EB-2011-0361
EB-2011-0376

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 an order under section 19 of the *Ontario Energy Board Act, 1998* declaring that certain provisions of the Ontario Energy Board's *Transmission System Code* are *ultra vires* the *Ontario Energy Board Act, 1998* and certain other order.

AND IN THE MATTER OF an application by Langley Utilities Contracting Ltd. for a determination as to whether certain services are permitted business activities for an affiliate of a municipally-owned electricity distributor under section 73 of the *Ontario Energy Board Act, 1998.*

WRITTEN SUBMISSIONS OF GOLDCORP - PRELIMINARY ISSUES ("Goldcorp's Submissions")

1. These are Goldcorp's Submissions on threshold questions A1 and A2, its Motion for Interim Relief, and Costs Awards as required by the *Notice of Applications, Notice of Combined Hearing and Procedural Order No. 1* (*PO No. 1*) in this proceeding.

ISSUE I – Board Issue A1

Does section 19 of the Act, in and of itself, provide a statutory basis for Goldcorp's Application

2. Goldcorp submits that the answer to A1 is *yes*: *s. 19* of the *Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B (the Act)* does, in and of itself, provide a statutory basis for its Application, for the reasons set out in the following paragraphs.

SUMMARY

3. For nearly a hundred years, *CPR v. Canadian Oil Companies Ltd. (1912), 47 S.C.R. 155 (COCL case); aff'd. (1914), 19 D.L.R. 64 (JCPC)* has settled the law in Canada that statutory wording in substantially the same form as subss. *19(3)* and *19(6)* of *the Act*

confers a plenary and independent power on a statutory body to make binding declarations on all matters within its jurisdiction.

THE APPLICATION

4. As *PO No. 1* recites, Goldcorp's Application seeks:

2(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 legal obligation to pay bypass compensation to Hydro One Networks Inc. (*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 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 may be required.

5. The crux of Goldcorp's Application is its request for Orders 2(a) and 2(b) above. Orders 2(c)-2(e) are all subordinate to Orders 2(a) and 2(b). In Order 2(a) Goldcorp asks the Board to find that the cited provisions of the *Transmission System Code (TSC)* are not authorized by *the Act* and in Order 2(b) it asks the Board to declare that Goldcorp is not under legal obligation to pay bypass compensation to Hydro One Networks Inc. (*HONI*) and that *HONI* may not demand bypass compensation from Goldcorp.

ARGUMENT

6. In order to demonstrate that *s. 19* of *the Act*, in and of itself, provides a statutory basis for Goldcorp's application and that the *COCL case* is applicable, it is necessary to follow the *Supreme Court of Canada's* (*SCC*) approach to interpreting statutory provisions. This approach requires us to consider the wording of the provision, its legislative history, its legislative context and the scheme of *the Act*, *(R v. Kapp [2008]* 2 S.C.R. 484, at para. 82 (Ex. C, T. 2, S.1; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, *2011 SCC 53*). Goldcorp will address each element of the SCC's approach.

Wording of Section 19

7. S. 19 of *the Act* reads as follows:

> **Power to determine law and fact**
>
> 19. (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact. 1998, c. 15, Sched. B, s. 19(1).
>
> **Order**
>
> (2) The Board shall make any determination in a proceeding by order. 1998, c. 15, Sched. B, s. 19(2); 2001, c. 9, Sched. F, s. 2(1).
>
> **Reference**
>
> (3) If a proceeding before the Board is commenced by a reference to the Board by the Minister of Natural Resources, the Board shall proceed in accordance with the reference. 1998, c. 15, Sched. B, s. 19(3).
>
> **Additional powers and duties**
>
> (4) The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application. 1998, c. 15, Sched. B, s. 19(4).
>
> **Exception**
>
> (5) Unless specifically provided otherwise, subsection (4) does not apply to any application under the *Electricity Act, 1998* or any other Act. 1998, c. 15, Sched. B, s. 19(5).

Jurisdiction exclusive

(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. 1998, c. 15, Sched. B, s. 19(6).

8. Goldcorp submits that the wording of *s. 19* is abundantly clear. In *subs. 19(1)* the Board is given the power to *hear and determine.* Everyone agrees upon what the requirement *to hear* includes. Goldcorp submits that the word *determine* is no less ambiguous. It refers to the definition of *determine* in the *Shorter Oxford English Dictionary (6th ed.),* the relevant elements of which are as follows:

> Determine/verb
>
> Settle or decide (a dispute, controversy, etc., or a sentence, conclusion, issue, etc.) as a judge or arbiter. Foll. by simple obj., subord. clause with that, what, whether, etc. LME. ▸
>
> Discuss and resolve a question or uphold a thesis in a scholastic disputation; spec. perform in the university exercise of determination (see determination 1c). obsolete exc. hist. L16.
>
> H. H. Milman The Dean presided in all causes…, and determined them. B. Jowett The law will determine all our various duties towards relatives. A. E. Stevenson Our entire military establishment must be re-examined to determine how we can best build and keep the forces we need for our national security.
>
> (b) determining bachelor = determiner noun² 2.
>
> Come to a judicial decision; make or give a decision about something. (Formerly foll. by of, on.) Cf. sense 13 below. LME.
>
> S. Johnson The general inability of man to determine rightly concerning his own.
>
> Lay down authoritatively; pronounce, declare. LME–M17.
>
> Settle or fix beforehand (now esp. a date); ordain, decree. LME.

Goldcorp submits that the above definitions effectively means that the word *determine* is equivalent to the word *decide*.

