



EB-2010-0023

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

AND IN THE MATTER OF section 99 of the Act;

AND IN THE MATTER OF an application by Hydro One
Networks Inc. for authority to expropriate interest in certain
lands for the purpose of constructing and operating a new
500 kilovolt double circuit transmission line known as the
Bruce to Milton Transmission Reinforcement Project.

BEFORE: Ken Quesnelle
Presiding Member

DECISION & ORDER

March 15, 2011

1.0 BACKGROUND

Hydro One Networks Inc. (“HONI”) has filed an application (the “Application”), dated February 26, 2010, with the Ontario Energy Board (the “Board”) under section 99 of the *Ontario Energy Board Act 1998*, S.O. 1998, c. 15 (Schedule B) (the “OEB Act”) for authority to expropriate interests in certain lands for the purpose of constructing and operating a new 500 kilovolt double circuit transmission line known as the Bruce to Milton Transmission Reinforcement Project (the “Project”) located between the Bruce Power Complex in Kincardine, Ontario and Hydro One’s switching station in Milton, Ontario. The Board assigned File No. EB-2010-0023 to this application.

HONI was granted leave of the Board to construct the Project on September 15, 2008 pursuant to Board Decision EB-2007-0050. The Project will be constructed adjacent to the existing transmission line and corridor extending from the Bruce Power Complex on the Lake Huron shore in the Municipality of Kincardine and will proceed in a south by south-east direction to Hydro One’s Milton Switching Station located south-east of the interchange of James Snow Parkway and Highway 401 in the Town of Milton.

On November 27, 2009, the Ontario Minister of the Environment granted Notice of Approval to Proceed with the undertaking in respect of the Project in accordance with section 9 of the *Environmental Assessment Act*, R.S.O. 1990 c. E-18. HONI has advised that the Niagara Escarpment Commission’s (“NEC”) decision to grant a development permit for the Project is currently under appeal. As a result, 13 properties within the Niagara Escarpment Planning Area have not been included in this Application. HONI advised that, as of March 1, 2011, the appeal of the development permit granted by the NEC remains outstanding. HONI will need to make a section 99 application to the Board if and when it seeks authority to expropriate interests in any of those affected properties.

2.0 PROJECT LAND REQUIREMENTS

HONI seeks new permanent easement interests in land for the construction and ongoing operation of the Project. Temporary easements would also be required during the period of construction for off-corridor access and construction activities. The new permanent easements sought range from 53 to 61 metres in width depending on the width of the adjacent existing transmission corridor and in order to accommodate the overhead transmission line and supporting structures. In limited circumstances HONI is seeking authority to expropriate the fee simple interest in the owner’s full parcel; i. e. HONI would expropriate all the rights to the entire property rather than establishing an

easement through the property. These are cases where a property owner has requested a full parcel taking and where either (i) major farm buildings or residences are located on the required lands and removal of those structures is necessary for the safe construction and operation of the line, or (ii) need for the required lands is deemed to negate the development potential of the full vacant parcel.

Following the issuance of Board Decision EB-2007-0050 granting leave to construct the Project, HONI notified all directly affected land owners of its intention to present offers to voluntarily acquire the land interests required for the Project. HONI has stated that all voluntary offers presented to private property owners were consistent with Hydro One's Bruce to Milton Land Acquisition Compensation Principles¹ ("LACP").

The LACP was developed by HONI, in consultation with a group of landowners referred to as the Power Line Connections Landowner Group. Page 1 of the LACP states that a central consideration in developing the LACP was the need for Property Owners to have flexibility and choice embedded in the principles, while balancing HONI's need and preference to achieve timely resolution of its land acquisition requirements and ensuring that overall compensation remains fair to ratepayers.

The LACP provided financial incentives and choices to private property owners in exchange for early and voluntary acquisition and resolution of land requirements necessary for the Project. As such, HONI submitted that the LACP is not applicable to the current proceeding which involves properties that have not settled voluntarily.

There are a total of 355 properties directly affected by the Project. Voluntary settlements have been reached for 308² of these properties (approximately 35% of settlements were reached within the time frame of this proceeding) leaving 47² properties that are the subject of this expropriation proceeding. A description of these 47 properties is given in Appendix "A" to this Decision and Order.

In accordance with Board privacy practices, the names of the property owners and other parties with registered interests in the properties have been excluded from Appendix "A". The affected property owners will receive all the information that pertains to their respective properties directly.

¹ Tab 4 of Brief of Authorities dated June 10, 2010, filed by Borden Ladner Gervais LLP.

² Based on the latest information provided by HONI as of March 1, 2011

3.0 INTERVENTIONS

The Board received requests for intervenor status from groups of property owners represented by six separate law firms. These groups were granted intervenor status. The counsel for each of these groups is listed below:

- Mr. Peter T. Fallis, Fallis Fallis & McMillan
- Mr. Quinn M. Ross, The Ross Firm Professional Corporation
- Mr. Stephen F. Waqué / Mr. Ian Mathany, Borden Ladner Gervais LLP
- Mr. John Goudy / Mr. Joe Hoffer, Cohen Highley LLP
- Mr. Eric K. Gillespie, Eric K. Gillespie Professional Corporation (voluntary settlement subsequently accepted by client)
- Mr. Andrew Adams, Evans & Adams (voluntary settlement subsequently accepted by client)

Furthermore, owners of the properties affected by this proceeding who did not request intervenor status were deemed intervenors by the Board, as they are directly impacted by this Decision. The Board did not receive any submissions from these intervenors.

4.0 THE PROCEEDING

On March 16, 2010, the Board issued a Notice of Application (the "Notice") for this proceeding. The Board directed HONI to serve the Notice and the Application on all affected landowners, other parties with registered interests on title, Aboriginal groups that may have an interest in the lands and the Niagara Escarpment Commission.

On April 27, 2010, HONI advised that it had completed the service as directed by the Board with the exception of 15 parties holding registered interests on title in the subject properties to whom HONI had not been able to effect service. In an attempt to contact and serve these parties, HONI placed a general notice in 15 different newspapers whose circulation area includes the general location of the lands that will be affected by the Project, from May 1-7, 2010.

In Procedural Order No. 1 dated May 4, 2010, the Board invited intervenors, HONI and Board staff to make submissions in support of the inclusion of issues they considered to be of relevance in this proceeding.

The Board heard submissions from parties regarding the issues to be considered in this case at an Issues Day proceeding held on June 10, 2010 and a Decision was issued on August 6, 2010 establishing a list of issues. A copy of that Decision is attached as Appendix "B" to this Decision and Order.

On June 21 and 22, 2010, Mr. Fallis and Mr. Gillespie filed Notices of Motions on behalf of their clients regarding a variety of issues, including "Prematurity of the Application". The Motion filed by Mr. Gillespie sought to have the project suspended for various reasons or in the alternative sought an order of the Board that would allow intervenors to adduce evidence on alternatives to the preferred route. The Board heard the Motions at an oral Motions Day held on July 14, 2010. A Decision on the Motions granting only the alternative relief sought in Mr. Gillespie's motion was issued simultaneously with the Decision on Issues on August 6, 2010. A copy of that Decision is attached as Appendix "C" to this Decision and Order.

On August 12, 2010, the Board issued Procedural Order No. 4 which included a supplemental Notice of Application of this proceeding. The purpose of the supplemental Notice was to ensure any persons with an interest in any of the affected properties (tenants, for example) that are not registered on title were notified of the proceeding. The Notice included a provision for any party who did not receive the original Notice to make a submission on the appropriateness of the Issues List. As directed by the Board, HONI published the supplemental Notice in 15 area newspapers. No further submissions were received, and no additional intervenors came forward.

Procedural Order No. 4 also provided for an interrogatory process. Three of the intervenor groups as well as Board staff filed interrogatories and Hydro One filed its responses on October 18, 2010.

An oral hearing for this proceeding was held on November 11 and 12, in Orangeville, Ontario and 19 and 22, 2010 in Toronto, Ontario, with final arguments of intervenor groups represented by Fallis Fallis & McMillan, Cohen Highley LLP, The Ross Firm and Borden Ladner Gervais LLP being filed with the Board on November 26 through 29, 2010.

HONI's reply argument was filed with the Board on December 6, 2010. This completed the record of this proceeding.

5.0 LEGISLATION AND SCOPE

The Board's power to grant an applicant authority to expropriate is derived from section 99 of the OEB Act, a copy of which is attached as Appendix "D" to this Decision and Order. Under this section, any person who has been granted leave by the Board under section 92 of the OEB Act may apply to the Board for authority to expropriate land for a work.

The Project itself and the general routing of the Project were approved in the Leave to Construct proceeding (EB-2007-0050). The environmental and health impacts of the Project were addressed through the environmental assessment process, which is outside of the Board's purview.

Section 99(5) of the OEB Act establishes the test for approving an expropriation: "If after the hearing the Board is of the opinion that the expropriation of the land is in the public interest, it may make an order authorizing the applicant to expropriate the land."

6.0 ISSUES

Considerable time and effort was spent by the parties and the Board in the establishment of the issues to be considered in this proceeding. As is typically the case with decisions on issues, their central purpose is to determine the scope of the proceeding. The scope of the proceeding is based on all the issues that the Board needs to hear in order to render a decision in the fulfilment of its responsibilities under the *OEB Act* and specifically in respect of its authorities pertaining to the specific application before it.

As discussed in Section 4.0, the Board's decision on the issues for this proceeding is attached as Appendix "B" to this Decision and Order. The issues are listed below:

- (1) To the extent that the public interest has not already been considered in the Board's decision in Board File No. EB-2007-0050, are the proposed expropriations in the public interest?
- (2) What specific interests in lands for which the authorization to expropriate is requested, are appropriate in the circumstances?
- (3) Has Hydro One taken appropriate and reasonable steps to minimize the impact of the proposed expropriations on the subject properties?

- (4) Has Hydro One taken appropriate steps to minimize the disruption to landowners by requesting easements that are no larger and no more extensive than necessary?
- (5) Does Hydro One's plan, if any, for the abandonment of the Project facilities include appropriate and reasonable measures taken to minimize any impact on the specific properties proposed for expropriation?
- (6) If approval to expropriate lands is granted, what conditions, if any, should be attached to the Board's Order?

7.0 EVIDENCE, POSITION OF THE PARTIES, AND DECISION

Overview

For the reasons described below, the Board approves HONI's application for expropriations as filed. The Board is imposing one condition, which is described in Section 7.2.2.

Although there was some degree of commonality of matters raised with respect to the established issues, many of submissions pertained to site specific matters. For this reason, the Board has organized the decision into two broad categories: general issues, and site specific issues.

7.1 General Issues

7.1.1 The Nature of a s. 99 Application vis-à-vis a s. 92 Application

There were several references by parties to the connection between this proceeding and the section 92 proceeding (EB-2007-0050). The connection was addressed in some detail in the Issues Decision (attached as Appendix "B").

Through the course of the proceeding the parties most interested in these issues voluntarily settled with HONI and there were no interrogatories posed to HONI on this subject matter.

Although there are no findings pertaining to the significance of the section 92 approval or limits of the actual route that was approved, the Board has provided this background in this Decision to highlight the direct and important connection between the two

processes with respect to both the identification of the approved route and the significance of the section 92 approval in general.

Both section 92 and section 99 of the *OEB Act* are to be administered in the public interest. The purposes of the two sections of the *OEB Act* are distinct and as was determined in the Issues Decision, the consideration of the public interest in both sections should not cause an overlap or duplication of the issues to be determined in the proceedings held under either section. These are separate proceedings, with separate purposes.

The Project as a whole was considered in the section 92 hearing as per the section 92 and section 96(2) parameters; that being the impact of the project on price, reliability and the quality of electrical service.

As stated in the Issues Decision, the Board considers the determination of the **appropriateness of the specific interests** in the subject lands to be the central issue in this proceeding. The individual and parcel specific project requirements were not considered within the scope of the section 92 application.

There were submissions on the Motion seeking an order of the Board that would allow intervenors to adduce evidence on alternatives to the preferred route. The submissions centered on what lands were included in the approved route and the extent to which the section 92 approval determined the scope of the issues in this proceeding. In its Decision on Motions (attached as Appendix "C"), the Board stated the following:

The Board has no intention of revisiting the issues that were decided in the leave to construct proceeding. The general route for the Project was an issue in that proceeding, and the general route will not be considered again in this proceeding.

However, with regard to potential route refinements, the Board will allow questions and submissions on route refinements within the corridor, and to a very limited extent on areas immediately adjacent to the corridor. To be clear, the Board does not accept that it would be appropriate to move the route outside of the corridor. It is not the Board's intent to allow parties to seek information on routing refinements that include areas immediately adjacent to the corridor on the simple grounds that they are impacted by the existing plan. Hydro One will be expected to answer questions intended to ascertain the reasonableness of any potential avoidance of

demonstrable and substantial impacts that can not otherwise be accommodated within the corridor. The Board recognizes that there would be notice issues if the new properties potentially become impacted. At this stage, however, the Board is prepared to allow parties to ask questions and make submissions on these matters.

In addition to matters related to the interplay of sections 92 and 99 of the OEB Act discussed above, the role of the Board in section 99 proceedings vs. the role of the Ontario Municipal Board under the *Expropriations Act* also received considerable attention in this proceeding. This was also addressed in some detail in the Issues Decision in this proceeding. The Board noted that determinations regarding the appropriateness of the interest sought and the appropriateness of the compensation required are made by two separate tribunals under two separate pieces of legislation.

The Board's mandate to determine the appropriateness of the interest sought is a role that aligns with the Board's expertise in network utility infrastructure. The interests in land that are required should be tailored to accommodate the construction and ongoing operation and maintenance of the network facility. These are areas that are very familiar to the Board.

The Ontario Municipal Board is ultimately mandated to address compensation issues that arise from expropriations for all manner of public need. This scheme facilitates a common consideration of the amount of compensation irrespective of the identity of the approving or expropriating authority, and is an area of expertise of the Ontario Municipal Board.

7.1.2 The Public Interest Test

It has long been recognized that expropriation is an extraordinary power. In *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority*, the Supreme Court stated:

The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an

*expropriating authority should be strictly construed in favour of those whose rights have been affected.*³

HONI submitted that the proposed expropriations are in the public interest noting that:

- the Project facilities are needed to maintain a safe, reliable and adequate supply of electricity in the province;
- the route for the Project has already been chosen through the EA process, a leave to construct has been granted and construction has commenced;
- the rights in the lands requested are an integral part of the completion of the Project, and therefore are necessary and in the public interest;
- there has been no evidence presented in the hearing to suggest that any portion of land that Hydro One seeks to expropriate is not required for the Project; and
- no intervenor has presented evidence to show that he or she will be unable to continue using his or her property currently or in the future in the same way as in the past.

