



**EB-2012-0314**

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

**AND IN THE MATTER OF** an Application by Achiel Kimpe  
under section 38(3) of the *Ontario Energy Board Act, 1998*,  
S.O. 1998 for an Order of the Board determining the  
quantum of compensation Mr. Kimpe is entitled to receive  
from Union Gas Limited.

**BEFORE:** Cathy Spoel  
Presiding Member

**DECISION**  
**February 21, 2013**

**Introduction**

On July 9, 2012 Achiel Kimpe (the “Applicant” or “Mr. Kimpe”) filed an application with the Ontario Energy Board (the “Board”) under section 38(3) of the *Ontario Energy Board Act, 1998* (the “Act”). Mr. Kimpe identified Union Gas Limited (“Union”) as the respondent in the application. The Applicant has requested an Order of the Board for compensation for residual gas and use of residual gas from a pressure of 50 pounds per square inch absolute (“psia”) to 0 psia used in the operation of Union’s Bentpath Storage Pool (the “Pool”). The Applicant is seeking compensation for the period of time from the designation of the Pool to present. The Board has assigned this matter Board File No. EB-2012-0314.

Mr. Kimpe is a landowner in the Pool which was designated as a storage area through O. Reg. 585/74 on August 7, 1974. The Board granted Union the authorization to

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operate the Pool by way of Board Order E.B.O. 64, dated August, 19, 1974. Since 1974 the Pool has been operated by Union.

The Applicant does not have a valid storage rights agreement with Union so there is no legal instrument which provides for compensation. The absence of a valid storage rights agreement permits Mr. Kimpe to apply to the Board, pursuant to section 38(3) of the Act, for a determination of compensation.

Mr. Kimpe also requested eligibility for a cost award for this Application pursuant to Rule 41 of the Board's Rules of Practice and Procedure

The Board has considered all of the evidence filed and denies the Application for compensation for residual gas for the reasons set out below.

### **Proceedings**

On August 30, 2012, the Board issued a Notice of Application and Procedural Order No. 1. In this procedural order the Board indicated that it would proceed by way of a written hearing.

In accordance with Procedural Order No. 1 Mr. Kimpe filed evidence in addition to that filed with his application on September 21, 2012. Union filed submissions supported by evidence in response to the application on October 5, 2012. Mr. Kimpe filed his response to Union's submissions on October 29, 2012.

### **Submissions by the Applicant**

In support of his application that the Board make an Order that Union pay compensation for residual gas and the use of residual gas from a pressure of 50 pounds per square inch absolute ("psia") to 0 psia, Mr. Kimpe submitted the following:

- (i) Others have been compensated for a rental use of gas from 50 to psia;
- (ii) Mr. Kimpe was expropriated because he has no storage agreement with Union;

- (iii) The Production Lease<sup>1</sup> that he holds with Union requires gas production to 0 psia and that he should be compensated accordingly.

Mr. Kimpe also submitted that the Board's determination of his compensation for residual gas portion from 50 to 0 psia should account for 30 years of Union's use of natural gas under his lands in Bentpath Pool.

In support of his application, Mr. Kimpe attached an excerpt from a report prepared by Enbridge Gas Distribution Inc. and Union for the Ministry of Natural Resources ("MNR") in review of Ontario Regulation 263/02 (the "Excerpt"). The Report was in the context of a potential for storage under Crown lands in the Great Lakes Basin storage marketplace. The Excerpt defines the concept of residual gas and describes approaches to residual gas compensation and related compensation concerns. The Excerpt outlines several approaches to residual gas compensation revenue to be collected by the Crown, from prospective developers of storage under the Crown lands. There is no discussion of compensation for residual gas in terms of pressure.

On October 29, 2012 the Board received Mr. Kimpe's submissions in response to the evidence filed by Union. Mr. Kimpe filed the following:

- A graph, prepared by the U.S. Energy Information Administration showing the price of natural gas over time, based on average monthly process for the U.S. Mr. Kimpe noted the increase in price since 1980.
- The history of gas production in the Jacob Pool<sup>2</sup> by well including: date, volume of gas produced per well, bottom hole pressure by well and well names within the pool.
- Excerpts from Annual Reports of Monthly Oil and Gas Production for the years 2010 and 2011 filed by well operators for the MNR showing production volumes and gas values and reservoir pressures per well in various pools in Ontario.

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<sup>1</sup> Mr. Kimpe refers to Production Lease which is also commonly referred to in Ontario industry as a Petroleum and Natural Gas Lease ("PNG Lease"). The PNG Lease is an agreement between landowners and operators of production pools which when exhausted become suitable for gas storage and are often converted to storage. This was the case with Bentpath Pool and all other storage pools currently operating in Ontario.