9. The provisions of *s. 19* relevant to Board Issue A1 are *subss. 19(1)* and *19(6). Subss. 19(2)* and *(3)* are process related provisions only and *subs. 19(5)* is an exclusion

provision. *Subs. 19(4)* is the subject of Board Issue A2, below. We will not consider *subss.19(2),19(3)* and *(5)* of *the Act* further.

10. The wording of *subs. 19(1)* gives the Board in all matters within its jurisdiction authority to hear and determine all questions of law and of fact (*HDLF provision*). The wording of *subs. 19(6)*, gives the Board exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on the Board by *the Act* or any other Act (*EJ provision*).

11. Goldcorp submits that, the first rule of interpretation, wording of *subss. 19(1)* and *19(6)* of *the Act*, gives the Board a clear, plenary and exclusive power to determine any question of law or fact including a question about the Board's jurisdiction to impose burdensome financial requirements in codes issued under *s. 70.1* of *the Act*.

Legislative History

12. The first version of what are now subss. *19(1)* and *19(6)* of *the Act* appeared in identically worded form as *subss. 12(1)* and *12(2)* of the *Energy Act, 1960, S. O, 1960, c. 75.* The *Energy Act, 1960* created the first Ontario Energy Board and resulted from recommendations of the *1960 Report of the Committee on Organization of Government in Ontario (Gordon Committee) Ontario: Hansard, February 8, 1960, at pp. 195-198*; see: John Willis, *Report of the Committee On the Organization of Government in Ontario (1961), 14 U. of T. L. J.* Goldcorp also notes that The *Energy Act, 1960* also complemented the then new *National Energy Board Act*, S.C. 1959, c. 46.

13. The *Ontario Energy Board Act, 1964, S. O, 1964, c. 74* re-enacted and expanded the *Energy Act, 1960* but *subss. 13(1)* and *13(2)* of that act were identical to subs. 19*(1)* and *19(6)* of *the Act*.

14. The *HDLF* and the *EJ provisions* in successive versions of the *Ontario Energy Board Act* have remained unchanged in *s. 13* of each of the *Ontario Energy Board Act*, *R.S.O. 1970, c. 312; R.S.O. 1980, c. 332; R.S.O. 1990, c. 313* contained identical provisions to *subss. 19(1)* and *19(6)* of *the Act*.

Legislative Context

15. While the *Energy Act, 1960* was in preparation, other energy policy developments were occurring. On October 22, 1958 the *Royal Commission on Energy (Borden Commission)* reported. It recommended the creation of the *National Energy Board* (*NEB*). As a result, the *National Energy Board Act (NEB Act)* came into force on July 18, 1959, as *S. C. 1959, c. 46*. This was nine months prior to Ontario's *Energy Act*, *1960* coming into force on April 12, 1960. *Ss. 11* and *12* of the *NEB Act* read as follows:

> 11. The Board has full and exclusive jurisdiction to inquire into, hear and determine any matter
>
> (a) where it appears to the Board that any person has failed to do any act, matter or thing required to be done by this Act or by any regulation, certificate, licence or permit, or any order or direction made by the Board, or that any person has done or is doing any act, matter or thing contrary to or in violation of this Act, or any such regulation, certificate, licence, permit, order or direction, or
>
> (b) where it appears to the Board that the circumstances may require the Board, in the public interest, to make any order or give any direction, leave, sanction or approval that by law it is authorized to make or give, or with respect to any matter, act or thing that by this Act or any such regulation, certificate, licence, permit, order or direction is prohibited, sanctioned or required to be done.
>
> 12. The Board may order and require any person to do, forthwith, or within or at any specified time and in any manner prescribed by the Board so far as it is not inconsistent with this Act, any act, matter or thing that such person is or may be required to do under this Act, or any regulation, certificate, licence or permit, or any order or direction made or given under this Act and may forbid the doing or continuing of any act, matter or thing that is contrary to this Act or any such regulation, certificate, licence, permit, order or direction and , *for the purposes of this Act, has full jurisdiction to hear and determine all matters, whether of law or of fact.* (emphasis added)

16. In the *Revised Statutes of Canada, 1985*, *ss. 11* and *12* of the *NEB Act* were subsequently adjusted without any change in substance and were combined into new *s. 12* which read, and still reads today, as follows:

12. (1) The Board has full and exclusive jurisdiction to inquire into, hear and determine any matter

(a) where it appears to the Board that any person has failed to do any act, matter or thing required to be done by this Act or by any regulation, certificate, licence or permit, or any order or direction made by the Board, or that any person has done or is doing any act, matter or thing contrary to or in contravention of this Act, or any such regulation, certificate, licence, permit, order or direction; or

(b) where it appears to the Board that the circumstances may require the Board, in the public interest, to make any order or give any direction, leave, sanction or approval that by law it is authorized to make or give, or with respect to any matter, act or thing that by this Act or any such regulation, certificate, licence, permit, order or direction is prohibited, sanctioned or required to be don.

(2) For the purposes of this Act, the Board has full jurisdiction to hear and determine all matters, whether of law or fact.

