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Ontario

BY EMAIL

December 15, 2011

Kirsten Walli
Board Sectetary
Ontario Energy Board
2300 Yonge St. 27th Floor
P.O. Box 2319
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: Board Staff Submission
Board File No. EB-2011-0361 and EB-2011-0376

Pursuant to the Board's November 25, 2011 Notice of Applications, Notice of Combined Hearing and Procedural Order No. 1 please find enclosed the written submissions of Board staff on the threshold questions and the Book of Authorities. Please forward the submission and the Book of Authorities to all parties to this proceeding.
Yours truly,

Original Signed By

Rudra Mukherji
Case Manager

cc: All Parties

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 orders;

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 BOARD STAFF ON THE COMMON THRESHOLD QUESTIONS to be heard on December 19, 2011

December 15, 2011

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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 orders;

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WRITTEN SUBMISSIONS OF BOARD STAFF ON THE COMMON THRESHOLD QUESTIONS to be heard on December 19, 2011

OVERVIEW

1. These submissions are made on behalf of Board staff by its counsel.

2. Goldcorp Canada Ltd. and Goldcorp Inc. (together "Goldcorp") have filed an Application (the "Goldcorp Application") with the Ontario Energy Board claiming certain declaratory relief "under section 19" of the *Ontario Energy Board Act, 1998* (the "*Act*"), together with related interim and costs orders. By way of letter dated December 14, 2011, Goldcorp requested that its request for interim relief be adjourned *sine die*.

3. Langley Utilities Contracting Ltd. ("Langley Utilities") has also filed an Application (the "Langley Utilities Application") with the Board claiming declaratory relief, without specifying in the Application any statutory basis for it.

4. By Notice of Applications, Notice of Combined Hearing and Procedural Order No. 1, issued by the Board on November 25, 2011 (the "Notice and P.O."), the Board has indicated that, before deciding whether or not it will hear the matters raised by the Goldcorp Application or the Langley Utilities Application, it will proceed to hear argument on the following:

A1 Does section 19 of the *Act*, in and of itself, provide a statutory basis for Goldcorp's Application?

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*?

B1 Is there a statutory basis for the Langley Utilities Application under the *Act*?

B2 If the *Act* does not provide a statutory basis on which Langley may bring its Application, should the Board nonetheless proceed, on its own motion, to hear and determine the matter raised by the Langley Utilities Application under section 19(4) of the *Act*?

The Board has also indicated that it would conduct a combined hearing in relation to threshold questions A1 and B1 and the principles and considerations relevant to threshold questions A2 and B2.

5. In their respective submissions in response to the Notice and P.O., Goldcorp and Langley Utilities (together, the "Applicants") have largely approached the first threshold question (A1 or B1, as applicable) as one of the Board's jurisdiction to provide the kind of relief sought in their respective Applications. As noted below, Board staff agree that s. 19(1) frames the Board's jurisdiction in broad terms that include, by implication, the power to grant declaratory relief or to determine the validity of contracts. However, Board staff submits that the issue before the Board is the circumstances under which the Board may or must exercise that jurisdiction. Section 19(1) of the *Act* addresses the scope of the Board's authority to determine *matters that*

are properly before it. Contrary to the position of the "Applicants", it is Board staff's view that the terms of s. 19(1) do not confer any rights on any parties to bring matters before the Board.

6. Legislation from which the Board derives its jurisdiction grants standing to particular parties to bring applications before the Board for specific purposes. Section 19(1) simply does not do so, either expressly or by implication. It describes the jurisdiction of the Board, but does not confer any right on parties to invoke the exercise of that jurisdiction. To read s. 19(1) as the Applicants suggest would render a number of specific statutory provisions in the legislative scheme superfluous, by giving ***any party*** the right to bring ***any matter*** before the Board for determination at ***any time***, merely by framing it as an 'application' under s. 19(1).

7. Simply put, s. 19(1) grants jurisdiction to the Board to hear and determine legal and factual issues; it does not grant parties the right to make applications to the Board. As such s. 19(1) alone does not provide either Goldcorp or Langley Utilities with any right to require the Board to hear their Applications.

8. Within the legislative scheme, however, s. 19(4) operates to give the Board the discretionary jurisdiction to hear and determine matters of its own motion, even when there is no pending application by anyone with standing before the Board. Thus, whereas s. 19(1) describes the broad powers of the Board to hear and determine matters under a properly constituted application brought forward by a party under another provision, s. 19(4) grants the Board the specific power to hear and determine matters that have not been brought forward by a particular party. Importantly, however, the language of s. 19(4) requires that any matter the Board seeks to raise of its own motion must be a matter that could have been raised in the course of an application properly before the Board (even if that is one by a different party under different circumstances than the current Applicants).

9. The decision to hear and determine an issue under s. 19(4), and thus to grant a party access to a hearing, rests entirely with the Board. To guide its exercise of discretion in this regard, the Board may wish to consider certain factors drawn from the jurisprudence concerning declaratory relief, mootness other related doctrines. These factors include:

(a) whether there is a real, adversarial dispute between the parties;

(b) whether the relief sought would be of practical use;

(c) whether the matter raises a hypothetical question;

(d) whether the dispute is ripe, or concerns speculative future harm;

(e) whether there is another pending proceeding;

(f) whether there is an alternate proceeding available;

(g) whether the issue warrants the use of scarce Board resources;

(h) whether the issue intrudes upon the legislative or enforcement role of the Board; and

(i) whether there is an advantage to having the matter first determined by the Board on account of its specialized expertise.

THE FACTS

10. For the purposes of these submissions and the determination of the threshold questions identified in the Board's Notice and P.O., the relevant facts giving rise to the Goldcorp Application and the Langley Utilities Application (together, the "Applications") should be assumed to be true, without prejudging any contentious allegations that are likely to be contested. The following is a summary of the facts accepted or assumed to be true by Board staff.

A. Goldcorp Application

11. On July 20, 2011, the Board granted Goldcorp leave to construct a transmission line ("GL-1") from a connection point on an existing transmission line belonging to Hydro One Networks Inc. ("HONI"). HONI advised Goldcorp that, because capacity at a transformer station will be made idle as a result of GL-1, Goldcorp must pay HONI bypass compensation.

