent of the consumer, retailer, wholesaler or generator, except where such information is required to be disclosed:

a) to comply with any legislative or regulatory requirements, including the conditions of this Licence;

b) for billing, settlement or market operations purposes;

c) for law enforcement purposes; or

d) to a debt collection agency for the processing of past due accounts of the consumer, retailer, wholesaler or generator.

14.3 Information regarding consumers, retailers, wholesalers or generators may be disclosed where the information has been sufficiently aggregated such that their particular information cannot reasonably be identified.

14.4 The Licensee shall inform consumers, retailers, wholesalers and generators of the conditions under which their information may be released to a third party without their consent.

14.5 If the Licensee discloses information under this section, the Licensee shall ensure that the information is not used for any other purpose except the purpose for which it was disclosed.

15 Term of Licence

15.1 This Licence shall take effect on December 3, 2003 and expire on December 2, 2023. The term of this Licence may be extended by the Board.

16 Fees and Assessments

16.1 The Licensee shall pay all fees charged and amounts assessed by the Board.

17 Communication

17.1 The Licensee shall designate a person that will act as a primary contact with the Board on matters related to this Licence. The Licensee shall notify the Board promptly should the contact details change.

17.2 All official communication relating to this Licence shall be in writing.

17.3 All written communication is to be regarded as having been given by the sender and received by the addressee:

a) when delivered in person to the addressee by hand, by registered mail or by courier;

b) ten (10) business days after the date of posting if the communication is sent by regular mail; and

c) when received by facsimile transmission by the addressee, according to the sender's transmission report.

18 Copies of the Licence

18.1 The Licensee shall:

a) make a copy of this Licence available for inspection by members of the public at its head office and regional offices during normal business hours; and

b) provide a copy of the Licence to any person who requests it. The Licensee may impose a fair and reasonable charge for the cost of providing copies.

80

SCHEDULE 1 DESCRIPTION OF THE TRANSMISSION SYSTEM

81

This Schedule describes the transmission system owned by the Licensee.

82

The transmission system and facilities of Hydro One Networks Inc. are depicted in the attached diagram and include transmission lines, transformation stations and all associated facilities. Subject to section 13.2, Hydro One may alter this diagram from time to time and shall file it with the Board, upon receipt of which the updated diagram shall be deemed to be the specification of transmission facilities under this schedule.

83

SCHEDULE 2 LIST OF CODE EXEMPTIONS

84

This Schedule specifies any specific Code requirements from which the Licensee has been exempted.

85

The Licensee is exempted from subsection 2.1.1 of the Transmission System Code so as to allow the licensee to enter into a modified form of connection agreement with both Ontario Power Generation Inc. ("OPG") and Bruce Power L.P. ("Bruce Power").

86

The modifications to the connection agreement are attached as Schedules 3 and 4 to this Licence. Schedule 3 contains changes needed to address legacy system confirguration issues as well as operating concerns affecting all generating stations owned by OPG and Bruce Power. Schedule 4 contains changes needed to comply with the operational requirements of nuclear genereating facilities, facilitate compliance with Power Reactor Operating Licences, issued by the Canadian Nuclear Safety Commission ("CNCP").

SCHEDULE 3
GENERATION RELATED CLAUSES SUPERSEDING THE CONNECTION AGREEMENT AND SCHEDULES

The purpose of this addendum is to capture generation related amendments that have been agreed to by the parties. In any circumstance where there is an inconsistency between the terms of the Connection Agreement and the terms of this Addendum, the terms of this Addendum shall prevail.

Insofar as this Agreement differs from the standard Transmission Connection Agreement issued by the OEB, this Agreement is subject to the approval of the Ontario Energy Board ("OEB"); and to the extent, if any, that the OEB fails to give such approval:

(a) this Agreement shall be amended as determined by the OEB; or

(b) if the OEB fails to give such approval but does not itself amend this Agreement, the parties shall amend this Agreement pursuant to the directions of the OEB, and the revised amendments shall be subject to the approval of the OEB.

Amendments to the Main Agreement

RECITAL

In accordance with its licence and the Market Rules, the Transmitter has agreed to offer, and the Customer has agreed to accept Connection Service, on the terms and conditions of this Agreement.

Replace by:

In accordance with its licence and the Market Rules, the Transmitter has agreed to offer, and the Customer has agreed to accept, in respect of those facilities defined in Schedule A, Connection Service, on the terms and conditions of this Agreement.

1. DEFINITIONS

1.14 "non-financial Default" means the following:

1.14.1 any breach of a term or condition of the Code or the Connection Agreement other than a financial default unless the breach occurs as a direct result of an emergency;

14

1.14.2 a licensed Party's ceasing to hold a licence; and

15

1.14.3 ...an Insolvency Event.

16

Replace by:

17

1.14 "non-financial Default" means the following:

18

1.14.1 any breach of a term or condition of the Code or the Connection Agreement other than a financial default unless the breach occurs as a direct result of an emergency; or

19

1.14.2 a licensed Party's ceasing to hold a licence; or

20

1.14.3 an Insolvency Event.

21

5. EQUIPMENT STANDARDS

22

5.1 The Transmitter and the Customer shall ensure that their respective new or altered equipment connected to the transmission system: (1) meets requirements of the Ontario Electrical Safety Authority; (2) conform to relevant industry standards including, but not limited to, CSA International, the Institute of Electrical and Electronic Engineers (IEEE), the American National Standards Association (ANSI), and the International Electrotechnical Commission (IEC); (3) conforms to good utility practices.

23

Replace by:

24

The Transmitter and the Customer shall ensure that their respective new or altered equipment connected to the transmission system: (1) meets requirements of the Ontario Electrical Safety Authority unless otherwise exempted; (2) conforms to relevant industry standards including, but not limited to, CSA International, the Institute of Electrical and Electronic Engineers (IEEE), the American National Standards Association (ANSI), and the International Electrotechnical Commission (IEC); (3) conforms to good utility practices.

25

5.2 The minimum general performance standards for all equipment connected to the transmission system are set out in Appendix 2 of the Code. The Transmitter shall provide the technical parameters to assist the Customer to ensure that the design of the Customer's equipment connected to the transmission system shall coordinate with the transmission system to achieve compliance with the Code and this Agreement.

26

Replace by:

27

The minimum general performance standards for all equipment connected to the transmission system are set out in Appendix 2 of the Code. The Transmitter shall provide the technical parameters to assist the Customer to ensure that the design of the Customer's equipment connected to the transmission system shall coordinate with the transmission system to achieve compliance with the Code and this Agreement. Responsibility for costs of any upgrade of the Customer's equipment deemed compliant under section 2.6.2 of the Transmission Code will be determined by the OEB.

28

6 OPERATIONAL STANDARDS AND REPORTING PROTOCOL

29

30

6.2 The Transmitter shall specify the fault levels at all connection points, including the Customer's connection points, as required by the Market Rules, which shall be recorded in Schedule D to this Agreement.

31

Replace by:

32

The Transmitter shall specify the fault levels (and the assumptions behind those levels) at all connection points, including the Customer's connection points, as required by the Market Rules, which shall be recorded in Schedule D to this Agreement.

33

6.5 The Customer shall provide prompt notice to the Transmitter in accordance with the Code or as agreed in Schedule D to this Agreement before disconnecting its equipment from the transmission system.

34

Replace by:

35

Where practical, the Customer shall provide prompt notice to the Transmitter in accordance with the Code or as agreed in Schedule D to this Agreement before disconnecting its equipment from the transmission system.

36

7.2 Involuntary Disconnection

37

38

7.2.1.6 if the Customer is a defaulting Party; or

39

Replace by:

40 if the Customer is a defaulting Party, however when the issue of default has been disputed by the Customer, no disconnection of a Customer may occur without a final resolution of the dispute, pursuant to section 13 of this Agreement; or

41 **7.3 Disconnection-General**

42 7.3.2 The Customer shall pay all costs that are directly attributable to an involuntary disconnection, and decommissioning of its facilities, including the cost of removing any of the Transmitter's equipment from the Customer's property and shall cooperate in establishing appropriate procedures for such decommissioning.

43 **Replace by:**

44

45 The Customer shall pay all costs that are directly attributable to an involuntary disconnection, and decommissioning of its facilities, including the cost of removing any of the Transmitter's equipment from the Customer's property and shall cooperate in establishing appropriate procedures for such decommissioning. The Transmitter will not require the removal of the protection and control wiring within the generating facility.

46 **7.4 Reconnection After Involuntary Disconnection**

47 7.4.2.3 The Customer has taken all necessary steps to prevent circumstances causing the disconnection from recurring and has delivered binding undertakings to the Transmitter that the circumstances leading to disconnection shall not recur; and

48 **Replace by:**

49 the Customer has taken all necessary steps to prevent circumstances causing the disconnection from recurring, has delivered on the binding decision to the Transmitter and has satisfied all requirements on it arising from any arbitrator's decision pursuant to section 13.11 that the circumstances leading to disconnection shall not recur; and

50 **8 LIABILITY**

51 8.3 Where the Customer uses the Transmitter's breakers as HV interruption devices or for synchronizing the generator to the transmission system, the Transmitter shall have no liability to the Customer, even where the Customer suffers damage as a result of the Transmitter's negligence or willful misconduct, except as follows:

52 a) if damage occurs to the Customer's main output transformer ("MOT") due to the negligence or willful misconduct of the Transmitter, the liability of the Transmitter to the Customer shall be for the lesser of (i) the cost to repair the MOT and (ii) the cost to replace the MOT; and

53 b) if damage occurs, due to the negligence or willful misconduct of the Transmitter, to the Customer's electrical equipment upstream of the MOT, but within the powerhouse, the liability of the Transmitter to the Customer shall be limited to 45% of the damage attributable to the said negligence or willful misconduct.

54 Notwithstanding a) and b) above, the Parties agree that the Transmitter's liability for a) and b) above shall not exceed $25 million per event of negligence or willful misconduct, recognizing that one such event may cause damage under both a) and b).

55 The Customer agrees that it shall, within five years of the commencement date of this Agreement, conduct and complete studies concerning the installation of its own breakers for HV interruption and for synchronizing the generator to the transmission system. The Customer and Transmitter will meet to review these studies and to discuss whether installation of the additional breakers by the Customer is warranted. The Parties will advise the OEB of the results of these discussions. The Parties agree that, after advising the OEB, the responsibility for any incremental costs incurred by the Transmitter as a result of the Customer not having its own breakers at these stations shall be as determined by the OEB.

56 Where these breakers are installed and the Customer no longer uses the Transmitter's breakers as HV interruption devices or for synchronizing this liability limitation will no longer be applicable.

57 The facilities covered by this clause are Bruce "A", Pickering "A" & "B", Lakeview, and Abitibi during normal operation, and Bruce "B" (Units 5,7,8), and Darlington during by-pass/emergency operation.

58 ***Include the above***

59 **9 REPRESENTATIONS AND WARRANTIES**

60 9.1.1.3 that its facilities meet the technical requirements of the Code and this Agreement, excluding equipments that are deemed compliant under section 2.6 of the Code which is listed in Schedule J of this Agreement; and

61 **Replace by:**

62 9.1.1.3 that its facilities meet the technical requirements of the Code and this Agreement, excluding equipment that is deemed compliant under section 2.6 of the Code which is listed in Schedule J of this Agreement; and

10 REQUIREMENTS FOR OPERATIONS AND MAINTENANCE

63

10.4.1 Each Party shall specify its controlling authority in accordance with the operations schedule attached to this Agreement.

64

Replace by:

65

Each Party shall specify its Controlling Authority in accordance with the operations schedule attached to this Agreement.

66

10.4.2 The Transmitter and the Customer shall comply with all requests by the other Party's controlling authority in accordance with this Agreement and the Code.

67

Replace by:

68

The Transmitter and the Customer shall comply with all requests by the other Party's Controlling Authority in accordance with this Agreement and the Code.

69

10.6.2 When the Parties have so agreed in writing, one Party may appoint an employee of the other as its designate for switching-purposes.

70

Replace by:

71

When the Parties have so agreed in writing, one Party may appoint an employee of the other as its designate for switching-purposes. Orders to operate, however, must originate from the Controlling Authority.

72

10.7.3 The Transmitter shall provide to the Customer the isolation and reconnection of the Customer's equipment at the Customer's request at no cost to the Customer, once per year, during normal business hours. The Customer shall pay the Transmitter's reasonable costs for isolating and reconnecting the Customer's equipment if the requested isolation and reconnection is for a time outside of normal business hours.

73

Replace by:

74

The Transmitter shall provide to the Customer the isolation and reconnection of the Customer's equipment at the Customer's request at no cost to the Customer, one time per generating unit per year, which can be aggregated across multi-unit stations during normal business hours. The Customer shall pay the Transmitter's reasonable costs for isolating and reconnecting the Customer's equipment if the requested isolation and reconnection is for a time outside of normal business hours.

75

76

10.7.4 The Transmitter shall charge the Customer, and the Customer shall pay, the reasonable costs incurred by the Transmitter for isolating and reconnecting the Customer's equipment for any isolation and reconnection request in excess of one per year as specified in section 10.7.3 above.

77

Replace by:

78

The Transmitter shall charge the Customer, and the Customer shall pay, the reasonable costs incurred by the Transmitter for isolating and reconnecting the Customer's equipment for any isolation and reconnection request in excess of one time per generating unit per year, which can be aggregated across multi-unit stations as specified in section 10.7.3 above.

79

10.8.3 The Customer shall provide to the Transmitter the isolation and reconnection of the Transmitter's equipment at the Transmitter's request at no cost to the Transmitter, one time per generating unit per year, which can be aggregated across multi-unit stations, during normal business hours. The Transmitter shall pay the Customer's reasonable costs for isolating and reconnecting the Transmitter's equipment if the requested isolation and re-connection is for the time outside of normal business hours.

80

Include the above

81

10.8.4 The Customer shall charge the Transmitter, and the Transmitter shall pay, the reasonable cost incurred by the Customer for isolating and reconnecting the Transmitter's equipment for any isolation and reconnection request in excess of one time per generating unit per year, which can be aggregated across multi-unit stations as specified in section 10.8.3 above.

82

Include the above

83

10.13 **Emergency Operations**

84

Note that parts 10.13.3 to 10.13.8 do not apply to Generators.

85

Include the above

86

10.13.3 The Transmitter may be required from time to time to implement load shedding as outlined in this Agreement, Schedule D, section 7.

87

Exclude the above for Generators

88

10.13.4 The Customer shall identify the loads (and their controllable devices) to be included on the rotational load shedding schedules to achieve the required level of emergency preparedness.

89

Exclude the above for Generators

90

10.13.5 The Transmitter may review the rotational load-shedding schedule with the Customer annually or more often as required.

91

Exclude the above for Generators

92

10.13.6 The Customer shall comply with all requests by the Transmitter's controlling authority to shed load. Such requests shall be initiated to protect transmission system security and reliability in response to a request by the IMO.

93

Exclude the above for Generators

94

10.13.7 When the Transmitter's transmission facilities return to normal, the Transmitter's controlling authority shall notify the Customer's controlling authority to re-energize the Customer's facilities.

95

Exclude the above for Generators

96

10.13.8 The Transmitter may be required from time to time to interrupt supply to the Customer during an emergency to protect the stability, reliability, and integrity of its own facilities and equipment, or to maintain its equipment availability. The Transmitter shall advise the affected Customer as soon as possible/practical of the transmission system's emergency status and when to expect normal resumption and reconnection to the transmission system.

97

Exclude the above for Generators

98

15 COMPLIANCE, INSPECTION, TESTING AND MONITORING

99

15.1.5 When requested by the Transmitter, the Customer shall produce test certificates certifying that its facilities have passed the relevant tests and comply with all applicable Canadian standards before connection.

100

Replace by:

101

With respect to new, modified or replacement equipment to be connected to the transmission system, the Customer shall, when requested by the Transmitter, produce test certificates certifying that its facilities have passed the relevant tests and comply with all applicable Canadian standards before connection.

102

18 TECHNICAL REQUIREMENTS FOR TAPPED TRANSFORMER STATIONS SUPPLYING LOAD

103

The Transmitter, the Customer, who is either a Distributor or a Consumer, shall follow the technical requirements set out in Schedule H of this Agreement.

104

Replace by:

105

Not applicable to Generators

106

23 INCORPORATION OF SCHEDULES

107

Schedule "M" - Amendment Agreement Template

108

Include the above:

109

28 ENTIRE AGREEMENT

110

This Agreement, together with the schedules attached hereto, constitutes the entire agreement between the Parties and supersedes all prior oral or written representations and agreements of any kind whatsoever with respect to the matters dealt with herein.

111

Replace by:

112

This Agreement, together with the Addendum and schedules attached hereto, constitutes the entire agreement between the Parties and supersedes all prior oral or written representations and agreements of any kind whatsoever with respect to the matters dealt with herein.

113

Amendments to Schedules "D", "F", "G", "H", and "I"

114

Schedule "D"

115

Section 8 – Clause 1

116

1. A Customer shall re-verify its station protections and control systems that can impact on the Transmitter's transmission system. The maximum verification or re-verification interval is: four (4) years for most of the 115 kV transmission system elements including transformer stations and transmission lines, and certain 230 kV transmission system elements; and two (2) years for all other high voltage elements. The maintenance cycle can be site specific.

117

Replace by:

118

A Customer shall re-verify its station protections and control systems that can impact on the Transmitter transmission system. The verifications will generally be carried out during generation outages. Where this cannot be accommodated within the time periods required for NPCC reporting, an entry will be made in the "EXCEPTIONS TO THE MAINTENANCE CRITERIA FOR BULK SYSTEM PROTECTION". The target date for the completion of the program will be indicated.

119

Schedule "F"

120

1.6.2 A Transmitter may require a Customer to install monitoring equipment to track the performance of its facilities, identify possible protection system problems, and provide measurements of power quality. As required, the monitoring equipment shall perform one or several of the following functions:

121

Replace by:

122

A Transmitter may require request a Customer to install monitoring equipment to track the performance of its facilities, identify possible protection system problems, and provide measurements of power quality. The responsibility for costs will be as determined by the OEB. As required, the monitoring equipment shall perform one or several of the following functions:

123

1.6.5 The Customer shall bear all costs, without limitation, of providing all required telemetry data, associated with its facilities to the Transmitter and providing all required connection inputs to the Transmitter's disturbance-monitoring equipment.

124

Replace by:

125

The Customer shall bear all costs, without limitation, of providing the same telemetry data required under the Market Rules, associated with its facilities to the Transmitter and providing all required connection inputs to the Transmitter's disturbance-monitoring equipment, except:

126

- Where the connection inputs to the Transmitter's disturbance-monitoring equipment are of mutual benefit to the Customer and the Transmitter in which circumstance the Customer and Transmitter shall share the cost of providing the data in proportion to the benefits received; or

127

- Where the connection inputs to the Transmitter's disturbance-monitoring equipment are required only for the transmitter's benefit in which case the transmitter shall pay all of the costs associated with providing the data.

128

1.8.1 The Transmitter may at its sole discretion specify the maintenance criteria and the maximum time intervals between verification cycles for those parts of Customers' facilities that may materially adversely affect the transmission system. The obligations for maintenance and performance re-verification shall be stipulated in the appropriate schedule to this Agreement.

129

Replace by:

130

The Transmitter, using Good Utility Practice, may specify the maintenance criteria and the maximum time intervals between verification cycles for those parts of Customers' facilities that may materially adversely affect the transmission system. The obligations for maintenance and performance re-verification shall be stipulated in the appropriate schedule to this Agreement.

131

1.8.5 To ensure that the Transmitter's representative can witness the relevant tests, the Customer shall submit the proposed test procedures and a test schedule to the Transmitter not less than ten business days before it proposes to carry out the test. Following receipt of the request, the Transmitter may delay for technical reasons the testing for as long as ten business days.

132

Replace by:

133

To ensure that the Transmitter's representative can witness the relevant tests, the Customer shall submit the proposed test procedures and a test schedule to the Transmitter not less than ten business days before it proposes to carry out the test. Following receipt of the request, the Transmitter may delay for technical reasons the testing for as long as ten business days. The Transmitter will use best efforts to make the required test date.

134

Schedule "G"

135

1.5 **Autoreclosure and Manual Energization**

136

1.5.2 Following a protection operation on a transmission line, the transmission breakers, located mainly in network switching and/or transformation stations, shall reclose after a certain time delay. The Generator shall provide a reliable means of disconnecting its equipment before this reclosure. The Generator is responsible for protecting its own equipment and the Transmitter is not liable for damage to the Generator's equipment. The Generator may request a means of supervising the transmission reclosure prior to the disconnection of its equipment e.g. changes in protection logic at one or both stations to reduce the risk of such events.

137

Replace by:

138

Following a protection operation on a transmission line, the transmission breakers, located mainly in network switching and/or transformation stations, shall autoreclose after a certain time delay. Where the Generator is directly connected to the transmission line, or for configurations where the Generator could be damaged by autoreclosure of the line, the Generator shall provide a reliable

means of disconnecting its equipment before autoreclosure. The Generator is responsible for protecting its own equipment and the Transmitter is not liable for damage to the Generator's equipment except as stipulated in Section 8, Appendix 1 of this Code. The Generator may request a means of supervising the transmission autoreclosure prior to the disconnection of its equipment e.g. changes in protection logic at one or both stations to reduce the risk of such events. The criteria governing the use of reclosures are as set out in the Ontario Hydro "Policies, Principles, & Guidelines" document "C-3.4.1 (R1), Automatic Reclosure and Manual Eneregization on Bulk Electricity System Circuits," which was in effect as of April 1, 1999.

139

Schedule "H"

140

Technical Requirements for Tapped Transformer Stations Supplying Load:

141

(a) Transmitter's Tapped Transformer Stations

142

(b) Distributor's and Consumer's Tapped Transformer Stations

143

Exclude entire Schedule H

144

Schedule "I"

145

1.3.1 Customers shall perform routine verifications of protection systems on a scheduled basis as specified by the Transmitter in accordance with applicable reliability standards. The maximum verification interval is four years for most 115-kV elements, most transformer stations, and certain 230-kV elements and two years for all other high- voltage elements. All newly commissioned protection systems shall be verified within six months of the initial in-service date of the system.

146

147

Replace by:

148

Customers shall perform routine verifications of protection systems on a scheduled basis in accordance with applicable reliability standards. The maximum verification interval is four years for most 115-kV elements, most transformer stations, and certain 230-kV elements and two years for all other high-voltage elements. All newly commissioned protection systems shall be verified within six months of the initial in-service date of the system.

SCHEDULE 4
SPECIFIC NUCLEAR ARRANGEMENTS AND AREAS OF CLARIFICATION

Addendum Setting Out:

(i) The Obligations of the Transmitter in Respect of the Provision of Class IV Power and

(ii) the Rights and Obligations of the Parties in Respect of their Property Interests and Mutual Cooperation

Contents

I Purpose

II Principles Governing the Specific Nuclear Arrangements and Areas of Clarification

III Specific Terms

I Purpose

The purpose of this addendum is to capture those requirements that the Transmitter must meet and adhere to in order for the Customer to be in conformance with its Power Reactor Operating Licence (PROL) and fulfill its obligations to the general public in maintaining the nuclear safety of the generating units. Meeting these requirements necessitates changes, in whole or in part, to a number of the sections of the standard Connection Agreement attached to the Ontario Energy Board's Transmission System Code. These changes are documented below in a format that identifies the existing section in the Connection Agreement and sets out the section that replaces it.

The provision of a continuous and reliable supply of Class IV power is an integral part of maintaining and ensuring reactor safety. In shutdown or lay-up conditions, the unit service loads must continue to be supplied to ensure nuclear safety. Loss or degradation of the electrical grid can be one of the most safety-significant events to occur at nuclear power plants. Such events have the potential to result in loss of main heat sink forcing the transfer to back-up heat sink, loss of output, automatic safety system actuation, and degraded containment functions.

12

II Principles Governing the Specific Nuclear Arrangements and Areas of Clarification.

13

II.1 In any circumstance where there is an inconsistency between the terms of the Transmission System Code, the Connection Agreement and the terms of this Addendum, the terms of this Addendum shall prevail, except where contrary to appplicable law.

14

II.2 Good Utility Practice is not intended to be limited to optimum practices, or methods, or act to the exclusion of all others, but rather to include all practices, methods or acts generally accepted in North America including those in the nuclear sector as the Customer holds a PROL from the Canadian Nuclear Safety Commission ("CNSC") and the Transmitter is providing a Transmission Service and Off-Site Power service to the Customer.

15

II.3 The Transmitter agrees to operate and maintain its transmission assets including the switchyards at the Customer's Facility in a manner which will meet the requirements of the Customer's PROL as reflected in this Addendum.

16

II.4 This Agreement shall continue in effect until a mutually agreeable termination date not to exceed the date on which the PROL for the Customer's Facility is terminated, provided that;

17

II.4.1 the Customer has satisfied all CNSC requirements and commitments required to be satisfied in order to eliminate the need for a transmission connection to provide an Off-Site Power service under this Agreement, and

18

II.4.2 the Customer no longer holds any other nuclear related licence for the Customer's Facility which identifies a requirement for an Off Site-Power service.

19

II.5 The Customer agrees to make timely application to the CNSC for authorization to terminate this Agreement when circumstances warrant.

20

II.6 Notwithstanding all other provisions of the Transmission System Code, the Connection Agreement and this Addendum except for Subsection 10.13.1 of the Connection Agreement, the Transmitter shall not, under any circumstances disconnect the Customer's Off-Site Power service required to meet its obligations under its PROL, either during the term of this Agreement, or upon its termination unless such action is pursuant to a decision of applicable regulator authority(ies) or a court having jurisdiction or the mutual agreement of the Customer and the Transmitter.

21

II.7 To the extent practicable, in the event of an Emergency as identified in Subsection 10.13.1 of the Connection Agreement that requires disconnection of the Customer's Facility from the Transmission System, or the Customer's Facility from the Off-Site Power services, the Transmitter shall give the Customer reasonable opportunity to shut down in a controlled manner such parts of the Customer's Facility as deemed appropriate by the Customer before the Transmitter disconnects the Customer's Facility from the Transmission System.

II.8 In the event of an unplanned outage of the conveyance of Off-Site Power, the Transmitter will use best efforts to promptly restore that service. 22

II.9 The Customer shall pay the additional incremental costs of the transmitter arising from any regulatory requirement from the CNSC coming into force after the execution of this Agreement; 23

II.9.1 Until such time as these costs can be recovered in rates or elsewhere and that the work giving rise to the costs has not been carried out for the benefit of other parties or as a requirement placed on the Transmitter from other sources; and 24

II.9.2 No additional costs are attributable to the provision of the Transmission connection in support of the conveyance of Off-Site Power at historical reliability levels. 25

II.10 Except as identified in the Connection Agreement Subsection 10.13.1 or applicable laws, the Transmitter shall take no action to prevent the Customer from utilizing the Off-Site Power. 26

III Specific Terms 27

The following provides changes, deletions and additions to specific clauses that form part of the amendments to the main Connection agreement Agreement and the Schedules thereto, as agreed to by the Parties. 28

Amendments to the Connection Agreement 29

Incorporation of Procedures and Manuals by Reference 30

Numbers appearing within square brackets "[ ]" incorporate by reference the procedures or manuals so designated in Schedule Q. 31

Include the above 32

1. DEFINITIONS 33

1.19 Abbreviations 34

ANO Authorized Nuclear Operator 35

BES Bulk Electricity System 36

GRMC Generation Resource Management Center 37

NGS Nuclear Generating Station

OATIS Operating, Administrative and Trades Information System

OP&P'S Operating Policies and Principles

OPEX Operating Experience

P&SI Process and System Implementation (Passport)

RTU Remote Terminal Unit

SCR Station Condition Record

SE System Engineer

SLA Service Level Agreement

SNO Supervising Nuclear Operator

SPOC Single Point of Contact

Include the above

1.20 "Class IV Power" has the meaning ascribed thereto in part I of this Addendum B;

Include the above

1.21 "CNSC" means the Canadian Nuclear Safety Commission, or its successor;

Include the above

1.22 "Corrective Maintenance" Consists of actions that restore, by repair, overhaul, or replacement, the capability of a failed system, structure, or component to perform its design function within acceptable criteria;

Include the above

56

1.23 "Customer Facility" means the facilities defined in Schedule A of this Agreement;

57

Include the above

58

1.24 "Design Authority" means the organization within each Party which has the authority to make final binding decisions and give approval regarding design requirements, design assurance, and design output for existing, new, and modified facilities, structures, systems, Equipment, and components, including material and software;

59

Include the above

60

1.25 "Equipment Ownership" means that authority which has design authority, maintenance responsibility and replacement responsibility for any particular piece of Equipment;

61

Include the above

62

1.26 "Good Utility Practice" means any of the practices, methods and acts engaged in or approved by a significant portion of the electrical utility industry in North America during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good utility practice is not intended to be limited to optimum practices, or methods, or act to the exclusion of all others, but rather to include all practices, methods or acts generally accepted in North America.

63

As it relates to nuclear safety, Good Utility Practice also includes those practices, methods or acts generally accepted in North America relating to the conveyance of Off-Site Power as the Customer holds a PROL from the CNSC and the Transmitter is providing Transmission Service and conveying Off-Site Power service to the Customer;

64

Include the above

65

1.27 "Modification" means any permanent or temporary addition, deletion or change to existing Equipment, systems or documentation;

66

Include the above

67

1.28 "Off-Site Power" means the electricity delivered conveyed by the Transmitter to the Customer's Facility, generally through the Customer's system service transformers, which enables the Customer to meet its obligations under its Power Reactor Operating LicenseLicence for the provision of a reliable supply of Class IV Power;

68

Include the above

69

1.29 "Open/Close Control" means an activity, authorized by the Controlling Authority, to change the position of a specific apparatus or device;

70

Include the above

71

1.30 "Part Substitution" means the installation of an item, which is not identical to the original item, and which does not alter the equipment or component design specifications of both the item and the applicable interfaces;

72

Include the above

73

1.31 "PASSPORT" means a suite of applications integrated into a central database capable of providing the required information infrastructure to enable business information to be shared in a (real-time) timely manner;

74

Include the above

75

1.32 "Power Reactor Operating Licence" or "PROL" means the licencse issued to the Customer pursuant to the Atomic Energy Control Act or its successor, the Nuclear Safety Control Act, for the operation of a nuclear installation in Canada;

76

Include the above

77

1.33 "Predefines" means identified work of a recurrent nature;

78

Include the above

79

1.34 "Predictive Maintenance" consists of the actions necessary to monitor, find trends, and analyze parameter, property, and performance characteristics or signatures associated with a piece of Equipment that indicate the Equipment may be approaching a state in which it may no longer be capable of performing its intended function;

80

Include the above

81

1.35 "Preventive Maintenance" consists of all those systematically planned and scheduled actions, including predictive or planned maintenance, performed for the purpose of preventing Equipment failure;

82

Include the above

83

1.36 Protected Area" means the area enclosed by station security fences with the entry and exit points controlled by the Customer's security personnel. Personnel entering the protected area must have Security Clearance [11] or be sponsored and escorted by a Customer site employee who has Security Clearance;

84

Include the above

85

1.37 "Scheduled Outage" means a planned removal from service of Equipment that has been coordinated in advance with a mutually agreed start date and duration and is required for the purposes of inspection, testing, Preventive Maintenance or Corrective Maintenance;

86

Include the above

87

1.38 "Single Point of Contact" or "SPOC" means the individuals designated in Schedule D with overall work approving authority for a given facility whose function is (i) immediate review of identified needs for approval, (ii) verification of incoming needs for duplication, completeness, and validity, (iii) prioritization of work into major categories, (iv) recognition of potential system impairments, (v) encouragement of effective use of resources across the facility and approval of work-needs in accordance with the approved divisional work programs, (vi) to act as a representative of the facility and be an integral part of the work control, or (vii) participation in the final decision for resolution of issues [4];

88

Include the above

89

1.39 "Terminal Point" means a device that serves as a division point between Equipment under the control of any two authorities. Operation of a Terminal Point requires the approval of both Controlling Authorities;

90

Include the above

91

2. PURPOSE OF AGREEMENT

92

This Agreement sets out the terms and conditions upon which the Transmitter has agreed to offer, and the Customer has agreed to accept Connection Service.

93

Replace by:

94

This Agreement sets out the terms and conditions upon which the Transmitter has agreed to offer, and the Customer has agreed to accept connection service.

95

The Power Reactor Operating Licence held by the Customer requires that the switchyards at Customer's Facility meet a certain standard of reliability as a whole and at the level of the individual components. It also requires that switchyard operating procedures and maintenance practices meet certain prescribed standards. The Transmitter agrees to operate and maintain its transmission assets including the switchyards at the Customer's Facility in a manner which will meet the requirements of the Customer's PROL as reflected in this Agreement.

96

3. TRANSMISSION SYSTEM CODE

97

The Transmission System Code (the "Code") and this Agreement establish minimum testing, operational and maintenance standards for the Transmitter and the Customer. The Parties hereto hereby agree to be bound by, and to act at all times in accordance with the Code which is hereby incorporated in its entirety by reference into, and which hereby forms part of this Agreement.

98

Replace by:

99

The Transmission System Code (the "Code") and this Agreement establish minimum testing, operational and maintenance standards for the Transmitter and the Customer. The Parties hereto hereby agree to be bound by, and to act at all times in accordance with the Code which is hereby incorporated in its entirety by reference into, and which hereby forms part of this Agreement except insofar as it is inconsistent with the terms of this Agreement. In any circumstance where there is an inconsistency between the terms of the Code and requirements of the Customer's PROL, the requirements of the PROL shall prevail.

100

5. EQUIPMENT STANDARDS

101

5.3 The Transmitter and the Customer shall fully cooperate to ensure that modelling data required by the Code and this Agreement for the planning, design and operations of connections are complete and accurate, and the Transmitter shall order required tests where there are grounds to question the validity of such data. This includes, but is not limited to, the Information in Appendix 1, Schedule E, Parts (A) to (E), where applicable.

102

Replace by:

103

5.3 The Transmitter and the Customer shall fully cooperate to ensure that modelling data required by the Code and this Agreement for the planning, design and operations of connections are complete and accurate, and the Transmitter shall order required tests where there are reasonable grounds to question the validity of such data. This includes, but is not limited to, the information in Appendix 1, Schedule E, Parts (A) to (E), where applicable. Any such tests must be conducted in a manner consistent with the Customer's obligations under its Power Reactor Operating Licence.

104

6. OPERATIONAL STANDARDS AND REPORTING PROTOCOL

105

6.8 Upon learning of any changes that can affect the reliability of the Customer's facilities, the Transmitter shall promptly submit a written report to the Customer describing any and all changes, including, without limitation, changes to the Transmitter's facilities, equipment, and associated protective relaying or protective relaying settings, or any other changes of any kind whatsoever that might affect the reliability of that Customer's facilities.

106

Replace by:

107

Upon learning of, or before implementing any changes that may affect the reliability of the Transmitter's facilities, and in particular, the reliability of the conveyance of the Customer's Off-Site Power and its ability to meet its obligations under its Power Reactor Operating Licence, the Transmitter shall promptly submit a written report to the Customer describing any and all such proposed changes, including, without limitation, proposed changes to the Transmitter's facilities, Equipment, and associated protective relaying or protective relaying settings, or any other changes of any kind whatsoever that might affect the reliability of that Customer's facilities. The Customer shall have a period of time as set out in Schedule D to consider whether the proposed change would materially affect its ability to comply with its obligations under its Power Reactor Operating Licence. In the event that the Customer, acting reasonably, determines that the proposed change would materially affect its ability to meet its obligations under the Power Reactor Operating Licence, the Transmitter shall not proceed with the proposed change without obtaining prior written approval of the applicable regulatory authority(ies). Any incremental costs which do not provide a benefit to the Transmission System resulting from altering the proposed change so as not to materially affect the Customer's ability to comply with the its obligations under the PROL, shall be identified by the Transmitter and paid for by the Customer.

108

7.2 Involuntary Disconnection

109

7.2.1 The Transmitter may disconnect the Customer's facilities, at any connection point at any time throughout the term of this Agreement in any of the following circumstances:

110

Replace by:

111

7.2.1 Notwithstanding all other provisions of this Agreement except for Subsection 10.13.1, the Transmitter shall not, under any circumstances except where authorized by an appropriate regulatory authority or court of law, disconnect the Customer's Off-Site Power required to meet its obligations under its Power Reactor Operating License, either during the term of this Agreement, or upon its termination. However, in the event of an Emergency that requires disconnection of the Customer's Facility from the Transmitter's transmission system facilities, the Transmitter shall, to the extent that it is within its control, give the Customer reasonable opportunity to shut down the nuclear reactors in a controlled manner before the Transmitter disconnects the Customer's Facility from the transmission system. Subject to the above, other than Off-Site Power, the Transmitter may, by following the requirements of this Agreement, disconnect the Customer's Facilities to prevent the

Customer's electricity output from entering the Transmitter's transmission facilities during the term of the Agreement in the following circumstances:

7.3 Disconnection - General

7.3.3 For the duration of the disconnection the Transmitter shall not be obliged to fulfill any agreement to convey electricity to or from the Customer's facilities.

Replace by:

7.3.3 For the duration of the disconnection, the Transmitter shall continue to provide the conveyence of Off-Site Power service to the Customer's Facilities.

8 LIABILITY

8.1 The Transmitter shall only be liable to the Customer and the Customer shall only be liable to the Transmitter for any damages which arise directly out of the willful misconduct or negligence:

8.1.1 of the Transmitter in providing Transmission Services to the Customer;

8.1.2 of the Customer during the period it is connected to the Transmitter's transmission facilities; or

8.1.3 of the Transmitter or Customer in meeting their respective obligations under this Agreement, the Transmission System Code, their licences and any other applicable law.

8.2 Despite section 8.1, above, neither the Transmitter nor the Customer shall be liable under any circumstances whatsoever for any loss of profits or revenues, business interruption losses, loss of contract or loss of goodwill, or for any indirect, consequential, incidental or special damages, including but not limited to punitive or exemplary damages, whether any of the said liability, loss or damages arise in contract, tort or otherwise.

Replace by:

8 LIABILITY

8.1 Subject to sections 8.2A and 8.2B below, the Transmitter shall only be liable to the Customer, and the Customer shall only be liable to the Transmitter, and each Party shall indemnify the other, only for damages that arise directly out of the willful misconduct or negligence:

8.1.1 of the Transmitter in providing Transmission Services to the Customer;

126

8.1.2 of the Customer during the period that it is connected to the Transmitter's transmission facilities; or

127

8.1.3 of the Transmitter or Customer in meeting their respective obligations under this Agreement, the Transmission System Code, their licences and any other applicable law.

128

8.2A The Transmitter shall not be liable to the Customer for any damages or loss caused by the hazardous properties of nuclear material as defined under the Nuclear Liability Act, R.S.C. 1985, N-28, as amended. In the event that any such damages or loss occur wholly or partially as a result of an unlawful act or omission of an employee, agent, contractor or sub-contractor of the Transmitter, done with the intent to cause injury or damage, the Transmitter shall not be liable for any claims by the Customer's insurer, in accordance with the letter dated May 10, 2001, from the Customer's insurer appended to this Agreement as Schedule R.

129

8.2B Neither Party shall be liable under any circumstances whatsoever for any loss of profits or revenues, business interruption losses, loss of contract or loss of goodwill, or for any indirect, consequential, incidental or special damages, including but not limited to punitive or exemplary damages, whether any of the said liability, loss or damages arise in contract, tort or otherwise.

130

10 REQUIREMENTS FOR OPERATIONS AND MAINTENANCE

131

10.1.1 When the Transmitter's staff, its contractors, or agents work at the Customer's facilities or site, the Customer's safety and environmental requirements shall be observed by such staff, contractors and agents.

132

Replace by:

133

10.1.1 When the Transmitter's staff, its contractors, or agents work at the Customer's Facilities or site, the Customer's safety and environmental requirements and obligations under its PROL shall be observed by such staff, contractors and agents, to the extent that those requirements and obligations have been communicated to the Transmitter.

134

The Customer shall provide appropriate site specific training, as required by the Customer, for staff, contractors and agents nominated by the Transmitter, to cover the work identified by the transmitter. The Transmitter's staff, its contractors and its agents will only be expected to be trained in and observe those requirements identified for the particular area in which they are to work and the nature of that work.

135

10.1.2 When the Transmitter can show the Customer, to the Customer's satisfaction, that the Transmitter's safety and environmental practices provide for an equivalent or better level of safety or environmental protection, the Customer shall give permission to work to the Transmitter's safety and environmental practices. As a minimum, all applicable statutes and regulations shall govern such work.

136

Exclude the above

137

10.3.1 Operations and maintenance shall be performed only by qualified persons.

138

Replace by:

139

Operations and maintenance shall be performed by the Customer's staff at the Transmitters site and by the Transmitter's staff at the Customer's site shall be performed only by qualified persons trained to understand the hazards involved at each site.

140

10.6.3 The Customer shall comply with all switching instructions issued by the Transmitter's Controlling Authority to maintain the security and reliability of the transmission system. The two Controlling Authorities shall agree to procedures prior to undertaking any switching-operations.

141

Replace by:

142

10.6.3 The Customer shall comply with all switching instructions issued by the Transmitter's Controlling Authority to maintain the security and reliability of the Transmission System unless this conflicts with public safety, life, property, or the environment, as applicable to a Nuclear Generating Station and as required by the Customer's PROL or with the terms of this Agreement. The two Controlling Authorities shall agree to procedures prior to undertaking any switching operations.

143

10.11 Scheduling of Planned Work

144

In order to maintain the provision conveyance of reliable Off-Site Power service, the parties will co-ordinate outage plans in accordance with Good Utility Practice and shall use their best efforts to schedule outages on mutually acceptable dates. To the extent practical, the Transmitter shall schedule any shutdown, withdrawal or testing of facilities to co-ordinate with the Customer's scheduled outages.

145

Include the above

146

10.11.2 The Customer shall, take all reasonable steps to ensure that its anticipated and planned outages for the upcoming year are submitted to the Transmitter by October 1st of each year.

147

Replace by:

148

The Customer shall, take all reasonable steps to ensure that its anticipated and planned outages for the upcoming year are submitted to the Transmitter by October 1st of each year.

149 Notice requirements for planned work are contained in this Addendum under Schedule D "Outage Planning".

150 10.11.3 At least four days in advance of planned work that requires feeder breaker to be opened or operated and at least ten days in advance of planned work that requires operations of multiple feeder breakers, station bus or a whole transformer station, the Customer's Controlling Authority shall fax requests to the appropriate Transmitter contact identified in the operations schedule of this Agreement.

151 **Replace by:**

152 10.11.3 At least four days in advance of planned work by the Transmitter that requires a Transmitter's feeder breaker to be opened or operated and at least ten days in advance of planned work by the Transmitter that requires operations of the Transmitter's multiple feeder breakers, Transmitter's station Bus or a Transmitter's whole transformer station, the Customer's Controlling Authority shall fax requests to the appropriate Transmitter contact identified in Part 1, Schedule D of this Agreement.

153 10.11.4.1 any disconnection from the Transmitter's transmission facilities of less than 50 kV e.g. disconnection from a feeder breaker owned by the Transmitter or by the Customer,

154 **Exclude the above**

155 10.11.4.2 load changes greater than 5 MW, or

156 **Exclude the above**

157 10.11.5 The Transmitter's Controlling Authority shall notify the Customer's Controlling Authority at least four days in advance of any planned work that requires a feeder breaker to be opened or operated and at least ten days in advance of planned work that requires operations of multiple feeder breakers, station bus or a whole transformer station, that directly affects the Customer's facilities, by contacting the appropriate Customer contact identified in the operations schedule to this Agreement.

158 **Replace by:**

159 10.11.5 The Transmitter's Controlling Authority shall notify the Customer's Controlling Authority at least ten days in advance of planned work that requires operations of a station bus, that directly affects the Customer's facilities, by contacting the appropriate Customer contact identified in Part 1, Schedule D of this Agreement.

160 10.11.9 Details regarding outage planning particular to the Customer are in Schedule D, Part 1, Section 6.2 "Outage Planning".

161 **Include the above**

162

10.11.10 In circumstances where the Customer reasonably believes that there is a material threat to its ability to comply with its PROL, the Customer may direct the Transmitter to undertake work on the Transmitter's facilities or Equipment. The Transmitter shall comply with this direction promptly provided that this work does not conflict with the Transmitter's legislative, regulatory or safety requirements, as the case may be. To avoid indiscriminate use of this provision, the request must be made by a Customer's senior staff (e.g. director level or above) to the Transmitter's Director of Network Management Program Execution or delegate. The Transmitter's Director shall immediately authorize the directed work and the work shall be completed on an expedited basis.

163

Incremental costs incurred by the Transmitter in complying with this direction shall initially be paid by the Customer upon receipt of a bill outlining in reasonable detail the amount and breakdown of the incremental costs, and may later be shared between the Transmitter and the Customer by mutual agreement. In no circumstances will the Customer be billed under this section for regularly scheduled maintenance that was not performed by the Transmitter. Where the Customer and the Transmitter can not agree on the sharing of these costs, the matter shall be resolved through the Dispute Resolution process set out in Section 13 of this Agreement.

164

Include the above

165

10.14 Access and Security of Facilities

166

10.14.9 In an Emergency, a site owner may, as far as reasonably necessary in the circumstances, have access to and interfere with the other Party's facilities. The site owner shall use reasonable efforts not to cause loss or damage to the other Party's facilities. If the site owner interferes with any of the facilities, it shall indemnify the other Party for reasonable costs and expenses incurred from any resulting loss or damage.

167

Replace by:

168

10.14.9 In an emergency the Customer may, as far as reasonably necessary in the circumstances, have access to and interfere with the Transmitter's facilities. The Customer shall use reasonable efforts not to cause loss or damage to the Transmitter's facilities. If the Customer interferes with any of the facilities, it shall indemnify the Transmitter for reasonable costs and expenses incurred from any resulting loss or damage.

169

10.14.10 Access to Equipment in the switchyard and switchyard security is the responsibility of both Parties subject to the Customer's obligation under its Power Reactor Operating Licence. Only authorized personnel are allowed unaccompanied access to the switchyard. Access codes and keys shall be registered with Customer site security which must be kept informed of gates left unlocked on a shift by shift basis, otherwise all gates must be closed and locked at all times.

170

Include the above

171

10.14.11 The Controlling Authorities shall be notified upon entry and exit of personnel from the switch-yard. The Transmitter and Customer will comply with each others procedures for accessing the switchyards: specifically the Transmitter's OATIS instruction [56], and the Customer's operating manual [18].

172

Include the above

173

11 TERM AND TERMINATION OF CONNECTION AGREEMENTS

174

This Agreement shall continue in effect until a mutually agreeable termination date not to exceed the date on which the Customer's PROL for the Customer Facility is terminated, provided that;

175

- the Customer has satisfied all CNSC requirements and commitments required to be satisfied in order to eliminate the need for a transmission connection to provide an Off-Site Power service under this Agreement, and

176

- the Customer no longer holds any other nuclear related licence for the Customer's Facility which identifies a requirement for an Off Site-Power service.

177

or until such time the parties execute an agreement which provides for the conveyance of Off-Site Power in a manner which satisfies any license that the Customer is required to hold by the CNSC or other regulatory body.

178

Include the above

179

11.2 Termination by a Non-Defaulting Party

180

11.2.1 A non-defaulting Party may terminate the Agreement at any time during the term or any renewal thereof by giving the other Party six months' prior written notice setting out the termination date. Termination in the event of a default shall follow the procedures set out in section 12.4 of this Agreement.

181

Exclude the above

182

11.3 Right to Disconnect

183

11.3.1 If a non-defaulting Party gives notice to terminate the Agreement under section 12.2.1, the Transmitter shall disconnect the connection point on the termination date specified in that notice or on another date that the Parties have agreed upon in writing.

184

Exclude the above

185

11.4 Right to Remove Assets

186

11.4.1 When a non-defaulting Party has terminated the Agreement under section 11.2.1, the Transmitter may disconnect the connection point and shall be entitled to de-commission and remove any of its assets associated with the connection and the connection point.

187

Replace by:

188

11.4.1 The Transmitter may only disconnect the connection point after the nuclear units are decommissioned. During the decommissioning phase, the Parties may negotiate a new connection agreement (the "New Agreement") to provide for the conveyance of Off-Site Power in a manner which satisfies any license that the Customer is required to hold by the CNSC or other regulatory body. Upon execution of the New Agreement, the Transmitter shall be entitled to decommission and remove any of its assets associated with the connection point and which are not required under the terms of the New Agreement.

189

12 EVENTS OF DEFAULT AND TERMINATION

190

12.4.1 A non-defaulting Party may, without prejudice to other rights and remedies provided for in this Agreement with respect to an Event of Default, which has not been remedied within the periods set forth below, terminate this Agreement by written notice to the defaulting Party:

191

Replace by:

192

12.4.1 A Non-defaulting Party may, without prejudice to other rights and remedies provided for in this Agreement with respect to an Event of Default, which has not been remedied within the periods set forth below, terminate this Agreement, provided that such termination under no circumstances permits the Transmitter to cease the conveyence of the Customer's Off-Site Power service required to meet its obligations under its Power Reactor Operating Licence, unless the Transmitter has the approval of the appropriate regulatory authority(ies) or a court of competent jurisdiction, it being the intent of the Parties that if the Customer is the Defaulting Party, the Transmitter can terminate the Agreement only insofar as it relates to the Transmitter's obligations to accept and transmit electricity generated by the Customer to the Market, by written notice to the Defaulting Party:

193

12.5.1 Neither the Transmitter nor the Customer may terminate the Agreement except in accordance with the applicable provisions set out in the Code or this Agreement.

194

Replace by:

195

12.5.1 Neither the Transmitter nor the Customer may terminate the Agreement except in accordance with the applicable provisions set out in the Code and this Agreement.

196

12.5.2 If either a Transmitter or a Customer chooses to terminate this Agreement pursuant to its rights under section 12.4, then upon termination the Agreement will, subject to section 12.5.3, be of no further force and effect.

197

Replace by:

198

12.5.2 If either a Transmitter or a Customer chooses to terminate this Agreement pursuant to its rights under section 12.4, then upon termination the Agreement will, subject to Subsection 12.5.3 and Subsection 12.4.1, be of no further force and effect.

199

12.6.1 If the Transmitter is the non-defaulting Party, the default has not been remedied and the cure period has expired, it may, on providing a written notice ten business days in advance, disconnect the connection point where the default remains unremedied at the end of the ten business days notice period.

200

Replace by:

201

12.6.1 If the Transmitter is the Non-defaulting Party, the default has not been remedied and the Cure Period has expired, it may, subject to Subsection 12.4.1, on providing a written notice ten business days in advance, disconnect the connection point where the default remains unremedied at the end of the ten business days notice period.

202

13 DISPUTE RESOLUTION

203

13.1 Exclusivity

204

13.1.1 Except where this Agreement states otherwise, the dispute resolution procedures set forth in this Agreement shall apply to all disputes arising between the Customer and the Transmitter regarding the Agreement and the Code and shall be the only means for resolving any such disputes.

205

Replace by:

206

13.1.1 Except where this Agreement states otherwise, the dispute resolution procedures set forth in this Agreement shall apply to all disputes, other than those relating to nuclear safety, arising between the Customer and the Transmitter regarding the Agreement and the Code and shall be the only means for resolving any such disputes.

207

13.2 Duty to Negotiate

208
13.2.1 Any dispute between the Customer and the Transmitter over this Agreement shall first be referred to a designated representative chosen by the Customer and to a designated representative chosen by the Transmitter for resolution on an informal basis.

209
Replace by:

210
13.2.1 Any dispute, other than those relating to nuclear safety, between the Customer and the Transmitter over this Agreement shall first be referred to a designated representative chosen by the Customer and to a designated representative chosen by the Transmitter for resolution on an informal basis. Any dispute relating to nuclear safety may be referred to such designated representatives on an informal basis or to a court of competent jurisdiction as set out in Subsection 13.3.1 below.

211
13.2.2 Such designated representatives shall attempt in good faith to resolve the dispute within thirty days of the date when the dispute was referred to them, except that the Parties may extend such period upon which they agree in writing.

212
Replace by:

213
13.2.2 Such designated representatives shall attempt in good faith to resolve the dispute within thirty days of the date when the dispute was referred to them, except that the Parties may extend such period upon which they agree in writing. When a dispute relating to nuclear safety is referred to such designated representatives, the designated representatives shall attempt in good faith to resolve the dispute within 48 hours of the date the dispute was referred to them unless the Parties agree otherwise in writing.

214
13.3 Referral of Unresolved Disputes

215
13.3.1 If the designated representatives cannot resolve the dispute within the time period set out in subsection 13.2.2, either Party may submit the dispute to binding arbitration and resolution in accordance with the arbitration procedures set out below.

216
Replace by:

217
13.3.1 If the designated representatives cannot resolve the dispute within the time period set out in subsection 13.2.2, either Party may submit the dispute to binding arbitration and resolution in accordance with the arbitration procedures set out below. If the dispute relates to nuclear safety, either party may apply to a court of competent jurisdiction to seek specific performance or injunctive relief. The Parties hereby agree that disputes relating to nuclear safety may cause irreparable harm to a Party, the Parties and/or the public for which ordinary damages are not an adequate or appropriate remedy and therefore it is necessary and appropriate to submit such disputes to a court of competent jurisdiction in order to obtain an order for specific performance or injunctive relief to compel the other Party to perform its obligations under this Agreement.

218

15 COMPLIANCE, INSPECTION, TESTING AND MONITORING

219

15.1.7 The Transmitter has the right to specify by addendum to this Agreement, the types of changes that require prior approval of the Transmitter before the Customer implements such changes. Such changes, that require prior approval of the Transmitter, shall be set out in Schedule A of this Agreement, and shall be limited to those that can have material adverse effect(s) on the Transmitter's transmission facilities or facilities of its other Customers.

220

Replace by:

221

15.1.7 The Parties have the right to specify by addendum to this Agreement, the types of changes that require prior approval of the Transmitter before the Customer implements such changes or that require prior approval of the Customer before the Transmitter implements such changes. Such changes, that require prior approval of the Transmitter, shall be set out in Schedule A of this Agreement, and shall be limited to those that can have material adverse effect(s) on the Transmitter's transmission facilities or facilities of its other Customers. Such changes that require prior approval of the Customer shall also be set out in Schedule A, and shall be limited to those that, subject to Sections 6.3 and 6.8, materially affect the ability of the Customer to meet its obligations under its PROL.

222

23 INCORPORATION OF SCHEDULES

223

Schedule N - Switchyard Equipment Affecting Nuclear Safety

224

Schedule O - Reliability Indices Used in Nuclear Safety Analysis

225

Schedule P - Drawings

226

Schedule Q - References

227

Schedule R - Letter from the Nuclear Insurance Association of Canada

228

Include the above

229

28 ENTIRE AGREEMENT

230

This Agreement, together with the schedules attached hereto, constitute the entire agreement between the Parties and supersedes all prior oral or written representations and agreements of any kind whatsoever with respect to the matters dealt with herein.

231

Replace by:

232

This Agreement, together with the Addenda and Schedules attached hereto, constitutes the entire agreement between the Parties and supersedes all prior oral or written representations and agreements of any kind whatsoever with respect to the matters dealt with herein.

233

29 AMENDMENTS

234

29.1.8 Schedule M – Amendment Agreement Template

235

29.1.9 Schedule N – Switchyard Equipment Affecting Nuclear safety

236

29.1.10 Schedule O - Reliability Indices Used in Nuclear Safety Analysis

237

29.1.11 Schedule P – Drawings

238

29.1.12 Schedule Q – References

239

29.1.13 Schedule R – Letter from the Nuclear Insurance Association of Canada

240

Include the above

241

29.3 The Parties to this Agreement agree to forthwith, upon receipt of notice from the Board, do all things and take all actions necessary to amend this Agreement as specified by the Board.

242

Replace by:

243

29.3 The Parties to this Agreement agree to forthwith, upon receipt of notice from the Board, provided that such direction does not materially affect the Customer's ability to meet its obligations under its Power Reactor Operating Licence, do all things and take all actions necessary to amend this Agreement as specified by the Board. If the direction from the Board is determined to materially affect the Customer's ability to meet its obligations under its Power Reactor Operating Licence, the parties agree to notify the Board and seek resolution.

244

Amendments to Schedules

245

There are also a number of amendments to the Schedules required to cater for the requirements at the nuclear stations.

246

247

248

Schedule C - Include the Following

249

Areas of Impact	Cure Period
Any Action that Impacts on a Party's Obligations under its Power Reactor Operating Licence	Promptly

250

Schedule F

251

1.2.3 With advance notice to the Customer, the Transmitter's personnel may lock the isolating disconnect switch in the open position:

252

Replace by:

253

1.2.3 Except during an Emergency as permitted by Subsection 10.3.1, the Transmitter shall not lock the isolating switch in the open position without the prior written agreement of the Customer. With the prior written agreement of the Customer the Transmitter may lock the isolating equipment switch in the open position in the following circumstances.

APPENDIX 1

VERSION A - FORM OF CONNECTION AGREEMENT FOR LOAD CUSTOMERS

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14. REPRESENTATIONS AND WARRANTIES
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This is Exhibit "J" referred to in the affidavit of Curtis C. Pedwell sworn before me, this 5th day of October 2011

A COMMISSIONER, ETC.

Linda Dianne Robinson, a Commissioner, etc., Province of Ontario, for Gardiner Roberts LLP, Lawyers. Expires July 9, 2012.

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APPENDIX 1

VERSION A - FORM OF CONNECTION AGREEMENT FOR LOAD CUSTOMERS

This Connection Agreement is made this ___ day of _____, _____,

BETWEEN

_____, a *[insert form of business organization]* duly *[incorporated/formed/registered]* under the laws of *[insert jurisdiction]* (the ATransmitter@)

AND

_____, a *[insert form of business organization]* duly *[incorporated/formed/registered]* under the laws of *[insert jurisdiction]* (the ACustomer@)

(each a AParty@ and collectively the AParties@)

RECITALS

WHEREAS the Customer has connected or wishes to connect its facilities to the Transmitter=s transmission system.

AND WHEREAS the Transmitter has connected or has agreed to connect the Customer=s facilities to its transmission system.

AND WHEREAS in accordance with its licence and the Market Rules the Transmitter has agreed to offer, and the Customer has agreed to accept, transmission service in relation to the Customer=s facilities.

NOW THEREFORE in consideration of the foregoing, and of the mutual covenants, agreements, terms and conditions herein contained, the Parties, intending to be legally bound, hereby agree as follows:

PART ONE
GENERAL

1. DEFINITIONS

1.1 In this Agreement, unless the context otherwise requires:

1.1.1 AAgreement@ means this connection agreement and all of the Schedules;

1.1.2. ACode@ means the Transmission System Code issued by the Board and in effect at the relevant time;

1.1.3. AConfidential Information@ in respect of a Party means (a) information disclosed by that Party to the other Party under this Agreement that is in its nature confidential, proprietary or commercially sensitive and (b) information derived from the information referred to in (a), but excludes information described in section 21.1;

1.1.4. AControlling Authority@ in respect of a Party means the person appointed by that Party as responsible for performing, directing or authorizing changes in the condition or physical position of electrical apparatus or devices;

1.1.5. ACure Period@ means the period of time given to a Defaulting Party for the purposes of remedying an Event of Default, determined in accordance with section 19.2.1;

1.1.6. ADefault Notice@ has the meaning given to it in section 19.1.1;

1.1.7. ADefaulting Party@ means a Party in relation to whom an Event of Default has occurred or is occurring;

1.1.8. AEnd of Cure Period Notice@ has the meaning given to it in section 19.2.3;

1.1.9. AEvent of Default@ means a Financial Default or a Non-financial Default;

1.1.10. AExport Transmission Service@ has the meaning given to it in the Transmitter=s Rate Order;

1.1.11. AFinancial Default@ in respect of a Party means a failure by that Party to pay an amount to the other Party when due under this Agreement, including failure to pay compensation or indemnification for loss or damage agreed to by the Parties or for amounts determined to be owed to a Party as a result of the settlement or resolution of a dispute arising under this Agreement;

1.1.12. AForce Majeure Event@ in respect of a Party means any event or circumstance, or combination of events or circumstances: (a) that is beyond the reasonable control of that Party; (b) that adversely affects the performance by the Party of its obligations under this Agreement; and (c) the adverse effects of which could not have been foreseen and prevented, overcome, remedied or mitigated in whole or in part by the Party through the

exercise of due diligence and reasonable care, provided however that the lack, insufficiency or non-availability of funds shall not constitute a Force Majeure Event;

1.1.13. AInsolvency/Dissolution Event@ in respect of a Party, means any of the following:

(a) in the case of a voluntary insolvency/dissolution, if the Party shall (i) apply for or consent to the appointment of a receiver, receiver/manager, interim receiver, trustee, administrator, or liquidator (or person having a similar or analogous function under the laws of any jurisdiction) of itself or of all or a substantial part of its assets; (ii) be unable, or state or admit in writing its inability or failure, to pay its debts generally as they become due; (iii) make a general assignment for the benefit of its creditors, or make or threaten to make a sale in bulk of all or a substantial part of its assets; (iv) commit an act of bankruptcy under the *Bankruptcy and Insolvency Act* (Canada) or under any existing or future law relating to bankruptcy and insolvency; (v) commence any proceeding or other action under any existing or future law relating to bankruptcy, insolvency, reorganization, or relief of debtors seeking to have an order for relief entered with respect to it, or seeking to adjudicate it bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, moratorium, winding up, liquidation, dissolution, composition, compromise or other relief with respect to it or its debts or an arrangement with creditors, or file an answer admitting the material allegations filed against it in any bankruptcy, insolvency, or reorganization proceeding; or (vi) take any corporate action for the purpose of effecting any of (i) to (v);

(b) in the case of an involuntary insolvency/dissolution, if any proceeding or other action shall be instituted in any court of competent jurisdiction seeking in respect of the Party or of all or a substantial part of its assets (i) an adjudication in bankruptcy or for reorganization, dissolution, winding up or liquidation; (ii) a composition, compromise, arrangement or moratorium with its creditors, or other relief with respect to it or its debts; (iii) the appointment of a trustee, receiver, receiver/manager, interim receiver, administrator or liquidator (or person having a similar or analogous function under the laws of any jurisdiction); or (iv) any other similar relief under any existing or future law relating to bankruptcy, insolvency, reorganization or relief of debtors;

(c) an application is made for the winding up or dissolution or a resolution is passed or any steps are taken to pass a resolution for the winding up or dissolution of the Party, except as part of a bona fide corporate reorganization; or

(d) the Party is wound up or dissolved, except as part of a bona fide corporate reorganization, unless the notice of winding up or dissolution is discharged;

1.1.14. ALender@ in respect of a Customer means a bank or other entity whose principal business is that of a financial institution and that is financing or refinancing the Customer=s facilities;

1.1.15. ANon-defaulting Party@ means a Party that is not experiencing an Event of Default;

1.1.16. ANon-financial Default@ in respect of a Party means any of the following:

(a) any breach of this Agreement by that Party, other than a breach that constitutes a Financial Default;

(b) the licence (if any) of the Party is suspended, withdrawn or revoked or expires without being replaced; or

(c) an Insolvency/Dissolution Event occurs in relation to the Party;

1.1.17. AParty Losses@ means any claims, losses, costs, liabilities, obligations, actions, judgments, suits, expenses, disbursements or damages of a Party, including where occasioned by a judgment resulting from an action instituted by a third party;

1.1.18. ARate Schedule@ means the rates in effect from time to time and the terms and conditions relating to those rates that are approved by the Board in the Transmitter=s Rate Order, including rates for connection service;

1.1.19. ASchedule@ means a schedule listed in section 4.2.1 and any additional schedules created by the Parties under section 4.3.1;

1.1.20. "Supporting Guarantee" has the meaning given to it in the "Glossary of Terms" of the "utility work protection code" referred to in the document entitled "Electrical Utility Safety Rules", published by the Electrical and Utilities Safety Association of Ontario Incorporated (now the Infrastructure Health and Safety Association) and revised January, 2009, as may be amended from time to time; and

1.1.21. AWork Protection@ means a state or condition whereby an isolated or isolated and de-energized condition has been established for work on facilities and will continue to exist, except for authorized tests, until the work relating thereto has been completed.

1.2. In this Agreement, unless the context otherwise requires, each of the following words and phrases shall have the meaning given to it in the Code (whether or not capitalized in the Code or in this Agreement): Aassigned capacity@; Aavailable capacity@; ABoard@; Abusiness day@; "Code revision date"; Aconnect@; Aconnection facilities@; Aconnection point@; Aconnection service@; Acontracted capacity@; Acircuit breaker@; Aemergency@; Afacilities@; Afault@; Aforced outage@; Agood utility practice@; Aisolate@; Aisolating device@; Alicence@; Aload shedding@; Amaintenance@; Aoutage@; Aplanned outage@; Apromptly@; Aprotection system@; Aprotective relay@; ARate Order@; Areliability@; Areliability organization@; Areliability standards@; Arenewable generation@; Asingle contingency@; Asite@; Atransmission facilities@; Atransmission service@; "transmission system" and Awork@.

2. INTERPRETATION

2.1. Words and phrases contained in this Agreement (whether or not capitalized) that are not defined herein shall have the meanings given to them in the *Electricity Act, 1998,* S.O. 1998, c. 15, Schedule A, the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, or in any regulations made under either of those *Acts*, as the case may be.

2.2. Headings are for convenience only and shall not affect the interpretation of this Agreement.

2.3. In this Agreement, unless the context otherwise requires:

(a) words importing the singular include the plural and vice versa;

(b) words importing a gender include any gender;

(c) words importing a person include: (a) an individual, (b) a company, sole proprietorship, partnership, trust, joint venture, association, corporation or other private or public body corporate; and (c) any government, government agency or body, regulatory agency or body or other body politic or collegiate;

(d) a reference to a person includes that person=s successors and permitted assigns;

(e) a reference to a Party includes any person acting on behalf of that Party;

(f) a reference to the Customer=s facilities is limited to such facilities as are relevant to the Customer=s connection to the Transmitter=s transmission system under this Agreement;

(g) a reference to a body, whether statutory or not, that ceases to exist or whose functions are transferred to another body is a reference to the body that replaces it or that substantially succeeds to its powers or functions;

(h) a reference to a document (including a statutory instrument) or a provision of a document includes any amendment or supplement to, or any replacement of, that document or that provision;

(i) the expression Aincluding@ means including without limitation, and the expressions Ainclude@, Aincludes@ and Aincluded@ shall be interpreted accordingly; and

(j) where a word or phrase is defined in this Agreement, including by virtue of the application of section 1.2, or in any document referred to in section 2.1, other parts of speech and grammatical forms of the word or phrase have a corresponding meaning.

2.4. Except when an emergency is anticipated or is occurring, if the time for doing any act or omitting to do any act under this Agreement expires on a day that is not a business day, the act may be done or may be omitted to be done on the next day that is a business day.

3. INCORPORATION OF TRANSMISSION SYSTEM CODE

3.1 The Code is hereby incorporated in its entirety by reference into, and forms an integral part of, this Agreement. Unless the context otherwise requires, all references in this Agreement to Athis Agreement@ shall be deemed to include a reference to the Code.

3.2. Without limiting the generality of section 3.1:

(a) the Transmitter hereby agrees to be bound by, and at all times to comply with, the Code; and

(b) the Customer acknowledges and agrees that the Transmitter is bound at all times to comply with the Code in addition to complying with the provisions of this Agreement.

4. SCHEDULES

4.1. Incorporation of Schedules

4.1.1. The Schedules form a part of, and are hereby incorporated by reference into, this Agreement.

4.2. Schedules

4.2.1 The following are the Schedules to this Agreement:

Schedule A	-	Single Line Diagram, Description of the Customer=s Connection Point(s) and Details of Specific Operations
Schedule B	-	Transmission Services and Associated Charges
	-	Attachment B1
Schedule C	-	Cure Periods for Defaults
Schedule D	-	Fault Levels and Modifications Requiring Transmitter Approval
	-	Attachment D1
Schedule E	-	General Technical Requirements
Schedule F	-	Additional Technical Requirements for Tapped Transformer Stations Supplying Load
Schedule G	-	Protection System Requirements
Schedule H	-	Facilities Deemed Compliant and Obligation to Comply
Schedule I	-	Exchange of Information
Schedule J	-	Embedded Generation, Bypass, Assigned Capacity and True-Ups
	-	Attachment J1
	-	Attachment J2
Schedule K	-	Contacts for Purposes of Notice

4. STANDARDS OF BUSINESS PRACTICE AND CONDUCT

4.1 GENERAL REQUIREMENTS

4.1.1 Subject to section 4.1.2, a transmitter shall connect a customer's facilities and shall offer and provide transmission services to a customer subject to that customer entering into or having a connection agreement with the transmitter. Such connection agreement shall be in the form set out in the applicable version of the connection agreement set out in Appendix 1. Where the customer is an unlicensed transmitter, the version of the connection agreement set out in Appendix 1 to be used shall be determined based on the nature of the facility that is connected to the unlicensed transmitter's transmission system. Where both a generation facility and a load facility are connected to the unlicensed transmitter's transmission system, this may require two connection agreements.

4.1.2 A transmitter may not enter into a connection agreement on terms and conditions other than those set forth in the applicable version of the connection agreement set out in Appendix 1 or amend the terms and conditions of a connection agreement relative to the terms and conditions set forth in the applicable version of the connection agreement set out in Appendix 1 except as expressly contemplated in the applicable version of the connection agreement set out in Appendix 1 or with the prior approval of the Board.

4.1.3 Where a transmitter does not have a connection agreement with a customer whose facilities were connected to the transmitter's transmission system prior to the Code revision date, the transmitter shall be bound by the applicable version of the connection agreement set out in Appendix 1 in relation to that customer and shall be permitted to consider that customer's continued acceptance of transmission service as acceptance by that customer of all of the terms and conditions of the connection agreement in the form set out in the applicable version of the connection agreement set out in Appendix 1.

4.1.4 A transmitter shall ensure that all connections to its transmission system are made by it with due regard for the safety of the transmitter's employees and the public.

This is Exhibit "C" referred to in the affidavit of Curtis C. Pedwell sworn before me, this 5th day of October 20 11

Linda Dianne Robinson, a Commissioner, etc., Province of Ontario, for Gardiner Roberts LLP, Lawyers. Expires July 9, 2012.

A COMMISSIONER, ETC.

network facility.

6.7.5 When a load customer provides its own connection facility to serve new load or transfers new load to the connection facility of another person, the transmitter shall not require bypass compensation from that customer.

6.7.6 Subject to sections 6.7.2, 6.7.7 and 6.7.8, for all or a portion of existing load a load customer may bypass a transmitter-owned connection facility with its own connection facility or the connection facility of another person, provided that the load customer compensates the transmitter.

6.7.7 For the purposes of sections 6.7.6 and 11.2.1, but subject to section 6.7.8, the transmitter shall calculate bypass compensation by first multiplying the net book value of the bypassed connection facility, including a salvage credit and reasonable removal and environmental remediation costs, if applicable, by the bypassed capacity on the relevant connection facility. The transmitter shall then divide the resulting figure by the total normal supply capacity of the bypassed connection facility. For purposes of this calculation:

(a) the bypassed capacity on the relevant connection facility shall be equal to the difference between the customer's existing load on that connection facility at the time of bypass and the customer's average monthly peak load in the three-month period following the date on which bypass occurred; and

(b) the normal supply capacity of the bypassed connection facility shall be determined by the transmitter in accordance with the Board-approved procedure referred to in section 6.2.7.

6.7.8 Where an economic evaluation, including an economic evaluation referred to in section 6.2.24, 6.3.9 or 6.3.17, was conducted by a transmitter for a load customer in relation to a connection facility on the basis of a load forecast, a transmitter shall not, during the economic evaluation period to which the economic evaluation relates, require bypass compensation from a customer under section 6.7.6 in relation to any load that represents that customer's contracted capacity.

6.7.9 A transmitter should avoid overloading a connection facility above its total normal supply capacity. Where a connection facility has been overloaded, and a customer transfers the overload to its own connection facility or to the connection facility of another person, the transmitter shall not require bypass compensation from that customer.

the transmitter shall not for any purpose treat that generation facility as embedded generation in relation to that load facility.

11.1.5 The reference to "for all purposes" and "for any purpose" in sections 11.1.1 to 11.1.4 includes the purpose of determining whether bypass compensation is required to be paid by the load customer and the purpose of determining the manner in which network charges will be applied.

11.2 BYPASS COMPENSATION

11.2.1 A transmitter shall require bypass compensation from a customer if:

(a) the customer disconnects its facility from the transmitter's connection facilities and subsequently connects that facility to a generation facility or to the facilities of any person such that both the load facility and a generation facility are connected to the transmitter's transmission facilities on that person's side of the connection point; and

(b) the transmitter will no longer receive line connection or transformation connection rate revenues in relation to that facility.

The transmitter shall calculate bypass compensation using the methodology set out in section 6.7.7.

11.2.2 Where a transmitter becomes aware that a customer intends to bypass a transmitter-owned connection facility in the manner described in section 11.2.1, the transmitter shall promptly notify all other load customers served by the connection facility that is intended to be bypassed.

11.2.3 A transmitter shall not require bypass compensation from a customer for any reduction in a customer's load served by the transmitter's connection facilities that the customer has demonstrated to the reasonable satisfaction of the transmitter (such as by means of an energy study or audit) has resulted from embedded renewable generation (determined in accordance with section 11.1), energy conservation, energy efficiency or load management activities, except in accordance with the transmitter's Rate Order.

RP-2002-0120

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

AND IN THE MATTER OF a proceeding pursuant to subsection 19(4), and 74 of the Ontario Energy Board Act, 1998 to review the Transmission System Code and Related Matters.

BEFORE:

Paul Sommerville
Presiding Member

Art Birchenough
Member

Fred Peters
Member

PHASE I POLICY DECISION WITH REASONS

June 8, 2004

This is Exhibit "L" referred to in the affidavit of Curtis C. Pedwell sworn before me, this 5th day of October 2011

A COMMISSIONER, ETC.

Linda Dianne Robinson, a Commissioner, etc.,
Province of Ontario, for
Gardiner Roberts LLP, Lawyers.
Expires July 9, 2012.

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5 TRANSMISSION SYSTEM BYPASS

184

5.1 Transmission System Bypass- Board Proposition No. 5. 1

185

186

The Code should contain a definition of "Embedded Generation" which addresses such factors as ownership, location and other relevant factors.

5.1.1 Analysis and Findings

187

188

The issue of what constitutes Embedded Generation was addressed by the Board in RP-1999-0044, which was a Hydro One rates case. Whether generation is embedded in relation to a transmission customer affects how, and how much the customer is to be charged by the transmitter for transmission services. The issue was also addressed more recently in two subsequent proceedings, RP-2002-0143 and RP-2002-0118. Those proceedings dealt with complaints brought by transmission customers, each of whom asserted that Hydro One refused to recognize certain generators as embedded and therefore was billing the customers in a manner not consistent with the governing rate order. In each proceeding, the Board concluded that the generation in question was embedded because it was connected on the customer side of the point of connection between Hydro One and the transmission customer.

189

This Decision, however, looks at the issue more broadly to determine under what circumstances generation ought to be considered to be embedded, examining the various possible combinations of old and new generation with old and new load. The Board is of the view that a comprehensive definition of Embedded Generation will provide greater regulatory certainty, which should facilitate investment in desirable new supply. The determination as to whether generation is embedded in a variety of scenarios will affect how the transmitter charges its customer, as set out in RP-1999-0044.

190

The definition of Embedded Generation was one of the seven issues addressed at the Settlement Conference. The settlement discussions resulted in the development of two options, each supported by different parties. Appendix B (Facilitator's Report, Issue No. 4) provides a detailed description of the two options. There were several similarities between the two options.

191

For both options, there was consensus that the generation is embedded if it is connected behind the point of connection between the facilities of the transmitter and the transmission customer. This is consistent with the Board's conclusion in RP-2002-0143 and RP-2002-0118. There was also agreement that generation is embedded if the generator is connected directly to a distribution system. This is consistent with RP-1999-0044.

192

There was consensus, for both options, that the ownership of the generation, the voltage level at which the generator is connected, and the type of licence held by a customer are not relevant to the question as to whether generation is Embedded or not. This, too, is consistent with the RP-2002-0143 and RP-2002-0118 Decisions. There was also agreement that it was immaterial whether the Embedded Generation capacity was greater than or less than the customer's load.

193 The parties concluded, for both options, that a Board review process should be available to resolve disputes as to whether a specific generation facility should be treated as embedded where the generation asset and the load are connected to the same Line Connection facility owned by a transmitter. Recourse to the review process would not be required if the generation was renewable generation. In such circumstances, the renewable generation would be deemed to be embedded. The parties also agreed that if new generation met the criteria for Embedded Generation, it did not matter if that generation was connected to existing or new load. However, the options diverge in their proposed treatment of new or reconfigured connections between existing load and existing generation. Option 1 would make recourse to Board review available in all such circumstances where the parties were unable to resolve their differences, while Option 2 would not provide for such recourse where the situation involved new load connected to existing generation, which should be considered to be embedded.

194 In Option 1, where generation qualified as Embedded in relation to a load, there would be an automatic rate adjustment for the transmitter based on the removal of that load. CAC and VECC did not support this aspect of Option 1.

195 Option 1 required generation and load to be located on a single property, while Option 2 did not. Option 2 did not require a Board review process for generation with a capacity of less than 20 MW.

196 In the Settlement Conference, the IMO took the position that the emerging definition of Embedded Generation in these proceedings, which is used for the purposes of establishing transmission rates and the consideration of Code issues, appeared to be different than the definition used in connection with the Market Rules. The IMO was of the view that it may be impractical to try to reach a common definition of Embedded Generation for both rate making purposes and reliability and connection purposes as addressed by the Market Rules.

197 There are four possible combinations of generation and load which the Board considered in deciding the issue of what constitutes Embedded Generation for the purposes of the Code. These are:

198 • new generation - new load

199 • new generation - existing load

200 • existing generation - new load, and,

201 • existing generation - existing load.

202 The Board's approach is driven in part by the objectives of the Act as expressed in Section 2 thereof. In addition, the Board is mindful of the overall state of the electricity market in Ontario, and the importance of accommodating, to the extent appropriate under its statutory mandate, the introduction of new and expanded generation to meet existing and new demand.

203 The Board will address the first two combinations together, since they each involve new generation and can be reasonably dealt with in the same manner.

204 The Board recognizes that the transmitter may lose some revenue from existing load when such load is subsequently met by new Embedded Generation. It is reasonably predictable that the advent of new generation, including new Embedded Generation, will result in overall improvement and growth in the electricity market. Much of the loss of transmission revenue is likely to be reduced or perhaps totally offset by load growth in the market as a whole. The Board also recognizes that this may lead to some increase in the costs borne by transmission ratepayers, but this should be offset by the expected reduction in overall energy cost resulting from entry of new generation. New generation means there is more supply to meet peak demand which should reduce energy costs for all consumers. Ontario is currently facing a tight supply situation and has had to rely on expensive sources, including imports, from time to time to meet peak demand. Historically, Embedded Generation has tended to be in the form of cogeneration, which is a more energy efficient and cost effective form of generation than most merchant generation. Embedded Generation may also have the effect of enhancing reliability and reducing inefficiencies associated with transmission congestion.

205 The Board is of the view that to the extent that all ratepayers will benefit from lower energy costs and a more effective and efficient transmission system, it is appropriate for them to bear additional transmission costs that may result from the rate treatment set out in RP-1999-0044 for Embedded Generation.

206 The Board recognizes that the commercial realities of the market place are such that there will often not be common ownership of load and generation. The Board considers it to be important that the imagination and industry of the marketplace be permitted adequate scope to develop configurations and arrangements that will serve the important societal goal of enhancing the efficiency and effectiveness of the electricity supply system in Ontario. It would be an unnecessary barrier to new generation to require common ownership as a criterion for qualification as Embedded Generation. For similar reasons, it is not necessary to require that the load and the generation be located on the same property. While Embedded Generation is often located on the same property as the load customer, there is no reason that generation should not be considered embedded if it is located on separate property, provided that it is connected on the transmission customer side of the connection point/interface between the transmitter and that transmission customer.

207 Generation can be connected at transmission or distribution voltage. The choice is often driven by economic or system efficiency factors which ought not to affect the question of whether the generation is Embedded. That was the Board's view in the RP-2002-0143 and RP-2002-0118 Decisions and there is no reason to take a different approach for the purposes of the revised Code.

208 There are many commercial arrangements that can be entered into by new generators and new types of arrangements will occur as the Ontario electricity market continues to evolve. The Board does not believe that the form of commercial arrangement entered into by new generation should affect whether that generation is considered to be embedded. To do so would be to run the risk of creating barriers to new generation. This is consistent with the Board's approach in RP-2002-0143 and RP-2002-0118.

209 The Board recognizes it is possible that Embedded Generation capacity may exceed the related load. It would be inconsistent with the objective of ensuring a reliable supply of electricity for Ontario to limit Embedded Generation capacity to the size of the load. Similarly, the number of generating units ought not to be a factor in determining whether new generation is Embedded.

210 The Board therefore finds, for the purposes of the revised Code, any new generation that is connected on the customer side of the connection between a transmission customer and the transmitter will be considered embedded, and therefore not transmission system bypass, regardless of:

- 211 whether the customer load is new or existing;
- 212 who owns the generation;
- 213 where the generation is located;
- 214 what voltage the generation is connected at;
- 215 what commercial arrangements the generator enters into; and
- 216 the size or the number of units of generation capacity.

217 For the purposes of the revised Code, the Board is of the view that the appropriate date to distinguish between new and existing generation shall be the date that this Decision is published on the Board's web site. This means that any generation facilities which go into online operation on or after the date that this Decision is published will be considered to be new. This does not affect any Board Decisions made in RP-1999-0044 and, as a result, October 31, 1998 will continue to be the date used for the application of rates under the current rate order.

218 If new generation is Embedded in relation to a load customer, the transmitter will charge for transmission services in accordance with the RP-1999-0044 Decision.

219 The revised Code will not provide for an automatic rate adjustment for the transmitter when load is lost as a result of new Embedded Generation, as proposed in Option 1. The Board prefers not to address one narrow aspect of what constitutes just and reasonable rates in isolation. Transmission rates are best addressed in a rates proceeding which looks at all rates issues together and establishes just and reasonable rates.

220 The Board will address the last two combinations together since they both involve existing generation.

221 It is possible that by reconfiguring existing transmission system connections, existing generation can become embedded in relation to an existing transmission customer. Similarly, new load can be

connected in such a way that existing generation can be Embedded in relation to that new load. The Board is not prepared to consider either combination as Embedded Generation for the purposes of RP-1999-0044.

222 Reconfiguration may result in narrow benefits for the generator or associated load customer but there is no apparent benefit to ratepayers who will bear the cost of assets that are stranded as a result of reconfiguration, primarily because no new generation has been added. Such reconfiguration amounts to bypassing the transmitter, which will increase the cost to be borne by other ratepayers unless the transmitter is compensated for the bypass.

223 In the revised Code, the Board will not consider any reconfigured existing generation to be Embedded for the purposes of RP-1999-0044 and gross load billing will, therefore, apply for both Network and Connection charges.

224 The Board emphasizes that for new Embedded Generation situations that are consistent with the revised Code, the bypass of transmitter-owned existing Transformation and Line Connection facilities serving existing load customers is allowable. If the bypass results in reduction of usage of the connection facilities, as set out in RP-1999-0044, the transmitter will be billing the customer on a gross load basis for the relevant Connection assets. However, if the existing customer(s) disconnects from the transmitter's Connection assets to take service from a new and, in effect, duplicative line and transformation connection owned by a party other than the transmitter, the transmitter's Line Connection and Transformation Connection assets, as the case may be, would be stranded, but the transmitter would not be compensated through gross load billing as the Board envisioned in RP-1999-0044. As a result, in such cases of bypass, the compensation for these Connection facilities will be a responsibility of the customer(s), and would be based on the NBV of the stranded assets.

225 As a result of these findings, a Board review process, as set out in the Facilitator's Report, is not necessary. It is also not necessary to consider the establishment of the Local Interrelated System concept as discussed at the Settlement Conference.

226

5.2 Transmission System Bypass- Board Proposition No. 5. 2

227 *The Code should reflect the principle with respect to the rate treatment of new Embedded Generation (i.e., net billing for Network and gross billing for Connection) established in RP-1999-0044.*

228

5.2.1 Analysis and Findings

229 Hydro One agreed with and supported RP-1999-0044. Generators agreed that rate treatment should be aligned with the principles established in RP-1999-0044. Large consumers submitted that net load billing for both Connection and Network charges should be applied in a manner consistent with the principles established in RP-1999-0044. The EDA generally supported the same proposition. In addition, the EDA suggested that the revised Code should include a specific clause to the effect that transmission load displaced by Embedded Generation of 1MW or less ought not to be considered system bypass. CAC and VECC submitted that there is a potential conflict with Proposition No.5.4,

below, and that gross load billing could be viewed as a measure that discourages the development of Embedded Generation. In their view, Proposition No. 5.2 should take precedence over Proposition No. 5.4.

230 In order to ensure consistent rate treatment, the Board is of the view that transmission customers with new Embedded Generation, as defined in this Decision, will be subject to the rate treatment established in RP-1999-0044. That is, net load billing for Network charges and gross load billing for Connection charges, except for Embedded Generation of 1 MW per unit or less where net load billing applies for both Network and Connection charges. The Board will increase the qualifying limit for exemption from gross billing from 1 MW per unit to 2 MW per unit for renewable generation installations. This increase reflects a societal interest in increasing the proportion of renewable generation in the overall generation mix in the province, and the technical reality that the output of some renewable source generation equipment has advanced from under 1 MW per unit to just under 2 MW per unit. It is intended that renewable energy projects comprised of generation units producing 2 MW or less per unit will be eligible for net billing charges on relevant connection facilities. The Board notes that there was a request to increase this qualifying limit to 20 MW. The Board rejects this proposal as being excessive.

231 There are references to "cleaner" energy sources throughout these propositions. There was a general consensus amongst the parties that this terminology was ambiguous, undefined and should be replaced with "renewable" energy sources. The Board agrees. The parties involved in this process also agreed to a definition of "renewable energy sources" as set out in the Facilitator's report. However, the Board believes it would be prudent to use an existing definition of renewable energy, as developed by the Ontario Government, to avoid having competing definitions in the Ontario electricity market. The Government recently released its Request for Qualifications (RFQ) for 300 MW of new renewable capacity. That RFQ contained such a definition which states that: a *"Renewable Generating Facility" refers to a facility that generates electricity from the following sources: wind, solar, Biomass, Bio-oil, Bio-gas, landfill gas, or water.* As such, the Board has decided to adopt this definition for the purposes of the revised Code.

232

5.3 Transmission System Bypass- Board Proposition No. 5. 3

233 *The Code should contain provisions establishing the right of load customers to construct their own connection facilities (e.g., transformation stations) regardless of the existence of Available Capacity, provided that the new facilities are designed to meet needs created by the development of new loads that are not presently served by existing transmission Connection facilities. The construction of such facilities should not be considered bypass. New load is defined as load which exceeds the CATC and based on the greater of either:*

234 1. *the highest monthly peak load over the past 5 years for the relevant delivery points;*

235 *or*

236 2. *the Available Capacity of the existing feeder positions associated with the relevant delivery point.*

5.3.1 Analysis and Findings

237

238

This proposition is related to and follows from the propositions that were addressed in sections 4.2 in 4.3 above in the chapter dealing with Available Capacity. As the Board has indicated above, a transmitter shall not have an automatic entitlement to serve new load on its own Connection facilities.

239

The Board has decided that the revised Code shall contain provisions establishing the right of load customers to construct their own transformation connection facilities, regardless of the existence of Available Capacity, provided that the new facilities are needed to meet the new load. This right also applies to overloads on existing Transformation and Line Connection facilities, but only to the extent of the overload portion of the customer's load. The construction of such facilities shall not be considered bypass. In section 5.5.1, the Board addresses situations covering customers' existing load on transmitter-owned transformation connections.

240

The Board clarified that for line connection facilities, a customer will have to demonstrate that it has new load that cannot be met by the Available Capacity on the transmitter's existing Line Connection facilities, before it can construct its own line connection facilities, except where it involves overloaded Connection facilities. Where Available Capacity is not adequate, that customer shall have the right to meet its own line connection requirements and the construction of such facilities shall not be considered bypass. The rationale for this approach to line connection facilities is to ensure that there will not be unnecessary duplication of existing lines.

241

The rationale underpinning this approach is the Board's interest in creating opportunities for enhanced competition in the provision of construction and consulting services for connection facilities. Competition should be applicable where the system as a whole cannot reasonably be said to be compromised or unduly disadvantaged by such diversity. In the Board's view, such competition should result in an overall enhancement and optimization of the transmission system, and the creation of appropriate new business opportunities for other sectors of the economy.

242

5.4 Transmission System Bypass- Board Proposition No. 5. 4

243

The Code should contain provisions which establish that the development of new Embedded Generation should not be considered to be system bypass. Any measures that discourage such development should be prohibited and where such measures are in existing agreements they should be unenforceable.

244

5.4.1 Analysis and Findings

245

Hydro One generally agreed with the proposition. However, Hydro One also submitted that prohibiting measures that discourage Embedded Generation could lead to the construction of Embedded Generation that is justified solely on the strength of avoiding transmission charges (i.e., uneconomic bypass) and that this would be an inappropriate market signal which could discourage the development of more efficient forms of generation from a societal perspective. Hydro One

submitted that this could result in higher transmission rates for remaining customers and the potential stranding of significant parts of the transmission system.

