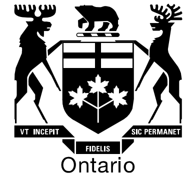
Ontario Energy Board

Commission de l’Énergie de l’Ontario



EB-2011-0087

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 Marie Snopko, Wayne McMurphy, Lyle Knight, and Eldon Knight under section 19 of the *Ontario Energy Board Act, 1998*, S.O. 1998, for an Order of the Board determining that the contracts, filed with the Application, between the Applicants and Union Gas Limited / Ram Petroleums Limited have been terminated;

AND IN THE MATTER OF an Application by Marie Snopko, Wayne McMurphy, Lyle Knight, and Eldon Knight under section 38(2) of the *Ontario Energy Board Act, 1998*, S.O. 1998 for an Order of the Board determining the quantum of compensation the Applicants are entitled to have received from Union Gas Limited and Ram Petroleums Limited;

AND IN THE MATTER OF a Motion filed by Union Gas Limited.

BEFORE: Cathy Spoel
Presiding Member

Ken Quesnelle
Member

Karen Taylor
Member

DECISON

Background

On March 16, 2011 Marie Snopko ("Snopko"), Wayne McMurphy ("McMurphy"), Lyle Knight and Eldon Knight (the "Knights") (collectively the "Applicants") filed an application with the Ontario Energy Board under section 19 and section 38(2) of the *Ontario Energy Board Act, 1998* (the "Act"). The Applicants identified Union Gas Limited ("Union") and Ram Petroleums Ltd. ("Ram") as respondents in the Application. The Applicants have requested a decision on two issues (a) the validity of Gas Storage Agreements (GSA) between Union and the Applicants pursuant to section 19 of the Act; and (b) a determination of the compensation the Applicants are entitled to receive from Union and Ram. The Board has assigned Board File No. EB-2011-0087.

The Applicants are landowners in the Edys Mills designated storage area operated by Union. Prior to 1993, the Applicants entered into a number of agreements with Ram, in particular petroleum and natural gas lease agreements, and gas storage agreements (the "Pre-1993 Agreements"). The Applicants' Gas Storage Lease Agreements and related events chronology is as follows:

- Snopko's Gas Storage Lease Agreement (GSLA) with Ram was signed on October 3, 1987 by George John Graham, predecessor in title. The term of the GSLA was 7 years from the date of signing and renewable annually as long as Lessee "shall have installed facilities for storage and /or utilizes the said lands within first 7 years of this lease" [1] .

- McMurphy's Gas Storage Lease Agreement with Ram was signed on October 11, 1989.

- Knights held 3 Gas Storage Lease Agreements with Ram for their properties within Edys Mills: Agnes Knight signed the GSLA with Ram on May 25, 1989; Lyle and Margaret Knight signed the GSLA with Ram on May 25, 1989 for one of their two properties within Edys Mills and signed another agreement for the second property also on May 25, 1989.

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[1] Graham (predecessor on title for Snopko's lands), McMurphy and Knights all signed the same form of the Gas Storage Lease Agreement with Ram. There are 3 GSLAs for Knights as there were 3 properties in question. The GSLAs may be found in the Volume 1 in the Tabs to Union's Motion record. All GSLA's had the term of 7 years and were extendable on yearly basis, provided that the storage operation commences within first seven years. Note that the operation of Edys Pool started in 1993 and all GSLAs were signed in 1989, meaning that all the GSLA's were valid in the period from 1993 to 1999. For the period from 1999 to 2008, as all the Applicants signed the amendments (2007) the leases were also valid. For the period from 2009 to 2013 only Knights signed the amendments of their GSLAs.

- In 1989 prior to the storage designation, Ram sold its interest in the Edys Mills Pool to Union and assigned the storage leases to Union by undertaking the following steps:

    - In August 1989, the Applicants and Ram entered into a Consent Agreement by which the Applicants consented to Ram assigning the leases to Union provided Ram takes back a sublease of all oil production rights; and

    - After the Consent Agreement was signed, Ram assigned its interest in the Gas Storage Lease Agreements to Union.