Reference: Affidavit of Curtis C. Pedwell sworn October 5, 2011 ("Pedwell Affidavit"), Goldcorp Application Record, Exhibit A, Tab 4, Schedule 2 at paras. 4-7

12. HONI and Goldcorp are currently negotiating a connection and cost recovery agreement respecting the GL-1 transmission line. Goldcorp and HONI have not yet signed an agreement in this regard.

Reference: Pedwell Affidavit, Goldcorp Application Record, Exhibit A, Tab 4, Schedule 2 at paras. 3, 5

13. Provisions of the Board's *Transmission System Code* (June 10, 2010) (the "*Code*") may affect whether Goldcorp must pay bypass compensation to HONI, and in what amount.

Reference: Pedwell Affidavit, Goldcorp Application Record, Exhibit A, Tab 4, Schedule 2 at para. 18

14. Goldcorp purports to bring an application under s. 19(1) of the *Act* for an order declaring that (i) certain provisions of the *Code* are *ultra vires* the *Act*; and (ii) Goldcorp is not under any legal obligation to pay bypass compensation to HONI.

Reference: Goldcorp Application, Goldcorp Application Record, Exhibit A, Tab 1

15. By way of letter dated December 14, 2011, Goldcorp advised that it did not intend to proceed with its motion for interim relief, and requested that the Board adjourn that proceeding *sine die*.

Reference: Letter from Ian Blue to Board Secretary re "Preliminary Issues" dated December 14, 2011

B. Langley Utilities Application

16. Langley Utilities submitted a bid to the Corporation of the City of Brampton (the "City") in a competitive procurement for the performance of certain street light maintenance services. A competing bid was submitted by Enersource Hydro Mississauga Services ("EHMS").

Reference: Langley Utilities Application at paras. 9-10

17. EHMS is an affiliate of Enersource Hydro Mississauga Inc. ("EHMI"), which is a municipally-owned, licensed electricity distributor.

Reference: Langley Utilities Application at paras. 4-6

18. Langley Utilities argues that, because of the affiliate relationship between EHMS and EHMI, EHMS cannot lawfully perform the contract for street light maintenance services. In particular, Langley Utilities relies on s. 73 of the *Act*, which restricts affiliates of municipally-owned distributors from carrying on certain activities.

Reference: Langley Utilities Application at paras. 14-17

19. On November 5, 2010, Board staff issued a Compliance Bulletin which sets out Board staff's view that an affiliate of a distributor is not precluded by s. 73(1) of the *Act* from providing street lighting services. On April 12, 2011, Board staff issued a further Compliance Bulletin regarding street lighting services which states that, if and to the extent that an activity is permitted under s. 73(1), an affiliate is permitted to undertake that activity both inside and outside of its affiliated distributor's licensed service area. These two Bulletins are referred to collectively as the "Compliance Bulletins".

Reference: Langley Utilities Application at paras. 65-67

Written Submissions of Langley Utilities dated December 5, 2011 in response to the Notice and P.O. at paras 11-14

20. Langley Utilities brings its Application, without any statutory basis other than s. 19(1) of the *Act*, for a determination as to whether the services contemplated under the street light maintenance contract with the City are permitted business activities that an affiliate of a municipally-owned electricity distributor can carry on under s. 73 of the *Act*.

Reference: Langley Utilities Application at para. 1

Written Submissions of Langley Utilities dated December 5, 2011 in response to the Notice and P.O. at para. 3

21. Langley Utilities has also commenced an action in Superior Court against EHMS, which is currently stayed pending a decision by the Board on the question raised in its Application.

Reference: Affidavit of Abrar Huq sworn December 5, 2011, Written Submissions of Langley Utilities dated December 5, 2011 in response to the Notice and P.O. Tab 2 at para. 5

THE ISSUES

22. The threshold questions for determination, as stated by the Board in respect of the Goldcorp Application, are:

A1 Does section 19 of the *Act*, in and of itself, provide a statutory basis for Goldcorp's Application?

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*?

23. The threshold questions for determination, as stated by the Board in respect of the Langley Utilities Application, are:

B1 Is there a statutory basis for the Langley Utilities Application under the *Act*?

B2 If the *Act* does not provide a statutory basis on which Langley may bring its Application, should the Board nonetheless proceed, on its own motion, to hear and determine the matter raised by the Langley Utilities Application under section 19(4) of the *Act*?

24. Given that Langley Utilities has now identified s. 19(1) as the statutory basis for its Application, Board staff will address the issues raised by the threshold questions as follows:

(a) Does section 19 of the *Act*, in and of itself, provide a statutory basis for an application to the Board?

(b) What criteria or principles should be applied by the Board in exercising its discretion to hear a matter on its own motion under section 19(4) of the *Act*?

(c) How might those criteria or principles apply to the matters raised in the Goldcorp Application and in the Langley Utilities Application?

LAW AND ANALYSIS

25. Normally, matters come before the Board for determination under specific statutory provisions of the *Act* (or other enabling legislation, or associated regulations and/or codes), under which the Board is empowered to provide specific orders or determinations. The Applications are unusual in that they seek mainly declaratory relief, and the statutory basis for the Applications is in doubt.

A. Section 19(1) of the *Act*

26. The Goldcorp Application seeks orders under s. 19 of the *Act* in relation to certain provisions of the *Code*. Neither the Goldcorp Application, nor the written submissions filed by Goldcorp on December 5, 2011 in response to the Notice and P.O. (the "Goldcorp Submissions"), cite any other provision of the *Act* as a basis for the Goldcorp Application.

i. Points of agreement and disagreement

27. At the outset, it is useful to set out the points made by the Applicants, which Board staff accept.[1]

28. Board staff agree that the Board is a specialized tribunal, and that s. 19 of the *Act* provides it with broad authority to carry out its statutory mandate. Courts have confirmed the broad scope of the Board's powers and recognized its expertise by extending considerable deference to its decisions.

29. Board staff also agree that the Board has the power to grant declaratory relief. Board staff submit that s. 19(1) of the *Act* confers on the Board a broad jurisdiction to deal with questions of fact and law, including by way of providing declaratory relief or determining the validity of contracts.