246 Generators were in agreement with the proposition. TransAlta objected to the inclusion of a "no bypass" clause in its existing Connection and Cost Recovery Agreement ("CCRA") with Hydro One, which TransAlta signed under protest. OPG in a separate application dated March 4, 2002, made requests including removal of a "no-bypass" section from Hydro One's CCRA template agreement. The generators stated that any existing contract that is inconsistent with the new Code should be amended to come in line with the revised Code.

247 GEC, CIELA and OSEA submitted that load reduction should also be excluded from the definition of bypass.

248 Large consumers agreed with the proposition, which is consistent with RP-1999-0044. AMPCO further submits that transmitters should not be able to circumvent RP-1999-0044 through additional contractual provisions.

249 Distributors were generally supportive. Generation supplying new load should not be considered bypass, but the Code should state that existing load displaced by Embedded Generation greater than 1MW per unit is to be considered bypass. The Code should contain criteria for calculating the gross load bill as a result of bypass. Bypass contributions should be reduced to the extent that:

250 • displaced transmission Connection assets have reached the end of their useful life;

251 • displaced capacity is built back by new transmission customer load growth;

252 • displaced capacity is reallocated by the transmitter to supply another customer;

253 and

254 • the Embedded Generation is down at the time of the billing peak in a particular month.

255 CAC and VECC submitted that Proposition No. 5.2, above, should take precedence over Proposition No. 5.4. CAC and VECC further submitted that the Board should clarify that the reference to "system bypass" in the first sentence relates specifically to Network system bypass, and that the second sentence does not preclude gross billing for Connections. CAC and VECC also requested clarification that the second sentences in Propositions 5.4 and 5.6 do not preclude measures designed to achieve a balance between transmission system integrity and encouraging new generation or energy conservation or efficiency.

256 The Board notes that, generally, there was consensus that the revised Code should state that the development of new Embedded Generation, consistent with section 5.2 of this Decision, is not considered to be system bypass. To a large degree, this issue has already been

addressed in section 5.2 Transmitters should not do anything that would discourage the development of new Embedded Generation. To the extent that provisions in existing agreements between a transmitter and customer prevent or discourage the development of new Embedded Generation or treat it as bypass, the revised Code will provide that such provisions are not to be enforced by the transmitter. The Board reiterates that load customers with Embedded Generation are to be billed in accordance with RP-1999-0044 as discussed above in section 5.2.1.

257

5.5 Transmission System Bypass- Board Proposition No. 5. 5

258

The Code should contain provisions that would require transmitters to replace Connection facilities that have become fully depreciated at no charge to the customers served from that facility. The Code should, however, allow customers to construct their own connection facilities to replace transmitter's assets which have been fully depreciated and are, therefore, not considered to be stranded. If the Connection facilities serve more than one customer, the same rule applies. If, in this situation, some of the customers choose to remain with the transmitter's Connection pool, the transmitter will provide for appropriate new facilities at no charge to these customers.

259

5.5.1 Analysis and Findings

260

Transmitters disagreed with the proposition. Hydro One submitted that it ignores the fact that facilities are built to accommodate future load and continue to be used and useful beyond their accounting life, and that the transmitter will continue to operate and maintain the facility, and include the costs in its cost of service. Value does not depreciate uniformly over time as components age and it is inconsistent with the principles of depreciation accounting. Depreciation rates are established on a pool basis to recover capital costs over the average life of assets; if some assets are prematurely abandoned, then depreciation rates and, consequently, transmission rates increase. In Hydro One's view, it would be incompatible with the current uniform rate structure and would also represent a move towards asset-specific pricing, increasing inequities among customers connected to newer facilities and those connected to older facilities. Hydro One further submitted that if bypass is allowed at the end of accounting life, then assets that fail prior to their accounting life should be replaced by the customer served by those assets, at their own cost. Hydro One proposed that the Code should permit bypass only at the end of an asset's physical life, as currently provided.

261

GLPL interpreted the proposition to mean that a transmitter would not charge a customer who is connecting to a fully depreciated Connection facility and that the transmitter must replace such facilities at no charge to a customer. GLPL disagreed with this proposition because the asset may still be serviceable. It argued that transmitters cannot be expected to replace Connection facilities for free and that it is inefficient to allow a customer to build its own connection facility to replace a transmitter's still useful, but fully depreciated, Connection facility.

262

Generators were generally supportive of the proposition. APPrO submitted that the Code should allow customers to buy down the remaining value of assets that are substantially depreciated in appropriate circumstances. OPG supported protecting customers from new stranded costs brought about by the transmitter's rebuilding of Connection facilities that have reached the end of their life,

addressed in section 5.2 Transmitters should not do anything that would discourage the development of new Embedded Generation. To the extent that provisions in existing agreements between a transmitter and customer prevent or discourage the development of new Embedded Generation or treat it as bypass, the revised Code will provide that such provisions are not to be enforced by the transmitter. The Board reiterates that load customers with Embedded Generation are to be billed in accordance with RP-1999-0044 as discussed above in section 5.2.1.

5.5 Transmission System Bypass- Board Proposition No. 5. 5

257

258

The Code should contain provisions that would require transmitters to replace Connection facilities that have become fully depreciated at no charge to the customers served from that facility. The Code should, however, allow customers to construct their own connection facilities to replace transmitter's assets which have been fully depreciated and are, therefore, not considered to be stranded. If the Connection facilities serve more than one customer, the same rule applies. If, in this situation, some of the customers choose to remain with the transmitter's Connection pool, the transmitter will provide for appropriate new facilities at no charge to these customers.

259

5.5.1 Analysis and Findings

260

Transmitters disagreed with the proposition. Hydro One submitted that it ignores the fact that facilities are built to accommodate future load and continue to be used and useful beyond their accounting life, and that the transmitter will continue to operate and maintain the facility, and include the costs in its cost of service. Value does not depreciate uniformly over time as components age and it is inconsistent with the principles of depreciation accounting. Depreciation rates are established on a pool basis to recover capital costs over the average life of assets; if some assets are prematurely abandoned, then depreciation rates and, consequently, transmission rates increase. In Hydro One's view, it would be incompatible with the current uniform rate structure and would also represent a move towards asset-specific pricing, increasing inequities among customers connected to newer facilities and those connected to older facilities. Hydro One further submitted that if bypass is allowed at the end of accounting life, then assets that fail prior to their accounting life should be replaced by the customer served by those assets, at their own cost. Hydro One proposed that the Code should permit bypass only at the end of an asset's physical life, as currently provided.

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GLPL interpreted the proposition to mean that a transmitter would not charge a customer who is connecting to a fully depreciated Connection facility and that the transmitter must replace such facilities at no charge to a customer. GLPL disagreed with this proposition because the asset may still be serviceable. It argued that transmitters cannot be expected to replace Connection facilities for free and that it is inefficient to allow a customer to build its own connection facility to replace a transmitter's still useful, but fully depreciated, Connection facility.

262

Generators were generally supportive of the proposition. APPrO submitted that the Code should allow customers to buy down the remaining value of assets that are substantially depreciated in appropriate circumstances. OPG supported protecting customers from new stranded costs brought about by the transmitter's rebuilding of Connection facilities that have reached the end of their life,

but in its view, the language used was problematic. OPG further submitted that the transmitter should not be required, or permitted to replace a facility solely because it is depreciated, as this is unlikely to match the end of the facility's operating life.

263 Large consumers agreed with the proposition. AMPCO submitted that the replacement of facilities by the transmitter at the transmitter's cost or replacement by the customer at the customer's cost should be at the customer's choice. The Code should include an allowance for cases where the Connection facility is substantially depreciated, such that the customer would have the option of reimbursing the transmitter for the remaining value of the assets. Imperial submitted that the Code should allow customers to construct their own connection facilities to replace a transmitter's assets which have been fully depreciated and are, therefore, not to be considered stranded.

264 The EDA was generally supportive of the proposition. The EDA further submitted that the transmitter should disclose to what extent existing facilities have reached the end of useful life and the revised Code should include a predefined methodology or standards for calculating the end of useful life. ECMI noted that the proposition appears to permit bypass only where Connection assets have been fully depreciated and to require the replacement of Connection facilities once they have become fully depreciated, not recognizing that assets may be serviceable long after they are fully depreciated. Reconstruction by the transmitter should only be required if the customer does not wish to purchase or construct alternate transmission capacity.

265 CAC and VECC submitted that to ensure a proper comparison between the cost of continued ownership by the transmitter and ownership by the customer, the transmitter must be allowed to undertake an economic evaluation and charge for the new facilities. It is inappropriate that customers be allowed to buy down the remaining net book value in situations where the assets are not fully depreciated.

266 ECAO submitted that customers should be permitted to replace depreciated assets with their own assets as a way to bring about greater competition and efficiency in connection activities. Customers are more likely to choose to take responsibility for assets, and only replace them when appropriate, rather than to duplicate assets.

267 Enbridge and Union Gas submitted that the Code should clarify that, while customers may not be directly charged for the replacement of fully depreciated Connection facilities, the costs will be included in the rate base and recovered from all customers. The Code should also indicate that replacement is required when assets are no longer capable of providing safe and reliable service and not automatically as soon as they are fully depreciated.

268 The Board agrees that Connection facilities should only be replaced by a transmitter if they have reached the end of their useful life, even if they have been fully depreciated. The Board recognizes that within a group of assets, different assets will have different actual lifespans, even though as a group, they are depreciated at the same rate. Some assets will require replacement before they have been fully depreciated, while others will still be useful even though fully depreciated. Such replacement should be at no cost directly to any individual customer, recognizing that the replacement assets will be included in rate base and subject to depreciation. The obligation to replace Connection facilities that are at the end of their useful life includes an obligation to ensure that

Connection facilities are properly repaired and maintained on an ongoing basis, to ensure that they perform at the required technical standards and level of reliability.

269 The Board has decided that where a transmitter's Connection assets have been fully depreciated, the revised Code shall allow a customer to construct its own connection facilities, at the customer's own cost, to replace the transmitter's Connection assets. This does not constitute bypass since the transmitter's Connection assets have been fully paid for, and accounted for in the rate structure. If the Connection assets serve more than one customer, the same rule applies. In this situation, if some of the customers choose to remain connected to the transmitter's facilities, the transmitter will continue to have an obligation to replace the Connection facilities at the end of their useful life, at no charge to those customers, taking into account that less capacity is required to serve those remaining customers.

270 The Board finds that the determination of whether the Connection facilities have become fully depreciated shall be based on the NBV of those facilities. Where the NBV of a particular Connection facility, serving existing load, is greater than zero, a customer will not be permitted to construct its own connection facilities to supply that existing load, unless it involves a transformation facility, as this would constitute bypass. Where it does involve a transformation facility, the transmitter shall be compensated as outlined above in section 4.8.1 in the Chapter dealing with Available Capacity.

271 The underlying rationale for the Board's view is its interest in providing reasonable opportunities for new approaches to system change, so long as existing customers and the transmitters are not unduly prejudiced. By allowing customers a new range of options and introducing increased diversity in the development of new transmission connection assets within the system, the Board expects to see overall optimization. The approach of using NBV is consistent with the rate structures governing the transmission assets and incorporates them directly in the determination as to whether bypass is in fact being effected.

272 It is important to clarify that the fact that a transmission asset may have been fully or substantially depreciated is not of itself an adequate rationale for its replacement. Assets should only be replaced at the end of their useful life according to the transmitter's asset management program. These programs normally include an engineering determination of when an asset is no longer reasonably capable of providing safe and reliable service. Premature replacement should be considered to be imprudent.

5.6 Transmission System Bypass- Board Proposition No. 5. 6

273

274 *The Code should contain provisions which establish that reductions in load attributable to measures for energy conservation, energy efficiency, load management or use of cleaner energy sources should not be considered system bypass. Measures discouraging such activities, such as a transmitter imposing a minimum payment obligation to cover present loads, should be prohibited and where such measures are in existing agreements they should be unenforceable.*

5.6.1 Analysis and Findings

275

276

Hydro One generally agreed with this proposition, provided that there was no subsidization by the transmission ratepayers. Hydro One noted its concern, referenced elsewhere in this Decision, regarding "unenforceable terms". Specifically, it submitted that existing agreements should not be changed or affected without the consent of both parties. Hydro One argued that any resulting revenue shortfall to be absorbed by the transmission system pool should be recoverable by the transmitter in rates.

277

Generators agreed that load reduction in any form should not be considered bypass. However, generators were also of the view that "cleaner energy sources" is an ambiguous term and that the Code should not distinguish between generation fuel types on the basis of whether they are"cleaner generation sources", especially without a definition of "cleaner energy source" in the Code.

278

Large consumers were in agreement with the proposition.

279

The EDA was generally supportive of the proposition but suggested replacing "cleaner" with "renewable" or defining "cleaner" in the Code.

280

CAC and VECC submitted that clarification of what is meant by the term "cleaner energy sources" is required and that RP-1999-0044, with respect to cost allocation and rate design for transmission rates, clearly established a 1 MW limit for net billing on Connection facilities associated with Embedded Generation regardless of the source of the generation concerned. In the view of CAC and VECC, the 1 MW limit should apply equally to all types of Embedded Generation.

281

Enbridge and Union Gas submitted that the Code should establish that Embedded Generation and load reductions attributable to energy efficiency, energy conservation, load management or the use of cleaner energy sources are not system bypass. However, a broad prohibition against minimum annual charges should not be instituted, as these charges protect existing customers and shareholders from stranded facility costs. The Code should not inadvertently prohibit the use of Lost Revenue Adjustment Mechanism accounts, which are intended to protect the utility against losses in revenue as a result of demand side management ("DSM") initiatives. DSM initiatives provide a system benefit and customers are required to pay for the forgone margin revenue that results from energy conservation measures initiated by the utility. If minimum load payments are prohibited and unenforceable, transmitters should not be prohibited from recovering legitimate costs as approved by the Board.

282

The Board is of the view that reductions in load, attributable to energy conservation, energy efficiency, and load management, should not be considered system bypass, under any circumstances. The promotion of energy efficiency and conservation is one of the objectives of the Act and is particularly important at a time when Ontario faces a tight supply of electricity. There appears to be consensus that the Ontario electricity market requires increased demand response and conservation measures, and many initiatives are underway to facilitate achievement of that goal. The Board is of the view that it is particularly important to ensure that the Code does not contain or create any barriers or disincentives for energy efficiency and conservation initiatives.

283 As indicated under Principle No. 8 and Principle No. 9 in Chapter 2, the Board has decided to replace "cleaner" energy sources with "renewable" energy sources. The definition of renewable energy sources is included in section 5.2.1 and the Board's decisions regarding the treatment of renewables is included in section 8.9.1 of this Decision.

284 The Board has decided that practices or measures which discourage such initiatives, such as a transmitter imposing a minimum payment obligation to cover present loads, shall be prohibited and, where such measures are in existing agreements, they shall be unenforceable by the transmitter.

285 Where measures in existing agreements are determined to be unenforceable, such agreements shall be read so as to be consistent with the revised Code. Any terms contained in such agreements which are not in conformity with the Code, shall be unenforceable by either party to the contract.

Synopsis of Changes to the Transmission System Code

Introduction

On July 25, 2005, the Ontario Energy Board (the "Board") issued a final revised version of the Transmission System Code (the "Code") following an extensive consultation process.

The Code sets out the electricity *transmitters' obligations* with respect to its customers. It includes a Connection Agreement which covers the *technical and commercial responsibilities* of both transmitters and their customers. The Code also addresses the transmitters' *standards for operating, managing and expanding* their transmission system.

The purpose of this document is to provide a brief synopsis of the more substantive changes to the Code, relative to the initial version that was issued in July 2000. This Synopsis is not intended to be, nor should it be used as an interpretive tool for the Revised Code for any purpose, or in any forum. It is merely an attempt at a narrative and informal description of the various changes made to the Code, and it has no legal or regulatory role in its interpretation, implementation or enforcement.

Understanding this Document and the Code

Providing clarification about some of the terms used in this document may assist in better understanding this document and the Code.

- There are different types of transmission assets. "Network" assets benefit all Ontario electricity consumers while "connection" assets are only used by a specific customer or group of customers. An analogy that may provide a better understanding is that the common network assets are similar to the highways we all drive our vehicles on, while connection assets are like the connecting roads only a certain driver(s) uses to get to the highway. The Code focuses primarily on connection (i.e., transformation and line) assets. Some are private while others are shared.
- Network assets are always owned by a transmitter. Connection assets can be owned by customers or transmitters.
- References to "customer" means a customer *directly* connected to the transmission system and includes electricity consumers, generators and distributors. In other words, it does not include a customer of a distributor.
- The term "load" essentially means a customer's level of electricity demand.

Why was the Code Revised?

Numerous expressions of concern were received from stakeholders regarding the application and interpretation of the Code. This included applications for changes to the Code. The Board decided that the Code, in its previous form, was not sustainable and a broad review was needed. A primary objective was to refine the Code to enhance the level of regulatory certainty for participants in the Ontario electricity market.

This is Exhibit "M" referred to in the affidavit of Curtis C. Pedwell sworn before me, this 5th day of October 20 11

Linda Dianne Robinson, a Commissioner, etc., Province of Ontario, for Gardiner Roberts LLP, Lawyers. Expires July 9, 2012.

A COMMISSIONER, ETC.

On June 14, 2002, the Board published a Notice of Proceeding indicating its intent to undertake this broad review. Based on the submissions received, the Board decided it would be best to divide the proceeding into two phases; Phase 1 dealing with *policy* issues and Phase 2 addressing *implementation* issues. The Board then issued a set of guiding principles and 41 preliminary propositions. The intent was to provide a vision of where the Board wanted to take the Code. [1]

The Board's Phase One Decision followed on June 8, 2004. This Decision set the policy framework and focused primarily on the following policy issues: (1) Available Capacity; (2) Transmission System Bypass; (3) Cost Responsibility; (4) Contestability; (5) Economic Evaluation; and (6) Contractual Issues. The following discusses how the Board has amended the Code in addressing these overlying policy issues.

Major Policy Issues

1. Available Capacity & Bypass

Available capacity is essentially the remaining amount of capacity on a transmitter's connection assets that is not required to meet the expected needs of the current customer(s).

Facilitating Competition in the Transmission Connections Market

A transmitter will not have an automatic right to require customers to use the transmitter's available capacity to service *new* customer load.[2] Accordingly, a customer opting to build its own facilities to meet new load will not be considered to have bypassed the transmitter's facilities. This approach allows for greater competition, which should increase economic efficiency on the part of the transmitter, without resulting in any uncompensated stranding of assets. It also enhances customer choice. However, this will only apply where the load is new – in other words, where the load has not been part of a customer's contractual forecast of its needs. In such cases, the customer will be held accountable for its forecast (i.e., by way of true up payments), throughout the economic evaluation period. Transmitters invest in the connection assets based on the customer(s) contractual forecast and customers must be held accountable for the costs of facilities built to meet it. It would be inappropriate to burden all the rest of the transmitter's customers with such costs.

If a customer chooses to build its own new connection facilities, those new facilities may also be used to supply the customer's *existing* load, provided the customer adequately compensates the transmitter for the loss of that customer's existing load. The methodology used to determine the required amount of compensation is discussed below. An issue arises if the customer involved is a distributor. Unlike an end-use customer of the transmitter, bypass in these cases could come at the expense of the distributor's captive customers. In such cases, there will always be a prudence review by the Board in

[1] A Settlement Conference was also held on September 9 - 16, 2003 to seek consensus, where possible, and develop workable alternatives for the Board's consideration.

[2] The method to be used to distinguish between a customer's *new* and *existing* load is established by a customer's forecast of their needs; i.e., load forecast.

the next distribution rate proceeding. Such a review could result in some or all of the investment being disallowed in distribution rates paid by consumers. The onus will be on the distributor to make a business case to the Board that the new facility was necessary and that it was more cost-effective to build it than to use the transmitter's existing facilities.

The decision to bypass will require time and planning by any customer. Transmitters will need to take bypass into account in planning their systems. The Connection Agreement has therefore been revised to require the customer to give at least one years' notice of their intention to bypass.

The underlying rationale for these decisions is the Board's interest in providing reasonable opportunities for new approaches to system change, as long as existing customers and the transmitters are not unduly prejudiced. By allowing customers a new range of options and introducing increased diversity in the development of new connection assets within the system, the Board expects to see overall optimization.

Overloaded Line and Transformation Connections Facilities

If a customer chooses to build its own connection facilities, those facilities may also be used to serve *existing* load without compensating the transmitter, provided the existing transmitter's facility is *overloaded*. Overloading any facility reduces the economic efficiency of the transmission system and should be avoided. However, only the overload portion will be transferable without compensation.

A Reasonable Approach to Determining the Amount of Bypass Compensation

Given the above, the Board needed to decide on the most appropriate method for determining the amount of bypass compensation, where such was required. After considering a number of options the Board decided to base it on the Net Book Value (NBV) of the stranded asset, plus an adjustment for salvage and removal costs, which includes environmental remediation. This approach is the most objective and it is consistent with the Board's approach for determining the rate base of a transmitter. Therefore, the NBV approach will be used for any bypass that triggers the need for compensation under the Code. That is, unless the customer in question is subject to the true up requirements referred to above and described below or the customer continues to be subject to gross load billing, as discussed below, on the affected connection facility. To also require bypass compensation based on NBV, in such cases, would result in the transmitter being fully compensated twice for the same asset.

Contracted and Assigned Capacity

The amended Code introduces the concepts of *assigned* and *contracted* capacity along with a transparent process to manage *available* capacity on the transmission system. Customers may request that available capacity be assigned to them and transmitters will assign the capacity on a first-come-first-served basis. That assignment is, however, valid for only a one year period if not taken up by the customer. If not, and an extension to the one year period is not granted, it can be reassigned to another customer in need.

Overall economic efficiency is achieved by allowing transmitters the flexibility they need to manage transmission capacity, while also ensuring that all of the capacity a customer has contracted for (i.e., contracted capacity) will be available to them if and when that customer ultimately needs it.

Transparency is achieved by requiring transmitters to establish an available capacity procedure which includes specific customer notification requirements. This procedure will be implemented by the transmitter when the available capacity on a connection facility is reduced to 25% or less. A reasonable period will then be provided for customers to submit competing applications. The available capacity will, in turn, be divided fairly amongst those customers that have adequately demonstrated a need.

Concerns were raised that a transmitter could provide its affiliated distributors with preferential treatment in allocating capacity that is available for use. Going forward, in all such cases, an assignment of available capacity to its affiliate will trigger a requirement that the transmitter notify all customers connected to the affected facility (i.e., regardless of whether the 25% threshold is triggered).

Contracted Capacity will Not Remain Idle

As noted, if a customer is not using a portion of its contracted capacity, the transmitter will be permitted to reallocate the unused capacity to other customer(s) in need. The Code will also not permit capacity to be reserved for back-up purposes. This will contribute to efficient use of the system and will defer or fully avoid unnecessary investments. The alternative approach that was not adopted would have been to allow customers to reserve all of the capacity that they had under contract for their sole use. This could have resulted in an inefficient and overbuilt transmission system.

2. Transmission System Bypass & Embedded Generation

A Comprehensive Definition of Embedded Generation — Enhancing Regulatory Certainty

Embedded generation is often self-generation which tends to be separate and apart from the transmission system. Whether generation is embedded, in relation to a customer, affects how the customer is to be charged for transmission services which is discussed below.

What qualifies as embedded generation was initially addressed in an earlier Board Decision (RP-1999-0044) and, more recently, in two proceedings that dealt with two customer complaints. Each asserted that the transmitter was failing to recognize certain generators as embedded and was, in turn, billing the customers improperly. The Board concluded that the generation in question qualified as embedded in both cases. These disputes arose, in part, because the current definition of embedded generation lacked the necessary specificity.

Given the above, the Board decided to look at the issue more broadly to determine under what specific circumstances generation will be considered embedded. In doing so, the Code now consolidates the Board's findings on embedded generation in the three Decisions noted above. This more refined and comprehensive definition of embedded generation will provide greater regulatory

certainty which should facilitate investment in desired new supply in Ontario's electricity market.

In arriving at the approach described below, the Board has taken into account the fact that transmission issues are part of a larger electricity supply picture. Ontario is currently facing a tight electricity supply situation and has had to rely on expensive sources of supply, including imports, from time to time to meet peak demand.

There are four combinations of generation and load — new and existing — to be considered in deciding what qualifies as embedded generation. The date to distinguish between new and existing generation is the date that the Phase One Decision was published; i.e., any generation which went into operation on or after June 8, 2004 will be considered to be new.[3]

New Generation

New generation will be considered embedded in relation to either existing or new load subject to satisfying certain criteria. The Code now identifies six specific circumstances that will not affect whether new generation qualifies as embedded generation: Any new generation that is connected on the customer side of the connection between a customer and the transmitter will be considered embedded (i.e., not bypass) regardless of: (1) whether the customer load is new or existing; (2) who owns the generation; (3) where the generation is located; (4) what voltage the generation is connected at; (5) what commercial arrangements the generator enters into; and (6) the size of the generation capacity and the number of generating units.

The transmitter will be compensated in one circumstance that involves new embedded generation. That is where an existing customer disconnects from the transmitter's connection assets to take service from a new and, in effect, a duplicative facility that is not owned by the transmitter. This would result in the transmitter's assets becoming stranded. Due to the disconnection, the transmitter would not be compensated for this stranding through gross load billing as the Board envisioned in RP-1999-0044. As a result, the revised Code provides that the customer will be required to compensate the transmitter based on the respective net book values (NBV) of these facilities, because this is clearly a case of "uneconomic" bypass.

The Board recognizes that the transmitter may lose revenue from existing load when it is supplied by new generation that qualifies as embedded generation and this may lead to an increase in transmission costs borne by ratepayers. However, this should be more than offset by the expected reduction in energy costs for all consumers resulting from the entry of new generation and the overall growth in demand that will continue to be served by the transmitter.

The Board also took into account that embedded generation is predominantly cogeneration which tends to be a more efficient and cost-effective form of generation. Embedded generation also tends to enhance reliability, reduces the need to invest in expanding the transmission network, decreases the amount of energy wasted due to transmission line losses and can reduce inefficiencies associated with

[3] October 31, 1998 will continue to be used for the application of rates as per RP-1999-0044.

transmission congestion. Reducing congestion means high cost generation does not need to be used as often when lower cost supply is available, thus tending to reduce overall energy costs in Ontario.

To the extent that all Ontario consumers will benefit from lower energy costs and enhanced reliability, it is appropriate that such additional transmission costs be shared across the system.

Existing Generation

Existing generation can also become embedded in relation to an existing customer by reconfiguring existing connections. Similarly, new customers could be connected so that existing generation can be embedded in relation to that customer. Neither combination will be treated as embedded generation.

Reconfiguration may result in some benefits for the specific generator and customer involved but there is no apparent benefit to electricity consumers as a whole, primarily because no new generation has been added to the Ontario market as a result of the mere reconfiguration of the connections. At the same time, such reconfigurations may create additional costs for Ontario consumers due to the stranding of the transmitter's assets. Accordingly, these reconfigurations amount to "uneconomic" bypass of the transmitter's facilities.

New Embedded Generation — Not Considered Bypass

New embedded generation projects that are consistent with the criteria discussed above will not be considered system bypass. One area of concern among customers which led to the Board's review of the Code arose because a transmitter was including a "no bypass" provision in the contracts that customers were required to sign before construction of facilities would be carried out. Going forward, such contract provisions that would unnecessarily discourage the development of new embedded generation will not be permitted.

Remaining Consistent with RP-1999-0044 Principles and Eliminating Barriers to Embedded Renewable Energy

Customers with new qualifying embedded generation will be subject to the rate treatment established in RP-1999-0044. That is, *net* load billing for *network* charges and *gross* load billing for *connection* charges. If it does not qualify as embedded generation, gross load billing will apply for both charges.[4]

For renewable embedded generation, the threshold for full net loading billing treatment (i.e., both network and connection charges) will be increased to 2 MW per unit through changes to the Rate Order. This recognizes the technological advances in renewable sources, particularly new wind projects which are now all primarily between 1 MW and 2 MW per unit. This threshold increase also reflects a societal interest in increasing the proportion of renewable generation in the overall supply mix.

[4] Under the Rate Order, net load billing applies for both network and connection charges for small scale embedded generation for administrative reasons (i.e., metering & billing). The threshold will continue to be 1 MW or less per unit for *conventional* generation sources.

Prudent Replacement of Existing Transmission Connection Facilities

Some assets will require replacement before they have been fully depreciated, while others will still be useful even though they are fully depreciated. Connection facilities should, therefore, only be replaced by a transmitter if they have reached the end of their useful life, regardless of whether they have been fully depreciated. To do otherwise would not be prudent.

Replacement will be at no direct cost to any individual customer since such assets will be included in the transmitter's rate base. Until facilities are replaced there is an obligation on the transmitter to ensure that those facilities are properly maintained and repaired, on an ongoing basis, so that they perform at the required technical standards and level of reliability.

Customers will also be able to construct their own new facilities, at their own cost, to replace the transmitter's connection assets that have reached the end of their useful life. At that point the transmitter is obligated, if the customer chooses, to have the connection assets replaced with no contribution by the customer. This is not bypass since the transmitter's assets have been fully paid for.

Prohibiting Measures that Discourage Energy Efficiency and Conservation

Reductions in demand due to energy efficiency, conservation and load management will not be considered system bypass, under any circumstances. This includes the installation of renewable energy technologies (e.g., solar panels) that reduce a customer's overall demand on the system. The promotion of energy efficiency and conservation is particularly important at a time when Ontario faces a tight electricity supply. There is a growing consensus that there is a need for increased conservation measures by consumers, and many initiatives are underway to facilitate achievement of that goal. The Board has therefore revised the Code to eliminate opportunities that might otherwise exist to create barriers or disincentives that stand in the way of such initiatives. However, customers will be required to demonstrate to the transmitter that the reduction in demand is in fact due to a conservation measure as opposed to, for example, a simple downturn in the economic cycle.

Practices that discourage these initiatives, such as a transmitter imposing a minimum payment obligation to cover present loads, will now be prohibited. Allowing such practices would require a customer to pay the same minimum amount even if, for example, they were able to cut their demand in half. This would constitute a penalty for conserving energy which is inconsistent with the societal goal to create a "culture of conservation" in Ontario.

This change to the Code takes into account the broader electricity market. A reduction in electricity demand is equally, and sometimes more, beneficial than an increase in supply. When high demand stretches the system close to its limits, electricity prices rise sharply. A relatively modest reduction in demand at such times, due to the measures discussed above, can hold peak prices in check and foster price stability for the benefit of all Ontario electricity consumers.

3. Cost Responsibility

All Parties to Pay Their Fair Share — No More, No Less

Customers who require new or upgraded connection facilities to meet their needs will bear the associated costs, to the extent that the cost is not already recovered in the transmitter's rates.

Customers should not, however, be required to bear the cost of facilities that were already planned by the transmitter. To ensure that this does not happen, a transmitter will be required to provide customers, upon request, with any pertinent existing transmission plans dealing with system expansion. All affected customers will be informed of the capacity available for use on all relevant facilities following the expansion. Such plans are expected to be developed by transmitters to address growing demand, system reliability and integrity. These plans will also be essential to determine whether a particular connection project is truly triggered by the needs of a specific customer.

Generators will also be held responsible for the costs associated with connection facilities that they cause. This should not be considered a deterrent to new generation because this is a standard cost of doing business for all new generators within and outside of Ontario. In other words, all customers of the transmitter need to pay their fair share.

If a transmitter adds more capacity than a customer requested, in anticipation of future growth in demand, the transmitter will not be permitted to charge that customer for the additional costs. Permitting such a requirement could inhibit the development of new generation.

Customer Accountability

The transmission system is dynamic in nature and customers will be expected to understand that they may have to upgrade their own equipment to adjust to a changing and growing transmission system. As a result, all customers will be held responsible for upgrading their own equipment to the new available fault current levels triggered by a new or modified connection, up to the maximum level set out in the Code. This is necessary to ensure Ontario's transmission system operates as efficiently and effectively as possible.

The Connection Agreement has also been revised to better recognize that there needs to be symmetry between customer obligations and the transmitter's obligations. Transmitters cannot do it alone.

Facilitating Necessary Transmission Planning and System Efficiency

It is important for a transmitter to be notified, as early as possible, of any reductions in a customer's demand resulting from installing embedded generation or implementing energy efficiency or conservation programs. All such initiatives would require planning by a customer and it would, therefore, not be unreasonable for a customer to notify a transmitter in advance. Transmitters need such information for their own transmission planning and prudent investment purposes as well as to operate Ontario's transmission system efficiently and effectively. The Code now recognizes this and

requires customers to provide information to transmitters on an annual basis regarding material changes in load and peak demand.

4. Contestability

Enhancing Customer Choice and Increasing Competition

Work on new connection facilities will be contestable, regardless of whether a capital contribution is required. This will facilitate competition and optimize efficiency. A customer requiring new dedicated facilities will have two options; either design, construct, pay for and own the new facilities or have them owned by the transmitter. If the latter, a customer may choose to accept the transmitter's cost estimate or contract with any qualified contractor. Regardless of which option is chosen, transmitters will retain the right to work on their own existing facilities as they will be most familiar with those assets. This is important to ensure the efficient operation and safety of the Ontario transmission system.

This approach provides business opportunities for private, innovative companies across Ontario. It also gives the customer options if the transmitter does not provide adequate customer service. The Board originally expressed its vision of developing a more competitive market for connection facilities in 1999, as part of its RP-1999-0044 Decision. The changes made now should further facilitate realizing that vision.

5. Economic Evaluation

Protecting Existing Ontario Electricity Consumers

The economic evaluation methodology provides the mechanism for determining any cost recovery shortfall, and ensures that all connection facility costs are recovered from the connecting customer, either through rates or a capital contribution. Except in exceptional circumstances, this does not include network facility costs which generally benefit all electricity consumers. This mechanism is needed to protect transmitters and their existing ratepayers from potential subsidization of specific customers. Again, all customers must pay their fair share, and an economic evaluation is the tool that will be used to make sure this happens.

Customers to Pay for Only the Transmission Services they Use — No More, No Less

As discussed above, the revised Code will prohibit minimum payment obligations being imposed by the transmitter. This approach resulted in a one-way true up process in favour of the transmitter. The Code will instead include a true up process for customer connection facilities that works both ways. If the true up calculation shows that a customer's actual demand is below its contractual forecast and, therefore, has not generated the anticipated revenues for the transmitter, the customer will be obliged to make up the shortfall. If the opposite occurs, the excess revenue realized by the transmitter will be returned to the customer when the last true up calculation is carried out. In this way, parties are held accountable for their contractual forecasts and the associated costs, but have the prospect of

reimbursement if they generate more revenue than was expected under the original economic evaluation.

To preclude the further creation of barriers to energy efficiency, conservation, renewable energy activities and small scale embedded generation projects,[5] the customer's initial load forecast will be adjusted downward to reflect such measures and the associated reductions in demand on the transmission system. If the forecast was not adjusted, it would be equivalent to penalizing these desirable measures which would conflict with the societal goal to create a "culture of conservation". The Ontario market will benefit from such measures due to improvements in the balance between supply and demand.

A customer's economic evaluation calculation will not include sunk costs or historic revenues, which have sometimes been included in the past. Only projected costs and revenues for the supply of new customer load will be included, since only they are genuinely relevant. Customers should not be paying the transmitter for costs that were, for example, incurred before they even became a customer.

6. Contractual Issues

Projects, Especially New Generation, will No Longer be Unnecessarily Delayed

The Code has been revised to clearly prohibit the transmitter from placing construction work on hold pending the outcome of a dispute resolution process. This can have the effect of causing needless delays to projects, including much needed new generation. The goal is that the addition of new supply to the Ontario electricity market will no longer be unnecessarily delayed by the transmitter.

Protecting Consumers & the Financial Viability of the Transmitter

Transmitters will be permitted to require a reasonable security deposit from a customer to cover all related construction costs. A customer requesting the new connection could walk away from the project or go bankrupt after the transmitter has incurred the costs to build the facility for that customer. If all goes as planned, the transmitter will return the deposit (with interest) once that risk no longer exists. Not permitting a transmitter to require a reasonable security deposit could result in all Ontario electricity consumers bearing the costs of delinquent customers.

Inappropriate Contract Provisions will Not be Enforceable by Transmitters

Any contract provisions that are inconsistent with the revised Code, such as a minimum payment obligation or a "no bypass" provision, will not be enforceable by transmitters. The Board did not accept a position that this should not apply to existing agreements. Otherwise, it would create a double standard based on an arbitrary distinction between existing and future customers. The regulatory environment needs to be consistent for all transmitters and customers.

[5] Small embedded generation is 1 MW or less for *conventional* generation and 2 MW or less for *renewable* energy.

7. A Common Set of Rules for New and Existing Customers

In terms of how the revised Connection Agreement will be applied to *existing* customers, the Board decided that the same set of rules will apply to all customers and transmitters going forward. This approach will provide greater certainty to transmitters and customers alike in terms of the rules that will govern their relationship. It will also promote fairness across all customers. However, elements of existing agreements that have been freely negotiated will be preserved to the extent that they are not contrary to the revised Code. The Code therefore now clarifies that existing agreements will be deemed to be amended to conform to the revised Connection Agreement.

Conclusion

The revised Code is the result of an extensive consultation process, which has included six opportunities for parties to provide written submissions. In total, there have been over 130 submissions received. There was also an extensive Settlement Conference that lasted five full days.

The Board would like to thank the stakeholders involved for their significant contribution to this process. Their input has assisted the Board in shaping and refining its vision for the Code.

The Board is of the view that it has achieved the appropriate balance in arriving at the revised Code. Many of the changes take into account that transmission issues cannot be properly addressed in isolation. Instead, they are part of a larger picture which includes the fact that Ontario needs more generation and energy conservation to improve the balance between supply and demand. At the same time, the Board has taken a great deal of care to ensure that the integrity of the transmission system is maintained and overall system optimization is facilitated.

The changes should help ensure that the transmitter's monopoly position will not restrain competition in areas where greater competition is beneficial, and should also facilitate the ability of parties to effect efficiencies in their use of electricity without facing disincentives. The Code includes provisions that eliminate opportunities that might otherwise exist to create barriers and disincentives that can discourage new generation, energy efficiency, conservation, demand management and the use of renewable energy sources.

The changes to the Code should also better ensure that all transmission customers will be held responsible for paying their fair share of the costs that they cause and the assets they benefit from. The financial viability of the transmitter, as well as all operational, safety and reliability requirements of the transmission system, remained a high priority for the Board throughout this process.

The Board is confident that the revised Code will result in providing all participants in the Ontario electricity market with greater regulatory certainty and predictability — a prerequisite to attracting investors to the Ontario market. While the changes will make the Code more prescriptive, the Board has also maintained sufficient room for negotiation amongst the parties. The Board is confident that the revised Code will enhance the regulatory environment in which these negotiations will take place.

1 **EB-2011-0106 DECISION**

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2011-0106

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

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

BEFORE: Ken Quesnelle
Presiding Member

Cynthia Chaplin
Member and Vice-Chair

Marika Hare
Member

DECISION AND ORDER

The Proceeding

Goldcorp Canada Ltd. and Goldcorp Inc. acting jointly as Goldcorp ("Goldcorp" or the "Company") filed an application, dated April 25, 2011, with the Ontario Energy Board (the "Board") under section 92 of the *Ontario Energy Board Act, S.O. 1998*, c.15, Schedule B (the *"Act"*). Goldcorp sought an order of the Board granting leave to construct the following transmission facilities in the Municipality of Red Lake:

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

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

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

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

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

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

Motions

Goldcorp Motions

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

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

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

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

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

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

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

LSFN Motion

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

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

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

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

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

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

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

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

Decision of the Board

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

Positions of Parties and Board Findings

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

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

Project Need

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

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

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

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

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

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

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

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

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

[1] Draft System Impact Assessment, p.i.

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

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

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

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

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

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

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

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

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

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

The purpose of the SIA was to study how the supply capability of the circuit E2R can be expanded beyond the existing 57 MVA threshold.[2] In that regard, the SIA concludes that the proposed facilities will not result in "any significant adverse impacts to the IESO controlled grid, provided that the requirements listed in this report are met". Similarly, the CIA concludes that the proposed transmission line will have a minimal impact on local supply facilities, no adverse affect on short circuits and will not materially affect the reliability of Hydro One's E2R line.[3]

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[2] Draft System Impact Report, Ex B/T6/S3, p. i
[3] Final Customer Impact Assessment Report, dated June 10, 2011

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

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

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

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

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

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

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

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

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

Goldcorp submitted that not having the necessary permits is not a valid reason to deny the application. Goldcorp noted that it was usual Board practice to grant orders that were conditional on the issuance of the relevant permits. Goldcorp also referred to the Board's Decision in Yellow Falls[4] where the Board provided reasons in support of such an approach.

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

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

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

[4] EB-2009-0120, Decision and Procedural Order No. 4 dated November 18, 2009.
[5] Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Counsel, [2010] 2 S.C.R.650.

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

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

Project Cost and Impact on Ratepayers

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

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

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

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

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

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

Conclusion

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

THE BOARD ORDERS THAT:

1. Pursuant to section 92 of the Act, Goldcorp is granted leave to construct the proposed transmission facilities, all in the Municipality of Red Lake, subject to the Conditions of Approval attached as Appendix A to this Order.

2. The Board had previously determined that LSFN was eligible to apply for an award of costs. Claims in this regard should conform with the Board's Practice Direction on Cost Awards, and shall be filed with the Board and one copy served on Goldcorp by **August 3, 2011**. Goldcorp should review the cost claims and any objections must be filed with the Board and one copy must be served on the claimant by **August 10, 2011**. LSFN will have until **August 17, 2011** to respond to any objections. All submissions must be filed with the Board and one copy is to be served on Goldcorp. Goldcorp shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

ISSUED at Toronto, July 20, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX A

TO DECISION AND ORDER

CONDITIONS OF APPROVAL

EB-2011-0106

DATED: JULY 20, 2011

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

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1 General Requirements

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

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

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

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

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

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

2 Project and Communications Requirements

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

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

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

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

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

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

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

3 Monitoring and Reporting Requirements

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

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

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

-- End of document --

APPENDIX B

TO DECISION AND ORDER

DECISION ON MOTION DATED APRIL 29, 2011

EB-2011-0106

DATED: JULY 20, 2011

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2011-0106

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

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

BEFORE: Ken Quesnelle
Presiding Member

Cynthia Chaplin
Member and Vice-Chair

Marika Hare
Member

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

BACKGROUND

Goldcorp Canada Ltd. and Goldcorp Inc. acting jointly as Goldcorp ("Goldcorp" or the "Applicant") filed an application, dated April 25, 2011, with the Ontario Energy Board under sections 92 and 19 of the *Ontario Energy Board Act, S.O. 1998*, c.15, Schedule B (the "Act"). Goldcorp is seeking an order of the Board granting leave to construct 10.7 km of 115 kV single circuit transmission line from Hydro One Networks Inc.'s ("HONI")

115 kV E2R Transmission line at a point approximately 2 km south of Harry's Corner to the to-be-constructed Balmer Complex Transformer Station ("TS"), all in the Municipality of Red Lake. Goldcorp filed a Notice of Motion of the same date seeking an *ex parte*, interim and interlocutory order under section 19 of the Act, granting leave to carry out civil engineering work at the proposed Balmer Complex TS site and to clear and grub the right-of-way prior to the Board rendering its decision on the leave to construct application and without prejudice to the Board's determination of that application.

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

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

THE MOTION

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

> 19(1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.
>
> (2) The Board shall make any determination in a proceeding by order.
>
> (6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act.

The evidence filed by the Applicant indicates that the Motion filed pursuant to section 19 of the Act is to authorize Goldcorp and its contractors to carry out:

- civil engineering work including grading, fencing, installing foundation for and constructing walls of the Balmer Complex TS building for the Balmer Complex TS. The Applicant proposed to commence with work on May 1 and continue this work until the Board makes its determination with respect to whether to grant leave to construct under section 92 of the Act.
- Clearing and grubbing the right-of-way for the applied for transmission line starting May 1, 2011 and lasting until the commencement of the nesting season

for breeding and migrating birds in May, and then again in mid July on the portions of the right-of-way outside the buffer zone for two separate bald eagle nests on the proposed right-of-way, and finally, in September, 2011 after the bald eagle nesting period is complete.

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

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

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

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

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

BOARD FINDINGS

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

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

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

> Despite section 4.1 of the *Statutory Powers Procedure Act*, the Board may, in addition to its power under that section, dispose of a proceeding without a hearing if,
>
> ...
>
> (b) ***the Board determines that no person, other than the applicant,*** appellant or licence holder ***will be adversely affected in a material way by the outcome of the proceeding*** and the applicant, appellant or licence holder has consented to disposing of a proceeding without a hearing. [Emphasis added]

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

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

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

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

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

ISSUED at Toronto, April 29, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX C

TO DECISION AND ORDER

DECISION ON MOTION DATED JUNE 20, 2011

EB-2011-0106

DATED: JULY 20, 2011

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2011-0106

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

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

BEFORE: Ken Quesnelle
Presiding Member

Cynthia Chaplin
Member and Vice-Chair

Marika Hare
Member

DECISION ON MOTION

BACKGROUND

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

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

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

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

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

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

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

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

Positions of parties:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[2] Arzem v. Ontario (Ministry of Community & Social Services) and Greenspace Alliance of Canada's Capital v. Ontario (Director, Ministry of the Environment)
[3] Oral Hearing Transcript, Vol. 1, p. 118

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

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

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

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

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

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

[4] Decision granting entry on land in connection with the Bruce to Milton line, dated August 20, 2011

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

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

BOARD FINDINGS

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

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

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

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

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

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

ISSUED at Toronto, June 20, 2011

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

E-mail Ian Blue to Raj Ghai dated July 26, 2011, 3:05 p.m.

Blue, Ian

From: Blue, Ian
Sent: Tuesday, July 26, 2011 3:05 PM
To: raj.ghai@HydroOne.com; naomi.martin@HydroOne.com
Cc: 'Curtis Pedwell'; Kathi Litt; 'Luc Major'
Subject: Re: Goldcorp's 115 kV Transmission Line from South of Harry's Corner to Balmer Complex Transformer Station Approved by the OEB I reply to Raj's e-mail of January 21, 2011.
Attachments: Goldcorp Information Request.PDF; 110726V3-InfoReq-Scenarios-byQuarter.xls

Hi Naomi and Raj,

Goldcorp has now decided that as soon as its new 115 kV line which we have referred to for shorthand purposes as **GL1** is commissioned, Goldcorp will transfer the electricity supply for the Red Lake , Campbell and Balmer Complexes from the E2R line onto GL1 and cease to rely on HONI's Red Lake Transformer Station (RLTS) and the section of E2R between the tap at Harry's Corner and the RLTS. Electricity for the Cochenour Complex will continue to be supplied through the RLTS and be received at distribution voltages.

I enclose:

1. A table forecasting the unutilized capacity on HONI's facilities as a result of transferring electricity supply to GL1,

2. A table that we ask you to complete in order to identify and quantify bypass charges under the Transmission System Code resulting from the described loading of GL1, and

3. Information Requests which we ask you to respond to, in good faith, in order to allow us to assess HONI's calculation of bypass charges.

Goldcorp requests HONI's co-operation.

If you have any questions, please let me know.

Thanks

Ian A. Blue, Q.C.
d 416-865-2962
iblue@gardiner-roberts.com
GARDINER ROBERTS LLP
Scotia Plaza, 40 King Street West, Suite 3100
Toronto, ON, Canada M5H 3Y2
t 416 865 6600 | f 416 865 6636
www.gardiner-roberts.com

From: raj.ghai@HydroOne.com [mailto:raj.ghai@HydroOne.com]
Sent: Friday, January 21, 2011 4:16 PM
To: Blue, Ian
Cc: cbouchard@rubiconminerals.com; dboyd@rubiconminerals.com; gord.caul@HydroOne.com; bdominique@casselsbrock.com; chris.dougherty@nordmin.com; timo.hakkarainen@HydroOne.com; sho@gardiner-roberts.com; gkumoi@rubiconminerals.com; klitt@era-inc.ca; luc.major@goldcorp.com; naomi.martin@HydroOne.com; michael.medeiros@HydroOne.com; nmelchio@wmnlaw.com; Andrew.Moshoian@goldcorp.com; bruce.parker@HydroOne.com; curtis.pedwell@goldcorp.com
Subject: RE: 101224-InfoReq-Scenarios.xls

Ian,
We have reviewed the various scenarios presented in your January 10, 2011 e-mail and our comments are as follows:

1) In scenario 3, the dates were displaced and we have made the necessary changes. Please see the attached spread sheet for total loading for various scenarios as follows:
    a. Load forecast for Red Lake TS for various scenarios from Dec. 2010 to Dec. 2014
    b. Load forecast for Goldcorp proposed 115 kV line from Dec. 2010 to Dec. 2014

2) The decline in Red Lake TS load indicates the start of bypass i.e. December 11. The bypass is defined as transfer of customer existing load from the transmitter owned connection facility to the customer owned facility or a third party owned facility. The bypass can be temporary or permanent depending upon whether the transferred load returns back to the transmitter owned facility. Also, the bypass is calculated at a point in time when a customer transfers all or part of their load from transmitter owned facility resulting in stranding of all or part of the capacity.
3) The loading of Red Lake TS varies between December 2010 and December 2014 for various scenarios. Please indicate the point in time when we should calculate the bypass compensation for Red Lake TS. My proposal is to use December 2010 as the reference point for Red Lake TS load. There is a 5 MW drop in December 2012 and additional 4 MW load drop in December 2014 (total load drop of 9 MW).
4) The loading of new Goldcorp 115 kV line has no impact on Red Lake TS bypass calculations.

If you are in agreement with above then we can calculate bypass compensation.

Raj Ghai
Hydro One - TCT15
Phone: 416.345.5302
Cell: 416.985.5359

Please consider the environment before printing this email.

From: Blue, Ian [mailto:iblue@gardiner-roberts.com]
Sent: Monday, January 10, 2011 11:50 AM
To: Blue, Ian; Bourchard, C_Rubicon; Boyd, D_Rubicon; CAUL Gordon; Dominique,B_Goldcorp; Dougherty, C_Rubicon; GHAI Raj; HAKKARAINEN Timo; Ho,S_Goldcorp; Kumoi,G_Rubicon; Litt,K_Goldcorp; Major,L_Goldcorp; MARTIN Naomi; MEDEIROS Michael; Melchiorre,N_Rubicon; Moshoian,A_Goldcorp; PARKER Bruce; Pedwell, C_Goldcorp
Subject: FW: 101224-InfoReq-Scenarios.xls

Please have a look at this IR that we should send to HONE stemming from our meeting wiyh them of December 17th.

Ian A. Blue, Q.C.
d 416-865-2962
iblue@gardiner-roberts.com
GARDINER ROBERTS LLP
Scotia Plaza, 40 King Street West, Suite 3100
Toronto, ON, Canada M5H 3Y2
t 416 865 6600 | f 416 865 6636
www.gardiner-roberts.com

From: Kathi Litt [mailto:klitt@Elenchus.ca]
Sent: Monday, January 10, 2011 11:02 AM
To: Blue, Ian
Subject: FW: 101224-InfoReq-Scenarios.xls

As promised

From: Kathi Litt
Sent: December 24, 2010 9:32 AM
To: Q. C. Ian A. Blue (iblue@gardiner-roberts.com)
Subject: 101224-InfoReq-Scenarios.xls

Hi Ian

Attached is the draft information request to HONI – please review and revise and then circulate to the rest of the team.
Scenario 1 is intended to provide the Baseline data, Scenario 2 is an intended to scope the results of favourable timing of load changes while Scenario 3 is intended to scope the results of less than favourable timing of load changes.
You will see that I have assumed that All Other parties do not experience any load growth; this is because I have incomplete information about magnitude and no information about timing.

The TSC references are sections 6.7 and 11.2.

By way of follow up:
Do you know the status of the SIA or any other reports from the IESO?
Has Naomi provided any past Decisions on Stranded Assets?
What is the status of Rubicon's Offer to Connect from HONI?

I think that's it, is there anything I've overlooked?

Kathi

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Goldcorp Information Request by Goldcorp to Hydro One Networks Inc.
July 26, 2011;

Re: Bypass Changes for Goldcorp's 115 kV line
Approved by the OEB's Decision of July 20th, 2011 in EB-2011-0106

1. Re: Net Book Value of Red Lake Transformer Station (RLTS)

Please provide a continuity statement, organized by year, of the Net Book Value of the Red Lake TS that provides the value and date incurred of:

(a) Capital additions
  (i) Direct costs (eg., materials)
  (ii) Indirect or allocated or assigned costs (eg., overheads)
  (iii) Capitalized expenses (eg., labour, depreciation)
  (iv) Other costs included in capital additions costs
(b) Interest During Construction
(c) Provision for End of Life costs (eg., environmental remediation, asset removal)
(d) All other costs recorded to this asset
(e) The annual depreciation expense of the Red Lake TS
(f) The depreciation rate applied to the Red Lake TS
(g) Any write downs, impairments, removals or other changes to the value of the RLTS.

2. Re: rebuild and refurbishment of the Red Lake TS

Please provide the Red Lake area electricity load forecast relied on:

(a) to support the decision to rebuild/refurbish the Red Lake TS in 2007
(b) for engineering purposes when designing the 2007 Red Lake TS rebuild/refurbishment.

Please provide the following information:

(c) the origin of the load forecast
(d) the name of the party who provided the load forecast or data input to the load forecasting model;
(e) documentation of all adjustments, revisions, updates and other changes made to this data by HONI and the supporting rationale.

3. Re: Red Lake capacity assigned to Goldcorp

Please provide a copy of the current connection agreement between HONI and Goldcorp, if any, with respect to RLTS available capacity and Goldcorp's assigned capacity on the Red Lake.

(a) Please provide Goldcorp's annual assigned capacity on the Red Lake TS since 1995.

(b) Please provide all reports or memorandum concerning the provision of capacity to Goldcorp at the Red Lake TS pursuant to section 6.2.7 of the Transmission System Code (TSC).

4. Re: definition or determination of time of bypass

Please provide HONI's definition of 'time of bypass' that is relied on when administering section 6.7.7 of the TSC.

5. Re: determination of bypass charges

Please provide the following information on the three most recent bypass charges remitted to HONI anywhere on HONI's system. Please protect customer confidentiality.

(a) date and amount of bypass charge;

(b) asset bypassed.

6. Re: Red Lake TS

Please provide the unutilized capacity at Red Lake TS on a monthly basis for the period July 2008 to June 2011; please state all assumptions and supporting facts.

7. Re: Red Lake TS

Please provide a schematic of HONI's Transmission assets from OPG's Ear Falls generating station up to and including HONI's RLTS. For each transmission asset please provide:

(a) maximum allowed loading;

(b) annual maximum loading for the 2006-2011 period on a coincident and non-coincident peak basis;

(c) average loading for the 2006-2011 period.

8. Forecasts

Please provide estimated transmission revenues by Network, Line Connection and Transformer Connection for the following scenarios:

(a) Scenario A: all Red Lake area loads are served by RLTS , peak load is 52.1MVA;

(b) Scenario B: 33.9MVA of Red Lake area load is served by Goldcorp's 115kV Transmission line and 17.8MVA of Red Lake area load is served by RLTS.

Please state all supporting facts and simplifying assumptions.

[ ]3/2011
Prepared b, ie, K Litt

Goldcorp
Load data per Goldcorp, Rubicon
Presented by quarter

Summary Table of Unutilized Capacity of HONI Facilities Associated With Goldcorp's Utilization of Goldcorp's Proposed 115kV Line, Phased per Goldcorp's Plan

	Source of Supply	December, 2011	Q1 2012	Q2 2012	Q3 2012	Q4 2012	Q1 2013	Q2 2013	Q3 2013	Q4 2013	Q1 2014	Q2 2014	Q3 2014	Q4 2014
Assumed Loads (in MVA)														
Goldcorp	115 kV line	10.6	10.6	28.398	37.955	38.256	39.44	39.632	40.243	40.618	40.375	40.439	40.501	40.598
Goldcorp	RLTS	29.191	29.484	12.015	2.625	3.675	3.675	3.675	3.885	3.885	3.885	3.885	5.46	8.332
Rubicon	RLTS	1.5	1.5	2	4	5	6	6	7	8	8	8	8	8
Pikangikum	RLTS	1	1	1	1	1	1	1	1	1	1	1	1	1
All Other Loads	RLTS	16.4	16.4	16.4	16.4	17.9	17.9	17.9	17.9	16.2	16.2	16.2	16.2	18.2
CALCULATIONS														
Utilized RLTS capacity		48.091	48.384	31.415	24.025	27.575	28.575	28.575	29.785	29.085	29.085	29.085	30.66	35.532
Utilized 115 kV line Capacity		10.6	10.6	28.398	37.955	38.256	39.44	39.632	40.243	40.618	40.375	40.439	40.501	40.598
Utilized Capacity downstream of Ear Falls		58.691	58.984	59.813	61.98	65.831	68.015	68.207	70.028	69.703	69.46	69.524	71.161	76.13
Unutilized Capacity Downstream of Ear Falls		4.309	4.016	3.187	1.02	-2.831	-5.015	-5.207	-7.028	-6.703	-6.46	-6.524	-8.161	-13.13
Unutilized RLTS Capacity		8.909	8.616	25.585	32.975	29.425	28.425	28.425	27.215	27.915	27.915	27.915	26.34	21.468
RLTS														
Theoretical Maximum Capacity		57	57	57	57	57	57	57	57	57	57	57	57	57
Maximum Available Capacity		52.4	52.4	34.602	25.045	24.744	23.56	23.368	22.757	22.382	22.625	22.561	22.499	22.402
Utilized Available Capacity		48.091	48.384	31.415	24.025	27.575	28.575	28.575	29.785	29.085	29.085	29.085	30.66	35.532
Unutilized Available Capacity		4.309	4.016	3.187	1.02	-2.831	-5.015	-5.207	-7.028	-6.703	-6.46	-6.524	-8.161	-13.13
Theoretical Maximum Capacity less Utilized Available Capacity			8.616	25.585	32.975	29.425	28.425	28.425	27.215	27.915	27.915	27.915	26.34	21.468
Goldcorp Proposed 115kV Line Capacity Downstream of Harry's Corner														
Maximum Capacity		50	50	50	50	50	50	50	50	50	50	50	50	50
Utilized Available Capacity		10.6	10.6	28.398	37.955	38.256	39.44	39.632	40.243	40.618	40.375	40.439	40.501	40.598
Unutilized Available Capacity		39.4	39.4	21.602	12.045	11.744	10.56	10.368	9.757	9.382	9.625	9.561	9.499	9.402
E2R Capacity Downstream of Ear Falls														
Maximum Capacity		63	63	63	63	63	63	63	63	63	63	63	63	63
Utilized Available Capacity		58.691	58.984	59.813	61.98	65.831	68.015	68.207	70.028	69.703	69.46	69.524	71.161	76.13
Unutilized Available Capacity		4.309	4.016	3.187	1.02	-2.831	-5.015	-5.207	-7.028	-6.703	-6.46	-6.524	-8.161	-13.13

Assumptions

	Conversion Priority	2011	Q1 2012										
Goldcorp Balmer Complex	3 Q3 2012	9.456	9.475	9.495	9.515	9.536	10.678	10.698	11.213	11.437	11.151	11.172	11.192	11.213
Goldcorp Campbell Complex	2 Q2 2012	17.53	17.594	17.798	17.84	18.12	18.162	18.334	18.43	18.581	18.624	18.667	18.709	18.785
Goldcorp Red Lake Complex	1 Q4 2011	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6	10.6
Goldcorp Cochenour Complex	0	2.205	2.415	2.52	2.625	3.675	3.675	3.675	3.885	3.885	3.885	3.885	5.46	8.332
RLTS Maximum Capacity		57 MVA												
E2R capacity downstream of Ear Falls		[redacted] MVA												
capacity increase via capacitors	Q1 2013	SIA												

Documentation

Load Assumptions: all Goldcorp loads are per Northwinds Energy's load forecast.
non-Goldcorp/non-Rubicon/non-Pikangikum loads are per the filed load forecast
Rubicon load forecast is per D Boyd email of December 31, 2010.
RLTS and E2R capacity limits are per the SIA.
GL1 capacity has been assumed to be 50 MVA.
The RLTS Maximum Available Capacity is the lesser of: 57 MVA (per the SIA) OR the difference between E2R's limit and Goldcorp loading on the new line.
GL1 is assumed to serve Goldcorp's Red Lake, Campbell and Balmer complexes.
Unutilized Capacity is computed as the difference between the maximum/available capacity and the proposed loading.
Simplifying assumption: RLTS loss factor assumed to be 0%.
-ve data is indicative of the need to self-supply (Goldcorp installs generators) or shed load (shedding load requires that Goldcorp forgo economic gold production)'

Goldcorp
Information Request to HONI
Identification and Quantification of Bypassed Asset Charges per TSC

Scenario 1

Delivery Recipient	Source of Supply	December, 2010	December, 2011	December, 2012	December, 2013	December, 2014
Goldcorp	110 kV line	0	12	26	26	34
Goldcorp	RLTS	34	29	22	24	16
Rubicon	RLTS	1	5	8	8	10
All Other Loads	RLTS	14	14	14	14	14

Results

MW of Bypassed Capacity per TSC
Bypassed Asset Charge, per TSC
HONI NBV RLTS
Party Responsible for Bypassed Asset Charge
Maximum Deliveries Downstream of RLTS (MW)
Maximum Deliveries to RLTS (MW)
Source of RLTS Throughput Constraint

Scenario 2

Delivery Recipient	Source of Supply	December, 2010	October, 2011	March, 2012	August, 2011	December, 2012	December, 2013	December, 2014
Goldcorp	110 kV line	0	0	12	12	26	26	34
Goldcorp	RLTS	34	34	29	29	22	24	16
Rubicon	RLTS	1	5	5	5	8	8	10
All Other Loads	RLTS	14	14	14	14	14	14	14

Results

MW of Bypassed Capacity per TSC
Bypassed Asset Charge, per TSC
HONI NBV RLTS
Party Responsible for Bypassed Asset Charge
Maximum Deliveries Downstream of RLTS (MW)
Maximum Deliveries to RLTS (MW)
Source of RLTS Throughput Constraint

Scenario 3

Delivery Recipient	Source of Supply	December, 2010	December, 2011	May, 2011	June, 2011	December, 2012	May, 2013	December, 2013	December, 2014
Goldcorp	110 kV line	0	12	12	12	26	26	26	34
Goldcorp	RLTS	34	29	29	29	22	22	24	16
Rubicon	RLTS	1	1	1	5	8	8	8	10
All Other Loads	RLTS	14	14	14	14	14	14	14	14

Results

MW of Bypassed Capacity per TSC
Bypassed Asset Charge, per TSC
HONI NBV RLTS
Party Responsible for Bypassed Asset Charge
Maximum Deliveries Downstream of RLTS (MW)
Maximum Deliveries to RLTS (MW)
Source of RLTS Throughput Constraint

Notes
All deliveries are peak monthly MVA

E-mail Curtis Pedwell to Luc Major dated April 16, 2010, 7:31 a.m. and chain

Bl lan

From: Curtis Pedwell [Curtis.Pedwell@goldcorp.com]
Sent: Friday, April 16, 2010 7:31 AM
To: Luc Major
Cc: Mike Lalonde
Subject: FW: Bypass calculations
Attachments: goldcorp red lake bypass calculation 2010 04 15.pdf

Luc,

Finally got this information from John, he told me earlier that this matrix was convoluted and hard to understand, I guess he must have dumbed it down for us. Let's discuss this morning when we get together.

Curtis Pedwell
Maintenance Manager
Goldcorp - Red Lake Gold Mines
W 807-735-2077 x 5118
Email curtis.pedwell@goldcorp.com

GOLDCORP
Red Lake Gold Mines

From: john.breen@HydroOne.com [mailto:john.breen@HydroOne.com]
Sent: Friday, April 16, 2010 4:46 AM
To: Curtis Pedwell
Cc: len.mcmillan@HydroOne.com; john.breen@HydroOne.com; marc.boucher@HydroOne.com; philip.yc.poon@HydroOne.com
Subject: Bypass calculations

<<goldcorp red lake bypass calculation 2010 04 15.pdf>>

Curtis

Attached is a note on the calculations for the bypass compensation at Red Lake TS. Calculations involved the net book value of the station and a winter loading value. Further calculations will need to be done at such time Goldcorp decides what their needs are and what their power supply configuration will be.

Hopefully this information will assist you in determining whether Goldcorp Red Lake Mines will be connected to the transmission system or remain being supplied from the Red Lake TS or a combination of the two.

If you have any questions, please contact me.

Again thanks for your patience in this matter.

John Breen
Northwest Zone
Hydro One
Thunder Bay
Please consider the environment before printing this e-mail

April 15, 2010

Preliminary Bypass Calculation

For Goldcorp Inc. at Red Lake TS

Prepared by: Philip Poon, Hydro One

Transmission Bypass Compensation is calculated in accordance with Section 6.7.7 of the Transmission System Code, which stipulates that:

> *...the transmitter shall calculate bypass compensation by first multiplying the net book value of the bypassed connection facility, including a salvage credit and reasonable removal and environmental remediation costs, if applicable, by the bypassed capacity on the relevant connection facility. The transmitter shall then divide the resulting figure by the total normal supply capacity of the bypassed connection facility. For purposes of this calculation:*
>
> *(a) the bypassed capacity on the relevant connection facility shall be equal to the difference between the customer's existing load on that connection facility at the time of bypass and the customer's average monthly peak load in the three-month period following the date on which bypass occurred; and*
>
> *(b) the normal supply capacity of the bypassed connection facility shall be determined by the transmitter in accordance with the Board-approved procedure referred to in section 6.2.7.*

Bypass Compensation	=	NBV	× (Bypassed Capacity / Total Normal Supply Capacity)
	=	$15 M	× (33 MVA / 61.5 MVA)
	=	$15 M	× 0.537
	=	**$8 M**	

Notes & Assumptions:

1) The bypass compensation amount above is a low-quality, preliminary estimate only. Additional work would be needed to develop the actual bypass compensation amount payable by Goldcorp, at the time of actual bypass. The re-calculated amount may differ significantly from this preliminary calculation.

2) NBV is the estimated Net Book Value of Red Lake TS, as of December 31, 2011 – the assumed date of bypass. (Note: The NBV is subject to change with time due to depreciation and incremental station investments.)

3) The above bypass compensation calculation is based on NBV only and excludes any removal or environmental remediation costs or salvage credit amounts. The actual bypass compensation amount, calculated at the time of actual bypass, would need to include these amounts.

4) The Bypassed Capacity is Goldcorp's existing load at Red Lake TS prior to the station refurbishment in 2007. Goldcorp's load growth since 2007 is not counted as bypassed capacity as it forms part of the load forecast that was used to justify the refurbishment work advancement (from 2010 to 2007), for which a separate true-up process applies.

5) The Total Normal Supply Capacity value is the Winter 10 Day Limited Time Rating of Red Lake TS.

E-mail from Pappur Shankar to Luc Major, Robert Bustraen, Hadi Banakar dated April 30, 2010 at 3:06 p.m. and chain

Blue, Ian

From: Shankar, Pappur [Pappur.Shankar@snclavalin.com]
Sent: Friday, April 30, 2010 3:06 PM
To: Luc Major; Bustraen, Robert; Banakar, Hadi
Subject: RE: Stranding and who pays for Network improvements

HI Luc

in the interest of Goldcorp, you should look into the best possible ways how it will be beneficial.. $8M is only a no, could be $11M as they were quoting yesterday. Hadi was saying if you install transfer switch, you may have to pay certain % of the load transferred for stranded costs.

Political is dangerous and lead time could go to 6 months to 2 years

---

From: Luc Major [mailto:luc.major@goldcorp.com]
Sent: April 30, 2010 3:01 PM
To: Bustraen, Robert; Banakar, Hadi; Shankar, Pappur
Subject: RE: Stranding and who pays for Network improvements

By the way we are talking about an upgrade cost and stranded assets that occurred only a few years ago. The age of the transformers triggered the upgrade. That is probably why we did not need to get into a contract.

I've also been telling the mine this for quite some time.

Regards,

Luc Major
Major Consulting
Phone - (807) 662-2525
Cell - (807) 727-0690
Fax - (807) 662-4458

From: Bustraen, Robert [mailto:Robert.Bustraen@snclavalin.com]
Sent: April-30-10 1:38 PM
To: Luc Major; Banakar, Hadi; Shankar, Pappur
Subject: RE: Stranding and who pays for Network improvements

Luc:

You may be on to something. I'd suggest though that you might wish to have some legal person look at the Transmission Code, because there may be wording in it that says something like "This Code covers all future contracts and agreements. All existing connection, whether legally bound by agreements or not are considered henceforth to be bound at the power levels supplied by HONI over the past one year period."

Bob

From: Luc Major [mailto:luc.major@goldcorp.com]
Sent: April 30, 2010 2:29 PM
To: Banakar, Hadi; Shankar, Pappur; Bustraen, Robert
Subject: FW: Stranding and who pays for Network improvements

Sorry, I forgot the SNC crew. It was getting late in the evening.

Regards,

Luc Major
Major Consulting
Phone - (807) 662-2525
Cell - (807) 727-0690
Fax - (807) 662-4458

From: Luc Major
Sent: April-29-10 8:45 PM
To: John Breen
Cc: Mike Lalonde; Dale Kosie; Curtis Pedwell; David Gelderland; David Boileau (dboileau@windeau.com); A MacIver; Vic Gignac; Bob Ritchie
Subject: FW: Stranding and who pays for Network improvements

John,

Can you please pass this on to all that was at the meeting from your end?

During the meeting it was said HONI did not need a contract to impose stranded assets costs. Please note, in the attached, the first paragraph that was highlighted. Twice it mentions 'Contractual Forecast' when it comes to system upgrades and stranded asset costs. I'm not a lawyer and I may be reading this the wrong way.

This is one of the reasons I asked for a copy of some agreement between Goldcorp and HONI. It is also a good reason to see the details of the stranded cost calculations. I think it's probably within Goldcorp's right to see this before they even consider bringing the $8,000,000 cost to head office's attention. It will also help with the financial decision on whether or not we move 1, 2 or 3 of our 4 sites to 115 kV should it be decided to go that way.

Regards,

Luc Major
Major Consulting
Phone - (807) 662-2525
Cell - (807) 727-0690
Fax - (807) 662-4458

From: David Boileau [mailto:dboileau@windeau.com]
Sent: April-19-10 9:12 AM
To: Mike Lalonde; Luc Major; Curtis Pedwell; David Gelderland
Subject: Stranding and who pays for Network improvements

Hello,

Alex has forwarded document that provides a good explanation of standing triggers and responsibility as well as principles for customer contributions on new Network assets. I have printed it in a PDF (attached) and high some key sections.

Regards,

David

From: A MacIver [mailto:a_maciver@sympatico.ca]
Sent: April-19-10 7:50 AM
To: dboileau@windeau.com
Subject: Re: Rational for stranding and line connection

More updated synopsis, explains it pretty good. Need to give a year notice to bypass.

http://www.theimo.com/imoweb/pubs/corp/TSC_Synopsis-2005July26.pdf

----- Original Message -----
From: David Boileau
To: 'A MacIver'
Sent: Sunday, April 18, 2010 6:46 PM
Subject: RE: Rational for stranding and line connection

Thanks Alex,

Can you find rules/decisions regarding customer contributions to reinforcements. For example if E2R is fully loaded how does OEB rule on who pays and what are the inputs to the formula?

Regards,

David

From: A MacIver [mailto:a_maciver@sympatico.ca]
Sent: April-18-10 6:17 PM
To: dboileau@windeau.com
Subject: Rational for stranding and line connection

You may know all this but it contains the reasoning behind the stranding costs and what they are, available capacity and customer arranging for own connection. In particular sections 4.4, 4.8, 5.3,5.5, and the synopsis at the end.

http://www.hydroone.com/RegulatoryAffairs/Documents/Archives/RP-2002-0101%20EB-2002-0242/Phase1%20Decision.pdf

----- Original Message -----
From: David Boileau
To: 'A MacIver'
Sent: Sunday, April 18, 2010 11:13 AM
Subject: RE: Questions

Thanks Alex,

This info help me to structure the package. Luc will have the answers to some of the questions and we will embed the rest of the questions in the text.

Regards,

David

From: A MacIver [mailto:a_maciver@sympatico.ca]
Sent: April-18-10 9:49 AM
To: dboileau@windeau.com
Subject: Questions

Here are some questions for HONI. Luc asked for them from us, not sure if he still wants them or they are being integrated into your presentation and submitted within. Anyways add to them as you see fit.

----- Original Message -----
From: David Boileau
To: 'A MacIver' ; 'Luc Major'
Cc: 'Mike Lalonde' ; 'Curtis Pedwell' ; 'David Gelderland'
Sent: Saturday, April 17, 2010 11:06 AM
Subject: line losses and other items

Hi Alex and Luc,

The priority objectives in the initial presentation to be sent to HONI are:

1) Clarify for HONI the loads and required schedule for power capacity at RLGM.
2) Build the case for the 115 kV tap and (competitive) HONI ownership of the 115kV line up to the to the Goldcorp substation.
3) Make a case to minimize stranded asset charges for 44kV infrastructure.
4) Make a case to maximize the HONI contribution (rate base) to the 115 kV tap option as well as the E2R twinning.
5) Provide a Goldcorp perspective of opportunities, risks and barriers.

In the package that we prepare for next Wednesday, we will want to raise every item that supports the case for a 115kV tap solution. This includes reasons why the 44 kV is not serving Goldcorp/HONI and ratebase needs. For example the 3 circuits (and proposed 4th circuit) must be expensive to maintain, more failure points, more right of way issues, more line losses etc. In addition to the burden on Goldcorp, these are costs that are ultimately paid by the rate base and would actually act as a credit to the 115 kV case.

HONI has an obligation to loads to deliver quality power and reliable service. They also have an obligation to the rate base to do so in a cost efficient manner.

We already have a lot of solid information from the spreadsheet and matrix exercise. However, now we need to expand our review to consider issues/benefits for HONI, non-RLGM loads and the issues/benefits and other loads. So if you can give me a list that explains and quantifies all of the deficiencies of the 44kV service, it will help me develop the argument to support the 115kV case. Also I need a list of all of the efficiencies, benefits and deficiencies of the 115kV tap so we can better defend our position.

Luc, for the Northern Loop project, has HONI ever discussed their position on the feasibility of this line? For the Pikangikum line, I understand that it was to be constructed as a 115kV line but operated at 44kV. Is this the case? How much would be saved by the FN if the 115kV terminated near the Nungesser? Road in Balmertown? On the map it looks like about 12 km from the Nungesser Road to RLTS. What would the line loss savings be for Pik if the line was 115kV? What are the other savings/costs (e.g. distribution vs

transmission rates, extra costs of transformation)? Who will be the owner of the Pik line, HONI or the FN.

Since the Target case is now similar to the Optimistic case for the first 5 years, and since HONI is predicting an increased demand from non-RLGM loads, the capacity of the E2R could be exceeded as early as 2012. This means that we will need to address the E2R twinning now, perhaps as a separate discussion but certainly it will be on the table. So, we will need to demonstrate that the rate base should pay a good portion of the E2R twinning. What are the E2R annual line losses (MWh and $ cost) at the current load? How much does this change as load approaches 80 MW. How would this compare to losses if the line was twinned? What other non-RLGM loads benefit from twinning and how?

This may be a naive question, but since RLGM proposes a tap at Harry's corner on the existing E2R, what happens when the 2nd circuit arrives at RLTS. In a line outage situation, (e.g. E2R old is out) how will E2R new power be delivered to the tap point at Harry's corner? Either an automatic isolation switch would be required at Harry's corner for the 2 circuits or the Goldcorp 115kV service line would need to terminate at RLTS. I assume that this was considered in the costing of the options – please confirm.

At this stage we do not need exact figures on costs, losses etc. A range of +/- 15% is ok. We just want to get all of the issues on the table. HONI and SNC can refine the figures once the scope and loads are well understood by the parties.

Regards,

David

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Meeting Minutes – Goldcorp Red Lake Gold Mines,
Meeting November 4th, 2010 (prepared by HONI)

dro One Networks
Bay Street
Toronto, ON M5G 2P5

Meeting Minutes – Goldcorp Red Lake Gold Mines

DATE OF MEETNG:	November 4, 2010	FILE NO:	
LOCATION:	483 Bay Street Toronto	WRITTEN BY:	Timo Hakkarainen
SUBJECT:	Electrical Supply in Red Lake Area	REVISION NO:	FINAL
CUSTOMER:	Goldcorp – Red Lake Gold Mines		
PROJECT TITLE:			

PRESENT:		
Goldcorp Representatives:	Curtis Pedwell	Goldcorp – Project Manager
	Luc Major	Major Consulting
	Kathi Litt	Elenchus Research Associates Inc.
	Ian Blue	Cassels Brock Lawyers
Hydro One Representatives:	Naomi Martin	Senior Legal Counsel, Hydro One Networks Inc.
	Mike Medeiros	Hydro One Network Management – Distribution Planning
	Ibrahim El Nahas	Hydro One Transmission Planning Manager
	Raj Ghai	Hydro One Sr. Network Management–Transmission Planning
	Timo Hakkarainen	Hydro One Account Executive

Objective

Objective of the meeting is to review electrical supply planning in the Red Lake Area.

Discussion

Hydro One stated that in accordance with its license and Rubicon's express requirements, it was not prepared to provide any information with respect to Rubicon.

Ian did, however, review for the benefit of Hydro One, and in the context of Goldcorp's own plans, what Rubicon had advised Goldcorp in respect of Rubicon's proposed line at their meeting on October 21st. Ian referred to the following:

- A copy of the aerial photograph of Rubicon's requested right-of-way from Nungesser Road to the Phoenix Mine Site that Rubicon provided to Goldcorp and to Rubicon's March 8, 2010 public presentation on the Phoenix Project.
- Goldcorp received a request from Hydro One Networks for easement rights from Goldcorp for its proposed M5 line to connect with Rubicon's right of way line, which proposed M5 line would necessarily cross lands

owned either by Goldcorp or by the joint venture between Goldcorp and Premier Gold. Ian had learned of the Hydro One Networks request the afternoon after the October 21st meeting between Goldcorp and Rubicon, at Goldcorp's offices.

- Goldcorp advised Hydro One that once its 115 kV line is constructed, which will be in service in 2011 Q4, it would be prepared to transfer its loads from the M6 line to its 115 kV line. This would free up capacity at the Red Lake Transformer Station (RLTS) and on the M6 line.
- Goldcorp stated it would make sense for Rubicon to utilize the freed up capacity in the RLTS and on the M6 line, rather than have Hydro One construct the new M5 line.
- The proposed M5 line runs across gold prospects owned by Goldcorp and the joint venture and, for that reason, Goldcorp is not inclined to grant any easements to Hydro One on, in, over or under those lands at this or any other time.
- In response to a question of Ian, Hydro One stated that it had no policy with respect to expropriating for distribution lines (or for transmission lines for that matter but that it has expropriated for a customer connection in the past but has not had to do so to date for a distribution connection) and made it clear that it would explore all other alternative routes as it would be required to do to satisfy the expropriation requirements under the *Ontario Energy Board Act, 1998* before deciding whether to do so.
- Ian believes that a meeting between Hydro One, Rubicon and Goldcorp would be extremely fruitful for all three companies in the interests of efficient system planning. Ian will e-mail Rubicon to recommend that a tri-party discussion be held.

Review of Goldcorp's 10.2 km 115 kV line from Harry's Corner to Balmer Complex

Goldcorp is considering options for loading the new 115 kV line. Present plan is to leave existing load on at Red Lake TS and load the 115 kV line with new load. This would result in the least impact for stranded asset costs for Goldcorp at Red Lake TS.

- Curtis reviewed the power quality and efficiency benefits for Goldcorp to move away from the 44 kV connection to a transmission connection.
- A System Impact Assessment (SIA) currently being performed by the IESO for the new line.
- Hydro One will do a Customer Impact Assessment (CIA) once part one of the SIA part is available.
- A Study Agreement will need to be executed prior to Hydro One performing a CIA.
- Hydro One requested that Goldcorp provide Hydro One with load forecast including the amount of capacity that Goldcorp would like to remove from the Red Lake TS (as well as their proposed timeline for so doing) so that Hydro One can determine whether the needs of all of its customers in the area can be met without a new transformer at Red Lake TS.

ACTION: Timo will provide a Study Agreement to Goldcorp for signing in advance so that the CIA can be completed.

- The amount of capacity available on the E2R line is limited and has been discussed with Goldcorp in past meetings. The SIA should confirm the capacity limitations.
- Hydro One is working with SNC Lavalin to review the connection of the line to E2R.
- Goldcorp may wish to have Hydro One take over ownership of the new line and SNC Lavalin has requested 115 kV functional design specifications from Hydro One for the new line.
- Goldcorp indicated they plan to build the new line to 230 kV specifications but operate it at 115 kV. As a result, the function design specifications to be provided need to be changed.

ACTION: Goldcorp will expeditiously confirm with SNC Lavalin that the new line design will be 230 kV and if so confirmed, Goldcorp or SNC Lavalin will revise their request for functional design specifications.

Stranded Assets Charge

Kathi provided Hydro One with a list of questions (attached) regarding Stranded Assets Charges.



hppscan16.pdf

Meeting Adjourned.

1 **Minutes of Meeting, Meeting December 17, 2010 (prepared by HONI)**

MINUTES OF MEETING

DATE: Dec 17, 2010	RECORDER: Michael Medeiros	ISSUED BY: Michael Medeiros
PROJECT: Goldcorp – Hydro One Red Lake Area Power Supply Meeting with Goldcorp and Rubicon Present.		
LOCATION OF MEETING: 483 Bay St., South Tower 5th floor Room G, Toronto, ON		DATE OF MEETING: Dec 17, 2010
PURPOSE OF MEETING: To discuss transmission and distribution system upgrade requirements to meet Gold Corp's and Rubicon's load forecast for the Red Lake TS area.		
ATTENDED BY: • Curtis Pedwell (CP), Maintenance Manager, Goldcorp • Luc Major (LM), Goldcorp Consultant • Michael Medeiros (MM), Distribution Development, Network Management Engineer, Hydro One • Naomi Martin, , Senior Legal Counsel, Hydro One • Raj Ghai (RG), Transmission System Development, Sr. Network Management Engineer, Hydro One • Timo Hakkarainen (TH), Account Executive, Customer Business Relations, Hydro One • Ian Blue, Gardiner Roberts LLP, Goldcorp's legal counsel • Claude Bouchard, VP Operations, Rubicon • B. Dominique, Legal Counsel, Goldcorp • Glenn Kumoi, VP General Counsel, Rubicon • Nick Melchiorre, Barrister and Solicitor, Weiler, Maloney, Nelson for Rubicon • Darrly Boyd, Manager Regulatory Affairs, Rubicon. • Chris Dougherty, Rubicon • Kathi Litt, Goldcorp • A. Moshoian, Goldcorp		
DISTRIBUTION: Attendees, Ron Salt, Ibrahim El Nahas, Philip Poon,		

Disclaimer

These meeting minutes are for the sole use of Goldcorp Inc, Rubicon and Hydro One Networks Inc. and are for information purposes only. The material in this document does not constitute a commitment from Hydro One Networks Inc. The ratings referred to in this document are the best estimate that could be provided at the time and are meant for reference only. Actual operating ratings may differ for these referenced ratings.

Summary of Minutes

A meeting was held to discuss the electrical supply in the Red Lake TS area with both Rubicon and Goldcorp present. The purpose of the meeting was to identify possible synergies between supply of Goldcorp and Rubicon. The Agenda agreed to by Rubicon and Goldcorp for the proposed meeting is attached in Appendix A. Ian Blue indicated that Goldcorp and Rubicon had had a meeting in the morning and had agreed to swap load on the M6 feeder. Ian Blue talked to points 1 to 5 of the agenda and then the meeting moved to the discussion of the stranded asset cost for Red Lake TS.

Background

Goldcorp has been in ongoing discussions with Hydro One Networks Inc. ("Hydro One") regarding new load growth in the Red Lake area. The last meeting held between Goldcorp and Hydro One took place on November \19, 2010. In this meeting Hydro One's Distribution representatives and Hydro One's Transmission representatives discussed the possibility of replacing Goldcorp's load with another customer's load to reduce Goldcorp's stranded asset cost on Red Lake TS.

Discussion

1. Review of HONI's Red Lake Transformer Station Upgrade

   The Transformer station upgrade is in the preliminary design stage.

2. Review of Goldcorp's 10.2 km 115 kV line from Harry's Corner to Balmer Complex

   Expected in service is end of 2011. SIA still pending.

3. Rubicon's 44 kV line to Phoenix Mine Site

   HONI's detailed design has been completed, easements have not been secured for the new M5 or for Rubicon's portion of the tap off the existing M6.

4. Proposal to have Rubicon utilize the capacity freed up at the Red Lake Transformer Station to the extent Goldcorp offloads the M6 line. (There would be potential to mitigate or preclude stranding assets.)

   Rubicon and Goldcorp have agreed to swap capacity on the M6. Goldcorp will move load off the M6 to accommodate new load from Rubicon. This is a two party agreement between Goldcorp and Rubicon.

5. Possible duplication of Hydro One assets if Hydro One proceeds with construction of the proposed M5 line and third transformer at the Red Lake Transformer Station.

   Hydro One Distribution agreed that there is possible duplication and that a load swap between Goldcorp and Rubicon could work in principle.

6. Stranded Assets.

   Ian Blue stated that stranding costs associated with moving load from the Red Lake TS should not apply to Goldcorp at all if Goldcorp removes load from Res Lake TS. Naomi Martin stated that Hydro One disagreed with that assertion on the basis of the provisions of the Transmission System Code. Hydro One will calculate bypass compensation based on the actual load bypassed at Red Lake TS when bypass of Red Lake TS occurs in accordance with the provisions of the Transmission System Code that Hydro One has discussed with Goldcorp previously. Rubicon and Goldcorp are to send revised load forecasts. Hydro One will provide a new estimate of the bypass compensation amount payable by Goldcorp based on the new load information. Hydro One indicated that bypass is determined based on actual load information and at the time that bypass occurs and if Rubicon's load does not

materialize as envisaged by Goldcorp and Rubicon that Goldcorp will be liable to pay bypass compensation.

Action Items

#	Description	Deadline	Accountability	Status
1	Send out revised load forecast for Goldcorp based on proposed swap and IESO SIA for new TS.	TBD	Luc Major, Goldcorp	Complete d
2	Send out revised load forecast for Rubicon based on proposed swap and IESO SIA for new TS.	TBD	Darryl Boyd, Rubicon	Complete d
3	Prepare new estimate for stranded asset cost after revised load forecast have been made available by Rubicon and Goldcorp.	Depende nt on 1 and 2.	Raj Ghai, Hydro One	In progress
	If there are any errors or omissions in the above, please contact the undersigned within 7 days.			
	_____ Michael Medeiros (416) 345-6848			

Follow up Summary

#	Description	Action Date
1	Received scenarios from Ian Blue on behalf of Goldcorp via email.	Jan. 10, 2011
2	Received load forecast by Quarter from Darryl Boyd from Rubicon via email.	Dec. 31, 2010
3	Raj Ghai requested a clarification from Goldcorp regarding scenarios to Ian Blue via email on Jan. 21, 2011.	TBD
4		
5		
6		
7		
8		
	If there are any errors or omissions in the above, please contact the undersigned within 7 days.	
	_____ Michael Medeiros (416) 345-6848	

Appendix A: Agenda for Meeting Re: Electrical Supply in Red Lake Area

1. Review of HONE's Red Lake Transformer Station Upgrade
   - Current status (allotment, schedule, cost)
   - Flexibility
2. Review of Goldcorp's 10.2 km 115 Kv line from Harry's Corner to Balmer Complex
   - Current status (permitting, procurement, construction)
   - Benefits to Goldcorp and system
   - Disadvantages including possibility of stranding assets
3. Rubicon's 44 Kv line to Phoenix Mine Site
   - Current status (permitting, procurement, construction)
   - Route and required easement
     - by Rubicon
     - by HONE
   - Advantages to Rubicon and to system
4. Proposal to have Rubicon utilize the capacity freed up at the Red Lake Transformer Station to the extent Goldcorp offloads the M6 line. (There would be potential to mitigate or preclude stranding assets.)
5. Possible duplication of Hydro One assets if Hydro One proceeds with construction of the proposed M5 line and third transformer at the Red Lake Transformer Station.

E-mail Raj Ghai to Ian Blue dated January 21, 2011, 4:16 p.m. and chain

Blue, Ian

From: raj.ghai@HydroOne.com

Sent: Friday, January 21, 2011 4:16 PM

To: Blue, Ian

Cc: cbouchard@rubiconminerals.com; dboyd@rubiconminerals.com; gord.caul@HydroOne.com; bdominique@casselsbrock.com; chris.dougherty@nordmin.com; timo.hakkarainen@HydroOne.com; sho@gardiner-roberts.com; gkumoi@rubiconminerals.com; klitt@era-inc.ca; luc.major@goldcorp.com; naomi.martin@HydroOne.com; michael.medeiros@HydroOne.com; nmelchio@wmnlaw.com; Andrew.Moshoian@goldcorp.com; bruce.parker@HydroOne.com; curtis.pedwell@goldcorp.com

Subject: RE: 101224-InfoReq-Scenarios.xls

Attachments: Goldcorp_Rubicon_LF_summary.xls

Ian,
We have reviewed the various scenarios presented in your January 10, 2011 e-mail and our comments are as follows:

1) In scenario 3, the dates were displaced and we have made the necessary changes. Please see the attached spread sheet for total loading for various scenarios as follows:
    a. Load forecast for Red Lake TS for various scenarios from Dec. 2010 to Dec. 2014
    b. Load forecast for Goldcorp proposed 115 kV line from Dec. 2010 to Dec. 2014

2) The decline in Red Lake TS load indicates the start of bypass i.e. December 11. The bypass is defined as transfer of customer existing load from the transmitter owned connection facility to the customer owned facility or a third party owned facility. The bypass can be temporary or permanent depending upon whether the transferred load returns back to the transmitter owned facility. Also, the bypass is calculated at a point in time when a customer transfers all or part of their load from transmitter owned facility resulting in stranding of all or part of the capacity.
3) The loading of Red Lake TS varies between December 2010 and December 2014 for various scenarios. Please indicate the point in time when we should calculate the bypass compensation for Red Lake TS. My proposal is to use December 2010 as the reference point for Red Lake TS load. There is a 5 MW drop in December 2012 and additional 4 MW load drop in December 2014 (total load drop of 9 MW).
4) The loading of new Goldcorp 115 kV line has no impact on Red Lake TS bypass calculations.