- On March 16, 1992 Union filed an application for a regulation designating the Edys Mills Pool as a gas storage area with the Board under section 35(2) of the *Ontario Energy Board Act*, R.S.O. 1990, c. 013[2] (E.B.O. 174). On March 16, 1992, Union also applied under section 21(1) of the *Ontario Energy Board Act*, R.S.O. 1990, c. 013 to the Board for an order authorizing Union to inject gas into, store gas in, and remove gas from the Edys Mills proposed gas storage pool (E.B.O. 174) and for leave to construct pipelines in the Edys Mills Pool (E.B.L.O. 243).

- On September 22 to 24, 1992 the Board held a hearing in Sarnia and approved, by way of an oral decision, the recommendation to the Lieutenant Governor in Council for designation of the Edys Mills Pool, the authorization to operate the Edys Mills Pool as well as leave to construct pipelines in the Edys Mills Pool.

- The Reasons for the Decisions were issued by the Board on November 12, 1992.

- The Edys Mills Pool was designated for storage by Ontario Regulation 719/92 on November 30, 1992.

- Union was granted an authorization to operate the Edys Mills Storage Pool and leave to construct pipelines under Board Order E.B.O. 174/E.B.L.O. 243

[2] Note that the sections of the Act dealing with the storage changed in the current *Ontario Energy Board Act*, R.S.O. 1998.

dated February 1, 1993. Collectively, the regulation designating the Edys Mill Pool and the Board's order granting Union the right to inject, store and remove gas from the Edys Mill Pool are referred to as the "Designation Order" in this Decision.

- In 2000, the Lambton County Storage Association ("LCSA", of which the Applicants Snopko and McMurphy were members) commenced a proceeding at the Board for just and equitable compensation pursuant to section 38(2) of the *Ontario Energy Board Act, 1998*. Following a protracted process and lengthy negotiations, Union and the LCSA reached a settlement on compensation in 2004. Expressly included in the settlement were all claims which were, or could have been raised in the storage compensation hearing before the Board, including claims for disturbance damages, crop loss and loss of opportunity. The settlement had retroactive effect and covered the years 1999-2008 inclusive.

- On March 23, 2004 the Board issued a Decision and Order (RP-2000-0005, the "Compensation Order") which accepted the settlement agreement and covered all compensation matters over which the Board has jurisdiction for the period 1999 to 2008. In RP-2000-0005 the Board determined that Snopko, McMurphy and Knights all have valid storage rights agreements with Union for the period 1999 to 2008.

- Based on the terms of the Compensation Order, Union made individual compensation offers to all LCSA and non-LCSA members in the Edys Mill Pool, including Snopko, McMurphy and Knights.

- On May 5, 2004 Snopko signed a compensation agreement with Union for the period from 1999 to 2008 for the compensation schedule and amounts as set in the Compensation Order.

- On August 17, 2004 Knights signed a compensation agreement with Union for the period from 1999 to 2008 for the compensation schedule and amounts as set in the Compensation Order.

- On January 28, 2005 McMurphy signed a compensation agreement with Union for the period from 1999 to 2008 for the compensation schedule and amounts as set in the Compensation Order.

- In 2007 Union and its storage pools landowners reached a Compensation Agreement which covers the period 2009-2013 (the “2007 Compensation Agreement”).
- On April 3, 2007 Knights signed the 2007 Compensation Agreement with Union.
- Snopko and McMurphy have not signed the 2007 Compensation Agreement. Snopko and McMurphy do not have gas storage rights agreements with Union for the period after 2008 to the present.

The Applicants stated in their Application that on April 25, 2006 they terminated the Gas Storage Agreement with Union. The Applicants brought the same claims as presented in this Application to the Ontario Superior Court of Justice (“Superior Court”). Union brought a motion before the Superior Court to have the claim dismissed. On January 6, 2008 the Superior Court granted Union’s motion, concluding that the Board has exclusive jurisdiction to hear matters related to just and equitable compensation in respect of the gas or oil rights or any damage resulting from these operations. The Applicants appealed the Superior Court decision. The appeal was heard on January 22, 2010. On April 7, 2010 the Court of Appeal dismissed the Applicants’ appeal and concluded that the OEB has the exclusive jurisdiction to hear the case.