The issues raised with respect to the property owned by Ms. Gail Walford (represented by Cohen Highley LLP) concerned the imposition of certain conditions. The general focus of the proposed conditions was to ensure that the easement granted be the minimum easement required by HONI. Ms. Walford submitted that the expropriation of an interest in her property would not be in the public interest unless the conditions are imposed upon HONI (see discussion in section in section 7.2.1 “The Walford Property”).

The intervenors represented by the Ross Firm Professional Corporation (“RFG”) submitted that while the public interest in the context of a Section 92 proceeding relates to protecting “the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service”, a section 99 public interest test is a far broader test.⁴

³ [1997] 1 S.C.R. 32, at para. 20.

⁴ Submissions by the RFG, dated November 29, 2010, items 13 and 14, page 3.

RFG submitted that, as HONI has already commenced construction of parts of the Project, it is now virtually impossible to argue that the requested expropriations are not in the public interest. Given the expense already undertaken, RFG argues, in effect, it would be too late to go back.

No party, however, argued that at least some form of expropriation was not in the public interest in this case. The nature of the dispute between HONI and the intervenors related to the appropriate scope of the taking, and/or what, if any, conditions should be attached to the expropriations. In addition, Cedar Crest Trout Farms (represented by Fallis Fallis & McMillan) argued that the proposed expropriations were premature (see discussion in section 7.2.4)

The Board finds, for reasons more completely explained in the following sections, that the interests sought by HONI in this application are in the public interest because they are based on what is considered to be required for the purpose of implementing the works that have been found to be in the public interest, in EB-2007-0050.

For clarity, the Board finds it necessary to explicitly dismiss the argument of RFG that the expropriations are now in the public interest because HONI has commenced the Project. RFG argued that if the authority to expropriate is not granted, Project ratepayers will not receive any benefit and therefore it is not in the public interest to deny the authority sought. HONI replied to this submission arguing that it has the legal authority to commence the project on the lands for which it has received rights and approvals and to do so allows for timely construction of a project already determined to be in the public interest.

HONI's commencement of the Project has had no bearing on the Board's assessment of the public interest. Issue 1 explicitly limited the scope of the public interest test in this application to considerations not already made in the section 92 application EB-2007-0050. RFG provided no detailed submission on the scope of the public interest test in this application other than to suggest it is "much larger" than that covered in the section 92 application. The Board's findings on the public interest are provided above and in the sections that follow. The findings are made in the context of this application which is based on a previously approved project. The argument that the commencement of construction, where legal to do so, has provided the applicant with an advantage in the Board's determination of the public interest as it pertains to this application has no merit whatsoever.

On a separate but related issue, the Board provides the following guidance. The Board accepts that HONI has no legal impediment to commence construction on lands in which it has been authorised to do so and that to do so appropriately allows for timely construction. However, the Board cautions HONI that the Board found it appropriate in this application to allow for discovery on comparative impacts on lands **adjacent** to what HONI submitted were the **only** lands potentially impacted by this application. The intent was to examine the reasonableness of minor alterations in routing intended to avoid substantial impacts on the property that formed part of the application. The Board based this finding on its observation that a clear delineation between section 92 and section 99 applications is required and as a precautionary measure to fill any possible gap between the two processes. Facilities that were placed on lands where HONI was authorised to do so may not have been placed so as to accommodate any fine tuning of the route on adjacent properties where authority had not yet been obtained. As it turned out, due to voluntary settlements, this issue was no longer a real concern in this application and there was no reason for the record to develop in this regard in this proceeding. The Board provides this caution with the objective of informing future applications. Where a route forms part of the consideration of a section 92 approval, a clear indication of the significance of that route consideration at the outset of the section 92 hearing will facilitate a commensurate discovery and analysis with respect to the matter in that hearing.

7.2 PROPERTY / INTERVENER SPECIFIC ISSUES

7.2.1 The Walford Property

The issues raised with respect to the property owned by Ms. Gail Walford (represented by Cohen Highley LLP) concerned the imposition of certain conditions. Prior to the oral hearing, Ms. Walford filed a list of proposed conditions⁵ to be attached to any order issued by the Board authorizing HONI to expropriate an interest in her property. A similar list was provided as Appendix A to her final submission. The list contains 21 proposed conditions

The general focus of the proposed conditions was to ensure that the easement granted be the minimum easement required by HONI. Ms. Walford submitted that the

⁵ List of Proposed Conditions dated November 10, 2010 submitted by Ms. Walford, Conditions 6 and 7, page 3.

expropriation of an interest in her property will not be in the public interest unless these conditions are imposed upon HONI and its proposed easement so as to ensure that HONI takes “no more than is required”. Ms. Walford also submitted that in some instances, this would entail limiting the scope of the easement to be taken and in other instances, specific conditions relating to the site specific impact mitigation measures must be included in the section 99(5) order. Ms. Walford further submitted that it is well within the Board’s authority to impose terms and conditions on the authorization to expropriate requested in this proceeding which address site specific concerns.

Ms. Walford also included a proposed “form of order that ensures that no more than is necessary or required is taken from Ms. Walford and thereby satisfies the public interest and conforms to the Board’s power as defined in Section 99...”⁶.

The proposed conditions were categorized by counsel for Ms. Walford under two headings: conditions that would form part of the actual granting clause of the easement, i.e. the form of easement itself (Section 7.2.1.1), and stand alone conditions that would be imposed as a condition of the Board’s order (Section 7.2.1.2).

7.2.1.1 Proposed Conditions Through the Easement Granting Clause

On November 22, 2010, HONI filed a document (Undertaking J1.2) which included the language of the granting clause that HONI proposes to include in all expropriation plans for easement interests filed with land titles offices. This document is included as Appendix “E” to this Decision and Order.

Ms. Walford argued that only the land “required” can be acquired by HONI through the expropriation process.

Subsection 99 (3) of the Act which speaks to the land that is the subject of a Section 99 application reads as follows:

The applicant shall file with the Board a plan and description of the land required, together with the names of all persons having an apparent interest in the land. 1998, c. 15, Sched. B, s. 99 (3).

The starting point for the Walford submissions was that the best taking was the minimum taking required. The argument was based on the contention that the test to be

⁶ Submissions by Ms. Walford, dated November 28, 2010, page 5 and Appendix A.

applied is whether the proposed easement was “necessary” guided by the principle that no more than “required” is to be taken, rather than whether or not the proposed easement is “reasonable” as was being suggested by HONI. In that light, Ms. Walford proposed a series of revisions to HONI’s proposed easement description.

The Board does not accept the Walford arguments regarding the meaning and application of the term “required” found in the legislation. The test, as established in s. 99(5) of the Act, is whether the proposed expropriation is in the public interest. While the Board agrees that, as a general principle, the best taking is the smallest taking required, the Board concludes that there is no practical distinction to be made between the determination of what is “required” versus the determination of what is “reasonable” in this application.

Any construction project involving the movement of heavy equipment and the installation of large infrastructure on various topographies, in varied soil conditions and in all types of weather will entail a myriad of generally anticipated but specifically unplanned events that must be taken into consideration.

An assessment of what interest is strictly “required” in advance of a complex construction project would, by necessity, have to rule out all but one potential construction eventuality. The “required” interests would be based on that eventuality and would form the basis for the interest in land easement. The interest would then be registered on title thus strictly establishing the limits of that interest. In the event that the predictions were wrong, construction would have to cease and the expropriation process would have to recommence with different interests in the land being sought. In the Board’s view this is not a workable approach and would therefore be a real and unwarranted impediment to the fulfillment of the public interest. It is clear to the Board that the concept of “reasonableness” is intrinsic in the meaning of “required” as it is applied in accordance to the statute.

It is in the public interest to provide a level of flexibility to recognize that the requirements associated with large construction projects can only be circumscribed in advance to a reasonable degree.

HONI submitted that its use of a common granting clause provides administrative efficiencies and predictability in the approaches used to plan both the construction and ongoing maintenance and repair functions and that these elements are in the public interest.

HONI further submitted:

- “all properties along the Project route that have granted Hydro One an easement on a voluntary basis have done so using the same form of granting clause” and that HONI “has substantially used this form of granting clause for transmission projects that have been found to be in the public interest across all of Ontario.”⁷
- “the Board should not disturb the uniformity of the granting clause which Hydro One has implemented and is proposing to use in the present circumstances” and that HONI “is concerned that any decision in this proceeding that has the effect of causing minor – let alone significant – variations to the granting clause or variations to the manner in which Hydro One carries out its approved construction, operation and maintenance practices, will spark further and unnecessary debate over the need for further changes and modifications to Hydro One’s standardized scheme.”⁸
- “as a matter of policy, it is not in the public interest for the Board to encourage a “checkerboard” of differing easement grants across the Province. Uniformity of the rights granted under an easement, whether voluntarily acquired or expropriated, should be the first principle that is applied. If changes are proposed, they should be based upon hard and sound facts and legal principles, as opposed to “nice to have” suggestions”⁹.
- If the Board accepted the Highley Intervenor’s proposed conditions, “a dangerous precedent would be set that would seriously interfere with Hydro One’s ability to reach voluntary settlements with landowners, since any voluntary settlement could be disturbed by a neighbour involved in a subsequent section 99 process.”¹⁰
- the Highley Intervenor’s proposed conditions cast doubt upon the nature of the interest Hydro One is proposing to expropriate to be something that is less than

⁷ HONI’s Reply Argument, dated December 6, 2010, item 10, pages 4-5.

⁸ HONI’s Reply Argument, dated December 6, 2010, item 11, page 5.

⁹ HONI’s Reply Argument dated December 6, 2010, item 12, page 5.

¹⁰ HONI’s Reply Argument dated December 6, 2010, item 20, page 7.

an unrestricted grant and easement free from all encumbrances and restrictions.¹¹

As previously stated, the Board concludes that the determination of what is required is based on an assessment of what can be reasonably planned for and anticipated given the nature of the project. The Board accepts that the elements contained in the granting clause filed by HONI in this application comport with this assessment.

It is for this reason, in this application, that the Board accepts HONI's proposed granting clause to be appropriate. The granting clause defines the taking that the Board considers to be reasonably required and therefore no alterations or additional elements are considered to be appropriate.

The Board has not relied on the arguments put forward by HONI that there is a public interest in ensuring uniformity of the granting clause being offered in making this finding. While these elements may provide administrative efficiencies and predictability, the Board does not consider these attributes to be, in and of themselves, sufficiently supportive rationale for the Board to accept its use automatically for all properties. The Board has received and accepted evidence in a Section 90 case for a leave to construct a natural gas pipeline (EB-2006-0305)¹². In that decision, the Board accepted that the offer of agreement in that case is a starting point and that routinely parties then negotiate specific terms that form part of the registered easement.

The Board has determined that the elements contained in the granting clause comport with what it has determined to be required in this case therefore it need not make findings on the merits of the uniformity of the use of the granting clause. The Board has not made a determination of the merits of the HONI uniformity argument, beyond accepting that it is likely administratively efficient in the context of this application.

Similarly, the Board has not relied on HONI's argument that its ability to reach voluntary settlements would be impaired if conditions were imposed. While the Board accepts that there is merit from an administrative viewpoint in reaching voluntary settlements, the Board does not consider it appropriate that a landowner would receive any less a consideration of its concerns if a neighbouring property owner accepted a voluntary settlement.

¹¹ HONI's Reply Argument dated December 6, 2010, item 5, page3.

¹² Board Decision and Order EB-2006-0305 dated June 1, 2007.

This project, as is the case with any linear infrastructure development, requires a series of contiguous land interests to accommodate its placement and operation. HONI's LACP has greatly reduced the degree to which it must seek authority to expropriate those land interests. However, as previously stated, expropriation is an extraordinary power and the rights afforded a property owner in this regard should not be diminished due to its neighbours voluntary election to accept a voluntary settlement.

HONI implemented its LACP in an effort to improve on its historic practices with regard to land interest acquisitions and is to be commended for its efforts. However, HONI should not expect that the Board will give any weight to the types of conditions accepted in voluntary settlements when it considers the appropriateness of the proposed conditions in an expropriation application; especially when the voluntary settlements were induced with financial offerings.

The LACP may have merit from an administrative cost savings perspective in that it has greatly reduced the number of land parcels that are included in the section 99 process. However, the voluntary settlements are obtained through a process designed to incent an early acceptance of a set of conditions and not intended to ascertain what land interests are necessarily in the public interest. The conditions accepted on a voluntary basis may be more or less attractive to land owners than what the Board ultimately decides is in the public interest in a section 99 application. The land owners who have accepted the voluntary agreements have effectively avoided the risk of potentially receiving less in a section 99 process than what is included in the voluntary offering.

With respect to the specific requests for changes to HONI's proposed easement, the Board offers the following comments.

The Board considers the amendments proposed by Ms. Walford, specifying the Board's statutory authority, and the direct references to the Bruce to Milton leave to construct approval (EB-2007-0050) to be unnecessary. Similarly, the references to compensation are not relevant to this proceeding as the Board has no jurisdiction over compensation.

Tower Location

Ms. Walford proposes a condition in the easement that only two towers be allowed on her land (This condition is also requested in a slightly different form through the proposed stand alone conditions discussed below - however the decision here applies equally to those arguments). HONI's intention is to place three towers on the Walford property, immediately adjacent to the three existing towers from the existing

transmission line. Ms. Walford submitted that one of the three towers that HONI proposed to install on her property should be installed on the adjacent property to the north-west and that the other two towers proposed for her property be installed at locations to be determined in consultation with her in order to minimize the cumulative visual impact of the proposed towers and the existing transmission system from a point on her property to be selected by her. The rationale for these proposed conditions centered around the visual impact of the towers on the Walford property. Mr. Philip Walford, provided testimony at the oral hearing. He emphasized the above-noted concerns mainly related to the visual impact of the towers proposed to be placed on the Walford's property.

The Board finds that there is no compelling reason to require that one of the towers proposed to be placed on the Walford's property be placed on an adjacent property instead. The Board agrees with HONI's submission that, generally speaking, the best location for a tower is adjacent to an existing tower. This tends to reduce visual impact overall, and results in a smaller footprint, thereby reducing the amount of land that cannot be farmed.

While the Board agrees generally that discussions should take place between HONI and intervenors regarding the location of the towers, it disagrees, in this case, that this should be a formal condition placed on a Board Order. (See also findings under Conditions of Approval.)