30. Where Board staff diverge from the Applicants, however, is that in Board staff's view, the Board's broad powers under s. 19(1) of the *Act* can only be exercised in a proceeding that is properly before it, typically by way of (i) an application that is properly brought before it by a party; (ii) a Ministerial directive; (iii) a proceeding commenced on the Board's own motion; (iv) an appeal to the Board; or (v) a review commenced under the Board's *Rules of Practice and Procedure* (the "Rules of Practice"). Board staff submit that s. 19(1) of the *Act*, standing alone, does not allow someone to bring applications before the Board, and that an application based solely on s. 19(1) of the *Act* is not one that is properly brought before the Board. Section 19(1) defines the boundaries of the Board's jurisdiction, but does not independently permit a person to invoke that jurisdiction.

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[1] In the view of Board staff, for the purposes of answering the common threshold questions, nothing turns on Goldcorp's characterization of the word "determine" as used in s. 19(1) of the *Act*, which Goldcorp defines as being equivalent to "decide". Board staff take no position on this issue for the purposes of this proceeding.

31. Accordingly, Board staff submit that the Applicants may **not** rely exclusively on s. 19(1) of the *Act* to bring their Applications before the Board.

32. The Langley Utilities Application was filed pursuant to Rule 34 of the Board's Rules of Practice. No provision of the *Act* was initially cited as a statutory basis for the Application. Board staff submits that Rule 34 of the Rules of Practice pertains to the form of hearings and to notice, and *cannot* be used as an independent basis for an application to the Board.

ii. The right to bring a proceeding before a tribunal must be based in the tribunal's enabling legislation

33. It is a fundamental principle of administrative law that there must a statutory basis for a party to have the right to bring a proceeding before a tribunal. The natural corollary to this principle is that a person may not demand – nor may a statutory tribunal grant – standing to bring such proceeding unless such a power is set out in the tribunal's enabling legislation.

34. This principle was recently applied by the Supreme Court of Canada in *Northrop Grumman Overseas Corp.* v. *Canada (Attorney General)*, [2009] 3 S.C.R. 309. The issue in that case was whether the Canadian International Trade Tribunal (the "CITT") erred in ruling that a particular complainant had standing before it. In ruling that the complainant did not have standing to seek a hearing before the CITT, the Supreme Court of Canada relied on the language of the enabling legislation, and explained:

> [44] It is suggested that the CITT provides an efficient dispute resolution mechanism to which there should be ready access. **While the CITT may be an efficient dispute resolution vehicle, it is a statutory tribunal and access to it must be found in the relevant statutory instrument.** The statutory provisions that provide access to the CITT is pursuant to specific trade agreements negotiated by governments. If the government of a supplier did not negotiate access to the CITT for its suppliers, there is no access for them. [Emphasis added].

Reference: *Northrop Grumman Overseas Corp.* v. *Canada (Attorney General)*, [2009] 3 S.C.R. 309 at para. 44

35. Much of the Supreme Court of Canada's decision in *Northrop* is devoted to an analysis of the relationship between the legislation governing the CITT, the *Agreement on Internal Trade* and other trade agreements. However, Board staff submit that the principle enunciated in the above excerpt applies and is equally relevant here: access to the Board must be found in legislation from which the Board derives its jurisdiction.

36. The same point is made in the context of public interest standing, in a leading text on administrative law, which summarizes the relevant jurisprudence succinctly as follows:

> Public interest standing deals with the ability of a person to challenge a decision who would not ordinarily be considered to be sufficiently directly affected by the issue at hand to do so. There are instances where such persons can be allowed to bring those applications in the public interest. However, unlike the superior courts which have the inherent authority to grant such standing, **statutory agencies must be given that authority by legislation** and, thus, must exercise caution in identifying such authority when considering requests for public interest standing. Agencies cannot grant public interest standing to result in their hearing matters which their legislation did not contemplate their hearing. **This may be seen most easily where their enabling statute clearly limits who can bring applications. Before an agency can grant public interest standing it must ensure that the legislature grants the agency discretion to do so. Allowing the bringing of an application by a person who does not meet the statutory criteria would be tantamount to the agency extending its own jurisdiction.** (emphasis added)

Reference: Macaulay and Sprague, *Practice and Procedure Before Administrative Tribunals*, Volume 2, pp. 9-20.44 and 9-20.45.

37. Board staff submit that the same principles apply with even greater force when dealing with the issue of a person attempting to gain access to a statutory tribunal as of right based on a personal interest in the matters sought to be raised. Board staff submit that s. 19(1) simply does not give anyone such a right, in and of itself.

iii. The Board's enabling legislation sets out clear limits regarding applications

38. Legislation from which the Board derives its jurisdiction "clearly limits" standing (in the sense discussed in Macaulay and Sprague) by setting out a number of "statutory criteria". Certain provisions address the issue of who can bring an application. For example:

i. only a "person who is directly affected by" an urgent market rule amendment may apply to the Board to review the amendment (*Electricity Act, 1998*, s. 34(3), and s. 35(1) is to the same effect in relation to an application to review a provision of the market rules);

ii. only the Independent Electricity System Operator may appeal to the Board from an order, finding or remedial action made or taken by a "standards authority" (*Electricity Act,* 1998, s. 36.3);

iii. s. 7 of the *Act* identifies who may appeal to the Board from an order made by an employee of the Board under delegation;

iv. s. 99(1) of the *Act* identifies who may apply to the Board for authority to expropriate land for a work; and

vi. s. 101(1) of the *Act* identifies who may apply to the Board for authority to construct a work upon, under or over a highway, utility line or ditch.

39. Moreover, certain matters may only be dealt with on the Board's own motion, and cannot be the subject of an application by any person. Specifically, under s. 112.2(1) of the *Act*, a compliance order may only be made on the Board's own motion.

40. Other provisions clearly limit the time within which an application may be brought or identify the conditions precedent to the bringing of an application. For example:

i. s. 31.1 of the *Electricity Act, 1998* states that an application for the restoration of electricity service may only be filed by the owner or occupier of the property and only after having made the necessary request to the distributor;

ii. ss. 33(4) and 34(4) of the *Electricity Act, 1998* establish the time within which an application for review of an amendment to the market rules may be made; and

iii. s. 35(1) of the *Electricity Act, 1998* prohibits the making of an application by a market participant to review a provision of the market rules if the applicant has

not made use of the provisions of the market rules relating to the review of market rules.