17. We know from an extant copy of the Briefing Book of Gordon Churchill, the then Minister of Trade and Commerce, who sponsored the *NEB Act* when it was going through Parliament, that *ss. 11* and *12* of the *NEB Act* were adapted from *s. 33* of the *Railway Act*, *R.S.C. 1952, c. 234*, which read as follows:

33. (1) The Board has full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested,

> (a) complaining that any company, or person, has failed to do any act, matter or thing required to be done by this Act, or the Special Act, or by any regulation, order or direction made thereunder by the Governor in Council, the Minister, the Board, or any inspecting engineer or other lawful authority, or that any company or person has done or is doing any act, matter or thing contrary to or in violation of this Act, or the Special Act, or any such regulation, order, or direction, or
>
> (b) requesting the Board to make any order, or give any direction, leave, sanction or approval, that by law it is authorized to make or give, or with respect to any matter, act or thing, that by this Act, or the Special Act, is prohibited, sanctioned or required to be done.
>
> (2) The Board may order and require any company or person to do forthwith, or within or at any specified time, and in any manner prescribed by the Board, so far as is not inconsistent with this Act, any act, matter or thing that such company or person is or may be required to do under this Act, or the special Act, and may forbid the doing or continuing of any act, matter or thing which is contrary to this Act, or the Special Act; and for the purposes of this Act has full jurisdiction to hear and determine all matters whether of law or of fact.

18. An identically worded provision was also *s. 26* of the *Railways Act*, *R.S.C. 1906, c. 37*. It was this *s. 26* that was considered in the *COCL case*.

19. *Subss. 12(1)* and *12(2) of the Energy Act, 1960*, now *subss. 19(1)* and *19(6)* of *the Act*, certainly appear to have been adapted from either *ss. 11* and *12* of the new *NEB Act* or from *s. 33 of the Railway Act* which would have been available to Ontario officials when preparing the *Energy Act, 1960*. Goldcorp submits it doesn't really matter which provision was used as the precedent because, substantively, both sets of federal provisions and *subss. 12(1)* and *12(2)* of the *Energy Act, 1960* conferred identical powers.

20. Each set of provisions conferred jurisdiction on each Board to hear and determine all matters, whether of law or fact: *Energy Act, 1960, subs. 12(1); NEB Act, s. 11*. Each conferred exclusive jurisdiction with respect to all matters over which each Board had been given jurisdiction under its act: *Energy Act, 1960, subs. 12(2)*; *1959 NEBA, s. 11*. The only difference between the federal and Ontario provisions is that *ss. 11* and *12* of the *NEB Act* was written in an older drafting style which delineated, in exhaustive terms, the matters the *NEB* could hear, determine, and over which it had exclusive jurisdiction; while *subss. 12(1)* and *12(2) of the Energy Act,1960* described the matters the Board could hear, determine and over which it had exclusive jurisdiction using the formula *all matters under this or any other act*. The Ontario provisions used a simpler and more modern drafting style to confer the same powers as in the federal provisions since in 1960 the federal provision were probably a century old. Again, Goldcorp submits that the *NEB Act* provisions and the *Energy Act, 1960* provisions are identical in substance.

21. In conclusion, Goldcorp submits that both the legislative history and the legislative context of *s. 19* does nothing to attenuate its clear meaning or Goldcorp's submission on that clear meaning.

Scheme of the Act

22. The scheme of *the Act* is to constitute the Board as a decision maker in certain energy matters, confer jurisdiction with respect to those matters, empower the Board to hold hearings and determine rights in the context of the objectives set out in *s. 1* of *the Act*. *S. 19* of *the Act* empowers the Board to make decisions respecting all those matters and gives it exclusive jurisdiction to determine all questions of law and fact arising in those matters, subject only to any right of appeal or judicial review. As Goldcorp emphasises that the Board has exclusive, not concurrent, but exclusive jurisdiction to consider all such questions of law and fact.

Jurisprudence

23. In *CPR et al. v. The Canadian Oil Companies Limited, (1912), 47 S.C.R. 155*, COCL filed a complaint with the Board of Railway Commissioners that CPR had over charged it for the transport of oil from the US into Canada because CPR had refused it the benefit of the applicable joint tariff for such shipments and charged it local Canadian rates instead. The Board agreed with COCL and, by an order, so declared.

24. As it then could do, CPR appealed the Board's decision to *the SCC* on a jurisdictional question of whether the Board had statutory authority to make such a declaration. CPR argued that prior to the Board making its order, CPR and COCL had settled their dispute, so the Board's order could only be declaratory and that the Board had no authority to make declaratory orders (p. 158). *The SCC* rejected CPR's argument. At p. 160, Davies, J. said as follows:

> On the question of jurisdiction I do not entertain any doubt. The Board (section 10) is made a court of record. Section 26 confers upon it power to inquire into, hear and determine any application by or on behalf of any party interested complaining (*inter alia*) that any company or person has done or is doing any act, matter or thing contrary to or in violation of this Act, etc.

At pp. 175-76, Duff, J. said as follows:

> The question of jurisdiction remains. I confess I can entertain no doubt that each of the several orders of the Board of the 16th of May, 1911, records and was intended to record an adjudication by the Board in its judicial capacity upon an issue between the complaints and the company or companies respectively against which the complaints were lodged; and I have come to the conclusion that the Board had, under section 26, jurisdiction to make the declarations contained in those orders...
>
> There are, obviously, many reasons of good sense and policy why such a jurisdiction should be exercisable by the Board; and I think there is no ground upon which the restriction contended for can be sustained.

25. CPR appealed to the *Judicial Committee of the Privy Council (JCPC)* and the appeal was finally decided two years later on July 14, 1914 (1914), *19 D.L.R. 64 (J.C.P.C.).* At p. 66-67. Lord Dunedin, for *the JCPC*, said as follows:

> The Supreme Court of Canada held unanimously that the Board had jurisdiction to make such an order. Their Lordships agree with that view and concur with the reasons set forth in the judgments of the learned Judges of the Supreme Court. Sec. 26 of the Railway Act confers jurisdiction of the Board to inquire into, hear, and determine, any application of a party interested complaining that any company...has done or is doing any act, matter, or thing, contrary to, or in violation of this Act, or the Special Act.