On March 16, 2011 the Applicants filed an application with the OEB, which is the subject of this Decision, regarding (a) the validity of Gas Storage Agreements (GSA) between Union and the Applicants pursuant to section 19 of the Act; and (b) a determination of the compensation the Applicants are entitled to receive from Union and Ram. The Applicants’ requested that the Application be bifurcated, with determination of the status of the contracts heard first.

On April 18, 2011, Union filed a letter with the Board and copied the Applicants’ Counsel (“Union’s April 18 Letter”). In Union’s April 18 Letter, Union stated that the Board should decline the Applicants' request to bifurcate the Application at this time. Union also stated that it would bring motions challenging the Applicants' standing to assert some or all of their claims on the basis of the compensation agreements and the relevant limitations law.

On May 26, 2011 the Board issued a Notice of Application and Procedural Order No. 1 (“Notice and PO 1”).

In the Notice and PO 1 the Board provided procedural direction for Union to file its motion(s) and for the parties to respond as well as for Union to reply to all submissions received. The Board determined that Union's motions would be heard in writing.

As set in the Notice and PO 1, Union filed its Motion Record on June 23, 2011. On July 21, 2011 the Applicants filed the Response to Union's Motion. On August 5, 2011 Union filed Reply Submissions. This filing completed the record with regard to the motion proceeding.

Test for Summary Judgment

Both parties refer to Rule 20 of the Ontario Rules of Civil Procedure in describing the appropriate test for summary judgment. Although the Rules of Civil Procedure apply to civil proceedings before the Ontario Court of Appeal and the Ontario Superior Court of Justice, and not strictly speaking to proceedings before the Board, the Board accepts that the Rules of Civil Procedure and precedents relating thereto are appropriate references for this proceeding.

Rule 20 (Summary Judgment) has recently been amended. A copy of Rule 20 is attached as an Appendix A to this decision. Union argues that the Applicants rely on the old version of the rule, and that the cases they cite do not reflect the recent amendments.

Rule 20.04(2) states: "The court shall grant summary judgment if: (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." The task before the Board on this motion, then, is to determine if there is a genuine issue requiring a hearing with respect to the issues identified by Union.

A recent decision of the Superior Court of Justice describes the factors a court should consider on the hearing of a summary judgment motion:

> The new rule does not change the burden of a party in a summary judgment motion. Rule 20.01 provides that a party who seeks summary judgment must move with supporting affidavit material or other evidence to support its motion. Pursuant to Rule 20.02(2), a responding party "may not rest solely on the allegations or denial in the party's pleadings but must set out affidavit material or other evidence, specific facts showing there is a genuine issue requiring a

> trial". In other words, consistent with existing jurisprudence, each side must "put its best foot forward." The court is entitled to assume that the record contains all the evidence which the parties will present if there is an actual trial, although in some circumstances the interests of justice may require that a material issue should be determined at trial, upon a full evidentiary record.[3]

As proceedings before the Board are not, strictly speaking, governed by the Rules of Civil Procedure, the Board does not necessarily expect that every provision of every Rule be strictly followed on all occasions; or that every decision of the courts relating to the Rules will always apply before the Board. Indeed, the Board has its own *Rules of Practice and Procedure*, though it is not uncommon for the Board to refer to the Rules of Civil Procedure where something is not addressed in detail in its own rules.[4] The Board does accept, however, that the court's guidance in the Cuthbert decision should be followed on summary judgment motions before the Board – in other words, that parties should be expected to put their best foot forward.

Relief Sought by Applicants

Prior to 1993, the Applicants entered into a number of agreements with Ram, in particular petroleum and natural gas lease agreements, and gas storage agreements (the "Pre-1993 Agreements"). The Pre-1993 Agreements were assigned to Union in 1989 through a consent agreement. The Application alleges that Union has committed various breaches of the Pre-1993 Agreements, and that the Applicants are entitled to further compensation.