41. All of the above-noted statutory provisions would be rendered superfluous if ***any party*** had the right to bring an application for ***any purpose*** before the Board for determination ***at any time***, simply by framing it as an 'application' under s. 19(1). Indeed, to read s. 19(1) as the Applicants suggest is to remove all restrictions on the ability of any person to bring an application on any subject at any time, and to create a concomitant obligation on the Board to consider all such applications, so long as they engage a question of law or fact within the Board's broad jurisdiction.

42. This violates one of the most basic rules of statutory interpretation: the presumption against tautology. In her leading text, Professor Sullivan explains the principle as follows:

> It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain... [E]very word and provision found in a statute is supposed to have a meaning and a function. For this reason, courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant.

Reference: Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed.) at pp. 210-11

43. Since the Board's governing statutory scheme variously delineates the parties who may bring an application, the purposes for which applications may be brought and the timing of and conditions precedent for applications, giving these provisions meaning requires the Board to reject the notion that s. 19(1) is a freestanding means by which to gain access to a hearing before the Board.

iv. Language of s. 19(1) does not advert to the ability to bring applications

44. Section 19(1) states:

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

45. This language in s. 19(1), itself, simply does not refer to the ability of any person to bring any type of proceeding. The language deals only with the scope of Board's jurisdiction, and not with a person's ability to invoke that jurisdiction by bringing an application.

46. More importantly, the language of s. 19(1) limits the Board's authority to hear and determine matters to those that are "within its jurisdiction", which includes the requirement that the Board may only hear and determine *matters that are properly before it*. This point was made clear by the Ontario Court of Appeal in *Snopko* v. *Union Gas Ltd.* – a case referred to in the written submissions filed by both Goldcorp and Langley Utilities in response to the Notice and P.O.. In *Snopko,* the Court of Appeal considered the proper interpretation of s. 19(1) and stated as follows:

> 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 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 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. [Emphasis added].
>
> **Reference:** *Snopko* v. *Union Gas Ltd.,* 2010 ONCA 248 at para. 27

47. Thus, as interpreted by the Court of Appeal in *Snopko*, it is submitted that s. 19(1) actually strengthens the view that the ability of persons to bring forward an application before the Board is limited to provisions set out elsewhere in the statutory scheme.

v. The cases cited by the Applicants do not support using s. 19(1) to bring applications

48. The interpretation of s. 19(1) set out above is only reinforced when one compares the language in s. 19(1) of the *Act* to the language in other statutory provisions that explicitly contemplate the ability of a person to bring forward an application.

49. In the Goldcorp Submissions, reliance is placed on the decisions of the Supreme Court of Canada in *The Canadian Pacific Railway Company et. al. v. The Canadian Oil Companies Limited,* (1912) 47 S.C.R. 155 and of the Federal Court of Appeal in *Re Saskatchewan Power Corporation et al. and TransCanada Pipelines Ltd.,* (1977) 73 D.L.R. (3d) 544.

50. Board staff agree that these cases support of the authority of the Board to grant declaratory relief. However, it is submitted that neither case supports the proposition that s. 19(1) of the *Act* gives persons any right to bring an application before the Board. That is because, unlike s. 19(1), the legislative provisions before the courts in both *Canadian Oil Companies* and *Re Saskatchewan Power Corporation* explicitly addressed the circumstances under which a matter may be heard by the statutory tribunal in issue.

51. For example, the relevant provisions of the *Railways Act* considered by the Supreme Court of Canada in the *Canadian Oil Companies* case read as follows:

> 26. (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 that any company or person has done or is doing any act, matter or thing contrary to or in violation of this Act...; 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...any act, matter or thing that such company or person is or may be required or authorized to do under this Act...and may forbid the doing or continuing of any act matter or thing which is contrary to this Act...and for the purposes of this Act has full jurisdiction to hear and determine all matters whether of law or fact. [Emphasis added].
>
> **Reference:** *Railways Act*, R.S.C. 1906, c. 37, s. 26

52. Contrary to Goldcorp's assertions, the *Railways Act* and the *Act* are very different in two fundamental respects. First, s. 26(1) of the *Railways Act* expressly contemplates that persons may apply to the Board of Railway Commissioners of Canada for the orders referred to in that section. By contrast, s. 19 of the *Act* makes no reference whatsoever to a person bringing forward an application; indeed, language similar to s. 19(1) of the *Act* is not set out in s. 26(1) of the *Railway Act*, but rather is set out separately in the final words of s. 26(2).

53. Second, whereas s. 26(1)(a) of the *Railways Act* expressly allows "any party interested" to apply for relief in relation to a complaint regarding non-compliance, s. 112.2(1) of the *Act* makes it clear that compliance orders may only be issued on the Board's own motion.

54. It should also be noted that although s. 26(1) of the *Railways Act* allows for applications to be brought, it also includes limiting language: applications may only be made "by or on behalf of any party interested". Section 19(1) of the *Act* contains no such limiting language. Thus, if one were to take Goldcorp's argument seriously, *anyone* would be able to bring an application under that provision – a clearly unworkable result that could not have been intended by the legislature.

55. The relevant provisions of the *National Energy Board Act*, which were considered by the Federal Court of Appeal in *Re Saskatchewan Power Corporation*, are equally distinguishable

from s. 19(1) of the *Act.* Section 11 of the *National Energy Board 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. [Emphasis added].