If you are in agreement with above then we can calculate bypass compensation.

Raj Ghai
Hydro One - TCT15
Phone: 416.345.5302
Cell: 416.985.5359


Please consider the environment before printing this email.

From: Blue, Ian [mailto:iblue@gardiner-roberts.com]
Sent: Monday, January 10, 2011 11:50 AM

To: Blue, Ian; Bourchard, C_Rubicon; Boyd, D_Rubicon; CAUL Gordon; Dominique,B_Goldcorp; Dougherty, C_Rubicon; GHAI Raj; HAKKARAINEN Timo; Ho,S_Goldcorp; Kumoi,G_Rubicon; Litt,K_Goldcorp; Major,L_Goldcorp; MARTIN Naomi; MEDEIROS Michael; Melchiorre,N_Rubicon; Moshoian,A_Goldcorp; PARKER Bruce; Pedwell, C_Goldcorp
Subject: FW: 101224-InfoReq-Scenarios.xls

Please have a look at this IR that we should send to HONE stemming from our meeting wiyh them of December 17th.

Ian A. Blue, Q.C.
d 416-865-2962
iblue@gardiner-roberts.com
GARDINER ROBERTS LLP
Scotia Plaza, 40 King Street West, Suite 3100
Toronto, ON, Canada M5H 3Y2
t 416 865 6600 | f 416 865 6636
www.gardiner-roberts.com

From: Kathi Litt [mailto:klitt@Elenchus.ca]
Sent: Monday, January 10, 2011 11:02 AM
To: Blue, Ian
Subject: FW: 101224-InfoReq-Scenarios.xls

As promised

From: Kathi Litt
Sent: December 24, 2010 9:32 AM
To: Q. C. Ian A. Blue (iblue@gardiner-roberts.com)
Subject: 101224-InfoReq-Scenarios.xls

Hi Ian

Attached is the draft information request to HONI – please review and revise and then circulate to the rest of the team.
Scenario 1 is intended to provide the Baseline data, Scenario 2 is an intended to scope the results of favourable timing of load changes while Scenario 3 is intended to scope the results of less than favourable timing of load changes.
You will see that I have assumed that All Other parties do not experience any load growth; this is because I have incomplete information about magnitude and no information about timing.

The TSC references are sections 6.7 and 11.2.

By way of follow up:
Do you know the status of the SIA or any other reports from the IESO?
Has Naomi provided any past Decisions on Stranded Assets?
What is the status of Rubicon's Offer to Connect from HONI?

I think that's it, is there anything I've overlooked?

Kathi

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Red Lake TS Load Forecast (Combined Goldcorp,Rubicon and Retaill Load)

	Dec-10	Oct-11	Dec-11	Mar-12	May-12	Jun-12	Aug-12	Dec-12	May-13	Dec-13	Dec-14
Scenario 1	49		48					44		46	40
Scenario 2	49	53		48			48	44		46	40
Scenario 3	49		44		44	48		44	44	46	40

Goldcorp 115 kV line Load Forecast

	Dec-10	Oct-11	Dec-11	Mar-12	May-12	Jun-12	Aug-12	Dec-12	May-13	Dec-13	Dec-14
Scenario 1	0		12					26		26	34
Scenario 2	0	0		12			12	26		26	34
Scenario 3	0		12		12	12		26	26	26	34

1 **Meeting Notes, April 1, 2011**

Goldcorp

Meeting Notes

Date of Meeting: April 1, 2011

Attendance

Goldcorp	Curtis Pedwell
	Luc Major (by teleconference)
	Ian Blue
	Kathi Litt
	Craig Pruitt
	Mary Shea
Rubicon	Daryl Boyd
	Nick Melchiorre
HONI	Naomi Martin
	Gord Caul
	Kelly Charbonneau
	Raj Ghai
	Timo Hakkarainen
	Michael Medeiros
	Ibrahim el-Nahas

The meeting opened with introductions. Three agenda items were entered by Ian Blue:

- Timing of Option 2;
- Treatment of capacity allocation under Option 2;
- Stranded asset charge.

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HONI staff did not oppose the proposition that Option 1 was duplicative. Nick Melchiorre observed that Option 1 rests on commitments and presents fewer or lower risks than does Option 2.

The discussion of stranded assets reflected the parties long standing differences. Ian Blue stated that the electricity supply issues in the Red Lake area differ from those that the TSC contemplated. Naomi Martin confirmed that Stranded Asset charges require a trigger and depend on timing which Raj Ghai sought to clarify. Curtis Pedwell described that Goldcorp's proposed Balmer TS would be loaded incrementally as RLTS was offloaded in response to Ibrahim el-Nahas' inquiry of how its capacity would be utilized. Raj Ghai indicated that the 'lumpiness' of loads to be transferred could be examined. Ian Blue also pointed out that Goldcorp's proposed 115 kV line would facilitate connecting renewable generation in the Red Lake area. HONI acknowledged that such opportunities exist and that, to their knowledge, none are under development. HONI staff acknowledged that an OEB exemption from the TSC may clarify or resolve the stranded asset issue. The OEB Codes were acknowledged to have force of law. All recognized that the OEB has power either to amend its Codes or to allow exemptions from specific provisions.

Timo Hakkarainen clarified that the CCRA is in progress; it will provide budget accuracy to 20%, provides HONI with pre-inspection rights and that its Terms and Conditions are available. Naomi Martin requested the most current load forecast. Raj Ghai probed the requested in-service date

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Ian Blue and Craig Pruitt probed the mechanisms for transferring ownership of the proposed 115kV line. Naomi Martin described that a formal agreement transferring ownership and a connection agreement are required. Ibrahim el-Nahas confirmed that SNC must satisfy HONI's standards and Raj Ghai indicated that HONI had provided SNC with the required information. Curtis Pedwell clarified that the line will be designed, engineered, constructed to operate at 115kV and that a 795mcil conductor and wood poles will be used. Raj Ghai pointed out certain discrepancies that have engaged other HONI staff.

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A discussion of the use of herbicides ensued. Mary Shea clarified that the ESR documented that herbicides would not be used in rare plant growth areas.

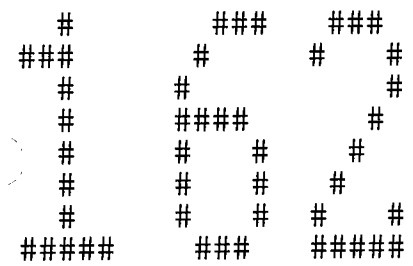
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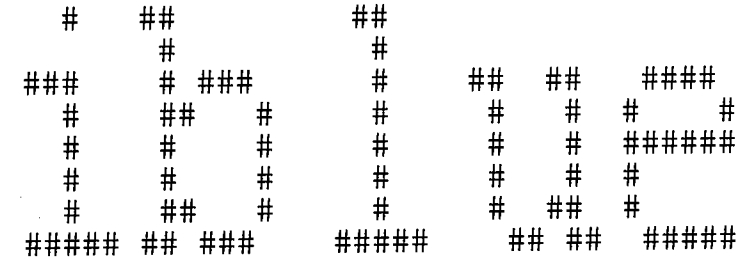
4G.A.R.D.I.N.E.R. , R.O.B.E.R.T.S. - CORPORATE OFFICE

Requester:

iblue

LAN BASE JOB NUMBER:





9/27/2011

Goldcorp

Meeting Notes

Date of Meeting:	April 1, 2011
Attendance	
Goldcorp	Curtis Pedwell
	Luc Major (by teleconference)
	Ian Blue
	Kathi Litt
	Craig Pruitt
	Mary Shea
Rubicon	Daryl Boyd
	Nick Melchiorre
HONI	Naomi Martin
	Gord Caul
	Kelly Charbonneau
	Raj Ghai
	Timo Hakkarainen
	Michael Medeiros
	Ibrahim el-Nahas

The meeting opened with introductions. Three agenda items were entered by Ian Blue:

- Timing of Option 2;
- Treatment of capacity allocation under Option 2;
- Stranded asset charge.

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APPENDIX A TO THE TSC
(PARTIAL)

APPENDIX 1

VERSION A - FORM OF CONNECTION AGREEMENT FOR LOAD CUSTOMERS

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APPENDIX 1

VERSION A - FORM OF CONNECTION AGREEMENT FOR LOAD CUSTOMERS

This Connection Agreement is made this ___ day of _____, _____,

BETWEEN

_____, a *[insert form of business organization]* duly *[incorporated/formed/registered]* under the laws of *[insert jurisdiction]* (the ATransmitter@)

AND

_____, a *[insert form of business organization]* duly *[incorporated/formed/registered]* under the laws of *[insert jurisdiction]* (the ACustomer@)

(each a AParty@ and collectively the AParties@)

RECITALS

WHEREAS the Customer has connected or wishes to connect its facilities to the Transmitter=s transmission system.

AND WHEREAS the Transmitter has connected or has agreed to connect the Customer=s facilities to its transmission system.

AND WHEREAS in accordance with its licence and the Market Rules the Transmitter has agreed to offer, and the Customer has agreed to accept, transmission service in relation to the Customer=s facilities.

NOW THEREFORE in consideration of the foregoing, and of the mutual covenants, agreements, terms and conditions herein contained, the Parties, intending to be legally bound, hereby agree as follows:

PART ONE
GENERAL

1. DEFINITIONS

1.1 In this Agreement, unless the context otherwise requires:

1.1.1 "Agreement" means this connection agreement and all of the Schedules;

1.1.2. "Code" means the Transmission System Code issued by the Board and in effect at the relevant time;

1.1.3. "Confidential Information" in respect of a Party means (a) information disclosed by that Party to the other Party under this Agreement that is in its nature confidential, proprietary or commercially sensitive and (b) information derived from the information referred to in (a), but excludes information described in section 21.1;

1.1.4. "Controlling Authority" in respect of a Party means the person appointed by that Party as responsible for performing, directing or authorizing changes in the condition or physical position of electrical apparatus or devices;

1.1.5. "Cure Period" means the period of time given to a Defaulting Party for the purposes of remedying an Event of Default, determined in accordance with section 19.2.1;

1.1.6. "Default Notice" has the meaning given to it in section 19.1.1;

1.1.7. "Defaulting Party" means a Party in relation to whom an Event of Default has occurred or is occurring;

1.1.8. "End of Cure Period Notice" has the meaning given to it in section 19.2.3;

1.1.9. "Event of Default" means a Financial Default or a Non-financial Default;

1.1.10. "Export Transmission Service" has the meaning given to it in the Transmitter=s Rate Order;

1.1.11. "Financial Default" in respect of a Party means a failure by that Party to pay an amount to the other Party when due under this Agreement, including failure to pay compensation or indemnification for loss or damage agreed to by the Parties or for amounts determined to be owed to a Party as a result of the settlement or resolution of a dispute arising under this Agreement;

1.1.12. "Force Majeure Event" in respect of a Party means any event or circumstance, or combination of events or circumstances: (a) that is beyond the reasonable control of that Party; (b) that adversely affects the performance by the Party of its obligations under this Agreement; and (c) the adverse effects of which could not have been foreseen and prevented, overcome, remedied or mitigated in whole or in part by the Party through the

exercise of due diligence and reasonable care, provided however that the lack, insufficiency or non-availability of funds shall not constitute a Force Majeure Event;

1.1.13. AInsolvency/Dissolution Event@ in respect of a Party, means any of the following:

(a) in the case of a voluntary insolvency/dissolution, if the Party shall (i) apply for or consent to the appointment of a receiver, receiver/manager, interim receiver, trustee, administrator, or liquidator (or person having a similar or analogous function under the laws of any jurisdiction) of itself or of all or a substantial part of its assets; (ii) be unable, or state or admit in writing its inability or failure, to pay its debts generally as they become due; (iii) make a general assignment for the benefit of its creditors, or make or threaten to make a sale in bulk of all or a substantial part of its assets; (iv) commit an act of bankruptcy under the *Bankruptcy and Insolvency Act* (Canada) or under any existing or future law relating to bankruptcy and insolvency; (v) commence any proceeding or other action under any existing or future law relating to bankruptcy, insolvency, reorganization, or relief of debtors seeking to have an order for relief entered with respect to it, or seeking to adjudicate it bankrupt or insolvent, or seeking reorganization, arrangement, adjustment, moratorium, winding up, liquidation, dissolution, composition, compromise or other relief with respect to it or its debts or an arrangement with creditors, or file an answer admitting the material allegations filed against it in any bankruptcy, insolvency, or reorganization proceeding; or (vi) take any corporate action for the purpose of effecting any of (i) to (v);

(b) in the case of an involuntary insolvency/dissolution, if any proceeding or other action shall be instituted in any court of competent jurisdiction seeking in respect of the Party or of all or a substantial part of its assets (i) an adjudication in bankruptcy or for reorganization, dissolution, winding up or liquidation; (ii) a composition, compromise, arrangement or moratorium with its creditors, or other relief with respect to it or its debts; (iii) the appointment of a trustee, receiver, receiver/manager, interim receiver, administrator or liquidator (or person having a similar or analogous function under the laws of any jurisdiction); or (iv) any other similar relief under any existing or future law relating to bankruptcy, insolvency, reorganization or relief of debtors;

(c) an application is made for the winding up or dissolution or a resolution is passed or any steps are taken to pass a resolution for the winding up or dissolution of the Party, except as part of a bona fide corporate reorganization; or

(d) the Party is wound up or dissolved, except as part of a bona fide corporate reorganization, unless the notice of winding up or dissolution is discharged;

1.1.14. ALender@ in respect of a Customer means a bank or other entity whose principal business is that of a financial institution and that is financing or refinancing the Customer=s facilities;

1.1.15. ANon-defaulting Party@ means a Party that is not experiencing an Event of Default;

1.1.16. ANon-financial Default@ in respect of a Party means any of the following:

(a) any breach of this Agreement by that Party, other than a breach that constitutes a Financial Default;

(b) the licence (if any) of the Party is suspended, withdrawn or revoked or expires without being replaced; or

(c) an Insolvency/Dissolution Event occurs in relation to the Party;

1.1.17. AParty Losses@ means any claims, losses, costs, liabilities, obligations, actions, judgments, suits, expenses, disbursements or damages of a Party, including where occasioned by a judgment resulting from an action instituted by a third party;

1.1.18. ARate Schedule@ means the rates in effect from time to time and the terms and conditions relating to those rates that are approved by the Board in the Transmitter=s Rate Order, including rates for connection service;

1.1.19. ASchedule@ means a schedule listed in section 4.2.1 and any additional schedules created by the Parties under section 4.3.1;

1.1.20. "Supporting Guarantee" has the meaning given to it in the "Glossary of Terms" of the "utility work protection code" referred to in the document entitled "Electrical Utility Safety Rules", published by the Electrical and Utilities Safety Association of Ontario Incorporated (now the Infrastructure Health and Safety Association) and revised January, 2009, as may be amended from time to time; and

1.1.21. AWork Protection@ means a state or condition whereby an isolated or isolated and de-energized condition has been established for work on facilities and will continue to exist, except for authorized tests, until the work relating thereto has been completed.

1.2. In this Agreement, unless the context otherwise requires, each of the following words and phrases shall have the meaning given to it in the Code (whether or not capitalized in the Code or in this Agreement): Aassigned capacity@; Aavailable capacity@; ABoard@; Abusiness day@; "Code revision date"; Aconnect@; Aconnection facilities@; Aconnection point@; Aconnection service@; Acontracted capacity@; Acircuit breaker@; Aemergency@; Afacilities@; Afault@; Aforced outage@; Agood utility practice@; Aisolate@; Aisolating device@; Alicence@; Aload shedding@; Amaintenance@; Aoutage@; Aplanned outage@; Apromptly@; Aprotection system@; Aprotective relay@; ARate Order@; Areliability@; Areliability organization@; Areliability standards@; Arenewable generation@; Asingle contingency@; Asite@; Atransmission facilities@; Atransmission service@; "transmission system" and Awork@.

2. INTERPRETATION

2.1. Words and phrases contained in this Agreement (whether or not capitalized) that are not defined herein shall have the meanings given to them in the *Electricity Act, 1998,* S.O. 1998, c. 15, Schedule A, the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, or in any regulations made under either of those *Acts*, as the case may be.

2.2. Headings are for convenience only and shall not affect the interpretation of this Agreement.

2.3. In this Agreement, unless the context otherwise requires:

(a) words importing the singular include the plural and vice versa;

(b) words importing a gender include any gender;

(c) words importing a person include: (a) an individual, (b) a company, sole proprietorship, partnership, trust, joint venture, association, corporation or other private or public body corporate; and (c) any government, government agency or body, regulatory agency or body or other body politic or collegiate;

(d) a reference to a person includes that person=s successors and permitted assigns;

(e) a reference to a Party includes any person acting on behalf of that Party;

(f) a reference to the Customer=s facilities is limited to such facilities as are relevant to the Customer=s connection to the Transmitter=s transmission system under this Agreement;

(g) a reference to a body, whether statutory or not, that ceases to exist or whose functions are transferred to another body is a reference to the body that replaces it or that substantially succeeds to its powers or functions;

(h) a reference to a document (including a statutory instrument) or a provision of a document includes any amendment or supplement to, or any replacement of, that document or that provision;

(i) the expression Aincluding@ means including without limitation, and the expressions Ainclude@, Aincludes@ and Aincluded@ shall be interpreted accordingly; and

(j) where a word or phrase is defined in this Agreement, including by virtue of the application of section 1.2, or in any document referred to in section 2.1, other parts of speech and grammatical forms of the word or phrase have a corresponding meaning.

2.4. Except when an emergency is anticipated or is occurring, if the time for doing any act or omitting to do any act under this Agreement expires on a day that is not a business day, the act may be done or may be omitted to be done on the next day that is a business day.

3. INCORPORATION OF TRANSMISSION SYSTEM CODE

3.1 The Code is hereby incorporated in its entirety by reference into, and forms an integral part of, this Agreement. Unless the context otherwise requires, all references in this Agreement to Athis Agreement@ shall be deemed to include a reference to the Code.

3.2. Without limiting the generality of section 3.1:

(a) the Transmitter hereby agrees to be bound by, and at all times to comply with, the Code; and

(b) the Customer acknowledges and agrees that the Transmitter is bound at all times to comply with the Code in addition to complying with the provisions of this Agreement.

4. SCHEDULES

4.1. Incorporation of Schedules

4.1.1. The Schedules form a part of, and are hereby incorporated by reference into, this Agreement.

4.2. Schedules

4.2.1 The following are the Schedules to this Agreement:

Schedule A	-	Single Line Diagram, Description of the Customer=s Connection Point(s) and Details of Specific Operations
Schedule B	-	Transmission Services and Associated Charges
	-	Attachment B1
Schedule C	-	Cure Periods for Defaults
Schedule D	-	Fault Levels and Modifications Requiring Transmitter Approval
	-	Attachment D1
Schedule E	-	General Technical Requirements
Schedule F	-	Additional Technical Requirements for Tapped Transformer Stations Supplying Load
Schedule G	-	Protection System Requirements
Schedule H	-	Facilities Deemed Compliant and Obligation to Comply
Schedule I	-	Exchange of Information
Schedule J	-	Embedded Generation, Bypass, Assigned Capacity and True-Ups
	-	Attachment J1
	-	Attachment J2
Schedule K	-	Contacts for Purposes of Notice

1 **SECTIONS 4.1.3, 6.7.6, 6.7.7 AND 11.2 OF THE TSC**

4. STANDARDS OF BUSINESS PRACTICE AND CONDUCT

4.1 GENERAL REQUIREMENTS

4.1.1 Subject to section 4.1.2, a transmitter shall connect a customer's facilities and shall offer and provide transmission services to a customer subject to that customer entering into or having a connection agreement with the transmitter. Such connection agreement shall be in the form set out in the applicable version of the connection agreement set out in Appendix 1. Where the customer is an unlicensed transmitter, the version of the connection agreement set out in Appendix 1 to be used shall be determined based on the nature of the facility that is connected to the unlicensed transmitter's transmission system. Where both a generation facility and a load facility are connected to the unlicensed transmitter's transmission system, this may require two connection agreements.

4.1.2 A transmitter may not enter into a connection agreement on terms and conditions other than those set forth in the applicable version of the connection agreement set out in Appendix 1 or amend the terms and conditions of a connection agreement relative to the terms and conditions set forth in the applicable version of the connection agreement set out in Appendix 1 except as expressly contemplated in the applicable version of the connection agreement set out in Appendix 1 or with the prior approval of the Board.

4.1.3 Where a transmitter does not have a connection agreement with a customer whose facilities were connected to the transmitter's transmission system prior to the Code revision date, the transmitter shall be bound by the applicable version of the connection agreement set out in Appendix 1 in relation to that customer and shall be permitted to consider that customer's continued acceptance of transmission service as acceptance by that customer of all of the terms and conditions of the connection agreement in the form set out in the applicable version of the connection agreement set out in Appendix 1.

4.1.4 A transmitter shall ensure that all connections to its transmission system are made by it with due regard for the safety of the transmitter's employees and the public.

network facility.

6.7.5 When a load customer provides its own connection facility to serve new load or transfers new load to the connection facility of another person, the transmitter shall not require bypass compensation from that customer.

6.7.6 Subject to sections 6.7.2, 6.7.7 and 6.7.8, for all or a portion of existing load a load customer may bypass a transmitter-owned connection facility with its own connection facility or the connection facility of another person, provided that the load customer compensates the transmitter.

6.7.7 For the purposes of sections 6.7.6 and 11.2.1, but subject to section 6.7.8, the transmitter shall calculate bypass compensation by first multiplying the net book value of the bypassed connection facility, including a salvage credit and reasonable removal and environmental remediation costs, if applicable, by the bypassed capacity on the relevant connection facility. The transmitter shall then divide the resulting figure by the total normal supply capacity of the bypassed connection facility. For purposes of this calculation:

(a) the bypassed capacity on the relevant connection facility shall be equal to the difference between the customer's existing load on that connection facility at the time of bypass and the customer's average monthly peak load in the three-month period following the date on which bypass occurred; and

(b) the normal supply capacity of the bypassed connection facility shall be determined by the transmitter in accordance with the Board-approved procedure referred to in section 6.2.7.

6.7.8 Where an economic evaluation, including an economic evaluation referred to in section 6.2.24, 6.3.9 or 6.3.17, was conducted by a transmitter for a load customer in relation to a connection facility on the basis of a load forecast, a transmitter shall not, during the economic evaluation period to which the economic evaluation relates, require bypass compensation from a customer under section 6.7.6 in relation to any load that represents that customer's contracted capacity.

6.7.9 A transmitter should avoid overloading a connection facility above its total normal supply capacity. Where a connection facility has been overloaded, and a customer transfers the overload to its own connection facility or to the connection facility of another person, the transmitter shall not require bypass compensation from that customer.

the transmitter shall not for any purpose treat that generation facility as embedded generation in relation to that load facility.

11.1.5 The reference to "for all purposes" and "for any purpose" in sections 11.1.1 to 11.1.4 includes the purpose of determining whether bypass compensation is required to be paid by the load customer and the purpose of determining the manner in which network charges will be applied.

11.2 BYPASS COMPENSATION

11.2.1 A transmitter shall require bypass compensation from a customer if:

(a) the customer disconnects its facility from the transmitter's connection facilities and subsequently connects that facility to a generation facility or to the facilities of any person such that both the load facility and a generation facility are connected to the transmitter's transmission facilities on that person's side of the connection point; and

(b) the transmitter will no longer receive line connection or transformation connection rate revenues in relation to that facility.

The transmitter shall calculate bypass compensation using the methodology set out in section 6.7.7.

11.2.2 Where a transmitter becomes aware that a customer intends to bypass a transmitter-owned connection facility in the manner described in section 11.2.1, the transmitter shall promptly notify all other load customers served by the connection facility that is intended to be bypassed.

11.2.3 A transmitter shall not require bypass compensation from a customer for any reduction in a customer's load served by the transmitter's connection facilities that the customer has demonstrated to the reasonable satisfaction of the transmitter (such as by means of an energy study or audit) has resulted from embedded renewable generation (determined in accordance with section 11.1), energy conservation, energy efficiency or load management activities, except in accordance with the transmitter's Rate Order.

1 **RP-2002-0120, Phase 1 Policy Decision with Reasons, Chapter 5**

RP-2002-0120

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

AND IN THE MATTER OF a proceeding pursuant to sub-section 19(4), and 74 of the Ontario Energy Board Act, 1998 to review the Transmission System Code and Related Matters.

BEFORE:

Paul Sommerville
Presiding Member

Art Birchenough
Member

Fred Peters
Member

PHASE I POLICY DECISION WITH REASONS

June 8, 2004

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5 TRANSMISSION SYSTEM BYPASS

184

5.1 Transmission System Bypass- Board Proposition No. 5. 1

185

The Code should contain a definition of "Embedded Generation" which addresses such factors as ownership, location and other relevant factors.

186

5.1.1 Analysis and Findings

187

188

The issue of what constitutes Embedded Generation was addressed by the Board in RP-1999-0044, which was a Hydro One rates case. Whether generation is embedded in relation to a transmission customer affects how, and how much the customer is to be charged by the transmitter for transmission services. The issue was also addressed more recently in two subsequent proceedings, RP-2002-0143 and RP-2002-0118. Those proceedings dealt with complaints brought by transmission customers, each of whom asserted that Hydro One refused to recognize certain generators as embedded and therefore was billing the customers in a manner not consistent with the governing rate order. In each proceeding, the Board concluded that the generation in question was embedded because it was connected on the customer side of the point of connection between Hydro One and the transmission customer.

189

This Decision, however, looks at the issue more broadly to determine under what circumstances generation ought to be considered to be embedded, examining the various possible combinations of old and new generation with old and new load. The Board is of the view that a comprehensive definition of Embedded Generation will provide greater regulatory certainty, which should facilitate investment in desirable new supply. The determination as to whether generation is embedded in a variety of scenarios will affect how the transmitter charges its customer, as set out in RP-1999-0044.

190

The definition of Embedded Generation was one of the seven issues addressed at the Settlement Conference. The settlement discussions resulted in the development of two options, each supported by different parties. Appendix B (Facilitator's Report, Issue No. 4) provides a detailed description of the two options. There were several similarities between the two options.

191

For both options, there was consensus that the generation is embedded if it is connected behind the point of connection between the facilities of the transmitter and the transmission customer. This is consistent with the Board's conclusion in RP-2002-0143 and RP-2002-0118. There was also agreement that generation is embedded if the generator is connected directly to a distribution system. This is consistent with RP-1999-0044.

192

There was consensus, for both options, that the ownership of the generation, the voltage level at which the generator is connected, and the type of licence held by a customer are not relevant to the question as to whether generation is Embedded or not. This, too, is consistent with the RP-2002-0143 and RP-2002-0118 Decisions. There was also agreement that it was immaterial whether the Embedded Generation capacity was greater than or less than the customer's load.

193 The parties concluded, for both options, that a Board review process should be available to resolve disputes as to whether a specific generation facility should be treated as embedded where the generation asset and the load are connected to the same Line Connection facility owned by a transmitter. Recourse to the review process would not be required if the generation was renewable generation. In such circumstances, the renewable generation would be deemed to be embedded. The parties also agreed that if new generation met the criteria for Embedded Generation, it did not matter if that generation was connected to existing or new load. However, the options diverge in their proposed treatment of new or reconfigured connections between existing load and existing generation. Option 1 would make recourse to Board review available in all such circumstances where the parties were unable to resolve their differences, while Option 2 would not provide for such recourse where the situation involved new load connected to existing generation, which should be considered to be embedded.

194 In Option 1, where generation qualified as Embedded in relation to a load, there would be an automatic rate adjustment for the transmitter based on the removal of that load. CAC and VECC did not support this aspect of Option 1.

195 Option 1 required generation and load to be located on a single property, while Option 2 did not. Option 2 did not require a Board review process for generation with a capacity of less than 20 MW.

196 In the Settlement Conference, the IMO took the position that the emerging definition of Embedded Generation in these proceedings, which is used for the purposes of establishing transmission rates and the consideration of Code issues, appeared to be different than the definition used in connection with the Market Rules. The IMO was of the view that it may be impractical to try to reach a common definition of Embedded Generation for both rate making purposes and reliability and connection purposes as addressed by the Market Rules.

197 There are four possible combinations of generation and load which the Board considered in deciding the issue of what constitutes Embedded Generation for the purposes of the Code. These are:

198 • new generation - new load

199 • new generation - existing load

200 • existing generation - new load, and,

201 • existing generation - existing load.

202 The Board's approach is driven in part by the objectives of the Act as expressed in Section 2 thereof. In addition, the Board is mindful of the overall state of the electricity market in Ontario, and the importance of accommodating, to the extent appropriate under its statutory mandate, the introduction of new and expanded generation to meet existing and new demand.

203 The Board will address the first two combinations together, since they each involve new generation and can be reasonably dealt with in the same manner.

204 The Board recognizes that the transmitter may lose some revenue from existing load when such load is subsequently met by new Embedded Generation. It is reasonably predictable that the advent of new generation, including new Embedded Generation, will result in overall improvement and growth in the electricity market. Much of the loss of transmission revenue is likely to be reduced or perhaps totally offset by load growth in the market as a whole. The Board also recognizes that this may lead to some increase in the costs borne by transmission ratepayers, but this should be offset by the expected reduction in overall energy cost resulting from entry of new generation. New generation means there is more supply to meet peak demand which should reduce energy costs for all consumers. Ontario is currently facing a tight supply situation and has had to rely on expensive sources, including imports, from time to time to meet peak demand. Historically, Embedded Generation has tended to be in the form of cogeneration, which is a more energy efficient and cost effective form of generation than most merchant generation. Embedded Generation may also have the effect of enhancing reliability and reducing inefficiencies associated with transmission congestion.

205 The Board is of the view that to the extent that all ratepayers will benefit from lower energy costs and a more effective and efficient transmission system, it is appropriate for them to bear additional transmission costs that may result from the rate treatment set out in RP-1999-0044 for Embedded Generation.

206 The Board recognizes that the commercial realities of the market place are such that there will often not be common ownership of load and generation. The Board considers it to be important that the imagination and industry of the marketplace be permitted adequate scope to develop configurations and arrangements that will serve the important societal goal of enhancing the efficiency and effectiveness of the electricity supply system in Ontario. It would be an unnecessary barrier to new generation to require common ownership as a criterion for qualification as Embedded Generation. For similar reasons, it is not necessary to require that the load and the generation be located on the same property. While Embedded Generation is often located on the same property as the load customer, there is no reason that generation should not be considered embedded if it is located on separate property, provided that it is connected on the transmission customer side of the connection point/interface between the transmitter and that transmission customer.

207 Generation can be connected at transmission or distribution voltage. The choice is often driven by economic or system efficiency factors which ought not to affect the question of whether the generation is Embedded. That was the Board's view in the RP-2002-0143 and RP-2002-0118 Decisions and there is no reason to take a different approach for the purposes of the revised Code.

208 There are many commercial arrangements that can be entered into by new generators and new types of arrangements will occur as the Ontario electricity market continues to evolve. The Board does not believe that the form of commercial arrangement entered into by new generation should affect whether that generation is considered to be embedded. To do so would be to run the risk of creating barriers to new generation. This is consistent with the Board's approach in RP-2002-0143 and RP-2002-0118.

209 The Board recognizes it is possible that Embedded Generation capacity may exceed the related load. It would be inconsistent with the objective of ensuring a reliable supply of electricity for Ontario to limit Embedded Generation capacity to the size of the load. Similarly, the number of generating units ought not to be a factor in determining whether new generation is Embedded.

210 The Board therefore finds, for the purposes of the revised Code, any new generation that is connected on the customer side of the connection between a transmission customer and the transmitter will be considered embedded, and therefore not transmission system bypass, regardless of:

211 • whether the customer load is new or existing;

212 • who owns the generation;

213 • where the generation is located;

214 • what voltage the generation is connected at;

215 • what commercial arrangements the generator enters into; and

216 • the size or the number of units of generation capacity.

217 For the purposes of the revised Code, the Board is of the view that the appropriate date to distinguish between new and existing generation shall be the date that this Decision is published on the Board's web site. This means that any generation facilities which go into online operation on or after the date that this Decision is published will be considered to be new. This does not affect any Board Decisions made in RP-1999-0044 and, as a result, October 31, 1998 will continue to be the date used for the application of rates under the current rate order.

218 If new generation is Embedded in relation to a load customer, the transmitter will charge for transmission services in accordance with the RP-1999-0044 Decision.

219 The revised Code will not provide for an automatic rate adjustment for the transmitter when load is lost as a result of new Embedded Generation, as proposed in Option 1. The Board prefers not to address one narrow aspect of what constitutes just and reasonable rates in isolation. Transmission rates are best addressed in a rates proceeding which looks at all rates issues together and establishes just and reasonable rates.

220 The Board will address the last two combinations together since they both involve existing generation.

221 It is possible that by reconfiguring existing transmission system connections, existing generation can become embedded in relation to an existing transmission customer. Similarly, new load can be

connected in such a way that existing generation can be Embedded in relation to that new load. The Board is not prepared to consider either combination as Embedded Generation for the purposes of RP-1999-0044.

222 Reconfiguration may result in narrow benefits for the generator or associated load customer but there is no apparent benefit to ratepayers who will bear the cost of assets that are stranded as a result of reconfiguration, primarily because no new generation has been added. Such reconfiguration amounts to bypassing the transmitter, which will increase the cost to be borne by other ratepayers unless the transmitter is compensated for the bypass.

223 In the revised Code, the Board will not consider any reconfigured existing generation to be Embedded for the purposes of RP-1999-0044 and gross load billing will, therefore, apply for both Network and Connection charges.

224 The Board emphasizes that for new Embedded Generation situations that are consistent with the revised Code, the bypass of transmitter-owned existing Transformation and Line Connection facilities serving existing load customers is allowable. If the bypass results in reduction of usage of the connection facilities, as set out in RP-1999-0044, the transmitter will be billing the customer on a gross load basis for the relevant Connection assets. However, if the existing customer(s) disconnects from the transmitter's Connection assets to take service from a new and, in effect, duplicative line and transformation connection owned by a party other than the transmitter, the transmitter's Line Connection and Transformation Connection assets, as the case may be, would be stranded, but the transmitter would not be compensated through gross load billing as the Board envisioned in RP-1999-0044. As a result, in such cases of bypass, the compensation for these Connection facilities will be a responsibility of the customer(s), and would be based on the NBV of the stranded assets.

225 As a result of these findings, a Board review process, as set out in the Facilitator's Report, is not necessary. It is also not necessary to consider the establishment of the Local Interrelated System concept as discussed at the Settlement Conference.

226

5.2 Transmission System Bypass- Board Proposition No. 5. 2

227 *The Code should reflect the principle with respect to the rate treatment of new Embedded Generation (i.e., net billing for Network and gross billing for Connection) established in RP-1999-0044.*

228

5.2.1 Analysis and Findings

229 Hydro One agreed with and supported RP-1999-0044. Generators agreed that rate treatment should be aligned with the principles established in RP-1999-0044. Large consumers submitted that net load billing for both Connection and Network charges should be applied in a manner consistent with the principles established in RP-1999-0044. The EDA generally supported the same proposition. In addition, the EDA suggested that the revised Code should include a specific clause to the effect that transmission load displaced by Embedded Generation of 1MW or less ought not to be considered system bypass. CAC and VECC submitted that there is a potential conflict with Proposition No.5.4,

below, and that gross load billing could be viewed as a measure that discourages the development of Embedded Generation. In their view, Proposition No. 5.2 should take precedence over Proposition No. 5.4.

230 In order to ensure consistent rate treatment, the Board is of the view that transmission customers with new Embedded Generation, as defined in this Decision, will be subject to the rate treatment established in RP-1999-0044. That is, net load billing for Network charges and gross load billing for Connection charges, except for Embedded Generation of 1 MW per unit or less where net load billing applies for both Network and Connection charges. The Board will increase the qualifying limit for exemption from gross billing from 1 MW per unit to 2 MW per unit for renewable generation installations. This increase reflects a societal interest in increasing the proportion of renewable generation in the overall generation mix in the province, and the technical reality that the output of some renewable source generation equipment has advanced from under 1 MW per unit to just under 2 MW per unit. It is intended that renewable energy projects comprised of generation units producing 2 MW or less per unit will be eligible for net billing charges on relevant connection facilities. The Board notes that there was a request to increase this qualifying limit to 20 MW. The Board rejects this proposal as being excessive.

231 There are references to "cleaner" energy sources throughout these propositions. There was a general consensus amongst the parties that this terminology was ambiguous, undefined and should be replaced with "renewable" energy sources. The Board agrees. The parties involved in this process also agreed to a definition of "renewable energy sources" as set out in the Facilitator's report. However, the Board believes it would be prudent to use an existing definition of renewable energy, as developed by the Ontario Government, to avoid having competing definitions in the Ontario electricity market. The Government recently released its Request for Qualifications (RFQ) for 300 MW of new renewable capacity. That RFQ contained such a definition which states that: a *"Renewable Generating Facility" refers to a facility that generates electricity from the following sources: wind, solar, Biomass, Bio-oil, Bio-gas, landfill gas, or water.* As such, the Board has decided to adopt this definition for the purposes of the revised Code.

5.3 Transmission System Bypass- Board Proposition No. 5. 3

232

233 *The Code should contain provisions establishing the right of load customers to construct their own connection facilities (e.g., transformation stations) regardless of the existence of Available Capacity, provided that the new facilities are designed to meet needs created by the development of new loads that are not presently served by existing transmission Connection facilities. The construction of such facilities should not be considered bypass. New load is defined as load which exceeds the CATC and based on the greater of either:*

234 1. *the highest monthly peak load over the past 5 years for the relevant delivery points;*

235 *or*

236 2. *the Available Capacity of the existing feeder positions associated with the relevant delivery point.*

5.3.1 Analysis and Findings

237

238 This proposition is related to and follows from the propositions that were addressed in sections 4.2 in 4.3 above in the chapter dealing with Available Capacity. As the Board has indicated above, a transmitter shall not have an automatic entitlement to serve new load on its own Connection facilities.

239 The Board has decided that the revised Code shall contain provisions establishing the right of load customers to construct their own transformation connection facilities, regardless of the existence of Available Capacity, provided that the new facilities are needed to meet the new load. This right also applies to overloads on existing Transformation and Line Connection facilities, but only to the extent of the overload portion of the customer's load. The construction of such facilities shall not be considered bypass. In section 5.5.1, the Board addresses situations covering customers' existing load on transmitter-owned transformation connections.

240 The Board clarified that for line connection facilities, a customer will have to demonstrate that it has new load that cannot be met by the Available Capacity on the transmitter's existing Line Connection facilities, before it can construct its own line connection facilities, except where it involves overloaded Connection facilities. Where Available Capacity is not adequate, that customer shall have the right to meet its own line connection requirements and the construction of such facilities shall not be considered bypass. The rationale for this approach to line connection facilities is to ensure that there will not be unnecessary duplication of existing lines.

241 The rationale underpinning this approach is the Board's interest in creating opportunities for enhanced competition in the provision of construction and consulting services for connection facilities. Competition should be applicable where the system as a whole cannot reasonably be said to be compromised or unduly disadvantaged by such diversity. In the Board's view, such competition should result in an overall enhancement and optimization of the transmission system, and the creation of appropriate new business opportunities for other sectors of the economy.

242

5.4 Transmission System Bypass- Board Proposition No. 5. 4

243 *The Code should contain provisions which establish that the development of new Embedded Generation should not be considered to be system bypass. Any measures that discourage such development should be prohibited and where such measures are in existing agreements they should be unenforceable.*

5.4.1 Analysis and Findings

244

245 Hydro One generally agreed with the proposition. However, Hydro One also submitted that prohibiting measures that discourage Embedded Generation could lead to the construction of Embedded Generation that is justified solely on the strength of avoiding transmission charges (i.e., uneconomic bypass) and that this would be an inappropriate market signal which could discourage the development of more efficient forms of generation from a societal perspective. Hydro One

submitted that this could result in higher transmission rates for remaining customers and the potential stranding of significant parts of the transmission system.

246 Generators were in agreement with the proposition. TransAlta objected to the inclusion of a "no bypass" clause in its existing Connection and Cost Recovery Agreement ("CCRA") with Hydro One, which TransAlta signed under protest. OPG in a separate application dated March 4, 2002, made requests including removal of a "no-bypass" section from Hydro One's CCRA template agreement. The generators stated that any existing contract that is inconsistent with the new Code should be amended to come in line with the revised Code.

247 GEC, CIELA and OSEA submitted that load reduction should also be excluded from the definition of bypass.

248 Large consumers agreed with the proposition, which is consistent with RP-1999-0044. AMPCO further submits that transmitters should not be able to circumvent RP-1999-0044 through additional contractual provisions.

249 Distributors were generally supportive. Generation supplying new load should not be considered bypass, but the Code should state that existing load displaced by Embedded Generation greater than 1MW per unit is to be considered bypass. The Code should contain criteria for calculating the gross load bill as a result of bypass. Bypass contributions should be reduced to the extent that:

- 250 displaced transmission Connection assets have reached the end of their useful life;
- 251 displaced capacity is built back by new transmission customer load growth;
- 252 displaced capacity is reallocated by the transmitter to supply another customer;

253 and

- 254 the Embedded Generation is down at the time of the billing peak in a particular month.

255 CAC and VECC submitted that Proposition No. 5.2, above, should take precedence over Proposition No. 5.4. CAC and VECC further submitted that the Board should clarify that the reference to "system bypass" in the first sentence relates specifically to Network system bypass, and that the second sentence does not preclude gross billing for Connections. CAC and VECC also requested clarification that the second sentences in Propositions 5.4 and 5.6 do not preclude measures designed to achieve a balance between transmission system integrity and encouraging new generation or energy conservation or efficiency.

256 The Board notes that, generally, there was consensus that the revised Code should state that the development of new Embedded Generation, consistent with section 5.2 of this Decision, is not considered to be system bypass. To a large degree, this issue has already been

addressed in section 5.2 Transmitters should not do anything that would discourage the development of new Embedded Generation. To the extent that provisions in existing agreements between a transmitter and customer prevent or discourage the development of new Embedded Generation or treat it as bypass, the revised Code will provide that such provisions are not to be enforced by the transmitter. The Board reiterates that load customers with Embedded Generation are to be billed in accordance with RP-1999-0044 as discussed above in section 5.2.1.

257

5.5 Transmission System Bypass- Board Proposition No. 5. 5

258

The Code should contain provisions that would require transmitters to replace Connection facilities that have become fully depreciated at no charge to the customers served from that facility. The Code should, however, allow customers to construct their own connection facilities to replace transmitter's assets which have been fully depreciated and are, therefore, not considered to be stranded. If the Connection facilities serve more than one customer, the same rule applies. If, in this situation, some of the customers choose to remain with the transmitter's Connection pool, the transmitter will provide for appropriate new facilities at no charge to these customers.

259

5.5.1 Analysis and Findings

260

Transmitters disagreed with the proposition. Hydro One submitted that it ignores the fact that facilities are built to accommodate future load and continue to be used and useful beyond their accounting life, and that the transmitter will continue to operate and maintain the facility, and include the costs in its cost of service. Value does not depreciate uniformly over time as components age and it is inconsistent with the principles of depreciation accounting. Depreciation rates are established on a pool basis to recover capital costs over the average life of assets; if some assets are prematurely abandoned, then depreciation rates and, consequently, transmission rates increase. In Hydro One's view, it would be incompatible with the current uniform rate structure and would also represent a move towards asset-specific pricing, increasing inequities among customers connected to newer facilities and those connected to older facilities. Hydro One further submitted that if bypass is allowed at the end of accounting life, then assets that fail prior to their accounting life should be replaced by the customer served by those assets, at their own cost. Hydro One proposed that the Code should permit bypass only at the end of an asset's physical life, as currently provided.

261

GLPL interpreted the proposition to mean that a transmitter would not charge a customer who is connecting to a fully depreciated Connection facility and that the transmitter must replace such facilities at no charge to a customer. GLPL disagreed with this proposition because the asset may still be serviceable. It argued that transmitters cannot be expected to replace Connection facilities for free and that it is inefficient to allow a customer to build its own connection facility to replace a transmitter's still useful, but fully depreciated, Connection facility.

262

Generators were generally supportive of the proposition. APPrO submitted that the Code should allow customers to buy down the remaining value of assets that are substantially depreciated in appropriate circumstances. OPG supported protecting customers from new stranded costs brought about by the transmitter's rebuilding of Connection facilities that have reached the end of their life,

addressed in section 5.2 Transmitters should not do anything that would discourage the development of new Embedded Generation. To the extent that provisions in existing agreements between a transmitter and customer prevent or discourage the development of new Embedded Generation or treat it as bypass, the revised Code will provide that such provisions are not to be enforced by the transmitter. The Board reiterates that load customers with Embedded Generation are to be billed in accordance with RP-1999-0044 as discussed above in section 5.2.1.

5.5 Transmission System Bypass- Board Proposition No. 5. 5

257

258

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259

5.5.1 Analysis and Findings

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Generators were generally supportive of the proposition. APPrO submitted that the Code should allow customers to buy down the remaining value of assets that are substantially depreciated in appropriate circumstances. OPG supported protecting customers from new stranded costs brought about by the transmitter's rebuilding of Connection facilities that have reached the end of their life,

but in its view, the language used was problematic. OPG further submitted that the transmitter should not be required, or permitted to replace a facility solely because it is depreciated, as this is unlikely to match the end of the facility's operating life.

263 Large consumers agreed with the proposition. AMPCO submitted that the replacement of facilities by the transmitter at the transmitter's cost or replacement by the customer at the customer's cost should be at the customer's choice. The Code should include an allowance for cases where the Connection facility is substantially depreciated, such that the customer would have the option of reimbursing the transmitter for the remaining value of the assets. Imperial submitted that the Code should allow customers to construct their own connection facilities to replace a transmitter's assets which have been fully depreciated and are, therefore, not to be considered stranded.

264 The EDA was generally supportive of the proposition. The EDA further submitted that the transmitter should disclose to what extent existing facilities have reached the end of useful life and the revised Code should include a predefined methodology or standards for calculating the end of useful life. ECMI noted that the proposition appears to permit bypass only where Connection assets have been fully depreciated and to require the replacement of Connection facilities once they have become fully depreciated, not recognizing that assets may be serviceable long after they are fully depreciated. Reconstruction by the transmitter should only be required if the customer does not wish to purchase or construct alternate transmission capacity.

265 CAC and VECC submitted that to ensure a proper comparison between the cost of continued ownership by the transmitter and ownership by the customer, the transmitter must be allowed to undertake an economic evaluation and charge for the new facilities. It is inappropriate that customers be allowed to buy down the remaining net book value in situations where the assets are not fully depreciated.

266 ECAO submitted that customers should be permitted to replace depreciated assets with their own assets as a way to bring about greater competition and efficiency in connection activities. Customers are more likely to choose to take responsibility for assets, and only replace them when appropriate, rather than to duplicate assets.

267 Enbridge and Union Gas submitted that the Code should clarify that, while customers may not be directly charged for the replacement of fully depreciated Connection facilities, the costs will be included in the rate base and recovered from all customers. The Code should also indicate that replacement is required when assets are no longer capable of providing safe and reliable service and not automatically as soon as they are fully depreciated.

268 The Board agrees that Connection facilities should only be replaced by a transmitter if they have reached the end of their useful life, even if they have been fully depreciated. The Board recognizes that within a group of assets, different assets will have different actual lifespans, even though as a group, they are depreciated at the same rate. Some assets will require replacement before they have been fully depreciated, while others will still be useful even though fully depreciated. Such replacement should be at no cost directly to any individual customer, recognizing that the replacement assets will be included in rate base and subject to depreciation. The obligation to replace Connection facilities that are at the end of their useful life includes an obligation to ensure that

Connection facilities are properly repaired and maintained on an ongoing basis, to ensure that they perform at the required technical standards and level of reliability.

269 The Board has decided that where a transmitter's Connection assets have been fully depreciated, the revised Code shall allow a customer to construct its own connection facilities, at the customer's own cost, to replace the transmitter's Connection assets. This does not constitute bypass since the transmitter's Connection assets have been fully paid for, and accounted for in the rate structure. If the Connection assets serve more than one customer, the same rule applies. In this situation, if some of the customers choose to remain connected to the transmitter's facilities, the transmitter will continue to have an obligation to replace the Connection facilities at the end of their useful life, at no charge to those customers, taking into account that less capacity is required to serve those remaining customers.

270 The Board finds that the determination of whether the Connection facilities have become fully depreciated shall be based on the NBV of those facilities. Where the NBV of a particular Connection facility, serving existing load, is greater than zero, a customer will not be permitted to construct its own connection facilities to supply that existing load, unless it involves a transformation facility, as this would constitute bypass. Where it does involve a transformation facility, the transmitter shall be compensated as outlined above in section 4.8.1 in the Chapter dealing with Available Capacity.

271 The underlying rationale for the Board's view is its interest in providing reasonable opportunities for new approaches to system change, so long as existing customers and the transmitters are not unduly prejudiced. By allowing customers a new range of options and introducing increased diversity in the development of new transmission connection assets within the system, the Board expects to see overall optimization. The approach of using NBV is consistent with the rate structures governing the transmission assets and incorporates them directly in the determination as to whether bypass is in fact being effected.

272 It is important to clarify that the fact that a transmission asset may have been fully or substantially depreciated is not of itself an adequate rationale for its replacement. Assets should only be replaced at the end of their useful life according to the transmitter's asset management program. These programs normally include an engineering determination of when an asset is no longer reasonably capable of providing safe and reliable service. Premature replacement should be considered to be imprudent.

5.6 Transmission System Bypass- Board Proposition No. 5. 6

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274 *The Code should contain provisions which establish that reductions in load attributable to measures for energy conservation, energy efficiency, load management or use of cleaner energy sources should not be considered system bypass. Measures discouraging such activities, such as a transmitter imposing a minimum payment obligation to cover present loads, should be prohibited and where such measures are in existing agreements they should be unenforceable.*

5.6.1 Analysis and Findings

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Hydro One generally agreed with this proposition, provided that there was no subsidization by the transmission ratepayers. Hydro One noted its concern, referenced elsewhere in this Decision, regarding "unenforceable terms". Specifically, it submitted that existing agreements should not be changed or affected without the consent of both parties. Hydro One argued that any resulting revenue shortfall to be absorbed by the transmission system pool should be recoverable by the transmitter in rates.

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Generators agreed that load reduction in any form should not be considered bypass. However, generators were also of the view that "cleaner energy sources" is an ambiguous term and that the Code should not distinguish between generation fuel types on the basis of whether they are"cleaner generation sources", especially without a definition of "cleaner energy source" in the Code.

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Large consumers were in agreement with the proposition.

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The EDA was generally supportive of the proposition but suggested replacing "cleaner" with "renewable" or defining "cleaner" in the Code.

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CAC and VECC submitted that clarification of what is meant by the term "cleaner energy sources" is required and that RP-1999-0044, with respect to cost allocation and rate design for transmission rates, clearly established a 1 MW limit for net billing on Connection facilities associated with Embedded Generation regardless of the source of the generation concerned. In the view of CAC and VECC, the 1 MW limit should apply equally to all types of Embedded Generation.

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Enbridge and Union Gas submitted that the Code should establish that Embedded Generation and load reductions attributable to energy efficiency, energy conservation, load management or the use of cleaner energy sources are not system bypass. However, a broad prohibition against minimum annual charges should not be instituted, as these charges protect existing customers and shareholders from stranded facility costs. The Code should not inadvertently prohibit the use of Lost Revenue Adjustment Mechanism accounts, which are intended to protect the utility against losses in revenue as a result of demand side management ("DSM") initiatives. DSM initiatives provide a system benefit and customers are required to pay for the forgone margin revenue that results from energy conservation measures initiated by the utility. If minimum load payments are prohibited and unenforceable, transmitters should not be prohibited from recovering legitimate costs as approved by the Board.

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The Board is of the view that reductions in load, attributable to energy conservation, energy efficiency, and load management, should not be considered system bypass, under any circumstances. The promotion of energy efficiency and conservation is one of the objectives of the Act and is particularly important at a time when Ontario faces a tight supply of electricity. There appears to be consensus that the Ontario electricity market requires increased demand response and conservation measures, and many initiatives are underway to facilitate achievement of that goal. The Board is of the view that it is particularly important to ensure that the Code does not contain or create any barriers or disincentives for energy efficiency and conservation initiatives.

283 As indicated under Principle No. 8 and Principle No. 9 in Chapter 2, the Board has decided to replace "cleaner" energy sources with "renewable" energy sources. The definition of renewable energy sources is included in section 5.2.1 and the Board's decisions regarding the treatment of renewables is included in section 8.9.1 of this Decision.

284 The Board has decided that practices or measures which discourage such initiatives, such as a transmitter imposing a minimum payment obligation to cover present loads, shall be prohibited and, where such measures are in existing agreements, they shall be unenforceable by the transmitter.

285 Where measures in existing agreements are determined to be unenforceable, such agreements shall be read so as to be consistent with the revised Code. Any terms contained in such agreements which are not in conformity with the Code, shall be unenforceable by either party to the contract.

Synopsis of Changes to the Transmission System Code, July 25, 2005

Synopsis of Changes to the Transmission System Code

Introduction

On July 25, 2005, the Ontario Energy Board (the "Board") issued a final revised version of the Transmission System Code (the "Code") following an extensive consultation process.

The Code sets out the electricity *transmitters' obligations* with respect to its customers. It includes a Connection Agreement which covers the *technical and commercial responsibilities* of both transmitters and their customers. The Code also addresses the transmitters' *standards for operating, managing and expanding* their transmission system.

The purpose of this document is to provide a brief synopsis of the more substantive changes to the Code, relative to the initial version that was issued in July 2000. This Synopsis is not intended to be, nor should it be used as an interpretive tool for the Revised Code for any purpose, or in any forum. It is merely an attempt at a narrative and informal description of the various changes made to the Code, and it has no legal or regulatory role in its interpretation, implementation or enforcement.

Understanding this Document and the Code

Providing clarification about some of the terms used in this document may assist in better understanding this document and the Code.

- There are different types of transmission assets. "Network" assets benefit all Ontario electricity consumers while "connection" assets are only used by a specific customer or group of customers. An analogy that may provide a better understanding is that the common network assets are similar to the highways we all drive our vehicles on, while connection assets are like the connecting roads only a certain driver(s) uses to get to the highway. The Code focuses primarily on connection (i.e., transformation and line) assets. Some are private while others are shared.
- Network assets are always owned by a transmitter. Connection assets can be owned by customers or transmitters.
- References to "customer" means a customer *directly* connected to the transmission system and includes electricity consumers, generators and distributors. In other words, it does <u>not</u> include a customer of a distributor.
- The term "load" essentially means a customer's level of electricity demand.

Why was the Code Revised?

Numerous expressions of concern were received from stakeholders regarding the application and interpretation of the Code. This included applications for changes to the Code. The Board decided that the Code, in its previous form, was not sustainable and a broad review was needed. A primary objective was to refine the Code to enhance the level of regulatory certainty for participants in the Ontario electricity market.

On June 14, 2002, the Board published a Notice of Proceeding indicating its intent to undertake this broad review. Based on the submissions received, the Board decided it would be best to divide the proceeding into two phases; Phase 1 dealing with *policy* issues and Phase 2 addressing *implementation* issues. The Board then issued a set of guiding principles and 41 preliminary propositions. The intent was to provide a vision of where the Board wanted to take the Code. [1]

The Board's Phase One Decision followed on June 8, 2004. This Decision set the policy framework and focused primarily on the following policy issues: (1) Available Capacity; (2) Transmission System Bypass; (3) Cost Responsibility; (4) Contestability; (5) Economic Evaluation; and (6) Contractual Issues. The following discusses how the Board has amended the Code in addressing these overlying policy issues.

Major Policy Issues

1. Available Capacity & Bypass

Available capacity is essentially the remaining amount of capacity on a transmitter's connection assets that is not required to meet the expected needs of the current customer(s).

Facilitating Competition in the Transmission Connections Market

A transmitter will not have an automatic right to require customers to use the transmitter's available capacity to service *new* customer load.[2] Accordingly, a customer opting to build its own facilities to meet new load will not be considered to have bypassed the transmitter's facilities. This approach allows for greater competition, which should increase economic efficiency on the part of the transmitter, without resulting in any uncompensated stranding of assets. It also enhances customer choice. However, this will only apply where the load is new – in other words, where the load has not been part of a customer's contractual forecast of its needs. In such cases, the customer will be held accountable for its forecast (i.e., by way of true up payments), throughout the economic evaluation period. Transmitters invest in the connection assets based on the customer(s) contractual forecast and customers must be held accountable for the costs of facilities built to meet it. It would be inappropriate to burden all the rest of the transmitter's customers with such costs.

If a customer chooses to build its own new connection facilities, those new facilities may also be used to supply the customer's *existing* load, provided the customer adequately compensates the transmitter for the loss of that customer's existing load. The methodology used to determine the required amount of compensation is discussed below. An issue arises if the customer involved is a distributor. Unlike an end-use customer of the transmitter, bypass in these cases could come at the expense of the distributor's captive customers. In such cases, there will always be a prudence review by the Board in

[1] A Settlement Conference was also held on September 9 - 16, 2003 to seek consensus, where possible, and develop workable alternatives for the Board's consideration.

[2] The method to be used to distinguish between a customer's *new* and *existing* load is established by a customer's forecast of their needs; i.e., load forecast.

the next distribution rate proceeding. Such a review could result in some or all of the investment being disallowed in distribution rates paid by consumers. The onus will be on the distributor to make a business case to the Board that the new facility was necessary and that it was more cost-effective to build it than to use the transmitter's existing facilities.

The decision to bypass will require time and planning by any customer. Transmitters will need to take bypass into account in planning their systems. The Connection Agreement has therefore been revised to require the customer to give at least one years' notice of their intention to bypass.

The underlying rationale for these decisions is the Board's interest in providing reasonable opportunities for new approaches to system change, as long as existing customers and the transmitters are not unduly prejudiced. By allowing customers a new range of options and introducing increased diversity in the development of new connection assets within the system, the Board expects to see overall optimization.

Overloaded Line and Transformation Connections Facilities

If a customer chooses to build its own connection facilities, those facilities may also be used to serve *existing* load without compensating the transmitter, provided the existing transmitter's facility is *overloaded*. Overloading any facility reduces the economic efficiency of the transmission system and should be avoided. However, only the overload portion will be transferable without compensation.

A Reasonable Approach to Determining the Amount of Bypass Compensation

Given the above, the Board needed to decide on the most appropriate method for determining the amount of bypass compensation, where such was required. After considering a number of options the Board decided to base it on the Net Book Value (NBV) of the stranded asset, plus an adjustment for salvage and removal costs, which includes environmental remediation. This approach is the most objective and it is consistent with the Board's approach for determining the rate base of a transmitter. Therefore, the NBV approach will be used for any bypass that triggers the need for compensation under the Code. That is, unless the customer in question is subject to the true up requirements referred to above and described below or the customer continues to be subject to gross load billing, as discussed below, on the affected connection facility. To also require bypass compensation based on NBV, in such cases, would result in the transmitter being fully compensated twice for the same asset.

Contracted and Assigned Capacity

The amended Code introduces the concepts of *assigned* and *contracted* capacity along with a transparent process to manage *available* capacity on the transmission system. Customers may request that available capacity be assigned to them and transmitters will assign the capacity on a first-come-first-served basis. That assignment is, however, valid for only a one year period if not taken up by the customer. If not, and an extension to the one year period is not granted, it can be reassigned to another customer in need.

Overall economic efficiency is achieved by allowing transmitters the flexibility they need to manage transmission capacity, while also ensuring that all of the capacity a customer has contracted for (i.e., contracted capacity) will be available to them if and when that customer ultimately needs it.

Transparency is achieved by requiring transmitters to establish an available capacity procedure which includes specific customer notification requirements. This procedure will be implemented by the transmitter when the available capacity on a connection facility is reduced to 25% or less. A reasonable period will then be provided for customers to submit competing applications. The available capacity will, in turn, be divided fairly amongst those customers that have adequately demonstrated a need.

Concerns were raised that a transmitter could provide its affiliated distributors with preferential treatment in allocating capacity that is available for use. Going forward, in all such cases, an assignment of available capacity to its affiliate will trigger a requirement that the transmitter notify all customers connected to the affected facility (i.e., regardless of whether the 25% threshold is triggered).

Contracted Capacity will Not Remain Idle

As noted, if a customer is not using a portion of its contracted capacity, the transmitter will be permitted to reallocate the unused capacity to other customer(s) in need. The Code will also not permit capacity to be reserved for back-up purposes. This will contribute to efficient use of the system and will defer or fully avoid unnecessary investments. The alternative approach that was not adopted would have been to allow customers to reserve all of the capacity that they had under contract for their sole use. This could have resulted in an inefficient and overbuilt transmission system.

2. Transmission System Bypass & Embedded Generation

A Comprehensive Definition of Embedded Generation — Enhancing Regulatory Certainty

Embedded generation is often self-generation which tends to be separate and apart from the transmission system. Whether generation is embedded, in relation to a customer, affects how the customer is to be charged for transmission services which is discussed below.

What qualifies as embedded generation was initially addressed in an earlier Board Decision (RP-1999-0044) and, more recently, in two proceedings that dealt with two customer complaints. Each asserted that the transmitter was failing to recognize certain generators as embedded and was, in turn, billing the customers improperly. The Board concluded that the generation in question qualified as embedded in both cases. These disputes arose, in part, because the current definition of embedded generation lacked the necessary specificity.

Given the above, the Board decided to look at the issue more broadly to determine under what specific circumstances generation will be considered embedded. In doing so, the Code now consolidates the Board's findings on embedded generation in the three Decisions noted above. This more refined and comprehensive definition of embedded generation will provide greater regulatory

certainty which should facilitate investment in desired new supply in Ontario's electricity market.

In arriving at the approach described below, the Board has taken into account the fact that transmission issues are part of a larger electricity supply picture. Ontario is currently facing a tight electricity supply situation and has had to rely on expensive sources of supply, including imports, from time to time to meet peak demand.

There are four combinations of generation and load — new and existing — to be considered in deciding what qualifies as embedded generation. The date to distinguish between new and existing generation is the date that the Phase One Decision was published; i.e., any generation which went into operation on or after June 8, 2004 will be considered to be new.[3]

New Generation

New generation will be considered embedded in relation to either existing or new load subject to satisfying certain criteria. The Code now identifies six specific circumstances that will not affect whether new generation qualifies as embedded generation: Any new generation that is connected on the customer side of the connection between a customer and the transmitter will be considered embedded (i.e., not bypass) regardless of: (1) whether the customer load is new or existing; (2) who owns the generation; (3) where the generation is located; (4) what voltage the generation is connected at; (5) what commercial arrangements the generator enters into; and (6) the size of the generation capacity and the number of generating units.

The transmitter will be compensated in one circumstance that involves new embedded generation. That is where an existing customer disconnects from the transmitter's connection assets to take service from a new and, in effect, a duplicative facility that is not owned by the transmitter. This would result in the transmitter's assets becoming stranded. Due to the disconnection, the transmitter would not be compensated for this stranding through gross load billing as the Board envisioned in RP-1999-0044. As a result, the revised Code provides that the customer will be required to compensate the transmitter based on the respective net book values (NBV) of these facilities, because this is clearly a case of "uneconomic" bypass.

The Board recognizes that the transmitter may lose revenue from existing load when it is supplied by new generation that qualifies as embedded generation and this may lead to an increase in transmission costs borne by ratepayers. However, this should be more than offset by the expected reduction in energy costs for all consumers resulting from the entry of new generation and the overall growth in demand that will continue to be served by the transmitter.

The Board also took into account that embedded generation is predominantly cogeneration which tends to be a more efficient and cost-effective form of generation. Embedded generation also tends to enhance reliability, reduces the need to invest in expanding the transmission network, decreases the amount of energy wasted due to transmission line losses and can reduce inefficiencies associated with

[3] October 31, 1998 will continue to be used for the application of rates as per RP-1999-0044.

transmission congestion. Reducing congestion means high cost generation does not need to be used as often when lower cost supply is available, thus tending to reduce overall energy costs in Ontario.

To the extent that all Ontario consumers will benefit from lower energy costs and enhanced reliability, it is appropriate that such additional transmission costs be shared across the system.

Existing Generation

Existing generation can also become embedded in relation to an existing customer by reconfiguring existing connections. Similarly, new customers could be connected so that existing generation can be embedded in relation to that customer. Neither combination will be treated as embedded generation.

Reconfiguration may result in some benefits for the specific generator and customer involved but there is no apparent benefit to electricity consumers as a whole, primarily because no new generation has been added to the Ontario market as a result of the mere reconfiguration of the connections. At the same time, such reconfigurations may create additional costs for Ontario consumers due to the stranding of the transmitter's assets. Accordingly, these reconfigurations amount to "uneconomic" bypass of the transmitter's facilities.

New Embedded Generation — Not Considered Bypass

New embedded generation projects that are consistent with the criteria discussed above will not be considered system bypass. One area of concern among customers which led to the Board's review of the Code arose because a transmitter was including a "no bypass" provision in the contracts that customers were required to sign before construction of facilities would be carried out. Going forward, such contract provisions that would unnecessarily discourage the development of new embedded generation will not be permitted.

Remaining Consistent with RP-1999-0044 Principles and Eliminating Barriers to Embedded Renewable Energy

Customers with new qualifying embedded generation will be subject to the rate treatment established in RP-1999-0044. That is, *net* load billing for *network* charges and *gross* load billing for *connection* charges. If it does not qualify as embedded generation, gross load billing will apply for both charges.[4]

For renewable embedded generation, the threshold for full net loading billing treatment (i.e., both network and connection charges) will be increased to 2 MW per unit through changes to the Rate Order. This recognizes the technological advances in renewable sources, particularly new wind projects which are now all primarily between 1 MW and 2 MW per unit. This threshold increase also reflects a societal interest in increasing the proportion of renewable generation in the overall supply mix.

[4] Under the Rate Order, net load billing applies for both network and connection charges for small scale embedded generation for administrative reasons (i.e., metering & billing). The threshold will continue to be 1 MW or less per unit for *conventional* generation sources.

Prudent Replacement of Existing Transmission Connection Facilities

Some assets will require replacement before they have been fully depreciated, while others will still be useful even though they are fully depreciated. Connection facilities should, therefore, only be replaced by a transmitter if they have reached the end of their useful life, regardless of whether they have been fully depreciated. To do otherwise would not be prudent.

Replacement will be at no direct cost to any individual customer since such assets will be included in the transmitter's rate base. Until facilities are replaced there is an obligation on the transmitter to ensure that those facilities are properly maintained and repaired, on an ongoing basis, so that they perform at the required technical standards and level of reliability.

Customers will also be able to construct their own new facilities, at their own cost, to replace the transmitter's connection assets that have reached the end of their useful life. At that point the transmitter is obligated, if the customer chooses, to have the connection assets replaced with no contribution by the customer. This is not bypass since the transmitter's assets have been fully paid for.

Prohibiting Measures that Discourage Energy Efficiency and Conservation

Reductions in demand due to energy efficiency, conservation and load management will not be considered system bypass, under any circumstances. This includes the installation of renewable energy technologies (e.g., solar panels) that reduce a customer's overall demand on the system. The promotion of energy efficiency and conservation is particularly important at a time when Ontario faces a tight electricity supply. There is a growing consensus that there is a need for increased conservation measures by consumers, and many initiatives are underway to facilitate achievement of that goal. The Board has therefore revised the Code to eliminate opportunities that might otherwise exist to create barriers or disincentives that stand in the way of such initiatives. However, customers will be required to demonstrate to the transmitter that the reduction in demand is in fact due to a conservation measure as opposed to, for example, a simple downturn in the economic cycle.

Practices that discourage these initiatives, such as a transmitter imposing a minimum payment obligation to cover present loads, will now be prohibited. Allowing such practices would require a customer to pay the same minimum amount even if, for example, they were able to cut their demand in half. This would constitute a penalty for conserving energy which is inconsistent with the societal goal to create a "culture of conservation" in Ontario.

This change to the Code takes into account the broader electricity market. A reduction in electricity demand is equally, and sometimes more, beneficial than an increase in supply. When high demand stretches the system close to its limits, electricity prices rise sharply. A relatively modest reduction in demand at such times, due to the measures discussed above, can hold peak prices in check and foster price stability for the benefit of all Ontario electricity consumers.

3. Cost Responsibility

All Parties to Pay Their Fair Share — No More, No Less

Customers who require new or upgraded connection facilities to meet their needs will bear the associated costs, to the extent that the cost is not already recovered in the transmitter's rates.

Customers should not, however, be required to bear the cost of facilities that were already planned by the transmitter. To ensure that this does not happen, a transmitter will be required to provide customers, upon request, with any pertinent existing transmission plans dealing with system expansion. All affected customers will be informed of the capacity available for use on all relevant facilities following the expansion. Such plans are expected to be developed by transmitters to address growing demand, system reliability and integrity. These plans will also be essential to determine whether a particular connection project is truly triggered by the needs of a specific customer.

Generators will also be held responsible for the costs associated with connection facilities that they cause. This should not be considered a deterrent to new generation because this is a standard cost of doing business for all new generators within and outside of Ontario. In other words, all customers of the transmitter need to pay their fair share.

If a transmitter adds more capacity than a customer requested, in anticipation of future growth in demand, the transmitter will not be permitted to charge that customer for the additional costs. Permitting such a requirement could inhibit the development of new generation.

Customer Accountability

The transmission system is dynamic in nature and customers will be expected to understand that they may have to upgrade their own equipment to adjust to a changing and growing transmission system. As a result, all customers will be held responsible for upgrading their own equipment to the new available fault current levels triggered by a new or modified connection, up to the maximum level set out in the Code. This is necessary to ensure Ontario's transmission system operates as efficiently and effectively as possible.

The Connection Agreement has also been revised to better recognize that there needs to be symmetry between customer obligations and the transmitter's obligations. Transmitters cannot do it alone.

Facilitating Necessary Transmission Planning and System Efficiency

It is important for a transmitter to be notified, as early as possible, of any reductions in a customer's demand resulting from installing embedded generation or implementing energy efficiency or conservation programs. All such initiatives would require planning by a customer and it would, therefore, not be unreasonable for a customer to notify a transmitter in advance. Transmitters need such information for their own transmission planning and prudent investment purposes as well as to operate Ontario's transmission system efficiently and effectively. The Code now recognizes this and

requires customers to provide information to transmitters on an annual basis regarding material changes in load and peak demand.

4. Contestability

Enhancing Customer Choice and Increasing Competition

Work on new connection facilities will be contestable, regardless of whether a capital contribution is required. This will facilitate competition and optimize efficiency. A customer requiring new dedicated facilities will have two options; either design, construct, pay for and own the new facilities or have them owned by the transmitter. If the latter, a customer may choose to accept the transmitter's cost estimate or contract with any qualified contractor. Regardless of which option is chosen, transmitters will retain the right to work on their own existing facilities as they will be most familiar with those assets. This is important to ensure the efficient operation and safety of the Ontario transmission system.

This approach provides business opportunities for private, innovative companies across Ontario. It also gives the customer options if the transmitter does not provide adequate customer service. The Board originally expressed its vision of developing a more competitive market for connection facilities in 1999, as part of its RP-1999-0044 Decision. The changes made now should further facilitate realizing that vision.

5. Economic Evaluation

Protecting Existing Ontario Electricity Consumers

The economic evaluation methodology provides the mechanism for determining any cost recovery shortfall, and ensures that all connection facility costs are recovered from the connecting customer, either through rates or a capital contribution. Except in exceptional circumstances, this does not include network facility costs which generally benefit all electricity consumers. This mechanism is needed to protect transmitters and their existing ratepayers from potential subsidization of specific customers. Again, all customers must pay their fair share, and an economic evaluation is the tool that will be used to make sure this happens.

Customers to Pay for Only the Transmission Services they Use — No More, No Less

As discussed above, the revised Code will prohibit minimum payment obligations being imposed by the transmitter. This approach resulted in a one-way true up process in favour of the transmitter. The Code will instead include a true up process for customer connection facilities that works both ways. If the true up calculation shows that a customer's actual demand is below its contractual forecast and, therefore, has not generated the anticipated revenues for the transmitter, the customer will be obliged to make up the shortfall. If the opposite occurs, the excess revenue realized by the transmitter will be returned to the customer when the last true up calculation is carried out. In this way, parties are held accountable for their contractual forecasts and the associated costs, but have the prospect of

reimbursement if they generate more revenue than was expected under the original economic evaluation.

To preclude the further creation of barriers to energy efficiency, conservation, renewable energy activities and small scale embedded generation projects,[5] the customer's initial load forecast will be adjusted downward to reflect such measures and the associated reductions in demand on the transmission system. If the forecast was not adjusted, it would be equivalent to penalizing these desirable measures which would conflict with the societal goal to create a "culture of conservation". The Ontario market will benefit from such measures due to improvements in the balance between supply and demand.

A customer's economic evaluation calculation will not include sunk costs or historic revenues, which have sometimes been included in the past. Only projected costs and revenues for the supply of new customer load will be included, since only they are genuinely relevant. Customers should not be paying the transmitter for costs that were, for example, incurred before they even became a customer.

6. Contractual Issues

Projects, Especially New Generation, will No Longer be Unnecessarily Delayed

The Code has been revised to clearly prohibit the transmitter from placing construction work on hold pending the outcome of a dispute resolution process. This can have the effect of causing needless delays to projects, including much needed new generation. The goal is that the addition of new supply to the Ontario electricity market will no longer be unnecessarily delayed by the transmitter.

Protecting Consumers & the Financial Viability of the Transmitter

Transmitters will be permitted to require a reasonable security deposit from a customer to cover all related construction costs. A customer requesting the new connection could walk away from the project or go bankrupt after the transmitter has incurred the costs to build the facility for that customer. If all goes as planned, the transmitter will return the deposit (with interest) once that risk no longer exists. Not permitting a transmitter to require a reasonable security deposit could result in all Ontario electricity consumers bearing the costs of delinquent customers.

Inappropriate Contract Provisions will Not be Enforceable by Transmitters

Any contract provisions that are inconsistent with the revised Code, such as a minimum payment obligation or a "no bypass" provision, will not be enforceable by transmitters. The Board did not accept a position that this should not apply to existing agreements. Otherwise, it would create a double standard based on an arbitrary distinction between existing and future customers. The regulatory environment needs to be consistent for all transmitters and customers.

[5] Small embedded generation is 1 MW or less for *conventional* generation and 2 MW or less for *renewable* energy.

7. A Common Set of Rules for New and Existing Customers

In terms of how the revised Connection Agreement will be applied to *existing* customers, the Board decided that the same set of rules will apply to all customers and transmitters going forward. This approach will provide greater certainty to transmitters and customers alike in terms of the rules that will govern their relationship. It will also promote fairness across all customers. However, elements of existing agreements that have been freely negotiated will be preserved to the extent that they are not contrary to the revised Code. The Code therefore now clarifies that existing agreements will be deemed to be amended to conform to the revised Connection Agreement.

Conclusion

The revised Code is the result of an extensive consultation process, which has included six opportunities for parties to provide written submissions. In total, there have been over 130 submissions received. There was also an extensive Settlement Conference that lasted five full days.

The Board would like to thank the stakeholders involved for their significant contribution to this process. Their input has assisted the Board in shaping and refining its vision for the Code.

The Board is of the view that it has achieved the appropriate balance in arriving at the revised Code. Many of the changes take into account that transmission issues cannot be properly addressed in isolation. Instead, they are part of a larger picture which includes the fact that Ontario needs more generation and energy conservation to improve the balance between supply and demand. At the same time, the Board has taken a great deal of care to ensure that the integrity of the transmission system is maintained and overall system optimization is facilitated.

The changes should help ensure that the transmitter's monopoly position will not restrain competition in areas where greater competition is beneficial, and should also facilitate the ability of parties to effect efficiencies in their use of electricity without facing disincentives. The Code includes provisions that eliminate opportunities that might otherwise exist to create barriers and disincentives that can discourage new generation, energy efficiency, conservation, demand management and the use of renewable energy sources.

The changes to the Code should also better ensure that all transmission customers will be held responsible for paying their fair share of the costs that they cause and the assets they benefit from. The financial viability of the transmitter, as well as all operational, safety and reliability requirements of the transmission system, remained a high priority for the Board throughout this process.

The Board is confident that the revised Code will result in providing all participants in the Ontario electricity market with greater regulatory certainty and predictability — a prerequisite to attracting investors to the Ontario market. While the changes will make the Code more prescriptive, the Board has also maintained sufficient room for negotiation amongst the parties. The Board is confident that the revised Code will enhance the regulatory environment in which these negotiations will take place.

1 **Section 70.1 of the Ontario Energy Board Act, 1998**

70.1 (1) The Board may issue codes that, with such modifications or exemptions as may be specified by the Board under section 70, may be incorporated by reference as conditions of a licence under that section. 2003, c. 3, s. 48.

Quorum

(2) For the purposes of this section and section 70.2, two members of the Board constitute a quorum. 2003, c. 3, s. 48.

Approval, etc., of Board

(3) A code issued under this section may provide that an approval, consent or determination of the Board is required, with or without a hearing, for any of the matters provided for in the code. 2003, c. 3, s. 48.

Incorporation of standards, etc.

(4) A code issued under this section may incorporate by reference, in whole or in part, any standard, procedure or guideline. 2003, c. 3, s. 48.

Scope

(5) A code may be general or particular in its application and may be limited as to time or place or both. 2003, c. 3, s. 48.

***Legislation Act, 2006*, Part III**

(6) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a code issued under this section. 2003, c. 3, s. 48; 2006, c. 21, Sched. F, s. 136 (1).

Transition

(7) The following documents issued by the Board, as they read immediately before this section came into force, shall be deemed to be codes issued under this section and the Board may change or amend the codes in accordance with this section and sections 70.2 and 70.3:

1. The Affiliate Relationships Code for Electricity Transmitters and Distributors.
2. The Distribution System Code.
3. The Electricity Retailer Code of Conduct.
4. The Retail Settlement Code.
5. The Transmission System Code.
6. Such other documents as are prescribed by the regulations

EXPLANATORY NOTE

Ontario

ServiceOntario

e-Laws

EXPLANATORY NOTE

This Explanatory Note was written as a reader's aid to Bill 23 and does not form part of the law. Bill 23 has been enacted as Chapter 3 of the Statutes of Ontario, 2003.

The Bill amends the *Municipal Franchises Act* and the *Ontario Energy Board Act, 1998.*

Municipal Franchises Act

Section 11 of the *Municipal Franchises Act* is repealed because section 33 of the *Ontario Energy Board Act, 1998* provides for appeals to the Divisional Court from decisions of the Ontario Energy Board.

Ontario Energy Board Act, 1998

Amendments to sections 1 and 2 of the *Ontario Energy Board Act, 1998* amend the objectives of the Ontario Energy Board to include promoting communications within the gas and electricity industries, educating consumers and protecting the interests of consumers with respect to prices, reliability and quality of gas service.

Section 4 of the Act is amended to continue the Board as an agency of the Crown, but as a corporation with the powers of a natural person for the purposes of carrying out its statutory duties.

A new section 4.2 of the Act provides for the establishment of a management committee, composed of the chair of the Board and two vice-chairs. The committee is responsible for managing the activities of the Board, including budgeting, allocation of resources and the making of by-laws governing the operation of the Board.

A new section 4.4 of the Act provides for the establishment of an advisory committee to provide advice to the Board's management committee and to perform such other duties as are assigned under the Act. The Minister will appoint members to the advisory committee.

A new section 4.6 of the Act provides that, every three years, the Minister and the chair of the Board must enter into a memorandum of understanding that sets out the roles, responsibilities and accountability relationships between the chair, the management committee and the Minister. The memorandum must also set out details of obligations on the management committee to provide statements of priorities and regulatory calendars, to establish performance standards for the Board and to establish a pay for performance plan for full-time Board members that links bonus pay to the achievement of performance standards. The memorandum of understanding must also contain details regarding the establishment of rules governing entitlement to interim and final awards of costs for organizations representing consumers.

New sections 4.8 and 4.9 of the Act obligate the Board to prepare annual financial statements that may be audited by the Provincial Auditor and to prepare an annual report that the Minister must lay before the Legislative Assembly.

A new section 4.10 of the Act sets out the by-law making powers of the Board's management committee and provides that by-laws governing the remuneration and benefits of the members of the Board must be delivered to the Minister, who has the power to accept, reject or return the by-laws for further consideration, before they become effective.

A new section 4.13 of the Act provides that revenues from the exercise of the Board's powers or duties do not form part of the Consolidated Revenue Fund but shall be applied to the carrying out of the powers conferred and duties imposed on the Board. The Board's revenue includes fees, assessments, administrative penalties and costs payable to the Board.

A new section 6 of the Act authorizes the Board's management committee to delegate powers and duties of the Board to an employee of the Board. The employee may exercise delegated powers with or without holding a hearing, but orders made by employees are subject to appeal to the Board by persons directly affected by the orders.

A new section 22.1 of the Act requires the Board to issue an order that embodies its final decision in a proceeding within 60 days of making the final decision. If this provision is not complied with, the validity of the decision is not affected. However, any award of costs in the proceeding could be subject to regulations made by the Lieutenant Governor in Council.

Amendments to section 30 of the Act clarify the Board's powers to award interim and final awards of costs.

Amendments to subsections 33 (1) and 34 (1) of the Act add the issuance of a code under section 70.1 of the Act to the list of powers exercised by the Board that may be appealed to the Divisional Court or that may be the subject of a petition to the Lieutenant Governor in Council.

New subsections 36 (4.1) to (4.5) of the Act require the Board, on a regular basis, to order whether and how amounts recorded in deferral or variance accounts of gas distributors shall be reflected in rates. The Board must consider the appropriate number of billing periods over which these amounts shall be divided in order to mitigate the impact on consumers.

Amendments to sections 50 and 51 of the Act provide for applications for the issuance, renewal or amendment of a gas marketer licence to be made to the Board, reflecting other amendments to the Act that remove references to the director of licensing. Sections 54 and 55 of the Act are repealed.

Amendments to subsection 59 (2) of the Act authorize the Board to appoint an interim licensee when the Board determines that a licensed distributor is likely to fail to meet its obligations under the Act. Amendments to subsection 59 (3) of the Act clarify and expand the powers of the interim licensee to carry out the distributor's business. A new subsection 59 (3.1) absolves the interim licensee from liability for exercising powers or duties granted under the Act, the interim licence or an order of the Board unless the liability arises from the negligence or wilful misconduct of the interim licensee.

Section 60 of the Act is amended to provide for applications for the issuance or renewal of a licence to undertake an activity listed in section 57 of the Act to be made to the Board. Sections 61 to 65 and 67 to 69 of the Act are also repealed as part of the amendments that remove references to the director of licensing.

A new section 70.1 of the Act allows the Board to issue codes that may be incorporated, with or without modification, as conditions of a licence. Under subsection 70.1 (7), certain documents already issued by the Board are deemed to be codes. The new section 70.1, and sections 70.2

and 70.3, are based on sections 44, 45 and 46 of the Act.

New subsections 78 (6.1) to (6.6) of the Act require the Board, on a regular basis, to order whether and how amounts recorded in deferral or variance accounts of electricity distributors shall be reflected in rates. The Board must consider the appropriate number of billing periods over which these amounts shall be divided in order to mitigate the impact on consumers.

Amendments to section 88.9 of the Act extend the time period during which a consumer can reaffirm a contract with a gas marketer or retailer of electricity, so that reaffirmation can occur anytime between the 10th day and 61st day after a written copy of the contract is delivered to the consumer. The ability to reaffirm before the 10th day may be permitted by regulation. A new subsection 88.9 (16) of the Act provides that certain contracts are not subject to the reaffirmation requirement.

Section 90 of the Act is amended to provide that Board approval is required for a hydrocarbon line only if the line meets criteria specified in that section.

A new subsection 96 (2) of the Act provides that, when the Board is determining whether an application for leave to construct, expand or reinforce an electricity transmission or distribution line or to make an interconnection under section 92 is in the public interest, the Board shall consider only the interests of consumers with respect to prices and the reliability and quality of electricity service.

Sections 106 to 112 of the Act are amended to remove references to the energy returns officer. The new section 106 of the Act empowers the Board's management committee to appoint inspectors. Section 107 gives inspectors the power to require documents, records or information from certain gas and electricity market participants. Section 108 gives inspectors the power to enter a place in which he or she reasonably believes documents or records may be located that are related to certain gas or electricity market activities, including activities for which a licence is required under section 48 or 57 of the Act. An inspector may also enter a place in which anything is being done that requires an order of the Board under Part VI of the Act.

The Act is amended to add a new Part VII.1 to deal with compliance with the Act and with other obligations. The new Part consolidates and replaces various compliance powers of the Board and the director of licensing that were formerly set out in other Parts of the Act. The new section 112.1 lists the "enforceable provisions" with respect to which the Board may take enforcement action. The new section 112.2 sets out the procedure applicable to Board compliance orders. The Board is required to give notice of its intention to make an order against a person under section 112.3, 112.4 or 112.5. The person may then, within 15 days of receiving the notice, give notice to the Board requiring it to hold a hearing.

The new section 112.3 of the Act authorizes the Board to order a person to comply with an enforceable provision and to take action to remedy a contravention or to prevent a contravention or further contravention. The new section 112.4 authorizes the Board to suspend or revoke a licence if a person has contravened an enforceable provision. The new section 112.5 allows the Board to issue an administrative penalty if a person has contravened an enforceable provision. The maximum amount of an administrative penalty is raised from $10,000 per day on which a contravention occurs or continues to $20,000 per day.

The new section 112.6 authorizes the Board to apply to the Superior Court of Justice for a restraining order directing a person not to contravene an enforceable provision. The new section

112.7 provides for a person to give the Board a written assurance of voluntary compliance with an enforceable provision and the written assurance has the same force and effect as an order of the Board.

Subsections 126 (3) and (4) of the Act are amended to increase the fines the courts may impose on a person convicted of an offence under the Act.

A new section 128.1 of the Act requires that, every five years, the Minister must cause a report to be prepared on the Board's effectiveness in meeting its objectives under sections 1 and 2 of the Act.

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Goldcorp Information Request by Goldcorp to Hydro One Networks Inc.

dated July 26, 2011

Goldcorp Information Request by Goldcorp to Hydro One Networks Inc.
July 26, 2011;

Re: Bypass Changes for Goldcorp's 115 kV line
Approved by the OEB's Decision of July 20th, 2011 in EB-2011-0106

1. Re: Net Book Value of Red Lake Transformer Station (RLTS)

Please provide a continuity statement, organized by year, of the Net Book Value of the Red Lake TS that provides the value and date incurred of:

(a) Capital additions
  (i) Direct costs (eg., materials)
  (ii) Indirect or allocated or assigned costs (eg., overheads)
  (iii) Capitalized expenses (eg., labour, depreciation)
  (iv) Other costs included in capital additions costs
(b) Interest During Construction
(c) Provision for End of Life costs (eg., environmental remediation, asset removal)
(d) All other costs recorded to this asset
(e) The annual depreciation expense of the Red Lake TS
(f) The depreciation rate applied to the Red Lake TS
(g) Any write downs, impairments, removals or other changes to the value of the RLTS.

2. Re: rebuild and refurbishment of the Red Lake TS

Please provide the Red Lake area electricity load forecast relied on:

(a) to support the decision to rebuild/refurbish the Red Lake TS in 2007
(b) for engineering purposes when designing the 2007 Red Lake TS rebuild/refurbishment.

Please provide the following information:

(c) the origin of the load forecast
(d) the name of the party who provided the load forecast or data input to the load forecasting model;
(e) documentation of all adjustments, revisions, updates and other changes made to this data by HONI and the supporting rationale.

3. Re: Red Lake capacity assigned to Goldcorp

Please provide a copy of the current connection agreement between HONI and Goldcorp, if any, with respect to RLTS available capacity and Goldcorp's assigned capacity on the Red Lake.

(a) Please provide Goldcorp's annual assigned capacity on the Red Lake TS since 1995.

(b) Please provide all reports or memorandum concerning the provision of capacity to Goldcorp at the Red Lake TS pursuant to section 6.2.7 of the Transmission System Code (TSC).

4. Re: definition or determination of time of bypass

Please provide HONI's definition of 'time of bypass' that is relied on when administering section 6.7.7 of the TSC.

5. Re: determination of bypass charges

Please provide the following information on the three most recent bypass charges remitted to HONI anywhere on HONI's system. Please protect customer confidentiality.

(a) date and amount of bypass charge;

(b) asset bypassed.

6. Re: Red Lake TS

Please provide the unutilized capacity at Red Lake TS on a monthly basis for the period July 2008 to June 2011; please state all assumptions and supporting facts.

7. Re: Red Lake TS

Please provide a schematic of HONI's Transmission assets from OPG's Ear Falls generating station up to and including HONI's RLTS. For each transmission asset please provide:

(a) maximum allowed loading;

(b) annual maximum loading for the 2006-2011 period on a coincident and non-coincident peak basis;

(c) average loading for the 2006-2011 period.