The Application was filed with the Board on March 16, 2011. The Applicants seek a determination that the contracts listed in Schedule A to the Application have been terminated and an order for the following damages from the Respondents:

a) damages against the Respondent Ram for misrepresentation and breach of contract in the amount of $2,500,000;
b) damages against both Respondents for negligence in the amount of $2,500,000;

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[3] *Cuthbert v. TD Canada Trust*, 2010 ONSC 830, para. 12.
[4] In the context of the Board's Rules, a motion for summary judgment is essentially akin to a motion to dismiss without a hearing (Rule 8 and Rule 18). The Board's ultimate authority to dismiss a matter without a full hearing comes from section 4.6 of the *Statutory Powers Procedure Act* ("SPPA"). As required by both Rule 18 and section 4.6 of the SPPA, the Board has allowed the Applicants to make full submissions on the proposed dismissal.

c) damages against both Respondents for loss of income in the amount of $1,500,000;
d) damages against the Respondents for unjust enrichment in the amount of $2,000,000;
e) damages for storage of natural gas on and in the Applicants' lands without a contractual right estimated at the amount of $2,500,000 or the disgorgement of all net profit from the date of termination of the contracts to the date of termination of storage;
f) damages for nuisance against the Respondent Union in the amount of $1,500,000;
g) punitive damages for Union operating a gas storage system on the Applicant's land and for dealing with the Applicants in a high handed manner without due regard for their rights in the amount of $10,000,000;
h) prejudgment and post judgment interest in accordance with the Courts of Justice Act or a reasonable equitable interest to be determined by the Board; and
i) the Applicants' costs of these proceedings.

Positions of the Parties respecting the motion

Union makes two arguments concerning why the Board should not hear any portions of the application relating to the Pre-1993 Agreements: there was significant delay in seeking the relief on the part of the Applicants; and that almost all of the claims for compensation are futile because Union has binding compensation agreements with the Applicants (which, together with the Designation Order, have superseded all the Pre-1993 Agreements).

Union alleges that the particulars with respect to the Applicants' claims regarding the pre-1993 agreements were known, or ought to have been known, for between 16 and 21 years, depending in the claim in question. Union states that the Applicants did not bring these claims to court until 2008; and, after the claims were dismissed by the Court of Appeal, delayed almost another year before filing the current application with the Board. Union argues that these delays are unreasonable, and the Board should decline to hear this portion of the Application on this basis.

Union further argues that, delay issues aside, any hearing related to the pre-1993 Agreements would be a waste of time as those agreements were replaced in 1993 by the Designation Order and in 2004 by the Compensation Order. Union argues that the

Designation Order grants it the rights to "inject gas into, store gas in and remove gas from … Edys Mill Pool … and to enter into and upon the land in the area and use land for such purposes…" In addition, Union reached a full settlement with the Applicants with respect to all compensation issues for the period 1999-2008, which was approved through an order of the Board in 2004 (the "Compensation Order"). Union has also entered into an agreement with the Knights for the period 2009-2013. Union concedes that it has no specific compensation agreement with Snopko and McMurphy for the period since 2009, and is not seeking to have that portion of the Application dismissed through this motion.

The Applicants argue that Union's assertions with respect to the futility of the Applicants' claims are not relevant to most of the Applicants claims, and are not an appropriate basis for a claim for summary judgment. The Applicants further argue that Union has breached the conditions of the Designation Order, and that Union therefore enjoys no rights under the Designation Order.

Union responds that the import of the Pre-1993 Agreements is in fact a cornerstone of the Application, and that the Applicants' submissions on this motion have done nothing to rebut Union's assertions that any request for relief relating to the Pre-1993 Agreements is futile. Union further responds that the Applicants' claims that Union has breached the Designation Order have not been supported by any evidence, and are in any case irrelevant to the current proceeding as the appropriate remedy for such a breach would be an application to amend or revoke the Edys Mills Pool pursuant to s. 36.1(1)(b) of the Act.

Board Decision

A. Standing versus jurisdiction

Section 38 or the Act provides:

38. (1) The Board by order may authorize a person to inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose. 1998, c. 15, Sched. B, s. 38 (1).

Right to compensation

(2) Subject to any agreement with respect thereto, the person authorized by an order under subsection (1),

(a) shall make to the owners of any gas or oil rights or of any right to store gas in the area just and equitable compensation in respect of the gas or oil rights or the right to store gas; and

(b) shall make to the owner of any land in the area just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the order. 1998, c. 15, Sched. B, s. 38 (2).