Decommissioning and Abandonment

Ms. Walford proposed a condition requiring HONI to remove all works from her land, and restore it as closely as possible to its original state, in the event that the line is decommissioned or abandoned. RFG proposed a similar condition (see below). Ms. Walford submitted that the minimum taking required would require the removal of any facilities that are no longer necessary.

In its response to an interrogatory, HONI submitted¹³:

The new Bruce to Milton 500kV transmission line is part of the transmission network that forms the backbone of the Hydro One transmission system. It is highly unlikely that this transmission line will no

¹³ HONI response to the RFG Interrogatories dated October 18, 2010, response to interrogatory 2f, page 3.

longer be needed at some time in the future. A transmission line of this type is designed to have a service life of about 100 years, and based on its experience with other lines Hydro One expects that the service life of the Bruce to Milton facilities can be extended beyond 100 years with appropriate maintenance and component replacement activities. Given this timing, removal plans for the various components of the Bruce to Milton facilities will only be prepared at or near the time of removal. For these reasons, and as indicated in the EA on page 361, Hydro One has not included decommissioning within the definition of the undertaking.

Ms Walford's proposed list of conditions included a condition that upon decommissioning and/or abandonment of the Project facilities HONI shall remove all of the Project facilities, including subsurface tower foundations from the Easement as well as other mitigation measures¹⁴.

Ms. Walford argued that without such a condition, if HONI decides to decommission and/or abandon the Project facilities, she would bear the risk of being left with HONI's facilities on her property.

RFG also addressed this issue, submitting that there should be a condition of approval requiring HONI, and the successors thereto, to be responsible at law into the future for the decommissioning of the works once those works are no longer in service.

HONI argued that the inclusion of decommissioning and/or abandonment obligations is not a reasonable approach given the nature and purpose of the grant of easement, namely, the construction and operation of transmission network facilities, which are intended to have an extensive service life exceeding 100 years. HONI further argued that any issues associated with the unlikely decommissioning and/or abandonment are best considered to be matters of public policy and issues addressed by legislation that apply equally and uniformly to all regulated transmitters¹⁵.

The Board notes that the wording of the granting clause speaks to the purpose of the easement. The Board considers the purpose of the easement to be appropriate in

¹⁴ List of Proposed Conditions dated November 10, 2010 submitted by the Ms. Walford, Condition 22, pages 5-6.

¹⁵ HONI's Reply Argument, dated December 6, 2010, item 9, page 4.

scope so as to accommodate the public interest that has been determined to exist, for as long as it is needed. This can arguably go beyond a point in time that the facilities are being used, if for whatever reason they were taken out of service but had the potential of being subsequently needed for the same purpose. An analysis of the merits of the abandonment of the easement versus the retention of the easement for potential future use can only reasonably be done with knowledge of the circumstance that will exist at that time. The Board is of the opinion that there is no need for the Board to order the removal of the Project facilities if they are no longer required, as part of this proceeding. In the Board's view, this can be better dealt at a time in the future if/when decommissioning of the facilities is contemplated.

7.2.1.2 Proposed Conditions Attached to the Board's Order

Ms. Walford recognizes that certain proposed conditions are not suitable to include as a part of the easement grant itself, and proposed instead that these form part of the Board's conditions to the order. For the reasons discussed below, the Board rejects these proposed conditions. The Board will, however, impose one related condition (see Proposed Construction and Maintenance related conditions below).

Proposed General Conditions

The Board finds that the proposed conditions requiring HONI to construct and operate the Project in accordance with its undertakings and commitments to be unnecessary. Similarly, the Board sees little need to add a condition specifying that the conditions apply to HONI's successors, especially since the conditions as requested are not being granted.

Proposed Condition 5 requires that HONI indemnify and hold-harmless Ms. Walford from all liabilities, damages, claims, suits and actions related to the Project and use of the easement. This condition is also included as one of the conditions proposed by Ms. Walford to be included in the easement granting clause¹⁶. HONI submitted that, in the case of an expropriation, such protection is something that is provided by common law and HONI will bear responsibility for any damages for which it is found liable in law. The Board accepts HONI's position that HONI already bears third party liability and will therefore not order the indemnity and hold harmless condition proposed by Ms. Walford.

¹⁶ Submissions by Ms. Walford dated November 28, 2010, Appendix A, Paragraph 4.

Proposed Construction and Maintenance related conditions

Proposed conditions 8 through 21 relate in one way or another to restrictions and requirements on HONI in its construction and maintenance of the Project.

The Board recognizes that this is a very important issue for both the Walfords and landowners in general.

In response to interrogatories, HONI filed documents entitled “Environmental Guidelines for Construction and Maintenance of Transmission Facilities” and “Environmental Specification”¹⁷ which include standard practices used by HONI to mitigate negative impacts of transmission line construction. The Board is satisfied that these documents, if followed by HONI, should reasonably alleviate landowners concerns with respect to the construction and maintenance of the Project. It will therefore not order the conditions as requested by Ms. Walford.

The Board is aware, however, that there have been problems in the past between HONI and certain landowners, and that there is a concern that in some cases HONI has not met the standards that it has established for itself. For this reason, the Board is imposing a monitoring requirement that is described fully in the Magwood section below.

7.2.2 The Magwood Property (RFG)

Mr. James Magwood, a member of the RFG, provided testimony at the oral hearing. Mr. Magwood submitted that there had been a history of negative interactions between his family and HONI related to previous projects undertaken by HONI and its predecessor Ontario Hydro. He described a number of incidents. He testified that during the construction of a previous project, construction conducted by Ontario Hydro had damaged a subsurface tile drainage system on his property and that Ontario Hydro did not repair the damage as it had agreed to do so. He further testified that in general there is a disconnect between HONI’s policies and what happens in practice. Mr. Magwood expressed that his family is more interested in being treated fairly by HONI than in any compensation they might receive.

RFG took no position on the size of the easement sought or the form of the easement.

¹⁷ HONI Response to interrogatories submitted by the Ms. Walford, dated October 18, 2010, labelled as EB-2010-0023, Exhibit B, Tab 2, Schedule 8, Page 2 of 2, Schedule 10, Page 2 of 2

Mr Magwood requested conditions that would require HONI to:

- conduct landowner consultations on tower placement, construction practices and notice; and
- be responsible at law into the future for the decommissioning of the works once those works are no longer in service.

The Board has determined that it will not impose either of these conditions on HONI through this order. The Board does recognize, however, that there has been an unfortunate history between HONI and the Magwood family, and is sympathetic to their concerns. The Board notes that sections of the Environmental Guidelines for Construction and Maintenance of Transmission Facilities and the Environmental Specification filed by HONI, generally contain what it anticipates to be the methods it will follow to construct the transmission line. It also contains descriptions of how HONI intends to mitigate the impacts of its construction activities.

The Board has determined that it would be appropriate to impose a condition that will facilitate the Board's oversight of HONI's adherence to its own Guidelines with respect to the Project. The Board will require HONI to maintain construction records of the project. The content and level of detail of the records must be suitable to provide clear indications of the adherence by HONI and/or its contractors to certain sections of the construction guidelines submitted in this proceeding. The records must also include explanations for any deviations from the guidelines and how alternative approaches were selected. The records are to be kept throughout the construction and commissioning phase of the project and are to be available to the OEB upon request. HONI shall file a final report compiling all information as described above as well as details of interactions with the owners of lands subject to this Order. The details of these interactions are to include all landowner complaints and resolutions reached. A complete description of the requirements of this condition is attached as Appendix "F" to this Decision and Order. The purpose of this condition is to have HONI's interactions with landowners documented to inform the Board in its assessment of any situations that come to its attention and to determine appropriate action if necessary. It will also inform future leave to construct proceedings involving HONI where landowner issues are present.

The proposed condition regarding decommissioning and abandonment is rejected for the reasons described in section 7.2.1.1 above (Walford).

7.2.3 The Bruce Property

The Bruce family (represented by Borden Ladner Gervais LLP) argued that instead of simply taking an easement interest, HONI should be required to expropriate their entire property, i.e. a fee simple taking. The Bruces submitted (both through final argument and the testimony of Ms. Bonnie Bruce) that the planned expansion of their existing dairy goat farm operation would become impractical if the proposed easement is granted, and that it would therefore be preferable for HONI to take the entire property and allow them to re-establish their operation elsewhere. The Bruces submitted:

If Hydro One is given the authority to expropriate a partial interest from the Owners, the Owners will suffer significant prejudice as their plans to expand their Dairy Goat Business will be unjustly thwarted. As such, the Owners require a full parcel taking so that they may commence with the plans to expand their Dairy [sic] Goat Operation in a responsible and economically feasible manner at a location that is suitable for incremental additions to existing farming structures¹⁸.

The Bruces further allege that HONI has not followed its own LACP which, in the Bruce's view, authorize a full parcel taking in this case.

HONI called an expert witness, Mr. Ron MacDonald of Agviro Energy, Environment, Efficiency, who proposed two options that might allow for the expansion of the Bruce's operation. The Bruces argued that the alternative expansions proposed by HONI would have various adverse impacts including visual impacts, odour and efficiency of their farming operation. The Bruces further argued that if a partial taking is authorized, they will suffer significant prejudice that far outweighs any prejudice that Hydro One would suffer if it is required to acquire the entire Bruce Farm and that it is appropriate for the Board to approve a full taking of the Bruce Farm¹⁹. At the oral hearing, Ms. Bonnie Bruce provided testimony in support of the above submissions. HONI submitted that the test for the scope of expropriation is not which party will suffer the most prejudice but whether the taking is minimized to the smallest amount of land required for the project.²⁰

¹⁸ Submissions by Borden Ladner Gervais LLP (on behalf of its clients) dated November 29, 2010, item 41, page 12.

¹⁹ Submissions by Borden Ladner Gervais LLP (on behalf of its clients) dated November 29, 2010, items 43-46, pages 12-13.

²⁰ HONI's Reply Argument, dated December 6, 2010, item 36, page 13.

HONI further submitted that there is no compelling evidence to suggest that the proposed easement will have such significant and adverse effects on the Bruce farm operation that a full parcel taking in these circumstances is fair, sound and reasonably necessary. HONI further submits that the issue remaining is one of compensation and this issue is one which will be addressed under the *Expropriations Act*²¹.

The disagreements between HONI and the Bruces relate to whether the proposed expropriation should be a full or partial taking of the Bruce's farm property.

With respect to the Bruce's assertion that HONI has not followed its own LACP, the Board has provided its considerations of the significance of the LACP earlier in section 7.2.1.1. In that section the Board dismissed HONI's argument that its ability to enter into voluntary agreements would be disrupted if conditions dissimilar to the ones in the voluntary agreements were now imposed. The Board stated in that section and repeats here as it is equally relevant.

The conditions accepted on a voluntary basis may be more or less attractive to land owners than what the Board ultimately decides is in the public interest in a section 99 application. The land owners who have accepted the voluntary agreements have effectively avoided the risk of potentially receiving less in a section 99 process than what is included in the voluntary offering.

While the LACP may be a useful tool in the administration of land acquisitions, as stated previously, it is not intended to determine the public interest.

The Board agrees with HONI's submission that the test for the scope of expropriation is not which party will suffer the most prejudice but whether the taking is minimized to the amount of land required for the project.

With respect to the existing and future land use, the Board concludes that the existing Bruce farm operations would not be adversely impacted by the Project to an extent that would warrant the full taking of the property. Nor would the ability to expand the operation of the farm be negated by the Project.

²¹ HONI's Reply Argument, dated December 6, 2010, item 41, pages 14-15.

There was no evidence submitted in support of the relief sought by the Bruces that the existing operations would be unduly hampered once the Project was built. The Bruces did submit that disturbances will occur due to the construction activities themselves.

The Board has imposed a condition in this Decision that is intended to ensure the adherence to the construction practices designed to mitigate the negative impacts of the construction of the Project.

The variation of the original proposed expansion plan that was submitted by HONI's expert indicates that a relocation of the structures to accommodate the Project can be accommodated on the land parcel owned by the Bruces. The Bruce's submissions on this alternative building layout and location center on the negative impact it will have on its operation.

The modifications to the expansion building plans may or may not result in sub-optimal operations as compared to what would have been the case with the original expansion plan. However, the Board agrees with HONI that the issue remaining is one of compensation that can be addressed under the *Expropriations Act*.

The Bruces provided the following case references in support of their position that HONI should acquire their entire property.

Hydro One Networks Inc. Re, 96 L.C.R. 23, 2007 CarswellOnt 6328 at para. 55 and 69 [Tab "5C"].

York (Regional Municipality) v. Gill, unreported decision of Inquiry Officer Goldkind, heard April 3 and 4, 1985, pages 19 and 20 [Tab "5D"]

Ontario (Ministry of Transportation) v. Marwick (1998), 67 L.c.R. 230, 1998 CarswellOnt 6130 (Ont. Bd. Of Inquiry) at para. 10 [Tab "5E"]

New Law of Expropriation (Coates & Waque) at 10-36. Verdiroc et al v. The City of Toronto, unreported decision of Inquiry Officer Goldkind, released in August, 1998.

The Board has reviewed these cases which were cases before an Inquiry Officer under the *Expropriations Act* and finds them to be unhelpful in this case. The Board accepts the general principle from these decisions that in some cases the public interest will require that a full taking be ordered even where the applicant does not require the entire property for the project in question. As described above, however, the Board finds that that is not the case here.

The Board concludes that there is no compelling evidence to suggest that the Project will have such significant and adverse effects on the Bruce farm operation that a full parcel taking in these circumstances is in the public interest.

7.2.4 Intervenor Represented by Fallis Fallis and McMillan

Fallis Fallis and McMillan filed submissions dated November 26, 2010 on behalf of intervenors: (i) 1136291 Ontario Inc. (carrying on business as Cedar Crest Trout Farm; and (ii) James Taylor, Lynette Taylor and 962561 Ontario Inc. These submissions relate to cost awards for this proceeding as well as issues that focus mainly on the process for expropriations and the Board's authority in this proceeding. These intervenors did not present any direct evidence in the proceeding.

HONI submitted that it views matters concerning cost recovery to be outside the scope of present matters and that these matters would be addressed at a later date. With respect to the other issues submitted by Fallis Fallis and McMillan, HONI submitted that it relies on Motions Day submissions with regard to the Fallis submissions as well as the Board's Decision on Motions, dated August 6, 2010.

The Board does not find the submission by Fallis Fallis and MacMillan to be helpful. The submissions largely repeat the submissions that were made with the motion previously brought (in part) by Fallis Fallis and MacMillan, and the Board has already ruled on these issues. Although Cedar Crest Trout Farm argues that the expropriations should be denied on account of lack of notice and prematurity, the Board has already rendered its decision on these matters in the Motions Decision. The submissions do not address any of the issues that remain relevant in this case.