Again, the *s. 26* referred to in the judgments was the same *s. 26* of the *Railways Act, R,S.C, 1906, c.37* mentioned above and was identical to *ss. 11* and *12* of the *NEB Act* which Goldcorp has submitted are identical in substance to *subss. 19(1)* and *19(6)* of *the Act*.

26. The *COCL case* settled the question of whether a *HDLF provision* similar to *subss. 19(1)* and *19(6)* of *the Act* provided a statutory basis for making a declaration such as the ones Goldcorp is seeking in its case. After 1914 the question did not arise again until 1977. In Re *Saskatchewan Power Corporation et al. and TransCanada PipeLines Ltd. (TransCanada) (1977), 73 D.L.R. (3d) 544 (F.C.A.)* the NEB had declared that a 1969

contract between *Saskatchewan Power* and *TransCanada* was a contract required to be filed with the NEB as part of *TransCanada's* tariff. *Saskatchewan Power* made a faint argument that the *NEB* did not have the power to make such a declaratory order. At pp. 552, LeDain, J.A., as he then was, said as follows:

> At the outset of the argument in this Court, a question was raised as to whether the Board was empowered to make a binding decision of the kind that was made in this case – that is, a decision of a declaratory nature apparently made outside of, or apart from, the regular exercise of its rate-making jurisdiction. At the conclusion of the hearing material was added to the case to show the circumstances in which the Board was called upon to make its decision. I have set out those circumstances in considerable detail to indicate the relationship of the Board's decision to its powers under the Act. They show that the Board's decision was no mere advisory opinion or interpretative ruling upon a matter not in controversy, but the determination of an issue that was raised initially in rate proceedings and was withdrawn from them to be considered in a separate hearing. The terms of s. 11(b) and s. 50 of the Act, respecting the powers of the Board, are broad enough, in my opinion, to include a binding determination, outside of rate proceedings...The Board has chosen to call its determination a "decision" but I do not attach any significance, for the purposes of this case, to such distinction as there may be between the words "order" and "decision". It would, moreover, in my opinion, be an unduly restrictive and highly inconvenient interpretation of the powers conferred by these provisions to confine them to orders or decisions of a coercive or prescriptive nature.

27. Footnote 2 to LeDain, J.A.'s decision reads as follows:

> The Board has full and exclusive jurisdiction to inquire into, hear and determine any matter
>
> . . . . .
>
> > 11(b) where it appears to the Board that the circumstances may require the Board, in the public interest, to make any order or give any direction, leave, sanction or approval that by law it is authorized to make or give, or with respect to any matter, act or thing that by this Act or any such regulation, certificate, licence, permit, order or direction is prohibited, sanctioned or required to be done.
>
> Any doubt that I might entertain on this question would be dispelled by the suggestion in the decisions of the Supreme Court of Canada that it is disposed to recognize the power of regulatory bodies such as the Board to make orders or decisions of a declaratory nature in appropriate cases. See, for example, *C.P.R. Co. v. Canadian Oil Companies Ltd.* (1912), 47 S.C.R. 155, 14 C.R.C. 201; affirmed 19 D.L.R. 64, [1914] A.C. 1022, in which it was expressly held that the Board had such power; and *Crow's Nest Pass Coal Co. (Ltd.) v. Alberta Natural Gas Co.* (1963), 38 D.L.R. (2d) 311, [1963 S.C.R. 257, and *The Queen in right of Ontario v. Board of Transport Cam'rs* (1967), 65 D.L.R. (2d) 425, [1968] S.C.R. 118, in which this power was apparently not questioned.

28. Goldcorp submits that it is also noteworthy that in *Ontario v. Canada (Board of Transport Commissioners), [1968] S.C.R. 118*, the Commissioners declared that fares on Ontario's

GO Trains were subject to federal jurisdiction. Ontario, in typical fashion to any jurisdictional decision against it, fought that ruling to *the SCC* on every ground its fine counsel could think of, but did not fight it on the basis that the Commissioners lacked jurisdiction to make declaratory orders. Goldcorp submits that this was because the *COCL* case was too well known to lawyers at the time.

29. On the exclusive jurisdiction point, in *Snopko v. Union Gas Ltd. 2010 ONCA 248*, the *Ontario Court of Appeal* upheld the dismissal of an action against Union Gas Ltd. in the *Ontario Superior Court* for breach of contract, unjust enrichment, nuisance, negligence and termination of contract because it found in substance that the claims all fell within the ambit of *subs. 38(2)* of *the Act* and related to just and equitable compensation in respect of gas or oil rights or the right to store gas. All the issues in the *Ontario Superior Court* action were therefore within the Board's exclusive jurisdiction. At *para. 27*, Sharpe, J.A. for the court said as follows:

> (2) Section 19 provides that, in the exercise of its jurisdiction, the Board has "in all matters within its jurisdiction authority to hear and determine all questions of law and of fact." This generous and expansive conferral of jurisdiction ensures that the Board has the requisite power to hear and decide all questions of fact and of law arising in connection with claims or other matters that are properly before it. This includes, *inter alia,* the power to rule on the validity of relevant contracts and to deal with other substantive legal issues.