Determination of amount of compensation

(3) No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board. 1998, c. 15, Sched. B, s. 38 (3).

Appeal

(4) An appeal within the meaning of section 31 of the *Expropriations Act* lies from a determination of the Board under subsection (3) to the Divisional Court, in which case that section applies and section 33 of this Act does not apply. 1998, c. 15, Sched. B, s. 38 (4); 2003, c. 3, s. 31.

The Applicants argue that the Board has jurisdiction over the matters for which they seek relief, and that the Board should therefore proceed to hear the case on its merits. They point out that the recent Court of Appeal decision (which dealt with the same prayer for relief) confirmed that the Board has exclusive jurisdiction over compensation for issues relating to gas storage, and that Union has repeatedly expressed the same opinion. As no one appears to challenge the Board's jurisdiction over this matter, the Applicants submit that the matter should not be dismissed at the pre-hearing stage.

Union argues in its response that the Applicants have confused jurisdiction with standing. Union accepts that the Board has exclusive jurisdiction over just and equitable compensation for gas storage pursuant to section 38 of the Act. What Union challenges is the Applicants' standing to bring these matters to the Board in the current case. Union states that although the Board has exclusive jurisdiction to deal with just and equitable compensation under the Act, no person has standing to raise an issue of just and reasonable compensation under the Act where that person is a party to an existing, unchallenged agreement dealing with compensation. As described below, it is

Union's position that the Applicants (with the exception of the Snopko and McMurphy claims from 2009 onwards) have existing and unchallenged agreements with Union respecting compensation. Union further argues that that the majority of the Applicants' claims are time barred, as they were aware, or should have been aware, of the claims for at least 16 years before they came to the Board.

The Board agrees with both parties that it has the jurisdiction to hear all claims relating to just and equitable compensation for the storage, injection, and removal of gas from the subject lands. Indeed, the Ontario Court of Appeal confirmed the Board's jurisdiction in this regard in the Snopko decision.[5] The mere existence of jurisdiction, however, does not automatically amount to a genuine issue requiring a hearing. On a motion for summary judgment, the Applicants must "put their best foot forward" and satisfy the Board that they are at least potentially entitled to some actual relief with respect to their application.

B. The Right to Inject, Store and Remove Natural Gas, and the Designation Order

The Board finds that Union's rights to inject gas into, store gas in and remove gas from the Edys Mill Pool, and to enter into and upon the land in the area and use land for such purposes is governed solely by the Designation Order, and has been since 1993. The Designation Order supersedes any previous agreements with respect to Union's rights to inject, store and remove gas. Whether previous contracts between the parties relating to the right to inject, store or remove gas have been formally cancelled or not is essentially irrelevant as these rights are now governed by the Designation Order.

Although the Applicants alleged in its responding argument that Union had committed unspecified breaches of the Designation Order, they provided no evidence or particulars to support this contention. Even if there had been breaches of the Designation Order (which was not alleged in the pre-filed Application) it is not clear that such breaches would be the proper subject of a hearing under section 38 of the Act. Section 36.1 of the Act addresses amendments or revocations of designation orders, and the Applicants have sought no relief under this section of the Act. Regardless, there would be no basis for any finding in this proceeding that Union has committed any breaches of the Designation Order. Any claims for damages based on Union not having the right to inject, store, or remove gas from the Applicants properties, or for having breached the Designation Order, are therefore dismissed.

[5] Pp. 7-9.

C. Just and Equitable Compensation

It is agreed by both parties that the Board, absent an agreement regarding compensation by the parties, has complete jurisdiction over all compensation issues relating to the injection, storage and removal of gas from the Edys Mill Pool since that time. The Board agrees with Union, however, that the issue on this motion with respect to compensation is not so much one of jurisdiction, but one of standing. For the reasons described below, the Board dismisses all claims regarding the sufficiency of compensation paid by Union to the Applicants, with the exception of amounts possibly owing to Snopko and McMurphy for the period 2009 forward.

Pre-Designation Order

Prior to the Designation Order, the Board had no jurisdiction over gas storage (or compensation related thereto) on the Applicants' lands. The Board will therefore not consider any compensation claims relating to the period prior to the imposition of the Designation Order in 1993.