THE BOARD ORDERS THAT:

- (1) Hydro One Networks Inc. is authorized to expropriate the interests sought in the lands listed in Appendix "A" to this Decision and Order.

Note: The information in Appendix "A" is based on information provided by HONI as of March 1, 2011. It is possible that HONI has or may reach voluntary agreements with respect to some of the properties listed. In that case, there will be no need for HONI to execute this order with respect to those properties.

- (2) Hydro One Networks Inc. shall file with the Board, final expropriation plans for Board approval and endorsement as soon as practical.
- (3) Hydro One Networks Inc. shall maintain construction records for the Bruce to Milton Transmission Reinforcement Project in accordance with section 7.2.2 above and Appendix "F" attached to this Decision and Order.

Cost Awards

A cost awards decision will be issued after the steps set out below are completed.

- (i) Intervenors eligible for cost awards shall file with the Board and forward to Hydro One Networks Inc. their respective cost claims within 20 days from the date of this Decision.
- (ii) Hydro One Networks Inc. may file with the Board and forward to intervenors eligible for cost awards any objections to the claimed costs within 25 days from the date of this Decision.
- (iii) Intervenors, whose cost claims have been objected to, may file with the Board and forward to Hydro One any responses to any objections for cost claims within 35 days of the date of this Decision.

The filing shall be effected in accordance with the instructions set out in the Board's Procedural Orders issued in the course of this proceeding.

Hydro One Networks Inc. shall pay the Board's costs of and incidental to, this proceeding upon receipt of the Board's invoice.

DATED at Toronto, March 15, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX "A"
TO
DECISION AND ORDER

BOARD FILE NO. EB-2010-0023

DESCRIPTION OF PROPERTIES SUBJECT TO EXPROPRIATION

DESCRIPTION OF PROPERTIES SUBJECT TO EXPROPRIATION

EB-2010-0023

	Municipality	Legal Description of Interest to be Expropriated
(A) Permanent Easements		
1.	Kincardine	Part Lots 33 and 34, Concession 4, Township of Bruce; designated as Part 1 on Reference Plan 3R-8797
2.	Brockton	Part Lot 13, Concession 10, Township of Brant; designated as Parts 7, 8, 9, and 10 on Reference Plan 3R-8836
3.	Brockton	Part Lots 11 and 12, Concession 16, Township of Greenock; designated as Part 1 on Reference Plan 3R-8833
4.	Brockton	Part Lots 19 and 20, Concession 9, Township of Brant; designated as Part 4 on Reference Plan 3R-8840
5.	Brockton	Part Lot 20, Concession 8, Township of Brant; designated as Part 6 on Reference Plan 3R-8840
6.	Brockton	Part Lot 34, Concession 4, Township of Brant; designated as Part 2 on Reference Plan 3R-8830
7.	Brockton	Part of Lot 74, Concession 3, NDR Township of Brant; designated as Part 3 on Reference Plan 3R-8830 and Part 1 Plan 3R-9081
8.	West Grey	Part Lot 13, Concession 2, NDR Township of Bentinck; designated as Part 10 on Reference Plan 16R-9826
9.	West Grey	Part Lot 16, Concession 2, NDR Township of Bentinck; designated as Part 12 on Reference Plan 16R-9826

	Municipality	Legal Description of Interest to be Expropriated
10.	West Grey	Part Lots 11 and 12, Concession 2, NDR Township of Bentinck; designated as Parts 2,7,13, and 14 on Reference Plan 16R-9826
11.	West Grey	Part Lots 14 and 15, Concession 2, NDR Township of Bentinck; designated as Part 11 on Reference Plan 16R-9826
12.	West Grey	Part Lot 1, Plan 55, Township of Bentinck; designated as Part 1 on Reference Plan 16R-9565
13.	West Grey	Part of Lots 41 and 42, Concession 1, Township of Bentinck and Part of Lots 41 to 43 inclusive, Concession 2, SDR Township of Bentinck; designated as Parts 1,2,and 3 on Reference Plan 16R-9596
14.	West Grey	Part Lots 17 and 18, Concession 2, NDR Township of Bentinck; designated as Part 1 on Reference Plan 16R-9608
15.	West Grey	Part Lots 38 and 39, Concession 1, SDR Township of Bentinck; designated as Part 2 on Reference Plan 16R-9598
16.	Southgate	Part of Lot 10, Concession 14, Township of Egremont; designated as Part 3 on Reference Plan 16R-9582
17.	Southgate	Part Lot 11, Concession 14, Township of Egremont; designated as Parts 4 and 5 on Reference Plan 16R-9582
18.	Southgate	Part of Lot 14, Concession 13, Township of Egremont; designated as Part 4 on Reference Plan 16R-9580
19.	Southgate	Part of Lot 18, Concession 12, Township of Egremont; designated as Part 4 on Reference Plan 16R-9615

	Municipality	Legal Description of Interest to be Expropriated
20.	Southgate	Part of Lot 18, Concession 12, Township of Egremont; designated as Part 5 on Reference Plan 16R-9615
21.	Southgate	Part of Lot 28, Concession 10, Township of Egremont; designated as Part 2 on Reference Plan 16R-9588
22.	Wellington North	Part of Lot 14, Concession 13, Township of West Luther; designated as Part 1 on Reference Plan 61R-11079
23.	East Luther Grand Valley	Part of Lot 19, Concession 13; designated as Part 1 on Reference Plan 7R-5794
24.	East Luther Grand Valley	Part of Lot 19, Concession 12; designated as Part 2 on Reference Plan 7R-5794
25.	East Luther Grand Valley	Part of South Half Lot 21, Concession 12; designated as Part 5 on Reference Plan 7R-5794
26.	East Luther Grand Valley	Part of Lot 26, Concession 10; designated as Part 2 and 5 on Reference Plan 7R-5795
27.	East Luther Grand Valley	Part of Lot 23, Concession 11; designated as Part 3 on Reference Plan 7R-5796
28.	East Luther Grand Valley	Part of South Half Lot 24, Concession 11; designated as Part 4 on Reference Plan 7R-5796
29.	East Luther Grand Valley	Part of Lot 27, Concession 10; designated as Parts 7,8 and 9 on Reference Plan 7R-5795

	Municipality	Legal Description of Interest to be Expropriated
30.	East Luther Grand Valley	Part of North Half Lot 27, Concession 2; designated as Parts 2 and 3 on Reference Plan 7R-5802
31.	East Luther Grand Valley	Part of Lot 27, Concession 1, and Part Lot 27 Concession 2; designated as Part 3 on Reference Plan 7R-5800
32.	East Luther Grand Valley	Part of North Half Lot 27, Concession 1; designated as Part 2 on Reference Plan 7R-5800
33.	East Garafraxa	Part of Lot 1, Concession 11; designated as Part 3 on Reference Plan 7R-5811
34.	Erin	Part of Lot 8, Concession 5, Township of Erin; designated as Part 1 on Reference Plan 61R-11059
35.	Erin	Part of North East Half of Lot 22, Concession 4, Township of Erin; designated as Part 2 on Reference Plan 61R-11081
36.	Erin	Part of Lot 16, Concession 4, Township of Erin; designated as Part 2 on Reference Plan 61R-11062
37.	Halton Hills	Part of Lot 15, Concession 5, Township of Esquesing; designated as Part 1 on Reference Plan 20R-18084
38.	Halton Hills	Part of Lot 6, Concession 5, Township of Esquesing; designated as Part 4 on Reference Plan 20R-18077
39.	Halton Hills	Part of Lot 5, Concession 5, Township of Esquesing; designated as Part 1 on Reference Plan 20R-18063

	Municipality	Legal Description of Interest to be Expropriated
40.	Halton Hills	Part of Lot 4, Concession 5, Township of Esquesing; designated as Part 2 on Reference Plan 20R-18063
(B) Full Parcel Takings		
41.	Brockton	Part of Lot 28, Concession 7, Township of Brant; designated as Parts 1 and 2 on Reference Plan 3R-9080
42.	Brockton	Part of Lot s 36 and 37, Concession A, Township of Greenock; designated as Parts 1, 2, 3, 4, 5, 6, 7, 8 and 9 on Reference Plan 3R-9083
43.	Brockton	Part of Lot 74, Concession 3, NDR Township of Brant; designated as Parts 1, 2 and 3 on Reference Plan 3R-9026
44.	West Grey	Part of Lot 1, Plan 55, NDR Township of Bentinck; designated as Parts 1, 2, 3 and 4 on Reference Plan 16R-9825
45.	Southgate	Part of Lot 21, Concession 2, Township of Egremont; designated as Parts 3, 4, and 5 on Reference Plan 16R-9613
46.	Southgate	Part of Lot 15, Concession 3, Township of Proton; designated as Parts 2, 3, 4 and 5 on Reference Plan 16R-9813
47.	East Garafraxa	Part of Lot 22, Concession 11; designated as Parts 1 and 2 on Reference Plan 07-23-547-39-EG1

APPENDIX "B"
TO
DECISION AND ORDER

BOARD FILE NO. EB-2010-0023

DECISION ON ISSUES LIST



EB-2010-0023

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

AND IN THE MATTER OF section 99 of the Act;

AND IN THE MATTER OF an application by Hydro One
Networks Inc. for authority to expropriate interest in certain
lands for the purpose of constructing and operating a new
500 kilovolt double circuit transmission line known as the
Bruce to Milton Transmission Reinforcement Project.

BEFORE: Ken Quesnelle
Presiding Member

ISSUES LIST - DECISION

August 6, 2010

INTRODUCTION

Hydro One Networks Inc. (“Hydro One”) has filed an application (the “Application”), dated February 26, 2010, with the Ontario Energy Board (the “Board”) under section 99 of the *Ontario Energy Board Act 1998*, S.O. 1998, c. 15 (Schedule B) (the “OEB Act”) for authority to expropriate interests in certain lands for the purpose of constructing and operating a new 500 kilovolt double circuit transmission line known as the Bruce to Milton Transmission Reinforcement Project (the “Project”) located between the Bruce Power Complex in Kincardine, Ontario and Hydro One’s switching station in Milton, Ontario. The Board has assigned File No. EB-2010-0023 to this application.

Hydro One was granted leave of the Board to construct the Project on September 15, 2008 pursuant to Board Decision EB-2007- 0050. The Project will be constructed adjacent to the existing transmission corridor extending from the Bruce Power Complex on the Lake Huron shore in the Municipality of Kincardine and will proceed in a south by south-east direction to Hydro One’s Milton Switching Station located south-east of the interchange of James Snow Parkway and Highway 401 in the Town of Milton

Hydro One has indicated that it requires new permanent easement interests in land for the construction and ongoing operation of the Project. New temporary easements will also be required during the period of construction for off-corridor access and construction activities. The proposed new permanent easements will range from 53 to 61 metres in width depending on the width of the adjacent existing transmission corridor and in order to accommodate the overhead transmission line and supporting structures. In limited circumstances Hydro One is seeking authority to expropriate the fee simple interest in the owner’s full parcel.

Hydro One has advised that the Niagara Escarpment Commission’s decision to grant a development permit for the Project is currently under appeal. As a result, 13 properties within the Niagara Escarpment Planning Area have not been included in this Application. Depending on the timing and outcome of this appeal, Hydro One will advise the Board of whether revisions will be made to this Application or if a separate application for expropriation authority in respect of such properties will be necessary.

SCOPE OF THE EXPROPRIATION PROCEEDING

The Board’s power to grant an applicant authority to expropriate is derived from section 99 of the OEB Act. Under this section, any person who has been granted leave by the

Board under section 92 of the OEB Act may apply to the Board for authority to expropriate land for a work.

The Project itself and the general routing of the Project were approved in the Leave to Construct proceeding (EB-2007-0050). The environmental and health impacts of the Project were addressed through the environmental assessment process, which is outside of the Board's purview.

Section 99(5) of the OEB Act establishes the test for approving an expropriation: "If after the hearing the Board is of the opinion that the expropriation of the land is in the public interest, it may make an order authorizing the applicant to expropriate the land."

SUBMISSIONS AND BOARD FINDINGS

In Procedural Order No.1, the Board invited submissions from Hydro One, intervenors and Board staff regarding the issues that should be considered in this proceeding. In addition, an Issues Day was held on June 10, 2010, in which the Board heard oral submissions with respect to these issues. The following parties filed written submissions¹ and made oral submissions at Issues Day²:

- Mr. Gordon M. Nettleton, Osler, Hoskin & Harcourt, representing Hydro One
- Mr. Stephen Waqué and Mr. M. Ian Mathany, Borden Ladner Gervais, representing client intervenors
- Mr. John D. Goudy, Cohen Highley, representing client intervenors
- Mr. Quinn M. Ross, The Ross Firm, representing client intervenors
- Mr. Peter T. Fallis, Fallis, Fallis & McMillan, representing client intervenors
- Mr. Eric K. Gillespie, Eric K. Gillespie Professional Corp., representing client intervenors
- Mr. Michael Millar, representing Board Staff

During Issues Day, the Board heard submissions from all parties present regarding the issues that each party wants considered in this proceeding.

¹ Fallis, Fallis & McMillan filed written submissions on May 13, 2010 and June 4, 2010. The other parties filed submissions on May 14, 2010. All are in the public record for EB-2010-0023.

² Transcripts for the Issues Day proceeding are in the public record for EB-2010-0023

For presentation purposes this decision references the various proposed issues according to the identification numbering contained in the respective submissions.

Issues Proposed by Mr. Fallis and Mr. Gillespie

Mr. Fallis filed two sets of proposed issues - one on May 13, 2010 and one on June 4, 2010.

On June 1, 2010, Hydro One filed a letter with the Board which advised that Messrs. Nettleton, Fallis, Gillespie and Millar had held discussions regarding Issue 2 (Prematurity of the Application) and Issue 3 (Referral of Issues to the Court) proposed by Mr. Fallis in his May 13, 2010 submission. As a result of the discussions, Messrs. Nettleton, Fallis and Gillespie proposed that Issues 2 and 3 not be determined at Issues Day but instead be raised by way of a formal motion that would be filed after Issues Day. This proposal was intended to allow the Issues Day proceeding to remain focused on the identification of issues to be considered during any evidentiary and argument phases of this proceeding. The Board accepted the proposal and made provisions for the filing and consideration of the motion in Procedural Order No. 2 issued June the 7th, 2010.

At Issues Day, Mr. Fallis spoke briefly about the proposed additional issues that he submitted on June 4, 2010. The Board provided guidance at Issues Day as to how issues raised pertaining to the Board's authority and jurisdiction in dealing with matters of expropriation could best be dealt with in the aforementioned motion along with Mr. Fallis' earlier proposed issues.

The Board further explained that for the sake of process expediency and due to the nature of the motions, the Board did not intend to delay the process related to the determination of issues so as to consider the motions in advance of issuing the approved issues list. The Board stated that no other procedural steps would be taken beyond that prior to the consideration of the motions.

Issues Proposed by the Other Intervenors, Hydro One and Board Staff

Early in the process at Issues Day, it became apparent that many of the proposed issues could be subsumed into the four issues submitted by Board staff, with some modification to one of the four issues (Issue 2), and the addition of a fifth issue. These five issues (the "Base Issues") are listed below:

Base Issues

- Issue 1** To the extent that the public interest has not already been considered in the Board's decision in Board File No. EB-2007-0050, are the proposed expropriations in the public interest?
- Issue 2** What specific interests in lands for which the authorization to expropriate is requested, are appropriate in the circumstances?
- Issue 3** Has Hydro One taken appropriate and reasonable steps to minimize the impact of the proposed expropriations on the subject properties?
- Issue 4** Has Hydro One taken appropriate steps to minimize the disruption to landowners by requesting easements that are no larger and no more extensive than necessary?
- Issue 5** If approval to expropriate lands is granted, what conditions, if any, should be attached to the Board's Order?

Subject to certain submissions pertaining to their meaning and scope (discussed in further detail below), no party objected to this Base Issues list. The Board finds that the Base Issues are within the scope of this proceeding and accepts them as the Issues List for this proceeding.

Proposed Issues Subsumed into Base Issues

During the Issues Day submissions, the parties agreed that the Base Issues listed above are sufficiently broad that they encompass many of the issues contained in the parties' initial proposed issues with the exception of those issues dealt with by way of the aforementioned motion. The Board considers it useful to provide a mapping of the proposed issues to the Base Issues. It may be that there is more than one Base Issue that could capture a proposed issue. The following mapping is provided as an administrative aid and is not intended to constrain the framing of any individual party's legitimate concern.

The issues that the parties agreed can be subsumed into one or more of the Base Issues are outlined below:

- Hydro One:** Proposed Issues 1 and 2 are subsumed into Base Issues 1 and 2, respectively.

The Ross Firm: Proposed Issues 3 and 4 are subsumed into Base Issues 1 and 2.

Cohen Highley: Proposed Issue 1 is subsumed in Base Issue 1;
Proposed Issues 2, 3, and 6 are subsumed in Base Issue 2;
Proposed Issues 4 - 11 are subsumed into Base Issue 2;
Proposed Issue 3 is subsumed into Base Issue 4; and

BLG: Proposed Issues 3.1 is subsumed in Base Issue 1;
Proposed Issues 2.2, and 5.4 are subsumed in Base Issues 2 and 4;
Proposed Issue 5.5 is subsumed into Base Issue 4; and
Proposed Issues 5.6 and 6.5 are subsumed into Base Issue 5.

The Board agrees that the Base Issues encompass the above-noted issues. The Board believes that it is not necessary or appropriate to define or describe each issue on the Issues List in complete detail. The Board accepts the parties' submissions that the issues listed above can be subsumed into one or more of the Base Issues, as indicated and, therefore, those issues will not be listed separately on the Issues List.

General Contested Issues

While the scope of the Base Issues will allow for most of the parties' proposals the Board provides the following general comments on the contested areas to assist in establishing the parameters of the issues. The Board provides greater detail on some discrete proposed issues later in this decision.

Three main areas of dispute arose amongst the parties regarding the proposed issues. They centered on matters related to: 1) the appropriateness of the proposed interests in the lands to be expropriated, 2) submissions arguing that the Board should consider the "public interest" test from section 99(5) of the OEB Act to be broad enough to capture the "fair, sound and reasonably necessary" test contained in section 7, subsection 5 of the *Expropriations Act* and 3) issues related to compensation.

Proposed Interests in the Lands

With the exception of the parties represented by Mr. Fallis and Mr. Gillespie, the parties generally agree that the general route of the Project was established with the granting of

the section 92 leave to construct order. Mr. Fallis and Mr. Gillespie raised certain issues relating to routing in their motions that were heard on July 14, 2010. The Board's determinations on the matters related to the routing are provided in its decisions on the motions.

Parties argued that the Board has 1) the authority to consider the appropriateness and extent of the specific interests sought in the lands that are affected by the route and 2) that the Board need not simply accept or reject Hydro One's proposed interest but rather, the Board has the authority to impose what it considers to be an appropriate interest through the provision of conditions and determinations as to what the appropriate interests are. A concern regarding future abandonment of the facilities was discussed in the context of obligations and conditions that the Board may find appropriate.

Hydro One agreed that there should be an issue in the proceeding to allow for consideration of its rights and obligations pertaining to the takings it is proposing. However, it asserted that if landowners had concerns regarding impacts they had opportunity to raise them in the section 92 Leave to Construct hearing and through the environmental assessment.

Board Findings

The Board considers the issue regarding the appropriateness of the interest in the subject lands to be the central issue in this proceeding. While the Board expects that there will be argument on the extent to which the Board can or should establish conditions or obligations on the applicant, it is prepared to consider evidence on parcel by parcel impacts in sufficient detail to provide for an informed assessment of the appropriateness of the interest sought for each parcel of land.

While there may have been an opportunity for landowners to raise their individual land impact concerns in the Leave to Construct hearing the individual and parcel specific land use impacts are not considered within the scope of a section 92 application. The project as a whole was considered in the section 92 hearing as per the section 92 parameters; that being the impact of the project on price, reliability and quality of power. This proceeding deals specifically with the act of expropriation and the determinations regarding the appropriateness of the precise interests sought should be informed by site

specific details. The Board does not intend to revisit issues that have been duly determined in the previous proceeding. The Board granted a leave to construct to the Hydro One for the general route contained in its application. In order to avoid the rehearing of issues previously dealt with, the Board will be guided by the level of detail and actual interests sought in this case in contrast to the relief sought and evidence provided in the section 92 proceeding.

Some intervenors expressed the view that the scope of this issue should allow consideration of whether interests in land in addition to those that are the subject-matter of Hydro One's application should or should not form part of the expropriation relief. In a letter filed with the Board on June 11, 2010, Hydro One indicated that it is prepared to have the scope of Issue include consideration of the appropriateness of the full parcel taking where circumstances relate to the mandatory buyout of properties, circumstances that Hydro One ascribes to a certain category of properties.

Public Interest

Several parties suggested that the Board should consider the public interest test from section 99(5) of the OEB Act to essentially include the "fair, sound and reasonably necessary" test from the *Expropriations Act*. Parties argued that if the Board were not to consider the fair, sound and reasonably necessary test set out in Section 7 subsection 5 of the *Expropriation Act* in this proceeding it would in effect be providing fewer rights to land owners affected by section 99 of the OEB Act than those rights enjoyed by property owners under the sole jurisdiction of the *Expropriation Act*. Mr. Waque argued that the public interest test is very broad, and should be viewed as inclusive of the test identified in the *Expropriations Act*. This would allow the Board to be informed by the jurisprudence established through expropriation cases under the *Expropriations Act*, which are much more numerous than cases under the OEB Act.

Board Findings

It is agreed by all parties, and the Board accepts, that the test for considering the expropriations is the public interest as established in section 99(5) of the OEB Act. The public interest test is a very broad one, and the Board accepts that the "fair, sound and reasonably necessary" test from Section 7(5) of the *Expropriations Act* will in some instances be subsumed within the public interest test.

With regard to the argument that land owners affected by section 99 of the OEB Act would be afforded fewer rights if the Board were not to consider the fair, sound and reasonably necessary test in this proceeding the Board makes the following observation.

The application before the Board is allowed under Section 99 due to the applicant's receipt of a leave to construct approval from the Board. While the Board accepts that the test can be considered to be generally within the parameters of the "public interest" test in Base Issue No.1, that issue only pertains to the matters not previously considered by the Board. The "public interest" test has previously been applied within the context of the section 92 application. To the extent that the "public interest" test can be considered to encompass the same elements of fairness, soundness and reasonable necessity found in the *Expropriation Act* the land owners were afforded those rights at that time and in the context of the impacts associated with the granting of a section 92 leave to construct. The Board will now consider the public interest in the context of this section 99 application cognizant of what it has approved in the section 92 proceeding and with a focus on the nexus of the two processes. As stated earlier, the Board does not intend to revisit issues that have been duly determined in the previous proceeding. In order to avoid the rehearing of issues the Board will be guided by the level of detail and actual interests sought in this case in contrast to the relief sought and evidence provided in the section 92 proceeding.

In this context, the Board will allow the review of the jurisprudence established through expropriation cases under the *Expropriations Act* as it relates to the Board's mandate in this proceeding.

Compensation

Parties agree that the Board does not establish levels of compensation for any expropriated land and that the establishment of compensation levels is not a matter to be decided in this proceeding.

However, parties made submissions that although the Board does not set levels of compensation, its determination of the appropriateness of the interests sought in the lands by Hydro One has a direct and commensurate impact on the total land use impacts and therefore on compensation.

Parties submitted that for this reason, matters related to total land value impacts and ultimate compensation requirements should be allowed in evidence within the scope of the issues to be determined in this case.

Mr. Waque argued that, among other things, the fairness provision of the *Expropriation Act* compels the Board to consider the fairness of the compensation policies of the applicant and the manner in which those policies have been applied.

Board Findings

While the Board accepts the submissions made that its determinations regarding the appropriateness of specific interests in lands has a direct and corresponding impact on compensation the Board does not agree that it must consider compensation as a concomitant matter in order to fulfil its mandate.

All of the Base Issues can be said to have elements that could ultimately influence the amount of compensation payable. However, the legislative scheme should be considered in determining what importance, if any, the Board should place on the consequential impacts of its determinations. Determinations regarding the appropriateness of the interest sought and the appropriateness of the compensation required are made by two separate tribunals under two separate pieces of legislation. The Board's mandate to determine the appropriateness of the interest sought is a role that aligns with the Board's core expertise in network utility infrastructure. The interests in land that are required should be tailored to accommodate the construction and ongoing operation and maintenance of the network facility. These are areas that are very familiar to the Board. The Ontario Municipal Board is mandated to address compensation issues that arise from expropriations for all manner of public need. This scheme facilitates a common consideration of the amount of compensation irrespective of the identity of the approving or expropriating authority, and is an area of core expertise of the Ontario Municipal Board.

It is the Board's view that the legislative scheme contemplates that matters regarding the setting of compensation would be solely the purview of the legislated body mandated to hear such matters and as such it will not thwart the intent of the scheme by including elements of compensation levels in its considerations.

With regard to the argument that the fairness provision of the *Expropriation Act* compels the Board to consider the fairness of the compensation policy the Board makes the following observations.

While the “public interest” test is a broad test its application is limited to those matters within the Board’s jurisdiction. As submitted by Board Staff, the Board is only empowered to act in accordance with its statutory mandate or from common law by the application of the doctrine of jurisdiction by necessary implication.

It is clear to the Board that it does not have the explicit authority to set compensation levels nor, given the aforementioned legislative scheme, is it necessary for it to do so. Therefore, the Board is not prepared to hear matters related to compensation policy from

a fairness of the amount of compensation perspective. However, the Board is prepared to consider the timing and equality of the offerings from a fairness perspective. Within the Board’s consideration of the expropriation interests sought, the manner in which the policy is applied may impact the applicant’s ability to avoid expropriation impacts when possible.

Detailed Contested Issues

There were a number of issues proposed by parties where it was not clear whether the issues can be subsumed into one or more of the Base Issues. These are listed and discussed below:

Cohen Highley’s Issues

There were submissions from both Mr. Goudy and Mr. Nettleton regarding the appropriateness and scope of Cohen Highley’s proposed issues 10 through 13.

Proposed issues 10-12 concern operational issues relating to the project and monitoring and reporting obligations for the project. The Board is prepared to allow for questions and submissions on these issues, and considers them to be subsumed into Base Issue 2 (proposed issues 10 and 11) and Base Issue 5 (proposed issue 12). The Board recognizes Hydro One’s concern that the proposed issues are worded somewhat broadly, and the Board re-iterates that it does not intend that any of the matters previously decided through the Leave to Construct case or the EA be reconsidered here. The Board accepts, however, that questions relating to impact mitigation measures and potential conditions are within the scope of this proceeding.

Proposed issue 13

What is the required method and timing of abandonment of the Project facilities?

The Board agrees with Mr. Goudy that landowners who are subject to expropriation are entitled to ask questions concerning Hydro One's obligations and plans (if any) with respect to the Project facilities if they no longer intend to use them and if they choose to abandon the facilities. The following frames what the Board considers to be appropriately subsumed primarily in issue No. 3 and also potentially being germane to issue No. 5.

What, if any, considerations should be made with regard to any future abandonment of the Project facilities to minimize any impact on the specific properties proposed for expropriation?

BLG's Proposed Issues, 1.1, 2.1, 2.3, 3.1 - 3.2, 4.1 - 4.5, 5.1 - 5.3, 6.1 - 6.4

These issues are listed below along with the associated Board findings:

1.1 Is Hydro One's objective of constructing and operating a new 500 kilovolt double circuit transmission line between the Bruce Power Complex in Kincardine, Ontario and Hydro One's switching station in Milton, Ontario reasonable, at this time?

BLG withdrew this proposed issue on issues day.

2.1 Can Hydro One's objective be accomplished without expropriation proceedings?

To the extent that this question pertains to circumstances in which an argument could be made that **no** interest in specific lands is required the Board considers it subsumed in Base Issue No. 2. The Board agrees with Hydro One that this issue should not lead to a probing of voluntary settlements including the evidence and dealings between Hydro One and the landowners.

2.3 In accordance with generally accepted industry principles, will Hydro One's proposed takings leave the smallest footprints possible?

The Board is of the view that this proposed issue relates to the size and nature of the taking and as such can be subsumed in Base Issue 4.

- 3.1** Is it fair for Hydro One to proceed with its expropriation application before attempting to negotiate a voluntary purchase of the proposed land interests with every landowner?

As it relates to the appropriateness of the timing of the expropriation the Board considers this issue to be partially subsumed in Base Issue 1. As mentioned earlier, the Board is of the view that the public interest test as identified in section 99 of the Act, is a broad one and can reasonably be taken to include aspects of fairness that may arise. While these aspects do not include the consideration of what might be a “fair” voluntary purchase amount they do include the applicant’s fair application of its compensation policy.