30. In *Ontario Rental Housing Tribunal v. Metropolitan Housing Authority (2002), Docket C36729, at para. 15*, the *Ontario Court of Appeal* expressed a similar view about *subss. 157(2)* and *162* of the *Tenant Protection Act, 1997, S.O. 1997, c. 24*, which are materially the same as *subss. 19(6)* and *19(1)* of *the Act*, respectively, in upholding an order of the Ontario Rental Housing Tribunal to combine individual applications for hearing.

Conclusion on Issue I

31. For generations, Canadian lawyers have understood that *HDLF* powers of the type found in *subs. 19(1)* and *EJ* powers of the type found in *subs. 19(6)* of *the Act* provide regulatory bodies like the Board with a statutory basis to make legal determinations and declarations of the type that Goldcorp is seeking.

32. The word "determine" in *subs. 19(1)* in the power to *hear and determine* means the power to decide an issue. The *Ontario Court of Appeal* has told us that *s.19* is there to ensure that the Board has the requisite power to hear and decide all questions of fact and law arising in connection with matters that are properly before it. Goldcorp submits that *s. 19(1)* includes the power to rule upon the validity of any provisions of a code the Board has issued under *s. 70.1* of *the Act*. Consequently Goldcorp reaches the conclusion stated in paragraph 2 and 3 above.

ISSUE 2- Board Issue A2

33. In Board Issue A2 the Board asks as follows:

> A2 If section 19 of the Act does not provide a statutory basis on which Goldcorp may bring its Application, should the Board nonetheless proceed, on its own motion, to hear and determine the matters raised by the Goldcorp Application under section 19(4) of the Act?

34. This issue has presented Goldcorp with a challenge because it appears to be internally inconsistent. In its submissions on Board Issue A1 Goldcorp has provided its reasons for why it submits *subss. 19(1)* and *19(6)* of *the Act*, do in and of themselves, provide a statutory basis for Goldcorp's application, and does not intend to repeat that argument.

35. If, Goldcorp's submissions on Board Issue A1 are correct, the Board must then process and hear Goldcorp's Application. The only grounds for the Board not doing so are those set out in *s. 4.5* of the *Statutory Powers Procedure Act,* which are tracked in *s. 19* of *the Ontario Energy Board Rules of Practice and Procedure*. None of those grounds are applicable to Goldcorp's Application. Goldcorp submits, therefore, that the Board must hear and determine its Application.

36. Arguing counterfactually, however, Goldcorp submits that if *subss. 19(1)* and *19(6)* of *the Act*, in and of themselves, do not provide a statutory basis for Goldcorp's application – that is: the Board cannot hear and determine questions of law or fact and has no exclusive authority to do so – then the Board would not have any authority to proceed under *subs. 19(4)* either. This is because *subss. 19(1)* and *19(6)* which, counterfactually, would not support a determination of the issues in Goldcorp's application, inform *subs. 19(4)* which does not itself contain either a *HDLF* power or an *EJ* power. Therefore if the Board cannot hear and determine the question of law and fact in Goldcorp's Application

under *subss. 19(1)* and *19(6)*, it cannot do so under *subs. 19(4)*. This is why Goldcorp submits that Board issue A2 is internally inconsistent.

37. We leave the counterfactual and return to Goldcorp's position that *subss. 19(1)* and *19(6)*, in and of themselves do provide a statutory basis for its Application. Goldcorp submits that if the Board hears and determines Goldcorp's application, this would not preclude the Board from also proceeding, on its own motion, to hear and determine other matters resulting from its decision on Goldcorp's Application

38. In *PO No. 1, p. 4*, the Board has requested submissions on the principles and considerations relevant to the exercise of the Board's discretion in relation to Board Issue A2. Goldcorp respectfully declines to do that but instead wishes to affirm its position on the scope of this Application as set out in Goldcorp's letter to the Board dated November 23, 2011:

> Scope of the Issue and Legal Test
>
> Goldcorp submits that its Application raises only one narrow jurisdictional issue: whether the *Ontario Energy Board Act, 1998 (the Act)* confers power on the Board to impose sections 4.1.3, 6.7.6, 6.7.7 and 11.2 of the *Transmission System Code (TSC)*.
>
> Canadian jurisprudence requires that a court – in this case the Board – in deciding any issue to decide it as narrowly as possible and not to determine matters that are not before the court.
>
> The issue raised in Goldcorp's Application is whether the Board's statutory grant of powers gives it the authority to impose the challenged TSC provisions. In law, Goldcorp's issue is a *true jurisdictional issue.* The significance of this characterization is that if the Divisional Court subsequently reviews the Board's decision on this issue, it would probably apply the correctness *standard of review (Dunsmuir v. New Brunswick,* [2008] 1 S.C.R. 196, at para. 59).
>
> The Board therefore must treat this Application as a court would treat a similar *ultra vires* issue; apply the law to the facts of the case and exclude extraneous considerations.

ISSUE 3: *Motion for Interim Relief*

39. Goldcorp requests the following Interim Orders.

> (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.
>
> (e) An order under paragraph 2(e) of the Application (such further and other orders as may be required), staying HONI's claim for bypass compensation and forbidding HONI from including a provision in the CCRA requiring Goldcorp to pay bypass compensation pending an ultimate decision on Goldcorp's Application.

Jurisdiction

40. The Board has statutory authority to make interim orders. *Subs. 21(7)* of *the Act* reads as follows:

> **Interim orders**
>
> 21(7) The Board may make interim orders pending the final disposition of all matter before it. 1998.

FACTS

41. Goldcorp incorporates by reference and affirms the facts in its Summary of Pre-Filed Evidence, in this Application, *Ex. A, T. 2, S. 1* and adds the following additional facts.

42. On January 20th, the Board granted Goldcorp leave to construct GL-1. In the Decision of the Board portion of the Decision and Order, the Board said as follows:

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. (Exhibit B, Tab 1, Sched. 1).

43. In *EB-2011-0106*, Goldcorp adduced the following evidence:

(a) Goldcorp needed to have GL-1 in service by Q4 2011 (now Q1 2012) in order to meet the electricity requirements of its Mine Development Plan, and to produce the economic benefits that Plan will produce (EB-2011-0106, Ex. B, T. 1, S.3, p. 2-3).

(b) If GL-1 is not able to be placed into service until after Q1 2012, Goldcorp's only alternative is to use diesel generation, with its attendant adverse environmental effects (EB-2011-0106, Tr. July 7, 2011, p. 31, ll 3-9; Ex. B, T. 3, S. 1, p. 1).

(d) If GL-1 is not able to be placed into service until after Q1 2012, natural gas fired generation would not be an option for 2012 (EB-2011-0106, Tr. July 7, 2011, p. 62, l. 16, p. 63, l. 1).

(e) GL-1 is required to allow Goldcorp to expand its operations, and to provide more reliable electricity service to the Red Lake Area. (EB-2011-0106, Tr. July, 7, 2011, p. 30, ll 7-13).

(f) If GL-1 is not able to be placed in service until after 2012, the Red Lake area will continue to suffer from voltage flicker caused by Goldcorp's mining operations. GL-1 going into service within Q1 2012 will improve

the quality of electricity service in the Red Lake Area (EB-2011-0106, Ex. B, Tab 1, S. 3, p. 3).

44. By the Board granting Goldcorp leave to construct GL-1, construction of GL-1 by Q4 2011 (now Q1 2012) must be taken to be an objective that is in the public interest. It also must be taken to be given that is in the interests of consumers with respect to prices and the reliability and quality of electricity service. These conclusions follow from *s. 96* of *the Act*.

45. Since late July, Goldcorp has been attempting to negotiate a Connection and Cost Recovery Agreement (CCRA) with HONI. Despite ongoing electronic communication between Goldcorp and HONI and one meeting since August, HONI has not yet provided Goldcorp with even a draft copy of the CCRA.

46. Goldcorp is concerned that if HONI's delays continue there is a risk that Goldcorp will not be able to connect its 115 kV line to HONI's system or to have it energized by the end of Q1 2012 when it will be required.

47. Goldcorp understands HONI's position to be that until a CCRA has been completed HONI will not connect GL-1 to its system or energize it (Affidavit of Luc Major paragraph 12).

48. Goldcorp is concerned that HONI will insist on including a provision in the CCRA purporting to require Goldcorp to pay bypass compensation and refuse to complete the CCRA or to connect the 115 kV line to its system or to energize it until Goldcorp so agrees (Affidavit of Luc Major, paragraph 13.)

Applicable Legal Principles

49. Orders 2(a) and 2(e) are the type of order known as mandatory orders (*Siemens VDO Automotive Inc. v. Rhodia Canada Inc. (2005),* 16 B.L.R. (4th) 336, paragraph 2.)

50. Goldcorp submits that where a mandatory order is sought, the tests the Board ought to apply are the same tests as courts use for granting an interlocutory injunction. These are set out in the well known decision of *RJR – MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311.* The tests, re-phrased for Board use, and utilizing the *strong prima facie* case test rather than the easier *serious issue to be tried* test, are as follows:

- Does the Applicant have a strong prima facie case to be determined?

- Would the Applicant suffer irreparable harm if the remedy was left to be determined at the hearing?

- Does the balance of convenience favour the Applicant?

(These tests were used in *Setana Sports NA Ltd. v. Score Television Network Ltd. (2009), Docket CV-09-382682 (Spies. J.)*, which held that when a mandatory order is sought the first test is whether there is a strong *prima facie* case rather than a substantial issue to be tried. Goldcorp will address each legal test.

Strong Prima Facie Case

51. Goldcorp submits it has made a strong prima facie case that the subject *TSC* provisions are *ultra vires* the Act. It has submitted a Written Argument setting out in clear terms that HONI has requested Goldcorp to pay bypass compensation, that the *TSC* requires the payment of bypass compensation and that the amount of requested bypass

compensation is between $8 - $11 million. Goldcorp had cited authoritative and relevant court decisions that support Goldcorp's position that no statutory body may impose financial burdens like *TSC's* bypass compensation requirements without clearly worded statutory language enabling it impose such burdens.

52. No one has yet suggested that Goldcorp's position is incorrect. On more than one occasion, Goldcorp's counsel requested that Board counsel tell Goldcorp whether its position is wrong or it has overlooked some statutory provision. No such statutory provision, other than *ss. 70* and *70.1* of *the Act*, has been offered in response. No intervenor has asked: what are we doing here? Goldcorp has overlooked section...?

53. Goldcorp, therefore submits that it has made a strong prima facie case that bypass compensation is not authorized by *the Act*.

Irreparable Harm

54. The *Irreparable Harm* test in court is usually stated as asking whether the Applicant will suffer any harm that cannot adequately be compensated by the remedy it is seeking at trial. Goldcorp submits that the evidence shows that by that standard it would suffer irreparable harm if HONI were not to connect GL-1 to its system and energize it by Q1 2012. This irreparable harm would be as follows:

(a) Inability of Goldcorp to meet the goals of its Mine Development Plan with loss of attendant economic growth benefits in the Red Lake area;

(b) Use of diesel generation, with attendant emissions and adverse environmental effects;

(c) Perpetuation of poor reliability and quality of electricity service in the Red Lake area; and

(d) Creation of a situation that is not in the public interest with respect to prices and the reliability and quality of electricity service in the Red Lake area.