8. Forecasts

Please provide estimated transmission revenues by Network, Line Connection and Transformer Connection for the following scenarios:

(a) Scenario A: all Red Lake area loads are served by RLTS , peak load is 52.1MVA;

(b) Scenario B: 33.9MVA of Red Lake area load is served by Goldcorp's 115kV Transmission line and 17.8MVA of Red Lake area load is served by RLTS.

Please state all supporting facts and simplifying assumptions.

E-mail Ian Blue to Raj Ghai dated August 2, 2011, 3:05 p.m.

Blue, Ian

From: Blue, Ian
Sent: Tuesday, August 02, 2011 3:46 PM
To: raj.ghai@HydroOne.com
Cc: Curtis.Pedwell@goldcorp.com; klitt@Elenchus.ca; luc.major@goldcorp.com; naomi.martin@HydroOne.com
Subject: RE: Goldcorp's 115 kV Transmission Line from South of Harry's Corner to Balmer Complex Transformer Station Approved by the OEB I reply to Raj's e-mail of January 21, 2011.

Thanks Raj

1. When may Goldcorp expect your estimate of bypass charges. We accept that the final number may vary from your estimate as long as the variance can be explained?

2. With respect to Goldcorp's questions, we take the position that HONI should answer them all. Quite simply, HONI's estimate of bypass charges is a *justiciable* issue. Golcorp is entitled to know everything about how that estimate was determined and to argue before the OEB that it is wrong for whatever reasons seem approptriate. So, may we expect answers to the information rerquest to arrive along with your estimate?

3. When can we meet to discuss the additional capacitors issue? In the meantime, what are the rough lead times for ordering, delivery and installation? Would it affect the ability of GL1 to be in service Q4 2011 / Q1 2012 at forecast loads for 2012?

Let's all discuss.

Ian A. Blue, Q.C.
d 416-865-2962
iblue@gardiner-roberts.com

From: raj.ghai@HydroOne.com [mailto:raj.ghai@HydroOne.com]
Sent: Tuesday, August 02, 2011 11:46 AM
To: Blue, Ian
Cc: Curtis.Pedwell@goldcorp.com; klitt@Elenchus.ca; luc.major@goldcorp.com; naomi.martin@HydroOne.com
Subject: RE: Goldcorp's 115 kV Transmission Line from South of Harry's Corner to Balmer Complex Transformer Station Approved by the OEB I reply to Raj's e-mail of January 21, 2011.

Ian,
Thank you for your e-mail advising us of Goldcorp's decision to transfer load from Red Lake TS to Goldcorp's new 115 kV GL1 line as soon as the new line is commissioned. In accordance with section 6.7 of the Transmission System Code, Hydro One will be seeking bypass compensation in relation to the transfer of existing load from Red Lake TS to Goldcorp's new facilities.

Hydro One will provide Goldcorp with an updated bypass compensation estimate, based on Goldcorp's latest load forecast. (Note that the actual bypass compensation

amount – which will be calculated after actual bypass has occurred – may vary from the estimate.) In regards to the questions contained in your email, Hydro One will provide any relevant information pertaining to the bypass calculation, where appropriate and pertinent, as soon as the information becomes available.

The increase in loading of Hydro One's 115 kV line E2R to 63 MVA will necessitate the installation of Capacitor Banks at Ear falls as specified in the System Impact Assessment performed by the IESO. We will need to discuss the required lead time and associated cost obligations for the installation of capacitor bank at Ear Falls with Goldcorp and other customers.

Hydro One has always been cooperative with Goldcorp and will continue to do so.

Yours truly,

Raj Ghai
Hydro One - TCT15
Phone: 416.345.5302
Cell: 416.985.5359

Please consider the environment before printing this email.

From: Blue, Ian [mailto:iblue@gardiner-roberts.com]
Sent: Tuesday, July 26, 2011 3:05 PM
To: GHAI Raj; MARTIN Naomi
Cc: 'Curtis Pedwell'; Kathi Litt; 'Luc Major'
Subject: Re: Goldcorp's 115 kV Transmission Line from South of Harry's Corner to Balmer Complex Transformer Station Approved by the OEB I reply to Raj's e-mail of January 21, 2011.

Hi Naomi and Raj,

Goldcorp has now decided that as soon as its new 115 kV line which we have referred to for shorthand purposes as **GL1** is commissioned, Goldcorp will transfer the electricity supply for the Red Lake , Campbell and Balmer Complexes from the E2R line onto GL1 and cease to rely on HONI's Red Lake Transformer Station (RLTS) and the section of E2R between the tap at Harry's Corner and the RLTS. Electricity for the Cochenour Complex will continue to be supplied through the RLTS and be received at distribution voltages.

I enclose:

1. A table forecasting the unutilized capacity on HONI's facilities as a result of transferring electricity supply to GL1,

2. A table that we ask you to complete in order to identify and quantify bypass charges under the Transmission System Code resulting from the described loading of GL1, and

3. Information Requests which we ask you to respond to, in good faith, in order to allow us to assess HONI's calculation of bypass charges.

Goldcorp requests HONI's co-operation.

If you have any questions, please let me know.

Thanks

Ian A. Blue, Q.C.
d 416-865-2962
iblue@gardiner-roberts.com
GARDINER ROBERTS LLP
Scotia Plaza, 40 King Street West, Suite 3100
Toronto, ON, Canada M5H 3Y2
t 416 865 6600 | f 416 865 6636
www.gardiner-roberts.com

From: raj.ghai@HydroOne.com [mailto:raj.ghai@HydroOne.com]
Sent: Friday, January 21, 2011 4:16 PM
To: Blue, Ian
Cc: cbouchard@rubiconminerals.com; dboyd@rubiconminerals.com; gord.caul@HydroOne.com; bdominique@casselsbrock.com; chris.dougherty@nordmin.com; timo.hakkarainen@HydroOne.com; sho@gardiner-roberts.com; gkumoi@rubiconminerals.com; klitt@era-inc.ca; luc.major@goldcorp.com; naomi.martin@HydroOne.com; michael.medeiros@HydroOne.com; nmelchio@wmnlaw.com; Andrew.Moshoian@goldcorp.com; bruce.parker@HydroOne.com; curtis.pedwell@goldcorp.com
Subject: RE: 101224-InfoReq-Scenarios.xls

Ian,
We have reviewed the various scenarios presented in your January 10, 2011 e-mail and our comments are as follows:

1) In scenario 3, the dates were displaced and we have made the necessary changes. Please see the attached spread sheet for total loading for various scenarios as follows:
    a. Load forecast for Red Lake TS for various scenarios from Dec. 2010 to Dec. 2014
    b. Load forecast for Goldcorp proposed 115 kV line from Dec. 2010 to Dec. 2014

2) The decline in Red Lake TS load indicates the start of bypass i.e. December 11. The bypass is defined as transfer of customer existing load from the transmitter owned connection facility to the customer owned facility or a third party owned facility. The bypass can be temporary or permanent depending upon whether the transferred load returns back to the transmitter owned facility. Also, the bypass is calculated at a point in time when a customer transfers all or part of their load from transmitter owned facility resulting in stranding of all or part of the capacity.
3) The loading of Red Lake TS varies between December 2010 and December 2014 for various scenarios. Please indicate the point in time when we should calculate the bypass compensation for Red Lake TS. My proposal is to use December 2010 as the reference point for Red Lake TS load. There is a 5 MW drop in December 2012 and additional 4 MW load drop in December 2014 (total load drop of 9 MW).

4) The loading of new Goldcorp 115 kV line has no impact on Red Lake TS bypass calculations.

If you are in agreement with above then we can calculate bypass compensation.

Raj Ghai
Hydro One - TCT15
Phone: 416.345.5302
Cell: 416.985.5359

Please consider the environment before printing this email.

From: Blue, Ian [mailto:iblue@gardiner-roberts.com]
Sent: Monday, January 10, 2011 11:50 AM
To: Blue, Ian; Bourchard, C_Rubicon; Boyd, D_Rubicon; CAUL Gordon; Dominique,B_Goldcorp; Dougherty, C_Rubicon; GHAI Raj; HAKKARAINEN Timo; Ho,S_Goldcorp; Kumoi,G_Rubicon; Litt,K_Goldcorp; Major,L_Goldcorp; MARTIN Naomi; MEDEIROS Michael; Melchiorre,N_Rubicon; Moshoian,A_Goldcorp; PARKER Bruce; Pedwell, C_Goldcorp
Subject: FW: 101224-InfoReq-Scenarios.xls

Please have a look at this IR that we should send to HONE stemming from our meeting wiyh them of December 17th.

Ian A. Blue, Q.C.
d 416-865-2962
iblue@gardiner-roberts.com
GARDINER ROBERTS LLP
Scotia Plaza, 40 King Street West, Suite 3100
Toronto, ON, Canada M5H 3Y2
t 416 865 6600 | f 416 865 6636
www.gardiner-roberts.com

From: Kathi Litt [mailto:klitt@Elenchus.ca]
Sent: Monday, January 10, 2011 11:02 AM
To: Blue, Ian
Subject: FW: 101224-InfoReq-Scenarios.xls

As promised

From: Kathi Litt
Sent: December 24, 2010 9:32 AM
To: Q. C. Ian A. Blue (iblue@gardiner-roberts.com)
Subject: 101224-InfoReq-Scenarios.xls

Hi Ian

Attached is the draft information request to HONI – please review and revise and then circulate to the rest of the team.
Scenario 1 is intended to provide the Baseline data, Scenario 2 is an intended to scope the results of favourable timing of load changes while Scenario 3 is intended to scope the results of less than favourable timing of load

changes.
You will see that I have assumed that All Other parties do not experience any load growth; this is because I have incomplete information about magnitude and no information about timing.

The TSC references are sections 6.7 and 11.2.

By way of follow up:
Do you know the status of the SIA or any other reports from the IESO?
Has Naomi provided any past Decisions on Stranded Assets?
What is the status of Rubicon's Offer to Connect from HONI?

I think that's it, is there anything I've overlooked?

Kathi

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Electricity Transmission Licence, ET-2003-0035, Hydro One Networks Inc.
valid until December 2, 2003

Ontario

Electricity Transmission Licence

ET-2003-0035

Hydro One Networks Inc.

Valid Until
December 2, 2023

Mark C. Garner
Secretary
Ontario Energy Board
Date of Issuance: December 3, 2003
Date of Amendment: August 11, 2004

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
26th. Floor
Toronto, ON M4P 1E4

Commission de l'Énergie de l'Ontario
C.P. 2319
2300, rue Yonge
26e étage
Toronto ON M4P 1E4

1 Definitions

In this Licence:

"**Accounting Procedures Handbook**" means the handbook, approved by the Board which specifies the accounting records, accounting principles and accounting separation standards to be followed by the Licensee;

"**Act**" means the *Ontario Energy Board Act, 1998*, S:O. 1998, c. 15, Schedule B;

"**Affiliate Relationships Code for Electricity Distributors and Transmitters**" means the code, approved by the Board which, among other things, establishes the standards and conditions for the interaction between electricity distributors or transmitters and their respective affiliated companies;

"**Board**" means the Ontario Energy Board

"**Electricity Act**" means the *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A;

"**Licensee**" means: Hydro One Networks Inc.;

"**Market Rules**" means the rules made under section 32 of the Electricity Act;

"**Performance Standards**" means the performance targets for the distribution and connection activities of the Licensee as established by the Board in accordance with section 83 of the Act;

"**Rate Order**" means an Order or Orders of the Board establishing rates the Licensee is permitted to charge;

"**transmission services**" means services related to the transmission of electricity and the services the Board has required transmitters to carry out for which a charge or rate has been established in the Rate Order;

"**Transmission System Code**" means the code approved by the Board and in effect at the relevant time, which, among other things, establishes the obligations of the transmitter with respect to the services and terms of service to be offered to customers and retailers and provides minimum technical operating standards of transmission systems;

"**wholesaler**" means a person that purchases electricity or ancillary services in the IMO-administered markets or directly from a generator or, a person who sells electricity or ancillary services through the IMO-administered markets or directly to another person other than a consumer.

2 Interpretation

2.1 In this Licence words and phrases shall have the meaning ascribed to them in the Act or the Electricity Act. Words or phrases importing the singular shall include the plural and vice versa. Headings are for convenience only and shall not affect the interpretation of the licence. Any reference to a document or a provision of a document includes an amendment or supplement to, or a replacement of, that document or that provision of that document. In the computation of time under this licence where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens and where the time for doing an act expires on a holiday, the act may be done on the next day.

3 Authorization

3.1 The Licensee is authorized, under Part V of the Act and subject to the terms and conditions set out in this Licence to own and operate a transmission system consisting of the facilities described in Schedule 1 of this Licence, including all associated transmission equipment.

4 Obligation to Comply with Legislation, Regulations and Market Rules

4.1 The Licensee shall comply with all applicable provisions of the Act and the Electricity Act and regulations under these Acts except where the Licensee has been exempted from such compliance by regulation.

4.2 The Licensee shall comply with all applicable Market Rules.

5 Obligation to Comply with Codes

5.1 The Licensee shall at all times comply with the following Codes (collectively the "Codes") approved by the Board, except where the Licensee has been specifically exempted from such compliance by the Board. Any exemptions granted to the licensee are set out in Schedule 2 of this Licence. The following Codes apply to this Licence:

a) the Affiliate Relationships Code for Electricity Distributors and Transmitters;

b) the Transmission System Code;

5.2 The Licensee shall:

a) make a copy of the Codes available for inspection by members of the public at its head office and regional offices during normal business hours; and

b) provide a copy of the Codes to any person who requests it. The Licensee may impose a fair and reasonable charge for the cost of providing copies.

6 Requirement to Enter into an Operating Agreement

6.1 The Licensee shall enter into an agreement ("the Operating Agreement") with the IMO providing for the direction by the IMO of the operation of the Licensee's transmission system. Following a request made by the IMO, the Licensee and the IMO shall enter into an Operating Agreement within a period of 90 business days, unless extended with leave of the Board. The Operating Agreement shall be filed with the Board within ten (10) business days of its completion.

6.2 Where there is a dispute that can not be resolved between the parties with respect to any of the terms and conditions of the Operating Agreement, the IMO or the Licensee may apply to the Board to determine the matter.

7 Obligation to Provide Non-discriminatory Access

7.1 The Licensee shall, upon the request of a consumer, generator, distributor or retailer, provide such consumer, generator, distributor or retailer, as the case may be, with access to the Licensee's transmission system and shall convey electricity on behalf of such consumer, generator or retailer in accordance with the terms of this Licence, the Transmission System Code and the Market Rules.

8 Obligation to Connect

8.1 If a request is made for connection to the Licensee's transmission system or for a change in the capacity of an existing connection the Licensee shall respond to the request within 30 business days.

8.2 The Licensee shall process connection requests in accordance with published connection procedures and participate with the customer in the IMO's Customer Assessment and Approval process in accordance with the Market Rules, its Rate Order(s), and the Transmission System Code.

8.3 An offer of connection shall be consistent with the terms of this Licence, the Rate Order, the Market Rules and the Transmission System Code, and Schedules 3 [12ZL7-0:1]and 4 [12ZL8-0:1]of this Licence.

8.4 The terms of such offer to connect shall be fair and reasonable.

8.5 The Licensee shall not refuse to make an offer to connect unless it is permitted to do so by the Act or any Codes, standards or rules to which the Licensee is obligated to comply with as a condition of this licence. 39

9 Obligation to Maintain System Integrity 40

9.1 The Licensee shall maintain its transmission system to the standards established in the Transmission System Code and the Market Rules and have regard to any other recognized industry operating or planning standards required by the Board. 41

10 Transmission Rates and Charges 42

10.1 The Licensee shall not charge for the connection of customers or the transmission of electricity except in accordance with the Licensee's Rate Order(s) as approved by the Board and the Transmission System Code. 43

11 Separation of Business Activities 44

11.1 The Licensee shall keep financial records associated with transmitting electricity separate from its financial records associated with distributing electricity or other activities in accordance with the Accounting Procedures Handbook and as required by the Board. 45

12 Expansion of Transmission System 46

12.1 The Licensee shall not construct, expand or reinforce an electricity transmission system or make an interconnection except in accordance with the Act and regulations, the Transmission System Code and the Market Rules. 47

12.2 In order to ensure and maintain system integrity or reliable and adequate capacity and supply of electricity, the Board may order the Licensee to expand or reinforce its transmission system in accordance with Market Rules and the Transmission System Code, in such a manner as the Board may determine. 48

12.3 The Licensee shall use its best efforts to expand inter-tie capacity to neighbouring jurisdictions by approximately 2000 MW by May 1, 2005. 49

12.4 Paragraph 12.3 in no way limits the obligation on the Licensee to obtain all necessary approvals including leave of the Board under Section 92 of the Act, where such leave is required. 50

12.5 The Licensee shall provide information to the Board as soon as practicable following May 1, 2005 or at an earlier date in order that the Board may determine whether or not, as of the end of such 36 51

month period, the Licensee has used its best efforts to expand inter-tie capacity to neighbouring jurisdictions by approximately 2000 MW.

13 Provision of Information to the Board

13.1 The Licensee shall maintain records of and provide, in the manner and form determined by the Board, such information as the Board may require from time to time.

13.2 Without limiting the generality of condition 13.1 the Licensee shall notify the Board of any material change in circumstances that adversely affects or is likely to adversely affect the business, operations or assets of the Licensee as soon as practicable, but in any event no more than twenty (20) business days past the date upon which such change occurs.

14 Restrictions on Provision of Information

14.1 The Licensee shall not use information regarding a consumer, retailer, wholesaler or generator obtained for one purpose for any other purpose without the written consent of the consumer, retailer, wholesaler or generator.

14.2 The Licensee shall not disclose information regarding a consumer, retailer, wholesaler or generator to any other party without the written consent of the consumer, retailer, wholesaler or generator, except where such information is required to be disclosed:

a) to comply with any legislative or regulatory requirements, including the conditions of this Licence;

b) for billing, settlement or market operations purposes;

c) for law enforcement purposes; or

d) to a debt collection agency for the processing of past due accounts of the consumer, retailer, wholesaler or generator.

14.3 Information regarding consumers, retailers, wholesalers or generators may be disclosed where the information has been sufficiently aggregated such that their particular information cannot reasonably be identified.

14.4 The Licensee shall inform consumers, retailers, wholesalers and generators of the conditions under which their information may be released to a third party without their consent.

14.5 If the Licensee discloses information under this section, the Licensee shall ensure that the information is not used for any other purpose except the purpose for which it was disclosed.

15 Term of Licence

15.1 This Licence shall take effect on December 3, 2003 and expire on December 2, 2023. The term of this Licence may be extended by the Board.

16 Fees and Assessments

16.1 The Licensee shall pay all fees charged and amounts assessed by the Board.

17 Communication

17.1 The Licensee shall designate a person that will act as a primary contact with the Board on matters related to this Licence. The Licensee shall notify the Board promptly should the contact details change.

17.2 All official communication relating to this Licence shall be in writing.

17.3 All written communication is to be regarded as having been given by the sender and received by the addressee:

a) when delivered in person to the addressee by hand, by registered mail or by courier;

b) ten (10) business days after the date of posting if the communication is sent by regular mail; and

c) when received by facsimile transmission by the addressee, according to the sender's transmission report.

18 Copies of the Licence

18.1 The Licensee shall:

a) make a copy of this Licence available for inspection by members of the public at its head office and regional offices during normal business hours; and

b) provide a copy of the Licence to any person who requests it. The Licensee may impose a fair and reasonable charge for the cost of providing copies.

80

SCHEDULE 1 DESCRIPTION OF THE TRANSMISSION SYSTEM

81

This Schedule describes the transmission system owned by the Licensee.

82

The transmission system and facilities of Hydro One Networks Inc. are depicted in the attached diagram and include transmission lines, transformation stations and all associated facilities. Subject to section 13.2, Hydro One may alter this diagram from time to time and shall file it with the Board, upon receipt of which the updated diagram shall be deemed to be the specification of transmission facilities under this schedule.

83

SCHEDULE 2 LIST OF CODE EXEMPTIONS

84

This Schedule specifies any specific Code requirements from which the Licensee has been exempted.

85

The Licensee is exempted from subsection 2.1.1 of the Transmission System Code so as to allow the licensee to enter into a modified form of connection agreement with both Ontario Power Generation Inc. ("OPG") and Bruce Power L.P. ("Bruce Power").

86

The modifications to the connection agreement are attached as Schedules 3 and 4 to this Licence. Schedule 3 contains changes needed to address legacy system confirguration issues as well as operating concerns affecting all generating stations owned by OPG and Bruce Power. Schedule 4 contains changes needed to comply with the operational requirements of nuclear genereating facilities, facilitate compliance with Power Reactor Operating Licences, issued by the Canadian Nuclear Safety Commission ("CNCP").

SCHEDULE 3
GENERATION RELATED CLAUSES SUPERSEDING THE CONNECTION AGREEMENT AND SCHEDULES

The purpose of this addendum is to capture generation related amendments that have been agreed to by the parties. In any circumstance where there is an inconsistency between the terms of the Connection Agreement and the terms of this Addendum, the terms of this Addendum shall prevail.

Insofar as this Agreement differs from the standard Transmission Connection Agreement issued by the OEB, this Agreement is subject to the approval of the Ontario Energy Board ("OEB"); and to the extent, if any, that the OEB fails to give such approval:

(a) this Agreement shall be amended as determined by the OEB; or

(b) if the OEB fails to give such approval but does not itself amend this Agreement, the parties shall amend this Agreement pursuant to the directions of the OEB, and the revised amendments shall be subject to the approval of the OEB.

Amendments to the Main Agreement

RECITAL

In accordance with its licence and the Market Rules, the Transmitter has agreed to offer, and the Customer has agreed to accept Connection Service, on the terms and conditions of this Agreement.

Replace by:

In accordance with its licence and the Market Rules, the Transmitter has agreed to offer, and the Customer has agreed to accept, in respect of those facilities defined in Schedule A, Connection Service, on the terms and conditions of this Agreement.

1. DEFINITIONS

1.14 "non-financial Default" means the following:

1.14.1 any breach of a term or condition of the Code or the Connection Agreement other than a financial default unless the breach occurs as a direct result of an emergency;

14

1.14.2 a licensed Party's ceasing to hold a licence; and

15

1.14.3 ...an Insolvency Event.

16

Replace by:

17

1.14 "non-financial Default" means the following:

18

1.14.1 any breach of a term or condition of the Code or the Connection Agreement other than a financial default unless the breach occurs as a direct result of an emergency; or

19

1.14.2 a licensed Party's ceasing to hold a licence; or

20

1.14.3 an Insolvency Event.

21

5. EQUIPMENT STANDARDS

22

5.1 The Transmitter and the Customer shall ensure that their respective new or altered equipment connected to the transmission system: (1) meets requirements of the Ontario Electrical Safety Authority; (2) conform to relevant industry standards including, but not limited to, CSA International, the Institute of Electrical and Electronic Engineers (IEEE), the American National Standards Association (ANSI), and the International Electrotechnical Commission (IEC); (3) conforms to good utility practices.

23

Replace by:

24

The Transmitter and the Customer shall ensure that their respective new or altered equipment connected to the transmission system: (1) meets requirements of the Ontario Electrical Safety Authority unless otherwise exempted; (2) conforms to relevant industry standards including, but not limited to, CSA International, the Institute of Electrical and Electronic Engineers (IEEE), the American National Standards Association (ANSI), and the International Electrotechnical Commission (IEC); (3) conforms to good utility practices.

25

5.2 The minimum general performance standards for all equipment connected to the transmission system are set out in Appendix 2 of the Code. The Transmitter shall provide the technical parameters to assist the Customer to ensure that the design of the Customer's equipment connected to the transmission system shall coordinate with the transmission system to achieve compliance with the Code and this Agreement.

26

Replace by:

27

The minimum general performance standards for all equipment connected to the transmission system are set out in Appendix 2 of the Code. The Transmitter shall provide the technical parameters to assist the Customer to ensure that the design of the Customer's equipment connected to the transmission system shall coordinate with the transmission system to achieve compliance with the Code and this Agreement. Responsibility for costs of any upgrade of the Customer's equipment deemed compliant under section 2.6.2 of the Transmission Code will be determined by the OEB.

28

6 OPERATIONAL STANDARDS AND REPORTING PROTOCOL

29

30

6.2 The Transmitter shall specify the fault levels at all connection points, including the Customer's connection points, as required by the Market Rules, which shall be recorded in Schedule D to this Agreement.

31

Replace by:

32

The Transmitter shall specify the fault levels (and the assumptions behind those levels) at all connection points, including the Customer's connection points, as required by the Market Rules, which shall be recorded in Schedule D to this Agreement.

33

6.5 The Customer shall provide prompt notice to the Transmitter in accordance with the Code or as agreed in Schedule D to this Agreement before disconnecting its equipment from the transmission system.

34

Replace by:

35

Where practical, the Customer shall provide prompt notice to the Transmitter in accordance with the Code or as agreed in Schedule D to this Agreement before disconnecting its equipment from the transmission system.

36

7.2 Involuntary Disconnection

37

38

7.2.1.6 if the Customer is a defaulting Party; or

39

Replace by:

40

if the Customer is a defaulting Party, however when the issue of default has been disputed by the Customer, no disconnection of a Customer may occur without a final resolution of the dispute, pursuant to section 13 of this Agreement; or

41

7.3 Disconnection-General

42

7.3.2 The Customer shall pay all costs that are directly attributable to an involuntary disconnection, and decommissioning of its facilities, including the cost of removing any of the Transmitter's equipment from the Customer's property and shall cooperate in establishing appropriate procedures for such decommissioning.

43

Replace by:

44

45

The Customer shall pay all costs that are directly attributable to an involuntary disconnection, and decommissioning of its facilities, including the cost of removing any of the Transmitter's equipment from the Customer's property and shall cooperate in establishing appropriate procedures for such decommissioning. The Transmitter will not require the removal of the protection and control wiring within the generating facility.

46

7.4 Reconnection After Involuntary Disconnection

47

7.4.2.3 The Customer has taken all necessary steps to prevent circumstances causing the disconnection from recurring and has delivered binding undertakings to the Transmitter that the circumstances leading to disconnection shall not recur; and

48

Replace by:

49

the Customer has taken all necessary steps to prevent circumstances causing the disconnection from recurring, has delivered on the binding decision to the Transmitter and has satisfied all requirements on it arising from any arbitrator's decision pursuant to section 13.11 that the circumstances leading to disconnection shall not recur; and

50

8 LIABILITY

51

8.3 Where the Customer uses the Transmitter's breakers as HV interruption devices or for synchronizing the generator to the transmission system, the Transmitter shall have no liability to the Customer, even where the Customer suffers damage as a result of the Transmitter's negligence or willful misconduct, except as follows:

52 a) if damage occurs to the Customer's main output transformer ("MOT") due to the negligence or willful misconduct of the Transmitter, the liability of the Transmitter to the Customer shall be for the lesser of (i) the cost to repair the MOT and (ii) the cost to replace the MOT; and

53 b) if damage occurs, due to the negligence or willful misconduct of the Transmitter, to the Customer's electrical equipment upstream of the MOT, but within the powerhouse, the liability of the Transmitter to the Customer shall be limited to 45% of the damage attributable to the said negligence or willful misconduct.

54 Notwithstanding a) and b) above, the Parties agree that the Transmitter's liability for a) and b) above shall not exceed $25 million per event of negligence or willful misconduct, recognizing that one such event may cause damage under both a) and b).

55 The Customer agrees that it shall, within five years of the commencement date of this Agreement, conduct and complete studies concerning the installation of its own breakers for HV interruption and for synchronizing the generator to the transmission system. The Customer and Transmitter will meet to review these studies and to discuss whether installation of the additional breakers by the Customer is warranted. The Parties will advise the OEB of the results of these discussions. The Parties agree that, after advising the OEB, the responsibility for any incremental costs incurred by the Transmitter as a result of the Customer not having its own breakers at these stations shall be as determined by the OEB.

56 Where these breakers are installed and the Customer no longer uses the Transmitter's breakers as HV interruption devices or for synchronizing this liability limitation will no longer be applicable.

57 The facilities covered by this clause are Bruce "A", Pickering "A" & "B", Lakeview, and Abitibi during normal operation, and Bruce "B" (Units 5,7,8), and Darlington during by-pass/emergency operation.

58 ***Include the above***

59 **9 REPRESENTATIONS AND WARRANTIES**

60 9.1.1.3 that its facilities meet the technical requirements of the Code and this Agreement, excluding equipments that are deemed compliant under section 2.6 of the Code which is listed in Schedule J of this Agreement; and

61 **Replace by:**

62 9.1.1.3 that its facilities meet the technical requirements of the Code and this Agreement, excluding equipment that is deemed compliant under section 2.6 of the Code which is listed in Schedule J of this Agreement; and

63

10 REQUIREMENTS FOR OPERATIONS AND MAINTENANCE

64

10.4.1 Each Party shall specify its controlling authority in accordance with the operations schedule attached to this Agreement.

65

Replace by:

66

Each Party shall specify its Controlling Authority in accordance with the operations schedule attached to this Agreement.

67

10.4.2 The Transmitter and the Customer shall comply with all requests by the other Party's controlling authority in accordance with this Agreement and the Code.

68

Replace by:

69

The Transmitter and the Customer shall comply with all requests by the other Party's Controlling Authority in accordance with this Agreement and the Code.

70

10.6.2 When the Parties have so agreed in writing, one Party may appoint an employee of the other as its designate for switching-purposes.

71

Replace by:

72

When the Parties have so agreed in writing, one Party may appoint an employee of the other as its designate for switching-purposes. Orders to operate, however, must originate from the Controlling Authority.

73

10.7.3 The Transmitter shall provide to the Customer the isolation and reconnection of the Customer's equipment at the Customer's request at no cost to the Customer, once per year, during normal business hours. The Customer shall pay the Transmitter's reasonable costs for isolating and reconnecting the Customer's equipment if the requested isolation and reconnection is for a time outside of normal business hours.

74

Replace by:

75

The Transmitter shall provide to the Customer the isolation and reconnection of the Customer's equipment at the Customer's request at no cost to the Customer, one time per generating unit per year, which can be aggregated across multi-unit stations during normal business hours. The Customer shall pay the Transmitter's reasonable costs for isolating and reconnecting the Customer's equipment if the requested isolation and reconnection is for a time outside of normal business hours.

76

10.7.4 The Transmitter shall charge the Customer, and the Customer shall pay, the reasonable costs incurred by the Transmitter for isolating and reconnecting the Customer's equipment for any isolation and reconnection request in excess of one per year as specified in section 10.7.3 above.

77

Replace by:

78

The Transmitter shall charge the Customer, and the Customer shall pay, the reasonable costs incurred by the Transmitter for isolating and reconnecting the Customer's equipment for any isolation and reconnection request in excess of one time per generating unit per year, which can be aggregated across multi-unit stations as specified in section 10.7.3 above.

79

10.8.3 The Customer shall provide to the Transmitter the isolation and reconnection of the Transmitter's equipment at the Transmitter's request at no cost to the Transmitter, one time per generating unit per year, which can be aggregated across multi-unit stations, during normal business hours. The Transmitter shall pay the Customer's reasonable costs for isolating and reconnecting the Transmitter's equipment if the requested isolation and re-connection is for the time outside of normal business hours.

80

Include the above

81

10.8.4 The Customer shall charge the Transmitter, and the Transmitter shall pay, the reasonable cost incurred by the Customer for isolating and reconnecting the Transmitter's equipment for any isolation and reconnection request in excess of one time per generating unit per year, which can be aggregated across multi-unit stations as specified in section 10.8.3 above.

82

Include the above

83

10.13 **Emergency Operations**

84

Note that parts 10.13.3 to 10.13.8 do not apply to Generators.

85

Include the above

86

10.13.3 The Transmitter may be required from time to time to implement load shedding as outlined in this Agreement, Schedule D, section 7.

87

Exclude the above for Generators

88

10.13.4 The Customer shall identify the loads (and their controllable devices) to be included on the rotational load shedding schedules to achieve the required level of emergency preparedness.

89

Exclude the above for Generators

90

10.13.5 The Transmitter may review the rotational load-shedding schedule with the Customer annually or more often as required.

91

Exclude the above for Generators

92

10.13.6 The Customer shall comply with all requests by the Transmitter's controlling authority to shed load. Such requests shall be initiated to protect transmission system security and reliability in response to a request by the IMO.

93

Exclude the above for Generators

94

10.13.7 When the Transmitter's transmission facilities return to normal, the Transmitter's controlling authority shall notify the Customer's controlling authority to re-energize the Customer's facilities.

95

Exclude the above for Generators

96

10.13.8 The Transmitter may be required from time to time to interrupt supply to the Customer during an emergency to protect the stability, reliability, and integrity of its own facilities and equipment, or to maintain its equipment availability. The Transmitter shall advise the affected Customer as soon as possible/practical of the transmission system's emergency status and when to expect normal resumption and reconnection to the transmission system.

97

Exclude the above for Generators

98

15 COMPLIANCE, INSPECTION, TESTING AND MONITORING

99

15.1.5 When requested by the Transmitter, the Customer shall produce test certificates certifying that its facilities have passed the relevant tests and comply with all applicable Canadian standards before connection.

100

Replace by:

101

With respect to new, modified or replacement equipment to be connected to the transmission system, the Customer shall, when requested by the Transmitter, produce test certificates certifying that its facilities have passed the relevant tests and comply with all applicable Canadian standards before connection.

102

18 TECHNICAL REQUIREMENTS FOR TAPPED TRANSFORMER STATIONS SUPPLYING LOAD

103

The Transmitter, the Customer, who is either a Distributor or a Consumer, shall follow the technical requirements set out in Schedule H of this Agreement.

104

Replace by:

105

Not applicable to Generators

106

23 INCORPORATION OF SCHEDULES

107

Schedule "M" - Amendment Agreement Template

108

Include the above:

109

28 ENTIRE AGREEMENT

110

This Agreement, together with the schedules attached hereto, constitutes the entire agreement between the Parties and supersedes all prior oral or written representations and agreements of any kind whatsoever with respect to the matters dealt with herein.

111

Replace by:

112

This Agreement, together with the Addendum and schedules attached hereto, constitutes the entire agreement between the Parties and supersedes all prior oral or written representations and agreements of any kind whatsoever with respect to the matters dealt with herein.

113

Amendments to Schedules "D", "F", "G", "H", and "I"

114

Schedule "D"

115

Section 8 – Clause 1

116

1. A Customer shall re-verify its station protections and control systems that can impact on the Transmitter's transmission system. The maximum verification or re-verification interval is: four (4) years for most of the 115 kV transmission system elements including transformer stations and transmission lines, and certain 230 kV transmission system elements; and two (2) years for all other high voltage elements. The maintenance cycle can be site specific.

117

Replace by:

118

A Customer shall re-verify its station protections and control systems that can impact on the Transmitter transmission system. The verifications will generally be carried out during generation outages. Where this cannot be accommodated within the time periods required for NPCC reporting, an entry will be made in the "EXCEPTIONS TO THE MAINTENANCE CRITERIA FOR BULK SYSTEM PROTECTION". The target date for the completion of the program will be indicated.

119

Schedule "F"

120

1.6.2 A Transmitter may require a Customer to install monitoring equipment to track the performance of its facilities, identify possible protection system problems, and provide measurements of power quality. As required, the monitoring equipment shall perform one or several of the following functions:

121

Replace by:

122

A Transmitter may require request a Customer to install monitoring equipment to track the performance of its facilities, identify possible protection system problems, and provide measurements of power quality. The responsibility for costs will be as determined by the OEB. As required, the monitoring equipment shall perform one or several of the following functions:

123

1.6.5 The Customer shall bear all costs, without limitation, of providing all required telemetry data, associated with its facilities to the Transmitter and providing all required connection inputs to the Transmitter's disturbance-monitoring equipment.

124

Replace by:

125

The Customer shall bear all costs, without limitation, of providing the same telemetry data required under the Market Rules, associated with its facilities to the Transmitter and providing all required connection inputs to the Transmitter's disturbance-monitoring equipment, except:

126

- Where the connection inputs to the Transmitter's disturbance-monitoring equipment are of mutual benefit to the Customer and the Transmitter in which circumstance the Customer and Transmitter shall share the cost of providing the data in proportion to the benefits received; or

127

- Where the connection inputs to the Transmitter's disturbance-monitoring equipment are required only for the transmitter's benefit in which case the transmitter shall pay all of the costs associated with providing the data.

128

1.8.1 The Transmitter may at its sole discretion specify the maintenance criteria and the maximum time intervals between verification cycles for those parts of Customers' facilities that may materially adversely affect the transmission system. The obligations for maintenance and performance re-verification shall be stipulated in the appropriate schedule to this Agreement.

129

Replace by:

130

The Transmitter, using Good Utility Practice, may specify the maintenance criteria and the maximum time intervals between verification cycles for those parts of Customers' facilities that may materially adversely affect the transmission system. The obligations for maintenance and performance re-verification shall be stipulated in the appropriate schedule to this Agreement.

131

1.8.5 To ensure that the Transmitter's representative can witness the relevant tests, the Customer shall submit the proposed test procedures and a test schedule to the Transmitter not less than ten business days before it proposes to carry out the test. Following receipt of the request, the Transmitter may delay for technical reasons the testing for as long as ten business days.

132

Replace by:

133

To ensure that the Transmitter's representative can witness the relevant tests, the Customer shall submit the proposed test procedures and a test schedule to the Transmitter not less than ten business days before it proposes to carry out the test. Following receipt of the request, the Transmitter may delay for technical reasons the testing for as long as ten business days. The Transmitter will use best efforts to make the required test date.

134

Schedule "G"

135

1.5 **Autoreclosure and Manual Energization**

136

1.5.2 Following a protection operation on a transmission line, the transmission breakers, located mainly in network switching and/or transformation stations, shall reclose after a certain time delay. The Generator shall provide a reliable means of disconnecting its equipment before this reclosure. The Generator is responsible for protecting its own equipment and the Transmitter is not liable for damage to the Generator's equipment. The Generator may request a means of supervising the transmission reclosure prior to the disconnection of its equipment e.g. changes in protection logic at one or both stations to reduce the risk of such events.

137

Replace by:

138

Following a protection operation on a transmission line, the transmission breakers, located mainly in network switching and/or transformation stations, shall autoreclose after a certain time delay. Where the Generator is directly connected to the transmission line, or for configurations where the Generator could be damaged by autoreclosure of the line, the Generator shall provide a reliable

means of disconnecting its equipment before autoreclosure. The Generator is responsible for protecting its own equipment and the Transmitter is not liable for damage to the Generator's equipment except as stipulated in Section 8, Appendix 1 of this Code. The Generator may request a means of supervising the transmission autoreclosure prior to the disconnection of its equipment e.g. changes in protection logic at one or both stations to reduce the risk of such events. The criteria governing the use of reclosures are as set out in the Ontario Hydro "Policies, Principles, & Guidelines" document "C-3.4.1 (R1), Automatic Reclosure and Manual Eneregization on Bulk Electricity System Circuits," which was in effect as of April 1, 1999.

139

Schedule "H"

140

Technical Requirements for Tapped Transformer Stations Supplying Load:

141

(a) Transmitter's Tapped Transformer Stations

142

(b) Distributor's and Consumer's Tapped Transformer Stations

143

Exclude entire Schedule H

144

Schedule "I"

145

1.3.1 Customers shall perform routine verifications of protection systems on a scheduled basis as specified by the Transmitter in accordance with applicable reliability standards. The maximum verification interval is four years for most 115-kV elements, most transformer stations, and certain 230-kV elements and two years for all other high- voltage elements. All newly commissioned protection systems shall be verified within six months of the initial in-service date of the system.

146

147

Replace by:

148

Customers shall perform routine verifications of protection systems on a scheduled basis in accordance with applicable reliability standards. The maximum verification interval is four years for most 115-kV elements, most transformer stations, and certain 230-kV elements and two years for all other high-voltage elements. All newly commissioned protection systems shall be verified within six months of the initial in-service date of the system.

SCHEDULE 4
SPECIFIC NUCLEAR ARRANGEMENTS AND AREAS OF CLARIFICATION

Addendum Setting Out:

(i) The Obligations of the Transmitter in Respect of the Provision of Class IV Power and

(ii) the Rights and Obligations of the Parties in Respect of their Property Interests and Mutual Cooperation

Contents

I Purpose

II Principles Governing the Specific Nuclear Arrangements and Areas of Clarification

III Specific Terms

I Purpose

The purpose of this addendum is to capture those requirements that the Transmitter must meet and adhere to in order for the Customer to be in conformance with its Power Reactor Operating Licence (PROL) and fulfill its obligations to the general public in maintaining the nuclear safety of the generating units. Meeting these requirements necessitates changes, in whole or in part, to a number of the sections of the standard Connection Agreement attached to the Ontario Energy Board's Transmission System Code. These changes are documented below in a format that identifies the existing section in the Connection Agreement and sets out the section that replaces it.

The provision of a continuous and reliable supply of Class IV power is an integral part of maintaining and ensuring reactor safety. In shutdown or lay-up conditions, the unit service loads must continue to be supplied to ensure nuclear safety. Loss or degradation of the electrical grid can be one of the most safety-significant events to occur at nuclear power plants. Such events have the potential to result in loss of main heat sink forcing the transfer to back-up heat sink, loss of output, automatic safety system actuation, and degraded containment functions.

12

II Principles Governing the Specific Nuclear Arrangements and Areas of Clarification.

13

II.1 In any circumstance where there is an inconsistency between the terms of the Transmission System Code, the Connection Agreement and the terms of this Addendum, the terms of this Addendum shall prevail, except where contrary to appplicable law.

14

II.2 Good Utility Practice is not intended to be limited to optimum practices, or methods, or act to the exclusion of all others, but rather to include all practices, methods or acts generally accepted in North America including those in the nuclear sector as the Customer holds a PROL from the Canadian Nuclear Safety Commission ("CNSC") and the Transmitter is providing a Transmission Service and Off-Site Power service to the Customer.

15

II.3 The Transmitter agrees to operate and maintain its transmission assets including the switchyards at the Customer's Facility in a manner which will meet the requirements of the Customer's PROL as reflected in this Addendum.

16

II.4 This Agreement shall continue in effect until a mutually agreeable termination date not to exceed the date on which the PROL for the Customer's Facility is terminated, provided that;

17

II.4.1 the Customer has satisfied all CNSC requirements and commitments required to be satisfied in order to eliminate the need for a transmission connection to provide an Off-Site Power service under this Agreement, and

18

II.4.2 the Customer no longer holds any other nuclear related licence for the Customer's Facility which identifies a requirement for an Off Site-Power service.

19

II.5 The Customer agrees to make timely application to the CNSC for authorization to terminate this Agreement when circumstances warrant.

20

II.6 Notwithstanding all other provisions of the Transmission System Code, the Connection Agreement and this Addendum except for Subsection 10.13.1 of the Connection Agreement, the Transmitter shall not, under any circumstances disconnect the Customer's Off-Site Power service required to meet its obligations under its PROL, either during the term of this Agreement, or upon its termination unless such action is pursuant to a decision of applicable regulator authority(ies) or a court having jurisdiction or the mutual agreement of the Customer and the Transmitter.

21

II.7 To the extent practicable, in the event of an Emergency as identified in Subsection 10.13.1 of the Connection Agreement that requires disconnection of the Customer's Facility from the Transmission System, or the Customer's Facility from the Off-Site Power services, the Transmitter shall give the Customer reasonable opportunity to shut down in a controlled manner such parts of the Customer's Facility as deemed appropriate by the Customer before the Transmitter disconnects the Customer's Facility from the Transmission System.

22 II.8 In the event of an unplanned outage of the conveyance of Off-Site Power, the Transmitter will use best efforts to promptly restore that service.

23 II.9 The Customer shall pay the additional incremental costs of the transmitter arising from any regulatory requirement from the CNSC coming into force after the execution of this Agreement;

24 II.9.1 Until such time as these costs can be recovered in rates or elsewhere and that the work giving rise to the costs has not been carried out for the benefit of other parties or as a requirement placed on the Transmitter from other sources; and

25 II.9.2 No additional costs are attributable to the provision of the Transmission connection in support of the conveyance of Off-Site Power at historical reliability levels.

26 II.10 Except as identified in the Connection Agreement Subsection 10.13.1 or applicable laws, the Transmitter shall take no action to prevent the Customer from utilizing the Off-Site Power.

27 **III Specific Terms**

28 The following provides changes, deletions and additions to specific clauses that form part of the amendments to the main Connection agreement Agreement and the Schedules thereto, as agreed to by the Parties.

29 **Amendments to the Connection Agreement**

30 **Incorporation of Procedures and Manuals by Reference**

31 Numbers appearing within square brackets "[ ]" incorporate by reference the procedures or manuals so designated in Schedule Q.

32 **Include the above**

33 **1. DEFINITIONS**

34 1.19 Abbreviations

35 ANO Authorized Nuclear Operator

36 BES Bulk Electricity System

37 GRMC Generation Resource Management Center

NGS Nuclear Generating Station

OATIS Operating, Administrative and Trades Information System

OP&P'S Operating Policies and Principles

OPEX Operating Experience

P&SI Process and System Implementation (Passport)

RTU Remote Terminal Unit

SCR Station Condition Record

SE System Engineer

SLA Service Level Agreement

SNO Supervising Nuclear Operator

SPOC Single Point of Contact

Include the above

1.20 "Class IV Power" has the meaning ascribed thereto in part I of this Addendum B;

Include the above

1.21 "CNSC" means the Canadian Nuclear Safety Commission, or its successor;

Include the above

1.22 "Corrective Maintenance" Consists of actions that restore, by repair, overhaul, or replacement, the capability of a failed system, structure, or component to perform its design function within acceptable criteria;

Include the above

56

1.23 "Customer Facility" means the facilities defined in Schedule A of this Agreement;

57

Include the above

58

1.24 "Design Authority" means the organization within each Party which has the authority to make final binding decisions and give approval regarding design requirements, design assurance, and design output for existing, new, and modified facilities, structures, systems, Equipment, and components, including material and software;

59

Include the above

60

1.25 "Equipment Ownership" means that authority which has design authority, maintenance responsibility and replacement responsibility for any particular piece of Equipment;

61

Include the above

62

1.26 "Good Utility Practice" means any of the practices, methods and acts engaged in or approved by a significant portion of the electrical utility industry in North America during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good utility practice is not intended to be limited to optimum practices, or methods, or act to the exclusion of all others, but rather to include all practices, methods or acts generally accepted in North America.

63

As it relates to nuclear safety, Good Utility Practice also includes those practices, methods or acts generally accepted in North America relating to the conveyance of Off-Site Power as the Customer holds a PROL from the CNSC and the Transmitter is providing Transmission Service and conveying Off-Site Power service to the Customer;

64

Include the above

65

1.27 "Modification" means any permanent or temporary addition, deletion or change to existing Equipment, systems or documentation;

66

Include the above

67

1.28 "Off-Site Power" means the electricity delivered conveyed by the Transmitter to the Customer's Facility, generally through the Customer's system service transformers, which enables the Customer to meet its obligations under its Power Reactor Operating LicenseLicence for the provision of a reliable supply of Class IV Power;

68

Include the above

69

1.29 "Open/Close Control" means an activity, authorized by the Controlling Authority, to change the position of a specific apparatus or device;

70

Include the above

71

1.30 "Part Substitution" means the installation of an item, which is not identical to the original item, and which does not alter the equipment or component design specifications of both the item and the applicable interfaces;

72

Include the above

73

1.31 "PASSPORT" means a suite of applications integrated into a central database capable of providing the required information infrastructure to enable business information to be shared in a (real-time) timely manner;

74

Include the above

75

1.32 "Power Reactor Operating Licence" or "PROL" means the licencse issued to the Customer pursuant to the Atomic Energy Control Act or its successor, the Nuclear Safety Control Act, for the operation of a nuclear installation in Canada;

76

Include the above

77

1.33 "Predefines" means identified work of a recurrent nature;

78

Include the above

79

1.34 "Predictive Maintenance" consists of the actions necessary to monitor, find trends, and analyze parameter, property, and performance characteristics or signatures associated with a piece of Equipment that indicate the Equipment may be approaching a state in which it may no longer be capable of performing its intended function;

80

Include the above

81

1.35 "Preventive Maintenance" consists of all those systematically planned and scheduled actions, including predictive or planned maintenance, performed for the purpose of preventing Equipment failure;

82

Include the above

83

1.36 Protected Area" means the area enclosed by station security fences with the entry and exit points controlled by the Customer's security personnel. Personnel entering the protected area must have Security Clearance [11] or be sponsored and escorted by a Customer site employee who has Security Clearance;

84

Include the above

85

1.37 "Scheduled Outage" means a planned removal from service of Equipment that has been coordinated in advance with a mutually agreed start date and duration and is required for the purposes of inspection, testing, Preventive Maintenance or Corrective Maintenance;

86

Include the above

87

1.38 "Single Point of Contact" or "SPOC" means the individuals designated in Schedule D with overall work approving authority for a given facility whose function is (i) immediate review of identified needs for approval, (ii) verification of incoming needs for duplication, completeness, and validity, (iii) prioritization of work into major categories, (iv) recognition of potential system impairments, (v) encouragement of effective use of resources across the facility and approval of work-needs in accordance with the approved divisional work programs, (vi) to act as a representative of the facility and be an integral part of the work control, or (vii) participation in the final decision for resolution of issues [4];

88

Include the above

89

1.39 "Terminal Point" means a device that serves as a division point between Equipment under the control of any two authorities. Operation of a Terminal Point requires the approval of both Controlling Authorities;

90

Include the above

91

2. PURPOSE OF AGREEMENT

92

This Agreement sets out the terms and conditions upon which the Transmitter has agreed to offer, and the Customer has agreed to accept Connection Service.

93

Replace by:

94

This Agreement sets out the terms and conditions upon which the Transmitter has agreed to offer, and the Customer has agreed to accept connection service.

95 The Power Reactor Operating Licence held by the Customer requires that the switchyards at Customer's Facility meet a certain standard of reliability as a whole and at the level of the individual components. It also requires that switchyard operating procedures and maintenance practices meet certain prescribed standards. The Transmitter agrees to operate and maintain its transmission assets including the switchyards at the Customer's Facility in a manner which will meet the requirements of the Customer's PROL as reflected in this Agreement.

96 **3. TRANSMISSION SYSTEM CODE**

97 The Transmission System Code (the "Code") and this Agreement establish minimum testing, operational and maintenance standards for the Transmitter and the Customer. The Parties hereto hereby agree to be bound by, and to act at all times in accordance with the Code which is hereby incorporated in its entirety by reference into, and which hereby forms part of this Agreement.

98 **Replace by:**

99 The Transmission System Code (the "Code") and this Agreement establish minimum testing, operational and maintenance standards for the Transmitter and the Customer. The Parties hereto hereby agree to be bound by, and to act at all times in accordance with the Code which is hereby incorporated in its entirety by reference into, and which hereby forms part of this Agreement except insofar as it is inconsistent with the terms of this Agreement. In any circumstance where there is an inconsistency between the terms of the Code and requirements of the Customer's PROL, the requirements of the PROL shall prevail.

100 **5. EQUIPMENT STANDARDS**

101 5.3 The Transmitter and the Customer shall fully cooperate to ensure that modelling data required by the Code and this Agreement for the planning, design and operations of connections are complete and accurate, and the Transmitter shall order required tests where there are grounds to question the validity of such data. This includes, but is not limited to, the Information in Appendix 1, Schedule E, Parts (A) to (E), where applicable.

102 **Replace by:**

103 5.3 The Transmitter and the Customer shall fully cooperate to ensure that modelling data required by the Code and this Agreement for the planning, design and operations of connections are complete and accurate, and the Transmitter shall order required tests where there are reasonable grounds to question the validity of such data. This includes, but is not limited to, the information in Appendix 1, Schedule E, Parts (A) to (E), where applicable. Any such tests must be conducted in a manner consistent with the Customer's obligations under its Power Reactor Operating Licence.

104

6. OPERATIONAL STANDARDS AND REPORTING PROTOCOL

105

6.8 Upon learning of any changes that can affect the reliability of the Customer's facilities, the Transmitter shall promptly submit a written report to the Customer describing any and all changes, including, without limitation, changes to the Transmitter's facilities, equipment, and associated protective relaying or protective relaying settings, or any other changes of any kind whatsoever that might affect the reliability of that Customer's facilities.

106

Replace by:

107

Upon learning of, or before implementing any changes that may affect the reliability of the Transmitter's facilities, and in particular, the reliability of the conveyance of the Customer's Off-Site Power and its ability to meet its obligations under its Power Reactor Operating Licence, the Transmitter shall promptly submit a written report to the Customer describing any and all such proposed changes, including, without limitation, proposed changes to the Transmitter's facilities, Equipment, and associated protective relaying or protective relaying settings, or any other changes of any kind whatsoever that might affect the reliability of that Customer's facilities. The Customer shall have a period of time as set out in Schedule D to consider whether the proposed change would materially affect its ability to comply with its obligations under its Power Reactor Operating Licence. In the event that the Customer, acting reasonably, determines that the proposed change would materially affect its ability to meet its obligations under the Power Reactor Operating Licence, the Transmitter shall not proceed with the proposed change without obtaining prior written approval of the applicable regulatory authority(ies). Any incremental costs which do not provide a benefit to the Transmission System resulting from altering the proposed change so as not to materially affect the Customer's ability to comply with the its obligations under the PROL, shall be identified by the Transmitter and paid for by the Customer.

108

7.2 Involuntary Disconnection

109

7.2.1 The Transmitter may disconnect the Customer's facilities, at any connection point at any time throughout the term of this Agreement in any of the following circumstances:

110

Replace by:

111

7.2.1 Notwithstanding all other provisions of this Agreement except for Subsection 10.13.1, the Transmitter shall not, under any circumstances except where authorized by an appropriate regulatory authority or court of law, disconnect the Customer's Off-Site Power required to meet its obligations under its Power Reactor Operating License, either during the term of this Agreement, or upon its termination. However, in the event of an Emergency that requires disconnection of the Customer's Facility from the Transmitter's transmission system facilities, the Transmitter shall, to the extent that it is within its control, give the Customer reasonable opportunity to shut down the nuclear reactors in a controlled manner before the Transmitter disconnects the Customer's Facility from the transmission system. Subject to the above, other than Off-Site Power, the Transmitter may, by following the requirements of this Agreement, disconnect the Customer's Facilities to prevent the

Customer's electricity output from entering the Transmitter's transmission facilities during the term of the Agreement in the following circumstances:

112

7.3 Disconnection - General

113

7.3.3 For the duration of the disconnection the Transmitter shall not be obliged to fulfill any agreement to convey electricity to or from the Customer's facilities.

114

Replace by:

115

7.3.3 For the duration of the disconnection, the Transmitter shall continue to provide the conveyence of Off-Site Power service to the Customer's Facilities.

116

8 LIABILITY

117

8.1 The Transmitter shall only be liable to the Customer and the Customer shall only be liable to the Transmitter for any damages which arise directly out of the willful misconduct or negligence:

118

8.1.1 of the Transmitter in providing Transmission Services to the Customer;

119

8.1.2 of the Customer during the period it is connected to the Transmitter's transmission facilities; or

120

8.1.3 of the Transmitter or Customer in meeting their respective obligations under this Agreement, the Transmission System Code, their licences and any other applicable law.

121

8.2 Despite section 8.1, above, neither the Transmitter nor the Customer shall be liable under any circumstances whatsoever for any loss of profits or revenues, business interruption losses, loss of contract or loss of goodwill, or for any indirect, consequential, incidental or special damages, including but not limited to punitive or exemplary damages, whether any of the said liability, loss or damages arise in contract, tort or otherwise.

122

Replace by:

123

8 LIABILITY

124

8.1 Subject to sections 8.2A and 8.2B below, the Transmitter shall only be liable to the Customer, and the Customer shall only be liable to the Transmitter, and each Party shall indemnify the other, only for damages that arise directly out of the willful misconduct or negligence:

125

8.1.1 of the Transmitter in providing Transmission Services to the Customer;

126

8.1.2 of the Customer during the period that it is connected to the Transmitter's transmission facilities; or

127

8.1.3 of the Transmitter or Customer in meeting their respective obligations under this Agreement, the Transmission System Code, their licences and any other applicable law.

128

8.2A The Transmitter shall not be liable to the Customer for any damages or loss caused by the hazardous properties of nuclear material as defined under the Nuclear Liability Act, R.S.C. 1985, N-28, as amended. In the event that any such damages or loss occur wholly or partially as a result of an unlawful act or omission of an employee, agent, contractor or sub-contractor of the Transmitter, done with the intent to cause injury or damage, the Transmitter shall not be liable for any claims by the Customer's insurer, in accordance with the letter dated May 10, 2001, from the Customer's insurer appended to this Agreement as Schedule R.

129

8.2B Neither Party shall be liable under any circumstances whatsoever for any loss of profits or revenues, business interruption losses, loss of contract or loss of goodwill, or for any indirect, consequential, incidental or special damages, including but not limited to punitive or exemplary damages, whether any of the said liability, loss or damages arise in contract, tort or otherwise.

130

10 REQUIREMENTS FOR OPERATIONS AND MAINTENANCE

131

10.1.1 When the Transmitter's staff, its contractors, or agents work at the Customer's facilities or site, the Customer's safety and environmental requirements shall be observed by such staff, contractors and agents.

132

Replace by:

133

10.1.1 When the Transmitter's staff, its contractors, or agents work at the Customer's Facilities or site, the Customer's safety and environmental requirements and obligations under its PROL shall be observed by such staff, contractors and agents, to the extent that those requirements and obligations have been communicated to the Transmitter.

134

The Customer shall provide appropriate site specific training, as required by the Customer, for staff, contractors and agents nominated by the Transmitter, to cover the work identified by the transmitter. The Transmitter's staff, its contractors and its agents will only be expected to be trained in and observe those requirements identified for the particular area in which they are to work and the nature of that work.

135

10.1.2 When the Transmitter can show the Customer, to the Customer's satisfaction, that the Transmitter's safety and environmental practices provide for an equivalent or better level of safety or environmental protection, the Customer shall give permission to work to the Transmitter's safety and environmental practices. As a minimum, all applicable statutes and regulations shall govern such work.

136

Exclude the above

137

10.3.1 Operations and maintenance shall be performed only by qualified persons.

138

Replace by:

139

Operations and maintenance shall be performed by the Customer's staff at the Transmitters site and by the Transmitter's staff at the Customer's site shall be performed only by qualified persons trained to understand the hazards involved at each site.

140

10.6.3 The Customer shall comply with all switching instructions issued by the Transmitter's Controlling Authority to maintain the security and reliability of the transmission system. The two Controlling Authorities shall agree to procedures prior to undertaking any switching-operations.

141

Replace by:

142

10.6.3 The Customer shall comply with all switching instructions issued by the Transmitter's Controlling Authority to maintain the security and reliability of the Transmission System unless this conflicts with public safety, life, property, or the environment, as applicable to a Nuclear Generating Station and as required by the Customer's PROL or with the terms of this Agreement. The two Controlling Authorities shall agree to procedures prior to undertaking any switching operations.

143

10.11 Scheduling of Planned Work

144

In order to maintain the provision conveyance of reliable Off-Site Power service, the parties will co-ordinate outage plans in accordance with Good Utility Practice and shall use their best efforts to schedule outages on mutually acceptable dates. To the extent practical, the Transmitter shall schedule any shutdown, withdrawal or testing of facilities to co-ordinate with the Customer's scheduled outages.

145

Include the above

146

10.11.2 The Customer shall, take all reasonable steps to ensure that its anticipated and planned outages for the upcoming year are submitted to the Transmitter by October 1st of each year.

147

Replace by:

148

The Customer shall, take all reasonable steps to ensure that its anticipated and planned outages for the upcoming year are submitted to the Transmitter by October 1st of each year.

149 Notice requirements for planned work are contained in this Addendum under Schedule D "Outage Planning".

150 10.11.3 At least four days in advance of planned work that requires feeder breaker to be opened or operated and at least ten days in advance of planned work that requires operations of multiple feeder breakers, station bus or a whole transformer station, the Customer's Controlling Authority shall fax requests to the appropriate Transmitter contact identified in the operations schedule of this Agreement.

151 **Replace by:**

152 10.11.3 At least four days in advance of planned work by the Transmitter that requires a Transmitter's feeder breaker to be opened or operated and at least ten days in advance of planned work by the Transmitter that requires operations of the Transmitter's multiple feeder breakers, Transmitter's station Bus or a Transmitter's whole transformer station, the Customer's Controlling Authority shall fax requests to the appropriate Transmitter contact identified in Part 1, Schedule D of this Agreement.

153 10.11.4.1 any disconnection from the Transmitter's transmission facilities of less than 50 kV e.g. disconnection from a feeder breaker owned by the Transmitter or by the Customer,

154 **Exclude the above**

155 10.11.4.2 load changes greater than 5 MW, or

156 **Exclude the above**

157 10.11.5 The Transmitter's Controlling Authority shall notify the Customer's Controlling Authority at least four days in advance of any planned work that requires a feeder breaker to be opened or operated and at least ten days in advance of planned work that requires operations of multiple feeder breakers, station bus or a whole transformer station, that directly affects the Customer's facilities, by contacting the appropriate Customer contact identified in the operations schedule to this Agreement.

158 **Replace by:**

159 10.11.5 The Transmitter's Controlling Authority shall notify the Customer's Controlling Authority at least ten days in advance of planned work that requires operations of a station bus, that directly affects the Customer's facilities, by contacting the appropriate Customer contact identified in Part 1, Schedule D of this Agreement.

160 10.11.9 Details regarding outage planning particular to the Customer are in Schedule D, Part 1, Section 6.2 "Outage Planning".

161 **Include the above**

162

10.11.10 In circumstances where the Customer reasonably believes that there is a material threat to its ability to comply with its PROL, the Customer may direct the Transmitter to undertake work on the Transmitter's facilities or Equipment. The Transmitter shall comply with this direction promptly provided that this work does not conflict with the Transmitter's legislative, regulatory or safety requirements, as the case may be. To avoid indiscriminate use of this provision, the request must be made by a Customer's senior staff (e.g. director level or above) to the Transmitter's Director of Network Management Program Execution or delegate. The Transmitter's Director shall immediately authorize the directed work and the work shall be completed on an expedited basis.

163

Incremental costs incurred by the Transmitter in complying with this direction shall initially be paid by the Customer upon receipt of a bill outlining in reasonable detail the amount and breakdown of the incremental costs, and may later be shared between the Transmitter and the Customer by mutual agreement. In no circumstances will the Customer be billed under this section for regularly scheduled maintenance that was not performed by the Transmitter. Where the Customer and the Transmitter can not agree on the sharing of these costs, the matter shall be resolved through the Dispute Resolution process set out in Section 13 of this Agreement.

164

Include the above

165

10.14 Access and Security of Facilities

166

10.14.9 In an Emergency, a site owner may, as far as reasonably necessary in the circumstances, have access to and interfere with the other Party's facilities. The site owner shall use reasonable efforts not to cause loss or damage to the other Party's facilities. If the site owner interferes with any of the facilities, it shall indemnify the other Party for reasonable costs and expenses incurred from any resulting loss or damage.

167

Replace by:

168

10.14.9 In an emergency the Customer may, as far as reasonably necessary in the circumstances, have access to and interfere with the Transmitter's facilities. The Customer shall use reasonable efforts not to cause loss or damage to the Transmitter's facilities. If the Customer interferes with any of the facilities, it shall indemnify the Transmitter for reasonable costs and expenses incurred from any resulting loss or damage.

169

10.14.10 Access to Equipment in the switchyard and switchyard security is the responsibility of both Parties subject to the Customer's obligation under its Power Reactor Operating Licence. Only authorized personnel are allowed unaccompanied access to the switchyard. Access codes and keys shall be registered with Customer site security which must be kept informed of gates left unlocked on a shift by shift basis, otherwise all gates must be closed and locked at all times.

170

Include the above

171

10.14.11 The Controlling Authorities shall be notified upon entry and exit of personnel from the switch-yard. The Transmitter and Customer will comply with each others procedures for accessing the switchyards: specifically the Transmitter's OATIS instruction [56], and the Customer's operating manual [18].

172

Include the above

173

11 TERM AND TERMINATION OF CONNECTION AGREEMENTS

174

This Agreement shall continue in effect until a mutually agreeable termination date not to exceed the date on which the Customer's PROL for the Customer Facility is terminated, provided that;

175

- the Customer has satisfied all CNSC requirements and commitments required to be satisfied in order to eliminate the need for a transmission connection to provide an Off-Site Power service under this Agreement, and

176

- the Customer no longer holds any other nuclear related licence for the Customer's Facility which identifies a requirement for an Off Site-Power service.

177

or until such time the parties execute an agreement which provides for the conveyance of Off-Site Power in a manner which satisfies any license that the Customer is required to hold by the CNSC or other regulatory body.

178

Include the above

179

11.2 Termination by a Non-Defaulting Party

180

11.2.1 A non-defaulting Party may terminate the Agreement at any time during the term or any renewal thereof by giving the other Party six months' prior written notice setting out the termination date. Termination in the event of a default shall follow the procedures set out in section 12.4 of this Agreement.

181

Exclude the above

182

11.3 Right to Disconnect

183

11.3.1 If a non-defaulting Party gives notice to terminate the Agreement under section 12.2.1, the Transmitter shall disconnect the connection point on the termination date specified in that notice or on another date that the Parties have agreed upon in writing.

184

Exclude the above

185

11.4 Right to Remove Assets

186

11.4.1 When a non-defaulting Party has terminated the Agreement under section 11.2.1, the Transmitter may disconnect the connection point and shall be entitled to de-commission and remove any of its assets associated with the connection and the connection point.

187

Replace by:

188

11.4.1 The Transmitter may only disconnect the connection point after the nuclear units are decommissioned. During the decommissioning phase, the Parties may negotiate a new connection agreement (the "New Agreement") to provide for the conveyance of Off-Site Power in a manner which satisfies any license that the Customer is required to hold by the CNSC or other regulatory body. Upon execution of the New Agreement, the Transmitter shall be entitled to decommission and remove any of its assets associated with the connection point and which are not required under the terms of the New Agreement.

189

12 EVENTS OF DEFAULT AND TERMINATION

190

12.4.1 A non-defaulting Party may, without prejudice to other rights and remedies provided for in this Agreement with respect to an Event of Default, which has not been remedied within the periods set forth below, terminate this Agreement by written notice to the defaulting Party:

191

Replace by:

192

12.4.1 A Non-defaulting Party may, without prejudice to other rights and remedies provided for in this Agreement with respect to an Event of Default, which has not been remedied within the periods set forth below, terminate this Agreement, provided that such termination under no circumstances permits the Transmitter to cease the conveyence of the Customer's Off-Site Power service required to meet its obligations under its Power Reactor Operating Licence, unless the Transmitter has the approval of the appropriate regulatory authority(ies) or a court of competent jurisdiction, it being the intent of the Parties that if the Customer is the Defaulting Party, the Transmitter can terminate the Agreement only insofar as it relates to the Transmitter's obligations to accept and transmit electricity generated by the Customer to the Market, by written notice to the Defaulting Party:

193

12.5.1 Neither the Transmitter nor the Customer may terminate the Agreement except in accordance with the applicable provisions set out in the Code or this Agreement.

194

Replace by:

195

12.5.1 Neither the Transmitter nor the Customer may terminate the Agreement except in accordance with the applicable provisions set out in the Code and this Agreement.

196

12.5.2 If either a Transmitter or a Customer chooses to terminate this Agreement pursuant to its rights under section 12.4, then upon termination the Agreement will, subject to section 12.5.3, be of no further force and effect.

197

Replace by:

198

12.5.2 If either a Transmitter or a Customer chooses to terminate this Agreement pursuant to its rights under section 12.4, then upon termination the Agreement will, subject to Subsection 12.5.3 and Subsection 12.4.1, be of no further force and effect.

199

12.6.1 If the Transmitter is the non-defaulting Party, the default has not been remedied and the cure period has expired, it may, on providing a written notice ten business days in advance, disconnect the connection point where the default remains unremedied at the end of the ten business days notice period.

200

Replace by:

201

12.6.1 If the Transmitter is the Non-defaulting Party, the default has not been remedied and the Cure Period has expired, it may, subject to Subsection 12.4.1, on providing a written notice ten business days in advance, disconnect the connection point where the default remains unremedied at the end of the ten business days notice period.

202

13 DISPUTE RESOLUTION

203

13.1 Exclusivity

204

13.1.1 Except where this Agreement states otherwise, the dispute resolution procedures set forth in this Agreement shall apply to all disputes arising between the Customer and the Transmitter regarding the Agreement and the Code and shall be the only means for resolving any such disputes.

205

Replace by:

206

13.1.1 Except where this Agreement states otherwise, the dispute resolution procedures set forth in this Agreement shall apply to all disputes, other than those relating to nuclear safety, arising between the Customer and the Transmitter regarding the Agreement and the Code and shall be the only means for resolving any such disputes.

207

13.2 Duty to Negotiate

208 13.2.1 Any dispute between the Customer and the Transmitter over this Agreement shall first be referred to a designated representative chosen by the Customer and to a designated representative chosen by the Transmitter for resolution on an informal basis.

209 **Replace by:**

210 13.2.1 Any dispute, other than those relating to nuclear safety, between the Customer and the Transmitter over this Agreement shall first be referred to a designated representative chosen by the Customer and to a designated representative chosen by the Transmitter for resolution on an informal basis. Any dispute relating to nuclear safety may be referred to such designated representatives on an informal basis or to a court of competent jurisdiction as set out in Subsection 13.3.1 below.

211 13.2.2 Such designated representatives shall attempt in good faith to resolve the dispute within thirty days of the date when the dispute was referred to them, except that the Parties may extend such period upon which they agree in writing.

212 **Replace by:**

213 13.2.2 Such designated representatives shall attempt in good faith to resolve the dispute within thirty days of the date when the dispute was referred to them, except that the Parties may extend such period upon which they agree in writing. When a dispute relating to nuclear safety is referred to such designated representatives, the designated representatives shall attempt in good faith to resolve the dispute within 48 hours of the date the dispute was referred to them unless the Parties agree otherwise in writing.

214 **13.3 Referral of Unresolved Disputes**

215 13.3.1 If the designated representatives cannot resolve the dispute within the time period set out in subsection 13.2.2, either Party may submit the dispute to binding arbitration and resolution in accordance with the arbitration procedures set out below.

216 **Replace by:**

217 13.3.1 If the designated representatives cannot resolve the dispute within the time period set out in subsection 13.2.2, either Party may submit the dispute to binding arbitration and resolution in accordance with the arbitration procedures set out below. If the dispute relates to nuclear safety, either party may apply to a court of competent jurisdiction to seek specific performance or injunctive relief. The Parties hereby agree that disputes relating to nuclear safety may cause irreparable harm to a Party, the Parties and/or the public for which ordinary damages are not an adequate or appropriate remedy and therefore it is necessary and appropriate to submit such disputes to a court of competent jurisdiction in order to obtain an order for specific performance or injunctive relief to compel the other Party to perform its obligations under this Agreement.

218

15 COMPLIANCE, INSPECTION, TESTING AND MONITORING

219

15.1.7 The Transmitter has the right to specify by addendum to this Agreement, the types of changes that require prior approval of the Transmitter before the Customer implements such changes. Such changes, that require prior approval of the Transmitter, shall be set out in Schedule A of this Agreement, and shall be limited to those that can have material adverse effect(s) on the Transmitter's transmission facilities or facilities of its other Customers.

220

Replace by:

221

15.1.7 The Parties have the right to specify by addendum to this Agreement, the types of changes that require prior approval of the Transmitter before the Customer implements such changes or that require prior approval of the Customer before the Transmitter implements such changes. Such changes, that require prior approval of the Transmitter, shall be set out in Schedule A of this Agreement, and shall be limited to those that can have material adverse effect(s) on the Transmitter's transmission facilities or facilities of its other Customers. Such changes that require prior approval of the Customer shall also be set out in Schedule A, and shall be limited to those that, subject to Sections 6.3 and 6.8, materially affect the ability of the Customer to meet its obligations under its PROL.

222

23 INCORPORATION OF SCHEDULES

223

Schedule N - Switchyard Equipment Affecting Nuclear Safety

224

Schedule O - Reliability Indices Used in Nuclear Safety Analysis

225

Schedule P - Drawings

226

Schedule Q - References

227

Schedule R - Letter from the Nuclear Insurance Association of Canada

228

Include the above

229

28 ENTIRE AGREEMENT

230

This Agreement, together with the schedules attached hereto, constitute the entire agreement between the Parties and supersedes all prior oral or written representations and agreements of any kind whatsoever with respect to the matters dealt with herein.

231

Replace by:

232 This Agreement, together with the Addenda and Schedules attached hereto, constitutes the entire agreement between the Parties and supersedes all prior oral or written representations and agreements of any kind whatsoever with respect to the matters dealt with herein.

233 **29 AMENDMENTS**

234 29.1.8 Schedule M – Amendment Agreement Template

235 29.1.9 Schedule N – Switchyard Equipment Affecting Nuclear safety

236 29.1.10 Schedule O - Reliability Indices Used in Nuclear Safety Analysis

237 29.1.11 Schedule P – Drawings

238 29.1.12 Schedule Q – References

239 29.1.13 Schedule R – Letter from the Nuclear Insurance Association of Canada

240 **Include the above**

241 29.3 The Parties to this Agreement agree to forthwith, upon receipt of notice from the Board, do all things and take all actions necessary to amend this Agreement as specified by the Board.

242 **Replace by:**

243 29.3 The Parties to this Agreement agree to forthwith, upon receipt of notice from the Board, provided that such direction does not materially affect the Customer's ability to meet its obligations under its Power Reactor Operating Licence, do all things and take all actions necessary to amend this Agreement as specified by the Board. If the direction from the Board is determined to materially affect the Customer's ability to meet its obligations under its Power Reactor Operating Licence, the parties agree to notify the Board and seek resolution.

244 <u>Amendments to Schedules</u>

245 There are also a number of amendments to the Schedules required to cater for the requirements at the nuclear stations.

246

247

248

Schedule C - Include the Following

249

Areas of Impact	Cure Period
Any Action that Impacts on a Party's Obligations under its Power Reactor Operating Licence	Promptly

250

Schedule F

251

1.2.3 With advance notice to the Customer, the Transmitter's personnel may lock the isolating disconnect switch in the open position:

252

Replace by:

253

1.2.3 Except during an Emergency as permitted by Subsection 10.3.1, the Transmitter shall not lock the isolating switch in the open position without the prior written agreement of the Customer. With the prior written agreement of the Customer the Transmitter may lock the isolating equipment switch in the open position in the following circumstances.

ONTARIO ENERGY BOARD

In the matter of the *Ontario Energy Board Act, 1998,* as amended (**the Act**); the *Ontario Energy Board Transmission Code of June 10, 2010* (**TSC**); Hydro One Networks Inc. (**HONI**); and the obligation of Goldcorp Canada Ltd. and Goldcorp Inc. to pay bypass compensation to HONI under the TSC.

WRITTEN ARGUMENT OF GOLDCORP ON THE APPLICATION

PART I – INTRODUCTION

1. This is an application to the Board for the following orders:

   (a) an order under s. 19 of the Act, declaring that ss. 4.1.3, 6.7.6, 6.7.7 and 11.2 of the TSC are *ultra vires* the Act;

   (b) an order, under s. 19 of the Act, declaring that Goldcorp is not under any obligation to pay bypass compensation to HONI and that HONI may not demand such compensation from Goldcorp;

   (c) an order, under paragraph 7.1 of HONI's Electricity Transmission Licence and under its implied obligation not to enforce any requirement contrary to the Act, that pending final determination of this Application HONI shall work cooperatively with Goldcorp in good faith and with all dispatch to complete all analyses and negotiations and to execute all required agreements, contracts or other instruments required in order to connect and energize GL-1 in Q1 2012.

   (d) an order, under s. 3.06 of the Board's Practice Direction on Cost Awards and subs. 30(2) of the Act, granting Goldcorp all of its costs of this Application; and,

(e) such further and other order as seems appropriate in the circumstances.

PART II - FACTS

2. Goldcorp has never entered into any written agreement with HONI with respect to HONI's provision of electricity supply and related services to Goldcorp's Red Lake Gold Mines. Instead, the process followed by HONI each year has been to inform Goldcorp in writing about the capacity allotment it is prepared to provide. Goldcorp then pays for the electricity delivered.

3. On July 20, 2011, the Board approved the construction of GL-1 (Ex. B, Tab 1). As stated in the Application, Goldcorp and HONI are currently negotiating a Connection and Cost Recovery Agreement **(CCRA)** respecting GL-1. HONI has been practically non responsive to Goldcorp's requests to complete the CCRA expeditiously. In addition, HONI has demanded funding of $25,000 for a review of SNC- Lavalin's engineering of GL-I, $15,000 for a review of SNC-Lavalin's Environmental Study Report which the Minister of the Environmental approved, and has indicated that there may be additional funding demands. What is more, Goldcorp and HONI still have to negotiate cost sharing of the additional reactive compensation facilities at HONI's Ear Falls TS as required by the IESO's System Impact Assessment Report (CAA ID 2010-407) filed in EB-2011-0106. Goldcorp cannot risk further delay by HONI on the grounds that Goldcorp has brought this application before the Board.

4. Once GL-I is entered into service, Goldcorp plans to transfer its Red Lake, Campbell and Balmer complexes' loads, currently served through the Red Lake Transformer Station (**RLTS**), to GL-1. Goldcorp's Cochenour Complex will continue to be supplied through the RLTS at distribution voltages (Ex. B, Tab 2). Goldcorp's loading of GL-1 will result in some capacity at the RLTS being underutilized for an uncertain period (Ex. B, Tab 3).

5. Goldcorp and HONI have been negotiating the placing of GL-1 into service since April 10, 2010. At that time, HONI informed Goldcorp that it would have to pay bypass compensation for the underutilized capacity at the RLTS. On April 15th, 2010, HONI estimated bypass

compensation at $8 million (Ex. B, Tab 3, p. 2). On April 29, 2010 HONI re-estimated it as between $8 and $11 million.

6. On November 4, 2010, Goldcorp met with HONI again (Ex. B, Tab 5). Goldcorp tabled an information request seeking information about the determinants of HONI's $8 to $11 million estimate, saying it would formally submit it again at another time (Ex. B, Tab 5, p.3). Goldcorp's position was that it was inappropriate for HONI to charge it bypass compensation because Goldcorp is an important economic engine in the Red Lake area, HONI's idle capacity will probably be reutilized in the near future by economic growth caused by Goldcorp and other local area consumers, because Goldcorp's plans to transfer GL-1and its system benefits to HONI at no net cost and because there are desirable offsetting system benefits which it considers are a sufficient surrogate for bypass compensation. These offsetting system benefits are that GL-1 expands HONI's transmission system in an economically efficient manner. No other alternative costs less, can be commissioned sooner or provide similar improvements to the quality of electricity service to electricity consumers Red Lake area. Again, GL-1 will be transferred at a price that will not increase Uniform Transmission Rates

7. On December 17th, 2010 Goldcorp and HONI, joined by Rubicon Minerals Corporation (**Rubicon**), met for a third time. Goldcorp and Rubicon informed HONI that they were negotiating an agreement under which Rubicon would utilize some, but not all, of the idle capacity at the RLTS that Goldcorp's proposed loading of GL-1 would create. It was then agreed that Goldcorp and Rubicon would provide up-to-date load forecasts to HONI and that HONI would then provide a new estimate of Goldcorp's required bypass compensation (Ex. B, Tab 6). Goldcorp and Rubicon provided their load forecasts on January 10, 2011 (Ex. B, Tab 7). On January 21, 2011 HONI requested a clarification from Goldcorp about certain scenarios in Goldcorp's load forecast (Ex. B, Tab 7). Goldcorp reserved its response until it had received a favourable decision about GL-1 from the Board.

8. On April 1, 2011 Goldcorp, Rubicon and HONI met for a fourth time concerning Goldcorp's plans for entering GL-1 into service. At this meeting, using the terminology of *stranded*

asset charge the topic of bypass compensation was discussed again, without resolution. The discussion was as follows:

> The discussion of stranded assets reflected the parties long standing differences. Ian Blue stated that the electricity supply issues in the Red Lake area differ from those that the TSC contemplated. Naomi Martin confirmed that Stranded Asset charges require a trigger and depend on timing which Raj Ghai sought to clarify. Curtis Pedwell described that Goldcorp's proposed Balmer TS would be loaded incrementally as RLTS was offloaded in response to Ibrahim el-Nahas' inquiry of how its capacity would be utilized. Raj Ghai indicated that the 'lumpiness' of loads to be transferred could be examined. Ian Blue also pointed out that Goldcorp's proposed 115 kV line would facilitate connecting renewable generation in the Red Lake area. HONI acknowledged that such opportunities exist and that, to their knowledge, none are under development. HONI staff acknowledged that an OEB exemption from the TSC may clarify or resolve the stranded asset issue. The OEB Codes were acknowledged to have force of law. All recognized that the OEB has power either to amend its Codes

The meeting notes show no inclination on the part of HONI to exempt Goldcorp from paying bypass compensation (Ex. B, Tab 8).

9. On July 26th, 2011, counsel for Goldcorp provided HONI with new load forecast matrices using Goldcorp's most recent load data which assumed, again, that all electricity except the Cochenour complex's requirements would be transferred from the RLTS to GL-1. Counsel also formally requested responses to a fresh information request (Ex. B, Tabs 2 and 15).

10. As a condition of licence, HONI is bound by the TSC (Ex. B, Tab 17, condition 5). Appendix A to the TSC provides a *pro forma* Form of Connection Agreement for Load Customers (CALC). This CALC, ninety-two pages long, contains among other provisions paragraph 3 which states:

> 3. INCORPORATION OF TRANSMISSION SYSTEM CODE
>
> 3.1 The Code is hereby incorporated in its entirety by reference into, and form an integral part of, this Agreement. Unless the context otherwise requires, all references in this Agreement to this Agreement shall be deemed to include a reference to the Code.
>
> 3.2 Without limiting the generality of s. 3.1:

(a) the Transmitter hereby agrees to be bound by, and at all times to comply with, the Code; and

(b) the Customer acknowledges and agrees that the Transmitter is bound at all times to comply with the Code in addition to complying with the provisions of this Agreement (Ex. B, Tab 9).

11. Even though Goldcorp has never signed any agreement with HONI, the TSC purports to answer that problem in s. 4.1.3, which states:

> 4.1.3. Where a transmitter does not have a connection agreement with a customer whose facilities were connected to the transmitter's transmission system prior to the Code revision date, the transmitter shall be bound by the applicable version of the connection agreement set out in Appendix 1 in relation to that customer and shall be permitted to consider that customer's continued acceptance of transmission service as acceptance by that customer of all of the terms and conditions of the connection agreement in the form set out in the applicable version of the connection agreement set out in Appendix 1.

12. The TSC deals with bypass compensation in ss. 6.7.6, 6.7.7 and 11.2.1 which state:

> 6.7.6 . . . for all or a portion of existing load a load customer may bypass a transmitter-owned connection facility with its own connection facility or the connection facility of another person, provided that the load customer compensates the transmitter.
>
> 6.7.7 . . . the transmitter shall calculate bypass compensation by first multiplying the net book value of the bypassed connection facility, including a salvage credit and reasonable removal and environmental facility. The transmitter shall then divide the resulting figure by the total normal supply capacity of the bypassed connection facility. For purposes of this calculation:
>
> (a) the bypassed capacity on the relevant connection facility shall be equal to the difference between the customer's existing load on that connection facility at the time of bypass and the customer's average monthly peak load in the three-month period following the date on which bypass occurred; and
>
> (b) the normal supply capacity of the bypassed connection facility shall be determined by the transmitter in accordance with the Board-approved procedure referred to in s. 6.2.7.
>
> 11.2.1 A transmitter shall require bypass compensation from a customer if:
>
> (a) the customer disconnects its facility from the transmitter's connection facilities and subsequently connects that facility to a generation facility or to the facilities of any person such that both the load facility

and a generation facility are connected to the transmitter's transmission facilities on that person's side of the connection point; and

(b) the transmitter will no longer receive line connection or transformation connection rate revenues in relation to that facility (Ex. B, Tab 10).

The transmitter shall calculate bypass compensation using the methodology set out in s. 6.7.7.

13. The above TSC provisions were added in 2005, with the following explanation:

Why was the Code Revised?

Numerous expressions of concern were received from stakeholders regarding the application and interpretation of the Code. This included applications for changes to the Code. The Board decided that the Code, in its previous form, was not sustainable and a broad review was needed. A primary objective was to refine the Code to enhance the level of regulatory certainty for participants in the Ontario electricity market.

. . .

Major Policy Issues

1. Available Capacity & Bypass

. . . .

A transmitter will not have an automatic right to require customers to use the transmitter's available capacity to service *new* customer load. Accordingly, a customer opting to build its own facilities to met new load will not be considered to have bypassed the transmitter's facilities. This approach allows for greater competition, which should increase economic efficiency on the part of the transmitter, without resulting in any uncompensated stranding of assets. It also enhances customer choice. However, this will only apply where the load is new – in other words, where the load has not been part of a customer's contractual forecast of its needs. In such cases, the customer will be held accountable for its forecast (i.e., by way of true up payments), throughout the economic evaluation period. Transmitters invest in the connection assets based on the customer(s) contractual forecast and customers must be held accountable for the costs of facilities built to meet it. It would be inappropriate to burden all the rest of the transmitter's customers with such costs.

If a customer chooses to build its own new connection facilities, those new facilities may be used to supply the customer's *existing* load, provided the

customer adequately compensates the transmitter for the loss of that customer's existing load. (Ex. B, Tabs 11 and 12).

PART III - ISSUE AND LAW: CODE PROVISIONS ULTRA VIRES

14. The effect of the above provisions is to impose the following legal requirements and liabilities on Goldcorp, none of which it has ever agreed to:

    (a) all the contractual obligations set out in the CALC and in the TSC, and,

    (b) liability to pay bypass compensation, estimated by HONI at $8-11 million, only because Goldcorp will use GL-1, the more economically efficient expansion of HONI's transmission system which Goldcorp has both paid for in its entirety and will transfer to HONI at no net cost.

    The TSC is also silent about Goldcorp's right to test HONI's calculation of, or rationale for, charging bypass compensation and about any obligation of HONI to provide transparency with respect to how it calculates bypass compensation.

15. These legal requirements have not been imposed by either the Legislative Assembly or by the Superior Court. Instead, they have been imposed by the Board, a statutory delegatee. These legal requirements are formidable indeed. Ostensibly, they bind a transmission customer to all the terms of the CALC and the TSC, even though that person never agreed to any of them. The Board has appropriated the right to impose these requirements even though in Canada it is well known that not even a judge of the Superior Court, who has authority that is awesome, can impose a contract upon a person who has not agreed to its terms.

16. As stated in the Application, the TSC is delegated legislation that provides a set of rules made by the Board ostensibly under authority delegated to it in the Act by the Legislative Assembly. For any item of delegated legislation to be valid, it must first be authorized by some provision in some statute. The only provision in the Act that purports to authorize the TSC is s. 70.1, which states:

70.1(1) The Board may issue codes that, with such modifications or exemptions as may be specified by the Board under s. 70, may be incorporated by reference as conditions of a licence under that section.

. . .

(4) A code issued under this section may incorporate by reference, in whole or in part, any standard, procedure or guideline.

(5) A code may be general or particular in its application and may be limited as to time or place or both.

(6) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a code issued under this section.

(7) The following documents issued by the Board, as they read immediately before this section came into force, shall be deemed to be codes issued under this section and the Board may change or amend the codes in accordance with this section and sections 70.2 and 70.3:

1. The Affiliate Relationships Code for Electricity Transmitters and Distributors.

2. The Distribution System Code.

3. The Electricity Retailer Code of Conduct.

4. The Retail Settlement Code.

5. The Transmission System Code.

6. Such other documents as are prescribed by the regulations

(Ex. B, Tab 13).

17. How should the Board interpret s. 70.1 in order to determine whether it authorizes bypass compensation? The Supreme Court of Canada **(SCC)** has held that the interpretation of statutory provisions like s. 70.1 requires a *purposive* interpretation. The requirements of a purposive interpretation were described authoritatively in *R. v. Kapp* where the SCC said:

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

***R. v. Kapp*, [2008] 2 S.C.R. 484, at para. 82** (Ex. C, Tab 2, Sch.1).

(i) Wording of the Act

18. The wording of s. 70.1 is uncharacteristically general for a contemporary Ontario statute. It simply states that *the Board may issue codes.* Apart from naming the codes in existence when it was enacted, s. 70.1 does not specify what matters codes may regulate or the scope or depth of such regulation. It certainly does not provide the Board with any specific authority to impose financial or other legal obligations, or confer rights, on persons. By way of contrast, sub-ss. 70(2)and 70(2.1) of the Act set out clear and detailed specifications for what conditions the Board may prescribe for licences it issues under section 57 of the Act. So it is clear that the Legislative Assembly could have provided the Board with detailed legislative authority for the content of codes if it had wanted to.

19. We might find some insight into the intended meaning of s. 70.1 from the marginal notes to the Bill that that introduced it into the Act, the *Ontario Energy Board Consumer Protection and Governance Act, S.O. 2003,c.3* (**S.O. 2003, c.3**). Such marginal notes are accepted by courts as useful extrinsic aids to interpretation of a statutory provision. The marginal notes to the bill, however, provide no additional assistance. They simply state that *A new s. 70.1 of the Act allows the Board to issue codes that may be incorporated, with or without modifications, as conditions of a licence* (Ex. B, Tab 14)

(ii) Legislative History of the Provision

20. As mentioned, s. 70.1 was introduced into the Act by S.O. 2003, c.3. The Act itself is Schedule B to the *Energy Competition Act, 1998, S.O. 1998, c. 15*, as amended. The Board's objectives with respect to electricity are as stated in s. 1 of the Act. In addition, the Board has jurisdiction to grant licences to own and operate transmission and distribution systems, over electricity rates within the province and business re-organization of licensed and rate regulated entities in Ontario's electricity market, and to grant leave to construct facilities (ss. 57, 78, 86 and 96). Nothing in any of these provisions, however, purports to supplement s. 70.1or authorize the Board to impose the above described legal requirements on persons who have not agreed to them.

