EB-2011-0361

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*.

SUMMARY OF THE SUBMISSIONS OF THE CONSUMERS COUNCIL OF CANADA ON THE THRESHOLD QUESTIONS

I Introduction and Overview

1. In its Notice of Applications, Notice of Combined Hearing and Procedural Order No. 1, ("Procedural Order No. 1") the Ontario Energy Board ("Board") states that it will hear argument on the following threshold questions:

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?

2. Procedural Order No. 1 also states that the Board will hear argument on Goldcorp's request that it be granted its costs, as well as on the question of the person(s) from whom cost awards should be recovered in the event that the Board were to rule in Goldcorp's favour in relation to the cost awards issue.

3. Procedural Order No. 1 directs that parties file a summary of their submissions on the threshold questions and on the cost awards issues.

4. This is the summary of the submissions of the Consumers Council of Canada ("CCC").

II The Facts

5. The CCC submits that the Board's consideration of the threshold questions cannot be made in the abstract, but must be made in the context of the factual background of Goldcorp's transmission facilities.

6. Goldcorp filed an application, dated April 25, 2011, with the Board, under s. 92 of the Act, seeking an order seeking leave to construct certain transmission facilities.

7. By Decision and Order in EB-2011-0106, issued July 20, 2011 (the "Board Decision"), the Board made the following findings:

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

> The issue of "price", (i.e. impacts on ratepayers) therefore does not arise in this case, and as a result the Board need not examine the issue of need in detail because it is not determinative.
>
> **Reference: Board Decision, p. 7**

8. The Board also made the following finding:

> Goldcorp confirmed that it intended to transfer the facilities to Hydro One at no net cost to Hydro One and therefore the transfer will not adversely affect electricity rates. Goldcorp further submitted that it will follow the Transmission System Code Economic Evaluation and the CCRA to achieve the stated objective.
>
> With respect to the matter of impact on ratepayers, as noted earlier in this Decision and Order, due to the fact that the proponent is paying for the facility, there is no ratepayer impact to be assessed. With regard to the intended future transfer of the assets, Hydro One, as a condition of its licence, is required to comply with the terms of the Transmission System Code Economic Evaluation when entering into the CCRA with Goldcorp thereby holding ratepayers harmless. Hydro One has an ongoing requirement to comply with the Transmission System Code and adherence to the Economic Evaluation provisions is a matter to be examined when Hydro One applies to have assets added to its rate base in a cost of service application.
>
> **Reference: Board Decision, pp. 11-12**

III The Threshold Questions

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

9. Goldcorp has applied for an order, under s. 19 of the Act, declaring that sections 4.1.3, 6.7.6, 6.7.7, and 11.2 of the Board's *Transmission System Code* are *ultra vires* the Act.

10. Goldcorp is also seeking 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. and that Hydro One may not demand such compensation from Goldcorp.

11. An administrative tribunal cannot grant declaratory relief. The power to grant such relief is reserved to the Courts.

12. However, an administrative tribunal can consider whether the provisions under which it is acting contain the necessary ground of authority. The Supreme Court of Canada in *R. v. Conway*, referred to the "well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction".

> **Reference: *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, para. 79**

13. The Ontario Court of Appeal in *Snopko et al. v. Union Gas Ltd. et al.*, expressed this principle in its consideration of s. 19 of the Act. The court stated:

> S. 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.
>
> **Reference: Snopko et al. v. Union Gas Ltd. et al. [2010] O.J. No. 1355, para. 27**

14. The relief which Goldcorp seeks in its application arises from, and is intimately related to, its application for an order granting it leave to construct, and the Board Decision arising therefrom. However, Goldcorp has framed its Application in a way which severs the connection to the essential factual context. Goldcorp should either have raised the issues, which it now raises in its application, in the application for leave to construct, or in the alternative, in an application to review and vary the Board Decision.

15. Goldcorp now seeks to consider the jurisdictional issue in the abstract. That is not the purpose of s. 19 of the Act.

16. The Council submits that s. 19 of the Act does not 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?

17. The Council submits that the Board should not proceed, on its own motion, to hear and determine the matters raised by the Goldcorp Application under section 19(4) of the Act.

18. Goldcorp's Application, because it is severed from the leave to construct application and the Board Decision, is a form of collateral attack on the Board Decision. In *R. v. Wilson*, the Supreme Court of Canada described a collateral attack as "an attack made in proceedings other than those whose specific objet is the reversal, variation, or nullification of the order of judgment."

Reference: *R. v. Wilson* [1983] 2 S.C.R. 594 at 599

19. Had Goldcorp brought this application in the Divisional Court, it would have been dismissed as a violation of the collateral attack principle. It is trying to do so indirectly what it cannot do directly.

20. Were the Board to proceed, on its own motion, to hear and determine the matters raised by the Goldcorp Application, under s. 19(4) of the Act, it would, in effect, be allowing Goldcorp to make a collateral attack on the Board Decision in circumstances where such an attack would not be permitted.

21. Goldcorp's Application is, in its essence, an application to relieve Goldcorp of the obligations imposed on it, by necessary implication, by the Board Decision. Put another way, Goldcorp's application is, in essence, an application to review and vary the Board Decision. As such, it should have been made under Rule 42 of the Board's *Rules of Practice and Procedure*.

22. Were Goldcorp to make an Application under Rule 42, it would be required to establish, as a threshold matter, whether it met the criteria set out in Rule 44 of the Board's *Rules of Practice and Procedure*. In attempting to satisfy the Board that it met the criteria, Goldcorp

would have to address, among other things, whether, or to what extent, it had accepted the validity of the provisions of the *Transmission System Code* ("TSC") in its Application for Leave to Construct. It would also have to address the question of whether the leave to construct application would have been granted had the Board known that Goldcorp did not consider the bypass provisions of the TSC to be binding.

23. By seeking to avoid having to deal with the Board Decision, and its role in obtaining it, Goldcorp's application is an abuse of process.

24. Were the Board to hear and determine the matters raised by the Goldcorp Application under s. 19(4) of the Act, the Board would, in effect, be relieving Goldcorp of the burden which it would otherwise bear in an application under Rule 42 of the Board's *Rules of Practice and Procedure*. That, the CCC submits, the Board should not do.

Costs

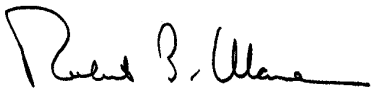
25. Section 30 of the Act authorizes the Board to order a person to pay all or a part of a person's costs of participating in a proceeding before the Board, a notice or comment process under section 45 or 70.2, or any other consultation process initiated by the Board.

26. Subject to the submission in the paragraph immediately following this one, the CCC submits that it would be premature for the Board to determine that Goldcorp should be granted its costs. It follows from that, the CCC submits, that it would be premature for the Board to determine from whom cost awards should be recovered in relation to Goldcorp's application as a whole.

27. However, we submit that the Board should make an award of costs with respect to the consideration of the threshold questions. For the reasons set out above, we submit that the Board should not consider Goldcorp's Application under s. 19 of the Act. We submit, therefore, that costs should be awarded against Goldcorp with respect to the consideration of the threshold questions.

28. The CCC asks that it be awarded 100% of its reasonably-incurred costs with respect to the consideration of the threshold questions.

All of which is respectfully submitted.



Robert B. Warren
Counsel to the Consumers Council of Canada

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