Reference: *National Energy Board Act,* R.S.C. 1970, c. N-6, s. 11

56. Section 11 of the *National Energy Board Act*, like s. 19(1) of the *Act*, makes no reference to the ability of any persons to bring applications. Indeed, it is submitted that s. 11 is more akin to s. 19(4) of the *Act* in that it gives the Board the power to determine whether a matter should be heard or not, but does not require the Board to grant a hearing to any person.[2] At the time, the *National Energy Board Act* also contained a separate provision (cited in the Goldcorp Submissions), which is similar to s. 19(1) in that it gave to the National Energy Board "full jurisdiction to hear and determine all matters, whether of law or fact". However, that provision was not expressly referred to by the Federal Court of Appeal. Rather, LeDain J.A. relied on ss. 11(b) and 50 of the *National Energy Board Act,* the latter of which empowered the National Energy Board to make orders with respect to traffic, tolls or tariffs. He noted that the National Energy Board's decision was "... the determination of an issue that was raised initially in rate

[2] Section 19(4) of the *Act* allows the Board to hear and determine a matter "of its own motion", and is discussed further below in Part B of these submissions.

proceedings and was withdrawn from them to be considered in a separate hearing". He also noted that the matter was ultimately determined by the National Energy Board in a separate hearing further to an application made pursuant to the rate-setting provisions of the *National Energy Board Act.* As such, the issue was one that properly arose under the rate-setting provisions of the *National Energy Board Act*, and the National Energy Board simply opted to deal with it in that context in a separate proceeding.

57. Finally, the doctrine of jurisdiction by necessary implication is cited by Langley Utilities in its submissions in response to the Notice and P.O. (the "Langley Utilities Submissions") in support of the conclusion that the Board should entertain its Application under s. 19(1) of the *Act*. Board staff submit that reliance on the doctrine is misplaced for at least two reasons.

58. First, the "necessary implication" doctrine traditionally applies in the context of determining a tribunal's substantive jurisdiction, and not whether parties have the right to access the Board and invoke that jurisdiction. In the *ATCO* decision cited in the Langley Utilities Submissions, for example, the doctrine was considered in the context of determining whether the scope of powers conferred by the legislature on a tribunal included the power to approve a sale with certain conditions. Board staff is not aware of any jurisprudence applying the doctrine in the context of standing before a tribunal; indeed, the Supreme Court's decision in *Northrop* would appear to preclude any such an application.

Reference: *ATCO Gas & Pipelines v. Alberta (Energy & Utilities Board),* [2006] 1 S.C.R. 140 at para. 51

59. Second, and more importantly, the doctrine may only be used if "the implication is essential to make sense of the legislation or to implement its scheme." As discussed above, to give s. 19(1) the meaning attributed to it by the Applicants would not "make sense" of the legislation, but rather render much of it superfluous. It would also undermine effectiveness of

the regulatory scheme by requiring the Board to devote its precious resources to hearing and determining applications whenever they are brought by any persons in respect of any matter related to the *Act,* or other enabling legislation or associated regulations and/or codes. Moreover, even where circumstances may make it "essential" that the Board hears a certain matter, the Board (as discussed below) is able to proceed of its own motion under s. 19(4). Given these considerations, there is no need to grant persons unrestricted access to the Board under s. 19(1) to make sense of, or implement, the legislative scheme.

vi. Conclusion

60. Board staff are not aware of any jurisprudence supporting the proposition that a provision like s. 19(1) of the *Act* can serve as a stand-alone basis to bring an application before a statutory tribunal. Tellingly, the Applicants have cited none in their submissions.

61. Board staff submit that, for the reasons outlined above, s. 19(1) of the *Act* does not, in and of itself, provide a statutory basis for an application to the Board. As such, neither the Goldcorp Application nor the Langley Utilities Application is properly brought before the Board, and the Board is under no obligation to hear them.

62. If the Board were to accept Board staff's view on s. 19(1) of the *Act,* it follows that the Board would be justified in dismissing the Applications under, *inter alia,* s. 4.6(1)(c) of the *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22 by reason that "some aspect of the statutory requirements for bringing the proceeding has not been met".

B. Criteria to be Applied by the Board under s. 19(4) of the *Act*

i. Statutory interpretation

63. Subsection 19(4) of the *Act* provides:

> 19.(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.

64. The Board has commenced proceedings of various kinds on its own motion under s. 19(4). For example, it has done so in relation to a single licensee to determine whether its rates are just and reasonable, and with respect to an entire class of licensees to determine a just and reasonable rate to recover the costs associated with embedded generators. As further examples, the Board also commenced a proceeding under s. 19(4) to determine whether new rates should be ordered for the provision of natural gas transmission, distribution and storage services to gas-fired generators (the "NGEIR" proceeding), and another to determine whether the costs and damages incurred by electricity distributors arising from the settlement of the late payment penalty class action are recoverable. These proceedings were commenced to deal with matters arising from the Board's ongoing regulation of the energy sector, and did not require the Board to articulate further criteria pertaining to the exercise of its discretion under s. 19(4).

Reference: EB-2005-0501, *Re Hydro One Networks Inc.*, 2006 CarswellOnt 8923, February 21, 2006

EB-2009-0326, Notice of a Proceeding to Determine a Just and Reasonable Rate to Recover the Costs Associated with Embedded Generators having a Nameplate Capacity of 10 kW or Less, September 21, 2009

EB-2005-0551, Notice of Proceeding on Natural Gas Electricity Interface Issues and Determination to Refrain from Regulating Rates Charged for the Storage of Gas, December 29, 2005

EB-2010-0295, Notice of Proceeding, October 29, 2010

65. In the present case, by contrast, the Board is considering having resort to s. 19(4) not for the purposes of pursuing its own regulatory priorities, but rather as a potential statutory basis to ground its consideration of matters sought to be raised by private parties. Those parties are not entities regulated by the Board, but they do interact with entities that are, to a greater or lesser degree, subject to the *Act.* Board staff submit it would be useful for the Board to consider and articulate principles or criteria that will guide the Board's exercise of discretion to determine matters on its own motion under s. 19(4) in such cases.

66. Although in previous decisions the Board has referred to the nature and scope of its power under s. 19(4), Board staff are not aware of any decisions of the Board in which the Board has established a general framework to guide the exercise of its discretion under that provision.

Reference: EB-2011-0027, In the Matter of a Notice of Motion filed by Haldimand County Hydro Inc. for an Order or Orders of the Board in relation to, *inter alia,* the deferral of any final decision in EB-2011-0027 and EB-2011-0063 until the Board has conducted a generic proceeding to decide issues of general applicability to the development of transmission lines in municipal rights-of-way, Decision and Order on Motion, May 30, 2011;

EB-2006-0322, EB-2006-0338, EB-2006-0340, In the Matter of a proceeding initiated by the Ontario Energy Board to determine whether it should order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other qualified customers) and whether the Board should refrain from regulating the rates for storage of gas, Decision with Reasons, May 22, 2007

67. Moreover, although Board staff have identified legislation conferring similar authority on the National Energy Board, the Canadian Radio-television Telecommunications Commission, the Ontario Municipal Board, and other tribunals, we are not aware of any tribunal or court decisions under those provisions that offer direct guidance.