1993 to 1999

Prior to the effective date of the Compensation Order (see below), Union either took over from Ram or entered into various agreements with the parties that covered compensation for gas injection, removal and storage (the "Gas Storage Leases"). Although the Gas Storage Leases were not reviewed or approved by the Board, the Act is clear that the Board is only responsible for setting just and equitable compensation where the parties cannot reach an agreement.

There has been no suggestion by the Applicants that Union did not pay the compensation owing under the Gas Storage Leases for the period from 1993 to when the Compensation Agreement came into effect in 1999. The Applicants have not suggested that the portions of the Gas Storage Leases dealing with compensation were not binding. The Board therefore has no basis upon which it could make any determination that further compensation for this period is appropriate, and dismisses all claims for additional compensation for the period 1993-1999.

The Compensation Order (1999-2008)

The Compensation Order, which was binding on all of the parties to this proceeding, specifically covered all claims that were, or could have been, raised in that application. [6] In other words, the Compensation Order covered all compensation matters over which the Board has jurisdiction for the period 1999-2008. As these matters were dealt with in a final manner by the Board in the Compensation Order, no party affected by it may seek additional or other relief for the period of time it covers. The fact that the Board has jurisdiction over compensation does not mean that the Board can revisit the issue. The Board will therefore not hear any portions of the Application which relate to compensation for the 1999-2008 period.

2009 to 2013

The Board will not hear any portion of the Application relating to compensation for the Knights for the period after 2008, as they accepted the terms of the 2007 Compensation Agreement which covers the period 2009-2013. However, the Applicants are requested to advise the Board in writing if they wish to proceed with the claims in the Application by Snopko and McMurphy for compensation post-2008, as Snopko and McMurphy are not signatories to the 2007 Compensation Agreement.

Damages respecting roadway acreage

The Application raises the issue of compensation for roadway acreage for Snopko. The exact amount being sought is not itemized, and is presumably subsumed within the headings of damages described at paragraph 41 of the Application. Union argues that it entered into a complete and final agreement (the Roadway Agreement") with Snopko in 1992 respecting compensation for roadways on her property, and that she therefore can be permitted to no further compensation through this Application. The Applicants do not directly respond to this submission in their responding motion record.

The Roadway Agreement (a copy of which was provided as an exhibit to the Wachsmuth affidavit) is a full and final release for roadways located on Snopko's property. The Board agrees with Union that the Roadway Agreement precludes Snopko from seeking further compensation with respect to roadways, and it will not entertain any claims for relief in this regard.

Unreasonable delay

[6] Union motion record, p. 1682.

Given the findings above, the Board does not consider it necessary to address Union's argument that the relief sought relating to the Pre-1993 Agreements should be dismissed on account of unreasonable delay, and the Board makes no findings in this regard.

Conclusion

As described in greater detail above, the Board dismisses all claims relating to Union's rights to inject, store, or remove natural gas from the Applicants' lands. Irrespective of the Pre-1993 Agreements, the terms and conditions upon which Union holds these rights are now solely governed by the Designation Order. No specific breaches of the Designation Order have been alleged, and there would be no basis for the Board to make any findings in this regard.

The Board also dismisses all claims for just and equitable compensation, save for those made by Snopko and McMurphy for the period after 2008. Prior to 1993, the Board has no jurisdiction over just and equitable compensation. From 1993-1998, compensation issues were covered by Gas Storage Leases, and no party has suggested that Union did not make the appropriate payments. From 1999-2008, all compensation issues were covered by the Compensation Order and the subsequent agreements Union reached individually with all of the Applicants. For the period 2009-2013, the Knights have entered into another agreement with Union regarding compensation. The Board will not overturn any of these agreements, and indeed no party has even specifically requested that it do so. The only remaining issue is whether Snopko and McMurphy are entitled to any additional compensation after 2008, and the Board will hear this issue if the Applicants choose to pursue it.

The Applicants are requested to advise the Board in writing if they wish to proceed with the claims in the Application by Snopko and McMurphy for compensation post-2008.

ISSUED at Toronto, December 8, 2011
ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary