

Application No. ....

## **ONTARIO ENERGY BOARD**

BETWEEN:

**MARIE SNOPKO, WAYNE MCMURPHY,  
LYLE KNIGHT and ELDON KNIGHT**

Applicants

-and-

**UNION GAS LTD. and RAM PETROLEUMS LTD.**

Respondents

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### **ONTARIO ENERGY BOARD APPLICATION**

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March 16, 2011

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## ONTARIO ENERGY BOARD APPLICATION

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### Introduction

1. The Applicants are bringing this Application for a determination of the following two issues:
  - a. A determination, pursuant to section 19 of the *Ontario Energy Board Act*, 1998 (“*Ontario Energy Board Act*”), that the contracts listed in Schedule A to this Application between the Applicants and the Respondents have been terminated;  
The status of the Respondents’ operations as a result of termination of the said contracts and
  - b. A determination, pursuant to section 38(2) of the *Ontario Energy Board Act*, of the quantum of compensation the Applicants are entitled to received from the Respondents.

2. The status of the contracts between the Applicants and the Respondents must be determined, particularly the validity of the Applicants termination of these contracts. As such, the Applicants request that the Ontario Energy Board bifurcate the two issues and determine the status of the contracts and validity of the termination of the contracts first. If the contracts are interpreted in favour of the Applicants, then the Ontario Energy Board can proceed to a hearing on compensation.
3. The Applicants are bringing this Application pursuant to section 19 and section 38 of the *Ontario Energy Board Act*.

**Statement of the Facts**

4. The Applicants own land in a rural area near the village of Edys Mills, in the Province of Ontario. The Applicants' land is within the boundaries of the Edys Mills Designated Storage Area.
5. The Respondent, Union Gas Ltd. ("Union"), is a Canadian natural gas utility with a head office in the city of Chatham, in the Province of Ontario.
6. The Respondent, Ram Petroleum Ltd. ("Ram"), is a petroleum and gas producing company with a head office in the City of Toronto, in the Province of Ontario.
7. The Respondent, Ram, signed petroleum and natural gas lease agreements (the "Head Leases") with the Applicants, or in some cases the Applicants' predecessors.
8. Duplicate copies of the Head Leases were also signed by the Applicants (the "Clone Leases"). The Head Leases were registered in the Sarnia Land Registry Office. The Clone Leases can be found in the Plan Books at the Sarnia Registry Office. The Head Leases and Clone Leases contained the following terms:

- a. Ram has the right to enter into the Applicants' property for the purpose of producing crude oil and natural gas;
  - b. The Applicants will receive from Ram a royalty of one eighth of all crude oil and natural gas that was produced, saved and marketed, at market price;
  - c. The Applicants will receive from Ram compensation for any damage to their crops the operation causes;
  - d. If crude oil and natural gas production are discontinued for 300 days the agreement can be terminated by the Applicants giving written notice to Ram;
  - e. Once production of the crude oil has commenced there is no provision in the petroleum and natural gas agreement to stop production and return to an acreage payment schedule, continuous production is required to keep the said agreement valid; and
  - f. The rights the agreement gives to Ram cannot be sold, transferred or assigned without the written consent of the Applicants.
9. Subsequently, the Applicants entered into a Pooling Agreement with Ram. This agreement set out the percentage of royalties each Applicant was entitled to.
10. In the late 1980s, the Applicants entered into Gas Storage Agreements ("GSA") with Ram. The GSA contained the following terms:
  - a. The Head Lease and Pooling Agreement are adopted and ratified in every respect, including storage;
  - b. Ram is granted the right to inject, store and withdraw natural and artificial gas into naturally occurring underground chambers in the Applicants' property;

- c. The Applicants are to be compensated by Ram for any property damage that results from Ram's operations;
  - d. Ram is to provide the Applicants with a 10% profit share of all of Ram's earnings from the storage operations;
  - e. If Ram assigns the lease to a third party the third party is not obligated to provide the Applicants with 10% of the profit share from the storage operations while the assignment remains in effect;
  - f. Ram can only transfer this agreement with the Applicants' written consent;
  - g. Ram will remain responsible to the Applicants for the obligations of the lessee while the agreement is in effect;
  - h. Ram is to restore the surface of the land to its original condition, as far as may be practicable, once the operation ends; and
  - i. The term of the agreement, subject to the provisions of the Head and Clone Leases, is seven years from the date of the agreement. At the end of the seven years the lease will be extended from year to year provided the lessee shall have installed facilities for storage and /or used the lands for storage. The Lessee also shall have the option to pay an acreage rental, before the anniversary date, to keep the contract valid for the year following.
11. The Applicants entered into a Consent Agreement on August 9, 1989. The Consent Agreement contained the following terms:
- a. The Applicants consent to Ram assigning the leases described above to Union provided Ram takes back a sublease of all oil production rights;

- b. The Applicants agree to take a onetime payment, as described in the agreement, that will satisfy and extinguish all future royalties payable under the lease for natural gas production and storage; and
  - c. The Applicants are still entitled to royalties on future oil production in the amount set out in the Head Lease.
- 12. After the Consent Agreement was signed by the Applicants and Ram, Ram assigned some, but not all, of its interest in the lease agreements to Union. Ram did not assign to Union the Head Lease signed by the Applicant, Marie Snopko's father but instead assigned the "Clone" Lease to Union. Union, in a separate agreement, assigned back to Ram the right to produce crude oil from the land, provided Ram pay the Applicants all oil royalties they are owed under the Head Lease.
- 13. On November 12, 1992, the Ontario Energy Board approved Union's Application to inject into, store in and withdraw gas from the Applicants' land. At the Ontario Energy Board hearing, Union's expert witnesses assured the Ontario Energy Board that their gas storage operations would not interfere with oil production. In fact, they suggested the storage operations would enhance oil production.
- 14. Union began storing natural gas in the Applicants' property soon after being granted approval.
- 15. From 1977 to 1993, Ram produced crude oil. However, shortly after the first injection of gas in 1993 oil production became sporadic and then ceased. As such, royalty payments to the Applicants ceased in 1994.

16. On June 17, 1998 Ram, without written consent from the Applicants, assigned their interest in the oil sublease to CanEnerco. On June 7, 2001 CanEnerco's court appointed receiver transferred their interest in the Oil Sublease to Kinetic Energy Inc. which has since become Torque Energy Inc.
17. No oil has been produced since Ram ceased production in 1993.
18. By 2006, the Applicants concluded that no oil was going to be produced in the near future. They decided to exercise their rights under the Head and Clone Leases to have all parties 'surrender all their interest in the lands'. On April 25, 2006, the Applicants sent a registered letter to Union, Ram, CanEnerco and Torque stating that since no oil or natural gas had been produced in the last 300 days they were exercising their rights to terminate all contracts and to have the Respondents "surrender all their interest" pursuant to clause 10 of the Head and Clone Leases.
19. Union responded to the Applicants' letter stating that they would surrender the oil and gas production leases but will not surrender the GSA. Despite the Applicants' termination of the Head Lease and the GSA, Union continues to operate its storage operation on the Applicants' land to this day.

**All contracts between the parties have been terminated**

20. The Applicants request an Order from the Ontario Energy Board declaring that all contracts between the Applicants and the Respondents have been terminated and the Respondents must immediately surrender all interest in the Applicants' land.
21. The Head Lease, which was adopted in every respect in the GSA, contained a clause that allowed the contract to be terminated by the Applicants. To terminate the contract the

Applicants simply needed to give written notice to Ram, if oil or natural gas production discontinued for 300 days, advising they were terminating all its interest in the land.

22. On April 25, 2006, the Applicants exercised their right under the Head Lease to terminate both the Head Lease and the GSA as no oil had been produced for 300 days. However, Union has refused to surrender its rights under the GSA. The Applicants claim that the GSA lease has been terminated.

23. Additionally, the Applicants submit that the relationship between the Respondents, Union and Ram, in the gas storage operation constituted a partnership. Specifically, the Applicants submit a partnership existed between the two Respondents due to the fact that the Head Leases signed by the Applicant, Marie Snopko's father and the Applicant, Wayne McMurphy's father were retained by Ram.

24. If the Ontario Energy Board determines that a partnership existed between the two Respondents, the Applicants submit that Union was not a 'third party' as contemplated in the GSA. Therefore, the Applicants submit that they would be entitled to the 10% profit share owed under the GSA from the gas storage operation from 1993 to April 25, 2006, the date the Applicants terminated the GSA.

**Claim for compensation pursuant to section 38(2) of the**

**Ontario Energy Board Act**

25. Subject to paragraph 2 above, the Applicants seek damages and/or compensation from the Respondents, Union and Ram, pursuant to section 38(2) of the *Ontario Energy Board Act*. Specifically, the Applicants seek compensation for a misrepresentation made by Ram, negligence, breach of contract, nuisance, unjust enrichment by Ram and Union and for Union



continuing to store gas in the Applicants' property without their consent or a contract. The Applicants also seek damages from Ram for trespass to their respective properties. The Applicants seek compensation from Union and Ram severally in the amount of \$3,500,000.00, or an amount to be determined by the Ontario Energy Board at the hearing.