- 3.2** Is it fair for Hydro One to insist that landowners already encumbered with existing transmission lines bear the burden of further intrusion?

To some extent issues relating to “fairness” are a part of the public interest test, and are therefore subsumed in Base Issue 1. However, the Board agrees with Hydro One that this proposed issue relates to the matter of routing alternatives which has already been largely considered in the environmental assessment and leave to construct processes. Questions relating to large scale routing alternatives, therefore, are not encompassed within the approved Issues List.

- 4.1 - 4.5** Some of these issues relate to the timing and phasing of the expropriation and whether Hydro One has complied with the *Environmental Assessment Act* and whether the interests of special interest groups including Aboriginal groups have been addressed adequately at this time, or is expropriation premature for these reasons.

To the extent that there may be matters related to timing and phasing that would be germane to the consideration of the appropriateness of the interest sought, the Board considers this proposal to be subsumed in Base Issue No. 5. The Board does not consider it necessary to conduct an examination of the applicant’s fulfilment of its obligations related to matters outside of the Board’s mandate. The Board would however be informed by the status of other approval processes in its consideration of the appropriateness of temporal conditions as contemplated in Base Issue No. 5.

- 5.1 - 5.3** These issues relate to whether it is fair, sound and reasonably necessary for Hydro One to acquire the proposed fee simple interests, temporary easements and permanent easements.

The Board provided its determinations on the breadth of the “public interest” test and how it intends to apply it in an earlier section.

6.1 - 6.4 These issues relate directly or indirectly to compensation or compensation policy.

The Board provided its determinations on matters related to compensation in an earlier section.

CONCLUSION

Based on the submissions of the parties and the above findings, the Board has established an issues list for this proceeding. The Issues List is shown in Appendix A to this Decision.

Note:

In issuing this Decision, the Board notes its determinations on Mr. Fallis’ and Mr. Gillespie’s motions on behalf of their clients. The Motion Decision, issued contemporaneously with this decision, contains determinations that further define the scope of the approved issues. The Board will issue a procedural order outlining the process and timing for the remainder of this proceeding in due course.

DATED at Toronto, August 6, 2010

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX "A"

TO

DECISION

BOARD-APPROVED ISSUES LIST

BOARD FILE NO. EB-2010-0023

HYDRO ONE NETWORKS INC.

**APPLICATION FOR AUTHORITY TO EXPROPRIATE CERTAIN LANDS FOR THE
BRUCE TO MILTON TRANSMISSION REINFORCEMENT PROJECT**

BOARD-APPROVED ISSUES LIST

BOARD FILE NO. EB-2010-0023

1. To the extent that the public interest has not already been considered in the Board's decision in Board File No. EB-2007-0050, are the proposed expropriations in the public interest?
2. What specific interests in lands for which the authorization to expropriate is requested, are appropriate in the circumstances?
3. Has Hydro One taken appropriate and reasonable steps to minimize the impact of the proposed expropriations on the subject properties?
4. Has Hydro One taken appropriate steps to minimize the disruption to landowners by requesting easements that are no larger and no more extensive than necessary?
5. Does Hydro One's plan, if any, for the abandonment of the Project facilities include appropriate and reasonable measures taken to minimize any impact on the specific properties proposed for expropriation?
6. If approval to expropriate lands is granted, what conditions, if any, should be attached to the Board's Order?

APPENDIX "C"
TO
DECISION AND ORDER

BOARD FILE NO. EB-2010-0023

DECISION ON MOTIONS



EB-2010-0023

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

AND IN THE MATTER OF section 99 of the Act;

AND IN THE MATTER OF an application by Hydro One
Networks Inc. for authority to expropriate interest in certain
lands for the purpose of constructing and operating a new
500 kilovolt double circuit transmission line known as the
Bruce to Milton Transmission Reinforcement Project;

AND IN THE MATTER OF Notices of Motion brought by
the Fallis Group of Intervenors and Eric K. Gillespie
Professional Corp. representing Intervenor Mr. Robert
Watson.

BEFORE: Ken Quesnelle
Presiding Member

DECISION ON MOTIONS

August 6, 2010

INTRODUCTION

Hydro One Networks Inc. (“Hydro One”) has filed an application (the “Application”), dated February 26, 2010, with the Ontario Energy Board (the “Board”) under Section 99 of the *Ontario Energy Board Act 1998*, S.O. 1998, c. 15 (Schedule B) (the “OEB Act”) for authority to expropriate interests in certain lands for the purpose of constructing and operating a new 500 kilovolt double circuit transmission line known as the Bruce to Milton Transmission Reinforcement Project (the “Project”) located between the Bruce Power Complex in Kincardine, Ontario and Hydro One’s switching station in Milton, Ontario. The Board has assigned File No. EB-2010-0023 to this application.

Hydro One was granted leave of the Board to construct the Project on September 15, 2008 pursuant to Board Decision EB-2007- 0050. The Project will be constructed adjacent to the existing transmission corridor extending from the Bruce Power Complex on the Lake Huron shore in the Municipality of Kincardine and will proceed in a south by south-east direction to Hydro One’s Milton Switching Station located south-east of the interchange of James Snow Parkway and Highway 401 in the Town of Milton

On March 16, 2010, the Board issued a Notice of Application (the “Notice”) for this proceeding. Hydro One served the Notice, the Application, and relevant pre-filed evidence on all affected landowners and other interested parties.

Through its Procedural Order No. 1, the Board invited submissions from the Applicant, intervenors and Board staff regarding the issues that should be considered in this proceeding and made provisions for an Issues Day hearing to hear submissions from parties regarding the issues to be considered in this case. Accordingly, the following parties filed submissions:

- Mr. Gordon M. Nettleton, Osler, Hoskin & Harcourt LLP, representing Hydro One;
- Mr. Peter T. Fallis, Fallis, Fallis & McMillan, representing client intervenors (the “Fallis Group”);
- Mr. Eric K. Gillespie, Eric K. Gillespie Prof Corp, representing Mr. Robert Watson;
- Mr. John D. Goudy, Cohen Highley LLP, representing Ms. Catherine Gale Walford;
- Mr. Ian Mathany, Borden Ladner Gervais LLP, representing client intervenors;

- Mr. Quinn M. Ross, The Ross Firm, representing client intervenors; and
- Board Staff

A number of the issues proposed by the Fallis Group in its May 13, 2010 submission related to “prematurity of the application” and “referral of issues to the court”. In order to allow the Issues Day proceeding to remain focused on the identification of issues to be considered during any evidentiary and argument hearing process held for the Application, the Board decided that the “prematurity of the application” and “referral of issues to the court” issues would be handled by way of a formal motion that would be filed after Issues Day. Accordingly, an Issues Day hearing was held on June 8, 2010, followed by Notices of Motion filed by the Fallis Group and Mr. Robert Watson and a Motions Day hearing was held on July 14, 2010.

A Decision regarding the issues to be considered in this case (EB-2009-0023) was issued on August 6, 2010.

This Decision addresses the Notices of Motion filed by the Fallis Group and by Mr. Robert Watson.

DESCRIPTION OF THE MOTIONS AND BOARD FINDINGS

(A) The Motion on Robert Watson (“Watson Motion”)

The Watson Motion seeks an order of the Board: (1) staying the proceeding until the completion of all proceedings pursuant to the *Consolidated Hearings Act*, (“CHA”) or, in the alternative, (2) an order permitting Mr. Watson (or any other intervenor) to adduce evidence and make submissions regarding the alterations to the preferred route of the Project based on the impacts to their lands and interests that have not previously been assessed.

(i) Prematurity of the Section 99 Application

The Watson Motion stated that Hydro One’s Application under Section 99 of the OEB Act is premature because:

- Hydro One has not obtained all necessary approvals, permits, licenses, certificates and easement rights as per Condition 1(4) in the Boards Decision and Order (EB-2007-0050) which granted Hydro One leave to construct the Project.

- Hydro One has not given any written notice of the Undertaking to the Hearings Registrar of the Environmental Hearing Board under s. 3(1) of the CHA.

The Watson Motion contends that the Project may require as many as five hearings and approvals that are covered by the CHA: a hearing before the Environmental Review Tribunal with respect to the Environmental Assessment, a hearing of inquiry pursuant to sections 6 and 7 of the *Expropriations Act*, a hearing for a development approval before the Niagara Escarpment Commission, a hearing before the Ontario Municipal Board for an approval under the *Ontario Planning and Development Act* with respect to one of the alternate proposed transmission corridor routes, and another hearing before the Environmental Review Tribunal for dewatering permits pursuant to the *Ontario Water Resources Act*.

Hydro One submitted that applications made pursuant to section 99 are not premature simply because the prerequisite section 92 approval is subject to outstanding conditions. Hydro One further submitted that “Condition 1(4) expressly obligates Hydro One to obtain all necessary approvals and easement rights required to construct and operate and maintain the project and to provide copies of same to the Board upon request. The Condition does not state that all such specific approvals must be obtained before applications are brought by Hydro One pursuant to section 99 of the Act.”

Hydro One also submitted that it has not taken steps to proceed under the CHA because it is not required to do so since the OEB Act is not included in the CHA’s Schedule, and thus the CHA cannot be said to be applicable or relevant to applications made to this Board under the Act. In the alternative, Hydro One argues that even if the CHA were relevant to the current proceeding, Hydro One has complied with all of the provisions of that Act. Specifically, Hydro One argues that it is not required to notify the hearings registrar because the criteria in section 2 of the CHA have not been triggered.

Section 2 requires that the CHA hearing requirements apply where: “more than one hearing is required or may be required or held by more than one tribunal under one or more of the Acts set out in the Schedule or prescribed by the regulations.” Hydro One submits that it does not require approvals by more than one of the tribunals listed in the Schedule to the CHA. The Environmental Assessment for the Project was not referred by the Minister of the Environment to the Environmental Review Tribunal. Hydro One did require an approval under the Niagara Escarpment Planning and Development Act, but that approval has been obtained (although it is under appeal). Hydro One further maintains that it does not require any approvals under the *Ontario Planning and*

Development Act, nor does it intend to seek any approvals pursuant to the *Ontario Water Resources Act*. In addition, Hydro One does not require any approvals pursuant to sections 6, 7 or 8 of the *Expropriations Act*, as Hydro One is seeking approval instead through section 99 of the OEB Act.

The Board accepts Hydro One's submission that Condition 1(4) in the Board's Decision and Order (EB-2007-0050) does not require Hydro One to obtain all the approvals pursuant to Condition 1(4) before filing an application with the Board under section 99 of the Act.

The Board will also not stay this proceeding on account of any breaches relating to the CHA. The Board is not mentioned in the CHA, and has no role to play regarding any enforcement of its provisions. The Board does not intend to involve itself in the administration of an act that does not relate to the Board.

It is also not clear to the Board that there has been any breach of the CHA. Although there may be some possibility Hydro One will be required to obtain additional approvals, this does not appear to be either imminent or likely. The Board understands that the CHA applies where more than one hearing is required or "may be required", however it does not accept that this should lead to significant delays where the necessity to hold a particular hearing is speculative and not imminent. There must be some reasonable basis on which to believe a requirement for a hearing to which the CHA applies is a realistic possibility. The Board is not convinced that this is the case here.

The Board therefore rejects the Watson Motion for an order from the Board staying the proceeding until the completion of all proceedings pursuant to the CHA.

(ii) Consideration of Routing Alternatives

The Watson Motion stated that Hydro One and the Board did not allow landowners the opportunity to present evidence regarding routing alternatives for the Project in the section 92 proceeding (EB-2007-0050). The Motion further stated that "only certainly generic and therefore limited aspects of routing have been dealt with and the Board specifically declined to deal with the specific and individual routing issues the Intervenor still seek to raise".

In its pre-filed materials, Hydro One submitted that "the Board's section 92 proceeding and the EA process both took into consideration Project alternatives, including different routes or route modifications. The fact is that the Act now expressly mandates the specific factors and criteria that are considered in the context of whether leave to

construct a Project should be granted". Board staff pointed out in its submission that the Board also addressed the issue of route alternatives in its Issues Day Decision and Order dated September 26, 2007 for the section 92 proceeding. At page 5 of that decision, the Board held:

The Board finds that it can and should address route alternatives that have a material impact on price, reliability and quality of electricity service, and we note [the intervenor group] Powerline Connections' intention to file evidence in this respect. That assessment should be included in the comparison of all reasonably alternatives. The Board notes that these alternatives may be alternatives in routing within the applied for corridor or alternatives outside the applied for corridor.

Mr. Goudy, representing Ms. Catherine Gale Walford, supported the Watson Motion with respect to consideration of routing alternatives in this Section 99 application. Mr. Goudy further emphasized the position that neither the Environmental Assessment process nor the Board's Section 92 proceeding examined the routing at a very site-specific level based on very site-specific considerations. In Mr. Goudy's view, that is left to the Board's Section 99 proceeding. Specifically, Mr. Goudy submitted that this proceeding should allow the consideration of routing alternatives that involve properties adjacent to the lands that have been targeted for expropriation.

The Board does not agree with the position as expressed by the Watson Motion (and the Fallis Group Motion) that the Board refused to entertain evidence on routing in the leave to construct proceeding. The Board was clear that the route of the Project would be an issue in that proceeding, and indeed heard evidence and submissions on that topic.

The Board also accepts, however, that the leave to construct proceeding did not examine the potential impacts of the Project on a site specific, property by property basis. The Board agrees that this is to some extent the purpose of the current proceeding.

During the oral hearing of the motions, it appeared that the land owner groups accepted, however, that the general routing for the project had already been determined. Their focus with regard to routing was on site specific routing issues.

Mr. Gillespie argued that the Board should permit questions and evidence on site specific routing issues. He submitted that parties should be permitted to ask questions relating to possible routing alternatives not only within the corridor Hydro One identified in the leave to construct process, but also on neighbouring lands. In Mr. Gillespie's view, this would not amount to a reconsideration of the general routing of the project.

Mr. Goudy argued that parties should be permitted to ask questions about routing alternatives outside of the lands that have been targeted by Hydro One for expropriation. He does not propose to examine routing alternatives outside of the general route that was approved through the leave to construct proceeding and the Environmental Assessment.