Reference: *National Energy Board Act*, R.S.C., 1985, c. N-7, s. 15(3);

Canada Oil and Gas Operations Act, R.S.C. 1985, c. O-7, s. 5.31(2);

Telecommunications Act, S.C. 1993, c. 38, s. 48(1);

Ontario Municipal Board Act, R.S.O. 1990, c. O.28, s. 41(1)

68. However, it is submitted that the existence of these similar powers in legislation governing several senior administrative tribunals, each of which has an ongoing supervisory role over their respective stakeholder groups, provides a key to the meaning and intent of s. 19(4).

69. As a matter of statutory interpretation, the language of s. 19(4) is broad enough to include the discretion to consider matters sought to be raised by private parties who are not regulated entities, but who interact with entities that are regulated by the Board or subject to some Board oversight in relation to matters within the Board's jurisdiction under the *Act*. In principle, that discretion should include cases where the primary or only relief sought is declaratory, since the Board unquestionably has the jurisdiction to grant such relief as part of its power to "hear and determine all questions of law and fact" under s. 19(1) in the context of a matter that is properly before it.

70. The only express limitation on the Board's discretion in s. 19(4) is that the "matter" sought to be raised must be one that the Board "may upon an application determine". That wording, on its face, does not require that an actual application be pending, or that the "matter" be the primary subject of such application. So long as the "matter" is one that *could* properly be "determined" by the Board in the event it were to arise in the course of an application properly before the Board, then it is submitted that this express requirement of s. 19(4) would be met. Indeed, the language of s. 19(4) does not require that the person asking the Board to exercise its discretion to hear a matter be a person with a statutory right to bring such an application before the Board.

71. Importantly, the discretion to hear a matter under s. 19(4) belongs to the Board, not the person making the request. Any resulting proceeding is on the Board's motion, not theirs. As such, it is submitted that it would be useful for the Board to articulate criteria or principles that will guide its exercise of discretion when it is requested to commence a proceeding on its own motion. Board staff submit that appropriate principles for exercising that discretion can be drawn from the law relating to:

(i) the exercise of discretion to grant or to refuse discretionary relief;

(ii) the considerations and principles on which the courts may agree to hear a matter, even though the legal or factual basis for the proceeding in which it is raised has become moot;

(iii) considerations arising from the *Act* and other statutes from which the Board draws its jurisdiction; and

(iv) other relevant considerations, to be determined and evaluated on a case-by-case basis.

ii. The discretion to refuse declaratory relief

72. Courts have maintained that their power to grant relief by way of declaration of right, whether or not any consequential relief is claimed, is always discretionary. That discretion underlies the entire history of the declaration as an equitable remedy, and it is preserved and codified in s. 97 of the *Courts of Justice Act*.

Reference: Sarna, *The Law of Declaratory Judgments*, 3rd ed. ("Sarna"), Chapter 3, especially at pp. 15-17;

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 97

73. The courts use equitable principles, as well as the law of standing, to effectively control whether and when they will grant a declaration.

Reference: Sarna, *supra*, at pp. 17-23

74. In so doing, the courts have articulated criteria which, it is submitted, are well suited to the exercise of discretion under s. 19(4) in cases like those now before the Board. It is respectfully submitted that the following factors may be considered for this purpose:

(a) **A Real Dispute between the Parties**: First, the courts will not entertain claims for declaratory relief where there is no real dispute of substance between parties, or where the right sought to be determined does not give rise to any difficulty or dispute. However, for these purposes, a dispute can include future conflict.

Reference: Sarna, *supra*, at pp. 23-25 and 27

(b) **Practical Use or Necessity**: The parties must demonstrate some practical use or necessity for the order sought. In other words, the right to be declared must be one that is capable of being enforced or redressed in a civil proceeding.

Reference: Sarna, *supra*, at pp. 25 and 27-28

(c) **Hypothetical Questions**: As a corollary, questions that are purely academic, hypothetical, obscure, conjectural, speculative or of no relevance to the parties are not a suitable subject for a declaratory proceeding. Hypothetical questions also engage concerns about devoting resources to decide matters where there may not be a proper evidentiary record.

Reference: Sarna, *supra*, at pp. 25-31;

Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441;

Corp. of the Canadian Civil Liberties Assn. v. Canada (Attorney General) (1998), 40 O.R. (3d) 489 (C.A.) at para. 30

(d) **Causal Link, Ripeness and Remoteness**: Similarly, where future harm is alleged, effects that are remote, uncertain or contingent do not justify granting declaratory relief. There must be a causal link between the right sought to be declared, and the future harm, before any relief is granted.

Reference: Sarna, *supra*, at pp. 29-31;

Operation Dismantle Inc. v. The Queen, above, at pp. 456-458

(e) **Another Pending Proceeding**: Declaratory relief will not be granted where there is another proceeding pending in which the same or a similar issue is to be adjudicated.

Reference: Sarna, *supra*, at pp. 33-34

(f) **Availability of Alternate Proceedings**: Similarly, the courts will decline to grant declaratory relief, even where an applicant otherwise would qualify for relief, if a preferable alternative proceeding is available. This is especially so where a statute provides a special procedure in another forum.

Reference: Sarna, *supra*, at pp. 34-36

(g) **Public Importance**: Finally, the broader public implications of an issue may be a reason either to entertain or to refuse to entertain a proceeding for declaratory relief, depending on the other circumstances.

Reference: Sarna, *supra*, at pp. 36-39

75. Many of these same concerns animate other, related doctrines, such as justiciability, prematurity and public interest standing, which similarly govern the discretion of decision-makers to control the adjudicative process before them, not only in terms of whether or not to grant declaratory relief, but also more generally with respect to whether to determine any matter on its merits.