(iii) Scheme of the Act

21. The Ontario Court of Appeal has provided recent guidance on how the Act must be interpreted. In the *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)* case (*THES Case*) it upheld a rate order condition that the Board had imposed on April 12th, 2006 requiring THES to obtain the approval of a majority of its independent directors before declaring future dividends payable to its affiliates. The Court held that the Board had broad powers to set rates and attach conditions and that the subject condition was a reasonable exercise of the Board's jurisdiction.

> ***Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board), (2010), 99 O.R. (3d) 481***

22. Much of the judgment dealt with the appropriate standard of review that the Court should apply to reviewing the Board's decision but the Court's comments are applicable to this case. At para. 24 it said as follows:

> Courts should hesitate to analyze the decisions of specialized tribunals through the lens of jurisdiction unless it is clear that the tribunal exceeded its statutory powers by entering into an area of inquiry outside of what the legislature intended. If the decision of a specialized tribunal aims to achieve a valid statutory purpose, and the enabling statute includes a broad grant of open-ended power to achieve that purpose, the matter should be considered within the jurisdiction of the tribunal. Its substance may still be reviewed for other reasons - on either a reasonableness or correctness standard - but it does not engage a true question of jurisdiction and cannot be quashed on the basis that the tribunal could not "make the inquiry" or "embark on a particular type of activity". In contrast, where a tribunal is pursuing an illegitimate objective, or is engaging in actions that clearly defy the limits of its statutory authority, then a reviewing court may properly declare its decisions to be ultra vires. These principles are consistent with Abella J.'s reasoning in VIA Rail at para. 96:

23. The Court acknowledged therefore that if the Board defies the limits of its statutory authority, then it would be acting *ultra vires.*

24. The Court also commented on the interaction of the Board's objectives for electricity in s. 1(1) of the Act, and its rate making powers. At paragraph 33, it said as follows:

> This case is distinguishable from ATCO [*ATCO Gas & Pipeline Ltd. v. Alberta (Energy & Utilities Board), [2006] 1 S.C.R. 140*]. The statutory grant of power in ATCO to "impose any additional conditions that the Board considers necessary in the public interest" is different than the statutory grant of power in this case. Bastarache J. referred to this provision as vague, elastic, and open-ended. In the present case, the OEB's imposition of a condition it considers proper (s. 23(1)) has to be guided by the legislated objectives set out in s. 1(1). These objectives are not vague, elastic, and open-ended. To the extent that there is uncertainty with respect to the
> achievement of the s. 1(1) objectives, that is a matter undeniably within the expertise of the OEB. Further, unlike the ATCO provision, the objectives in the Act require that the OEB protect the interests of both the customer and the utility.

25. Goldcorp submits that these comments cannot be comfortably applied to the Board's power to issue codes. Unlike its power to impose rate-order conditions, the Board does not have unrestricted authority to determine the content of codes subject only to the statutory objectives in section 1(1) of the Act. The intention of the Act is that it is the government acting through the Minister of Energy, and not the Board, who determines electricity policy in Ontario. This is made clear by sections 27, 27.1, 27.2, 28 and 28.1 - 28.7 of the Act under which the Minister may issue detailed policy directives to the Board which the Board must follow.

26. Goldcorp submits that the Board's decisions about the content of codes it issues, including the TSC, are entitled to less deference than are its decisions about rates and rate-order conditions. The jurisprudence with respect to unauthorized delegated legislation must be considered with that distinction in mind.

27. Nothing in the Act or in s. 70.1 provides any insight about what aspects of the electricity sector the Board may regulate through codes in areas not delegated to the IESO or to the Ontario Power Authority, or, subject to directives from the Minister. Under Canadian law, as the jurisprudence below will demonstrate, it is not to be inferred from the fact that the Board has some powers over the electricity sector in areas not delegated to others, that it is thereby omnipotent with respect to all such non delegated areas.

(iv) Legislative Context

28. In S.O. 2003, c.3, the Legislative Assembly was amending the Act after five years of experience with the new electricity regime created by the *Energy Competition Act*, 1999. The Legislative Assembly appears to have left it to the Board to determine what additional electricity regulation was needed, and to include those rules in the Board's codes.

29. Goldcorp submits that a *purposive* analysis of s. 70.1 shows that the Legislative Assembly intended to allow the Board to make codes respecting electricity regulation, but did not provide it with any legislative guidance about their content. Goldcorp further submits that by leaving the content of codes up to the Board, the Legislative Assembly consigned the legal question of whether a specific code requirement is authorized or not to the Board, to be decided on a case by case basis. This Application is such a case.

30. There is a wealth of jurisprudence on whether or not delegated legislation is *ultra vires* which has established the following well known principles:

    (a) Delegated authority must be exercised strictly in accordance with enabling legislation and cannot amend, add to or conflict with provisions of the parent statute;

    (b) In determining the *vires* of delegated legislation the court must ascertain the purpose and intent of the enabling statute in order to identify the scope of the power to issue delegated legislation;

    (c) The board, in making delegated legislation, must not exceed the express terms of the delegating provisions and is confined by the object, purpose and terms of the enabling statute;

    (d) When considering the validity of delegated legislation, a court must assume that such legislation is within the authority conferred by the parent statute and should not declare it invalid unless there is clear evidence to support such a finding;

    (e) If there is doubt as to the meaning of the words used, the court should prefer a construction which will promote the legislation as opposed to one that would defeat it.

    ***Kubel v. Alberta (Minister of Justice)*, [2006] 8 W.W.R. 570 (Q.B.), at para. 23.** (Ex. C, Tab 2, Sch. 2)

31. While these principles seem straightforward, actual examples will assist the Board in understanding their application to this file.

32. In the *Saskatchewan Power case*, the *National Energy Board Act, RSC 1970, C. N-6* **(NEBA)**, ss. 50, 51and 52 conferred broad discretionary authority on the National Energy Board *(***NEB***) with respect to traffic, tolls and tariffs* on inter provincial pipelines. In 1969, Trans Canada Pipe Lines (**TCPL**) had entered into a contract with Saskatchewan Power which in the early 1980's entitled Saskatchewan Power to purchase natural gas at the low 1969 price. The contract was subject to the NEB's jurisdiction over traffic, tolls and tariffs. TCPL asked the NEB to amend the contract by substituting a much higher price. The provisions of the NEBA under which TCPL made its request and which the SCC was considering read as follows:

> **50.** The Board may make orders with respect to all matters relating to traffic, tolls or tariffs.
>
> **51.** (1) A company shall not charge any tolls except tolls that are
> (*a*) specified in a tariff that has been filed with the Board and is in effect; or
> (*b*) approved by an order of the Board.
>
> **51**. (2) Where gas or a commodity other than oil transmitted by a company through its pipeline is the property of the company, the company shall file with the Board, on the making thereof, true copies of all the contracts it may make for the sale of the gas or commodity and of any amendments from time to time made thereto, and the true copies so filed are deemed, for the purposes of this Part, to constitute a tariff pursuant to subs. (1).
>
> **52.** All tolls shall be just and reasonable, and shall always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.

33. The NEB found that Saskatchewan Power had been paying a negative toll. It reasoned that since it had authority to make all orders relating to tolls and tariffs under s. 50 and since the contract, having been filed under s.51(2), was part of a tariff, it could (and did) make an

order respecting the tariff by specifying an appropriate toll that resulted in the requested higher price.

> ***Saskatchewan Power Corporation et. al. v. TransCanada Pipelines et al.,* [1981] 2 S.C.R. 688** (Ex. C, Tab 2, Sch. 3)

34. The SCC said that the *crucial issue* was whether it was within the NEB's authority over traffic, tolls and tariffs to interfere with the1969 contract price *(p. 693).* Despite the seeming clarity of ss. 50, 51(2) and 52 of the NEBA, the SCC said that the NEB's authority did not allow it to impose this financial burden on Saskatchewan Power. It said as follows, at pp. 698-699:

> Nothing in the Act, as I read it, authorized any further interference by the Board with the terms of the contract. Nor is there any further provision of the Act which affects or changes it. ....
>
> There is no common law or equity applicable to the exercise of jurisdiction by a statutory tribunal unless they arise from the terms of the enactment which give it its authority. There is nothing here that, in my view, gives the Board overall price fixing authority in connection with the fixing of transportation tolls.
>
> **Saskatchewan Power Case, *loc. cit.*** (Ex. C, Tab 2, Sch. 3)

35. The *Saskatchewan Power Case* told regulators they had to find clear and explicit legislative authority for the content of any order they wished to make and that they could no longer rely upon general words in their parent statute to make exceptional orders or impose financial burdens on persons. Goldcorp submits that if the NEB did not have power to impose the financial burden on Saskatchewan Power that it did under the fairly explicit NEBA provisions above, then the Board cannot impose the financial burdens in the TSC provisions challenged in this file under the generally worded s. 70.1 of the Act.

36. In the *Bomberry Case* the Minister of Revenue imposed a quota on the quantity of tobacco that a retailer on a First Nations reserve could sell because persons were purchasing cigarettes by the carton tax free and re-selling them off reserve at a level that impinged on provincial revenues. The quota resulted in a substantial loss of revenue to on-reserve retailers and was an effective financial burden. The retailers challenged the quota on the

grounds that the *Tobacco Tax Act, R.S.O. 1980, c. 502*, did not authorize it. The government responded by arguing that the quota was authorized by its power to make regulations *respecting any matter necessary or advisable to carry out effectively the intent and purpose of the Act.* It also argued that a power to make regulations need not set out every detail of a regulation that might be made. The Divisional Court rejected both these arguments, quashed the quota and said as follows:

> 44 It is trite that the Minister, the Ministry, and the Director must have legal authority before they may impose any restrictions upon the business conducted by wholesalers or retailers, including Indian retailers, on the reserve. Unless the restrictions are authorized by law, they must be struck down.
>
> 45 The question is, therefore, whether the Ministry of Revenue and its Director of Tobacco Tax acted within or without the scope of the power given them by the Legislative Assembly through the machinery of the tobacco Tax Act and its regulations. The scope of such power must always be scrutinized most carefully, as McRhuer C.J.H.C. pointed out in Groen Watch Co. v. A.G. Can., [1950] O.R. 429 at p. 438, [1950] 4 D.L.R. 156 at pp. 165-6, [1950] C.T.C. 440 (H.C.J.):
>
> > It is for the legislative body to decide in every case what power is to be delegated to any administrative body, and in each case the administrative tribunal is confined to the express authority delegated to it and to the authority that may arise by necessary implication. In no case is the exercise of the delegated authority more carefully scrutinized than in the case where it is claimed that it gives a right to impose any financial burden on the subject.
>
> ....
>
> 48 The power to impose a quota on any retailer represents a significant interference with his freedom to buy and sell. **To the extent that it interferes with his commercial freedom, it represents a financial burden. That kind of power over individual conduct requires very clear statutory authority (emphasis added).**
>
> ....

> 61 It would require much more explicit language to authorize the restrictions on the freedom of the Indian retailers imposed by the quota system.
>
> ***Bomberry v. Ontario (Ministry of Revenue)* (1989), 70 O.R. (2d) 662 (High Ct. – Div. Ct.); 107 D.L.R. (4th) 448 (C.A.) – appeal dismissed as moot** (Ex. C, Tab 2, Sch. 4)

37. The *Bomberry Case* is another example where delegated legislation that imposed a financial burden, even though it was patently in the public interest, could not be supported by a generally worded statutory provision, but instead required clear and explicit legislative authority. This case also supports the view that the Board's general power *to issue codes* under s. 70.1 does not authorize the financial burdens imposed in the challenged TSC provisions.

38. In the *Szmuilowicz Case*, the Ministry of Health was concerned about medical practitioners who charged patients an annual block fee for access and for non *Canada Health Act* insured services. It therefore had the then Transitional Council make a regulation under a power which enabled it to define *professional misconduct,* defining it as *professional misconduct* to charge block fees. The regulation deprived doctors of a significant source of income and effectively imposed a financial burden on them. The applicant- doctors challenged the regulation as *ultra vires*. In so holding, the court said:

> 44. The purpose for which executive legislative authority is conferred affects its valid scope. The impugned regulation was made pursuant to a specific enabling statutory provision which authorized the Transitional Council to define acts of professional misconduct. However, a statutory power given to a delegate to "define" a particular term is an authority to "settle the limits of" or to "make clear" that particular term. **It is not a carte blanche**. The authority given to the delegate to define a term is limited by the common meaning of the term: Trans-Canada Pipe Lines Ltd. v. Saskatchewan (Treasurer) (1968), 67 D.L.R. (2d) 694 at p. 703,63 W.W.R. 541 (Sask. Q.B.); Canada (Attorney General) v. Paulsen, [1973] F.C. 376 at p. 384, 38 D.L.R. (3d) 225 at pp. 232-33 (C.A.) (emphasis added)
>
> ***Szmuilowicz v. Ontario (Minister of Health)* (1995), 24 O.R. (3d) 204, at pp. 219-220.** (Ex. C, Tab 2, Sch. 5)

39. The *Szmuilowicz Case* is instructive because it holds that no authority to make delegated legislation, even if seemingly a clear source of authority, provides a *carte blanche.* Nor can

such authority be used to impose financial burdens on persons, without words that explicitly authorise the imposition of that burden. This case too supports the view that the Board's general power *to issue codes* under s. 70.1 of the Act does not authorize the financial burdens imposed in the challenged TSC provisions.

40. In the *Village Shopping Plaza Case,* property developers applied for a development permit. The act empowered the Niagara Escarpment Commission to*...issue [a] development permit or to refuse to issue the permit or to issue the permit subject to such terms and conditions as it considers desirable.* The Commission issued the permit subject to the condition that the developers dedicate a strip of land, without compensation, for road widening purposes. This imposed a financial burden on the developers.

41. The Ontario Court of Appeal held that the power to add conditions to a development permit did not include the authority to require the developer to transfer land to the municipality without compensation. The Court said as follows at pp. 314-315:

> The principle is well-established that a [statutory body] does not have powers other than those conferred upon it by statute: *Re Pinetree Development Co. Ltd. and Minister of Housing for Province of Ontario et al.* (1976), 14 O.R. (2d) 687, 1 M.P.L.R. 277. Correspondingly, the discretion conferred by the Act of the Minister and the Commission must be exercised by them in pursuance of the objects and policy of that Act: *Re Doctors Hospital and Minister of Health et al.* (1976), 12 OR (2d) 164, 68 D.L.R. (3d) 220, 1 C.P.C. 232; *A.-G. Can. V. Inuit Tapirisate of Canada et al.,* [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1, 33 N.R. 304.
>
> The power to impose terms and conditions must, however, be exercised within the perspective within which the statute is intended to operate: *Roncarelli v. Duplessis,* [1959] S.C.R. 121 at p. 140, 16 D.L.R. (2d) 689. The stated objective of the Act is the maintenance of the escarpment and the control of compatible development. The Commission's own staff agreed that the applicants' proposed development conformed to its policies. In the absence of any express or necessarily implied statutory authorization, the Commission was not, in my view, entitled to oblige the applicants to satisfy Hamilton-Wentworth's road widening policy as a condition of issuing a development permit.

Village Shopping Plaza (Waterdown Ltd.) et al. v. Regional Municipality of Hamilton, Wentworth et al. (1981), 34 O.R. (2d)311 (C.A.) (Ex. C, Tab 2, Sch. 6)

42. The *Village Shopping Plaza Case* is another example of a statutory power that seemed wide enough to impose a condition which the Commission must have legitimately believed was in the public interest. Yet, because it imposed a financial burden by requiring the transfer of property without compensation, the Ontario Court of Appeal decided that express wording, or wording that conferred such a power by necessary implication, was needed before the Commission could impose that requirement. This case too supports Goldcorp's submission that the Board's generally worded power *to issue codes* under s. 70.1 of the Act does not authorize the financial burdens imposed in the challenged TSC provisions.

43. In the *Saskatchewan Wheat Pool case*, the federal government wanted to deregulate the marketing and importation of barley without going to Parliament. Under the Canadian Wheat Board Act, the government could make a regulation under its power to make regulations *for the granting of licences*. It made a regulation that effectively said no one any longer needed a licence to engage in the barley trade in Western Canada. The issue was whether the government could make this policy change under the statutory formula: fo*r the granting of licences*. Rothstein, J., then in the Federal Court, held the regulation to be *ultra vires* and at pp. 202-205,said as follows:

> Counsel for the applicants argue that a regulation-making power "to provide for the granting of licences" must involve licensing of some kind. It cannot mean no licensing.
>
> . . .
>
> In *Booth* it was found that the Governor in Council could not, by regulation, provide for automatic renewals of licences when the overriding statute limited licences to 12 months. Similarly, in my view, in the present case, the Governor in Council cannot dispense with the requirement for a licence altogether when the statute conferring regulation-making authority expressly contemplates regulations providing for the granting of licences.
>
> . . .
>
> In the case at bar the Governor in Council purports to remove from the regulatory regime of the *Canadian Wheat Board Act,* the interprovincial

> trade in barley and the export and import of barley to and from the United States. It seems to me that paras. 46(c) and (e) contemplate the continued existence of some form of control over this trade by providing for it to be licensed. I do not think paras. 46(c) and (e) can be construed to authorize, by regulations made under them, deregulation, and therefore the loss of control over this trade in barley. It is not, in my view, an expression of the authority granted to the Governor in Council in paras. 46(c) and (e) for him to say that no licence at all is required.
>
> . . .
>
> The only other regulation-making authority to which reference was made during argument that might support the impugned regulations was s. 61 of the Act. S. 61 states:
>
> The Governor in Council may make regulations for any purpose for which regulations may be made under this Act.
>
> As I interpret s. 61, it is not a regulation-making authority on its own. It must be read together with other provisions allowing for the making of regulations. To construe it as a regulation-making authority at large leads to the conclusion that under s. 61, the Governor in Council could make whatever regulations he chooses, without regard for the statute itself. That position is, of course, untenable.
>
> ***Saskatchewan Wheat Pool v. Canada (Attorney General)*** **(1993), 107 DLR (4th) 190 (F.C.T.D.)** (Ex. C, Tab 2, Sch. 7)

44. It is interesting to observe that Rothstein, J. so held even though the government had a strong argument that section 31(4) of the *Interpretation Act, RSC 1985, c. 1-21* allowed the government to do what it did. Section 31(4) reads as follows:

> (4) Where a power is conferred to make regulations, the power shall be construed as including a power, exercisable in the same manner and subject to the same consent and conditions, if any, to repeal, amend or vary the regulations and make others.

Rothstein, J. chose not to interpret this provision liberally to justify the change, but instead read it strictly to hold that it could only be used to repeal the regulation as a whole. This reluctance to support the government's position showed the firmness of Rothstein, J's holding that the government could not make this policy change without explicit legislative authority.

45. The *Saskatchewan Wheat Pool Case* holds that governments, acting through statutory agents may not make major policy decisions by means of delegated legislation - unless the Legislative Assembly or Parliament has approved those policies by enacting explicit statutory provisions. In that case the major policy change was to Canadian grain policy. In this case the major policy change was to Ontario electricity policy. Specifically, the Board transferred the responsibility for the recovery of the costs of idled facilities from all transmission customers to the person judged responsible for causing the facility to be idle. That transfer of responsibility imposes a significant financial burden on transmission customers who wish to reconfigure or expand the transmission system to improve its economic efficiency. The Legislative Assembly has not provided the Board with explicit legislative authority for that policy change. The *Saskatchewan Wheat Pool Case* too, therefore, supports Goldcorp's position that s. 70.1 of the Act does not authorize the financial burdens imposed in the challenged TSC provisions.

46. Goldcorp submits that the Board should draw the following conclusions from the precedents it has presented:

(a) the authority to issue codes is limited by the general wording of ss. 70.1 and 1(1); they are not a "*Carte Blanche*" (*Village Shopping Plaza*, *Saskatchewan Wheat Pool* and *Szmuilowicz* cases);

(b) any code requirement which imposes a financial burden upon Goldcorp requires *very clear statutory language* which we simply do not find in either s.70.1 or 1(1)(*Bomberry* case);

(c) while the power to issue codes might not need to contain every detail of what the Board may want to write, it must set out a general outline of the policy to be covered; again, s. 70.1 does not have such an outline (*Bomberry* case); and,

(d) the simple power to *issue codes* does not authorize either the imposition of bypass compensation upon Goldcororp or the above provisions of the TSC which ostensibly authorize it.(*All cases cited).*

47. Goldcorp submits that it is unnecessary to provide additional precedents. All are based on the principle described which is that no statutory body may make rules that extend an act of

the Legislative Assembly or impose legal or financial burdens on persons that have not been expressly authorized by the Legislative Assembly in clear and unmistakeable statutory language. Goldcorp submits that ss. 4.1.3., 6.7.6, 6.7.7 and 11.2 of the TSC fail to meet that test and asks the Board to find that they are *ultra vires* the Act.

ORDER REQUESTED

48. Goldcorp requests that the final orders sought in paragraphs (a), (b), (d) and (e) of the Application and in Part I of this factum be granted.

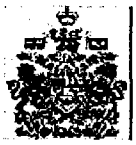
ALL OF WICH IS RESPECTFULLY SUBMITTED this _____ day of October, 2011.

Ian A. Blue, Q.C.

TORONTO-#268273-v3-Written_Argument_of_Goldcorp_on_the_Application

***R. v. Kapp*, [2008] 2 S.C.R. 484**

Citation: R. v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483
Date: June 27, 2008
Docket: 31603
Other formats: PDF WPD
Printer Friendly



SUPREME COURT OF CANADA

CITATION: R. *v.* Kapp, [2008] 2 S.C.R. 483, 2008 SCC 41

DATE: 20080627
DOCKET: 31603

BETWEEN:

John Michael Kapp, Robert Agricola, William Anderson, Albert Armstrong, Dale Armstrong, Lloyd James Armstrong, Pasha Berlak, Kenneth Axelson, Michael Bemi, Leonard Botkin, John Brodie, Darrin Chung, Donald Connors, Bruce Crosby, Barry Dolby, Wayne Ellis, William Gaunt, George Horne, Hon van Lam, William Leslie Sr., Bob M. McDonald, Leona McDonald, Stuart McDonald, Ryan McEachern, William McIsaac, Melvin (Butch) Mitchell, Ritchie Moore, Galen Murray, Dennis Nakutsuru, Theordore Neef, David Luke Nelson, Phuoc Nguyen, Nung Duc Gia Nguyen, Richard Nomura, Vui Phan, Robert Powroznik, Bruce Probert, Larry Salmi, Andy Sasidiak, Colin R. Smith, Donna Sonnenberg, Den van Ta, Cedric Towers, Thanh S. Tra, George Tudor, Mervin Tudor, Dieu To Ve, Albert White, Gary Williamson, Jerry A. Williamson, Spencer J. Williamson, Kenny Yoshikawa, Dorothy Zilcosky and Robert Zilcosky
Appellants
and
Her Majesty The Queen
Respondent
– and –
Attorney General of Ontario, Attorney General of Quebec, Attorney General for Saskatchewan, Attorney General of Alberta, Tsawwassen First Nation, Haisla Nation, Songhees Indian Band, Malahat First Nation, T'Sou-ke First Nation, Snaw-naw-as (Nanoose) First Nation and Beecher Bay Indian Band (collectively Te'mexw Nations), Heiltsuk Nation, Musqueam Indian Band, Cowichan Tribes, Sportfishing Defence Alliance, B.C. Seafood Alliance, Pacific Salmon Harvesters Society, Aboriginal Fishing Vessel Owners Association, United Fishermen and Allied Workers Union, Japanese Canadian Fishermens Association, Atlantic Fishing Industry Alliance, Nee Tahi Buhn Indian Band, Tseshaht First Nation and Assembly of First Nations
Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 66)	McLachlin C.J. and Abella J. (Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ. concurring)
REASONS CONCURRING IN RESULT: (paras. 67 to 123)	Bastarache J.

R. *v.* Kapp, [2008] 2 S.C.R. 483, 2008 SCC 41

John Michael Kapp, Robert Agricola, William Anderson, Albert Armstrong, Dale Armstrong, Lloyd James Armstrong, Pasha Berlak, Kenneth Axelson, Michael Bemi, Leonard Botkin, John Brodie, Darrin Chung, Donald Connors, Bruce Crosby, Barry Dolby, Wayne Ellis, William Gaunt, George Horne, Hon van Lam, William Leslie Sr., Bob M. McDonald, Leona McDonald, Stuart McDonald, Ryan McEachern, William McIsaac, Melvin (Butch) Mitchell, Ritchie Moore, Galen Murray, Dennis Nakutsuru, Theordore Neef, David Luke Nelson, Phuoc Nguyen, Nung Duc Gia Nguyen, Richard Nomura, Vui Phan, Robert Powroznik, Bruce Probert, Larry Salmi, Andy Sasidiak, Colin R. Smith, Donna Sonnenberg, Den van Ta, Cedric Towers, Thanh S. Tra, George Tudor, Mervin Tudor, Dieu To Ve, Albert White, Gary Williamson, Jerry A. Williamson, Spencer J. Williamson, Kenny Yoshikawa, Dorothy Zilcosky and Robert Zilcosky *Appellants*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, Attorney General of Quebec, Attorney General for Saskatchewan, Attorney General of Alberta, Tsawwassen First Nation, Haisla Nation, Songhees Indian Band, Malahat First Nation, T'Sou-ke First Nation, Snaw-naw-as (Nanoose) First Nation and Beecher Bay Indian Band (collectively Te'mexw Nations), Heiltsuk Nation, Musqueam Indian Band, Cowichan Tribes, Sportfishing Defence Alliance, B.C. Seafood Alliance, Pacific Salmon Harvesters Society, Aboriginal Fishing Vessel Owners Association, United Fishermen and Allied Workers Union,

Japanese Canadian Fishermens Association, Atlantic Fishing Industry Alliance, Nee Tahi Buhn Indian Band, Tseshaht First Nation and Assembly of First Nations *Interveners*

Indexed as: R. *v.* Kapp

Neutral citation: 2008 SCC 41.

File No.: 31603.

2007: December 11; 2008: June 27.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for british columbia

Constitutional law — Charter of Rights — Right to equality — Affirmative action programs — Relationship between s. 15(1) and s. 15(2) of Canadian Charter of Rights and Freedoms — Ambit and operation of s. 15(2) — Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours — Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination — Whether program protected by s. 15(2) of Charter.

Constitutional law — Charter of Rights — Aboriginal rights and freedoms not affected by Charter — Right to equality — Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours — Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination — Whether s. 25 of Canadian Charter of Rights and Freedoms applicable to insulate program from discrimination charge.

Fisheries — Commercial fishery — Aboriginal Fisheries Strategy — Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours — Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination — Whether licence constitutional — Canadian Charter of Rights and Freedoms, s. 15.

The federal government's decision to enhance aboriginal involvement in the commercial fishery led to the Aboriginal Fisheries Strategy. A significant part of the Strategy was the introduction of three pilot sales programs, one of which resulted in the issuance of a communal fishing licence to three aboriginal bands, permitting fishers designated by the bands to fish for salmon in the mouth of the Fraser River for a period of 24 hours and to sell their catch. The appellants, who are all commercial fishers, mainly non-aboriginal, excluded from the fishery during this 24-hour period, participated in a protest fishery and were charged with fishing at a prohibited time. At their trial, they argued that the communal fishing licence discriminated against them on the basis of race. The trial judge found that the licence granted to the three bands was a breach of the appellants' equality rights under s. 15(1) of the *Canadian Charter of Rights and Freedoms* that was not justified under s. 1 of the *Charter*. Proceedings on all the charges were stayed. A summary convictions appeal by the Crown was allowed. The stay of proceedings was lifted and convictions were entered against the appellants. The Court of Appeal upheld that decision.

Held: The appeal should be dismissed. The communal fishing licence was constitutional.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.: The communal fishing licence falls within the ambit of s. 15(2) of the *Charter*, and the appellants' claim of a violation of s. 15 cannot succeed. [3]

Section 15(1) and s. 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. The focus of s. 15(1) is on preventing governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping. The focus of s. 15(2) is on enabling governments to pro-actively combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s. 15(2), the *Charter* preserves the right of governments to implement such programs without fear of challenge under s. 15(1). It is thus open to the government, when faced with a s. 15 claim, to establish that the impugned program falls under s. 15(2) and is therefore constitutional. If the government fails to do so, the program must then receive full scrutiny under s. 15(1) to determine whether its impact is discriminatory. [16] [37] [40]

A distinction based on an enumerated or analogous ground in a government program will not constitute discrimination under s. 15 if, under s. 15(2): (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. Given the language of the provision and its purpose, legislative goal is the paramount consideration in determining whether or not a program qualifies for s. 15(2) protection. The program's ameliorative purpose need not be its sole object. [41] [44] [48] [50] [57]

The government program at issue here is protected by s. 15(2) of the *Charter*. The communal fishing licence was issued pursuant to an enabling statute and regulations and qualifies as a "law, program or activity" within the meaning of s. 15(2). The program also "has as its object the amelioration of conditions of disadvantaged individuals or groups". The Crown describes numerous objectives for the program, which include negotiating solutions to aboriginal fishing rights claims, providing economic opportunities to native bands and supporting their progress towards self-sufficiency. The means chosen to achieve the purpose (special fishing

privileges for aboriginal communities, constituting a benefit) are rationally related to serving that purpose. The Crown has thus established a credible ameliorative purpose for the program. The program also targets a disadvantaged group identified by the enumerated or analogous grounds. The bands granted the benefit were disadvantaged in terms of income, education and a host of other measures. This disadvantage, rooted in history, continues to this day. The fact that some individual members of the bands may not experience personal disadvantage does not negate the group disadvantage suffered by band members. It follows that the program does not violate the equality guarantee of s. 15 of the *Charter*. [30] [57-59] [61]

With respect to s. 25 of the *Charter*, it is not clear that the communal fishing licence at issue lies within the provision's compass. The wording of s. 25 and the examples given therein suggest that only rights of a constitutional character are likely to benefit from s. 25. A second concern is whether, even if the fishing licence does fall under s. 25, the result would constitute an absolute bar to the appellants' s. 15 claim, as distinguished from an interpretive provision informing the construction of potentially conflicting *Charter* rights. Prudence suggests that these issues, which raise complex questions of the utmost importance to the peaceful reconciliation of aboriginal entitlements with the interests of all Canadians, are best left for resolution on a case-by-case basis as they arise. [63-65]

Per Bastarache J.: Section 25 of the *Charter* operates to bar the appellants' constitutional challenge under s. 15. Although there is agreement with the restatement of the test for the application of s. 15 of the *Charter* set out in the main opinion, there is no need to go through a full s. 15 analysis before considering whether s. 25 applies. It is sufficient to establish the existence of a potential conflict between the pilot sales program and s. 15. [75] [77] [108]

Section 25 is not a mere canon of interpretation. It serves the purpose of protecting the rights of aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group. This is consistent with the wording and history of the provision. The s. 25 shield against the intrusion of the *Charter* upon native rights or freedoms is restricted by s. 28 of the *Charter*, which provides for gender equality "[n]otwithstanding anything in this Charter". It is also restricted to its object, placing *Charter* rights and freedoms in juxtaposition to aboriginal rights and freedoms. This means in essence that only laws that actually impair native rights will be considered, not those that simply have incidental effects on natives. [80-81] [89] [93] [97]

The reference to "aboriginal and treaty rights" in s. 25 suggests that the focus of the provision is the uniqueness of those persons or communities mentioned in the Constitution; the rights protected are those that are unique to them because of their special status. Legislation that distinguishes between aboriginal and non-aboriginal people in order to protect interests associated with aboriginal culture, territory, sovereignty or the treaty process deserves to be shielded from *Charter* scrutiny. Laws adopted under the power set out in s. 91(24) of the *Constitution Act, 1867* would normally fall into this category, the power being in relation to the aboriginal peoples as such, but not laws that fall under s. 88 of the *Indian Act*, because they are by definition laws of general application. "[O]ther rights or freedoms" in s. 25 comprise statutory rights which seek to protect interests associated with aboriginal culture, territory, self-government, and settlement agreements that are a replacement for treaty and aboriginal rights. But private rights of individual Indians held in a private capacity as ordinary Canadian citizens would not be protected. Section 25 reflects the imperative need to accommodate, recognize and reconcile aboriginal interests. [103] [105-106]

There are three steps in the application of s. 25. The first step requires an evaluation of the claim in order to establish the nature of the substantive *Charter* right and whether the claim is made out, *prima facie*. The second step requires an evaluation of the native right to establish whether it falls under s. 25. The third step requires a determination of the existence of a true conflict between the *Charter* right and the native right. [111]

Here, there is a *prima facie* case of discrimination pursuant to s. 15(1). The right given by the pilot sales program is limited to Aboriginals and has a detrimental effect on non-aboriginal commercial fishers who operate in the same region as the beneficiaries of the program. It is also clear that the disadvantage is related to racial differences. The native right falls under s. 25. The unique relationship between British Columbia aboriginal communities and the fishery should be enough to draw a link between the right to fish given to Aboriginals pursuant to the pilot sales program and the rights contemplated by s. 25. The right to fish has

consistently been the object of claims based on aboriginal rights and treaty rights, the enumerated terms in the provisions. Furthermore, the Crown itself argued that these rights to fish were a first step in establishing a treaty right and s. 25 reflects the notions of reconciliation and negotiation present in the treaty process. Finally, the right in this case is totally dependent on the exercise of powers given to Parliament under s. 91(24) of the *Constitution Act, 1867*, which deals with Indians. The *Charter* cannot be interpreted as rendering unconstitutional the exercise of powers consistent with the purposes of s. 91(24), nor is it rational to believe that every exercise of the s. 91(24) jurisdiction requires a justification under s. 1 of the *Charter*. Section 25 is a necessary partner to s. 35(1) of the *Constitution Act, 1982*; it protects s. 35(1) purposes and enlarges the reach of measures needed to fulfill the promise of reconciliation. There is also a real conflict here, since the right to equality afforded to every individual under s. 15 is not capable of application consistently with the rights of aboriginal fishers holding licences under the pilot sales program. Section 25 of the *Charter* accordingly applies in the present situation and provides a full answer to the claim. [116] [119-123]

Cases Cited

By McLachlin C.J. and Abella J.

Considered: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; **referred to:** *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Athabasca Tribal Council v. Amoco Canada Petroleum Co.*, [1981] 1 S.C.R. 699; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37; *Manitoba Rice Farmers Association v. Human Rights Commission (Man.)* (1987), 50 Man. R. (2d) 92, rev'd in part (1988), 55 Man. R. (2d) 263; *R. v. Music Explosion Ltd.* (1989), 62 Man. R. (2d) 189, rev'd (1990), 68 Man. R. (2d) 203; *Re Rebic and The Queen* (1985), 20 C.C.C. (3d) 196, aff'd (1986), 28 C.C.C. (3d) 154; *Re M and The Queen* (1985), 21 C.C.C. (3d) 116; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

By Bastarache J.

Referred to: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; *R. v. Daoust*, [2004] 1 S.C.R. 217, 2004 SCC 6; *Adler v. Ontario*, [1996] 3 S.C.R. 609; *R. v. Drybones*, [1970] S.C.R. 282; *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349; *Mahe v. Alberta*, [1990] 1 S.C.R. 342; *R. v. Steinhauer*, [1985] 3 C.N.L.R. 187; *Campbell v. British Columbia (Attorney General)*, [2000] 4 C.N.L.R. 1; *Shubenacadie Band Council v. Canada (Human Rights Commission)* (2000), 37 C.H.R.R. D/466; *R. v. Nicholas*, [1989] 2 C.N.L.R. 131; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505.

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Canadian Bill of Rights, R.S.C. 1985, App. III, s. 2.

Canadian Charter of Rights of Freedoms, ss. 1, 2, 3, 15, 16(3), 21, 25, 27, 28, 29, 32(1)(*a*).

Constitution Act, 1867, ss. 91(24), 93.

Constitution Act, 1982, s. 35.

Constitution Amendment Proclamation, 1983, R.S.C. 1985, App. II, No. 46.

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APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Mackenzie, Low, Levine and Kirkpatrick JJ.A.) (2006), 56 B.C.L.R. (4th) 11, 271 D.L.R. (4th) 70, [2006] 10 W.W.R. 577, 227 B.C.A.C. 248, 374 W.A.C. 248, 24 C.E.L.R. (3d) 99, [2006] 3 C.N.L.R. 282, 141 C.R.R. (2d) 249, [2006] B.C.J. No. 1273 (QL), 2006 CarswellBC 1407, 2006 BCCA 277, affirming a decision of Brenner C.J.S.C. (2004), 31 B.C.L.R. (4th) 258, [2004] 3 C.N.L.R. 269, 121 C.R.R. (2d) 349, [2004] B.C.J. No. 1440 (QL), 2004 CarswellBC 1607, 2004 BCSC 958, lifting a stay of proceedings by Kitchen Prov. Ct. J., [2003] 4 C.N.L.R. 238, [2003] B.C.J. No. 1772 (QL), 2003 CarswellBC 1881, 2003 BCPC 279. Appeal dismissed.

Bryan Finlay, Q.C., J. Gregory Richards and *Paul D. Guy*, for the appellants.

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Richard James Fyfe, for the intervener the Attorney General for Saskatchewan.

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Allan Donovan and *Bram Rogachevsky*, for the intervener the Haisla Nation.

Robert J. M. Janes and *Dominique Nouvet*, for the interveners the Songhees Indian Band, the Malahat First Nation, the T'Sou-ke First Nation, the Snaw-naw-as (Nanoose) First Nation and the Beecher Bay Indian Band (collectively the Te'mexw Nations).

Maria A. Morellato and *Joanne R. Lysyk*, for the interveners the Heiltsuk Nation and the Musqueam Indian Band.

F. Matthew Kirchner and *Lisa C. Glowacki*, for the intervener the Cowichan Tribes.

J. Keith Lowes, for the interveners the Sportfishing Defence Alliance, the B.C. Seafood Alliance, the Pacific Salmon Harvesters Society, the Aboriginal Fishing Vessel Owners Association and the United Fishermen and Allied Workers Union.

John Carpay and *Chris Schafer*, for the intervener the Japanese Canadian Fishermens Association.

Kevin O'Callaghan and *Katey Grist*, for the intervener the Atlantic Fishing Industry Alliance.

Ryan D. W. Dalziel, for the intervener the Nee Tahi Buhn Indian Band.

Hugh M. G. Braker, Q.C., and *Anja P. Brown*, for the intervener the Tseshaht First Nation.

Bryan P. Schwartz and *Jack R. London, Q.C.*, for the intervener the Assembly of First Nations.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. was delivered by

THE CHIEF JUSTICE AND ABELLA J. —

A. Introduction

[1] The appellants are commercial fishers, mainly non-aboriginal, who assert that their equality rights under s. 15 of the *Canadian Charter of Rights and Freedoms* were violated by a communal fishing licence granting members of three aboriginal bands the exclusive right to fish for salmon in the mouth of the Fraser River for a period of 24 hours on August 19-20, 1998.

[2] The appellants base their claim on s. 15(1). The essence of the claim is that the communal fishing licence discriminated against them on the basis of race. The Crown argues that the general purpose of the program under which the licence was issued was to regulate the fishery, and that it ameliorated the conditions of a disadvantaged group. These contentions, taken together, raise the issue of the interplay between s. 15(1) and s. 15(2) of the *Charter*. Specifically, they require this Court to consider whether s. 15(2) is capable of operating independently of s. 15(1) to protect ameliorative programs from claims of discrimination — a possibility left open in this Court's equality jurisprudence.

[3] We have concluded that where a program makes a distinction on one of the grounds enumerated under s. 15 or an analogous ground but has as its object the amelioration of the conditions of a disadvantaged group, s. 15's guarantee of substantive equality is furthered, and the claim of discrimination must fail. As the communal fishing licence challenged in this appeal falls within s. 15(2)'s ambit — one of its

objects being to ameliorate the conditions of the participating aboriginal bands — the appellants' claim of a violation of s. 15 cannot succeed. While the operation of s. 15(2) is sufficient to dispose of the appeal, these reasons, in addition to examining the respective roles of s. 15(1) and s. 15(2), will comment briefly on s. 25 of the *Charter*, in view of the reasons of Bastarache J. on this point.

B. Factual and Judicial History

[4] Prior to European contact, aboriginal groups living in the region of the mouth of the Fraser River fished the river for food, social and ceremonial purposes. It is no exaggeration to say that their life centered in large part around the river and its abundant fishery. In the last two decades, court decisions have confirmed that pre-contact fishing practices integral to the culture of aboriginal people translate into a modern-day right to fish for food, social and ceremonial purposes: *R. v. Sparrow*, [1990] 1 S.C.R. 1075. The right is a communal right. It inheres in the community, not the individual, and may be exercised by people who are linked to the ancestral aboriginal community.

[5] The aboriginal right has not been recognized by the courts as extending to fishing for the purpose of sale or commercial fishing: *R. v. Van der Peet*, [1996] 2 S.C.R. 507. The participation of Aboriginals in the commercial fishery was thus left to individual initiative or to negotiation between aboriginal peoples and the government. The federal government determined that aboriginal people should be given a stake in the commercial fishery. The bands tended to be disadvantaged economically, compared to non-Aboriginals. Catching fish for their own tables and ceremonies left many needs unmet.

[6] The government's decision to enhance aboriginal involvement in the commercial fishery followed the recommendations of the 1982 Pearse Final Report, which endorsed the negotiation of aboriginal fishery agreements (*Turning the Tide: A New Policy For Canada's Pacific Fisheries*). The Pearse Report recognized the problematic connection between aboriginal communities' economic disadvantage and the longstanding prohibition against selling fish — a prohibition that disrupted what was once an important economic opportunity for Aboriginals. Policing the prohibition was also problematic; the 1994 Gardner Pinfold Report addressed the serious conservation issue stemming from a fish sales prohibition "honoured more in the breach than the observance" (*An Evaluation of the Pilot Sale Arrangement of Aboriginal Fisheries Strategy (AFS)*, p. 3). The decision to enhance aboriginal participation in the commercial fishery may also be seen as a response to the directive of this Court in *Sparrow*, at p. 1119, that the government consult with aboriginal groups in the implementation of fishery regulation in order to honour its fiduciary duty to aboriginal communities. Subsequent decisions have affirmed the duty to consult and accommodate aboriginal communities with respect to resource development and conservation; it is a constitutional duty, the fulfilment of which is consistent with the honour of the Crown: see e.g. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

[7] The federal government's policies aimed at giving aboriginal people a share of the commercial fishery took different forms, united under the umbrella of the "Aboriginal Fisheries Strategy". Introduced in 1992, the Aboriginal Fisheries Strategy has three stated objectives: ensuring the rights recognized by the *Sparrow* decision are respected; providing aboriginal communities with a larger role in fisheries management and increased economic benefits; and minimizing the disruption of non-aboriginal fisheries (1994 Gardner Pinfold Report). In response to consultations with stakeholders carried out since its inception, the Aboriginal Fisheries Strategy has been reviewed and adjusted periodically in order to achieve these goals. A significant part of the Aboriginal Fisheries Strategy was the introduction of three pilot sales programs, one of which resulted in the issuance of the communal fishing licence at issue in this case. The licence was granted pursuant to the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332 ("*ACFLR*"). The *ACFLR* grants communal licences to "aboriginal organization[s]", defined as including "an Indian band, an Indian band council, a tribal council and an organization that represents a territorially based aboriginal community" (s. 2). The communal licence cannot be granted to individuals, but an aboriginal organization can designate its use to individuals.

[8] The licence with which we are concerned permitted fishers designated by the bands to fish for sockeye salmon between 7:00 a.m on August 19, 1998 and 7:00 a.m. on August 20, 1998, and to use the fish caught for food, social and ceremonial purposes, and for sale. Some of the fishers designated by the bands to

fish under the communal fishing licence were also licensed commercial fishers entitled to fish at other openings for commercial fishers.

[9] The appellants are all commercial fishers who were excluded from the fishery during the 24 hours allocated to the aboriginal fishery under the communal fishing licence. Under the auspices of the B.C. Fisheries Survival Coalition, they participated in a protest fishery during the prohibited period, for the purpose of bringing a constitutional challenge to the communal licence. As anticipated, they were charged with fishing at a prohibited time. In defence of the charges, they filed notice of a constitutional question seeking declarations that the communal fishing licence, the *ACFLR* and related regulations and the Aboriginal Fisheries Strategy were unconstitutional.

[10] The Provincial Court of British Columbia (Judge Kitchen) found that the communal fishing licence granted to the three bands was a breach of the equality rights of the appellants under s. 15(1) of the *Charter* that was not justified under s. 1 of the *Charter*. The court stayed proceedings on all the charges under s. 24 of the *Charter*: [2003] 4 C.N.L.R. 238, 2003 BCPC 279.

[11] The Supreme Court of British Columbia (Brenner C.J.S.C.) allowed a summary convictions appeal by the Crown: (2004), 31 B.C.L.R. (4th) 258, 2004 BCSC 958. It held that the pilot sales program did not have a discriminatory purpose or effect because it did not perpetuate or promote the view that those who were forbidden to fish on the days when the pilot sales program fishery was open are less capable or worthy of recognition or value as human beings or as members of Canadian society. Brenner C.J.S.C. lifted the stay of proceedings and entered convictions against the appellants.

[12] The British Columbia Court of Appeal, in five sets of reasons concurring in the result, dismissed the appeal: (2006), 56 B.C.L.R. (4th) 11, 2006 BCCA 277. Low J.A. concluded that the pilot sales program did not constitute denial of a benefit under s. 15 when the matter was viewed in a contextual rather than formalistic way. Mackenzie J.A. rejected the claim of discrimination on the basis that a discriminatory purpose or effect had not been established, endorsing the view of Brenner C.J.S.C. on the summary convictions appeal. Kirkpatrick J.A. dismissed the s. 15 claim on the basis that s. 25 of the *Charter*, which protects rights and freedoms pertaining to the aboriginal peoples of Canada, insulated the scheme from the discrimination charge. Finch C.J.B.C. concurred with both Low J.A. and Mackenzie J.A. on the s. 15 issue, and found that s. 25 was not engaged. Finally, Levine J.A. agreed with Finch C.J.B.C. on the s. 15 issue, but declined to express a view on whether s. 25 was engaged.

C. Analysis

[13] Section 15 of the *Charter* provides:

> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection an benefit of the law without discrimination and, in particular, without discrimination based on race, nati ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the ameliora conditions of disadvantaged individuals or groups including those that are disadvantaged because c national or ethnic origin, colour, religion, sex, age or mental or physical disability.

1. *The Purpose of Section 15*

[14] Nearly 20 years have passed since the Court handed down its first s. 15 decision in the case of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. *Andrews* set the template for this Court's commitment to substantive equality — a template which subsequent decisions have enriched but never abandoned.

[15] Substantive equality, as contrasted with formal equality, is grounded in the idea that: "The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration": *Andrews*, at p. 171, *per* McIntyre J., for the majority on the s. 15 issue. Pointing out that the concept of equality does not necessarily mean identical treatment and that the formal "like treatment" model of discrimination may in fact produce inequality, McIntyre J. stated (at p. 165):

> To approach the ideal of full equality before and under the law — and in human affairs an approach is all t be expected — the main consideration must be the impact of the law on the individual or the group conc Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitleme merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of and protection and no more of the restrictions, penalties or burdens imposed upon one than another. I words, the admittedly unattainable ideal should be that a law expressed to bind all should not bec irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

While acknowledging that equality is an inherently comparative concept (p. 164), McIntyre J. warned against a sterile similarly situated test focussed on treating "likes" alike. An insistence on substantive equality has remained central to the Court's approach to equality claims.

[16] Sections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. Section 15(1) is aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds. This is one way of combatting discrimination. However, governments may also wish to combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s. 15(2), the *Charter* preserves the right of governments to implement such programs, without fear of challenge under s. 15 (1). This is made apparent by the existence of s. 15(2). Thus s. 15(1) and s. 15(2) work together to confirm s. 15's purpose of furthering substantive equality.

[17] The template in *Andrews*, as further developed in a series of cases culminating in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, established in essence a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? These were divided, in *Law*, into three steps, but in our view the test is, in substance, the same.

[18] In *Andrews*, McIntyre J. viewed discriminatory impact through the lens of two concepts: (1) the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds; and (2) stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant's or group's actual circumstances and characteristics. *Andrews*, for example, was decided on the second of these concepts; it was held that the prohibition against non-citizens practising law was based on a stereotype that non-citizens could not *properly* discharge the responsibilities of a lawyer in British Columbia — a view that denied non-citizens a privilege, not on the basis of their merits and capabilities, but on the basis of what the Royal Commission Report on *Equality in Employment* (1984), referred to as "attributed rather than actual characteristics" (p. 2). Additionally, McIntyre J. emphasized that a finding of discrimination might be grounded in the fact that the impact of a particular law or program was to perpetuate the disadvantage of a group defined by enumerated or analogous s. 15 grounds. In this context, he said (at p. 174):

> I would say then that discrimination may be described as a distinction, whether intentional or not but b grounds relating to personal characteristics of the individual or group, which has the effect of imposing b obligations, or disadvantages on such individual or group not imposed upon others, or which withholds o access to opportunities, benefits, and advantages available to other members of society.

[19] A decade later, in *Law*, this Court suggested that discrimination should be defined in terms of the impact of the law or program on the "human dignity" of members of the claimant group, having regard to four contextual factors: (1) pre-existing disadvantage, if any, of the claimant group; (2) degree of

correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected (paras. 62-75).

[20] The achievement of *Law* was its success in unifying what had become, since *Andrews*, a division in this Court's approach to s. 15. *Law* accomplished this by reiterating and confirming *Andrews'* interpretation of s. 15 as a guarantee of substantive, and not just formal, equality. Moreover, *Law* made an important contribution to our understanding of the conceptual underpinnings of substantive equality.

[21] At the same time, several difficulties have arisen from the attempt in *Law* to employ human dignity *as a legal test*. There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity. As Dickson C.J. said in *R. v. Oakes*, [1986] 1 S.C.R. 103:

> The Court must be guided by the values and principles essential to a free and democratic society which I embody, to name but a few, respect for the inherent dignity of the human person, commitment to social and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and social and political institutions which enhance the participation of individuals and groups in society. [p. 13

[22] But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be.[1] Criticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.[2]

[23] The analysis in a particular case, as *Law* itself recognizes, more usefully focusses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)

[24] Viewed in this way, *Law* does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in *Andrews* and developed in numerous subsequent decisions. The factors cited in *Law* should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in *Andrews* — combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping.

[25] The central purpose of combatting discrimination, as discussed, underlies both s. 15(1) and s. 15(2). Under s. 15(1), the focus is on *preventing* governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping. Under s. 15(2), the focus is on *enabling* governments to pro-actively combat existing discrimination through affirmative measures.

[26] Against this background, we turn to a more detailed examination of s. 15(2) and its role in this appeal.

2. *Section 15(2)*

[27] Under *Andrews*, as previously noted, s. 15 does not mean identical treatment. McIntyre J. explained that "every difference in treatment between individuals under the law will not necessarily result in inequality", and that "identical treatment may frequently produce serious inequality" (p. 164). McIntyre J. explicitly rejected identical treatment as a *Charter* objective, based in part on the existence of s. 15(2). At p. 171, he stated that "the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2)".

[28] Rather than requiring identical treatment for everyone, in *Andrews*, McIntyre J. distinguished between difference and discrimination and adopted an approach to equality that acknowledged and accommodated differences. McIntyre J. proposed the following model, at p. 182:

> [I]n assessing whether a complainant's rights have been infringed under s. 15(1), it is not enough to focus the alleged ground of discrimination and decide whether or not it is an enumerated or analogous groun effect of the impugned distinction or classification on the complainant must be considered. Once it is a that not all distinctions and differentiations created by law are discriminatory, then a role must be assign 15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s. 15(1) mu not only that he or she is not receiving equal treatment before and under the law or that the law has a diff impact on him or her in the protection or benefit accorded by law but, in addition, must show that the leg impact of the law is discriminatory.

In other words, not every distinction is discriminatory. By their very nature, programs designed to ameliorate the disadvantage of one group will inevitably exclude individuals from other groups. This does not necessarily make them either unconstitutional or "reverse discrimination". *Andrews* requires that discriminatory conduct entail more than *different* treatment. As McIntyre J. declared at p. 167, a law will not "necessarily be bad because it makes distinctions".

[29] In our view, the appellants have established that they were treated differently based on an enumerated ground, race. Because the government argues that the program ameliorated the conditions of a disadvantaged group, we must take a more detailed look at s. 15(2).

[30] The question that arises is whether the program that targeted the aboriginal bands falls under s. 15(2) in the sense that it is a "law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups". As noted, the communal fishing licence authorizing the three bands to fish for sale on August 19-20 was issued pursuant to an enabling statute and regulations — namely the *ACFLR*. This qualifies as a "law, program or activity" within the meaning of s. 15(2). The more complex issue is whether the program fulfills the remaining criteria of s. 15(2) — that is, whether the program "has as its object the amelioration of conditions of disadvantaged individuals or groups".

[31] Even before the enactment of the *Charter*, this Court in *Athabasca Tribal Council v. Amoco Canada Petroleum Co.*, [1981] 1 S.C.R. 699, recognized that ameliorative programs targeting a disadvantaged group do not constitute discrimination. The issue in the case was whether the Energy Resources Conservation Board had jurisdiction to require an "affirmative action" program for the hiring of aboriginal people as a condition of its approval of a tar sands plant. The Court unanimously concluded that there was no such jurisdiction, but Ritchie J., writing for four of the judges (Laskin C.J., himself, Dickson J. and McIntyre J.), addressed the affirmative action aspect of the case, concluding that a program designed to benefit the aboriginal community was not discrimination within the meaning of *The Individual's Rights Protection Act* of Alberta, S.A. 1972, c. 2:

> In the present case what is involved is a proposal designed to improve the lot of the native peoples view to enabling them to compete as nearly as possible on equal terms with other members of the com who are seeking employment in the tar sands plant. With all respect, I can see no reason why the m proposed by the "affirmative action" programs for the betterment of the lot of the native peoples in the question should be construed as "discriminating against" other inhabitants. The purpose of the pl understand it is not to displace non-Indians from their employment, but rather to advance the lot of the Inc that they may be in a competitive position to obtain employment without regard to the handicaps which th has inherited. [p. 711]

[32] The Royal Commission Report on *Equality in Employment*, whose mandate was to determine whether there should be affirmative action in Canada and on which McIntyre J. relied to develop his theories of discrimination and equality, set out the principles underlying s. 15(2), at pp. 13-14:

> In recognition of the journey many have yet to complete before they achieve equality, and in recogn how the duration of the journey has been and is being unfairly protracted by arbitrary barriers, sectio permits laws, programs, or activities designed to eliminate these restraints. While section 15(1) guara individuals the right to be treated as equals free from discrimination, section 15(2), though itself crea enforceable remedy, assures that it is neither discriminatory nor a violation of the equality guaranteed by 15(1) to attempt to improve the condition of disadvantaged individuals or groups, even if this means them differently.
>
> Section 15(2) covers the canvas with a broad brush, permitting a group remedy for discriminatio section encourages a comprehensive or systemic rather than a particularized approach to the elimina discriminatory barriers.
>
> Section 15(2) does not create the statutory obligation to establish laws, programs, or activities to equality, ameliorate disadvantage, or eliminate discrimination. But it sanctions them, acting with s acquiescence.

[33] In essence, s. 15(2) of the *Charter* seeks to protect efforts by the state to develop and adopt remedial schemes designed to assist disadvantaged groups. This interpretation is confirmed by the language in s. 15(2), "does not preclude".

[34] This Court dealt explicitly with the relationship between s. 15(1) and s. 15(2) in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37. The Court, *per* Iacobucci J., appeared unwilling at that time to give s. 15(2) independent force, but left the door open for that possibility, at para. 108:

> [A]t this stage of the jurisprudence, I see s. 15(2) as confirmatory of s. 15(1) and, in that respect, cl arguing equality claims in the future should first be directed to s. 15(1) since that subsection can e ameliorative programs of the kind that are contemplated by s. 15(2). By doing that one can ensure t program is subject to the full scrutiny of the discrimination analysis, as well as the possibility of a s. 1 r However . . . we may well wish to reconsider this matter at a future time in the context of anothe [Emphasis added.]

[35] Iacobucci J. in *Lovelace* perceived two possible approaches to the interpretation of s. 15(2). He believed that the Supreme Court could either read s. 15(2) as an interpretive aid to s. 15(1) (the approach adopted in *Lovelace*) or read it as an exception or exemption from the operation of s. 15(1).

[36] He favoured the interpretive aid approach, while acknowledging that the exemption approach had some support. In particular, he cited Mark A. Drumbl and John D. R. Craig for the proposition that s. 15(2) should defend against a s. 15(1) violation because otherwise the provision becomes redundant and does not encourage the government to combat discrimination pro-actively through ameliorative programs ("Affirmative Action in Question: A Coherent Theory for Section 15(2)" (1997), 4 *Rev. Const. Stud.* 80, at para. 102).

[37] In our view, there is a third option: if the government can demonstrate that an impugned program meets the criteria of s. 15(2), it may be unnecessary to conduct a s. 15(1) analysis at all. As discussed at the outset of this analysis, s. 15(1) and s. 15(2) should be read as working together to promote substantive equality. The focus of s. 15(1) is on *preventing* governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping. The focus of s. 15(2) is on *enabling* governments to pro-actively combat discrimination. Read thus, the two sections are confirmatory of each other. Section 15(2) supports a full expression of equality, rather than derogating from it. "Under a substantive definition of equality, different treatment in the service of equity for disadvantaged groups is an expression of equality, not an exception to it": P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. 2007), vol. 2, at p. 55-53.

[38] But this confirmatory purpose does not preclude an independent role for s. 15(2). Section 15 (2) is more than a hortatory admonition. It tells us, in simple clear language, that s. 15(1) cannot be read in a way that finds an ameliorative program aimed at combatting disadvantage to be discriminatory and in breach of s. 15.

[39] Here the appellants claim discrimination on the basis of s. 15(1). The source of that discrimination — the very essence of their complaint — is a program that may be ameliorative. This leaves but one conclusion: if the government establishes that the program falls under s. 15(2), the appellants' claim must fail.

[40] In other words, once the s. 15 claimant has shown a distinction made on an enumerated or analogous ground, it is open to the government to show that the impugned law, program or activity is ameliorative and, thus, constitutional. This approach has the advantage of avoiding the symbolic problem of finding a program discriminatory before "saving" it as ameliorative, while also giving independent force to a provision that has been written as distinct and separate from s. 15(1). Should the government fail to demonstrate that its program falls under s. 15(2), the program must then receive full scrutiny under s. 15(1) to determine whether its impact is discriminatory.

[41] We would therefore formulate the test under s. 15(2) as follows. A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. In proposing this test, we are mindful that future cases may demand some adjustment to the framework in order to meet the litigants' particular circumstances. However, at this early stage in the development of the law surrounding s. 15(2), the test we have described provides a basic starting point — one that is adequate for determining the issues before us on this appeal, but leaves open the possibility for future refinement.

[42] We build our analysis of s. 15(2) and its operation around three key phrases in the provision. The subsection protects "any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups". While there is some overlap in the considerations raised by each of these terms, it may be useful to consider each of them individually.

(a) "Has as Its Object"

[43] In interpreting this phrase, two issues arise. The first is whether courts should look to the *purpose* or to the *effect* of legislation. The second is whether, in order to qualify for s. 15(2) protection, a program must have an ameliorative purpose as its sole object, or whether having such a goal as one of several objectives is sufficient.

[44] The language of s. 15(2) suggests that legislative goal rather than actual effect is the paramount consideration in determining whether or not a program qualifies for s. 15(2) protection. Michael Peirce defends this view, which he refers to as the "subjective" approach, because it adheres more closely to the language of the provision and avoids potentially inappropriate judicial intervention in government programs ("A Progressive Interpretation of Subsection 15(2) of the *Charter*" (1993), 57 *Sask. L. Rev.* 263). Scholars have nonetheless disagreed about the appropriate approach, often using the "subjective" (goal-based) and "objective" (effect-based) language.

[45] Scholars and judges who have supported judicial examination of the actual *effect* of a program offer one primary argument to defend their view. They express concern that a "subjective" test will permit the government to defeat a discrimination claim by declaring that the impugned law has an ameliorative purpose. Thus, Russell Juriansz states that a "purely subjective test may be too wide" ("Recent Developments in Canadian Law: Anti-Discrimination Law Part I" (1987), 19 *Ottawa L. Rev.* 447, at p. 483). David Lepofsky and Jerome Bickenbach believe that the "better view is that the defendant must establish that the impugned program has some serious likelihood of achieving its ameliorative goal" ("Equality Rights and the Physically Handicapped", in A. F. Bayefsky and M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (1985), 323, at p. 355). They justify this perspective with the argument that "if ameliorative legislative purpose were the sole test under section 15(2), a legislature could easily circumvent the egalitarian requirements under section 15(1) by including in any potentially discriminatory legislation a clause which provides that 'this Act has as its object the amelioration of the conditions of . . . a disadvantaged group'" (p. 355).

[46] In our opinion, this concern can be easily addressed. There is nothing to suggest that a test focussed on the goal of legislation must slavishly accept the government's characterization of its purpose. Courts could well examine legislation to ensure that the declared purpose is genuine. Courts confronted with a s. 15(2) claim have done just that. For example, in *Manitoba Rice Farmers Association v. Human Rights Commission (Man.)* (1987), 50 Man. R. (2d) 92 (Q.B.) (rev'd in part (1988), 55 Man. R. (2d) 263 (C.A.)), Simonsen J. explained, at para. 51:

> A bald declaration by government that it has adopted a program which "has as its object the amelior conditions of disadvantaged individuals or groups including those that are disadvantaged because of ra does not *ipso facto* meet the requirements to sanctify the program under s. 15(2) of the *Charter*. The gove cannot employ such a naked declaration as a shield to protect an activity or program which is unnec discriminatory.

[47] In that vein, proponents of the approach that focusses on the ameliorative goal of the program, rather than its effect, argue that doing so will prevent courts from unduly interfering in ameliorative programs created by the legislature. They note that Canadian *Charter* drafters wished to avoid the American experience, whereby judges overturned affirmative action programs under the banner of equality. The purpose-driven approach also reflects the language of the provision itself, which focusses on the "object" of the program, law or activity rather than its impact. Moreover, the effects of a program in its fledgling stages cannot always be easily ascertained. The law or program may be experimental. If the sincere purpose is to promote equality by ameliorating the conditions of a disadvantaged group, the government should be given some leeway to adopt innovative programs, even though some may ultimately prove to be unsuccessful. The government may learn from such failures and revise equality-enhancing programs to make them more effective.

[48] Given the language of the provision and its goal of enabling governments to pro-actively combat discrimination, we believe the "purpose"-based approach is more appropriate than the "effect"-based approach: where a law, program or activity creates a distinction based on an enumerated or analogous ground, was the government's goal in creating that distinction to improve the conditions of a group that is disadvantaged? In examining purpose, courts may therefore find it necessary to consider not only statements made by the drafters of the program but also whether the legislature chose means rationally related to that ameliorative purpose, in the sense that it appears at least plausible that the program may indeed advance the stated goal of combatting disadvantage. The Manitoba Court of Queen's Bench suggested that it favoured an analysis of this kind in *Manitoba Rice Farmers Association*, at para. 54:

> In order to justify a program under s. 15(2), I believe there must be a real nexus between the objec program as declared by the government and its form and implementation. It is not sufficient to declare object of a program is to help a disadvantaged group if in fact the ameliorative remedy is not directed tow cause of the disadvantage. There must be a unity or interrelationship amongst the elements in the program will prompt the court to conclude that the remedy in its form and implementation is rationally related to th of the disadvantage.

[49] Analysing the means employed by the government can easily turn into assessing the *effect* of the program. As a result, to preserve an intent-based analysis, courts could be encouraged to frame the analysis as follows: Was it rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to that purpose? For the distinction to be rational, there must be a correlation between the program and the disadvantage suffered by the target group. Such a standard permits significant deference to the legislature but allows judicial review where a program nominally seeks to serve the disadvantaged but in practice serves other non-remedial objectives.

[50] The next issue is whether the program's ameliorative purpose needs to be its exclusive objective. Programs frequently serve more than one purpose or attempt to meet more than one goal. Must the ameliorative object be the sole object, or may it be one of several?

[51] We can find little justification for requiring the ameliorative purpose to be the sole object of a program. It seems unlikely that a single purpose will motivate any particular program; any number of goals are likely to be subsumed within a single scheme. To prevent such programs from earning s. 15(2) protection on the grounds that they contain other objectives seems to undermine the goal of s. 15(2).

[52] The importance of the ameliorative purpose within the scheme may help determine the *scope* of s. 15(2) protection, however. Consider that an ameliorative program may coexist with or interact with a larger legislative scheme. If only the program has an ameliorative purpose, does s. 15(2) extend to protect the wider legislative scheme? We offer as a tentative guide that s. 15(2) precludes from s. 15(1) review distinctions made on enumerated or analogous grounds that serve and are necessary to the ameliorative purpose.

(b) "Amelioration"

[53] Section 15(2) protects programs that aim to "ameliorate" the condition of disadvantaged groups identified by the enumerated or analogous grounds. Although the word does not at first seem liable to misunderstanding, courts have previously understood the term (and s. 15(2)) to apply in surprising circumstances. In *R. v. Music Explosion Ltd.* (1989), 62 Man. R. (2d) 189, the Manitoba Court of Queen's Bench upheld a Winnipeg bylaw that restricted young people under 16 from operating an amusement device without the consent of a guardian or a parent on the grounds that it was protected by s. 15(2). Smith J. declared that the bylaw "is obviously for the benefit of the special needs of young persons" (para. 21). On appeal, the decision was reversed. The Court of Appeal explained: "[T]his legislation does not confer special benefits upon young people, but rather imposes a limitation. Nor is the purpose of the legislation the amelioration of their condition" ((1990), 68 Man. R. (2d) 203, at para. 18). Courts have also used s. 15(2) to uphold provisions of the *Criminal Code* (*Re Rebic and The Queen* (1985), 20 C.C.C. (3d) 196 (B.C.S.C.), aff'd (1986), 28 C.C.C. (3d) 154 (B.C.C.A.)) and of the *Young Offenders Act* (*Re M and The Queen* (1985), 21 C.C.C. (3d) 116 (Man. Q.B.)).

[54] These precedents suggest that the meaning of "amelioration" deserves careful attention in evaluating programs under s. 15(2). We would suggest that laws designed to restrict or punish behaviour would not qualify for s. 15(2) protection. Nor, as already discussed, should the focus be on the effect of the law. This said, the fact that a law has no plausible or predictable ameliorative effect may render suspect the state's ameliorative purpose. Governments, as discussed above, are not permitted to protect discriminatory programs on colourable pretexts.

(c) "Disadvantaged"

[55] The interpretation of "disadvantaged", explored in *Andrews*, *Miron v. Trudel*, [1995] 2 S.C.R. 418, and *Law*, and other cases in the context of s. 15(1), requires little further elaboration here. "Disadvantage" under s. 15 connotes vulnerability, prejudice and negative social characterization. Section 15 (2)'s purpose is to protect government programs targeting the conditions of a specific and identifiable disadvantaged group, as contrasted with broad societal legislation, such as social assistance programs. Not all members of the group need to be disadvantaged, as long as the group as a whole has experienced discrimination.

3. *Application of Section 15(2) to This Case*

[56] The appellants have argued they were denied a benefit on the basis of race, a ground enumerated in s. 15 of the *Charter*. As discussed above, once the appellants have demonstrated such a distinction, the government may attempt to show the program is protected under s. 15(2). The government conferred the communal fishing licence valid for August 19-20 to particular aboriginal bands. Therefore, we are satisfied that the appellants have demonstrated a distinction imposed on the basis of race, an enumerated ground under s. 15.

[57] We have earlier suggested that a distinction based on the enumerated or analogous grounds in a government program will not constitute discrimination under s. 15 if, under s. 15(2), (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. The question is whether the program at issue on this appeal meets these conditions.

[58] The first issue is whether the program that excluded Mr. Kapp and other non-band fishers from the fishery had an ameliorative or remedial purpose. The Crown describes numerous objectives for the impugned pilot sales program. These include negotiating solutions to aboriginal fishing rights claims, providing economic opportunities to native bands and supporting their progress towards self-sufficiency. The impugned fishing licence relates to all of these goals. The pilot sales program was part of an attempt — albeit a small part — to negotiate a solution to aboriginal fishing rights claims. The communal fishing licence provided economic opportunities, through sale or trade, to the bands. Through these endeavours, the government was pursuing the goal of promoting band self-sufficiency. In these ways, the government was hoping to redress the social and economic disadvantage of the targeted bands. The means chosen to achieve the purpose (special fishing privileges for aboriginal communities, constituting a benefit) are rationally related to serving that purpose. It follows that the Crown has established a credible ameliorative purpose for the program.

[59] The government's aims correlate to the actual economic and social disadvantage suffered by members of the three aboriginal bands. The disadvantage of aboriginal people is indisputable. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, the Court noted "the legacy of stereotyping and prejudice against Aboriginal peoples" (para. 66). The Court has also acknowledged that "Aboriginal peoples experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health and housing" (*Lovelace*, at para. 69). More particularly, the evidence shows in this case that the bands granted the benefit were in fact disadvantaged in terms of income, education and a host of other measures. This disadvantage, rooted in history, continues to this day. The communal fishing licence, by addressing long-term goals of self-sufficiency and, more immediately, by providing additional sources of income and employment, relates to the social and economic disadvantage suffered by the bands. The fact that some individual members of the bands may not experience personal disadvantage does not negate the group disadvantage suffered by band members.

[60] Mr. Kapp suggests that the focus must be on the particular forms of disadvantage suffered by the bands who received the benefit, and argues that this program did not offer a benefit that effectively tackled the problems faced by these bands. As discussed above, what is required is a correlation between the program and the disadvantage suffered by the target group. If the target group is socially and economically

disadvantaged, as is the case here, and the program may rationally address that disadvantage, then the necessary correspondence is established.

[61] We conclude that the government program here at issue is protected by s. 15(2) as a program that "has as its object the amelioration of conditions of disadvantaged individuals or groups". It follows that the program does not violate the equality guarantee of s. 15 of the *Charter*.

4. *Section 25 of the Charter*

[62] Having concluded that a breach of s. 15 is not established, it is unnecessary to consider whether s. 25 of the *Charter* would bar the appellants' claim. However, we wish to signal our concerns with aspects of the reasoning of Bastarache J. and of Kirkpatrick J.A., both of whom would have dismissed the appeal solely on the basis of s. 25.

[63] An initial concern is whether the communal fishing licence at issue in this case lies within s. 25's compass. In our view, the wording of s. 25 and the examples given therein — aboriginal rights, treaty rights, and "other rights or freedoms", such as rights derived from the *Royal Proclamation* or from land claims agreements — suggest that not every aboriginal interest or program falls within the provision's scope. Rather, only rights of a constitutional character are likely to benefit from s. 25. If so, we would question, without deciding, whether the fishing licence is a s. 25 right or freedom.

[64] A second concern is whether, even if the fishing licence does fall under s. 25, the result would constitute an absolute bar to the appellants' s. 15 claim, as distinguished from an interpretive provision informing the construction of potentially conflicting *Charter* rights.

[65] These issues raise complex questions of the utmost importance to the peaceful reconciliation of aboriginal entitlements with the interests of all Canadians. In our view, prudence suggests that these issues are best left for resolution on a case-by-case basis as they arise before the Court.

D. Conclusion

[66] We would dismiss the appeal on the ground that breach of the s. 15 equality guarantee has not been established.

The following are the reasons delivered by

BASTARACHE J. –

1. Introduction

[67] The Minister of Fisheries and Oceans has the task of managing the salmon fishery on the Fraser River. In an effort to enhance the management of this fishery and address a number of issues besetting the fishery, he developed the Aboriginal Fisheries Strategy, a component of which in turn is the pilot sales program. Under this program, the Minister exercised his discretion under the *Fisheries Act*, R.S.C. 1985, c. F-14, and the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332.

[68] On August 19, 1998, the Minister issued a licence to the Musqueam, Burrard and Tsawwassen First Nations, permitting them to fish for a period of 24 hours in exclusivity, and to sell their catch. The appellants, who are all commercial fishers, mounted a "protest fishery" during the aboriginal fishery and were charged for fishing during a time when the fishery was closed to them. At their subsequent trial, the appellants

did not challenge the law under which they were charged, but asserted that the trial proceedings should be stayed as their rights to equality under s. 15(1) of the *Canadian Charter of Rights and Freedoms* had been violated. They argue that their right to participate as equals in the public commercial fishery has been breached on the basis of a race-based distinction and that any race-based distinction affects the dignity of the persons subject to discrimination.

[69] The respondent Minister argues that the appellants were not denied any benefit of the law, as they were provided opportunities to fish and, indeed, caught significant quantities of salmon. Moreover, providing aboriginal communities, which have historically been disadvantaged, with access to commercial salmon fishing does not demean the dignity of commercial salmon fishers by treating them as less worthy and valued members of Canadian society. The respondent Minister stated that the policy under the Aboriginal Fisheries Strategy was to provide opportunities to fish for food, and for social and ceremonial purposes, and in some cases pilot sales, to aboriginal communities having historical use and occupancy of an area. He explained that approximately 70 fisheries agreements were negotiated annually with aboriginal groups throughout the province. Under these agreements, the groups received communal licences authorizing fishing in accordance with the fisheries agreements. The position of the respondent is that the members of the claimant group, which consists of individuals, cannot properly compare themselves to aboriginal communities, the recipients of the benefit in question. The appellants respond that membership in a band does not constitute a valid proxy in any circumstance that is functionally relevant to the regulation of the public fishery. The appellants add that any cultural significance to fishery activity is dealt with by the doctrine of aboriginal rights and the protection of such rights by s. 35 of the *Constitution Act, 1982*.

[70] With regard to the communal aspect of the fishery, the trial judge, Kitchen Prov. Ct. J., had this to say: "The Department labels the fishery 'communal', but the individuals designated by the bands to participate are completely on their own and keep all profits for themselves. . . . [T]he pilot sales fishery provides financial assistance to only the individual members of the bands, not the bands generally . . . It is not a communal fishery. . . . [B]and members who were most successful in the pilot sales fishery were those who were also commercial fishers and operated fully equipped commercial fishing vessels" ([2003] 4 C.N.L.R. 238, 2003 BCPC 279, at paras. 200, 211 and 214).

[71] The pilot sales program was not related to the specific aboriginal right to fish for food found in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. Rather, according to the respondent, it was designed to reach negotiated solutions to claims for aboriginal commercial fishing rights and to provide economic opportunities to native bands, to support their progress towards self-sufficiency. Minister Crosbie, the Minister of Fisheries and Oceans at the time, explained that unauthorized sale of aboriginal food fish was creating a management problem. He explained that, rather than litigating the issue, the Department sought to reach an agreement with aboriginal groups as to how much fish they could take and sell and to allow the Department to regulate how the fish would be sold. James Matkin, speaking for the Department of Fisheries, explained that the pilot sales are justified as an exercise in policy making of the Minister's authority under the *Fisheries Act* and that they are designated to follow the court's direction to negotiate rather than to litigate.

[72] With regard to the rationale for the pilot project, Kitchen Prov. Ct. J. had this to say:

> It is difficult to discern the real purpose of the pilot sales fishery. . . . Fisheries Minister John Crosb control of poaching as the reason for the program. . . .
>
> . . . he also mentioned that the program was to be an experiment. This is a second justification given program. . . .
>
> This literature also asserts that the *Sparrow Case* requires that this type of opportunity be affo Aboriginals. This is clearly not the situation. . . .
>
> . . . Department literature also mentions the fiduciary duty society has to the Aboriginal community a this has prompted the Department to move ahead of caselaw . . . .

. . .

> Most significantly, the Department of Fisheries and Oceans have given economic development ameliorative purpose as the reason for pilot sales program. But there is a real suspicion that this is an *facto* justification; . . .
>
> . . .
>
> Even if financial disadvantage were an issue there was no economic study or assessment done pri during the pilot sales fishery concerning the economic need of the bands and the financial rewards the would produce. . . .
>
> . . .
>
> . . . Several reasons have been proffered at various times. There has been no consistent rationale program. [paras. 186-89, 191, 199 and 210]

[73] The important point to be made here is that the respondent's position is that the Aboriginal Fisheries Strategy and the pilot sales program were primarily aimed at management of the fishery and did not have as their primary object the amelioration of conditions of disadvantaged groups or individuals. The respondent therefore does not rely on s. 15(2) of the *Charter*. He states that s. 15(2) is an interpretative provision and that given this Court's established lines of authority on the proper approach to analysis of the equality claims under s. 15(1), the ameliorative purpose or effect of a program can readily be taken into account under s. 15(1).

[74] Kitchen Prov. Ct. J. held that the pilot sales program violated s. 15(1) and was not saved by s. 1 of the *Charter*. The summary conviction appeal judge, Brenner C.J.S.C., allowed the appeal on the basis that the trial judge had identified the claimant and comparator groups too narrowly, that he had failed to properly consider the pre-existing disadvantage of the aboriginal communities that comprise the comparator group, and that he did not give sufficient weight to the fact that the pilot sales program did not have a significant impact on the claimant group ((2004), 31 B.C.L.R. (4th) 258, 2004 BCSC 958). He concluded that the pilot sales program corresponds to the needs, capacity and circumstances of the aboriginal communities and that it is also consistent with the needs, capacity and circumstances of the rest of Canadian society. Although the issue was not dealt with substantially at trial, Brenner C.J.S.C. permitted a number of interveners to argue that s. 25 of the *Charter* applied in this case. He eventually concluded that it did not. The application of s. 25 was fully argued by all parties and most interveners in the Court of Appeal and in this Court.

[75] The five members of the panel in the Court of Appeal of British Columbia were unanimous in dismissing the appeal, but for different reasons ((2006), 56 B.C.L.R. (4th) 11, 2006 BCCA 277). Finch C.J.B.C. and Low and Levine JJ.A. held that the appellants had totally failed to establish that they had been denied a benefit and therefore failed to get past the first stage of the *Law* test (*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497). They concluded that the aboriginal communal licence was simply part of a broader regulatory framework which provided for various user groups. The Minister in exercising his discretion did not deny the appellants a real benefit since they were provided other opportunities to fish under commercial licences. Mackenzie J.A. held that, assuming the appellants were successful in getting past the first two stages of the *Law* test, they had failed to establish that the communal licences had a discriminatory purpose or effect. Kirkpatrick J.A. held that the communal fishing licences granted were protected under s. 25 of the *Charter* as "another right or freedom that pertains to the aboriginal peoples of Canada". She further held that s. 25 was triggered whenever the outcome of a *Charter* challenge might abrogate or derogate from aboriginal rights or freedoms. Since the appellants were seeking to eliminate the pilot sales program, s. 25 operated to bar their constitutional challenge under s. 15.

2. Analysis

[76] Like Kirkpatrick J.A., I am of the view that s. 25 of the *Charter* provides a complete answer to the question posed in this appeal. I will initially address the role and effect of s. 25, then outline the scope of the provision. Finally, I will propose an analytical approach to be followed when s. 25 is engaged and apply that approach to the present matter.

[77] There is no need for me to engage in a full analysis of the application of s. 15 of the *Charter*. It is sufficient for me to establish the existence of a potential conflict between the pilot sales program and s. 15. This said, I want to state clearly that I am in complete agreement with the restatement of the test for the application of s. 15 that is adopted by the Chief Justice and Abella J. in their reasons for judgment.

2.1 *Role and Effect of Section 25*

[78] The enactment of the *Charter* undoubtedly heralded a new era for individual rights in Canada. Nevertheless, the document also expressly recognizes rights more aptly described as collective or group rights. The manner in which collective rights can exist with the liberal paradigm otherwise established by the *Charter* remains a source of ongoing tension within the jurisprudence and the literature. This tension comes to a head in the aboriginal context in s. 25.

[79] Most authors believe that s. 25 is an interpretative provision and does not create new rights. B. H. Wildsmith outlines the two modes of interpretation most commonly posited:

> Under one mode of interpreting section 25, the section admonishes the decision maker to construe the right or freedom so as to give effect to it, if possible, without an adverse impact on section 25 rights or fre If it is not possible to so construe the Charter right or freedom so as to avoid a negative impact on native then the force of section 25 is spent. Effect is given to the Charter right or freedom despite the [negative] on native rights. Under the second mode of interpreting section 25, the conflict between Charter rig section 25 rights, if irreconcilable, would be resolved by giving effect to the section 25 rights and freedc short, native rights remain inviolable and unaffected by the rights or freedoms guaranteed by the Charter. (*Aboriginal Peoples & Section 25 of the Canadian Charter of Rights and Freedoms* (1988), at pp. 10-11)

[80] The first mode has been described in the literature as an interpretative prism or a mere canon of interpretation. The second method is most commonly referred to as a shield. Wildsmith provides an example (at pp. 11-12) that is highly reminiscent of the present matter to demonstrate that there is a serious difficulty in finding that s. 25 is a mere canon of interpretation. If a provincial Act were to establish that "[n]o Indian shall hunt (or fish) except for his own personal consumption unless he has first obtained a licence", and that no treaty or aboriginal right to this exemption existed, then a non-Indian hunter or fisherman would say that the statute violated s. 15(1) of the *Charter*. Indians would have a right to hunt or fish for personal consumption denied to others. The statutory right given to the Indians would be an "other righ[t] or freedo[m]" under s. 25. The court would then be forced to choose between vindicating the equality right or the right protected by s. 25. If the real effect of s. 25 is to protect native rights and freedoms from erosion based on the *Charter*, the conflict should be resolved by refusing to apply s. 15 in these circumstances.

[81] I agree that giving primacy to s. 25 is what was clearly intended. As will be seen, this is consistent with the wording and history of the provision. It is also consistent with the declarations of the then Deputy Minister of Justice, Roger Tassé, and with those of the Minister of Justice at the time of the 1983 amendment, Justice Minister Mark MacGuigan.

2.1.1 Interpretative Approach

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

the scheme of the Act, and the legislative context. Consequently, I will examine the manner in which s. 25 addresses the tension between individual and group rights with reference to all of the above.

[83] In *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 82, this Court stated: "Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples." Clearly, this Court has held that a generous interpretation is mandated.

2.1.2 Textual and Structural Analysis

[84] First, let us consider the terms of s. 25:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abr derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of including

(*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763;

(*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

25. Le fait que la présente charte garantit certains droits et libertés ne porte pas atteinte aux dr libertés — ancestraux, issus de traités ou autres — des peuples autochtones du Canada, notamment :

a) aux droits ou libertés reconnus par la Proclamation royale du 7 octobre 1763;

b) aux droits ou libertés existants issus d'accords sur des revendications territoriales ou ceux d'être ainsi acquis.

[85] Here we have an Act that is clear in its French version and ambiguous in its English version. Other provisions of the *Charter* provide the statutory context for the interpretation of s. 25. Section 21 provides that nothing in ss. 16 to 20 "abrogates or derogates from any right, privilege or obligation with respect to the English and French languages". Section 29 provides that nothing in the *Charter* "abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools".

[86] Most authors have considered the use of the word "construed" as significant in s. 25. In my opinion, the word "construe" is very broad. The *Oxford English Dictionary* (2nd ed. 1989) defines the term as meaning "[t]o analyse or trace the grammatical construction of a sentence; to take its words in such an order as to show the meaning of the sentence" (p. 796). The term accordingly permits the understanding that in constructing and interpreting the scope of *Charter* rights, courts must ensure that they do not abrogate or derogate from an aboriginal right or freedom. As noted above, Wildsmith described the two competing approaches to s. 25 as differing modes of interpretation. I view the expression "shall not be construed" as ambiguous in terms of the effect of the provision.

[87] This said, I view the French version of s. 25 as being considerably more certain. The expression "*ne porte pas atteinte aux*" loosely translates to "without prejudice to" (J. Picotte, *Juridictionnaire: Recueil des difficultés et des ressources du français juridique* (1991), vol. I A, at p. 228) or "will not prejudicially affect" (*Ontario English-French Legal Lexicon* (1987), entry 224). It is also important to note that the French version of s. 25 uses the same terms as ss. 21 and 29 of the *Charter* and that those sections have already been interpreted by this Court. In *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, "*ne porte pas atteinte aux*" in s. 29 was read by this Court, in *obiter dicta*, as constituting a bar to competing rights. The rule of internal consistency would require that the same words used in the same *Charter* (especially in the same section, dealing with general provisions) be interpreted in the same way, militating

against finding that the French version does not provide for the most consistent answer to the quest for a common meaning. See *R. v. Daoust*, [2004] 1 S.C.R. 217, 2004 SCC 6; see also *Reference re Bill 30* and *Adler v. Ontario*, [1996] 3 S.C.R. 609.

[88] In any case, like Wildsmith, I do not believe that the difference in wording is decisive. First, s. 25 is very different from s. 27, which is the only general provision in the *Charter* that has been clearly identified as a simple interpretative clause. Second, it creates a priority, which is inconsistent with the idea of weighing one right against another. This Court has considered a similar provision in the *Canadian Bill of Rights*, R.S.C. 1985, App. III, s. 2, which reads: "Every law of Canada shall, . . . be so construed and applied as not to abrogate, abridge or infringe . . . any of the rights or freedoms herein recognized . . .". In *R. v. Drybones*, [1970] S.C.R. 282, Ritchie J. said that a more realistic meaning had to be given to the operative words, meaning that if a law cannot be "sensibly construed and applied" (p. 294) without infringing the right, it must be declared inoperative. This was affirmed in *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349. There is no substantial difference in the present case.

[89] It could be argued that to interpret s. 25 as a shield would not be in keeping with the flexible, non-hierarchical approach to *Charter* rights that this Court has espoused. It is certainly true that this Court has in the past acknowledged the difficulty in reconciling rights that often seem to be operating in opposition to each other, particularly in the context of equality claims. Nevertheless, where collective rights are clearly prioritized in terms of protection (as I believe is the case here), individual equality rights have typically given way. In *Reference re Bill 30*, Wilson J. stated at p. 1197, that although the special minority religion education rights conferred by s. 93 of the *Constitution Act, 1867* " si[t] uncomfortably with the concept of equality embodied in the *Charter*", s. 15 can be used neither to nullify the specific rights of the protected group nor to extend those rights to other religious groups. It is also instructive to read the reasons of former Chief Justice Dickson in *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 369, where, speaking of the application of s. 15 in the context of minority language rights in education, he said: "[I]t would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to 'every individual'". In my opinion, and as argued by J. M. Arbour, s. 25 serves the purpose of protecting the rights of aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group ("The Protection of Aboriginal Rights Within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the Canadian Charter of Rights and Freedoms" (2003), 21 *S.C.L.R.* (2d) 3, p. 60).

2.1.3 Legislative History

[90] The legislative history of s. 25 was set out by Wildsmith, at pp. 5-8. He noted that s. 25 of the *Charter* can be traced back to s. 26 of Bill C-60, presented to Parliament on June 20, 1978. The white paper accompanying the Bill stated that "[t]he renewal of the Federation must fully respect the legitimate rights of the native peoples" (*A Time for Action — Toward the Renewal of the Canadian Federation* (1978)). Section 26 was incorporated as s. 24 in the October 1980 Resolution which followed the First Ministers' meeting of September 1980. Sanders described this section as being designed to protect aboriginal rights from the egalitarian provisions of the *Charter* (see D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada", in S. M. Beck and I. Bernier, eds., *Canada and the New Constitution: The Unfinished Agenda* (1983), vol. 1, 225, at p. 231).

[91] On January 30, 1981, an agreement was reached between representatives of aboriginal organizations and the three national political parties on new provisions concerning native peoples. These provisions were introduced that day to the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada. A new s. 34 provided that "[t]he aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Section 24 was also altered by divorcing the native rights issue from the general saving provision created by a new s. 25.

[92] These changes were then incorporated into the Consolidated Resolution of April 24, 1981. Support for the resolution weakened and there were new negotiations between aboriginal representatives and government officials which led to the introduction of a modified s. 25 on November 18, 1981. This section

makes no reference to treaty rights or "other rights or freedoms". Negotiations with the premiers resulted in an amendment reflected in the final resolution of December 8, 1981. The text of that resolution was amended again by the adoption of the *Constitution Amendment Proclamation, 1983*, R.S.C. 1985, App. II, No. 46. This modification added s. 35(3) which states: "For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired."

[93] The Minister of Justice at the time, the Honourable Jean Chrétien, declared before the Special Joint Committee: "We say that there is nothing in this Charter that will infringe upon the rights of the Natives. . . . [T]he rights of all the native Canadians, either flowing from Treaties or the Royal Proclamation, are assured to remain as they are, and not being changed by the adoption of this Charter of Rights, its clause 24" (*Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue No. 3, November 12, 1980, at pp. 68 and 84). It was made abundantly clear that s. 25 creates no new rights. It was meant as a shield against the intrusion of the *Charter* upon native rights or freedoms. A more comprehensive account of the historical foundation of s. 25 is found in Arbour, at pp. 30-37.

2.1.4 Academic and Judicial Commentary

[94] Practically all authors agree with the fact that s. 25 operates as a shield: see Wildsmith, at p. 23; B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-1983), 8 *Queen's L.J.* 232, at p. 239; N. K. Zlotkin, *Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference* (1983), at p. 46; K. McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 *S.C.L.R.* 255, at p. 262; P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. 2007), vol. 1, at pp. 28-56 and 28-57; D. Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983), 61 *Can. Bar Rev.* 314, at p. 321; P. Cumming, "Canada's North and Native Rights", in B. W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (1985), 695, at p. 732; N. Lyon, "Constitutional Issues in Native Law", in Morse, 408, at p. 423; K. M. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada", in W. S. Tarnopolsky and G.-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (1982), 467, at pp. 471-72; *contra*: R. H. Bartlett, "Survey of Canadian Law: Indian and Native Law" (1983), 15 *Ottawa L. Rev.* 431; B. Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada, 1982-1984* (1985).

[95] Also agreeing are K. Wilkins, ". . . But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-government" (1999), 49 *U.T.L.J.* 53; T. Isaac, "*Canadian Charter of Rights and Freedoms*: The Challenge of the Individual and Collective Rights of Aboriginal People" (2002), 21 *Windsor Y.B. Access Just.* 431; A. Goldenberg, "'Salmon for Peanut Butter': Equality, Reconciliation and the Rejection of Commercial Aboriginal Rights" (2004), 3 *Indigenous L.J.* 61, at p. 90; C. Hutchinson, "Case Comment on *R. v. Kapp*: An Analytical Framework for Section 25 of the *Charter*" (2007), 52 *McGill L.J.* 173, at p. 189. P. Macklem, *Indigenous Difference and the Constitution of Canada* (2001), and T. Dickson, "Section 25 and Intercultural Judgment" (2003), 61 *U.T. Fac. L. Rev.* 141, develop a unique approach based on the distinction between individual and collective rights. It might be noted that none of these authors have applied the rule of interpretation applicable to bilingual legislation.

[96] There is little case law on the issue, but the recent trend has been to see the protective feature in s. 25 as a "shield", as opposed to an "interpretative prism"; *R. v. Steinhauer*, [1985] 3 C.N.L.R. 187 (Alta. Q.B.), *Campbell v. British Columbia (Attorney General)*, [2000] 4 C.N.L.R. 1 (B.C.S.C.), and *Shubenacadie Band Council v. Canada (Human Rights Commission)* (2000), 37 C.H.R.R. D/466 (F.C.A.), held that s. 25 provides a shield. *R. v. Nicholas*, [1989] 2 C.N.L.R. 131 (N.B.Q.B.), is to the same effect but restricts the application of s. 25 to s. 15 rights. In *Campbell*, Williamson J. summarized the case law at that point as showing that "the section is meant to be a 'shield' which protects Aboriginal, treaty and other rights from being adversely affected by provisions of the *Charter*": para. 156. He further suggested that a purposive approach to s. 25 should be taken and that "the purpose of this section is to shield the distinctive position of Aboriginal peoples in Canada from being eroded or undermined by provisions of the *Charter*" (para. 158).

2.1.5 Limitations on the Shield

[97] Is this shield absolute? Obviously not. First, it is restricted by s. 28 of the *Charter* which provides for gender equality "[n]otwithstanding anything in this Charter". Second, it is restricted to its object, placing *Charter* rights and freedoms in juxtaposition to aboriginal rights and freedoms. *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 46, provides guidance in that respect. This means in essence that only laws that actually impair native rights will be considered, not those that simply have incidental effects on natives.

[98] There is some uncertainty concerning what rights and freedoms are contemplated in s. 25. Most concerns have been with self-government issues. Are all of the laws adopted by bands under the authority of the *Indian Act*, R.S.C. 1985, c. I-5, protected? Wildsmith suggests that this is possibly the case because their source is in s. 91(24) of the *Constitution Act, 1867*, which is clearly associated with the concept of Indianness (p. 33). He nevertheless says that the power in question would not be unrestrained because the courts would read in the need for "reasonableness" as they did for the exercise of municipal powers, and because the *Canadian Bill of Rights* would continue to apply. (The courts would of course have to deal with the *Lavell* precedent to make this avenue useful.) Wildsmith, at pp. 25-26 suggests that the court may want to apply a proportionality test similar to that in *Oakes* in order to determine whether an Act would truly abrogate an aboriginal right or freedom (*R. v. Oakes*, [1986] 1 S.C.R. 103). He argues at p. 37 that *Charter* rights would still be available to Indians who would want to attack federal legislation giving preferential treatment to other Indians.

[99] There is no reason to believe that s. 25 has taken Aboriginals out of the *Charter* protection scheme. One aboriginal group can ask to be given the same benefit as another aboriginal group under s. 15 (1). Sections 2 and 3 of the *Charter* apply to Aboriginals. Macklem, at pp. 225-27, suggests that the courts should distinguish between external and internal restrictions on aboriginal laws that clash with the *Charter* and that in the case of internal restrictions, aboriginal communities should be required to satisfy the *Oakes* test to resist a challenge. It could also be argued that it would be contrary to the purpose of s. 25 to prevent an Aboriginal from invoking those sections to attack an Act passed by a band council. It is not at all obvious in my view that it is necessary to constrain the individual rights of Aboriginals in order to recognize collective rights under s. 25; as A. Shachar notes, individuals can have multiple identities ("The Paradox of Multicultural Vulnerability: Individual Rights, Identity Groups, and the State", in C. Joppke and S. Lukes, eds., *Multicultural Questions* (1999), 87; see also W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995), at p. 35). Aboriginals are Canadian. The framework of reconciliation is consistent with the need for flexibility in the application of s. 25. This is in line with the approach taken by Binnie J. in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 164.

[100] Some would like the Court to ignore s. 25 because of the uncertainty in its application, particularly with regard to legislative powers contemplated by the *Indian Act*. I think it is unreasonable to suggest that a law should not be applied by this Court because it is too difficult. After all, s. 25 is the only provision in the *Charter* which makes express reference to aboriginal people, and the *Charter* is now 25 years old. I also think the concerns are overstated. Even under the present justification in a s. 1 analysis, there is much room for government to establish that *Charter* values should not be overstated when dealing with the requirements of substantive equality of native peoples. Legislative powers of bands under s. 81 of the *Indian Act* are subject to disallowance; those that fall under ss. 83 and 85.1 can be addressed by amendments to the *Indian Act* if a serious problem of consistency with *Charter* values occurs. Section 25 rights are not constitutionalized and can be taken away. Parliament can also make a right subject to the same protections as those afforded in the *Charter* by its particular terms. Wildsmith mentions that s. 25 may not even apply to band councils because they may not fall under the definition of s. 32(1)(*a*) of the *Charter* (p. 39), an argument that might find support in the fact that the *Charlottetown Accord* contained a provision that would have provided for the application of s. 25 to aboriginal governments. All this to say we need not resolve every imaginable case in this single decision.

2.2 *Scope of Section 25 Protection*

[101] In this case, what is significant about the scope of s. 25 protection is the meaning of the words "other rights or freedoms". These words are "all-embracive", as mentioned by Lysyk, at p. 472; this indicates that the protection was meant to be very broad. But the rights and freedoms are only those that "pertain to the aboriginal peoples of Canada", those that are particular to them. In French, the Act speaks of "*droits ou libertés — ancestraux, issus de traités ou autres — des peuples autochtones du Canada*".

[102] The *ejusdem generis* rule indicates that, in an enumeration, the general word must be constrained to persons or things of the same class as those specifically mentioned. In s. 25, the general term "other rights or freedoms" follows the enumerated terms "aboriginal" and "treaty" rights. McLachlin C.J. and Abella J. argue that the rule should apply to limit the rights or freedoms protected to those of a constitutional character. I believe that a broader approach is merited, one more consistent with the interpretative principles outlined above.

[103] I believe that the reference to "aboriginal and treaty rights" suggests that the focus of the provision is the uniqueness of those persons or communities mentioned in the Constitution; the rights protected are those that are unique to them because of their special status. As argued by Macklem, s. 25 "protects federal, provincial and Aboriginal initiatives that seek to further interests associated with indigenous difference from Charter scrutiny": see p. 225. Accordingly, legislation that distinguishes between aboriginal and non-aboriginal people in order to protect interests associated with aboriginal culture, territory, sovereignty or the treaty process deserves to be shielded from *Charter* scrutiny.

[104] In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 52, L'Heureux-Dub— J. suggested in *obiter* that the scope of s. 25 was likely greater than that of s. 35 of the *Constitution Act, 1982* and may include statutory provisions. She did qualify this statement by noting that the fact that a statute relates to aboriginal people would not, without more, suffice to bring it within the scope of s. 25. In my opinion, the limitations proposed above are consistent with this statement.

[105] Laws adopted under the s. 91(24) power would normally fall into this category, the power being in relation to the aboriginal peoples as such, but not laws that fall under s. 88 of the *Indian Act*, because they are by definition laws of general application. "[O]ther rights or freedoms" comprise statutory rights which seek to protect interests associated with aboriginal culture, territory, self-government, as mentioned above, and settlement agreements that are a replacement for treaty and aboriginal rights. But private rights of individual Indians held in a private capacity as ordinary Canadian citizens would not be protected.

[106] The inclusion of statutory rights and settlement agreements pertaining to the treaty process and pertaining to indigenous difference is consistent with the jurisprudence of this Court. As observed by Kirkpatrick J.A., this Court's decisions in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74, make it clear that the Crown's duty to consult with and accommodate aboriginal peoples arises prior to the establishment of an aboriginal or treaty right. These were, of course, the two enumerated terms discussed above in the context of the *ejusdem generis* rule. Moreover, this Court in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186, held that in order to preserve the honour of the Crown, the Crown must be allowed to negotiate in good faith with aboriginal peoples. Finally, in *Sparrow*, this Court urged the Crown to negotiate first prior to litigation. Section 25 reflects this imperative need to accommodate, recognize and reconcile aboriginal interests.

[107] William Pentney raises the concern that if the phrase "other rights or freedoms" is construed broadly to include legislated or common law rights, this will result in the "undesirable and anomalous result" that the scope of a *Charter*-protected provision can be modified by ordinary legislation: "The Rights of the Aboriginal Peoples of Canada and the *Constitution Act, 1982: Part I — The Interpretive Prism of Section 25*" (1988), 22 *U.B.C. L. Rev.* 21, at p. 57. Another concern often raised is that allowing statutory rights to be protected by s. 25 would elevate them to constitutional rights: see, e.g., Hutchinson, at p. 186. Similar concerns have been raised with respect to s. 16(3) of the *Charter*, the principle of advancement for language rights. In *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505, at para. 92, the Ontario Court of Appeal addressed these concerns as follows:

> We are not persuaded that s. 16(3) includes a "ratchet" principle that clothes measures taken to a linguistic equality with constitutional protection. Section 16(3) builds on the principle established in *J*

> *New Brunswick (Attorney General)* (1974), [1975] 2 S.C.R. 182, 45 D.L.R. (3d) 583 that the Consti language guarantees are a "floor" and not a "ceiling" and reflects an aspirational element of advancement substantive equality. The aspirational element of s. 16(3) is not without significance when it co interpreting legislation. However, it seems to us undeniable that the effect of this provision is to *prot constitutionalize*, measures to advance linguistic equality. The operative legal effect of s. 16(3) is determi limited by its opening words: "Nothing in this *Charter* limits the authority of Parliament or a legisl Section 16(3) is not a rights-conferring provision. It is, rather, a provision designed to shield from government action that would otherwise contravene s. 15 or exceed legislative authority. [Emphasis in orig

In my view, the same principles apply to legislative measures protected by s. 25.

2.3 *Approach to Section 25*

[108] One important issue is to determine when s. 25 is triggered. Kirkpatrick J.A. held that it was before any consideration of the *Charter* right; Brenner C.J.S.C., the summary conviction appeal judge in this case, agreed by adopting the approach taken in the *Campbell* case. This seems to correspond to what was said by L'Heureux-Dubé J. in *Corbiere*, at para. 52. In *Campbell*, it was also held that s. 25 is a threshold issue. I agree. This does not mean that there is no need to properly define the *Charter* claim; it simply means that there is no need to go through a full s. 15 analysis, for instance in this case, before considering whether s. 25 applies. What has to be determined is whether there is a real conflict.

[109] I do not think it is reasonable to invoke s. 25 once a *Charter* violation is established. One reason for this position is that there would be no rationale for invoking s. 25 in the case of a finding of discrimination that could not be justified under s. 1, simply because, in the context of s. 15, as in this case for instance, considerations that serve to justify that an Act is not discriminatory would have to be relitigated under the terms of s. 25. Another reason is that a true interpretative section would serve to define the substantive guarantee. Section 25 is meant to preserve some distinctions, which are inconsistent with weighing equality rights and native rights. What is called for, in essence, is a contextualized interpretation that takes into account the cultural needs and aspirations of natives. Dan Russell (*A People's Dream: Aboriginal Self-Government in Canada* (2000), at p. 100) gives an example of this based on s. 3 of the *Charter*: he says that the right to vote should be reinterpreted in the context of band elections to reflect the particularities of the clan system. This, I believe, is tantamount to saying natives do not have the same rights as other Canadians, rather than saying they are protected like all other Canadians from interference with their individual rights as guaranteed by the *Charter*. W. F. Pentney (*The Aboriginal Rights Provisions in the Constitution Act, 1982* (1987)), takes the same approach by suggesting that the *Charter* be interpreted through a native prism. I do not believe there are distinct *Charter* rights for aboriginal individuals and non-aboriginal individuals, or that it is feasible to take into account the specific cultural experience of Aboriginals in defining rights guaranteed by the *Charter*. The rights are the same for everyone; their application is a matter of justification according to context.

[110] I also think it is contrary to the scheme of the *Charter* to invoke s. 25 as a factor in applying s. 1. Section 1 does not apply to s. 25 as such because s. 25 does not create rights; to incorporate s. 25 is inconceivable in that context. Section 1 already takes into account the aboriginal perspective in the right case. Section 25 is protective and its function must be preserved. Section 25 was not meant to provide for balancing *Charter* rights against aboriginal rights. There should be no reading down of s. 25 while our jurisprudence establishes that aboriginal rights must be given a broad and generous application, and that where there is uncertainty, every effort should be made to give priority to the aboriginal perspective. It seems to me that the only reason for wanting to consider s. 25 within the framework of s. 15(1) is the fear mentioned earlier that individual rights will possibly be compromised. Another fear that is revealed by some pleadings in this case is that rights falling under s. 25 will be constitutionalized; this fear is totally unfounded. Section 25 does not create or constitutionalize rights.

2.4 *Application in This Case*

[111] There are three steps in the application of s. 25. The first step requires an evaluation of the claim in order to establish the nature of the substantive *Charter* right and whether the claim is made out, *prima facie*. The second step requires an evaluation of the native right to establish whether it falls under s. 25.

The third step requires a determination of the existence of a true conflict between the *Charter* right and the native right.

2.4.1 The Nature of the Claim

[112] The appellants claim that aboriginal fishers have been given the right to fish in exclusivity, for one day, prior to the opening of the general commercial fishery in which they participate, and that this right gives rise to a benefit that is denied to non-Aboriginals on the basis of race. They argue that the fact that communal licences are given to a number of bands which then authorize specific fishers to fish is irrelevant, membership in bands not being a valid proxy that is functionally relevant to the regulation of the public fishery.

[113] The respondent has presented a number of arguments opposing the claim. He says in particular that s. 15(1) is not breached because the claimants are individual licence holders while the aboriginal licences are communal; there is no valid comparator. He says that there is no denial of benefit because the program allows for sufficient catches under different categories of beneficiaries, some communal, some individual.

[114] It is a finding of fact that the fishery is not communal (findings of Kitchen Prov. Ct. J. are summarized in the factum of the appellants, at para. 22); it is also a finding of fact that many Aboriginals who fish under the communal licences also participate in the general commercial fishery. More importantly, it is admitted that aboriginal fishers are being given a licence to fish that is not available to non-Aboriginals. The fact that the authorization to fish is given by way of band licences is immaterial; government cannot do indirectly what it cannot do directly. As mentioned in *Van der Peet*, at para. 19, these rights "arise from the fact that aboriginal people are aboriginal" (emphasis deleted). It is also some indication of the true nature of the licence that practically all parties and interveners in this case speak of the "right to fish" afforded by the pilot sales program. Even if communal licences were significant, their nature says nothing about the fact that limiting them to natives as a user group may be discriminatory. The fact that the program is race-based is established beyond doubt.

[115] The declarations of Minister Crosbie and government officials explaining the rationale for the program clearly relate to agreements with bands on the regulation and management of the fishery. The very title of the regulations is instructive: *Aboriginal Communal Fishing Licences Regulations*. With regard to the existence of a benefit, here again there is a finding of fact of Kitchen Prov. Ct. J. (a summary is found in the appellants' factum, at para. 25). In any case, it is hard to understand how the respondent can argue that there was considerable benefit to Aboriginals, particularly the Tsawwassen Band which went from 15 to 35 boats (respondent's factum, at para. 43), and increased revenues and employment for Aboriginals (para. 44), with no impact on non-aboriginal fishers, while the catch is limited by allocations adjusted from year to year. What is allocated to bands in exclusivity cannot be allocated to the general fishery.

[116] There is in my view a *prima facie* case of discrimination pursuant to s. 15(1). There is no need to proceed further in the analysis or to invoke s. 1. The potential for conflict is established.

2.4.2 The Native Right

[117] The Minister issued licences to Aboriginals in application of a discretion given by the *Fisheries Act* and the *Aboriginal Communal Fishing Licences Regulations*. The respondent argues that these licences do not constitute a right or freedom as prescribed by s. 25 of the *Charter*. He says that only those rights and freedoms that "are vital to maintaining the distinctiveness of aboriginal cultures within the larger Canadian polity . . . have the potential to fall within s. 25" (factum, at para. 131), and adds that "[i]t follows that to be afforded protection under s. 25, an 'other right or freedom' must: (1) be of sufficient magnitude to warrant overriding a *Charter* right or freedom; (2) manifest a strong degree of permanence; and, (3) be intimately related to the protection and affirmation of aboriginal distinctiveness. The licence in question does not satisfy these criteria. The licence permitting sale was simply an exercise of administrative discretion,

subject to numerous conditions and of brief duration. It was only effective for twenty-four hours. The agreement entered into with the Musqueam, Burrard and Tsawwassen bands expressly stated that it did not create any aboriginal rights. The conclusion of Brenner C.J.S.C. that the licence did not create a right under s. 25 was correct" (paras. 137-38).

[118] The first comment that I would make is that the criterion of magnitude is simply inconsistent with the actual terms of s. 25. That section simply speaks of rights that pertain to the aboriginal peoples of Canada, i.e., any rights that advance the distinctive position of aboriginal peoples. The same is true with regard to the criterion of permanence; as mentioned earlier in these reasons, "other rights or freedoms" necessarily refers to statutory rights, which can be abolished at any time. The fact that the agreements with the named bands stated that they did not create any aboriginal rights is of no moment. Section 25 does not create any rights.

[119] The respondent agrees that the intended scope of "other rights or freedoms" in s. 25 is achieved by applying the *ejusdem generis* rule. At para. 101 of his factum, the respondent speaks of the unique relationship between British Columbia aboriginal communities and the fishery. This should be enough to draw a link between the right to fish given to Aboriginals pursuant to the pilot sales program and the rights contemplated by s. 25. The right to fish has consistently been the object of claims based on aboriginal rights and treaty rights, the enumerated terms in the provisions.

[120] Furthermore, the respondent himself argues that these rights were a first step in establishing a treaty right. As noted earlier in these reasons, s. 25 reflects the notions of reconciliation and negotiation present in the treaty process and recognized by the previous jurisprudence of this Court: *Haida Nation*, *Taku River*. Brenner C.J.S.C. discussed the rights and freedoms provided to the aboriginal peoples participating in the pilot sales program as well as the significance of the program to the aboriginal peoples of British Columbia (at para. 93):

> The A.F.S. represented an attempt to reconcile this unique relationship with the need for regulatior fishery by providing for a separately regulated fishery respectful of and sensitive to traditional aboriginal This was achieved through the negotiation of such matters as co-management of the fishery, allocation and other matters of importance to aboriginal groups. It also provided an opportunity for communal lic which is of particular and unique importance to aboriginal communities.

[121] Finally, in my opinion, the right in this case is totally dependent on the exercise of powers given to Parliament under s. 91(24) of the *Constitution Act, 1867* which deals with a class of persons, Indians. Here again it is interesting to note the parallel made between s. 93 and s. 91(24) of the *Constitution Act, 1867* by Estey J. in *Reference re Bill 30*, at p. 1206, where he says: "In this sense, s. 93 is a provincial counterpart of s. 91(24) (Indians, and lands reserved for Indians) which authorizes the Parliament of Canada to legislate for the benefit of the Indian population in a preferential, discriminatory, or distinctive fashion *vis-à-vis* others." To argue that according these licences is not a right but an exercise of ministerial discretion is to privilege form over substance. The *Charter* cannot be interpreted as rendering unconstitutional the exercise of powers consistent with the purposes of s. 91(24), nor is it rational to believe that every exercise of the s. 91(24) jurisdiction requires a justification under s. 1. Section 25 is a necessary partner to s. 35(1); it protects s. 35(1) purposes and enlarges the reach of measures needed to fulfill the promise of reconciliation.

2.4.3 Potential Conflict

[122] I think it is established, in this case, that the right given by the pilot sales program is limited to Aboriginals and has a detrimental effect on non-aboriginal commercial fishers who operate in the same region as the beneficiaries of the program. It is also clear that the disadvantage is related to racial differences. Section 15 of the *Charter* is *prima facie* engaged. The right to equality afforded to every individual under s. 15 is not capable of application consistently with the rights of aboriginal fishers holding licences under the pilot sales program. There is a real conflict.

3. Conclusion

[123] Section 25 of the *Charter* applies in the present situation and provides a full answer to the claim. For this reason, I would dismiss the appeal.

Appeal dismissed.

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Solicitor for the respondent: Public Prosecution Service of Canada, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Tsawwassen First Nation: Arvay Finlay, Vancouver.

Solicitors for the intervener the Haisla Nation: Donovan & Company, Vancouver.

Solicitors for the interveners the Songhees Indian Band, the Malahat First Nation, the T'Sou-ke First Nation, the Snaw-naw-as (Nanoose) First Nation and the Beecher Bay Indian Band (collectively the Te'mexw Nations): Cook, Roberts, Victoria.

Solicitors for the interveners the Heiltsuk Nation and the Musqueam Indian Band: Blake, Cassels & Graydon, Vancouver.

Solicitors for the intervener the Cowichan Tribes: Ratcliff & Company, North Vancouver.

Solicitor for the interveners the Sportfishing Defence Alliance, the B.C. Seafood Alliance, the Pacific Salmon Harvesters Society, the Aboriginal Fishing Vessel Owners Association and the United Fishermen and Allied Workers Union: J. Keith Lowes, Vancouver.

Solicitor for the intervener the Japanese Canadian Fishermens Association: Canadian Constitution Foundation, Calgary.

Solicitors for the intervener the Atlantic Fishing Industry Alliance: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the Nee Tahi Buhn Indian Band: Bull, Housser & Tupper, Vancouver.

Solicitors for the intervener the Tseshaht First Nation: Braker & Company, West Vancouver.

Solicitors for the intervener the Assembly of First Nations: Pitblado, Winnipeg.

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[1] Donna Greschner, "Does *Law* Advance the Cause of Equality?" (2001), 27 *Queen's L.J.* 299; Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001), 80 *Can. Bar Rev.* 299; Donna Greschner, "The Purpose of Canadian Equality Rights" (2002), 6 *Rev. Const. Stud.* 291; Debra M. McAllister, "Section 15 — The Unpredictability of the *Law* Test" (2003-2004), 15 *N.J.C.L.* 3; Christopher D. Bredt and Adam M. Dodek, "Breaking the *Law*'s Grip on Equality: A New Paradigm for Section 15" (2003),

20 *S.C.L.R.* (2d) 33; Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the *Charter*" (2003), 48 *McGill L.J.* 627; Daniel Proulx, "Le concept de dignité et son usage en contexte de discrimination: deux Chartes, deux modèles", [2003] *R. du B.* (numéro spécial) 485; Daphne Gilbert and Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006), 24 *Windsor Y.B. Access Just.* 111; Christian Brunelle, "La dignité dans la *Charte des droits et libertés de la personne*: de l'ubiquité à l'ambiguïté d'une notion fondamentale", in *La Charte québécoise: origines, enjeux et perspectives*, [2006] *R. du B.* (numéro thématique) 143; R. James Fyfe, "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada" (2007), 70 *Sask. L. Rev.* 1; Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. 2007), vol. 2, at pp. 55-28 and 55-29; Alexandre Morin, *Le droit à l'égalité au Canada* (2008), at pp. 80–82.

[2] Sophia Reibetanz Moreau, "Equality Rights and the Relevance of Comparator Groups" (2006), 5 *J.L. & Equality* 81; Daphne Gilbert and Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006), 24 *Windsor Y.B. Access Just.* 111; Beverley Baines, "Equality, Comparison, Discrimination, Status", in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2006), 73; Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 135. See also Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001), 13 *C.J.W.L.* 37; Bruce Ryder, Cidalia C. Faria and Emily Lawrence, "What's *Law* Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004), 24 *S.C.L.R.* (2d) 103; Mayo Moran, "Protesting Too Much: Rational Basis Review Under Canada's Equality Guarantee", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 71; Sheila McIntyre, "Deference and Dominance: Equality Without Substance", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 95.

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by LEXUM in partnership with the Supreme Court of Canada

1 ***Kubel v. Alberta (Minister of Justice)*, [2006] 8 W.W.R. 570 (Q.B.)**

Case Name:

Kubel v. Alberta (Minister of Justice)

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Between
Eric Kubel, applicant, and
The Minister of Justice and Attorney General of Alberta, respondent

[2005] A.J. No. 1834

2005 ABQB 836

[2006] 8 W.W.R. 570
58 Alta. L.R. (4th) 254
32 C.C.L.I. (4th) 243
144 A.C.W.S. (3d) 946
2005 CarswellAlta 1961

Docket Nos. 0501 08777; 0501 02339

Alberta Court of Queen's Bench
Judicial District of Calgary

Wittmann A.C.J.

Heard: September 28, 2005.
Judgment: November 21, 2005.

(41 paras.)

Statutory interpretation — Statutes — Determination of validity — Enabling statutes — Scope — Application by Kubel for a declaration that ss. 1(h) and 1(j) of the Minor Injury Regulation, promulgated under s. 650.1 of the Insurance Act, were ultra vires the Lieutenant Governor in Council dismissed — The impugned provisions did not conflict with or exceed the object, purpose or intent of the Insurance Act accordingly, ss. 1(h) and 1(j) of the Minor Injury Regulation are intra vires the Lieutenant Governor.

Application by Kubel for a declaration that ss. 1(h) and 1(j) of the Minor Injury Regulation, promulgated under s. 650.1 of the Insurance Act, were ultra vires the Lieutenant Governor in Council -- On December 6, 2004 Kubel was crossing the street when he was struck by a car -- As a result, he sustained a number of injuries including: a strain of the medial collateral ligament of the right knee; a bone contusion of the tibia; and probable mild fraying of the anterior horn of the medial meniscus -- The insurance adjuster for the driver of the car took the position that Kubel was suffering from a 'minor soft tissue injury' -- Pursuant to s. 650.1 of the Insurance Act, the Legislature delegated the power to define 'minor injury' to the Lieutenant Governor in Council -- Kubel submitted that the Legislature, by choosing to qualify the word 'injury' by the adjective 'minor', limited the delegate's discretion in defining the term and, specifically, the qualifier 'minor' signals the intent to regulate only 'truly minor injuries' -- HELD: Application dismissed -- The Insurance Act and the Minor Injury Regulation were intended to strike a balance between the competing interests of providing affordable insurance rates and maintaining adequate insurance coverage -- There was a limit implied in the discretion granted to the Lieutenant Governor by the

qualification of the term 'injury' with the word 'minor' however, the definitions adopted in ss. 1(h) and 1(j) did not exceed that implied limit -- The impugned provisions did not conflict with or exceed the object, purpose or intent of the Insurance Act -- Accordingly, ss. 1(h) and 1(j) of the Minor Injury Regulation are intra vires the Lieutenant Governor.

Statutes, Regulations and Rules Cited:

Diagnostic and Treatment Protocols Regulation, Alta. Reg. 122/ 2004 s. 7(2), s. 11(2)

Insurance Act, R.S.A. 2000, c. I-3 s. 650.1, s. 650.1(1), s. 650.1(2), s. 650.1(3), s. 650.1(3)(a), s. 650.1(3)(b), s. 650.1(3)(c), s. 650.1(3)(d), s. 650.1(3)(e), s. 650.1(3)(f), s. 650.1(3)(g), s. 650.1(3)(h), s. 650.1(3)(i), s. 650.1(3)(j), s. 650.1(3)(k), s. 650.1(3)(l), s. 650.1(4)

Insurance Amendment Act, 2003 (No. 2), S.A. 2003 c. 40, amending R.S.A. 2000, c. I-3

Minor Injury Regulation, Alta. Reg. 123/2004 s. 1(h), s. 1(h) (i), s. 1(h)(ii), s. 1(h)(iii), s. 1(j), s. 1(k), s. 1(l), s. 1(n), s. 3, s. 5(1), s. 6

Counsel:

Walter M. Kubitz for the Applicant

Frank R. Foran, Q.C., Michael G. Massicotte for the Respondent

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REASONS FOR JUDGMENT

WITTMANN A.C.J.:--

Introduction

1 The Applicant, Eric Kubel, seeks a declaration that subsections 1(h) and 1(j) of the Minor Injury Regulation, Alta. Reg. 123/2004 ("MIR"), promulgated under section 650.1 of the Insurance Act, R.S.A. 2000, c. I-3 ("the Act") are ultra vires the Lieutenant Governor in Council.

Facts

2 On December 6, 2004 the Applicant, a pedestrian, crossing 37th Street, S.W. in Calgary, was struck by a 2001 Volkswagen Beetle. As a result, he sustained a number of injuries including: a strain of the medial collateral ligament of the right knee; a bone contusion of the tibia; and probable mild fraying of the anterior horn of the medial meniscus. The insurance adjuster for the driver of the Volkswagen has taken the position that the Applicant is suffering from a "minor soft tissue injury".

3 Pursuant to section 650.1 of the Act, the Legislature delegated the power to define "minor injury" to the Lieutenant Governor in Council. Section 650.1 was enacted as part of the Insurance Amendment Act, 2003 (No. 2), S.A. 2003 c. 40, amending R.S.A. 2000, c. I-3.

Legislation

4 Section 650.1 of the Act is found in Part 5, Subpart 5 which deals with Automobile Insurance and claims for injuries arising from the operation and use of automobiles. Section 650.1 of the Act reads:

Minor Injury

650.1(1) In this section, "minor injury" means an injury as defined or otherwise described by regulation as a minor injury.

(2) In an accident claim, the amount recoverable as damages for non-pecuniary loss of the plaintiff for a minor injury must be calculated or otherwise determined in accordance with the regulations.

(3) The Lieutenant Governor in Council may make regulations

(a) defining minor injury or otherwise describing what constitutes a minor injury;

(b) providing for the classification of or categories of minor injuries;

(c) providing for the assessment of injuries, including, without limitation, regulations establishing or adopting guidelines, best practices or other methods for assessing whether an injury is or is not a minor injury;

(d) governing damages, including the amounts of or limits on damages, for non-pecuniary loss for minor injuries;

(e) governing deductible amounts or limits and the application of those amounts or limits in respect of damages for non-pecuniary loss for minor injuries;

(f) providing for or otherwise setting out circumstances under which a minor injury to which this section would otherwise apply is exempt from the operation of this section;

(g) governing the application of this section in respect of injuries arising out of an accident where

(i) it is unclear as to whether or not this section applies to those injuries, or

(ii) the injuries consist of a combination of minor injuries to which this section applies and injuries to which this section does not apply;

(h) establishing and governing a system or process under which a person or a committee, panel or other body may review any injury to a person and give an opinion as to whether or not the injury is a minor injury;

(i) providing for the appointment or designation of persons or of members of committees, panels or other bodies for the purposes of a system or process established under clause (h);

(j) governing the payment of any fees, levies and other assessments in respect of a system or process established under clause (h), including, without limitation, regulations respecting

(i) the amount of the fees, levies or other assessments or the manner in which and by whom any of those amounts are to be determined, and

(ii) by whom and to whom the fees, levies or other assessments are to be paid;

(k) governing any transitional matter concerning the application of this section in respect of matters dealt with under this section;

(l) providing for any matter that the Lieutenant Governor in Council considers

advisable for carrying out the purpose and intent of this section.

(4) This section does not apply to any accident claim that arose in respect of an accident that occurred before the coming into force of this section.

5 Subsection 1(h) of the MIR provides:

(h) "minor injury", in respect of an accident, means

(i) a sprain,

(ii) a strain, or

(iii) a WAD injury

caused by that accident that does not result in a serious impairment;

6 A "sprain" is defined in subsection 1(k) of the MIR as "an injury to one or more tendons or ligaments or both". Subsection 11(2) of the Diagnostic and Treatment Protocols Regulation, Alta. Reg. 122/2004 ("DTPR") states that "sprain" ranges from a few fibres of ligament torn, to a complete tear of all ligament fibres with a complete opening of the joint resulting in minor to major disability and a loss of function.

7 A "strain" is defined in subsection 1(l) of the MIR as "an injury to one or more muscles". Subsection 7(2) of the DTPR states that a "strain" ranges from a few fibres of muscle torn, to all muscle fibres torn with major disability, spasms and swelling.

8 A WAD injury is defined in subsection 1(n) of the MIR as "a whiplash associated disorder other than one that exhibits ... objective, demonstrable, definable and clinically relevant neurological signs" or "a fracture or dislocation of the spine".

9 Subsection 1(j) of the MIR defines "serious impairment":

(j) "serious impairment", in respect of a claimant, means an impairment of a physical or cognitive function

(i) that results in a substantial inability to perform the

(A) essential tasks of the claimant's regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's employment, occupation or profession,

(B) essential tasks of the claimant's training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's training or education, or

(C) normal activities of the claimant's daily living,

(ii) that has been ongoing since the accident, and

(iii) that is expected not to improve substantially;

10 Section 3 of the MIR provides that, in order for a strain, sprain or WAD injury to be considered to have resulted in "serious impairment", the injury must be the primary factor contributing to the impairment.

11 Subsection 5(1) of the MIR states that if the strain, sprain or WAD injury is not diagnosed in accordance with the DTPR, and the injury results in serious impairment, it will be considered a minor injury unless the claimant establishes that it would have resulted in serious impairment even if the claimant had been diagnosed and treated in accordance with the DTPR.

12 Section 6 of the MIR limits the total amount recoverable as damages for non-pecuniary loss for all minor injuries arising out of a motor vehicle accident to $4000.

Applicant's Position

13 The Applicant submits that a regulation is ultra vires if it goes beyond the legislative power which is conferred by the enabling legislation or is repugnant to the express provisions of the enabling legislation. He points out that the Legislature has chosen to qualify the word "injury" by the adjective "minor". He submits that the Legislature has thereby limited the delegate's discretion in defining the term and, specifically, he argues the qualifier "minor" signals the Legislature's intent to regulate only "truly minor injuries".

14 The Applicant cites Szmuilowicz v. Ontario (Minister of Health) (1995), 24 O.R. (3d) 204 (Ont. Div. Ct.) for the proposition that the authority granted to a statutory delegate to define a term is limited by the common meaning of the term. Although the Applicant concedes that the delegate need not adopt a definition that mirrors the dictionary definition of the term, he argues that the further the definition strays from the term's common meaning, the more likely it is to be ultra vires. He submits that "minor" is defined in various dictionaries as "comparatively unimportant" or "insignificant".

15 The Applicant argues that because the definition ascribed by the Lieutenant Governor in Council to "minor injury" fails to consider the severity or duration of the pain associated with the injury or the length of any resulting non-permanent disability, it captures injuries that are moderate or severe. He also notes that serious injuries will be subject to the application of the non-pecuniary damages cap when they are not diagnosed in accordance with the DTPR. Accordingly, he submits that subsections 1(h) and (j) of the MIR are contrary to the intention of the Legislature and are repugnant to, or operate to amend, the Act. Had the Legislature intended to limit non-pecuniary damages for other or more severe forms of injuries, the Applicant suggests that it would have used some other phrase, such as "regulated injuries".

16 To illustrate the alleged over-breadth of the definition of "minor injury" in the MIR, the Applicant notes that the Manual for Courts-Martial, Part IV, paragraph 54c(4)(a)(iii) (1995), states that "grievous bodily harm" does not include "minor injuries such as a black eye or a bloody nose": United States v. Miller 1996 CCA Lexis 367 (A.F.C.C.A). He also cites Hartwick v. Simser, [2004] O.T.C. 917 (Ont. S.C.) where the Court defined "serious impairment" to include a number of injuries that the Applicant submits would fall within the impugned definition of "minor injury". He argues that the definition of "minor injury" adopted under the MIR is analogous to defining a "foot injury" as including a hand injury.

17 The Applicant also objects to section 3 of the MIR which states that in order for the injury to result in "serious impairment", the injury must be the primary factor contributing to the impairment. The Applicant submits that this is contrary to the Supreme Court of Canada's decision in Athey v. Leonati, [1996] 3 S.C.R. 458.

Respondent's Position

18 The Respondent states that the Legislature's intention in passing the Insurance Amendment

Act, 2003 (No. 2) was to create a scheme restricting non-pecuniary damages recoverable by plaintiffs who suffer a "minor injury" in a motor vehicle accident. It argues that in enacting subsections 1(h) and 1(j) of the MIR, the Lieutenant Governor in Council has done what it was specifically authorized to do, namely define what constitutes a minor injury.

19 The Respondent submits that there is no obligation on the Lieutenant Governor in Council to adopt a definition of minor injury that conforms with common parlance. It relies on Johnson v. Federated Mutual Insurance Co. (1989), 96 A.R. 266 (C.A.), reversing (1988), 86 A.R. 32 (Q.B.), as authority for the proposition that a statutory delegate may make regulations defining particular terms that are at variance with their ordinary and plain meaning. The Respondent concedes, however, that the discretion of a statutory delegate is restricted to adopting definitions that are consistent with the Legislative intent and the purpose of the statute. In this case it submits that the definitions were within the authority granted to the Lieutenant Governor in Council.

20 The Respondent argues further that "minor" is a relative term and when compared to quadrapelegia and injuries of that magnitude, strains, sprains and WAD injuries that do not result in serious impairment are minor. In any event, the Respondent submits that it would be inappropriate for the court to draw a rigid dividing line between "minor" injuries and those that may be described as moderate or severe. It relies on Re: Metropolitan School Board and Minister of Education (1986), 54 O.R. (2d) 458 (Div. Ct) in that regard.

21 Finally, in response to the Applicant's submission concerning section 3 of the MIR, the Respondent notes that Athey v. Leonati was a case about liability, not injuries. It also suggests that because the Applicant is not seeking a declaration that section 3 is ulra vires, this issue is not properly before the Court. Analysis

22 The central issue on this application is whether the definitions of "minor injury" and "serious impairment" in the MIR exceed the scope of the power conferred on the Lieutenant Governor in Council in section 650.1 of the Act.

23 The jurisprudence in this area has established a number of guiding principles in relation to this issue:

(a) Delegated authority must be exercised strictly in accordance with enabling legislation and can not amend or conflict with the specific provisions of the enabling statute: The King v. National Fish Co Ltd., [1931] Ex. C.R. 75 (Can. Ex. Ct.); Heppner v. Alberta (Minister of Environment) (1977), 6 A.R. 154 (C.A.);

(b) In determining the vires of subordinate legislation the court must ascertain the purpose and intent of the enabling statute in order to identify the scope of the regulation making power: Giant Grosmont Petroleums Ltd. v. Gulf Canada Resources Ltd. (2001), 286 A.R. 146 (C.A.); Brown v. Dental Association (Alberta) (2002), 299 A.R. 60 (C.A.);

(c) A statutory delegate must not exceed the express terms of the delegating provisions and is confined by the object, purpose and terms of the enabling statute: Johnson;

(d) When considering the validity of subordinate legislation, a court must proceed on the assumption that such legislation is within the authority conferred by the parent statute and will not declare it invalid unless there is clear evidence to support such a finding: Heppner;

(e) If there is doubt as to the meaning of the words used, the court should prefer a construction which will promote the intention of the Legislature as opposed to one that would defeat it: Liversidge v. Anderson, [1942] A.C. 206 (H.L.), per Viscount Maughan as quoted in Reference re: Regulations (Chemical) under War Measures Act (Canada), [1943] S.C.R. 1 at p. 17;

(f) Enabling legislation may grant the statutory delegate the requisite authority to define terms in a manner that is at variance with the plain and ordinary meaning normally attributed to such terms: Johnson

(g) A definition that amounts to a colourable attempt to amend the legislation or is adopted in an effort to satisfy some other collateral purpose is ultras vires: Szmuilowicz; Trans Canada Pipelines Ltd. v. Saskatchewan (Treasurer) (1968), 67 D.L.R. (2d) 694 (Sask. Q.B.).

24 Accordingly, I must determine the purpose and intent of the enabling statute in order to identify the scope of the regulation making power granted to the delegate.

25 Reading the Insurance Amendment Act, 2003 (No. 2) as a whole demonstrates its various purposes which include: limiting the circumstances in which insurers can refuse to issue automobile insurance contracts; providing a method for the calculation of pecuniary damages in certain circumstances so as to reduce automobile accident claim awards by accounting for income tax, Canadian Pension Plan contributions and Employment Insurance contributions; providing for structured judgment awards; establishing and outlining the duties and powers of the Automobile Insurance Rate Board; and limiting the amount payable as general damages for minor injuries (as defined), arising from motor vehicle accidents.

26 The language used in the enabling statute is informed by the legislative debates relating thereto. In the present case I have had resort to the relevant legislative debates relating to Bill 53, the Insurance Amendment Act, 2003 (No. 2) which discuss the proposed reforms to the Act and, more specifically, the minor injury, non-pecuniary damages cap. I have considered these Hansard excerpts only in relation to the background and purpose of the the Insurance Amendment Act, 2003 (No. 2) and the Act, while remaining mindful that the reliability of this evidence is limited: Giant Grosmont Petroleums at para. 8.

27 A review of the relevant legislative debates relating to Bill 53, the Insurance Amendment Act, 2003 (No. 2), readily reveals the purpose of the legislation - to address rising automobile insurance rates in Alberta. More specifically, the Legislature's overriding objective was to reform the Act to respond to "skyrocketing" rate increases so as to ensure that mandatory automobile insurance remained accessible to Albertans. At some level of increase, accessibility would be thwarted by the cost of automobile insurance. The purpose of the reforms was succinctly set out by the member for Edmonton-Mill Creek:

> The issue of having unacceptable increases coming at us as they were in the spring was quickly recognized by the government. It was time to do something about that. In fact, that's what Bill 53 [the Insurance Amendment Act, 2003 (No. 2)] will do.
>
> (Alberta, Legislative Assembly, Hansard (December 3, 2003) at 2100 (Mr. Zwozdesky).)

28 All of the purposes set out in the Insurance Amendment Act, 2003 (No. 2) theoretically advance the legislative objective in specific ways. For example, the establishment of the Automobile Insurance Rate Board provides a body to set benchmark insurance rates, thereby providing the provincial government with direct control over rate increases. Capping non-pecuniary awards for minor injuries is also an initiative designed to ensure that insurance rates remain affordable. The theory is that by limiting non-pecuniary damage claims in cases of minor injury, the quantum of insurance payouts will be reduced and thereby result in lower insurance rates.

29 In addition to the Legislature's express intent to counter rising insurance rates, was a recognition that cheaper insurance rates were sustainable only with significant tort reform resulting in lower payouts by automobile insurers to victims. The issue of what would constitute a

minor injury was specifically debated in this context. Thus, the Act and the Regulations were intended to strike a balance between the competing interests of providing affordable insurance rates and maintaining adequate insurance coverage. Reference was made to this balance in Hansard:

> Essentially, the legislation proposes changes to two parts of the auto insurance system: the premium side, which is what we've been talking about, the reduction of premiums and ensuring that all Albertans have access to affordable, accessible insurance, and at the same time reflecting that we're dealing with a balance. If we're going to make significant reductions on the premium side, we'll also have to find appropriate savings on the benefit side.
>
> (Alberta, Legislative Assembly, Hansard (November 25, 2003) at 1852 (Mr. Renner).)

30 Section 650.1 of the Act grants the Lieutenant Governor in Council broad discretion to delineate the application of the minor injury cap. Specifically, it was provided with the authority to define, categorize and classify "minor injuries" and to set out circumstances under which a minor injury is exempt from the operation of the section. The Applicant does not quarrel with the delegate's entitlement to define the terms "minor injury" and "serious impairment". Rather, he argues that the Lieutenant Governor in Council has exceeded its jurisdiction by adopting definitions that effectively apply the non-pecuniary damages cap to injuries that are not minor and has thereby amended the Act and acted contrary to the intention of the Legislature.

31 As in Johnson, the discretion granted to the Lieutenant Governor in Council by section 650.1 of the Act is sufficiently broad to allow the delegate to craft a definition of "minor injury" that is at variance with the plain and ordinary meaning of that phrase. The Applicant, however, seeks to distinguish Johnson on the basis that, in that case the delegate limited the common meaning of the defined term, whereas here the Lieutenant Governor in Council has expanded the meaning of "minor injury" beyond the natural meaning of the words. In that regard he notes that synonyms for "minor" include "inconsequential" and "immaterial".

32 The definition of "minor injury" adopted by the Lieutenant Governor in Council does not so much expand on the ordinary meaning of that phrase, as much as it identifies a formula defining what, for the purposes of the Act, will constitute a "minor injury" as opposed to a non-regulated injury. In selecting a point on the continuum of injuries past which they will not fall within the cap, the Lieutenant Governor in Council has effected a balance between the competing interests that the Legislature intended to accommodate. Whether this is a balance or cut off that the Applicant or this Court would have selected is immaterial to the vires of the MIR. Simply put, it is not the function of the courts to assess the merits of subordinate legislation in a consideration of the vires of the that legislation: S.G.E.U. v. Saskatchewan (1997), 145 D.L.R. (4th) 300 (Sask. Q.B.), aff'd (1997), 149 D.L.R. (4th) 190 (Sask. C.A.). Had the Lieutenant Governor in Council chosen a cut off point whereby the cap was applicable only to immaterial or inconsequential injuries, it would arguably have frustrated the purpose and intent of the Act as it would not have effectively assisted in reducing automobile insurance rates.

33 The Applicant argues further that as a result of the broad definitions adopted under the MIR, the non-pecuniary damages cap is no longer applicable only to minor injuries as the statute intended. Put another way, the regulation has effectively amended the Act and is, therefore, ultra vires.

34 "Minor" is a relative term that can only be defined by degree or in relation to comparators. The term "minor injury" signals that the Act intended to regulate less serious injuries, but less serious than what? I agree with the Applicant that there was a limit implied in the discretion granted to the Lieutenant Governor in Council by the qualification of the term "injury" with the word "minor". However, in my view the definitions adopted in subsection 1(h) and 1(j) do not exceed that implied limit. In this regard I note the observations of D.J.M. Brown and J.M. Evans,

Judicial Review of Administrative Action in Canada, vol. 3 looseleaf (Toronto: Canvasback Publishing, 1998) at para. 14:3352:

> In any event, the law seems to be that subordinate legislation enacted by a Cabinet will be found to be ultra vires on the ground that it is inconsistent with the purposes of the enabling legislation only in an egregious case.

This is not such a case.

35 Generally, the definitions adopted by the Lieutenant Governor in Council will capture what, on the scale of injuries, may be described as less serious or minor, such as non-permanent injuries or whiplash injuries that do not exhibit objective signs. As the Respondent points out, sprains, strains and WAD injuries that do not result in serious impairment are minor when compared to injuries such as quadrapelegia. Indeed, fashioning a definition incapable of including within its breadth an injury that may be considered moderate by some standards may be impossible given the infinite varieties of injuries that could be sustained in a motor vehicle accident.

36 I would also note that the broad discretion given to the Lieutenant Governor in Council in defining "minor injury" clearly demonstrates that it was not confined by interpretations given to similar terms in other jurisdictions.

37 The Applicant's argument concerning section 3 of the MIR vis a vis the Supreme Court of Canada's decision in Athey v. Leonati bears on the definition of "serious impairment" which is specifically at issue here. First, I agree with the Respondent that Athey v. Leonati is distinguishable on the basis that that case dealt with issues of causation and liability. Specifically, the Court, per Major J., found that a defendant is not excused from liability because other factors contributed to the harm. He stated at para. 20:

> This would be contrary to established principles and the essential purpose of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.

38 This application is concerned with statutory definitions and the application of a non-pecuniary damages cap under insurance legislation. Restoring the plaintiff to his or her original position is not the purpose of this legislation.

39 Secondly, there is no principle of which I am aware, nor has there been any authority submitted to the effect that subordinate legislation must be consistent with or not be at variance with jurisprudence in order to be intra vires. Indeed, I note that legislation is often enacted to counter the effects of specific judicial decisions. In the context of the quantum of general damages awarded by Courts in Alberta for soft tissue injuries arising from automobile accidents in Alberta prior to the enactment of the Insurance Amendment Act, 2003 (No. 2) this is precisely what happened here.

40 Lastly, the Applicant has submitted that the application of the definitions could result in disproportionate deleterious effects on women, children and the elderly. The argument in this regard was not developed nor raised during the oral hearing of this application. Therefore, I decline to rule on this issue.

Conclusion

41 The impugned provisions do not conflict with or exceed the object, purpose or intent of the Act. Nor is there any suggestion by the Applicant that the definition was drafted to satisfy some collateral purpose. Accordingly, I find that subsections 1(h) and 1(j) of the MIR are intra vires the Lieutenant Governor in Council. The application is dismissed.

WITTMANN A.C.J.

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Saskatchewan Power Corporation et. al. v. TransCanada Pipelines et al.,
[1981] 2 S.C.R. 688

Saskatchewan Power Corporation and Many Islands Pipe Lines Limited *Appellants*;

and

TransCanada Pipelines Limited and The National Energy Board *Respondents*;

and

The Attorney General of Canada, the Attorney General of Quebec, the Attorney General of British Columbia, the Attorney General for Alberta, the Attorney General for Saskatchewan and the Attorney General of Newfoundland *Interveners.*

1981: November 5; 1981: December 17.

Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Jurisdiction — Powers and jurisdiction of the National Energy Board under ss. 50, 53 and 61 of the National Energy Board Act — Whether Board interfered with contract price for sale of gas — Whether Board exceeded its powers — National Energy Board Act, R.S.C. 1970, c. N-6 as amended, ss. 2, 50, 51, 52, 53, 61.

Respondent TransCanada, a pipeline company within the meaning of the *National Energy Board Act*, is engaged in the interprovincial transmission of gas. In 1969, it entered into a contract with appellants providing for a right to delivery of gas to the appellants for a fixed period at a price of 23.5 cents per M.C.F. On respondent's application for the fixing of just and reasonable rates or tolls for transportation services under ss. 50 and 53 of the Act, the Board ordered the Imputed Alberta Border Price be substituted for the contractual sale price of the gas. The issue was whether the *National Energy Board Act* conferred upon the Board any jurisdiction to alter the terms of a contract.

Held: The appeal should be allowed.

The Board exceeded its authority in purporting to substitute the Imputed Alberta Border Price for that fixed by the contract between the parties. The only power of the Board on an application under s. 50 to deal with price is to do so incidental to the fixing of transportation tolls, and this is so even under s. 61. Under s. 53 the Board could disallow and disregard the contract as

Saskatchewan Power Corporation et Many Islands Pipe Lines Limited *Appelantes*;

et

TransCanada Pipelines Limited et l'Office national de l'énergie *Intimés*;

et

Le procureur général du Canada, le procureur général du Québec, le procureur général de la Colombie-Britannique, le procureur général de l'Alberta, le procureur général de la Saskatchewan et le procureur général de Terre-Neuve *Intervenants.*

1981: 5 novembre; 1981; 17 décembre.

Présents: Le juge en chef Laskin et les juges Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard et Lamer.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Compétence — Pouvoirs et compétence de l'Office national de l'énergie en vertu des art. 50, 53 et 61 de la Loi sur l'Office national de l'énergie — L'Office a-t-il modifié le prix prévu au contrat pour la vente de gaz? — L'Office a-t-il outrepassé ses pouvoirs? — Loi sur l'Office national de l'énergie, S.R.C. 1970, chap. N-6 et modifications, art. 2, 50, 51, 52, 53, 61.

L'intimée TransCanada, une compagnie de pipe-line au sens de la *Loi sur l'Office national de l'énergie*, s'occupe de transport interprovincial du gaz. En 1969, elle a conclu avec les appelantes un contrat prévoyant le droit de livrer du gaz aux appelantes pour une période fixe au prix de 23.5 cents par Mp³. L'intimée a demandé à l'Office de fixer en vertu des art. 50 et 53 de la Loi les taux ou les droits justes et raisonnables pour les services de transport, et l'Office a ordonné de substituer au prix de vente du gaz prévu au contrat le prix imputé à la frontière de l'Alberta. La question en litige est de savoir si la *Loi sur l'Office national de l'énergie* accorde à l'Office le pouvoir de modifier les termes d'un contrat.

Arrêt: Le pourvoi est accueilli.

L'Office a outrepassé ses pouvoirs en prétendant substituer le prix imputé à la frontière de l'Alberta au prix que les parties ont fixé au contrat. Le seul pouvoir de l'Office, lorsqu'une demande en vertu de l'art. 50 lui est soumise pour qu'il fixe un prix, est de le faire accessoirement à la fixation de droits de transport, et c'est le cas même en vertu de l'art. 61. En vertu de l'art. 53, l'Office

tariff of tolls and could prescribe the appropriate tolls when it considered that such a tariff was contrary to the Act. In the present case, however, as the contract did not purport to be a tariff and to fix tolls for transportation of gas, s. 61 applied. But the result of its application was that there was nothing that could be regarded as a toll. The Board's authority was spent. The Act authorized no further interference by the Board with the terms of the contract.

Saskatchewan Power Corp. v. TransCanada Pipelines Ltd., [1979] 1 S.C.R. 297; *Northern and Central Gas Corporation Ltd. v. National Energy Board and Trans-Canada Pipe Lines Ltd.*, [1971] F.C. 149, referred to.

APPEAL from a judgment of the Federal Court of Appeal[1], dismissing an appeal from a National Energy Board decision. Appeal allowed.

Gordon F. Henderson, Q.C., *Maurice J. Sychuk, Q.C.*, and *Emilio S. Binavince*, for the appellants.

George D. Finlayson, Q.C., and *Joan H. Francis, Q.C.*, for the respondent TransCanada Pipelines Ltd.

T. B. Smith, Q.C., and *P. G. Griffin*, for the respondent the National Energy Board and the intervener the Attorney General of Canada.

Jean-K. Samson and *Odette Laverdière*, for the intervener the Attorney General of Quebec.

W. G. Burke-Robertson, Q.C., and *Howard R. Eddy*, for the intervener the Attorney General of British Columbia.

Y. A. George Hynna, for the intervener the Attorney General for Saskatchewan.

Lloyd Nelson, for the intervener the Attorney General for Alberta.

James A. Nesbitt, Q.C., for the intervener the Attorney General of Newfoundland.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—This appeal, which is here by leave, from a unanimous judgment of the Federal Court of Appeal raises an important ques-

[1] [1981] F.C. 192.

peut rejeter le contrat en tant que tarif des droits et n'en pas tenir compte, et peut fixer les droits appropriés dès lors qu'il estime que ce tarif est contraire à la Loi. En l'espèce toutefois, comme le contrat ne se veut pas un tarif et ne fixe pas de droits pour le transport du gaz, l'art. 61 s'applique. Mais il résulte de cette application que rien ne peut être considéré comme un droit. Le pouvoir de l'Office a pris fin. Rien dans la Loi n'autorise l'Office à modifier davantage le contrat.

Jurisprudence: *Saskatchewan Power Corp. c. Trans-Canada Pipelines Ltd.*, [1979] 1 R.C.S 297; *Northern and Central Gas Corporation Ltd. c. L'Office national de l'énergie et TransCanada Pipe Lines Ltd.*, [1971] C.F., 149.

POURVOI contre un arrêt de la Cour d'appel fédérale[1], qui a rejeté l'appel d'une décision de l'Office national de l'énergie. Pourvoi accueilli.

Gordon F. Henderson, c.r., *Maurice J. Sychuk, c.r.*, et *Emilio S. Binavince*, pour les appelantes.

George D. Finlayson, c.r., et *Joan H. Francis, c.r.*, pour l'intimée TransCanada Pipelines Ltd.

T. B. Smith, c.r., et *P. G. Griffin*, pour l'intimé l'Office national de l'énergie et l'intervenant le procureur général du Canada.

Jean-K. Samson et *Odette Laverdière*, pour l'intervenant le procureur général du Québec.

W. G. Burke-Robertson, c.r., et *Howard R. Eddy*, pour l'intervenant le procureur général de la Colombie-Britannique.

Y. A. George Hynna, pour l'intervenant le procureur général de la Saskatchewan.

Lloyd Nelson, pour l'intervenant le procureur général de l'Alberta.

James A. Nesbitt, c.r., pour l'intervenant le procureur général de Terre-Neuve.

Version française du jugement de la Cour rendu par

LE JUGE EN CHEF—Ce pourvoi, interjeté avec l'autorisation de cette Cour à l'encontre d'un arrêt unanime de la Cour d'appel fédérale, soulève une

[1] [1981] C.F. 192.

tion of the powers and jurisdiction of the National Energy Board under ss. 50, 53 and 61 of the *National Energy Board Act*, R.S.C. 1970, c. N-6, as amended. Those powers were invoked by the respondent TransCanada Pipelines Limited and resulted in a decision embodied in its Order TG-1-76. The appellants Saskatchewan Power Corporation and Many Islands Pipe Lines Limited, adversely affected by the Order, appealed to the Federal Court of Appeal under s. 18(1) of the Act. Although that Court dismissed the appeal, each of the three members, Thurlow C.J., Pratte J. and Kerr D.J., did so for different reasons. Those of Thurlow C.J. would have satisfied the appellants because he struck out a part of the Board's Order (to which the appellants objected) as going beyond its jurisdiction; the appellants had no complaint with what was left. The reasons of the other two members of the Court confirmed the whole of the Board's Order and hence affirmed the exercise of jurisdiction reflected in the Order.

Constitutional issues were also raised in this appeal if it should turn out that the jurisdiction exercised by the Board was within its authority under ss. 50, 53 and 61 aforementioned. This Court did not hear the parties or the various intervenors on the constitutional issues, deciding to postpone them until it came to a conclusion on the question of the Board's challenged jurisdiction. Of course, if it should be the case that the Board, in its Order, went beyond the authority under which it acted, it would be unnecessary to examine the constitutional questions posed in this appeal.

The relevant legislation governing this appeal is as follows:

50. The Board may make orders with respect to all matters relating to traffic, tolls or tariffs.

51. (1) A company shall not charge any tolls except tolls specified in a tariff that has been filed with the Board and is in effect.

(2) Where the gas transmitted by a company through its pipeline is the property of the company, the company shall file with the Board, upon the making thereof, true copies of all the contracts it may make for the sale of

question importante relativement aux pouvoirs et à la compétence de l'Office national de l'énergie en vertu des art. 50, 53 et 61 de la *Loi sur l'Office national de l'énergie*, S.R.C. 1970, chap. N-6 modifiée. L'intimée TransCanada Pipelines Limited a invoqué ces pouvoirs, et la décision prise a été incorporée dans l'ordonnance TG-1-76 de l'Office. Les appelantes Saskatchewan Power Corporation et Many Islands Pipe Lines Limited, auxquelles l'ordonnance cause préjudice, ont interjeté appel à la Cour d'appel fédérale en vertu du par. 18(1) de la Loi. Bien que cette Cour ait rejeté l'appel, les trois membres de la Cour, le juge en chef Thurlow, le juge Pratte et le juge suppléant Kerr, ont exprimé des motifs différents. Les motifs du juge en chef Thurlow auraient satisfait les appelantes puisqu'il a rayé une partie de l'ordonnance de l'Office (que contestaient les appelantes) parce qu'elle excédait sa compétence; les appelantes n'avaient pas de plainte quant au reste. Les motifs des deux autres membres de la Cour ont confirmé intégralement l'ordonnance de l'Office et ont ainsi reconnu que l'Office a légitimement exercé sa compétence dans l'ordonnance.

Le présent pourvoi soulève en outre des questions constitutionnelles dans le cas où les art. 50, 53 et 61 autoriseraient l'Office à exercer cette compétence. Cette Cour n'a pas entendu les parties ni les différents intervenants sur les questions constitutionnelles; elle a décidé de les ajourner jusqu'à ce qu'elle ait tranché la question de la compétence de l'Office. De fait, s'il appert que l'Office, dans son ordonnance, a excédé sa compétence, il ne sera plus nécessaire d'examiner les questions constitutionnelles qui se posent en l'espèce.

Le texte de loi applicable en l'espèce se lit comme suit:

50. L'Office peut rendre des ordonnances sur tous les sujets relatifs au mouvement, aux droits ou tarifs.

51. (1) Une compagnie ne doit pas imposer de droits, sauf les droits que spécifie un tarif produit auprès de l'Office et en vigueur.

(2) Si le gaz que transmet une compagnie par son pipe-line lui appartient, elle doit, lors de l'établissement de tous les contrats de vente de gaz qu'elle peut conclure et des modifications y apportées à l'occasion, en fournir

gas and amendments from time to time made thereto, and the true copies so filed shall be deemed, for the purposes of this Part, to constitute a tariff pursuant to subsection (1).

. . .

52. All tolls shall be just and reasonable, and shall always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate.

53. The Board may disallow any tariff or any portion thereof that it considers to be contrary to any of the provisions of this Act or to any order of the Board, and may require a company, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tariffs in lieu of the tariff or portion thereof so disallowed.

. . .

61. Where the gas transmitted by a company through its pipeline is the property of the company, the differential between the cost to the company of the gas at the point where it enters its pipeline and the amount for which the gas is sold by the company shall, for the purposes of this Part, be deemed to be a toll charged by the company to the purchaser for the transmission thereof.

The term "toll" found in ss. 50, 51, 52 and 61 is defined in s. 2 in these words:

"toll" includes any toll, rate, charge or allowance charged or made for the shipment, transportation, transmission, care, handling or delivery of hydrocarbons, or for storage or demurrage or the like.

Neither the word "traffic" nor the word "tariff" is defined in the Act.

The respondent TransCanada is a pipeline company engaged in the interprovincial transmission of gas and as such is within the applicable provisions of the *National Energy Board Act* and subject to the powers of the National Energy Board. It had entered into a contract in 1969 with the appellants for the sale and delivery of gas between them. There were two phases to the contract. Under the first, the appellants were to sell and deliver gas to the respondent over yearly periods between November 1, 1969 and 1974 at a specified price, averaging 23.5 cents per M.C.F. Under the second

copie conforme à l'Office, et les copies conformes ainsi fournies sont censées, aux fins de la présente Partie, constituer un tarif produit en conformité du paragraphe (1).

. . .

52. Tous les droits doivent être justes et raisonnables, et ils doivent toujours, dans des circonstances et conditions fondamentalement semblables, à l'égard de tout le mouvement d'une même nature opéré sur le même parcours, être imposés également à toutes personnes, au même taux.

53. L'Office peut rejeter tout tarif ou une partie d'un tarif qu'il estime contraire à une disposition quelconque de la présente loi ou à une ordonnance de l'Office, et il peut exiger qu'une compagnie y substitue, dans un délai prescrit, un tarif qu'il juge satisfaisant, ou il peut prescrire d'autres tarifs au lieu du tarif ainsi rejeté en totalité ou en partie.

. . .

61. Si le gaz que transmet une compagnie, par son pipe-line, appartient à la compagnie, la différence entre ce qu'il en coûte à la compagnie pour le gaz au point où celui-ci pénètre dans son pipe-line et le montant pour lequel la compagnie vend le gaz, est réputée, aux fins de la présente Partie, un droit imposé par la compagnie, à l'acheteur, pour la transmission de ce gaz.

Le terme «droit» qu'on retrouve aux art. 50, 51, 52 et 61 est défini comme suit à l'art. 2:

«droit» comprend tout droit, taux ou prix ou tous frais exigés ou établis pour l'expédition, le transport, la transmission, la garde, la manutention ou la livraison d'hydrocarbures, ou pour l'emmagasinage, les surestaries ou choses analogues.

La Loi ne donne aucune définition des mots «mouvement» et «tarif».

L'intimée TransCanada est une compagnie de pipe-line qui s'occupe de transport interprovincial du gaz. Elle est de ce fait visée par les dispositions applicables de la *Loi sur l'Office national de l'énergie* et assujettie aux pouvoirs de l'Office national de l'énergie. En 1969, elle a conclu avec les appelantes un contrat pour la vente et la livraison de gaz entre elles. Le contrat comportait deux étapes. Dans la première étape, les appelantes devaient vendre et livrer du gaz à l'intimée pendant des périodes annuelles commençant le 1er novembre 1969 jusqu'en 1974, pour un prix déter-

phase, the respondent agreed to sell and deliver to the appellants an equal volume of gas at the price of 23.5 cents per M.C.F. in the period November 1, 1974 to October 31, 1981 on the nomination of the appellants. This contract was the subject of litigation in this Court: *Saskatchewan Power Corp. v. TransCanada Pipelines Ltd.*[2] The Court was concerned in that case with whether the contract was one that was required to be filed with the Board and whether it provided for an exchange of gas between the parties or was rather a contract under which the appellants here had the option of electing to buy gas, in which case upon its exercise, a contract of sale would come into being. This Court affirmed the Board and the Federal Court of Appeal which held that the contract had to be filed and also decided that the contract gave an option or the right to nominate gas at the discretion of the appellants and that it did not envisage an exchange. Only a narrow constitutional issue was considered by this Court upon which it said this (at p. 308):

> In my opinion, Parliament had the power to provide for the tolls and tariffs to be applied in connection with the transmission of gas through an interprovincial pipeline and had the power to require a pipeline company to file with it copies of its contracts for the sale of gas, which would be deemed to constitute a tariff. Those are the only constitutional issues involved in the present proceedings.

The appellants exercised their option or made their nomination pursuant to the contract. This case is concerned with the nomination of a total volume of 17 million M.C.F., being the consolidated volume of gas nominated as of August 6, 1975.

The contract between the parties did not contain any provision as to the cost of transportation. (It was accepted in this appeal that it would be for the appellants as buyers to pay that cost.) On July 16, 1976 TransCanada applied to the Board under ss. 50 and 53 of the Board's Act for orders fixing the just and reasonable rates or tolls" (to use the words of the Board in its reasons and Order) that

[2] [1979] 1 S.C.R. 297.

miné, établi en moyenne à 23.5 cents par millier de pieds cubes (ci-après: Mp³). Dans la seconde étape, l'intimée a accepté de vendre et de livrer aux appelantes un volume égal de gaz au prix de 23.5 cents par Mp³ durant la période du 1er novembre 1974 au 31 octobre 1981, à la demande des appelantes. Ce contrat a soulevé un litige porté devant cette Cour: *Saskatchewan Power Corp. c. TransCanada Pipelines Ltd.*[2] Dans cette affaire, la Cour devait décider si une copie du contrat devait être fournie à l'Office et si le contrat prévoyait un échange de gaz entre les parties ou s'il s'agissait plutôt d'un contrat par lequel les appelantes en l'espèce avaient l'option de choisir d'acheter du gaz, dans lequel cas un contrat de vente serait conclu par l'exercice de l'option. Cette Cour a confirmé les décisions de l'Office et de la Cour d'appel fédérale qui ont conclu qu'une copie du contrat devait être fournie et qui ont en outre décidé que le contrat accordait une option ou le droit de fixer la quantité de gaz à la discrétion des appelantes et qu'il ne prévoyait pas un échange. Cette Cour a examiné une question constitutionnelle restreinte sur laquelle elle a dit (à la p. 308):

> A mon avis, le Parlement a le pouvoir de légiférer à l'égard des droits et tarifs relatifs à la transmission de gaz par un pipe-line interprovincial et peut exiger d'une compagnie exploitant le pipe-line qu'elle produise des copies de ses contrats de vente de gaz, car ces documents sont réputés constituer un tarif. Telles sont les seules questions constitutionnelles soulevées en l'espèce.

Les appelantes ont exercé leur option ou demandé que le gaz soit livré conformément au contrat. Le présent pourvoi porte sur la demande de livraison d'un volume total de 17 millions de Mp³, soit le volume total de gaz fixé le 6 août 1975.

Le contrat entre les parties ne prévoyait aucune disposition relative au coût du transport. (Dans ce pourvoi, on a reconnu que le paiement du coût du transport incombe aux appelantes en qualité d'acheteur.) Le 16 juillet 1976, TransCanada a demandé à l'Office, en vertu des art. 50 et 53 de la Loi concernant l'Office, de rendre une ordonnance établissant «les taux ou les droits justes et raison-

[2] [1979] 1 R.C.S. 297.

the applicant could charge for transportation services to the appellant Saskatchewan Power Corporation and to certain other companies not involved in this appeal. The applicant also applied under s. 53 of the *Petroleum Administration Act*, 1974-75-76 (Can.), c. 47, and regulations thereunder for special and general orders of the Board approving the price to be paid by the applicant to acquire gas for removal from Alberta. However, the Board ruled that this application under the *Petroleum Administration Act* would not be considered in the application to fix rates or tolls but would be dealt with as a separate matter. Notwithstanding this, Kerr D.J. based his reasons largely on the *Petroleum Administration Act*, a strange reliance when the Board rejected that Act as having any application to the fixing of just and reasonable rates or tolls for transportation or transmission of gas. In my opinion, therefore, the reasons of Kerr D.J. are of no help in coming to a determination on the specific issues in this case arising from the application of TransCanada under ss. 50 and 53 of the *National Energy Board Act*.

Counsel for the appellants pointed out that the application under ss. 50 and 53 also asked for disallowance of the sale price set out in the contract for the 17 million M.C.F. of gas and the substitution therefor of the Saskatchewan Zone CD rate proposed in the application. The crucial issue in this appeal is whether the Board did interfere with the contract price for the sale of the nominated gas, as part of or in connection with its prescription of transportation tolls, and, if so, whether this was within its statutory authority.

TransCanada's application was under Part IV of the *National Energy Board Act* purporting to deal with "Traffic, Tolls and Tariffs". The authority and power of the Board to fix the transmission or transportation toll for the nominated gas is not in dispute. What is alleged here is that the Board

nables» (pour reprendre les mots que l'Office a employés dans ses motifs et son ordonnance) que la requérante peut exiger pour les services de transport fournis à l'appelante Saskatchewan Power Corporation et à certaines autres compagnies non parties en l'espèce. La requérante a également demandé, en vertu de l'art. 53 de la *Loi sur l'administration du pétrole*, 1974-75-76 (Can.), chap. 47, et de ses règlements d'application, que l'Office rende des ordonnances générales ou spéciales approuvant le prix que la requérante doit payer pour acquérir en Alberta du gaz destiné à être transporté ailleurs. Cependant, l'Office a décidé que cette demande présentée en vertu de la *Loi sur l'administration du pétrole* ne serait pas examinée en même temps que la demande d'établir les taux ou les droits mais qu'elle formerait une instance à part. Malgré cela, le juge suppléant Kerr a appuyé les motifs de sa décision principalement sur la *Loi sur l'administration du pétrole*, ce qui est étrange puisque l'Office a décidé que cette loi ne s'applique pas à l'établissement des taux ou des droits justes et raisonnables pour le transport ou la transmission du gaz. Je suis par conséquent d'avis que les motifs du juge suppléant Kerr ne nous aident aucunement à répondre aux questions précises que soulève en l'espèce la demande de TransCanada en vertu des art. 50 et 53 de la *Loi sur l'Office national de l'énergie*.

L'avocat des appelantes a souligné que la demande faite en vertu des art. 50 et 53 visait également au rejet du prix de vente prévu au contrat pour les 17 millions de Mp^3 de gaz et à son remplacement par le barème de taux CD de la zone de la Saskatchewan proposé dans la demande. La question importante en l'espèce est de savoir si, en exerçant son pouvoir de prescrire les droits de transport, l'Office a modifié le prix prévu au contrat pour la vente d'une quantité fixée de gaz et, le cas échéant, si la loi l'autorisait à le faire.

La demande de TransCanada a été faite en vertu de la Partie IV de la *Loi sur l'Office national de l'énergie* intitulée «Mouvement, droits et tarifs». On ne conteste pas la compétence et le pouvoir de l'Office d'établir le droit de transmission ou de transport du gaz à recevoir. On allègue

went beyond this by altering the 23.5 cents M.C.F. contract price and substituting what is known as the Imputed Alberta Border price, being 105.228 cents per MMBtu. This was the price established under the *Alberta Natural Gas Canadian Pricing Order*, SOR/76-60 of December 31, 1975 which, as amended, set a price of 105.228 cents per MMBtu, for the period commencing January 1, 1977, for the transmission of Alberta gas outside the Province. TransCanada was fixed with this price as its costs of gas as at the Alberta border. In the present case, it demanded this price from the appellants (which was paid under protest in order to get the gas) notwithstanding the contract price of 23.5 cents per M.C.F. and notwithstanding the fact that the nomination of the gas by the appellants was made or its sale effected before the Imputed Alberta Border price above-mentioned was fixed.

In its reasons for its decision, the Board declared that in its view "the substance of the dispute between TransCanada and SPC relates to the price at which gas will be sold to SPC under Article XVII of the Contract": Case on Appeal, vol. 2, at p. 358. This view was reflected in its earlier reference to s. 61 of the *National Energy Board Act* as being the governing provision where a company such as TransCanada transmitted gas which was its own property through its pipeline. In such case, s. 61 provides

> ... the differential between the cost to the company of the gas at the point where it enters its pipeline and the amount for which the gas is sold by the company shall, for the purposes of this part, be deemed to be a toll charged by the company to the purchaser for the transmission thereof.

The Board had also noted earlier that the gas to be sold by TransCanada through its pipeline from Empress, Alberta, would move 85 miles to the point of delivery at Success, Saskatchewan. It then went on to apply s. 61, as follows:

> On the basis of this section, the price stipulated in the Contract of 23.25 cents per Mcf, and the cost to TransCanada of the gas at the Alberta border of 105.228

en l'espèce que l'Office a excédé sa compétence en modifiant le prix prévu au contrat de 23.5 cents par Mp^3 et en y substituant ce qu'on appelle le prix imputé à la frontière de l'Alberta, soit 105.228 cents par million de BTU. C'était le prix établi en vertu de l'*Ordonnance sur le prix canadien du gaz naturel de l'Alberta*, DORS/76-60 du 31 décembre 1975 laquelle, après modification, a établi le prix 105.228 cents par million de BTU, pour la période commençant le 1er janvier 1977, pour la transmission du gaz de l'Alberta à l'extérieur de la province. C'est ce prix qui a été fixé à TransCanada comme représentant ce que lui coûte le gaz à la frontière de l'Alberta. En l'espèce, elle a demandé ce prix aux appelantes (qui l'ont payé sous réserve afin d'obtenir le gaz) nonobstant le prix de 23.5 cents par Mp^3 au contrat et en dépit du fait que le volume de gaz à livrer aux appelantes a été fixé ou que sa vente a été conclue avant que soit établi le prix imputé à la frontière de l'Alberta déjà mentionné.

Dans les motifs de sa décision, l'Office a déclaré qu'à son avis, «la nature du conflit entre la TransCanada et la SPC porte sur le prix auquel le gaz sera vendu à la SPC conformément à l'article XVII du contrat»: dossier d'appel, vol. 2, à la p. 358. Cette opinion ressort de sa mention antérieure de l'art. 61 de la *Loi sur l'Office national de l'énergie* dans laquelle elle dit que c'est la disposition applicable lorsqu'une compagnie, telle TransCanada, transmet par son pipe-line du gaz dont elle est propriétaire. Dans un tel cas, l'art. 61 prévoit que

> ... la différence entre ce qu'il en coûte à la compagnie pour le gaz au point où celui-ci pénètre dans son pipeline et le montant pour lequel la compagnie vend le gaz, est réputée, aux fins de la présente Partie, un droit imposé par la compagnie, à l'acheteur, pour la transmission de ce gaz.

L'Office avait déjà indiqué en outre que le gaz que devait vendre TransCanada par son pipe-line à partir d'Empress (Alberta), devait parcourir 85 milles jusqu'au point de livraison à Success (Saskatchewan). Il a poursuivi en appliquant comme suit l'art. 61:

> Selon cet article, compte tenu du prix de 23.25 cents par Mpc qui est stipulé dans le contrat et du coût assumé par la TransCanada pour le gaz à la frontière de l'Al-

cents per MMBtu (or per Mcf at 1000 Btu heating value), the deemed transportation toll under section 61 is equal to a negative toll of 81.98 cents per Mcf.

Sections 52 and 55 of the Act provide:

"52. All tolls shall be just and reasonable and shall always, under substantially similar circumstances and conditions with respect to all traffic of the same description carried over the same route, be charged equally to all persons at the same rate."

"55. A company shall not make any unjust discrimination in tolls, service or facilities against any person or locality."

The Act does not prescribe what constitutes just and reasonable tolls, nor the method by which the Board is to determine just and reasonable rates. The Act does, however, require that under substantially similar circumstances and conditions, tolls shall be charged equally to all persons at the same rate for traffic of the same description carried over the same route, and that the company shall not make any unjust discrimination in tolls, services or facilities against any person or locality.

On the evidence adduced, there is nothing, other than the distance that the gas moves through the pipeline, which differentiates the transportation service provided for the gas to be sold to SPC, from the transportation services provided for any other gas sold by TransCanada on its pipeline system. Accordingly, the only circumstances and conditions which might be substantially dissimilar so as to negate the statutory requirement of equality, must, in this situation, be circumstances and conditions relating to the Contract itself.

The Board concluded its reasons in these words:

In view of the various factors considered in the earlier sections of these Reasons, the Board finds that a just and reasonable transportation toll in respect of the gas to be sold to SPC in the test year under the Contract, would be the Saskatchewan Zone CD rate set out in Schedule A to Order No. TG-1-76, which rate is applicable to all volumes of gas sold by TransCanada to SPC in the Saskatchewan Zone.

berta, soit 105.228 cents par million de BTU (ou par millier de pieds cubes pour un pouvoir calorifique de 1000 B.T.U.), le droit de transport réputé conformément à l'article 61 est égal à un droit négatif de 81.98 cents par Mpc.

Les articles 52 et 55 de la Loi sur l'Office national de l'énergie stipulent que:

«52. Tous les droits doivent être justes et raisonnables, et ils doivent toujours, dans des circonstances et conditions fondamentalement semblables, à l'égard de tout mouvement d'une même nature opéré sur le même parcours, être imposés également à toutes personnes, au même taux.»

«55. Une compagnie ne doit faire, à l'égard d'une personne ou d'une localité, aucune différenciation injuste dans les droits, le service ou les aménagements.»

La Loi ne précise pas ce que sont des droits justes et raisonnables, ni la méthode par laquelle l'Office doit fixer des taux justes et raisonnables. La Loi exige cependant que dans des circonstances et conditions fondamentalement semblables, les taux doivent être imposés également à toutes personnes, au même taux, à l'égard de tout mouvement d'une même nature opéré sur le même parcours, et que la compagnie ne doit faire aucune différenciation injuste dans les droits, le service ou les aménagements à l'égard d'une personne ou d'une localité.

D'après les témoignages présentés, il n'existe rien, mis à part la distance de transport du gaz dans le pipeline, qui différencie le service de transport fourni pour le gaz qui doit être vendu à la SPC, et les services de transport assurés pour toute autre quantité de gaz vendue par la TransCanada dans son réseau de gazoduc. En conséquence, les seules circonstances et conditions qui pourraient être fondamentalement différentes au point de nier la condition réglementaire de l'égalité, doivent, dans ce cas, être des circonstances et conditions relatives au contrat lui-même.

L'Office a conclu ses motifs en disant:

Vu les divers facteurs examinés dans les précédentes parties des présents motifs, l'Office conclut que le droit de transport juste et raisonnable relatif au gaz qui doit être vendu à la SPC au cours de l'année de référence en vertu du contrat est le taux CD de la zone de la Saskatchewan tel qu'établi à l'Annexe A de l'ordonnance TG-1-76, lequel taux est applicable à toutes les quantités de gaz vendues par la TransCanada à la SPC dans la zone de la Saskatchewan.

The relevant portion of the Board's Order TG-1-76 is in these words:

IT IS ORDERED THAT:

1. The Applicant shall charge in respect of gas sold by it in Canada and in respect of its T-Service and Transportation Service, the rates and tolls specified in Schedule A hereto.

2. The Applicant's proposed tariff amendments in respect of its General Terms and Conditions, its Rate Schedules, and its Transportation contracts, all as more particularly set forth under Tabs 1 to 7 inclusive under the heading "Tariff" in the said application, and as set forth in Exhibit No. 54 filed at the hearing of the said application, be and the same are hereby approved.

3. The Applicant's proposed tariff amendments to its Rate Schedules and its Transportation Contracts, all as more particularly set forth in Exhibit No. 55 filed at the hearing of the said application, be and the same are hereby disallowed.

AND IT IS FURTHER ORDERED THAT:

4. The Applicant shall forthwith file with the Board and serve upon all parties to the hearing of this application, new tariffs, tolls and rates conforming with this Order.

Schedule A referred to in Article 1 of the Order is, in its only relevant portion, as follows:

TRANSCANADA PIPELINES LIMITED

RATES AND TOLLS FOR CANADIAN SALES, TRANSPORTATION & T-SERVICE

EFFECTIVE: 1 January 1977

Particulars	Rate Schedule	Transportation Demand Rate ($/Mcf/Mo)	Transportation Commodity Rate (¢/Mcf)	Imputed Alberta Border Price (¢/MMBtu)
Sales Service				
Saskatchewan Zone	CD	0.711	0.975	105.228
	AOI	—	3.313	105.228
	SGS	—	6.819	105.228
	PS	—	160.000	105.228
	TWS	—	35.000	105.228

The appellants do not object to the two transportation charges referable to Saskatchewan Zone CD. It is the Imputed Alberta Border Price which is at the root of their appeal. The Board's reasons reproduced above, take the Imputed Alberta

La partie pertinente de l'ordonnance TG-1-76 de l'Office se lit comme suit:

IL EST ORDONNÉ QUE

1. La demanderesse exige, en ce qui concerne ses ventes de gaz naturel au Canada, son service de transport et son service-T, les tarifs et les droits prescrits à l'Annexe A de la présente ordonnance.

2. Soient approuvées, et elles le sont par les présentes, les modifications du tarif proposées par la demanderesse relativement à ses modalités générales, à ses barèmes de taux et à ses contrats de transport, le tout étant exposé plus en détail aux tableaux 1 à 7 inclusivement, sous la rubrique «tarif» de ladite demande, et énoncé dans la pièce justificative n° 54 déposée au cours de l'audition de ladite demande.

3. Soient rejetées et elles le sont par la présente, les modifications du tarif proposées par la demanderesse en ce qui concerne ses barèmes de taux et ses contrats de transport, le tout étant énoncé plus en détail dans la pièce justificative n° 55 déposée au cours de l'audition de ladite demande.

ET IL EST EN OUTRE ORDONNÉ QUE:

4. La demanderesse dépose sans délai auprès de l'Office et signifie à toutes les parties à l'audition de cette demande les nouveaux tarifs, taux et droits conformes à la présente ordonnance.

La seule partie pertinente de l'annexe A mentionnée à l'article 1 de l'ordonnance se lit comme suit:

TRANSCANADA PIPELINES LIMITED

TAUX ET DROITS DES VENTES, TRANSPORT ET SERVICE-T AU CANADA

DATE D'ENTRÉE EN VIGUEUR: Le 1er janvier 1977

Détails	Barème de taux	Transport taux de la demande ($/Mpc/Mois)	Transport taux de la marchandise (¢/Mpc)	Prix imputé à la frontière de l'Alberta (¢/MMBtu)
Services de vente				
Zone de la Saskatchewan	CD	0.711	0.975	105.228
	AOI	—	3.313	105.228
	SGS	—	6.819	105.228
	PS	—	160.000	105.228
	TWS	—	35.000	105.228

Les appelantes ne s'opposent pas aux deux prix de transport mentionnés pour la zone CD de la Saskatchewan. C'est le prix imputé à la frontière de l'Alberta qui est la cause première de leur pourvoi. Selon les motifs précités de l'Office, le

Border Price as establishing, under s. 61, a negative transportation toll as an offset from the contract price of 23.5 cents per M.C.F. (the Board's figure in its reasons was 23.25 cents) so as to leave a negative toll of 81.98 cents per M.C.F. (on the Board's figures). It is far from clear to me that s. 61 provides for a negative transportation toll; its terms envisage rather that the cost of gas to the pipeline supplier will be less than the amount payable by the purchaser and thus give rise to a deemed toll. The artificiality of a negative toll was pointed out by Thurlow C.J. in his reasons; in a case where the cost of gas exceeds the contract supply price the result is more properly characterized as zero. I need not be troubled by this here, however, because it is conceded that the Imputed Alberta Border Price had been fixed by the Board as the price to be paid by the appellants for their nominated gas.

Chief Justice Thurlow, in his extensive reasons, agreed with the submission of counsel for the appellants that the Imputed Alberta Border Price was not a rate or toll for the transportation of gas; rather, in his words, "it is the value or price, or part of the price to be paid for the gas": at p. 196. After examining ss. 50 to 54 and s. 61 of the Board's Act, he found that it had no authority to apply the Imputed Alberta Border Price to the nominated gas. His reasons were as follows [at pp. 197 *et seq.*]:

In my opinion these provisions are concerned entirely with the rates or tolls to be charged by a carrier in respect of the transportation of oil and gas. The rates and tolls are in respect of the transportation of gas and oil in international and interprovincial trade and what the Board may prescribe under sections 50 and 53 are the rates and tolls for such transportation. That, I think, becomes apparent from a perusal of the statute and, particularly Part IV, as a whole. There is no requirement that the price at which gas or oil is sold shall be just or reasonable or that it be charged equally to all persons at the same rate. Nor is there any authority given to the Board by these provisions to prescribe or interfere with the price at which oil or gas is to be sold beyond what may be involved in requiring the carrier to

prix imputé à la frontière de l'Alberta établit, en vertu de l'art. 61, un droit de transport négatif en compensation du prix de 23.5 cents par Mp^3 prévu au contrat (dans ses motifs, l'Office mentionne 23.25 cents) de façon à laisser un droit négatif de 81.98 cents par Mp^3 (selon les chiffres de l'Office). Il ne me paraît pas évident que l'art. 61 prévoit un droit de transport négatif; il envisage plutôt que le coût du gaz au fournisseur du pipe-line sera moindre que le montant que doit payer l'acheteur et il produit ainsi un droit présumé. Le caractère artificiel d'un droit négatif a été souligné par le juge en chef Thurlow dans ses motifs; si le coût du gaz est supérieur au prix d'approvisionnement prévu au contrat, il vaut mieux parler d'un résultat égal à zéro. Je ne dois cependant pas m'en inquiéter en l'espèce puisqu'il est admis que l'Office a établi le prix imputé à la frontière de l'Alberta comme représentant le prix que les appelantes doivent payer pour les quantités de gaz qu'elles ont demandées.

Dans ses motifs circonstanciés, le juge en chef Thurlow a souscrit à la prétention de l'avocat des appelantes que le prix imputé à la frontière de l'Alberta ne constitue pas un taux ou droit pour le transport du gaz; plutôt, pour employer ses mots à la p. 196 «il s'agit de la valeur ou du prix, ou d'une partie du prix, à payer pour le gaz». Après avoir examiné les art. 50 à 54 et l'art. 61 de la Loi concernant l'Office, il a conclu que l'Office n'avait pas le pouvoir d'appliquer le prix imputé à la frontière de l'Alberta aux quantités de gaz demandées. Ses motifs se lisent comme suit [aux pp. 197 à 199]:

A mon avis, ces dispositions portent entièrement sur les taux ou droits que fait payer un transporteur pour le transport du pétrole et du gaz. Ces taux et droits sont imposés pour le transport du gaz et du pétrole sur le marché international et interprovincial et, en application des art. 50 et 53, l'Office est autorisé à les fixer. C'est, à mon avis, ce qui se dégage d'une lecture attentive de l'ensemble de la Loi et, en particulier, de la Partie IV. Rien n'exige que le prix de vente du gaz ou du pétrole soit juste et raisonnable ou le même pour tous. L'Office ne tient de ces dispositions le pouvoir de fixer le prix de vente du pétrole ou du gaz ou d'influer sur celui-ci que dans la mesure où il peut forcer le transporteur à exiger les droits de transport prévus par l'Office. Par contre, le fait que les parties aient convenu, dans le contrat, de la

charge the appropriate transportation tolls prescribed by the Board. On the other hand, the fact that parties have contracted for the sale of gas at a price to be paid for it at the point where it is to be delivered, with no reference in the contract to any portion of the price being a transportation toll, cannot deprive the Board of its undoubted authority under section 53 to disallow the tariff of transportation tolls represented by the contract, to require the carrier to substitute a tariff satisfactory to the Board and to prescribe a tariff of tolls for the transportation of the gas which is the subject matter of the contract in place of the tariff that has been disallowed.

In the present case the contract contained no provision allocating any portion of the 23.50¢ per M.C.F. as a toll for the transportation of the gas and as on the material before the Board the cost of the gas to TransCanada was much more than 23.50¢ per M.C.F., the result of the application of section 61 was that the toll to be charged was zero. In my view, it was within the authority of the Board under section 53 to disallow and disregard the contract as a tariff of tolls when it considered, as it did, that such a tariff was contrary to provisions of the Act requiring that tolls be just and reasonable and be charged, under substantially similar circumstances and conditions with respect to traffic over the same route, equally to all persons at the same rate.

It was also within the authority of the Board to prescribe the appropriate tolls for the transportation of the gas referred to in the contract and to require the carrier to file a tariff satisfactory to the Board.

