



**EB-2014-0234**

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

**AND IN THE MATTER OF** an Application by Goldcorp Inc.  
for an Order under section 36 of the Act directed at Union  
Gas Limited regarding the quantum of an aid to construct  
payable by Goldcorp to Union for a gas pipeline that was  
the subject of EB-2011-0040.

**Before:** Ellen Fry  
Presiding Member

Marika Hare  
Member

Emad Elsayed  
Member

**Decision and Order**  
**February 26, 2015**

## **Introduction**

Goldcorp Inc. (Goldcorp) has applied to the OEB to determine what amount it should contribute to certain cost overruns that resulted from the construction of a natural gas pipeline by Union Gas Limited (Union Gas). In 2011 the OEB approved an application submitted by Union Gas for leave to construct this pipeline. Goldcorp participated actively in the proceeding.

The construction of the pipeline was in two phases. Phase I was to construct a pipeline with sufficient capacity to serve Goldcorp and the Municipality of Red Lake. Phase II provided service to the Municipality of Red Lake. This proceeding concerns cost overruns for Phase I.

The original forecast cost of construction of Phase I was \$27.3 million<sup>1</sup>. Based on this forecast, the OEB approved the proposal to fund construction via contributions of \$18.6 million by Goldcorp, \$7.0 million by the Municipality of Red Lake and \$1.7 million by Union Gas customers.

The cost of constructing the pipeline exceeded the forecast. A key factor causing this cost overrun was that the project was constructed over two seasons (2011 and 2012) rather than solely in the 2011 season as planned. According to Union Gas, the amount of the cost overrun due to this delay was \$3.3 million. Union Gas charged Goldcorp \$2.375 million of this amount, consistent with the proportion of pipeline capacity that Goldcorp uses.

Goldcorp has applied to the OEB to have its \$2.375 million share of the cost overrun excluded from the final calculation of its capital contribution for the pipeline. This is because of the time required in the OEB proceeding to consider issues concerning the Crown's duty under the Constitution to consult with aboriginal groups. In Goldcorp's view, the time to address these issues delayed the OEB decision, which prevented the pipeline from being constructed within one season. Goldcorp considers that consideration of these issues benefitted Union Gas customers generally and that Union Gas customers should share responsibility for paying for the cost overrun.

The jurisdiction of the OEB to consider this request by Goldcorp is found in section 36 of the OEB Act. This section provides that the OEB "may make orders approving or fixing just and reasonable rates...for the distribution... of gas". Prior decisions of the OEB in similar cases have confirmed that this type of payment is a "rate".

The OEB has determined that Goldcorp should pay its proportionate share of the cost overrun (i.e. \$2.375 million). When the OEB approves gas pipeline construction projects, the normal expectation is that parties such as Goldcorp pay their proportionate share of cost overruns. Addressing the issues concerning consultation with aboriginal groups was a normal part of the regulatory process. The OEB is also not convinced that the time to consider the consultation issues caused the cost overrun or that its determination on the consultation issues would be of significant benefit to Union Gas customers generally. The reasoning of the OEB in reaching its decision is explained below.

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<sup>1</sup>EB-2011-0040, Decision with Respect to Preliminary Questions and Final Decision and Orders, page 35.

## Process

The OEB heard this case by way of written hearing. Notice of this proceeding was served on the intervenors that participated in both the 2011 proceeding and the application by Union Gas for approval of 2014 rates.<sup>2</sup> Union Gas and Enbridge Gas Distribution Inc. are intervenors in the current proceeding. Union Gas made submissions and Enbridge Gas Distribution Inc. did not.

## Questions on the Consultation Issue

In the 2011 proceeding the OEB asked for submissions on three questions in order to address the consultation issue:

- i. The duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. In the current case, what is the conduct that the Crown has contemplated that has the potential to adversely impact an Aboriginal right or title? What is the Crown's responsibility with respect to this project, which is being undertaken by a private proponent?
- ii. To the extent that there are duty to consult issues associated with the project, what is the scope of the Board's power to review them? In particular, should the Board's review be limited to potential impacts arising directly from the proposed natural gas pipeline itself (over which it has approval authority), or indirect impacts such as potential expansions to the mine or the town that may be enabled by the pipeline (over which it has no approval authority)?
- iii. Can the Crown impliedly delegate the duty to consult to a private proponent?