Reference: See, generally, Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*

iii. The discretion to hear cases that are moot

76. The criteria relating to the availability of declaratory relief, and the discussion of those criteria in Sarna's text, also overlap significantly with those laid down by the Supreme Court of Canada with respect to the courts' discretion to hear cases despite the fact that they are or have

become moot. In such cases, even though the proper legal or factual basis for the dispute is absent, the courts can nevertheless hear and determine the case in certain circumstances. That situation is analogous to s. 19(4) in cases like the present, if the Board agrees that a proper statutory basis for the Applications is otherwise absent.

77. In *Borowski v. Canada (Attorney General)*, the Supreme Court laid down the following principles governing the exercise of the courts' discretion to hear or to decline to hear a case that is moot, which, it is submitted, may be instructive for the exercise of the Board's discretion under s. 19(4):

(a) **Adversarial Context**: First, the courts must be satisfied that, despite the circumstances rendering the case moot, the issues raised will be fully argued by parties who have a continuing stake in their outcome. The existence of a live controversy, and the necessity of an adversarial relationship between parties, is considered fundamental to our system of justice.

Reference: *Borowski v. Canada (Attorney-General)*, [1989] 1 S.C.R. 342 at pp. 359-360

(b) **Judicial Economy**: Second, the decision to hear the case must satisfy any concerns about judicial economy and the reality of competing claims for scarce judicial resources. In order to make it worthwhile to exercise discretion, there must be factors such as the recurring nature of the issue, its public importance, difficulty in bringing the matter to timely and effective adjudication, and the consequences of uncertainty in the law.

Reference: *Borowski*, *supra*, at pp. 360-361

(c) **Intrusion on the Political or Legislative Role**: In considering the exercise of discretion, the courts are sensitive to the extent to which they are being asked to depart from an adjudicative role, and engage in matters

of a political nature or intrude into the role of the legislative branch of government.

Reference: *Borowski, supra*, at pp. 362-363

iv. The Board's mandate and statutory context

78. Board staff submit that the above criteria can be applied to the Board's exercise of discretion regarding whether to hear and determine matters of its own motion under s. 19(4), when requested to do so by private parties who do not otherwise have a statutory right to seek relief, but are nevertheless affected by a matter within the Board's jurisdiction under the *Act*. As noted, that discretion arises as long as such matters could properly be the subject of an application by someone under the *Act*.

79. However, it is submitted that these criteria should not be considered in isolation. Rather, the criteria must be applied having regard to the Board's statutory mandate, and the statutory context of the matter sought to be raised under the *Act* (or other enabling legislation) and associated regulations.

80. For example, as a general question, the Board may wish to consider whether the issue sought to be raised is one which engages the Board's specialized expertise such that it wishes to be the adjudicator of first instance, and to be responsible for assembling the record of evidence on which the matter is to be adjudicated.

81. More specifically, the Goldcorp Application essentially asks that a Panel of the Board, in an adjudicative hearing, find that sections of the Board's own *Code* are *ultra vires*. That *Code* was issued by the Board initially in 2000 prior to the enactment of ss. 70.1 to 70.3 of the *Act,* and is deemed by the *Act* to have been made under those sections (the *Code* provisions at issue in the Goldcorp Application were added to the *Code* in 2005 after ss. 70.1 to 70.3 had come into force).

The power to make codes is one that can be exercised by the Board as a collective body, in which multiple Board members have a role. Codes are issued or amended after a process that allows an opportunity for broad stakeholder consultation and the submission of written comments. Goldcorp in effect seeks a review of a decision made on that basis, by an adjudicative Panel of selected Board members.

82. In its Application, Langley Utilities asks the Board to interpret s. 73 of the *Act* in a manner that would, if accepted, mean that "street lighting" is not a permitted business activity for affiliates of municipally-owned electricity distributors. The Compliance Bulletins respecting the application of s. 73, issued to all licensed electricity distributors and other interested persons, indicates Board Staff's view that "street lighting" can be a permitted activity for such affiliates, whether undertaken within or outside of the licensed service area of their affiliated distributors. The view of Board staff has not changed on this issue.

83. The purpose of the Compliance Bulletins is "to provide guidance" on this issue in respect of *compliance* with s. 73. The Board's website notes that although Board Members do not formally approve Staff Bulletins, Board Members (typically limited to 3 or 4) do provide guidance and advice to Board Staff as part of the Bulletin development process.

84. In effect, Langley Utilities is seeking a determination pertaining to compliance by EHMS with s. 73 of the *Act*, based on an interpretation of that section which differs from Board Staff's published interpretation. In deciding whether to entertain that request, it is important to note that s. 112.2(1) of the *Act* expressly provides that an order respecting compliance under ss. 112.3, 112.4 or 112.5 of the *Act* "may only be made on the Board's own motion". The Board has not taken such action in relation to the street lighting activities of an affiliate of a municipally-owned electricity distributor.

Reference: *Act*, Part VII.1 "Compliance", especially ss. 112.2(1), 112.3, 112.4 and 112.5

85. In each case, it is respectfully submitted that this statutory context is important to the Board's consideration of its discretion to hear the matters raised in the Applications, on the Board's own motion under s. 19(4) of the *Act*, at the request of Goldcorp and Langley Utilities, respectively.

v. Other relevant considerations

86. Board staff do not propose that the foregoing list of factors should be applied mechanically as a 'checklist', or that the list comprises an exhaustive list of all relevant factors in all cases. Indeed, Board staff accept that, depending on the specific facts of a given matter, there may be other independent considerations or criteria that may be appropriate to consider in the Board's exercise of discretion. However, it is the view of Board staff that the factors identified above are sufficient to guide the Board in determining whether to hear the Goldcorp Application and Langley Utilities Application under s. 19(4). That is, Board staff are not aware of any additional factors that would militate in favour of, or against, hearing the Applications on the Board's own motion.

C. Application of the criteria to the Applications

87. To assist the Board in determining whether or not to exercise its discretion under s. 19(4) of the *Act* in relation to the matters raised in either the Goldcorp Application or the Langley Utilities Application, this section highlights considerations that arise from the application of the criteria referred to above to the circumstances in the Applications.

88. It is acknowledged that the parties to both Applications have the necessary adversarial interests in the matters sought to be raised, and that in each case those matters arise in the context

of a real dispute, at least in the sense and to the extent that the issues raised are not hypothetical. It is also accepted that the issues raised are related to matters of public interest that fall within the Board's jurisdiction.