However, in my opinion, having disallowed the contract as a tariff, the Board's authority with respect to it and the effect of section 61 were spent. The contract had been filed under subsection 51(2). The filed copies thereupon were deemed to be a tariff. As the contract did not in fact purport to be a tariff and to fix tolls for transportation of gas, section 61 applied. But the result of its application was that there was nothing that could be regarded as a toll. The Board thereupon disallowed the contract as a tariff and prescribed what it regarded as appropriate tolls. Nothing in the Act, as I read it, authorized any further interference by the Board with the terms of the contract. Nor is there any further provision of the Act which affects or changes it. Moreover, the structure and purpose of section 61, in my view, do not lend themselves to an interpretation which would enable the Board, by the exercise of its power under section 50 to make orders respecting tariffs and tolls, to require that a price be charged for gas sold by TransCanada that would be high enough to recover the

vente de gaz à un prix à payer au point de livraison sans y mentionner que partie du prix représentait un droit de transport, ne peut priver l'Office du pouvoir incontestable qu'il tient de l'article 53 de rejeter le tarif des droits de transport contenu dans le contrat, d'exiger que le transporteur y substitue un tarif qu'il juge satisfaisant et de fixer, en remplacement de celui qui a été rejeté, un tarif des droits pour le transport du gaz qui fait l'objet du contrat.

En l'espèce, le contrat ne stipule nullement qu'une partie du prix de 23.50¢ par Mp^3 constitue un droit pour le transport du gaz, et il ressort du dossier soumis à l'Office que ce qu'il en coûte à TransCanada pour le gaz dépasse de beaucoup le prix de 23.50¢ le Mp^3. Il résulte de l'application de l'article 61 que le droit à imposer est égal à zéro. A mon avis, l'Office avait le pouvoir, en vertu de l'article 53, de rejeter le contrat en tant que tarif des droits et de n'en pas tenir compte dès lors qu'il estimait que ce tarif était contraire aux dispositions de la Loi qui exige que les droits soient justes et raisonnables et qu'ils soient toujours, dans des circonstances et conditions fondamentalement semblables, à l'égard de tout le mouvement opéré sur le même parcours, imposés également à toutes personnes, au même taux.

L'Office avait aussi compétence pour fixer les droits appropriés pour le transport du gaz visé dans le contrat et exiger que le transporteur soumette un tarif qu'il juge satisfaisant.

Toutefois, à mon avis, le pouvoir de l'Office relativement au contrat et à l'application de l'article 61 ont pris fin avec le rejet du contrat en tant que tarif. Le contrat avait été déposé en application du paragraphe 51(2). Les copies du contrat ainsi fournies furent considérées comme un tarif. Comme le contrat ne se voulait pas un tarif et ne fixait pas de droits pour le transport du gaz, l'article 61 s'appliqua. Mais il résulta de cette application que rien ne pouvait être considéré comme un droit. L'Office rejeta donc le contrat en tant que tarif et fixa ce qu'il estimait des droits appropriés. Selon mon interprétation, rien dans la Loi n'autorisait l'Office à modifier davantage le contrat. Du reste, aucune autre disposition de la Loi n'a pour effet de modifier ce dernier. De plus, l'article 61 ne saurait être interprété comme permettant à l'Office d'utiliser les pouvoirs que lui accorde l'article 50 de rendre des ordonnances relatives aux tarifs et aux droits pour exiger que soit imposé pour le gaz vendu par TransCanada, un prix qui serait assez élevé pour recouvrer le coût d'achat du gaz plus les

acquisition cost of the gas plus the transportation tolls so that the difference between that selling price and the cost of the gas could be deemed to be a toll. And in any event, the Imputed Alberta Border Price is not, as I understand it, the cost to TransCanada PipeLines of the gas at the point where it enters TransCanada's pipeline, within the meaning of section 61, but is simply a figure arrived at by a mathematical formula devised for the purposes of the *Natural Gas Prices Regulations*.

What Chief Justice Thurlow emphasized by the sentence last quoted was that s. 61 could not be used to support the Imputed Alberta Border Price as a basis for determining a transportation toll when it bore no relation to the cost of gas by which to measure the toll.

In the result, Thurlow C.J. thought it appropriate to modify paragraph 1 of the Board's Order by inserting the word "transportation" before the words "rates and tolls" and the words "for transportation" before the word "conforming" in paragraph 4 of the Board's Order. What was more important in his reasons was his denial of any effect to the Imputed Alberta Border Price; in effect, he excised it from Schedule A to the Board's Order.

Pratte J. took a different view and upheld the Board's Order both as to transportation tolls and as to price. After referring to ss. 51(2), 60 and 61 of the Act, he expressed himself as follows [at p. 206]:

As I read them, those provisions were enacted on the assumption that gas pipelines could normally be operated in two ways. First, a gas pipeline company could act merely as a carrier who, for a remuneration, transports his customers' goods. That is the method of operation contemplated in the provisions of Part IV which apply to both gas and oil pipelines. The second method of operating a gas pipeline is referred to in subsection 51(2) and sections 60 and 61, which all contemplate that the gas pipeline company will operate its undertaking by transmitting and selling its own gas. When a gas pipeline is operated in this manner, section 61 provides that:

> the differential between the cost to the company of the gas at the point where it enters its pipeline and the amount for which the gas is sold by the company shall, for the purposes of this Part, be deemed to be a

droits de transport, de sorte que la différence entre le prix de vente et le prix d'achat du gaz puisse être réputée un droit. Quoi qu'il en soit, le prix imputé à la frontière de l'Alberta n'est pas, selon moi, ce qu'il en coûte à TransCanada PipeLines pour le gaz au point où celui-ci pénètre dans son pipe-line, au sens de l'article 61. Il s'agit plutôt d'un chiffre obtenu en appliquant une formule mathématique conçue pour les fins du *Règlement sur les prix du gaz naturel*.

Ce que le juge en chef Thurlow a fait ressortir dans la dernière phrase citée, c'est qu'on ne peut invoquer l'art. 61 pour dire que le prix imputé à la frontière de l'Alberta sert de base à l'établissement d'un droit de transport lorsqu'il n'a aucun rapport avec le coût du gaz servant au calcul du droit.

En définitive, le juge en chef Thurlow a estimé convenable de modifier le paragraphe 1 de l'ordonnance de l'Office par l'insertion des mots «de transport» après les mots «les tarifs et les droits» ainsi que des mots «de transport» après le mot «droits» au paragraphe 4 de l'ordonnance de l'Office. Mais ce qui importe encore plus dans les motifs de sa décision, c'est qu'il a nié que le prix imputé à la frontière de l'Alberta ait quelque effet que ce soit; de fait, il l'a retranché de l'annexe A de l'ordonnance de l'Office.

Le juge Pratte a envisagé la question de manière différente et a maintenu l'ordonnance de l'Office tant sur la question des droits de transport que sur le prix. Après avoir cité les art. 51(2), 60 et 61 de la Loi, il a dit ce qui suit [à la p. 206]:

Selon moi, ces dispositions ont été prises dans l'idée que le fonctionnement des pipe-lines de gaz ne pouvait se faire normalement que de deux façons. Tout d'abord, une compagnie de transport de gaz par pipe-line peut agir tout simplement comme transporteur et recevoir à ce titre une rémunération pour le transport des marchandises de ses clients. C'est la méthode de fonctionnement visée aux dispositions de la Partie IV qui s'appliquent à la fois au transport de gaz et de pétrole par pipe-line. Le paragraphe 51(2) et les articles 60 et 61 font mention de la deuxième méthode de fonctionnement, selon laquelle une compagnie de transport de gaz par pipe-line s'occupe de la transmission et de la vente de son propre gaz. Dans ce cas, l'article 61 porte que:

> ... la différence entre ce qu'il en coûte à la compagnie pour le gaz au point où celui-ci pénètre dans son pipe-line et le montant pour lequel la compagnie vend le gaz, est réputée, aux fins de la présente Partie, un

toll charged by the company to the purchaser for the transmission thereof.

The effect of that section, which deems the "differential" to which it refers to be a toll charged for the transmission of gas, is to confer on the Board the same powers with respect to that differential as those possessed by the Board in relation to mere transportation tolls. As the Board may disallow a tariff specifying unreasonable tolls and prescribe tolls that it considers to be just and reasonable, it may, in the same manner, disallow a contract for the sale of gas entered into by a pipeline company and prescribe the "differential" that must exist between the cost of the gas to the company and the price for which it is sold.

This being my interpretation of section 61, it follows that, in my view, that section clearly empowers the Board to prescribe, in the circumstances contemplated by section 61, the price at which gas may be sold by a pipeline company. For that reason, I do not find merit in the appellants' first submission that the Board exceeded the powers conferred on it by the statute in making the order here in question.

I say, with respect, that I cannot accept Pratte J.'s view of s. 61. Special as that provision is, it is still a provision in Part IV and subject to the limitation of the Board's authority to fix transportation tolls. I take the view that I regard as that taken by Gibson J. in *Northern and Central Gas Corp. Ltd. v. National Energy Board and Trans-Canada Pipe Lines Ltd.*[3] at p. 167 that the only power of the Board on an application under s. 50 to deal with price is to do so incidental to the fixing of transportation tolls, and this is so even under s. 61.

In my view, subject to two further observations, the reasons of Thurlow C.J. are compelling and should be followed here. The two observations that I would add concern a submission by counsel for the respondent TransCanada and a submission made by counsel for the National Energy Board. Counsel for the respondent dwelt upon the *Petroleum Administration Act*, although the Act was excluded by the Board from its consideration, and insisted that the appellants would have to meet the Imputed Alberta Border Price if they

[3] [1971] F.C. 149.

droit imposé par la compagnie, à l'acheteur, pour la transmission de ce gaz.

Cet article, qui considère la «différence» comme étant un droit imposé pour la transmission du gaz, a pour conséquence de conférer à l'Office les mêmes pouvoirs relativement à cette différence que ceux dont il est investi relativement aux simples droits de transport. Puisque l'Office peut rejeter un tarif prévoyant des droits déraisonnables et fixer les droits qu'il estime justes et raisonnables, il peut, de la même manière, rejeter un contrat de vente de gaz passé par une compagnie de pipe-line et établir la «différence» qui doit exister entre ce qu'il en coûte à la compagnie pour le gaz et le prix de vente de celui-ci.

Puisque j'interprète ainsi l'article 61, je suis forcé de conclure que, de toute évidence, cet article autorise l'Office à fixer, dans les circonstances dont fait état l'article 61, le prix auquel une compagnie de pipe-line doit vendre du gaz. C'est pour cette raison que je trouve mal fondée la première prétention des appelantes, selon laquelle l'Office aurait outrepassé les pouvoirs que la Loi lui a conférés en rendant l'ordonnance en question.

Avec égards, je dois dire que je ne puis accepter l'interprétation de l'art. 61 que donne le juge Pratte. Si particulière soit-elle, cette disposition est tout de même portée à la Partie IV et assujettie à la limitation du pouvoir de l'Office de fixer les droits de transport. J'adopte l'opinion que j'estime être celle qu'a exprimée le juge Gibson dans *Northern and Central Gas Corporation Ltd. c. L'Office national de l'énergie et TransCanada Pipe Lines Ltd.*[3], à la p. 167 que le seul pouvoir de l'Office, lorsqu'une demande en vertu de l'art. 50 lui est soumise pour qu'il fixe un prix, est de le faire accessoirement à la fixation de droits de transport, et c'est le cas même en vertu de l'art. 61.

À mon avis, et sous réserve de deux autres remarques, les motifs du juge en chef Thurlow s'imposent et devraient être suivis en l'espèce. Les deux remarques que je veux ajouter portent sur une allégation de l'avocat de l'intimée TransCanada et sur une allégation de l'avocat de l'Office national de l'énergie. L'avocat de l'intimée a insisté sur la *Loi sur l'administration du pétrole*, même si l'Office n'a pas tenu compte de cette loi dans ses motifs, et il a soutenu que les appelantes devraient accepter le prix imputé à la frontière de

[3] [1971] C.F. 149.

were to obtain across border gas. That may well be so but it is hardly a reason for expanding the jurisdiction of the Board under the application made by the respondent in the present case. There is no common law or equity applicable to the exercise of jurisdiction by a statutory tribunal unless they arise from the terms of the enactment which give it its authority. There is nothing here that, in my view, gives the Board overall price fixing authority in connection with the fixing of transportation tolls.

Counsel for the Board, speaking to its jurisdiction, contended that the word "tariff" was a broader term than "toll", that the contract here constituted a tariff and that the Board had price fixing powers associated with its toll function. In short, he supported the reasons of Pratte J. I do not agree with this submission. It can hardly be said that the proposed price fixing here was incidental to the fixing of transportation tolls when it was independent of the toll. This was not a case of varying the contract to allow for a toll, something which was within the Board's powers if limited according to s. 61; the Board's order went far beyond this. Nor can I agree with the scope that counsel would give to the word "tariff". If I understand his argument, it is that "tariff" encompasses price fixing and, further, permits the Board to act outside the prescriptions of Part IV and, particularly, outside of the limitations of the relevant provisions of that Part that confine the Board's powers to the fixing of transportation rates or tolls. Section 51, as I read it, denies the large effect that counsel would give to the word "tariff". Thurlow C.J., in his reasons, pointing out that the word "tariff" is not defined, stated that, in the context in which it is found in Part IV of the Act, it means simply a list of tolls or rates.

I should add that the Board's Order in this case, referring therein to Exhibits 54 and 55, would seem to support the view that "tariffs", in the context of s. 50 of the *National Energy Board Act*, envisages a list of transportation tolls. The exhibits

l'Alberta si elles voulaient obtenir du gaz provenant d'une autre province. C'est bien possible, mais ce n'est pas une raison d'accroître la compétence de l'Office en vertu de la demande que l'intimée a faite en l'espèce. La *common law* ou l'*equity* ne s'appliquent pas à l'exercice d'une compétence par un tribunal créé par une loi à moins que leur application ne ressorte des termes de la loi qui lui donne son pouvoir. A mon avis, il n'y a rien en l'espèce qui donne à l'Office le pouvoir général de fixer les prix dans le cadre de l'établissement des droits de transport.

L'avocat de l'Office, au sujet de sa compétence, a fait valoir que le mot «tarif» a un sens plus large que «droit», que le contrat en l'espèce constitue un tarif et que l'Office a des pouvoirs de fixation de prix, reliés à son pouvoir sur les droits. En somme, il a appuyé les motifs du juge Pratte. Je ne suis pas d'accord avec cette prétention. On peut difficilement affirmer que l'établissement du prix qu'on envisage en l'espèce soit accessoire à l'établissement de droits de transport lorsqu'il est indépendant du droit. Il ne s'agit pas de modifier le contrat pour permettre de fixer un droit, ce que l'Office avait le pouvoir de faire si son pouvoir est restreint conformément à l'art. 61; l'ordonnance de l'Office va beaucoup plus loin. Je ne suis pas d'accord non plus avec le sens que l'avocat veut donner au mot «tarif». Si je comprends bien, il prétend que «tarif» comprend l'établissement du prix et, en outre, permet à l'Office de passer outre aux dispositions de la Partie IV et, en particulier, aux restrictions des dispositions pertinentes de cette Partie qui limitent les pouvoirs de l'Office à l'établissement des taux ou des droits de transport. L'article 51, à mon avis, nie la portée étendue que l'avocat veut donner au mot «tarif». En soulignant, dans ses motifs, que le mot «tarif» n'est pas défini dans la Loi, le juge en chef Thurlow dit que dans le contexte dans lequel il est employé dans la Partie IV de la Loi, il signifie simplement une énumération de droits ou de taux.

Je dois ajouter que l'ordonnance de l'Office en l'espèce, lorsqu'elle fait mention des pièces 54 et 55, semble confirmer l'opinion que «tarifs», dans le contexte de l'art. 50 de la *Loi sur l'Office national de l'énergie*, envisage une énumération de droits de

clearly so indicate in dealing with demand and commodity charges, terms used in Schedule A to the Board's Order.

The words "traffic, tolls or tariffs", in s. 50 are well known terms in railway legislation. There, too, there appears to be no definition of "tariffs". Coyne's *Railway Law of Canada* (1947), at p. 431, referring to s. 323 of the *Railway Act*, as it then stood, quoted its specification of a "tariff of tolls" and added by way of comment that "no definition of 'tariff' is given in the Act. It has been sometimes defined as 'a schedule of rates together with rules and regulations'." The present *Railway Act*, R.S.C. 1970, c. R-2, also speaks in ss. 268 to 270 of "tariffs of tolls". In the context of s. 50 of the *National Energy Board Act* there must be, of course, a limitation to transportation tolls.

It follows from the foregoing that the Board exceeded its authority in purporting to substitute the Imputed Alberta Border Price for that fixed by the contract between the parties. It was entitled to make a variation for the purpose of fixing transportation charges but not to establish a new contract price for the gas as a commodity. The appeal should therefore be allowed on this ground and it is hence unnecessary to consider the constitutional issues which arise only if the Board had acted here within its statutory authority.

The appellants should have their costs throughout. There will be no costs against the Board.

Appeal allowed with costs. No costs against the Board.

Solicitors for the appellants: Gowling & Henderson, Ottawa.

Solicitors for the respondent TransCanada Pipelines Ltd.: McCarthy & McCarthy, Toronto.

Solicitor for the respondent the National Energy Board: Philip G. Griffin, Ottawa.

transport. C'est ce que ces pièces indiquent clairement lorsqu'elles mentionnent les frais de la demande et de la marchandise, termes qu'emploie l'annexe A de l'ordonnance de l'Office.

Les mots «au mouvement, aux droits ou tarifs», à l'art. 50 sont des termes consacrés des lois sur les chemins de fer. Là également, il ne semble pas y avoir de définition de «tarifs». L'ouvrage de Coyne *The Railway Law of Canada* (1947), lorsqu'il mentionne l'art. 323 de la *Loi sur les chemins de fer* tel qu'il se lisait alors, cite la prescription d'un «tarif des taxes» et ajoute, sous forme de commentaire, à la p. 431, que [TRADUCTION] «la Loi ne donne pas la définition de 'tarif'. On l'a parfois défini comme «un barème des taux assorti de règles et de règlements».» La *Loi sur les chemins de fer* actuelle, S.R.C. 1970, chap. R-2, parle également des «tarifs de taxes» aux art. 268 et 270. Dans le contexte de l'art. 50 de la *Loi sur l'Office national de l'énergie*, il doit bien sûr y avoir une restriction des droits de transport.

Il découle de ce qui précède que l'Office a outrepassé ses pouvoirs en prétendant substituer le prix imputé à la frontière de l'Alberta au prix que les parties ont fixé au contrat. L'Office avait le droit d'apporter une modification aux fins d'établir des frais de transport, mais non d'établir un nouveau prix de vente du gaz en tant que marchandise. Je suis par conséquent d'avis d'accueillir le pourvoi pour ce motif, et il n'est donc plus nécessaire d'examiner les questions constitutionnelles qui se posent uniquement si l'Office a agi en l'espèce dans les limites des pouvoirs que la Loi lui accorde.

Les appelantes ont droit aux dépens dans toutes les cours. Il n'y aura pas de dépens contre l'Office.

Pourvoi accueilli avec dépens. Il n'y a pas de dépens contre l'Office.

Procureurs des appelantes: Gowling & Henderson, Ottawa.

Procureurs de l'intimée TransCanada Pipelines Ltd.: McCarthy & McCarthy, Toronto.

Procureur de l'intimé l'Office national de l'énergie: Philip G. Griffin, Ottawa.

Solicitor for the intervener the Attorney General of Canada: R. Tassé, Ottawa.

Solicitors for the intervener the Attorney General of Québec: Jean-K. Samson and Odette Laverdière, Quebec.

Solicitor for the intervener the Attorney General of British Columbia: Howard R. Eddy, Victoria.

Solicitors for the intervener the Attorney General for Saskatchewan: Gowling & Henderson, Ottawa.

Solicitor for the intervener the Attorney General for Alberta: R. W. Painsley, Edmonton.

Solicitor for the intervener the Attorney General of Newfoundland: Ronald G. Penney, St. John's.

Procureur de l'intervenant le procureur général du Canada: R. Tassé, Ottawa.

Procureurs de l'intervenant le procureur général du Québec: Jean-K. Samson et Odette Laverdière, Québec.

Procureur de l'intervenant le procureur général de la Colombie-Britannique: Howard R. Eddy, Victoria.

Procureurs de l'intervenant le procureur général de la Saskatchewan: Gowling & Henderson, Ottawa.

Procureur de l'intervenant le procureur général de l'Alberta: R. W. Painsley, Edmonton.

Procureur de l'intervenant le procureur général de Terre-Neuve: Ronald G. Penney, St-Jean.

Bomberry v. Ontario (Ministry of Revenue) **(1989), 70 O.R. (2d) 662 (High Ct. – Div. Ct.); 107 D.L.R. (4th) 448 (C.A.) – appeal dismissed as moot**

case is an exception: van Cleeff never did assume the duty to administer the estate; on the contrary, the beneficiary had empowered the solicitor to do so. If I am wrong in this assumption, none the less I relieve him from liability because he acted honestly and reasonably and ought fairly to be excused for his breach of trust.

The answers then to the questions being tried are as follows: (a) — yes; (b) — n/a; (c)(i) — no; (ii) — yes.

Counsel may speak to costs.

Judgment for defendants.

CASES AND AUTHORITIES CONSIDERED

Davies v. Nelson (1921), 61 O.L.R. 457, [1928] 1 D.L.R. 254; *Trost v. Cook* (1920), 48 O.L.R. 278, 56 D.L.R. 305; *Re Weall; Andrews v. Weall* (1889), 42 Ch. D. 674; *Re Sheppard; De Brimont v. Harvey*, [1911] 1 Ch. D. 50; *Re Chapman; Cocks v. Chapman*, [1896] 2 Ch. D. 763; *Dover v. Denne* (1902), 3 O.L.R. 664; *Lamport v. Thompson*, [1940] O.R. 201, [1940] 2 D.L.R. 619; *McLellan Properties Ltd. v. Roberge*, [1947] 4 D.L.R. 641, [1947] S.C.R. 561; *Fales v. Canada Permanent Trust Co.* (1976), 70 D.L.R. (3d) 257, [1977] 2 S.C.R. 302, [1976] 6 W.W.R. 10; *Re Cooper (No. 2)* (1978), 21 O.R. (2d) 579, 90 D.L.R. (3d) 715; *Low v. Gemley* (1890), 18 S.C.R. 685; *Clough v. Bond* (1838), 2 Jur. 958; *Benjamin v. Haskell*, [1936] 4 D.L.R. 465; *City Bank v. Maulson* (1871), 3 Ch. Chrs. 334; *Island Realty Investments Ltd. v. Douglas* (1985), 19 E.T.R. 56; *Maritime Trust Co. v. Eastern Trust Co.*, [1949] 2 D.L.R. 497, 23 M.P.R. 34 *sub nom. Re Dugan*; *Fry v. Tapson* (1884), 28 Ch. D. 268; *Green v. Whitehead*, [1930] 1 Ch. D. 38; *Re Speight; Speight v. Gaunt* (1833), 22 Ch. D. 727; *Wyman v. Paterson*, [1900] A.C. 271; *Re Cooper (No. 1)* (1978), 21 O.R. (2d) 574, 90 D.L.R. (3d) 710; Ellis, *Fiduciary Duties in Canada* (Don Mills, DeBoo, 1988), pp. 20-3-4; Skane, "Trustees' Duties, Powers and Discretions — Power to Delegate and Duty to Account" (1980), L.S.U.C. Special Lectures 43-62; Waters, *Law of Trusts in Canada* (Toronto, Carswell, 1984), pp. 689-710; Ontario Law Reform Commission, "Report on the Law of Trusts" (Toronto, Ministry of the Attorney-General, 1984), pp. 23-9, 35-9, 42-6, 48-57

Re Bomberry et al. and Minister of Revenue for Ontario*

[Indexed as: Bomberry v. Ontario (Minister of Revenue)]

High Court of Justice, Divisional Court, Osler, Reid and Campbell JJ.
May 3, 1989†.

Constitutional law — Distribution of legislative authority — Taxation — Act imposing tax on cigarettes and other tobacco products sold in Ontario — Consumer liable to pay tax — Retailers required to collect taxes agents of Minister — Direct taxation — Intra vires province — Tobacco Tax Act, R.S.O. 1980, c. 502 — Constitution Act, 1867.

*On appeal to the Ontario Court of Appeal (File No. A50/89).

†Received November 23, 1989.

Aboriginal peoples — Exemption from taxation — Tobacco tax imposed on consumer — Retailer obliged to collect — Exemption for cigarettes and tobacco sold on reserve — Quotas imposed on retailers to prevent illegal sales — Regulations ultra vires — Tobacco Tax Act, R.S.O. 1980, c. 502.

By s. 87(1)(*b*) of the *Indian Act*, R.S.C. 1985, c. I-5, the personal property of an Indian on a reserve is exempt from taxation. The *Tobacco Tax Act*, R.S.O. 1980, c. 502, imposes a tax on consumers of tobacco and imposes an obligation on a retailer to collect the tax. Retailers on a reserve are not required to collect tax from Indians purchasing tobacco products for their own use on the reserve. Because retailers on a reserve sold tobacco in quantities giving rise to the inference that illegal sales were being made, the province established a quota system by regulation under the Act, the quotas to represent realistically legitimate sales to Indians on the reserve.

The retailers brought an application for a declaration that the regulation was *ultra vires* and that the entire system of tax collection was invalid.

Held, the application should be allowed and the regulation declared void.

Although the *Tobacco Tax Act* was valid as direct taxation, nothing in the Act authorized the creation of the quota system. Furthermore, the purported administration of the Act, in the form of the quota, overreached not only the Act but also the constitutional authority of the province by intruding into the jurisdiction over Indians reserved to Parliament and exercised by Parliament in s. 87 of the *Indian Act*.

Gruen Watch Co. v. A.-G. Can., [1950] O.R. 429, [1950] 4 D.L.R. 156, [1950] C.T.C. 440; *Reference re Agricultural Products Marketing Act* (1978), 84 D.L.R. (3d) 257, [1978] 2 S.C.R. 1198, 19 N.R. 361, **apld**

Other cases referred to

Shanahan v. Scott (1956), 96 C.L.R. 245; *Utah Construction & Engineering v. Pataky*, [1986] A.C. 629; *423092 Ontario Ltd. v. Minister of Revenue*, S.C.O., March 6, 1986 (unreported); *Re Hill and Minister of Revenue* (1985), 50 O.R. (2d) 765, 18 D.L.R. (4th) 537; leave to appeal to Court of Appeal refused June 17, 1985; *Re Loeb Inc. and Minister of Revenue* (1987), 59 O.R. (2d) 737, 39 D.L.R. (4th) 723; *Johnson v. Minister of Revenue*, Ont. Div. Ct., August 8, 1987; leave to appeal to Court of Appeal refused February 1, 1988 (unreported); *Chehalis Indian Band v. British Columbia* (1988), 53 D.L.R. (4th) 761, 31 B.C.L.R. (2d) 333, [1989] 1 C.N.L.R. 62; *Union of Nova Scotia Indians v. Nova Scotia (Attorney-General)* (1988), 54 D.L.R. (4th) 639, 89 N.S.R. (2d) 121, [1989] 2 C.N.L.R. 168

Statutes referred to

Constitution Act, 1867, s. 92(2)
Constitution Act, 1982
Indian Act, R.S.C. 1985, c. I-5, s. 87
Public Inquiries Act, R.S.O. 1980, c. 411, Part II
Tobacco Tax Act, R.S.O. 1980, c. 502, s. 28 [am. 1981, c. 4, s. 6; 1983, c. 25, s. 2; 1985, c. 22, s. 8; 1988, c. 65, ss. 3, 4]

Rules and regulations referred to

R.R.O. 1980, Reg. 934 (*Tobacco Tax Act*), s. 23, para. 2

EDITORIAL NOTE: This case was only recently received but was thought to be of sufficient interest to be reported at this time.

APPLICATION for a declaration that the Indian tobacco quota established by regulation was unauthorized by the *Tobacco Tax Act* (Ont.) and therefore null and void and of no force and effect.

Joel Richler, for applicants.
Janet E. Minor, for respondent.

BY THE COURT:—

The issue

The applicants, status Indians on the Six Nations of the Grand River Indian Reserve, are the respective proprietors of Chiefswood Gas Bar and Dick's Smoke Shop, both on the reserve. They apply for declaration that the tobacco quota imposed exclusively on Indian retailers on reserves by the Ontario Minister of Revenue is invalid on the grounds:

(1) That Reg. 934, R.R.O. 1980, under the *Tobacco Tax Act*, R.S.O. 1980, c. 502, and the entire provincial system of tobacco tax collection are *ultra vires* because they impose a constitutionally prohibited indirect tax instead of a direct tax authorized by s. 92, head 2 of the *Constitution Act, 1867*;

(2) That the Indian tobacco quota is not authorized by the *Tobacco Tax Act* and its regulations;

(3) That the Indian tobacco quota represents an administrative overreach of provincial power into jurisdiction constitutionally reserved to the Dominion and exercised by Parliament in s. 87 of the *Indian Act*, R.S.C. 1985, c. I-5, which exempts from taxation the personal property of an Indian situated on a reserve.

The general tobacco tax system

The *Tobacco Tax Act* imposes tax on cigarettes and other tobacco products sold in Ontario, to be paid by every consumer to Her Majesty in right of Ontario on all tobacco products purchased by the consumer. The Act provides that retail dealers shall collect the tax as agent of the Minister at the time of sale to the consumer and shall remit the tax to the Minister at the time and in the manner prescribed by the regulations.

The regulations under the Act provide a system which designates all individual tobacco wholesalers as collectors. They prepare monthly returns on the 28th day of each month to the Minister showing the amount of tobacco bought by the wholesaler from the manufacturer in the previous calendar month. The wholesaler, on the basis of the form, remits a tobacco tax amount to the

Minister. The forms do not refer to the amount of sales by the wholesaler to the retailer or by the retailer to the consumer.

The retailer does not pay the wholesaler any separate amount on account of tobacco tax and does not get involved in the system of tax return forms.

It is physically possible for an amount to be paid by the wholesaler to the Minister in respect of tobacco not yet sold to the consumer, depending on how long it sits in the warehouse or on a store shelf. The Director of Tobacco Tax agreed that was a possibility, but it was his position that in fact the tax remitted by the wholesaler on the 28th of each month, or a very high percentage of it, has been paid by consumers in the prior calendar month.

The evidence in this case is therefore a little different from the evidence in *423092 Ontario Ltd. v. Minister of Revenue* (Ont. H.C.J., March 6, 1986) where Barr J. found that in many, if not most, instances the tax will in fact have been received by the wholesaler and in many instances remitted to the Minister of Revenue before the sale to the consumer has been completed. In the result, nothing turns on this distinction.

The regulations provide a system of tax payment refunds if unsold tobacco is returned by a retailer to a wholesaler for credit, or if tobacco is stolen in a break-in or destroyed in a fire.

The direct tax issue

It is the applicant's position that although the Act is *intra vires* Ontario because it imposes a direct tax on consumers, the regulations and the administrative practice under the regulations collect the tax from wholesalers rather than from retailers and, thereby, transform the tobacco tax from a direct tax into an indirect tax which is *ultra vires* Ontario because s. 92, head 2, of the *Constitution Act, 1867*, restricts the province to direct taxation.

While that argument is not implausible, the contrary conclusion has been reached in many cases including *Re Hill and Minister of Revenue* (1985), 50 O.R. (2d) 765, 18 D.L.R. (4th) 537 (H.C.J.), *per* Krever J.; leave to appeal to the Court of Appeal refused June 17, 1985; *423092 Ontario Ltd. v. Minister of Revenue, supra*; *Re Loeb Inc. and Minister of Revenue* (1987), 59 O.R. (2d) 737, 39 D.L.R. (4th) 723 (H.C.J.), *per* Smith J.; *Johnson v. Minister of Revenue* (Divisional Court, August 8, 1987, *per* Steele, J. Holland and Boland JJ.; leave to appeal to the Court of Appeal on this issue refused February 1, 1988). A similar taxation system was upheld by the British Columbia Court of Appeal in *Chehalis Indian Band v. British Columbia* (Macfarlane, Wallace and Locke

JJ., September 13, 1988) [since reported 53 D.L.R. (4th) 761, 31 B.C.L.R. (2d) 333, [1989] 1 C.N.L.R. 62], which quoted with approval from the judgment of Barr J., in *423092 v. Minister of Revenue, supra.*

The persuasive weight of that authority satisfies us that the applicants cannot succeed on this ground.

The origins of the Indian tobacco quota

The tobacco tax return form completed by the wholesaler and remitted by him to the Minister, together with the tax amount, lists tax-exempt sales to Indians residing on Indian reservations, tax-exempt export sales, tax-exempt sales to other wholesalers and tax-exempt sales to diplomats.

The regulations (s. 23, para. 2) exempt from the payment of tax imposed by the Act:

> 2. Indians who purchase on a reserve tobacco for their exclusive use . . .

It will be noted that the provincial exemption is expressed in terms different from the exemption provided by s. 87(1)(*b*) of the *Indian Act*, R.S.C. 1985, c. I-5:

> 87(1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83, [money by-laws made by Band Councils under the Indian Act], the following property is exempt from taxation, namely,
>
> . . . . .
>
> (*b*) the personal property of an Indian or a band situated on a reserve.

Until the events leading up to this case, retailers on Indian reserves could purchase any quantity of tax-exempt tobacco for sale to Indian consumers on a reserve. Illicit sales of tax-free tobacco for resale to non-Indians off reserve created a very serious problem. A measure of that problem is shown in *Re Hill, supra* (a different Mr. Hill), where Krever J. declined to interfere with an assessment of $2,721,207.65 on an Indian retailer resulting from the illicit sale of 413,186 cartons of cigarettes for resale off reserve.

At the urging of the Ministry, the Chiefs of Ontario, a group representing many of the band leaders on Ontario reserves, agreed to a permit system whereby band councils after January 1, 1983, issued permits to Indian retailers on reserves, without limiting the quantity of tax-exempt tobacco they could purchase.

The permit system did not work. The estimated tax loss for the first five months of 1983 was $1,370,434.70 on tobacco sold through the Six Nations Reserve, a figure not disputed by the respondents.

After further consultation and unsuccessful good faith attempts to work out a system acceptable to the Indian people which would stop the tax loss, the Director on May 31, 1983, wrote to all retailers on the Six Nation Reserve holding permits to purchase tobacco from wholesalers, informing them that he was imposing the Indian tobacco quota challenged in this case. It is necessary to set out in full this lengthy document which provides important background information about the basis of the system in question:

May 31, 1983

TO ALL RETAILERS ON THE SIX NATIONS RESERVE
HOLDING PERMITS TO PURCHASE TOBACCO PRODUCTS
FROM WHOLESALE DEALERS

RE: PURCHASES OF TAX-EXEMPT TOBACCO PRODUCTS

Under the federal Indian Act, the personal property of an Indian situated on a reserve is exempt from taxation. Personal property includes tobacco products intended for personal use. Ontario abides by the federal law and recognizes that provincial tobacco tax is not payable by an Indian on the tobacco acquired by him for personal use on the reserve.

In order to ensure that the individual Indian obtains this exemption to which he is entitled, prior to October 1, 1982 it was possible for an Indian to purchase tobacco products in any quantity from any wholesale dealer in Ontario. However, it was clear long before October 1, 1982 that far more cigarettes were being purchased tax-exempt than were required by individual Indians on the reserves. Accordingly, at the All Ontario Chiefs Conference held in Toronto in the summer of 1982, it was resolved and passed that Indian Chiefs would take the responsibility of nominating a few tobacco retailers on their reserves to purchase in bulk from wholesale dealers, the tax-exempt cigarettes for those individual Indians who were entitled to them. On the Six Nations Reserve, 72 permits have been issued by the Chief.

In the four months between January 1, 1983 and April 30, 1983 for which statistics are available, more than forty million cigarettes have been obtained tax-exempt under the permits issued by the Chief. Clearly, Non-Indians not entitled to tax-exemption have improperly benefited from the purchases made under these permits, resulting in a very substantial loss of tax revenue to the Province of Ontario.

For the past several months, I have been in contact with Chief Staats advising him that the purpose of the permits issued by him must be explained again to all permit holders, and that the total number of cigarettes being purchased tax-exempt under his permits must be reduced to the amount required by the population of the Six Nations Reserve. Regrettably, the results show that no change has occurred. Accordingly, until the Chief and council develop an effective alternative, there is no alternative now but to impose the restrictions that the permit system was intended to achieve voluntarily.

Commencing June 1, 1983, the total number of cigarettes that may be purchased tax-exempt at wholesale by permit holders on the Six Nations Reserve in any calendar month, will be limited to 2.5 million. This number was arrived at based upon reserve population. *This limitation of 2.5 million*

cigarettes per month applied only to cigarettes obtained tax-exempt. It does not in any way limit any retailer from purchasing any quantity of other cigarettes he may otherwise require.

Since the volume of native trade to each place of business of each permit-holder is unknown, the allocation will be equally among all permit-holders. This results in each permit holder being able to purchase 34,700 cigarettes tax-exempt each month. Your usual wholesale supplier has been notified of your allocation, and a copy of that notice is attached. If you wish to change your supplier of tax-exempt cigarettes for any subsequent month, please let me know in writing before the end of the preceding month.

This allocation procedure, which is also in effect on a number of other Reserves, ensures that a sufficient number of tax-exempt cigarettes will be available to resident Indians on the Six Nations Reserve, which is the intent of the federal Indian Act provisions on taxation. Also, the procedure ensures that tax-exempt cigarettes will not be available to non-Indians, and that tax will be payable by them as required by the taxation laws of Ontario to which they are subject.

(Emphasis in original.) A number of observations will later be made about this letter and about this immediate reply on June 3rd from the chief on behalf of the Six Nations Council suggesting a somewhat different understanding of the background of previous discussions and challenging the authority for the quota:

June 3, 1983
Ministry of Revenue,
Motor Fuels & Tobacco Tax Branch,
P.O. Box 625,
35 King Street West,
Oshawa, Ontario,
L1H 8H9

Attention: Mr. Derek Rowsell
Director

Dear Mr. Rowsell:

This is in reply to your letter dated May 13, 1983, concerning the placing of a quota on wholesale cigarette purchases and the designation of the wholesale outlet cigarettes may be purchased from by merchants on the Six Nations Indian Reserve.

There seems to be some misunderstanding between yourself and the Six Nations Band concerning the issuing of Permits for people to buy tax exempt tobacco products. Firstly, at the All-Ontario Chiefs Conference held in Toronto on June 3, 1982, the motion specifically stated that we would monitor the sale of cigarettes to identify to the government who was authorized to buy and sell cigarettes. A copy of this motion is enclosed.

In going along with this resolution, the Band Council attempted to work out some form of issuing Permits, but found that by issuing Permits to only certain individuals, we were depriving other individuals of their treaty and constitutional rights as quoted in the Indian Act under Sections 83, 87, 88 and 89.

In the past month it was quite evident that the issuing of Permits to

individual Indians was certainly not going to solve the problem, and so at a meeting on May 28, 1983, the Six Nations Council made a resolution stating that of that date all Permits were cancelled, which numbered some 72, and a that the Band would revert back to the method of purchasing wholesale cigarettes before the Permits were issued. A copy of this resolution is enclosed. As you are quite aware, previous to the issuing of Permits, there were approximately 24 people who were buying wholesale, and approximately ten of these only on a part-time basis. So therefore, before the Permits were issued, there were actually only 14 merchants purchasing wholesale tobacco b products.

In initiating a quota as you have at $2.5 million cigarettes per month, I believe that in recent discussions with yourself both in Toronto and at the Band Office, it was agreed that a reasonable quota for Six Nations was in the area of $4.5 million cigarettes per month. How you arrived at the smaller figure is questionable at this time. Having visited this reserve, you of course c know first hand the size of it and the number of actual stores that are selling all types of products to the public. I suppose like stores in any other area of the country, we are in a competitive business and are competing with each other for a share of the market. Some of the stores are larger, some are smaller, and because of certain other individuals who have held Permits, there is no store at all.

d It would seem that before an arbitrary quota could be set, some area of distinction should be made on the size of the business and the other products the business sells besides cigarettes. There is no doubt that cigarettes are a vital part of our businesses, and under the system you have implemented, it leaves each and every store owner a capacity to sell approximately 35 cartons of cigarettes per week. This is absolutely undesirable, and I think the quota e system is unconstitutional; certainly, your letter stating that merchants have to buy at one certain wholesale outlet would bear some looking into by the government itself in fair business practice.

In the meeting that the Band had on May 28, 1983, it was stated that we would be pursuing another method of trying to control the illegal sale of cigarettes on the Six Nations Reserve. We believe that the laws covering f both the Indian Act and the new Constitution of Canada, we have no power to take away an individual's Indian tax right, but perhaps in that same calibre, we may have the power to regulate retail outlets so that they would have to conform to certain standards that the Band sets. As you know, a bylaw has first to be drawn up and then approved by the federal government before it is placed into effect. It is the Band's intention to pursue and try to curb the g illegal sale of cigarettes on our reserve.

Under the conditions you have indicated, there is little or no doubt that if the people cannot purchase from the store in their community what they wish to buy, they will go to another store. As I stated before, at 35 cartons a week, which is approximately seven cartons per day, it would be impossible for any store to carry five or six brands of cigarettes as they come in large, small, h king and regular sizes. In effect, I believe that you are probably going to have the pleasure of completely closing down some of the businesses, because a package of cigarettes does have a certain drawing power, and along with the cigarettes many other products are sold such as gas, groceries, meats, etc. Certainly, the individual is going to travel to a place where they can purchase all of these products at one time.

We are suggesting, as in the resolution, that until such time that the Band drafts its bylaw and puts it into effect, that the matter of purchasing wholesale cigarettes be dealt with in the same manner that it was before the issuing of Permits, and that some of the onus be placed on the wholesale outlets in our area to make certain that only qualified dealers be allowed to enter their premises and buy products from them the same as it is in any other community.

Perhaps for his particular problem the delivery by the wholesaler of cigarette products should be made at the place of business, so that the wholesaler would know immediately whether it was a full legitimate business and have no excuse to say that he did not know if there was a business existing or not. We believe, that in the interim this would be a reasonable solution.

An immediate response to this letter and suggestions would be appreciated.

Yours truly,

SIX NATIONS COUNCIL

"W. Staats"

Wellington Staats,

Chief.

The Director, in his reply on June 10th, reviewed the background of the quota from a different perspective. He emphasized the problem of illicit sale off reserve to non-Indians of tax-free tobacco and the consequent tax loss. He recited the many steps the Ministry had taken to co-operate with the Indian people in resolving the problem. The thrust of his reply was that the government had been neither hasty nor arbitrary but, on the contrary, had been most patient in dealing with the Indian people who had not been able to bring the problem under control within a reasonable time.

A great deal can be said about the controversy as to who was more reasonable during the period leading up to the quota and many letters and documents could be quoted which bear upon this controversy. It is sufficient to say that each side apparently tried in good faith to resolve the problem so far as it could without going below its bottom line. For the Director, the bottom line was the protection of the tax revenue. For the Indian people, the bottom line was the right of Indians to purchase and, of legitimate retailers, to sell tax-exempt tobacco on the reserve free from provincial interference with their rights under the *Indian Act*.

The Director offered to reallocate quotas among retailers as advised by the band council (Director's letter, June 10, 1983); and the council offered to impose its own quotas on individual business establishments (chief's letter of June 20, 1983). Although each side showed some willingness to compromise in the discussions that continued until this legal challenge was launched, neither side gave up its bottom line.

There is a suggestion in some of the material filed by the respondent that the quota was established by the band council and was simply administered by the government on behalf of the band council. If that suggestion leaves the impression that the quota system is the creature of the Indian people and not the government, that impression is seriously misleading. The band council made the best of a bad situation. It had to bend to the government's will because the government, by its power over the wholesalers, had the practical means, if not the legal authority, to cut off completely the supply of tobacco to the reserve.

When it considered its tax revenue to be in serious danger, the Ministry did not hesitate to use that power. The Director, on July 20, 1983, by letter, summarily ordered all licensed wholesale dealers in the Brantford area to stop selling tax-exempt cigarettes to any retailers on the reserve:

> . . .effective immediately and until further advised by me in writing, no further cigarettes are to be sold by you tax-exempt to any retailer on the Six Nations Reserve. The reason for this is that the number of cigarettes purchased tax-exempt in the first two weeks of July by retailers on the reserve far exceeds the quantity reasonably required for resale there in any calendar month.
>
> In the meantime, I am working with the Chief to establish a revised system acceptable to both him and the government and as soon as possible you will be advised and tax-exempt sales may then resume.

As a result of this "force majeure", not expressly authorized by any provision of the Act or regulations, the Ministry secured the reluctant participation of the Indian leaders, under protest, in the administration of the Indian tobacco quota imposed by the government. The Indians had no choice but to make the best of a bad job and salvage any concessions they could through participation in the quota system.

The question for the court is whether that quota system reflects the application of legal authority or the exercise of power by the Ministry without regard to legal justification.

The operation of the quota

The quota operates on this basis: the Director decides how much tobacco product will probably be consumed each month by the Indians on the reserve. This is set as the over-all quota for the reserve which is divided up among individual retailers. The band council reluctantly and under protest participates in the system. Unless a retailer on the reserve applies for and obtains a quota, he cannot obtain tax-exempt cigarettes for his Indian customers on the reserve. If he has obtained a quota, he cannot purchase any

more tax-exempt tobacco than that represented by his individual quota. The Indian retailer on the reserve is permitted to deal with only one wholesaler in any one month but he may, on notice to the Director, give advance notice that he wishes for the next month to deal with another wholesaler.

The impact of the quota

The impact of the quota is partly reflected in the correspondence quoted above.

It limits the ability of Indian retailers to purchase tax-free tobacco products. Its commercial effect is referred to in Chief Staat's letter referred to above in terms of the competitive position between different retailers, the restriction on their ability within the quota to stock enough variety of brands, sizes, and types of cigarettes to satisfy customer tastes and demand, and the effect on the small retailer whose customers may buy their gas and groceries somewhere else where they can get the size and brand of cigarettes they want without making two shopping trips. This evidence is impressionistic; there is no empirical evidence of the economic impact of the quota system on the retail tobacco trade on the reserve.

The particular burdens imposed on the Indian retailer by the quota system are:

1. The Indian retailer on the reserve is restricted to the purchase of tobacco products from wholesalers designated by the Ministry which may change the designation on request.
2. The Indian retailer on the reserve cannot obtain any tax-exempt tobacco for sale to his Indian customers on the reserve unless he applies for and receives an individual quota.
3. The Indian retailer on the reserve who applies for and receives an individual quota is restricted to that amount and can sell no more tax-exempt tobacco to his Indian customers on the reserve.

So far as these particular applicants are concerned, the quota system prevents Mr. Bomberry, who has no quota, from obtaining any tax-exempt cigarettes at all for his Indian customers on the reserve. It prevents Mr. Hill, who has a quota, from selling to his Indian customers on the reserve any more tax-exempt tobacco products than the amount assigned to him in his quota.

Although there is some suggestion in the respondent's case that the real function of the quota is to ensure an adequate supply for legitimate retailers, it is only in the most Orwellian sense that a quota restricting access to tax-exempt tobacco can be said to be anything other than a restriction.

The quota limits the total amount of tax-exempt tobacco which all retailers can make available for purchase by Indian people on the reserve. It further limits the amount of tax-exempt tobacco which any individual retailer, competing with the others, may sell to his Indian customers on the reserve. It limits the freedom of the retailer to buy from whatever wholesaler he wishes, although that freedom is not totally curtailed because the Ministry indicates that it would permit the retailers to switch wholesalers for the succeeding month if they give enough notice to the Ministry.

Efficiency

A good deal of argument by the respondent was directed to establishing that the present system is fair and involves some balance of the respective interests of the Indians and the revenue authorities. Emphasis was placed on the argument that the quantity of tax-free cigarettes available under the system is more than sufficient for the needs of the Indian consumer, that no consumer has complained to the Director, that the band council has declined to help alleviate the impact of the system by readjusting quota amounts among individual retailers, and that:

> The present system achieves the goals of ensuring that a more than sufficient quantity of tax free cigarettes is available to Indian consumers on a reserve without the necessity of significant involvement of Indian retailers and consumers in the provincial tax collection mechanism, and minimizing tax loss which results when non-taxable cigarettes are resold to non-Indians.

The answer to these arguments is that this is not a case about how many cigarettes Indian people might reasonably smoke each day or each month, or about the most efficient way to enforce the tobacco tax. It is a case about legality.

The Act contains a wide array of enforcement measures to control abuse and stop tax loss including the power of assessment which was used in *Hill, supra*, to the tune of over $2.7 million, the power to examine and obtain search warrants and to impound and to launch inquiries with all the powers under Part II of the *Public Inquiries Act*, R.S.O. 1980, c. 411. There are three offence provisions, including an offence punishable by two years' imprisonment for selling for resale without a wholesaler's permit.

There is no evidence that the respondent, in addressing the tax loss which forms the reason for the quota, has used or attempted or even considered any of the enforcement machinery expressly provided by the Legislative Assembly to prevent the kind of abuse at which the quota system is directed. It appears from the record that the respondent, instead of using the existing enforcement mechanisms or seeking more effective ones from the Legislative Assembly, has devised the Indian tobacco quota.

The following appears from the cross-examination of the Director by Mr. Kellock, counsel for the applicants:

> Q. Does this sheet, tab E, showing sales by various members of the Six Nations Band during January and February, 1983, disclose, in your opinion, sales that should have borne tax upon which no tax was paid?
>
> A. Yes.
>
> Q. So, they show illegitimate transactions, in your opinion.
>
> A. Yes.
>
> Q. All right. Did you prosecute or take enforcement proceedings against any of the people shown on that list?
>
> A. I don't believe so.
>
> Q. Why not?
>
> A. Because I was about to lower the boom, and did so.
>
> Q. I see. And, it was easier to establish the quota system than to prosecute individually.
>
> A. Certainly.
>
> Q. Cheaper, more efficient, the best bureaucratic solution you could come up with.
>
> A. Everybody was a winner from that system, except those who were abusing the system, that the Indians were attempting to institute.

There is no doubt that the Director acted in good faith in instituting the quota in the sense that he believed he was acting reasonably. The question is not whether the Indian tobacco quota would be reasonable in a system where the Director enjoys limitless powers, but whether he exceeded the powers given him by the Legislative Assembly and the constitution.

It may well be that there are administrative and practical difficulties involved in the use of the enforcement machinery expressly provided by statute to prevent tax evasion. It is obvious that the machinery provided by the Indian tobacco quota, is a much more efficient way to enforce the Act than the machinery expressly provided by the Legislative Assembly for the enforcement of the Act. But that is no answer to an attack on the legality of the machinery devised by the Ministry.

The Indian tobacco quota sweeps every legitimate retailer into the same net as the smuggler. The underlying premise of the quota is that the innocent retailer must suffer the same restriction as the suspected smuggler because it is too inefficient administratively to distinguish between the guilty and the innocent.

Although it may well be more administratively efficient to treat the innocent retailer exactly the same as the smuggler that has nothing to do with the legality of the administrative measures.

The demise of any efficient tax collection system which is inconsistent with the legal protections afforded to Indians or otherwise unconstitutional or illegal will generally produce a degree of inefficiency. The degree of that inefficiency will depend on the ingenuity of the tax authorities in applying existing enforcement techniques or developing new ones within the scope of their powers. While this inefficiency would not exist in a unitary state, it represents part of the price we sometimes must pay for living under a federal system of government which affords a measure of protection for the rights of Indian people.

In any collision of values between the efficiency of tax collection on the one hand and the principles of legality on the other hand, the principles of legality must win out.

The principle of legality

It is trite that the Minister, the Ministry, and the Director must have legal authority before they may impose any restrictions upon the business conducted by wholesalers or retailers, including Indian retailers on the reserve. Unless the restrictions are authorized by law, they must be struck down.

The question is, therefore, whether the Ministry of Revenue and its Director of Tobacco Tax acted within or without the scope of the power given them by the Legislative Assembly through the machinery of the *Tobacco Tax Act* and its regulations. The scope of such power must always be scrutinized most carefully, as McRuer C.J.H.C. pointed out in *Gruen Watch Co. v. A.-G. Can.*, [1950] O.R. 429 at p. 438, [1950] 4 D.L.R. 156 at pp. 165-6, [1950] C.T.C. 440 (H.C.J.):

> It is for the legislative body to decide in every case what power is to be delegated to any administrative body, and in each case the administrative tribunal is confined to the express authority delegated to it and to the authority that may arise by necessary implication. In no case is the exercise of the delegated authority more carefully scrutinized than in the case where it is claimed that it gives a right to impose any financial burden on the subject.

The power to impose a quota on any retailer represents a significant interference with his freedom to buy and sell. To the extent that it interferes with his commercial freedom, it represents a financial burden. That kind of power over individual conduct requires very clear statutory authority.

The stick that drives the quota system is the Ministry's apparent practical ability to prohibit wholesalers from selling to Indian retailers unless they do so on terms laid down by the Ministry.

This is amply demonstrated by a number of documents,

including the order from the Director to the wholesalers, in the July 20, 1983 letter set out above, to stop selling tax-exempt tobacco to Indian retailers on the reserve.

That letter recited no legal authority for the order. Nor could it have, for there is in the Act and the regulations no authority to make the order and no authority for any aspect of the Indian tobacco quota.

The power to restrict the right of any retail merchant to buy his product from whomever he pleases, the power to insist that he buy from no wholesaler other than the one designated for the time being by the government, the power to decide what is a reasonable amount of tobacco for Indians to smoke, the power to prevent wholesalers from selling to Indian retailers tax-exempt products to which they would otherwise be freely entitled unless they do so in accordance with a quota, the power to set an over-all quota for a reserve and to enforce quotas set for individual retailers, are all significant infringements of the rights of Indian retailers engaged in the business of supplying retail tobacco products to Indian people on the Six Nations Reserve.

It would take express language to confer such powers on the Minister or the Director, just as it would take express language to impose a food-rationing scheme or an agricultural marketing scheme.

There is, however, not a single word in the Act or regulations that expressly authorizes any quota system, let alone the Indian tobacco quota.

Although not found in the machinery of the Act or in the regulations, can such authority be read into the regulation-making power?

The Act contains, in s. 28, the usual regulation-making power found in such statutes. It gives the Lieutenant-Governor wide powers to do specific things:

> 28(1) The Lieutenant Governor in Council may make regulations,
>
> (*a*) providing for the collection of the tax imposed by this Act and designating the persons by whom it is to be collected;
>
> (*b*) providing for compensation to be paid to dealers out of tax collected by them in cases where a dealer is required to complete an inventory under sub-section 14(6), and prescribing the conditions under which such compensation will be paid;
>
> (*c*) requiring security to be furnished by the persons who collect the tax imposed by this Act and prescribing the form and amount of the security to be furnished;
>
> (*d*) providing for the accounting for and paying over of the tax imposed by this Act, and regulating the time and manner of such accounting and payment;

(*e*) prescribing the returns and statements to be made by importers, manufacturers and dealers of tobacco, the information to be given in such returns and statements, and by whom and in what manner they are to be made;

(*f*) providing for the extension of time for making returns;

(*g*) establishing a system of permits for wholesale dealers;

(*h*) respecting agreements between the Minister and the persons who collect the tax imposed by this Act, and providing for their use;

(*i*) prescribing the rate of interest payable on amounts payable to or to be remitted to the Treasurer under this Act;

(*j*) excluding any class of tobacco products from this Act;

(*k*) exempting any class of persons from the payment of the tax imposed by this Act;

(*l*) providing for the refund of the whole or any part of the tax paid under this Act, and prescribing the records and material to be furnished upon any application for a refund;

(*m*) providing for the appointment of such inspectors, officers and other persons as may be necessary for the proper carrying out of this Act;

(*n*) authorizing or requiring the Deputy Minister or any other officer of the Ministry of Revenue to exercise any power or perform any duty conferred or imposed upon the Minister by this Act;

(*o*) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.

(2) The Minister may make regulations prescribing any form required by this Act or the regulations or that, in his opinion, will assist in the administration of this Act, and prescribing how and by whom any form shall be completed and what information it shall contain.

(3) A regulation is, if it so provides, effective with reference to a period before it was filed.

None of these powers authorizes the Indian tobacco quota. The only ones that bear close examination as possible statutory support for the quota are cls. (*a*) and (*o*). They certainly do not provide any express authority for the quota, and the only question is whether they might by implication authorize the quota as necessarily incidental to the powers conferred by the Act.

It is, in this context, said in defence of the quota system that the Act and the regulations need not spell out every detail of a system for the collection and enforcement of tax revenues.

Although every detail need not be spelled out, at least the general outlines must be. The Indian tobacco quota is not an administrative detail in a statutorily authorized system, but rather an entire mini-system of market regulation that applies to the Six Nations Reserve.

While the legislature conferred a general power to pass regulations to authorize the collection of tax imposed by the Act and to

do things necessarily incidental to carrying out the powers granted by the Act, the legislature did not thereby write the Minister or the Director a blank cheque.

Before an impugned power may be said to be necessarily incidental to a statutory power, the statutory power must be clearly identified to which the impugned power is necessarily incidental. The incidental power must have some peg to hang on. There is no provision in the Act which can support a quota as a necessarily incidental power. The over-all purpose of the Act is to collect tax from consumers through a system of wholesale dealers. It is a very large step from a tax on consumers to a quota system for Indian retailers.

If this enforcement scheme can be considered as necessarily incidental to the Act without any specific statutory authority or any specific regulation, then virtually any power could be considered necessarily incidental and there would be no need to have any regulations at all.

It would require much more explicit language to authorize the restrictions on the freedom of the Indian retailers imposed by the quota system.

The limits on a court's ability to discover in a statute powers not expressly given by the legislature are set out in the judgment of the High Court of Australia in *Shanahan v. Scott* (1956), 96 C.L.R. 245 at p. 250, quoted by Lord Guest in *Utah Construction & Engineering v. Pataky*, [1966] A.C. 629 at p. 640:

> "The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends."

The Indian tobacco quota is in this sense a new and different means of enforcing the Act and carrying out its purposes, a means outside the plan which the legislature has adopted.

Whether or not the province would have the power to enact the Indian tobacco quota is a quite different question tied up with the constitutional limitations on provincial powers imposed by the *Indian Act*, discussed below.

It is not necessary to deal here with the question whether the Indian tobacco quota if directly enacted by the Legislative Assembly would, quite apart from the *Indian Act*, be *ultra vires* the province as an exercise in indirect taxation.

For this branch of the case it is sufficient to say that nothing in the Act confers the power to impose a quota on tax-exempt cigarettes purchased by an Indian retailer on a reserve.

The Indian Act and the Constitution

Having found the Indian tobacco quota unauthorized by law, it is not necessary to deal extensively with the alternative challenge based on the extent to which the federal *Indian Act* blocks the penetration of provincial laws into Indian reserves. That issue is, however, before us and, to the extent it is bound up with the issue discussed above, some reference should be made to it.

No issue was raised as to treaty rights or aboriginal rights under the *Constitution Act, 1982*, and later amendments.

There is an obvious difference between the exemption in the *Indian Act* and the exemption in the regulation under the *Tobacco Tax Act*. A comparison of these two provisions, set out above, shows that the *Indian Act* exemption is wider, applying without any restriction to the personal property of an Indian situated on a reserve. The exemption in the tobacco tax regulation is narrower, applying more restrictively only to tobacco purchased on a reserve by Indians for their exclusive use.

It is not necessary to grapple with that difference because the attack here is on the administrative machinery, not directly upon the *vires* of this part of the regulation. It is therefore, unnecessary to decide whether or not tobacco purchased on a reserve by an Indian for use by a non-Indian is tax-exempt property within the intent and purpose of the *Indian Act*.

The argument against the *vires* of the Indian tobacco quota is that the province cannot extend its administrative power beyond its constitutional reach and, in particular, cannot interfere with the right of Indians on a reserve pursuant to s. 87 of the *Indian Act* to be exempt from taxation on personal property.

It is clear that neither the province nor the federal government can extend its administrative power beyond its constitutional reach, particularly in a way that trenches upon the exclusive legislative authority of the other order of government, or the constitutionally protected rights of individuals. Although a statute might on its face be unimpeachable, its overreaching administration may be struck down on the grounds of constitutional overreach. As Laskin C.J.C. said in *Reference re Agricultural Products Marketing Act* (1978), 84 D.L.R. (3d) 257 at p. 312, [1978] 2 S.C.R. 1198, 19 N.R. 361:

> It is commonplace that if a provincial marketing statute is limited in its thrust

> to intraprovincial trade, there being an express opening declaration to that effect, it ought not to be construed otherwise in any of its provisions unless they separately indicate a wider application. If they do not, it can then only be through monitoring the actual application and administration of the Act that any determination can be made whether there is an overreaching. The Act itself would not, however, be impeachable as encroaching on federal power but its overreaching administration would be invalidated as going beyond the scope of power conferred by the Act an well as being in itself unconstitutional.

To apply that principle to this case, even if the *Tobacco Tax Act* and regulations could be considered unimpeachable, does the purported administration of the Act in the form of the Indian tobacco quota overreach not only the Act but also the constitutional authority of the province by intruding into jurisdiction over Indians reserved to Parliament and exercised by it in s. 87 of the *Indian Act*?

In our view, it does.

The Indian tobacco quota, because Mr. Bomberry has no quota, prevents him from buying tax-exempt tobacco for sale to his Indian customers on the reserve. He cannot buy tax-exempt tobacco from the wholesalers because he is not on the quota list. He could get tobacco by paying the tax on it, but then he would not be able to recover that tax from his Indian customers on the reserve because they, like him, are not liable to pay tax. The quota thereby directly infringes his right under s. 87 of the *Indian Act* to be exempt from tax on his personal property on the reserve. Because Mr. Hill has a limited quota and can only purchase as much tobacco as his quota permits, it directly infringes his right under s. 87 in the sense that it limits that right.

To that extent, the Indian tobacco quota exceeds the constitutional authority of the province by intruding into the constitutional jurisdiction over Indians reserved to Parliament and exercised in s. 87 of the *Indian Act*.

A similar conclusion was reached with respect to a somewhat different tax scheme in *Union of Nova Scotia Indians v. Nova Scotia (Attorney-General)* (Burchell J., December 12, 1988) [since reported 54 D.L.R. (4th) 639, 89 N.S.R. (2d) 121, [1989] 2 C.N.L.R. 168 (N.S.S.C.)].

This case does not involve any measure aimed at the transfer of tax-exempt tobacco from Indians to non-Indians. Although it may achieve that goal indirectly, the Indian tobacco quota aims directly at Indian retailers. By aiming directly at Indians, rather than at the transfer of tax-exempt tobacco to non-Indians, the Indian tobacco quota is unconstitutional in the sense explained above.

Conclusion

Although the *Tobacco Tax Act* and regulations are *intra vires* Ontario in the sense that they represent a direct tax on the consumer, the Indian tobacco quota represents an illegal exercise of authority because it is not authorized by the *Tobacco Tax Act* or regulations, and because it represents a constitutionally unauthorized incursion into jurisdiction over Indians reserved to Parliament and expressed in s. 87 of the *Indian Act*.

We would therefore make the declaration requested, that the Indian tobacco quota is unauthorized by the *Tobacco Tax Act* or any valid statute or regulation and is, therefore, null and void and of no force and effect.

We would award costs to the applicant unless the respondent within 10 days files brief written argument that this is not a proper case for costs; the applicant will have five days to respond in writing.

Order accordingly.

Murphy v. Dodd et al.

[Indexed as: Murphy v. Dodd]

*High Court of Justice, Gray J. July 11, 1989.**

Judgments and orders — Setting aside — Order preventing abortion — Respondent not appearing — Motion to set order aside — Accident, mistake or insufficient notice — Respondent served on Friday afternoon — Hearing on following Tuesday morning — Monday public holiday — Respondent deaf — Matter not explained in sign language — Respondent confused — Notice inadequate — Order set aside — Rules of Civil Procedure, rule 38.12(1).

Judgments and orders — Setting aside — Fraud — Respondent enjoined from having abortion — Not appearing at hearing — Applicant describing self as father — Evidence of possible paternity of someone else — Not disclosing evidence of danger to mother — Fraud on court relating to material issues — Order set aside — Rules of Civil Procedure, rule 59.06(2).

The respondent, who had a 90% hearing loss and a grade 10 education, was 22 years old and the mother of two children. Having become pregnant again, she decided to seek an abortion. The applicant sought to have the abortion enjoined. Notice of motion was served on the respondent by counsel for the applicant on a Friday afternoon and the hearing was to take place the following Tuesday morning, the Monday being a statutory holiday. The respondent did not attend and was not represented at the hearing. The applicant stated that he was the father of the child, although he was aware that the respondent had also had relations with another man and that this man claimed that he was the father. Furthermore, the

*Transcript of oral reasons received December 10, 1989.

1 ***Szmuilowicz v. Ontario (Minister of Health)* (1995), 24 O.R. (3d) 204**

mental elements of the guilty plea. Thus, it was proper for the trial judge to assume at the time of the plea that the appellant admitted the facts which had been put in evidence concerning the four counts but, at the second stage of the hearing when it became clear that the appellant denied the facts in evidence, the trial judge should have at least considered exercising his discretion to reject the guilty pleas and proceed with the trial.

He did not do so and this court must intervene to correct that oversight.

I have no hesitation in concluding that the guilty pleas should be set aside. This case presents a graphic example of why it is essential to the plea bargaining process that the accused person is prepared to admit to the facts that support the conviction. The court should not be in the position of convicting and sentencing individuals, who fall short of admitting the facts to support the conviction unless that guilt is proved beyond a reasonable doubt. Nor should sentencing proceed on the false assumption of contrition. That did not happen here, but worse, the sentence became impossible to perform. Plea bargaining is an accepted and integral part of our criminal justice system but must be conducted with sensitivity to its vulnerabilities. A court that is misled, or allows itself to be misled, cannot serve the interests of justice.

I would therefore set aside the guilty pleas, rescind the withdrawal by the Crown of the other counts, and direct a new trial on all ten counts. In reinstating those six counts I am relying upon the power of this court set forth in s. 686(8) of the *Criminal Code*: see *R. v. Yanover (No. 1)* (1985), 20 C.C.C. (3d) 300, 9 O.A.C. 93 (C.A.).

Appeal allowed; new trial ordered.

Re Szmuilowicz and the Queen in Right of Ontario et al.

Re Senior and the Queen in Right of Ontario et al.

[Indexed as: Szmuilowicz v. Ontario (Minister of Health)]

Ontario Court (General Division), Divisional Court, Rosenberg, Feldman and Winkler JJ. June 12, 1995

Professions — Physicians and surgeons — Regulation making it an act of professional misconduct for physicians to charge patients annual or block fee for uninsured services ultra vires Medicine Act, 1991 and of no force or effect — Medicine Act, 1991, S.O. 1991, c. 30 — O. Reg. 857/93 (Medicine Act, 1991).

The applicant doctors applied for an order declaring that a regulation under the *Medicine Act, 1991*, which made it an act of "professional misconduct" for physicians to charge their patients an annual or block fee for uninsured services was *ultra vires* and of no force or effect.

Held, the applications should be allowed.

The issue was not whether or not the legislature can disallow the block fee method of billing. Rather, it was whether regulations can prohibit that method of billing by defining it as professional misconduct. The purpose of the *Medicine Act, 1991* is to regulate the conduct of doctors and continue to regulate the College of Physicians and Surgeons of Ontario. The impugned regulation was made pursuant to a specific enabling statutory provision which authorized the Transitional Council to define acts of professional misconduct. A statutory power given to a delegate to "define" a particular term is an authority to "settle the limits of" or to "make clear" that particular term. It is not a *carte blanche*. The authority given to the delegate to define a term is limited by the common meaning of the term. While "professional misconduct" is a general term, there are limits to its meaning. The vast majority of physicians and the Ontario Medical Association and the College of Physicians and Surgeons do not consider block billing to be professional misconduct. Professional persons who have special knowledge, training and skill are in the best position to determine issues of professional misconduct. When the Minister sees fit to override a determination made by a self-governing body of professionals authorized by the legislature to determine such issues, the views of the self-governing body of the profession should be taken into consideration by the court in determining whether the Minister pushed the definition of "professional misconduct" beyond permissible limits. The impugned regulation in this case was made for the purpose of assuring accessibility and preventing abuses of "extra billing", a purpose which is extraneous to the purpose of the *Medicine Act, 1991*. The definition of "professional misconduct" cannot be distorted to accomplish purposes outside the purpose of the *Medicine Act, 1991*.

Even if the Ministry were deemed to have expertise in defining and determining an appropriate definition for professional misconduct, its definition was patently unreasonable. So long as the block billing policy of a physician and the manner in which the policy is administered does not offend the College's guidelines, so long as the block billing is not coercive, is not subject to interpretation that services will be withheld if the option for block billing is not chosen, and is not excessive in amount, and so long as it is clear that the acceptance by the patient of extra billing is voluntary and optional, then offering the option cannot be said to constitute professional misconduct.

The impugned paragraph of the regulation was *ultra vires* the *Medicine Act, 1991* and of no force or effect.

Cases referred to

Canada (Attorney General) v. Paulsen, [1973] F.C. 376, 38 D.L.R. (3d) 225 (C.A.); *Doctors Hospital v. Ontario (Minister of Health)* (1976), 12 O.R. (2d) 164, 68 D.L.R. (3d) 220, 1 C.P.C. 232 (Div. Ct.); *Heppner v. Alberta (Minister of Environment)* (1977), 80 D.L.R. (3d) 112, 4 Alta. L.R. 139 (C.A.); *Hett v. College of Physicians & Surgeons (Ontario)*, [1937] O.R. 582, [1937] 3 D.L.R. 687, 69 C.C.C. 71 (C.A.); *Koenig v. Ontario (Minister of Municipal Affairs)* (1994), 21 O.R. (3d) 282, 24 M.P.L.R. (2d) 261 (Div. Ct.); *LaRush v. Metropolitan Toronto & Region Conservation Authority*, [1968] 1 O.R. 300, 66 D.L.R. (2d) 310 (C.A.); *Law Society of Manitoba v. Savino* (1983), 1 D.L.R. (4th) 285, 23 Man. R. (2d) 293, [1983] 6 W.W.R. 538, 6 C.R.R. 336 (C.A.); *Matthews v. Board of Directors of Physiotherapy* (1986),

54 O.R. (2d) 375, 26 D.L.R. (4th) 626, 15 O.A.C. 37 (Div. Ct.) [affd (1987), 61 O.R. (2d) 475, 43 D.L.R. (4th) 478, 24 O.A.C. 319 (C.A.)]; *Nova Scotia (Minister of Environment) v. Cacchione* (1987), 35 D.L.R. (4th) 196 (N.S.S.C.); *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, 84 D.L.R. (4th) 105, 75 Man. R. (2d) 81, 130 N.R. 121, [1991] 6 W.W.R. 289, 6 C.R.R. (2d) 259; *Pharmaceutical Society of Great Britain v. Dickson*, [1968] 2 All E.R. 686, [1970] A.C. 403, [1968] 3 W.L.R. 286, 112 Sol. Jo. 601 (H.L.); *Redhill v. Ontario Health Insurance Plan* (1990), 75 O.R. (2d) 258, 73 D.L.R. (4th) 457, [1990] I.L.R. 1-2638, 40 O.A.C. 213 (Div. Ct.); *Ritholz v. Manitoba Optometric Society (No. 2)* (1959), 21 D.L.R. (2d) 542, 30 W.W.R. 204 (Man. C.A.); *Shomair v. Ontario Health Insurance Plan* (1990), 75 O.R. (2d) 266, 73 D.L.R. (4th) 470, 40 O.A.C. 142 (Div. Ct.); *Trans-Canada Pipe Lines Ltd. v. Saskatchewan (Treasurer)* (1968), 67 D.L.R. (2d) 694 (Sask. Q.B.)

Statutes referred to

Health Care Accessibility Act, 1986, S.O. 1986, c. 20 — now R.S.O. 1990, c. H.3
Health Care Accessibility Act, R.S.O. 1990, c. H.3
Health Insurance Act, R.S.O. 1990, c. H.6
Judicial Review Procedure Act, R.S.O. 1990, c. J.1, s. 2
Medicine Act, 1991, S.O. 1991, c. 30, s. 14(6), (7)
Regulated Health Professionals Act, 1991, S.O. 1991, c. 18

Rules and regulations referred to

O. Reg. 856/93 (*Medicine Act, 1991*), s. 1(1), para. 23 [am. O. Reg. 857/93]
O. Reg. 857/93 (*Medicine Act, 1991*), s. 1(1)
R.R.O. 1990, Reg. 552 (*Health Insurance Act*), s. 24(1), paras. 5, 6, 8, 8.1, 8.2, 9

APPLICATIONS for an order declaring s. 1(1), para. 23 of O. Reg. 857/93 (*Medicine Act, 1991*, S.O. 1991, c. 30) *ultra vires* and of no force or effect.

L. David Roebuck, for applicant, Dr. Julio Szmuilowicz.
Steven Barrett, for applicant, Dr. Steven L. Senior.
Kim Twohig, for the Crown, respondent.

The judgment of the court was delivered by

ROSENBERG J.: —

NATURE OF THE APPLICATIONS

These were two applications, one by Dr. Julio Szmuilowicz ("Szmuilowicz") and one by Dr. Steven Senior ("Senior"), both made pursuant to s. 2 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 ("J.R.P.A."), for an order declaring that s. 1(1) of O. Reg. 857/93, amending s. 1(1), para. 23 of O. Reg. 856/93, made under the *Medicine Act, 1991*, S.O. 1991, c. 30 (the "*Medicine Act*"), which makes it an act of "professional misconduct" for physicians to charge their patients an annual or block fee for uninsured services, is *ultra vires* and of no force or effect.

FACTS

The Annual Fee Option

(i) *Insured and Uninsured Services*

By virtue of the *Health Insurance Act*, R.S.O. 1990, c. H.6, the Government is responsible for paying physicians for the provision of "insured services" to residents of Ontario. The *Health Care Accessibility Act*, R.S.O. 1990, c. H.3, prohibits physicians from charging or receiving in excess of the amount payable for insured services. The amount to be charged for each insured service is negotiated between the Government and the Ontario Medical Association ("O.M.A."), and included in the Schedule of Benefits under the *Health Insurance Act*.

However, the Schedule of Benefits explicitly provides that "insured medical services are limited to the services which are medically necessary and listed in the Schedule of Benefits without being specifically excluded by legislation or regulation". As a result, unless a service is listed in the Schedule of Benefits as an insured service, the service is an "uninsured service". Uninsured services include certain telephone advice at the patient's request, renewal of prescriptions by telephone, completion of various forms and documentation and associated medical assessments, and certain patient-related interviews or discussions with professionals. The Government does not pay physicians for rendering uninsured services. Instead, payment for uninsured services is generally the responsibility of the patient (unless another party has agreed to or is required by law to pay for the service). Neither the *Health Insurance Act* nor any other legislation specifically fixes a set fee to be charged by a physician for rendering uninsured services.

(ii) *The College of Physicians and Surgeons of Ontario Policy ("C.P.S.O.")*

For over 17 years (since 1978), the C.P.S.O., the self-regulating body charged with governing the medical profession, has had in place policy guidelines and criteria on methods of payment for uninsured services. From the outset, the C.P.S.O. policy has permitted patients to choose to pay for uninsured services either on an individual service-by-service basis, or by paying a block fee on an annual basis. The annual basis requirement is said to be intended to protect patients, by ensuring that there is an ongoing relationship between the patient

and the physician before the annual fee option can be offered. Therefore there is said to be a reasonable basis for expecting that the patient may require or request uninsured services from his or her physician during the year. In addition, the C.P.S.O. has prohibited as professional misconduct the charging of excessive fees in relation to services performed.

The original 1978 C.P.S.O. policy in respect of annual fees provided as follows:

(1) an annual fee must be identified as a fee for uninsured services for a period of not less than one year;

(2) the services covered by the annual fee must be clearly stated, in writing, and understood by the patient;

(3) the patient must be advised of the amount of the individual charges;

(4) the patient must be given the option of paying individual charges for the uninsured services as they are rendered;

(5) the decision as to whether or not to elect to pay for uninsured services on an annual fee basis must be the patient's, and must not be a condition of the patient being accepted by the doctor.

The 1978 policy was somewhat modified in 1991, by adding items 6 and 7 below:

(6) the patient must be given a copy of the CPSO policy and indicate his/her acceptance for paying for uninsured services on an annual fee basis before being billed an annual fee;

(7) fees for the service of "being available to render a service" cannot be charged for in advance and are not to be included in the annual fee.

The 1991 C.P.S.O. policy continued in effect until the Government imposed O. Reg. 857/93.

(iii) *The Applicants' Position that Annual Fee Option Benefits Both Patients and Doctors*

The applicants argue that the annual fee option benefits both patients and doctors in that since the C.P.S.O. first introduced its annual fee policy, the option of paying for uninsured services on an annual or separate individual fee basis has been regarded as a particular convenience and advantage for both patients and physicians. The freedom of patients to choose to pay for uninsured services on an annual basis, which the patient is entirely at liberty to reject and which is in accordance with the patient protection policy set out by the C.P.S.O., has been widely accepted by both physicians and patients.

The large majority of doctors who provide their patients with the option for uninsured services on an annual basis are general

and family practitioners (although certain specialists, including psychiatrists, also make a block fee arrangement available to their patients).

Many patients choose the annual fee approach because they are more comfortable in requesting uninsured services under an annual fee approach than they would be if they knew that a separate fee would be payable for each separate service. The patient who chooses the annual fee option knows that, no matter how many uninsured services he/she requests or requires, he/she will not be charged any more than the annual fee which has already been agreed to between the patient and the physician in advance. In this sense, annual fees provide patients who will tend to require access to uninsured services on a relatively frequent basis (*e.g.*, older patients who require frequent prescription renewals or telephone consultations) with enhanced accessibility to these uninsured medical services than if those patients were required to pay on an individualized basis. As well, the annual fee option allows the physician to pass on cost savings to his/her patients. These cost savings result from the physician not having to incur the clerical, administrative, invoicing, accounting, collection and other expenses associated with having to separately bill for each individual uninsured service provided.

Conversely, for those patients who would have made the choice to pay for uninsured services on an annual basis, the removal of that option could well make them more reluctant to obtain the uninsured services they need, because they will have to pay for each individual uninsured service they obtain on an individualized basis, and because the fee charged for the average uninsured services will likely be higher as a result of increased clerical, administrative, invoicing, accounting, collection and other costs to the physician.

The evidence before us was that the average annual amount currently charged by the vast majority of family physicians and general practitioners who provide their patients with the option of choosing to pay for uninsured services on an annual fee basis is in the range of $50 for individual coverage and $100 for family coverage. In this respect, choosing to pay an annual fee for uninsured services generally proves to be financially advantageous to most patients who will require even a limited range of uninsured services; moreover, those patients who do choose the annual fee option for paying for uninsured services in accordance with the C.P.S.O. guidelines are generally in a financially better position than if they had chosen or been required to pay for each individual uninsured service on a fee-for-service basis. In effect, choos-

ing to pay for uninsured services on an annual fee basis can be viewed as analogous to choosing to purchase an insurance policy covering all uninsured services which may be needed over the course of the year.

(iv) *Compliance with C.P.S.O. Policy*

The applicants submit that the overwhelming majority of physicians who offer their patients the freedom to choose to pay for uninsured services on an annual fee basis comply with the C.P.S.O. policy. Generally speaking, inquiries from patients concerning billing for uninsured services have related to the requirement to pay at all for uninsured services when they are rendered — whether on an annual fee or individual basis — but not to the method of paying or to the principle of being afforded the freedom to choose to pay for uninsured services on an annual fee basis. In this respect, some patients believe that all health care is or should be free, that doctors are paid by O.H.I.P. for all the services they provide, and that having to pay for any medical services is an illegal or unethical attempt by some doctors to increase their incomes.

The Applicants

Although the applicant doctors' personal practice is not determinative of the issue of whether or not the amendment to the Regulation is *ultra vires*, it is of significance to show that these doctors are examples of doctors using the annual or block fee billing method for uninsured services in a way that is not detrimental to the patient or patient care.

Dr. Szmuilowicz

Dr. Szmuilowicz is a psychiatrist practising in the City of Toronto. He graduated as a medical doctor in September 1973 from the Universidad Nacional Autonoma de Mexico. In June 1979 he completed four years of specialized psychiatric training in Toronto. He was certified as a specialist in psychiatry by the Royal College of Physicians and Surgeons of Canada in November 1978 and is a member of the Ontario College of Physicians and Surgeons and of the Ontario Medical Association.

Since 1982 Dr. Szmuilowicz has been an Assistant Professor in the Department of Psychiatry at the University of Toronto. He is licensed to practise medicine in Mexico, Israel and Ontario. Dr. Szmuilowicz has held various administrative positions over the years with the Wellesley Hospital, the University of Toronto and the Ontario Medical Association. He has also conducted research

in psychiatry, published articles on psychotherapy and co-ordinated educational initiatives at the Wellesley Hospital and at the University of Toronto.

While Dr. Szmuilowicz is trained to provide the medical service of psychotherapy, and while he is remunerated by O.H.I.P. for the 46-minute psychotherapy session on a fixed-fee basis, he also offers his patients the option of receiving and paying for uninsured services which are beneficial to the patient but which are not insured under O.H.I.P. The auxiliary or uninsured services which Dr. Szmuilowicz commonly provides to his patients are listed as uninsured services in s. 24(1) of R.R.O. 1990, Reg. 552, under the *Health Insurance Act* as follows:

> 5. Advice given by telephone to an insured person at the request of the person or person's representative unless advice by telephone is specifically listed as an insured service or part of an insured service in the schedule of benefits.
>
> 6. An interview or case conference in respect of an insured person that,
>
> i. lasts more than twenty minutes, and
>
> ii. includes a professional, none of whose services are insured services.
>
> . . . . .
>
> 8. A service, including an annual health or annual physical examination, received wholly or partly for the production or completion of a document or the transmission of information to which paragraph 8.1 or 8.2 applies regardless of whether the document or information was requested before, at the same time as or after the service was received.
>
> 8.1 The production or completion of a document, or the transmission of information to any person other than the insured person, if the document or transmission of information is required by legislation of any government or is to be used to receive anything under, or to satisfy a condition under, any legislation or program of a government.
>
> 8.2 The production or completion of a document, or the transmission of information to a person other than the insured person, if the document or transmission of the information relates to,
>
> i. admission to or continued attendance in a daycare or pre-school program or a school, community college, university or other educational institution or program,
>
> ii. admission to or continued attendance in a recreational or athletic club, association or program or a camp,
>
> iii. an application for, or the continuation of, insurance,
>
> iv. an application for, or the continuation of, a licence,
>
> v. entering or maintaining a contract,
>
> vi. an entitlement to benefits, including insurance benefits or benefits under a pension plan,

vii. obtaining or continuing employment,

viii. an absence from, or return to work,

ix. legal proceedings.

9. The providing of a prescription to an insured person if the person or the person's personal representative requests the prescription and no concomitant insured service is provided.

Dr. Szmuilowicz's regular office hours are 6:45 a.m. to 7:30 p.m. Monday through Friday. As a psychiatrist, the applicant regularly treats patients with emotional disorders manifested by severe anxiety, paranoia, severe anger and outbursts of emotion. Such patients sometimes want to contact Dr. Szmuilowicz outside of his regular office hours. Accordingly, on Dr. Szmuilowicz's answering machine he provides his patients with a phone number where he can be reached outside of his regular office hours. This number is connected to a cellular phone which Dr. Szmuilowicz carries with him. The patient leaves a message and Dr. Szmuilowicz then returns the call to his patient. Essentially, Dr. Szmuilowicz is "on call" 24 hours a day. When on holiday, he ensures that his patients have either access to him when possible, or, when not, to one of his colleagues. Dr. Szmuilowicz is not obliged to make himself available for telephone consultations with his patients on such an extensive basis. Being "on call" on this basis is highly demanding and highly intrusive into the time that would otherwise be available to him to devote to family and personal matters. Many psychiatrists have chosen not to make themselves available to patients on a similar basis, but rather leave the number of another referral doctor for their patients during non-office hours. However, having chosen to provide additional telephone services, present and past regulations clearly permit Dr. Szmuilowicz to charge his patients for these uninsured services.

At all material times Dr. Szmuilowicz has been an "opted out" physician, meaning that he does not submit his accounts directly to O.H.I.P. for payment. Rather Dr. Szmuilowicz is paid directly by his patients who are later reimbursed by O.H.I.P.

Before June 20, 1986 Dr. Szmuilowicz charged his patients a single fee which remunerated him for both insured and uninsured services. On June 20, 1986, the *Health Care Accessibility Act, 1986*, S.O. 1986, c. 20 (hereinafter the "*Accessibility Act*"), came into force, which Act prohibited a physician who does not submit his or her accounts directly to the plan (*i.e.*, an "opted out" physician) from charging more or accepting payment for more than the amount payable by O.H.I.P. for rendering an insured service to an insured person.

After the *Accessibility Act* was proclaimed in force, it became important for a physician such as Dr. Szmuilowicz who offered uninsured services to patients to be able to demonstrate that any fee charged to patients in addition to a fee on the O.H.I.P. Schedule was indeed in respect of some additional uninsured service. Accordingly, in order to demonstrate his compliance with the *Accessibility Act*, Dr. Szmuilowicz offered his patients, in writing, alternative methods of paying for uninsured services (as well as the option of receiving no uninsured services) so as to ensure that the fee for uninsured services would not be mistaken as an "extra billing" for the insured service of psychotherapy. Dr. Szmuilowicz's patient's were given the option of paying a block monthly fee for uninsured services based on their ability to pay, the complexity of the case and the frequency of sessions. At the end of each six-month period, Dr. Szmuilowicz would review the circumstances of the patient and their utilization of uninsured services. He would then consider whether the fee for uninsured services should be re-adjusted. Alternatively, the patients were given the option of paying for uninsured services on a strict fee-for-service basis. In the further alternative, patients could choose not to receive or pay for any uninsured services.

Dr. Szmuilowicz later provided his patients with a fourth option of paying for uninsured services on a monthly basis based on the number of sessions the patient attended. This option was advantageous to those patients who frequently used uninsured services but who attended sessions infrequently. It allowed patients to elect to pay a "block" or averaged fee, which fee would be determined by the number of therapy sessions per month they required, regardless of the amount of uninsured services they utilized. All of Dr. Szmuilowicz's patients were given the option of not paying for and not receiving uninsured services. Receiving uninsured services was not a condition of his treating the patients.

The "block fee" method of billing, whether determined on a monthly or a sessional basis, is intended to benefit those patients who frequently utilize many uninsured services. The block fee reduces the average cost of the individual uninsured service utilized by the patient. A "block fee" arrangement is also more economical for the physician to administer since it relieves the physician of the need to keep a separate record for billing purposes of each telephone consultation, akin to a lawyer's docket. If the physician can eliminate "docketing" time and eliminate the administrative cost of separately billing for such time, it allows savings to be passed on to the patient. From the patient's perspective, the block fee method of billing is

"worry free" in that the patient always knows the maximum amount which he or she will be charged no matter how many uninsured services are utilized.

Some of Dr. Szmuilowicz's patients have chosen to pay for uninsured services on a fee-for-service basis. Some have chosen not to receive uninsured services at all. Most of his patients who chose to receive uninsured services have preferred to pay for them by a block monthly or sessional fee. Dr. Szmuilowicz does not exert pressure on his patients to make a specific choice. Immediately prior to the coming into force of O. Reg. 857/93, Dr. Szmuilowicz was treating 15 patients. Three of the 15 patients chose not to receive uninsured services. The remaining 12 patients all chose to pay for uninsured services by means of a monthly block fee.

Dr. Senior

Dr. Steven Senior has been a family physician in Lakefield since 1979, and together with three colleagues with whom he works at the Lakefield clinic, has over 7,000 patients. Before 1991, Dr. Senior generally did not charge patients for uninsured services, whether on an individual service-by-service basis or through the annual fee option. However, because of escalating office and overhead costs, and the physician and staff time and resources required to provide patients with uninsured services, in 1991, Dr. Senior's clinic decided to begin to bill patients for uninsured services.

Since 1991, Dr. Senior has provided his patients with the choice, consistent with the applicable C.P.S.O. guidelines, of paying an annual fee for uninsured services or paying for each uninsured service on a separate service-by-service basis, in order to permit his patients to choose the method of paying which best suited their own assessment of their need for uninsured services, thereby enhancing accessibility to uninsured services.

As required under the C.P.S.O. policy, Dr. Senior has always offered the annual fee option only for a period of one year, has listed the services covered by the annual fee, has advised patients as to how much each service would cost on its own, has advised patients that they do not have to pay an annual fee, but could instead choose to pay for each service on a one-by-one basis, has never threatened to stop seeing any patient who chose not to pay by way of the annual fee, and has never charged patients a fee for "being available" in advance to provide services.

For the fiscal year 1994, Dr. Senior's annual fee was $27.50 per adult, and $12 per family for children under 18 years of age (*i.e.*,

regardless of how many children there were in the family, the annual fee for children was $12). The uninsured services covered
a by this annual fee included prescription renewals by telephone (which involves the time to take the patient's request, locate the chart, review the chart to determine the necessity of the drug and the frequency of renewals and any associated testing that needs to be done before repeats are allowed, call the pharmacy
b and record the information in the patient's chart); telephone advice requested by the patient (which varies from a short consultation to more complex problem-solving and occasionally counselling); preparation of chart summaries (which can be a very labour-intensive request, involving a total chart review and
c forms, certificates, reports, *etc.*, requested by the patient or by a third party (which can vary from basic fitness to return to work or absence from work notes to more complex, lengthy and time-consuming insurance and other medical reports).