## Issues

To reach its decision in this proceeding, the OEB considered the following issues:

1. Are the amounts of the cost overrun (\$3.3 million) and Goldcorp's share, as calculated by Union Gas (\$2.375 million) reasonable?
2. Did the consultation issue cause the cost overrun?
3. Should Goldcorp pay its proportionate share of the cost overrun?

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<sup>2</sup>EB-2013-0365

## **1. Amounts of the Cost Overrun and Goldcorp's Share**

As indicated above, Union Gas has calculated that the amount of the cost overrun due to the construction delay is \$3.3 million and that Goldcorp's share would be \$2.375 million. Union Gas has provided information about the breakdown of the cost overrun in the post construction report required by the 2011 proceeding and in its response to interrogatories in this proceeding. Neither Goldcorp nor OEB staff has challenged the amount of the cost overrun or the calculation of Goldcorp's share by Union Gas. Taking these factors into consideration, the OEB agrees that the amounts of \$3.3 million and \$2.375 million as calculated by Union Gas are reasonable.

## **2. Did the Consultation Issue Cause the Cost Overrun?**

Union Gas, Goldcorp and OEB staff submitted that the delay in the OEB decision due to the consultation issue made it necessary to construct the pipeline over two seasons rather than one, causing the cost overrun.

The consultation issue was raised on May 5, 2011 by the Grand Council of Treaty 3, two days after Union Gas filed its reply submission. The OEB held an oral hearing on the consultation issue on June 20, 2011 and issued its decision on the application on July 25, 2011.

Both Goldcorp and Union Gas submitted that they expected the OEB decision in May 2011, enabling construction to start at that point. The construction schedule filed by Union Gas shows the planned in-service date of the pipeline as November 1, 2011, based on the expectation of an OEB decision in May 2011.

The evidence of Union Gas was that because the OEB decision was issued on July 25, 2011 rather than in May, it would have been risky to attempt to complete construction in 2011. This was because of the weather and ground conditions in this region, which cause a short construction window in the frost free period.

Union indicated that it did not commence construction until August 8, 2011, after OEB approval. However, it did commence what it described as pre-construction activities in April 2011, prior to OEB approval:

As part of Union's normal construction process, construction crews and equipment were mobilized in stages, starting in April 2011, to complete a number of pre-construction activities prior to Board approval. These activities included tree clearing along the right of way prior to Avian nesting periods. In order to complete the tree clearing it

was also necessary to construct some access points off Highway 105 and construct some access roads along the proposed pipeline route. A yard was set up and some of the steel pipe was also received and stored on-site prior to Board approval.<sup>3</sup>

Union Gas indicated that after the OEB decision it put forward three scheduling options to respond to the delay:

1. Compress the project timeline and attempt to complete in 2011;
2. Begin the project upon receipt of the Leave to Construct authorization and complete the project in 2012; or
3. Stop work on the project and complete the majority of the work in 2012.<sup>4</sup>

Union Gas undertook an assessment of these three options in terms of incremental costs, impact on the original in-service date and ability to complete the project in the proposed timeframe. As indicated above, completion under option 1 would have been risky due to the possibility of frost. After discussion with Goldcorp, Union Gas decided to construct the pipeline over two seasons (option (2)), because it was lower cost than doing the majority of work in 2012 (option (3)). Union Gas, Goldcorp and OEB staff submitted that this was the appropriate option.

The Board believes that if Union Gas had waited for OEB approval to start work on the pipeline and completed construction entirely in 2012, the cost overrun due to the change in planned project schedule would likely have been minimal. It would have been limited to any increases that occurred in labour or materials costs from 2011 to 2012. However, by starting work in April 2011, Union Gas incurred the risk that OEB approval would not be given in May as expected, and limited the options it had when OEB approval was given in July.

As a result of the work commencing in April, prior to OEB approval, Union Gas could not limit cost overruns to a minimal level by simply delaying the start of construction until 2012. The work that Union Gas had started in April meant that there would be a cost overrun due to mobilization/demobilization costs.