26. The Applicants claim they were induced to enter into the Consent Agreement with Ram by a substantial misrepresentation. The Applicants entered into the Consent Agreement and agreed to accept a onetime gas royalty payment because Ram led them to believe they would be receiving significant oil royalty payments in the future.

27. The Applicants claim that because they were induced to enter into the contract by a misrepresentation the Consent Agreement should be rescinded or declared invalid *ab initio*.

28. The Applicants claim they are entitled to damages and/or compensation for the misrepresentation as they have lost millions of dollars in gas storage profit share as a result of being induced, through the above misrepresentation, to enter into the Consent Agreement. The Applicants claim that the Consent Agreement should also be set aside based on the principle of unconscionable transaction. Specifically, the Applicants claim as follows:

- a. The Consent Agreement was an improvident agreement. The Applicants gave up millions of dollars in storage profit share for a relatively small onetime payment; and
- b. There was an inequality of bargaining power. Ram is a sophisticated oil and gas producing company which at the time was listed on the Toronto Stock Exchange. The Applicants trusted that Ram was acting in good faith and agreed to enter into the Consent Agreement drafted by Ram.

29. The Applicants claim that the Ram was negligent or deceitful in advising the Applicants that Ram would continue to produce oil if the Applicants consented to the assignment of the GSA to Union. Particulars of this claim are as follows:

- a. Ram owed the Applicants a duty of care as they were in a contractual relationship with the Applicants and were engaging in oil and gas operations on the Applicants' land;
- b. Ram fell below the standard of care owed to the Applicants when it advised the Applicants it would continue to produce oil while the Union was engaging in the gas storage operation. Ram failed to properly consider the implications the storage operation would have on oil production when they made these statements; and
- c. Ram's negligence caused harm to the Applicants. Specifically, Ram's false statements induced the Applicants to enter into a Consent Agreement waiving all future royalties from the gas storage operations. The Applicants submit that they are entitled to compensation from Ram for Ram's negligence.

30. The Applicants claim that Union was negligent in their gas storage operations. Particulars of this claim are as follows:

- a. Union owed the Applicants a duty of care as they were carrying on a gas storage operation on the Applicants' land;
- b. Union fell below the standard of care owed to the Applicants. Specifically, Union engaged in their gas storage operation without properly considering the implications the storage operation would have on oil production and / or without taking any steps to ensure the gas storage operation would not interfere with oil production; and

- c. Union's negligence caused harm to the Applicants. Specifically, Union's storage operations adversely affected oil production. Union has not maintained steady pressure levels making oil removal from the ground impractical. As a result of Union's actions the Applicants have lost a significant amount of money in lost oil royalties and the value of the oil in the Applicants' land has, in effect, been decreased. Since 1994, when the oil reserves returned to Union due to cessation of production, the Applicants have on several occasions approached Union to resolve the oil production issue to no avail. The Applicants submit that Union owes compensation to the Applicants for negligence.
31. The Applicants submit that Ram owes compensation to the Applicants for breach of contract. The Head Lease and the GSA both contained a provision that the contracts cannot be assigned without the Applicants' consent. Ram assigned its interests in the sublease to CanEnerco on June 17, 1998. The Applicants did not give consent to this assignment.
32. The assignment by the Respondent, Ram caused harm to the Applicants. The Applicants would have sought compensation from Ram before consenting to the assignment. Ram's assignment without the Applicants' consent caused the Applicants to lose this opportunity. Additionally, CanEnerco did not produce any oil causing the Applicants to continue losing out on oil royalties. As well, the Applicants were forced to allow CanEnerco, a company with whom they knew nothing about and had no prior dealings with, to enter their property and to construct any structures it required to produce oil.
33. Union's gas storage operation causes a nuisance to the Applicants. It takes the Applicants 50% longer to operate farm equipment on their lands and results in a 25% crop loss as a

result of having to make increased turns around the Union's facilities. This fact was stated in the November 12, 1992 Ontario Energy Board decision allowing Union to store gas in the Edys Mills Pool. Union has never paid this increased compensation.

34. Marie Snopko signed an amending agreement which provided her acreage payments for any surface occupation. Union has refused to pay any roadway acreage which is certainly a surface occupation. Marie Snopko signed a Full and Final Release for construction issues only to the end of 1993
35. Despite a term in the GSA that states the Applicants will be compensated for any damage that results from the gas storage operations, Union has failed to adequately do so.
36. The Applicants submit that Union's gas storage operation causes a nuisance to the Applicants as the sight of the above ground facilities adversely affects the Applicants' enjoyment of their land and poses safety concerns. Additionally, the gas storage operation has caused irreversible damage to the surface of the Applicants' land. The Applicants claim they are entitled to compensation from Union for nuisance.
37. The Applicants claim Ram was unjustly enriched by the Applicants entering into the Consent Agreement. The Applicants suffered a corresponding deprivation as a result of entering into the Consent Agreement as they have been denied the 10% profit share owed under the GSA because they entered into the Consent Agreement. The enrichment was unjust as the legitimate expectations of the Applicants were not met. The Applicants only entered into the Consent Agreement because Ram misled the Applicants to believe they would be receiving significant oil royalty payments in the future if they entered into the Consent Agreement. The Applicants claim they are entitled to compensation from Ram for unjust enrichment.