<sup>2</sup> It is not entirely clear from Mr. Kimpe's submissions what is the relevance of Jacob Pool production pressures information. Mr. Kimpe did not provide commentary on this information.

Mr. Kimpe did not provide a specific submission on the relevance of the above attached documentation nor did he indicate how they supported his application for residual gas compensation.

### **Submissions by Union**

Union submitted that the Board should deny the application filed by Mr. Kimpe.

Union, in its submission, set out the historical practice and current policy in Ontario regarding compensation to landowners for storage of residual gas. Residual gas is defined as a gas that remains in a gas and oil production pool when the production ceases. Union stated that in Ontario owners of land with oil pools receive royalties on the commercially recoverable gas under their land properties. Union indicated that these royalties are not paid once a production pool is converted to a storage pool because, typically, there is no concurrent economically viable production during the operation of a pool for storage.

Union's position is that landowners should only be compensated for commercially recoverable gas.

Union discussed a concept of "reasonable abandonment pressure" to counter Mr. Kimpe's submission that he should be compensated for residual gas below 50 psia. Union submitted that the "reasonable abandonment pressure" is defined as a pressure below which residual gas is not commercially recoverable and that it is the pressure used to calculate quantum of monetary compensation for residual gas to storage landowners in Ontario. Union submitted that this approach was established by the Board in a "Gas Storage Report Lieutenant Governor in Council by Ontario Energy Board" dated May 4, 1964 ("Cozier Report"). The Cozier Report states at page 21:

1. Landowners should, upon the first use of a pool for storage, be paid for their royalty interests in residual gas down to a reasonable abandonment pressure. This principle has been adopted and used in Ontario. Compensation in this respect is required under the law, but the rate of payment is not fixed. The "reasonable abandonment pressure" referred to is determined by agreement or arbitration as appropriate to the particular reservoir being dealt with."

Union submitted that the Board already determined in its “Reasons for Decision in the matter of certain applications under the Ontario Energy Board Act by Bentpath Pool landowners” EBO 64 (1) and (2)”, dated July 16, 1982 (“Bentpath Decision”), that residual gas compensation be calculated based on 50 psia to all Bentpath Pool landowners including Mr. Kimpe. As part of Union’s pre-filed evidence, dated October 5, 2012, Union filed a copy of the Bentpath Decision.

Union stated that there are no changes in circumstances that would, in Union’s view warrant the Board to approve Mr. Kimpe’s current application.

In further support of its position Union referred to two other Board decisions dealing with residual gas compensation:

- (i) Decision with Reasons EBO 184, Sombra Pool Residual Gas Compensation, May 22, 1997 ( “Sombra Pool Decision”); and
- (ii) Decision and Order RP-2000-0005, March 23, 2004 (“LCSA Decision”<sup>3</sup>).

Copies of Both decisions are included in Union’s pre-filed evidence.

Union noted that in the Sombra Pool Decision, the Board accepted the agreement reached by the applicants and Union in an Alternative Dispute Resolution process that the appropriate threshold pressure level to determine the residual gas volume for compensation was 50 psia.

In the LCSA Decision the Board accepted a settlement agreement between the applicants and Union which, among other storage compensation components, included an agreement on residual gas compensation to 50 psia for Bluewater and Oil City Pools.

Union further submitted that it is an industry wide practice, as well as Union’s practice, to compensate storage landowners for residual gas at a pressure above 50psia as below this level production is no longer profitable.

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<sup>3</sup> This application was filed by a group of landowners who were members of Lambton County Storage Association (“LCSA”) and who were represented by a legal counsel. Mr. Kimpe was the applicant in RP-2000-0005.

In response to Mr. Kimpe's submissions that there are pools where production is at pressure levels below 50 psia, Union submitted that some individual wells in a pool may produce below 50 psia but that the average pressure in a pool as a whole is above 50 psia. Union stated: "It is possible to produce gas below 50 psia in some site-specific circumstances, but it is not the general practice for natural gas to be produced at pressures below 50 psia".<sup>4</sup>

Union submitted that its existing gas storage leases with the Bentpath landowners provide for residual gas compensation above 50 psia. Union maintains that this approach to compensation is the industry practice and noted "...we are aware of only two exceptions ...In these exceptional cases the threshold pressure used was voluntarily reduced down to 0 psia following negotiations with the landowner and was not based on reassessment of the pressure level at which natural gas becomes commercially recoverable."<sup>5</sup> Union referred to the Sombra Pool Decision in which the Board accepted the ADR Agreement and Union quoted the following from the ADR Agreement:

"...As identified in Union's prefiled evidence there have been at least three arbitrations in Ontario where 50 psia was adopted and only two circumstances where 50 psia was not used for the determination of residual gas compensation. Those two are Oil Springs East and Edys Mills. Oil Springs East was decided by negotiation and Edys Mills was paid under the contract term of the lease. The parties agreed that the weight of the evidence in favour of 50 psia exceeds the value of these exceptions and that they are not representative of industry practice".<sup>6</sup>

In addition to the above argument that it is not industry practice to pay a landowner for storage below 50 psia, Union noted that Mr. Kimpe and Union are parties to a Petroleum and Natural Gas Lease ("PNG Lease")<sup>7</sup> entered into by their respective predecessors. The PNG Lease is an oil and gas exploration and production agreement. Union stated that it paid to Mr. Kimpe all required payments set in the PNG Lease. In

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4 Prefiled Evidence of Union Gas Limited, October 5, 2012, (EB-2012-0314) page 6, lines 4 and 5.

5 Prefiled Evidence of Union Gas Limited, October 5, 2012, (EB-2012-0314) page 6, lines 12 and 17.

6 Prefiled Evidence of Union Gas Limited, October 5, 2012 (EB-2012-0314) page 7, lines 1 and 9.

7 Prefiled Evidence of Union Gas Limited, October 5, 2012 (EB-2012-0314) Exhibit 7

Union's submissions there is nothing in the PNG Lease that obliges Union to pay royalties with respect to residual gas that is not produced or to continue production if it is not profitable. The PNG Lease does not set a specific psia cut-off level below which a production is not profitable.

Union's position with regard to the Excerpt of the Enbridge and Union's Report to the MNR that was filed by Mr. Kimpe, is that it has no relevance to Mr. Kimpe's application before the Board. Union submitted that the Enbridge and Union's Report to the MNR was in the context of a tendering process for developing storage on Crown lands.

### **Board Findings**

The Board finds that compensation for residual gas below 50 psia is not reasonable as it is not generally economically viable to recover gas below this pressure. This is reflected in the practice in Ontario to compensate storage landowners for residual gas down to 50 psia and not to 0 psia.

This practice has been accepted by the Board in prior decisions such as the OEB Decision and Order on landowner compensation by the LCSA landowners (RP-2000-0005).

In 1981 and 1982, in the Bentpath Pool proceeding, the Board reviewed Mr. Kimpe's application for compensation for residual gas to 0 psia and decided not to approve this request. In 1982, in the Bentpath Pool Decision, the Board found that "...that below the bottom-hole pressure to 50 psia gas cannot be economically produced, saved and marketed."<sup>8</sup> The Board expressly found that argument by Mr. Kimpe's legal counsel in the Bentpath Pool proceeding was not persuasive and stated:

"The submissions that residual volumes should be calculated to zero psia is rejected since the evidence before the Board is that below a bottom-hole pressure of 50 psia gas cannot be economically produced, saved and marketed."<sup>9</sup>

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<sup>8</sup> OEB "Reasons for Decision in the matter of certain applications under the Ontario Energy Board Act by Bentpath Pool landowners" EBO 64 (1) and (2), dated July 16, 1982, page 110

<sup>9</sup> OEB "Reasons for Decision in the matter of certain applications under the Ontario Energy Board Act by Bentpath Pool landowners" EBO 64 (1) and (2), dated July 16, 1982, page 110, paragraph 3

The Board notes that the compensation to 50 psia for residual gas in storage has been a long standing practice endorsed by the Board since 1960`s as reflected in the Cozier Report.

Regarding the two exceptions where Union paid residual gas compensation to 0 psia in Oil City East Pool and Edys Mills Pool, the Board understands that these exceptions are based on contractual terms of agreements and were negotiated outside the Board`s proceedings and required no approval by the Board. The Board will not accept these as precedents.

### **Cost Award**

The Board finds that Mr. Kimpe is eligible for an award of costs.

The Board will grant an honorarium of \$1,000 to Mr. Kimpe plus any disbursements he may claim. The awarded costs should be paid to Mr. Kimpe by Union.

If Mr. Kimpe wishes to seek an award of costs for disbursements incurred in this proceeding he shall file his claims in accordance with the *Practice Direction on Cost Awards* with the Board Secretary and with Union **within 35 days after the date of this Decision.**

Union may make submissions regarding the cost claim **within 45 days after the date of this Decision** and Mr. Kimpe may reply **within 65 days after the date of this Decision.** A decision and order regarding cost award will be issued at a later date.

Union shall pay the Board`s costs incidental to this proceeding upon receipt of the Board`s invoice.

**DATED** at Toronto, February 21, 2013.

### **ONTARIO ENERGY BOARD**

*Original Signed By*

Cathy Spoel  
Presiding Member