Accordingly, the OEB considers that the cost overrun was caused by the Union Gas decision to start construction activities prior to OEB approval and not by the time required for the OEB proceeding.

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<sup>3</sup> EB-2014-0234, Exhibit B.Staff.1

<sup>4</sup> Exhibit A, Tab 1, page 3.

### 3. Should Goldcorp Pay its Proportionate Share of the Cost Overrun?

As indicated above, Goldcorp submitted that it should not be required to pay any of the cost overrun. This was because in its view the OEB conclusions on the consultation issue would guide future OEB proceedings and benefit Union Gas customers generally.

The request being made by Goldcorp, if granted, would be a departure from the way the OEB normally deals with cost overruns on gas pipeline construction projects. The OEB normally approves this type of project based on a cost estimate, subject to reconciliation after the project is completed and the actual costs are known. The normal expectation is that a party such as Goldcorp that is making a contribution to the capital cost of the pipeline will make a corresponding contribution to any cost overruns.

In considering this type of case, the OEB has consistently applied the principle that the customers benefitting from the new pipeline should pay for it, and that customers who do not benefit should not be unduly subsidizing the cost of construction.

In this instance, as indicated above, Goldcorp is the main beneficiary of the pipeline. This is reflected in the level of contribution by Goldcorp that was approved by the OEB in the 2011 proceeding. In its decision, the OEB referred specifically to the fact that “the existing ratepayers of Union [Gas] will not be negatively financially impacted by the project...Union [Gas’s] existing ratepayers would be exposed to only Union [Gas’s] portion of funding at \$1.7 million”<sup>5</sup>. The request being made by Goldcorp, if granted, would increase the funding to be provided by the customers of Union Gas from \$1.7 million to \$4.1 million.

Consideration of the consultation issue in the 2011 proceeding was part of the normal legal process to make regulatory decisions. The timeframe to reach a regulatory decision depends on the issues raised, and counsel for Goldcorp and Union Gas should have been well aware of this. The OEB also notes that Union Gas filed its application for the 2011 proceeding one month later than planned. If the application had been filed when planned, this could have enabled Union Gas to complete construction in 2011.

The OEB is also not convinced by the Goldcorp argument that Union Gas customers in general are the beneficiaries of its conclusions on the consultation issue. Goldcorp was a direct beneficiary of the OEB conclusions, since they were required for the OEB to decide whether to approve the pipeline application. The other Union Gas customers affected would only be those who benefit from future pipeline construction projects

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<sup>5</sup> EB-2011-0040, Decision with Respect to Preliminary Questions and Final Decision and Orders, page 35.

where issues about consultation are raised. For proceedings where this occurs, it is not clear how much time would be saved, or what benefit such a time saving would bring to the affected customers.

### **Municipality of Red Lake Share of the Cost Overrun**

The OEB notes that the proportionate share of the Municipality of Red Lake for the cost overrun would have been \$0.925 million. That amount is not the subject of this proceeding. Union Gas has indicated that it will be seeking approval in its 2019 rates application to the OEB to include this amount in rates from that point rather than recovering it from the Municipality of Red Lake. An OEB staff interrogatory in this proceeding refers to a July 10, 2014 letter from the Municipality of Red Lake to the OEB referring to an alleged agreement between Union Gas and itself that the Municipality of Red Lake would not be responsible for any cost overruns. Regardless of what the agreement is between Union Gas and the Municipality of Red Lake, it will be for the OEB to determine in the 2019 rates proceeding to what extent Union Gas customers will be required to pay for the \$0.925 million cost overrun.

### **Conclusion**

For the above reasons, the OEB has determined that Goldcorp should pay its proportionate share of the cost overrun (\$2.375 million).

### **The OEB Orders that:**

1. The calculation of Goldcorp's capital contribution for the pipeline shall include its \$2.375 million share of the cost overrun.
2. Goldcorp shall pay the OEB's costs of, and incidental to, this proceeding immediately upon receipt of the OEB invoice.

**DATED** at Toronto, February 26, 2015

### **ONTARIO ENERGY BOARD**

*Original Signed By*

Kirsten Walli  
Board Secretary