55. Goldcorp submits that nothing other than HONI connecting GL-1 to its system and energizing it by Q1 2012 will prevent the occurrence these adverse effects. A decision that the challenged provisions of the *TSC* are *ultra vires* would not be an adequate alternative remedy.

56. Goldcorp submits therefore that it has met the *Irreparable Harm* test for the requested *Interim Orders*.

Balance of Convenience

Order 2(c)

57. Goldcorp seeks this *Interim Order* in order to insure that HONI does not procrastinate in completing a *CCRA* or in connecting *GL-1* to HONI's system and energizing it. Goldcorp is concerned that this may be happening. Goldcorp submits that the Affidavit of Luc Major provides evidence that is consistent with Goldcorp's concern. At the time of filing the Written Submissions, December 5, 2011, HONI has not yet provided Goldcorp with a draft CCRA. With the Christmas and New Year holiday fast approaching, it now appears unlikely that a *CCRA* can be completed in 2011. The CCRA is only one of several matters such as location of capacitor banks, financial issues and scheduling that must be settled between Goldcorp and HONI before *GL-1* can be connected to HONI's system and be energized.

58. Goldcorp requests that the Board make Order 2(c) in order to ensure the public interest is protected.

59. Goldcorp submits that such an order would do nothing more than require HONI to give connecting and energizing GL-1 an appropriate priority. It would not require HONI to do anything unusual or out of the ordinary. Goldcorp submits therefore that the balance of convenience favours the making of Order 2(c).

Order 2(e)

60. Again, Goldcorp is concerned that HONI might attempt to include a provision in the *CCRA* requiring Goldcorp to pay bypass compensation and refuse to complete the *CCRA* until Goldcorp so agrees. That would delay both the connection of *GL-1* to HONI's system and energizing it.

61. Goldcorp submits that if HONI were to insist on such a provision, it would be attempting to circumvent Goldcorp's Application and this proceeding in an effort to predetermine an issue which is for the Board to decide. That would be inappropriate and the Board should not tolerate such a tactic.

62. Goldcorp also acknowledges that if its Application is ultimately unsuccessful it will be required to pay bypass compensation. If *s. 11.2* of the TSC passes jurisdictional muster, it requires HONI to demand bypass compensation from Goldcorp, but it does not require HONI to write that requirement into the *CCRA*. If there is no express requirement to pay bypass compensation in the *CCRA*, HONI would still be able to insist that Goldcorp pay.

63. There is nothing in *Order 2(e)* to upset HONI's daily operations in any way. Goldcorp therefore submits that the balance of convenience favours the making of Order 2(e) as well.

Conclusion on issue 13

64. For these reasons, Goldcorp requests the interim orders sought.

Issue 4 Costs Awards

Jurisdiction

65. The Board's authority with respect to costs is set out in *s. 30* of *the Act*, which reads as follows:

> 30. (1) The Board may order a person to pay all or part of a person's costs of participating in a proceeding before the Board, a notice and comment process under section 45 or 70.2 or any other consultation process initiated by the Board.
>
> **Same**
>
> (2) The Board may make an interim or final order that provided,
>
> (a) by whom and to whom any costs are to be paid;
>
> (b) the amount of any costs to be paid or by whom any costs are to be assessed and allowed; and
>
> (c) when any costs are to be paid.
>
> **Rules**
>
> (3) The rules governing practice and procedure that are made under section 25.1 of the *Statutory Powers Procedure Act* may prescribe a scale under which costs shall be assessed.
>
> **Inclusion of Board costs**
>
> (4) The costs may include the costs of the Board, regard being had to the time and expenses of the Board.
>
> **Considerations not limited**
>
> (5) In awarding costs, the Board is not limited to the considerations that govern awards of costs in any court.
>
> **Application**
>
> (6) This section applied despite section 17.1 of the *Statutory Powers Procedure Act,* 2003.

66. *Ss. 3.05* and *3.06* of the Board's *Practice Direction on Cost Awards* state:

> 3.05 Despite section 3.03, the following parties are not eligible for a cost award:
>
> (a) applicants before the Board;

(b) transmitters, wholesalers, generators, distributors, and retailers of electricity, either individually or in a group;

(c) transmitters, distributors, and marketers of natural gas, and gas storage companies, either individually or in a group;

(d) the IESO; and

(e) the Ontario Power Authority.

3.06 Notwithstanding section 3.05, a party which falls into one of the categories listed in section 3.05 may be eligible for a cost award it if is a customer of the applicant.

67. Goldcorp submits that *ss. 30(5)* of *the Act* makes it clear that while the Board is not limited to considerations that govern awards of costs in any court, it certainly may apply those considerations in an appropriate case. The Board's *Practice Direction on Costs* recognizes this possibility in *s. 3.06* which recognizes that applicants before the Board may be eligible for costs in an appropriate case. Goldcorp submits that this proceeding is an appropriate case for the Board to apply the considerations which courts apply to an award of costs.