89. Nevertheless, the Board may wish to consider that hearing the matters raised in the Applications would divert the Board from its own regulatory priorities, at a time when it already has a full regulatory and hearing agenda. The issues raised in these Applications are not priorities the Board itself has set. Each Application, in different ways, seeks to challenge, overturn, or undo the results of actions taken in recent years in relation to the Board's oversight of the energy sector. The economic use of the Board's scarce adjudicative resources may weigh against this.

90. In both cases, an adequate alternative procedure exists for the Applicants to raise the matters at issue, and that is an application to the courts, either for judicial review or for the determination of rights that depend upon the interpretation of the statutory provisions in issue. While it may be preferable in some cases for the Board to act as an adjudicator of first instance, the Board may also wish to consider that the matters in each of these Applications have already been addressed or spoken to in one fashion or another.

Reference: *Judicial Review Procedure Act*, R.S.O. 1990 c. J.1;
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 14.05(3)(d)

91. At least in case of the Langley Utilities Application, another proceeding to determine the same issue is in fact already pending, in the form of the Langley Utilities court action against EHMS challenging the results of the contractual tendering process held by the City of Mississauga.

92. In the case of the Goldcorp Application, there is a question as to whether the matter may

not truly be "ripe" for determination as long the negotiations between Goldcorp and Hydro One remain incomplete and ongoing. Through its Application, Goldcorp may be asking the Board, in effect, to intervene in and supervise the process of negotiations on a broad basis. Any hearing in these circumstances may become protracted and costly for parties, and ultimately for ratepayers. The Board may wish to guard against requests that it use s. 19(4) of the *Act* to avoid negotiations that are contemplated by the Board's regulatory instruments. An alternative course, which has been followed by other parties in similar circumstances, would be for the negotiations to be completed, and payment of the disputed amounts made by Goldcorp "under protest". At that point, Goldcorp would have the option, among other possible avenues, of filing a court action for unjust enrichment and breach of contract, in which the *vires* of the *Code* provisions could be reviewed.

Reference: See, for example, *Graywood Investments Ltd. v. Toronto Hydro et al.* (2006), 80 O.R. (3d) 492 (C.A.) at paras. 7-8;

Garland v. Consumers Gas Co., [1998] 3 S.C.R. 112

93. Consistency in the Board's decision-making is an important aspect of the public interest. The Board was engaged in the code-making process that is challenged in the Goldcorp Application, and the Compliance Bulletins which are at issue in the Langley Utilities Application were issued by the Board's specialized staff. In both cases, other stakeholders will have placed reliance on these instruments, and structured their activities and business arrangements accordingly. The Board may wish to consider whether the hearing of such matters could threaten to undermine the Board's normal regulatory processes and its ability to effectively focus resources on pursuing its statutory mandate.

94. The Board may also wish to consider whether hearing the matters raised in the Applications would cause the Board's adjudicative function to intrude upon and undermine its

other roles, both as a delegated legislator under ss. 70.1 to 70.3 of the *Act*, and as the body empowered to enforce compliance under Part VII.1 of the *Act* in cases where the Board considers it appropriate to do so. While hearing panels of the Board will undoubtedly play an important role, both in the interpretation and application of codes in particular cases, and as an adjudicative tribunal to hear and determine allegations of non-compliance, there is in Board staff's view merit in keeping the Board's adjudicative, legislative and enforcement roles separate, as far as possible.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: December 15, 2011

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SCHEDULE "A" – STATUTORY AND REGULATORY PROVISIONS

	LEGISLATION
1.	*Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7, ss. 5.31(1) - (3)
2.	*Canadian Railways Act,* R.S.C. 1906, c. 37, pp. 48 - 50
3.	*Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 97
4.	*Electricity Act*, 1998, S.O. 1998, c. 15, sched. A, ss. 31.1, 33(4), 34(3) – (4), 35(1), 36.3
5.	*National Energy Board Act*, R.S.C. 1970, c. N-6
6.	*National Energy Board Act*, R.S.C. 1985, c. N-7, s. 15(3)
7.	*Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, sched. B, ss. 7, 19, 42(3), 50(1), 60(1), 90, 91, 98 (1.1), 99(1), 101(1), 112.2 – 112.5
8.	*Ontario Municipal Board Act*, R.S.O. 1990, c. O.28, s. 41(1)
9.	*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 14.05(3)(d)
10.	*Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, ss. 4.6 – 4.7
11.	*Telecommunications Act*, S.C. 1993, c. 38, s. 48
	RULES
12.	*Ontario Energy Board Rules of Practice and Procedure*, Rule 34

SCHEDULE "B" – AUTHORITIES CITED

	CASE LAW
1.	*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342
2.	*Garland v. Consumers' Gas co.,* [1998] 3 S.C.R. 112
3.	*Graywood Investments Limited. v. Toronto Hydro-Electric System Limited, et al*, 2006 CanLII 16823 (ON CA)
4.	*Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309
5.	*Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441
6.	*The Corporation of the Canadian Civil Liberties Association v. The Attorney General of Canada*, 1998 CanLII6272 (ON CA)
	TEXTS
7.	Macaulay and Sprague, *Practice and Procedure before Administrative Tribunals*, Vol. 2 (loose-leaf)
8.	Lazar Sarna, *The Law of Declaratory Judgments*, 3rd ed.
9.	Ruth Sullivan, Sullivan on the *Construction of Statutes*, 5th ed.
	OTHER
10.	*Re Hydro One Networks Inc.*, 2006 CarswellOnt 8923, February 21, 2006
11.	EB-2009-0326, Notice of a Proceeding to Determine a Just and Reasonable Rate to Recover the Costs Associated with Embedded Generators having a Nameplate Capacity of 10 KW or Less, September 21, 2009
12.	EB-2005-0551, Notice of Proceeding on Natural Gas Electricity Interface Issues and Determination to Refrain from Regulating Rates Charged for the Storage of Gas, December 29, 2005
13.	EB-2010-0295, Notice of Proceeding, October 29, 2010
14.	EB-2011-0027 / ED-2011-0063 / EB-2011-0127, Decision and Order on Motion
15.	EB-2006-0322 / EB-2006-0338 / EB-2006-0340, Decision with Reasons dated May 22, 2007