38. The Applicants claim Union was unjustly enriched by storing gas on and in the Applicants' land and by having the oil located in the Applicants' land left in place. The oil that is naturally found in the Applicants' land benefits Union's storage operation as the oil traps impurities and prevents their escape during the withdrawal of the injected gas. Also, as the oil in the Applicants' land decomposes, it produces gas that Union withdraws with its injected gas and sells. The Applicants have suffered a corresponding deprivation as they are not receiving proper compensation from Union's use of the oil in the Applicants' land. The Applicants submit that this enrichment is unjust as the legitimate expectations of the Applicants were not met. The Applicants claim they are entitled to compensation from Union for unjust enrichment.

39. The Applicants claim that Union has been storing gas since May 5, 2006 without a contract. As such, the Applicants claim they are owed compensation from Union's Edys Mills Storage Pool operation. Additionally, the Applicants claim that Union must stop storing gas in the Applicants' land immediately. Union is trespassing on the Applicants' land.

40. The Applicants claim that Union is in effect misappropriating their oil as Union is acquiring "new" gas from the decomposition of the oil that exists in the Applicants' land.

41. The Applicants claim the Respondent Union has acted in a high handed, arrogant fashion and has operated the gas storage facility without any consideration of the Applicants' property rights and the Applicants claim punitive damages of \$10,000,000.

In summary the Applicants claim damages from the Respondent parties in the amounts shown below or the amount determined by the Ontario Energy Board at the hearing as follows:

- (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;
- (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;
- (i) the Applicants' costs of these proceedings

#### **Jurisdiction Issue**

42. The Applicants originally brought the claims set out in this Application against the Respondents before the Ontario Superior Court of Justice in Sarnia by issuing a Statement of Claim on January 29, 2008, Court File No. 5021/08. Prior to this action the Applicants had sought relief before this Board. The Respondent, Union, brought a motion for summary judgment seeking to have the claim against them dismissed. On January 6, 2008, Justice Desotti granted Union's motion for summary judgment concluding that the Ontario Energy Board has exclusive jurisdiction to hear this matter.

43. The Applicants appealed Justice Desotti's decision to the Ontario Court of Appeal. The Appeal was heard on January 22, 2010. The Court of Appeal reserved their decision and wrote to the Ontario Energy Board inviting them to make submissions on whether the Ontario Energy Board had jurisdiction to hear this matter.
44. In a letter dated February 10, 2010, Kirsten Walli, the Ontario Energy Board Secretary, made written submissions to the Court of Appeal indicating that the Ontario Energy Board has taken a broad view of its powers under section 38 of the *Ontario Energy Board Act*. Kirsten Walli indicated that the Ontario Energy Board's powers under section 38 of the *Ontario Energy Board Act* included the power to determine the validity of compensation contracts. The submissions further stated that the Ontario Energy Board would take note of the decision of the Court of Appeal regarding jurisdiction.
45. On April 7, 2010, the Ontario Court of Appeal released its decision dismissing the Applicants' Appeal. The Ontario Court of Appeal concluded that the Ontario Energy Board has exclusive jurisdiction to hear the case pursuant to section 38 of the *Ontario Energy Board Act*.
46. The Applicants accept the Ontario Court of Appeal's decision and as such have brought this Application before the Ontario Energy Board. Therefore, the Applicants submit that the Ontario Energy Board has full jurisdiction to hear this matter and the Applicants have standing to bring this Application.

## **Summary**

47. The Applicants seek an order pursuant to section 19 of the *Ontario Energy Board Act* that all contracts between the Applicants and the Respondents have been terminated and the Respondents must immediately surrender all interest in the Applicants' land.
48. The Applicants seek compensation from the Respondents for negligence, breach of contract, nuisance, unjust enrichment, and misrepresentation made by Ram and for Union storing gas in the Applicants' land without the Applicants' permission.
49. The Applicants request their costs of this Application pursuant to Rule 41 of the Ontario Energy Board Rules of Practice and Procedure and such further or other relief as the Ontario Energy Board may deem just, including compensation for their costs before the courts
50. The Applicants request that the hearing of this matter be held in Sarnia, Ontario.

Dated: March 16, 2011.

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