(a) Why Goldcorp Should be Awarded Costs

68. In its letter to the Board of November 23, 2011, Goldcorp said as follows:

> Costs
>
> Goldcorp refers to Exhibit A, Tab 1, Schedule 1, page 1, paragraph 2(d) of its Application which seeks:
>
> > 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 costs of this Application.
>
> The Board's Practice Direction on Cost Awards was primarily designed for multi-party proceedings concerning applications by, for example, transmitters or distributors respecting rates, facilities and other approvals. Again, Goldcorp's Application is sharply defined and can be effectively and efficiently processed using the "*Party A vs Party B*" process used in the courts and other statutory bodies.
>
> Goldcorp suggests that the Board require one legal argument supporting Goldcorp's position and another legal argument supporting the contrary position. Goldcorp anticipates that such a process would produce a complete record to support the Board in its decision making and would control the costs of the proceeding. Goldcorp suggests that the Board can do this by adhering to its *Practice Direction on Cost Awards, Section*

5. Principles in Awarding Costs which allows it to instruct intervenors of the same interest to co-ordinate their participation.

If it is successful, Goldcorp will seek an award of costs under section 3.06 of the Board's Practice Direction on Costs. Goldcorp submits that it would be entitled to its costs because:

- It is always proper to question the authority of a statutory body to impose financial burdens on persons;
- The Board would have been purporting to tax persons without proper legal authority (See: *Eurig Estate (Re), [1998] 2 S.C.R. 565, at paras. 25 and 31-32)*; and,
- The Board's Decision on Goldcorp's Application will further the legal public policy issue of the keeping the Board's authority within the limits granted by the Legislative Assembly.

69. Goldcorp confirms that position set out in the letter of November 23rd and wishes to add additional reasons why Goldcorp submits that it will be entitled to an award of costs.

70. First, this Application was triggered by an act of the Board in the guise of the 2005 amendments to the *TSC*. Goldcorp in its Application has merely responded to this act in order to protect its right as a legal person to hold statutory bodies to the powers granted them by the Legislative Assembly. Whatever the Board decides will not change the fact that Goldcorp is responding to a Board action.

71. Second, the fact that Goldcorp has risen up against the Board's authority to make policy and opened the legal issue of whether certain code provisions are *ultra vires*, makes this Application an important one. Importance of the issue is one of the factors a court would consider in awarding costs under *Rule 57.01(1)(d)* of *the Rules of Civil Procedure*.

72. Third, the legal issue that Goldcorp has opened is not only important, it is of province-wide importance and, with some variations, of national importance.

73. Fourth, Goldcorp has tried to proceed expeditiously. The Board has required a delaying and expensive interlocutory proceeding. On October 6, 2011 representatives of

Goldcorp met with Senior Board staff to inform the Board that Goldcorp's Application might be filed and to explore possible solutions to Goldcorp's concerns. There was no response from Board Staff. On October 17th Goldcorp filed its Application as it said it would if there had been no response from Board Staff prior to that date. Only on November 25, 2011, five weeks later, did the Board issue *P.O. No. 1. P.O. No. 1* has only postponed the determination of Goldcorp's Application and created additional costs.

74. Goldcorp is in the position of finding itself the first person to open an important question of jurisdiction and, in order to seek its rights, being forced to participate in a drawn-out and expensive proceeding along with other parties with whom, apart from LacSeul First Nation and HONI, it has never previously dealt. The four factors just listed in paras. 69 to 72 and this para. are good reasons why Goldcorp should receive an award of costs regardless of the outcome, as was the case in *B (R) v. Children's Aid Society of Metropolitan Toronto (1993), 10 O.R. (3d) 321, at paras. 100-109;* and *Horsefield v. Ontario (Registrar of Motor Vehicles) (1999), 44 O.R. (3d) 73).*

(b) Who Should Pay Costs

75. Goldcorp submits that the Board should designate HONI for the purpose of costs awards, to be administered in accordance with the Boards *Practice Direction On Cost Awards* and its decision respecting Goldcorp's application for a costs award.

76. Before explaining its reasons for that position, Goldcorp wishes to withdraw its request for costs against any party who opposes it, other than HONI.

77. Goldcorp submits that HONI is the appropriate party to be designated for purposes of costs awards, for the following reasons:

(a) The 2005 amendments to the *TSC* were triggered in part by *HONI's* September 27, 2001 and October 17th proposed amendments to the then *TSC* in proceeding RP-1999-0057.

(b) They were also a result of HONI's January 30, 2002 submissions for approval of its proposed Customer Connection Process, which included its suggested bypass compensation requirements now in *the TSC* and the subject of Goldcorp's application.

(c) The Board had also received expressions of concern from other stakeholders about the *TSC* so decided to deal with *HONI's* Applications referred to in paras. 77(a) and (b) above in the context of a review of the whole *TSC*. This was proceeding *RP-2002-0120* which led to the 2005 *TSC* amendments.

(d) In its Notice of Proceeding in *RP-2002-0120*, the Board designated *HONI* for the purpose of cost awards, to be administered in accordance with the Board's then guidelines on costs.

(e) Since this proceeding arises out of *RP-2002-0120* and *HONI's* connection procedures, it is reasonable that the Board should again designate *HONI* for the purpose of cost awards.

(f) Further, in putting its proposed connection procedures before the Board in what was essentially a policy hearing, *HONI* had a duty to perform due diligence on whether the Act would support its proposed procedures. There is nothing in the record of *RP-2002-0120* indicating that anyone turned his/her mind to that fundamental issue. This failure of analysis has put both the Board and Goldcorp in the awkward position where Goldcorp has had to come before the Board. This

is another reason why the Board should designate HONI for the purposes of costs awards.

78. Goldcorp submits that for all the reasons why it submits it is entitled to an award of costs and why *HONI* should be designated for the purpose of cost awards, the Board should not designate Goldcorp for the purpose of Cost Awards.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of December, 2011.

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