Hydro One agreed that parties should be permitted to ask questions regarding the design and location of the transmission facilities that Hydro One proposes to build on their properties, provided that scope of the questions is restricted to the approved route. Hydro One has two concerns, however, regarding any questions or submissions relating to routing alternatives that fall outside of the approved route. First, any variations to the route approved in this proceeding would not match the approval in the leave to construct proceeding. In such a situation, Hydro One would arguably not have leave to construct approval to build the transmission line over the route as approved in the current proceeding. Second, Hydro One emphasized that it had already filed its request for specific expropriations rights, and that it did not intend to file any additional evidence on routing issues because it had no desire to see the route changed. To the extent that route refinements are proposed by any land owner, they would be required to provide evidence in support of that refinement. Hydro One did accept that in some cases it might provide additional information on proposed route refinements through the interrogatory process, depending on the question and the final issues list.

The Board has no intention of revisiting the issues that were decided in the leave to construct proceeding. The general route for the Project was an issue in that proceeding, and the general route will not be considered again in this proceeding.

However, with regard to potential route refinements, the Board will allow questions and submissions on route refinements within the corridor, and to a very limited extent on areas immediately adjacent to the corridor. To be clear, the Board does not accept that it would be appropriate to move the route outside of the corridor. It is not the Board's intent to allow parties to seek information on routing refinements that include areas immediately adjacent to the corridor on the simple grounds that they are impacted by

the existing plan. Hydro One will only be expected to answer questions intended to ascertain the reasonableness of any potential avoidance of demonstrable and substantial impacts that can not otherwise be accommodated within the corridor. The Board recognises that there would be notice issues if new properties potentially become impacted. At this stage, however, the Board is prepared to allow parties to ask questions and make submissions on these matters. The Board re-iterates, however, that it does not intend to stray from the decision in the leave to construct proceeding, nor to make a decision that would be inconsistent with the Environmental Assessment approval. The Board will not amend the approved Issues List; any questions relating to routing will fall within Issue 1.

(B) The Fallis Group Motion

The Fallis Group Motion asks the Board to make twenty four separate orders. Many of these proposed orders are related, and the Board agrees with Board staff's submissions that these requested orders can be generally organized into five categories:

Notice Issues (requested orders 1-3)

The Fallis Group Motion states that Cedar Crest Trout Farm (the "Company") has an interest as a tenant and holder of a constructive trust in one of the properties that Hydro One Networks Inc. ("Hydro One") seeks to expropriate, and that it did not receive direct notice of the application for authorization to expropriate (the "Application"). Proposed order #3 asks that the Board declare that it is without legislative competence to grant the Application with respect to this property as a proper notice was not served. The Fallis Group Motion also states that the Company was never provided notice for the original section 92 leave to construct application (EB-2007-0050).

Both Hydro One and Board staff opposed the granting of the requested relief. They noted that the Company had been an intervenor since May 20, and that it had been actively represented by Mr. Fallis at every stage of the proceeding. It was also pointed out that the principals of the Company are in fact also the landowners, who did receive direct notice of the application. Mr. Fallis did not identify any prejudice to his client resulting from the alleged lack of notice.

With regard to the assertions in the Fallis Group Motion that the Company did not receive notice of the original section 92 leave to construct application, Board staff submitted that Notice for the Leave to Construct application was in fact widely published in 6 local newspapers during the period January 9-15, 2008.

The Board finds that there is no issue relating to notice vis a vis the Company. The Company received at minimum constructive notice, and has not been prejudiced in any way. The Board will not make any of the notice related orders requested in the Fallis Group Motion.

The Board accepts Board staff's submissions with respect to the Notice Issues and rejects the request for orders 1-3 of the Fallis Group Motion.

The Board does recognize, however, that it is possible that there are parties that could be impacted by the decision that have not received notice. Tenants without a registered interest in the land, for example, would not have received direct notice of the application. Although it is the Board's expectation that the registered owners would notify all tenants, it is not a certainty that they have done so. In order to ensure that notice is complete, the Board will require Hydro One to publish a supplemental notice through the next Procedural Order. To the extent any new parties respond to this notice, the Board will make provision for them to make submissions on any preceding procedural steps, such as the issues list.

Injurious Affection Issues (requested orders 4-6 and 10)

The Fallis Group Motion seeks an order from the Board declaring that the Board has no jurisdiction to authorize Hydro One to cause injurious affection.

Hydro One submitted that injurious affection is term that concerns claims for a type of damage resulting from a taking. As a result, this is a compensation issue, and is not a matter within the Board's jurisdiction to address. Hydro One argues that compensation issues are decided through the provisions of the Expropriations Act, and the Board therefore does not need to make any declarations or orders relating to injurious affection.

Board staff submitted that injurious affection is in effect a heading of damages, and not a subject of explicit approval itself. Injurious affection is essentially a by-product of some expropriations. Although an expropriation itself may be authorized by an approving authority (such as the Board), injurious affection is a compensation issue and should be dealt with in that context. As discussed below, the Board itself has no authority over compensation issues.

Distinction between "expropriating authority" and "statutory authority" (Decision with respect to questions presented in Procedural Order No. 3)

In the context of discussions around the injurious affection issues, the Board indicated that it would seek further written submissions from parties relating to certain definitions in the *Expropriations Act*. In Procedural Order No. 3, the Board identified three questions it wished to have addressed, and gave parties until July 30 to make written submissions on these questions. The Board received submissions from Mr. Goudy, Mr. Nettleton, Mr. Fallis, and Mr. Ross. Mr. Gillespie indicated that he supported the submissions of Mr. Fallis and Mr. Ross.

After reviewing each party's respective submissions, the Board agrees with and adopts the position taken by Mr. Goudy in response to the questions presented in Procedural Order No. 3. The Board also accepts the position taken by Hydro One, to the extent that Hydro One's submissions support the position taken by Mr. Goudy.

Therefore, the Board takes the position that the distinction between the terms "statutory authority" and "expropriating authority" in the *Expropriations Act* has no significance in the context of this proceeding and is not an issue that the Board needs to address in its final decision in this case. Under the *Expropriations Act*, the term "statutory authority" is expansive and encompasses the term "expropriating authority."¹ Every "expropriating authority" is also a "statutory authority" for the purposes of certain provisions of the *Expropriations Act*.² If the Board does authorize the proposed expropriations under the OEB Act, Hydro One will become an "expropriating authority" and will therefore be a "statutory authority" under the *Expropriations Act*.

Mr. Ross submitted issues regarding the Board's mandate to test an application under section 99 of the OEB Act in order to determine if the expropriation is in the public interest. These submissions do not address the questions asked by the Board in Procedural Order No. 3 and therefore the Board will not discuss them further.

Mr. Ross also submitted that a "Statutory Authority" has the power to cause injurious affection whereas an "Expropriating Authority" does not and that neither term

1 The *Expropriations Act* refers to an "expropriating authority" only when the provision deals with an "authority" actually engaging in the process of land expropriation. On the other hand, the term "statutory authority" is referred to in provisions that deal not only with the actual process of land expropriation but in provisions that deal with compensation issues relating to that process, which do not involve actual expropriation of land *per se*.

2 See Ontario Court of Appeal's decision in *Rotenberg v. York (Borough)* (No. 2) (1976), 13 O.R. (2d) 101 (C.A.), 1976 CarswellOnt 267, which confirms that the term "statutory authority" encompasses an "expropriating authority" in the context of cost awards.

encompasses the other, that if authorized to expropriate land, Hydro One would be an Expropriating Authority able to expropriate land but not cause injurious affection in the process, and that the distinction between an “expropriating authority” and a “statutory authority” is an issue that the Board must address in its final decision in order to reach a juristically sound result.

The Board does not accept the position taken by Mr. Ross. As discussed at para. 3 of this decision, every expropriating authority is also a statutory authority for the purposes of certain provisions of the *Expropriations Act*, including those relating to cost awards. This idea has been confirmed by the Ontario Court of Appeals.³ Therefore if authorized to expropriate land under the OEB Act, Hydro One would be an “expropriating authority” and also a “statutory authority,” giving Hydro One the ability to both expropriate land and cause injurious affection as defined by the *Expropriations Act*.

Mr. Fallis put forward many lengthy submissions in response to Procedural Order No. 3, a number of which did not address any of the questions asked by the Board.

Response submissions 3-6 address the business composition of Hydro One Inc., and suggest that the beneficial equity in the company is owned solely by the Government of Ontario.

Response submissions 7-9 address the authority of the Minister of Government Services to request a taking and an expropriation of land on behalf of the Minister of Energy and Infrastructure.

Response submissions 10-11 address the process that the Minister of Government Services must follow when applying to the Board for an Order for leave to construct on behalf of the Minister of Energy and Infrastructure, which does not require the Minister of Government Services to apply for the authority to expropriate lands, subject only to the *Expropriations Act*.

Response submissions 12-17 argue that every expropriation of land by the Government and government agencies of Ontario, if carried out under the authority of the Minister of Government Services, shall be subject to the *Expropriations Act*.

Response submissions 21-23 submit that sections 98, 102 and 103(1), (2) of the OEB Act have nothing to do with the expropriation of land.

³ See note 2

None of these submissions relate in any way to the questions posed by the Board in Procedural Order No. 3, and the Board will not address them further.

Other submissions made by Mr. Fallis, though they relate to the questions asked by the Board, largely mirror his written submissions put forward in his original motion. Mr. Fallis' response submissions 1 -2, 28-32, and 42-44 question the Board's legislative authority to approve an application to expropriate certain lands under section 99 of the OEB Act. These submissions are the same as the issues addressed in requested orders 11-22 of the original Fallis Group Motion. Response submissions 25 -26 relate to compensation for injurious affection, and response submissions 36-38, and 48 relate to the authority of the Board to grant Hydro One the authority to cause injurious affection, issues that were addressed in the Fallis Group Motion requested orders 4-6 and 10.

Mr. Fallis' response submissions 45-46 state that if the Board empowers Hydro One with the right to expropriate land, it will neither be an "expropriating authority" nor a "statutory authority." The Board rejects this submission for the reasons stated above.

The Board has determined that it will not make any of the requested orders relating to injurious affection. The Board's powers with regard to expropriations are set out in the OEB Act. Injurious affection is a category of damages; it is not expressly "authorized" by the Board, but is instead a result of certain expropriations. Any claims relating to injurious affection are compensation issues and are properly dealt with through the framework of the *Expropriations Act*.

The Meaning of the Word "authorizing" in s. 99(5) of the Act (requested orders 11-22);

Section 99(5) of the Act states: "If after the hearing the Board is of the opinion that the expropriation of the land is in the public interest, it may make an order authorizing the applicant to expropriate the land."

The Fallis Group Motion seeks clarity from the Board regarding the effect or meaning of any order granting authority to expropriate under s. 99(5) of the OEB Act. The Fallis Group Motion's central contention in this regard appears to be that a Board order authorizing expropriation under s. 99(5) is in effect a condition precedent to a subsequent application to expropriate through the provisions of the *Expropriations Act*. The Motion seeks an order confirming that an "authorization" of the Board does not amount to an approval to expropriate, and that Hydro One would still have to apply under the *Expropriations Act* for an actual approval to expropriate.

Hydro One submits that the analysis in the Fallis Group Motion is incorrect, and that section 99 of the OEB Act provides the Board with the express power to grant orders authorizing an applicant to expropriate land. Hydro One argues that section 4(2) of the Expropriations Act expressly precludes applications under section 99 of the OEB Act for being subject to the inquiry and application processes under sections 6, 7 and 8 of the *Expropriations Act*. In other words, an approval under section 99 of the OEB Act authorizes the applicant to actually expropriate the lands, and is not a condition precedent to a subsequent application under the *Expropriations Act*.

Board staff's arguments on this point were similar to those of Hydro One. Board staff submitted that the Fallis Group's interpretation of the OEB Act and the Expropriations Act is not correct, and that any authorization granted under s. 99(5) of the OEB Act is in fact an approval to expropriate. Where authority is granted under s. 99(5) of the OEB Act, an applicant need not seek separate approval through ss. 6-8 of the Expropriations Act.

The Board accepts the interpretation of the Acts as presented by Hydro One and Board staff. Section 4(2) of the Expropriations Act clearly exempts parties that have an approval under section 99 of the OEB Act from following the process established in sections 6-8 of the Expropriations Act. The Board will not make any of the orders requested in the Fallis Group Motion relating to the interpretation of the word "authorizing" in section 99 of the OEB Act.

Issues Regarding the Consolidated Hearings Act (requested orders 23-24)

The Fallis Group Motion and the Watson Motion make similar arguments and request similar relief with respect to issues concerning the Consolidated Hearings Act.

The Board's decision with respect to CHA hearings is detailed above.

The Board therefore rejects the request for orders 23-24 of the Fallis Group Motion.

Other Issues (requested orders 7, 9, and 22)

The Fallis Group Motion requests several additional orders that do not fit neatly into the categories listed above. Requested order 7 of the Fallis Group Motion asks the Board to declare that Hydro One has no authority to expropriate lands for its works absent a grant of authority by the Board under s. 99. The very purpose of this Hydro One application to the Board is to receive an order from the Board authorizing it to

expropriate land. There is no suggestion from any party that Hydro One has an independent right to expropriate land absent such an authorization from the Board. Therefore, there is no need to make an order confirming this, and the Board will not do so.

Requested order 9 seeks a declaration from the Board that any damages arising from the proposed expropriations will be determined by the Ontario Municipal Board unless otherwise agreed to by the parties. The Board has been very clear that it has no authority to set compensation and that compensation is determined (if necessary) through the provisions of the *Expropriations Act* or by the Ontario Municipal Board. Hydro One has stated on several occasions that it agrees that the Board has no authority to set compensation amounts. In fact, the Board is not aware of any party suggesting that the Board has responsibility for setting compensation. The Board finds, therefore, that there is no need to make a declaration confirming this point.

Requested order 22 seeks a declaration from the Board that it has not established guidelines or forms for use in s. 99 applications. As submitted by Board staff, the Board notes that its powers with respect to expropriations are set out in the OEB Act, and the Act does not require the Board to establish guidelines or prepare forms. To the extent any guidelines or forms were established, they would be subordinate to the provisions of the OEB Act in any event. There is no need for an order stating that no guidelines or forms have been established.

Requested order 22 further asks the Board to refer all 20 of the previous requested orders (there is no requested order number 9) to the Superior Court of Justice to gain “clarity of understanding of the limitation of powers as conferred upon the Board on a Sec. 99 Application.”

The Board will not refer any of the orders requested in the Fallis Group Motion to the courts. Section 32 of the OEB Act does allow the Board to state cases to the Divisional Court. However, there is no reason to do so in this case. The Board has considered numerous expropriation cases before without recourse to a stated case. Pursuant to section 19 of the OEB Act, the Board has full authority to hear and determine all issues of fact and law that fall within its jurisdiction. The Board intends to hear this case in full. In addition, there may be factual issues relevant to the requested orders that have yet to be determined, and any record presented to the Divisional Court might be incomplete. The request to refer this matter to the courts is therefore denied.

At paragraph 17 of the Motion Record, the Fallis Group Motion alleges that there have been certain breaches of the *Canadian Charter of Rights and Freedoms* with respect to this application. Mr. Fallis repeated the allegations in his oral argument. Mr. Fallis did not, however, identify which Charter right or rights he felt had been breached, nor did he provide any case law, or indeed any real argument, to support these allegations. In the Board's view, an alleged breach of a Charter provision is a serious matter. It is irresponsible for counsel to make such allegations where they are unable to articulate any of the details of the alleged breach, or even identify which provision they believe has been breached. Such conduct is not helpful to the Board's processes. The Board finds that there is no merit to these allegations whatsoever, and will make no orders in this regard.

CONCLUSION

Based on the submissions of the parties and the above findings, the Board has decided that certain issues relating to routing will be considered to be within the scope of Issue 1 as identified in the Issues Decision. All other requested orders in the Watson Motion and the Fallis Group Motion are denied.

DATED at Toronto, August 6, 2010

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

APPENDIX “D”
TO
DECISION AND ORDER

BOARD FILE NO. EB-2010-0023

**SECTION 99 OF THE *ONTARIO ENERGY BOARD ACT 1998,*
*S.O.1998, C.15, (SCHEDULE B)***

Applications under s. 92

(2) In an application under section 92, the Board shall only consider the following when, under subsection (1), it considers whether the construction, expansion or reinforcement of the electricity transmission line or electricity distribution line, or the making of the interconnection, is in the public interest:

1. The interests of consumers with respect to prices and the reliability and quality of electricity service.
2. Where applicable and in a manner consistent with the policies of the Government of Ontario, the promotion of the use of renewable energy sources. 2009, c. 12, Sched. D, s. 16.

Condition, land-owner's agreements

97. In an application under section 90, 91 or 92, leave to construct shall not be granted until the applicant satisfies the Board that it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board. 1998, c. 15, Sched. B, s. 97.

Right to enter land

98. (1) The following persons may enter on land at the intended location of any part of a proposed work and may make such surveys and examinations as are necessary for fixing the site of the work:

1. Any person who has leave under this Part or a predecessor of this Part to construct the work.
2. Any person who is exempted under section 95 from the requirement to obtain leave to construct the work.
3. Where the proposed work is the expansion or reinforcement of a transmission or distribution system, any person who is required by the Board, pursuant to a condition of the person's licence, to expand or reinforce the transmission or distribution system.
4. The officers, employees and agents of a person described in paragraph 1, 2 or 3. 2006, c. 33, Sched. X, s. 2 (1).

Interim order

(1.1) The Board may, upon application, issue an interim order authorizing a person and the officers, employees and agents of that person to enter on land at the intended location of any part of a proposed work and to make such surveys and examinations as are necessary for fixing the site of the work and as are specified in the order if,

- (a) the person has applied for leave under section 90 or 92 and has complied with section 94;
- (b) the person has applied to the Board for an exemption under section 95; or
- (c) the Board has commenced a proceeding to determine whether to require the person, pursuant to a condition of the person's licence, to expand or reinforce a transmission or distribution system. 2006, c. 33, Sched. X, s. 2 (2).

Damages

(2) Any damages resulting from an entry onto land carried out under subsection (1) or pursuant to an order under subsection (1.1) shall be determined by agreement or, failing agreement, in the manner set out in section 100. 2006, c. 33, Sched. X, s. 2 (3).

Expropriation

99. (1) The following persons may apply to the Board for authority to expropriate land for a work:

1. Any person who has leave under this Part or a predecessor of this Part.
2. Any person who intends to construct, expand or reinforce an electricity transmission line or an electricity distribution line or make an interconnection and who is exempted from the requirement

to obtain leave by the Board under section 95 or a regulation made under clause 127 (1) (f). 1998, c. 15, Sched. B, s. 99 (1).

Hearing

(2) The Board shall set a date for the hearing of the application, but the date shall not be earlier than 14 days after the date of the application. 1998, c. 15, Sched. B, s. 99 (2).

Information to be filed

(3) The applicant shall file with the Board a plan and description of the land required, together with the names of all persons having an apparent interest in the land. 1998, c. 15, Sched. B, s. 99 (3).

(4) Repealed: 2003, c. 3, s. 67.

Power to make order

(5) If after the hearing the Board is of the opinion that the expropriation of the land is in the public interest, it may make an order authorizing the applicant to expropriate the land. 1998, c. 15, Sched. B, s. 99 (5).

Determination of compensation

100. If compensation for damages is provided for in this Part and is not agreed upon, the procedures set out in clauses 26 (a) and (b) of the *Expropriations Act* apply to the determination of the compensation, and the compensation shall be determined under section 27 of that Act or by the Ontario Municipal Board. 1998, c. 15, Sched. B, s. 100.

Crossings with leave

101. (1) The following persons may apply to the Board for authority to construct a work upon, under or over a highway, utility line or ditch:

1. Any person who has leave to construct the work under this Part.
2. Any person who intends to construct the work and who is exempted under section 95 from the requirement to obtain leave.
3. Where the proposed work is the expansion or reinforcement of a transmission or distribution system, any person who is required by the Board, pursuant to a condition of the person's licence, to expand or reinforce the transmission or distribution system.
4. The officers, employees and agents of a person described in paragraph 1, 2 or 3. 2006, c. 33, Sched. X, s. 3.

Procedure

(2) The procedure set out in subsections 99 (1) to (4) applies with necessary modifications to an application under this section. 1998, c. 15, Sched. B, s. 101 (2).

Order

(3) Without any other leave and despite any other Act, if after the hearing the Board is of the opinion that the construction of the work upon, under or over a highway, utility line or ditch is in the public interest, it may make an order authorizing the construction upon such conditions as it considers appropriate. 1998, c. 15, Sched. B, s. 101 (3).

Right to compensation for damages

102. Any person who has acquired land for a work under this Part by agreement with the owner of the land shall pay to the owner due compensation for any damages resulting from the exercise of the person's rights under the agreement and, if the compensation is not agreed upon, it shall be determined in the manner set out in section 100. 1998, c. 15, Sched. B, s. 102.

Entry upon land

103. (1) Any person may at any time enter upon land, without the consent of the owner of the land, for the purpose of inspecting, altering, maintaining, repairing, renewing, disconnecting, replacing or removing a work or part of a work where leave for the construction, expansion or reinforcement of the work or the

APPENDIX "E"
TO
DECISION AND ORDER

BOARD FILE NO. EB-2010-0023

HONI'S STATEMENT OF RIGHTS OR GRANT OF EASEMENT

UNDERTAKING

Undertaking

TO PROVIDE STATEMENT OF RIGHTS OR GRANT OF EASEMENT.

Response

The language found below is the granting clause Hydro One will be including in all expropriation plans for easement interests filed with land titles offices. The language is virtually identical to the granting clause found in Clause 1 to its voluntary easement agreement and addresses the difference in circumstances between expropriation and voluntary agreement circumstances:

Hydro One Networks Inc. (“**HONI**”) under and by virtue of the *Ontario Energy Board Act, 1998*, S.O. 1998, Chapter 15, Schedule B, and in accordance with the *Expropriations Act*, R.S.O. 1990, hereby takes and expropriates an unrestricted grant and easement, free from all encumbrances and restrictions, of the following unobstructed and exclusive rights, easements and privileges in perpetuity in, through, under, over, across, along and upon a portion of the lands described as XXXXX (the “**Lands**”), which taking affects the Lands described herein as XXXXX (the “**Strip**”), for the following purposes:

- a) To enter and lay down, install, construct, erect, maintain, open, inspect, add to, enlarge, alter, repair and keep in good condition, move, remove, replace, reinstall, reconstruct, relocate, supplement and operate and maintain at all times in, through, under, over, across, along and upon the Strip an electrical transmission system and telecommunications system consisting in both instances of pole structures, steel towers, anchors, guys and braces and all such aboveground or underground lines, wires, cables, telecommunications cables, grounding electrodes, conductors, apparatus, works, accessories, associated material and equipment, and appurtenances pertaining to or required by either such system (all or any of which are herein individually or collectively called the “**Works**”) as in the opinion of HONI are necessary or convenient thereto for use as required by HONI in its undertaking from time to time, or a related business venture. Notwithstanding the foregoing, such part of the Works which form any part of the telecommunications system shall be installed, if underground, with a depth of cover of not less than one (1) metre and the telecommunications system may only be used by HONI, and its successors and assigns, for telecommunications purposes in connection with the operation of HONI’s electrical transmission system or any part thereof located on the Lands or any other lands.
- b) To enter on and selectively cut or prune, and to clear and keep clear, and remove all trees (subject to compensation for merchantable wood values), branches, bush and shrubs and other obstructions and materials in, over or upon the Strip, and without limitation, to cut and remove all leaning or decayed trees located on the Lands whose proximity to the Works renders them liable to fall and come in contact with the

- 1 Works or which may in any way interfere with the safe, efficient or serviceable
2 operation of the Works or this easement by HONI.
3
- 4 c) To conduct all engineering, legal surveys, and make soil tests, soil compaction and
5 environmental studies and audits in, under, on and over the Strip as HONI in its
6 discretion considers requisite.
7
- 8 d) To erect, install, construct, maintain, repair and keep in good condition, move,
9 remove, replace and use bridges and such gates in all fences which are now or may
10 hereafter be on the Strip as HONI may from time to time consider necessary.
11
- 12 e) Except for fences and permitted installations, to clear the Strip and keep it clear of all
13 buildings, structures, erections, installations, or other obstructions of any nature
14 whether above or below ground, including removal of any materials and equipment or
15 plants and natural growth, which in the opinion of HONI, endanger its Works or any
16 person or property or which may be likely to become a hazard to any Works of HONI
17 or to any persons or property or which do or may in any way interfere with the safe,
18 efficient or serviceable operation of the Works or this easement by HONI.
19
- 20 f) To enter on and exit by the owner's access routes and to pass and repass at all times
21 in, over, along, upon and across the Strip and so much of the Lands as is reasonably
22 required, for HONI, its employees, agents, contractors, subcontractors, workmen and
23 permittees with or without all plant machinery, material, supplies, vehicles and
24 equipment for all purposes necessary or convenient to the exercise and enjoyment of
25 this easement, subject to compensation afterwards for any crop or other physical
26 damage to the Lands or permitted structures sustained by the owner caused by the
27 exercise of this right of entry and passageway.
28

APPENDIX "F"
TO
DECISION AND ORDER

BOARD FILE NO. EB-2010-0023

REPORTING REQUIREMENTS OF HYDRO ONE NETWORKS INC.

BRUCE - MILTON TRANSMISSION REINFORCEMENT PROJECT
REPORTING REQUIREMENTS OF HYDRO ONE NETWORKS INC.
PURSUANT TO BOARD ORDER EB-2010-0023

GENERAL

This document contains the specific requirements pertaining to the reporting requirement order contained in this decision..

The reporting should be based on the sections of “Environmental Guidelines for Construction and Maintenance of Transmission Facilities” (EG) filed as Exhibit B-2-8 Attachment 1 on October 18, 2010 and the corresponding sections that are contained in the “Environmental Specification” (ES) filed as Exhibit B-2-10 Attachment 1 on October 18,2010 that pertain to the construction activities related to this project. The sections listed contain both construction mitigation guidelines and descriptions of the generally anticipated construction methodologies.

HONI is expected to report on any significant issues that arise that impact landowner interests. Aspects of the Project for which concerns were expressed during the course of this proceeding are captured by the sections listed below.

REPORTING REQUIREMENTS

Landowner Communication and Complaints

HONI must report on:

- the manner in which the guidelines in section 2.11 of the EG (Communication with Affected Property Owners) were followed as well as any deviations from the guidelines complete with reasons for the deviation,
- a description of any complaints received; and
- how the complaints were addressed and the actions taken to resolve the issue.

Construction Effects and Mitigation Measures

HONI must report on:

- the manner in which the guidelines in section 2.11.5 (Access Route Layout) were followed as well as any deviations from the guidelines complete with reasons for the deviation;
- the manner in which the guidelines in section 3.2.1 of the EG (Establishment of Temporary Workhouse Yards) and section 5.1 of the ES (Temporary Material Yards) were followed as well as any deviations from the guidelines complete with reasons for the deviation;
- the manner in which the guidelines in section 3.2.2 of the EG (Selection and Construction of Transmission Access Routes) and section 5.3 of the ES (Access Road Construction) were followed as well as any deviations from the guidelines complete with reasons for the deviation;
- the manner in which the guidelines in section 3.2.3 of the EG (ROW selective Clearing) and section 5.2 of the ES (Selective Cutting) were followed as well as any deviations from the guidelines complete with reasons for the deviation;
- the manner in which the guidelines in section 3.2.5 of the EG (Installation of Foundations and Footings) and section 5.4 of the ES (Foundations) were followed as well as any deviations from the guidelines complete with reasons for the deviation;
- the manner in which the guidelines in section 3.2.6 of the EG (Tower Delivery and Assembly) and section 5.5 of the ES (Tower Assembly and Erection) were followed as well as any deviations from the guidelines complete with reasons for the deviation;
- the manner in which the guidelines in section 3.2.7 of the EG (Delivery and Stringing of Conductor) and section 5.6 of the ES (Stringing) were followed as well as any deviations from the guidelines complete with reasons for the deviation; and
- the manner in which the guidelines in section 3.2.14 of the EG (ROW Restoration) and sections 6.10 and 6.12 (Sit Restoration and Work areas and Access Roads) were followed as well as any deviations from the guidelines complete with reasons for the deviation.

- the manner in which the guidelines in sections (including sub-sections) 6.4, 6.5, 6.6, 6.7 and 6.9, of the ES (Vegetation, Sediment and Erosion Control, Soil Management, Agricultural Lands, Noise and Dust) were followed as well as any deviations from the guidelines complete with reasons for the deviation.

AVAILABILITY AND FILING OF RECORDS

The records are to be kept throughout the construction and commissioning phase of the Project and are to be available to the Ontario Energy Board upon request. HONI shall file a final report compiling all information described above pertaining to lands subject to Board Order EB-2010-0023 once the Project has been commissioned and all restoration work has been completed.

HONI shall furnish the Board's designated representative²² with all reasonable assistance needed to ascertain whether the work is being or has been performed in accordance with the Board's direction in EB-2010-0023.

²² Manager, Electricity Facilities & Infrastructure Applications