None of the clinic's patients ever complained about having the option of paying for uninsured services on either an annual basis
d or on a fee-for-service basis. Approximately 25 per cent of Dr. Senior's 1,900 patients chose the option of paying for uninsured services by way of an annual fee, while the remaining 75 per cent of his patients decided to pay for uninsured services on a separate fee-for-service basis. The patients who chose the annual fee
e option generally tended to be the elderly on fixed incomes, older and other patients who suffer from a variety of illnesses, disabled patients including those injured at work, and families with younger children, all of whom tend to be relatively high users of uninsured services, such as telephone advice and prescription
f renewals. By allowing these patients the ability to pay for services by way of an up-front, inexpensive annual fee, Dr. Senior's concerns about limiting access to his services did not materialize, and he was able to balance what he believed to be his legitimate need for payment with ongoing access for these patients.

As a result of O. Reg. 857/93, all of the clinic's patients have
g lost their freedom to choose to pay for uninsured services on an annual fee basis. This means that almost 500 of Dr. Senior's patients alone have been required to pay for uninsured services on a separate individual service-by-service basis, even though they would have preferred to pay on an annual fee basis.

h The effect of the abolition of the annual fee option on Dr. Senior's practice has been to substantially increase the complexity of and time required for bookkeeping, recording and accounting. There are, on average, over 20 separate uninsured services performed each day. It has also become necessary to follow up and remind patients of the need to pay bills for uninsured ser-

vices that have been rendered. As well, several of Dr. Senior's patients have advised him that they are unhappy with the new procedure of being billed for each individual service. In the past, these patients have tended to require uninsured services on a relatively frequent basis, and have not had to incur any separate expense save for the one-time annual fee. Some of these patients are now more reluctant to request uninsured services because of the additional cost they would now incur. Other patients, for example those who often renew prescriptions by telephone, have noticed an increase in cost over the amount they paid previously.

The prohibition on providing patients with the option of paying for uninsured services on an annual fee basis will increase the cost of providing uninsured services to both the clinic and the clinic's patients, and will adversely affect Dr. Senior's style of practising medicine and the accessibility of his services to some of his patients. In this respect, many patients who chose the annual fee option and for whom that option would continue to make good sense, will be discouraged from seeking the services formerly covered by the annual fee, and will not seek those services because of the concern and uncertainty over added cost each time a service is requested. Furthermore, the resulting inconvenience, and added administrative, clerical, invoicing, accounting and collection costs to Dr. Senior's practice of having to separately account and bill for each service rendered, has resulted in his clinic being required to increase the fees it must charge for providing uninsured services.

Four of Dr. Senior's patients filed affidavits in this proceeding expressing their concern with and opposition to losing the option of choosing to pay for uninsured services on an annual basis. These patients include senior citizens on a fixed income, and their concerns include the greater financial burden and significantly higher cost of being required to separately pay for each individual uninsured service, as well as the adverse effect on the quality and accessibility of the medical care they will receive as a result of their reluctance to request needed uninsured services because of the additional cost under the individual fee-for-service approach.

ISSUE

The issue in these applications is not whether or not the legislature can disallow the "block-fee" method of billing. The issue is whether regulations can prohibit that method of billing by defining it as professional misconduct.

It was not disputed that the vast majority of the physicians and the Ontario Medical Association and the College of Physicians

and Surgeons of Ontario do not consider block billing to be professional misconduct. There was no evidence before us of any professional misconduct with regard to block billing that was not covered by the guidelines or by other sections of the Regulations. The respondent argued that this method of billing is open to abuse by the doctor. The doctor has the ability to influence the patient, is prohibited from doing a number of things that might be permissible if the doctor/patient relationship did not exist. For example, a psychiatrist having consensual sex with a patient is guilty of sexual misconduct. On the other hand, the applicants agree that block billing is open to abuse and some doctors may use their position of influence to persuade a patient to agree to block fees against that patient's interest. They submit that the practice is not professional misconduct because some doctors may abuse it. While as previously stated there was no evidence of actual abuse of the block fee method of billing it is quite possible that some patients may be anxious to please their doctor or not to offend their doctor and may agree to block billing when it is not in their best interests. The applicants argue that certain drugs prescribed by doctors may give the doctors an opportunity to abuse and in some cases have been known to lead to abuse by doctors but this should not outlaw the use of such drugs which are beneficial and which are not abused by the vast majority of doctors.

DECISION

The Divisional Court has determined in two previous cases that block billing is not a method of extra billing for insured services even when it is tied to the number of patient visits: *Redhill v. Ontario Health Insurance Plan* (1990), 75 O.R. (2d) 258, 73 D.L.R. (4th) 457 (Div. Ct.); *Shomair v. Ontario Health Insurance Plan* (1990), 75 O.R. (2d) 266, 73 D.L.R. (4th) 470 (Div. Ct.).

The Divisional Court in the *Shomair* application found that the Board had erred in its finding that the sessional block fee method of billing was necessarily a form of extra billing. In addition, the Divisional Court in both applications indicated that there was nothing inherently unfair to the patient in being charged a block fee for uninsured services, even when the block fee was tied to the number of insured sessions [p. 269]:

> The Board found that at least part of the impugned payments were for uninsured services. The board was concerned that there was a claim for uninsured services whether those services were rendered or not and further that the payments were tied in to the performance of insured services. In regard to the latter concern, it should be remembered that there was a monthly maximum of $150 for uninsured services. The essence of a flat rate contract is that it is payable regardless of the amount of service. There may

be no service or a great deal of service. It is usually tied to a time period. Sometimes it is tied to other events such as miles travelled or calls made. Here, it was tied to professional sessions per month. There can be no objection to such an arrangement on the part of the general manager. It may be a fairer arrangement than a simple monthly charge.

As the decision appears to be based on a wrong principle, it is unreasonable and should not be allowed to stand.

The Divisional Court recognized that a benefit to the public may be derived from this averaging method. It also recognized the theoretical potential for abuse by some physicians inclined to do so. However, the Divisional Court indicated that the College has authority to discipline physicians who charge an unreasonable fee for uninsured services by reason of the regulations and stated in *Redhill* [pp. 265-66]:

If the patient agrees to pay a block fee for specified uninsured services, that would appear to present no problem. . . . If the amount charged is not reasonable, that is a matter for the governing authority of the profession.

After the *Redhill* and *Shomair* decisions, the Ministry of Health wrote to the Registrar of the College of Physicians and Surgeons requesting that the College consider changing its guidelines to prohibit block fees. In May of 1992, the Ministry of Health wrote to Mr. Peter Fraser of the O.M.A. stating the Ministry's position that the charging of block fees for uninsured services contravened both the spirit and intent of the *Accessibility Act*. The Ministry proposed a draft regulation be made under the *Regulated Health Professionals Act, 1991*, S.O. 1991, c. 18 ("R.H.P.A."), concerning block fees. By the fall of 1993 the Ministry was pressing the College to pass a regulation making it an act of professional misconduct for a physician to charge block fees for uninsured services. The Ministry in their letter stated in part:

It may be that there will be many patients who will never use uninsured services but who may feel that their best interests in their relationship with their physician to pay a block fee.

Dr. Olson on behalf of the respondent stated in his affidavit:

The purpose of the impugned sections of Regulation 856/93 under the *Medicine Act* is to ensure that residents of Ontario have access, and believe they have access, to *insured* medical services . . .

(Emphasis added)

The College refused to pass the regulation as suggested by the Ministry and set out their reasons in the letter of November 24, 1993 as follows:

It is fair to say that the general consensus of Council was that the College should be given an opportunity to make the public more aware that they can

> lodge a complaint with the College against any physician who appears to be in contravention of the policy. Public awareness could be raised in a number of ways, including news release or paid advertisements in newspapers and magazines across the province.
>
> As you know, the College's original intent with this policy was to ensure that consumers could make an informed choice about how they wished to be billed for legitimate uninsured services provided by their physicians, i.e., they could choose to pay on a service by service basis or as an all-inclusive annual fee which frequently resulted in a discount for the services provided especially in the case of families. With other OHIP-covered services about to be de-listed, the College continues to be concerned that the cost to patients for medical care will increase, and that without the option of what amounts to a "volume discount" for uninsured services, patients will have to pay more in total than they otherwise might.

The purpose of the *Medicine Act* is to regulate the conduct of doctors and to continue and regulate the College of Physicians and Surgeons of Ontario. In pursuance of that purpose the College made regulations defining professional misconduct. The *Medicine Act* provides:

> 14(6) If the Minister requires the transitional Council to make, amend or revoke a regulation under clause (4)(*b*) and the transitional Council does not do so within sixty days, the Lieutenant Governor in Council may make, amend or revoke the regulation.
>
> (7) Subsection (6) does not give the Lieutenant Governor in Council authority to do anything that the transitional Council does not have authority to do.

However, the impugned regulation was not enacted pursuant to an omnibus provision authorizing the executive legislation "for carrying out the purposes and provisions" of the *Medicine Act* or the R.H.P.A. The validity of the impugned regulation must be determined in light of the restrictions found in s. 14(6) and (7), *supra*. Counsel for Dr. Szmuilowicz referred to the issue as follows:

> . . . did the Transitional Council have authority to enact a regulation defining as "professional misconduct" the charging of a block or annual fee in circumstances where that regulation was made admittedly for the purpose of insuring "that residents of Ontario have access, and believe they have access, to insured medical services."

The purposes for which executive legislative authority is conferred affects its valid scope. The impugned regulation was made pursuant to a specific enabling statutory provision which authorized the Transitional Council to define acts of professional misconduct. However, a statutory power given to a delegate to "define" a particular term is an authority to "settle the limits of" or to "make clear" that particular term. It is not a *carte blanche*. The authority given to the delegate to define a term is limited by

the common meaning of the term: *Trans-Canada Pipe Lines Ltd. v. Saskatchewan (Treasurer)* (1968), 67 D.L.R. (2d) 694 at p. 703, 63 W.W.R. 541 (Sask. Q.B.); *Canada (Attorney General) v. Paulsen*, [1973] F.C. 376 at p. 384, 38 D.L.R. (3d) 225 at pp. 232-33 (C.A.).

In the *Trans-Canada Pipe Lines Ltd. v. Saskatchewan (Treasurer)* case, *supra*, the Act imposed a tax on tangible personal property. Natural gas was exempted from the provisions of the Act. By regulation natural gas was defined as "natural gas used for fuel in homes and buildings". The Provincial Treasurer assessed the appellant company for tax in respect of natural gas used to operate the compressor stations situated along its pipe lines, contending that the gas so used was not within the exemption under the Act and did constitute tangible personal property. It was held that the appellant was not liable for the tax assessed. The legislature had exempted all natural gas from the tax imposed by the Act and the Lieutenant Governor in Council could not by purporting to "define" natural gas amend s. 6 to reduce the statutory exemption. The Regulation was *ultra vires* and thus could not have the same force and effect as if enacted by the Act. At p. 704 the learned judge stated:

> I am of the opinion that if the Lieutenant-Governor in Council had by Regulation defined a "single woman" to mean a "married woman" such a Regulation would have been *ultra vires* the Lieutenant-Governor in Council, for he would by such a Regulation in effect be amending the statute. In like manner the impugned Regulations were in reality attempts to amend s. 6 of the Act.

In the case of *Canada (Attorney General) v. Paulsen*, *supra*, the impugned regulation attempted to define interruption of earnings as taking place four months after the actual employment ceased. The decision held that the power to make regulations defining and determining when an interruption of earning occurs is insufficient to support such a regulation. The power to define or determine does not include a power arbitrarily to alter the meaning of the statute itself. Chief Justice Jackett stated at p. 385 F.C., p. 233 D.L.R.:

> In my view, on the other hand, s. 58(*r*) does not authorize a regulation that, on the face of it, lays down a rule for determining a time that is to be deemed to be the time when the "interruption of earnings" occurred even though it is, on the face of it, a time quite remote from the time when the interruption of earnings really occurred. (Lawyers are so accustomed, in this country, to the unfortunate practice followed by legislative draughtsmen of using so-called "definitions" to give expressions arbitrary meanings that are quite remote from the real sense of the words used that they tend to think of such "definitions" as performing a "defining" function. On reflection, with the aid of the dictionaries, my conclusion is that such a use of a "definition" section is not

an act of "defining" at all.) Section 158 of the Regulations is in this latter class and is not, therefore, in my view, authorized by s. 58(*r*) of the Act.

a

While "professional misconduct" is a general term, there are limits to its meaning:

> It [professional misconduct] is conduct which would be reasonably regarded as disgraceful, dishonourable, or unbecoming of a member of the profession by his well respected brethren in the group — persons of integrity and good reputation amongst the membership.

b

Law Society of Manitoba v. Savino (1983), 1 D.L.R. (4th) 285 at pp. 292-93, 23 Man. R. (2d) 293 (C.A.), *per* Monnin C.J.M. as quoted with approval in *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at p. 890, 84 D.L.R. (4th) 105 at p. 121, *per* Iacobucci J.; and *Matthews v. Board of Directors of Physiotherapy* (1986), 54 O.R. (2d) 375 at pp. 379-81, 26 D.L.R. (4th) 626 (Div. Ct.).

c

Professional persons who have special knowledge, training and skill are in the best position to determine issues of professional misconduct. When the Minister sees fit to override a determination made by a self-governing body of professionals authorized by the legislature to determine such issues, the views of the self-governing body of the profession should be taken into consideration by the court in determining whether the Minister pushed the definition of "professional misconduct" beyond permissible limits, given that the term is peculiarly defined by the standards of the profession: *Pearlman v. Manitoba Law Society Judicial Committee*, *supra*; *Law Society of Manitoba v. Savino*, *supra*; *Hett v. College of Physicians & Surgeons (Ontario)*, [1937] O.R. 582 at p. 587, [1937] 3 D.L.R. 687 at p. 690 (C.A.), *per* Rowell C.J.O.

d

e

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In *Pearlman v. Manitoba Law Society Judicial Committee*, *supra*, Iacobucci J. stated at p. 890 S.C.R., pp. 120-21 D.L.R.:

> To my mind, a large part of effective self-governance depends upon the concept of peer review. If an autonomous Law Society is to enforce a code of conduct among its members, as indeed is required by the public interest, a power to discipline its members is essential. It is entirely appropriate that an individual whose conduct is to be judged should be assessed by a group of his or her peers who are themselves subject to the rules and standards that are being enforced. As Monnin C.J.M. recognized in *Re Law Society of Manitoba and Savino*, *supra* (at pp. 292-3):

g

> Our Legislature has given the benchers the right to pass rules and regulations as well as the right to enforce them. *It would be ridiculous and lacking in common sense to call upon another body of men and women to hear and dispose of complaints of professional misconduct. Professional misconduct is a wide and general term.* It is conduct which would be reasonably regarded as disgraceful, dishonourable, or unbecoming of a member of the profession by his well respected brethren in the group — persons of integrity and good reputation amongst the membership.

h

No one is better qualified to say what constitutes professional misconduct than a group of practising barristers who are themselves subject to the rules established by their governing body.

(Emphasis added)

In *Hett v. College of Physicians and Surgeons (Ontario)*, *supra*, Chief Justice Rowell stated at p. 587 O.R.:

> It appears to me that the natural construction of the language used is that the standard by which the accused is to be judged is not what is infamous or disgraceful conduct in the common judgment of men but that which is infamous or disgraceful conduct in the judgment of his professional brethren of good repute and competency.

In the case of *Pharmaceutical Society of Great Britain v. Dickson*, [1968] 2 All E.R. 686, [1970] A.C. 403 (H.L.), the objects of the Society included:

> . . . to maintain the honour and safeguard and promote the interests of the members in their exercise of the profession of pharmacy.

A motion was made that:

> New pharmacies should be situated only in premises which are physically distinct, and should be devoted solely to: (i) professional services, as defined in para. 19 of the report of the committee on the general practice of pharmacy, (ii) within the limits recommended in the report non-professional services as defined in para. 19 of the report, and (iii) such other services as may be approved by the council; and the range of services in existing pharmacies, or in pharmacy departments of large establishments should not be extended beyond the present limits except as approved by the council.

Lord Reid determined at pp. 689-90:

> The appellants maintain for a number of reasons that this declaration should not be made. In the first place they say that there is no justiciable issue; but I agree with your lordships that this contention must be rejected. If this motion stands it becomes a rule of professional conduct and the appellants do not deny that they will do their best to enforce it. So a pharmacist who does not restrict his trade in this way may be reported to the statutory committee and he will be at risk of that committee finding that he has been guilty of misconduct and of being deprived of his professional qualification. In my judgment the court has the power and duty to determine this question at this stage.
>
> In every profession, of which I have any knowledge, there is a code of conduct, written or unwritten, which makes it improper for members of the profession to engage in certain activities in which ordinary members of the public are quite entitled to engage. Normally this is regarded as a domestic matter within the profession; but it appears to me that if a member of a profession can show that a particular restriction on his activities goes beyond anything which can reasonably be related to the maintenance of professional honour or standards, the court must be able to intervene. In the present case there is also a question whether these restrictions are within the objects of the society. In *Jenkins v. Pharmaceutical Society of Great Britain* [[1921] 1 Ch. 392] it was held that certain attempts to regu-

> late trading by the members were *ultra vires*. But the respondent does not dispute that the society is entitled to regulate such trading activities in so far as that is reasonably necessary to achieve the society's objects set out in the charter. So it becomes a question whether these restrictions can properly be related to the maintenance or improvement of the status of the profession of pharmacy. That these restrictions are in restraint of trade cannot be doubted. Any pharmacist who opens a new chemist's shop can only sell professional or traditional goods in it, and in any existing chemist's shop no new classes of non-traditional goods can be sold unless the council consents.

And further at p. 691:

> I do not doubt that this motion was proposed and supported with the belief that it would assist in maintaining and raising the standards of the profession; but I cannot find from the evidence or from common knowledge any reasonable support for this belief. So I must hold that the motion has not been sufficiently related to the objects of the society to be *intra vires*.

The authority given to the Lieutenant Governor in Council is to define "professional misconduct". Accordingly the statutory purpose for which the regulation must adhere is narrowed. Whether or not the regulation is made with the best of intentions, a departure from the purpose of the *Medicine Act* is objectionable and subject to review by the court. In this case the regulation was made for a purpose extraneous to the purpose of the *Medicine Act* but for the purpose of assuring accessibility and preventing so-called abuses of "extra billing". The definition of "professional misconduct" cannot be distorted to accomplish purposes outside the purpose of the *Medicine Act*: *Doctors Hospital v. Ontario (Minister of Health)* (1976), 12 O.R. (2d) 164, 68 D.L.R. (3d) 220 (Div. Ct.); *Koenig v. Ontario (Minister of Municipal Affairs)* (1994), 21 O.R. (3d) 282, 24 M.P.L.R. (2d) 261 (Div. Ct.); *Nova Scotia (Minister of Environment) v. Cacchione* (1987), 35 D.L.R. (4th) 196 (N.S.S.C.) at p. 207.

In *Doctors Hospital v. Ontario (Minister of Health)*, *supra*, a number of hospitals sought a declaratory order that the decisions of the Minister of Health and the Lieutenant Governor in Council to revoke the approval of the hospitals as public hospitals were made without jurisdiction and were invalid and should be revoked. The Minister had acknowledged by letter that:

> A decision has been regretfully reached that The Doctors Hospital must be among those to be closed as part of the Ontario Government's plan for greater overall cost-efficiency in the provincial health system.

Justice Cory speaking on behalf of the Divisional Court stated at pp. 174-75:

> It has been held that even if made in good faith and with the best of intentions, a departure by a decision-making body from the objects and purposes

of the statute pursuant to which it acts is objectionable and subject to review by the Courts.

In *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at p. 140, 16 D.L.R. (2d) 689 at p. 705, Mr. Justice Rand said:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

In the absence of clear words in the statute, the discretion granted to the Lieutenant-Governor in Council could only be used to pursue the policy and objects of the act, which are to be determined according to the standard canons of construction and to that extent, at least, reviewable by the Courts. That we take to be the view of Mr. Justice Lacourciere expressed in *Multi-Malls* at p. 18 of his reasons, where he in turn was relying upon and to a certain extent interpreting the speech of Lord Reid in *Padfield et al. v. Minister of Agriculture, Fisheries & Food et al.*, [1968] A.C. 997. At p. 1030, Lord Reid stated:

> It is implicit in the argument for the Minister that there are only two possible interpretations of this provision — either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act: the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act.

We have then determined from a review of the *Public Hospitals Act* and its history that it is regulatory in nature. Section 4(5) was not designed or intended to be used as a means of closing hospitals for financial or budgetary considerations.

It was apparent from the material before us, that the decision of the Lieutenant-Governor in Council to revoke the approval of the hospitals was based upon financial consideration. The Lieutenant-Governor in Council was acting, not pursuant to royal prerogative, but by the statutory authority contained in s. 4(5) of the *Public Hospitals Act*.

And further at p. 177:

There will, therefore, be a declaration that the Orders in Council revoking the approval of the applicant hospitals and all Orders in Council

resulting from and concomitant to such Orders in Council revoking approval, are invalid.

In the case of *Koenig v. Ontario, supra*, the Minister of Municipal Affairs had refused to validate a mortgage because of a dispute between two mortgagees. The court held that the decision must be made on proper planning principles and not in an attempt to resolve a dispute. Steele J. stated at pp. 286-87:

> The Minister must exercise his discretion upon proper principles. Any discretion must consider the policy and objects of the statute: see *Multi-Malls Inc. v. Ontario (Minister of Transportation & Communications)* (1976), 14 O.R. (2d) 49 at p. 57, 73 D.L.R. (3d) 18 (C.A.). If the Minister considers extraneous matters beyond the objects and purposes of the statute the decision should be declared invalid: *Doctors Hospital v. Ontario (Minister of Health)* (1976), O.R. (2d) 164 at pp. 175 and 177, 68 D.L.R. (3d) 220 (Div. Ct.).
>
> In my opinion the power of the Minister under s. 57 of the Act is confined to matters contained within the Act. Short of clear policy considerations relating to matters within the Act the Minister in granting validation orders under s. 57 should consider matters similar to those set out in ss. 51 and 53 of the Act relating to the granting of a consent to severance in the first instance.
>
> The Minister's decision does not refer to the guidelines of 1974 which may not be rigidly applicable in view of subsequent amendments to the Act. It would appear that the Minister relied heavily upon "the subsequently registered interests on title" rather than upon planning considerations within the meaning of the Act. In fact counsel for the Minister in argument stated that if it had not been for Saitowitz's intervention the Minister's approval to the request of Barrie would have been automatic. I agree with the statement in the Minister's factum that the Minister's power to cure technical breaches of the Act does not extend to determining disputed rights between interested parties in a lawsuit. The factum further states that once the lawsuit has been decided or abandoned that an application can be made again. This shows that the Minister did not appreciate the effect of his refusing to consider the matter on planning principles. In effect he has determined the priority issues in the court proceedings. Without his approval the mortgage is void and the priority issues in the court are thus not open to argument. In my opinion the Minister had no ulterior motive in refusing the consent. He merely misunderstood his function.
>
> The onus is upon the applicant to show that the Minister made his decision upon extraneous principles. The decision shows that he considered extraneous principles and in view of his counsel's submission to this court it is clear that these were the paramount matters going to his decision. For these reasons the decision is quashed.

In a number of cases evidence has been admitted to show that an order was for purposes other than that permitted under the statute: *LaRush v. Metropolitan Toronto & Region Conservation Authority*, [1968] 1 O.R. 300 at pp. 306-10, 66 D.L.R. (2d) 310 at pp. 316-20 (C.A.); *Heppner v. Alberta (Minister of Environment)* (1977), 80 D.L.R. (3d) 112 at p. 117, 4 Alta. L.R. 139 (C.A.).

In *LaRush v. Metropolitan Toronto & Region Conservation Authority, supra*, the Court of Appeal held that in determining the true purposes motivating the Authority in taking a particular parcel of land, the court is fully justified in examining reports by the Authority's experts submitted both to it and to the Minister and the minutes of the meetings at which these reports were considered and is not restricted to a scrutiny of the formal recital of "conservation purposes" contained in the expropriation notice service upon the owner.

In the *Heppner v. Alberta (Minister of Environment)* case, *supra*, the legislation permitted the Government to establish restricted development areas to control everything of detriment to the environment by regulations. Such an area was established which was on the face of the regulation for such purposes. The real purpose of the area was stated by the Minister of the Government in a letter to be a transportation and utility corridor which was detrimental to the area environment and accordingly the regulation was *ultra vires* the Act. Lieberman J.A. stated at p. 117:

> The argument of counsel for the appellant may be divided into two main heads:
>
> 1. Order in Council 1062/76 is invalid in that it was promulgated for the purpose of creating a "transportation and utility corridor," a purpose not authorized by-the Act.
>
> 2. Order in Council 1062/76 is invalid in that it is contrary to s. 1(a) of the *Alberta Bill of Rights* 1972, (Alta.), c. 1.
>
> It is a fundamental rule that subordinate legislation must, in order to be valid, come within the terms of the empowering statute. This rule is clearly stated by Sedgewick, J., in *Hartley v. Mason* (1902), 32 S.C.R. 575, where he says at p. 580:
>
> > . . . no ordinances or regulations passed by the Governor in Council, repugnant to the express provisions of the Act of Parliament giving the subordinate authority jurisdiction to make them can have any legal effect.
>
> It is, of course, clear that the Courts have jurisdiction to declare invalid, subordinate legislation that offends this cardinal rule.

And further at p. 202 [*Nova Scotia (Minister of Environment) v. Cacchione*]:

> It is clear from the decision of Judge Cacchione, particularly those paragraphs that I have already quoted, that he could not find in the *Environmental Protection Act* authority for the passing of N.S. Reg. 116/86. He found the purpose of the Act to be that set out in s. 3 of the Act, the preservation and protection of the environment — that it is directed towards pollution and does not enable the Minister to make a regulation under the Act dealing with an increase of vehicular traffic.

> Despite the argument of the applicant, to which I will later refer, I am of the opinion that Judge Cacchione was correct in his interpretation of the *Environmental Protection Act*, vis-à-vis the impugned regulation and that he committed no error of law on the face of the record.
>
> The pith and substance of N.S. Reg. 116/86 is the control of vehicular traffic on public highways or access roads adjacent to a project licensed or to be licensed under the Act as a result of the operation or likely operation of that project.
>
> The purpose of the Act as set out in s. 3 is the preservation and protection of the environment.

Further at p. 207:

> The control of vehicular traffic on highways adjacent to a project permitted under the Act cannot be said to relate to pollution and the protection and preservation of the environment, and be within the purview of the purpose and intent of the Act.

In the case of *Ritholz v. Manitoba Optometric Society (No. 2)* (1959), 21 D.L.R. (2d) 542, 30 W.W.R. 204, the Manitoba Court of Appeal set aside a regulation that provided that no optometrist could be employed by a corporation. Schultz J.A. stated at pp. 549-50:

> For the purpose of decision in the present case I do not find it necessary to go into the merits of this position because I am in agreement with the learned trial Judge that art. XV is invalid on the ground of unreasonableness. I restrict my decision to the point that the article goes unnecessarily far in prohibiting any optometrist being "employed as an Optometrist by any corporation". The professions of law, medicine and dentistry permit their members to accept employment by firms, corporations, hospitals, municipal corporations, governments, and in my opinion higher standards are not required nor can they be justified as necessary to the proper control, regulation and discipline of the members of the Optometric Society.

In the result, the respondents have by the impugned regulation created a situation whereby doctors, such as the applicants, if they continue to block bill, would bear the stigma and unfair blemish on their records that they had been guilty of "professional misconduct".

Even if somehow the Ministry were deemed to have expertise in defining and determining an appropriate definition for professional misconduct, we would have found their definition patently unreasonable and would have set it aside. Since they do not have such expertise, *a fortiori* their definition must be set aside. There was no evidence before us of any impropriety of the applicants and very little, if any, allegations of abuse by other physicians. So long as the block billing policy of a physician and the manner in which the policy is administered does not offend the College's guideline; so long as the block billing is not coercive; is not subject to inter-

pretation that services will be withheld if the option for block billing is not chosen; is not excessive in amount; and as long as it is clear that the acceptance by the patient of extra billing is voluntary and optional and fully complies with the code of the College, then offering the option cannot be said to constitute professional misconduct. On the other hand, any of the improprieties suggested by failure to adhere to the requirements of the College, some of which are set out above, in both the policy of block billing and its administration by individual physicians and their staff would constitute professional misconduct and could lead to appropriate proceedings by the College of Physicians and Surgeons. Block billing however, in and of itself, is not professional misconduct.

Accordingly there will be an order declaring that para. 23 of s. 1(1) of O. Reg. 856/93 as amended by O. Reg. 857/93 made pursuant to s. 14(6) of the *Medicine Act* is *ultra vires* the *Medicine Act* and is of no force and effect.

If the parties cannot agree on the question of costs, we will receive written submissions in that regard.

Applications allowed.

Edwards Estate et al. v. Lovie et al.

[Indexed as: Edwards Estate v. Lovie]

Ontario Court (General Division), Cavarzan J. May 10, 1995

Police — Confidentiality of information — Words "and not contained in a record as defined in the Freedom of Information and Protection of Privacy Act" in s. 108(2) of Police Services Act to be read as relieving from confidentiality obligation in s. 108 if information is ordered to be released pursuant to application under applicable freedom of information statute — Freedom of information statutes prevailing over confidentiality provisions of Police Services Act — Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31 — Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56 — Police Services Act, R.S.O. 1990, c. P.15, s. 108.

The plaintiffs moved for orders compelling the defendants to produce documentation relating to an internal investigation carried out by the Police Services Board or relating to the complaint submitted to the Police Complaints Commissioner arising from the events surrounding an arrest, and compelling the defendant M to attend an examination for discovery to answer questions with respect to that documentation. The issue raised on the motion was whether s. 108 of the *Police Services Act* amounts to a prohibition against producing for inspection documentation prepared during an investigation into a complaint made about the conduct of a police officer.

***Village Shopping Plaza (Waterdown Ltd.) et al. v. Regional Municipality of Hamilton, Wentworth et al.* (1981),34 O.R. (2d)311**

[HIGH COURT OF JUSTICE]
DIVISIONAL COURT

Village Shopping Plaza (Waterdown) Ltd. et al. v. Regional Municipality of Hamilton-Wentworth et al.

GALLIGAN, GRANGE AND CATZMAN JJ. 22ND OCTOBER 1981.

Municipal law — Development permits — Niagara Escarpment Commission and Minister of Housing requiring applicants to enter agreement with regional municipality regarding road allowance — Power of regional municipality to require dedication of property for road allowance without compensation — Power of Commission or Minister to compel such dedication as condition of issuance of development permit — Niagara Escarpment Planning and Development Act, 1973 (Ont.), c. 52, ss. 2, 8(g), 22a(2)(b), 24(4) — Planning Act, R.S.O. 1970, c. 349, s. 35a(6)(a).

The applicants owned adjoining parcels of land fronting onto an arterial road in the Township of Flamborough in the Regional Municipality of Hamilton-Wentworth. Separate applications for development permits were submitted under the *Niagara Escarpment Planning and Development Act*, 1973 (Ont.), c. 52 (now R.S.O. 1980, c. 316), to the Niagara Escarpment Commission which circulated copies to various municipalities. In accordance with its own road allowance widening policy, Hamilton-Wentworth responded that it would require both applicants to dedicate a strip of land without compensation for road widening purposes. Both the Commission and, on appeal, the Minister stipulated that, *inter alia*, each applicant enter into an agreement with Hamilton-Wentworth regarding a road allowance. Applicants sought judicial review of the two decisions of the Commission and the two decisions of the Minister.

Held, (1) the Regional Municipality of Hamilton-Wentworth lacked statutory authority to require dedication without compensation of any part of the applicants' lands on an application for the issuance of a development permit, and (2) both the Commission and the Minister lacked power to compel, by way of condition to the issuance of a development permit, dedication to a municipality which has no such statutory power.

Section 24(4) (now s. 25(4)) of the Act empowers the Minister, or the Commission as delegate, to issue development permits "subject to such terms and conditions as it considers desirable". However, this power must be exercised in fulfillment of the objective of the statute which is to maintain the escarpment and control compatible development. Given that the applicants' proposed development conformed to the Commission's policies, neither the Commission nor the Minister, in the absence of any express or necessarily implied statutory authorization, was entitled to require satisfaction of Hamilton-Wentworth's road widening policy as a condition of issuing a development permit.

Furthermore, s. 8(*g*) of the Act, which empowers the Commission to support municipalities "in their exercise of the planning functions conferred upon them by *The Planning Act*", was inapplicable because the planning functions in respect of the applicants' lands were the responsibility of the Township of Flamborough, not of Hamilton-Wentworth.

[*Re Pinetree Development Co. Ltd. and Minister of Housing for Province of Ontario et al.* (1976), 14 O.R. (2d) 687, 1 M.P.L.R. 277; *Re Doctors Hospital and*

Minister of Health et al. (1976), 12 O.R. (2d) 164, 68 D.L.R. (3d) 220, 1 C.P.C. 232; *A.-G. Can. v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1, 33 N.R. 304; *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689, apld; *Cignini v. Minister of Housing for Ontario and Niagara Escarpment Commission* unreported (June 4, 1980), distd]

APPLICATION for judicial review of two decisions of the Niagara Escarpment Commission and two decisions of the Minister of Housing.

Paul McLaughlin, for applicants.
L. A. Pirelli, for Regional Municipality of Hamilton-Wentworth, respondent.
Janet E. Minor, for Minister of Housing and Niagara Escarpment Commission, respondents.

The judgment of the Court was delivered by

CATZMAN J.:—This is an application for judicial review of certain decisions of the Niagara Escarpment Commission ("the Commission") and the Minister of Housing ("the Minister") with respect to applications for development permits made under the *Niagara Escarpment Planning and Development Act*, 1973 (Ont.), c. 52 [now R.S.O. 1980, c. 316] ("the Act").

The applicants own two adjoining parcels of land in Waterdown, a village located in the Township of Flamborough ("Flamborough") in the Regional Municipality of Hamilton-Wentworth ("Hamilton-Wentworth"). These parcels front on Hamilton Street, an arterial road in the Hamilton-Wentworth road system.

The lands of both applicants are within the area of development control established under the Act. By virtue of O. Reg. 453/75 [now R.R.O. 1980, Reg. 685] made under the Act, the operation of local zoning by-laws within the area of development control (which includes the applicants' lands) was suspended, and anyone seeking to develop lands within the area was obliged to apply to the Minister (or where, as in the present case, the Minister delegated to the Commission his power to issue permits, to the Commission) for a development permit.

Since 1975, the applicants have made six applications for development permits in respect of their properties. The first four applications were ultimately withdrawn, and we are concerned in the instant case only with the fifth and sixth applications. The fifth application, dated February 1, 1978, was made by the applicant Joe Swirski ("Swirski") for the erection of a retail store, bank and offices on his property. The sixth application, dated February 1, 1979, was made by the applicant Village Shopping Plaza (Waterdown) Limited ("Village Plaza") for expansion of its shopping plaza facilities.

Following submission of these applications, the Commission circulated copies and received replies from various municipalities and municipal departments. Neither Flamborough nor the Commission's own staff advanced any serious objection to either application. Hamilton-Wentworth, however, responded to both applications with a requirement that a strip of land, variously described as 27 ft. and 17 ft. in width, be dedicated by the applicants to Hamilton-Wentworth without compensation for road allowance widening purposes. This requirement by Hamilton-Wentworth was based upon an interim road allowance widening policy passed by it on December 3, 1974 (which was in effect from that date until August 15, 1978), and on Policy P-1 Road Allowance Widening on Regional Roads, passed by it on August 15, 1978. These policies established certain target road allowance widths on regional roads, including Hamilton Street, on which the applicants' lands fronted.

On October 24, 1978, the Commission approved the fifth application subject to a number of conditions, including the following:

> 8. That prior to the issuance of a Development Permit by the Niagara Escarpment Commission the applicant enter into an agreement with the Regional Municipality of Hamilton-Wentworth to satisfy their concerns with regard to the future widening of Hamilton Street.

Swirski appealed the decision of the Commission to the Minister who, on January 31, 1979, after reviewing the report of the hearing officer appointed under s. 24(6) of the Act, directed the Commission to issue a development permit subject to certain conditions, of which the following are relevant:

> 8. That prior to the issuance of a development permit by the Niagara Escarpment Commission the applicant enter into an agreement with the Regional Municipality of Hamilton-Wentworth to satisfy their concerns with regard to the future widening of Hamilton Street.
>
> 9. That non-fulfillment or breach of any one of conditions 1 to 8 shall render the development permit null and void.

On October 3, 1980, the Commission approved the sixth application subject to a number of conditions, including the following:

> 5. That prior to the issuance of a Building Permit by the Township of Flamborough, the applicant enter into an agreement with the Regional Municipality of Hamilton-Wentworth regarding the future widening of Hamilton Street.

Village Plaza appealed the decision of the Commission to the Minister who, on February 6, 1981, after reviewing the report of the hearing officer, made this disposition of the appeal:

> After reviewing the hearing officer's report . . . I concur with his opinion that a development permit should not be issued.
>
> I also agree with the hearing officer that a new application should be submitted, taking into consideration the concerns of the affected parties mentioned in his report. Further, the question of the road widening should be settled with the

> Region of Hamilton-Wentworth, preferably before the new application is submitted.

The applicants then brought this application for judicial review of the two decisions of the Commission and the two decisions of the Minister to which reference has been made.

The principle is well-established that a municipal corporation does not have powers other than those conferred upon it by statute: *Re Pinetree Development Co. Ltd. and Minister of Housing for Province of Ontario et al.* (1976), 14 O.R. (2d) 687, 1 M.P.L.R. 277. Correspondingly, the discretion conferred by the Act on the Minister and the Commission must be exercised by them in pursuance of the objects and policy of that Act: *Re Doctors Hospital and Minister of Health et al.* (1976), 12 O.R. (2d) 164, 68 D.L.R. (3d) 220, 1 C.P.C. 232; *A.-G. Can. v. Inuit Tapirisat of Canada et al.*, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1, 33 N.R. 304. The disposition of this application therefore requires consideration of the relevant statutory provisions, to which I now turn. Though I use the present tense, the section numbers referred to are those of the statutes indicated which were in force at the material times.

While Hamilton-Wentworth, by the combined effect of s. 55(4) [rep. & sub. 1978, c. 33, s. 100] of the *Regional Municipality of Hamilton-Wentworth Act*, 1973 (Ont.), c. 74 [now R.S.O. 1980, c. 437], and s. 33(5) [am. 1972, c. 118, s. 5(1); am. 1974, c. 53, s. 5(1)] of the *Planning Act*, R.S.O. 1970, c. 349 [now R.S.O. 1980, c. 379], has power to impose, as a condition of approval of a plan of subdivision of land abutting on an existing highway, the dedication of lands without compensation to provide for the widening of the highway, it is common ground that Hamilton-Wentworth has no such statutory authority on an application for rezoning or for the issuance of a development permit. (Flamborough, however, may have such power: see s. 35a(6)(*a*) [enacted 1973, c. 168, s. 10; rep. & sub. 1979, c. 59, s. 1] of the *Planning Act*.) Nor is there any provision of the Act which specifically empowers the Minister or the Commission to require the dedication of land without compensation to a municipality for road allowance widening or to require applicants for development permits to enter into agreements with a municipality relating to road allowance widening as a condition of the issuance of a development permit. The purpose of the Act, as set out in s. 2 thereof, is:

> 2. . . . to provide for the maintenance of the Niagara Escarpment and land in its vicinity substantially as a continuous natural environment, and to ensure only such development occurs as is compatible with that natural environment.

As noted, there were no environmental objections to the applicants' proposed development and while, by s. 22a(2)(*b*) of the Act, as amended [1974, c. 52, s. 3; 1976, c. 35, s. 3], the Minister is

empowered to make regulations providing for the issuance of development permits and prescribing terms and conditions of permits, no such regulations have been made.

Counsel for the respondents rely on s. 24(4) of the Act, which empowers the Minister (or, in the circumstances of the instant case, the Commission), to:

> . . . issue [a] development permit or to refuse to issue the permit or to issue the permit subject to such terms and conditions as it considers desirable.

The power to impose terms and conditions must, however, be exercised within the perspective within which the statute is intended to operate: *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at p. 140, 16 D.L.R. (2d) 689. The stated objective of the Act is the maintenance of the escarpment and the control of compatible development. The Commission's own staff agreed that the applicants' proposed development conformed to its policies. In the absence of any express or necessarily implied statutory authorization, the Commission was not, in my view, entitled to oblige the applicants to satisfy Hamilton-Wentworth's road widening policy as a condition of issuing a development permit.

Reference was also made in argument to s. 8(*g*) of the Act, which provides:

> 8. In preparing the Niagara Escarpment Plan, the objectives to be sought by the Commission in the Niagara Escarpment Planning Area shall be,
>
> . . . . .
>
> (*g*) to support municipalities within the Niagara Escarpment Planning Area in their exercise of the planning functions conferred upon them by *The Planning Act*.

It should be remembered, however, that the planning functions in respect of the applicants' lands — as counsel for Hamilton-Wentworth conceded — were the responsibility of the Township of Flamborough, not of Hamilton-Wentworth. Thus, s. 35a(6)(*a*) of the *Planning Act*, referred to above, confers the power to exact dedication of land without compensation for highway widening only upon Flamborough, not Hamilton-Wentworth. If, quite apart from the provisions of the Act, Hamilton-Wentworth sought land for highway widening purposes, it could negotiate with the owner for the purchase of such land, or could expropriate it. Nothing in the Act inhibits Hamilton-Wentworth from such negotiation or expropriation, but it would in either case be obliged to compensate the owner for the land taken. In the present case, Hamilton-Wentworth seeks to obtain such land without compensation, and the Commission seeks to give Hamilton-Wentworth such land as a condition of the issuance of a development permit under the Act.

Much of the argument was directed to the judgment of this Court in *Cignini v. Minister of Housing for Ontario and Niagara Escarp-*

ment Commission (June 4, 1980, unreported). The *Cignini* case involved an application for judicial review of the Minister's decision refusing an application for a development permit on the ground, *inter alia*, that the Minister had improperly fettered his discretion by basing his decision not on the merits but on the policy of a local municipality as evidenced by a by-law enacted by it which had not yet received Municipal Board approval. Steele J., giving the judgment of the court dismissing the application for judicial review, said at pp. 6-7 of the reasons for judgment:

> It is clear that the hearing officer considered all issues reported in summary and gave his opinion. We read his report as giving weight to the township's submission and its By-law 78-27 but not being bound by it or precluded from making an independent decision or recommendation because of it.
>
> By s. 22(*a*) of the Act all municipal by-laws become ineffective within a development area and it is for the Minister to make the decision with respect to the issuance of a permit. In so doing he must consider the objectives of the Commission as set out in s. 8 of the Act. The relevant portion of which has been included in the hearing officer's report. *One of those objectives is to support the exercise of municipal planning functions under the Planning Act. While 78-27 was not an effective by-law it represented the exercise by the municipality of a planning function* and a hearing officer and the Minister had the obligation to consider it.

(Emphasis added.)

In my view, the *Cignini* case is distinguishable from the case at bar. There was no suggestion in *Cignini* that, but for the provisions of the Act, the local municipality lacked the authority to enact the by-law which the hearing officer and the Minister considered in reaching their decisions. In the present case, on the other hand, Hamilton-Wentworth, before the Act was made applicable to the area which includes the applicants' lands, admittedly lacked any statutory authority to require dedication of any part of their lands without compensation for road widening purposes.

By regulation under the Act, the Minister can effectively suspend the operation of local by-laws where an area of development control is designated. On the authority of *Cignini*, he may, on an application for a permit to develop land within such area, properly consider the wishes of a municipality which, but for such regulation, would have authority over planning functions for the proposed development. But he cannot, in my opinion, give effect to a declared policy of a municipality which has no such authority. Even the broad language of s. 24(4) of the Act cannot, in my view, confer upon the Minister or the Commission the power to compel, by way of condition to the issuance of a development permit, the dedication of land without compensation to a municipality which has no such statutory power.

Having reached this conclusion, I find it unnecessary to consider the applicants' further argument that, in imposing the condition of

satisfying Hamilton-Wentworth on the road widening, the Commission and the Minister were unlawfully sub-delegating the power delegated by the statute to them.

In the result, I would quash those portions of the decisions of the Commission and of the Minister hereinbefore set out (with the exception of condition No. 9 in the Minister's decision dated January 31, 1979, which, in accordance with these reasons, should refer to "conditions 1 to 7" rather than "conditions 1 to 8"). The applicants will have their costs of this application.

Application allowed; decisions quashed in part.

[COUNTY COURT]
JUDICIAL DISTRICT OF NIAGARA SOUTH

Saccone v. Orr

JACOB Co. Ct. J. 11TH SEPTEMBER 1981.

Torts — Invasion of privacy — Defendant liable for playing unauthorized recording of telephone conversation against plaintiff's will.

The defendant recorded a private telephone conversation with the plaintiff, without the plaintiff's knowledge. The plaintiff learned of the recording, despite the defendant's denial, and told the defendant not to use it. The defendant played the tape at a municipal council meeting and the tape was subsequently published in the local newspaper. The plaintiff sought damages for embarrassment caused by tortious invasion of privacy. No special damages were claimed and no material loss was established.

Held, on a motion to dismiss the action on the grounds that there was no cause of action known as "invasion of privacy", there should be judgment for the plaintiff.

In the circumstances proven, the plaintiff must be given some right of recovery. The law of Ontario recognized a right of action for invasion of privacy and for want of a better description this was an invasion of privacy. The plaintiff was entitled to damages of $500 and costs.

[*Krouse v. Chrysler Canada Ltd. et al.*, [1972] 2 O.R. 133, 25 D.L.R. (3d) 49, 5 C.P.R. (2d) 30 [revd 1 O.R. (2d) 225, 40 D.L.R. (3d) 15, 13 C.P.R. (2d) 28], apld; *Motherwell et al. v. Motherwell* (1976), 73 D.L.R. (3d) 62, [1976] 6 W.W.R. 550, 1 A.R. 47; *Burnett v. The Queen in right of Canada et al.* (1979), 23 O.R. (2d) 109, 94 D.L.R. (3d) 281, 9 C.P.C. 310; *Krouse v. Chrysler Canada Ltd. et al.* [1970] 3 O.R. 135, 12 D.L.R. (3d) 463, 1 C.P.R. (2d) 218, consd]

ACTION in tort for invasion of privacy.

Charles A. Galloway, for plaintiff.
David Crowe, for defendant.

JACOB Co. Ct. J. (orally):—In the matter of Augustine Saccone,

***Saskatchewan Wheat Pool v. Canada (Attorney General)* (1993), 107 DLR 94th) 190**

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made by the applicant and the respondent, that the court could in any event order to be filed pursuant to Federal Court Immigration Rule 14(2). If I am in error with respect to the application of Federal Court Rules 5 and 6, then I hereby exercise my authority pursuant to Federal Court Immigration Rule 14(2) and direct the filing of the transcript.

The respondent shall have two weeks from the date of these directions to file any further representations which he wishes to make.

Order accordingly.

Re Saskatchewan Wheat Pool et al. and Attorney-General of Canada

[Indexed as: Saskatchewan Wheat Pool v. Canada (Attorney-General)]

Court File No. T-1962-93

Federal Court, Trial Division, Rothstein J. *September 10, 1993.*

Statutes — Subordinate legislation — Validity — Governor in Council extending application of Canadian Wheat Board Act by regulation to barley — Effect of extension to give Wheat Board or licensee exclusive control of interprovincial and international trade in barley — Governor in Council subsequently passing regulation, partially deregulating interprovincial and American trade in barley — Regulation invalid — Canadian Wheat Board Act, R.S.C. 1985, c. C-24, ss. 46, 47 — Canadian Wheat Board Regulations, C.R.C. 1978, c. 397 — Canadian Wheat Board Regulations Amendment, SOR/93-360.

Courts — Jurisdiction — Federal Court — Judicial review — Party challenging validity of regulation made by Governor in Council — Governor in Council federal board — Proceeding should commence by way of originating notice — Federal Court Act, R.S.C. 1985, c. F-7, s. 18.1.

Statutes — Interpretation — Particular terms — "Federal board" — Term including Governor in Council acting pursuant to statute — Federal Court Act, R.S.C. 1985, c. F-7, ss. 2(1), 18.1.

Section 47 of the *Canadian Wheat Board Act*, R.S.C. 1985, c. C-24, provides that the Governor in Council can, by regulation, extend the application of Parts III and IV to oats and/or barley, thereby vesting in the Canadian Wheat Board exclusive control over the interprovincial and export marketing and import of those commodities. Section 9 of the *Canadian Wheat Board Regulations*, C.R.C. 1978, c. 397 extends Parts III and IV of the Act to barley, with the effect that no wheat or barley may be marketed interprovincially or internationally except by the board or by a person licensed by the board. By Order in Council P.C. 1993-1399 (SOR/93-360), the Governor in Council passed a regulation permitting trade in barley interprovincially or to or from the United States without a licence.

On an application for judicial review to determine the validity of this regulation, **held**, the application should be granted and SOR/93-360 should be declared *ultra vires*.

When the Governor in Council acts pursuant to a statute, it is a federal board within s. 2(1) of the *Federal Court Act*, R.S.C. 1985, c. F-7. In challenging a decision or order of the Governor in Council made pursuant to statutory authority, the correct procedure is by way of originating notice under s. 18.1 of the *Federal Court Act*, even if the Governor in Council acts in a legislative capacity.

The regulatory power in s. 47 of the *Canadian Wheat Board Act* is not spent once it is acted upon by the Governor in Council. The regulation-making authority of the Governor in Council under the licensing provisions of s. 46 of the Act does not include the power to authorize export or import of barley to or from the United States without a licence and, by implication, the interprovincial trading of barley without a licence. Section 47 does not permit regulation to allow interprovincial trading in barley or trade with the United States without a licence. Therefore, the impugned regulations were not authorized by the Act.

Cases referred to

National Anti-Poverty Organization v. Canada (Attorney-General) (1988), 21 C.P.R. (3d) 305, [1989] 1 F.C. 208, 32 Admin. L.R. 1, 21 F.T.R. 33; revd 60 D.L.R. (4th) 712, 26 C.P.R. (3d) 440, [1989] 3 F.C. 684, 36 Admin. L.R. 197, 99 N.R. 181, 28 F.T.R. 160*n*, 15 A.C.W.S. (3d) 381 [leave to appeal to S.C.C. refused 62 D.L.R. (4th) viii, 28 C.P.R. (3d) vi, 105 N.R. 160*n*]; *Saskatchewan Wheat Pool v. Canada (Attorney-General)* (1993), 41 A.C.W.S. (3d) 1144; vard *ante*, p. 63, 43 A.C.W.S. (3d) 70; *Murphy v. C.P.R. Co. and A.-G. Can.* (1958), 15 D.L.R. (2d) 145, [1958] S.C.R. 626, 77 C.R.T.C. 322; *Lacey v. Canada*, [1990] 1 F.C. 168, 28 F.T.R. 205, 17 A.C.W.S. (3d) 366 [affd 127 N.R. 311, 27 A.C.W.S. (3d) 1106; leave to appeal to S.C.C. refused 138 N.R. 406*n*]; *Booth v. The King* (1915), 21 D.L.R. 558, 51 S.C.R. 20; *Municipal Corporation of the City of Toronto v. Virgo*, [1896] A.C. 88; affg 22 S.C.R. 447

Statutes referred to

Canadian Wheat Board Act, R.S.C. 1985, c. C-24, ss. 45, 46 [am. 1988, c. 65, s. 60], 47, 61, Parts III, IV

Canadian Wheat Board Act, 1935, S.C. 1935, c. 53 (as amended by 1947, c. 15), s. 29A [enacted 1948, c. 4, s. 5], Parts III, IV

Federal Court Act, R.S.C. 1985, c. F-7, ss. 2(1), definition "federal board, commission or other tribunal" [renumbered 1990, c. 8, s. 1(1); rep. & sub. *idem*, s. 1(3)], 17 [am. *idem*, s. 3], 18 [rep. & sub. *idem*, s. 4], 18.1 [enacted *idem*, s. 5]

Interpretation Act, R.S.C. 1985, c. I-21, s. 31(4)

Rules and regulations referred to

Canadian Wheat Board Regulations, C.R.C. 1978, c. 397, ss. 9 [rep. & sub. SOR/89-282, s. 1], 14 [rep. & sub. SOR/86-213, s. 1; am. SOR/89-281, s. 4], 15 [rep. & sub. SOR/93-360, s. 2], 16.1 [enacted *idem*, s. 3]

P.C. 3376, July 28, 1948 (*Canadian Wheat Board Act, 1935*)

P.C. 3713, July 20, 1949 (*Canadian Wheat Board Act, 1935*), ss. 13, 15, 18

APPLICATION for judicial review pursuant to s. 18.1 of the *Federal Court Act* (Can.) to determine the validity of certain regulations under the *Canadian Wheat Board Act*.

John Beke, Q.C., and *James Nugent*, for applicant, Saskatchewan Wheat Pool.

Brian E. Leroy, for applicant, Alberta Wheat Pool.

Alan W. Scarth, Q.C., for applicant, Manitoba Pool Elevators.

Mark Kindrachuk and *Mary Lou Senko*, for respondent.

ROTHSTEIN J. (orally):—The issue in this case is whether certain regulations made by the Governor in Council under the *Canadian Wheat Board Act*, R.S.C. 1985, c. C-24, as amended, are *ultra vires* and of no force and effect.

Preliminary question as to procedure

The proceedings were commenced by way of notice of motion for judicial review pursuant to s. 18.1 of the *Federal Court Act*, R.S.C. 1985, c. F-7, as amended. In the course of setting this matter down for hearing, the question of whether these proceedings should be by way of application for judicial review under s. 18.1 or by way of action and statement of claim was considered by the parties.

Counsel for the Saskatchewan Wheat Pool was of the view that the appropriate procedure might be that of an action commenced by way of statement of claim. Counsel for the respondent did not object to this approach, and an agreement was reached that the matter should proceed by way of action instead of by way of application for judicial review. A document dated August 30, 1993, entitled "Agreement as to Procedure" was filed to this effect.

As the matter presently stands, there is filed a motion seeking judicial review and a statement of claim commencing an action and a statement of defence in response. While there is no doubt that, between the two procedures, the matter is properly before the court (and I will grant the extension of time sought with respect to the filing of the application for judicial review), for the sake of clarity, I will briefly express my views as to the appropriate procedure in a case such as this.

"Federal board, commission or other tribunal" is defined in s. 2(1) of the *Federal Court Act*:

> "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown . . .

When the Governor in Council acts pursuant to a statute, it is a federal board: see, for example, *National Anti-Poverty Organization v. Canada (Attorney-General)* (1988), 21 C.P.R. (3d) 305, [1989] 1 F.C. 208, 32 Admin. L.R. 1 (T.D.); reversed without comment on this point 60 D.L.R. (4th) 712, 26 C.P.R. (3d) 440, [1989] 3 F.C. 684 (C.A.).

Section 18(1) and (3) of the *Federal Court Act* states:

> 18(1) Subject to section 28, the Trial Division has exclusive original jurisdiction
>
> (*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.
>
> . . . . .
>
> (3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

It would appear from these provisions that in challenging a decision or order of the Governor in Council made pursuant to statutory authority, the correct and only procedure is to proceed by way of originating notice under s. 18.1 of the *Federal Court Act* as was originally done here.

Counsel for the Saskatchewan Wheat Pool, however, submitted that when the Governor in Council is acting in a legislative capacity, as he says is the case here, the Governor in Council is not a federal board and thus s. 18(3) is not applicable. While the proceeding is against the Attorney-General of Canada as contemplated by s. 18(1)(*b*), counsel says that in substance the proceeding is against the Crown and that such proceeding is properly by way of action.

In addition, he relies on s. 17(3)(*b*) which provides:

> 17(3) The Trial Division has exclusive original jurisdiction to hear and determine the following matters:
>
> . . . . .
>
> (*b*) any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined by the Federal Court, the Trial Division, or the Exchequer Court of Canada;

As I have said, an agreement between counsel to proceed by way of action and to have a question of law determined has been entered into by the parties and has been filed.

As I read s. 17 of the *Federal Court Act*, it is the basic provision that confers jurisdiction on the Federal Court, which, of course, is a statutory court and not a court of inherent jurisdiction. In the absence of other specific provisions, all proceedings in the court would be commenced under s. 17.

Section 18 is a specific statutory provision which deals with prerogative writs and declarations in respect of decisions and

orders of federal boards, commissions and other tribunals. As I read s. 18, it clearly provides that proceedings brought against the Attorney-General of Canada for declaratory relief in respect of a decision or order of a federal board, commission or other tribunal are to be brought by way of application for judicial review under s. 18.1 and in no other way. The fact that the parties have agreed that the Federal Court shall decide a question of law does not derogate from s. 18. If the question relates to a federal board, commission or other tribunal, judicial review is the proper procedure. Nor do I see any distinction in the definition of federal board, commission or other tribunal or in s. 18 that would exclude from the ambit of s. 18 the Governor in Council or any other federal board when acting in a legislative capacity.

No explanation has been provided that satisfies me that Parliament would have intended that legislative acts of federal boards, commissions or other tribunals should be challenged by way of action while decisions or orders of a judicial, *quasi*-judicial or administrative nature should be challenged by way of judicial review. Indeed, the amendments to the *Federal Court Act* brought into force on February 1, 1992, were introduced, at least in part, to clarify and simplify proceedings in the Federal Court. At this time, when the courts are tending to move away from technical distinctions, I do not think Parliament, in enacting the February 1, 1992 amendments to the *Federal Court Act*, would have intended that there be a subtle distinction between the way in which proceedings are brought to challenge legislative actions as opposed to actions of a judicial, *quasi*-judicial or administrative nature. No useful purpose would be served by such a distinction.

I am fully satisfied that the proceedings as originally framed under s. 18.1 were properly brought. However, in order to avoid unproductive procedural objections at the appeal stage of these proceedings, I will allow the statement of claim and agreement as to procedure between counsel to subsist as filed.

Just before I move to the chronology of events, I should make one other observation that I should have made before I began, and that is that I am going to reserve my right to amend these reasons, not in substance but for grammatical and other reasons, and perhaps to add an authority or otherwise in that way; but, as I say, not to affect the substance of the decision.

Chronology of events

This case comes to this court after having been through the Court of Queen's Bench of Saskatchewan and the Saskatchewan Court of Appeal. In an unreported decision dated July 20, 1993,

Scheibel J. of the Saskatchewan Court of Queen's Bench determined that the impugned regulations were validly made [*Saskatchewan Wheat Pool v. Canada (Attorney-General)* (1993), 41 A.C.W.S. (3d) 1144]. On appeal, the Court of Appeal for Saskatchewan found that the Saskatchewan Court of Queen's Bench did not have jurisdiction to decide this matter [*ante*, p. 63, 43 A.C.W.S. (3d) 70]. At that point, the applicants filed their s. 18.1 application in this court and arranged for an early hearing date.

The statutory history and scheme

The issue is whether the Governor in Council may, by regulation, in effect, deregulate the interprovincial marketing of barley and the export and import of barley to or from the United States.

A brief reference to the establishment of the Canadian Wheat Board and the regulation of the marketing of wheat and barley will provide some background for the issue to be decided. A more extensive exposition on this subject may be found in *Murphy v. C.P.R. Co. and A.-G. Can.* (1958), 15 D.L.R. (2d) 145, [1958] S.C.R. 626, 77 C.R.T.C. 322, and *Lacey v. Canada*, [1990] 1 F.C. 168, 28 F.T.R. 205, 17 A.C.W.S. (3d) 366 (T.D.).

The *Canadian Wheat Board Act, 1935*, S.C. 1935, c. 53, was first enacted in that year. At first the Act, and the board established under it, dealt only with wheat. Initially, the Canadian Wheat Board did not have exclusive control over the marketing of wheat, but by amendments to the Act in 1947, c. 15, such exclusive control was conferred on the board. By amendments to the Act in 1948, c. 4, s. 5, Parliament enacted enabling legislation in the form of s. 29A of the Act, providing for the exclusive control by the Canadian Wheat Board over the interprovincial and international trading of oats and barley.

Section 29A(1) stated:

> 29A(1) The Governor in Council may by regulation extend the application of Part III of Part IV or of both Parts III and IV to oats or to barley or to both oats and barley.

Parts III and IV of the Act established the board's exclusive control over the interprovincial and export marketing and import of wheat. By s. 29A(1) Parliament provided that the Governor in Council could extend the application of Parts III and IV to oats and/or barley, thereby vesting in the Canadian Wheat Board exclusive control over the interprovincial and export marketing and import of those commodities.

The material before me suggests that one reason that Parliament left it to the Governor in Council to extend the application of Parts III and IV of the Act to oats and barley was that a large

portion of the oats and barley crops were at that time marketed locally within a province. Intraprovincial marketing of oats and barley was thought to be within provincial jurisdiction, and thus, to ensure total effective control over the marketing of oats and barley, complementary provincial legislation was required. Presumably because of a need to co-ordinate the control over the marketing of oats and barley with the prairie provinces, Parliament thought it best to maintain flexibility and leave it to the Governor in Council to act by regulation to extend the Canadian Wheat Board's exclusive authority over oats and barley. There may also have been some political or ideological reasons for maintaining this flexibility as well.

Subsection (2) of s. 29A of the Act provided:

> 29A(2) Where the Governor in Council has extended the application of any Part of this Act under subsection one, the provisions of the said Part shall be deemed to be re-enacted in this Part, subject to the following:
>
> (*a*) the word "oats" or "barley", as the case may be, shall be substituted for the word "wheat";
>
> (*b*) the expression "oat products" or "barley products", as the case may be, shall be substituted for the expression "wheat products";
>
> (*c*) the sum certain per bushel to be fixed by the Governor in Council shall be fixed in the case of oats in respect of the grade No. 2 Canada Western and in the case of barley in respect of the grade No. 3 Canada Western Six-Row, and in both cases basis in store Fort William or Port Arthur;
>
> (*d*) each pool period for the purposes of Part III shall be a crop year as designated by the Governor in Council;
>
> (*e*) section twenty, the proviso to paragraph (*b*) and paragraph (*d*) of subsection one of section twenty-one, section twenty-five and paragraph (*b*) of subsection two of section twenty-six are not applicable; and
>
> (*f*) such other modifications as the circumstances may require.

Thus while it was left to the Governor in Council, in his discretion, to extend or not extend Parts III and/or IV of the Act to oats and/or barley, once they were extended, those Parts were deemed re-enacted so as to apply to oats and/or barley. The effect of the words of s. 29A(2) was to apply Parts III and/or IV, only with the necessary modifications to recognize that those Parts were applicable to oats and/or barley. No other changes to Parts III and IV other than those envisaged by s. 29A were authorized. The Governor in Council was not vested with the authority to amend Parts III and IV.

It is not entirely clear from the material before me when the Governor in Council first acted by regulation to extend Parts III and IV to oats and barley. It appears that it may have been in 1948

by Order in Council P.C. 3376 of July 28, 1948. However, it is clear from the material that on July 20, 1949, the Governor in Council, by Order in Council P.C. 3713, made such regulations.

Section 13 of those regulations provided:

> 13(1) Part III and Part IV of the Act are hereby extended to oats and barley for the crop year commencing on the first day of August, 1949, and ending on the thirty-first day of July, 1950.

Section 15 stated:

> 15. This Part shall come into force on the first day of August, 1949.

Section 18 provided in part:

> 18. These regulations shall come into operation and be of full force and effect on and after the first day of August, nineteen hundred and forty-nine and shall cease to have any force and effect on and after the first day of August nineteen hundred and fifty . . .

The inference I draw from these provisions is that the Governor in Council, at least at that time, acted on an annual basis to extend Parts III and IV of the *Canadian Wheat Board Act* to oats and barley.

I refer to the annual making of regulations because the applicants in this case argue that the Governor in Council, in acting under s. 29A, now s. 47, is, in effect, promulgating the coming into force of legislation governing the Canadian Wheat Board's authority over barley and that once exercised, that power is spent. In other words, the Governor in Council cannot revoke the extension of Parts III and IV once he has extended them and that it is only Parliament that can revoke the board's authority over barley.

The inference I draw from the annual extensions of Parts III and IV to oats and barley is that the Governor in Council could act by regulation to extend the board's exclusive control over the marketing of oats and barley in a crop year if he chose to do so; however, if in any crop year the Governor in Council chose not to do so, the board would not have control over oats and barley for that crop year and would continue not to have control until the Governor in Council decided to extend the application of Parts III and IV at a later date.

This view is supported by the fact that s. 29A has been re-enacted as a continuing enabling provision as s. 47 of the *Canadian Wheat Board Act*, 1985, as amended.

This leads me to the conclusion that the extension of Parts III and IV to oats and barley is a regulatory action of the Governor in Council. It is not analogous to the promulgation of a statute and the regulatory power is not spent once it is acted upon by the Governor in Council.

Section 31(4) of the *Interpretation Act*, R.S.C. 1985, c. I-21, as amended, provides:

> 31(4) Where a power is conferred to make regulations, the power shall be construed as including a power, exercisable in the same manner and subject to the same consent and conditions, if any, to repeal, amend or vary the regulations and make others.

In extending the application of Parts III and IV of the *Canadian Wheat Board Act* to barley, the Governor in Council is acting by regulation. I can see no reason why s. 31(4) of the *Interpretation Act* would not enable the Governor in Council, if he chose to do so, to repeal the extension of Parts III and IV to barley.

At this point in time, s. 9 of the *Canadian Wheat Board Regulations*, C.R.C. 1978, c. 397, as amended, extends Part III and IV of the *Canadian Wheat Board Act* to barley. The Governor in Council has not acted to repeal this extension, but I see no reason why he could not do so provided it was done in accordance with relevant provisions of the *Canadian Wheat Board Act* and s. 31(4) of the *Interpretation Act*.

Relevant statutory and regulatory provisions

Part IV of the *Canadian Wheat Board Act* as it is extended to barley is entitled "Regulation of Interprovincial and Export Trade in Barley".

Section 45 of the Act confers on the Canadian Wheat Board the exclusive control over the interprovincial and international marketing of wheat and, by extension of Part IV, of barley, except as permitted under the regulations. Section 45 states:

> 45. Except as permitted under the regulations, no person other than the Board shall
>
> (*a*) export from or import into Canada wheat or wheat products owned by a person other than the Board;
>
> (*b*) transport or cause to be transported from one province to another province, wheat or wheat products owned by a person other than the Board;
>
> (*c*) sell or agree to sell wheat or wheat products situated in one province for delivery in another province or outside Canada; or
>
> (*d*) buy or agree to buy wheat or wheat products situated in one province for delivery in another province or outside Canada.

Section 46 confers on the Governor in Council regulation-making authority in respect of the interprovincial and export trade in wheat and barley. A primary aspect of this regulatory authority deals with provisions for the granting of licences to persons other than the Canadian Wheat Board who wish to engage in the interprovincial or international trade in wheat or barley. Section 46

states (reading the word "barley" for "wheat" by virtue of the extension of Part IV to barley):

46. The Governor in Council may make regulations

(*a*) to prescribe forms of documents that may be required under this Part;

(*b*) to exclude any kind of wheat, or any grade thereof, or wheat produced in any area in Canada, from the provisions of this Part either in whole or in part, or generally, or for any period;

(*b.1*) to permit the importation into Canada of wheat or wheat products that are entitled to the benefit of the United States Tariff of Schedule I to the *Customs Tariff* and that are owned by a person other than the Board subject, where the Governor in Council considers it appropriate, to any of the following requirements, namely,

(i) that the wheat be accompanied by an end-use certificate referred to in subsection 87.1(1) of the *Canada Grain Act*, completed by the person importing the wheat, declaring that the wheat is imported for consumption in Canada and is consigned directly to a milling, manufacturing, brewing, distilling or other processing facility for consumption at that facility,

(ii) that the wheat be denatured in a prescribed manner, if the wheat is imported for feed use, or

(iii) that the wheat be accompanied by a certificate issued pursuant to section 4.1 of the *Seeds Act*, if the wheat is imported for seed use;

(*c*) to provide for the granting of licences for the export from or import into Canada, or for the sale or purchase for delivery outside Canada, of wheat or wheat products, which export, import, sale or purchase is otherwise prohibited under this Part;

(*d*) to prescribe the terms and conditions on which licences described in paragraph (*c*) may be granted, including a requirement for the recovery from the applicant by the Board or any other person specified by the regulation, of a sum that, in the opinion of the Board, represents the pecuniary benefit enuring to the applicant pursuant to the granting of a licence, arising solely by reason of the prohibition of imports or exports of wheat and wheat products without a licence and then existing differences between prices of wheat and wheat products inside and outside Canada;

(*e*) to provide for the granting of licences for the transportation from one province to another province, or the sale or purchase for delivery anywhere in Canada, of wheat or wheat products, which transportation, sale or purchase is otherwise prohibited under this Part, and to prescribe the terms and conditions on which those licences may be granted or the terms or conditions of the permission granted in those licences;

(*f*) to empower the Board to do such acts and things as may be necessary for the administration of this Part; and

(*g*) to provide for any other matter necessary to give effect to this Part.

Pursuant to the regulation-making authority in s. 46 of the Act, the Governor in Council made the *Canadian Wheat Board Regulations*, as amended. Prior to the amendments to the regulations made in 1993 which are being challenged before this court, the regulations contained the following provisions, amongst others:

9. Parts III and IV of the Act are hereby extended to barley.

. . . . .

14(1) The Board may grant licenses

(*a*) for the export from Canada or for the sale or purchase for delivery outside Canada of wheat, wheat products, barley or barley products . . .

. . . . .

(2) The Secretary of State for External Affairs may grant licences for the import into Canada of barley or barley products when alternative supplies thereof sufficient to meet the needs of users are not generally available . . .

15. The Board may grant a licence for the transportation from one province to another, or for the sale or delivery anywhere in Canada, of wheat, wheat products, barley or barley products, but no fee shall be charged for such a licence.

The gist of ss. 14(1)(*a*), (2) and 15 is that licences could be granted by the board for exports and interprovincial trade in barley or by the Secretary of State for External Affairs for the import of barley under specified conditions.

As I understand ss. 45 and 46 of the Act and these regulations, they effectively grant to the Canadian Wheat Board the exclusive control over the marketing of wheat and barley interprovincially and internationally. The board may buy and sell wheat and barley itself or it may license others to do so. The effect is that no wheat or barley may be marketed interprovincially or internationally except by the board or by a person licensed by the board.

The regulations which are challenged in this case were included in a Schedule annexed to Order in Council P.C. 1993-1399 [SOR/93-360], dated June 21, 1993. Section 2 of the Schedule provides in part:

2. Section 15 of the said Regulations is revoked and the following substituted therefor:

. . . . .

"15(1) Notwithstanding paragraph 14(1)(*a*), a person other than the Board may export barley and barley products from Canada, or sell or purchase barley and barley products for delivery outside Canada, without a licence granted by the Board under that paragraph, where the barley and barley products are

(*a*) produced in Canada; and

(*b*) destined for sale to the United States.

(2) Notwithstanding subsection 14(2), a person other than the Board may import barley and barley products into Canada from the United States without a licence granted by the Secretary of State for External Affairs under that subsection."

Section 3 of the Schedule provides in part:

3. The heading preceding section 16 and section 16 of the said Regulations are revoked and the following substituted therefor:

. . . . .

"16.1 Permission is hereby granted to any person other than the Board

(*a*) to transport, or cause to be transported, from one province to another, barley or barley products that are produced in Canada; and

(*b*) to sell or purchase, or agree to sell or purchase, barley or barley products produced in Canada that are situated in one province for delivery in another province."

These regulations permit the trading in barley interprovincially or to or from the United States without a licence. The question of whether there is authority for the Governor in Council to make such regulations, having regard to the overall marketing scheme envisaged by the *Canadian Wheat Board Act*, and in particular having regard to the regulation-making authority given to the Governor in Council in the *Canadian Wheat Board Act* is at issue.

The regulation-making authority of the Governor in Council

The opening words of s. 45 of the Act state: "Except as permitted under the regulations, no person other than the Board . . ." shall engage in the exporting, importing or interprovincial trading of barley. These words, "[e]xcept as permitted under the regulations", do not, in themselves, confer a regulation-making authority on the Governor in Council. These words only create the potential or possibility for persons other than the Canadian Wheat Board to trade in barley. Other regulation-making authority must be found to enable the Governor in Council to make regulations entitling such persons actually to do so.

Section 46 does confer on the Governor in Council the authority to make the type of regulations contemplated by the opening words of s. 45. Whether or not s. 46 authorizes the type of regulations made by Order in Council P.C. 1993-1399 requires a close inspection of the section.

Section 46(*a*) is not relevant for this purpose. Section 46(*b*) was not advanced as such authority by counsel for the respondent and

indeed Order in Council P.C. 1993-1399 does not itself refer to s. 46(*b*) as authority for the regulations made. Counsel for Manitoba Pool Elevators argued that s. 46(*b*) cannot be construed so as to have the broad effect of authorizing the deregulation of the marketing of barley. In his view, para. (*b*) was intended to address specific circumstances relating to types or grades of barley or production areas. This appears to be a reasonable interpretation of s. 46(*b*) and is consistent with the Governor in Council himself not relying on this paragraph.

Section 46(*b.1*) relates to the importation of wheat and wheat products, and perhaps barley and barley products, and was enacted in relation to the Free Trade Agreement with the United States. While it is not directly relevant to the issue before me, counsel for the applicants noted that this exception to the board's exclusive control over the importation of wheat was effected by statutory amendment. It was suggested that the inference I should draw is that the much more extensive encroachments to the board's exclusive control over the marketing of barley at issue here must also be effected by statutory amendment and not by regulatory change. While this argument has some attraction, I think I must be guided by the words of the legislation and not by past examples of how changes were made.

Section 46(*c*) authorizes the Governor in Council to make regulations to provide for the granting of licences for the export and import of barley. Section 46(*e*) provides for the granting of licences for the interprovincial trade in, and transportation of, barley.

Counsel for the respondent argues that the words of s. 46(*c*) and (*e*) could be construed as being broad enough to authorize the challenged regulations which permit the export and import of barley without a licence to and from the United States and the interprovincial trading of barley. He submits that the words "to provide for the granting of licences" could contemplate dispensing with licensing altogether.

Counsel for the applicants are, of course, of the opposite view. They argue that a regulation-making power "to provide for the granting of licences" must involve licensing of some kind. It cannot mean no licensing.

In support of this contention, counsel for the applicants rely on *Booth v. The King* (1915), 21 D.L.R. 558, 51 S.C.R. 20. In that case, the *Indian Act*, R.S.C. 1886, c. 43, provided that no licence to cut timber could be granted for a period of longer than 12 months. In regulations made under that Act, the Governor in Council provided that licence holders who complied with the regulations

were entitled to have their licences renewed. At p. 560 Idington J. stated:

> It seems almost too clear for argument that in face of the absolute restriction in the statute limiting the duration of a license to twelve months, that the Governor in Council could make any regulation which would in fact nullify the statute.

In *Booth* it was found that the Governor in Council could not, by regulation, provide for automatic renewals of licences when the overriding statute limited licences to 12 months. Similarly, in my view, in the present case, the Governor in Council cannot dispense with the requirement for a licence altogether when the statute conferring regulation-making authority expressly contemplates regulations providing for the granting of licences.

This view of the limitation on the Governor in Council's regulation-making authority is also seen in *Municipal Corporation of the City of Toronto v. Virgo*, [1896] A.C. 88 (P.C.); affirming 22 S.C.R. 447. In that case, the *Municipal Act*, R.S.O. 1887, c. 184, authorized municipal councils to license hawkers. The City of Toronto prohibited hawkers from carrying on business on certain streets in Toronto.

At p. 93 Lord Davey stated:

> No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed.

In the case at bar the Governor in Council purports to remove from the regulatory regime of the *Canadian Wheat Board Act*, the interprovincial trade in barley and the export and import of barley to and from the United States. It seems to me that s. 46(*c*) and (*e*) contemplates the continued existence of some form of control over this trade by providing for it to be licensed. I do not think s. 46(*c*) and (*e*) can be construed to authorize, by regulations made under it, deregulation, and therefore the loss of control over this trade in barley. It is not, in my view, an expression of the authority granted to the Governor in Council in s. 46(*c*) and (*e*) for him to say that no licence at all is required.

Section 46(*d*) provides for conditions on licences, including a condition where applicable, requiring a licensee to turn over to the board certain pecuniary benefits he or she receives from exporting or importing barley. This provision is not relevant as a basis for the

regulatory authority for the Governor in Council to dispense with licensing. However, it is of some significance that Parliament, when referring to the pecuniary benefits that might accrue to a licensee, used the following words, "arising solely by reason of the prohibition of imports or exports of barley and barley products without a licence". These words suggest to me that the scheme that Parliament envisaged in ss. 45 and 46 is that either the board or licensees could export or import barley; however, the export or import of barley without a licence was prohibited by the Act.

In the light of these words, I cannot construe the Governor in Council's regulation-making authority under the licensing provisions of s. 46 to include the power to authorize the export or import of barley to or from the United States without a licence and, by implication, the interprovincial trading of barley without a licence.

Section 46(*f*) is not relevant. Section 46(*g*) authorizes the making of regulations to provide for any other matter necessary to give effect to Part IV. I think it is self-evident that a regulation, in effect deregulating the interprovincial trading in barley and the exporting and importing of barley to or from the United States, does not give effect to anything in Part IV of the Act. If anything, such deregulation acts in the contrary manner. Section 46(*g*) is what might be thought of as an ancillary type of regulation-making power in the sense that it does not address specific matters, but is there to cover incidental matters that may have to be regulated to give effect to the Part. It would not be reasonable, in my view, to construe such an ancillary power as supporting a regulation dispensing with licensing when other provisions in s. 46 clearly envisage the continuation of the licensing process.

I conclude there is no regulation-making authority in s. 46 which would support the regulations being challenged by the applicants.

The regulation-making power in s. 47(1) has been dealt with already. Section 47 states:

> 47(1) The Governor in Council may, by regulation, extend the application of Part III or of Part IV or of both Parts III and IV to oats or to barley or to both oats and barley.
>
> (2) Where the Governor in Council has extended the application of any Part under subsection (1), the provisions of that Part shall be deemed to be re-enacted in this Part, subject to the following:
>
> (*a*) the word "oats" or "barley", as the case may be, shall be substituted for the word "wheat";
>
> (*b*) the expression "oat products" or "barley products", as the case may be, shall be substituted for the expression "wheat products";

(*c*) the sum certain per tonne to be fixed by the Governor in Council in respect of oats or barley may be fixed basis in storage either Thunder Bay or Vancouver or only Thunder Bay or only Vancouver; and

(*d*) subsection 40(2) is not applicable.

(3) An extension of the application of Part III shall come into force only at the beginning of a crop year.

(4) For the purposes of this section, "product", in relation to any grain referred to in subsection (1), means any substance produced by processing or manufacturing that grain, alone or together with any other material or substance, designated by the Governor in Council by regulation as a product of that grain for the purposes of this Part.

Section 47(1) confers on the Governor in Council the power to extend the application of Parts III and IV to barley. However, that is the extent of the regulatory power conferred. Parts III and IV cannot be changed by regulation because, when they are extended to barley they are "deemed to be re-enacted in this Part". There is no scope for the Governor in Council, in regulations that he is authorized to make under s. 47, to allow for the interprovincial trading in barley or the export or import of barley to or from the United States without a licence.

The only other regulation-making authority to which reference was made during argument that might support the impugned regulations was s. 61 of the Act. Section 61 states:

61. The Governor in Council may make regulations for any purpose for which regulations may be made under this Act.

As I interpret s. 61, it is not a regulation-making authority on its own. It must be read together with other provisions allowing for the making of regulations. To construe it as a regulation-making authority at large leads to the conclusion that under s. 61, the Governor in Council could make whatever regulations he chooses, without regard for the statute itself. That position is, of course, untenable.

I am impelled to the conclusion that the impugned regulations are not authorized by the *Canadian Wheat Board Act* and that they are not within the power of the Governor in Council to make.

I earlier indicated that it was my view that s. 47 of the *Canadian Wheat Board Act* and s. 31(4) of the *Interpretation Act*, confer on the Governor in Council the power to revoke the extension of Parts III and IV of the *Canadian Wheat Board Act* to barley. I was somewhat troubled by the proposition that the Act allowed the Governor in Council to completely deregulate barley but not deregulate it in part as has been attempted here. I have

carefully reviewed s. 47 to see if there was a necessary implication that barley could be partially deregulated by the Governor in Council. I cannot see how this can be the case. When Parts III and IV of the *Canadian Wheat Board Act* are extended to barley, they are deemed re-enacted. It is beyond the authority of the Governor in Council to amend Parts III and IV, which is what is implied by partial deregulation.

I can only conclude that Parliament was prepared to permit the Governor in Council only to decide whether or not the interprovincial and export trade in barley should be subject to the same regulatory regime set forth in the Act as was applicable to wheat. If the Governor in Council decided upon the deregulatory approach, the Canadian Wheat Board would not trade in barley and there would be no licensing system applicable. There would be an open or free market in barley. However, if the Governor in Council decided to regulate barley, it would involve the board having exclusive control over the marketing of barley either by trading in the commodity itself or by licensing others to do so. The Act does not contemplate partial deregulation by the Governor in Council as was attempted by Order in Council P.C. 1993-1399.

Conclusion

I come to my conclusion with some regret, not because of any policy views I may have, which would be irrelevant in any case, but because the order I must make in this case prevents the federal Cabinet from effecting a policy initiative which it has chosen to pursue according to its view of the public interest. It is regrettable when the courts must interfere with elected officials pursuing their intended policies. However, Parliament is supreme, and the Cabinet in its role of making regulations pursuant to statutory authority is subject to the will of Parliament.

In this case, Parliament has not authorized the Cabinet to make the type of regulations that have been challenged. I must declare ss. 15 and 16.1 of the *Canadian Wheat Board Regulations*, made by virtue of Order in Council P.C. 1993-1399 to be *ultra vires* and of no force and effect.

The order giving effect to these reasons shall be settled by the parties forthwith and shall be executed by me without delay. The matter has been expedited at the request of the applicants. The applicants are directed to co-operate with the respondent, should the respondent decide to appeal this decision, to have the appeal brought on without delay caused by the parties.

Application granted.

ONTARIO ENERGY BOARD

In the matter of the *Ontario Energy Board Act, 1998,* as amended (**the Act**); the *Ontario Energy Board Transmission Code of June 10, 2010* (**TSC**); Hydro One Networks Inc. (**HONI**); and the obligation of Goldcorp Canada Ltd. and Goldcorp Inc. to pay bypass compensation to HONI under the TSC.

SUPPLEMENTARY WRITTEN ARGUMENT OF GOLDCORP ON THE APPLICATION

1. Goldcorp wishes to supplement its Written Argument (Ex. C, tab1, Sch 1) to include attention to include two recent administrative law decisions of the Supreme Court of Canada (SCC).which are relevant to Goldcorp's argument.

Mowat Case

2. Goldcorp will begin with *Canada (Human Rights Commission) v. Canada (Attorney General), 2011 SCC 53* (*Mowat Case*) even though, chronologically, it is the second of the two new SCC cases.

3. In the Mowat case Canadian Human Rights Tribunal held that it had the authority to order the payment of a complainant's legal costs. It purported to do so under ss. 53(2)(1) and (d) of the *Canadian Human Rights Act, R.S.C. 1985, c. H-6 (CHRA)* which authorized it to *compensate the victim…for any expenses incurred by the victim as the result of the discriminatory practice*, permitted an award of legal-costs (para. 32). This was a plausible interpretation because as a member of the Tribunal noted: *without an ability to recover legal costs, a complainant's victory would be pyrrhic* (para. 10). The issue was whether the Tribunal's decision was reasonable.

4. The SCC unanimously held that those words did not support a power to award legal costs and that the Tribunal's decision that they did was unreasonable (para. 32).

5. Paragraphs 14-30 of the decision deal with the issue of the appropriate standard of review to be applied to the Tribunal's interpretation of ss. 53(2)(e) and (d) and with the need to accord curial deference to the decisions of statutory bodies when they are interpreting the core provisions of their empowering statutes. The SCC decided that the Standard of review which applied in the *Mowat Case* was one of reasonableness (para. 27). As in the Figliola Case, below, however the reasonableness standard of review did not inhibit the SCC from setting aside the Tribunal's decision.

6. Instead, Lebel and Cromwell JJ. said:

> The question is one of statutory interpretation and the object is to seek the intent of Parliament by reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Inc. Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). In approaching this task in relation to human rights legislation, one must be mindful that it expresses fundamental values and pursues fundamental goals. It must therefore be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect: see, e.g., R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 497-500. However, what is required is nonetheless an interpretation of the text of the statute which respects the words chosen by Parliament.

7. This approach is the same purposive approach to which Goldcorp refers in paragraph 17 of its Written Argument. Goldcorp submits that the Board should apply this approach in this case, but with one new and important addition: any discretionary interpretation by a statutory body of its governing statute must respect the words chosen (or omitted) by Parliament. Even a reasonableness standard of review will not protect such a statutory body's decision from judicial correction if it does not accord with the wording of the statute.

8. The Mowat Case tells us that the Divisional Court will not allow ambiguously phrased provisions or, equally, generally worded provisions like section 70.1 of the Act to be used to implement a policy that the Legislative Assembly has not approved - even if the statutory body legitimately believes such an interpretation will further the purpose of the Act.

Figliola Case

9. The other SCC decision is *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 (*Figliola Case*), released the day before the *Mowat Case.* While the Figliola case may appear to be slightly removed from the central issue in this case it is still pertinent. It represents the first time that the contemporary SCC has set aside a discretionary decision that was arguably reasonable and was well within the core jurisdiction and expertise of a statutory body.

10. In the Figliola Case, workers suffered from chronic pain and sought compensation from the British Columbia's Workers' Compensation Board (WCB). Pursuant to the WCB's Chronic Pain Policy, they received a fixed compensation award. They appealed to the WCB's Review Division, arguing that a policy which set a fixed award for chronic pain was patently unreasonable, unconstitutional and discriminatory on the grounds of disability under s. 8 of the British Columbia Human Rights Code ("Code"). The Review Officer accepted that he had jurisdiction over the Human Rights Code complaint and concluded that the Board's Chronic Pain Policy was not contrary to s. 8 of the Code and therefore not discriminatory.

11. The workers appealed this decision to the Workers' Compensation Appeal Tribunal ("WCAT"). Before the appeal was heard, the legislation was amended removing WCAT's authority to apply the Code. Based on the amendments, the complainants' appeal of the Review Officer's Decision on their human rights complaint could not be heard by WCAT, but judicial review remained available. Instead of applying for judicial review, the complainants filed new complaints with the Human Rights Tribunal, repeating the same s. 8 arguments about the Board's Chronic Pain Policy that they had made before the Review Division.

12. The WCB brought a motion asking the Tribunal to dismiss the new complaints, arguing that under s. 27(1)(a) of the Code, the Tribunal had no jurisdiction, and that under s. 27(1)(f) of the Code the complaints had already been "appropriately dealt with" by the Review Division. The Tribunal rejected both arguments and found that the issue raised was an appropriate question for the Tribunal to consider and that the parties to the complaints should receive the benefit of a full Tribunal hearing. On judicial review, the Tribunal's decision was set aside. The B.C.

Court of Appeal, however, concluded that the Tribunal's decision was not patently unreasonable and restored it.

13. The issue for the SCC was whether the Tribunal's decision to accept the workers' complaint under s. 27(1)(f) of the *Human Rights Code*, *R.S.B.C. 1996, c. 210* was patently unreasonable . S. 27(1)(f) empowered the Tribunal to dismiss the workers' complaint if it determined that *the substance of the complaint has been appropriately dealt with in another proceeding.* The Tribunal had decided that it had not been appropriately dealt with.

14. The majority held that the Human Rights Tribunal had acted patently unreasonably in accepting the complaint already dealt with by the WCB Reviewing Officer in a manner that the Tribunal considered flawed. It did so despite Cromwell, J., for the minority, having observed that it was *difficult ... to imagine broader language to describe a discretionary power than to say the Tribunal may dismiss a complaint if the substance of it has been appropriately dealt with elsewhere* (para. 81).

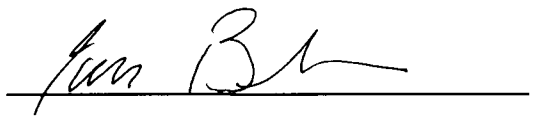
15. The *ratio decidendi* of the Figliola Case is that you only get one forum and appeal process in which to present your case. While this ratio may not be relevant to Goldcorp's case, the fact that the SCC set aside a discretionary decision of a statutory body protected by a patently unreasonable standard of review certainly is. This highest standard of review proved to be no obstacle and the usual discussion about the issue of whether the court should have accorded the Tribunal's decision curial deference found in legion SCC cases, including the *Mowat Case,* did not even come up. The Figliola case was nothing less than a signal change from the SCC's policy of supporting discretionary decisions made by statutory bodies within their core areas of expertise.

16. What does the Figliola Case mean for Goldcorp's case? At the least, it means that a reasonableness standard of review will not inhibit the Divisional Court from quashing a code provision that ignores well established legal precedents, even if it resulted from a discretionary decision after a public hearing. If the B.C. Supreme Court can validly interfere with a discretionary decision of the B.C. Human Rights Tribunal's to accept a human rights complaint, the Ontario Divisional Court can interfere with a discretionary Board decision prescribing code provisions.

Conclusion

17. Goldcorp respectfully submits that both the *Mowat* and the *Figliola Cases* have shifted the Canadian administrative law paradigm towards stricter control of discretionary decisions made by statutory bodies than has been seen in thirty years. Without going even that far, however, Goldcorp submits that these two decisions strongly support both the approach taken and analysis contained in its Written Argument.

ALL OF WICH IS RESPECTFULLY SUBMITTED this 4th day of November, 2011.



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